ALJ/JSL/tcg

Decision 90 03 071 MAR 28 1990

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

COACHELLA VALLEY COMMUNICATIONS, INC., (U-5117-C) Complainant, vs. CALL AMERICA-PALM DESERT, (U-5062-C) Defendant.	Case 89-10-044 (Filed October 31, 1989)

Ronald R. Easton, Attorney at Law, for Call America-Palm Desert, defendant.
Chandler Brown, Attorney at Law, for Coachella Valley Communications, complainant.

O P I N I O N

On October 31, 1989 Coachella Valley Communications, Inc. (complainant) filed its Complaint and Request for Immediate Cease and Desist Order against Call America-Palm Desert (defendant). The complaint contained the following allegations:

1. Complainant is a public utility engaged in the provision of interLATA long distance telephone service pursuant to authority granted by the Commission in Decision (D.) 86-08-066.

2. Defendant too is an interLATA long distance telephone service provider operating in direct competition with complainant pursuant to authority granted by the Commission.

3. Defendant had in the past and was then promoting its services by offering prospective customers one month's service free of charge, notwithstanding that there is no provision in its tariff permitting such a waiver or other similar reduction in charges, thereby violating Public Utilities (PU) Code §§ 494 and 532.

4. As a direct and proximate result of defendant's unlawful promotions, complainant had lost and will continue to lose customers and associated revenues.

5. Defendant's conduct was being undertaken in knowing and willing disregard of the law.

Complainant requested that the Commission immediately issue its order directing defendant to cease and desist from offering to directly or indirectly waive or rebate any charge or otherwise provide service at rates other than those lawfully on file with the Commission, and for "Such other order as the Commission deems appropriate..."

In its answer filed November 27, defendant conceded that it is an interLATA long distance telephone service provider operating in competition with complainant, but denied every other material allegation. As a defense, defendant asserted:

"3. Defendant timely sent tariff to the Public Utilities Commission on August 22, 1989; filing officer for the Public Utilities Commission received the tariff but, due to their own inadvertence, failed to timely file the tariff. As of the date of filing this answer, the tariff has been filed and is in full force and effect."

Defendant asked that the Commission not issue any order requiring it to cease and desist operations.

Oral argument was held before Administrative Law Judge (ALJ) John Lemke in Palm Desert on November 30, 1989. Counsel have stipulated that the facts in this proceeding are undisputed, and

agreed to submit the matter with the filing of briefs on January 2, 1990.

Facts

The pertinent facts are these:

1. On August 22, 1989 defendant sent a new tariff provision to its tariff filing agent.

2. The agent inadvertently failed to timely file the tariff.

3. The Commission's files show that the tariff provision in question was received at the Commission on November 15, and became effective November 20, 1989.

The Tariff Item

The item in question is set forth on Sheet No. 68-T of defendant's tariff. It provides, in connection with defendant's D.C.O. (Digital Central Office) WATS service afforded to new customers, for refunds of the first month's usage charges - 50% thereof to be credited to the second month's charges, and the remaining 50% to be credited to the seventh month's charges. There is a minimum monthly usage charge of $100.00.

Arguments

Complainant

Complainant argues principally that defendant has charged rates different from those stated in its tariff, referring to PU Code Section 532:

> "(N)o public utility shall charge, or receive a different compensation for any product or commodity furnished or to be furnished, or for any service rendered or to be rendered, than the rates, tolls, rentals, and charges applicable thereto as specified in its schedules on file and in effect at the time..."

Complainant asserts that whether defendant transmitted tariffs to its agent is of no consequence; that under PU Code § 2109 the act of any agent of a utility acting within the scope of its agency is the act of the utility. Thus, complainant maintains, regardless of who was at fault for failing to file tariffs, such

omission is the responsibility of defendant, and defendant may not escape liability for its violation of Section 532.

Complainant contends that we should require defendant to backbill subscribers who received discounts in violation of Section 532, citing the Supreme Court in Empire West v. Southern California Gas Co. (1974) Cal. 3d 805, 809:

> "(A) public utility cannot by contract, conduct, estoppel, waiver, directly or indirectly increase or decrease the rate as published in the tariff... Scheduled rates must be inflexibly enforced in order to maintain equality for all customers and to prevent collusion which might otherwise be easily and effectively disguised. Therefore, as a general rule, utility customers cannot recover damages which are tantamount to a preferential rate reduction even though the utility may have intentionally misquoted the applicable rate." (Emphasis in original.)

Complainant further urges that we consider imposing a penalty on defendant in accordance with PU Code § 2107, recommending that the fine be set in an amount equal to the unlawful discounts ordered to be backbilled, as we commonly do in cases of undercharge violations by common carriers. Complainant believes such a fine would prevent defendant from benefiting from the collection of the undercharges, but would not be excessive because defendant has already determined, by publication of the rule in question, that it could afford to forgo those revenues.

Defendant

Defendant's position here chiefly is that it did not intentionally violate PU Code § 532. It refers us to D.89-05-024, dated May 10, 1989 in Case 89-03-016 (Comtech Mobile Telephone Company, et al. v. Bay Area Cellular Telephone Co. & San Jose Real Estate Board). The defendant had made a bulk use proposal for cellular phone use, including a waiver of an activation fee, as well as 120 minutes of free air time and a wholesale rather than a retail rate. The Commission ordered the defendant to cease and

desist and to backbill. Defendant distinguishes the facts in Comtech from those involved in this proceeding, principally because of the intentional violation of an existing tariff in Comtech, compared with a third party's misfeasance in this proceeding.

Defendant notes that complainant has made no showing of damages based on loss of customers as a direct result of the activities of defendant, and maintains therefore that complainant has not met any burden sufficient to provide the Commission with grounds to issue a cease and desist order or to require defendant to backbill.

Discussion

PU Code § 494 applies in connection with the transportation rates of common carriers, and is not applicable here.

Because the tariff provision authorizing rebates has been in effect since November 20, 1989, the issue stemming from complainant's request that we direct defendant to cease and desist from offering rebates, or from providing service at rates other than those stated in its tariff, is moot. Furthermore, counsel for complainant stated that complainant has no quarrel with the tariff provision in question now that it is published and in effect. The only issues remaining for the Commission to decide are legal issues, involving the questions (1) should defendant be ordered to backbill, and (2) should the Commission impose a penalty in these circumstances?

Backbilling - PU Code § 532

The misfeasance of defendant's tariff filing agent was the apparent cause of this complaint. However, notwithstanding this, we can find no basis for not directing defendant to observe its filed tariff rates, i.e. to backbill. Defendant asserts that in cases that generally review alleged Section 532 violations, those violations have been intentional. However, we find the opposite to be true when reading Transmix Corporation v. Southern

Pacific Company (1960) 187 C.A. 2d 257. In that case the defendant railroad had inadvertently, unintentionally and mistakenly published in its tariff a very low rate from Redwood City to El Centro, rather than to El Cerrito, as intended (a much closer destination point) and was held nevertheless to be bound to the lower, mistakenly published rate on shipments to El Centro. The court iterated the oft-cited maxim that "(T)ariffs are strictly construed and no understandintg or misunderstanding of either or both of the parties is enough to change the rule." "

The court also referred to New York, N.H. & H. R. Co. v. York & Whitney Co. 215 Mass. 36 (writ of error denied in 239 U.S. 631,) and cited with approval in Pittsburgh, C.C. & St. L. R. Co. v. Fink, 250 U.S. 577, where it was stated:

> "...The reasons why there must be inflexibility in the enforcement of the published rate against all and every suggestion for relaxation rests upon the practical impossibility otherwise of maintaining equality between all shippers without preferential privileges of any sort. The rate when published becomes established by law. It can be varied only by law, and not by act of the parties."

The cases cited immediately above involve rates of common carriers; however, common carriers, as well as defendant, are "public utilities" as defined in PU Code § 216(a), both falling under the purview of § 532.

We are unable to locate either statute or case law holding that defendant may be excused from assessing its filed tariff rate. We can only observe that the circumstances here manifest one of the perils of doing business in a part of the state remote from the governmental agency by whom it is regulated, and with whose rules and regulations it must comply. However, by way of advice we can also note that defendant could have requested confirmation of the tariff filing from its agent or from the Commission staff in this important transaction, and likely avoided

the need for this proceeding. This is hindsight, but it suggests a practice perhaps worth observing in connection with similar future filings.

Penalty

It is unrefuted that defendant sent its tariff provision to its tariff filing agent so that the new provision could be filed with the Commission, but that the agent inadvertently failed to file the new provision in a timely manner.

Complainant alleges that during the period of almost three months between the intended and actual filing dates, defendant's actions in providing service free of charge caused complainant to lose customers and revenues. Complainant has not quantified this alleged loss.

The complaint was not filed until October 31, and not served until November 10, 1989. The new filing was sent to the Commission on November 14, received the next day, and became effective on November 20. The lapse of time between receipt of the complaint by defendant on November 10 and transmittal of the new provision by its agent to the Commission four days later is about the least that could be reasonably expected. There does not appear to be any indication, and we find based upon this record that defendant did not act, in knowing and willing disregard of the law, but took appropriate corrective measures as soon as practicable after learning of the failure of its agent. We will not therefore impose a penalty based upon defendant's actions in these circumstances.

We turn lastly to defendant's argument that complainant has made no showing of damages based on loss of customers as a direct result of defendant's activities, and has not therefore met any burden sufficient to provide the Commission with grounds to order defendant to backbill. Complainant is not seeking damages, i.e., compensation, for the loss it may have sustained through migration of customers to defendant. It seeks an order requiring defendant to backbill, and to pay such backbilled amounts to the

Commission. It is not necessary that the precise amount of tariff charges which have been improperly credited to new customers be quantified by complainant. For complainant to do so would involve a protracted process, one apparently considered unnecessary or undesirable by complainant. The Commission has the power and the duty to direct the collection by utilities of improperly refunded tariff charges, whatever the level of those charges.

Comments

In accordance with PU Code § 311, the ALJ's proposed decision was mailed to the parties on February 20, 1990. Comments were received only from complainant, who stated that because of the expeditious handling of the case, it had been unable to engage in normal discovery, which it believes would have enabled it to uncover information establishing greater culpability on the part of defendant than that found in the proposed decision. Nevertheless, complainant states it is satisfied with the proposed decision.

Findings of Fact

1. Defendant is a public utility engaged in the provision of interLATA long distance telephone service.

2. Defendant sent a new tariff provision to its tariff filing agent, to be filed with the Commission, on August 22, 1989. The new provision authorizes, in connection with defendant's D.C.O. WATS service afforded new customers, for refunds of the first month's usage charges - 50% there to be credited to the second month's charges, and the remaining 50% to be credited to the seventh month's charges, with a minimum monthly usage charge of $100.00.

3. Through the tariff filing agent's inadvertence, the new provision was not actually filed until November 15, and not effective until November 20, 1989.

4. PU Code § 532 provides that no public utility shall charge rates different from those on file and in effect at the time service is rendered.

5. Complainant has alleged that defendant offered prospective customers one month's service free of charge, even though there was no provision in its tariff permitting such waiver or simiar reduction in charges.

6. Based upon the information brought before the Commission, there is no indication of the defendant's having knowingly or wilfully violated the provisions of its tariff or of PU Code § 532.

Conclusions of Law

1. Since complainant is not seeking damages, it is not necessary for complainant to quantify the precise amounts of usage charges improperly credited to new customers of defendant through operation of the tariff item in question.

2. Defendant should be directed to refrain from extending any provision of the new tariff rule to those new customers who contracted for its services prior to the effective date of the new item, and to collect, within 60 days of the effective date of this order, all improperly credited amounts from said customers.

3. Defendant should be directed, within 60 days of the effective date of this order, to furnish the Chief of the Telecommunications Branch of the Commission Advisory and Compliance Division with a report detailing the results of its efforts to collect all improperly credited amounts.

O R D E R

IT IS ORDERED that:

1. Call America-Palm Desert (defendant) shall, within 60 days after the effective date of this order, collect from new customers all charges credited to them under the D.C.O. Sign Up Promotion rule shown on Sheet 68-T of its tariff for service rendered prior to November 20, 1989.

2. Defendant shall refrain from extending any provision of the new tariff item described in Ordering Paragraph 1 to those new

customers who signed up for such service prior to November 20, 1989.

3. Defendant shall, within 60 days of the effective date of this order, furnish the Chief of the Telecommunications Branch of the Commission Advisory and Compliance Division with a report detailing the results of its efforts to collect all improperly credited amounts.

4. Defendant shall proceed promptly, diligently, and in good faith to pursue all reasonable measures, including legal remedies, to collect all improperly credited charges. In the event these charges, or any part thereof, remain uncollected 60 days after the effective date of this order, defendant shall file with the Chief of the Telecommunications Branch, on the first Monday of each month after the end of the 60 days, a report of the charges remaining to be collected, specifying the action taken to collect such charges and the result of such action, until such charges have been collected in full or until further order of the Commission. Failure to file any such monthly report within fifteen days after the due date shall result in the automatic suspension of defendant's authority until the report is filed.

The Executive Director of the Commission shall cause personal service of this order to be made upon defendant Call America-Palm Desert, and cause service by mail of this order to be made upon complainant Coachella Valley Communications, Inc.

This order is effective today.

Dated MAR 28 1990, at San Francisco, California.

G. MITCHELL WILK
President
FREDERICK R. DUDA
STANLEY W. HULETT
JOHN B. OHANIAN
PATRICIA M. ECKERT
Commissioners

I CERTIFY THAT THIS DECISION WAS APPROVED BY THE ABOVE COMMISSIONERS TODAY

NEAL J. SHULMAN, Executive Director
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