

ALJ/LEM/gn

Decision 90 09 060 SEP 12 1990

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Wright's Stationers,

Complainant,

vs.

Pacific Bell (U 1001 C),

Defendant.

ORIGINAL

Case 89-10-050
(Filed October 31, 1989)

Jim Mitchell, for himself, complainant.
Colleen O'Grady, Attorney at Law,
for Pacific Bell, defendant.

O P I N I O N

The complaint of James Mitchell (complainant), doing business as Wright's Stationers, against Pacific Bell (Pacific) alleges he was overbilled \$45.45 plus tax each month for over 11 years. The total amount of overcharges claimed is \$6,100, plus interest and taxes.

In its Motion to Dismiss and Answer to Complaint, Pacific asserted that complainant's cause of action is barred by the three-year statute of limitations set forth in Public Utilities (PU) Code § 736. Pacific also asserts that no interest is due on complainant's billing refund because Pacific's tariff prohibits payment of interest on billing adjustments; further, that no tax is due on complainant's refund because no taxes were paid.

Pacific answered that in May 1989, after being notified by complainant of overcharges, it gave complainant a refund of \$1,612.91, representing a credit of \$44.75 per month for three years plus credit for a surcharge of \$1.61 paid by complainant. Pacific maintains that complainant never paid taxes on these charges.

Pacific points out that complainant has alleged violations of PU Code § 532, and that PU Code § 736 sets the statute of limitations for § 532 violations.

PU Code §§ 532 and 736 read, in pertinent part:

Section 532

"...(N)o public utility shall charge...a different compensation for any...service rendered...than the rates...specified in its schedules..."

Section 736

"All complaints for damages resulting from the violation of any of the provisions of Section...532 shall either be filed with the commission, or, where concurrent jurisdiction of the cause of action is vested in the courts of this State, in any court of competent jurisdiction within three years from the time the cause of action accrues..."

Pacific insists that complainant can seek relief only for actions that occurred three years prior to the filing of the complaint, citing Apex Smelting Co. v. Southern California Edison Co. (1962) 59 Cal. P.U.C. 519, where the complainant was given a refund for three years, but where overcharges occurred from 1953 through 1961. Pacific also refers us to App. of San Francisco Eye and Ear Hospital, Inc. (1973) 75 Cal. P.U.C. 758, holding that on a complaint filed in 1972, the statute of limitations bars the award of any reparations for incidents which may have occurred in 1965 and 1966.

Pacific argues that it is prohibited from refunding overcharges beyond three years, because the running of the statute of limitations extinguishes not only the remedy, but the right of action, citing Southern Pacific Co. (1959) 57 Cal. P.U.C. 328, 330 and may not be waived. (Id.) Pacific contends that permitting it to pay damages to some customers and not to others would result in prohibited discrimination.

The utility also professes that its tariff prohibits Pacific from paying interest on credit refunds for simple billing errors, referring us to its Schedule Cal. P.U.C. A2.1.14.

Pacific admits that complainant was overcharged for over 11 years, but denies the total amount is well over \$6,100 as claimed, and denies the overcharge of \$45.45 plus tax each month. It does admit that complainant was overcharged \$44.80 each month, and avers that this amount was not taxed.

Finally, Pacific insists that the Commission has repeatedly held that it is without jurisdiction to award damages (Schumacher v. Pacific Tel. & Tel. Co. (1965) 64 Cal. P.U.C. 295; Edward L. Blincore, et al. v. Pac. Tel. & Tel. Co. (1963) 60 Cal. P.U.C. 432), and that PU Code § 453 (a) prohibits any further refund on the basis that it would constitute a preference or advantage to complainant.

The assigned Administrative Law Judge (ALJ) wrote the complainant on January 22, 1990 advising that the facts appeared to be undisputed, but offering complainant the opportunity to take exception to the statement of facts as set forth in Pacific's answer. By letter to the ALJ dated January 20, 1990 complainant took exception to Pacific's basing its defense on PU Code §§ 532 and 736, and iterated his claim of being overcharged for \$45.45 per month.

A public hearing was held in Lodi on March 10, 1990 before ALJ John Lemke and the matter was submitted at the close of hearing.

The Facts

In summary, Pacific overcharged complainant for approximately 11 years, up to March 1989. At that time, complainant brought the matter of overcharges to the utility's attention, whereupon Pacific ceased its overcharging practices and dutifully refunded three years' overcharges. A formal complaint was not filed until October 31, 1989.

A witness for Pacific explained that the admitted error occurred in connection with the calculation of foreign exchange mileage as billed on complainant's account. Foreign exchange mileage is applied when a customer has a business in Stockton, for instance, and also wishes to have a line in Lodi. Foreign exchange mileage is measured in quarter-mile increments from the central office in Stockton to the boundary between Stockton and Lodi; however, the charge for service is assessed on the half-mile basis. In this instance, complainant was charged per quarter-mile because Pacific inadvertently did not convert to half-miles before assessing charges. Complainant was refunded \$1,612.91, but should have received \$1,618.43, the defendant asserts. This particular amount, representing the admitted overcharges calculated by Pacific for a period of 36 months, is unrefuted.

Defendant's witness testified that its tariff does not allow Pacific to pay interest on simple billing errors, citing its Tariff Schedule Cal. P.U.C. A2.1.14.

Discussion

In 31 Cal Jur 2d, p. 428 the purposes of statutes of limitation are elucidated:

"A statute of limitations is one of repose, enacted as a matter of public policy to promote justice by preventing the assertion of stale claims after the lapse of long periods of time--or at least the periods designated in the statute--to the surprise of parties or their representatives, perhaps fraudulently, after evidence has been lost, memories have faded, and witnesses have disappeared or died, making it impossible or extremely difficult to prove the actual facts or make a fair presentation of the case. It is presumed that a person who has a well-founded claim and the power to sue will enforce his claim within a reasonable time..." (31 Cal Jur 2d, p. 428 and cases cited.)

Furthermore, in public utility law the running of a statute of limitations is more than a defense, it extinguishes the

underlying right of action. The rule may seem harsh in some cases, but must be applied uniformly in order to avoid potential discrimination. Customers may find solace in the fact that they have the same protection accorded utilities by virtue of the wording contained in PU Code § 737. There, it is provided that utilities may file complaints for the collection of lawful tariff charges within three years from the time the cause of action accrues, and not after. ✓

Interest

Pacific argues that the wording contained in its Tariff Schedule Cal. P.U.C. A2.1.14 prohibits the payment of interest on the overcharges found refundable. The particular wording is set forth on 1st Revised Sheet 87 of the tariff, in paragraph 3, and is as stated below:

"Except as provided in 1. and 2. of this rule, the liability of the Utility for damages arising out of mistakes, omissions, interruptions, delays, errors or defects in any of the services or facilities furnished by the Utility, including exchange, toll, private line, supplemental equipment, alphabetical directory listings (excluding the use of bold fact type) and all other services, shall in no event exceed an amount equal to the pro rata charges to the customer for the period during which the services or facilities are affected by the mistake, omission, interruption, delay, error or defect, provided, however, that where any mistake, omission, interruption, delay, error or defect in any one service or facility affects or diminishes the value of any other service said liability shall include such diminution, but in no event shall the liability exceed the total amount of the charges to the customer for all services or facilities for the period affected by the mistake, omission, interruption, delay, error or defect."

We cannot agree that the above rule prohibits the payment of interest on the refundable overcharges. The item clearly focuses on consequences stemming from interruptions, delays, etc.,

conditions where a customer may experience an economic loss because of the inability of the utility to provide service, or provides mistaken or unsatisfactory service. PU Code § 734 clearly authorizes the Commission to award reparations and interest to a customer, if no discrimination will result from such payment.

Section 734

"When complaint has been made to the commission...and the commission has found...that the public utility has charged an ...excessive...amount therefor in violation of any of the provisions of this part, the commission may order that the public utility make due reparation to the complainant therefor, with interest from the date of collection if no discrimination will result from such reparation."

No allegation by Pacific of discrimination has been made, and no such discrimination will result from our order that Pacific pay to the complainant a fair rate of interest on the refundable overcharges. Pacific has had the use of complainant's money. It would be unconscionable for the Commission not to direct the payment of interest in these circumstances.

We find that the overcharges conceded by Pacific come under the purview of PU Code § 532, and that PU Code § 736 sets the statute of limitations for refunds of such overcharges.

Finally, we find that PU Code § 734 authorizes the Commission to direct payment of interest on the overcharges assessed and collected by Pacific from complainant. For purposes of this decision, a fair interest rate will be the average three-month commercial paper rate as published in the Federal Reserve Bulletin, based upon the average amount of refundable overcharges.

Findings of Fact

1. Pacific overcharged complainant for telephone service for 11 years up to March 23, 1989, at which time it was notified by complainant of the overcharges.

2. Upon notification by complainant of the overcharges, Pacific in March 1989 refunded complainant \$1,612.91 an amount equal to three years' overcharges for telephone service rendered from February 23, 1986 to February 23, 1989, and immediately ceased its overcharging practices. The correct amount of refundable overcharges is \$1,618.43.

3. In assessing complainant overcharges, Pacific violated PU Code § 532.

4. PU Code § 736 sets the statute of limitations within which damages may be refunded for violations of PU Code § 532.

5. PU Code § 453 prohibits a public utility from making or granting any preference or advantage to any person or corporation. ✓

6. Pacific's tariff, Schedule Cal. P.U.C. A2.1.14, does not prohibit the payment of interest by the utility to the customer on billing errors. If the wording in Pacific's tariff were to be construed as prohibiting such interest payments, it would be unlawful because it would conflict with PU Code § 734. ✓

Conclusions of Law

1. Pacific should be ordered to pay complainant interest on \$1,618.43, the amount of overcharges found by this decision to be refundable. Interest payment should be at the average three-month commercial paper rate as published in the Federal Reserve Bulletin, and should be based upon the average amount of overcharges determined by this decision or \$809.22. Pacific should also be ordered to pay complainant \$5.52, the difference between \$1,612.91 and \$1,618.43, the amount properly refundable to complainant.

2. In all other respects, this complaint should be denied.

ORDER

IT IS ORDERED that:

1. Within 30 days after the effective date of this order, Pacific Bell shall pay to James Mitchell, as interest on \$1,618.43, an amount equal to the average three-month commercial paper rate as published in the Federal Reserve Bulletin, based upon the average amount of overcharges determined by this decision or \$809.22, and in addition should pay Mitchell \$5.52.

2. In all other respects, this complaint is denied.

This order becomes effective 30 days from today.

Dated SEP 12 1990, at San Francisco, California.

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

Commissioner John B. Ohanian,
being necessarily absent, did
not participate.

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

[Handwritten Signature]
JOHN B. OHANIAN, SECRETARY