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Decision 91-02-031 February 21, 1991

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

PACIFIC BELL (U 1001 C),

Complainant,

vs.

A+ BEEPERS COMPANY; SOUTHLAND COMMUNICATIONS, INC. (dba) NATIONAL PAGING; and SOUTHLAND HOLDINGS, INC.,

Defendants.

ORIGINAL

Case 89-10-036
(Filed October 24, 1989)

ORDER OF DISMISSAL

This is a complaint by Pacific Bell (PacBell) against A+ Beepers Company (A+), Southland Communications, Inc. (SCI), and Southland Holdings, Inc. (SHI).

On November 28, 1990, PacBell and A+ filed a joint request for a dismissal without prejudice. On December 7, 1990, SCI and SHI filed a request for dismissal with prejudice. PacBell filed a responsive pleading opposing the SCI and SHI request on December 31, 1990.

Material Issue

The material issue presented in this matter is whether the complaint should be dismissed with or without prejudice.

Findings of Fact

1. The complaint was filed by PacBell on October 24, 1989. A+ filed a motion to dismiss on November 14, 1989. SCI filed a motion to dismiss on November 15, 1989. PacBell filed an opposition to the A+ motion on December 4, 1989. SCI filed an answer on December 4, 1989, and A+ filed its answer on December 12,

1989. PacBell filed a Joint Amended Complaint on March 23, 1990. SHI filed an answer to the complaint on April 25, 1990.

2. The matter was calendared for hearing on April 3 and 4, 1990. It was removed from the calendar at the request of the parties and a prehearing conference was set for May 15, 1990. On May 14, 1990, PacBell and A+ requested that the prehearing conference be removed from the calendar because of settlement negotiations. The assigned administrative law judge granted the request and notified the parties that "Unless the parties indicate in writing by October 1, 1990, that a settlement has been reached, I will restore the matter to the calendar for an evidentiary hearing."

3. Notification of settlement was not received, and the matter was calendared for hearing on December 19 and 20, 1990. On November 28, 1990, PacBell and A+ filed a joint request for dismissal without prejudice. The matter was removed from the calendar. On December 7, 1990, SCI and SHI filed a request for a dismissal with prejudice. PacBell filed a responsive pleading opposing the SCI and SHI request on December 31, 1990.

4. No hearing or prehearing conference was held in this matter. No substantive rulings were made in this matter.

Conclusions of Law

1. PacBell has an absolute right to have its complaint dismissed. (C.C.P. § 581; Associated Convalescent Enterprises v. Carl Marks & Co. (1973) 33 Cal. App. 3d 116; McDaniel v. California Timber Co. (1905) 2 Cal. App. 165.)

2. Public Utilities (PU) Code § 308 provides in part that:

> "The commission may authorize the executive director to dismiss complaints or applications when all parties are in agreement thereto, in accordance with such rules as it may prescribe."

The Commission adopted Resolution A-4661, which implemented PU Code § 308.

The cited portion of PU Code § 308 is procedural and not substantive. It provides for the expeditious entry of a dismissal where all parties are in agreement. It does not change the substantive law relating to dismissals. Where all parties do not agree, the Commission can make an appropriate order in accordance with law.

3. A voluntary dismissal is presumed to be without prejudice. (Rae v. California Equipment Co. (1939) 12 Cal. 2d 558, 563; Breznikar v. T. J. Topper Co. (1937) 23 Cal. App. 2d 298, 303; Witkin, California Procedure, Proceedings Without Trial § 81(b).)

4. PacBell is entitled to have this complaint dismissed without prejudice.

IT IS ORDERED that Case 89-10-036 is dismissed without prejudice.

This order becomes effective 30 days from today.

Dated February 21, 1991, at San Francisco, California.

PATRICIA M. ECKERT
President
G. MITCHELL WILK
JOHN B. OHANIAN
Commissioners

I abstain.

DANIEL WM. FESSLER
Commissioner

I abstain.

NORMAN D. SHUMWAY
Commissioner

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