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Decision 91-10-043 October 23, 1991

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application for)
Rehearing of Resolution No. T-12015.)In the Matter of Resolution No.)
T-12015: Commission Approval of)
Pacific Bell Advice Letter No. 15224)
and Denial of Protests of Omniphone,)
Inc. and Sable Communications of)
California, Inc.)Application 87-05-049
(Filed May 26, 1987)**ORIGINAL**OPINIONSummary

This decision grants the Motion for Summary Judgment by Lottery Hotline Inc. (Lottery Hotline). We find that Lottery Hotline was not provided notice of the proposed change in the chargeback policy pursuant to Public Utilities (PU) Code § 454.

Background

In Decision (D.) 85-11-028, dated November 6, 1985, we authorized Pacific Bell (Pacific) to amend its 976 IAS tariff to provide, on an interim basis and under specific conditions, for a one-time adjustment (refund) for 976 calls appearing on residential subscribers' bills. By D.87-01-042 dated January 14, 1987, we made permanent the adjustment policy adopted in D.85-11-028.

On February 13, 1987, pursuant to D.87-01-042, Pacific filed its Advice Letter 15224 whereby Pacific would be authorized to charge the appropriate information provider's (IP) account the

full amount of a 976 call refunded to a residential subscriber.¹ Protests to the Advice Letter were filed separately by Omniphone, Inc. (Omniphone) and Sable Communications of California, Inc. (Sable) on March 10, 1987.

On April 22, 1987, we rejected the protests of Omniphone and Sable and by Resolution T-12015 approved Pacific's advice letter authorizing the full chargeback of adjustments to the IP.

Applications for rehearing were filed by Omniphone and Colter Corporation (jointly with several other IPs). D.87-08-064 dated August 26, 1987 ordered a rehearing to develop evidence on the record relevant to the issue of how Pacific's billing and transport charges should be treated in the context of the 976 refund policy. That decision also ordered that all billing and transport charges which Pacific and GTE California Incorporated (GTEC) had charged back to any IP's account pursuant to Resolution T-12015 be refunded to the IP and that on rehearing Pacific should submit evidence on its actual billing and transport costs as well as the actual costs of making each adjustment.

Hearings were held December 17 and 18, 1987 in San Francisco. The matter was submitted subject to the mailing of concurrent briefs on January 20, 1988. Briefs were received from

1 When a caller makes a 976 call, the utility bills and collects a charge for the call. The utility remits to the IP a portion of the charge. If, for example, the cost of the 976 call is \$2.00, the utility remits to the IP \$1.30, and the utility retains \$0.70. In certain circumstances, the caller may receive an adjustment (refund) from the utility for a certain call. If the caller receives an adjustment, the utility will charge a certain amount back to the IP. The chargeback is typically in the form of a debit against future remittances to the IP. Under a "full chargeback" policy, the utility will debit the IP the entire amount refunded to the caller. Using a \$2.00 call as an example, the utility will initially remit \$1.30 to the IP; if the call is refunded, the utility will debit the IP \$2.00.

Pacific, GTEC, the Information Providers Association, Sable, and the Commission's Division of Ratepayer Advocates.

On April 27, 1988, the Commission adopted D.88-04-077 which directed that all adjustments for 976 calls shall be recharged "in full" to the appropriate IP's account. We ordered Pacific and GTEC (Pacific and GTEC are collectively referred to herein as the "utilities") to file advice letters implementing the full chargeback policy.

On May 26, 1988, we issued D.88-05-073 to clarify that the "full chargeback" policy adopted by D.88-04-077 will apply prospectively to 976 calls made on or after the effective dates of the advice letters revising the appropriate tariff sheets.

On May 31, 1988, Lottery Hotline filed an Application for Rehearing of D.88-04-077 on the grounds that the Commission awarded Pacific and GTEC "a rate increase for 976 IAS in violation of Section 454 of the California PU Code, in that PacBell and GTEC failed to notify their affected 976 customers, including Applicant, that they were seeking a rate increase for this service." Pacific and GTEC opposed Lottery Hotline's Application for Rehearing.

On August 10, 1988, we adopted D.88-08-028 and granted a limited rehearing of D.88-04-077 on the issue "of whether applicant received notice of the proposed rate increase." With regard to Lottery Hotline's specific charge that Pacific and GTEC failed to comply with PU Code § 454, we ordered that a limited rehearing be held "to establish whether Lottery Hotline, Inc. was notified by Pacific Bell and GTE of California of the proposed rate increase in this matter pursuant to PU Code section 454."

The Motion for Summary Judgment

On January 23, 1990, Lottery Hotline filed its "Motion for Summary Judgment." Lottery Hotline states the issue presented by its motion as follows: Did Pacific or GTEC provide notice of the proposed "full chargeback" rate increase as required by Section 454? Lottery Hotline asserts that there is no dispute as

to any triable issue and that a decision should be issued in favor of Lottery Hotline as a matter of law.

Lottery Hotline alleges that neither Pacific nor GTEC satisfied the requirements of Section 454. More specifically, Lottery Hotline asserts that between August 26, 1987 and December 18, 1987 "...no document was ever sent to Lottery Hotline or any other IP that contained the notice required by section 454."

Pacific and GTEC filed responses to the Motion for Summary Judgment.

Pacific responds that the provisions of Section 454 are clearly inapplicable to the circumstances of the rehearing ordered by D.87-08-064. Even if Section 454 were deemed applicable, Pacific argues that Lottery Hotline "received legally adequate notice of the hearings ordered by the Commission in D.87-08-064." Pacific challenges "Lottery's insistence that it lacked legally sufficient notice to have participated in the evidentiary hearings before ALJ Banks on December 17 and 18, 1987." Pacific cites 17 documents which it contends constitute notice, pursuant to PU Code § 454, of the proposed increase in chargebacks to IPs. Pacific asserts that these documents were provided to the attorney of record of PhoneAmerica, and to Jack Barnwell, who filed an appearance on behalf of Intercambio. Pacific argues that Lottery Hotline, Intercambio, and PhoneAmerica have interlocking operations, and that as a result of this interlocking relationship, Lottery Hotline had constructive, if not actual, notice of the proposed increase.

GTEC's response is similar to Pacific's. GTEC also contends that Section 454 does not apply to this situation. However, unlike Pacific, GTEC's response does not address the substantive question of the notice, if any, that GTEC provided to Lottery Hotline.

Lottery Hotline filed a reply to the responses of Pacific and GTEC. Lottery Hotline denies that the documents cited by

Pacific contain the required information. Lottery Hotline also appears to deny that it had actual or constructive notice of these documents. Lottery Hotline further denies that constructive notice satisfies the requirements of Section 454.

Discussion

Section 1701 of the PU Code states, "All hearings, investigations, and proceedings shall be governed by this part and by rules of practice and procedure adopted by the commission...." While the only pre-trial motion authorized by the rules is a Motion to Dismiss (Rule 56), the rules are to be liberally construed to secure "just, speedy, and inexpensive determination of the issues presented. In special cases and for good cause shown, the Commission may permit deviations from the rules." (Rule 87.)

In this case, it is reasonable to entertain Lottery Hotline's Motion for Summary Judgment. To properly consider this motion, we will employ the procedure for summary judgment provided at Section 437(c) of the California Code of Civil Procedure and the relevant case law.² Inasmuch as summary judgment denies the

2 California Code of Civil Procedure Section 437(c) states:

- "(c) The motion for summary judgment shall be granted if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to judgment as a matter of law. In determining whether the papers show that there is no triable issue as to any material fact the court shall consider all of the evidence set forth in the papers, except that to which objections have been made and sustained by the court, and all inferences reasonably deducible from the evidence, except summary judgment shall not be granted by the court based on inferences reasonably deducible from the evidence, if contradicted by other inferences or evidence, which raise a triable issue as to any material fact."

right of the adverse party to full hearing of the case, it should be applied with caution. Summary judgment will be granted only when it is clear from the affidavits or declarations filed in connection with the motion that there are no triable issues of fact.

The purpose of the limited rehearing is to establish whether Lottery Hotline was provided or received notice of the proposed rate increase pursuant to PU Code § 454. In this case, Lottery Hotline's Motion for Summary Judgment should be granted if the facts set forth by the parties, when construed in the light most favorable to the utilities, demonstrate that Lottery Hotline was not provided or received notice of the proposed increase pursuant to PU Code § 454.

PU Code § 454 requires, in pertinent part, that whenever a utility files an application to change any rate, other than a change reflecting and passing through to customers only new costs to the utility which do not result in changes in revenue allocation, for the services or commodities furnished by it, the utility shall furnish to its customers affected by the proposed rate change notice of its application to the Commission for approval of the new rate. Section 454 permits the utility to include the notice in customers' regular bills within 45 to 75 days of the application (depending on the length of the billing cycle), but does not otherwise specify the timing or form of the notice. Section 454 requires the notice to state, among other matters, the amount at the proposed rate change and a brief statement of the reasons for the change.

The responses by Pacific and GTEC to the Motion for Summary Judgment argue vigorously that the Commission should reconsider its previous determination that the provisions of Section 454 are applicable to the change in the chargeback policy. Pacific asserts:

"that the proper issue presented for summary adjudication on this rehearing is not Did

Pacific provide Lottery Hotline with notice of the hearings before ALJ Banks according to the provisions of P.U. Code section 454?,' but rather 'Should Pacific have provided Lottery Hotline with notice of the rehearings before ALJ Banks according to the provisions of section 454?' Pacific contends that thus properly framed, the threshold issue of section 454's applicability to Pacific in responding to the Commission's decision in D.87-08-064 ordering evidentiary hearings before ALJ Banks can readily be determined as a matter of law." (Response of Pacific Bell to Motion for Summary Judgement, 2-21-90, at pp. 13 - 14.)

The issue posed by Pacific as the "threshold issue" has already been clearly decided by D.88-08-028:

"As for the applicability of PU Code § 454, the Commission in prior decisions in this proceeding has treated determinations regarding how much the adjusted 976 call should be charged back to the IPs as a rate increase. In fact, rehearing was ordered on Resolution T-12015 primarily because the Commission believed that the requirements of PU Code Section 454 had not been complied with. Thus the telephone utilities are under an obligation when seeking an increase in the chargeback to IPs of adjusted 976 calls to notify all the IP customers of the proposed rate increase. Consequently, the Commission will grant a limited rehearing to establish whether notice pursuant to PU Code Section 454 was given to Hotline by Pacific and GTEC." (D.88-08-028, p. 2.)

Neither Pacific nor GTEC applied for further rehearing of D.88-08-028, and that decision has now become final. Accordingly, we agree with Lottery Hotline that the specific finding by the Commission in D.88-08-028 that Pacific and GTEC should have provided notice of the change in chargebacks pursuant to

Section 454 are part of a final order, and, as such, are conclusive and binding upon Pacific and GTEC.³

Turning to the facts of this case, as set forth in the affidavits of Lottery Hotline and Pacific, it is undisputed that neither Pacific nor GTEC included in customer bills or otherwise provided all IPs (the customers affected by the proposed rate change) a single written notice containing all of the information specified by Section 454.

Although Pacific concedes that it did not provide Lottery Hotline with the specific notice required by Section 454, Pacific contends that Lottery Hotline did "receive adequate notice of the evidentiary hearings which led to the Commission's decision in D.88-04-077." Pacific contends that Lottery Hotline received "constructive, if not actual, notice of the hearings ordered by the Commission in D.87-08-064," and is "consequently not entitled to challenge the settled decisions of the Commission in D.88-04-077 on procedural due process grounds."

Pacific's argument that Lottery Hotline received actual notice of the hearings is supported by the declaration of Martha Ashe. That declaration states that two companies, PhoneAmerica and Intercambio, received certain documents concerning Application (A.) 87-05-049. For the purposes of considering the Motion for

³ As we explained in D.87-03-034, 24 CPUC 2d 45, when the time for filing an application for rehearing has elapsed, a party's only recourse to seek major modifications in a decision is an application to reopen the proceeding pursuant to PU Code § 1708. While Section 1708 gives the Commission discretionary authority to reopen completed proceedings, we have determined that this authority to reopen a proceeding and alter a final decision must be exercised with great care and justified by extraordinary circumstances. A petition requesting a proceeding be reopened must demonstrate (1) significant new facts, (2) a material change in conditions, or (3) a basic misconception of law or fact in the prior decision.

Summary Judgment, we will assume, without deciding, that these two companies received the documents listed by Pacific. Pacific contends that PhoneAmerica, Intercambio, and Lottery Hotline are so closely related that whatever notice was received by PhoneAmerica and Intercambio may be imputed to Lottery Hotline. For purposes of considering the Motion for Summary Judgment, we will assume, without deciding, that whatever notice was received by PhoneAmerica and Intercambio was also received by Lottery Hotline.

PhoneAmerica and Intercambio were not parties to A.87-05-049. Consequently, these companies were not served with D.87-08-064. However these companies had filed appearances in another proceeding, I.85-04-047. Based upon our review of the formal file, it appears that all parties in I.85-04-047 were served with certain documents pertinent to A.87-05-049. Pacific cites 17 documents sent to these parties.

As Lottery Hotline correctly notes, eight of these documents were sent by Pacific after the close of hearings on December 17 - 18.⁴ We agree with Lottery Hotline that these documents did not provide reasonable notice of the opportunity to participate in the scheduled hearings on revision of the chargeback policy.

Lottery Hotline also correctly notes that three other documents are not relevant in any way to the issues set for rehearing.⁵ Of the remaining five documents,⁶ only one of

4 The documents received by PhoneAmerica and Intercambio are set forth at pages 4 - 6 of the "Motion by Pacific Bell to Dismiss or Deny Application for Rehearing of D.88-04-077 by Lottery Hotline," 7-15-88. Items 9 - 17 on Pacific's list were sent after the close of hearings.

5 Items 1, 2, and 4 on Pacific's list do not relate in any way to the issues set forth for rehearing.

6 Items 3 and 5 - 8.

these five documents,⁷ even refers remotely to a change in the chargeback policy. We agree with Lottery Hotline that none of these documents provide parties reasonable notice of the nature of the rehearing, much less the specific notice required by PU Code § 454.

PhoneAmerica and Intercambio were served with one additional document relating to A.87-05-049 not listed by Pacific. On October 23, 1987, the Commission mailed a Notice of Rehearing to all parties of record in A.87-05-049 and I.85-04-047. The Notice stated in full:

"NOTICE IS HEREBY GIVEN that the Public Utilities Commission of the State of California has set the rehearing in the above entitled matter before Administrative Law Judge Banks for Thursday, December 17, 1987 at 10:00 a.m. in the Commission Courtroom, State Office Building, 505 Van Ness Avenue, San Francisco, California, at which time and place all parties may appear and be heard."

While the notice was sufficient to apprise parties to A.87-05-049 of the time and place for rehearing, this notice did not provide reasonable notice of the purpose of rehearing to those who were not a party to A.87-05-049.

We conclude that the documents served on PhoneAmerica and Intercambio prior to the commencement of the hearings on December 17, 1987 did not provide notice of a proposed change in the chargeback policy. PhoneAmerica and Intercambio were notified of the time and place for a hearing, but they were not informed of

⁷ Item 7 is an administrative law judge ruling dated 12-7-87 regarding discovery requests.

the purpose of the hearing and they did not attend.⁸ Neither the Notice of Rehearing nor the 17 documents cited by Pacific provided actual notice of the proposal to modify the chargeback policy. These documents did not provide the specific disclosures (such as the amount of the proposed rate change) as required by PU Code § 454.

In summary, the only notice which Lottery Hotline could be said to have constructively received is that notice which was actually provided to Intercambio and PhoneAmerica. Based on the facts presented to us by Pacific, and interpreting those facts in the light most favorable to the utilities, we conclude that the documents received by Intercambio and PhoneAmerica, and imputed to Lottery Hotline, did not provide notice of a proposed change in the chargeback policy, pursuant to PU Code § 454.

Having found that Lottery Hotline did not receive notice of the proposed change in the chargeback policy, we vacate D.88-04-077 and remand this issue for new hearings.

Finally, we turn to Lottery Hotline's request for a refund for itself and "all California 976 IPs." The request is denied without prejudice. As stated in D.87-12-057, the sole purpose of this limited rehearing is to determine whether "notice was provided." We did not intend the question of monetary remedies to be addressed in this limited rehearing. These questions may be addressed following further hearings.

⁸ Had either PhoneAmerica, Intercambio or Lottery Hotline attended the hearings in A.87-05-049, the result which we reach here would be different. "The general rule is that one who has been notified to attend a certain proceeding and does do so, cannot be heard to complain of alleged insufficiency of the notice; it has in such instance served its purpose. This rule applies...[a]lso to one who appears in an administrative proceeding without the notice to which he is entitled by law." (156 CA 2d 161, 165 (1957).)

Findings of Fact

1. D.88-08-028 granted a limited rehearing of D.88-04-077 on the issue of whether Lottery Hotline was provided or received notice of the proposed rate increase.

2. Neither Pacific nor GTEC included in customer bills or otherwise provided all IPs (the customers affected by the proposed rate change) a written notice containing the information specified by PU Code § 454.

3. Lottery Hotline was not provided a written notice containing the information specified by PU Code § 454.

4. PhoneAmerica and Intercambio were not parties to A.87-05-049. Consequently, these companies were not served with D.87-08-064.

5. As parties in I.85-04-047, Intercambio and PhoneAmerica received 17 documents relating to A.87-05-049.

6. Eight of the 17 documents were sent by Pacific after the close of hearings on December 17 - 18. These documents did not provide reasonable notice of the opportunity to participate in the scheduled hearings on revision of the chargeback policy.

7. Another 3 of the 17 documents are not relevant in any way to the issues set for rehearing.

8. The remaining five documents pertain to discovery requests. Only one of these five documents even refers remotely to a change in the chargeback policy.

9. PhoneAmerica and Intercambio were served with a Notice of Rehearing in A.87-05-049 and I.85-04-047. While the notice was sufficient to apprise parties to A.87-05-049 of the time and place for rehearing, this notice did not provide actual notice of the purpose of rehearing to those who were not a party to A.87-05-049.

Conclusions of Law

1. Even if knowledge of all documents served on PhoneAmerica and Intercambio can be imputed to Lottery Hotline, these documents

did not provide notice of a proposed change in the chargeback policy.

2. Lottery Hotline was not provided nor did it receive notice of a change in the chargeback policy pursuant to PU Code § 454.

3. The advice letters authorized by Ordering Paragraph 1 of D.88-04-077 should be suspended.

ORDER

IT IS ORDERED that:

1. The advice letters authorized by Ordering Paragraph 1 of Decision (D.) 88-04-077, revising the associated tariff sheet to prospectively provide that all one-time adjustments for 976 calls shall be recharged in full, shall be suspended on the effective date of this decision.

2. Pending further action by this Commission, the amount of each refund charged back to the information provider (IP) shall not exceed the amount remitted to the IP.

3. Rehearing of D.88-04-077 is granted.

This order becomes effective 30 days from today.

Dated October 23, 1991, at San Francisco, California.

PATRICIA M. ECKERT
President
JOHN B. OHANIAN
DANIEL Wm. FESSLER
NORMAN D. SHUMWAY
Commissioners

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


NEAL J. SCHULMAN, Executive Director