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Decision 91-10-047 October 23, 1991

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Pacific Bell (U 1001 C),

Complainant,

vs.

AT&T Communications of California,  
 Inc. (U 5002 C), Allnet Communica-  
 tions Services of Michigan, Inc.  
 (U 5005 C), Cable and Wireless  
 Management Services, Inc.  
 (U 5131 C), Com System Network  
 Services (U 5082 C), Express Tel  
 (U 5047 C), South Bay Communica-  
 tions, Inc. (U 5110 C), Teleconomix,  
 and US Sprint Communications  
 (U 5112 C),

Defendants.

**ORIGINAL**Case 91-09-024  
(Filed September 17, 1991)INTERIM OPINION

On September 17, 1991, Pacific Bell (Pacific) filed a complaint against interLATA telecommunications carriers AT&T Communications of California, Inc. (AT&T), Allnet Communications Services of Michigan, Inc., Cable and Wireless Management Services, Inc., Com System Network Services, Express Tel, South Bay Communications, Inc., Teleconomix, and US Sprint Communications (defendants). The complaint seeks, among other things, a temporary restraining order (TRO) and preliminary injunction against defendants on the basis that they are offering intraLATA services in violation of Commission orders.

This decision denies Pacific's request for a TRO, dismisses the complaint as to defendant South Bay Communications, Inc., and orders each remaining defendant to notify its sales and marketing employees of the limits of defendant's authority.

Pacific's Complaint

Pacific alleges that defendants are "holding out" intraLATA services to their customers in violation of Commission orders. It states that AT&T has made written proposals to customers in which it urged customers to use AT&T's services to make and receive intraLATA calls. It makes similar allegations against other defendants.

Pacific argues that it has lost substantial intraLATA revenues because defendants are marketing intraLATA services. It also argues that once it loses a customer to defendants it may never again regain that customer and may consequently lose revenues permanently. Among other things, Pacific asks the Commission to issue a TRO and a preliminary injunction, enjoining defendants:

1. From holding out intraLATA message telephone service in California;
2. From offering a sales commission plan to employees or agents that rewards or encourages the sale of intraLATA calling;
3. From providing service to customers whose use of the service is more than incidental;
4. From providing services which are used to carry more than incidental intraLATA traffic;
5. To retain all records of intrastate message telephone service to enable the Commission to determine the extent of unauthorized intraLATA service and the amount of revenues diverted from Pacific;
6. To account for all funds collected by them from California customers for the past and current provision of unauthorized intraLATA message telephone service.

Pacific seeks several other Commission findings and actions regarding defendants' alleged holding out of intraLATA

service. We will not address them here because they are not appropriately the subject of an ex parte decision.

Pacific filed a motion to dismiss without prejudice the complaint against South Bay Communications, Inc. We will dismiss the complaint as to defendant South Bay Communications, Inc.

Responses of Defendants

Pursuant to a ruling of the assigned administrative law judge, dated September 19, 1991, several defendants filed Memoranda of Points and Authorities with respect to Pacific's request for a TRO and preliminary injunction. Defendants oppose Pacific's request on the basis that Pacific has failed to demonstrate any of the elements required for a TRO or injunction.

According to defendants, the courts have determined that in order to obtain a TRO or injunction, a complainant must demonstrate:

1. The complainant will suffer irreparable injury without the order;
2. No substantial harm to other interested persons will result from the issuance of the order;
3. The complainant is likely to prevail on the merits of the claim; and
4. The public interest will not be harmed by issuance of the order.

Defendants state that Pacific's complaint does not provide evidence that any of these tests will be met.

Generally, defendants argue that Pacific may recover damages by way of reparations if and when it prevails in the complaint, and that restricting the services offered by defendants by way of a TRO will harm defendants and their customers. They assert that, in any event, Pacific is unlikely to prevail in this case because it cannot demonstrate, and has not demonstrated in its

complaint, that defendants have "held out" or marketed intraLATA services or violated Commission orders.

Comments of Intervenor

Bank of America filed a motion for leave to intervene in this complaint case. It filed comments in opposition to Pacific's request for TRO and preliminary injunction. Bank of America is a large customer of AT&T. It states that granting the TRO and preliminary injunction would cause it substantial financial damage and serious disruptions in its banking operations which would affect the banking needs of its customers.

Motions for leave to intervene have also been filed by Roseville Telephone Company, GTE California Incorporated, Calaveras Telephone Company, California-Oregon Telephone Co., Ducor Telephone Company, Foresthill Telephone Co., Happy Valley Telephone Company, Hornitos Telephone Company, The Ponderosa Telephone Co., and The Volcano Telephone Company.

Discussion

Defendants correctly state that the Commission cannot issue a TRO and preliminary injunction unless it can find that irreparable harm would otherwise occur, and that no substantial harm to other interested parties or the public will occur. We must also find that Pacific is likely to prevail in this case (H-10 Water Taxi Co. Ltd. v. Universal Marine Corp., 84 CPUC 375 (1978)), and we address this issue first.

We first address whether Pacific is likely to prevail in this case.

Pacific's pleading includes several documents which suggest defendants may be "holding out" or marketing intraLATA services. The documents are, however, open to interpretation. For example, some of the documents may provide analysis of intraLATA costs simply in response to customer requests. The documents alone do not permit us to determine at this time whether Pacific is likely to prevail in this complaint.

Assuming arguendo that Pacific is likely to prevail, we must consider other standards which must be met in order for us to issue a TRO and preliminary injunction. Pacific states it will suffer irreparable harm if the Commission does not issue a TRO and preliminary injunction because it will not be able to recover lost revenues or lost customers. It also states it cannot estimate the level of damages which would accrue if it were to prevail in this complaint. We cannot agree. First, Pacific may recover damages by way of reparations which appear possible to determine. Pacific's own complaint quantifies with some degree of specificity certain losses relating to AT&T's Megacom service. Moreover, we doubt Pacific's claim that customers who use other carriers' services will be forever lost to Pacific. Pacific presents no evidence to contradict the common sense notion that customers will change carriers to take advantage of better services or lower prices.

Granting this request is likely to cause substantial damage to defendants and their customers. Limiting the service offerings of defendants is certain to cause harm to defendants in terms of lost revenues and customer goodwill. More critically, such action would harm customers whose services are interrupted or changed. This potential damage to defendants and their customers requires that Pacific meet a heavy burden of proof in demonstrating the need for a TRO and preliminary injunction. Pacific does not meet this burden of proof.

Pacific does not offer a definition of the term "incidental" or provide an analysis of Commission orders which would allow us to define the term for the purpose of addressing its complaint. Pacific, however, seeks a TRO on the basis that defendants' intraLATA traffic is more than "incidental."

Commission decisions have not prohibited interexchange carriers from providing intraLATA services. Although local exchange carriers, such as Pacific, retain exclusive authority to offer intraLATA message services, we have recognized that intraLATA

traffic which is "incidental" to interLATA service offerings may be carried by defendants because of the limits of existing technology. Our decisions, however, clearly prohibit interexchange carriers from holding out intraLATA services.

It is unnecessary for the Commission to issue a TRO and preliminary injunction to notify defendants that they should not violate Commission orders by holding out intraLATA message services.

This decision puts interexchange carriers on notice that we will not take lightly violations of Commission orders. Those orders were issued following careful deliberation of the interests of carriers and customers. Any acts in violation of those orders amount to an intrusion on the lawful rights of others and may undermine our authority to protect the interests of the public.

Nonetheless, we will not grant Pacific's request for a TRO and preliminary injunction. Pacific's complaint does not provide evidence to show that the harm which may befall it under the existing circumstances outweighs the potential damage to defendants and their customers which may occur if we were to grant Pacific's request.

As noted above, documents attached to Pacific's complaint suggest that some carriers may be holding out intraLATA services in violation of our orders. In order to determine whether defendants are in fact holding out intraLATA services we must consider defendants' acts more carefully. We may also need to define the terms "incidental" and "holding out" more precisely than we have in past decisions. Nevertheless, we are concerned with the possibility that some carriers may be violating Commission orders. We will direct defendants to this complaint to inform their sales and marketing employees of the Commission's policy and of the nature of this complaint. Defendants will be ordered to provide to all of their sales and marketing employees a written notice which states the following:

(Defendant) is not authorized by the California Public Utilities Commission (CPUC) to offer intraLATA message services to (Defendant's) customers. While (Defendant) is not prohibited from providing intraLATA message services which are incidental to the provision of authorized interLATA services, it is unlawful for (Defendant) to "hold out," or market, intraLATA message services.

In your sales and marketing efforts, you are directed to inform your customers and potential customers of the limits of (Defendant's) regulatory authority and to inform them that their local exchange companies offer intraLATA message services. You may not market or attempt to sell intraLATA message services.

The CPUC directed (Defendant) to provide this notice to you pending the resolution of a complaint filed by Pacific Bell against (Defendant). The complaint alleges that (Defendant) has unlawfully marketed and provided intraLATA message services. Resolution of the complaint in favor of Pacific Bell could require (Defendant) to pay fines, penalties, or reparations.

This proceeding will remain open to consider other matters of fact and law which are raised by the complaint.

#### Findings of Fact

1. Bank of America, Roseville Telephone Company, GTE California Incorporated, Calaveras Telephone Company, California-Oregon Telephone Co., Ducor Telephone Company, Foresthill Telephone Co., Happy Valley Telephone Company, Hornitos Telephone Company, The Ponderosa Telephone Co., and The Volcano Telephone Company filed motions to intervene in this complaint.

2. Certain documents attached to Pacific's complaint suggest that defendants may be holding out intraLATA message services in violation of Commission orders. The documents, however, may be subject to interpretation.

3. Pacific's complaint does not demonstrate that if the Commission does not issue a TRO and preliminary injunction against defendants it will be irreparably harmed, or that the harm to it would outweigh that which would be borne by defendants and their customers.

4. Commission decisions have not prohibited interexchange carriers from providing intraLATA message services.

5. Local exchange carriers retain exclusive authority to offer intraLATA message services; however, intraLATA message service which is "incidental" to interLATA service offerings may be carried by defendants because of the limits of existing technology.

6. Commission decisions prohibit interexchange carriers from holding out intraLATA message services.

7. Pacific filed a motion to dismiss this complaint as to South Bay Communications, Inc.

#### Conclusions of Law

1. The Commission should grant motions to intervene in this complaint filed by Bank of America, Roseville Telephone Company, GTE California Incorporated, Calaveras Telephone Company, California-Oregon Telephone Co., Ducor Telephone Company, Foresthill Telephone Co., Happy Valley Telephone Company, Hornitos Telephone Company, The Ponderosa Telephone Co., and The Volcano Telephone Company.

2. The Commission should deny Pacific's request for a TRO and preliminary injunction against defendants.

3. The Commission should direct defendants to notify their marketing and sales employees of Commission rules and orders as set forth herein.

4. The Commission should grant Pacific's motion to dismiss this complaint as to South Bay Communications, Inc.



INTERIM ORDER

IT IS ORDERED that:

1. Motions to intervene filed by Bank of America, Roseville Telephone Company, GTE California Incorporated, Calaveras Telephone Company, California-Oregon Telephone Co., Ducor Telephone Company, Foresthill Telephone Co., Happy Valley Telephone Company, Hornitos Telephone Company, The Ponderosa Telephone Co., and The Volcano Telephone Company are granted.

2. Pacific Bell's request for a temporary restraining order and preliminary injunction is denied.

3. The complaint as to defendant South Bay Communications, Inc. is dismissed.

4. Each remaining defendant to this complaint shall notify in writing each of its sales and marketing employees, representatives, and agents of the following:

(Defendant) is not authorized by the California Public Utilities Commission (CPUC) to offer intraLATA message services to (Defendant's) customers. While (Defendant) is not prohibited from providing intraLATA message services which are incidental to the provision of authorized interLATA services, it is unlawful for (Defendant) to "hold out," or market, intraLATA message services.

In your sales and marketing efforts, you are directed to inform your customers and potential customers of the limits of (Defendant's) regulatory authority and to inform them that their local exchange companies offer intraLATA message services. You may not market or attempt to sell intraLATA message services.

The CPUC directed (Defendant) to provide this notice to you pending the resolution of a complaint filed by Pacific Bell against (Defendant). The complaint alleges that (Defendant) has unlawfully marketed and provided intraLATA message services.

Resolution of the complaint in favor of Pacific Bell could require (Defendant) to pay fines, penalties, or reparations.

5. Each remaining defendant shall file, by November 15, 1991, an affidavit signed by an officer of the company stating that he or she has provided to all sales and marketing representatives, employees, and agents the notice set forth in Ordering Paragraph 4.

6. The complaint filed in this docket against South Bay Communications, Inc. is dismissed.

7. This proceeding shall remain open to address outstanding matters in this complaint.

This order is effective 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. SHULMAN, Executive Director