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Decision 91-11-036 November 20, 1991

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Medallion Real Estate Corporation,

Complainant,

vs.

Pacific Bell,

Defendant.

ORIGINAL

Case 91-05-012
(Filed May 7, 1991)

Frank M. Williams, for Medallion Real Estate Corporation, complainant.
Colleen O'Grady, Attorney at Law, for Pacific Bell, defendant.

OPINION

Statement of Facts

For a number of years leading up to September 5, 1990, Jack W. Huber, a real estate broker operating as a sole proprietor, operated a successful multi-office real estate business doing business as Century Medallion Realty. One of these Huber offices was located at 10370 South De Anza Boulevard in Cupertino, Santa Clara County. A considerable number of independent contractor realtors worked out of Huber's Cupertino office with telephone service being furnished by Huber as part of this business arrangement. The Cupertino office was internally served by three separate Measured Business Line services and a Data Access Line service. Billings for these Pacific Bell (Pacific) services went to a Huber office other than the De Anza Boulevard, Cupertino office.

Unfortunately for Huber, he had overexpanded, and with the advent of the current economic recession his real estate business declined. He attempted negotiations to sell his offices,

but when the negotiations failed, Huber filed Chapter 11 bankruptcy on September 5, 1990. The business continued under Huber as debtor in possession. At the same time Huber approached three of the brokers who were working out of the Cupertino office, Frank M. Williams, Perry Demorest, and Murray James, to see if they and others would be interested in salvaging the Cupertino office. These three then joined with 21 other brokers in that office on approximately October 18, 1990, and incorporated as Medallion Real Estate Corporation (Medallion) to purchase the Cupertino-located real estate business portion of Huber's operation. The 24 stockholders of Medallion thereupon elected James as president, in which capacity he served for about three months, resigning about year-end to be replaced by Demorest as president.

On October 26, 1990 the United States Bankruptcy Court for the Northern District of California, Division 5, in Case 590-04213-JRS, approved sale of the Cupertino-located business, free and clear of all liens and encumbrances, for \$63,000 to Medallion. Ordering Paragraphs 3, 4, and 7 of the Bankruptcy Court's order stated:

- "3. The Medallion Real Estate Corporation shall have no obligations to any creditors of the Debtor herein except as expressly set forth in the Asset Purchase and Sale Agreement between the Medallion Real Estate Corporation and the Debtor ('the Agreement').
- "4. The Agreement is attached to this Order as Exhibit '1' and made part of this Order by this reference."

1 While the photocopy of the court order submitted as an exhibit had a "Business Agreement" sheet attached, it bore no identification as "Exhibit 1" as stated in the order. However, the content and other markings were persuasive that it is the agreement

(Footnote continues on next page)

7. The Medallion Real Estate Corporation shall bear full responsibility for all obligations incurred by their business operation beginning on October 18, 1990."

In the real estate business, as testified to by Williams, the telephone numbers are perhaps the most vital part of the business. Obviously to preserve the facade of business continuity, Medallion had elected to do business as "Century Medallion Realty"--the same styling as that previously used by the now bankrupt Huber, and it wanted the same public telephone numbers. Accordingly, on October 16, 1990, "Janet," a representative from Medallion, telephoned Pacific's business office to ask about Medallion taking over Huber's 408-996-9990 measured business line service. Nothing was then mentioned about the other services. Purportedly, Medallion was unaware of their existence as the billings went elsewhere than the Cupertino office. The Pacific representative advised of its supersedure procedure: that a form had to be signed by the outgoing and incoming parties and that the then existing account must be paid to a zero balance.² Pacific's local business office at this point was unaware of the Huber bankruptcy. James entered the discussions and Medallion was

(Footnote continued from previous page) referred to. Item 2 of the Terms and Conditions states in relevant part:

"SELLER to pay in full all expenses including but not limited to: . . . (c) all telephone charges through October 17, 1990, . . . (g) Buyer will not assume any responsibility for any payments and charges relating to the business whatsoever, prior to October 17, 1990."

2 The Pacific representative made it clear that Pacific does not care who pays the balance, only that it be paid.

informed of its choice--that it need not supersede but could instead establish new service, with new telephone numbers, at a cost of \$1,791.75, or it could supersede by paying the open balance in full and keep the old Huber number. Pacific was asked to proceed with the supersedure. Accordingly, the form "Request to Transfer Customer Responsibility" was sent to Medallion. The form was returned to Pacific's local office on November 2, 1990, signed by Huber as the outgoing customer and James as the incoming customer, and listing the effective date to be "upon receipt." That same day James first informed Pacific's local office of the fact that Huber had filed in Chapter 11 of bankruptcy, and Pacific changed its records to reflect Huber as the debtor in possession after September 5, 1990, and apportioned the Huber 408-996-9990 account as of November 7, 1990 to include pre-bankruptcy charges as of September 5, 1990 of \$276.40, and post-bankruptcy charges September 5, 1990 to November 5, 1990 of \$1,900.82. Told of the open balance of \$1,900.82, James requested that Medallion be given until November 19, 1990 to bring it to a zero balance. Pacific's records indicate that Medallion paid this \$1,900.82 on November 26, 1990, and the former Huber 408-496-9990 service and telephone number were superseded to Medallion.

On September 18, 1990, the bankruptcy judge sent a Meeting of Creditors Notice addressed to Pacific in Sacramento. When this notice filtered down to Pacific's Los Angeles office handling bankruptcy matters, apparently on October 1, 1990, Pacific was on notice of the bankruptcy but did nothing to advise its local business office.³ Thereafter, on January 7, 1991 Pacific billed

3 Pacific's stated practice where bankruptcy is filed is when noticed to change the service immediately to "Debtor-in-Possession", thereby creating a closing bill with pre- and

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Huber as debtor in possession for the open balances since the September 5 bankruptcy of \$1,223.07 for the remaining three services still serving the Cupertino office--Accounts 408-996-9491, 408-996-7647, and 408-253-5643.

Medallion still wanted to retain these services and numbers. By this date, Demorest was in charge. Again the option was to obtain new services with delays, a \$748.50 installation charge, and new numbers, or supersede and retain the services and numbers immediately by paying the \$1,223.07 open balance. On January 22, 1991 both Huber and Demorest signed the respective supersedure forms for the three accounts and paid the \$1,223.07 open balance to zero. The effective date stated on the forms was "return form."

Shortly thereafter Williams took over at Medallion. He concluded that Pacific should have collected these balances between the bankruptcy date and the dates of supersedure (all paid by Medallion) from Huber; that while he did not blame the phone company for trying to collect these bills, to collect the account from Medallion as a condition of supersedure was "blackmail." Williams contends that under the "Business Agreement" incorporated into the Bankruptcy Court's order Huber should pay all charges through October 17, 1990.

After unsuccessfully seeking resolution of the issue in its favor through the Commission's Consumer Affairs Branch, Medallion filed the present formal complaint, seeking refund of

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post-bankruptcy charges. Pacific then files a proof of claim on the pre-charges in bankruptcy court, and places the post-bankruptcy date charges to a brand new account for the debtor in possession. The bankruptcy court claims are handled by Pacific's Los Angeles Office.

\$3,123.89 paid Pacific plus interest. After filing its complaint Medallion also sought to collect from Huber who assertedly refused to pay upon advice of his lawyers. Thereupon Medallion filed malpractice claims against Huber's attorneys. On June 26, 1991 Medallion by a letter signed by Williams advised the Commission that "apparently as a result of pressure from the State Bar," Huber's lawyers had sent Medallion a "take it or leave it" check for \$2,275.35 to settle. Medallion accordingly reduced its claim on Pacific in this complaint to the \$848.52 balance, plus interest on the entire \$3,123.89 originally claimed to June 24, 1991, and on the \$848.92 balance until paid.

A duly noticed public hearing in which both Medallion and Pacific participated was conducted in San Jose on August 9, 1991 before Administrative Law Judge (ALJ) John B. Weiss. Upon completion of the hearing and oral argument the matter was submitted for decision.

Discussion

Usually when a new business entity purchases the existing business of another entity, it wishes to take over whatever good will, custom, and customers the predecessor entity has built up, and to present a facade of unbroken continuity. With regard to its telephone services, it will also want to avoid the delay and costs attending establishment of new service, but most importantly, it will want to retain the same telephone numbers. In the real estate business, Williams testified, this is of paramount importance. Accordingly, an arrangement can usually be made to transfer the entire existing service, including the telephone numbers, from a predecessor to the new business, with no interruption of service and no change in service, equipment or facilities, by application to the telephone company under the utility's supersedure procedures. With Pacific this is done by applying to the utility and submitting its form "Request to Transfer Customer Responsibility-Business" (K2160-B (10-88)).

This Pacific request form includes a box to be checked to indicate supersedure is wanted, and a space where the outgoing and incoming customers indicate the effective date when the change in responsibility is to occur. The form must be signed by authorized signatories of both parties. The outgoing customer is responsible for service charges, etc. through the effective date, and the applicant incoming customer is responsible for service charges, etc. beginning the date after the effective date (see Pacific's Rule No.23: 2.1.23 D, Supersedure and Change in Billing, Exhibit No. 4).

It must be noted, however, that nowhere in Rule No. 23 or in the Request to Transfer Customer Responsibility form is there mention that before supersedure can be effected, the outgoing customer's account must be paid to a zero balance. These supersedure procedures are, according to Pacific's testimony, to protect the utility from fraud, and to protect the outgoing customer by providing notice that somebody is going to be taking over the existing telephone service. At any time, with notice to the incoming customers, the outgoing customer can cancel the arrangement. The rule does provide that the outgoing customer is responsible for charges through the effective date of the supersedure, and must provide a final bill address (other than the service address) and a current telephone number. Obviously, this is so that the outgoing customer can be sent a final bill. Here Huber gave the Cupertino office address and telephone number, but Pacific accepted the form. However, as Pacific billed the 408-996-9990 account to Huber at another of Huber's offices than the Cupertino office, the utility had another address and number already on file. As Pacific further testified, the incoming customer is also protected, and on notice, regarding responsibility for charges after the date of supersedure.

We agree with Pacific's argument that the utility has its supersedure rules and forms in effect for the very purpose of

avoiding conflict as to who owes the bills, who has the responsibility to pay them, but we also conclude that these rules and forms have no requirement or precondition to supersedure that the outgoing customer's account must be paid to zero balance. Nor does the filed tariff Rule No. 23 provide that Pacific may demand payment from the incoming business customer of the outgoing business customer's balance as a precondition to supersedure. A public utility's tariff filed with the Commission has the force and effect of law (Dollar-A-Day Rent-A-Car System v. Pacific Tel. & Tel. Co. (1972) 26 CA 3d 454), and tariffs will be construed according to their language irrespective of the intentions of their framers (Calif. Chemical Co. v. So. Pac. Co. et al. (1965) 64 CPUC 590).

It has long been established that a telephone service subscriber, residential or business, has no proprietary rights to the telephone number assigned it by the telephone company,⁴ and therefore cannot transfer such number to another customer, even though that customer is purchasing its business. But supersedure of telephone numbers and service can be of crucial importance to a successor business; as a telephone utility is there to serve the public, unless there exist compelling ethical or credit reasons to the contrary, supersedure should be reasonably available to otherwise qualified business customers, in the interests of avoiding delay to an incoming or successor business. A telephone company faced with an outgoing business customer owing a balance faces no additional risk or cost in collecting from that business customer by permitting supersedure. Accordingly, supersedure

4 Where the tariff so provides, the assignment of a telephone number is within the discretion of the utility and no subscriber is entitled to assert a proprietary right to any telephone number (Aston v. PT & T Co., et al. (1965) 63 CPUC 807). And Pacific's Rule No. 17 provides accordingly.

should not be used as a collection device against the incoming business. It should be noted that we specifically do not address residential supersedures here.

The next issue posed by this complaint is that of the effective date of the supersedure in this case. The outgoing and incoming customers in completing the transfer of responsibility form filled in the effective date space with the words "upon receipt" as applicable to the 408-996-9990 service. Pacific testified that the form was received November 2, 1990, and that it prepared a final bill for \$1,900.82 on November 7, 1990. Strictly construed, this would mean that Huber should be responsible for this entire \$1,900.82 incurred between September 5, 1990 and the effective date of supersedure. But to do so would place form over rationality, and also offends equity. Both parties have contributed to creation of this problem. Pacific had been notified October 1, 1990 of Huber's bankruptcy by the Court, but its Los Angeles office took no steps to advise the local business office handling the account. And Medallion, while well aware of the fact of bankruptcy, in initiating the supersedure with Pacific's local office on October 16, 1990, made no mention of the bankruptcy until November 2, 1990. The Bankruptcy Court in authorizing sale of the real estate business of the Cupertino office to Medallion apportioned telephone costs as between Huber and Medallion as of October 17, 1990.⁵

We conclude that it would be reasonable and equitable under the facts of this case to adopt October 17, 1990 as the effective date of supersedure, and to require Pacific to reapportion the charges accordingly. Pacific has already filed in

⁵ The Court reportedly concluded that telephone services through October 17, 1990 were part of the service Huber provided the realtors working there. On October 18, 1990 Medallion was on its own and the telephone costs were its expense and responsibility.

bankruptcy for the pre-September 5, 1990 charges, and it should seek collection from Huber as debtor in possession for charges incurred by the Cupertino office service September 6, 1990 through October 17, 1990. Medallion will be billed for the charges incurred October 18, 1990 and after.

We will apply the same effective date determination to the 408-996-9491, 408-996-7647, and 408-253-5453 service supersedures. In all three instances, Pacific had been on notice since October 1, 1990 and on January 7 was still billing Huber, but not even as debtor in possession. It was the local business office which notified the Los Angeles group. But Medallion, using the services, did not submit request to transfer responsibility forms to Pacific until January 22, 1991. The effective date inserted by Medallion was "return form." In view of the omissions to act by both parties we find our determination of the October 17, 1990 date to apply to these three supersedures to be reasonable and equitable. As in the above discussed 408-996-9990 account, Pacific will seek collection from Huber as debtor in possession for that portion of the charges that was incurred September 5, 1990 through October 17, 1990, and rebill Medallion for the portion incurred October 18, 1990 and after.

As Pacific has already collected \$3,123.89 from Medallion, after it has recomputed the respective apportionments it will furnish Medallion with the corrected billings as well as an itemization by dates of the charges incurred, and will refund to Medallion that portion of the \$3,123.89 inappropriately collected previously. In view of the dual responsibility for these problems, we will not require that any interest be paid, and it will be Medallion's responsibility to resolve its accounts with Huber as debtor in possession.

Findings of Fact

1. Pacific is a telephone public utility within the jurisdiction of this Commission.
2. Huber, a multiple office business customer of Pacific, on September 5, 1990 filed in Chapter 11 bankruptcy.
3. A number of realtors working through Huber's Cupertino office thereupon incorporated as Medallion and with authorization of the Bankruptcy Court purchased Huber's Cupertino office on October 17, 1990.
4. Incorporated into the Bankruptcy Court's order authorizing sale of Huber's Cupertino office business to Medallion was a court-ordered apportionment of telephone costs, which apportionment provided that Huber as debtor in possession would pay costs through October 17, 1990, and Medallion would pay costs commencing October 18, 1990.
5. While the Bankruptcy Court by means of a creditors meeting notice mailed on September 18, 1990 put Pacific on notice as of October 1, 1990 of Huber's bankruptcy, through unexplained internal omissions at Pacific, the latter's local business office was not informed of that fact.
6. Medallion, desiring to avoid installation costs and delay and to retain the telephone numbers and services of Huber's Cupertino office, on October 16, 1990, initiated supersedure procedures with Pacific's local business office, but until November 2, 1990 did not disclose the fact of Huber's bankruptcy.
7. On November 2, 1990, Medallion submitted a supersedure form to Pacific's local business office signed by Huber and Medallion but containing an equivocal effective date.
8. In accepting the supersedure form Pacific did not strictly adhere to the provisions of its filed tariff, permitting deviations and effectively imposing a condition that Medallion pay the Huber debtor in possession balance as of November 7, 1990 to zero before granting supersedure.

9. Subsequently in January 1991 Pacific ascertained that there were three additional services still serving the Cupertino facility that had not been superseded as to responsibility although they continued in use by Medallion, and following the same practice as with the initial service transfer, required Medallion to pay the January 7, 1991 balance to zero before effecting the supersedure transfer.

10. Medallion, after paying Pacific, proceeded against Huber and recovered some of the costs.

Conclusions of Law

1. Pacific's filed tariff Rule No. 23 and the terms of its Request to Transfer Customer Responsibility form applicable to business supersedures place responsibility for charges through the effective date of a supersedure on the outgoing customer, but do not require payment of the outgoing customer's account to balance zero before effecting a supersedure, nor do they permit Pacific to require that an incoming customer pay the balance as a condition of granting a supersedure.

2. Unless there exist compelling ethical or credit reasons to the contrary, in view of the importance of use of the same telephone numbers and avoidance of delay to an incoming or successor business, supersedure should be reasonably available to qualified business customers.

3. Under the facts of this case it would be equitable to require Pacific to apportion the charges incurred since bankruptcy protection was sought September 5, 1990, using October 17, 1990 as the effective date of supersedure with Pacific to look to Huber as debtor in possession and Medallion for each respective portion of the charge incurred.

4. Pacific should be required to refund to Medallion any excess charges collected from Medallion as provided herein, but without interest.

ORDER

IT IS ORDERED that:

1. Pacific Bell (Pacific) shall recompute the \$3,128.89 representing charges collected from Medallion Real Estate Corporation (Medallion) as a condition precedent to superseding Medallion to services 408-996-9990, 408-253-5643, 408-996-7647, and 408-996-9491, apportioning the charges between those incurred September 6 through October 17, 1990, and those incurred October 18, 1990 and thereafter.
2. Pacific shall bill and institute appropriate collection procedures to Jack W. Huber, Jo Rita Huber, dba Century Medallion Realty aka Century Medallion (Huber), for the charges apportioned to the period September 6 through October 17, 1990 for the four services listed in Ordering Paragraph 1.
3. Pacific shall bill Medallion for the charges apportioned to the period October 18, 1990 and thereafter of the \$3,128.89 for the four services listed in Ordering Paragraph 1, refunding to Medallion the difference between the apportioned amount and the \$3,128.89 already collected.
4. No interest is to be applicable to the refund to be paid Medallion by Pacific.

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

[Handwritten Signature]
 Executive Director

5. This order closes this case.

This order becomes effective 30 days from today.

Dated November 20, 1991, at San Francisco, California.

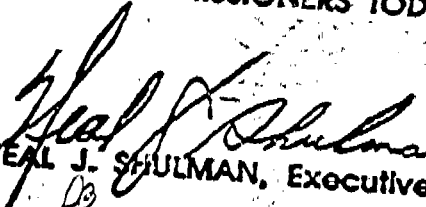
PATRICIA M. ECKERT
President

DANIEL W. FESSLER

NORMAN D. SHUMWAY
Commissioners

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

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


NEAL J. SHULMAN, Executive Director