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Decision 92-01-020 January 10, 1992

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 Communications 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), Teleconomix, and US Sprint Communications (U 5112 C),

Defendants.

ORIGINAL

Case 91-09-024
(Filed September 17, 1991)

## INTERIM OPINION

This decision resolves certain outstanding legal and procedural matters in this complaint. Specifically, it provides guidance to the parties regarding the Commission's use of the terms "holding out" and "incidental" as they relate to defendants' intraLATA capabilities. It also narrows the scope of this complaint by finding that Pacific Bell's (Pacific) complaint requests damages from defendants which the Commission cannot order. We deny defendants' motions to dismiss.

## I. The Commission's Use of the Term "Holding Out"

Pacific alleges in this complaint that defendant interexchange companies (IECs) have been unlawfully "holding out" that they have authority to provide intraLATA services. The term "holding out" has been used in utility regulation in determining whether or not a service offering is that of a common carrier subject to regulation. Traditionally, the term has referred to an

indiscriminate or general offering to the public. The Commission has used the term as it applies to intraLATA carriage by IECs in several decisions.

The Commission first used the term as it relates to intraLATA communications in Decision (D.) 84-01-037. That decision prohibited IECs who had applied for message toll service authority from holding out intraLATA services.

Subsequently, in D.84-06-113, we granted Pacific's request to require the IECs to advise current and potential customers that intraLATA calls "(1) may not be lawfully placed over their networks and (2) should be placed over the facilities of the local exchange carriers without any further advice being given" (emphasis in original). Pacific argues that this requirement is "the crux" of the holding out rule. We disagree. Neither D.84-06-113 nor any other decision characterizes this requirement as one which applies to any IEC services other than message toll services. In fact, the Commission subsequently addressed the issue of intraLATA carriage by IECs in several decisions where IECs had applied for other new authority. In those decisions, we considered the matter of intraLATA traffic separately and in some cases set forth standards which differ from those adopted in D.84-06-113 (see, for example, D.86-05-073, D.88-11-053, D.90-04-023).

Moreover, D.84-06-113 does not define holding out specifically. The requirement that IECs advise their customers of the limits of their authority was not a definition of holding out but, as the decision states, a "further" requirement to the prohibition against holding out.

D.90-08-066 defines holding out as it applies to IECs:

> Interexchange carriers are not permitted to offer or advertise intraLATA services they are not authorized to provide, even though they may be technically able to provide the services.

This is the only explicit definition of holding out offered by a Commission decision addressing intraLATA capabilities

of IECs and does not contradict any previous Commission discussion of holding out. Because it is the only explicit definition of holding out as it applies to intraLATA services, we will rely on it and other, broader interpretations relating to other utility services in considering the merits of Pacific's complaint. Pacific may also attempt to demonstrate that IECs have violated D.84-06-113 by failing to inform their customers that they are not authorized to provide intraLATA message toll services.

## II. The Commission's Use of the Term "Incidental Use"

Pacific's complaint alleges that the intraLATA traffic of defendant IECs is more than incidental. The Commission has used the term "incidental" to refer to intraLATA traffic which the IECs carry even though they are not authorized to provide intraLATA services. Incidental intraLATA traffic is permitted under regulatory authority in recognition that IECs may not be able to prevent the carriage of such traffic because of technological or other practical constraints.

We have distinguished incidental intraLATA traffic from intraLATA traffic which would be considered unlawful. In D.84-06-013, the Commission found that "the question of whether intraLATA traffic at issue constitutes an incidental use turns on the defendants' intentions." In that decision, the Commission denied Pacific's complaint against several carriers who had carried intraLATA traffic without authority. We found that the defendants did not exhibit an "affirmative intent" to hold out and, by implication, their traffic was incidental. The Commission has never defined incidental in terms of the quantity of intraLATA traffic carried by an IEC.

Consistent with past decisions, we will in this proceeding consider the merits of Pacific's complaint on the basis of whether defendants' actions exhibit an affirmative intent to

hold out the offering of intraLATA services. We will not consider whether intraLATA traffic is incidental on the basis of the quantity of that traffic which defendants carry.

## III. Pacific's Request for Reparations

Pacific's complaint seeks reparations from the IECs for revenues it alleges to have lost as a result of unlawful intraLATA services. Its complaint does not specify how it would calculate reparations. In its reply to motions to dismiss, Pacific suggests the formula for reparations would be the difference between the access charge revenues it received from the IEC and the toll revenues it would have received if the IEC had not carried the intraLATA traffic.

Pacific characterizes its proposed monetary award as reparations because it is asking the Commission to impose a "reasonable access charge" as a substitute for the "unreasonable and discriminatory access charges paid by carriers when they engage in the unlawful provision of intraLATA services." Defendants argue that Pacific is seeking damages, not reparations. They state the Commission is without jurisdiction to award damages.

It is well settled that the Commission cannot award damages (see, for example, California Electronics Inc. v. Pacific Bell, D.91-08-017, and Marin Telephone Answering Service v. Pacific Bell, 20 CPUC 2d 643 (1986)). The distinction between damages and reparations is also well established:

> "Only a court has the power to award consequential damages as opposed to reparation. Reparation is limited to a refund or adjustment of part or all of the utility charge for a service...." (Garcia v. PT&T Co., 3 CPUC 2d 534, 538-539 (1980)). (Emphasis added.)

We have generally applied this standard where a serving utility has, for example, overcharged a customer for a service. Here,

Pacific is not a customer of defendants and does not allege defendants overcharged it for utility service. Rather, Pacific asks the Commission (1) to find that its own rates were unlawful and discriminatory, and (2) to change those rates. Pursuant to Public Utilities Code Section 734, the Commission cannot award reparations for rates which have been deemed to be reasonable,

> "...No order for the payment of reparation upon the ground of unreasonableness shall be made by the commission in any instance wherein the rate in question has, by formal finding, been declared by the commission to be reasonable...."

We have already found Pacific's access charges to be lawful and reasonable. We could not, therefore, order reparations for those rates. Moreover, changing past access charges would violate the bar against retroactive ratemaking (Fremont Customers of PT&T, Co., 68 CPUC 203 (1968)).

The basis for Pacific's proposed monetary award is that it has lost profits and revenues which would have been returned to ratepayers under the "sharing mechanism." No matter how such an award were to be calculated, Pacific's requested relief is clearly a request for damages.

In this complaint, the Commission will not consider whether and to what extent Pacific may have been harmed by the intraLATA traffic which has been carried by defendants. If Pacific prevails in showing that the defendants have unlawfully held out intraLATA services, it may seek damages in a filing before a court.

## IV. Compensation for MEGACOM, MEGACOM 800 and READYLINE Services

Pacific's complaint seeks modification of compensation which AT&T Communications of California, Inc. (AT&T) pays to Pacific when AT&T carrier intraLATA traffic under its MEGACOM,

MEGACOM 800 and READYLINE tariffs. Compensation under these services was authorized by the Commission.

For reasons stated above, we cannot lawfully change these rates retroactively nor modify the rates as a means of reparations to Pacific for unlawful carriage of intraLATA traffic. Prospective increases to these rates are not appropriately topics of a complaint. If Pacific seek to modify the compensation AT&T pays it, Pacific should file an application. The Commission therefore will not consider in this proceeding the compensation AT&T provides Pacific for intraLATA traffic carried under AT&T's MEGACOM, MEGACOM 80 and READYLINE tariffs.

## V. Motions to Dismiss

Motions to dismiss have been filed in this complaint by AT&T, US Sprint Communications Company Limited Partnership, Allnet Communications Systems of Michigan, Inc. (Allnet), Cable and Wireless Communications, Inc., and Com Systems, Inc.

These defendants move to dismiss the complaint on the basis that Pacific may not seek damages or retroactive adjustments to rates in this forum. Some claim that Pacific cannot show that defendants have unlawfully held out intraLATA services.

Pacific's complaint presents some documentation which may support its claim that defendants are unlawfully providing intraLATA services. Although Pacific cannot claim damages (or what it terms "reparations") in this proceeding, Pacific should be granted an opportunity to establish unlawful activity by defendants. If Pacific prevails on this matter, it could use Commission findings to seek damages in a court.

We will deny the motions to dismiss.

## VI. Procedural Motions

Contel of California, Inc. (Contel) and Citizens Utilities Company of California (CUCC) filed motions to intervene in this proceeding. Their motions will be granted.

Allnet filed a motion to allow late filing of its reply to Pacific Bell's reply to motions to dismiss. No party will be prejudiced by granting the motion, and it will be granted.

Findings of Fact

1. Pacific's complaint claims that defendants are holding out intraLATA services contrary to Commission decisions and that intraLATA traffic over defendants' networks is more than incidental.

2. Pacific seeks monetary awards from defendants for unlawfully holding out intraLATA services on the basis that it has lost revenues as a result of the marketing activity of defendants.

3. Pacific effectively requests that the Commission award damages.

4. Pacific's access charges and compensation from AT&T to Pacific for intraLATA traffic carried pursuant to MEGACOM, MEGACOM 800 and READYLINE tariffs have been authorized by the Commission.

5. Several defendants in this complaint have filed motions to dismiss.

Conclusions of Law

1. D.84-06-113 did not explicitly define the term "holding out." D.90-08-066 defined holding out intraLATA services as "offering" or "advertising" those services.

2. D.84-06-113 stated that whether or not intraLATA traffic is "incidental" depends upon the IEC's intent. No Commission decision has defined what is incidental in terms of the quantity of intraLATA traffic carried by an IEC.

3. The Commission cannot award reparations by changing a lawful rate or charge, pursuant to Section 734.

4. The Commission does not have the authority to award damages.

5. This proceeding should remain open to provide Pacific an opportunity to demonstrate that defendants are holding out intraLATA services without authority.

6. The motions of CUCC and Contel to intervene should be granted.

7. Allnet's motion for accepting a late-filed reply should be granted.

## INTERIM ORDER

IT IS ORDERED that:

1. The motions to dismiss filed in this complaint by AT&T Communications of California, Inc., US Sprint Communications Company Limited Partnership, Allnet Communications Systems of Michigan, Inc. (Allnet), Cable and Wireless Communications, Inc., and Com Systems, Inc. are denied.

2. The motions of Contel of California, Inc. and Citizens Utilities Company of California to intervene are granted.

3. Allnet's motion for accepting a late-filed reply is granted.

4. This proceeding shall remain open to consider whether defendants have unlawfully held out intraLATA services, as discussed in this decision.

This order is effective today.

Dated January 10, 1992, at San Francisco, California.

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

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

NEAL J. SHULMAN, Executive Director