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Decision 92-04-077 APRIL 22, 1992

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Pacific Bell, Complainant, vs. AT&T Communications of California, Inc.; Allnet Communications Services of Michigan, Inc.; ComSystem Network Services; Express Tel; Teleconomix; and US Sprint Communications, Defendants.	Case 91-09-024 (Filed September 17, 1991)

ORDER DENYING REHEARING AND MODIFYING D.92-01-020

Pacific Bell ("Pacific") has filed an Application for Rehearing of Decision 92-01-020 complaining that the Commission's findings in that decision relating to the definitions of the terms "incidental use" and "holding out" improperly modify prior Commission decisions without the Commission first having held hearings, as required by Public Utilities Code section 1708. According to Pacific, the Commission in D.84-06-113, 15 CPUC 2d 426, 462,[1] adopted the rule that Interexchange Carriers (IECs) and "all persons" were prohibited from discussing intraLATA services with their customers, and must tell their customers to obtain intraLATA service from the local exchange carrier (LEC). Pacific then claims that the Commission weakens this rule when it

1. In D.84-06-113, 15 CPUC 2d 426 (1984), the Commission adopted a prohibition on competitive entry into the intraLATA toll market and left monopoly control over this market in the hands of the local exchange companies.

defines the term "incidental use" in D.92-01-020 to allow the prohibited conduct if no "affirmative intent" to offer intraLATA service is present (D.92-01-020, mimeo, p. 3). This complaint by Pacific is puzzling since it admits that the Commission in D.84-06-113, supra, also found that "affirmative intent" had to be shown.

Pacific goes on to say that in D.84-06-113, supra, the Commission added a requirement that carriers must now prove that they have affirmatively directed their customers to use the LEC for intraLATA calling. Compliance with this requirement is based not on a carrier's intent but whether the carrier actually did direct its customers in this way. However, the Commission in D.92-01-020 agreed with Pacific when it stated that "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." (Mimeo, p. 3.)

Next, Pacific is critical of the fact that the Commission stated that carriage of substantial quantities of intraLATA traffic cannot be used as an independent basis of liability. However, Pacific fails to cite to a single instance in which the Commission has defined "incidental use" in terms of volume. Instead, Pacific points to instances where the Commission has considered volume in addition to other factors. The Commission in D.92-01-020 has taken a consistent position. In this decision, the Commission states that "[w]e will not consider whether intraLATA traffic is incidental on the basis of the quantity of that traffic which defendants carry." (Mimeo, p. 4.) This statement does not preclude evidence of quantity being considered as one factor in proving affirmative intent.

Next, Pacific charges that the Commission limited the "holding out" rule by making it applicable only to "message toll service" (D.92-01-020, mimeo, p. 2). The Commission in D.92-01-020 stated, "[n]either D.84-06-113 nor any other decision characterizes this requirement as one which applies to any IEC services other than message toll services." (Mimeo, p. 2.) A

review of D.84-06-113, supra, reveals the fact the Commission in that decision does not use the term "message toll service" but instead uses the broader term "intraLATA toll service". (See 15 CPUC 2d at 474.) While in 1984, "message toll service" was the primary "intraLATA toll service", that narrower term was not used in the findings of fact and conclusions of law. Given this, it would be appropriate to modify D.92-01-020 to state that D.84-06-113, supra, prohibited IECs who had applied for intraLATA toll service authority from holding out intraLATA services.

Finally, Pacific argues that the Commission improperly denied Pacific's reparations claim. In D.92-01-020, the Commission found that the facts in the instant case involved a damages request and not a reparations claim. Under Public Utilities Code Section 734 the Commission can award reparations when a public utility has charged an unreasonable, excessive or discriminatory rate. The Commission does not have authority to award damages. Marin Telephone Answering Service v. Pacific Bell, 20 CPUC 2d 643 (1986) (only a court has the power to award consequential damages as opposed to reparations).

Pacific offers no new legal citations to support its position. Instead Pacific repeats its argument from the complaint that the facts support an award of reparations. Since a reparations claim 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), it is unclear how Pacific can seek reparations based on the allegation that another party has stolen business. This is particularly so because no refund or adjustment to any tariffs is involved in this proceeding. Instead what Pacific is seeking is damages for lost revenues. Because Pacific realizes that the Commission does not have authority to award damages, it has attempted to describe the facts in such a way as to come under the definition of reparations. However this complaint is clearly about lost business and not about improper rates. Moreover, Pacific has not cited to any authority for the proposition that a utility may

recover reparations where it has allegedly lost customers to another utility. As stated by the Commission in Ad Visor, Inc. v. GTEC, 83 CPUC 9, 11-12 (1977),

> Lost profits is an element of a cause of action for damages; however carefully disguised, a Commission award intended to recoup even part of a subscriber's lost profits would be an incursion into the courts' jurisdiction over damage claims, and would hence be unlawful.

Since the Commission cannot grant damages, Pacific's argument is without legal merit.

We have reviewed each and every allegation raised in the Application for Rehearing and believe that no grounds for rehearing are set forth. Having fully considered the issues raised by Pacific and found them to be without merit, we will deny the Application for Rehearing.

Therefore, good cause appearing,

IT IS ORDERED that D.92-01-020 is modified as follows:

1. On Page 2, line 6, the words "message toll service" are deleted and instead the words "intraLATA toll service" are added.

2. On Page 2, lines 14-17, the following discussion is deleted:

> "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..." (Mimeo, p. 2, line 14-17.)

The following language should replace the above deleted language:

> "Since the general pronouncement regarding intraLATA toll service in D.84-06-113, the Commission ..."

WHEREFORE, IT IS ORDERED that Pacific's Application for Rehearing of D.92-01-020 as modified herein is denied.

This order is effective today.

Dated April 22, 1992, at San Francisco, California

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

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