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Decision 92-06-027 June 3, 1992

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Nova Cellular West, Inc., d/b/a)
 San Diego Cellular (U-4038-C),)
 Complainant,)
 vs.)
 PacTel Cellular (U-3001-C))
 Defendant.)

ORIGINAL

Case 92-03-020
(Filed March 10, 1992)

O P I N I O N

In this opinion, we dismiss with prejudice the complaint and request for an interim cease and desist order of Nova Cellular West, Inc. (Nova), doing business as San Diego Cellular, against PacTel Cellular (PacTel).

On March 10, 1992, Nova filed its complaint and request for an interim cease and desist order pursuant to § 1707 of the Public Utilities (PU) Code and Rule 9 of this Commission's Rules of Practice and Procedure (Rules). Nova is a certificated cellular reseller which operates in the San Diego MSA as well as other parts of California pursuant to tariffs on file with this Commission. PacTel is a certificated cellular wholesale and retail facilities-based cellular carrier in the San Diego MSA. Nova purchases its wholesale telephone service from PacTel and then resells it according to its tariffs on file with this Commission.

According to Nova's complaint, on approximately February 6, 1992, it began to pay its wholesale bills to PacTel with a Mastercard credit card. Attached to Nova's complaint are two Mastercard charge slips made out to PacTel, one in the amount of \$9,000 dated February 6, 1992, and one in the amount of \$10,000 dated February 11, 1992. Rather than being signed by the customer,

they merely indicate that the charge was taken over the telephone. Also, the name of the card holder shown on both slips is Kevin J. McAllister. The names, Nova Cellular West, Inc. or San Diego Cellular, are not on the charge slips. Nova asserts that on or about February 21, 1992, PacTel advised it that Nova's credit card would no longer be accepted by PacTel for payment of Nova's wholesale bills.

In its complaint, Nova asserts that PacTel's tariff, more particularly Schedule Cal. P.U.C. No. 4-T First Revised Sheet 14, Rule 9, provides that payment be made to PacTel in accordance with its tariff in the same manner for both wholesale and retail customers. Nova asserts it believes that PacTel has accepted and continues to accept credit card payments from its retail customers and attaches a form letter utilized by PacTel acknowledging payment by credit card. Nova asserts that the refusal of PacTel to accept payment from it as a wholesale customer via credit card violates PU Code § 532 because PacTel has a uniform practice of accepting credit cards from retail customers under its tariff. Nova also contends that PacTel's refusal to honor its credit card violates PU Code § 453 which prohibits discrimination between customers because it believes PacTel accepts credit cards from its own retail and volume user customers. Nova asserts this treatment of retail customers is preferential and discriminatory as opposed to the treatment of Nova and other similarly situated wholesale customers when the tariffs make no distinction regarding payment of charges by wholesale versus retail customers. Nova requested an immediate issuance of an interim cease and desist order to require PacTel to resume acceptance of Nova's credit card for its wholesale charges, and that PacTel be ordered not to disconnect Nova's service or assess Nova late charges pending the outcome of the complaint. Nova requested that the case be set for hearing and that such further relief as is necessary and proper be granted. Nowhere in Nova's complaint and request for interim cease and desist order was

the statement made that attempts at informal resolution with Commission staff had been made.

On April 13, 1992, PacTel answered and acknowledged that on two occasions in February 1992 it had processed payment of charges of the complainant by credit card in the amounts of \$9,000 and \$10,000, respectively. PacTel stated that following the processing of the credit card payments, PacTel advised Nova it would not accept payment by credit card and has continued to refuse Nova's offer of payment only by credit card. PacTel admits that it has accepted in the past and does continue to accept credit card payments from some of its retail customers and that it has utilized a form letter as acknowledgment of receipt of credit card payments on retail accounts. By way of affirmative defenses, PacTel asserted that the complaint failed to allege facts sufficient to constitute a cause of action due to the fact its conduct is authorized by its tariff and there is no violation of any statute, order, rule, or regulation of the Commission. It also contends that the complaint is uncertain in that it cannot be ascertained in what manner, if at all, Nova has been harmed since Nova must pay the wholesale charges in full in legal tender under the tariff no matter what the outcome of the case. Therefore, PacTel requested the case be dismissed with prejudice.

On April 13, 1992, PacTel also filed a motion to dismiss on the grounds that PacTel's actions are expressly authorized by its tariff (Schedule Cal. P.U.C. No. 4-T, First Revised Sheet 14, Rule 9.D.) and that PacTel's actions do not violate any statute, order, rule, or regulation of this Commission.

In its motion to dismiss, PacTel also observes that although no dispute over the amount of the bill exists nor did Nova allege such a dispute, Nova had asserted Rule 10 (Schedule Cal. P.U.C. No. 4-T, Original Sheet 15, "Disputed Bills") was applicable, and instead of paying PacTel, deposited its current wholesale account balance with the Commission. The Commission

takes official notice of the Commission's records that show on April 1, 1992 Nova deposited \$79,647.28, on April 27, 1992, \$93,329.70, and on May 12, 1992, \$92,661.81 with the Commission's Fiscal Office by way of checks. Nowhere in the complaint was this mentioned by Nova nor did Nova make the assigned administrative law judge (ALJ) aware of these payments to the Commission.

On April 27, Nova filed its Opposition to Motion to Dismiss. In it, Nova merely reasserted its PU Code § 532 argument based on PacTel's admission of differing payment practices for retail versus wholesale customers. And Nova declared Rule 9.D. of PacTel's tariff is inapplicable since it speaks only to checks, drafts, or other negotiable instruments and is silent as to credit card payments. Finally, Nova contended PacTel discriminates against wholesale customers' credit card payments on arbitrary and capricious terms, reasserting its § 453 position. On May 13, 1992, Nova mailed its first data request to PacTel. It requested seven years of records of credit card payments and processing fees.

Rule 9 in PacTel's tariff reads in its entirety:

"PAYMENT OF CHARGES

- "A. Bills for cellular are rendered at least monthly. The customer is responsible for payment of charges for all services furnished including, but not limited to, all calls originated by or completed to the customer's mobile radio unit, as well as any other charges billed to the customer's access number. Charges are based on tariff rates and subject to rules and regulations effective at the time service is furnished. Billing for access, optional features, and items noted in the special condition section of the Rate Schedules is in advance of service, except for resellers who have demonstrated a satisfactory six-month payment history with the Company, which resellers will be billed in arrears for access, usage and optional features. All other charges to all customers are billed at the end of the billing period.

- "B. Effective December 27, 1988 a bill shall not include any previously unbilled charge for service furnished prior to three months immediately preceding the date of the bill (except for collect calls, credit card calls and third party calls). Roamer billing (calls and usage by a cellular customer on a "foreign system", i.e., a system other than the customer's home system) may be backbilled for a period of six months.
- "C. A late payment charge of one and one-half percent (1.5%) per month will be applied to all unpaid balances if payment is not received at the locations designated by the company by the due date printed on the bill. The due date for retail customers will not be less than fifteen (15) days from the postmarked date on the billing envelope. Neither the billing nor payment of late payment charges relieves the customers of the obligation to pay all charges by the due date of the bill.
- "D. When payment for service is made by check, draft, or similar negotiable instrument, a charge of \$15.00 will be made by the Company for each such item returned unpaid by a bank to the Company for any reason. This charge is in addition to the late payment charge which may also be applicable. The acceptance of checks, drafts, or other negotiable instruments for the satisfaction of customers' debt to the Company shall not constitute a waiver by the Company of its right to payment by legal tender."

Although Nova asserts in its complaint that this rule requires that there be no distinction between wholesale and retail customers, it points to no specific language within the rule. A plain reading of Rule 9 shows that its paragraph A. provides for one different treatment between resellers and retail customers. That difference is that resellers which have demonstrated a satisfactory six-month payment history can be billed in arrears for

access usage and optional features charges rather than paying in advance of service as retail customers and resellers without the six-month satisfactory payment history do. We find no language within Rule 9 that specifically requires that all customers be treated exactly the same in regard to payment.

PacTel specifically cites paragraph D. of Rule 9 for its assertion that it is authorized to require payment for wholesale charges by legal tender only pursuant to the tariff. Specifically, PacTel cites the language in Rule 9.D. that states: "The acceptance of checks, drafts, or other negotiable instruments for the satisfaction of customer's debts to the Company shall not constitute a waiver by the Company of its right to payment by legal tender."

Nova asserts this language is silent on credit card payments. This is an incorrect statement. A credit card charge slip, if signed, may qualify as a negotiable instrument if it meets all the requirements of Commercial Code Section 3104(1). Civil Code Sections 1747 et seq., California's version of the federal Truth in Lending Act, covers billing practices of credit card issuers and rights of cardholders, but does not specifically pre-empt application of the provisions of Commercial Code Section 3104 to credit cards. Civil Code Sections 1748.10 et seq., California's version of federal Regulation Z and state requirements for disclosure by card issuers, also do not specifically preclude application of that section. Since the Mastercard charge slips processed under Kevin McAllister's name were not signed because the charges occurred over the telephone, they do not meet all criteria for negotiability. However, these slips do qualify as drafts.

"In common parlance a draft is an open letter of request from, and an order by, one person on another to pay a sum of money therein stated to a third person on demand or at a future time therein specified, and the word is a common one for a bill of exchange. . . . The word is nomen generalissimum and includes all words for the payment of money drawn by one person on

another." (People v. McNear (1961) 12 Cal. Rptr. 124, 128 (citations omitted).)

See also, Wilson v. Buchenau (S.D. Calif. 1942) 43 F. Supp. 272, 275. (A draft is also known as a bill of exchange but the term is sometimes broad enough to cover checks. However, a check is drawn on a bank and is payable instantly on demand, but it is always drawn on a deposit while a bill of exchange is not.) Thus, even if a signed Mastercard charge slip does not meet the Commercial Code Section 3104(1) criteria for negotiability, it still qualifies as a draft under our case law which pre-dates California's enactment of the Uniform Commercial Code and has carried over under it. As observed in Commercial Code Section 3104(2), a draft may or may not be a negotiable instrument. Therefore, regardless whether the Uniform Commercial Code applies to credit card charge slips, they fall under the common law definition of drafts, which need not be negotiable. PacTel's Rule 9.D. specifically states that the acceptance of drafts does not constitute a waiver of the company's right to payment in legal tender. Therefore, the language of Rule 9.D. does permit PacTel's treatment of Nova's mode of payment.

The plain meaning of Rule 9.D. is that it is at the reasonable discretion of PacTel whether to accept payment by cash, check, draft, or other negotiable instrument. It also appears to preserve PacTel's right to insist on cash payment should a check, draft, or other negotiable instrument be dishonored on presentment or have previously been accepted. For reasons which we will detail below, we also find that the distinction in payment made by PacTel, under this portion of Rule 9, regarding mode of payment by retail customers versus wholesale customers, does not constitute a violation of PU Code § 532 nor § 453.

We also observe that no allegations are made in the complaint that there is a distinction in treatment among wholesale customers, but merely that the mode of payment accepted from retail customers differs from that accepted from wholesale customers. In

its motion to dismiss, PacTel asserts: "PacTel has never accepted credit cards in payment of wholesale charges from any of its resellers, including Complainant, other than the inadvertent processing of two credit card payments from Complainant in February 1992." (Motion to Dismiss, at pp. 3-4.) Nova has not controverted this statement. We also note that it would appear that the inadvertent processing was occasioned by the fact that the credit card receipts were in the name of Kevin J. McAllister rather than in the legal or fictitious name of Nova. It appears reasonable that a telephone operator receiving a credit card charge to an individual's name on a Mastercard would believe that that individual was a retail customer.

We also find the rationale advanced by PacTel in its motion to dismiss for the disparity in mode of payment between retail customers and wholesale customers to be reasonable. PacTel asserted that it accepts credit card payments "from certain of its retail customers; in all such instances, the account balances involved are of a much lesser amount than the typical reseller account balance." (Motion to Dismiss, at p. 4, Footnote 4.) Nova does not controvert this statement in its opposition to the motion to dismiss. The reason PacTel permits such payment by the retail customer is that "By the acceptance of a credit card in those cases, PacTel incurs only a relatively modest credit card processing fee." (Id.) PacTel also asserts that there is no reason it should have to incur processing expenses in the case of a certificated public utility making much larger payments. Nova contends this rationale is not in the tariffs and therefore violates § 532.

We find this to be a reasonable rationale for distinguishing between the types of payment that are accepted from retail customers versus wholesale customers. As a matter of custom and practice, it is common knowledge that credit card payment processing fees are based on a percentage of the payment made to

the vendor accepting the card. Under Rule 73 and California Evidence Code Section 452(g), we take judicial notice of this fact. Cf., Gamer v. duPont Glove Forgon, Inc. (1976) 135 Cal. Rptr 230, 235, 65 C.A. 3d 280 (judicial notice taken of prime interest rates over last three years) and Clark v. Andrews (1952) 240 P. 2d 330, 109 C.A. 2d 193, 198-99 (judicial notice taken of fact collection agencies are compensated by taking assignment of claim and retaining a percentage of monies collected). The two inadvertently accepted charges in this case totaled \$19,000 within a one-week period. The amount deposited with the Commission in a six-week period stands at more than \$265,000. We note no allegations are made in the complaint or response to the motion to dismiss that retail customers whose charge payments have been accepted have had bills anywhere near this amount. Failing such allegations, we see no need to proceed to hearing under PU Code § 532 or § 453.

"PU Code Section 532 requires that a public utility adhere to the rates and charges in its applicable tariff schedules on file and in effect at the time and forbids a utility from extending any form of contract, facility, or privilege except such as are regularly and uniformly extended to all corporations and persons. However, § 532 permits the Commission by rule or order to establish such exceptions from the operation of the statute's prohibitions as it may consider just and reasonable for each utility." (Reuben H. Donnelley Corporation v. Pacific Bell 39 CPUC 2d 209, 245.)

Although the clarity of Rule 9.D. could be improved, we believe that Rule 9.D. of its tariffs permits PacTel to distinguish between the mode of payment it will accept between retail and wholesale customers and that the rationale does not have to be found in the tariff. We also find, due to the rationale given in PacTel's motion to dismiss, it could conceivably distinguish, based on a dollar amount of charges, among retail customers as well. We

suggest that PacTel modify its tariffs to note the distinction between modes of payment accepted from retail versus wholesale customers; and if a dollar threshold distinguishes between retail customers who may pay by credit card and retail customers who must pay by check or cash; the tariff should make this clear. However, failure to be this specific is far from a violation of either of the PU Code sections cited.

PU Code § 453 prohibits discrimination, but as our decisional law makes clear, not all discrimination is prohibited. As this Commission observed in Reuben H. Donnelley Corporation:

*PU Code Section 453(a) declares that:

'No public utility shall, as to rates, charges, services, facilities, or in any other respect, make or grant any preference of advantage to any corporation or person or subject any corporation or person to any prejudice or disadvantage.'

*In Sunland Refining Corp., the Commission observed that a prejudice, disadvantage or unreasonable difference under § 453 'can only be established when comparison is made between situations which are comparable.' 80 Cal PUC at 816. Thus, not all inequity of treatment is entitled to redress under that statute. As we have noted previously:

'Discrimination by a public utility does not mean, merely and literally, unlike treatment accorded by the utility to those who may wish to do business with it, but refers to partiality in the treatment of those in like circumstances seeking a class of service offered to the public in general. With respect to a utility's offer to serve the general public or a limited portion thereof, as evidenced by its schedules of rates and rules, the offer is made, to the extent of the utility's ability to provide the service, to serve impartially any member of the public who may qualify under the rules and is willing to pay the rates; here the duty to serve impartially is correlative with the right

to demand and receive the services applied for.'

"International Cable T.V. Corporation vs. All Metal Fabricators, Inc., 66 Cal PUC 366, 382-83 (1966) (emphasis added). In International Cable, we found that the complainant was not in like or similar circumstances with a customer who contracted with the utility outside its tariffs and, therefore, no § 453 discrimination had occurred.

"Similarly, differences in operating conditions may justify substantial differences in rates, so that no violation of the statute occurs. See Southern Pipe and Casing Company vs. Pacific Electric Railway Company 49 Cal PUC 567, 569 (1950). ...

"Even if discrimination exists, for preference or prejudice to be unlawful under § 453, 'the preference or prejudice must be unjust or undue. To be undue, the preference or prejudice must be shown to be a source of advantage to the parties or traffic allegedly favored and a detriment to the other parties or traffic,' California Portland Cement Company vs. Union Pacific Railroad Company, 54 Cal PUC 539, 542 (1955). See also, In re Western Airlines, Inc., 62 Cal PUC 553, 562 (1964). The discrimination must also be the proximate cause of the injury which is the source of complaint. Ad Visor, Inc., 82 Cal PUC at 698. Discrimination forbidden by the statute 'must be undue, taking into consideration all of the surrounding facts and circumstances.' In re Atchison, Topeka and Santa Fe Railway Company, 43 CRC 25, 34 (1940). (39 CPUC 2d at 242-43.)

Retail and wholesale customers are not in comparable situations. We find that PacTel's practice of not accepting credit card payments from wholesale customers, whose bills are far larger on average than those of retail customers, is not unjust or undue because of the higher amount of processing fees that must be paid

by PacTel on larger bills. Therefore, no violation of PU Code § 453 is properly alleged.

Based on the foregoing, we find that the motion to dismiss should be granted. We also observe that we believe Nova has exhibited bad faith by paying, by way of checks to the Commission, the amount of its bills under Rule 10 while continuing to insist that the defendant honor credit card payments, from which PacTel must deduct a sizable bank transaction fee, in regard to such payments. We find that Rule 10 as to disputed bills in Schedule Cal. P.U.C. No. 4-T, Original Sheet 15 is meant to apply as the tariff so states "[w]hen a retail customer and the utility fail to agree on a bill for the utility's service." That is not the case in the instant complaint. The dispute under consideration is as to the mode of payment, not on the amount of the bill for the utility's service. For this reason, Nova should not be excused from payment of late fees on the amount deposited with the Commission. We also deplore the fact that no attempt was made to resolve this matter informally before Nova required the utilization of the Commission's adjudicatory resources to resolve the complaint. We concur with the ALJ that the insistence on an attempt at informal resolution, based on the uncontroverted contents of the motion to dismiss, would merely have resulted in mitigating Nova's liability for a larger late fee.

In conclusion, we find that PacTel's motion to dismiss should be granted and the complaint should be dismissed with prejudice. While we suggest that PacTel supplement its Rule 9.D. to specifically delineate the difference between modes of payment by wholesale versus retail customers, we will not require such an amendment as the present language already gives PacTel such discretion. We do not wish to micromanage the payment practices of utilities. We also observe that Nova should have availed itself of the Commission's informal resolution process in order to conserve the adjudicatory resources of the Commission. However, we agree

with the ALJ that a delay in order to insist that this requirement of our rules should have been honored would merely have resulted in further late charges being incurred by Nova and unnecessary data requests to PacTel due to the ultimate resolution of the motion to dismiss. We further find that Nova improperly availed itself of the procedure set forth in PacTel's Rule 10 by insisting on depositing the allegedly disputed amount with this Commission. For this reason, these deposits do not stay the imposition of any late charges called for in Rule 9.C.

Findings of Fact

1. Nova is a certificated cellular reseller which operates in the San Diego MSA as well as other parts of California pursuant to tariffs on file with this Commission.

2. PacTel is a certificated cellular wholesale and retail facilities-based cellular carrier in the San Diego MSA.

3. Nova purchases its wholesale telephone service from PacTel and then resells it according to its tariffs on file with this Commission.

4. On approximately February 6, 1992, Nova tendered via telephone a Mastercard payment to PacTel in the name of Kevin J. McAllister for the \$9,000 bill of Nova. Nowhere on the Mastercard credit card slip was the corporate or fictitious name of Nova shown. Another Mastercard slip in the name of Kevin J. McAllister was accepted by PacTel via telephone on February 11, 1992 in the amount of \$10,000.

5. On or about February 21, 1992, PacTel advised Nova that its credit card would no longer be accepted by PacTel for the payment of Nova's wholesale bills.

6. PacTel has accepted in the past and continues to accept credit card payments from some of its retail customers.

7. PacTel does not accept credit card payments for wholesale charges from resellers other than the inadvertent processing of the two credit card payments from Nova in February 1992.

8. On April 1, 1992, Nova deposited \$79,647.28 with the Commission's Fiscal Office. On April 27, 1992, Nova made a deposit of \$93,329.70 with the Commission's Fiscal Office. On May 12, 1992, Nova deposited \$92,661.81 with the Fiscal Office. All deposits were made by checks.

9. Schedule Cal. P.U.C. No. 4-T, First Revised Sheet 14, Rule 9.D. states "The acceptance of checks, drafts, or other negotiable instruments for the satisfaction of customers' debt to the Company shall not constitute a waiver by the Company of its right to payment by legal tender."

10. Were PacTel to accept credit card payments from wholesale customers whose bills are much higher than those of retail customers, PacTel would incur large credit card processing fees. By accepting credit card payments from retail customers, PacTel incurs only relatively modest credit card processing fees.

Conclusions of Law

1. PacTel's tariffs do not specifically require that all retail and wholesale customers be treated the same in regard to mode of payment.

2. A Mastercard credit card charge slip may qualify as either a negotiable instrument or a draft. Rule 9.D. permits PacTel to require payment by legal tender even in the face of prior payments or present tenders of credit card charge slips.

3. PacTel's Rule 10 regarding deposit with the Commission of amounts of disputed bills does not apply to the instant complaint in which the dispute is over mode of payment.

4. PU Code § 453 does not redress all inequity of treatment and permits a finding of prejudice, disadvantage, or unreasonable difference only when comparison is made between situations which are comparable. Retail and wholesale customers of PacTel are not in comparable situations. PacTel's practice of not accepting credit card payments from wholesale customers whose bills are far

larger on average than those of retail customers is not unjust or undue and is therefore not a violation of PU Code § 453.

5. PU Code § 532 is only violated when a utility fails to adhere to rates and charges in its applicable tariff schedules on file and in effect at the time. Because Rule 9.D. does permit PacTel to refuse credit card payments, it has not deviated from its tariffs and no violation of PU Code § 532 has occurred as a matter of law.

6. Because Rule 10 in PacTel's tariffs is inapplicable to the grounds of the instant complaint, Nova should not be excused from payment of late fees on the amount of PacTel charges deposited with this Commission.

O R D E R

IT IS ORDERED that:

1. The complaint is dismissed with prejudice.
2. The request for an interim cease and desist order is denied.
3. Nova Cellular West, Inc. shall be liable for late charges pursuant to Schedule Cal. P.U.C. No. 4-T, First Revised Sheet 14, Rule 9.C. of PacTel Cellular as specified in that rule.

This order is effective today.

Dated June 3, 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
Neal J. SHULMAN, Executive Director
PP