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Decision 92-07-019 July 1, 1992

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Z.I.P., Inc.,

Complainant,

vs.

Pacific Bell,

Defendant.

Case 90-12-016
(Filed December 6, 1990)

INTERIM OPINION

1. Summary

This interim decision denies defendant Pacific Bell's (Pac Bell) motion to dismiss complainant Z.I.P., Inc.'s (ZIP) complaint for reparations, and remands the case to the administrative law judge (ALJ) for further proceedings. The Commission also orders the institution of an investigation to determine the extent to which similarly situated Pac Bell customers have paid charges to Pac Bell such as those at issue in this proceeding.

2. Procedural History

This proceeding was brought by ZIP, which seeks reparations based upon Pac Bell's alleged misapplication of its "800" tariff, and asks the Commission to institute an investigation to determine the extent to which Pac Bell may have billed other "800" customers for calls held "in queue" (i.e., in chronological sequence, awaiting connection with a station at the called number) under similar circumstances in violation of the same tariff. The complaint alleges that the tariff in question does not obligate ZIP to pay for the time during which incoming calls were held in queue in Pac Bell's central office by a uniform call distributor (UCD) associated with ZIP's Centrex service. ZIP has placed a sum

equivalent to the contested tariff charges on deposit with the Commission in an interest-bearing account pending final resolution of the parties' dispute.

The 32-page Complaint and 29-page Answer which were filed in this proceeding allege a great many facts concerning the circumstances surrounding ZIP's decision to procure "800" service and a Centrex system from Pac Bell. The ALJ held a prehearing conference (PHC) pursuant to Rule 49 of the Commission's Rules of Practice and Procedure to formulate and simplify the issues presented by these pleadings, and to take other action to expedite the orderly conduct and disposition of this proceeding.

At the PHC the ALJ determined, with the parties' concurrence, that in view of the lengthy allegations of the Complaint and Answer, the parties should draft a joint statement of facts and issues of law, and legal memoranda, for purposes of determining the further course of the proceeding. (Tr. 1-2.) The ALJ ruled (also with the parties' agreement) that, following receipt of these documents, he would convene a second PHC to set further proceedings. (Tr. 3.) Upon telephone request by the parties, the deadline for filing the joint statement and legal memoranda was extended, as the parties were unable to agree upon a joint statement of material facts. (ALJ Ruling filed March 8, 1991.)

The ALJ subsequently received a letter signed jointly by the parties' attorneys which states in pertinent part:

"By this letter the parties request both an extension of time in which to make a filing with you as well as a modification in the scope of the filing. We make this request in an attempt to avoid conducting hearings to resolve factual issues unless these issues need to [sic] resolved.

"The parties disagree as to whether Pacific tariffs permit Pacific to bill ZIP per minute 800 usage charges while 800 calls are held in queue by the Centrex uniform call distributor

('UCD'). The parties believe that this disagreement may be resolved on a legal basis. Accordingly, the parties propose to phase this proceeding by requesting that the Commission first resolve the tariff issue. The parties proposed [sic] to proceed as follows:

- "1. ZIP and Pacific will file concurrent memorandums of points and authorities by April 1, 1990 [sic] on the issue of whether Pacific's tariffs permit Pacific to assess ZIP per minute 800 usage charges while 800 calls are held in queue by the Centrex UCD. The parties also recommend that the ALJ schedule oral argument on this issue.
- "2. Following the issuance of a Commission decision on this issue, a second pre-hearing conference ('PHC') would be held within 10 calender [sic] days to determine what further proceedings, if any, will be necessary."

In response to this letter the ALJ issued a Ruling on April 16, 1991, stating:

"Rule 56 of the Commission's Rules of Practice and Procedure contemplates the availability of a motion to dismiss any proceeding, based upon 'the pleadings or any matter occurring before the first day of hearing.' We think that such a motion, if properly supported, would effectively dispose of the threshold legal issue presented by the parties. To assure prehearing resolution of the issue, the motion should be supported by declarations or a stipulation setting forth the material facts concerning the contested issue. The opposing party may also furnish material evidence in its opposition to the motion. The Commission may then issue an interim decision dismissing the case or granting other interlocutory relief, as appropriate."

This Ruling granted Pac Bell ten days within which to file and serve a "properly supported motion to dismiss under Rule 56," and specified that if Pac Bell did not do so, the parties would be required to comply with the filing requirements of the PHC order.

At Pac Bell's request, and with ZIP's consent, the date for filing this motion was extended.

Pac Bell timely filed its motion to dismiss ZIP's complaint, and ZIP filed its response. Neither the motion nor the Response was supported by declarations or a stipulation setting forth material facts concerning the contested issues, and there is consequently no formal evidentiary record. However, the fundamental question of whether ZIP is obligated by tariff to pay for the time during which calls were held in queue by the UCD may be answered by reference to Pac Bell's applicable tariffs and the uncontradicted allegations of the Complaint. The tariffs have been filed with, and approved by, this Commission, and we take official notice thereof pursuant to Rule 73 and California Evidence Code Section 450 et seq.

As recommended by the parties, following the filing of briefs by both parties the ALJ heard oral argument on Pac Bell's motion. The following day, August 14, 1991, ZIP's attorney wrote a letter to the ALJ to correct a response he had given to a question posed to him during argument. On September 11, after reviewing the transcript, he again wrote to the ALJ to correct a factual assertion made by Pac Bell's attorney. Neither of these letters concern facts which are directly pertinent to the question of tariff interpretation, and as the August 14 letter recognizes, "ZIP has focused on the tariff construction issue in an attempt to avoid hearings regarding who said what to who [sic] where and when." [Underscoring in original.] Consistent with this view, we disregard the August 14 and September 11 letters for purposes of this decision.

3. Background and Discussion

ZIP is a corporation whose principal business activity is travel-related marketing, and Pac Bell is a telephone corporation regulated by this Commission. ZIP ordered facilities from Pac Bell in March 1990, consisting of 18 "800" lines, 21 Centrex lines,

WATS lines, and a UCD. In late March and early April of 1990 the facilities ordered by ZIP were installed by Pac Bell. Pac Bell subsequently installed 177 additional "800" lines at ZIP's request.

The UCD that was ordered in connection with the Centrex system was physically located in Pac Bell's central office. A UCD "distributes calls evenly to...Centrex lines..., provided service is from a DMS-100 central office switching system." (Pacific Bell Sched. Cal. P.U.C. No. A9.1.1C.28.1.) As more fully described at page 1 of Advice Letter (A.L.) No. 15241 (April 9, 1987), which established digital system Uniform Call Distribution served from a central office switching system as a separate service offering under the Centrex tariff:

"Uniform Call Distribution (UCD) is used by business customers that receive many calls and want to distribute the calls evenly to a group or group of agents, and to hold incoming calls in queue until an agent is available. Typical users of UCD include: airlines, insurance claims offices, utilities, order desks, repair/service centers and reservation centers.

"UCD-DMS distributes calls evenly to Centrex station lines that are served by a DMS-100 central office and are equipped with the UCD-DMS station feature which allows them to receive calls from the Uniform Call Distribution-DMS group.

"The UCD-DMS group may contain up to five local system telephone numbers for incoming calls. In addition to local numbers from the same central office which are included in the UCD-DMS group rate, Foreign Exchange Trunks, 800 Service, and/or Tie Lines may be terminated in the UCD-DMS at their respective rates. Calls to the telephone numbers will be distributed to Centrex station lines that have the UCD-DMS station feature and have been activated to receive calls. The incoming call will go to the line that has been idle for the longest period of time. If no line is available, the calls are placed into a queue." (Underscoring added.)

After the new system went into service, ZIP became aware through its bills that Pac Bell was charging for the time "800" calls were held in queue in the UCD under its "800" tariff, and disputed this practice. Pac Bell's "800" tariff specifies that chargeable time for messages,

"begins when connection is established between a telephone station associated with the access line and the calling or called station."

Sched. Cal. P.U.C. No. A7.A.3.e(1). The term "station," is defined in Pac Bell's Network and Exchange Services General Regulations (Rule No. 1 - Definition of Terms), Sched. Cal. P.U.C. No. A.2.1.1, as:

"A telephone or other terminal equipment connected to a Utility telecommunications service at the customer premises which enables the customer to establish the communications connections and to effect communications through such connections." (Underscoring added.)

Consequently, on their face these tariffs provide that chargeable time does not commence until the connection is established between ZIP's terminal and Pac Bell's telecommunications service at ZIP's premises. Pac Bell contends that charges begin at the time the UCD "answers" the call, whether or not the call is thereafter placed in queue, and despite the fact that the UCD in Pac Bell's central office.

The UCD feature, by tariff definition, is a Centrex service feature. Although the customer must pay specified additional rates and charges under Pac Bell Sched. Cal. P.U.C. No. A9.1.1.D.8.n for the services provided by the UCD, the tariff does not specify that the UCD equipment itself constitutes a "telephone or other terminal equipment." To the contrary, the tariff language treats the provision of the various optional capabilities of the UCD device (e.g., queuing, delay announcements,

and music), as separately priced services, for which individual charges apply.

We have searched in vain for tariff language which defines the UCD as a "terminal." The closest we have come is the definition of "primary station" within the "Centrex Service" definitions of Sched. Cal. P.U.C. No. A2.1.1 Rule No. 1 - Definitions of Terms. That section merely states that the term, "primary station," as used in connection with Centrex Service, denotes "a mechanized station (excluding extension stations) capable of receiving direct in-dialed calls and capable of direct out-dialing of calls." The term, "extension station" in this connection, "denotes a station connected to the same telephone number terminal as the primary station with which it is associated." Id. But whereas these definitions appear to describe the configuration of the UCD and associated Centrex lines of ZIP's system, they beg the question whether chargeable time commences upon connection with the station on the premises or the UCD at the central office.

Because these tariffs can, viewing them most charitably to Pac Bell, be interpreted either of the ways asserted by the parties, they contain a latent ambiguity. Such an ambiguity must be construed against Pac Bell to prevent unfairness to an unwitting telephone subscriber like ZIP. Sylvester's Security Alarms, Inc. v. General Telephone Co. of California (1984), D.84-05-007 (mimeo.). The solution to such a problem is for Pac Bell to revise all applicable tariff language so that such misunderstandings do not occur.

Although we believe that this is the correct decision in light of the current tariff language, it is clearly an uncomfortable result in light of everyday experience. The UCD device is obviously the equipment which received ZIP's "800" calls, and which could distribute those calls only as fast as the number of agents on hand could pick up the telephones at the Centrex

stations. This means that ZIP, and not Pac Bell, essentially controlled the number of calls held in queue and the length of time they were held, according to the number of Centrex lines and agents for which ZIP was willing to pay.

The UCD's only purpose, according to the tariff, is to distribute calls to Centrex lines evenly. (Pac Bell Sched. Cal. P.U.C. A9.1.1C.28.1.) Pac Bell describes this role as that of a receptionist, a role which is familiar to any lay person who has been exposed to a large business workplace. Like a receptionist, the UCD must "answer" incoming calls in order to distribute those calls to the agents manning the individual telephones. And as most of us have become aware through everyday experience, telephone charges begin when the receptionist first picks up the telephone, whether or not the call is placed on "hold" until the receptionist can transfer the call to the called party.

Notwithstanding this troubling aspect of today's decision, we believe the result is justified. With the rapidly occurring developments in telecommunications technology, telephone utilities must be vigilant to insure that their tariffs are comprehensive and clear, so that customers are unquestionably placed on notice of the charges for which they will be held responsible after they order a new service. That burden simply was not met in this instance, and we believe that the fairest result is to place the responsibility on Pac Bell, which could have detected and corrected the ambiguity at the time it issued the new Centrex tariff.

Inasmuch as other Pac Bell customers similarly may have paid charges for calls held in queue in a Centrex system under the same tariff, we also believe it is appropriate to institute a new proceeding to determine if there have been such instances, and to afford those other customers the opportunity to obtain relief. We are therefore ordering the institution of an investigation for this purpose.

For the foregoing reasons Pac Bell's motion to dismiss is denied. In accordance with the procedure agreed upon by the parties, within ten calendar days of the date the order herein is

signed, the ALJ shall convene a second PHC to determine what further proceedings, if any, will be necessary in this proceeding.

Findings of Fact

1. Complainant ZIP is a corporation whose principal business activity is travel-related marketing.

2. Defendant Pac Bell is a telephone corporation regulated by the California Public Utilities Commission.

3. On March 15, 1990, ZIP ordered facilities from Pac Bell consisting of 18 "800" lines, 21 Centrex lines, 3 WATS lines, and a UCD.

4. The UCD ordered by ZIP was physically located in Pac Bell's central office.

5. The purpose of the UCD ordered by ZIP was to distribute incoming "800" calls evenly to ZIP Centrex lines.

6. The facilities ordered by ZIP were installed by Pac Bell in late March and early April 1990.

7. Pac Bell subsequently installed 177 additional "800" lines at ZIP's request.

8. After the initial provision of telephone service on these facilities a dispute arose between ZIP and Pac Bell as to whether Pac Bell was entitled to charge for the time during which "800" calls to ZIP were held in queue in the UCD at Pac Bell's central office, pursuant to Pac Bell's "800" and Centrex service tariffs.

9. Pac Bell Sched. Cal. P.U.C. No. A7 is the applicable "800" tariff.

10. Pac Bell Sched. Cal P.U.C. No. A9 and A2.1.1 Rule No. 1 are the applicable Centrex tariffs.

11. There is a latent ambiguity in these tariffs, because "800" call chargeable time appears to begin when a connection is established with terminal equipment at the customer premises, whereas the UCD connected the calls to ZIP's Centrex lines in Pac Bell's central office.

12. ZIP deposited the sums which are disputed herein with this Commission, which thereupon deposited the funds in trust, in accordance with California Public Utilities Code § 1702.2(b).

13. No evidentiary hearing has been held in this matter.

Conclusions of Law

1. Pac Bell's motion to dismiss should be denied.
2. The Commission should institute an investigation to determine the extent to which similarly situated Pac Bell customers have paid such charges, to insure that proper rebates are made.
3. This decision is not issued pursuant to Section 311 of the California Public Utilities Code.

INTERIM ORDER

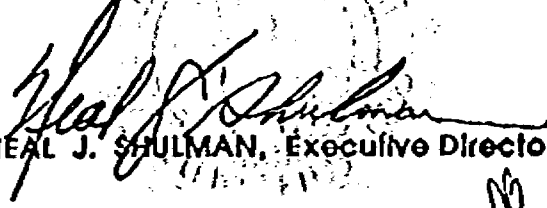
IT IS ORDERED that:

1. The motion to dismiss is denied.
2. Within 10 calendar days of the date of signing hereof, the administrative law judge shall convene a prehearing conference to determine what further proceedings, if any, will be necessary in this proceeding.
3. The Commission, by separate order, shall institute an investigation to determine the extent to which similarly situated Pacific Bell customers have paid charges such as those at issue herein.

This order is effective today.

Dated July 1, 1992, at San Francisco, California.

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


NEAL J. SHULMAN, Executive Director

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