

L/bjk

Decision 92-09-087 SEPTEMBER 16, 1992

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Z.I.P., Inc.,

Complainant,

vs.

Pacific Bell,

Defendant.

ORIGINAL

Case No. 90-12-016
(Filed December 6, 1990)

ORDER DENYING REHEARING OF DECISION 92-07-019

PACIFIC BELL filed an application for rehearing of Decision (D.) 92-07-019, which denied Pacific Bell's motion to dismiss Case 90-12-016. After reviewing all the allegations in the application for rehearing, we are of the opinion that no basis for granting rehearing has been demonstrated.

In this case, Z.I.P., Inc. (ZIP) and Pacific Bell dispute, among other things, whether Pacific Bell's tariffs allow Pacific Bell to charge its customers the "800" charges for the time incoming 800 calls are held in a queue by the Uniform Call Distribution (UCD) feature of Centrex.

Pacific Bell and ZIP agreed that the interpretation of Pacific Bell's tariffs, which was central to their dispute, should be solved "on a legal basis." (D.92-07-019 at p. 3 (mimeo).) Accordingly, Pacific Bell filed a motion to dismiss ZIP's complaint, and ZIP filed a response. In D.92-07-019 we denied the motion to dismiss holding that: "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" (D.92-07-019 at p. 7.)

In its application, Pacific Bell claims it is error to interpret tariff ambiguities against their drafters without first

applying other rules of construction (which require ambiguous language to be interpreted so that it gives expression to the intent of the parties, reflects surrounding circumstances, gives terms operative meanings and avoids harsh results). Pacific Bell relies upon Civil Code Section 1654 as authority for this claim. Pacific Bell further requests that we order evidentiary hearings to address what it claims are unresolved legal and factual issues.

Pacific Bell's reliance on the authority of the Civil Code is misplaced. D.92-07-019 does not commit error by misapplying rules of contract interpretation found in the Civil Code. Rather, it applies a rule of regulatory law well established in Commission precedent to a dispute over the meaning of an ambiguous tariff.

Although tariffs are often considered to be contracts, rules governing the interpretation of contracts negotiated at arm's length do not control the interpretation of tariffs by regulators in disputes between utilities and their customers. The California Supreme Court has held that considerations of public policy which might be applicable to disputes between private parties, such as contract rules found in the Civil Code, are not necessarily applicable to the provisions of a tariff filed with an administrative agency. (Waters v. Pacific Telephone Co. (1974) 12 Cal. 3d 1, 6, fn. 5, 10.)

The Supreme Court recognizes that a "considerable difference" exists between tariffs and contracts negotiated at arm's length. (E.B. Ackerman Importing Co. v. City of Los Angeles (1964) 61 Cal. 2d 595, 599.) We elaborated on that difference in Ellickson v. General Telephone (1981) 6 CPUC 2d 432 (D.93365): "Tariff language is set by [the utility] and the Commission... thereafter the individual seeking service comes as a new party. He was not a party when the tariff or contract was drawn. To bind him with uncertain or unclear language that has considerable economic impact, and to which he was not a party to making, is onerous and unjust." (Id. at p. 437.)

Our rule that ambiguous tariff provisions should be interpreted in order to give the customer the lowest rate is well established. (API Alarm Systems v. General Telephone Company of California (1988) 30 CPUC 2d 94, 107 [D.88-12-036], Carlton Hills School v. San Diego Gas & Electric Co. (1982) 8 CPUC 2d 438, 440 [D.82-04-007], Kings Alarm Systems v. Pacific Telephone & Telegraph Co. (1977) 81 CPUC 283, 287 [D.86879], Dick Bell Trucking, Inc. (1973) 75 CPUC 418, 423 [D.81733].) This rule is in accord with general principles of tariff construction. (See, e.g. United States v. Gulf Refining Co. (1925) 268 U.S. 542, 546, Masonite Corp. v. PG&E (1976) 65 Cal App. 3d 1.)

Pacific Bell argues that our tariff interpretation rule does not apply here because the facts of D.92-07-019 are distinguishable from the facts of Sylvester's Security Alarms, Inc. v. General Telephone Company (1984) excerpted at 15 CPUC 2d 75 [D.84-05-047] (Sylvester's), upon which D.92-07-019 relies. However, D.92-07-019 does not interpret Pacific Bell's tariffs in ZIP's favor because ZIP's facts are similar to the facts in Sylvester's. The decision relies upon Sylvester's as authority for the general rule of tariff interpretation.

Finally, Pacific Bell requests that an evidentiary hearing be held in this case to address what it claims are unresolved issues of fact and law. Since we have concluded, as a matter of well-settled law, that the ambiguities in Pacific Bell's tariffs should be construed in ZIP's favor, there is no need for an evidentiary hearing. Further, an evidentiary hearing would serve little purpose since, "It is a matter of settled regulatory law that the intention of the framers of tariffs cannot be given controlling weight." (Kings Alarm Systems, Inc. v. Pacific Telephone & Telegraph Co. (1977) 81 C.P.U.C. 283, 287 [D.86879].)

Since Pacific Bell's application does not demonstrate any error in D.92-07-019, we are of the opinion that the application should be denied. D.92-07-019, however, should be

modified to add a conclusion of law stating that tariff ambiguities should be interpreted against the drafting utility.

THEREFORE, IT IS ORDERED that:

1. D.92-07-019 be modified to insert before the existing conclusions of law a new conclusion which reads:

1. Ambiguities in Pacific Bell's tariffs must be construed against the utility and in favor of the customer.

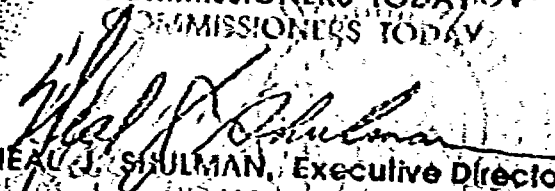
and the existing conclusions of law be renumbered accordingly.

2. Pacific Bell's application for rehearing of D.92-07-019 is denied.

This order is effective today.

Dated September 16, 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
WAS COMMISSIONERS TODAY OR
COMMISSIONERS TODAY

NEAL J. SHULMAN, Executive Director