

Decision S2 03 070 MAR 16 1982

ORIGINAL

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

TOWARD UTILITY RATE NORMALIZATION,)
a non-profit California corporation,)

Complainant,)

vs.)

PACIFIC TELEPHONE AND TELEGRAPH)
COMPANY, a California corporation,)

Defendant.)

Case 10269
(Filed February 23, 1977)

Edward M. Goebel, Attorney at Law, for Toward
Utility Rate Normalization (TURN), complainant.
Duane G. Henry, Attorney at Law, for The Pacific
Telephone and Telegraph Company, defendant.

O P I N I O N

By its complaint Toward Utility Rate Normalization (TURN) alleges that The Pacific Telephone and Telegraph Company (PT&T) placed false and misleading advertisements in newspapers throughout the State of California regarding telephone rates.

Public hearing was held before Administrative Law Judge Daly on March 5, 1979, at San Francisco and the matter was submitted upon concurrent briefs, which were filed April 12, 1979.

The record discloses that in late November or early December 1976, American Telephone and Telegraph Company (Long-lines Department), which administers the interstate telephone rates, determined that holiday rates would apply on the day before Christmas, Friday, December 24, instead of the usual weekday rate. Because the directories did not indicate that holiday rates would apply on Friday, December 24, PT&T decided to conduct an advertising campaign to so inform the public.

The following advertisements appeared in various papers throughout the state on December 23, 1976:

CHRISTMAS PHONE RATES
THE DAY BEFORE CHRISTMAS

Since Christmas comes on Saturday this year, holiday long distance rates will be in effect Friday, the 24th. So call a day early and do not get caught in the mad Christmas Day calling rush.

CHRISTMAS PHONE RATES
THE DAY BEFORE CHRISTMAS

Because Christmas comes on Saturday this year, holiday long distance rates will be in effect a day sooner than usual. That means you can make your Christmas calls Friday, the 24th. So call the day before Christmas and avoid the Christmas Day rush.

Although long distance calls made on Friday, December 24, 1976, were charged at the Christmas "holiday rates", all calls made on Saturday, Christmas Day, were charged the Saturday rates. On interstate calls the holiday rates provide for a 35 percent discount, whereas the Saturday rates provide for a 60 percent discount. On intrastate calls holiday rates and Saturday rates are identical until 5:00 p.m. Between 5:00 p.m. and 11:00 p.m. Saturday rates are anywhere from 10 percent to 40 percent less than the holiday rates (Exhibit 4 and 5). PT&T did not request nor receive formal authorization from this Commission to charge the holiday rates on December 24, 1976.

TURN's Presentation

TURN contends that the advertisements implied that the same rates would apply on the day before Christmas as on Christmas Day and that PT&T failed to advertise or otherwise notify its customers that the rates would be cheaper on Christmas Day than on the day before Christmas.

TURN introduced the testimony of Ms. Joan O'Keefe Hanel, a resident of Belmont, California, who testified that she read advertisements in the San Mateo Times. According to the witness she has relatives in New York whom she calls at least once every other week on Saturdays or Sundays. Assertedly she would not have called on Friday except for the advertisement. Her bill for the call was

\$7.02 as compared to approximately \$5 for prior calls placed on Saturdays.

TURN also introduced the testimony of an expert in the field of advertising. He testified that the ads are clearly intended for a general audience and create the impression that calling the day before Christmas would cost no more than calling on Christmas Day.

In his opinion the ads were promotional as opposed to informational because they were attractive to the eye and easy to read, whereas informational advertising is more detailed and requires a greater effort on the part of the reader.

PT&T's Presentation

The advertising manager of PT&T testified that he selected the ads in question because he believed they were clear, concise, and communicated to the customer that holiday rates would be in effect on Friday, December 24th, rather than the usual weekday rates.

According to the witness it was not his intention to design an ad that would confuse or mislead the public regarding the rates. His primary purpose assertedly was to call to the attention of the public that Christmas can be a time when it is difficult to get a call through and by calling on Friday the public could take advantage of cheaper rates without continuously getting a busy signal.

Discussion

In its complaint TURN contends that publishing false and misleading advertisements is a violation covered by Sections 1709, 1710, 1711, 3369 of the California Civil Code; Sections 17500 through 17535 of the California Business and Professions Code; and Sections 2107, 2108, and 2113 of the Public Utilities Code.

Sections 1709, 1710, and 1711 of the Civil Code cover actions for damages involving deceit and this Commission has no jurisdiction to award damages. (Robert Bruce Walker v P.T.&T. Co. (1971) 71 Cal PUC 778; and W. Schumacher v P.T.&T. Co. (1965) 64 Cal PUC 295.) ✓

Only Sections 17500 and 17535 of Business and Professions Code could have any applicability to the facts of this case. These sections relate to false advertising. Section 17500 is a criminal statute, violation of which is a misdemeanor, and Section 17535 provides that misleading statements may be enjoined by any court of competent jurisdiction. Section 3369 of the Civil Code also provides for injunctive relief by any court of competent jurisdiction for unfair competition including misleading advertising.

A criminal action under Section 17500 would have to be filed by the district attorney in the municipal court. As far as Sections 17535 and 3369 are concerned, there is nothing in this record to suggest that injunctive relief is either requested or required.

Section 2107 of the Public Utilities Code authorizes the courts to assess monetary penalties against any public utility for violation or failure to comply with any provision of the State Constitution, or any order, decision, decree, rule, direction, demand, or requirement of the Commission. Section 2108 of the Public Utilities Code makes every such violation a separate and distinct offense. Under Section 2113 of the Public Utilities Code, every violation and failure to comply with any Commission order, decision, rule, regulation, direction, demand or requirement is punishable by the Commission for contempt in the same manner and to the same extent as contempt is punished by courts of record. These sections, except Section 2113, would require the Commission to bring action in Superior Court against defendant and could result in penalties being assessed against defendant resulting in payments to the general fund of the State of California. Application of these sections would not benefit the ratepayers in any way but might serve as a form of punishment to PT&T.

The essence of TURN's complaint is that because of misleading ads the public was led to place calls on Friday, December 24, at rates that were higher than those applicable on Saturday, December 25. On

this issue there is a complete failure of proof. The only evidence in the record before us that this occurred is that of Ms. Hanel whose call was interstate and not subject to our jurisdiction.

We may surmise that other customers reacted in a similar manner and to their detriment paid higher rates than would have been necessary, but we have no evidence to tell us who they are or to what extent they paid higher than necessary rates. Absent such evidence we are simply unable to order reparation in spite of the fact that we conclude the ads complained of were misleading. This proceeding poses us a further problem.

Section 532 of the Public Utilities Code prohibits a public utility from charging anything other than the rate as specified in its tariff on file and in effect. Section 532 also forbids any utility from refunding "directly or indirectly, in any manner or by any device" the scheduled charges for its services. Nor can they "by contract, conduct, estoppel, waiver, directly or indirectly increase or decrease" rates as published in their tariffs. These principles are most commonly applied in cases in which utilities have misquoted rates to their customers. Tariff rates are considered to be part of the contract between the utility and the customer. By law under these circumstances customers are charged with knowledge of the contents of the utilities' published tariffs and therefore may not justifiably rely on misrepresentations regarding rates. (See Transmix Corp. v Southern Pac. Co., 187 CA 2d 257, 265; Empire West v Southern California Gas Co., 12 C 3d 805, 810.)

Since PT&T did not have authorization from us to charge the holiday rate on Friday, December 24, the only legal rate was that set forth in the weekday tariff schedule. Those rates are higher than paid by intrastate toll customers who made calls on Friday, December 24. We are not constrained to order PT&T to collect the difference from such

customers, if indeed they could even identify who they are, nor do we believe TURN would want such an order.

We find ourselves in the position of dealing with a record that denies us the ability of determining who and to what extent customers were misled by the misleading ads of PT&T which violated the tariffs on file by offering and charging a lower rate to customers who placed calls on Friday, December 24, than was lawfully applicable and with a remedy for the latter situation that we find unreasonable. Strict application of tariff requirement would reward defendant at the expense of its ratepayers where the only improper action was that of defendant. The statutes and case law with which we deal here provide us no choice but to deny the relief sought.

We can, however, strongly admonish PT&T to strictly adhere to its tariffs unless they have prior authorization from this Commission to deviate. We also admonish PT&T to exercise greater care when placing ads for public consumption to make sure the public is fully and accurately informed as to what rates and services are actually being offered. The complaint must be denied.

Findings of Fact

1. In late November or early December 1976. Long-lines Department determined that holiday rates would apply on Friday, December 24, instead of the usual weekday rates.
2. To the extent that the issues raised address interstate telecommunications service, this Commission has no jurisdiction.
3. PT&T did not receive authorization from this Commission to charge holiday rates on Friday, December 24, 1976.
4. Reasonably construed, the ads implied that the same rate would apply to calls placed on Friday, December 24, as on Christmas.
5. The ads designed by PT&T to encourage customers to place calls on Friday, December 24, 1976, instead of Saturday, December 25, 1976, were in fact misleading.
6. Some individuals such as Ms. Hanel may have relied on PT&T's ads to their detriment, incurring higher charges than would have been incurred absent such reliance.

Conclusions of Law

1. Section 532 of the Public Utilities Code prohibits a utility from charging anything other than the rate as specified in its tariff on file and in effect. ✓

2. Section 532 also forbids any utility from refunding directly or indirectly, in any manner or by any device the scheduled charges for its services.

3. Section 532 prohibits a utility from directly or indirectly increasing or decreasing a tariff rate by contract, conduct, estoppel, or waiver.

4. Tariff rates are considered to be part of the contract for service between a utility and its customers.

5. By law, customers are charged with knowledge of the contents of the utilities' published tariffs and therefore may not justifiably rely on misrepresentations regarding rates.

6. No evidence presented in this complaint establishes that any customer suffered financial loss due to the misrepresentation of defendant's ads.

7. The only lawful rate that was in effect on Friday, December 24, 1976 was the normal weekday rate specified in defendant's tariff.

8. The relief sought in the complaint should be denied.

O R D E R

IT IS ORDERED that Case 10269 is denied.

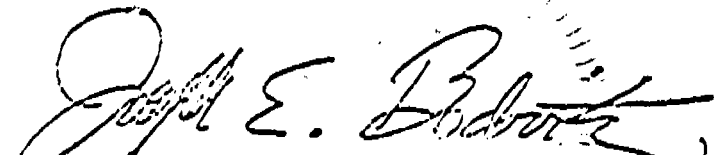
Pacific Telephone and Telegraph Company is admonished to charge and collect only those rates legally in effect and to seek prior authorization from this Commission before affecting changes in such rates. Pacific Telephone and Telegraph Company is also admonished and directed to cease and desist from any advertising of rates and service that mislead its customers as to what service is being offered or the cost thereof. ✓

This order becomes effective 30 days from today.

Dated March 16, 1982, at San Francisco, California.

JOHN E. BRYSON
President
RICHARD D. GRAVELLE
LEONARD M. GRIMES, JR.
VICTOR CALVO
PRISCILLA C. GREW
Commissioners

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


Joseph E. Bodovitz, Executive Director