

ORIGINAL

Decision SZ 05 073

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

PARTS LOCATOR, INC.,
Complainant,

vs.

THE PACIFIC TELEPHONE AND
TELEGRAPH COMPANY,
Defendant.

Case 10897
(Filed July 31, 1980)

William L. Knecht, Attorney at Law, for
Parts Locator, Inc., complainant.
Margaret deB. Brown, Attorney at Law,
for The Pacific Telephone and
Telegraph Company, defendant.

O P I N I O N

Introduction

Parts Locator, Inc. (complainant) requests reparation, damages, and attorneys' fees for substantial harm caused by the failure of The Pacific Telephone and Telegraph Company (defendant) to render correct and prompt billing statements. The complaint further alleges that in "backbilling"^{1/} the complainant and threatening to terminate its service for failure to pay disputed charges defendant unlawfully treated complainant differently than other customers who were allowed to refuse payment for certain backbilled services.

^{1/} "Backbilling" is the practice of rendering statements for service more than one billing cycle after the service was first provided.

Defendant filed an answer and a motion to dismiss the complaint on grounds that it is vague and unintelligible, that it is barred by res judicata and by prior agreement between the parties, and that it improperly asks for damages and attorneys' fees.

Public hearing was held on December 22, 1980 and January 16, 1981 in San Francisco. Concurrent briefs were received on June 24, 1981, and the matter is now submitted for decision. We will deny defendant's motion to dismiss and will address the merits of the substantive claims made by complainant.

By Decision (D.) 82-03-045 issued March 2, 1982 in Application (A.) 59849 et al. we granted rehearing of D.93790 to the limited extent of consolidating the applicable record in A.59849 et al. (consolidated matters) with the record in this proceeding. The following findings, conclusions of law, and order are based, then, on the record in Case (C.) 10897 and A.59849 et al.

Statement of Facts

Complainant provides instant communication for auto dealers, repair shops, and storage yards, which require constant information about the availability of auto parts. Defendant provides complainant with what is described as interexchanged private line service. The undisputed facts underlying the complaint are as follows:

When rates for interstate circuits were changed by the Federal Communications Commission (FCC) in January 1978, it became more economical for complainant to have intrastate circuits rather than interstate circuits.

Complainant asked for a redesign or redesignation of its circuits as "intrastate" to reduce the impact of the announced rate changes to the extent possible. ^{2/} Defendant agreed to the requested changes and advised complainant that its newly designated intrastate circuits would be subject to a rate change effective in March 1978.

^{2/} Since some of complainant's customers are located outside California one circuit necessarily remained an interstate circuit.

When complainant received its April 1978 bill, the bill did not reflect the increased charges for the changed circuits. Defendant told complainant that there would be a delay in revising the bill. Sometime between April and September, defendant advised complainant that the approximate amount of its monthly increase would total \$3,200.

Bills which accurately reflected the increased charges for the changed circuits were rendered in September and October 1978. The bills indicated an outstanding amount due of \$80,000. However, the tendered bill did not include credits due defendant for payments made from March to September 1978.^{3/} Complainant was told that substantial credits would be applied to its bill and it was not required to pay the backbilled amount at that time.

After discussions between complainant and defendant's representative, a special bill in the amount of \$25,366.44^{4/} was rendered to complainant on May 16, 1979. Defendant prepared the special bill by removing the net backbilled amounts (after the credits had been applied) from complainant's regular monthly bills and setting forth these amounts, as well as certain amounts in arrears which had accrued prior to the March 1978 rate change in the special bill.

Complainant and defendant negotiated a payment arrangement to amortize the amount outstanding on the special bill; and in August 1979 complainant began to pay the special bill in monthly installments of \$1,000. Complainant continued its monthly payment through January 1980 and then refused payment of further

^{3/} During this period, complainant continued to make payments as billed at the rate in effect prior to March 1978.

^{4/} Of this total, \$7,013.04 is derived from uncollected previous balances unrelated to this complaint and \$18,353.40 is derived from the underbilling from March to September 1978.

installments to defendant on grounds that defendant was claiming that the payments were admission of complainant's obligation to pay the backbilled amounts. Upon threat of termination of its service, complainant resumed payment of the monthly installments in October 1980.

Finally, in October 1980, FCC-approved rate increases became effective for certain loudspeaker equipment. Defendant failed to implement this change. In December 1980, defendant discovered its error and began the process of correcting the billing for approximately 20 customers, including complainant. In March 1981 a corrected bill, containing delayed charges totaling \$3,206.68, was sent to complainant.

Complainant's Position

A. Defendant's Failure to Render Correct Billing Statements is a Violation of Public Utilities (PU) Code Section 451

Despite the absence of a tariff provision limiting back-billing for private line service, defendant has abrogated its statutory duty to provide "adequate, efficient...and reasonable service" by falling behind in billing complainant. Defendant knew at all times that complainant had need for prompt and accurate billing in order to charge its clients for services rendered; this need was continually ignored.

Complainant requested a redesignation of its circuits to avail itself of the opportunity to be billed at the lowest lawful rate. The request involved nothing more than record changes. They did not require any changes in physical facilities. The problems that prohibited defendant from rendering prompt and accurate statements of account were neither caused by complainant nor within its control. Computer and accounting errors which, in large part, caused the billing delay were solely the defendant's responsibility.

Defendant was well aware of complainant's need for prompt billings. The ability to render such accurate billings was totally within defendant's control. Its failure to meet complainant's service needs is a clear violation of defendant's public utility obligations under Section 451. Therefore, defendant should be ordered to cancel the backbilled amount and to pay complainant \$93,069 in admitted backbillings. ✓

B. Defendant's Refusal to Accord Complainant the Right To Refuse a Tremendous Backbilling is a Violation of PU Code Section 453

Defendant is precluded by Section 453 from discriminating against complainant in collecting backbilled accounts when compared with other customers in similar circumstances. Complainant contends that defendant's normal practices were to give credit for overbillings but to refrain from attempted collection of underbillings more than three months after rendition of the service.

Complainant presented a witness who addressed defendant's practices in handling both underbillings and overbillings. There are essentially four combinations of circumstances which can result when considering customer billing problems:

1. The records, the accounting, and facilities inventory are correct, and no adjustment is required.
2. There is the case of "straight overbilling" in which the customer facilities are wrongly overpriced, e.g. for 11 years. Defendant's practice is to go back as far as its records indicate it is possible, compute the overbilled amount, and refund it to the customer.
3. There is the case of "straight underbilling" in which the customer is asked to accept charges newly calculated and billed for the first time. Usual practice is to go back three months only; but if the customer refused to accept that charge, it is written off.

4. There is the case of net overbilling or net underbilling. A three-step process is necessary to reach the conclusion that there is either a net over- or net underbilling. The process is as follows:
 - a. Calculate the overbilling, as in the second category, as far back as records will allow;
 - b. Calculate the underbilling for a period of not more than three years and offset the overbilled and underbilled amounts;
 - c. If the result is a net overcharge, the defendant issues a credit to the customer; if the result is a net undercharge, the defendant calculates the underbilling for the past three months, matches it against the underbilling calculated in step b and assesses the customer the lower of the two amounts; and if the customer refuses to accept the charges, an adjustment off for that amount is made.

Complainant acknowledges the existence of a three-year statute of limitations governing the period of time during which defendant can backbill. However, the three-year period is the statutory outside limit; it does not preclude defendant from adopting a practice involving a lesser period of time, such as a three-month limit.

The tariff is the primary authority governing the method and manner of backbilling. The tariff which governs exchange service exactly parallels the testimony of complainant's witness and includes reference to the three-step process for calculating net over- or net underbillings. Complainant contends that there is no reason to distinguish between exchange service and complainant's private line service for purposes of applying a backbilling policy. The Commission

should recognize the absence of a distinction by granting complainant's requested reparations as well as by requiring defendant to file a tariff which would limit defendant's ability to backbill private line service customers to a three-month period.

Complainant argues that defendant's backbilling policies are applied unevenly and unfairly. No tariff provision governs backbilling of private line service customers. Defendant allegedly backbills certain unspecified private line service customers using the three-step process set forth in its tariff governing exchange service. Some customers, under this process, are given the opportunity to reject the charges which the defendant subsequently writes off. Complainant was not afforded this same even-handed treatment because defendant considers complainant a "pest" which should be gotten "rid of."

C. Complainant is Entitled to Reparation of \$93,000

Reparation simply contemplates an adjustment of the charges assessed by defendant. Complainant is barred neither by statute nor by its agreement to amortize the backbilled amounts from seeking reparation. The Commission has frequently recognized the propriety of granting reparation. Defendant's claim that complainant is contractually bound to reimburse defendant for the backbilled amounts is without merit. Complainant agreed to make monthly payments only under threat of termination or interruption of service.

The parties before the Commission in this matter are of greatly disproportionate power. The customer is entirely at the mercy of the company which operates as a public utility financed by the public and operating as an extension of the State. The company has exclusive and sole control over the process of recording and billing for services rendered. The record shows clearly that there is nothing that this customer did or can do that affects the

process. The Commission staff is on record in A.55492 concerning failures of the telephone company to bill promptly and has recommended a limit for private line service as an inducement to the company to make its process efficient and to remove the burden on the customer.

Complainant believes that the duty to render accurate and correct statements is absolute and not subject to offset on some employee's "guesstimate" of what the ultimate and corrected bill will be. The duty to render correct and prompt statements of account is universal among utilities, with private line service being the only apparent exception that it can find.

The absence of a statutory duty does not excuse the defendant. Defendant knew the complainant's need for prompt billings. Defendant undertook to provide them. Tariffs, which defendant relies upon to excuse its failures, may codify a duty and narrow it; but the absence of such a codification, coupled with the practice of the utility to allow write-offs for selected customers, suggests the need for an absolute rule and an absolute liability. Imposition of the reparation requested by complainant, though initially costly to defendant, will require defendant to review its procedures; and the elimination of write-offs will more than recapture the amount demanded by complainant.

The total backbilling admitted in this case is in excess of \$80,000; and by careful examination of the billings sent to complainant, the total delayed billing is over \$93,000 (\$89,862 + \$3,207) plus any backbilling not yet identified.

The rule of this case should be that the complainant should have reparation of the total backbilled amount, as a motivation to the defendant to improve its billing process. If the Commission determines that it is powerless to motivate defendant to improve its practices, the Commission should award complainant reparation in the lesser sum of the actual backbilling identified by complainant,

plus any other not identified, plus the sums paid by complainant at the demand and insistence of defendant.

D. Complainant is Entitled to Reasonable Attorney Fees and Expenses

The California Supreme Court has considered the matter of attorney fees in CLAM v PUC (1979) 25 Cal 3d 891. Additionally, the Commission has established a fund for payment of fees when meritorious matters are pressed to completion through Commission action (CLAM v PT&T (Decision 93251, 1981) ___ CPUC ___).

If the Commission does not feel that it should award attorneys' fees in a matter such as this, the Commission can and has required a number of regulated utilities to pay for management services and advice which the utilities did not particularly desire. The management audits were intended to help the utilities improve their efficiency and reduce expenses. Complainant has brought to the attention of defendant errors in its practices. A management consulting fee to complainant of \$5,000 is clearly reasonable for the benefits conferred upon defendant in putting its house in order.

Further, if the Commission can "encourage" defendant to modify its policies, whether by forcing it to correct its practices by a tariff change or by reparation for inferior and inadequate service when charges are billed six or nine months late, it will have generated a substantial benefit to all of defendant's ratepayers, for prompt billing will recover substantial revenues for defendant.

Defendant's Position

A. Defendant Applies a Three-Year Limitation On Billing for Private Line Service

Defendant's tariffs impose a three-month limitation on billing for exchange service. In contrast, there is no limitation imposed by tariff on billing for private line service. For private line service, the applicable limits are two years for interstate private line service (Federal Communications Act of 1934, 47 U.S.C. § 415(a) and three years for intrastate private line service (PU Code § 737). The difference between exchange service and

private line limitations has often been recognized by the Commission. The private line billing limits are also reflected in the various operating manuals prepared and used by defendant's employees who handle billing for private line customers.

Although the tariffs would not have permitted a delay in billing of over three months for exchange service, there is no such limitation for private line service, and thus complainant must pay the backbilled amounts.

B. The Evidence About Write-Offs and Flexible Payment Arrangements Does Not Support Complainant

If it is discovered that a customer has not been billed correctly for some item of equipment through defendant's error, the error may well be written off as uncollectible. Write-offs also occur when the customer is given a credit for time out of service or when a final bill has been rendered and the account is turned over to a collection agency. But there was no testimony that amounts were ever written off in this way in a delayed private line billing situation such as the one involved in this case.

It should be noted that, in view of the amounts involved, a division level manager would have had to approve any such write-off. The fact that write-offs occur in other, quite different, circumstances does not mean that either the special bill or the delayed charges for loudspeakers should be written off.

Defendant, like any other business, experiences collection problems and must negotiate with its customers about payment. More convenient payment dates are arranged for certain customers as was done for complainant; extended payment schedules are arranged to handle unusual situations, as was done more than once for complainant. Defendant naturally prefers to help its customers pay their bills, even on a delayed basis, rather than to write off the bills entirely.

Defendant submits that its procedures in this area are not in conflict with its tariffs stating when bills are due and payable; the Commission did not intend these tariff rules to tie defendant's hands in its collection efforts but rather to inform defendant's customers what is expected of them. If the tariffs had been applied rigidly to complainant, it would have been out of business long before December 1977. Again, the fact that defendant makes such arrangements with its customers, including complainant, in no way excuses complainant's payment of the special bill or the delayed loudspeaker charges.

C. Complainant Failed to Prove that the Longer Limitations Period for Private Line Billing Is Unreasonable

Billing for private line customers such as complainant is a complex and difficult subject. Complainant testified that his service had "approximately 260 auto dismantling accounts...hooked up on these circuits all over the West Coast," and that the computer printout of the equipment furnished it by defendant was "probably 50 pages." Mistakes occasionally occur (e.g., the loudspeaker over-billing). Bills are sometimes delayed for a variety of reasons. The bills for two of the redesigned circuits are extremely lengthy and show the complexity of the billing.

The evidence shows that the Commission was correct in not providing a three-month limitation period for private line billing in its D.88232 and 91495 issued in A.55492 and 59269; it would be unreasonable, in view of the billing difficulties, to establish such a limit. Similar reasoning has led the Commission to provide five months, rather than three, as a limitations period for billing certain calls (collect, credit card, and third number calls). Of course, the Commission, defendant, and its customers all prefer more timely billing, but the Commission has realized that it is not always possible. ✓

There is no evidence that defendant is misusing the three-year limitations period, e.g. by deliberate delays or delays of over one year. The bills in question are dated in September and October 1978; they pertain to a change that took place in March 1978 and could arguably have appeared in the April 1978 bills. Thus, they are at most six months late. The loudspeaker billing delay was four months. Billing delays of up to a year had occurred, but the delays were reduced to two, three, or four months in 1979 and thereafter. The record simply does not support a change from the current three-year limit.

D. It Would Be Inappropriate to Excuse Complainant from Payment of the Backbilled Amounts

Even if, for purposes of argument, a three-month limit were feasible and correct for other billing errors, it would still be inappropriate in the case of the special bill to impose such a limit on defendant. Part of the special bill consisted of arrears admittedly owed to defendant. The bulk of the special bill resulted from delays in producing bills for a completely redesigned complex system, which was in a constant state of flux while the redesign was in progress. Complainant was kept informed that his bills were not correct and that corrected bills would be some \$3,200 per month higher. (The actual increase eventually amounted to \$3,058.90 per month.) He could at that time have begun passing this estimated increase on to its customers but did not do so.

When the bills for the new system were issued, they did not include credits for the payments he had been making, but again complainant was informed of the situation. He was sent a special bill reflecting the credits and was not required to pay any part of the total on the special bill until August 1979, 14 months after the service redesign was effective; a very generous payment schedule, extending over two years without interest, was arranged. Complainant

was in contact with his attorney during this period; his attorney included arguments about the backbilled amounts in Case (C.)10490 and attempted to have the backbilled amounts eliminated nunc pro tunc in Application 55492. The Commission and the California Supreme Court rejected his arguments. Complainant agreed to the payment schedule and began making payments.

Defendant submits that, on these facts, complainant is barred by res judicata, collateral estoppel, and standard doctrines of contract law from the relief it seeks and must abide by its agreement with defendant.

E. Complainant Is Not Entitled to Damages or Attorney Fees

The Commission has no jurisdiction to award damages, Sonnenfeld v General Telephone Co. (1971) 72 CPUC 419, and can only award attorney fees in very limited circumstances not present in this case.

Discussion

In resolving the complaint before us, it is necessary to review both the legal and equitable arguments at issue.

We cannot agree with complainant that defendant's failure to render correct billing statement is a per se violation of defendant's statutory duty to provide "adequate, efficient...and reasonable service." The very existence of tariffs and statutes which limit the period of time during which defendant may attempt to recover undercharges recognizes the possibility of utility error or oversight. Furthermore, defendant, while not human, is comprised of such individuals who are not immune from mistakes. It would not be in the ratepayers' interest to require defendant to forgo the collection of revenues in every case of an employee mistake. ✓

However, it is appropriate to impose reasonable limitations on defendant respecting its ability to collect for past undercharges.

Therefore, we must determine whether the longer limitations period for private line billing is reasonable. It is clearly in the ratepayers' interest to provide defendant wide latitude in its efforts to collect lawful charges from its customers. Yet, this interest must be balanced against the extreme hardship potentially imposed upon customers by the failure of defendant to render timely billing statements, a failure which is totally the utility's responsibility.

In the instant matter, bills were delayed for approximately six months. Complainant had no control over the problems which caused the delay. The absence of accurate and timely bills from defendant compromised complainant's ability to pass its cost of "doing business" on to its customers. On the other hand, the changes requested by complainant were complex and necessitated significant adjustments to the accounting and computer records. Sometime between April and September 1978, complainant was told by defendant that the increase in his monthly billing would be approximately \$3,200; complainant could have passed the projected rate increase on to his customers.

While we do not wish to impose restrictions on defendant which will unnecessarily limit its ability to collect lawful rates, we must remain mindful of the disparity between defendant's and complainant's ability to control and resolve backbilling problems. Our balancing of interests compels us to conclude that the three-year limitations period for private line backbilling is unreasonable.

Some further external inducement must be established to encourage defendant to provide timely billing to its private line customers. A tariff provision limiting the period during which defendant could backbill a private line customer is the appropriate inducement. In determining the appropriate time line, there is no sufficient reason to distinguish between exchange and private line service.

We will require defendant to revise its tariffs to provide that, with certain exceptions, no billing of private line service customers shall be made for any services unless the charges for such services are made within three months.

With respect to complainant's contention that it was unlawfully treated differently than other similarly situated customers, the evidence does not support the argument. Defendant's policy of limiting its backbilling practices to a period of three months is established by tariff and applies only to exchange service. No tariff provision governs backbilling practices as they pertain to private line service customers. No competent evidence was presented demonstrating that defendant affords certain private line service customers preferential treatment over complainant. Defendant's failure to accord complainant the right to refuse a tremendous backbilling did not constitute unlawful discrimination in violation of PU Code § 453.

While we find no basis in previously existing law for granting complainant's request for reparation totaling in excess of \$93,000, there is basis in equity for granting complainant some degree of reparation. The six-month delay in rendering accurate billing statements represents a diminution in the level of service that complainant reasonably could have expected. We cannot ignore the fact that complainant was in no way responsible for the delayed billing. All matters relating to billing were solely within defendant's control. Complainant had little or no option but to wait until defendant managed to correct its computer and accounting errors and tender complainant an accurate bill. Although defendant substantially mitigated the impact of the problems it created by eventually providing complainant with an estimate of the expected monthly increase in charges, there is no doubt that the delayed

billing, in some degree, decreased the value of the service complainant received from defendant.

Complainant deserves some reparation for the obvious loss in value of the service provided. Complainant has not provided the Commission with a sound basis for computing the proper amount of reparation. Its request for \$93,000 is extravagant and represents nothing more than the total legitimate service charges assessed complainant during the period covered by this complaint. We find it more reasonable to grant reparation in an amount equal to one month's increased charges for complainant's private line service, i.e. \$3,058.90. We will direct that the amount of \$3,058.90 be applied to complainant's current bill as a one-time credit.

With respect to complainant's request for damages and attorney fees, we agree with defendant that we have no jurisdiction to award damages and that the circumstances necessary for an award of attorney fees are not present in this case.

In the CLAM case, the California Supreme Court has recognized that the Commission, in the absence of specific statutory authorization, can award attorney fees under three well-established equitable exceptions to the general rule, known as the common fund, substantial benefits, and private attorney general theories. Complainant's attorney can realistically claim attorney fees under one theory only, the substantial benefits test. The common fund and private attorney general theories are inapposite with respect to the substantial interest theory. It may be appropriate to award fees in cases in which an advocate not only advances the interests of his client but also significantly contributes to the interests of all ratepayers.

While the instant complaint may provide the vehicle for ordering a tariff revision with universal application, its practical effect is limited. The total benefits that may accrue to ratepayers

as a result of today's changes simply are not significant enough to warrant an award of attorney fees. Our experience indicates that application of a three-month limit on defendant's backbilling of private line service customers will be restricted to few situations and will have little impact on the general ratepayer while it will have a great impact on those few individuals who share the rather unique types of billing problems experienced by complainant. Accordingly, we will deny the request by complainant's attorney for recovery of his fees.

Therefore, we will grant complainant reparation of \$3,058.90, direct defendant to file a tariff provision limiting backbilling of intrastate private line service customers to a three-month period, and deny the complaint in all other respects.

Findings of Fact

1. Defendant provides complainant with interexchange line service.
2. Due to federally approved rate increases effective March 1978, it became more economical for complainant to have intrastate, rather than interstate, circuits.
3. When complainant received its April 1978 bill, the bill did not reflect the increased charges for the changed circuits.
4. Sometime between April and September, defendant advised complainant that the approximate amount of its monthly increase would total \$3,200.
5. Bills which accurately reflected the increased charges for the changed circuits were rendered in September and October 1978.
6. A special bill, for past undercharges in the amount of \$25,366.44, was rendered to complainant in May 1979.

7. Defendant's tariffs impose a three-month limitation on billing for exchange service; at the time C.10897 was filed, there was no limitation imposed by tariff on billing for private line service.

8. The applicable billing limit for interstate private line service is two years; the applicable billing limit for intrastate private line service is three years.

9. Defendant and complainant entered an agreement in July 15, 1979 whereby complainant would amortize the outstanding special bill of \$25,366.44 in monthly installments of \$1,000.

Conclusions of Law

1. Defendant's failure to render correct billing statements to complainant is not a violation of PU Code § 451.

2. Defendant's failure to accord complainant the right to refuse a tremendous backbilling is not a violation of PU Code § 453.

3. Defendant's failure to render timely and accurate billing statements to complainant diminished the value of the service received by complainant.

4. Reparation, equal to one month's increased charges under tariffs effective March 1978 and in the amount of \$3,058.90, reasonably compensate complainant for the loss in value of service.

5. The amount of \$3,058.90 should be credited against complainant's current bill on a one-time basis.

6. A three-year period during which defendant can backbill for private line service is unreasonable.

7. Defendant should be limited to a three-month period during which it can backbill for private line service consistent with our determination in D.93790.

8. The Commission cannot award damages; the limited circumstances under which the Commission can award attorney fees are not present in this case.

9. The complaint should be denied in all other respects.

O R D E R

IT IS ORDERED that:

1. The Pacific Telephone and Telegraph Company (PT&T) shall make reparation of \$3,058.90 to Parts Locator, Inc.; such reparation shall be made as a one-time credit to the current bill of Parts Locator, Inc.

2. PT&T shall, within 5 days of the effective date of this order, file a tariff provision limiting backbilling of intrastate private line service customers to a 3-month period. ✓

3. In all other respects, C.10897 is denied.

4. The rehearing of D.93790 in A.59849, 59269, 59858, and 59888, which was granted by D.82-03-045, is disposed of in that the record in those consolidated proceedings was consolidated with the record in C.10897 and resulted in this order. ✓

This order becomes effective 30 days from today.

Dated MAY 18 1982, at San Francisco, California.

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

I CERTIFY THAT THIS DECISION
WAS APPROVED BY THE ABOVE
COMMISSIONERS


Joseph E. Bodovitz, Executive Director