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ORIGINAL

Decision No. 88656 APR 4 1978

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

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| MICHAEL S. SIMMS,<br>Complainant,<br>vs<br>PACIFIC TELEPHONE AND TELEGRAPH COMPANY,<br>Defendant. | Case No. 10464<br>(Filed November 16, 1977) |

Michael S. Simms, for himself, complainant.
Maurice R. LeRoy, for defendant.

## O P I N I O N

The complainant has filed this complaint concerning his request to the defendant to convert his telephone so that he may be able to use International Direct Distance Dialing (IDDD) and concerning a rebate for service he alleges he did not have on a weekend. He seeks an order requiring the defendant to convert his telephone so that he may be able to use IDDD and seeks a rebate for the difference between IDDD charge and the charge he has incurred by dialing overseas operators for his overseas calls. He seeks reparation in the sum of $60 for service which he alleges he paid for and has not received, and in the sum of $1,500 for alleged loss of profit from work which was not received due to the fact that his telephone was out of service for the weekend involved.

The defendant admits that the complainant has requested conversion to provide him access to IDDD, and alleges that it has offered to comply with the complainant's request if the complainant would agree to change one of his telephone numbers or add a separate number with a prefix which allows IDDD. The defendant's equipment cannot provide IDDD to the complainant's present telephone prefix, and the complainant has refused to change his telephone prefix or add a new number. The defendant alleges that it is unaware that the complainant's telephone was out-of-service for a weekend and denies the allegation on the basis of such lack of information or belief.

The defendant alleges that the IDDD service requested by the complainant is provided for by Federal Communications Commission (FCC) Tariff 263, 37th Revised Page 130.1, a copy of which is attached to its answer, and contends that the Commission is without jurisdiction over this matter. It alleges that the Commission is without jurisdiction to award damages for alleged loss of profits as contended by the complainant.

The parties have signed a proper consent and waiver, stated that they desire to use the Commission's expedited procedure, waived the presence of a court reporter, and waived findings of fact and conclusions of law in the decision to be issued herein. A hearing was held in Los Angeles on February 21, 1978 before Administrative Law Judge James D. Tante pursuant to Rule 13.2 (Expedited Complaint Procedure) of the Commission's Rules of Practice and Procedure, and the matter was submitted on that date.

At the hearing the parties agreed that the facts as hereinabove set forth are accurate.

At the hearing the complainant was handed copies of Exhibits 1, 2, 3, 4, and 5 and given an opportunity to read the exhibits. He then made a motion to continue the matter for three weeks stating that none of these documents had been provided him prior to the hearing and he did not feel that he was prepared to proceed under the circumstances. The defendant objected to the motion and stated that the additional expense involved in causing the representative of the defendant and the witnesses to return at a later date would be approximately $500. The complainant refused to agree to share any of the additional expense which might be incurred by the defendant as a result of granting a continuance. The motion for continuance was properly denied.

The complainant testified for himself. Theodore B. Bierman, an employee of the defendant who specializes in analyzing trouble reports and reports of troubles found, and Dorothy Kelley, an employee of the defendant who supervises the operations of a unit in the Central Business Center in Los Angeles, testified for the defendant.

Exhibit 1, notes of Mr. Bierman; Exhibit 2, trouble history of Mid Town Plumbers (the complainant's business); Exhibit 3, notes for Mrs. Kelley; Exhibit 4, FCC Tariff 263; Exhibit 5, tariff Schedule P.U.C. No. 36-T; and Exhibit 6, a handwritten note, were received in evidence.

The complainant testified that he has occasion to make quite a few overseas telephone calls, especially to London, England; he wishes to dial these calls directly instead of having to make them through one of the defendant's operators; direct dialing is less expensive; and that the cost is approximately 50 percent more when it is necessary for him to place the calls through an operator. He testified that he has requested the defendant to provide him with IDDD service and the defendant has refused to do so. He testified that if the defendant does not have the proper equipment to provide him with such service and does provide such service to subscribers in other areas, such conduct is discriminatory and should be prohibited. He stated that he has three telephone numbers on a rotary system and a fourth number that he uses for a different purpose. The defendant has offered to provide him with IDDD service if he changes one of his 749 prefixes to 742, at no additional expense to him, or if he installed an additional telephone with a 742 prefix, he may have the IDDD service he requested. He does not desire to do either because he does not need an additional telephone and he depends on his present 749 prefix telephone numbers for his business.

The complainant did not testify or present any evidence concerning his request for a rebate for service that he alleged he had not had, or for damages which he sought as a result of his alleged loss of telephone service.

The defendant's evidence showed that its equipment is not capable of providing IDDD service to the telephone prefixes now used by the complainant. The defendant had offered to provide him with such service if he would change one of his prefixes to 742 (with no charge for the change in prefix) or if he would subscribe to a telephone with a 742 prefix, and the complainant had refused to make such a change.

The defendant's evidence further showed that in the ordinary course of business, had the complainant made a complaint concerning loss of telephone service for more than 24 hours, a written notation would have been made thereof by one of the defendant's service representatives, but a search was made of the defendant's records and no such complaint by the complainant was found. During 1977 the complainant reported service difficulties on 26 occasions. On 20 of such reports the service tested clear and no troubles were found. Of the remaining six complaints, five were found to be caused by the defendant's central service equipment and in the other the trouble resulted from a wire disconnected in error in the central office. None of the complaints resulted in loss of service for more than 24 hours.

The defendant's evidence showed that it intends to improve its equipment in such a manner so that the complainant will be able to have IDDD service within the next year, and at that time will make such service available to him.

To be unlawful, discrimination must be unjust and undue. (In re Maximum-Minimum Cement Rates of Highway Carriers (1942) 44 CRC 172; Sperry Flour Co. v Island Transp. Co. (1927) 30 CRC 561; California Portland Cement Co. v Union Pac. R.R. (1955) 54 CPUC 539.) Not every discrimination or recognition of ground of difference may be classified as unlawful, and discrimination based upon reason and justice can properly exist. (Live Oak Water Users Association v Railroad Commission (1923) 192 Cal 132.) There may be cases where the apparent discrimination is merely a difference which is legitimately brought about by circumstances operative in one case that do not exist in another. (Southern Pac. Co. (1960) 10 CRC 354; In re Carriers (1920) 18 CRC 762.)

The defendant's equipment which serves the prefix 749 in the area where the complainant is situated is not such that it can handle the IDDD service requested by the complainant.

There is no evidence to show that the defendant has conducted itself in any way other than reasonable in this case, and its inability to provide the complainant with IDDD service is not undue or unlawful discrimination.

IDDD involves foreign and not intrastate communication. The Communications Act of 1934, as amended, provides that the FCC has jurisdiction over foreign communications by wire or radio such as calls placed over IDDD; therefore, this Commission is without jurisdiction regarding the complainant's request for IDDD service. (Gargiulo v Pacific Tel. & Tel. Co. (1971) 72 CPUC 325 (unreported opinion D.78830, dated June 22, 1971).) (Also see California Interstate Tel. Co. (1962) 59 CPUC 761; West Coast Tel. Co. (1958) 56 CPUC 694 (unreported opinion); and California Water & Tel. Co. (1959) 56 CPUC 742.)

In Williams v Pacific Telephone Co., D.86099 dated July 13, 1976, we concluded on page 18:

> "1. In view of our shared jurisdiction in telecommunications matters with the Federal Communications Commission, and the unseverable aspects of the service as well as the existence of readily available Commission adjudicative remedies, this Commission assumes jurisdiction over the merits of disputed interstate toll charges in the same manner as we do in disputed intrastate matters, when these charges are billed through a telephone utility within our jurisdiction and when the entire service, including the intrastate portion, is subject to disconnection penalties for nonpayment of any portion."

The Williams case is distinguishable from the instant case as the former involved termination of the entire telephone service including the intrastate portion. The request for IDDD herein involves only foreign service, not intrastate service.

The defendant's filed tariffs include a limitation of liability provision as found in Schedule Cal. P.U.C. No. 36-T, Original Sheet 57-A, Rule No. 14 (4)B, (Exhibit 5) which provides:

> "The Utility shall allow, for interruptions in exchange telephone service of 24 hours or more not due to conduct of the customer, an amount equal to the fixed monthly charges for exchange service multiplied by the ratio of the days of interruption to thirty days. When interruptions continue beyond 24 hours, credit allowance will be given in successive 24-hour multiples."

There is no evidence to show that the defendant has failed to render telephone service for a weekend as alleged by the complainant, or for any continuous period exceeding 24 hours, so the defendant is not liable to the complainant for $60 as alleged by the complainant or any amount whatever for loss of service.

There is no evidence to indicate that the complainant has suffered damages by reason of loss of profits as alleged by the complainant. In addition, the Commission has repeatedly held that it is without jurisdiction to award damages for loss of profits as requested by the complainant. (Schumacher v Pacific Tel. & Tel. Co. (1965) 64 CPUC 295); (Edward L. Blincoe, et al v Pacific

Tel. & Tel. Co. (1963) 60 CPUC 432); (Manfred M. Warren and C. Jay Hollander v Pacific Tel. & Tel. Co. (1956) 54 CPUC 704.)

The Commission concludes that the relief requested by the complainant should be denied.

**O R D E R**

IT IS ORDERED that the relief requested by the complainant is denied.

The effective date of this order shall be thirty days after the date hereof.

Dated at San Francisco, California, this 4th day of APRIL, 1978.

William Symons, Jr.
President

Vernon L. Sturgeon

Claire T. Dedrick
Commissioners

I dissent:
Complainant should have been granted a reasonable opportunity to examine Exhibits 1 through 5 before continuing the hearing. The service was poor, as stated in the order, I would have granted the $60.00 relief and dismissed as to the balance of the complaint.
Richard D. Gravelle

I dissent.
Robert Batinovich