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ORIGINAL

Decision No. 90928 OCT 23 1979

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

HELLER & WEINER,
A Professional Corporation,

Complainant,

vs.

PACIFIC TELEPHONE AND
TELEGRAPH COMPANY, a
corporation,

Defendant.

Case No. 10465
(Filed November 21, 1977)

Heller & Weiner, Inc., by Frank Piro,
Attorney at Law, for complainant.
Cathy L. Valentine, Attorney at Law,
for defendant.

O P I N I O N

Complainant is an incorporated firm of attorneys. It has several telephone numbers in a rotary arrangement. It has an answering service which picks up calls to complainant's principal number on weekends and daily after working hours. At one time the answering service would couple all of the numbers together by means of extended dial-ups on each of the four subsidiary lines. By means of these dial-ups, which left all of the four numbers engaged for as long as 60 hours, the service was able to answer all of the numbers, while allowing complainant to avoid paying for more than one line to the service.

By April of 1977, defendant had acquired the equipment necessary to commence Single Message Rate Timing (SMRT) on Los Angeles area business phones (Decision No. 83612 in Application No. 53587 (1974) reported at 77 CPUC 117, Cf. TURN v PT&T Co. (1978) Cal., 3d).

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The complainant did not realize that the change to time-metered rates had occurred or that its extended dial-ups would therefore become very expensive. If it had recognized that the time charges would amount to as much as \$600 per month, it would have ended the practice immediately. Instead, however, the practice continued until sometime in June, producing approximately \$1,600 in time charges.

The complaint, in effect, seeks to relieve complainant of the obligation to pay any of the charges in question and for reparation to the extent that they have been paid.^{1/} Defendant responded contending that the complaint failed to state a cause of action, and misrepresented the findings, and the evidence underlying those findings in Application No. 53587. There followed a series of pleadings with complainant raising new theories, and defendant challenging them as defective.

Oral argument was held before Administrative Law Judge Gilman in Los Angeles on March 8, 1979, to determine inter alia which of complainant's theories it was prepared to stand on, and whether any of them could be dismissed as not stating a cause of action. During the course of the proceedings, complainant was directed to expressly respond to defendant's claim that it had provided multiple notices of the impact of SMRT on extended dialers, both immediately before and immediately after the institution of metered service.

We can state the position of the parties very simply. Complainant contends that it should have been expressly, personally warned of SMRT's impact at the time Application No. 53587 was filed, that it was entitled to ignore or overlook subsequent warnings, and that the failure to send that first warning was the cause of the \$1,600 loss. Defendant, on the other hand, contends that it was under no duty to provide that type of notice in 1972, and that it is complainant's own failure to heed the 1977 notices which caused the injury.

^{1/} None of complainant's pleadings have specified the amounts paid or the amounts withheld.

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The other issues raised by complainant need not be discussed. They are obviously mere pleading devices, designed to relieve the pleader of the necessity of responding directly to defendant's claim that it provided multiple contemporaneous warnings of SMRT's impact.

Despite the ALJ's direction, complainant has not admitted or denied that the warnings or notices were sent or received. Because of complainant's failure to plead on an important issue, we will adopt findings adverse to it on that issue. In the first place such a result is logical; if complainant could truthfully deny that it was warned, we would expect that it would naturally rush to make its version of events a matter of record. Such a result is also appropriate procedurally; in a court action, a party who ignores a demand to admit or deny is deemed to have admitted (cf Section 2033 of the Code of Civil Procedure).

Complainant, conceding that no statute or rule expressly required such a warning at the time Application No. 53587 was filed, attempts to find one implied in Rule 24. That rule, however, is clearly intended to provide the kind of notice which demonstrates that the recipient had an opportunity to be heard. Since complainant conceded at oral argument that it would have had nothing to contribute to the hearing on the application in question, it cannot state a cause of action based on Rule 24.

Findings Of Fact

1. Complainant was directed to expressly indicate whether or not it received any of the alleged warnings from defendant concerning the increase in charges produced by the institution of SMRT.

2. Complainant has not complied. It should be treated as if it had expressly admitted the truth of defendant's allegations on this issue.

3. Defendant sent three warnings. If complainant had heeded either of the first two it would have terminated extended dial-ups before SMRT commenced, saving approximately \$1,600 in time charges. If complainant had responded to the third, it would have incurred only a little more than one month's time charges.

4. Complainant ignored or overlooked these notices. This caused complainant to incur the charges in question.

5. If notified of Application No. 53587, complainant would not have appeared or participated.

6. Complainant has admitted that the applicability of SMRT to business service is reasonable.

Conclusions of Law

1. Defendant was not required in 1972 (when Application No. 53587 was filed) to provide warning of the consequences of SMRT billing, should the Commission approve it, for the purpose of enabling customers to avoid time charges.

2. Complainant has failed to state a cause of action.

3. The relief requested should be denied.

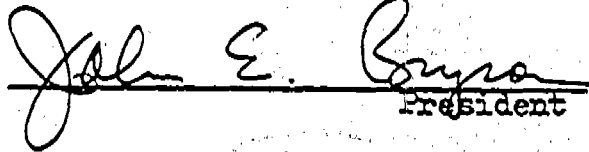
O R D E R

IT IS HEREBY ORDERED that the complainant is entitled to no relief in this proceeding.

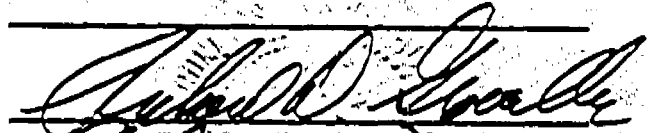
The effective date of this order shall be thirty days after the date hereof.

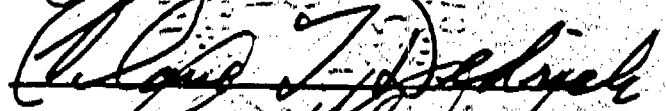
Dated OCT 23 1979, at San Francisco, California.

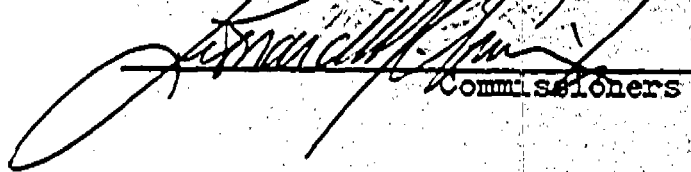
Commissioner Vernon L. Sturgeon, being necessarily absent, did not participate in the disposition of this proceeding.



President







Commissioners