

ORIGINAL

Decision No. 90997 NOV 6 1979

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

NATIONAL COMMUNICATION CENTER CORPORATION, dba THE NATIONAL COMMUNICATION CENTER; AUTOMATION INTERNATIONAL, INC.; RANDALL, ROGERS & LONG; CCS CENTER, INC.; and CRT, INC.,

Complainants,

vs.

THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY,

Defendant.

Case No. 10446
(Filed October 19, 1977;
amended July 5, 1978)

Roland Mallory,^{1/} Attorney at Law, for complainants.
Duane G. Henry, Attorney at Law, for defendant.
Willard A. Dodge, Jr., for the Commission staff.

O P I N I O N

Complainant, National Communication Center (NCC), is a California corporation with one of its places of business in Shingle Springs. The remaining complainants have various corporate connections with NCC, as described in the amendment to the complaint filed July 5, 1978. For simplicity we may narrate the facts as if NCC were the sole complainant, since NCC actually operates the service which is the subject of the complaint, and the remaining complainants, insofar as the facts of this case are concerned, acted on NCC's behalf.

1/ Thomas N. Fahrner, Attorney at Law, appeared as trial counsel for complainant. Roland Mallory was substituted at a later date and was counsel on the briefs.

Defendant. The Pacific Telephone and Telegraph Company (Pacific), furnishes telephone service as a public utility to the Shingle Springs and Sacramento areas.

Nature of Relief Sought

NCC alleges that Pacific supplied it with an uneconomical configuration of equipment and trunks, resulting in an overbilling for INWATS telephone charges from December 1976 through May 1977 and that Pacific should make reparation in the amount of \$66,238.41 plus interest from the date the sum was deposited with the Commission.^{2/}

Hearings were held before Administrative Law Judge Donald C. Meaney on July 5 and 6, 1978, but briefing deadlines were extended twice by request of the parties. Briefs finally being filed in November of 1978.

NCC operates what may be termed a wide area answering service. Persons wishing to contact a client from elsewhere in the state, or from out-of-state locations, are given a toll-free number. One of NCC's operators at Shingle Springs (or at certain other locations now in operation) answers and forwards the message to the client. Customers include business and professional persons, including those who wish to be contacted when they travel. For an additional fee, NCC will keep track of travel itineraries and forward messages in conformance with them. About half of NCC's business is of the "ad response" variety, in connection with national advertising campaigns. The service is available 24 hours a day. At the time the complaint was filed, NCC had about 1,000 clients and was processing about 30,000 calls per day. ✓

NCC uses Wide Area Telephone Service (WATS) including WATS lines for incoming calls (INWATS lines) and for outgoing calls (OUTWATS lines). The INWATS lines, which are the subject of the complaint, are

^{2/} The amount on deposit with the Commission is \$70,000. At one time the deposit approached \$200,000, but the complainant agreed to a release to the defendant of all sums over \$70,000. We ordered such release in Decision No. 89581 dated October 31, 1978.

either intrastate or interstate lines. The latter can accept calls from any state other than California and from Canada. (The interstate trunks are AT&T's, but the actual hookup is performed by Pacific.) Paragraphs 6 and 7 of the complaint describe the problem from NCC's viewpoint:

- "6. The use of WATS lines is sold by Pacific Telephone under various hourly billing options, including 10 hour, 100 hour, 240 hour and 1000 hour WATS lines. Under the conditions of doing business mandated by Pacific Telephone, a WATS customer elects the WATS hourly billing option for which he will contract during the upcoming month. For example, a customer of Pacific Telephone may elect to utilize the 10 hour WATS line. The customer pays a flat rate specified by Pacific Telephone for the use of the line. This flat rate covers, without further charge to the customer, a total of 10 hours per month of telephone calls received by the customer on its WATS line. However, if more than 10 hours per month of telephone calls are received on that line, the customer pays an additional premium rate for each hour in excess of 10. Because these premium charges are substantial expenses to a business such as NCC, it is essential that NCC choose for each of its seven telephone lines the WATS hourly billing option which will most closely meet the expected number of hours of usage for each such line. For example, a 10 hour WATS line which receives 90 hours of incoming telephone calls per month is much more expensive than the same amount of hours on a 100 hour WATS line. If 90 or 100 hours of incoming telephone calls are anticipated for a particular upcoming month, it is essential to economical and efficient business operation that a 100 hour WATS line be ordered for that month rather than a 10 hour WATS line.
- "7. The question of which particular WATS line option should be ordered for a particular month has always been extremely crucial to NCC, since NCC's payment to Pacific Telephone

for its seven WATS lines is one of the largest single business expenses of NCC. The decision of which WATS hourly billing option for NCC to order must be made separately for each of the seven WATS lines which NCC utilizes. For example, during a particular month it may be most economical for two of NCC's WATS lines to be 100 hour lines, while the remaining lines should be 10 hour lines."

The above allegations actually concern INWATS. Detailed message billing is available for OUTWATS, for an extra charge. The problem is arriving at the correct INWATS line arrangement. The complaint alleges that the correct line configuration cannot be made without receiving expert advice from Pacific and without access to records showing the previous month's total hours of usage for each INWATS line, "so that an accurate prediction may be made of the next month's usage for that same line." (Complaint, paragraph 7.)

The complaint further alleges (1) that an oral contract or agreement was entered into between NCC and Pacific in March 1976, under which, in consideration of NCC's ordering and paying for WATS lines, Pacific promised to furnish NCC with the necessary advice and expertise which would result in NCC properly choosing "the correct billing option for each of its seven WATS lines during any particular month" (complaint, page 6); (2) that Pacific, from March 1976 to December 1976, continued to represent that it would furnish such advice and expertise; (3) that only Pacific possesses the necessary information from which the proper configuration can be determined; and (4) that the advice and expertise was not provided, resulting in a more expensive configuration than necessary.

The complaint further states that NCC first became aware of cost problems in connection with its equipment in December of 1976, the telephone bills themselves not indicating the amount of hours each separate line was used in a particular month.

Pacific's answer denies that it failed to render adequate assistance to NCC or that any charges are improper. Pacific also asserts certain affirmative defenses discussed hereafter.

Summary of the Evidence

The evidence concerning the sequence of events is not free from dispute, but we believe a fair evaluation of the testimony and the associated exhibits supports the summary which follows.

NCC's first control room commenced operating in Shingle Springs in June 1976. Mr. Ben Gay of NCC had conferred with Mr. Jon Burgess of Pacific before starting operations and told Mr. Burgess that neither he (Mr. Gay) nor Mr. Santino Meo, NCC's president, had any telecommunications experience and would need to rely on advice from Pacific regarding equipment. After discussing NCC's proposed operation, Mr. Burgess recommended, and NCC ordered three intrastate and four interstate INWATS lines, all of the ten-hour type. This initial order was based on nothing more than an estimate of the amount of initial business by Mr. Gay, since NCC was a new business with no track record.

At the outset, Mr. Burgess said he would do a "busy study" approximately once a month to see if the line configuration was correct.

Business grew rapidly in late 1976 and early 1977. One result of such growth was overtime billing for INWATS considerably larger than anticipated by NCC. As a result of the overtime charges Mr. Gay kept asking Mr. Burgess whether he believed the line configuration should be changed. Mr. Burgess, until January of 1977, stated that no information was available to make a specific recommendation and that Mr. Gay, or NCC, would have to decide. In January 1977, Mr. Burgess recommended no changes based on the information contained in NCC's December 1976 bill.

In January 1977, Mr. Burgess informed Mr. Gay for the first time that line meters (of independent manufacture) could be installed to determine INWATS usage. Mr. Gay said, "Order them." Pacific maintained none of the meters in stock, although they had been an

offering under Pacific's tariffs since 1970. Those ordered for NCC did not arrive from the manufacturer until August or September 1977. Mr. Burgess did not know of the existence of the INWATS line meters until about November of 1976.

Pending arrival of the meters, Mr. Burgess attempted to analyze the line usage by reference to NCC's monthly bill. By his own testimony, he could not determine the break-even point from a ten-hour INWATS line to the next higher category from the information on the bill. Again, according to Mr. Burgess' own testimony, he was unaware at the time of a computerized printout called the "699 report" or "699 run" which furnished certain itemized INWATS usage information, and which would have been of assistance in determining NCC's optimum line configuration. Mr. Burgess conceded that the information available on the 699 run would have indicated a change. (Mr. Burgess remained unaware of the 699 run until April of 1979, long after he had ceased to be NCC's service representative.)

NCC opened a second control room in July 1977 and ordered meters at once. They were not received and completely installed until May of 1978. A third control room was opened in November or December 1978. Meters were ordered in advance of the opening date. By mid-1978 NCC was considering opening another control room to consolidate the existing three control rooms, and because of this plan, the order for the meters for the third control room, which had not been received, was canceled. (The evidence on alleged overcharges runs through May of 1978; thus, we need not consider problems, if any, relating to the third and proposed fourth control room.)

NCC investigated whether it could more speedily order meters from the manufacturer directly and found the delay would be the same; it thus informed Pacific it would rather order through Pacific so that Pacific's technicians would install and maintain them.

Because the NCC bill became in arrears, Lynn Bunton of Pacific's Marketing Department contacted Mr. Gay in April of 1977 about the bill. Miss Bunton was aware of the existence of the 699 run and

in conversations with Mr. Gay informed him that she used it to analyze the high overtime charges. This was NCC's first notice of the 699 run.

Exhibit 1 shows the essentials of Miss Bunton's initial analysis for April 1976. The line configuration she designed, based upon current usage, would have reduced the April 1976 interstate billing by \$4,591.26 and the intrastate billing by \$3,316.

It should be noted that the 699 runs went back only to December 1976 or early January 1977. It should also be noted that Miss Bunton stated that there is about a month and a half lag from the time a WATS customer could order a regrade of service to the time it would actually start to affect the billings due to the normal delay in billing cycles. (Such a six-week period would be only the start of the effect on the billings; about two weeks longer might be necessary to survey briefly the effect of the regrade.)

Kenneth Miller of Pacific's Marketing Department took over the NCC account in April of 1977. He met with NCC representatives about once a month until December 1977 when his responsibility for the account ended. Mr. Miller became aware of the availability of the 699 run at about the time of Miss Bunton's conversation on the subject with Mr. Gay. He made at least two changes to the line configuration based on the 699 data.

Mr. Miller testified that he considers the 699 data reliable for changing lines, provided the line-by-line information is consistent with the cumulative totals. (There appears not to have been a significant discrepancy in this instance.)

Clyde Van DeVeere of Pacific's marketing staff described the WATS tariff offerings. For both interstate and intrastate WATS, there are two service options. Interstate flat rate service may be ordered as a ten-hour or a 240-hour service; intrastate flat rate is either ten hour or 100 hour. Interstate services are covered by FCC Schedule 259; intrastate services are included in Cal. P.U.C. Schedule 128-T. When WATS service is ordered, the following factors

must be considered: geographical area to be covered; volume of calls; what hours will carry peak traffic for the particular customer; average holding time for a call; actual work days the business of the customer will operate; and grade of service (e.g., how many busy signals are within the range of tolerance). What kind of terminal equipment the customer will use must also be carefully surveyed.

The witness testified that in his opinion, the customer representatives carried out their responsibilities under the tariffs in force.^{3/} He pointed out that when a business is started from scratch there is a period of uncertainty when no one knows what the usage patterns will be. He also stated that the shifting of some accounts from NCC to the other corporations associated with NCC would increase volatility of usage.

Regarding the 699 run, Mr. Van DeVeere explained that its original purpose was to furnish AT&T with data. Later it was used by salespeople "on an experimental basis" to determine proper INWATS configurations. The run has its limitations in that line-by-line information is not available from ESS (electronic) central offices. The 699 run is no longer being produced. It never emerged from the experimental stage and the data was not 100 percent accurate. The witness questioned whether it would be an undue preference to establish a precedent under which the 699 run is available for all INWATS customers, since over 59 percent of California INWATS customers are

^{3/} Schedule Cal P.U.C. No. 36T, Seventh Revised Sheet 54, Rule 12, reads in part: "Where there are two or more rate schedules applicable to any class of service, the utility, or its authorized employees, will call applicant's attention, at the time application is made, to the several schedules, and the customer may designate which rate or schedule he desires". (See Exhibit 16.) This language has been in effect since 1967.

served from ESS offices from which no such data can be produced. WATS, he stressed, is priced as a "no frills" service, and such a general requirement might add to costs.

The witness reviewed NCC's 699 run. He pointed out certain entries which, in his opinion, would indicate erroneous data. On cross-examination, Mr. Van DeVeere conceded that he made no analysis of the possible percentage of error for the run.

In this connection, NCC called as a witness Charles C. Putney, President of complainant Randall, Rogers & Long. Mr. Putney worked for Pacific before joining the NCC organization. His responsibilities for NCC include the operation of the Shingle Springs control room. He reviewed the 699 data and developed various line configurations (by reference to the tariffed rates) from the information available, in order to compare costs. Assuming, for example, the most economical configuration for April 1977, over the actual configuration, there would have been a saving in the \$4,000 range.

On cross-examination, Mr. Putney conceded that in his analysis he assumed that the 699 run was available at the same time as the bill itself, although there is a delay in receiving the bill. His testimony indicates, however, that even if the 699 run contains some undefinable percentage of inaccuracy, the data in the run generally agrees with that which is available from the line meters.

Issues Presented

The essential question is what duty Pacific owed to NCC to furnish information on NCC's line usage so that NCC could make reasonably correct and prompt decisions in changing its INWATS line configuration, thus reducing billing costs.

Pacific raises certain other issues which should be disposed of before analyzing the evidence relative to this question.

"Setoff" for Directory Advertising Arrears

Pacific made an offer of proof concerning certain overdue yellow page bills of NCC, claiming the amount as a setoff against any award for overbilling. The ALJ excluded the evidence.

This ruling was correct. Division 1, Chapter 9, Article 1 of the Public Utilities Code, concerning complaints (Sections 1701-1709) does not grant us jurisdiction regarding collection of overdue utility bills. Section 1702^{4/} provides for our processing of complaints against public utilities (concerning their public service obligations). The section states that we may entertain complaints by persons and certain other entities concerning "...any act or thing done or omitted to be done by any public utility..." (emphasis added). There is no corresponding language which grants us jurisdiction to hear cases in which a public utility is a complainant, except as provided in Section 1707.^{5/} The purpose of Section 1707 is to allow one public utility to complain against another on the same basis as provided for individuals (and certain entities) in Section 1702 and the remainder of Chapter 9.

Moreover, Section 779, concerning termination of utility service for nonpayment and adjustment procedures for disputed bills, contains no language susceptible of conferring upon us jurisdiction to make an order requiring payment of an overdue bill.

We conclude that there is no legislative intent to vest us with jurisdiction concerning the collection of overdue utility bills, and since we cannot entertain complaints on this subject, neither can we indirectly deal with such subject matter by way of setoff or counterclaim.

NCC's Interstate WATS Lines

Pacific asserts that if we determine reparation to be in order, our award must be based solely upon any overbilling for the

^{4/} References to code sections are to the Public Utilities Code unless otherwise stated.

^{5/} "Any public utility may complain on any of the grounds upon which complaints are allowed to be filed by other parties, and the same procedure shall be adopted and followed as in other cases, except that the complaint may be heard ex parte by the commission or may be served upon any parties designated by the commission."

intrastate INWATS lines and that only the FCC may make any billing adjustment concerning the interstate lines.

This contention has no merit. The subject of this proceeding is Pacific's service, not regulation of interstate WATS. We are well aware of federal preemption of interstate WATS rates, tariffs, and practices. No such matters are in issue here. We make no findings that any such rates, tariffs, or rules are unreasonable, nor any conclusions that such matters should be changed, and our order is not based on any findings or conclusions on such subject matter. No jurisdiction is asserted over interstate WATS, or over AT&T.

AT&T (specifically, its Long Lines Department) dealt with NCC entirely through Pacific. All the service representatives, marketing personnel, installers, and other employees were Pacific's. AT&T's sole, and passive, function in this situation was to provide its operating telephone company in the area (Pacific), and not the customer directly, with the necessary trunks so that Pacific could furnish NCC with both interstate and intrastate connections. Pacific, not AT&T, serviced and billed NCC for both interstate and intrastate service. Any acts or omissions which give rise to the right of NCC to seek reparation from Pacific are those of Pacific under its own tariffs. It is with such acts and omissions that we are concerned.

We have reviewed Pacific's citations of legal authority on the subject and find they are not in point. Ivy Broadcasting Co. v AT&T (1968) 391 F 2d 486 concerned a question of concurrent federal jurisdiction over a tort action and not a question of federal preemption. No language in that opinion, taken in context, indicates that we are without jurisdiction to deal with the subject matter presented here.

We have previously held that as a matter of essential fairness and equity, a subscriber with a dispute over interstate charges on his telephone bill, which the utility under Commission jurisdiction has contracted with the utility under federal jurisdiction to collect, must be allowed recourse against the collecting utility

on the same basis as would be available to a subscriber with a purely intrastate billing dispute^{6/}. (Williams v Pacific Tel. & Tel. Co. (1976) 80 CPUC 222.) We adhere to this determination. In Williams we were concerned with allegedly erroneous bills; here the subject matter is alleged service errors and omissions leading to excessive overtime charges. But the problem is the same: as a matter of common sense the dispute between NCC and Pacific over the interstate and intrastate portions of the bill involves the identical actions and omissions and is not severable. As we said in Williams (page 229):

"Federal and state regulatory agencies have long recognized that certain aspects of the telephone industry are not severable in that common facilities are involved (Jordaphone Corp. of America v AT&T (1954) 18 FCC 644; and Katz v AT&T (1953) 8 FCC Radio Regulations 919). This Commission also recognizes that defendant's division of toll revenue agreement with AT&T contains express provisions for defendant to bill and collect all interstate and foreign toll revenues originating within defendant's territory, and that defendant in rendering bills to subscribers does not treat separately the intrastate and interstate charges. However, as a matter of essential fairness and equity, it appears to us that a subscriber with a dispute over the interstate charges on his telephone bill, which the utility under our jurisdiction has contracted with the utility under federal jurisdiction to collect, must be allowed such recourse to further administrative adjudication as would be available to the subscriber with a purely intrastate dispute when his dispute cannot be resolved by conference with the utility. Otherwise as a practical matter he has no administrative appeal. There is no federal forum locally available to which a subscriber with a disputed interstate bill can have expedient resort so as to forestall disconnection

^{6/} This assumes that there is no challenge to the interstate rate itself. As we have mentioned, there is no such issue here.

while the dispute is resolved. The decision of a utility business office is only preliminary and tentative, as was recognized in Lucas v Wisconsin Electric Power Co., supra, and further administrative appeal apart from resort to the legal remedy of an action for damages should be available. It should not be that a subscriber with a bona fide dispute over interstate charges on his bill, unsuccessful in his conference with the utility, should have no recourse other than to pay or suffer disconnection and sue for damages."

We have reviewed federal legislation on the subject of telecommunications common carriers (Title 47, U.S. Code) and find nothing in such legislation which can reasonably be interpreted to mean that an intrastate operating telephone company may avoid responsibility for its own actions and omissions by claiming that because both intrastate and interstate connections are involved, a portion of such actions or omissions must, by operation of law, be attributed to its interstate parent rather than to itself.

We conclude that in a proceeding in which the subject matter is the actions, omissions, and practices of a utility under our jurisdiction, and in which the interstate rates, rules, and tariffs of its interstate parent corporation are not in issue, this Commission may adjudicate the entire dispute notwithstanding the fact that part of the reparations sought result from alleged overcollection of interstate charges by the utility under our jurisdiction.

Contentions of the Parties

NCC argues that Pacific failed in its statutory duty under Public Utilities Code Section 451^{2/} and also violated its tariffs (see footnote 3) regarding the usage meters and the 699 run.

^{2/} "All charges demanded or received by any public utility, or by any two or more public utilities, for any product or commodity furnished or to be furnished or any service rendered or to be rendered shall be just and reasonable. Every unjust or unreasonable charge demanded or received for such product or commodity or service is unlawful.

(Continued)

Regarding the meters, NCC contends that Pacific failed to advise NCC promptly that such meters existed and additionally failed to stock any of them although they are a tariffed item and although they are not always available from the manufacturer without delay.^{8/}

Regarding the 699 run, NCC contends that Pacific failed in its duty to supply NCC with line usage information because for ten months the representative on NCC's account was unaware of the 699 run's existence.

Pacific maintains it violated no statutory duty or obligation under its tariffs. Pacific points out that neither its own tariff for the intrastate INWATS service nor the applicable FCC schedule for the interstate INWATS requires it to provide a customer with per-line usage information, such as is available on the 699 run. Many of Pacific's personnel, according to Pacific, were unaware of the 699 run since it was experimental. Imposing such a duty, Pacific points out, might grant an undue preference or advantage to some customers (see Public Utilities Code Section 453(a)) since the run in the form provided to NCC is not available from an ESS central office. In any event, the 699 run was recently discontinued because it proved to contain certain inaccuracies, as was demonstrated by the testimony associated with Exhibit 17.

7/ (Continued)

"Every public utility shall furnish and maintain such adequate, efficient, just, and reasonable service, instrumentalities, equipment, and facilities, including telephone facilities, as defined in Section 54.1 of the Civil Code, as are necessary to promote the safety, health, comfort, and convenience of its patrons, employees, and the public.

"All rules made by a public utility affecting or pertaining to its charges or service to the public shall be just and reasonable."

8/ NCC also argues that there are various breaches of duty by Pacific on an independent contractual basis. It is well settled that Pacific provides utility service to the public pursuant to its tariffs and not by contract. Packard v Pacific Tel. & Tel. Co. (1972) 73 CPUC 307; see General Order No. 96-A, part X.A., and Schedule Cal. P.U.C. No. 1-T, 4th Revised Sheet 3. We need not further discuss the contentions of the parties regarding "contract" theories.

Pacific argues that WATS is a discounted, "no frills" alternative to normal exchange network long distance service and that one reason why Pacific is able to provide WATS at lower rates is that the service does not include detailed billing, time of call, and duration-of-call information which would be available with regular long-distance service.

Discussion

In H. T. Welker, Inc. v Pacific Tel. & Tel. Co. (1969) 69 CPUC 579, 582, we stated:

"In the complex field of communications, no layman can be expected to understand the innumerable offerings under defendant's filed tariffs. When defendant sends out one of its communications consultants to a customer's place of business for the explicit purpose of discussing telephone service, the consultant should point out all the alternative communications systems available to meet the customer's needs. This is a duty owed by defendant to its customers."

The Welker case concerned the initial selection of equipment rather than later analysis of it, but the basic principle is the same.

We assume, in making this statement, that the equipment involved is the telephone company's and not that of an independent supplier which has sold its terminal equipment direct to the customer. Additionally, it is not our opinion that, in the absence of unusual problems which are clearly the telephone company's responsibility, a customer may request continuing analyses of its lines and equipment, or request the utility to make complex special studies in order to develop information not normally and readily available to the utility itself. Such a broad concept of responsibility under Section 451 would no doubt add to operating expenses. Independent consultants are available to examine involved, ongoing telecommunications problems traceable to a customer's own operational difficulties. (Cf. Parts Locator, Inc. v Pacific Tel. & Tel. Co. (1979) _____ CPUC _____, Decision No. 90260, Case No. 10490.)

Here, however, NCC understandably did not contact an independent expert for some time because it was led to believe that it was receiving proper advice, and also because it was told that only the monthly bill could be used to analyze the line configurations. NCC reasonably relied on the statements of Mr. Burgess to the effect that no other raw data were available. Under this circumstance, NCC could reasonably conclude, at least until it became aware of the 699 report, that it would be pointless to retain an outside consultant.

We agree with Pacific that we should not establish a general rule that the 699 run should be made available to WATS customers, or that Pacific should at this time initiate some new computer program to replace the 699 run now that it is discontinued. We need not decide this case except with reference to what, if anything, Pacific should have provided to NCC given the situation at the time.

It is our opinion that under Public Utilities Code Section 451, supra, Pacific should have advised NCC promptly of the existence of line usage meters and that since the 699 run was available at the time, some use should have been made of it temporarily - that is, until the line usage meters were available. While we agree that Pacific was (and is) under no duty to make 699 run information available on a continual and open-ended basis to all its WATS customers, Pacific should at least furnish a WATS customer, particularly one of the size of NCC, with a service representative reasonably familiar with information and hardware available to assist the customer in establishing an economical line configuration. The original service representative was aware neither of the usage meters nor the 699 run, and we may infer from the circumstance that he remained so unaware for a number of months that he made insufficient effort to inquire of others more experienced in WATS than himself what could be done to help NCC (or, in the alternative, that Pacific offered this particular representative insufficient backup or

specialized advice). Under the particular circumstances in this case, we see no undue preference or advantage that would have resulted from furnishing NCC with the 699 run's information pending the availability of the meters.

The evidence is uncontroverted that monthly INWATS billings do not contain information from which a customer, or a service representative, can determine the break-even point in changing from one line configuration to another. Thus, we recognize that the 699 program had certain errors built into it, and that this was the main reason for its discontinuance. However, it was reasonably accurate. Pacific's Mr. Burgess testified that it was the best "immediate" information available. As NCC's witness Putney pointed out, his investigation showed general agreement between the 699 program and the line usage meters.

We agree that WATS is, in effect, a discount service. Day-to-day usage of the 699 run would have been cumbersome and expensive for Pacific. The record indicates, however, that a survey of the run on the basis of approximately once a month, pending arrival of the meters, would have produced fairly accurate information for NCC's purposes. Pacific's Schedule Cal. P.U.C. No. 36T, Seventh Revised Sheet 54, Rule 12 (quoted in footnote 3) requires that a customer be notified of the "several schedules" available to a class of service so that the customer may designate which schedule is desired. We agree with Pacific that this tariff language concerns original installations and cannot be interpreted to mean that a telephone utility has a continuing duty to analyze a customer's service (unless such ongoing analysis is offered under a tariff and for an appropriate charge) and to make recommended changes on its own initiative.

However, under Section 451 (quoted in footnote 7) a telephone utility does, in our opinion, have a duty to provide a prompt response

to a specific customer request for information readily available to the utility which may assist the customer in determining whether its line and equipment configurations are reasonably economical, so long as such request is reasonable in scope. Since the 699 run was being produced, at the time, for the company's own purposes, and since, although it was far from perfect, it was reasonably accurate, we find that Pacific should have provided NCC with a service representative who was aware of its existence and able to interpret it.

Pacific also had a duty, in our opinion, to tell NCC that INWATS usage meters were available under its tariffs at or about the time Mr. Gay started inquiring as to the economy of the line configuration. There is no evidence on whether Pacific was aware (prior to January 1977) of the delays in ordering the meters from the manufacturer, but if NCC had been notified of their existence with reasonable promptness, they could have been ordered several months sooner.^{10/} Furthermore, after learning of the problems connected with ordering the meters, Pacific should have taken steps to acquire a minimum stock of them, since they are a tariffed item. Such action by Pacific would have alleviated problems regarding NCC's second and third control rooms.

Calculation of Reparations

NCC claims a total due of \$66,238.^{11/} This figure is based on a hindsight calculation of the optimum versus the actual line configurations. It is of use as a mathematical starting point but not as a basis of an award. An award, in a case such as this, should be based on an estimate of the sum which NCC could have saved, as

^{10/} We note Pacific's argument on brief that NCC could have kept track of line usage manually. Whether this is a workable alternative was not explored during the hearings.

^{11/} Amounts are rounded to the nearest dollar.

against what it paid, if NCC had had the information necessary for a better forward-looking evaluation. As will be shown, calculating this amount involves estimating certain factors which are not susceptible of being reduced to exact mathematical figures.

Starting with NCC's claim of \$66,238, we agree with Pacific^{12/} (1) that there are certain calculating errors in NCC's favor, notably a \$5,000 arithmetic error relative to telephone number 852-7711; (2) Pacific is not given credit for certain "net billed amounts", which should have been done; (3) the lag time which elapses between the end of a billing period and the point at which line usage information for that period would become available was sometimes not given proper consideration; (4) either the 699 run or the line meters contain a certain unquantified, although minor, percentage of error; (5) any claim for reparation after the installation of line meters is unwarranted, and (6) certain lines for which adjustments are claimed are ESS-connected, and no 699 program information was available for them.

Pacific's adjustments, from an arithmetical standpoint, are, in our opinion, correct, which would reduce NCC's claim to \$33,915 (not including deductions solely on the basis that certain lines are interstate: see Pacific's opening brief, page 33).

Turning to the factors which cannot be reduced to specific figures: (1) there is a certain incalculable amount of constant change in NCC's business that even the best forward-looking estimates on a month-to-month basis cannot account for (this is a separate factor from "lag time"); (2) there is the question of how promptly, after learning of the existence of the 699 report, NCC should have sought its own communications advice; or, to state the matter differently, how soon after April 1977, should NCC have realized that it was no longer reasonable to rely entirely on Pacific's

^{12/} See Pacific's opening brief, pages 24-33, and its closing brief, generally.

advice? (Mr. Putney did not join NCC until January 1978. Granted, even if a consultant had been called in promptly in April of 1977, he could not have produced an immediate answer but here, eight months passed from NCC's knowledge of the 699 run to its first use of non-telephone company expertise.)

We believe it is reasonable, taking into account the above factors, to award NCC (and the other complainants) a total of \$25,000. No interest is due either party since the funds have been on deposit with the Commission.

Findings of Fact

1. Complainants operate a wide area answering service by the use of INWATS and OUTWATS lines furnished by defendant.
2. Defendant provides complainants with connections to its own intrastate INWATS lines and to interstate INWATS lines furnished to defendant by AT&T.
3. Complainants' first control room was established in Shingle Springs in June 1976. The initial order of WATS lines, including type of line (ten hour, etc.) and the number of lines, was based on a pure estimate since at that time complainants had no business history or experience in the wide area answering service field.
4. In late 1976 and early 1977, complainants' business grew rapidly, and during this period, overtime INWATS charges were higher than complainants had anticipated. Complainants during this time asked defendant for line information it could use to determine a more economical line arrangement and were told that no information other than the monthly bill was available.
5. In January 1977, defendant informed complainants for the first time that INWATS line usage meters were available under defendant's tariffs but manufactured by an independent company. Complainants placed an immediate order with defendant for the meters for its Shingle Springs control room.

6. Defendant maintained no stock of the meters and did not receive the initial order for complainants until August or September 1977.

7. Because defendant continued to maintain no stock of the meters, although they were (and are) a tariffed item, similar delays were encountered in ordering meters for complainants' later-established control rooms.

8. The point at which it is economical to shift from a ten-hour INWATS line to a higher category cannot be determined from a customer's bill. There is about a six-week lag from the time a WATS customer can order a regrade of service to the time the billing begins to be affected.

9. In December 1976 or early January 1977, defendant commenced producing a computer program known as a 699 run. The 699 run was intended as an internal accounting tool, but it contained information of sufficient accuracy to analyze INWATS usage for the purpose of determining an INWATS customer's optimum line configuration for preceding months (except when the INWATS customer was served by an ESS central office). It therefore was of use in forecasting a proper INWATS line configuration.

10. The service representative originally assigned to complainants was not aware of the 699 run's existence. It was first used to analyze complainants' line usage when another employee of defendant contacted complainants about billing arrears in April of 1977. Complainants had been unaware of the 699 run until that time.

11. Pending arrival of the meters, the service representative originally assigned to complainants attempted, unsuccessfully, to analyze complainants' line configuration by use of the billings. He was unaware, at the time, of the existence of the 699 run.

12. A different service representative took over complainants' account in April 1977. He used the 699 run to analyze complainants' line usage and to recommend changes.

13. The 699 run was discontinued because it contained certain errors. These errors were not of a magnitude to interfere with its usefulness as a forecasting tool for INWATS line usage.

14. It is the nature of complainants' business that its customer accounts change constantly, and that the needs of customers change constantly. In the case of complainants in this proceeding, it is therefore impossible to forecast with complete accuracy the most economical line configuration, even with the use of line meters or the 699 run or similar program.

Conclusions of Law

1. The Commission has no jurisdiction over the collection of overdue utility bills; therefore, we have no jurisdiction to decide whether any claim for reparation should be set off by sums billed which are allegedly in arrears.

2. There is no basis for recovery by the complainants under a theory of contract entered into independently of defendant's tariffs.

3. The issues in this proceeding concern the defendant's service of the complainants' account, and not the reasonableness of interstate WATS rates, rules, or tariffs. There is no jurisdictional bar to our considering claimed overcharges for the INWATS lines of the complainants, since any such overcharges result entirely from the actions or omissions of the defendant.

4. Upon notification to defendant by complainants of large overtime charges, and upon complainants' request for assistance in lowering them, defendant should have advised complainants promptly of the existence of INWATS line usage meters.

5. Since such meters were not in stock and not readily available, defendant should have made reasonably prompt use of its existing computer program information on approximately a monthly basis to help reduce the overtime charges.

6. Upon ascertaining the delay of several months in obtaining the INWATS usage meters from the manufacturer, defendant should have taken steps to acquire a minimum stock of this tariffed item.

7. The actions and omissions of defendant described in Conclusions 4, 5, and 6 were failures on the part of defendant to furnish complainants with adequate, efficient, just, and reasonable service, instrumentalities, equipment, and facilities under Public Utilities Code Section 451 from approximately January 1, 1977 to approximately January 1, 1978.

8. The measure of reparation to be awarded complainants as a result of such actions and omissions should be based on an estimate of how much complainants' billings might have been reduced from a foresight viewpoint, and not on the basis of a hindsight comparison of the actual billings to the optimum line configuration, month by month, for the same period. An exact mathematical total cannot be calculated.

9. We should award complainants reparation in the sum of \$25,000 of the funds on deposit with the Commission and should order the remainder of such funds remitted to defendant.

O R D E R

IT IS ORDERED that the Executive Director shall release to the complainants the sum of \$25,000 of the \$70,000 on deposit with the Commission and shall release to the defendant the remainder of the sum.

This proceeding is closed.

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

Dated NOV 6 1979, at San Francisco, California.

I will file a concurring opinion

I dissent

Vernon L. Sturgeon

I dissent
James J. [Signature]

John E. Bryson

President

Joseph D. [Signature]

Clare J. [Signature]

Commissioners

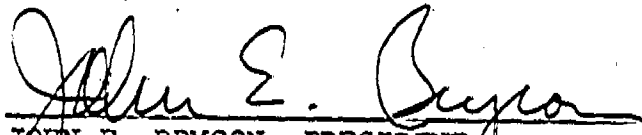
C. 10446 - D. 90997

(National Communications Center v. PT&T)

COMMISSIONER JOHN E. BRYSON, CONCURRING

I concur in the decision. Based on the initial, apparently inaccurate, representations of its service representative, Pacific Telephone should be required to make reparations to National Communications (NCC) for unnecessary charges incurred by NCC from the time at which NCC's obligations first could have been affected by those representations, until Pacific advised NCC that its selected WATS options were not the least costly options.

I would have preferred that the calculation of reparations have been based on a finding as to the specific period during which the original representation caused NCC to be complacent about its tariff choice.


JOHN E. BRYSON, PRESIDENT

San Francisco, California
November 6, 1979