

ORIGINAL

Decision No. 92919 APR 21 1981

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Fred H. Arm, Pan American)
 Marketing Systems, Inc.,)
)
 Complainant,)
)
 vs.)
)
 Pacific Telephone Company,)
 a Corporation,)
)
 Defendant.)

(ECP)
 Case No. 10919
 (Filed October 20, 1980)

ORDER OF DISMISSAL

Fred H. Arm, president, and Pan American Marketing Systems, Inc., by and through their attorney Fred H. Arm, (Arm) bring this complaint against The Pacific Telephone and Telegraph Company (Pacific) and maintain the following:

1. Arm moved its place of business from the Seventh to the Twenty-second floor of 110 West C Street, San Diego, California, and incurred phone installation costs from Pacific in the amount of \$456;
2. The complaint is brought under California Public Utilities Code (Code) Section 1702.1, which covers expedited complaint procedures;
3. The rate charged for the installation is confiscatory, excessive, unlawful, unjust, unreasonable, and discriminatory, as established in Code Section 728, and pursuant to Code Section 729, the Commission may, after hearing, investigate such a single rate, and thereafter establish a new rate that is more in line with acceptable and reasonable business practices;

4. The rate charged by Pacific is confiscatory to complainant by denying it equal protection of the law as guaranteed by the Fifth and Fourteenth Amendments to the Constitution of the United States, essentially amounts to a taking of private property without just compensation;

5. This action against Pacific will result in the enforcement of an important right affecting the public interest by providing a significant benefit to the general public and a large class of persons;

6. Reasonable attorney's fees should be awarded to complainant;

7. The Commission should issue an order setting aside the previous tariffs and order a reasonable and just compensation for the services provided because they involve a de minimis expenditure of labor; and

8. Complainant should be compensated for time expended in prosecution of this action.

Pacific filed its answer to the complaint on November 25, 1980 alleging that:

1. It did move the services of complainant as claimed in the complaint;

2. Complainant was billed \$456 in nonrecurring charges on a bill dated November 17, 1979;

3. Complainant later received a credit of \$15 in connection with the touch-tone services it had previously paid, making the net nonrecurring charges in question \$441, rather than \$456;

4. As attachments to its answer show, all charges were in accordance with the authorized effective tariffs at the time of the service, ✓

5. The nonrecurring charges were not solely for complainant's change in location;

6. Complainant fails to state a cause of action because it does not set forth any act or thing done or omitted to be done which is claimed to be in violation of any provision of law or of any order or rule of the Commission as required by Code Section 1702 and Rule 9 of the Commission's Rules of Practice and Procedure;

7. Any reduction in the nonrecurring charges for complainant would be in violation of Code Sections 453 and 532;

8. Complainant has not specifically requested a reduction in nonrecurring charges described in the complaint, but has requested a change in the applicable tariffs which set the rates. However, to the extent that complainant's request for other appropriate relief may include a reduction in the nonrecurring charges retroactively applied in its situation, Code Sections 453 and 532 apply;

9. Complainant seeks to recover costs associated with this action and the Commission has consistently found that it is without authority to award the costs of bringing suit; and

10. An award of attorney's fees as requested by the complainant would be inappropriate because:

- a. If complainant requests the Commission to set new tariff rates, the California Supreme Court has recently held that the Commission's equitable jurisdiction to award attorney's fees did not extend to such quasi-legislative ratemaking duties (Consumer's Lobby Against Monopolies v CPUC (1979) 25 CA 3d 891, 909); and
- b. Even if complainant seeks a reduction of non-recurring charges retroactively applied in its situation pursuant to its prayer for other appropriate relief, an award of attorney's fees would be inappropriate. The Commission does have the power to award attorney's fees from a common fund in a quasi-judicial proceeding (Consumer's Lobby, supra, 25 CA 3d 907); however, there would be no common fund in this case, and any award of attorney's fees would be paid from a fund created for a complainant's sole benefit, an illogical and inappropriate result;

11. Complainant is not entitled to any relief. The complaint is without merit and should be dismissed without additional burden to the ratepayers of California;

12. The \$441 of the funds on deposit with the Commission relating to this case should be disbursed to Pacific and the remaining \$15 disbursed to complainant.

Discussion

We agree with Pacific that complainant has not brought a cause of action under Code Section 1702.1.^{1/} Complainant and Pacific agree that certain services were performed for which complainant was billed correctly under the tariffs then in effect. Complainant's claim is that the rates were not reasonable for the service performed. Section 1702.1 provides for expeditious litigation of claimed violations of Sections 734, 735, and 736. Under Section 734 an order may issue for payment of reparations on the ground of unreasonableness only where a showing has been made that the Commission has not previously, by formal finding, declared the rate to be reasonable. Complainant makes no such showing in this proceeding.

An application for general rate relief by Pacific would be the proper forum for complainant to bring its concerns.

1/ Because of the disposition which follows, we will not address the possible issue that Code Section 1702.1(b) provides that no attorney shall represent any party other than himself under the expedited complaint procedure. ✓

Conclusion of Law

Complainant has not stated a cause of action and Case No. 10919 should be dismissed.

IT IS ORDERED that:

1. Case No. 10919 is dismissed.
2. Of the \$456 deposited with the Commission by complainant the Executive Director shall disburse \$15 to complainant and \$441 to Pacific.

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

Dated APR 21 1981, at San Francisco, California.

John G. Boyer
President
Richard W. [unclear]
Edward W. [unclear]
Victor [unclear]
Sumner [unclear]
Commissioners