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Decision 97-09-060 September 3, 1997

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Philip Ortega, Complainant, vs. AT&T Communications of California, Inc., Defendant.	Case 92-08-031 (Filed August 24, 1992)
Centro Legal de la Raza, et al. Complainants, vs. AT&T Communications of California, Inc., Defendant.	Case 92-09-009 (Filed September 8, 1992)

ORIGINAL

ORDER GRANTING LIMITED REHEARING AND MODIFYING DECISION NO. 94-11-026

On May 20, 1992, AT&T Communications, Inc. (AT&T) filed Advice Letter (AL) 254 with the Commission, advising of changes to AT&T's interLATA rates and charges for pay phone calls paid by coin. The changes took effect on July 1, 1992. On August 24, 1992, Philip Ortega filed a complaint, Case (C.) 92-08-031, alleging that the implemented changes were unauthorized because the filing of an AL was an improper means of instituting the changes and because the AL itself was defective.

On September 8, 1992, Centro Legal de la Raza filed a complaint (C.92-09-009) alleging that the increases resulting from AL 254 unreasonably discriminated against those persons who must use coins to place long distance calls.

On December 14, 1992, a prehearing conference on the two complaints was held before Administrative Law Judge (ALJ) Wheatland. The two complaints were consolidated and requests to intervene by the California Payphone Association (CPA) and the Division of Ratepayer Advocates (DRA) were granted.

On February 2, 1993, AT&T moved to dismiss the complaints as moot in light of Decision (D.) 93-02-010. That decision, effective on February 3, 1993, granted AT&T authority to increase rates for existing services on 30 days' notice through AL filings. Plaintiffs responded to the motion in their opening briefs, filed March 23, 1993.

An evidentiary hearing was held on February 16, 1993 regarding three issues: (1) Do the rate changes resulting from AL 254 constitute a "minor increase" as defined by the Commission? (2) Was this type of change authorized by a prior decision? (3) Did AL 254 contain the information required by General Order (GO) 96-A?

In May, 1992, when AT&T filed AL 254, AT&T was authorized to make "minor rate increases" and introduce some new services through AL filings. If the proposed change represented more than a minor increase to an existing service, AT&T was required to file an application. D.90-11-029 defined a "minor" increase as "one which does not increase [AT&T's] California intrastate revenue by more than 1% and which will not increase rates for the affected service by more than five percent (5%)." (D.90-11-029, 38 CPUC 2d 126, 146.)

D.94-11-026 (the Decision) found that AL 254 increased AT&T's intrastate revenues by less than 1%, but that it increased the cost of station-to-station coin paid calls on PacBell pay phones by more than 5%. In fact, the increases for a three and four minute call were 94% and 70%, respectively. Part of this increase flowed from the addition of a charge of $1.05 to each station-to-station call.

The Decision thus held that AL 254 was defective because it provided for more than a minor rate increase to an existing service, failed to properly notify

customers of each rate change contained therein, did not make clear the effects of the revisions and failed to comply with the basic requirements of GO 96-A and D.90-11-029, principally involving notice to customers of rate changes. The Commission further concluded that AT&T should properly have sought the rate increase contained in AL 254 through an application and ordered it to do so in the future for changes in rates and charges for interLATA calls paid by coin.

The Commission concluded by ordering AT&T to immediately reinstate interLATA rates for all pay phone calls to the rates and charges which were in effect prior to July 1, 1992 and further made all amounts collected since that date in excess of the previously authorized amount to be subject to refund. Disposition of the excess amount collected was left to further proceedings. The effective date of the decision was November 9, 1994.

On November 23, 1994, AT&T filed a petition for an extension of time to comply with the Decision pending resolution of the application for rehearing that it intended to file. On June 21, 1995 the Commission issued D.95-06-061 staying those portions of the Decision that ordered reinstatement of pay telephone rates to those in effect prior to July 1, 1992 and ordering AT&T to file an application to increase future rates and charges paid by pay-telephone.

Applications for rehearing were filed by AT&T and by CPA.

I. AT&T's Application

AT&T alleges myriad factual and legal errors in the Decision. First, the company complains that the Decision violates its due process rights under the U.S. Constitution. The argument is that the Administrative Law Judge (ALJ) specified at the Prehearing Conference that the only issue to be addressed at the first phase of the proceeding was whether AL 254 was defective on its face. The question of the reasonableness of the rates was left until later. The issue of the propriety of refunds was not addressed by any party to the proceedings. However, the Decision

implicitly found the rates to be unreasonable by ordering the complained of refunds.

A review of the transcript of the Prehearing Conference indicates that the ALJ did, in fact, announce that the proceeding was to be phased. At page 28 of the PHC transcript appears the following:

> "ALJ Wheatland: Well, again, the one issue that we would not be taking up at this first hearing would be the question of whether or not the advice letter was misleading.
>
> That was the one issue we were going to separate out. The three things that we would talk about at the first hearing is whether or not the tariff change meets the definition of a minor increase, whether this type of tariff change was authorized by a prior decision, and whether it contained the required information.
>
> The question of whether it's misleading or was intending to be misleading or whether in fact misled would not be an issue that I was proposing to take up at the first hearing."

There was no finding in the Decision that the rates contained in AL 254 were unreasonable or misleading. Rather, the Commission found that the AL was invalid on its face because the rate increase was not "minor". Further, Ordering Paragraph 2 of the Decision specifically orders that "further proceedings will be held to determine the precise amount and disposition of the excess payments." Today's order provides that all parties will have an opportunity to address the issue of the propriety of refunds and how they should be effected.

Applicant next argues that the Commission erred in Finding of Fact 2 where it stated: "AL 254 also revised the rates for existing PacBell coin-paid interLATA service, so that the rates for Customer Owned Pay Telephone (COPTs) and PacBell pay phones would be the same." AT&T alleges that PacBell is not authorized to provide any interLATA service within California, nor does AL 254 revise any Pacific Bell rates. Applicant is correct, and the Finding of Fact is corrected herein. However, a review of

the discussion of the rate increase resulting from the AL at page 6 of the Decision makes it clear that the point being made was that the effect of AL 254 would be to raise the cost of a call at a PacBell telephone - not to change PacBell's actual rates, but AT&T's. The error is therefore not prejudicial.

AT&T complains that Finding of Fact 3 is in error. The following language appears in the Finding:

> "AT&T also added language which levied the operator surcharge for $1.05 on all coin-paid station-to-station calls, whether or not [emphasis added] such calls are completed with the assistance of an operator."

However, as applicant points out, by D.90-06-018, Appendix A, p. 6, all coin calls are by definition operator assisted. The proposed order corrects the Finding.

AT&T next argues, incredibly, that the Commission erred in stating, at pp. 8-9 that customer impact is a proper test for determining whether or not a rate increase is a "minor" increase, relying on language in D.85-03-017 that customer impact had been a "pivotal" concern. First, one can only wonder what could be more crucial than customer impact in determining whether a rate change is "minor" or not. Second, although AT&T asserts that it was unable to find the words "pivotal concern" in D.85-03-017, the language does appear at 1985 Cal.P.U.C. Lexis at page 53.

Applicant next argues that the evidence presented failed to support the language at page 10 of the Decision that the "extension of Operator Coin Supervisor (OCS) to COPT does not qualify as a new service ... Callers receiving OCS over a COPT will not perceive a new service."

The Commission relied on testimony submitted by AT&T for this statement. AT&T argues that this was error because the complainant, not AT&T had the burden of proof on this point. (Application of AT&T, p. 15) The argument is without merit. It is

immaterial which party submitted the evidence, as long as there was some evidence to support the Decision.

Next, Applicant complains about language in a footnote at page 10 of the Decision that "AT&T has presented no evidence of the actual cost of providing OCS to COPT." The company does not assert that this language is erroneous, nor that it has suffered any prejudice from its inclusion. Rather, the argument is that this bears on the issue of reasonableness and should have been reserved for a later phase of the case. No error has been demonstrated and the argument is without merit.

AT&T also complains that certain language contained at page 2 of the Decision is without support in the record, to wit:

> "Millions of Californians, especially the poor and disadvantaged, rely on coin-paid pay phones for basic communications. These Californians do not subscribe to residential service. They do not have calling cards. They do not have a choice of inter exchange carriers. If they need to place an interLATA call, they must pay by coin for interLATA services offered exclusively by AT&T."

A review of the record in this proceeding indicates that no party offered any evidence to support this assertion, although it would appear to be supported by common knowledge. However, the language complained of is hereby removed.

Next, AT&T argues that the Commission erred in Ordering Paragraph 1 by mandating that AT&T reinstate the rates for interLATA coin calls to the rates in effect prior to July 1, 1992. The argument is that this disregards and eliminates the tariff rates that became effective when AL 349 was filed, on December 29, 1993. The Decision refers to AL 349 in footnote 2, page 5, but does not clarify what, if any effect it will have on this later AL. The parties should be allowed to respond to the issue of whether the refund period ordered by the Decision should be terminated as of the effective date of the

later-filed AL, as this issue is not addressed in the Decision. Limited rehearing will therefore be granted on this issue.

Finally, AT&T argues that the Decision constitutes impermissible retroactive ratemaking because it orders a refund of rates in effect prior to the decision.

Applicant argues that the Commission could only have made any refund prospective, citing PUC Code § 728. However, AT&T conveniently overlooks the fact that this is a complaint proceeding governed by PUC Code § 734, which provides:

> "When complaint has been made to the commission concerning any rate for any product or commodity furnished or service performed by any public utility, and the commission has found, after investigation, that the public utility has charged an unreasonable, excessive, or discriminatory amount therefor in violation of any of the provisions of this part, the commission may order that the public utility make due reparation to the complainant therefor, with interest from the date of collection if no discrimination will result from such reparation. No order for the payment of reparation upon the ground of unreasonableness shall be made by the commission in an instance wherein the rate in question has, by formal finding, been declared by the commission to be reasonable, and no assignment of a reparation claim shall be recognized by the commission except assignments by operation of law as in cases of death, insane, bankruptcy, receivership or order of court.

Further, the California Supreme Court has consistently held that the rule against retroactive ratemaking applies only to general ratemaking, which is not the situation here. In Toward Utility Rate Normalization v. Public Utilities Com. (1988) 44 Cal 3d 870, the Court stated, at page 874:

> "In Southern Cal. Edison Co. v. Public Utilities Com., supra, 20 Cal. 3d 813, 816, this court said: "If the prohibition against retroactive ratemaking is to remain a useful principle of regulatory law and not become a device to fetter the commission in the exercise of its lawful discretion, the rule must be properly understood. In Pacific Tel. & tel. Co. v. Public Util. Com. (1965) 62 Cal.2d 634... the first decision of this court on the question, we construed Public Utilities Code section 728 to vest the commission with power to fix rates prospectively only. But we did not require that each and every act of the commission operate solely in future; our decision was limited to the act of promulgating 'general rates.'" (Fn. Omitted.) Southern Cal. Edison went on to hold that a commission order (1) changing a fuel cost adjustment clause so as to measure fuel expense by actual monthly costs rather than by a 12-month forecast of expense under average weather conditions and (2) requiring the utility to refund the difference between amounts collected under the original clause and what would have been collectible during the same period under the clause as revised did not constitute the sort of rate regulation governed by the rule against retroactive effect."

The argument is without merit. The AL that is at issue here affected only one specific rate - coin operated telephones. It did not constitute general ratemaking as that term has been used by the California Supreme Court.

II. Application of CPA

CPA makes the same argument as AT&T that the Decision fails to address the issue of the effect of the filing of AL 349 on the refund period ordered by the Decision. This has been dealt with above.

CPA seeks clarification of the effect of the Decision on those portions of AL 254 that established a tariffed mechanism for completing coin-paid interLATA calls on COPT Coin Lines. Specifically, CPA is concerned with those aspects of AL 254 providing tariff changes not impacting the rate structure. AT&T similarly asks for clarification that the 15% discount to OCS tariff rates would continue to

be allowed so that COPT owners could recover the administrative costs incurred in collecting and remitting the revenues to AT&T. Complainants have made it clear in their Response to the Applications for Rehearing that they agree with AT&T and CPA on this issue. (Response to Applications for Rehearing, page 9) Complainants are only interested in the revenue aspects of the Decision. We reiterate that our only intent in the Decision was to affect rates. The other portions of AL 254 are not affected.

Finally, both Applicants argue that the Decision is in error for ordering that AT&T file an application, rather than an AL, for future increases for coin telephone service. Both parties point out that this ignores the fact that AT&T filed AL 349 which had already gone into effect before the present decision was issued subsequent to AL 254.

However, this issue has become moot. Since the close of the record in this case, the Telecommunications Act of 1996 has become effective. Pursuant to this federal legislation, this Commission will no longer have any jurisdiction to regulate pay telephone rates as of October 7, 1997. We will therefore no longer have authority to order AT&T to make filings in order to alter rates.

Therefore, **IT IS ORDERED** that:

1. Decision D.94-11-026 is modified as follows:
   a. The first paragraph of page 1 is deleted.
   b. Finding of Fact 2 is deleted. The following Finding of Fact is substituted:

> "2. AL 254 extended AT&T interLATA operator coin supervision services to providers of COPTs who purchase PacBell's service. AL 254 had the effect of increasing the revenues from existing PacBell coin-paid phones for interLATA service, so that the rates for COPTs and PacBell pay phones would be the same."

c. Finding of Fact 3 is amended by removing the following language:

> "whether or not such calls are completed with the assistance of an operator."

2. Limited Rehearing of Decision 94-11-026 is granted. Such rehearing is limited to additional pleadings as outlined below. Should any party request oral hearings, it shall indicate what specific evidence it intends to produce at such hearings.

3. Within thirty days of the effective date of this Order, all parties may file with the Commission's Docket Office responses to the question of how any customer refunds flowing from Decision No. 94-11-026 should be accomplished.

4. Within thirty days of the effective date of this Order, all parties may file with the Docket office a response to the issue of whether the refund period outlined in this Decision should terminate at the effective date of AL 349, which superseded AL 254.

This order is effective today.

Dated September 5, 1997, at San Francisco, California.

P. GREGORY CONLON
President
JESSIE J. KNIGHT, JR.
HENRY M. DUQUE
JOSIAH L. NEEPER
RICHARD A. BILAS
Commissioners