

Decision 98-05-038 May 21, 1998

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Pacific Bell,

Complainant,

vs.

AT&T Communications of California, Inc.,

Defendant.

ORIGINAL

Case 97-09-019
(Filed September 12, 1997)

O P I N I O N

1. Summary

Pacific Bell alleges that AT&T Communications of California, Inc. (AT&T) violated a Commission order by prematurely stopping payments to Pacific Bell for certain telephone services offered by AT&T. Pacific Bell seeks recovery of \$5.2 million. This decision finds that the complaint is time-barred by the two-year statute of limitations set forth in Public Utilities (PU) Code § 735 and that, in any event, the complaint substantively is without merit. The complaint is dismissed. Case 97-09-019 is closed.

2. Background

On November 23, 1988, the Commission in Decision (D.) 88-11-053 approved an AT&T application to provide Megacom telephone service that included what AT&T called incidental intrastate traffic. (*Re AT&T Communications* (1988) 29 CPUC2d 609.) Aimed at high-volume users, Megacom service uses the AT&T Public Switched Telephone Network to transmit voice and data communications to any point in the United States. The application had been

opposed by Pacific Bell and others because it permitted intrastate calls within Local Access and Transport Areas (LATAs) at a time when long-distance carriers were not permitted to offer intraLATA service in California.

AT&T claimed that the technology used in providing Megacom services made it impractical to block intraLATA calls, but it stated that such calls would be incidental, since most customers would be using the service for interstate transmissions. AT&T proposed to track intraLATA usage and pay the affected local exchange carrier (primarily Pacific Bell) 3.86 cents for each intraLATA minute provided through its Megacom services. Accordingly, the parties agreed on 14 conditions, including AT&T's proposed payment to local exchange carriers, and the Commission gave interim approval to the new AT&T service. One of the 14 conditions approved by the Commission dealt with the length of time that the 3.86-cent payments would be made. That condition stated:

"This compensation is interim pending a decision by the Commission in the Phase III (I. 87-11-033) proceedings. No retroactive adjustments to the payments made during the interim period shall occur unless agreed to by both parties or ordered by the Commission." (D.88-11-053, Ordering Paragraph 1h, 29 CPUC2d at 615.)

The Implementation Rate Design (IRD) decision was the Phase III decision in Investigation 87-11-033. The decision was issued and made effective on September 15, 1994. Among other things, the IRD decision authorized AT&T and others to offer intraLATA services beginning on January 1, 1995.

AT&T ceased the 3.86-cent Megacom payments to Pacific Bell as of September 15, 1994, stating that the obligation to make interim payments ended on the date of the IRD decision. Pacific Bell demanded that payments continue until January 1, 1995, the date that AT&T was authorized to offer intraLATA service. Based on the monthly average of payments paid by AT&T from January

to November 1994, Pacific Bell estimates that it is entitled to \$5,239,300 for the 3.5 months of non-payment.

3. Procedural History

The complaint was filed on September 12, 1997, and was served on AT&T by the Commission on October 2, 1997. AT&T timely filed its answer on October 31, 1997. A prehearing conference was conducted on November 20, 1997.

At the prehearing conference, the parties agreed with the administrative law judge (ALJ) that no material issues of fact were in dispute, and that therefore no hearing was required. The parties also agreed that two issues would be before the Commission:

1. Was the complaint timely filed?
2. Did AT&T violate a Commission order by refusing to make Megacom payments to Pacific Bell for the period September 16-December 31, 1994?

By ALJ ruling, parties were required to file opening briefs on December 22, 1997, and concurrent reply briefs on January 12, 1998, at which time the case was deemed submitted.

4. Was the Complaint Timely Filed?

AT&T argues that the gravamen of Pacific Bell's complaint is that AT&T violated a requirement of D.88-11-053. Therefore, according to AT&T, the complaint arises under PU Code § 702, which states:

"Every public utility shall obey and comply with every order, decision, direction, or rule made or prescribed by the commission in the matters specified in this part, or any other matter in any way relating to or affecting its business as a public utility, and shall do everything necessary or proper to secure compliance therewith by all of its officers, agents, and employees."

AT&T states that actions claiming a violation of Section 702 must be brought within two years, pursuant to PU Code § 735. Section 735 states in pertinent part:

"All complaints for damages resulting from a violation of any of the provisions of this part, except Sections 494 and 532, shall either be filed with the commission, or where concurrent jurisdiction of the cause of action is vested by the Constitution and laws of this State in the courts, in any court of competent jurisdiction, within two years from the time the cause of action accrues, and not after."

The exceptions to the two-year statute are Section 494, dealing with transportation utilities, and Section 532, dealing with deviations from filed tariffs. Pacific Bell argues that its complaint falls within Section 532 because the Megacom payments to Pacific Bell were part and parcel of AT&T's approved rates for the Megacom services, whether memorialized in tariffs or not. Pacific Bell relies on *TURN v. Pacific Bell* (1994) 49 CPUC2d 299, in which the Commission stated that "late payment charges and reconnection charges are part and parcel of the rates charged for telephone services which are undeniably subject to PU Code Section 532." (49 CPUC2d at 307.) Pacific Bell notes correctly that complaints brought under PU Code § 532 are subject to a three-year statute of limitations under PU Code § 736.

4.1. *Discussion*

There is no dispute that AT&T ceased its Megacom payments to Pacific Bell effective September 15, 1994. Similarly, there is no dispute that Pacific Bell knew on or shortly after that date that AT&T took the position that its obligation to make such payments ended on the effective date of the IRD decision. Pacific Bell does not explain why it waited almost three years, until September 12, 1997, to file its complaint.

While customer complaints normally have a three-year statute of limitations (because they involve alleged violation of tariff rates), Section 735 provides that complaints for a violation of the Code must be filed within two years from the time that the cause of action accrues. (*TURN v. Pacific Bell* (1993) 49 CPUC2d at 311.) There are three exceptions to the two-year statute: actions for violation of an order for payment of reparation must be brought within one year (PU Code § 735); actions for violation of Section 494 (deviations from common carrier tariffs) and actions for violation of Section 532 (deviations from a public utility's filed tariffs) must be brought within three years (PU Code § 736).

Pacific Bell seeks to cast its complaint as a claim for violation of Section 532. Section 532 proscribes rate discrimination among customers, prohibiting a utility from charging its customers an amount that is different from that published in the utility's filed tariffs. (*Kings Alarm v. Pacific Telephone* (1977) 81 CPC 283, 287-88.) Section 532 deals specifically with variations from published tariff rates, providing in pertinent part that

"[N]o public utility shall charge, or receive a different compensation for any product or commodity furnished or to be furnished, or for any service rendered or to be rendered, than the rates, tolls, rentals, and charges applicable thereto as specified in its schedules on file and in effect at the time...." (PU Code § 532; emphasis added.)

Pacific Bell acknowledges that the compensation for intraLATA usage that AT&T paid to Pacific is not and never was a tariffed rate of either AT&T or Pacific Bell. Nevertheless, Pacific Bell argues that these charges were "part and parcel" of AT&T's rates. The case upon which Pacific Bell relies, however, does not support that view. In *TURN v. Pacific Bell, supra*, the Commission found that late payment fee overcharges to customers were part and

parcel of the rates charged, but it added that late charges "must be tariffed" under the controlling statute. (49 CPUC2d at 307.)

Here, Pacific Bell seeks damages for 3.5 months worth of payments that it believes AT&T owes it based on what essentially was an agreement by the parties approved by the Commission. These payments were not tariffed rates, nor does Pacific Bell cite any authority stating that such rates should have been tariffed. Pacific Bell's claim does not fall within the ambit of Section 532. It follows that the claim is governed by the two-year filing requirement of PU Code § 735. The claim was not filed within two years. The claim is time-barred.¹

5. Substantive Claim

Because we have found that Pacific Bell's complaint is untimely under PU Code § 735, this Commission lacks jurisdiction to rule on the substantive merits of Pacific Bell's claim. Nevertheless, because of the importance of this matter, we feel compelled to address briefly the merits of Pacific Bell's claim, assuming for the sake of this discussion that the claim is timely.

Pacific Bell argues that the intent of the parties and of the Commission in D.88-11-053 was to require AT&T to pay the 3.86-cent per minute charge on intraLATA traffic "until the intraLATA ban was lifted." (Pacific Bell Opening Brief, p. 3.) In support of this, it cites ordering paragraphs of the decision stating that AT&T "will be required to pay compensation to local exchange carriers for their loss in revenues" (Ordering Paragraph 1f) and AT&T will "be directed to work with Pacific and the other local exchange companies to perfect the opportunity for them to recover their costs of any incidental intraLATA usage"

¹ Because we find that Pacific Bell's claim is time-barred under PU Code § 735, we do not address AT&T's argument that the complaint is barred by the equitable doctrine of laches.

(Ordering Paragraph 1n). These references lack specificity as to the duration of AT&T payments.

In fact, as AT&T points out, the Commission through its ALJ asked about the length of time that AT&T's Megacom payments should continue, and it adopted without change the recommendation of the parties that

"[t]his compensation is interim pending a decision by the Commission in the Phase III (I.87-11-033) proceedings."
(D.88-11-053, Ordering Paragraph 1h.)

The common meaning of the word "interim" is a temporary or provisional arrangement. (Random House Dictionary of the English Language (1973).) The common meaning of the word "pending" is "through the period of continuance or indeterminacy of," "during; until the occurrence or completion of," or "while awaiting...." (*Webster's Third New International Dictionary* (1971).)

While Pacific Bell may have had a different understanding of the period during which AT&T would make payments, the plain words of Ordering Paragraph 1h lend themselves reasonably to no meaning other than that the AT&T payments were temporary in nature and were to continue until the date of the Phase III decision by the Commission in Investigation 87-11-033.

Pacific Bell cites a statement at hearing by AT&T's counsel to support its argument that the Megacom payments were to continue until AT&T was able to offer intraLATA service to the public. The statement cited, however, is less than clear on that point.² Moreover, comments by counsel at best can be viewed

² Pacific Bell cites the following statement by AT&T counsel:

"The two primary issues that the parties are concerned about have to do with the intraLATA application of this service and the compensation associated with that on an interim basis.

Footnote continued on next page

merely as an extrinsic aid in assessing the Commission's intent in fixing the period for interim payments. Under traditional rules of statutory construction, if the words of Ordering Paragraph 1h are deemed to be clear and unequivocal, giving the words their usual and ordinary meaning, then reference to extrinsic aids in interpreting the words is unnecessary. (*Cal. School Employees Assn v. Governing Bd.* (1994) 8 Cal. 4th 333, 338.)

The Megacom decision dealt with "incidental intraLATA traffic," and AT&T was directed not to hold the Megacom services out as intraLATA offerings. (D.88-11-053, Ordering Paragraph 1i, 29 CPUC2d at 615.) Prior to opening of the intraLATA market, the Commission in a number of cases authorized telephone services that for technical reasons would include incidental intraLATA service, provided that the carrier did not hold itself out as an intraLATA provider. Among such cases are *Re Competition in Transmission Services* (1984) 14 CPUC2d 317, 319 (incidental intraLATA service permitted so long as carriers do not offer or advertise intraLATA service), and *Pacific Bell v. AT&T* (1992) 43 CPUC2d 100, 101 ("Incidental intraLATA traffic is permitted under regulatory authority in recognition that IECs may not be able to prevent the carriage of such traffic because of technological or other practical constraints.")

In a case similar to this one, the Commission authorized AT&T to provide 800 Readyline service subject to conditions established in a settlement. (*Re AT&T Communications* (1990) 36 CPUC2d 206.) One of the conditions was that AT&T

"Both of those matters will be addressed by all the parties and the Commission in Phase 3 of the local exchange carriers' flexible regulation docket.

"So we would anticipate that in that proceeding, we would have a resolution of that matter which is causing this service to be interim in nature." (Application 88-07-020, Reporter's Transcript, October 18, 1988, p. 16.)

would pay local exchange companies compensation for incidental intraLATA Readyline usage of customers who previously subscribed to basic 800 service offered on a share basis by AT&T and the local exchange carrier. The compensation was to end on a date certain, December 31, 1991, established by negotiation. (36 CPUC2d at 223.)

Similarly here, the parties in D.88-11-053 agreed on certain payments by AT&T that were to end when the Commission issued its IRD decision. Based on the prior cases involving incidental intraLATA traffic, Pacific Bell could have proposed a specific date for the termination of such payments, or it could have proposed that the payments continue until AT&T was authorized to hold itself out as providing intraLATA service. Instead, Pacific Bell agreed to the language of Ordering Paragraph 1h, providing for interim payments pending the IRD decision. Having agreed to that provision, Pacific Bell cannot now be heard to state that it and the Commission intended a different and unstated date for the termination of payments.

We conclude that Pacific Bell's complaint is substantively without merit.

Judicial review of Commission decisions is governed by Part 1, Chapter 9, Article 3 of the PU Code. The appropriate court for judicial review is dependent on the nature of the proceeding. We find that this is a complaint case *not* challenging the reasonableness of rates or charges, and so this decision is issued in an "adjudicatory proceeding" as defined in PU Code § 1757.1. Therefore, following disposition of any application for rehearing, it would be subject to judicial review in the Court of Appeal. (See PU Code § 1756(b).)

Findings of Fact

1. This complaint was filed on September 12, 1997.

2. At a prehearing conference on November 20, 1997, the parties agreed that there were no material issues of disputed fact, and that therefore the case could be submitted on brief.

3. The Commission in D.88-11-053 approved an AT&T application to provide Megacom service that would include incidental intraLATA traffic.

4. AT&T agreed to pay Pacific Bell and other local exchange carriers 3.86 cents for each intraLATA minute provided through the Megacom services.

5. The parties agreed that such payments would be interim pending a decision by the Commission in the Phase III proceedings of Investigation (I.) 87-11-033.

6. The IRD decision was the Phase III decision in I.87-11-033.

7. The IRD decision was issued and became effective on September 15, 1994.

8. AT&T ceased its Megacom payments to Pacific Bell on September 15, 1994.

9. Pacific Bell alleges that Megacom payments should have continued through December 31, 1994, until the date (January 1, 1995) that the IRD decision authorized AT&T to offer intraLATA service.

10. Based on the monthly average of payments paid by AT&T to Pacific Bell, the amount of Megacom payments for the period September 16-December 31, 1994, would have been \$5,239,300.

Conclusions of Law

1. PU Code § 735 requires that complaints for a violation of the Public Utilities Code must be filed within two years from the time that the cause of action accrues.

2. There are three exceptions to the two-year statute of limitations: actions for violation of an order for payment of reparations must be brought within one year; actions for deviations from common carrier tariffs must be brought within

three years, and actions for deviations from a public utility's filed tariffs must be brought within three years.

3. Pacific Bell's complaint does not allege deviation from a filed tariff of a public utility.

4. Pacific Bell's complaint is subject to the two-year statute of limitations of PU Code § 735.

5. Pacific Bell's complaint is untimely.

6. Pacific Bell agreed to the language of Ordering Paragraph 1h in D.88-11-053, regarding the termination of AT&T Megacom payments.

7. Given their usual and ordinary meaning, in light of the decision as a whole, the words of Paragraph 1h mean that AT&T payments were temporary in nature and were to continue until the date of the Phase III decision by the Commission in I.87-11-033.

8. Prior to the opening of intraLATA competition, the Commission issued decisions permitting incidental intraLATA traffic by carriers, provided that such carriers did not hold themselves out to customers as providing intraLATA service.

9. Pacific Bell's complaint is without substantive merit and should be dismissed.

10. In order that this matter may be resolved promptly, our order today should be made effective immediately.

11. This is a complaint case not challenging the reasonableness of rates or charges, and so this decision is issued in an "adjudicatory proceeding" as defined in PU Code § 1757.1. Therefore, following disposition of any application for rehearing, the proper court for filing any petition for writ of review would be the Court of Appeal.

O R D E R

IT IS ORDERED that:

1. The complaint of Pacific Bell against AT&T Communications of California, Inc., filed on September 12, 1997, is untimely under Public Utilities Code § 735, and is dismissed.

2. Case 97-09-019 is closed.

This order is effective today.

Dated May 21, 1998, at San Francisco, California.

RICHARD A. BILAS

President

P. GREGORY CONLON

JESSIE J. KNIGHT, JR.

HENRY M. DUQUE

JOSIAH L. NEEPER

Commissioners