

Decision 98-10-023 October 8, 1998

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Philip Ortega,

Complainant,

vs.

AT&T Communications of California, Inc.,

Defendant.

ORIGINAL

Case 92-08-031
(Filed August 24, 1992)

Central Legal de La Raza, et al.,

Complainants,

vs.

AT&T Communications of California, Inc.,

Defendant.

Case 92-09-009
(Filed September 8, 1992)

O P I N I O N

Summary

In this decision on rehearing, we find that the refund period created by Decision (D.) 94-11-026 has not yet terminated. AT&T Communications of California, Inc. (AT&T) must either reduce its coin payphone rates or properly obtain Commission authorization for the increase. To date, AT&T's refund obligation is \$27 million, an amount which, if refunded through reduced rates,

will substantially and negatively affect the market. For equitable and practical reasons, we reduce the refund to about \$5 million.

Procedural History

On May 20, 1992, AT&T filed Advice Letter (AL) 254, which increased AT&T's interLATA coin payphone rates. In response to complaints filed by Philip Ortega and Centro Legal de la Raza, the Commission concluded that "the substantial increases in existing rates initiated by AL 254 are invalid because they may not properly be initiated by advice letter." Philip Ortega v. AT&T Communications of California, Inc., 57 CPUC2d 317, 326 (Decision 94-11-026). To remedy the invalid rates that AT&T had been charging, the Commission ordered that:

1. AT&T shall immediately reinstate interLATA rates for all payphone calls paid by coin to the rates and charges which were in effect prior to July 1, 1992.
2. All amounts collected by AT&T since July 1, 1992, in excess of the rates in effect prior to that date are subject to refund. AT&T shall calculate the amount of the excess payments and shall file a report, within 30 days of the effective date of this decision, which details the methodology and results of these calculations. Upon receipt of this report, the Commission shall conduct further proceedings as necessary, to determine the precise amount and disposition to the excess payments.
3. AT&T shall file an application to increase future rates and charges for interLATA calls paid by coin. In such an application, AT&T shall bear the burden of showing that any proposed increase in rates or charges is reasonable and nondiscriminatory.

AT&T and the California Payphone Association (CPA) filed applications for rehearing of D.94-11-026.

On June 21, 1995, the Commission issued its first decision on rehearing in which it stayed, pending further order of the Commission, the directives

numbered one and three; that is, AT&T was not required to immediately reduce its rates nor was it required to file an application to increase its future rates.

Philip Ortega v. AT&T Communications of California, Inc., 60 CPUC433, 434 (1995)(D.95-06-061).

On September 8, 1997, the Commission mailed its second decision on the rehearing applications of AT&T and CPA which granted limited rehearing on three minor factual issues but left unaltered the three ordering paragraphs quoted above and the stay of Ordering Paragraphs 1 and 3. That decision also authorized further filings by the parties on two issues:

1. 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 D.94-11-026 should be accomplished.
2. 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 on the effective date of AL 349, which superseded AL 254.

Philip Ortega v. AT&T Communications of California, Inc., Decision 97-09-060, at 10.

The application ordered by Ordering Paragraph 3 in D.94-11-026, the decision on the merits, was subsequently changed by D.97-12-052 to reflect the fact that the Commission had authorized AT&T to change rates via the advice letter process:

However, since the close of the record in this case, this Commission has issued further decisions with respect to the regulation of AT&T. Specifically, D.97-08-060 granted the company complete regulatory flexibility and ordered that AT&T be regulated like all other IECs. Appendix A of the decision specifically provides for Advice Letter filings for changes in rates by those companies.

Philip Ortega v. AT&T Communications of California, Inc., Decision 97-12-052, at 3.

On October 6, 1997, AT&T and Complainant Philip Ortega filed their responses to the Commission's directives for further filings in D.97-09-060. In its response AT&T stated that the record does not support ordering a refund, and if it does, such a refund period must end with the approval of AL 349. Philip Ortega points to Public Utilities Code (PU) Code § 453.5 which requires that refunds be distributed to the customers that paid them, where practicable, or to current customers. Since coin payphone users are anonymous, Ortega concludes that the refund must go to current users through reduced charges for interLATA intrastate calls. Ortega also stated that AL 349 did not comply with the Commission's rules for rate increases via an advice letter and thus no rate increase was approved.

On November 24, 1997, the assigned Administrative Law Judge issued a ruling which set the issue of the validity of AL 349 for further briefing, ordered AT&T to supply refund calculations, imposed a ban on any further ex parte contacts, and stated that oral argument will be scheduled before the assigned Commissioner prior to issuance of a final decision.

In compliance with the ALJ's briefing schedule, AT&T and Ortega submitted initial briefs, and AT&T, Ortega, and the Office of Ratepayer Advocates filed reply briefs.

On February 11, 1998, the ALJ issued a ruling directing AT&T to provide refund calculations which reflected the actual overcollection as well as a reasonable amount of interest. The ruling included specific spreadsheets for AT&T to complete as well as detailed instructions. AT&T filed its response on

April 7, 1998, along with a request for a protective order. The Law and Motion ALJ granted the request. Complainants filed comments on AT&T's response.¹

The purpose of this decision is to lift the stay on the refund obligation, determine the period over which unauthorized rates were charged, calculate the final refund amount, and order the refund to customers.

On June 22, 1998, the assigned Commissioner and ALJ issued a draft decision for comment and scheduled oral argument on the draft decision. Oral argument was held on July 21, 1998, before Commissioners Neeper and Duque and President Bilas. AT&T, ORA, Ortega and the CPA participated.

Discussion

1. Lifting The Stay Imposed By D.95-06-061

In our 1995 decision we stayed AT&T's obligation to reduce its rates and make refunds. That decision did not eliminate AT&T's on-going liability for refunding the overcollected amounts. That stay is lifted. AT&T must comply with the directives of D.94-11-026, as modified below.

2. Determining The End Of The Refund Period

A. Did D.94-11-026 Create A Refund Obligation?

D.94-11-026 held that the increased rates reflected by AL 254 were "invalid." AT&T argues that despite having determined that the increase was invalid, to create a refund obligation the Commission must now determine whether the rates were also "unreasonable," presumably based on ratemaking standards.

¹ AT&T filed a motion to strike complainant's filing as it was unauthorized. Complainant's offered to withdraw their comments thus making AT&T's motion moot.

PU Code § 734 allows the Commission to order reparations where 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." Section 454 is included in the same Part of the PU Code (Part 1) and requires that all rate increases be approved by the Commission. Because the rate increase reflected in AL 254 was not approved by the Commission, and is therefore invalid, charging such a rate is unreasonable, thus enabling the Commission to order reparations as specified in § 734.

AT&T misapprehends the importance of adhering to the Commission's established procedures for instituting rate increases. Having failed to follow the proper procedural rules and having charged invalid rates, AT&T does not have a second opportunity to prove that the procedurally invalid rates nevertheless meet our ratemaking standards for reasonableness. A valid, i.e., not subject to reparations, rate must be approved by the Commission as required by § 454 and be reasonable as required by § 451. A rate which fails either standard violates Part 1 of the PU Code and is thus subject to reparations. The Commission clearly found that the rate increase reflected in AL 254 failed to meet § 454's requirement because the Commission did not approve it either through an application or an advice letter. D94-11-026 at Findings of Fact 4 and 5. Thus, the Commission concluded, consistent with § 734, that "all amounts collected by AT&T since July 1, 1992, in excess of the rates in effect prior to that date are subject to refund." Accordingly, complainants need not prove that the procedurally defective rate was also unreasonable. The 1994 decision created a refund obligation.

B. Did AL 349 Close The Refund Period?

On December 23, 1993, AT&T filed AL 349 to "establish separate schedules for calls placed utilizing Coin-Paid Operator Station and Coin-Paid Person-to-Person Service" and to "change the initial minute rate period from one minute to three minutes." The tariff sheet attached, Schedule Cal. P.U.C. No. PL-T, Price List, 7th Revised Check Sheet A, reflected the rates AT&T sought through AL 254.

AT&T contends that AL 349, because it reflected the rates at issue in this proceeding, caused the Commission to approve those rates through the advice letter process. As such, AT&T concludes, any refund period must end on the date of AL 349's approval, January 24, 1994.

Complainants and ORA dispute AT&T's analysis and state that AL 349 did not purport to make any rate changes at all, other than the impact of imposing a three-minute minimum on telephone calls. As such, the date it was allowed to go into effect should have no bearing on any refund period. Complainants contrast AT&T's estimate of the revenue impact of AL 349, \$960,000, with AT&T's estimate of the AL 254 increases, \$5.7 million, as further demonstration of the limited affects of AL 349.

AT&T's own filings clearly demonstrate the absence of any intention to implement the rate changes reflected in AL 254. The advice letter cover letter quoted above states only a request to establish separate schedules and change the initial rate period. The letter goes on to note that "except as stated above, this filing will not increase any rate or charge." No mention is made anywhere of the imposition of the \$1.05 surcharge on station-to-station calls or any other rate increases made by AL 254.

In a letter from AT&T's John Sumpter to the Chief of the Commission's Telecommunications Branch, dated January 11, 1994, AT&T

emphatically states that "the only price increase in Advice Letter 349 results from the change of the rate period from one minute to three; there is no 'hidden' rate increase associated with this Advice Letter."

We should take AT&T's word for the effects of AL 349. See Rule 1 of the Commission's Rules of Practice and Procedure. To the extent AL 349 established separate schedules for calls placed utilizing Coin-Paid Operator Station and Coin-Paid Person-to-Person Service and changed the initial minute rate period from one minute to three minutes, the advice letter is valid and effective. Any effects beyond that would violate General Order (GO) 96A, III, C, which requires that an advice letter "call attention to each increase or decrease in rate or charge, or change in condition which may result in an increase or decrease, more or less restrictive conditions, or withdrawal of service." As AT&T stated, "there is no 'hidden' rate increase." Therefore, AL 349 did not approve the unacknowledged increases in AL 254.

In conclusion, the Commission determined that AL 254 did not validly increase rates in D.94-11-026. Here, we find that AL 349 similarly did not effect a valid rate increase. Because AT&T continues to charge these invalid rates, the refund period begins with the implementation date of AL 254 and continues to run. AL 349 did not close the refund period.

3. Determining The Final Refund Amount

A. AT&T's Refund Calculations

In its response to the ALJ's ruling, AT&T calculated that the overcollections totaled \$27,290,369, with interest through December 31, 1997. A complete accounting would also require adding to this amount the overcollections for the period January 1, 1998, through the date that AT&T changes its interLATA intrastate rates in compliance with this order and interest on the outstanding balance during the refund period.

B. Practical and Equitable Considerations

At oral argument, the parties discussed at length the practical and equitable issues raised by a refund of more than \$27 million in the coin paid payphone market. Complainant Ortega's counsel, while agreeing with the amount of the refund, stated that because such a refund would require AT&T to charge an extremely low rate, other payphone service carriers would have to meet that below-cost price which would have the effect of cutting all such carriers' revenue and potentially driving some carriers from the market. Complainant's counsel recommended that the Commission seek legislation which would allow it to distribute the bulk of the refund to charitable institutions. ORA's counsel agreed that a refund of this size would cause serious dislocations in the payphone market.

Counsel for the CPA explained such a low rate would also harm owners of payphones, in addition to those carriers that provide service to payphones. Payphone owners, other than local exchange companies, are compensated based on a share of coin revenue generated from the payphone. Ordering AT&T to charge an extremely low rate has the effect of decreasing the compensation received by these payphone owners. Counsel suggested that these owners would immediately switch away from AT&T for long distance service.

Counsel from AT&T agreed and stated his belief that the effects on the coin paid payphone industry, which is already suffering from prepaid phone card competition, of this refund would be that AT&T would never be able to make the refund because their market share would dwindle.

All parties offered equitable arguments. Both ORA and complainant pointed out that AT&T has allowed the size of this refund to grow steadily over the years due to its steadfast refusal to file an application or advice letter seeking prospective approval of the rate increase. ORA correctly observed

that AT&T may indeed be estopped by laches from objecting to the size of the refund caused by the passage of time.

AT&T contended that the size of the refund was caused by the Commission's failure to process this complaint and rehearing application in a timely fashion. AT&T also noted that the genesis of its original advice letter filing was cooperation with the Commission's objective of bringing competition to the payphone market. AT&T also pointed out that in D.93-02-010 the Commission authorized it to implement major rate increases by advice letter, the very actions complained of here, only seven months after AT&T filed AL 254.

CPA observed that the size of the refund was out of proportion to AT&T's failings.

The practical and equitable considerations here suggest a substantial reduction in the refund we order AT&T to pay. As a foundational matter, we observe that the reparations statute, § 734, is discretionary, "the Commission may order that the public utility make due reparation." (emphasis added). Thus, the Legislature has afforded us the latitude to determine the exact amount of reparations AT&T shall make.

The practical considerations discussed above loom large over this matter. The Commission has no interest in disrupting a functioning market with a large refund, absent the most compelling circumstances, which are certainly not apparent here. Should we determine that AT&T should disgorge the entire refund amount and that it is not feasible to make the refund to current customers without untoward results, the state treasury is a possible beneficiary. Code of Civil Procedure § 1519.5.

The equitable factors pull both ways. AT&T could have limited the size of this refund with a simple advice letter filing any time after the Commission issued D.93-02-010. Such a filing would have bounded the refund

period by approving the rate increase on a prospective basis. The Commission could have also limited the size of the refund if it had more expeditiously resolved this matter.

If AT&T had filed such an advice letter immediately upon authorization, AT&T's refund obligation would have been capped at \$3.1 million, including interest through the February 1993. AT&T's rationale for failing to take this simple step was not well-stated at oral argument. At least one other Commission-regulated entity, when confronted by similar facts, almost immediately sought Commission authorization, on a prospective basis. See United Parcel Service, 48 CPUC 2d 1 (headnote only)(Decision 93-02-001)(1993).

Of the amounts which AT&T has collected from its customers, the pre-March 1993 amounts are clearly beyond its authority. After that date, AT&T could have increased its rates via the advice letter process.

In consideration of these practical and equitable factors, we find that AT&T's reparations obligation should be reduced to the amount it collected prior to March 1993, with interest through the date of distribution, currently estimated to be about \$4.5 million.

4. Distributing the Refund

The Commission distributes refunds to prior customers, where practicable, and if not practicable, to current customers. As the users of coin payphones are anonymous, there are no means to distribute the refund to prior users. The simplest way to distribute the refund to current coin payphone users is through reduced charges for current services. AT&T has proposed to reduce its intrastate interLATA rate to 25 cents per minute to accomplish the refund.

5. Accounting for the Refund

AT&T is directed to determine the soonest practicable date that it can reasonably implement the refund rate. AT&T shall include interest on the

outstanding amount to be refunded using the methodology set out in the February 11, 1998 ALJ ruling, modified as follows. The interest rate used for the period January 1, 1998, through the final refund period shall be the average rate that was calculated for the period July 1992 through December 1997.

AT&T shall maintain a thorough accounting, updated at least monthly, to show the actual amount refunded. The basis for determining the amount refunded shall be the difference between the refund rate, 25 cents, and "average revenue per billed minute" in 1997 as reported in AT&T's response to the ALJ's February 11, 1998, ruling. Accordingly, AT&T may not file any advice letter to change its interLATA intrastate coin payphone rates, until the refund has been fully distributed pursuant to this order.

AT&T shall report its progress on distributing the refund by filing and serving a report to the Director of the Telecommunications Division every six months, beginning six months after the effective date of this order. In addition, AT&T shall file and serve a compliance statement no later than 30 days after the effective date of this order describing the actions it has taken and its plans for implementing the requirements of this decision.

6. Discontinuance of InterLATA Intrastate Service

Should AT&T decide to cease providing coin paid interLATA, intrastate service, AT&T shall notify the Commission in writing by letter addressed to the Director of the Commission's Telecommunications Division no later than 90 days prior to the service being discontinued. AT&T shall file an advice letter no later than 30 days after ceasing to provide such service which shall contain the final accounting of the amount refunded. AT&T shall issue a check for any outstanding balance payable to the General Fund of the State of California and shall provide proof of such payment in the advice letter.

Findings of Fact

1. AT&T has been charging the rates reflected in AL 254 since July 1, 1992.
2. In D.94-11-026, the Commission determined that the rate increase reflected in AL 254 was invalid and all amounts collected in excess of rates in effect prior to July 1, 1992, are subject to refund.
3. In D.95-06-061, the Commission stayed AT&T's refund obligation.
4. On December 23, 1993, AT&T filed AL 349 to "establish separate schedules for calls placed utilizing Coin-Paid Operator Station and Coin-Paid Person-to-Person Service" and to "change the initial minute rate period from one minute to three minutes." The tariff sheet attached, Schedule Cal. P.U.C. No. PL-T, Price List, 7th Revised Check Sheet A, reflected the rates AT&T sought through AL 254.
5. AL 349's cover letter stated only a request to establish separate schedules and change the initial rate period and noted that "except as stated above, this filing will not increase any rate or charge." No mention is made anywhere of the imposition of the \$1.05 surcharge on station-to-station calls or any other rate increases made by AL 254.
6. A letter from AT&T's John Sumpter to the Chief of the Commission's Telecommunications Branch, dated January 11, 1994, AT&T stated that "the only price increase in Advice Letter 349 results from the change of the rate period from one minute to three; there is no 'hidden' rate increase associated with this Advice Letter."
7. Through December 31, 1997, AT&T's refund obligation with interest was \$27,290,369.
8. All parties agreed that a refund of this magnitude would cause severe disruptions in the payphone market.

9. AT&T did not avail itself of the advice letter process approved in D 93-02-010 to obtain prospective Commission authorization for the invalid AL 254 rate increase.

10. AT&T has proposed to charge 25 cents per minute for its intrastate interLATA calls to distribute the refund to current customers.

Conclusions of Law

1. Charging and collecting an invalid rate is unreasonable.

2. PU § 734 allows the Commission to order reparations where 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."

3. Section 454 of the PU Code requires that all rate increases be approved by the Commission.

4. The rate increase reflected in AL 254 was not approved by the Commission and is therefore unreasonable and subject to reparations as specified in § 734.

5. A valid rate must be approved by the Commission as required by § 454 as well as be "just and reasonable" as required by § 451.

6. A charged rate which fails to meet either § 454 or § 451 violates Part 1 of the PU Code and is thus subject to reparations as set out in §734.

7. To the extent AL 349 established separate schedules for calls placed utilizing Coin-Paid Operator Station and Coin-Paid Person-to-Person Service and changed the initial minute rate period from one minute to three minutes, the advice letter is valid and effective.

8. GO 96A, III, C, requires that an advice letter "call attention to each increase or decrease in rate or charge, or change in condition which may result in an increase or decrease, more or less restrictive conditions, or withdrawal of service."

9. In AL 349 AT&T did not call attention to the substantial rate increases previously but invalidly included in AL 254.

10. The invalid AL 254 increases surreptitiously included in AL 349 were similarly invalid because AT&T did not "call attention" to the increase and in fact denied its existence in both the cover letter and subsequent communication with Commission staff.

11. AT&T was authorized by D.93-02-010 to implement major rate increases via the advice letter process the very action which AT&T invalidly attempted in AL 254.

12. Practical and equitable considerations support limiting AT&T's reparations obligation to pre March 1993 overcollections, with interest.

13. This is a complaint case not challenging the reasonableness of rates or charges, so this decision is issued in an "adjudicatory" proceeding as defined in § 1757.1.

14. Any portion of the modified reparations amount not refunded to customers escheats to the State of California as provided in Code of Civil Procedure § 1519.5.

O R D E R

Therefore, IT IS ORDERED that:

1. The stay established in Decision 95-06-061 is lifted.
2. AT&T Communications of California, Inc. (AT&T) shall refund the amount it overcollected prior to March 1993, \$3.1 million, and shall include interest on the outstanding amount to be refunded using the methodology set out in the February 11, 1998, Administrative Law Judge (ALJ) ruling, as modified by this decision.

3. AT&T shall maintain a thorough accounting, updated at least monthly, to show the actual amount refunded. The basis for determining the amount refunded shall be the difference between the refund rate, 25 cents, and "average revenue per billed minute" in 1997 as reported in AT&T's response to the ALJ's ruling.

4. AT&T shall not file any advice letters to change its interLATA intrastate coin payphone rates until the refund has been fully distributed pursuant to this order.

5. AT&T shall report its progress on distributing the refund by filing and serving a report to the Director of the Telecommunications Division every six months, beginning six months after the effective date of this order.

6. Should AT&T decide to cease providing coin paid interLATA, intrastate service, AT&T shall notify the Commission in writing by letter addressed to the Director of the Commission's Telecommunications Division no later than 90 days prior to the service being discontinued. AT&T shall file an advice letter no later than 30 days after ceasing to provide such service which shall contain the final accounting of the amount refunded. AT&T shall issue a check for any outstanding balance payable to the General Fund of the State of California and shall provide proof of such payment in the advice letter.

7. AT&T shall file and serve a compliance statement no later than 30 days after the effective date of this order describing the actions it has taken and its plans for implementing the requirements of this decision.

8. This docket will be closed with the filing of AT&T's compliance statement.

This order is effective today.

Dated October 8, 1998, at Laguna Hills, California.

RICHARD A. BILAS

President

P. GREGORY CONLON

JESSIE J. KNIGHT, JR.

HENRY M. DUQUE

JOSIAH L. NEEPER

Commissioners