

Decision 99-08-015 August 5, 1999

**BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA**

Pacific Bell (U 1001 C),

Complainant,

vs.

AT&T Communications of California, Inc.  
(U 5002 C),

Defendant.

Case 98-11-004  
(Filed November 2, 1998)

**OPINION**

**Summary**

The complaint of Pacific Bell (Pacific) is denied without prejudice.

**Background**

On November 2, 1998, Pacific filed this complaint alleging that AT&T Communications of California, Inc. (AT&T) has "illegally withheld payment for Feature Group D switched access services in the amount of approximately \$2.3 million." The disputed charges are for "switched access charges incurred by AT&T callers who do not purchase local exchange service from AT&T, but use AT&T to make local calls." Specifically, Pacific alleges that AT&T has violated Pacific's Schedule Cal. P.U.C. No. 175-T, section 6.8 as well as Pub. Util. Code § 451 and § 453.

Pacific's prayer for relief asks that the Commission:

1. Issue a finding that AT&T has violated Schedule Cal. P.U.C. No. 175-T, Section 6.8 by failing to remit access charges to Pacific for incidental local traffic carried on Pacific's access facilities;
2. Issue a finding that AT&T's violations alleged in Pacific's complaint were intentional and willful and without justification;
3. Issue a finding that the reasons advanced by AT&T for refusing to pay Pacific were false and misleading;
4. Issue an order requiring AT&T to remit access charges to Pacific for the amounts withheld to date (approximately \$2.3 million), plus applicable late payment charges;
5. Issue an order requiring AT&T to remit access charges to Pacific on a prospective basis;
6. Order such further relief as the Commission finds just and reasonable.

On December 16, 1998, AT&T filed an answer to Pacific's complaint.

AT&T asserts that Pacific and AT&T agreed to resolve the instant dispute by arbitration. Further, AT&T states that AT&T and Pacific fully participated in an arbitration hearing and that the arbitrator rendered an award in favor of AT&T on February 12, 1998. Thus, in its second affirmative defense, AT&T contends that Pacific's complaint is barred because " Pacific agreed, pursuant to the ICA [Interconnection Agreement], to final and binding arbitration of the same matter raised in the complaint and in fact arbitrated such matter before a private arbitrator." (AT&T's Answer at p. 6.)

On November 10, 1998, AT&T filed an Application to Confirm the arbitration award in the United States District Court for the Northern District of California. Attached to AT&T's answer as Exhibit 1 is a copy of AT&T's Application to Confirm. Exhibit B to the Application to Confirm is a copy of the Arbitrator's Award.

On January 27, 1999, a prehearing conference (PHC) was held in San Francisco. At the PHC, Pacific's attorney stated that:

"...in my [written] Prehearing Conference Statement I tried to be very specific and identify that the issue that we would like resolved by the Commission is whether or not AT&T has a right to a self-help remedy of withholding amounts due under a tariff based on its interpretation of a ruling from another forum, namely the Arbitrator's award; and it's Pacific's view that neither AT&T nor any other customer at Pacific has a right to withhold these types of monies owed if there's a dispute over them. The proper remedy is to deposit them with the Commission until the dispute's resolved or to remit them to Pacific.

"That's the primary issue that we are seeking to deal with in our complaint, and just to be clear, that's not an issue that was ever raised before the Arbitrator in this matter. It's not an issue that's pending in Federal Court so we don't see any threat of relitigating the same issue or inconsistent judgements coming from this Commission and the District Court or this Commission and the Arbitrator.

"We see it as a very narrow question that we're asking the Commission to decide. ...." (PHC -1, Rt. pp. 3-4.) (See also Pacific's written Prehearing Conference statement dated January 22, 1999, at p. 9.)

On February 10, 1999, AT&T filed a Motion to Dismiss Complaint of Pacific Bell (AT&T's Motion). In its motion, AT&T states, among other things, that a binding arbitration award entered on February 12, 1998, that found AT&T not liable for payments of access charges for local traffic carried over Pacific's switched access facilities bars Pacific's complaint. Further, AT&T asserts that on November 10, 1998, AT&T filed an Application to Confirm the arbitration award in U.S. District Court in San Francisco. Consequently, in deference to the proceedings now pending in the U.S. District Court to confirm the arbitration award, AT&T requests that the Commission dismiss Pacific's complaint or stay all proceedings.

On February 25, 1999, Pacific filed a response to AT&T's Motion (Pacific's Response). Pacific's Response acknowledges that "[t]he issue of the refund and the types of calls covered by the award will be determined by the arbitrator." (Pacific's Response at p. 1.)

### **Discussion**

Taking into account Pacific's written PHC statement and verbal PHC statements, Pacific's complaint is unclear and ambiguous.

Rules 9 of the Commission's Rules of Practice and Procedure (Rules) require that a complaint set forth an "...act, or thing done or omitted to be done by any public utility in violation, or claimed to be in violation, of any provision of law or of any order or rule of the Commission...." Rule 10 requires that a complainant state the specific act complained of in ordinary and concise language.

Pacific's complaint does not satisfy the requirements of Rules 9 and 10. In its *written* complaint, Pacific seeks a finding, among other things, that AT&T has violated Pacific's tariffs by failing to remit charges due. On the one hand, Pacific's written complaint requests that the Commission determine the amount of charges due and on the other hand, Pacific has made verbal and written representations that the issue of what charges are due from AT&T is an issue before an arbitrator. Pacific's written and verbal representations are not reconcilable and thus Pacific's complaint is unclear and ambiguous.

Thus, we will dismiss this matter without prejudice to allow Pacific an opportunity, if necessary, to refile its complaint.

### **Comments on Draft Decision**

The draft decision of the ALJ in this matter was mailed to the parties in accordance with Pub. Util. Code § 311(g) and Rule 77.1 of the Rules of Practice and Procedure.

AT&T filed comments on June 24, 1999, in support of the draft decision. On June 24, 1999, Pacific also filed comments to the draft decision. Pacific's comments assert that the draft decision errs in five respects. On June 29, 1999 AT&T filed a reply to Pacific's comments.

First, Pacific asserts that the draft decision is based on the erroneous statement that Pacific's complaint requested the Commission to determine the amount of charges due. Pacific's comments imply that that the amount it alleges is due, approximately \$2.3 million, is not in dispute. Pacific contends that:

"AT&T admitted in Paragraph 9 of its Answer that it had withheld \$2.3 million from access charges owed, thereby acknowledging this as the amount in dispute." (Pacific's comments at page 2.)  
(Emphasis added.)

Pacific's comment strongly suggests that AT&T admits that it owes Pacific \$2.3 million.

However, AT&T's answer does not admit that it owes Pacific \$2.3 million. Instead, AT&T challenges Pacific's right to collect the \$2.3 million and characterizes the \$2.3 million as "charges allegedly due Pacific". (AT&T answer at p. 5, paragraph 9.)

Contrary to Pacific's assertion of error, the Commission is in fact called upon to determine whether Pacific is owed \$2.3 million as it asserts or whether Pacific is owed nothing as AT&T contends. Moreover, Pacific acknowledges that the relief it requested included a Commission order "requiring AT&T to remit access charges to Pacific for amounts withheld to date (approximately \$2.3 million), plus applicable charges."

Further, as a corollary argument to its first contention of error, Pacific notes that both it and AT&T indicated that hearings would not be necessary. Additionally, Pacific notes that the assigned ALJ issued a December 28, 1998,

ruling determining that no hearing was required. Consequently, Pacific concludes that the ruling recognizes that:

“... the Commission would not have to decide any factual issues, such as amount of charges due. The amount owed by AT&T was not an issue to be resolved by the Commission...”

Pacific reads too much into the draft decision. The draft decision does not assert that any factual issues need resolution. Instead, the draft decision implies that it must decide whether Pacific is owed \$2.3 million or \$0. This is not necessarily a factual issue, rather it requires an interpretation of an interconnection agreement between AT&T and Pacific which Pacific admits is an issue before an arbitrator. Thus, contrary to Pacific's claim of error, the determination that an evidentiary hearing is not required is consistent with the draft decision.

Pacific's second major claim of error is based on the argument that the \$2.3 million in dispute is not an amount covered by the arbitration award. Pacific asserts that: “... a refund owed by Pacific to AT&T pursuant to an arbitration award is distinct from the amounts AT&T owes for tariffed services...” Pacific's comments are totally inconsistent with Pacific's February 25, 1999, response to AT&T's motion to dismiss. Pacific's written response stated that:

“[t]he issue of the refund and the types of calls covered by the award will be determined by the arbitrator.” (Pacific's response at p. 1.)  
(Emphasis added.)

Pacific's comments do not identify any error, but further make Pacific's complaint even more inconsistent and ambiguous. Pacific now ask the Commission to find that the amount in dispute is not covered by the arbitrators award when Pacific's prior written pleading clearly asserted that this matter was before an arbitrator.

Pacific's third argument is that the draft ignores the standard for a motion to dismiss. The basis for Pacific's argument is that under Rule 50, the "information disclosed" at a prehearing conference (PHC) is privileged and cannot be used against participating parties. Thus, Pacific concludes that the draft decision erred by relying on statements of Pacific's counsel at the PHC.

Pacific's claim of error lacks merit. Pacific misconstrues Rule 50. Rule 50 does not prohibit the use of all "information disclosed" at a PHC as Pacific states. Rather, Rule 50 attaches a privilege to "facts disclosed" at a PHC. One of the purposes of a PHC is to determine the scope of a proceeding. Thus, parties may be asked to clarify the relief sought. Pacific's comments regarding clarification of its complaint and the relief sought are not "facts" as defined under Rule 50.

Pacific's fourth claim of legal error is that the complaint is not unclear and ambiguous, and it complies with Rules 9 and 10. The basis for Pacific's argument is that the assigned ALJ sua sponte raised the issue of ambiguity rather than AT&T. In going forward with a complaint, the Commission has a duty to determine the scope of the proceeding. Implicit in this duty is an obligation to determine whether a complaint meets the basic requirements of Rules 9 and 10. The fact that AT&T did not raise the issue of ambiguity does not cure the existing deficiencies in Pacific's Complaint.

Pacific's fifth and final claim of error concerns the conclusion of the draft decision that Pacific be allowed an opportunity to refile its complaint subsequent to the U.S. District Court confirmation of the arbitrator's award. The basis of Pacific's claim of error is that the issue of the \$2.3 million claimed is not included in the arbitrator's award. As addressed earlier, Pacific's claim of error clearly contradicts Pacific's February 25, 1999, response to AT&T's motion to dismiss. Pacific's written response stated that:

"[t]he issue of the refund and the types of calls covered by the award will be determined by the arbitrator." (Pacific's response at p. 1.) (Emphasis added.)

Similarly, at the PHC, Pacific's attorney made verbal representations that the issue of covered calls pursuant to the arbitrators award was a matter before the arbitrator. (See PHC transcript pp. 14-15, 19.) Thus, Pacific's final argument also lacks merit.

### **Additional Comments on June 24, 1999, U.S District Court Opinion**

In a letter dated July 1, 1999, Pacific submitted an opinion from the United States (US) District Court dated June 24, 1999, regarding the motion of Pacific to dismiss and the motion of AT&T to confirm arbitration award. Further, Pacific's July 1 letter requested that the Commission take official notice of the decision. In a letter dated July 2, 1999, AT&T responded that nothing in the District Court's opinion should change the result of the pending ALJ draft decision.

On July 14, 1999, the assigned ALJ issued a ruling providing parties an opportunity to file comments on the effect, if any, of the June 24, 1999, US District Court opinion. Both Pacific and AT&T filed comments and reply comments. Pacific states that the scope of the arbitrator's award is an issue to be resolved by the arbitrator. Further, Pacific asserts that: "... the only issue Pacific seeks to have the Commission decide is whether, pending the outcome of the arbitration, AT&T has the legal right to withhold amounts owed for tariffed services." (Pacific's comments at p. 4.) (Emphasis in original.) Further, Pacific believes that the Complaint proceeding should be kept open until the conclusion of the arbitration so that the statute of limitations does not expire on Pacific's right to seek payment for services in the event Pacific prevails on the arbitration. Consequently, Pacific concludes that: "given the statute of limitations... this complaint should be stayed pending resolution of the issues to be decided by the arbitrator." (Pacific's comments at p. 7.)



Although Pacific's comments clarify the relief sought, consistent with verbal statements made by counsel at the PHC, the written complaint still requests inconsistent relief. As to the substance of Pacific's written complaint, we still find it ambiguous.

With regards to the procedural concerns raised by Pacific, we address those matters here. However, as a general matter, we are disappointed that two sophisticated telecommunications companies can not resolve the "self-help" and statute of limitations issues raised by Pacific. Further, we are concerned about the strain imposed on limited Commission resources by Pacific's decision to expand its dispute with AT&T to a different forum rather than first attempt to seek resolution before the arbitrator on how to treat disputed monies.

With regards to monies that Pacific alleges are owed, under the current circumstances, the arbitrator should decide how disputed monies billed should be treated. Unless Pacific and AT&T can reach mutual agreement, Pacific and AT&T should return to the arbitrator and ask for a determination as to how disputed monies should be treated. With regard to Pacific's concern regarding the statute of limitations, rather than hold open this proceeding pending the resolution of the arbitration, we will toll the statute of limitations on rights Pacific may have to seek payment for services in the event Pacific prevails in the arbitration.

### **Findings of Fact**

1. The written complaint of Pacific is ambiguous and unclear in light of the representations made at the Prehearing Conference held on January 27, 1999.
2. Pacific's complaint and comments raise procedural concerns regarding withholding of monies and the statute of limitations.

**Conclusions of Law**

1. Pacific's complaint, in light of the whole record, fails to state a valid cause of action.

2. Pacific should raise in its arbitration its procedural withholding of monies concern.

3. The statute of limitations should be tolled on Pacific's right to seek payment for service in the event Pacific prevails on the arbitration rather hold open a proceeding pending resolution of arbitration.

**O R D E R**

**IT IS ORDERED that:**

1. Unless Pacific Bell (Pacific) and AT&T Communications of California, Inc. (AT&T) reach mutual agreement within 15 days on how to treat disputed monies owed, Pacific and AT&T shall ask the arbitrator to resolve how disputed monies shall be treated. Pacific and AT&T shall abide by the arbitrator's decision on how to treat disputed monies owed pending the outcome of the arbitration.

2. The statute of limitations, if any that may apply at the Commission, is tolled for any claim that Pacific may have for monies found by the arbitrator to be owed to Pacific and withheld by AT&T.

3. AT&T's motion to dismiss is granted without prejudice.
4. This proceeding is closed.

This order is effective today.

Dated August 5, 1999, at San Francisco, California.

RICHARD A. BILAS  
President  
HENRY M. DUQUE  
JOSIAH L. NEEPER  
JOEL Z. HYATT  
CARL W. WOOD  
Commissioners