STATE OF CALIFORNIA EDMUND G. BROWN J

PUBLIC UTILITIES COMMISSION
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3298

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August 1, 2017

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TO PARTIES OF RECORD IN CASE 16-12-008

This is the proposed decision of Administrative Law Judge Cooke. Until and unless the Commission hears the item and votes to approve it, the proposed decision has no legal effect. This item may be heard, at the earliest, at the Commission's September 14, 2017 Business Meeting. To confirm when the item will be heard, please see the Business Meeting agenda, which is posted on the Commission's website 10 days before each Business Meeting.

Parties of record may file comments on the proposed decision as provided in Rule 14.3 of the Commission's Rules of Practice and Procedure.

/s/ DARWIN E. FARRAR
Darwin E. Farrar
Acting Administrative Law Judge

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Attachment

Decision **PROPOSED DECISION OF ADMINISTRATIVE LAW JUDGE COOKE**
(Mailed 8/1/2017)

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Wave Community Newspapers, Inc. Complainant, vs. U.S. TelePacific Corp., dba TelePacific Communications (U5721C), Defendant.	Case 16-12-008 (Filed December 1, 2016)

DECISION GRANTING MOTION TO DISMISS

Summary

This decision grants the motion of U.S. TelePacific Corp., dba TelePacific Communications (TelePacific or Defendant) to dismiss the complaint of Wave Community Newspapers, Inc. (Wave or Complainant) for failure to identify a cause of action upon which the Commission may grant relief. Wave requests the Commission order TelePacific to refund amounts billed and collected by TelePacific for unused and unneeded services and facilities for the period from January 2006 to August 2016.

1. Background

Wave Community Newspapers, Inc. (Wave or Complainant) is a California business that owns and publishes eight different newspapers serving various minority and other media-underserved communities in Los Angeles County.

Beginning in approximately 2001, Complainant entered into series of triennial service agreements with U.S. TelePacific Corp., dba TelePacific Communications (TelePacific or Defendant). During that period of time, Complainant received the services described in the terms of the agreement at the rates stated in the contract. The last renewal occurred in June 2016, along with adjustments on the amount of services and facilities provided following Complainant's request.

The parties attempted to resolve their matter with the Commission's Consumer Affairs Branch (CAB). CAB did not find any violations of Commission rules or regulations by Defendant. The complaint was filed on December 1, 2016 to seek refund from Defendant of allegedly overbilled charges for telecommunications services and facilities provided to Complainant.

Defendant filed its Answer on March 1, 2017, which was followed by a Motion to Dismiss on March 13, 2017. On March 27, 2017, Complainant filed its Opposition to the Motion to Dismiss, and Defendant replied on April 3, 2017. The parties participated in the Commission's Alternative Dispute Resolution process but were unable to reach an agreement.

Complainant alleges that, under the terms of the service agreement, TelePacific made implied representations to provide tailored services to meet Wave's needs. To this extent, Complainant avers that TelePacific owed a duty and obligation to monitor the services and facilities it provided to Wave and to advise Wave on the amount of facilities and services needed. Complainant claims to have relied on TelePacific's implied representations which it argues were breached in 2006 when TelePacific provided Complainant with an inappropriate level of services compared to Complainant's evolving needs. Particularly, Complainant argues that as a result of the downsizing of its business in approximately 2006, it should have been advised by its TelePacific representative to reduce unused services, namely high speed and regular telephone lines. Consequently, Complainant seeks refund of the amounts billed and collected by TelePacific for what it asserts were unused and unneeded services and facilities for the period from January 2006 to August 2016.

2. The Motion to Dismiss

Defendant moves to dismiss on four grounds.

2.1. Failure to State a Cause of Action Under § 1702

Pursuant to Pub. Util. Code § 1702, a complaint must show an "act or thing done or omitted to be done by any public utility, including any rule or charge heretofore established or fixed by or for any public utility, in violation, or claimed to be in violation, of any provision of law or of any order of the Commission."

Defendant states that Complainant does not meet the statutory requirement because the Complaint fails to identify any violation to any statute, provision of law, order or rule of the Commission. As such, Defendant argues that the Complaint does not assert that Defendant did not deliver the services requested under the service agreement, nor that the services were furnished at a different rate than agreed to, nor that there was a failure in the performance, nor that Complainant was not provided with the opportunity to review its monthly bills, nor that those bills were unclear.

Defendant contends that telecommunications providers are under no duty or obligation to monitor the usage of its customers and initiate adjustments in accordance to their usage.

2.2. Commission Lacks Jurisdiction Over the Services Provided

According to TelePacific, the services provided to Wave include interstate and international telecommunication service and Voice over Internet Protocol (VoIP) service.

TelePacific argues that part of the refund claimed potentially encompasses interstate or international calls. Therefore, TelePacific challenges the jurisdiction of the Commission on the basis that such calls are within the jurisdiction of the Federal Communications Commission (FCC).

TelePacific argues that beginning in 2012 the services provided to Wave include VoIP which the Legislature has proscribed the Commission to regulate or enforce pursuant to Pub. Util. Code § 710. TelePacific further argues that Wave's complaint does not meet any of the exceptions provided by Pub. Util. Code § 710(c) nor the requirement of Pub. Util. Code § 710(d).

2.3. Commission Lacks Jurisdiction to Grant Damages

According to TelePacific, the Commission lacks jurisdiction to award refunds to Wave of sums paid to TelePacific for services unused or needed because it would amount to award consequential damages where the Commission is limited to the award of reparations as monetary relief. TelePacific asserts that Wave seeks consequential damages because its claims are unrelated to TelePacific's provision of telecommunications services at improper rates.

2.4. Statute of Limitations Bars Complainant's Claims

According to TelePacific, Complainant's claims are barred by the statute of limitations. Pub. Util. Code § 735 and § 736 respectively provide for two years and three years limitation period from the time the cause of action accrues to file with the Commission. TelePacific argues that damages sought by Complainant are for monthly services provided as early as 2006, which is prohibited by the statute of limitations. Further, TelePacific states that Pub. Util. Code § 736 precludes the Commission from considering refunds with respect to any service it provided to Wave before December 2013.

3. Discussion and Analysis

3.1. The Commission's Standard of Review for Motion to Dismiss

The Commission standard for dismissing complaints has been summarized as follows:

> On a motion to dismiss a complaint, the legal standard against which the sufficiency of the complaint is measured is whether, taking the well-pleaded factual allegations of the complaint as true, the defendant is entitled to prevail as a matter of law (*e.g.*, *MCI Telecommunications Corp. v. Pacific Bell*, D.95-05-020, 59 Cal. PUC 2d 665, 1995 Cal. PUC. LEXIS 458, at *29-*30, citing *Burke v. Yellow Cab Co.* (1973) 76 Cal. PUC 166.)

By assuming that the facts as alleged in the complaint are true for the purpose of deciding whether to grant a motion to dismiss, we assume that Complainant will be able to prove everything alleged in the Complaint. We do not accept as true the ultimate facts, or conclusions.

3.2. Does the Complaint Meet § 1702 Standards?

Considering that Complainant has not identified, in support of its claims, any violation of law or Commission rule or order, the Commission cannot grant relief because Pub. Util. Code § 1702 standards are not satisfied. (*e.g.*, *Labrada v. Southern California Edison*, D.13-07-047, 2013 Cal. PUC LEXIS 387 at *7; *Rudder v. MCI Worldcom*, D.04-07-005, 2004 Cal. PUC LEXIS 354 at *5; *Colley v. PG&E*, D.02-11-005, 2002 Cal. PUC LEXIS 706, *2-3; *Allen v. Southern California Edison Company*, Decision 16-01-018, 2016 Cal. PUC LEXIS 25 at *13–14.)

The failure to identify a statute or a Commission decision cannot be cured by the mere assertion that telecommunications service providers owe a duty to deal with their customers in good faith and in a just and reasonable manner.

3.2.1. Defendant's Conduct Under Just and Reasonable Standard

Complainant suggests that Defendant is not acting in a just and reasonable manner because it did not actively engage in the assessment of Wave's business performance to adapt the level of service needed by Wave. Rather, customers are responsible for tracking and administering their usage to make adjustments as they see fit for their business's needs.

Complainant has not offered any rebuttal to the fact that there is no statute or Commission decision compelling telecommunications providers to proactively monitor their customers' accounts. In this respect, the Commission cannot sanction the conduct of utilities providers in the absence of a violation of any law or Commission rule or order.

Although the Court of Appeal stated in *Pacific Bell Wireless, LLC v. Public Utilities Commission*, 140 Cal. App. 4th 718, 744 (2006), that "a company's actions can be unjust and unreasonable without a specific rule or statute prohibiting it", it does not amount to a waiver of the requirement for the complaint to establish a violation of a law or Commission decision under Pub. Util. Code § 1702. In fact, in *Pacific Bell Wireless*, the Commission found that the defendant had violated Pub. Util. Code § 451, 702 and 2896. Similarly, to be heard by this Commission, Complainant should have alleged that TelePacific violated some laws, Commission orders or rules, which it did not.

3.2.2. Defendant's Conduct under Good Faith and Fair Dealings Standard

Complainant stretches the terms and intent of Pub. Util. Code § 1702 to read in a duty of good faith and fair dealings that would presumably allow the Commission (1) to hear a case despite no violation of law or rule, and (2) to sanction conduct of Defendant despite no provision in the contract directing Defendant to actively monitor usage and needs of Complainant. Complainant has not offered any rebuttal to the fact that the contract with Defendant, which was freely negotiated and agreed to, does not contain any provision directing Defendant to actively monitor Complainant's usage and needs.

The covenant of good faith and fair dealing is a standard to evaluate the conduct of a party within the scope of the terms of the contract, it cannot be used to create new obligations under the contract.

> "It is universally recognized the scope of conduct prohibited by the covenant of good faith circumscribed by the purposes and express terms of the contract". *Carma Developers, Inc. v. Marathon Development California, Inc*. (1992) 2 Cal. 4th 342, 373 (citing *Foley v. Interactive Data Corp*. (1988) 47 Cal.3d 654 (1988)).

In this context, the covenant of good faith cannot simultaneously assess the standard of the conduct and create the underlying contractual obligation. If there is no interference with the purpose or rights of the contract, the good faith and fair dealing claim must be dismissed (e.g. *County Sanitation District No. 2 of Los Angeles County v. Southern California Edison Company*, 2001, D.01-08-025, Cal. PUC at *5). Consequently, Complainant's construction of Pub. Util. Code § 1702 and the covenant of good faith and fair dealing is impermissible under current legal authorities.

4. Conclusion

The record before us does not identify any law or Commission decision supporting Wave's contention that telecommunications providers have a duty to monitor the usage of their customers. The mere fact that Complainant ultimately did not need and did not use the services it contracted for with the Defendant is not sufficient for this Commission to grant relief. The allegation that telecommunications service providers owe a duty to deal with their customers in good faith and in a just and reasonable manner does not cure this defect of the complaint. For these reasons, Complainant's Motion to Dismiss is granted.

Since the Complaint fails to state a cause of action for which relief can be sought under Pub. Util. Code § 1702, this decision need not, and does not, reach the other elements raised in Defendant's Motion to Dismiss.

5. Need for Hearing

Because we dismiss the Complaint, no hearings are necessary.

6. Comments on Proposed Decision

The proposed decision of Administrative Law Judge Cooke in this matter was mailed to the parties in accordance with Section 311 of the Public Utilities Code and comments were allowed under Rule 14.3 of the Commission's Rules of Practice and Procedure. Comments were filed on ___________ , and reply comments were filed on _________________.

7. Assignment of Proceeding

Martha Guzman Aceves is the assigned Commissioner and Michelle Cooke is the assigned ALJ in this proceeding.

Findings of Fact

1. Wave entered into a series of triennial telecommunication services and facilities agreements with TelePacific.

2. Wave received the services and facilities pursuant to the contract terms.

3. Wave seeks refund of amounts billed and collected by TelePacific for services and facilities it asserts were unused and unneeded for the period from January 2006 to August 2016.

4. Complainant has not shown any violation of law or rule over which this Commission can grant relief.

Conclusions of Law

1. Telecommunications providers have no duty to monitor the usage of their customers.

2. The Complaint does not satisfy the requirement of Pub. Util. Code § 1702 that complainants set forth an "act or thing done or omitted to be done by any public utility, including any rule or charge heretofore established or fixed by or for any public utility, in violation, or claimed to be in violation, of any provision of law or of any order of the Commission."

3. No hearing is necessary.

4. The Complaint should be dismissed for failure to state a claim under § 1702.

O R D E R

IT IS ORDERED that:

1. No hearings are necessary.

2. The Complaint of Wave Community Newspapers, Inc. is dismissed with prejudice.

3. Case 16-12-008 is closed.

This order is effective today.

Dated ______________________________, at Sacramento, California.