



BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

FILED

04-26-10

04:59 PM

California Building Industry Association,

Complainant,

vs.

Pacific Bell Telephone Company d/b/a AT&T
California (U 1001 C)

Defendant.

Case No. 09-09-016

**MOTION BY PACIFIC BELL TELEPHONE COMPANY (U 1001 C)
d/b/a AT&T CALIFORNIA TO STRIKE PORTIONS OF THE COMPLAINT**

I. INTRODUCTION.

As authorized by Administrative Law Judge (“ALJ”) Myra Prestidge at the April 15, 2010 prehearing conference in this proceeding, Pacific Bell Telephone Company, doing business as AT&T California (“AT&T”), hereby moves to strike the portions of the complaint seeking relief not only on behalf of CBIA members but also on behalf of all similarly situated “applicants.” Complainant’s attempt to represent not just CBIA members who applied to have AT&T convert aerial to underground facilities but also all similarly situated applicants is an attempt to represent a class (collectively “undergrounding applicants”).¹ As discussed below, the Commission itself has recognized that it has no jurisdiction to entertain a class action. As such, the portions of the complaint seeking relief not just on behalf of CBIA members but also on behalf of all other applicants should be stricken.

¹ Although the Complaint does not define the class with any certainty, it appears the class CBIA seeks to represent is a class of all applicants who may have been harmed by the practices alleged in the complaint.

II. DISCUSSION.

In its Amended Complaint, CBIA alleges that AT&T “changed its previous practice by which CBIA members paid for the replacement of aerial facilities with underground facilities under Rule 32 of AT&T California’s Tariff.”² According to the Amended Complaint, “[t]his changed practice and condition has resulted in new, unexpected, and increased charges for CBIA members...in violation of Public Utilities Code Section 454 and General Order 96-B.”³ The Amended Complaint then purports to seek refunds not just “on behalf of its members” but also on behalf of “all similarly situated applicants...”⁴

The Commission has long recognized that it has no jurisdiction to entertain a class action. For example, in D.88-11-028, the complainant alleged that Pacific Bell had been misrepresenting its Touch-Tone service to end users by claiming it permits faster dialing. The complainant argued this representation was false and sought an order requiring the payment of refunds on behalf of himself and all Touch-Tone subscribers. The Commission denied the complainant’s request to represent the interests of a class, concluding that “[n]either the PU Code nor our rules contain any provisions for class action complaints...”⁵

AT&T anticipates that CBIA will attempt to rely on the Commission’s Decision No. 08-08-001⁶ to support its position. There, CBIA brought a complaint against Southern California Edison (“SCE”) alleging that SCE overcharged developers under SCE’s line extension tariff. The Commission agreed with CBIA and, because the tariff and challenged practice were generally applicable to developers, the Commission directed SCE to refund all “developers” that had been overcharged under SCE’s tariff. The Commission’s determination that the decision should apply not just to CBIA members but to all developers was the result of the fact that

² Amended Complaint, p. 1.

³ *Id.* at 2.

⁴ *Id.*

⁵ *Sawaya v. Pacific Bell*, Decision No. 88-11-028, *Opinion*, 29 Cal. P.U.C.2d 485 (1986), *mimeo*, p. 5. *See also Actions of Estelle Nunemaker, et al. v. PT&T Co. and Henry Wood, et al. v. PG&E Co.*, Decision No. 76065, *Opinion*, 70 Cal. P.U.C. 38, 39 (1969) (“...there are no statutory provisions authorizing class actions before the Commission.”).

⁶ *California Building Industry Assoc. v. Southern California Edison*, Decision No. 08-08-001, *Decision Granting Complaint*, 2008 WL 3213125 (Cal.P.U.C. Aug. 1, 2008).

Commission decisions (like any decision of a court) generally are applicable to all similarly situated persons.⁷ It does not stand for the proposition that a complainant can bring its complaint on behalf of a group or class, which is what CBIA seeks to do here.

Even if it were permissible to bring a complaint before the Commission on behalf of a group or class, the complainant would have to justify class treatment by establishing an ascertainable class and a well-defined community of interest among the class members.⁸ Here, it is clear from the face of the Amended Complaint that CBIA could not do so for a number of reasons. First, the factual circumstances of each member of the purported class could vary significantly. For example, some undergrounding applicants may be developers, some may be subcontractors, and some may be individuals seeking to sink the telephone poles and aerial facilities on their street. Some may have paid AT&T's undergrounding invoices, while others may not have. The legal framework also could vary based on the varying factual circumstances of each undergrounding applicant. For example, the provisions of Section 66473.6 of the Government Code may apply to some purported class members but not to others.⁹ Similarly, some undergrounding applicants may have contracts with AT&T addressing the manner in which they would be billed, while others may have contracts with different terms. In short, CBIA would be unable to satisfy the requirement that common questions of fact and law predominate over individualized ones, as the claims and factual circumstances of each undergrounding applicant would vary widely.

⁷ See, e.g., *D.76065, supra*, 70 Cal. P.U.C. at 39 (“As a general rule class actions are not necessary because the statutory provisions dealing with discrimination...make available the results of any Commission decision to all persons similarly situated.”). It was also the result of the fact that SCE did not challenge CBIA's efforts to represent the interests of a class through any motions or filings, as AT&T seeks to do here.

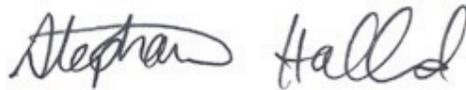
⁸ See, e.g., California Civil Procedure (“CCP”) Code § 382 and Rule 23 of the Federal Rules of Civil Procedure. Because the Commission has no jurisdiction to entertain complaints on behalf of a group or class, there are no Commission rules setting forth criteria for establishing a class. As such, for the purposes of this argument, the standards under state and federal law are instructive.

⁹ Cal. Gov. Code § 66473.6 (“Whenever a city or county imposes...a requirement that necessitates replacing, undergrounding, or permanently or temporarily relocating existing facilities of a telephone corporation or cable television system, the developer or subdivider shall reimburse the telephone corporation or cable television system for all costs for the replacement, undergrounding, or relocation. All these costs shall be billed after they are incurred...”).

AT&T does not dispute that the Commission's resolution of the complaint may have applicability to others who applied to have AT&T convert aerial to underground facilities. Indeed, it would make no sense for a tariff to be interpreted in one manner as to one person and in another manner as to others. However, this does not entitle CBIA to represent the interests of anyone other than its members particularly where CBIA cannot establish sufficient commonality among separate class members. Consequently, the portions of the Amended Complaint purporting to represent or seek relief on behalf of anyone other than CBIA's members should be stricken.

Dated at San Francisco, California, this 26th day of April 2010.

Respectfully submitted,

A handwritten signature in black ink that reads "Stephanie Holland". The signature is written in a cursive style with a horizontal line underneath the name.

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the **MOTION BY PACIFIC BELL TELEPHONE COMPANY (U 1001 C) d/b/a AT&T CALIFORNIA TO STRIKE PORTIONS OF THE COMPLAINT** in **C.09-09-016** by electronic mail and/or hand-delivery to the persons below for this proceeding.

Executed this 26th day of April 2010, at San Francisco, California.

AT&T CALIFORNIA
525 Market Street, 20th Floor
San Francisco, CA 94105



Michelle K. Choo



CALIFORNIA PUBLIC UTILITIES COMMISSION

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