

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Legal Division

San Francisco, California
Date: November 30, 2006
Resolution No. L-339

RESOLUTION

RESOLUTION CONCERNING AT&T CALIFORNIA'S ADVICE LETTERS 28800 AND 28982, REGARDING TARIFF RULE 12 DISCLOSURE REQUIREMENTS, AND PROTESTS TO THOSE ADVICE LETTERS.

BACKGROUND

On September 11, 2006, AT&T California ("AT&T") filed Advice Letter 28800, which removed certain disclosure requirements contained in its tariffs that were imposed as a result of Decision ("D.") 01-09-058. That decision was issued in a complaint proceeding against Pacific Bell (now part of AT&T) regarding its practices for marketing optional services to residential customers. (See Case ("C.") 98-04-004, and related cases C.98-06-003, C.98-06-027, C.98-06-049, and Investigation ("I.") 90-02-047.) The complaint proceeding consolidated complaints brought by the Utility Consumers' Action Network ("UCAN"), the Greenlining Institute and Latino Issues Forum ("Greenlining"), and the Telecommunications Union, California Local 103, International Federation of Professional and Technical Engineers, AFL-CIO ("TIU").

In D.01-09-058, as modified by D.02-02-027 (Order Granting Limited Rehearing and Modifying D.01-09-058), the Commission concluded that Pacific Bell had violated statutes, decisional law, and Pacific Bell's Tariff Rule 12¹ by failing to adequately disclose information related to Caller ID blocking options and inside wire plans, and by marketing optional services sequentially, starting with highest priced packages. The Commission imposed significant monetary penalties on Pacific Bell, as well as remedial

¹ Pacific Bell's Tariff Rule 12 provided requirements for marketing optional services to residential customers, including the requirement that the utility include "a quotation of the applicable recurring and nonrecurring charges applicable to each service designated by the customers. The quotation of applicable rates and charges shall be stated separately for each optional service designated by the customer." (Rule No. 12 – Disclosure of Rates and Charges and Information to be Provided to the Public, effective May 15, 1995.)

measures. Those remedial measures included certain disclosure requirements, which were added to Tariff Rule 12. (See Resolution T-16650, issued May 2, 2002.)

On April 7, 2005, the Commission filed Rulemaking (“R.”) 05-04-005 (Order Instituting Rulemaking on the Commission’s Own Motion to Assess and Revise the Regulation of Telecommunications Utilities) to assess and revise the regulation of large and mid-sized incumbent local exchange carriers (“ILECs”) in California. The primary purpose of the proceeding was to develop a Uniform Regulatory Framework (“URF”). (D.06-08-030 at p. 13.) On August 24, 2006 (mailed August 30, 2006), the Commission issued D.06-08-030. Among other things, D.06-08-030 granted ILECs increased pricing flexibility in many areas due to increased competition, with some notable exceptions relating to basic rates and those subsidized by certain public policy programs. The decision allows advice letters proposing tariff changes consistent with D.06-08-030 to go into effect one day after filing (with a 30-day notice requirement for advice letters which would increase prices or impose service restrictions). (See D.06-08-030 at pp. 202, 268 [FOF 78], 276-277 [FOF 35], and 281 [OP 9].) D.06-08-030 also eliminates asymmetric or company-specific requirements concerning marketing, disclosure, or administrative processes. (See D.06-08-030 at pp. 210, 269 [FOF 83], 271 [FOF 110], 278 [COL 53], 282 [OP 21]).

On September 11, 2006, AT&T filed Advice Letter (“AL”) 28800 with the Commission. AL 28800, among other things, eliminated most of the disclosure requirements imposed by D.01-09-058 and Resolution T-16650. AT&T relied on the language in D.06-08-030 which eliminates asymmetric marketing and disclosure requirements. Pursuant to D.06-08-030, the tariff became effective on September 12, 2006.

Protests to the advice letter were filed on October 2, 2006, within the 20-day time period authorized by General Order (“GO”) 96, by the Division of Ratepayer Advocates (“DRA”) and The Utility Reform Network (“TURN”) (jointly), Utility Consumers’ Action Network (“UCAN”), Latino Issues Forum (“LIF”), and Centro La Familia Advocacy Services, Inc. (“Centro La Familia”). The protests object to AT&T’s elimination of the disclosure requirements on the following grounds: (1) The removal of the Rule 12 disclosure requirements pose a threat to consumers because of AT&T’s/Pacific Bell’s past history of abusive marketing (e.g., providing inadequate or misleading information and commingling sales/marketing and customer service); (2) the disclosure requirements should not be eliminated absent a showing that they are no longer necessary and should not be removed by advice letter; (3) D.06-08-030 does not authorize the withdrawal of the Rule 12 disclosures because the decision was not intended to apply to obligations designed as a remedy for specific conduct; (4) AL 28800 violates Public Utilities Code section 1708 because there was no notice in the URF proceeding or elsewhere that the Commission intended to rescind penalties and remedies imposed in complaint cases in general, or in D.01-09-058 and Resolution T-16650 in particular; and (5) AL 28800 is inconsistent with Commission policies as set forth in GO

168, the “Consumer Bill of Rights,” which include customers having adequate knowledge of products and services when making purchases.

AT&T filed a reply to the protests on October 10, 2006. AT&T contends that (1) D.06-08-030 clearly authorizes removal of company-specific marketing and disclosure requirements; (2) the allegations of error regarding notice constitute a collateral attack on D.06-08-030; and (3) DRA/TURN misrepresents the tariff changes in AL 28800. On the latter point, AT&T asserts that the company-specific requirements imposed by D.01-09-058 have proven to be “consumer-unfriendly, cumbersome, and wasteful of customers’ time and patience”.

In the meantime, on September 29, 2006, applications for rehearing of D.06-08-030 were filed by DRA and TURN (jointly) and Disabled Rights Advocates. DRA/TURN’s application for rehearing contends, among other things, that (1) the Commission’s elimination of “asymmetric” marketing, disclosure and administrative processes is unlawfully vague; (2) that the Commission failed to provide notice pursuant to Public Utilities Code section 1708 that it intended to change prior orders and decision that implemented marketing, disclosure and administrative requirements; and (3) that the Commission unlawfully delegated its duties to staff.²

On October 23, 2006, AT&T filed AL 28982, which adds back some disclosure language to Rule 12 of its tariffs. AL 28982 was protested by DRA and TURN (jointly) on the ground that many of the requirements of D.01-09-058 remain eliminated.³

DISCUSSION

The issues raised in the protests to AL 28800 and AL 28982 overlap several issues raised in the applications for rehearing of D.06-08-030. While we do not reach the substance of those issues in this resolution, we recognize that AL 28800 and AL 28982 and the respective protests to those advice letters need to be addressed further. The Administrative Law Judge (“ALJ”) in Phase II of the URF proceeding (R.05-04-005) has stated that issues raised in the protests to AL 28800 and AL 28982 may be addressed in that proceeding. (See November 7, 2006 transcript of pre-hearing conference in R.05-04-005, pp. 3-5.) These issues may be further defined or clarified in the scoping memo in Phase II, which has not yet been issued. However, because Ordering Paragraph 21 of D.06-08-030 allows carriers to eliminate “asymmetric requirements concerning

² These applications for rehearing are still pending, and today’s resolution is not intended in any way to prejudice the issues raised in the applications for rehearing.

³ We also note that on November 3, 2006, DRA and TURN sent a joint letter to the Commission’s Executive Director, Steve Larson in which they appeal the Telecommunication Division’s lack of action on AT&T’s AL 28800 and request the Commission’s review of AL 28800 and AL 28982.

marketing, disclosure, or administrative processes ” and because the tariffs became effective on one-day’s notice pursuant to Ordering Paragraph 9 of D.06-08-030, the tariffs will remain in effect pending resolution of the issues raised in the protests.

In addition to serving AT&T and the parties protesting AL 28800 and AL 28982, this resolution shall be served on all parties in R.05-04-005 (the URF proceeding) and all parties in C.98-04-004 et al. (the consolidated complaint case).

FINDINGS

1. On September 11, 2006, AT&T California (“AT&T”) filed Advice Letter 28800, which removed certain disclosure requirements which had been imposed in Decision (“D.”) 01-09-058 and which were included in Rule 12 of AT&T’s tariffs.
2. D.01-09-058 was issued in a complaint proceeding against Pacific Bell (now part of AT&T) regarding its practices for marketing optional services to residential customers.
3. D.01-09-058, as modified by D.02-02-027, imposed penalties on Pacific Bell and remedial measures for violations of statutes, decisional law, and Pacific Bell’s Tariff Rule 12.
4. The remedial measures imposed by D.01-09-058 included certain disclosure requirements, which were added to Tariff Rule 12. (See Resolution T-16650, issued May 2, 2002.)
5. On August 30, 2006, the Commission issued D.06-08-030 in R.05-04-005.
6. D.06-08-030 allows carriers to eliminate “asymmetric requirements concerning marketing, disclosure, or administrative processes” (see Ordering Paragraph 21) and allows tariffs to become effective one day after filing, with some exceptions (see Ordering Paragraph 9).
7. On September 11, 1006, AL 28800 was filed by AT&T in reliance on D.06-08-030.
8. Pursuant to Ordering Paragraphs 9 and 21 of D.06-08-030, the tariff became effective on September 12, 2006.
9. Protests to the advice letter were filed on October 2, 2006 by the Division of Ratepayer Advocates (“DRA”) and The Utility Reform Network (“TURN”) (jointly), Utility Consumers’ Action Network (“UCAN”), Latino Issues Forum

(“LIF”), and Centro La Familia Advocacy Services, Inc. (“Centro La Familia”), which raise a number of issues regarding AT&T’s elimination of the Rule 12 disclosure requirements.

10. On September 29, 2006, applications for rehearing of D.06-08-030 were filed by DRA and TURN (jointly) and Disabled Rights Advocates, which raise issues related to the issues raised in the advice letter protest.
11. On October 23, 2006, AT&T filed AL 28982, which adds back some disclosure requirements to Tariff Rule 12.
12. AL 28982 was protested by DRA and TURN.
13. The issues raised in the protests to AL 28800 and 28982 overlap issues raised in the applications for rehearing of D.06-08-030.
14. At the pre-hearing conference for Phase II of the URF proceeding (R.05-04-005), the Administrative Law Judge (“ALJ”) stated that issues related to AL 28800 and AL 28982 may be addressed in that proceeding.

ORDER

1. AT&T’s Rule 12 tariff changes and the protests filed in response to AL 28800 and AL 28982 shall be addressed in Phase II of the URF proceeding (R.05-04-005).
2. The tariff changes associated with AL 28800 and AL 28982 shall remain in effect pending resolution of the issues raised in the protests.
3. This resolution shall be served on AT&T and the parties protesting AL 28800 and AL 28982, all parties in R.05-04-005 (the URF proceeding), and all parties in C.98-04-004 (the consolidated complaint case).

The effective date of this order is today.

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I certify that this Resolution was adopted by the Public Utilities Commission at its regular meeting of November 30, 2006 and that the following Commissioners approved it:

/s/ STEPHEN LARSON

STEPHEN LARSON
Executive Director

MICHAEL R. PEEVEY
President

JOHN A. BOHN
RACHELLE B. CHONG
Commissioners

I reserve the right to file a dissent.

/s/ GEOFFREY F. BROWN
Commissioner

I reserve the right to file a dissent.

/s/ DIAN M. GRUENEICH
Commissioner

Resolution L-339**Commissioners Geoffrey F. Brown and Dian Grueneich, dissenting:**

Today's resolution countenances a clandestine repeal of a specific remedial consumer protection tariff (Tariff Rule 12), borne of AT&T's egregious marketing abuses (by its predecessor, Pacific Bell). It does so without considering the momentous history underlying the tariff rules. More significantly, it does so without notice to the litigants who won a massive, contested hearing against the errant utility. Such notice is required by law.¹

Not coincidentally, it was not just the litigant, the Utility Consumers' Action Network ("UCAN"), which did not know that Tariff Rule 12 was being repealed. This Commission itself did not know of it, either.

All notice and due process issues are referred to another phase of this proceeding, on the unprecedented theory that the law's requirement of notice and an opportunity to be heard may be applied *after the fact*.² The Queen's dictate in *Alice in Wonderland* compelling the sentence first and the trial thereafter comes immediately to mind. One can only speculate how balanced that process will be.

Twice in a decade, Pacific Bell was disciplined by this Commission for having engaged in a fraudulent, deceptive and unconscionable abuse of its monopoly power. Pacific Bell was found to have marketed unneeded and unwanted products and services to a public.³ In 2001, this Commission required amendments to a tariff designed to assure that Pacific Bell did not continue its abuses. These changes to Tariff Rule 12 require particularity in marketing protocols to correct a pattern of misleading sales practices that Pacific Bell engaged in even after having been previously sanctioned. Compliance with the tariff, in AT&T's view, has stood as an unpleasant reminder, an annoyance, and an impediment to swift sales calls.

The Uniform Regulatory Framework (URF) proceeding, when begun, did not contemplate reformation or repeal of company-specific remedial marketing orders.⁴ The complainant in the second Pacific Bell marketing abuse case, UCAN, was not given notice under Public Utilities Code §1708 that URF might reverse the redress that come out of the evidentiary hearing in the marketing abuse complaint.

¹ Public Utilities Code § 1708 provides as follows: The commission may at any time, upon notice to the parties, and with opportunity to be heard as provided in the case of complaints, rescind, alter, or amend any order or decision made by it. Any order rescinding, altering, or amending a prior order or decision shall, when served upon the parties, have the same effect as an original order or decision. See also, California Trucking Assn. v. Public Utilities Commission (1977) 19 Cal 3d 240, 137 Cal. Rptr. 190, 561 P2d 280, 1977 Cal LEXIS 128

² Legal Division Resolution No. L-339, Ordering Paragraph 1.

³ See I. 90-02-047; C. 98-04-004; C.98-06-003, C. 98-06-027; D.01-09-058; D. 02-02-027.

⁴ See R. 05-04-005. UCAN, it should be noted, was not named as a respondent.

AT&T asserted in its Advice Letter filing that the URF decision's Ordering Paragraph 21 (OP 21) invalidated the marketing abuse prohibitions in the tariff. OP 21 provides, "With the exception of conditions relating to basic residential rates, all asymmetric requirements concerning marketing, disclosure, or administrative processes shall be eliminated."⁵

Irrespective of the notice provisions of §1708 that were violated, the notion that the broad *generic* should invalidate the well-crafted *specific* is on its face extremely questionable. If a broad egalitarian principle, intended to place all carriers on an equal footing, can be effectively used as a defense to vitiate company-specific discipline, then enforcement by this Commission is effectively nullified.

Here, the insertion of the crucial OP 21 was done in a way that could not be better designed to escape notice. It was added in changes circulated late in the afternoon of August 23, only one day before the August 24, 2006, morning commission meeting. A hard-copy of a completely-changed document of approximately 282 pages was circulated with a blue cover memorandum⁶ that made no mention whatever of the "asymmetric" prohibition, let alone mention that by its terms the decision could be interpreted to invalidate one of the Commission's most prominent and contentious discipline cases. Nothing in the decision's text gave a clue to this Commission that AT&T was about to get absolution from rules that were hard fought and widely embraced by staff and consumer groups.

California Evidence Code §1040 (deliberative process privilege) prohibits me from discussing representations made or the reasons that a "hold" to delay voting on the massively-changed proposed decision for two weeks (until September 7, 2006) was withdrawn. Suffice it to say that there was precious little time to review the myriad, complex changes in a massive document and, as well, little interest among certain Commissioners' offices in permitting such review. My office did not see the significance of the changes and I know of no individuals other than those associated with the author's office who claims to have seen their significance.⁷

⁵ D. 06-08-030, OP 21, p. 264.

⁶ For decades, custom and practice within the Commission has been that substantive changes are delineated with highlighted designation of the changed language and an accompanying memorandum that states briefly (but with particularity and rationale) the nature of the changes. In this instance, the blue cover memorandum made no mention of the addition of the elimination of "asymmetric" requirements. An electronic copy of the changes, without any explanatory materials, circulated the previous afternoon, August 22. The August 23 hard copy of the proposed decision that came with the blue cover memorandum had no highlighted or redlined provisions showing the proposed (and un-summarized) changes.

⁷ This is reminiscent of the 1993 IRD scandal involving this Commission's adoption of the Implementation Rate Design (IRD)(D.93-09-076) in which four commissioners indicated they were not fully conversant with last minute changes to the decision. The controversy derived from Pacific Bell's writing of a major rate decision (overnight, on the PUC premises) and precipitated a scandal that caused rescinding of the decision, extensive newspaper coverage, a major internal report (*Report to the Commission: A Review of the Events Surrounding D.93-09-076 (IRD)*, dated October 13, 1993), a major joint legislative hearing (Joint Hearing of the Assembly Committee on Utilities and Commerce and the Senate Committee on Energy and Public Utilities, *Improprieties in the California Public Utilities Commission's Telephone Rate Decision: Restoring Public Trust*, October 21, 1993) and, some months later, the resignation of

AT&T has asserted in *ex parte* meetings after the Advice Letter changes took effect that “everyone” understood what OP 21 meant (i.e., that Tariff Rule 12 was being repealed). Other litigants, to the contrary, exclaim in outrage at the notion that they had the slightest indication that Tariff Rule 12 would be eliminated; they point out that at no time in the URF proceedings did they have the slightest idea that the remedial tariff was “in play.”

One measure by which one might judge the credibility of AT&T in this matter is by its argument that, even with the elimination of Tariff Rule 12, Public Utilities Code §2896 would still afford protection for consumers.⁸ Enacted in 1993, §2896 directs the Commission to require telephone carriers to provide customers with sufficient information to make informed choices about telecommunications services. By its terms, §2896⁹ is not self-executing.¹⁰

For 11 years, this Commission ignored the requirement in §2896 that it promulgate rules pursuant thereto as to what consumers need be told to make such “informed choices.” On May 27, 2004 this Commission passed General Order 168, the

Commissioner Norman Shumway, whose office had coordinated the massive, last-minute changes that were written by Pacific Bell. A number of strengthened procedural rules and laws derive directly from the IRD scandal, including a rule that all visitors to the PUC wear badges.

⁸ On September 13, 2006, AT&T’s representatives argued, in a Power Point summary of its position in favor of the initial September 11, 2006, advice letter filing (AL 28800) that §2896 would afford protection for consumers in the absence of Tariff Rule 12. When my office notified the AT&T staffers that it was outrageous for them to argue that §2896 afforded protection to consumers when AT&T (and its predecessors-in-interest, such as SBC and Pacific Bell) has argued consistently in our courtrooms, before the Commission itself, and in the appellate courts of California that §2896 is not self-executing, AT&T’s representatives retreated and returned a couple of days later with a revised Power Point presentation that, without explanation, eliminated all mention of §2896.

⁹ Public Utilities Code § 2896 provides as follows: Minimum required customer service.

The **commission shall require** telephone corporations to provide customer service to telecommunication customers that includes, but is not limited to, all the following:

(a) Sufficient information upon which to make informed choices among telecommunications services and providers. This includes, but is not limited to, information regarding the provider's identity, service options, pricing, and terms and conditions of service. A provider need only provide information to its customers on the services which it offers.

(b) Ability to access a live operator by dialing the numeral "0" as an available, free option. The commission may authorize rates and charges for any operator assistance service provided subsequent to access.

(c) Reasonable statewide service quality standards, including, but not limited to, standards regarding network technical quality, customer service, installation, repair, and billing.

(d) Information concerning the regulatory process and how customers can participate in that process, including the process of resolving complaints. (Emphasis added.)

¹⁰ In order to avoid promulgating any consumer protection rules, I expect a majority of this Commission will find in its decision rehearing D. 06-03-013 that §2896 *is* self-executing, a position that, if squarely presented to an appellate court, will be summarily rejected as facially false, thereby giving the carrier whom we have found to have misled the public an effective exoneration. So long as this Commission fails to establish a regulation implementing §2896, any marketing enforcement actions it should undertake will ultimately fail, thereby providing errant carriers with a handy prophylactic fallback defense.

so-called Telephone Consumer Bill of Rights,¹¹ which went into effect about November 28, 2004, only to be stayed on January 27, 2005. On March 9, 2006, the re-named Consumer Protection Initiative went into effect without any rules promulgated pursuant to §2896. The upshot is that this Commission has for only two months of the past 13 years imposed on telephone carriers a general obligation to fairly inform consumers of their options, the requirement of the legislature to the contrary notwithstanding. By this resolution, we continue our disregard of the Legislature's explicit instruction.

Today's resolution continues our headlong march toward ineffectual and impotent general consumer protection and enforcement¹² by an invalidation of a necessary remedial tariff, without the slightest notice to the interested litigant or the public. Fairness dictates more than this.

Dated November 30, 2006, at San Francisco, California.

/s/ GEOFFREY F. BROWN

Geoffrey F. Brown
Commissioner

Commissioner Dian M. Grueneich, dissenting:

I concur in Commissioner Brown's dissent; however, one additional point merits attention. AT&T announced the clandestine repeal of Tariff Rule 12 by filing an advice letter that went into effect immediately, without opportunity for notice and comment, and without opportunity for protests to be filed. This Commission had the ability to order a stay of the advice letter for good cause but declined to exercise its discretion in the face of a clear due process violation. We have failed in our obligations to the public.

Dated November 30, 2006, at San Francisco, California.

/s/ DIAN M. GRUENEICH

Dian M. Grueneich
Commissioner

¹¹ D. 04-05-057, Order Instituting Rulemaking on the Commission's Own Motion to Establish Consumer Protection Rules Applicable to All Telecommunications Utilities.

¹² See my dissent to the so-called Consumer Protection Initiative, D. 06-03-013.