

Decision **PROPOSED DECISION OF ALJ S.PAT TSEN (Mailed 5/4/17)**

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

J. Boggeri & Co., also known
as (aka) Boggeri Sales & Marketing,

Complainant,

vs.

AT&T Corp. (U5002C),

Defendant.

Case 16-06-019
(Filed June 29, 2016)

DECISION DISMISSING THE COMPLAINT OF J. BOGGERI & CO.

Summary

This Decision grants the motion filed by AT&T and dismisses the Complaint filed by J. Boggeri & Co. against AT&T Corp. (U5002C) and AT&T California (U1001C).

Case 16-06-019 is closed.

1. Parties

J. Boggeri & Co., also known as Boggeri Sales & Marketing, (Boggeri or Complainant) is a customer of AT&T Corp., and AT&T California (collectively, AT&T or Defendant). Defendant is a provider of telecommunications services and is an investor-owned public utility under the jurisdiction of the California Public Utilities Commission (Commission).

2. Factual and Procedural Background

On June 29, 2016, Boggeri filed with the Commission the instant formal Complaint (C.) 16-06-019 against AT&T.

The Complaint alleges that in or around May 2015, Complainant contacted its AT&T account representative to question certain charges on its business telephone bill. Allegedly, Defendant's representative acknowledged that some of the charges for 'plain old telephone service' (POTS) lines were incorrectly applied to Complainant and agreed to disconnect the lines and credit Complainant for the incorrect charges. After at least two (2) months of no action, Complainant again contacted its AT&T account representative and allegedly received an apology and a renewed commitment to take the above actions. Complainant claims that Defendant continued billing the incorrect charges for four (4) additional months before removing the POTS lines from Complainant's bill. Complainant further asserts that Defendant has ignored its subsequent customer service complaints and never refunded the incorrect charges Complainant had paid.

Separately, the complaint alleges that on May 11, 2015, Defendant was scheduled to deliver a PBX circuit upgrade to Boggeri and migrate its phone service to this new circuit. After multiple attempts in May and June 2015, Defendant was allegedly unable to complete this migration due to "unknown technical issues." Complainant claims that despite the inoperability of the PBX circuit, Defendant immediately began charging Complainant for these new services. Despite repeated customer service calls in which Defendant allegedly conceded the inappropriateness of the charges and agreed to credit Complainant's account, Complainant claims that Defendant never provided such credits. Complainant further alleges that Defendant refused to remove the

ongoing charges for the inoperable services from Complainant's bills and threatened service interruptions and collection actions against Complainant if the monthly bills were not paid in full. Complainant claims that it "gave up" on Defendant ever completing the upgrade to make the PBX circuit functional and on July 6, 2015, transferred its telephone numbers to a new carrier and terminated all AT&T services except for two POTS lines used for life and safety.

Complainant claims that despite the disconnection of nearly all AT&T services in July, 2015, Defendant continued to bill Complainant for approximately \$1200 per month for services that Complainant asserts were terminated. Complainant claims that it contacted Defendant to question these charges and received the response that "It will resolve on your next billing cycle." According to Complainant, approximately fourteen (14) billing cycles passed with no action taken by Defendant to either discontinue the ongoing charges or refund any prior charges.

The Complaint states that on May 17, 2016, Boggeri opened a new customer service complaint with AT&T addressing all outstanding billing issues and received assurances that all credits would be issued no later than June 15, 2016, and that AT&T would provide progress updates every three business days until the credits were issued. Complainant alleges that numerous AT&T representatives made and then ceased contact, all assuring Complainant that the issues would be resolved. Complainant asserts that the last such contact came on June 10, 2016, in which an AT&T representative allegedly delivered a spreadsheet reconfirming the outstanding issues and credits owed to Complainant and agreed to daily status calls until the resolution of the complaint. Complainant claims it received no further contact from AT&T representatives seeking to resolve its complaint.

Defendant filed its Answer to the Complaint on August 15, 2016. The assigned Administrative Law Judge (ALJ) S. Pat Tsen held a prehearing conference (PHC) for this proceeding on September 7, 2016. During the PHC, ALJ Tsen informed the parties of the Commission's Alternate Dispute Resolution (ADR) Program and the parties agreed to submit their dispute to mediation. ALJ Tsen suspended the PHC pending the outcome of the ADR process.

On November 7, 2016, the parties attended mediation with ALJ W. Anthony Colbert as mediator. At the mediation, the parties reached an agreement in principle to settle the Complaint. Following the mediation, the parties executed a confidential Settlement Agreement on November 17, 2016, to be governed by the laws of the State of California.

On December 21, 2016, Defendant filed a Motion to Dismiss the Complaint with prejudice on the grounds that it has fulfilled all of its obligations under the Settlement Agreement and, pursuant to the terms thereof, is entitled to dismissal. In support of its motion, Defendant submitted the confidential Settlement Agreement and a Declaration of Mark Berry detailing Defendant's fulfillment of its obligations under the Settlement Agreement.

According to the Declaration of Mark Berry, Complainant has refused to withdraw the Complaint because of a collateral dispute over new POTS lines, unrelated to the matters covered in the Complaint or Settlement Agreement.

3. Standard for Summary Dismissal

AT&T has moved to summarily dismiss the Complaint. The standard for ruling on a motion for summary dismissal is whether, taking the well-pleaded

factual allegations of the complaint as true, the moving party is entitled to judgment as a matter of law.¹

Rule 11.2 governs motions to dismiss. This procedure is analogous to a motion for summary judgment in civil practice.² The Commission has explained that the purpose of both types of motions is to permit determination before hearing whether there are any triable issues as to any material fact. The Commission looks to California Code of Civil Procedure § 437(c) for the standards on which to decide a motion for summary judgment. § 437(c) provides:

The motion for summary judgment shall be granted if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to judgment as a matter of law. In determining whether the papers show that there is no triable issue as to any material fact the court shall consider all of the evidence set forth in the papers . . .

A further purpose of such a motion is that it promotes and protects the administration of justice and expedites litigation by the elimination of needless trials. As such, where appropriate, the Commission regularly grants motions for summary judgment or summary adjudication.³

As the Commission stated in D.06-08-006:

Under the summary judgment procedure, the moving party has the burden of showing that there are no disputed facts by means of "affidavits, declarations, admissions,

¹ See, e.g., *Re Western Gas Resources-California, Inc.* (1999) Decision (D.) 99-11-023 at 7.

² *Westcom Long Distance v. Pacific Bell*, D.94-04-082, 54 CPUC2d 244, [249] (1994).

³ See, D.07-07-040 (granting Chevron judgment against Equilon "as a matter of law"); D.07-01-004 (granting Cox Telecom judgment against Global NAPs of California); D.02 04-051 (granting summary adjudication of a claim by County Sanitation District against SoCal Edison).

answers to interrogatories, depositions, and matters of which judicial notice shall or may be taken." The opposition to the motion must state which facts are still in dispute. The motion shall be granted if all the papers show that there is no triable issue as to any material fact and the moving party is entitled to judgment as a matter of law. If the parties' filings disclose the existence of a disputed issue of material fact, the motion must be denied.

With this standard in mind, we will examine the parties' assertions and arguments to determine whether there remains any triable issue as to any material fact and whether AT&T is entitled to judgment as a matter of law.

4. Parties' Positions

Complainant has not filed a response to the Defendant's Motion to Dismiss.

AT&T contends that it is entitled to summary dismissal under the Settlement Agreement. It points to California Code of Civil Procedure § 664.6, which states:

If parties to pending litigation stipulate, in a writing signed by the parties outside the presence of the court or orally before the court, for settlement of the case, or part thereof, the court, upon motion, may enter judgment pursuant to the terms of the settlement. . .

AT&T argues that it has fulfilled all of its obligations under the Settlement Agreement and, pursuant to the terms thereof, is entitled to summary dismissal.⁴

⁴ AT&T Motion to Dismiss.

5. Discussion

Taking the entirety of the factual assertions stated by Complainant in this proceeding to be true, we find that there remains no triable issue as to any material fact and Defendant is entitled to judgment as a matter of law.

a. The Commission Favors Settlement

The Commission has long held a policy strongly favoring settlements, similar to that of other judicial bodies in the State of California and the United States: “We have acknowledged in prior decisions the strong public policy in California favoring settlements and the propriety of settlement in utility matters.”⁵ Indeed, this is precisely why ALJ Tsen took the time to explain the ADR Program and suggest the parties submit their dispute to mediation. As described in Resolution ALJ-158:

ADR processes are often preferable to a litigated result because they potentially can produce outcomes that are more responsive to the parties' needs, more consistent with the public interest, avoid the narrow results of litigation that may not adequately address the parties' problems, encourage more active participation of all parties (regardless of an individual party's size or resources), save the parties' time and resources, and allow the Commission to direct its decisionmaking resources to other important proceedings.

Consistent with this policy and California Code of Civil Procedure § 437(c) and § 664.6, in an action for damages where an agreement is reached and a valid settlement contract exists, we must “enter judgment pursuant to the terms of the settlement.”⁶

⁵ D.93-03-021, 48 CPUC 2d 352, *33 (1993); D.91-05-029, 40 CPUC 2d 301, 326 (1991).

⁶ California Code of Civil Procedure § 664.6.

b. The Settlement Agreement

The Settlement Agreement was voluntarily entered in the course of a voluntary mediation and, under the laws of the State of California, is a valid, enforceable contract.⁷

We have examined the confidential materials submitted by AT&T in support of its motion, including the Settlement Agreement, as well as the Declaration of Mark Berry, and we conclude that AT&T has fulfilled all of its obligations under the Settlement Agreement.

Complainant has not offered any rebuttal to either the validity of the Settlement Agreement or AT&T's satisfactory performance of its obligations thereunder. As such, there remains no triable issue as to any material fact and, pursuant to the terms of the Settlement Agreement, AT&T is entitled to judgment as a matter of law.

6. Conclusion

AT&T has shown that the Settlement Agreement is valid and that it fulfilled all of its obligations thereunder while Complainant has offered no rebuttal. An examination of the submitted papers reveals there is no triable issue as to any material fact. Under California Code of Civil Procedure § 664.6 and the terms of the Settlement Agreement, the Defendant is entitled to judgment as a matter of law. Pursuant to California Code of Civil Procedure § 437(c), we grant the Defendant's motion. The Complaint is dismissed with prejudice. This proceeding is closed.

⁷ *Bowers v. Raymond J. Lucia Companies, Inc.*, 206 Cal. App. 4th 724 (Cal. App. 4th Dist. 2012).

7. Pending Motions

On December 21, 2016, Defendant filed a Motion for Leave to File Confidential Portions of its Motion to Dismiss and Supporting Materials Under Seal. These materials contain information confidential under the Settlement Agreement. We therefore grant the motion.

8. Categorization and Need for Hearing

The categorization of this proceeding remains adjudicatory and the hearing determination is no hearings necessary.

9. Comments

The proposed decision of ALJ Tsen 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. No comments were filed.

10. Assignment of Proceeding

Carla J. Peterman is the assigned Commissioner and S. Pat Tsen is the assigned ALJ and Presiding Officer in this proceeding.

Findings of Fact

1. Defendant is a provider of telecommunications services and is an investor-owned public utility under the jurisdiction of the Commission.
2. Complainant is a customer of AT&T.
3. Complainant filed the complaint with the Commission on June 29, 2016.
4. Defendant filed its Answer to the complaint on August 15, 2016.
5. A PHC was held on September 7, 2016, where ALJ Tsen referred the parties to ADR through mediation.
6. On November 7, 2016, the parties attended mediation with ALJ W. Anthony Colbert as mediator and reached an agreement in principle to settle their dispute.

7. The parties executed a confidential Settlement Agreement on November 17, 2016, to be governed by the laws of the State of California.

8. Defendant has fulfilled all of its obligations under the Settlement Agreement.

9. On December 21, 2016, AT&T filed a motion to dismiss the instant complaint with prejudice and as a matter of law.

10. On December 21, 2016, Defendant filed a Motion for Leave to File Confidential Materials Under Seal.

Conclusions of Law

1. The Settlement Agreement is valid and enforceable.

2. There is no triable issue as to any material fact.

3. Under the Settlement Agreement and California Code of Civil Procedure § 664.6, Defendant is entitled to judgment as a matter of law.

4. Pursuant to California Code of Civil Procedure § 437(c), Defendant has met the standard for summary dismissal.

5. Evidentiary hearings are not needed.

6. Defendant's Motion to Dismiss should be granted.

7. The complaint against the Defendant should be dismissed with prejudice.

8. Defendant's Motion for Leave to File Confidential Materials Under Seal should be granted.

ORDER

IT IS ORDERED that:

1. AT&T Corp. and AT&T California's Motion to Dismiss complaint with prejudice filed on December 21, 2016, is granted.

2. The complaint of J. Boggeri & Co. against AT&T Corp. and AT&T California is dismissed with prejudice.

3. AT&T Corp. and AT&T California's Motion for Leave to File Confidential Materials Under Seal is granted. This information will remain under seal and shall not be made accessible or disclosed to anyone other than the Commission staff, or on the further order or ruling of the Commission, the assigned Commissioner, the assigned Administrative Law Judge (ALJ), the Law and Motion ALJ, the Chief ALJ, or the Assistant Chief ALJ, or as ordered by a court of competent jurisdiction.

4. The hearing determination is no hearings are necessary.

5. Case 16-06-019 is closed.

This order is effective today.

Dated _____, at Sacramento, California.