

Mike Knell, dba JTR Publishing,
Complainant,
vs.
Pacific Bell and AT&T,
Defendants.

Case No. 01-07-034

OPENING BRIEF OF PACIFIC BELL TELEPHONE COMPANY (U 1001 C)

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July 3, 2002

Pursuant to the schedule established by the assigned Administrative Law Judge ("ALJ") at the June 5, 2002 hearing in the above-captioned matter, Pacific Bell Telephone Company ("Pacific") hereby submits its opening brief. As set forth below, each one of Complainant's claims as to Pacific should be dismissed as either failing to state a claim for which relief can be granted, involving claims outside the statute of limitations, or lacking evidentiary support.

I. INTRODUCTION

As set forth in the February 26, 2002 Administrative Law Judge's Ruling Granting Motion To File Amendment To Complaint, Denying Motion To Dismiss, And Amending Scoping Memo, there are seven issues to be considered in this proceeding. They are as follows:

1. Whether the complaint and amendment state any cause of action against Pacific for telephone lines where Pacific no longer is Complainant's retail service provider.
2. Whether AT&T and/or Pacific have violated any Commission rule, regulation, or order in their handling of Complainant's service quality problems.
3. Whether Complainant's phone listings fail to conform to his terms of service with AT&T.
4. Whether AT&T and/or Pacific have violated any Commission rule, regulation or order in publishing Complainant's unlisted number.
5. Whether Complainant states a currently valid claim against AT&T and Pacific.
6. Whether AT&T and Pacific have followed applicable tariffs and Commission rules, regulations, and orders in restricting Complainants' contacts.
7. Whether AT&T and Pacific have overcharged Complainant and owe him refunds.

On May 17, 2002, the ALJ dismissed issues 3 and 4 as to Pacific.¹

Pacific responds to the remaining five issues below.

II. ISSUE 1: THE COMPLAINT FAILS TO STATE A CAUSE OF ACTION AGAINST PACIFIC FOR THE TELEPHONE LINES WHERE PACIFIC IS NO LONGER COMPLAINANT'S RETAIL SERVICE PROVIDER.

Complainant has alleged service quality problems on the following four telephone lines: 925-462-3619, 925-846-3642, 925-485-0461, and 925-462-5093.² Complainant discontinued service from Pacific in April 1997 for each of these lines, and has not been a customer of Pacific since that time for these lines.³ Instead, with respect to each of these numbers, Pacific either provides resale services to AT&T, or Complainant obtains service directly through AT&T Broadband.⁴

When a CLEC, like AT&T, resells Pacific's services to an end-user, that CLEC – not the end-user – is Pacific's customer. Pursuant to Pacific's tariff, Schedule Cal.P.U.C. No. 175-T, Section 18.1.1(A), "[t]he CLC Reseller becomes the customer of record for the Utility; the end user is the customer of the CLC Reseller." Thus, here, AT&T is Pacific's customer of record for the resale services Pacific provides to AT&T on two of Complainant's lines, and Complainant is AT&T's customer for those lines.

¹ Administrative Law Judge's Ruling Granting In Part And Denying In Part Pacific Bell Telephone Company's Motion To Dismiss Itself As A Defendant, p. 5 (May 17, 2002).

² These are the numbers listed on page 1-1 of Complainant's Amended Complaint. Also included in the list of telephone accounts that Complainant alleges are at issue in this proceeding is a fifth telephone account, 925-455-4975. However, the Complaint asserts later that the only issue with that number is a billing dispute, not a service quality dispute.

³ Testimony of Ginger L. Henry for Pacific (June 5, 2002), p. 3 (hereinafter, "Henry Testimony").

⁴ *Id.*; see also p. 1-6 of the Amended Complaint, in which Complainant states that "in November, 1999, my residential phones (485-0461 and 462-5093) were switched from AT&T resale (Pac Bell phone lines) to AT&T Broadband."

As a result, Pacific's obligations flow to the CLEC reseller – AT&T.

AT&T's obligations, in turn, flow to the end-user – Complainant. Pacific does not have any legal duty directly to Complainant for Complainant's four telephone lines on which he obtains local service from AT&T. Therefore, whatever the problems that may or may not have occurred on Complainant's telephone lines over the years, Complainant cannot maintain any cause of action against Pacific for those problems. As a result, the Complaint fails to state a cause of action against Pacific for the telephone lines where Pacific is no longer Complainant's retail service provider.

III. **ISSUE 2: PACIFIC HAS NOT VIOLATED ANY COMMISSION RULE, REGULATION, OR ORDER IN ITS HANDLING OF COMPLAINANT'S SERVICE QUALITY PROBLEMS.**

Assuming that Complainant's service quality allegations could be asserted against Pacific (which they cannot, as described in Section II above) and were not barred by the statute of limitations (which they are, as described in Section VI below), there is no evidence that Pacific has violated any Commission rule, regulation, or order in its handling of Complainant's service quality problems.

As set forth in the testimony of Bob Alex, Pacific received a total of 27 trouble reports (either directly from Complainant or submitted by AT&T on Complainant's behalf) since August 1996.⁵ Significantly, a trouble report does not necessarily indicate that trouble existed on a customer's line; rather, it simply indicates that a customer has reported their belief that a problem exists.⁶

Nevertheless, of those 27 trouble reports, Pacific's records indicate that no trouble

⁵ Testimony of Bob Alex for Pacific (June 5, 2002), p. 5 (hereinafter, "Alex Testimony").

⁶ Id.

was found on 22 reports. Moreover, on one occasion, Complainant admitted to the Pacific technician that was dispatched to Complainant's premises that, in fact, there was no problem with Complainant's line. Complainant stated that, although his line was functioning properly, he reported a problem because he wanted a technician to go out and run a test on his line.⁷

Of the remaining five reports, two were resolved by moving Complainant's service to a new cable pair (on September 16, 1996 and January 29, 2001). On two other occasions (February 19 and March 2, 1998), technicians made minor repairs to the facilities serving Complainant. The one remaining trouble ticket (dated March 6, 1998) indicates that Complainant requested that Pacific and AT&T meet, but that AT&T failed to show up.⁸ In each instance, Pacific responded to these trouble reports in a timely manner.⁹ Pacific does not have any outstanding trouble reports from AT&T on Complainant's accounts, and there are no current problems with Pacific's facilities that serve Complainant's address on Woodthrush Court.¹⁰

In addition to the time and manpower that Pacific invested in responding to the foregoing trouble reports, Pacific also took initiative to dispatch a crew of maintenance splicers in August 2001 to test the buried cable that provides dial tone to Complainant and other residents in the area. Their tests verified that there was no trouble affecting the cable that provides Complainant's service. Nevertheless, as a preventative measure, Pacific rebuilt the serving terminals

⁷ *Id.* at 7.

⁸ *Id.* at 5-6.

⁹ *Id.* at 8.

¹⁰ *Id.*

servicing Complainant's property in September 2001 (although the terminals were not defective, Pacific does not wait until equipment fails to maintain it).¹¹

Complainant has submitted no evidence to refute any of the foregoing. Nevertheless, he insists in his testimony that Pacific violated Section 453 of the Public Utilities Code by continuing "to refuse to test and/or repair my phone lines."¹² According to Complainant, "most recently this occurred in Sept. 2000 and Nov. 2000, when my business phone line (925-846-3642) was having problems running credit card transactions."¹³ Complainant's own testimony contradicts his claim. On the one hand, he alleges that Pacific refused to test his line on this occasion, but later in his testimony he notes that Pacific "denied there were problems in September 2000 and November 2000."¹⁴ Significantly, the only way Pacific could have determined if there were problems is if it had tested Complainant's lines. As set forth in the testimony of Mr. Alex, Pacific did, in fact, visit the premises and test the line on two occasions in September 2000 and one occasion in November 2000.¹⁵ In each instance, no trouble was found; however, in an abundance of caution, the technician switched Complainant's phone service for this account to another cable pair.¹⁶

Complainant's only other "evidence" allegedly supporting his service quality claim is his assertion that Pacific "is using defective cable pairs to provide

¹¹ *Id.* at 6.

¹² Testimony of Mike Knell (June 5, 2002), p. 1-14 (hereinafter, "Knell Testimony").

¹³ *Id.*

¹⁴ *Id.* at 1-14, 1-15.

¹⁵ Alex Testimony, Exhibit 2, p. 2 (see table entries for September 12, September 14, and November 15, 2000).

¹⁶ *Id.*

service" on Complainant's street.¹⁷ According to Complainant, the photographs set forth in Attachments 25-27 to his testimony allegedly support this assertion.

Complainant is mistaken. While this document does list a number of defective pairs on Complainant's street, it does not establish that Pacific is using those pairs to provide service. Rather, the document appearing in Complainant's photographs is a log that Pacific maintains of defective cable pairs so that Pacific knows not to use those pairs to provide service. As Mr. Alex explains in his testimony, there are 50 pairs in the distribution cable serving Complainant's neighborhood. On May 15, 2002, Pacific tested all 50 pairs. The results showed that of those 50, 15 pairs are currently in use and functional; 15 are classified as "defective" and in no instance would be used by Pacific to provide service; the remaining 20 constitute clean spare pairs that remain available should they be needed at a future date. In other words, the mere existence of some defective pairs on a 50-pair cable does not support Complainant's allegation that Pacific is using defective facilities to provide service to him. In fact, this simply is not the case.

IV. ISSUE 3: DISMISSED AS TO PACIFIC

As set forth in the ALJ's May 17, 2002 Ruling, this issue is dismissed as to Pacific.

V. ISSUE 4: DISMISSED AS TO PACIFIC

As set forth in the ALJ's May 17, 2002 Ruling, this issue is dismissed as to Pacific.

¹⁷ Knell Testimony, p. 1-19.

VI. ISSUE 5: COMPLAINANT HAS NOT STATED A CURRENTLY VALID CLAIM AGAINST PACIFIC, AS HIS CLAIMS ARE BARRED BY THE STATUTE OF LIMITATIONS.

The Complaint was filed July 25, 2001, and amended on January 25, 2002. Since April 1997, Complainant has not been a customer of Pacific for four of the five telephone numbers that are the subject of the Complaint; AT&T has been Complainant's local service provider since April 1997 for those four accounts. As to the one account for which Pacific currently is Complainant's local service provider (925-455-4975), the only cause of action that Complainant has asserted as to that account is a claim for over-billing.¹⁸ The amount in question involves \$6 and, as described below in Section VIII, Pacific has agreed to credit Complainant's account for the \$6. As such, that issue is now moot and there remain no other causes of action applicable to that account.

As to Complainant's allegations that he experienced service quality problems on his other four accounts prior to April 1997 while Pacific was his local service provider, any cause of action asserted directly against Pacific for those alleged problems would have accrued, if at all, over four years prior to the filing of the Complaint. Consequently, these claims are barred by the statute of limitations.

Section 735 of the California Public Utilities Code provides, in pertinent part:

All complaints for damages resulting from a violation of any of the provisions of this part, except Sections 494 and 532, shall either be filed with the commission, or where concurrent jurisdiction of the cause of action is vested by the Constitution and laws of this State in the

¹⁸ The Complaint asserts that the only issue that pertains to the 925-455-4975 account, for which Pacific is the local service provider, is a billing dispute, not a service quality dispute.

courts, in any court of competent jurisdiction, within two years from the time the cause of action accrues, and not after.

Section 736 provides, in pertinent part:

All complaints for damages resulting from the violation of any of the provisions of Sections 494 and 532 shall either be filed with the commission, or, where concurrent jurisdiction of the cause of action is vested in the courts of this state, in any court of competent jurisdiction within three years from the time the cause of action accrues, and not after. If claim for the asserted damages has been presented in writing to the public utility concerned within the period of three years, the period shall be extended to include six months from the date notice in writing is given by the public utility to the claimant of the disallowance of the claim, or of any part or parts thereof specified in the notice.

Accordingly, Complainant's allegations of a direct cause of action against Pacific for service quality problems during the time that Pacific was Complainant's local service provider (i.e., prior to April 1997) are barred by the statute of limitations set forth in Public Utilities Code Sections 735-736.

VII. **ISSUE 6: PACIFIC FOLLOWED ALL APPLICABLE TARIFFS, COMMISSION RULES, REGULATIONS, AND ORDERS IN RESTRICTING COMPLAINANT'S CONTACTS.**

Pacific's tariff, Schedule Cal.P.U.C. No. A2.1.11(A)(10)(c) ("Rule 11") provides that if a customer places telephone calls to Pacific Bell with "intent to annoy," Pacific may refuse to transact business with that customer except by written communication. Pursuant to that tariff section, Pacific placed Complainant on Rule 11 restrictions on April 3, 1997 after receiving harassing telephone calls from him in or about March 1997.

Due to the age of these data, Pacific Bell has been unable to locate comprehensive written documentation of the specific dates, times, and instances of telephonic harassment of its employees. However, Pacific did locate a letter written by a Pacific manager who had been in contact with Complainant by telephone over a period of five to six months.¹⁹ In the letter, which was produced to Complainant during the discovery phase of this proceeding, the author specifically makes reference to having received "verbal threats" from Mr. Knell, and confirms that Mr. Knell also threatened other "upper management" personnel at Pacific. Moreover, in an independent investigation conducted by Linda Woods, a manager in the Commission's Consumer Affairs Branch, Ms. Woods corroborated these facts. Specifically, she stated in a letter to Mr. Knell dated October 28, 1999 that Rule 11 restrictions were imposed following "unwanted and harassing telephone calls to [Pacific employee] Linda Standen" in March 1997.²⁰

Significantly, Complainant provides no evidence whatsoever to contradict these events. Just the opposite, Complainant confirms in his June 5, 2002 testimony that he called Ms. Standen on at least two occasions prior to the imposition of Rule 11 restrictions on his communications -- "in late February 1997" and "on 3/11/97."²¹ Moreover, Pacific has provided documentation that Complainant threatened two other Pacific employees during an on-site service visit.²² Although Rule 11 only applies to harassing and annoying telephone calls, Complainant's threatening behavior towards these on-site employees, as described

¹⁹ Knell Testimony, Attachment 7.

²⁰ A copy of Ms. Woods' letter to Complainant is set forth as Exhibit 3 to the Alex Testimony.

²¹ Knell Testimony, pp. 1-24, 1-25.

²² See letters set forth in Attachment 7 to Mr. Knell's Testimony.

in the documentation set forth in Attachment 7 to Complainant's testimony, lends further credence to the fact that Complainant's telephone calls to Ms. Standen in February 1997 were of a harassing nature and warranted the imposition of Rule 11 limitations on Complainant's future communications.

Pacific does not lightly impose Rule 11 restrictions on its customers. However, when the safety of Pacific's employees becomes an issue, as it became in this case, Pacific must act to protect its employees. That is precisely what occurred here and, for the foregoing reasons, Pacific properly imposed Rule 11 restrictions on Complainant in April 1997.

VIII. ISSUE 7: PACIFIC AGREES TO REFUND COMPLAINANT THE \$6.00 HE CLAIMS HE IS OWED, THEREBY MOOTING THIS ISSUE AS TO PACIFIC.

The Amended Complaint contains only a single telephone account number for which Complainant is a retail customer of Pacific Bell. As to that account, 925-455-4975, Complainant alleges that he was charged for an "additional phone line" and "an additional jack that was not installed."²³ In his testimony filed June 5, 2002, Complainant concedes that he was credited \$125 after he complained about the alleged overcharges, but alleges that Pacific still owes him \$6 for the jack that he claims was not installed.²⁴

The Commission is without jurisdiction to award damages. Therefore, the only relief available to Complainant on this claim is an award of \$6. In the interest of time and expediency, Pacific agrees to issue a \$6 credit on

²³ Knell Testimony, p. 1-2.

²⁴ *Id.* at 1-60.

Complainant's telephone account. Consequently, there is nothing further for the Commission to resolve as to Pacific on this issue.

IX. CONCLUSION

As set forth above, Complainant is not entitled to any of the relief sought (with the exception of the \$6 credit Pacific has agreed to issue in the interest of expediency). Each one of Complainant's claims as to Pacific either fails to state a claim for which relief can be granted, involves allegations outside the statute of limitations, or lacks evidentiary support.

Dated at San Francisco, California, this 3rd day of July 2002.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, Susan Y. Palileo-Gotico, certify that I have this day caused a true copy of the original attached **OPENING BRIEF OF PACIFIC BELL TELEPHONE COMPANY (U 1001 C)** in C.01-07-034 to be served by mail or hand delivery on parties on the attached service list for this proceeding.

Dated at San Francisco, California, this 3rd day of July 2002.



Susan Y. Palileo-Gotico

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