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Decision No. 69510

ORIGINAL

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

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| EDGAR J. SOKOL,<br>Complainant,<br>vs.<br>THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY, a corporation,<br>Defendant. | Case No. 7784<br>(Filed November 20, 1963) |

Marshall W. Krause and Leo E. Borregard, for complainant.
Noble K. Gregory, James F. Kirkham, Pillsbury, Madison & Sutro, for defendant.
Albert W. Harris, Jr. and John F. Kraetzer, Deputy Attorneys General, for the Attorney General of the State of California, intervenor.

## O P I N I O N

Complainant Sokol challenges, as void for unconstitutionality from the beginning, a regulatory order issued by this Commission in 1948 (Re Communication Utilities, Decision No. 41415, April 6, 1948, Case No. 4930, 47 Cal.P.U.C. 853). The order, resulting from a statewide investigation into alleged illegal use of communications facilities, is incorporated in the tariff schedules of defendant, The Pacific Telephone and Telegraph Company (Pacific). The order has since governed complaints filed with the Commission for restoration of telephone service after discontinuance in cases where telephones have been used for alleged unlawful purposes, chiefly bookmaking (Pen. Code, Sec. 337a).

Sokol's service was discontinued on October 13, 1961 upon receipt by Pacific of an advice from the San Francisco Police Department. Sokol later sued Pacific and members of the Police Department for damages in the Superior Court in San Francisco (No. 525,896). The present complaint seeks to remove the impediment of Decision No. 41415 and Decision No. 63178 (the latter issued January 26, 1962 in Case No. 7209, Sokol's complaint before the Commission for restoration of telephone service) in order to further prosecution of the Superior Court action. The Commission, on February 25, 1964, reopened its statewide investigation (Case No. 4930) in order to determine whether Decision No. 41415 should be rescinded, altered, or amended (Public Utilities Code, Sec. 1708). Hearings have been deferred pending final disposition of the issues raised by the present complaint, which was heard at San Francisco on July 22 and 23, 1964, before Commissioner Grover and Examiner Gregory and submitted subject to briefs, since filed.

We adopt the statement of facts set forth in the opinion of the Supreme Court of California in a proceeding brought by Pacific to prohibit the San Francisco Superior Court from taking further action on Sokol's complaint (the aforesaid Case No. 525,896) on the ground of lack of jurisdiction in the Superior Court to pass upon the validity or reasonableness of decisions of this Commission. The Supreme Court granted prohibition (Pacific Tel. & Tel. Co. v. Superior Court, 60 Cal.2d 426). In its modified opinion, issued December 5, 1963 on denial of Sokol's petition for rehearing, the Supreme Court noted that Sokol had filed the instant complaint with the Commission for retroactive recision of Decision No. 41415 on the ground of unconstitutionality. The

Court observed: "The validity of that decision and the power of the Commission to rescind it may be determined in plaintiff's proceeding before the commission subject to review by this court. Thereafter the present action /in the Superior Court/ may proceed or be terminated depending on the ultimate outcome of plaintiff's proceeding before the commission ..." (Pacific Tel. & Tel. Co. v. Superior Court, supra, p. 430.)

The essential facts, as stated by the Supreme Court, are as follows:

> "Facts: Plaintiff /Sokol/ operated a club through which anyone paying a membership fee was entitled to receive the names of horses selected by the club to win at local race tracks. This information was transmitted to members by communications services furnished by petitioner.
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> "Petitioner /Pacific/ notified plaintiff that it had received information from local law enforcement officers that his operations were illegal, and immediately disconnected his telephones. The effect of such action was to completely eliminate plaintiff's business activities.
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> "Petitioner purported to act pursuant to Decision 41415 of the Public Utilities Commission (hereinafter referred to as the 'commission'), issued in 1948, providing, in part: '/A/ny communications utility ... must discontinue and disconnect service to a subscriber, whenever it has reasonable cause to believe that the use made or to be made of the service ... is prohibited under any law ... or /such service/ is being or is to be used as an instrumentality, directly or indirectly, to violate or to aid and abet the violation of the law. A written notice to such utility from any official charged with the enforcement of the law stating that such service is being used or will be used as an instrumentality to violate or to aid and abet the violation of the law is sufficient to constitute such reasonable cause.
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> "'... any person aggrieved by any action taken or threatened to be taken pursuant to the provisions of this decision shall have the right to file a complaint with this Commission in accordance with law. This remedy shall be exclusive. Except as

specifically provided herein, no action at law or in equity shall accrue against any communications utility because, or as a result of, any matter or thing done or threatened to be done pursuant to the provisions of this decision.' (Italics added.) (47 Cal.P.U.C. 853, 859-860.)

"It was also stated that each contract for communications should be deemed to incorporate the provisions of the order.

"Following the discontinuance of his service and pursuant to Decision 41415, plaintiff instituted proceedings before the commission.

"The commission found that plaintiff's telephone facilities were not being used for any unlawful service, and accordingly his service was restored 14 days after being discontinued. The commission further found 'that defendant herein /petitioner/ acted upon reasonable cause in disconnecting said telephone facilities'. (P.U.C. Decision 63178.)

"Ten months later plaintiff filed an action in respondent court seeking damages from petitioner on the ground that discontinuance of telephone service was not in accord with any 'valid' order of the commission, and in violation of petitioner's obligations as a public utility. Petitioner moved for summary judgment on the ground that respondent lacked jurisdiction. The motion was denied." (Pacific Tel. & Tel. Co. v. Superior Court, supra, pp. 427-428.)

This case squarely presents the issue of whether the method provided since 1948, by Decision No. 41415, for thwarting illegal use of communications service resulted in depriving Sokol of due process of law (a) by failing to provide for notice and an opportunity to be heard prior to removal of instruments or discontinuance of service, or (b) by immunizing communications utilities from actions at law or in equity when purporting to act on "reasonable cause" based solely on written notice from law enforcement officers of either actual or impending illegal use of service. Sokol does not challenge lawful removal of instruments as evidence in connection with a valid arrest or pursuant to a valid search warrant, neither of which is involved here.

A subsidiary issue concerns Decision No. 63178. Sokol did not seek review of that order. He urges that he was not bound to do so since the order restored his telephone service, which was all he had asked for in his complaint. He now asserts that the finding of "reasonable cause" not only was irrelevant to the basic issue of the lawfulness of the use of telephones in his business activities but that Decision No. 41415 actually compelled such finding. He maintains that, under these circumstances, the doctrine of collateral estoppel, urged by Pacific, does not apply and that the "compulsive" finding of "reasonable cause", coupled with the Commission's lack of power to award damages and its claim, under Decision No. 41415, of exclusive jurisdiction, has effectively barred monetary redress for the utility's assertedly unlawful action in temporarily disconnecting his service.

Pacific contends that the finding of reasonable cause in Decision No. 63178 related to a relevant issue in Sokol's complaint for restoration of service (Case No. 7209); that such finding barred a subsequent action for damages; that Sokol, because of imputed knowledge of his counsel, knew that disconnection of telephone service solely upon notice from a law enforcement officer raised questions of due process of law; and that the Commission, in finding Pacific acted with reasonable cause, necessarily found that Decision No. 41415 was valid and that the telephone company had acted in conformance with it. Hence, the utility asserts, when Sokol chose not to seek review of Decision No. 63178, he necessarily chose to forego his action for damages.

In any event, Pacific argues, Decision No. 63178 was an order within the judicial power of the Commission, as distinguished from its legislative or rulemaking power, was conclusive between

the parties and is not subject to being modified pursuant to the provisions of Section 1708 of the Public Utilities Code. That section, Pacific asserts, is applicable only to legislative decisions of the Commission, as indicated by the fact that the only notice required by its provisions is "to the public utility affected" and there is no provision for notice to adverse litigants in a judicial controversy such as Sokol's complaint for restoration of service.

We are thus brought to a consideration of the primary issue, which is the validity of Decision No. 41415 and the method there adopted by the Commission for aiding law enforcement officials in their task of combatting crimes that involve the use of public communications facilities. If that decision is invalid, so also may be every decision based on it, including Decision No. 63178. The presumption is, however, that in issuing Decision No. 41415 the Commission regularly exercised its jurisdiction over intrastate public communications facilities. It is incumbent upon one who asserts the contrary to show that the regulation is, as to him, unreasonable or invalid (Wilkins v. City of San Bernardino (1946), 29 Cal.2d 332); constitutionality cannot be determined in a vacuum. Sokol has relied, in this proceeding, solely upon the record before this Commission in Case No. 7209 as evidentiary support for his claim that Decision No. 41415 was void ab initio for unconstitutionality. What Sokol asks this Commission to hold, in the present case, is that its 1948 decision is so patently abhorrent to constitutional safeguards that it is a nullity.[1/]

1/ Whether the Commission should adhere to the approach in Decision No. 41415 or, in the light of further evidence, should revise that decision is involved in the Commission's recent reopening of the investigation which resulted in that order.

We approach the resolution of this question by first considering the context in which Decision No. 41415 was adopted. The Commission, in 1948, advised by a Special Study Commission on Organized Crime that organized bookmaking existed only through extensive use of communications facilities, opened a statewide investigation and received evidence which showed that organized bookmaking, facilitated by use of communications facilities, was a major law enforcement problem in California and, among other things, promoted gangsterism (47 Cal.P.U.C. at 854). The threat to society by this facet of organized crime led to the provision, in Decision No. 41415, for discontinuance and disconnection of service to a subscriber whenever a communications utility had reasonable cause (i.e., a written statement from a law enforcement official) to believe that the use made or to be made of the service was prohibited under any law. The order was mandatory as to discontinuance without advance notice, since the record there (as here) showed that the giving of advance notice lessens the probability of successful law enforcement.[2/] The decision provided the subscriber with the remedy of a complaint before the Commission for restoration of service. If, in fact, the law was not being, or not intended to be, violated by the subscriber, his service would be restored as expeditiously as possible; the Commission's usual practice is to order interim restoration, when requested, pending hearing.[3/]

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2/ The Commission, however, has upheld giving advance notice of intended disconnection in the unusual case of an otherwise legitimate answering service, with 130 customers, some of the lines of which were used for bookmaking. (See Gates v. Pac. Tel. & Tel. Co. (1952), 51 Cal.P.U.C. 443.)

3/ Sokol's service was temporarily restored on October 27, 1961 (Decision No. 62717, Case No. 7209) pending a hearing on his complaint. He voluntarily terminated service a month prior to the hearing which resulted in Decision No. 63178, supra.

Sokol asserts that he is not concerned with the current operation of Decision No. 41415, but is concerned only with going forward with his pending action for damages by removal of that portion of the decision which immunizes a communications utility from actions at law or in equity when proceeding in accordance with the provisions of the order. He argues that the right to be furnished telephone service is an indispensable property right for anyone operating a modern business and is part of the liberties of citizens of the United States. Such right, he maintains, may not be terminated by any public or quasi-public body without the procedures guaranteed by due process of law, at least in the absence of an arrest by police officers where the instruments themselves are seized as evidence. Even a temporary deprivation of telephone service, he urges, constitutes a "taking" of his property which, if accomplished without constitutional safeguards of notice and a right to be heard, requires that he have a remedy whereby he may be compensated for what may turn out to be an unlawful taking. Since Decision No. 41415 insulates the telephone company from actions at law or in equity, it is, he contends, invalid to that extent. Furthermore, he maintains, if Decision No. 41415 is unconstitutional, it must be treated as if it never existed.

Sokol further urges that although the Commission has broad and plenary powers under the California Constitution and statutes, including wide discretionary authority conferred by Section 701 of the Public Utilities Code, it still may not act in contravention of the Federal Constitution or beyond the powers conferred by the California Legislature. The Legislature, he asserts, did not intend to allow the Commission to insulate regulated utilities from liability for private wrongs. What the Commission has purported to do, he

states, is to put telephone utilities in the law enforcement business and to immunize them from civil liability when so acting. Such measures, he contends, are beyond the proper scope of public utility regulation and should be invalidated.

Although Pacific contends, as stated earlier, that Decision No. 63178 is not open to collateral attack in this proceeding and is thus conclusive on the issue of "reasonable cause" for disconnecting Sokol's telephone service, the utility also urges that the underlying action of the Commission in 1948, Decision No. 41415, was in fact a reasonable, and in law a constitutional, measure and should be upheld. Pacific, however, concedes that the Commission may exercise discretion, under Section 1708 of the Public Utilities Code, to rescind Decision No. 41415 or to amend it prospectively to provide for advance notice to a subscriber prior to discontinuance of service. As stated above, the statewide investigation, Case No. 4930, now has been reopened for further hearings to determine these matters in the light of present-day conditions.

Pacific takes the position that the Commission's action in 1948, based on the record in Case No. 4930, was a proper exercise of the police power and resulted from balancing the rights or privileges of the public, including patrons of communications service, with the requirements of effective law enforcement. The utility argues that whether telephone service is a property right or simply a privilege measured by regulations adopted by the Commission pursuant to the Public Utilities Code and incorporated in the utility's tariff schedules, cannot substantially affect constitutionality insofar as the present case is concerned. This is so, the company asserts, because Sokol has failed to establish any evidentiary basis for determining that Decision No. 41415 is

unconstitutional, even if it be assumed that he had a "property right" to the telephone service that was temporarily disconnected.

The utility maintains that whether prompt action without prior hearing in the field of law enforcement accords with due process of law depends upon a delicate balance of the needs of the individual against the urgency of immediate action and upon the existence of other means of effectively combatting the evil sought to be remedied. The principle, drawn from an earlier decision of the California Supreme Court cited both by Sokol and Pacific (Matter of Lambert (1901), 134 Cal. 626, 633) is stated to be that a person has the right to such notice "as is appropriate to the proceedings and adapted to the nature of the case". That the measures provided by Decision No. 41415 were both appropriate and "adapted to the nature" of the investigation in Case No. 4930 is clear, Pacific asserts, from the evidence there that discontinuance of service without advance notice was essential to the control of bookmaking.

Another consideration indicating the propriety of the Commission's action, Pacific argues, is that the utility should not be placed in the untenable position of exercising independent discretion when informed by a law enforcement official of illegal use of facilities and should not be in the law enforcement business at all. Under such circumstances, the utility states, it may properly be protected from civil liability, as are other persons who may be required to come to the aid of and act under the direction of law enforcement officials.

Pacific also argues that while the measures adopted by Decision No. 41415 may be ill-advised (by not providing for advance notice prior to discontinuance of service), they are not necessarily

unconstitutional, if properly within the police power. In this connection, the utility points to the recent action by Congress which prohibited the interstate use of wire communications for the transmission of bets (Act of September 13, 1961, 75 Stat. 491, 18 U.S.C. 1084); Congress, nonetheless, provided for "reasonable notice to the subscriber" before the disconnection of service (18 U.S.C. 1084(d)); and Congress also recognized, as did this Commission in 1948, that "modern bookmaking depends in large measure on the rapid transmission of gambling information by wire communication facilities" (H. Rept. 967, 87th Cong., 1st Sess., 1961, U.S.C. Cong. & Admin. News, p. 2631; see also, Telephone News System, Inc. v. Illinois Bell Telephone Co. (N.D. Ill. 1963), 220 F.Supp. 621, 633-638, affirmed (1964) 376 U.S. 782).

The Attorney General, intervenor herein, agrees with Pacific that the measures adopted by Decision No. 41415 for discontinuance of service and for granting immunity from civil liability therefor were properly related to the exercise of police power in the face of overriding public policy. Intervenor also maintains that the records in Case No. 4930 and here both point inescapably to the necessity for continuing the present practice of discontinuance without prior notice to the subscriber. Any loss to a subscriber occasioned thereby, intervenor asserts, is only incidental to the suppression of activities which are unlawful and contrary to public policy. Moreover, since Decision No. 41415 does provide an expeditious procedure for restoration of service, there is available, intervenor states, a more prompt and efficient remedy for correction of a mistake than would be the case if property were taken in the course of a search, or if the subscriber were seeking the freedom of his own person after an arrest.

Whether due process be considered as requiring only "such notice of the claim as is appropriate to the proceedings and is adapted to the nature of the case" (Lambert, supra) or as excluding "all arbitrary dealings with persons or property" (Estate of Buckman (1954), 123 Cal.App.2d, 546, 559-560), intervenor asserts that due process does not necessarily require advance notice and that there is nothing in the above definitions which compels this Commission to conclude that the procedures adopted in Decision No. 41415 are violative of due process. By not requiring advance notice to the individual subscriber, the argument continues, Decision No. 41415 applies the procedure found by the Commission to be essential for the prevention of the illegal use of telephone communication in circumstances (analogous to others outside the field of administrative procedure) where the public interest simply outweighs possible injury to the individual and justifies prompt preliminary action pending ultimate determination of the case.

Finally, Pacific, in response to Sokol's contention that Decision No. 41415 must be rescinded ab initio, asserts that to rescind an order retroactively, following years of compliance, so as to expose a regulated utility to damage actions for acts that were required under possible penalties when done, would be unlawful and plainly inequitable. (Arizona Grocery v. Atchison, etc. Ry. (1931), 284 U.S. 370, 389. See also Ross v. Pac. Tel. & Tel. Co. (1963), 61 Cal.P.U.C. 760, 770; East Side County Water District v. The San Jose Water Works (1945), 45 C.R.C. 643, 649.) Moreover, Pacific argues, it is particularly inappropriate and unnecessary for the Commission to attempt to rescind Decision No. 41415 retroactively because the Commission possesses, in addition to its

judicial power, the power to legislate prospectively. (In re Pacific Telephone (1949), 48 Cal.P.U.C. 823.) This Commission, Pacific notes, can amend Decision No. 41415 prospectively, if it so decides, upon re-examination of the present rule.

We have considered the evidence in this case and the arguments of the parties. The uncontradicted testimony of law enforcement officials in this case shows that one of the most effective means of frustrating bookmaking or other criminal activities which rely upon continuous telephonic communication with customers or patrons is the interruption of such communications without advance warning. The evidence in this case, in our opinion, justifies immunizing a communications utility from liability when it has been advised by law enforcement officials that the service is used to further unlawful activity. The remedy afforded of prompt temporary restoration of service pending a hearing and decision by the Commission on the merits of a complaint for restoration not only places responsibility on the Commission for deciding whether service should be continued or not in the circumstances, but relieves the utility of the necessity of acting at its peril in responding to the advice of law enforcement officials; a public utility should not be required to decide questions which involve the enforcement of criminal laws against private citizens. Moreover, it is not in the public interest to constitute privately owned communications utilities as, in effect, reviewing agencies to determine whether or not duly constituted law enforcement officials have correctly determined that emergency disconnection of telephone service is warranted. (Cf. Cal. Penal Code §150; Peterson v. Robison, 43 Cal.2d 690, 697; Babington v. Yellow Taxi Corp., 250 N.Y. 14, 164 N.E. 726, 61 A.L.R. 1354.) If the police act improperly in a given case, the affected telephone subscriber has his action against the officers responsible; their liability, if any, is not affected by Decision No. 41415.

It bears emphasis that we are not here determining the legality or the reasonableness of all of the procedures adopted in Decision No. 41415. On the contrary, Case No. 4930 has been reopened for the purpose of reconsidering those procedures. In view of Sokol's failure to present any appreciable evidence concerning the need (or lack of need) for telephone disconnection as a means of combatting crime, the evidence herein is relatively one-sided, consisting largely of testimony of law enforcement officers. In the reopened investigation, we anticipate that additional evidence will be developed and that specific amendments to the procedures provided in Decision No. 41415 will be presented and tested. The central question which needs to be decided here is whether or not, on this record, those provisions of Decision No. 41415 are lawful which purport to immunize Pacific from liability for effecting a disconnection upon receipt of the required letter from a law enforcement officer. On this record we cannot say that it was unconstitutional or otherwise unlawful - or that it was unreasonable - for the Commission to provide for such immunity.

We find, on this record, as follows:

1. Edgar J. Sokol, complainant herein, on October 18, 1961, pursuant to Decision No. 41415 of this Commission issued in 1948 (47 Cal.P.U.C. 853), filed a complaint with this Commission (Case No. 7209) alleging that he was engaged in the business of dispensing information to patrons of race tracks and that defendant herein, The Pacific Telephone and Telegraph Company, on October 13, 1961, had disconnected telephone service which he had been using in connection with that business.

2. On October 24, 1961, the Commission issued Decision No. 62717 in Case No. 7209, a temporary order which directed Pacific to restore Sokol's service pending a hearing. Pursuant to such order Pacific restored that service on October 27, 1961.

3. On November 21, 1961 complainant had Pacific terminate service to him.

4. On December 19, 1961, the Commission held a hearing in Case No. 7209 which resulted in Decision No. 63178, issued January 26, 1962. The Commission, in that decision, found that the evidence failed to show that the facilities in question were in fact used for an unlawful purpose and also found that Pacific had acted upon reasonable cause in disconnecting said facilities; the Commission made permanent its temporary order that service be restored to complainant. Complainant did not seek rehearing or review of Decision No. 63178.

5. On October 11, 1962 complainant filed a complaint for damages in the Superior Court in San Francisco (No. 525,896) against Pacific and other defendants, in which he alleged that as a direct and proximate result of the discontinuance of his telephone service his business was drastically reduced and he was forced to abandon it to his loss in the sum of $30,000 and the good will of his business and his business name were damaged to his loss in the sum of $10,000. Pacific, in said action, moved for summary judgment on the ground that the Court had no jurisdiction as to it over the subject matter of the action. The motion was denied by the Court. Pacific thereafter sought and secured a writ of prohibition from the Supreme Court of California restraining the Superior Court from further proceeding with said action. (Pac. Tel. & Tel. Co. v. Superior Court, Edgar J. Sokol, Real Party in Interest (1963), 60 Cal.2nd 426.)

6. On November 20, 1963, prior to the issuance by the Supreme Court of its modified opinion in the prohibition proceeding on December 5, 1963, in which the Court also denied Sokol's petition for rehearing, complainant filed the complaint herein with the Public Utilities Commission of the State of California. Said complaint has been duly heard, argued and submitted for decision.

7. The Commission, in issuing Decision No. 41415 in Case No. 4930, found that bookmaking was being conducted in California on a large scale by use of information furnished through wire services, and that successful bookmaking could not be conducted without access to such wire services or without access to telephone facilities. The Commission, in said proceeding, further found that it was in the public interest to require communications utilities to refrain from furnishing telephone or telegraph service that is being or will be used in furthering bookmaking or related illegal activities.

8. The Commission, in Decision No. 41415, ordered that any communications utility under its jurisdiction must refuse to provide service to any applicant, and must discontinue and disconnect service to any subscriber, when it has reasonable cause to believe the service is being or will be used to violate, or aid and abet the violation of the law. A written notice to the utility, from a law enforcement official, of such actual or intended illegal use was ordered by the Commission to be sufficient to constitute such reasonable cause. Said decision further ordered that any person aggrieved by any action taken or threatened to be taken pursuant to the provisions thereof would have the right to file a complaint with the Commission, that such remedy was exclusive and that, except as to the complaint procedures specifically provided, no action at law or in equity would accrue against any communications utility because, or as a result, of any matter done or threatened to be done pursuant to the provisions of Decision No. 41415. It was further ordered by Decision No. 41415 that each contract for communications service, by operation of law, would be deemed to contain the provisions of said decision and any applicant for such

service would be deemed to have consented to the provisions of said decision as a consideration for the furnishing of such service. Said Decision No. 41415, since its effective date, has been and now is the decision which controls the Commission's proceedings concerning applications for, and restoration of, telephone service under circumstances falling within its purview. Case No. 7209, involving complainant's request for restoration of telephone service, was a proceeding within the purview of said Decision No. 41415.

9. There was in 1948, when the Commission issued Decision No. 41415, and has continued to be until the present time, as revealed by evidence of law enforcement officials on the present record, a serious problem of law enforcement connected with bookmaking and other crimes which involve the use of public communications service and facilities. The procedures set forth by Decision No. 41415 which relate to the role of telephone utilities are reasonable as an aid to effective law enforcement related to such criminal activity.

10. Complainant has failed to show that defendant telephone company, in disconnecting his telephone service in 1961, or that the Commission, in entertaining and proceeding with his complaint for restoration of such service (Case No. 7209), have, or that either of them has, acted to deprive complainant of any right

guaranteed to him by the Fourteenth Amendment to the United States Constitution or by any other constitutional provision or law.

We conclude, therefore, that the complaint herein should be dismissed.

O R D E R

IT IS ORDERED that the complaint of Edgar J. Sokol herein be, and it hereby is, dismissed.

The effective date of this order shall be twenty days after the date hereof.

Dated at San Francisco, California, this 3rd day of AUGUST, 1965.

Frederick B. Holoboff
President

Commissioners

I will set forth my views in a separate opinion.
William M. Bennett

Commissioner George G. Grover, being necessarily absent, did not participate in the disposition of this proceeding.

C. 7784 AG

DISSENT

BENNETT, William M., Commissioner, Dissenting Opinion:

I suppose that it all comes down to a notion of fairness. And reviewing the majority opinion herein, I can only conclude that it perpertuates a procedure which is unconstitutional on its face, which is lacking any proper deference to the standards of due process and which is sought to be justified only upon the startling premise that a public utility service, i.e. the telephone, may be summarily removed without notice, without hearing and without demonstrated valid cause simply because such a procedure in some unspecified way constitutes "an aid to effective law enforcement." The question to be determined is a higher one than a mere judgment determining that which is promotive of effective law enforcement. In seeking to assist law enforcement, the majority overrides constitutional rights.

Decision No. 41415 Discussed.

The only concern as presented by the Sokol case should be directed toward a critical review of the unjust procedure set up by Decision No. 41415.

This proceeding had its genesis in Decision No. 41415, Case No. 4930, decided April 6, 1948, 47 Decisions of the PUC of the State of California 853. That decision arose out of a concentrated effort to eradicate bookmaking within California and to eliminate the use of the telephone as an aid to illegal bookmaking. The public policy against bookmaking as set forth in the Penal Code is not an issue here. The ban against such activities was settled long ago.

It is one limited to determining the validity of the

procedure prescribed by Commission Decision No. 41415 (supra). The critical portion of Decision No. 41415 compels a discontinuance of telephone service upon receipt of a letter from "any official charged with the enforcement of the law" complaining of illegal activity with reference to a telephone. And there is no discretion on the part of the telephone corporation to dishonor such a request. Decision No. 41415 is mandatory and it directs that a telephone corporation "must discontinue and disconnect service" upon reasonable cause and in turn reasonable cause is made out by the casual written notice herein described.

To sum up then, a public utility telephone corporation upon receipt of a letter from any official charged with law enforcement advising of actual or future illegal use of such telephone must instantly discontinue and disconnect service to the affected subscriber. And why? Because the Commission has held that such a letter constitutes reasonable cause.

Speculation can conceive of all manner of situations in which such written notices could be erroneous; the telephone corporation could have direct knowledge that the enforcement letter is erroneous; this and many other conditions could exist but to no avail so far as the subscriber and his telephone are concerned. The telephone company "must discontinue and disconnect service ..."

We have not commited in our structure of government the judicial process to law enforcement officers. And so any letter which is received by a telephone corporation is hearsay in nature and the matters set forth therein have not been arrived at through the process of judicial inquiry. And most importantly, the safeguards which surround judicial inquiry summed up in the concept of due process are totally lacking. In addition to all of these

inevitable deficiencies in such a letter, even its deficiencies are unknown to the subscriber since he is without notice or knowledge of such a letter and its contents and has absolutely no opportunity to contest the contents of such letter in any tribunal. I do not agree with the notion that because a hearing is ultimately held that the subscriber is protected adequately or indeed at all.

Perhaps the most unusual, even startling, portion of Decision 41415 is the language reading "No action at law or in equity shall accrue against any communications utility because, or as a result of any matter or thing done or threatened to be done pursuant to the provisions of this decision." I was not aware that the Public Utilities Commission of the State of California has the power in law or in fact to create or to destroy liability which would otherwise obtain coming from the general body of law. And obviously the Commission does not possess such power nor can it immunize a public utility telephone corporation from liability through such an unconstitutional decision.

While the public utility telephone corporations of California in an understandable desire to cooperate with law enforcement officials have followed the procedure of Decision 41415, nonetheless this cannot relieve them of the responsibility for making a correct decision with reference to the disconnection of a subscriber's telephone. And if the decision be incorrect and if a subscriber has been damaged, then in my judgment a liability has been created, and the cause of action which obtains as to the subscriber cannot be destroyed by the verbage of Decision 41415 which in reality is proscribing the jurisdiction of the judicial branch of the State of California. This the Commission cannot do and no amount of research and extended discussion is required on this point.

Sokol Complaint

The very proceeding here discloses the working of the so-called "bookie procedure" and its unfairness is singularly evident. On October 13, 1961 the Pacific Telephone and Telegraph Company advised the complainant here as follows:

> "We are informed that the communications service furnished to you by this Company under SU 1-5926, SU 1-5927, SU 1-5928 and SU 1-5929 is being used as an instrumentality to violate or to aid and abet the violation of the law. We are therefore discontinuing such communication service immediately."

This letter was based upon letter advice from the San Francisco Police Department complaining of unlawful use of the telephone and requesting that service be discontinued. Sokol had no opportunity, no notice and no hearing in order to refute the contents of the letter from the Police Department. In his case the telephones were physically removed from his premises by employees of the telephone company over his objections. Ultimately after 14 days upon Sokol's complaint telephone service was restored. As the majority opinion recites and is set forth in Pacific Telephone and Telegraph Company vs. Superior Court, 50 Cal. 2nd 426 at Page 428 "The Commission found that plaintiff's telephone facilities were not being used for any unlawful service, and accordingly his service was restored 14 days after being discontinued. The commission further found "that defendant herein (petitioner) acted upon reasonable cause in disconnecting said telephone facilities." (P.U.C. Decision 63178.)

It should be noted here that the telephone corporation quite frequently if not usually makes telephone disconnection at the particular exchange or office which services the subscriber's particular phone by a simple physical act of disconnecting some appropriate wire. This is short, quick, effective

and I presume the subscriber first learns that he has no telephone service when the instrument upon being put to use fails to function.

The Sokol case discloses the deficiencies, the unfairness, and the invalidity of the procedure created by D. 41415. In Sokol's case the opinions of the police as to unlawful activity were not demonstrated. The Commission decision relating to Sokol's complaint as the Supreme Court decision here shows found "no unlawful activity." And it would seem to do great violence to the ordinary processes of thought and to any reasoning based upon use of the syllogism to conclude then that despite the lack of unlawful activity that the telephone company had "reasonable cause to discontinue service." This latter proposition is most dubious in view of the findings of the Commission in reference to Sokol's telephone use.

The Nature of the Telephone.

While it is most basic nonetheless note should be taken that we are dealing here with a vital public utility service. This is unlike some privilege accorded the State of California to a licentiate through the usual licensing agency process. Those matters are considered to be privileges granted upon an equal basis and as to many of them are hard to come by. It is generally recognized that aside from equal opportunity to obtain this type of privilege there is no constitutional right to such. On the other hand the telephone has been regulated because it is a utility necessity to which as a matter of law each person is entitled upon meeting minimal conditions usually associated with ability to pay. And by law, a public utility telephone corporation may not withhold service absent good cause.

Upon the practical side no discussion need be had of the necessity of the telephone in our society. Accordingly then,

to remove such a service from a subscriber requires that it be done in a most proper manner and only upon demonstrated valid cause and in my opinion not in so loose, casual and unconstitutional a manner as here. And it is no argument to insist that the procedure be continued to stamp out bookmaking. The creation of a procedure so demonstratively unfair and its continuance based upon mere pragmatic reasons has no appeal to me.

A Discussion of Other Decisions.

So far as the Federal Communications Commission is concerned this question was decided sometime ago in Katz vs. American Telephone & Telegraph Company et al., 92 PUR, New Series 1952 at Page 1. The FCC there considered a tariff provision of the American Telephone & Telegraph Company which provided as to telephone service that:

> Service will not be furnished if any law enforcement agency, acting within its jurisdiction, advises that such service is being used or will be used in violation of law, or if the telephone company receives other evidence that such service is being or will be so used.

In the Katz case the Commission took note of the evils of "illegal gambling industry" but then went on to condemn the language herein quoted from the tariff and pointed out that the telephone company could not escape responsibility and ultimately liability for an authorized and improper disconnection of telephone service. It pointed out that the telephone company "must make a decision. That such decision may render it liable in the event of error ... does not eliminate the carrier's necessity to make the determination.: Further the Commission struck down the tariff language because:

> In effect, the carrier binds itself to accept in every case the advice of "any law enforcement agency, acting within its jurisdiction," without regard to the nature of the advice. Thus, it is possible that even though it may be within the knowledge of a carrier that the advice given it by a law enforcementment agency is unfounded, the regulations would require acceptance of the advice and

action in response thereto. In such or comparable situations, the automatic action required by the regulations would be clearly unreasonable, and consequently the regulations themselves, demanding such action, must fall. (Page 7)

In the concurring opinions of Commissioners Coy and Sterling is found this:

"Telephone service has assumed an important, almost indispensable, place in our everyday lives. To permit the discontinuance of such a service by the telephone company upon request to them by a law enforcement agency or upon any other basis of information that the telephone is being used for an unlawful purpose without first giving the customer an opportunity to be heard as the present tariff provides appears to us to be unjust and unreasonable. (Page 9)

A similar telephone provision was rejected in Tollin vs. Diamond State Telephone Company, 164 A.2d 254, at 259, wherein the court said:

"I have no doubt but that this particular section is in itself invalid because it purports to permit the cutting off of telephone service without a hearing and to absolve the telephone company from all liability for damages thereby resulting, Andrews v. Chesapeake & Potomac Telephone Co., supra, and see also Katz vs. American Telephone & Telegraph Co. (F.C.C.) 92 P.U.R. (N.S.) 1, aff'd 98 P.U.R. (N.S.) 134. Compare Pike v. Southern Bell Telephone & Telegraph Co., 263 Ala. 59, 81 So.2d 254, and Jannuzzio v. Hackett, 32 Del Ch. 163, 82 A. 2d 730."

Reference is made to Pike vs. Southern Bell Telephone and Telegraph Co., 81 So. 2d 254. Louis Pike's troubles began this way. A letter addressed to the district manager of the Southern Bell Telephone and Telegraph Company, Birmingham, Alabama, said:

"This is your order to remove the attached list of telephones which are used for illegal purposes. These telephones are not to be reconnected without a Court order or advice from me.

Sincerely yours,
/s/ Eugene "Bull" Connor
Commissioner of Public Safety." (1)

(1) The Commissioner of Public Safety and his highly colorful name has subsequently become a better known figure upon the American scene. His notions of due process and rights derivative from the Constitution of the United States of America have been the subject of discussion.

The telephones of Louis Pike were removed at once and subsequently the Supreme Court of the sovereign State of Alabama had occasion to review both the action of Eugene "Bull" Connor and the Southern Bell Telephone and Telegraph Co. The decision is worth reading and contains these observations throughout.

> "But mere suspicion that such service is desired for purposes contrary to the public interest will not justify refusal." (Page 255)

> "In the instant case, as far as the record reveals, there was not even a "tariff" of the telephone company to justify their discontinuance of this appellant's telephone service. We do not think this point controlling, however, and agree with the reasoning of the above case that the Telephone Company could not have adopted a valid tariff in this particular. Such a "tariff" would have been a denial of due process of law." (Page 255)

The Pike decision quotes Giordullo v. Cincinnati & Suburban Bell Telephone Co., Ohio Com. Pl., 71 N.E. 2d 858, 859, 860:

> "The telephone company required the plaintiff to get the OK of the Chief of Police before it would give plaintiff telephone service and withdrew the same upon the request of the Chief of Police, all without any hearing as to the gambling charges - that is police government pure and simple. (Emphasis supplied)." (Page 256)

> "If that is true (that plaintiff was using the telephone for bookmaking) it seems to the court that the defendant had the right to withdraw plaintiff's telephone service. When it comes to the trial of this case the Telephone Company will be required to prove that defense by preponderance of the evidence and the letter of the Chief of Police requesting defendant to withdraw plaintiff's telephone service will not even be proper evidence in the case. (Emphasis supplied).) (Page 256)

> "Neither the police commissioner nor the police department has any jurisdiction or authority over the matter of furnishing, discontinuing or restoring telephone service to the public, nor in any other way, so far as I am aware; his or its approval or disapproval in that regard are meaningless insofar as any legal effect is concerned; they possess no more power in that respect than a stranger; each is

utterly without such power whatever, however much the views and attitude of the commissioner or the department may by indirection be enforced, as, for example, by the arrangement or understanding between the police and the telephone company. * * *" (Page 257)

"Whether or no service should be terminated or discontinued is a decision that must be made by the telephone company. That power - as well as duty - rests with the public utility, and it may not delegate the one or avoid the other. True, the company is free to consult with the Police Department or with any other law enforcement agency, and may be guided in its action by the advice received. But whether the action is justified or warranted must be determined by the telephone company upon the facts presented. * * *" (Page 257)

"These depredations of a subscriber's legal right to telephone service constitute a denial of due process guaranteed by the Constitution of 1901, art. 1, § 6. The gratuitous and arbitrary action of a police official is no justification for an abridgement of this right. To hold that the Telephone Company is justified in discontinuing service by "order" of a police official would require judicial recognition of a police power which does not exist. The bald assertion of an executive officer, be he the Attorney General of the United States or a constable of some remote beat, cannot be accepted as a substitute for proof in the judicial process. No presumption arises as to the sufficiency of evidence based on a law enforcement officer's conclusions." (Page 258)

In Andrews vs. Chesapeake & Potomac Telephone Company 83 F.Supp. 966, concerning tariff language similar to that here under challenge is found this at page 966:

"That a person seeking the protection of the Constitution and laws is himself a person of bad character does not diminish his constitutional and legal rights."

"A public utility, such as a common carrier or a telegraph or telephone company, must serve all members of the public without discrimination or distinction, and fact that a person may be a bad character does not deprive him of right to receive service from a public utility."

It is interesting to note the discussion of this problem in People against Brophy [49 C.A. (2d) 15]. To my knowledge the Brophy case has never been revised or modified and importantly the reasoning of Brophy appears to me as valid as when enunciated.

As I view D. 41415 it is erroneous based upon notions of ordinary fairness. It is erroneous under the cases set forth herein and under any sensible interpretation of constitutional law.

The Delay in Decision.

This matter was filed with the Public Utilities Comission of the State of California on November 20, 1963 - almost two years ago. The case does not present any extraordinary problems in terms of the facts presented or the law relating thereto. Whatever the merits of Sokol's cause he was entitled to a decision long before now. This extraordinary delay is typical of the regulatory lag which now marks the business of this Commission. Parties in proceedings before this Commission are entitled to decisions with some degree of timeliness since the failure to render decisions with reasonable diligence could well seriously and adversely affect such parties' rights. In the instant case Sokol is attempting to pursue a cause of action in the civil courts for redress and he has been delayed in pursuing his alleged rights for so long as this matter has remained undecided by this Commission.

Some General Observations.

It is interesting to note in the majority opinion at Page 4 thereof the statement that the issue presented here is clearly one involving the constitutionality of Decision 41415. But then on Page 14 of the majority opinion the majority evades the issue by stating that this record does not present sufficient information upon which such an issue may be decided. This reasoning ignores the fact that the Sokol case on its facts presents a typical example of the workings of the procedures of Decision 41415. Further that procedure is well known to this

Commission since it was set forth by the Commission's own decision (D. 41415), this Commission reviews so-called "bookie" cases frequently and there is no requirement that any information as to the manner in which this procedure operates is necessary from third parties. This procedure is the business of the Commission, it is well known to it and there is adequate information in this record to reach the determination of whether or not such a procedure is valid.

It is noted as well that the investigation initiated by this Commission of the so-called "bookie" procedure was commenced by an Order Instituting Investigation, Case No. 4930, February 25, 1964. This matter has never even been set for hearing and the failure to do so represents a disregard of Commission responsibilities.

A casual research of the Commission decisions relating to disconnection of telephones used for unlawful bookmaking activities discloses that the usual Commission opinion refers to the filing of a complaint for restoration of telephone service. The defense of the responding telephone utility is an allegation that it had reasonable cause to disconnect the instrument and a letter from the Police Department is introduced to establish such cause. Then the typical "bookie" opinion notes that complainant testifies that "he has great need for telephone service, and he did not and will not use the telephone for any unlawful purpose. There was no appearance or testimony from any law enforcement agency." The opinion further states "We find that defendant's action was based upon reasonable cause, and the evidence fails to show that the telephone was used for any illegal purpose."

This language is taken from a typical decision and is representative of all too many of the decisions pertaining to this

matter. One can only speculate as to the reasons for a lack of appearance by the law enforcement agency to give proof to those matters set forth in the original letter to the communications utility.

It is clear that such a method is highly effective. It is equally clear that such a procedure is unfair and in total disregard of the obligations of law enforcement officials and the rights of a telephone subscriber. As I view these cases all public utility telephone corporations in California have the obligation to make an independent judgment as to the merits of any letter received from any public official charged with the enforcement of the law before disconnecting telephone service.

In the hearing held in connection with the complaint of Sokol wherein he originally filed for restoration of telephone service, C. 7209, is found this at Page 21 of the transcript:

"Q. Thank you, Mr. Sorensen.

Do you have any personal knowledge, sir, as to the truth of the matter contained in that letter?

A. No, sir.

Q. To your knowledge, does anyone in the Special Agent's office of the Telephone Company have any personal knowledge of the truth of the matter contained in that letter?

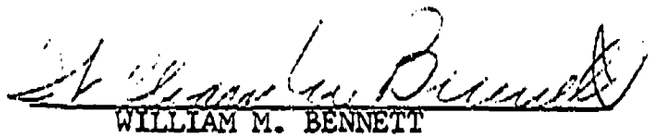
A. No, sir.

Q. Did you or anyone in your office make an investigation into the truth of that matter?

A. No, sir." Sokol vs. Pacific Telephone & Telegraph Company, Case No. 7209, Reporter's Transcript, Vol. 1, Page 21, of hearing before the Public Utilities Commission of the State of California on December 19, 1961.

This bit of testimony is really dispositive of the whole procedure in terms of its validity.

One could pursue this matter endlessly for a host of reasons which I have not gone into here. There are many issues of law bearing hereon which are perhaps equally pertinent to those things I have discussed; however, for the reasons I have set forth as is evident by now, I dissent to the opinion of the majority. This is a matter which should be reviewed by the Supreme Court of the State of California.



WILLIAM M. BENNETT
Commissioner