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ORIGINAL

Decision No. 70045

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

EDGAR J. SOKOL,

Petitioner,

vs.

THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY, a corporation,

Respondent.

Case No. 7784

ORDER DENYING REHEARING

Edgar J. Sokol, having petitioned for rehearing of Decision No. 69510, the Commission having considered each and every allegation therein, and being of the opinion that no cause for rehearing is set forth;

IT IS ORDERED that rehearing of Decision No. 69510 be, and the same is, hereby denied.

Dated at San Francisco, California, this 7th day of DECEMBER, 1965.

Frederick B. Holoboff
President

Peter E. Mitchell

George G. Grover

William M. Bennett

Commissioners

My views as to the costs and the procedure in all of the cases is set forth in my original dissent herein.
William M. Bennett

I will file a concurring opinion.
George G. Grover

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BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

EDGAR J. SOKOL, Complainant, vs. THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY, a corporation Defendant.	Case No. 7784

CONCURRING OPINION OF COMMISSIONER GROVER

I concur in the order denying rehearing of Decision 69510.

Inasmuch as I presided at the public hearing in this matter but was not present at the Commission meeting when it was decided, I should like to record the fact that, had I been present, I would have joined in Decision 69510. This is also an appropriate time to offer certain supplementary observations.

I

The police may lawfully arrest a man without notice, hearing or prior judicial authorization.[1/] Similarly without notice, hearing or prior judicial authorization, they may invade his home or place of business,[2/] seize or destroy his property,[3/] strike him,[4/] even kill him.[5/] The framers of

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1/ See Report of the Governor's Commission on the Los Angeles Riots (Dec. 2, 1965), p. 24; Coverstone v. Davies (1952), 38 Cal.2d 315.

2/ Ker v. California (1963), 374 U.S. 23, 10 L.Ed.2d 726, 83 S.Ct. 1623.

3/ Lawton v. Steele (1894), 152 U.S. 133, 38 L.Ed. 385 (fish nets); Affonso Bros. v. Brock (1938), 29 Cal.App.2d 26 (cattle).

4/ People v. Brite (1937), 9 Cal.2d 666, 681.

5/ See People v. Newsome (1921), 51 Cal.App. 42, 49; Report of the Governor's Commission on the Los Angeles Riots (Dec. 2, 1965), p. 23.

our Bill of Rights believed strongly in individual liberty, and from their own experience they fully appreciated the dangers of a police state. But they equally appreciated that on the front line of the struggle for a decent, just and stable society, there will always be moments when the speed and vigor of an effective police force will be more appropriate than the caution and deliberation which are the hallmarks of the judicial process.

There are safeguards. The police are ultimately answerable to the people through the electoral process, and if, in a particular case, a police officer exceeds his lawful powers, he may be held liable for damages[6/] or punished in the criminal courts.[7/] In recent years there has also been an increasing judicial tendency to discourage improper police action by rejecting illegally obtained evidence or by reversing convictions obtained in violation of citizen rights.[8/] But a critical distinction remains--the distinction between the excesses of the police state on the one hand and reasonable emergency law enforcement on the other. After all, even the Fourth Amendment prohibits only unreasonable searches and seizures.

I am startled by the suggestion that telephone service is somehow beyond the reach of these fundamental principles. On the surface it does not appear unique; and certainly the ipse dixit of one Commissioner does not make it so. More important, the evidence in this proceeding is definitely to the contrary. Complainant's counsel approached this case

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6/ Miller v. Glass (1955), 44 Cal.2d 359; Boyes v. Evans (1936), 14 Cal.App.2d 472 (exemplary damages); Sarafini v. City and County of San Francisco (1956), 143 Cal.App.2d 570.

7/ People v. Dukes (1928), 90 Cal.App. 657; People v. McCaffrey (1953), 118 Cal.App.2d 611.

8/ See Mapp v. Ohio (1961), 367 U.S. 643, 6 L.Ed.2d 1081, 81 S.Ct. 1684; People v. Cahan (1955), 44 Cal.2d 434.

largely on a theoretical basis, asserting abstract and virtually absolute constitutional rights to telephone service; except for very limited cross-examination of the Attorney General's witnesses, they presented almost nothing in opposition to the convincing evidence of these law enforcement experts. This law enforcement evidence was to the effect that illegal bookmaking is a multi-billion dollar industry; that it is intimately tied to the most powerful echelons of organized crime; that it has especially sinister impact upon our youth; 9/ that detection and apprehension of criminal bookmakers is made particularly difficult by extensive use of telephones; that in the period immediately following the closing of a bookmaker's establishment by the police, it is essential to interrupt his telephone service so that he cannot arrange for continuation of his bookmaking at another location; and that a central office disconnection is necessary to assure such interruption. 10/ It is clear on this record that notice would alert a bookmaker and give him time to set up substitute telephone facilities behind which to continue his violation of the law. The law enforcement problem is also complicated by the fact that conviction of bookmakers often does nothing to stop the illegal conduct involved, for those apprehended are frequently mere hired fronts for the real bookmaker, whose ability to remain anonymous is due in large part to the special protection afforded by telephone facilities.

In short, if we approach this problem in the same way we would approach any other search and seizure case, we reach the conclusion that the police, if they act reasonably, may constitutionally "seize" telephone service without notice or hearing, and that a central office disconnection

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9/ Even without such evidence, of course, we are bound to respect the Legislature's determination that bookmaking is undesirable and should be punished. (Penal Code §337a.)

10/ If the arresting officer disconnects and impounds the telephone instrument, service is not necessarily interrupted, for the instrument can be replaced with another; the criminals can even tap the line and route the service to another location.

may appropriately be made a part of such a seizure.

If the police could never lawfully interrupt telephone service without notice and hearing, then perhaps complainant here could prevail--on the theory that the company was constitutionally obligated to disregard the procedure established by the Commission in Decision 41415. But so long as some system for reasonable emergency police interference with telephone service is permissible, then it was proper for the Commission to consider and to decide what the role of the telephone company in these cases should be.

It must be borne in mind that the critical point in Decision 69510 is the immunization of the utility. Decision 69510 did not hold that the police acted correctly here--indeed, there is a possibility they did not. Decision 69510 did not purport to approve any and all police conduct relating to telephone service, nor did it completely reaffirm Decision 41415; on the contrary, Decision 69510 called attention to the reopened investigation. Proceeding from a recognition that reasonable police seizure of telephone service is lawful, Decision 69510 merely determined that, in the event of such seizure, the telephone company should not have a veto. The company's immunization from liability follows as a necessary consequence.

We are now brought to the great irony of this case. Repeatedly, complainant's counsel have declared that the telephone company should be kept out of the law enforcement business. That is exactly what I want to do! The law holds a defendant liable, not for the mere fact that he has been sued, but because he has done something wrong. If the company is to be held liable as a wrongdoer, it must first be given a choice between doing right and doing wrong. And if, upon being requested by the police to disconnect telephone service, the company is given a choice, then it is given power to review the decision of the police: it becomes a law enforcement agency--and at the appellate level.

We trust the police reluctantly. We trust them at all because,

without them, civilization as we know it would be impossible and also because most policemen are able and honest. Our trust is reluctant because, unfortunately, history teaches that fallible, incompetent, even corrupt policemen do exist. Why complicate the problem by bringing the telephone company into it? If we are to trust anyone with emergency power to disconnect telephone service (and the reasonable search and seizure principles of our constitutional law indicate that we should), then let it be the police. There are other dangers to our liberties. The cause of freedom simply is not served by subjecting our democratically controlled police to the superintendence of a private corporation.

It is not suggested that a telephone utility will be liable in damages if it refuses a police request for disconnection; if it is now to be made liable for granting such requests, then it is apparent where the company's self interest will lead. For the very reason that a utility is not a law enforcement agency, it will have no inclination under such circumstances to aid law enforcement--even in meritorious cases.[11] In short, the method by which complainant's counsel would "keep the telephone company out of the law enforcement business" would be by simply eliminating law enforcement at the point in question, that is, at the vital central office connection. We do not follow such a course with respect to other law enforcement weapons; the police are not denied guns or jails simply because they might shoot or imprison innocent persons. Rather the law holds the police accountable for their use of these weapons;[12] and it requires, under appropriate circumstances, that private citizens assist the police when called upon--with appropriate immunity from liability.[13]

11/ As Decision 41415 points out, the Commission's 1948 investigation revealed that utilities had been allowing illegal use of facilities even when they must have been aware of what was going on.

12/ See footnotes 6 and 7, supra. Sokol has brought suit in the Superior Court against the police officers involved in this case.

13/ Penal Code §150; Peterson v. Robison (1954), 43 Cal.2d 690, 697; see Babington v. Yellow Taxi Corp. (1928), 250 N.Y. 14, 164 N.E. 726, 61 A.L.R. 1354.

II

Decision 69510, and the relevant portions of Decision 41415, are within the Commission's jurisdiction.

Both the California Constitution and the Public Utilities Act clearly contemplate that it is for the Commission to decide the standards of utility conduct toward subscribers.[14/] In the exercise of this undoubted jurisdiction, the Commission has determined, both in Decision 41415 and in Decision 69510, that a telephone utility acts reasonably and without undue discrimination when it temporarily refuses service to customers claimed by the police to be using it illegally.

It is true that Decision 41415 declares that, except as provided therein, "no action in law or equity" shall accrue against any communications utility because of anything done pursuant to that decision. But the declaration in question is not, as suggested in the dissenting opinion, an assertion by the Commission of the power to define the jurisdiction of the courts; rather the statement articulates the legal effect of a Commission decision concerning reasonable standards of service. When, for example, the Commission authorizes abandonment of a particular route of a passenger stage corporation, the bus company's refusal thereafter to carry passengers over that route is not actionable in court--whether or not the Commission says so.[15/] Similarly in Decision 41415, it was for the Commission to determine to what extent a telephone company may reasonably be required to provide service in the face of police allegations of illegal use; a legal consequence of that determination is that a contrary court action will not lie.

14/ Cal. Const. Art. XII, §§22, 23; Pub. Util. Code §§761, 701, 702; Pacific Tel. & Tel. Co. v. Superior Court (1963), 60 Cal.2d 426, 428-429.

15/ See also Cole v. Pacific Tel. & Tel. Co. (1952), 112 Cal.App.2d 416 (commission rule limiting utility's liability held binding in court suit for damages); cf. Pratt v. Coast Trucking, Inc. (1964), 228 Cal.App.2d 139.

III

When this case was being set for hearing, the telephone company moved that it be consolidated with Case 4930, which is the Commission's reopened general investigation of this subject. At complainant's request, the motion was denied, and the Sokol case was tried first. After the hearing, the issues were extensively briefed, and by the time of submission it was apparent that the direction and scope of the general investigation could be better determined after the decision in the Sokol case. Thus, for example, if we had decided that the disconnection procedure is wholly unconstitutional, then there might be no point in pursuing the investigation at all. To state it another way, the Sokol case has served in effect as the opening phase of our reconsideration of Decision 41415. Now that rehearing of Decision 69510 has been denied, public hearings in the investigation have been scheduled for February 16, 1966 at San Francisco.

At the forthcoming hearings, the Commission will be interested in a number of questions not directly involved in the Sokol case. Thus, in place of the provision of Decision 41415 that a complaint filed with the Commission is the exclusive remedy for restoration of service, we may reconsider the possibility of restoration by court order. The question of burden of proof in restoration cases will also be explored. Although our interim relief policy was liberalized in 1962, so that, upon request, interim restoration of service is today essentially automatic,[16/] we shall again review interim procedures to determine if any further revisions are called for. The utilities' present unlimited discretion as to public telephones will also be examined. And we shall consider what "punishment", if any, can or should be imposed when a subscriber admits illegal use of facilities or when such illegal use has been established at a public

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16/ Prior to that time the Commission had sometimes denied interim relief, if the complainant failed to comply with technical pleading requirements.

hearing.[17] Utilities, law enforcement agencies, and other interested parties will be invited to suggest other issues and to present evidence.

It bears emphasis, however, that the Commission's interest in the general subject of illegal use of telephone facilities does not militate against the determinations which have been made, after careful deliberation, in the Sokol case, namely:

1. Although the police themselves may be held liable if they are guilty of improperly interrupting telephone service, they should not be denied the power to interrupt service; this power should include the right to require a central office disconnection.

2. Upon receiving from a duly constituted law enforcement agency a request for a central office disconnection on the ground of illegal use, a communications utility should be required to comply, and it should not be held liable in damages for doing so.

George G. Grover

Commissioner

February 4, 1966

17/ See in particular my dissent in Rogers v. Pacific Tel. & Tel. Co. (1964), 62 Cal.P.U.C. 205, 206; see also Kretske v. Pacific Telephone (1964, Cal.P.U.C. unreported), Decision 66633 in Case 7686.