

**ORIGINAL**Decision No. 71797

## BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Investigation on the Commission's own motion into the use being made of communications facilities and instrumentalities for the purpose of determining if such use, in any instance, is in violation of law or is aiding or abetting, directly or indirectly, a violation of law or is not in the public interest.

Case No. 4930  
(Further Hearing)

## APPEARANCES AT FURTHER HEARING:

Pillsbury, Madison & Sutro, by Noble K. Gregory and Walter R. Allan, for The Pacific Telephone and Telegraph Company; A. M. Hart and A. Ralph Snyder, Jr., for General Telephone Company of California; Noel Dyer and Dudley A. Zinke, for Western Union Telegraph Company, respondents.

Albert W. Harris, Jr., Assistant Attorney General, for Thomas C. Lynch, Attorney General of the State of California, intervenor.

Roger Arnebergh, City Attorney, by Charles E. Mattson, Deputy City Attorney, for the City of Los Angeles; William L. Knecht, for the California Farm Bureau Federation; Richard Godino, for the County of Marin; Milton Stern, Jr., in propria persona; Marshall W. Krause, for American Civil Liberties Union of Northern California, interested parties.

Harold J. McCarthy, for the Commission staff.

OPINION ON FURTHER HEARING

The Commission, by order dated February 25, 1964, reopened this investigation for the purpose of determining whether a rule, established in 1948 by Decision No. 41415 (47 Cal.P.U.C. 853), requiring a communications utility summarily to refuse service to an applicant or to discontinue service to a subscriber if advised by any law enforcement agency that the service is, or will be, used for unlawful purposes, should be rescinded, altered, or amended (Public Util. Code, sec. 1708).

The rule, incorporated since 1948 in tariffs filed by communications utilities with the Commission, has served both as an aid to law enforcement agencies in combatting crimes, chiefly bookmaking and prostitution, that rely for their perpetration on the uninterrupted use of telephone or telegraph facilities and service, and as the basis for disposition of complaints filed with the Commission for restoration of such service after termination for alleged unlawful use. The rule also provides that the subscriber's action before the Commission shall be the exclusive means of challenging the termination of service and it explicitly insulates the communications utility from civil damage actions when acting pursuant to its provisions.

Evidence at hearings held in the reopened investigation in February and August, 1966, at San Francisco before Commissioner Grover and Examiner Gregory, disclosed that the rule has been effective in providing a measure of control over the criminal activity at which it is directed. Unfortunately, on rare occasions subscribers not found by the Commission to be guilty of wrongful conduct have had their telephone service interrupted by police and utility action under the rule.

One such case, involving a racing information service in San Francisco, resulted in litigation which, for the first time in California, raised the issue of whether the procedures established in Decision No. 41415 were constitutionally infirm because they deprived the subscriber of property without due process of law: first, because they did not provide him with an opportunity to challenge the allegations of the police department until after his telephones had been removed and his business had been affected, and second, because they denied him any action against the telephone company for the

wrongful discontinuance of service. (Sokol v. Public Utilities Comm., Sept. 29, 1966, 65 A.C. 241.)

Submission of the reopened investigation was deferred at the concluding hearing on August 17, 1966, to await the result of the Supreme Court's review of the Sokol case. Immediately upon issuance of the court's decision, holding that though the rule contained a constitutional infirmity the defect was not necessarily incurable if the rule were appropriately amended, the parties were requested to file memoranda in light of that decision. The briefs, which include a variety of proposed amendments to the present rule, have been received and carefully considered.<sup>1/</sup>

We note, preliminarily, that the court found nothing improper in the provision which denies a subscriber any action against a telephone company for wrongful discontinuance of service in cases arising under the rule. On that issue the court observed: "A contrary rule would not only be inequitable but would discourage cooperation with law enforcement agencies." (Sokol v. P.U.C., supra, at p. 252.) Accordingly, we conclude that no change of the substance of that provision of the present rule is required.

The Supreme Court concluded that "the rule promulgated in Decision No. 41415 does not conform to the due process requirements of the state and federal constitutions in that it provides

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<sup>1/</sup> Concurrent opening briefs were filed by: The Pacific Telephone and Telegraph Company, General Telephone Company of California, The Western Union Telegraph Company, the City of Los Angeles, The Attorney General of the State of California, the American Civil Liberties Union of Northern California and the Commission staff.

Concurrent reply briefs were received from: The Pacific Telephone and Telegraph Company, The Western Union Telegraph Company, The Attorney General and the Commission staff.

for no review of the bare allegations of the police prior to the termination of service." (Sokol v. P.U.C., supra, at p. 250.)

Noting that the Commission had reopened the case in which Decision No. 41415 was issued, the court said:

"...whatever new procedure is hereafter devised must at a minimum require that the police obtain prior authorization to secure the termination of service by satisfying an impartial tribunal that they have probable cause to act, in a manner reasonably comparable to a proceeding before a magistrate to obtain a search warrant. In addition, after service is terminated the subscriber must be promptly afforded the opportunity to challenge the allegations of the police and to secure restoration of the service. A procedure incorporating these measures would provide substantial protection to the subscriber without hindering the enforcement of gambling laws." (Sokol v. P.U.C., supra, at p. 250.)

The court cited a number of decisions in California and other jurisdictions concerning the right of an individual to present his views at a hearing prior to the institution of action affecting his substantial rights, and stated that the various cases are conflicting, that they are distinguishable from the Sokol case, and that they demonstrate the lack of a rule of universal application that confers a right to such prior hearing. Our own research points to the same conclusions.

The various proposals, with supporting arguments, for amendment of present procedures, some of which were tentatively advanced at the final hearing, disclose a wide range of opinion as to what the proponents conceive to be the court's views on the procedures required to safeguard a subscriber's right to due process in cases arising under the rule. The briefs also reveal much diversity on the subject of this Commission's jurisdiction in such cases, and on questions related to the extent of

the Commission's concern with various procedures connected with the physical removal of communications facilities from suspected premises and the termination and restoration of a subscriber's service.

Without discussing the proposals in detail, which would serve no useful purpose here, we will attempt to summarize the views of the parties as set forth in their briefs. We do this not only because the court has indicated that a "plethora" of ~~constitutionally valid solutions are conceivable~~, but also because the parties are entitled to know, especially in a case that involves all communications utilities and law enforcement agencies in this State, as well as this Commission, just how the Commission views both the court's decision and the remedial measures advanced by those directly concerned with the rule.

The court has indicated neither specific corrective procedures nor the tribunal before which such procedures are to be effected. It is, therefore, not surprising that the proposals advanced by the parties tend to emphasize, in one way or another, their concern for an amended rule that will comport with their special interests and responsibilities in the fields of public communications service, law enforcement, protection of constitutional rights of property and expression, and utility regulation.

Preliminarily, enforcement of the gambling or other laws, in which public communications service figures as an aid to unlawful conduct, involves two basic concepts or spheres of activity; first, the law enforcement process, directed at the alleged lawbreaker, which includes investigations, arrests, searches, seizures, bail, criminal prosecutions and penalties and the whole range of police and judicial action directed at the

suppression of crime, and second, the regulatory process, including rule making, enforced by this Commission and which is directed primarily at the rates and service of public utilities and some related nonutility services. The regulatory process includes making necessary orders in investigations, applications and complaints concerning utility and related activities.

A basic consideration common to all law enforcement action, whether in the criminal field or in that which involves public utility regulatory and judicial processes, is that such action, to be valid, must comply with federal and state constitutional requirements for both substantive and procedural due process of law. Unreasonable action by law enforcement agencies, whether in the criminal or regulatory field, bears a heavy presumption of unconstitutionality when brought before a reviewing tribunal. As stated by the court in the Sokol case:

"In view of the importance of the fundamental rights affected, we would be justified only by the most compelling considerations in permitting the deferment of all procedural safeguards until the fait accompli: termination of the telephone service." (Sokol v. P.U.C., supra, at p. 250.)

Examining the proposals advanced by the several parties in light of the foregoing remarks, we note that the respondent utilities (Pacific, General and Western Union), with the general concurrence of the American Civil Liberties Union, have proposed

that, prior to central office disconnection of service (whether or not following an arrest or search involving seizure of telephone instruments by the police), substantially the following measures be taken: a police request to the utility, or, by affidavit, to the Commission, for termination of service; notice by the utility or the Commission to the subscriber of the proposed termination; interim orders by members of the Commission's staff (Secretary or Assistant Secretary) directing termination or, upon the filing of a counter-affidavit by the subscriber, interim restoral of service pending a hearing to determine disputed facts raised by the affidavits. (The American Civil Liberties Union urges that the subscriber's affidavit be conclusionary in form, rather than factual, so as not to require that he furnish self-incriminatory evidence that could be used in a criminal prosecution concerning the alleged illegal use of the communications facility.)

The procedure suggested by Pacific Telephone provides that copies of a "directive" made by the Director (of the Commission's Los Angeles Office) or the Secretary, requiring either a stay or discontinuance of service, or restoration of service after discontinuance, shall be mailed to the law enforcement agency which requested disconnection. Thereafter, if such law enforcement agency requests a hearing, the Director or Secretary shall set a hearing at which all parties may appear. No pleadings shall be required of the parties appearing at the hearing. The law enforcement agency requesting the service disconnection shall have the burden of establishing that the service was used, is being used, or will be used as an instrumentality, directly or indirectly, to violate or to aid and abet the violation of the law. The balance of Pacific's proposal incorporates present

provisions of the rule concerning exclusiveness of the remedies provided by the rule, insulation of the utility from civil or criminal actions for any act done in compliance with the rule, and the statement that each contract for communications service shall be deemed to contain the provisions of the rule.

The Attorney General urges that the proposals of the utilities and the American Civil Liberties Union would impose unnecessarily high standards of due process and would tend to hamper efficient law enforcement. Specific objection is made to the proposal of staff counsel for the Commission that each written request by a law enforcement agency to a utility to disconnect service must be endorsed by a magistrate, and to a suggestion by General Telephone that an Assistant Secretary of the Commission be delegated the power, upon receipt of a written request and affidavit from a law enforcement agency, to order a utility to disconnect service.

The Attorney General and the City of Los Angeles have urged that separate procedures be adopted for service disconnections in the following circumstances: (a) where the request for disconnection merely alleges unlawful use of the communications facility, in which case disconnection would occur only after reasonable notice to the subscriber; (b) where the request alleges unlawful use of the instrumentality on a specific date and its physical removal by the law enforcement agency as part of law enforcement action, in which case the disconnection would be effected immediately and without prior notice to the subscriber.



In the latter case, the subscriber, within 15 days from the disconnection, could request interim restoration of service, subject to written notice by the Commission to the law enforcement agency of such request and an opportunity, if requested by the law enforcement agency, to be heard in opposition to the granting of interim relief. After such 15-day period, service would be restored by the utility upon application by the subscriber after written notice by the utility to the concerned law enforcement agency.

An additional provision urged by proponents of the above procedures would require the utility, upon any restoration of service following disconnection under provisions of the rule, to issue a new telephone number to the subscriber, without referral service, and to give written advice to the law enforcement agency of its decision to restore service and the new telephone number issued.

We pass now to a consideration of the procedures suggested by counsel for the Commission staff. Those procedures, in substance, place primary responsibility on law enforcement agencies, including magistrates, for the initial steps taken to secure disconnection of utility communications service, both in cases involving an arrest or search in which facilities have been physically removed from suspected premises, and in those cases where the request to disconnect service is based simply on allegations by law enforcement officials of unlawful use of communications facilities, without there having occurred a prior arrest or search or a physical removal of the facilities. Procedure for securing restoration of service, after termination by the utility at the request of law enforcement officials,

would continue to be the responsibility of the Commission as it is now, both under the present rule and in any other case that involves the Commission's regulatory jurisdiction over a service controversy between a utility and its patrons or consumers.

Staff counsel argues that the court's minimal requirements for procedures that would provide substantial protection to the subscriber without hindering enforcement of the gambling laws are met by an amended rule that incorporates measures summarized as follows:

1. The utility shall refuse or discontinue service upon receipt from any authorized law enforcement official of written authorization, endorsed by a magistrate as defined by the Penal Code, secs. 807 and 808, finding that probable cause exists for the belief that the use made or to be made of the service is prohibited by law, or that the service is being used as an instrumentality, directly or indirectly, to violate or to aid and abet the violation of the law, and authorizing such enforcement official to request the communications utility to refuse or discontinue service for that reason.

2. Any person aggrieved by any action taken or threatened to be taken under the rule would have the right, as at present, to file a complaint with the Commission and that remedy would be exclusive, as under the present rule.

3. If communications facilities have been physically disconnected by law enforcement officials at the premises where located, without central office disconnection of service by the utility, the utility must promptly restore such facilities upon written request of the subscriber, unless, prior to receipt of the subscriber's request, the utility has received from an

authorized law enforcement official a written request, endorsed by a magistrate, to refuse or to disconnect such service.

Proposals of staff counsel include retention of the present provision making the rule a part of each contract for communications service by operation of law and binding upon any applicant for such service.

Taking issue with proponents of the more complex procedures, staff counsel argues that his proposed order not only fully satisfies the requisites for due process given in the Sokol case while maintaining effective enforcement of the gambling laws, but it also places the determination of probable cause of illegal use of communications service and facilities in the hands of a proper impartial tribunal, namely, a magistrate.

Staff counsel, in the development of his argument, points out that the determination of probable cause in connection with alleged illegal conduct by an individual, in a manner comparable to a proceeding for obtaining a search warrant, is neither proper utility regulation nor within the scope of specific judicial powers vested in this Commission by the Constitution and statutes of this State. Counsel urges that the Commission has not been authorized by law to perform the duties of a magistrate and the court's decision in the Sokol case does not require it to assume such powers.

Our review of the record in this proceeding, together with a careful study of the court's decision in the Sokol case and examination of the authorities cited by proponents of the suggested remedial procedures, has led us to conclude that the separation of legitimate from illegitimate use of the rights of property or freedom of expression calls for sensitive tools. (See Speiser v. Randall, 357 U.S. 513, 525, 2 L.ed.2d 1460, 1472.) The injudicious application of procedural remedies, especially at the initial stage of cases involving fundamental rights such as those under consideration here, can result in miscarriages of justice and in protracted litigation to secure relief from improper or over-zealous action by law enforcement agencies, or, in the regulatory field, by administrative agencies like this Commission.

When confronted by a choice of remedial rule-making procedures, many of which have merit but all of which must, at a minimum, be responsive to the basic concepts of due process laid down by the Supreme Court, the Commission is of the opinion that its choice should be in the direction of those procedures that offer the best opportunity for correct law enforcement action at the earliest stage of a proceeding. We are reasonably certain, for example, that had the police request for disconnection of Sokol's telephone service been required to pass muster before a magistrate, in a manner comparable to a proceeding to obtain a search warrant, that individual might very well still be enjoying the use of a telephone.

Accordingly, the Commission finds and concludes that of the numerous proposals for correction of the constitutional defect found by the court to inhere in the present rule, the procedures suggested by counsel for the Commission staff, appearing as an appendix to his reply brief in this proceeding, modified as hereinafter set forth, are reasonable and should be included in the rule adopted herein by the Commission.

We further find and conclude that it is reasonable to include and that there should be included in said rule a provision for advance notice to concerned law enforcement agencies of any hearing held by the Commission on a subscriber's complaint for refusal or restoration of service; that such law enforcement agency should have the right to intervene in such proceeding, should be entitled to receive copies of all notices and orders issued in such proceeding and should have both the burden of proving past or threatened misuse of the service and the burden of persuading the Commission that the service should be refused or should not be restored; that a utility disconnecting or refusing to provide service pursuant to the rule adopted herein should give notice thereof to the applicant or subscriber affected, together with a copy of said rule; and that, in the absence of timely objection by a concerned law enforcement agency, refused service should be provided, and disconnected service should be restored, at the end of fifteen days after such refusal or disconnection.

We find that it will not be necessary or appropriate to include in said rule the suggested provision for issuance of new telephone numbers, without referral service, after

disconnection of service by the utility at the request of a law enforcement agency. We recognize, however, that the record before the Commission on a particular complaint involving disconnection of service may justify the imposition of such a service restriction by appropriate order.

The following order will provide for the amendment of present tariff schedules of all communications utilities subject to the jurisdiction of this Commission, in accordance with the provisions of General Order No. 96-A, so as to incorporate in such schedules the provisions of the rule set forth in Appendix "A" to this decision.

O R D E R

IT IS ORDERED that:

1. The rule adopted by the Commission by Decision No. 41415, heretofore issued in this proceeding, is rescinded and the rule set forth in Appendix "A", attached to and hereby made a part of this order, is hereby adopted.
2. Every communications utility subject to the jurisdiction of this Commission shall, within sixty days after the effective date of this order and on not less than five days' notice to the Commission and the public, amend its existing tariff schedules, in accordance with the provisions of General Order No. 96-A, so as to include in such amended schedules the provisions of the rule set forth in Appendix "A" attached to this order.

The Secretary shall cause a certified copy of this order to be served forthwith by registered mail upon each communications utility subject to the jurisdiction of this Commission, and by regular mail upon each of the other parties of record herein.

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

Dated at San Francisco, California, this 20<sup>th</sup> day of DECEMBER, 1961.

[Signature]  
President

George T. Grover

Frederick B. Holshoff

[Signature]

Commissioners

Commissioner William M. Bennett, being necessarily absent, did not participate in the disposition of this proceeding.

APPENDIX "A"

1. Any communications utility operating under the jurisdiction of this Commission shall refuse service to a new applicant, and shall disconnect existing service to a subscriber, upon receipt from any authorized official of a law enforcement agency of a writing, signed by a magistrate, as defined by Penal Code Sections 807 and 808, finding that probable cause exists to believe that the use made or to be made of the service is prohibited by law, or that the service is being or is to be used as an instrumentality, directly or indirectly, to violate or to assist in the violation of the law.

2. Any person aggrieved by any action taken or threatened to be taken pursuant to this rule shall have the right to file a complaint with the Commission and may include therein a request for interim relief. The remedy provided by this rule shall be exclusive. No other action at law or in equity shall accrue against any communications utility because of, or as a result of, any matter or thing done or threatened to be done pursuant to the provisions of this rule.

3. If communications facilities have been physically disconnected by law enforcement officials at the premises where located, without central office disconnection, and if there is not presented to the communications utility the written finding of a magistrate, as specified in paragraph 1 of this rule, then upon written request of the subscriber the communications utility shall promptly restore such service.

4. Any concerned law enforcement agency shall have the right to Commission notice of any hearing held by the Commission pursuant



APPENDIX "A"

to paragraph 2 of this rule, and shall have the right to participate therein, including the right to present evidence and argument and to present and cross-examine witnesses. Such law enforcement agency shall be entitled to receive copies of all notices and orders issued in such proceeding and shall have both (1) the burden of proving that the use made or to be made of the service is prohibited by law, or that the service is being or is to be used as an instrumentality, directly or indirectly, to violate or to assist in the violation of the law, and (2) the burden of persuading the Commission that the service should be refused or should not be restored.

5. The utility, immediately upon refusal or disconnection of service in accordance with paragraph 1 of this rule, shall notify the applicant or subscriber in writing that such refusal or disconnection has been made pursuant to a request by a law enforcement agency, naming the agency, and shall include with said notice a copy of this rule together with a statement that the applicant or subscriber may request information and assistance from the Commission at its San Francisco or Los Angeles office concerning any provision of this rule.

6. At the expiration of fifteen days after refusal or disconnection of service pursuant to paragraph 1 of this rule, the utility, upon written request of the applicant or subscriber, shall provide or restore such service unless the law enforcement agency concerned shall have notified the utility in writing of its objection to such provision or restoration of service, in which event service may be provided or restored only in a complaint

APPENDIX "A"

proceeding pursuant to paragraph 2 of this rule. At the time of giving any such notice of objection, the law enforcement agency shall mail or deliver a copy thereof to the applicant or subscriber. Nothing in this paragraph shall be construed to preclude the granting of interim relief in a proceeding initiated pursuant to paragraph 2 of this rule.

7. Each contract for communications service, by operation of law, shall be deemed to contain the provisions of this rule. Such provisions shall be deemed to be a part of any application for communications service. Applicants for service shall be deemed to have consented to the provisions of this rule as a consideration for the furnishing of such service.

8. The term "person", as used herein, includes a subscriber to communications service, an applicant for such service, a corporation, a company, a copartnership, an association, a political subdivision, a public officer, a governmental agency, and an individual.

9. The term "communications utility", as used herein, includes a "telephone corporation" and a "telegraph corporation", as defined in Division 1 of the California Public Utilities Code.