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Decision No. 72568

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Suspension and Investigation on the Commission's own motion of tariffs revising the Rules to provide a new Rule entitled Recorded Public Announcements on Telephone Company Facilities by The Pacific Telephone and Telegraph Company.	Case No. 8335 (Filed January 9, 1967)

Arthur T. George; Pillsbury, Madison & Sutro, John A. Sutro, George A. Sears, Richard W. Odgers, by George A. Sears, for The Pacific Telephone and Telegraph Company, respondent.
Fred E. Huntley, for Let Freedom Ring, protestant.
John Riordan, for Catholic Inter-racial Council of San Francisco, San Francisco Conference on Religion and Race, San Francisco Jewish Community Relations Council, Archdiocese of San Francisco, Commission on Social Justice; John V. Moore, for San Francisco Council of Churches; Reed H. Bement, for Northern California Chapter - American Civil Liberties Union; Ronald P. Wright, for Let Freedom Ring; Adley M. Shulman, for the Anti-Defamation League of B'nai B'rith; Harvey B. Schechter, for the Anti-Defamation League of B'nai B'rith; R. W. Russell, by K. D. Walpert, for the City of Los Angeles; William K. Rawson, for the San Gabriel Committee for Let Freedom Ring; interested parties.
B. A. Peeters, Counsel, and Ermet Macario, for the Commission staff.

O P I N I O N

This is an investigation and suspension proceeding to determine the reasonableness and legality of proposed revisions of the tariff of Pacific Telephone and Telegraph Company (hereinafter referred to as PT&T) relating to recorded public announcements. The Commission directed that an Examiner's Proposed Report be filed in this matter and the Proposed Report of Examiner Jarvis was filed on January 9, 1967. A copy of the Proposed Report is attached

hereto as Appendix 1. The Commission is of the opinion and finds that the facts and chronology set forth in the Proposed Report are correct and need not be repeated. The Examiner recommended that PT&T be allowed to publish tariff provisions, dealing with recorded public announcement service only, requiring identification of the message sender, and, only if the message sender does not have a current directory listing, the address at which the service is rendered.

The Examiner concluded that because of the comprehensive constitutional and statutory regulatory provisions in California, which permit the Commission to consider the reasonableness of the tariff proposals here involved, there is sufficient state action to require the consideration of First Amendment questions herein raised. He found that the proposed tariff provisions did not violate the constitutional guarantee of freedom of speech provided for in the Constitution of the United States and the California Constitution. In reaching this finding, the Examiner held that most of the cases dealing with freedom of speech were not applicable because they deal with primary actors whereas, in the case at bar, PT&T is a neutral or unsympathetic intervening commercial instrumentality which could promulgate reasonable regulations to disassociate itself from the contents of recorded announcements, and require the sender to identify himself so a listener would not ascribe the message to the utility. The Examiner also held that the situation here under consideration was analogous to the requirements for identification with respect to second class mail (see Lewis Publishing Co. v. Morgan, 229 U.S. 288) and radio and television broadcasting (see 47 U.S.C. § 317). In considering the non-constitutional aspects of the matter, the Examiner found that the proposed modified tariff provisions were

reasonable and not adverse to the public interest. In reaching this finding the Examiner indicated that he did not think the possibility of harassment of recorded message senders was significant enough to countervail the reasons for the proposed tariff schedules. The Examiner also rejected contentions of interested party Anti-Defamation League of B'nai B'rith (hereinafter referred to as the Anti-Defamation League) which would have required PT&T to add tariff provisions providing for discontinuance of recorded announcement service when defamatory matter was transmitted and requiring a subscriber to recorded announcement service to keep or file with PT&T the texts of such announcements.

Interested Party Northern California Chapter - American Civil Liberties Union (hereinafter referred to as the Civil Liberties Union) filed exceptions to the Proposed Report and PT&T filed a reply to the exceptions. No other party filed exceptions to the Proposed Report or a reply to the exceptions which were filed. Since the Anti-Defamation League filed no exceptions we do not consider those of its contentions which were rejected by the Examiner.

Preliminarily, we note that the exceptions filed by the Civil Liberties Union are emotional in tone and at times do not accurately reflect the record. For example, the exceptions do not accurately describe the tariff provisions which the Examiner recommended be authorized. The exceptions state "The requirement that the recorded message include the name and address of the sponsor is objectionable for two reasons... "(Exceptions, p. 8.) The recommended tariff provisions require identification of the message sender as part of the message. Only if the sender does not have a current directory listing need the address at which the service is

furnished be included in the message. Only if a residence is the place where the service is furnished need it be disclosed. (Proposed Report App. A, p. 3; pp. 4, 20-21.) The exceptions also state "The public 'concern' used by PT&T to originally justify the proposal has now become public 'irritation' (Examiner's Proposed Report, p. 3)... "(Exceptions, pp. 1-2.) The record discloses that an assistant vice-president of PT&T testified in part that "In its response, the American Company stated its recognition that some anonymous recorded announcements had caused public irritation (emphasis added)..."(R. T. 24.) At another point the exceptions state "If PT&T does in fact have unexpressed fears that persons using the phone believe that the answerer represents PT&T then it would make as much sense to require every person answering the phone to identify himself and give his address on pain of losing his service for failure to do so." (Exceptions, p. 4.) The Proposed Report clearly points out that the recommended tariff provisions do not deal with telephone conversations but with the transmission of recorded messages which people are invited or encouraged to dial. (Proposed Report, pp. 10, 11.) We turn now to the substantive points raised by the exceptions and reply thereto.

The Civil Liberties Union in its exceptions contends that the recommended tariff provisions are unconstitutional under the First Amendment of the Constitution of the United States and Article I, Section 9 of the California Constitution; that the Examiner erroneously failed to follow the authorities cited by the Civil Liberties Union by distinguishing between originators of messages as primary actors and the carriers of messages as neutral or unsympathetic intervening commercial instrumentalities; that the Examiner erroneously held that the recommended tariff provisions

were analogous to the identification requirements for second-class mail and those required by Section 317 of the Federal Communications Act of 1934 and the regulations promulgated thereunder; and that the Examiner erroneously found that the proposed tariff provisions were reasonable and not adverse to the public interest because in reaching this ultimate finding the Examiner found that these provisions would not increase the possibility of harassment to message senders to any significant degree. The reply to the exceptions filed by PT&T supports the findings, conclusions and recommended order of the Examiner. It reasserts the authorities relied upon by the Examiner and distinguishes those contended for by the Civil Liberties Union. The only point upon which the reply disagreed with the Proposed Report was on the Examiner's holding that the recommended tariff provisions involve state action. (PT&T contends that no state action is here involved.) (Reply to Exceptions, p. 2.)

Before considering the points raised by the exceptions and reply thereto, we restate what is being considered herein. The Examiner in his Proposed Report has recommended that PT&T be allowed to include in its tariff provisions with respect to recorded announcement service which it furnishes. These provisions would require identification of the message sender in recorded messages, and, if the sender did not have a current directory listing, the address at which the service was rendered. These tariff provisions in no way deal with regular telephone service. While they would apply to recordings of a political nature they also apply to those dealing with commercial matters. Violation of the recommended tariff provisions would result only in discontinuance of recorded announcement service. Regular telephone service would not be affected. No criminal or civil sanctions would result.

We first turn to the point raised by PT&T in its reply to the exceptions. If the recommended tariff provisions do not involve state action for constitutional law purposes, it is not necessary to consider the freedom of speech questions raised by the Civil Liberties Union. (Weaver v. Jordan, 64 Adv. Cal. 243, 249, 49 Cal. Reptr. 537, 539, Cert. denied, 17 L. Ed. 2d 75.) This point was extensively covered in the Proposed Report. We agree with the Examiner's holding that the recommended tariff provisions involve state action for constitutional law purposes. (Public Utilities Comm'n v. Pollak, 343, U.S. 451.)

In considering the exceptions filed by the Civil Liberties Union the primary questions presented are (1) whether the Examiner properly distinguished between originators of messages whom he called primary actors and commercial instrumentalities carrying the messages of others which he called intervening neutral or unsympathetic commercial instrumentalities, and (2) whether the Examiner properly analogized the recommended tariff provisions with the identification requirements for second-class mail and those required by Section 317 of the Federal Communications Act and the regulations promulgated thereunder.

The Commission is of the opinion that there is a difference between one seeking to do something directly and one seeking to use the facilities of another to do the same act. There is a difference between publishing one's own newspaper anonymously and compelling a newspaper published by another to publish an anonymous advertisement or message therein. There is a difference between an amatuer radio operator transmitting his own message (see 47 C.F.R. 97. 111 et seq.) and compelling a telecommunications utility to transmit it for him. We believe that the Examiner correctly distinguished between "primary actors" and "intervening

neutral or unsympathetic commercial instrumentalities" and correctly concluded that in recorded announcement service the commercial instrumentality over whose facilities a message is transmitted can require identification of the message to disassociate itself from the content thereof. We do not read Sokol v. Public Utilities Comm., 65 Adv. Cal. 241, as compelling a different result. Sokol involved regular telephone service. In Sokol, the commercial instrumentality was required by a Commission decision to disconnect the telephone service which the police requested be removed. The actions of the utility were commanded by state action. The California Supreme Court held that the summary procedure for disconnecting telephone service disclosed in Sokol was not consonant with the requirements of due process of law. However, Sokol clearly recognizes the intervening commercial instrumentality status of the telephone company by refusing to hold the telephone company liable for complying with the mandatory requirements of this Commission. (65 Adv. Cal. at pp. 251-52.)

The Commission is also of the opinion that the Examiner correctly analogized the situation here under consideration to second-class mail service and radio or television broadcasting. The record discloses that recorded announcement service is primarily used for commercial purposes. The person dialing the recorded announcement number only has the opportunity of listening to the announcement. He cannot converse with, inquire of or dispute with the message sender during the announcement. The recorded announcement is not designed to be a confidential communication between the sender and a particular recipient. It is designed to be heard by all who will listen. It is similar to second-class mail, which applies to newspapers and other periodicals (39 U.S.C. § § 4351 et seq.) which must be printed (39 U.S.C. § 4354), comply with

identification requirements (39 U.S.C. § 4369) and identify any editorial or other matter contained therein for which consideration is paid or promised with the marking "advertisement" (39 U.S.C. § 4367.) It is even more analogous to radio broadcasting where the listener is solicited or invited by one or more stations to listen to a program or message; where the program or message is intended for all who will listen; where the listener cannot usually converse with the person giving the message[1/] and where the message is brought to him through a device which he has purchased.

Since we agree with the Examiner's distinction between primary actors and intervening commercial instrumentalities for applying constitutional law principles, we hold that the Examiner correctly distinguished cases such as Talley v. California 362 U.S. 60, and others cited by the Civil Liberties Union, which dealt with criminal sanctions sought to be applied to primary actors.

The Examiner found, in respect to non-constitutional considerations, that the proposed tariff provisions were reasonable and not adverse to the public interest. In reaching this finding he indicated that he did not believe "the proposed tariff schedules will increase the possibility of harassment [of message senders] to any significant degree." We agree with this conclusion, which finds support in the record. The record discloses that a few instances of alleged harassment were testified to by three protestants; at least one and possibly two of these three protestants had directory listings and that almost every incident of alleged harassment was occasioned by newspaper publicity.

1/ The Commission takes official notice of the current vogue of "talk" radio shows where an announcer engages in telephone conversations with listeners which are broadcast and question and answer programs involving political candidates. These programs do not affect the comparison given above.

The Commission has, because of the importance of this matter, dealt at length with the exceptions and reply thereto. A further extension of this opinion is not warranted. The Commission has carefully considered the exceptions and reply thereto. The Commission adopts as its own the findings and conclusions made by the Examiner in his Proposed Report.

O R D E R

IT IS ORDERED that:

1. Within twenty days after the effective date of this order, and on not less than five days' notice to the public and the Commission, The Pacific Telephone and Telegraph Company shall revise its tariff schedules by means of an Advice Letter filed in accordance with procedures set forth in General Order No. 96-A to put into effect Special Condition 7 for Automatic Answering and Recording Equipment, and special conditions applicable to Types A and B recorder couplers of its Cal. P.U.C. Schedule No. 32-T and Rule 29 of its Cal. P.U.C. Schedule No. 36-T, as more particularly set forth in Appendix A attached to the Examiner's Proposed Report.

2. The tariff schedules filed by Advice Letter No. 9407 are hereby permanently suspended.

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

Dated at San Francisco, California, this 6th day of JUNE, 1967.

President

Commissioners

C. 8335

DISSENT

BENNETT, William M., Commissioner, Dissenting Opinion:

I would not inhibit free speech even so slightly as here by compelling the giving of identification. The Commission is dictating that which must be stated over the telephone, thus controlling the message content. And while particular telephonic messages may be repugnant to me as an individual, as well as to others, I do not consider that this furnishes to me the basis for directing and controlling speech over the telephone instrument.

Accordingly, I would not accept the tariff as offered.

WILLIAM M. BENNETT
Commissioner

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BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Suspension and Investigation on the Commission's own motion of tariffs revising the Rules to provide a new Rule entitled Recorded Public Announcements on Telephone Company Facilities By The Pacific Telephone and Telegraph Company.	Case No. 8335

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John Riordan, for Catholic Inter-racial Council of San Francisco, San Francisco Conference on Religion and Race, San Francisco Jewish Community Relations Council, Archdiocese of San Francisco, Commission on Social Justice; John V. Moore, for San Francisco Council of Churches; Reed H. Bement, for Northern California Chapter - American Civil Liberties Union; Ronald P. Wright, for Let Freedom Ring; Adley M. Shulman, for the Anti-Defamation League of B'nai B'rith; Harvey B. Schechter, for the Anti-Defamation League of B'nai B'rith; R. W. Russell, by K. D. Walpert, for the City of Los Angeles; William K. Rawson, for the San Gabriel Committee for Let Freedom Ring; interested parties.

B. A. Peeters and Ermet Macario, for the Commission staff.

PROPOSED REPORT OF EXAMINER DONALD B. JARVIS

This is an investigation and suspension proceeding. On December 30, 1965, The Pacific Telephone and Telegraph Company (hereinafter referred to as PT&T) filed Advice Letter No. 9212 providing for revisions of its tariff Schedules Cal. P.U.C. Nos. 32-T and 36-T.

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Schedule No. 36-T was revised to establish the following condition for use of PT&T's facilities in transmitting recorded public announcements:

> (1) For purposes of identification, subscribers to telephone service who transmit recorded public announcements over facilities provided by the Company must include in the recorded message the name of the organization or individual responsible for the service and the address at which the service is provided.
>
> (2) Failure to comply with the provisions of this tariff shall be cause for termination of the service.

Schedule No. 32-T was revised to refer to the condition above set forth in Schedule No. 36-T. Protests against the tariff revisions were received by the Commission. On January 18, 1966, the Commission commenced this proceeding, ordered certain tariff sheets of Schedules Nos. 32-T and 36-T suspended until May 29, 1966, and commenced an investigation to determine whether they are unreasonable or unlawful in any particular and if the Commission should enter any order in connection therewith. On May 17, 1966, the Commission entered an order continuing the suspension of the revised schedules until November 29, 1966.

On October 28, 1966, The Pacific Telephone and Telegraph Company filed a Supplement to its Advice Letter No. 9212, requesting

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that the tariff sheets transmitted with that advice letter be permanently suspended. On the same date, The Pacific Telephone and Telegraph Company filed a new Advice Letter No. 9407, containing the same tariff revisions as in Advice Letter No. 9212, to allow continuation of the investigation. On November 22, 1966, the Commission permanently suspended the tariff sheets filed by Advice Letter No. 9212, and suspended the tariff sheets filed by Advice Letter No. 9407, to and including March 27, 1967.

A duly noticed public hearing was held in this matter before me at San Francisco on May 2, 1966 and at Los Angeles on May 5, 1966. The matter was submitted subject to the filing of late-filed exhibits and briefs on or before June 24, 1966. The late-filed exhibits have been received and briefs were filed by some of the parties. On December 30, 1966, the Commission directed that an Examiner's Proposed Report be filed herein.

The tariff provisions here under consideration resulted from complaints about anonymous recorded telephone messages filed with the Federal Communications Commission by various organizations, including the National Council of Churches, National

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Congress of Parents and Teachers and the Anti-Defamation League of B'nai B'rith. The Federal Communications Commission directed the Bell System to respond to these complaints and the American Telephone and Telegraph Company did so for the Bell System. As part of its response, American Telephone and Telegraph Company indicated that some anonymous recorded announcements had caused public irritation and that it had suggested that Bell System companies make available on request the names and addresses of subscribers to automatic announcement service. Since October of 1965, PT&T has released upon request such names and addresses. In addition, the Bell System companies prepared tariff provisions similar but not necessarily identical to those here involved. At the time of the hearing in this matter these tariff provisions were in effect in 46 states. The four states in which they were not in effect are California, Idaho, Indiana and Nebraska.

The record discloses that PT&T provides two general types of automatic answering equipment: (1) automatic answering equipment and (2) automatic answering equipment together with a recorder provided by PT&T or a coupling device to permit the subscriber to use his own recorder. Automatic answering equipment is used by subscribers who want their telephones to answer automatically, but do not desire to record a message from the calling party. Examples of the use of automatic answering equipment include weather reports, announcements by theaters of current programs and coming attractions, prayers and messages by churches, lists of homes for sale by real estate firms, campaign statements by political candidates, snow condition announcements by sporting goods stores, department store advertising and market

reports by stockbrokers. Automatic answering and recording equipment is used by wholesale firms who receive and record orders from retailers, pharmacists who receive prescriptions from doctors, television repairmen, firms whose salesmen call in to get messages and record orders, plumbers, insurance and real estate salesmen and others. In January of 1966, PT&T had approximately 5,600 service arrangements for automatic answering or answering and recording devices. An assistant vice president of PT&T testified that the proposed tariff changes here under consideration would be applicable to approximately 700 services. PT&T's present tariff charge for a single telephone line simple type automatic answering service, which provides the capability of playing out a three-minute recorded message, is an installation charge of $35 and a monthly rate of $13.50.

At the hearing and in its closing brief PT&T indicated that it was willing to modify its proposed tariff schedules and modify the provisions to provide that if the address of the person furnishing the recorded public announcement service were included in the current telephone directory, it need not be included in the message along with the identity of the person or organization.

PT&T contends that the proposed tariff schedules are reasonable regulations in connection with its furnishing telephone service which do not raise any constitutional questions, and that if constitutional questions are considered these schedules do not result in an unconstitutional abridgement of freedom of speech. The Catholic Interracial Council of San Francisco, San Francisco Conference on Religion and Race,

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San Francisco Jewish Community Relations Council, Commission on Social Justice of the Archdiocese of San Francisco, San Francisco Council of Churches and Anti-Defamation League of B'nai B'rith appeared in support of the proposed tariff schedules. These organizations took the position, generally, that anonymous recorded announcements prevent the proper evaluation of their content because the listener does not know the source thereof; that freedom of speech is enhanced by allowing a free exchange of ideas between known adversaries, anonymous telephone recordings do not permit answer or confrontation and that some anonymous messages are abusive or defamatory and identification of the source thereof would enable the victims to more easily obtain legal redress. The Anti-Defamation League also took the position that the proposed tariff schedules did not go far enough and requested the Commission to order PT&T to include provisions in its tariffs to require the sender of any recorded public announcement to deposit a copy of the text thereof with PT&T or keep it for a specified period of time and, upon request, to make such text available to PT&T for appropriate dissemination to an allegedly aggrieved person, and to provide that messages containing profane or obscene language or defamatory matter would not be acceptable to PT&T.

The Northern California Chapter of the American Civil Liberties Union, Let Freedom Ring of Berkeley, Let Freedom Ring, South Bay Area (Los Angeles) and the San Gabriel Committee for Let Freedom Ring appeared in opposition to the proposed tariff schedules. They took the position, generally, that broadcasters of recorded public announcements have the right to remain

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anonymous and the proposed tariff schedules violate the constitutional right of freedom of speech and that the identification of such broadcasters would subject them to harassment. The record indicates that some of the protestants presently identify themselves in some of their messages and that some have or previously had telephone directory listings.

Before examining the various points raised by the parties, I first consider whether any constitutional question of freedom of speech is involved and before the Commission. The constitutional guarantees of freedom of speech apply to governmental action and not that of private individuals. (U.S. Constit., Amendment I; Cal. Constit., Art. I, Sec. 9; Weaver v. Jordan 64 Adv. Cal. 243, 249, 49 Cal. Reptr. 537, 539, cert. denied, L7L. Ed.2d 75.) The tariff schedules here under consideration were originated by PT&T and were not required by any statute or decision of this Commission. If it were not for the fact that PT&T is a public utility subject to the jurisdiction of this Commission there could be no constitutional impediment to the proposed tariff schedules. For example, if a daily newspaper (which has the right of freedom of speech and the specific constitutional protection of freedom of the press) in a large metropolitan area adopted rules, similar to those here under consideration, requiring advertisers, including political advertisers, to insert their name and location in each advertisement, no constitutional right would be involved. Is the situation different when a regulated public utility is involved and would it vary from state to state depending on the scope of regulation?

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The Rhode Island Supreme Court has held that:

> "In our opinion the fact that the regulations are filed with the division of public utilities and are approved by the administrator does not transform them into acts of the state. Such filing and approval are merely incidents of the state's regulatory supervision of respondent as a public utility and are designed to inform the patrons thereof of their rights and obligations in the use of the service offered by respondent to the public." (Taglianetti v. New England Tel. & Tel. Co., 81 R.I. 351, 358; 103 Atl.2d 67, 71.)

However, in Public Utilities Comm'n v. Pollak, 343 U.S. 451, the court held that:

> "...Capital Transit operates its service under the regulatory supervision of the Public Utilities Commission of the District of Columbia which is an agency authorized by Congress. We rely particularly on the fact that that agency, pursuant to protests against the radio program, ordered an investigation of it and, after formal public hearings, ordered its investigation dismissed on the ground that the public safety, comfort and convenience were not impaired thereby. (Citation omitted.)
>
> "We, therefore, find it appropriate to examine into what restriction, if any, the First and Fifth Amendments place upon the Federal Government under the facts of this case, assuming that the action of Capital Transit in operating radio service, together with the action of the commission in permitting such operation, amounts to sufficient Federal Government action to make the First and Fifth Amendments applicable thereto." (343 U.S. 451 at pp. 462-63; see also Evans v. Newton, 382 U.S. 296, 301; Baldwin v. Morgan, 287 F.2d 750, 754-55.)

I deem the holding of the United States Supreme Court in Pollak to be controlling.

The Commission's jurisdiction in this matter stems from Article XII, Section 23 of the California Constitution and Sections 451, 455, 489, 491, 701-03 and 761 of the Public Utilities Code. I conclude that these jurisdictional provisions together with the instant proceeding have, under the holding of Pollak, placed the imprimatur of state action upon the tariff

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schedules proposed by PT&T, whether they be accepted, rejected or modified herein.[1/] "First Amendment freedoms of press, speech and religion are protected by the due process clause of the Fourteenth Amendment from invasion by state action." (Weaver v. Jordan, supra, 64 Adv. Cal. 243, 249, 49 Cal. Reptr. 537, 539.) Therefore, the question of whether the proposed tariff schedules abridge the constitional guarantee of freedom of speech under the United States and California Constitutions must be considered. I deem the provisions of both constitutions to be identical in meaning for the purposes of this Proposed Report and will, in the remainder of this Proposed Report, refer only to the First Amendment of the Constitution of the United States with the understanding that my comments also apply to Article I, Section 9 of the California Constitution.

1/ It is anomalous that a constitutional right may not be universal. For example, if a state's law only provides for regulating telephone rates and not the terms and conditions of service (cf. Pub.Util.Code §238(b)) no state action would be present and a constitutional question would not be presented. It might be argued, however, that telephone service is a business affected with the public interest and, as such, could not even though a private business adopt rules contrary to constitutional principles. Of course, if the definition of "a business affected with a public interest" were sufficiently broad the First Amendment would apply to personal conduct as well as state action. See Marsh v. Alabama, 326 U.S. 501 (privately owned town held subject to 14th Amendment). But see Guillory v. Administrators of Tulane University of La., 212 F.Supp. 674 (University held to be private and not subject to 14th Amendment); Johnson v. Levitt & Sons, 131 F.Supp. 114 (housing project proprietor not subject to 14th Amendment). See also, Evans v. Newton, 382 U.S. 296 (park); Simkins v. Moses H. Cone Memorial Hospital, 323 F.2d 959, certiorari denied 376 U.S. 938 (hospital).

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PT&T contends that a person does not have a constitutional right to utility service, and, therefore, no constitutional questions need be decided herein and the questions to be determined herein are ones of validity of the proposed tariff schedules under the Public Utilities Code. It cites cases such as Holt v. New England Teleph. & Teleg. Co. (Mass. D.P.U. 1955) 11 P.U.R.3rd 502; United States Light & Heat Corp. v. Niagara Falls G.& E. L. Co. (2nd Cir. 1931) 47 F.2d 567, 569 and City of Middlesboro v. Louisville & Nashville R. Co. (Ct.App. Ky. 1952) 252 S.W.2d 680 in support of this proposition. The cited cases do hold that a person is not constitutionally entitled to utility service or any particular kind of utility service. However, the question here presented is not whether the protestants are entitled to a particular kind of service but whether a utility can place an alleged unconstitutional limitation on service offered. In view of the conclusion heretofore made, that the tariff schedules here under consideration have the imprint of state action, I hold that an unconstitutional tariff provision cannot be a requirement for service and consider the First Amendment questions raised herein.

The protestants contend that the proposed tariff schedules abridge the right of freedom of speech because they deprive the sender of the right to anonymity, that the identification provisions deal with the content of the announcement or message because they require certain information to be included therein and that including such information will shorten the time for the rest of the message. PT&T and those parties supporting its position therein contend that the tariff schedules do not deal with the substantive content of recorded messages and are reasonable regulations within the scope of the First Amendment.

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While I have herein used the term anonymous recorded announcements, the anonymity referred to and also contended for by protestants is not the type of complete anonymity discussed by Mr. Justice Black in Talley v. California, 362 U.S. 60 at pages 64-65. It is not total anonymity because PT&T knows the name and location of the sender and PT&T has no interest in preventing disclosure thereof. The record discloses that potential listeners for some recorded telephone messages are contacted by mail, newspaper advertisements and word of mouth. Sometimes the potential caller is informed of the identity of the sender. When the caller is not given the identity of the sender the message is anonymous as to him.

Most of the cases dealing with freedom of speech involve primary actors and do not deal with neutral or unsympathetic intervening commercial instrumentalities. In these cases, the individual or his agent is himself doing the challenged act and seeks constitutional protection. (E.g., distributing pamphlets, Talley v. California, 362 U.S. 60; Marsh v. Alabama, 326 U.S. 501; using a public address system or a sound truck, Saia v. New York, 334 U.S. 558, Hovacks v. Cooper, 336 U.S. 77; publishing a newspaper with alleged malicious, scandalous or defamatory material, Near v. State of Minnesota, 283 U.S. 697.) If the contentions of the protestants are upheld, and no identification of the sender can be required, a person dialing a number having a recorded announcement could ascribe the message to PT&T. A person dialing a number with a recorded announcement might not know whether it was PT&T or another who was telling him to buy X's aluminum siding, Y's doughnuts, not to shop at Z's store, that the policies of the Federal Government were wrong or that A was furthering the international communist conspiracy.

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Interested party Anti-Defamation League takes the position herein that PT&T is liable as a publisher for any defamatory material transmitted by use of its service, whether anonymous or not. PT&T contends it has no such liability. I do not consider the arguments and cases cited by the parties on this point because it is a matter which must be resolved in the courts. I do, however, believe that the First Amendment does not prohibit a public utility as a neutral or unsympathetic carrier of a message from disassociating itself from the message's content and requiring the sender to identify himself so the listener will not ascribe it to the utility.

The proposed tariff schedules apply only to recorded announcement service. Except for identification, no attempt is made to regulate the content of messages and no prior restraint of any kind is placed on their transmission. Failure to comply with the tariff schedules will result only in the discontinuance of recorded announcement service. No criminal or civil penalties are involved. Regular telephone service will not be affected. Recorded announcement service can be resumed upon compliance with the tariff. In Lewis Publishing Co. v. Morgan, 229 U.S. 288, the United States Supreme Court upheld, against a challenge of unconstitutionality, the provisions of the Post Office Appropriation Act which required disclosure of identity as a condition to obtaining second-class mail privileges. The court stated that "by its terms the provision only regulates second class mail, and the exclusion from the mails for which it provides is not an exclusion from the mails generally, but only from the right to participate in and enjoy the privileges accorded by the second class classification". (229 U.S. 288 at p. 308.)

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The Civil Liberties Union attempts to distinguish the Lewis Publishing case on the ground that second-class mail involves a subsidy by the Government to the user and that "Failure to comply meant only exclusion from second-class privileges and had only the effect of increasing the cost to the applicant of the use of the mails through utilization of first-class service." (Supp. Memo No. Cal. Br. A.C.L.U., p. 4.) The Civil Liberties Union argues that there is only one type of recorded announcement service furnished by PT&T, that there is no acceptable substitute therefor and that the service is paid for by the subscriber and does not involve a subsidy of public funds.

I do not believe the question of whether the service involved is compensatory is determinative of the point raised. I take official notice that, at times, first-class mail service may be operating at a loss and that the difference between that and second-class service may only be the degree of subsidy involved. Also, as indicated, this case deals with essentially private action, and constitutional questions are presented because the action is subject to state regulatory supervision. In the circumstances, I cannot conceive that the constitutional guarantees are broader when applied to such privately initiated action than when applied to the Federal Government itself. If the tariff schedules here involved are applied to cause the discontinuance of recorded announcement service or a potential user does not avail himself of such service because of an unwillingness to comply with their provisions, he may achieve a substantially similar result with regular telephone service, which is not subject to those tariff schedules. Whatever

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anonymity may be afforded by telephone service can be obtained by securing a regular unlisted number. The unlisted number can be publicized similar to a number using recorded announcement service. When the number is rung and the telephone answered a message may be given orally or by means of a mechanical device. The number of messages transmitted in a given period of time would not vary significantly. Telephone answering services are available at a fee to provide the manpower for such a procedure or it could be carried out by the subscriber himself. While the procedure is slightly more cumbersome, the same net effect may be achieved. The cost for using regular telephone service would not be prohibitive. Since the service involved deals with incoming calls there is no per call charge involved. The basic charge for listed or unlisted telephone service is less than the cost of recorded announcement service. If it is deemed necessary to employ an answering service, the total cost might be greater than the charge for recorded announcement service, but in my opinion it would not be prohibitive. Furthermore, the person desiring to disseminate the message may do so by initiating direct telephone calls (cf. McDaniel v. PT&T Co., 64 Cal.P.U.C. 707, 709) or by any other permissible mode of free speech. I believe the proposed tariff regulations are constitutionally sustainable under the doctrine of the Lewis Publishing case as well as the authorities heretofore and hereafter considered.

Extensive research has failed to disclose a case on all fours with the factual and legal situation here presented. I do believe, however, that an analogous situation to recorded telephone announcements is that of radio and television broadcasting. Congress has provided in the Communications Act of 1934 that:

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" (a) (1) All matter broadcast by any radio station for which any money, service or other valuable consideration is directly or indirectly paid, or promised to or charged or accepted by, the station so broadcasting, from any person, shall, at the time the same is so broadcast, be announced as paid for or furnished, as the case may be, by such person: Provided, That 'service or other valuable consideration' shall not include any service or property furnished without charge or at a nominal charge for use on, or in connection with, a broadcast unless it is so furnished in consideration for an identification in a broadcast of any person, product, service, trademark, or brand name beyond an identification which is reasonably related to the use of such service or property on the broadcast.

" (2) Nothing in this section shall preclude the Commission from requiring that an appropriate announcement shall be made at the time of the broadcast in the case of any political program or any program involving the discussion of any controversial issue for which any films, records, transcriptions, talent, scripts, or other material or service of any kind have been furnished, without charge or at a nominal charge, directly or indirectly, as an inducement to the broadcast of such program.

**** " (47 U.S.C. §317.)

Pursuant to the statute, the Federal Communications Commission adopted and continues to apply the following policy: "With the development of broadcast service along private commercial lines, meaningful government regulation of the various broadcast media has from an early date embraced the principle that listeners are entitled to know by whom they are persuaded." (28 Fed. Reg. 4732.) It has adopted the following regulations in furtherance thereof:

" (a) When a standard broadcast station transmits any matter for which money, services, or other valuable consideration is either directly or indirectly paid or promised to, or charged or received by, such station, the station shall broadcast an announcement that such matter is sponsored, paid for, or furnished, either in whole or in part, and by whom or on whose behalf such consideration was supplied: Provided,

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however, That 'service or other valuable consideration' shall not include any service or property furnished without charge or at a nominal charge for use on, or in connection with, a broadcast unless it is so furnished in consideration for an identification in a broadcast of any person, product, service, trademark, or brand name beyond an identification which is reasonably related to the use of such service or property on the broadcast.

" (b) The licensee of each standard broadcast station shall exercise reasonable diligence to obtain from its employees, and from other persons with whom it deals directly in connection with any program matter for broadcast, information to enable such licensee to make the announcement required by this section.

" (c) In any case where a report (concerning the providing or accepting of valuable consideration by any person for inclusion of any matter in a program intended for broadcasting) has been made to a standard broadcast station, as required by section 508 of the Communications Act of 1934, as amended, of circumstances which would have required an announcement under this section had the consideration been received by such standard broadcast station, an appropriate announcement shall be made by such station.

" (d) In the case of any political program or any program involving the discussion of public controversial issues for which any records, transcriptions, talent, scripts, or other material or services of any kind are furnished, either directly or indirectly, to a station as an inducement to the broadcasting of such program, an announcement shall be made both at the beginning and conclusion of such program on which such material or services are used that such records, transcriptions, talent, scripts, or other material or services have been furnished to such station in connection with the broadcasting of such program: Provided, however, That only one such announcement need be made in the case of any such program of 5 minutes' duration or less, which announcement may be made either at the beginning or conclusion of the program.

" (e) The announcement required by this section shall fully and fairly disclose the true identity of the person or persons by whom or in whose behalf such payment is made or promised, or from whom or in whose behalf such services or other valuable consideration is received, or by whom the material or services referred to in paragraph (d) of this section are furnished. Where an agent or other person contracts or otherwise makes arrangements

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with a station on behalf of another, and such fact is known to the station, the announcement shall disclose the identity of the person or persons in whose behalf such agent is acting instead of the name of such agent.

" (f) In the case of any program, other than a program advertising commercial products or services, which is sponsored, paid for, or furnished, either in whole or in part, or for which material or services referred to in paragraph (d) of this section are furnished, by a corporation, committee, association, or other unincorporated group, the announcement required by this section shall disclose the name of such corporation, committee, association, or other unincorporated group. In each such case the station shall require that a list of the chief executive officers or members of the executive committee or of the board of directors of the corporation, committee, association or other unincorporated group shall be made available for public inspection at the studios of general offices of one of the standard broadcast stations carrying the program in each community in which the program is broadcast.

" (g) In the case of broadcast matter advertising commercial products or services, an announcement stating the sponsor's corporate or trade name, or the name of the sponsor's product, when it is clear that the mention of the name of the product constitutes a sponsorship identification, shall be deemed sufficient for the purposes of this section and only one such announcement need be made at any time during the course of the program.

" (h) Commission interpretations in connection with the foregoing rules may be found in the Commission's Public Notice entitled 'Applicability of Sponsorship Identification Rules' (FCC 63-409; 28 F.R. 4732, May 10, 1963) and such supplements thereto as are issued from time to time."

(47 C.F.R. §73.119.)

The following interpretations by the Federal Communications Commission are also probative:

" F. Nature of the announcement.

" 31. A station broadcasts spot announcements which solicit mail orders from listeners. The sponsor is merely referred to in the announcements and in the mail order address as 'Flower Seeds' or 'Real Estate' or 'the Record Man.' Such a reference to the sponsor of the announcements is insufficient to constitute compliance with the Commission's

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sponsorship identification Rules because it is limited to a description of the product or service being advertised. The announcement requirement contemplates the explicit identification of the name of the manufacturer or seller of goods, or the generally known trade or brand name of the goods sold. (See Commission Notice entitled 'Sponsor Identification on Broadcast Station.' FCC 50-1207, 6 R.R. 835.)

" 32. A station broadcasts 'Teaser' announcements utilizing catch words, slogans, symbols, etc. designed to arouse the curiosity of the public by telling it that something is 'coming soon.' The sponsor of the announcements is not named therein, nor is any generally known trade or brand name given, but it is the intention of the station and the advertiser to inaugurate at a later date a series of conventional spot announcements at the conclusion of the 'teaser' campaign. Announcements of this type do not comply with the Commission's sponsorship identification rules. All commercial matter must contain an explicit identification of the advertiser or the generally known trade or brand name of the goods being advertised. (See Memorandum Opinion and Order In the Matter of Amendment of §3.119(e) of the Commission's Rules, FCC 59-939, 18 R.R. 1860.)

" 33. A station carries an announcement (or program) on behalf of a candidate for public office or on behalf of the proponents or opponents of a bond issue (or any other public controversial issue). At the conclusion thereof, the station broadcasts a 'disclaimer' or states that 'the preceding was a paid political announcement.' Such announcements per se do not demonstrate compliance with the sponsorship identification rules. The Rules do not provide that either of the above-mentioned types of announcements must be made, but they do provide in such situations that an identification be broadcast which will fully and fairly disclose the true identity of the person or persons by whom or in whose behalf payment was made. If payment is made by an agent, and the station has knowledge thereof, the announcement shall identify the person in whose behalf such agent is acting. If the sponsor is a corporation, committee, association or other group, the required announcement shall contain the name of such group; moreover, the station broadcasting any matter on behalf of such group shall require that a list of the chief officers, members of the executive committee or members of the board of directors of the sponsoring organization be made available upon demand for public inspection at the studios or general offices of one of the stations in each community in which the program is broadcast. In

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the event of a network originated broadcast, the records required by the Commission's rules shall be made available upon demand for public inspection at the studios of[sic] general offices of the originating station.

" 34. Must the required sponsorship announcement on television broadcasts be made by visual means in order for it to be an 'appropriate announcement' within the meaning of the Commission's rules?

" Not necessarily. The Commission's rule does not contain any provision stating whether aural or visual or both types of announcements are required. The purpose of the rule is to provide a full and fair disclosure of the facts of sponsorship, and responsibility for determining whether a visual or aural announcement is appropriate lies with the licensee. (See Commission telegram to Mr. Bert Combs, FCC Public Notice of April 9, 1959, Mimeo No. 71945.)

" G. Controversial issues.

" 35.(a) A trade association furnishes a television station with kinescope recordings of a Senate committee hearing on labor relations. The subject of the kinescope is a strike being conducted by a labor union. The station broadcasts the kinescope on a 'sustaining' basis but does not announce the supplier of the film. The failure to make an appropriate announcement as to the party supplying the film is a violation of the Commission's sponsorship identification rules dealing with the presentation of program matter involving controversial issues of public importance. Moreover, the Commission requires that a licensee exercise due diligence in ascertaining the identity of the supplier of such program matter. An alert licensee should be on notice that expensive kinescope prints dealing with controversial issues are being paid for by someone and must make inquiry to determine the source of the films in order to make the required announcement. (See KSTP, Inc. 17 R.R. 553 and Storer Broadcasting Co., 17 R.R. 556a.) A station which has ascertained the source of kinescopes is under an additional obligation to supply such information to any other station to which it furnishes the program.

(b) Same situation as above, except that the time for the program is sold to a sponsor (not the supplier of the film) and contains proper identification of the advertiser purchasing the program time. An additional announcement as to the supplier of the films is still required, for the reasons set forth above.

(c) Same situation as in (a) or (b), above, except that only excerpts from the film are used by a station in its news programs. An announcement as to the source of the films is required. (See Westinghouse Broadcasting Co., 17 R.R. 556d.)

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" 36. A church group plans to film the proceedings of its national convention and distribute film clips 'dealing with numerous matters of profound importance to members of (its) faith' in order to 'disseminate to the American people information concerning its objectives and programs.' The groups request a general waiver under section 317(d) of the Communications Act so that it need not 'waste' any of the short periods of broadcast time donated to it by making sponsorship identification announcements. In the below-cited case, the Commission did not grant such a waiver because of the absence of information indicating that the subject matter of the clips was not controversial and because the alleged 'loss' of a few seconds of air time was not of decisional significance vis-a-vis Congressional and Commission policy relating to issues of public importance. (See Petition of National Council of Churches of Christ, FCC 60-1418.)"

(28 Fed. Regist. 4734-5.)

Section 317 has been in effect since 1934. I have been unable to discover any judicial holdings on the section or regulations promulgated thereunder on the particular points here under consideration. I give the statute and regulations thereunder the required presumption of constitutionality.

I am of the opinion that PT&T is in a position similar to a radio or television broadcaster. It does not originate the recorded messages here under consideration. Its only connection with the message is the use of its facilities as a public utility. Violation of Section 317 of the Communications Act of 1934 and the regulations promulgated thereunder subjects the violator to criminal sanctions. (47 U.S.C. §§ 501, 502.) If Congress can constitutionally enact Section 317 and the Federal Communications Commission promulgate the aforesaid regulations thereunder, I am of the opinion that PT&T can adopt the proposed tariff schedules, which carry no criminal or civil sanctions, without constitutional impediment. (Lewis Publishing Co. v. Morgan, supra, 229 U.S. 288; United States v. Harriss, 347 U.S. 612, 625; Beard v. Alexandria, 341 U.S. 622; Konigsberg v.

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State Bar, 366 U.S. 36; Communist Party v. Subversive Activities Control Board, 367 U.S. 1; United States v. Scott (D.N.D. 1961) 195 F.Supp. 440; Canon v. Justice Court, 61 Cal.2d 446.)[2/]

Under the regulatory statutes heretofore cited the Commission may do more than consider the constitutionality of the proposed tariff regulations. I now consider whether or not they are adverse to the public interest.

One of the grounds upon which the protestants claimed a constitutional right to transmit recorded messages anonymously was that identification could bring harassment. This consideration was kept in mind during the previous constitutional considerations. I do not believe that the proposed tariff schedules will increase the possibility of harassment to any significant degree. As indicated, some of the protestants identify themselves in their recordings and others publish or have published telephone directory listings. A few instances of alleged harassment were testified to by three protestants. Since the proposed tariff schedules have never been in effect there could be no relationship thereto. The record discloses that almost every incident of alleged harassment was occasioned by newspaper publicity and not by identification provided within the announcement or telephone directory. Some of the concern

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2/ I am mindful of the statements in Weaver v. Jordan, supra, and Sokol v. Public Utilities Comm. 65 Adv. Cal. 241, which hold that the guarantees of freedom of speech and the press apply to the content of the communication and the means employed for its dissemination. I read these cases as applying to direct actor situations and not to a neutral or unwilling intermediary whose facilities transmit the message without control over or regard to content.

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over harassment stems from a misunderstanding of the proposed tariff schedules. They do not necessarily require disclosure of the home address of the message sender. They require identification of the address at which service is furnished. Only if the residence is the place where the service is located need it be disclosed. I do not believe that the possibility of harassment is significant enough to countervail the reasons for the proposed tariff schedules and compel a finding that they are adverse to the public interest.

The Anti-Defamation League contends that many recorded announcements contain defamatory matter and that the Commission should order PT&T herein to add tariff provisions providing for discontinuance of service when defamatory matter is transmitted. Such a provision would place upon PT&T the duty and power of determining what was or was not defamatory. "To suggest the vesting of such powers and duties in a private corporation is to reject it." (Sokol v. Public Utilities Comm., supra, 65 Adv. Cal. 241, 251.)

The Anti-Defamation League also contends that the Commission should order PT&T to include in its tariff schedules a provision requiring a subscriber of recorded public announcements to file copies of the texts thereof with PT&T or keep such texts for a specified period of time, and make them available to PT&T upon demand. I do not believe that placing such a burden on PT&T is warranted. As a repository of texts, additional costs would be incurred to the detriment of ratepayers. The requirement for production of text upon demand places an undue enforcement type burden on PT&T. (Cf., McDaniel v. P.T.&T. Co., supra, 707, 714.) Stenographers and, where permitted, recording

devices enable anyone deeming himself defamed or aggrieved by a recorded announcement to obtain the text thereof.

I am of the opinion that the proposed tariff schedules, as modified, are reasonable and that PT&T should be permitted to put them into effect. No other points require discussion. I make the following findings and conclusion.

Findings of Fact

1. Proposed Tariff Schedules 32-T and 36-T, as modified, are reasonable and not adverse to the public interest.

2. Proposed Tariff Schedules 32-T and 36-T do not violate the constitutional guarantee of freedom of speech provided for in the Constitution of the United States and the California Constitution.

Conclusion of Law

The suspension of Tariff Schedules 32-T and 36-T should be terminated, and PT&T should be authorized to adopt and put into effect said tariff schedules, as modified.

I recommend that the Commission enter the following order.

O R D E R

IT IS ORDERED that:

1. Within twenty days after the effective date of this order, and on not less than five days' notice to the public and the Commission, The Pacific Telephone and Telegraph Company shall revise its tariff schedules by means of an Advice Letter filed in accordance with procedures set forth in General Order No. 96-A to put into effect Special Condition 7 for Automatic Answering and Recording Equipment, and special conditions applicable to TypesA and B recorder

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couplers of its Cal. P.U.C. Schedule No. 32-T and Rule 29 of its Cal. P.U.C. Schedule No. 36-T, as more particularly set forth in Appendix A attached hereto.

2. The tariff schedules filed by Advice Letter No. 9407 are hereby permanently suspended.

Dated at San Francisco, California, this 9th day of January, 1967.

Donald B. Jarvis
Examiner

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Appendix A

EXCHANGE TELEPHONE SERVICE

SUPPLEMENTAL EQUIPMENT

AUTOMATIC ANSWERING AND RECORDING EQUIPMENT - Continued

SPECIAL CONDITIONS - Continued

5. In the event of any error or delay in or interruption, suspension or other failure of the service due to poor quality of or defects in the recordings of messages, improper use of the answering or recording equipment by the subscriber or the calling party, or failure of said equipment to operate properly or at all, or due to any other cause in the use of or inability to use said service, the Company's liability therefor if any, shall be in an amount not in excess of the Company's charge for the call in which such error, delay, interruption, suspension or other failure occurred or for the period during which the service was so affected, as the case may be. Subject to the foregoing provisions, the subscriber releases the Company from and indemnifies the Company against and holds the Company harmless from any and all losses, claims, demands, causes of action, damages, costs or liability, in law or in equity, of every kind and nature whatsoever, whether suffered, made, instituted, or asserted by the subscriber, or by the calling party, or by any other party or person, arising directly or indirectly from such error, delay, interruption, suspension or other failure.

6. The subscriber indemnifies the Company against and holds the Company harmless from any and all losses, claims, demands, causes of action, damages, costs or liability, in law or in equity, of every kind and nature whatsoever (including, without limiting the generality of the foregoing, losses, claims, demands, causes of action, damages, costs or liability for libel, slander, fraudulent or misleading advertising, invasion of the right of privacy, or infringement of copyright) arising directly or indirectly from the material transmitted over or recorded by the automatic answering or recording equipment or arising directly or indirectly from any act or omission of the subscriber or the calling party while using or attempting to use said equipment.

7. The use of automatic answering and recording equipment is subject to the provisions expressed in Schedule No. 36-T, Rules, "Recorded Public Announcements on Telephone Company Facilities". (N) (N)

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Appendix A

EXCHANGE TELEPHONE SERVICE

SUPPLEMENTAL EQUIPMENT

RECORDER COUPLER - Continued

SPECIAL CONDITIONS - Continued

Type B - Continued

3. Responsibility of the Company and obligation of the subscriber for Type B recorder coupler is the same as set forth for the Type A recorder coupler.

Type A and B (N)

The use of the recorder coupler, Type A or B, is subject to the provisions expressed in Schedule No. 36-T, Rules, "Recorded Public Announcements on Telephone Company Facilities". (N)

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Appendix A

RULES

29. RECORDED PUBLIC ANNOUNCEMENTS ON TELEPHONE COMPANY FACILITIES (N)

The use of Telephone Company facilities for public announcements is subject to the following:

1. For purpose of identification subscribers to telephone service who transmit recorded public announcements over facilities provided by the company must include in the recorded message the name of the organization or individual responsible for the service, and in addition the address at which the service is provided unless the address of the organization or individual in the announcement is shown in the currently distributed telephone directory.

2. Failure to comply with the provisions of this tariff shall be cause for termination of the service. (N)