

**ORIGINAL**

Decision No. 72782

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

GERALD H. KILGORE,

Petitioner,

vs

GENERAL TELEPHONE AND  
TELEGRAPH COMPANY, a  
corporation,

Respondent.

Case No. 7971  
(Filed August 5, 1964)

GERALD H. KILGORE,

Petitioner,

vs

WESTERN UNION TELEGRAPH  
COMPANY, a corporation,

Respondent.

Case No. 7976  
(Filed August 10, 1964)

Lemaire and Mohi, by Gary Mohi,  
for petitioner.

Albert M. Hart, H. Ralph Snyder, Jr.,  
and Donald J. Duckett, by  
Donald J. Duckett, for General  
Telephone Company of California,  
respondent.

Lawler, Felix & Hall, by Robert C.  
Coppo, for Western Union Telegraph  
Company, respondent.

Roger Arnebergh, City Attorney, by  
Charles E. Mattson, for the Police  
Department of the City of Los Angeles,  
intervener.

John C. Gilman, Counsel, for the  
Commission staff.

OPINION ON REHEARING

On August 5, 1964, petitioner<sup>1/</sup> filed Case No. 7971 seeking to permanently enjoin the General Telephone Company of California (General) from interfering with petitioner's telephone service, and seeking a temporary restraining order pending plenary hearing on the injunction. On August 10, 1964, petitioner filed Case No. 7976 seeking to permanently enjoin the Western Union Telegraph Company (Western Union) from interfering with petitioner's telegraph (sports ticker) service, and seeking a temporary restraining order pending plenary hearing on the injunction. Orders restraining service interference were issued ex parte (Decision No. 67684 dated August 11, 1964 in Case No. 7971, and Decision No. 67715 dated August 18, 1964 in Case No. 7976.)

Case No. 7971 was set for hearing September 24, 1964, was continued to November 12, 1964, was continued to December 18, 1964, at which time the City of Los Angeles (the City) intervened, and was continued to February 16, 1965, at which time it was consolidated for hearing with Case No. 7976. No testimony or other evidence was taken at any time prior to February 16, 1965.

Case No. 7976 was set for hearing December 12, 1964, was continued to December 18, 1964, at which time the City intervened, and was continued to February 16, 1965, at which time it was consolidated for hearing with Case No. 7971. No testimony or other evidence was taken at any time prior to February 16, 1965.

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Throughout these proceedings Gerald H. Kilgore has been referred to as "petitioner" or "complainant" interchangeably. In this decision he shall be referred to as "petitioner."

At the February 16th hearing petitioner objected to the intervention of the City on the grounds that it was not a proper party in these cases and that its intervention did not conform to the Commission's Rules of Procedure. The objection was overruled by the examiner and that ruling was subsequently affirmed by the Commission. After the ruling on the motion testimony was taken, evidence was received, and the matter was submitted. Briefs were filed by petitioner and the City. The City in its brief requested that petitioner's telephone and telegraph services be disconnected. On December 7, 1965 the Commission issued Decision No. 70053 wherein it made findings of fact and ordered that petitioner's "request for restoration of telephone service and of the sports ticker service be denied" and that the temporary relief granted be vacated.<sup>2/</sup>

On May 24, 1966 the Commission issued its order granting rehearing and staying the operative effect of Decision No. 70053.<sup>3/</sup> Rehearing was set for January 9, 1967 at Los Angeles before Examiner Robert Barnett at which time the Commission staff appeared, testimony was taken, and the matter was submitted subject to the filing of briefs, which have been filed.<sup>4/</sup>

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<sup>2/</sup> Petitioner's telephone and telegraph services had never been disconnected. Petitioner had asked in his petitions for restoration of service, among other relief, in the event that General and Western Union had disconnected service before the Commission could act on his request for a temporary restraining order and injunction.

<sup>3/</sup> Commissioner George G. Grover filed a dissenting opinion December 31, 1966.

<sup>4/</sup> The staff argues that we should not make any order concerning Case No. 7976 because we have no jurisdiction over the Western Union ticker service as it is interstate service. Without expressing an opinion on this jurisdictional question we shall dismiss Case No. 7976 because our decision in Case No. 7971 will effectively dispose of both matters.

At the January 9th hearing, and prior to the taking of testimony, petitioner moved to withdraw his petitions, objected to the participation of the City and the staff, and objected to the use of the transcript made at the February 16, 1966 hearing.

Petitioner argues that when the Commission granted a rehearing of Decision No. 70053 it set the matter at large; that Decision No. 70053 is no longer effective; that the entire case must be reheard; that petitioner has the right to dismiss his petitions; and, therefore, since the City's intervention is improper there is nothing upon which the Commission can act. Petitioner is also concerned about the burden of proof. He asserts that it is improper for him to have the burden of proving that he is entitled to telephone service.

Petitioner's motion to withdraw his petitions is granted. This case will be considered and determined according to the City's complaint in intervention, upon which the City has the burden of proof.

Petitioner's other procedural objections cannot be sustained. The grant of a rehearing does not set the case at large. Rather, it is for the purpose of reconsidering matters that might have been mistakenly conceived in the original decision, considering matters that might have been overlooked in the original decision, and determining the effect of new evidence on the original decision. It is not a new trial. For these reasons there can be no proper objection to the use of the transcript of the testimony given at the prior hearings; it is all part of the same case. (Investigation of Pearce (1964) 63 CPUC 587.) For the same reasons there can be no

objection to the City's being able to continue to participate in the proceedings. The objection to the City's participation was considered and overruled by the Commission in Decision No. 70053. For over a year prior to the rehearing petitioner had notice of the City's position and had the opportunity to be heard in opposition. Certainly petitioner cannot claim surprise. Not only did petitioner have an opportunity to refute the City's allegations at the first hearing in this matter but had further opportunity at the rehearing, which he utilized. Petitioner's objection to the Commission staff's appearance is without merit. The Commission staff may appear in all proceedings before the Commission to assist in developing the record.

At the original hearing petitioner testified that he is a publisher and handicapper and, for 2½ years, has operated a business at 10687 Santa Monica Boulevard, Los Angeles under the name of J. K. Sports Journal; he has six telephones and a sports ticker service; he receives scores and bulletins of different happenings in sports from all parts of the country; he furnishes scores on various sports, whichever is in season, plus his opinion of the handicap lines (by "line" is meant the point spread<sup>5/</sup> or odds on a game), which he develops himself; he does not furnish information concerning horse racing nor does he take bets or place bets over the telephone; on July 17, 1964 he was arrested and charged with bookmaking, conspiracy, and aiding and abetting; the case against him was dismissed and there are no charges pending against him;

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<sup>5/</sup> The "point spread" is the anticipated difference in the final score of a contest.

his customers do not give their names but, when they subscribe to the service, he gives them an identification number, and when they call for handicapping information, they identify themselves by such number; his charges for this service are up to \$25 per week; he does not know the business or occupation of his customers, and does not keep records of their identities; his customers phone in and identify themselves by number and he gives out the scores of the different games and other sporting news, plus the handicap line on the particular sports in season; about half of his customers just take scores and not the line; he tells his customers not to use the information from his service for gambling purposes; he also publishes a sports journal and, during the baseball season, baseball books; he distributes information similar to the information contained in newspaper sport sections on events such as football, baseball, and basketball; and his telephones and sports ticker service are never used for unlawful purposes.

The City called four police officers and an agent of the Federal Bureau of Investigation.

The four police officers were assigned to the Administrative Vice Division of the Los Angeles Police Department, and had from two to eleven years experience in the department. The witnesses testified that they were experienced in bookmaking investigations and one stated that he has testified as an expert on the subject in the Municipal Court, the Superior Court, and before the Grand Jury, and has lectured on the investigation of bookmaking at the Los Angeles Police Academy and Los Angeles State College.

Their testimony may be summarized as follows: Petitioner furnishes a betting line on sports events for his customers; a betting line is utilized by bookmakers and bettors when placing and accepting wagers in the County of Los Angeles; the betting line is usually expressed in terms of odds or points; someone must decide what chance one team has in winning a contest or how many points one team is superior to another team; sports bookmaking cannot exist without such service; and such service aids and abets the operations of sports bookmaking. All of the people who utilize the kind of service which petitioner furnishes are either engaged in sports bookmaking or are bettors who can afford to pay for the service. Much of the information furnished by petitioner is similar to that furnished to gamblers by Las Vegas odds-makers. The similarity of information furnished on baseball world series games by petitioner and Las Vegas operators is an example. One officer, known to petitioner, testified that he called petitioner at various times and was given the betting line in basketball and baseball for that day. At another time he was in petitioner's office while petitioner was answering the telephone and heard him give a point spread on a sporting event to the other party on the telephone. By subterfuge, another officer obtained free service from petitioner. He was designated No. 4 for identification and he later called twice and received the betting line for the day. Once petitioner stated that he would like to quit publishing the Sports Journal as he did not make a profit on it, but he could not do this as he had been told it was necessary for him to put out such a publication in order to obtain the sports ticker service; if he discontinued

the publication, he would lose the ticker service.

On July 17, 1964 petitioner's place of business was entered by police officers armed with a search warrant. At that time petitioner was on the premises talking on the telephone. Petitioner said that he was giving out the line to his customers and that he wished to finish, but he was not allowed to. A search of petitioner's premises turned up papers with baseball betting lines, baseball parlay cards, and journals. Officers answered petitioner's telephones 20 or 25 times, took down information, and gave out the betting line. The officers then called back three of the calling parties, for the purpose, among others, of showing the business of petitioner's customers, and ascertained that they were bookmakers by placing bets with them over petitioner's telephone. Subsequently two persons were arrested as a result of these conversations.

On July 18, 1964 an officer telephoned petitioner at his place of business and assumed the identity of one of petitioner's customers. A voice, which he recognized as petitioner's stated words to the effect, "You stupid jerk, you gave your phone number out to the cops yesterday and you just missed getting arrested. I have told you many times never to give your phone number out over this phone."

The F.B.I. agent testified that petitioner told him that he was charging \$10 to \$25 per week for his sports service and that he did not know of anyone other than bookmakers or gamblers who would pay such a fee, and that he did not care to know the identity of his customers.



At the rehearing only petitioner testified. He testified that he was still engaged in the same business which he was engaged in at the time of the February 16, 1965 hearing; he has not been arrested for bookmaking or aiding and abetting bookmaking since the 1965 hearing; he operates in the same manner as he did in 1965; he still tells his customers that the information he supplies is not to be used for illegal purposes; he furnishes immediate changes in the odds and the results of sporting events; his customers are anonymous; and, he does not know the business of his customers.

Discussion

The substantive issues of this case are 1) whether this Commission can order a removal of petitioner's telephone service absent a finding that petitioner used it to violate a penal statute or in aiding and abetting the violation of a penal statute, 2) whether the removal of petitioner's telephone service constitutes a denial of equal protection of law in derogation of the Fourteenth Amendment to the Constitution of the United States, and 3) whether petitioner's activities are protected by the First Amendment to the Constitution of the United States.

Petitioner asserts that no evidence has been adduced to show that he violated any penal statutes or aided and abetted in such violation. Only upon such a finding, he claims, may his telephone service be disconnected. Petitioner construes our jurisdiction too narrowly. Not only may we order disconnection of telephone service for conduct that violates penal statutes, or

aids and abets such violations, but we may order disconnection of service when the use of such telephone service is against public policy, such as in the furtherance of bookmaking, an illegal enterprise in this and other states. (Penal Code Section 337a; Telephone News System, Inc. v. Illinois Bell Telephone Co. (DC ILL 1963) 220 F Supp 621, 51 PUR 3d 21, 34, aff'd without opinion 376 US 782, 12 L ed 2d 83 (1964); Re Delaware Sports Service (1963) \_\_\_ Del \_\_\_, 196 A 2d 215, 51 PUR 3d 512, 516 aff'd without opinion \_\_\_ Del \_\_\_, 202 A 2d 568 (1964); Delaware Sports Service v. Diamond State Telephone Co. (DC Del 1965) 241 F Supp 847, 60 PUR 3d 167, 172, aff'd without opinion, 355 F 2d 929 (CA 3d 1966); and see cases collected 8 PUR Digest 2d Service sec. 451.1.)

We have no reason to believe that petitioner's service is used for other than the furtherance of bookmaking and gambling. By his own admission he knows of no one other than bookmakers or gamblers who would pay a fee for his service. His protestation that he does not know the names or businesses of his clients borders on the absurd, as does his statement that he does not know the use to which the information he supplies is put. It is clear that petitioner's operations do not involve the mere dissemination of facts of interest to the general public. The evidence is all too clear that the furnishing of betting odds, complete with fluctuations as they occur, over the telephone for a price as done herein, is of value only to bookmakers and gamblers; petitioner offered no evidence that could lead us to arrive at any other conclusion. Such use of the telephone encourages the perpetration of an unlawful act and is against the public policy of the State.

of California.<sup>6/</sup>

Petitioner argues that an order denying him the use of telephone service in his business would be in violation of the Fourteenth Amendment to the United States Constitution as such order would deny to petitioner the equal protection of the laws.

Petitioner asserts that his service provides nothing more than can be found in other news media. Petitioner introduced evidence to the effect that newspapers carry odds on sporting events; that the Associated Press and United Press International disseminate odds on sporting events and results of sporting events; and that television broadcasts carry the same kind of information. Petitioner does not expect us to remove the communication facilities of these enterprises; in this expectation petitioner is correct. (See Kelly v Illinois Bell Telephone Co. (DC ILL 1962) 210 F Supp 456, 47 PUR 3d 328.) But we cannot bracket petitioner's business with that of a newspaper or television station.

It is not the giving of odds or results that is the cause of our interdiction, but knowingly giving odds and results by means of rapid transmission to persons known to the sender to be using the information for illegal purposes. Such activity distinguishes petitioner's operation from news media. The prohibition of transmission of information as to point spreads, betting odds, or changes in betting odds soon after the event is clearly related to

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For example, Public Utilities Code section 7904, while making it a misdemeanor for any telegraph or telephone office to wilfully refuse to send any message received for transmission, does not require a telegraph or telephone office to send, receive, or deliver any message which instigates or encourages the perpetration of any unlawful act. (Emphasis added.)

the suppression of illegal gambling for "modern bookmaking depends in large measure on the rapid transmission of gambling information ... ." (HR Rep No. 967, 87th Cong, 1st Sess (1961)-) Obviously, petitioner's business is different from a newspaper. We know of no other reason to explain why anyone would pay \$25 per week for petitioner's service when one could buy a 10-cent newspaper.

Finally, petitioner asserts that the information he furnishes, his opinion as to the probable odds on sporting events and the results thereof, is protected by the state and federal constitutional provisions guaranteeing the right of free speech.

It is abundantly clear that the exercise of governmental power to prohibit the uses of public utility facilities in the furtherance of illegal gambling activities is not precluded by the fact that the business activity affected is claimed to be generally within the protection of the First Amendment. (Telephone News System, Inc. v. Illinois Bell Telephone Co., supra, 51 PUR 3d at 42.) In related news dissemination fields First Amendment arguments were also rejected: activities of press associations may be enjoined for violation of the anti-trust laws (Associated Press v US (1945) 326 US 1, 89 L ed 2013); broadcasting licenses may be denied if the company's past business practices were monopolistic in character (Mansfield Journal Co. v. FCC (DC Cir 1949) 180 F 2d 28), if the broadcaster made misrepresentations in his application for a license (Independent Broadcasting Co. v. FCC (DC Cir 1951) 193 F 2d 900), or if the broadcaster violates standards prescribed by the FCC (NBC v FCC (1943) 319 US 190, 87 L ed 1344).

It is not the dissemination of odds and results on sporting events that we are attempting to prevent, nor the rapid transmission of such information. But it is the rapid transmission of such information to a group of persons who the disseminator knows will put the information to an illegal use. When all these factors coalesce the result is not free speech but improper activity.

(Compare Kelly v. Illinois Bell Telephone Co., supra, with Re Delaware Sports Service, supra.)

#### Findings of Fact

1. Petitioner, Gerald H. Kilgore, is a publisher and handicapper and has, for 2½ years, operated a business at 10687 Santa Monica Boulevard, Los Angeles under the name of J. K. Sports Journal; he has six telephones and a sports ticker service; he receives scores and bulletins concerning sports events from all parts of the country; he furnishes scores on various sports events, such as football, baseball, and basketball, plus his opinion of the handicap lines which he develops himself; he does not furnish information concerning horse racing nor does he take bets or place bets over the telephone; when his customers subscribe to his service he gives them an identification number; after his customers phone in and identify themselves by number he gives them the scores on the different games and other sporting news, plus the handicap line on any particular sports event. His charges for this service are up to \$25 per week; about half of his customers take scores and not the line; he also publishes a sports journal and, during the baseball season, baseball books; he distributes information similar to the information which may be from time to time contained in newspaper sport sections.

2. Petitioner furnishes a handicap line on sports events for his customers; this handicap line is utilized by bookmakers and bettors when placing and accepting wagers in the County of Los Angeles; the handicap line is usually expressed in terms of odds or points; someone must decide what chance one team has in winning a contest or how many points one team is superior to another team; sports bookmaking cannot exist without such service; and such service encourages the perpetration of sports bookmaking. All of the people who utilize the kind of service which petitioner furnishes are either engaged in sports bookmaking or are bettors who can afford the cost.

3. On July 17, 1964 petitioner's place of business was entered by police officers armed with a search warrant. At that time petitioner was on the premises talking on the telephone. Petitioner said that he was giving out the line to his customers and that he wished to finish, but he was not allowed to. A search of petitioner's premises turned up papers with baseball handicap lines, baseball parlay cards, and journals. Officers answered petitioner's telephones 20 or 25 times, took down information, and gave out the handicap line. The officers then called back three of the calling parties, for the purpose, among others, of showing the business of petitioner's customers, and ascertained that they were bookmakers by placing bets with them over petitioner's telephone.

4. On July 18, 1964 an officer telephoned petitioner at his place of business and assumed the identity of one of petitioner's customers. A voice, which he recognized as petitioner's stated words to the effect, "You stupid jerk, you gave your phone number out to the cops yesterday and you just missed getting arrested. I have told you many times never to give your phone number out over this phone."

5. Petitioner does not know of anyone other than bookmakers or gamblers who would pay a fee of from \$10 to \$25 per week for his services.

6. Petitioner, at 10687 Santa Monica Boulevard, Los Angeles, utilizes the facilities of respondent General Telephone Company of California to provide his services to his customers, and for no other purpose.

7. The information that petitioner furnishes is indispensable to the operations of bookmakers and gamblers. Petitioner knows that the information that he furnishes is used to further bookmaking and gambling. Petitioner knows that no one other than bookmakers and gamblers have any use for the service he provides. And petitioner knows the names of many of his customers and knows that they are bookmakers.

8. Petitioner is in the business of the rapid transmission of betting odds and point spreads on sports contests, and the results thereof, to persons known to the petitioner to be putting such information to an illegal use. Such business encourages the perpetration of an unlawful act, to wit: bookmaking.

9. It is against the public policy of the State of California to use telephone equipment to knowingly furnish information, by rapid transmission, of the betting odds and point spreads of sports contests to persons known to the disseminator of the information to utilize such information for illegal purposes. Such use encourages the perpetration of an unlawful act, to wit: bookmaking.

Based on the foregoing findings of fact the Commission concludes that:

1. Petitioner's services are not protected by the First or Fourteenth Amendment to the Constitution of the United States or similar provisions in the Constitution of the State of California.

2. The use to which petitioner puts the facilities of respondent, General Telephone Company of California, encourages the perpetration of an unlawful act, namely, bookmaking, and which use is contrary to the public policy of the State of California.

3. Petitioner should be prohibited from using the facilities of respondent General Telephone Company of California in the furtherance of the activities described in this opinion.

#### O R D E R

IT IS ORDERED that:

1. The temporary interim relief granted by Decision No. 67684 dated August 11, 1964, and Decision No. 67715 dated August 18, 1964, is vacated and set aside.

2. Case No. 7976 is dismissed.

3. Petitioner's petition in Case No. 7971 is dismissed.

4. The relief requested by the City of Los Angeles in its complaint in intervention in Case No. 7971 is granted to the extent set forth in Ordering paragraph 5 of this order and in all other respects is denied.



5. General Telephone Company of California shall forthwith remove all of its telephone facilities from petitioner's offices located at 10687 Santa Monica Boulevard, Los Angeles.

The Secretary of the Commission is directed to cause personal service of this order to be made upon General Telephone Company of California and to serve all other parties by mail.

The effective date of this order shall be the date hereof.

Dated at San Francisco, California, this 18<sup>th</sup> day of JULY, 1967.

[Signature]  
President

[Signature]

[Signature]  
Commissioners

I dissent, no unlawful  
conduct is here ruled out.  
Furnishing information as  
here does not afford the  
basis for such drastic action.  
William L. Bennett