

Decision No. 78442

ORIGINAL

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

COMMUNICATIONS WORKERS OF AMERICA,)
 AFL-CIO, an unincorporated)
 association,)

Complainant,

vs.

THE PACIFIC TELEPHONE AND TELEGRAPH)
 COMPANY, a corporation, and GENERAL)
 TELEPHONE COMPANY OF CALIFORNIA,)
 a corporation,)

Defendants.

Case No. 8815
 (Filed June 10, 1968;
 Amended July 29, 1968)

Duane W. Anderson, Attorney at Law, for Communications
 Workers of America, AFL-CIO, complainant.
Robert E. Michalski, Attorney at Law, for The Pacific
 Telephone and Telegraph Company, defendant.
Donald J. Duckett, Attorney at Law, for General
 Telephone Company of California, defendant.
Elinore C. Morgan, Attorney at Law, for the
 Commission staff.

O P I N I O N

Hearings on this complaint were held after due notice before Examiner Coffey in San Francisco and Santa Monica on February 17, 18, May 19, 20, 21 and August 11, 1969. After receipt of complainant's opening brief, defendants' reply briefs and complainant's closing brief, this matter was initially submitted on December 23, 1969.

Decision No. 77189, dated May 12, 1970, granted complainant's petition filed on April 13, 1970, that this matter be reopened for the purpose of taking additional evidence. On September 10, 1970, complainant advised the Commission that it had

concluded the proposed additional evidence would not be relevant in determining the issues in this proceeding and requested this matter be submitted for decision. On November 4, 1970, by Decision No. 77890, complainant's request for resubmission of this complaint was granted.

Complaint

The Communications Workers of America, AFL-CIO, (CWA) the collective bargaining representative of some of the non-supervisory employees of The Pacific Telephone and Telegraph Company (Pacific) and General Telephone Company of California (General), allege that Pacific and General, defendants, have violated Decision No. 73146, dated October 3, 1967, as follows by:

1. Performing "administrative monitoring" with reference to the performance of individual employees.
2. Identifying individual employees or subscribers when performing "administrative monitoring".
3. Making written notations and records of the contents, substance, purport, effect, or meaning of conversations heard during "supervisory monitoring".
4. Permitting its officers, employees or agents to divulge or publish the existence, contents, substance, purport, effect or meaning of communications, or parts thereof, as defined in said Order, which were intentionally or unintentionally monitored, recorded or otherwise intercepted. Said violations did not involve communications disclosing threats or danger to the public or individual health and safety, or lewd, harassing or other nuisance calls.

5. Permitting its officers, employees or agents to use for the benefit of the defendant telephone corporations communications defined in said Order, or the information therein contained, which were intentionally or unintentionally monitored, recorded, or otherwise intercepted.

6. Using information derived from monitoring in connection with kinds of disciplinary action imposed against bargaining unit employees.

Complainant requests the Commission to order defendants to cease and desist from:

1. Using information derived from monitoring in connection with any kind of disciplinary action imposed against bargaining unit employees.

2. Performing "administrative monitoring" with respect to the performance of individual employees.

3. Identifying individual employees or subscribers when performing "administrative monitoring".

4. Making written notations and records of the contents, substance, purport, effect, or meaning of conversations heard during "supervisory monitoring".

5. Permitting its officers, employees or agents to divulge or publish the existence, contents, substance, purport, effect or meaning of communications, or parts thereof, which are intentionally or unintentionally monitored, recorded or otherwise intercepted.

6. Permitting its officers, employees or agents to use for the benefit of the defendant telephone corporations communications, or the information therein contained, which are intentionally or unintentionally monitored, recorded, or otherwise intercepted.

Complainants also request such other and further orders which may be necessary and proper to require defendants to conduct their operations in a lawful and proper manner.

Exhibit A attached to the complaint sets forth the dates, times and places of the violations referred to above and said exhibit is alleged to be representative of the violations which have occurred to date.

Since ordering paragraph 7 of Decision No. 73146 required California telephone corporations to effect compliance with said decision on or before January 1, 1968, the evidence in this proceeding was confined to monitoring practices of Pacific and General from and after January 1, 1968.

Answer to Complaint

Pacific denies complainant's allegations set forth above. That a dispute exists with complainant concerning the application and interpretation of said decision with regard to defendant's administrative and supervisory practices is admitted but Pacific denies that the dispute as it applies to the facts contained in the complaint is subject to the Commission's jurisdiction. Pacific alleges that nine of the alleged violations contained in Exhibit A occurred prior to the implementation of said Decision No. 73146 on January 1, 1968.

As a defense Pacific alleged that the complaint is defective in that it does not state a cause of action since Decision No. 73146 does not prohibit Pacific from using information derived from monitoring in connection with any kind of disciplinary action imposed

against defendant's employees. As a second defense Pacific alleged that the Commission has no general jurisdiction to resolve a labor dispute between a utility and its employees or between a utility and a labor union.

While admitting that a dispute exists between complainant and defendants, General denies that the dispute is subject to the Commission's jurisdiction. General, in substance, makes the same denials as Pacific of complainant's allegations.

History of Proceeding

Case No. 7915, filed on June 3, 1964, was an investigation on the Commission's own motion into the service offering of telephone monitoring equipment under filed tariffs by telephone corporations. After hearing on October 14, 1964, Decision No. 69447 was issued on July 27, 1965. On April 5, 1966, an order reopening said proceeding was issued so as to afford interested parties (subscribers to monitoring equipment) an additional opportunity to be heard and for consideration to be given to monitoring by telephone utilities. The scope of the reopened proceeding was enlarged to determine whether any monitoring, "service observing," or "recording practices" of any nature should be employed by public utility telephone corporations in the conduct of business and for the purpose of further considering the need, if any, for "telephonic service observation" without the requirement of notice.

After 27 additional days of hearing, the receipt of concurrent opening and closing briefs and oral argument, Decision No. 73146 was issued on October 3, 1967. Ordering paragraph 1 of Decision No. 73146 affirmed Decision No. 69447. Ordering paragraphs 2-5, inclusive, of Decision No. 73146 concern monitoring by telephone

utilities and the prohibitions, restrictions and required notice in connection therewith.

Following the issuance of Decision No. 73146, various disputes have arisen between complainant CWA and defendants concerning the interpretation and application of the Order of this Commission to the monitoring practices of Pacific and General. On June 10, 1968, CWA filed a complaint in Case No. 8815 against Pacific and General wherein CWA alleged that Pacific and General had violated and were continuing to violate the Order in Decision No. 73146. Pacific and General submitted statements of asserted defects in the pleading, and on July 29, 1968, CWA filed an Amended Complaint in Case No. 8815. An Answer to Amended Complaint was filed by Pacific and General, and a prehearing conference was held on November 27, 1968. Thereafter, defendants Pacific and General filed a Motion to Dismiss and argument on said motions was had at the commencement of the hearing on February 17, 1969. The Motions to Dismiss were denied.

Proceeding

Of the 33 instances of alleged representative violations of Decision No. 73146 enumerated in Exhibit A attached to the complaint, 23 were attributable to Pacific and 10 were attributable to General. Of the 23 Pacific alleged violations, nine appear to have occurred prior to January 1, 1968, the specified date for utility compliance with the Order. Likewise, one of the alleged violations by General was prior to the compliance date. Complainant presented testimony on five ^{1/} of the 14 alleged Pacific violations which occurred after the compliance date, plus testimony on three instances which occurred after the filing of the complaint.

1/ Evidence on one alleged instance was stricken by the granting of a motion by Pacific.

During the five days of hearing complainant presented the testimony of 22 witnesses. Of complainant's witnesses, nine are, or were, employed by General, 12 by Pacific, and one is a union official. General presented the nine witnesses in its defense and Pacific presented four witnesses.

Discussion

The evidence produced in this proceeding relates only to whether the provisions of Decision No. 73146 have been violated by defendants, or if defendants have permitted its officers, employees or agents to violate the provisions of Decision No. 73146 by the following:

1. Using information obtained through supervisory monitoring^{2/} for disciplinary purposes.
2. Disclosure of conversations heard during supervisory monitoring.
3. Making written notations or records of the content, substance, purport, effect or meaning of conversations heard during supervisory monitoring.

2/ Supervisory monitoring is defined at 67 Cal. PUC. 530, 531 as:

"'Supervisory monitoring' or 'service observing' is used by telephone utilities, public agencies and business concerns to train and supervise individual employees in their performance of telephone service assignments. This includes monitoring, upon the request of any business subscriber using a PBX board, of conversations between the employees of the business subscriber and the customers of the business subscriber by employees of the telephone utility for the purpose of evaluating the grade of service of the PBX board telephone operators. We shall use the term 'supervisory monitoring' to describe the use of monitoring equipment for the functions described in this paragraph." (Emphasis supplied.)

We have previously stated that in our view, Section 7906^{3/} of the Public Utilities Code and Section 653(j) of the Penal Code clearly indicate that it is the continuing policy of the Legislature that the communications over public utility telephone systems shall be private. The Commission, by Decisions Nos. 69447 and 73146, has endeavored to comply with the legislative mandate by promoting the privacy of the using public and of utility employees while at the same time permitting utility management access to adequate means of insuring a high level of telephone service. In all instances, other than for certain specified exceptions, the Commission has prescribed forms of notice to be given those whose conversations are monitored.

The exceptions to the requirement of the notice of monitoring are set forth in ordering paragraph 2C of Decision No. 73146. In general, the exceptions apply to law enforcement, national defense, lewd and harassing calls, administrative monitoring, supervisory monitoring, perpetration of fraud or loss of revenue by telephone corporations, and employees engaged in actual operation, maintenance and construction of the communication circuitry. For each of the foregoing exceptions the Commission prescribed conditions to ensure the privacy of communications. "Supervisory monitoring" of telephone traffic and plant operations, only, is permitted without notice when performed without the making of any written notation or any record of the contents, substance, purpose, effect, and meaning of any conversation which may have been heard during said supervisory monitoring.

3/ Section 7906 of the Public Utilities Code provides:

"The Public Utilities Commission shall regularly make inquiry of every telephone corporation under its jurisdiction to determine whether or not such corporation is taking adequate steps to insure the privacy of communications over such corporation's telephone communication system."

To insure that individuals who may have complied with the prescribed conditions did not disclose information obtained by supervisory and other monitoring exceptions, the Commission included ordering paragraph 4 which forbids such disclosures to any person.

The Commission did not specifically forbid the use for disciplinary purposes of information that had been obtained through supervisory monitoring. The Commission is aware that by forbidding written notations and records and by forbidding disclosure to any person (which includes the employee whose conversation was monitored) the Commission has made the use of supervisory monitoring for direct disciplinary purposes difficult. However, telephone corporations have adequate means of observing employee performance by means other than supervisory monitoring, including monitoring with prescribed notice. In the opinion of the Commission, it is not necessary to sacrifice for ease of employee discipline the principle that, if the privacy of a communication is being violated, notice should be given of the violation of that privacy.

The evidence in this proceeding has been so well summarized and argued by the parties in their opening, answering, and closing briefs that it is only necessary here to comment that the evidence herein is sufficient to establish that instances have occurred where information obtained through supervisory monitoring has been used for disciplinary purposes, information obtained through monitoring has been disclosed, and that written notations or records have been made during supervisory monitoring. It appears that the objective of insuring the privacy of communications can best be served by requiring defendants to review the order of this Commission on monitoring with all personnel at the time of their employment and annually thereafter.

Findings and Conclusions

We find that:

1. Since January 1, 1968, there have been instances where employees of telephone corporations have disclosed information obtained by supervisory monitoring in violation of ordering paragraph 4 of Decision No. 73146.

2. Since January 1, 1968, there have been instances where employees of telephone corporations have made written notations, or record, of the content, substance, purport, effect or meaning of conversations which have been heard during supervisory monitoring in violation of ordering paragraph 2C(4) of Decision No. 73146.

3. The practices and procedures of defendant telephone corporations to implement the provisions of Decision No. 73146 have not been sufficient to insure compliance with said decision.

We conclude that defendant telephone corporations should be required to have all employees who have access to their communication systems advised of the provisions of Decision No. 73146.

O R D E R

IT IS ORDERED that:

1. On or before April 30, 1971, The Pacific Telephone and Telegraph Company and General Telephone Company of California (defendants) shall have made available a copy of Appendix A of this decision to each of its officers, employees, and agents who have access to defendants' communication systems by means other than those available to the general public and shall have required each such officer, employee and agent to acknowledge in writing that each individual has read said decision.

2. Defendants, on or before April 30, 1971, shall establish such procedures and employee training practices as may be necessary to implement the provisions of Decision No. 73146 and to insure that each officer, employee or agent of defendants who has access to defendants' communication system by means other than those available to the general public shall comprehend said provisions.

3. After April 30, 1971, defendants shall require each new employee who will have access to defendants' communication system by means other than those available to the general public to read a copy of Appendix A of this decision and acknowledge such reading in writing.

4. After January 1, 1972, defendants shall put into effect a program to insure the periodic reading of Appendix A by each officer, employee and agent who has access to defendants' communication system. The details of this program shall be furnished to the Commission no later than December 1, 1971.

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

Dated at San Francisco, California, this 23rd day of MARCH, 1971.

Chairman

[Handwritten signature]

[Handwritten signature]

[Handwritten signature]

Commissioners

Abstain

William L. Sturgeon - Chairman

PUBLIC UTILITIES COMMISSION
of the
STATE OF CALIFORNIA

PRIVACY OF COMMUNICATION - TELEPHONE CORPORATIONS

Purpose

The definitions and orders contained herein are abstracted from Decision No. 73146, dated October 3, 1967, of this Commission to implement the continuing policy of the Legislature that communications over public utility telephone systems shall be private. Each telephone corporation officer, employee or agent who has access to the communication system of a telephone corporation by means other than those available to the general public shall read, and acknowledge reading, the information contained herein upon its initial receipt and annually thereafter.

Definitions

Decision No. 73146 at 67 Cal. P.U.C. 530, 531 defines terms relating to privacy of communication as follows:

"For the purpose of this proceeding we will revise the definition of monitoring or 'service observing' and 'training equipment' (hereinafter referred to as monitoring equipment), which we set forth in our Decision No. 69447 (64 Cal. P.U.C. 528), to include public utility telephone corporations as follows:

'Telephone utility apparatus by which a public utility telephone corporation or a telephone subscriber, or any of their officers, employees or agents, may listen to or record telephone conversations on premises owned or controlled by the utility or by the subscriber (a) without any audible indication to the parties conversing that their conversation is being overheard, or (b) without connection of a device to provide two-way conversation between the listener and the parties conversing so that the listener's voice may be heard throughout any period of monitoring, or (c) without any indication to the parties conversing that their conversation is being recorded'. We adopt and find reasonable the foregoing modified definition of monitoring equipment.

APPENDIX A
Page 2 of 6

The use of monitoring equipment has in this proceeding been referred to as monitoring 'service observing,' 'official' or 'administrative service observing,' 'supervisory monitoring' or 'service observing,' 'PBX observations,' and 'special studies.' 'Service observing' has been defined by the telephone utilities as 'the quality-control procedure applicable to the business of serving the public by telephone.' We shall use the term monitoring to generally describe the use of monitoring equipment.

'Official' or 'administrative service observing' is performed by utility employees with the job classification of 'Service Observer.' They provide the utility with an over-all evaluation or index of the quality of telephone service furnished subscribers by a telephone company office, or work group, but without reference to the performance of an individual employee, or identifying employees or subscribers. Historically this type of monitoring has been known as 'official service observing,' but in this proceeding the utilities have chosen to use the term 'administrative observing.' We shall use the term 'administrative monitoring' to describe the use of monitoring equipment for this function.

'Supervisory monitoring' or 'service observing' is used by telephone utilities, public agencies and business concerns to train and supervise individual employees in their performance of telephone service assignments. This includes monitoring, upon the request of any business subscriber using a PBX board, of conversations between the employees of the business subscriber and the customers of the business subscriber by employees of the telephone utility for the purpose of evaluating the grade of service of the PBX board telephone operators. We shall use the term 'supervisory monitoring' to describe the use of monitoring equipment for the functions described in this paragraph.

'Special studies' by telephone utilities using monitoring may be initiated by requests of subscribers or law enforcement agencies relating to harassing or obscene calls, suspected wiretapping, eavesdropping or other similar irregular and forbidden practices. We shall use the term 'special study monitoring' to describe the use of monitoring equipment in the course of special studies as herein defined.

We do not include in the term monitoring the concepts of 'wiretapping' and 'eavesdropping,' forbidden by the Penal Code as interceptions of confidential communications, nor do we include in the term those accidental and unintentional interceptions of confidential communications, as defined in the Penal

APPENDIX A
Page 3 of 6

Code, by telephone utility employees engaged in their obviously normal tasks relating to the operation, maintenance and construction of telephone utility facilities. Further, we are not in this proceeding considering monitoring by law enforcement and national defense agencies, or by telephone utilities to prevent fraud or loss of revenues, when their activities are permitted under enabling laws and legal safeguards."

Order

Decision No. 73146 at 67 Cal. P.U.C. 551, 552, 553 and 554 ordered the following to insure that the rules, practices, equipment, appliances, facilities and service of telephone corporations promote the privacy of communication:

"2. No telephone corporation shall permit any officer, employee or agent thereof to intentionally monitor, record or otherwise intercept any communication over any part of the public utility network of the telephone corporation without notice as herein provided of said monitoring, recording or interception to all parties to said communication. The provisions of this paragraph apply to communications between users of the service of the telephone corporation; between said service users and officers, employees and/or agents of the telephone corporation; and between officers, employees and/or agents of the telephone corporation.

A. Notice to all parties to a communication being recorded shall be given either:

- (1) By an automatic tone warning device which shall automatically produce the distinct tone warning signal known as a 'beep tone' which is audible to all parties to a communication and which is repeated at regular intervals during the course of said communication whenever said communication is being recorded; or
- (2) By clearly, prominently and permanently marking each telephone instrument for company use from which communications may be recorded to indicate that a communication of the user of said instrument may be recorded without notice; provided that this method of giving notice of recording may be used only if said automatic tone warning signal is audible to all parties to the communication using telephone instruments not so marked.

APPENDIX A
Page 4 of 6

- B. Notice to all parties to a communication being monitored or otherwise intercepted, except recorded, shall be given by either:
- (1) By an automatic tone warning device which shall automatically produce a distant tone warning signal audible to all parties to a communication and which is repeated at regular intervals during the course of said communication whenever said communication is being monitored or intercepted. The distinct tone warning signal required by this subparagraph shall have those characteristics specified by the Federal Communications Commission for automatic tone warning of recording or shall have such characteristics as may be approved by this Commission after industry-wide consultation and request by the telephone corporations in California; or
 - (2) By clearly, prominently and permanently marking each telephone instrument for company use from which communications may be monitored or otherwise intercepted to indicate that a communication of the user of said instrument may be monitored or otherwise intercepted without notice; provided that this method of giving notice of monitoring or interception may be used only if an automatic tone warning signal is audible to all parties to the communication using telephone instruments not so marked; or
 - (3) By verbal announcement by the operator of monitoring equipment to the parties to a communication that their communication is being monitored; or
 - (4) By a telephone instrument transmitter which is operationally connected to the communication circuit being monitored, and which acoustically, mechanically, electrically or otherwise has not been designed, modified, desensitized or located with the intent of eliminating notice of monitoring or interception, with the exception that minimization of transmission losses will be permitted.
- C. The provisions of this paragraph shall not apply to the following:
- (1) Monitoring, recording, and interception of communications by telephone corporations when required by law enforcement and national defense agencies under enabling laws and legal safeguards.

APPENDIX A
Page 5 of 6

- (2) Monitoring, recording, and interception of communications by telephone corporations when any of said activities may be required to identify and eliminate the source of lewd or harassing calls of which a subscriber has complained to the telephone corporation.
- (3) 'Administrative monitoring' when performed by telephone corporation employees to provide the utility with an over-all evaluation or index of the quality of telephone corporation service furnished by a telephone corporation office or work group to subscribers without reference to the performance of individual employees; without identifying individual employees or subscribers; and without the making of any notation or any written record of the contents, substance, purport, effect, or meaning if any conversations which may have been heard during said administrative monitoring, except as specifically required for administrative monitoring.
- (4) 'Supervisory monitoring' of telephone traffic and plant operations when performed without the making of any written notation or any record of the contents, substance, purport, effect, or meaning of any conversation which may have been heard during said supervisory monitoring.
- (5) Monitoring, recording and interception of communications when performed by telephone corporation employees to prevent the perpetration of fraud upon or loss of revenue by the telephone corporation when performed without the making of any notation or any record of the contents, substance, purport, effect, or meaning of any of said communications, except as absolutely necessary to prevent such fraud or loss of revenues.
- (6) Interception of communications by telephone corporation employees who are engaged in the actual operation, maintenance, and construction of the communication circuitry of the telephone corporation when performed without any written notation and any record of the contents, substance, purport, effect, or meaning of any communication which may have been intercepted.

APPENDIX A
Page 6 of 6

- "3. Each telephone corporation shall require any officer, employee or agent thereof who is engaged in the actual operation, maintenance or construction of the physical plant of said corporation and who intentionally or unintentionally monitors, records or otherwise intercepts any communication, as defined in this order, over any part of the public utility network of the said corporation, without notice as provided in this order, to immediately identify himself to all parties to said communication.
- "4. Except as herein provided, no telephone corporation shall permit any officer, employee or agent thereof to divulge to any person, or to publish, the existence, contents, substance, purport, effect, or meaning of any communication, or part thereof, as defined in this order, which was intentionally or unintentionally monitored, recorded, or otherwise intercepted. The provisions of this paragraph shall not apply to communications disclosing threats or danger to the public or individual health and safety, or to lewd, harassing and other nuisance calls.
- "5. No telephone corporation shall permit any officer, employee or agent thereof to use for his own benefit, for the benefit of the telephone corporation, or for the benefit of another not entitled thereto, any communication as defined in this order, or the information therein contained, which was intentionally or unintentionally monitored, recorded, or otherwise intercepted."

Reference

For complete texts, reference is made to Decision No. 69447, 64 Cal. P.U.C. 526 and Decision No. 73146, 67 Cal. P.U.C. 528.