

ORIGINAL

Decision No. 79504

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

San Mateo Union High School District, )  
Complainant, )

vs.

PACIFIC TELEPHONE AND TELEGRAPH COM- )  
PANY, a corporation, )  
Defendant. )

Case No. 9246  
(Filed July 14, 1971)

Keith C. Sorenson, District Attorney, by  
Jerome F. Coleman, Deputy District Attorney;  
for San Mateo Union High School District,  
complainant.  
Richard Siegfried, Attorney at Law, for The  
Pacific Telephone and Telegraph Company,  
defendant.

O P I N I O N

Complainant San Mateo Union High School District on July 14, 1971, filed a complaint against defendant The Pacific Telephone and Telegraph Company requesting this Commission to issue an order to show cause why defendant and its agents, servants and employees should not be restrained temporarily during the pendency of the proceeding, and permanently thereafter, from terminating or threatening to terminate the telephone services to complainant because of the use by complainant of a monitoring device which does not contain a recorder tone, when such monitoring device is only used to record conversations from the time the call is received until the time it is transferred to the appropriate extension.

On July 16, 1971, the Commission by Decision No. 78930 herein issued the requested Order to Show Cause and Temporary Restraining Order. A hearing on the Order to Show Cause and also upon

the entire complaint herein was held before Examiner Cline on July 23, 1971. The matter was taken under submission upon the filing of the brief of defendant on August 20, 1971, and the brief of complainant on September 24, 1971. By Decision No. 79017 issued August 10, 1971, herein the Commission ordered the continuance of the temporary restraining order pending final determination of the complaint herein.

The issue in this proceeding is whether two-way telephone conversations may be recorded by the School District without the use of a "beep tone."

The pertinent provisions of the California Penal Code Sections 632 and 633 reads as follows:

"§ 632. Eavesdropping on or recording confidential communications

(a) Prohibited acts; punishment; recidivists. Every person who, intentionally and without the consent of all parties to a confidential communication, by means of any electronic amplifying or recording device, eavesdrops upon or records such confidential communication, whether such communication is carried on among such parties in the presence of one another or by means of a telegraph, telephone or other device, except a radio, shall be punishable by fine not exceeding two thousand five hundred dollars (\$2,500), or by imprisonment in the county jail not exceeding one year, or by imprisonment in the state prison not exceeding three years, or by both such fine and imprisonment in the county jail or in the state prison. If such person has previously been convicted of a violation of this section or Section 631 or 636, he is punishable by fine not exceeding ten thousand dollars (\$10,000), or by imprisonment in the county jail not exceeding one year, or by imprisonment in the state prison not exceeding five years, or by both such fine and imprisonment in the county jail or in the state prison.

(b) Person. The term "person" includes an individual, business association, partnership, corporation, or other legal entity, and an individual acting or purporting to act for or on behalf of any government or subdivision thereof, whether federal, state, or local, but excludes an individual known by all parties to a confidential communication to be overhearing or recording such communication.

(c) Confidential communication. The term "confidential communication" includes any communication carried on in such circumstances as may reasonably indicate that any party to such communication desires it to be confined to such parties, but excludes a communication made in a public gathering or in any legislative, judicial, executive or administrative proceeding open to the public, or in any other circumstance in which the parties to the communication may reasonably expect that the communication may be overheard or recorded.

(d) Evidence. Except as proof in an action or prosecution for violation of this section, no evidence obtained as a result of eavesdropping upon or recording a confidential communication in violation of this section shall be admissible in any judicial, administrative, legislative or other proceeding.

(e) Exceptions. This section shall not apply (1) to any public utility engaged in the business of providing communications services and facilities, or to the officers, employees or agents thereof, where the acts otherwise prohibited herein are for the purpose of construction, maintenance, conduct or operation of the services and facilities of such public utility, or (2) to the use of any instrument, equipment, facility, or service furnished and used pursuant to the tariffs of such a public utility, or (3) to any telephonic communication system used for communication exclusively within a state, county, city and county, or city correctional facility.

"§ 633. Law enforcement officers; authorized use of electronic, etc., equipment

Nothing in Section 631 or 632 shall be construed as prohibiting the Attorney General, any district attorney, or any assistant, deputy, or investigator of the Attorney General or any district attorney, or any officer of the California Highway Patrol, or any chief of police, assistant chief of police, or policeman of a city or city and county, or any sheriff, under sheriff, or deputy sheriff regularly employed and paid as such of a county, or any person acting pursuant to the direction of one of the above-named law enforcement officers acting within the scope of his authority, from overhearing or recording any communication which they could lawfully overhear or record prior to the effective date of this chapter.

Nothing in Section 631 or 632 shall be construed as rendering inadmissible any evidence obtained by the above-named persons by means of overhearing or recording any communication which they could lawfully overhear or record prior to the effective date of this chapter."

In Decision No. 69447, issued July 27, 1965, in Case No. 7915, 64 Cal.P.U.C. 526 (1965), the Commission found that the recording of telephone conversations should be permitted only where a utility-provided connector is employed which includes a "beep tone". In this decision the Commission considered the relationship of Section 653j of the Penal Code (the predecessor of Section 632 of the Penal Code) which prohibited the recording of conversations where the consent of at least one of the parties had not been obtained and stated:

"[1]The citations presented and their legislative history<sup>3</sup> would seem to indicate that consent to the use of monitoring equipment by one of the parties to a conversation may make possible the use of monitoring equipment without legal penalty. However, 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.'

In our view, Section 7906 of the Public Utilities Code and Section 653j of the Penal Code clearly indicate that it is the continuing policy of the Legislature that communications over public utility telephone systems shall be private."  
(64 Cal.P.U.C. 526, 534.)

The Commission then ordered the telephone companies to provide connecting equipment which included the "beep tone". In subsequent decisions dealing with the monitoring of and recording of telephone conversations, the Commission adhered to this view (see Decision No. 73146 and Decision No. 78442).

In Communication Workers of America v. Pacific Telephone & Telegraph Company, et al., Decision No. 78442 (1971), the Commission said:

"We have previously stated that in our view, Section 7906<sup>3/</sup> 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." (Page 8 of the Mimeographed Decision.)

The exception for law enforcement agencies set out in Paragraph 2C of Decision No. 73146 and cited above is also very limited. Paragraph 2C(1) provides:

"(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." (Emphasis added.) (67 Cal.P.U.C. 528, 553.)

As a result of Decision No. 69447, Pacific filed a tariff which requires that the recording of telephone conversations be done only through a connector which provides the "beep tone".

The Pacific Telephone and Telegraph Company Schedule Cal. P.U.C. No. 135-T, 1st Revised Sheet 21, Paragraph II.B.5. provides:

- "5. Connection of Customer-Provided Recording and Reproducing Equipment
- a. Exchange and message toll service furnished by the Utility is not represented as adapted to the recording of telephone conversations or incoming messages, or to the transmission of prerecorded messages. However, customer-provided recording and reproducing terminal equipment may be used in connection with such service for the following purposes and subject to the following conditions:

- (1) Recording of Two-Way Telephone Conversations
  - (a) Connection of customer-provided voice recording equipment with facilities of the Utility for the recording of telephone conversations is permitted only by means of a direct electrical connection through recorder connector equipment which contains a recorder tone device automatically producing a distinctive recorder tone that is repeated at intervals of approximately fifteen seconds when the recording equipment is in use, except that in the case of stations or lines which are physically restricted from connection with the exchange and message toll network of the Utility, recorder connector equipment which does not contain the automatic recorder tone device may be used at the option of the customer.
  - (b) Direct electrical connection shall be made only through recorder connector equipment furnished, installed and maintained by the Utility.
  - (c) Connection may be made through portable recorder connector equipment provided such equipment is obtained from and is maintained by the Utility. The portable recorder connector equipment shall be connected with the telephone line through jacks installed by the Utility on each line or at each station used for recording purposes, except that where recording is done at a cord service attendant position, a portable jack box supplied and maintained by the Utility may be used.
  - (d) The customer-provided voice recording equipment shall be so arranged that it can be physically connected to and disconnected from the facilities of the Utility or switched on and off."

The Pacific Telephone and Telegraph Company Schedule Cal.P.U.C. No. 135-T, Original Sheet 7 provides as follows:

"CONNECTIONS OF CUSTOMER-PROVIDED  
EQUIPMENT AND SYSTEMS

"I. GENERAL REGULATIONS - Continued

"B. Responsibility of the Customer

"Where services set forth in the tariff schedules of the Utility are available for use in connection with customer-provided equipment or systems the operating characteristics of such equipment or systems shall be such as to not interfere with any of the services offered by the Utility. Such use is subject to the further provisions that the customer-provided equipment or systems does not endanger the safety of the Utility employees or the public; damage, require change in or alteration of the equipment or other facilities of the Utility; interfere with the proper functioning of such equipment or facilities; impair the operation of the exchange and toll network or other facilities or otherwise injure the public in its use of the Utility's services. Upon notice from the Utility that the customer-provided equipment or systems is causing or is likely to cause such hazard or interference, the customer shall make such change as shall be necessary to remove or prevent such hazard or interference. The customer shall be responsible for the payment of all Utility charges for visits by the Utility to the customer's premises where a service difficulty or trouble report results from customer-provided equipment or systems.

"C. Violation of Regulations

"Where any customer-provided equipment or systems is used with exchange and message toll service, or private line service, in violation of any of the provisions in I. through VI. the Utility will take such immediate action as necessary for the protection of its facilities, and will promptly notify the customer of the violation. The customer shall discontinue such use of the equipment or systems or correct the violation and shall confirm in writing to the Utility within 10 days, following the receipt of written notice from the Utility, that such use has ceased or that the violation has been corrected. Failure of the customer to discontinue such use or to correct the violation and to give the required written confirmation to the Utility within the time stated above shall result in suspension of the customer's service until such time as the customer complies with the provisions of this tariff."

The Commission has previously considered the desirability of eliminating the "beep tone" where emergency telephone conversations are recorded by local fire and police departments. In Decision No. 68678, issued March 2, 1965, in Case No. 8032, 64 Cal.P.U.C. 106, 108, the Commission found that:

"Until such time as Pacific shows it is not feasible to design and install equipment producing a warning tone which would substantially eliminate the City's cause for complaint and until definitive safeguards are devised which will insure that the privacy of communications will not be circumvented by allegations of emergency conditions, we find that Pacific should not eliminate the automatic tone device with recorder-connection equipment used for local fire and police department emergency calls."

Applicable federal statutes prohibit the recording of a telephone conversation by a person without the knowledge and consent of at least one of the parties to a conversation (see 18 U.S.C.A., § 2511; 47 U.S.C.A., § 605). Since the recording is being done by, and with the consent of, one party to the conversation, namely, personnel at the switchboard at each of the schools, neither of these statutes would appear to be violated.

The Federal Communications Commission, in exercising its continuing regulatory jurisdiction over interstate and foreign message toll telephone service held, however, that:

"3. The use of recording devices in connection with interstate and foreign message toll telephone service should be authorized, provided such use is accompanied by adequate notice to all parties to the telephone conversation that the conversation is being recorded. Adequate notice will be given by the use of the automatic tone-warning device, which would automatically produce a distinct signal that is repeated at regular intervals during the course of the telephone conversation when the recording device is in use. Both the telephone companies and the recorder manufacturers should also undertake a publicity program designed to inform telephone users generally of the use of telephone recording devices and of the import of the warning signal. Any publicity program should provide for the



insertion of full page statements in telephone directories, informing the telephone using public of the nature and use of recording devices and describing in detail the operation and significance of the tone warning signal. In addition, the telephone companies should make available a special telephone number which when dialed or called, would reproduce the tone warning sound.

"4. No recording device should be used in connection with interstate and foreign message toll telephone service unless, at the will of the user, it can be physically connected to and disconnected from the telephone line or switched on and off.

"5. In the case of a telephone recorder physically attached to the telephone line, the equipment necessary to make such physical connection should be provided, installed, and maintained by the telephone companies." (Emphasis added.)

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<sup>1</sup>"In the Matter of Use of Recording Devices in Connection with Telephone Service, 11 F.C.C. 1033, 1055 (1947)."

The F.C.C. ordered the telephone carriers to file tariffs providing for connecting equipment which included the "beep tone" (11 F.C.C. 1056). In subsequent decisions, the F.C.C. specified the technical requirement that must be met by such equipment (12 F.C.C. 1005 and 12 F.C.C. 1008).

In accordance with the requirements of these decisions, tariffs have been filed with the F.C.C. by the American Telephone and Telegraph Company Long Lines Department and concurred in by Pacific providing for such restrictions on the recording of two-way interstate telephone conversations. Tariff F.C.C. No. 263, 2nd Revised Page 18.1 and 1st Revised Sheet 18.2, Paragraph 2.6.4(D) provides:

"D. Connection of Customer-Provided Voice Transmitting and/or Receiving Terminal Equipment for Recording of Two-Way Telephone Conversations

- (1) Long distance message telecommunications service furnished by the Telephone Company is not represented as adapted to the recording of telephone conversations. However, customer-provided recording

equipment may be used in connection with long distance message telecommunications service subject to the following conditions:

- (a) (Filed in compliance with order dated May 20, 1948 of Federal Communications Commission in Docket No. 6787)

Connection of customer-provided voice recording equipment with facilities of the Telephone Company for the recording of two-way telephone conversations is permitted only by means of a direct electrical connection through a connecting arrangement furnished, installed and maintained by the Telephone Company, which contains a recorder tone device automatically producing a distinctive recorder tone that is repeated at intervals of approximately fifteen seconds when the recording equipment is in use.

- (b) In lieu of the above arrangement, connection may be made through a portable direct electrical connecting arrangement provided such arrangement is obtained from and is maintained by the Telephone Company. The portable connecting arrangement shall be connected with the telephone line through jacks installed by the Telephone Company on each line or at each station used for recording purposes, except that where recording is done at a cord switchboard, a portable jack box supplied and maintained by the Telephone Company may be used.
- (c) The customer-provided voice recording equipment shall be so arranged that at the will of the user it can be physically connected to and disconnected from the facilities of the Telephone Company or switched on and off.
- (d) The customer-provided voice recording equipment must comply with the minimum network protection criteria set forth for direct electrical connection of customer-provided voice terminal equipment in 2.6.4 (E)(1)(b) preceding."

Findings

Based upon a consideration of the record herein the Commission finds as follows:

1. The San Mateo Union High School District has seven regular comprehensive high schools and 12,000 students in its district which covers six communities in the mid-peninsula area: San Mateo, Foster City, Hillsborough, Burlingame, Millbrae and San Bruno.

2. Its schools are located in four police and fire jurisdictions in the cities of San Mateo, Burlingame, Millbrae and San Bruno.

3. Each of the schools has a telephone company switchboard with approximately four incoming lines and about 25 internal trunk lines.

4. During the 1970-71 school year, with the seriousness of bomb threats and the possibility of actual bombs being placed in the schools, the School District personnel decided to tape record the incoming calls through the central switchboards at the training positions.

5. All incoming calls to each school during the hours the board is open, generally from 8:00 a.m. through 4:30 p.m., are recorded while the attendant is on the line and until the extension cord is plugged in. Similarly all outgoing calls of students which are placed through the attendant are recorded until the attendant places the call on an extension. No monitoring tone is used in any of these cases of recording.

6. During the past school year from September 1970 through the close of school in June of 1971, the School District recorded 50 specific bomb calls at the seven schools. No bombs were actually discovered as a result of any of these calls.

7. Four callers out of the 50 bomb callers were identified, two being students who were prosecuted through the local police jurisdiction and placed on probation by the Juvenile Court.

8. If a monitoring tone is used during the recording of the telephone calls, it can cause the thousands of callers to the various schools in the School District to have some apprehension and to suspect that confidential calls that take place between parents,

teachers, counselors and nurses are being monitored, and it might also tip off some of the threatening callers to the fact that the calls are being recorded.

9. One of the advantages to recording the threatening calls is that the correct message rather than a garbled report of the message is available for use by the proper authorities.

10. Pursuant to Schedule Cal.P.U.C. No. 135-T, Original Sheet 7, Paragraph I.C., the defendant, The Pacific Telephone and Telegraph Company, notified the complainant, School District, that it would have to disconnect its telephone services unless the recording was done using a utility-provided connector which included a "beep tone".

#### Conclusions

Based upon a consideration of the foregoing facts and the law, Commission's decisions, and tariffs of defendant applicable thereto, the Commission concludes as follows:

1. Both the California Public Utilities Commission and the Federal Communications Commission are keenly interested in assuring that telephone communications remain private unless the parties to the conversation are advised that the communications are to be recorded.

2. The restraining order heretofore issued herein should be vacated and the complaint herein should be dismissed.

3. The complainant should be ordered to discontinue recording two-way telephone conversations in the manner described in the foregoing decision without a utility-provided connector which includes a beep tone.

4. If complainant continues to violate the law and the tariffs of defendant by recording two-way telephone conversations without a utility-provided connector which includes a beep tone, defendant should be ordered to discontinue its telephone service to complainant.

O R D E R

IT IS ORDERED that:

1. The restraining order heretofore issued herein is vacated and the complaint herein is dismissed.

2. Complainant San Mateo Union High School District shall discontinue the recording of two-way telephone conversations in the manner described in the foregoing decision without a utility-provided connector which includes a beep tone.

3. If complainant San Mateo Union High School District after the effective date of this order continues to violate the law and the tariffs of defendant The Pacific Telephone and Telegraph Company and violates Paragraph 2 of the order herein by recording two-way telephone conversations without a utility-provided connector which includes a beep tone, The Pacific Telephone and Telegraph Company shall discontinue its telephone service to complainant San Mateo Union High School District.

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

Dated at San Francisco, California, this 21<sup>st</sup> day of DECEMBER, 1971.

[Signature]  
Chairman

[Signature]

[Signature]

[Signature]  
Commissioners