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Decision No. 82341

ORIGINAL

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

101 PLATING CORPORATION, a California Corporation, Complainant, vs. THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY, a Corporation, Defendant.	Case No. 9313 (Filed January 5, 1972)

Anthony Castanares, Attorney at Law, for complainant.
Richard Siegfried, Attorney at Law, for defendant.

O P I N I O N

101 Plating Corporation, a debtor in possession under the federal Bankruptcy Act Chapter XI (11 U.S.C. 701 et seq.), complains against The Pacific Telephone and Telegraph Company seeking to permanently enjoin defendant from disconnecting telephone service at any of complainant's present telephone numbers for nonpayment of the telephone bills of the pre-Chapter XI debtor. In Decision No. 79621 dated January 18, 1972 we ordered defendant to temporarily cease and desist from disconnecting such service pending the outcome of this case because the assailed disconnect tariff provisions and procedures thereunder might be in conflict with the federal Bankruptcy Act. The matter came on for hearing and posthearing briefs were submitted. At the hearing complainant and defendant stipulated (Exhibit 1) that the facts controlling this litigation are in part as follows:

"Complainant is a California corporation with its principal place of business in San Jose, California.

"Complainant is engaged in the business of reconditioning automobile bumpers.

"Complainant's active customers number approximately 650 to 700, and consist largely of automobile repair shops and dealers who make use of Complainant's automobile bumper reconditioning services. These customers, together with approximately 800 to 850 less active customers, are located throughout the San Francisco Bay area.

"Complainant obtains its business primarily from two sources: telephone orders directly from its customers, and orders telephoned in to Complainant by Complainant's delivery drivers. Between fifty and sixty percent of Complainant's business is obtained by telephone orders directly from Complainant's customers, and these orders number approximately seventy-five to eighty telephone calls per business day.

"Complainant is engaged in a highly competitive business with several active competitors in its relevant market area. Complainant's product and services are not unique and its prices are not substantially different from those of its competitors.

"Complainant's product and services are of a type which is needed by Complainant's customers on an immediate time basis, and, since those customers are in turn under great time pressure from their respective clientele, they could not afford to delay in attempting to contact Complainant or one of its competitors in order to obtain the product and services they require.

"Prior to the date of the filing of a petition under Chapter XI of the Federal Bankruptcy Act, Complainant had listed to it and was using the following telephone numbers, supplied by Defendant: (408) 297-8400 through 8405; (408) 275-0107 and 0108; (408) 297-1681 through 1683; and EN 1-2455 as well as two non-published numbers.

"On September 8, 1971, Defendant notified Complainant in writing that the telephone service furnished to it under the above numbers would be subject to disconnection unless the then past due balance of $4,247.61 was paid within five days.

"On September 17, 1971, Defendant received a partial payment of $1,810.14.

"On October 4, 1971, Complainant filed a petition for an arrangement under Chapter XI of the Federal Bankruptcy Act in the United States District Court for the Northern District of California. Complainant is the Debtor-in-Possession in said arrangement proceedings, which are presently pending before the Honorable Daniel R. Cowans, Referee in Bankruptcy, and have been assigned Case No. 5-71-2117-C.

"On that date, Complainant was indebted to Defendant in the sum of $6,431.29.

"On October 11, 1971, Defendant advised the Complainant that it would have to terminate the telephone service. Defendant further advised the Complainant that, as the Debtor-in-Possession, if it desired to retain telephone service under the same telephone numbers, it would be required to supersede to the former service and pay all outstanding charges. In the alternative, Defendant advised Complainant, as Debtor-in-Possession, that it could obtain telephone service under different telephone numbers without any referral of calls, without paying the outstanding balance.

"On October 14, 1971, Complainant brought on an Application for Permanent Injunction and Temporary Restraining Order against Defendant, seeking to enjoin Defendant from terminating Complainant's telephone service, in the bankruptcy court. On that same date, that court entered its Order to Show Cause and Temporary Restraining Order against Defendant. On October 26, 1971, a hearing was held in the bankruptcy court upon Complainant's Application for a Permanent Injunction.

"On December 29, 1971, the bankruptcy court entered its Order Vacating and Dissolving the Temporary Restraining Order and Dismissing Application for Permanent Injunction. Said dismissal was for lack of summary jurisdiction only, and did not operate as an adjudication of the merits of the present controversy.

"Shortly prior to the entry of the above-referenced Order of Dismissal, Complainant had applied to the bankruptcy court for instructions, and, by Order dated December 30, 1971, the bankruptcy court denied Complainant permission to follow Defendant's supersedure procedures, and directed Complainant to institute these proceedings.

"All current charges for the telephone service have been paid by the Complainant as an expense of administration, and, under applicable provisions of the Bankruptcy Act, Complainant will be required to do so in the future."

Defendant submitted with its brief a copy of the order of the United States District Court dated December 30, 1971 referred to in the next to last above paragraph. The ordering paragraphs of that order read as follows:

"ORDERED, that the Debtor shall institute appropriate plenary proceedings, including, but not limited to, proceedings Before the Public Utilities Commission of the State of California, for the determination of the merits of the issue of whether it need follow the telephone company's supersedure procedures in order to maintain its present existing telephone service; and it is further

"ORDERED, that the Debtor is denied permission to follow said supersedure procedures, without prejudice to the Debtor's right to request such permission in the event that it should not prevail in said plenary proceedings."

At the hearing complainant also presented witness Fred Young, vice president of complainant, who testified as follows: that 101 Plating is a wholly owned subsidiary of Faith Plating which has automobile bumper reconditioning plants located at Compton and Santa Fe, California; that he is in charge of production at both of the Faith Plating plants as well as at complainant's plant; that virtually all business is done on the same day or the next day delivery basis; that complainant has four competitors located in San Jose; that during the last nine months two bumper plating companies in the San Francisco Bay Area have gone out of business; that 20 percent of complainant's customers also do business with complainant's competitors; that at times complainant has lost business, sometimes permanently, to competitors where the customer is unable to reach complainant by phone because complainant's telephone circuits are busy; that complainant fears that an interruption of its service would take place where it got new numbers; that complainant would lose an estimated 40 percent of its business during any week its telephone service was interrupted and would permanently lose an estimated 10 percent of its business where its telephone service was interrupted for a week and the service reinstituted under new numbers where the telephone company did not refer calls coming to the old telephone numbers to the new ones; that during the week of interrupted telephone service complainant would lose $14,000 gross revenue; that the aforementioned estimated 10 percent loss, based on its present gross sales of $35,000 per week from which it derives between $1,000 and $2,000 per week net profit, would destroy most if not all of its profit; that complainant's customers already have an insecure feeling about complainant's ability to continue to serve them by reason of the bankruptcy proceeding; and that an interruption in complainant's telephone service now would only heighten this insecure feeling to the detriment of complainant's future business.

The pertinent portion of defendant's tariff provisions governing disconnect procedure appears in defendant's tariff Schedule Cal. P.U.C. 36-T, 4th Revised Sheet 49, Rule 11, paragraph A.2.a., and reads as follows:

> "All Classes, Types and Grades of Exchange and Toll Service.
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> "Service to particular premises, separately served and billed, may be temporarily or permanently discontinued for the nonpayment of a bill for the service furnished, provided the bill therefor has not been paid within the period specified below and the utility informs the customer with a written 5 day notice:
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> * * *
>
> "Fifteen calendar days after presentation of all other bills."

The term "supersedure" is defined in defendant's tariff Schedule Cal. P.U.C. 36-T, 8th Revised Sheet 16, as follows:

> "The transfer of a customer's service, including the telephone number, from one party to another with no change in type or location of equipment."

Conditions applicable to a supersedure are set out in defendant's tariff Schedule Cal. P.U.C. 36-T, 3rd Revised Sheet 72, Rule 23, paragraph (B):

> "(B) SUPERSEDURE
>
> "An applicant who otherwise qualifies for the immediate establishment of service under Section (A) of this rule may supersede the service of a subscriber discontinuing that service when the applicant is to take service on the premises where that service is being rendered and a written notice to that effect from both the subscriber and applicant is presented to the company and where an arrangement acceptable to the company is made to pay all unpaid charges and to assume all obligations of the outgoing subscriber in connection with the service existing on the date of supersedure, including any charges and obligations for advertising."

Concerning the assignment of telephone numbers, defendant's applicable tariff Schedule Cal. P.U.C. 36-T, 3rd Revised Sheet 63, paragraph 17(C), provides:

> "The assignment of a number to a customer's telephone service will be made at the discretion of the utility. The subscriber has no proprietary right in the number..."

Complainant contends that the rules and tariffs permitting defendant to terminate telephone service to complainant conflict with the federal Bankruptcy Act and are therefore void under the Supremacy Clause of the United States Constitution. Specifically, complainant contends that its first alternative, i.e., payment of the antecedent indebtedness, would frustrate the paramount theme of the federal Bankruptcy Act of equality of distribution among a debtor's creditors and allow a state-created priority to take precedence over those created by federal law and that its second alternative, i.e., termination of telephone service, would frustrate the fundamental theme of rehabilitation under Chapter XI of the Bankruptcy Act. Complainant also contends that the termination of telephone service, as well as the tariff rule permitting such termination for nonpayment of bills on short notice without a hearing, deprives complainant of its property without due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution and Article I, Section 13, of the California Constitution, and that there is no "compelling state interest" which justifies the summary disconnect procedure.

Defendant argues that under the provisions of its applicable tariffs it cannot furnish telephone service to complainant under the same telephone numbers as furnished to the pre-Chapter XI debtor unless complainant supersedes to the former service; that a debtor in possession has no right to enforcement of benefits of an executory contract for telephone service without accepting its burdens; that complainant has no proprietary interest in a telephone number assigned to the telephone service to which it subscribes; that complainant has no standing to challenge the constitutionality of defendant's disconnect rule; that defendant's disconnect rule for nonpayment of a bill provides for adequate procedural safeguards consistent with due process; that defendant's position is not like that of an ordinary creditor; and that a balancing of the equities weighs heavily in favor of defendant's disconnect procedure. Defendant admits that complainant as debtor in possession is entitled to telephone service, but under numbers to be assigned at the discretion of defendant.

Discussion

Conflict with the Federal Bankruptcy Act

We find that no substantial conflict exists between defendant's disconnect procedure for nonpayment of a bill or its supersedure tariff on the one hand and on the other, the federal Bankruptcy Act. The subject disconnect procedure and the threat of disconnection is designed to enforce state policy against any person, be he bankrupt or not, from obtaining or continuing to obtain an unlawful preference or privilege not accorded to all subscribers from a public utility, the preference or privilege in this case being the obtaining of service without the payment of the lawful and reasonable rate therefor--the most basic and baldest of all proscribed preferences or privileges. Section 453 of the Public Utilities Code enacted under the state's police power reads: "No public utility shall, as to rates, charges, service, facilities, or in any other respect, make or grant any preference or advantage to any corporation or person or subject any corporation or person to any prejudice or disadvantage." And Section 532 of the Public Utilities Code reads in part as follows: "...nor shall any such public utility...extend to any corporation or person any...privilege except such as are regularly and uniformly extended to all corporations and persons." Violation of those sections by a public utility is punishable by criminal penalty under Section 2106 of the Public Utilities Code, and Section 2111 of the Public Utilities Code makes it a criminal violation for any person to knowingly aid or abet any public utility in the violation of Part I of the Public Utilities Code which includes Section 453.

In Zavelo v Reeves (1943) 227 US 625, 629, 57 L ed 676, 678, the United States Supreme Court held that a discharge in bankruptcy destroys the remedy to collect the debt but not the indebtedness, and in Kesler v Department of Public Safety (1962) 369 US 153, 170-171, 7 L ed 2d 641, 654, a case which held valid a state law under which a driver's license was kept suspended until the driver paid an unpaid judgment against him growing out of an automobile accident even though the driver held a discharge in bankruptcy covering the liability under the judgment, the United States Supreme Court declared approvingly (three judges dissenting) that "the Bankruptcy Act does not forbid a state to attach any consequences whatsoever to a debt which has been discharged." Disconnection of service is the consequence we have allowed to be attached to the failure to pay a telephone bill on time. These consequences apply and must be applied equally to all subscribers be they bankrupts or not if we are to fairly enforce state policy against allowing subscribers to receive or obtain preferences or privileges not accorded others from a telephone company.

In Tracy v Contractors' State License Board (1965) 47 Cal. Rptr. 561, 63 Cal 2d 598, our State Supreme Court considered the question of the conflict of a state law with the federal Bankruptcy Act. The state law was Business and Professions Code Section 7113.5 pertaining to the licensing of contractors which provides that "The avoidance or settlement by a licensee for less than their full value of the lawful obligations of such licensee incurred as a contractor whether by (a) adjudication in bankruptcy...constitutes a cause for disciplinary action." Under that section the Contractors' State License Board as disciplinary action had suspended plaintiff contractor's license because he had taken bankruptcy under the federal Bankruptcy Act and ordered the license suspended until he satisfied certain debts from which he sought to be discharged in the bankruptcy proceedings. Plaintiff appealed this ruling on the grounds that Section 7113.5 and the action taken thereunder were in conflict with the federal Bankruptcy Act and in violation of the Fourteenth Amendment to the United States Constitution. Our State Supreme Court did not agree, finding that Section 7113.5 "bears only tangentially on the purposes served by the Bankruptcy Act and does not conflict with it." (P. 653.) The court reasoned that the law was designed not to aid the collection of debts but to enforce a state policy properly within the purview of the state's police power. Applying the above rule to this case, we find that the legislature has decreed under its police power that utilities may not grant preferences or privileges not accorded to other subscribers and that the disconnect tariff rule and procedure are designed to enforce such policy and therefore bear only tangentially on the purposes served by the federal Bankruptcy Act and does not conflict with it.

What we have said as a basis for our holding that defendant's disconnect tariff and procedure thereunder does not substantially conflict with the federal Bankruptcy Act applies equally as well in answer to complainant's contention that defendant's supersedure tariff is void as frustrating the fundamental theme of rehabilitation under Chapter XI of that act and as allowing a state-created priority to take precedence over those created by federal law.[1/] Complainant deems that it is entitled to a privilege not shown to be extended to all insolvents. In fact, the supersedure tariff negates the extension of the right to supersede without the required arrangement. Here again our state law is clear: utilities may not extend a preference or a privilege not regularly or uniformly extended to all corporations and persons. If, as we have said above, the summary termination procedure is designed to enforce state policy against the giving or obtaining a preference and bears only tangentially on the purposes served by the federal Bankruptcy Act, and therefore does not conflict with it, then the same considerations prevail where defendant refuses to continue a service, albeit under another subscriber's name, when previous charges for that service are still due and owing.

1/ Initially there is no question as to complainant's entitlement to telephone service as such. The Commission in World Scope Publishers, Inc. v Pacific Telephone and Telegraph Company, Decision No. 64839, (1963) 60 CPUC 495, 499, held that a debtor in possession is a different party from the debtor in the context of the defendant's supersedure tariff. The first condition set out in defendant's supersedure rule (see tariff Schedule Cal. P.U.C. 36-T, Revised Sheet 72, supra) is that an applicant must be otherwise qualified for immediate service, so that complainant is entitled to either supersede to the pre-Chapter XI debtor's service, subject to the conditions set out in the supersedure item, or to obtain new service under such conditions provided for in the tariffs governing new applications for service.

Due Process

While defendant's tariff contains no provisions for a hearing prior to summary termination of service for failure to pay an undisputed bill within 15 days, the tariff does provide for the giving of an additional five days' written notice by the defendant to the subscriber of defendant's intention to terminate the service, and the subscriber as a matter of right may initiate a complaint with us.[2/] An example of a subscriber using our complaint procedure to obtain a determination of the merits of its complaint against a utility before disconnection of service for nonpayment of a telephone bill is the instant case wherein upon filing the complaint we summarily issued an order temporarily requiring defendant to cease and desist from disconnecting complainant's service pending our further study of the objections raised by complainant. We are here considering the merits and are affording complainant the due process of law which it contends is not available to it.[3/] And we find no fatal flaw in the

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2/ See Public Utilities Code Section 1702 et seq., pertinent portions of which read as follows:

"1702. Complaint may be made...by any corporation or person ...by written petition or complaint, setting forth any act or thing done or omitted to be done by any public utility, including any rule or charge heretofore established or fixed by...any public utility, in violation or claimed...violation, of any provision of law or of any order or rule of the commission. . . ."

"1704. . . . The commission shall fix the time when and the place where a hearing will be had upon the complaint..."

"1705. . . . After the conclusion of the hearing, the commission shall make and file its order, containing its decision. . . ."

3/ The Commission's records disclose that for the 12-month period ending June 30, 1972 the Commission rendered 103 decisions on formal complaints filed with it against utility companies, 67 of such complaints being against communication utilities. (Public Utilities Commission Annual Report, 1971-72 Fiscal Year, p. 28.)

procedure because of the fact that the onus is placed on the subscriber to initiate the proceeding, rather than on the defendant to initiate it before summary action is taken. Defendant's proposed action is being taken in conformity with its duly filed tariffs. We deem it to be highly unreasonable to require a utility company to initiate a proceeding with us every time it proposes to take some action or inaction permitted or required by its tariffs to which someone might object or to require a utility company to list in its tariffs the various remedies open to a subscriber or would-be subscriber in the event it takes issue with some action or inaction by the utility. In Wood v Public Utilities Commission (1971) 93 Cal. Rptr. 455, 457, 4 Cal. 3d 288, 293, the California Supreme Court said, in considering the constitutionality on other grounds of the defendant's credit rules requiring an applicant to establish its credit with defendant as a condition to receiving service:

> "It bears emphasis that the fact that ratepayers have no constitutional or statutory right to a hearing before rules such as those before us are adopted in no way means that they are without a remedy to challenge the lawfulness of any such rule or its application by the utility involved. Section 1702 of the Public Utilities Code provides that such challenge may be made by complainant before the commission at any time, and Section 1756 provides that the commission's decision thereon is subject to review in this court."

In that case the court was not disturbed that the tariff did not provide for notice and hearing before the defendant could deny a person his otherwise constitutional and statutory right to utility service for failure to initially establish his credit with the utility; the above quote, by implication at least, sanctions the procedure here being assailed. The arguments in favor of summary procedure in the herein case are even stronger than in the Wood case, supra, which merely considered standards set up in the defendant's tariffs for judging an applicant's future willingness and/or ability to pay for service rendered. In this case the future is at hand; there is either an actual lack of willingness or ability to pay for past service. The same procedure sanctioned for complaints based on a refusal of service for credit reasons is available to a person aggrieved because of the proposed termination of his service for nonpayment of a telephone bill undisputed in amount. This procedure affords the latter persons adequate due process of law.

Other Points

Both complainant and defendant contend that the equities of the situation are in its own favor. We find that the tariff provisions under consideration here are being fairly and equitably enforced and that no reasons have been advanced to convince us that the contrary is true.

Defendant contends and complainant denies that the contract for telephone service is an executory contract and hence the bankruptcy court must, if the court wants complainant to retain the old numbers, accept the whole contract including payment for past service and that it may not accept part of the contract and reject the part it does not want. We have held here that defendant may properly terminate complainant's telephone service for nonpayment of the antecedent bill, so that it matters not whether the contract for services is considered an executory contract. Failure to pay any part of the subject antecedent indebtedness will make the service subject to termination.

The supersedure tariff provision requires only that an acceptable "arrangement" be made to pay all of the unpaid charges of the outgoing subscriber. Since little doubt exists in this case as to complainant's actual insolvency, the arrangement may call for reasonable time payments so as not to unduly burden complainant with having to make a lump sum payment of $6,431.29. Indeed, defendant should not terminate the service before exhausting its efforts to reach such an arrangement with complainant or an interested third party.

Findings

1. Complainant is a debtor in possession under Chapter XI of the federal Bankruptcy Act (11 U.S.C. 701 et seq.).

2. At the time of filing its petition under Chapter XI the debtor owed defendant, a public utility telephone company, $6,431.29 in outstanding billed charges for services rendered.

3. Such charges have not been paid and no arrangements have been made to pay them.

4. Complainant does not dispute the amount of the unpaid charges.

5. Defendant's tariff provides that defendant may terminate a subscriber's service if the subscriber does not pay its bill for service within 15 days after presentation of the bill and defendant informs the subscriber with a five-day written notice of such intention to so terminate service.

6. Defendant did duly inform complainant of its intention to terminate complainant's service for nonpayment of the bill.

7. Defendant's tariff provides that an incoming subscriber may supersede to an outgoing subscriber service at the same premises on condition that an arrangement satisfactory to the defendant be made to pay all of the outgoing subscriber's unpaid charges and to assume all of the outgoing subscriber's obligations to the defendant.

8. Defendant offered to allow complainant to supersede to the debtor's service upon satisfying the conditions of defendant's supersedure tariff.

9. Complainant as debtor in possession under Chapter XI of the federal Bankruptcy Act is a different person from the debtor within the context of defendant's supersedure tariff and is therefore eligible to supersede to the pre-Chapter XI debtor's telephone service upon an arrangement satisfactory to defendant being made to pay all of the debtor's unpaid telephone bills and to assume all of the debtor's obligations to defendant.

10. Public Utilities Code Sections 453, 532, 2111, and 2106 establish a state policy against a utility's giving and any person's obtaining a preference or a privilege as to rates, charges, services, or facilities or in any other respect, and requires that this policy be applied equally to all persons whether bankrupt or not.

11. The giving and obtaining of telephone service without the payment of the lawful rate therefor within the time allotted by defendant's tariffs is a preference and privilege prohibited by Sections453 and 532 of the Public Utilities Code.

12. The summary disconnect tariff and procedure set out in paragraph 5 above, as well as the condition of a prior arrangement for the payment and assumption of an outgoing subscriber's obligations in defendant's supersedure tariff set out in paragraph 7 above, are designed to enforce state policy against the obtaining or giving of an unlawful preference or privilege and therefore bear only tangentially on the purposes served by the federal Bankruptcy Act and are not in conflict with such act.

13. While defendant's tariff contains no provision for a hearing prior to summary termination of telephone service for failure of a subscriber to pay its bill, the tariff does provide for the giving of five days' written notice and a 15-day credit period by defendant to the subscriber of defendant's intention to terminate such service, and the subscriber as a matter of right may initiate a complaint with this Commission under Section 1701 et seq. of the Public Utilities Code. This procedure affords complainant and persons similarly situated due process of law.

14. Defendant is required under its tariffs to disconnect the complainant's present telephone service while the subject debt remains unpaid and defendant has exhausted its efforts to reach an arrangement for the payment of all of the subject unpaid telephone bill.

15. Complainant is entitled to new telephone service at numbers to be issued at the discretion of defendant.

Conclusions

1. Defendant's disconnect tariff Schedule Cal. P.U.C. 36-T, 4th Revised Sheet 49, Rule 11, paragraph A.2.a., and procedures in connection therewith do not violate complainant's right to due process of law as guaranteed by the Fourteenth Amendment to the Constitution of the United States and Article I, Section 13, of the California Constitution and are not void under the Supremacy Clause of the Constitution of the United States as being in conflict with the federal Bankruptcy Act.

2. Defendant's supersedure tariff Schedule Cal. P.U.C. 36-T, 3rd Revised Sheet 72, Rule 23, paragraph (B), and in particular the condition found therein requiring that an arrangement acceptable to defendant be made to pay all unpaid charges and to assume all obligations of the outgoing subscriber before the incoming subscriber may supersede to the service of the outgoing subscriber, is not void under the Supremacy Clause of the Constitution of the United States as being in conflict with the federal Bankruptcy Act.

3. While defendant has the right to change the phone numbers in a case of this kind, it is not obligated to do so and indeed should not do so short of exhausting its efforts to enter into an arrangement for the payment in reasonable installments of all of the unpaid telephone charges of the outgoing subscriber.

O R D E R

IT IS ORDERED that:

1. The relief requested is denied.

2. The cease and desist order issued in Decision No. 79621 dated January 18, 1972 is hereby vacated.

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

Dated at San Francisco, California, this 15th day of JANUARY, 1974.

Vernon L. Sturgeon
President

William Symons Jr.

Commissioners