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Decision No. 83824

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)

OPINION AND ORDER
UPON FURTHER CONSIDERATION

On January 15, 1974, we issued Decision No. 82341 in which we denied the relief sought by complainant 101 Plating Corporation (101), a Debtor in Possession under Chapter XI of the Federal Bankruptcy Act. 101 sought to permanently enjoin The Pacific Telephone and Telegraph Company (PT&T) from disconnecting telephone service at any of complainant's present telephone numbers for nonpayment of the telephone bills incurred prior to 101's Chapter XI filing. On April 2, 1974, subsequent to the filing of a petition for rehearing of Decision No. 82341 by 101, we issued an order which granted rehearing for the limited purpose of permitting this Commission to further consider the allegations made in 101's petition and by Decision No. 82659 issued April 2, 1974, we stayed the effectiveness of Decision No. 82341 pending our review.

Our review of the entire record in this proceeding, including 101's petition for rehearing, convinces us that 101 as a Debtor in Possession should not be required to pay all unpaid charges incurred prior to its Chapter XI filing in order to continue its existing telephone service.

At the outset it is important to stress that the subject debt amounting to $6,431.29 was wholly incurred prior to 101's Chapter XI filing and that all current telephone charges have been paid by 101 as Debtor in Possession of the estate.

101 has consistently alleged both at hearing and in its petition for rehearing that the supersedure provisions of PT&T's tariff are, in this situation, an unconstitutional interference with the Federal Bankruptcy Act in that they frustrate the rehabilitative goal of the Act, as well as give PT&T an illegal priority of payment above other unsecured creditors. According to PT&T's tariffs, only two alternatives are available to 101 at this point--supersedure with payment of the antecedent debt, or disconnection of its present service. It is agreed by all parties that 101 as a Debtor in Possession could obtain new service upon request at new numbers without referral, but this is available only after disconnection of its present service. 101 placed evidence in the record that service at its existing numbers is essential for continuance of its business and that loss of service, even with subsequent reconnection with new phone numbers, would result in a substantial diversion of business, both temporary and permanent. These facts are unopposed except for a brief statement by counsel for PT&T that such disconnection-reconnection procedure could be done very quickly and without excessive cost to 101.

In Decision No. 82341 we relied principally on two cases[1/] in saying that, since the purpose of the challenged tariff provisions is to insure nonpreferential treatment of subscribers rather than to enforce collection of debts, there is no conflict between the tariff and the Bankruptcy Act.

1/ Kesler v. Department of Public Safety, 369 U.S. 153 (1962); Tracy v. Contractors' State License Board, 63 Cal.2d 598 (1965).

In its petition for rehearing, 101 states that the Kesler case has been specifically overruled by the Supreme Court in the case of Perez v. Campbell, 402 U.S. 637 (1971). Furthermore, since the Tracy case also relied on Kesler, 101 also challenges the value of that case in this proceeding.[2/]

The Kesler case involved the application of Utah's financial responsibility law to a judgment debtor who had succeeded in having said debt discharged in bankruptcy. The Utah statute mandated that under certain circumstances a driver's license would not be issued to such a debtor until the debt was paid, even though the debtor had received a discharge in bankruptcy. The Court in Kesler upheld the statute with the rationale that it was designed to insure that only careful and responsible drivers were allowed on the road rather than to assist in the collection of debts. Therefore, the Court reasoned, since the purpose of the challenged statute was not designed to conflict with the Bankruptcy Act, no unconstitutional conflict with federal law existed.

Perez also involved a financial responsibility statute, this time in Arizona. Here, however, the Court focused not on the purpose of the challenged statute, but on whether the statute in effect frustrated the purpose of the Bankruptcy Act. The Court stated:

> "Thus we conclude that Kesler and Reitz can have no authoritative effect to the extent they are inconsistent with the controlling principle that any state legislation which frustrates the full effectiveness of the federal law is rendered invalid by the Supremacy Clause." 402 U.S. 637, 652 (1971).

2/ The Tracy case has now also been overruled by the California Supreme Court in the case of Grimes v. Hoschler, 12 Cal.3d 305 (1974).

Moreover, the Court in Perez stated:

> "Turning to the federal statute, the construction of the Bankruptcy Act is similarly clear. '[o]ne of the primary purposes of the bankruptcy act' is to give debtors a 'new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of preexisting debt.'" Local Loan Co. v. Hunt, 292 U.S. 234, 244, 78 L.Ed. 1230, 1235, 54 S CT 695, 93 ALR 195 (1934). (Ibid. at 648)

Our review of the entire record in this proceeding leads us to the conclusion that, in requiring 101 to pay its prefiling debt to PT&T (which agrees that it is a general unsecured creditor) in order to continue 101's present telephone service, a state-created priority of payment is being made for "101's debt in contravention of Section 64 of the Bankruptcy Act. Furthermore, in view of 101's uncontroverted testimony, we believe that disconnection in the event of nonpayment, even though of limited duration pending reconnection with new telephone numbers, would frustrate the overall rehabilitative policy of the Federal Bankruptcy Act as enunciated in Perez.

We note that some difference does exist between the case at hand and the cases in both Perez and Kesler. 101 is not being absolutely deprived of its telephone service as the plaintiffs in the cited cases were being deprived, absolutely, of their driving privilege. 101 can take service at new numbers, as has been suggested. However, 101 has placed undisputed testimony in the record that damage to both its financial condition and its customer good will would occur, and such testimony is unchallenged. In fact, 101 asserts that the continued existence of its financially troubled enterprise is dependent upon the continuance of its present telephone service. In view of the scope of the holdings in Perez and in the case of Grimes v. Hoschler, 12 C.3d 305 (1974) which cases place paramount importance on the purposes of the Bankruptcy Act and their full

effectiveness and their complete fulfillment rather than on the purposes of the challenged statute, we do not view this distinction in the degree of deprivation as persuasive in this case.

Finally, we would add that, although we have found in this case strict application of the tariff would frustrate the rehabilitative goal of the Act, we are also convinced that the action we take here is proper because rehabilitation offers the best possibility that 101 will ultimately be able to pay the debt owed to PT&T. If the debt is paid the utility's other ratepayers will, of course, also benefit.

We view any departure from a tariff provision for a particular customer as a serious matter which depends upon the unique facts of each particular case. Absent special circumstances, the action by PT&T which we herein permit would be viewed as a preference proscribed by Sections 453 and 532 of the Public Utilities Code. However, we believe that the sections were designed to prevent the utility of its own accord from discriminating amongst its various customers. In this proceeding, PT&T is not arbitrarily and illegally being permitted to prefer one customer over another, since 101 has availed itself of the rather drastic remedy contained in the Bankruptcy Act, and will be under the supervision of the Bankruptcy Court.

In view of our holding herein that 101 is entitled to maintain its current telephone service without payment of the antecedent debt, it is unnecessary to reach 101's arguments on the due process afforded 101 by PT&T's disconnect procedures.

FINDINGS

1. The agreed stipulations of facts of the parties is herein adopted as findings of this Commission.

2. PT&T is a general, unsecured creditor of 101.

3. 101's present telephone service has a substantial good will value and 101 would suffer monetary loss in the event of its disconnection, even if followed by reconnection of service with new telephone numbers.

CONCLUSIONS OF LAW

1. The cases of Perez v. Campbell, 402 U.S. 637 (1971) and Grimes v. Hoschler, 12 C.3d 305 (1974) establish the principle that any state legislation, no matter what its stated purpose, which frustrates the full effectiveness of the Federal Bankruptcy Act, is invalidated by the Supremacy Clause of the United States Constitution.

2. Based on the facts of this case, PT&T's supersedure tariff Schedule, Cal. P.U.C. 36-T, 3rd Revised Sheet 72, Rule 23, paragraph (B), which provision requires payment by 101, as Debtor in Possession, of all charges incurred prior to its Chapter XI filing in order to maintain its current telephone service is a state-created priority which contravenes the provisions of Section 64 of the Federal Bankruptcy Act.

IT IS THEREFORE ORDERED that PT&T shall cease and desist from disconnecting 101's present service for failure to pay charges incurred by the debtor prior to its Chapter XI filing.

IT IS FURTHER ORDERED that, should 101 be denied its requested relief by the Bankruptcy Court, then PT&T may pursue all remedies available to it under its currently effective tariffs to recover the outstanding debt.

IT IS FURTHER ORDERED that Decision No. 82341 is hereby rescinded to the extent that it conflicts with this order.

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The effective date of this order is the date hereof.
Dated at San Francisco, California, on this 17th
day of DECEMBER, 1974.

Leonard L. Sturgeon
President
William Symons Jr.

Commissioners

I abstain
Robert E. McLaird
Commissioner

I will file
a dissent.
Thomas Moran

NO DISSENTING OPINION FILED BY COMMISSIONER MORAN. HIS TERM OF OFFICE EXPIRED DECEMBER 31, 1974.