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ORIGINAL

Decision No. 85033

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

D. REGINALD TIBBETTS,

Complainant,

vs.

THE PACIFIC TELEPHONE & TELEGRAPH
COMPANY, a corporation,

Defendant.

Case No. 9851
(Filed December 31, 1974;
amended August 11, 1975)

D. Reginald Tibbetts, for himself, complainant.
Michael J. Ritter, Attorney at Law, for The
Pacific Telephone and Telegraph Company,
defendant.

O P I N I O N

Statement of Facts

Complainant owns a 6-acre parcel of real estate fronting the entire 2100 block of Camino Pablo in Moraga. The only habitable structures on this parcel of land are a single family residence with garage, occupied by complainant, and a guest cottage. The residence occupied by complainant bears the address 2151 Camino Pablo, Moraga.

At times relevant here, complainant's property was serviced by approximately 23 residential telephone services, and five PBX business telephone services, from defendant public utility, with all services coming off a terminal in complainant's garage at the 2151 Camino Pablo property. However, the residential services were listed to approximately 15 different individuals with different listed addresses, some nonexistent, all in the 2100 block of

Camino Pablo in Moraga.^{1/} Some of these same residential services, while listed to individuals, were billed to United Press International at 2151 Camino Pablo. Complainant asserted he is communications consultant to United Press International under a lifetime contract. All mail addressed to odd numbered addresses in the 2100 block of Camino Pablo is delivered to complainant at 2151 Camino Pablo despite the fact there are no habitations in that block on that side of the street other than the one at 2151 Camino Pablo.

Seven of the 23 residential services had Optional Residential Telephone Service (ORTS), a plan offered by defendant only with one party flat rate residence service. For a set extra charge monthly ORTS allows the residential subscriber to make an unlimited number of station-to-station calls within an area expanded beyond his normal residential service local calling area.

1/ Names and addresses shown in Pacific Telephone's records as receiving residential service off the terminal at 2151 Camino Pablo (other than Tibbetts):

Robert Swatland, 2151 Camino Pablo, Apt. D, Moraga.
Ronald Allen, 2151 Camino Pablo, Apt. B, Moraga.
Duncan Kerricker, 2151 Camino Pablo, Moraga.
Howard Elliott, 2151 Camino Pablo, Apt. A, Moraga.
Marvin Benjamin, 2177 Camino Pablo, Moraga.
Duncan Stanley, 2127 Camino Pablo, Moraga.
Morton B. Young, 2158 Camino Pablo, Moraga.
Duncan Stanley, 2151 Camino Pablo, Moraga.
Louis Sherritt, 2151 Camino Pablo, Moraga.
Albert Gleason, 2151 Camino Pablo, Apt. E, Moraga.
Martin Matthiesen, 2151 Camino Pablo, Moraga.
Ronald Allen, 2133 Camino Pablo, Moraga.
Don Ford Young, 2151 Camino Pablo, Moraga.
George Gorman, 2151 Camino Pablo, Apt. A, Moraga.
Stanley Duncan, 2151 Camino Pablo, Moraga.
Mr. Manning, 2123 Camino Pablo, Moraga.
Mr. Jaeger, 2153 Camino Pablo, Moraga.

Defendant's employee Benten, with seven and one-half years experience in defendant's service, was attached during these events to the area general manager's staff to perform special assignments, among other functions. Following receipt of information from several sources which suggested possible noncontractual usage of service and equipment by complainant to circumvent or otherwise avoid payment of authorized tariff charges, Benten was assigned to investigate.^{2/}

Among other activities in pursuit of his assignment Benten personally dialed a number of the above referenced residential services. On 10 of these calls he received a second dial tone - indicative to him of either trouble with the line or defendant's equipment, or of unauthorized tampering with defendant's equipment at the subscriber's location. Using defendant's special equipment, Benten learned that the service reached was frequently different from the service originally dialed.

2/ One example of the type of information which caused the investigation is derived from Exhibit No. 11, summarized below:

On November 10, 1973 complainant, under letter-head of CYCLOTRON SPECIALTIES COMPANY, of Moraga, California, addressed an order to Jim Woulfe Ford, Inc. in Albany, California, to propose routing Ford's telephone calls to a Bay Area WATS switching connection through complainant's Moraga computer center, thus securing unlimited calls to all of Alameda, Contra Costa, San Francisco, and San Mateo counties, and parts of Solano, Marin, Santa Clara, and San Joaquin counties, at a cost to Ford substantially below that incurred through defendant's service. On this business letter complainant listed Cyclotron's telephone as 376-5082, one of the residential non-ORTS services listed to complainant but billed to United Press International at 2151 Camino Pablo, Moraga.

Checking with United Press International, Benten advised that there were a number of residential services billed to them at complainant's 2151 Camino Pablo address. Benten was told that did not sound proper, but that United Press International would check and call back. Instead, complainant returned the call, informed Benten that the subscribers, formerly employees of United Press International, were now employees of Competition Press (of which complainant is vice-president and director of communications), and that defendant should send bills directly to the individuals. Defendant addressed change forms to these individuals; all were returned to defendant signed with the name "Tibbett" and included instructions to bill these individual residential services to Competition Press. Thereafter Benten tried unsuccessfully for over a two-month period to reach these subscribers through each listed service. In the few instances a phone was answered, the person answering was complainant, not the subscriber.

Defendant's accounting office furnished Benten with data showing that in a one-month period in August 1974 there were 1427 calls made on seven of these residential lines beyond the local dialing area service.^{3/} One of the services checked, that of Morton B. Young, which service included ORTS and touch-tone equipment, had 369 calls placed through it to the extended area^{4/} (although Benten had been unable to get any answer when he dialed the number).

3/ The local dialing area includes: Moraga, Orinda, Lafayette, Walnut Creek, Berkeley, Oakland, San Leandro, and part of Danville.

4/ The number of local area dialed calls was not known as the particular equipment used by defendant could not count calls made to other services within the local dialing area.

Defendant's test supervisor externally tested each of the 23 residential services associated with complainant's terminal and advised Benten that all 23 services tested had unauthorized equipment attached.

Defendant concluded from the foregoing that complainant was misusing its residential class telephone service to provide business service to complainant's communications customers, and, without notice or consultation with complainant, on or about October 1, 1974 Benten (with knowledge of and authorization by defendant's executives) caused to be placed into operation equipment specially designed to keep a second number from being successfully dialed after a dial tone was received upon an initial phone number dialing. Allegedly it was not defendant's intention to completely disrupt complainant's service, but such was the result, and for the period October 1, 1974 through October 4, 1974 complainant was effectively disconnected on all equipment terminating on his garage terminal^{5/}, leaving only one unimpaired service terminating in complainant's guest cottage. Complainant suffers from high blood pressure, taking Aldactazide daily, and is about 64 years old. He was concerned for his health and the safety of his property in that communication to medical, fire, and police was curtailed drastically by the phone service impairment. Complainant registered a service complaint with defendant's repair bureau.

^{5/} In substantiation of the impairment, together with other like evidence, complainant presented credible documentation of a maximum difference of 15.5 DB on October 2, 1974 vs. a maximum deviation of 4 DB on June 3, 1974 in the frequency response on telephone service 376-5082, a residential service (the maximum difference in levels between frequencies should be 4 DB according to Bell System Technical Reference No. 42208 in order for central office receivers to properly register the digits tone address signals).

By October 4, 1974 service was restored so that complainant could receive incoming calls and place outgoing calls on his residential services, although complainant asserts that the line frequency response on service 376-5082 was thereafter altered so as to render the equipment unable to pass signals to activate his computer. Defendant asserts it was refused access into complainant's premises to check phones although allowed to see the garage terminal. On October 4, 1974 Benten observed jumper wires from defendant's terminal to several smaller terminals above defendant's terminal. Again on October 9, 1974 Benten unsuccessfully attempted to gain access. Defendant submitted copies of letters addressed to complainant on October 10 and October 16, 1974 (which complainant denies receiving) requesting access to inspect defendant's equipment. Complainant was not satisfied with the restored service.

On or after October 22, 1974, in response to complainant's request that full service as it existed before October 1, 1974 be restored, defendant advised complainant it would thereafter furnish complainant no more than two residential services, but would furnish as many business services as complainant wished. Complainant made informal complaint to the staff of this Commission, and as the result of a meeting November 20, 1974 between complainant, defendant, and Commission staff personnel, defendant removed the restrictive devices on two or three residential services, but insisted that any additional lines must be classed as business service.

On December 31, 1974 complainant filed a formal complaint with this Commission, requesting (1) immediate restoration of service to 376-4011 with the same equipment and supplemental service as existed prior to October 1, 1974, and (2) an order to defendant to cease discrimination in regard to limiting residential service at any given location.

On February 24, 1975 a Judge of the Superior Court, county of Contra Costa, upon affidavit of Benten, found probable cause to believe a felony had been committed, and issued a search warrant to search complainant's premises for certain property and other evidence tending to prove identity of persons connected with such suspected felony. On May 20, 1975 a criminal case was filed against complainant in the Municipal Court of Contra Costa County, Walnut Creek-Danville District, charging two violations of California Penal Code, Section 502.7 (obtaining telephone or telegraph services by fraud).^{6/}

Defendant, noting that complainant after March 5, 1975 had assured defendant that complainant's residential service would be used only for domestic or social requirements, and that defendant on July 11, 1975 had offered complainant additional residential services under those assurances - an offer not taken up by complainant, on July 22, 1975 filed a motion to dismiss the complaint before the Commission.

On August 11, 1975 complainant filed an amended complaint with the Commission (1) to determine who was responsible for placing the devices which on or about October 1, 1974 prevented outgoing calls on service 376-5082, and (2) imposition of "monetary forfeiture" if warranted for failure to give prior notification, plus (3) an amount for each day the service was left in other than "normal state."

^{6/} Case No. 16398, People of California v D. Reginald Tibbetts.

A public hearing was held August 18, 1975 in San Francisco before Examiner Weiss. Both the original complaint filed December 31, 1974, and the amended complaint filed August 11, 1975 were heard despite defendant's objection to the limited notice on the amended complaint.^{7/}

Discussion

It must be noted that the events chronicled here are but a segment of what appears to be a long standing wrangle between complainant and defendant, and must be viewed in prospective of the backdrop of the pending criminal case involving both. Neither party was willing to air all aspects of their differences before the Commission. In view of the legal posturing underlying the presentations, at onset of the hearing the Examiner explored the possibility of a stipulation without prejudice to disposal of the original complaint of December 31, 1974 (which related to service 376-4011).^{8/} The complainant indicated that restoration of this third

^{7/} Defendant stated it received the amended complaint on August 13, 1975, and filed its answer by messenger August 18, 1975. The Examiner, noting that defendant had not requested a continuance on the amended complaint before start of the actual hearing, although it obviously had ample opportunity to have done so before, and that defendant as part of its answer to the amended complaint had again moved to dismiss, ruled that the hearing would proceed.

^{8/} At the August 18, 1975 hearing the parties stipulated as follows:

"Pacific Telephone stipulates that upon his request it will provide to Mr. D. Reginald Tibbetts one 1-party residence telephone service No. 376-4011 with touch tone and 20 ORTS service at its tariff rate for reconnection of such service and in so doing does not admit any tariff violation or any other illegal act. D. Reginald Tibbetts if he requests such service agrees to pay such tariff rate for reconnection and by so doing does not admit that Pacific's prior actions conformed to its published tariff or any provision of law."

residential one party flat rate service with the previously held touch tone and 20-hour option ORTS would satisfy his original complaint. Defendant was agreeable to restoration of such service as it existed before October 1, 1974, except that since June 1975, 20-hour ORTS service had been frozen to those having it in January 1975. Both parties agreed that if the Commission were to order this restoration in conformity with their stipulation, the original complaint on service 376-4011 would be rendered moot as being satisfied.

There remains the matter of the amended complaint relating to service 356-5082. Considering evidence which strongly tends to substantiate defendant's conclusion that complainant was deliberately misusing residential service in association with his communication consulting businesses - including listing a residential service number as the telephone number of a business venture; the extraordinarily large number of ORTS calls on a relative few residential services (including 369 calls alone listed to an asserted independent maintenance contractor, at a fictitious address, when that contractor ceased association with complainant sometime in 1974); and the suspicious second dial tone reached when certain of the residential services associated with complainant were called - defendant had good reason to take stringent measures to protect the integrity of its service. In this regard its use of specially designed equipment to forestall use of a second dial tone after connection on the initial dialing was understandable. But given defendant's acknowledged engineering expertise, it is difficult to accept defendant's assertion that it did not intend to completely disconnect complainant's service.

Continued misuse of service by complainant would obviously be financially detrimental to defendant, but the situation does not seem to have been so urgent as to warrant so drastic a remedy. The situation had existed for some time, and it is noteworthy that the criminal case arising at least in part out of these events was not filed until approximately eight months later. What happened appears to be an unfortunate example of overkill. In the absence of any emergency, or any evidence to conclude there was a dangerous condition which had suddenly risen on the customer's premises to warrant such drastic measures, defendant's failure to follow the five-day written notice provision of its tariff^{9/} before effectively disconnecting this residential telephone service leaving complainant with no, or at best limited, telephone access to medical, fire, or police

9/ The Commission takes official notice of the provisions of PT&T's tariff applicable to the facts herein presented. PT&T's Rule No. 11, Paragraph A.7 of Cal. P.U.C. Schedule No. 36-T, 6th Revised Sheet, provides as follows:

Rule 11(A)(7):

"The utility may discontinue service if a customer fails to comply with any of the rules herein, provided such failure is not remedied within a reasonable time, after due written notice has been given, except as provided by these rules, the utility will not temporarily or permanently discontinue telephone service to any customer for violation of any rule except upon written notice of at least five days, advising the customer in what particular such rule has been violated for which telephone service will be discontinued if the violation is not remedied. This notice may be waived in cases of an emergency or in the event of the discovery of a dangerous condition on the customer's premises or in the case of the customer's utilizing the telephone service in such a manner as to make it dangerous for occupants of the premises, thus rendering the immediate discontinuance of service to the premises imperative."

assistance had they been required, must be considered by this Commission to have been arbitrary and improper action. Defendant's tariff has the force and effect of a statute^{10/}, and is as applicable to defendant as it is to defendant's customers.

In reparations cases we follow the theory of looking at the whole transaction. Under all the circumstances of this case, including complainant's evident and apparently extensive use of residential service for business purposes, and defendant's failure to follow its own tariff rules, we conclude complainant at most is entitled to reparations to recover for the four-day period (October 1-4, 1974) during which the weight of evidence indicates all incoming and outgoing service on 356-5082 was interdicted. Defendant already has agreed to refund to complainant by means of a billing adjustment an amount equal to the pro rata charges for each of the 24-hour periods that the telephone service was interrupted. Complainant asks for more. The only demonstrated residential usage allegedly impaired on 356-5082 by continuance of an altered frequency response after October 4, 1974 (but restored between November 20, 1974 and December 1, 1974) was complainant's access to a computer service in Nevada used occasionally to obtain weather and temperature readings in Nevada. But there is no evidence that complainant filed any complaint on this impairment until the meeting in November at which time adjustment was made. We are mindful that the limitation of liability rules of telephone utilities do not apply to situations involving willful misconduct, fraudulent conduct, or violations of law (Decision No. 77406 dated June 30, 1970 in Case No. 8593^{11/} and

^{10/} See Fortier Transp. Co., Decision No. 53006 (1956) 55 CPUC 27, 29.

^{11/} In the Matter of an Investigation on the Commission's own motion into all rates, conditions, or tariff provisions limiting liability of telephone corporations.

the Civil Code of California, Section 1668^{12/}), but the forum for the recovery of such damages is not this Commission, but the civil courts (Decision No. 77406, supra).

Findings

1. Complainant's residence and guest cottage, the sole habitable structures in the 2100 block of Camino Pablo, Moraga, were served by approximately 23 residential and five PBX business telephone services furnished by defendant.

2. The residential services were listed to approximately 15 different individual subscribers with different listed addresses, some physically nonexistent, all in the 2100 block of Camino Pablo, Moraga. In fact, all services were billed through complainant and all mail delivered to complainant.

3. Seven of the 23 residential services had Optional Residential Telephone Service (ORTS) which effectively served to extend the residential service local dialing area throughout the Bay Area.

4. Defendant's exterior testing showed that all 23 residential services were attached to unauthorized equipment on complainant's premises.

5. Despite the fact that several listed subscribers never answered calls to the residential services listed to them, in a one-month period 1427 ORTS calls went through the seven residential services with ORTS. Of these, 369 calls were placed through one such subscriber service alone.

12/ California Civil Code, Section 1668:

"CERTAIN CONTRACTS UNLAWFUL. All contracts which have for their object, directly or indirectly, to exempt anyone from responsibility for his own fraud, or willful injury to the person or property of another, or violation of law, whether willful or negligent, are against the policy of the law."

6. When certain of the residential services with ORTS were dialed, upon connection a second dial tone activated, and when tested by defendant, the service thus reached was not that originally dialed.

7. Complainant's business letterhead used in solicitation of business listed a residential service telephone number for the business.

8. On or about October 1, 1974 defendant, concluding complainant was misusing residential service for business purposes, without notice as required by defendant's tariff, activated specially designed equipment which effectively interdicted all of complainant's business and residential telephone service.

9. Defendant did not comply with its tariff Rule 11(A)(7) when it discontinued complainant's service without five days' notice.

10. Defendant restored service, with minor deviations in the frequency response on residential service 356-5082, but thereafter limited complainant as to the number of residential service while offering unlimited business service.

11. Defendant repeatedly was unsuccessful in obtaining entry to complainant's premises, except as to a garage terminal.

12. Pursuant to a court order resulting from an affidavit filed by defendant, a search of complainant's premises resulted on May 20, 1975 in a criminal complaint against complainant being docketed in Municipal Court, Walnut Creek-Danville District, Contra Costa County. This case is pending.

13. By stipulation, the parties reached agreement at onset of hearing as to the issues arising out of the original complaint filed December 31, 1974, rendering the complaint moot except for issuance of an order on 376-4011.

14. Defendant agreed to return by a billing adjustment pro rata charges on service 356-5082 for the four-day period October 1, 1974 through October 4, 1974.

Conclusion

Despite the provocation in misuse of its equipment, defendant's action in effectively disconnecting complainant's telephone service without adhering to the provisions of its own tariff was arbitrary and improper and reparation should be made to complainant for the four days complainant was without service to number 356-5082.

O R D E R

IT IS ORDERED that:


1. Provided complainant within sixty days makes formal application and pays defendant's tariff charge for reconnection, defendant is to provide complainant without delay with one 1-party residence telephone service, number 376-4011, with touch tone and 20-hour option ORTS, at complainant's residence, 2151 Camino Pablo, Moraga.
2. Defendant will provide reparations in an amount equal to the pro rata charges for each of the four 24-hour periods October 1, 1974 through October 4, 1974, during which service to number 356-5082 was interdicted. Such reparations will be made by means of a billing adjustment.

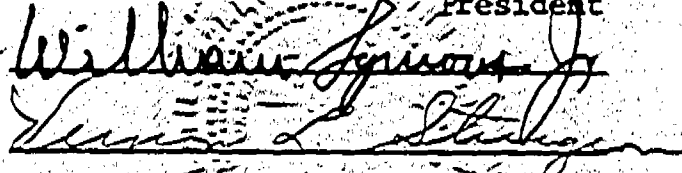
3. Defendant's motion to dismiss the amended complaint is denied, and the original complaint is moot.

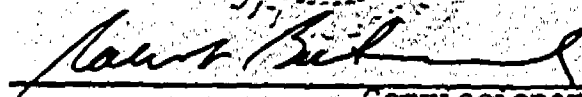
4. Complainant is entitled to no other relief.

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

Dated at San Francisco, California, this 21st day of OCTOBER, 1975.



President


Commissioners


Commissioners

Commissioner Leonard Ross, being necessarily absent, did not participate in the disposition of this proceeding.