

Decision 90 05 009 MAY 04 1990

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

George Sing Louie,

Complainant,

vs.

Pacific Telephone & Telegraph  
Co., Pacific Bell,

Defendant.

Case 89-04-043  
(Filed April 12, 1989)

ORIGINAL

ORDER OF DISMISSAL

Complainant is an inmate of the California Department of Corrections (Department). He complains that Pacific Bell (Pacific) has a "state-wide policy" that does not allow prisoners to charge telephone calls to third parties. He requests that the Commission order Pacific "to discontinue such practice and to permit inmates in state prisons to charge telephone calls to third parties, at the same time, defendants will require that all charges be accepted by the third number before defendants complete a call." Complainant cites Louie et al. v. PT&T et al., Decision (D.) 86327, dated August 31, 1976, in Case (C.) 10082, in support of his complaint and attaches a copy.

On May 24, 1989, Pacific filed its motion to dismiss and answer to the complaint. In its motion it asserts that: (1) the doctrine of res judicata bars complainant from relitigating a case that was decided against him in D.88-10-033; and (2) the complaint fails to state a cause of action against Pacific.

In its answer Pacific denies the material allegations of the complaint and avers that it has no policies relating to what a prisoner may or may not do. For affirmative defenses Pacific pleads: (1) res judicata; (2) failure to state a cause of action;

(3) that it is in full compliance with the applicable law and its filed tariffs; and (4) that the Department is responsible for rulemaking with respect to provision of telephone service for prisoners, decisions in which Pacific has no involvement. Pacific denies that complainant is entitled to any relief and requests that the complaint be dismissed.

By letter dated May 25, 1989, the administrative law judge offered to complainant the opportunity to reply by letter to Pacific's motion to dismiss. Complainant replied by letter dated June 14, 1989, attaching a copy of a class-action complaint in the United States District Court (USDC) for the Northern District of California in Louie et al. v. Miller et al. (The defendants are employees of various telephone corporations, such as Pacific, CP National, Tuolumne, Citizens, GTE California, Calaveras, Happy Valley, Hornitos, etc. The telephone corporations themselves are not named as defendants.) The complaint itself is 17 pages to which plaintiffs have appended 16 pages of exhibits. The complaint was signed May 29, 1989, but complainant does not assert that it has been filed. The copy of the complaint submitted by complainant is lacking either a filing stamp or an action number.

On July 11, 1989, Pacific filed its reply to complainant's letter brief.

Pacific's Motion to Dismiss

Pacific argues that the complaint is barred by the doctrine of res judicata. It is a fundamental concept of law, according to Pacific, that a party cannot relitigate a matter that has already been decided. Pacific states that on November 16, 1986, Louie filed a complaint against Pacific, Pacific Telesis, AT&T, and various affiliates. (C.86-11-026.) That complaint alleged violations of several provisions of the U.S. Constitution arising from the policy of the Department requiring inmate's telephone calls to be made either collect or billed to a third number. (A person at the third number must accept the charges

before the call will be completed.) In D.88-10-033 the Commission dismissed the complaint, holding that "the Commission has no authority to prescribe the kind of telephone service that should be offered or provided to inmates under the rules and regulations of the Department." (Id., page 7.) The Commission also found that the Director has rulemaking authority, which he has exercised, to establish policies pertaining to telephone service for inmates; that the Director has delegated to wardens and superintendents in the prison system the duty to establish procedures for inmate use of the telephone; and that those procedures are to apply to public telephones for personal calls by inmates and are to incorporate the policies in 15 California Code of Regulation (CCR) § 3282(b) and (d).<sup>1</sup>

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1 "Each warden and superintendent will establish procedures for inmate use of telephones within the institution. Such procedures will apply to...public telephones for personal calls by inmates. Each institution must provide at least one public telephone for the use of general population inmates to make personal calls. Additional public telephones may be provided for inmate personal calls as desired or deemed necessary by the warden or superintendent. The following general regulations will be incorporated in the institution telephone procedures:"

\* \* \*

"(b) An inmate may not use or be allowed access to a telephone with the capability of direct connections with a public telephone system, except as authorized in the institution's telephone procedures."

\* \* \*

"(d) No limitation will be placed on the numbers, identity or relationship to the inmate of persons to whom an inmate may make a telephone call, providing the inmate or person called, or a third party, agrees to accept all charges for the call." (15 Admin. Code § 3282.)

The Commission further concluded that the Department was the proper defendant in a case involving violations of constitutional rights in providing telephone service to inmates. The Commission made clear in D.88-10-033 that Pacific does not provide telephone service directly to inmates. Rather, the subscriber is the Department; and it subscribes to the form of telephone service it chooses from among the various types of service offered through Pacific's tariffs. If the form of telephone service chosen for prison inmates by the Department or its agents violates the constitutional rights of the inmates, the cause of action for such violations lies against the Department or the Director in the state or federal courts.

Pacific contends that complainant is seeking to have the same matter brought before the Commission again. This is unfair and inappropriate, according to Pacific, because:

"Where the subsequent suit is between the same parties on the same cause of action, the prior judgment operates as a complete bar to the second action." (Judgments 40 Cal. Jur. 3d, § 229; Zimmerman v. Stotter (1984) 160 Cal. App. 3d 1067, 1073.)

Pacific cites the same authorities for the proposition that, even if the current action were on a slightly different claim or cause of action, the judgment in the previous action would estop complainant from raising the same issues litigated in the previous case.

Pacific states that the Commission has recognized the doctrine of res judicata so that parties can rely on decisions and not be forced to relitigate the same issues again and again. (Parts Locator, Inc. v. PT&T, D.82-06-016 in C.11050.) It concludes that if the Commission allows this complaint to go forward, Pacific and the Commission will simply be litigating the same issues as were decided in D.88-10-033. It asks that the complaint be dismissed.

Pacific also asserts that the complaint fails to state a cause of action against Pacific. The complaint does not state that any act or omission of Pacific's has violated any tariff, provision of law, or order or rule of the Commission. (Public Utilities (PU) Code § 1702; Rule 9; Blincoe et al. v. PT&T (1963) 60 CPUC 432.) Pacific asks that the complaint be dismissed for failure to state a cause of action.

Complainant's Response to Pacific's Motion to Dismiss

In responding to Pacific's motion to dismiss complainant submitted only his letter of June 14, 1989, with the attached USCD complaint. The letter contains only one substantive paragraph, which combines both factual material and citations of legal authorities. Complainant asserts:

"The...[Department]...permits its prisoners at least two 15-minute telephone calls per week or more. The calls must be either collect or billed to a third number; and the Department... requires that charges be accepted by a person at the third number before they will complete a call."

The foregoing assertions pertain solely to the conduct of the Department. Complainant continues:

"However, ...Pacific...refuses to permit myself and other prisoners to charge approved telephone calls to third parties...."

The foregoing assertion is the only new factual matter added by complainant's letter. The remainder of the paragraph consists of citations. Pacific points out that complainant "gives no specific information as to what Pacific has done or failed to do, and [he] gives no explanation for why he has not alleged this action in his complaint." (Pacific's Reply, page 2.)

PU Code § 1702 provides in relevant part:

"Complaint may be made...by any...person..., setting forth any act or thing done or omitted to be done by any public utility..., in violation or claimed to be in violation, of any

provision of law or of any order or rule of the commission."

Rule 10 of the Rules of Practice and Procedure states about the contents of complaints:

"...The specific act complained of shall be set forth in ordinary and concise language. The complaint shall be so drawn as to completely advise the defendant and the Commission of the facts constituting the grounds of the complaint, the injury complained of, and the exact relief which is desired."

Even if the single, unverified sentence containing factual matter in his letter of June 14, 1989, could be imported into his complaint,<sup>2</sup> that would not satisfy § 1702 or Rule 10. The specific acts that Pacific has allegedly done or omitted are not set forth, nor has complainant cited the state statutes, tariff provisions, general orders, orders, or other provisions of law allegedly violated.

In addition, the sentence in question is ambiguous. It could suggest: That Pacific does not allow any calls by prisoners to be charged to any third parties; or that Pacific allows such charges when they are accepted by third parties, but disallows them if the third party does not answer or does not accept the charges. Also, the sentence does not make clear what "approved telephone calls" are or who is doing the approving.

Finally, the complainant does not distinguish between the acts of the Department and of Pacific. His response to Pacific's motion to dismiss acknowledges in detail certain policies and practices of the Department, but his assertions applicable to Pacific are brief, vague, ambiguous, and conclusory. They give no

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<sup>2</sup> Complaints or amendments thereto shall be verified by at least one complainant. (Rule 5.)

notice to Pacific or the Commission of "the facts constituting the grounds of the complaint."

Without an adequate factual foundation the consideration of complainant's citations of authorities is largely an empty exercise. However, we will mention them in passing. Complainant cites Title 15 of the CCR Section 3282(d). (Supra, footnote 1.) This section and others in Title 15 are regulations adopted by, and governing the operations of, the Department. They have no application to telephone corporations, which merely stand ready to provide whatever tariffed services the Department may order for its own use or the use of its inmates.

Complainant also cites 47 United States Code (USC) § 202(a). Without specific factual allegations we cannot conclude that complainant has stated a cause of action under § 202(a), even if we had jurisdiction to try cases involving claims of discrimination under § 202(a). The proper forum is the USDC or the Federal Communications Commission.

Finally, complainant attaches to his June 14, 1989, letter a class action complaint in USDC seeking injunctive relief and damages. He then cites that complaint, along with the other authorities mentioned above, but he does not state for what purpose it is cited or how it should bear on Pacific's motion to dismiss. If he intends that the allegations of the USDC complaint should augment the allegations of the complaint in the instant case, he has neither said so nor has he complied with our Rules of Practice and Procedure. Also, the USDC complaint invokes federal constitutional provisions, federal statutes, federal case law, and federal procedures in support of its claims against telephone corporation and Department employees. These are matters not within the ambit of our authority. In any event, it would duplicate the effort of the USDC for the Commission to try the identical case that complainant implies is pending before that court.

Nothing in complainant's letter brief (or in the attachment) convinces us that Pacific's motion to dismiss should be denied. Rather, as Pacific notes, the "letter brief does not address the two issues raised in the Motion to Dismiss i.e., that Louie has already litigated this matter and lost [res judicata], and that the complaint alleges no violation of a rule, tariff, or order [failure to state a cause of action]."

Discussion

Complainant's sole allegation is contained in a single sentence, as follows:

"Defendants, has a State wide policy of disallowing prisoners to charge telephone calls to third parties...."

This language is lifted almost verbatim from complainant's 1976 complaint in C.10082. There, complainant alleged:

"[PT&T]...has a State wide policy...of disallowing prisoners to charge phone calls to third parties."

In his 1989 pleading complainant continues:

"...and request that the Commission order the defendants to discontinue such practice and to permit prisoners in State prisons to charge telephone calls to third parties."

Again, this language is lifted from the 1976 proceeding. In D.86327, dated August 31, 1976, in C.10082 the Commission stated at mimeo. page 1:

"The complainants request that the Commission order the defendants to discontinue the practice of not permitting State prison inmates to charge telephone calls to third parties."

Even the prayer of the instant complaint is lifted from the 1976 decision. Complainant repeats the second half of the sentence quoted above and continues:



"...at the same time, defendants will require that all charges be accepted by the third number before defendants complete a call."

This language is virtually identical to the language quoted by the Commission in D.86327 from Pacific's letter dated May 11, 1976, which states in part:

"At the same time, we will require that all charges be accepted by the third number before we complete a call." (Id., mimeo. p. 2.)

It is clear that complainant, instead of alleging facts, is recycling verbiage from old decisions.<sup>3</sup> This fact alone supports an order granting Pacific's motion to dismiss for failure to state a cause of action.

But apart from complainant's failure to allege new factual material, we considered complainant's claims in C.10082 and found that:

"...Pacific has discontinued its former practice, will permit inmates in State prisons to charge telephone calls to third parties consistent with its tariff..., and has advised the director of the Department...by its letter dated May 11, 1976 that it will do so. The need for the relief sought had been obviated and the complaint should be dismissed." (D.86327, dated August 31, 1976, in C.10082, mimeo. p. 5, Finding of Fact 2.)

Accordingly, the Commission dismissed the complaint in C.10082. (Id., mimeo. p. 7.)

We also considered similar claims in Louie v. Pacific Bell et al., C.86-11-026. In D.88-10-033, an exhaustive, 19-page decision we discussed in detail complainant's claims regarding denial of telephone service, considered his citations and arguments, and dismissed the complaint for failure to state a cause

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<sup>3</sup> The federal complaint is a patchwork of allegations, many of which are lifted almost verbatim from D.88-10-033.

of action. Appendix A contains the findings of fact and conclusions of law from D.88-10-033. Complainant did not file an application for rehearing of D.88-10-033, so it is now a final decision.<sup>4</sup>

We conclude that Pacific's motion to dismiss on the ground of res judicata is well taken.

Findings of Fact

1. Complainant has not alleged any new factual matter. Rather, he has recycled verbiage from the complaint and decision in C.10082.

2. Complainant's allegations are brief, vague, ambiguous, and conclusory. They give insufficient notice to Pacific and to the Commission of the specific facts constituting the grounds of the complaint.

3. The Commission has previously adjudicated complainant's identical claims in C.10082. (See D.86327, dated August 31, 1976.) The Commission has previously adjudicated complainant's similar claims in C.86-11-026. (See D.88-10-033, dated October 14, 1988.)

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4 "In all collateral actions or proceedings, the orders and decisions of the commission which have become final shall be conclusive." (PU Code § 1709.)

Conclusions of Law

1. The complaint should be dismissed on the ground that it fails to state a cause of action against Pacific.

2. The complaint should be dismissed on the ground of res judicata.

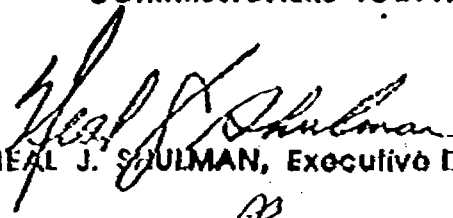
IT IS ORDERED that the complaint in Case 89-04-043 is dismissed with prejudice.

This order becomes effective 30 days from today.

Dated MAY 04 1990, at San Francisco, California.

G. MITCHELL WILK  
President  
FREDERICK R. DUDA  
STANLEY W. HULETT  
JOHN B. OHANIAN  
PATRICIA M. ECKERT  
Commissioners

I CERTIFY THAT THIS DECISION  
WAS APPROVED BY THE ABOVE  
COMMISSIONERS TODAY

  
NEAL J. SHULMAN, Executive Director

person called, or a third party, agrees to accept all charges for the call. (15 Admin. Code § 3282(b) and (d).)<sup>4</sup>

The Director has delegated to each warden or superintendent the duty to establish procedures for inmate use of telephones within each institution. Those procedures are to apply to public telephones for personal calls by inmates and are to incorporate the two policies mentioned above. (15 Admin. Code § 3282.) The warden or superintendent then subscribes to the form of telephone service for the personal use of the inmates that is consistent with the procedures he has established and the policies of the Director. It is abundantly clear that, if the form of telephone service chosen for an institution by the Department or its agents violates the constitutional rights of the inmates, the cause of action for violation of those rights lies against the Department. It has legal responsibility for the inmates; it has rulemaking power; it has exercised that power; and it has exercised its discretion in choosing the form of inmate telephone service.

We conclude, therefore, that the proper defendant for causes of action in the complaint alleging violations of complainant's constitutional rights is the Department. Since the Department is not a public utility, the Commission may not entertain a complaint against it, even if complainant had named the Department as a defendant. Thus, not only has complainant named the wrong defendants in his complaint, he has also chosen the wrong forum. Accordingly, the complaint should be dismissed.

#### Findings of Fact

1. Group is not a public utility for the purposes represented in this complaint.

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4 Pacific's tariff is consistent with both of these policies. Direct connections are avoided by the requirement that calls be "identified at the Utility operator's position"; and proper billing is assured by the requirement that the calls be collect or coin sent-paid.

2. International is not a public utility for the purposes represented in this complaint.

3. Complainant has failed to allege facts sufficient to constitute a cause of action against AT&T-C.

4. The Department is the agency of State government with authority over the State prison system.

5. The Director of the Department supervises, manages, and controls the State prisons and has the responsibility for the care, custody, treatment, training, discipline, and employment of the inmates. (Penal Code, § 5054.)

6. The Director may prescribe and amend rules and regulations for the administration of the prisons. (Penal Code, § 5058(a).)

7. The Director has exercised his rulemaking authority to establish policies pertaining to telephone service for inmates. (15 Admin. Code §§ 3282(b) & (d).)

8. The Director has delegated to wardens and superintendents in the prison system the duty to establish procedures for inmate use of telephone. Those procedures are to apply to public telephones for personal calls by inmates and are to incorporate the policies cited in Finding 7. (15 Admin. Code § 3282.)

9. Wardens and superintendents have subscribed to public telephone service for personal calls by inmates.

#### Conclusions of Law

1. Complaints before the Commission may be brought only against public utilities. (PU Code § 1702.)

2. The complaint should be dismissed as to Group for lack of jurisdiction.

3. The complaint should be dismissed as to International for lack of jurisdiction.

4. If the form of telephone service chosen for a prison by the Department or its agents violates the constitutional rights of the inmates, the cause of action for violation of those rights lies

against the Department or the Director in the state or federal courts.

5. The complaint should be dismissed as to AT&T-C for failure to state a cause of action.

6. The complaint should be dismissed as to Pacific for failure to state a cause of action.

O R D E R

IT IS ORDERED that the complaint is dismissed.

This order becomes effective 30 days from today.

Dated October 14, 1988, at San Francisco, California.

STANLEY W. HULETT  
President

DONALD VIAL  
FREDERICK R. DUDA  
G. MITCHELL WILK  
JOHN B. OHANIAN  
Commissioners