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Decision 92-03-031 March 11, 1992

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Michael Joseph DiMaggio,  
Complainant,

vs.

Pacific Bell,  
Defendant.

ORIGINAL

Case 86-09-027  
(Filed September 17, 1986)

O P I N I O N

This decision resolves the complaint of Michael Joseph DiMaggio against Pacific Bell (Pacific). We find that Pacific violated complainant's right to privacy when it reviewed complainant's toll calling records.

DiMaggio's Complaint

DiMaggio alleges that Pacific violated his right to privacy when Pacific reviewed his toll calling records during an investigation. DiMaggio asks the Commission to order Pacific to stop the practice of using toll calling records to investigate employee activity, to file a plan to insure the practice does not happen again, and to impose a penalty on Pacific for its disregard of law and Commission policy.

The facts in this proceeding are essentially undisputed. Pacific undertook an investigation of several of its employees who had allegedly made unauthorized calls from a telephone in a Pacific office. DiMaggio is not an employee of Pacific. His AT&T toll calling records were reviewed by Pacific investigators. DiMaggio's toll calling records were reviewed because his telephone number appeared during the investigation of an employee.

The main issue which is unresolved in this proceeding is whether Pacific violated DiMaggio's right to privacy when it examined his AT&T bills during the course of an investigation.

Following one day of hearing, Pacific filed a brief. In addition, thirty individuals (Intervenors) jointly filed a brief in this proceeding. Intervenors filed briefs claiming to have an interest in the outcome of the complaint because they were seeking the vindication of rights "substantially identical" to those raised in this proceeding.

Did Pacific Violate DiMaggio's Privacy Rights?

In this case, we are presented with the competing interests of a utility's right to protect itself from unlawful employee activity and the privacy rights of individuals. DiMaggio alleges in this case that Pacific violated his privacy rights when it reviewed his AT&T calling records. Pacific believes it acted lawfully because it has a right to protect itself from fraud.

Pacific relies primarily on People v. Mahoney (1975) 47 Cal. App.3d 699, in arguing that it has a right to review customer records in order to protect itself from toll fraud. In Mahoney, the court found that a telephone company did not violate the federal Omnibus Crime Control and Safe Streets Act when it intercepted toll calls of a customer and later disclosed the customer's calling records to the district attorney. That case, however, is distinguishable from this complaint. Mahoney is a state appellate court decision which analyzes federal statutes. Mahoney does not address privacy rights under the California Constitution which may differ from those under the federal Omnibus Crime Control and Safe Streets Act. Further, Mahoney conflicts with a later decision of the California Supreme Court.

In People v. Blair (1979) 25 C.3d 640, the Supreme Court found that:

"...a telephone subscriber has a reasonable expectation that the calls he makes will be utilized only for the accounting functions of the telephone company and that he cannot anticipate that his personal life, as disclosed by the calls he makes and receives, will be disclosed to outsiders without legal process." (Emphasis added.)

In this instance, Pacific used calling records for purposes other than accounting matters without legal process (a term generally referring to court orders). As Intervenor's point out, the court did not carve out special exceptions for utilities who wish to investigate fraud or to use customer records for any purpose other than those relating to accounting.

Pacific believes that the court in Blair did not intend to limit a company's use of customer records to "accounting functions." Pacific cites Burrows v. Superior Court (1974) 13 C.3d 238, to argue that the court permits use of customer records whenever a customer has a reasonable expectation that Pacific might use his or her records for internal purposes. That decision, however, does not support Pacific's position. In Burrows, the Court found that a bank had improperly provided customer banking records to law enforcement agents for an investigation unrelated to banking operations. The court stated:

"a bank customer's reasonable expectation is that, absent compulsion by legal process, the matters he reveals to the bank will be utilized by the bank only for internal banking purposes." (Emphasis added.)

In this case, as in Burrows, Pacific did not use DiMaggio's records for purposes related to its business operations as the customer would expect. That is, Pacific did not use the records for utility purposes. Rather, it used the information in its role as an

employer investigating employee theft. A utility customer is unlikely to expect calling records to be used for such a purpose.

Pacific also distinguishes the circumstances in this case from those in Blair by arguing that it did not "disclose" toll records to any third party. It states that even though AT&T is a separate business, Pacific had legitimate access to AT&T's calling records. It believes if it had informed AT&T of its investigation, AT&T would have authorized use of the records.

Pacific may be technically correct that it did not "disclose" DiMaggio's records to a third party. To be sure, Pacific is the third party which wrongfully gained access to the records of AT&T and its customer. It defies logic to assume that the Court would prohibit a corporation from disclosing information to a third party but would permit a third party to use the same information without the corporation's knowledge or consent. The law does not permit Pacific to review, absent legal process, the customer records of any carrier for purposes of investigating its employees' misconduct. For purposes of laws relating to privacy, Pacific did in fact "disclose" documents in this case by reviewing the calling records of AT&T. Whether AT&T would have permitted Pacific to use the records (a matter which Pacific asserts but does not support with evidence) is irrelevant: AT&T has no authority to disclose customer records to Pacific, without legal process, to facilitate Pacific's investigation of employee theft.

This is not the first time this Commission has considered customers' privacy rights where calling records are concerned. In Decision (D.) 92860 (1981) 5 CPUC 2d 745, we cited Blair in finding that telephone utilities may not release calling records absent legal process:

Blair, Burrows, and McKunes are all clear that, under our state constitution, court-approved legal process is required to obtain toll records and credit information. Were we to agree with the contention of some of the federal agencies that federal preemption exists

to require our state telephone companies to release information without court-approved legal process, we would in effect be declaring part of our state constitution unenforceable.... [T]he question is whether this Commission...can permit California utilities to adopt or follow practices which do not protect privacy as stringently as our state constitution requires. The answer must be 'No.'" (5 CPUC 2d at 764.)

With this in mind, we adopted rules which permit release of calling records only pursuant to legal process.<sup>1</sup>

Assuming for the sake of argument that Pacific's actions in this case were lawful, the implications of Pacific's position are disturbing. Pacific argues that it may review the records of another corporation relating to that corporation's customers in the course of investigating Pacific employees. Pacific defends the use of the records on the grounds that it has a right to protect its pecuniary interest and because it provides a billing service to the corporation. A logical extension of this argument would permit, for example, Pacific to review the credit card records of a bank customer in a case where Pacific bills for the bank and the bank customer knows a Pacific employee who is being considered for a promotion. Pacific's analysis would not distinguish between the example and the case before us. We would not condone such an

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<sup>1</sup> Rule E(1) of Appendix B in D.92860 provides an exception to the "procedure" for release of calling records which applies to collection agencies working for the utility on the subscriber's account or another telephone company. Consistent with the discussion in D.92860 and Blair, the term "procedure" in this context does not refer to the rule requiring legal process prior to release of calling information set forth in Rule B of Appendix B. It refers instead to customer notification procedures set forth in Rule C and Rule D of Appendix B. In this case, Pacific has violated the rules adopted in D.92860.

unfounded invasion of privacy even if the rulings of the court permitted it.

We are concerned about the chain of events in this case and Pacific's defense of its actions. Pacific has a legitimate interest in protecting itself from unlawful activity by its customers and employees. In pursuing that interest, however, it may not tread upon the privacy rights of individuals whether or not, in its own assessment, those individuals are harmed in the process.

In sum, Pacific may not, without legal process, use records of AT&T's customers for any type of investigation, whether it is related to customer fraud, employee theft or any other circumstance, except investigations which are inherent to its billing and collection function. Pacific may not, without legal process, use its own customer records for any purpose not related to its role as a utility.<sup>2</sup>

DiMaggio's Requested Relief

DiMaggio asks the Commission to order Pacific to cease and desist from the practice of using the calling records of non-employees to investigate employee activity, to file a plan to insure the practice does not happen again, and to impose a penalty on Pacific.

We will direct Pacific to refrain from using its own customer records for non-utility purposes and to refrain from using the customer records of any other corporation for any purpose unrelated to its billing and collection functions without going through the requisite legal channels. We will also direct Pacific

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<sup>2</sup> Since Pacific's employee investigation and submittal of this case, the Legislature added Section 2891 to the Public Utilities Code, which provides, among other things, that no telephone company may provide customer calling information to any other person or corporation without the customer's prior consent.

to develop, implement and submit a report stating corporate policy which is consistent with this decision and Public Utilities Code Section 2891, and to inform all management and supervisory staff of that policy.

DiMaggio's proposal for the Commission to fine Pacific for violating his privacy rights provides us with an opportunity to consider a matter of potentially broad interest. Unfortunately, from the prospective of the public and its interest in the effective enforcement of law and regulations affecting entities subjected to our jurisdiction, the answer is hardly satisfactory. We clearly have authority to fine Pacific for violations of Commission orders. Public Utilities Code Section 2113 provides that the Commission may fine a utility for contempt if we conclude that it has failed to abide by our orders. However, that authority is limited to \$1,000 per incident, a figure analogous to the contempt powers of a trial court.

The imposition of a \$1,000 fine upon a utility with annual revenues in the billions can hardly be regarded as a deterrent. Under existing legislation our only alternative is to commence an action in state court pursuant to Public Utilities Code Sections 2104 and 2107. In exchange for the expenditure of considerable public money and no little time we would extend our remedial powers to an amount for \$2,000 per offense. Again, the corrective pressure would be minimal. Further, we would only be adding to the backlog of cases already pending before our courts.

Faced with these unpalatable alternatives, we will grant DiMaggio's request to impose a financial penalty on Pacific in the amount of \$1,000 which sum shall be credited to California's General Fund. We do so knowing that the fine is, for Pacific, a symbolic gesture and not one which can be expected to influence Pacific's actions in the future.

Finally, we compliment DiMaggio for his initiative in bringing this complaint, which required substantial effort on his

part and which promises no pecuniary reward. DiMaggio and Intervenors may qualify for reimbursement of their costs under the Advocates Trust Fund and should contact our Public Advisor's Office for assistance in filing requests for compensation under the rules of that fund.

Findings of Fact

1. Pacific reviewed DiMaggio's toll calling records in the course of investigating Pacific employees suspected of making unauthorized calls from a telephone in a Pacific office.

2. In the course of the above investigation, Pacific used DiMaggio's toll calling records, without legal process, in its role as an employer and for purposes unrelated to its role as a utility provider.

3. Pacific had access to DiMaggio's AT&T calling records because it provides a billing and collection service for AT&T.

4. Investigating suspected employee theft is not an activity for which Pacific's customers would reasonably expect to have their calling records reviewed.

Conclusions of Law

1. Pacific's use of DiMaggio's toll calling records was unlawful pursuant to Blair and Burrows.

2. Pacific violated D.92860 by using DiMaggio's toll records without legal process.

3. Absent legal process, Pacific may not use AT&T's customer calling records for any purpose other than those inherent in its billing and collection function.

4. Absent legal process, Pacific may not use its own customer calling records for purposes not related to its utility functions.

5. Pacific should be ordered to submit a report setting forth its corporate policy regarding use of customer records consistent with this decision and Section 2891.

6. Pacific should be ordered to submit an affidavit that it has informed all of its management and supervisory staff of its corporate policy regarding use of customer records.

7. The Commission is empowered by Section 2113 to fine a utility for contempt in an amount up to \$1,000 per incident.

8. The Commission should find Pacific Bell in contempt of D.92860, and fine Pacific \$1,000 pursuant to Section 2113.

9. To the extent set forth herein, DiMaggio's complaint should be granted.

O R D E R

IT IS ORDERED that:

1. Pacific Bell (Pacific) shall refrain from using its customer records for any purpose not related to its utility functions, unless it has obtained legal authority to do so.

2. Pacific shall refrain from using the customer records of the individuals and corporations for which it bills for any purpose unrelated to its billing and collection functions unless it has obtained legal authority to do so.

3. Pacific shall submit to the Commission Advisory and Compliance Division (CACD), by March 30, 1992, a report setting forth its corporate policy, consistent with this decision and Section 2891.

4. Pacific shall submit to CACD, by March 30, 1992, an affidavit by a corporate officer certifying that it has informed all of its management and supervisory staff of its corporate policy regarding use of customer records.

5. This complaint is granted to the extent set forth herein.

6. This proceeding shall remain open pending receipt of the report required by Ordering Paragraph 3 and the affidavit required by Ordering Paragraph 4, and in the event that complainant or intervenors file requests for compensation.

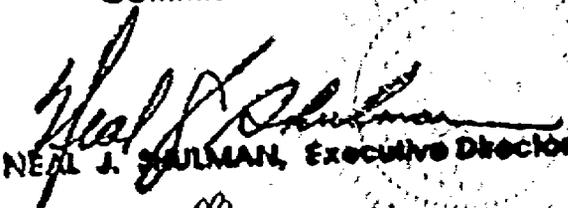
7. Pacific shall, within 60 days, submit \$1,000 to the state of California's General Fund.

This order becomes effective 30 days from today.

Dated March 11, 1992, at San Francisco, California.

DANIEL Wm. FESSLER  
President  
JOHN B. OHANIAN  
PATRICIA M. ECKERT  
NORMAN D. SHUMWAY  
Commissioners

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

  
NEAL J. SULMAN, Executive Director