

ORIGINAL

Decision 82 06 068 JUN 15 1982

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

LAWRENCE H. PARKER dba
WEST FRONTIER SUPPLY CO.,
individually and in the
public interest,

Complainant,

vs.

GENERAL TELEPHONE COMPANY
OF CALIFORNIA,

Defendant.

Case 11004
(Filed July 8, 1981)

Donald W. Ricketts, Attorney at Law,
for complainant.
Richard E. Potter, Attorney at Law,
for defendant.

INTERIM OPINION

Complainant filed this action, concerning his telephone bills, entitled "Verified Complaint for Interim Order Restraining Termination of Certain Service and Ordering Reinstatement of Other Service, and for Order Instituting Investigation."

Because of the then impending termination of service, an informal conference was held on July 13, 1981 with attorneys for the parties and the assigned administrative law judge (ALJ) attempting to work out an arrangement whereby complainant's service could be continued pending the formal hearing. An

agreement was reached whereby complainant's telephone service would be continued upon immediate payment by complainant to defendant of all undisputed past-due charges plus accumulated charges from June 25, 1981 through July 13, 1981, and complainant's depositing the disputed amount of the past-due charges (approximately \$21,000) with the Commission at the rate of \$3,000 per week. Complainant failed to pay the agreed upon undisputed amounts owing to defendant within the designated time and also failed to deposit any of the disputed amounts with the Commission as agreed upon. Defendant thereafter permanently disconnected complainant's telephone service as of July 23, 1981. In view of this event, the Commission will disregard complainant's request for an interim order restraining defendant from terminating service and will consider the complaint as one for reparation.

The relevant portion of the complaint alleges that because of errors in billing by defendant and misrepresentations made by defendant's representative, complainant incurred large bills associated with the telephone service furnished by defendant; whereas, had defendant billed him correctly, he could have seen that his subscribed-for service of four measured OUTWATS^{1/} lines in conjunction with the use of local lines for long distance toll calls from 4:00 a.m. to 8:00 a.m. was exceeding his projected estimates and budget, and he would

^{1/} Outgoing wide area telephone service which, in addition to a monthly base rate, charges on the basis of hours of usage after a 10-hour free allowance. WATS lines are generally used where frequent long-distance calls (other than intra-state) are made by the subscriber.

then have changed his measured OUTWATS lines to less expensive full-day unmeasured OUTWATS^{2/} service without the use of local lines. In addition to this allegation, the complaint further alleges that the tariff requirement that complainant must first pay the disputed amount before being entitled to continued telephone service is void as it is in violation of complainant's constitutional right to the exercise of free speech and [is] a taking of property in violation of his right to due process.

Complainant seeks a final order and decision from the Commission declaring the amount due to defendant for telephone services rendered by defendant to complainant to the date of decision. Complainant also seeks an order declaring that defendant's tariff rules, which require telephone subscribers with a bona fide dispute to pay the amount in dispute to defendant or to the Commission as a condition precedent to securing a resolution of the dispute involved and continuation of telephone service, are constitutionally infirm because they authorize a taking of property without due process and are in violation of complainant's right to free speech. ✓

In its answer, defendant admits to certain factual allegations in the complaint which are not in issue, but generally and specifically denies all allegations which are placed in issue by complainant. ✓

Following notice, a formal public hearing on this complaint was held in Los Angeles on January 20, 1982 before ALJ William A. Turkish, and the matter was submitted upon the receipt of concurrent briefs due on or before February 22, 1982. Briefs were received from both parties on that date.

^{2/} This type of service charges a higher monthly base rate than measured service, but permits up to 240 hours of usage per month without additional charges.

Solomon Kuri, general manager of complainant's business, testified in behalf of complainant. Three witnesses, all employees of defendant, testified in defendant's behalf.

Issues

The issues raised by complainant are as follows:

1. Whether complainant incurred excessive charges in his use of WATS lines and local lines because of misrepresentations of defendant and defendant's refusal to allow complainant to change to a more economical service.
2. Whether defendant may terminate telephone service for nonpayment of bills prior to a hearing, when a bona fide dispute exists over the charges.

Summary of Testimony of Complainant's Witness

1. Complainant owns a telemarketing company engaged in the business of selling tools, safety equipment, and contractor's supplies throughout the United States by telephone.
2. On or around November 4, 1980, complainant placed an order with defendant for telephone service for seven full 240-hour OUTWATS lines, five local lines, and one incoming 800 WATS line. Defendant commenced installation of service, but installation was stopped when one of the installation personnel recognized complainant's general manager as a person formerly associated with a company which owed defendant money for telephone service. However, installation of service was again resumed after defendant requested that complainant make an advance deposit.
3. Because of the advance deposit requirement and because complainant reduced his original order from seven unmeasured outgoing WATS lines to four measured WATS lines, complainant believed that, with

good management, using local lines between the hours of 4 a.m. and 8 a.m. (lowest long-distance rate period) and the measured WATS lines from 8 a.m. on, he would expend approximately \$7,000 to \$8,000 per month for telephone service.

4. Complainant received his first OUTWATS bill on or about January 16, 1981. The bill stated, as a single line entry, a total of 110.1 hours of OUTWATS usage for December. The next line entry showed a subtraction of 10 hours allowance from this total and the following line entry showed the charges for the net total of 100.1 hours of usage. Under defendant's tariff for measured service, 10 hours of usage is included in the base monthly rate. Thus, for the January billing, defendant had allowed only 10 hours as a credit against the billings for the four lines. The February billing was similar to January's and complainant called defendant's attention to the fact that he was being billed for four OUTWATS lines but only being given the 10-hour credit for a single line.

Thereafter, defendant granted complainant the 60 hours additional credit for the January and February billings.

5. The March billing, for the first time, showed the hours of usage for each of complainant's OUTWATS lines rather than by the single entry as shown on the January and February billings. The total billing on the March statement was for \$4,965.25, an increase of about \$2,000 over the January and February billings. Complainant noticed that line 3 showed "0" hours of usage and only half as many hours of usage on lines 2 and 4 as on line 1. Believing this was incorrect, complainant called it to defendant's attention.

6. In May 1981, complainant requested that defendant change his OUTWATS service from measured to unmeasured service because it became obvious to him that his use of local lines between 4:00 a.m. and 8:00 a.m. for long distance calls and the measured OUTWATS lines from 8:00 a.m. on would yield billings that exceeded the \$8,000 which complainant had estimated would be required and which had been budgeted.
7. The May 16, 1981 billing was for \$8,274 and the total OUTWATS line hourly usage showed an increase of 180 hours over the total of the April billing. Had complainant been using four unmeasured OUTWATS lines for his long distance calls instead of the local lines in connection with the four measured OUTWATS lines, the charges would have totaled only \$7,044 per month.
8. On or about May 8, 1981, complainant contacted defendant's customer representative and proposed that all prior and current bills be recomputed as if complainant had been using unmeasured OUTWATS for its long distance calls instead of the use of local lines from 4:00 a.m. to 8:00 a.m. and measured OUTWATS lines thereafter as it had actually been using.
9. Complainant was thereafter advised by defendant that as to the \$19,331.19 then owing to defendant for the OUTWATS lines, it would accept installment payments of \$6,000 on the delinquent bill and when fully paid, would switch complainant's service from measured to unmeasured service retroactive to May 1, 1981.

10. Complainant, although unhappy with this ultimatum, but conceding that at least \$6,000 was due, made one payment of \$6,000 and thereafter contacted his attorney to arrange a meeting with defendant's representative. The meeting failed to resolve the dispute and thereafter complainant sought relief in the Los Angeles County Superior Court and with the Commission, seeking an injunction to prevent defendant from terminating his telephone service. On July 10, 1981 telephone service to complainant was terminated by defendant.

Summary of Testimony of Defendant's Witnesses

1. Complainant initially placed an order for seven full-business-day OUTWATS lines (unmeasured service), five local business lines, and one INWATS line which was to be installed effective November 5, 1980. Prior to the scheduled installation, defendant's installers recognized complainant's manager as an individual who had been associated with another similar business which had shortly before gone out of business, leaving an unpaid delinquent bill. This was brought to the attention of defendant's customer representative superintendent who ordered work halted until the matter was clarified.
2. When defendant was informed that complainant's manager had no ownership interest in the business, defendant agreed to resume installation although it imposed an advance payment requirement. The payment was applied as a credit to complainant's local service billing. Installation was completed on November 24, 1980.

3. During the period that installation was delayed, complainant changed the initial order for seven full (unmeasured) business day OUTWATS lines to four 10-hour (measured) OUTWATS lines.
4. Defendant's witness Pippin denies making any statements to complainant's manager which could be construed as concurring with the manager's belief that it would be more economical to use local lines between 4:00 a.m. and 8:00 a.m. for long distance calls and the four measured WATS lines the remainder of the day rather than subscribing to full business day OUTWATS service for all of complainant's long distance calls. Pippin had only the initial meeting with complainant's manager during which an order was placed for the seven full business day OUTWATS service.
5. Following the establishment of complainant's OUTWATS service, there were admittedly errors in the billing tendered to complainant for that service. The January and February bills charged complainant the base monthly rate for four 10-hour OUTWATS lines (\$1,032) but only reflected the usage allowance (10 hours) for one line. In actuality, all four lines were in operation, but the total hourly usage and associated charge indicated on the bills were for the usage associated with only one line. No usage was shown (or billed) for the remaining three lines and no usage allowance was given for those three lines.

When complainant contacted defendant following receipt of the January and February bills to question the omission of the additional 30 hours of credit due for the remaining three lines, defendant promptly made the requested adjustment.

6. The March bill, for the first time, properly reflected all four measured OUTWATS lines and, except for one line, accurately reflected the hours of usage on each line. One line did not reflect any hours of usage due to a central office equipment malfunction although the line was in actual use during the month.
7. On or about May 8, 1981, Kuri, complainant's general manager, called defendant's customer service supervisor to discuss complainant's local and OUTWATS usage and bills and to changing the OUTWATS service from 10-hour measured to full business day unmeasured service, back to the beginning. On that date complainant's OUTWATS service charges were delinquent in the amount of \$19,331.19. Kuri was advised that his request would be reviewed.

On May 21 complainant was informed that defendant would convert the OUTWATS service as requested, effective May 1, 1981, if the delinquent OUTWATS charges were paid in three installment payments of \$6,000 per week commencing May 22, 1981, with the balance of \$1,331.19 paid along with the charges appearing on complainant's June bill. Kuri accepted this payment arrangement and made the initial \$6,000 payment but no further payments. No change was made in complainant's OUTWATS service.

8. Complainant's telephone service was terminated for nonpayment on July 10, 1981 after complainant's unsuccessful efforts to obtain a judicial restraining order to prevent termination. As of the date service was terminated, complainant's outstanding bill for OUTWATS service was \$38,363.57, for INWATS service was \$1,520.72, and for local service was \$8,120.51.

Discussion

At the outset of the hearing complainant raised the issue of improper charges for his INWATS service when that service, for all practical purposes, was rendered useless for a period of time due to a mixup in the number assigned to this service. However, complainant's general manager admitted under cross-examination that complainant was subsequently given a credit by defendant for the period in question. He made a vague reference to some trouble with this line after the adjustment but never elaborated further on it in his testimony. In his post-hearing brief, complainant failed to identify the INWATS service as an issue or discuss it. Therefore, with respect to any issue in connection with his INWATS service, complainant received a credit for all periods when he did not have effective use of this service and complainant is not entitled to anything further. Defendant is entitled to the amount of \$1,520.72 from complainant for the charges incurred by complainant up to the point when that service was terminated by defendant for nonpayment. ✓

Complainant challenges the right of defendant to terminate telephone service for nonpayment of bills prior to a hearing when a bona fide dispute exists over the charges. While conceding that defendant's tariff permits termination of service for nonpayment of charges, where complainant fails to post the disputed amount with the Public Utilities Commission, complainant contends such tariff is constitutionally infirm because it authorizes a taking of property without due process and also violates complainant's constitutional right to free speech. Complainant contends that the fact that a telephone consumer must post the disputed amount in order to be entitled to continuation of service pending a hearing is nothing more than conditioning the enjoyment of constitutional rights on ability to pay. Complainant cites Memphis Light, Gas and Water Div. v Craft (1978) 436 US 1, 56 L ed 24, 30, 98 S Ct 1554, and Goldin v Public Utilities Commission (1979) 23 C 3rd 638, 153 Cal Rptr 802, in support of his position. We disagree.

The facts in Memphis differ materially from the facts here. In Memphis, respondents' utility service was terminated at will by a municipal utility for nonpayment of bills which respondents claimed resulted from double billing. The utility was held to have deprived respondents of an "interest" in property without due process of law because under the law of Tennessee, a public utility could not terminate service at will, but only for cause. The court held that due process required an informal administrative remedy which allowed a customer an opportunity to present to

a designated utility employee a complaint that he was being overcharged or charged for service not rendered and further that due process necessitated notification by a municipal utility to customers of the required procedure for contesting bills. In the matter before us, complainant was able to and did present his complaint to a utility representative for an informal company review. Provision for such review is contained in defendant's tariff Schedule Cal. P.U.C. No. D&R, Rule 12.

Rule 12 discusses the procedures and remedy available to a customer in cases of disputed bills when the customer and the utility fail to agree. It provides that the utility notify the customer in writing that:

1. In lieu of paying a disputed bill, he may deposit with the Public Utilities Commission the amount claimed by the utility to be due;
2. Upon receipt of the deposit, the Commission will notify the utility, will review the basis of the billed amount, and will advise both parties of its findings and disburse the deposit accordingly; and
3. Service will not be discontinued for nonpayment of the disputed bill during the pendency of an investigation by the utility of the dispute or complaint or when the above deposit has been made with the Commission pending the outcome of the Commission's review.

Complainant failed to deposit any part of the disputed bills with the Commission. Where a customer fails to make such deposit, termination of service for nonpayment is then authorized by defendant's tariff Rule 11, 15 calendar days after presentation of the bill.

In Memphis, the municipal utility was statutorily exempted from regulation by the state public services commission. In the matter before us, defendant is a public utility regulated by this Commission. Its tariffs are reviewed by this Commission and must receive Commission approval before they can be placed into effect. This review and approval process is designed, among other things, to ensure due process to utility customers by affording them avenues of redress within the utility's organization and within the Public Utilities Commission in an informal manner and then by formal action before the Commission, if so desired. Since complainant was informed of these avenues of redress, was granted an informal review, chose not to pay defendant or to deposit the amounts in dispute with the Commission, there has been no violation of due process.

The facts of Goldin, like those of Memphis, are totally unlike the facts here. Goldin involved discontinuance of phone service by the utility under the provisions of its tariff Schedule Cal. P.U.C. D&R, Rule 31, after receiving a writing signed by a magistrate finding "that probable cause exists to believe that the use made of the service is prohibited by law, or that the service is being or is to be used as an instrumentality, directly or indirectly, to violate or to assist in the violation of the

law." The court reviewed Rule 31 and the allegations that the discontinuance of service under this rule constituted a taking of property without due process and that the rule authorized a violation of Goldin's constitutional right to free speech. Although the court acknowledged that commercial telephone communication can be viewed as a valid interest entitled to the U.S. Constitution First Amendment protection, it held that such interest is altogether absent when the activity itself is illegal. Goldin contended that Rule 31 was inconsistent with constitutional guarantees forbidding the taking of property without due process of law insofar as it permits the Commission to discontinue telephone service without a prior hearing comporting with the procedural requirements required by such guarantees. Complainant alleges the same constitutional infirmity lies in defendant's Rule 12. In Goldin, the court upheld Rule 31 which provides for hearing (and the opportunity to apply for interim relief), but concluded that it must be modified in certain respects to ensure the subscriber a prompt hearing and the opportunity to put concerned law enforcement agencies to their proof. We fail to see any analogous fact situation in the matter before us. Complainant's telephone service was terminated for nonpayment of bills.

While we concede that complainant's commercial use of telephone communication constitutes an interest deserving First Amendment constitutional protection, that right is guaranteed if, among other reasons, the complainant pays for such service. The general rule is that a public utility distributing or furnishing electric, gas, or telephone service has the right to cut off such service to customers for nonpayment of just service bills, and may adopt and enforce, as reasonable, rules and regulations that provide for such cutoff (Rule 11). An exception to this rule exists where there is a bona fide dispute about the correctness of a bill or the liability of that particular customer (Rule 12). In the case before us, complainant chose not only not to deposit the amounts in dispute with the Commission, but also to refuse to pay defendant the amounts owing which complainant acknowledges are not in dispute. The procedure outlined in Rule 12 was developed so that recalcitrant customers would not be able to avoid paying for their utilities under the guise of disputing the amount of the bill. This is the only plan by which such bills can be collected, as resort to legal process to enforce their collection would be prohibitive because of the cost, as well as time-consuming. We believe Rule 12 is both fair and reasonable, and rests upon the necessity of the utility's collecting its revenues to ensure its own existence and also to avoid a consequent injustice being imposed upon paying customers in the fixing of rates due to the additional incurred expenses if defendant had to continuously resort to legal process to collect past-due bills.

Complainant does not claim that the charges billed to him by defendant are in violation of defendant's tariffs or that the telephone service for which such charges were rendered was not furnished him by defendant. Thus, the charges are correctly billed for the service received. Complainant's dispute with defendant is with respect to alleged errors on the part of defendant which prohibited complainant from changing to a telephone service which complainant now feels would have been less expensive than the type of service he originally subscribed to.

Complainant had the opportunity to deposit the amount he felt was in dispute with the Commission in order to have continued telephone service. As a matter of fact, complainant was permitted, because of the size of the disputed amount, to deposit such amounts (\$19,000) with the Commission in installments rather than the full amount. Complainant acknowledged undisputed past-due charges of approximately \$20,000 owing to defendant. He failed to make the deposits of the disputed charges with the Commission or to pay the undisputed past-due charges to defendant. He has had the opportunity of both an informal review of his complaint as well as a formal hearing before this Commission.

How complainant can complain of a violation of due process in the taking of his property interest (termination of service) and of his constitutional right of free speech by the application of defendant's tariff Rules 11 and 12 is beyond our understanding. While it is true, as complainant contends, that commercial speech has been declared constitutionally protected speech, we cannot believe that complainant seriously expects the right to continued telephone service when he has failed to pay his delinquent bills which are not in dispute. Free speech does not mean free telephone service. We are convinced that complainant has received all the process which the Constitution, both federal and state, has established as his "due".

We next consider complainant's allegation that he incurred excessive charges in the use of his OUTWATS lines and local lines because of misrepresentations of defendant and defendant's refusal to allow complainant to change to a more economical service.

In essence, complainant is asking that all the toll calls made on his local service be written off or forgiven because he would have switched his service and made such calls on the full-day OUTWATS lines had he had the opportunity to review the actual costs for his use of local lines between 4:00 a.m. and 8:00 a.m. along with the correct bills for his measured OUTWATS service on his January billing, the first full month of his telephone service. Complainant's general manager was of the opinion that his total charges for any one month would not have exceeded \$8,000 and that his January and February

OUTWATS bills confirmed this belief. He testified that it was not until defendant corrected the billing errors and began charging for the overtime usage on all the OUTWATS lines that he became aware that his theory of using local lines between 4:00 a.m. and 8:00 a.m. and WATS lines the remainder of the day was incorrect. His theory that his total charges for any month would not have exceeded \$8,000 if defendant had billed him correctly for his OUTWATS service is given little credence because it is purely speculative. Admittedly, defendant's January and February OUTWATS billings were incorrect in that while they reflected the correct base charge for four OUTWATS lines, the overtime usage was incorrect in that it showed the overtime usage of only one line instead of four lines. This caused complainant's bill to be considerably understated in his favor.

Complainant's general manager, however, was experienced in telephone billing for WATS service. He was previously the principal owner of an identical telephone solicitation business and was quite familiar with telephone company billing for WATS service. As a matter of fact, he quickly recognized the fact that defendant had given complainant the 10-hour allowance credit for only one line on the January and February bills instead of a 10-hour allowance for each of the four lines and immediately called this to defendant's attention. He should likewise have easily seen that the total hours of usage of 110.1 hours shown on the bill was apparently for only one line instead of for four lines, since by his own testimony he stated he expected each OUTWATS line to be used

a total of four hours per day although his 12 salesmen were on two shifts and the lines were available for usage 15 hours per day. This amount of usage appears to be an unusually low estimate, given the type and nature of this business and the hours of operation (4:00 a.m. to 7:00 p.m.). However, even assuming this amount of usage, the 10-hour base allowance applicable to each line would be exhausted after only two and one-half days. Assuming 22 normal work days in a typical month,^{3/} the average chargeable usage on each line, after the 10-hour allowance, would then be 78 hours or 312 hours for the four lines. This discrepancy plus the general manager's experience should reasonably have alerted him to the fact that complainant was not being charged the total usage for four lines. Yet complainant complained to defendant only that complainant had not been granted the 10-hour allowance for each of the four lines. No mention was made of the apparent undercharge for the usage on the four lines.

At the rate of \$19.32 charged for each hour of use in excess of the 10-hour allowance, Kuri's estimated usage would have resulted in charges over and above the monthly base rate of \$1,506.96 per line (78 x \$19.32). For four lines, the overtime charges would have been \$6,027.84. When this sum is added to the base cost for the four lines, the monthly cost for OUTWATS service comes to \$7,059.84. This is substantially more than complainant was billed for OUTWATS service for the months of January through April. Thus, using complainant's own estimate of use, it should have been clearly obvious to complainant that he was being greatly undercharged.

^{3/} Complainant's general manager testified his salesmen would occasionally also work on Saturdays.

The weight of the evidence indicates that complainant's assertion that he expected total telephone costs to remain under \$8,000 per month is mere invention designed to take advantage of defendant's billing errors and to avoid payment of the tariff charges for the services which complainant had actually ordered and received. Complainant has received a substantial windfall with respect to his telephone costs since he was never billed for the usage on three of his four OUTWATS lines for January and February, and he was also given a total of 60 hours additional allowance credit for the additional three OUTWATS lines in January and February, even though he was not charged for any usage on those lines.

Complainant's March and April billings showed all four OUTWATS lines, but were also admittedly incorrect in that the bills reflected no usage on one of the four OUTWATS lines. According to defendant's witness, this was due to a malfunction in defendant's central office. Even with this additional windfall of not being charged for usage on this line, although complainant received the 10-hour allowance for it, complainant's March bill showed OUTWATS usage charges of \$4,965.24 for a total of 257 hours in addition to the \$1,032 base charge. April's bill showed a usage amount of \$8,427.38 for a total of 436.2 hours usage in addition to the \$1,032 base charge despite not being charged for any usage on one line due to the malfunction in defendant's equipment. This amount is what the charge would be if the four OUTWATS lines were used 5.4 hours per day or just 1.4 hours more than complainant's estimate for the 15 hours that the business was operating daily. Again in March and April, complainant had an opportunity to

assess his bills and easily ascertain that he was not being charged enough and that if defendant had correctly billed him, his estimates of \$7,000-\$8,000 per month for telephone service was being exceeded. Yet it was not until around May 8 that complainant first contacted defendant's representative to question the additional hours of usage appearing on his bill as well as the toll calls on his local lines.

Complainant alleged he had been advised by defendant's communications consultant to use his local lines from 4:00 a.m. to 8:00 a.m. and the OUTWATS lines from 8:00 a.m. to 7:00 p.m. to obtain the most economical use and that if his January and February billings had been correct, he would not have used his local lines for toll calls. However, according to the consultant, who was involved only with the initial order, the use of local lines before 8:00 a.m. and measured OUTWATS lines thereafter was never discussed. This is verified by the fact that complainant placed his order with the consultant for seven full-day unmeasured OUTWATS and sometime later changed this to four measured OUTWATS lines. Defendant's witness, who was involved with complainant's service order change, also testified that no discussion took place concerning complainant's intended use of local lines in conjunction with the measured OUTWATS service.

The evidence is also clear that although complainant saw his March and April OUTWATS billings exceed his January and February OUTWATS billings despite the apparent undercharge for at least one OUTWATS line which indicated no usage, he did nothing about requesting a change to full-day OUTWATS service which he claimed would have been less expensive until sometime in May. The evidence is convincing that on May 21, 1981, when he was delinquent in the amount of \$19,331.19 for past-due OUTWATS service, complainant's general manager was informed by

defendant's representative that after reviewing the matter, it was decided that defendant would not make any adjustments to complainant's local line toll billing, but that defendant would make the OUTWATS change from measured to unmeasured service retroactive to May 1 as soon as an acceptable payment arrangement was made with respect to the outstanding past-due OUTWATS charges.

The evidence is also undisputed that complainant made only one installment payment of \$6,000 on his delinquent OUTWATS bills and failed to make any further payments to defendant under his agreement. Although complainant's general manager testified that it was his belief that payment of the \$19,331.19 constituted an agreement to resolve all past-due amounts, including those for local line toll charges and INWATS service, defendant's witnesses convincingly testified that all that was being discussed concerning the \$19,331.19 was the OUTWATS past-due charges.

On or about June 15, 1981 defendant was temporarily restrained by the Superior Court from disconnecting complainant's service for nonpayment of delinquent charges. On or about July 10, 1981, complainant's telephone service was disconnected when complainant was unsuccessful in obtaining a preliminary injunction and the temporary restraining order was dissolved. By July 10, the date defendant temporarily disconnected complainant's telephone service, complainant's delinquent charges were as follows:

OUTWATS	\$38,363.57
Local Service	8,120.51
INWATS	1,520.72

On July 13, 1981, in a prehearing conference called by ALJ Turkish for the purpose of negotiating some agreement which would permit restoration of telephone service to complainant while awaiting a formal hearing date before this Commission, an agreement was reached whereby complainant would pay defendant undisputed past-due charges of approximately \$20,000 by the next business day and complainant would be permitted to pay the remaining disputed amounts to the Commission in weekly installment payments of \$3,000. Complainant failed to make either the undisputed charge payment to defendant or any of the disputed installment payments to the Commission.

The weight of evidence convinces us that complainant selected and ordered the telephone service which defendant installed on his premises without any misrepresentations by defendant. The decision to change from seven full-day unmeasured OUTWATS to four measured OUTWATS lines was based entirely upon Kuri's theory that the combination of using local lines for long-distance calls from 4:00 a.m. to 8:00 a.m. and four measured OUTWATS lines from 8:00 a.m. to 6:30 p.m. or 7:00 p.m. would result in the most economical telephone service for complainant. By Kuri's own testimony, in relating the ultimate settlement he desired, he stated:

"...let's go back to day 1 since I screwed up and my whole theory got screwed up, the fact that a local call before 8:00 a.m. is cheaper than a measured OUTWATS overtime. That's the point, that it is cheaper, but we're using too many hours on the OUTWATS."

Based on Kuri's previous experience in this same business and his knowledge of WATS telephone service and billings, we are of the belief that Kuri knew that the January and February bills did not reflect his actual use of the OUTWATS lines. Yet he complained to defendant only of the fact that defendant failed to give him a 10-hour free allowance on three of the four OUTWATS lines. He was apparently willing to continue with his telephone service as installed so long as he continued to receive the windfall from defendant's undercharges. However, as soon as defendant began correcting the problems which had been responsible for such undercharges and complainant began receiving bills which more accurately reflected the true charges for his OUTWATS lines, and complainant began to become delinquent in his bill payments, he then figured it would be cheaper to switch his telephone service from measured to unmeasured OUTWATS and not use local lines for long-distance calls.

We are not convinced that complainant's estimate and budget of \$7,000-\$8,000 per month for all telephone service is realistic or reasonable given the nature of the business engaged in, which relies 100% on the telephone as the principal means of soliciting business, the fact that complainant employed 12 telephone salespersons in two shifts, the fact that the telephones were used from 4:00 a.m. to 7:00 p.m. daily except Sundays but including some Saturdays, and the fact that complainant's general manager was, prior to November 1980, principal owner and manager of an identical telephone soliciting and sales business. Nor are we convinced that complainant's estimate of only four actual hours of usage

per line during the 15 hours the business operates daily is an accurate estimate of telephone usage for a business which relies totally on telephone sales for its business.

We are also not convinced that complainant would have switched from measured to unmeasured service even if the January and February bills were accurate. After defendant cleared up some of the billing problems, and the bills for March and April more accurately reflected the total hours of usage but still not 100%, complainant could easily see that his total telephone bills were exceeding the \$7,000-\$8,000 he states was budgeted for telephones and still he made no request to change from measured to unmeasured service until sometime in May when he was greatly delinquent in the payment of his bills.

For these reasons we see no basis for ordering an adjustment "back to day 1" as complainant requests. Complainant will have to be content with the windfall received from being undercharged for all those months. However, inasmuch as complainant did request a change in service in May, we are of the opinion that defendant had no basis for conditioning such changes in service only upon the payment of past-due charges. Defendant had the right to terminate service for nonpayment of any undisputed bill in accordance with its tariff but not to condition a change in service only if payment was made of past charges. Complainant should have been permitted to change from measured service to unmeasured service effective May 1, 1981 without conditions. Complainant is therefore entitled to an adjustment in his telephone bill from May 1, 1981 until service was terminated on July 10, 1981. We will order a review of this billing period and keep this proceeding open pending the results of that review and any billing adjustment.

Findings of Fact

1. Complainant subscribed for and received telephone service from defendant from approximately November 24, 1980 to July 10, 1981.

2. During the above periods complainant was engaged in the business of telephone sales of tools, safety equipment, and contractor supplies throughout the United States and Alaska.

3. Prior to the commencement of complainant's business around the end of October 1980, complainant's general manager had been part owner and general manager of a company engaged in an identical telephone sales business which went out of business around October 16, 1980, leaving an unpaid high delinquent telephone bill with defendant.

4. Complainant believed he could obtain the most economical telephone service by using local telephone lines for long-distance calls between the hours of 4:00 a.m. and 8:00 a.m. when those rates are the least expensive and four measured OUTWATS lines for such calls from 8:00 a.m. to 7:00 p.m.

5. Defendant's telephone consultant made no representations to complainant that his telephone utilization plan would be the most economical.

6. Defendant's representatives made no misrepresentations to complainant concerning the telephone service ordered by complainant.

7. Defendant's January and February OUTWATS billings were incorrect insofar as the hourly usage and charge and the 10-hour allowance credit were for only one of complainant's four OUTWATS lines. This was due to a clerical error

in billing and complainant was never billed for the usage of the three other OUTWATS lines in December and January 1981 which were actually used. The monthly base charge for the four OUTWATS lines was correctly billed.

8. Defendant granted complainant a total of 60 hours usage credit for the three OUTWATS lines used but not billed on the January and February 1981 bills.

9. Defendant's March, April, and May OUTWATS bills were incorrect insofar as they did not charge complainant any usage hours for one of the four OUTWATS lines although the line was actually in use.

10. At the time of termination of complainant's telephone service on July 10, 1981, complainant was delinquent in the amount of \$38,363.57 for OUTWATS service, \$8,120.51 for local telephone service, and \$1,520.72 for INWATS service.

11. Complainant requested that his OUTWATS service be changed from measured to unmeasured service in May 1981. Defendant refused to make such change until complainant paid all delinquent bills. Complainant never paid such delinquent bills and defendant never changed his OUTWATS service to unmeasured service.

12. Complainant's tariff Schedule Cal. P.U.C. No. D&R, Rule 12, provides procedures whereby a customer may continue to receive uninterrupted service when there is a disputed bill. These procedures include a utility management investigation and review, and the depositing of the moneys in dispute with the Commission if an informal review by the Commission is desired. In addition, the customer may file a formal complaint with the Commission and have a hearing on the matter under the provisions of the Public Utilities Code.

13. Defendant has not identified any tariff which permits it to condition a requested change in telephone service with the payment of all delinquent bills before such change is made.

Conclusions of Law

1. Defendant did not overcharge complainant for his telephone service from the date of installation to May 1, 1981.

2. Defendant made no misrepresentations to complainant regarding the economy of complainant's telephone plan of operation.

3. Defendant's tariff Schedule Cal. P.U.C. No. D&R, Rule 12, is reasonable and does not violate complainant's constitutional right to due process or rights to free speech.

4. Defendant had no reasonable basis for denying complainant's request to change his OUTWATS service from measured to unmeasured service effective May 1, 1981. Complainant is entitled to a review of his OUTWATS charges and local line toll charges from May 1 to July 10, 1981 for comparison with what his charges would have been had defendant changed his OUTWATS service from measured to unmeasured service effective May 1, 1981 and for a credit if unmeasured service would have been less expensive.

5. In all other respects, defendant is entitled to the remainder of all delinquent past-due bills from complainant. Defendant's discontinuance of complainant's telephone service on July 10, 1981 for nonpayment of delinquent bills was proper.

INTERIM ORDER

IT IS ORDERED that:

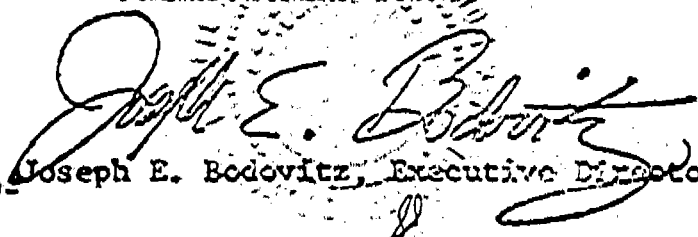
1. General Telephone Company of California (defendant) and Lawrence H. Parker, dba West Frontier Supply Co., (complainant) shall jointly review complainant's OUTWATS and local telephone toll charges for the period May 1, 1981 through July 10, 1981 for a comparison with what OUTWATS unmeasured service would have been for that same period. Defendant shall adjust complainant's outstanding delinquent bill as of July 10, 1981 by the difference found by such comparison between measured and unmeasured OUTWATS service.
2. Complainant and defendant shall jointly inform the administrative law judge by letter of the results of the comparison ordered above within 10 days of the joint review, along with the resulting adjusted delinquent bill total so that a final order may be prepared.
3. In all other respects, the remedy sought by complainant is denied.

This order becomes effective 30 days from today.

Dated JUN 15 1982, at San Francisco, California.

JOHN E. BRYSON
President
RICHARD D. GRAVELLE
LEONARD M. GRIMES, JR.
VICTOR CALVO
PRISCILLA C. CREW
Commissioners

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


-29- Joseph E. Bodovitz, Executive Director

then have changed his measured OUTWATS lines to less expensive full-day unmeasured OUTWATS^{2/} service without the use of local lines. In addition to this allegation, the complaint further alleges that the tariff requirement that complainant must first pay the disputed amount before being entitled to continued telephone service is void as it is in violation of complainant's constitutional right to the exercise of free speech and [Is] a taking of property in violation of his right to due process.

95 Complainant seeks a final order and decision from the Commission declaring the amount due to defendant for telephone services rendered by defendant to complainant to the date of decision. Complainant also seeks an order declaring that defendant's tariff rules, which require telephone subscribers with a bona fide dispute pay the amount in dispute to defendant or to the Commission as a condition precedent to securing a resolution of the dispute involved and continuation of telephone service, are constitutionally infirm because they authorize a taking of property without due process and are in violation of complainant's right to free speech.

In its answer, defendant admits to certain factual allegations in the complaint which are not in issue, but generally and specifically denies all allegations which are placed in issue by complainant.

Following notice, a formal public hearing on this complaint was held in Los Angeles on January 20, 1982 before ALJ William A. Turkish, and the matter was submitted upon the receipt of concurrent briefs due on or before February 22, 1982. Briefs were received from both parties on that date.

2/ This type of service charges a higher monthly base rate than measured service, but permits up to 240 hours of usage per month without additional charges.

8. Complainant's telephone service was terminated for nonpayment on July 10, 1981 after complainant's unsuccessful efforts to obtain a judicial restraining order to prevent termination. As of the date service was terminated, complainant's outstanding bill for OUTWATS service was \$38,363.57, for INWATS service was \$1,520.72, and for local service was \$8,120.51.

Discussion

At the outset of the hearing complainant raised the issue of improper charges for his INWATS service when that service, for all practical purposes, was rendered useless for a period of time due to a mixup in the number assigned to this service. However, complainant's general manager admitted under cross-examination that complainant was subsequently given a credit by defendant for the period in question. He made a vague reference to some trouble with this line after the adjustment but never elaborated further on it in his testimony. In his post-hearing brief, complainant failed to identify the INWATS service as an issue or discuss it. Therefore, with respect to any issue in connection with his INWATS service, complainant received a credit for all periods when he did not have effective use of this service and complainant is not entitled to anything further. Defendant ~~is thus~~ is entitled to the amount of \$1,520.72 from complainant for the charges incurred by complainant up to the point when that service was terminated by defendant for nonpayment.

a total of four hours per day although his 12 salesmen were on two shifts and the lines were available for usage 15 hours per day. This amount of usage appears to be an unusually low estimate, given the type and nature of this business and the hours of operation (4:00 a.m. to 7:00 p.m.). However, even assuming this amount of usage, the 10-hour base allowance applicable to each line would be exhausted after only two and one-half days. Assuming 22 normal work days in a typical month,^{3/} the average chargeable usage on each line, after the 10-hour allowance, would then be 78 hours or 312 hours for the four lines. This discrepancy plus the general manager's experience should reasonably have alerted him to the fact that complainant was not being charged the total usage for four lines. Yet complainant complained to defendant only that complainant had not been granted the 10-hour allowance for each of the four lines. No mention was made of the apparent undercharge for the usage on the four lines.

At the rate of \$19.32 charged for each hour of use in excess of the 10-hour allowance, Kuri's estimated usage would have resulted in charges over and above the monthly base rate of \$258, \$1,506.96 per line (78 x \$19.32). For four lines, the overtime charges would have been \$6,027.84. When this sum is added to the base cost for the four lines, the monthly cost for OUTWATS service comes to \$7,059.84. This is substantially more than complainant was billed for OUTWATS service for the months of January through April. Thus, using complainant's own estimate of use, it should have been clearly obvious to complainant that he was being greatly undercharged.

^{3/} Complainant's general manager testified his salesmen would occasionally also work on Saturdays.