

ORIGINAL

Decision No. 87170

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

MARVIN GOLDIN, dba SUMMERWIND,  
Complainant,

vs.

GENERAL TELEPHONE OF CALIFORNIA,  
Defendant.

Case No. 10282  
(Filed March 14, 1977)

Paul Fitzgerald, Attorney at Law, for complainant.  
Louis K. Ito, Deputy District Attorney, County of  
Los Angeles, for John K. Van De Kamp, Los  
Angeles County District Attorney; Edward M. Davis,  
Chief of Police of the City of Los Angeles; and  
Peter J. Pitchess, Sheriff of Los Angeles County;  
intervenor.  
Hart, Snyder, & Johnson, by Dale W. Johnson, Attorney  
at Law, for defendant.  
Jasper Williams, Attorney at Law, for the Commission  
staff.

INTERIM OPINION

The complainant alleges that the defendant terminated complainant's service of thirty-nine telephone numbers at 2:10 p.m. on March 11, 1977 pursuant to Rule 31, Schedule Cal. P.U.C. No. D&R, (Rule 31) Advice Letter No. 1877, based upon Appendix "A" of Decision No. 71797, dated December 30, 1966, which telephone service termination was ordered by Richard L. Olson, vice president of the defendant, after the defendant was served with a court document denominated "Finding of Probable Cause" signed by Mary E. Waters, Judge of the Municipal Court, Los Angeles Judicial District, dated March 7, 1977. The telephone numbers involved are attached to the complaint as Exhibit A.

The complainant alleges that he operates a legitimate legal telephone answering service business and has not used the telephone equipment and numbers for any illegal purpose. In addition he alleges that the telephone service was terminated without prior knowledge, without prior notice, without prior hearing, and without opportunity to present evidence or any defense, in violation of his rights to due process and equal protection of the laws and of the decisional law of California and the United States; and alleges that he has been denied rights guaranteed by the First Amendment to the United States Constitution and related provisions of the California Constitution in that the action taken by defendant constitutes a prior restraint infringing on free speech. Complainant further alleges that to the extent that the summary provision utilized for termination of service was sanctioned by Decision No. 71797, 66 CPUC 675, and promulgation of the resulting tariff, the tariff is unconstitutional and void. The complainant cites cases in his complaint and briefs which he believes sustain his position.

The complainant seeks an order requiring the defendant to forthwith restore telephone service or, in the alternative, to order a hearing to commence immediately and pending said hearing grant him the interim relief of the restoration of full telephone service pending decision by the Commission, as provided in the defendant's Rule 31.

Rule 31 provides in part as follows:

"LEGAL REQUIREMENTS FOR REFUSAL OR  
DISCONTINUANCE OF SERVICE

"California Public Utilities Commission's Decision No. 71797 in Case No. 4930 requires that each communications utility, operating under the jurisdiction of the Commission, include the provisions of the rule set forth in Appendix 'A' of that decision as a part of the rules in the utility's tariff schedules. Accordingly, Appendix 'A' of Decision No. 71797, Case No. 4930, is quoted herein:

'APPENDIX "A" OF DECISION NO. 71797

- '1. Any communications utility operating under the jurisdiction of this Commission shall refuse service to a new applicant, and shall disconnect existing service to a subscriber, upon receipt from any authorized official of law enforcement agency of a writing, signed by a magistrate, as defined by Penal Code Sections 807 and 808, finding that probable cause exists to believe that the use made or to be 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.
- '2. Any person aggrieved by any action taken or threatened to be taken pursuant to this rule shall have the right to file a complaint with the Commission and may include therein a request for interim relief. The remedy provided by this rule shall be exclusive. No other action at law or in equity shall accrue against any communications utility because of, or as a result of, any matter or thing done or threatened to be done pursuant to the provisions of this rule.
- '3. If communications facilities have been physically disconnected by law enforcement officials at the premises where located, without central office disconnection, and if there is not presented to the communications utility the written finding of a magistrate, as specified in paragraph 1 of this rule, then upon written request of the subscriber the communications utility shall promptly restore such service.

'4. Any concerned law enforcement agency shall have the right to Commission notice of any hearing held by the Commission pursuant to paragraph 2 of this rule, and shall have the right to participate therein, including the right to present evidence and argument and to present and cross-examine witnesses. Such law enforcement agency shall be entitled to receive copies of all notices and orders issued in such proceeding and shall have both (1) the burden of proving that the use made or to be 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, and (2) the burden of persuading the Commission that the service should be refused or should be restored.'"

Pursuant to paragraph 4 of Rule 31, John K. Van De Kamp, Los Angeles County District Attorney; Peter J. Pitchess, Los Angeles County Sheriff; and Edward M. Davis, Chief of Police of the City of Los Angeles; were properly notified of the filing of the complaint and of the date, time, and place of hearing; and thereafter these three persons filed petitions for leave to intervene pursuant to Rule 53 of the Commission's Rules of Practice and Procedure, and on March 17, 1977 an answer was filed by John K. Van De Kamp as an intervenor.

The intervenor's answer denies that the complainant operates a legitimate legal telephone answering service business and alleges that the telephones were used directly and indirectly to violate the penal statutes, or to assist in the violation of penal statutes, and denies that the complainant has been deprived of any rights to due process and equal protection of the laws. The intervenor requests an order denying the complainant immediate restoration of telephone service pending a decision of the Commission and requests the setting of the adjudication hearing at the earliest possible date.

After proper notice, a hearing was held in Los Angeles on March 21 and 23, 1977. A hearing was not held on March 22 because the complainant's motion on March 21, to continue the matter until March 23, was granted.

At the hearing on March 21, 1977 the petitions of Van De Kamp, Pitchess, and Davis to intervene were granted and the intervenors thereafter were permitted to participate in the case as set forth in paragraph 4 of Rule 31.

The complainant seeks immediate interim relief on the theory that the procedure set forth in Rule 31, which procedure was followed by the law enforcement officials and the defendant involved herein, is illegal, unconstitutional, and void, and on the theory that the affidavits of Sergeant R. J. McGuire and Deputy Sheriff Paul George, and the attachments referred to in the "Finding of Probable Cause" dated March 7, 1977 and signed by Judge Mary E. Waters of the Los Angeles Judicial District, was insufficient basis for the finding of probable cause that the telephone numbers involved herein were at the time being utilized for illegal purposes as required by paragraph 1 of Rule 31.

Exhibit 1, Affidavit For Probable Cause; Exhibit 2 attachments "A" through "CCCC", numerous documents, some of which are incorporated by reference in Exhibit 1; and Exhibit 3, Finding of Probable Cause; were received in evidence.

The complainant and the intervenors stipulated that Judge Mary E. Waters read Exhibit 1, and perused Exhibit 2, and thereafter signed Exhibit 3, Finding of Probable Cause. The Commission takes official notice that as of March 7, 1977, the date Exhibit 3 was signed, Mary E. Waters was a judge of the Municipal Court of the Los Angeles Judicial District and as such was a magistrate as defined by Sections 807 and 808 of the Penal Code. None of the other parties had any objections to the stipulation.

Except as set forth above, no evidence whatever was presented by any party to show that the complainant is or is not entitled to immediate interim relief as requested.

Pursuant to paragraph 2 of Rule 31, the Commission has discretion to grant the interim relief sought by complainant. Whether the Commission should order restoration of service pending the completion of hearings and the issuance of a final decision is a case-by-case determination.

One of the complainant's contentions for the granting of interim relief is that the attachments referred to in the "Finding of Probable Cause" dated March 7, 1977 and signed by Judge Mary E. Waters were insufficient basis for the finding of probable cause that the telephone numbers involved were being used for illegal purposes as required by paragraph 1 of Rule 31. The Commission is not the proper forum to challenge the magistrate's "Finding of Probable Cause". The magistrate's "Finding of Probable Cause" is not unlike a search warrant in that the same legal standards for probable cause are the appropriate tests to be applied. The proper forum for the complainant to challenge the magistrate's "Finding of Probable Cause" is the criminal courts. This Commission does not make findings of probable cause as a preliminary to having telephone service disconnected pending full evidentiary hearings. We modified procedures to be followed to provide that law enforcement agencies obtain a finding of probable cause from a magistrate before utility service could be terminated by a utility, 66 CPUC 675 (1966). The complainant could institute proceedings in the proper court to challenge the magistrate's finding. We note that Section 1538.5, et seq., of the Penal Code provides for a procedure to seek the return of property.

We are granting the complainant's request for interim relief. In our review of recent case law we find a trend toward prompt, if not prior, hearing when an individual's rights or property is interfered with by governmental action. Also, we recognize that there could in this case be delay, despite an expeditious hearing and briefing schedule, before our final determination is rendered that could cause the complainant business hardship.<sup>1/</sup> At this juncture we must assume the complainant's activities to be lawful, and will continue to so assume until the intervenors complete their direct showing, the complainant has had an opportunity to present any rebuttal evidence, and briefs are filed.

The complainant also requested interim relief on the ground that Rule 31 is unconstitutional. Since we are granting the complainant's request for interim relief we need not now address complainant's contention that the defendant's Rule 31 is unconstitutional.

The defendant utility requests that should the Commission grant interim relief, and order the restoration of telephone service, the complainant be required to pay the applicable reconnection charges pursuant to the defendant's tariffs. Telephone service was disconnected by the defendant after procedures prescribed in Rule 31 were followed, and we find it reasonable for the complainant to pay applicable reconnection charges for the restoration of service. However, reconnection charges paid by the complainant shall be collected subject to refund, for should we ultimately determine that Rule 31 is unconstitutional, as the complainant alleges, a refund may be appropriate.

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<sup>1/</sup> Our adjudication process is not as expeditious as that of the criminal courts. After the taking of evidence the assigned hearing examiner prepares a proposed draft decision for the assigned Commissioner, who in turn presents a proposed decision to the full Commission for consideration.

Findings

1. The procedure set forth in the defendant's Rule 31 for the termination of telephone service of a subscriber allegedly using the service for illegal purposes requires that the police obtain prior authorization to secure termination of service by satisfying an impartial tribunal that they have reasonable cause to act, in a manner reasonably comparable to the procedure before a magistrate to obtain a search warrant, and after service is terminated the subscriber is provided by that rule with a prompt opportunity to challenge the allegations of the police and to secure prompt restoration of service.

2. The defendant adopted Rule 31 in its tariff. Rule 31, as adopted by the defendant, conforms with the Commission's requirements as ordered in Decision No. 71797, 66 CPUC 675 (1966).

3. Exhibit 3, a Certificate of Probable Cause, was issued by a magistrate on March 7, 1977, in accordance with the provisions of Rule 31.

4. The requirements of defendant's Rule 31 were properly adhered to when the telephone service consisting of 39 telephone numbers of the complainant as set forth in Exhibit A to the complaint was terminated by the defendant on March 11, 1977.

5. The Commission established a procedure whereby the restoration of telephone service could be ordered pending the ultimate determination of whether the service is being or is to be used as an instrumentality, directly or indirectly, to violate or assist in the violation of the law, 66 CPUC 675 (1966).

6. The complainant could suffer business hardship by being deprived of service while it is determined by the Commission whether the telephone service in question is an instrumentality used or to be used, directly or indirectly, to violate or to assist in the violation of the law.



7. It is reasonable to order that telephone service be temporarily restored to the complainant to prevent any undue business hardship pending our final determination.

8. It is reasonable for the complainant to pay applicable reconnection charges to the defendant, subject to refund, for the restoration of service.

INTERIM ORDER

IT IS ORDERED that the interim relief requested by the complainant is granted. The restoration of telephone service shall be made on a timely basis and the complainant shall be assessed the applicable reconnection charges by the defendant, subject to refund, as prescribed in the defendant's tariff.

The effective date of this Interim Order is the date hereof.

Dated at Sacramento, California, this 5th day of APRIL 1, 1977.

*I abstain*  
*William S. Lyons, Jr.*  
Commissioner

*I dissent*  
*Vernon L. Sturgeon*  
Commissioner

*Robert Bateman*  
President  
*Leonard K.*  
*Richard D. Givens*  
Commissioners