

ORIGINAL

Decision No. 91551 APR 15 1980

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Donna E. Livingston,)
)
 Complainant,)
)
 vs.)
)
 Pacific Telephone and)
 Telegraph Company,)
)
 Defendant.)

Case No. 10816
(Filed December 21, 1979)

George Haverstick and Thomas Homann,
 Attorneys at Law, for complainant.
Roger P. Downes, Attorney at Law, for
 defendant.
Nicholas Kasimatis, Deputy District
 Attorney, County of San Diego, for
 Edwin L. Miller, Jr., San Diego
 County District Attorney; and David W.
Ryan, Deputy City Attorney, City of
 San Diego, for John W. Witt, City
 Attorney, City of San Diego; intervenors.

ORDER OF DISMISSAL

Complainant alleges that on and prior to December 3, 1979 she had arranged for the purchase of a business which included a right to the goodwill of said business and the right to use certain telephone numbers of said business, to wit: telephone numbers (714) 223-1964, (714) 275-0140, (714) 222-2213, and (714) 299-6606. Complainant further alleges that on or about December 7, 1979, and prior thereto, one Thomas Mullen held the above-listed telephone numbers in trust as an escrow agent for complainant pending completion of the sale of the business and that since the sale of the business has been completed, with all conditions precedent having been performed, complainant is thus the equitable owner of the right to use the

above-listed telephone numbers. The complaint further alleges the following: (1) on or about December 7, 1979 defendant disconnected service to the aforementioned telephone numbers pursuant to Rule 31^{1/} based on an alleged "Finding of Probable Cause" by a magistrate of the San Diego Municipal Court; (2) complainant does not intend to make use of the telephone service in a manner prohibited by law, and does not intend that the service be used as an instrumentality, directly or indirectly, to violate or to assist in the violation of the law;

1/ Schedule Cal. P.U.C. No. 36-T, Rule 31, 4th Revised Sheet 80, effective October 21, 1977, and Original Sheet 81 ("Rule 31"), effective April 8, 1967, based upon Appendix "A" of Decision No. 71797 dated September 1, 1967, which provides in part as follows:

- "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.

(Continued)

and (3) unless service is restored to Thomas Mullen, as agent for complainant, she will suffer great and irreparable injury, and serious economic effects will result in that she will be deprived of the goodwill and the benefit of her bargain for the purchase of the business. Complainant seeks an order for interim relief restoring service to the four aforementioned telephone numbers pending hearing and determination or, alternatively, for an order requiring defendant to answer the complaint within five days of its filing, for a prompt and expedited hearing upon shortened notice within seven days of the filing of the complaint, and for an order that telephone service be restored to the aforementioned telephone numbers.

1/ (Continued)

"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 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 not be restored."

Pursuant to paragraph 4 of Rule 31, Edwin L. Miller, Jr., San Diego County District Attorney, and John W. Witt, City Attorney of the city of San Diego, were properly notified of the filing of the complaint and of the date, time, and place of hearing. Thereafter, these persons filed petitions for leave to intervene pursuant to Rule 53 of the Commission's Rules of Practice and Procedure. The petitioners oppose the granting of any relief which would restore the disconnected telephone service to complainant.

Defendant's answer alleges that it disconnected telephone service associated with telephone numbers (714) 223-1964, (714) 275-0140, (714) 222-2213, and (714) 299-6606 (located in San Diego, California) pursuant to its being served with a court document entitled "Finding of Probable Cause" dated December 4, 1979 and signed by a magistrate of the San Diego Judicial District wherein that court document states in pertinent part that there is probable cause to believe that telephone numbers (714) 223-1964, (714) 275-0140, (714) 222-2213, and (714) 299-6606 "are being used as an instrumentality to violate and assist in the violation of the penal laws of the State of California, and the character of the acts is such that, absent immediate and summary action in the premises, significant dangers to the public health, safety or welfare will result." A copy of the court document and the affidavit upon which the magistrate's "Finding of Probable Cause" was based, along with a letter dated December 4, 1979 from W. B. Kolender, Chief of Police, San Diego Police Department, in which defendant was requested to terminate telephone service on the subject telephone numbers, were attached as exhibits to defendant's answer. Defendant further alleges that on December 13, 1979 it was orally instructed by the subscriber (Thomas Mullen) to permanently terminate telephone services on the subject telephone numbers and that such oral instruction was subsequently confirmed in writing.

As a first separate and affirmative defense, defendant avers that the issue of reestablishment of service to the telephone numbers in question is moot in that the alleged trustee (Thomas Mullen), as the customer for such service, had the legal right to permanently terminate those services on December 13, 1979 and that he did so. As a second separate and affirmative defense, defendant alleges that under the provisions of Schedule Cal. P.U.C. No. 36-T, Rule 17(c), 3rd Revised Sheet 63,^{2/} the utility is the owner of the subject numbers and may exercise its discretion in their assignment. Thus, defendant alleges that the alleged trustee had no assignable interest in the subject numbers and that complainant was in no position to purchase "the right to use certain telephone numbers" and, accordingly, has no standing to complain herein. For its third separate and affirmative defense, defendant alleges that the complaint fails to state a cause of action against defendant in light of the California Supreme Court's opinion in Goldin v Public Utilities Commission (1979) 23 Cal. 3d 638, wherein the validity of Rule 31 was upheld. Defendant denies that complainant is entitled to any relief and requests that the complaint be dismissed.

After proper notice, a hearing was held in San Diego on January 4, 1980 before Administrative Law Judge William A. Turkish.

At the hearing, the petitions of Edwin L. Miller, Jr. and John W. Witt to intervene were granted and the intervenors thereafter were permitted to participate in the case as set forth in paragraph 4 of Rule 31.

2/ Rule 17 states in part:

"(C) Changes in Telephone Numbers

"The assignment of a number to a customer's telephone service will be made at the discretion of the Utility. The customer has no proprietary right in the number, and the Utility may make such reasonable changes in telephone number or central office designation as the requirements of the service may demand."

Exhibit 1, Affidavit For Probable Cause to Believe Telephone is Being Used For Illegal Purposes in Violation of Public Utilities Commission Decision No. 71797, Declaration of Affiant, and Finding of Probable Cause; Exhibits 2 and 3, entitled Request For Assignment of Telephone Number for telephone number 222-2213, dated December 14, 1979 and December 3, 1979, respectively; Exhibits 4 and 5, entitled Request For Assignment of Telephone Number for telephone number 275-0140, dated December 14, 1979 and December 3, 1979, respectively; Exhibits 6 and 7, entitled Request For Assignment of Telephone Number for telephone number 299-6606, dated December 14, 1979 and December 3, 1979, respectively; Exhibit 8, entitled Request For Assignment of Telephone Number for telephone number 223-1964, dated December 14, 1979; and Exhibit 9, a letter dated December 13, 1979, signed by Thomas F. Mullen, were received into evidence.

Complainant and intervenors stipulated that if called as a witness, San Diego Police Officer William M. Graham would testify to the following: (1) he has been a police officer with the city of San Diego for eight years, he has been assigned to the vice unit for 1-1/2 years, and he is presently assigned to investigate prostitution activity in the escort/modeling agencies; (2) he has made numerous arrests for prostitution activity from escort and modeling services and he has conducted numerous investigations into these services; (3) he has worked in an undercover capacity during the investigation of escort and modeling services and he is familiar with the manners in which they are operated and the terms used by these services; (4) through an investigation into escort and modeling services he observed ads in both the newspaper personal column and the San Diego telephone book advertising "Mermaid Models", "Playmate Models", "Models by Karen", "Beach Models", "California Girls Escorts", "Beach Bunny Models", "Pink Kitten Models", "Models

by Vicki", and "Models by Barbie"; (5) on October 2, 1979 he was contacted by a Stephanie Whitney who stated she was an employee for Michael Van Mills, that her job initially was to answer the telephone at 5036 West Point Loma Boulevard, and that inside this address were several telephones, each with a different telephone number; (6) she further stated that although the telephones were listed in different names, they were all at the 5036 West Point Loma Boulevard address and that they were all operated as one unit; (7) she identified the services at 5036 West Point Loma Boulevard as "Mermaid Models", "Beach Models", "Playmate Models", "Beach Bunny Models", and "Pink Kitten Models"; (8) on November 15, 1979 he and Police Officer Hannibal executed a search warrant at 5036 West Point Loma Boulevard which did not appear to be inhabited but was being run solely as a business; (9) they found a bank of seven telephones that were being answered by one female who was present at the location; (10) they found maps and directories to various hotels in the city and they were able to determine that telephone numbers (714) 223-1964, (714) 275-0140, (714) 222-2213, and (714) 299-6606 are listed to the West Point Loma Boulevard address; (11) these telephone numbers are represented as modeling and escort services and that, although listed in different names such as "Mermaid Models" and "Playmate Escorts", they are, in fact, one and the same business; and (12) based on his investigation, he believes that illegal activities, to wit prostitution, are being committed on a daily basis and that the telephone is the primary instrument being utilized by the owners, operators, or agents of the aforementioned businesses in that it is used to receive calls and dispatch calls which result in the commission of criminal acts. It was further stipulated that if called as a witness, Police Officer Harvey Seagraves would testify that: (1) on October 2, 1979 he called "Models by Karen" at (714) 222-2213

and was told by the person answering the telephone that after an agency fee of \$60 was paid for the model, the model would engage in sex with him for an additional fee; and (2) on that same day he called "Mermaid Models" at (714) 275-0140 and again was told that after paying an agency fee, he could obtain sex from the model for an additional amount of money. It was also stipulated that if called as a witness, Police Officer Gary Gaus would testify as follows: (1) while working in an undercover capacity on October 20, 1979, he called "Playmate Escorts" at (714) 299-6606 and requested an escort and after the arrival of the escort, she offered to engage in sexual relations with him for an additional \$75; (2) on October 26, 1979 he requested a second escort from "Playmate Escorts" and a different girl arrived who told him that she would engage in sex with him for an additional \$100; and (3) she also told him that the owner of "Playmate Escorts" also owned "Surfer Girls Massage", "Mermaid Escorts", "Playmate Escorts", "Beach Bunny Escorts", and "Pink Kitten Escorts".

Thomas Mullen was called as a witness by complainant and testified as follows: (1) he was paid \$20 in cash on October 26, 1979 by Michael Van Mills to subscribe for new telephone services and to hold such telephone numbers as trustee for Mills; (2) the telephone numbers in question were (714) 223-1964, (714) 275-0140, (714) 222-2213, and (714) 299-6606; (3) he orally agreed to "hold" such numbers for Mills until such time as Mills built up the business and sold it; (4) he was never informed by Mills that the business had been sold to complainant nor that he was to transfer the telephone numbers to complainant; (5) he was informed by defendant of the discontinuance of said numbers and the reason for such discontinuance and that he then contacted defendant and informed defendant that he wished to permanently terminate his assignment of the subject telephone numbers; and (6) his intention at the

time of the call was to terminate all telephone service in his name. The witness further testified that: (1) he signed Exhibits 2, 4, 6, and 8 in the offices of defendant on December 14, 1979 and thought he was signing to permanently terminate service to the subject telephone numbers; (2) Mills accompanied him to the telephone company on December 14, 1979 and at no time did Mills mention complainant's name to him or that Mills had sold the business to complainant or that he was to transfer the numbers to complainant; (3) he had never before seen Exhibits 3, 5, or 7; (4) Exhibits 2 through 8 were brought into the courtroom on the day of the hearing by Mills who then gave them to complainant; (5) he saw complainant sign several of the exhibits in the courtroom which then were given to complainant's counsel; and (6) Mills had threatened him in the courtroom, prior to testifying, with respect to how he was to testify. The witness also testified that: (1) he would have objection to complainant now signing Exhibit 8 which did not have complainant's signature on it; (2) after he signed Exhibits 2, 4, 6, and 8, he gave his signed documents to the telephone company representative and walked away and she apparently gave them to Mills; (3) he did not discuss with Mills what would happen to the numbers; and (4) he thought he was applying for telephone service for a modeling agency at the time he obtained the telephone numbers. He also testified that Mills never told him either that the business had been sold or that he was to transfer the numbers to complainant or anyone else and, further, that no escrow agreement had ever been shown to him and that the letter to defendant dated December 13 still states his intention, namely, that service be permanently terminated to the subject telephone numbers which had been assigned to him.

Following testimony of complainant's witness, the matter was submitted by complainant. Intervenors and defendant moved that the complaint be dismissed on the grounds, among others, that complainant is not a subscriber to the telephone numbers in question and thus has no standing to bring this action against defendant before the Commission. They argue that complainant appears to be seeking specific performance of a contract allegedly entered into between complainant and Mills, the operator of the business utilizing the subject telephone numbers, and that the Commission lacks jurisdiction in such matter.

Section 1702 of the Public Utilities Code provides in part:

"Complaint may be made by...any...person, ... by written petition or complaint, setting forth any act or thing done...by any public utility, including any rule or charge heretofore established or fixed by or for 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. . . ."

Implied within the meaning of Section 1702 is the concept that the person bringing a complaint has some type of a contractual or other right which has in some way been violated by the act or thing done or omitted to be done by the public utility defendant, including any rule fixed by or for the utility, which is in violation or claimed to be in violation of any provision of law or of any order or rule of the Commission.

After examining and weighing the only evidence presented by complainant, including the testimony of complainant's witness, we fail to see any act done or omitted to be done by defendant, including any rule of defendant which is in violation of any provision of law or of any order or rule by the Commission. There was absolutely no evidence presented by complainant to show privity

of any kind between complainant and defendant. The verified complaint alleges that one Thomas Mullen held the subject telephone numbers in trust as an escrow agent for complainant pending completion of the sale of the business to complainant. No evidence of any kind to support such allegation was presented by complainant. As a matter of fact, complainant's own witness, Thomas Mullen, the alleged "trustee", denied such allegations as contained in the complaint. Since Thomas Mullen was the subscriber to the telephone numbers in issue, although acknowledging he was, in fact, doing so on behalf of one Michael Van Mills, he notified defendant to terminate any and all telephone lines for which his name was shown as trustee or in any other capacity and never assigned, or intended to assign, the subject telephone numbers to complainant before such termination. Thus, complainant was neither a subscriber to the subject telephone numbers nor an assignee of any rights to such telephone numbers. If she has been wronged in any way, it was certainly not by defendant who properly discontinued service to the four subject telephone numbers in accordance with its Rule 31.

Findings of Fact

1. Complainant is not, and was not, a subscriber to telephone numbers (714) 223-1964, (714) 275-0140, (714) 222-2213, and (714) 299-6606 prior to their termination by defendant on December 7, 1979.
2. Complainant was not the assignee of any right to telephone numbers (714) 223-1964, (714) 275-0140, (714) 222-2213, and (714) 299-6606.
3. No assignment of telephone numbers (714) 223-1964, (714) 275-0140, (714) 222-2213, and (714) 299-6606 was made by the subscriber holding such telephone numbers to complainant or to any other person prior to discontinuance of service to such telephone numbers by defendant.

4. Defendant properly discontinued service to telephone numbers (714) 223-1964, (714) 275-0140, (714) 222-2213, and (714) 299-6606 in accordance with Rule 31 of its tariffs.

5. The subscriber to telephone numbers (714) 223-1964, (714) 275-0140, (714) 222-2213, and (714) 299-6606 instructed defendant to permanently terminate service to said telephone numbers.

Conclusion of Law

The Commission concludes that since complainant is not, and was not, a subscriber to the telephone numbers which are the subject of this proceeding and, further, that she was not an assignee of any right to such telephone numbers, she has no standing to bring this action against defendant and the complaint should be dismissed.

IT IS ORDERED that Case No. 10816 is dismissed.

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

Dated APR 15 1980, at San Francisco, California.

Veronica L. Starnes President
Michael W. Kowale
Clare J. DeLuca
Thomas J. Quinn Commissioners

Commissioner John E. Bryson,
being necessarily absent, did
not participate.