

ORIGINAL

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Morris E. Hurley,

Complainant,

vs.

SBC Communications, Inc., and Pacific Bell,

Defendant.

Case 98-02-043
(Filed February 17, 1998)

O P I N I O N

1. Summary

Complainant seeks sanctions against Pacific Bell for a privacy violation, alleging that Pacific Bell permitted third parties to re-record voice mail messages and use such re-recorded transcriptions in court proceedings. Pacific Bell moves to dismiss the complaint on grounds, among others, that complainant states no violation of law, rule or Commission order. Pacific Bell's motion is granted. The complaint is dismissed.

2. Jurisdiction

This matter alleges a violation of General Order (GO) 107 and is brought pursuant to § 1702 of the Public Utilities (PU) Code. The matter was preliminarily categorized as an adjudicatory proceeding in the request to answer.

3. Background

Complainant Morris E. Hurley is the father of Robert Bruce Hurley, who died at age 39 on May 26, 1997. Before his death, Robert Bruce Hurley made

numerous telephone calls to physicians and other staff members at the Kaiser Permanente Oakland Medical Center, and to a Kaiser attorney. In these calls, he was alleged to have left voice mail messages of a harassing nature. According to the complaint, Kaiser re-recorded many of these messages and used them in court proceedings to obtain a restraining order against Robert Bruce Hurley. Kaiser was granted a permanent injunction, effective May 1, 1996, in the Superior Court, County of Alameda.

Complainant alleges that Pacific Bell violated his son's right of privacy by permitting its subscribers to re-record the voice mail messages. Complainant further alleges that Pacific Bell is in violation of the Commission's GO 107-B, Rules and Regulations Concerning the Privacy of Telephone Communications.

4. Procedural History

This case was filed on February 17, 1998. Notice of the filing appeared in the Commission's Daily Calendar on March 3, 1998. On March 10, 1998, defendant was instructed to answer the complaint within 30 days. The instructions, a copy of which was served on complainant, assigned the matter to Administrative Law Judge (ALJ) Walker and categorized the case as an adjudicatory proceeding, as that term is defined in Rule 5(b) of the Rules of Practice and Procedure. By ALJ Ruling dated March 25, 1998, the complaint was referred to the Commission's Consumer Services Division for informal resolution, pursuant to Rule 10. Informal resolution was unsuccessful. Because we have decided to dismiss the complaint on the basis of defendant's motion to dismiss, no scoping memo is necessary, nor is a hearing required. As noted in the instructions to answer, a hearing is not required where the matter "is otherwise resolved by the parties," *i.e.*, through pleadings addressing the motion to dismiss. The categorization of this matter as adjudicatory has not been contested, and we see no need to disturb that designation.

5. Motion to Dismiss

Pacific Bell on May 5, 1998, moved to dismiss the complaint on grounds, among others,¹ that the complaint states no violation of law, rule or Commission order. Pacific Bell states that GO 107-B by definition governs the monitoring of telephone conversations "of two or more persons." (GO 107-B(II)(A)(1).) Accordingly, Pacific Bell states, the recording of one person's voice mail message is not governed by GO 107-B.

Complainant in his response argues that GO 107-B must be read broadly if individual privacy rights are to be protected. Complainant states:

"When a person speaks extemporaneously upon invitation into a one-person voice mail holding box, he or she has no opportunity to delete, edit out, or withdraw some phrase, word, or momentary thought expressed. It would be stifling to voice mail communication if the Commission really intends that each and every word spoken is irretrievably placed in the public domain, for extortion, humiliation, or court use. The entire concept goes squarely against Legislative intent in the Invasion of Privacy Act, and would today be an outrageous, intrusive law for appeal to the Supreme Court." (Opposition to Motion to Dismiss, p. 5.)

Complainant alleges that Pacific Bell is or should be under an obligation to investigate reported incidents of re-recorded voice mail messages and, where such re-recording is shown to have taken place, to take appropriate actions against those subscribers who have permitted such re-recording.

¹ Alternatively, Pacific Bell seeks dismissal on grounds that complainant lacks legal standing to bring this complaint, and that Pacific Bell is not a proper defendant. SBC Communications, Inc., specially appearing, moves to quash service on grounds that the Commission lacks jurisdiction over SBC. Because we dismiss the complaint for failure to state a cause of action, we do not reach these other claims by defendants.

6. Discussion

The Commission considers complaints pursuant to Rule 9 of the Rules of Practice and Procedure and Section 1702 of the PU Code. Section 1702 places the burden on a complainant to show that there is:

"...any act or thing done or omitted to be 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."

Complainant here alleges generally that the re-recording of a recorded voice mail message violates the privacy of the caller who left the message. Specifically, complainant alleges a violation of GO 107-B.

GO 107-B prohibits monitoring or recording of telephone conversations without prescribed prior notice to the parties, for example through a beep tone or a verbal announcement. We agree with Pacific Bell, however, that GO 107-B applies to telephone conversations between two or more persons. GO 107-B(II) states in pertinent part:

"Monitoring or recording of telephone conversations shall not be conducted except pursuant to this General Order.

1. 'Monitoring' means the use of monitoring equipment to allow a third person to overhear the telephone conversation of two or more persons....
2. 'Recording' means the recording or transcribing of any telephone conversation by means of any electronic device." (Emphasis added.)

The juxtaposition of these provisions supports a conclusion that both the monitoring and recording requirements of the general order are intended to apply to a telephone conversation involving two or more persons. We have carefully reviewed the decisions adopting GO 107-B, and we conclude that the restrictions and regulations that they impose are intended to apply to telephone

communications in which more than one party is involved. (See Decision (D.) 83-06-021, 11 CPUC2d 692; D.83-10-090, 13 CPUC2d 46.)

Moreover, no reading of GO 107-B can suggest that the general order contemplated or was intended to apply to a telephone caller who does not speak to another party but instead voluntarily leaves a recorded message. In such a case, the calling party obviously consents to the recording of his message. GO 107-B does not prohibit the recording of telephone messages where a party knowingly consents to the recording.

By the same token, we are unable to discern a violation of the constitutional right of privacy in the facts alleged in the complaint. Complainant provides us with no legal authority that purports to protect the privacy of a voice mail recording, and our own research reveals none. Indeed, it has been held that state and federal privacy statutes exclude any "circumstance in which the parties to the communication may reasonably expect that the communication may be overheard or recorded." (People v. Suite (1980) 101 CA3d 680; see, generally 19 Cal.Jur.3d §§ 1981-1996, Invasion of Privacy.) In short, a person who leaves a telephone message on a telephone recording device or system knows that his message is being recorded. The caller can have no reasonable expectation that the message will not be heard by anyone who has access to the recording or by anyone with whom a listener chooses to share it.²

² Complainant appears to suggest that a person receiving a recorded message is required to erase the message immediately if he or she regards the message as harassing. We are aware of no such requirement in law.

Conclusion

The complaint does not state a violation of law, rule, or Commission order, as required by PU Code § 1702. Accordingly, the complaint must be, and is, dismissed.

Findings of Fact

1. Pacific Bell subscribers re-recorded voice mail messages of complainant's son.
2. The re-recorded messages were used in court proceedings to obtain a restraining order against complainant's son.
3. Pacific Bell moved to dismiss the complaint on grounds that it states no violation of law, rule or Commission order.

Conclusions of Law

1. GO 107-B prohibits monitoring or recording a telephone conversation of two or more persons without prescribed prior notice.
2. The act complained of here involved single-party telephone messages which the caller voluntarily permitted to be recorded.
3. A caller who voluntarily leaves a telephone message on a recording device can have no reasonable expectation that the message will not be heard by anyone with access to the recording or by anyone with whom a listener chooses to share it.
4. Pacific Bell's motion to dismiss for failure to state a violation of law, rule or Commission order should be granted.

O R D E R

IT IS ORDERED that:

1. The motion of Pacific Bell to dismiss this complaint on grounds that it states no violation of law, rule or Commission order is granted. The complaint is dismissed.

2. This case is closed.

This order is effective today.

Dated August 6, 1998, at San Francisco, California.

RICHARD A. BILAS

President

P. GREGORY CONLON

JESSIE J. KNIGHT, JR.

HENRY M. DUQUE

JOSIAH L. NEEPER

Commissioners