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MAIL DATE

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Decision 99-02-046

February 4, 1999

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Morris E. Hurley,

Complainant,

vs.

SBC Communications, Inc. and
Pacific Bell,

Defendants.

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

ORDER DENYING REHEARING OF DECISION 98-08-008

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

In Decision 98-08-008 (the decision) the Commission granted Pacific's Motion to Dismiss. We found that GO 107-B prohibits the monitoring of

telephone conversations without prior notice to the parties, as through a beep tone or verbal announcement. However, the prohibition only extends to conversations between two or more persons. (D.83-06-021, 11 CPUC 692; D.83-10-090, 13 CPUC 46.)

GO 107-B provides, 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.)

As Pacific points out in its Response to the Application, Applicant has not alleged that the Commission committed any legal or factual errors in the decision. Rather, with one exception, he simply reargues the positions he took at various stages of the proceeding.

Rule 86.1 of the Commission’s Rules of Practice and Procedure requires that applications for rehearing set forth specifically the ground on which the applicant considers the order or decision of the Commission to be unlawful or erroneous. In addition, the rule cautions applicants that “vague assertions...may be accorded little attention” and that the purpose of an application for rehearing is to alert the Commission to an error.

Applicant’s application consists of discursive assertions that the Commission decision was in error with respect to the interpretation of the words “conversation and communication” by failing to acknowledge the revisions of Penal Code Sections 630 and 631. Applicant himself, however, fails to recognize that GO 107-B, para. A, 1a) explicitly excludes from its application “unlawful

wiretapping and eavesdropping," i.e. Penal Code Sections 630 and 631. The Commission was therefore not in error by not considering legal standards outside of GO 107-B for the definition of the term "communication."

Applicant further ignores that, even if, assuming *arguendo*, the communications of Applicant's son Robert Hurley were to be considered communications as defined in Penal Code Sections 630, the recording of these "communications," i.e. voice mail messages, and use as evidence in a court proceeding, was not unlawful under Penal Code Section 633.5, which provides:

"§ 633.5. Recording communications relating to commission of extortion, kidnapping, bribery, felony involving violence against the person, or violation of § 653m:

"Nothing in Section 631, 632, 632.5, 632.6, or 632.7 prohibits one party to a confidential communication from recording the communication for the purpose of obtaining evidence reasonably believed to relate to the commission by another party to the communication of the crime of extortion, kidnapping, bribery, any felony involving violence against the person, or a violation of Section 653m. Nothing in Section 631, 632, 632.5, 632.6, or 632.7 renders any evidence so obtained inadmissible in a prosecution for extortion, kidnapping, bribery, any felony involving violence against the person, a violation of Section 653m, or any crime in connection therewith."

Penal Code Section 653m (a) provides:

"653m. Telephone calls or contact by electronic communication device with intent to annoy

"(a) Every person who, with intent to annoy, telephones or makes contact by means of an electronic communication device with another and addresses to or about the other person any obscene language addresses to the other person any threat to inflict injury to the person or property of the person addressed or any member of his or her family, is guilty of a misdemeanor. Nothing in this

subdivision shall apply to telephone calls or electronic contacts made in good faith.”

The messages left by Applicant’s son were presumably of a harassing nature and could therefore be lawfully recorded for the purpose of use as evidence in the proceeding against Applicant’s son. Thus, even if the Penal Code sections were applicable, the sections allow messages of a harassing nature to be recorded and used as evidence.

The decision further found that a person voluntarily leaving a message on an electronic voice mail obviously consents to the recording of his voice. Further, 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 CA3rd 680.

Applicant complains that Pacific has failed to “perform field investigations” of the voice mail systems of the three organizations that owned the recording devices. However, as Pacific points out, this ignores the fact that Pacific does not provide voice mail service and the three organizations do not subscribe to the voice mail service offered by Pacific's affiliate. Thus, Applicant’s argument is without merit.

IT IS THEREFORE ORDERED that:

1. The Application for rehearing of Decision 98-08-008 is dismissed.

2. This proceeding is closed.

This order is effective today.

Dated February 4, 1999, at San Francisco, California.

RICHARD BILAS

President

HENRY M. DUQUE

JOSIAH L. NEEPER

Commissioners