

Decision 99-06-031 June 10, 1999

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Ms. Cheryl Duke,

Complainant,

vs.

Pacific Bell,

Defendant.

(ECP)
Case 99-02-028
(Filed February 17, 1999)

Cheryl Duke, complainant.
Douglas Phason and Jewel Stoddard, for
Pacific Bell, defendant.

O P I N I O N

1. Summary

We deny the complaint filed by plaintiff Cheryl Duke (Duke) since the weight of the evidence fails to establish that defendant Pacific Bell (PacBell or utility) violated its tariffs or other applicable law when it placed a password on the account associated with a telephone line at Duke's residence and later transferred that telephone service to other premises.

2. Procedural Background

On February 17, 1999, Duke filed a complaint against PacBell after efforts at informal resolution reached an impasse. Plaintiff requested an accelerated schedule and the Commission's Docket Office assigned the complaint to the expedited complaint procedure (ECP). We hear expedited complaints under

Pub. Util. Code Sec. 1702.1 and Rule 13.2 of our Rules of Practice and Procedure. The complaint and answer are the only ECP pleadings necessary, in light of the 132-day resolution timeline.

On March 15, PacBell filed its answer and on March 23 both parties appeared at the hearing before Administrative Law Judge (ALJ) Jean Vieth. On March 26, pursuant to the ALJ's ruling at hearing, PacBell served additional documents by mail. At hearing the ALJ also ruled that the parties might submit, by letter on April 9, final arguments on the evidence and the applicable law. By telephone call to the ALJ on April 8, Duke requested a one-week extension of time to prepare and submit her letter. The ALJ granted Duke's request and Duke submitted the letter, with a copy to PacBell, on April 16. Previously, PacBell had informed the ALJ it was unlikely to submit a letter and it did not do so.

Accordingly, this proceeding was submitted for decision on April 16. As a courtesy to the parties, the draft decision of the ALJ was mailed prior to our action today.

3. Discussion

3.1 The Dispute

This dispute concerns the telephone number (510) 357-1540. In her complaint and at hearing, Duke argued that PacBell wrongfully placed a password on (510) 357-1540, which she alleged was her personal telephone service, and wrongfully transferred that service to her sister, Doris Elerick (Elerick). Duke claimed that she had used the number for more than 20 years and had it printed on her checkbooks. She testified that elderly friends of her deceased mother, Ruth Duke, continued to use the number. Duke claimed we should order PacBell to: 1) restore the (510) 357-1540 service to her; 2) apply credits totaling \$555 to the account; and 3) state in writing that the telephone

service switch occurred because the utility relied on Elerick's misleading statements. PacBell argued it had acted consistent with its tariffs and other applicable law.

Duke testified that her father, John Duke, obtained the number more than 20 years ago for residential service at 460 Elsie Avenue, San Leandro, California. When John Duke died, his widow, Ruth Duke, continued to use the listing and did not change the account name. When Ruth Duke died in May 1997, Duke and Elerick became co-trustees of the Duke Family Trust (part of which is attached to the complaint) and Duke inherited the real property at 460 Elsie Avenue. According to Duke, she and Elerick agreed between them that a second telephone line at 460 Elsie Avenue, (510) 353-7682, should be disconnected but that Duke, who was living there, would continue to use (510) 357-1540. Duke testified that she contacted PacBell in May or June of 1997 to advise the utility that she wanted the directory listing to remain "J Duke" but that she would become responsible for billing.

PacBell's service records do not show any calls in May or June of 1997 regarding (510) 357-1540. The records show a woman called on September 3, 1997 to request a duplicate bill. There are no records of other calls until May 1998. (Exhibits 2, 4.) PacBell's records through June 1998 continue to list "J Duke" as the person responsible for billing. (Exhibit 5.) Jewel Stoddard (Stoddard), the utility's Director, Consumer Markets Group, testified a telephone service representative with computer access to a customer account must make two entries each time access is obtained. These entries are required by the computer system, cannot be by-passed and serve as tracers. Douglas Phason (Phason), the utility's Associate Director, State Regulatory, testified PacBell first learned of John Duke's death in June 1998. Stoddard testified that had PacBell learned earlier of John's Duke's death, it would have disconnected the service

pursuant to its tariff governing supersedure of service unless a living person had established legal authority to assume billing responsibility for the account. (See PacBell's Schedule Cal. PUC No. A2.1.23(B), Note 3.) Phason stated that the utility *would* recognize a decedent's daughter as a person responsible for billing and that, in such a situation, continuing a listing such as "J Duke" would be consistent with its tariff governing directories and listings. (See PacBell's Schedule Cal. PUC No. A2.1.17(A)(2).)

In any event, Duke used (510) 357-1540 for approximately a year after her mother's death. PacBell's records show that on May 20, 1998, however, Elerick telephoned PacBell and sought to establish legal authority over the "J Duke" account, to have a password added to the account associated with (510) 357-1540 and to have the service transferred to her own residence across the street at 451 Elsie Avenue. The PacBell service representative's entry indicates that Elerick advised that Duke was no longer a trustee and "has not been using the ph [sic] legally." (Exhibit 2.) A password like the one supplied here prevents anyone other than the password holder from obtaining account information by a call to a service representative.

Duke testified she received no notification from PacBell before it placed the password on her account or transferred the service to Elerick's residence. Duke stated she did not learn what had happened until she contacted the utility about what she thought was a telephone line service problem. Phason and Stoddard testified that, pursuant to tariff, the utility routinely 1) attempts to make verbal contact and 2) mails written notice within 48 hours.

The next date entered in PacBell's records is June 1. The entry shows that Duke telephoned regarding the interrupted service for (510) 357-1540, explained "J Duke" was her deceased father, argued Elerick had acted without authorization and stated she would FAX the will devising 650 Elsie Avenue to

her. (Exhibit 3.) Duke called again on June 2 to verify that the FAX had been received. In her complaint and at hearing, Duke asserted Elerick lacked authority to act vis a vis the "J Duke" account because her trusteeship only extended to the Duke Family Trust, which was Ruth Duke's trust.

PacBell's records contain no more entries after June 2 until June 23, when Elerick called to ascertain that PacBell had received the court order removing Duke as trustee. (Exhibit 2.)

That court order, entered in evidence here as Exhibit 1, begins with this statement:

"Between April 27 and May 6, 1998, this Court heard the evidence and arguments presented by counsel concerning the above-referenced probate adversary matter. Based on that evidence, the Court makes the following findings of fact and conclusions of law." (In the Matter of the Trust of Ruth M. Duke, Alameda County Superior Court No. 250461, Findings of Fact and Conclusions of Law, filed June 17, 1998.)

Paragraph 1 of the judgment states:

"Cheryl Duke is removed as co-trustee of the Duke Family Trust as of May 6, 1998, and replaced with Jacqueline Helekunihi." (*Ibid.*)

In an effort to resolve this matter prior to hearing, on March 4 PacBell wrote to Duke and Elerick, offering a split referral of (510) 357-1540 for 60 days. (Exhibit 1 to PacBell's answer.) Phason testified an attorney representing Elerick had contacted him on March 17 to say he would attempt to communicate with Elerick about the split-referral. As of the date of hearing, PacBell had heard nothing further from either party. Phason and Stoddard both testified that should the Commission order PacBell to do so, it would reassign (510) 357-1540 to Duke at such time as Elerick might cancel the service associated with that number.

3.2 We Conclude the Complaint Must Be Denied

We examine Duke's contentions in light of the evidence presented by both parties at hearing and the applicable law. Because we conclude Duke has failed to establish PacBell acted unlawfully, we do not reach issues presented by the relief requested in her complaint and consequently, do not discuss those issues here.

3.2.1 Admissibility of Business Records to Prove

Nonoccurrence. Duke contends because she had clarified her responsibility for the "J Duke" account in May or June of 1997, PacBell wrongfully gave Elerick access to (510) 357-1540 a year later. However, PacBell's service records do not show any calls from Duke to the utility prior to June 1998. Evid. Code § 1272 provides that "evidence of the absence from the records of a business of a record of an asserted act" may be admitted to prove the nonoccurrence of that act where it was the regular course of business to prepare such records and the information sources and methods were such that the absence of a record is trustworthy. PacBell's testimony persuades us that its service records meet Evid. Code § 1272 requirements. Duke's April 16 letter argues the PacBell service records are incomplete because they do not reflect any communications with CPUC staff in the Consumer Affairs Branch. However, such contacts are of a different character than calls to a customer service representative and need not access account information in the same way. Duke has not met the burden of establishing that she ever legally assumed billing responsibility for the "J Duke" account associated with (510) 357-1540.

3.2.2 Third Party Reliance Upon Trustee. Duke does not allege that Elerick *was not* a trustee of the Duke Family Trust or that Elerick *failed to establish* that authority to PacBell. Rather, Duke contends Elerick acted beyond that authority with regard to (510) 357-1540 and PacBell, by failing to investigate

the nature and scope of her authority, acted wrongfully. However, the law does not support Duke's position.

As PacBell noted in its answer, we examined a similar situation in Oakland Recycling Association, Inc. v. Pacific Bell, where a company's general manager placed a password on the business telephone number. (See Oakland Recycling Association, Inc. v. Pacific Bell, Decision (D.) 91-05-017, (1991) 40 CPUC2d 48, 1991 Cal. PUC LEXIS 242.) The company's president filed a complaint against the utility for return of the number and we dismissed the complaint. Relying upon Civil Code §§ 2137 and 2138, which govern agency representations vis a vis third parties who rely upon those representation in good faith, we stated:

"Anyone dealing with a corporation is entitled to assume that a person entrusted with the title and function of General Manager has wide authority to govern the corporation's affairs." (*Id.* 1991 Cal. PUC LEXIS at p.4.)

Statute also protects third parties who rely in good faith upon a trustee's representations regarding the scope of her authority. PacBell's answer correctly referenced Prob. Code § 18100 for this proposition; we quote the full text of that statute here:

18100. With respect to a third person dealing with a trustee or assisting a trustee in the conduct of a transaction, *if the third person acts in good faith* and for a valuable consideration and without actual knowledge that the trustee is exceeding the trustee's powers or improperly exercising them:

- (a) *The third person is not bound to inquire* whether the trustee has power to act or is properly exercising a power *and may assume without inquiry the existence of a trust power and its proper exercise.*

- (b) *The third person is fully protected in dealing with or assisting the trustee just as if the trustee has and is properly exercising the power the trustee purports to exercise.* (Prob. Code § 18100, italics added.)

Case law interpreting Prob. Code § 18100 has held it protects a title company's reliance upon a trustee's representations of authority to convey real property, absent actual knowledge by the title company that the trustee is exceeding or improperly exercising trust powers. (Adler v. Manor Healthcare Corp. (1992) 7 Cal. App. 4th 1110.) Duke has not shown that PacBell did not act in good faith when it relied upon Elerick's representations of trust power. PacBell had no obligation to investigate the scope of Elerick's authority, nor do we.

3.2.3 Notice. Duke testified that she received no notice of PacBell's impending action to transfer the service for (510) 357-1540. Phason testified the utility complied with its tariff. PacBell's supersedure tariff requires the utility to obtain verbal approval from the "outgoing customer", such as Duke, before transferring service to another *unless* "the outgoing customer cannot be reached and the incoming customer can present evidence to the Utility of their [sic] responsibility for the account". (See PacBell's Schedule Cal. PUC No. A2.1.23(B), Note 2.) The weight of the evidence on this point does not establish that the utility violated its tariff.

3.2.4 A Telephone Number Is Not a Property Right. Duke's testimony about the inconvenience to her caused by the transfer of (510) 357-1540 to Elerick is understandable to anyone who has had to acquire a new telephone number after changing residences. Nonetheless, PacBell's tariff governing directories and listings does not create a property right in an individual's use of a telephone number, whether that use is long-term or short. (See PacBell's Schedule Cal. PUC No. A2.1.17(B).) Duke's complaint fails on this ground. Nonetheless, we recognize PacBell's good faith offer to reassign (510) 357-1540 to

Duke if Elerick should cancel the service associated with that number: We order PacBell to make a good faith effort to offer (510) 357-1540 to Duke, should it become available again. This order does not revoke or amend PacBell's tariff.

O R D E R

IT IS ORDERED that:

1. The complaint filed by plaintiff Cheryl Duke against defendant Pacific Bell for restoration to her of the residential telephone service associated with (510) 357-1540 is denied. Plaintiff has failed to establish that defendant acted unlawfully in transferring the service.

2. If the current service associated with (510) 357-1540 is cancelled, Pacific Bell shall make a good faith effort to offer (510) 357-1540 to Cheryl Duke, consistent with our discussion in this Decision. This order does not revoke or amend Pacific Bell's tariff.

3. This proceeding is closed.

This order is effective today.

Dated June 10, 1999, at San Francisco, California.

RICHARD A. BILAS
President
HENRY M. DUQUE
JOSIAH L. NEEPER
LORETTA M. LYNCH
JOEL Z. HYATT
Commissioners