

## PUBLIC UTILITIES COMMISSION

505 VAN NESS AVENUE  
SAN FRANCISCO, CA 94102-3298



November 19, 1999

TO: PARTIES OF RECORD IN CASE 99-07-040  
DECISION 99-11-059, Mailed 11/19/99

On October 19, 1999, a Presiding Officer's Decision in this proceeding was mailed to all parties. Public Utilities Code Section 1701.2 and Rule 8.2 of the Commission's Rules of Practice and Procedures provide that the Presiding Officer's Decision becomes the decision of the Commission 30 days after its mailing unless an appeal to the Commission or a request for review has been filed.

No timely appeals to the Commission or requests for review have been filed. Therefore, the Presiding Officer's Decision is now the decision of the Commission.

The decision number is shown above.

A handwritten signature in cursive script that reads "Lynn T. Carew".

Lynn T. Carew, Chief  
Administrative Law Judge

LTC:mrj

Attachment

Decision 99-11-059

**BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA**

Melvin Leroy Carter, dba Mel's Tire Service,

Complainant,

vs.

Pacific Bell,

Defendant.

Case 99-07-040  
(Filed July 28, 1999)

Jeffrey S. Kravitz, Attorney at Law, for complainant.

Randall E. Cape, Attorney at Law, for Pacific Bell, defendant.

Luana L. Martilla, Attorney at Law, for California Department  
of Consumer Affairs, Bureau of Automotive Repair, intervenor.

**O P I N I O N**

**1. Summary**

Melvin Leroy Carter, doing business as Mel's Tire Service, seeks restoration of his two business telephones following disconnection by Pacific Bell at the direction of the Superior Court for the County of Sacramento. Because we find that probable cause has been established to support the termination of the telephone service, and because we find no basis upon which to provide interim relief, we deny the request for restoration of service and deny the complaint.

**2. Background**

This complaint was filed on July 28, 1999, by Carter, who operates a business offering tire service and other automotive services in Orangevale,

California. Carter is accused by the Bureau of Automotive Repair, California Department of Consumer Affairs, of operating an auto repair and emissions testing business without authority to do so.

On July 1, 1999, pursuant to order of Superior Court Judge Joe S. Gray, Pacific Bell disconnected two telephone numbers used by Carter. The court, acting on an affidavit prepared by the Bureau of Automotive Repair, found probable cause to believe that Carter's telephone lines were being used as an instrumentality to violate the law, and that this presented a significant danger to the public health, safety, or welfare. In this complaint, Carter seeks reconnection of the telephone lines pursuant to Rule 31 of Pacific Bell's tariffs.

Rule 31, entitled "Legal Requirements for Refusal or Discontinuance of Service," governs this case. The rule requires a telephone company to disconnect service to a customer upon written demand of a law enforcement agency, signed by a magistrate, asserting that there is probable cause to believe that the telephone facilities "have been or are to be used in the commission or facilitation of illegal acts." The character of such acts must pose significant danger to public health, safety, or welfare.

Under Rule 31, a disconnected subscriber may file a complaint with the Commission seeking restoration of service. The Commission is required to schedule a hearing on the complaint within 20 days of filing, and to serve notice on the concerned law enforcement agency. At hearing, the law enforcement agency has the burden of proving that the disconnection of service was based on probable cause, and that service should not be restored.

Rule 31, as amended, was promulgated by this Commission in Decision (D.) 91188, dated January 8, 1980. The California Supreme Court dismissed constitutional objections to the rule and upheld its validity in Goldin v. Public Utilities Commission (1979) 23 Cal.3d 638.

A hearing in this case was scheduled in the Commission's courtroom, in San Francisco on August 17, 1999, within 20 days of filing of the complaint. At complainant's request, the hearing was rescheduled for August 25, 1999, in Sacramento. Following the hearing, the parties waived briefs, and the case was deemed submitted for Commission consideration upon receipt of transcript, which occurred on September 22, 1999.

**3. Evidence at Hearing**

At hearing, the Department of Consumer Affairs presented its evidence through the testimony of seven witnesses, all of them state and county enforcement officers. Pacific Bell offered the testimony of one witness. Complainant, through counsel, cross-examined all witnesses and questioned the legal sufficiency underlying the disconnections. The Commission received 15 exhibits into evidence.

**4. Enforcement Agency Testimony**

The Bureau of Automotive Repair accuses Carter of violating at least two state laws in the operation of his business. These are Bus. & Prof. Code § 9884.6(a), which makes it unlawful for any person to be an automotive repair dealer unless that person has registered with the Bureau and the registration is currently valid, and Health & Safety Code § 44032, which makes it unlawful to perform emission control tests or repairs unless the test or repairs are performed at a licensed smog check station.

Kenneth L. Besson, an investigator for the Bureau of Automotive Repair, testified that Mel's Tire Service is a large automotive repair dealership, with five service bays, located at a prominent intersection in Orangevale. Besson stated that Carter's auto repair and smog check licenses were revoked in 1997 after an investigation of numerous infractions, including an incident in which the firm is

alleged to have "clean piped" a vehicle, that is, substituted one vehicle's smog readings for another vehicle in order to pass a smog check.

Despite having no licenses and despite continued warnings by the Bureau, Besson said, Carter has continued to do prohibited auto repair and smog check work. The Bureau ran an undercover vehicle with a bad alternator into Mel's Tire Service in 1998 and obtained a prohibited repair. In January 1999, Besson and other enforcement officers raided the establishment and obtained 82 invoices that showed substantial automotive work. Carter was arrested during the raid for allegedly threatening an investigator. He was cited for obstruction of justice.

Besson introduced the statements of nine customers who alleged that they had major automotive work or smog checks at Mel's Tire Service in 1998 and 1999. He also introduced evidence showing that Carter in 1998 and 1999 advertised in telephone yellow page directories and other publications offering major mechanical repairs and smog checks. Prominent signs at the establishment state the availability of such services as tune-ups, diagnostics, brakes, shocks, and alignment.

Besson stated that the Bureau in April 1999 made recommendations to the State Attorney General that resulted in legal action in Superior Court seeking a permanent injunction to prohibit Carter from operating an auto repair business in California. A preliminary injunction against Carter was issued in July 1999.

On July 26, 1999, a number of state and county enforcement officers converged on Mel's Tire Service and issued numerous citations. A vehicle abatement officer from the county testified that she tagged 13 vehicles on the property for removal as public nuisances. A fire department investigator testified that he cited the establishment for hazards, including improper tire storage and vehicle painting infractions. A zoning enforcement officer testified that he cited Carter for four zoning violations, including improper use of the

premises and illegal structures attached to the rear of the main building. A sheriff's department detective testified that he cited Carter for failure to have a waste tire facility permit and failure to maintain required records. A representative of the California Integrated Waste Management Board testified that he served written notice on Carter threatening abatement action unless Carter either disposed of most of the tires at the facility or obtained a waste tire facility permit.

Pat Jarratt, a supervisor in the Bureau of Automotive Repair, testified that Carter is accused of violating those provisions of Bus. & Prof. Code § 9880 that require state registration of an auto repair facility for all but routine tire service and the kind of minor repairs typically performed by a gasoline service station. Jarratt testified that after issuance of the temporary injunction by the Superior Court, he supervised the posting of four large signs at Mel's Tire Service warning the public that:

"Mel's Tire Service and its employees have been determined by the Sacramento Superior Court to have engaged in unlawful and unlicensed automotive repair services and emission control tests....Mel's Tire Service is prohibited by order of the Court from further engaging in unlawful conduct." (Exhibit 3.)

On cross-examination, Jarratt acknowledged that the Bureau has received only three or four customer complaints against Mel's Tire Service in the past 18 months, and he was unable to estimate the percentage of minor automotive services that Carter conducted that are permitted without registration. On redirect examination, asked why the Bureau was pursuing Carter so vigorously, Jarratt stated: "Because we've exhausted all of our administrative remedies and he continues to operate, so our only remedies lie with trying to get injunctions

and restraining orders and that sort of thing through the court system.”

(Transcript, p. 139.)

### **5. Pacific Bell's Testimony**

Pacific Bell's witness, Eva Holding, director of regulatory and customer relations, testified that her department received the order to disconnect two telephone lines at Mel's Tire Service on July 1, 1999, and that it disconnected the lines on that day. She admitted that Pacific failed to notify the subscriber immediately in writing of the disconnection, as required by Rule 31. She added, however, that Carter's attorney called Pacific's legal division the next day, that the attorney was reading from a copy of Rule 31 in his possession, and that Pacific's representative explained the Rule 31 complaint procedure.

Rule 31 also requires restoration of service after 15 days unless the enforcement agency has notified the utility in writing of its objection to restoration. Holding testified that the State Department of Justice on July 16, 1999, notified Pacific in writing of its opposition to restoring service.

### **6. Subscriber's Position**

Through counsel, complainant argues that he has been in business for 29 years and has, at various times, been licensed to conduct both automotive repairs and smog checks. He argues that much of the work he does – tire service and minor repairs – can be done without licensing, but the loss of his telephone lines inhibits those legitimate business activities. Through counsel, Carter argues that the four large signs posted at Mel's Tire Service by the Bureau serve to put the public on notice of prohibited activities, and the termination of phone service is therefore unnecessary. According to complainant, the state must look to less restrictive means of limiting commercial free speech while not prohibiting legitimate commercial free speech, citing Central Hudson Gas & Elec. Corp. v.

Public Serv. Comm'n of New York (1980) 447 U.S. 557 (state ban on utility advertising violates commercial free speech.)

Carter also argues, through counsel, that the failure of Pacific Bell to notify him immediately of the telephone disconnection and the failure of the Department of Justice to send him a copy of the letter objecting to reconnection of the phones violated specific provisions of Rule 31 and constituted a denial of due process.

## **7. Commission Analysis**

For a business relying on telephones, uninterrupted telephone service is an interest in "property" constitutionally entitled to protection against "taking" without due process of law. (Goldin, supra at 662; see also Board of Regents v. Roth (1972) 408 U.S. 564.) Before such a taking can occur, in the context of the case now before us, there must be probable cause to believe that the telephone facilities are being or are about to be used to commit illegal acts, and it must be shown that the character of the acts is such that, absent summary action, significant dangers to public health, safety, and welfare will result. (Goldin, supra at 663-64.)

Such a showing of probable cause must be made before a magistrate – in this case, the Superior Court for the County of Sacramento – and is reasonably comparable to the showing that must be made in order to obtain a search warrant. (Sokol v. Pub. Util. Comm. (1966) 65 Cal.2d 247, 256.) Based on the affidavit, declarations and exhibits that have been entered into evidence here (Exhibit 1), Superior Court Judge Gray concluded that there was probable cause to believe that Carter's business telephones were being used to violate or assist in violating the law, and that, absent summary action, such violation could cause significant danger to public health, safety, and welfare. (Exhibit 13.)



The Commission is empowered to rule on the adequacy of the showing of probable cause, and to determine whether interim relief is warranted pending the resolution of the civil court charges brought against the subscriber.<sup>1</sup> As the California Supreme Court has stated:

“In a civil administrative proceeding of this nature, where the liberty of the subscriber is not at stake, it is sufficient for purposes of the interim protection involved that the Commission limit itself to the face of the affidavits and an assessment of their adequacy to support the magistrate’s finding....Even in cases when it appears to the Commission that the finding is adequately supported by the affidavits presented to the magistrate, it may wish to consider the strength and character of the showing made as a factor to be weighed, along with pressing need or imminent economic damage, in its determination whether or not interim relief should be afforded to the subscriber.” (Goldin, supra at 668; footnotes omitted.)

The evidence presented here recounts a long and tangled series of disputes and confrontations between Carter and the Bureau of Automotive Repair stretching back to 1993. It is undisputed that Mel’s Tire Service has operated for the past two years without registration as an auto repair facility and without a license to conduct smog checks. The evidence shows that the business has continued to hold itself out, through advertising and prominent signs, as a facility doing major auto repairs and smog checks. The testimony of Bureau agents and the statements of customers of Mel’s Tire Service support a

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<sup>1</sup> The Superior Court has issued a preliminary injunction against Carter, and proceedings for a permanent injunction are pending. Additionally, Carter faces charges of contempt of court related to alleged violations of the temporary injunction. (Exhibit 1.) Holding one’s self out to be a registered automotive repair dealer is a misdemeanor punishable by a fine of up to \$1,000 and six months’ imprisonment. (Bus. & Prof. Code § 9889.20.)

conclusion that a full range of auto services and repairs has been conducted during the past two years despite the lack of registration.

We need not pause to consider whether operating without required licenses constitutes a significant danger to the public health, safety or welfare, as required by Rule 31. The Legislature has made that determination already, holding in Bus. & Prof. Code § 145 that:

“(a) Unlicensed activity in the professions and vocations regulated by the Department of Consumer Affairs is a threat to the health, welfare, and safety of the people of the State of California.”

“(c) The criminal sanction for unlicensed activity should be swift, effective, appropriate, and create a strong incentive to obtain a license.”

By the same token, the argument by complainant that disconnection of his business telephones violates his First Amendment right to commercial free speech is an argument that should be made to the civil courts in which these matters are pending. This Commission is prohibited from refusing to give effect to a state law on the basis that the law is unconstitutional, unless an appellate court has made a determination that the particular law is unconstitutional. (Cal. Const., Art. III, Section 3.5.)

More troublesome is complainant's showing that Pacific failed to immediately notify complainant in writing of the disconnection, as required by Rule 31. However, the evidence also shows that complainant and his attorney the day after the disconnection were fully apprised of the action taken and the Rule 31 remedies available to them. Based on this, we find that Pacific's error does not rise to a level requiring us to order the telephone service restored.

In summary, based on the testimony, the affidavits and the corroborating documents, we find that the totality of the evidence would lead a reasonably

prudent person to conclude that violations of California's laws related to automotive repair and smog check facilities have been shown, and that such violations posed a significant danger to public health, safety, or welfare. We further find that good cause has been shown to deny any interim restoration of telephone service pending the disposition of the actions that have been brought against Carter in the Superior Court.

Accordingly, the request for reinstatement of the disconnected telephone service is denied, and this complaint is dismissed.

The scope of this proceeding is set forth in Tariff Rule 31. Our order today confirms that ALJ Walker is the presiding officer.

#### **Findings of Fact**

1. Melvin Leroy Carter, doing business as Mel's Tire Service, operates a tire and automotive service in Orangevale, California.
2. Two business telephones at Mel's Tire Service were disconnected by Pacific Bell on July 1, 1999, pursuant to its Tariff Rule 31.
3. Pursuant to Rule 31, Carter on July 28, 1999, filed a complaint seeking restoration of the telephone numbers disconnected by Pacific Bell.
4. Carter has operated for the past two years without registration as an auto repair facility and without a license to conduct smog checks.
5. At hearing, the California Department of Consumer Affairs, Bureau of Automotive Repair, presented evidence showing that Carter during the past two years has held himself out to conduct, and has conducted, major auto repairs and emission control testing.
6. The California Legislature has determined that unlicensed activity in professions regulated by the Department of Consumer Affairs is a threat to the health, safety, and welfare of the people of California.

### **Conclusions of Law**

1. Goldin, supra, and Rule 31 require the Commission to examine the face of the affidavit supporting the finding of probable cause on which the disconnection of telephone service is based in order to determine the adequacy of the affidavit and weigh any request for relief.

2. Rule 31 places the burden on the law enforcement agency responsible for a disconnection to (1) show that the telephone service was used directly or indirectly to violate or assist in violating the law; (2) show that the character of the violation was such that significant dangers to public health, safety, or welfare would result if immediate and summary action had not been taken; and (3) show that the service should not be restored.

3. Pacific Bell executed the disconnection of July 1, 1999, in compliance with Rule 31, except that it did not immediately notify complainant in writing of the actions taken.

4. Unlicensed activity in automotive repairs and emissions testing that are regulated by the Department of Consumer Affairs pose a significant danger to the public health, safety, and welfare.

5. The affidavit set forth in Exhibit 1 supporting the Superior Court's finding of probable cause is adequate to support the disconnection of July 1, 1999.

6. The request for immediate restoration of the two telephone lines disconnected on July 1, 1999, should be denied, and the complaint should be dismissed.

7. Because the complaint seeks immediate action by the Commission, this order should be made effective immediately.

8. The scope of this proceeding is set forth in Tariff Rule 31; ALJ Walker is designated the presiding officer.

**O R D E R**

**IT IS ORDERED** that the complaint of Melvin Leroy Carter doing business as Mel's Tire Service seeking restoration of two telephone lines (916-988-1768 and 916-988-2251), disconnected pursuant to Pacific Bell Tariff Rule No. 31 on July 1, 1999, is denied.

This order is effective today.

Dated November 19, 1999, at San Francisco, California.