

PUBLIC UTILITIES COMMISSION

505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3298



November 22, 1999

TO: PARTIES OF RECORD IN CASE 99-04-016
DECISION 99-11-060, Mailed 11/22/99

On October 20, 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, appearing to read "Lynn T. Carew".

Lynn T. Carew, Chief
Administrative Law Judge

LTC:epg

Attachment

Decision 99-11-060

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Paul Richard Klein dba Stereo's R Us,

Complainant,

vs.

GTE California, Inc.,

Defendant.

Case 99-04-016
(Filed April 12, 1999)

Joe A. Dickerson, Attorney at Law, for
Stereo's R Us, complainant.

Sandra Newmark, for GTE California, Inc.,
defendant.

Rick Diamond and Ernest Martinez, for
Dept. of Consumer Affairs, Bureau of
Electronic & Appliance Repair,
intervenors.

O P I N I O N

Summary

This decision denies the complaint of Paul Klein, doing business as Stereo's R Us (Complainant or Stereo's R Us), against GTE California Incorporated (GTE) seeking restoration of business telephone numbers as an interim relief and service reconnection.

I. Background

Complainant seeks restoration of business telephone lines serving his commercial establishment. The basis for the disconnection is a magistrate's finding of probable cause that Complainant is using telephone service as an instrumentality to violate or assist in the violation of the criminal laws, within the meaning of GTE Tariff Rule 31, approved by the commission.

On April 12, 1999, Complainant filed this complaint against GTE seeking the following:

- a hearing before the Commission pursuant to Paragraph 2 of Rule 31; and
- interim restoral of service to the retail business pending the hearing and decision of the Commission.

The Instructions to Answer (Instructions) was mailed on April 19, 1999. The Instructions categorized this proceeding as adjudicatory and determined that an evidentiary hearing would be necessary. Further, the Instructions noted that this matter was assigned to Commissioner Josiah L. Neeper and Administrative Law Judge (ALJ) Joseph DeUlloa.

On March 18, 1999, the Honorable Ben Kayashima, Judge of the Superior Court, West Valley Division, County of San Bernardino, issued a magistrate's finding that probable cause exists to believe that:

"... Paul Richard Klein, doing business as Stereo's R Us, ... has, despite a similar order and finding of this court dated December 30, 1998, used and continues to use telephone service (909) 318-6160 (Montclair store) and (909) 888-3456 (San Bernardino store) as an instrumentality, directly or indirectly, to violate or assist in the violation of criminal laws within the meaning of California Public Utilities Commission Tariff Rule 31, as amended by Public Utilities Commission decision (D.) 91188, ... and that the character of such continued acts or activities is such that, absent immediate and summary action disconnecting such phone service at telephone numbers

(909) 318-6160 and (909) 888-3456, or any other telephone numbers used or obtained for use by Paul Richard Klein, or any other individual(s) doing business as Stereo's R Us, at any and all of its business locations, significant danger to the public health, safety or welfare will result."

Further, the finding of probable cause was directed to any communications utility operating under the jurisdiction of the Public Utilities Commission for the purpose of refusing service to the Complainant and for the purpose of disconnecting service to (909) 318-6160 and (909) 888-3456.

Shortly after March 18, 1999, GTE disconnected the above telephone numbers.

Under GTE's Rule 31, an evidentiary hearing was held before the assigned ALJ on April 26, 1999, to determine whether GTE should restore telephone service to (909) 318-6160 and (909) 888-3456. Complainant served an opening brief on May 10, 1999. On May 17, 1999, the Department of Consumer Affairs, Bureau of Electronic and Appliance Repair (Bureau) served its reply brief. The matter was submitted upon the filing of the Bureau's reply brief.

This proceeding follows a similar complaint filed by complainant in February 1999. In complaint (C.) 99-02-020, the complainant sought restoral of service to phone lines serving his store at 5200 Holt Boulevard, Montclair. We also take official notice of D.99-07-039 issued on July 22, 1999. In D.99-07-039, the Commission found that complainant engaged in the business of a service dealer without proper registration. In D.99-07-039, the Commission denied complainant's request to restore service to lines serving complainant's Montclair store location.

Subsequent to the disconnection of phone service to complainant's Montclair location (which was the subject of C.99-02-020) and prior to the

issuance of D.99-07-039, complainant obtained new phone service that is the subject of this proceeding.

D.91188, dated January 8, 1980, sets out the procedure whereby telephone service provided by a telephone utility is to be disconnected when the service is being used for illegal purposes. That decision requires disconnection of existing service upon receipt from any authorized official of a law enforcement agency of a document, signed by a magistrate, finding that probable cause exists to believe that the service is or will be used to violate or assist in the violation of the law. Included in the magistrate's writing must be a finding that there is probable cause to believe not only that the subject telephone facilities have been or are to be used in the commission or facilitation of illegal acts, but that the character of such acts is such that, absent immediate and summary action, significant dangers to the public health, safety, or welfare will result. (Id., pp. 98-99.)

The Bureau, as the concerned law enforcement agency under Schedule Cal. P.U.C. No. D&R 3rd Rev. Sheet 61 has:

"4.(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 that the character of such acts is such that, absent immediate and summary action in the premises, significant dangers to the public health, safety, or welfare will result, and

"(2) the burden of persuading the Commission that the service should be refused or not be restored."

A. Testimony of the Bureau

The Bureau participated in the hearings, providing documentary evidence and the testimony of Harold Chadwick (Chadwick) and Robert Hilton

(Hilton). In his written affidavit and verbal testimony, Chadwick explained the circumstances leading up to the request for a court order to disconnect services.

On November 6, 1995, in the course of his duties as an investigator for the Bureau, Chadwick and a fellow investigator Gary Jewell noticed advertising on the window of Complainant's business that led them to believe that Complainant was engaging in business as a "Service Dealer."¹ Further, Chadwick's affidavit states that Complainant was given a violation notice, a cease and desist order, and a service dealer license application.

The cease and desist ordered Complainant to:

"immediately cease and desist accepting any and all repairs or doing service or installation of any kind until your are properly registered with the Bureau of Electronic and Appliance Repair." (Attachment to Exhibit 3.)

Subsequently, Complainant applied for registration as a service dealer. On March 25, 1998, the Department of Consumer Affairs issued an "Order of the Director" effective April 24, 1998, which denied the "application for registration received from applicant Paul Richard Klein, doing business as STEREO'S R US, ... " (Attachment to Exhibit 3.) The order was signed by Derry Knight, Deputy Director of Consumer Affairs. The First Amended Statement of Issues (referred

¹ Chapter 20 of the Business and Professions (B&P) Code is cited as the Electronic and Appliance Repair Dealer Registration Law. B&P Code § 9801(f) states that: "Service dealer' means a person who, for compensation, engages in, or holds himself or herself out to the public as offering services in, the business of: ...(2) installing, repairing, servicing, or maintaining equipment or burglar alarm system for use in private motor vehicles." B&P Code § 9801(g) defines "equipment" to include an "electronic set." B&P Code § 9801(h) states that: "Electronic set' includes but is not limited to any television, radio, audio or video recorder or playback equipment, video camera..."

to in the Order of March 25, 1998) listed, among other things, Complainant's prior criminal convictions and a consumer complaint filed by Richard Thorpe.

The affidavit signed by Chadwick that formed the basis of the magistrate's finding of probable cause recited Complainant's prior criminal convictions and the Thorpe consumer complaint contained in the First Amended Statement of Issues.

In addition, on March 4, 1999, Chadwick had been informed by another field representative from the Bureau, Mike Dwyer, that he had on that day conducted an undercover investigation at Stereo's R Us and determined that complainant was still engaged in the unlawful activities of a service dealer, including installation of auto alarms. Dwyer informed Chadwick that Stereo's R Us had installed an alarm on his vehicle and had given him an invoice with a pre-printed telephone number of (909) 318-6160, which had apparently replaced the earlier number that had been scratched out and disconnected pursuant to the prior Tariff Rule 31 disconnection.

Chadwick's affidavit also states that on March 11, 1999, he drove to San Bernardino to investigate Stereo's R Us and observed a sign advertising alarms installed for \$99. Further, Chadwick alleges that a store manager of Stereo's R Us told him that Stereo's R Us installed alarms at that location. Additionally, Chadwick's affidavit asserts that immediately after leaving the San Bernardino store of Stereo's R Us, he drove to the Montclair location of Stereo's R Us where he took photographs of the front window signs and an auto bay at the side of the building. At hearing, Chadwick sponsored several photographic exhibits of the exterior of complainant's two stores. Chadwick testified that these photos showed that Complainant was installing equipment in violation of the Electronic and Appliance Repair Dealer Registration Law.

The declaration of Hilton states that on April 22, 1999, Chadwick requested Hilton's assistance in an undercover investigation of Stereo's R Us. Hilton is not an employee of the Bureau, but rather is an employee of Pizza Hut. Hilton's declaration (Exhibit 10) states he used the assumed name of Robert Downs in an undercover capacity to determine if Stereo's R Us was installing auto alarm systems and if a sign placed on the front door, by the Bureau, was still clearly visible to the public.

The sign referred to in Hilton's declaration is a notice that states that:

"This establishment is not registered, authorized, or permitted to perform, or accept for compensation, for the purpose of performance by someone else, the installation, servicing or repair of electronic equipment, including car stereos, compact disk (CD) players, car security or burglar alarm systems or devices, and any other equipment or electronic sets, as those terms are defined by the Electronic and Appliance Repair Dealer Registration Law."

The posting of above notice at all business locations for Stereo's R Us was ordered by an injunction issued by the San Bernardino Superior Court on April 13, 1999. (Exhibit 9.) Hilton's affidavit asserts that advertisement stickers on the door obscured the notice. Further, Hilton asserts that a store employee offered to install an alarm.

B. Testimony of Complainant

Klein offered limited testimony in this proceeding. Klein testified that he found the sign attached to the front door by the Bureau on the ground one morning while opening up his store, and that he made efforts to place the sign where the Bureau had left it. However, after the sign fell down again, Klein testified that he placed the sign against a bar used to open the door.

C. Testimony of GTE

GTE offered no evidence or witness.

II. Discussion

It has been determined that telephone service is an interest in property entitled to protection against taking without due process. To disconnect, there must be probable cause to believe that facilities are being or are to be used to commit illegal acts, and that the character of the acts is such that, absent summary action, significant dangers to public health, safety, and welfare will result. (*Goldin v. Pub. Util. Comm.*, 153 Cal. Rptr. 802, 23 C.3d 638, 663 (1979).)

Prior to termination of service, the law enforcement agency must show an impartial tribunal that there is probable cause to act, in a manner reasonably comparable to a proceeding before a magistrate to obtain a search warrant. (*Sokol v. Pub. Util. Comm.*, 53 Cal. Rptr. 673, 679, 65 Cal. 2d 247, 256 (1966).)

Probable cause for issuance of a search warrant is approximately the same as that justifying arrest without warrant; reasonable and probable cause exists if a person of ordinary care and prudence would be led to conscientiously entertain honest and strong suspicion that the accused is guilty or that contraband is present. (*People v. Scott*, 66 Cal. Rptr. 257, 259 Cal. App. 2d 268 (1968).)

The Commission's obligation is to review the showing made before the magistrate in order to determine whether telephone service should be restored. The Commission might find sufficient basis for denying restoration based on the record before the magistrate. "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." (*Goldin v. Pub. Util. Comm.*, 23 C.3d 663, 668.)

The United States Supreme Court has adopted the "totality of the circumstances" analysis to determine the sufficiency of an affidavit in support of a search warrant. According to the court:

"The task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. And the duty of the reviewing court is simply to ensure that the magistrate had a 'substantial basis for...conclud(ing)' that probable cause existed." (*Illinois v. Gates*, 462 U.S. 213, 238 - 239 (1983).)

In California, the totality of the circumstances test is used to assess whether a search warrant affidavit based on hearsay established probable cause (*People v. Rochen*, 250 Cal. Rptr. 73, 203 CA 3d 684 (1988)); whether hearsay or double hearsay information of criminal activity will support issuance of a search warrant depends not upon terminology or ritualistic formula, but upon the quality and persuasiveness of the information itself. (*See People v. Superior Court of Santa Clara City*, 154 Cal. Rptr. 157, 91 Cal. App. 3d 463 (1979).)

This Commission is not a forum to relitigate a magistrate's finding of probable cause; the Complainant must avail himself of procedures before the criminal courts to address that issue. (*See D.87642 in the complaint of Marvin Goldin (Summerwind) v. Gen. Tel. Co. of Cal.* 82 CPUC 332 at 339 (1977).)

This proceeding is an administrative proceeding pursuant to a complaint seeking restoration of telephone service. This is a civil proceeding; it is not a quasi-criminal matter. There is no requirement of proof beyond a reasonable doubt that the subscriber of the telephone service committed a violation of any law. For discontinuance of service, Tariff Rule 31 requires a showing by the law enforcement agency that probable cause exists to find 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 directly or indirectly to assist in the violation of the law.

The Bureau under Rule 31 has the burden of convincing the Commission of the threatened prohibited use of the telephone. The extent of certainty is a civil degree of certainty, not a criminal law requirement of certainty beyond a reasonable doubt.

In this case, the Bureau informed the magistrate that it determined that Complainant as of March 18, 1999, had continued to engage in business as a Service Dealer without a state registration in violation of Section 9840 of the Business and Professions Code. Further, the Bureau believes the conduct to be illegal and the character of the acts such that, absent immediate and summary action on the premises, specifically disconnection of the telephones, significant dangers to the public health, safety and welfare will result. Further, the Bureau contended that usage of the telephones assists the individual directly in the commission of these crimes. Judge Kayashima issued a magistrate order finding that there was probable cause to believe that the Complainant's telephone facilities were used to commit or facilitate illegal acts, necessitating immediate and summary action to disconnect respondent's telephone facilities to protect the public health, safety and welfare.

In deciding whether to order restoration of service, we find it reasonable to analyze the case in the light of the totality of the circumstances to answer whether the situation in its totality persuades us to restore service.

A. Illegal Act

Rule 31 requires the magistrate to make a finding that there is probable cause to believe that the subject telephone facilities have been or are being used in the commission or facilitation of illegal acts.

In this instance, the illegal act complained of is a violation of the B&P Code. The Bureau alleges that complainant is acting as a service dealer without proper registration. A service dealer is defined in the B&P Code as including a person who, for compensation, engages in, or holds himself or herself out to the public as offering services in the business of installing, repairing, servicing, or maintaining equipment for use in private motor vehicles. (See footnote 1.)

At hearing, and in its brief, Complainant disputes the Bureau's contention that Complainant is engaging in the business of a service dealer. Complainant's opening brief states that the Bureau has:

"... shown only that it believes Complainant is conducting installation of auto radios and alarm systems without a proper registration ... The Bureau put on the testimony of two witnesses, Harold Chadwick, who observed and photographed the two businesses from across the street, and could not testify to observing any installation, or any telephone use aiding in such installation." (Complainant's opening brief at p. 4.)

Complainant misunderstands the B&P code. Under B&P Code section 9801(f), a Service Dealer is defined as a person who holds himself or herself out to the public as offering services defined by statute. In this proceeding, the Bureau relies on pictures depicting the exterior of complainant's premises, and the testimony of Chadwick and Hilton. The pictures depicting the exterior of complainant's premises offer little circumstantial proof that complainant is offering to install equipment in violation of the Electronic and Appliance Repair Dealer Registration Law. However, the activities Chadwick observed and his conversations with employees of complainant offer direct evidence that complainant held himself out to the public as installing equipment for use in private motor vehicles. Similarly, Hilton's testimony provides direct evidence

that complainant offered to install equipment in violation of the Electronic and Appliance Repair Dealer Registration Law.

III. Conclusion

Our conclusion based, on the evidence presented in this case, is that the law prohibits the use made of the telephone service, and that the service was used as an instrumentality, directly or indirectly, to violate or assist in the violation of the law. We find that law enforcement has satisfactorily met its burden of proof to justify maintaining the disconnection of telephone services of Complainant to (909) 318- 6160 and (909) 888-3456.

Findings of Fact

1. Complainant holds himself out to the public as offering services in the business of installing, repairing, servicing, or maintaining equipment for use in private motor vehicles.
2. Complainant is engaging in the business of a service dealer without proper registration.
3. Complainant is using telephone facilities [(909) 318- 6160 and (909) 888-3456] in the commission or facilitation of illegal acts.

Conclusions of Law

1. The Legislature enacted the Electronic Repair Dealer Registration Law in order to protect the public from fraudulent, incompetent, and elusive service dealers.
2. The purpose of the Electronic Repair Dealer Registration Law is to protect the public health, safety, and welfare.
3. A violation of B&P Code § 9840 poses a threat to the public health, safety, and welfare.

4. Because of the threat to the public health, safety, and welfare, this order should be made effective immediately.

O R D E R

IT IS ORDERED that:

1. The complaint of Paul Klein, doing business as Stereo's R Us, for interim relief and reconnection of telephone service to (909) 318- 6160 and (909) 888-3456 is denied.

2. Case 99-04-016 is closed.

This order is effective today.

Dated November 22, 1999, at San Francisco, California.