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Ex Parte Deprivation of Telephone Service to Alleged Gamblers—Police Power vs. Constitution

*by Jules L. Kaufman**

ON APRIL 10, 1951 THE Public Utilities Commission of Ohio through its document number 22,305 issued to the telephone and telegraph companies doing business in Ohio an "Order to Show Cause" why certain rules and regulations should not be adopted by it to govern the said companies in their future operations. One of the so-called rules and regulations included in the Order was as follows:

> "In the event of objection being made by any governmental authority to the continuance of telephone or telegraph service, the company *shall forthwith* discontinue said service and notify this commission thereof." (emphasis supplied.)

At the time of the issuance of this Order the telephone companies were operating under the following General Exchange Tariff: [1]

> "In the event of abandonment of the service, the nonpayment of any sums due, the use of foul or profane language, the impersonation of another with fraudulent intent, listening in on party line conversations, excessive use of party line, use of the service in such a manner as to interfere with the service of other telephone users, use of the service for any purpose other than as a means of communication, or any other violation of the regulations of the Telephone Company, *or upon objection to the continuance of service made by or on behalf of any governmental authority, the Telephone Company may either temporarily deny service or terminate the service.* Subsequent to the completion of an order to discontinue service, this will be reestablished only upon the basis of a new service application." (emphasis supplied.)

On December 21, 1951, subsequent to hearings on the said "Order to Show Cause," the Public Utilities Commission promul-

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[1] Ohio Public Utility Commission Order No. 3, General Exchange Tariff, Section 2, Original Sheet No. 9, Par. B-9.

gated the following Order based upon the findings set forth, among others:[2]

> ". . . .
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> "(3) It also appearing, from the evidence adduced herein, that telephone service and telegraph service have been and are being used with frequency in the furtherance of (a) bookmaking, (b) illegal dissemination of racing information, and (c) other unlawful organized gambling activities, all of which are hereinafter referred to as 'gambling'; and
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> "(4) It further appearing, from the evidence adduced herein, that said commission is charged by law to require all such public utilities to furnish their products and render all such services exacted by the commission, or by law, and to promulgate and enforce all orders relating to protection and welfare of the public with respect to such services;
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> "It is, therefore, *ORDERED,* That the following rules and regulations be, and hereby the same are, adopted, prescribed for and made applicable to all telegraph companies and all Class A, B and C telephone companies doing business within the State of Ohio and subject to the jurisdiction of this Commission:
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> ". . . .
>
> "IV. Upon receipt of written notice, from any law enforcement agency, that such agency *has reason to believe* such utility facilities and service are being used in furtherance of gambling, such company *shall forthwith* discontinue said service." (emphasis supplied.)

The question immediately arises as to the propriety of such an order, in view of the constitutional principles reserved by the Fifth and Fourteenth Amendments to the Federal Constitution upon which the rights of the individual purport to be based.[3] It is apparent that if the term, "shall forthwith," in the Order were given its usual meaning ("forthwith—as soon as, by reasonable exertion, confined to the object, a thing may be done."),[4] the telephone of a subscriber which, in the opinion of any law en-

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[2] Ohio Public Utility Commission Order No. 22,305.

[3] U. S. CONST. AMENDMENT V:

> "No person shall . . . be deprived of . . . property, without due process of law."

U. S. CONST. AMENDMENT XIV, § 1:

> "No state shall . . . deprive any person of . . . property, without due process of law."

[4] Black's Law Dictionary.

forcement agency, is being used "in furtherance of gambling" summarily must be removed. This, it would seem, would occur without any opportunity being afforded to the subscriber to prevent it, either at a hearing before a commission, by producing evidence rebutting that relied upon by the complaining law enforcement agency to substantiate its opinion, or by obtaining an injunction restraining such removal until the facts may be examined by a court of competent jurisdiction. Will such summary action as provided for in this Order constitute deprivation of property without due process of law, in violation of the Fifth and Fourteenth Amendments? The question has been raised as to the applicability of these amendments, since they are thought to apply only to federal and state governments, and not to private organizations, such as telephone companies. Suffice it to say that for the purposes of this article, it appears that the exercise by the state of control of the companies, through the Public Utilities Commission, brings the problem within the purview of the Fourteenth Amendment.

Whether or not the Constitution will be violated, clearly such ex parte procedure is foreign to the basic principles of justice as we know them. Justice Struble in *Giordullo v. The Cincinnati and Southern Bell Telephone Company*[5] expresses this thought:

> "The telephone company required the plaintiff to get the o.k. of the chief of police before it would give the plaintiff service and withdrew the same upon the request of the chief of police, all without any hearing as to the gambling charges—that is police government pure and simple."

At the outset it is to be said to the credit of the telephone companies that in almost every recent instance where such a situation has arisen, the company involved has taken it upon *itself* to give notice, in advance of discontinuance, to its subscriber, thus enabling him to take such steps as he feels necessary to prevent the "ex parte" discontinuance of his telephone service. As a result, it will be appreciated that from a practical viewpoint and apart from the regulations themselves, discontinuance of telephone service at this time is rarely ever so abrupt as to deny the subscriber the opportunity to object in advance. But this article is addressed, not to the reasonableness of action of

[5] 34 Ohio Op. 251, 252, 71 N. E. 2d 858, 859 (1946).

the telephone companies in administering this type of regulation, but rather to the provisions of the regulation itself.

At this point it may be well to emphasize the distinctions among the proposed regulation in the "Order to Show Cause," the final Order No. 22,305 of the Ohio Public Utilities Commission and the General Exchange Tariff, No. 3, with respect to the portions which have been quoted above. It is notable that the Tariff places on the telephone company the burden of determining what action to take respecting discontinuance of telephone service (see emphasized portion and particularly the word "may," giving the company the option of action), while both the proposed regulation and P. U. C. O. No. 22,305 make mandatory upon the company the termination of service, subsequent to receipt by the company of proper objection by a proper authority. The distinction between the proposed regulation and the Order is that, under the former, the objecting authority could have been "any governmental authority" and the reason for the objection, being unlimited, would not have been required to be stated, in the notice; under the latter the authority is limited to "any law enforcement agency" and the objection to the service must be specifically that it is being used "in furtherance of gambling."

The intended scope of this article is the examination, from a constitutional viewpoint, of orders, rules, regulations, statutes, and ordinances similar to the Order or proposed regulation above quoted. It is not intended to embody an exhaustive treatment of the many correlative problems and questions which arise in the cases dealing with the deprivation of telephone service of a subscriber, or refusal by a telephone company to serve an applicant. But to insure a more complete understanding of the specific problem here under examination and to provide a logical frame of reference some background and certain surrounding circumstances should be kept constantly in mind.

The "Right" to Telephone Service

The obvious point of commencement is the examination of the very nature of telephone service. In return for the favor of monopolistic operation which is conferred by law upon a telephone company, a public utility, it is charged with the duty of rendering service without discrimination to members of the

public, by and for which the laws are created.[6] It is universally conceded, however, that this duty does not preclude the right of a telephone company ab initio to refuse to furnish service to, or to contract with, persons whom it has some reason to believe will use the service for, or in furtherance of, an illegal purpose.[7] In the case of *Plotnick v. The Pennsylvania Bell Telephone Company*,[8] before the Pennsylvania Public Utilities Commission, the generally accepted rule was stated in the opinion of the Commission.

> "Complainant's right to telephone service is not an inherent right. His right to receive service is dependent upon the fact of whether or not the use he desires to make of the service is consistent with the laws of this commonwealth."

A slightly more detailed statement with respect to justification for refusal to serve is that of the court in *Nevans v. Southern California Telephone and Telegraph Company*:[9]

> "So far as the duty of a public service corporation to furnish service is concerned, it is not absolute. I think we all know that. It is subject to reasonable limitations generally, if necessary, to protect public welfare and public order, and a public service corporation is not bound to furnish service to anyone who has—who it has reason to believe will use the service for illegal purposes."

It has been stated that the duty of the telephone company to serve—and the corresponding right of the subscriber to receive service—arises primarily out of the contract for service.[10] The telephone company, having the initial right to determine whether or not it will contract, may make a summary refusal of an application; and this determination, perhaps, might be made upon

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[6] Southwestern Telegraph and Telephone Co. v. Danaher, 238 U. S. 482 (1914); Western Union Telegraph Co. v. Call Publishing Co., 181 U. S. 92 (1900).

[7] Howard Sports Daily v. Weller, 179 Md. 355, 18 A. 2d 210 (1941); Rodman v. New England Telephone and Telegraph Co., 61 P. U. R. (N. S.) 242 (Mass. Dept. Public Utilities, 1945); Carrozza v. New England Telephone and Telegraph Co., 61 P. U. R. (N. S.) 249 (Mass. Dept. Public Utilities, 1945); McCabe v. New England Telephone and Telegraph Co., 78 P. U. R. (N. S.) 127 (Mass. Dept. Public Utilities, 1949); Partnoy v. Southwestern Bell Telephone Co., 65 P. U. R. (N. S.) 120 (Mo. Public Utilities Commission, 1946); Re Communications Utilities, Cal. P. U. C., 1948 Dec. #4415.

[8] 35 P. U. R. (N. S.) 87 (Penn. P. U. C. 1940).

[9] Nevans v. Southern California Telephone and Telegraph Co., Case No. 447,702, Dist. Ct., Cal.

[10] Pollock v. New England Telephone and Telegraph Co., 289 Mass. 255, 258; 194 N. E. 133, 135 (1935).

arbitrary grounds. However, if such is the case, the applicant may then complain to the Commission which regulates public utilities (usually called Public Utilities Commissions) and from there appeal to the courts. Through the accepted procedure, an applicant has full opportunity to procure the service, although he has no right to it until he establishes that the prospective use will be proper. In other words, until the condition precedent to the contract has been met, the applicant for service has been deprived of nothing to which he has a right.

As will be seen subsequently, however, where the condition has once been met, that is, where the company has once been satisfied that the prospective use of its service by the applicant will be proper, and the service is being furnished, there is some authority upon which to base a different conclusion regarding a summary discontinuance of this service by the company. In the following pages these situations—the refusal to serve an applicant, and the discontinuance of service to a subscriber—are therefore considered as two separate and distinct problems.

Is the Furnishing of Service Illegal

With the understanding that a telephone company may legally refuse to contract, so long as such refusal is not based upon arbitrary grounds, and similarly that a proper discontinuance of service must be based upon valid grounds (i.e. from the standpoint of this article, relating to unlawful use of the service), we pass to dictum in the case of *People v. Brophy.*[11] While the opinion and holding do not concern themselves directly with the question under our examination, the following dictum does provide an indication of the complexity of the general problem, in pointing up the important, if tenuous, distinction between the illegal use of telephone service and the illegal use of information procured by means of telephone service:

> "The telephone company has no more right to refuse its facilities to persons because of a belief that such persons will use such service to transmit information that may enable recipients thereof to violate the law than a railroad company would have to refuse to carry persons because those in charge believe that the purpose of the person so transported, in going to a certain point, was to commit an offense. . . . Fur-

[11] 49 Cal. App. 2d 15, 120 P. 2d 946 (1942).

thermore, the furnishing or receiving of racing or sporting information is not gambling and is not a crime."

Generally at common law, as is correctly stated in the last quoted sentence above, the mere furnishing of telephone service is not in any way illegal.[12] However, in *Hamilton v. Western Union Telegraph Company,* the United States District Court (Ohio) held illegal the furnishing of such service, per se, when accompanied by the knowledge that it would be used to further gambling.[13] As long ago as 1905, this result was intimated.[14] On the other hand it has been held that at common law the furnishing of machines which are afterward used for gambling purposes does not necessarily constitute the furnisher an aider or abettor:

> "The furnishing by the defendant of a machine that happens afterwards, without his privity to be used for gambling, does not constitute either an aiding, abetting or assisting in the keeping of a gambling resort." [15]

But in 1938, even in the absence of statutes, the Pennsylvania Public Utilities Commission held that it was not only the right, but the affirmative duty of a telephone company to refuse to service any place which has any telephone or telegraph connections with a race track circuit, or its subscribers, using such facilities in furtherance of illegal activities.[16]

As might be expected, the courts experienced obvious difficulty in trying to draw the thin line separating legal and illegal enterprise in the distribution of information which can be considered merely "news," such as the racing information carried in the sporting section of newspapers, on radios and television screens, and the same information, similarly supplied, but per-

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[12] Hagerty v. Coleman, 133 Fla. 363, 182 So. 776 (1938); State *ex rel.* Dooley v. Coleman, 126 Fla. 203, 170 So. 722 (1936); Commonwealth v. Western Union Telegraph Co., 112 Ky. 355, 67 S. W. 59 (1901); People *ex rel.* Hammond v. Breen, 44 Misc. 375, 89 N. Y. S. 998 (1904); Pennsylvania Publications v. Pennsylvania P. U. C., 349 Pa. 184, 36 A. 2d 777 (1944); Kreeling v. Superior Court, 18 Cal. 2d 884, 118 P. 2d 470 (1941); See also Tollin v. State, 78 A. 2d 810 (Ct. Gen'l Sessions, Del. 1951).

[13] Hamilton v. Western Union Telegraph Co., 34 F. Supp. 928 (D. C. Ohio, 1940); see also: Cullen v. Ohio Bell Telephone Co., 36 P. U. R. (N. S.) 152 (Ohio Com. Pleas, 1940).

[14] Cullen v. New York Telephone Co., 94 N. Y. Supp. 290, 106 App. Div. 250 (1905).

[15] State v. Flynn, 76 N. J. L. 473, 72 Atl. 296 (1909); see also: State *ex rel.* Dooley v. Coleman, *supra,* note 12.

[16] Public Utility Commission v. Bell Telephone Co. of Pennsylvania, 25 P. U. R. (N. S.) 452.

verted to the furtherance of gambling. Note the language of the court in *Annette v. New York Telephone Company*: [17]

> "Petitioner is correct in his contentions that the use of telephones and telegraphs to supply results of horse racing is in and of itself a lawful use. It is a matter of common knowledge that horse races are televised and broadcast."

Inasmuch as almost every jurisdiction in the United States, Nevada excepted, has determined the public policy to be against gambling, and has enacted criminal legislation against it, many states (and in some cases cities), in desperation, have enacted further legislation designed to eliminate the furnishing of gambling information per se. Two of the briefer acts, cited by way of example, are as follows:

> "Any person, or any express, telephone, telegraph or other company or corporation, engaged in the business of carrying or transmitting packages, letters or communication within this state, whether by express, telegraph, telephone, or any other means whatsoever, that shall knowingly carry any message of a kind which shall further or promote the interest of any unlawful pursuit, or enable a person to carry on any business or practice declared illegal by any statute of this state, shall be guilty of a high misdemeanor." [18]

and

> "It shall be unlawful for any public utility knowingly to furnish to any person any private wire for use or intended for use in the dissemination of information in furtherance of gambling or for gambling purposes, or for any person knowingly to use any private wire in the dissemination of information in furtherance of gambling or for gambling purposes." [19]

To date, the enactment of legislation of this type consistently has been held to be a valid exercise of the police power of the state.[20] The effect of such legislation is succinctly expressed by the court in *Kronenberg v. Southern Bell Telephone Company*: [21]

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[17] 74 N. Y. Supp. (2d) 331 (1947); see also: Commonwealth v. Western Union Telegraph Co., *supra*, note 12; Penn. Publications v. Penn. Public Utilities Commission, *supra*, note 12; Hamilton v. Western Union Telegraph Co., *supra*, note 13.

[18] R. S. 2: 171-3 N. J. S. A.

[19] Sec. 365.02 F. S. A., Laws 1949—c 25016, § 2.

[20] McInerny v. Ervin, 46 So. 2d 458 (Fla. 1950); Southern Bell Telephone and Telegraph Co. v. State *ex rel.* Transradio Press Service, 53 So. 2d 863 (Fla. 1952); State v. Chesapeake and Potomac Telephone Co., 121 W. Va. 420, 4 S. E. 2d 257 (1939); State v. Harbourne, 70 Conn. 484, 40 Atl. 179 (1898); Louisville v. Wehmhoff, 116 Ky. 812, 76 S. W. 876 (1903).

[21] 36 P. U. R. (N. S.) 513 (D. C. La., 1940).

"If the defendant telephone company knowingly permits such uses, whether the law is being violated by the plaintiff or those with whom he does business, it thereby 'aids' and 'assists' in such violation, or at least puts itself in such a precarious position that no prudent man would wish to take the chance of prosecution under this statute."

Some states have enacted anti-gambling device statutes. For example, a portion of the Delaware statute is quoted:

"CONTEST OF SKILL, SPEED OR POWER OF ENDURANCE; KEEPING BOOKS OR DEVICES FOR RECORDING, ETC. BETS OR WAGERS; RECORDING BETS OR WAGERS; OWNERSHIP OR OCCUPYING OF PREMISES WHERE SAME IS DONE; PENALTY.—Whoever keeps, exhibits or uses, or is concerned in interest in keeping, exhibiting or using, any books, device, apparatus, or paraphernalia for the purpose of receiving, recording or registering bets or wagers upon the result of any trial, or contest in the State of Delaware, or elsewhere, of skill, speed, or powers of endurance of man or beast . . . shall be deemed guilty of a high misdemeanor. . . ." [22]

In several instances, the public utilities have been hard put to prevent the destruction and confiscation of their equipment as "gambling paraphernalia" under some of these acts.[23]

Under these "anti-gambling" type statutes, prosecution has been threatened in many instances in situations where the law enforcement officials have determined that a particular public utility was "aiding and abetting" the gambling procedure. It is to be remembered in fairness to the companies that where there is no illegality involved in the use of the equipment, they have a legitimate business interest in securing and keeping subscribers. Their normal reluctance to discontinue service which occasionally has been found in the situations arising in this field, is perfectly understandable when viewed in this light. It is submitted that this consideration may also play an important role in the action on the part of the telephone companies in giving notice of proposed discontinuance of service, instead of "forthwith" (immediately) discontinuing. Be that as it may, there are a few rare instances in which the utilities have been convicted under these statutes.[24]

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[22] Revised Code of Delaware 1935, Sec. 4063.

[23] Pennsylvania Publications v. Pennsylvania Public Utilities Commission, *supra*, note 12; American Telephone and Telegraph Company's Appeal, 126 Pa. Super. Ct. 533, 191 Atl. 210 (1937); Plotnick v. Pennsylvania Public Utilities Commission, *supra*, note 8.

[24] State v. Western Union Telegraph Co., 13 N. J. Super. 172, 80 A. 2d 342 (1951); Ervin v. Peninsular Telephone Co., 53 So. 2d 647 (Fla. 1952).

The Dilemma of the Telephone Company

It is readily perceived that if, after being informed by a law enforcement official that the service is being unlawfully used, the telephone company maintains the service, it might find itself a defendant in a criminal action, charged with aiding and abetting an illegal activity. On the other hand, if the company removes the equipment and service, without just cause, it thereby might subject itself to a civil action brought against it by the subscriber. The consistent position of the telephone companies has been that when they receive such notification from a law enforcement official, this, per se, constitutes just cause for the termination of the service.

Haggerty v. The Southern Bell Telephone Company,[25] is a case involving the threatened discontinuance of service pursuant to the company's receipt, from the United States Attorney General and Florida state law enforcers, of notification that the service was being illegally used. The Florida Supreme Court, refusing to grant an injunction against the discontinuance, held the telephone company justified in discontinuing service when faced with this dilemna. In the opinion was the following language:

> "The real question in the case at bar is whether or not equity will compel respondent (telephone company) to furnish petitioner service in the face of a threat from both state and federal authorities that it will be prosecuted therefor because the service is being used by its purchaser in violation of law in the manner detailed. . . . Here we are concerned with the power of a court of equity to relieve a public service corporation from furnishing service in the face of a threat of prosecution. . . . We hold that the answer of the telephone company (i.e. that it had a right to discontinue the service because of the notice given it by the law enforcement authorities) to be a good defense." (parenthetical clause supplied.)

It is to be noted that in this suit for injunction there were two parties, both allegedly innocent. A similar situation existed in *Fogarty v. The Southern Bell Telephone Company,*[26] in which the Court refused to grant a permanent injunction prohibiting the telephone company from discontinuing service to the subscriber. A portion of the opinion reads:

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[25] 145 Fla. 515, 199 So. 570 (1940).

[26] 34 F. Supp. 251 (D. C. La. 1940).

"The defendant company, in so considering [its decision to discontinue service to the subscriber], could also consider the warning received from the United States Attorney General's office. . . .

"Defendant was legally justified [under the facts known to it] in believing that its continued furnishing of such service was at least contrary to public policy of both the United States of America and the State of Louisiana, if not illegal.

"Reasonable grounds exist to justify the determination of the defendant company to no longer service the plaintiff's race track news dissemination system, and the company should not be enjoined against [discontinuing such service]."

In *Tracy v. Southern Bell Telephone Company*,[27] the court, on similar facts held similarly, and rendered an exceptionally readable and interesting opinion. In these cases the courts, having looked at the evidence, have determined that as a matter of law the facts were sufficient to justify a belief on the part of the telephone company that the service was being used for an illegal purpose.

The following quotation from the opinion in *State ex rel. Taylor v. Nangle*[28] draws the problem closer to the direct issue, in point, respecting the degree of proof required and incidence of the burden of proof in a service discontinuance case:

"In the instant case the notice from the Governor and Attorney General would not amount to a judicial finding of the facts stated therein and would not constitute full and complete authority for the telephone company to discontinue service, but coming from the chief law enforcement officers of the state, it was not to be ignored or lightly considered. No doubt, the telephone company could have applied to the Commission for permission to discontinue service. Apparently it was satisfied that the statements contained in the telegram were true and assumed the responsibility for discontinuing service."

As we shall see, this short statement embodies the seeds of several thorny questions. As a prelude, some of them include (1) How much authority is actually required of a telephone company in order to justify its discontinuance of service to a subscriber? (2) If the telephone company had applied to the commission, would the commission have had the authority to ignore or override the attorney general's request, assuming it felt the

[27] 37 F. Supp. 829 (D. C. Fla., 1940); Slapkowski v. New Jersey Bell Telephone Co., 67 P. U. R. (N. S.) 33 (N. J. P. U. C., 1947).
[28] 227 S. W. 2d 655 (1950).

facts stated therein were insufficient to establish illegal usage, or were downright untrue? (3) If the telephone company did not feel that the facts justified discontinuance, should it have been obliged, nevertheless, to discontinue service? (4) Did the telephone company actually assume any responsibility for its decision to discontinue service. If so, how much?

Proof Required for Disconnection

By this time, it will have become quite evident that the burden of proof required to establish reasonable cause for permitting a telephone company to disconnect its service is probably not as heavy as that of a plaintiff in any legal proceeding. All that is needed, apparently, is some justification for a reasonable belief; but, whatever the degree of proof required, it must be based on some evidence, as opposed to mere suspicion or opinion, to which the following statements bear witness:

> "The company may not refuse to furnish telephone service because of mere suspicion or belief that its facilities are being used or will be used for illegal purposes." [29]

> "A telephone company, in order to justify denial of service to a subscriber . . . must prove that the subscriber's customers are using the service . . . for unlawful gambling purposes. . . . Suspicions do not constitute that substantial evidence upon which a Commission finding must be based." [30]

> "Such testimony, while . . . it awakens suspicion . . . nevertheless falls short of proving that petitioner has been using telephone service for unlawful purposes. . . . A finding based upon suspicion would not provide the proper basis necessary for the statutory validity of the order." [31]

At this point, so that we do not stray afield and lose sight of our goal, the primary question again is reiterated. Briefly, it is "May telephone service properly be summarily discontinued under Order No. 22,305 pursuant to a naked request by some law enforcement agency?" In *People ex rel. Restmeyer v. New York*

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[29] Katz v. Chesapeake and Potomac Telephone Co., 80 P. U. R. (N. S.) 76 (D. C. P. U. C., 1949).

[30] Pioneer News Service v. Southwestern Bell Telephone & Telegraph Co., 61 P. U. R. (N. S.) 47 (Mo. P. U. C., 1945).

[31] Cologiavanni v. Southern New England Telephone and Telegraph Co., 65 P. U. R. (N. S.) 171 (Conn. P. U. C., 1946).

Telephone Company,[32] on appeal from a mandamus order of the lower court directing the telephone company to reinstate the service of the plaintiff, previously disconnected upon notification by the police that it was being used for bookmaking, the company brought in affidavits of the police to justify the permanent discontinuance of the service. Despite the fact that the relator produced evidence that he had been acquitted in the Magistrate's court of the charge of gambling, the appellate court reversed the order of mandamus, including in its opinion the following:

> "If there were [a record of discharge by the magistrate on a gambling charge], the fact that the relator was discharged by the magistrate does not of itself prove the falsity of the charge, or does the failure to sustain one charge relieve the relator from the burden of others. Order of mandamus reversed."

The difference in the burden required for criminal conviction and that required for the removal of telephone service is similarly in evidence in the opinion of the court in *Feldman v. Wallander,*[33] in which the court nevertheless ordered telephone service, previously removed at the request of the police, restored to the plaintiff:

> "Of course, the petitioner's acquittal in the magistrate court would not establish that he was not using the premises and telephone for bookmaking; it was simply a legal determination that the charge against him had not been established beyond a reasonable doubt. However, the evidence relied upon by the Police Commissioner and the telephone Company to sustain their refusal to authorize further telephone service fails to indicate that the petitioner had ever been engaged in . . . bookmaking, or that the telephone in the premises was ever used for any illegal purpose with plaintiff's consent or knowledge."

[32] 159 N. Y. Supp. 369, 173 App. Div. 132 (1916); Ganek v. New Jersey Bell Telephone Co., 57 P. U. R. (N. S.) 146 (N. J. P. U. C., 1944); But see: Clethero v. New Jersey Bell Telephone Co., 70 P. U. R. N. S. 131, 134 (N. J. P. U. C., 1947), wherein the court states, "In the present case, however, the Board must take cognizance of the fact that the police witnesses produced by the respondent who include the same witnesses mentioned by the chief of police in his letter of February 6, 1947, to respondent as the basis for the belief that bookmaking was being conducted in complainant's premises, testified that at no time did they have sufficient evidence against him to arrest him for bookmaking at the Front Street premises, or to justify any affirmative action directed against the complainant or the premises, other than to request discontinuance of telephone service. The Board is of the opinion, therefore, that the record does not warrant further deprivation to complainant of telephone service."

[33] 67 N. Y. Supp. (2d) 395 (1946).

Upon whom, then, is the burden of proof? Is it upon the subscriber to prove that he has always used the service according to law?[34] Is it upon the telephone company to show facts justifying its discontinuance of service?[35] Is it upon the police agency to show facts justifying a reasonable belief on its part, leading to a request for removal of service?[36] What is the proper jurisdiction for determining the facts of the case and how much evidence is required, depending upon the answer to the foregoing questions?

Indicating additional complexities of the matter is the case of *Cyprus v. The New York Telephone Company*,[37] in which the court distinguished between mere betting on races (admittedly engaged in by the plaintiff in this action) and "booking" bets, which activity was not in question in this case. It appears that telephone service had been unceremoniously discontinued subsequent to a raid by police who had physically removed telephones from the plaintiff's beauty parlor. The court stated:

> "It is clear that in the eye of the law the professional gambler and his customer do not stand on the same plane. They are not in pari delicto . . . It is thus evident that the respondent may deny telephone service to a customer only when it is reasonably sure that it will be used for an illegal purpose in the future. It has no authority to deny telephone service as a punishment for past crimes. Presumably the criminal court inflicts punishment commensurate with the crime and no other punishment should be meted out by private organizations."

The telephone company was required by the court to reinstall service to the beauty parlor. It is submitted that this is a unique case and not a typical example. Note, however, that the courts have on many occasions required the restoration of service over the objection of police.[38]

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[34] Re Southwestern Bell Telephone and Telegraph Co., 79 P. U. R. (N. S.) 61 (Mo. P. U. C., 1949).

[35] Whyte v. New York Telephone Co., 73 N. Y. Supp. (2d) 138 (1947); Andrews v. Chesapeake and Potomac Telephone Co., 83 F. Supp. 966 (D. C. Md., 1949).

[36] Re Manfredonio, 183 Misc. 770, 52 N. Y. Supp. (2d) 392 (1944); Dente v. New York Telephone Co., 55 N. Y. Supp. (2d) 688, (1944); Dees Cigarette and Automatic Music Co. v. New York Telephone Co., 184 Misc. 269, 53 N. Y. Supp. (2d) 651 (1945).

[37] 192 Misc. 671, 84 N. Y. Supp. (2d) 114 (1948).

[38] Tavern v. New York Telephone Co., 82 N. Y. Supp. (2d) 515 (1948); Re Knapp, 83 N. Y. Supp. (2d) 919; Cyprus v. New York Telephone Co., *supra*, note 37; Dees Cigarette and Automatic Music Co. v. N. Y. Telephone Co., *supra*, note 36.

It is interesting to note that, theoretically at least, it is the character of the use of the service, and not the character of the user, which must be the basis for the denial of service. In *Goodwin v. Carolina Telephone and Telegraph Company*[39] the court held that it would not require the telephone company to install service in a bawdy house, but indicated that in its opinion the company would have no right to refuse service to the madam, an admitted prostitute, at another address, unless the company could prove that she was using the service for business purposes. . . .

The case of *Fay v. Miller,*[40] unreported, is of great interest at this point for two reasons. First is the dicta following, second is the fact that this case was decided in 1950 by the Court of Appeals for the District of Columbia, which court since 1952 has appellate jurisdiction of cases arising before the Federal Communications Commission. This fact will assume considerable importance in the evaluation of the case of *Katz et al. v. American Telephone and Telegraph Company* which is later discussed at length. Briefly, it should be stated that the two *Katz* cases (both involving the same facts) directly in point from the standpoint of this article, have been four times decided—first by the Public Utilities Commission of the District of Columbia;[41] then on appeal to the District Court for the District of Columbia;[42] then in a proceeding before the Federal Communications Commission;[43] then reversed in a re-hearing before the same body;[44] and now remains pending on the docket for a second re-hearing. It is not unreasonable to conjecture that the case may some time find its way to the Court of Appeals which, as before stated, decided the *Fay v Miller* case following.

The facts of the *Miller* case were that the plaintiff telephone subscriber (Miller) sued in the District Court of the District of Columbia to enjoin the Chesapeake and Potomac Telephone Company from discontinuing his telephone service pursuant to a

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[39] 136 N. C. 258, 48 S. E. 636 (1904); see also: Andrews v. Chesapeake and Potomac Telephone Co., *supra,* note 35.

[40] Case No. 10,364 (C. C. A. Dist. Col., 1950).

[41] Katz v. Chesapeake and Potomac Telephone Co., 80 P. U. R. (N. S.) 76 (D. C. P. U. C. 1949).

[42] Id., Civil Action No. 3787-49 (D. C., D. C., 1949).

[43] Katz v. American Telephone and Telegraph Co., *et al.,* 86 P. U. R. (N. S.) 65 (F. C. C., 1950).

[44] Id., 92 P. U. R. (N. S.) 1 (F. C. C., 1951).

request by the United States Attorney for the District of Columbia (Fay). The request, a letter addressed to the telephone company, contained the following language:

> "This office is in possession of competent evidence that the following telephone number, WArfield 5061, located at 4923 LaSalle Road, Avondale, Maryland, is being used to aid and abet in the violation of statutes prohibiting gambling in the District of Columbia. I, therefore, request that this telephone equipment be disconnected and that such telephone service be discontinued."

When this request was issued by the United States Attorney the Company was governed by the following General Exchange Tariff, adopted as a regulation of the Public Service Commission of Maryland:

> "Use of Service for Unlawful Purposes.—The service is furnished subject to the condition that it will not be used for an unlawful purpose. Service will not be furnished if any law enforcement agency, acting within its jurisdiction, advises that such service is being used or will be used in violation of law, or if Telephone Company receives other evidence that such service is being or will be so used."

Injunction against discontinuance of the telephone service had issued in the District Court, and no appeal was taken therefrom by the company. On appeal by the United States Attorney however, from a companion injunction restraining him from making such a "request" to have the service discontinued, the court of appeals made the following statement:

> "[But] at the point of imminent or actual removal, the subscriber may obtain a hearing on the merits of the charges against him by suing to enjoin the Company. If the Company cannot then sustain its burden of proof by mustering a *preponderance of the evidence* to support the charge of illegal use, an injunction will issue against it. And if it has acted only because of the United States Attorney's request, it still must justify its action by a preponderance of the evidence in order to keep the telephone disconnected." (emphasis supplied.)

While the obligation of the telephone company was not directly in issue in the appeal, the dictum must be considered as indicative of the court's position on the question.

Note that the court specifically did not say that the telephone company would have been unjustified in discontinuing the service, relying upon its receipt of notice from the United States At-

torney that the telephone service was being illegally used. To the contrary as a matter of fact, the quoted matter rather indicates that the court did feel that the telephone company would have been within its rights in so relying. But where there was opportunity for a prior hearing, the use of the terms "preponderance of the evidence" in describing the company's burden of proof cannot be attributed to anything except a real desire on the part of the court to protect fully the right of the subscriber to telephone service, even at the expense of permitting an illegal use, which might have been prevented by the telephone company if it were saddled with a lighter burden. Another exceptionally interesting facet of this dictum, from our point of view, lies in the fact that, according to the language of this court, the burden of proof rests on the telephone company from the outset and so continues after the removal of the service. According to this statement, in order to justify the continued denial of service, the telephone company must again prove by the "preponderance of the evidence" that the service was indeed illegally used. It is submitted that a "preponderance of the evidence" will require cold facts, and not merely the opinion of a law enforcer.

In view of the many opinions of courts and Public Utilities Commissions, prior in time to the decision in *Fay v. Miller,* holding that the burden on the telephone company is completely satisfied by a mere showing that notice was received from a law enforcement agency and that the company acted in accordance therewith, this language is indeed noteworthy. Emphasizing again, this dictum indicates a state of mind on the part of this court, which tends to require the initial burden of establishing the legality or illegality of the use of the service to be placed upon the telephone company, where a prior hearing is procured. Where service has been discontinued without a prior hearing the burden is on the company to justify its sustained discontinuance, and this burden can be satisfied, according to this court of appeals, only by a preponderance of the evidence. This differs vastly from the decisions later cited which hold that the sole recourse of a subscriber who has lost his service in this manner is against the law enforcement agency by means of a mandamus suit. As these cases hold—and they are in the vast majority—once the telephone company justifies its action in removing the telephone service, by exhibiting the notification of the law enforcement agency requesting the discontinuance, the telephone company has completely exonerated

itself and satisfied its burden. Nor is there any requirement, or prerogative on the part of the company, according to these cases, to look into the evidence for the purpose of determining the basis or motives behind the law enforcement agency's notification.[45]

In *A. C. and Daily Sports Digest v. New England Telephone and Telegraph Service*,[46] the Massachusetts Department of Public Utilities stated the generally accepted view:

> "We will not inquire into the motives activating the police. The tariff provision is a reasonable regulation, and we cannot say that the telephone company is unreasonably refusing to furnish service to the plaintiff on the facts here before us."

The sole evidence adduced by the telephone company, indicating illegal use of the telephone, was a notification from the law enforcement officer that the services were being illegally used.

It is to be emphasized that the language of the court in *Fay v. Miller* refuses to allow a shift in the burden of proof, precisely what is not only allowed, but is required, by Order No. 22,305 of the Ohio Public Utility Commission.

In 1947, the Court of Appeals of New York rendered its decision in the case of *Shillitani v. Valentine*.[47] The service of plaintiff had been disconnected pursuant to notification by the law enforcement authorities that the service was being used for gambling. The special term had issued an order requiring the telephone company to reinstate the service,[48] which order was reversed by the Appellate Division.[49] The Court of Appeals found that the facts warranted the conclusion that the telephone service was being illegally used in this case and thus no right of relief was found to be present. But the language of the opinion is of singular interest:

> "Since the record justifies the conclusion that the petitioner was engaged in [illegal conduct], it follows that he failed to establish . . . a clear legal right to the relief sought. Under the circumstances in this case there was no warrant for compelling the telephone company to reinstate its service to petitioner. . . .

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[45] See cases cited *infra*, note 57.

[46] 79 P. U. R. (N. S.) 159 (Mass. D. P. U., 1949).

[47] 296 N. Y. 161, 71 N. E. 2d 450 (1950).

[48] 184 Misc. 77, 53 N. Y. Supp. (2d) 127 (1944).

[49] 55 N. Y. Supp. (2d) 210 (1947).

"Neither the police commissioner nor police department is given any authority to pass upon or regulate applications for telephone service, or to require a telephone company to withhold or discontinue its service. . . .

"Whether or not service should be terminated or discontinued is a decision which must be made by the telephone company. That power—as well as the duty—rests with the public utility, and it may not delegate the one or avoid the other. True, the company is free to consult the police department or any other law enforcement agency, and may be guided in its action by the advice received. But whether the action is justified or warranted must be determined by the telephone company upon the facts presented."

The majority viewpoint on the question of the burden of proof required the utility, at least from the standpoint of degree, is exemplified in *Hamilton v. Western Union Telegraph Company.*[50] The facts of the case indicate that a preliminary injunction issued against the telegraph company to prevent it from discontinuing (as per notification to plaintiff, subscriber) leased wire service furnished by the defendant to the plaintiff. Thereafter a motion was filed by the defendant, telegraph company, to dissolve the preliminary injunction. The basis upon which the company acted in informing the plaintiff that it would discontinue service was a notification by the United States Attorney to the effect that, if it continued to serve the plaintiff it would be held to be conspiring in a violation of federal and state laws. The court dissolved the injunction:

"If there is a justification for the defendant's belief that the information transmitted to the plaintiff over its wires is being used for an illegal purpose, a court of equity will not restrain the defendant from discontinuing such service.

"A court of equity will not restrain the discontinuance of service by a utility if the character of the use of the service is such as to justify an honest doubt as to its legality."

In *McBride v. Western Union Telegraph Company,*[51] the Court of Appeals for the Ninth Circuit held in 1949 that:

"State and county officers notifying telegraph company that 'drops' or instruments telegraphically receiving eastern race track news were being illegitimately used in several California cities are not required to supply to telegraph company, in order to permit company to discontinue wire serv-

[50] *Supra,* note 47.

[51] 171 F. 2d 1 (C. C. A. 9th, 1948).

ice, the probative facts to be adduced in court in trial of cases of the violation stated in notices."

The typical viewpoint of the public utilities commissions is expressed in the logical, forcefully written opinion of the Public Utilities Commission of Connecticut in the case of *In re Alexander Presmarita.*[52] Because the language of this unreported case expresses with simplicity the majority view on nearly every point covered in the various Commission opinions, liberty has been taken in citing this opinion at some length, thus eliminating quotations from various other cases, and enabling a study of the opinion which might otherwise entail great difficulty. The facts of this case indicate that the subscriber had purchased, as a going business, a retail cigar and magazine stand located on the main street of Hartford, Connecticut. On July 21, 1951, defendant telephone company received notice from the Chief of the Hartford Police Department that he had received reports of gambling on the petitioner's (subscriber's) premises and that same had been observed by officers assigned to the vice and liquor division of his department. The chief's letter concluded:

"As a result of this report and visit by the Vice Division, I am recommending that the phone be removed from the premises."

By registered mail defendant notified the petitioner on July 24th that his phone would be removed on July 25th, which in fact was done. On September 7th, petitioner directed a letter to the company requesting restoration of the service to which the company replied that it would not restore service until authorized by the State's Attorney. On November 7th the State's Attorney notified the company that after examining the evidence he felt that telephone service should be withheld and the company immediately notified the petitioner. The petitioner claimed that the inability to use his telephone seriously hampered his legitimate business. It is to be noted that the recommendation of the Chief of Police to the defendant company cited the evidence that the police had amassed and that the telephone company in this case on the basis of this evidence would have had sufficient grounds to justify its own determination to discontinue the telephone service; but the opinion of the Commission does not turn on this fact. The company relied, in its answer, on provisions of its tariff which were as follows:

[52] Case No. 8610 (Conn. P. U. C., 1952).

"USE OF SERVICE FOR UNLAWFUL PURPOSES—The service is furnished subject to the condition that it will not be used for any unlawful purpose. Service will not be furnished if any law enforcement agency, acting within its jurisdiction, advises that such service is being used or will be used in violation of law, or if the Telephone Company receives other evidence that such service is being or will be so used."

The opinion treats the subject matter in three parts: (1) the extent of the company's obligation to provide service, (2) reasonableness of the regulation, and (3) reasonableness of the company's practices (under the regulation). With respect to the first part, the Commission stated:

"It is necessary at the threshold of a discussion of the reasonableness of the Company's tariff provisions, or of its practices in pursuance thereof, that an understanding be reached of the obligations placed by law upon a telephone company to provide service to subscribers.

"A telephone company is a public service company as defined in Section 5390 of the General Statutes and by virtue of this statute is required by the terms of Section 5410, of the General Statutes, to render adequate service, at reasonable rates, to any person within the territorial limits within which such company has, by its charter, authority to furnish such service. In addition, the Federal Communications Act of 1934, as amended, requires telephone carriers to serve the public without undue or unreasonable preference. Inherent in both the Connecticut statute and the Federal statute is the obligation that service be rendered within reasonable limitations. The purpose and desire of the Company to ensure against aiding and abetting violations of criminal statutes or becoming itself involved in a violation of a criminal statute has been recognized as one of the legitimate limitations which may reasonably be enforced by a telephone company. *Peter J. DeLusia v. New Jersey Bell Telephone Company,* 78 PUR (N. S.) 22 (1949); *Partnoy v. Southwestern Bell Telephone Company,* 70 PUR (N. S.) 134, Missouri (1947); *Rodman v. New England Telephone & Telegraph Company,* 61 PUR (N. S.) 242, Massachusetts (1945); *Ganek v. New Jersey Bell Telephone Company,* 57 PUR (N. S.) 146, New Jersey (1944); *In re Michigan Bell Telephone Company,* 34 PUR (N. S.) 65, Michigan (1940); *Katz v. American Telephone & Telegraph Company, et al.,* FCC Docket No. 9500, issued December 21, 1951.

"The only latitude for difference of opinion lies in the means which the telephone companies have adopted to protect themselves reasonably against involvement in unlawful activities without impairing the obligation imposed upon

> them by statute, to render service when reasonably required without unreasonable preference or discrimination. We find, therefore, that the Company's refusal to furnish service for unlawful purposes as a general principle is not unreasonable. We turn now to a consideration of the tariff provision designed to implement this policy."

Coming on to the second part, "the reasonableness of the regulation itself," the Commission commences by citing the Connecticut statute under which the telephone company, if it provides service which is used for an illegal purpose, might be liable as an accessory after the facts, or otherwise in violation of criminal statutes.[53]

The Commission then continues its opinion stating that the first sentence of the tariff by which the telephone company seeks to protect itself against this possibility is reasonable, inasmuch as the intent and purpose is perfectly consistent with public policy. The opinion then goes on to discuss the second sentence which is similar to the Ohio P. U. C. Order No. 22,305.

> "Before we can find that the balance of the tariff provision is reasonable or unreasonable, we must determine the extent of the Company's responsibility in discharging its obligations, to make certain that it does not engage in unlawful activities. The tariff provision provides that upon the advice of a law enforcement agency, acting within its jurisdiction, that a telephone service is being used for an unlawful purpose, it will be removed. Nothing contained in this provision requires a determination by the Company that a subscriber is using the telephone for unlawful purposes before it is removed. No reference is made to the guilt or innocence of any individual. The tariff is directed solely against the use of the instrument since it is for the use of the instrument that the Company is responsible.
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> "Even without the presence of such a rule or regulation in the tariffs, upon the receipt of a request by a law enforcement agency, acting within its jurisdiction, to discontinue service, the Company would have little choice but to comply. To hold, as a matter of law, that the reduction of such a patent principle to tariff form is unreasonable does not ap-

[53] GEN. STAT. CONN., § 8674.

Section 8674-1. "Any person, whether acting for himself or as agent or servant, who * * * shall install or operate in any room or building, any * * * telephone * * * or other similar apparatus, with knowledge or intent that such instrument, machine or apparatus is to be used for receiving, transmitting or recording bets or wagers, or for receiving, transmitting or recording the name of any horse or jockey participating in horseracing upon which bets are or are to be placed * * * shall be fined not more than five hundred dollars or imprisoned not more than one year or both."

pear sound in law or reason. The actions of a law enforcement agency, when acting within its jurisdiction, are entitled to the greatest weight and must be presumed to be governed by the highest standards of impartial and unselfish performance of public duties. *State ex rel. Fitzroy v. Trustees of Firemen's Relief Fund,* 122 Conn. 650, 657; 191 Atl. 729. It is true that there must be a duty imposed upon the public officer to act in a certain way in order to give rise to such a presumption, *Olson v. Musselman,* 127 Conn. 228, 233; 15 Atl. 2d 879. The authority of the State's Attorney and the Chief of the Hartford Department of Police, however, are well settled and sufficiently definite to provide reasonable standards of investigation which must be complied with before they can conclude that a certain telephone was being used for unlawful purposes. From this presumption, the Company may legitimately conclude that the law enforcement agency had made the investigation necessarily required before informing the Company that a certain telephone was being used for unlawful purposes. The Company is entitled to assume and, indeed, must assume that the law enforcement agency so acted until the contrary is clearly shown.

"Nothing to dispute this presumption appears from the evidence or testimony of record. In fact, there is every indication that an investigation was made before the Chief of the Hartford Department of Police ordered the removal and before the State's Attorney refused permission for restoration. Whether the presumption would fail in the event of a manifest failure by the law enforcement agency to make an investigation, we need not here decide. It is enough to note that substantial countervailing evidence in a given situation will exhaust a presumption, which rests on common experience and inherent probability at least to the point of casting the burden on the law enforcement agency to demonstrate contrary facts. See *O'Dea v. Amodeo,* 118 Conn. 58, 61; 170 Atl. 486.

"The Commission has neither the authority nor the equipment to perform criminal investigations in determining the reasonableness of a tariff provision. Moreover, this Commission should not question the purpose or motives of a law enforcement agency even if an arrest is not made, as was the case in the proceeding here under consideration. There may be any number of reasons which might prevent the arresting of any individual or individuals in connection with the unlawful uses to which the telephone is put. This, of course, does not mean that the telephone is not being used for unlawful purposes. Of course, if it becomes clear beyond any doubt, or if the Company should know as a demonstrable fact that the telephone is not being so used, it might restore service even upon the advice of a law enforcement agency to the contrary since in such a case there is no risk of viola-

tion of any criminal statute. In case of doubt, however, in view of the expression of public policy contained in Section 8674 of the General Statutes and in view of the trend of the decisions as represented by *State v. Western Union, Supra,* we cannot hold as a matter of law that a tariff provision which enables the Company to comply with the orders of a law enforcement agency is anything but reasonable.

"We are aware of the recent decision of the Federal Communication Commission decision in *Katz v. American Telephone and Telegraph Company, supra,* which holds that the sentence, here under consideration, is per se unreasonable. We cannot, however, agree with the conclusions of the majority in that decision in view of the expression of public policy contained in the general statutes, Section 8674, and in view of our conclusions respecting the reasonableness of the Company's determination to avoid implication in any criminal activity. To imply, as does the Federal Communications Commission, that the Company should have freedom to make a decision after receiving a notice from the police when there is genuine doubt is equivalent to saying that the Company has a choice whether to obey the law. To this latter proposition, we cannot lend our weight. It seems contrary to public policy and regulatory principle to hold that any such action is open to the Company.

"We do not say, as the Federal Communications Commission decision *supra* implies that we must, that the Company is placed on the action end of a circuit actuated by the impulse of the police order and followed invariably by automatic removal. Facts, of course, will always prevail. The Company has no more choice to assent to a manifestly false or malicious order to discontinue when it is certain of its own knowledge that the order is false or malicious than it has a freedom of choice when the police order a removal in circumstances not known to the Company. In either event, the Company merely conforms its action to what in one case it knows to be the facts, and in the other case, to what it has no reason to believe and no right to consider, is anything but the facts.

"The tariff regulation, of course, places upon the law enforcement agency the primary responsibility of determining whether or not a certain subscriber will have available the privilege of telephone service. Doubt immediately rises, therefore, whether the law enforcement agency by this method could not succeed in denying permanently the use of telephone to a given subscriber without ever making an arrest or instituting criminal action.

"We have no jurisdiction over the activities of a law enforcement agency and, therefore, cannot compel them to agree to the restoration of a telephone or to the extension of

service to a new subscriber. A subscriber, however, is not left without remedy since the courts are open to him and, if an adequate remedy at law exists, he may pursue his action for damage. *Queen City Stock and Grain Company v. Cunningham,* 128 Ala. 645; 29 So. 583. If none exists, he may invoke one of the extraordinary remedies at law, such as, a bill for injunctive relief. This Commission could not entertain such a procedure and would have no jurisdiction to order the law enforcement agency to do anything even if it were equipped and authorized by statute to reach the conclusions requisite in making such an order.

"An injunction will lie against a law enforcement agency or police body if it can be shown that the act sought to be enjoined was based on an ex parte determination of unlawful activity, *Cannon City v. Manning,* 43 Colo. 144; 95 Pac. 537, unless the obvious purpose is to prevent police interference with an unlawful business, *State ex rel. Daniel v. Kizer,* 164 S. C. 383; 162 S. E. 444. Since there is no question of interference with an arrest involved in this instance and since no opportunity is presented for judicial determination of the factual question of guilt or innocence as would be the case in an arrest, the rule which prevents equity from acting to enjoin an arrest is not applicable (see Anno. 2 LRA (N. S.) 678). As stated by the Massachusetts Department of Public Utilities in a similar proceeding:

> "* * * Unless and until the courts shall decide that the action of the Police Commissioner in requesting the telephone company to discontinue the service to the petitioner is unwarranted and baseless, we feel bound to consider that a request, such as was made to the telephone company in this case, is a necessary incident in the prevention of crime and the maintenance of law and order equally binding upon this Department as upon the telephone company * * *." *Rodman v. New England Tel. & Tel. Co.,* 61 PUR (N. S.) 242, 245. (Bul. 4321.)

"The tariff provisions, therefore, do not deprive a subscriber of the rights of due process since ample opportunity is offered to him for judicial review and for the invocation of his civil rights guaranteeing him protection against unreasonable exercise of police power. We find, therefore, that the tariff rule and regulation is not, in and of itself, unreasonable."

With the reasonableness of the company's administration of the regulation, the third part of the opinion, we are not here concerned. While the point appears to have small meaning in terms of actuality, it might be well to note that the provision under which the *Presmarita* case is decided provides that the law

enforcement officers who notify the telephone company to discontinue service must be acting within the scope of their authority. No such limiting language appears in the Ohio P. U. C. order No. 22,305 although it may be contended that by implication it actually is a part of the order. Nevertheless, it would appear to be a valid question to ask whether or not the language of the Connecticut Public Utilities Commission, "the company has no more right to assent to a manifestly false or malicious order to discontinue, etc. . . .," would hold true under the Ohio order, which leaves the company with no alternative to act upon its own information or even to inquire into the scope of authority of the notifying officers.

From the dictum in the case of *Andrews v. Chesapeake and Potomac Telephone Company*,[54] on the other hand, comes the following expression providing some authority, however slight, for those who espouse the cause of requiring a hearing, as a matter of right of the telephone subscriber, prior to discontinuance of service. Noting that the viewpoint expressed in this dictum is not prevalent in the cases dealing with this subject, it is nevertheless felt to be worthy of quotation at length, first because the language sets forth well the fundamental constitutional issue, and secondly because it appears to offer a handy recapitulation of some of the more important factors covered so far.

> "The plaintiff alleges in her complaint that she received a letter from the defendant telephone company to the effect that the company has been advised by the United States Attorney for the District of Columbia that his office is in possession of competent evidence that the plaintiff's telephone is being used in violation of the statutes prohibiting gambling in the District of Columbia and that the United States Attorney has requested the company to disconnect this telephone equipment and discontinue the telephone service. The letter further contains a statement that the telephone will be disconnected and telephone service discontinued on a date and at an hour specified in the letter. The plaintiff denies that the telephone is being employed in violation of the statutes and claims that it is being used by her in her living and social activities. She seeks an injunction against the telephone company from discontinuing service and against the United States Attorney from advising, coercing, or in any manner aiding or assisting the telephone company in disconnecting the telephone equipment.

[54] 83 F. Supp. 966 (D. C. Md., 1949).

"Naturally, it is of importance that the gambling statutes, and criminal statutes generally, be stringently enforced. It is of greater importance, however, that this enforcement be conducted in accordance with the requirements of the Constitution and laws of the United States. It not infrequently happens that a person seeking the protection of the Constitution and laws is himself a person of bad character, but this circumstance does not diminish his constitutional and legal rights. This is one of the fundamentals of our system of government and one of the basic principles of the Bill of Rights.

"A public utility, such as a common carrier, a telegraph company, or a telephone company, must serve all members of the public without discrimination or distinction. In this respect, public utilities are different from other businesses, such as stores, restaurants, and theatres, which may select their customers. The fact that a person may be of bad character does not deprive him of the right to receive service from a public utility. On the other hand, the facilities of a public utility may not be used for criminal purposes. A public utility has not only a right but a duty to refuse to render service for criminal purposes.

"It clearly follows, therefore, that a telephone company may refuse to furnish or may discontinue service that has been furnished if the service is used for criminal purposes, such as violation of the gambling statutes. The burden of proof, however, is on the public utility to establish the fact that the service is being used or is about to be used for a criminal purpose. Naturally, since this is a civil matter, such fact need not be established beyond a reasonable doubt. It is sufficient if it is shown by a fair preponderance of the evidence.

"A public utility erroneously refusing service to a person entitled to it is subject to an action for damages. An action for damages may be inadequate, however, and, hence, equitable relief may be proper. It seems to the Court, therefore, that before telephone service may be discontinued on the ground that it is being used for an illegal purpose, the fact of the illegal use must appear by a preponderance of the evidence. True, there is a provision in the tariff of the telephone company to the effect that telephone service may be discontinued and not be furnished 'if any law enforcement agency, acting within its jurisdiction, advises that such service is being used or will be used in violation of law . . .' Obviously, if this provision of the tariff is to be literally construed, it is not valid. A public utility may not deprive a member of the public of his rights to service merely because it receives a notice from a law enforcement agency that he is using the service for illegal purposes. A public utility may

> refuse, and, in fact, must refuse, service if to its knowledge the service is being used for illegal purposes. This fact must, however, be established. To confer what would amount to judicial power on a law enforcement officer and to exercise such power ex parte would be violative of due process of law and would deprive members of the public of their legal rights. A public utility may not do this, and neither may a regulatory administrative body."

To the contrary, the court *In re Application of Manfredonio*[55] upheld the telephone company which had disconnected the telephone of a subscriber pursuant to a request to do so by a law enforcement agency. Its opinion indicates that it feels that the burden should rest upon the law enforcement agency to establish reasonable grounds for requesting the discontinuance and, although the essential nature of the service is clearly recognized, the court obviously does not feel that such service constitutes a property right, and that the summary deprivation violates the constitutional guaranty of due process:

> "Telephone service, at one time a luxury, has today become a necessity. The Police Department should not interfere with a subscriber's service unless it acts within reason. Before it may act in this respect, it must be prepared to support its action by evidence that the subscriber has used his telephone for unlawful purposes. Ordinary justice dictates to the court that the petitioner has the right to speedily inquire as to the reasons underlying the discontinuance of his service."

Following this case the Supreme Court of Weschester County in *Dente v. New York Telephone Company*[56] held that the telephone company was justified in discontinuing service to the plaintiff pursuant to the request of the police, and the burden was on the police department thereafter to sustain the justification for its request and for its refusal to certify the reinstatement of service. It is to be noted that this case holds that the telephone company is completely absolved of all responsibility in making the determination of legality or illegality by its reliance upon the notification of the law enforcement agency.

> "The question here presented is, was the respondent justified in discontinuing service upon a mere naked request of

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[55] *Supra,* note 36.
[56] *Supra,* note 36.

the police authorities, without any independent investigation of its own that there was reasonable grounds to believe that the telephone was being used for an unlawful purpose? In other words, was there a legal right to refuse the petitioner telephone service upon the mere action of the police department objecting to the furnishing of such service, especially where the action of the police may be arbitrary, unreasonable and discriminatory, and based upon mere suspicion? Or does the telephone company have to wait until there has been either a conviction showing the unlawful use of the phone, or some court action on the part of the police authorities? Here, concededly none was taken.

"The courts of this state have repeatedly given sanction to the basic proposition or rule that where the police department has objected to and disapproved of furnishing telephone service on the ground that it is being used for an unlawful purpose, the telephone company has a legal right to refuse such service.

"Does the law require that a telephone company shall at its peril determine the legality of an order of the police department directing a telephone be not restored to premises in which the police have requested a removal of service for an alleged illegal use? I am mindful that the position of the respondent (telephone company) may frequently work hardship and injustice, and here evidence obtained by the police department, that the law was being violated, is tenuous. Following . . . Re Manfredonio (cited above), I hold that the telephone company was within its rights in discontinuing service upon the request of the police department without an independent investigation of its own. The police department refuses to rescind its request, and the respondent declines to restore service without such recision or without order of the court. In this stand, likewise, the court holds that the telephone company was within its rights, that the police department cannot indefinitely refuse permission to the telephone company to restore service, where the department has taken no action since requesting such discontinuance. The question of restoration should not be held in suspense, however.

"There must be some means open to the petitioner for determination as to whether or not the phone was being used for illegal purposes. . . . Oral testimony should be taken. I consequently refer this matter to a referee to hear and report whether there was reasonable grounds for believing that the petitioner's telephone was being illegally used."

It would appear to serve little purpose to continue to cite cases of this nature. Suffice it to say that the weight of authority

is almost solidly in line with this view[57] upon which is based the reasoning of the decision of the Ohio Public Utilities Commission in *Sylvia Miller v. The Ohio Bell Telephone Company,*[58] upholding the validity of the Public Utilities Commission Order No. 22,305.

Complainant, Sylvia Miller, was a subscriber of the defendant's telephone service at her residence in Columbus, Ohio. On April 5, 1952 the Director of Public Safety of Columbus directed and forwarded a letter to the defendant telephone company's commercial manager requesting the immediate removal of said telephone service, based upon certain alleged police and vice squad investigations, resulting in the determination by the vice squad that the telephone had been used for gambling in the so-called "numbers game." About April 8, 1952, Mrs. Miller's husband was notified in writing by the defendant telephone company that the line would be discontinued on April 14th. A copy of this notice was forwarded to the Commission by the defendant. The complainant, requesting an injunction to require telephone company to continue subscriber's service made several allegations to the proper action by the telephone company, the only one concerning us at this point being the eighth.

> "(8) That the defendant had made no investigation whatsoever to determine whether certain equipment and facilities offered and rendered her (complainant) were used unlawfully."

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[57] Weinacht v. New Jersey Bell Telephone Co., Case 6904 (N. J. P. U. C., 1952); Scance v. New Jersey Bell Telephone Co., 95 P. U. R. (N. S.) 16 (N. J. P. U. C., 1952); Dade County Newsdealers v. Florida R. R., etc., 48 So. 2d 89 (1950); Berentano v. N. J. Bell Telephone Co., 76 P. U. R. (N. S.) 1 (N. J. P. U. C., 1948); Tela-News Flash v. District Attorney of Queens County, 197 Misc. 1015, 96 N. Y. Supp. (2d) 338 (1950); Di Benedetto v. New York Telephone Co., 83 N. Y. Supp. (2d) 920 (1948); Howard Sports Daily v. Weller, *supra,* note 7; Re Southwestern Bell Telephone Co., *supra,* note 34; Partnoy v. Southwestern Bell Telephone Co., *supra,* note 7; Ganek v. N. J. Bell Telephone Co., *supra,* note 32; Slapkowski v. N. J. Bell Telephone Co., *supra,* note 27; Rodman v. New England Bell Telephone Co., *supra,* note 7; Carrozza v. New England Bell Telephone Co., *supra,* note 7; A. C. and Daily Sports Digest v. New England Bell Telephone Co., *supra,* note 46.

[58] Case No. 23,078 (Ohio P. U. C., 1952); see also: Bell v. Ohio Bell Telephone Co., Case No. 23,053 (Ohio P. U. C., 1952); Tinsley v. Ohio Bell Telephone Co., Case No. 23,067 (Ohio P. U. C., 1952); Hall v. Ohio Bell Telephone Co., Case No. 23,068 (Ohio P. U. C., 1952); Brown v. Ohio Bell Telephone Co., Case No. 23,072 (Ohio P. U. C., 1952).

The defense of the telephone company rested upon its tariff,[59] and likewise set forth the terms of P. U. C. Order No. 22,305. The telephone company's position was that (1) it had a right to discontinue plaintiff's service under its tariff and (2) it was required to do so by virtue of the aforesaid P. U. C. Order. The most pertinent parts of the opinion follow:

> "It is well recognized that whatever right a subscriber has to telephone service, whether inherent or contractual, is not an absolute right, but rather is a qualified right. It is qualified to the extent that a public utility is not bound to furnish service to anyone who it has reason to believe will use the service for illegal purposes. It is qualified and subject to greater considerations of law and order and to reasonable limitations necessary to public welfare and public order. . . .
>
> "Considering first the reasonableness and lawfulness of said tariff provision, it is clear that, having received from a governmental authority objection to the continuance of the service furnished to complainant, defendant's proposal to disconnect complainant's service was not only in accordance with but was required by said tariff provision. Complainant, however, contends, among other things, that said tariff provision is unconstitutional, unreasonable, unjustly discriminatory and contrary to the public interest. On the constitutional question, complainant states that said tariff provision deprives her of her property without due process of law. It seems to be well settled that the requirement of due process does not always require a hearing before discretion is exercised, but is satisfied if there is opportunity for a hearing and a judicial determination at some stage. In the instant situation, the complainant failed to take advantage of the injunctive process available against the governmental authority in the courts. Furthermore, the Commission's action in approving said tariff provision is not, as contended by complainant, a delegation to a governmental agency of the right to determine who shall have telephone service. Said tariff provision merely sets forth one of the things which would constitute reasonable grounds for defendant to believe that its service is being used in the furtherance of an illegal purpose, and the Commission has merely sanctioned the inclusion in defendant's tariffs of that which is the law independent of the tariff. On the question of reasonableness, although several reasons can be given why said tariff provision is reasonable, the reason which particularly impresses this Commission is that it is consonant with good public policy and

[59] P. U. C. O. Tariff 3:

". . . upon objection to the continuance of service made by or on behalf of any governmental authority the telephone company may either temporarily deny service or terminate the service. . . ."

promotes the public welfare. As long as it is in the public interest to prevent gambling, then certainly it is consistent with the public interest to provide a means such as said tariff provision to do so. On the question of discrimination, even though said tariff provision was entirely reasonable, it would nevertheless be illegal if it resulted in illegal discrimination. That said tariff provision does not result in illegal discrimination is clear, however, since it operates uniformly on all subscribers.

"Entirely independent of any consideration of the reasonableness and lawfulness of said tariff provision, the files and records of the Commission show that said tariff provision was supplemented by this Commission's so-called 'anti-gambling' order in P. U. C. O. Docket No. 22,305, dated December 21, 1951, which order was made and issued after public hearings at which all members of the public were afforded ample opportunity to appear and be heard (Company Exhibit E).

"Since defendant received written notification from a law enforcement agency that the telephone serving complainant was being used in furtherance of gambling, defendant's proposal to discontinue complainant's telephone service was in accordance with and required by said Order No. 22,305. Although there is some doubt that the reasonableness and lawfulness of said Order No. 22,305 is properly before this Commission in this proceeding, the complainant has raised the question and we have considered it. We are not persuaded by complainant's contentions. All that has been said hereinbefore with respect to the reasonableness, lawfulness and constitutionality of said tariff provision, is equally applicable to paragraph IV of said Order No. 22,305.

"Complainant alleges that the removal of said telephones would deprive her of telephone service without provocation or cause. The evidence shows that defendant received a letter from said Safety Director requesting the removal of complainant's telephone service on the grounds that said telephone service was being used for gambling purposes. The Commission's said Order No. 22,305 provides that, upon receipt of written notice from any law enforcement agency that such agency has reason to believe same are being used in furtherance of gambling, the telephone company shall forthwith discontinue such service. It, therefore, becomes apparent that, while the within complaint is directed against the telephone company, complainant in effect seeks judicial review by the Commission of said Safety Director's action to determine whether or not said action was warranted in the circumstances and, if not warranted, to nullify the Director's action.

"There is no provision in the public utilities law of Ohio which indicates legislative intent to vest in this Commission

power to review the aforesaid action of said Safety Director and to nullify it if the Commission should conclude on a record made before it that such action was not justified. Nor do the provisions of said Order No. 22,305 contemplate such a review and adjudication.

"Counsel for complainant in this proceeding has suggested that a law enforcement officer (or agency), in requesting such discontinuance of telephone service, may be basing his request on mere assumptions or may be motivated by a desire to penalize the subscriber. He has further suggested that, unless relief is to be afforded by the Commission in such cases, subscribers so deprived of telephone service would have no relief at all.

"The Commission cannot subscribe to these suggestions. It must be presumed that acts within the proper sphere of a public official have been properly performed, and without improper motive. The Commission must also further presume that the function, of keeping law enforcement officers (and agencies) to observance of and to acting within the sphere of their duties and authority, is judicial and not administrative; and that, under the laws of Ohio, judicial and executive powers afford adequate preventive, corrective and punitive remedies for such actions as may be violative of their duties and authority.

. . .

"Complainant contends that defendant has neither made an investigation to determine whether complainant's telephone service was being used unlawfully or a report to the Commission of any such investigation, as provided by said Order No. 22,305. In view of the provisions of said Order No. 22,305, defendant company, having received notification from a law enforcement officer (or agency) that the telephone serving complainant was being used for illegal purposes, had no obligation to make either an investigation of the use of said telephone or a report to this Commission, but had the duty to act forthwith without investigation and without report. The Commission, therefore, finds that said complaint, insofar as same is based upon such grounds, is not well made and should be dismissed."

In *Millstone v. The Pacific Telephone and Telegraph Company*,[60] the court held that a similar order[61] of the California

[60] 82 P. U. R. (N. S.) 522 (Cal. P. U. C., 1950).

[61] "It is hereby ordered that any communication utility operating under the jurisdiction of this Commission must refuse to establish service for any applicant, and it must discontinue and disconnect service to a subscriber, whenever it has reasonable cause to believe that the use made or to be made of the service, or the furnishing of service to the premises of the applicant or subscriber, is prohibited under any law, ordinance, regulation, or other legal requirement, or is being or is to be used as an instrumentality, directly or

Public Utilities Commission was valid and that pursuant to notice given the company by a special temporary crime study commission the company was forced to suspend its service of a coin operated telephone to the plaintiff's premises.

We come finally to the cases of *Katz v. American Telephone and Telegraph Company,* and *Katz v. Chesapeake and Potomac Telephone Co.*[62] which appear to include in the four decisions to date, the most comprehensive coverage of the immediate problem involved. Let us have a look at the facts involved. They are set forth in part in an agreed statement appearing in the opinion of the original decision of the Federal Communications Commission:

> "On or about the 1 April, 1949, complainants received the following notice from the Chesapeake and Potomac Telephone Company—March 30, 1949: Dear Mr. Katz: We have been advised by the U. S. Attorney for the District of Columbia that his office is in possession of competent evidence that the following telephone, Adams 7738, furnished you at 3169 Wallbridge Place, N. W., Washington, D. C. is being used in violation of the statutes prohibiting gambling in the District of Columbia, and he has requested our company to disconnect the telephone equipment and disconnect such telephone service. In compliance with this request, you are hereby notified that the above mentioned telephone will be discontinued at 11 A. M. on Wednesday, April 6, 1949. Very truly yours, (signed) C. B. Schultz, Mgr."

Discontinuance did not occur because an injunction suit was instituted in the United States District Court[63] to restrain it, and on November 8, 1949, the United States Attorney withdrew the request. Upon notification to the complainants, the suit was dismissed with the consent of all.

However, at the time of the original notification to subscriber there was pending an amendment to the Chesapeake and Potomac Telephone Company tariff which was due to become effective on April 18, 1949. As is patent, this amendment would enable the telephone company, and indeed require it, to suspend its services to complainant. It appears to have been a formal codification of

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indirectly, to violate or to aid and abet the violation of the law. A written notice to such utility from any official charged with the enforcement of the law stating that such service is being used or will be used as an instrumentality to violate or to aid and abet the violation of the law is sufficient to constitute such reasonable cause."

[62] *Supra,* notes 41-44.

[63] D. C., D. C. Civil Action 1506-49 (1949).

a long standing "interoffice policy" of the company. The proposed tariff stated:

> "17. The service is furnished subject to the condition that it will not be used for an unlawful purpose. Service will not be furnished if any law enforcement agency, acting within its jurisdiction, advises that such service is being used or will be used in violation of the law, or if the telephone company receives other evidence that such service is being or will be so used." [64]

On April 14, 1949, four days before the effective date of the amended tariff, Katz filed with the Public Utilities Commission of the District of Columbia a petition requesting that the tariff provision cited above, or any rule or practice of the company consistent therewith, be canceled, suspended or disallowed. Among other things, the petition alleged that complainant had received notice that his telephone would be disconnected, which action (he claimed) would be arbitrary, capricious, constituting a denial of his rights without due process of law, and contrary to the public interest.

In its opinion, the Public Utilities Commission held the tariff valid:

> "It is not the function, nor is it within the power of this Commission to make judicial determinations. The guilt or innocence of petitioners of violation of law is not a question before this Commission. . . . The company may not refuse to furnish telephone service because of mere suspicion or belief that its facilities are being used or will be used for illegal purposes. . . . The tariff provision in question provides that service may not be rendered where a law enforcement officer, acting within his jurisdiction, advises the company that its facilities are being used for unlawful purposes. It is a commonly accepted principle that officers are presumed to do their duty, and the company should not be placed in the position of judging the competency of the duly constituted law enforcement officers. Consequently, it has probable cause to believe that its facilities are being used for unlawful purposes when so advised by the duly constituted officer acting within his jurisdiction. . . ."

The United States District Court for the District of Columbia dismissed an appeal from this decision, but only after the issuance by the Public Utilities Commission of District of Columbia of an order "clarifying the meaning of the tariff amendment" and its enforcement order, No. 3573, which it had promul-

[64] Chesapeake and Potomac Telephone Tariff, F. C. C. No. 3.

gated in closing its opinion on the *Katz* case. The amending order,[65] required that the tariff provision in question be modified so as to provide:

> "that any subscriber whose service is to be discontinued, or any applicant to whom service is to be denied under this regulation, will be notified by the Telephone Company of his right to a hearing by the Public Utilities Commission of the District of Columbia to determine whether or not such service is being used or will be used in violation of law."

On the basis of this modification, and without consideration of the tariff provision as it had stood prior thereto, the District Court dismissed the appeal:

> "Upon consideration of order No. 3573 of the Public Utilities Commission of the District of Columbia, as amended by its Order No. 3590, and of the record of the proceedings before the Commission, the Court is of the opinion, and so finds, that paragraph 17 of Tariff P. U. C.—D. C. No. 3 as amended is not arbitrary or capricious and does not constitute a denial of one's right of due process of law."

Upon analysis, what does this opinion mean, in terms of the Ohio P. U. C. Order No. 22,305, with which we are primarily concerned? It can hardly be said to sustain the position of those courts and commissions which had previously held that the only ground necessary to justify summary discontinuance of telephone service is a mere notification from a law enforcement agency that, in its opinion, the service is being used to further illegal ends. To the contrary, it appears that this court would endeavor to establish that the subscriber has the right to a hearing prior to the discontinuance, if he wishes one, and that he likewise has the right to be notified of a pending discontinuance. But the most miraculous effect of the decision, based as it is upon the modifying order, is that the Public Utilities Commission by the prescribed procedure *does actually become* the determiner of the facts and of the law pertaining to them, i.e. the illegality of the use of the telephone equipment! And this despite its very own language that "It is not the function, nor is it within the power of this Commission to make judicial determinations!" So, by its own modifying order, it would appear that the Public Utilities Commission has dealt a telling blow to its opinion (and similarly to the many identical opinions of other public utilities commissions), in which it disclaims all interest in establishing whether

[65] D. C., P. U. C. Order No. 3590.

or not the facts do justify the opinion held by the law enforcement agency requesting the discontinuance of service! And this without mentioning that it has suddenly, with the blessing of the District Court, pulled itself by its own bootstraps out of the category of an administrative agency and into the sphere of a real, "honest-to-goodness" court. It has been held in one case that the legislature may by enactment constitute a public utilities commission the determiner of facts respecting the basis for a law enforcement notification.[66] The court in that case stated:

> "I see no constitutional impediment to the legislature's delegating to a public commission, rather than to the courts, the jurisdiction to hear and determine the question of whether or not the notification as to legal use was baseless and untrue."

It may well be contended, however, that absent such legislation, and in the light of the many decisions of the various public utilities commissions holding that the determination of legality vs. illegality is outside the scope of commission authority, the modifying order is perhaps a nullity. Where does that leave us?

On November 10, 1949, immediately prior to the said decision of the District Court (November 16, 1949), Katz filed a complaint with the Federal Communications Commission, objecting on similar grounds to American Telephone and Telegraph Tariff,[67] and also to the identical Chesapeake and Potomac Telephone Tariff,[68] which language has been above quoted. It is interesting to note that at that time the appellate jurisdiction for cases arising before the FCC was the District Court for the District of Columbia. The two tariffs in question had been filed in response to a request made by the FCC in a letter to American Telephone and Telegraph Company, dated January 6, 1949:

> (Addressed to American Telephone and Telegraph Company, 195 Broadway, New York, New York, dated January 6, 1949, from the Federal Communications Commission) "Gentlemen: It is the Commission's understanding that with respect to interstate and foreign communication service the Bell System Companies, as a matter of policy, have instructed the personnel not to furnish such service to persons using the same for unlawful purposes. It is requested that the Bell System companies file, in accordance with Section

[66] Gardner v. Southern Bell Telephone & Telegraph Co. (Cir. Ct. Fla., 1951).
[67] American Telephone and Telegraph Tariff, F. C. C. No. 132.
[68] Chesapeake and Potomac Telephone Tariff, F. C. C. No. 3.

203 of the Communications Act appropriate tariff regulations with this Commission which will reflect the policies and practices of those companies concerning this matter insofar as interstate and foreign communication service is involved.

"In this connection, you are undoubtedly aware of the decision of December 1, 1948, by the United States court of appeals for the ninth circuit (cited below) in which it was held that on the basis of regulations contained in Western Union Tariff F. C. C. No. 219 (a copy of which is attached), Western Union was within its rights in refusing to restore to Continental Press Service the leased line service which Western Union had discontinued upon receiving notice from law enforcement officials of the state of California that the service was being used in violation of law. McBride d/b/a Continental Press Service v. Western Union Telegraph Co. 77 PUR NS 65, 171 Fed. 2d 1.

"By Direction of the Commission

(signed) T. J. SLOWIE"

On February 2, 1950, there was a conference and hearing before the Federal Communications Commission. In addition to the constitutional questions presented by the complaint, there is involved in this case the additional problem of the reasonableness of the regulations and tariffs under certain federal statutes, most specifically the Communications Act of 1934, as amended. The opinion, of great interest, is devoted in large part to the specific determination of the character of the tariffs and regulations solely from the standpoint of the federal statute. Because of the limited application, this need not be considered here. It is to be noted that with respect to the tariffs in issue in this proceeding, there is no modifying order as there was in the District Court case. It would seem that this is the only distinguishing factor between the cases. Excerpts from the initial decision follow:

"The complaint and answer thereto raise the following issues: (1) insofar as the tariff regulations permit a telephone company to discontinue service to a subscriber, without prior notice or the opportunity to be heard, do they in effect deprive the subscriber of a property right without due process of law in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States? and (2) are the tariff regulations of the defendant carrier just as reasonable as required by Section 201 (b) of the Communications Act of 1934, as amended?

. . .

"In examining the constitutional issue raised herein, we must consider whether the right of which complainants con-

tend as subscribers they are deprived by reason of said tariff regulations is such a right as is entitled to protection in the Constitution. Does anyone have a 'property right' in the telephone service provided by the defendant's carrier? Any right to interstate and foreign telephone service which any one might assert is denied to him by reason of defendant carrier's regulations here involved, and exists by virtue of the fact that in the exercise of its power to regulate commerce, Congress has seen fit, through the instrumentality of the Communications Act of 1934, to require telephone carriers to serve the public without undue or unreasonable interference. (The Commission cites U. S. Light and Heat Corporation v. Niagara Falls Gas and Electric Company.) Under the Commission's Act, however, the right of the public to receive service is not absolute but may be limited by conditions in the tariff regulations of carriers which, however, must be 'just and reasonable.' These conditions necessarily include consideration of law and order, such as those set forth in defendant carrier's telephone regulations and others similarly compelling, involving the public welfare. We conclude, therefore, that the public (and complainants as members thereof) has no unqualified vested property right to telephone service which may be protected under the Fifth and Fourteenth Amendments of the Constitution, and that any right to service may be conditioned by just and reasonable regulations of the defendant carrier. . . .

"Anyone who is refused service or whose service is terminated by a carrier has recourse by complaint to the courts under Section 406 of the Communications Act of 1934, as amended. Furthermore under Section 402 of the Act, the United States District Courts (in accordance with Chapter 157 Title 28, USCA) have jurisdiction to enforce, enjoin, set aside, annul, or suspend any order of the Commission. . . . These tariff regulations of defendant carriers cannot of course enlarge, diminish, or otherwise alter the remedies provided by law or alter the powers conferred upon the Commission by the Communications Act. Accordingly, we conclude that they do not deprive complainants of opportunity for a hearing in violation of the Fifth and Fourteenth Amendments. . . .

"It is well settled that 'due process' does not always require a hearing before discretion is exercised. (The Commission cites Ewing v. Mytinger and Councilberg; Yakus v. United States; and Bowles v. Willingham. The requirements of 'due process' are satisfied if there is opportunity for a hearing and an issue determined at some stage. . . .

"The tariff regulations do not, of course, relieve the carrier of the necessity of showing 'probable cause' for refusal or discontinuance of service on its own initiative; in order to operate to relieve the carriers of consequences of damages in

the event they act without probable cause in such cases. In any action brought by an individual either to require the carrier to provide or continue service terminated or discontinued on advice of a law enforcement officer pursuant to these regulations, or for damages growing out of refusal or discontinuance of service by the carrier on such advice pursuant to its tariff regulation, the complainant will have the unusual burden of supporting the allegation of which complained. The regulations neither enlarge nor alter that burden. In such actions where the carrier had refused to discontinue service at the request of a law enforcement agency, the burden of the carrier of going forward to show 'probable cause' would be met by the carrier's showing that it acted upon such request in pursuance of its tariff regulation. A complainant would have the usual opportunity of offering rebuttal evidence to show that the notice from a law enforcement agency, upon which the carrier relied was unsupported by fact. Hence, the tariff regulations, in themselves, in no wise operate to deny complainant's particular use of the telephone service. Insofar as these tariff regulations may operate to preclude the recovery of damages to one deprived of service by a carrier upon notice of a law enforcement agency that the service was becoming or would be used for illegal purposes, such circumstance in and of itself does not require us to find that the regulations in question contervene the due process clauses of the Fifth and Fourteenth Amendments to the Federal Constitution; and we think for reasons fully discussed below, the sound basis exists for affording protection to the telephone carrier. We conclude, therefore, that no denial of due process results from the application of these tariff regulations. . . .

"The second sentence of the tariff regulations provides that 'service will not be furnished if any law enforcement agency acting within its jurisdiction advises that such service is or will be used in violation of law, or if the telephone company receives other evidence that such service is being or will be so used.' This is in effect, a statement that advice from a law enforcement agency that service is being or will be used in violation of law will be considered to be 'probable cause' for the discontinuance or refusal of service by the carrier. The carrier is not a law enforcement agency and should not be required to assume the function of law enforcement. The final responsibility of maintaining law, order, and the prevention of crime is vested in law enforcement agencies established for that purpose. These law enforcement agencies through their personnel must be presumed to act within their proper sphere, and without improper motive. Unless and until the courts shall decide that the action of a law enforcement officer in requesting telephone carrier to discontinue service to a subscriber is unmerited in basis,

we think such a request must be considered an incident in the prevention of crime and maintenance of law and order, binding upon telephone company, and has control in determining the telephone company had 'probable cause' for discontinuance or refusal of service. (The Commission here cites McBride v. Western Union, Haggerty v. Southern Bell Telephone Company, Tracy v. Southern Bell Telephone Company, Re Manfredonio, Dente v. New York Telephone Company, and notes that Andrews v. Chesapeake and Potomac Telephone Company holds a contra view.) Moreover were the carrier to disregard the advice of a law enforcement officer it might well find itself subject to prosecution for participating in an illegal enterprise. On the other hand, without some protection, the carrier refusing or discontinuing service at the request of law enforcement agency would be under threat of similar liability in the event the accusations were unlawfully made by the enforcement officials and in the final analysis the resulting expense imposed upon the common carrier is borne by the legitimate users of its service. We conclude, therefore, that in the light of Section 201 (b) of the Communications Act of 1934, as amended, the tariff regulations here in question are just and reasonable." (parentheses supplied.)

In a footnote the Commission points out that the regulations here under consideration were before the District of Columbia Public Utilities Commission in 1949 in the case of *Katz v. Chesapeake and Potomac Telephone Company* and that the Commission held that the telephone tariff regulation was valid, consistent with public interest, and in no degree a denial of due process. The Commission also states that regulations similar to those here under consideration have been found to be just, reasonable and lawful, by the following additional public utility commissions: New Jersey Public Service Commission; Missouri Public Service Commission; and Massachusetts Department of Public Service.

Out of traditional respect for stare decisis, it might be thought that Katz would have been less aggressive in his attempt to maintain his telephone service. But not content to rest upon the defeat he received at the hands of the F. C. C., in this decision promulgated on November 1, 1950, he filed an application for a rehearing based on exceptions to the initial decision. Strangely enough, his application was granted! And on December 21, 1951, the Commission handed down the following decision reversing its previous one! (Commissioner Walker dissented, adopting for his dissenting opinion the earlier unanimous opinion of the Commission.) The opinion, evidencing perhaps a growing trend toward

protection of the telephone subscriber, is quoted in entirety. Soon after the decision was rendered, on December 21, 1951, the Commission suspended the operation of its order, and so the matter stands. The tariffs are still on file, and, three years after the U. S. Attorney made his request of the telephone company to (forthwith?) disconnect Mr. Katz's service, the telephone is still in operation, according to the best information available. The wheels of justice seem to grind slowly, but there is yet hope. The case is docketed for a second rehearing before the F. C. C.

The final pronouncement in the *Katz* case—the opinion of the Federal Communications Commission rendered in December, 1951:

> "1. Complainants charge that the tariff regulations are defective both from the constitutional standpoint and because they offend the provisions of the Communications Act of 1934, as amended. We have considered both aspects of the matter, but have concluded that it is unnecessary to rule upon the constitutionality of the regulations because, to the extent stated below, they are unjust, unreasonable, and therefore unlawful under section 201 (b) of the Communications Act of 1934, as amended.
>
> "2. The Commission is entirely aware of the significance of rapid communication in the ramified illegal gambling industry, to name only one unlawful activity in which transmission of vital information is a factor. We have hitherto expressed our opinion that the transmission of gambling information in interstate commerce should be outlawed (see, e.g., letter to the Chairman of the Senate Interstate and Foreign Commerce Committee, dated September 19, 1951, submitting comments on S. 2116 (a bill to prohibit transmission of certain gambling information in interstate commerce); Senate Report No. 925, 82nd Congress, 1st Session, page 37). It would be laboring the obvious to say that the eradication or prevention of crime is a desirable goal, and we have no wish to see interstate and foreign communication facilities promote criminal activity. We are of the opinion that a tariff regulation which expressed the carrier's policy not to furnish service used for an unlawful purpose would not be unjust or unreasonable. Nor would it be unjustly or unreasonably discriminatory, under section 202 (a) of the Communications Act, to deny telephone service when such service is being or will be used for illegal purposes. Such a view is consonant with the general construction of a carrier's duty toward illegal enterprises. It would appear, therefore, that the first sentence of the regulations under consideration, standing by itself, is unexceptionable, and if the regulations stopped at that point there could be no quarrel

with them. But the second sentence, we hold, cannot be sustained, and we proceed to discuss the regulations in the light of its presence.

"3. Section 201 (b) of the Communications Act provides that 'all charges, practices, classifications, and regulations for and in connection with (interstate or foreign wire or radio) communication service, shall be just and reasonable'; and declares them unlawful if they do not conform to this standard. There can be no question of the power of a telephone company, both at common law and under the Communications Act, to adopt reasonable regulations respecting the conduct of its business and the terms upon which it furnishes service. Southwestern Teleg. & Teleph. Co. v. Danaher, 238 U. S. 482, 59 L. ed. 1419, PUR 1915D 571, 35 S. Ct. 886, LRA 1916 A 1208; Ambassador, Inc. v. United States (1945) 325 U. S. 317, 323, 89 L. ed. 1637, 58 PUR NS 193, 65 S. Ct. 1151. The second sentence of the regulations states:

> 'Service will not be furnished if any law enforcement agency acting within its jurisdiction, advises that such service is being used or will be used in violation of law, or if the telephone company receives other evidence that such service is being or will be so used.'

"The telephone company takes the position that because of the inclusion of this sentence it will be absolved of liability to a subscriber or applicant if the action which it takes with respect to such subscriber or applicant is based upon the advice of a law enforcement agency. Indeed, defendants request 'clarification' of the language of the Initial Decision to put it beyond misunderstanding that they would not be liable. We are of the opinion that the carrier cannot so avoid responsibilities which are implicit in its operation. In giving or in refusing service after receiving the advice mentioned in the regulation, or the 'other evidence,' the carrier must make a decision. That such decision may render it liable in the event of error, either to the subscriber or applicant or to process for aiding and abetting a criminal violation, does not eliminate the carrier's necessity to make the determination. We find nothing in the Communications Act which will permit the carrier to insulate itself from liability for its actions in connection with the rendition or refusal to render service in the manner here sought. To the extent, therefore, that the regulations in question attempt so to protect the carrier they cannot be upheld.

"4. In addition to the foregoing, we find another reason why this portion of the regulations cannot be sustained. In effect, the carrier binds itself to accept in every case the advice of 'any law enforcement agency, acting within its jurisdiction,' without regard to the nature of the advice. Thus, it is possible that even though it may be within the knowledge

of a carrier that the advice given it by a law enforcement agency is unfounded, the regulations would require acceptance of the advice and action in response thereto. In such or comparable situations, the automatic action required by the regulations would be clearly unreasonable, and consequently the regulations themselves, demanding such action, must fall.

"5. However, our holding with respect to the second sentence of the regulations should in no way be construed as precluding the carrier, in the exercise of the judgment which it is required to make in furnishing or refusing service, from giving the weight or consideration, which it decides is justified under the circumstances, to any evidence, including evidence or representations which may be made to it by law enforcement agencies. No rule of thumb can be prescribed for application to the situations in which a carrier must make a decision. It may be observed, however, that the nature of the offense involved, the strength of the evidence of its perpetration, and the patent need for social protection demanding immediate action, may in certain cases prompt the carrier to discontinue service without notice to the subscriber; while in other cases, perhaps, instanced by the circumstances under which complainants herein were threatened with loss of their telephone service, the carrier may justifiably feel that notice of the proposed discontinuance can be afforded the subscriber so that he may avail himself of legal remedies looking toward continuance of his service. Manifestly, although the carrier may in some situations offer the subscriber a grace period during which he may seek to prevent interruption of his service, in others immediate action will be indicated. We recognize that these are questions calling for careful judgment on the part of the carrier. But the fact that an arduous task may be imposed upon the carrier, and that it may possibly be visited with civil or criminal liability in the event of a mistaken decision on its part, cannot constitute a reason for permitting it to immunize itself from all responsibility for discontinuance of service.

"6. Accordingly, as we are of the opinion that while the first sentence of the tariff regulations of defendants herein involved is not unlawful, in and of itself, the regulations as a whole are unjust, unreasonable, and therefore unlawful, to the extent set forth above the complaint should be sustained. It is therefore *ordered,* this 19th day of December, 1951, that defendants shall file tariff schedules effective not later than February 1, 1952, or not less than one day's notice to the Commission and to the public, canceling the second sentence of each of said tariff regulations, namely, American Telephone and Telegraph Company Tariff FCC No. 132, 3rd Revised Page 10A, Section B, Paragraph 10, and The Chesa-

peake and Potomac Telephone Company Tariff FCC No. 3, 1st Revised Page 11B, Section B, Paragraph 16."

In the event that the decision is again reversed, the appeal, if taken, will now come before the Court of Appeals for the District of Columbia, as was previously explained, due to the change in the law in 1952. This court, it will be recalled, rendered the decision in the case of *Fay v. Miller,* which must certainly be considered as tending toward the protection of the subscriber from ex-parte discontinuance of his service.

Conclusion

In exasperated conclusion, it can only be said that the question is still much in a state of flux as to whether or not such regulations as Ohio Public Utilities Commission, Order No. 22,305, and actions taken thereunder, constitute an unconstitutional denial of due process. The large majority of cases, many of which have been decided by public utilities commissions, however, uphold the right of the telephone company to discontinue service summarily at the request of a law enforcement agency without the necessity of any further proof of illegal use of the equipment. There is some authority to the contrary. There is considerable dicta indicating an awareness on the part of the courts of the increasing economic importance of the telephone, and a corresponding desire to protect the subscriber from the possibility of unwarranted interference with his service. With respect to the burden of proof as regards the legality or illegality of use and the incidence of the burden on the subscriber, telephone company, or law enforcement agency, there appears to be a considerable difference of opinion, clouded by dicta and not susceptible of any clearcut analysis. It can be said with certainty that the telephone companies are free to refuse to contract if they have reason to believe that an applicant will use the service for illegal means, or to further illegal pursuits. Once service has been established,—that is, once the burden of proving that he will use the service properly has been met by the applicant,—the decisions diverge. There is no question that the telephone company must have more than a mere suspicion of illegal usage to justify its discontinuance of service. But where it is the law enforcement agency which has the "mere suspicion" it appears that the subscriber may lose his telephone before he even learns of it, and only afterward may require a hearing to recover it. It is im-

possible to foretell what effect will come of cases like *Fay v. Miller,* indicating that the company is justified in relying upon the notification of the law enforcement officer in the original discontinuance of service, but thereafter holding that the company must sustain by a "preponderance of the evidence" the burden of proving that the service was indeed illegally used, in order to sustain a continued refusal to serve. Whether or not this viewpoint will prevail over that expressed in "Re Southwestern Bell Telephone" [69] holding that, given the same facts, the company is justified in continued refusal to serve until the subscriber proves that his prospective use will be proper, remains to be seen. The "off-again—on again" *Katz* case, while it seems to cover every facet of the question, leaves much to be desired in obtaining a positive conclusion on the constitutional question.

In view of the increasing importance of telephone service, it is submitted that the most satisfactory way to insure the public against unwarranted stoppages, even if temporary, is to require notice and the opportunity for hearing prior to discontinuance. It is submitted that the "cost" involved in permitting temporarily the continuance of an offense to public policy, only until the hearing, is far outweighed by the benefit to be received by withdrawing from the realm of possibility the slightest potentiality for what Justice Struble has so aptly termed "police government."

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[69] *Supra,* note 34.