

## Memorandum

TO : Mr. E. V. Anderson

Date December 22, 1986

From : John Abbott

RECEIVED

DEC 22 1986

Subject : Emergency Telephone Users Surcharge Law -  
subpoena for customers' calling records

E. V. ANDERSON

In your November 3, 1986 memo to Mr. Gary Jugum, you write:

"Attached is a copy of two letters, one from and one from the P.U.C. which, in effect, say that we cannot see the books and records to make a telephone tax audit. We need some legal advice as to how to proceed. We are thinking the best way might be to use a subpoena. Could you have someone review this matter.

"Following are some of the questions which I feel we need to explore:

- "1. Does the tariff Rule 35 take precedence over Section 41130?
- "2. Is a subpoena appropriate here?
- "3. Should we seek modification of the rule through the Commission?
- "4. Should we seek an attorney general opinion if we do not agree with P.U.C.?"

"We would appreciate an early response, as we are ready to start the audit of as soon as we can get access to the records and today informed us that based on the letter from P.U.C. they were asking our auditors to discontinue the audit we currently have under way."

The letter you enclosed from the Public Utilities Commission is dated November 1, 1986, from Mr. Victor Weisser, Executive Director of the P.U.C., to Mr. . . . . In summary, Mr. Weisser's letter confirms . . . . 's opinion that the provisions of . . . . 's tariff schedule, Rule 35, take precedence over Revenue and Taxation Code Section 41130. Mr. Weisser relates that the Board has asked . . . . to produce certain of its records which constitute "calling records." Under tariff Rule 35, these records may be released only under the following circumstances:

- "(1) Upon receipt of a search warrant obtained pursuant to California or federal law, or of a Federal Grand Jury Subpoena or a Federal Agency Subpoena; or
- (2) Upon making return to a subpoena or subpoena duces tecum, when it reasonably appears to the telephone utility that the procedures set out in Code of Civil Procedure Section 1985.3, or successor provisions, as they then exist, have been followed. The utility shall not produce the records if there has not been compliance with CCP Section 1985.3. The utility shall abide by all orders to quash, protective orders and similar court orders which may be issued with regard to the subpoenaed credit information and calling records.
- (3) Upon receiving permission of the customer to release the information."

Mr. Weisser concludes that since Section 41130 was not intended to overrule the legal principle that tariff Rule 35 has the force and effect of statutory law, the Board should either comply with the applicable provisions in Rule 35 to obtain the records or apply to the P.U.C. for a modification of the tariff rule.

#### Opinion

Our opinion is that Section 41130 and tariff Rule 35 are not inconsistent with each other, and that both the Board and the telephone companies will comply with Rule 35 when the Board subpoenas the records, and when the telephone companies make a return to those subpoenas. Under Section 41130, the Board has the right to inspect and audit all records of the service

suppliers ( , and other telephone companies regulated by the P.U.C.) upon proper notification to the service supplier. That proper notification may take the form of a subpoena duces tecum, issued by the Board under the authority of Government Code Section 15613.

Among other provisions, tariff Rule 35 allows the telephone companies to make a return to a subpoena or subpoena duces tecum "when it reasonably appears to the telephone utility that the procedures set out in Code of Civil Procedure Section 1985.3, or successor provisions, as they then exist, have been followed."

Section 1985.3 sets forth the procedure to be followed when a subpoenaing party serves a subpoena duces tecum on a witness for the personal records of a consumer. A witness under Section 1985.3 includes a telephone corporation which is a public utility, and the personal records of a consumer undoubtedly include some of the calling records which the Board would wish to examine for audit purposes. However, the definition of a subpoenaing party in Section 1985.3 "shall not include the state or local agencies described in Section 7465 of the Government Code..."

Government Code Section 7465(e) states: "The term 'state agency' means every state office, officer, department, division, bureau, board, and commission or other state agency, including the Legislature." The Board can of course affirmatively show that it is included within this definition and, therefore, excluded from the definition of a subpoenaing party for Section 1985.3 purposes.

Therefore, our recommendation is that the Board should routinely issue subpoenas to the telephone companies regulated by the P.U.C. in order to conduct our audits under the Emergency Telephone Users Surcharge Law. The subpoenas will affirmatively show that the Board has complied with Code of Civil Procedure Section 1985.3 both by issuing the subpoena and by demonstrating that it is a state agency exempt from the customer notification requirements of Section 1985.3. Accordingly, the telephone companies will be in a position to comply both with the Board's subpoena duces tecum and with the provisions of tariff Rule 35 by making a return to the subpoena when it reasonably appears to the telephone companies that Section 1985.3 has been followed by the Board.

Mr. E. V. Anderson

-4-

December 22, 1986

If for any reason the telephone companies remain of the contention that they need not comply with the Board's subpoena, then our recommendation is that we refer the non-compliance with the subpoenas to the Attorney General's office in order to seek a court order requiring compliance with the Board's subpoenas.

In answer to your other questions, we feel that since tariff Rule 35 and Section 41130 do not conflict with each other, there is no necessity to seek a modification of Rule 35 through the P.U.C., nor to seek an Attorney General's opinion on this issue.

In order to enable me to issue a subpoena duces tecum to [redacted] and [redacted] please send me the information listed in Section 799.050 of the Compliance Policies and Procedures Manual, and I will promptly see to it that these subpoenas are issued.

JA:jb/0239E

*John Abbott*