

ORIGINAL

Decision No. 58699

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

In the Matter of the Application  
 of THE PACIFIC TELEPHONE AND  
 TELEGRAPH COMPANY, a corporation,  
 for authority to cancel immediately  
 its Tariff Schedule Cal. P. U. C.  
 No. 108-T and to withdraw from the  
 furnishing of private mobile  
 communication service on a lease-  
 maintenance basis by January 24, 1961,  
 except as to services that may be  
 provided to the United States  
 Government.

Application No. 40934

Arthur T. George and Francis N. Marshall, for applicant.  
 Milford Springer and Robert M. Olson, Jr., by Robert  
 M. Olson, Jr., for Southern Counties Gas Company of  
 California and Southern California Gas Company; Cross  
 and Brandt by Frances L. Cross, and Brobeck, Phleger  
 & Harrison by Robert N. Lowry, for Motorola Communica-  
 tions and Electronics, Inc.; William L. Knecht, for  
 California Farm Bureau Federation, interested parties.  
 Mary Moran Pajalich and William W. Dunlop, for the  
 Commission's staff.

O P I N I O NApplicant's Request

The Pacific Telephone and Telegraph Company filed the above-entitled application on March 17, 1959 requesting an order of the Commission authorizing it to: (1) cancel Tariff Schedule Cal. P. U. C. No. 108-T immediately, and (2) withdraw from the furnishing of private mobile communication systems on a lease-maintenance basis by January 24, 1961, except as to services that may be provided to the United States Government.

Public Hearing

After due notice, public hearing was held upon this application before Examiner Manley W. Edwards on April 27, 1959 in San Francisco. Applicant presented fourteen exhibits and testimony by one witness in support of its request. Counsel for the Commission

staff and for the interested parties cross-examined the witness for the purpose of developing a full record to aid the Commission in deciding this request. The matter was submitted for Commission consideration at the close of the day's hearing and now is ready for decision.

Applicant's Position

Applicant refers to the fact that it is now serving private mobile telephone service under Schedule No. 108-T; that by Decision No. 54438 (Case No. 5754, dated January 29, 1957) this Commission held that private mobile communication systems and service as rendered under Schedule No. 108-T constituted a telephone line and public telephone service; that the California Supreme Court<sup>1/</sup> affirmed the Commission's decision; that the customer under Schedule No. 108-T has the full responsibility for obtaining the necessary authorizations from the Federal Communications Commission for the operation of the system; however, the Federal Communications Commission has not licensed any new customers seeking to obtain facilities from applicant under the tariff; and, that it is not fair to its present customers to hold out hope of a continuing service in the future which, under the consent decree,<sup>2/</sup> will apparently not be available after January 24, 1961, except as to services that may be provided to the United States Government.

Parenthetically, we here point out that the decision of the Supreme Court of California, which affirmed Decision No. 54438

1/ Decision issued June 27, 1958 in Commercial Communications v. Public Utilities Commission, 327 P. 2d 513, 50 Cal. 2d 512 (rehearing denied July 23, 1958).

2/ Section V of the Final Judgment entered by the United States District Court for the District of New Jersey on January 24, 1956 in United States of America v. Western Electric Company, Inc., et al., forbids the American Telephone and Telegraph Company and its subsidiaries, including applicant, from engaging in any business other than the furnishing of common carrier communications services.

rendered by this Commission in Case No. 5754 under date of January 29, 1957, was denied review by the Supreme Court of the United States.

Applicant is of the opinion that Section V of the Final Judgment permits it to engage in common carrier communications services, which include private mobile communications services on a lease-maintenance basis where regulated by this Commission; however, it states that the Justice Department of the United States of America has taken the position that the consent decree prohibits the American Company and its subsidiaries from engaging in the lease-maintenance of private mobile communications systems after January 24, 1961 even though charges for such service are subject to public regulation. Applicant also refers to the fact that Assistant Attorney General Hansen advised the Federal Communications Commission in a letter opinion dated October 14, 1958, in substance, that applicant remained subject to the prohibition of Section V of the Final Judgment notwithstanding its Tariff 108-T which was upheld by the California Supreme Court, and that it could not furnish the service contemplated by that tariff to persons who were not lessees of such systems on March 11, 1956 and, in any event, not after January 24, 1961.

Federal Communications Commission Licenses

Applicant states that when it filed Schedule No. 108-T on March 30, 1956, it had 133 contract customers; that as of December 31, 1958 this number had been reduced to 118; that since the filing of the tariff it has not executed any new contracts with new customers other than the United States Government, nor has it provided any facilities to new customers under the tariff; that the Federal Communications Commission announced in a rule-making proceeding (Docket No. 12722, December 30, 1958) that it will not license any applicant who was not a lessee of a private mobile system from the American Company, or one of its subsidiaries, on or before March 9, 1956; that the Federal Communications Commission made no exceptions

for lease-maintenance arrangements where the charges are subject to public regulation, as in the applicant's service furnished in California, although it did request comments on the effect of the Final Judgment in such cases. Applicant represents that the pendency of this proceeding with its effects upon the licensing practices of the Federal Communications Commission makes it clear that there will be no licenses granted to any persons seeking to obtain service from applicant in the immediate future.

Applicant's Proposal

In order to aid applicant in resolving this matter at the earliest practical date and to give its customers ample warning notice and sufficient time to make satisfactory arrangements to meet their private mobile communications needs, applicant proposes to cancel Schedule No. 108-T but to continue to furnish this service to its customers who may desire it, subject to discontinuance not later than January 24, 1961, except as to services which may be provided to the United States Government; to offer to sell equipment and facilities presently used to furnish private mobile communications service; to give first opportunity to purchase to existing customers; to submit to this Commission for its approval such sales of operating property as are negotiated; and as to such equipment and facilities that are not sold in place, to be removed or retired or used wherever possible in applicant's public mobile communication service offering.

Applicant's Exhibit No. 12 shows that it expects to have 190 private mobile stations remaining in service on January 24, 1961 if this application is granted; that it is estimated the number of public mobile stations in service at the end of 1959 will be 2,700,

at the end of 1960 the number will be 3,490, and at the end of 1961, 4,000; that it presently has 46 mobile service centers; and that if this application is granted, three of the mobile service centers will be discontinued.

Commission Staff Position

Counsel for the staff took the position that the applicant has not sustained the burden of proof, and, that the application should be denied because (1) the usual criteria for abandoning a public utility service are lacking here; (2) that public need for the service is increasing; (3) the applicant has not shown it is losing money in performing the service; (4) that since the United States Supreme Court has not seen fit to set aside this Commission's decision, there have not been adequate tests under the latest conditions to show that the Federal Communications Commission will not issue any license to mobile services in California which are classed as public utility service; (5) that the tariff does not have to be cancelled before the applicant can negotiate with its customers; (6) that the consent decree does not include within its terms common carrier communications service; (7) that no court has found that service under Schedule No. 108-T is not a common carrier communications service; (8) that this is intrastate service not subject to Federal laws; and (9) if in the future the Federal Communications Commission should refuse to grant an application to either an existing or prospective customer of applicant under Schedule No. 108-T, then the time would be right for filing of an application such as this one.

Counsel for the applicant had no quarrel with the staff's contentions regarding the meaning of the consent decree, stating that they read it alike, but that the only difficulty is that the Justice

Department apparently reads it differently and that the applicant cannot seem to do anything about it; that this is an unusual case and these circumstances have forced the applicant into a situation much against its will and much against its belief as to the best interests of California customers and that it cannot hold out this service to the customers with any hope that the service would ever be provided because, as a practical matter, where the prospective customer files with the Federal Communications Commission, he will not receive a license.

Findings and Conclusions

After considering the evidence of record, it appears to the Commission that to permit applicant now to withdraw its intrastate tariff, Schedule No. 108-T, would not be in the public interest until applicant can show conclusively that the Federal Communications Commission will not grant or renew licenses to California customers applying for service thereunder or until applicant can show that the exception contained in the consent decree to common carrier service does not exempt California intrastate private mobile service under Schedule No. 108-T. Furthermore, such service to the Federal Government is exempted by the consent decree and such service could carry on under Schedule No. 108-T after January 24, 1961.

The rules thus far promulgated by the Federal Communications Commission on granting licenses to customers served by the American Company and its subsidiaries,<sup>3/</sup> adopted on March 25, 1959, state: "Pending final action in Docket No. 12722, the terms of this section are not intended to encompass, in a negative or affirmative manner, applications involving telephone company lease-maintenance arrangements

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<sup>3/</sup> See Exhibit No. 7 herein, Note 2, of the Appendix.

which have been found or may be found, by any jurisdiction, to be 'the furnishing of common carrier communications services' and/or if the charges therefor are or may become 'subject to public regulation'."

Most of this service now is being rendered under contracts with termination dates of January 24, 1961. No service can be provided under the tariff after January 24, 1961 unless the Federal Communications Commission renews the licenses or grants new ones. The customers now receiving service under Schedule No. 108-T are all aware of this termination date and it is difficult to see how the mere withdrawal of the schedule at this time would assist the applicant in solving its problem. The City of Antioch desires that the service be continued under the tariff schedule.

The Commission finds and concludes as follows:

1. That there is an increasing need for private mobile telephone service as performed by applicant.
2. That applicant has not shown that private mobile telephone service is being rendered at a loss.
3. That applicant is physically able to perform its dedicated service.
4. That in the Commission's opinion applicant legally is able to perform the service in question under the terms of the Consent decree and under the rulings of the Federal Communications Commission.
5. That a premature abandonment of this service might result in an economic loss and burden on applicant's other types of service and customers.

6. That applicant has failed to sustain its burden of proving that public convenience and necessity do not require, between now and January 24, 1961, the common carrier services as provided by Schedule No. 108-T.

In order to give the private mobile customers now receiving service under the tariff schedule the same opportunity and length of service as those being served under special contracts, we will require that the applicant keep Schedule No. 108-T in force for non-Federal customers only, until January 24, 1961. By that time experience may show that licenses can be renewed, that this public utility service is not prevented by the consent decree, and that the applicant can permanently maintain a Schedule No. 108-T.

O R D E R

The Pacific Telephone and Telegraph Company having applied to this Commission for authority to cancel and withdraw Schedule No. 108-T, public hearing having been held, the matter having been submitted and the Commission being of the opinion that cancellation at this time and the withdrawal from offering of private mobile communication service by applicant prior to January 24, 1961 are not in the public interest; therefore,

IT IS ORDERED that:

1. The request of The Pacific Telephone and Telegraph Company to cancel and withdraw Schedule No. 108-T prior to January 24, 1961 is denied.

2. In the event that applicant does not desire to continue Schedule No. 108-T after January 24, 1961, it shall file a supplemental application herein, approximately sixty days prior to



January 24, 1961, showing reasons why the schedule should not be continued after January 24, 1961 for non-United States Government as well as for United States Government service.

The effective date of this order shall be twenty days after the date hereof.

Dated at San Francisco, California, this 29<sup>th</sup> day of June, 1959.

[Signature]  
President  
[Signature]  
[Signature]  
[Signature]  
Commissioners