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ORIGINAL

Decision No. 68137

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY, a corporation, Complainant, vs. INDUSTRIAL COMMUNICATIONS SYSTEMS, INC., a corporation, Defendant.	Case No. 7651

Arthur T. George and Maurice D. L. Fuller, Jr., by Maurice D. L. Fuller, Jr., for complainant.

Lester W. Spillane, for defendant.

Neal C. Hasbrook, for California Independent Telephone Association, intervenor.

Paul Popenoe, Jr., for the Commission staff.

O P I N I O N

Complainant, by a complaint filed June 18, 1963, seeks an order canceling certain tariffs refiled by defendant on May 10, 1963 under Advice Letter No. 6 and any other tariffs of defendant by which it purports to offer point-to-point communication service as specified in the complaint.[1/] Complainant alleges that defendant does not have the requisite operating authority to support its offer of service and that, in any case, the proffered service would result in wasteful and unnecessary duplication of facilities and service presently being offered to the public by complainant under its tariff schedule Cal. P.U.C. No. 45-T.

1/ Cal. P.U.C. Sheets 21-T, 22-T, 23-T, 24-T, canceling Cal. P.U.C. Sheets 19-T, 5-T, 13-T, 20-T, originally filed August 10, 1961 under Advice Letter No. 1 (Decision No. 62156, June 20, 1961, Case No. 6945, 58 Cal. P.U.C. 756). The refiled tariffs became effective June 10, 1963 over complainant's letter protest.

Defendant, by its answer and by a written motion to dismiss the complaint, asserts that, as a telephone utility subjected by Decision No. 62156, supra, to this Commission's regulatory jurisdiction along with other Miscellaneous Common Carriers in the Domestic Public Land Mobile Radio Service, it has the right, under Section 1001 of the Public Utilities Code, to provide the radio channel link service, offered in its tariffs, over its existing microwave facilities in Southern California without being required to obtain specific certificated authority from this Commission.

The case was submitted on briefs, since filed, at the conclusion of public hearings held at San Francisco on October 29 and 30, 1963 and Los Angeles on November 14, 1963, before Examiner Gregory.

The only issue we decide here is whether defendant has the requisite operating authority to support the intrastate communication service offered in tariffs presently filed with this Commission. If not, those tariffs should be canceled.

The record reveals that in 1961 this Commission, by Decision No. 62156, supra, on the basis of information submitted by a number of radiotelephone enterprises, including defendant, that they were operating in this State in the furnishing of intrastate telephone communications to the public by radio under licenses granted by the Federal Communications Commission in the Domestic Public Land Mobile Radio Service, found that such "miscellaneous common carriers", licensed by the FCC pursuant to Part 21 of its Rules, were "public utility telephone corporations as such term is defined in Section 234 of the California Public Utilities Code and are subject to all applicable provisions of said code and of this Commission's general orders, except as herein modified." The Commission also found that

public convenience and necessity required "continuation of the California intrastate radiotelephone service as presently offered and that utilities rendering such service should be authorized and directed to continue in operation under present rate levels and conditions of service." (58 Cal. P.U.C. 756, 761.)

The Commission's order in Decision No. 62156 (58 Cal. P.U.C. 756, 762) directed defendant and other respondent radiotelephone utilities to continue their intrastate communications service "at the rates and charges and under the conditions authorized by the Federal Communications Commission in effect on the effective date of this decision." Decision No. 62156, dated June 20, 1961, became effective twenty days thereafter.

Other parts of the order directed the filing of tariffs and certain annual reports; forbade expansion of operations into new territory except in accordance with provisions of Section 1001 of the Public Utilities Code; forbade unauthorized discontinuance or partial withdrawal of service; and, except where exempted by Section 1001 of the Public Utilities Code, forbade construction or extension of a plant or system without prior certification by this Commission, or the offer of service to the public without this Commission's authorization.[2/]

2/ Section 1001 of the Public Utilities Code exempts a utility from the requirement of prior certification for extension "within or to territory already served by it, necessary in the ordinary course of its business." Complainant argues that defendant's public offering of point-to-point radio channel link service, as proposed in its tariffs, is not supported by appropriate FCC licensing authority, hence is not an extension "necessary in the ordinary course of its business" as a licensee in the Domestic Public Land Mobile Radio Service.

The evidence shows that Industrial secured its original radio station license (Call Sign KMD990) from the FCC for the period August 29, 1958 to April 1, 1960 as a common carrier in the Domestic Public Land Mobile Radio Service (FCC Rules and Regulations, Part 21, Subpart G), with assigned locations, frequencies and classes of stations as follows (Exhibit 18):

Location No. 1, Santiago Peak, Orange County,	454.15	MC-Base
	896.5	MC-Repeater
Location No. 2, 1500 W. 58th St., Los Angeles	891.5	MC-Control

Mobile Frequency - 459.15 MC

The license bears on its face the following restriction:

> "This license shall not vest in the licensee any right to operate the station nor any right in the use of the frequencies designated in the license beyond the term hereof, nor in any other manner than authorized herein . . . ."

The FCC, by a subsequent construction permit and by modified licenses, issued from September 21, 1960 to June 20, 1963, authorized Industrial to construct and operate a base station on Verdugo Peak, Los Angeles County, in addition to the base station on Santiago Peak, assigned two frequencies each to the base stations (454.15 and 454.20 MC) and the mobile service (459.15 and 459.20 MC), and frequencies in the 6KMC spectrum (in lieu of previous lower frequencies) for control or repeater facilities at the three fixed locations as follows: Santiago and Verdugo Peaks, 6226.9 MC, repeater; 1500 W. 58th St., Los Angeles, 5974.8 MC, control.

The construction permit dated September 21, 1960 (which authorized frequencies in the 6KMC spectrum for control or repeater facilities) contains the following condition (Exhibit 19):

> "This grant is subject to the condition that the use of frequencies herein authorized, for Control and Repeater facilities, is subject to termination without hearing, upon notice from the Commission if, in its discretion, justification exists for the use of these frequencies for assignment to stations in the Point to Point Microwave Radio Service." 3/

An FCC modified Radio Station License issued to Industrial on May 24, 1961 (Exhibit 1) added the Verdugo Peak Base Station location and assigned frequency (454.15 MC), but did not include the control and repeater frequencies in the 6KMC spectrum granted by the construction permit dated September 21, 1960. On June 13, 1961, however, in response to telegraphic and letter communications from Industrial, the FCC granted defendant utility telegraphic special temporary authority, for the period ending July 12, 1961, to operate control facilities at 1500 West 58th Street, Los Angeles on 5974.8 MC and repeater facilities at Santiago Peak on 6226.9 MC, "constructed exactly as authorized in construction permit, File No. 3286-C2-MP-61. Concurrent authority granted operate control facilities at location two exactly in accordance present license, File No. 2213-C2-ML-61, except utilizing frequency 896.5 megacycles, presently licensed for repeater facilities at location one, /Santiago Peak/ with directional antenna oriented at azimuth 355 degrees true to provide control base station facilities at location three /Verdugo Peak/ in lieu of location one. Operation of 890 MC - 940 MC repeater facilities at location one shall be discontinued during term of this authorization . . . ." (Exhibit 20.)

3/ Point-to-Point Microwave Service is governed by FCC Rules and Regulations, Part 21, Subpart I. The modified radio station licenses issued July 13, 1961 (Exhibit 2) and June 20, 1963 (Exhibit 3), contain the same condition, as well as the restriction in the original license, quoted above, against station operation or frequency use in a manner otherwise than as authorized.

The license issued July 13, 1961 (Exhibit 2) incorporated the control and repeater frequencies in the 6KMC spectrum assigned to the various locations, as did that of June 20, 1963 (Exhibit 3). The latter license also included the additional base station and mobile frequencies referred to above.

Industrial, on February 26, 1962, transmitted to the FCC applications for authority to shift the control and repeater facilities associated with Domestic Public Land Mobile Radio Station KMD990 to the Point-to-Point Microwave Service and for a modified station license (FCC Files Nos. 4188 and 4209 - C1-P-62). On March 29, 1962, the FCC returned the applications as defective and pointed out, among other matters, that the proposal was not part of a mobile radio service, "but would apparently provide, on a common carrier basis, a communications circuit to the public for hire, for a number of purposes not specifically set forth in the application." Industrial was advised that if it believed its existing authority from the California Public Utilities Commission (Decision No. 62156 and tariffs; Secs. 234, 1001, Pub. Util. Code) was appropriate for the proposed microwave service, then an opinion to that effect should be submitted to the FCC, preferably from the California commission (Exhibit 5).

On May 15, 1962, Industrial resubmitted the applications, limited, however, to a request to use the assigned repeater frequency of 6226.9 MC between Santiago Peak and 1500 West 58th Street, Los Angeles, only. Attached to the application are letters, dated January 26 and April 13, 1962, from Los Angeles Airways, Inc. (helicopter service), requesting use of one of Industrial's proposed microwave audio channels upon relocation of Airways' radio transmission

facilities from Mt. Wilson to Santiago Peak (Exhibit 4). Also, in support of the applications, Industrial submitted a copy of the portion of Decision No. 62156, supra, which states, in part, that miscellaneous common carriers, such as Industrial, come within the definition of "telephone corporations" (Pub. Util. Code, Sec. 234), are "public utility telephone corporations", and are excepted from the jurisdiction of the FCC with regard to "charges, classifications, practices, services, facilities or regulations for or in connection with intrastate communication service by wire or radio. (Section 152(b), Title 47 U.S.C.A.)." (See 58 Cal. P.U.C. 756, 759.)

In further support of its resubmitted applications and with reference to the FCC's letter of March 29, 1962, Industrial, in a supplementary showing (Exhibit 7 of the resubmitted applications), described the proposed service as follows:

> ". . . an audio channel with related control circuit to be carried over existing, already licensed, Microwave carrier. . . . It is to provide a control circuit to enable an aeronautical user to control its base-mobile system which is to be located on Santiago Peak."
>
> "The user involved, Los Angeles Airways, Inc., has need for additional coverage for its base mobile system, and this would be supplied by adding one Multiplex Sub-Carrier to the Microwave line authorized under KMD-990. Hence this use of the facilities is for control purposes in connection with a mobile radio service."

The supplementary showing refers to Industrial's tariff filed with this Commission on August 10, 1961, under Advice Letter No. 1, which includes the offer of "radio channel link service", by voice and control channels, "for the operation of subscribers' own purposes" between Industrial's main office at 1500 West 58th St., Los Angeles and its transmitter buildings on Santiago and Verdugo Peaks. (This tariff, as stated, was refiled May 10, 1963 under Advice Letter No. 6, without significant changes.)

Complainant has opposed Industrial's applications before the FCC upon essentially the same grounds urged here: (1) that Industrial, prior to the effective date of Decision No. 62156, did not have FCC authority and has not since obtained authority from the California commission for the proposed point-to-point intrastate communications service; (2) that granting of the FCC applications would result in needless and wasteful duplication of common carrier facilities and services in the areas involved and would not serve the public interest, convenience and necessity.

On March 25, 1963, the FCC rejected the resubmitted applications (Exhibit 11).[4/] That action resulted from an exchange of correspondence between the FCC and this Commission, initiated by the FCC on February 18, 1963 (Exhibit 23) in light of Industrial's representation, supported by a letter from this Commission, that it possessed appropriate California authority for the Point-to-Point Microwave Radio Service proposed in its applications. The FCC letter states, in part:

> "Although both the Domestic Public Land Mobile Radio Service and the Point-to-Point Microwave Radio Service fall within the purview of Part 21 of the Commission's rules, the Point-to-Point Microwave Radio Service proposed is a separate and distinct service as opposed to a land mobile radio service, and it can, on a common carrier basis, provide to the public for hire, communication circuits for a great variety of purposes."

The letter requested this Commission's comments concerning the applications (copies of which were attached) and the operation proposed therein.

4/ Industrial, on or about August 1, 1963, again submitted its applications to the FCC (Exhibit 27). They were again opposed by Pacific (and counter-opposed by Industrial) on grounds previously stated and on the additional ground, urged by Pacific, that the applications were premature because of the pendency of the instant complaint (Exhibits 13, 15, 26).

This Commission replied, on March 1, 1963 (Exhibit 10), citing the substance of Decision No. 62156 and the tariff provisions contained in Industrial's original tariff, filed August 10, 1961, which offered the radio channel link service, and concluded as follows:

> "From the foregoing tariff provisions it would appear that Industrial was authorized to furnish point-to-point service by the FCC at the time tariffs were first filed with this Commission. If, in fact, such service was not authorized by the FCC, the statements contained in the tariff exceed the authority granted by this Commission. No additional or further authority has been granted by this Commission to Industrial in this regard subsequent to Decision No. 62156."

The FCC, in its letter of March 25, 1963 to Industrial, returning the resubmitted applications, referred to Industrial's representations concerning its claim of authority from this Commission for the proposed service and to this Commission's letter of March 1, 1963, and stated as follows:

> "On the effective date of said decision, /Decision No. 62156/ Industrial Communications Systems, Inc. was authorized the use of frequencies 5974.8 Mc/s, 6226.9 Mc/s, and 6226.9 Mc/s at three locations only for the control and repeater facilities associated with its Domestic Public Land Mobile Radio Station KMD990 and subject to the condition that the Commission could in its discretion, upon notice, terminate said grant if justification existed for the use of these frequencies for assignment to stations in the Point-to-Point Microwave Radio Service.
>
> "Therefore, it appears that applicant's existing franchise is not appropriate for the proposed microwave service and that additional authority is necessary, which has not been submitted pursuant to Section 21.15(c)(4) of the Commission's rules.
>
> "It also appears that the prospective subscriber for the proposed service /Los Angeles Airways, Inc./ is currently receiving service from the Pacific Telephone and Telegraph Company and that therefore, no need is shown for the proposed point-to-point microwave radio service."

We find from the evidence in this record that defendant does not possess appropriate authority by virtue of this Commission's Decision No. 62156, or otherwise, to support the public offering of radio channel link service contained in its tariffs filed with this Commission on August 10, 1961 and May 10, 1963.

We conclude, therefore, that defendant's tariffs, to the extent that they offer to the public point-to-point microwave communication service by means of existing control and repeater frequencies and facilities associated with Domestic Public Land Mobile Radio Station KMD990, should be canceled.

Our decision respecting defendant's tariffs renders unnecessary the determination, in this proceeding, of questions raised by the pleadings concerning the need for the proposed service or the competitive aspects thereof. If defendant is successful in securing from the FCC appropriate authority for point-to-point microwave service under Part 21, Subpart I of the rules of that agency, this Commission would then be in a position to consider whether defendant's present intrastate operating authority should be modified to permit a public offering of such service within this State.

O R D E R

IT IS ORDERED that the tariff filed with this Commission by Industrial Communications Systems, Inc., on August 10, 1961 pursuant to Advice Letter No. 1 and as refiled on June 10, 1963 pursuant to Advice Letter No. 6, be and it is canceled, as of the effective date of this decision, to the extent that said tariff purports to offer to the public point-to-point radio channel link service by means of existing control and repeater frequencies and facilities associated with Domestic Public Land Mobile Radio Station KMD990, Los Angeles, California.

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

Dated at San Francisco, California, this 27th day of OCTOBER, 1964.

President

Commissioners

I dissent. The proposed service is within the authority granted Industrial Communications, Inc. by our Decision No. 62156.
Frederick B. Holoboff

I agree with Commissioner Holoboff.
George G. Grover