

ORIGINAL

Decision No. 68873

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

KAY K. KIDD, doing business as
RADIO DISPATCH ENGINEERING COMPANY,

Complainant,

vs.

THOMAS R. POOR, doing business as
KERN RADIO DISPATCH,

Defendant.

Case No. 7397
(Filed July 12, 1962)

In the Matter of the Application of
THOMAS R. POOR, doing business as
KERN RADIO DISPATCH, for a certi-
ficate of public convenience and
necessity authorizing mobile radio
communications service as a public
utility.

Application No. 45121
(Filed January 18, 1963)

Silver & Cole, by William L. Cole and
Bertram S. Silver, for complainant in
C. 7397 and protestant in A. 45121.
Berol, Loughran & Geernaert, by Bruce R.
Geernaert, and Orrick, Dahlquist,
Herrington & Sutcliffe, by Warren A.
Palmer, for defendant in C. 7397 and
applicant in A. 45121.
Homer Harris for Allied Telephone Company's
Association and Ralph Hubbard, for
California Farm Bureau Federation, Kern
County Farm Bureau, interested parties
in A. 45121.
Hector Anninos and Paul Popenoe, Jr., for
Commission staff.

O P I N I O N

Both complainant, Kay K. Kidd, doing business as
Radio Dispatch Engineering Company, and defendant, Thomas R. Poor,

doing business as Kern Radio Dispatch, are public utility telephone corporations authorized to operate as radiotelephone utilities pursuant to Decision No. 62156, dated June 20, 1961, in Case No. 6945. That decision, often cited as the grandfather rights decision, stated in ordering paragraph 1:

"Each radiotelephone utility listed in Appendix A attached hereto and made a part hereof is authorized and directed to continue its California intrastate public utility 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."

On the effective date of that decision, July 10, 1961, complainant, Kidd, was operating as a miscellaneous common carrier in Kern County pursuant to licenses issued by the Federal Communications Commission (FCC). Under these licenses Kidd was authorized to operate four base stations and several control points, one of the control points being located in the City of Bakersfield. Also, on that date, defendant, Poor, was operating as a miscellaneous common carrier in Kern County pursuant to licenses issued by the FCC. Under these licenses defendant was authorized to operate a base station at a location south of the City of Taft and a control point in the City of Taft.

In substance, Kidd alleged that Poor had extended his radiotelephone system into the City of Bakersfield, and that the utility operation, as conducted by Poor in the City of Bakersfield, constituted a control point which was not authorized by the FCC on the effective date of the grandfather rights decision, and

therefore Poor's Bakersfield facility was not covered by said decision, nor had it been authorized by any subsequent decision.

Complainant requested that an order be issued requiring defendant to cease and desist all radiotelephone utility operations either directly or indirectly in the City of Bakersfield.

In substance, Poor denied complainant's allegations that he was conducting an unauthorized operation in the City of Bakersfield and alleged that the facility in question was operated simply as a message center, not as a control point, and that, as such, it was in full compliance with the FCC Rules and Regulations.

On January 18, 1963, defendant, Poor, filed Application No. 45121, alleging that in his opinion his operations were authorized by the grandfather rights decision, but requested that if the Commission determined that such service required additional authorization, a certificate be issued authorizing the continuance of his radiotelephone service as it existed on July 10, 1961, or in the alternative, if it were determined that said operation had already been authorized, the application be dismissed.

Hearing of this complaint and application on a consolidated record was held before Examiner Patterson in Bakersfield on January 30 and 31, 1963. At the conclusion of complainant's direct presentation in Case No. 7397 defendant moved to dismiss the complaint on the ground of complete failure to establish even a prima facie case. No evidence was taken at that time on the application proceeding. Briefs were filed by defendant and complainant in support of or in opposition to

the motion. By Decision No. 66374, dated November 26, 1963, the Commission denied defendant's motion and ordered further hearing to allow defendant to present his defense in Case No. 7397 and his affirmative showing in Application No. 45121.

Said further hearings were held in Bakersfield on May 19, 20, and 21, 1964, and in San Francisco on June 26, 1964. The matters were submitted upon receipt of concurrent briefs and are now ready for decision.

The broad issues involved in these proceedings concern the respective operating rights of two competing radiotelephone utilities. These operating rights stem from conditions authorized by the FCC in effect on July 10, 1961. The record shows that on that date Poor operated a radiotelephone system with a base station on Pelato Hill, south of Taft, connected by radio link to a telephone answering service at 400 - 5th Street in Taft, which under contract to Poor operated both as a control point and as a message center.^{1/} On that date Poor also operated a facility at his own telephone answering service at 1222 California Avenue in

^{1/} Control point and message center are defined in Sec. 21.1 of the FCC Rules and Regulations, Part 21 as follows:

Control Point. A control point is an operating position at which an operator responsible for the operation of the transmitter is stationed and which is under the control and supervision of the licensee.

Message Center. The point at which messages from members of the public are accepted by the carrier for transmission to the addressee.

Bakersfield through which messages from or to his subscribers could be handled and which he classified as a message center. The Bakersfield facility was connected to the Taft control point by a leased telephone circuit. Poor testified that in April, 1961, since the majority of calls made by his subscribers required long distance calls to or from Bakersfield, he had requested a foreign exchange line from the Kern Mutual Telephone Company and The Pacific Telephone and Telegraph Company, pursuant to FCC Rules and Regulations Sec. 21.513.^{2/} These landline telephone utilities, serving Taft and Bakersfield, respectively, informed him that their tariffs did not provide for a foreign exchange line between Bakersfield and Taft, and Kern Mutual suggested the private line as an alternative.

Defendant's base station on Pelato Hill, the control point in Taft, and the radio link between the control point and the base station, were specifically authorized by FCC license (Exhibit 3), but no mention was made in the license of defendant's

^{2/}

Sec. 21.513 LOCATION OF MESSAGE CENTER

Within the service area encompassed by the field strength contour of each base station as defined in Sec. 21.504, there shall be at least one message center so located that the major portion of subscribers' local exchange landline telephone calls, which originate or terminate in such area in conjunction with messages transmitted or received by said station, cost no more per call than the local message single unit rate. In cases where the control point of a base station is not so located, a public foreign exchange telephone circuit shall be provided to afford service so that a radio service subscriber may communicate between such points at a cost per call not in excess of the local message single unit rate.

Bakersfield facility. In the tariffs filed with this Commission, pursuant to the grandfather rights decision, defendant listed message centers at 1222 California Avenue, Bakersfield, and 400 - 5th Street, Taft. Subsequently, the Bakersfield message center was moved to 2315 Q Street, Bakersfield.

At the initial hearings in Bakersfield in January, 1963, extensive testimony was presented describing in detail the manner in which calls were placed through both of defendant's message centers and the extent to which operators in each of these facilities had the ability or the responsibility for control of the radio transmissions. It was complainant's position that the evidence demonstrated that the Bakersfield facility functioned as an unauthorized control point. Defendant, on the other hand, maintained that the Taft facility constituted his only control point and that the Bakersfield facility operated only as a message center. Subsequently, the status of defendant's Bakersfield operation was clarified following an exchange of correspondence between the FCC and Poor's and Kidd's Washington attorneys when the FCC, on January 14, 1964, licensed Poor to operate a control point at 2315 Q Street, Bakersfield (Exhibit 21).

The record in these proceedings indicates that there is a lack of understanding as to the distinction between control points and message centers, and particularly as to the authorization required for their establishment and operation. Effective regulation of radiotelephone utilities requires that this lack of understanding be dispelled and that the respective jurisdictions of the FCC and of this Commission concerning control points and

message centers be clearly understood. In considering the respective responsibilities as related to radiotelephone utilities, it may be stated that in general the FCC is concerned primarily with those elements associated with the control and emission of radio signals, whereas, this Commission is concerned primarily with those elements which affect the relationship between a radio-telephone utility and the public.

When examined in the context of the above broad line of demarcation, it may be readily seen that a control point, which is defined in Section 21.1, supra, and detailed requirements for which are set forth in Sections 21.118 and 21.515 of the FCC Rules and Regulations,^{3/} is so directly associated with the emission of

^{3/}The most significant portions of these sections of the FCC Rules and Regulations are as follows:

Sec. 21.118 TRANSMITTER CONSTRUCTION AND INSTALLATION

(d) Each station in these services, which is required to have a person on duty and in charge of the station's operations during the normal rendition of service, shall be provided with at least one control point. Prior authority from the Commission is required for the installation of any control point which is to be more than 100 feet from the transmitter or which is to be at an address different from that of the transmitter.

Sec. 21.515 CONTROL POINTS, DISPATCH POINTS AND DISPATCH STATIONS

(c) At each control point for a base station or fixed station in this service, the following facilities will be installed:

- (1) Equipment to permit the responsible radio operator to monitor aurally at such intervals as may be necessary to insure proper operation of the integrated communication system, all transmissions originating at dispatch points under his supervision and at stations with which the base station communicates.
- (2) Facilities which will permit the responsible radio operator either to disconnect immediately the dispatch point circuits from the transmitter or immediately to render the transmitter inoperative from any dispatch point associated therewith.

radio signals that it properly falls within the jurisdiction of the FCC, and, indeed, as the record shows, the location of control points is licensed by the FCC. Since, however, the location and number of control points does not directly affect the relationship between a radiotelephone utility and the public, it may be concluded that control points are not a primary concern of this Commission.

With respect to message centers the situation is entirely different. The FCC Rules and Regulations provide a definition of message center in Section 21.1 and a minimum requirement for location in Section 21.513, but there is no provision for FCC authorization and the radio station licenses issued by the FCC give no indication of message center location. The location and number of message centers has a decided effect upon the relationship between a radiotelephone utility and the public, for the location of message centers with reference to telephone exchange area boundaries will affect the cost of calls and hence the usefulness of the service to the public. It is apparent that a radiotelephone utility operator may expand the scope of his operation without expanding his service area as measured by the 37 dbu contour simply by judicious location of message centers. It is also apparent that location of message centers in fringe areas and particularly outside of the 37 dbu contour could result in inferior service and could raise questions of competition with other radiotelephone utilities. Because of the effects which message center location may have upon all these elements concerning the relationship between a radiotelephone utility and the public, it may be concluded that message centers are a primary concern of this Commission. It

should be kept in mind, however, that since control point functions and message center functions are often performed by the same personnel at a single location, the facilities at such a location may be an important concern of both the FCC and this Commission.

When radiotelephone utilities filed tariffs pursuant to Decision No. 62156 the Commission initiated control of message centers by requiring that the location of message centers be specified in the preliminary statement section of the tariffs. A matter which requires some clarification is the determination as to what actually constitutes establishment of a message center. In the case before us, Poor established a message center in Bakersfield by connecting a telephone answering service in Bakersfield with his Taft control point by a leased telephone circuit. The evidence shows that if foreign exchange service had been available, Poor could have established the same message center function in the Bakersfield area by means of a foreign exchange line from Taft to Bakersfield. It may be seen then that for uniform and adequate control of message center locations the use of a foreign exchange line by a radiotelephone utility should be considered as establishing a message center at the "foreign" end of the exchange line.

Turning now to the status of the facility operated by Poor in Bakersfield, the evidence clearly shows that that facility was operating as a message center on July 10, 1961, the effective date of the grandfather rights Decision No. 62156. In that decision we found that:

"Public convenience and necessity require 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."

It appears then that since Poor's operation of a message center in Bakersfield was a "condition of service" existing on July 10, 1961, it falls within the authorization granted by Decision No. 62156, no further authorization is required, and therefore Application No. 45121 should be dismissed. Whether or not the Bakersfield facility also operated as a control point is not relevant to our determination.

The evidence shows that Poor and Kidd compete vigorously for subscribers in and around Bakersfield and that Kidd's business has increased despite the competition from Poor. The record also shows that on at least one occasion, Poor departed from his filed tariffs by offering free service for several months as an inducement for a subscriber to take his service. Such discriminatory action by a public utility cannot be condoned and defendant, Poor, is placed on notice that his filed tariffs must be applied uniformly without discrimination.

After a careful consideration of the entire record, we find that defendant was operating a message center in Bakersfield on July 10, 1961, the effective date of the grandfather rights Decision No. 62156, and said operation falls within the authority granted by said decision. In light of the foregoing finding, we further find that Case No. 7397 is without merit.

We conclude that Case No. 7397 and Application No. 45121 should both be dismissed.

O R D E R

IT IS ORDERED that:

1. Thomas R. Poor, doing business as Kern Radio Dispatch, is authorized to operate a message center in Bakersfield by virtue of the rights granted by Decision No. 62156.

2. Case No. 7397 is dismissed.

3. Application No. 45121 is dismissed.

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

Dated at San Francisco, California, this 13th day of April, 1965.

Frederick B. Holladay
President
John E. [unclear]
George H. Hoover
[unclear]
William G. Durrell
Commissioners