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ORIGINAL

Decision No. 70265

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 The Pacific Telephone and Telegraph Company, Complainant.
Lester W. Spillane, for Industrial Communications Systems, Inc., Defendant, and Allied Telephone Companies Association, interested party.
Neal C. Hasbrook, for California Independent Telephone Association, intervenor.
Paul Popenoe, Jr., for the Commission staff.

OPINION ON REHEARING OF DECISION NO. 68137

The Commission, on petition of defendant, Industrial Communications Systems, Inc., granted rehearing of Decision No. 68137, limited to oral argument on the record theretofore made. That decision ordered defendant's tariffs cancelled, absent possession of a modified station license from The Federal Communications Commission, to the extent they offered public, intrastate, radio channel link service over existing microwave frequencies assigned by the FCC to defendant's Radio Station KMD 990, at Los Angeles.

The case was argued and submitted on March 19, 1965 before the Commission en banc and Examiner Gregory. Defendant conceded - and its tariffs state - that the proposed service is offered subject to obtaining the required FCC license. Defendant argues that the

order places it - and other radiotelephone utilities in California - in a "jurisdictional limbo", since the FCC, it appears, will not grant the modified station license without a decision by this Commission on the question of whether or not defendant requires further authority under California law to inaugurate the proposed service. The underlying facts are stated in the questioned decision.

Defendant urges that the order is contrary to Malis v. General Telephone Company of California (1961) 59 Cal. P.U.C. 110, where the Commission held that a landline telephone corporation, not then possessing the required FCC station license, nevertheless could provide mobile radio telephone service under its existing franchises and certificates, without further certification, as "an extension within or to territory already served by it, necessary in the ordinary course of its business". (Public Utilities Code, Sec. 1001.) Defendant asserts the same right here, in its capacity of a public utility telephone corporation subjected to this Commission's jurisdiction, in 1961, with other Miscellaneous Common Carriers in California operating under FCC licenses in the Domestic Public Land Mobile Radio Service (FCC Rules and Regulations, Part 21.1; Re Miscellaneous Common Carriers (1961), 58 Cal. P.U.C. 756).

Defendant also urges that if this Commission, when it took intrastate jurisdiction over the rates and service of Miscellaneous Common Carriers, intended by its order (Decision No. 62156) that the radiotelephone services then offered by defendant and other Miscellaneous Common Carriers were to remain fixed in the scope then authorized by FCC licenses and reflected in initial tariff filings with

this Commission, the resulting "freeze" of radiotelephone service would affect adversely the future development of radiotelephony in this State. Defendant argues that the language of the cited "grandfather" order, instead of indicating an intent to "freeze" radiotelephone service on the date of the Commission's assumption of intrastate jurisdiction, was designed instead to provide continuity, under state regulation, of whatever service was then being offered.[1/] Extended or different intrastate radio communication services, subject to appropriate FCC licensing authority, would thereafter, the argument continues, be governed by provisions of California law applicable to all telephone utilities, as in the case of the established landline companies, like complainant, which also are required to have FCC licenses for their radiotelephone services.

Complainant, The Pacific Telephone and Telegraph Company, which has had on file with this Commission, since 1952, a tariff that includes radiotelephone service throughout California (Tariff Schedule Cal. P.U.C. No. 45-T), takes the position that defendant's offer of radio channel link service (provision of subscriber-activated and controlled audio sub-carrier microwave channels by addition of a simple multiplex device to existing facilities and frequencies) constitutes a "new" service which involves "construction" of facilities and, therefore, requires a specific certificate of public convenience and necessity under the first paragraph of Section 1001 of the Public Utilities Code. Complainant argues that defendant may

1/ Decision No. 62156 (the so-called "grandfather" order), in ordering paragraph 1 thereof, states: "1. Each radiotelephone utility... 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". (58 Cal. P.U.C. 756, 762.)

not, without such intrastate authority and a modified FCC license in the Point-to-Point Microwave Radio Service (FCC Rules and Regulations, Part 21.15 (c)(4)), commence "construction" or offer the "new" intrastate service proposed in its tariffs; nor, complainant asserts, is defendant entitled to render the service under the exemption provided in the second paragraph of Section 1001 for an extension "necessary in the ordinary course of its business", since defendant's "ordinary" business, complainant argues, is that of a licensee in the Domestic Public Land Mobile Radio Service and not in the Point-to-Point Microwave Radio Service.

Defendant argues that, on the contrary, the proposed public offering of presently unused microwave capacity will simply provide a more effective and economical mobile radio service and will give subscribers a private line for audio communications over the subscribers' own facilities, without - as at present - the interposition of defendant in the overall communication circuit for control or repeater purposes. This, defendant asserts, it may do as an extension of its ordinary business as a mobile radio public utility telephone corporation, now under state regulation as such, without further certification.

Complainant's argument, other than controverting the assertions of defendant, was limited to what it described as "the single issue before the Commission"; namely, whether defendant had the requisite authority to provide private line service.

We have reviewed the record in light of the oral argument and of defendant's concession that it does not now possess the requisite FCC authority to inaugurate the proposed microwave link service in California. It is clear that, under defendant's presently filed tariffs and existing FCC authority, if a potential subscriber

should attempt to avail himself of that class of service defendant could not render it even if nothing further were required from this Commission, unless and until defendant obtained a modified FCC station license.

The vice of the decision which cancelled defendant's offer of microwave link service on the sole ground of lack of appropriate FCC authority to support it, is, as we now view the case, that the decision leaves untouched three important issues that concern all parties as well as this Commission and which were raised by the pleadings and briefs. Those issues relate to: (1) the scope of this Commission's intrastate jurisdiction over radiotelephone utilities which are also required to obtain construction permits and station licenses from the FCC; (2) whether provision of radio channel link service, as proposed by defendant, constitutes "construction" or "extension" of "a line, plant, or system" requiring prior certification by this Commission pursuant to Section 1001 of the Public Utilities Code; (3) whether defendant, even if not required to obtain a "construction" or "extension" certificate pursuant to the first paragraph of Section 1001, or because of the exemption afforded by the second paragraph of that section for "an extension within or to territory already served by it, necessary in the ordinary course of its business", nevertheless may have to face a claim by a utility already in the field that it is being "injuriously affected" by defendant's "construction" or "extension" of its "line, plant, or system" (Pub. Util. Code, Sec. 1001). The latter issue, raised by complainant and intervenor in their pleadings but only briefly touched in the evidence, goes to the root of this Commission's power to regulate competition between communications utilities in the interest both of the general public and of the utilities themselves.

Concerning those issues this Commission, in Malis (59 Cal. P.U.C. 110, 115-116), concurred with the FCC policy of "fostering the development of competing systems, techniques and equipments" as between public radiotelephone systems and the established landline telephone companies (FCC Memorandum Opinion and Order, December 21, 1960, Docket No. 13900, in re General Telephone Co. of Calif.). The Commission said (59 Cal. P.U.C. 110, 115):

> "As is the case with other types of communication utilities, both the FCC and this Commission have spheres of regulatory authority over the operations of radiotelephone utilities. Where regulatory authority is so divided, the public interest demands that the policies of the two jurisdictions be sufficiently consistent to prevent an impasse under which business cannot be conducted because of one jurisdiction thwarting the mandates of the other."

We have no doubt that when this Commission, in 1961, assumed intrastate jurisdiction over Miscellaneous Common Carriers as "public utility telephone corporations" (Re Miscellaneous Common Carriers, 58 Cal. P.U.C. 756, 761), the jurisdiction so undertaken was and is plenary, except with respect to the issuance of construction permits and radio station licenses provided for by FCC rules and regulations. Our assertion of complete jurisdiction over the operations of radiotelephone utilities in this State, subject to the abovementioned exception, leaves both the FCC and this Commission free, within their respective spheres, to regulate whatever public communications services, with or without wires, may be required by the public convenience and necessity, as well as to foster improvements in the art and promote stability in the industry.

The second and third issues, mentioned above, which relate to the requirements of Section 1001 of the Public Utilities Code, involve matters over which this Commission exercises primary and exclusive jurisdiction pursuant to applicable provisions of California

law and the Commission's General Orders. The fact that established landline telephone utilities may offer a variety of services not normally provided by the radiotelephone companies is irrelevant to the basic fact of this Commission's unquestioned plenary intrastate jurisdiction over both types of utility. As is the case with other kinds of utility service that may be subject to both federal and state regulation, we are not aware of any provision of the Public Utilities Code, or other California law, that would so circumscribe the discretion this Commission may exercise in the regulation of radiotelephone utilities as to preclude the application of regulatory standards that will be just and reasonable not only for that type of communications utility and its patrons but as applied to controversies that may arise, within this Commission's cognizance, between the various kinds of communications utilities. (See Plumas-Sierra Rural Electric Cooperative, Inc. (1951), 50 Cal. P.U.C. 301.)

In Malis, supra, we held that an established landline telephone utility did not require a certificate of public convenience and necessity, under Section 1001 of the Public Utilities Code, to offer telephone service by means of a radio link to subscribers in vehicles, since such service was a normal extension of its plant and service and it was immaterial that it was to be accomplished by a radio link rather than a wire link. The Commission noted that, in any event, the utility, before it could render the proposed mobile service, had to obtain an appropriate construction permit and station license from the FCC.

We hold that defendant, in offering to provide a radio channel link service for subscribers by means of utilizing presently unused capacity of its assigned microwave frequencies, is subject to

no greater disabilities under California law than any other telephone utility that may offer private line communications service by means of a radio link, and is not required to obtain from this Commission a certificate of public convenience and necessity pursuant to Section 1001 of the Public Utilities Code for rendition of such radio channel link service.

Complainant and intervenor have alleged that defendant's proposed radio channel link service would cause "duplication of service presently being offered to the public, result in wasteful duplication of facilities, be inconsistent with the conservation of radio frequencies, and otherwise contrary to the public interest." (Complaint, Par. V.) Defendant has not denied those allegations; instead, it asserts, argumentatively, that "Paragraph V is immaterial in its entirety and should be stricken." (Answer, Par. V.)

We observe that complainant and intervenor have not claimed, in the language of Section 1001 of the Public Utilities Code, that they would be "injuriously affected" by defendant's proposed microwave link service, so as to invoke the Commission's discretionary authority, under that section, to hold a hearing and make an appropriate order with respect to location of competing facilities and services. Also, it seems at least arguable, although we do not here pass on the point, that the location of radiotelephone facilities may be a matter within the purview of FCC authority.

Complainant's showing of what it asserts would be the adverse effect on it and other landline telephone utilities of limited private line service by defendant and other radiotelephone utilities in California, was confined to opinions expressed by members of its engineering staff, unsupported by factual data, to the effect that the proposed service would cause uneconomic use of plant, equipment

and radio frequencies and higher charges for service, with consequent disadvantage to the landline companies and their patrons. Defendant took the position that competitive aspects of the proposed service were not in issue in this proceeding and that the only question to be decided was whether defendant had the right, under the exemption provided by Section 1001 of the Public Utilities Code, to inaugurate the link service subject to FCC modification of its station license.

Since we have held that defendant has the right, as a regulated radiotelephone utility, to provide the proposed link service, subject to FCC licensing authority, without further certification pursuant to Section 1001 of the Public Utilities Code, and since complainant and intervenor, in our opinion, have neither alleged nor proved that they would be "injuriously affected" by provision of such service by defendant, we conclude that defendant's tariffs, offering such link service to the public, should be permitted to become effective, subject to acquisition by defendant from the FCC of an appropriate station license and other authority that may be required by applicable FCC Rules and Regulations.

Decision No. 68137 herein will be vacated and the complaint will be dismissed.

O R D E R

After rehearing herein duly had, IT IS ORDERED that:

1. Decision No. 68137 herein, dated October 27, 1964 is vacated and set aside.

2. The complaint of The Pacific Telephone and Telegraph Company herein is dismissed.

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

Dated at San Francisco, California, this 18th day of JANUARY, 1966.

Frederick B. Holoboff
President

George G. Grover

Commissioners