

ORIGINALDecision No. 70829

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application of)
 MARIAN LEE, doing business as RADIO)
 PAGING COMPANY, for an order author-)
 izing (A) Radio Paging Company to)
 sell and Tel-Page, Inc., a corpora-)
 tion, to buy the properties owned by)
 Marian Lee consisting of a one-way)
 radio paging service, call letters)
 KMB-306, License No. 1979-C2-R-63,)
 together with the operative rights)
 thereto; (B) Radio Paging Company)
 to withdraw from the one-way radio)
 paging service; (C) Tel-Page, Inc.,)
 a corporation, to engage in the)
 one-way radio paging service.

Application No. 47821
 Filed August 18, 1965;
 Amended October 13, 1965

Bacigalupi, Elkus, Salinger & Rosenberg, by
Michael B. Foley, for Tel-Page, Inc.,
 applicant.

Thomas J. Murray, for Marian N. Lee, applicant.
 McCutchen, Doyle, Brown, Trautman & Enersen,
 by Gerald H. Trautman, for ITT Mobile Tele-
 phone, Inc., protestant.

Berol, Loughran & Geernaert, by Glenn A. Howard,
 for Redwood Radio Telephone Corporation;
Joseph A. Smiley, in propria persona,
 interested parties.

Catherine D. McAndrews, for the Commission
 staff.

O P I N I O N

This is an application by Marian Lee, doing business as Radio Paging Company (hereinafter referred to as Radio Paging), and Tel-Page, Inc., a corporation (hereinafter referred to as Tel-Page), in which (1) Radio Paging seeks authority to sell and transfer and Tel-Page seeks authority to purchase and acquire the property and operative rights of Radio Paging; (2) Radio Paging seeks authority to withdraw from one-way radio paging service; (3) Tel-Page seeks authority to engage in one-way radio paging service.

A duly noticed public hearing was held in the matter before Examiner Jarvis in San Francisco on October 7, 8 and 13, 1965. Protestant ITT Mobile Telephone, Inc. (hereinafter referred to as ITT) presented motions asking that the Commission direct that a proposed report be filed, or, in the alternative, that permission to file briefs be granted. The motion for a proposed report was denied. Thereafter, the Presiding Examiner provided that the parties who so desired could file briefs on or before January 28, 1966. The applicants and ITT filed briefs on January 28, 1966.

At the hearing, ITT attacked the jurisdiction of the Commission to proceed with the hearing on the application on the ground that Marian Lee had not signed the application in behalf of Radio Paging. The original application, filed on August 18, 1965, was signed for Radio Paging by Thomas J. Murray, Esquire, as attorney-in-fact for Marian Lee. The record discloses that on June 11, 1965, Marian Lee executed a witnessed and notarized document appointing Thomas J. Murray her attorney-in-fact (Exhibit 12). The Presiding Examiner, indicating that he found that no one would be prejudiced, granted Radio Paging leave to file an amended application. On October 13, 1965, the last day of hearing in the matter, Radio Paging filed an amended application which was identical to the original application, except for the signature. The amended application was signed by Marian Lee. Even if it be assumed, for purposes of discussion only, that the original application was defective, such defect did not deprive the Commission of jurisdiction and was cured by the amended application. (Jenssen v. R.K.O. Studios, Inc., 20 Cal. App.2d 705; Board of Education v. Mulcahy, 50 Cal. App.2d 418, 423.)

The primary question to be determined in a transfer proceeding is whether the proposed transfer would be adverse to the public interest. Questions relating to public convenience and necessity usually are not relevant to the transfer proceeding because they were determined in the proceeding in which the certificate was granted. (Frank Nolan Drayage Co., 61 Cal. P.U.C. 160; C. J. Morrissey, 61 Cal. P.U.C. 567.)

ITT contends that the transfer should not be authorized because (1) the Radio Paging operative rights were abandoned and there are no rights susceptible of being transferred and (2) the proposed transfer is not in the public interest because it would give Tel-Page a monopoly in the low-band one-way radiotelephone paging business in the San Francisco Bay Area.

The record discloses that, in addition to owning Radio Paging, Marian Lee was the owner of a telephone answering service under the fictitious name of Professional Answering Service (hereinafter referred to as Professional). Radio Paging and Professional were operated in conjunction with each other at the same location with common employees. On August 3, 1963, Marian Lee entered into a transaction whereby she sold Professional and, subject to appropriate regulatory authorization, Radio Paging to Knox LaRue and Alvor Olson. At the time of the agreement Marian Lee had the knowledge that LaRue and Olson were licensed by the Federal Communications Commission (hereinafter referred to as the FCC) to operate one-way radio paging services in Stockton, Eureka and Sacramento, and that each one had at least 20 years experience in the field. LaRue and Olson took over the operations of Professional and Radio Paging on or about August 3, 1963. LaRue and Olson operated Professional and Radio Paging until July 16, 1965, when Tel-Page

commenced to operate Radio Paging under a dispatching agreement with Marian Lee. At some time not indicated in this record and unbeknown to Marian Lee, LaRue and Olson formed a corporation, under which they conducted some of their business activities, known as GMG Corporation.

The agreement between Marian Lee and LaRue and Olson provided for a total purchase price of \$70,000 for Radio Paging and Professional. LaRue and Olson made an initial down payment of \$3,000, which was to be substantially increased within one and one-half years. The agreement also provided that during this interim Marian Lee was to receive \$300 per month plus a percentage of net profits. The record indicates that during this period the net income of Professional, before taxes, was \$1,000 per month. Marian Lee testified that she believed Radio Paging had net earnings during 1963, but that overall, it operated in the red for that year. The only money Marian Lee received from LaRue and Olson was the \$3,000 deposit and \$300 per month until July 1965.

For reasons not indicated in this record LaRue and Olson did not seek authorization of this Commission and the FCC for the transfer of Radio Paging in accordance with the agreement of August 3, 1963. In the early part of 1965 the relationship between Marian Lee and LaRue and Olson deteriorated and she decided to sell Radio Paging and Professional to another buyer. She executed a power of attorney, conferring upon her attorney at law, Thomas J. Murray, a power to negotiate a sale of the two businesses. Murray entered into negotiations with Tel-Page and ITT which eventually resulted in the agreement here under consideration.

When LaRue and Olson took charge of operating Radio Paging Marian Lee told one of the employees, who had worked for her for

17 years, that the "license" was in her name and that the employee should inform her of anything that affected Radio Paging. This instruction was repeated on two other occasions. During the period LaRue and Olson operated Radio Paging, Marian Lee paid the telephone bill and transmitter rental, and, for a substantial amount of time, the PG&E bill. She had approximately 12 meetings with LaRue and Olson, and inspected Radio Paging's logs on two occasions. During this period Marian Lee retained the ownership of Radio Paging's transmitter, dispatching point, and mobile and hand receivers. When Marian Lee and Tel-Page entered into the agreement here under consideration LaRue and Olson acknowledged her ownership and cooperated in the arrangements.

On July 16, 1965, Marian Lee had entered into a dispatching agreement with Professional, which as hereinafter indicated had been acquired by a company related to Tel-Page. The agreement acknowledges Marian Lee as the owner of Radio Paging and provides for the operation of Radio Paging by Professional at a charge to Marian Lee of \$5 a month per customer. Radio Paging is presently being operated under this agreement.

The Commission is of the opinion and finds that Marian Lee did not abandon her operating rights. The primary manifestation of abandonment - cessation of service - is not here present. The record indicates that continuous service has been rendered to Radio Paging's customers and there is no indication that this service has been other than adequate. Clearly, there was no intent to abandon the operating rights as is evident from the conduct heretofore described. In addition, the fact that Tel-Page entered into an agreement to purchase and ITT offered to purchase Radio Paging, including its operating rights, indicates that the commercial community did not consider Marian Lee's operating rights abandoned.

ITT's abandonment argument rests upon the premise that an individual holding operating authority from this Commission must personally conduct the operations under such authority and may not delegate this to others. This proposition is unsound because it would create an unreasonable classification between individual and corporate holders of operating rights and also is contrary to Sections 2296 and 2304 of the California Civil Code which provide as follows:

"Section 2296. Principal. - Capacity. - Any person having capacity to contract may appoint an agent, and any person may be an agent."

"Section 2304. Authority or Acts Delegable. - An agent may be authorized to do any acts which the principal might do, except those to which the latter is bound to give his personal attention."

The Commission knows of no rule of law which binds an individual holder of operating rights to run the operation personally.

It has heretofore been found, as a matter of fact, that Marian Lee did not abandon her operating rights. The Commission is also of the opinion and holds that, under the facts here under consideration, as a matter of law Marian Lee is the owner of the operating rights here involved and that LaRue, Olson and Tel-Page have acted or are acting as her agents. (Transport Clearings - Bay Area v. Simmonds, 226 Cal. App.2d 405, 421, 424.) Furthermore, even if it be assumed for discussion only that an abandonment occurred, there is no mandatory requirement that the operating rights involved be revoked. (Western Consolidated Express, 45 C.R.C. 219, 220; Furniture Mfrs. Assn. of Cal. v. Loyd B. Turner, 58 Cal. P.U.C. 691.) In the circumstances, the Commission does not deem revocation appropriate. Marian Lee acquired the operating rights here involved in 1957. When she entered into the agreements with LaRue

and Olson and Tel-Page under which they conducted the operations of Radio Paging the radio paging service was run by persons experienced in the field. There was no interruption of service and the public continued to receive adequate service from Radio Paging. No detriment was suffered by anyone. Marian Lee presently possesses acknowledged legal control of Radio Paging. If it be assumed that some of her conduct constituted, in law, abandonment of the operating rights here involved, the abandonment was the result of ignorance or inadvertence. Under these circumstances, the Commission is not disposed to revoke these operative rights.

We next turn to IIT's contention that the proposed transfer is adverse to the public interest because it "would effectively grant Tel-Page a complete and permanent monopoly in the low-band one-way radiotelephone-utility paging business in San Francisco and the immediately surrounding area." The general rules of law applicable to this contention are: (1) "There can be no doubt that competition is a relevant factor in weighing the public interest." (F.C.C. v. R.C.A. Communications, Inc., 346 U.S. 86, 94.) and (2) "Merely to assume that competition is bound to be of advantage, in an industry so regulated and so largely closed as this one, is not enough. (F.C.C. v. R.C.A. Communications, Inc., supra, at p. 97.)¹

¹ Antitrust considerations are also relevant to the issues of public interest and public convenience and necessity. (California v. Federal Power Comm'n., 369 U.S. 482.) However, it is generally the courts which have jurisdiction to determine antitrust issues. (United States v. R.C.A., 358 U.S. 334.) No antitrust violations were alleged in this proceeding.

In Malis v. General Telephone Co., 59 Cal. P.U.C. 110, the Commission stated at page 116 that:

"This Commission expresses the concurring view that a policy of fostering limited competition has a beneficial effect on the development of the communications art and industry. The pursuance of such a policy by this Commission will, in a manner consistent with the established licensing policies of the FCC, go far toward assuring optimum utilization in California of the respective portions of the radio-frequency spectrum allocated by the FCC to telephone utilities as a class and to miscellaneous common carriers as a class."

However, in Malis there was an attempt by an existing public utility radio mobile telephone service, providing one type of service, to prevent another company, offering to provide a more comprehensive service, from entering the field by using an available frequency, which might not otherwise be used.

Before considering the record on the issue of competition, we note that Marian Lee desires, for personal reasons, to sell Radio Paging and Professional. It appears that at the moment, the only two entities interested in acquiring Radio Paging are Tel-Page and ITT. If this application is denied Marian Lee, in all probability, will have only one prospective purchaser, ITT. Obviously, this limits the bargaining power of the seller. There are, of course, instances where a sale which yields the highest net amount to the seller is not in the public interest. In these circumstances, the public interest must prevail and another purchaser, who might pay less, found. However, where, in practice, disapproval of a prospective transfer will compel the seller to deal with only one buyer the evidence indicating that the public interest requires such disapproval should be clear and convincing. (Cf., Re Boston Maine Transp. Co., 87 P.U.R. N.S. 465, 489; Hearst Radio, Inc. v.

Public Service Radio Corp., 6 Pike & Fischer R.R. 994; United States v. General Outdoor Advertising Co., Inc. (D.C. Ill.) 1955 Trade Cases 70,814, 70,816; United States v. National Lead Co., 332 U.S. 319, 352,53; United States v. Alliance Amusement Co. (D.C. Ind.) 1955 Trade Cases 70,704, 70,707.)

All the witnesses who testified at the hearing were called by Radio Paging or Tel-Page. ITT and the staff vigorously cross-examined these witnesses, but neither ITT nor the staff called any witnesses. ITT requested, and the Presiding Examiner, on occasion, ordered the production of documents by applicants. These documents related to the transactions here under consideration and the financial status of Tel-Page and its parent company. Some of these documents were received in evidence upon the request of ITT; others upon the request of one of the applicants. The examiner took official notice of certain annual reports of Tel-Page and one of its predecessors.

The record discloses that the FCC has allocated four channels (frequencies) to low-band one-way radio paging service. An FCC licensee may operate on an assigned channel in the geographical area where its radio signal does not interfere with another licensee which has been assigned the same channel. The FCC has licensed the four available channels in the San Francisco Bay Area. Tel-Page presently owns and operates two of the four channels under the call letters KMB-305. One channel is licensed to Joseph A. Smiley, who operates Central Exchange Mobile Radio. Smiley filed an appearance in this proceeding as an interested party, but did not take an active part herein. The remaining channel is the one here under consideration.

In considering the issue of competition, two main points are raised by the evidence: (1) Does the amount paid for the

purchase of Radio Paging and Professional indicate that the purpose of the transactions here under consideration was to eliminate competition? (2) Do the proposed operations of Tel-Page indicate that the purpose of acquiring the channel here under consideration is to prevent competition, and that the public would be deprived of the best use of this channel?

The record indicates that Marian Lee desired to sell Radio Paging and Professional, preferably together in a package deal. She sold Radio Paging, subject to appropriate regulatory authorization, to Tel-Page, and Professional to a company affiliated with Tel-Page for \$105,000. The accountants and attorneys handling the transaction agreed on an allocation of \$15,000 for the purchase of Radio Paging and \$90,000 for the purchase of Professional. ITT made an offer for Radio Paging and Professional, but the amount offered does not appear in the record.² In 1963, Marian Lee had agreed to sell Radio Paging and Professional to LaRue and Olson for \$70,000. This information was not known to Tel-Page until it was elicited by testimony at the hearing. The president of Tel-Page, Frank Cristich, testified that Tel-Page is one of six wholly owned subsidiaries of Ventec Corporation, that another wholly owned subsidiary is Consolidated Communications (hereinafter referred to as Consolidated); that Consolidated was in the telephone answering service business and that the acquisition of Professional, at the price paid, would permit a profitable consolidation of the two answering services. Marian Lee testified that the net income of Professional, before taxes, was approximately \$1,000 per month.

² Counsel for ITT asserted in a question to Marian Lee that ITT had offered \$25,000 for Radio Paging. (R.T. 219.) Marian Lee, in response to the question, indicated that she was only aware of the total amount offered by ITT, and not of the breakdown of the figure.

The allocated price of \$15,000 for Radio Paging does not appear excessive. If we look to the rest of the package transaction we find that at the allocated price of \$90,000 for Professional, Consolidated could anticipate a return on its investment of 13.3 percent before taxes. In the circumstances, we cannot find from the amounts involved that the transactions were entered into primarily to prevent competition.

ITT contends that the way in which Tel-Page operates the two channels it presently owns and the proposed operation of the channel sought to be acquired herein indicate that the proposed acquisition is to prevent competition and is not in the public interest.

The record discloses that in the field of one-way radio paging the following types of paging may be used: voice message, voice code, tone, selective tone (sometimes referred to as tone code), voice code plus voice message and tone or selective tone plus voice code or voice message. There is some public demand for each type of service. For example, doctors generally use voice code, tone, or selective tone because of the complicated nature of their messages. Repair services, particularly elevator ones, usually require voice message either alone or in combination with tone, selective tone, or voice code. The type of paging used has a bearing on the number of customers a channel can adequately serve. Voice message and voice code utilize a tape recording which is continuously repeated and changed as messages are answered and new ones arrive. When voice message or voice code is used singly or in combination a subscriber hears all that is broadcast on the channel and may have to listen to the entire tape in order to hear his code number or message. If a tape is of too long a duration, the

subscriber will become annoyed and at some point will not use the service. The same situation applies to tone. However, where selective tone is used, the subscriber need not listen to the broadcast to determine if there is a message for him. Different audio tones are transmitted on the channel, and when there is a message for a particular subscriber one or more of these tones turns on his receiver. He may then, depending on the service offered, listen for a code or message, or immediately call the paging service for the message.

A consulting engineer who specializes in the radiotelephone utility field testified on behalf of Tel-Page. He testified that, in his opinion, the technical capacity of the various modes of paging was 500-1000 receivers for voice code only; 500 receivers for tone plus voice message and that selective tone could serve a "reasonably unlimited" number of receivers. The consultant testified that there was a difference between capacity, giving theoretical saturation and capacity which should not be exceeded to give first class service. He expressed no opinion on the latter, stating that was a matter of management judgment. He also indicated that a channel in Boston, using selective tone only, had approximately 2000 subscribers. The consultant testified that, presently, more than 55 percent of Tel-Page's customers on its voice-only channel use a service consisting of voice code plus message. He also testified that it was technically possible but not desirable to have voice and tone transmission on the same channel.

Cristich testified that one of Tel-Page's channels is used for voice paging only and the other is used for selective tone only. Tel-Page presently has only two subscribers using selective tone paging. He testified that the reason the tone channel presently

had only two subscribers was because Tel-Page was unable to give proper service on that channel because of technical difficulties, primarily caused by the topography of the Bay Area; that Tel-Page had pending before the FCC applications to authorize it to install additional transmitters and that if these applications are granted Tel-Page would have the technical ability to provide adequate service on its tone channel. Cristich also testified that, in giving voice code plus message service, a tape of one minute's duration is the longest interval in which good service can be provided. He indicated that if this type of service is rendered, the maximum number of customers which can be served on one channel is approximately 250.

ITT contends that Tel-Page should use the channel with only two subscribers, presently used for tone only, for voice operations. It is argued that the lack of such use indicates that Tel-Page is attempting to secure the channel here in question to prevent competition and by so doing will prevent the most effective use of the channel. This argument, however, ignores the evidence which indicates that a channel transmitting voice code plus message can, practically, only serve a limited number of customers; that a channel transmitting selective tone code only can serve approximately 2000 customers, and perhaps more; that one expert testified that it was not desirable to mix tone and voice on the same channel; and that if the FCC grants Tel-Page's applications for authority to install additional transmitters Tel-Page will have the ability to serve a greater portion of the public desiring radio paging service. In the circumstances, the Commission cannot say that Tel-Page's use of its presently owned channels indicates that acquisition of the one here considered would be contrary to the public interest.

As indicated, ITT called no witnesses in its behalf. Therefore, there is nothing in this record which would indicate that, if this application is denied and ITT were to be eventually authorized to operate the channel, ITT would render any different or better service to the public.

The record indicates that if this application is granted, Tel-Page proposes to spend approximately \$8,000 to improve the channel here under consideration. Tel-Page has budgeted money for this. In addition, Tel-Page will receive money as needed from Ventec, its parent company. At the hearing, the Presiding Examiner, at the request of ITT, ordered financial data relating to Ventec produced. This material was prepared for other than regulatory purposes and must be considered along with the testimony of Cristich to get an accurate picture of Tel-Page's financial ability. An analysis of all the evidence indicates that Tel-Page has the financial ability to acquire and operate the channel here under consideration.

No other points require discussion. The Commission makes the following findings and conclusions.

Findings of Fact

The Commission finds that:

1. Marian Lee, doing business as Radio Paging Company, call letters KMB-306, License No. 1979-C2-R-63, has not abandoned her California operating rights.
2. The transfer of the properties and public utility radio-telephone operating rights of Marian Lee, doing business as Radio Paging Company, to Tel-Page, Inc., would not be adverse to the public interest.

3. Tel-Page, Inc., has the ability, including financial ability, to conduct operations under said operating rights.

Conclusions of Law

The Commission concludes that:

1. Marian Lee should be authorized to transfer and sell her public utility radiotelephone operating rights and properties to Tel-Page, Inc.

2. Upon completion of the sale and transfer of the public utility radiotelephone operating rights and properties herein authorized, Marian Lee should be relieved of all public utility obligations.

O R D E R

IT IS ORDERED that:

1. Within one hundred twenty days after the effective date of this order Marian Lee may transfer her public utility radiotelephone operating rights (call letters KMB-306, License No. 1979-C2-R-63) and properties to Tel-Page, Inc., in accordance with the agreement attached to the amended application as Exhibit A. Within thirty days after the actual transfer, Tel-Page, Inc., shall notify this Commission, in writing, of the date upon which the transfer was consummated.

2. Within sixty days after the date of actual transfer the tariffs of Marian Lee now on file with this Commission shall be refiled under the name of Tel-Page, Inc., in accordance with the procedure prescribed in General Order No. 96-A. No increases in the presently filed rates and rules shall be made unless otherwise authorized by this Commission.

3. On or before the date of actual transfer, sellers shall refund all customers's deposits and advances which are subject to refund. Any unrefunded advances and deposits shall be transferred to and become the obligation for refund of buyer.

4. On or before the date of actual transfer of the specific properties herein authorized, Marian Lee shall transfer and deliver to Tel-Page, Inc., and the latter shall receive and preserve all records, memoranda and papers pertaining to the construction and operation of the radiotelephone utility authorized to be transferred.

5. Upon compliance with the above ordering paragraphs, Marian Lee is hereby relieved of her public utility responsibilities with respect to the property being transferred coincident with the full assumption of such responsibilities by Tel-Page, Inc.

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

Dated at San Francisco, California, this 9th day of JUNE, 1966.

We concur in the numbered findings and the order.

*Fredrick B. Holbrook
George G. Grover*

[Signature]
[Signature]

Commissioners

Commissioner William M. Bennett, being necessarily absent, did not participate in the disposition of this proceeding.