

Decision No. 71640

**ORIGINAL**

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application of )  
 MORTON A. DAVIS d.b.a. ALL-AMERICAN )  
 ANSWERING SERVICE, for a certificate )  
 of public convenience and necessity )  
 to construct a new radio telephone )  
 utility system. )

Application No. 47191

OPINION ON PETITION FOR REVIEW OF EXAMINER'S RULING

Morton A. Davis, dba All-American Answering Service (applicant), requests a certificate of public convenience and necessity to construct a new radiotelephone utility system which will provide one-way paging service to locations in Santa Barbara and vicinity. The owner of Coast Mobilphone Service (protestant) claims that he has been offering signalling service since 1961 in the Santa Barbara area. Decision No. 69076 denied applicant's request for a certificate due to the fact that "Dilution of the already marginal market for signalling service in the Santa Barbara area would impair the operations of protestant." Applicant petitioned for a rehearing and submitted an affidavit from one of protestant's former employees who alleged that protestant never provided one-way paging service in the Santa Barbara area. On October 5, 1965 the Commission granted a rehearing.

On November 5, 1965 attorneys for applicant, by letter, requested the Commission to issue subpoenas for the purpose of taking depositions from the owner, station manager, and salesman of protestant. The letter also requested "that the subpoenas for taking deposition require that each witness bring with him to the deposition all books, records, and correspondence relating to the acquisition, development

and operation of Coast Mobilphone one-way paging operations and further, that Sylvan Malis be ordered to bring to said deposition, in addition to all such records, his broadcasting logs for the period May, 1964 to date." The requested subpoenas were issued by the Secretary; however, no copy of the letter requesting the subpoenas was served on the prospective witnesses.

On November 29, 1965 protestant filed a "Motion to Quash Subpena Duces Tecum." On March 16, 1966 a duly noticed public hearing was held on the motion before Examiner John R. Gillanders. Oral argument was presented, and the Examiner denied the motion. On March 23, 1966 protestant filed a "Petition for Review of Examiner's Ruling."

Sections 311 and 312 of the Public Utilities Code authorize the issuance of subpoenas by the Commission, each Commissioner, the Secretary, Assistant Secretaries and Examiners. Section 1794 authorizes the taking of depositions in matters before the Commission and provides that the Commission may "cause the deposition of witnesses residing within or without the State to be taken in the manner prescribed by law for like depositions in civil actions in the superior courts of this State and to that end may compel the attendance of witnesses and the production of books, waybills, documents, papers, and accounts." In River Lines v. Southern Pacific Pipe Lines (1962), 60 C.P.U.C. 312, the Commission applied the provisions of the Discovery Act (commencing with Section 2016 of the Code of Civil Procedure) to a subpoena duces tecum issued by the Commission in connection with depositions.

The procedure for issuing a subpoena duces tecum in connection with depositions in the Superior Court is governed by the following applicable sections of the Code of Civil Procedure:

§2016(a). \* \* \* "The attendance of witnesses or the production of books, documents or other things at depositions may be compelled by the use of subpoena as provided in Chapter 2 (commencing with Section 1985), Title 3, Part 4 of this code."

§1985. "An application before trial for a subpoena duces tecum shall be, or contain, an affidavit showing good cause for the production of the matters and things described in such subpoena and shall specify the exact matters or things desired to be produced, shall set forth in full detail the materiality thereof to the issues involved in the case, and shall state that the witness has the desired matters or things in his possession or under his control."

§1987.5. "The service of a subpoena duces tecum is invalid unless at the time of such service a copy of the affidavit upon which the subpoena was issued is served on the person served with the subpoena."

Rule 51 of the Commission's Rules of Procedure provides:

"Requests for the issuance of subpoenas for the production of documents or records shall be in writing; shall specify the particular document or record, or part thereof, desired to be produced; and shall state the reasons why the production thereof is believed to be material and relevant to the issues involved."

In McClatchy Newspapers v. Superior Court, 26 Cal.2d

386, 396, the California Supreme Court said:

"A party or witness has a constitutional right to be free from unreasonable searches and seizures, and it is therefore incumbent upon the one seeking an inspection to show clearly that he has a right thereto and that the constitutional guaranties will not be infringed. Hence, the affidavit in support of the demand for inspection must identify the desired books, papers and documents and it must clearly show that they contain competent and admissible evidence which is material to the issues to be tried. The affiant cannot rely merely upon the legal conclusion, stated in general terms, that the desired documentary evidence is relevant and material."

The Court of Appeals of New York has also commented on the potential evils of an improperly issued subpoena duces tecum, in Hirshfield v. Craig, 239 N.Y. 98, 118, 130 A.L.R. 329:

"Where the statute has given an officer power to require the attendance of witnesses, we have pointed out, no legal wrong is suffered by the person subpoenaed, unless he is wrongfully compelled to answer questions, after refusal, and he may ask the protection of the court only upon such refusal. A direction to produce a book or paper may in itself, if enforced, work harm to its custodian, and possibly infringe his constitutional rights, even though the document be not received in evidence."

On procedural grounds, two of protestant's objections to the subpoena appear to be well taken. At the argument on the motion to quash, protestant asserted, and we find, (1) that no affidavit had accompanied the request for subpoenas, and (2) that protestant had not been served with a copy of any such affidavit, nor, in fact, with a copy of the letter request to the Commission. The Examiner, acting in accordance with the Commission's past practice regarding issuance of subpoenas, rejected these procedural objections and ruled that the motion to quash should be denied. In the light of past practice, this ruling was proper. However, a review of the statutory authority to issue subpoenas duces tecum for depositions has persuaded us that our procedure should be made to conform substantially with that set forth in the sections of the Code of Civil Procedure referred to.<sup>1/</sup> Since applicant failed to submit an affidavit with his request for the subpoenas duces tecum, and also failed to make service upon protestant, protestant's motion to quash must be sustained.

In view of the foregoing, it is unnecessary to consider whether applicant's request for subpoenas sufficiently complied with the requirement that the materiality of the documents be set forth "in full detail." We hold that this requirement of Section 1985 of the Code of Civil Procedure is applicable, but we withhold judgment

<sup>1/</sup> We express no opinion concerning the procedure for subpoenas duces tecum where depositions are not involved.

on the suggestion that, in this case, the materiality of the documents was sufficiently shown by the very fact of the request itself. In issuing the subpoenas, the Secretary was familiar with Decision No. 69076, with the order granting rehearing, and with the fact that the petition for rehearing included the factual claim that protestant had never provided signalling service; the Secretary was also aware of the various laws and regulations which require radio-telephone utilities to maintain records of their operations. If the documents in question should be found to contain no reference at all to signalling service, that fact would tend to prove applicant's claim that such service had never been rendered, and, on this theory, it might be said that no specific explanation of materiality was needed. We entertain no doubt that these records are material, but the question presented is whether an express explanation of materiality must literally be "set forth" in the affidavit. Since applicant, in any amended request which may be made, can eliminate this question by including such an explanation, there is no need here to determine whether or not the original request constituted substantial compliance with the statute.

Protestant also contends that the request for materials is so ambiguous and so broad in scope that compliance would be difficult and burdensome. It was brought out at the oral argument on the motion that protestant did not keep "broadcasting logs" but did keep "accounting logs, operating logs, and maintenance logs." Applicant is willing that the subpoena duces tecum be amended to substitute these latter items. It is sufficient that documents be described as accurately as possible under the circumstances; each particular document need not be individually described. With the suggested amendment, the documents would be described with sufficient specificity.

In the motion to quash the subpoena, protestant also argued that the requested documents contain privileged information. At the oral argument, however, protestant conceded that the proper place to raise this issue is at the deposition itself.

O R D E R

IT IS ORDERED that the Examiner's ruling denying the "Motion to Quash Subpena Duces Tecum" is overruled, the motion is granted, and the subpoena is quashed.

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 NOVEMBER, 1966.

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 President  
*George G. Trover*  
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*Fredrick B. Holcluff*  
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*William W. Bennett*  
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*August*  
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 Commissioners

Commissioner Peter E. Mitchell, being necessarily absent, did not participate in the disposition of this proceeding.