

Decision No. 72448

ORIGINAL

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

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

Application No. 47191
(Filed December 15, 1964;
Amended February 9, 1965;
Amended January 25, 1967.)

Additional Appearances:

George M. Carr, for applicant.
Halde & Battin, by Tom Halde for Coast
Mobilphone, protestant.
Avery H. Simon, for Mobile Radio System of
Ventura, Inc.; Lester W. Spillane, for
Allied Telephone Companies Association,
interested parties.
John D. Quinley, for the Commission staff.

OPINION AND ORDER ON REHEARING

On December 15, 1964, applicant requested a certificate of public convenience and necessity to provide one-way radio paging service as a radiotelephone utility in Santa Barbara and vicinity. By Decision No. 69076, dated May 18, 1965, the Commission denied the request.

On August 3, 1965, applicant petitioned for rehearing of Decision No. 69076. On October 5, 1965, the Commission granted rehearing.

At the request of applicant, the Commission on November 12, 1965 issued a subpoena duces tecum requiring the owner of Coast Mobilphone Service (protestant) to produce himself and certain of his documents at Santa Barbara before an officer authorized to take depositions.

On November 29, 1965, the owner of Coast Mobilphone Service filed a "Motion to Quash Subpoena Duces Tecum".

Public hearing on the motion to quash was held at Santa Barbara on March 16, 1966, before Examiner Gillanders. The presiding examiner denied the motion to quash. On March 23, 1966, Coast Mobilphone Service filed a petition for Commission review of the examiner's ruling. By Decision No. 71640, dated November 29, 1966 the Commission quashed the subpoena.

On January 17, 1967, the Commission, at the request of applicant, issued a subpoena duces tecum requiring protestant to produce himself and certain documents at the rehearing in this matter to be held January 27, 1967 at Santa Barbara. This subpoena could not be served.

Rehearing was scheduled to be held in Santa Barbara on January 24, 25, 26 and 27, 1967. Due to circumstances beyond the control of the parties, hearing could not be held on January 24th.

Rehearing in this matter was held on January 25, 26, and 27, at Santa Barbara before Examiner Gillanders.

At the beginning of the rehearing, counsel for one of the interested parties moved that the matter be dismissed because of applicant's alleged failure to conform to Rule 76 of the Commission's rules of procedure. He was joined in the motion by counsel for protestant. This motion was denied by the examiner.

Applicant then proposed certain amendments to his application. The substance of the amendments was to eliminate the offering of nonselective tone paging; to eliminate the limit on the number of calls handled for the basic charge; instituting an \$8 per month rental charge for the unit and a \$10 per month service charge for unlimited messages; increasing the number of receivers purchased from 12 to 60; and to change the antenna location to the Nogales Medical

Building located at 2320 Bath Street. Protestant and Allied Telephone Companies Association (Allied) protested the amendments and requested a continuance of the hearing. The examiner denied the request for a continuance and permitted the amendments.

Applicant produced a witness who testified that in August or September, 1965, at the request of applicant, he applied to protestant for one-way paging service and subsequently was furnished a General Electric Voice Director receiver. This receiver is approximately six and one half inches high, one inch in depth and three inches wide. It is equipped with an external antenna seventeen and one half inches long and has a small speaker connected to it by a cord thirty-six inches long. The witness testified he carried the receiver for approximately one and one half months and, when leaving the area, turned it over to applicant. The purpose of this testimony was to show that protestant supplied its customers with receivers differing from the type he demonstrated at the original hearing in this matter.

A physician and surgeon called by applicant testified that it was important to her and her patients that she receive messages promptly and that sometime in 1963 or 1964 she contacted protestant regarding paging service. Protestant stated that no one-way paging service was available but that he could supply a better service, namely, a portable-type two-way radio phone. She tried this service, but found it was not satisfactory for her purposes.

Approximately a year ago she again communicated with protestant regarding one-way paging and protestant offered to lend her a pager similar to the General Electric Voice Director but, because of its size and the fact that the external antenna must be kept upright, such receiver did not meet her needs. In addition, she felt the service, because the page would not be repeated, would be unsatisfactory. She did not subscribe to the offered service.

A witness called by applicant testified that late in 1966, his firm was asked to conduct a study of the economic development patterns of the greater Santa Barbara area; to develop and conduct a survey to measure the extent of interest and need for a one-way page service for business and personal use in this area; and to make a projection of the potential market for such a service. He testified that in his judgment there was a definite current market potential of 225 one-way paging units and within five years, with appropriate advertising and promotion, there should be a potential market of from 750 to 1000 units.

An attorney called by applicant testified that while he had no need for telephone answering service, he did have a need for one-way paging service. However, he would not subscribe to such service unless the receiver met his requirements as to size. He would not use the General Electric Voice Director, as it was too large.

The record shows that applicant had planned on calling a total of 24 public witnesses to testify as to their need for paging service. He had scheduled such witnesses for January 24, but had to cancel his schedule when the hearing could not be held.

Applicant testified that he proposed to use the Lear Siegler Bogen Pagemaster receiver and model 3RBTAT automatic time out encoder in his paging system. Applicant was not qualified as an expert on the operation of this equipment. He testified that he asked the manufacturer's representative to appear as a witness in this proceeding in his behalf. The representative would not appear. Applicant did not offer a qualified expert to explain the technical feasibility of his proposed system.

Applicant testified that he was unable to obtain a working receiver to display at the hearing, but did obtain a receiver shell, a description of which was read into the record.

At the original hearing in this matter (February 9, 1965), the City of Santa Barbara took the position that the antenna location described in the application was inappropriate because a commercial operation is inappropriate in a residential district. Applicant then amended his application to show the proposed antenna installation would be at 1216 State Street, Granada Building, Santa Barbara, a location satisfactory to the City of Santa Barbara. Applicant was directed by the Examiner to furnish, within 10 days, copies of the amendment to the application. The copies were filed with this Commission after the matter was submitted. On January 27, 1967 applicant testified that he had discussed obtaining transmitter space at the Nogales Medical Building with a representative of the Nogales Corporation.

He produced no evidence to show that he had or could obtain a long term lease for the installation on the Nogales Building or for any other location.

At this stage of the proceeding, counsel for protestant moved that the application be dismissed. He was joined in the motion by counsel for Allied Telephone Companies Association. The Examiner took the motion to dismiss under submission.

On February 6, 1967 applicant filed a petition in opposition to motion to dismiss and on March 7, 1967 he filed a supplement to the petition.

In Decision No. 63147, dated January 23, 1962, in Application No. 43704, the Commission found that an applicant for a certificate (to construct and operate a public utility radiotelephone system of the miscellaneous common carrier class) has the burden of establishing that public convenience and necessity require the proposed service and as incidents thereto that the present service is unsatisfactory and that the proposed operation will be technically and economically feasible.

The record is clear that applicant has attempted to overcome our previous finding that he failed to establish that public convenience and necessity require his proposed service.

Assuming the validity of applicant's survey, it is apparent from evidence adduced at the original hearing that protestant can accommodate on his existing facilities the estimated current potential market of 225 units plus at least 2 years growth. However, cross-examination of the witness who made the survey revealed that replies to his questionnaire were predicated upon receiving the paging service for approximately \$10 per month, when in actuality the proposed charges would be approximately \$18 per month. The witness testified he had validated his results by rechecking a sample number of prospective customers at the \$18 charge. We are not convinced that the present and future market for one-way paging is as great as predicted by this witness.

The inability of applicant to call more public witnesses to testify as to their need for paging service does no violence to applicant's right to present evidence favorable to his request. The record is clear that there is a conflict between the testimony of protestant and that of applicant's witness regarding availability of paging service in 1963 or 1964. The record is likewise clear that the receiver offered to applicant's witnesses is not the same model receiver by which protestant demonstrated to the Commission that his service did exist. Cumulative evidence of need for service would not change our previous finding that protestant can accommodate many more customers on his existing facilities. It would, perhaps, develop further opinions regarding tolerable sizes of receivers and conflicts with protestant's evidence but these issues are presently before us.

The record reveals that applicant has failed to adduce evidence that his proposed system will be technically feasible

although over two years have passed since he filed his original application. Applicant was afforded every opportunity to present such evidence both at the original hearing and at the rehearing. His failure to do so alone merits dismissal of his application.

At the original hearing, applicant's showing of economic feasibility consisted simply of testimony regarding his net worth and how he and his wife intended to operate the system in conjunction with his telephone answering service. The record reveals that applicant intended to present evidence of economic feasibility at the rehearing by means of documents prepared by his accountant. He did not present such evidence before the motion to dismiss was taken under submission. Based upon our findings, set forth below, such evidence, if received, would have no bearing upon the order in this matter.

In view of the evidence and in the light of the foregoing discussion of its elements, the Commission finds that:

1. Applicant, although afforded two opportunities to do so, failed to meet his burden of establishing that his proposed system will be technically feasible.

2. Applicant has not overcome our previous finding that he failed to establish that public convenience and necessity require the proposed service.

3. Applicant has established that the existing service of protestant as regards the use of General Electric Voice Director receivers, is unsatisfactory from the customers' viewpoint.

4. A conflict exists between protestant's testimony regarding his operations and the testimony of public witnesses describing protestant's operations.

Based upon the above findings, the Commission concludes that protestant's motion for dismissal should be granted and applicant's petition in opposition to the motion should be denied.

A. 47191 lm

IT IS ORDERED that Application No. 47191 is dismissed without prejudice.

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

Dated at San Francisco, California, this 23rd day of MAY, 1967.

E. N. [Signature]
President

[Signature]

[Signature]

William [Signature]

[Signature]
Commissioners