BEM

Decision No. 74090

ORIGINAL

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

MOBILE RADIO SYSTEM OF SAN JOSE, INC., a Radiotelephone Utility,

Complainant,

vs.

JACK VOGELMAN, Licensee, and ROBERT PODESTA, Operator, of Station KIZ 549,

Defendants.

Case No. 8564
(Filed November 16, 1966)

Application of JACK VOGELMAN, M.D., for Certificate of Public Convenience and Necessity.

Application No. 49066
(Filed January 3, 1967)

Bruce R. Geernaert, for complainant in Case No. 8564; for protestant in Application No. 49066.
Noel Dyer and Dudley Zinke, for applicant in Application No. 49066; for defendant in Case No. 8564.
Joseph A. Smiley, for Central Exchange Mobile Radio; Donald R. Cook, for Cook's Telephone Answering & Radio, Inc., and Fresno Mobile Radio, Inc.; Lester W. Spillane, for Allied Telephone Companies Association; Homer N. Harris, for Industrial Communications Systems, Inc.; Leland D. Stephenson, for County of Santa Clara; Phillips Wyman, for Salinas Valley Radio Telephone Co.; interested parties.
John D. Quinley, for the Commission staff.

OPINION

Proceedings

The complaint charges that defendants are operating a radiotelephone utility and rendering and offering to render radiotelephone utility services without appropriate authorization from

this Commission. It seeks an order requiring defendants to cease and desist therefrom.

Defendants aver that the radio stations which are the subject of the above complaint are operated under the Special Emergency Radio Service Rules (Part 89) of the Federal Communications Commission pursuant to a nonprofit, cost-sharing cooperative arrangement to provide needed communications solely to physicians who are members of the Santa Clara County Medical Society. Defendants further aver that at no time did they have any intention to dedicate any of the property or facilities of said stations to the public; and that no member of the public has a right to demand communication service through said stations. However, in the event the Commission determines that a certificate of public convenience and necessity under the provisions of Section 1001 of the Public Utilities Code is required, defendant Jack Vogelman, M.D., has applied for a certificate of public convenience and necessity in Application No. 49066.

Public hearing was held before Examiner Gillanders on June 1 and August 7, 1967, at San Jose.

At the original hearing complainant and defendants presented a tentative memorandum of understanding regarding an attempt to work out an arrangement whereby the doctors now receiving tone plus voice paging service from defendants would receive the same service from complainant. The hearing was adjourned at the request of the parties until August 7, 1967 in order to afford ample time for negotiations.

At the further hearing held on August 7 complainant and defendants presented an agreement (Exhibit 1) which they planned to consummate on February 1, 1968. By its terms, defendants agree to dismissal of Application No. 49066 and to the issuance of an order requiring them to cease and desist from providing service and

facilities within the scope of Case No. 8564. On the consummation date title to the radio equipment was to be transferred from defendants to complainant and the paging service now rendered by defendants would henceforth be provided by complainant.

Applicant Dr. Vogelman presented no evidence in support of his application for a certificate of public convenience and necessity.

The proceedings were submitted on September 18, 1967 upon receipt of a late-filed exhibit and concurrent closing memoranda.

Issues

There are two issues before the Commission, namely: (1) Are defendants a public utility? and (2) Should the Commission issue applicant a certificate of public convenience and necessity?

Position of Interested Parties and the Commission Staff

Allied Telephone Companies Association (which is made up of the majority of authorized radiotelephone utilities in California) states that:

> "1. While Allied has no interest in, or concern with, the business arrangements entered into by the complainant and defendants in this case (Exhibit No. 1), it is vitally interested in the subject matter of the complaint and in seeing an authoritative decision emerge based on the facts and law involved. A more flagrant example of the 'pseudo common carrier' in operation would be hard to imagine, and the record fully establishes the burden of the complaint; namely that the defendants are presently operating an uncertificated radio-telephone utility service in violation of Section 1001 of the California Public Utilities Code, and, accordingly, that the defendants must be ordered to cease and desist from such unlawful operations.
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> "2. The record clearly shows that the offering of defendants, its illegality excepted, is comparable in all substantial respects to that of certificated utilities--the same order of frequencies is employed; the entrepreneur Podesta is the real party in interest; charges made for the defendants' service are generally comparable, at least at this point, to those of the regulated utility; practices are similar; the licensee

of KIZ 549 is manifestly only nominal, to satisfy Federal Communications Commission regulations; the system involved is owned and operated in fact by Podesta; customers have been aggressively sought and, in fact, it appears that defendants, with their unregulated utility service, have more paging customers than the lawful utility. The fact that documents have been signed purporting to show that the service is being rendered on a non-profit, cost-sharing basis is of no significance, but is obviously only designed to comply with the naivete of the rules of the Federal Communications Commission. There is nothing to show that the so-called licensee of the system has actually had any real or substantial responsibility for it.

"3. So far as the accompanying application of Jack Vogelman for a Certificate of Convenience and Necessity is concerned, if reliance had been continued on this alternative, the need and other criteria of the William K. Harper Case, Decision No. 63147 and following cases, would have had to be met, which they were not. Moreover, since the rules of the Federal Communications Commission, particularly Section 89.7, specifically preclude the use of the privately licensed frequencies for the rendition of a communications common carrier service, even if a pseudo common carrier should manage to become certificated in this state, it is not clear how he could then implement any such certification at the Federal Communications Commission in view of the barrier to common carrier operation on the private radio frequencies. This problem is not necessarily involved in the disposition proposed by the complainant and defendants because complainant testified in the record that it can, and is prepared to, render paging service to the customers it is acquiring from defendant on complainant's common carrier frequencies.

"4. Clearly, the requirements of California law cannot be avoided by the form adopted or the frequencies employed. Reference to non-profit cost-sharing arrangements cannot avoid the effects of the Code. An activity may bring itself under regulation by holding itself out to serve a substantial part of the public, as done here to the doctors, or a dedication to public use of its telephone facilities. Private radiotelephone is none the less telephone service.1/ Such effects cannot be circumvented by contentions that one is doing something else. It is the fact of dedication, and that substantial numbers of people

1/ Commercial Communications, Inc. vs. Public Utilities Commission, 50 Cal.2d 512.

are involved, that is controlling. Even if a person or company disclaim dedication to public use, if what he is doing in fact constitutes a utility service, he is subject to the Commission's jurisdiction and bound by the requirements of Section 1001 of the Code. In this case, Podesta's Physician's Exchange is rendering a service in all respects comparable to and competitive with that being offered in the same area by a certificated radiotelephone utility. The vice of such operation is that, of course, the unregulated operation can easily undermine and destroy the responsible regulated utility, so that substance as well as legalities are involved here. For example, the unregulated utility could, at will, undercut on price until he achieved dominance, then do as he wanted.

"5. The Commission should specifically decide in this case that the service offered by defendants, and in fact any similar kind of combination of cooperative or other device, does constitute radiotelephone utility service within the definition of Section 234 of the Code, that such service may not be conducted without a certificate obtained under Section 1001 of the Code, and that the Commission order the defendants to cease and desist from their unlawful activities. Since there has been no showing in support of the application, it should be dismissed with, or without, references to the agreement."

Salinas Valley Radio Telephone (Salinas) believes "that the original issues are now clouded and that the Commission is being surreptitiously led down another path to make a decision on the sale of assets from one party to another party. To us, it is a moot question whether the Commission passes on the purchase of equipment from the defendants, in this case, or anyone else. The issue in the instant case has been disproportionately completely removed from what the Commission was originally asked to determine, i.e. were the defendants operating illegally?"

According to Salinas, "complainant has offered an agreement with the defendants, together with supporting data, with all its 'ifs', 'buts' and 'whens'. He purports to offer paging with voice

at a price. Complainant has no right to ask the Commission to spend its valuable time to approve such an agreement that extends far beyond the scope of this present case. These items in the agreement are so slyly asked of the Commission for approval, go far beyond the scope of this hearing and are tainted with an attempt to circumvent the Commission's methods as set up by its rules and regulations. In fact, complainant is asking the Commission to approve, if even indiscreetly, tariffs and perhaps a change in repeator location."

Salinas further believes "that by their own actions defendants have admitted their guilt in operating without the Commission's approval under the law of the State of California and the rules and regulations of the Commission and that the Commission should avail itself of this opportunity to clearly affirm this illegal operation in its decision, and to abort itself from making a decision as to the purchase of equipment, the price paid for the equipment and the date such purchase should become effective."

The Commission staff states that "Physicians Exchange is engaged in a public utility service that cannot be distinguished from that of a radiotelephone utility in offering one-way selective paging service to doctors in the San Jose area. Section 1001 of the Public Utilities Code requires that every telephone corporation shall obtain from this Commission a certificate of public convenience and necessity before beginning the construction of facilities, except as that section expressly permits." Therefore, it recommends that the Commission issue an order directing Jack Vogelman and Robert Podesta to cease and desist from all further construction or operation of radiotelephone facilities until the requirements of Section 1001 of the Public Utilities Code are fulfilled.

Utility Status

Defendant Dr. Vogelman is licensed by the Federal Communications Commission under Part 89, Subpart P, Special Emergency Radio Service, of the FCC Rules and Regulations to operate 2 two-way mobile radio units and one base station on the frequency 155.295 MHz located approximately 11 miles west of the center of San Jose, California, at an elevation of 2,455 feet. The base station utilizes a directional antenna with a maximum effective radiated power of 550 watts in the direction of San Jose.

Pertinent sections of Part 89 of the FCC Rules and Regulations are shown below:

> §89.3 defines Special Emergency Radio Service as "a public safety service of radio communications essential to the alleviation of an emergency endangering life or property."
>
> §89.7 states: "The radio facilities authorized under this part shall not be used to carry program material of any kind for use in connection with radio broadcasting and shall not be used to render a communications common carrier service except for stations in the Special Emergency Radio Service while being used to bridge gaps in common carrier wire facilities."
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> §89.13 states: "Arrangements may be made between two or more persons for the cooperative use of radio station facilities in the mobile radio service provided all persons sharing in the use of a station are eligible to hold licenses to operate the particular type of station shared. Such cooperative arrangements shall be governed by the following:
>
> (a) Agreements relating to control. (1) A group of persons eligible for a license in the same public safety radio service may share the use of a base station or a base and mobile station licensed to one member of the group provided there is on file with the Commission, and maintained with the records of the station, a copy of the agreement under which such shared operation shall take place. Such agreement should provide that the licensee of the station shall be in control of the operation of the station and that all use

of its facilities shall take place only under the direction and supervision of an employee of the licensee. (2) Subscribers to such service may either obtain a separate license to cover the mobile transmitters which they use or the mobile transmitters may be included in the license of the base station from which service is rendered. In the latter case the coordinated service agreement should specifically cover use of such mobile units and indicate that the licensee would be in control of such units.

(b) Contributions to operating costs. Coordinated service may be rendered without cost to subscribers or contributions to capital and operating expenses may be accepted by the licensee. Such contributions must be on a cost-sharing basis and pro-rated on an equitable basis among all persons who are parties to the cooperative arrangement. Records which reflect the cost of the service and its nonprofit, cost-sharing nature shall be maintained by the base station licensee and held available for inspection by a Commission representative.

(c) Letter to accompany application. Each application for a mobile station proposing to receive coordinated service shall be accompanied by a letter from the licensee of the base station concerned indicating that the proposed coordinated service will be rendered."

§89.501 states: "Special Emergency Radio Service is available only to the extent and for the purposes described in succeeding sections of this subpart. The eligibility requirements, classes of stations available to each eligible group, permissible communications in accordance with eligibility, and other applicable conditions of use are set forth as separate sections of this subpart."

§89.507 states:

"(a) Eligibility. Physicians and veterinarians are eligible in this service. As used in this part, the term 'physician' or 'veterinarian' shall be construed to mean individual physicians or veterinarians or schools of medicine, including schools of veterinary medicine.

(b) Eligibility showing. The initial application from a physician or veterinarian shall be accompanied by a statement in sufficient

detail to permit a ready determination of the applicant's eligibility. Any subsequent application may refer to information previously filed if there has been no change in the status of the applicant's eligibility. In the event changes have occurred which affect the original eligibility statements, a new showing must accompany the application.

(c) Class and number of stations available. Each physician or veterinarian normally may be authorized to operate not more than one base station and two mobile units. Additional base stations or mobile units will be authorized only in exceptional circumstances when the applicant can show a specific need therefor.

(d) Permissible communications. Except for test transmissions as permitted by §89.151(e), stations licensed to physicians or veterinarians may be used only for the transmission of messages pertaining to the safety of life or property and urgent messages relating to the medical duties of the licensee."

Complainant Mobile Radio System of San Jose, Inc., a radiotelephone utility, is licensed by the FCC under Part 21 of its rules to operate as a miscellaneous common carrier on the frequency pair 152.09 and 158.55 MHz. The utility operates two base stations, one in the center of San Jose and one on Loma Prieta Mtn., approximately 15 miles south of San Jose. Mobile Radio System is licensed to provide a communications common carrier service.

Though Dr. Vogelman and Mobile Radio System are licensed under different parts of the FCC Rules and Regulations, both operate similar equipment for one-way paging consisting of a base station transmitter, a specified number of mobile units and an unlimited number of paging receivers. The 37 dbu contour for two-way service and the 43 dbu contour for one-way service, applied to miscellaneous common carrier services by the FCC and this Commission to define service area limitations, do not apply to Dr. Vogelman's system under Part 89 of the FCC Rules.

A comparison of the service offerings of defendants and complainant is shown below.

Defendants

1. Service available only to doctors who are members of Santa Clara County Medical Society.
2. Minimum one year initial sign up.
3. Quarterly billing in advance.
4. Twenty-four hour, continuous service.
5. Rates revised quarterly to reflect nonprofit costs.
6. Initial tone-only service rate of $16 per month including receiver rental and maintenance.
7. Initial tone plus voice service rate of $19.50 per month, presently $17.
8. Unlimited paging calls.[a]
9. $50 deposit on receivers, refundable with 6½% interest after one year.
10. Defendants reserve right to terminate service for illegal use of service or nonpayment of fees.
11. Leased property at no time the property of user and may be inspected or reclaimed at any time.
12. User agrees to submit equipment to regular maintenance.
13. Defendants not responsible for interruptions beyond their control.

Complainant

1. Service available to all persons. Subscriptions by doctors and other public safety and health personnel given first priority.
2. Minimum one month initial contract.
3. Monthly billing in advance.
4. Twenty-four hour, continuous service.
5. Rates under filed tariff L-1 schedule.
6. Tone-only service rate of $16 per month including receiver rental and maintenance.
7. Unlimited paging calls.[b]
8. $50 deposit on receivers, refundable with 6% interest after one year.
9. Utility reserves right to terminate service for FCC violations or nonpayment of fees.
10. Equipment furnished by utility remains its property and agents have right to access to equipment at any reasonable hour for repairs or removal.
11. Equipment furnished by utility will be maintained by it.
12. Allowances made for interruptions continuing for more than 24 hours.

(a) Calls limited to messages pertaining to the safety of life or property and urgent messages relating to medical duties.

(b) No limitation as to contents of message.

The FCC created a class of radio service restricted to emergency use, and has carefully preserved the distinction between that use and the general public use offered by the communications common carrier service.

This Commission does not believe that it was a historical accident or the result of unthinking regulatory practices by the FCC that created these two classes of radio service. The FCC carefully regulates use of the available radio frequencies and has found that there is a requirement for both types of service and that such requirements do not result in wasteful duplication of facilities. By letter dated February 21, 1967 (Exhibit 16) the FCC informed this Commission that its staff is "reviewing the entire matter of the shared use of private radio systems and following that review the existing rules may be changed." We, however, are guided by California law regarding public utilities.

In Commercial Communications v. PUC, 50 Cal.2d 512 (1958) the California Supreme Court said:

> "Because of the physical nature of the medium here used (radio), the private nature of the communications contemplated and the restrictions established by the federal commission, private radiotelephone differs in some respects from public radiotelephone service and also from land line telephone service. Nevertheless it is a telephone service and if dedicated to public use it is subject to the jurisdiction of respondent commission." (p. 523)

Public Utilities Code, Section 216(a)

> "'Public utility' includes every common carrier, toll bridge corporation, pipeline corporation, gas corporation, electrical corporation, telephone corporation, telegraph corporation, water corporation, wharfinger, warehouseman, and heat corporation, where the service is performed for or the commodity delivered to the public or any portion thereof."

Public Utilities Code, Section 216(b)

> "Whenever any common carrier, toll bridge corporation, pipeline corporation, gas corporation, electrical corporation, telephone corporation, telegraph corporation, water corporation, wharfinger, warehouseman, or heat corporation performs a service or delivers a commodity to the public or any portion thereof for which any compensation or payment whatsoever is received, such common carrier, toll bridge corporation, pipeline corporation, gas corporation, electrical corporation, telephone corporation, telegraph corporation, water corporation, wharfinger, warehouseman, or heat corporation, is a public utility subject to the jurisdiction, control, and regulation of the commission and the provisions of this part."

The Legislature, in enacting the Public Utilities Code, took cognizance of the fact that certain acts which could be considered as of a public utility nature should be specifically exempted from regulation.

Public Utilities Code, Section 239

> "(a) 'Warehouseman' includes:
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> Every corporation or person owning, controlling, operating or managing any building or structure in which property, other than liquid petroleum commodities in bulk, is regularly stored for compensation within this state, in connection with or to facilitate the transportation of property by a common carrier or vessel, or the loading or unloading of property, other than liquid petroleum commodities in bulk, and other than a dock, wharf, or structure, owned, operated, controlled, or managed by a wharfinger.
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> "(b) Every corporation or person owning, controlling, operating, or managing any building, structure, or warehouse, in which merchandise, other than second-hand household goods or effects, and other than liquid petroleum commodities in bulk, and other than merchandise sold but retained in the custody of the vendor, is stored for the public or any portion thereof, for compensation, within this state, _except warehouses conducted by any nonprofit, cooperative association or corporation which is engaged in the handling or marketing of the agricultural products of its members and warehouses conducted by the agents, individual or corporate, of such associations or corporations, while acting within the limitations imposed by law on their principals._" (Emphasis added.)

Public Utilities Code, Section 3511

> "'Highway carrier' means every corporation or person, their lessees, trustees, receivers or trustees appointed by any court whatsoever, engaged in transportation of property for compensation or hire as a business over any public highway in this State by means of a motor vehicle, except that 'highway carrier' does not include:
>
> ". . . .
>
> "(e) Any nonprofit agricultural cooperative association organized and acting within the scope of its powers under Chapter 4, Division 6 of the Agricultural Code to the extent only that it is engaged in transporting its own property or the property of its members." (Emphasis added.)

This Commission is not unmindful that parties, without meaning to do so, may become subject to our regulation because of the acts which they commit. This record reveals no actions which should bring defendants within the ambit of our regulation nor does the record reveal any actions of defendants that bolster the contention of complainant, interested parties, and the staff that the service rendered is comparable to and competitive with the common carrier service offered by complainant radiotelephone utility. There is no question that the radiotelephone utility can offer a much more complete telephone service than can defendants.

Findings of Fact

1. The service rendered by defendants is a telephone service.

2. The telephone service of defendants is rendered only to doctors who are members of the Santa Clara County Medical Society.

3. The telephone service to doctors who are members of the Santa Clara Medical Society is rendered pursuant to a nonprofit, cost-sharing cooperative association as required under Part 89 of the Federal Communications Commission's Rules and Regulations.

4. The telephone message service rendered by defendants is limited to messages pertaining to the safety of life or property and urgent messages relating to the medical duties of its users.

5. Defendants have not dedicated their telephone service to general public use.

Conclusions of Law

1. Because of the private nature of defendants' telephone service and lack of dedication by defendants of such telephone service to the public use it should not be subject to regulation by this Commission.

2. Case No. 8564 should be dismissed.

Public Convenience and Necessity

Findings of Fact

Applicant presented no evidence that public convenience and necessity require his proposed service.

Conclusions of Law

1. Applicant did not sustain his burden of establishing that public convenience and necessity require his proposed service be authorized.

2. Application No. 49066 should be dismissed.

C. 8564, A. 49066 bem

O R D E R

IT IS ORDERED that:

1. Application No. 49066 is dismissed.
2. Case No. 8564 is dismissed.

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

Dated at San Francisco, California, this 14th day of MAY, 1968.

President

Commissioners

Commissioner A. W. GATOV
Present but not participating.

Commissioner Fred P. Morrissey
Present but not participating.