

Decision No. 75357**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)OPINION AFTER REHEARING

By Decision No. 74323, issued herein on July 2, 1968, the Commission granted rehearing of Decision No. 74090, issued on May 14, 1968. By letters (1) dated August 8, 1968, from Bruce R. Geernaert, (2) dated August 26, 1968, from Noel Dyer, and (3) dated September 5, 1968, from Lester W. Spillane, the parties indicated that no request for further public hearing was being made and that there is no objection to the matters being determined on the basis of a reconsideration of the pleadings, file and record in the proceedings. Said letters are hereby being placed in the formal file in Case No. 8564 herein.

Issues

By the agreement dated August 3, 1967, between complainant Mobile Radio System of San Jose, Inc., and defendants and applicant, Robert Podesta and Jack Vogelmann, M.D., Exhibit No. 1 herein, Podesta

and Vogelmann agreed to the dismissal of Application No. 49066. Hence, no issue has been raised by the parties respecting Application No. 49066. By said agreement Podesta and Vogelmann further agreed to refrain from owning, controlling or operating any radio equipment used for the purpose of providing paging service to any other person or entity for compensation unless and until appropriate authority is sought and obtained from the California Public Utilities Commission, under Section 1001 of the Public Utilities Code and whatever license that may be required from the Federal Communications Commission, and they consented to the issuance of an order by this Commission in Case No. 8564 requiring them jointly or severally to cease and desist from and after February 1, 1968, from providing paging service for compensation and from owning, controlling or operating any radio equipment used for such purpose within the scope of the complaint in said case. By its complaint Mobile Radio System requested this Commission to order and direct the defendants Podesta and Vogelmann to cease and desist in their rendering and/or offering to render radiotelephone utility services, namely, one-way pocket paging. Therefore, no issue has been raised by the parties respecting Case No. 8564. The issue which will be considered by the Commission on its own motion, however, is whether the record sets forth sufficient facts to justify the conclusion that the Commission has jurisdiction to issue the cease and desist order requested by complainant Mobile Radio System and consented to by defendants Podesta and Vogelmann.

Findings of Fact

Based upon a consideration of the record herein the Commission finds that:

1. Exhibit No. 5 is a Traffic Study of Physicians' Exchange Paging Service showing the number of transmissions each half hour

commencing at 7:30-8:00 a.m. through 10:00-10:30 p.m. for the test days July 17 through July 21, 1967. The average number for each half-hour period ranges from a low of .6 transmissions for the period 2:30-3:00 p.m. to a high of 10.6 for the period 7:30-8:00 p.m.

2. Robert Podesta does business under the name of Physicians' Exchange.

3. Mr. Podesta has purchased radio equipment and operates such radio equipment in providing service to 113 subscribers.

4. Exhibit No. 8 is a letter dated August 12, 1966, to Drs. Robinson & Hoag from Robert Podesta submitting an agreement for radio transmission service available twenty-four hours per day on a 7 days per week basis.

5. For the \$50 deposit on the beeper and the \$58.50 service charge for the 3-month period 10/17/66-1/17/67 William H. Hoag, M.D. issued a check payable to Physicians' Exchange for \$108.50.

6. Exhibit No. 10 headed KIZ 549 Radio Transmission Service is the agreement which was actually signed by Mr. Podesta's subscribers. This agreement in part provides for radio transmission service under the call sign KIZ 549 for a period of one year on a nonprofit cost-sharing basis. The agreement further provides that the subscriber will make a \$50 deposit on the equipment which will be returned after 12 months' service, with interest of 6-1/2%; that the quarterly fee, \$58.50 initially, to be paid by the subscriber will be three times each of the following: (1) the estimated monthly service fee, \$11 initially, (2) the monthly rental fee, \$5.50 initially, and (3) the monthly maintenance fee, \$3.00 initially; and that the subscriber agrees to acquaint himself with and to abide by Federal Communications Commission Rules and Regulations.

7. Exhibit No. 12 is an engineering statement for KIZ 549 Radio Paging Service which includes a map showing the predicted service contours of radio paging service for KIZ 549. The transmitter is located at FM station KREP, whose transmitter is located on the Mt. Hamilton road, four miles east of Alum Rock. The directional Motorola antenna is mounted on top of the KREP building, 30 feet above ground, having the maximum radiation directed toward the city of Palo Alto. The input power to this antenna is 110 watts.

8. Exhibit No. 13 is a conditional sales contract, dated August 11, 1966, in the amount of \$9,511.24 for the sale of communications and electronic equipment by Motorola Communications & Electronics, Inc., to Robert Podesta, FCC licensee.

9. Exhibit No. 14 is the Federal Communications Commission Construction Permit and License Call Sign KIZ 549, Special Emergency, issued to Jack Vogelmann, effective October 5, 1966.

No exceptions were taken by any of the parties to the following findings appearing on page 13 of Decision No. 74090 issued herein, and they are reissued in the present decision:

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

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

As findings 3, 4 and 5 on page 14 of Decision No. 74090 issued herein are not fully supported by the evidence they are hereby rescinded and the following findings are made in lieu thereof:

12. The telephone service to the doctors who are members of the Santa Clara Medical Society is rendered by defendants on a nonprofit cost-sharing basis, and such subscribers have agreed to acquaint themselves with and to abide by Federal Communications Rules and Regulations.

13. Defendants are persons owning, controlling, operating and managing a telephone line used to facilitate communication by telephone, without the use of transmission wires, for compensation within this State.

14. Defendants perform telephone service for a portion of the public.

15. Defendants have not obtained from this Commission a certificate of public convenience and necessity for the construction and operation of a telephone line to provide intrastate telephone service.

16. Applicant has agreed to the dismissal of Application No. 49066 herein.

Based upon a consideration of the foregoing findings and the State and Federal law applicable thereto and Part 89 of the Federal Communications Commission Rules and Regulations and Exhibits Nos. 15 and 16 which pertain thereto, the Commission concludes that:

1. The Federal law has not preempted the regulation of intrastate communication by wire or radio by this Commission except as provided by the provisions of 47 USCA Sec. 301 relating to the granting of Federal licenses for the use of channels for radio transmission. (47 USCA Sec. 152(b) and Sec. 153(e).)

2. Defendants are required to obtain from this Commission a certificate of public convenience and necessity before beginning the construction of the telephone facilities to provide the telephone service referred to in the findings herein. (Public Utilities Code Secs. 207, 216, 233, 234 and 1001. Mesa Electric Cooperative, Inc., 47 Cal.P.U.C. 119.)

3. Defendants should be ordered to cease and desist from the construction and operation of telephone lines or facilities to

provide intrastate telephone service until a certificate of public convenience and necessity has been obtained from this Commission.

4. Pursuant to the agreement of applicant, Application No. 49066 herein should be dismissed.

ORDER AFTER REHEARING

IT IS ORDERED that:

1. Paragraph 2 of the order in Decision No. 74090 issued herein on May 14, 1968, is rescinded.

2. Jack Vogelmann and Robert Podesta jointly shall immediately cease and desist from the construction of any telephone lines or facilities to provide telephone service for compensation within the State of California, until they shall have obtained a certificate of public convenience and necessity authorizing such construction and operation.

3. Jack Vogelmann shall immediately cease and desist from the construction of any telephone lines or facilities to provide telephone service for compensation within the State of California until he shall have obtained a certificate of public convenience and necessity authorizing such construction and operation.

4. Robert Podesta shall immediately cease and desist from the construction of any telephone lines or facilities to provide telephone service for compensation within the State of California until he shall have obtained a certificate of public convenience and necessity authorizing such construction and operation.

5. Application No. 49066 herein is dismissed.

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


Dated at San Francisco, California, this
25th day of FEBRUARY 1969.

1909:
William Lyman J.
President

Anderson

Aud. R. Monseign

(1) *Philosophy* - 25


Commissioners