NB

Decision No. 78105

ORIGINAL

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Jack Loperena, dba RADIO DISPATCH FRESNO, Complainant, vs. FRESNO MOBILE RADIO, INC. Defendant.	Case No. 8983 (Filed October 10, 1969)
In the Matter of the Application of FRESNO MOBILE RADIO, INC., a corporation, for authorization to construct additional radiotelephone utility facilities in territory served by its existing facilities in the San Joaquin Valley, and request for dismissal.	Application No. 51776 (Filed March 19, 1970)

Carl B. Hilliard, for Jack Loperena, complainant.
John G. Lyons, of Vaughn, Paul & Lyons, for Fresno Mobile Radio, Inc., defendant and applicant.
Lester W. Spillane, for Allied Telephone Companies Association, intervenor.
Janice E. Kerr, Counsel, for the Commission staff.

O P I N I O N

By his complaint herein, as supplemented, Jack Loperena, doing business as Radio Dispatch Fresno, raises the question of the lawfulness of the one-way paging service rendered by Fresno Mobile Radio, Inc. (Mobile). In the alternative, the complaint seeks either the discontinuance of all paging service by Mobile or a restriction to paging in a limited area served by defendant's (Mobile's) downtown Fresno base station.

By Application No. 51776, Fresno Mobile Radio, Inc. requests a certificate of public convenience and necessity, authorizing the one-way signaling or paging operations presently conducted by it, or the dismissal of the application in the event the Commission determines that it requires no certificate of public convenience and necessity for its present operations.

Allied Telephone Companies Association, an association of radiotelephone utilities, was allowed to intervene, its participation being limited to the determination of whether a "grandfathered" radiotelephone utility offering two-way radio service has a right to offer one-way paging or signaling services (Decision No. 77138, dated April 24, 1970).

Complainant filed a petition requesting certain interim relief. Applicant, defendant in the complaint case, filed a reply and the Commission issued its order denying interim relief (Decision No. 76957, dated March 17, 1970).

Hearings were held before Examiner Gilman in San Francisco and Fresno, California, and these matters were submitted upon the filing of concurrent briefs. Briefs were due July 2, 1970. On the last day of hearing herein, complainant renewed orally its petition for interim relief. That petition was again denied by Decision No. 77333, dated June 9, 1970.

The proceeding was originally submitted July 2, 1970. On July 30, 1970, complainant filed a petition to set aside submission for the purpose of receiving additional documentary evidence. On September 1, 1970, the Commission granted the petition and ordered resubmission; subsequently, defendant filed a Reply to Petition to Set Aside.

The complaint argues that a certificate of public convenience and necessity is required when an RTU offering two-way mobile service initiates a paging service in territory already served by an established but uncertificated paging operator. To justify service area limitation, complainant points to a recently superseded tariff which assertedly would so limit the service area. Complainant also argues that defendant's competition constitutes an interference with the operation of Loperena's paging system. (Section 1001 Pub. Util. Code.)

Defendant asserts that it already has authority to offer service throughout its present service area; in the alternative it urges that public convenience and necessity require duplicatory service.

The complaint as amended and supplemented attacks defendant's rates as noncompensatory and thus unfairly competitive. It is also alleged therein that defendant established an FEX line into Hanford in order to render service in that city in circumvention of our Order of Suspension and Investigation in Case No. 8986 directed to Hanford Mobile Radio, Inc., a corporation related to defendant.

History

Miscellaneous common carriers (in California called radiotelephone utilities) were brought into existence by the Federal Communications Commission for the purpose of "fostering the development of competing systems, techniques and equipments" as between public radiotelephone systems and the established landline companies.[1] At that time, there were three areas of service that the

1 FCC Memorandum Opinion and Order, released December 28, 1960, Docket No. 13900, in re General Telephone Company of California.

prospective radiotelephone utility could apply for in competition with the wireline carrier. These areas were designated as rural radiotelephone service, one-way signaling service (hereinafter called "paging") and two-way communications with mobile stations (hereinafter called "mobile telephone service"). Of concern in this proceeding are the mobile telephone and paging services.

The Federal Communications Commission originally set aside a portion of the "lowband" frequency spectrum for paging only. Both wireline carrier and prospective radiotelephone utilities could apply for authority to offer service on these frequencies. At the same time, the Federal Communications Commission released a portion of the VHF frequency spectrum for exclusive use by the prospective radiotelephone utilities for mobile telephone service. (Later a portion of the UHF spectrum was also released for this purpose.)

In passing it should be noted that any two-way system offers the potentiality for one-way use. In practice the option as to type of use could not be denied to the subscriber.

This record does not disclose the basis for the FCC's making this distinction between two-way and one-way service. It does not appear that the California Commission has ever affirmatively determined that such a distinction is necessary for the accomplishment of our own regulatory objectives.

The "grandfather decision" (Decision No. 62156 in Application No. 42456 and Case No. 6945, 58 Cal. P.U.C. 756) declared that these carriers were public utilities under California law, and assumed economic and certification jurisdiction over the industry. Existing utility services were found to be required by public convenience and ordered to be maintained. That decision was issued June 20, 1961.

At that time Fresno Mobile Radio, Inc. was operating a mobile telephone service under its Federal Communications Commission Tariff No. 2. The base stations were located at Meadow Lake, Joaquin Ridge and Panoche Mountain. This tariff was filed with the California Public Utilities Commission on July 31, 1961, under cover of Advice Letter No. 1. The preliminary statement of that tariff declares that, "The following classifications of service are offered:

"(1) Two-way communications with mobile stations, including message relay, direct dispatching, car-to-car, transient, selective calling and general services.

"(2) One-way signaling service. Not applicable. (Emphasis added.)

"(3) Rural radio service."

Fresno Mobile Radio, Inc., Cook's Telephone Answering and Radio, Inc. and Hanford Mobile Radio, Inc. are all owned by Don Cook and his family. On the date of the grandfather decision, Cook's Telephone Answering and Radio, Inc. was providing one-way service from a base station in downtown Fresno, and Hanford Mobile was providing mobile telephone service from a base station on Joaquin Ridge. On that same date, complainant was providing mobile two-way and (assertedly) one-way communication from base stations at Meadow Lake and Visalia.[2]

By Advice Letter No. 2 (also part of Exhibit No. 2 herein), filed June 2, 1965, with this Commission, Fresno Mobile Radio advised of the "addition of a local controlled transmitter to be used for emergency standby and one-way paging on the mobile frequency."

2 Decision No. 70804, dated June 8, 1966, authorized the sale of Tulare County Radio Dispatch Company (Visalia) to Jack Loperena.

The following classifications of service were offered:

L-1 radiotelephone service with mobile units (T)

L-2 one-way communications ..... (N)

L-4 rural radio service ..... (T)

The symbol (N) represents new offering. Under the statement of base station facilities in its tariffs, Fresno Mobile Radio mentioned a transmitter, listed as No. 3, at 160 North Broadway, Fresno, California. Under cover of Advice Letter No. 2 Fresno Mobile Radio's new Tariff Sheet, 15-T, contained the L-2 Tariff. This L-2 Tariff states:

> "The service area of this One-Way Communications Service is the entire area within the service area of the base radiotelephone station of Fresno Mobile Radio, Inc. at 160 North Broadway, Fresno, California."

On September 10, 1969, Fresno Mobile Radio, Inc. filed Advice Letter No. 5 which accomplished a "text correction" by canceling its original Tariff Sheet No. 15-T and substituted therefor Tariff Sheet No. 36-T. The latter sheet revised the paragraph entitled One-Way Communications Service to read:

> "Territory Served - The service area of this One-Way Communications Service is the entire area within the service area of the base radiotelephone stations of Fresno Mobile Radio, Inc., as shown on our filed service area map."

The service area map (Fresno Mobile Radio's California P.U.C. Sheet No. 28-T) includes the following statement:

> "The service area shown on this map was not reached in the usual manner. It is simply a map showing our service area from a practical standpoint. By the filing of the map, this utility makes no claim to exclusive serving rights in this area."

For some time prior to this filing, defendant had actually been providing paging throughout a service area much broader than indicated in its original paging tariff.

Defendant asserts that the discrepancy between service and the Advice Letter No. 2 filing was caused by management's inexperience in the niceties of tariff filings.

In 1968 both complainant and defendant applied to the FCC to obtain guardband frequencies; complainant knew that defendant intended to use this frequency for paging, utilizing remote transmitters, but did not assert defendant's alleged lack of authority to offer service in the extended service area.

Complainant's Paging Authority

Complainant's first California tariff was, to say the least, ambiguous on the subject of whether one-way service was offered. Capitalizing on this ambiguity and on their own alleged pioneering, Fresno Mobile Radio, Inc., together with Cook's Telephone Answering,attempted to exclude Loperena from the Fresno paging market (Cook's etc., v. Loperena, Case No. 8658, filed July 28, 1967). The Commission, however, declared Loperena's paging service lawful despite the lack of either a certificate or an unambiguous tariff offering. (Decision 74364, pet. reh., den. by Decision 74597.)

Does Defendant's One-Way Service Require A Certificate?

Certificates of public convenience and necessity issued under Section 1001 of the Public Utilities Code are, strictly speaking, authority to construct, rather than to operate. It is technically practicable for an RTU offering selective two-way mobile communication to add one-way paging service throughout its two-way service area without any necessary additions to its transmitting equipment, and consequently without any construction requiring a certificate.

Thus we cannot rely on certification of construction as a uniformly useful tool to regulate the transition from two-way

only to two-way plus paging operations within concentric[3] service areas.

To require a certificate in those instances where an RTU has chosen a form of paging requiring some construction would work an unreasonable discrimination based on accidental differences unrelated to any requirement of sound regulation. It might indeed lead an operator to select a paging system requiring no certification over alternatives offering better service to the public.

The above discussion points up one of many difficulties we would expect to encounter in trying to regulate RTU's under statutes designed for classes of utilities with fundamentally different physical and economic characteristics.

In the absence of legislative mandates specifically designed to meet the problems of RTU regulation we must operate within the confines of existing legislation. Because of the reasoning stated above we should not require a certificate from any two-way operator who institutes concentric one-way service. The least confusing way to accommodate this necessity to the literal words of statute is to hold that any construction involved in such growth is "necessary in the ordinary course of business" (Section 1001, Public Utilities Code).

Policy reasons, while not the only justification for such interpretation, fully support it. The nature of the two services permits joint use of equipment and personnel with resulting lower costs. Further, solicitation by operators able to offer both services would be more likely to ensure that customers would select the service best fitted to their needs.

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3 Since one-way services are assumed to have a shorter reliable range the service area of a one-way operation will always be somewhat less than that of a two-way operation conducted at the same base station site.

Should Defendant be Compelled to Reduce His Service?

Obviously, defendant's one-way paging tariff should conform to the actual offering. Should this be accomplished by enlarging the tariff or by restricting the service?

We find no basis in statute, precedent or policy for a conclusion that a tariff filing by a utility automatically confers any rights on that utility's competitor. A tariff is in essence a contract between utility and customer; enforcement of the obligations created thereby is available to a competitor only if he can show justifiable detrimental reliance or other facts similar to those required to qualify him as a third party beneficiary. In the absence of such a showing the service area limitation of defendant's 1965 tariff created no rights in complainant.

We point out that outside of this tariff filing there is nothing in complainant's or defendant's regulatory history that gives complainant any exclusive right to serve specified customers or a pro rata share of the total Fresno market, except perhaps for his claim to be a pioneer (discussed below).

Even in the absence of a private right, complainant could attack defendant's established wide-area service as a relator[4] in support of a public interest (Sections 1703 and 1707, Public Utilities Code).

The record affirmatively establishes that reducing defendant's service area would adversely affect defendant's customers. With the exception of an unspecified number who confine their travels to a circumscribed area in and around downtown Fresno,

4 In the sense of a person who has no personal right in the premises, but is permitted to sue in the name of the public cf. Words and Phrases, "Relator", Vol. 38A.

defendant's customers would either have to forego the advantages of wide-area service or pay complainant's higher rates. Such disadvantage, while not of crucial importance, is significant enough to shift the burden of proof to complainant to show a compensating public benefit or advantage to be derived from the reduction in usefulness of an existing service. Complainant has shown no concrete public benefit and we find no reason to presume that a benefit to complainant is a benefit to the public.

Thus complainant has established neither a private nor a public right to have defendant's service reduced.

Is Complainant a Pioneer?

Complainant claims to be the paging pioneer in the Fresno market.

Since complainant unaccountably has named only Fresno Mobile as defendant herein, we are effectively precluded from determining more than a portion of the underlying dispute. Cook's Telephone Answering & Radio, in Case No. 8658 (supra), alleged that it, rather than Loperena, was the paging pioneer. Decision No. 74364 made no findings on this issue and consequently the comparative status of Cook's and Loperena has never been adjudicated.

Any determination of pioneering status that omits a claim allegedly superior to complainant's would be illusory and would in all likelihood touch off a third round in litigation that has already been unduly protracted.

Nevertheless Section 1703 of the Public Utilities Code seems to indicate that dismissal is not a proper remedy for nonjoinder of parties or causes of action in proceedings before this Commission.

Since we can neither resolve the underlying dispute nor avoid the possibility of a third proceeding involving pioneering claims, we decline to make any findings on this issue. At least this will ensure that if a third proceeding is instituted that all of the parties will come before us on an equal footing on this issue.

Complainant's argument on this point implies that a utility found to be a pioneer is thereby entitled to special consideration over a competitor. Our holding herein should not be interpreted as supporting that theory, nor should it be interpreted as holding that such considerations would operate independently of the public interest.

Has Defendant Interfered?

Complainant alleges that defendant's conduct interferes with his operations (Section 1001, Public Utilities Code).

Even assuming that economic interferences are within the meaning of that portion of the statute, the only order "... for the location of lines, plants or systems ..." which has been suggested would involve disabling the one-way capability of defendant's outlying transmitters. Such an order does not "seem just and reasonable" as to that portion of the public which utilizes defendant's one-way service.

The FEX Line

The FEX line is not now in service. The question of whether that line can be lawfully utilized by defendant as part of its paging system will depend on the outcome of Case No. 9125 (Order of Suspension and Investigation, Hanford Mobile Radio, Inc.).

Rates

Complainant alleges that the tariff rates under which respondent offers one-way paging service are noncompensatory and thus create unfair competition to the service offered by complainant. To support this allegation, complainant introduced exhibits estimating the cost of service of respondent, using, as part of this cost, complainant's own costs rather than defendant's.

We wish to emphasize that complainant is attacking the reasonableness of established rates of another utility. We further emphasize the result sought by complainant will increase the price to customers of a competing utility, which is a less desirable form of competition than complainant lowering its rates to meet the competition. Complainant's burden of proof and persuasion is heavy.

We do not believe that the evidence offered by complainant, even without consideration of the rebuttal evidence of defendant is of sufficient probity to warrant us to raise the price of service to customers of defendant. Therefore, the complaint as to the reasonableness of the rates of defendant will be dismissed.

Summary

Complainant voluntarily chose to initiate paging service in the Fresno area in the face of an offering of paging by a Cook company. He chose to do so under a claim of right rather than risk an unfavorable finding on the issue of public convenience and necessity. When challenged he sought and obtained a Commission declaration that under certain circumstances paging may be instituted without a finding of public convenience and necessity.

At that time, Loperena's paging was competitively superior to Cook's, both in range and price. The Cook interests, as could have been expected, responded to the competitive challenge by increasing range and lowering charges.

Now Loperena asserts that he has a prescriptive and exclusive right to the patronage of those customers who need long-range, inexpensive paging service and that the Cook companies must be required to respect those rights.

There is a very real probability that the only ultimate difference between the respective claims of the Cook companies and Loperena is that the Cook companies have split their grandfather rights between two separate entities while Loperena's is undivided. The omission of one of Cook's companies has prevented us from determining if this difference is as narrow as it appears.

Despite two intensively considered complaints concerning the same service in the same market, we have no real basis for determining whether competition or monopoly is more favorable to the public interest.

Consequently, even if we found a clear and substantial distinction between the regulatory conduct of the two competitors, we would hesitate to carve up the paging market without at least a prima facie showing that the result will benefit the consuming public.

In the absence of either a clear indication of the public interest or superiority of private right we will not award complainant a partial monopoly of the Fresno paging market.

Findings

The Commission finds that:

1. On September 10, 1969 defendant had between 26 and 65 one-way customers.

2. Defendant's tariff of June 2, 1965 claimed a one-way service area centered in downtown Fresno and excluded one-way service from transmitters located in any other area.

3. Prior to September 10, 1969 defendant was offering one-way service using transmitters other than that located in downtown Fresno.

4. Complainant did not prove that he was ignorant of the discrepancy between defendant's tariff and service until September 10, 1969 or show any excuse for delay in filing the complaint herein.

5. Reducing defendant's service area to the territory described in its 1965 tariff would adversely affect a portion of the public.

6. Cook's Telephone Answering & Radio, Inc. has an unadjudicated claim to be the paging pioneer in the Fresno market.

7. Complainant's evidence is insufficient to persuade us that defendant's rates should be raised.

Conclusions

The Commission concludes that:

1. A radiotelephone utility lawfully providing two-way service may, without additional certification, provide one-way service within a concentric service area as an extension necessary in the ordinary course of business.

2. A radiotelephone utility offering two-way service may institute one-way service within a service area concentric with its two-way service area without a certificate of public convenience and necessity, regardless of the type or amount of construction necessary.

3. A competitor who protests institution of concentric one-way service should do so before the service has attracted substantial patronage. Failing that he must prove either excuse for delay or a public benefit to flow from elimination or reduction in service.

4. Complainant's request to compel an increase in defendant's rates is not in the pulic interest.

5. The relief from interference proposed by complainant is not just and reasonable.

6. It would be futile to determine who is a pioneer in the absence of Cook's Telephone Answering & Radio, Inc.

7. The application for a certificate of public convenience and necessity is moot.

O R D E R

IT IS ORDERED that:

1. The complaint herein is dismissed.

2. The application herein is dismissed.

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

Dated at San Francisco, California, this 22nd day of DECEMBER, 1970.

Chairman

Commissioners