

Decision No. 78705

ORIGINAL

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Suspension and Investigation on the Commission's own motion of the tariff sheets covering the offering of radiotelephone services to San Rafael and Santa Rosa filed under Advice Letter No. 6 by National Communication Systems, Inc.

Case No. 9097
(Filed August 4, 1970)

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Vaughan, Paul & Lyons, by John C. Lyons, Attorney at Law, for Intrastate Radio Telephone Inc. of San Francisco, complainant in Case No. 9137, 1/ protestant in Case No. 9097.
John Paul Fischer, Attorney at Law, of Silver, Rosen & Johnson, for Peninsula Radio Secretarial Service, Inc., protestant in Case No. 9097, 1/ interested party in Case No. 9137.
R. G. Thayer, Attorney at Law and J. D. Quinley, for the Commission staff.

O P I N I O N

National Communications System, Inc. (formerly Delta Mobile Radio Telephone Co.) filed tariff sheets on July 6, 1970 under its Advice Letter No. 6, by which it sought to extend radio-telephone utility (RTU) service, pursuant to Section 1001 of the Public Utilities Code, to the Santa Rosa and San Rafael areas formerly served by Redwood Radiotelephone Corporation or Redwood Radiotelephone Corporation - Marin (hereafter collectively "Redwood").

1/ Case No. 9137 (Intrastate Radio Telephone Inc. of San Francisco vs. National Communications System, Inc.) was dismissed pursuant to stipulation of the parties made at the hearing on January 6, 1971 (Decision No. 78243, dated February 2, 1971). Both Intra-state and Peninsula withdrew their protests to National's Advice Letter No. 6 at the January 6 hearing, thus leaving National and the Commission staff as the surviving adversary parties in Case No. 9097.

Redwood ceased RTU operations on June 1, 1970 and its station authorizations were cancelled by the Federal Communications Commission on June 22, 1970. National, by its Advice Letter No. 6, and a number of existing and prospective RTUs by applications for certificated authority, have sought to replace or expand the former Redwood services in the whole or portions of the San Francisco/Oakland Metropolitan Area, including peripheral areas in Marin, Sonoma and Contra Costa Counties. National, originally a party to early proceedings designed to test public need for temporary services proposed by some applicants,^{2/} later elected to proceed independently of the application proceedings. The latter have now been submitted on a consolidated and comparative record, subject to proposed report procedures (Application No. 51951 of San Francisco Mobile Telephone Company, Inc. and related applications).

National's advice letter tariff filing was protested, on July 9 and 10, 1970, by two existing RTU applicants in the comparative proceeding - Intrastate Radio Telephone, Inc. of San Francisco and Peninsula Radio Secretarial Service, Inc. (As noted in footnote 1, supra, those protests have since been withdrawn.) The Commission suspended National's proposed tariffs until December 3, 1970 pending public hearing or further order (Order of Suspension and Investigation, dated August 4, 1970, Case No. 9097), and extended the suspension until June 3, 1971, unless otherwise thereafter ordered (Decision No. 77994, dated December 1, 1970, Case No. 9097).

Hearings in Case No. 9097 were held, after due notice, at San Francisco on January 6 and 7, 1971 before Examiner Gregory, and

^{2/} See Decision No. 77754 (an interim decision), dated September 22, 1970, in Case No. 9071, et al.

the case was submitted subject to receipt of memoranda from the Commission staff and National, since filed. National presented a prima facie operational and public showing at the hearing, without rebuttal by other parties present.

This is a somewhat unusual case. Considered in the context of the number of applications filed as a result of the Redwood collapse, National's tariff filing, under a claim of a statutory right to extend RTU service to contiguous areas pursuant to Section 1001 of the Public Utilities Code, if valid, would have given that utility a preemptive right to apply to the FCC for the former Redwood station authorizations at the same or different locations in its system, as so extended, without further authority from this Commission. National has made such applications to the FCC and is now, with other Bay Area RTUs, under a temporary cease and desist order to refrain from further pursuit of those applications pending resolution of the consolidated and comparative application proceeding. (Decision No. 78159, dated January 5, 1971, Application No. 51591 (Order to Show Cause), and Interim Decision No. 78658, dated May 11, 1971).

The issue in this tariff suspension case is whether Section 1001 of the Code confers on National the right to pursue the course it has taken, in light of service area criteria or limitations applicable to National's predecessor, Delta Mobile Radio Telephone Co., that appear to require further authorization

from this Commission for extensions of RTU service beyond the areas so delimited.^{3/}

National's predecessor, Delta Mobile Radio Telephone Co., was the first applicant for a radiotelephone utility certificate in California. It proposed to offer a wide area, integrated service extending from Lake Tahoe to Vallejo, in contrast to then-known operations of protestants to its application which were essentially local and not interrelated. The application was originally filed July 13, 1960 and was amended on January 4, 1965. It was heard on a consolidated record with the Commission's general investigation into the operations of Domestic Public Land Mobile Service ("Miscellaneous Common Carriers" under FCC nomenclature, later "radio common carriers" and, in California, "RTUs").^{4/}

3/ "Grandfather" decision No. 62156, Application No. 42456, Case No. 6945 (1961), 58 CPUC 756 wherein RTU service areas were established according to FCC field strength contours (58 CPUC at 760). Ordering paragraphs 4 and 6 of that decision provided for extension of an RTU service territory under the provisions of Public Utilities Code Section 1001.

Ordering paragraph 2 of the decision designating the area now served by National contains language markedly different from that of the grandfather case (Delta Mobile Radio Telephone Co., Decision No. 70731, Application No. 42456 (1966), 65 CPUC 570 at 575), as follows:

"2. In the exercise of the foregoing certificate, applicant shall not hold itself out as serving, nor shall it offer to serve, beyond the limits of a 37 dbu contour emanating from each of its base stations used for two-way radio communications nor beyond a 43 dbu contour from such base stations used for one-way signaling service, except upon the further authorization of this Commission."
(Emphasis added.)

4/ Decision No. 62156, supra. The investigation was terminated in 1965 by Decision No. 68951, 64 CPUC 266.

Several RTU protestants to Delta Mobile's wide area proposal urged that such an operation, extending through 13 Northern and Central California counties, would dilute their local markets. The Commission, finding that Delta Mobile's proposal, because of its integrated nature, would provide a service "different from and superior to" existing local services, granted the application "to the extent set forth" in its order (65 CPUC, supra, at 574-576). We note that all ordering paragraphs of that decision except the second (quoted in footnote 3 hereinabove) are of the kind normally found in a Commission decision granting an application - such as Delta Mobile's - for a certificate and for authority to issue stock.

National asserts, on brief, that because it was and is "contiguous" to the San Rafael and Santa Rosa areas vacated by Redwood, and because both Peninsula and Intrastate (which also seek to extend their existing RTU services to those areas - Applications Nos. 51955 and 51998, respectively, in the comparative proceeding) have withdrawn their protests to Advice Letter No. 6, National's motion to dismiss Case No. 9097, on the ground that the tariff suspension was premised on the protests, should be granted, as the original reason for exercise of the Commission's discretionary authority (conferred by the last sentence of Section 1001 of the Code) no longer exists.

National's position, in substance, is that its status as a public utility permits it to expand its service, pursuant to Section 1001, to contiguous territory not then being served by another like utility, by the procedure of filing an advice letter which is subject to implementation merely by a Commission resolution. If protested - as it was here originally - the Commission can suspend and enter upon an investigation of the advice letter tariff filing pursuant

to Section 455 of the Code. National has cited the footnoted Commission authorities in support of its claim.^{5/}

National has also urged, on brief, that the merits of its evidentiary showing of its financial basis, growth rate and ability to restore RTU service to the San Rafael and Santa Rosa areas, and the absence of any rebuttal to that showing, indicate clearly that National, because of the integrated nature of its operations, can expand its system profitably and, at the same time, provide both local communications and wide area service in the sought territory.

We may note that because of National's election to disassociate itself from the comparative application proceeding and to proceed, instead, on the basis of a claimed statutory right to expand its service, the merits of its evidentiary showing - though concededly of a prima facie nature - were not open to testing by parties to the comparative proceeding, other than the Commission staff. As a result, the issue on this record, as we have previously indicated, is the legal one of whether, in light of the service area criteria and limitations appearing in ordering paragraph two of Decision No. 70731, supra, National may now claim the right to extend service to the San Rafael and Santa Rosa areas, in the context of the comparative nature of the proceedings involving those and other areas, or otherwise, without further authorization by this Commission.

^{5/} Tehachapi Cattle Co., et al. vs. Kern Island Canal Co., etc., 39 CRC 78, 87; Happy Valley Telephone Co., 67 CPUC 423, 427; Southern Pacific Co., et al. vs. San Francisco - Sacramento Railway Co., 32 CRC 249, 254; Yucca Water Co., Ltd., 54 CPUC 525, 527; General Order No. 96-A, Sec. 1.E, New Territory; R.C.S., Inc., Advice Letter No. 3, Orange County Radio Service, Inc., Advice Letter No. 4 and Chalfont Communications, Advice Letter No. 5. The advice letter matters were officially noticed on the record.

The staff asserts that the purpose of the suspension and investigation case is to determine whether the tariff sheets proposed by National are unreasonable or unlawful in any particular, and to issue any lawful and appropriate orders in connection therewith. The staff notes (Memorandum, pp. 2-3), that its basis for objecting to National's motion to dismiss the case, after withdrawal of protests, was that: (1) as others besides National were seeking to serve the same areas, the public interest would be better served by hearing all proposals before determining which of them could best serve the public need; (2) limitations in its predecessor's certificate (ordering paragraph two, Decision No. 70731, supra) prevented National's territorial expansion except by further certificate proceedings; (3) the exemptions claimed by National under Section 1001 are not applicable in the present fact setting; and (4) the type of uncertificated expansion claimed by National appears to be contrary to Commission precedent.

The staff, commenting on the limitations it asserts were placed by ordering paragraph 2 of Decision No. 70731 on Delta Mobile's service area, urges that because of the "wide area" concept proposed by National's predecessor as followed by National here and the possibility of damage to local operating RTUs within or near Delta Mobile's coverage area, it is understandable that any further expansion of that territory would be made subject to further certification proceedings.

We observe that the FCC's signal strength contour criteria were adopted by the "Grandfather Decision" (Decision No. 62156, supra), and that the limitations on Delta Mobile's certificate imposed by ordering paragraph two were couched in the language of signal strength contours, rather than in geographical terms. The

theoretical limits of FCC signal strength contours assume a reliability factor of 90% for signals within contour limits. In practice, that factor is subject to variations due to terrain and other interference conditions. As a result - and bearing in mind the FCC's exclusive jurisdiction over station authorizations and signal strength criteria - it seems to us to be a reasonable conclusion that the Commission, on the record then before it, prohibited Delta Mobile from holding itself out as serving, or offering to serve, beyond territory within which its signals, from designated community base stations, would - at least theoretically - be considered to be 90% reliable, without further authorization for such extension of service by this Commission. We see no reason to adopt a different view on the record now before us.

The foregoing discussion, in our opinion, is dispositive of National's claim of an unfettered right to extend service to the San Rafael and Santa Rosa areas under provisions of Section 1001 of the Public Utilities Code, since these areas are outside the limits of 90% reliable radio communications service as shown on National's filed service map for Vallejo.

The other points advanced by the staff in its memorandum, to which we have alluded above, merit some comment. Noting that the second paragraph of Section 1001 provides three exemptions from the certification requirements of the first paragraph of that section, the staff asserts that there does not appear to be any precedent for interpretation of Section 1001 to allow an RTU to obtain an entire previously designated service area (here the former Redwood Sonoma and Marin County areas centered on Santa Rosa and San

Rafael), in preference to other RTUs and applicants seeking to serve the same area.^{6/}

The staff, conceding that RTU service areas have sometimes been extended under Section 1001, maintains that the instances cited by National, footnoted earlier, do not resemble the unusual circumstances in this case. In a case by case analysis of National's citations, the staff, in our opinion, has demonstrated their inapplicability, from a factual standpoint, to the issue presented by this record. The staff also urges, citing Commission decisions, that an uncertificated expansion is not in the public interest where a utility seeks to serve territory contiguous to its present service area and other utilities or applicants are serving or seek to serve the same area.^{7/} National, in that connection, has claimed an absolute right to expand into former Redwood territory if such expansion is not disputed by another RTU under the provisions of Section 1001 (Intrastate's complaint in Case No. 9137 was such a challenge, but, as noted earlier, it was dismissed by stipulation). National relies on Richfield Oil Corp. vs. Public Utilities Commission (1960), 54 C. 2d 419, cert. denied 364 U.S. 900, 5 L. Ed. 2d 193. That case, however, held that a utility could not prevent a non-utility from serving a customer of the utility where the nonutility company had not dedicated its property to public use. Richfield

^{6/} The three exemptions from certification provided by Section 1001 state that a utility without further certification may extend service (1) within territory in which it has already lawfully commenced operations; (2) to contiguous territory not theretofore served by a public utility of like character (this is the exemption claimed by National); and (3) within or to territory already served by it, necessary in the ordinary course of its business.

^{7/} Clara St. Water Co. vs. Park Water Co., 48 CPUC 154; Pacific Telephone vs. General Telephone, 57 CPUC 562 at 567; Application of George W. Smith, 67 CPUC 16.

does not aid either National or us in resolving National's claim of an "absolute right" to expand.

Finally, the staff urges that it is the Commission's duty to consider, from applications properly filed before it, "what service or services would be in the greatest public interest."

(Memo., p. 9.)^{8/} National's election to proceed by its advice letter tariff filing, instead of subjecting its proposal to the rigors of a comparative hearing with other applicants, has foreclosed the Commission, the staff asserts, from determining whether its proposal, from the standpoint of the public interest, is as meritorious as National claims.

The Commission, upon consideration of the evidence and argument in this proceeding, finds that:

1. National Communications System, Inc., respondent herein, on July 6, 1970 filed its Advice Letter No. 6 together with proposed tariff sheets by which it sought to extend radiotelephone utility service to the Santa Rosa and San Rafael areas served by Redwood Radiotelephone Corporation or Redwood Radiotelephone Corporation - Marin prior to June 1, 1970.

2. During the period from June 9 to November 6, 1970 seven existing or prospective radiotelephone utilities in the San Francisco/Oakland Metropolitan Area and nearby communities filed applications with this Commission for certificated authority to replace or expand the former Redwood services in said area, including the Santa Rosa and San Rafael areas. One of said applications, No. 52021 (Walley), was voluntarily withdrawn prior to commencement, on December 8, 1970,

^{8/} ICS vs. Moore (1965), 13 FCC 2d 65 (as modified by Supplemental Decision of the Hearing Examiner, FCC 63 D-10 released February 8, 1968; Imperial Constant (1966), 66 CPUC 145; Delta Mobile Radiotelephone (1966), 65 CPUC 570, supra.

of comparative hearings on a consolidated record on the remaining six applications. Said applications were submitted for decision on April 6, 1971, subject to proposed report procedures to be taken prior to final decision thereof (Rules of Practice and Procedure, Rules 69-72).

3. The Commission on August 4, 1970 suspended the effectiveness of said proposed tariff sheets filed under National's said Advice Letter No. 6 and ordered an investigation thereof to determine whether said tariff sheets were unreasonable or unlawful in any particular and to issue any lawful and appropriate orders in connection therewith (Case No. 9097 herein). Said suspension, originally effective until December 10, 1970, has been extended by further order to and including June 3, 1971. Said Case No. 9097, after hearings duly noticed and held on January 6 and 7, 1971, was submitted for decision with the filing of National's Closing Brief on February 16, 1971.

4. The Commission, by Decision No. 70731, dated May 17, 1966, in Application No. 42456 (65 CPUC 570), granted to Delta Mobile Radio Telephone Co., predecessor of National Communications System, Inc., a certificate of public convenience and necessity to construct base station radio equipment in several designated Northern and Central California communities and to provide radiotelephone utility service therefrom. National, in the instant proceeding, relies upon said Decision No. 70731 as the source of its present certificated operating rights.

5. Ordering paragraph two (2) of said Decision No. 70731 provides that the applicant (Delta Mobile) "shall not hold itself out as serving, nor shall it offer to serve, beyond the limits of a 37 dbu contour emanating from each of its base stations used for

two-way radio communications nor beyond a 43 dbu contour from such base stations used for one-way signaling service, except upon the further authorization of this Commission." (65 CPUC at 575.) Said Decision No. 70731 and said ordering paragraph two thereof have been at all times since their effective date and are now in full force and effect.

6. The areas of Santa Rosa and San Rafael to which National seeks to extend service by its proposed tariff filings under Advice Letter No. 6, are outside the limits of 90% reliable radio communications service contemplated by the signal strength contours described in ordering paragraph two (2) of said Decision No. 70731.

7. Section 1001 of the Public Utilities Code provides, among other exemptions from the requirements of that section, that a utility, without further certification, may extend "... into territory either within or without a city or city and county contiguous to its ... line, plant, or system, and not theretofore served by a public utility of like character ..." Said Santa Rosa and San Rafael areas to which National seeks to extend service were served, immediately prior to June 1, 1970, by public utilities of like character, namely, the Redwood companies heretofore mentioned.

8. It is unreasonable, and contrary to the public interest, to apply the concept of contiguity in the aforesaid exemption provision of Section 1001 to the entire previously designated Santa Rosa and San Rafael service areas of the Redwood companies, in the context of the aforementioned comparative applications which, in addition to National's Advice Letter No. 6, seek to serve those areas.


The Commission, therefore, concludes that National's tariff filing under Advice Letter No. 6 should be nullified.

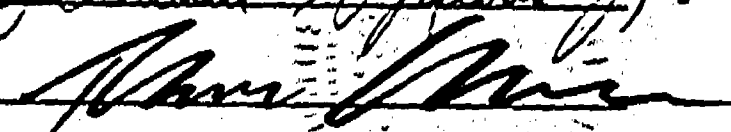
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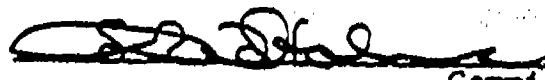
IT IS HEREBY ORDERED that the proposed tariff sheets filed July 6, 1970 by National Communications System, Inc. under its Advice Letter No. 6 are nullified and the investigation herein, Case No. 9097, is discontinued.

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

Dated at San Francisco, California, this 18th day of MAY, 1971.



Chairman


Vernon L. Sturgeon


Commissioners