

ORIGINAL

Decision No. 81220

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application of }
A. W. BROTHERS, dba LAKE TAHOE MARINE }
TELEPHONE CO., for a certificate of }
convenience and necessity to provide }
Marine telephone service to Lake }
Tahoe, California. }

Application No. 52649
(Filed May 28, 1971)

A. W. Brothers, applicant.
Dudley A. Zinke and Frank E. Sieglitz, Attorneys
at Law, for The Pacific Telephone and Telegraph
Company, protestant.
Richard D. Crowe, for Continental Telephone Company
of California; and Homer Harris, for Industrial
Communications Systems, Inc.; interested parties.
Rufus C. Thayer and Richard D. Gravelle, Attorneys
at Law, and Harold D. Seielstad, for the Com-
mission staff.

O P I N I O N

On May 28, 1971, the Marine Telephone Company of California, a California corporation, filed an application for a certificate of public convenience and necessity under Section 1001 of the Public Utilities Code of the State of California to provide marine telephone common carrier services within the State of California and to establish rates related thereto.

A prehearing conference was held at San Francisco on November 19, 1971 before Examiner Gillanders. At the prehearing

conference, Mr. Brothers stated that applicant would be changed from the Marine Telephone Company of California to A. W. Brothers, dba Lake Tahoe Marine Telephone Co., and that he would limit the certificate sought to Lake Tahoe waters only.

Public hearing was held before Examiner Gillanders at San Francisco on April 17, 18, 24, 25, 26, 27, and 28, 1972, and the matter was submitted at the close of the last day of hearing. The record contains 928 pages of transcript and numbers 43 exhibits.

On October 20, 1972, the assigned examiner issued his proposed report in this matter.

On November 3, 1972, The Pacific Telephone and Telegraph Company filed a "PETITION FOR EXTENSION OF TIME TO SERVE AND FILE EXCEPTIONS TO PROPOSED REPORT". An extension of time to and including November 20, 1972 was granted to all parties.

On November 20, 1972, the staff filed a "PETITION FOR ORAL ARGUMENT". The Pacific Telephone and Telegraph Company filed a "BRIEF IN SUPPORT OF EXCEPTIONS AND EXCEPTIONS TO PROPOSED REPORT OF THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY." Industrial Communications Systems, Inc. filed "COMMENTS ON THE PROPOSED REPORT OF EXAMINER JOEN R. GILLANDERS".

On November 21, 1972, Continental Telephone Company of California filed "EXCEPTIONS OF CONTINENTAL TELEPHONE COMPANY OF CALIFORNIA TO PROPOSED REPORT AND MEMORANDUM IN SUPPORT THEREOF".

The staff filed "EXCEPTIONS TO PROPOSED REPORT OF EXAMINER JOHN R. GILLANDERS AND PROPOSED SUBSTITUTE FINDINGS AND CONCLUSIONS".

On December 29, 1972, The Pacific Telephone and Telegraph Company filed a "REPLY TO INDUSTRIAL COMMUNICATIONS SYSTEMS' COMMENTS ON PROPOSED REPORT".

On January 2, 1973, applicant filed a "REPLY TO EXCEPTIONS".

We have carefully reviewed the examiner's proposed report, the exceptions to the proposed report, and the reply to the exceptions.

We were particularly impressed by the staff's exceptions I and II quoted below:

"EXCEPTIONS TO FINDINGS OF FACT"

"I.

"Page 16, Finding of Fact No. 4:

"Exception is taken to the Finding that there is a public requirement for applicant's service. Applicant presented no proof during the entire hearing from any member of the public either by means of testimony from potential users or by contracts for the proposed service by potential users or by other affirmed indications of interest or commitments by members of the public who would use the proposed service.

"II.

"Page 16, Finding of Fact No. 5:

"Exception is taken to Finding of Fact No. 5 that applicant's service can meet the needs of the boating public on the waters of Lake Tahoe. While the record indicates assumptions by Mr. Brothers as to what the needs of the boating public on the waters of Lake Tahoe may be, the record does not show any specific evidence as to those needs. There is no evidence in the record, other than speculation by Mr. Brothers, as to the number of

boats on the Lake that would be equipped with VHF mobile units. The record shows that Mr. Brothers has no plans to provide mobile units. The record does not show where mobile units would be available to said public on the waters of Lake Tahoe. There is no testimony from boaters on the waters of Lake Tahoe as to what their needs may be. Insofar as emergencies arise, the record shows that the Coast Guard operates a radio station serving the Lake and guards the safety and distress channel 156.8 MHz. (Tr. 332, 333, 327, 309, 857.)

"Public convenience and necessity is a question of fact that must be proven by competent evidence, and the burden of presenting such evidence is on the applicant in every case. (Crystal Springs Water Co., 61 CPUC 329 (1963); Albert Noce, 59 CPUC 209 (1961); Pico Street Warehouse Co., 47 CPUC 371 (1947)).

"This burden is not realized merely because the applicant desires to provide the proposed service. The applicant must present affirmative proof that the services are needed by those who may be expected to use it. This consists of 'testimony of witnesses competent to know their own needs' (City Transfer & Storage Co., 32 CRC 2 (1928)), and not ex parte statements of absent persons who cannot be subjected to the test of cross-examination and the determination of what public convenience and necessity actually requires. (Highway Transportation Company, 26 CRC 942 (1925)). Moreover, the Commission has held that three public witnesses were not sufficient to prove public convenience and necessity. In G.A. Hutchinson & Son Draying, 59 CPUC 18 (1961)."

We were also impressed by exception No. 46 of The Pacific Telephone and Telegraph Company shown below:

"46. To the failure to find that Brothers failed to sustain his burden of proving a public need for his proposed services by testimony of prospective users of the service who are competent to know their own needs or by a competent market survey of need (City Transfer and Storage Company, Dec. 19919 (1928) 32 C.R.C. 2, 6; J & S Electronics, Inc., Dec. 68992 (1965) 64 Cal.P.U.C. 285 (opinion unreported))."

This is not the proceeding in which to change our long-standing policy that we require "testimony of witnesses competent to know their own needs".

Finding and Conclusion

The record shows that Mr. Brothers was the only witness for applicant. We find that applicant has not met the burden of proof required in an application for a certificate of public convenience and necessity and has failed to establish that public convenience and necessity require the proposed service.

We conclude that the application should be denied.

No other issues need be decided. All motions and petitions not yet ruled upon are denied.

O R D E R

IT IS ORDERED that Application No. 52649 is denied.

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

Dated at San Francisco, California, this 3rd day of APRIL, 1973.

Vernon L. Sturgeon
President
William J. Simon
William J. Simon
William J. Simon
William J. Simon
Commissioners