

Decision No. 82822**ORIGINAL**

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Microband Corporation of America,
Complainant,

vs.

R. L. Mohr, dba RadioCall Corporation,
Defendant.Case No. 9428
(Filed August 18, 1972)

Daly, Joyce, Bosari & George by Leo I. George,
Attorney at Law, for Microband Corporation
of America, complainant.
Carl Hilliard, Attorney at Law, for R. L. Mohr,
dba RadioCall Corporation, defendant.
Phillips Wyman, for Salinas Valley Radio Tele-
phone Co., intervenor.
Elinore C. Morgan, Attorney at Law, and Paul
Popenoe, Jr., for the Commission staff.

O P I N I O N

On July 31, 1970, the Federal Communications Commission (FCC) amended Section 21.703(g) of the FCC rules to permit the use of up to 10 MHz in the 2,150-2,160 MHz portion of the spectrum by common carriers for the omnidirectional relays of video, facsimile, data, and other signals. This service, which is a multitude of individual closed circuits from a central point to numerous subscribers, has become known as Multipoint Distribution Service (MDS).

Footnote 2 to Section 21.701 on page 2 of Exhibit 2 herein, which is a portion of Part 21 of the FCC Rules of Regulations, describes MDS as follows:

"This band is available for use only by non-broadcast omnidirectional radio systems employing omnidirectional antennas for communicating with a multiplicity of fixed points using directional antennas at such points. . . ."

Complainant Microband Corporation of America (Microband) has applied to the FCC for assignment of an MDS frequency to serve the public in Los Angeles and a number of other cities in California. Paragraph 21.15(c)(4) of the FCC Rules and Regulations require an applicant to state whether or not a certificate of public convenience and necessity is required from the state within which the proposed service is to be offered. Microband stated in its application that a certificate was not required in California.

Defendant R. L. Mohr dba RadioCall Corporation (RadioCall) is a radiotelephone utility providing two-way mobile telephone and one-way paging service to the public in the Los Angeles area. On July 31, 1972, RadioCall filed tariffs which became effective on August 31, 1972, adding MDS to its service. RadioCall has also filed an application with the FCC for assignment of an MDS frequency in Los Angeles. In its application to the FCC RadioCall stated that a certificate of public convenience and necessity was required in California.

In its complaint filed August 18, 1972, Microband alleged that this Commission is without jurisdiction to accept the tariff filed by RadioCall pertaining to MDS service because MDS's service is a one-way television transmission service. Microband requested that the Commission accept no tariff filing from any person or entity in the State of California proposing to render MDS service until such time as the Commission makes a determination as to whether or not the regulation of MDS service falls within its jurisdiction. If an investigation is instituted by the Commission to determine whether it has jurisdiction to regulate MDS service, Microband requests that it be given notice of any hearings which may be held.

Public hearing was held before Examiner Cline in Los Angeles on February 20, 1973.

At the hearing defendant RadioCall moved that the complaint be dismissed because Microband was not seeking relief within the provisions of Section 1702 of the Public Utilities Code, which in part provides:

"Complaint may be made ... by any corporation or person ... by written petition or complaint, setting forth any act or thing done or omitted to be done by any public utility, including any rule or charge heretofore established or fixed by or for any public utility in violation or claimed to be in violation of any provision of law or of any order or rule of the Commission.
....."

Counsel for the Commission staff supported the motion to dismiss.

The motion to dismiss was taken under submission and evidence was thereafter received pertaining to the merits of the complaint. The entire matter was taken under submission on the filing of the reply brief by Microband on July 2, 1973.

Issues

The following issues have been raised by the parties to this proceeding:

1. Does Microband have a right to complain against RadioCall because RadioCall by the filing of its MDS tariff has voluntarily submitted its MDS rates to regulation by the Commission?
2. By its complaint does Microband seek to prevent RadioCall from offering MDS in California and thereby to reduce competition in this field?
3. Does the Commission have authority to regulate intrastate MDS activities of radiotelephone utilities subject to the jurisdiction of this Commission?
4. Should this Commission institute an investigation to determine if it has jurisdiction to regulate intrastate MDS activities under the California Public Utilities Code?

Discussion

Position of Microband

In its brief Microband points out that this Commission derives its jurisdiction to regulate public utility telephone corporations from the legislature and contends that the legislature has not granted authority to the Commission to regulate MDS. Microband argues that absent such specific enabling legislation it was an

error of law for the Commission to accept for filing the tariff pertaining to MDS service submitted by RadioCall.

In opposing the motion to dismiss made by RadioCall, Microband refers to the letter dated October 4, 1972, in which the Secretary of the Commission stated that "since the complaint in this matter is not directed toward the reasonableness of rates or charges set forth in this tariff, the acceptance for filing of the tariff should not prejudice any party with regard to issues related to jurisdiction over the service or the appropriateness of RadioCall to furnish the service." Microband contends that the jurisdiction issue must first be decided by the Commission before the tariff can be accepted for filing and that RadioCall should be stopped from claiming that the jurisdiction issue should not be explored in this proceeding.

Microband points out that in Television Transmission, Inc. v Public Utilities Commission (1956) 47 C 2d 82 the court held that community antenna television (CATV) is not a telephone corporation or within any other class of public utilities enumerated in the Public Utilities Code, and that the Commission has no jurisdiction over the CATV operations of Television Transmission, Inc.¹

Microband also cites Minnesota Microwave, Inc. v The Public Service Commission of Minnesota (1971) 190 NW 2d 661, in which the Minnesota Supreme Court held that a private company which provides, under contract, unidirectional, closed-circuit microwave facilities for the transmission of television signals is not subject to the jurisdiction of the Public Service Commission as a telephone company.

Microband contends that the operations of a radiotelephone utility (RTU) determined to be subject to regulation by this

¹ The Commission now has health and safety jurisdiction over cable television corporations. (Public Utilities Codes Section 768.5.)

Commission in the case of Commercial Communications v Public Utilities Commission (1958) 50 Cal 2d 512 are distinguishable from MDS which is the subject of this proceeding. In the Commercial Communications case the court pointed out the two-way voice communication aspect of telephony which is not present in MDS.

Microband urges the Commission to conclude that it has no jurisdiction over MDS service even though it is offered under a tariff filed by a regulated RTU and that complete jurisdiction over MDS in California rests with the Federal Communications Commission.

Microband points out that Microband, RadioCall, and Microwave Transmission Co. are all applicants before the Federal Communications Commission (FCC) to construct an MDS service in Los Angeles and that only one channel can be allocated to one of these applicants by the FCC. This complaint does not seek a dismissal of RadioCall's application before the FCC. Microband contends that any action taken by this Commission in this proceeding will not affect RadioCall's application before the FCC, and that a determination that this Commission has no jurisdiction over MDS will not prevent RadioCall from offering MDS service in the Los Angeles area. On the other hand, a determination that a certificate of public convenience and necessity is required from this Commission for MDS service may result in dismissal of Microband's application with the FCC because such a certificate has not been secured by Microband before filing its application with the FCC.

Position of RadioCall

RadioCall contends that until the Commission attempts to regulate the MDS operations of Microband, it has no occasion to complain that it is denied due process of law by the Commission's acceptance of RadioCall's tariff offering MDS. Stephenson v Binford 287 US 251, 277; 53 L ed 288; Continental Baking Co. v Woodring, 286 US 352, 267-269, 76 L ed 1155; Hicklin v Coney, 290 US 169, 172-173, 78 L ed 247, and urges that the complaint should be dismissed as not within Section 1702 of the Public Utilities Code, the applicable portion of which has been quoted above.

RadioCall further contends that the intrastate aspect of MDS has not been preempted by the FCC. RadioCall asserts that although Microband analogizes MDS to television and radio broadcasting Microband has neglected to add that in addition to video transmissions, MDS can also accommodate voice, facsimile, and data transmissions.

Radio and television broadcasts are freely received without charge by the general public. MDS is limited to subscribers who must pay a charge for the transmission and receiving equipment. The MDS transmissions are coded and must be decoded by the subscriber's equipment. MDS is conducted over microwave frequencies that are governed by the common carrier rules of the FCC and has been designated as a "nonbroadcast" service. CATV is distinguishable because even though the receiver pays for the CATV service, the original

transmission is broadcast. The distinction drawn in Television Transmission, Inc. v Public Utilities Commission (1956) 47 C 2d 82 and Commercial Communications, Inc. v Public Utilities Commission (1958) 50 C 2d 512 is between broadcast and nonbroadcast.

RadioCall contends that the filing of the tariff offering MDS is lawful, valid, and proper because (1) a utility may extend its service within a territory already served by it without the necessity of a certificate, (2) MDS, using omnidirectional microwave frequencies to provide video, data, and facsimile service is closely akin to and is a normal extension of RTU service, and (3) the fact that MDS may be received from sources other than a public utility does not detract from the utility nature of the service when it is offered by a utility to the public under a voluntarily filed tariff.

Position of the Staff

The staff supports the position of RadioCall that this Commission has jurisdiction over intrastate MDS by California utilities.

The staff points out that in Commercial Communications, Inc. v Public Utilities Commission, supra, the Commission was extending its jurisdiction over new services being proposed by an already regulated utility. The court upheld the Commission and at 50 C 2d at 522, 523 stated that:

"The word 'telephone' is not defined in the code. In its narrow sense 'telephone' refers to the instrument by which telephony is achieved. It is defined in Webster's New International Dictionary, 2d edition as 'An instrument for reproducing sounds, especially articulate speech, at a distance.' In defining 'telephony' the Encyclopaedia Britannica (1954 ed.) states 'In a broad sense the term telephone or telephony includes the entire art of speech transmission with the many accessories and operating methods which research, development and invention have supplied to facilitate and extend conversation at a distance by electrical means.'

As this court pointed out in Television Transmission, Inc. v. Public Utilities Com., 47 Cal. 2d 82, 88 [301 P.2d 862], in telephony 'one may carry on a two-way communication by speaking as well as by listening' and it is distinguishable from radio broadcasting in that the latter 'is usually associated with music halls, theaters and newspapers.' . . .

"In determining whether Pacific is here offering a telephone service, it appears to be basic that what a telephone company actually provides and maintains is the facilities for the transmission of telephone messages, or for communication by telephone. In its earliest beginnings this transmission was over a single iron wire connecting two telephone instruments with ground return circuits. It was over such a wire that Alexander Graham Bell called to his startled assistant, 'Mr. Watson, come here, I want you.' That was in March 1876. Many technological improvements in the art of telephony have since been made, including radio telephony and the instruments used for carrying on conversations at distances greater than the human voice naturally carries. The exact form or shape of the transmitter and the receiver or the medium over which the communication can be effected is not prescribed by law.

"In common understanding the communication effected by private mobile systems would appear to be a telephone communication. Section 233 above quoted expressly recognizes that communication may be made without the use of transmission wires. Among the other uses of radio is the transmission of telephone messages without the use of wires. We are informed that today ordinary toll telephone service is furnished as much by radio as by land lines and that Pacific now operates about 350,000 toll circuit miles of microwave radio relay in California. It also uses radio for such diverse services as rural subscriber lines, coastal harbor service and highway service. All of these are treated as public telephone service under filed tariffs. Because of the physical nature of the medium here used (radio), the private nature of the communication 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 the respondent commission."

After the decision by the Supreme Court in the Commercial Communications case, the Commission instituted Case No. 6945, Inv. Communication Common Carriers and in Decision No. 62156 (1961) 58 CPUC 756 held that radiotelephone utilities (RTU's) are subject to the jurisdiction of this Commission as a telephone utility under Section 234 of the Public Utilities Code.

RadioCall already offers one-way paging service to the public. MDS is also one-way service. Both kinds of service are encoded before being sent to a subscriber.

The staff witness discussed the differences between television broadcasting and MDS as follows:

"Television broadcasting involves the transmission of program material generally of an entertainment nature, out to anyone within range of the transmitter who cares to receive the signal. The program material is provided by the broadcaster or by people who purchase broadcasting time for advertising purposes. MDS service, on the other hand, provides for transmission only to specified receiving points at specified hours, and the program material must be provided by the subscriber. For television broadcasting, dozens of channels are available for use by high powered transmitters radiating up to 5-million watts. In contrast, MDS is limited to one channel and a maximum of 100 watts power."

He also pointed out that services comparable to MDS are offered by The Pacific Telephone and Telegraph Company (Pacific) under tariffs on file with the Commission.

Under Schedule 102-T Pacific offers a one-way television channel service between points specified by the subscriber. One point is used for transmission of the subscriber's program and the receivers are located at one or more points. Transmitting and receiving station equipment and station wiring are furnished by the

subscriber. Channel facilities are available either wholly within a telephone exchange area or between exchange areas. Pacific may use radio facilities to transmit the signal, but the terminations at the customer's premises are by cable. Service is furnished at video frequencies.

Under Pacific's Schedule 126-T the service is similar to the service furnished under Schedule 102-T, except that up to six channels are provided on a facility and the service is tailored to educational uses. Special rates apply to service provided between buildings on the same premises such as a college campus.

The two main differences between the proposed MDS service and the services provided by Pacific under its Schedules 102-T and 126-T are area coverage and rate structure. The area covered by an MDS system is limited to the service area of a low power transmitter. Pacific's service may be provided statewide. MDS would have an hourly charge for each receiving location regardless of the distance from transmitter. Pacific's service has a charge for time and for mileage between locations. Studio equipment will be provided by the utility in MDS service. It is provided by the subscriber to Pacific's service.

The staff argues that by attempting to prevent RadioCall from offering MDS service in California, Microband is seeking to restrict competition. In Northern California Power Agency v Public Utilities Commission (1971) 5 C 3d 370, the Supreme Court has ruled that this Commission must consider the antitrust issue even though it is not raised by the parties.

In prior proceedings involving RTUs, the Commission has recognized the benefits of competition. (Sylvan B. Malis, dba Coast Mobilphone Service v General Telephone Co. (1961) 59 CPUC 110; App. William K. Harper dba American Mobile Radiotelephone Enterprises (1962) 59 CPUC 295; App. R. L. Mohr, dba Advanced Electronics (1963) 61 CPUC 479 (unreported).)

FCC Classification

Since the hearings in this proceeding the FCC has promulgated new rules pertaining to MDS. We take official notice of FCC Decision 74-34, adopted January 9, 1974 in Docket Number 19493. This order resulted in amendment of Parts 1, 2, 21, and 43 of the FCC Rules to provide for MDS. The main rules defining this service are in Part 21 of the FCC Rules.

Part 21 of the Rules provide for Domestic Public Radio Service (other than Maritime Mobile). By inclusion in Part 21, MDS service is clearly classified as a common carrier service as distinguished from broadcasting service. Under Section 3 of the Communications Act of 1934 a common carrier is defined as follows:

" 'Common carrier' or 'carrier' means any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio or in interstate or foreign radio transmission of energy, except where reference is made to common carriers not subject to this Act; but a person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier."

While it is true that the transmission of video and audio service will be one of the major uses for MDS service in its early development, the FCC Rules do not limit the type of service which may be offered. Section 21.903 of the new FCC Rules sets forth the purpose and permissible service for MDS stations as follows:

"(a) Multipoint Distribution Service stations are intended to provide one-way radio transmission (usually in an omnidirectional pattern) of subscriber supplied information from a stationary transmitter to multiple receiving facilities located at fixed points designated by the subscriber.

"(b) Unless otherwise directed or conditioned in the applicable instrument of authorization, Multipoint Distribution Service stations may render any kind of communications service consistent with the Commission's Rules and the legally applicable tariff of the carrier..."

From these rules it is clear that MDS does not constitute a television broadcasting service under FCC Rules but rather merely provides communication channels for use by the public in the same manner that channels are provided by telephone and telegraph utilities.

Findings

1. RadioCall is an RTU providing two-way mobile telephone and one-way paging service to the public in the Los Angeles area.
2. On July 31, 1972, with its Advice Letter No. 6, dated July 28, 1972, RadioCall filed a tariff schedule adding MDS to its service. This schedule became effective August 31, 1972.
3. The MDS band is available for use only by nonbroadcast omnidirectional radio systems employing omnidirectional antennas for communicating with a multiplicity of fixed points using directional antennas at such points.
4. MDS provides one-way television transmission on a for-hire basis from a central distribution station to one or more receiving locations as specified by a subscriber to the service.
5. The program material to be transmitted and the receiving equipment at each specified location are furnished by the subscriber under MDS.
6. The studio equipment at the transmitter location is furnished by RadioCall in its MDS.
7. As the signal is encoded at the transmitter and decoded at the receiver, only those specified and paid for points may receive the communication. The decoders are furnished by RadioCall.
8. In addition to providing video transmission, MDS can also accommodate voice, facsimile, and data transmissions.
9. MDS is limited to one channel and a maximum of 100 watts power.
10. In contrast to MDS, television broadcasting involves the transmission of program material generally of an entertainment nature to anyone within range of the transmitter who cares to receive the signal which is not encoded. The program material is provided by the broadcaster or by people who purchase broadcasting time for advertising purposes. For television broadcasting dozens of channels are available for use by high powered transmitters using up to 5-million watts.

11. Services comparable to MDS are offered by Pacific under tariffs on file with this Commission.

12. Under Schedule Cal. P.U.C. No. 102-T, Channels for Video Transmission in Connection with Television Viewers, Pacific offers a one-way television channel service between points specified by the subscriber. Transmitting and receiving station equipment and station wiring are furnished by the subscriber. Channel facilities are available either wholly within a telephone exchange area or between exchange areas. Pacific may use radio facilities to transmit the signal, but the terminations at the customer's premises are by cable. The service is furnished at video frequencies.

13. Under Schedule Cal. P.U.C. No. 126-T, Channels for Television Transmission for Use in Educational Television Systems, the service offered by Pacific is generally similar to the service furnished under Schedule No. 102-T, except that up to six channels are provided on a facility and the service is tailored to educational uses. Special rates apply to service provided between buildings on the same premises such as a college campus.

14. MDS is not a broadcasting service.

15. MDS provided by RadioCall is strictly intrastate service and is a normal extension of RadioCall's RTU service within its service area.

16. The filing of the MDS tariff by RadioCall without rejection by this Commission is the act or thing done by a public utility which has been alleged by Microband to be in violation of law or order or rule of this Commission under Section 1702 of the Public Utilities Code and therefore the complaint has properly raised the issue of the jurisdiction of this Commission to accept such tariff filing.

17. By this complaint seeking to prevent RadioCall from filing a tariff offering MDS in California, Microband is not seeking to prevent RadioCall from offering MDS in California and thereby to reduce competition in this field.

18. Intrastate MDS service is subject to regulation by this Commission as public utility telephone and telegraph service under Sections 233-236 of the Public Utilities Code when such service is offered to the public as nonbroadcast service in the manner described in the foregoing findings.

19. The Commission should not institute an investigation on its own motion to determine if it has jurisdiction to regulate intra-state MDS activities under the California Public Utilities Code, as such determination has been made by the Commission in this decision.

Conclusion

1. The motion of RadioCall to dismiss the complaint should be denied because Microband is seeking relief within the provisions of Section 1702 of the Public Utilities Code.

2. The relief requested should be denied because the MDS provided by RadioCall is subject to the jurisdiction of this Commission.

O R D E R

IT IS ORDERED that:

- 1. The motion to dismiss the complaint is denied.
- 2. The relief requested is denied.

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

Dated at Los Angeles, California, this 7th day of MAY, 1974.

President
William Lyons

Commissioners

Commissioner Vernon L. Sturgeon, being necessarily absent, did not participate in the disposition of this proceeding.

-14- Commissioner J. P. Vukasin, Jr., being necessarily absent, did not participate in the disposition of this proceeding.