

Decision No. 83493

ORIGINAL

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the matter of the application
of DANA POINT MARINE TELEPHONE CO. for
a Certificate of Public Convenience
and Necessity to construct and operate
a new marine mobile radio coast station.

} Application No. 54448
(Filed November 15, 1973;
amended February 25, 1974)

Warren A. Palmer, Attorney at Law, for
Dana Point Marine Telephone Co.
applicant.

Carl Hilliard, Attorney at Law, for
R. L. Mohr, protestant.

Harold E. Crozier, for Southern California
Marine Radio Council, interested party.

Roger Johnson, for the Commission staff.

O P I N I O N

Dana Point Marine Telephone Co. (Dana), a California corporation, seeks a certificate of public convenience and necessity to construct and operate a public utility marine mobile radio station in the coastal waters westward of Dana Point, Oceanside, and Newport Beach, California, and validation of the issuance of 1,000 shares of its capital stock to Sam Miller, and the sale and transfer of 500 shares thereof by Sam Miller to Homer Harris.

After notice, public hearing was held before Examiner Johnson on March 1, 1974 in Newport Beach, and the matter was submitted on June 3, 1974 upon the filing of concurrent briefs.

Testimony was presented on behalf of Dana by its vice president and general manager, its prospective sales manager, the harbor master for Orange County Harbor District, four boat owners and/or operators, and the general manager of a yacht brokerage company. Testimony was presented in opposition to the granting of the requested certificate by the past commodore and

member of the executive committee of the Southern California Marine Radio Council (SCMRC), and by the protestant in this matter, a certificated operator of a public coast marine station. The Commission staff representative cross-examined witnesses.

Proposed Service

Dana proposes to provide ship-to-shore marine radio service within the area which extends generally from north of Santa Monica Bay, seaward beyond San Clemente Island and south to a point south of San Diego as delineated by the 17 dbu (decibels above one microvolt per meter) contour with Santiago Peak as the apex.

Conditioned on the acquisition of a certificate of public convenience and necessity from this Commission, the Federal Communications Commission (FCC), by order adopted December 20, 1972 in Docket No. 18662, granted Dana a construction permit for a new public Class III-B coast station to be located at Santiago Peak. Additionally, Dana possesses a permanent license from the FCC to operate a maritime mobile public coast III-B radio station at a frequency of 161.825 MHz (Channel 84) and, as required by FCC Rule Section 81.104(b)(2), 156.8 MHz (Channel 16) the distress, safety, and calling frequency.

Landline telephone calls to a ship station will be received over public utility telephone networks at Dana's control point in Los Angeles. Dana's contract marine operator will ticket the call and connect the shore-to-ship call over private wire line circuits to Dana's radio transmission facilities at Santiago Peak. Radio calls from a ship-at-sea to a land telephone subscriber will be received at Santiago Peak and transmitted over private wire line circuits to the control point in Los Angeles. Dana's marine operator will employ landline public utility telephone service to connect the ship-at-sea with the number called. The station rate point for the proposed service will be Dana Point. Local service with no landline charge will be provided from

telephone exchanges contiguous to the Capistrano exchange, which includes, in addition to Dana Point, Newport Beach, Santa Ana, Huntington Beach, Costa Mesa, and Tustin. The current landline charges from San Diego, the closest other marine coast station, are from 25 cents to 35 cents per call. In addition, Dana will provide message holding and forwarding services. The proposed rate for the marine radio service is one dollar for the first three minutes of marine station air time used on a completed ship-to-shore or shore-to-ship call plus 30 cents for each additional minute. An additional charge of one dollar will be made for holding or forwarding a three-minute or shorter message, or for five additional efforts to complete an uncompleted call at the request of the calling party.

Proposed Facilities

Dana's vice president is also president and operator-manager of Industrial Communications Systems, Incorporated, (ICS), a radio-telephone utility serving approximately 10,000 square miles in Southern California, and of Peak Rentals (Peak), a company that provides equipment and services to common carriers such as ICS. ICS presently owns and operates an antenna tower and concrete building on Santiago Peak and a control point manned by marine operators at 1500 W. 58th Street, Los Angeles.

Dana proposes to rent space on the antenna tower and in the concrete building for transmission and receiving equipment to be rented from Peak. Dana also intends to contract for message handling marine operator service by personnel of ICS at the control point.

The transmitting and receiving equipment at Santiago Peak will be connected to the control point by two private wire line circuits to be installed by Pacific Telephone and Telegraph Company (Pacific).

The new construction on Santiago Peak consists of receiving and transmitting antennas to be installed on the existing antenna tower. Because of this very limited amount of new physical construction, Dana alleges that it can be seen with reasonable certainty that the project will not have any significant effect on the environment, and hence, pursuant to Rule 17.1(a)(2), no Environmental Data Statement or Environmental Impact Report is required.

Public Necessity

At the public hearing on this matter testimony was presented by the harbor master for Orange County Harbor District, Dana's prospective sales manager, four boat owners and/or operators, and the general manager of a yacht brokerage company that an additional VHF Channel is required for the area because of the presently overloaded conditions of existing facilities, that a transmitter on Santiago Peak is necessary to provide full coverage of the Dana Point area without shadow areas of poor radio reception, and that a local calling area for marine radio communication is essential to preclude excessive landline charges for marine radio service. In addition, a member of the executive committee of the Southern California Marine Radio Council, testifying on behalf of the protestant, stated that if a radio station could be made self-supporting, the public would be served, but that the proposed operations do not appear to him to be economically feasible.

The protestant testified that there was a need to provide local service for local residents because of the presently existing landline charges. He is opposed, however, to Dana's proposed operations because the extended service area related to the height of the transmitting antennas coupled with a Los Angeles control point permits Dana to actively compete with protestant for Marina Del Rey customers.

With respect to competition it is noted that in the application of Coast Mobilephone Service (1962) 59 CPUC 559, the Commission stated that:

"The effective regulation of radio telephone utilities' service areas necessitates a consideration of the requirements of the subscribers as related to the utilities' base stations and control points".

and further

"Thus a certain degree of overlapping of the two operators' service areas is indicated as being in the public interest".

Because of the similarity of operations such standards are equally applicable in the instant proceeding.

Recognizing the fact that this Commission has separate and original jurisdiction to decide the issue of public convenience and necessity without regard to the FCC's decision as to that issue, Dana nevertheless referred to an FCC decision, adopted August 2, 1972 in Docket No. 18662, et al,^{1/} as further support for the necessity of the requested marine telephone service. That decision states in part:

"15. Dana Point Marine, operating on Channel 84, would duplicate the southeastern half of Advanced Electronics' service area and, in addition would cover the coastal area between Los Angeles and San Diego. It would offer the land-mobile type of service. In the area from San Diego to Alamitos Bay, which is southeast of Long Beach, there were over 10,000 salt water berths and moorings in 1966. To this area, Dana Point would provide the only land mobile type service."

Also included in the decision is the following:

"As we have already noted, the local nature of the service is important, but the need to assure service to other localities without their own

^{1/} Official notice was taken of FCC decisions adopted August 2, 1972 and December 20, 1972 on Docket No. 18662, et al.

stations must also be recognized in an area such as Los Angeles and its environs. In such an area it is also important to have a wireline oriented service available in addition to that which is offered by land-mobile operators. With Pacific, Dana Point and Advanced in operation, some areas will have as many as three services available to them, which is clearly warranted by the high concentration of boating facilities in this area." (FCC Review Board Decision, P. 11.)

The testimony in this proceeding tends to confirm the FCC conclusions.

Economic Feasibility

Exhibit 14, sets forth estimated results of operations for the first, third, and fifth full years of operation as follows:

	<u>1st Year</u>	<u>3rd Year</u>	<u>5th Year</u>
Income from public services rendered	\$5,400	\$15,000	\$25,000
Extra Charges	<u>600</u>	<u>1,800</u>	<u>2,400</u>
Total	6,000	16,800	27,400
General and Administrative Expenses	1,200	2,000	2,400
Contract Expenses, ICS	2,400	4,560	6,680
Telephone Facilities expenses	2,760	2,760	4,800
Rental expenses	2,256	2,256	2,256
Other expenses, including advertising	<u>3,600</u>	<u>3,600</u>	<u>4,600</u>
Total	12,216	15,176	20,736
Net Profit	(6,216)	1,624	6,664

() denotes negative figure

The ICS contract expense consists of a facility rental charge of \$100 per month plus 20 percent of the gross message revenue received by Dana. The telephone facilities expense consists of a charge of \$230 a month by Pacific for the

rental of two private wire line circuits to control the transmitter on Santiago Peak from the control point. The rental charge of \$188 a month is the amount to be paid to Peak for the rental of two transmitters, receiver antenna combinations complete with remote controls and modems.

The protestant testified to his belief that the results of operations depicted in Exhibit 14 overstated the revenues and understated the expenses. The basis for the allegations that Dana's revenue estimates were high was the actual experience of Advanced Electronics serving Marina del Rey, the largest small boat harbor in the world. The total revenue for the first year's operations of this marine VHF station was \$2,687.90 as contrasted to Dana's estimated \$6,000 of revenue for its first year of operation. The basis for challenging the amount of the telephone facility expense of \$2,760 a year was a quote the protestant received from Pacific Telephone Company that the rate for radio-telephone operation control was \$3.65 per mile plus \$20 per termination. The protestant believed that four wires, or two circuits would be required for Channel 84 and two wires, or one circuit, would be required for mandatory emergency Channel 16. The computed cost of these facilities for the 31 miles from Dana's control point to Santiago Peak was approximately \$580 a month as contrasted to Dana's estimate of \$230 per month. Dana's vice president testified that the \$230 was the actual cost to be charged Dana by Pacific Telephone for the facilities actually requested by Dana. For the purposes of this proceeding we will adopt Dana's estimates.

The record shows that Mr. Homer Harris or Peak will advance any funds required for the continuous operations of Dana, which are projected to be profitable by the third year.

Ownership of Dana Point Marine Telephone Company

The record shows that Dana Point Marine Telephone Company was incorporated on August 26, 1968 with the primary

purpose of operating a marine ship-to-shore communication service in the Dana Point area (Exhibit 2-Articles of Incorporation).

Exhibits Nos. 3, 4, and 5 show that stock was issued pursuant to the close-corporation exemption provided for by Section 25102(h) of the California Corporations Code, that Sam Miller agreed to sell 50 percent of the resulting outstanding common voting stock to Homer Harris for \$6,117 and thereby relinquish 50 percent of the control of Dana, and that the FCC approved the relinquishment of positive control of Dana by Sam Miller and the acquisition of negative control of Dana by Sam Miller and Homer Harris on November 6, 1973. The record shows that Mr. Miller is in poor physical condition as he is suffering from a severe case of diabetes acquired subsequent to the FCC hearings on Docket No. 18662.

The \$6,117 selling price of 50 percent of the outstanding common stock represents one-half of Sam Miller's out-of-pocket expenses with respect to Dana as of the date of transfer.

Section 818 of the Public Utilities Code provides that no public utility may issue stock and stock certificates or other evidence of interest or ownership without an order from the Commission authorizing the issue, and Section 825 provides that stock or stock certificates issued without such an order are void. Further, Section 854 provides that no person or corporation shall acquire control of any public utility organized and doing business in this state without prior Commission approval and that the acquisition of control without such approval is void. Consequently, the issuance of the 1,000 shares of common voting stock by Sam Miller and the transfer of 50 percent of these shares to Homer Harris and relinquishment of positive control of Dana without prior approval by this Commission are void transactions.

This Commission has consistently held that it has no power to retroactively validate such a transaction.^{1/} The order that follows, however, will authorize Dana to issue 1,000 shares of capital stock to replace the stock heretofore issued and to further authorize the transfer of 500 shares from Sam Miller to Homer Harris to replace the 500 shares previously transferred. Such action is not without precedent. (See San Diego and South Eastern Parkway Company (1915) 8 CRC 301; Gray Line Motor Tours, Inc., (1929) 33 CRC 26; Merchants Ice and Cold Storage Company of Los Angeles (1929) 32 CRC 646.)

On August 26, 1974 protestant petitioned to set aside submission and reopen the proceeding for the purpose of requesting official notice of the FCC Opinion and Order released June 27, 1974, granting an additional channel to Pacific for marine service from Santa Catalina Island. We have reviewed the filing and find it insufficient to warrant reopening the proceeding.

Findings

1. Public convenience and necessity require and will require the marine mobile radio coast station proposed by Dana Point Marine Telephone Company.
2. Overlapping of the proposed service area with that of protestant's is in the public interest because of the high concentration boating facilities in this area.
3. Dana possesses the ability and resources to construct and operate the proposed system.
4. The proposed operations are economically feasible.
5. The rates proposed by Dana are just and reasonable for the service to be rendered.
6. Applicant should file rules, standard forms, and other tariff sheets as needed to define conditions of rendering public utility service.
7. One thousand shares of capital stock of Dana were issued to Sam Miller and 500 shares of this stock together with 50 percent of the control were transferred from Sam Miller to Homer Harris without prior approval of this Commission. These 1,000 shares should be canceled. ✓
8. Applicant should be permitted to issue 1,000 shares of common stock, 500 to Miller and 500 to Harris.

^{1/} In re P.J. Baunhausser (1970) 70 CPUC 783.

9. Miller should be permitted to relinquish positive control of Dana and Harris and Miller should be authorized to acquire negative control.

10. It is reasonably certain that the project involved in this proceeding will not have a significant effect on the environment.

The Commission concludes that:

1. The application should be granted as provided in the order which follows.

2. The issuance of 1,000 shares of capital stock to Sam Miller and the transfer of 500 shares of such stock together with 50 percent of the control of Dana was void under Sections 825 and 854 of the Public Utilities Code.

Applicant is placed on notice that operative rights, as such, do not constitute a class of property which may be capitalized or used as an element of value in rate fixing for any amount of money in excess of that originally paid to the State as the consideration for the grant of such rights. Aside from their purely permissive aspect, such rights extend to the holder a full or partial monopoly of a class of business. This monopoly feature may be modified or canceled at any time by the State, which is not in any respect limited as to the number of rights, which may be given.

O R D E R

IT IS ORDERED that:

1. A certificate of public convenience and necessity is hereby granted to Dana Point Marine Telephone Co. for the construction and operation of a public utility marine mobile radio station in the coastal waters westward of Dana Point, Oceanside, and Newport Beach, California.

2. Applicant is authorized to file, on or after the effective date of this order and in conformity with the provisions of General Order No. 96-A, tariffs containing the schedule of rates and charges

set forth in Appendix A attached hereto, together with rules governing conditions of service to subscribers, service area maps, and sample copies of printed forms normally used in connection with subscribers' services and, on not less than five days' notice to this Commission and to the public, to make said tariffs effective for service as of the date of such filing.

3. Applicant shall notify this Commission, in writing, of the date service is first rendered the public under the rates and rules hereinabove authorized, within five days thereafter.

4. Applicant shall keep its books and records in accordance with the Uniform System of Accounts prescribed by the Commission for marine radio utilities and shall determine accruals for depreciation by dividing the original cost of depreciable utility plant, less estimated future net salvage and less depreciation reserve, by the estimated remaining life of the depreciable plant. Further, applicant shall review said accruals as of January 1, following the date service is first rendered, and thereafter whenever major changes in plant composition may occur and at intervals of not more than five years. Results of these reviews shall be submitted to this Commission.

5. The certificate herein granted and the authority to render service under the rates and rules hereinabove authorized will expire if not exercised within twenty-four months after the effective date hereof.

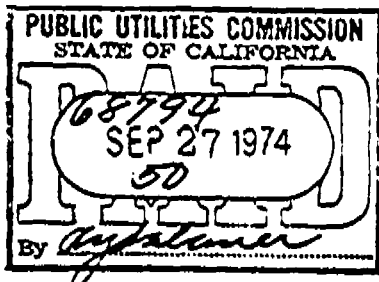
6. On or after the effective date of this order for the purpose specified in this proceeding, Dana may issue not exceeding 1,000 shares of its common stock having a par (stated) value of one dollar per share and concurrently cancel 1,000 shares previously issued without authority from this Commission.

7. On or after the effective date of this order, Dana may transfer 500 of the 1,000 shares to Sam Miller and 500 shares to Homer Harris to replace the shares previously transferred without authority from this Commission.

8. Effective with the transfer of these shares positive control of Dana by Sam Miller will be relinquished and negative control of Dana will be acquired by Sam Miller and Homer Harris as approved by the FCC on November 6, 1973.

The authority granted by this order to issue stock will become effective when the issuer has paid the fee prescribed by Section 1904.1 of the Public Utilities Code, which fee is \$50. In other respects the effective date of this order shall be twenty days after the date hereof.

Dated at San Francisco, California, this 24th day of SEPTEMBER, 1974.



Thomas L. Stenger
President
William J. ...
...
Commissioners

Commissioner Thomas Moran, being necessarily absent, did not participate in the disposition of this proceeding.

APPENDIX A

OUTLINE OF PROPOSED TARIFF PROVISIONS

DANA POINT MARINE TELEPHONE CO.

First three minutes of marine station air time
used on a completed ship-to-shore or shore-to-
ship call \$1.00

Each additional minute \$.30

Extra charge for holding and forwarding a 3-
minute or shorter message, or for five additional
efforts to complete an uncompleted call initiated
by the marine operator complying with a calling
party request at time of reporting a "Don't
Answer" \$1.00

These tariff proposals are 1-year experimental
and are subject to amendment to conform to any
uniform rate structure arrived at by multiple
marine shore station licensees conferring under
California Public Utilities Commission
supervision.