

ORIGINAL

Decision No. 86490

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

CENTRAL RADIO TELEPHONE, INTRASTATE
RADIO TELEPHONE, INC., SALINAS VALLEY
RADIO TELEPHONE CO., SANTA CRUZ
TELEPHONE ANSWERING AND RADIO SERVICE,
and TEL PAGE, INC.,

Complainants,

vs.

MOBILE RADIO SYSTEM OF SAN JOSE,
INC., and JOHN S. LANDES, M.D.,

Defendants.

Case No. 9953
(Filed July 31, 1975)

Dinkelspiel, Pelavin, Steefel & Levitt, by
David M. Wilson, Attorney at Law, for
Central Radio Telephone; Intrastate Radio
Telephone, Inc.; Salinas Valley Radio
Telephone Co.; Santa Cruz Telephone
Answering and Radio Service; and Tel Page,
Inc.; complainants.

Hilliard, McGuire & Bauer, by Carl Hilliard,
Attorney at Law, for Mobile Radio System of
San Jose, Inc. and John S. Landes, M.D.,
defendants.

Russ Harris, for Allied Telephone Companies
Association, intervenor.

Roger Johnson, for the Commission staff.

O P I N I O N

Introduction

Complainants are radiotelephone utilities who
provide dial-accessed one-way radio-paging services in the greater

San Francisco Bay area. As certificated utilities, complainants are subject to tariff, service area, and other restrictions imposed by this Commission.

This action involves a fully automatic, dial-accessed paging system which operates in an area extending from Monterey to San Francisco. Defendant John S. Landes, M.D. (Landes), who is the FCC licensee of the system does not hold a certificate of public convenience and necessity from this Commission. Nor has defendant Mobile Radio System of San Jose, Inc. (Mobile), which operates the system under contract, sought or received such a certificate for the Landes operation. It is defendants' contention that Landes' status as a licensee under Part 89^{1/} of the Rules and Regulations of the Federal Communications Commission exempt both him and Mobile from any need to apply for a certificate, or to operate in accordance with the PUC service area and tariff restrictions applicable to other paging utilities.

The original complaint requested a temporary restraining order. The request was denied without prejudice (Decision No. 84791 dated August 12, 1975) because:

"There is no assertion that the service has started. There is no certainty that service, if and when started, will be provided to any portion of the public beyond the areas certificated to Mobile."

The case in chief came on for hearing before Examiner Gillanders on April 27-28, 1976. Testimony elicited from Mrs. Virginia Bane, Mobile's general manager, revealed that the Landes system has gone into operation and now provides fully automatic, dial-accessed service to 449 paging units in a service area which according to Mobile's advertisement extends from Monterey to San Francisco.

^{1/} Part 89 permits certain classes of persons or organizations (e. g. medical services, rescue organizations, veterinarians) to establish base and mobile stations. No service area standards have been established by the FCC for this group.

At the conclusion of Mrs. Bane's testimony, it was agreed that the hearing should be adjourned until resolution of Case No. 9615, involving the extent of Mobile's service area, or until being recalendared by either side. In the meantime, it was agreed that complainants would file a renewed motion for a restraining order, supported by appropriate affidavits, exhibits, and excerpts from Mrs. Bane's testimony. ✓

On June 18, 1976 complainants filed such a motion. According to complainants, the Landes system, thanks to its claimed immunity from regulation by this Commission, is growing with extraordinary rapidity, and clearly threatens irreparable harm to complainants. In addition, this Commission's decision in Industrial Communication Systems, Inc. v R. L. Mohr, etc., et al., Case No. 9373 (Decision No. 85141), makes it clear beyond question that Landes and Mobile, in operating a wide area noncertificated radio-paging system interconnected with the public telephone network are in violation of Section 1001 of the California Public Utilities Code.

Complainants request that defendants be restrained forthwith from offering or providing "special emergency" radio-telephone services pursuant to the Landes Part 89 license unless and until Landes and/or Mobile shall have obtained a certificate of public convenience and necessity authorizing such services.

Findings

1. Mobile is a radiotelephone utility certificated to render two-way mobile radio and one-way radio-paging services in the San Jose area. Mobile's currently effective tariffs indicate that such services are rendered from a transmitter location on Loma Prieta peak. Mobile's Form L's for 1974, together with its FCC licenses, reveal that one-way services are also rendered from transmitters located in downtown San Jose and on Mt. Umunhum.

2. From Mt. Umunhum, the 158.70 MHz transmitter has an FCC authorized effective radiated power of 171 watts, thereby giving 43 dbu coverage in an area which includes San Jose, Santa Cruz, and Watsonville, but which does not include Palo Alto, Fremont, or cities north thereof, or Salinas, Hollister, or cities to the south.

3. Mobile has never advertised in connection with its certificated utility operations that it is able to give paging coverage in San Francisco, San Mateo, Monterey, Carmel, or other cities outside of the above-described area.

4. Mobile's certificated services on 158.70 MHz include fully automatic, dial-accessed tone and voice paging through an Amcor terminal. The Amcor terminal permits a user to perform his own dispatching from any dial telephone, without additional special equipment. This paging service is subject to an L-2 tariff filing which indicates a monthly rate of \$21, including service, equipment rental, and maintenance. There is an additional 15-cent charge for each call in excess of a 50-call per month allowance.

5. The control point for Mobile's certificated one-way operations is located at the offices of Mobile, 777 North First Street, San Jose, California 95112.

6. Mobile also offers paging services on Station KIZ 549, 155.295 MHz, from a transmitter located on Mt. Hamilton Road at an elevation of 1,851 feet. The 155.295 MHz operation is licensed to Dr. Jack Vogelmann under Part 89 of the Rules and Regulations of the Federal Communications Commission, and provides operator-assisted paging services to doctors and veterinarians. Mobile provides equipment and services in connection with the Vogelmann operation pursuant to an "L-3" filing, i.e., a "Summary List of Contracts and Deviations" filed pursuant to Section X of General Order No. 96-A of this Commission.

7. From Mt. Hamilton Road, the Vogelmann transmitter has an effective radiated power ranging between 175 and 550 watts. A 43 dbu contour drawn from the transmitter site would include San Jose, Palo Alto, Redwood City, and parts of Santa Cruz. Such a contour would not include San Mateo, Fremont, or cities to the north thereof, or Watsonville, Monterey, Carmel, or other cities south of Santa Cruz.

8. Mobile has never advertised in connection with the Vogelmann operation that it was able to give paging coverage in San Francisco, San Mateo, Monterey, Carmel, or other cities outside of the above-described area.

9. The Vogelmann operation is not automatic or dial-accessed and does not use an Amcor terminal. Incoming calls require operator assistance in order to be dispatched from the Mt. Hamilton Road transmitter.

10. The control point for the Vogelmann operation is located at Physicians' Exchange, 2775 Park Avenue, Santa Clara, California 95050.

11. Vogelmann has not obtained a certificate of public convenience and necessity in connection with his Part 89 paging service. Mobile successfully attacked Vogelmann as a "pseudo common carrier", and in Decision No. 75357 (Case No. 8564), this Commission ordered Vogelmann to cease and desist his operation until he should have obtained such a certificate. Instead, Mobile agreed to provide paging equipment and services to the Vogelmann users under a contract listed in an "L-3" filing.

12. Mobile also provides utility equipment and services in connection with a Part 89 license issued to Dr. John S. Landes. The Landes operation is on Station KXQ 858, 152.0075 MHz, and utilizes a transmitter located on Mt. Umunhum, elevation 3,320 feet.

13. From Mt. Umunhum, the Landes transmitter has an effective radiated power of 740 watts, giving 43 dbu coverage in an area larger than either the Vogelman or the 158.70 MHz system.

14. Unlike its advertisement for its other paging operations, Mobile has advertised that the Landes system affords "wide area coverage" in San Francisco, San Mateo County, Monterey, and Carmel, which areas are outside of the area described by the Loma Prieta map filed by Mobile with its tariffs, as well as outside 43 dbu contours prepared in accordance with engineering filed by Mobile with the FCC as to its 158.70 transmitter on Mt. Umunhum.

15. The Mobile/Landes operation includes fully automatic, dial-accessed tone and voice paging through the same Ancor terminal used by Mobile in connection with its utility operations. The terminal permits a user to perform his own dispatching from any dial telephone without special equipment. The Landes system provides users with Motorola Pageboy-2 "Slimline" receivers.

16. Neither Mobile nor Landes has filed an L-2 tariff, or obtained a certificate of public convenience and necessity for the paging services offered on the Landes system. Rather Mobile, by Advice Letter No. 15 dated March 14, 1975, submitted under Section X, Paragraph A, of General Order No. 96-A a contract between it and Dr. Landes pursuant to which subscribers to the Landes system may obtain the above-described services for a flat rate of \$17 per month, with no limitation on message units.

17. The control point for the Landes operation is located at Mobile's offices on 777 North First Street, San Jose, California 95112.

18. Complainants are certificated radiotelephone utilities which provide one-way radio-paging services in areas which overlap the "wide area" in which coverage is afforded by the Landes system.

19. Depending on the particular RTU, between 30 percent and 40 percent of complainants' customers are eligible for Part 89 service. The Landes system with its freedom from area and tariff restrictions poses a definite competitive threat to complainants, and now serves some 449 paging units after less than a year's operation. By way of contrast, the Vogelmann system during more than six years operation never attracted more than 250 units, and now services only 51 subscribers.

Conclusions

1. The Federal Communications Act, and related regulations concerning "special emergency" frequencies, does not preempt our regulation of service areas and user rates (Mobile Radio v Vogelmann (1968) 68 PUC 270).

2. Any radio-paging system which is interconnected with the public telephone network is itself a telephone service subject to the certification requirements of Section 1001 et seq. of the Public Utilities Code (Industrial Communications Systems v Mohr, Decision No. 85141 dated November 18, 1975 in Case No. 9373).

3. The Landes system is connected to the public switched land-line telephone system.

4. The certification requirement cannot be evaded simply by entering into a service and equipment contract with an existing RTU.

5. If a paging operation is in fact a public utility service, that service must be found to serve the public convenience and necessity before it can be certificated.

6. The Landes system serves the public convenience and necessity.

7. The competition of the Landes system with RTU's is in the public interest.

Discussion

In previous decisions, the Part 89 and Part 91 systems described in Chalfont, Boer, Mohr, and Vogelman^{2/} were found subject to Section 1001 and the defendants were ordered to cease and desist until they were granted a certificate of public convenience and necessity from this Commission. None of the defendants applied for certificates. Instead Vogelmann entered into an L-3 contract with Mobile Radio System of San Jose, Inc., and Mohr requested and was granted time to change his system to a private line operation as he claimed that such operation would remove him from our jurisdiction.

On this record, and in harmony with the precedents of past decisions, we must find that Landes' operation requires our authorization. However, instead of ordering Landes to cease and desist, we must grant him authority to continue his operations for the following reasons:

1. He is providing a service superior to any being furnished by any party to this proceeding.
2. It would not be in the public interest to require the dismantling of such a wide area system.
3. The service is to a limited portion of the public--those who qualify under Part 89 of the FCC rules.
4. Such authorization does not conflict with the manner in which this Commission or the FCC regulates holders of Part 21 licenses.

2/ Chalfont Communications v Tesco Communications, et al. (1968) 69 CPUC 124; Mobile Radio System of San Jose, Inc. v Vogelmann, et al. (1968) 68 CPUC 270, (1969) 69 CPUC 333; Radio Electronic Products Corporation v Boer (1972) 73 CPUC 153; Industrial Communications Systems, Inc. v R. L. Mohr, etc., et al. (Decision No. 85141 dated November 18, 1975 in Case No. 9373).

Based on the above, we will order Dr. Landes to file a tariff with us in order that we might have control over his rates and service. We will not specify a service area for his system as there are no standards by which we can calculate the dimensions of such a service area.

We are not unmindful of the claim that the Landes system has obtained customers that could or should be served by the RTU's who have filed this complaint. We recognize our treatment of the Landes system is a break with the past and that we perhaps are rewarding Mobile Radio for not being candid about the extent of Landes' system. Be that as it may, the service is one that should continue. Henceforth, we will certify any Part 89 system which files a tariff. If the owner of a Part 89 system contracts with an RTU to provide facilities and services for his system, such RTU shall file the appropriate contract or deviation schedule by advice letter filing.

In view of the result reached in this decision, no further hearing on Mobile's service area is needed in this case. Our order in this case will be a final order.

O R D E R

IT IS ORDERED that:

1. Complainants' motion for a restraining order is denied.

2. Dr. Landes is a public utility and as such shall file tariffs with this Commission in conformance with the requirements of General Order No. 96-A.

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

Dated at San Francisco, California, this 13th
day of OCTOBER, 1976.

I abstain
William Synovus Jr.
Commissioner

[Signature]
President

[Signature]

Leonard Ross

Robert P. [Signature]
Commissioners