

ORIGINAL

Decision S4 03 012

MAR 7 1984

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application of Radio Relay Corp. - California, a California corporation, for a certificate of public convenience and necessity to construct additional Radiotelephone utility facilities to serve the Greater San Diego Area.

Application 83-04-34
(Filed April 13, 1983;
amended September 12, 1983
and September 19, 1983)

O P I N I O N

Applicant Radio Relay Corp. - California, a California corporation, requests a certificate of public convenience and necessity to construct and operate radiotelephone facilities for the purpose of extending its present one-way paging Los Angeles Basin service area to the United States-Mexico border in the vicinity of San Diego. The application and amendments show that copies of the application and amendments were served on Gencom, Inc., General Telephone Co., Pacific Telephone & Telegraph Co., and various cities and counties within the extended service area. The application was noticed in the Commission Daily Calendar of April 14, 1983. The application is protested by Gencom, Inc. The Federal Communication Commission (FCC) by memorandum Opinion and Order granted applicant's application for the requisite construction permit.

The application shows that applicant presently owns and operates a certificated radiotelephone utility providing one-way paging service to an area encompassing portions of the counties of Los Angeles, Orange, Riverside, San Bernardino, and Ventura. In that area it operates ten transmitters on frequency 35.22 megahertz (MHz) and five transmitters on frequency 158.7 MHz. It offers tone-only (including vibrators), tone-and-voice, and alpha-numeric digital display paging services. Applicant claims it has in excess of 60,000

subscribers. For the year ended June 30, 1983 it had gross income from its Los Angeles Basin operations of \$4,208,753 and a net profit after taxes of \$603,711. As of that date applicant had assets of \$2,953,786 (including intercompany balances in its favor of \$1,853,159), liabilities of \$250,520, and a net worth of \$2,703,266.

The application shows that there presently exists an Intercarrier Traffic Exchange Agreement (ITEA) between applicant and protestant Gencom, Inc., the only radiotelephone utility presently operating in the San Diego area, whereby their respective customers on their 158.7 MHz systems have been able to receive paging service in the other carrier's service area upon payment of a \$5 per month surcharge. The purpose of the ITEA is to enable users from one carrier's service area to receive paging calls on those occasions when the user is in the other carrier's service area. Applicant states that service under the ITEA is satisfactory for the limited purpose for which it was set up. However, a customer of applicant who wishes to contact one of its users traveling in the San Diego area must use a San Diego access number as each system is separately controlled. In addition, customers needing to reach a user who are uncertain if the user is in the Los Angeles or San Diego area must place one call to activate applicant's system and then another to activate the San Diego system. Furthermore, applicant's users cannot take advantage of all the services offered by applicant while the user is in the foreign service area.

Applicant's proposed extended service will include tone-only (including vibrators), tone-and-voice, and digital and alpha-numeric display one-way paging.

Applicant will establish four transmitter sites in the proposed extended service area to be located at Oceanside, Woodson Mountain, Downtown San Diego, and San Miguel Mountain. The transmitters will be placed on existing radio towers and will transmit on frequency 35.22 MHz. The proposed service area encompasses a land area within an imperfect semicircle drawn from a point on the coastline opposite Camp Pendelton Marine Corps Base east to Temecula, thence southeast to the vicinity of Santa Ysabel, thence south to a point on the United States--Mexico border 14 miles inland from the Pacific Ocean, thence west along that border to the Pacific Ocean. (Actually, the service will extend 4 miles into Mexico.) A small theoretical gap exists between applicant's present service area and its proposed extended service area which is the result of changes in FCC height/power rules since this application was filed. If, after construction, the gap proves genuine, applicant states it will make such changes as are needed to close the gap.

Applicant proposes to consolidate the four new transmitters into its existing 35.22 MHz Los Angeles Basin system by installing a terminal which will be linked by wireline to applicant's larger master terminal in Los Angeles and to the new transmitters. Access to the consolidated systems may be made with a single telephone call.

Applicant deems itself fully qualified technically to construct and operate the proposed facilities. In addition to the satisfactory design, construction, and operation of its multi-transmitter system in Los Angeles, applicant's sister corporations have constructed and operated similar systems in major cities all across the country. Applicant has full-time technical personnel in its Los Angeles headquarters who hold general radiotelephone licenses

issued by the FCC and such personnel can be at any of the San Diego sites within a short time should any problems arise. Local licensed maintenance technicians in San Diego will also be under contract for any occasion requiring more immediate emergency service.

Applicant estimates the the total cost of the acquisition and installation of equipment for the proposed expansion will be not more than \$125,000, \$75,000 of which will be spent for equipment and installations at the four transmitter sites and \$50,000 of which will be attributable to the new terminal. All of the antenna types proposed, as well as the transmitter types to be used, have been used by applicant at other of its transmitter sites, and all have proven reliable and efficient. Authority to use the terminal and transmitter sites has been obtained.

Exhibits 8 through 11 attached to the application are purported synopses of telephone surveys undertaken by applicant at the time of filing its FCC application for the proposed new facilities to determine a need for applicant's new service. These synopses show that of 288 persons randomly selected in applicant's proposed San Diego service area, 59 persons representing 28 different types of businesses indicated a need for the proposed service. This represents a projected total, according to these respondents' estimates, of 646 paging units (including 470 units to be used by 4 answering services). In addition, 23 out of 34 randomly selected customers of applicant's Los Angeles service, represented by 16 different types of businesses, indicated they had a need for the new paging service and estimated that 45 paging units would be added to their present subscriptions if such service were available.

Applicant estimates that in its first year of operation of the proposed service it will serve 6,500 pagers, have expenses of \$388,496 against income of \$390,025, and a net profit before taxes of \$1,129. In each of the next succeeding four years it expects to

increase the number of customers and pagers it will be serving and to return a profit for each of those years. It estimates that it will be serving 54,000 pagers in its fifth year of operation.

Applicant does not contemplate increasing its rates as a result of the proposed expansion.

Protestant presently provides two-way radiotelephone service and one-way tone-only and tone-and-voice paging service to the populated areas of San Diego County. It has been providing these services for many years. Protestant bases its protest upon the following grounds:

- "(1) Applicant has failed to make the prima facie case for economic and technical feasibility required by Rule 18(o)(ii)(iv)(v).
- "(2) Applicant's parent corporation is currently the subject of a massive FCC investigation. Applicant's FCC San Diego grant is expressly conditional on the result of such proceedings. As a result, Applicant's license could be revoked and the system dismantled.
- "(3) The system is therefore clearly not in the public's interest. The public would be significantly harmed were this Application granted in that:
 - "(a) it would not deliver an adequate signal in the areas sought to be certificated to Applicant; and
 - "(b) there is a substantial risk that the authority for the system might be revoked."

Protestant contends that applicant's fifth year financial projections are based on two fallacies, i.e., (1) that fully 54,000 customers could and would be added to its San Diego system within five years, and (2) that the costs of such system will be limited to the provision of four transmitters, with no local offices or support staff being required. Protestant cites its own experience and that of Pacific Telephone in the San Diego area which is, that after more than a decade of offering paging services applicant and Pacific Telephone together do not serve more than 20,000 paging customers even though their services are technically superior to that which applicant intends to offer. Moreover, protestant contends that there would not be sufficient air time on 35.22 MHz to accommodate both 54,000 San Diego customers as well as applicant's existing customer base in Los Angeles County. In addition, as noted in the next paragraph, eight transmitter sites, and not four transmitter sites as proposed by applicant, would be required to give adequate service in the proposed service area and the cost of this additional equipment and associated equipment is not included in applicant's calculations.

Protestant contends that it has investigated the possibility of utilizing 35.22 MHz as a county-wide supplement to its existing paging system and concluded as a result of this investigation that fully eight transmitters would have to be constructed in San Diego County to provide adequate and reliable service to the public. Protestant's analysis has revealed that the facilities described by applicant's FCC application would not provide reliable coverage in La Jolla, Pacific Beach, or along the critical travel corridor on Interstate Highway 5 from Encinitas to Mission Bay. Protestant also contends that applicant's forecasts for channel loading, particularly during the fifth year of operation, are completely unrealistic and unattainable from a technical standpoint

unless the system was devoted to tone-only paging, for which there is minimal, and perhaps nonexistent, demand. Protestant states the trend in public demand is toward voice or display units which utilize more air time and thus cannot be loaded on one channel in the volume proposed by applicant.

Protestant alleges that applicant is a subsidiary of Digital Paging, Inc., which is a subsidiary of Graphic Scanning. This latter company is presently the subject of an FCC investigation based on allegations that it was "warehousing" frequencies by creating numerous shell entities in every major market in the nation and that each of those shell entities have filed for separate low band frequencies, thereby violating the FCC requirement that each carrier receive only one low band frequency per market. The relief sought by the complainants in that investigation includes the revocation of applicant's paging and two-way licenses on the grounds of character deficiency. As a result, applicant's San Diego grant from the FCC is expressly conditioned on the outcome of that investigation. Protestant contends that it would thus not be in the public interest to grant a license to an entity whose FCC authorization could be revoked and whose system could be dismantled at any time.

Protestant requests that the application be set for hearing after which the application be denied.

Discussion

Protestant takes issue with applicant's estimate that applicant will be serving 54,000 customers in its fifth year of operation. Protestant states that such figure is completely unattainable both from a technical and marketing standpoint. Even if what protestant states is true, it does not follow, as protestant contends, that applicant has failed to show that applicant's service will be economically feasible. Applicant has shown that its first

year of operation serving only 6,500 customers will return a small profit. Applicant has also shown that its second year of operation, with an expected increase in business, will likewise be profitable. Therefore, even if the operations for succeeding years are maintained at the same level as its first year or second year of operations, the proposed service will be profitable and hence economically feasible.

Protestant states that it investigated the possibility of itself utilizing 35.22 MHz to supplement its existing paging system and that it concluded from such investigation that fully eight transmitters--not four as proposed by applicant--were necessary to provide adequate and reliable service in applicant's proposed service area. Protestant, however, presents no engineering data to substantiate such claim. For all we know protestant may have used transmitter sites different from those proposed by applicant. Many other differences to applicant's proposed operations may also have existed in the conduct of protestant's alleged investigation. We can give little credence to a protest which makes such a broad conclusion without setting forth any of the underlying facts. On the other hand, applicant has presented us with engineering studies and with a proposed service area map prepared in accordance with Section 22.504 of the Rules and Regulations of the FCC which shows applicant's proposed service area. Furthermore, applicant has received its FCC license for the proposed service based on such studies. We find that applicant has made a prima facie showing that its operations will be technically feasible and that protestant has not presented any factual basis in its protest which would contradict such finding or entitle protestant to a hearing thereon.

Apparently the FCC did not believe that it was against the public interest to grant applicant a construction permit in the face of the FCC investigation referred to by protestant. The FCC

considered the public interest factor and found that it would not be in the public interest to delay granting applicant its construction permit. In its Memorandum of Opinion and Order (MOO) (Exhibit 16 to the herein application) which granted applicant its permit, the FCC stated as follows:

"4. Character issue. Gencom argues that since Radio Relay is owned by Digital Paging Systems, Inc. (DPS), and DPS is, in turn, controlled by Graphic Scanning Corporation (GSC), allegations of misrepresentation raised in applications filed by other GSC subsidiaries should be considered here. We have considered those allegations, and we find that it is not in the public interest to delay action on these applications any further. ... However, in order to preserve the Commission's flexibility to take remedial action later, and to avoid prejudice to the pending proceedings, we will condition our grant here as specified in paragraph 9." (Emphasis added.)

From this quotation it would appear that while applicant's parent and affiliated corporations are alleged to have been involved in misrepresentations, applicant itself was not so involved. The MOO even absolves applicant from protestant's charge of "warehousing" frequencies in this case:

"5. Warehousing Issue....Radio Relay's request is for an initial one-way channel in Oceanside and San Diego area. Therefore, we find Gencom's allegations of warehousing, as they related to the locations requested in this application, to be irrelevant."

We do not believe that the public interest will be served by delaying the final disposition of this case pending the outcome of the FCC investigation, especially since the only evidence we have been presented with in this case--the findings of the FCC--concerning that investigation did not lead the FCC itself to delay action.

Applicant has made a prima facie showing that public convenience and necessity requires the granting of the application through the results of its survey. Such being the case, Rule 18(o)(3) of the Commission's Rules of Practice and Procedure places the burden on the protestant, if it is to maintain its protest, to establish affirmatively that "granting the application will so damage existing service or the particular marketplace as to deprive the public of adequate service." Since the protest does not establish such facts, the protest fails. In addition, since the protest contains no allegations dealing with these facts, there is no necessity for holding a hearing on the application.¹ The application will be granted.

Findings of Fact

1. Applicant requests a certificate to construct and operate a public utility one-way paging radiotelephone system with four base stations located as more particularly described in the application in and around the City of San Diego.
2. Applicant has the requisite FCC construction permits for the proposed operations.
3. The proposed service will offer tone-only (including vibrators), tone-and-voice, and digital and alpha-numeric display one-way paging service.

¹ Rule 8.4(c) of the Commission's Rules of Practice and Procedure requires a protest to contain "facts the protestant would develop at a public hearing, which could result in a denial of the application...in whole or in part."

4. The initial capital requirements to install all necessary facilities will be no more than \$125,000.

5. As of June 30, 1983 applicant had a net worth of approximately \$2,703,266.

6. Applicant currently operates a profitable one-way paging service in the greater Los Angeles area serving 60,000 pagers.

7. One of the frequencies applicant currently uses in the greater Los Angeles area for one-way paging is 35.22 MHz, which is the same frequency applicant intends to use in the proposed service in the San Diego area.

8. Applicant's greater Los Angeles one-way paging service on frequency 35.22 MHz will be interconnected with its proposed San Diego area paging service thus affording its subscribers a larger area in which to receive paging signals.

9. The proposed system is economically feasible.

10. The proposed system is technically feasible.

11. Applicant is financially fit to engage in the proposed operations.

12. Applicant has available to it persons who are technically qualified to construct and manage the proposed system.

13. Applicant has not been shown to be of bad character.

14. The public interest will not be served by delaying the final disposition of this application until the conclusion of the pending FCC investigation.

15. It can be seen with certainty that there is no possibility that the activity in question may have a significant effect on the environment.

16. The protest does not affirmatively establish that granting this application will so damage existing service or the particular marketplace as to deprive the public of adequate service.

17. The protest contains no facts which would be developed at a public hearing which could establish that granting the application

will so damage existing service or the particular marketplace as to deprive the public of adequate service.

18. Public convenience and necessity require the granting of the application.

Conclusions of Law

1. A hearing is not necessary.
2. Protestant's request for an oral hearing should be denied.
3. The application should be granted.

Only the amount paid to the State for operative rights may be used in rate fixing. The State may grant any number of rights and may cancel or modify the monopoly feature of these rights at any time.

O R D E R

IT IS ORDERED that:

1. A certificate of public convenience and necessity is granted to Radio Relay Corp.- California (applicant) for the construction and operation of a public utility one-way radiotelephone system with base stations and a service area located as follows:

Base station locations:

- a. 5 miles NNW of the City of San Marcos.
Lat. $33^{\circ} 12'53''$ N, Long. $117^{\circ} 11'15''$ W.
- b. On Woodson Mountain 17 miles NE of the City of San Diego. Lat. $33^{\circ} 0'34''$ N, Long. $116^{\circ} 58'11''$ W.
- c. 2850 Sixth Avenue, San Diego. Lat. $32^{\circ} 44'5.5''$ N, Long. $117^{\circ} 9'31.5''$ W.
- d. On San Miguel Mountain 13 miles east of San Diego. Lat. $32^{\circ} 41'48''$ N, Long. $116^{\circ} 56'10''$ W.

Service area: As set out on the contour map in Exhibit 6-A to Application 83-04-34 as amended.

2. Within 30 days after this order is effective, applicant shall file a written acceptance of the certificate granted in this proceeding.

3. Applicant is authorized to file, after the effective date of this order and in compliance with Ordering Paragraph 3, tariffs applicable to the service authorized containing rates, rules, and charges otherwise applicable to its radiotelephone services. The offerings, rates, and charges shall be the same as applicant is now charging for its one-way paging service on frequency 35-22 MHz in its Los Angeles area operations. This filing shall comply with General Order 96-A. The tariffs shall become effective on not less than 10 days' notice.

4. Applicant shall file, after the effective date of this order and compliance with Ordering Paragraph 3, as part of its individual tariff, an engineered service area map drawn in conformity with the provisions of the Federal Communications Commission Rule 22.504, commonly known as the "Carey Report," consistent with Exhibit 6-A to A.83-04-34.

5. Applicant shall notify this Commission, in writing, of the date service is first rendered to public under the rates, rules, and charges authorized within five days after service begins.

6. Applicant shall keep its books and records in accordance with the Uniform System of Accounts for Radiotelephone Utilities, prescribed by this Commission.

7. The request of Gencom, Inc. that an oral hearing be held and that the application be denied, is denied.

8. Applicant shall file an annual report, in compliance with General Order 104-A, on a calendar-year basis using CPUC Annual Report Form L and prepared in accordance with the instructions included in that form.

9. The certificate granted and the authority to render service under rates, rules, and charges authorized will expire if not exercised within 12 months after the effective date of this order.

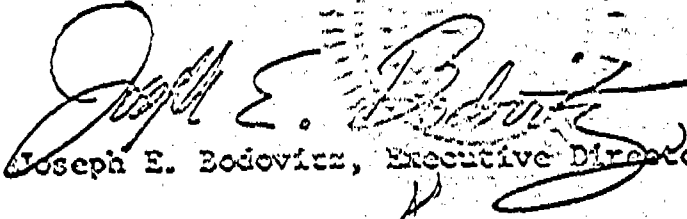
This order becomes effective 30 days from today.

Dated MAR 7 1984, at San Francisco, California.

VICTOR CALVO
FRISCILLA C. CREW
DONALD VIAL
WILLIAM T. BAGLEY
Commissioners

Commissioner Leonard M. Grimes, Jr.,
being necessarily absent, did not
participate.

I CERTIFY THAT THIS DECISION
WAS APPROVED BY THE ABOVE
COMMISSIONERS TOGETHER.


Joseph E. Bodovitz, Executive Director