

Decision 89 12 003 DEC 6 1989

~~CONFIDENTIAL~~

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application of ESTATE OF ROBERT L. MOHR to transfer and ARGENTINA MOHR to acquire control and operating authority of R. L. Mohr dba RADIOCALL CORP. (U-2046-C)

Application 89-05-022
(Filed May 10, 1989)

O P I N I O N

This is an application in which the Estate of Robert L. Mohr (Estate) seeks authority to transfer the telephone corporation operating authority and utility property of Robert L. Mohr (R. L. Mohr) doing business as RadioCall (RadioCall) to his widow Argentina Mohr (Ms. Mohr).

The application was filed on May 10, 1989. Notice of its filing appeared in the Commission's Daily Calendar on May 15, 1989. No protests were filed within the period set forth in Rule 8.3. The City of Rolling Hills (Rolling Hills) subsequently filed a Motion for leave to file a protest to which was attached the proposed protest.

On October 11, 1989, the assigned Administrative Law Judge (ALJ) issued a ruling denying the motion of Rolling Hills. The ALJ issued an amended ruling on October 24, 1989. The ALJ's amended ruling is attached to the decision as Appendix A. We affirm the ruling.

The Commission makes the following findings and conclusion.

Findings of Fact

1. A public hearing is not necessary in this matter.
2. R. L. Mohr, doing business as RadioCall, received a certificate of public convenience and necessity to operate as a telephone corporation for the purpose of providing radiotelephone service in Decision 66101, dated October 1, 1963.

3. R. L. Mohr died on August 4, 1987. On July 8, 1988, the Los Angeles Superior Court sitting in probate entered a decree distributing the "entire ownership" of RadioCall to Ms. Mohr.

4. Ms. Mohr seeks in this proceeding authority to acquire the assets of RadioCall pursuant to the decree of the probate court.

5. If the application is granted, RadioCall will have the same assets and liabilities as existed prior to the decree of the probate court.

The verified application alleges that:

"II.

"Ms. Mohr is the wife of the late Robert L. Mohr, owner and proprietor of RadioCall. Ms. Mohr, in her capacity as Special Administrator and Executrix of the Estate, has had oversight responsibilities for the general operations of RadioCall since August 1987."

* * *

"VI.

"Transfer of control of RadioCall will not have any material impact upon the nature of the company's operations or upon the quality of service provided. In fact, RadioCall will continue to be managed by virtually the same personnel who have operated the company successfully over the last several years."

6. Ms. Mohr has the ability, including financial ability to acquire the operating authority and assets of R. L. Mohr, doing business as RadioCall, and continue the public utility operations of RadioCall.

7. The proposed acquisition of the operating authority and assets of RadioCall by Ms. Mohr is not adverse to the public interest.

Since the ensuring order primarily affects the parties to this application, it should be made effective on the date of issuance.

Conclusion of Law

The application should be granted.

This authorization is not a finding of the value of the rights and properties over which control is to be acquired.

ORDER

IT IS ORDERED that:

1. On or after the effective date of this order, Argentina Mohr (Ms. Mohr) may acquire the operating rights and property of Robert L. Mohr, deceased, doing business as RadioCall, in accordance with the terms set forth in the application.

2. Within 10 days after the acquisition of the operating rights and property described in Ordering Paragraph 1, Ms. Mohr shall write the Commission stating the date on which the transfer occurred. A copy of the documents effectuating the transfer shall be attached.

3. Upon consumation of the acquisition of RadioCall, Ms. Mohr shall continue to use Identification Number U-2046-C in the caption of all original filings with the Commission, and in the titles of other pleadings filed in existing cases.

4. The authority granted in Ordering Paragraph 1 shall expire unless it is exercised before December 31, 1990.

This order is effective today.

Dated DEC 6 1989, at San Francisco, California.

G. MITCHELL WILK
President
FREDERICK R. DUDA
STANLEY W. HULETT
JOHN B. OHANIAN
PATRICIA M. ECKERT
Commissioners

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

Wesley Franklin

WESLEY FRANKLIN, Acting Executive Director

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Application of ESTATE OF ROBERT L. MOHR to transfer and ARGENTINA MOHR to acquire control and operating authority of R. L. Mohr dba RADIOCALL CORP. (U-2046-C))
Application 89-05-022

AMENDED ADMINISTRATIVE LAW JUDGE'S RULING

This is an application in which the Estate of Robert L. Mohr (Estate) seeks authority to transfer the telephone corporation operating authority and utility property of Robert L. Mohr (R. H. Mohr) doing business as RadioCall (RadioCall) to his widow Argentina Mohr (Ms. Mohr).

The application was filed on May 10, 1989. Notice of its filing appeared in the Commission's Daily Calendar on May 15, 1989. No protests were filed within the period set forth in Rule 8.3. The City of Rolling Hills (Rolling Hills) subsequently filed a Motion for leave to file a protest to which was attached the proposed protest. In addition, the Rolling Hills Community Association (Association) transmitted to me a document entitled "Objections to Applicants' Request for Ex Parte Relief." The document was not filed in the Docket Office because it did not comply with the Commission's Rules 2-8.8, 42, and 44. It is not part of the record in this proceeding.

Rule 87 provides in part that: "In special cases and for good cause shown, the Commission may permit deviations from the rules." In considering whether a special case and good cause exists to permit Rolling Hills to file a protest, it is necessary to consider the reason for the late filing, the matters sought to be raised in the protest and whether there is a substantial likelihood that Rolling Hills would prevail in any of these matters. This is particularly true in this proceeding which invokes the Commission's jurisdiction under Section 851 of the

Public Utilities (PU) Code. Section 851 does not require the Commission to hold a public hearing even if a protest is timely filed if the Commission determines that the protest has no merit. (Cedar Ridge Water Co., Decision (D.) 89-09-027 in Application (A.) 88-09-016, dated April 12, 1989; Tahoe Paradise Water Co., D.86-12-067 in A.86-10-053, dated December 17, 1986.)

On May 19, 1989, an attorney for Rolling Hills sent a letter to the Commission about this application which stated in part:

"As this is a matter of interest and concern to the City of Rolling Hills, the City respectfully requests that it receive notice regarding any hearing or proceeding on that application as well as a copy of the application.

"If the above requests should be communicated to the PUC other than by this letter, please advise me of the appropriate procedures."

Somehow, in the Commission's bureaucratic maze, the letter was sent to the Legal Division, where it was received on May 24, 1989. The letter was not placed in the formal file nor brought to my attention until after the events next described. It emerged from the labyrinth in early September 1989. The Commission never responded to the May 19th letter.

On July 5, 1989, in response to an inquiry by Rolling Hills about the status of the proceeding and a renewed request for a copy of the application, I directed the applicants to furnish a copy to Rolling Hills. On July 7, 1989, applicants' attorney complied with the request and sent a copy to Rolling Hills. Thereafter, Rolling Hills was permitted to file its motion, which was filed on August 24, 1989. Estate and Ms. Mohr filed a response on August 25, 1989. Rolling Hills filed a reply to the response on September 5, 1989.

Rolling Hills bases its protest on two issues: (1) It alleges that Ms. Mohr is attempting to pursue an unauthorized

expansion of RadioCall's operations. (2) It also alleges that the application fails to make a showing on the ability and fitness of Ms. Mohr to conduct the operations of RadioCall.

Discussion

The record indicates that the parties have been involved in a bitter dispute for many years over the location of an antenna tower on Association's property in Rolling Hills. Three proceedings have been filed in the Los Angeles Superior Court stemming from this dispute: (1) A complaint originally filed by R. H. Mohr, in which Estate has been substituted as plaintiff, which seeks to take the parcel upon which the tower is located by eminent domain (C.368944). (2) An action for a writ of mandate filed by Estate seeking to enjoin a Rolling Hills Ordinance which revoked RadioCall's conditional use permit for the antenna tower (C.613968 - mandate proceeding). (3) On proceeding in inverse condemnation filed by Estate against Rolling Hills seeking compensation for the taking of the tower site if the revocation of the conditional use permit is upheld (C.673449 - inverse condemnation proceeding).

The Superior Court has jurisdiction over the eminent domain proceeding. A necessary element in the eminent domain proceeding is whether the tower is within RadioCall's authorized operating authority. If the tower is outside of RadioCall's authorized operating authority it has no power to use eminent domain to acquire it. This is a question of fact to be determined by the Superior Court. On November 8, 1984, the Superior Court entered an order authorizing Estate to take the tower site. However, the issue of just compensation has not been adjudicated and no final judgment has been entered.

Association and others are defendants in the eminent domain proceeding. The Superior Court's order of November 8, 1984, implicitly holds the tower site is within RadioCall's operating authority and is res judicata as to the

defendants in the eminent domain proceeding unless it is set aside by the Superior Court or reversed on appeal. Although Rolling Hills is not a defendant in the eminent domain proceeding, it should not be permitted to use a protest in this transfer proceeding to collaterally attack and relitigate the matter decided by the Superior Court.

The other issue sought to be raised in the protest which Rolling Hills seeks to file is the fitness of Ms. Mohr. Rolling Hills does not allege that Ms. Mohr is unfit. It contends that the application does not contain facts sufficient to support a finding of fitness. There is no merit in this contention.

One of the elements in determining whether the transfer of operating rights is or is not adverse to the public interest is whether the transferee has the ability, including financial ability, to continue the operations of the utility. (Santa Barbara Cellular, D.89-09-092 in A.89-04-059, slip dec. at p. 3.)

Under the particular facts of this case financial ability is not an issue. The record shows that Ms. Mohr is to receive all of the assets of RadioCall pursuant to a decree of distribution by the probate court. Thus, RadioCall would have the same assets and be subject to the same liabilities as existed prior to the decree. The transaction will have no financial impact.

The verified application alleges that:

"II.

"Ms. Mohr is the wife of the late Robert L. Mohr, owner and proprietor of RadioCall. Ms. Mohr, in her capacity as Special Administrator and Executrix of the Estate, has had oversight responsibilities for the general operations of RadioCall since August 1989."

* * *

"VI.

"Transfer of control of RadioCall will not have any material impact upon the nature of the

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company's operations or upon the quality of service provided. In fact, RadioCall will continue to be managed by virtually the same personnel who have operated the company successfully over the last several years.
...."

The Commission has held that:

"ITT's abandonment argument rests upon the premise that an individual holding operating authority from this Commission must personally conduct the operations under such authority and may not delegate this to others. This proposition is unsound because it would create an unreasonable classification between individual and corporate holders of operating rights and also is contrary to Sections 2296 and 2304 of the California Civil Code which provide as follows:

"Section 2296. Principal.--
Capacity.--Any person having capacity to contract may appoint an agent, and any person may be an agent."

"Section 2304. Authority or Acts Delegable.--An agent may be authorized to do any acts which the principal might do, except those to which the latter is bound to give his personal attention."

"The Commission knows of no rule of law which binds an individual holder of operating rights to run the operation personally."
(M. Lee (Radio Paging) (1966) 65 CPUC 635, 639.)

The cited portions of the verified application constitute a prima facie showing of fitness upon which a finding can be based.

No other points require discussion.

Findings of Fact

1. The application was filed on May 10, 1989. Notice of the filing appeared in the Commission's Daily Calendar on May 15, 1989. The time in which to file a protest under Rule 8.3 expired on June 14, 1989. No protests were filed during that period.

2. The application is a public record. (Government Code (GC) § 6252 and copies of it were available for inspection at the Commission's offices in Los Angeles and San Francisco. (GC § 6253.)

3. On May 19, 1989, counsel for Rolling Hills wrote to the Commission asking for a copy of the application and inquiring about the procedure for filing a protest. Rolling Hills clearly had knowledge that the application had been filed on that date. The Commission never responded to the letter.

4. The Commission's Rules are contained in Title 20 of the California Administrative Code, which is available in most public law libraries.

5. There is no statute or Commission Rule which required service of the application on Rolling Hills.

6. At the request of Rolling Hills, I directed Estate and Ms. Mohr to furnish Rolling Hills a copy of the application on July 5, 1989. The direction was complied with on July 7, 1989. Thereafter, I permitted Rolling Hills to file the present motion for leave to file a protest to which was attached a proposed protest. Estate and Ms. Mohr were given an opportunity to respond to the motion and Rolling Hills afforded the opportunity to reply to the response.

7. The jurisdiction of the Commission over the application is derived from PU Code § 851, which does not require a public hearing even if a timely protest is filed.

8. The application seeks authority to transfer the operating authority and utility property formerly owned by R. H. Mohr, deceased, from Estate to Ms. Mohr.

9. The protest which Rolling Hills seeks to file attempts to raise two issues: (1) It alleges that Ms. Mohr is attempting to pursue an unauthorized expansion of RadioCall's operations. (2) It alleges that the application fails to make a showing on the ability and fitness of Ms. Mohr to conduct the operations of RadioCall.

10. The allegation relating to unauthorized expansion deals with a dispute between the parties, dating back to 1981, over the location of an antenna tower on Association's property in Rolling Hills.

11. The application does not mention the tower and does not seek any Commission action with respect to it.

12. Rolling Hills has had knowledge of facts pertaining to the tower since 1981.

13. On May 29, 1981, RadioCall filed a proceeding in the Los Angeles Superior Court (C.368944) seeking to acquire the parcel upon which the tower is located by eminent domain. Association and others are defendants in that proceeding. One of the issues in the eminent domain proceeding is whether the tower is situated outside RadioCall's authorized operating area. If it is outside that area, RadioCall could not exercise the power of eminent domain.

14. On November 8, 1984, the Superior Court entered an order authorizing Estate dba RadioCall to take the tower site. The issue of just compensation has not yet been adjudicated and no final judgment has been entered.

15. Association and the other defendants are bound by the Superior Court's order of November 8, 1984, under the doctrine of res judicata, unless it is set aside by the Superior Court or overturned on appeal.

16. It is not permissible for Rolling Hills to attempt to collaterally attack the November 8, 1984 order of the Superior Court under the guise of an attempted protest to this application.

17. There is no substantial probability that Rolling Hills would prevail on the alleged issue of unauthorized expansion of operating authority in the protest it seeks to have filed.

18. The remaining issue Rolling Hills seeks to raise in the protest sought to be filed is the fitness of Ms. Mohr to acquire the operating rights and property of RadioCall. Rolling Hills does not allege any facts which would show lack of fitness. It contends that the application does not establish this qualification.

19. Since the proposed transfer of utility operating rights to Ms. Mohr stems from a decree of distribution by the probate court, financial ability is not an issue in this proceeding. RadioCall would have the same assets and liabilities before and after the transfer.

20. The verified application alleges that:

"II.

"Ms. Mohr is the wife of the late Robert L. Mohr, owner and proprietor of RadioCall. Ms. Mohr, in her capacity as Special Administrator and Executrix of the Estate, has had oversight responsibilities for the general operations of RadioCall since August 1989."

* * *

"Transfer of control of RadioCall will not have any material impact upon the nature of the company's operations or upon the quality of service provided. In fact, RadioCall will continue to be managed by virtually the same personnel who have operated the company successfully over the last several years."

These allegations constitute a prima facie showing of fitness upon which a finding can be based.

21. There is no substantial probability that Rolling Hills would prevail on the alleged issue of lack of fitness of Ms. Mohr in the protest it seeks to have filed.

22. Rolling Hills has failed to establish that this is a special case for which good cause has been shown to permit a deviation from Rule 8.3 and allow it to file a protest at this time.

Conclusions of Law

1. Rolling Hills' motion for leave to file the proposed protest should be denied.

2. The application should proceed to decision on an ex parte basis as an unprotested application.

IT IS RULED that:

1. The motion of the City of Rolling Hills for leave to file a protest in this application is denied.

2. The application shall be handled on an ex parte basis as a non-protested application.

Dated October 24, 1989, at San Francisco, California.

/s/ DONALD B. JARVIS
Donald B. Jarvis
Administrative Law Judge

CERTIFICATE OF SERVICE

I certify that I have by mail this day served a true copy of the original attached Amended Administrative Law Judge's Ruling on all parties of record in this proceeding or their attorneys of record.

Honorable Aurelio Munoz
Judge of The Superior Court
Los Angeles, CA 90012

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Dated October 24, 1989, at San Francisco, California.

/s/ BERNADETTE T. RIVERA
Bernadette T. Rivera

N O T I C E

Parties should notify the Process Office,
Public Utilities Commission, 505 Van Ness
Avenue, Room 2000, San Francisco, CA 94102, of
any change of address to insure that they
continue to receive documents. You must
indicate the proceeding number of the service
list on which your name appears.

(END OF APPENDIX A)