

JUN 17 1992

Decision 92-06-045 June 17, 1992

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application of)
INTERNATIONAL PAGING CORPORATION)
(U-2106-C) for a Certificate of)
Public Convenience and Necessity)
Pursuant to Section 1001 of the)
Public Utilities Code to Extend)
its Radiotelephone Utility System)
in and to El Dorado, Kern, Orange,)
Riverside, San Bernardino, San)
Joaquin, San Mateo, Santa Clara)
and Solano Counties.)

ORIGINAL

Application 91-07-027
(Filed July 18, 1991)

O P I N I O N

Summary

International Paging Corporation (IPC/applicant) requests a certificate of public convenience and necessity (CPCN) pursuant to Public Utilities (PU) Code § 1001 to extend its radiotelephone utility (RTU) service in California. IPC is presently authorized under Decision (D.) 89-03-057 and D.89-10-024 to provide one-way paging and signalling service for tone, display, and alpha-numeric radio pagers through a system of 24 transmitter locations. By this application, IPC seeks authority to add 11 transmitter sites.

IPC has violated PU Code § 1001 and Rule 18 of the Commission's Rules of Practice and Procedure by already completing construction and activation of six of the requested transmitter sites: three sites prior to filing the application and three sites within a month of filing. Applicant was notified by the Administrative Law Judge's (ALJ) ruling on March 13, 1992 that the violations were punishable by a \$1,000 fine and given an opportunity to request hearing. Applicant's attorney wrote a letter confirming the violations and requesting a fine not be imposed.

We find applicant to be technically competent, financially responsible, and able to offer a service responsive to public need and demand. We grant the requested CPCN, fine applicant \$1,000 for violations, and order it to cease and desist from further construction without first obtaining a CPCN.

I. Background

The application was filed on July 18, 1991 and served on nine counties and 65 utilities. Notice appeared in the Daily Calendar on July 23, 1991. No timely protest was received. IPC requests a waiver of the portion of Rule 18(b) of the Commission's Rules of Practice and Procedure that requires service of the entire application on the 128 cities in the service area. A one-page summary of the application was served on each city with an address provided for any interested city to obtain the full application upon request. D.90-03-010 granted a waiver from Rule 18(b) subject to the same summary notice requirement, and the precedent of D.90-03-010 is reasonable to follow in this proceeding.

II. Issues

A. Public Need and Environmental Impact

Installation of the additional sites will cure gaps in coverage within IPC's existing area of operations, as well as extend its coverage into the Stockton, Bakersfield, and Palm Springs areas. After the proposed expansion, IPC's California service territory will include El Dorado, Kern, Orange, Riverside, San Bernardino, San Joaquin, San Mateo, Santa Clara, and Solano Counties.

IPC will continue to charge its existing tariff rates although reference is made to an anticipated advice letter filing reflecting both increases and reductions. The requested

construction is intended to assure high quality uninterrupted service to IPC's customers. No new service offerings are requested. The company presently has approximately 12,000 paging customers, with a total of 31,000 pagers in service. Projections given are based on the present growth rate of 2,500 pagers a month, doubling the system within one year and reaching 150,000 within five years.

We conclude that the proposed expansion responds to a public need and demand for IPC's services.

All additional transmitter sites will be installed on existing towers which IPC will lease. These facilities are already in existence and house several other communication antennae. Therefore, it can be seen with certainty that the proposed construction will not have a significant effect on the environment.

B. Adequate Financial and Technical Resources

The company was acquired in 1984; its president and sole stockholder is Susan Winter. IPC's primary business is providing paging utility service in California, Nevada, Arizona, and Utah. Audited financial statements for the year ending December 31, 1990 reflect profitable operations with assets of \$5,820,709, liabilities of \$4,661,409, and equity of \$1,159,300. Interim financial statements on September 30, 1991 show a significant increase in sales and asset growth to \$8,522,477. IPC expects revenues from customer growth to be sufficient to cover the \$7,100 per month capital and maintenance expense of the construction.

IPC currently provides one-way paging and signalling service for tone, display, and alpha-numeric radio pagers throughout its service territory, offering features such as direct input dialing, a service feature which allows a paging customer to have local telephone numbers in different cities, i.e., San Francisco and Los Angeles, and end-to-end paging, a service which complements direct dial service by allowing a paging customer to dial IPC's toll-free 800 number for messages.

We conclude that IPC has the financial and technical ability to carry out the proposed expansion.

C. Violation of PU Code § 1001 and Rule 18

In response to an Administrative Law Judge's Ruling of December 30, 1991, IPC on February 6, 1992 submitted documents supplementing this application. Included in the material submitted are filings with the Federal Communications Commission (FCC) stating that six of the requested transmitter sites have been constructed and activated, three sites by April 3, 1991 and three sites by August 30, 1991.¹ Construction of the transmitter facilities prior to issuance of the CPCN is in violation of PU Code § 1001 and Rule 18 of the Commission's Rules of Practice and Procedure. IPC is a certificated RTU and therefore well aware of the Commission's requirements.

The Commission has warned telecommunications carriers that construction prior to receipt of a CPCN can result in fines. Metromedia Telecommunications Inc., D.87-09-072 (Application (A.) 87-06-006), and United Radiophone System, D.87-11-050 (A.87-05-023), both found that RTUs had engaged in similar violations and the decisions discussed imposition of fines. In Vortel Communications, Inc. v. Advanced Communications Technology, Inc., D.90-06-061 (Case (C.) 90-02-031), the Commission penalized a reseller of intrastate long distance telecommunications services \$1,000 for providing utility services without a CPCN; and in Atlantic Cellular Company, D.91-04-059 (A.89-05-060), it assessed a \$2,000 fine for construction of a facility not included in the

¹ IPC requested waiver of Rule 18(o)(1) for the other five sites as these sites do not require FCC permits prior to commencement of construction. IPC acknowledges in the application, page 9, that our authority is needed for the five sites prior to construction, and, absent evidence to the contrary, we will assume no construction has taken place and grant the waiver.

utility's CPCN. These fines were imposed under PU Code § 2107. The Commission recently, in DiMaggio v. Pacific Bell, D.92-03-031 (C.86-09-027), found the defendant to be in contempt of a prior order and imposed a fine of \$1,000 under PU Code § 2113.

On March 13, 1992, an ALJ ruling was issued advising applicant of a proposed fine and providing an opportunity to submit a written motion or request a hearing. IPC responded by letter dated March 19. It acknowledges it was quite remiss in failing to timely file and asserts it was too preoccupied with business expansion and it had no intention to evade this Commission's regulation. IPC also cites the quandary faced by applicants in trying to meet both the FCC's and the Commission's filing requirements, and cites D.92-01-016 in Rulemaking into the Regulation of Radiotelephone Utilities (Rulemaking 88-02-015).

In D.92-01-016 we explicitly rejected industry arguments to relax our present requirements for expansion of operations (see pp. 37-38). We do propose to allow simultaneous filing of FCC and Commission applications. This is done to allow a more timely filing, not to permit greater delay, as is the case with IPC. We do not find the arguments of applicant persuasive.

We cannot ignore or condone IPC's violations and expect other carriers to comply with the requirement. For convenience of enforcement, we will rely on PU Code § 2113, find IPC in contempt of the Commission for its violation of Rule 18, and impose a \$1,000 fine. We also find that IPC has violated § 1001 and Rule 18 and is subject to the penalties of §§ 2107 and 2108. If IPC fails to pay the contempt fine promptly, we authorize the General Counsel to pursue appropriate penalties under §§ 2107 and 2108, according to the procedure specified in § 2104.

While a \$1,000 fine may not be an effective deterrent to a carrier with a three-month net profit of \$870,552 on September 30, 1991, another violation could be grounds for certificate denial on the basis of fitness.

III. Conclusion

We find that applicant should be granted a CPCN to extend its service territory based on a demonstration of public need and ability to serve. We also find that applicant violated PU Code § 1001 and Rule 18. We fine it \$1,000 under PU Code § 2113 for violation of Rule 18.

Applicant should be subject to the fee system, as set forth in PU Code §§ 401, et seq., which is used to fund the cost of regulating common carriers and businesses related thereto and public utilities. Applicant is not subject to a rate recovery mechanism for deaf and disabled program costs since it is a one-way paging service specifically exempted by PU Code § 2881(d).

Findings of Fact

1. Applicant requests a CPCN to extend its RTU service in California.
2. Applicant is presently authorized to provide RTU service under D.89-03-057 and D.89-10-024.
3. The requested expansion will cure gaps in coverage within the existing service territory as well as extend service into the Stockton, Bakersfield, and Palm Springs area.
4. Applicant seeks authority to add 11 transmitter sites.
5. It can be seen with certainty that the proposed construction will not have a significant effect on the environment.
6. Notice of the application appeared in the Daily Calendar on July 23, 1991. Copies of the application were served on counties and competitors.
7. Waiver of Rule 18(b) requiring service of the entire application on each city in the service area is requested. A summary of the application was served on each city.
8. No timely protests were received. A hearing is not required.

9. IPC requests a waiver of Rule 18(o)(1) for its delay in filing this application; its filing was not within the required 30 days of obtaining FCC permits for six sites. IPC requests an additional waiver of Rule 18(o)(1) for its failure to include copies of FCC permits for five sites; FCC permits for these sites are not required prior to beginning construction.

10. Applicant has already constructed and activated six of the requested sites.

11. The proposed service is responsive to public need and demand.

12. The proposed operation is technically feasible and applicant is technically competent.

13. The proposed operation is economically feasible and applicant is financially responsible.

14. Applicant is not subject to assessment for a share of program costs for the deaf and disabled.

15. Applicant will continue to charge its existing tariff rates. No new service offerings are requested.

Conclusions of Law

1. The provision of Rule 18(b) requiring service of the entire application on cities where the service will be rendered should be waived. In lieu of this requirement, a summary notice should be served on all affected cities.

2. The requirement of Rule 18(o)(1) to supply copies of FCC permits for each construction site with the application should be waived. The requirement of Rule 18(o)(1) to file an application within 30 days of obtaining an FCC permit should not be waived.

3. Applicant has violated PU Code § 1001 and Rule 18 of our Rules of Practice and Procedure by constructing and activating six transmitter sites prior to obtaining a CPCN.

4. Applicant is in contempt of the Commission for its violation of Rule 18.

5. Applicant should be fined \$1,000 for its contempt under PU Code § 2113.

6. The fine should be remitted to the Executive Director within 30 days, payable to the State of California's General Fund.

7. The application should be granted.

8. Applicant is subject to the user fee as a percentage of gross intrastate revenue under PU Code §§ 401, et. seq.

O R D E R

IT IS ORDERED that:

1. A certificate of public convenience and necessity (CPCN) is granted to International Paging Corporation (IPC) to construct and operate a public utility one-way radiotelephone system providing service in and to El Dorado, Kern, Orange, Riverside, San Bernardino, San Joaquin, San Mateo, Santa Clara, and Solano Counties, California. The base station facility is to be located at 1450 West Colorado Boulevard, Pasadena, California, and authority is granted for the 11 transmitter sites identified in the application.

2. The requirements of Rule 18(b) of the Commission's Rules of Practice and Procedure to serve copies of the application on all cities within which service will be rendered is waived.

3. The requirement of Rule 18(o)(1) to supply all FCC construction permits with the application is waived.

4. IPC shall be subject to a fine in the amount of \$1,000 pursuant to Public Utilities (PU) Code § 2113 for being in contempt of the Commission for its violation of Rule 18 by constructing and activating six transmitter sites prior to obtaining a CPCN.

5. IPC shall remit the \$1,000 fine, payable to the State of California's General Fund, to the Executive Director within 30 days. If the fine is not paid within this period, the Commission's General Counsel is instructed to bring and prosecute to final

judgment an action in the name of the people of the State of California against IPC to recover damages authorized by PU Code §§ 2107 and 2108.

6. Within 30 days of the effective date of this order, IPC shall file a written acceptance of the certificate granted in this proceeding.

7. The certificate granted and the authority to render service under existing authorized tariffs will expire if not exercised within 12 months after the effective date of this order.

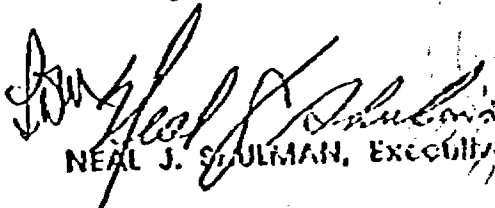
8. IPC shall send a copy of this decision to concerned local permitting agencies not later than 30 days from the effective date of this order.

This order is effective today.

Dated June 17, 1992, at San Francisco, California.

DANIEL Wm. FESSLER
President
JOHN B. OHANIAN
PATRICIA M. ECKERT
NORMAN D. SHUMWAY
Commissioners

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


NEAL J. SULMAN, Executive Director