

Decision 82 06 067 JUN 15 1982

ORIGINAL

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application)
of INTRASTATE RADIO TELEPHONE, INC.)
OF SAN FRANCISCO, a corporation,)
for authorization to construct)
additional radiotelephone utility)
facilities in the San Jose area to)
serve San Jose, Campbell, Los)
Gatos, and Saratoga.)

Application 61093
(Filed December 1, 1981;
amended January 27, 1982)

Vaughn, Paul & Lyons, by John G. Lyons,
Attorney at Law, for Intrastate Radio
Telephone, Inc. of San Francisco,
applicant.

Palmer & Willoughby, by Michael F. Willoughby,
Attorney at Law, for Mobile Radio Systems
of San Jose, protestant.

INTERIM OPINION

Applicant Intrastate Radio Telephone, Inc. of San Francisco, a corporation, requests a certificate of public convenience and necessity to construct and operate radiotelephone utility (RTU) facilities on the Sherman Building, 3031 Tisch Way, San Jose, California. A copy of the application was served on Central Radio Telephone, Inc., Mobile Radio Systems of San Jose (Mobile Radio), The Pacific Telephone and Telegraph Company, Peninsula Radio, the Administrator of Santa Clara County, the City Clerk of the City of Campbell, the City Manager of the City of San Jose, and the City Clerk of the City of Saratoga. A protest was received from Mobile Radio, which also moved to dismiss. The protest noted that Mobile Radio and other RTUs offered service within the territory which would be served by the new facilities and contended that certification would significantly dilute the market. It argued that dilution would adversely affect investors and the served public. The motion, among

other points, relied on the fact that applicant had filed an "inconsistent" application with the Federal Communications Commission (FCC), seeking authority to operate at the same transmitter location but with a directional antenna and lower radiated power. Both of these features would significantly decrease applicant's proposed service territory, reducing the potential for competition with the established RTUs. A prehearing conference and oral argument were held before Administrative Law Judge (ALJ) Gilman in San Francisco on February 2, 1982. An Administrative Law Judge's Ruling was issued on February 17; among other provisions, the Ruling deferred submission of the motion until after applicant had filed its prepared testimony.

Subsequently, a limited settlement was arrived at between parties. Applicant agreed to reduce the scope of its proposed service area extension to that proposed to the FCC if protestant would withdraw its opposition. The agreement was not intended to set up a permanent dividing line between the parties' service territories.

A hearing was held before the same ALJ on March 3, 1982 at San Francisco, California. In conformity with the settlement, applicant amended its application at the hearing. As agreed, the amendment substitutes the directional antenna and reduced power aspects of the FCC filing for the original proposal, thus reducing the service area.¹ The protest of Mobile Radio was thereupon withdrawn and the application is now unopposed.

¹ The reduction is significant, as the table shows.

<u>Frequency</u>	<u>Reliable Service Area of Amended Application</u>	<u>Reliable Service Area of Original Application</u>	<u>Percent Change</u>
152.03 MHz	288 sq. mi.	422 sq. mi.	53.5%
152.06 MHz	288 sq. mi.	422 sq. mi.	53.5%
454.125 MHz	109 sq. mi.	340 sq. mi.	211.9%

The application shows that applicant operates as an RTU in the San Francisco Bay Area using radio transmitters at several locations. The proposed additional facilities will operate on 152.03, 152.06 MHz, and 454.125 MHz frequencies used by applicant at other locations.

Applicant proposes to locate the additional facilities on the Sherman Building to supplement its present facilities, providing two-way and one-way paging services on a 24-hour basis. Applicant alleges that it now serves over 500 one-way paging and two-way subscribers in San Jose, and that additional prospective subscribers have requested service. Applicant further alleges that the proposed operations will provide improved and more reliable service in a market it has long served.

To the extent that applicant's area of service is expanded by the proposed operations, its presently effective rates, rules, and regulations would be made effective in the new territory.

Applicant alleges that it presently has adequate personnel to conduct the proposed operations, and that the estimated cost of the proposed facilities is \$35,000. The balance sheet of applicant, as of March 31, 1981, shows current assets of \$1,156,534.09, including cash in the amount of \$377,480.91. Current liabilities total \$915,013.04.

Discussion

Applicant and Mobile Radio have made what appears to be an agreement to divide service territory between themselves. Notwithstanding the parties' agreement, the Commission may examine whether the public interest would be injured or benefited by increased competition between the parties.

We are required to examine such bargains with great care. We have done so and concluded that this agreement is not adverse to the public interest. The parties have merely agreed that applicant can begin operations without delay in the undisputed territory and to defer litigation over the territory which is genuinely in dispute.

Indeed, Mobile Radio might have been subject to criticism if it had obstructed a competitor's improvement in service while challenging those aspects of the application which would significantly alter competition.

Findings of Fact

1. Under the amended application, the construction proposed will function primarily to improve reliability within applicant's existing service area. The improvement is required by public convenience and necessity.

2. To the extent that such construction also expands applicant's service area, it is required by public convenience and necessity.

3. Such construction will not affect the competitive balance between applicant and Mobile Radio to any significant degree.

4. The parties agree that applicant should quickly receive permanent authority to add facilities primarily intended to improve reliability and that litigation over operational and equipment changes which would have a significant competitive effect should be deferred.

5. Applicant has applied to the FCC for a permit and license for the proposed facilities.

6. The service will be in operation 24 hours a day.

7. The service area to be served by the proposed facilities is described in Exhibit 2.

8. The facilities proposed to be constructed and operated by applicant do not involve construction of any substantial magnitude.

9. Applicant is financially able to initiate the proposed construction and operations.

10. Applicant is fit, willing, and able to conduct the proposed operations.

11. Applicant's presently effective rates, rules, and regulations will apply to the proposed operations.

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

13. The application, as amended, is not opposed and the order should be effective when signed.

Conclusion of Law

Applicant should be granted a final, restricted certificate immediately. Both parties should be given an opportunity to be heard to determine whether the public interest requires the restriction to be lifted or modified. The application should be kept open for the sole purpose of considering competitive and public interest questions affecting territory included in the original application which is not within the service area authorized by this order. ✓

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.

INTERIM ORDER

IT IS ORDERED that:

1. The motion to dismiss is denied, without prejudice to Mobile Radio Systems of San Jose's right to protest full power or omnidirectional operation of the facilities authorized by this order.

2. A certificate of public convenience and necessity is granted to Intrastate Radio Telephone, Inc. of San Francisco for the construction and operation of public utility radiotelephone facilities on the Sherman Building, 3031 Tisch Way, San Jose, with a service area as set out in Exhibit 2 of record. The certificate is final, subject to the condition stated in paragraph 5 below.

3. Applicant is authorized to file, after the effective date of this order, a tariff applicable to the service authorized containing rates and charges otherwise applicable to its one-way paging and two-way radiotelephone services. Such filing shall comply with General Order 96-A. The tariff filing shall become effective on not less than 10 days' notice.

4. Applicant shall file, after the effective date of this order, as part of its tariff, an engineered service area map drawn in conformity with the provisions of Federal Communications Commission Rule 22.504, commonly known as the "Carey Report."

5. The certificate granted and the authority to render service will expire if not exercised within 24 months after the effective date of this order.

6. Pending further order of the Commission, applicant shall operate the authorized facilities with limited power and with directional radiation only so as not to exceed the predicted service contours set forth in Exhibit 2 in this proceeding.

7. This matter is kept open for the limited purpose of deciding:

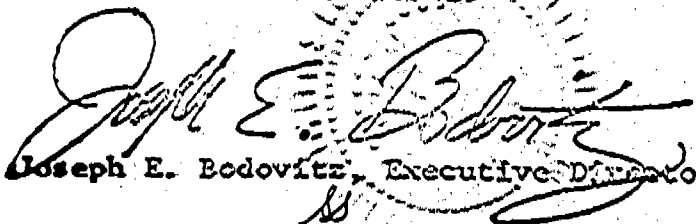
- a. Whether and to what extent the restrictions on radiated power and antenna directionality should be lifted.
- b. Whether or not any facilities to be constructed should be used jointly.

This order is effective today.

Dated June 15, 1982, at San Francisco, California.

JOHN E. BRYSON
President
RICHARD D. GRAVELLE
LEONARD M. GRIMES, JR.
VICTOR CALVO
PRISCILLA C. GREW
Commissioners

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


Joseph E. Bodovitz, Executive Director

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Subsequently, a limited settlement was arrived at between parties. Applicant agreed to reduce the scope of its proposed service area extension to that proposed to the FCC if protestant would withdraw its opposition. *The agreement was not intended to set up a permanent dividing line between the parties' service*

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Discussion

Applicant and Mobile Radio have made what appears to be an agreement to divide service territory between themselves. As a result, the Commission has been denied an opportunity to determine whether the public interest would be injured or benefited by increased competition between the parties. Furthermore, the means chosen to limit competition, i.e. the limitation on radiated power and the directional signal, have side effects which are almost certainly adverse to the public interest. Each can be expected to render applicant's service less reliable, particularly for customers located in the fringe of applicant's service area.

We are required to examine such bargains with great care to ensure that none of the parties is using its ability to fund litigation and create regulatory lag as a device to frustrate the public interest (Northern Cal. Pwr. Agency v P.U.C. (1971) 5 C 3d 370; cf. Calif. Mtr. Transport etc. v Trucking Unlimited (1972) 30 L ed 2d 642). We have done so and concluded that this agreement is not adverse to the public interest. The parties have merely agreed that applicant can begin operations without delay in the undisputed territory and to defer litigation over the territory which is genuinely in dispute. Indeed, Mobile Radio might have been subject to criticism if it had obstructed a competitor's improvement in service while challenging those aspects of the application which would significantly alter competition.

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