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BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the matter of the Application of
INDUSTRIAL COMMUNICATIONS SYSTEMS, INC.,
a California Corporation, for a
Certificate of Public Convenience and
Necessity to Provide Paging Service in
Ventura County, California.

Application 60194
(Filed January 15, 1981;
amended April 21, 1981)

Mobile Radio System of Ventura, Inc.,

Complainant,

vs.

Industrial Communications Systems, Inc.,

Defendant.

Case 10964
(Filed March 16, 1981)

In the Matter of the Application of
INDUSTRIAL COMMUNICATIONS SYSTEMS, INC.,
a California corporation, for a
Certificate of Public Convenience and
Necessity to Provide Automatic Two-Way
Mobile telephone service in Ventura
County, California.

Application 60574
(Filed May 19, 1981)

Industrial Communications Systems, Inc.,
a California corporation,

Complainant,

vs.

Mobile Radio System of Ventura, Inc.,

Defendant.

Case 11030
(Filed September 11, 1981)

Palmer & Willoughby, by Warren A. Palmer,
Attorney at Law, for Industrial Communications
Systems, Inc., applicant, defendant in C.10964,
and complainant in C.11030.
Hegarty, Pougiales, Loughran & Gulseth, by
Thomas M. Loughran, Attorney at Law, for
Mobile Radio System of Ventura, complainant in
C.10964 and defendant in C.11030.

O P I N I O N

The Parties

Industrial Communications Systems, Inc. (ICS)¹ is a radio-telephone utility (RTU) corporation providing two-way mobile telephone service and one-way tone only and tone and voice paging service in major portions of San Bernardino, Riverside, Los Angeles, Orange, and San Diego counties, and adjacent areas. ICS' principal office and control point for its system is in Anaheim. It now serves about 40,000 mobile and paging units, used by about 6,300 customers.

Mobile Radio System of Ventura, Inc. (MRSV), a California corporation with offices in Ventura, is a RTU. It provides tone-only and tone and voice paging service and two-way radiotelephone service in Ventura County and has about 1,600 tone-only pagers, 200 tone and voice pagers, and over 100 mobile units. MRSV began business in 1957 when its founder and current owner, Avery Simon, acquired an existing RTU. MRSV was granted grandfather certification in 1961 by D.62156 (58 CPUC 756).

ICS' Application (A.) 60194 (January 15, 1981)

In A.60194 ICS seeks a certificate of public convenience and necessity under Public Utilities (PU) Code § 1001 to construct radio communication facilities to provide tone-only paging service in Ventura County, including the cities of Ventura, Oxnard, and adjacent

¹ The corporate name has subsequently been changed to ICS Communications.

areas. This service, if authorized, would be integrated with the tone-only paging system of ICS serving the Los Angeles Basin. The proposed transmitter would operate on frequency 158.7 megahertz (MHz) from Red Mountain, 6 miles west of Ventura. ICS would interconnect its proposed Red Mountain transmitter with its Santiago Peak transmitter by point-to-point microwave service. ICS alleges that radiotelephone needs of the local business and professional people in Ventura County are not presently being met by MRSV, nor by interconnecting RTUs, and that the existing tone-only paging service is unsatisfactory. ICS proposes to supply the fast, automatic, efficient, reliable, wide-area tone-only paging service it believes Ventura County needs.

MRSV's Case (C.) 10964 (March 16, 1981)

In its complaint in C.10964 MRSV alleges that ICS has constructed an omnidirectional transmitter on Saddle Peak from which it provides tone-only paging service to Ventura County on frequency 158.70 MHz; that ICS has constructed a transmitter on Oat Mountain from which it provides service to Ventura County on frequency 158.70 MHz; that ICS has no authority from this Commission to provide such service; and that such service substantially encroaches upon MRSV's service area in that ICS' contour from both transmitters embraces more than one-third of MRSV's service area, including the major communities of Thousand Oaks, Newbury Park, Moorpark, Camarillo, Santa Paula, and Fillmore, and adjacent areas having a population in excess of 200,000.

MRSV alleges that ICS has 2,500 pagers in service for customers located within its service area. It states that it has been damaged by the loss of these customers and asks the Commission to restrain ICS from providing this service without authority.

ICS denies the essential allegations of the complaint and for affirmative defenses alleges that:

1. The complaint fails to state a cause of action.

2. MRSV has never protested ICS's applications and advice letter filings with the Commission and the Federal Communications Commission (FCC) for its Saddle Peak and Oat Mountain transmitters and related service area contours.
3. MRSV has substantially expanded its facilities and service area to include portions of the authorized service areas of competing RTUs, including ICS, through advice letter filings and applications with the Commission and to FCC either without protest or withdrawal of protest by ICS.
4. MRSV has refused to enter into a reasonable intercarrier agreement with ICS where tone-only paging traffic could be suitably interchanged to meet the public convenience and necessity.
5. The MRSV complaint was filed in furtherance of an anticompetitive and monopolistic plan.

ICS asks that the complaint be dismissed.

ICS' A.60574 (May 19, 1981)

In addition to its paging service to the counties and areas described above ICS also provides two-way mobile telephone services on frequencies 454.125 MHz, 454.150 MHz, 454.200 MHz, and 454.300 MHz in that territory. By its A.60574, ICS seeks authority to construct and operate facilities on Red Mountain, 6 miles west of Ventura, to provide a four-channel automatic two-way mobile service in Ventura County. The proposed service would provide both local automatic mobile telephone service in Ventura County and roamer or transient service through arrangements with wireline carriers, other RTUs, and other mobile systems of ICS.

ICS alleges that the mobile telephone needs of local business, commercial, and professional enterprises, and people in Ventura County are not being met by the wireline carriers or by MRSV. ICS states that it has not sought to negotiate an intercarrier agreement with MRSV because:

1. MRSV does not provide automatic two-way mobile telephone service in Ventura County; and
2. ICS was unable after almost four years of fruitless negotiations to reach a reasonable intercarrier agreement with MRSV for wide-area tone-only paging service on frequency 158.70 MHz in Ventura County.

ICS' C.11030 (September 11, 1981)

ICS alleges that since 1976 or 1977 MRSV has been furnishing two-way mobile and one-way paging service to areas in Ventura and Los Angeles Counties well beyond its authorized service area without prior certification by the Commission. ICS contends that this expansion violates PU Code § 1001 and Rule 18(o) of the Rules of Practice and Procedure. ICS states that MRSV's unauthorized and illegally expanded service area is in excess of 30% of MRSV's authorized service area, encompasses such major communities as Simi Valley and Westlake Village, and overlaps the service areas of other utilities, including ICS and the wireline carrier, General Telephone Company of California (General). ICS asks that the Commission restrain MRSV from providing service to the illegally expanded service territory.

Because the ICS complaint in C.11030 was filed only a short time before hearings began on September 28, 1981, counsel for MRSV asked to be excused from filing a written answer to the complaint. This request was granted and counsel for MRSV generally denied the allegations of the complaint by a statement on the record. (Tr. 1:1.)

Protests

MRSV, Radio Relay Corp.-California (Radio Relay), Sylvan Malis, dba Coast Mobilephone Service, and General filed protests to ICS' A.60194. Radio Relay, Malis, and General eventually withdrew their protests and did not participate in the hearings. MRSV alleges as grounds for its protest that:

1. ICS has not alleged facts showing that the public convenience and necessity require the proposed construction or expansion.
2. A grant of this application will result in a wasteful duplication of facilities.
3. ICS has made no serious attempt to reach an intercarrier agreement with MRSV.
4. A grant of the application would strengthen ICS' dominant market position which has already reached a point that constitutes monopolization in violation of anti-trust laws.
5. ICS' illegal operations show that it is unfit to obtain further certification.

MRSV also filed a protest to ICS' A.60574 in which it incorporates by reference the allegations of its protest in A.60194. It further alleges that it provides two-way mobile telephone service on frequencies 152.12, 152.21, and 454.325 MHz throughout the area ICS proposes to serve and has on file with the FCC an application to provide such service on frequency 152.09 MHz. If this application is granted, MRSV's capacity will increase by 100 mobile telephone units. MRSV's mobile service is now manually controlled but will be converted to automatic operation in the future.

MRSV's customers, according to the protest, enjoy wide-area service through transient arrangements between MRSV and other RTUs, including ICS. This is no different from the service ICS proposes. MRSV's service is adequate and ICS makes no contrary allegation as required by Rule 18(o).

MRSV asks that A.60574 either be dismissed or set for hearing to determine whether public convenience and necessity require the proposed extension.

Proceedings

A prehearing conference was held on July 22, 1981, and hearings were held September 28 and 29, 1981, in Los Angeles, and September 30 and October 1, 1981, in San Francisco before Administrative Law Judge Robert T. Baer. The proceeding was submitted February 22, 1982, upon the filing of concurrent opening and closing briefs.

Governing Rules

An application of an RTU to expand its service territory is governed by Rule 18(o)² of the Rules of Practice and Procedure as set forth in Appendix A. Complaints by and against RTUs are governed by Rule 10.1 of those rules, as set forth in Appendix B.

Background

On September 1, 1960, the Commission issued its order of investigation in C.6945 to determine if RTUs then licensed under Part 22 of the FCC rules are public utilities. The Commission on June 20, 1961, in D.62156 (the Grandfather Decision) held that the named respondents³ were public utilities and ordered them to file tariffs, and set out guidance on the subject of service area maps.

D.62156 provided further guidance in Appendix B for RTU's filing service area maps.

The Commission also ordered that: (1) no RTU shall expand its operations to include any territory not theretofore served by it except in accordance with PU Code § 1001; and (2) except where exempted by PU Code § 1001, no RTU shall begin the construction of a

² Rule 18(o) is currently the subject of an Order Instituting Investigation to determine whether revisions are required.

³ ICS and MRSV are listed as respondents in Appendix A of D.62156.

plant, or system, or any extension thereof without first obtaining from the Commission a certificate that the present or future public convenience and necessity require or will require such construction, nor shall any RTU offer its service to the public without authorization of the Commission.

On July 12, 1976, ICS filed advice letter 76 to establish an omnidirectional pattern at its Saddle Peak transmitter site in lieu of the existing unidirectional pattern. ICS stated that the new pattern would improve service in the Thousand Oaks, Newbury Park, Westlake Village, and Agoura areas; that the change of pattern would slightly enlarge the service area of ICS (by 2.81%); and that the change would provide service to those persons not otherwise served by any communications common carrier. ICS also stated that it sent copies of Advice Letter 76 to parties named in its letter to the Commission dated May 2, 1974. (Exhibit 1-M.) That letter lists MRSV at 709 Bank of America Building, San Diego.

R. L. Mohr, dba RadioCall Corporation (Mohr), protested the advice letter.

By letter of August 6, 1976, the staff rejected advice letter 76 because:

"The proposed change in service area is considered to be a substantial expansion into territory that Industrial is not now authorized, by this Commission to serve. Such expansion will extend into territory now served by two other utilities and is not of minor importance or temporary in nature. Request for such authorization should be made by formal application, in accordance with the Commission's Rules of Practice and Procedure."

Meanwhile on August 25, 1976, MRSV filed A.56710 to expand its service area by constructing paging and mobile telephone transmitters on South Mountain and Red Mountain. Together, these new

transmitters would have expanded MRSV's service area beyond Carpinteria to Santa Barbara, and beyond Thousand Oaks to Newhall. MRSV mailed a copy of its application to ICS and to other RTUs with which its proposed service was likely to compete.

General and Coast Mobilephone Service filed protests to the application. ICS sent a letter of protest dated September 14, 1976; and Mobilfone, Inc. (Mobilfone) sent a letter of protest dated October 13, 1976.

Further proceedings in A.56710, and other RTU matters, were held in abeyance pending the outcome of C.10210. Ultimately, by letter dated October 4, 1978, MRSV requested that its application be dismissed without prejudice. In D.89659 (November 9, 1978) the Commission dismissed the application.

In response to the staff letter of August 6, 1976, and perhaps to the filing of MRSV's A.56710 on August 25, 1976, ICS filed A.56736 on September 8, 1976, seeking authority to provide tone-only paging service in the Thousand Oaks, Newbury Park, Westlake Village, and Agoura areas of Ventura and Los Angeles Counties. In its application ICS acknowledges that those areas "are not currently within the authorized service area of applicant" and states that the "additional land area outside the presently authorized service area of applicant proposed to be served comprises slightly over 330 square miles,...an increase of approximately 2.8% in applicant's authorized service area."⁴ ICS would expand by changing its Saddle Peak transmitter antenna pattern from unidirectional to omnidirectional at slight cost and no increase in power. ICS listed MRSV at 2365 East Main Street, Ventura, as among those "with which the proposed facilities may compete" and upon which it served a copy of the application.

⁴ If 330 square miles is 2.8% of ICS' authorized service area, then that area is 11,786 square miles ($.028X = 330$). MRSV's witness testified that ICS' service area as shown on its sheet 362-T is about 16,980 square miles.

Mohr and Mobilfone filed protests to the application.

By letter of November 28, 1978, ICS requested that A.56736 be dismissed without prejudice. The letter stated that the request for dismissal was prompted by dismissal of MRSV's A.56710, also at the applicant's (MRSV's) request, and by D.88513 in C.10210. In D.89846 (January 4, 1979) the Commission dismissed the application.

On November 23, 1976, the Commission issued an order instituting investigation (OII) in C.10210 to determine if it should end its regulation of RTUs. In D.88513 dated February 22, 1978⁵ (83 CPUC 461) the Commission: (1) concluded that the PU Code required it to regulate RTUs; (2) ordered all RTUs and wireline telephone utilities to file a service area map drawn in conformity with FCC Rule 21.504 (the Carey Report) to reflect their authorized power and antennae characteristics as of November 23, 1976; and (3) enacted Rules 10.1 and 18(o) of the Rules of Practice and Procedure.

ICS was a party to C.10210. MRSV was not, but Mobile Radio System of San Jose, Inc. appeared by Avery E. Simon, MRSV's owner. While both MRSV's A.56710 and ICS' A.56736 were on file but held in abeyance pending the outcome of C.10210, ICS filed with the FCC on December 7, 1976, an application to modify its antenna system and power at Saddle Peak. That application stated that the construction of the omnidirectional Saddle Peak transmitter was completed December 1, 1976, and was ready for operation.

⁵ Petitions for rehearing of D.88513 were denied June 27, 1978, by D.89045. Petition for writ of review by Airsignal of California, Inc. was denied December 20, 1978, in SF 23886.

On October 24, 1977, ICS filed another application with the FCC requesting authority to construct facilities on Oat Mountain to transmit paging signals on frequency 158.7 MHz. ICS application to the FCC dated August 12, 1978, states that construction of the Oat Mountain facility was completed August 12, 1978, and is ready for operation.

Concurrently with its request for dismissal of A.56736 on November 28, 1978, ICS filed with the Commission on November 27, 1978, in advice letter 86 a service area map (Sheet 352-T) showing its service contour as predicted by Part 21.504 of the FCC rules. The contours encompass Santa Paula, Fillmore, Thousand Oaks, and Simi Valley and extend northwest to the outskirts of Oxnard.

On July 23, 1979, ICS filed with the Commission in Advice Letter 89 a service area map (Sheet 359-T) showing its combined reliable service contours. Sheet 359-T identifies Saddle Peak, Oat Mountain, and Verdugo as transmitter locations within its northwesterly contour. That contour encompasses approximately the same areas as were named for Sheet 352-T, which it replaces.

On September 7, 1980, ICS filed with the Commission in Advice Letter 90 a service area map (Sheet 362-T). The northwesterly contour is virtually identical to that indicated on Sheet 359-T, which it replaces.

Discussion-Complaints

MRSV's complaint in C.10964 provides a convenient starting point since the resolution of the factual and legal issues in that proceeding will resolve many of the issues raised by the other pleadings. The thrust of MRSV's complaint is that ICS has encroached on MRSV's service area. To decide whether that claim is true we must first determine the extent of MRSV's service area.

MRSV's Service Area

MRSV's expert witness prepared the service area map which MRSV filed in compliance with D.88513. That decision required RTU's to file by November 5, 1978, their service area maps, drawn in conformity with FCC Rule 21.504 (the Carey Report) and reflecting their authorized power and antenna characteristics as of November 23, 1976, the date the OII was issued in C.10210. Although MRSV's service area map (Sheet 50-T) is dated May 1978, it was not filed until December 17, 1979. The same⁶ map was again filed October 6, 1980 (Sheet 105-T) and is the map now in effect (Exh. 7, Fig. 1; Exh. 5, App.B; Exh. 3A). The map shows the service areas of MRSV's base stations on Willis Canyon Peak as of November 23, 1976, in conformance with § 21.504 of the FCC rules. The 37 dBu contour for frequency 152.21 MHz encompasses Fillmore, Moorpark, Newbury Park, and Thousand Oaks.

Sheet 39-T, the former service area map, was filed September 7, 1976. Its 37 dBu contour for frequency 152.21 MHz encompasses approximately the same areas as the corresponding contours on Sheets 50-T and 105-T. Sheet 5-T, filed March 15, 1962, contains no map, but merely states that none is available.

Supplementing the service area maps as evidence of its service area is MRSV's preliminary statement. The original preliminary statement, Sheet 3-T, filed March 15, 1962, described MRSV's service area as "...the entire area within the service area of the land radiotelephone station at Ventura, California." That sheet was superseded by Sheet 17-T, filed November 3, 1965, which designated Ventura County as the service area. Sheet 38-T, filed

⁶ The transmitter sites at Red and South Mountains appear on Sheet 105-T but not on Sheet 50-T; however, the contours are the same.

September 7, 1976, designated the "areas surrounding the Cities of Ventura, Oxnard, Carpinteria, Santa Paula, Ojai, Fillmore, and Thousand Oaks, California" as the territory served by MRSV. Sheet 41-T, filed August 11, 1977, continued the description used in Sheet 38-T. The preliminary statement now in effect (Sheet 103-T, filed October 6, 1980) adds Westlake Village, Simi Valley, and Moorpark to the description used in Sheets 38-T and 41-T. Sheet 103-T also adds the Red Mountain and South Mountain locations to the Preliminary Statement, Item F, Base Station locations.

Since November 23, 1976, MRSV has constructed and operated additional base stations, both two-way mobile and one-way paging, at Red Mountain to the west and South Mountain to the east of the original Willis Canyon Peak site. The one-way paging signal contours of the Red and South Mountain stations lie wholly within the contour shown on MRSV's service area map (Sheet 105-T) except for a minor extension to the northeast of Fillmore. The extension of the contour of the two-way station beyond MRSV's filed service area contour is due primarily to the 454.375 MHz base station at South Mountain. According to MRSV's expert witness, the greater amount of the additional area covered by that station is uninhabited and all but roadless. However, on cross-examination the witness admitted that the contour "apparently cuts through approximately half of Simi Valley" and that he did not consider Simi Valley to be largely uninhabited. (Tr. 3:225-226.)

MRSV obtained staff approval for the construction and operation of the stations on Red and South Mountains by correspondence. In letters written during 1977, the staff stated that in its opinion the new base stations involved either no expansion or only minor expansion of MRSV's service area and did not require certification under PU Code § 1001. (Exh. 7, Figures 6, 8, and 10.)

Through its general manager MRSV admitted that the Carey Report contours of its existing transmitters extend beyond the contour shown on its Sheet 105-T. These extended contours emanate

from "fill-in transmitters...installed on Red Mountain and South Mountain which were designed to cover shadow areas where the signal from our original Willis Peak transmitter was weak." (Exh. 5, pp.18-19.) The witness stated that it was not MRSV's intention in extending its contours from the Red and South Mountain transmitters to increase its customer base by expanding into the service area of any adjacent RTU. The witness described the area of expansion - excepting Simi Valley - as rugged and almost totally uninhabited mountains, much of it designated as wildlife refuge. He testified that the contour of frequency 454.325 MHz from South Mountain extends about 3-1/2 miles beyond MRSV's tariff contour and embraces about 1/2 of the populated area of Simi Valley, a bedroom community for workers in the San Fernando Valley. He stated that MRSV does not have a single customer there, that bedroom communities are not generally good markets for mobile radio services, and that coverage of 1/2 of the town on only one two-way channel (454.325 MHz) does not give MRSV much service to market. When asked why he did not file a map reflecting the extended contour from Red and South Mountains, the witness replied:

1. He was not sure whether the letters simply authorized construction of facilities or whether they also authorized MRSV to file a new map.
2. It is difficult to engineer the signal strength contours from one site to stay within the contours from another site.
3. Since the extensions were inconsequential, he did not think it was necessary to file a new map.

Replying to ICS's complaint in C.11030 that MRSV has extended its service area without authority, the witness stated that if the Commission should decide that MRSV's extension into 1/2 of Simi Valley requires further certification, MRSV will gladly redesign the one two-way transmitter (454.325 MHz) from which the contour

extends into Simi Valley so that the contour will fall within the limits of MRSV's tariff map, Sheet 105-T. This, he asserted, can be easily and inexpensively done by simply adjusting or replacing the antenna. The other extensions from Red and South Mountain transmitters fall entirely in wilderness areas and, for the most part, do not overlap ICS's service area. On this point, at least, MRSV and ICS agree; for ICS' expert witness testified that the contour on MRSV's Sheet 105-T does not include Simi Valley.

We believe that MRSV should file a new service area map showing contours as expanded by its transmitters on Red Mountain and South Mountain. To the extent that MRSV's two-way transmitter (454.325 MHz) has intruded into Simi Valley, its radiation characteristics should be adjusted, as MRSV suggests, so that its Carey Report Contour falls within or near the limits of the contour on Sheet 105-T. We understand that perfect exactitude in such adjustments is not possible, but we expect that when the 454.325 MHz facility is adjusted its contour will not intrude into the populated area of Simi Valley. In reaching this conclusion we rely on Rule 10.1 and find under that rule that MRSV's 454.325 MHz transmitter on South Mountain "provide[s] substantial coverage of [an] additional major communit[y]," i.e. Simi Valley. Therefore, the expansion is not minor.

ICS' Service Area

We next turn to the evidence of ICS' service area. Some of that evidence has been described above. As relevant to the dispute between ICS and MRSV, ICS' actions regarding its service area and other material facts may be summarized chronologically, as follows:

<u>Date</u>	
7/12/76	ICS filed advice letter 76 re omnidirectional pattern at Saddle Peak.
8/6/76	Staff rejects Advice Letter 76 because expansion will overlap two other RTUs.
8/25/76	MRSV files A.56710 to construct Red and South Mountain transmitters.

9/8/76 ICS files A.56736 to provide paging service to Thousand Oaks, Newbury Park, West Lake Village, and Agoura areas by changing Saddle Peak transmitter to omnidirectional pattern.

9/14/76 ICS protests MRSV's A.56710.

11/23/76 Commission issues OII in C.10210. A.56710, A.56736, and other RTU matters held in abeyance pending decision in C.10210.

12/7/76 ICS files application at FCC to modify Saddle Peak transmitter. Application states construction of omnidirectional Saddle Peak transmitter completed 12/1/76.

10/24/77 ICS files FCC application to construct Oat Mt. paging transmitter (158.7 MHz).

2/22/78 D.88513 issued in C.10210 orders RTUs to file service area maps showing Carey Report contours as of 11/23/76 within 180 days of effective date.

3/10/78 Radio Relay files application for rehearing of D.88513. D.88513 suspended by operation of law. (See PU Code § 1733(a).)

5/9/78 Suspension of D.88513 lapses and D.88513 becomes effective. (See PU Code § 1733(a).)

6/27/78 Petition for rehearing of D.88513 denied by D.89045.

8/12/78 ICS' application to FCC states that Oat Mt. facility completed 8/12/78 and is ready for operation.

10/4/78 MRSV requests that A.56710 be dismissed.

11/5/78 Service area maps to be filed by this date under D.88513 (180 days from effective date).

11/9/78 MRSV's A.56710 dismissed by D.89659.

11/27/78 ICS files Advice Letter 86 (service area map, Sheet 352-T).

11/28/78 ICS requests that A.56736 be dismissed.

12/20/78 Petition for writ of review re D.88513 denied.

1/4/79 D.89846 dismisses ICS' A.56736.

7/23/79 ICS files Advice Letter 89 (service area map, Sheet 359-T.)

9/7/80 ICS files advice letter 90 (service area map, Sheet 362-T.)

As indicated in the above summary, ICS filed Advice Letter 86 on November 27, 1978. The Advice Letter (Exhibit 1-S) states that its purpose is "to comply with Ordering Paragraph 1, Decision 88513 dated February 22, 1978, Case No. 10210." But does it comply with D.88513? We already know that it was filed late; for, rather than filing it within 180 days of the effective date of D.88513 or by November 5, 1978, ICS filed it on November 27, 1978. This was no doubt an oversight, since the filing was made within 180 days after the applications for rehearing were denied. However, does Sheet 352-T, filed with Advice Letter 86, represent the Carey Report contours of ICS as of November 23, 1976, as D.88513 requires? Neither advice letter 86 nor Sheet 352-T answers this question. Sheet 352-T states only that it represents the "SERVICE CONTOUR as predicted by Part 21.504 of FCC Rules and Regulations". But it does not state that the contour is as of a certain date, nor does it reveal what transmitters were used to construct the contours.

Since the omnidirectional antenna on Saddle Peak was not complete until December 1, 1976, it would not have been proper for ICS to use the contours produced by it to construct a composite contour for the northwestern part of its service area. And thus ICS's Sheet 352-T - which should represent the power and characteristics of ICS antennas as of November 23, 1976 - should not reflect the omnidirectional characteristic of the Saddle Peak transmitting antenna.

Other evidence suggests that ICS' service area had never, before November 23, 1976, included any part of Ventura County. ICS' preliminary statement (Sheet 331-T, filed November 1978, and effective January 5, 1979) states in Section A:

"Territory served by the company:
Metropolitan Los Angeles including major
portions of Orange County, San Bernardino
County, Riverside County, San Diego County
and Los Angeles County."

Neither this statement nor any previous preliminary statement claims Ventura County as part of ICS' service territory.

On September 8, 1976, ICS filed A.56736 seeking authority to provide tone-only paging service in the Thousand Oaks, Newbury Park, Westlake Village, and Agoura areas of Ventura and Los Angeles counties. In its application, ICS states that those areas "are not currently within the authorized service area of applicant" and further states that the "additional land area outside the presently authorized service area of applicant proposed to be served comprises slightly over 330 square miles, ... an increase of approximately 2.8% in applicant's authorized service area." ICS proposed to expand its service area by changing its Saddle Peak transmitter antenna from a unidirectional to an omnidirectional pattern.

Thus, it is clear that as of September 8, 1976, ICS did not claim as part of its service area the Thousand Oaks, Newbury Park, Westlake Village, and Agoura areas of Ventura and Los Angeles Counties, nor did its transmitters then in operation allow it to provide service to those areas. No action of ICS or other event of which we are aware intervened between September 8, 1976, and November 23, 1976, which would have given ICS a colorable claim to the territories sought in A.56736.

On October 24, 1977, ICS filed an application with the FCC requesting authority to construct facilities on Oat Mountain to transmit paging signals on frequency 158.7 MHz. ICS' application to the FCC dated August 12, 1978, states that the construction of the Oat Mountain facility was completed August 12, 1978, and is ready for operation.

ICS first claimed Oat Mountain as a transmitter location on November 1, 1978, when it filed Sheet 333-T, adding to § G of its preliminary statement, location 8 (Oat Mountain), transmitting on frequency 158.7 MHz.

Obviously, the Oat Mountain transmitter was not part of ICS' operation on November 23, 1976, and should not have been reflected in its service area maps filed in 1978 under D.88513.

MRSV's expert witness testified that MRSV's service area (as depicted on Sheet 105-T) encompasses 843.9 square miles and that ICS' Saddle Peak and Oat Mountain stations have intruded a total of 432.9 square miles (or 51.3%) into MRSV's service area. (Exh. 7, p. 3 and Fig. 2.)

MRSV's general manager, Michael Taylor, testified that after seeing their ads in the yellow pages, he visited the business offices of Executive Page, Telpage, Inc., in Thousand Oaks, and A-Accurate Answering Service with offices in Thousand Oaks, Westlake, and Oxnard. He posed as a prospective paging customer and found that each company was marketing the paging service provided by ICS. The Executive Page salesperson stated that he would deliver a pager to Taylor anywhere in Ventura County, including the city of Ventura, and that the signal would be adequate. Information obtained by Taylor from the other companies was similar. Taylor then measured the strength of ICS' 158.70 signal in the City of Ventura and found that it was 14 times stronger than was needed to activate a tone-only pager. He also determined that the signal was coming primarily from the Saddle Peak transmitter.

ICS is obviously providing service in MRSV's service area without our authority and on the strength of its service area map filings only. It follows inexorably that to the extent that ICS' Sheet 352-T (filed November 27, 1978, to comply with D.88513) claims the areas sought by ICS in A.56736 or the areas encompassed by the Oat Mountain facility, it is in error. ICS has not established in this record any right to those areas as of November 23, 1976. Since Sheet 359-T (the service area map that cancels Sheet 352-T) and Sheet 362-T (the service area map that cancels Sheet 359-T) partake of the same error they cannot give to ICS any color of right to the disputed area.

Since the construction of the omnidirectional Saddle Peak antenna and the Oat Mountain facility extended ICS' signal into the certificated area of MRSV, those expansions should have been accomplished by formal application under Rule 18(o). ICS did not adopt this procedure but instead filed service area maps. ICS cannot equitably be allowed to expand its service area in this manner. These major expansions, involving in each case more than 10% of MRSV service area, cannot be allowed to stand. We will require ICS to file a new service area map indicating the contours of its transmitters as of November 23, 1976. From the evidence received in this record it appears that ICS' contour should approximate the contour shown on Exhibit 7-A, a map prepared by MRSV's expert witness. That map shows that ICS' two-way contours from its station KMD 990 on Verdugo Peak falls just east of the city of Thousand Oaks but includes Simi Valley. The ICS contour only very slightly overlaps MRSV's contour as depicted on Sheet 105-T. MRSV's witness testified that ICS also has a one-way signaling station on Verdugo Peak on frequency 158.70 MHz and that the signaling contour would approximate the shape of the two-way contour but fall well within it. We conclude, therefore, that the maximum extent of ICS' Verdugo Peak contour in the direction of MRSV's service area should be represented by the KMD 990, two-way contour.

Having determined and adjusted both MRSV's and ICS' authorized service areas, we have decided the main issues in C.10964 and C.11030 and may now move to determine the issues raised by ICS' A.60194 and A.60574.

Discussion - Applications

In A.60194 ICS seeks authority to construct a paging transmitter on Red Mountain six miles west of Ventura. The proposed transmitter, together with ICS' existing Saddle Peak and Oat Mountain transmitters, would overlap 84.9% of MRSV's service area.

Upon careful review we find the surveys are inconclusive in establishing the need for the proposed service. In particular we note that some of the surveys were poorly worded and thus produced ambiguous results. Other surveys gave incomplete information to potential customers. We therefore place no reliance on the survey evidence in making a finding of public need.

Public Witness Testimony for ICS

ICS called Dennis Scully, an officer of Executive Page Limited (EPL), to testify about MRSV's service and the needs of the public. EPL is a subcontractor of ICS. EPL owns and leases paging units to its customers. ICS provides the signaling service, for which EPL pays ICS \$4 per pager per month. EPL in turn bills its customers \$23 per month for a single pager. EPL has 1,700 pagers in service and 500 customers. EPL does not have exclusive rights to the territory it serves. ICS can and does solicit customers in EPL's service area.

Scully was asked if he believed that there is a need for ICS tone only paging service in Ventura County. He responded: "Undoubtedly". When asked for his reasons, he replied:

"We, for the last year have asked our customers if they would like such [service], or if they could use such additional service, and invariably they would answer affirmatively." (Tr. 2:105.)

Scully described a survey made of his 500 customers on behalf of ICS. He testified first that 16 customers responded and then that 60 customers responded. He reported the results to ICS, but was not able to say whether the data were used in other evidence sponsored by ICS or not. The survey cards were never offered in evidence.

ICS also called Lori Peterson, a sales representative of Page Alert Communications Enterprises (Page Alert). Page Alert operates in the same fashion as EPL, except that it services more pagers (3,500) over a wider area from several offices. Peterson's office is in Thousand Oaks and she had been engaged in the business of selling and servicing pagers for only 9 months at the time she testified.

She testified that some of her customers are also customers of MRSV because they have trouble getting reception from ICS in Oxnard.

Conceding that her experience "might be somewhat limited", the ICS attorney nevertheless asked her whether she felt there is a need for ICS service in the heart of Ventura County, to which she replied "definitely". She also thought that such service would be of benefit to the public. This opinion seems to be based upon the fact that two of Page Alert's pagers were recently turned in when the customer could not get reception in Ventura County.

ICS also called Vincent Granatelli, who builds racing cars and is associated with Tuneup Masters, a chain of automotive tuneup centers, principally in the Los Angeles. He also has an outlet in Oxnard. He is a subscriber of ICS' mobile telephone service, which he uses in Los Angeles County. He would like to use his mobile telephone in Ventura County. When asked whether there would be a benefit to the public to have two competitive RTU's in Ventura County, he replied "I don't see anything wrong with that". On cross-examination Granatelli revealed that he did not know that the ICS service he would be receiving in Ventura County would be transient or roamer service. However, he indicated that he wanted to receive a single bill for his mobile service and to be able to have automatic dialing through improved mobile telephone service (IMTS). ICS service would provide both of these attributes.

ICS called Floyd Welles, a vice president of C W Communications, which operates out of a Burbank office and has about 1,000 pagers in service in the San Fernando Valley, Los Angeles, Burbank, Glendale, and Pasadena. He has a number of customers in the west end of Simi Valley and in Thousand Oaks.

Welles believes that ICS' proposed paging service would be beneficial to the public. He has had numerous requests in the last 5 years from existing paging customers expressing an interest in the Ventura area and even as far north as Santa Barbara. He believes a competitive service in that area would be in the public interest.

ICS next called Clement J. Stadler, a vice president and district manager for Armored Transport, Inc. That company operates two businesses out of Ventura: (1) an armored car business, and (2) a courier business. Stadler's district includes Santa Ana, Pomona, San Bernardino, Palm Springs, and Barstow. In some areas Armored Transport has its own radio service, while in other areas it subscribes to ICS' service. It has 4 of ICS' mobile units installed, some of which are manual and some automatic. Stadler has had a personal mobile unit from ICS for 10 to 12 years and has been very satisfied.

In Ventura his company has 18 mobile units installed by MRSV. He considers MRSV's service to be crowded and stated that his manager reported to him delays of 10 to 15 minutes to secure a MRSV channel. He thinks additional facilities would be desirable and that competition would be healthy.

In addition to the public witnesses who testified, ICS offered into evidence a list of 9 other witnesses, who, had they been called, would have testified in the same vein as those who did testify. MRSV stipulated that the list could be received into evidence (Exh. 6) as if the 9 witnesses had been called and examined.

New Rule 18(o)

This proceeding was tried under our Rule of Practice and Procedure as they existed before August 17, 1983. On that date the Commission issued D.83-08-059 in OII 83-03-01 et al., which cancelled old Rule 18(o) and adopted new Rule 18(o). New Rule 18(o) greatly liberalizes the rules for RTU certificate applications.

New Rule 18(o) places the burden on the protestant to show that granting the application "will so damage existing service or the particular marketplace as to deprive the public of adequate service." MRSV has alleged that its growth has been impaired, but there is no evidence that existing service or the particular marketplace has or will be damaged or that the public will be deprived of adequate service. Certainly, it cannot be shown that the service ICS would provide in Ventura County is inferior, since it is the same service ICS provides to thousands of customers in Southern California. ✓

As the following findings will show ICS has proved its case under new Rule 18(o). In addition, were we to deny the applications, ICS would most likely refile. Several months would be consumed before the protest period elapsed and a decision could be issued under new Rule 18(o). Thus, were we to deny the applications, as the ALJ proposed, the mostly likely product would be several months delay for ICS. We prefer that these proceedings not be protracted needlessly. Therefore, we conclude that the applications of ICS should be granted.

Findings of Fact

1. MRSV's presently authorized service area is as represented on Sheet 105-T.

2. The addition of transmitters on Red and South Mountains has extended the effective reach of MRSV's signals beyond the area represented by the contour on Sheet 105-T.

3. The 454.325 MHz transmitter on South Mountain extends MRSV's radiation contour beyond the area represented by the contour on Sheet 105-T and into Simi Valley.

4. Simi Valley is not within the presently authorized service area of MRSV.

5. Before November 23, 1976, ICS' service area did not include any part of Ventura County.

6. Service area maps filed by ICS after November 23, 1976, showed its service area as it was expanded by the Saddle Peak and Oat Mountain facilities, which were in operation after that date.

7. ICS' signal and service area as shown on its latest service area maps intrudes into MRSV's authorized service area.

8. ICS' survey evidence of public need for its services in Ventura County was equivocal and unconvincing.

9. Since these proceedings were tried, we have revised Rule 18(o) to liberalize entry into markets by competing RTUs. ✓

10. Granting these applications now will avoid needless delay in processing ICS' applications for entry into the Ventura County market.

11. The public needs and demands the service, as evidenced by ICS' public witness testimony.

12. The proposed system expansions are technically feasible and ICS has the technical competence to provide the proposed service.

13. ICS has the financial resources to support the proposed service.

14. The low incremental cost of expanding its system into Ventura County will insure its economic feasibility for ICS.

15. Neither MRSV's protests nor its evidence is sufficient under new Rule 18(o)(3) to require denying the applications.

16. In D.83-08-059, we ordered:

"An application listed in the heading of this decision which, after 45 days from the date of the decision, does not contain a copy of the relevant Federal Communications Commission permit will not be further proposed unless and until the time the application is amended to show a copy of such permit, provided that applicant shall have until April 30, 1984, within which to acquire such permit and amend its application. Upon obtaining the Federal Communications Commission permit, applicant shall file a copy of it with its application for amendment within 30 days of its receipt. In the event that neither of the time limits prescribed in this ordering paragraph are met, the application will be dismissed."

Conclusions of Law

1. Simi Valley is an additional major community for the purposes of Rule 10.1, in respect to MRSV.
2. MRSV should modify its transmitting facilities on frequency 454.325 MHz so that the radiation contour falls within or near the limits of the contour on Sheet 105-T and does not intrude into the populated area of Simi Valley.
3. MRSV should file a new service area map showing a service area contour revised to show the effects of the new transmitters on Red and South Mountains and of the 454.325 MHz transmitter adjusted to exclude Simi Valley.

4. MRSV should file a new Preliminary Statement replacing Sheet 103-T and deleting any reference to Simi Valley as being within the territory served.

5. ICS did not comply with Rule 18(o) in expanding its service area by operating its Saddle Peak and Oat Mountain facilities.

6. ICS should file a new service area map showing the contours of its transmitters as of November 23, 1976.

7. The maximum extent of ICS' Verdugo Peak contour in the direction of MRSV's service area should be represented by the KMD 990, two-way contour.

8. The applications of ICS should be granted subject to the conditions set forth in the following order, which are similar to the requirements imposed in D.83-08-059. (See Finding 16 above.)

9. The relief sought in the complaints in C.10964 and C.11030 should be granted to the extent set forth in the following order.

O R D E R

IT IS ORDERED that:

1. Within 30 days Industrial Communications Systems, Inc. (ICS) shall apply for any FCC approval required to modify its transmitting facilities so that its signals do not intrude upon Mobile Radio System of Ventura, Inc.'s (MRSV) service area. Following receipt of any necessary authorization, ICS shall promptly implement these modifications and shall report the completion thereof to the Commission. Service area contour maps showing all changes shall be filed.

2. ICS shall neither provide service through subcontractors, nor market its service, within MRSV's service area until all appropriate FCC approvals have been secured.

3. Within 30 days ICS shall file a new service area map showing its contour as of November 23, 1976. Such contour shall not include the influence of the transmitters operated after that date.

4. Within 30 days MRSV shall apply for any FCC approval required to modify its transmitting facilities so that its signal does not intrude upon ICS's service area in Simi Valley. Following receipt of any necessary authorization, MRSV shall promptly implement these modifications and shall report the completion thereof to the Commission. Service area contour maps showing all changes shall be filed.

5. Within 30 days MRSV shall file a new Preliminary Statement omitting reference to Simi Valley. ✓

6. This order is without prejudice to minor service area contour modifications filed by MRSV in accordance with Rule 18(o)(2)(iii) subsequent to February 22, 1982.

7. The applications of ICS are granted, provided that ICS shall neither construct nor operate its proposed Red Mountain transmitters until it has obtained before April 30, 1984, the relevant FCC permits, and has filed a copy of its permits with the Commission within 30 days after it receives them. ✓

8. If either of the time limits prescribed in Ordering Paragraph 7 are not met, the authority granted shall lapse and the applications may be dismissed without prejudice by order of the Executive Director.

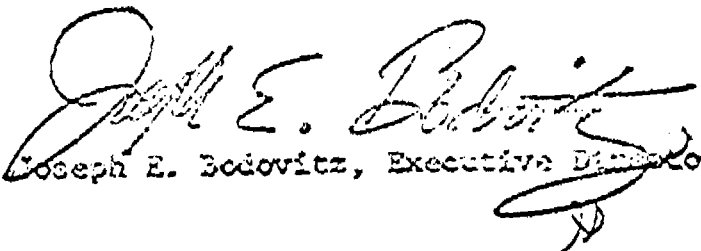
9. The relief requested in C.10964 and C.11030 is granted to the extent set forth in Ordering Paragraphs 1 through 5.

This order becomes effective 30 days from today.

Dated OCT 5 1983, at San Francisco, California.

LEONARD M. GRIMES, JR.
President
VICTOR CALVO
FRISCILLA C. CREW
DONALD VIAL
WILLIAM T. BAGLEY
Commissioners

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


Joseph E. Bodovitz, Executive Director

APPENDIX A
Page 1

"18. (Rule 18) Construction or Extension.
(...[T]elephone [or] telegraph...
utility.) This rule applies to
application...by an existing public
utility to begin construction of an
extension of such a character as to
require certification under Section
1001 of the Public Utilities Code...
[S]uch applications shall contain the
following data....:"

* * *

"(o) In the case of radiotelephone
utility, proposing to expand its
existing facilities add new
facilities or file to serve
additional territory:

"(1) When a radiotelephone utility
applies to the FCC for a
construction permit or change
in its base station
transmitters, antennae or
frequencies, it shall at the
same time submit all
necessary engineering data to
this Commission and obtain a
staff letter of approval
thereof. The effect of the
proposed new or changed
facilities on the utility's
existing service area and
that of adjacent RTUs will be
shown on an engineered
service area contour map.

"(2) When the proposed expansion
by the radiotelephone utility
extends into the certified
area of another
radiotelephone utility and is
contested by the latter, the
applicant shall show:

APPENDIX A
Page 2

- "(i) That the present service is unsatisfactory and the proposed operation will be technically and economically feasible, adequate and of good quality.
- "(ii) A statement that the radiotelephone utility attempted to reach an intercarrier agreement whereby traffic can be suitably interchanged to meet the public convenience and necessity. If agreement cannot be reached, both the applying radiotelephone utility and the complainant radiotelephone utility are hereby duly notified that this Commission, after hearing, may issue a mandatory intercarrier agreement or other suitable instrument pursuant to parts 766 and 767 of the Public Utilities Code as this Commission deems necessary to meet the public convenience and necessity.
- "(iii) Minor extensions of service area are excluded from these requirements where the overlap does not exceed 10% of either utility's service area and where the extension does not provide substantial coverage of additional major communities."

(END OF APPENDIX A)

APPENDIX B

"10.1 (Rule 10.1) Form and Contents of Complaint
(Radio/telephone Utilities).

"In addition, when both the complainant and defendant are radiotelephone utilities, and the complaint alleges unlawful or improper actions or intentions by the defendant, each and every allegation will be documented, and each utility involved will submit a current balance sheet together with an income and expense statement showing the nature and type of operating expenses for the past 12 months. If the matter has been referred to the staff, consideration will be given as to whether the complaint is anti-competitive in nature when both complainant and defendant serve an area common to each. Furthermore, the Commission will not entertain complaints of service area invasion where there are only minor overlaps of service area. Overlaps will be considered minor where the overlap does not exceed 10% of service area of either utility and does not provide substantial coverage of additional major communities."

(END OF APPENDIX B)

New Rule 18(o)

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13. ICS has the financial resources to support the proposed service.

14. The low incremental cost of expanding its system into Ventura County will insure its economic feasibility for ICS.

15. Neither MRSV's protests nor its evidence is sufficient under new Rule 18(o)(3) to require denying the applications.

2. ICS shall neither provide service through subcontractors, nor market its service, within MRSV's service area until all appropriate FCC approvals have been secured.

3. Within 30 days ICS shall file a new service area map showing its contour as of November 23, 1976. Such contour shall not include the influence of the transmitters operated after that date.

4. Within 30 days MRSV shall apply for any FCC approval required to modify its transmitting facilities so that its signal does not intrude upon ICS's service area in Simi Valley. Following receipt of any necessary authorization, MRSV shall promptly implement these modifications and shall report the completion thereof to the Commission. Service area contour maps showing all changes shall be filed.

5. Within 30 days MRSV shall file a new Preliminary Statement omitting reference to Simi Valley. *Km*

6. This order is without prejudice to minor service area contour modifications filed by MRSV in accordance with Rule 18(o)(2)(iii) subsequent to February 22, 1982. *Km*

7. The applications of ICS are granted, provided that ICS shall neither construct nor operate its proposed Red Mountain transmitters until it has obtained before April 30, 1984, the relevant FCC permits, and has filed a copy of its permits with the Commission within 30 days after it receives them.