Decision 83 12 060 DEC 20 1983

ORIGINAL

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application of COMMUNICATIONS INDUSTRIES, INC., a Texas corporation; INTRASTATE RADIO TELEPHONE, INC. OF SAN FRANCISCO, a California corporation; and DELTA MOBILE RADIO SERVICE, INC., pursuant to Public Utilities Code Section 854.	Application 83-05-03 (Filed May 2, 1983)

Dinkelspiel, Donovan & Reder, by David M. Wilson and Roni Crichton, Attorneys at Law, for Communications Industries, Inc., Intrastate Radio Telephone, Inc. of San Francisco, and Delta Mobile Radio Service, Inc., applicants.
Peter A. Casciato, Attorney at Law, for Beepercall; Hegarty, Pougiales, Loughran & Gulseth, by Thomas M. Loughran, Attorney at Law, for Page America Communications of California, Inc.; and Palmer & Willoughby, by Michael Willoughby, Attorney at Law, for MCI Airsignal of California, Inc.; protestants.
Sheldon Rosenthal and Patrick Gileau, Attorneys at Law, and Willard A. Dodge, Jr., for the Commission staff.

O P I N I O N

Application

Communications Industries, Inc. (CI), Intrastate Radio Telephone, Inc. of San Francisco (IRT), and Delta Mobile Radio Service, Inc. (Delta) seek authority under Public Utilities (PU) Code § 854 for CI to acquire IRT and Delta through the purchase of all their outstanding stock.

The Applicants

CI is a communications holding company operating through wholly owned subsidiaries. It conducts radio common carrier businesses in various cities, including San Francisco and San Diego; Phoenix and Tucson, Arizona; Midland, Texas; St. Louis, Missouri;

Louisville, Kentucky; Tampa/St. Petersburg and Jacksonville, Florida; and Atlanta, Georgia. CI is a Texas corporation with its principal place of business in Dallas. Its utility operations in California are conducted by subsidiary California corporations, Gencom, Inc. in San Diego and Tel-Page, Inc. in Oakland. These subsidiaries are wholly owned by Gencom, Inc., an Arizona corporation (Gencom-Arizona). Gencom-Arizona is, in turn, wholly owned by CI. CI is a publicly held company whose shares are traded over the counter.

IRT and Delta are radio telephone utilities (RTU) certificated in California to render one-way and two-way radio telephone services in the greater San Francisco Bay Area. IRT is privately owned, with 440 outstanding shares, of which 200 shares are owned by Donald R. Cook, 190 shares are owned by Tommy L. Cook, his son, and 50 shares are owned by H. J. Robertson. IRT's principal place of business is in San Francisco.

Delta is a wholly owned subsidiary of IRT. Its principal place of business is in Rio Vista.

Description of Transaction

By written agreement the stockholders of IRT have agreed to assign and transfer their shares in IRT to CI. CI will in turn deliver to IRT's stockholders the number of shares of CI common stock determined by dividing $23,500,000 by the average of the closing bid prices of CI common stock as reported in the Wall Street Journal for the seventh through the third trading days preceding the closing, but such number shall not be fewer than 628,342 shares nor more than 799,592 shares. Each of IRT's stockholders shall then receive that number of CI shares determined by multiplying the total number of CI shares delivered by CI by the percentage of his present ownership of IRT shares. The closing of the transaction shall follow and be subject to the obtaining of all necessary regulatory approvals from this Commission and the Federal Communications Commission (FCC).

Immediately after the closing, CI will transfer its IRT shares to Gencom-Arizona, which will provide operational support and direction for the future utility operations of IRT and Delta as it has done in the past for CI's San Diego and Oakland subsidiaries. CI does not presently intend to merge or consolidate IRT and/or Delta with CI, Gencom-Arizona, Gencom-San Diego, Tel-Page, Inc., or any other entity.

Protests

Page America Communications of California, Inc. (PAC), Beepercall, and MCI Airsignal of California, Inc. (MCI Airsignal) filed protests to the application. PAC is an applicant for a certificate to provide paging service in the San Francisco Bay Area (Application (A.) 82-10-43). It has no present operations in the San Francisco Bay Area. On December 8, 1983, PAC withdrew its protest.

MCI Airsignal is a California corporation certificated to provide one-way paging and two-way RTU services in Sacramento, Stockton, Concord, Modesto, Vallejo, South Lake Tahoe, Fresno, Hanford, Visalia, Newcastle, Auburn, Porterville, Taft, and Shafter. It provides RTU services to more than 13,000 mobile and paging units on various low-band, VHF and UHF frequencies in those areas. On January 21, 1983, MCI Airsignal filed A.83-01-47 for a certificate to expand its facilities to provide RTU services in the greater San Francisco Bay Area. IRT and Tel-Page (a second level subsidiary of CI) each filed protests to the granting of MCI Airsignal's application. On December 14, 1983, MCI Airsignal withdrew its protest.

Beepercall is a California corporation certificated to provide and providing one-way paging and two-way mobile RTU services throughout most of the San Francisco Bay Area. Through intercarrier agreements with other RTUs, Beepercall provides one-way paging service throughout the greater Bay Area. Beepercall stated in its protest filed June 1, 1983, that it also intends to expand its service in the greater San Francisco Bay Area by filing within 60 days an application for wide area certification to provide the public with an alternative to the service that would be provided by CI and

its subsidiaries were the proposed combination to be approved.[1] On December 13, 1983, Beepercall withdrew its protest.

Protestants allege in support of their protests that the consolidation or IRT and Tel-Page under a common parent corporation, which this application would accomplish if approved, would place CI in control of 65 to 75% of the one-way paging market in the San Francisco Bay Area.

Procedural Background

Prehearing conferences were held on August 9 and 31, 1983, and hearings were held September 14, 15, and 16, 1983. Concurrent opening and closing briefs were filed by the parties on November 9 and 19, 1983.

The Evidence

The applicants introduced the prepared testimony of three witnesses: Clayton Niles, the president and chief executive officer of CI; Edward Baker, the Western regional manager of Gencom-Arizona; and Tom L. Cook, president and chief executive officer of IRT. The applicants also introduced documentary evidence in support of their prepared testimony.

Protestants introduced no testimony through either expert or company witnesses. They limited their participation entirely to cross-examination of applicants' witnesses and the introduction of copies of documents largely on file with the Commission.

Protestants complain that they were prevented from sponsoring expert testimony on the anticompetitive aspects of the transaction by the hearing schedule set by the administrative law judge (ALJ Robert T. Baer). However, it should be noted that the application was filed on May 2, 1983 and by the time of the first prehearing conference on August 9, 1983, protestants had made no

[1] On September 1, 1983, Beepercall was dissolved and its assets transferred to Paging Network of San Francisco, Inc. pursuant to Commission authorization. For the sake of simplicity we will continue to refer to this entity as Beepercall.

effort to obtain an expert witness. Moreover, protestants at no time made an offer of proof as to what their proposed expert witness would attempt to show through his testimony. Finally, protestants did not sponsor the testimony of any company witness to show the alleged anticompetitive effects of the proposed transaction on their respective corporations. We believe that protestants had an adequate opportunity to prepare themselves for hearing and that any prejudice was due to their own dilatory conduct.

The Issue

In general, the issue in a transfer proceeding of this sort is whether or not the proposed transaction is in the public interest. Several factors might be explored as bearing on the public interest. For instance, does CI have the technical and managerial competence to assure IRT's customers of the continuance of the kind and quality of service they have experienced in the past? Does CI have the financial ability to acquire IRT without degrading IRT's service? What will be the anticompetitive effects, if any, of CI's control of 75% of the paging market in the Bay Area?

While there are many fruitful areas for inquiry in transfer proceeding of this sort, protestants limited their opposition to the application to two major assertions: (1) CI will effectively control 75% of the paging market in the San Francisco Bay Area and (2) both IRT and CI are engaged in anticompetitive conduct by reason of their formal opposition to the applications of any and all potential new entrants into the Bay Area market.

Discussion

While protestants would have us limit our inquiry to the dominance in the San Francisco Bay Area paging market that CI would obtain if the transaction proposed by applicants is approved, we believe that a much broader view of the application should be taken. Thus, we concur in the staff's position supporting the granting of the application. The staff believes that the application should be

evaluated in light of the major changes now taking place in the telecommunications business, since these regulatory and technical changes will dramatically affect the providing of radio telecommunications service in future years.

Under former Rule 18(o) of the Rules of Practice and Procedure the Commission has followed a policy of limited entry in both one-way and two-way RTU markets. However, the FCC recently adopted a policy of open entry into these markets by opening about 60 new paging channels and by authorizing new two-way mobile radio channels in areas such as San Francisco and Los Angeles.

In response to the new FCC policies the Commission in Decision 83-08-059 in Order Instituting Investigation 83-03-01 revised Rule 18(o) to greatly relax the difficulty of entering the RTU market. The response of the public to these FCC and Commission changes has been enthusiastic. The FCC has on file over 350 new applications for base stations in California alone. The Commission has on file more than 50 applications for sites in the San Francisco Bay Area.

The new technology of cellular mobile telephone service also bears on this application. Once systems based on cellular technology are built they will compete directly with conventional two-way mobile telephone services now provided by IRT and others, at least in the major metropolitan areas. However, the FCC has limited competition in the cellular marketplace to one wireline carrier and one non-wireline carrier in each area it intends to certificate. The FCC is now considering applications by IRT and its co-venturers and others to enter the cellular markets in San Francisco, San Jose, and Sacramento.

The staff recommends that we consider this application in light of the dynamic market conditions that now exist as described above. We concur in this approach.

We go now directly to the antitrust concerns raised by protestants, since CI's ability to manage and preserve IRT's and

Delta's asset in the interest of the consumers was not seriously challenged by protestants.

The Commission is not bound by the antitrust laws; rather, antitrust factors are merely one of the things it must consider to determine if a proposed acquisition is in the public interest. (Northern California Power Agency v PUC, 5 Cal 3d 370, 379 (1971).) The protestants argue that the acquisition, if approved, would have probable anticompetitive effects in violation of § 7 of the Clayton Act (15 U.S.C. § 18) and, that therefore the application should be denied. They assert that if CI is allowed to acquire IRT CI would control about 75% of the one-way paging market in the San Francisco Bay Area. However, no direct evidence was presented by protestants regarding the probable anticompetitive effects of the acquisition. They did point to alleged anticompetitive conduct on the part of both IRT and CI stemming from their uniform opposition to applications for entry into the Bay Area marketplace. The staff believes, and we concur, that such conduct does not justify denying the application.

The U.S. Supreme Court has held that firms have a right under the First Amendment to oppose applications by competitors for certification by regulatory bodies provided that the protests are made in accordance with the agencies' established procedures. (California Motor Transport v Trucking Unlimited, 404 US 508, 92 Sup. Ct. 609 (1971). Both CI and IRT have in general a right under the First Amendment to oppose applications for certification. Moreover, such protests are provided for in both former and new Rule 18(o) of the Rules of Practice and Procedure.

There is however an exception to the general rule. The court has also stated that a lawful means may have an unlawful end and that an antitrust violation may be established if it can be shown that the opposition to the applications for certifications is a mere sham which effectively bars the applicants from access to the

administrative agency. However, protestants have not demonstrated that the exception applies in this proceeding.

The protests of both IRT and Tel-Page to the applications of MCI Airsignal and PAC for certification in the San Francisco Bay Area were received as exhibits in this proceeding. The protests raised the issue of the adequacy of the existing service. This was a legitimate ground for protest under former Rule 18(o). The protests also raised questions regarding the technical and financial feasibility of applicants' proposals, which are not spurious on their face. The evidence supports the conclusion that the IRT and Tel-Page protests were not of the type giving rise to protestants' claim to an antitrust violation.

Pursuant to the order revising Rule 18(o), CI withdrew its protest to PAC's applications, but filed an amended protest to the applications of MCI Airsignal in San Francisco and San Diego. IRT continues to protest the applications of both PAC and MCI Airsignal in the San Francisco area.

Protestants argue that the 65 to 75% market share in the San Francisco Bay Area paging market that CI would obtain if the transaction was approved forbids the Commission from approving the transaction. From the briefs it appears that older cases have leaned heavily on the concept of market share. However, later case law indicates that whether market share will per se involve anticompetitive effects must be considered in light of the structure, history, and probable future of the particular market. Other factors which should also be considered include entry barriers, demand trends, and technological trends.

Our staff has considered these other factors and has concluded that the acquisition in all probability will not have the anticompetitive effects proposed by the protestants. The staff lists six factors which lead it to this conclusion:

1. A relaxation of barriers to entry;
2. A pent-up demand for paging services, both nationally and locally;
3. The demonstrated interest of potential entrants;
4. Evidence of significant price competition by existing competitors;
5. A lack of evidence of anticompetitive conduct by CI in markets where it is the dominating carrier; and
6. The continuing assertion of jurisdiction by this Commission over the rates set by RTUs for paging services.

We will consider each of these items briefly in order.

The FCC's expansion of available paging channels and its open entry policy, combined with the Commission's recent revision of Rule 18(o), leads to the conclusion that it is substantially easier for new competitors to enter the paging market.

The FCC's recent allocation of new paging channels was largely in response to market studies projecting a need for additional one-way paging services. Over 50 new applications for sites in the Bay Area have been filed, indicating a perception of pent-up demand. Both PAC and MCI Airsignal rely on pent-up demand to support their San Francisco applications. This growth potential reduces the impact of the 20% increase in market share that would result from the approval of this application.

There is evidence of substantial price competition by RTUs in the San Francisco Bay Area. The staff study of rates for tone only and tone and voice services shows that rates have remained stable for at least ten years, reflecting a substantial reduction in the real cost to the consumer. This evidence indicates that there is competitiveness in the local market, making it unlikely that CI could improve its position by anticompetitive conduct in the future.

Protestants produced no evidence of any anticompetitive conduct by CI in markets where it is the dominant carrier, in the sense that it has a share of the market in excess of 50%. Despite this dominance CI provides services in these markets which are technologically superior to those available in other markets with a higher degree of competition and at prices that are no higher than elsewhere. In San Diego CI's subsidiary introduced the first dial-access mobile telephone system in California even though there are no non-wireline competitors. Gencom was also the first California carrier to introduce consumer paging, involving a usage sensitive rate for less than that offered in competitive marketplaces. This unrebutted testimony indicates that CI is unlikely to engage in anticompetitive conduct if the acquisition is approved.

Although invited to do so in its recent investigation, the Commission declined to deregulate the rates for paging services. This continuing regulation of rates makes future anticompetitive conduct involving rates unlikely. Also, because of its continuing jurisdiction, any RTU aggrieved by anticompetitive conduct involving rates can use the Commission's complaint procedure to bring that conduct quickly to the attention of the Commission.

We believe with our staff that the enumerated factors make it improbable that the acquisition, if approved, would have the anticompetitive effects argued by protestants.

PAC also argues that the acquisition of IRT by CI would result in Gencom-Arizona's monopolization of the Bay Area paging market in violation of § 2 of the Sherman Act (15 USCA § 2) in that it would control 75% of the paging market. PAC does not argue that Gencom-Arizona is attempting to monopolize the Bay Area paging market, which is a separate violation of § 2, but rather that approval of the acquisition would result in monopolization in violation of § 2. The two offenses have separate elements. That offense claimed by PAC has the following elements:

1. Possession of monopoly power in a relevant market, and
2. Willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historical accident.

PAC does not argue that CI is attempting to monopolize the Bay Area paging market, since the record is silent with respect to the elements of that offense. Instead, it asks the Commission to determine if monopolization would result were the acquisition to occur. This problem is more appropriately addressed under § 7 of the Clayton Act which specifically deals with future effects rather than § 2 of the Sherman Act which looks at whether monopolization exists in fact. In our staff's opinion the acquisition would not violate

§ 2 of the Sherman Act for the same reasons that it would not violate § 7 of the Clayton Act. The reason for this conclusion is that the presence or absence of monopoly power must be determined by an analysis of a number of market factors, such as the number of competitors, the historical development and competitive trends in the industry, consumer preferences, existence and nature of barriers to entry, the existence of potential competition, and the competitive performance and internal policies of the various firms in the industry. These factors can bear greatly upon the practical economic power of a given firm in the relevant market.

Protestants would rely entirely upon the one factor of market share to support their claim that the acquisition would result in monopoly power to Gencom-Arizona. They fail largely to address any other factors. We conclude with our staff that the same factors which show that the acquisition would not have a probable anticompetitive effect in violation of § 7 of the Clayton Act show that the acquisition would not result in a monopolization of the relevant paging market within the meaning of the Sherman Act.

From the outset of its participation in this proceeding, MCI Airsignal has urged the Commission to condition any grant of the application on the grant of all applications to provide RTU service in the San Francisco Bay Area currently pending before the Commission. One of those pending applications is MCI Airsignal's, which has been protested by Tel-Page and IRT. In its protest filed June 3, 1983 MCI Airsignal reasoned in support of its request:

> "With additional entrants able to meet marketplace demands with investment, innovation, and a willingness to provide competing services, many of these potential anticompetitive problems would be alleviated." (Protest, page 5.)

In its opening brief, MCI Airsignal continues to advocate the conditional approval of the application in the following terms:

> "MCI Airsignal, on the other hand, believes that the public interest is best served when firms in a market compete vigorously. It therefore

> advocates a market characterized by relatively free entry. If the Commission permits MCI Airsignal and other firms to enter the San Francisco Bay market, MCI Airsignal has no objection to the Commission granting the instant application. Despite applicants' dominance in that market, new entry would assure vigorous competition, and thus serve the public's needs." (MCI Airsignal Opening Brief, page 3.)

MCI Airsignal then argues that in the absence of new entrants the proposed acquisition will have probable anticompetitive effects which are not outweighed by any countervailing public interest factors. It concludes:

> "The Commission can insure that the public benefits are achieved with no significant anticompetitive consequences only if it conditions approval of the application on either the granting of, or the withdrawal of the protest against, the pending applications to provide new service in the San Francisco Bay Area." (MCI Airsignal Opening Brief, page 19.)

MCI Airsignal's argument recognizes that the entry of new competitors into the Bay Area market militates against any probable anticompetitive effects resulting from the acquisition. Our staff support of the application arises largely from its understanding that the availability of new spectrum resources, the relaxation of the Commission's limited entry policy under former Rule 18(o), and the demonstrated interest of potential entrants indicate that the acquisition would probably not have any anticompetitive effects. However, this does not mean that we should guarantee that every application for entry into the San Francisco Bay Area market will be granted. Each application should stand or fall on its own merits. Nevertheless, the recent changes in FCC and Commission policy on entry should suggest to informed observers that it will be much more difficult for protestants to prevail in certification proceedings and consequently much easier for new applicants to gain entry into the markets where they seek to provide service.

The affirmative showing of the staff in this proceeding was largely in aid of its attempts to gain IRT's compliance with certain Commission requirements. It offered into evidence Exhibit 30 containing a stipulation among CI, IRT, and Delta and the staff regarding IRT's agreement to maintain its books and records in accordance with the Uniform System of Accounts. The terms of the stipulation are set forth in Appendix A. Paragraph 2 of the stipulation states that in the following order "a condition shall be inserted requiring that IRT maintain books of account in conformity with the uniform rules of accounting." The applicants and the staff do not specify exactly the form that this condition should take; and, since the following order will be effective in ten days from the date of issuance, a conditional order granting the application appears problematical. However, we will order IRT to do the things it has agreed to do within the time frame set forth in the stipulation. Should IRT fail to obey these orders, enforcement action may be taken by order to show cause.

Findings of Fact

1. If the application is granted, CI will control, through its subsidiary Gencom-Arizona, about 65-75% of the paging market in the San Francisco Bay Area.

2. IRT, when it is acquired by CI, will be better able to compete with other RTUs, which are gradually being acquired by nationally based organizations, and with wireline companies, which have a privileged position with respect to frequency allocation, in providing a full range of communication services to the public.

3. CI's and IRT's protests to the applications of MCI Airsignal, PAC, and other to enter the Bay Area market are valid on their face and do not show a pattern of sham protests to impede access to the Commission.

4. Other market factors, as enumerated in the discussion, show that the acquisition will not be likely to have the anticompetitive effects predicted by protestants.

Conclusions of Law

1. CI and IRT did not engage in anticompetitive conduct by reason of their opposition under former or new Rule 18(o) to applications for entry into markets that they serve.

2. The mere assertion that CI will control from 65 to 75% of the paging market in the San Francisco Bay Area does not establish probable future anticompetitive effects, when that fact is considered in light of recent technological and regulatory changes in the industry as well as changes in the nature of the competitors themselves.

3. No violations by CI, Gencom-Arizona, or IRT of § 7 of the Clayton Act or § 2 of the Sherman Act have been proved.

4. The application should be granted.

5. IRT should be ordered to abide by the terms of the stipulation between it and the staff.

6. The following order should be effective ten days from today in accordance with the provisions of PU Code § 1731[2] so that the transaction may close before its upset date, December 31, 1983.

---

[2] "... No cause of action arising out of any order or decision of the Commission shall accrue in any court to any corporation or person unless the corporation or person has filed application...for rehearing before the effective date of the order or decision, or, if the Commission fixes a date earlier than the 20th day after issuance as the effective date of the order or decision, unless the corporation or person has filed such application for rehearing...before the 10th day after the date of issuance in the case of an order issued pursuant to...Article 6 (commencing with Section 851) of Chapter 4 of this division relating to security transaction..."

This application is filed under Section 854, part of Article 6.

O R D E R

IT IS ORDERED that:

1. Communications Industries, Inc. (CI) is authorized to acquire the shares of Intrastate Radio Telephone, Inc. of San Francisco (IRT) in accordance with the agreement, as amended, attached to the application.

2. IRT shall, within 30 days from the date of this order, bring its books of account into conformity with the Uniform System of Accounts.

3. IRT shall maintain its books of account in conformity with the Uniform System of Accounts prescribed by the Commission.

4. IRT shall notify the staff members named in the stipulation when it has complied with Ordering Paragraphs 2 and 3.

This order becomes effective ten days from today.

Dated DEC 20 1983, at San Francisco, California.

LEONARD M. GRIMES, JR.
President
VICTOR CALVO
PRISCILLA C. GREW
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

Stipulation (Exhibit 30)

1. The applicants and staff agree that the books of account of Intrastate Radio Telephone, Inc. (hereinafter IRT), though kept in accordance with generally accepted accounting principles, are not currently maintained in accordance with the Uniform System of Accounts prescribed by the Commission for Radio Telephone Utilities.

2. Applicants and staff further agree that in any order or decision emanating from this proceeding permitting the acquisition of IRT by Communications Industries, Inc., a condition shall be inserted requiring that IRT maintain books of account in conformity with the Uniform Rules of Accounting. This agreement is without prejudice to IRT's right to continue to maintain its other books in their present format.

3. Applicants and staff further agree that 30 days from the date of the order or decision is a reasonable time in which to bring the books of account into conformity with the Uniform System of Accounts.

4. Applicants agree that they will notify the following staff personnel when they have complied with the stipulation: Mark Bumgardner, Willard Dodge, and Patrick Gileau.

5. At a mutually agreeable time staff will examine the above-referenced books of account and verify that they are in conformity with the Uniform System of Accounts.

(END OF APPENDIX A)

Immediately after the closing, CI will transfer its IRT shares to Gencom-Arizona, which will provide operational support and direction for the future utility operations of IRT and Delta as it has done in the past for CI's San Diego and Oakland subsidiaries. CI does not presently intend to merge or consolidate IRT and/or Delta with CI, Gencom-Arizona, Gencom-San Diego, Tel-Page, Inc., or any other entity.

Protests

Page America Communications of California, Inc. (PAC), Beepercall, and MCI Airsignal of California, Inc. (MCI Airsignal) filed protests to the application. PAC is an applicant for a certificate to provide paging service in the San Francisco Bay Area (Application (A.) 82-10-43). It has no present operations in the San Francisco Bay Area. On December 8, 1983, PAC withdrew its protest.

MCI Airsignal is a California corporation certificated to provide one-way paging and two-way RTU services in Sacramento, Stockton, Concord, Modesto, Vallejo, South Lake Tahoe, Fresno, Hanford, Visalia, Newcastle, Auburn, Porterville, Taft, and Shafter. It provides RTU services to more than 13,000 mobile and paging units on various low-band, VHF and UHF frequencies in those areas. On January 21, 1983, MCI Airsignal filed A.83-01-47 for a certificate to expand its facilities to provide RTU services in the greater San Francisco Bay Area. IRT and Tel-Page (a second level subsidiary of CI) each filed protests to the granting of MCI Airsignal's application.

Beepercall is a California corporation certificated to provide and providing one-way paging and two-way mobile RTU services throughout most of the San Francisco Bay Area. Through intercarrier agreements with other RTUs, Beepercall provides one-way paging service throughout the greater Bay Area. Beepercall stated in its protest filed June 1, 1983, that it also intends to expand its service in the greater San Francisco Bay Area by filing within 60 days an application for wide area certification to provide the public with an alternative to the service that would be provided by CI and

effort to obtain an expert witness. Moreover, protestants at no time made an offer of proof as to what their proposed expert witness would attempt to show through his testimony. Finally, protestants did not sponsor the testimony of any company witness to show the alleged anticompetitive effects of the proposed transaction on their respective corporations. We believe that protestants had an adequate opportunity to prepare themselves for hearing and that any prejudice was due to their own dilatory conduct.

The Issue

In general, the issue in a transfer proceeding of this sort is whether or not the proposed transaction is in the public interest. Several factors might be explored as bearing on the public interest. For instance, does CI have the technical and managerial competence to assure IRT's customers of the continuance of the kind and quality of service they have experienced in the past? Does CI have the financial ability to acquire IRT without degrading IRT's service? What is CI's record for fair competition in the markets in which it is engaged in the RTU business in California? What will be the anticompetitive effects, if any, of CI's control of 75% of the paging market in the Bay Area?

While there are many fruitful areas for inquiry in transfer proceeding of this sort, protestants limited their opposition to the application to two major assertions: (1) CI will effectively control 75% of the paging market in the San Francisco Bay Area and (2) both IRT and CI are engaged in anticompetitive conduct by reason of their formal opposition to the applications of any and all potential new entrants into the Bay Area market.

Discussion

While protestants would have us limit our inquiry to the dominance in the San Francisco Bay Area paging market that CI would obtain if the transaction proposed by applicants is approved, we believe that a much broader view of the application should be taken. Thus, we concur in the staff's position supporting the granting of the application. The staff believes that the application should be

evaulated in light of the major changes now taking place in the telecommunications business, since these regulatory and technical changes will dramatically affect the providing of radio telecommunications service in future years.

Under former Rule 18(o) of the Rules of Practice and Procedure the Commission has followed a policy of limited entry in both one-way and two-way RTU markets. However, the FCC recently adopted a policy of open entry into these markets by opening about 60 new paging channels and by authorizing new two-way mobile radio channels in areas such as San Francisco and Los Angeles.

In response to the new FCC policies the Commission in Decision 83-08-059 in Order Instituting Investigation 83-03-01 revised Rule 18(o) to greatly relax the difficulty of entering the RTU market. The response of the public to these FCC and Commission changes has been enthusiastic. The FCC has on file over 350 new applications for base stations in California alone. The Commission has on file more than 50 applications for sites in the San Francisco Bay Area.

The new technology of cellular mobile telephone service also bears on this application. Once systems based on cellular technology are built they will compete directly with conventional two-way mobile telephone services now provided by IRT and others, at least in the major metropolitan areas. However, the FCC has limited competition in the cellular marketplace to one wireline carrier and one non-wireline carrier in each area it intends to certificate. The FCC is now considering applications by IRT and its co-venturers and others to enter the cellular markets in San Francisco, San Jose, and Sacramento.

The staff recommends that we consider this application in light of the dynamic market conditions that now exist as described above. We concur in this approach.

We go now directly to the antitrust concerns raised by protestants, since CI's ability to manage and preserve IRT's and

Delta's asset in the interest of the consumers was not seriously challenged by protestants.

The Commission is not bound by the antitrust laws; rather, antitrust factors are merely one of the things it must consider to determine if a proposed acquisition is in the public interest. (Northern California Power Agency v PUC, 5 Cal 3d 370, 379 (1971).) The protestants argue that the acquisition, if approved, would have probable anticompetitive effects in violation of § 7 of the Clayton Act (15 U.S.C. § 18) and, that therefore the application should be denied. They assert that if CI is allowed to acquire IRT CI would control about 75% of the one-way paging market in the San Francisco Bay Area. However, no direct evidence was presented by protestants regarding the probable anticompetitive effects of the acquisition. They did point to alleged anticompetitive conduct on the part of both IRT and CI stemming from their uniform opposition to applications for entry into the Bay Area marketplace. The staff believes, and we concur, that such conduct does not justify denying the application.

The U.S. Supreme Court has held that firms have a right under the First Amendment to oppose applications by competitors for certification by regulatory bodies provided that the protests are made in accordance with the agencies' established procedures. Both CI and IRT have in general a right under the First Amendment to oppose applications for certification. Moreover, such protests are provided for in both former and new Rule 18(o) of the Rules of Practice and Procedure.

There is however an exception to the general rule. The court has also stated that a lawful means may have an unlawful end and that an antitrust violation may be established if it can be shown that the opposition to the applications for certifications is a mere sham which effectively bars the applicants from access to the administrative agency. However, protestants have not demonstrated that the exception applies in this proceeding.

The protests of both IRT and Tel-Page to the applications of MCI Airsignal and PAC for certification in the San Francisco Bay Area were received as exhibits in this proceeding. The protests raised the issue of the adequacy of the existing service. This was a legitimate ground for protest under former Rule 18(o). The protests also raised ~~technical~~ the technical and financial feasibility questions regarding applicants' proposals, which are not spurious on their face. The evidence supports the conclusion that the IRT and Tel-Page protests were not of the type giving rise to protestants' claim to an antitrust violation.

Pursuant to the order revising Rule 18(o), CI withdrew its protest to PAC's applications, but filed an amended protest to the applications of MCI Airsignal in San Francisco and San Diego. IRT continues to protest the applications of both PAC and MCI Airsignal in the San Francisco area.

CI's and IRT's amended protests to MCI Airsignal's applications attack the applicant's prima facie showing of technical and financial feasibility. They assert that MCI Airsignal's parent corporation by unreimbursed subsidies has allowed MCI Airsignal to continue operating at a loss over an extended period of time. They argue that this practice is harmful to the public interest in fair competition, and, if allowed to continue, could ultimately damage the marketplace and deprive the public of adequate service within the meaning of Rule 18(o)(3). These allegations are substantial and do not give rise to claims of anticompetitive conduct by sham protest.

IRT's amended protest to the San Francisco application of PAC also attacks PAC's prima facie showing of technical, financial, and economic feasibility. However, IRT's amended protest fails to state the facts on which it is based in violation of Rule 8.4.

Although IRT's protest is technically deficient it does not establish the type of sham giving rise to anticompetitive conduct, because; (1) IRT's original protests to the PAC and MCI Airsignal applications were valid on their face, and IRT's amended protest to MCI Airsignal's application is also valid on its face, and therefore,

the record fails to establish a "pattern" of frivolous protest by IRT giving rise to the type of sham constituting anticompetitive conduct and (2) the record shows that PAC's amended application has certain deficiencies. IRT has merely failed to specify those deficiencies in the manner required by Rule 18(c).

We conclude that the protests of IRT and CI do not constitute sham protests amounting to anticompetitive conduct.

Protestants argue that the 65 to 75% market share in the San Francisco Bay Area paging market that CI would obtain if the transaction was approved forbids the Commission from approving the transaction. From the briefs it appears that older cases have leaned heavily on the concept of market share. However, later case law indicates that whether ~~or not~~ market share will per se involve anticompetitive effects must be considered in light of the structure, history, and probable future of the particular market. Other factors which should also be considered include entry barriers, demand trends, and technological trends.

Our staff has considered these other factors and has concluded that the acquisition in all probability will not have the anticompetitive effects proposed by the protestants. The staff lists six factors which lead it to this conclusion:

1. A relaxation of barriers to entry;
2. A pent-up demand for paging services, both nationally and locally;
3. The demonstrated interest of potential entrants;
4. Evidence of significant price competition by existing competitors;
5. A lack of evidence of anticompetitive conduct by CI in markets where it is the dominating carrier; and
6. The continuing assertion of jurisdiction by this Commission over the rates set by RTUs for paging services.

We will consider each of these items briefly in order.

Conclusions of Law

1. CI and IRT did not engage in anticompetitive conduct by reason of their opposition under former or new Rule 18(o) to applications for entry into markets that they serve.

2. The mere assertion that CI will control from 65 to 75% of the paging market in the San Francisco Bay Area does not establish probable future anticompetitive effects, when that fact is considered in light of recent technological regulatory changes in the industry as well as changes in the nature of the competitors themselves.

3. No violations by CI, Gencom-Arizona, or IRT of § 7 of the Clayton Act or § 2 of the Sherman Act have been proved.

4. The application should be granted.

5. IRT should be ordered to abide by the terms of the stipulation between it and the staff.

6. The following order should be effective ten days from today in accordance with the provisions of PU Code § 1731[2] so that the transaction may close before its upset date, December 31, 1983.

---

[2] "... No cause of action arising out of any order or decision of the Commission shall accrue in any court to any corporation or person unless the corporation or person has filed application...for rehearing before the effective date of the order or decision, or, if the Commission fixes a date earlier than the 20th day after issuance as the effective date of the order or decision, unless the corporation or person has filed such application for rehearing...before the 10th day after the date of issuance in the case of an order issued pursuant to...Article 6 (commencing with Section 851) of Chapter 4 of this division relating to security transaction..."

This application is filed under Section 854, part of Article 6.