

Decision 84 01 046 JAN 19 1984

ORIGINAL

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the matter of the application of)
Dial Page, Inc., a California)
corporation, for a certificate of)
public convenience and necessity to)
construct a radiotelephone utility)
system and for approval to issue)
stock.)

Application 83-02-34
(Filed February 15, 1983)

O P I N I O N

Applicant Dial Page, Inc., a California corporation, requests a certificate of public convenience and necessity to construct and operate radio communication facilities for the purpose of providing a radiotelephone utility (RTU) service offering one-way radio paging to the public with a base station located each in the City of Santa Barbara and on Santa Ynez Peak, 11 miles northwest of the City of Goleta. Applicant also requests approval to issue 10,000 shares of its common stock for \$10,000 to its parent corporation, Bud-North Shore Communications (BNSC). The application was protested by Sylvan B. Malis, dba Coast Mobilphone Service.

The application shows that applicant possesses the necessary Federal Communications Commission (FCC) construction permits.

The application shows that applicant proposes to provide tone-only and tone-plus-voice message paging service generally in Southern Santa Barbara County on frequency 43.50 megahertz. The proposed control station, located at 923 Laguna, Santa Barbara, will be linked to each base station by wireline. The system will be connected to the public-switched telephone network using end-to-end

dialing techniques and will be completely automatic in its operation. The control center will be equipped with recording devices to store messages to subscribers for subsequent automatic transmission if the messages are offered for transmission at times when the transmitters are busy. The application shows that applicant has received commitments for leasing antenna sites.

Applicant plans to have its base station and control equipment installed and maintained by BNSC, which will also provide 24-hour technical monitoring and repair service on the system on a contract basis. BNSC has been involved in providing engineering and radio services for communications equipment for over 20 years and its principals hold FCC First Class Radio Telephone Licenses.

Applicant estimates that it will require approximately \$77,000 initial capital to install the necessary facilities and to start up business. \$10,000 of that money will come from the sale of stock to BNSC as proposed here and the balance will be advanced to applicant from BNSC. The application shows that BNSC had a net worth of \$171,506 as of December 31, 1982. James Evans, who is president of applicant as well as vice president of BNSC, indicates a willingness on the part of BNSC to advance the balance of required initial capital to applicant.

Applicant proposes to charge the following rates for its services:

	<u>Rate Per Month</u>	<u>Msg. Unit Allowance Per Month</u>	<u>Each Additional Msg. Unit Over Monthly Allowance</u>
1. Selective Tone Only	\$10.00	100	\$ 0.10
2. Selective Tone and Voice Msg.	10.00 12.00	65 100	0.15 0.15

Applicant proposes to allow its customers to use their own pagers. In the event the customer wishes to rent a pager from applicant,

applicant proposes a monthly rental charge of \$10 for a tone-only pager and \$15 for a tone-and-voice pager.

At the end of the first year applicant expects to be serving approximately 75 pagers at an incurred loss of \$28,450. However, by the end of the fifth year of operation it expects to be serving 375 pagers and to make a net profit for that year of \$17,030.

The application shows that the proposed construction of antennas is restricted to installations on short masts in built-up areas where no visual or air navigational adverse effects will be produced. Applicant states that local authority for construction, where needed, has been assured.

Applicant states that between December 10, 1982 and January 31, 1983 it conducted a written survey of businesses in the proposed service area to establish a need for RTU paging services at rates proposed in the application. Responses from 49 individuals were made to the survey, of which 40 were positive responses indicating a potential use of 64 pagers. A tabulation of the positive responses are as follows:

<u>Number of Respondents</u>	<u>Type of Business</u>	<u>Potential Number Of Pagers</u>
12	Medical	16
7	Sales	17
3	Plumbing	4
3	Construction	3
3	Consultant	5
2	Automotive	5
2	Real Estate	3
1	Appliance	3
1	Agriculture	2
1	Janitorial	1
1	Answering Service	1
1	Telecommunications	1
1	Office Products	1
1	Photography	1
1	Education	1
<u>40</u>		<u>64</u>

22 of the respondents stated they presently subscribe to a RTU paging service and 27 indicated they did not so subscribe. None of the 22 who presently subscribe to a paging service own their own pager, while 34 respondents thought it would be to their advantage in subscribing to applicant's proposed service and to own their own pagers in lieu of renting the pagers. Twenty-eight respondents indicated they would be interested in immediately subscribing to applicant's paging service and 12 respondents felt a definite need exists for applicant's service and have a positive interest in subscribing to such service. Applicant contends, apparently based on its survey, that there is presently no RTU service covering the entire Southern Santa Barbara County service area proposed to be served by applicant which allows for customer-owned paging equipment, and that there is only one RTU in that area offering tone-and-voice paging service.

The protest, as amended, shows that for many years protestant has been providing two-way mobile radiotelephone service and one-way paging service throughout an area embracing Santa Barbara County, Southern San Luis Obispo County, and Northern Ventura County, which includes the entire area proposed to be served by applicant. For 10 years until late 1978 protestant offered service to customer-owned pagers. In late 1978 it deleted service to customer-owned pagers from its tariffs because none of its customers during the previous 10-year period subscribed to customer-owned pager service. Recently, however, protestant sensed "industry trends toward substantially more customer ownership" and amended its tariff to provide service to customer-owned equipment. Protestant claims it filed these tariff changes "well before the instant application was filed." (Protestant's tariff on file with the Commission shows that the subject tariff change was filed on March 30, 1983 and became effective on April 30, 1983, whereas this application was filed February 15, 1983.)

Protestant contends that applicant has failed either to allege or to show that the proposed service is responsive to a public need and demand. It argues that applicant's forecast of serving only 75 pagers the first year of operation and only 375 pagers at the end of the fifth year of operation belies the idea that there is any substantial unsatisfied need for new service in the area. It claims that it has advertised extensively for new business and that the business this advertising has generated for it would not support a new paging service. Furthermore, it contends that if prospective customers were truly interested in subscribing to a paging service they could contact any of the several carriers serving the area and they would be immediately accommodated.

Protestant also argues that applicant's prospective business will come from an invasion of existing carriers' businesses¹ and not from a development of new subscribers or any new or different services. Protestant claims this invasion of its business will cause extensive damage to it so as to render it unable to give adequate service. Protestant requests that an oral hearing be held, or, in the alternative, that the application be denied.

Applicant moved to strike the protest on the grounds that the protest is a sham filed merely to delay the entry of applicant into the Santa Barbara market. Applicant contends that as evidence of the frivolous nature of the protest protestant failed to show

¹ General Telephone Company of California and Mobile Radio System of Ventura also give paging service in much of the area.

affirmatively in its protest that "granting the application will so damage existing service or the particular marketplace as to deprive the public of adequate service." This affirmative showing is required of protestants by Rule 18(o)(3) of the Commission's Rules of Practice and Procedure in order to maintain a protest in an RTU certificate matter. Applicant argues that if protestant's customers are prepared to leave protestant for a new competitor, such evidence is merely illustrative of the need for new service in the marketplace.

Discussion

With respect to the applicant's proposed offerings of pagers on a tariffed basis, recent actions by the FCC have established that pagers were in fact detariffed by the FCC's prior orders in the Second Computer Inquiry. We take notice of the relevant portion of the FCC's Notice of Proposed Rulemaking, CC Docket No. 83-372, adopted April 7, 1983 and released April 28, 1983 which reads as follows:

"While we reserved judgment in the Second Computer Inquiry regarding deregulation of mobile telephone CPE, we expressed no such reservation with respect to common carrier paging receivers. To the extent that there is any ambiguity, we here confirm that paging receivers were included in the generic categories of CPE deregulated in the Second Computer Inquiry." (Mimeo. page 2.)

In consequence there is no basis for authorizing the offering of pagers under tariff and we will deny that portion of the application.

We disagree with protestant's assertion that applicant has failed to show that the proposed service is responsive to a public need. Applicant surveyed 49 businesses from which 40 positive responses were obtained. Those 40 positive responses came from 15 different types of businesses. While the number of respondents surveyed was not great, we believe the number of different types of businesses surveyed makes for a reasonably representative sample to conclude that there is a public need for the proposed service.

Furthermore, the survey indicated that 34 respondents considered it to their advantage to own their own pagers instead of having to rent them from the RTU. At the time of that survey-- December 10, 1982 to January 31, 1983--protestant did not offer service to customer-owned pagers. It was not until after this application was filed--not, as contended by protestant, before the application was filed--that protestant filed to amend its tariff to provide service to customer-owned pagers. This tariff change was made according to protestant, "in light of recent industry trends toward substantially more customer ownership." Such statement by protestant bears out the results of applicant's survey in regard to a growing demand for the use of customer-owned pagers. In addition, the possible notoriety of the survey and the filing of this application are too coincidental with the change in protestant's tariffs to rule out the possibility that the tariff changes were made, for the most part, merely to support its protest.

Protestant requests that the application be denied because it fears the competition will do extensive damage to its business and adversely affect its paging service. Apparently, protestant has been strong enough to withstand the competition of General Telephone Company of California and Mobile Radio System of Ventura--two companies offering paging service in the area which did not protest the application. No reason was advanced why protestant is able to withstand the competition of these two companies but would be unable to withstand competition from applicant. Furthermore, protestant offers mobile radiotelephone service in the area, which applicant does not propose to offer, so that applicant's competitive paging service can do no harm to protestant's mobile radiotelephone business.

But even if protestant's worst fears come true, which we seriously doubt, there has been no showing by protestant that the demise of the protestant's paging business will leave the public without adequate paging service in the area if we grant the requested

certificate. There will still be applicant's paging service and the service of protestant's two present competitors from which the public could choose. Thus, protestant has not met the burden of proof necessary to defeat the application. The criteria for use in determining the efficacy of a protest to a RTU application is set forth in Rule 18(o)(3) of the Commission's Rules of Practice and Procedure (RP&P), which states in part as follows:

"(3) Should an existing utility protest such application, the burden shall rest with the protestant to show that the application should not be granted by affirmatively establishing that granting the application will so damage existing service or the particular marketplace as to deprive the public of adequate service. The protest shall conform to Rules 8.1 through 8.8 of the Commission's Rules of Practice and Procedure...."

The effect of that rule was explained on pages 28 and 29 (mimeo.) of Decision (D.) 83-08-59, which established that rule:

"The rule [Rule 18(o)(3)] downplays the Commission's role as the protector of the profits of a nonmonopolistic type of public utility and focuses instead on the overall effect that the granting of the application will have on the adequacy of existing service to the public in any particular marketplace."

Since the protest does not affirmatively establish that granting the application "will so damage existing service or the particular marketplace as to deprive the public of adequate service" as required by Rule 18(o)(3) the protest fails. In addition, since the protest contains no facts dealing with such establishment there is no necessity for holding a hearing on the application.²

² Rule 8.4(c) of the RP&P requires a protest to contain "facts the protestant would develop at a public hearing, which could result in a denial of the application...in whole or in part."

Applicant's Motion to Strike the protest will be denied. The allegations in the motion are not convincing that the protest is a sham or was filed to delay applicant's entry into the market.

Findings of Fact

1. Applicant requests a certificate to construct and operate a public utility one-way paging radiotelephone system with two base stations located as more particularly described in the application in and close to the City of Santa Barbara.

2. Applicant has the requisite FCC construction permits for the proposed operations.

3. The paging system will be connected to the public switched telephone network using end-to-end dialing techniques and be completely automatic in its operation.

4. Paging receivers are Customer Premises Equipment and cannot be offered by the applicant on a tariffed basis.

5. The initial capital requirements to install any necessary facilities and start up the business are approximately \$77,000.

6. BNSC, applicant's parent corporation, will provide the start-up capital for the system.

7. Applicant expects to be serving approximately 75 pagers at the end of the first year of operations and 275 at the end of the fifth year of operations.

8. Applicant expects its first year of operations to result in a loss of approximately \$28,450 but expects to earn a profit during its fifth year of operations of approximately \$17,030.

9. Applicant conducted a survey between December 10, 1982 and January 31, 1983 in the area it intends to serve to determine a need for its proposed service.

10. A total of 49 businesses were included in the survey from which 40 positive responses were received from 15 different types of businesses indicating potential use of 64 pagers.

11. A total of 34 respondents in the survey indicated that it would be to their advantage, in subscribing to applicant's service, to own their own pagers rather than renting them from applicant.

12. In the survey 28 respondents indicated they would be interested in immediately subscribing to applicant's proposed service.

13. According to the survey 12 respondents felt a definite need exists for applicant's service and have a positive interest in subscribing to it.

14. Applicant's survey was a reasonably representative sampling as to the need and demand for its service in the involved area.

15. A need and demand exist for applicant's proposed service.

16. Public convenience and necessity require the issuance of the requested certificate.

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

18. The proposed operations are technically feasible.

19. The proposed operations are economically feasible.

20. Protestant provides two-way mobile radiotelephone service and one-way paging service in the involved area.

21. The involved area is served by two other companies offering one-way radiotelephone paging service.

22. Protestant did not amend its tariff so as to provide customer-owned service until after this application was filed.

23. The protest does not affirmatively establish that granting the application will so damage existing service or the particular marketplace as to deprive the public of adequate service.

24. The protest contains no facts which would be developed at a public hearing which could lead to the establishment that granting the application will so damage existing service or the particular marketplace as to deprive the public of adequate service.

25. Should protestant's paging service suffer because of competition from applicant there will still be left the service of applicant and protestant's two present competitors from which the public could choose.

26. Applicant also requests authority to issue 10,000 shares of its common stock to BNSC, applicant's parent corporation, for \$10,000.

27. The proceeds from this sale of stock, along with monetary advancements from BNSC to applicant, will be used by applicant to purchase and install the proposed system and as initial working capital.

28. A hearing is not necessary.

Conclusions of Law

1. The application should be granted to the extent stated herein.

2. Protestant's request that an oral hearing be held, or, in the alternative, that the application be denied, should be denied.

3. Applicant's Motion to Dismiss the protest should be denied.

4. The proposed security issue is for lawful purposes and the money to be obtained by it are required for these purposes. Proceeds from the security issue may not be charged to operating expenses or income.

5. Only the amount paid to the State for operative rights may be used in rate fixing. The State may grant any number of rights and may cancel or modify the monopoly feature of these rights at any time.

6. The number of shares outstanding, the total stated value of the shares, and the dividends paid do not determine allowable return on plant investment. This authorization is not a finding of the value of the utility's stock or property, nor does it indicate the amounts to be included in ratesetting proceedings.

O R D E R

IT IS ORDERED that:

1. A certificate of public convenience and necessity is granted to Dial Page, Inc. (applicant) for the construction and operation of a public utility one-way radiotelephone system with base stations and a service area located as follows:

Base station locations:

- a. 3035 Gibraltar Road, City of Santa Barbara. (Gibraltar) Lat. $34^{\circ}27'58''$ N, Long. $119^{\circ}40'37''$ W.
- b. Santa Ynez Peak, 11 miles northwest of the City of Goleta. (Laguna) Lat. $34^{\circ}31'36''$ N, Long. $119^{\circ}58'39''$ W.

Service area: As set out on the contour map in Exhibit B to Application (A.) 83-02-34.

2. Within 30 days after this order is effective, applicant shall file a written acceptance of the certificate granted in this proceeding.

3. Applicant is authorized to file, after the effective date of this order and in compliance with Ordering Paragraph 3, tariffs applicable to the service authorized containing rates, rules, and charges otherwise applicable to its radiotelephone services. The offerings, rates, and charges shall be as proposed in Exhibit L to A.83-02-34 except that pagers shall not be offered under tariff. This filing shall comply with General Order 96-A. The tariffs shall become effective on not less than 10 days' notice.

4. Applicant shall file, after the effective date of this order and compliance with Ordering Paragraph 3, as part of its individual tariff, an engineered service area map drawn in conformity with the provisions of the Federal Communications Commission Rule 22.504, commonly known as the "Carey Report," consistent with Exhibit B to A.83-02-34.

5. Applicant shall notify this Commission, in writing, of the date service is first rendered the public under the rates, rules, and charges authorized within five days after service begins.

6. Applicant, on or after the effective date hereof, may issue, sell, and transfer not exceeding 10,000 shares of its common stock to Bud-North Shore Communications for \$1 (one dollar) per share.

7. Applicant shall file reports required by General Order Series 24.

8. Applicant shall keep its books and records in accordance with the Uniform System of Accounts for Radiotelephone Utilities, prescribed by this Commission.

9. The request of Sylvan B. Malis (protestant) that an oral hearing be held, or, in the alternative, that the application be denied, is denied.

10. Applicant's Motion to Dismiss the protest of protestant is denied.

11. Applicant shall file an annual report, in compliance with General Order 104-A, on a calendar-year basis using CPUC Annual Report Form L and prepared in accordance with the instructions included in that form.

12. The certificate granted and the authority to render service under rates, rules, and charges authorized will expire if not exercised within 12 months after the effective date of this order.

~~12.~~ 13. To the extent that A.83-02-34 pertains to the offering of
pagers under tariff, the application is denied.

The authority granted by this order to issue stock will
become effective when the issuer pays \$20, set by PU Code Section
1904(b). In all other respects this order becomes effective 30 days
from today.

Dated JAN 19 1984, at San Francisco, California.

LEONARD M. GRIMES, JR.
President

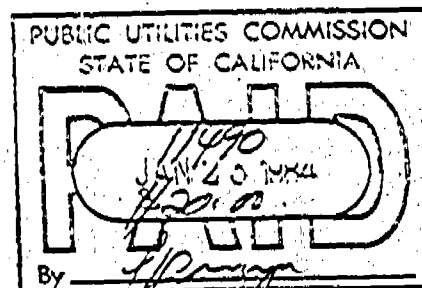
VICTOR CALVO

PRISCILLA C. GREW

DONALD VIAL

WILLIAM T. BAGLEY

Commissioners



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

Joseph E. Bodovitz
Joseph E. Bodovitz, Executive Director

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9. The request of Sylvan B. Malis (protestant) that an oral hearing be held, or, in the alternative, that the application be denied, is denied.

10. Applicant's Motion to Dismiss the protest of protestant is denied.

11. Applicant shall file an annual report, in compliance with General Order 104-A, on a calendar-year basis using CPUC Annual Report Form L and prepared in accordance with the instructions included in that form.