

Decision No. 86859

ORIGINAL

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of ELECTROPAGE, INC.,)
and DELTA VALLEY RADIOTELEPHONE)
COMPANY, INC.,)

Complainants,)

vs.)

SACRAMENTO DOCTORS ANSWERING SERVICE,)
INC., SACRAMENTO DOCTORS SERVICE)
BUREAU, JAMES T. LUKENS, LONNIE)
MURPHY, DOROTHY MURPHY, DOE ONE)
THROUGH DOE FIFTY,)

Defendants.)

Case No. 10157
(Filed August 6, 1976)

Farrand, Malti, Spillane & Cooper, by Wayne B. Cooper,
Attorney at Law, for Electropage, Inc.; and Delta
Valley Radiotelephone Co., Inc.; complainants.

Russell, Jarvis, Estabrook & Dashiell, by Laurence B.
Dashiell, Attorney at Law, for Sacramento Doctors
Answering Service, Inc.; Sacramento Doctors Service
Bureau; James T. Lukens; Lonnie Murphy; and Dorothy
Murphy; defendants.

Brobeck, Phleger and Harrison, by Robert N. Lowry,
Attorney at Law, for Motorola Communications and
Electronics, Inc.; and Lucas Held; interested parties.
Timothy E. Treacy, Attorney at Law, and Oscar B. Weed,
for the Commission staff.

ORDER TO DISSOLVE CEASE AND DESIST ORDER

Statement of Facts

Electropage, Inc. (Electropage) and Delta Valley
Radiotelephone Company, Inc. (Delta) are California corporations and
radiotelephone utilities licensed by the Federal Communications

Commission (FCC), and certified by this Commission to provide, among other services, one-way radio paging in Sacramento and environs pursuant to tariffs on file with this Commission. Among their clientele are numerous doctors and oral surgeons.

In 1965, a coterie of Sacramento doctors led by Dr. Joseph Davies organized its own answering service under the name Sacramento Doctors Answering Service (SDAS), and employed Mrs. Dorothy Murphy, an experienced telephone and answering service operator, as manager. In 1969, SDAS incorporated as a nonprofit organization. Today, SDAS employs ten operators, and operates 24 hours daily, 7 days a week, providing answering service to 120 professional subscribers. Before June 1, 1976, SDAS had arrangements with a small number of radio-telephone utilities, including Electropage and Delta, for forwarding telephoned messages received from patients and others through the respective paging service to which an addressed doctor subscribed, for relay via voice and/or beep, to the addressed doctor. The connection to the addressed doctor's pager was dial direct from the answering service.

Beginning in 1974, Motorola Communications and Electronics, Inc. (Motorola), a manufacturer and vendor of radiotelephone equipment, made contact with Mrs. Murphy and SDAS, trying to sell a page system. A proposal was submitted. Initially nothing came of it. In January 1975, Doctor James Lukens, present chairman of the SDAS board of directors, noting that changes in the federal minimum wage law mandated a 10 percent increase the first of January, with another increase scheduled for 1976, advised the SDAS membership of the need to raise SDAS salaries accordingly, and of the board's search for an alternative to raising SDAS rates to pay for the wage increases. The board had determined upon an alternative way to raise its income through purchasing a paging system, as suggested by Motorola, to be operated under a Special Emergency Radio Service

license from the FCC ^{1/}, with rental of pagers to the subscribing doctors. It was estimated this alternative would raise, beyond the \$800 - \$900 equipment payment requirement, about \$500 a month in additional income to pay required salary increments. In response to a letter and postcard solicitation in January 1975, 24 doctors indicated willingness to rent, 3 were uncertain, and 34 were not interested in renting pagers. Meetings and discussions followed with advice and guidance from Motorola, represented by Mr. Lucas Held, newly designated district sales manager of Motorola's Health Care Division. Motorola handled the application to the FCC for the special medical service license. Initially this application ran into difficulties when the FCC questioned the role of SDAS as proposed owner of the paging service equipment, stating that an individual doctor or a medical association could own the equipment and be licensed, but an answering service could not. To surmount these difficulties it was determined that Dr. Lukens would become the FCC licensee, and that a nucleus of about 20 doctors from SDAS would organize and establish an unincorporated professional association, the Sacramento Doctors Service Bureau (SDSB), and this bureau would purchase and own the paging system. With Motorola's assistance, the financing was arranged through the Bank of

1/ Subpart P - Special Emergency Radio Service, Sections 89.501 and 89.503 of the Federal Communications Commission Rules and Regulations (Ed.12/74), provides for granting licenses to, among others, physicians and oral surgeons for the purpose of conducting radio operations for the delivery or rendition of medical services to the public.

California.^{2/} On April 21, 1976 the FCC licensed Dr. Lukens.^{3/} Motorola delivered the equipment and on June 1, 1976 SDSB became operational, using SDAS personnel, with 23 subscribers, each paying \$28 per month per pager. A number of these subscribers up to this point had been pager subscribers to Electropage and Delta, and abruptly canceled their service to switch to SDSB.

Stung by the sudden loss of several hundred dollars monthly revenue, and facing further diminishment of business resulting from alleged SDSB attempts to lure away additional customers as well as future SDSB interference with existing contractual relationships, Electropage and Delta reacted strongly. Contending that--to the great damage of Electropage and Delta--SDAS, SDSB, Dr. Lukens, and Mrs. Murphy (as well as others) were in a conspiracy, and in essence carrying on a common carrier service, unauthorized by this Commission and in violation of Sections 453 et seq., 495 et seq., 701 et seq., and 1001 of the Public Utilities Code, and wilfully interfering with Electropage's and Delta's long established contractual relationships, Electropage and Delta complained to this Commission and requested issuance of an ex parte temporary restraining order. Good cause being shown in the verified complaint, the Commission by Decision No. 86271 dated August 17, 1976 in Case No. 10157 issued a Cease and Desist Order prohibiting the

^{2/} The down payment of \$2,350 was raised by voluntary subscription from certain individual members of Sacramento Doctors Answering Service who comprise Sacramento Doctors Service Bureau. The \$21,200 balance of the Motorola equipment cost was borrowed on a Bank of California Simplifier Loan (see Exhibit 2) by a note signed by Doctors Lukens and Keating. There is a gentlemen's agreement among the answering service doctors to jointly guarantee the loan.

^{3/} Lukens is licensed to operate under a frequency of 163.250 MHz using call sign KZR 612.

defendants from holding out, constructing, providing, or offering to provide radio-paging service until further order of this Commission. The order further provided for a hearing to determine whether the Cease and Desist Order should be continued in effect or terminated.

A duly noticed public hearing on the Cease and Desist Order was held in Sacramento before Examiner John B. Weiss on September 1 and 9, 1976. Upon receipt of briefs September 22, 1976, the cease and desist order issue was submitted; with a hearing on the complaint itself to be set at an undetermined future date.

At the hearing defendants moved to dismiss the complaint, contending that they are not a public utility in that they have not and will not dedicate any service to the public and that therefore the Commission has no jurisdiction. Defendants contended that the first Vogelman-Podesta decision^{4/} controls here, relying upon the finding in that case in the first decision that the defendants therein had not dedicated their service to the general public. On the other hand, Electropage and Delta disputed this view; contending that all the points upon which defendants might seek support were totally reversed upon rehearing as represented by the second Vogelman-Podesta decision^{5/}, and moved for summary judgment. The examiner took all motions under submission. Motorola appeared, primarily in response to numerous subpoenas duces tecum, but also to protect its interests.

4/ Mobile Radio System of San Jose, Inc. v Vogelman et al. (1968)
68 CPUC 270.

5/ Mobile Radio System of San Jose, Inc. v Vogelman et al. (1969),
reconsidered 69 CPUC 333.

Discussion

The transmission of radio frequency energy is under the primary jurisdiction of the FCC, and no one in the United States may lawfully utilize frequencies in nongovernmental transmissions unless he first secures an FCC license. This is necessarily so in that radio energy in its essence is rather deliquescent in nature; its waves flow out from their source transmitter without regard for state borders and can interfere with radio frequencies originating from another transmitter in another state. Thus the FCC allocates frequencies and controls transmissions. But it also is clear that the federal commission has not asserted jurisdiction over tariffs and rates where the radio communication service is entirely intrastate in nature (Coml. Communications v PUC (1958) 50 C 2d 512, 526). Therefore, where state law confers jurisdiction, a state regulatory body may exercise it.

In the past this Commission has taken jurisdiction to determine whether or not paging services, both tone only and tone and voice, involving transmissions by radio from transmitters to receivers all situated within California, are public utility radiotelephone services subject to the jurisdiction and regulation of this Commission (Mobile Radio System of San Jose, Inc. v Vogelman, et al. (1969) 69 CPUC 333; Chalfont Communications v Tesco Communications, et al. (1968) 69 CPUC 124; Radio Electronic Products Corp. v Boer (1972) 73 CPUC 153). In the past we have held that where interconnection is accomplished with a general telephone network open to the public, the fact of such interconnection served to bring the service using interconnective devices under our jurisdiction.

In the case at bar, the defendants, a small group of doctors, one of whom obtained an FCC Part 89 license, have formed a nonprofit, voluntary association which owns and operates a tone and voice radio-paging system which is not interconnected with any public telephone network. They contend that operation as such under an FCC Part 89 license and operation under certification by this Commission is mutually exclusive, and challenge our jurisdiction. They rely upon the first Vogelmann-Podesta opinion,^{6/} asserting that therein this Commission held that a radio-paging service rendered only to doctors (under Part 89 of the FCC Rules and Regulations) who are members of a county medical

^{6/} See Footnote 4, supra.

society--a nonprofit, cost-saving cooperative association - where messages are limited to matters relating to the medical duties of the doctors--is not a public utility, and therefore not subject to regulation by this Commission.

Although this Commission in the Vogelmann-Podesta matter upon petition granted reconsideration, and in its second and final opinion^{7/} came to a different conclusion from a revised set of findings, it is defendants' assertion that the second opinion, based upon a change of facts rather than a change of law, did not reverse or modify the principles and law expounded in the first opinion. Accordingly they seek here to apply some precedential value to the first Vogelmann-Podesta opinion. The difficulty with that assertion is that the first opinion was in fact superseded and is not the decision of record in the matter. Therefore the principles expounded in the first opinion have no precedent value and are at best some mere form of dicta, based upon findings not before the Commission. The Commission does not issue advisory opinions and is not bound by dicta expressed in a superseded opinion.

However, defendants' efforts to reassert principles expounded in the first Vogelmann-Podesta opinion and to apply them to the factual matrix of their case are not without merit. It is clear that to date we have not answered the question whether a non-interconnected radio-paging system licensed under FCC Part 89, limited to medically related messages, and operated by doctors who are members of a nonprofit, cost-sharing cooperative medical association, is or is not a public utility under our jurisdiction. Furthermore, in Case No. 10210 dated November 23, 1976 this Commission, recognizing that changed circumstances in the industry make the question of

^{7/} See Footnote 5, supra.

continued regulation a very real issue, ordered an investigation on our own motion of that issue, stating our opinion that the radiotelephone industry should be deregulated by March 1, 1977. Hearings on that OII will commence shortly.

In view of the above questions and developments it is clear we have asserted jurisdiction here. It is equally clear that it would be manifestly inequitable to defendants to allow the cease and desist order of Decision No. 86271 dated August 17, 1976 to continue in force. Accordingly we will order it dissolved. The motions under submission, one for summary judgment by complainants, and one for dismissal by defendants, both relate to the complaint and accordingly will be continued together with the complaint matter, pending resolution of the issues raised by our order instituting investigation in Case No. 10210.

Findings

1. Defendants' radio-paging service is operated by and for doctors who are members of Sacramento Doctors Service Bureau, a nonprofit, cost-sharing cooperative unincorporated association, and is open to doctors and allied professionals who are members of the Sacramento Doctors Answering Service, a nonprofit corporation.
2. Defendants' radio-paging service is licensed under Part 89 of the FCC's Rules and Regulations.
3. The radio-paging service rendered by defendants is limited to messages pertaining to the safety of life or property and urgent messages relating to the medical duties of its users.
4. The radio-paging service operated by defendants is not interconnected to any general telephone network open to the public.

5. Defendants have not and do not seek certification by this Commission as a radiotelephone utility.

6. In response to a request for a temporary restraining order arising out of a complaint filed by Electropage and Delta, Decision No. 86271 dated August 17, 1976, an order to cease and desist from holding out, constructing, providing, or offering to provide, radio-paging service until further order, was issued.

7. By an order instituting investigation in Case No. 10210 dated November 23, 1976, this Commission intends to determine whether or not it should continue regulation over any of the radiotelephone industry.

Conclusion

It would be inequitable to continue the cease and desist order of Decision No. 86271 dated August 17, 1976 in force, and the order should be dissolved. For the same reason our order will be made effective on the date signed.

IT IS ORDERED that the Cease and Desist Order of Decision No. 86271 dated August 17, 1976 in Case No. 10157 is dissolved. The effective date of this order is the date hereof.

Dated at San Francisco, California, this 14th day of JANUARY, 1977.

Robert Bateman
President
William Sproule Jr.
Robert Ross
Commissioners

Commissioner Vernon L. Sturgeon, being necessarily absent, did not participate in the disposition of this proceeding.