

Decision No. 87746 AUG 23 1977

ORIGINAL

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application of  
MARTIN E. WILLSON, doing business as  
VICTOR VALLEY RADIO-TELEPHONE COMPANY,  
for authority to sell and transfer his  
Certificate of Public Convenience and  
Necessity and related assets to VICTOR  
RADIO TELEPHONE CORPORATION, and for  
the latter to issue and sell 800 shares  
of its Capital Stock at \$10.00 par value.

Application No. 55888  
(Filed August 20, 1975)

Estelle L. Le Vine, Attorney at Law, for  
Martin E. Willson, dba Victor Valley  
Radio-Telephone Company, applicant.  
Ronald M. Sohigian, Attorney at Law, for  
Richard A. Howard and Hi-Desert  
Communications, protestants.  
Homer Harris, for Industrial Communications  
Systems, Inc., and Surr & Hellyer, by  
Michael B. Arkin, Attorney at Law, for  
Victor Valley Radio-Telephone Company,  
interested parties.  
Lionel B. Wilson, Attorney at Law, and  
R. Roger Johnson for the Commission  
staff.

O P I N I O N

This is an application by Martin E. Willson, doing business as Victor Valley Radio-Telephone Company, (Willson) seeking authority to transfer to Victor Radio Telephone Corporation (Victor) his certificate of public convenience and necessity to operate as a telephone corporation and related assets. Victor seeks authority to acquire the certificate, the related assets, and to issue and sell shares of its capital stock. Richard A. Howard (Howard) and Hi-Desert Communications (Hi-Desert) protested the application. Howard owns all the equity interest in Hi-Desert.

A duly noticed public hearing was held in this matter by Administrative Law Judge Donald B. Jarvis in Los Angeles on December 17, 18, 1975; January 28, 29, February 26, 27, and June 7, 1976. The matter was submitted subject to the filing of briefs which were submitted by July 13, 1976.

The basis of the protests was that the Commission should abate this proceeding pending the disposition of a superior court action between Hi-Desert and Willson. The suit was one in which Hi-Desert sought damages and specific performance against Willson in connection with the certificate and related assets here under consideration. Applicants contended that the contract between Willson and Hi-Desert was null and void because of its breach by protestants, and, that, in any event regardless of the outcome of the superior court action, the protestants were not fit and proper persons to hold the certificate. Therefore, applicants argued the proceeding should not be abated.

The presiding Administrative Law Judge correctly ruled that the Commission had no jurisdiction to adjudicate who breached the contract between Willson and Hi-Desert. (Cal. Water & Tel. Co. v Public Utilities Commission (1959) 51 C 2d 478, 485.) He also correctly ruled that evidence of the fitness of protestants was relevant to the issue of whether the proceeding should be abated. The presiding Administrative Law Judge's rationale for the ruling, with which we agree, was as follows: The Commission has exclusive jurisdiction to determine the circumstances under which a certificate of public convenience and necessity to operate as a telephone corporation may be transferred. (Public Utilities Code §§ 852, 854, 1001, 1005, 1904; Crum v Mt. Shasta Power Co. (1934) 220 C 295, 310; Transport Clearings v Simmons (1964) 226 CA 2d 405, 419.) If protestants were found to lack fitness, the certificate should not be transferred to them regardless of the outcome of the superior court action. In such event abatement of this proceeding would not be appropriate.

During the course of the hearing the presiding Administrative Law Judge raised the question of the existence of perjury in the proceeding. In fact, the matter was reopened to receive further evidence on this point. (Ruling dated May 20, 1976.)

On September 7, 1976, after the matter was submitted and briefed, counsel for protestants indicated, by letter, that the superior court litigation had been settled and that the protestants withdrew their protest to the application.

The material issues herein presented are: (1) Is the proposed transfer of operating rights adverse to the public interest? (2) If the proposed transfer is not adverse to the public interest, should the Commission authorize Victor (the transferee) to issue the requested amount of capital stock? (3) Was perjury committed in this proceeding?

#### Transfer of Operating Rights

John Passeneau and Frederick Daniel are the incorporators and directors of Victor. If the requested authority to issue stock is granted, each will own 50 percent of Victor's common stock. Daniel holds a radiotelephone first class license with radar endorsement issued by the FCC. Daniel operates a business known as Communications Specialties, which sells and services industrial communications equipment. He has operated the business since 1965. If the transfer is approved, Daniel would supervise the engineering and technical activities of Victor.

Passeneau owns 50 percent of a business known as Rand Communications. Rand leases communication equipment and provides basic system engineering for entities in the communication business. It also owns a number of mountain-top repeater sites from which it furnishes repeater service to business and industrial radio users. Passeneau is also the sole owner of a pest control business known as General Exterminators, which does business in a geographical area

that encompasses the service area of the utility here under consideration. Thus, Passeneau is acquainted with the terrain and business operations in the area.

Willson and Victor have entered into an agreement whereby Victor will, subject to the approval of the Commission, purchase Willson's operating rights and equipment for \$12,000. Victor seeks authority herein to issue \$8,000 of its common stock. That money is to be used to purchase the equipment which is valued at \$8,000. Passeneau and Daniel will contribute the remaining amount to Victor to enable it to consummate the agreement. The record indicates that they have the ability to do so. The Commission finds and concludes that the transfer of the operating rights here involved would not be adverse to the public interest.

#### Issuance of Stock

Victor seeks authority to issue 800 shares of its \$10 par value common stock for an aggregate amount of \$8,000. The stock would be issued in equal amounts to Passeneau and Daniel. The proceeds would be used to purchase from Willson the equipment of the utility involved in the transfer heretofore discussed. It appears that the stock is to be issued for the purpose of acquiring utility property as contemplated by Public Utilities Code Section 817 and should be authorized.

#### Perjury

As indicated, the fitness of protestant was a material issue on the question of abatement. Evidence was introduced which indicated that the operating frequency of the utility had been changed from its authorized common carrier frequency while Howard was in charge of its operations pending consummation of a contract to purchase it. Howard denied making the change.

During the hearing the presiding Administrative Law Judge stated:

"EXAMINER [ALJ] JARVIS: It is almost time to adjourn for the afternoon. I will direct the witness to be present tomorrow at 9:30 a.m.

"Before we adjourn I would just like to express one concern on the record so that nobody feels misled at a later date.

"At the present posture of the record there is fairly explicit testimony that at some point in time a common carrier frequency crystal was put into the pagers, the 154.625 frequency. There is also some very direct testimony in this record as to who did it, where those crystals were purchased, et cetera.

"There was some question today, although not a direct contradiction of some of that. I want to alert the parties that to me this is a serious issue in this case and I will have no hesitation in referring the matter to the Attorney General for perjury prosecution or instituting contempt proceedings out of the Commission or both if there appears to be a direct conflict.

"I just want to alert the parties that while there are some issues in this proceeding that are subject to interpretation and one party can look at certain facts one way and another party can look at certain facts another way and I do not consider the question of the fact of the installation of crystals as something subject to interpretation. It happened and it happened on a certain date and there appears to be developing a conflict and I want to let the parties know that it is not going to end by conflicting testimony because it is too important an issue in this case and at this point I have no opinion as to which testimony is correct.

"I always wait until the end of the proceedings before I make up my mind, but I don't want you to be misled in this case that if there is a direct contradiction, and I am not talking about a mistake of two or three days, I am talking about the fact, the denial of an occurrence, that this thing will proceed further."  
(RT 352-53.)

At the conclusion of the public hearing, the presiding Administrative Law Judge again articulated his concern about the possibility of perjury:

"EXAMINER [ALJ] JARVIS: All right.

"Mr. Perry, you may step down. You are excused. I will submit in a moment.

"I do want the record to show that I am still quite troubled by the conflict in testimony.

"MR. SOHIGIAN: I don't blame you.

"EXAMINER [ALJ] JARVIS: To a certain degree it will be necessary for me to resolve some of these conflicts within the issues of this proceeding.

"I am still of the opinion that if the record discloses that there has been false testimony given to the Commission that the Commission will contact the Attorney General or the appropriate authority will be contacted.

"I don't want the parties to be misled, or not only the parties, but anybody connected with this case, that the submission of this matter puts to rest the discrepancies in the matter.

"I am still very troubled by them.

"I intend to read the record very carefully. And if a very thorough reading of the record indicates to me that further proceedings should be taken I will have no hesitation of pursuing this.

"And I don't want anybody to be misled that when we submit today that this question has been put to rest.

"All right. The matter will be submitted subject to the filing of the transcript in this matter.

"And the parties will be informed when the transcript has been filed." (RT 728)

The record indicates that in December of 1973, Willson and Howard entered into agreements under which: (1) Howard, subject to the approval of this Commission, would purchase the operating rights and equipment of the utility and (2) Howard would take over its day to day operations. Howard took over and operated the utility from January 1, 1974 until April 21, 1975. The record also discloses that

Howard owns or has an interest in the following entities which do business in the communications field: Radio Dispatch Corporation, a radiotelephone common carrier; Valley Radio Corporation; VEPCO and Allen Industries.

Willson testified that the authorized frequency for the radiotelephone utility here under consideration is 152.060 megahertz and that he never changed the frequency. (RT 7-8, 111.) At the time Willson turned over operations to Howard, the utility had a base station and control equipment located at 161 Chula Vista, Victorville, California and two satellite receivers; one of which was located on Quartsite Mountain. The utility had a contract with the Hesperia Fire Department to provide paging receivers to the department on a frequency assigned to it by the FCC. The fire department used its own transmitter for dispatching and its assigned frequency was different than that of the utility.

By March of 1975, Willson was of the opinion that Howard had breached his contract to acquire the utility. He negotiated with Passeneau and Daniel to have them take over the daily operations of the utility, which was done on April 21, 1975. Sometime during March or the early part of April, 1975, but prior to April 21, 1975, Willson came into possession of a pager that belonged to the utility which had been lost in the desert. Willson put a new battery in the pager, which worked. However, Willson was only able to hear two-way calls on the lost pager. He was unable to hear one-way pages even though the receiver was crystalized on the utility's assigned frequency (RT 44). After Passeneau and Daniel took over operations of the utility, they along with Willson determined that a transmitter, which had not been authorized by the FCC, had been installed on Quartsite Mountain; that the transmitter operated on a frequency of 154.625 megahertz; that the frequency of 154.625 megahertz was a business frequency, which was not authorized for the utility's operations;

that there had been installed at the 161 Chula Vista, Victorville location a unit known as a comex, which was connected by a telephone line to the transmitter on Quartsite Mountain, that the comex was activating the transmitter to signal the utility's one-way paging customers on the 154.625 megahertz business frequency rather than the utility's frequency of 152.060 megahertz and that all of the utility's one-way paging customers had receivers which were crystaled at a frequency of 154.625 megahertz. (RT 43-44, 45, 89, 119-122, 125, 165-66.) Thereafter, Passeneau and Daniel removed the Quartsite Mountain transmitter and, over a period of time, returned the operations of the utility to its authorized frequency of 152.060 megahertz (RT 170, 237, 373-74.)

E. James Perry testified that he was employed as a service technician by Howard from July of 1969 to October or November of 1974. (RT 173) Perry testified that in January of 1974, after Howard took over management of the utility's operations, that he and Howard examined its equipment; Howard proposed to make various changes in the operation of the utility; that Howard determined to change the frequency of the one-way pagers; that a letter was sent to the utility's customers telling them to bring in their receivers on specified dates so that the receivers could be recrystaled; that Howard changed the crystals in the receivers to cause them to operate on a frequency of 154.625 megahertz; that the crystals were purchased from International Crystals in Oklahoma City; that Perry and Howard installed the transmitter which transmitted at a frequency of 154.625 megahertz on Quartsite Mountain and that there was no FCC license posted on the transmitter. (RT 173-75, 181, 183, 188, 196.)

Howard testified that he never recrystaled the one-way paging receivers of the utility's customers to change them from 152.060 megahertz to 154.625 megahertz. (RT 431, 433, 437, 453.) Howard also testified that after he took charge of the utility's



operations on January 1, 1975, he caused a letter to be sent to the utility's customers; that the purpose of the letter was to have the customers come in and reexecute their contracts and that the letter had nothing to do with recrystallizing pagers. (RT 256-57.) Howard further testified that he determined to increase the utility's revenues by leasing equipment; that he was contacted by the person who owned SMB Enterprises (SMB) and asked to provide equipment in a manner similar to that provided for the fire department; that he suggested that SMB use the private business frequency of 154.625 megahertz; that he prepared the FCC license application for the owner of SMB and mailed it to him; that he notified Perry that SMB wanted the transmitter on Quartsite Mountain and to install it; that he rented the transmitter to SMB and a towing company and a swimming pool company, whose names he could not recall; that the transmitter was leased for private paging purposes and that there was a total of nine or ten pagers leased for private paging. (RT 394-97, 440, 575-77, 608.)

Spencer M. Boyd testified that he was the sole proprietor of a business known as SMB Enterprises which operated from approximately July, 1973 to July, 1974; that in January of 1974 he permitted the utility, acting through Howard to install a receive monitor and antenna on a tower which he owned; that he discussed with Howard the possibility of establishing a business radio communications system; that he authorized Howard to prepare the paperwork for him to sign and file with the FCC but that Howard never did so and that he never utilized the service of or any equipment belonging to the utility here under consideration. (RT 467-70, 474.)

There was conflicting testimony throughout the proceeding about the contents of the letter sent by Howard after he took over operations of the utility. After the initial days of hearing, a copy of the letter was discovered in the files of a local hospital, which

uses the utility's service. On May 20, 1976, the presiding Administrative Law Judge vacated the submission to permit the parties to produce additional evidence. At the subsequent hearing on June 7, 1976, the letter was received in evidence as Exhibit 43. The letter, signed by Howard, states in part that:

"To modify and change for the better the paging service in the Victorville area, it is necessary that we change and modify each pager. For your convenience, we will set aside two days of February with our service facilities and office personnel to be at your disposal for this change-over. We will be at 15421 6th Street, Victorville on February 7th and 8th from eight in the morning until eight in the evening both days.

"In order to continue your paging service, you must be issued a new pager or have your existing pager modified to work with the new equipment."

The presiding Administrative Law Judge who heard all the testimony and observed the demeanor of the witnesses has advised the Commission that he believes that Howard did not testify truthfully when he denied changing the authorized operating frequency of the utility and recrystallizing the pagers. The record also supports this conclusion. Howard's testimony about the contents of the letter sent to the utility's customers is contradicted by the letter itself. Howard admits directing Perry to install the transmitter, which was on the business frequency of 154.625 megahertz, on Quartsite Mountain. His explanation that this was for leased equipment business transmissions does not withstand scrutiny. Howard testified that the leased equipment was provided to SMB Enterprises a towing company and a swimming pool company. Boyd, the owner of SMB Enterprises, testified that he never leased or received any equipment from the utility and never utilized its service. In fact, Howard later modified his testimony to indicate Boyd was correct. (RT 612.) The record is devoid of any evidence to indicate that the utility ever received any

revenue whatsoever from the unnamed swimming pool and towing companies. It defies reason and common sense to believe that the utility operated the transmitter, with attendant costs, without receiving any revenue from its operation. The only other evidence in the record which would tend to substantiate the testimony of Howard is the testimony of Eileen C. Fellows, who worked for Howard from December 3, 1973, to March 3, 1974. The presiding Administrative Law Judge has indicated that Fellows' testimony lacks credibility and is entitled to little weight on the issues here under consideration. We agree. Fellows' testimony that the letter sent by Howard did not ask customers to bring in their pagers for recrystallizing is contradicted by the letter itself. (Compare, RT 257 with Exhibit 43.) Fellows also testified that she was present during the period in February of 1974 when the utility's customers came in to reexecute contracts and that she was not aware of any crystals being changed. (RT 260.) However, on the witness stand she was unable to recognize a crystal when one was shown to her. (RT 275.)

Arrayed against the denials by Howard is the direct testimony of Perry that he observed Howard change the crystals of the one-way paging receivers so that the utility was operating its service on the private business frequency of 154.625 megahertz rather than its authorized one. Overwhelming circumstantial evidence corroborates the testimony of Perry. It appears that willful perjury occurred in this proceeding. Howard's conduct in this proceeding indicates his lack of fitness to conduct public utility radiotelephone operations. He should be precluded from obtaining any further radiotelephone operating rights.

The transfer of operating rights here involved should not be further delayed because of the other matters raised herein. Except for the provisions dealing with the issuance of stock, the effective date of the order hereinafter entered should be the date hereof. No other points require consideration. The Commission makes the following findings and conclusions:

Findings of Fact

1. John Passeneau and Frederick Daniel are the incorporators and directors of Victor. If the requested authority to issue stock is granted, each will own 50 percent of Victor's common stock.

2. Daniel holds a radio-telephone first class license with radar endorsement issued by the FCC. Daniel operates a business known as Communications Specialties, which sells and services industrial communications equipment. He has operated the business since 1965. If the transfer is approved, Daniel would supervise the engineering and technical activities of Victor.

3. Passeneau owns 50 percent of a business known as Rand Communications. Rand leases communication equipment and provides basic system engineering for entities in the communication business. It also owns a number of mountain-top repeater sites from which it furnishes repeater service to business and industrial radio users. Passeneau is also the sole owner of a pest control business known as General Exterminators, which does business in a geographical area that encompasses the service area of the utility here under consideration. Thus, Passeneau is acquainted with the terrain and business operations in the area.

4. Willson and Victor have entered into an agreement whereby Victor will, subject to the approval of the Commission, purchase Willson's operating rights and equipment for \$12,000. The equipment is valued at \$8,000. Victor seeks authority herein to issue \$8,000 of its common stock. That money will be used to purchase the equipment which is valued at \$8,000. Passeneau and Daniel will

contribute the remaining amount to Victor to enable it to consummate the agreement.

5. The transfer of the operating rights here involved would not be adverse to the public interest.

6. Victor seeks authority to issue 800 shares of its \$10 par value common stock for an aggregate amount of \$8,000. The stock will be issued in equal amounts to Passeneau and Daniel. The proceeds will be used to purchase from Willson the equipment of the utility here involved.

7. The stock proposed to be issued is for the purpose of acquiring utility property as contemplated by Public Utilities Code Section 817 and should be authorized.

8. A material issue in this proceeding was whether the one-way paging operating frequency of the utility was changed from its FCC authorized frequency of 152.060 megahertz to the private business frequency of 154.625 megahertz.

9. Howard conducted the operations of the utility from January 1, 1974 until April 21, 1975.

10. Howard testified that he did not change the one-way paging operating frequency of the utility from 152.060 megahertz to 154.625 megahertz. The Administrative Law Judge who presided at the hearing and observed the demeanor of the witnesses did not believe this testimony.

11. During February of 1974, Howard changed the one-way paging operating frequency of the utility from 152.060 megahertz to 154.625 megahertz.

12. Howard willfully gave false testimony on a material issue in this proceeding. He lacks the fitness necessary to conduct public utility radiotelephone operations.

#### Conclusions of Law

1. Willson should be authorized to sell and transfer his radiotelephone operating rights, properties, and equipment to Victor.

2. Upon completion of the sale and transfer of the public utility radiotelephone operating rights, properties, and equipment to Victor, Willson should be relieved of all public utility obligations.

3. The proposed security issue is for proper purposes and the money, property, or labor to be procured or paid for by the issue of the security authorized by this decision is reasonably required for the purposes specified, which purposes are not, in whole or in part, reasonably chargeable to operating expenses or to income.

4. The Commission should not grant any further public utility radiotelephone operating rights to Howard.

O R D E R

IT IS ORDERED that:

1. Within one hundred twenty days after the effective date of this order, Martin E. Willson may transfer his certificate of public convenience and necessity to operate as a telephone corporation and his operating equipment and properties to Victor Radio Telephone Corporation in accordance with the agreement attached to the application as Appendix B. Within thirty days after the actual transfer, Victor Radio Telephone Corporation shall notify this Commission, in writing, of the date upon which the transfer was consummated.

2. Within sixty days after the date of actual transfer the tariffs of Martin E. Willson now on file with this Commission, shall be refiled under the name of Victor Radio Telephone Corporation, in accordance with the procedure prescribed in General Order No. 96-A. No increases in the presently authorized filed rules and rates shall be made unless otherwise authorized by the Commission.

3. On or before the date of actual transfer, seller shall refund all customers' deposits and advances which are subject to refund. Any unrefunded advances and deposits shall be transferred to and become the obligation for refund of buyer.

4. On or before the date of actual transfer of the specific properties herein authorized, Martin E. Willson shall transfer and deliver to Victor Radio Telephone Corporation, and the latter shall receive and preserve all records, memoranda, and papers pertaining to the construction and operation of the radiotelephone utility authorized to be transferred.

5. Upon compliance with Ordering Paragraphs, 1, 2, 3, and 4 Martin E. Willson is hereby relieved of his public utility responsibilities with respect to the property being transferred coincident with the full assumption of such responsibilities by Victor Radio Telephone Corporation.

6. On or after the effective date of this order and on or before January 31, 1978, for the purposes specified in this proceeding, transferee may issue not exceeding 800 shares of its common stock having a par (stated) value of \$10 per share.

7. Richard A. Howard shall be precluded from receiving any further public utility radiotelephone operating authority from the Commission.

8. Victor Radio Telephone Corporation is placed on notice that operative rights, as such, do not constitute a class of property which may be capitalized or used as an element of value in rate fixing for any amount of money in excess of that originally paid to the State as the consideration for the grant of such rights. Aside from their purely permissive aspect, such rights extend to the holder a full or partial monopoly of a class of business. This monopoly feature may be

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modified or canceled at any time by the State, which is not in any respect limited as to the number of rights which may be given.

9. The issuer of the securities authorized by this order shall file with the Commission a report, or reports, as required by General Order No. 24-Series.

10. The authorization granted shall not be construed as a finding of the value of the rights and properties authorized to be transferred.

11. The authority granted by this order to issue stock will become effective when the issuer has paid the fee prescribed by Section 1904.1 of the Public Utilities Code, which fee is \$16. In other respects the effective date of this order is the date hereof.

Dated at San Francisco, California, this 23rd day of AUGUST, 1977.

*Labetain*  
*William Ignouo, Jr.*

*Robert Bateman*  
President  
*Yegor L. Sturgis*  
*Richard D. Gravelle*  
*Clair L. DeWitt*  
Commissioners



/fc\*

Appendix A      ARROW TRUCKING CO. OF CALIFORNIA, INC.    Original Page 1  
(a California corporation)

Arrow Trucking Co. of California, Inc., by the certificate of public convenience and necessity granted in the decision noted in the margin, is authorized to conduct operations as a highway common carrier as defined in Section 213 of the Public Utilities Code for the transportation of general commodities as follows:

Between all points on and within twenty-five (25) statute miles of points on the following routes:

1.    U.S. Highway 101 between San Rafael and Salinas, inclusive;
2.    State Highway 17 between San Rafael and Santa Cruz, inclusive;
3.    State Highway 1 between Santa Cruz and Monterey, inclusive;
4.    Interstate Highway 80 between San Francisco and Sacramento, inclusive;
5.    State Highway 4 between its junction with Interstate Highway 80 near Pinole, and Stockton, inclusive; ✓
6.    Interstate Highway 580 between Oakland and its junction with Interstate Highway 5 near the San Joaquin - Stanislaus County boundary line, inclusive;
7.    Interstate Highway 205 between its junction with Interstate Highways 580 and 5, inclusive; ✓
8.    Interstate Highway 5 between Stockton and its junction with State Highway 152, near Los Banos, inclusive;
9.    State Highway 99 between Sacramento and Fresno, inclusive;
10.   State Highway 152 between its junctions with Interstate Highway 5, near Los Banos, and State Highway 99, near Chowchilla. ✓

Issued by California Public Utilities Commission.

Decision 87746, Application 56161.