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ORIGINAL

Decision No. 88513 FEB 22 1978

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

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| Investigation on the Commission's own motion to determine if this Commission should end its regulation of radiotelephone utilities. | Case No. 10210 (Filed November 23, 1976) |

(Appearances are listed in Appendix A.)

# O P I N I O N

## Preliminary

On November 23, 1976, this Commission issued an Order Instituting Investigation to determine if it should end its regulation of radiotelephone utilities (RTUs). All RTUs and wireline companies operating in California were made respondents. Respondents were given 60 days from the effective date of the order to file such comments as they desired. Comments were timely filed by various respondents as well as by interested parties.

A prehearing conference was held at San Francisco before Administrative Law Judge Gillanders on February 15, 1977. Fourteen days of hearing were held at San Francisco, beginning on March 9, 1977 and ending on May 16, 1977. Petitions for a proposed report were filed on March 29 by Industrial Communications Systems, Inc. and by Allied Telephone Companies Association on April 11. The petitions are hereby denied. The matter was submitted on June 27, 1977, upon receipt of concurrent briefs.

The record contains 47 exhibits and the testimony of 15 witnesses encompassed within 2,071 pages of transcript.

Position of Parties at Submission

The staff, the overwhelming majority of the RTU industry, and the wireline utilities are strongly in favor of continued regulation and are of the opinion that the Commission may not legally deregulate the RTU industry or the wireline utilities absent specific enabling legislation. The principal reasons given were that continued regulation is necessary to preserve competition, that technological advances in telecommunications promise a great proliferation of radiotelephone communication with the public, and that RTUs are telephone companies subject to this Commission's jurisdiction. The staff sponsored the idea that its numbers should be increased to obtain more stringent regulation. The RTU industry not only agreed with the staff but was willing to be taxed to support more stringent regulation.

On the other hand, California Mobile Radio Association contends that this Commission may lawfully discontinue its regulation of two-way radio and one-way paging service under the present statutes and that full deregulation of the radiotelephone industry is in the public interest. The National Association of Business and Educational Radio contends that this Commission may not lawfully regulate licenses and providers of radio communications facilities licensed under Parts 89, 91, and 93 of the Federal Communications Commission's (FCC) Rules and Regulation and that it would not be in the public interest if this Commission assumed such regulation.

Commission's Jurisdiction

This Commission's powers and jurisdiction to supervise and regulate public utilities are derived from the Constitution of the State of California and implementing statutes, now codified as a Public Utilities Code Section 201 et seq.

Article 12, Section 3, of the California Constitution defines a public utility to include:

> "Private corporations and persons that own, operate, control or manage a line, plant or system for . . . the transmission of telephone and telegraph messages . . ."

Section 5 of Article 12 further provides that the Legislature has the power to confer any additional authority and jurisdiction on the Commission other than that provided by the Constitution.

The Legislature has enacted no statutes related specifically to RTUs. However, the following sections of the Public Utilities Code have been enacted regarding telephone corporations.

> "Section 216(a): 'Public utility' includes every . . . telephone corporation . . . where service is performed for . . . the public or any portion thereof."

> "Section 233: 'Telephone line' includes all conduits, ducts, poles, wires, cables, instruments and appliances, and all other real estate, fixtures and personal property owned, controlled, operated, or managed in connection with or to facilitate communication by telephone, whether such communication is had with or without the use of transmission wires."

> "Section 234: 'Telephone corporation' includes every corporation or person owning, controlling, operating, or managing any telephone line for compensation within this state."

The code further provides for specific regulation of telephone utilities. For example, Section 495 provides that telephone corporations must file rate schedules with the Commission. Section 314.5 requires the Commission to audit the books of telephone corporations for regulatory purposes.

Regarding the regulation of public utilities in general, Section 454 provides:

> "No public utility shall raise any rate or so alter any . . . practice . . . as to result in any increase in any rate except upon a showing before the Commission . . . that such increase is justified . . ."

Section 1001 provides:

> "No . . . telephone corporation . . . shall begin the construction of a . . . line, plant, or system, or of any extension thereof, without having first obtained from the Commission a certificate that the present or future public convenience and necessity require or will require such construction.
>
> ". . . If any public utility . . . interferes . . . with the operation of the line, plant or system of any other public utility . . . the Commission, on complaint of the public utility . . . claimed to be injuriously affected, may, after hearing, make such order . . . as to it may seem just and reasonable."

Prior Judicial and Commission Litigation

The principal California case regarding Commission regulation of the radiotelephone industry is Coml. Communications v. Public Util. Com. (1958) 50 C.2d 512. In that case, Pacific Telephone was furnishing private radiotelephone systems on a lease-maintenance basis. The systems were not tied into the general toll and switching activities of Pacific, and were not offered to the general public. The Court did not consider these distinctions significant; rather, it stated that the central issue was whether the service offered was "for the transmission of telephone messages" or "in connection with and to facilitate communication by telephone." (50 C.2d at page 522) The Court specifically found that type of communication offered by private mobile radio systems to be a telephone communication within the meaning of Section 233 of the Public Utilities Code and therefore within the regulatory jurisdiction of the Commission.

In 1961, the Commission issued Decision No. 62156 (Miscellaneous Common Carriers), 58 CPUC 756. There, the Commission held that the common carriers licensed by the FCC under Part 21 of its rules which performed the service of facilitating intrastate communication by telephone came within the definition of a telephone corporation pursuant to Section 234 of the Public Utilities Code, and came within all the provisions of the Code and all Commission General Orders applicable to such companies.

The Commission has consistently followed this decision. In Chalfont v. Tesco (1968), 69 CPUC 124, the Commission stated:

> "It is clear that the examiner concluded that any device used to accomplish interconnection with the general telephone network brings the owner-operator of such device under our jurisdiction. It is equally clear that the examiner concluded that the offering of interconnection also brings the entity making such offer under our jurisdiction."

See also Mobile Radio System of San Jose, Inc. v. Vogelman, et al. (1969) 69 CPUC 333. One of the most recent decisions issued regarding Commission regulation of RTUs is Industrial Communication Systems, Inc. v. R. L. Mohr (1975) Decision No. 85141. In this case, the Commission found that a joint-user tone and voice radio system interconnected to the landline telephone system constituted a telephone public utility subject to the jurisdiction of the Commission. This conclusion was affirmed by the California Supreme Court in R. L. Mohr and Advanced Mobile Radiotelephone Services, Inc. v. PUC (1976) S.F. No. 23424. The denial of the petition for writ of review by the Court had the effect of a decision on the merits both as to the law and the facts presented in the review proceedings. People v. Western Air Lines (1954) 42 C.2d 621.

Since 1961, the Commission has followed a consistent policy of regulation of RTUs. The principal reason has been the fact of interconnection with the landline telephone network and findings that the activities of the RTUs are in the nature of telephone service. In addition, the Legislature has required the Commission to regulate certain aspects of public telephone service, particularly as to rates.

It would, therefore, appear that absent legislation or a showing of changed circumstances under which the RTUs could demonstrate with substantial evidence that they no longer fell within the definition of a public utility or that it is no longer in the public interest to regulate them, the Commission could not completely deregulate the RTU industry.

Discussion

The issue pressed by CMRA and National Association of Business and Educational Radio (NABER) is that PUC regulation has resulted in embroiling the PUC in battles between RTUs and Parts 89, 91, or 93 licensees and equipment providers although this Commission is preempted by the FCC from hearing such disputes.

The Commission shares the concern of CMRA and NABER that this Commission should not actively regulate these entities and in fact does not have the authority to regulate them. It would be misleading, however, to characterize all cases involving private mobile services as active regulation of Parts 89, 91, or 93 licensees. RTUs as regulated entities are entitled to seek relief for alleged claims of injuries from such licensees under Section 1001 of the Public Utilities Code, and the Commission is obligated to determine by hearing, if necessary, the merits of these complaints. This Commission has consistently taken an abundance of caution to hear these cases only in relation to possible violations of the Public Utilities Code and limit relief to the extent of any code violations. In Chalfont v. Tesco (1968), 69 CPUC 124, for example, the Commission stated:

> "A blanket pronouncement that establishing Shared Repeater service automatically brings the owner or user of such repeater under our jurisdiction would patently be in error."

In the same case the Commission rejected certain staff positions saying:

> "Nor will we adopt the staff's recommendation because it would bring private systems offering only message relay service under our jurisdiction."

We reiterate that this Commission will not entertain complaints of unlawful private mobile operation as a public utility except where the private mobile system is interconnected with the telephone toll and exchange network to provide a through communications service between wireline stations and radio mobile units or pocket paging receivers and where such service is offered to the public.

All parties and the staff expressed concern over previous protracted and wasteful litigation which has been carried on before the Commission. A review of prior litigation before the Commission and the testimony in the present Order Instituting Investigation indicates that the principal area of litigation among the RTUs has been over the question of service areas. One reason for this is that there are varying methods of measuring the service areas of an RTU, all of which result in different size areas. Further, when the Commission issued its grandfather decision assuming jurisdiction of RTUs, it invited but did not require all existing RTUs to file a service area map. Some did and some did not, and varying methods have been used over the years in the maps that have been filed, resulting in confusion and endless litigation.

The grandfather decision provided that RTUs filing service area maps do so using the specifications provided in FCC Rules, Part 21.504, based on the Boese Report. However, this data was valid only for VHF frequencies transmitted from antennae whose height was not more than 500 feet above average terrain. For those situations not covered by Part 504, varying methods were used, usually based on television curves. On August 15, 1967, the FCC adopted the data contained in the Carey Report, which provides an accurate means to measure the service area of stations operating on either VHF or UHF frequencies

transmitted from antennae with up to 5,000 feet height factors above average terrain. The staff has reviewed all the methods used for measuring service areas and recommends that the Carey Report be adopted by the Commission and further that all RTUs be required to file a service area map based on this report. Although in some situations, this may result in a somewhat smaller service area than that using the Boese Report, none of the parties participating in Case No. 10210 disputed this conclusion. We will adopt the staff's recommendation.

The record of litigation before the Commission is replete with numerous formal proceedings in which one RTU has filed a complaint of doubtful validity against another, which appear to have been attempts to eliminate the defendant as a viable competitor, the "internecine warfare" referred to in the Order Instituting Investigation. To eliminate this time-consuming activity, the staff has recommended adoption of additional Commission Rules of Practice and Procedure as set forth in Appendix B hereto. These additional rules will formalize the matters discussed above and should serve to eliminate frivolous protests. These additional rules are adopted.

Findings of Fact

1. RTUs provide two-way radio and one-way paging services to the public in California by the use of radio transmitters and receivers operating over frequencies authorized to be used by the FCC.

2. Wireline telephone companies provide two-way radio and one-way paging services to the public in California by the use of radio transmitters and receivers operating over frequencies authorized to be used by the FCC.

3. Two-way radio and one-way paging services are a necessary adjunct to wireline telephone and communications services.

4. This Commission has been regulating RTUs since 1961.

5. Continued regulation of the RTU industry is in the public interest.

6. There is a need to improve and streamline regulation by the Commission to avoid costly and wasteful litigation by the various RTUs.

7. The principal source of litigation has concerned service area disputes.

8. These disputes could be lessened by the adoption of a uniform method of service area measurement.

9. The most accurate such method is the Carey Report found in FCC Rules, §21.504.

10. Such disputes could further be lessened by the adoption of the rules proposed by the Commission staff as set out above.

11. Parts 89, 91, and 93 FCC licensees or equipment suppliers, or other entities providing private mobile radio communication services are not subject to regulation by this Commission.

12. The Public Utilities Commission has never revoked a Part 89, 91, or 93 license or prohibited such a licensee from using private mobile communications service.

13. The Public Utilities Commission will continue to issue cease and desist orders against private mobile radio suppliers who provide public utility type communications, for compensation, between wireline telephones connected to a telephone exchange and mobile radio stations or paging receivers.

Conclusions of Law

1. Two-way radio and one-way paging services offered by radiotelephone utilities and wireline telephone companies are public utility services.

2. Radiotelephone utilities are telephone corporations under §234 of the Public Utilities Code.

3. Radiotelephone utilities and wireline telephone companies are subject to the jurisdiction of this Commission respecting their provision of two-way radio and one-way paging services to the public.

4. The Public Utilities Code requires this Commission to regulate radiotelephone utilities and wireline telephone companies with respect to their providing two-way radio and one-way paging services to the public.

5. Continued regulation of radiotelephone utilities and the wireline telephone companies with respect to their providing two-way radio and one-way paging services is in the public interest.

6. This Commission has no authority to regulate, nor should it seek to regulate, the operations of private mobile radio communications licensees.

O R D E R

1. Within 180 days of the effective date of this order, all radiotelephone utilities and all wireline telephone utilities shall file with the Commission a service area map drawn in conformity with the provisions of FCC Rule 21.504, the Carey Report, to reflect their authorized power and antennae characteristics as of November 23, 1976.

2. The revisions to Rules of Practice and Procedure 10.1, 18(O) and 18(P) set forth in Appendix B, hereto, are hereby adopted and will become effective 30 days from the effective date of this order.

3. No complaints against Parts 89, 91, and 93 licensees will be entertained by this Commission except where such licensees are offering to the public a radiotelephone utility service which is interconnected to a telephone exchange of the general toll and exchange networks.

4. The Executive Director is hereby notified to cause all pending cases and applications placed in moratorium due to this investigation to be placed back on calendar for hearing subject to any provisions of this order.

5. In all other respects, the Order Instituting Investigation contained in Case No. 10210 is hereby dismissed.

The effective date of this order shall be thirty days after the date hereof.

Dated at San Francisco, California, this 22nd day of FEBRUARY, 1978.

President

Commissioners

Commissioner Robert Batinovich, being necessarily absent, did not participate in the disposition of this proceeding.

Commissioner William Symons, Jr., being necessarily absent, did not participate in the disposition of this proceeding.

# APPENDIX A

## LIST OF APPEARANCES

Respondents: Duane G. Henry, Attorney at Law, for The Pacific Telephone and Telegraph Company; Kenneth K. Okel, Attorney at Law, for General Telephone Company of California; John G. Lyons, Attorney at Law, for Intrastate Radio Telephone, Inc. of San Francisco and Fresno Mobile Radio, Inc.; Wayne B. Cooper, Attorney at Law, for Radio Relay Corporation, Electropage, Inc., Knox La Rue, and Sylvan Malis; John Paul Fischer and Robert B. Lisker, Attorneys at Law, for Mobilphone, Inc.; Phillips B. Patton, Attorney at Law, for Kidd's Communications, Inc., Salinas Valley Radio Telephone Company, and Imperial Communications, Inc.; Jerome Grotsky, for Peninsula Radio Secretarial Service, Inc.; Carl B. Hilliard, Attorney at Law, for Airsignal of California, Inc.; Thomas M. Laughran, Attorney at Law, for Orange County Radiotelephone Service, Inc.; Patrick J. O'Shea, Attorney at Law (New York), for Airsignal of California and Airsignal International, Incorporated; Warren A. Palmer, Attorney at Law, for Industrial Communications Systems, Inc., Kern Valley Dispatch, Cal-Autofone, Inc., Radio Electronics Products, and James E. Walley; Joseph A. Smiley, for Central Radio Telephone, Inc.; A. R. Turini, for United Radiophone System; Peter A. Nenzel, for Tel-Page, Inc.; Avery H. Simon, for Mobile Radio System of San Jose, Inc.; and Bob Mohr, for Radio Call Corporation.

Interested Parties: Robert C. Brown, for California Independent Telephone Association; Gerald Shacter, Attorney at Law, for California Mobile Radio Association and National Association of Business and Educational Radio, Inc.; Kenneth E. Hardman, Attorney at Law, for National Associations of Radiotelephone Systems; Loren R. McQueen, for Communication and Control; David M. Wilson, for Allied Telephone Companies Association; and Richard Somers, for himself.

Commission Staff: James S. Rood, Attorney at Law, and Roger W. Johnson.

APPENDIX B
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The Commission's Rules of Practice and Procedures are revised as follows:

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

18. (Rule 18)
(0) In the case of a radiotelephone utility, proposing to expand its existing facilities add new facilities or file to serve additional territory.

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

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

(i) That the present service is unsatisfactory and the proposed operation will be technically and economically feasible, adequate and of good quality.

(ii) A statement that the radiotelephone utility attempted to reach an intercarrier agreement whereby traffic can be suitably interchanged to meet the public convenience and necessity. If agreement cannot be reached, both the applying radiotelephone utility and the complainant radiotelephone utility are hereby duly notified that this Commission, after hearing, may issue a mandatory intercarrier agreement or other suitable instrument pursuant to parts 766 and 767 of the Public Utilities Code as this Commission deems necessary to meet the public convenience and necessity.

(iii) Minor extensions of service area are excluded from these requirements where the overlap does not exceed 10% of either utility's service area and where the extension does not provide substantial coverage of additional major communities.

(P) Such additional information and data as may be necessary to a full understanding of the situation.