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ORIGINAL

Decision No. 89714 DEC 12 1978

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of Intrastate Radio
Telephone, Inc. of San Francisco and
Tel-Page, Inc.,

Complainants,

v.

San Francisco Medical Society,
Doe I, Doe II, Doe III, Doe IV,
and Doe V,

Defendants.

Case No. 9638
(Filed December 5, 1973)

In the Matter of Peninsula Radio
Secretarial Service, Inc.,

Complainant,

v.

San Mateo County Medical Society, aka
San Mateo Medical Society, Doe I,
Doe II, Doe III, Doe IV,

Defendants.

Case No. 9651
(Filed January 15, 1974)

FRESNO MOBILE RADIO, INC.,

Complainant,

v.

FRESNO COUNTY MEDICAL SOCIETY;
BUREAU OF MEDICAL ECONOMICS OF
FRESNO COUNTY; DOES I THROUGH IV,

Defendants.

Case No. 9671
(Filed March 1, 1974)

Silver, Rosen, Fischer & Stecher, by Granville Harper and Bertram S. Silver, Attorneys at Law, for Peninsula Radio Secretarial Service, Inc.; and Gary A. Patton and Philips B. Patton, Attorneys at Law, for Intrastate Radio Telephone, Inc. of San Francisco, Tel-Page, Inc., and Fresno Mobile Radio, Inc.; complainants.

George M. Malti, Attorney at Law, for San Mateo County, San Francisco, and Fresno County Medical Societies; and Hilliard, McGuire & Bauer, by Ronald L. Bauer, Attorney at Law, for Fresno County Medical Society; defendants.

Gary A. Patton and Philips B. Patton, Attorneys at Law, for Allied Telephone Companies Association, intervenor.

Lionel B. Wilson, Attorney at Law, and Roger Johnson, for the Commission staff.

O P I N I O N

The proceedings in these consolidated matters were abated pending the disposition of Case No. 10210, an investigation on the Commission's own motion to determine if this Commission should end its regulation of radiotelephone utilities. The Commission entered Decision No. 88513 in Case No. 10210 on February 22, 1978. An application for rehearing was filed. The Commission denied rehearing in Decision No. 89045, entered on June 27, 1978, and these matters were restored to the Commission's active calendar.

Each of the three consolidated cases is a complaint by a public utility radiotelephone corporation operating under authority granted by this Commission against a county medical society and others. The gravamen of each complaint is that the defendants were operating or threatening to operate as a radiotelephone utility without authority from the Commission. Because of the interrelated subject matter, the complaints were consolidated for hearing. An ancillary

hearing was held before consideration of the merits wherein defendant San Mateo County Medical Society in Case No. 9651 was found to be in contempt for violating a cease and desist order previously entered by the Commission. (Decision No. 83298, entered August 12, 1974; modified and rehearing denied by Decision No. 83609, entered October 16, 1974.)

A duly noticed public hearing was held in these matters before Administrative Law Judge Donald B. Jarvis in San Francisco on January 16, July 25, October 16, December 2 and 3, 1974, and March 17, 18, 19, and 20, 1975. They were submitted subject to the filing of briefs which were received by September 2, 1975. As indicated, these matters were abated pending the disposition of Case No. 10210.

At the hearing stipulations involving various parties were presented to the Commission. In the light of the stipulations, it is appropriate to separately deal with each of the consolidated matters.

Case No. 9638

At the hearing on December 2, 1974, it was stipulated by the parties in Case No. 9638 "that the San Francisco Medical Society has given up its plans for the present for a county medical society-operated paging system; and secondly, the society agrees that it will not reactivate plans for such a system, order equipment, or make FCC applications without giving prior notice to all of the parties in this action, including the Commission." (RT 46.) The record also indicates that at the time of the hearing the San Francisco Medical Society was receiving radiotelephone service from a public utility radiotelephone corporation operating under authority granted by the Commission at rates established in the utility's tariff. The parties agree to dismissal of the complaint.

In the circumstances Case No. 9638 should be dismissed because the issues raised therein have become moot.

Case No. 9651

At the hearing on December 3, 1974, the parties to Case No. 9651 filed the following stipulation:

- "1. That the San Mateo County Medical Society will not offer, hold itself out, solicit or advertise paging service for or to its members except by showing that the service is to be provided by an authorized Radio Telephone Utility and any such offer holding out, solicitation or advertising will specify the said Utility.
- "2. That the San Mateo County Medical Society will not hold itself out, offer, solicit or advertise to provide or participate in any manner in paging service to persons or groups who are not members of said Association.
- "3. Any participation by the San Mateo County Medical Society in paging activity for members will be provided under an L-2 Tariff of a Radio Telephone Utility authorized by the Public Utilities Commission.
- "4. That the San Mateo County Medical Society will surrender its license to the Federal Communications Commission as soon as practicable but not later than January 1, 1975."

(Exhibit 1.) The parties agree that the matter should be dismissed. In the circumstances Case No. 9651 should be dismissed because the issues raised therein have become moot.

Case No. 9671

I. Issues

The material issues presented in Case No. 9671 are as follows: (1) Does the Fresno County Medical Society (Society) hold a federal authorization which preempts the jurisdiction of

the Commission to regulate its radiotelephone operations? (2) If preemption exists, do the operations of Society exceed the provisions of the federal authorization so that Society is providing radiotelephone service to a public or portion thereof, for compensation, without having secured authority from the Commission?

(3) If preemption does not exist, is Society operating as a radiotelephone corporation without having secured authority from the Commission?

II. Facts

On September 30, 1973, Society received licenses pursuant to the rules of the Federal Communications Commission (FCC)^{1/} to operate Special Emergency Radio Service (SERS).^{2/} Society has continued to hold a license for SERS from September 30, 1973 to the present time.

The record discloses that Society provided paging service to physicians who were not members of the Society, employees of Sierra Hospital, and drivers employed by the Central California Blood Bank. There is also evidence of the occasional transmission of a nonemergency message over the service.

On the last day of hearing, Society put in evidence an agreement, subject to Commission and FCC approval, in which it agreed to sell its equipment to Airsignal of California (Airsignal) and have Airsignal conduct the SERS operations for Society on its SERS frequency. Airsignal is a public utility radiotelephone corporation and a competitor of complainant Fresno Mobile Radio, Inc. (Mobile Radio).

^{1/} 47 CFR 89.

^{2/} Special Emergency License KVV 577, Special Emergency License KVV 578, Special Emergency Station WPQ 64, and Special Emergency Station WPQ 65.

III. Discussion

A. Preemption

In Decision No. 88513 entered on February 22, 1978, the Commission made the following findings, conclusions, and orders:

Findings of Fact

- "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

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

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."

Decision No. 88513 was entered before the enactment of Proposition 5 on the June 6, 1978, ballot, which added Section 3.5 to Article III

of the Constitution. That section precludes administrative agencies from finding federal preemption unless an appellate court has so declared. At the time of entry of Decision No. 88513, the Commission had the jurisdiction to find federal preemption and that decision is controlling. (Southern Pac. Transp. v Public Utilities Com'n (1976) 18 C 3d 308.)

B. Did Society Engage in Conduct Beyond the Federal Authorization Thereby Subjecting It to Commission Jurisdiction?

The finding of federal preemption does not end this matter. Mobile Radio contends that in the conduct of its operations Society exceeded its federal SERS authorization and thereby conducted public utility radiotelephone operations without authority from this Commission. (See Yucaipa Water Co. No. 1 v Public Utilities Com'n. (1960) 54 C 2d 823, 827-28.)

In considering the evidence adduced by Mobile Radio, we note that while the proceeding was pending the FCC amended 47 CFR 89.^{2/} In the circumstances the Commission must apply the current regulations in deciding this case. (Paul v Milk Depots (1964) 62 C 2d 129, 133; City of Orange v Valenti (1974) 37 CA 3d 240, 248; Bell v Board of Supervisors (1976) 55 CA 3d 629, 636; cf., Beard v Atchison, Topeka & Santa Fe Ry Co. (1970) 4 CA 3d 129, 135.)

As indicated, Society provided paging service to physicians who were not members, employees of Sierra Hospital, and drivers employed by the Central California Blood Bank. Section 89.14 of 47 CFR provides that:

^{3/} Federal Register, Vol. 39, No. 137, Tuesday, July 16, 1974.

- "(a) Licensees and persons eligible to become licensees of operational fixed stations under this part may make cooperative use of such licensed facilities under the conditions and subject to the limitations specified in this section.
- "(b) Such licensed facilities may be cooperatively used and shared only by: (1) Persons licensed or eligible to be licensed within the same radio service; ..."

Section 89.503 under which Society is licensed provides in part that:

- "(a) Eligibility. Licenses will be granted under this section only to the following described persons, and only for the purpose of conducting radio operations for the delivery or rendition of medical services to the public:
 - "(1) Hospital establishments that offer services, facilities and beds for use beyond 24 hours in rendering medical treatment.
 - "(2) Institutions and organizations regularly engaged in providing medical services through clinics, public health facilities, and similar establishments.
 - "(3) Ambulance companies regularly engaged in providing medical ambulance services.
 - "(4) Rescue organizations, to participate in activities for providing medical services.
 - "(5) Associations comprised of two or more of the organizations eligible under paragraph (a) (1), (2), (3) and (4) of this section, for the purpose of coordination of the medical services communication activities of such organizations.

- "(6) Physicians, schools of medicine, and oral surgeons, which may include an association of physicians or oral surgeons in a locality (such as a county, city, or metropolitan area), which is chartered by a national, State, or regional association of physicians or oral surgeons. . . ."

The physicians who are not members of Society, employees of Sierra Hospital, and drivers employed by the Central California Blood Bank are authorized to utilize SERS under 47 CFR 89.503.

47 CFR 89.503(d) provides that:

- "(d) Permissible communications. Except for test transmissions as permitted by § 89.151(e), stations may be used primarily for the transmission of messages necessary to rendition or delivery of medical services. On a secondary noninterference basis, stations may be used for the transmission of messages related to the efficient administration of organizations and facilities engaged in medical services operations."

The record indicates that on a few occasions nonemergency messages were transmitted over Society's frequency. These isolated instances would not support a finding that Society is exceeding its federal SERS authorization, thereby subjecting it to the jurisdiction of the Commission.

The Airsignal Contract

In the light of the foregoing discussion, Mobile Radio is entitled to no relief herein. This result is mandated by the record, without consideration of the Airsignal contract, which was placed in evidence on the last day of hearing.^{4/} However, since there appears to be a dispute over the contract and the briefs have discussed the matter, the Commission deems it appropriate to

^{4/} Airsignal is not a party to this proceeding.

consider the contract for the guidance of the parties. (See cases collected in Witkin, California Procedure, 2nd Ed., Advice to Parties or Judge, p. 4455.)

As indicated, Society is not subject to Commission jurisdiction in the conduct of its federally authorized SERS. It may utilize an agent to conduct the operation within the ambit of the federal authority. (M. Lee (1966) 65 CPUC 635, 639.) However, Airsignal is a public utility subject to the jurisdiction of the Commission. It must apply in a nondiscriminatory manner the tariffs which it has filed with the Commission. (Public Util. Code §§ 453, 454, 489, 491, and 495.)

For Airsignal to perform under the contract with Society, it is necessary for Airsignal to have an appropriate tariff or secure approval of the contract under General Order No. 96-A, paragraph X.A. The record contains discussion about L-2 and L-3 tariffs. In Domestic Public Land Mobile Radio Service (1961) 58 CPUC 756, the Commission provided, in Appendix B, that:

"5. Rate Schedules.

- "a. Radiotelephone utilities not having tariffs on file with the Federal Communications Commission shall file schedules of rates, conditions of service, and rules in accordance with this Commission's General Order No. 96. Schedules of rates pertaining to two-way mobile service shall be designated 'Schedule No. L-1'. Schedules pertaining only to one-way signalling or paging service shall be designated 'Schedule No. L-2'." (58 CPUC at p. 763.)

The Commission has never formally established other specified tariffs, but over the years tariffs designated as L-3 have customarily been filed to apply to private mobile communications systems.

The Commission takes official notice that Airsignal has not filed for approval of the contract pursuant to General Order No. 96-A, paragraph X.A. The Commission further takes official notice that in the geographic area here under consideration all of Airsignal's tariffs deal with operations under its common carrier frequency. Airsignal has no presently filed tariff which would authorize it to operate Society's SERS service.

In the circumstances, for Airsignal to operate Society's SERS service, it is necessary for Airsignal to file an appropriate tariff or seek approval of the contract pursuant to General Order No. 96-A.

No other points require discussion. The Commission makes the following findings and conclusions.

Findings of Fact

1. The issues raised in Case No. 9638 have become moot and the parties thereto are in agreement that it should be dismissed.
2. The issues raised in Case No. 9651 have become moot and the parties thereto are in agreement that it should be dismissed.
3. On September 30, 1973, pursuant to 47 CFR 89, the FCC issued to Society the following SERS licenses: Special Emergency License KVV 577, Special Emergency License KVV 578, Special Emergency Station WPQ 64, and Special Emergency Station WPQ 65. Society has continued to hold a license for SERS from September 30, 1973, to the present time.

4. In Decision No. 88513 the Commission found that it had no jurisdiction to regulate FCC licensees operating pursuant to 47 CFR 89.

5. Society provided paging service to physicians who were not members of the Society, employees of Sierra Hospital, and drivers employed by the Central California Blood Bank.

6. On July 16, 1974, the FCC amended 47 CFR 89. Nonmember physicians, employees of Sierra Hospital, and drivers employed by the Central California Blood Bank are eligible to receive SERS service from Society pursuant to Sections 89.14 and 89.503 of 47 CFR.

7. There have been a few occasions on which messages not authorized under 47 CFR 503(d) were transmitted over Society's SERS frequency. These isolated instances do not support a finding that Society is exceeding its authority under 47 CFR 89, thereby subjecting it to the jurisdiction of the Commission.

Conclusions of Law

1. Case No. 9638 should be dismissed.

2. Case No. 9651 should be dismissed.

3. The Commission has no jurisdiction to regulate an FCC licensee operating pursuant to 47 CFR 89.

4. Since Society's operations have not exceeded its authority under 47 CFR 89, it is not required to secure operating authority from this Commission.

5. The relief requested by complainant in Case No. 9671 should be denied.

6. For Airsignal to operate Society's SERS service, it is necessary for Airsignal to file an appropriate tariff or seek approval of the contract pursuant to General Order No. 96-A.

O R D E R

IT IS ORDERED that:

1. Case No. 9638 is hereby dismissed.
2. Case No. 9651 is hereby dismissed.
3. Complainant is entitled to no relief in Case No. 9671 and the requested relief is denied.

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

Dated at San Francisco, California, this 12th day of DECEMBER, 1978.

Robert Bateman
President
William S. Gouss
Vernon L. Sturgeon
Richard D. Howell
Alvin T. DeWitt
Commissioners