

Decision No. 91732 MAY 6 1980

ORIGINAL

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application of General Telephone Company of California for Certificate of Public Convenience and Necessity under Section 1001 of the Public Utilities Code of the State of California for Authority to offer Personal Signaling Service Beyond the Boundaries of its Pomona, Ontario, Redlands, and San Bernardino Exchange.

Application No. 58526
(Filed December 14, 1978)

A. M. Hart, H. R. Snyder, Jr., Kenneth K. Okel, by Kenneth K. Okel, Attorney at Law, for applicant.
Warren A. Palmer, Michael F. Willoughby, by Warren Palmer, Attorney at Law, for Industrial Communications Systems, Inc., Intrastate Radio Telephone, Inc. of San Bernadino, Intrastate Radio Telephone, Inc. of Los Angeles, and Radio Relay Corp.-California, protestants.
Warren A. Palmer, Michael F. Willoughby, by Warren Palmer, Attorney at Law, for Allied Telephone Companies Association, Fresno Mobile Radio, Inc., Intrastate Radiotelephone of San Francisco, Orange County Radiotelephone Service, Inc., and American Mobile Radio, Inc., Long Beach, interested parties.

O P I N I O N

On December 14, 1978 General Telephone Company of California (General) filed an application for a certificate of public convenience and necessity pursuant to Section 1001 of the California Public Utilities Code, for its Pomona/Ontario and Redlands/San Bernardino paging service, to the

extent that the signal strength contours for said service more than incidently extend into areas beyond the boundaries of General's wireline telephone exchanges.

Protests to General's application were received from Industrial Communications Systems, Inc. (ICS), Intrastate Radio Telephone, Inc. of San Bernardino (IRSB), Intrastate Radio Telephone, Inc. of Los Angeles (IRLA), and Radio Relay Corp.-California (RR-C).

Hearings in the matter were held in Los Angeles on May 8, 22, and 23, 1979 before Administrative Law Judge William A. Turkish, and the matter was submitted on July 30, 1979 upon the filing of concurrent reply briefs by the parties.

Background Information

The genesis of this proceeding relates back to January 1972 when General first began offering one-way personal signaling (paging) service in its Pomona/Ontario telephone exchange areas. On May 30, 1974, General filed tariff sheets providing for the expansion of the Pomona/Ontario personal signaling service to include its Redlands and San Bernardino exchanges in San Bernardino County. On June 25, 1974, the Commission suspended General's tariff sheets and instituted C.9757 to investigate whether said tariff sheets were unreasonable or unlawful in any particular. While such investigation was being conducted, the suspension of General's tariff sheets was extended several times until September 21, 1976 when the Commission issued D.86402 in which the Commission concluded, among other things, that General could institute paging service in the Redlands/San Bernardino area, an area in which it had already established two-way

mobile telephone service, without first securing a certificate of public convenience and necessity from this Commission pursuant to the terms of Section 1001 of the Public Utilities Code. D.86402 also lifted the suspension of General's tariff sheets and permitted them to be placed into effect.

A Writ of Review to the California Supreme Court was thereafter sought by protestants in C.9757 and that court, in Industrial Communications Systems, Inc. v Public Utilities Com. (1978) 22 Cal 3d 572, annulled D.86402, holding that General must obtain a certificate of public convenience and necessity under Section 1001 to the extent that the signal strength contours for the service more than incidently extend beyond General's wireline telephone exchange boundaries. In its opinion, the Supreme Court further held that the Commission's D.86402 was unlawful in that the Commission exceeded its authority when it investigated but did not adequately consider the anticompetitive aspects of the proposed service. The application involved herein was thereafter filed by General. On January 30, 1979 the Commission issued D.89917 granting General authority to continue providing the personal signaling service to its customers as of that date pending a decision on the current application.

Description of Service

General presently provides telephone and other communication services in portions of 20 counties in the State of California. Among the communication services furnished by it are two-way mobile telephone and tone-only, one-way paging service. General is presently offering common carrier, automatic dial-tone-only, one-way paging service in the

Pomona/Ontario and Redlands/San Bernardino areas from base stations operating on the radio frequency of 158.1 MHz. This is one of the frequencies assigned to wireline telephone companies by the Federal Communications Commission (FCC) for their exclusive use in providing such paging services. General's base station transmitters are located in Pomona, Ontario, and Redlands, within the boundaries of its wireline telephone exchanges. The automatic dial paging terminal with a capacity of 1,560 paging numbers is located in Pomona and is the control point for the paging system.

Tone-only paging service is a service whereby a customer is notified by an audible tone emitted from a small portable radio receiver, usually carried on the customer's person, to take some predetermined course of action. Under the service provided by General, the paging customer usually designates one person or entity to be the point of contact with him. When that person or entity desires to contact the paging customer for some reason, the designee will dial one of the telephone numbers assigned to the service that is associated with the calling party's local telephone calling area to access the paging terminal. The Redlands and San Bernardino local numbers are extended to the paging terminal by means of foreign exchange lines. After dialing the appropriate paging terminal number, the calling party keys in the 4-digit number assigned to the customer's paging receiver, using either a touch-tone telephone or a touch-calling pad if using a dial telephone. After the pager number has been keyed in, the calling party will receive an acknowledgment tone to confirm that the terminal has received the message. The terminal will then store the

message in its memory unit until the radio channel for transmitting the page is cleared of all previous page requests. When the channel is clear, the stored page is sent over private lines to all three transmitters associated with the service and transmitted simultaneously. The page is transmitted twice to improve reliability in weak reception areas. The paging message will be received by the customer's paging receiver in the form of a high pitch tone.

Testifying on behalf of General were Martin E. Willson, who is responsible, among other things, for the preparation of General's FCC applications for construction permits, licenses, and other radio authorizations involving point-to-point microwave, domestic public land mobile radio service, and marine service; Ronald K. Farrar, marketing planning coordinator in the general office marketing department; Leo J. Habel, a revenue requirements department analyst; and Allen L. Trepp, manager of special projects. Testifying on behalf of the protestants were Homer Harris, president of ICS; Jack G. Hofeld, vice president and general manager of IRLA; David G. Berg, vice president of IRSB; and Daniel Moynihan, regional manager of RR-C. Also called as a witness by protestants was Harley Beck, district staff manager, Bell Independent Relations of The Pacific Telephone and Telegraph Company (Pacific).

A total of 50 exhibits were received into evidence during the course of the hearings; 22 exhibits offered into evidence by protestants were objected to by General and rejected by the Administrative Law Judge's ruling on the basis that they were not relevant to the issues of this proceeding.

Certification Issue

General's position is that it is already entitled to provide one-way paging service, to the extent that the signal contours fall within its telephone exchange boundaries, without further certification under the exception found in Section 1001^{1/} of the Public Utilities Code (see Malis v General Telephone Co. (1961) 59 CPUC 110). It thus seeks a certificate only as to the areas beyond its wireline exchange boundaries into which its signal contours fall. These spillover areas fall into several Pacific exchanges which the Supreme Court held to be more than incidental and thus would require a certificate of public convenience and necessity (Industrial Communications Systems, Inc. v Public Utilities Commission, supra). General contends that since it is already entitled to offer this service in a large part of its present service area without the need for

1/ Section 1001 provides in relevant part that:

"This article shall not be construed to require any such corporation to secure such certificate for an extension...within or to territory already served by it, necessary in the ordinary course of its business."

further certification, has already constructed and placed in service all of the equipment to serve the entire area, and has been issued a radio station license by the FCC to use the 158.1 MHz frequency, the threshold issue is not whether the public convenience and necessity would be served by General's offering of the service in the first instance, but whether the public interest would be served by allowing it to offer service in those areas covered by the signal contours that are more than incidently outside of its telephone exchange boundaries in addition to the areas that are within its exchange boundaries.

Opposing General's application are several radio telephone utilities (RTUs) who compete in all or part of General's proposed service area. While the testimony given by the witnesses for these competitors was of a general nature as to why the application should be denied, their objections can be summarized as follows: (1) The area General proposes to serve outside of its wireline exchange boundaries is already adequately served by existing utilities, (2) General's entry will dilute the market for paging service, and (3) General will somehow compete with them unfairly. In argument, the RTUs also contend that General is furnishing and offering to furnish an inferior paging service and that General has failed to establish its fitness to be entrusted with a certificate of public convenience and necessity. Finally, the RTUs argue that anticompetitive considerations warrant and compel denial of General's application.

Public Convenience and Necessity

The primary issue in a certification proceeding is the public interest, and in such proceeding the Commission has long held that the burden is on the applicant to show that the public convenience and necessity require the proposed service.

In Industrial Communications Systems et al. v Pacific Telephone and Telegraph Company et al. (1976), D.85356, 79 CPUC 404, the Commission enumerated those factors which we consider relative to the granting or denying of a certificate of public convenience and necessity to RTUs wherein competition exists. Those factors include public requirement for the service; adequacy of the existing service; adequacy and quality of the proposed service; revenue requirements and rates; technical feasibility of the proposed system and technical competency of the operator; and fitness and financial integrity of the operator. In addition, we must also consider antitrust and anticompetitive matters (Industrial Communications Systems, Inc. v Public Utilities Commission, supra, and present operations of the applicant (Silver Beehive Telephone Co., Inc. (1970) 71 CPUC 304).

General's witness Willson sponsored Exhibit 2, a map of the area upon which is superimposed the signal contour area of the area to be served by General's proposed personal signaling service in the extended Pomona/Ontario - Redlands/San Bernardino areas. Also shown on this map are the paging service contours within General's proposed service area of IRLA and RR-C which were obtained from Revised Exhibit 84 in

C.9395, Allied Telephone Companies Association v Pacific, for cease and desist order (D.80623), prepared by the Commission's staff on September 28, 1973; the paging service contours of IRSB which had been obtained from Exhibit 8 in C.9757; and the 39 dbu contour for two-way mobile radio service of Radio Dispatch Corporation (who is not a participant in this proceeding) which, according to the map legend, is shown in lieu of the paging contour since no paging contour map was available to General at the time the exhibit was prepared. The paging service contours of protestant ICS is not shown on the map because they include 100 percent of General's proposed extended service area. Exhibit 2 indicates that the paging service contours of the other RTUs appearing in this proceeding only cover portions of the geographic area in which General proposes to offer its paging service. Exhibit 34, which was received in evidence by official notice, further indicates that the contours for Orange County Radiotelephone Service, Inc., Mobilfone, Inc., and Radio Dispatch Corporation,^{2/} all RTUs, do not cover significant parts of General's proposed expanded service area.

General contends that the public convenience and necessity will be served by authorizing it to continue providing paging service throughout the area covered by the signal strength contours shown in Exhibit 2. According to General, the service was designed to enable its customers with a

^{2/} Radio Dispatch Corporation and Mobilfone, Inc. did not enter appearances nor file protests to General's application, while Orange County Radiotelephone Service, Inc. merely entered an appearance as an interested party and did not present any evidence regarding the merits of the application.

community of interest between the Pomona/Ontario - Redlands/ San Bernardino areas to travel freely between those areas without an interruption in their paging service. A study of Exhibit 2 bears out General's contention that it can provide such continuous coverage if the signal strength contours for the service include the intervening territory which, to a large extent, is within the wireline service area of Pacific. General introduced into evidence (Exhibit 22) the results of a questionnaire survey which had been mailed to each of its 239 paging customers of record as of December 6, 1978 who subscribed to a total of 490 paging receivers. Of that survey, 123 questionnaires were completed and returned by customers subscribing to a total of 297 paging units, or 60 percent, of the pagers in service. The results of this survey which were summarized in the testimony of General's witness Farrar showed that 70 percent of General's San Bernardino paging customers require service in Ontario, 57 percent in Pomona, 53 percent in Chino, 45 percent in Covina, 65 percent in Montclair, and 78 percent in Redlands. All of these communities are within General's wireline exchange boundaries, but the Redlands and San Bernardino exchanges are separated from the above-named areas by intervening exchanges of Pacific which form a wedge-shaped area, sandwiched between General's Redlands/San Bernardino and Pomona/Ontario wireline exchange boundaries. These same customers, however, also have a need for the service in those areas covered by the contours that are outside of General's exchange boundaries. Eighty-four percent of the responding customers to the survey indicated a present need for the service in Colton, 82 percent in Fontana, 88 percent

in Rialto, 85 percent in Riverside, and 29 percent in Corona. All of these communities are located within Pacific's intervening telephone exchanges. A similar high demand for the service throughout General's proposed service contour areas was expressed by General's customers in Pomona, Ontario, and Redlands. All of General's present customers, with only eight exceptions, have service addresses located within General's wireline exchange boundaries. Connecting General's Pomona/Ontario and Redlands/San Bernardino exchange areas and running through Pacific's intervening wireline exchange areas are two major freeway systems in addition to many major and minor surface street thoroughfares.

It is clear that if General is to provide its own wireline customers with the type of service the evidence seems to indicate they require, it is in the public interest to grant General the certificate it seeks so that its customers can have uninterrupted paging service throughout the areas as defined by the signal contours of Exhibit 2. To require General to relocate its transmitters so as to confine its signal contour area completely within its wireline exchange boundaries would not be in the public interest since General would then be unable to provide uninterrupted paging service to its customers having a community of interest between the Pomona/Ontario - Redlands/San Bernardino areas.

Exhibit 20 is a forecast showing that General's service will have a net pager gain of 140 units in 1979, 136 in 1980, 102 in 1981, 104 in 1982, and 108 in 1983. According to General's witness Farrar, who prepared the study, this is a conservative forecast showing anticipated service demand growth from persons who live within General's

wireline exchanges and does not take into consideration the potential demand from persons living in Pacific's exchange areas encompassed by General's paging contours. Continued demand for paging service from General is evidenced by the fact that since service was frozen to new customers effective January 30, 1979, there have been 46 customers denied service and placed on a waiting list through April 25, 1979.

The evidence established that only one RTU in these proceedings offers paging service throughout the area covered by General's proposed service contours shown on Exhibit 2. All of the other RTUs admitted that their service contours cover only portions of this geographic area. The evidence does indicate, however, that they each have presently in effect, or pending, intercarrier agreements whereby their customers can be paged throughout the area over the facilities of another RTU. Such agreements, while they do give each RTU the ability to provide service throughout General's proposed service area, underscore the fact that the quality and continuity of that service is dependent on the cooperation and goodwill of at least one other utility. General, on the other hand, as the only other utility serving the entire area, will not have any such dependency and will retain full control over the quality of its service, irrespective of the actions or inactions of some other utility or utilities.

Rates

General's witness Habel testified with respect to General's tariff rate for its paging service which is \$20 per month. This amount entitles the customer to the paging service as well as the use of a paging receiver. This amount was considered reasonable by General on an adopted rate of return of 9½ percent during the proceedings in C.9757. At the time of determining the \$20 per month rate, General's overall authorized return on investment was 8.85 percent and was still so at the time of these proceedings. A review of the reasonableness of the rates since the C.9757 proceedings was undertaken by General just prior to this current application during which updated data was considered in developing the rates and revenue requirements. Exhibit 29 is a showing as to the profitability of the paging service at the time of these proceedings and shows the current rate of \$20 to be reasonable and producing a rate of return of 11 percent.

Protestants' Arguments

The consensus of the competing RTU witnesses is that General's entry into the paging business outside of its wireline exchange boundaries will dilute the market for paging service. In addition, the protestants argue that General's paging system constitutes a wasteful duplication of facilities and wasteful use of the radio spectrum of a relatively limited market. While it may be true that General's signal paging service and equipment may duplicate some of the equipment of the protesting RTUs, there was no evidence presented by protestants to indicate that granting a certificate to General would dilute the market potential

to such extent as to adversely affect the protesting RTUs to any significant degree. On the contrary, the evidence adduced from the testimony of the protestants' witnesses indicates that although General has been providing paging service within the Pomona/Ontario area of the proposed contour signal area since 1972 and in its Redlands/San Bernardino area since June 1977, all the protestants have been doing very well for the past few years and they have seen a rapid growth in the size and profitability of their paging operations. ICS, the largest provider of paging service in the area, has increased the number of pagers in service from 500 in 1975 to 2,403 as of May 1979, for an increase of almost 500 percent. Each of the other protestants has experienced a similar rapid growth. For instance, protestant IRLA's business has been growing at a rate of at least 10 percent per year for the last several years and since IRLA began competing with General in General's proposed service area, the number of paging units in operation has continued to increase. Witness Berg, testifying on behalf of IRSB, admitted that in each year since at least 1977 the number of paging customers subscribing to his company's service and living in General's proposed service area has increased substantially, in spite of the fact that it has been competing with General in the Ontario area since 1972 and in the Redlands/San Bernardino area for several years. Witness Moynihan, testifying on behalf of protestant RR-C, which, like ICS, is a giant in the personal signaling service business, stated that in the first four months of 1979, RR-C increased its net pagers in service by approximately 2,000

units for a gain of almost 10 percent in just four months. He further indicated that RR-C's paging business is growing rapidly and has been growing at a good rate for the past few years--at least 10 percent per year--and that this growth has occurred despite RR-C's competition with General in the area in question. He further testified that the market for paging is not saturated but will continue to expand rapidly, and predicted that personal pagers would be in everyday household use in the future. Thus, the testimony of the protestants' witnesses establishes beyond question that the market for paging service in the proposed service area is far from saturated and is in fact expanding rapidly. This indicates ample room for competition from General, particularly when we consider the fact that General is already entitled to compete within those portions of the contour area that fall within its wireline exchanges without further certificate.

In addition to the dilution issue, protestants also raise the issue that General would be offering an inferior service in contrast to theirs by offering tone-only service while they offer both tone-only and tone-and-voice paging with the exception of RR-C which offers a brief voice message along with the tone alert. ICS, IRLA, and IRSE also provide dual address and shaker pagers to their customers. Since General offers tone-only paging and has no plans to offer the other paging services offered by protestants, a substantial part of protestants' business will be unaffected by General's competition. We fail to see how General's tone-only pagers can be said to be an inferior service when the evidence shows a demand for such service by customers who, by preference, find such service

adequate to meet their needs and subscribe to such service even in the face of the variety of services offered by protestants. Likewise, the fact that the public seeks out General for service is indicative of a public demand. We stated in D.86402 that any negative impact of General's service proposal on the protestants should be more than offset by utilization of the 158.1 MHz radio frequency enunciated in the Guardband decision, 12 FCC 2d 841, 850. This is one of the frequencies assigned to the wireline telephone companies by the FCC for use in providing personal signaling service. Contrary to the protestants' argument with respect to duplication of service and equipment, this assigned frequency is not a duplication of protestants' assigned frequencies and unless this application is approved, this resource of the radio spectrum would remain idle, thereby frustrating the policy of the FCC of promoting competition between wireline carriers and the RTUs. We have also held that a policy of fostering limited competition between the landline carriers and the RTUs can have a beneficial effect on the development of the communications art and industry (Malis v General Telephone Co., supra). (See also LAEA Paging decision (1976) 79 CPUC 404, 455 (rehearing denied, D.86245; Petition for Writ of Review, SF No. 23521, denied (September 1, 1977)).)

Protestants contend that the RTUs provide local message unit service throughout their certified service areas within the proposed expanded service area, while General, in contrast and contrary to the requirements of the FCC (Section 21.513 of Title 47, CFR telecommunication), fails to provide local message unit service in six telephone

exchanges of other wireline carriers and that it has no immediate plans to provide such service. However, General's witness Willson, although acknowledging that that was the situation as it existed on that date, testified that if General were to serve those areas in the future, it would provide foreign exchange lines in compliance with the FCC requirements.

No participant in this proceeding questioned General's technical and financial ability to offer the proposed service. It has been providing one-way, tone-only paging service in the Oxnard, Santa Barbara, Lompoc, and Santa Maria areas since 1968 and currently provides this service in seven separate geographic areas. General thus has had broad experience in the management, operation, engineering, and maintenance of such systems. No evidence was presented during these proceedings which would indicate that General does not now provide good service to its customers in all of these areas.

General presented undisputed evidence that the \$20 per month rate charged for its paging service is just and reasonable and generates revenues in excess of its overall authorized rate of return. There was no evidence presented that General's rates for paging service would be anti-competitive.

Fitness

Protestants argue that General has failed to establish its fitness to be entrusted with a certificate and base this argument on the fact that in its 1969 FCC application for its Pomona/Ontario paging transmitters, General represented that it had state authorization or franchise

granted pursuant to Section 7901 of the Public Utilities Code and that in its 1974 FCC application for its Redlands/San Bernardino paging transmitter, General represented that no state authorization or franchise was required. Protestants allege that these statements are not true or correct. Protestants are relying on the California Supreme Court's opinion in Industrial Communications Systems, Inc. v Public Utilities Commission, supra, wherein that court held that the Commission's approval of General's one-way radiotelephone service without certification (D.86402) was unlawful even though General had previously been operating two-way radiotelephone service in the same area, where the underlying two-way service had never been certified as an extension of General's wireline system in that service area. Protestants also contend that the FCC renewal licenses (granted September 6, 1978) are invalid because the FCC regulations (47 CFR Sec. 21.13(f)(2)) require a licensee to have all requisite state authority and be in operation within 240 days of the date of the license grant, or the license will automatically expire.

It is beyond the jurisdiction of this Commission to rule on the validity of General's radio license since the FCC has exclusive jurisdiction to vacate the grant of a radio license (Radio Station WOW, Inc. v Johnson (1945) 326 US 120, 129-132). Any attempt by this Commission to make a determination as to the validity of General's radio license would be a direct interference with the exclusive jurisdiction of the FCC. This Commission has previously recognized that it has no jurisdiction to interfere with the authority of the FCC over the assignment of radio frequencies (Interstate

Radio Telephone, Inc. of S.F. (1972) 73 CPUC 442, 449) or to assert authority in matters falling under the regulatory jurisdiction of some other federal agency (see e.g. Holiday Airlines (1966) 66 CPUC 537, 541). ✓

Even assuming arguendo that this Commission could consider in this proceeding the validity of General's radio licenses, it appears that the licenses are lawful. The statements made by General in the FCC applications themselves were made long before the court's decision in Industrial Communications Systems, Inc. v Public Utilities Commission, supra. They were made at a time when General in good faith believed certification was not required, which belief was in turn supported by D.86402, which was subsequently annulled by the California Supreme Court in Industrial Communications Systems, Inc., supra. Now that the Supreme Court has annulled that decision, the protestants advance the legal theory that the statements originally made by General, which admittedly are no longer correct, in light of the Supreme Court's decision, render the applications and thus the licenses invalid. Protestants cite no authority supporting this theory that a FCC license is automatically invalidated when a later court decision holds that the applicant's perception of state law was wrong. So far as this Commission is concerned, General still possesses valid FCC licenses (Exhibits 7 and 8) and if protestants believe otherwise, they can file a complaint with the FCC. ✓

With respect to protestants' other contention concerning Section 21.13(f)(2), we take official notice that that section was added to the rules after the licenses in question were issued. This section became effective

September 15, 1978 (43 FR 34316) while the licenses were issued on September 6, 1978. This section is not deemed relevant to the validity of General's licenses. Even if this section were to apply retroactively, it would not affect the validity of General's licenses since the evidence shows General began lawful operation under its renewal license within the stated 240-day time period as a result of D.89917 issued by this Commission on January 30, 1979.

Protestants also contend that General is unfit for certification because it has not applied for certification of its mobile two-way radiotelephone within the proposed expanded service area in compliance with the California Supreme Court's decision in Industrial Communications Systems, Inc. v Public Utilities Commission, supra. However, this allegation has no merit since the lawfulness of General's mobile two-way radiotelephone services is not an issue in this proceeding.

Protestants, citing Joe Mangini Drayage Company (1937) 41 CRC 49 at 53, correctly point out that this Commission has long held that certificates should not be granted to applicants who have engaged in illegal operations. However, in Mangini, we held that certificates will not be granted where the applicant is shown to have been previously willfully operating in an illegal manner. We have likewise held that a certificate will not be denied where there is otherwise a public need for a proposed service when the applicant reasonably believed he had the right to offer the service without certification, even though that belief is subsequently determined to have been in error. (Airtransit

of California (1975) 79 CPUC 130, 131-132; CEX, Inc. (1975) 79 CPUC 25, 30; Holiday Airlines, supra; California Motor Trans. Co. Ltd. (1947) 47 CPUC 319, 324.)

As stated above, the allegation of protestants that General is unfit to receive a certificate for its one-way personal signaling service because it has not filed a certificate for its two-way mobile radiotelephone service is not an issue in this proceeding. In addition, protestants have misread the aforementioned Supreme Court decision. The issue before the Supreme Court was the lawfulness of this Commission's D.86402 which had approved the tariffs for the expansion of General's Pomona/Ontario paging system to include the Redlands/San Bernardino area. That proceeding did not involve an attempt by General to amend its previously filed and approved tariffs for its mobile two-way radiotelephone service offering in the proposed service area. The issue of the lawfulness of General's mobile service came up only in the context of whether General could "piggyback" its paging service contours onto its mobile contours and thereby avoid the need for obtaining a certificate of public convenience and necessity. The Supreme Court held that General could only avoid certification for its paging service in the extensive area outside of its exchange boundaries if General had obtained certification of its two-way mobile radiotelephone contours for that area. Since no evidence was before it that General had such certification, the court held that the offering of the two-way mobile radiotelephone service in those areas was unlawful. Thus, the offering of paging service in those same areas was unlawful unless a certificate of public convenience and necessity was first obtained. The court, however, did not

annul the tariffs for General's two-way mobile service if offered beyond General's wireline exchange boundaries. General's filing for this certificate for its extended area personal one-way paging service is seen as an effort to respond directly to the court's ruling and the fact that it did not or has not filed for certification of its two-way mobile radiotelephone service prior to or concurrently with this filing does not represent a direct violation of the aforementioned Supreme Court decision.

The only issue before us in this proceeding is whether the public convenience and necessity would be served by granting General authorization to provide one-way paging service beyond its Pomona/Ontario - Redlands/San Bernardino wireline exchange boundaries. Contrary to protestants' contention, two-way mobile radiotelephone and one-way paging services are not interrelated. As an example, protestant RR-C does not provide two-way mobile radiotelephone service. The Administrative Law Judge properly denied protestants' attempt to expand this proceeding to consider this totally separate and unrelated matter and gave protestants' counsel ample opportunity to establish the relevancy of General's two-way mobile radiotelephone service offering to this proceeding, but he totally failed to make the necessary offer of proof to tie the two services together. We conclude that the Administrative Law Judge correctly excluded for lack of relevancy the proffered evidence regarding General's two-way mobile telephone service. If protestants were seriously concerned about the lawfulness of General's two-way mobile service, they could have filed a complaint with this Commission

seeking an order to cancel the tariffs unless certification is first obtained. However, we are not unmindful of the Supreme Court's comments concerning General's two-way mobile radiotelephone system and we will consider an order instituting investigation concerning the matter in the event General does not file an application for a certificate of public convenience and necessity within a reasonable period of time.

Anticompetitive Issues

In the Industrial Communications Systems, Inc. decision, supra, the California Supreme Court further held that in reaching a decision to grant or deny a certificate of public convenience and necessity or to approve tariffs for new services, the Commission should consider the antitrust implications of the new service where a close nexus exists between an agreement presenting antitrust problems and the new construction. This issue was raised in C.9757, In the Matter of the Suspension and Investigation on the Commission's Own Motion of Tariffs Filed Under Advice Letter No. 3157 by General Telephone Company of California, which resulted in D.86402 and was raised again in protestants' petition for a Writ of Review of that decision to the Supreme Court. The court agreed with the contention of protestants that the Commission exceeded its authority when it investigated but did not adequately consider the anticompetitive aspects of the proposed one-way paging service. We shall consider them here.

In C.9757 protestants contended that General's proposed service constituted a conspiracy between General and Pacific to monopolize the personal paging market throughout southern California and we pointed out in D.86402 that in contrast to the LAEA Paging cases,^{3/} where the antitrust implications of a joint service plan of General and Pacific to offer tone-only signaling services in the principal southern California market, the Los Angeles extended area, were raised, that contention was misplaced in C.9757 because General's proposed service and its existing Pomona/Ontario paging service were offered solely by General and were not provided jointly with Pacific. We pointed out in D.86402 that General's proposed paging services were not compatible with the paging services General and Pacific proposed to provide in the LAEA and that no plans existed for making them compatible.

In this current application proceeding, protestants' anticompetitive theory is based on the allegation that Pacific and General have entered into an agreement with the objective of monopolizing the paging market throughout southern California and that the service in question is simply a further step in the implementation of that plan. To support this claim protestants introduced into evidence a document entitled "Personal Signaling Service Fundamental Plan-Southern California Region" (Exhibit 34). This plan was entered into by Pacific and General in 1968 following the FCC's Guardband decision, *supra*, wherein the FCC allocated two radio frequencies

^{3/} C.9395, C.9450, C.9715, and C.9716.

in the 150 MHz band to the wireline utilities for their exclusive use and two others to the RTUs for their exclusive use for the provision of personal signaling services.

The objective of the plan, as stated therein (Exhibit 34, page 3), was "to provide a means of offering competitive service, making best use of available radio channels and equipment."

According to the plan, the existing radio frequencies available for the provision of paging at the time had been exhausted and in order to optimize the usage of the two, newly made available frequencies in the 150 MHz band, Exhibit 34, was developed by General and Pacific. The plan provided for the establishment of 17 personal signaling service radio coverage areas based on topography and technical limits. The plan contemplated that radio coverage of these areas would be provided using radio systems operated separately by one company or jointly between General and Pacific. The plan expressly states that either utility was free to go its own way and file an application with the FCC for a construction permit to provide paging service contrary to the terms of the plan provided it first simply notify the other utility of its intention to proceed alone.

According to the testimony of witness Beck, who appeared on behalf of Pacific, the fundamental plan (Exhibit 34) was still a working document in part, although much of the plan has not been followed since its inception. He further testified that since the LAEA paging hearings by the Commission in 1972, which resulted in D.85356, there have been no planning efforts between General and Pacific with respect to that fundamental

plan. The system was put into effect in the 213 area (Los Angeles Extended Area), was contested, and did not come on the air until 1976. Since then Pacific has gone no further either alone or with General on that fundamental plan. The evidence supports General's contention that the fundamental plan was, in large part, never implemented and that General proceeded on its own to serve the areas covered by the service contours shown on Exhibit 2.

The rationale underlying Exhibit 34 seems very similar to the rationale that led the protesting RTUs to enter into sharing agreements with respect to the use of the two guardband frequencies assigned to them by the FCC. These agreements, according to the protestants, were designed to prevent interference between RTUs providing paging services over the same radio frequencies. Under these agreements, each participating RTU is allocated an agreed upon number of seconds of each minute of available air time for the transmission of its paging messages. If the sharing agreements that have been entered into by the protestants are not anti-competitive, or, if so, are still in the public interest, then Exhibit 34 must likewise be unobjectionable from an antitrust viewpoint and in the public interest. However, irrespective of whether Exhibit 34 has anticompetitive implications, and irrespective of whether this Commission would still have approved the plan on public interest grounds in spite of any such implications if asked to approve the implementation thereof, no such question is before us here. The service which is the subject of this application is not one contemplated by the plan. Instead, it represents General's independent determination of how best to serve the public

interest in the Pomona/Ontario - Redlands/San Bernardino areas without any participation or cooperation on the part of Pacific. According to the evidence, although General notified Pacific when it originally decided to extend its Pomona/Ontario system on the 158.1 MHz frequency into the Redlands/San Bernardino area since such an extension was contrary to the plan, and even invited Pacific to join its service requirements in the area with those of General, Pacific rejected the invitation and no further contact occurred between the two utilities regarding the matter. There were no discussions between Pacific and General regarding the details of General's proposed service expansion nor was an agreement reached between the companies which would have prevented Pacific from offering its own paging service in all or portions of the same area.

The protestants have failed to present any substantial evidence to support the claim that General's service will have a significant anticompetitive impact.

The protestants attempted to offer evidence regarding General's two-way mobile telephone service to establish General's purported anticompetitive conduct, but such evidence was correctly excluded for lack of relevancy after the Administrative Law Judge gave protestants' counsel every opportunity to establish the relevancy of such offering to this proceeding and counsel totally failed to make the necessary offer of proof to tie the two services together.

The Supreme Court in Northern California Power Agency v Public Utilities Com. (1971) 5 Cal 3d 370, at 380, and more recently in Industrial Communications Systems, Inc. v Public Utilities Commission, supra, held that the Commission must consider antitrust issues where there is a "close nexus" between the construction to be approved by the Commission and an agreement presenting antitrust problems. In this proceeding all of protestants' proffered evidence regarding General's paging service, which they contend raises antitrust issues, was admitted. However, we cannot conclude from such proffered evidence any violation of antitrust laws or that General's proposal has anticompetitive ramifications. Likewise, we conclude from the evidence that General is fit to receive the requested certificate.

Competition

The FCC and this Commission have adopted a policy of fostering limited competition between the landline carriers and the RTUs (Guardband decision, supra; LAEA Paging decision (1976) 79 CPUC 404, 455, (rehearing denied, D.86245; Petition for Writ of Review, SF No. 23521, denied (September 1, 1977); Malis v General Tel. Co., supra). In Malis we stated, with respect to the desirability of competition, that:

"Brought to the fore in this proceeding is the question of the desirability of permitting competition between a radiotelephone utility of the miscellaneous common carrier class and a landline utility providing general telephone service. In all instances, the furnishing of mobile telephone service by either class of utility is possible only upon the issuance of a radio station license by the FCC. As set forth in Exhibit No. 15 in this proceeding, the FCC has encouraged the development of competitive public radiotelephone systems through the provision of a family of frequencies within which the development of common carrier mobile radio systems by enterprises other than existing

telephone companies may take place. In establishing that policy, the FCC notes that its determinations have been effected advisedly, and with the stated purpose, among others, of fostering the development of competing systems, techniques and equipments. The FCC expresses the view that this purpose, in light of experience since it was so stated in 1949, has proved to be salutary. This Commission expresses the concurring view that a policy of fostering limited competition has a beneficial effect on the development of the communications art and industry. The pursuance of such a policy by this Commission will, in a manner consistent with the established licensing policies of the FCC, go far toward assuring optimum utilization in California of the respective portions of the radio-frequency spectrum allocated by the FCC to telephone utilities as a class and to miscellaneous common carriers as a class." (Footnotes omitted.) (59 CPUC at pp. 115-116.)

By granting this application, we will be furthering this policy of fostering limited competition between the wireline carriers and RTUs and the rationale underlying the policy. Such approval will obviously promote the "optimum utilization" in California of that portion of the radio spectrum assigned by the FCC to telephone utilities as a class since General will otherwise be confined to using the 158.1 MHz frequency in very restricted and geographically separate areas and will not be able to offer service throughout the entire area where the signal can now be received and where there is a strong community of interest. It is doubtful that General could continue providing service on a competitive basis if it were limited to service only within the exchange boundaries since the majority of its customers, who require service throughout the proposed contour area, would no doubt

seek service from some other utility. At the present time only ICS' contours cover the entire proposed service area. General's service will increase the number of competitors to two and will encourage both companies to maintain high-quality paging service at reasonable rates.

In a certification proceeding, our main concern should be for the public that will be consuming a proposed new utility service. Where, as here, it has been shown that there is an existing and growing public need for General's proposed utility service, where approval of the offering will promote beneficial competition, and where there has been no showing that competing providers of similar communications services will be adversely affected, we are of the opinion that the requested certification should be granted.

Findings of Fact

1. General is a public utility telephone corporation offering telephone and other communications services in portions of 20 counties in the state of California.
2. General has been providing tone-only personal signaling service since 1968. It presently provides such service in seven separate geographic areas. These areas consist of the Los Angeles Extended Area (LAEA), Oxnard, Thousand Oaks, Santa Barbara, Santa Maria/Lompoc, Los Gatos, Novato, as well as the Pomona/Ontario - Redlands/San Bernardino areas.
3. General has had broad experience in the management, operation, engineering, and maintenance of such paging systems.
4. This application concerns General's request for a certificate of public convenience and necessity under Section 1001 of the Public Utilities Code to offer personal

signaling service within the service area contours shown on Exhibit 2 beyond the boundaries of its wireline telephone exchanges.

5. The service area contours for General's proposed service shown on Exhibit 2 were computed in accordance with Part 21, Section 21.504, of the FCC rules. This Commission has adopted the FCC's method of computing service contours for determining the service areas of telephone corporations offering personal signaling services in California.

6. One-way tone-only signaling service is a service whereby a customer is notified by an audible tone emitted from a small portable radio receiver to take some predetermined course of action.

7. General's proposed service will be provided over the radio frequency of 158.1 MHz, which is one of the radio frequencies assigned by the FCC to the wireline telephone corporations for their exclusive use in providing personal signaling services.

8. All of the facilities and equipment to provide the service are already in place and operation. General possesses all necessary licenses and authorizations, except the certificate of public convenience and necessity here in question, to provide the proposed service.

9. Approval of this application will not have a significant impact on the environment since no construction is necessary to provide the proposed service.

10. General is technically and financially qualified to provide the proposed service. General also has taken satisfactory steps to maintain the facilities and equipment used to provide the service.

11. General's proposed service rate of \$20 per month is reasonable.

12. In 1968 General and Pacific entered into an agreement entitled "Personal Signaling Service Fundamental Plan-Southern California Region." The purpose of the plan was to assure that the two radio frequencies in the 150 MHz₂ band assigned by the FCC to wireline carriers for their exclusive use were used efficiently in the public interest. The plan, however, was in large part never implemented.

13. Under the terms of the plan either utility was free to implement a paging service of its own using said frequencies provided it first notify the other utility of its intent to do so. If one of the utilities decided to set up a paging service on its own in a given geographic area, nothing in the agreement prevented the other utility from seeking authorization to establish a competitive system covering the same geographic areas.

14. The service here in question represents a departure from the plan. General notified Pacific that it was going to establish this service on its own contrary to the terms of the plan.

15. There is no agreement by General and Pacific not to compete with each other in the proposed service area. In addition, no evidence was presented that General would compete unfairly with the other utilities offering paging services in all or portions of the proposed service area.

16. Only one other utility, ICS, serves all of the territory that General will serve if its application is granted.

17. There is a definite public need for General's proposed service. The undisputed evidence shows that there is a present and growing demand for General's service throughout the proposed service contours. This community of interest was conclusively established by the results of a market survey sent by General to all of its paging customers of record as of December 6, 1978. The anticipated future growth in demand for the service was well documented by a conservative five-year market forecast prepared by General.

18. The market for personal signaling services in the proposed service area is not saturated, but is growing rapidly. There is ample unsatisfied demand to support one more competitor.

19. The provision of paging services by a wireline telephone utility such as General in addition to that offered by the RTUs will promote the efficient use of those portions of the radio spectrum assigned by the FCC to wireline carriers and miscellaneous common carriers respectively, for use in providing paging services. It will also encourage the development of the communications art and industry.

20. General has not yet applied for a certificate public convenience and necessity for its two-way mobile telephone service in the Pomona/Ontario and Redlands/San Bernardino areas.

Conclusions of Law

1. General is entitled to provide one-way personal signaling services within its wireline telephone exchanges without obtaining further certification from this Commission under Section 1001 of the Public Utilities Code.

2. The public convenience and necessity would be served by granting A.58526.

3. General's proposed service is not anticompetitive but, instead, will foster competition between the wireline carriers and the radiotelephone utilities.

4. The "Personal Signaling Service Fundamental Plan-Southern California Region" does not cover the service proposed by General herein. Even if it did, we conclude that the plan is not anticompetitive in nature but was intended to promote the efficient utilization of the two radio frequencies in the 150 MHz band assigned by the FCC to wireline carriers for their exclusive use. To the extent the agreement may have any anticompetitive significance, the terms expressed therein are reasonable and in public interest, and would not give General and Pacific an unreasonable competitive advantage with respect to the RTUs. Its purpose is similar to the frequency-sharing agreements entered into by the RTUs who appeared in opposition to this application.

5. General's present tariff schedules for its Pomona/Ontario - Redlands/San Bernardino paging service should be made effective for service throughout the proposed service area.

O R D E R

IT IS ORDERED that:

1. A certificate of public convenience and necessity is granted authorizing General Telephone Company of California (General) to offer personal signaling service beyond the boundaries of its Pomona, Ontario, Redlands, and San Bernardino exchanges as set forth in this application.

2. The tariffs of General, for one-way paging service in its Pomona/Ontario - Redlands/San Bernardino service areas, are allowed to go into effect on the effective date of this order.

3. General is further ordered to apply for a certificate of public convenience and necessity for its two-way mobile radiotelephone system in the Pomona/Ontario - Redlands/San Bernardino service areas within ninety days from the effective date of this order.

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

Dated MAY 6 1980 , San Francisco, California.

John E. Bryan
President
James L. Stanger
Richard D. Howell
Clair T. Smith
Edward W. Smith
Commissioners