

ORIGINAL

Decision No. 92571 JAN 6 1981

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application of GENERAL TELEPHONE)
COMPANY OF CALIFORNIA for a)
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)
exchanges.)

Application No. 58526
(Filed December 14, 1978)

ORDER DENYING PETITION FOR STAY AND MODIFICATION
OF ORDERING PARAGRAPH 3 OF DECISION NO. 91732

General Telephone Company of California (General) petitions for a stay of Ordering Paragraph 3 of Decision No. 91732 issued May 6, 1980, and for an order modifying Decision No. 91732 pursuant to Section 1708^{1/} of the Public Utilities Code.

Ordering Paragraph 3 of Decision No. 91732 states as follows:

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

1/ Unless otherwise indicated, all code sections hereinafter refer to the Public Utilities Code.

In Decision No. 91732 we granted General's Application No. 58526 for a certificate of public convenience and necessity to provide one-way personal signaling (paging) service beyond the boundaries of General's Pomona/Ontario-Redlands/San Bernardino wire line telephone exchanges.

Petitions for rehearing of Decision No. 91732 were subsequently filed by General as well as by several radiotelephone utilities (protestants) who appeared in opposition to the application. Protestants' petition for rehearing had the effect of automatically staying Decision No. 91732. By Decision No. 92050 issued July 15, 1980, the stay of Decision No. 91732 was extended pending the outcome of our review thereof. On July 29, 1980, we issued Decision No. 92092 denying rehearing and discontinuing the stay. Since Decision No. 91732 was stayed until July 29, 1980, the deadline for filing an application for a certificate of public convenience and necessity by General in response to Ordering Paragraph 3 was extended to October 27, 1980.

On or about August 28, 1980, protestants in Application No. 58526 filed with the California Supreme Court a petition for writ of review of Decisions Nos. 91732 and 92092 (S.F. No. 24206). Answers to the petition were filed by both General and the **Commission on** September 22, 1980. Protestants' reply brief was filed on October 7, 1980.

On October 27, 1980, General filed the present petition seeking a stay and modification of Ordering Paragraph 3 of Decision No. 91732. Specifically, General asks that Ordering Paragraph 3 be stayed until the California Supreme Court has acted on protestants' petition for writ of review, arguing that review of Decision No. 91732 could lead to annulment of the order

and that under those circumstances, if no stay were granted, General would have been compelled to incur time and expense in complying with an order which was ultimately declared to be invalid.

Protestants' petition for writ of review, however, has now been denied. As a result of the Court's order issued December 10, 1980, Decisions Nos. 91732 and 92092 have been upheld, and the grounds supporting General's request for a stay of Ordering Paragraph 3 no longer have merit. Any further stay of the order based on those grounds would therefore be inappropriate.

The present petition also includes a request by General for modification of Ordering Paragraph 3. General seeks to remove the requirement that it file an application for a certificate of public convenience and necessity for its two-way mobile telephone service in the Pomona/Ontario-Redlands/San Bernardino area and to have the parties directed to file briefs on the question of the necessity for such certification. Alternatively, General asks for public hearing and oral argument on the issue of whether certification for its two-way service is required.

This request is the second time General has asked us for such relief in this proceeding. In its petition for rehearing of Decision No. 91732, General sought "rehearing of Decision No. 91732 on the limited legal question of whether certification is required for General's two-way mobile radiotelephone service in the Pomona/Ontario-Redlands/San Bernardino area, or, alternatively, modify Decision No. 91732 by striking Ordering Paragraph No. 3." The issue was argued both by General, in support of its request, and protestants, in opposition to General's petition. In Decision No. 92092, we ruled on General's petition by denying rehearing and further stating:

"We do find, however, that modification of Decision No. 91732 [is necessary] to clarify our view that General has the burden of

establishing the lawfulness of its two-way mobile radiotelephone service in the Pomona/Ontario-Redlands/San Bernardino areas and applying for a certificate of public convenience and necessity for that service."

The only difference between General's petition for rehearing and the present petition is General's reference in the latter to Section 1708 of the Public Utilities Code. Section 1708, however, is merely legal authority for requesting a modification; all legal authority and support for the modification itself are supplied by the petition for rehearing which General has incorporated by reference with its present petition.

Additionally, in response to protestants' petition for writ of review, the effect of Loperena v Fresno Mobile Radio, Inc. (1970) 71 CPUC 645, the sole legal support for General's position, was addressed. In support of Decisions Nos. 91732 and 92092, in particular the Commission's exclusion of evidence relating to General's two-way service, counsel for the Commission argued the following to the Court:

". . . While Loperena does indicate that under certain circumstances the relationship between one-way paging and two-way mobile telephone service may eliminate the need for certification, it does not stand for the proposition that evidence relating to an applicant's two-way service is necessarily relevant to certification of its one-way paging. Further, as stated previously, in Loperena the Commission only concluded that one-way paging could be added to existing two-way mobile telephone service without additional construction which would require certification. Nowhere is it suggested that the same relationship or conclusion could be reached if a proposed two-way service was added to an existing one-way paging service.

Loperena contains no findings or analysis of whether additional construction would be needed for expansion of one-way to two-way service or whether the construction necessary to add two-way service could ever be avoided. Until such determinations are made, certification must necessarily be required of all one-way operators seeking to add two-way service.

"The fact that the Commission has adopted this approach is made quite clear in Decision No. 91732, as modified by Decision No. 92092, and by the Commission's order directing General '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 the order.' The Commission's rejection of General's request for rescission of this order and its modification of Decision No. 91732 further indicate that, for certification purposes, individual application will be required except when one-way service is added to existing two-way mobile telephone service which is either certificated or within a telephone corporation's wireline boundaries." (Respondent's Answer, at pp. 10-11, emphasis original.)

Not only are we in agreement with this analysis of our decisions, but we would also note that the Court in denying review of Decisions Nos. 91732 and 92092 may have found this particular argument persuasive. In any event, it is clear that the issue of the need for certification of General's two-way service has already been presented, argued, reviewed, and ruled on by the Commission in this proceeding. Any order requiring further examination of this issue would unnecessarily delay compliance with a valid Commission order. General, who chose not to seek review of Decision No. 92092 denying its petition for rehearing, should not be allowed to accomplish such a delay by the filing of an additional petition which differed from its rehearing request only with respect to the procedural mechanism it invoked.

Although General may have legitimately had concern in complying with an order under review by the California Supreme Court, the denial of review by that Court ends any uncertainty regarding that order. Because the Court's action was recent, however, and General is presently in noncompliance with Ordering Paragraph 3, we will allow General 30 days from the effective date of this order to comply with Ordering Paragraph 3. Since Ordering Paragraph 3 has been in effect for some time, this order will be made effective the date hereof.

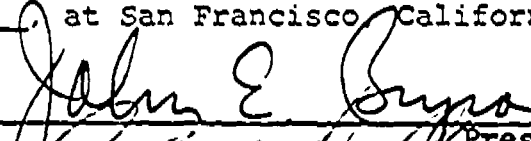
IT IS ORDERED that:

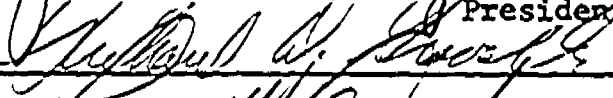
1. The petition by General Telephone Company of California for stay and for modification of Ordering Paragraph 3 of Decision No. 91732 is denied.

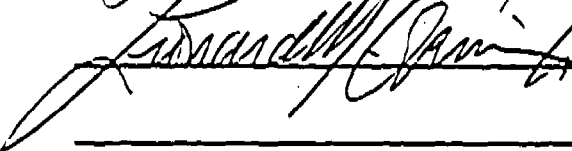
2. The date by which General Telephone Company of California is required to comply with Ordering Paragraph 3 of Decision No. 91732 is extended to thirty days after the effective date of this order.

The effective date of this order is the date hereof.

Dated JAN 6 1981 at San Francisco California.



President




Commissioners