

ORIGINAL

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Decision 93043

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

DUSTY'S ANSWERING SERVICE, INC., )  
 )  
 Plaintiff, )  
 )  
 v. )  
 )  
 IMPERIAL COMMUNICATIONS )  
 CORPORATION, )  
 )  
 Defendant. )

Case 10847  
(Filed April 7, 1980)

Carl Hilliard, Attorney at Law, for Dusty's  
 Answering Service, Inc., complainant.  
Dinkelspiel, Pelavin, Steefel & Levitt, by  
David M. Wilson, Attorney at Law, for  
 Gencom (Imperial Communications Corporation),  
 defendant.

O P I N I O N

Background

Complainant Dusty's Answering Service, Inc. (Dusty's) is a nonutility telephone answering service (TAS) operating in San Diego County. Defendant Imperial Communications Corporation, which will be referred to by its current name of "Gencom", is a certificated radiotelephone utility (RTU) which operates one-way paging and two-way telephone systems in San Diego County and a one-way paging system in the San Francisco Bay Area. Gencom also operates a non-utility TAS in the City of San Diego. It is the relationship of Gencom's RTU business with its TAS operations which gives rise to the complaint.

Dusty's alleges that Gencom in its conduct of operations as both a TAS and an RTU has engaged in anticompetitive activities. Specifically, Dusty's contends that Gencom's RTU operations cross-subsidize its TAS by sharing expenses and facilities and provide the TAS with an unfair advantage with respect to its competitors. Dusty's also alleges that Gencom's operations of both an RTU and a TAS present Gencom with the unique opportunity to advertise the availability of both paging and telephone answering services. Since Dusty's can only offer telephone answering service, it argues that it is therefore improperly and unfairly disadvantaged in its effort to compete with Gencom's TAS. Finally, Dusty's argues that Gencom's refusal to enter into an agency agreement by which Dusty's could then offer paging services through Gencom is done with the purpose of maintaining a monopoly power and thus violates the Sherman Act.

As its main request for relief, Dusty's seeks a Commission order directing Gencom to divest itself of the TAS operation. Alternatively, Dusty's requests an order requiring Gencom to permit Dusty's, as well as similarly situated entities, to purchase paging service from the RTU and to resell it to the general public at whatever price the market will sustain. Dusty's final request is an award of monetary damages as deemed appropriate by the Commission. Dusty's suggests that as a result of Gencom's anticompetitive conduct it has suffered approximate damages of \$13,000/mo. for the past year.

In its answer, Gencom denies that it has engaged in any anticompetitive conduct through its TAS or RTU operation. Gencom also contends that all activities about which Dusty's complains have been undertaken for legitimate business reasons. As its final defense, Gencom asserts that the Commission is without jurisdiction to award the relief sought by Dusty's. Gencom concludes that Dusty's complaint is without merit and requests that the Commission deny the complaint.

The complaint was the subject of public hearing held in Los Angeles on December 19, 1980. Both Dusty's and Gencom presented affirmative evidence; the case was submitted pending receipt of concurrent briefs on February 13, 1981. On February 20, 1981, Dusty's filed a "Motion to strike Gencom's untimely filed brief." The motion is denied. The matter is now ready for decision.

Evidence and Position  
of the Parties

Complainant Dusty's Position

In support of its contention that Gencom is engaging in anticompetitive activities, Dusty's presented the prepared testimony and exhibits of Carl Hilliard. Mr. Hilliard, an attorney with extensive experience in communications practice before the Commission, is the president and a major shareholder of Dusty's.

Through Mr. Hilliard's direct testimony, his sponsorship of 20 exhibits, and cross-examination of Gencom's witnesses, Dusty's seeks to demonstrate that Gencom has engaged in a pattern of conduct which violates state and federal antitrust law. Such allegedly illegal conduct by Gencom can be summarized as including the following elements: (1) cross-subsidization, (2) refusal to deal, (3) exploitation of an essential facility, (4) tying arrangements; (5) price fixing, and (6) limitation of market entry.

(1) Cross-subsidization

Gencom's utility (RTU) and nonutility (TAS) service are fully integrated. Because Gencom's operators and physical facilities are shared by both utility and nonutility services, Gencom is in a position to disproportionately allocate costs from its nonutility operation to the utility side of the ledger. Such improper allocation or cross-subsidization allows Gencom to underprice its TAS offerings to the substantial detriment of its competitors.

In support of its contention that costs actually incurred by Gencom's TAS are not properly allocated to the TAS operation, Dusty's presented a tabulation comparing the relative net sales and operating expenses of Dusty's and Gencom.<sup>1/</sup>

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<sup>1/</sup> Gencom's TAS serves about 329 lines as compared to Dusty's 469 lines; the net sales of both entities are substantially the same.

	<u>Complainant's TAS</u> <u>1/3 of Three Months</u> <u>Ended 9/30/80</u>		<u>Defendant's TAS</u> <u>Allocated to TAS</u> <u>One Month Ended 9/30/80</u>	
Net Sales	\$24,567	100%	\$22,543	100%
Operating Expenses				
Salaries	14,464	58.9	1,266	5.6
Payroll Taxes	1,329	5.5	438	1.9
Advertising	21	.1	170	.7
Automobile	45	.2	114	.5
Computer Services	567	2.3	216	1.0
Dues and Subscriptions	298	1.2	18	.0
Insurance	767	3.1	141	.6
Maintenance and Repairs	8	.0	141	.6
Office Expense	647	2.6	293	1.3
Outside Services	37	.1	6	.0
Postage	55	.2	174	.8
Rent	384	1.6	241	1.2
Taxes - Other	4	.0	287	1.4
Telephone	2,453	10.0	2,211	9.8
Utilities	228	.9	183	.8
Other Oper. Expenses	<u>1,227</u>	<u>5.0</u>	<u>4,489</u>	<u>19.9</u>
Total Operating Exp.	\$22,534	91.7	\$10,388	46.1
Earnings from Operations	<u>\$ 2,042</u>	<u>8.3</u>	<u>\$12,155</u>	<u>53.9</u>

Dusty's directs particular attention to the entries for "salaries" and "advertising". Dusty's contends that the allocation for salaries is grossly underestimated. If one assumes as is the case with Dusty's TAS operation, that salary expenses constitute 58.9 percent of net sales, Gencom has understated its TAS salary expenses by \$144,142 on an annual basis.<sup>2/</sup> Gencom did acknowledge that its dispatch salaries were understated by approximately \$50,000. However, Gencom testified that administrative and management fees for its TAS were overstated by \$40,000 and thus offset all but \$10,000 of the salary expense underestimate. Even accepting these adjustments, Dusty's argues that the amount of the salary expense understatement, i.e., cross-subsidization, is still \$104,142.<sup>3/</sup>

With respect to advertising expenses, Gencom testified that it allocates approximately \$2,400 a year to its TAS for such costs incurred. The comparative tabulation shows that Gencom's advertising expenses total \$170/mo. or \$2,040/yr. This amount represents the cost of running TAS advertisements in the yellow pages. The difference between the annual cost of advertising in the answering service section of the yellow pages (\$2,040) and Gencom's allocation for all of its TAS advertising expenses (\$2,400) is \$360. Dusty's posits that this \$360 could not possibly reflect the additional advertising costs actually incurred by Gencom's TAS including: the proportional share of the expense of brochures distributed by Gencom's three salesmen; the portion of Gencom's advertisement in the yellow page section reserved for RTUs; every media ad over the past three years, with one exception, which have

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2/  $58.9\% \times \$22,543 \text{ (net sales)} \times 12 \text{ months} = \$159,334 \text{ projected yearly salary expenses. } \$159,334 - (\$1,266 \text{ (Gencom's monthly estimate)} \times 12 \text{ months}) = \$144,142 \text{ understatement.}$

3/  $\$159,334 - (\$50,000 + [\$1,266 \times 12 \text{ months}]) = \$94,142 \text{ plus } \$10,000 \text{ offset} = \$104,142 \text{ cross-subsidization.}$

included TAS advertising with paging advertising; and the large posters and other materials in Gencom's premises which advertise its TAS.

Dusty's challenges Gencom's allocation between utility and nonutility expenses as arbitrary management decisions. Though it acknowledges that the actual amount of cross-subsidization may be in question, Dusty's contends that there can be no serious question that Gencom has improperly and unfairly shifted TAS expenses to its RTU operation.

(2) Refusal to Deal

Dusty's claims that Gencom's refusal to make an agent of Hilliard is done with the purpose of maintaining a monopoly power and thus violates the Sherman Act. There is no dispute that Gencom's RTU has refused to make an agent of Hilliard. Dusty's argues that Gencom's contention that it refuses to deal for legitimate business is specious.

Gencom refuses to sell paging service to Dusty's as provided for in its tariff on the grounds that the resale of such service by Dusty's is "illegal". Dusty's alleges that Gencom even refuses to allow Dusty's to fill out applications for paging service on behalf of its customers and requires such customers to be interviewed by Gencom's personnel at which time they are either directly or indirectly solicited to be customers of Gencom's TAS.

Dusty's challenges the following reasons cited by Gencom in support of its refusal to make Dusty's an agent: (1) Hilliard is attorney of record for an uncertified "pseudo common carrier"; (2) Hilliard represented a competitor in a recent attempt to obtain a RTU certificate; (3) Hilliard represented his wife in a dispute with another TAS. In each instance cited, Hilliard's representation has so far resulted in his client prevailing.

Dusty's states that it has repeatedly made it clear that it wishes to enhance Gencom's service, provide better equipment, and at lower prices. Dusty's does not seek to injure Gencom. Dusty's maintains that it is not Hilliard's lack of qualifications which prompts Gencom's refusal to make him an agent; but rather it is Dusty's clear ability to effectively compete that has caused Gencom to block Dusty's efforts to provide, improve, and expand service and equipment alternatives to the public. Dusty's contends that Gencom's refusal to deal is illustrative of its desire and design to maintain an unfair competitive advantage.

(3) Exploitation of an Essential Facility

Gencom controls the available RTU frequencies in San Diego. A firm in control of an essential facility can effectively and easily foreclose competition by refusing to allow its competitors access to the facility on reasonable and nondiscriminatory terms. Dusty's cited case law to support its conclusion that such refusal of reasonable access is unlawful. Since access has allegedly been denied, Gencom's actions are an anticompetitive exploitation of essential facilities because reasonable and nondiscriminatory access to the RTU frequencies is an essential element of the telephone message delivery system.

(4) Tying Arrangements

Section 3 of the Clayton Act makes it unlawful to lease or sell a commodity or to fix a price, discount, or rebate "on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale or contract for sale or such condition, agreement, or



understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce." In the instant case the sale of paging service to Gencom's "agents" is tied to an agreement not to resell such service at less than Gencom's tariff and not to lease or maintain pager equipment purchased from any supplier at less than the amount charged for similar equipment by Gencom.

Dusty's claims that the tying arrangement which Gencom has constructed to create the illusion of "competition" actually limits competition in the provision and maintenance of paging reception equipment. Dusty's cannot, as a practical matter, provide pager reception equipment because of Gencom's refusal to allow it to purchase paging service.

(5) Price Fixing and Control

Gencom has fixed the price for resale of its services by agents and the price for rental of pager reception equipment provided by such agents to their customers. Although Gencom contends that there is "competition" from independent equipment suppliers in the provision of reception equipment used on Gencom's system, Gencom's own evidence belies that contention. Gencom presented evidence demonstrating the growth of its system from November 1979 to October 1980. During that period there was a 57% decrease in customer-owned equipment. As of October 1980 customer-owned units represented .6% of the total pager units on Gencom's system. In spite of a \$100 decrease (27% reduction) in pager reception equipment costs, Gencom has been able to maintain rates based on higher costs. Dusty's maintains that this insensitivity to price could not be maintained without the existence of monopoly power.

(6) Limitation of Market Entry

Gencom's intent to maintain its unfair advantage in the telephone message delivery service business is apparent from its course of conduct in excluding competing telephone answering services from offering paging services.

Gencom has only added agents for its service who are not in the telephone answering service business. Gencom has refused the requests of Dusty's and Gladstone to become agents, both of whom operate telephone answering services in competition with Gencom. In attempting to justify this conduct Gencom claimed that there are over 50 telephone answering services in San Diego County and "By no view of the market are there enough potential new subscribers to support even ten agents in the County..." During cross-examination of Gencom's witness, it was established that all of the 50 telephone answering services are not competitive because the economics of service to a particular customer depend on the TAS central office location.

The evidence is, then: (1) there are not 50 telephone answering services competing with Gencom's TAS; (2) two requests for agency agreements have been received by Gencom; and (3) Gencom tacitly admits more, but less than ten, agents are needed to support potential new subscribers in the County. The two requests for "agency" agreements were received by Gencom at a time when more agents generating tone-only paging subscribers would result in pure profit to the utility. These requests were rejected, according to Gencom, because the present level of marketing "has been more than sufficient to achieve our goals."

It is submitted by Dusty's that the fact that the two requests for agency agreements came from Gencom's TAS competitors is the real reason for rejection by Gencom. Such conduct taken as a whole is ample evidence of Gencom's intent to use its utility status to maintain unfair advantage over its competitors.

In summary of its position, Dusty's concludes that as a result of Gencom's control of all of the RTU spectrum in San Diego, it has been able to establish a bottleneck monopoly. Basic state and federal statutory principles require that access to this spectrum be allowed to all competitors on equal and nondiscriminatory terms. Instead, Gencom's monopolistic abuses have covered every category of conduct condemned and prohibited in public utility and antitrust laws. The remedy of divestiture of its TAS and limitation of Gencom to provision of basic services is consistent with the reason for this Commission's regulation of RTUs in the first instance, promotes the public interest in establishing more and different services at lower prices, and restores competition in the telephone message delivery service market. If Gencom is permitted to engage in enhanced services at all, it should, by reason of its past conduct, be required to completely disassociate such services from its utility operation.

Defendant Gencom's Position

Gencom contends that Dusty's has failed to produce any probative evidence to substantiate its allegations that Gencom has engaged in anticompetitive activities in operating its TAS and RTU. In contrast to Dusty's weak showing, Gencom argues that it has made a strong presentation and has demonstrated the following facts:

1. Gencom has not cross-subsidized its TAS and enabled it to undercut the rates of competitors; by any standard of cost-accounting, Gencom's TAS is profit-making and charges rates that, if anything, are higher than Dusty's.

2. Gencom is not in a unique position to advertise the availability through it of both paging and telephone answering services; many other answering services can make similar claims.
3. Customers referred by Dusty's to Gencom for paging service have not been subjected to high-pressure sales tactics and criticism of Dusty's as part of a scheme by Gencom to steal Dusty's TAS customers; Dusty's could not and cannot identify any single Dusty's customers who have been lost to Gencom for any reason, legitimate or otherwise.
4. Gencom has not engaged in predatory pricing; Gencom's customer base has not been increased at the expense of its competitors nor has there been any correlation between the growth of its paging clientele and the growth of its TAS customer base.
5. Gencom had ample business reasons for its refusal to deal with Hilliard; Gencom demonstrated that its desire, like any competitive enterprise, is to limit the independent distributors of its product to a relatively few, credit-worthy individuals whose interests are similar to Gencom's.

Although Gencom maintains that its factual showing is sufficient to warrant denial of the complaint, Gencom also argues that as a matter of both general law and public utility law the relief sought by Dusty's is beyond the power of the Commission to grant.

(1) Cross-subsidization

Gencom contends that any allegation that subsidies from Gencom's RTU operation allow its TAS to undercut rates is contradicted by the fact that Gencom's TAS rates are, if anything, higher than those of Dusty's. Furthermore, Gencom's evidence demonstrates that by whatever cost-allocation method one uses its TAS is profitable, i.e., its sales are not below cost but result in profit comparable to that earned by similar TAS entities throughout the country.

The allocation controversy principally concerns a single line item--"operators' salaries". Gencom concedes that the same operators are used for both radiotelephone utility and for telephone answering service activities. On a nationwide basis, Gencom has found it unprofitable to go through the time and motion studies which were formerly employed to allocate operators' salaries by actual function. Rather, for purposes of Gencom's FCC filings such allocation has been on the basis of revenue ratios, which in San Diego resulted in only 10 percent of salaries being attributed to the TAS enterprise.

Gencom's witness freely admitted that because of the high level of automation achieved by the San Diego RTU considerably more than 10 percent of operators' time was devoted to TAS activities. But he further testified that even if a more realistic ratio, for example 50:50, were applied, the result would still be a profitable TAS operation.

Gencom notes that even with a 50:50 allocation of operator's salaries, Gencom's TAS labor costs are significantly less than Dusty's. For example, evidence indicates that \$117,331 in "salary" expenses was incurred by Dusty's TAS operation through September 30, 1980, while \$113,426 in operator salaries was incurred for both Gencom's TAS and RTU operations.

Gencom maintains that this cost advantage enjoyed by its TAS has nothing to do with an unfair cross-subsidy; rather it results from the efficiencies which result from Gencom's ability to use the same personnel for two significant revenue-producing functions.

No proof of cross-subsidization has been adduced by Dusty's. It is not enough to show that Gencom's TAS and radio-telephone operations are more cost-efficient because they are

operated together. Rather Dusty's must show that these efficiencies have resulted from something "unfair" within the meaning of the antitrust laws, and that they have resulted in Gencom's TAS being able to undercut Dusty's in the marketplace. And in this regard, Gencom argues that Dusty's has not contradicted the obvious conclusion, i.e., that Gencom's TAS operates at a profit, does not sell its services for less than their cost, and receives no subsidies from its RTU operation.

(2) Advertising

Dusty's submitted exhibits consisting of a collection of advertisements in which Gencom, under the name of Imperial Communications Corporation, advertised the availability from it of both answering and paging services. Gencom in no way contests that it advertises in this manner. Gencom did submit evidence demonstrating that a great many answering services who are neither utilities nor agents of utilities advertise in exactly the same way. Any answering service can refer its customers to the Pacific Telephone Company (Pacific), or to Gencom for paging services. Gencom testified that Dusty's in fact refers customers to Gencom for paging services, and Dusty's choice not to advertise that paging is available through Gencom is strictly its own decision, and in no way results from anticompetitive activity by Gencom.

Further, Gencom claims that any advertising advantage, if it possesses one at all, is not unique to it. If anything, Pacific is far better placed to advertise a "full range of communication services", both regulated and unregulated. Pacific can provide the entire citizenry with wireline telephone service, as well as private line services, leased-line services, mobile telephone services, terminal equipment, and paging service. The

"Bell" name enjoys instant identification and is undoubtedly an advantage to Pacific in marketing both unregulated and regulated products and services. Yet, Gencom argues that it competes effectively with Pacific, even as Dusty's has been able over many years to compete with Gencom's TAS.<sup>4/</sup>

(3) Interference with Business Advantage

Acknowledging that it could refer its customers to Gencom or Pacific for satisfaction of their paging needs, Dusty's professes to fear that Gencom sales persons will unfairly criticize Dusty's, and will lure away the customers thus referred to them. No evidence was presented in support of the allegation.

Dusty's was entirely unable to address itself to the pre-November, 1979 period during which Dusty's apparently built up a larger clientele than had Gencom's TAS. Nor was Dusty's able to specify any instance in which it had lost a single customer to Gencom, or in which a Gencom salesman had acted improperly.

(4) Predatory Pricing<sup>5/</sup>

Gencom rebuts the allegation that its TAS has engaged in predatory pricing practices with evidence of the following:

- (1) Gencom's TAS rates are, if anything, higher than Dusty's and

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<sup>4/</sup> Gencom notes that Dusty's has a larger TAS market share than Gencom, with 469 lines on its south county system and 118 lines in north San Diego county. Gencom has 329 lines in service.

<sup>5/</sup> Gencom maintains that there is a significant question as to whether Gencom's TAS even competes with Dusty's. Because they are located in different telephone exchanges, it is at present most difficult for a potential customer in Dusty's exchange to obtain interconnection with the Gencom TAS office, while it is equally difficult for the public in Gencom's exchange to be interconnected with Dusty's. In fact the only effective competition relevant to this case may be that between Dusty's north county TAS and that of one of Gencom's agents who is also located in northern San Diego county. Yet, on close examination, it becomes apparent that Dusty's north county operation happens to be the one which is growing the quickest.

(2) Gencom's TAS customer base has not grown, much less as the result of predatory pricing and undercutting competitors' rates.

Gencom's Net Gain Report, entered as an exhibit, shows that in the period from November 1979 through November 1980, i.e., during the period following Hilliard's acquisition of Dusty's, Gencom paging units in service rose from 8,231 to 9,208, while its TAS accounts declined from 429 to 415. There is no evidence that Gencom's TAS has picked up accounts at the expense of other answering services by undercutting the rates of the competition. Further, it can be seen that there is no correlation between the growth of Gencom's paging clientele and the "growth" of its TAS customer base.

(5) Refusal to Deal

Gencom maintains that its reasons for refusing Hilliard's request to become an agent are based on the following legitimate business concerns:

1. Carl Hilliard is a well-known communications attorney who over the years has taken positions adverse to those of Gencom, and who, at least on two occasions, has gone into competition with his own clients. Indeed, one of Hilliard's clients, George Oakley, is an agent of Gencom, and as such, could be significantly harmed by the addition of another agent in the San Diego area.
2. Hilliard has an ownership interest in a wide range of radiotelephone utilities, as well as other communications enterprises which have the potential to compete with Gencom.



3. Gencom has concluded that its ability to compete effectively with Pacific requires that the number of agents be held at three, and that a proliferation of agents, with each one advertising in its own name, would substantially lessen the overall impact of Gencom advertising.
4. If additional agents were to be created, Gencom would much prefer to engage Fred Gladstone, who applied earlier for the position, and whose reputation and qualifications are unquestioned. For Gencom to refuse Gladstone, while accepting Hilliard, would run counter to its own business interests, and might expose it to liability to Gladstone.

Gencom contends that the underlying principle of all commercial law is freedom of contract and that unless such freedom is abused, one may deal or refuse to deal with whomever he chooses. Thus, a business entity is permitted to give one distributor exclusive rights in a given area and refuse on that ground to deal with others.

Gencom argues that in order to violate the Sherman Act, there must be more than the refusal to deal alleged by Hilliard. There must also be a conspiracy between Gencom and another entity and a showing of an anticompetitive motive. Thus, if Dusty's could show that Gencom and Pacific had together agreed not to deal with Dusty's, the conspiracy prerequisite could be satisfied. And, if Dusty's could further show that Gencom's motive in refusing to deal was to create a monopoly for itself of the answering service business, it would have satisfied the requirement that there be an improper motive for any refusal to deal to be a violation of the anti-trust laws. If, on the contrary, there is no conspiracy, and there are legitimate business motivations for the refusal, the questioned conduct will be deemed proper.

Gencom claims that Dusty's has alleged neither a conspiracy nor an improper motive in Gencom's refusal to deal with it and both are necessary under traditional "refusal to deal" cases. Therefore, Dusty's claim must fail.

As final proof that Gencom has not engaged in anti-competitive behavior, Gencom calls attention to evidence which demonstrates that Dusty's has been able to compete and has achieved a very respectable first-year profit, while Gencom has not in any way grown during the period covered by Dusty's allegations. Gencom's analysis shows that Dusty's profit and loss figures for the first nine months of 1980, i.e., for the first accounting periods under Hilliard's ownership, reveal a pretax profit of \$37,923, or a profit-to-sales ratio of somewhat over 16 percent.

In addition to its factual showing which Gencom believes convincingly rebuts any allegations that it has engaged in anti-competitive behavior, Gencom makes one legal argument. Even if Dusty's allegations were well-founded, Gencom contends that the relief sought is beyond the power of the Commission to grant.

Dusty's seeks monetary damages as well as injunctive relief from the Commission. Gencom cites numerous authorities supporting the proposition that the Commission is without jurisdiction to award money damages for tort claims, breach of contract claims, antitrust claims, and similar actions. Industrial Communications Systems v PT&T, (1973) 75 Cal PUC 462 applied this principle to a claim for damages relating to lost business similar to the claim made by Dusty's.

Dusty's also seeks an injunction ordering Gencom to allow Dusty's and others similarly placed to buy their utility services at wholesale or bulk rates from Gencom and to resell such services to the general public on an unregulated basis.

Gencom argues that the relief sought runs entirely counter to the regulatory scheme imposed on the Commission and on the utilities subject to its jurisdiction. In California, radiotelephone services are clearly comprehended by the definitions in Public Utilities Code Sections 233 and 234, since they involve "communication...with or without the use of transmission wires". It has accordingly been repeatedly held that one may not furnish radiotelephone communications services to the public for compensation without an appropriate certificate from the Commission.

Dusty's does not ask to be certificated by the Commission, and makes no attempt to make the showing required under Sections 1001 et seq. of the Code. Gencom maintains that no such showing could be made, since Dusty's has no radiotelephone system of its own, and since no additional frequencies are available for common carrier radiotelephone services in San Diego county. Dusty's can only market to the public as an agent for Gencom or Pacific, or as a distributor of their services.

There then arises the question of whether Dusty's, even if it were in some way "certificated" to act as Gencom's agent, could resell its services without regard to its tariffs. Gencom is subject to the clear mandate that (1) all of its charges shall be just and reasonable (Section 451), (2) it may not grant preferential treatment to any class of customers (Section 453), (3) the rates charged by it shall be those set forth in its tariffs (Sections 486 and 489), and (4) there may be no change in such rates except on advance notice to the Commission and on a showing of reasonableness (Sections 454 and 491).

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What Gencom cannot itself do under the Code should not be permitted to be accomplished by its agents. To immunize Dusty's from these requirements would not only run counter to this principle, it would inevitably mean that Gencom and its existing agents would be forced to follow suit. If, for example, Dusty's chose to give preferential treatment to a certain class of customers, Gencom to meet competition would be forced to do the same, and therefore, to act in derogation of its own tariffs and Section 453.

In summary of its position, Gencom concludes that Dusty's has not shown any of the elements required to support a finding that Gencom has been guilty of the behavior proscribed by Sections 1 and 2 of the Sherman Act, the Clayton Act, or California's Cartwright Act. There is no evidence of a conspiracy between Gencom and any other entity to exclude Dusty's from any relevant marketplace. Nor is there evidence that Gencom's individual refusal to deal was motivated by other than legitimate business reasons. Finally, there has been no showing that Gencom has used its certificated status in an attempt to monopolize the TAS field. Dusty's has been unable to demonstrate any damage to its TAS business. In essence, Dusty's complaint is nothing more than a veiled effort to obtain a de facto certificate to operate as an RTU--unfettered by the financial and legal constraints imposed on the traditional RTU.

Discussion

By this complaint we are asked to issue a sweeping order directing Gencom to divest itself of its TAS operation. In the alternative, Dusty's seeks an order requiring Gencom to sell its paging services to anyone who wishes to buy, irrespective of the price of resale to the ultimate consumer. Dusty's also requests that, at a minimum, monetary damages be assessed against Gencom in the approximate amount of \$145,000. ✓

In support of its contention, Dusty's filed a detailed brief, running in excess of seventy pages. The allegations of anticompetitive conduct by Gencom were numerous, including among them violations of the Sherman Act, the Clayton Act, and California's Cartwright Act. Such antitrust actions are typically filed in the federal courts and require months, if not years, for resolution. Extensive discovery is undertaken; settlement conferences are held. Ultimately, the matter goes to trial, if necessary. In view of the substantial interests at stake in antitrust cases and given the need for development of a complete factual record, the litigation of such matters is generally quite time-consuming.

In the instant case, one day of hearing was held. In support of its complaint Dusty's presented 12 pages of written testimony and 19 exhibits, consisting primarily of copies of yellow page advertisements and some limited financial information. Certain additional facts were elicited by Hilliard's cross-examination of Gencom's two witnesses.

These elements, taken together, constitute the record on which Dusty's would have the Commission base an order of divestiture. Even assuming *arguendo* that the Commission possesses the power to grant the relief sought by Dusty's, the limited facts before us are simply insufficient to support a conclusion that Gencom has engaged in a pattern of anticompetitive conduct to the detriment of competing telephone answering services.

The evidence does not support a finding that Gencom's RTU operation is cross-subsidizing its TAS business. Gencom's cost-allocation method demonstrates that it is a profitable entity; there is no probative evidence that Gencom's sales

are below cost. Dusty's evidence simply shows that the percentage of total costs attributable to various expense items, such as operator's salaries, is quite different from Gencom's percentage. However, it was not established that the two TAS operations are substantially similar so that one could expect similar allocations of expenses. If anything, the evidence indicates that due to Gencom's automation it is able to realize substantial savings in areas such as operator salary expenses.

The evidence does not support a finding that Gencom enjoys unique advertising advantages which provide it with an unfair competitive edge. The evidence shows that Gencom advertises the availability from it of both paging and answering services. The evidence further demonstrates that numerous telephone answering services which are neither an RTU nor an agent of an RTU can and do advertise in a substantially similar fashion. Any TAS can refer its customer, albeit for a fee, to Pacific or to Gencom for paging services.

The record does not support a finding that Gencom has improperly interfered with business advantages enjoyed by Dusty's by stealing customers referred to Gencom by Dusty's. No instance was cited in which Dusty's has lost a single customer to Gencom. In fact, during much of the period in question, the testimony demonstrates that Dusty's experienced a larger increase in clientele than Gencom.

There is insufficient evidence to support a finding that Gencom has engaged in predatory pricing practices. The record reflects that Gencom's TAS rates are, if anything, higher than Dusty's. Furthermore, during the period from November 1979 to November 1980, Gencom's TAS accounts declined from 429 to 415. There is no evidence whatsoever upon which to conclude that Gencom has increased its TAS customer base by means of predatory pricing and undercutting competitors' rates.

There is no evidence to support a finding that Gencom's refusal to deal with Dusty's as an agent was done with the purpose of furthering its monopoly power. There is no evidence that Gencom either acting alone or in concert refused to deal in order to create a monopoly of the TAS business. Rather, the evidence indicates that Gencom had legitimate business reasons for declining to make Hilliard an agent. These business reasons included the following concerns: (1) Hilliard with his wide ownership interests in RTUs would potentially compete with Gencom; (2) a proliferation of agents would significantly lessen the overall impact of Gencom's advertising; and (3) acceptance of Hilliard as an agent, instead of earlier applicants for the position, would run counter to Gencom's business interests and perhaps expose it to liability to the prior applicant. From the evidence of record, Gencom was neither engaged in a conspiracy to dominate the TAS market nor improperly motivated in refusing to make Dusty's an agent.

Based upon all of the foregoing, we find that there is insufficient evidence upon which to conclude that Gencom has engaged in anticompetitive conduct in violation of federal and state law and the policies of this Commission. We will, therefore, deny the complaint.

Findings of Fact

1. Gencom's TAS is a profit-making enterprise.
2. Gencom's RTU operation does not cross-subsidize its TAS business.
3. Gencom does not enjoy unique advertising advantages which provide it with an unfair competitive edge.

4. Gencom has not improperly interfered with business advantages enjoyed by Dusty's.

5. Gencom has not engaged in predatory pricing practices.

6. Gencom's TAS rates are higher than Dusty's TAS rates.

7. During the period from November 1979 to November 1980, Gencom's TAS accounts declined from 429 to 415.

8. Gencom had legitimate reasons for refusing to deal with Dusty's as an agent.

Conclusions of Law

1. There is insufficient evidence to conclude that Gencom has engaged in activities which violate the Sherman Act, the Clayton Act, and California's Cartwright Act.

2. There is no evidence of a conspiracy between Gencom and any other entity to exclude Dusty's from any relevant marketplace.



3. Gencom has not used its RTU status in an attempt to monopolize the telephone answering service field.

O R D E R

IT IS ORDERED that the complaint in Case No. 10847 is denied.

This order becomes effective 30 days from today.

Dated MAY 19 1981, at San Francisco, California.

John E. Boyer  
President  
William D. ...  
...  
...  
Presulla C. ...  
Commissioners