ORIGINAL

Decision 93478 SEP 1 1981

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application of MOBILFONE, INC., a California corporation, for a certificate to construct additional radiotelephone utility facilities as may be required by Section 1001, et seq., of the California Public Utilities Code.	Application 59021 (Filed July 25, 1979)

Martin J. Rosen and Ross Anderson, Attorneys at Law, for applicant.
Philips B. Patton, Attorney at Law, for Valley Mobile Communications, Inc. and Kidd Communications, Inc., protestants.

FINAL OPINION

Summary

In Decision (D.) 92311 dated October 8, 1980 for Phase I of this proceeding, a certificate of public convenience and necessity (CPC&N) was granted to Mobilfone, Inc. (applicant) to construct, operate, and maintain a one-way radiotelephone (RTU) paging system and a two-way mobile RTU system from five base station facilities to be constructed or expanded.

This Phase II decision denies applicant's request for a CPC&N to further expand its mobile service area to provide similar services through the construction and operation of a base station located on Mt. Hauser. Applicant has not established that the mobile service now provided in the requested area by Valley Mobile Communications, Inc. (Valley) is unsatisfactory. However, Valley

is not providing and could not obtain authority to provide the tone-only paging authority requested by applicant. Applicant will be authorized to provide paging service on the requested Channels P-3, P-4, and P-5. Valley is providing paging service to 309 tone-and-voice paging units and to one tone-only unit.

Establishment of the proposed mobile service, with or without applicant's proposed intercarrier agreement, would be unreasonably anticompetitive in nature and would adversely affect Valley's financial integrity. Valley concentrates its paging operations on tone-and-voice paging. Applicant does not provide tone-and-voice paging service. The impact on Valley of the paging authority granted in this decision would be negligible. Applicant could improve the quality of its paging service in the San Fernando portion of its service area and develop the limited paging market served from Mt. Hauser.

If Valley can obtain Federal Communications Commission (FCC) licensing for the mobile channels sought by applicant (22, 23, and 24), it could provide service on a reasonable basis to applicant's customers within the proposed expansion area without damage to Valley. Applicant would have to enter into an intercarrier agreement with Valley as the licensee, Proc H-3

as a preliminary step to Valley's filing with the FCC. Allocation of charges based on proportionate use of the facilities to recover operating and maintenance expenses and to amortize plant over 10 years is not unreasonable. The agreement, or a subsidiary agreement, may contain provisions to guarantee that Valley will carry out its obligations on a timely basis. The level of demand demonstrated by applicant does not justify a Commission order mandating (an) intercarrier agreement(s).

Summary of Evidence

A. Applicant's

1. Jeanne M. Crabb is applicant's president and chairman of its board of directors. She and her husband, Robert C. Crabb, own 95 to 96% of applicant's stock. Mrs. Crabb testified essentially as follows:

   a. Applicant is a radio common carrier providing one-way, high-speed paging service and two-way mobile RTU service to parts of Los Angeles, Ventura, Orange, San Bernardino, and Riverside counties, California. These RTU-related services have been provided to the public since 1947.

b. Applicant filed with the Commission and the FCC for authority to provide the requested service.[1] Applicant seeks to construct transmitters on Mt. Hauser on low band paging Channels P-3 and P-4, guard band paging Channel P-5, and ultra high frequency (UHF) mobile Channels 22, 23, and 24. The broadcast frequencies (in MHz) of these channels are 43.22, 43.58, 152.24, 454.050, 454.075, and 454.100, respectively.

c. Rapid growth within the Los Angeles basin (Basin) area has resulted in a significant increase in noise levels which interfere with efficient radio transmission. Radio signal interference has also resulted from the construction of high-rise structures. Applicant is requesting authority to construct additional facilities to improve the quality and quantity of service offered to the public.

d. Basin growth has resulted in the filling in of rural areas between communities. This growth has required applicant's customers to conduct their business over a wider area and its customers need to communicate over a wider area than they did before.

e. An affiliate, Mobilefone Systems, Inc., will own much of the equipment used in the proposed operation.

f. Applicant has relocated to a new central office (designed for future expansion) in the City of Commerce. It will use new equipment, institute organizational changes, and use its new central offices to better serve its present and future customers and to improve its earnings.

1/ Protests at the FCC level were later resolved. These protests involved reduction of the output of the P-5 paging frequency signal from 500 watts to 35 watts and withdrawing of applicant's request to broadcast from Mt. Hauser on Channel 25.

g. Applicant serves over 400 mobile and 6,500 pager customers. It has purchased new equipment which will permit it to serve about 600 mobile customers. It plans to modify this equipment to increase this capacity to permit it to serve about 750 mobile customers. It is exploring other equipment alternatives to further increase the speed of its service to its customers and thus its customer capacity.2/ Applicant estimates it will serve an additional 4,000 pagers the first year after completing construction of the new facilities.

h. Applicant is seeking to cut down on the excessive use of transient mobile service by individuals residing in its service area who subscribe to another RTU's service. This practice cuts down on the air time available to its subscribers and lessens the number of potential subscribers on its system.

i. Applicant believes that it can eliminate its waiting list for mobile service after implementing the changes described above.

Mrs. Crabb testified as follows concerning Valley's protest:

a. Mr. Crabb, applicant's executive vice president, unsuccessfully tried to reach an intercarrier agreement with Bruce Gary, Valley's president and major stockholder, prior to filing this application and the related FCC application.

2/ Widely separated transmitters on the same frequency could possibly be used to simultaneously broadcast different messages without interference to effect "channel reuse". If perfected, use of this "cellular broadcasting concept" might permit the addition of 200 mobile customers on applicant's system.

b. Gary refused to discuss the possibility that applicant construct facilities on Mt. Hauser, obtain licenses for the requested channels, and work out an interchange agreement with Valley.

c. Gary proposed that Valley be the licensee and requested applicant to pay for the necessary construction and support Valley's FCC application.

In addition, Mrs. Crabb testified that Valley was encouraging Valley customers, based in applicant's service area, to use applicant's channels on a transient basis in violation of industry custom; since January 1979 applicant has prepared more billings for transient customers than for its own mobile subscribers; and that up to 50% of these transient customers have been Valley subscribers.

Applicant's billings to Valley for transient services have increased from approximately $3,500 in 1975, to $7,900 in 1978, and to $25,300 in 1979. Applicant objects to Valley's delayed payments of applicant's transient service billings to it. Applicant advised Valley to pay the amounts due (which reached $11,074) to avoid its taking action to obtain collection. Therefore, applicant is reluctant to enter into any agreement with Valley unless it obtains positive assurance that Valley will correct these practices and that Valley is in a sound financial position.

2. The uncontested testimony of Keith J. Schute demonstrated applicant's financial ability to construct and operate the facilities needed for the requested certificate.

3. The uncontested testimony of Douglas B. DeLawder shows the impact of applicant's proposal on its service area boundaries based on the theory adopted in FCC Rules, Section 21.504, the Carey Report, except for a portion of the contour around Johnstone Peak which was calculated using another theory to avoid an anomaly in the Carey Report methodology (which would indicate interference where none existed). His testimony shows that construction of the facilities proposed by applicant is feasible and practical from a technical and engineering standpoint; that granting the application would improve applicant's service to customers in four areas, one of which encompasses Glendale, Burbank, Van Nuys, San Fernando, and Northridge in the San Fernando Valley; and that applicant would be able to extend service to five areas it does not now serve, one of which encompasses the Lancaster-Antelope Valley area. He defines improved service as improving the quality of applicant's signal, which would eliminate distortion or noise on the system and improve the quality of reception.

4. Mr. Crabb testified on the underlying technical aspects of the application based upon his engineering background, as follows:

   a. In addition to the area served by Valley, applicant seeks the Mt. Hauser facility to improve coverage of mobile and paging channels between Oat Mountain and the Antelope Valley through the canyon area traversed by Highway 6 through Acton, Soledad, and Palmdale, and to provide service to Gorman. Its Oat Mountain transmitter covers that area, but its signal cannot be received in portions of that hilly terrain. It desires to use two transmitters to blanket an area, penetrate buildings, and provide backup if one of its transmitters fails.

b. The Los Angeles County Fire Department, U.S. Forest Service, emergency services, and rural subscribers need and have requested service in those areas.

c. Applicant is the only RTU holding itself out to provide mobile UHF channels and any paging channel throughout Los Angeles County.

d. Co-channel competition is the time-sharing of a common channel by more than one carrier.

e. Reuse permits widely separated transmitters of one carrier with a central control facility to broadcast different conversations or signals with a differing modulation without interference.

f. Applicant could not page Valley's customers because it uses its two-way channels exclusively for two-way transmissions.

g. Valley could not transmit a signal on Channel 3 from Mt. Emma without interfering with applicant's Channel 3 transmission to portions of the San Fernando Valley served from Oat Mountain.

h. Adding Valley to the other carriers (including applicant) now using Channel P-5 would require synchronization with the other carriers on an already crowded channel, would add wasteful switching time, would cut down potential use of the channel, and would degrade the quality of service.

i. Paging on Channel P-5 could not accommodate the low band paging applicant provides on Channels P-3 and P-4. Its paging subscribers would be required to use new pagers, which cost \$300 to \$400 each, to obtain service from Valley on Channel P-5.

j. Control under an intercarrier agreement is technically possible, but applicant wants to have sole broadcast control to minimize interference since it is responsible for serving customers throughout the Basin.

k. Applicant reluctantly entered into intercarrier agreements due to this Commission's objections to its cutting off transient customers. Its intercarrier agreements provide that transients are served on a secondary basis and are charged on a transient basis.

5. John Q. Hearne, an attorney specializing in communications matters before the FCC,[3] testified on his interpretation of FCC rules pertaining to the dispute between Valley and applicant as follows:

a. Valley's offer to obtain a license and install transmitters on Channels 3 and P-5 at Mt. Emma is unrealistic because Valley cannot provide assurance to anyone that it would obtain an FCC license because Valley did not file a timely application with the FCC to provide such service.

b. Even if applicant dismissed its FCC application as an acceptance of Valley's offer and Valley subsequently applied to the FCC for Channel P-5, or any

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3/ He is associated with a law firm which has represented applicant before the FCC since 1972.

other channel requested by applicant, Valley's application would be subject to mutually exclusive applications by other parties. The FCC would have to evaluate the competing applications and would be required to choose the best-qualified applicant, from a public interest viewpoint, and would not necessarily pick Valley.

c. There is no viable mechanism which would permit applicant to amend, assign, or transfer its Channel P-5 application to Valley by substituting Valley as applicant without the FCC's requiring new public notice and giving full opportunity to other parties to file mutually exclusive applications.

d. The FCC accepted three other applications for filing on Channel P-5 near applicant's proposed service area. The service areas encompassed by these filings, together with existing Channel P-5 service areas, completely surround Valley's service area. Since there was possible interference with applicant's Mt. Hauser service area by two of the other RTUs, applicant petitioned to have the FCC return the applications as deficient. One of these RTUs then amended its application to protect applicant's proposed service area. The engineer for the other RTU was reviewing its application to find a way to avoid such interference. The third filing was initially designed to avoid interference.

e. Valley's offer recognizes applicant's need for a wider service area, but Valley does not wish to provide the service needed on the six channels requested by applicant.

f. A copy of applicant's Channel P-5 license (late-filed Exhibit 4) was filed[4] to resolve the issue of whether the terms of applicant's license for Channel P-5 precluded a filing by Valley. The license states, in part:

"This authorization is granted subject to the following conditions:

"(a) Authorization herein is subject to mutual agreement between the Los Angeles, California area participants for cooperative sharing of the specified frequencies on a non-interference basis.

INTRASTATE RADIO TELEPHONE, INC. - KSV977
Los Angeles, California

MOBILFONE, INC. - KSV978
Los Angeles, California

AMERICAN MOBILE RADIO, INC. - KSV979
Long Beach, California

ORANGE COUNTY RADIOTELEPHONE SERVICE, INC. - KSV980
Santa Ana, California

"(b) Commission approval of this proposed cooperative project should not be construed to prohibit consideration of requests for participation by other qualified applicants, having requisite State approval. Such applications will be evaluated on the basis of specific circumstances presented in each case and the Commission reserves the rights to prescribe appropriate conditions for such participation if facts presented warrant such action."

4/ A letter filed with the license was not received in evidence.

6. Robert R. Rush participates in three businesses (a machine shop, a bearings business for power transmission equipment, and in a business dealing with automotive brake shop equipment), two of which are located in Los Angeles and the third in Lancaster. One of his salesmen lives in Lancaster. Rush owns and uses three low-band paging units in his businesses. He is satisfied with applicant's operating and repair services. It would be advantageous to him to have applicant extend service to Lancaster. When questioned about receiving service from Valley, Rush wanted to know if he could use his low-band pagers.5/ He did not want to pay the additional charges of obtaining Valley's existing service. He questioned Valley's ability to serve him outside of its area.

7. Stephen L. Vader is sales manager of a firm which sells, leases, and services two-way radios and mobile telephones. His firm, a customer of applicant, uses five mobile units and paging equipment in its operations. He testified that he had recently experienced problems in getting access to applicant's transmitting equipment because of heavy transient use by subscribers with Valley's identification numbers. Vader cannot get paging or mobile calls directly from applicant in the Lancaster-Palmdale area. His operations are based in Los Angeles, but he has a branch factory in applicant's Chatsworth service area. He uses a Ventura transmitter to get service in the requested service area and encounters loss of coverage in some areas. He testified that his firm and some of his firm's customers would find it advantageous to have applicant extend its several paging and

5/ He could not on Valley's existing channels.

UHF channels to the requested service area. In selling equipment, members of his firm discuss the areas in which the buyer desires service and sometimes help buyers prepare required FCC license applications.

Vader admitted that he could install a decoder to receive a call through Valley on Channel 1 and he has placed a call through Valley. However, he did not wish to incur the bother and expense of installing a second decoder in his vehicle.

8. Jewel M. Alderton is vice president of a market and research corporation retained by applicant to conduct two surveys of public need for improvement of applicant's service and for expansion of applicant's service area. One survey was conducted among applicant's existing customers; the other was conducted among nonsubscribers engaged in types of business activities likely to subscribe to RTU service located in the proposed expansion areas. She testified that the subscriber survey showed:

   a. Subject to a possible sampling error of plus or minus 8.9%, 35.7% of the subscribers were interested in service at no change in rates within the expanded areas. Approximately 19.1% of this group or 6.8% of the subscribers were interested in service in the Lancaster-Antelope Valley area; only 16.7% of the subscribers were aware of other carriers in the expansion area. She believed that 57.9% of the subscribers indicated a preference for service from applicant because it would be more convenient to use one RTU for service in both the existing and expanded areas, and that despite the service problems encountered most of the subscribers were satisfied with applicant's service.

b. Improved signals in the San Fernando Valley would benefit approximately 22% of applicant's customers. The 52 mobile subscribers surveyed volunteered that they encountered the following type of problems: poor reception, fading, or conversation loss (41 subscribers); no reception, fading, or missed calls (25 subscribers); distortion or noise (34 subscribers); and other problems (18 subscribers, including 8 who encountered other people on the same channel). The 75 paging subscribers surveyed mentioned the following problems: missed calls (11 subscribers); other problems (13 subscribers).

c. Of the 126 subscribers surveyed, 5 would use applicant's mobile service in the contested area. None of them would use paging service in the area.

d. The nonsubscriber survey of 154 persons tended to concentrate on the larger Riverside-San Bernardino area. Of this group, one person was interested in pager service in the contested area and one person was uncertain if he would use mobile service in the contested area.

e. Alderton believed the survey understated the potential demand for service because subscribers were not made aware of the size of the proposed service area.

B. Protestant's Testimony

Gary, an officer of and principal stockholder of Valley, testified that:

a. He has managed Valley since July 1979, after the death of Robert Curry, Valley's former manager, who was a major stockholder of Valley.

b. Under his management, Valley has added a second radio channel, increased the number of its customers severalfold to provide service, at a profit, to 290 mobile units, to 309 tone-and-voice paging units, and to one paging-only unit in and around the cities of Lancaster and Palmdale. Due to customer growth Valley is about to file for another channel.

c. Valley is willing and able to provide whatever RTU services are required by its own customers and/or by transient customers, including applicant's subscribers, needing service within its service area, without charging high transient rates. Valley can expand its transmitter facilities on Mt. Emma to accommodate other channels or frequencies.

d. Valley now shares Channel 1 with applicant and is willing to enter into intercarrier agreements with Basin RTUs to permit customers of those RTUs to obtain mobile and paging calls within Valley's service area at the same frequencies they use within the Basin. Valley has negotiated an agreement in principle along these lines with Industrial Communications Systems, the largest Basin RTU, and is willing to work out a similar arrangement with applicant.

e. He testified that:

   (1) he discussed his proposal with Mr. and Mrs. Crabb before the application was filed and believed that an understanding had been reached with applicant which had to be reduced to a written agreement;

   (2) he was shocked when the subject application was filed, overlapping his service area; and that

   (3) he further discussed his proposal with applicant after the prehearing conference in this proceeding and by letter.

f. He believed that his proposal would be in the public interest because there is a limited demand for service from subscribers within Valley's service area, even though such demand has grown in recent years; until recently local subscribers hardly supported Valley and that there is no market justification for a duplicate system to serve locally based subscribers. Valley's written proposal calls for Valley to obtain licenses and to install transmitters on Channels 3 and P-5 on its Mt. Emma site and to install one end of a microwave communications link with applicant, contingent on applicant's installing the other link and withdrawing its plans to install transmitters on those frequencies on Mt. Hauser. He believed that applicant was initially seeking to reach an agreement with him on Channels 3 and P-5. The area which could be served from the two sites is similar.

   Gary suggests that applicant either pay Valley for each minute of applicant's use of the transmitters or pay a portion of total operational, maintenance, and depreciation expenses (over a 10-year amortization period) for these facilities on a ratio-of-use basis. He is willing to consider alternate arrangements and/or to obtain the assistance of a Commission staff engineer to work out a reasonable financial arrangement and to eliminate transient charges for use of Valley's Channel 1 transmitter by applicant's subscribers if applicant would pay for its portion of use of the transmitter or pay for each call. However, Gary was insistent that the equipment be licensed to, installed by, and maintained by Valley.

He testified that a provision of his written offer to make other arrangements needed to serve applicant's customers in Valley's service area was a commitment to add other transmitters as needed.

g. Under an intercarrier agreement, Gary proposes to provide extended service at a flat surcharge rather than at higher transient charges. He is not prepared to construct six additional transmitters and related facilities at a cost of at least $23,000 /6/ absent a stronger showing of need than was demonstrated in applicant's surveys. He would enter into intercarrier agreements, supported by applicant, and make the necessary FCC filings for additional channels as needed. The need would be demonstrated by channel loading.

6/ He would prefer to obtain transmitters at a cost of $2,500 to $3,000 each. But he would consider requests for another manufacturer's equipment which costs $7,000 per transmitter.

h. If applicant established a duplicate system and syphoned off some of Valley's relatively small number of local subscribers, two financially undernourished Lancaster-Palmdale area systems would result. Both systems would be incapable of generating enough money to pay for the equipment needed to keep up with rapid technological changes.

i. If applicant wanted to provide extended service to applicant's subscribers within Valley's service area, it would be much less costly to provide that service through use of (an) additional transmitter(s) at Valley's Mt. Emma site, as is now done on Channel 1, than to duplicate Valley's facilities with a new station on Mt. Hauser.

j. Applicant has not made a good faith proposal to interchange traffic with Valley; its proposal is simply a request to expand its service area.

k. Mr. Crabb established an RTU based on Mt. Emma (which is now Valley) more than 20 years ago. Applicant soon sold the utility rather than continuing its service to the then existing small market.

On the issue of adding subscribers residing in applicant's service area, Gary testified that:

(1) Mr. and Mrs. Crabb told him of their objections to Valley's acquiring subscribers based in applicant's service area in March 1979 (at a time when management of Valley was shared between Gary and the administrator of Curry's estate).

(2) He agreed that Valley would not and it subsequently has not added mobile

subscribers based in applicant's service area.

(3) The number of such subscribers has since dropped from 130-135 to 82 subscribers.

(4) The acquisition of such subscribers was not a wrongful practice nor was it in derogation of industry custom.

(5) His former partner who was managing Valley informed him that applicant was referring subscribers to Valley.

(6) Applicant benefited financially from its past policy of supplying such transient service rather than supplying its own subscribers.

Gary believes that Mrs. Crabb consented to a 60-day delay in payment for transient calls because it took Valley that long to receive payment for its subscribers' transient calls and applicant had initially encouraged people to obtain service from Valley. He contends that Valley's proposed intercarrier agreement would tend to reduce the net balances Valley pays applicant.

He recommends a Commission denial of applicant's request to construct the Mt. Hauser facilities and a requirement for the filing of joint or separate proposed interchange of traffic agreements to satisfy the service needs of applicant's subscribers within Valley's service area.

Discussion

A. Paging-only Service

Gary testified that the combination of rugged terrain and the relative absence of telephones in the extensive outlying portions of Valley's service area precludes the development of a tone-only paging market in his service area. In fact, he provides service to only one tone-only customer. He believes that tone-and-voice paging affords the only practical method of providing paging service in his service area and he provides such service to a large proportion of his subscribers. Applicant does not provide tone-and-voice paging. It segregates its tone-only paging and mobile service on separate channels.

Due to television interference the FCC issued Order 80-91 which would prevent any other RTU from filing an application to serve on Channels P-3 and P-4. Thus the only way service could be provided on these channels would be to grant a CPC&N to applicant. Applicant presented convincing evidence that existing problems on guard band paging Channel P-5 would be worsened by further switching delays which would result from integrating Valley into that shared frequency. Since Valley does not and cannot provide paging-only service on either of its existing channels and it sees no meaningful market for such services in its service area, the Commission will grant a CPC&N to applicant on Channels P-3, P-4, and P-5. These paging signals will improve the quality of applicant's paging service in the adjacent portion of its service area, the San Fernando Valley. Applicant's customer survey demonstrates a need for such improved paging service. Paging certification would permit applicant to develop what now appears to be a limited market in the Mt. Hauser service area.

B. Mobile Service

Applicant's surveys showed a need for its mobile service served from Mt. Hauser by 5 out of 126 subscribers and the possible need for mobile service by 1 out of 154 nonsubscribers. One of applicant's two public witnesses testified in support of its request for mobile service in this area. He testified that the grouping of three UHF frequencies would expedite placing of calls. He did not elect to install the necessary equipment on his VHF equipment to receive transient calls from Valley, but he did place calls through Valley. Construction of the Mt. Hauser facilities for Channels 22, 23, and 24 would improve the quality of applicant's mobile service in the San Fernando Valley.

Applicant seeks to overlap almost all of Valley's service area and to provide mobile service to the major communities served by Valley. Thus the exclusion under the Commission's Rules of Practice and Procedure (Rules) 18(o)(2)(iii) does not apply. Applicant's objections to Valley's generation of high volumes of transient traffic on its system and its slow payment for such traffic which are discussed below are not germane to the quality of service provided by Valley.

Applicant's demonstration of need is of itself not convincing. In addition, applicant did not show that Valley's mobile service is unsatisfactory. Absent that prerequisite showing this Commission will not authorize applicant to extend mobile service into Valley's service area (Rule 18(o)(2)(i)). The Commission must consider the possible impact of certification on Valley.

Valley's subscribers discussed their need for extended service with Gary. He testified that there was some demand for such service. He contends that if applicant could offer Valley's subscribers extended service throughout the Basin, Valley would lose customers and face bankruptcy because Valley's comparable service would require payment of additional transient charges. In response to questioning on why Valley did not protest applicant's FCC application, Gary testified that he could not demonstrate sufficient demand from his customers to justify filing a mutually exclusive application with the FCC. Furthermore, he did not want Valley to incur the considerable expense needed to oppose applicant before the FCC. Nor did he believe it necessary to bear the expense of a detailed survey to demonstrate that Valley could be forced into bankruptcy by granting a Mt. Hauser CPC&N to applicant.

In D.93038 dated May 19, 1981 in A.56615, Orange County Radiotelephone Service, Inc. (OC) was authorized to expand its service area and to overlap the service areas of competing RTUs in whole and in part. Industrial Communications Systems, Inc. (ICS) was the only RTU presenting evidence in opposition to granting a CPC&N to OC. The decision states, in part:

> "ICS has not demonstrated that the proposed expansion would destroy or eliminate its service area. . . ."
>
> * * *
>
> "OC has established that service is not adequate in the expanded area. . . ."

The Commission found that:

> "7. Many of OC's customers need a better method of receiving messages or paging signals in the expanded area and in Santa Ana Canyon to more effectively conduct their business activities."
>
> * * *
>
> "12. Protestant ICS is the largest RTU in southern California. Its service area encompasses OC's present and proposed service areas. ICS would not be hurt economically by the granting of the certificate to OC."
>
> * * *
>
> "14. ICS cannot meet the needs of OC's mobile or tone-and-voice paging customers for expanded service."

Valley provides mobile service to 290 (48%) of its 600 subscribers. The threat to Valley of losing mobile subscribers and revenues to applicant is real. The principal limitations on subscriber migration would be the available capacity on applicant's Channel 1 (applicant's overall mobile capacity will increase by 87.5%), the ability of applicant to shift Valley subscribers to its UHF channels, the cost to Valley subscribers of purchasing or leasing UHF equipment from applicant, and the losses to Valley customers selling or trading in their unneeded VHF equipment.

The Commission has an affirmative duty to consider the antitrust implications of its actions (Northern California Power Agency v Public Utilities Commission, et al. (1971) 5 C 3d 370). The market for mobile RTU services in the contested area is limited. Granting a certificate to applicant would permit it to market a less costly extended area mobile service, based on comparable basic and transient service charges, and to solicit Valley's mobile subscribers to the detriment of Valley. Antitrust considerations would not prevent the Commission from authorizing the mobile competition proposed by applicant. Alternatively, the Commission is not encouraging a concentration of control in the mobile market. Since applicant did not show that Valley is not providing satisfactory service and did not provide a convincing demonstration of need, the requested mobile certificates will be denied. It would not be in the public interest to jeopardize Valley's financial stability and in turn jeopardize service to Valley's remaining subscribers.

The demand for extended mobile service could be met by applicant's entering into (an) intercarrier agreement(s) with Valley along the lines suggested by Gary, in which Valley as licensee would construct, operate, and maintain the transmitter(s) and would charge applicant on a per-call basis or charge for applicant's pro rata portion of operating and depreciation (over a 10-year amortization period) expenses. It would be reasonable to terminate the amortization charges after the plant (or replacement plant) had been fully depreciated. Mobile subscribers are frequently paging subscribers as well. If applicant needs an intercarrier paging agreement from Valley, it would be reasonable to use a cost-sharing arrangement similar to that described above.

The level of demand is not sufficient for the Commission to mandate the parties to enter into an intercarrier agreement under Rule 18(o)(2)(ii). Nor is it necessary for Valley to initially seek FCC certification of three UHF transmitters to its system to provide the service.

Applicant has been reluctant to enter into intercarrier agreements. It has charged transient rates for service provided under intercarrier agreements. Valley's proposal to charge a lower surcharge for such service would provide greater benefits to the public.

Applicant's witness Hearne admits that denial of this application would result in the loss of FCC authority to provide the requested service. However, it is unlikely that other parties would challenge an application by Valley supported by an intercarrier agreement entered into with applicant. Any challenger seeking to establish mobile service within Valley's service area would be faced with the same burden of proof under Rule 18(o)(2) which applicant could not meet. This caveat would not preclude challenges based on interference or on possible deterioration of service on shared channels. Valley would have to design a system compatible with applicant's system operations which would not interfere with other RTUs' signals. A written survey of all subscribers of Valley and of applicant which shows service areas and proposed rates could provide the basis for determining potential demand for Valley's initial FCC filing.

We are not persuaded by applicant's contention that it was not seeking to encourage transient service, which interfered with its service on Channel 1, because it had asked Gary to stop adding subscribers based in its service area. Applicant decried Valley's actions in accepting these subscribers. Gary testified that Curry, his predecessor manager of Valley, told him that applicant was referring mobile customers to Valley. Applicant's policy considerations on this issue could differ with time.

Earlier, due to heavy mobile channel loading, applicant could not accept new mobile customers for approximately 2½ years, and its new customers displaced departing customers. It obtained transient revenues from Valley's mobile customers based in applicant's service area. Some of applicant's customers experienced inconvenience and delays.

Applicant is now installing improved equipment which would permit it to dramatically increase the potential number of mobile subscribers on its system from about 400 to 750 subscribers. The prospect of adding a large number of subscribers to its system provides applicant with an inducement to discourage Valley from continuing to accept subscribers based in applicant's service area. Given applicant's ability to serve more mobile subscribers at lower costs for calling other portions of its large service area, it is likely that more of Valley's remaining 82 of an original 130-135 subscribers based in applicant's service area will seek service from applicant. Some of those subscribers paid a premium to avoid applicant's waiting list. A disproportionate 65% of applicant's transient billings to all RTUs were to Valley's subscribers.

It would not be practical to police that type of transient service. A customer based in one RTU's territory could find it advantageous to be a subscriber of another RTU. But the practice of accepting subscribers seeking to avoid another RTU's waiting list should be discouraged to avoid unnecessary delays affecting the service to subscribers of the utility providing the service.

Applicant wants faster payments on its transient bills to Valley. Under cross-examination Mrs. Crabb conceded that many RTU settlement bills were in arrears. However, she noted that most of them were for small amounts not worth pursuing, except for one account involving a nonpaying subscriber of a remote utility. Valley has in the past allowed the balance owed applicant to exceed the amount accrued during the 60-day payment period claimed by Gary. Absent an understanding (either verbal or written) permitting a 60-day payment period, Valley should pay its transient service settlement bills to applicant more expeditiously. Valley receives payment for the basic service provided to these customers.

Applicant, which obtains and leases much of its equipment through a nonregulated subsidiary company, brought out that most of Valley's recent equipment purchases in the amount of $150,000 were financed by a manufacturers' subsidiary with payout periods ranging from two to ten years. Applicant expressed concern about Valley's ability to pay its debts for past obligations and to pay for the equipment needed to carry out the terms of an intercarrier agreement with it. It believes that Valley's slow payments on transient bills indicate possible financial problems and it is reluctant to enter into an agreement with Valley. Gary claims that a manufacturer's representative advised him that Commission approval for long-term conditional sales contracts was unnecessary. That advice was correct. Yet, Gary could not supply current financial information. He has other sources of income and defers certain transactions with Valley based on his tax and/or financial considerations. While we are not ordering applicant and Valley to enter into an intercarrier agreement, we would observe that it would not be unreasonable for applicant to require that a voluntary intercarrier agreement contains guarantees or bonding provisions to insure that Valley would meet its obligations in an intercarrier agreement with it.

Findings of Fact

1. Applicant is an RTU providing mobile and tone-only paging services to parts of Los Angeles, Ventura, Orange, San Bernardino, and Riverside counties. It provides no tone-and-voice paging service.

2. Applicant seeks a CPC&N to construct transmitters on Mt. Hauser on paging Channels P-3 and P-4 and guard band paging on Channel P-5, and on UHF mobile Channels 22, 23, and 24.

3. Rapid growth within the Basin area has resulted in a significant increase in noise levels which interfere with efficient radio transmission. Radio signal interference has also resulted from the construction of high-rise structures. Applicant is requesting authority to construct additional facilities to improve the quality and quantity of service offered to the public.

4. Applicant's 126-person subscriber survey shows that 5 subscribers would use applicant's mobile service in the area served from Mt. Hauser, but none would use paging service in that area. This survey also disclosed service problems, particularly in the San Fernando Valley area adjacent to the proposed Mt. Hauser service area. Applicant's 154-person nonsubscriber survey shows that one person was interested in pager service and one person was uncertain if he could use mobile service in this area. Both of applicant's public witnesses wanted paging service and one wanted mobile service from applicant in this area.

5. Applicant serves over 400 mobile and 6,500 pager customers. It has purchased new equipment which will permit it to serve about 600 mobile customers. It plans to modify this equipment to increase this capacity to permit it to serve about 750 mobile customers. It is exploring other equipment alternatives to further increase the speed of its service to its customers and thus its customer capacity. Applicant estimates it will serve an additional 4,000 pagers the first year after completing construction of the new facilities.

6. The FCC will not accept new applications for Channels P-3 and P-4.

7. Applicant presented convincing evidence that existing problems on guard band paging Channel P-5 would be worsened by further switching delays which would result from integrating Valley's operations on that shared frequency.

8. Valley does not and cannot provide paging-only service on either of its existing channels and it sees no meaningful market for such services in its service area.

9. Protestant Valley provides service on Channels 1 and 7. Valley serves one paging-only customer. Valley relies on tone-and-voice paging to meet the paging needs of 309 of its subscribers. Valley provides mobile service to 290 subscribers.

10. Valley does not and could not provide paging service on Channels P-3, P-4, or on guard band Channel P-5.

11. Valley could not meet the needs of applicant's paging customers for better service in the adjacent portion of applicant's service area in the San Fernando Valley or meet the limited market for extended low band or guard band paging service in the Mt. Hauser service area.

12. Applicant can meet these needs and applicant should be granted a CPC&N to construct and operate transmitters and communications links to provide service on Channels P-3, P-4, and P-5 from Mt. Hauser.

13. Valley is willing to file for certification of additional transmitters from its station on Mt. Emma to provide paging and mobile services on an intercarrier basis to applicant's and its own customers within Valley's service area. Valley and applicant provide intercarrier mobile service to each other's customers on Channel 1.

14. The service area of the proposed Mt. Hauser facilities overlaps most of Valley's Mt. Emma service area, including the major population centers in that area.

15. Applicant has not demonstrated that the quality of Valley's mobile service to 290 subscribers is unsatisfactory.

16. The market for mobile RTU service in the contested area is limited.

17. Applicant's new equipment will permit it to increase the number of its mobile customers by about 87.5%.

18. Granting a CPC&N to applicant to provide service on Channels 22, 23, and 24 would permit it to market a less costly extended area mobile service, based on comparable basic and transient service charges, and to solicit Valley's mobile subscribers to the detriment of Valley.

Conclusions of Law

1. The FCC will not accept new applications for Channels P-3 and P-4.

2. Valley will not be financially damaged by the granting of a CPC&N to applicant for paging service since Valley is not actively seeking to supply that market.

3. Valley does not and could not provide paging service on Channels P-3, P-4, or on guard band Channel P-5.

4. Valley could not meet the needs of applicant's paging customers for better service in the adjacent portion of applicant's service area in the San Fernando Valley or meet the limited market for extended low band or guard band paging service in the Mt. Hauser service area.

5. Applicant can meet these needs and applicant should be granted a CPC&N to construct and operate transmitters and communications links to provide service on Channels P-3, P-4, and P-5 from Mt. Hauser.

6. Applicant has not met the requirements of Rule 18(o) (2)(i) regarding Valley's mobile service.

7. It would not be in the public interest to jeopardize Valley's financial stability and in turn jeopardize service to Valley's remaining subscribers by authorizing applicant to provide UHF mobile service on Channels 22, 23, and 24 from Mt. Hauser.

8. Applicant's request for a CPC&N to construct and operate facilities on Mt. Hauser on Channels 22, 23, and 24 should be denied.

9. There is a public need for the service applicant is authorized to perform; therefore, the following order should be effective today.

The certificate to be granted is subject to the provision of law that the Commission shall have no power to authorize the capitalization of the certificate or the right to own, operate, or enjoy the certificate in excess of the amount (exclusive of any tax or annual charge) actually paid to the State as the consideration for the issuance of the certificate or right.

FINAL ORDER

IT IS ORDERED that:

1. A certificate of public convenience and necessity is granted to Mobilfone, Inc. (applicant), a California corporation, authorizing it to construct and operate common carrier one-way radiotelephone paging systemson Channels P-3, P-4, and P-5 from proposed base station facilities to be constructed and located at Mt. Hauser in Los Angeles County, California, within the 43 dbu contour shown on the map included in Exhibit C attached to the application.

2. Applicant is authorized to file, after the effective date of this order, tariffs applicable to the service authorized, containing rates and charges otherwise applicable to its one-way paging service, in accordance with the requirements of General Order 96-A. The tariffs shall become effective on not less than 5 days' notice.

3. Applicant shall notify this Commission, in writing, of the date service is first rendered to the public under the rates and rules authorized, within 10 days thereafter.

4. Applicant shall file with this Commission copies of all annual reports made to the Federal Communications Commission.

5. Applicant shall file, after the effective date of this order, as part of its tariff, an engineered service area map drawn in conformity with the provisions of Federal Communications Commission Rule 21.504, commonly known as the "Carey Report".

6. Applicant shall maintain its books of account in accordance with the Uniform System of Accounts for Radiotelephone Companies as prescribed by this Commission.

7. The certificate granted and the authority to render service under the rates and rules authorized will expire if not exercised within one year after the effective date of this order.

8. Applicant's request for a certificate of public convenience and necessity to construct common carrier two-way mobile radiotelephone systems on Channels 22, 23, and 24 from proposed base station facilities located at Mt. Hauser in Los Angeles County, California, is denied.

This order is effective today.

Dated SEP 1 1981, at San Francisco, California.

President

Commissioners