ALJ/MCK/jva

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Decision 98-10-013 October 8, 1998

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application of Paging Systems, Inc. (U-2097-C) for a Certificate of Public Convenience and Necessity to Extend Its Radiotelephone Utility Services To Various Locations in California.	Application 92-12-005 (Filed December 3, 1992)

ORIGINAL

OPINION DISMISSING APPLICATION

In this decision, we dismiss an application filed by Paging Systems, Inc. (applicant or Paging Systems), a provider of one- and two-way radiotelephone (RTU) paging services, for authority to expand its service area within California.

As explained below, this application was first filed in late 1992, and was then amended twice (in mid-1993 and early 1994) to add additional sites. Shortly after the second amendment was filed, the Federal Communications Commission (FCC) adopted rules providing that two-way paging services of the kind offered by applicant are "private" mobile radio service providers, and thus are not subject to regulation by the States under § 332 (c)(3)(A) of the Communications Act of 1934 (47 U.S.C. § 332 (c)(3)(A)).[1] Under § 247 of the Public Utilities (PU) Code, we are free to give effect to the preemptive effect of this federal legislation. Moreover, on January 1, 1996, § 234 of the PU Code became effective, which provides that one-way RTU paging services are not considered "public

[1] As explained in the text, Section 332 of the Communications Act of 1934 was substantially amended by the Omnibus Budget Reconciliation Act of 1993 (Budget Act), P.L. 103-66, 107 Stat. 312. The amendments to Section 332 (which are now codified at 47 U.S.C. § 332) are set forth in § 6002 of the Budget Act. *See* 107 Stat. at 394-395.

utilities" within the meaning of the PU Code, and so are exempt from this Commission's jurisdiction.

In short, we have no jurisdiction over applicant's one-way paging services, and are preempted by federal law from regulating applicant's private two-way paging services (an area over which, in any event, we have traditionally not exercised jurisdiction). Accordingly, this application is moot and will be dismissed.

Background

Paging Systems first received a certificate of public convenience and necessity (CPCN) pursuant to § 1001 of the PU Code over ten years ago, in Decision (D.) 87-08-007. That decision authorized applicant to offer one-way radiotelephone services in the greater Los Angeles area.

However, when Paging Systems decided in 1992 to expand its service area, an additional application became necessary, because PU Code § 1001 provides that a CPCN must be sought from this Commission whenever an applicant like Paging Systems desires to expand its system beyond its original service territory.[2] It was on account of this requirement that Paging Systems filed the instant application on December 3, 1992. The application recited that Paging Systems wished "to extend its California operating authority" to include 72 additional sites for which it had received operating authority from the FCC. A list of the new sites was attached to the application as Appendix A, and copies of the construction authorizations that applicant had received from the FCC were

[2] PU Code § 1001 provides that "No . . . telephone corporation . . . shall begin the construction of a . . . line, plant or system, *or any extension thereof*, without having first obtained from the commission a certificate that the present or future public convenience and necessity require or will require such construction." (Emphasis supplied.)

attached to the application as Appendix B. Applicant asserted that the new facilities would not have an environmental impact necessitating Commission review under Rule 17.1 of the Rules of Practice and Procedure, and that "if there is a local use permit required, Applicant will follow those procedures and satisfy the local requirements." No protests were received in connection with the application.

After reviewing the application, the Commission Advisory and Compliance Division (CACD)[3] advised applicant on December 30, 1992 that the application was incomplete, and that it would have to be denied unless supplemented. Thereafter, on August 16, 1993, Paging Systems filed an amendment to its application. The amendment noted that for all of the sites listed in Appendix A to the original application, "the transmitter sites are located where there are existing radio facilities, including transmitters, antennas, buildings and other structures, at the exact location or in the immediate vicinity." However, applicant continued, with respect to 21 of these sites, the relevant FCC documentation disclosed that there would be either a new structure, or an increase in the height of an existing structure. Applicant then demonstrated that with respect to these 21 sites, the site had either been explicitly authorized in D.87-08-007, or that another carrier had an equally high or higher tower, either at the same location or in the immediate vicinity.

[3] As the result of a Commission reorganization, those environmental review functions previously performed by CACD are now undertaken by the Environmental Branch of the Energy Division. The original name CACD is used, however, in this decision.

On February 10, 1994, Paging Systems filed a second amendment to its application. The second amendment set forth additional sites for which applicant had sought authority from the FCC, along with the engineering data submitted to the FCC concerning the sites. No protest was filed in connection with either the first or second amendments to the application.

Discussion

The showing made by Paging Systems in its application as amended is a thorough one, and – if this application were still subject to our jurisdiction – would appear to satisfy the requirements for new sites set forth in General Order (G.O.) 159-A.

However, as noted in the introduction, several pieces of state and federal legislation enacted since the filing of the application have ousted us of jurisdiction over this matter. One of these legislative enactments is § 234(b) of the PU Code, which became effective on January 1, 1996. PU Code § 234 defines the "telephone corporations" over which this Commission exercises jurisdiction. Section 234 (b) creates the following exception to the general definition:

> "'Telephone corporation' does not include any of the following . . . (2) any *one-way paging service* utilizing facilities that are licensed by the Federal Communications Commission, including, but not limited to, narrowband personal communication services described in Subpart D (commencing with Section 24.100) of Part 24 of Title 47 of the Code of Federal Regulations, as in effect on June 13, 1995." (Emphasis supplied.)

It is clear that under PU Code § 234(b), this Commission no longer has the jurisdiction over applicant's one-way paging operations.

The mix of legislation and regulations affecting applicant's two-way paging operations is more complex, but the net effect is, once again, to deprive us of jurisdiction over them. The starting point for analysis is § 332(c)(3) of the Communications Act, as amended by § 6002(b) of the Budget Act. As the FCC

explained in its Second Report and Order in GN Docket No. 93-252 (FCC 93-41, 9 FCC Rcd 1411 (1994)), the amendments in § 6002(b) were designed to bring about a comprehensive change in the way in which the FCC and the States had previously regulated mobile radio services:

> "The amended statute changes the prior regulatory regime in two significant respects. First, Congress has replaced the common carrier and private radio definitions that evolved under the prior version of Section 332 with two newly-defined categories of mobile services: commercial mobile radio service (CMRS) and private mobile radio service (PMRS). CMRS is defined as 'any mobile service . . . that is provided for profit and makes interconnected service available (A) to the public or (B) to such classes of eligible users as to be effectively available to a substantial portion of the public.' PMRS means 'any mobile service . . . that is not a commercial mobile service or the functional equivalent of a commercial mobile service.'
>
> "Second, Congress has replaced traditional regulation of mobile services with an approach that brings all mobile service providers under a comprehensive, consistent regulatory framework and gives the Commission flexibility to establish appropriate levels of regulation for mobile service radio providers. Section 332(c) states that a person providing commercial mobile radio service will be treated as a common carrier, but grants the Commission the authority to forbear from applying the provisions of Title II, except for Sections 201, 202 and 208. . . The statute also preempt[s] state regulation of entry and rates for both CMRS and PMRS providers." (9 FCC Rcd at 1417.)

The preemption referred to in the preceding quotation arises out of the first sentence of § 332(c)(3)(A), which provides in full:

> "Notwithstanding sections 152(b) and 221(b) of this title, no State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service or private mobile service, except that this paragraph shall not prohibit a State from regulating the other terms and conditions of commercial mobile services."

In D.95-10-032 (62 CPUC2d 3 (1995)), we reviewed the legislative history of § 332(c)(3)(A) and concluded that it was not intended to preempt our authority over the siting of CMRS facilities, because "the siting of [CMRS] facilities within a given market area is related to, but distinct from, entry or exit from a given market." (62 CPUC2d at 15.) We pointed out that the House Report on the Budget Act specifically noted that "facilities siting issues (*e.g.*, zoning)" were among the "other terms and conditions" over which the States retained authority with respect to CMRS providers. (*Id.*) However, consistent with the last clause in the first sentence of § 332(c)(3)(A), we also noted in D.95-10-032 that "this Commission has never regulated private mobile services." (*Id.* at 8.)

In correspondence with both CACD and the assigned Administrative Law Judge (ALJ), counsel for Paging Systems has represented that the two-way paging sites covered by the application are not interconnected with the "public switched network," as that term is used in § 332(d)(2) of the Communications Act (47 U.S.C. § 332(d)(2)).[1] This lack of interconnection is crucial for the jurisdictional analysis, because the commercial mobile services over which we

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[1] In a February 15, 1996 letter to CACD staff, counsel for applicant confirmed staff's understanding that in the Second Report and Order cited in the text (9 FCC Rcd 1411, 1431), the FCC:

> "state[d] that in order for a mobile service to be defined as a [CMRS], it must make interconnected service available. Since the Communications Act of 1934, as amended, defines interconnected service as 'service that is interconnected with the public switched network . . .,' this classified the referenced two way dispatch radio service as [PMRS], the only other classification of mobile services. Private mobile service is preempted by Section 332(c)(3) of the Communications Act."

In an August 17, 1998 letter to the assigned ALJ, counsel for Paging Systems has represented that this lack of interconnection with the public switched network applies to all of "the two-way facilities which are included in . . . A.92-12-005."

retain siting jurisdiction are defined as those that make "interconnected service" available to the public or a substantial segment thereof (47 U.S.C. § 332(d)(1)), and interconnected service is in turn defined as a service "that is interconnected with the public switched network." (47 U.S.C. § 332(d)(2).) Services that are not considered a "commercial mobile service" are defined by the Act as a "private mobile service."[5] As indicated by the quotation above from § 332 (c)(3)(A), that legislation does not – unlike the situation with CMRS providers -- reserve to the States any jurisdiction over "other terms and conditions" (such as facilities siting) for private mobile service providers. Thus, § 332 (c)(3)(A) effectively preempts us from exercising jurisdiction over the siting of facilities for applicant's private two-way paging services.

As we pointed out in D.95-10-032, Article 3, Section 3.5 of the California Constitution ordinarily prohibits us, in the absence of an appellate court judgment, from "declar[ing] the requirements of any California statute [to be] unenforceable due to federal preemption." (62 CPUC2d at 11.) However, Article 3, Section 3.5 is not an issue in this case because of the recent enactment of PU Code § 247. This statute, which became effective on January 1, 1997, provides that any provision of the PU Code that "is in conflict with . . . 47 U.S.C. Sec. 332 (c)(3) . . . shall not apply . . . to the extent of that conflict."[6] Thus, even if the PU Code could be read as giving this Commission jurisdiction over the facilities siting of

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[5] Section 332(d)(3) states that "the term 'private mobile service' means any mobile service . . . that is not a commercial mobile service or the functional equivalent of a commercial mobile service, as specified by regulation by the [FCC]."

[6] In D.98-07-037, we recently ruled that because of the enactment of PU Code § 247, the federal preemption of state regulation over the entry of CMRS providers could be implemented by us, and so it would no longer be necessary for such CMRS providers to obtain the "ministerial" CPCN provided for in Ordering Paragraph 2 of D.95-10-032 (62 CPUC2d at 18).

PMRS providers (a jurisdiction we have not traditionally exercised), PU Code § 247 permits us to recognize the preemptive effect of 47 U.S.C. § 332(c)(3)(A) with respect to such jurisdiction.

Findings of Fact

1. The instant application seeking authority to add sites and expand applicant's service territory was filed on December 3, 1992.

2. The application was amended on August 16, 1993 and February 10, 1994.

3. The two-way dispatch radio sites covered by the instant application, as amended, are not interconnected with the "public switched network," as the FCC has defined that term in its Second Report and Order in GN Docket No. 93-252.

4. This Commission has not traditionally exercised jurisdiction over providers of private mobile radio services.

Conclusions of Law

1. By virtue of PU Code § 234(b)(2), which became effective on January 1, 1996, this Commission no longer has jurisdiction over the sites in the instant application used to provide one-way paging services.

2. Because the sites in the instant application used to provide two-way paging services are not interconnected with the public switched network, the services provided from such sites are considered "private mobile radio services" within the meaning of the Communications Act, as amended.

3. Section 332(c)(3)(A) of the Communications Act, as amended, preempts this Commission from exercising jurisdiction over the siting of facilities of private mobile radio service providers.

4. Under PU Code § 247, this Commission is free to implement the preemptive effect of § 332(c)(3)(A) of the Communications Act, as amended.

5. Because this Commission no longer has jurisdiction over either the one-way or two-way paging sites covered by the instant application as amended, the application should be dismissed.

O R D E R

IT IS ORDERED that:

1. This application is dismissed for lack of jurisdiction.
2. This proceeding is closed.

This order is effective today.

Dated October 8, 1998, at Laguna Hills, California.

RICHARD A. BILAS
President
P. GREGORY CONLON
JESSIE J. KNIGHT, JR.
HENRY M. DUQUE
JOSIAH L. NEEPER
Commissioners