

1 governmental entity that works as a sort of middleman for frequency applications)
2 mistakenly requested Telesaurus's frequencies on RadioLink's behalf. In any event, the
3 FCC did not realize that the requested frequencies were already assigned to Telesaurus,
4 and it granted RadioLink's application. RadioLink began using Telesaurus's frequencies
5 allegedly "for a common carrier Wireless Telecommunication Service and Commercial
6 Mobile Radio Service." (*Id.* ¶ 16.) RadioLink disputes that it operated a commercial
7 mobile radio service, instead arguing that it operated a private mobile radio service for
8 customers such as fire departments and bus systems. The distinction between a
9 commercial service and a private service matters because the FCC treats commercial
10 services, but not private services, as "common carriers," 47 U.S.C. § 332(c)(1)–(2), and
11 (as discussed below) RadioLink's liability turns on whether or not it was a common
12 carrier.

13 Telesaurus apparently paid no attention to its VPC frequencies for several years,
14 and had no idea that RadioLink was using them until 2003 or 2004. Administrative
15 proceedings with the FCC ensued. In 2005, the FCC modified RadioLink's license to
16 exclude Telesaurus's five frequencies and include five replacement frequencies.

17 **B. Initial Stages and Appeal**

18 Telesaurus initiated this lawsuit in 2007, alleging that RadioLink had used
19 Telesaurus's frequencies without permission from 1999 through 2005, thus supposedly
20 violating the common carrier provisions of the Federal Communications Act (FCA), *see*
21 47 U.S.C. § 207, and entitling Telesaurus to unspecified damages.¹ Telesaurus also
22 asserted state-law torts. RadioLink eventually moved to dismiss, arguing that it was not a
23 common carrier as a matter of law, and therefore 47 U.S.C. § 207 could not apply.
24 RadioLink also argued that Telesaurus's state-law claims were preempted by federal law.

25
26 ¹ According to counsel, Telesaurus suffered no losses from RadioLink's actions,
27 but rather seeks damages measured by RadioLink's profits from using the VPC
28 frequencies, similar to equitable disgorgement. (*See* Doc. 115 at 23–25.)

1 This Court granted RadioLink’s motion, holding that RadioLink was not a
2 common carrier as a matter of law, and that the FCA preempts the state-law claims. On
3 appeal, the Ninth Circuit upheld the preemption conclusion, but not the common carrier
4 conclusion. Nonetheless, the Ninth Circuit agreed that Telesaurus’s then-operative
5 complaint did not sufficiently allege common carrier status. The Ninth Circuit therefore
6 remanded to give Telesaurus an opportunity to amend its complaint.

7 **C. Development of a Focused Discovery and Summary Judgment**
8 **Procedure**

9 The Ninth Circuit’s order established the following elements for common carrier
10 status:

11 [A] mobile service provider such as RadioLink qualifies as a
12 “common carrier” under the FCA only to the extent it is
13 “engaged in the provision of a service” that is: (1) for profit;
14 (2) interconnected (or pending interconnection) with the
public switched network; and (3) available to the public or
other specified users.

15 *Telesaurus VPC, LLC v. Power*, 623 F.3d 998, 1004 (9th Cir. 2010). Telesaurus’s second
16 amended complaint, filed in January 2011, tracked this language fairly closely, but was
17 devoid of supporting facts. RadioLink again moved to dismiss.

18 At a hearing on that motion in April 2011, the court stated that “those facts going
19 to ‘available to the public or other specified users,’ or ‘interconnected to the public
20 switched network,’ appear to be readily amenable to quick economical and definitive
21 discovery and resolution.” (Doc. 143 at 5.) The Court surmised that the parties “might
22 need some depositions. But most of this would appear . . . to be paper discovery.” (*Id.* at
23 17.) Referring to RadioLink’s transmitter site, counsel for Telesaurus added: “I could
24 envision a site inspection by an expert. I believe there’s going to be some disagreement
25 as to what the equipment can or can’t do . . . during this five- or six-year period [in which
26 RadioLink allegedly violated Telesaurus’s rights].” (*Id.* at 18.)

27 Based on the discussion at the hearing, the Court denied RadioLink’s motion to
28 dismiss and instead ordered the parties to develop a discovery plan focused only on the

1 second and third elements of the Ninth Circuit’s common carrier test, to be followed by
2 cross-motions for summary judgment on those elements. (Doc. 138.) After delays
3 occasioned by the parties’ other motions, the parties agreed on a scheduling order
4 requiring RadioLink to file a motion for summary judgment regarding interconnectedness
5 and availability to the public. That motion was to include

6 a written description in the form of a functional diagram of
7 RadioLink’s operating system during the period from 1999
8 through the time in 2005 when its frequencies were changed,
9 with sufficient detail to allow a third party, including
10 [Telesaurus]’s expert witness, if any, to determine whether
the system was interconnected with the public switched
network

11 (Doc. 189 at 2.) The scheduling order went on to specify:

12 During January, 2012, (A) Defendants will permit inspections
13 by duly qualified experts, at mutually convenient dates as
14 follows: (i) Site inspection of RadioLink’s [repeater] facility,
15 and (ii) Inspection of RadioLink’s repeater equipment in
16 operation during the relevant time period, whether or not still
17 operating; and (B) Plaintiff shall conduct the deposition of
18 Randy Power at a date and time convenient to all parties,
19 limited to the issues raised in Defendants’ Motion for
20 Summary Judgment. Plaintiff reserves the right to request
additional discovery concerning the issues raised by
21 Defendant’s Motion for Summary Judgment pursuant to Rule
56(d) Fed.R.Civ.P. following its review of the Motion, and
22 Defendants reserve the right to object to any such requests.

23 (*Id.*)

24 Telesaurus was required to obtain new counsel in the midst of summary judgment
25 briefing, causing delays. In the end, Telesaurus deposed Randy Power, but “decided to
26 forgo [an] inspection [of RadioLink’s repeater site] since none of the equipment
27 RadioLink used during the relevant time period remains at the site.” (Doc. 223 at 2.)
28 Telesaurus cites nothing in support of the assertion that none of the relevant equipment
remains in place.

1 **II. LEGAL STANDARD**

2 Summary judgment is warranted if the evidence shows there is no genuine issue as
3 to any material fact and the moving party is entitled to judgment as a matter of law. Fed.
4 R. Civ. P. 56(a). The moving party bears the initial burden of identifying those portions
5 of the pleadings, depositions, answers to interrogatories, and admissions on file, together
6 with the affidavits, if any, which it believes demonstrate the absence of any genuine issue
7 of material fact. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). If the
8 nonmoving party would bear the burden of persuasion at trial, the moving party may
9 carry its initial burden of production by submitting admissible “evidence negating an
10 essential element of the nonmoving party’s case,” or by showing, “after suitable
11 discovery,” that the “nonmoving party does not have enough evidence of an essential
12 element of its claim or defense to carry its ultimate burden of persuasion at trial.” *Nissan*
13 *Fire & Marine Ins. Co., Ltd. v. Fritz Cos., Inc.*, 210 F.3d 1099, 1105–06 (9th Cir. 2000).

14 When the moving party has carried its burden, the nonmoving party must respond
15 with specific facts, supported by admissible evidence, showing a genuine issue for trial.
16 *See* Fed. R. Civ. P. 56(c). But allegedly disputed facts must be material — the existence
17 of only “*some* alleged factual dispute between the parties will not defeat an otherwise
18 properly supported motion for summary judgment.” *Anderson v. Liberty Lobby, Inc.*, 477
19 U.S. 242, 247–48 (1986) (emphasis in original).

20 Where the record, taken as a whole, could not lead a rational trier of fact to find
21 for the nonmoving party, there is no genuine issue of material fact for trial. *Matsushita*
22 *Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). However, the
23 nonmoving party’s properly presented evidence is presumed to be true and all inferences
24 from the evidence are drawn in the light most favorable to that party. *Eisenberg v. Ins.*
25 *Co. of N. Am.*, 815 F.2d 1285, 1289 (9th Cir. 1987).

26 **III. ADMISSIBILITY OF EVIDENCE**

27 A party may object that the evidence cited by the other party in support or
28 opposition to summary judgment “cannot be presented in a form that would be

1 admissible in evidence.” Fed. R. Civ. P. 56(c)(2). “While the evidence presented at the
2 summary judgment stage does not yet need to be in a form that would be admissible at
3 trial, the proponent must set out facts that it will be able to prove through admissible
4 evidence.” *Norse v. City of Santa Cruz*, 629 F.3d 966, 973 (9th Cir. 2010).

5 **A. Evidence Submitted by RadioLink**

6 Telesaurus claims that certain documents submitted by RadioLink related to its
7 FCC applications (Doc. 194 at 11–26) are hearsay. This motion can be resolved without
8 reference to those documents. The Court will therefore not rule on Telesaurus’s hearsay
9 objections.

10 **B. Evidence Submitted by Telesaurus**

11 **1. BLM Documents**

12 RadioLink challenges the authenticity of documents Telesaurus obtained from the
13 Bureau of Land Management (Docs. 210-2 through 210-8). Telesaurus submitted
14 nothing from the BLM’s custodian of records to authenticate the BLM documents.
15 However, it is not impossible for these documents to be authenticated, especially if this
16 case went forward to full discovery. In addition, at his deposition, Power authenticated
17 certain of these BLM documents relating to himself and RadioLink. Therefore, the BLM
18 documents relating directly to Power or RadioLink will not be excluded for lack of
19 authenticity. The remaining BLM documents are irrelevant, and even if relevant, would
20 be hearsay. They will be excluded.

21 **2. Havens Affidavit**

22 RadioLink challenges an affidavit submitted by Telesaurus’s principal, Warren
23 Havens. “An affidavit or declaration used to support or oppose a [summary judgment]
24 motion must be made on personal knowledge, set out facts that would be admissible in
25 evidence, and show that the affiant or declarant is competent to testify on the matter
26 stated.” Fed. R. Civ. P. 56(c)(4). Havens’ affidavit fails this standard. It only
27 summarizes attached documentary evidence (such as the BLM documents), none of
28

1 which substantiates his personal knowledge. Rather, he gained his knowledge *from* the
2 documentary evidence. Accordingly, the Havens affidavit is inadmissible.

3 **IV. FACTS**

4 Taking into account the foregoing, the following facts are undisputed unless
5 attributed to one party or another.

6 **A. The VPC Frequencies and RadioLink's Equipment**

7 As noted above, both RadioLink and Telesaurus competed in an auction in 1998
8 for certain VPC frequencies, which Telesaurus won. The following year, RadioLink
9 gained overlapping rights to five of those frequencies, on which it transmitted under call
10 sign WPOX212. RadioLink claims that the overlap was a mistake on the part of
11 Industrial Telecommunications Association, a frequency coordinator authorized by the
12 FCC to recommend appropriate frequencies in the private land mobile radio spectrum. In
13 2005, this conflict between Telesaurus's and RadioLink's rights came to light and the
14 FCC deleted the five disputed frequencies from RadioLink's WPOX212 license,
15 replacing them with other available frequencies.

16 According to a declaration from Randy Power, RadioLink's WPOX212 repeater
17 equipment has never included the technology or other means necessary to interconnect
18 with the public switched network — or in other words, to allow radio operators to place
19 or receive phone calls from their radios. In addition, Power claims that RadioLink's
20 service has never been offered to the general public. Rather, says Power, RadioLink
21 selected its customers based on the repeater equipment's capacity, the potential
22 customer's ability to obtain needed FCC permits, and the potential customer's ability to
23 pay. RadioLink therefore claims that it has always operated as a private mobile radio
24 service, rather than a commercial service.

25 **B. BLM Rent Calculations**

26 RadioLink's repeater equipment sits on land owned by the Bureau of Land
27 Management on White Tank Mountain, west of Phoenix. Randy Power has leased that
28 land from the BLM since sometime in the 1980s. Not only has he placed RadioLink's

1 equipment on that land, but he has also sublet his facilities to certain other
2 communications providers.

3 Occasionally (usually once a year), Power is required to fill out a BLM form
4 listing the “occupants” of the land he leases, the “type of use” for each occupant, and
5 whether each occupant is a “customer” or “tenant.” This form assists the BLM in
6 calculating Power’s rent. On every one of these forms filled out by Power from 1996
7 through 2011, Power identified the site’s general “type of use” as a “commercial mobile
8 radio service/facility manager” or just “commercial mobile radio service.” Each tenant’s
9 specific type of use was listed as “CMRS” (commercial mobile radio service) or “BT”
10 (broadcast translator), but every customer’s type of use was listed as “PMRS” (private
11 mobile radio service). (*See* Doc. 210-2 at 12, 21, 27, 33, 50, 59, 69, 89, 97, 103, 113;
12 Doc. 210-3 at 7, 11, 16, 29, 44.)

13 C. FCC Form 499-A

14 At some point, probably in the late 1990s and no later than 2001 (*see* Doc. 223-1
15 at 24), Power and his then-wife, Patricia, each filled out an FCC Form 499-A (Doc. 210-9
16 at 21–24). The FCC requires certain telecommunications providers to report revenue
17 annually on Form 499-A so that the FCC can collect contributions used to fund various
18 programs relating to telephone service. (*See* Doc. 223-1 at 89.) The Powers were in the
19 midst of divorce proceedings at that time and to the best of Randy Power’s recollection,
20 they filled out these forms independently of each other because they both had certain
21 FCC licenses in their own names.

22 Both Randy and Patricia stated on their Forms 499-A that they were “doing
23 business as” “RadioLink Corp.” Randy identified RadioLink’s business as “other
24 mobile,” which is not listed as an available category on the form’s instructions. Patricia
25 identified RadioLink’s business as “SMR [specialized mobile radio] (dispatch),” defined
26 in the instructions as “primarily provid[ing] dispatch services and mobile services other
27 than wireless telephony. While dispatch services may include interconnection with the
28

1 public switched network, this category does not include carriers that primarily offer
2 wireless telephony.” (*Id.* at 99–100.)

3 When asked at his deposition to explain the discrepancy between his and his
4 Patricia’s forms, Power stated: “[T]hat was a confusing time in my life [while going
5 through the divorce] and maybe she thought of one way and I thought of another. I don’t
6 know. I can’t answer that for sure.” (*Id.* at 25.) Also at Power’s deposition, Telesaurus
7 pointed out that the Powers could have identified RadioLink as being a “Private Service
8 Provider,” defined on the form’s instructions as “offer[ing] telecommunications to others
9 for a fee on a non-common carrier basis. This would include a company that offers
10 excess capacity on a private system that it uses primarily for internal purposes.” (*Id.* at
11 99.) Power responded that RadioLink has never provided “telecommunications,” but
12 only “dispatch.” (*Id.* at 27.) Power speculated that he and his wife nonetheless filled out
13 these forms either as part of a transaction in which a cellphone company acquired certain
14 frequencies from the Powers, or because they operated another service in Phoenix in the
15 late 1990s with telephone interconnect. (*Id.*)

16 **V. ANALYSIS**

17 **A. Alleged Legal Presumption of CMRS**

18 The Ninth Circuit has made clear that liability in this case turns on RadioLink
19 being a “common carrier,” and that common carrier status turns on the service that the
20 alleged common carrier actually provides:

21 [A] mobile service provider such as RadioLink qualifies as a
22 “common carrier” under the FCA only to the extent it is
23 “engaged in the provision of a service” that is: (1) for profit;
24 (2) interconnected (or pending interconnection) with the
25 public switched network; and (3) available to the public or
26 other specified users.

27 *Telesaurus*, 623 F.3d at 1004. Despite this, Telesaurus’s primary argument here is that
28 RadioLink must be presumed to be a common carrier because it used the VPC

1 frequencies. Telesaurus raised essentially this same argument on appeal, and the Ninth
2 Circuit disagreed:

3 Telesaurus argues that Radiolink must be deemed to be a
4 common carrier because it was using the VPC Frequencies,
5 which the FCC designated for use only by commercial mobile
6 services. We reject this tautology. As explained above, the
7 definition of “commercial mobile services” does not turn on
8 the nature of the frequencies being used, but rather on
9 whether the service being provided meets certain criteria.

10 *Id.* at 1005.

11 The only distinction Telesaurus makes now is to pile the elements of common
12 carrier status into the argument. Telesaurus, for example, states that use of the VPC
13 frequencies constitutes a commercial service *and* that commercial service operators must
14 interconnect with the public switched network, *therefore* RadioLink must have
15 interconnected. Telesaurus also points out the various FCC regulations that RadioLink
16 supposedly violated by using the VPC frequencies for something other than a commercial
17 service, insisting that RadioLink must therefore have been a commercial service. These
18 arguments are no less tautological than the argument the Ninth Circuit rejected. They do
19 not suffice to defeat summary judgment.

20 **B. Interconnection with the Public Switched Network**

21 RadioLink has proffered evidence that WPOX212 (which included the VPC
22 frequencies from 1999 to 2005) has never been interconnected with the public switched
23 network. (*See* Doc. 194-1 at 4–7.) The burden therefore shifted to Telesaurus to bring
24 forth evidence showing that a reasonable trier of fact could conclude otherwise. As
25 explained below, Telesaurus has not met that burden.

26 **1. The Forms 499-A**

27 Telesaurus leans heavily on the 499-A forms that Randy and Patricia Power had
28 once filled out. Telesaurus located these forms in an online FCC database. They are the
only two forms that Telesaurus has offered from that database. They do not create a
dispute over a material issue.

1 First, their exact date is unclear. Telesaurus continually suggests that the forms
2 were filled out in 2001, but it provides no citation for that. The forms themselves bear no
3 date on which they were submitted to the FCC. Based on the business address listed on
4 those forms and the nature of the forms themselves, Power speculated at his deposition
5 that he and Patricia filled them out sometime in the late 1990s — meaning that they may
6 have filled them out before RadioLink began using the VPC frequencies. If so, these
7 forms would clearly have no relevance.

8 But even assuming that the Powers filled out these forms sometime after
9 RadioLink began using the VPC frequencies, the relevance is still unclear. Telesaurus
10 argues that because neither Randy nor Patricia Power selected “Private Service Provider”
11 from a list of available types of telecommunications services in the 499-A instructions, an
12 inference arises that RadioLink was not a private mobile radio service. But Telesaurus
13 has not established, nor do its documents establish, that Form 499-A has anything to do
14 the distinctions between commercial mobile radio services and private mobile radio
15 services. The form’s instructions list fifteen different types of services that the Powers
16 could have selected. “Commercial mobile radio service” and “private mobile radio
17 service” are not on that list. (Doc. 223-1 at 98–99.) The only option linguistically close
18 to either of them is “Private Service Provider,” defined as “offer[ing] telecommunications
19 to others for a fee on a non-common carrier basis. This would include a company that
20 offers excess capacity on a private system that it uses primarily for internal purposes.”
21 (Doc. 223-1 at 99.) If the FCC meant this definition to be coterminous with its definition
22 of private mobile radio service, one could reasonably have expected it to say so. But it
23 did not.

24 In addition, the types of service that Randy and Patricia Power listed for
25 RadioLink do not suggest that RadioLink operated as a commercial service. Randy
26 Power chose “other mobile,” an option which does not exist in the 499-A instructions.
27 “Other mobile” says nothing about the relevant characteristics of RadioLink’s service.
28 Patricia Power chose “SMR (dispatch),” which applies to those who “primarily provide[]

1 dispatch services and mobile services other than wireless telephony. While dispatch
2 services may include interconnection with the public switched network, this category
3 does not include carriers that primarily offer wireless telephony.” (Doc. 223-1 at 99–
4 100.) This definition shows only that *if* RadioLink had provided telephone
5 interconnection, “SMR (dispatch)” might still have been the appropriate designation on
6 the 499-A. It says nothing about whether RadioLink ever provided interconnection.
7 Accordingly, the 499-A forms do not raise a dispute over whether RadioLink was ever
8 interconnected with the public switched network.

9 **2. BLM Documents**

10 Telesaurus also attempts to make much of the BLM paperwork documenting
11 Power’s yearly rent payments for the White Tank Mountain repeater site. Because, on
12 the BLM documents, Power has consistently identified his use of the repeater site as
13 “commercial mobile radio service/facility manager” or “commercial mobile radio
14 service,” Telesaurus argues that a material issue of fact exists about what sort of service
15 RadioLink really offered. Telesaurus further asserts that listing oneself as a commercial
16 service on these BLM forms raises a presumption that one is in fact a commercial service
17 for FCC purposes, and therefore RadioLink must have been interconnected to the public
18 switched network, with services offered to the public indiscriminately. Telesaurus is
19 mistaken.

20 The BLM’s regulations make clear that its definitions of “commercial mobile
21 radio service” and “private mobile radio service” differ from the FCC’s definitions:

22 Commercial mobile radio service (CMRS)/facility manager
23 means commercial mobile radio uses that provide mobile
24 communication service to individual customers. Examples of
25 CMRS include: Community repeaters, trunked radio
26 (specialized mobile radio), two-way radio voice dispatch,
27 public switched network (telephone/data) interconnect
28 service, microwave communications link equipment, and
other two-way voice and paging services. “Facility
Managers” are grant or lease holders that lease building,

1 tower, and related facility space to a variety of tenants and
2 customers as part of the holder's business enterprise, but do
3 not own or operate communication equipment in the facility
4 for their own uses;

5 * * *

6 Private mobile radio service (PMRS) means uses supporting
7 private mobile radio systems primarily for a single entity for
8 mobile internal communications. PMRS service is not sold
9 and is exclusively limited to the user in support of business,
10 community activities, or other organizational communication
11 needs. Examples of PMRS include: Private local radio
12 dispatch, private paging services, and ancillary microwave
13 communications equipment for controlling mobile facilities;

14 43 C.F.R. § 2801.5(b).

15 The most notable difference between these definitions and the FCC's definitions is
16 that, for BLM purposes, a private mobile radio service "is not sold and is exclusively
17 limited to the user." The FCC, by contrast, permits some private mobile radio services to
18 operate on a for-profit basis with subscribers. *See* 47 C.F.R. § 20.3 (defining "Private
19 Mobile Radio Service" to include, among other things, "[m]obile radio service offered to
20 restricted classes of eligible users"). In addition, the BLM views "switched network
21 (telephone/data) interconnect service" as an example of commercial mobile radio
22 services, not as an element of such service. Thus, the BLM's definitions demonstrate that
23 any FCC-designated "private mobile radio service" operating on a for-profit basis would
24 fall under the "commercial mobile radio service" heading for BLM rent purposes. It is
25 undisputed that RadioLink operated on a for-profit basis from 1999 to 2005.
26 Accordingly, Power correctly identified the White Tank Mountain site as being used for a
27 "commercial" service with respect to the BLM's rent calculations.

28 In addition, the BLM "calculates rents for * * * [m]ultiple-use facilities, whose
authorizations provide for subleasing, by setting the rent of the highest value use in the
facility or facilities as the base rent" 43 C.F.R. § 2806.31(a)(2). As far as the BLM
documents disclose, the "highest value use" on the White Tank Mountain site was the

1 commercial mobile radio service offered by certain of Power’s tenants. Accordingly, for
2 this additional reason, Power correctly identified the White Tank Mountain site as being
3 used for a “commercial” service with respect to the BLM’s rent calculations.

4 However, Telesaurus has failed to demonstrate how the BLM’s regulations have
5 any relevance to whether RadioLink was a commercial service under the FCC’s
6 definition. Indeed, Telesaurus failed to address any of the foregoing authority. Nor does
7 Telesaurus acknowledge that Power consistently listed all of RadioLink’s customers (as
8 opposed to other tenants on the site) as receiving private mobile radio services, just as
9 RadioLink has claimed. (*See* Doc. 210-2 at 12, 21, 27, 33, 50, 59, 69, 89, 97, 103, 113;
10 Doc. 210-3 at 7, 11, 16, 29, 44.) Thus, rather than casting doubt on RadioLink’s
11 assertions, the BLM documents offered by Telesaurus support RadioLink’s position.
12 They do not raise a genuine issue of material fact.

13 Because interconnection is a necessary element of Telesaurus’s claim, and because
14 it has failed to show that a genuine dispute exists as to that element, RadioLink is entitled
15 to summary judgment.

16 **C. Availability to the Public**

17 RadioLink has proffered evidence that WPOX212 has never been offered to “the
18 public or . . . to such classes of eligible users as to be effectively available to a substantial
19 portion of the public.” *Telesaurus*, 623 F.3d at 1004 (quoting 47 U.S.C. § 332(d)(1))
20 (alteration added). Power’s declaration in support of summary judgment states:

21 All of RadioLink’s customers were selected on an individual
22 basis and selectively allowed to use the Repeater System
23 based on a) a determination that they met the criteria of being
24 qualified as permitted from [certain] FCC rules . . . and b) an
25 agreed upon price per unit per month based upon various
26 criteria, including the total number of radios being used, the
27 type of customer, the number of ID codes to be used in the
28 customer’s private fleet and other factors determined and
applied in RadioLink’s discretion. The selection of customers
was discriminatory and limited by the capacity of the
Repeater System. Among other things, RadioLink limited the

1 number of customers so that the Repeater System would not
2 be overloaded, thus allowing normal access to the radio
3 system without many if any “busy beeps.”

4 (Doc. 194-1 at 7.) At his deposition, Power testified that he develops business through
5 “word-of-mouth” and “by responding to bids for two-way radio service that I might be
6 able to provide for a school district or some entity that’s looking for service.” (Doc. 223-
7 1 at 23–24.)

8 Telesaurus has offered no evidence refuting Power’s claims. Because offering the
9 service to the public or a substantial class of the public is a necessary element of
10 Telesaurus’s claim, and because it has failed to show that a genuine dispute exists as to
11 that element, RadioLink is entitled to summary judgment on this basis as well.

12 **D. Discovery Issues**

13 Telesaurus has claimed that it cannot fully make its case because RadioLink has
14 been hiding documents. This claim stems from requests for production that Telesaurus
15 served on RadioLink (Doc. 211-1 at 3–20), to which RadioLink objected on various
16 grounds, but also noted, with respect to certain requests, that no responsive documents
17 exist. Concerning certain other requests, counsel for RadioLink directed Telesaurus to
18 specific documents previously produced. As for Telesaurus’s remaining requests (having
19 to do with certain FCC proceedings), counsel stated that Telesaurus “can just as readily
20 obtain any such documents, to the extent they exist, from the public records as can
21 [RadioLink].” (*Id.* at 29–30.)

22 Telesaurus argues that RadioLink’s response was disingenuous because
23 Telesaurus found documents that RadioLink should have disclosed — referring to public
24 documents such as the BLM rent paperwork and the 499-A forms. Telesaurus has
25 provided no reason to think that these documents were in RadioLink’s possession, and in
26 any event Telesaurus has not been harmed because it obtained the documents anyway.
27 To the extent Telesaurus believes that RadioLink is still hiding something, Telesaurus has
28 never brought a motion to compel production.

1 Telesaurus had ample opportunity to conduct discovery in this case. The parties
2 and the Court began developing this narrowed discovery and summary judgment
3 procedure over a year ago. Although the scheduling order as between Telesaurus and
4 RadioLink did not go into effect until last November, nothing prevented Telesaurus from
5 conducting third-party discovery. For example, through its own efforts to obtain the
6 BLM documents, Telesaurus learned of many of RadioLink's customers. It could have
7 followed up by serving subpoenas on those customers to discover information relevant to
8 the elements at issue here — such as whether those customers expected or received the
9 ability to place phone calls through their radios. Telesaurus's failure to do so does not
10 excuse its supposed inability to rebut RadioLink's evidence.

11 IT IS THEREFORE ORDERED that Defendants' Motion for Summary Judgment
12 (Doc. 193) is GRANTED.

13 IT IS FURTHER ORDERED that the Clerk enter judgment in favor of Defendants
14 against Plaintiff, and that Plaintiff take nothing. The Clerk shall terminate this case.

15 Dated this 17th day of May, 2012.

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17 
18 _____
19 Neil V. Wake
20 United States District Judge
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