

Decision 89 09 092 SEP 27 1989**ORIGINAL**

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Joint )  
 Application of SANTA BARBARA )  
 CELLULAR, INC. and SANTA BARBARA )  
 CELLULAR SYSTEMS, LTD. dba CELLULAR )  
 ONE for Authorization to Acquire )  
 Control of SANTA BARBARA CELLULAR )  
 SYSTEMS, LTD. dba CELLULAR ONE )  
 (U-3015-C) through the Acquisition )  
 of the Stock of FCJ, Inc. )

Application 89-04-059  
 (Filed April 26, 1989)

OPINION

This is an application in which Santa Barbara Cellular, Inc. (Cellular) seeks authority to acquire control of Santa Barbara Cellular Systems, Ltd., doing business as Cellular One (Systems).

Cellular and Systems did not include in the body of the application the purchase price information required by Rule 35(d). Instead, they filed a motion requesting that they be allowed to file the information as confidential information under seal. The sealed material was attached to the motion. The motion is made under the purported authority of General Order (GO) 66-C.

Notice of the filing of the application appeared in the Commission's Daily Calendar on May 2, 1989. No protest was filed within the 30 days provided for in Rule 8.3. On July 8, 1989 while the matter was pending, Cellular Resellers Association, Inc. (Resellers) requested that the purchase price information be unsealed and made available to it and the public generally.

The request of Resellers is an ancillary matter which merits consideration in this proceeding. The Commission is not a passive body which responds to the action or non-action of litigants. It is charged with promoting the public interest and

safety. It has a duty to consider on its own motion implications in an application which may affect the public interest.

"The Commission may and should consider sua sponte every element of public interest affected by facilities which it is called upon to approve. It should not be necessary for any private party to rouse the commission to perform its duty. . . ." (Northern California Power Agency v. Public Util. Com. (1971) 5 Cal. 3d 370, 380.)

Even if Resellers' request had not been filed, careful scrutiny of applicants' motion would be warranted.

Rule 35 provides that:

"Article 9. Applications to Sell, Lease or Encumber Utility Property or Rights; to Merge or Consolidate Facilities; to Acquire Stock of Another Utility; or to Acquire or Control a Utility

"35. (Rule 35) Contents.

"This article applies to applications under Sections 851-854 of the Public Utilities Code.

"In addition to being drafted to comply with Rules 2 tghrough [sic] 8, 15 and 16, such applications shall be signed by all parties to the proposed transaction, except the lender, vendor under a conditional sales contract, or trustee under a deed of trust, unless such party is a public utility. In addition, they shall contain the following data:

"(a) The character of business performed and the territory served by each applicant.

"(b) A description of the property involved in the transaction, including any franchises, permits, or operative rights; and, if the transaction is a sale, lease, assignment, merger or consolidation, a statement of the book cost and the original cost, if known, of the property involved.

"(c) Detailed reasons upon the part of each applicant for entering into the proposed transaction, and all facts warranting the same.

"(d) The agreed purchase price and the terms for payment. If a merger or consolidation, the full terms and conditions thereof.

"(e) Other pertinent facts. The filing of additional information may be required by the Commission in particular cases."

It is a well settled principle of public utility law that one element to be considered in determining whether operating rights should be granted, transferred or subject to different control is the ability, including financial ability, to conduct or continue the public utility operation. (Certificates: Oro Electric Corp. (1912) 1 CRC 253, 257, 267; Our Town Water Co. (1972) 73 CPUC 417; Wells Water Co. (1968) 68 CPUC 713; Dyke Water Co. (1957) 56 CPUC 109, 113; Peninsula Motor Express (1955) 54 CPUC 3; C. D. Gulick (1925) 26 CRC 312; Marin County Electric Railway (1914) 4 CRC 503, 507. Transfers: Southern California Mountain Water Co. (1912) 1 CRC 520; Cable & Wireless Communications, Inc. (1989) Decision (D.) 89-06-025 in A.89-02-044, Finding 7; Raymond L. Smith (1986) D.86-12-051 in A.86-08-041, Finding 16; ATL, Inc. (1958) 56 CPUC 269; La Frenz (1966) 65 CPUC 368; Walnut Creek Water Co. (1926) 28 CRC 686, 688.)

Rule 35(d) and its predecessors date back to 1912:

"Transfers and reorganizations often are made which leave the utility so burdened with fixed interest charged and crippled financially that it is totally unable longer to perform its duty to the public, and to prevent the bringing about of such conditions the Railroad Commission has been given the authority to regulate the transfer and encumbrance of its property by a utility. While the jurisdiction of the Commission is over the utility then in ownership and which desires to sell or encumber its property, yet from the very reason underlying the conferring of this power upon the public authority it becomes necessary when a sale or lease is contemplated which will bring about the substitution for the existing agency of another agency to be in charge of the public service, that a careful investigation

into both the terms of the transfer and the ability of the new agency to perform be made. Hence, we have required by our rules that both parties to the transaction shall submit their affairs to the scrutiny of the Commission." (Southern California Mountain Water Co., supra, at pp. 524-25.)

In the Walnut Creek case the Commission stated:

"This Commission can not authorize the sale of public utility properties without having before it definite information as to the terms of the sale. The price which the purchaser proposes to pay for the properties is a vital factor to be considered by the Commission in determining whether or not the purchaser, if permitted to acquire the properties will be financially able to continue successfully their operation." (28 CRC at p. 688.)<sup>1</sup>

The granting of Cellular's and Systems' motion based on GO 66-C would defeat the access afforded to public records by Government Code § 6253 (Public Records Act).

GO 66-C does not apply to public records encompassed in Government Code § 6252. Applications filed with the Commission are public records. Rule 35 prescribes the content of applications to sell, lease or encumber utility property or rights, to merge or consolidate facilities, to acquire stock of another utility or acquire control of a utility. To seek such authority from the Commission requires disclosure in the application of the materials

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1 The decision in Gregory L. Owen (1984) D.84-04-038 in A.84-01-043 states at page 1 that: "The purchase price is confidential. Since applicant plans to pay the entire sum from his own assets, no disclosure is necessary." The uncontested, ex parte decision gives no rationale or citation of authority for this statement. It is contrary to prior and subsequent Commission decisions. (Southern California Mountain Water Co., supra; Cable & Wireless Communications, Inc., supra; Raymond L. Smith, supra; ATL, Inc., supra; La Frentz, supra; and Walnut Creek Water Co., supra.) It is overruled.

required under the Commission's Rules. An applicant is required to put this information on the public record so it can be subject to the scrutiny of the Commission staff, competitors, and the public generally.

Assuming that under the motion the information would be available to the Commission staff, this would not be sufficient. As indicated, this information has been required to be part of the public record since 1912. (Southern California Mountain Water Co., supra.) Members of the public, including competitors, have the right to protest applications for transfer of control. (Public Utilities Code § 1701; Rules 8.1-8.8, 54.) Purchase price information is an element which may be considered by a potential protester in determining whether to file a protest. (ATL Inc., supra, Kenwood in the Pines Community Association (1963) 61 CPUC 629, 633; Pacific Greyhound Lines (1952) 52 CPUC 2; Southern California Gas Co. (1940) 43 CRC 107.)

A statement of confidentiality with material omitted from an application filed separately sealed cannot be used to defeat the requirements of Rule 35 and convert what is required to be in a public record into protected matter under GO 66-C. Rule 87 provides in part that: "In special cases and for good cause shown, the Commission may permit deviations from the rules." It is axiomatic that applicants desire to furnish the least amount of financial data which is permissible. However, regulated public utilities are subject to a higher level of scrutiny than nonregulated entities, including financial matters. Under the authorities cited, a deviation for good cause under Rule 87 from Rule 35 requires more than a statement that an applicant considers the material confidential and does not want its competitors or the public to see the information.

The motion of Cellular and Systems made under the purported authority of GO 66-C is an inappropriate one because it

attempts to convert material required by the Public Records Act to be available to the public into non-public material.

Considering the motion as a request under Rule 87 for a deviation from Rule 35(d), it should be denied. The Commission finds that the facts alleged and argument in support of the motion do not constitute a special case for which good cause has been shown within the meaning of Rule 87.

The material purportedly filed under seal is designated as Exhibit 1 and hereby placed in the formal file, which is available for public inspection pursuant to Government Code § 6253.

No other points require discussion.

The Commission makes the following findings and conclusion in this matter.

Findings of Fact

1. A public hearing is not necessary in this matter.
2. Cellular is a California corporation. It is a wholly owned subsidiary of McCaw Cellular Communications, Inc. (MCCI), a Delaware corporation. Cellular, MCCI, and other affiliated corporations are called the McCaw Group (Group).
3. Systems is a limited partnership organized and existing under the laws of the State of Georgia.

It holds an FCC permit to construct and operate a cellular radiotelephone system on the Frequency Block "A" in the Santa Barbara-Santa Maria-Lompoc Metropolitan Statistical Area (MSA), a market adjacent to the Oxnard-Ventura market presently served by an MCCI affiliate. Systems is authorized to provide wholesale, retail, and roamer cellular services pursuant to Commission D.87-12-050, dated December 17, 1987.

Systems serves the Santa Barbara-Santa Maria-Lompoc MSA under the trade name Cellular One. Neither Systems nor any of its affiliates provides cellular service outside the Santa Barbara-Santa Maria-Lompoc MSA.

4. Group is engaged in providing paging, traditional mobile telephone and cellular radio telecommunications services throughout the country. MCCI is the largest operator of non-wireline cellular systems in the United States. Directly or through its subsidiaries, MCCI has interests in facilities-based cellular telephone companies in more than eighty MSAs, and resells cellular radio telecommunications services in numerous other MSAs.

In California, MCCI operates facilities-based cellular systems through the following affiliated companies:

Fresno Cellular Telephone Company	(U-3014-C)
Napa Cellular Telephone Company	(U-3016-C)
Oxnard Cellular Telephone Company	(U-3010-C)
Redding Cellular Telephone Partnership	(U-3020-C)
Sacramento Cellular Telephone Company	(U-3013-C)
Salinas Cellular Telephone Company	(U-3018-C)
Stockton Cellular Telephone Company	(U-3012-C)

MCCI also resells cellular service in California through its affiliate, Fresno Cellular Telephone Company (U-4040-C), and provides paging and traditional radiotelephone service through its affiliate, Airsignal of California, Inc. (U-2028-C).

5. Cellular was originally incorporated on April 22, 1987 as McCaw Communications of Santa Barbara, Inc. It changed its name to Cellular on March 22, 1989.

6. FCJ, Inc. (FCJ) is a Georgia corporation. It has 16 shareholders (hereinafter referred to as Sellers). FCJ holds a 50.005 percent controlling partnership interest in Santa Barbara Holdings, Inc., a Georgia limited partnership, (S. B. Holdings). S. B. Holdings, in turn, holds a 99.95 percent general partnership interest in Systems.

7. On April 6, 1989, McCaw Communications of Santa Barbara, Inc., the predecessor in interest to Cellular and Sellers entered into an agreement under which Sellers agreed to sell 50,000 shares of their one dollar (\$1.00) par value common stock, comprising 100 percent of the issued and outstanding voting stock in FCJ, to McCaw Communications of Santa Barbara, Inc. Upon completion of the

transaction, Cellular would own a 50.005 percent general partnership interest in S. B. Holdings, the controlling general partner of Systems and would thus acquire control of Systems. ✓

8. Cellular's unaudited balance sheet, as of December 31, 1988, indicates that it had no revenues or expenses for 1988 and had paid in capital and common stock of \$528,600. MCCI and its affiliated subsidiary companies in an unaudited balance sheet for the quarter ending September 30, 1988, had total current assets of \$714,430,000 and operating revenues of \$219,521,000 for the nine months ending on that date. MCCI has given a commitment letter indicating it will provide financial support for the transaction.

9. Cellular has the ability, including financial ability, to acquire control and continue the operations of Systems.

10. MCCI and its California affiliates operate their cellular systems through regional, multi-market cellular systems, or clusters. Four clusters of facilities-based operations form the basis of MCCI's cellular operations in California. Presently, the Central Coast cluster consists of Oxnard Cellular Telephone Company, through which MCCI serves the Oxnard-Ventura MSA. Systems provides cellular service within the adjacent Santa Barbara-Santa Maria-Lompoc MSA, and if the transaction is approved, it will become an integral part of MCCI's Central Coast cluster. The coordination by MCCI of its cellular systems into an operational network of regional systems enables MCCI to enjoy functional and competitive advantages. The cluster strategy enables MCCI to concentrate switching functions at a small number of switches in each region, thereby avoiding the capital costs associated with the installation of individual switches in each MSA. The cluster-based system allows MCCI to offer to its subscribers expanded service areas and enhanced services, such as automatic roaming.

11. The proposed acquisition and control of Systems by Cellular is not adverse to the public interest.



Since the ensuing order primarily affects the parties to this application, it should be made effective on the date of issuance.

Conclusions of Law

The application should be granted.

This authorization is not a finding of the value of the property for which authorization to acquire control is granted.

ORDER

IT IS ORDERED that:

1. On or after the effective date of this order, Santa Barbara Cellular, Inc. (Cellular) may acquire control of Santa Barbara Cellular Systems, Ltd. (Systems) through the acquisition of capital stock in accordance with the terms set forth in the application.
2. Cellular shall file written notice of the acquisition of control with the CACD within 15 days after it has occurred.
3. Systems shall continue to use Identification Number U-3015-C in the caption of all original filings with the Commission, and in the titles of other pleadings filed in existing cases. ✓

4. The authority granted in Ordering Paragraph 1 shall expire unless it is exercised before September 31, 1990.

This order is effective today.

Dated SEP 27 1989, at San Francisco, California.

G. MITCHELL WILK  
President  
STANLEY W. HULETT  
JOHN B. OHANIAN  
PATRICIA M. ECKERT  
Commissioners

Commissioner Frederick R. Duda,  
being necessarily absent, did  
not participate.

I CERTIFY THAT THIS DECISION  
WAS APPROVED BY THE ABOVE  
COMMISSIONERS TODAY.

*Wesley Franklin*

WESLEY FRANKLIN, Acting Executive Director

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