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BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application
of Cagal Cellular Communications
Corporation (U-4047-C), a Delaware
corporation, for a certificate of
public convenience and necessity
under Section 1001 of the Public
Utilities Code of the State of
California for authority to
construct and operate a domestic
public cellular radio telecom-
munications service in Sonoma
County, and for authority under
Sections 816 through 830 and 851
of the Public Utilities Code to
issue evidences of indebtedness in
a principal amount of up to \$3.6
million and to encumber public
utility property. (U-3021-C)

ORIGINAL

Application 88-07-041
(Filed July 22, 1988)

OPINION ON PETITIONS FOR MODIFICATION
OF DECISION 88-12-088

Background

On December 19, 1988, the Commission issued Decision (D.) 88-12-088, which granted Cagal Cellular Communications Corp. (Cagal) a certificate of public convenience and necessity (CPC&N) to construct and operate public cellular radio telecommunications facilities at five cell sites in Sonoma County. One of the cell sites is located on Fitch Mountain near Healdsburg. The Commission also approved a Negative Declaration applicable to Cagal's proposed construction. Both the decision and the Negative Declaration contained the following requirement:

Cagal will consult with appropriate local public agencies on project details such as the design, color, and type of materials used in the antenna towers, the specific configuration of equipment on each facility site, and any other relevant community building codes, providing such conditions or requirements do

not render the project infeasible. While it is the Commission's intent that local concerns be incorporated into the design, construction, and operation of this system, no additional permits from local authorities are required as a condition of this certificate.

Petitions for Modification of D.88-12-088 were filed by Cagal on June 7, 1989 and by John and Debra Crevelli, Robin Kirby, Robin Riffenburg, Ed Liu, and Gaspar Valena, all of Healdsburg (Residents), on July 10, 1989.

Petitions for Modification

Cagal claims that in attempting to comply with the requirement that it consult with local agencies, Cagal applied for a Use Permit from the County of Sonoma for the construction of a cell site at Fitch Mountain. On March 25, 1989, the Sonoma County Board of Supervisors (Sonoma) denied Cagal a Use Permit on the grounds that the proposed construction would have "adverse visual impacts" and "potential adverse impacts on adjacent property values." Cagal indicates that it risks legal action if it proceeds with the construction in defiance of Sonoma's decision on one hand, but is unable to find a new site which would both meet the technical requirements of the system and raise fewer environmental concerns than the original site. Cagal requests that following notice, the Commission amend Cagal's CPC&N and the Negative Declaration issued pursuant thereto to:

1. Direct Cagal, assuming the amended Negative Declaration is properly issued, to proceed with immediate construction at the Fitch Mountain site.
2. Assert the preemptive jurisdiction of this Commission with respect to the construction at the Fitch Mountain site.
3. Assert that Cagal has no further obligation to consult with local authorities with respect to the Fitch Mountain site.

4. Establish procedures whereby Cagal can obtain, in the absence of a Use Permit, a building permit, building inspections, certificate of occupancy, and all other local authorizations which would otherwise be issued pursuant to a Use Permit.
5. Establish the procedures Cagal should follow in securing approval for expansion sites which are not now described by the Negative Declaration.

Residents believe the single tower on Fitch Mountain is placed in an extremely sensitive and inappropriate location and request that the Commission rescind approval of this site and direct Cagal to find an alternate site in some other location not on Fitch Mountain.

Discussion

The Commission has previously taken the position that its regulation of utility service, including cellular radiotelephone service, preempts conflicting local jurisdiction. This authority was last endorsed in dicta in GTE Mobilnet, D.86-09-011, issued September 4, 1986, in Application 85-06-040.

As a general rule, "Local ordinances are controlled by and subject to general state laws and the regulations of statewide agencies regarding matters of statewide concern. Accordingly, the Commission has been held to have paramount jurisdiction in cases where it has exercised its authority, and its authority is pitted against that of a local government involving a matter of statewide concern." (Orange County Air Pollution Control Dist. v. Pub. Util. Comm. (1971) 4 Cal. 3d 945, 950-951 (common carriers); Cal. Const., Art. XI, § 7; Cal. Const., Art. XII, § 8.) Although local governments may have a degree of concurrent jurisdiction over some aspects of utility operations, local regulations must give way to the Commission's authority in cases where conflicts exist. (Harbor Carriers, Inc. v. City of Sausalito (1975) 46 Cal. App. 3d 773, 775 (ferries).)

The importance of consistent statewide regulation has been particularly emphasized in regard to telephone services. The Commission has broad authority over telephone corporations, generally, and over radiotelephone utilities, a subclass of telephone corporations, specifically. (See Public Utilities Code §§ 233, 234, 1001, 7901.) Because, "the right to exist as a telephone corporation and conduct a telephone business is a matter of statewide concern and not a municipal affair," the California Supreme Court has held that state regulation preempts local authority over telephone corporation franchises. (Pac. Tel. & Tel. Co. v. City of Los Angeles (1955) 44 Cal. 2d 272, 281.) The Court has similarly held that the construction and maintenance of telephone lines within a city are a matter of statewide concern. (Pac. Tel. & Tel. Co. v. City and County of S.F. (1959) 51 Cal. 2d 766, 768.)

The Commission exercised its broad authority over cellular radiotelephone utilities when it approved Cagal's certificate application. In D.88-12-088 the Commission approved Cagal's request to construct cellular radiotelephone facilities at five sites, including the Fitch Mountain site. The Commission directed Cagal to consult with local authorities regarding project details, but limited this consultation by "providing such conditions or requirements do not render the project infeasible." (D.88-12-088, at p. 20.)

Essentially, D.88-12-088 required Cagal to make a good faith effort to satisfy local concerns. Cagal maintains that it made all reasonable efforts to consult with local authorities and no one has challenged this assertion. Therefore, Cagal has satisfied that condition of the certificate.

Despite these efforts, Sonoma has prevented construction at Fitch Mountain by denying Cagal a conditional use permit. The denial of the permit prevents Cagal from obtaining a building permit, which in turn prevents Cagal from obtaining electric

service. As discussed above, Sonoma does not have the authority to prevent construction at the Fitch Mountain site once the Commission has approved the site for cellular radiotelephone facilities. Thus, in this situation, the Commission must explicitly override the local government's attempt to disapprove construction at the site.

However, the Commission cannot force Sonoma to issue a conditional use or building permit. Cagal was not required by the Commission to apply for a conditional use permit or building permit from Sonoma County. Cagal was only required to consult with Sonoma County on project details. In the absence of established procedures to effect this consultation, Cagal chose to apply for a conditional use permit, which Sonoma County eventually denied. The denial by Sonoma County is an idle act since local regulation must give way to the Commission's authority once a CPC&N for a site is authorized. If the Commission is asserting regulatory authority over cellular radiotelephone sites, it must provide a mechanism for these utilities to obtain the necessary permits without going through local governments.

The requirement that cellular radiotelephone utilities consult with local authorities was intended to provide the local entity with the opportunity to recommend mitigation measures for conditions unique to the locale. The requirement also contemplated local inspection of the construction and collection of concomitant fees to assure that all applicable building codes were satisfied. This was explained in a letter from the Commission to all County and City Planning Directors on June 14, 1988, Exhibit 3 to Cagal's Petition for Modification.

There is no need to change the decision or the negative declaration to delete the requirement that Cagal consult with the local authorities because Cagal has already met that requirement. However, there remains the need for inspection of the construction of the facilities. Cagal should first approach the County of

Sonoma and request that it provide this service. If the County chooses to continue to be uncooperative in meeting this obligation, then Cagal should engage a state licensed safety engineer to perform the requisite inspections to assure compliance with appropriate state building and safety codes. The contractor's report of compliance with appropriate codes is to be submitted to the Commission Advisory and Compliance Division.

Cagal also seeks an order establishing the procedures that it should follow in securing expansion to sites not now covered by the Negative Declaration. That issue is a generic one that cannot be resolved here. This is an issue that involves all cellular siting cases and will be dealt with in the Order Instituting Rulemaking (OIR) issued today.

Findings of Fact

1. Cagal received a CPC&N by D.88-12-088 to construct a cellular radiotelephone facility at a cell site located on Fitch Mountain, near Healdsburg.

2. Cagal was required by that decision to consult with local public agencies on project details, but no additional permits from local agencies were required as a condition of the certificate.

3. In attempting to consult with Sonoma County on the Fitch Mountain site, Cagal applied for a conditional use permit for the site from Sonoma County.

4. Sonoma County denied the conditional use permit.

5. Petitions for modification of D.88-12-088 have been filed by Cagal and Residents.

6. Although permits from local agencies are not required, inspection of the site is needed to assure compliance with applicable building and safety codes.

7. Cagal also requests an order establishing procedures that it should follow in securing expansion to sites not covered in the Negative Declaration.

Conclusions of Law

1. A building or other permit from a local agency is not required as a condition of the CPC&N for this site.
2. Cagal should be required to contact Sonoma County to explore the possibility of local building inspection of the site. That failing, Cagal should obtain a state licensed safety engineer for site inspection and report the results of that inspection to the Commission.
3. Cagal's request for an order establishing procedures for expansion of its cellular facilities is inappropriate in a petition for modification. This issue is a generic one that involves all cellular siting cases and should be dealt with in the OIR.
4. To the extent not granted here the petitions filed by Cagal and Residents should be denied.

O R D E R

IT IS ORDERED that:

1. Cagal Cellular Communications Corp. (Cagal) is authorized to commence construction of its certificated cellular radiotelephone facilities at the Fitch Mountain site.
2. Cagal shall obtain building inspection of the site through the use of building inspectors from Sonoma County or from a state licensed safety engineer. Cagal shall submit the safety engineer's report of compliance with appropriate codes to the Director of the Commission Advisory and Compliance Division within 15 days of receipt of such report.

3. To the extent not granted here the Petitions for Modification filed by Cagal and Residents are denied.

This order is effective today.

Dated JAN 9 1990, at San Francisco, California.

G. MITCHELL WILK
President
FREDERICK R. DUDA
JOHN B. OHANIAN
PATRICIA M. ECKERT
Commissioners

Commissioner Stanley W. Hulett,
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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