

Decision 90 08 027 AUG 8 1990**ORIGINAL**

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application
of CONTEL CELLULAR OF CALIFORNIA,
INC. 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 new domestic public cellular
radio telecommunication service to
the public in the California RSA
No. 7 encompassing Imperial County.

Application 90-03-042
(Filed March 28, 1990)**INTERIM OPINION**

On March 28, 1990, Contel Cellular of California, Inc. (applicant) filed an application requesting a certificate of public convenience and necessity (CPC&N) under § 1001 of the California Public Utilities (PU) Code to construct and operate a new domestic public cellular radiotelephone service within the California Rural Service Area (RSA) No. 7, encompassing Imperial County.

On June 18, 1990, applicant filed a motion requesting interim relief pending the determination of the above application. The motion is for an interim order of the Commission, pursuant to PU Code §§ 1001 and 1005 authorizing applicant to operate a single temporary cell site and provide domestic public cellular radio telecommunication service in California RSA No. 7, on a temporary basis at a location in Imperial County, for up to 90 days.

The reason for the motion is that applicant's construction permit issued by the Federal Communications Commission (FCC) will expire on September 13, 1990 unless applicant has installed at least one cell and notified the FCC that the system is ready to commence service to the public pursuant to 47 C.F.R.

§ 22.43(c)(2). Failure to comply with § 22.43(c)(2) can result in the expiration and termination of the construction permit.

In the meantime, applicant, the Commission staff, and the Commission's recently designated independent consultant are working together in an effort to complete the environmental review of the application for the permanent cell site as quickly as possible. However, as of the date of filing the motion, it does appear that such review could not be accomplished in time for the Commission to issue a final decision in this proceeding, such that construction of the proposed permanent cell site could be finished and service commenced by September 13, 1990.

Applicant points out that the Commission already has determined that the rapid deployment of cellular systems in this State is in the public interest. This is further evidenced by its recent Decision 90-06-025, but unfortunately the workshops ordered in that decision to develop "a streamlined certification process for RSA facilities-based carriers" are not likely to be finished in time to assist applicant. Applicant asserts that granting the interim operating authority sought by the motion will foster the foregoing policies and is clearly within the Commission's authority under the PU Code.

Applicant states that the proposed temporary cell site facilities will consist of a prefabricated structure (slightly less than 28 feet long, 12 feet wide, and 10 feet high), constructed of fibercrete with an aggregate exterior, in which substantially all of the radio equipment is installed before delivery to the site by flat-bed truck. The structure is designed specifically for mobility, with hoist connections, such that it can be lifted by crane and moved no matter how long it may have been in place. No more than six antennae will be temporarily mounted either on the structure or on a temporary telephone pole not exceeding 25 feet in height (with the antennae no higher than 12 feet above the structure or pole). Normal overhead telephone and power

connections will be extended to the structure. The proposed temporary structure will be located in El Centro at the permanent site specified in the application, which is hard-packed, arid dirt, with only sparse weed cover. Applicant states that there is no possibility of any permanent environmental effect at the site. Applicant agrees that were it to become necessary, applicant would quickly remove the temporary structures and completely return the site to its prior condition.

The proposed temporary cell site differs from the proposed permanent cell site in two significant respects: (1) the temporary cell site will use a normal telephone pole as an antenna mount, not a 240-foot tower; and (2) the temporary facility will be temporary. According to applicant, these differences assure that the temporary cell site will have no possibility of causing any significant adverse effects.

Applicant argues that the relief sought in the motion does not require completion of the California Environmental Quality Act (CEQA) review on the application for a CPC&N for two reasons. First, the approval requested is not an "approval" of the permanent cell site within the meaning of CEQA, because in granting this interim order for a temporary facility the Commission would not be "committing itself to a definite course of action" with respect to applicant's application for a CPC&N. Second, the approval which is being sought in the motion is not with respect to any of the permanent facilities which will be constructed pursuant to the CPC&N, or their locations, if the CPC&N is ultimately granted by the Commission. The approval sought is for temporary measures necessary to protect applicant's license, which present none of the potential environmental impacts which will be the focus for environmental review of applicant's underlying application for a CPC&N to construct and operate a full-scale cellular system.

Lastly, applicant asserts that it can be seen with certainty that there is no possibility that the proposed temporary

facilities may have a significant adverse effect on the environment; and this statement alone is sufficient to permit the Commission to grant applicant's motion for separate temporary operating authority for the temporary site.

Discussion

A copy of the motion (and the application) has been served on the cities and counties within the proposed service area and on other entities with which applicant's proposed service is likely to compete. No protests were received; therefore, a public hearing is not necessary.

Applicant possesses the requisite FCC permits to construct and operate its system. However, this Commission has not completed its review of the application for the permanent cell site and is not likely to issue its findings in time for applicant to complete construction of permanent facilities by September 13, 1990, the date on which applicant's FCC permits are expected to expire.

We note that the FCC permits were issued on March 16, 1989. The application for a CPC&N was filed with this Commission on March 28, 1990. It has taken applicant one year to make its filing with this Commission. The applicant delayed, without good cause, before making its filing for a CPC&N for the permanent installation. Had the application been filed in a timely manner, it would not be necessary for us to consider this request for interim relief.

We could justifiably deny applicant's request for interim relief because of failure to timely make its filing with this Commission for a CPC&N. However, since applicant's request for temporary authority predates our recent warning to parties that failure to file timely could result in our failure to act before expiration of the FCC permit, we will grant applicant's request for interim relief, with conditions:

- o Applicant may operate a temporary transmission facility consisting of a small,

mobile, prefabricated unit and associated telephone pole mounted antennae of no more than 37 feet in total elevation at one cell site located in El Centro for up to 90 days from the effective date of this order.

- o Applicant will comply with all local permitting requirements applicable to the temporary facility.
- o Under interim operating authority, applicant will file provisional tariffs in substantially final form according to the terms set forth in the application and otherwise comply with all of the rules, regulations, and general orders of the Commission applicable to cellular carriers.

We grant applicant's request for interim relief with the understanding that this decision does not in any way commit the Commission to approving the application for a CPC&N (or for any particular site if the CPC&N is eventually approved) and that applicant will proceed at its own economic risk should the Commission eventually disapprove the application, thus requiring applicant to remove this temporary facility. The Commission is not in any way committing itself to a definite course of action with respect to the permanent cellular project. Nor is the Commission even giving final approval or committing itself in any way to any component of the permanent cellular project. Rather, the Commission is only approving temporary facilities which have no possibility of causing significant adverse environmental effects.

Findings of Fact

1. Applicant has the necessary FCC license to operate a new domestic public cellular radio telecommunication service in California RSA No. 7, encompassing Imperial County.
2. Applicant's construction permit issued by the FCC will expire on September 13, 1990 unless applicant has installed at

least one cell and notified the FCC that the system is ready to commence service to the public.

3. At the time of filing the motion for interim relief, the Commission's review of the application for the permanent cell site cannot be completed by September 13, 1990. Therefore, it is likely that applicant's FCC construction permit will expire and be terminated by the FCC.

4. The motion for interim relief is for temporary measures necessary to protect applicant's FCC license.

5. Applicant's motion for interim relief was served on all permitting authorities within the proposed service area and no protests were received.

6. The Commission already has determined that the rapid deployment of cellular systems in this State is in the public interest. Therefore, it is not in the public interest to allow applicant's FCC construction permit to expire.

7. To avoid termination of applicant's FCC construction permit, applicant needs authority to operate a single temporary cell site and provide domestic public cellular radio telecommunications service in California RSA No. 7, on a temporary basis at a location in Imperial County, for up to 90 days from the date of this decision.

8. The temporary nature of the proposed cell site assures that any other conceivable impact will not be significant. Since the facility can be completely removed without leaving any permanent changes to the environment, any such impacts would last only 90 days, at a maximum.

9. It can be seen with certainty that there is no possibility that the proposed temporary cell site will have a significant adverse effect on the environment.

Conclusions of Law

1. The Commission, having assumed the Lead Agency role in this matter, finds that construction of the proposed temporary cell

site, as described in this decision, will not have a significant adverse effect on the environment.

2. The granting of the interim relief requested by applicant is only for the purpose of protecting applicant's FCC license, and is expressly limited for up to 90 days from the date of this decision.

3. The 90-day authority to operate temporary facilities granted by this decision does not in any way commit the Commission to approving the application for a CPC&N (or for any particular site if the CPC&N is eventually approved). Applicant will proceed at its own economic risk should the Commission eventually disapprove the application, thus requiring applicant to remove this temporary facility.

4. The Commission is only approving temporary facilities which have no possibility of causing significant adverse environmental effects.

5. Applicant's request for interim relief should be granted subject to the conditions set forth above.

INTERIM ORDER

IT IS ORDERED that:

1. Contel Cellular of California, Inc. (applicant) shall be granted temporary authority to operate a single temporary cell site and provide domestic public cellular radio telecommunications service to the public in California Rural Service Area (RSA) No. 7 on a temporary basis at a location in Imperial County, at applicant's sole risk and expense, for up to 90 days from the effective date of this decision.

2. Applicant is authorized to file temporary tariffs substantially in the form described in the application and to commence service to the public pursuant thereto, such tariffs to be effective on 5 days' notice.

3. The corporate identification number assigned to applicant is U-3029-C which should be included in the caption of all original filings with this Commission, and in the titles of other pleadings filed in existing cases.

4. Applicant is subject to:

- (a) The current 0.3% surcharge on gross intrastate interLATA revenues to fund Telecommunications Devices for the Deaf (PU Code § 2881; Resolution T-13061), and
- (b) the user fee provided in PU Code §§ 431-435, which is 0.1% of gross intrastate revenue for the 1990-91 fiscal year.

5. Applicant shall provide a copy of this decision to all local permitting agencies not later than 10 days from the effective date of this decision.

6. Applicant shall comply with all local permitting requirements applicable to the temporary facility.

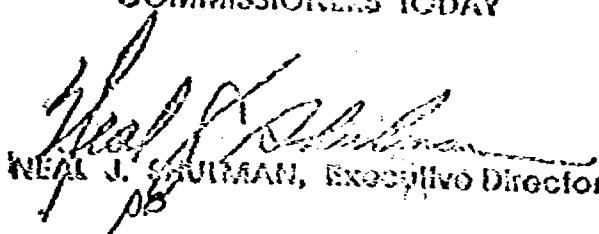
7. This proceeding remains open for consideration of applicant's request for a Certificate of Public Convenience and Necessity.

This order is effective today.

Dated AUG 8 1990, at San Francisco, California.

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

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


Neal J. Sullivan, Executive Director