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Decision 90-11-077 November 21, 1990

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. )

**ORIGINAL**

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

O P I N I O N

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 radiotéléphone 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) would 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). This Commission, in Decision (D.) 90-08-027, granted the request for temporary operating authority for 90 days. Also, by D.90-10-067, applicant was granted temporary operating authority for an additional 30 days.

On September 25, 1990, applicant filed a motion to amend the Summary of Rates and Charges set forth in Application 90-03-042. According to applicant, the reason for this amendment is to bring the rates for RSA No. 7 more into line with the rates of PacTel Cellular in the San Diego Metropolitan Statistical Area (MSA), since the community of interest for Imperial County is with San Diego, thus warranting a comparability of rates.

Copies of the application and the above motions have been served on entities with which the proposed service is likely to compete. Notice of this application appeared in the Commission's Daily Calendar of March 30, 1990. No timely protests to the application have been received.

Applicant is a corporation duly organized under the laws of the State of California for the purpose of providing cellular radio telephone service to the public. Applicant maintains its principal place of business in California at 770 East Shaw, Suite 126, Fresno, California 93710.

Applicant is a wholly owned subsidiary of Contel Cellular Inc. (Contel), a Delaware corporation headquartered in Atlanta, Georgia. Contel is a subsidiary of Contel Corporation which owns 90% of Contel's 100 million outstanding common shares. The remaining 10% are publicly traded. Contel was established to operate Contel Corporation's cellular interests nationwide. Contel currently has limited partnership interests in 31 MSA markets and has subsidiaries, including applicant, which are general partners/managing partners and in some instances sole owners responsible for operating 36 cellular systems throughout the country. In addition, Contel or its subsidiaries have been

designated the general/managing partner for 42 RSAs, including five other California RSAs.

Applicant and its parent corporation, Contel, have been operating cellular systems in MSAs in California and elsewhere in the country since 1985.

Fresno MSA Limited Partnership (Fresno), of which applicant is the general partner and 92% owner, currently has Commission authority to provide cellular service in the Fresno, Visalia, and Bakersfield MSAs and the Kings County RSA.

Applicant has been selected as the wireline (Frequency Block B) cellular carrier by the Federal Communications Commission (FCC) to provide Domestic Public Cellular Radio Telecommunications Service in RSA No. 7 which encompasses Imperial County.

On March 13, 1989, the FCC granted applicant authority to construct two base radio stations (cell sites) in RSA No. 7. Applicant intends to provide its initial cellular service with one cell site.

This application covers applicant's initial system consisting of one cell site located in El Centro. Applicant plans to utilize the mobile telephone switching office of PacTel Cellular at San Diego to transfer calls from one cell site to the next. A detailed description of the design and operation of the proposed cellular system, including a discussion of its technical adequacy, is attached to the application as Exhibit D.

According to applicant, no outstanding franchises or health and safety related permits are required by public authorities for the proposed system, other than construction permits obtained from the FCC, approvals from the Federal Aviation Authority (FAA), the certificate requested herein, and local permits to construct and operate antennas or facilities as may be required.

Regarding public convenience and necessity, applicant states that this Commission has also consistently found that there

is a public need for cellular telephone services throughout the State of California. Additionally, applicant has examined the market for cellular service in the RSA No. 7 area and has concluded that the public would benefit from the construction of the proposed cellular system. The facts supporting such a conclusion are attached as Exhibit G to the application.

Applicant intends to purchase its cellular mobile telephone system from Motorola. The estimated capital cost of equipment, construction, and installation for the initial service offering is \$657,000. An additional capital expenditure of \$977,000 is expected by the end of the fifth year of operation.

Applicant states that it has the financial ability to undertake the proposed project. This ability is demonstrated by Exhibit I attached to the application. Applicant previously has been found by this Commission to possess sufficient financial resources to operate Fresno's cellular system. (D.85-11-055.)

Applicant is proposing a wholesale pricing plan that would permit resellers. However, given the size of the RSA, applicant does not believe that there would be interest in resale other than from the non-wireline licensee. According to applicant, this plan conforms with the FCC's Cellular Report and Order of May 4, 1981 (FCC Docket No. 79318) and this Commission's rulings in D.84-04-014.

Applicant's proposed base rate for wholesale and retail operations is summarized in the amendment to the application.

Regarding environmental considerations, the Proponent's Environmental Assessment is set forth in Exhibit K attached to the application.

Applicant requests that the Commission declare that it is the lead agency under the California Environmental Quality Act (CEQA), with respect to the determination of environmental considerations in connection with this project. Applicant also requests that the Commission issue a proposed Negative Declaration

and adopt that Negative Declaration following the applicable public comment period.

Proposed Project

The proposed project consists of the construction of one cellular tower which would provide service over an area of 320 square miles and would include cities of El Centro, Brawley, and Calexico, as well as western Imperial County and travelers along Interstate 8 and Highways 86 and 111.

The proposed El Centro site is located approximately 600 feet east of State Highway 111 and approximately 400 feet south of Evan Hewes Highway. (Imperial County Assessor's Parcel No. 44-460-10.)

The proposed project would consist of a 240-foot guyed tower and a 12 by 28-foot prefabricated equipment shelter. Seven 13-foot omni-directional whip-type antennas would be mounted at the 240-foot level of the tower. Two 8-foot microwave transmitting/receiving parabolic dish-type antennas would be mounted at approximately 120- and 150-foot levels of the tower. The tower will be marked and lighted according to FAA regulations.

The equipment shelter, containing radio transmitting/receiving equipment, batteries, and an air conditioner, would be constructed of "fibercrete," a mixture of fiberglass and concrete, and would have a stone aggregate exterior. It would be built on a concrete slab foundation. Outside, an emergency generator would be mounted on a separate concrete slab. The generator would include a 200-gallon double-walled diesel fuel tank mounted in a catch basin below the generator but above ground. The proposed facility would be surrounded by an eight-foot chain-link security fence topped with three strand of barbed wire. A lockable gate will also be included for safety. The only utility service required is electricity. Commercial power will be extended along the same access easement to the equipment shelter.

The proposed project would be an unmanned facility requiring routine maintenance visits once or twice each month.

Discussion

The Commission Advisory and Compliance Division (CACD) staff has reviewed the environmental aspects of the proposed initial construction and on September 13, 1990 issued a proposed Negative Declaration. The Negative Declaration was served on all local agencies and entities with which the proposed service is likely to compete.

Only the Planning Department of Imperial County (County) submitted comments. The County fully supports the project and there is no dispute. However, the County points out that it had expeditiously processed its own Negative Declaration under CEQA, and issued the necessary local permits for this project prior to the CACD staff issuing its proposed Negative Declaration. The County believes that the CACD staff's Negative Declaration was an unnecessary duplication of effort, and that under Section 15051 of CEQA "the Lead Agency will normally be the agency with general governmental powers such as the City or County, rather than an agency with single or limited purpose."

Although the County generally would be correct with regard to the CEQA review of subsequent expansion sites under Section VII(B) of General Order 159, the Commission, under Section VII(A) of General Order 159, has assumed a lead agency role with regard to sites which are part of the initial system for which a CPC&N is sought (see also Harbor Carriers, Inc. v City of Sausalito 46 CA 3rd 773; 121 Cal. Rptr. 577). The County's comments make clear that it acted expeditiously both with regard to its independent review of the cellular tower and its review of the Negative Declaration prepared by CACD. The County urges the Commission to grant the CPC&N, and we shall do so.

The Negative Declaration prepared by CACD is marked as Exhibit 1 and received into evidence as part of the formal file in

this proceeding. We will receive the County's Negative Declaration as Exhibit 2 in this proceeding.

CACD's conclusions are summarized below:

"Findings

"An Initial Environmental Study (attached) was prepared to assess the project's effects on the environment and the significance of those effects. Based upon the initial study, the project will not have any substantial adverse effects on the environment. This conclusion is supported by the following findings:

- "1. The proposed telephone system will not have a significant effect on the geology, soils, climate, hydrology, vegetation, or wildlife of the cell site.
- "2. The proposed telephone system will not have a significant effect on municipal or social services, utility services, or community structure.
- "3. The proposed telephone system will not have a significant adverse effect on air or water quality, the existing circulation system, ambient noise levels, or public health.
- "4. While the tower for this cell site will be visible from the surrounding area, the visual impacts are minimized because of the distance of most viewers and the cell site, the specific location of the cell site in a manufacturing zone located in a rural setting, and the presence of two existing towers and a high voltage transmission line in the project vicinity.

"To assure that significant adverse effects do not occur as a result of this project, the following conditions are incorporated into this Negative Declaration:

- "1. The applicant will secure a Conditional Use Permit and a height variance from Imperial County, and comply with all relevant building codes provided such conditions do not render the proposed project infeasible.
- "2. The applicant will consult with the Federal Aviation Administration, the local county department of airports, or other appropriate aviation agencies concerning the need for tower marking, lighting, height, or placement prior to the construction of the cell site.
- "3. The applicant will provide adjacent property owners with an anticipated schedule of construction prior to initiating construction activity.
- "4. For future cell sites which would allow the applicant to serve a larger area, the applicant shall follow the procedures outlined in the California Public Utilities Commission General Order 159, Appendix A, Section IV." (Exhibit 1, pp. 28, 29.)

Since the CACD report concludes that, pursuant to the requirements of Division B of the California Public Resources Code, this project will not have any substantial adverse effects on the environment, we see no reason to deny applicant's request for a CPC&N to construct one cell site at El Centro, subject to Conditions 1 through 4 above as recommended by CACD.

Construction of additional cell sites in yet undetermined locations will be subject to the Commission's General Order 159, adopted March 28, 1990, pursuant to D.90-03-080.

Since applicant's system will bring a technologically advanced telecommunications service to the citizens of the rural areas of California, we agree that the proposed service will enhance public convenience and necessity.



Applicant has provided sufficient information to demonstrate that it has the ability, including financial ability to conduct the proposed operations. Therefore, we conclude that applicant's request for a CPC&N should be granted.

Findings of Fact

1. This application covers applicant's initial system consisting of one cell site located in Imperial County
2. Copies of the application have been served on the cities and counties within the proposed service territory and on other entities with which the proposed service is likely to compete.
3. Applicant did file copies of its proposed rates with its application. These rates were amended by a motion filed on September 25, 1990.
4. Notice of the application appeared on the Commission's Daily Calendar of March 30, 1990.
5. No protests to the application have been received.
6. Applicant possess the requisite FCC permit to serve California RSA No. 7.
7. The Commission is the lead agency under CEQA for determination of environmental effects of the project under consideration.
8. Pursuant to Division B of the California Public Resources Code and CPUC Rule 17.1(h)(A)2, the CACD issued a Negative Declaration on the proposed project.
9. The CACD Negative Declaration concludes that the proposed project will not have any substantial adverse effects on the environment, and the project should be approved with conditions as set forth above.
10. Applicant has the ability, including financial ability, to conduct the proposed operations.
11. Public convenience and necessity will be served in granting applicant's request for a CPC&N.

12. Applicant's proposed rates and service area map are set forth in the application.
13. No public hearing is necessary in this matter.
14. Applicant is subject to:
  - (a) The current 0.3% surcharge on gross intrastate 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.

Conclusions of Law

1. Applicant should be granted a CPC&N to provide public cellular radio telecommunications service in the California RSA No. 7.
2. The Commission should approve the findings of CACD as set forth above.
3. Applicant should be authorized to construct and operate its initial system which will consist of one cell site at El Centro.
4. The following order should be effective on the date the order is signed because public convenience and necessity require prompt construction of applicant's system at the one site identified in the application.
5. PU Code § 709 states:

"709. The Legislature hereby finds and declares that the policies for telecommunications in California are both of the following:  
(a) To assure the continued affordability and widespread availability of high quality basic telephone service for all Californians.  
(b) To encourage the development and deployment of new technologies and the equitable provision of services in a way which efficiently meets consumer need and encourages the availability of a wide choice of state-of-the-art services.  
(Added Stats. 1987, Ch. 849.)"

We believe that the granting of a CPC&N for this system by this Commission is in accordance with the Legislature's intent that a wide choice of state-of-the-art services be made available for all Californians.

O R D E R

IT IS ORDERED that:

1. On or after the effective date of this order, Contel Cellular of California, Inc. (applicant) is granted a certificate of public convenience and necessity to provide cellular telephone service throughout California Rural Service Area No. 7 encompassing Imperial County and to construct one cell site at El Centro.

2. The Commission has assumed the lead agency role in this matter with respect to environmental considerations.

3. The Commission adopts the findings and conclusions of the Commission Advisory and Compliance Division's (CACD) Negative Declaration, as set forth at pages 7-8 of this opinion.

4. Applicant shall comply with Conditions 1 through 4 as recommended by CACD in the Negative Declaration, which are set forth in the Discussion section of this decision.

5. Construction of additional cell sites in yet undetermined locations will be subject to the Commission's General Order 159, adopted March 28, 1990, pursuant to D.90-03-080.

6. The Commission does not, by this order, determine that applicant's construction program is necessary or reasonable for ratemaking purposes. These issues are normally tested in general ratemaking proceedings.

7. The corporate identification number assigned to applicant is U-3030-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.

8. Upon providing 5 days' notice, applicant is authorized to file tariffs in substantially the form described in the petition to modify the application dated September 25, 1990.

9. Within 60 days of the effective date of this order, applicant shall comply with Public Utilities Code § 708, Employee Identification Cards, and notify, in writing, the Chief of the Telecommunications Branch of the Commission Advisory and Compliance Division of compliance.

10. Applicant shall keep its books and records in accordance with the Uniform System of Accounts for cellular communications licensees as prescribed by D.86-01-043.

11. Applicant shall file an annual report, in compliance with General Order Order 104-A, on a calendar-year basis using CPUC Annual Report Form for Cellular Communications Licensees (wholesalers) and prepared according to the instructions included with that form.

12. The certificate of public convenience and necessity granted by this order shall expire within 12 months after the effective date of this order if applicant has not filed tariffs and commenced operations by that date.

13. Applicant shall provide a copy of this decision to all local permitting agencies not later than 30 days from today.

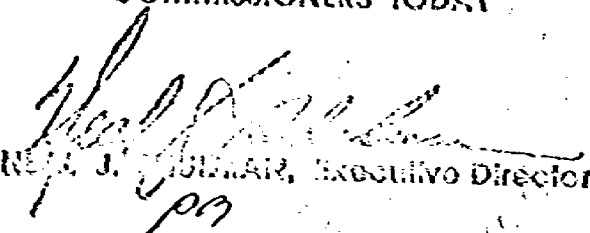
14. Within 30 days after this order is effective, applicant shall file a written acceptance of the certificate granted in the proceeding.

15. This proceeding is closed.  
This order is effective today.  
Dated November 21, 1990, 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.

  
Robert J. Johnson, Executive Director