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Decision 91-04-059 April 24, 1991

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application of Atlantic Cellular  
Company, L.P., a Delaware limited  
partnership, doing business as  
Mountain Cellular, for a Certificate  
of Public Convenience and Necessity  
to construct and operate a domestic  
public land cellular radiotelephone  
system in El Dorado County,  
California.

ORIGINAL

Application 89-05-060  
(Filed May 26, 1989;  
amended December 21, 1989  
and June 15, 1990)

Debi Drake and Peter Maurer, for themselves,  
petitioners.

Messrs. Dinkelspiel, Donovan & Reder, by David  
A. Simpson, Attorney at Law, for Atlantic  
Cellular Company, respondent.

### OPINION

#### Background

El Dorado Cellular Communications (El Dorado) filed an initial application for a certificate of public convenience and necessity (CPCN) on May 26, 1989. That original application proposed a cellular radio telecommunications (CRT) system comprised of three cell sites to be located at Pine Hill, Clarksville and Placerville. The Clarksville site was intended to contain a colocated mobile telephone switching office (MTSO).

Subsequently, the interests of El Dorado were acquired by Atlantic Cellular Company (Atlantic), and Application (A.) 89-05-060 was amended on December 21, 1989 to substitute Atlantic as the applicant. In April 1990, the Commission Advisory and Compliance Division (CACD) prepared a draft negative declaration for the project pursuant to the California Environmental Quality Act.

Responses to the negative declaration persuaded CACD that the project may have significant effects on the environment. CACD then determined that an environmental impact report (EIR), rather than a negative declaration, was required. Noting that the EIR could not be completed before October 27, 1990, the date on which Atlantic's Federal Communications Commission (FCC) authority would expire unless Atlantic had commenced the service, Atlantic filed a second amended application on June 15, 1990. The amendment sought immediate interim authority to construct a single cell site at Pine Hill, an existing communications facility four miles north of Cameron Park, and an MTSO in the City of Placerville.

The Commission granted the requested interim authority on July 17, 1990 (Decision (D.) 90-07-061). In its decision, the Commission limited the CPCN "to the use of its Pine Hill site for the placement of its antennas and microwave dishes." (Ordering Paragraph 1.) The Commission expressly directed that "Applicant shall not use any other site in El Dorado County for the placement of its antennas and microwave dishes until completion of an environmental review and further order of this Commission." (Ordering Paragraph 2.) The Commission indicated that it would "retain jurisdiction to issue a final CPCN for the other two sites, Clarksville and Placerville, upon completion of an environmental analysis." (Mimeo. p. 6.) In granting interim authority for the Pine Hill site, the Commission found that the proposed construction would not have a significant effect on the environment. (Finding of Fact 9.)

Atlantic promptly constructed its Pine Hill cell site. Atlantic also constructed a microwave relay facility on Coon Hollow Road, less than one mile southwest of Placerville, a location several miles distant from the Pine Hill site. The microwave facility consisted a single 30 foot wooden telephone pole with a six-foot microwave receiving dish attached. A small portable shed was placed nearby to house electronic equipment and the facility

was connected to Pacific Bell service at that point. The purpose of the dish was to receive microwave signals from the Pine Hill cellular antennas and relay them by wire to Atlantic's MTSO in Placerville.

On August 10, 1990 Debi Drake and Peter Maurer, residents of Placerville, filed an "Application for Rehearing" of D.90-07-061.<sup>1</sup> On October 12, 1990 the Commission granted limited rehearing "for the sole purpose of determining whether Ordering Paragraph 2 should be modified, or in the alternative whether Atlantic must discontinue the use of its temporary link at the Placerville site, and instead seek a temporary link with Pacific Bell until the Commission has had the opportunity to complete its environmental review of the Placerville site." (D.90-10-049.)

On November 9, 1990 Atlantic offered its late filed response to the Drake application and its petition for modification of D.90-07-061. In its petition Atlantic sought a modification of Ordering Paragraph 2 to prohibit only the construction of any cell site other than Pine Hill until further order of the Commission.

Assigned Administrative Law Judge (ALJ) Wilson consolidated the rehearing with Atlantic's petition for modification and held a hearing on November 2, 1990 in Placerville.

Drake and Maurer appeared for themselves and presented the testimony of Peter Maurer. Atlantic Cellular presented the testimony of its witness John P. Kelly. At the conclusion of the testimony and examination of the witnesses, the hearing was

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1 As filed by Drake and Maurer, the August 10, 1990 document was entitled "Complaint." They alleged among other things that Mountain Cellular had wrongfully failed to inform the Commission of its intent to establish the subject microwave site. The document was retitled "Application for Rehearing" and treated by the Commission as such.

recessed briefly and reconvened at the Coon Hollow site. With the parties in attendance, the ALJ viewed the facility. At the conclusion of the tour, the hearing was adjourned. Briefs were filed by the parties on November 20, 1990, and the matter was submitted on the filing of reply briefs on November 30, 1990.

#### Drake's Argument

Drake complains that Atlantic constructed its Coon Hollow microwave dish in violation of the Commission's order. Drake believes that Ordering Paragraph 2 in D.90-07-061 specifically prohibited the use of any site other than Pine Hill for the placement of antennas and microwave dishes until the completion of the Commission's environmental analysis and issuance of its further order.

Drake also complains that Atlantic's use of the Coon Hollow site violates General Order (GO) 159-B, Section III, D(3)(IV) in that it occupies a parcel of land zoned by the City of Placerville for residential purposes. Drake believes that this provision of GO 159-B excludes temporary cell sites from residential areas.

Drake further complains that the specific environmental impacts of the Coon Hollow microwave installation have never been considered. Drake claims that the City of Placerville issued a permit for the microwave dish without adequate notice or hearing and without environmental review as required by the California Environmental Quality Act (CEQA).

In her initial application for rehearing, Drake claimed that Atlantic had deceived the Commission in violation of Rule 1 of the Commission's Rules of Practice and Procedure. Drake suggests that the Commission's Finding of Fact 6 in D.90-07-061, that the proposed interim system was technologically feasible, was made in error. Drake points out that A.89-05-060 as amended on June 15, 1990 was silent about the need for the Coon Hollow site to link the Pine Hill cell site to Atlantic's MTSO in Placerville. Drake

claims that the fact that Atlantic applied to the FCC for a microwave permit at Coon Hollow on June 13, 1990, shows that Atlantic knew at least two days prior to its filing of the amendment to A.89-05-060 that it would require the Coon Hollow microwave installation in order to operate the interim system. Drake believes that Atlantic's silence induced the Commission to assume that the Pine Hill site was feasible, without additional microwave locations, even though it was not.

Drake asks the Commission to order Atlantic to cease its use of the Coon Hollow microwave facility and to reapply with a system proposal that is both demonstrably feasible and based on a consideration of alternate sites and environmental analyses.<sup>2</sup>

#### Atlantic's Argument

Atlantic does not deny that it established a microwave facility at the Coon Hollow Road location but argues that doing so did not violate the orders in D.90-07-061. Atlantic interprets Ordering Paragraphs 1 and 2 of the decision to mean that Atlantic could not establish a "cell site" anywhere but at Pine Hill, but that was free to construct any other "ancillary facilities reasonably necessary to provide the authorized service from the Pine Hill Location." (Atlantic Response to Application for Rehearing p. 1 and Reply Brief pp. 4-5.)

Atlantic distinguishes "cell sites" from "control facilities" and argues that what it has constructed on Coon Hollow Road is a "control facility." Atlantic claims that "as a matter of practice no cellular utility has ever been required to seek

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<sup>2</sup> In her application for rehearing, Drake also requested that a fine be levied against Atlantic with the proceeds to be used to establish a fund for the compensation of intervenors who "must watchdog the cellular industry for irregularities". We will not consider such a request in a CPCN application proceeding in the absence of reference to any existing authority for such compensation.

explicit Commission authority in the CPCN application process for...control facilities" required to link MTSOs with cell sites. (Id., p. 5.) Atlantic seeks to buttress this argument with its testimony that the development of the Coon Hollow microwave station was far less expensive and produced less environmental impact than a telephone cable link between the Pine Hill cell site and the Placerville MTSO.

Atlantic contends that the Coon Hollow facility construction did not violate GO 159-B because that order applies only to facilities required after an initial CPCN has been granted. In the alternative, Atlantic claims that it complied with GO 159-B because it did obtain a permit from the City of Placerville. In granting that permit, Atlantic claims that the City implicitly found that the Coon Hollow facility was exempt from CEQA.

As to Drake's claim that the Commission was misled by Atlantic's failure to include the Coon Hollow microwave facility in its June 15, 1990 amendment, Atlantic replies that, at the time of its June 15 application, it "had not yet determined which of two control alternatives--microwave or Pacific Bell lines--was most reasonable. The fact that Mountain Cellular [Atlantic] during that same time frame, applied to the FCC for a microwave permit reveals nothing more than prudent business judgement--the utility was keeping its options open while it shopped for the most effective, cost efficient means of linking Pine Hill to its central office (MTSO)." (Atlantic, Reply Brief p. 5.)

Finally, Atlantic claims that no public purpose would be served if the Commission were to order Atlantic to dismantle the Coon Hill microwave facility. Atlantic's witness Kelly testified that if the microwave dish were removed, the system would cease to function, stranding well over 200 current customers, denying the community use of 911 emergency telephone service via cellular telephones, curtailing roamer service along U.S. Highway 50 and

jeopardizing the viability of Atlantic as a corporation. (Tr. p. 46-48.)

### Discussion

The central issue in this matter is whether Atlantic installed its microwave facility at the Placerville site on Coon Hollow Road in violation of our orders in D.90-07-061. Our Ordering Paragraphs 1 and 2 provided:

- "1. A certificate of public convenience and necessity is granted to Atlantic Cellular Company, Ltd. (applicant) to construct and operate a public utility domestic public land cellular radiotelephone system in El Dorado County, restricted to the use of its Pine Hill site for placement of its antennas and microwave dishes.
- "2. Applicant shall not use any other site in El Dorado County for placement of its antennas and microwave dishes until completion of an environmental review and further order of this Commission."

We must reject Atlantic's semantic argument that these orders were only intended to prohibit the construction of other cell sites and that the microwave dish it installed on Coon Hollow Road was not prohibited. Our orders did not use the term "cell site" but, rather, specifically referred to any other site in El Dorado County for the placement of its antennas and microwave dishes.

Atlantic's argument that the Commission implicitly granted authority to construct any ancillary facility necessary to provide the proposed service is likewise unpersuasive. Ordering Paragraph 1 expressly restricted Atlantic's authority "to the use of its Pine Hill site for placement of its antennas and microwave dishes." It is simply wrong to infer that the Commission authorized "between the lines" what it expressly forbade.

Atlantic's contention that the Commission has never specifically regulated the point or manner by which connection is

made between a cellular system and the landline telephone service rings true, but cannot rescue Atlantic's case. The type of linkage at issue has invariably been made at a cell site. Our reason for regulating cell sites is the need to bring proper environmental scrutiny and to provide an opportunity for public and local government to participate in the siting process (D.90-03-080). We are not concerned with the actual cellular-landline linkage but with the physical siting of communications equipment. Where the linkage occurs at a cell site, there is no pertinent issue in the linkage per se. However, where the linkage is made by way of the installation of cellular equipment at a location apart from a proposed cell site, it clearly raises separate issues of environmental impact and local land use concerns.

The facts in this case disclose that Atlantic was aware of at least the possibility that the Coon Hollow tower might be needed in order to operate the interim Pine Hill system it proposed on June 15, 1990. In reply to questioning by the ALJ, Atlantic's witness Kelly stated that at the time Atlantic filed its amended application for interim approval of the Pine Hill site, it was not aware of what method it would use to establish linkage with Pacific Bell. (Tr. p. 52, l. 11-17.) The witness testified on cross-examination that it was not until late July that Atlantic was aware of the cost and construction time necessary for a Pine Hill link with Pacific Bell, but that it knew "that the Pine Hill site was not the best economic alternative back in May or in June."

(Tr. p. 52, l. 22-28; p. 53, l. 1-22.)

If Atlantic was truly using nothing more than prudent business judgement when it applied for FCC approval of the Coon Hollow site, it might also have used that judgement and included Coon Hollow Road in the application it filed with this Commission just two days later. When Atlantic discovered its dilemma after the Commission's decision on July 17, 1990, it could have immediately sought a modification of D.90-07-061. Instead,

Atlantic sought approval for its temporary use of the Coon Hollow Road site from the City of Placerville.<sup>3</sup> Under direct examination by Drake, witness Kelly explained that it was his belief that the Commission somehow recognized, when it issued its interim order on July 17, 1990, that the Pine Hill cell site could not be made operational. Kelly reasoned that the Commission was not foreclosing Atlantic's ability to make the Pine Hill site operational by adding an off site control link with Pacific Bell. (Tr. p. 19, l. 23-28.)

Atlantic would have us believe that we somehow knew that Atlantic required a construction site never proposed and that we did not mean what we said when we expressly limited Atlantic to the use of the Pine Hill site exclusive of any other location in El Dorado County. We must reject these arguments. In interpreting the Commission's order to suit its purposes, Atlantic took the risk that it might be proven wrong. We conclude that Atlantic's construction of its microwave facility at Coon Hollow Road in clear violation of Ordering Paragraphs 1 and 2.

It is appropriate that Atlantic be fined the maximum amount provided in Public Utilities Code § 2107. That section provides:

"Any public utility which violates or fails to comply with any provision of the Constitution of this State or of this part, or which fails or neglects to comply with any part or provision of any order, decision, decree, rule, direction, demand or requirement of the commission, in a case in which a penalty has not otherwise been provided, is subject to a penalty of not less than five hundred dollars

<sup>3</sup> Atlantic notified the previously assigned ALJ Barnett by letter on August 7, 1990 of its intent to proceed at Coon Hollow Road but did not file a petition for modification until two months after Drake filed her application for rehearing.

(\$500) nor more than two thousand dollars, or more than (\$2,000) for each offense."

As to Drake's contention that Atlantic unethically deceived the Commission causing it to conclude approve the Pine Hill site, we conclude that the facts in this matter do not warrant a finding to that effect.<sup>4</sup>

In the first place, while it is clear that Atlantic knew early on that the Coon Hollow site might be desirable as a control link, it was not until after the Commission issued D.90-07-061 that Atlantic actually determined to construct it in lieu of the Pine Hill link. Pacific Bell furnished its initial cost estimate and construction schedule for a link with Pine Hill on or about July 11, 1990. Pacific Bell advised Atlantic that the placement of a telephone cable to Pine Hill would cost around \$80,000 and would require several months to complete. (Tr. p. 23, l. 20-23, p. 28, l. 21 to p. 29, l. 3.) Atlantic testified that it finally dismissed the contemplated link at the Pine Hill site only when it learned that the City of Placerville might approve a temporary link at Coon Hollow Road. (Tr. p. 25, l. 10-15.)

Atlantic's remarkably poor judgment in this proceeding causes us concerns. Its conduct ultimately resulted in a violation of our orders in D.90-07-061, but we cannot say with certainty, on the facts shown, that Atlantic made false statements in its

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4 Rule 1 provides:

"Any person who signs a pleading or brief, enters an appearance at a hearing, or transacts business with the Commission, by such act represents that he is authorized to do so and agrees to comply with the laws of this State; to maintain the respect due to the Commission and its Administrative Law Judges; and never to mislead the Commission or its staff by an artifice or false statement of fact or law."

Based on our determination that Atlantic violated the provisions of D.90-07-061, we need not reach the issues raised by Drake as to whether Atlantic also violated GO 159-B Section III D(3)(iv) based on the facts presented. Furthermore, we do not decide the issue of whether the City of Placerville failed to

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provide adequate notice and opportunity to be heard and failed to conduct a proper environmental analysis in the issuance of its temporary use permit because we lack jurisdiction as a tribunal for the judicial review of local government proceedings.

Because we have determined that D.90-07-061 was not issued in error, we need not modify Ordering Paragraph 2 in D.90-07-061. However, we will authorize Atlantic in this decision to continue to use the Coon Hollow microwave facility as it existed on the hearing date of November 2, 1990 pending construction of the authority granted in our decision granting a final CPCN. We grant this authorization because we are convinced that an order for the immediate removal of the Coon Hollow microwave facility could result in at least a temporary curtailment of Atlantic's service in its California Rural Service Area (RSA). Such a move would strand Atlantic's some 200 customers and eliminate access to police and emergency services and would not be in the public interest.<sup>6</sup> We wish to avoid having to deprive the community of cellular telephone service because Atlantic erred.

No substantial evidence has been presented to show that the construction on Coon Hollow Road has resulted in specific harm to any person or property. Since the temporary placement of small equipment or structures is categorically exempt under the California Environmental Quality Act Guidelines § 15304, we need not prepare an environmental impact report or negative declaration in order to allow the temporary use of the facility.

<sup>6</sup> Atlantic's witness testified that Atlantic had handled "thousands" of calls in the first two months of its operation. (Tr. p. 47, l. 12-28.)

Comments on the Proposed Decision

This decision was mailed to the parties on February 28, 1991. Comments were received from Atlantic Cellular on March 19, 1991. Atlantic believes that these findings are correct and the conclusions and orders in this decision are substantiated and warranted.<sup>7</sup>

Findings of Fact

1. In May 1990 the CACD staff determined that an EIR should be prepared for the cellular telephone service proposed in A.89-05-060.

2. On June 15, 1990, Atlantic filed an amendment to A.89-05-060 seeking immediate interim authority to construct a single cellular radio telecommunications facility at Pine Hill, four miles north of Cameron park in El Dorado County. Atlantic did not mention any immediate need for additional microwave facilities in its application.

3. The requested authority was granted on July 17, 1990 in D.90-07-061. The decision specifically ordered Atlantic not to use any other site in El Dorado County for the placement of its antenna and microwave dishes until the construction of an EIR and further order of the Commission.

4. Sometime in May or June of 1990, Atlantic became aware that linkage with Pacific Bell at the Pine Hill cell site was not the most economical method of linking its Pine Hill cellular antenna facility with its mobile telephone switch in Placerville.

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<sup>7</sup> Atlantic suggests changes to the text at pages 10-11 to remove our commentary on Atlantic's conduct in this proceeding. Our comments are appropriate in light of the facts.

5. On June 13, 1990 Atlantic applied for authority from the FCC to construct a microwave facility on Coon Hollow Road, less than one mile southwest of Placerville, a location which was not within the Pine Hill site.

6. In late July 1990 Atlantic learned that a link with Pacific Bell at its Pine Hill site would be expensive and would require several months to install.

7. Atlantic interpreted D.90-07-061 to only prohibit the construction of additional cell sites to implicitly approve the construction of any ancillary facilities which were reasonably necessary.

8. In August 1990, Atlantic obtained a temporary special use permit from the City of Placerville and constructed the temporary microwave facility on Coon Hollow Road.

9. The facility on Coon Hollow Road consists of a single 30-foot wooden telephone pole with a six-foot diameter microwave receiving dish and a small portable equipment shed.

10. Atlantic has over 200 cellular customers and also provides roamer and emergency 911 telephone service in the RSA.

11. Atlantic's service cannot be provided without a control link between its Pine Hill cell site and its MTSO in Placerville.

#### Conclusions of Law

1. Atlantic violated the Commission's express orders in D.90-07-061 prohibiting the placement of microwave dishes at any location other than at the Pine Hill site.

2. Atlantic bore the risk that its interpretation of D.90-07-061 might be erroneous.

3. Atlantic should not be required to cease using the Coon Hollow facility where to do so would result in a termination of service to its customers.

4. Ordering Paragraph 2 in D.90-07-061 should not be modified.

5. Atlantic should be fined as the maximum amount provided in Public Utilities § 2107. Ordering Paragraph 2 in D.90-07-061 should not be modified.

6. Atlantic should be allowed to use the Coon Hollow facility pending construction of the facility authorized by the Commission in D.91-01-035.

7. Temporary authority to continue the use of the Coon Hollow facility is categorically exempt from the environmental impact reporting requirements of the CEQA.

O R D E R

IT IS ORDERED that:

1. Atlantic Cellular Company is authorized to continue its use the temporary microwave facility located 0.35 miles south of the City of Placerville on Coon Hollow Road in El Dorado County until such time as it completes the construction of the Placerville cell site authorized in D.91-01-035

2. Atlantic Cellular Company shall be subject to a fine in the amount of \$2,000 pursuant to Public Utilities Code Section 2107 for its failure to comply with the Commission's orders in D.90-07-061.

3. Unless such fine is paid to the Executive Director within 45 days of the effective date of this order, the General Counsel of this Commission is ordered to bring and prosecute to final judgement an action against Atlantic Cellular Company to recover \$2,000 in the name of the people of the State of California in the Superior Court of El Dorado County.

4. This proceeding is complete and the matter is closed.

This order becomes effective 30 days from today.

Dated April 24, 1991, at San Francisco, California

PATRICIA M. ECKERT

President

G. MITCHELL WILK

JOHN B. OHANIAN

DANIEL Wm. FESSLER

NORMAN D. SHUMWAY

Commissioners

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

NEAL J. SHUMWAY, Executive Director