

Decision 91-05-026 May 8, 1991

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application of)
Kings Telephone Company, a 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 New Domestic Public)
Cellular Radio Telecommunications)
System in the Kings County Rural)
Service Area.)

ORIGINAL

Application 91-02-087
(Filed February 19, 1991)

INTERIM OPINION

Kings Telephone Company (applicant) seeks a certificate of public convenience and necessity (CPCN) under Public Utilities (PU) Code § 1001 to construct and operate a new domestic public cellular radiotelephone system serving the Kings County Rural Service Area (RSA), also known as the California 12 RSA, encompassing all parts of Kings County.

Applicant is a Georgia corporation in good standing and duly qualified to conduct business in California as a foreign corporation. A certified copy of applicant's articles of incorporation and a copy of its certificate of qualification to transact intrastate business in California is attached to the application as Exhibit A. Applicant's principal place of business is in Atlanta, Georgia.

Applicant is the assignee of the construction permit granted to Mobile Teletalk Group, which was selected by the Federal Communications Commission (FCC) as the nonwireline (frequency block A) carrier to provide domestic public cellular radiotelephone service in the Kings County RSA.

Cellular radio telephone service will be provided within applicant's Kings County RSA cellular geographic service area (CGSA) using a combination of fixed and mobile radio and telephone facilities. The CGSA will initially be subdivided into two cells. Communications to or from subscribers' mobile radio equipment in each cell will be carried over frequencies assigned to the cell from or to a base station transmitter/receiver in the cell. The base station or "cell site" will connect via microwave or landline telephone facilities with applicant's mobile telephone switching office (MTSO), which, in turn, will connect with the public switched telephone network (PSTN) as well as all other cells in the CGSA. These interconnections will enable applicant to handle land-to-mobile, mobile-to-land, and mobile-to-mobile calls.

Applicant's proposed cellular system will have four major components:

1. A mobile telephone switching office (MTSO).
2. Cell sites (base station radio equipment).
3. Interconnecting facilities, some of which may be:
 - a. landline telephone facilities leased from Pacific Bell or other local exchange carriers; or
 - b. microwave facilities leased or owned by applicant.
4. Mobile or portable subscriber units.

The MTSO is the central coordinating point for the proposed cellular system. It controls the cellular system and interconnects with the landline telephone network and the cell sites. Applicant's MTSO will be installed by applicant at its cell site location in Lemoore, California.

Each cell site in a cellular system consists of fixed radio equipment. The radio equipment at the cell site interfaces

with mobile and portable units operating within the cell site's geographic area. Applicant will install its base station facilities at each of the two locations shown in Exhibit C to the application. The proposed cell site construction involves the installation of a new tower and a small telecommunications shelter at each location.

In filing the instant application for a CPCN, applicant assumes an in-service date of June 24, 1991, for its cellular radio telephone service. In order to meet the projected in-service date and to protect its FCC authority, applicant alleges that it will be necessary to undertake construction of the MTSO as soon as possible. While much of the system will be prefabricated, substantial lead times are involved. The absolute minimum amount of time required for completion of the system is 90 days. Accordingly, in order to meet its schedule, applicant will be required to commence construction of its cell sites prior to the period of time normally required to process applications. Accordingly, applicant requests that it be granted interim ex parte authority to begin construction of its cell sites immediately upon expiration of the notice period for this application. (Rule 8.1, et seq.) Applicant seeks further authority under PU Code §§ 816-830 and 851 to enter into the financing arrangements described in Exhibit H to the application.

On March 14, 1991, applicant filed, pursuant to Rule 42, a motion seeking an order granting an interim CPCN to commence construction of its proposed cellular radio telephone system prior to the issuance of a final order in this proceeding, but at applicant's risk that a final grant of authority may ultimately be denied or conditioned in such a manner as to prevent applicant from proceeding further with its proposal.

By letter dated March 19, 1991, the Commission Advisory and Compliance Division (CACD) notified applicant that its proponent's environmental assessment (PEA), attached to the

application, was incomplete. Accordingly, CACD could not accept the application as complete for filing under Government Code Section 65943 and California Environmental Quality Act (CEQA) Guideline Section 15101. The letter indicated that the docket for the application would be held open for a period of 60 days to allow the filing of amendments to the application to furnish the information required by CEQA, the CEQA guidelines, and Rule 17.1.

Having been orally advised earlier of CACD's position on the application, applicant had written to CACD on March 18, 1991, proposing that it be allowed to temporarily install the MTSO/cell site, excluding tower, on wooden ties at the Lemoore site. Applicant proposed that, after the Commission issues a certificate, it could excavate and pour the permanent foundation. It also suggested that it would simply forego any construction at the Kettlemen City cell site until the environmental review is complete.

In a follow-up letter dated March 25, 1991, applicant described the proposed temporary installation as follows:

Shelter Description:

Enclosed is a copy of the plan detailing the proposed temporary shelter installation. The plan shows that applicant would install the shelter on 4' long, 4" x 8" ties spaced every 2 feet around the perimeter and along the midsection of the shelter. The shelter is 21'-8" wide x 31' long. The MTSO/base station facilities will be pre-installed in Texas. The total weight would be approximately 150,000 pounds. In order to protect the facilities, it will be necessary to install grounding rods around the perimeter of the shelter. The grounding rods will be 10' long, 3/4" diameter copper and will be connected by copper wiring laid on the surface.

Location Activities:

The shelter, which is in two halves, will be placed by crane onto the ties and then secured together. Once the shelter is installed, work

will be undertaken inside the shelter to prepare the MTSO/cell site for operation. In order to carry out the installation, it will be necessary for vehicles to traverse the field to deliver the ties and grounding rods. In addition, trucks carrying the shelter halves and the crane will have to traverse the field. Unless authorized to drive over the land, workmen will park their trucks along side the field and walk to the site. Once the shelter is installed, work at the site will be conducted inside the shelter.

In further correspondence with CACD dated March 28, 1991, applicant stated, among other things:

"If Kings' telephone company is not permitted to install the MTSO/cell site either on a concrete foundation, or on ties, or on two flatbed trailers (in descending order of preferability), Kings County Telephone Company will lose its construction permit, period."
(Emphasis added.)

Applicant determined after March 28, 1991, that it could not practically install the MTSO/cell site temporarily on two flatbed trailers parked side-by-side. Accordingly, on or about May 1, 1991, applicant filed an amendment to its original motion, requesting:

1. that it be authorized to install and operate temporary cell site facilities at the proposed Lemoore location in accordance with § III D.(3) of General Order (GO) 159 (exemption for temporary facilities);
2. that it be permitted to interconnect such facilities with aerial or buried Pacific Bell T-1 lines extending from the temporary facility; and,
3. that the financing arrangements described in the application be approved.

This amended proposal for an interim CPCN differs from that included in the original motion in the following particulars:

1. Applicant is no longer seeking authority to install its MTSO temporarily at the Lemoore location. Rather, applicant intends to provide service using the temporary cell site facilities by transmitting calls to and from those facilities to the MTSO operated by the McCaw affiliate in the neighboring Fresno MSA for switching and interconnection with the public switched telephone network. Calls to and from the temporary facilities at the Lemoore location would be carried over T-1 lines provided by Pacific Bell.
2. Applicant is no longer seeking a deviation from GO 159 to allow it to install temporary facilities larger than those contemplated by the temporary facilities exemption of GO 159, § III D.(3)(a)(i). Instead, applicant will comply with the terms of that exemption.
3. Applicant seeks approval of the financing arrangements proposed in the application, whereas its original motion did not address financing.

Applicable Regulations

In GO 159, the Commission provided:

"For all issues relating to the siting, design, and construction of cellular facilities which are part of the initial configuration described in an application for a certificate of public convenience and necessity, the Commission will be the lead agency under the California Environmental Quality Act ('CEQA')." (GO 159 (VII) (A).)

Accordingly, the CACD properly assumed that the Commission was the lead agency for the instant application and rejected the application as incomplete after reviewing the materials provided by applicant pursuant to CEQA, the CEQA Guidelines, and Rule 17.1.

The Commission has also provided in GO 159 that "a cellular utility must obtain authorization from the Commission

prior to the construction of cellular facilities." "Construction" for the purposes of GO 159 includes the construction of any new cellular facilities. (Id. (III)(A).)

When a cellular utility intends to construct cellular facilities that are part of its initial system configuration, the cellular utility must file an application seeking authority to construct those facilities in conjunction with its application for certificate of public convenience and necessity filed pursuant to PU Code § 1001, Rule 17.1, and other general rules of practice and procedure. (GO 159 (III)(B).)

Section III (D) provides for certain kinds of activities that are exempt from the general rules stated above. These exemptions are for minor maintenance and repair work, emergency construction, and temporary facilities. The regulations pertaining to the temporary facilities exemption are those pertinent to this order. Those provisions are:

Temporary Facilities

- (a) For the purposes of this General Order, "temporary facilities" are defined as a cellular telephone facility which:
- (i) is no larger than a trailer twenty-eight (28) feet in length, twelve (12) feet in width and twelve (12) feet in height with no appurtenant structures other than a roll-up standby power generator;
 - (ii) contains no more than the following equipment: cell site electronics, two (2) air conditioning units, a fire suppression system, a DC power plant, and a gasoline powered generator that has critical silencing of the exhaust system and the generator itself;
 - (iii) includes no more than six (6) antennae and one (1) microwave dish not exceeding four (4) feet in diameter. Such antennae may be placed on the temporary facilities itself, on an adjacent existing structure, or a portable, extendable, nonpermanent support structure, not exceeding 25

feet in height, provided that the antennae shall not extend more than twelve (12) feet above the topmost portion of the temporary facilities or structure;

- (iv) is not placed on a parcel zoned for residential uses; and
 - (v) is deployed for the purpose of replacing existing damaged or malfunctioning facilities; meeting unanticipated, rapid increases in customer demand; or providing initial service pending the Commission's consideration of an advice letter or application filed pursuant to this General Order. However, the cellular utility must still comply with local permitting requirements, if any.
- (b) A cellular utility which has a CPC&N to serve the area surrounding the proposed temporary facility may deploy such a facility on a temporary basis without additional authorization from this Commission. However, the cellular utility must still comply with local permitting requirements, if any.
- (c) Except when deployed pending the processing of an advice letter or an application for preemptive authority to construct, temporary facilities deployed pursuant to this section may be in place for 120 days in a single location. Within 100 days from the date the temporary facilities were originally deployed, the cellular utility shall send the CACD a letter either confirming that it will remove the temporary facilities and restore the site within the next twenty (20) days or requesting that it be allowed to maintain the temporary facilities in their current location for an additional 120 days. The utility shall provide a copy of this letter to any affected local agencies. The CACD has discretion to grant or deny the utility's request for an extension. If the utility does not receive a letter from the CACD within twenty (20) days from the date of its request granting the extension, the utility's request for extension shall be deemed denied and the utility shall immediately remove the temporary facilities. For the purposes of a temporary facilities, "a single location" is defined as the parcel of property on which it is initially deployed or any other parcel within 200 yards of that parcel. Temporary facilities deployed pending the processing of an advice letter or application pursuant to this General Order may be in place for up to 120 days after the effective date of the Commission's

ruling with regard to such advice letter or application or as otherwise provided in such decision.

Applicant would qualify for the temporary facilities exemption, except that the enclosure containing its MTSO/cell site electronics is too large to fit on a single trailer 28 feet long and 12 feet wide. Applicant's shelter is 21'-8" x 31' and will require two trailers of about the size specified in GO 159 to support it.

Rule 17.1 also provides that certain projects are within the classes of projects which the Secretary for Resources has exempted from the EIR requirements of CEQA. One of the categories of Class III exemptions is: "Stores and offices for utility purposes, if designed for an occupant load of 20 persons or less, if not in conjunction with the building of two or more such structures." (Rule 17.1 (h)(1)(C)(1).)

The CEQA Guidelines also provide for various classes of exempt projects. Section 15303 of the Guidelines pertains to new construction or conversion of small structures. That section states in part:

"Class III consists of construction and location of limited numbers of new, small facilities or structures; installation of small new equipment and facilities in small structures; ... Examples of this exemption include but are not limited to: ... (c) stores, motels, offices, restaurants, and similar small commercial structures not involving the use of significant amounts of hazardous substances, if designed for an occupant load of 30 persons or less, if not constructed in conjunction with the building of two or more such structures..." (14 CCR § 15303 (c).) (Emphasis added.)

The CEQA guidelines also have a Class IV exemption pertaining to minor alterations to land. That exemption provides:

"Class IV consists of minor public or private alterations in the condition of land, water, and/or vegetation which do not involve removal of mature, scenic trees except for forestry and

agricultural purposes. Examples include but are not limited to: ... (e) minor temporary use of land having negligible or no permanent effects on the environment, including carnivals, sales of Christmas trees, etc. (Emphasis added.)

In Decision (D.) 91-02-005, in Application (A.) 90-08-070, we granted interim authority to Cellular 2000 to construct a single temporary cell site and co-located MTSO at a proposed site in Atwater, California, pending completion of the environmental review for all four sites proposed in that application. We granted to Cellular 2000 permission to install a small, removable equipment shelter and two or three cellular radio antennas not extending more than 12 feet above the topmost height of the shelter. Our permission was based on our conclusion that the proposed temporary facility was categorically exempt from the environmental impact report requirements of CEQA under §§ 15303 and 15304(e).

Discussion

It is not necessary to discuss applicant's request for an interim CPCN authorizing it to install and operate temporarily the cell site facilities at the Lemoore location. Applicant will comply with the criteria set forth in GO 159, so its temporary facilities are exempt under § III D.(3).

Similarly, applicant's request for permission to interconnect with Pacific Bell lines is made out of an abundance of caution. It would be an empty exercise to be allowed to place temporary cell site facilities at the Lemoore location only to find that authority to connect them with the public switched telephone network was lacking. Our interim CPCN includes authority to connect the temporary cell site with Pacific Bell lines and to operate the system in the configuration proposed in applicant's motion, as amended.

Applicant proposes to obtain complete financing for its system from Ericsson Radio Systems, Inc. (Ericsson), the equipment

vendor. Ericsson will fund 100% of the direct costs (purchase price, installation costs, sales tax, and subcontractor charges) of the system, including MTSO, cell site equipment, civil works, shelters, towers, transmission equipment, and related equipment, accessories, and software (but not including personal property, such as office equipment, that is not an integral part of a cellular radio system). In addition, Ericsson will provide working capital in an amount sufficient to meet applicant's projected initial operating requirements. The total amount to be financed will be \$2.5 million in the first year and an additional \$0.5 million in the 2nd through the 5th years of operations, for a total of \$3 million.

Interest payable to Ericsson will be at a floating prime rate, plus 2%. In addition, a loan processing fee of \$7,500 may be assessed. As security, applicant will pledge 100% of its assets, except FCC licenses and CPCN. Applicant attaches a copy of the proposed financing agreement to the application.

We will approve applicant's financing arrangements, including the pledge of all system assets.

Applicant should complete its PEA in accordance with the instructions of CACD. After the PEA is submitted and evaluated by our Environmental Branch, the Commission will issue a final order disposing of the application in full.

Findings of Fact

1. Applicant's FCC construction permit will expire before it will be able to operate its cellular system, unless it is able to begin installation and testing of its cell site electronics at the Lemoore site in advance of receiving its CPCN from the Commission.

2. Applicant seeks authority to install the cell site electronics and enclosure temporarily at the Lemoore site, pending full environmental review and a final decision on the application for CPCN.

3. Applicant will install and operate the cell site in accordance with GO 159 criteria for temporary facilities.

4. We recently granted to another applicant authority to install similar temporary cellular facilities. (Cellular 2000, D.91-02-005 in A.90-08-070.)

5. Applicant has obtained all local permits from Kings County, which also issued a negative declaration.

Conclusions of Law

1. The proposed temporary facilities are categorically exempt from CEQA under Rule 17.1 and the CEQA Guidelines.

2. The motion for authority to install the cell site electronics and enclosure temporarily at the Lemoore site should be granted, subject to the condition that applicant should comply with all provisions of GO 159 (III)(D)(3) Temporary Facilities.

3. An interim CPCN should be granted, limited to the temporary facilities described above.

4. Construction of any additional cell sites, pursuant to this application, is subject to further order of the Commission in this docket.

5. Construction of additional cell sites in as yet undetermined locations is subject to GO 159, issued March 28, 1990, by D.90-03-080 in R.90-01-012.

6. Applicant is subject to a three-tenths of one percent (0.3%) monthly surcharge to fund Telecommunications Devices for the Deaf, pursuant to PU Code § 2881 and Resolution T-13061, dated April 26, 1989.

7. Applicant is subject to the user fee established pursuant to PU Code §§ 431-435.

8. The proposed security issue is for lawful purposes and the money, property, or labor to be obtained by it are required for these purposes. Proceeds from the security issue may not be charged to operating expenses or income.

9. Because there is an immediate need for cellular radio telecommunications service in RSA 12, the following order should be effective immediately.

The State may grant any number of operative rights and may cancel or modify the monopoly feature of those rights at any time.

INTERIM ORDER

IT IS ORDERED that:

1. An interim certificate of public convenience and necessity is granted to Kings Telephone Company to provide cellular radio telecommunications service in RSA 12 and to establish a temporary cell site at its Lemoore site, as described in Findings of Fact 2 and 3, above, subject to the condition set forth in Conclusion of Law 2.

2. Applicant shall not construct or install additional cellular radiotelephone facilities in RSA 12 without further order of the Commission.

3. Within 30 days after this order is effective, applicant shall file a written acceptance of the interim certificate.

4. Applicant is authorized to file, after the effective date of this order in compliance with GO 96-A, tariffs applicable to the service authorized containing rates, charges, and rules applicable to its radiotelephone services. The tariffs shall become effective on not less than 5 days' notice. The rates and charges shall be the same as applicant has proposed in its application with the Commission.

5. Applicant shall file as part of its individual tariff, after the effective date of this order and consistent with Ordering Paragraph 5, an engineered service area map drawn in conformity with FCC Rule 22.504(b)(2), and consistent with Exhibit C to the application.

6. Applicant shall notify the Commission Advisory and Compliance Division (CACD) director in writing of the date service is first rendered to the public as authorized herein, within 5 days after service begins.

7. Corporate Identification No. U-3041-C is assigned to applicant and shall be included in the caption of all original filings with this Commission and in the titles of other pleadings filed in existing cases.

8. Applicant is subject to the user fee as a percentage of gross intrastate revenue pursuant to PU Code §§ 431-435.

9. 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.

10. Within 60 days of the effective date of this order, applicant shall comply with PU Code § 708, Employee Identification Cards, and notify, in writing, the Chief of Telecommunications Branch of the CACD of compliance.

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

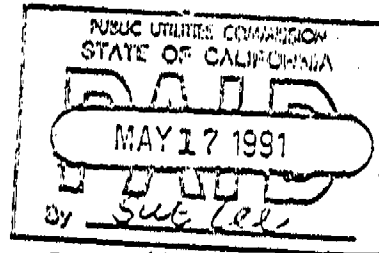
12. Applicant shall comply with all applicable local building permit requirements.

13. On or after the effective date of this order, but before December 31, 1991, for the purposes specified, transferee may issue an evidence of indebtedness in principal not exceeding \$3 million, and may execute and deliver an encumbering document. This document shall be substantially the same as that attached to the application.

14. The authority granted by this order to issue an evidence of indebtedness and to execute and deliver an encumbering document will become effective when the issuer pays \$4,000, set by PU Code § 1904(b). In all other respects this order becomes effective on the date hereof.

Dated May 8, 1991, at San Francisco, California.

PATRICIA M. ECKERT
President
G. MITCHELL WILK
JOHN B. OHANIAN
DANIEL Wm. FESSLER
NORMAN D. SHUMWAY
Commissioners



Rec. # 34601
\$4,000.00

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

Neal J. Schulman
NEAL J. SCHULMAN, Executive Director
PB