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Decision 92-03-050 March 11, 1992

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

MARK C. BORON, JOSIE RAMIREZ,
MARTIN ROBINSON, CLEARWOOD
NEIGHBORHOOD GROUP, CITRUS
HEIGHTS NEIGHBORHOOD GROUP,
and DOES 1 through 100,000,

Complainants,

vs.

CELLULAR ONE (U-3013-C), aka
C-1, aka SACRAMENTO CELLULAR
COMPANY, aka SACRAMENTO
CELLULAR TELEPHONE COMPANY, aka
MCC, aka API, ACC/MCCAW
CELLULAR OF SACTO, INC., aka
DOES 1 through 100,

Defendant.

ORIGINAL

Case 90-02-020
(Filed February 6, 1990)

Josie Ramirez and Curt A. Serrano, for
Citrus Heights Neighborhood Group and
other complainants.
Marc P. Fairman and Suzanne Toller,
Attorneys at Law, for Sacramento
Cellular Telephone Company, defendant.

O P I N I O N

Preliminary Matters

As originally filed, this complaint concerned cellular radiotelephone cell sites constructed by Sacramento Cellular Telephone Company (SCTC) in August 1989 at Citrus Heights and North Highlands in Sacramento County.

On October 1, 1990, prior to hearings in this case, SCTC reached a settlement with Mark C. Boron, Martin Robinson, and the Clearwood Neighborhood Group with regard to the North Highlands cell site. Pursuant to that settlement agreement, SCTC agreed to

relocate the North Highlands cell site, and Boron and Robinson agreed to withdraw the testimony they had submitted.

Accordingly, the instant proceeding is limited to issues relating to the Citrus Heights cell site, and Josie Ramirez and the Citrus Heights Neighborhood Group are the only remaining complainants.

Further, SCTC argues that it should be the only defendant in this proceeding, since it is the only utility named as a defendant, and it can provide all the relief requested from the other named defendants. SCTC asserts that the Commission's jurisdiction to hear complaints under Public Utilities (PU) Code § 1702 is limited to those concerning acts done or omitted to be done by public utilities (TURN v. PT&T Co., 83 Cal. PUC 318).

We agree. The only defendant in this proceeding should be SCTC, and this complaint should be dismissed as to all other named defendants.

The Citrus Heights Cell Site

A cell site is a facility that is equipped with radios and antennae to carry the telephone conversations of cellular subscribers speaking on mobile telephones in the surrounding area or cell.

The Citrus Heights cell site is located behind Larry's Saw and Mower, Inc., a business at 7238 Auburn Boulevard. It is on a 0.4-acre parcel which is zoned for residential use (RD-5). It is within SCTC's certificated service area in Sacramento County.

The cell site has a 105-foot high steel tower. It is a self-supporting tapered steel monopole with several antennae and a microwave dish side mounted near the top end. At the base of the tower is a 12-foot high concrete building which houses electronic equipment. The tower and building are in a 50-foot by 50-foot area enclosed by a 6-foot high chain-link fence. Redwood slats in the chain-link fence screen the enclosed area, except for the upper section of the tower.

The site is bordered by commercial land uses to the west and south, and by a garden and horse paddock to the north and east. Further to the west, across Auburn Boulevard, are a school and cemetery. To the north of the site are more commercial land uses; to the northeast and east are residences; and to the south is a lumber yard.

The site and surrounding area is developed with commercial and residential uses. One existing guyed lattice-type communication tower of approximately 60 to 75 feet in height is located directly north of the cell site on the roof of an approximately 15-foot tall commercial building fronting Auburn Boulevard. This facility is not currently operated by the property owner but was used by the previous owner to provide two-way radio communication between service trucks. However, the monopole tower for the cell site is taller and has a greater mass than the nearby lattice type communication tower and the existing wooden poles for electric and telephone utility lines along Auburn Boulevard.

Most affected by the visual impact of the tower are the immediately surrounding residents to the northeast and east. However, the long range view of the tower from Auburn Boulevard does not appear out of character with the already existing lattice-type communication tower, and wooden poles supporting overhead electric and telephone utility lines.

Position of Complainants

Complainants request that the Commission order SCTC to:

- (1) move the Citrus Heights cell site to another location and
- (2) require SCTC to apply to the County for a permit for a new cell site.

Complainants allege that SCTC misused and took unfair advantage of the permission given them by the Commission when it issued SCTC a certificate of public convenience and necessity (CPC&N) in Decision (D.) 87-10-037. They also allege that in

constructing the Citrus Heights cell site, SCTC ignored the California Environmental Quality Act (CEQA).

Complainants argue that the CPC&N issued by the Commission was for seven named cell sites, with the possible addition of three more named cell sites (D.87-10-037, p. 6). Since the Citrus Heights cell site is not mentioned in the CPC&N decision, complainants contend that it is an "expansion antenna site" because the Commission considered the system complete with the 10 named sites. Since the Citrus Heights site is an expansion site not named in the CPC&N decision, environmental review and approval from the Commission's Evaluation and Compliance Division is required prior to construction, in accordance with Ordering Paragraph 10 of the decision.

Complainants contend that SCTC did not comply with Ordering Paragraph 10. According to complainants, if SCTC had filed the required environmental information, the Commission could have prohibited the construction of the Citrus Heights cell site.

Position of County of Sacramento

The County of Sacramento (County), in its Amicus Curiae Brief, requests that the Commission order SCTC to obtain a conditional use permit from the County for the Citrus Heights cell site. The County suggests that the Commission retain jurisdiction over this proceeding and enter an interim order directing SCTC to apply for and prosecute a conditional use permit from the County. If the County grants SCTC a conditional use permit for the subject cell site, the problem almost resolves itself. If the County denies the conditional use permit, the Commission may then determine if it is necessary to preempt the County's permitting process.

The County contends that the Citrus Heights tower is an illegal nonconforming use, even though County personnel signed off on the building permit because they mistakenly believed that the CPC&N issued to SCTC preempted the local permitting process, and

since the CPC&N issued by the Commission authorizing the tower does not regulate its site location, the County argues that SCTC is not legally entitled to use the tower for transmission without first obtaining a conditional use permit. The County points out that Section 301-13 of the County's Zoning Code requires a conditional use permit as a condition precedent to the establishment of "a public utility or public service use, including communication equipment building." Therefore, the County believes that use of the tower at 7230 Auburn Boulevard constitutes a public utility use for which such a local permit is required.

Position of SCTC

SCTC's position is that it is in compliance with all regulatory requirements in effect at the time the Citrus Heights tower was constructed, including Ordering Paragraph 10 of its CPC&N decision which requires SCTC to "file additional environmental information with the Evaluation and Compliance Division for all future expansion antenna sites prior to the construction of such antennas." (D.87-10-037, p. 20, emphasis added.)

According to SCTC, the Citrus heights tower was constructed "to increase capacity" and to meet demand within SCTC's existing service area in the Citrus Heights area of Sacramento County and along highways Interstate 80 and Business 80. This site also served to relieve congestion experienced by SCTC's adjacent cell sites, especially the Carmichael and U.S. Highway 50 sites, which were close to capacity. SCTC contends that the Citrus Heights cell site did not "expand" SCTC's coverage area from that approved by the Commission in D.87-10-037.

SCTC states that prior to commencing construction, SCTC applied for and received all permits required by the County and the Federal Aviation Administration (FAA) for the construction of the cell sites. SCTC witness Counce, in his prepared testimony, defines the terms "fill-in" or "in-fill" cell site as a cell site constructed to meet increased customer demand, or to fill in

coverage holes within the existing service area. In contrast, an "expansion" site is a cell site constructed to expand the coverage area of the system.

As evidence that the Citrus Heights cell site is not an expansion site and is within its certificated service area, SCTC submitted a copy of its Form 489 for the Citrus Heights and North Highlands cell sites filed with the FCC on September 8, 1989. Consistent with SCTC's description of these cell sites to the Commission in its CPC&N application, in its FCC Form 489, SCTC states that "the 39dbu contours of the North Highlands and Citrus Heights Cell Site remain entirely within Sacramento Cellular's currently authorized CGSA [Cellular Geographic Service Area]."¹

SCTC argues that CEQA would have applied to the construction of the Citrus Heights cell site only if SCTC were required to obtain the Commission's approval of the construction of this site in the form of a license, permit, or certificate and if the Commission's approval were discretionary.

Also, SCTC points out that under PU Code § 1001, a utility does not need to obtain any Commission authorization "for an extension [of its facilities] within any city or city and county within which it has theretofore lawfully commenced operations." Thus, the construction of post-CPC&N cell sites does not constitute a "project" and is therefore exempt from CEQA. SCTC contends that this conclusion is strongly supported by Commission precedent and was explicitly confirmed in the order instituting the cell site rulemaking: "Because the Commission does not issue a permit for these expansion and in-fill [cell] sites, CEQA is not invoked and an environmental review is not performed." (Rulemaking 90-01-012, mimeo. at 3.)

¹ Cellular Geographic Service Area, which is the same as the CPC&N certificated service area.

SCTC argues that the Commission should reject the County's request for authority to issue a conditional use permit for several reasons. First, according to SCTC, the County's Amicus Brief is unconscionably tardy and procedurally improper. Second, the Commission clearly has jurisdiction over the construction of all cell sites, including the Citrus Heights cell site, and has preempted the County's jurisdiction over the cell site. Third, the County is estopped from requiring SCTC to obtain a conditional use permit since the site was constructed pursuant to a building permit issued by the County, and SCTC's rights in the cell site have long since vested. Finally, there are no practical advantages to requiring SCTC to undergo a conditional use permit process at this late date.

Discussion

The bases for challenge to the SCTC tower which are currently before the Commission in this complaint can be summarized as follows: 1) SCTC's construction of the tower violated Ordering Paragraph 10 of the CPC&N decision because SCTC failed to provide environmental information prior to the tower's construction; 2) SCTC's Citrus Heights tower is not reasonable or appropriate environmentally; 3) SCTC should have applied and still should apply to the County for a conditional use permit for the tower; and 4) SCTC's construction of the tower without an environmental review violated CEQA.

Ordering Paragraph 10 of SCTC's CPC&N decision provides as follows:

"Applicant shall file additional environmental information with the Evaluation and Compliance Division for all future expansion antenna sites prior to the construction of such antennas. Determination will be made at that time whether any supplemental environmental documentation is required in accordance with the provisions of the California Environmental Quality Act."
(D.87-10-037, p. 20, emphasis added.)

Based on the record before us, we conclude that the Citrus Heights cell site is an "expansion antenna site" as that term is used in D.87-10-037. We find that SCTC's failure to submit supplemental environmental information to the Commission prior to construction of the tower violated the Commission's order.

The term "expansion" is not expressly defined in Ordering Paragraph 10. The complainant argues that the term applies to any cell site which is constructed to expand the area or capacity of the system. The defendant argues that the term applies only to those sites constructed for the purpose of expanding the system outside of the authorized service area.

The text of D.87-10-037 uses the term "expand" to refer to both expansion of capacity and expansion of area:

"Applicant asserts that seven cells will be initially required to cover the Sacramento MSA adequately. The system was designed to handle expansion to accommodate more than 30,000 subscribers through use of radios, sectorization and cell splitting. Future cell sites are planned in the Tahoe National Forest area near Colfax, Emigrant Gap and Mt. Pluto."

"A total of seven cell sites and three areas for location of future cell sites have been identified. The expansion area is in the Tahoe National Forest and will be subject to Federal Environmental requirements and prior approval by the FCC." (D.87-10-037, p. 15.)

As illustrated by the foregoing passages, D.87-10-037 refers both to expansion of the system to accommodate increased capacity and expansion of the area of the system. The term "expansion" is not limited to the area of the system as SCTC urges.

SCTC attempts to distinguish between "expansion" sites and "in-fill" sites. However, this is not a distinction which is recognized in D.87-10-037. We find no basis in law or reason for concluding that the Commission intended to require environmental information only for those sites which expand the service area and

not for those sites which may expand capacity. The potential environmental effects of a proposed cell site will be the same, regardless of the purpose for which the tower is constructed. The environmental impacts of an in-fill site are just as important as the impacts of the initial seven sites. Furthermore, environmental information for a future site within the initial area of coverage is just as necessary as environmental information on a site outside of that area.

Based on the information before us and the plain language of Ordering Paragraph 10 of D.87-10-037 SCTC should have realized that it needed to submit environmental information prior to constructing the Citrus Heights site. Complainants have identified a clear violation of the Commission's Ordering Paragraph.

The Commission has held that utility conduct which results in unreasonable environmental damage is a proper basis for a complaint before the commission pursuant to PU Code §§ 705, 762, and 762.5. (H. B. Ranches (1983) 11 Cal PUC 2d 400, 406.) Complainants' arguments primarily concern the tower's visual impacts and the potential health effects from the electromagnetic fields (EMFs) the tower may emit. Based on the record before us, we find that the presence of the tower at the Citrus Heights site is not unreasonable environmentally.

With respect to the possible health effects from EMFs, both complainants' and SCTC's experts concur that the electromagnetic radiation at the tower is well within accepted safety standards. At present the scientific community has not reached consensus on the nature of any health impacts from contact with EMFs or by radiation from cellular facilities. The Commission is currently studying the issue. (I.91-01-012.) In the meantime, we are not persuaded that there is sufficient evidence based on the record of this proceeding to require removal of the Citrus Heights tower to another location because of possible health effects.

The visual impact of the tower, though somewhat objectionable from the short-range view, is not uncommon for cellular towers. The presence of cellular sites at some locations is inevitable, since both the Commission and the Federal Communications Commission (FCC) have determined that cellular service is in the public interest. SCTC has presented evidence demonstrating that it attempted to locate non-residential sites but was unsuccessful. Therefore, we find that the location of the tower is not unreasonable environmentally.

To the extent, however, that any of the visual impact of the facilities can be mitigated without relocating the tower it is reasonable to order such mitigation. The environmental assessment submitted by SCTC, and SCTC's testimony indicate that there are a number of measures which are feasible and which may mitigate the visual impact of the tower. Under our authority pursuant to PU Code §§ 762 and 762.5, we will require SCTC to implement each of the visual impact mitigation measures identified in SCTC's preliminary environmental assessment (PEA), and in SCTC's previous offers to the Citrus Heights residents.

The next issue concerns whether a County conditional use permit was or should be required for the Citrus Heights site. We find that SCTC violated no law in proceeding to build the tower without a conditional use permit, and that the County's request to review the site occurs too late in the process to be considered.

SCTC constructed the Citrus Heights tower in August 1989. At that time the Commission's only requirement concerning the expansion (or in-fill) site was that SCTC provide the supplemental environmental information. However, the Commission also largely preempted local jurisdictions from regulating cellular projects and no procedure had been developed for resolving conflicts with local governments. (See R.90-01-012, at 2.) This left a regulatory loophole in which SCTC constructed its Citrus Heights tower. Given the Commission's preemptive stance, the ambiguities which existed

at the time, and the fact that the County did not assert conditional use authority, we cannot find that SCTC was required to obtain a conditional use permit from the County before constructing the Citrus Heights site.

Although it may have been desirable for SCTC to go through the County's review procedure at the outset, as we have since provided in General Order 159, we decline to require that at this time. We cannot grant the County's request for this authority when the County declined to assert jurisdiction before the tower was built, even to the extent of encouraging the utility to voluntarily comply with local requirements. In fact, the County did not intervene in the proceeding until the complaint had been pending for over a year. We can see no constructive purpose in sending this controversy back to the County after the Commission has evaluated the complainants' contentions in resolving this complaint.

Finally, we turn to the issue of whether SCTC's construction of the tower without an environmental review violated CEQA. We hold that CEQA did not require that the Citrus Heights tower be subjected to the CEQA environmental review process.

Privately sponsored projects, such as the instant tower, are only subject to CEQA if they are to be "approved by public agencies." (Pub. Resources Code § 21080 subd. (a).) The agency approval must also be discretionary. (Ibid.)

As mentioned earlier, the Citrus Heights cell site was not subject to any discretionary public agency approval. SCTC correctly notes that the tower did not have to be approved by the Commission since it constituted an "extension" of SCTC's facilities which does not require Commission approval under PU Code § 1001. Furthermore, the county did not have discretionary approval authority over the tower due to the Commission's preemption of local jurisdictions on utility projects. Although, the Commission has since taken steps to rectify this loophole, at the time of

construction of the Citrus Heights tower there were no CEQA obligations because no public agency had discretionary approval authority over the cellular tower.

In summary, based on the record before us we find that SCTC violated its CPC&N decision by failing to provide environmental documentation on the Citrus Heights tower before it was built.

However, SCTC can implement visual mitigation and thereby avoid unreasonable environmental harm. Therefore, we will require SCTC to carry out the mitigation measures it has identified as feasible and which are identified in the PEA.

Findings of Fact

1. Because of a settlement of issues related to a cellular communications tower at North Highlands, this case is limited to the issues surrounding the construction of a cellular communications tower at Citrus Heights in Sacramento County.

2. SCTC is the only utility named as a defendant, and SCTC can provide all the requested relief.

3. The Citrus Heights tower was constructed in August 1989. SCTC did not submit any supplemental environmental information to the Commission prior to the construction of cellular communications towers at Citrus Heights.

4. SCTC did not obtain a conditional use permit from Sacramento County prior to construction of the Citrus Heights site.

5. Sacramento County did not assert discretionary approval authority over the Citrus Heights site before the Citrus Heights tower was constructed.

6. The Citrus Heights cell site was constructed to relieve other overburdened cell sites adjacent to that area. By locating a new cell site at Citrus Heights, SCTC was able to expand its capacity to serve additional customers within its service area and to prevent degradation of service throughout its cellular network.

Conclusions of Law

1. The words "all future expansion antenna sites" in Ordering Paragraph 10 of D.87-10-037 apply to all future antenna sites intended to expand, or facilitate the expansion of, the capacity or area of the system.

2. SCTC violated Ordering Paragraph 10 of D.87-10-037 by failing to submit environmental documentation to the Commission before the Citrus Heights site was constructed.

3. If the visual impacts of the tower are mitigated to the extent feasible, the Citrus Heights cell site does not cause unreasonable environmental harm.

4. SCTC's construction of the Citrus Heights cell site without an environmental review did not violate the CEQA.

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ORDER

IT IS ORDERED that within 30 days of the effective date of this order Sacramento Cellular Telephone Company shall submit its specific mitigation plan. To the extent feasible, SCTC's plan shall implement each of the visual impact mitigation measures identified in SCTC's preliminary environmental assessment (PEA), and in SCTC's previous offers to the Citrus Heights residents. SCTC shall serve complainants with a copy of this compliance filing. Within 20 days of receipt of SCTC's plan complainants may submit written comments to the Commission's Advisory and Compliance Division (CACD). CACD shall review the plan and any comments to

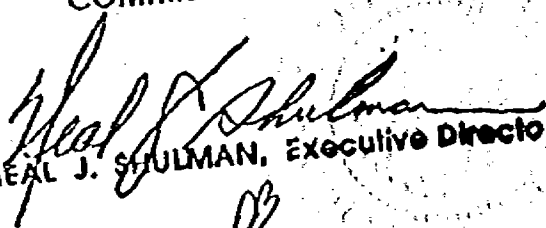
the plan and approve or modify SCTC's mitigation plan within 45 days of receipt of SCTC's submission.

This order is effective today.

Dated March 11, 1992, at San Francisco, California.

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

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


NEAL J. SHULMAN, Executive Director