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Decision 92-03-059 March 20, 1992

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)

FINAL OPINION

Summary

In this decision we grant a certificate of public convenience and necessity (CPCN) to applicant authorizing it to construct permanent cellular radiotelephone facilities at two locations in Kings County, which will provide cellular service in the Kings County Rural Service Area. We also issue the Mitigated Negative Declaration and Initial Study, heretofore circulated in draft form, with one modification. This matter is not protested.

Procedural Background

Kings Telephone Company (applicant) seeks a 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.

On May 8, 1991, in Decision (D.) 91-05-026, the Commission granted an interim CPCN authorizing applicant to construct a mobile telephone switching office (MTSO) and cell site (or base station) radio equipment temporarily on property owned by applicant near Lemoore. This authority was granted pending the

completion of an initial study by the Environmental and Energy Advisory Branch of the Commission Advisory and Compliance Division (CACD) of the environmental effects of the proposed permanent facilities. D.91-05-026 also authorized applicant to borrow funds from the vendor of its cellular radio equipment in order to fund the purchase and initial operations of the system.

On July 24, 1991, the Commission issued D.91-07-038, its second interim opinion, which corrected minor errors in the earlier decision, pertaining to applicant's proposed financing.

Discussion

On October 2, 1991, the Environmental Branch, through its contractor EIP Associates, issued a Mitigated Negative Declaration and Initial Study pertaining to the applicant's proposed cellular telephone system. The Mitigated Negative Declaration includes several conditions applicable to both cell sites: the Kettleman City site and the Lemoore site. These conditions variously pertain to the period before construction, during construction, and during operation. Condition 1.A.5. states: "The applicant shall install free-standing antenna towers rather than towers supported by guy wires." In comments filed November 1, 1991, applicant opposed the stand-alone tower condition stating that it would increase its cost by at least \$200,000 or over 10% of the initial cost of the entire system. It argues that there does not appear to be any substantial evidence supporting the decision to require installation of stand-alone towers in this particular instance. It asks that the Commission issue a negative declaration that does not require the installation of stand-alone towers.

After the issuance of the Mitigated Negative Declaration in October 1991, applicant met with CACD to discuss the stand-alone tower condition. Applicant also wrote to CACD expressing the same concerns. These meetings and letters concluded in a letter to the Administrative Law Judge (ALJ) dated January 3, 1992, in which applicant stated its final position, as follows:

"...the staff has clearly made a sincere effort to examine the issues objectively, and to formulate its recommendations in accordance with its view of the requirements of CEQA [California Environmental Quality Act].

"Nevertheless, we believe that the staff's recommendation is inappropriate. We do not disagree with the staff's conclusion that guyed towers present the potential for raptor deaths; however, it is our opinion that there is just no substantial evidence of record to support the proposition that the installation of two new guyed towers in Kings County could have a significant effect on the environment either on an incremental or a cumulative basis. While the staff believes there is sufficient controversy among the experts on this question to require an EIR [environmental impact report], we have not seen any evidence that the experts who have purported to foresee significant impacts have actually based their opinions on any consideration other than pure speculation. Accordingly, we continue to believe the requirement to construct stand-alone towers is unnecessary.

"Notwithstanding this view, Kings Telephone Company cannot afford the significant delays, costs, and risks that would attend completion of an EIR. Therefore, if the Commission concludes on the basis of the substantial evidence before it that a negative declaration must be conditioned on construction of stand-alone towers rather than guyed towers, Kings Telephone Company will accept a final certificate requiring such construction rather than request an EIR."

The issue before the Commission is whether there is "substantial evidence" that the installation of guyed towers may have a "significant effect on the environment." (Public Resources (PR) Code § 21080(c).) If so, the Commission must prepare an EIR, unless applicant is willing to obviate the need for further study by agreeing to construct stand-alone towers. However, if there is

no such evidence, the Commission must issue a negative declaration. (Ibid.)

A significant effect is defined in the CEQA guidelines as "a substantial, or a potentially substantial, adverse change in any of the physical conditions within the area affected by the project including land, air, water, minerals, flora, fauna, ambient noise, and objects of historical or aesthetic significance." (14 CCR § 15382.) In the context of CEQA:

"[S]ubstantial evidence is 'enough relevant information and reasonable inferences from this information that a fair argument can be made to support a conclusion, even though other conclusions might also be reached. Whether a fair argument can be made is to be determined by examining the entire record. Mere uncorroborated opinion or rumor does not constitute substantial evidence.' [Citations]." (Schaefer Land Trust v. San Jose City Council (1989) 215 Cal.App.3d 612, 621, fn. 6.)

Applicant argues that there is no substantial evidence supporting the proposition that construction of guyed towers at the proposed locations presents the potential for significant environmental effects. Applicant cites certain passages from the Mitigated Negative Declaration to support its assertion that there is no substantial evidence supporting the stand-alone tower condition. A review of the Mitigated Negative Declaration supports its assertions. Beginning on page 22, the Mitigated Negative Declaration discusses the biological resources of the two proposed cell sites. Regarding the Lemoore site, the Mitigated Negative Declaration recites:

"Little wildlife was seen during the June survey, but birds and mammals typical of the San Joaquin Valley floor were reported from the March survey. Neither survey reported the presence of any raptor species, but they are almost certainly found in this area. Raptors are protected by the California Fish and Game Code, and there is a possibility that raptors

may be killed or injured by colliding with the guy wires that support the tower. Raptor kills could result as birds, intently focusing on prey during the hunt, dive and collide with guy wires. The number of raptors killed through collisions with guy wires is unknown, and it is difficult to determine potential losses. Free-standing towers are preferred over guyed towers, but in the absence of documentation, it is not possible to estimate how much free-standing towers could reduce raptor losses."

The foregoing paragraph is noteworthy for the absence of any substantial evidence and for the speculative nature of the conclusions. In addition, on page 24 the Mitigated Negative Declaration asserts that: "Several sensitive animal species have the potential for occurring on the project site...." The burrowing owl is the only bird mentioned amongst the nine sensitive animal species listed. Again, there is an absence of evidence for the occurrence of the species mentioned, leading to the conclusion that their occurrence on the project site is largely speculative. The only hard evidence for the presence of a raptor on one of the project sites is found in the April 1991 survey which noted the presence of one red-tailed hawk. The Mitigated Negative Declaration goes on to speculate that other raptors are also likely to occur in the vicinity.

The final passage of the Mitigated Negative Declaration dealing with raptors occurs on page 27 where the report states:

"Bird deaths due to man-made structures, principally transmission lines and towers, are well documented. Migratory song birds constitute the group suffering the highest mortality rate, but migrating waterfowl also suffer a number of deaths, especially when towers and lines are built in or near flyways. Raptor deaths are known to occur, but in smaller numbers and with less documentation. Although bird deaths are known to occur from tower guy wires, there is little documentation concerning the extent and significance of this cause of bird mortality. Even less is known about the effect of guy wires on California

bird populations or on the species killed by guy wires.

"Free-standing towers, because they are larger and have no thin guy wires, are often suggested as a design that lessens the impact on bird populations. As a condition of approval, the applicant would be required to change from guyed towers to free-standing towers."

Again, while the Mitigated Negative Declaration is forthright about the lack of documentation concerning the relationship between raptor death and guy wires, it nevertheless concludes without substantial evidence that free-standing towers should be a condition of approval.

Applicant asserts, based on the foregoing passages from the Mitigated Negative Declaration, that even assuming that guy wire collisions could have a significant effect on some bird populations in some areas, which it does not deny, there is no substantial evidence to support the view that any such collisions resulting from the installation of the guyed towers in Kettleman City and Lemoore would ever possibly be significant, within the meaning of CEQA. There is no indication that the towers will be located within the paths of migrating birds of any species, nor will they be located near any wetlands known to attract significant bird populations. Moreover, there is no evidence of any rare or endangered birds, as defined by 14 CCR § 1670.5, living in the vicinity of the proposed towers. Thus, while it may be conceivable or possible that collisions with the guy wires may occur, it is not conceivable, based on any information contained in the initial study, that such collisions could possibly have a significant effect on any species, within the meaning of CEQA.

Applicant submits that no fair argument can be made that the installation of guyed towers poses any threat of significant adverse environmental impacts. The mere existence of general controversy, if any, over the potential adverse impacts of guyed

towers is not grounds for requiring an EIR in a specific case when there is no substantial evidence such impacts could arise in that case. Applicant cites in support of its argument the following holding:

"We reject the inference that the existence of factual controversy, uncertainty, conflicting assertions, argument, or public controversy can of themselves nullify the adoption of a negative declaration and require the preparation of EIR when there is no substantial evidence in the record that the project as designed and approved will fall within the requirements of [CEQA]." (Running Fence Corp. v. Superior Court (1975) 51 Cal.App.3d 400, 424; cited with approval, Friends of "B" Street v. City of Hayward (1980) 106 Cal.App.3d 988, 1002.)

In ruling on the stand-alone tower condition proposed in the Mitigated Negative Declaration, we have also considered the Draft Mitigated Negative Declaration and Initial Study prepared in Application (A.) 90-07-039 (Cal-One Cellular L.P.) for a certificate to construct a domestic public cellular radiotelecommunications system. The facilities proposed in A.90-07-039 also involved guyed towers. It is noteworthy that the Mitigated Negative Declaration in this case adopts verbatim language on raptor deaths identical to that contained in the Mitigated Negative Declaration in A.90-07-039. Yet, in A.90-07-039 such language led only to a condition that the applicant should study the incidence of bird mortality due to guy lines. The Mitigated Negative Declaration in A.90-07-039 stated:

"It would, therefore, be useful to have data on bird kills due to guy lines in California, and to be able to use this information to formulate mitigation measures that would lessen the impact of these structures on bird populations.

"Several techniques are known that result in lower numbers of bird kills, including:  
building unguyed, stand-alone towers;  
increasing the diameter of guy wires; using

flashing, white (ice-blue) lights rather than steady lights. These methods, unfortunately, also increase the visibility of towers and lines to humans, and often result in a conflict with community desires for less obvious structures.

"Given the neighboring communities' sensitivity to the visual impacts which would be created by the McKinley Hill Tower...none of the above mitigations are recommended for this tower. Instead, it is suggested that a monitoring program be put in place at this site in order to gather data regarding the extent and significance of bird kills as a result of this tower. A monitoring program should collect data on the species using the site and the number of dead individuals of each species found during the monitoring period. This data will be invaluable in the effort to establish the extent of avian mortality and to create effective mitigation measures for future towers." (Pages 26-27.)

The study recommended in A.90-07-039, and ordered in D.91-02-004, is not yet available and, therefore, did not underlie the recommendation in the instant case for stand-alone towers as a mitigation measure. In fact, there does not appear to be any more evidence implicating guyed towers as a cause of raptor deaths in this case than there was in A.90-07-039, where the Commission approved the guyed towers.

Based on the foregoing analysis, we will approve the Draft Mitigated Negative Declaration and Initial Study, provided that the condition requiring the construction of stand-alone towers, instead of guyed towers, should be stricken. We will also



amend the text of the Draft Mitigated Declaration to delete the conclusions that support the stand-alone tower condition.<sup>1</sup>

Findings of Fact

1. Applicant seeks a CPCN, pursuant to PU Code § 1001, to construct a cellular radiotelephone system in Kings County, consisting of two cell sites, one at Lemoore and the other at Kettleman City. The MTSO will be placed on one of the cell sites; and each site will contain a structure for housing the electronic equipment and a guyed, monopole antenna tower, as proposed in the application.

2. No protests have been filed, and a public hearing is not necessary.

3. The public convenience and necessity require the construction of the proposed facilities.

4. The Draft Mitigated Negative Declaration and Initial Study published by the Environmental Branch of CACD recommends as a mitigation measure that free-standing, lattice-type towers be required instead of the proposed guyed monopoles.

5. There is not substantial evidence, in the context of CEQA, to support a fair argument that the construction of the proposed guyed monopoles may have a significant effect upon the environment.

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1 The following conclusions should be deleted from the Draft Mitigated Negative Declaration and Initial Study:

"Free-standing towers, because they are larger and have no thin guywires, are often suggested as a design that lessens the impact on bird populations. As a condition of approval, the applicant would be required to change from guyed towers to free-standing towers." (Page 28.) "Since both proposed towers would use guy wires, there is a hazard of raptor kills. CPUC would require redesign of the towers to be free-standing." (Page 58.)

6. The conclusions on page 58 (first two sentences) and on page 28 (first two sentences) of the Draft Mitigated Negative Declaration are not supported by substantial evidence.

Conclusions of Law

1. The Draft Mitigated Negative Declaration and Initial Study should be approved and its findings and conditions of approval should be adopted, except for Condition 1.A.5. and the two supporting conclusions, pertaining to the construction of free-standing towers instead of those proposed in the application.

2. Any future construction of cell sites at locations other than those specified in the application should be subject to the provisions of GO-159-B.

3. The application should be granted.

4. Because of the immediate need for service, the following order should be effective immediately.

FINAL ORDER

IT IS ORDERED that:

1. Kings Telephone Company (applicant) is granted a certificate of public convenience and necessity to construct and operate a new domestic public cellular radiotelephone system to serve the Kings County Rural Service Area and to construct the cellular radiotelephone sites and a mobile telephone switching office, as described in the application and in Decision (D.) 91-05-026 (Interim Opinion).

2. Applicant shall obtain all applicable development permits required by any agency of the city or county having jurisdiction over projects at the locations of the approved cell sites.

3. Applicant shall comply with the conditions of approval, except for Condition 1.A.5., contained in the Mitigated Negative Declaration, which we approve, as amended, and make a part of the record.

4. Applicant shall comply with General Order 159-B before constructing any additional cell sites.

5. Within 30 after the effective date of this order applicant shall file a written acceptance of the certificated granted above.

6. Applicant shall use U-3041-C as its corporate identification number.

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

8. The ordering paragraphs of D.91-05-026 (Interim Decision), as amended by D.91-07-038 (Second Interim Decision), shall continue in effect unless superseded by this decision.

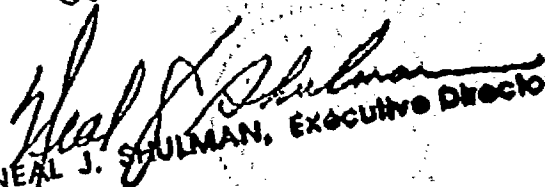
9. This case is closed.

This order is effective today.

Dated March 20, 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  
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