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Decision 92-07-074 July 22, 1992

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of an Application for)
Preemptive Authority to Construct a)
Cellular Facility in the City of)
Mountain View of Bay Area Cellular)
Telephone Company.)

ORIGINAL
Application 91-08-008
(Filed August 5, 1991)

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O P I N I O N

I. Summary

This decision grants Bay Area Cellular Telephone Company's (BACTC or applicant) application for preemptive authority to construct a cellular facility in the City of Mountain View (Mountain View or City), pursuant to General Order (GO) 159. The California Public Utilities Commission (Commission), having assumed the lead agency role in this matter, finds that the proposed facility will not have a significant impact on the environment. The Negative Declaration, prepared in accordance with the California Environmental Quality Act (CEQA), is adopted.

II. Background

The Federal Communications Commission (FCC) has determined that a compatible nationwide cellular system of high quality serves the national interest and directly or indirectly benefits all citizens. Affirming at the state level, the Commission has "found in numerous decisions authorizing the specific cellular systems that construction of cellular systems generally serves the public convenience and necessity."¹ BACTC is an authorized public utility, licensed by the FCC and certificated by the Commission to provide cellular radiotelephone service in the San Francisco/San Jose Metropolitan Statistical Areas as the nonwireline licensee.²

1 GO 159, Decision (D.) 90-03-080, Appendix A at 3 (3/28/90).

2 The FCC licenses a wireline and nonwireline cellular radio franchise in each standard metropolitan statistical area.

On March 28, 1990, the Commission issued GO 159 as a guideline to local jurisdictions and cellular carriers for the approval process of individual cellular mobile radiotelephone facilities (cell sites). The focus of GO 159 is to delegate to local governments the authority to review development of cell sites within their jurisdictions and set reasonable conditions of approval. The order permits local governments and the public the opportunity for review and comment on proposed cell sites within their jurisdiction.

Nevertheless, GO 159 also provides that during the course of local government review a "clear conflict with statewide interests" will trigger a public hearing process. At that time, the cellular carrier may appeal to the Commission a local agency's denial of a cell site or imposition of conditions which render the project infeasible. The Commission will examine the need to preempt local jurisdiction, allowing local agencies and citizens the opportunity to present their positions. The cellular carrier has the burden of proof, and must show that it has attempted in good faith to receive approval of at least two sites and that both sites were denied or de facto denied. The Commission has the final authority as to whether or not a cell site is approved.

A. The Applicant

BACTC declared that its radio engineers have identified a pressing need for a new cellular transmission facility along the Highway 85 corridor between Highway 101 and Highway 280. BACTC states that this area is currently receiving poor coverage from existing cellular transmission facilities. Consequently, its customers using their cellular telephones in that area are experiencing poor transmission quality and calls in progress

disconnected by the system because of a momentary loss in radio signal.³

To improve service quality in the affected area, BACTC's engineers identified a "target area" representing the best geographic location in which to place a new cellular facility. A cellular mobile radiotelephone system may be made up of dozens of cell sites containing radio receiving and transmitting equipment. The cell sites are placed close to each other and they pass cellular telephone calls to each other in a manner similar to a relay system. Consequently, in order to form an integrated communication network, BACTC contends that each target area is selected after an extensive investigation of topographic characteristics, land use compatibility, frequency analysis, and adjacent cell interconnection.

BACTC maintains that two aspects of the target area identified by its engineers make it difficult to locate an appropriate site for a cellular facility. The target area's search ring spans four jurisdictions: Mountain View, the City of Sunnyvale (Sunnyvale), the City of Los Altos, and the County of Santa Clara. In addition, within the area is a very high proportion of densely-populated residential areas.

B. Statement of the Facts

BACTC submitted an application to Mountain View's Planning and Community Development Department (Planning Department) for authority to build a 100-foot monopole and a 317-square foot accessory equipment shelter at a school district site (Bryant Avenue site) near Highway 85 in mid-April 1990. Pursuant to CEQA, the agency issued an Initial Study soon after, concluding that a Negative Declaration be proposed. After agency review and a public

3 This is characterized as a "dropped call."

hearing, the city's Zoning Administrator denied the application two months later.

In November 1990, BACTC advised the Zoning Administrator that in response to community concerns it was preparing to submit an application for a smaller facility at the same site. It convened a meeting early the next month inviting the community and the staff of the Planning Department to further address concerns. Immediately after, BACTC resubmitted the application proposing a 60-foot facility. In March 1991, the Zoning Administrator denied BACTC's application for the 60-foot proposed facility.

In late March, BACTC appealed the Administrator's second denial to the Mountain View City Council. The applicant requested a continuance until late May 1991 in order to coordinate scheduling between itself and the City and to fully prepare its appeal. Included in BACTC's appeal package was "an explanation of the criteria...used to evaluate 22 potential sites within the designated target area and a detailed evaluation of each alternate site." (Exhibit 13 to Application for Preemptive Authority of Bay Area Cellular Telephone Company (Application), Tab A.)

In early May 1991, BACTC applied for a Special Development Permit for an alternate site in Sunnyvale. On June 12, 1991, Sunnyvale's Director of Community Development held a public administrative hearing. The staff recommended that the proposed Sunnyvale site be denied on the grounds of incompatibility "with the character of the Zoning District" and as being "materially detrimental...or injurious to the property improvements or uses...." (Exhibit 4 to Application, Tab V at 5.) At this hearing, BACTC's application for the proposed Sunnyvale site was denied.

On July 9, 1991, the Mountain View City Council denied BACTC's appeal of the Zoning Administrator's ruling on its application for the 60-foot facility. In addition, the City Council upheld the Administrator's findings and decision with respect to the permits required for the project.

C. Procedural History

On August 5, 1991, BACTC filed with the Commission an application for preemptive authority to construct a cellular facility in Mountain View. The City of Mountain View, Mr. and Mrs. Byron Owens, Susan Holm (Holn), and Michael and Maureen Aronson filed protests requesting evidentiary hearings. The assigned Administrative Law Judge (ALJ) convened a prehearing conference (PHC) on September 26, 1991.

At the PHC, the ALJ held that in light of BACTC's submission that one or more local agencies have denied its cellular application, the matter was ripe for the Commission's jurisdiction. She determined that evidentiary hearings should be held. The issues to be examined were identified at the PHC as: (1) the definition of the target area; (2) the existence of alternatives to BACTC's proposal, including no project, a redesigned project or a facility on alternative sites; (3) the existence of local zoning restrictions and conditions upon use in given zones and (4) conditions which should be imposed on the construction, design and operation of the facility to mitigate any environmental effects. Evidentiary hearings were held in San Francisco from December 3-5, 1991. The matter was submitted on May 26, 1992.⁴

D. Environmental Analysis

Additionally, at the PHC the ALJ found that the local agency denied the applicant's permit applications without issuing a Negative Declaration or an Environmental Impact Report (EIR). Pursuant to GO 159, she determined that the Commission is designated the Lead Agency under CEQA. On October 25, 1991, as required by CEQA and Rule 17.1 of the Commission's Rules of

⁴ The proceeding was originally submitted on January 13, 1992, but was re-opened on May 18, 1992 to accept into evidence ALJ Exhibits 14 and 15.

Practice and Procedure, the Commission Advisory and Compliance Division (CACD) issued a Notice of Preparation of a Negative Declaration in this case for Commission consideration. Comments were received from several residents near the proposed site who opposed its construction due to perceived "visual pollution" and potential safety hazards for unauthorized persons accessing the site. The Office of the State Architect (OSA) verbally confirmed to CACD its jurisdiction over the site's design and construction on public school property. BACTC filed further comments in support of a Negative Declaration.

A Negative Declaration and Initial Study for the proposed cell site was prepared and made available for public review from April 30, to May 29, 1992. The Initial Study examined the environmental impact of seventeen factors including visual quality and hazards. It concluded with respect to visual quality that the proposal would not obstruct "any existing scenic vistas, nor would it add significant new glare to the visual environment." (Initial Study at 43.) Moreover, while the Initial Study found the monopole would create an "aesthetically offensive sight open to public view," it evaluated the effect as having a "less than significant impact." (Id.)

In terms of hazards, the Initial Study stated that:
"The proposed project involves radio frequency radiation, which -- at sufficient intensity -- can pose a health hazard. However, the level of radiation intensity proposed by the project is substantially below the level currently considered to constitute a health hazard."
(Id. at 47.)

It concluded that the proposal would not result in interference with emergency response plans or emergency evacuation plans. (Id.) To assure that significant adverse effects do not occur as a result of this proposed project, ten conditions of approval were

incorporated into the Negative Declaration.⁵ Any granting of authority to BACTC to construct the proposed facility would be predicated on the ten conditions being met. No comments, other than a written confirmation by OSA of its permitting authority, were received in response to the Negative Declaration and Initial Study.

E. Determination and Definition of the "Target Area"

Important elements in this proceeding and any cellular siting application are the determination and definition of the technical boundaries of the facility to be sited. Before we discuss the position of the parties, we think that it will be helpful to a clear understanding of cell site placement to detail the evidence submitted on the technical parameters and definition of the target area. Only the applicant presented evidence on this issue.

BACTC's engineering witness Jay Noceto submitted testimony stating that BACTC uses three criteria to ascertain when a new cell site is needed in a cellular network: (1) coverage, (2) capacity and (3) reuse of frequencies. He characterizes the Highway 85 corridor cell site as "primarily a coverage site." (Exhibit 1 at 2, 4.) The purpose of a coverage site is to improve an area that is suffering from a weak radio signal.

According to Noceto, using specially equipped vans, BACTC does monthly drive tests throughout its service area to monitor coverage patterns. The radio signal strength and location information determined by these tests are measured and the measurements are then analyzed to find out whether coverage in a given area meets BACTC's design criterion of -75 decibels relative to a milliwatt (dBm) to -80dBm. To customers using either mobile cellular telephones or hand-held portable cellular telephones, this

⁵ See Appendix A.

signal strength threshold has been considered to provide excellent service.

A signal strength below -75dBm to -80dBm, witness Noceto testified, generally results in significant static, an increase in the number of dropped calls on mobile cellular telephones and quality of service degradation on portable cellular telephones so that they are virtually unusable in the weak signal area. He identified the current signal strength in the Highway 85 area as 10dBm or more below BACTC's design criteria, and ranked the location as third among all service-related customer complaints received by the company. Noceto listed the top two locations as being in San Francisco, the most densely populated area in the cellular system. (Exhibit 1 at 4, 6.)

Mr. Noceto testified that after an area has been identified as needing a new cell site, the next step is to locate the target area. He described the target area as "a geographic region defining the acceptable area for potential cell site locations." (Exhibit 1 at 7.) Moreover, with respect to a coverage site, Noceto testified that the target is configured to provide the necessary signal in the deficient service area without causing interference to nearby or adjacent cells. He asserted that the "target area" should be distinguished from the "service area" of the cell site. The geographic region to which a new cell site will provide a useable cellular signal is the service area, while the region within the service area where the proposed site may be located to achieve desired coverage is the target area. (Id.) Mr. Noceto maintained that these two regions never have the same boundaries.

BACTC's witness Noceto described the technical parameters used to define the target area as:

"(i) the geographic features of the area to be served, including ground elevation, mountains, valleys, and bodies of waters (identified from United States Geological Survey topographical maps); (ii) the location of highways, roads and

neighborhoods to be covered; and (iii) the relation of the new cell to the existing cell sites in the system." (Id. at 8.)

He testified that a new cell site must work in conjunction with the existing system because if the site does not cover enough area, it cannot hand off a call to its neighbors, and if it covers too much area the site will cause interference and limit system capacity.

Noceto indicated that once calculations are projected for the ideal theoretical location of a cell site, the extent of its signal coverage is determined through computer simulation. He maintained that this computerized process is duplicated for surrounding points to ascertain what other nearby locations will provide adequate signal coverage to the deficient area. Consequently, by charting those locations where a transmitter might be placed to provide the desired coverage, the boundaries of the target area are marked. Noceto contended that technical requirements and system considerations are the catalysts behind the addition of new cell sites to the cellular network. (Id. at 8-9.)

III. Discussion

A. Site Placement

BACTC contends that it is unable to improve the quality of radio signals along Highway 85 by increasing either the power or the tower heights of its existing cellular facilities surrounding the target area. Rather, the applicant insists that the proposed cell site must be located within the designated target area in order to give the necessary coverage to the area on Highway 85 between El Camino Real and Homestead. (BACTC Brief at 8.) In support of this contention, BACTC presented a number of charts, maps and the direct and rebuttal testimony of its engineering witness who underwent more than four hours of cross-examination.

Conversely, the City insists that BACTC has not justified its target area as the exclusively "acceptable" target area for the Highway 85 corridor. It states:

"The evidence submitted at the evidentiary hearing indicates that despite BACTC's assertion to the contrary, several sites outside the delineated 'target area' could provide the necessary increased radio signal strength." (Mountain View Brief at 10.)

However, while the City challenges BACTC's technical submission regarding the target area and radio frequency engineering, it never refutes the evidence presented. The City submitted no engineering witnesses of its own. In addition, the City does not support its assertion that the applicant must prove the target area to be the exclusively acceptable site.

Further, the City maintains that BACTC's technical parameters neither restrict a new cellular site to its designated target area, nor, again, justify the delimited target area as the exclusive acceptable site for BACTC's new cellular facility. (Id. at 10-11.) Still, the City supports none of its arguments with technical evidence.

The City also contends that BACTC's defined target area is arbitrarily chosen. It notes that the target area is "selected solely by BACTC's engineering staff." (Id. at 10.) However, the testimony of witness Noceto during cross-examination at the evidentiary hearing suggests otherwise:

"Q: In your opinion as an expert in this field is it possible that another engineer -- qualified engineer in this field would select another target site or target area?

A: I think given the same system configuration -- existing system configuration and coverage needs, there would be very little difference between what two engineers would determine." (Transcript at 60.)

Accordingly, we find that the weight of the evidence supports BACTC's position that the proposed cell site must be located within the designated target area in order to give the necessary coverage to the area on Highway 85 between El Camino Real and Homestead.

B. Alternative Sites

BACTC asserts that the Bryant Avenue location is the "optimal site" of the many alternative sites investigated within the target area. (BACTC Brief at 11.) Its site location witness Mike Mangiantini testified that he began the search for an appropriate site for the Highway 85 facility in June 1989. He noted that the search involved several complications. First, the target area spanned four jurisdictions, each with its own zoning requirements. Also, there were few tall structures in the target area capable of either eliminating the need for or mitigating the visual impact of a cellular facility. Finally, the target area contained a very high proportion of densely-populated residential areas, and not many large industrial or commercial parcels. In fact, Mangiantini testified, there were very few large parcels of land in the target area. (Exhibit 3 at 5-6.)

BACTC lists among the Bryant Avenue site's virtues its willing lessor, the school district, and its size, which allows the greatest distance between the proposed monopole and the nearest residential homes. Witness Mangiantini indicated that few within the target area were willing to lease property knowing it would become the site of a cellular facility. He characterized the school district property as the most ideal site location within the target area because the large 38.93 acre size of the parcel would enable BACTC to place the monopole approximately 300 feet from the nearest residential property and approximately 235 feet from Highway 85. Mangiantini asserted that the ability to locate the monopole some distance from the nearest residential property was

not possible in most, if not all, the alternative sites BACTC investigated. (Id. at 6-7.)

BACTC lists as another virtue of the Bryant Avenue site its redesigned appearance, which is shorter and slimmer than initially proposed. Witness Mangiantini testified that BACTC redesigned the proposed Bryant Avenue facility in the fall of 1990 to accommodate the concerns of the City's Planning Department staff and neighbors regarding the visual effect of the monopole. (Id. at 24-25.) He stated that the proposed site is now 60 feet in height, instead of 100 feet. Additionally, the diameter of the monopole was reduced so that it is slimmer and less obtrusive. Moreover, it still satisfies the Office of the State Architect's (OSA) and the Uniform Building Code's stringent seismic safety standards. Mangiantini asserted that based on his experience siting cellular facilities, he believes that BACTC has done everything within reason to place the monopole at the optimal site in the target area and to render it unobtrusive to the surrounding neighborhood. (Id. at 26.)

BACTC contends that it "made extraordinary efforts to search high and low for alternatives, considering 25 alternative sites in the target area." (BACTC Brief at 19.) The alternative sites were either unavailable or inadequate for its use because of the refusal of the property owner to lease to BACTC, the inadequacy of the parcel size, or the proximity to residences. Also, the applicant insists that, at the City's request, it has even considered five alternate sites outside the target area. BACTC concludes from a technical basis that these five sites would cause "unacceptable interference with BACTC's existing system and would not provide adequate radio signal coverage of the cell." (Id. at 20.)

During the evidentiary hearing and in direct testimony, Mr. Mangiantini testified that he explored approximately 22

alternate sites⁶ for BACTC to locate the cellular facility. The sites evaluated within the designated target area were either

6 The sites investigated were: #1) A 38.93 acre "L"-shaped parcel on the southeast corner of Bryant Avenue and Truman Avenue, Mountain View; #2) a 5.73 acre irregular shaped parcel - east side of Highway (Hwy) 85 and north Remington Drive, Mountain View; #3) a 2.89 acre triangular shaped parcel east of Hwy 85 and north of W. Remington Drive, owned by Mountain View; #4) a 4.20 acre triangular shaped parcel located east of Hwy 85 and south of W. Remington Drive, owned by Mountain View; #5) a 1.90 acre irregular shaped parcel between Hwy 85 and S. Bernardo Avenue north of Ticondegora Drive, owned by Mountain View; #6) a 1.08 acre parcel between Hwy 85 and S. Bernardo Avenue north of Ticondegora Drive, Mountain View - owned by California Water Service Company; #7) a 1.5 acre triangular parcel on the north side of W. Remington Drive and west of Robin Way, Sunnyvale - owned by Pacific Gas & Electric Co.; #8) a 0.82 acre parcel located west of S. Bernardo Avenue and Robin Way, Sunnyvale - owned by Salvation Army; #9) a 0.92 acre parcel east of S. Bernardo Avenue and north of Ticonderoga Drive, Sunnyvale; #10) a 9.29 acre parcel at the southeast corner of Rockefeller and Lime Drives, Sunnyvale; #11) a 0.45 acre parcel on the southwest corner of S. Mary Avenue and Ticonderoga Drive, Sunnyvale; #12) a 5.96 acre irregularly shaped parcel on the south side of Astoria Drive west of Wright Avenue, Sunnyvale; #13) a 3.16 acre on the west side of S. Bernardo Avenue north of Fremont, Sunnyvale - owned by J. Jones; #14) a 1.90 acre parcel on the northeast corner of Fremont and Bernardo Avenues, Sunnyvale - owned by Diversified Convalescent Hospital, Inc.; #15) a 5.88 acre triangular parcel on the north side of Fremont Avenue, west of Hwy 85, Sunnyvale - owned by ISK Mt. View Research Center Corporation; #16) a 10.5 acre parcel at the northeast corner of W. Remington Drive and Mango Avenue, Sunnyvale - owned by Sunnyvale School District; #17) a 5.68 acre parcel on the northwest corner of Fremont and S. Mary Avenues, Sunnyvale - owned by the Westmoor Village Shopping Center; #18) a 1.35 acre parcel at the southwest corner of Fremont and Wright Avenues, Sunnyvale - owned by Idylwood Convalescent Hospital; #19) a 0.56 rectangular parcel on the south side of Fremont Avenue west of Wright Avenue, Sunnyvale - owned by Dr. M. Fallick; #20) a "L"-shaped parcel on the northwest corner of Astoria Drive, west of Wright Avenue, Sunnyvale - owned by the Mape Family Partnership; #21) a 4.25 acre parcel at the southwest corner of Fremont and Mary Avenues, Sunnyvale - owned by DeAnza Properties; #22) an 8.05 acre parcel at the northeast corner of Lime and Ticonderoga Drives, Sunnyvale - owned by the Sunnyvale Elementary School District.

identified by BACTC or suggested by the community. BACTC states that an evaluation and discussion of each alternate site was submitted to the Mountain View City Council in its appeal packet, a copy of which was submitted with the application filed in this proceeding. (Application, Exhibit 13.)

According to Mangiantini, while the Mountain View Planning Department identified alternate sites #4, #5, #6, #7, and #15 as "potentially better sites" than the one on Bryant Avenue, none of the five sites are feasible, principally because their respective owners have declined to lease the properties to BACTC. He further contended that the commercial alternate sites⁷ within the target area investigated were "either unavailable for lease or infeasible due to the size of the parcel or close proximity to residential property lines." (Id. at 18.)

Mangiantini also testified that if BACTC were confronted with the possibility of "no project" in the target area, its cellular service in the Highway 85 corridor would continue to be poor. Consequently, BACTC would be forced to re-engineer its system to establish new target areas which would avoid the current target area and yet, could provide the necessary coverage to the Highway 85 corridor.

In response to the issue of whether the Bryant Avenue site could be redesigned, witness Mangiantini reiterated that BACTC already redesigned the proposed Bryant Avenue facility in the fall of 1990 to accommodate the concerns of the City's Planning Department staff and neighbors regarding the visual effect of the monopole. He stated that the resultant re-engineering was made possible in part by the approval of the Highways 85 and 101

⁷ The commercial alternate sites include: #15, #17, #18, #19, #20, #21 and the Wrightmont Professional Center at 990 W. Fremont Avenue at Wright, Sunnyvale.

colocation site in Mountain View. There, BACTC entered into a "site-sharing" arrangement with GTE. (Id. at 24-25.)

Mountain View maintains that BACTC's search for alternative sites has been passive. The City's witness, Kate Black, Acting Zoning Administrator, testified as to her review of BACTC's cellular site application for the proposed location. She asserted that BACTC's 21 letters to property owners at alternative sites were dated after her denial of the application and first produced as part of the City Council appeal. Black further testified that her review of the letters indicated that form letters had been sent, and that it was not established "that any aggressive negotiations or efforts to obtain alternative sites were made by the applicant." (Exhibit 9 at 11.)

In response to the issue of what alternatives the City, or she as its representative, would consider instead of BACTC placing a cellular facility at the Bryant Avenue site, Black testified that she would consider: (1) no-project; (2) alternate sites; and (3) a redesigning of the project, such as by reducing the height of the monopole. She contended that for alternate sites she would look in an industrial or commercial area. Further, she stated she would look for locations that would provide adequate screening of the monopole from residential areas, and that would address issues of safety, accessibility, appropriate zoning, design and compatibility with the surrounding properties.

Ms. Black maintained that all of the cellular monopoles currently in Mountain View are located in industrial areas, and consequently are visually less intrusive and less conspicuous because their location reduces the impact on surrounding property. She stated that the Bryant Avenue site, on the other hand, could not be adequately screened to mitigate the visual impact of the facility, and therefore was not acceptable. In addition, she noted that the Bryant Avenue site is the only alternate site that BACTC has formally pursued with the City.

Black contended that BACTC failed to provide her office with various information before the February 19th zoning hearing. That information included BACTC's: (1) careful evaluation of specific alternate sites; (2) colocation efforts; (3) determination of target boundaries, and (4) presentation on whether boundaries could be "adjusted in such a way as to provide more available sites within a target area." (Id.) Ms. Black advised that the City strongly supports colocation because it:

"...avoids the unnecessary proliferation of towers while providing sufficient service to mobile telephone users. It also encourages the maximum use of well-situated appropriate sites and facilities, thereby reducing multiple impacts on multiple neighborhoods."
(Id. at 13.)

The witness indicated that the applicant should colocate on GTE's facility at the intersection of Highways 280 and 85. She maintained that despite repeated requests, BACTC did not provide the City with satisfactory technical and engineering information and criteria on why its competitor seemed able to supply adequate service from its two facilities at either end of Highway 85, while BACTC could not.

To the City's insistence that BACTC colocate its facility at existing cellular sites at the intersections of Highways 280 and 85, and Highways 85 and 101, Mangiantini responded that coverage to the Highway 85 corridor would not be achieved since neither of the two sites are within the target area. In addition, he stated that BACTC has currently collocated with a competitor at Highways 85 and 101, per the City's request. Consequently, he maintains, BACTC was able to lower the height of the proposed monopole from 100 feet to 60 feet. (Exhibit #3 at 18.)

The City asserts that BACTC has not investigated the possibility of colocating on the other two existing GTE cellular facilities in the Highway 85 corridor. However, BACTC's witness Mangiantini testified that it is unable to colocate with any other

utility within the target area. (Transcript at 193-194.) He stated that PG&E denied BACTC's request for a lease, and GTE Mobilnet, applicant's only competitor, does not have any facilities within the target area. (BACTC Brief at 38; Transcript at 193-194.) The City's witness Kate Black confirmed that the City-owned water tank, a potential utility site for colocation, is scheduled to be removed in the near future. (Transcript at 306-307.)

The weight of the evidence indicates that BACTC has actually pursued alternate sites in the target area and has done more than go through the motions. In addition, the evidence does not support the City's assertion that BACTC has not investigated the possibility of collocating. Moreover, BACTC is correct that while we encourage colocation with other cellular carriers where technically feasible, GO 159 does not require it. Consequently, we hold that BACTC has adequately investigated alternative sites and colocation.

C. Seismic Safety

BACTC maintains that the design of the proposed monopole is seismically safe. (BACTC Brief at 18.) Douglas Carlson, BACTC's structural engineer, testified on the issue of the seismic safety of the proposed Bryant Avenue facility. He stated that his firm had designed this and approximately 100 other cellular facilities for BACTC. Carlson asserted that the 60-foot monopole and the equipment shelter are designed to withstand a wind force of 40 pounds per square foot against the side of the monopole. (Exhibit 5 at 3.)

He maintained that the criteria used in BACTC's design are considerably greater than the values required for design by the current Uniform Building Code and Title 24 of the California Code of Regulations, the applicable codes. Carlson testified that while these codes require that the structure be designed to withstand lateral forces resulting from either wind or earthquakes, BACTC

facilities are designed to withstand wind, the greater force under the codes. (Id.)

In addition, Mr. Carlson contended that BACTC requires that, for operational use, the monopole be designed and constructed so as to limit the movement of its radio antennas on top. He stated that this requirement results in a monopole and foundation design that is more rigid and therefore stronger than is demanded by the codes. Finally, Carlson testified that to the best of his knowledge, none of BACTC's monopoles or tall antenna towers fell down during or after the 1989 Loma Prieta earthquake. (Id. at 5.)

While Ms. Black testified that she considered seismic safety questions regarding the stability of the tower design, and the neighborhood's concerns about the health impact of living in the vicinity of the microwave antennas when she denied BACTC's application, the City submitted no evidence either to refute BACTC's showing or to substantiate the concerns. The Negative Declaration found that the proposed site would have a less than significant impact or no impact on the safety and health of those in the neighborhood. Where necessary, mitigation measures have been suggested to reduce potential impacts. Therefore, with the addition of the mitigation measures, we find that the design of the proposed monopole is seismically safe.

D. Effect on Residential Property Values

BACTC argues that the proposed Bryant Avenue cellular facility will not have a deleterious effect on residential property values. Its final witness, Frank Schmidt, a real estate appraiser, testified that, in his professional opinion, the proposed facility "will have negligible, if any, effect on residential values in the neighborhood." (Exhibit #8 at 2.) Mr. Schmidt stated that he based this evaluation on an analysis of: (1) the neighborhood in question; (2) the size of the proposed site and the fact that it is 300 feet from the closest residential home; (3) the improvements proposed at the site; and (4) the results of a market study that

his firm conducted examining two comparable neighborhoods⁸ in northern and southern California.

Schmidt testified that his firm studied the properties using "paired sales comparison analysis" which he described as the simplest tool in extracting the marketplace's valuation of a specific item. He stated that in the analysis, properties are selected with essentially similar features, and one specifically dissimilar feature. An amount of adjustment is estimated for the presence or absence of any feature. Then, the sales prices of otherwise similar properties with and without the feature are paired. With respect to the Bryant Avenue site, the specifically dissimilar feature was the visibility of the cellular tower or monopole. (Id. at 5.)

Witness Schmidt testified that his firm also contacted in the second comparable neighborhood ten property owners located close to the cellular monopoles. He reported that nine of the owners stated that the monopoles did not bother or concern them. While the remaining owner, initially fearful that the facilities would fall on his home, stated that he now finds the installed monopoles acceptable, unobtrusive and safe. Schmidt further maintained that his firm contacted 22 real estate agents who operate in the comparable neighborhoods. He contended that none of

⁸ Comparable neighborhood 1 is situated west of Freeway 680 and south of Maybury Road in the city of San Jose. The area is primarily composed of residential homes and a few small industrial parks. The cellular facility, located in a small industrial park, consists of a 75-foot monopole and other related equipment approximately 250 feet southeast of the closest residential homes. Comparable neighborhood 2 is situated on the Pacific coast in the southern portion of Orange County in the city of Dana Point. The neighborhood is predominantly residential and the cellular facility is located on high school property. There are two 100-foot monopoles on the school site, visible from many neighborhood homes with the closest homes approximately 150 feet from the monopoles. (Id. at 6, 8.)

them felt that the monopoles had a negative influence on property value. Schmidt asserted the agents stated that of the homes that backed directly to the high school, the location of the school was the only real negative locational influence. Finally, he reiterated that his research indicated that the market does not recognize a significant value difference for the visibility of the cellular monopoles.

Susan Holm, a witness in support of Mountain View's protest and a resident of the Bryant Avenue neighborhood, submitted testimony on the effect that she felt BACTC's facility would have upon the neighborhood's property values. She described the area as "a well maintained upper middle class family neighborhood with one and two story homes, generally having three or four bedrooms and large landscaped lots" with an average market value of "approximately \$500,000." (Exhibit 13 at 4.) Mrs. Holm stated that the industrial and visual intrusion would disrupt the residential character of the neighborhood. (Id.) She repeated the opinion of a real estate agent who has listed a neighbor's properties for sale that the proposed monopole will diminish property values in the neighborhood. Mrs. Holm also relayed her neighbors' concerns about the health effects of a cellular facility's electromagnetic field and the safety of its placement in a school yard. (Id. at 5.)

We find that BACTC's showing on the proposed facility's effect upon residential property values was not refuted by the hearsay testimony Mrs. Holm offered from a neighbor's real estate agent. In addition, while the City and the residents of Bryant Avenue have expressed concerns about the health effects of the proposed facility, BACTC maintains that "(t)he operation of the cell site would involve only low-power radio transmissions and low power consumption." (Application, Exhibit 4, Tab A at 3.) The Negative Declaration found that the proposed project would result in a less than significant impact on the visual environment.

(Negative Declaration at 50.) No health risks are known to occur at this time. Mitigation measures have been suggested by the Negative Declaration to reduce potential impacts. Accordingly, we hold that there is no evidence that the proposed cellular facility will have a deleterious effect upon residential property values in the community.

E. Mountain View's Denial of Permit Application

Mountain View maintains that the proposed location of BACTC's 60-foot monopole in the residential Bryant Avenue neighborhood is an incompatible land use. It denies that a Public Facility zoned area could appropriately accommodate the structure, describing the monopole as "an industrial type structure which cannot be adequately screened." (City's Brief at 18.) Ms. Black testified that on February 19, 1991, at the administrative zoning hearing, she denied BACTC's application for a "variance, conditional use permit and site plan and architectural review approval to permit the 60-foot monopole antenna and 317-square foot accessory equipment structure at 1299 Bryant Avenue." (Exhibit 9 at 3 and tab 10.) She further stated that on July 9, 1991, pursuant to BACTC's appeal of her decision, the City Council of Mountain View received and considered all evidence presented at the hearings, reviewed her staff reports with accompanying attachments and upheld the decision.

Black indicated that one of the primary reasons for the denial of BACTC's application was that the proposed structure was incompatible with the existing land uses of the neighborhood. Ms. Black emphasized that the height of the monopole will be more than two times taller than any conforming structure in the area, the

zoning on the site is "Public Facility"⁹ and the surrounding context of the site is primarily single-family, one- and two-story homes. She asserted that most importantly, the negative visual and aesthetic impacts on the neighborhood could not be adequately mitigated. Ms. Black noted that the monopole with its multiple microwave dishes is an industrial-type structure that would be visible from many homes within the area, as well as from the school and would intrude on the appearance and residential character of the neighborhood. (Id. at 4.)

F. Evaluation of the Conflict

The applicant argues that the record clearly establishes that there are "irreconcilable differences" between BACTC and the City regarding placement of the proposed Bryant Avenue site. (BACTC Brief at 19.) Mountain View, on the other hand, appears confident that a mutually acceptable site can eventually be found. Ms. Black testified that she would not characterize the differences between BACTC's needs and the City's needs "irreconcilable differences." Instead, she stated that she believed that there are several potential alternate sites that have not been aggressively explored or pursued. It was her opinion that BACTC and the City could work together to select a mutually acceptable site. She declared that the City's staff currently is actively seeking alternate sites for BACTC's facility.

In GO 159, the Commission stated that the rules adopted have "the effect of relying on local review processes in those cases where disputes over siting and design are resolved amicably

9 "Public facility district or PF district. Purpose. To foster the orderly development of large-scale educational and public services uses in the community and of special approved uses on city land; to insure their presence as a vital part of the neighborhood balance; and to prevent intrusion of uses which may overburden neighborhood facilities and resources." (Mountain View City Code, Chapter 36, Sec. 36.20A (Exhibit 11 at 555).)

at the local level." (D.90-03-080 at 3.) We expected that this would describe the vast majority of cell siting cases. We continue to expect that this will be true in the future. We anticipated that we would need to intervene only in a small number of cases, where "irreconcilable differences or intolerable delays" exist.

More than two and a half years have passed since the applicant determined its need for the cellular facility in the Highway 85 corridor. BACTC has spent fourteen months before the City of Mountain View unsuccessfully applying for local permits. Moreover, four months have passed since the evidentiary hearing in this proceeding, and it appears that a "mutually acceptable" site has still not been found. Consequently, we find here that the term "irreconcilable differences" accurately describes the positions of the parties with respect to each other.

G. Preemptive Authority to Construct

BACTC argues that the Commission should preempt Mountain View and grant it permission to construct the Bryant Avenue site. It maintains that there is a "clear and urgent need" for another cell site within the geographic target area established by BACTC's engineers. (BACTC Brief at 5.) The City maintains that BACTC has failed to meet the standards of GO 159 in filing its application for preemptive authority. It argues that BACTC has failed to demonstrate that it has provided the local agency with two or more acceptable sites. The City also contends that the applicant has failed to prove that the denial of this application frustrates the Commission's articulated objectives under GO 159. (Mountain View's Brief at 8.)

GO 159 states that a cellular utility can file an application for preemptive authority to construct a cellular facility:

"notwithstanding the lack of one or more local permits by application when the cellular utility can demonstrate that it has provided the local agency with two or more acceptable sites..." (Emphasis added.)

Here, the record indicates that BACTC formally applied for a permit before two "local agencies" -- Mountain View and Sunnyvale. Still, while the presentation of a formal permit which has been denied is the clearest and most direct demonstration that a local agency has been provided with an acceptable site, we have seen in this case, it is not the only demonstration.

At the evidentiary hearing, BACTC maintained that while the City enthusiastically pointed to various alternate sites within and outside of the target area, it was not interested in seriously discussing an alternate site within its jurisdictional control in the target area. (Transcript at 320-339.) In substantiation, BACTC submitted copies of letters¹⁰ expressing an interest in leasing property within the Stevens Creek park chain¹¹ from the City for the cellular facility. Pursuant to a December 20, 1991 ALJ Ruling, the parties submitted status reports on January 10, 1992, on the Stevens Creek park chain discussions. The parties reported (Exhibits #14 and #15) that on January 3, 1992, BACTC submitted a formal proposal to the City Council of Mountain View to request a lease of ground space on those alternate sites. As of this date, no progress has been made.

Consequently, we find that through both its application for permits for the Bryant Avenue site and its formal proposal for the Stevens Creek park chain sites, BACTC has demonstrated that it has provided Mountain View with two acceptable sites. In addition, we find that the denial of permits by Mountain View and Sunnyvale

¹⁰ Letter dated February 26, 1991, from Mike Mangiantini to Don Biondo, Mountain View's Parks and Facilities Director, response dated March 25, 1991, from John Kirby, the Public Works Department's property agent, to Mangiantini (Application, Exhibit 13, Tab A at 34-35.), and September 19, 1991 letter from Mike Mangiantini to Kate Black (Exhibit 12).

¹¹ This property is also referred to as Alternate Sites #4 or #5.

indicate that BACTC is unlikely to obtain a permit for either site which will provide adequate coverage of the cell.

Section 311 Comments

The Administrative Law Judge's (ALJ) proposed decision on this matter was filed with the Docket Office and mailed to all parties of record on June 22, 1992, pursuant to Section 311(d) of the PU Code and Rule 77 of the Commission's Rules. Comments were due on July 13, 1992. On July 17, 1992, pursuant to Rule 77.5, the City filed a motion for leave to file late comments. Good cause having been found, the motion was granted. BACTC filed reply comments on July 17, 1992. The initial and reply comments have been carefully considered by the Commission in preparing its final order.

Findings of Fact

1. BACTC filed with the Commission an application for preemptive authority to construct a cellular facility in Mountain View on August 5, 1991.

2. Protests were filed requesting evidentiary hearings.

3. In light of BACTC's submission that one or more local agencies had denied its cellular application, it was determined that evidentiary hearings should be held.

4. The local agency denied BACTC's permit applications without issuing a negative declaration or an EIR.

5. This Commission prepared and made available for public review a Negative Declaration incorporated with ten conditions of approval. No comments requesting changes to the Negative Declaration were received.

6. The target area is a geographic region defining the acceptable area for potential cell site locations.

7. BACTC's system suffers from a weak radio signal in the Highway 85 corridor between El Camino Real and Homestead.

8. BACTC's target area resembles a ring spanning four jurisdictions: the cities of Mountain View, Sunnyvale, Los Altos, and the County of Santa Clara.

9. BACTC is unable to improve the quality of radio signals along Highway 85 by increasing either the power or the tower heights of its existing cellular facilities surrounding the target area.

10. BACTC's proposed cell site must be located within the designated target area in order to give the necessary coverage to the area on Highway 85 between El Camino Real and Homestead.

11. BACTC has adequately investigated alternative sites and colocation.

12. The Bryant Avenue location is the "optimal site" of the many alternative sites investigated within the target area.

13. The design of the proposed monopole is seismically safe.

14. There is no evidence that the proposed cellular facility will have a deleterious effect upon residential property values in the community.

15. "Irreconcilable differences" exist between BACTC and the City of Mountain View.

16. BACTC has demonstrated that it has provided Mountain View with two acceptable sites.

17. BACTC is unlikely to obtain a permit for either site which will provide adequate coverage of the cell.

18. For BACTC to accommodate Mountain View's requirements for the Bryant Avenue site would frustrate the Commission's objectives.

Conclusions of Law

1. The Commission should preempt Mountain View's jurisdiction pursuant to its authority under Article XII, Section 8 of the California Constitution.

2. Pursuant to GO 159, the Commission is designated the Lead Agency under CEQA.

3. The Negative Declaration prepared during the review of Application 91-08-008 should be adopted and the ten conditions of approval incorporated in the Negative Declaration should be met.

4. Applicant should be granted authority to construct a cellular facility at the Bryant Avenue site in Mountain View notwithstanding the lack of one or more local permits.

O R D E R

IT IS ORDERED that:

1. Bay Area Cellular Telephone Company's (BACTC) application for preemptive authority to construct is granted.

2. The Commission, having assumed the lead agency role in this matter, finds that the proposed project will not have a significant impact on the environment. The Negative Declaration, incorporated with the ten conditions of approval listed in Appendix A to this order and prepared pursuant to the California Environmental Quality Act, is adopted.

3. BACTC is authorized to construct and operate a cellular facility at 1299 Bryant Avenue in the City of Mountain View, notwithstanding the lack of a Conditional Use permit and a Site Plan and Architectural Review, pursuant to Section VI, paragraph F of General Order (GO) 159.

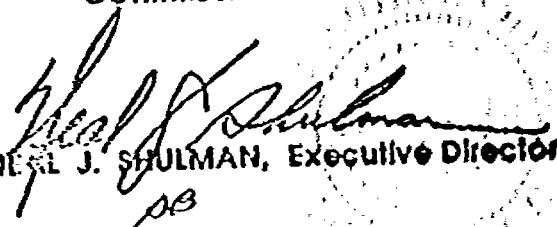
4. BACTC shall comply with the review and inspection provisions of Section VI, Paragraph F of GO 159.

Because there is an immediate need to provide signal coverage to the area described herein, this order is effective today.

Dated July 22, 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

Negative Declaration

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

I. Prior to Construction

- A. The Applicant shall submit grading, building and landscape plans for approval and compliance with applicable requirements (i.e., Office of the State Architect).
- B. The Applicant shall obtain all necessary building permits from city and county government, and comply with all local, State and federal building and safety codes.
- C. The Applicant shall coordinate with local traffic authorities to determine if a preferred route exists for construction traffic. If a preferred route is determined, crews would be instructed to use appropriate roads. In addition, truck traffic would be restricted to 7 a.m. to 5 p.m., Monday through Friday. Construction traffic would not be permitted between 7:45 and 8:00 a.m. and 2:30 and 2:50 p.m. to minimize traffic impacts.
- D. The Applicant shall design the proposed structures to withstand maximum credible seismic and wind forces expected at the sites.
- E. Increased runoff would be directed away from the pole and building foundations and concrete slabs as part of the project.

II. During Construction

- F. The Applicant shall adopt the alternative non-reflective design of the antennas to mitigate to the greatest extent possible any impression the monopole may create on the visual environment of the proposed site or surrounding neighborhood.
- G. The Applicant shall restore disturbed areas immediately following construction, including revegetation of denuded areas with native, drought-resistant species.
- H. The Applicant shall implement dust control measures, and ozone precursor emission controls as recommended by the Bay Area Air Quality Management District and identified in the Initial Study (Section 8.2, Air Quality).
- I. On-site construction activities and truck traffic shall be restricted to the hours of 7 a.m. to 5 p.m. on weekdays. Construction shall be prohibited on Saturday and Sunday. Construction traffic would not be permitted between 7:45 and 8:00 a.m.

and 2:30 and 2:50 p.m. The applicant shall coordinate with local traffic authorities to determine if a preferred route exists for construction traffic.

- J. The Applicant would notify the school district and the residential neighborhood of the day when most construction noise would occur.

(END OF APPENDIX A)