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Decision 92-11-032 November 23, 1992

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application
 of ATLANTIC CELLULAR COMPANY,
 L.P., dba MOUNTAIN CELLULAR
 (U-3024-C), for authority under
 Section 851 of the Public
 Utilities Code to encumber
 public utility property.

ORIGINAL
 Application 92-03-039
 (Filed March 17, 1992)
 (Petition for Modification
 filed July 31, 1992)

O P I N I O N

Atlantic Cellular Company, L.P., doing business as Mountain Cellular (Atlantic), is a Delaware limited partnership and maintains its principal place of business in Providence, Rhode Island. Atlantic provides cellular radiotelephone service as a licensed carrier in California and Vermont and holds a majority interest in the New Hampshire Rural Service Area (RSA) 1, a nonwireline system. In addition, Atlantic holds a noncontrolling majority interest in the wireline carrier serving the Hagerstown, Maryland Metropolitan Service Area. It provides service in the El Dorado RSA pursuant to Decision (D.) 90-07-061 in Application (A.) 89-05-060.

A.90-10-041

By D.90-12-031 in A.90-10-041, Atlantic was authorized to issue evidences of indebtedness up to a maximum principal amount of \$35 million and to encumber its property as security for its obligations under the loan agreement. Since D.90-12-031 was issued, the maximum principal amount available under the loan was reduced at Atlantic's initiative to \$25 million. Only \$1.5 million of the total loan amount was initially earmarked for operation and expansion of Atlantic's California cellular system. Accordingly, D.90-12-031 limited the encumbrances on Atlantic's California operating property to the principal amount of \$1.5 million.

A.92-03-039

The purpose of A.92-03-039 was to request that the \$1.5 million limitation be stricken. Atlantic sought authority to eliminate the limitation imposed by D.90-12-031 on the extent to which its California operating property is actually available to secure its obligations under the loan agreements and associated documents. In D.92-07-009, the Commission granted in full the relief sought by Atlantic, eliminating the \$1.5 million limitation imposed in D.90-12-031.

Petition for Modification of D.92-07-009

On July 31, 1992, less than one month after the relief sought by Atlantic in A.92-03-039 was granted in full by D.92-07-009, Atlantic filed a petition for modification of that decision, pursuant to Rule 43.¹

Atlantic states that it seeks authority to amend the loan agreement, the note evidencing indebtedness, the general security agreement, and other loan documents under the loan agreement to provide for, inter alia, certain changes in the formulas for the variable interest rate for the loan, a six-month extension of the date upon which the loan will convert to a term loan (and repayment will begin), a six-month acceleration in the date final payment of the loan is due, and changes to and consolidation of the various covenant tests that govern performance under the loan agreement.

Atlantic's rationale for filing its petition is that, because the Commission referred to and presumably relied upon the terms of the loan documents in passing on Atlantic's requests for approval, the Finance Branch of the Commission Advisory and

¹ "Petitions for modification of a...decision...shall indicate the reasons justifying relief....Petitions for modification...shall only be filed to make minor changes in a...decision or order. Other desired changes shall be by application for rehearing or by a new application...."

Compliance Division (CACD) has informally advised Atlantic that a petition to modify D.92-07-009 is, technically, required prior to making any amendments to the terms of those documents. (Petition, p. 2.)

Discussion

Nothing in Atlantic's petition suggests that modification of D.92-07-009 is needed. Atlantic does not allege that D.92-07-009 contains any typographical errors, any oversights, any unclear or surplus language, any mistaken factual assertions or findings, any legal error, or any failure to grant any of the relief sought in A.92-03-039. In short, Atlantic seeks neither "to make minor changes" nor to make major changes in D.92-07-009. Rather, Atlantic seeks other and different relief than that sought in A.92-03-039. Accordingly, petition for modification of D.92-07-009 is an inappropriate procedural vehicle for obtaining the relief sought by Atlantic. The petition for modification should be dismissed on that basis alone.

In addition, we are not convinced that the relief sought by Atlantic is necessary. Atlantic does not cite a single section of the Public Utilities Code nor does it cite any court or Commission decision, pursuant to which it seeks relief. Moreover, Atlantic all but concedes that the authority it seeks is unnecessary, when it states:

"As neither [D.] 90-12-031 nor [D.] 92-07-009 addressed the specific terms of the underlying loan, other than the maximum amount of the loan, the purposes for which loan proceeds may be used, and the nature of the required encumbrances, such amendments [to various terms of the loan agreement] arguably could be made without Commission approval." (Petition for Modification, p. 2.)

The sole basis for its petition is that the Finance Branch of CACD "...has informally advised Atlantic Cellular that a petition to modify [D.] 92-07-009 is, technically, required prior to making any

amendments to the terms of those documents," i.e., the loan agreement and associated documents. (Petition for Modification, p. 2.) We assume that Atlantic's rationale for filing its petition is derived from the advice of the Finance Branch.

Mere reference to a document, such as a loan agreement, does not make it a part of a decision nor does it raise the document to the stature of the decision itself. If the Commission had intended to incorporate the loan agreement, and associated documents, by reference in its decision, it could have done so explicitly by employing standard language to that effect. It did not do so. In addition, the Commission did not have before it in A.92-03-039, as originally filed, a copy of the executed loan agreement.

Finally, we do not have before us the actual modifications proposed but merely a three-page "Outline of Approved Modifications." (Petition for Modification, Exhibit B.) We are not told how these modifications relate to the appended Loan Agreement. (Petition for Modification, Exhibit A.) We are not told whether the "Approved Modifications" relate to the Loan Agreement or to associated documents. And Atlantic does not identify the provisions of the 77-page Loan Agreement that the "Approved Modifications" would change.

Amendment to Petition for Modification

On August 27, 1992, Atlantic filed an amendment to its petition, deleting its request that Atlantic be granted authority to make changes to the terms of the evidence of indebtedness and other loan documents underlying D.92-03-009, except for the specific changes described in the petition for modification. Atlantic had also sought authority "to make future amendments [to the loan agreement] that it deems, in its judgment, to be advantageous, other than amendments that would increase the maximum amount of the loan or the purposes for which the loan proceeds may be used (i.e., amendments subject to statutory approval

requirements under the Public Utilities Code." (Petition for Modification, p. 3.) In other words, Atlantic had sought an order authorizing it do those things as to which the Public Utilities Code is silent. Since Atlantic has withdrawn that aspect of its petition, it need not be addressed.

Findings of Fact

1. Atlantic does not seek to change or clarify any of the language of D.92-07-009.
2. Atlantic seeks to amend the language of the 1990 loan agreement and associated documents.
3. The loan agreement is neither incorporated by reference in, nor made a part of, D.92-07-009, nor was it part of the record in A.92-03-039 when D.92-07-009 was issued.
4. All of the relief sought by Atlantic in A.92-03-039 was granted by D.92-07-009.
5. By petition for modification of D.92-07-009, Atlantic seeks relief beyond, and in addition to, the relief granted in D.92-07-009.

Conclusions of Law

1. A petition for modification is an inappropriate vehicle for seeking new and additional relief or authority.
2. New and additional relief or authority is properly the subject of a new application. (Rule 43.)
3. Atlantic has cited no case or statute and has articulated no persuasive rationale that would support its request for authority to amend the loan agreement.
4. Even if such a request were appropriate, Atlantic has not specifically set forth the amendments proposed and the documents or provisions to be amended.
5. It would be a superfluous act for us to grant authority to Atlantic in matters as to which the Public Utilities Code and our prior decisions are silent.
6. The petition for modification should be dismissed.

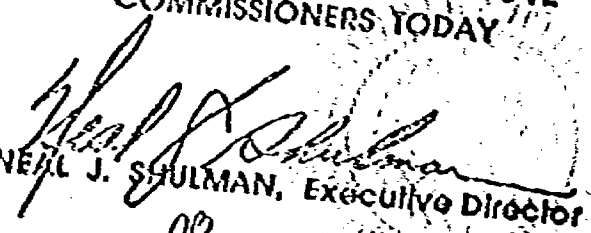
ORDER

IT IS ORDERED that the petition for modification is dismissed.

This order becomes effective 30 days from today.
Dated November 23, 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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