

In re Application of FORT MOJAVE INDIAN TRIBE For facilities in
the Domestic Public Cellular Telecommunications Radio Service on
Frequency Block B, in Market No. 318, Arizona 1 - Mojave

File No. 10051-CL-P-318-B-88

FEDERAL COMMUNICATIONS COMMISSION

6 FCC Rcd 6852; 1991 FCC LEXIS 6111; 70 Rad. Reg. 2d (P & F) 73

RELEASE-NUMBER: FCC 91-353

November 20, 1991 Released; Adopted November 8, 1991

ACTION:

MEMORANDUM OPINION AND ORDER

JUDGES:

By the Commission

OPINION:

I. BACKGROUND

1. On November 9, 1988, the Fort Mojave Indian Tribe (Mohave Tribe) won the lottery and subsequently was announced tentative selectee for frequency Block B to serve Rural Service Area No. 318 (Arizona 1 - Mojave)¹ in the Domestic Public Cellular Radio Telecommunications Service². See Public Notice CL-89-29 (released November 10, 1988). Citizens Utilities Company (Citizens), a mutually exclusive applicant, filed a petition to deny the Mojave Tribe's application on March 13, 1989³. Citizens argues that the application should be denied on five grounds: (1) the Mojave Tribe is ineligible to apply for the wireline cellular authorization because it is not a wireline common carrier; (2) the application is a sham in which the Mojave Tribe is not the real party in interest, and material misrepresentations have been made; (3) two other companies actually filed the application on behalf of the Mojave Tribe, but lacked the legal authority to do so; (4) the Mojave Tribe is not financially qualified; and (5) grant of the application is not in the public interest. In the alternative Citizens argues that the application should be designated for hearing on real party in interest and misrepresentation issues.

II. ELIGIBILITY

A. Contentions of the Parties

2. In support of its petition to deny, Citizens states that at the time the Mojave Tribe filed its application it had never provided public landline telephone service to anyone, and has not initiated any such service since filing its application. Therefore, Citizens maintains, the Mojave Tribe does not meet the requirements of Section 22.902(b) for applying as a wireline cellular carrier. In addition, Citizens argues such an eligibility defect cannot be cured by subsequent amendment. Moreover, according to Citizens, even if the Mojave Tribe had initiated landline service within the Mojave Reservation, such service would not constitute public landline telephone service because the public has no right to enter the reservation.

¹ This Rural Service Area (RSA) includes, but is not limited to, the Fort Mojave Indian Reservation.

² The application was filed on July 28, 1988.

³ Citizens is a wireline carrier in this market. The other three companies who also filed mutually exclusive applications for RSA No. 318 support Citizens' petition.

3. Citizens argues that the Certificate of Convenience and Necessity issued under tribal law by the Mojave Tribal Council to construct, operate and maintain a wireline telecommunications system within the Reservation was a sham, executed just two days before the application was filed and before the creation of Fort Mojave Telecommunications. See para. 5 *infra*. Moreover, Citizens maintains, it would make a mockery of the Commission's processes for the Commission to find that the Mojave Tribe provided local telephone service within the meaning of Section 22.902(b) solely because it issued itself a certificate shortly before its application was filed.⁴

4. In response, the Mojave Tribe states that it is a federally recognized Indian tribe, invested with all rights and prerogatives attendant thereto including the authority to issue a certificate of public convenience and necessity. The Mojave Tribe is governed by the Fort Mojave Tribal Council and is organized in accordance with the Constitution and Bylaws of the Mojave Tribe. According to the Mojave Tribe, "it has embarked on a concerted effort to assert greater control over its economic destiny by undertaking to provide basic utility services to its Reservation and surrounds." With respect to the provision of telecommunications services, the Tribe states that it desires to increase the availability of telephone service to residential and commercial customers including Indian homes, churches and schools to enable the Tribe to achieve further economic development and generate additional revenues.

5. The Mojave Tribe asserts that with the assistance of National Companies and Associated Research⁵ the Mojave Tribe prepared the cellular application. The application was reviewed by the Tribal Council and was executed by Llewellyn Barrackman, Vice-Chairperson of the Council. On October 28, 1988, subsequent to filing the application, the Tribal Council chartered Fort Mojave Telecommunications, Inc. (Mojave Telco) as its agent to provide telecommunications services, including landline telephone services, cable television and cellular services.

6. According to the Mojave Tribe, nothing in section 22.902(b) or interpretative case law requires a wireline company to be actually providing service at the time of the filing of the application. The Mojave Tribe adds that it meets the requirement of section 22.902(b) because it is a lawfully certificated common carrier⁶ in the business of providing public landline message telephone service.⁷

B. Discussion

7. Section 22.902(b) in pertinent part states:

. . . Common carriers engaged directly or indirectly in the business of affording public landline message telephone service will be assigned frequencies from cellular System B in those areas in which they provide such landline service in some portion of the cellular market. . .

⁴ Citizen argues that the Tribal Certificate has no validity because Citizens holds a certificate of Convenience and Necessity issued in 1934 by the Arizona Commission, to provide service inside the reservation and has provided telephone service to and within the Fort Mojave Indian Reservation for years without a Tribal Certificate.

⁵ Two companies which provide technical and engineering services.

⁶ The Mojave Tribe asserts they erroneously issued a Certificate of Convenience and Necessity to Mojave Telco. The Tribe alleges that the clear intent of the Tribe was to authorize itself to provide landline telephone service. This intent was also expressly stated by the Mojave Tribe in the reissued Certificate, the Tribe argues.

⁷ At the time it filed its Opposition to the Petition to Deny on April 18, 1989, the Mojave Tribe contends that a DMS-10 digital switch (class 5 end office) is in place 1,442 feet inside the reservation boundary, and a distribution line is being laid from the switch to the initial subscribers.

Section 22.2 of the Commission's rules defines the term wireline common carrier as follows:

Common carriers which are in the business of providing landline local exchange telephone service . . .

8. In adopting this separate allocation for wireline carriers, the Commission stated that it was convinced that the separate allocation is the most practical way to make cellular service available to the public in the most expeditious manner possible. The Commission considered that much of the successful research and development in the mobile communications field have come from wireline carriers. Therefore, wireline carriers were in the best position to place cellular systems in operation around the country on a prompt basis. *Cellular Communications Systems*, 86 FCC 2d 469, 488-89 (1981). The Commission decided to consider a wireline applicant eligible to apply only in those markets in which it is certified as a wireline carrier to diminish the need for comparative hearings for wireline frequencies by limiting the number of wirelines that could file in a market. *Id.* at 490 n. 56. See also *Cellular Communications Systems, Reconsideration*, 89 FCC 2d 58, 70 (1982). The Commission also concluded that it considered cellular to be an extension of local exchange service, and expected that wireline carriers would be able to rely on their expertise and knowledge about their individual service areas to make quality cellular service available to their communities in an expeditious manner. *Id.* at 71.

9. When the Commission decided to use lotteries for the selection of mutually competing cellular applications, it maintained the wireline set aside, to ensure that rural telephone companies were not precluded from providing cellular service. The Commission stated that it was concerned with the continued financial viability of small telephone companies which is necessary to achieve the Commission's universal service goal. *Cellular Lotteries*, 98 FCC 2d 175, 192-98 (1984). See also *Rules for Rural Cellular Service*, 2 FCC Rcd 3366, 3369 (1987).

10. We conclude that applicants for wireline cellular frequencies must be providing landline local exchange telephone service at the time of filing an application in order to be eligible for those frequencies. We cannot determine whether an applicant has a presence in a market if it is not providing landline local exchange telephone service in that market. Although in *Cellular Communications Systems, supra*, the Commission referred to a wireline carrier that is "certified" in the area in which the Block B license is sought, there is no indication that certification is the sole criteria for determining eligibility to apply for a Block B license. See, e.g., *Cellular Communications Systems*, 86 FCC 2d at 490; *Cellular Communication Systems Reconsideration*, 89 FCC 2d at 71; *Cellular Lotteries*, 98 FCC 2d at 192-98.

11. Other Commission decisions also support our conclusion that in order to be eligible, a wireline must be in the business of providing local exchange telephone service at the time of filing its application. For instance, in *The Offshore Telephone Co*, 65 Rad. Reg. 2d (P&F) 54 (1988), the Commission affirmed the dismissal of Offshore's application because the applicant only provided microwave services in the market and not public landline service as required by Section 22.902(b). In *Montgomery Independent Cellular Telephone Company, Inc*, 4 FCC Rcd 2323 (1989) (Montgomery), the Commission affirmed dismissal of a wireline cellular application because the applicant was not a provider of landline wireline service in the MSA, citing *Advanced Mobile Phone Service Inc. (Los Angeles)*, 93 FCC 2d 683, 685 (1983). See also *Beehive Cellular Inc.*, 2 FCC Rcd 4505 (Com. Car. Bur. 1987).

12. The Mojave Tribe admits that it was not providing landline local exchange telephone service at the time it filed its application for the Arizona 1 RSA. Therefore, we must conclude that it was not a wireline carrier within the meaning of the requirements of Section 22.902(b) of the rules at the time it filed its application and, thus, could not apply for the wireline frequencies in the cellular service. Failure to comply with eligibility requirements renders the application defective and subject to dismissal. Such defective applications cannot be amended to correct such defects.⁸ See *Montgomery*, 4 FCC Rcd at 2326. See also, *Rem Communications*, 3 FCC Rcd 3705 (1988).

⁸ Section 22.20(a)(2) provides that an application will be deemed defective and unacceptable for filing if the application does not comply with the Commission's rules or specific requests for additional information.

III. WAIVER REQUEST

A. Contentions of the Parties

13. The Mojave Tribe argues that even if Section 22.902(b) requires a cellular applicant to be providing service at the time of filing, the rule should not be applicable to the special circumstances of an Indian Tribe. According to the Mojave Tribe, the rule conflicts with Federal laws and policies which encourage tribal self-sufficiency and grant Indian tribes exclusive sovereignty over their lands. Therefore, the Mojave Tribe argues, Section 22.902(b) should be waived in the unique circumstances of this case. Moreover, according to the Mojave Tribe, the waiver will enhance the underlying purpose of the wireline set aside by encouraging participation by smaller telephone companies, including those run by Indian tribes, thus promoting the Commission's pro-competitive policies. This would also encourage tribal self-sufficiency.

14. Citizens argues that the waiver request is defective because the affirmative showings required by section 22.19(a) of the rules were not made⁹ Specifically, Citizens argues that the purpose of the wireline set-aside would be frustrated by a grant of the Mojave Tribe's waiver request by precluding a telephone company from providing cellular service. Similarly, Citizens alleges, the Mojave Tribe cannot show the lack of a reasonable alternative to a grant of its waiver request since the Mojave Tribe was free to apply for a nonwireline authorization. Finally, Citizens contends, the Mojave Tribe has not shown that application of section 22.902(b) would be inequitable, unduly burdensome or contrary to the public interest. Since the Mojave Tribe lacks expertise in the telephone business and there is a dispute between the Mojave Tribe and the Arizona Commission regarding certification proceedings, these factors will cause delays in providing cellular service to the public.¹⁰

B. Discussion

15. Section 22.19 provides that requests for waiver will not be granted except upon an affirmative showing:

(i) that the underlying purpose of the rule will not be served, or would be frustrated, by its application in a particular case, and that grant of the waiver is otherwise in the public interest; or (ii) that the unique facts or circumstances of a particular case render application of the rule inequitable, unduly burdensome or otherwise contrary to the public interest. Applicants must also show the lack of a reasonable alternative.

16. As discussed above, the wireline frequency set aside serves multiple Commission policies. It provides for expediting the provision of cellular service to the public while at the same time fostering competition by providing for the participation of both large and small telephone companies in the provision of cellular service.

17. A waiver in this case will undermine the policies served by the rule, not further those policies. See *WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969); see also *WITN, Inc. v. FCC*, 849 F.2d 1521, 1525 (D.C. Cir. 1988). Application of the rule in this case promotes our objectives of guaranteeing the participation of wireline companies in the provision of cellular services in this market. Unlike the wireline companies with a presence in the market, the Mojave Tribe does not have the infrastructure in place nor the

⁹ Section 22.19 generally requires that waiver requests demonstrate that the underlying purpose of the rule will not be served by its application in a particular case, or that the unique facts or circumstances of a particular case render application of the rule contrary to the public interest. Waiver requests must also demonstrate lack of a reasonable alternative to grant.

¹⁰ Southwestern Bell Mobile Systems, Inc. (Southwestern Bell) filed an opposition to the waiver request asserting arguments similar to those presented by Citizens. Southwestern does not have standing to intervene in the Arizona-1 proceeding since it was not an applicant in that market. We considered Southwestern's pleading as informal comments and therefore deny the Motion to Strike filed by Indian Cellular Telephone Company (an applicant in RSA #604, Oklahoma-9).

demonstrated expertise from previous operations necessary to initiate service expeditiously, including knowledge about the service area. Moreover, if we granted a waiver in this case we would preclude all the independent and small rural telephone companies, who are in the business of providing landline local exchange telephone service, from having a fair opportunity to provide cellular service in this market. These goals are exactly what the wireline set aside sought to promote. See *Cellular Communications Systems*, 86 FCC 2d 469, 488-89 (1981), recon. 89 FCC 2d 58, 70 (1982). Therefore, we conclude that waiver of the rule in this case would not be in the public interest.¹¹

18. Moreover, the Mojave Tribe had in the past, and continues to have, alternatives which do not necessitate a waiver. The Mojave Tribe could have applied to provide cellular service for the nonwireline block of the cellular frequencies. The Mojave Tribe may also approach the ultimate licensee for either block of frequencies to establish their own cellular system on the reservation during the five-year fill-in period.¹² Additionally, after the five-year fill-in period expires in this RSA the Mojave Tribe may apply to provide cellular service to any unserved areas. Therefore, we conclude that application of the rule to the Mojave Tribe is not unduly harsh or burdensome. Therefore, we must conclude that waiver of the rule would be contrary to the public interest.

19. We recognize that federal statutes evidence a congressional goal of fostering tribal self-government and economic development, (25 U.S.C. Section 1, et seq.) but we believe that these policies does not, by themselves, justify abrogation of the purpose behind Section 22.902(b) of the rules, which was promulgated pursuant to the Communications Act of 1934.¹³

IV. CONCLUSIONS

20. We conclude that the Mojave Tribe was not providing landline local exchange telephone service at the time it filed the application and was consequently not qualified to apply for the wireline cellular frequencies. We also conclude that waiver of the eligibility requirements of Section 22.902(b) is not in the public interest. Failure to comply with eligibility requirements renders the application defective and it must

¹¹ Through this waiver request the Mojave Tribe is, in essence, attempting to add an additional public interest eligibility criterion for the wireline frequency block. We find that at a minimum this request is untimely. It should have presented its proposal in the original Rule Making proceeding which created the cellular service. The Commission can establish threshold standards to accept qualified applicants and exclude those applicants who plainly fail to meet the standards. See e.g., *Hispanic Information and Telecommunications Network Inc. v. FCC*, 856 F.2d 1289 (D.C. Cir. 1989). The Mojave Tribe as an interested party had ample opportunity to participate in the RSA Rule Making proceeding. be dismissed. Such defective applications cannot be amended to correct such defects. ¹⁴ See *Montgomery*, 4 FCC Rcd at 2326. See also *Rem Communications*, 3 FCC Rcd 3705 (1988). Since these conclusions are dispositive of the application we need not address the other issues raised by the petitioner.

¹² Each cellular system licensee can expand its system for five years from authorization, free from competing applications. See *Rural Cellular Service (Second Report and Order)*, 2 FCC Rcd 2306 (1987), modified, 4 FCC Rcd 5377 (1989).

¹³ See generally, *Washington v. Confederated Tribes*, 447 U.S. 134 (1980).

¹⁴ Section 22.20(a)(2) provides that an application will be deemed defective and unacceptable for filing if the application does not comply with the Commissions Rules, regulations or specific requests for additional information

V. ORDERING CLAUSES

21. ACCORDINGLY, IT IS ORDERED, that the application of Fort Mojave Indian Tribe, File No. 10051-CL-P-318-B-88 IS DISMISSED.

22. IT IS FURTHER ORDERED, that the waiver request filed by the Mojave Tribe is hereby DENIED.

23. IT IS FURTHER ORDERED, that the petition to deny filed by Citizen's Utilities Company, IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy, Secretary