

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA



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Order Instituting Rulemaking on the Commission's own motion into the application of the California Environmental Quality Act to applications of jurisdictional telecommunications utilities for authority to offer service and construct facilities.

Rulemaking 06-10-006
(Filed: October 5, 2006)

JOINT RESPONSE OF NEXTG NETWORKS OF CALIFORNIA, INC. (U-6745-C), ABOVENET COMMUNICATIONS, INC. (U-6030-C), NEWPATH NETWORKS, LLC (U-6928-C), SUNESYS, LLC (U-6991-C), EXTENET SYSTEMS, (CALIFORNIA) LLC, INC. (U-6959-C) AND SOUTHERN CALIFORNIA EDISON D/B/A EDISON CARRIER SOLUTIONS (U-6096-C) IN OPPOSITION TO MOTION OF THE LEAGUE OF CALIFORNIA CITIES, THE CALIFORNIA STATE ASSOCIATION OF COUNTIES, AND SCAN NATOA, INC. FOR AN IMMEDIATE STAY OF DECISION 10-12-056

Stephen P. Bowen
BOWEN LAW GROUP
235 Montgomery Street, Suite 742
San Francisco, CA 94104
Telephone: (415) 394-7500
Facsimile: (415) 394-7505
E-Mail: steve.bowen@bowenlawgroup.com
Counsel for NewPath Networks, LLC

Anita Taff-Rice
Law Offices of Anita Taff-Rice
1547 Palos Verdes, #298
Walnut Creek, CA 94597
Telephone: (415) 699-7885
E-Mail: anitataffrice@earthlink.net
Counsel for ExteNet System (California) LLC.
and Southern California Edison d/b/a Edison
Carrier Solutions

Edward W. O'Neill
DAVIS WRIGHT TREMAINE LLP
505 Montgomery Street, Suite 800
San Francisco, CA 94111-6533
Telephone: (415) 276-6582
Facsimile: (415)-276-6599
E-mail: edwardoneill@dwt.com
Counsel for AboveNet Communications, Inc.

Suzanne K. Toller
Kerry E. Shea
DAVIS WRIGHT TREMAINE LLP
505 Montgomery Street, Suite 800
San Francisco, CA 94111-6533
Telephone: (415) 276-6500
Facsimile: (415) 276-6599
E-mail: suzannetoller@dwt.com

Counsel for Sunesys, LLC and NextG Networks of
California, Inc.

February 8, 2011

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Pursuant to Rule 11 of the Commission’s Rules of Practice and Procedure, Sunesys, LLC (“Sunesys”) (U-6991-C) NextG of California, Inc. (“NextG”) (U-6745-C), NewPath Networks, LLC (“NewPath”) (U-6928-C), ExteNet Systems (“ExteNet”) (U-6959-C), and AboveNet Communications, Inc. (“AboveNet”) (U -6030 C), Southern California Edison d/b/a Edison Carrier Solutions (U-6096-C) (“SCE”) (collectively, the “Competitive Carriers”) hereby oppose the Motion of the League of California Cities, the California State Association of Counties, and SCAN NATOA, Inc. (collectively, the “Cities”) for a Stay of Decision (“D.”) 10-12-056 (“Decision”).¹ Because the Cities have failed to meet any of the Commission’s criteria for granting a stay, the Commission must deny the Cities’ Motion for Stay of the Decision (“Cities Motion”).

I. DISCUSSION

Granting a motion for stay is an extraordinary remedy that is granted only sparingly, and only when the moving party has met all of the necessary criteria for a stay.² In order to grant a stay, the Commission must find that: (i) the moving parties will incur irreparable harm if the decision is not stayed; (ii) the moving party has demonstrated that it is likely to succeed on the merits of its application for rehearing; (iii) there will be no substantial harm to other interested persons or to the public; and (iv) other considerations do not support a stay.³ The Commission should deny the Cities’ Motion as they have failed to meet these factors.

As discussed in grater detail below, the Cities submitted a cursory declaration with only high-level, blanket assertions that fail to identify specific harms or to assert or demonstrate that they are probable. Speculative injury does not constitute irreparable injury sufficient to warrant

¹ The Competitive Carriers have also filed concurrently with this Opposition a Response to the Cities’ Application for Rehearing of the Decision.

² D.08-09-044, *Order Modifying Decision 08-04-055, And Denying Rehearing. Of Decision, As Modified, And Denying Request for Stay*, *mimeo at 18-23(citing North Shuttle Service, Inc. v. Public Utilities Commission ("North Shuttle Service"))* (1998) 67 Cal.App.4th 386.

³ *See* D.08-04-044, *Order Granting Motion for Stay of Decision 08-01-031, mimeo at 3.*

granting a preliminary injunction.⁴ In order to qualify for a grant of a preliminary injunction, a plaintiff must demonstrate immediate, threatened injury.⁵ "Bare allegations of what is likely to occur are of no value since the court must decide whether the harm will in fact occur."⁶ Injunctive relief such as a stay will not be granted against something which is merely feared as possible to occur.⁷ As discussed in detail below, the Cities' motion for stay falls far short of providing actual evidence of imminent harm, the standard required under Commission precedent and state law. Therefore, the Commission need not go further to determine whether the Cities' motion meets any of the other three requirements for issuance of a stay. Nonetheless, the Competitive Carriers demonstrate below that the Cities fail to meet any of the other factors required for issuance of a stay.

For all the reasons discussed in the Competitive Carriers' concurrently filed Response to the Cities' Application for Rehearing,⁸ it is highly unlikely that the Cities will prevail on the merits of their underlying claims in that Application. Indeed, contrary to their claims, granting the stay would in fact cause harm to (i) interested parties such as carriers that would be denied the right to proceed to deploy infrastructure supporting emergency services and advanced telecommunications services, as mandated by state law; and ultimately to (ii) competition and the public interest. Thus, granting stay of the Decision and GO 170 would be contrary to the

⁴ D.97-12-085, 1997 Cal. PUC LEXIS 1178, at *18 (Dec. 16, 1997) (citing *Caribbean Marine Services Co. v. Baldrige*, 844 F.2d 668, 674 (9th Cir. 1988) See also, *Goldie's Bookstore, Inc. v. Superior Court*, 739 F.2d 466, 472 (9th Cir., 1984) and *Arcamuzi v. Continental Air Lines, Inc.*, 819 F.2d 935,938 (9th Cir. 1987)

⁵ *Caribbean*, 844 F.2d at 674.

⁶ *Wisconsin Gas Co. v. Federal Energy Regulatory Commission*, 758 F.2d 669, 674 (D.C. Cir. 1985)

⁷ *Connecticut v. Massachusetts*, 282 U.S. 660, 674 (1931); see also *Mead Johnson Pharmaceutical Group v. Bowen*, 655 F.Supp. 53, 56 (D.D.C. (1986) (mere statement of probable annual economic loss of 20 to 30 percent market share was not adequate to show irreparable harm); *Arrow Air, Inc. v. U.S.*, 649 F.Supp. 993, 1000 (D.D.C. 1986) (even economic loss of 25% of projected gross revenues of a company already in bankruptcy is not enough to show irreparable harm).

⁸ The Competitive Carriers hereby incorporate by reference the entirety of their Response to the applications for rehearing filed by the Cities, and by a group of incumbent local carriers.

Commission's precedent, state law, and is unnecessary to ensure judicial or administrative efficiency.⁹

A. The Cities Will Not Suffer Serious and Irreparable Harm if the Commission Does Not Grant the Stay

To demonstrate irreparable harm, a party must provide specific evidence in a verified petition or sworn declaration, showing that immediate and irreparable injury, loss, or damage will result if the decision is not stayed, because, as the California courts have noted, "some injury or damage is inherent in any adverse decision by the commission."¹⁰ In *North Shuttle Service*, the court refused to grant a stay of a Commission decision revoking its certificate to operate because North Shuttle made only a blanket assertion that it would suffer irreparable financial harm if its certificate were revoked pending appellate review. The Court indicated that North Shuttle should have provided a detailed explanation of its financial situation, the amount of funds it had on hand to continue operating, the amount of funds it could borrow, costs that could be cut, and a calculation showing that the amount of time the appeal would take would likely deplete all of its funds.¹¹

Here, the Cities fail to provide any detail that convincingly demonstrates that they would suffer irreparable harm. Instead, the Cities submit a cursory declaration from the general counsel of the League of California Cities including blanket assertions that they might suffer irreparable harm if the Decision and GO 170 are not stayed. Specifically, the Cities' general counsel asserts that there will be irreparable harm because the Cities will be required to issue ministerial permits for telecommunications facilities that might otherwise be denied if the Cities had discretionary

⁹ See Cities' Motion at 2.

¹⁰ *North Shuttle Service*, (1998) 67 Cal. App.4th 386, 395; Pub. Util. Code § 1763(a).

¹¹ *Id.*, at 395-396.

authority, and that it will be difficult to reverse such permits if the Commission subsequently grants the Application.¹²

In support of its argument, the Cities provide general references to various discretionary permit requirements that the Cities will be unable to enforce, but these references fail to provide specific evidence of irreparable injury. For example, the Cities' Declaration cites a few discretionary permits that the City of San Francisco imposes on telecommunications carriers that presumably will be unenforceable without a stay of GO 170.¹³ These mere references to local permitting requirements fail to establish the purported harm that would result. The Cities' Motion further concentrates a good part of its argument on the fact that several local governments impose discretionary permit processes over wireless facilities¹⁴ and contends that local governments will not be able to enforce those requirements.¹⁵ The Cities' references to discretionary permitting authorities for "wireless facilities" are simply irrelevant as GO 170 does not govern wireless facilities. Specifically, GO 170 states expressly that it "does not preclude the applicability of General Order 159-A to cellular service providers constructing commercial mobile radio service facilities" and that "General Order 159-A, and not General Order 170, shall apply for construction of cellsites."¹⁶

Aside from these references to their current discretionary authority, the Cities have failed specifically to demonstrate exactly how the local agencies' inability to enforce discretionary permitting authority would impair or irreparably harm local concerns regarding aesthetics or the

¹² See Declaration of Patrick Whitnell, at ¶ 10.

¹³ Declaration of Patrick Whitnell at ¶¶ 6-7.

¹⁴ Mr. Whitnell's Declaration cites a number of discretionary permits for "wireless facilities" in numerous local jurisdictions. *Id.* at ¶ 7.

¹⁵ See Cities' Motion at 4-5.

¹⁶ GO 170, § I.B.

environment.¹⁷ They cannot demonstrate such irreparable harm because GO 170 anticipates that the Commission will review any construction activity that may have a direct or indirect physical change to the environment.¹⁸ The Cities also exaggerate concerns that they will be unable to review local concerns of certain activity in historic areas or scenic corridors. CEQA law and GO 170 both provide for exceptions to exemptions when projects are located in specific categories of areas such as sensitive locations, scenic highways or historical resources.¹⁹ Those projects are not eligible for the expedited review procedure, and will undergo formal review by the Commission (with the local agencies being notified of and given the opportunity to participate in review of, such projects). Thus, the Cities' concern that there will be no local review of environmental impacts of telephone construction in historic areas or scenic corridors is unfounded. Moreover, under the expedited review procedures and even in certain cases where a carrier's construction does not constitute a "project" or is categorically exempt,²⁰ GO 170 requires that telephone corporations notify local jurisdictions of such projects, and thus, they will be informed and aware of telephone construction that may raise local concerns.

B. It is Unlikely that the Cities' Application for Rehearing Will be Granted

For the reasons discussed in the Competitive Carriers' accompanying Response to the Cities' Application for Rehearing, it is unlikely that the Cities will succeed with regard to the merits of the underlying claims of their rehearing application. The Competitive Carriers'

¹⁷ Indeed the Commission has rejected similar requests for stay of decisions authorizing the construction of "58 foot power poles, along with a 60 kV power line, in front of and over their property," where the construction "may" involve the removal of several trees on the property." D.07-08-034, Order Granting Party Status and Denying Request, mimeo at 5. Although the moving parties specified the potential injury that may result, the Commission noted that the property owners failed to "identify how many poles are in fact on or near their property," and that the poles would be a one-for-one replacement in existing rights-of-way, and concluded that the parties incorrectly contended that the project would remove trees from their property. *Id.*

¹⁸ Any activity that is not expected to have such impacts on the environment is properly considered to be exempt from the Commission's review.

¹⁹ See Cal Code Regs. Title 14, § 15300.2 (1998) and GO 170 § IV.C.

²⁰ See, e.g., GO 170, § III (requiring notice of distributed antennae system projects to local agencies).

Response to the Cities' Application explains in detail why there is no merit to the Cities' claims, but summarized below are some of the key reasons why there is no merit to the Cities' Application.

Specifically, the Commission did not exceed its authority in asserting its role to be the lead and exclusive agency over telephone corporation construction activities. As explained in the Competitive Carriers' Response, although local authorities have constitutionally-vested police power, the Commission also has constitutionally-vested authority over public utilities.²¹ Further, the Legislature, unlimited by other provisions of the Constitution, has conferred upon the Commission comprehensive and broad jurisdiction to regulate public utilities. The courts have consistently held that the Commission's jurisdiction prevails over any local law concerning the regulation of public utilities as matters of state concern.²² Thus, the Commission properly exercised its authority to be the sole agency to review and approve telephone construction projects.

Moreover, the Decision does not violate the due process rights of the Cities. As noted in the Competitive Carriers' Response, the Commission raised the issue when this rulemaking commenced of whether it should maintain oversight for all discretionary approvals for telecommunications construction.²³ In fact, two of the members of the Cities' filing for rehearing *expressly addressed this very issue* in comments filed in November of 2006.²⁴

Additionally, there is absolutely no basis for the Cities' claim that the Commission has failed to identify the discretionary approval or action it must take that would trigger the Commission's CEQA review of telephone construction activity. The Cities simply ignore the

²¹ See Response at Section III

²² Response at 13-14

²³ Response at 20.

²⁴ Comments of the League of California Cities, the California State Association of Counties, SCAN NATOA, Inc., the City and County of San Francisco, and the City of Walnut Creek at 10 (Nov. 9, 2006).

fact that the Decision and GO 170 establishes an explicit streamlined process for issuing discretionary approvals for certain telephone construction projects in California, consistent with the Commission's authority and responsibility to implement statewide policies.²⁵

The Cities also incorrectly claim that GO 170 violates CEQA. The Commission, through years of experience reviewing telephone construction projects and careful consideration of various construction activities that telephone corporations undertake, established clear categories of activities that do not rise to the level of projects, categories of projects that do not require its review, and categories of projects that are eligible for streamlined review or formal applications. GO 170 does not "delegate" to telephone corporations the determination of which activities are required to be reviewed or not. The Commission has, as an initial matter in GO 170, clearly established which activities require its further consideration and approval and which do not. As is the case with all construction activities that any entity in California undertakes, the entity must make a determination as to whether its activity requires the agency's review and approval pursuant to the agency's guidelines/procedures.

C. The Balance of Harms Does Not Support A Stay

The Cities argue that the Commission should grant the stay because no prejudice results to other parties by grant of the Decision. This is incorrect. A stay would harm the Competitive Carriers and other carriers that are ready to commence specific construction projects. More importantly, a stay would continue to harm the public interest and competition, by further delaying the construction of facilities to support emergency communications services and advanced telecommunications services such as broadband, as mandated by state law. In addition, a stay would perpetuate ongoing violations of Section 253 of the Telecommunications Act by creating barriers to entry and treating wireline carriers in a discriminatory fashion.

²⁵ Response at Section II.

As an initial matter, the Cities incorrectly claim that it is not true that GO 170 “has yet to go into effect.” GO 170 *is currently effective*, and some of the Competitive Carriers and other carriers have imminent plans to file for approval of certain projects and activities under the new GO 170 procedures. Since GO 170 became effective on the date of adoption on December 16, 2010, carriers have been preparing construction activity and materials for approval under the GO 170 process. If the Commission were to stay the Decision at this point, such a stay would have considerable impacts not only on many carriers’ business operations, resulting in substantial loss of time, money, and resources, but more significantly, would cause considerable delay of network buildouts and service to certain customers.

Further, and more importantly, a stay would only further perpetuate the inequity and harm to competition that has persisted for over a decade from the Commission’s disparate procedures governing telephone construction in the State. Ironically, a stay of GO 170 would also preclude the local governments from an official process for participating in review of telephone construction projects, because under the current “Notice to Proceed” procedures for individual carriers, local agencies are not always notified of such projects. The lack of formal process has resulted in disputes between carriers and local governments that have further exacerbated the delay of building critical telecommunications networks.²⁶ Ultimately, a stay would be adverse to the public interest (contrary to the Cities’ claims otherwise) and would delay deployment of networks to support emergency communications and advanced telecommunications, in violation of the Commission’s and this State’s goals. In contrast, as discussed above, there is no serious or irreparable harm to the Cities resulting from a lack of stay

²⁶ NextG, for example, has experienced a delay of *more two years* to undertake a simple project that was approved under the Commission’s prior Notice to Proceed process. The City of Huntington Beach disputed the approval of the project and filed a complaint and the ensuing resolution of the complaint took more than two years. *See D.11-01-02, Order Modifying Decision 10-10-007, Denying Rehearing of Decision as Modified and Denying the Request for oral Argument.*

given that the bulk of construction by carriers either will not rise to the level of “project” or be subject to this Commission’s review (with notice to the local jurisdictions and opportunity to weigh in as well). Accordingly, the balance of harms weighs in favor of denying a stay.

The Cities also point to the fact that AT&T and other carriers have asked the Commission for a 90-day extension of time to comply with the GO as demonstration that the Commission should grant the stay. The fact that other carriers have asked for an extension of time to comply with GO 170 is not a compelling basis on which the Commission should grant a stay. In fact, notably AT&T and carriers filing an application for rehearing of the Decision *did not ask* for a “stay” of GO 170. If anything, their failure to request a stay suggests that there will *not* be serious or irreparable harm to them from the failure to stay the Decision.

D. There are No Other Reasons to Stay the Decision

Finally, the Cities argue that they were not afforded “sufficient due process” in this proceeding and that a stay will ensure administrative or judicial efficiency.²⁷ However, for the reasons discussed above and in the Competitive Carriers’ Response, there is absolutely no basis for the Cities’ claim that there was no due process on the issue that the Commission is the “only agency that can issue discretionary permits for telecommunications projects.”²⁸ The Cities were given sufficient opportunity to address this issue, and in fact, did so in their opening comments on the 2006 Order Instituting Rulemaking in this proceeding and again in their comments on the Proposed Decision in this proceeding. Further, there is no administrative efficiency to staying the Decision, given that it is highly unlikely that the Cities will prevail on their Application for Rehearing and a stay will merely create more regulatory uncertainty and delay.²⁹

²⁷ Motion at 11-12.

²⁸ See Response at Section IV.

²⁹ Although the Cities note in passing that a stay will ensure administrative or judicial efficiency, they fail to elaborate on this point.

II. CONCLUSION

For the foregoing reasons, Competitive Carriers respectfully urge the Commission to deny the Cities' Motion for Stay.

Respectfully submitted this February 8, 2011 at San Francisco, California.

/s/ Stephen P. Bowen

Stephen P. Bowen
BOWEN LAW GROUP
235 Montgomery Street, Suite 742
San Francisco, CA 94104
Telephone: (415) 394-7500
Facsimile: (415) 394-7505
E-Mail: steve.bowen@bowenlawgroup.com
Counsel for NewPath Networks, LLC

/s/ Edward W. O'Neill

Edward W. O'Neill
DAVIS WRIGHT TREMAINE LLP
505 Montgomery Street, Suite 800
San Francisco, CA 94111-6533
Telephone: (415) 276-6582
Facsimile: (415)-276-6599
E-mail: edwardoneill@dwt.com
Counsel for AboveNet Communications, Inc.

/s/ Anita Taft-Rice

Anita Taff-Rice
Law Offices of Anita Taff-Rice
1547 Palos Verdes, #298
Walnut Creek, CA 94597
Telephone: (415) 699-7885
E-Mail: anitataffrice@earthlink.net
Counsel for ExteNet System (California) LLC
and Southern California Edison d/b/a Edison
Carrier Solutions

/s/ Suzanne K. Toller

Suzanne K. Toller
Kerry E. Shea
DAVIS WRIGHT TREMAINE LLP
505 Montgomery Street, Suite 800
San Francisco, CA 94111-6533
Telephone: (415) 276-6500
Facsimile: (415) 276-6599
E-mail: suzannetoller@dwt.com

Counsel for Sunesys, LLC and NextG Networks of
California, Inc.

CERTIFICATE OF SERVICE

I, Judy Pau, certify:

I am employed in the City and County of San Francisco, California, am over eighteen years of age, and not a party to the within entitled cause. My business address is 505 Montgomery Street, Suite 800, San Francisco, California 94111.

On February 8, 2011, I caused the following to be served:

JOINT RESPONSE OF NEXTG NETWORKS OF CALIFORNIA, INC. (U-6745-C), ABOVENET COMMUNICATIONS, INC. (U-6030-C), NEWPATH NETWORKS, LLC (U-6928-C), SUNESYS, LLC (U-6991-C), EXTENET SYSTEMS, (CALIFORNIA) LLC, INC. (U-6959-C) AND SOUTHERN CALIFORNIA EDISON D/B/A EDISON CARRIER SOLUTIONS (U-6096-C) IN OPPOSITION TO MOTION OF THE LEAGUE OF CALIFORNIA CITIES, THE CALIFORNIA STATE ASSOCIATION OF COUNTIES, AND SCAN NATOA, INC. FOR AN IMMEDIATE STAY OF DECISION 10-12-056

enclosed in a sealed envelope, by first class mail on the parties listed as “Parties” and “State Service” on the attached service list, R.06-10-006 who have not provided an electronic mail address, and via electronic mail to all parties on the service list who have provided the Commission with an electronic mail address.

Executed on February 8, 2011 at San Francisco, California.

/s/ Judy Pau

Judy Pau

VIA U.S. MAIL and EMAIL

President Michael R. Peevey
California Public Utilities Commission
505 Van Ness Avenue, Room 5218
San Francisco, CA 94102

Maribeth A. Bushey
California Public Utilities Commission
Division of Administrative Law Judges
505 Van Ness Avenue
San Francisco, CA 94102

Commissioner Mike Florio
California Public Utilities Commission
505 Van Ness Avenue, Room 5207
San Francisco, CA 94102

Sepideh Khosrowjah
Advisor to Commissioner Mike Florio
California Public Utilities Commission
505 Van Ness Avenue
San Francisco, CA 94102

Matthew Tisdale
Advisor to Commissioner Mike Florio
California Public Utilities Commission
505 Van Ness Avenue
San Francisco, CA 94102

Commissioner Timothy Alan Simon
California Public Utilities Commission
505 Van Ness Avenue, Room 5213
San Francisco, CA 904102

Christhian Escobar, Advisor – Telecom
To Commissioner Timothy Alan Simon
California Public Utilities Commission
505 Van Ness Avenue
San Francisco, CA 94102

Commissioner Catherine Sandoval
California Public Utilities Commission
505 Van Ness Avenue, Room 5205
San Francisco, CA 94102

Phil Weismehl, Chief of Staff
To Commissioner Catherine Sandoval
California Public Utilities Commission
505 Van Ness Avenue
San Francisco, CA 94102

VIA EMAIL

Phyllis.Whitten@ftr.com; jq@cahnellawgroup.com; lorraine.kocen@verizon.com;
nino.mascolo@sce.com; elaine.duncan@verizon.com; rudy.reyes@verizon.com;
lmb@cpuc.ca.gov; omv@cpuc.ca.gov; mang@turn.org; steve.bowen@bowenlawgroup.com;
david.discher@att.com; fassil.t.fenikile@att.com; gwen.johnson@att.com;
Kristin.L.Jacobson@sprint.com; pacasciato@gmail.com; amanda.monchamp@hkclaw.com;
jarmstrong@goodinmacbride.com; mschreiber@cwclaw.com; ngieleghem@cwclaw.com;
smalllecs@cwclaw.com; deyoung@caltel.org; O'Neill, Edward; Toller, Suzanne; valle-
riestra@ci.walnut-creek.ca.us; anitataffrice@earthlink.net; raissa.lerner@doj.ca.gov;
robertg@greenlining.org; glcastro@pacbell.net; jpeidsness@yahoo.com; Charlie.Born@ftr.com;
Joe.Chicoine@ftr.com; jhawley@technet.org; blake@consumercal.org; lesla@calcable.org;
rmillar@nextgnetworks.net; stephaniec@greenlining.org; SFOCPUCDockets; Pau, Judy;
greg.rogers@level3.com; PHILILLINI@aol.com; ann.cohn@sce.com; case.admin@sce.com;
thomas.k.braun@sce.com; lori.ortenstone@att.com; CFaber@SempraUtilities.com;
CentralFiles@SempraUtilities.com; dhankin@wavebroadband.com; P.martz@cox.net;
lindab@stcg.net; william.sanders@sfgov.org; bnusbaum@turn.org; FSC2@pge.com;
gls@pge.com; Stephen.H.Kukta@sprint.com; thomas.selhorst@att.com; marg@tobiaslo.com;
elizabeth.lake@hkclaw.com; madeline.stone@hkclaw.com; Prabhakaran, Vidhya;
SFOCPUCDockets; Whang, Jane; Davidson, Josh; StoverLaw@gmail.com; JLLm@pge.com;
kck5@pge.com; ppv1@pge.com; selbytelecom@gmail.com; rdelsman@nextgnetworks.net;
mcf@calcom.ws; cm9268@att.com; Adam.Sherr@Qwest.com; bca@cpuc.ca.gov;
ph1@cpuc.ca.gov; evw@cpuc.ca.gov; jmu@cpuc.ca.gov; jzr@cpuc.ca.gov; kar@cpuc.ca.gov;
mab@cpuc.ca.gov; nxb@cpuc.ca.gov; psp@cpuc.ca.gov; phs@cpuc.ca.gov; rw1@cpuc.ca.gov;
leh@cpuc.ca.gov; MP1@cpuc.ca.gov; DGX@cpuc.ca.gov; SKH@cpuc.ca.gov;
TAS@cpuc.ca.gov; ESC@cpuc.ca.gov; PSW@cpuc.ca.gov; cjs@cpuc.ca.gov