

DRAFT

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Energy Division

Agenda ID 12284
San Francisco, California
Date: October 31, 2013
Resolution No.: E-4607

RESOLUTION

**UPHOLDS THE DETERMINATION OF CALIFORNIA
PUBLIC UTILITIES COMMISSION'S ENERGY DIVISION
APPROVING A NOTICE OF PROPOSED CONSTRUCTION
FOR A DISTRIBUTED ANTENNA SYSTEM PROJECT BY
NEW PATH NETWORKS, LLC LOCATED IN THE TOWN OF
HILLSBOROUGH.**

SUMMARY

The City Attorney for the Town of Hillsborough, at the direction of the Hillsborough City Council, requests that the Commission reconsider the staff approval of a telecommunications project located in Hillsborough. We find that the staff determination was made consistent with the conditions set forth in the utility's Certificate of Public Convenience and Necessity ("CPCN"). Thus, in this Resolution, we decline to overturn staff's determination.

BACKGROUND

On June 14, 2012 Energy Division staff approved a Notice of Proposed Construction ("NPC") for a Distributed Antenna System Project ("DAS") by NewPath Networks, LLC ("NewPath") located in the Town of Hillsborough, San Mateo County. The project consists of the installation of fiber optic cable, DAS antenna nodes, utility poles, and other DAS-related equipment. Staff determined that the proposed construction activities are consistent with those described by the Commission as eligible for staff approval under the "Procedure for Obtaining [California Environmental Quality Act] CEQA Exemption for Distributed Antenna System Networks" adopted by the Commission for NewPath in Decision (D.) 06-04-030 on April 13, 2006. Accordingly, staff found that the Commission had determined these types of activities to be categorically exempt from CEQA and granted NewPath the authority to proceed with the construction of the project.

Before approving the NPC, on June 14, 2012, staff sent an email to NewPath asking if the Town of Hillsborough was aware of the projects and if they indicated

any opposition to it. NewPath responded that they had met with the Town of Hillsborough, and they had not voiced any opposition to the project. On June 21, 2012, NewPath filed a Wireless Communications Facility Permit Application with the Town of Hillsborough for the DAS project described in the NPC.

On November 2, 2012, staff received a letter from counsel for the Town of Hillsborough stating that the project entails “significant environmental impacts” and requesting staff to clarify the particular CEQA exemptions that apply to the project. On December 11, 2012 President Peevey’s office received a letter from counsel for the Town of Hillsborough notifying the Commission that Hillsborough would be commencing an action in San Francisco Superior Court challenging Commission staff’s approval of the project. On December 17, 2012 the Commission’s Executive Director received a summons from the Superior Court of San Francisco for a lawsuit filed against the Commission by Hillsborough on December 12, 2012.

Soon thereafter, an attorney with the Commission’s Legal Division contacted counsel for the Town of Hillsborough. Hillsborough’s counsel was told that there were two separate administrative processes available at the Commission to challenge staff level determinations: formal complaints and letter requests for reconsideration. Partly in reliance on its ability to seek reconsideration by the Commission of staff’s approval of the NewPath project, Hillsborough dismissed the lawsuit against the Commission. On January 30, 2013, the City Attorney for the Town of Hillsborough, at the direction of the Hillsborough City Council, requested that the Commission reconsider the staff approval of NewPath’s NPC.

DISCUSSION

The Commission must determine whether staff acted consistently with the direction given in D.06-04-030 and whether this particular project was correctly approved pursuant to NewPath’s Procedure for Obtaining CEQA Exemption for Distributed Antenna System Networks.

In D.06-04-030 the Commission modified NewPath’s CPCN, authorizing a process by which Commission staff could approve DAS projects that would consist of: “predominantly aerial fiber optic facilities; the installation of compact “nodes” on existing utility poles; a minor amount of ground disturbance (100 – 200 feet) associated with connecting equipment enclosures on private property with the aerial right-of-way; aerial fiber runs of short distances, rarely exceeding 1,000 feet in length; all facilities to be located within public utility rights-of-way (with the exception of ingress and egress to and from); and projects and facilities that are widely separated geographically.”

In approving the Procedure for Obtaining CEQA Exemption for Distributed Antenna System Networks, the Commission found that:

- (1) NewPath's proposed facilities-based project activities are indeed of a limited nature;
- (2) they would in almost all circumstances be highly likely to qualify for an exemption from CEQA; and
- (3) the process for staff review of the applicability of the exemptions for Applicant's DAS projects is adequate for the Commission's purposes as a CEQA Lead Agency, and in the public interest in that NewPath would be able to respond in a timely manner to Wireless Service Providers requests for service without the delay or burden of a full CEQA review where it is not necessary.

Staff reviewed NewPath's NPC submitted on or about May 16, 2012. The NPC contains: a description of the proposed project and environmental setting, the construction workplan, and a statement of the categorical exemptions that may apply to the project. The construction workplan describes the activity schedule and construction/installation techniques for the installation of: underground fiber-optic conduit and hand holes, new and replacement wooden and steel utility poles, communications nodes and equipment, and measures for traffic control, erosion, pre-construction environmental training and operation and maintenance. The Appendices to the NPC include: project maps and drawings, cultural and paleontological resources background information, special-status wildlife species background information, the list of permits/clearances required for the project, CEQA exemptions documentation, a list of agencies and other groups contacted and aesthetics background data.

Staff determined that the nature of the DAS project for the Town of Hillsborough is consistent with the type of projects for which the Commission authorized the use of the Procedure for Obtaining CEQA Exemption for Distributed Antenna System Networks approved as part of NewPath's CPCN. Staff also considered the proposed CEQA exemptions claimed by NewPath:

- Class 1 - Minor Alterations to Existing Structures
- Class 2 - Replacement or Reconstruction of Existing Facilities
- Class 3 - New Construction or Conversion of Small Structures
- Class 4 - Minor Alterations to Land
- Class 32 - In-Fill Development Projects

Staff considered the DAS project as described in the NPC and determined that the entirety of the proposed project was covered by the exemptions listed above.

COMMENTS ON DRAFT RESOLUTION

The Draft Resolution of the Commission's Energy Division in this matter was mailed to the parties in interest on July 31, 2013, in accordance with Cal. Pub. Util. Code § 311(g). Comments were filed on _____. Reply comments were filed on _____.

FINDINGS OF FACT

1. The information contained in NewPath's Notice of Proposed Construction was sufficient for staff to make a determination pursuant to the Procedure for Obtaining CEQA Exemption for Distributed Antenna System Networks that was approved as part of NewPath's CPCN.
2. Staff appropriately acted and approved NewPath's Notice to Proceed consistent with the authority delegated to Staff by the Commission.
3. Staff's determination that the project is categorically exempt from CEQA review is consistent with the direction that was provided by the Commission in Decision 06-04-030.

THEREFORE IT IS ORDERED THAT:

1. We deny the request from the Town of Hillsborough to reconsider staff's approval of NewPath's Notice of Proposed Construction for a Distributed Antenna System project to be located in the Town of Hillsborough.
2. The effective date of this order is today.

I certify that this Resolution was adopted by the California Public Utilities Commission at its regular meeting of October 31, 2013 and that the following Commissioners approved it:

PAUL CLANON
Executive Director