PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Energy Division

San Francisco, California
Date: December 19, 2013
Resolution No.: E-4607

R E S O L U T I O N

ALTERNATE RESOLUTION OF COMMISSIONER FLORIO REVOKING A NOTICE TO PROCEED ISSUED BY COMMISSION STAFF FOR A DISTRIBUTED ANTENNA SYSTEM PROJECT BY NEW PATH NETWORKS, LLC LOCATED IN THE TOWN OF HILLSBOROUGH.

SUMMARY

This Resolution revokes the Notice to Proceed issued by the California Public Utilities Commission's Energy Division to New Path Networks, LLC for a Distributed Antenna System project in the Town of Hillsborough.

BACKGROUND

On June 14, 2012 the California Public Utilities Commission's Energy Division 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 (Hillsborough or Town). 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, and granted NewPath the authority to proceed with project construction through the issuance of a Notice to Proceed ("NTP").

Before approving the NPC on June 14, 2012, staff sent an email to NewPath asking if Hillsborough was aware of the project and if the Town had indicated any opposition to it. NewPath responded that it had met with Hillsborough, and the Town had not voiced any opposition to the project. On June 21, 2012, NewPath filed a Wireless Communications Facility Permit Application with Hillsborough for the DAS project described in the NPC.

On November 2, 2012, staff received a letter from Hillsborough stating that the project entails "significant environmental impacts" and requesting that staff clarify the particular CEQA exemptions that apply to the project. On December 11, 2012, the Commission received a letter from Hillsborough providing notification that it would be commencing an action in San Francisco Superior Court to challenge the Commission's approval of the project. On December 17, 2012, the Commission received a summons to appear from the Superior Court of San Francisco for a lawsuit filed against the Commission by Hillsborough on December 12, 2012.

Soon thereafter, Commission staff contacted Hillsborough to inform it that there existed two separate administrative processes available at the Commission to challenge a staff determination: formal complaints and letter requests for reconsideration. Hillsborough subsequently dismissed the lawsuit against the Commission and on January 30, 2013, by letter, requested that the Commission overturn the staff determination.

DISCUSSION

In response to the Hillsborough request the Commission must determine whether staff acted consistently with D.06-04-030 and also whether this particular project was appropriate to be 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 Certificate of Public Convenience and Necessity (CPCN), authorizing a process by which Commission staff may 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 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 of interest on July 31, 2013, in accordance with Cal. Pub. Util. Code 311 (g). Comments to Draft Resolution E-4607 were filed by Hillsborough on August 26, 2013, and NewPath submitted late-filed comments on September 4, 2013.

Comment Summary of the Town of Hillsborough:

Hillsborough claims it was not notified of NewPath's Notice of Proposed Construction that was submitted to the Commission. Hillsborough states that the Commission did not contact it and that affected residents were not provided notice. Hillsborough claims that the carrier only contacted it regarding the NPC after the NPC had been approved and the Commission had issued the NTP. Hillsborough also claims that this is a major construction project that should not qualify for a categorical exemption from CEQA and that the nine faux streetlights that would house nine of the thirteen DAS antennas that comprise the project are out of character with the neighborhood.

The Town of Hillsborough's specific claims are as follows:

The Proposed Project is Substantially Different from the Exemplar Projects in D.06-04-030.

In D.06-04-030, the Commission adopted the 21-day NTP process for NewPath. D.06-04-030 relied on two exemplar projects to support its finding that typical DAS projects would not have a significant impact on the environment and that the projects were categorically exempt under CEQA. One exemplar project was to be constructed in Cupertino, predominantly in commercial areas. That project involved antenna nodes to be installed on existing telephone poles and network connections using aerial cabling. In contrast, the Hillsborough project involves only four antenna nodes on existing telephone poles. Nearly 70% of the project will be installed on new faux streetlight poles to be connected with underground cables. The second exemplar project was in Irvine. The antenna nodes were to be installed on new, functioning light poles along a parkway. Connecting fiber optic cable was to be installed under existing city streets using horizontal directional drilling.

Hillsborough's opinion is that NewPath's project is substantially different from the Cupertino and Irvine projects because the Hillsborough project involves nonfunctioning light poles to be built in front of existing residences and trenching of approximately seven miles within city streets to connect them. Hillsborough contends that an initial study should have been performed to ascertain whether the Hillsborough project would have impacts that were not present in the two exemplar projects.

The Proposed Project Does Not Satisfy the Technical Standards in D.06-04-030.

D.06-04-030 allows staff to determine that a project is categorically exempt and issue a NTP if the project satisfies six technical criteria. Hillsborough contends that the project does not consist of the following five criteria: predominantly aerial fiber optic facilities; installation of compact 'nodes' on existing poles; minor amount of ground

disturbance; aerial runs of short distances, rarely exceeding 1,000 feet in length; and projects and facilities that are widely separated geographically. Hillsborough cites to the following to support its contention: only four nodes would be on existing telephone poles, while the other nine (nearly 70%) would be installed on new faux street light poles to be constructed by NewPath; the project would require nearly seven miles of trenching; and all of the aerial fiber optic cable runs would substantially exceed 1,000 feet. Approximately eight miles of aerial cable is needed to connect four nodes to the remainder of the system.

The Draft Resolution Does Not Address Known Environmental Impacts From the Proposed Project.

Hillsborough claims that the project is not categorically exempt from CEQA based on the following potential impacts: known cultural resources beneath El Cerrito Avenue, traffic, noise, dust, possible disturbance of habitat during trenching, and visual impacts due to the installation of faux streetlight poles that do not fit the character of the Town. Hillsborough states that at a minimum, a mitigated negative declaration would be required to establish mitigation measures to eliminate or reduce the impact on Native American artifacts and remains and to lessen the impact of other effects.

Hillsborough also claims that the project does not satisfy the categorical exemptions for: the Class 1 exemption, which applies to minor alterations of existing structures, the Class 2 exemption, which applies to replacement or reconstruction of existing structures; the Class 3 exemption for new construction or conversion of small structures; and the Class 4 exemption, which pertains to minor alterations of land.

Hillsborough claims that even if the project could fit within the parameters of one of these categorical exemptions, the project still could not be categorically exempt because of the likely impact on public resources due to "unusual circumstances" that create a reasonable likelihood of significant effects on the environment. Hillsborough claims that the likelihood that the proposed project will have a significant impact on Native American artifacts and remains is an “unusual circumstance,” based on existing studies performed by Hillsborough and contained in its CEQA document for the Crystal Sprints/El Cerrito Phase II Trunk Sewer Improvement Project.

The Project is Inconsistent with Community Values.

Hillsborough describes itself as “a residential community that does not have sidewalks, street lights, or other urban amenities. The Town is careful to retain its rural ambiance. Through its City Council, Architecture and Design Review Board, and public participation policies, the Town is committed to working with residents, designers, developers, contractors, and other public agencies to achieve projects that

fairly meet all parties' interests…Hillsborough's policies include reduction of the proliferation of visual clutter and blight from utility infrastructure. Hillsborough requires undergrounding of utilities in certain areas and hopes to adopt a city-wide program to eventually underground all utilities. This project is contrary to Hillsborough's goals." Hillsborough further states that its residents do not want faux streetlight poles.

REPLY COMMENTS OF NEWPATH NETWORKS, LLC

The late-filed reply comments of NewPath are as follows:

THE AVENUE FOR CHALLENGING AN AGENCY'S CEQA EXEMPTION IS A TIMELY LAWSUIT.

NewPath asserts that as early as March 19, 2012 -- three months prior to the issuance of the NTP -- NewPath representatives met with Hillsborough to discuss the Project and explain its features and purpose and to propose various designs and facility configurations. NewPath submitted the Declaration of Stephen Garcia, to support this claim.

On or about December 12, 2012, the Town served both the Commission and NewPath with a petition for writ of mandate challenging the Commission's CEQA exemption for the Project (lawsuit). NewPath Claims that the lawsuit was filed past the 180-day statute of limitations for CEQA lawsuits challenging projects found to be categorically exempt from CEQA for which no Notice of Exemption is filed with the State Clearinghouse. NewPath claims that the law required Hillsborough to file the lawsuit by December 11, 2012. NewPath further claims that Hillsborough had sufficient notice to file such a timely lawsuit. Because it did not do so, it cannot now seek to revive the statute of limitations.

NEWPATH'S DAS PROJECT QUALIFIES FOR A CATEGORICAL EXEMPTION.

NewPath states that the CEQA exemption was appropriate. Its comments are as follows:

NewPath claims that the Crystal Sprints/El Cerrito Phase II Trunk Sewer Improvement Project actually supports the exemption based on the documents findings that trenching in existing roadways is not an area of potential archaeological impacts because the roadways are already disturbed. The focus of the potential impacts of that project is outside developed roadways in undisturbed native soils.

NewPath states that its project will be located in the public rights-of-way, where paving, previous trenching, existing underground utilities and underlying fill make archaeological impacts unlikely. In any event, NewPath's NPC adequately addresses archaeological resources and prescribes an archaeological monitor to be present during any ground-disturbing activities. The Commission therefore did not overlook this area of potential impacts.

In response to Hillsborough, Newpath also addresses the following topics:

(a) **Traffic:** It is not clear how a DAS system could generate any perceivable increase in traffic counts in the Town. It therefore is assumed that the Town is referring to temporary construction impacts. In the NPC NewPath addresses such potential impacts and commits to following established traffic control protocols.

(b) Noise: It is not clear how the Project could add any significant increase in noise to developed roadways where automobiles regularly travel. It's therefore is assumed that the Town is referring to temporary construction noise. The NPC establishes that construction will be limited to daylight hours, when the baseline noise levels are highest, not during times when the Town's noise ordinance is in effect.

(c) Habitat: As discussed in the NPC, the project is proposed to be constructed in the public rights-of-way. Because the public rights-of-way are already developed and highly disturbed, there are no habitat values that could be subject to impacts. As the NPC demonstrates, no sensitive or endangered species were identified in the area of the public roads where the Project is proposed to be sited.

(d) Visual Blight: The NPC addresses potential aesthetic impacts. It concludes that the Project components are located in the public roads and are not within any scenic vista. Additionally, the NPC reviewed potential designs and materials to be utilized in the Project. The NPC concludes that no significant aesthetic effects are likely. The Town complains that the Project does not accommodate multiple carriers and therefore "is contrary to Hillsborough 's policy of encouraging collocation." If the Town wants a larger, multi-carrier design, NewPath claims that it is happy to propose one; the limited-carrier design was intended to address the Town's aesthetic concerns by advancing a lower-profile system.

Finally, NewPath states that the Town's comments suggest that no avenues exist for public input on the Project and that the Commission's issuance of the NTP somehow forecloses the Town from further participation in the Project approval. The Project is still subject to approval by Hillsborough. The Town's currently codified Wireless Ordinance requires that wireless infrastructure developers obtain a fully discretionary

conditional use permit after compliance with application requirements. Among other things, the ordinance provides for appeal rights to the City Council, full public hearings and a final decision rendered on the basis of substantial evidence. The Town is developing a new wireless ordinance. Based on the existing Wireless Ordinance, it is presumed that the Town's processes will afford adequate opportunity for input from staff and the public on aesthetic designs and ensure some level of public involvement in the local permitting process.

Discussion

There is a factual disagreement between the parties regarding notice being provided to Hillsborough prior to issuance of the NTP. Hillsborough also states that the Commission unreasonably relied upon communications from NewPath in which it stated that, "Hillsborough did not oppose the project". In its comments, NewPath included a declaration stating that a meeting prior to the issuance of the NTP had indeed incurred. We are unable in this Resolution to resolve these issues. Rule 1.1 of the Commission's Rules of Practice and Procedure imparts a duty on entities doing business with the Commission to never to mislead Commission staff. If Hillsborough believes that NewPath did not properly notify it of the NTP and that it mischaracterized communications, Hillsborough may file a complaint to adjudicate these serious allegations.

We also find it troubling that NewPath submitted its Wireless Communications Facility Permit Application with Hillsborough only one week after the Commission issued the NTP. NewPath's decision not to file its application with Hillsborough concurrently with its NPC at the Commission may have been a conscience one. This approach to permitting is not prohibited by Commission rules, but may have effectively prevented Hillsborough from bringing a timely protest before the Commission. The NTP process authorized by the Commission should not be used to impede local government participation.

Regarding CEQA, NewPath is likely correct regarding the expiration of the statute of limitations to challenge staff's determination that the project was categorically exempt from CEQA. Nonetheless, we conclude that the project fits squarely within the categorical exemptions cited by staff.

Because Hillsborough has an undergrounding ordinance, there are few existing utility poles for NewPath to attach aerial facilities and DAS antennas. The extent of trenching involved is a direct result of Hillsborough's preference for undergrounding utilities. Trenching within existing streets and returning the street to its former condition is consistent with the CEQA exemption for minor alterations to land. The environmental study cited by Hillsborough does not demonstrate that there is a likelihood of

encountering Native American artifacts in the existing Right-of-Way. Thus an exception to the exemption is not triggered.

Attaching the four DAS nodes and aerial fiber to existing utility poles clearly meets the criteria for either Class 1 exemptions, which apply to minor alterations of existing structures or Class 3, which applies to small facilities and structures.

Whether the faux streetlights proposed by NewPath meet the criteria of Class 3, which applies to small facilities and structures is less clear. However, we find that staff acted appropriately in finding that an exemption is applicable. Hillsborough cites to no authority to substantiate its claim that this exemption is misapplied. In fact, examples listed in the CEQA Guidelines for this exemption include projects much larger than the faux streetlight antennas proposed by NewPath: "Class 3 consists of construction and location of limited numbers of new, small facilities or structures.... Examples of this exemption include but are not limited to:

A. One single-family residence or a second dwelling unit in a zone which permits residential uses. In urbanized areas, up to three single-family residences may be constructed or converted under this exemption;

B. A duplex or similar multi-family residential structure totaling no more than four dwelling units if not in conjunction with the building or conversion of two or more such structures. In urbanized areas, exemption applies to single apartments, duplexes, and similar structures designed for not more than six dwelling units;

C. A store, motel, office, restaurant or similar commercial or institutional structure not involving the use of significant amounts of hazardous substances, and not exceeding 2500 square feet in floor area. In urbanized areas, the exemption also applies to up to four such commercial buildings not exceeding 10,000 square feet in floor area on sites zoned for such use, if not involving the use of significant amounts of hazardous substances where all necessary public services and facilities are available and the surrounding area is not environmentally sensitive.

D. Water mains, sewage, electrical, gas, and other utility extensions including street improvements, to serve individual customers;

E. Accessory (appurtenant) structures including garages, carports, patios, swimming pools, and fences. (Ord. 5119-B, 2001)

Additionally, the California Supreme Court recently upheld the application of the Class 3 exemption for a project that involved the installation of forty DAS nodes on existing facilities throughout the City of San Francisco. Thus, both the CEQA Guidelines and recent case law support staff's conclusion that the faux streetlight antennas placed in the public Right-of-Way qualify for a Class 3 exemption.

Even though we disagree with Hillsborough's CEQA arguments, we are not convinced that it was appropriate for NewPath to seek approval of this project via the 21-day process. The ministerial authority delegated to staff within this process is limited to determining whether the proposed project qualifies for an exemption based on the parameters outlined in D.06-04-030. However, the Commission is not limited in the same respect. It is clear that the proposed project may be inconsistent with the community values expressed by Hillsborough.

In this instance, it appears that the NTP issued by the Commission has been used as a means to leverage Hillsborough to issue permits in spite of its objections. This is not the intent of the NTP process, which is to speed up deployment of non-controversial and relatively non-intrusive communications facilities. When a carrier proposes to build facilities in a community like Hillsborough with an undergrounding ordinance that is intended to maintain the rural character of the community, the 21-day process is only appropriate when and after the community has expressly agreed to the design and placement of the facilities.

In this instance, where agreement on how best to accommodate community values has not been reached, the NTP process is not appropriate. If a carrier believes that it is being unreasonably denied access to place facilities in the public right-of-way, an application is the appropriate procedural vehicle to allow the Commission to adequately weigh the need for the facilities with the potential impacts to the community. For this reason, the Commission is revoking the NTP issued to NewPath. If NewPath reaches agreement with Hillsborough on an acceptable project design, it may re-file an NPC with the Commission. But, if NewPath is unable to find agreement with Hillsborough, it may only proceed with the project through the filing of a formal application with the Commission.

FINDINGS OF FACT

1. NewPath Newtworks, LLC (NewPath) filed a Notice of Proposed Construction (NPC) with the Commission's Energy Division pursuant to the "Procedure for Obtaining [California Environmental Quality Act] CEQA Exemption for Distributed Antenna System Networks" that was approved for NewPath in Decision 06-04-030.

2. The Energy Division determined that the project is categorically exempt from CEQA review consistent with Decision 06-04-030.

3. NewPath submitted its Wireless Communications Facility Permit Application to the Town of Hillsborough one week after the Commission approved its NPC.

4. The Town of Hillsborough filed a letter with the Commission requesting reconsideration of the NPC.

5. It is unclear to what extent NewPath informed the Town of Hillsborough of the pending NPC filed with Commission staff.

6. There is an ongoing disagreement between parties concerning the siting and design of the proposed project as they relate to the preservation of community values.

7. In this instance, the Notice to Proceed process would only be appropriate after the community has agreed with the applicant as to the design and placement of the proposed facilities.

THEREFORE IT IS ORDERED THAT:

1. The Notice to Proceed issued on June 14, 2012, to NewPath Network, LLC for its proposed Distributed Antenna System project to be located in the Town of Hillsborough is revoked.

This resolution is effective today.

I certify that this Resolution was adopted by the California Public Utilities Commission at its regular meeting of December 19, 2013 and that the following Commissioners approved it:

_____

PAUL CLANON
Executive Director