

PUBLIC UTILITIES COMMISSION

505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3298



December 23, 2010

TO: ALL PARTIES OF RECORD IN RULEMAKING 06-10-006

Decision 10-12-056 is being mailed without the Dissent of Commissioner Michael R. Peevey. The Dissent will be mailed separately.

Very truly yours,

/s/ JANET A. ECONOME for
Karen V. Clopton, Chief
Administrative Law Judge

KVC/jyc

Attachment

Decision 10-12-056 December 16, 2010

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

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)

**FINAL DECISION ADOPTING GENERAL ORDER
SPECIFYING REVIEW PROCEDURES PURSUANT TO
CALIFORNIA ENVIRONMENTAL QUALITY ACT**

1. Summary

This decision adopts General Order (GO) 170 which sets forth the Commission's procedures for reviewing proposed construction projects by California telephone corporations.¹ GO 170 implements the Commission's responsibilities pursuant to the California Environmental Quality Act (CEQA) to review possible environmental impacts of construction projects consisting of any new telephone or telegraph line; or the repair, replacement, modification, alteration, or addition to an existing telephone or telegraph line in the State of

¹ As set forth in General Order (GO) 170, which is Attachment 1 to today's decision, the GO also applies to California telegraph corporations as defined in Pub. Util. Code § 236 when constructing telegraph lines as defined in § 235. These corporations are subject to the Commission's jurisdiction and are included for completeness as their business is largely of historical interest only. All references to telephone corporation herein include telegraph corporation as well.

California. GO 170 contains a comprehensive, streamlined CEQA process that will facilitate deployment of advanced communications policy by applying the same rules to all telephone corporations. GO 170 will ensure that the Commission's practices comply with the current requirements and policies of CEQA and will promote the development of an advanced telecommunications infrastructure.

2. Background

On October 5, 2006, the Commission opened this Order Instituting Rulemaking (OIR) in order to consider changes to the Commission's enforcement of CEQA for projects undertaken by telephone corporations. The stated goals of this OIR are to develop rules and policies that will:

- Ensure that the Commission's practices comply with the current requirements and policies of CEQA;
- Promote the development of an advanced telecommunications infrastructure, particularly with regard to facilities that provide broadband facilities; and
- Make certain that the application of CEQA in the area of telecommunications does not cause undue harm to competition, particularly intermodal competition.

The Commission's current application of CEQA to carriers has resulted in inconsistent requirements, largely depending on when the particular company began to do business in California. For example, the large incumbent local exchange telephone corporations obtained their operating authority¹ from this Commission decades ago, prior to the Legislature adopting CEQA, and these corporations did not then and do not now submit their construction projects for

¹ Pursuant to Pub. Util. Code § 1001, the Commission must issue a Certificate of Public Convenience and Necessity (CPCN) prior to any "telephone corporation" commencing construction of "a line, plant, or system, or any extension thereof."

Commission CEQA review. Between 1995 and 1999, the Commission, when granting operating authority to competitive local exchange carriers, conducted environmental review through “batch negative declarations” which authorized construction of facilities statewide within existing utility rights-of-way without any additional CEQA review, with some variation in the requirements of individual batch declarations.² In contrast, new entrants to the California telecommunications marketplace that wish to perform construction, other than very minor activities such as the use of existing facilities and placement of switches or other equipment in or on existing buildings, must generally undergo CEQA review at the Commission in order to obtain a full facilities-based CPCN.³

The goals of this proceeding include the adoption of clear, consistent, and effective policies, programs, and requirements for the Commission’s implementation of CEQA as applied to carriers.

As specified in the OIR, parties filed opening comments on certain issues in November 2006. Workshops were held in this proceeding on January 24, and February 27, 2007. At the February 27, 2007 workshop, a number of the parties proposed that local agencies, rather than the Commission, conduct any required CEQA review for telecommunications projects.

² All telephone corporations must also obtain any required local permits or meet other regulatory requirements imposed by local governments or agencies consistent with this decision and GO 170.

³ As an exception, the Commission has permitted a small number of new entrants, which plan to construct facilities that they claim are exempt from CEQA, to obtain authorization to construct through an expedited process, on a case-by-case basis. For example, *see Decision (D.) 06-04-030, Application of NewPath Networks, LLC (U-6928-C) for a Modification to its Certificate of Public Convenience and Necessity in Order to Provide Competitive Local Exchange, Access and Non-Dominant Interexchange Service (Newpath)*.

The parties through an informal process of meeting and conferring, divided themselves into two groups, the Joint Carriers and the Joint Competitive Local Exchange Carriers (CLECs). The Joint Carriers group is comprised of established telephone corporations with relatively long-standing operating authority, including specifically the local exchange carriers and some competitive carriers that received CPCNs from the Commission before 1996 and had “batch negative declarations” approved for their construction projects.⁴ The Joint CLECs group includes ExteNet Systems, LLC (ExteNet); NewPath Networks, LLC (NewPath); NextG Networks of California, Inc.(NextG); Southern California Edison; Sprint Communications Company, LP; Sunesys, LLC (Sunesys); and Utility Telephone, Inc.

The Joint Carriers filed opening comments in response to the assigned ALJ’s ruling on August 24, 2007, and the Joint CLECs filed their opening comments on August 27, 2007.

Comments were filed on the two proposals by the League of California Cities, the City and County of San Francisco, the City of Walnut Creek and SCAN

⁴ More specifically, the Joint Carriers includes Astound Broadband, LLC; Citizens Telecommunications Company of California, Inc. d/b/a Frontier Telecommunications Company of California; Citizens Telecommunications Company of Tuolumne d/b/a Frontier Telecommunications Company of Tuolumne, Frontier Communications of America, Inc.; Level 3 Communications, LLC; Pacific Bell Telephone Company, d/b/a AT&T California; Surewest Telephone; Time Warner Telecom of California, LP; Verizon, including Verizon California Inc. and its certificated California affiliates; and the following small Incumbent Local Exchange Carriers (ILECs): Calaveras Telephone Company, Cal-Ore Telephone Co., Ducor Telephone Company, Foresthill Telephone Co., Global Valley Networks, Inc., Happy Valley Telephone Company, Hornitos Telephone Company, Kerman Telephone Company, Pinnacles Telephone Co., The Ponderosa Telephone Co., Sierra Telephone Company, Inc., The Siskiyou Telephone Company, Volcano Telephone Company, and Winterhaven Telephone Company.

NATOA, Inc.⁵ (jointly referred to as Cities); the California Attorney General's Office (AG), the Salinan National Cultural Preservation Association and the Society for California Archaeology (Salinan Nation), and AboveNet Communications (AboveNet) in September 2007. These comments raised legal and policy issues in response to the two proposals. The Joint Carriers and the Joint CLECs also filed reply comments to each other's proposals on September 10, 2007.

On April 18, 2008, the assigned Commissioner and Administrative Law Judge issued the scoping memo for this proceeding which set forth the issues to be resolved and the plan to issue a proposed decision for comment from the parties. Today's decision completes the procedural schedule adopted in the scoping memo.

3. Overview of CEQA

CEQA requires public agencies,⁶ under certain conditions, to identify the significant environmental effects⁷ of their actions, and alternatives to these actions, and to either avoid or mitigate those significant environmental effects, where feasible.⁸ CEQA applies to a government action if it involves a discretionary decision of a public agency, a public agency is approving an activity that may have

⁵ States of California and Nevada Chapter, National Association of Telecommunications Officers and Advisors.

⁶ "Public agency" includes any state agency, board, or commission, any county, city and county, city, regional agency, public district, redevelopment agency, or other political subdivision." (Pub. Res. Code, § 21063.)

⁷ "Significant effect on the environment" means a substantial, or potentially substantial, adverse change in the environment." (Pub. Res. Code, § 21068.)

⁸ "Feasible" means capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, social, and technological factors." (Pub. Res. Code, § 21061.1.)

a significant effect on the environment, and it falls within the definition of a project.⁹ In determining whether an activity constitutes a project, a public agency must look at all of the parts, components, and phases of the activity.¹⁰

A “lead agency” determines whether a government action constitutes a project. A lead agency is the public agency that has the principal responsibility for carrying out or approving a project which may have a significant effect upon the environment.¹¹ A “responsible agency” is a “public agency, other than the lead agency, which has responsibility for carrying out or approving a project.”¹²

Once a lead agency has determined that an activity is a project under CEQA, the lead agency must decide whether an exemption applies.¹³ If an exemption does not apply to a project, then the lead agency must prepare an initial study to

⁹ “Project’ means an activity which may cause either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment, and which is any of the following: “(a) An activity directly undertaken by any public agency. (b) An activity undertaken by a person which is supported, in whole or in part, through contracts, grants, subsidies, loans, or other forms of assistance from one or more public agencies. (c) An activity that involves the issuance to a person of a lease, permit, license, certificate, or other entitlement for use by one or more public agencies.” (Pub. Res. Code, § 21065.)

¹⁰ California courts have interpreted the statutory definition of the definition of “project” (particularly the phrase “whole of the action”) as meaning that it is contrary to CEQA to break up a project into smaller components to avoid CEQA requirements. (See CEQA Guidelines, 14 Cal. Code Reg., § 15378(c); *Laurel Heights Improvement Association v. Regents of the University of California* (1988) 47 Cal. 3d 376, *394-*396.)

¹¹ Pub. Res. Code, § 21067.

¹² *Id.*, § 21069.

¹³ CEQA Guidelines, 14 Cal. Code Reg., § 15061(b).

determine whether to prepare either a negative declaration¹⁴ or an environmental impact report (EIR).¹⁵ If the lead agency finds that there is no substantial evidence showing that the project will have a significant effect on the environment, it must prepare a negative declaration. In some cases, a public agency may find that certain measures can be incorporated in, or changes made, to the project description that would mitigate any significant environmental impacts, and that an EIR may not be necessary. In those cases, the public agency prepares a “mitigated negative declaration.”¹⁶

If the lead agency determines that a government activity is a project, is not exempt from CEQA, and may cause significant effects on the environment that cannot be addressed by a mitigated negative declaration, then the lead agency must prepare an EIR.

¹⁴ "Negative declaration' means a written statement briefly describing the reasons that a proposed project will not have a significant effect on the environment and does not require the preparation of an environmental impact report." (Pub. Res. Code, § 21064.)

¹⁵ An EIR is a detailed statement discussing any potential significant environmental impacts of a project. An EIR “ . . . shall be considered by every public agency prior to its approval or disapproval of a project. The purpose of an environmental impact report is to provide public agencies and the public in general with detailed information about the effect which a proposed project is likely to have on the environment; to list ways in which the significant effects of such a project might be minimized; and to indicate alternatives to such a project . . .” (Pub. Res. Code, § 21061.)

¹⁶ "Mitigated negative declaration' means a negative declaration prepared for a project when the initial study has identified potentially significant effects on the environment, but (1) revisions in the project plans or proposals made by, or agreed to by, the applicant before the proposed negative declaration and initial study are released for public review would avoid the effects or mitigate the effects to a point where clearly no significant effect on the environment would occur, and (2) there is no substantial evidence in light of the whole record before the public agency that the project, as revised, may have a significant effect on the environment." (Pub. Res. Code, § 21064.5.)

4. Summary of Parties' Comments in response to ALJ Ruling

In response to the May 8, 2007 ALJ ruling, which directed the parties to meet and confer and to file comments on designated issues, both the Joint Carriers and the Joint CLECs filed timely opening comments and proposals for improving the Commission's CEQA process as applied to telecommunications carriers. Below is a summary of these comments and proposals.

4.1. Joint Carriers' Comments and Proposal

Under the Joint Carriers' proposal, existing carriers, (i.e., telecommunications utilities that are currently certificated to operate in this State) would no longer be required to apply for an amended CPCN before constructing telecommunications facilities that will: (1) extend their services in any city or city and county in which they have already lawfully commenced operations; (2) extend services into territory either within or without a city or city and county contiguous to their lines, plants or systems and not already served by another telecommunications utility; or (3) extend their services within or to territory already served by them, as necessary in the ordinary course of business.

The Joint Carriers' proposal states that existing carriers would have the right to construct in public rights of way within their approved service areas without returning to the Commission for approval, subject to the requirements of federal, state and local law. For existing carriers, local agencies would generally be the Lead Agency under CEQA, would conduct any necessary environmental review of telecommunications construction projects within their jurisdictions, and may also find that a proposed construction project is categorically or statutorily exempt from CEQA. However, the Commission would be the Lead Agency under CEQA

if an existing carrier applies to the Commission for a modification of its CPCN to authorize new construction projects.

The Joint Carriers propose that new or modified CPCNs issued after the effective date of the final Commission decision in this proceeding would not authorize the construction of telecommunications facilities, unless: (1) the CPCN identifies the facility by size, type, and geographic location, or (2) the Commission analyzed the construction of the facility under CEQA when issuing the CPCN. In cases in which the Commission issues a new or modified CPCN, telecommunications utilities would also obtain any other required permits, licenses or entitlements from federal, state, or local agencies having jurisdiction over the construction project.

The Joint Carriers have proposed an expedited procedure for Commission staff approval of construction projects claimed to fall within statutory or categorical exemptions under CEQA, which is similar to the process currently utilized by the Commission for some carriers on a case-by-case basis. (*For example, see Decision (D.) 06-04-030, (Newpath)*). Under the Joint Carriers' Proposal, when a telecommunications utility applies to the Commission for a new or modified CPCN for projects claiming to be CEQA-exempt, the carrier would identify the relevant categorical or statutory exemptions and for categorical exemptions, would explain the carrier's basis for claiming that no exception to the exemption exists. The Commission or its staff would issue a written determination within 21 days finding that either: (1) the project is exempt from CEQA and, in the case of categorical exemptions, no exceptions to the exemption apply, or (2) the project is not exempt from CEQA and an explanation of this finding; or (3) there is insufficient information to determine whether the project is exempt from CEQA.

For projects found to be categorically exempt, Commission staff would issue a Notice of Exemption as required by State CEQA Guidelines Section 15062.

4.2. Joint CLECs' Comments and Proposal

Under the Joint CLECs' proposal, all certificated carriers would have the authority to construct facilities needed to provide telecommunications service in California, without regard to the specific type of technology, equipment or facility being deployed. All carriers would have the right to: a) operate in public rights of way, b) access public rights of way, including facilities such as utility poles and conduit located therein, c) construct telecommunications facilities in public rights of way, subject to applicable time, place, and manner restrictions, and d) occupy public rights of way subject to obtaining all required excavation or encroachment permits, and/or agreements to attach equipment to facilities located in the public rights of way, such as utility poles and conduit.

The Joint CLECs' proposal emphasizes leveling the playing field. All telecommunications utilities in this state, including the ILECs, carriers whose construction projects were previously approved by "batch" negative declarations, newly certificated carriers, carriers holding CPCNs that require further Commission approval in order to construct telecommunications facilities, and any carriers operating pursuant to other authority from the Commission, would be subject to a uniform process for CEQA review of new construction. Under the Joint CLECs' proposal, telecommunications carriers that wish to engage in new construction may elect to have either the Commission or another state or local agency having jurisdiction over the project serve as the Lead Agency under CEQA.

The Joint CLECs state that telecommunications utilities that choose the Commission as the Lead Agency under CEQA and believe that a proposed

construction project is exempt from CEQA may submit to Commission staff a Construction Statement that describes the proposed construction activities, identifies the statutory or categorical exemptions claimed to apply, and in the case of categorical exemptions, states the basis for claiming that no exception to the categorical exemption applies. Within five business days, Commission staff would issue a letter determination that the proposed construction project either is or is not exempt from CEQA. If Commission staff finds that the construction project is exempt from CEQA, the carrier may proceed with construction. The Commission would conduct an environmental review of standard ground-disturbing telecommunications construction statewide and would either issue and certify a program or master EIR or a master negative declaration (ND) or mitigated negative declaration (MND).

Under the Joint CLECs' proposal, if a telecommunications carrier believes that a proposed construction activity is within the scope of the Master or Program EIR, ND or MND and elects to have the Commission, rather than another state agency or a local agency, serve as Lead Agency, the telecommunications carrier shall submit an advice letter to the Commission which describes the proposed construction and demonstrates that this construction activity is substantially of the same type and scope as reviewed in the Master or Program EIR or ND or MND. Within 21 days, the Commission would prepare an initial study and notify the carrier whether the proposed project is within the scope of the Master or Program EIR or ND or MND, and, if so, would issue a written finding approving the project and identifying all feasible mitigation measures or feasible alternatives.

If a telecommunications utility wishes to engage in ground-breaking construction outside of public rights of way that does not fall within the scope of the Commission's Master or Program EIR or ND or MND, and chooses to have the

Commission act as the Lead Agency, the Joint CLECs propose that the carrier file an application that describes the type, location, and size of the proposed construction and proposes additional mitigation measures necessary to reduce the environmental impacts of the project.

4.3. Reply Comments of Joint Carriers

The Joint Carriers state that the proposal of the Joint CLECs is unwieldy, does not comply with CEQA, and would perpetuate distinctions between telecommunications carriers and intermodal enterprises. The Joint Carriers further comment that local governments are generally in the best position to evaluate the environmental impacts of telecommunications projects, and local CEQA review will prevent inconsistent and anticompetitive treatment of telecommunications carriers and intermodal providers. However, the Joint Carriers believe that the Commission should be the Lead Agency when it issues a new or amended CPCN that will have foreseeable environmental impacts.

The Joint Carriers state that CLECs, which previously obtained batch negative declarations for their projects, and the ILECs, which have operating authority that predates the requirement for a CPCN under Section 1001, are not legally required to undergo CEQA review of their projects because the Commission need not make any discretionary decision on their projects. The Joint Carriers also claim that their proposal lessens the unequal treatment of CLECs that were not issued batch negative declarations by superseding the requirement for CEQA review by the Commission of additional projects not specifically authorized in their CPCNs.

According to the Joint Carriers, the tiered CEQA review proposed by the Joint CLECs is cumbersome and inconsistent with CEQA. The Joint Carriers believe that the Joint CLECs' proposal fails to describe the specific project that

would be reviewed in a Program EIR or a Master EIR or Master Negative Declaration. According to the Joint Carriers, CEQA review requires analysis of a specific project, and hypothetical statewide construction of telecommunications facilities is not a project. The Joint Carriers feel the proposed tiered approach is overly broad because the CEQA review would include all hypothetical telecommunications projects, even those which are exempt from CEQA.

The Joint Carriers also contend that the Joint CLECs' proposal appears to involve the unlawful piecemealing of projects.

4.4. Reply Comments of Joint CLECs

The Joint CLECs believe that the Commission needs to level the playing field so that all carriers undergo CEQA review for their projects that may have significant environmental impacts in order to ensure equitable treatment of all carriers and to remove barriers to entry into the telecommunications market in California. The Joint CLECs comment that their proposal levels the playing field by allowing carriers to choose whether they wish to undergo CEQA review at the Commission or at the local level, which gives CLECs the opportunity to avoid problems with local agencies that require unlawful payments as a condition of permitting construction. The Joint CLECs state that CEQA focuses on the type of construction to be performed and the potential environmental impacts, not the type of CPCN held by the carrier or the time period within which the CPCN was issued, and the Commission should modify its CEQA process to reflect this principle.

The Joint CLECs disagree with the Joint Carriers that the affected local agency is always better suited to be the Lead Agency than the Commission. Therefore, the Joint CLECs' proposal states that in many circumstances, it is appropriate for the Commission to be the Lead Agency for telecommunications

projects because the Commission is the only agency charged with regulating the telecommunications industry, removing barriers to entry into the marketplace, and fostering fair competition among carriers.

The Joint CLECs state that the Joint Carriers' proposal puts the heaviest burden on new CLECs entering the California market, when their construction projects, such as the installation of facilities necessary to provide Distributed Antenna System (DAS)-based services, may have less impact on the environment than other types of construction performed by carriers.

The Joint CLECs also contend that the Joint Carriers proposal makes the 21-day expedited process for Commission staff review of claimed CEQA-exempt projects adopted in *Newpath* and other Commission orders more cumbersome and more time-consuming by requiring a formal application. In addition, the Joint CLECs claim that the Joint Carriers' proposal suggests that both the Commission and the local agency might make a determination regarding whether the project is exempt from CEQA, which is not permitted under CEQA.

The Joint CLECs also object to the Joint Carrier's Proposal on the grounds that it would require CLECs applying for CPCNs to describe any facilities for which construction is reasonably foreseeable. The Joint CLECs state that this requirement would result in new CLECs having to undergo CEQA review whether or not they have a definite plan to construct particular facilities. The Joint CLECs state that, in order to avoid disruption, their proposal excludes projects already carried out by the ILECs or carriers holding batch negative declarations.

The Joint CLECs also comment that the Commission has met all procedural prerequisites to issuing an order approving the Joint CLECs' proposal. The Commission has given public notice of its intent to modify its CEQA process in the

OIR and has given the parties the opportunity to attend workshops, file proposals, and to file comments on each other's proposals.

4.5. Other Parties' Comments

Additional comments were filed on the proposals of the Joint Carriers and the Joint CLECs by AboveNet, the AG, Cities, and Salinan Nation on September 10, 2007. These comments are summarized below.

AboveNet

AboveNet commented that it supports the goal of the Joint CLECs' proposal. AboveNet contends that the Joint Carriers' proposal contains elements that favor the ILECs. For example, the Joint Carriers' Proposal "grandfathers" the authority of the existing ILECs, supersedes existing Commission decisions that require certain carriers to obtain additional review and approval from the Commission before constructing telecommunications facilities, would exempt the ILECs from further review and approval of proposed construction by the Commission, and would defer the responsibility for CEQA review of these projects to local governments. AboveNet states that since new carriers would still be required to comply with the Commission's CEQA procedures, the Joint Carriers' proposal would perpetuate the favored status of the ILECs and perpetuate the disparate treatment of other carriers.

The AG

The AG states that the Joint Carrier's proposal could become the basis for a Commission General Order (GO), but makes several comments. The AG recommends that any GO adopted in this proceeding specifically state that the new GO is not intended to alter the respective rights of carriers and local governments regarding the use of public rights of way for telecommunications facilities under state law.

The AG notes that under the Joint Carriers' Proposal, existing carriers do need to return to the Commission for authorization to construct new facilities within the areas authorized by Section 1001, and that unless the carrier applies to the Commission for such authorization, the carrier would undergo any CEQA review only as may be required by the local agency. However, the AG recommends that the Commission reserve its authority to conduct CEQA review when the carrier applies to the Commission for authorization to construct, when the Commission is the first agency to act on an application for authorization to construct, or in other appropriate cases.

The AG states that if carriers are no longer required to return to the Commission for authorization to construct every new facility, the Commission and the public may not receive notice of CEQA-exempt projects that are proposed or are under construction within California, because CEQA does not require public disclosure of exempt projects. Therefore, the AG recommends that when a Lead Agency other than the Commission approves a telecommunications construction project that is exempt from CEQA, and the Lead Agency does not file a Notice of Exemption (NOE), then the carrier should be required to file a NOE in accordance with State CEQA Guidelines Section 15062.

The AG also proposes that in order to avoid the unlawful "piecemealing" of projects, the Commission should include language in its decision or any GO adopted to state that in considering proposed CEQA exemptions for telecommunications construction activities, the Commission shall consider all reasonably foreseeable construction by the carrier and shall not apply exemptions to segments of the project without considering all reasonably foreseeable construction.

The AG generally supports the concepts in the Joint CLECs' proposal, but makes note of several legal issues. The AG points out that the Joint CLECs' proposal appears to exceed the legal right of carriers to utilize public rights of way for their facilities, by: (1) giving carriers an unqualified right to construct facilities without prior Commission approval in violation of Section 1001; (2) including an overly expansive definition of "public rights of way;" and (3) giving carriers rights to operate in the public right of way that exceed the express grant of authority to them in Section 7901. The AG also observes that although carriers may not choose the Lead Agency under CEQA, the agency that acts first on a proposed project may be the Lead Agency.

The AG states that the Commission could prepare a program or master EIR that analyzes the potential environmental impacts of the planned deployment of telecommunications services in California, and then perform a stream-lined site-specific review of a carrier's application to construct certain facilities that are within the scope of the Master or Program EIR, ND or MND. However, the Joint CLECs proposal fails to specify the mechanism that the Commission should use to accomplish this objective or to link its proposal to the requirements for tiered environmental review stated in CEQA and the State CEQA Guidelines. In addition, the Joint CLEC's proposal fails to state the manner in which "program" MND or ND would differ from the "batch" negative declarations that the Commission discontinued in 1999.

Cities

Cities generally support the proposal of the Joint Carriers, but raised several issues. Cities state that by eliminating the requirement for existing carriers to apply for modified CPCNs before constructing additional facilities, the Joint Carriers' Proposal appears to permit carriers to perform new construction without

CEQA review by the Commission. In order to remedy this problem, Cities propose that carriers required by previous Commission decisions to apply for amended CPCNs before constructing additional facilities file applications with the Commission. If the Commission determines that the proposed construction will potentially result in a significant direct or indirect physical change in the environment, the application for an amended CPCN is a project under CEQA, and the Commission would be the Lead Agency.

Cities state that the Joint Carriers' proposal regarding Commission review of construction activities claimed to be exempt from CEQA fails to acknowledge that CEQA requires the Lead Agency to analyze projects as a whole, rather than engaging in piecemealing or segmenting of projects. Cities contend that although some of the construction activities that Joint Carriers claim are exempt from CEQA may be exempt in routine, isolated projects, segmenting a large project so that each segment is "stuffed" into one of the exemptions in order to reach the conclusion that the entire project is exempt would be inconsistent with CEQA.

Cities note that the Joint Carriers' Proposal provides that the installation of antennas, microcells, and supporting equipment in or on existing utility poles or other support structures used to provide telephone, electric power or other utility services would be exempt from CEQA, so long as the installation does not represent a substantial change in the nature of the structure. Cities propose that this language be modified to provide that installation of this type of equipment is exempt from CEQA only if the installation does not substantially change the size of the structure on which it is mounted and would not be installed in locations that are a historic resource, in order to avoid potential impacts on safety, aesthetics, and migratory birds.

Cities state that the Joint CLECs' proposal does not meet the requirements of CEQA and should be rejected. The State CEQA Guidelines set forth specific criteria for selection of the Lead Agency and address situations in which more than one public agency has for supervising or approving a project. According to Cities, under CEQA, the applicant does not have a legal right to select the Lead Agency by "forum-shopping."

Cities note that since CEQA authorizes the use of Master EIRs only for designated classes of projects and Program EIRs only to analyze "a series of actions that can be characterized as one large project," neither a Master nor a Program EIR could properly be used to analyze the environmental impacts of a hypothetical "standard" telecommunications project.

Cities contend that the Joint CLECs' proposal expands the right of carriers to use public and private property beyond the authority granted in Section 7901. Cities state that under Section 7901, carriers have a right to use certain public property to construct telephone lines. Further, Cities contend that despite its broad regulatory powers, the Commission does not have jurisdiction to interfere with the statutory rights of local agencies to regulate the use of public rights of way by telecommunications carriers.

Salinan Nation

Salinan Nation commented on the proposals filed by the Joint Carriers and the Joint CLECs and proposed a “best practices” cultural resources standard and procedures for the identification and protection of historical resources and Native American cultural places, which are subject to impacts from telecommunications construction projects, including CEQA-exempt projects. Salinan Nation states that since California has failed to adopt “best practices” standards and procedures for compliance with CEQA, CEQA has been applied unequally and often inadequately with regard to cultural and historic resources. Salinan Nation states that impacts to Native American archaeological resources during a fiber optics installation project resulted in a Commission investigation (I.00-03-001).

Salinan Nation also disputes the assumption that that the public right of way is already highly disturbed and has no reasonable chance for significant impacts on archaeological or native American cultural resources. Salinan Nation points out that Caltrans has an extensive historic preservation program and has had hundreds of cases in which historic or cultural resources were uncovered during construction in the public right of way. Modern roads typically follow age-old trails used by Native Americans in prehistoric times and were later used as land transportation corridors by Spanish, Mexican and American settlers. Therefore, archaeological resources and traces of historic and prehistoric human land use are most heavily concentrated along public rights of way. CEQA requires that cultural resources older than 50 years old be identified and assessed pursuant to established criteria in order to determine whether a proposed project will have a significant adverse impact on a significant cultural resource. Salinan Nation also states that even minor trenching and backhoeing may uncover and disturb archaeological and cultural resources, and the installation of antennas or

microcells in or on existing structures could have a significant environmental impact if the existing structure is a historic building.

Salinan Nation does not contest the recommendation that either the Commission or local agencies be able to serve as the Lead Agency under CEQA for telecommunications projects. However, Salinan Nation requests that the Commission give notice to the public and conduct public hearings before issuing a decision in this proceeding. Salinan Nation also states that both the Commission and local governments should have staff with sufficient professional training and experience in historic preservation to handle CEQA review in a consistent, competent and timely manner.

Salinan Nation states that the best practices standards adopted by Caltrans in its updated Stanford Environmental Reference (SER), Volume 2, Chapter 4. Cultural Resources Identification, gives adequate guidance regarding compliance with the requirement for all telecommunications carriers to conduct and documents appropriate data research to determine whether historic resources or Native American cultural places would be significantly impacted by a proposed project.

Salinan Nation recommends that when the Commission or local agencies require the monitoring of construction activities in areas that may be archaeologically sensitive for unlocated, buried Native American cultural places by a trained experienced archaeologist and a trained Native American monitor from the tribe(s) or groups that are culturally affiliated with project area.

Salinan Nation also states that the public needs to have at least 21 days advance notice of any claimed CEQA exemptions for telecommunications construction projects. Salinan Nation recommends that the Commission post notices of claimed CEQA- exempt projects, sorted by geographic area, and any

determinations that certain projects are found to be exempt from CEQA on its website. Local agencies should also post these notices when they are reviewing claimed CEQA-exempt telecommunications construction projects.

Salinan Nation recommends that carriers report annually on the status of their construction projects. Salinan Nation believes that carriers should summarize each case in which an inadvertent archaeological discovery was made during project implementation, the outcome, e.g., whether the project was redesigned to avoid impacts or archaeological data was recovered, and the carrier's recommendations for avoiding post CEQA-review discoveries and improving the process for notifying and resolving sensitive discoveries in consultation with the involved public agencies and culturally affiliated Native Americans.

5. Summary of General Order (GO) 170

Our experience with CEQA over the years has shown that nearly all of the construction projects typically undertaken by California's telephone corporations fall within an exclusion or an exemption from CEQA or were included with the CEQA review of the CPCN application. Very few telephone corporation construction projects require full CEQA review by this Commission. Accordingly, our primary objective in developing GO 170 has been to create an orderly process with clear requirements for claiming exclusion or exemption from CEQA. This objective is fully consistent with our dual goals for this proceeding of complying with the letter and spirit of CEQA while encouraging the ubiquitous availability of state-of-the-art telecommunications services.

While we do not adopt either the proposal of the Joint Carriers or the proposal of the Joint CLECs in its entirety, we do adopt portions of both of these proposals, in addition to some of the proposals and comments of the other parties.

The Commission aims to adopt a CEQA process for telecommunications carriers that complies with the law, is efficient, and services the needs of the rapidly developing communications marketplace.

GO 170 begins with general provisions that require the Commission to apply CEQA equally to all California telephone corporations and require telephone corporations to design all construction projects in a manner that reduces environmental impacts. The GO also explicitly acknowledges that all CPCNs grant the same construction authority to telephone corporations, the authority to construct projects necessary to provide the services consistent with telephone corporations' Commission-granted operating authority. GO 170 imposes procedural conditions based on the significance of the proposed construction activity that will allow the Commission to meet its responsibilities pursuant to CEQA.

In the recent past, the Commission adopted distinctions such as "Limited Facilities Based" and "Full Facilities Based" authority when approving CPCNs. These distinctions were used to implement the requirements of CEQA by linking authorized construction activities to the certificate authorization. Thus, Limited Facilities Based certificates authorized telephone corporations to perform activities that were deemed exempt from CEQA by the Commission. Full Facilities Based certificates authorized telephone corporations to perform construction activities that were not exempt from CEQA, but required telephone corporations to submit applications for specific projects so that the Commission could conduct CEQA review on those non-exempt projects. These distinctions were not directly related to the type of phone service a telephone company was seeking to offer to California consumers, but rather, only related to the scope of the contemplated construction activity necessary to provide those services. GO 170 eliminates the

need for these distinctions by applying CEQA based on the specific construction activities proposed by telephone corporations and not the services that they are authorized to provide via their CPCN.

The new CEQA procedures do not in any way alter the operational authority previously granted to a telephone corporation. However, the GO may change the processes by which the telephone corporations must submit information to the Commission in order for the Commission to review the environmental impacts of specific projects.

The GO sets out three levels of Commission review for telephone corporations' construction projects. GO 170 contemplates that all routine activities will be covered by Sections III and IV.A. The first level, found in Section III, is an exclusion from CEQA review primarily based on the fact that these enumerated activities do not result in any physical change to the environment.¹⁷ Using existing facilities, either owned by the telephone corporation or as a reseller of services provided by such facilities, and installing new equipment in existing structures, are prominent examples of exclusions from CEQA review.

The Commission has extensive experience with the type of construction activities in the enumerated list of exclusions in Section III of the GO 170. In the Commission's experience, it can be seen with certainty that the activities contained in Section III do not have the potential to result in significant impacts on the environment.¹⁸ Even though the activities set forth in Section III of GO 170 would also likely qualify for Categorical Exemptions from CEQA pursuant to CEQA Guidelines

¹⁷ CEQA applies to projects that "may cause either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment." (Public Resources (Pub. Res.) Code, § 21065.)

¹⁸ CEQA Guidelines Section 15061(b)(3).

15300, *et seq.*, the Commission will treat them as enumerated activities in GO 170. The reason for doing so is to ease the administrative burden for activities that the Commission has routinely found have no potential to cause environmental impacts.

The GO offers two means for telephone corporations to claim exemption from CEQA in Section IV. The first option allows a telephone corporation to claim exemption without notice to the Commission and by retaining records of the projects for three years for which specified exemptions have been claimed as set forth in CEQA Guidelines Sections 15301, 15302, 15303, 15304, 15332, and 15359. The specified exemptions are for operating, maintaining, replacing or reconstructing existing facilities, new construction or conversion of small structures, minor alterations to land, in-fill development projects and emergency projects involving a clear and imminent danger to life, health or property. No other CEQA exemptions can be claimed via this option.

For example, CEQA Guidelines Section 15301 exempts from the provisions of CEQA existing facilities, including operation, repair, maintenance, permitting, leasing, licensing, or minor alteration of existing public or private structures, facilities, mechanical equipment, or topographical features, involving negligible or no expansion of use. Carriers shall note that “existing facilities” refers to actual utility facilities and not to utility systems. That is, a specific facility may be maintained, replaced, or reconstructed, but new facilities shall not be installed to provide enhanced performance of existing systems.

Under CEQA Guidelines Section 15302, replacement or reconstruction are exempt from the provisions of CEQA. This includes replacement or reconstruction of existing structures and facilities where the new structure will be located on the same site as the structure replaced and will have substantially the same purpose and capacity as the structure replaced, and also undergrounding of

utility distribution systems. We note that capacity refers to the physical footprint of the facilities and not their function. Functional upgrades to facilities, including replacing copper with fiber, are considered replacement and/or reconstruction.

CEQA Guidelines Section 15303 provides that certain new construction or conversion of small structures are exempt from the provisions of CEQA. This includes “[w]ater main, sewage, electrical, gas, and other utility extensions, including street improvements, of reasonable length to serve such connections.”¹⁹

CEQA Guidelines Section 15304 exempts minor alterations to land from the provisions of CEQA. These minor alterations include grading and “[m]inor trenching and backfilling where the surface is restored.”²⁰

Under CEQA Guidelines Section 15332, in-fill development projects are exempt from the provisions of CEQA. These in-fill projects must meet certain conditions, including be consistent with all applicable zoning designations and regulations, “[t]he project site has no value as habitat for endangered, rare or threatened species,”²¹ and “[a]pproval of the project would not result in significant effects relating to traffic, noise, air quality or water quality.”²²

Lastly, pursuant to CEQA Guidelines Section 15359, emergency projects are exempt from the provisions of CEQA. CEQA Guidelines Section 15359 defines “Emergency” as a sudden, unexpected occurrence, involving a clear and imminent danger, demanding immediate action to prevent or mitigate loss of, or damage to life, health, property, or essential public services. Emergency includes such

¹⁹ CEQA Guidelines Section 15303(d).

²⁰ CEQA Guidelines Section 15304(f).

²¹ CEQA Guidelines Section 15332(c).

²² CEQA Guidelines Section 15332(d).

occurrences as fire, flood, earthquake, or other soil or geologic movements, as well as such occurrences as riot, accident, or sabotage.²³

The second option for claiming exemption requires filing a request with the Commission's Energy Division staff (Staff) and obtaining a Notice to Proceed, and allows the telephone corporation to claim any valid and applicable exemption from CEQA. A telephone corporation must file a Notice of Proposed Construction and supporting materials as a Tier 2 advice letter with Staff. The Notice of Proposed Construction must include a verified statement demonstrating that the proposed construction project is exempt from CEQA review and must be served on local agencies with a permit to issue in the project area, other interested parties, and provided over the Commission's on-line reporting system when available.²⁴ Parties may protest the filing. Staff then evaluates the filing, including any protests. If the protests meet the criteria for valid protests under GO 96-B, Staff must prepare a Resolution for Commission disposition of the advice letter. If there are no valid protests, Staff may issue a Notice to Proceed. The Staff finding is subject to appeal through the existing advice letter process found in GO 96-B.

It should be noted that telephone corporations that propose to construct Distributed Antenna Systems (DAS) are specifically required to provide notice to all local agencies with a permit to issue in the project area, even if the DAS project falls in one of the enumerated activities that do not require further review pursuant to CEQA under Section III of GO 170. Also, installation of new poles is not included in the enumerated list in Section III of GO 170 and is subject to the

²³ CEQA Guidelines Section 15359.

²⁴ Telephone and telegraph corporations subject to GO 170 must provide this information over the Commission's on-line reporting system once that system is up and running.

Tier 2 advice letter process set forth in Section IV.B. of the GO. While we believe that installation of new poles could fall within the enumerated list in Section III of GO 170, we also recognize that the Cities have an interest in the location of new poles in the communities.

The final level of Commission review for proposed construction projects is set out in Section V of GO 170 and provides for full CEQA review. The Commission has existing rules for full CEQA review that require an application and proponent's environmental assessment and are found in the Commission's Rules of Practice and Procedure.

GO 170 Section VI provides for enforcement. The Commission specifically retains all its authority to take such actions as the public interest may require to ensure that all California telephone corporations comply with GO 170 and other applicable law and regulations. The Commission also delegates authority to the Executive Director or the Energy Division Director to take immediate actions necessary to halt an on-going violation of the General Order by a California telephone corporation. Where the Director finds that a violation of CEQA or Commission law or regulations is occurring, the Director may issue a Stop Work Notice requiring immediate cessation of the violation. A telephone corporation may appeal a Stop Work Notice to the Executive Director. If the appeal is rejected by the Executive Director, this determination must be ratified by the Commission via Resolution.

6. Discussion

The principal objective of CEQA, Public Resources Code Sections 21000, *et seq.*,²⁵ is to develop and maintain a high-quality environment in California in the present and in the future.²⁶ In the General Order adopted in today's decision, we carry forward the objective of maintaining a high-quality environment in California while also achieving our goals of encouraging the availability of state-of-the-art telecommunications technologies.

When opening this rulemaking, we stated that our overarching objective is to ensure that the Commission is in compliance with the requirements of CEQA. We take our obligations in this arena seriously and we remain fully committed to the objectives of CEQA to ensure that the impacts of our policies on the environment are taken into account in our decision-making process.

As described above, GO 170 reflects existing CEQA law and provides clear and convenient processes for telephone corporations to comply with CEQA. These rules will enable telephone corporations to pursue their business objectives with greater certainty of regulatory compliance requirements.

State policy encourages the deployment of advanced telecommunications networks. We find that GO 170 applies CEQA in a way that also achieves the State's clear and oft reiterated policy favoring the widespread deployment and availability of advanced telecommunications services, including broadband and wireless technologies. GO 170 sets forth clear, pragmatic and effective policies,

²⁵ In addition to the provision of the Public Resources Code, the California Resources Agency has adopted regulations, as required by Public Resources Code Section 21083, which provide detailed procedures that public agencies must follow to apply CEQA. The CEQA Guidelines are codified at 14 California Code of Regulations Sections 15000, *et seq.*

²⁶ Pub. Res. Code, §§ 21000, 21001.

processes, and requirements for complying with the Commission's obligations under CEQA.

As provided in GO 170, this Commission is the only agency that can issue discretionary permits for telecommunications projects because deployment of telecommunications infrastructure is a matter of statewide concern. Although additional authorization for ministerial permits may be required from other state agencies or local authorities, this Commission is best suited to issue the only required discretionary permits and to evaluate the physical change in the environment caused by telephone corporations' construction projects due to our extensive experience with such facilities and the state-wide interest in encouraging deployment. Local Agencies may not use their discretionary land use authority to effectively prohibit projects that are in compliance with the operating authority granted by the Commission. However, telephone corporations must obtain any ministerial permits required by the applicable local agency. If a locality believes that a carrier is acting unreasonably, the proper way to address this issue is for the locality to file a complaint with the Commission.

The provisions of GO 170 apply even-handedly to all California telephone corporations but also require that the proposed construction project be within the scope of the telephone corporation's Commission-granted operating authority. Consequently, a telephone corporation with reseller or limited facilities-based operating authority may need to obtain Commission permission to modify its operating authority should the corporation wish to construct significant facilities. Such a change would typically be requested as an amendment to the CPCN, which would also provide a suitable forum for any needed CEQA review. To the extent specific facilities have been reviewed pursuant to CEQA as part of the CPCN process, no further review is needed. Construction projects for new facilities,

however, trigger the need for additional review. As noted above, these new facilities often qualify for exclusion or exemption from CEQA, but require formal processing.

7. Comments on Proposed Decision

The proposed decision (PD) of Commissioner Bohn in this matter was mailed to the parties in accordance with Section 311 of the Public Utilities Code and comments were allowed under Rule 14.3 of the Commission's Rules of Practice and Procedure. Comments were filed on November 9 and 10, 2010 by AboveNet, CTIA - The Wireless Association, Cities, Joint Carriers, SCAN NATOA, Sunesys, NextG and NewPath. Reply comments were filed on November 15, 2010 by NewPath, NextG, California Wireless Association, Joint Carriers, AboveNet and ExteNet.

The Joint Carriers filed comments opposing the PD as creating an unwieldy new construction permitting regime and recommended changes to the text of GO 170. The Joint Carriers offered continuing support for their August 24, 2007 proposal. The Joint Carriers first stated that the applicability of Proposed GO 170 should be clarified to apply only to telephone corporations and other applicants seeking discretionary approval from the Commission because CEQA applies only when a government agency takes a discretionary action. The Joint Carriers also opposed the Commission exercising exclusive CEQA jurisdiction over all telephone corporation construction projects related to the provision of telephone service in the State and explained that such a broad exercise of jurisdiction is inconsistent with the CEQA Guidelines. The Joint Carriers supported local entities having the role of lead agency. The Joint Carriers provided a comprehensive set of proposed revisions to the General Order.

The Cities also opposed the proposed GO 170 for asserting that the Commission act as the lead agency which, these parties contended, is at odds with the Commission's current policy of deferring to local agencies.²⁷ The League of Cities particularly objected to the proposed exemption of distributed antenna systems from review. The Cities concluded that the proposed GO should be rejected and the Commission begin anew with the Joint Carriers' 2007 proposal.

CTIA - The Wireless Association sought clarification that the Commission intended to exempt wireless carriers from General Order 170 because General Order 159-A applies to these carriers.²⁸

AboveNet supported the Proposed GO 170 as a means of leveling the playing field for all telecommunications companies.²⁹ AboveNet stated that the Commission's CEQA review and licensing procedures have resulted in significant competitive inequities that have delayed or impeded some carriers from constructing their network infrastructure while other carriers have been free to build their networks without submitting to CEQA review.

Sunesys and NextG supported the proposed GO's streamlined process for review and approval of construction activity that is exempt from CEQA, but recommended further improvements to the advice letter process.³⁰

²⁷ Opening Comments of the League of California Cities and California Association of Counties at 2.

²⁸ CTIA-The Wireless Association Opening Comments on the Proposed Decision at 2.

²⁹ AboveNet Communications, Inc, Opening Comments on the Proposed Decision at 1.

³⁰ Synesys, LLC, and NextG Networks of California Opening Comments on the Proposed Decision at 4.

NewPath also supported the proposed GO 170's uniform application of CEQA licensing and environmental review processes and procedures for telecommunications facility construction.

In reply, the Joint Carriers reiterated their opening comments and stated that their proposal addressed many of the concerns raised by other parties, including the level of review for common construction activities with minimal environmental impacts that should not require environmental review and the proper role for local agencies in the CEQA process.³¹

ExteNet replied that the opening comments filed by local government entities contain factual and legal errors, and therefore should be given no weight. ExteNet specified that the local government comments inaccurately describe the nature of DAS facilities and services and, based on those errors, the local government entities incorrectly conclude these facilities should be treated the same as cellular carriers for purposes of CEQA review.³²

The California Wireless Association also argued that the opening comments filed by Cities should be given no weight because they urge an interpretation of the PD that would constitute legal error by asserting that the Commission may not serve as the lead agency for CEQA review of telecommunications construction, and/or that the PD's reference to "local authorizations" gives local jurisdictions unlimited authority to conduct duplicative review of such construction.³³ This Association supported the proposed decision and general order, and the Commission's continued reliance on local jurisdictions to conduct CEQA reviews

³¹ Joint Carriers Reply Comments on Proposed Decision at 3.

³² ExteNet Systems Reply Comments on Proposed Decision at 2-4.

³³ California Wireless Association Reply Comments on the Proposed Decision at 1.

pursuant to General Order 159-A (subject to the stated limits of its applicability), but encouraged the Commission to remove or clarify the references to local permits and authorization to eliminate the perception that the Commission has ceded to local jurisdictions its responsibility with respect to authorization of utility construction by certificated utilities.

Sunesys and NextG supported NewPath's request that the Commission affirm that it is the lead agency for all California wireline telephone corporation construction projects and that its GO 170 CEQA review comprises the discretionary approval on a project, which local agencies cannot revisit.

NewPath replied that Commission is fully able to serve as the lead agency for CEQA review, with the resources necessary to carry out such reviews. NewPath stated that the large majority of projects will fall within exceptions stated in Sections III or IV.A.,³⁴ and therefore will not require staff time for review. NewPath recommended that GO 170 should be adopted as written, with the modifications suggested in its opening comments.³⁵

We have made a number of changes to this proposed decision in response to comments. Specifically, Sunesys and NextG note that it is important that the Commission provide clarification as to which parties are required to be served by the applicant. We agree that clarifying that carriers must serve local agencies with a permit to issue in the project areas under the process set forth in Section IV.B. of the GO is a good idea. We direct staff to work with the Cities to compile a list of

³⁴ NewPath actually referred to Sections II and III.A. of GO 170, but since we have updated the sections of GO 170, we have changed the references to Section III and IV.A. of GO 170, which are the sections to which NewPath referred.

³⁵ NewPath Reply Comments on Proposed Decision at 4 - 5.

who should be served in each locality and publish this list on the Commission's website.

Joint Carriers and several of the CLEC providers note that there are other activities that belong in the enumerated list in Section III of GO 170. We agree with most of these comments and have included several other types of construction in GO 170 Section III that do not have an environmental impact and therefore do not rise to the level of a project. These include customer drops, replacement or reconstruction of existing facilities and replacement or addition of guy wires or anchors. We also clarify that if any of the exceptions to the categorical exemptions, as set forth in CEQA Guidelines Section 15300.2, apply to a particular project, then the telephone corporation must file an application for full Commission review of the proposed construction project as provided in Section V of GO 170. We also clarify and expand the list of categorical exemptions in Section IV.A.

To address Cities' concerns regarding DAS projects, we have clarified that DAS projects must serve on notice local agencies with a permit to issue in the DAS project location prior to commencing construction. While we recognize that most construction for DAS projects property falls in the enumerated list in Section III of GO 170, we are also cognizant that Cities still have concerns about DAS, perhaps because they are unfamiliar with this new technology. We also clarify that projects involving the construction of new poles must go through the GO 96-B advice letter process set forth in Section IV.B. of GO 170.

In response to Cities' arguments regarding the Commission's authority to regulate telecommunications carriers and to assert primary CEQA responsibility for telecommunications projects in California, we summarize some of the Commission's relevant authority over telecommunications corporations here.

Under California Constitution Article XII, the Legislature vested the Commission with authority over all public utilities, including telephone corporations. Public Utilities Code Section 1001 gives the Commission authority to grant approvals via CPCNs for the construction or extension of telephone lines, systems, plants, or networks. Public Utilities Code Section 7901 broadly provides that telephone corporations may construct telephone lines along and upon any public road or highway, and may erect poles, posts, piers, or abutments to support wires and other necessary fixtures of their lines as not to incommode the public use of the road or highway.

Pursuant to Public Utilities Code Section 709, the Commission has authority and responsibility to ensure open competitive markets and the development of advanced telecommunications services in California.³⁶ Public Utilities Code Section 709.3 requires the Commission to "convene a proceeding to develop a plan for encouraging the widespread availability and use of advanced communications infrastructure." Moreover, Public Utilities Code Section 709.5 directs the Commission to take steps "to ensure that competition in telecommunications markets is fair and that the state's universal service policy is observed."³⁷

³⁶ Section 709 expressly sets forth the Legislature's commitment to ensure the "continued affordability and widespread availability of high-quality telecommunications services to all Californians." Section 709 further expresses California's telecommunications policies include encouraging "the development and deployment of new technologies."

³⁷ See also Public Utilities Code Section 709.6 which required the Commission to commence a proceeding to consider whether to establish a new regulatory framework that, among other things, "[e]ncourages the provision of advanced, high-speed digital telecommunications services to the public."; Public Utilities Code Section 882(a), which directs the Commission to open a proceeding to "consider ways to ensure that advanced telecommunications services are made available as ubiquitously and economically as possible, in a timely fashion, to California's citizens, institutions, and businesses;

Footnote continued on next page

These statutes make it clear that the Commission is the agency with the broadest authority over telephone and telegraph corporations in the State. The Commission is also the agency in California with the greatest technical expertise on telecommunications matters.

8. Assignment of Proceeding

John A. Bohn is the assigned Commissioner and Maribeth A. Bushey is the assigned Administrative Law Judge in this proceeding.

Executive Order S-23-06, which directed the Commission and other state agencies to assist with the implementation of efforts to increase broadband deployment in California, including streamlining access to public Rights-of-Way and resolving Rights-Of-Way disputes in favor of accelerating deployment of broadband.; 47 U.S.C. Section 706, which directed that the FCC and “each State commission with regulatory jurisdiction over telecommunications services shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans (including, in particular, elementary and secondary schools and classrooms) by utilizing, in a manner consistent with the public interest, convenience, and necessity, price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment.”; 47 U.S.C. Section 257(a)(b), which required the FCC to issue regulations to eliminate barriers to entry for entrepreneurs “in the provision and ownership of telecommunications services and information services” and articulated a national policy directing the FCC “to promote the policies and purposes of this chapter favoring diversity of media voices, vigorous economic competition, technological advancement, and promotion of the public interest, convenience, and necessity;” 47 U.S.C Section 253(a), which provides that “no State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service”; and 47 U.S.C. Section 253 (b), which provides that “[n]othing in this section shall affect the ability of a State to impose, on a competitively neutral basis and consistent with section 254 of this title, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.”

Findings of Fact

1. From time to time, California telephone and telegraph corporations may require additional facilities and equipment to pursue the provision of public utility service to the public and constructing such facilities may result in a change in the physical environment.
2. State policy supports continued deployment of state-of-the-art telecommunications services and facilities.
3. GO 170 sets forth clear, pragmatic and effective policies, processes, and requirements for complying with the Commission's obligations under CEQA.

Conclusions of Law

1. This Commission must review construction projects by telephone corporations as defined in California Public Utilities Code section 234 and telegraph corporations as defined in California Public Utilities Code Section 236 for compliance with CEQA.
2. This Commission should adopt rules to provide for the orderly evaluation of proposed construction projects by California telephone and telegraph corporations for compliance with the CEQA.
3. Any rules for evaluating telephone and telegraph corporations' construction projects for compliance with the CEQA should be even-handed and not dependent on operating authority.
4. California telephone and telegraph corporations should obtain appropriate operating authority prior to or simultaneously with seeking Commission approval of proposed construction projections pursuant to the CEQA.
5. GO 170 attached to today's decision as Attachment A sets forth reasonable and even-handed procedural rules and substantive policies for this Commission's

evaluation of construction projects by telephone and telegraph corporations as required by the CEQA.

6. GO 170 should be adopted and all telephone and telegraph corporations should comply with its terms.

7. This proceeding should be closed.

FINAL ORDER

IT IS ORDERED that:

1. General Order 170 attached to this decision as Attachment A is adopted and all California telephone and telegraph corporations must comply therewith.

2. Rulemaking 06-10-006 is closed.

This order is effective today.

Dated December 16, 2010, at San Francisco, California.

DIAN M. GRUENEICH
JOHN A. BOHN
NANCY E. RYAN
Commissioners

We will file a joint dissent.

/s/ MICHAEL R. PEEVEY
President
/s/ TIMOTHY ALAN SIMON
Commissioners

Attachment A – General Order 170

General Order No. 170

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

**COMMISSION REVIEW PURSUANT TO THE CALIFORNIA
ENVIRONMENTAL QUALITY ACT OF THE CONSTRUCTION OF
TELEPHONE AND TELEGRAPH LINES LOCATED IN CALIFORNIA**

**Adopted December XX, 2010 Effective January XX, 2011
Decision 10-12-XXX**

I. GENERAL PROVISIONS

- A. Purpose: These rules implement the California Public Utility Commission's (Commission) responsibilities pursuant to the California Environmental Quality Act (CEQA) to review possible environmental impacts of construction projects consisting of any new telephone or telegraph line; or the repair, replacement, modification, alteration, or addition to an existing telephone or telegraph line in the State of California.
- B. Applicability: These rules apply to all telephone and telegraph corporations, as defined in Public Utilities Code Sections 234 and 236, subject to the jurisdiction of this Commission and to any other applicant seeking discretionary authority from the Commission relating to telephone lines as defined in Section 233 and telegraph lines as defined in Section 235. This General Order does not preclude the applicability of General Order 159-A to cellular service providers constructing commercial mobile radio service facilities. General Order 159-A, and not General Order 170, shall apply for construction of cellsites.
- C. General Requirement: California telephone and telegraph corporations shall design and engineer their projects in a manner that avoids, reduces, and mitigates any potential environmental impacts.

Construction activities shall not commence except as specified in this General Order.

D. Definitions:

- a. CEQA – Public Resources Code Sections 21000, et seq., and the CEQA Guidelines codified at 14 California Code of Regulations Sections 15000, et seq.
- b. Construction Project – an effort by or on behalf of a telephone or telegraph corporation to build or assemble a telephone or a telegraph line or portion thereof that may result in a direct or indirect physical change to the environment. A Construction Project includes all reasonably foreseeable construction by the carrier that is part of the same project.
- c. Full CEQA Review – Commission review of a proposed construction project that is subject to CEQA and does not qualify for an exemption from CEQA review, which requires a Commission decision on the specific proposed construction project.

II. COMMISSION AUTHORIZATION

Construction of facilities shall be consistent with the authority granted in a California telephone and telegraph corporations' Certificate of Public Convenience and Necessity (CPCN) and shall not commence until a CPCN is granted pursuant to Public Utilities Code Section 1001. CPCNs, past and prospective, authorize construction projects to commence if one or more of the following are applicable:

- A. Construction of the facilities do not rise to the level of a CEQA project because the Commission has determined that it can be seen with certainty that there is no possibility that the construction of those facilities may have a significant effect on the environment pursuant to CEQA Guidelines Section 15061(b)(3).

- B. Construction of the facilities do not rise to the level of a CEQA project because they fall within the list of enumerated activities contained in Section III of this General Order.
- C. The Commission determines that the construction of the facilities are exempt from CEQA review, even though they are not contained within the list of enumerated exemptions in this General Order, and all of the following occur:
 - 1. Proper notice has been served pursuant to this General Order;
 - 2. Notice has been provided via the Commission's Online Reporting System (ORS) once ORS is up and running;
 - 3. No exceptions to any claimed exemptions apply; and
 - 4. A Notice to Proceed has been issued by Commission Energy Division Staff (Staff).
- D. The proposed facilities have undergone a full CEQA review and a Final Negative Declaration or Final Mitigated Negative Declaration (MND) has been adopted, or a Final Environmental Impact Report (EIR) has been certified, by this Commission as either a Lead or Responsible Agency, as defined in CEQA Guidelines Sections 15050, 15053, 15367, and 15381; and the Commission has made Findings and adopted a Statement of Overriding Considerations pursuant to CEQA, if applicable.
- E. The proposed facilities have already undergone CEQA review.

III. ACTIVITIES THAT DO NOT REQUIRE REVIEW BY THE COMMISSION PURSUANT TO CEQA

The following activities are authorized to be performed by a California telephone and telegraph corporation in compliance with its Certificate of Public Convenience and Necessity and do not rise to the level of a project pursuant to CEQA. The Commission has determined that it can be seen with certainty that these activities would not have a significant effect on the environment and do not require further Commission review pursuant to CEQA:

- A. Reselling local or interexchange service.
- B. Service drops of unlimited length.

- C. Use of existing facilities, including, but not limited to, conduit, poles, and other structures.
- D. Installation of replacement poles, guy wires and anchors.
- E. Installation of facilities in existing conduit.
- F. Installation of underground or at-grade hand-holes, pull-boxes, and conduit vaults as necessary for any authorized activity.
- G. Installation of above-ground vaults and splice boxes as necessary for any authorized activity.
- H. Installation of facilities within existing structures.
- I. Installation of minor facilities such as distributed antennae systems and related nodes on existing structures.
- J. Installation of minor facilities of less than 2,400 cubic feet in total volume above-ground within a state, federal, municipal or special district Right-of-Way which must have been previously disturbed and occupied by existing utility facilities and all applicable permits must be obtained.
- K. Minimal trenching of discrete, non-continuous segments of approximately 150 feet and/or 1,000 feet of new aerial facilities and supporting structures.
- L. Construction activities authorized, after CEQA review, in a decision issuing a CPCN.

DAS projects that fall within this enumerated list must serve notice on local agencies with a permit to issue in the project areas before commencing construction of the project.

California telephone and telegraph corporations are required to obtain all applicable state, local, resource, and special use permits when engaging in the above Section III activities. Certificated and registered entities are and continue to be governed by Public Utilities Code Section 7901. Pursuant to Public Utilities Code Section 7901.1, municipalities shall have the right to exercise reasonable control as to time, place, and manner in which roads, highways, and waterways are accessed.

IV. CONSTRUCTION PROJECTS EXEMPT FROM REVIEW PURSUANT TO THE CALIFORNIA ENVIRONMENTAL QUALITY ACT.

Certain types of construction projects are subject to CEQA but qualify for exemption from full review. The procedures for claiming these exemptions differ depending on whether a Notice to Proceed is required to be issued by the Commission:

- A. California telephone and telegraph corporations acting within the scope of their CPCNs may, where applicable, rely on the following exemptions without receiving a Notice to Proceed from the Commission, but must retain records for three years of all instances where such exemptions are relied on as set forth in CEQA Guidelines Sections 15301, 15302, 15303, 15304, 15332 and 15359.
- i. CEQA Guidelines Section 15301 – Existing Facilities: operation, repair, maintenance, permitting, leasing, licensing, or minor alteration of existing public or private structures, facilities, mechanical equipment, or topographical features, involving negligible or no expansion of use.
 - ii. CEQA Guidelines Section 15302 – Replacement or Reconstruction: replacement or reconstruction of existing structures and facilities where the new structure will be located on the same site as the structure replaced and will have substantially the same purpose and capacity as the structure replaced. The term “capacity” in this context refers to the physical footprint of the facilities and not to their function. Functional upgrades to facilities are considered replacement and/or reconstruction.
 - iii. CEQA Guidelines Section 15303 – New Construction or Conversion of Small Structures: construction, installation, and/or conversion of limited numbers of new and/or existing facilities/structures.
 - iv. CEQA Guidelines Section 15304 – Minor Alterations to Land: public or private alterations in the conditions of land, water, and/or vegetation.
 - v. CEQA Guidelines Section 15332 – In-Fill Development Projects: provided all applicable Guideline criteria are met.
 - vi. CEQA Guidelines Section 15359 – Emergency Projects as defined by CEQA Guidelines Section 15359:
- B. California telephone and telegraph corporations claiming that an exemption for an activity, not included in Sections III or IV.A. of this

General Order, would not have a significant effect on the environment must file a Notice of Proposed Construction. The Notice of Proposed Construction must state the grounds upon which the Commission could find the activity to be exempt from full CEQA review. This process applies to the installation of new poles. This process may also be used for activities utilizing new technologies that are not contemplated by this General Order.

Each Notice of Proposed Construction shall be limited to 25 pages (exclusive of maps; charts; tables; graphs; photographs; lists; and check-lists) and must contain the following information:

- i. Detailed description of the proposed project:
 1. Customer(s) to be served
 2. The precise location of the proposed construction project
 3. Regional and local site maps
 4. Project-level design details
 5. Other relevant information necessary to adequately describe the project
- ii. Description of the environmental setting:
 1. Cultural, historical, and paleontological resources
 2. Biological resources
 3. Current land use and zoning
 4. Sensitive visual receptors
 5. Other relevant information necessary to adequately describe the environmental setting
- iii. Construction workplan, to include:
 1. Pre-Construction Survey Checklist - Archaeological Resources
 2. Pre-Construction Survey Checklist - Biological Resources
 3. Detailed schedule of construction activities, including site restoration activities
 4. Description of construction/installation techniques
 5. List of other agencies contacted with respect to siting, land use planning, and environmental resource issues, including contact information
 6. List of permits required for the proposed project

- iv. Exemption statement - Clear and concise statement, with supporting factual evidence, documentation, and verifications, identifying the exemption claimed for the proposed project and demonstrating that the proposed project meets all the requirements for the exemption.
 - v. Procedures for Filing and Processing a Notice of Proposed Construction
 1. The Notice of Proposed Construction shall be filed with the Staff as a Tier 2 advice letter as specified in General Order 96-B, or successor rule, served on all local agencies with a permit to issue in the project areas, in addition to those parties specified in General Order 96-B, and shall be provided via the Commission's Online Reporting System (ORS) once ORS is up and running. Staff will maintain a non-exclusive list of local agency contact information on the website.
 2. Interested parties may protest the advice letter as specified in General Order 96-B and Staff shall review and process the Notice of Proposed Construction advice letter as provided in General Order 96-B.
 3. If Staff finds from the review of the advice letter and any protests that the proposed construction qualifies for the claimed exemption, it shall issue a Notice to Proceed to the advice letter filer with copies to the protestants (if any). If Staff finds that the construction does not so qualify, it shall notify the advice letter filer and any protestants. Staff's finding is subject to appeal as provided in General Order 96-B.
- C. Exceptional Circumstances: When filing a Notice of Proposed Construction claiming an exemption, carriers will represent to the Commission that no exceptional circumstances apply. CEQA Guidelines Section 15300.2 provides for exceptions to the CEQA exemptions for the following circumstances:
- i. Sensitive locations
 - ii. Cumulative impacts
 - iii. Significant effects
 - iv. Scenic highways

- v. Hazardous waste sites
- vi. Historical resources

D. Segmented or piecemealed construction designed to avoid CEQA is prohibited. All projects must comply with CEQA Guidelines Section 15378

V. FULL COMMISSION REVIEW OF PROPOSED CONSTRUCTION PROJECT PURSUANT CALIFORNIA ENVIROMENTAL QUALITY ACT

- A. If a proposed construction project may have a physical impact on the environment and does not qualify for the Notice of Proposed Construction process described above, the telephone or telegraph corporation must file an application and Proponents Environmental Assessment as provided in the Commission's Rules of Practice and Procedure.
- B. If a proposed construction project is subject to the California Environmental Quality Act and does not qualify for an exemption, but a full CEQA review has been certified or adopted by another agency, the telephone or telegraph corporation may make use of previously-completed applicable CEQA studies provided all of the following occur:
 - a. The studies are not more than five years old and there are no changed circumstances per CEQA Guidelines Section 15153;
 - b. Upon review by Commission staff, no exceptional circumstances apply per CEQA Guidelines Section 15300.2;
 - c. There are no changes in the baseline assumptions of the original CEQA analysis; the installation and construction techniques; the technical operations of the facilities; or other material changes; and
 - d. The Commission is a Responsible Agency pursuant to CEQA.

VI. ENFORCEMENT AND DELEGATION OF AUTHORITY

- A. The Commission reserves all of its authority to take such actions as the public interest may require to ensure that all telephone and telegraph corporations adhere to the requirements of this General Order, CEQA, and any applicable Commission rules or decisions.

- B. In addition, the Commission delegates to Staff, as designated by the Executive Director, the following authority:
- a. Monitor and Inspect Construction Activities – Staff is authorized to monitor and inspect all construction activity by California telephone and telegraph corporations for compliance with CEQA as well as all Commission orders, rules, and decisions.
 - b. Access to Records and Projects – all California telephone and telegraph corporations shall, upon request, provide Staff immediate access to all records relating to construction projects and physical access to any construction projects that are underway.
 - c. Issue Stop-Work Notices – when Staff obtains sufficient evidence to support a finding of that a violation of CEQA or Commission rules or decisions may have occurred at a construction project by a California telephone or telegraph corporation, Staff shall issue a Stop-Work Notice to the telephone or telegraph corporation.
 - d. Contents of Stop-Work Notice – the notice shall be in writing and served on a representative or agent of the telephone or telegraph corporation conducting the construction project, including by facsimile. The Notice shall indicate the activity believed to be in violation of CEQA or Commission rules or decisions and specify the construction activity that must cease. The Notice must also provide any available and obvious means to remedy the identified potential violation. The Notice may apply to the entire construction project or a defined portion, and may make allowances for continued work to provide for immediate public safety, such as covering an open trench. The Notice shall be signed by either the Executive Director or a Division Director.
 - e. Compliance with Stop-Work Notice – all California telephone and telegraph corporations shall comply with any Stop-Work Notice and any violation of a Stop-Work Notice is a violation of this General Order.
 - f. Appeal of Stop-Work Notice – any California telephone or telegraph corporation that receives a Stop-Work Notice may appeal the issuance of the Notice to the Commission’s Executive Director. Such an appeal, however, does not excuse compliance with the Stop-Work Notice and all appeals where work has not ceased will be summarily denied.

(END OF ATTACHMENT A)

D.10-12-056

R.06-10-006

**Dissent of Commissioner Timothy Alan Simon
December 16, 2010 Commission Meeting – Item 61 R.06-10-006
Final Decision Adopting General Order Specifying Review Procedures
Pursuant to California Environmental Quality Act**

Introduction

During the California Public Utilities Commission (CPUC) December 16, 2010 meeting, the CPUC voted 3-2 in favor of a Proposed Decision [Item 61 on the December 16, 2010 Agenda].

I voted against the proposed decision and file this Dissent.

Background and Discussion

I want to commend Commissioner John A. Bohn for taking on this challenging and complex proceeding to consider changes to the Commission's application of the California Environmental Quality Act (CEQA) to telephone corporations. The Commission opened this Order Instituting Rulemaking (OIR) in 2006, but the Commission's quixotic attempts to reconcile our obligations under CEQA with a policy mandate of broadband deployment go back even further. However valiant these efforts may be, I do not think we struck the appropriate balance. The adopted General Order 170 runs the real risk of causing severe delay in network build out and delivery of advanced services to consumers, inconvenience and financial loss to small and large businesses that depend on communications services, and may dampen investment and growth in California at a time when we should promoting investment in infrastructure to nurture economic growth.

The Commission's current application of CEQA to carriers has resulted in inconsistent requirements, largely depending on when the particular company began to do business in California. While the proposed decision proclaims the dawning of a level playing field by applying the same rules to all telephone corporations, cable and wireless/wifi providers that compete with telephone corporations in overlapping markets will remain subject to disparate CEQA treatment. Creating this new permitting process "from whole cloth" is inconsistent with the treatment of wireless carriers under General Order 159-A and video service providers under the Digital Information Video Competition

Act (“DIVCA”)³⁸, both of which explicitly assign any required CEQA review to local agencies. The proposed decision therefore contradicts the OIR’s goal of ensuring “that the application of CEQA in the area of telecommunications does not cause undue harm to competition, particularly intermodal competition³⁹” since different players in the relevant market will not be treated equally under GO 170, G0169-A, and DIVCA. This disparate CEQA treatment fails to promote the expedient deployment of advanced telecommunications networks by the entire relevant industry, and may cause undue harm to competition.

The perceived benefits of adopting this new way forward must be balanced against the apparent risks. First, there is the real risk that the proposed decision will derail timelines for network projects and deployments, which is significant since many of the affected carriers have already invested hundreds of millions in infrastructure. New regimes come with growing pains, but we cannot introduce a system that unreasonably hinders and delays the investment in infrastructure and service deployment that California consumers and business increasingly rely upon for their respective livelihoods and development. Arguably, the fear of bottle necks for carriers’ projects and the strain on resource availability for the carriers and Commission staff may not be as acute as represented by some carriers. It is encouraging that the Commission will retain the ability to adapt the program should any of these intended consequences prove to be unworkable, but we also run the risk that subsequent program tweaks will come “too little, too late.”

Separately, this decision cannot be viewed in a regulatory vacuum. Delaying network projects and deployment will be felt at the local level by consumers and businesses that increasingly rely on advanced telecommunications services. CEQA compliance does not have to mean imposing unnecessary procedural hurdles, especially as the telecommunications industry, consumers, and businesses shift to broadband. This shift entails significant infrastructure investment. Adding what could prove to be time-consuming and resource intensive layers of CEQA compliance may negatively impact not just the newly

³⁸ See Pub. Util. Code § 5820

³⁹ PD at 3, *quoting* OIR at 1.

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affected carriers, but also the consumers and businesses that use and procure the vast array of products and services made possible by technological innovation. Lastly, delays in broadband deployment and system upgrades may be further exacerbated by a challenging investing climate. We must be mindful that the amount and types investment made by industry and investors is related to the level and scope of regulation. We run the risk of sending the wrong signal to investors who have already invested in California's broadband infrastructure. California will remain a competitive market, but it is not prudent to create unintended barriers to effective competition by imposing regulatory costs and time restraints on some but not others.

Ultimately, we should avoid regulatory spawned barriers to competition and should advance critical infrastructure in an environmentally balanced way. It may not be possible at this time to completely level the entire playing field. Still, having changed the rules, it is imperative that we diligently track the implementation of this new GO to ensure that the perceived benefits are not eviscerated by the apparent risks. To serve that end, my office will be involved in tracking the implementation of GO 170.

Conclusion

It is for these reasons provided above that I respectfully dissent on this Order.

/s/ TIMOTHY ALAN SIMON

Timothy Alan Simon
Commissioner