

**BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA**



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Investigation on the Commission's Own)
Motion into the Operations and Practices of)
Southern California Edison Company, Cellco)
Partnership LLP d/b/a Verizon Wireless, Sprint) Investigation 09-01-018
Communications Company LP, NextG Networks) (Filed: January 29, 2009)
of California, Inc. and AT&T California and AT&T)
Mobility LLC, Regarding the Utility Facilities)
and the Canyon Fire in Malibu of October 21, 2007.)
_____)

**COMMENTS OF AT&T MOBILITY LLC (U 3060 C), SPRINT TELEPHONY
PCS, L.P. (U 3064 C) AND CELLCO PARTNERSHIP LLP D/B/A VERIZON
WIRELESS (U 3001 C) ON PROPOSED DECISION OF ALJ KENNEY**

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Summary of Recommended Changes

Settling Respondents recommend that the Commission remove or modify three of the items that the PD proposes as conditions to the Commission's approval of the Settlement Agreement: (i) the Commission should not impose an 18-month deadline on the EIIF projects; (ii) the Commission should not make the Settling Respondents liable for overruns in the unlikely event that the cost of the EIIF projects exceeds \$5.1 million, and (iii) the Commission should allow sufficient time after completion of the EIIF projects for submission of a proper accounting to CPSD and escheat of remaining EIIF funds to the General Fund.

Pursuant to Rule 14.3 of the Commission’s Rules of Practice and Procedure, AT&T Mobility LLC (“AT&T”), Sprint Telephony PCS, L. P. (“Sprint”) and Cellco Partnership LLP d/b/a Verizon Wireless (“Verizon Wireless”) (hereinafter Sprint, AT&T, and Verizon Wireless are collectively referred to as the “Settling Respondents”)¹ respectfully submit these Comments on the May 18, 2012² Proposed Decision of ALJ Kenney (“PD”) entitled “Decision Approving Settlement Agreement.”³

Introduction

The PD approves the Settlement Agreement, finding that it “is reasonable in light of the whole record, as it provides a comprehensive remedy for the safety-related issues that were raised in CPSD’s testimony with respect to the Settling Respondents,”⁴ and is “consistent with the law, and in the public interest.”⁵ The PD, however, also proposes ten conditions, set forth in Ordering Paragraph 1, subparagraphs (i)-(x), and directs the Settling Parties to state “whether they accept the conditions” proposed in the PD.⁶

The conditions proposed by the PD modify the settlement terms negotiated by the Settling Parties over several months. Nevertheless, the Settling Respondents are willing to agree to all of the proposed conditions *except for* three conditions that impose material modifications to the Settlement Agreement. These are the conditions set forth in

¹ The Consumer Protection and Safety Division (“CPSD”) of the California Public Utilities Commission is not a party to these Comments on the Proposed Decision. CPSD and the Settling Respondents are referred to herein as the “Settling Parties.”

² On June 5, 2012, ALJ Kenney extended the deadline for filing comments on this Proposed Decision to June 8, 2012.

³ On February 3, 2012, the Settling Parties filed a Joint Motion for Approval of the Settlement Agreement they entered into on that date (“the Settlement Agreement,” which was attached to the Joint Motion).

⁴ PD at 17.

⁵ *Id.* at 26.

⁶ *Id.* at 27.

subparagraphs (ii), (vi), and (vii) of Ordering Paragraph One.⁷ Two of these conditions constitute material modifications of the Settlement Agreement because they impose additional risks and, at least potentially, unlimited liability upon Settling Respondents. Paragraphs 6-10 of the Settlement Agreement expressly limit Settling Respondents' liability to \$12 million, but proposed condition (ii) would require Settling Respondents to pay *more* than this amount if the total cost of the Enhanced Infrastructure and Inspection Fund ("EIIF") projects exceeds \$5.1 million. Moreover, subparagraph (vi) would require the EIIF projects to be completed within 18 months, an arbitrary deadline. The Settling Parties previously explained that such "rigid timelines" are not required or appropriate given the unique nature of the EIIF projects. Setting an arbitrary deadline for completion of the EIIF projects could significantly increase the cost of the projects. As explained more fully below, these two conditions must be removed or modified because they are inconsistent with both the public interest and the express terms of the Settlement Agreement.

Finally, subparagraph (vii) would require that any funds remaining in the EIIF upon the completion of the projects immediately be sent to the General Fund. This condition also constitutes a material modification of the Settlement Agreement, because it is likely that contractor invoices will not be sent to the Settling Parties until 30 - 60 days after the EIIF projects have been completed. Those invoices must then be reviewed and paid. Accordingly, Settling Parties propose that any funds remaining in the EIIF only be sent to the General Fund *after* all invoices have been paid and an accounting of all funds has been completed. Proposed condition (vii) should be revised accordingly.

⁷ See *id.* at 32-34.

The record in this proceeding does not contain facts that would support imposing conditions that materially modify the settlement terms, and the PD's conditions would penalize Settling Respondents – the very Respondents that have worked collaboratively with CPSD to develop unique projects that will enhance public safety in Southern California. For these reasons, and for the reasons set forth below, the Commission should approve the Settlement Agreement as it was proposed or with the alternative modifications set forth in these comments.

Discussion

I. The 18-Month Deadline Must be Eliminated or Revised

A deadline for completion of EIIF projects was not included in the Settlement Agreement. As the Settling Parties explained to the ALJ:

These are large projects that will require retaining an independent contractor(s) and, as articulated by SCE, “will necessarily involve participation of SCE and other joint pole owners.” ***Therefore, rigid timelines are not required.*** CPSD will maintain oversight, and the Settling Respondents will keep CPSD apprised of their progress regarding the EIIF projects.⁸

The PD, however, conditions approval of the Settlement Agreement on the Settling Respondents performing all work contemplated by the EIIF within 18 months of the effective date of the decision. The 18-month deadline creates an arbitrary date that has not previously been posed to the Settlement Respondents. This condition is a material modification of the Settlement Agreement to which the Settling Respondents cannot agree, as there may be unforeseen developments that cannot reasonably be anticipated at this time. Such contingencies could directly impact the timing of the

⁸ Reply Comments of Consumer Protection and Safety Division [and Settling Respondents] in Support of Joint Motion to Approve the February 3, 2012 Settlement Agreement, filed March 20, 2012, at 6 (emphasis added).

projects and delay their completion. The Settling Respondents simply cannot guarantee that such contingencies will not arise.

For example, in order to determine the number and location of the poles in the 3.38 mile stretch of Malibu Canyon Road that must be upgraded to a safety factor of 4.0, the Settling Respondents must first prepare and release a request for proposals (RFP); select a contractor or contractors; perform pole loading calculations; and then review these calculations with CPSD and submit them to other pole owners. Until this vital preliminary work has been completed, Settling Respondents will not know the scope and magnitude of the construction project in Malibu Canyon - whether zero or 82 poles need to be replaced or upgraded. Once the scope of the project is known, the Settling Respondents will then be able to prepare a plan for performing the required upgrades to the poles, including: preparing and releasing additional RFP(s), notifying other joint pole owners; obtaining any necessary permits, and developing plans to ensure, among other things, that there are minimal disruptions to nearby home owners (from interruptions of electric power, for example) and to rush hour traffic on Malibu Canyon Road, which is a key commuter artery for the West Los Angeles area. Only after this equally vital preliminary work has been attended to will it be possible to turn attention toward completing the required construction. At this time, the Settling Respondents do not have all of the information they – or *any* party – need to determine whether all of the preliminary work *plus* the construction work can be completed within 18 months.

Moreover, there may be other unforeseen problems that no one can reasonably anticipate at this time that could affect the project schedule.⁹ Indeed, the PD itself notes

⁹ Respondents respectfully direct the Commission's attention to Exhibits 9 through 34B attached to Sprint's April 20, 2009 Response to the Order Instituting Investigation in this proceeding. Review of these exhibits reveals that (a) the entire process, including the acquisition of environmental permits, involved in Sprint's simply placing cross-arms, whip antennas and electronics on SCE pole number 1169253E occupied approximately 17 months (July, 2002 through November, 2003) and (b) the process of arranging for electric power for this cell site (from planning to final construction) occupied approximately 15 months (August, 2002 through November, 2003) – and this was simply *for one pole*. Close attention to the highly detailed record already before the Commission in this proceeding indicates the need for the Commission to

that other pole owners will be involved in any remediation measures associated with the Settlement Agreement and that disagreements between owners could result in complaint proceedings, another possible source of delay.¹⁰ This risk also exists with the Malibu Canyon construction project.

Finally, an artificial and arbitrarily short deadline could result in third-party vendors substantially increasing their bids, which would materially increase the cost of the EIIF projects. Settling Respondents did not agree to this risk when entering into the Settlement Agreement.

For all of these reasons, Settling Respondents cannot in good faith agree to an 18-month deadline for completion of all EIIF projects.¹¹ Instead, as previously stated, CPSD should maintain direct oversight, and the Settling Respondents will keep CPSD apprised of their progress. In the unlikely event that CPSD believes Settling Respondents are not acting in a timely fashion, CPSD can propose an alternate plan or modified approach.

Alternatively, the Settling Respondents believe that a milestone-based approach would be more appropriate for a project of this magnitude. Assuming Settling Respondents receive the cooperation of other joint pole owners and there are no unforeseen circumstances, Settling Respondents could agree to the following:

- Within 6 months of the decision, set up the EIIF fund and its governance, draft and issue an RFP for the pole loading work to be conducted in both the Malibu Canyon pole enhancement project and the Inspection project, select

allow ample time for the Malibu Canyon portion of the EIIF projects, without imposition of an arbitrary deadline.

¹⁰ PD at 29.

¹¹ This condition also requires an accounting of the survey and upgrade projects upon completion of the work. The deadline for the accounting should not coincide with project completion—indeed, the accounting cannot be done because vendor bills will of necessity likely not have been submitted or received for weeks if not months after completion. Instead, such an accounting could be performed six months after the project is complete. This will allow all bills from contractors to be received; and CPSD can review the accounting prior to the funds escheating to the General Fund.

and retain a contractor to conduct pole loading, and complete pole loading calculations for the Malibu Canyon pole enhancement project.

- Within 18 months of the decision, complete the pole loading for a statistically valid sample of existing poles located in Southern California Edison’s service territory¹² with a 95% confidence level and an interval of 2.

In order to further assess the feasibility of this alternative milestone-based approach, the Settling Respondents respectfully request an additional two weeks in which to discuss this proposed timeline with CPSD and then file supplemental comments.

II. Removal of the \$5.1 Million Cap Is Inappropriate

The Settlement Agreement is clear and unambiguous: the Settling Parties agreed to pay “a total of \$12,000,000 (to be divided between them in equal one-third shares),”¹³ and the portion of funds designated for the EIIF “will be capped at \$5,100,000.”¹⁴ The PD however, removes the cap on the \$5.1 million, which creates the possibility that the Settling Parties will pay *more* than the \$12 million provided for in the Settlement Agreement. This is a significant change to the agreement, and would require the Settling Parties to assume responsibility for events that are not reasonably foreseeable that could affect the EIIF projects. This proposed condition must be removed or modified.

To be clear, the Settling Parties believe that the \$5.1 million budget for the EIIF projects is sufficient based on reasonable estimates of anticipated costs for both the pole enhancement project and the loading calculations for poles in SCE’s territory. But the Settling Parties have never suggested, nor does the Settlement Agreement require, that the Settling Parties should act as “financial guarantors” for every possible contingency or eventuality associated with the EIIF projects. Indeed, the Settlement Agreement states

¹² The poles included in the inspection must have an electric facility and at least one attachment by AT&T, Sprint or Verizon Wireless.

¹³ Settlement Agreement at ¶ 1.

¹⁴ *Id.* at ¶ 10.

just the opposite – it states (in ¶ 10) that the EEIF is capped at \$5.1 million. If the Settling Parties were to be guarantors, there would be no cap.

While Settling Parties believe the \$5.1 million is sufficient for the EEIF projects, it is possible that costs might exceed \$5.1 million due to unforeseeable circumstances, such as a *force majeure* event, or from unreasonable delays or expenses imposed by other joint poles owners, including SCE. It is the Settling Respondents’ experience that SCE generally does not permit companies to contract directly with SCE-qualified contractors to replace poles and transfer electric facilities, but must instead go through SCE. As a result, EEIF project costs, especially in Malibu Canyon, will be directly affected by SCE’s cooperation and rates. Moreover, if the cap is eliminated, the EEIF could well become an open checkbook to SCE, as well as to independent contractors that will bid on the EEIF projects. In addition, as mentioned above, there is a direct relationship between timeline and costs. The imposition of unreasonably short timelines may require the expenditure of additional costs to expedite work, which was not foreseen when the agreement was reached.

Furthermore, the PD itself recognizes that Settling Respondents agreed to pay a total of \$12 million to settle all claims brought by CPSD, and nothing more. The PD notes that to “resolve CPSD’s allegations, the Settling Respondents agree to pay \$12 million,”¹⁵ and that because “the Settlement Agreement requires the Settling Respondents to pay \$12 million, or 48% of the \$24.903 million recommended by CPSD, we conclude that this is a reasonable compromise that is within the range of likely litigated outcomes.”¹⁶ The PD’s proposal to impose unlimited liability on Settling Respondents conflicts with these statements and conclusions.

For all these reasons, Settling Parties respectfully request that the ALJ approve the express terms of the Settlement Agreement (¶ 10) by affirming the \$5.1 million cap.

¹⁵ PD at 17.

¹⁶ *Id.*

Alternatively, in order to address the concern that all EIIF projects are fully funded, Settling Respondents would not object to putting into a reserve account the \$6.9 million currently earmarked for the State's General Fund. This reserve account would act as a "safety net" in the unlikely event the cost of the projects exceeds \$5.1 million, and all funds in this account would be sent to the General Fund after the projects are completed. This proposal would not penalize Settling Respondents – instead, it would ensure that the Settling Respondents' total payments would not exceed the \$12 million expressly provided for in the Settlement Agreement.

III. Conditions Regarding Post-Project Actions Must Be Modified

Subparagraph (vii) would require that any funds remaining in the EIIF upon the completion of the projects must immediately be sent to the General Fund. Similarly, subparagraph (vi)(b) requires an accounting of all work performed and all funds expended after the pole loading survey is completed.

These conditions cannot be met because it is likely contractor invoices will not be sent to the Settling Respondents until at least 30 or 60 days after the projects are completed. The Settling Respondents will need to review, approve and pay the invoices before rendering a final accounting to CPSD, and they will then need to permit CPSD to review the accounting prior to sending the remaining funds, if any, to the General Fund. Accordingly, Settling Respondents propose that any funds remaining in the EIIF be sent to the General Fund after all invoices have been paid and an accounting of all funds has been completed and reviewed by CPSD. Settling Respondents expect that an accounting could be completed within six months after the EIIF projects are completed.

IV. The Decision Should Urge Cooperation By All Joint Pole Owners

The Settling Respondents recommend that the Commission's Decision emphasize to all joint pole owners that the Commission expects their full cooperation with Settling Parties on the EIIF projects to avoid delay and ensure that the enhancement and inspection projects proceed efficiently and effectively. The Commission should declare

that it will take an extremely dim view of any party found to be interfering with or delaying completion of the EEIF projects. Such a declaration will help ensure that the EEIF projects are completed in as timely and cost-effective a manner as possible.

Conclusion

For the reasons set forth above, Settling Respondents oppose the three specified conditions imposed by the PD and urge the Commission to remove or modify the conditions discussed herein. In the alternative, Settling Respondents respectfully request that the ALJ, pursuant to Rule 12.4(b) of the Rules of Practice and Procedure, allow Settling Respondents and CPSD a period of two weeks to renegotiate the settlement terms to address proposed conditions (ii), (vi), and (vii).

[Signature page follows.]

Respectfully submitted,

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Dated: June 8, 2012

Appendix

Recommended Changes to Ordering Paragraph 1:

~~(ii) If \$5.1 million is not sufficient to (a) upgrade the safety factor for all utility poles on 3.38 miles of Malibu Canyon Road in accordance with Paragraph 6 of the Settlement Agreement, and (b) conduct a statistically valid survey of joint-use utility poles in accordance with Paragraph 8 of the Settlement Agreement, the Settling Respondents shall deposit sufficient additional funds into the EHF to complete Items (a) and (b), with the shortfall shared equally among the Settling Respondents.~~

~~...~~

~~vi. The following activities required by Paragraphs 6—8 of the Settlement Agreement shall be completed within 18 months from the effective date of this order:~~

- ~~a. Upgrading the safety factor for all utility poles along 3.38 miles of Malibu Canyon Road.~~
- ~~b. After completing the upgrades, providing a report to CPSD that includes all pole-loading calculations and an accounting of the work performed and the funds expended.~~
- ~~c. Conducting a statistically valid survey of the joint-use poles identified in Paragraph 8 of the Settlement Agreement to determine if these poles comply with GO 95 safety factor requirements.~~
- ~~d. After completing the survey, providing a report to CPSD that includes the inspection results, all pole-loading calculations, and an accounting of the work performed and the funds expended.~~

~~vii. Any funds that remain in the EHF after the completion of the activities in Paragraphs 6—8 of the Settlement Agreement shall escheat to the State of California General Fund no later than 18 months from the effective date of this order.~~