

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



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Order Instituting Rulemaking on the Commission's Own Motion into the Application of the California Environmental Quality Act to Applications of Jurisdictional Telecommunications Utilities for Authority to Offer Service and Construct Facilities.

R.06-10-006
(Filed October 5, 2006)

**REPLY OF THE LEAGUE OF CALIFORNIA CITIES,
THE CALIFORNIA STATE ASSOCIATION OF COUNTIES, AND SCAN
NATOA, INC. TO THE OPPOSITIONS TO THEIR MOTION FOR AN
IMMEDIATE STAY OF DECISION 10-12-056**

I. INTRODUCTION

Pursuant to Rule of Practice and Procedure 11.1(f) of the California Public Utilities Commission (the "Commission"), the California State Association of Counties, and SCAN NATOA, INC. (collectively the "Local Governments"), file this reply to the oppositions to their motion for an immediate stay of Decision ("D.") 10-12-056 (the "Decision").¹

Local Governments demonstrated in their motion that the Commission must stay the Decision pending resolution of their Application for Rehearing because: (1) Local Governments and the general public will suffer serious and irreparable harm unless the Decision is stayed; (2) Local Governments have demonstrated a probability of succeeding on the merits of the underlying claims in the accompanying Application for Rehearing; (3) granting the stay will not create any harm to either the public interest or any other interested party; and (4) granting the

¹ As required by Rule of Practice and Procedure 11.1(f), Local Governments requested leave to file this reply from the Assigned Administrative Law Judge (Maribeth A. Bushey). In an email message dated February 17, 2011, Assistant Chief Administrative Law Judge Jacqueline A. Reed informed the attorneys for Local Governments that ALJ Bushey did not have authority to address this request because this matter is currently with the Commission's Appellate Section. She instructed Local Governments to file a motion for leave with the response to the opposition. Accordingly, Local Governments are concurrently filing a motion for leave to file this reply brief.

stay will ensure judicial and administrative efficiency and allow the Commission to address the lack of due process afforded to Local Governments.

The Competitive Carriers² and the California Wireless Association (“CalWA”) filed oppositions to Local Governments’ motion, while the small Local Exchange Carriers (“Small LECs”)³ support the motion. The Competitive Carriers argue that the Commission should deny the motion because: (1) Local Governments have not established irreparable harm; (2) it is highly unlikely Local Governments will prevail on their Application for Rehearing; and (3) the balance of harms do not support the stay. CalWA argues that Local Governments’ concerns can be addressed through ministerial permits.

As discussed below, the Commission should grant Local Governments’ motion for a stay because the motion satisfies all of the legal requirements for staying the enforcement of a Commission decision while an Application for Rehearing is pending.

II. DISCUSSION

A. Local Governments Have Properly Demonstrated They Will Suffer Serious and Irreparable Injury Unless the Commission Stays the Decision.

1. The standard for showing irreparable harm

Competitive Carriers argue that Local Governments have not shown that they will be irreparably harmed if the stay is not granted. In making this argument, however, Competitive Carriers rely on *North Shuttle Service, Inc. v. California Public Utilities Commission* (1998) 67 Cal.App.4th 386.⁴ That reliance is misplaced. The court’s holding in *North Shuttle Service* is irrelevant to the reasons Local Governments seek a stay.

² Competitive Carriers are NextG Networks of California, Inc, NewPath Networks, LLC, ExteNet Systems (California) LLC, Sunesys, LLC, Southern California Edison d/b/a Edison Carrier Solutions and AboveNet Communications, Inc.

³ The small Local Exchange Carriers are the Calaveras, Cal-Ore, Ducor, Happy Valley, Hornitos, Kerman, Pinnacles, Ponderosa, Sierra, Siskiyou, Volcano, and Winterhaven Telephone Co. SureWest Telephone joined in their filing.

⁴ Joint Response of Competitive Carriers to Local Governments’ Motion for a Stay (“Joint Response to Motion”), at p. 4.

Unlike in *North Shuttle Service*, Local Governments do not seek a stay to avoid financial losses. Instead, Local Governments argued in their motion that a stay is appropriate because of the “substantial costs, burdens, and risks to the people and communities” affected by the decision.⁵ Under such circumstances, the Commission should preserve the status quo until such time that the Commission can issue a decision on the challenged issues.

In the declaration of Patrick Whitnell, General Counsel of the League of California Cities, Local Governments showed that refusing to stay the Decision will irreparably harm Local Governments by placing into question local zoning and discretionary permitting requirements, creating a real threat of litigation, and interfering with the administration of local concerns such as aesthetics, city planning, and compliance with state and federal laws.

2. The declaration submitted by Local Governments is sufficient

In his declaration, Mr. Whitnell identified a number of local ordinances that contain discretionary permitting requirements for “wireless facilities.”⁶ Competitive Carriers argue that Mr. Whitnell’s declaration is insufficient because the Decision and General Order 170 are inapplicable to the types of facilities that are regulated under the local ordinances Mr. Whitnell refers to in his declaration.⁷ They argue that these local ordinances regulate the types of “wireless facilities” that are installed by “cellular service providers” and regulated by General Order 159-A.⁸ Even a cursory review of those statutes shows that this is not the case, and that these local ordinances regulate the installation of distributed antenna systems (“DAS”) facilities installed throughout California by some of the Competitive Carriers.⁹

⁵ *Decision Granting the Motion for a Temporary Restraining Order Regarding San Diego Gas & Electric Company’s Power Shut-off Plan* (2009), Decision No. 09-08-030, 2009 Cal. PUC LEXIS 423, at p. *8.

⁶ Declaration of Patrick Whitnell in Support of Local Governments’ Motion for a Stay, ¶ 7.

⁷ Joint Response to Motion, at p. 4.

⁸ Joint Response to Motion, at p. 4.

⁹ Competitive Carriers include NextG Networks of California, Inc, NewPath Networks, LLC, and ExteNet Systems (California) LLC, all of which are DAS providers.

For example, Mr. Whitnell discusses San Francisco Public Works Code Article 25, which regulates the installation of “Personal Wireless Service Facilities” in the public rights-of-way.¹⁰ Article 25 defines the term “Personal Wireless Service Facility” to mean “antennas and related facilities used to provide or facilitate the provision of Personal Wireless Service.”¹¹ This definition shows that the permitting requirements of Article 25 clearly apply to DAS facilities. Under Article 25, in many different parts of San Francisco, the Department of Public Works could not issue a Personal Wireless Service Facility Site Permit unless the Planning Department determines that a proposed DAS facility complies with certain prescribed standards to ensure that the facility does not impair the character of a historic district, a scenic corridor, or a residential neighborhood, among other things.¹²

Another example of a discretionary permit for DAS facilities can be found in section 40.29.170 of the Davis Municipal Code. Section 40.29.170 applies to *all* “telecommunications projects,” and requires a finding that the “proposed telecommunications site/facility has been designed to minimize its visual and environmental impacts” as a condition of the city issuing a required conditional use permit. DAS facilities are included in this requirement.

A third example cited by Mr. Whitnell is section 17.46.040 of the Malibu Municipal Code. Section 17.46.040 defines “Wireless telecommunications facilities” as “an installation that sends and/or receives radio frequency signals, including but not limited to directional, omnidirectional and parabolic antennas, structures or towers to support receiving and/or transmitting devices, cabinets, equipment rooms, accessory equipment and other structures, and the land or structure on which they are all situated.” DAS facilities are certainly included in this definition. Section 17.46.060 contains a host of “General Requirements” for the installation of

¹⁰ S.F. Public Works Code article 25 was newly adopted, so it has not been incorporated into the City’s on-line codes. For that reason, a copy is attached hereto.

¹¹ S.F. Public Works Code, § 1502(p). Article 25 defines “Personal Wireless Service” as “commercial mobile services provided under a license issued by the FCC.” S.F. Public Works Code, § 1502(o).

¹² See S.F. Public Works Code, § 1509.

these “Wireless telecommunications facilities,” including facilities installed on “existing utility poles.”

Thus, Local Governments have more than adequately demonstrated that, unless the Commission stays the Decision and General Order, their legal right to enforce discretionary permitting requirements for telecommunications facilities could be questioned by Competitive Carriers. This significant showing demonstrates the irreparable harm necessary for a stay here.

3. These local permitting requirements are not simply ministerial

CalWA suggests that Local Government concerns over the siting of DAS facilities can be addressed in “ministerial permitting processes” still authorized by the Commission.¹³ As discussed above, however, aesthetic and city planning concerns addressed in the local ordinances cited by Mr. Whitnell require the exercise of discretion.¹⁴

4. General Order 170 does not require Commission review over most construction by Competitive Carriers

Competitive Carriers assert that Local Governments either “cannot demonstrate” or “exaggerate” any irreparable harm that might occur because: (i) General Order 170 “anticipates that the Commission will review any construction activity that may have a direct or indirect physical change to the environment;” (ii) CEQA and General Order 170 “provide for exceptions to exemptions when projects are located in specific categories of areas such as sensitive locations, scenic highways or historical resources;” and (iii) General Order 170 “requires that telephone corporations notify local jurisdictions of” projects that have a direct physical impact

¹³ CalWA’s Opposition to Local Governments’ Application for Rehearing and Motion for a Stay (“CalWA Opposition”), at p. 2

¹⁴ The Commission should reject out of hand CalWA’s request to “provide additional evidence” at some later date. CalWA Opposition, at p. 2. If CalWA thought this evidence was important to the Commission’s decision whether to grant a motion for a stay it should have filed it in a timely manner.

on the environment.¹⁵ None of these arguments provide a basis for the Commission to deny Local Governments' motion for a stay.

Competitive Carriers' arguments seem to assume that Local Governments have no interest in any local construction that this Commission has determined is subject to the general rule exemption. That is simply not the case. Section III of General Order 170 would grant a sweeping "general rule" exemption from CEQA for all listed activities, including all DAS projects in the state. Yet, as discussed above, many cities require discretionary permits for DAS projects because of their concerns over aesthetic and other impacts the unregulated installation of these facilities could have in their communities. Thus, Local Governments showed in their motion that the Decision directly puts into question the ability of Local Governments to regulate the placement of telecommunications facilities in their jurisdictions.

Competitive Carriers also argue that the so-called "exceptions to the exemptions" obviate the need for a stay because they are sufficient to address Local Governments concerns over scenic and historic resources. However, under GO 170, these exceptions do not apply when the proposed construction is subject to the general rule exemption (like DAS projects),¹⁶ or when a telephone corporation claims that the project is subject to a categorical exemption.¹⁷ They only apply when a telephone corporation must file a Notice of Proposed Construction.¹⁸ Because these broad exemptions will more often than not apply to most construction by Competitive Carriers, and because General Order 170 allows telephone corporations to self-certify that the exemptions apply,¹⁹ rarely will the Commission even be asked to consider whether these exceptions should apply.

Finally, Competitive Carriers argue that Local Governments will not be harmed because General Order 170 requires telephone corporations to notify local jurisdictions before they begin

¹⁵ Joint Response to Motion, at pp. 4-5.

¹⁶ General Order 170, § III.

¹⁷ General Order 170, § IV.A.

¹⁸ General Order 170, § IV.C.

¹⁹ General Order 170, § IV.A.

construction of a project that is categorically exempt. Such notice does nothing to protect Local Governments from irreparable harm. While Local Governments might learn of a telephone corporation's plan to construct facilities prior to construction beginning, they would still face claims from carriers that Local Governments lack the authority to enforce compliance with local ordinances that require a discretionary permit to construct telecommunications facilities.

For these reasons, absent a stay Local Governments will suffer irreparable harm.

B. Local Governments Have Demonstrated that the Balance of the Harms Support a Stay.

Competitive Carriers argue that they would be harmed by a stay by “delaying the construction of facilities to support emergency communications services and advanced telecommunications services such as broadband.”²⁰ They assert, without any factual support, that the Commission's Decision has spurred construction activity that somehow has been dormant during the four years that this proceeding has been pending.²¹

The Competitive Carriers point to absolutely no information in the record to support their claim that an abrogation of discretionary local permitting authority is necessary to spur broadband deployment. In fact, the growth in the number of DAS carriers over the years is a testament to the fact that DAS facilities are routinely deployed throughout the state. Indeed, the Small LECs agree with Local Governments that a stay would not affect construction activity because the “status quo ante” has enabled telephone corporations to proceed with construction for many years:

Carriers complied with CEQA prior to the adoption of General Order 170. Those that needed discretionary permits from the Commission to authorize construction had CEQA evaluated at the CPUC. Those that did not need to come before the Commission for such authority had CEQA compliance evaluated by their local jurisdictions.²²

²⁰ Joint Response to Motion, at p. 7.

²¹ Joint Response to Motion, at p. 8.

²² Response of the Small LECS to the Motion for a Stay, at p. 2.

There is no evidence in the record that staying the Decision and General Order 170 will prevent Competitive Carriers from proceeding to construct necessary telecommunications facilities. For this reason, Competitive Carriers will suffer no harm if the stay is granted, and the balance of harms clearly falls with Local Governments.

C. Local Governments Have Demonstrated They Are Likely to Prevail on Their Application for Rehearing.

1. Competitive Carriers admit that the Decision is fatally flawed

Competitive Carriers admit that the Applications for Rehearing filed by Local Governments and the Joint Carriers²³ are “correct that CEQA only applies to activities . . . that require discretionary approval of a public agency and that *absent discretionary approval authority . . . a public agency has no authority to review or approve a project under CEQA.*”²⁴ Competitive Carriers, however, misconstrue the importance of that statement in the context of this proceeding.

The only discretionary approval that the Commission grants to a telephone corporation is a certificate of public and convenience and necessity (“CPCN”). While applicants for CPCNs could seek Commission approval of particular construction projects, they generally do not. Moreover, it is not generally the rule that certificated telecommunications carriers come to the Commission to amend their CPCNs to include particular construction projects (although they certainly could). For these reasons, this statement by Competitive Carriers is an admission that the Commission should not conduct CEQA review of construction by telephone corporations.

Cognizant of this legal pitfall, Competitive Carriers claim that in the Decision and General Order 170 “the Commission created a new discretionary approval process for telephone

²³ The Joint Carriers seeking rehearing include AT&T California, Frontier, SureWest, and the Small LECS.

²⁴ Competitive Carriers’ Joint Response to Applications for Rehearing of D.10-12-056 (“Joint Response to Applications”), at p. 3 (emphasis added). Verizon also agrees with this statement. Response of Verizon to Applications for Rehearing filed by Local Governments and Joint Carriers, at pp. 4-6.

corporations' construction of their telephone lines, plant, and system.²⁵ They point to isolated statements in the Decision and General Order 170 that they claim supports this assertion.²⁶

Yet, General Order 170 makes clear that this is not the Commission's purpose. The title of General Order 170, "Commission Review Pursuant to the California Environmental Quality Act of the Construction of Telephone and Telegraph Lines Located in California," belies any intent on the Commission's part to exercise such regulatory authority. The title shows that the Commission adopted General Order 170 to establish requirements for CEQA review – not to establish a permit requirement for telecommunications facilities.²⁷ But the Commission's clarity of purpose does not end with the title. The "Purpose" and "Applicability" sections of General Order 170 ensure that General Order 170 should not be construed to create some sort of Commission telecommunications facilities permit:

A. Purpose: These rules implement the California Public Utility [sic] 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. . . .

²⁵ Joint Response to Applications, at p. 3.

²⁶ Joint Response to Applications, at pp. 3-4. Apparently unsure of their own arguments, Competitive Carriers ask the Commission to modify the Decision to "more clearly state that the GO contains new procedural requirements for review and approval of telecommunications facility construction. Joint Response to Applications, at p. 12. Local Governments urge the Commission to reject this overture, because the Commission would have to issue a decision that would exceed the scope of this proceeding.

²⁷ This is in stark contrast to General Order 131 cited by Competitive Carriers, which is entitled "Rules Relating to the Planning and Construction of Electric Generation, Transmission/Power/Distribution Line Facilities and Substations Located in California." In General Order 131 the Commission required certificated electric utilities to obtain a CPCN for large electrical facilities or a permit to construct for smaller facilities. In that context, the Commission correctly recognized its responsibility to conduct a CEQA review before issuing such a CPCN or permit to construct. The Notice to Proceed process in General 170 is not akin to the CPCN or permit to construct required by General Order 131.

Nothing in these Sections expresses or implies the Commission's intent to become a permitting agency for construction projects. Instead, they recognize that the CEQA review required by General Order 170 only applies when a telephone corporation or other entity seeks "discretionary authority from the Commission relating to telephone lines." In their Application for Rehearing, the Joint Carriers agree with Local Governments' understanding of General Order 170:

To apply CEQA to telecommunications projects undertaken by [incumbent Local Exchange Carriers ("ILECS")]. . . , the Commission would have to be able to create a new approval requirement that provides a vehicle for invoking CEQA. But the Commission did not create this new approval requirement nor did it explain how it could do so, at least for the ILECs. . . . Even if the Commission did intend to (and could) create a new permitting structure, the Commission could not do it in the instant proceeding as it did not provide the facts or legal reasons to justify such expansive authority.²⁸

The Decision's admitted failure to identify the discretionary decisions that trigger the Commission's application of CEQA to all telephone corporation projects is one of several serious legal flaws that warrant granting Local Governments' Application for Rehearing.

2. Even Competitive Carriers acknowledge that there are gaping holes in the Decision and General Order 170

While the Competitive Carriers assert that the Decision and General Order properly define the Commission's duties and responsibilities under CEQA, they repeatedly acknowledge that the Decision might be ambiguous, needs clarification, and could be misinterpreted.²⁹ They therefore ask the Commission on five different occasions to modify the Decision and General Order (sometimes in ways that would change its meaning).³⁰ These acknowledgements demonstrate that the Decision and GO 170 have significant legal problems.

²⁸ Joint Carriers' Application for Rehearing of Decision 10-12-056 ("Joint Carrier's Application"), at pp. 7-8.

²⁹ Joint Response to Applications, at pp. 12, 28, 30, 32, and 34.

³⁰ Joint Response to Applications, at pp. 12, 28, 30, 32, and 34.

3. Other post-Decision filings show that the parties to this proceeding do not fully understand the Decision or General Order 170, which provides further support for Local Governments' motion

The problems with the Decision are underscored by the fact that the parties cannot even agree on what it means or requires. For example, one of the purposes of the Decision and General Order 170 was to address the Commission's "inconsistent requirements" for CEQA, which were largely dependent on when a telephone corporation started doing business in California.³¹ In this regard too, the Decision seems to have failed. According to tw telecom of california lp, competitive local exchange carriers that received their CPCNs prior to 1999 would never have to come to the Commission for CEQA approval, because General Order 170 creates an exception to CEQA review where the Commission previously adopted a "Final Negative Declaration" or the "proposed facilities have already undergone CEQA review."³² The Joint Carriers, on the other hand, assert that the Decision and General Order do not apply to telephone corporations that obtained state franchises prior to the enactment of CEQA.³³ According to the Joint Carriers, the Decision and General Order only apply to a limited number of telephone corporations that "must still receive new CPCNs prior to undertaking construction projects."³⁴

Such a fundamental disagreement among the parties to this proceeding about the scope and effect of the Decision clearly demonstrates that the Decision should be stayed pending a Commission decision on the Applications for Rehearing filed by Local Governments and the Joint Carriers.

³¹ Decision, at p. 2.

³² Response of tw telecom of california lp to Local Governments' Application for Rehearing, at p. 2 (quoting General Order 170, §§ II.D, II.E.)

³³ Joint Carriers' Application, at pp. 5-6.

³⁴ Joint Carriers' Application, at pp. 5-6.

III. CONCLUSION

Based on the foregoing, Local Governments respectfully request that the Commission stay D.10-12-056 pending the resolution of Local Governments' and Joint Carriers' Applications for Rehearing.

Dated: February 18, 2011

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CERTIFICATE OF SERVICE

I, **PAULA FERNANDEZ**, declare that:

I am employed in the City and County of San Francisco, State of California. I am over the age of eighteen years and not a party to the within action. My business address is City Attorney's Office, City Hall, Room 234, 1 Dr. Carlton B. Goodlett Place, San Francisco, CA 94102; telephone (415) 554-4623.

On February 18, 2011, I served: **Reply of the League of California Cities, the California State Association of Counties, and SCAN NATOA, Inc. to the Oppositions to Their Motion for an Immediate Stay of Decision 10-12-056** by electronic mail on the attached Service List, Proceeding No. R06-10-006.

The following addressee(s) without an email address were served:

- BY UNITED STATES MAIL:** Following ordinary business practices, I sealed true and correct copies of the above documents in addressed envelope(s) and placed them at my workplace for collection and mailing with the United States Postal Service. I am readily familiar with the practices of the San Francisco City Attorney's Office for collecting and processing mail. In the ordinary course of business, the sealed envelope(s) that I placed for collection would be deposited, postage prepaid, with the United States Postal Service that same day.

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I declare under penalty of perjury pursuant to the laws of the State of California that the foregoing is true and correct.

Executed February 18, 2011, at San Francisco, California.

/s/
PAULA FERNANDEZ



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