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

City of Huntington Beach,

Complainant,

vs.

NextG Networks of California Inc. (U6745C),

Defendant.

Case 08-04-037  
(Filed April 23, 2008)

**JOINT RULING OF THE ASSIGNED COMMISSIONER AND ASSIGNED  
ADMINISTRATIVE LAW JUDGE REGARDING MOTION TO DISMISS**

**Summary**

This ruling denies the motion to dismiss filed by Defendant, NextG Networks of California Inc. (NextG), except as to the third cause of action. We dismiss the third cause of action in the complaint filed by the City of Huntington Beach (City) against NextG without leave to amend.

**Background**

In Decision (D.) 03-01-061, the Commission granted NextG a limited facilities-based Certificate of Public Convenience and Necessity (CPCN), which authorized NextG to install a network of antennas on existing utility poles to be used to transmit and receive radio frequency communications for retail wireless (cellular and PCS) companies.

In D.07-04-045, the Commission granted NextG's application for expansion of its CPCN to include full facilities-based services. D.07-04-045 also authorized NextG to use an expedited 21-day procedure under which Commission Energy Division staff (ED staff) could authorize NextG to construct new antenna poles and related facilities at unspecified locations in this state, if the installations would comply with local undergrounding ordinances and are exempt from the requirements of the California Environmental Quality Act (CEQA). If the proposed network does not meet either requirement, NextG must then apply for Commission approval of the project and undergo any legally required CEQA review.

Pursuant to D.07-04-065, on November 12, 2007, NextG submitted a Notice of Proposed Construction (NPC) for its Metro PCS Huntington Beach Project (the project) to the Commission Energy Division. On December 3, 2007, ED staff found that the proposed project is exempt from CEQA and granted NextG a Notice to Proceed (NTP).

On or about December 4, 2007, City contacted ED staff and raised concerns about the project. City filed an informal appeal of the NTP with the Commission Energy Division on or about December 24, 2007. On January 4, 2008, ED staff notified NextG by letter that the company should withhold any action pursuant to the NTP, pending an investigation of the issues raised by City.

On March 14, 2008, ED staff notified NextG by letter that the project is consistent with activities identified by the Commission as categorically exempt from CEQA and lifted the temporary suspension of the NTP issued after City's appeal. This letter also noted that on February 26, 2008, the U.S. District Court had enjoined City from enforcing its undergrounding ordinance against NextG in any manner inconsistent with its enforcement of the ordinance against the incumbent telecommunications providers.

On April 23, 2008, City filed the complaint in this proceeding, which alleges that NextG's project involves the construction of three new utility poles and the installation of 19 miles of fiber optic cable, involving hundreds of street closings and temporary lane and street closures. City claims that in many cases, NextG's project will require the routing of aerial cables through mature street trees, so that either the trees must be removed or wires must be run into the street. The complaint includes three causes of action as follows:

First Cause of Action - ED staff abused its discretion in determining that the project is exempt from CEQA, because the project does not fall within the categorical exemptions cited by NextG, and because ED staff failed to consider the project as a whole in violation of CEQA. Further, ED staff made its decision finding the project exempt from CEQA without substantial evidence. Therefore, ED staff and NextG violated their duties under CEQA, abused their discretion, and have failed to proceed in the manner required by law.

Second Cause of Action - In 2007, City amended its undergrounding ordinance to prohibit the installation of new utility poles to support antennas in the public right of way (PROW). In D.07-04-045, the Commission authorized NextG to install antennas on new poles only where local ordinances authorize utilities to install new communications poles in the PROW. However, ED staff issued a NTP for the project, which includes the installation of new utility poles in the PROW in violation of D.07-04-065, based on the U.S. District Court's preliminary injunction enjoining City's enforcement of the undergrounding ordinance against NextG. As a result, NextG and ED staff have violated their duties under Commission orders and rules, have abused their discretion, have failed to proceed in the manner required by law, and have decided matters without substantial evidence.

Third Cause of Action – Although in D.03-01-061, the Commission authorized NextG to use the PROW for its operations, City alleges that the Commission has never determined that NextG is a “telephone corporation” as a matter of law. City claims that only land line telephone carriers are “telephone corporations” entitled to use the PROW under Public Utilities Code Section 7901.<sup>1</sup> According to City, since NextG’s project is an extension of cellular service on behalf of MetroPCS, NextG is not operating as a land line telephone carrier, but is a wireless carrier. Therefore, NextG has no legal right to use the PROW for its operations, and City requests that the Commission declare that as a matter of law, NextG is not a “telephone corporation” under Section 7901.

### **Motion to Dismiss**

On June 11, 2008, NextG filed a Motion to Dismiss (Motion), on the following grounds:

1. The complaint contests the acts and omissions of the Commission, not NextG, and therefore fails to comply with Public Utilities Code Section 1702 and Rule 4.1(A).<sup>2</sup>
2. The complaint is an untimely improper attack on a decision of the Commission issued under authority properly delegated to ED staff and should have been contested by filing an application for rehearing;
3. The complaint is a procedurally improper and untimely challenge to a Commission decision under CEQA, which should have been filed in the California Supreme Court as a petition for a writ of review;

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<sup>1</sup> All subsequent Code references are to the Public Utilities Code, unless otherwise stated.

<sup>2</sup> All Rule citations are to the Commission Rules of Practice and Procedure, unless otherwise stated.

4. The complaint is a procedurally improper collateral attack on previous Commission decisions, which found NextG to be a telephone corporation that is legally entitled to install facilities within PROW;
5. City's claim that the entire city is an underground district is incorrect as a matter of law and is contradicted by the findings of the federal district court enjoining the City's undergrounding ordinance;
6. City's claim that NextG's proposed construction is not exempt from CEQA is inconsistent with an almost unbroken line of prior Commission decisions finding comparable construction exempt from CEQA;
7. In approving NextG's NPC for the installation of facilities in City, the Commission considered the entirety of NextG's proposed project, and the Commission's decision is fully supported by substantial evidence in the record; and
8. Entertaining the City's complaint would undermine the Commission's intent in establishing the expedited review process for CEQA-exempt telecommunications projects, such as NextG's project.

City filed Opposition to the Motion on August 8, 2008, and NextG filed a Reply on August 18, 2008.

A hearing on the Motion was held before the assigned Commissioner, John A. Bohn, and the assigned Administrative Law Judge (ALJ), Myra J. Prestidge on August 25, 2008.

### **Standard of Review**

A motion to dismiss requires the Commission to determine whether the party filing the motion wins based solely on undisputed facts and matters of

law.<sup>3</sup> The Commission generally treats motions to dismiss as a court would treat motions for summary judgment in civil practice.<sup>4</sup>

## **Discussion**

### **1. Since City's Complaint Alleges Violations of Law and Commission Rules and Orders by NextG, the Complaint is Sufficient to Comply with Rule 4.1 and Section 1702.**

NextG argues that City's complaint should be dismissed, because under Rule 4.1 and Section 1702, a complaint may be filed only to contest violations of law or Commission rules or orders by a public utility, and the complaint seeks to review the actions of the Commission, as delegated to ED staff, rather than unlawful acts or omissions by NextG.

NextG is correct that Rule 4.5 generally permits the Commission to address violations of law or Commission rules or orders by a public utility, rather than by the Commission or Commission staff. Rule 4.1(a) states, in pertinent part:

A complaint may be filed by: (1) any corporation or person, chamber of commerce, board of trade, labor organization, or any civic, commercial, mercantile, traffic, agricultural or manufacturing association or organization, or any body politic or municipal corporation, setting forth any act or thing done or omitted to be done by any public utility including any rule or charge heretofore established or fixed by or for any public utility, in violation, or claimed to be in violation, of any provision of law or of any order or rule of the Commission. (Emphasis added.)

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<sup>3</sup> D.01-08-061, 2001 Cal. PUC LEXIS 512, see also D.06-04-010, 2006 Cal. PUC LEXIS 116.

<sup>4</sup> *Id.*

Rule 4.1(a) mirrors the language of Section 1702, which permits the filing of complaints against public utilities with the Commission.<sup>5</sup>

The Commission construes complaints liberally, in the interests of justice.<sup>6</sup> Under our prior decisions, if a complaint raises an issue pertaining to the regulation and control of a public utility, it is only necessary that the complaint allege facts upon which the Commission may act.<sup>7</sup>

Here, although the complaint alleges that ED abused its discretion in finding the project exempt from CEQA and violated legal requirements in authorizing the project in violation of City's undergrounding ordinance, the complaint also alleges that NextG has failed to comply with CEQA and has acted in violation of the law by proceeding with the project. We find these allegations sufficient to permit City to proceed with its complaint against NextG.

In addition, in D.08-08-010, the Commission stated that complaints are a procedurally appropriate vehicle to address allegations of environmental harm, which would include CEQA exemptions, and deferred its decision on the correct

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<sup>5</sup> Section 1702 states:

**§ 1702. Filing of complaint**

Complaint may be made by the commission of its own motion or by any corporation or person, chamber of commerce, board of trade, labor organization, or any civic, commercial, mercantile, traffic, agricultural, or manufacturing association or organization, or any body politic or municipal corporation, by written petition or complaint, setting forth any act or thing done or omitted to be done by any public utility, including any rule or charge heretofore established or fixed by or for any public utility, in violation or claimed to be in violation, of any provision of law or of any order or rule of the commission.

<sup>6</sup> D.99-08-008 (*Ferrick v. GTE*).

<sup>7</sup> *Id.*, see also D. 94-10-061 (*Westcom Long Distance v. Pacific Bell*).

procedure for appealing a NTP issued by ED staff under the expedited 21-day process to Rulemaking (R.) 06-10-006.

We reject NextG's argument that D.08-08-010 permits the filing of complaints to raise issues related to claimed CEQA exemptions only before ED has made its determination regarding a claimed CEQA exemption under the expedited 21-day process. D.08-08-010 states no such any restriction on the filing of complaints to raise environmental issues. Moreover, requiring an opposing party, such as City, to file a formal complaint before ED staff has made its decision on the CEQA exemption under the expedited 21-day process would waste time and Commission resources in adjudicating a formal complaint before protesting parties have exhausted their administrative remedies, would undermine the expedited 21-day process for ED staff review of claimed CEQA exemptions established by Commission decisions, and makes no sense.<sup>8</sup>

Based on the above, we find that NextG's argument that the complaint should be dismissed based on non-compliance with Rule 4.1 and Section 1702 is without merit.

**2. The Complaint Is Not an Improper Collateral Attack on a Final Commission Decision That Was Properly Delegated to ED Staff.**

NextG argues that in D.07-04-045, the Commission delegated its authority to ED staff to make a final decision regarding whether NextG's project is exempt from CEQA review and to authorize NextG to proceed with the project.

Therefore, ED staff's decision is a final decision of the Commission. NextG

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<sup>8</sup> However, we note that in R.06-10-006, the Commission will consider the appropriate procedure for challenging ED's determination that a project is exempt from CEQA under the expedited 21-day process, and may designate a procedure other than a complaint for raising these issues.

contends that City should have filed a timely application for rehearing pursuant to Rule 16.1 and 16.2, rather than the complaint, and that City's complaint is an improper collateral attack on a Commission decision.

NextG is correct that Section 1709 generally prohibits parties from making collateral attacks on a Commission decision or order.<sup>9 10</sup> A collateral attack is an attempt to invalidate the judgment or order of the Commission in a proceeding other than that in which the judgment or order was rendered.<sup>11</sup>

However, here, although D.07-04-045 authorizes ED staff to review whether NextG's project is exempt from CEQA review under the expedited 21-day process, this delegation of authority does not overturn the long standing principle that the Commission only speaks through its written decisions. (D.00-09-042.)

Although the Commission has not yet issued a decision in R.06-10-006 in order to clarify the procedure for Commission review of ED staff decisions on CEQA exemptions, the fact that D.08-08-010 authorizes the filing of a complaint, in the interim, suggests that the Commission did not intend the decision of ED staff on CEQA exemptions to be final.

Further, as noted in D.02-02-049, decisions involving the application of CEQA are often discretionary, and the Commission's authority to delegate functions which involve the exercise of discretion and judgment to staff is

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<sup>9</sup> See D.07-04-017.

<sup>10</sup> Section 1709 states:

In all collateral actions or proceedings, the orders and decisions of the commission which have become final shall be conclusive.

<sup>11</sup> D.07-04-017.

limited. Under state law, the Commission may delegate ministerial decisions, which do not involve the exercise of discretion, to staff, but may delegate functions which involve the exercise of discretion and judgment, such as investigations, the determination of facts, making recommendations, or drafting proposed decisions, to staff only so long as the staff actions are subject to ratification by the full Commission.<sup>12</sup>

This delegation does not bind the Commission to acts of staff nor does it bar the Commission from retaining the authority to review ED staff determinations that a project is exempt from CEQA. Since the process for appealing a staff decision to issue a NTP is not specified in Commission decisions adopting the expedited 21-day process, City's filing of a complaint, as authorized in D.08-08-010, is permissible.

At the hearing on the Motion, NextG argued that City should have challenged the NTP through an application for rehearing filed in Application (A.) 06-05-031, the proceeding in which D.07-04-045 was rendered. However, under Rule 16.2, an application for rehearing may be filed only by a party to the underlying proceeding, and City was not a party.<sup>13</sup> In addition, under Rule 16.1, an application for rehearing must generally be filed within 30 days after the mailing of the Commission order or decision, and ED staff did not make its initial decision issuing the NTP until December 3, 2007,

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<sup>12</sup> See D.02-02-049 and cases cited therein.

<sup>13</sup> We note that D.07-04-045 did not approve NextG's projects in any particular location, but stated only that NextG would be installing facilities at unspecified locations within the state. Therefore, the filing of the application gave City no notice that NextG would be constructing facilities within City limits, which might otherwise have prompted City to file a protest or to intervene in the proceeding.

approximately eight months after the issuance of D.07-04-045. Therefore, even if an application for rehearing of D.07-04-045 were the appropriate remedy, City could not have filed an application for rehearing under Commission Rules.

As a result, NextG's argument that the complaint is an improper collateral attack on a Commission decision is without merit.

**3. The Complaint Is Not an Untimely and Improper Challenge to a Commission Decision under CEQA.**

NextG argues that City's complaint is an untimely and improper challenge to the final decision of the Commission regarding the project under CEQA.

As stated by NextG, final decisions of the Commission on CEQA issues must be challenged through a petition for a writ of review in the California Supreme Court within 35 days of the filing of a Notice of Exemption by the Commission.

However, for the reasons previously stated, the decision of ED staff finding the project exempt from CEQA and issuing the NTP was not the final decision of the Commission. Under D.08-08-010, ED staff's determination on these issues is subject to the review of the Commission in this complaint. Therefore, it would be premature for City to file a petition for a writ of review with the California Supreme Court pending the outcome of this proceeding.<sup>14</sup>

As a result, NextG is not entitled to dismissal of the complaint on these grounds.

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<sup>14</sup> We also note that according to City, the Assistant City Attorney contacted the Commission Legal Division after ED staff made its first determination that the project is exempt from CEQA, to find out if the staff decision was final and if City should file a legal challenge in court. City states that the Commission Legal Division advised the Assistant City Attorney to first file a complaint in order to exhaust its administrative remedies before challenging the ED staff decision in court.

**4. City's Second Cause of Action Should Not Be Dismissed, Because NextG Has Not Shown that It is Entitled to Judgment As a Matter of Law.**

City's Second Cause of Action alleges that ED staff's issuance of a NTP for NextG's project violates D.07-04-045, because the project includes the installation of new communications poles in violation of City's amended undergrounding ordinance. City also alleges that in issuing the NTP, ED staff improperly applied the U.S. District Court's preliminary injunction which enjoins City from enforcing its undergrounding ordinance against NextG.

NextG argues that the Second Cause of Action should be dismissed because City's claim that the entire city is an underground district is incorrect as a matter of law and is contradicted by the findings of the U. S. District Court in the preliminary injunction which enjoined City's undergrounding ordinance. According to NextG, in D.07-04-045, the Commission authorized NextG to use the 21-day expedited process for ED staff review of projects involving the installation of poles in local underground districts, when local ordinances permit exceptions to undergrounding requirements. Further, D.07-07-023, which denied a rehearing of D.07-04-045, clarified that whether the expedited 21-day process for ED staff review of NextG's projects applies to the installation of facilities above ground in underground districts must be determined on a case-by-case basis, because some local ordinances may allow above-ground wireless utility equipment in these areas.

NextG states that in this case, the administrative record shows that ED staff correctly determined that City's ordinance did not bar NextG's installation of the poles in the designated areas. NextG also contends that ED staff properly considered the findings of the U.S. District Court that City had not applied its undergrounding ordinance in a consistent manner and had enjoined City from

applying its undergrounding ordinance against NextG in any manner inconsistent with its enforcement of the ordinance against the incumbent telecommunications providers.

We agree that D.07-04-045 permits NextG to install new utility poles in local undergrounding districts only when permitted by local ordinance. Further, D.07-04-045, which denied NextG's application for rehearing of D.07-04-045, clearly states that whether NextG may use the expedited 21-day process for ED staff review of its projects involving the construction of new poles in undergrounding districts must be determined on a case-by-case basis, and depends on whether local ordinances allow above-ground wireless equipment in undergrounding districts.

In addition, we take official notice of the September 23, 2008 order of the Ninth Circuit Court of Appeals, which vacated the preliminary injunction previously issued by the U. S. District Court to enjoin City from enforcement of its undergrounding ordinance against NextG in any manner inconsistent with enforcement against the incumbent carriers. Therefore, NextG's argument that the findings in the preliminary injunction refute City's claim that the entire city is an undergrounding district is moot.

We also cannot make a ruling as to whether the City's undergrounding ordinance permits the installation of NextG's poles at the locations designated for the project, as claimed by NextG, without a review of the evidence, which is not before us on this Motion.

Further, we agree with City that it is not possible to conclude whether the ED staff made the necessary case-by-case analysis regarding whether NextG's project complied with City's undergrounding ordinance, because the administrative record is not before the Commission in ruling on the Motion.

As a result, NextG is not entitled to dismissal of the Second Cause of Action on these grounds.

**5. City's Third Cause of Action Should be Dismissed Because as a Matter of Law, NextG is a Telephone Corporation That Is Entitled to Use the PROW under Section 7901.**

NextG argues that City's Third Cause of Action, which states that NextG is not a telephone corporation authorized to use the PROW under Section 7901, is an improper collateral attack on previous Commission decisions granting NextG the right to operate in the PROW.

City contends that a complaint is an appropriate mechanism to raise violations of law by a public utility, and NextG has violated Section 7901 by proceeding with its project, because none of the Commission decisions granting NextG a CPCN state that NextG is a telephone corporation within the meaning of Section 7901. City claims that NextG is therefore not entitled to use the PROW without first obtaining approval from City under General Order (GO) 159-A.

Section 7901 states that a "telephone corporation" may construct telephone lines along or across any public road or highway or along or across any waters or lands within this state, and may construct poles, posts, piers and other abutments for supporting insulators or other necessary fixtures for the operation of telephone lines, in a manner that does not "incommode" the public in the use of the road or highway or interrupt the navigation of the waters. Under Section 7901.1, local public agencies may generally regulate the time, place, and manner in which telephone corporations use the PROW for their operations.

Section 7901 does not define "telephone corporation." City correctly states that only one court decision, *Sprint Telephony v. County of San Diego*, 140 Cal. App. 4<sup>th</sup> 748(2006) (*Sprint Telephony*), has addressed whether wireless

carriers are entitled to use the PROW under Section 7901, and this decision has been effectively depublished.

However, the Public Utilities Code contains general definitions which govern the construction of the Code, unless the particular Code section or the context requires another interpretation.<sup>15</sup>

Section 234(a) defines “telephone corporation” as follows:

"Telephone corporation" includes every corporation or person owning, controlling, operating, or managing any telephone line for compensation within this state. (Emphasis added.)

Section 233 broadly defines “telephone line” as follows:

"Telephone line" includes all conduits, ducts, poles, wires, cables, instruments, and appliances, and all other real estate, fixtures, and personal property owned, controlled, operated, or managed in connection with or to facilitate communication by telephone, whether such communication is had with or without the use of transmission wires. (Emphasis added.)

City argued at the hearing on the Motion that since Section 233 was enacted in 1951, before the development of wireless services, the Legislature could not have intended for wireless carriers to qualify as “telephone corporations” under Sections 234(a) and 7901. However, under the principles of statutory construction, statutes are to be interpreted first based on their plain language, because statutory language is generally the most reliable indicator of

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<sup>15</sup> Section 5 states:

**§ 5. Construction of code**

Unless the provision or the context otherwise requires, these definitions, rules of construction, and general provisions shall govern the construction of this code.

legislative intent.<sup>16</sup> Unless the statute contains an ambiguity or is reasonably subject to multiple interpretations, it is not necessary to resort to extrinsic aids, such as legislative history, to interpret a statute, and the plain meaning of the statutory language is controlling.<sup>17</sup>

Here, Section 233 contains no ambiguity, and the plain language of Section 233 is sufficiently broad to include facilities and equipment installed by carriers in connection with or to facilitate wireless telecommunications services, as well as landline telecommunications services. The plain language of Sections 233 also suggests a legislative intent to include a broad range of technologies used to provide or facilitate telecommunications services in this state within the definition of "telephone line". Therefore, we find that as a matter of law, NextG is a telephone corporation authorized to utilize the PROW for its operations under Section 7901, to the extent consistent with its CPCN and applicable legal requirements.

This conclusion is also consistent with previous Commission decisions. In D.06-01-006, the Commission denied a complaint filed by the City and County of San Francisco (CCSF) against NextG. The complaint alleged that NextG had misrepresented to CCSF that it was authorized to provide radiofrequency transport services, when NextG's limited facilities-based CPCN did not authorize the company to provide this type of service or to install microcell and antenna in PROW or equipment or facilities on existing utility poles. The Commission found that by granting NextG a limited facilities-based CPCN in D.03-01-061, the Commission had authorized NextG to provide radiofrequency transport services

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<sup>16</sup> *Miklosy v. Regents of the University of California*, 44 Cal. 4<sup>th</sup> 876 (2008).

<sup>17</sup> *Id.*

and to install microcells and antennas on existing utility poles in the PROW, and did not limit NextG's operations to more traditional forms of telephone service.<sup>18</sup>

The Commission reasoned that:

We have stated that our rules concerning competitive services apply to all CLCs, whether they use wireline, wireless, or both...Many telecommunications providers are not traditionally regulated, yet they purchase regulated telecommunications services from regulated carriers. We must focus on what we are authorizing, the authority to provide a type of telecommunications service, and not on the technology used or the customers for that service. (Emphasis added.)

In D.06-01-006, the Commission also found that NextG's statement to CCSF that the Commission had granted NextG a CPCN to operate as a telephone corporation was "not inaccurate."

Subsequently, in D.07-04-045, the Commission granted NextG's application for expanded CPCN authority to provide full facilities-based services. The decision noted that NextG's proposed construction projects would include the installation of facilities in the PROW. By granting NextG full facilities-based authority, the Commission authorized NextG to utilize the PROW for its projects, after either obtaining a NTP from ED staff or obtaining Commission authorization for the project and undergoing CEQA review.

Based on the above, we grant NextG's Motion and dismiss City's Third Cause of Action, without leave to amend.

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<sup>18</sup> In D.06-07-036, the Commission denied an application for rehearing of D.06-01-006 filed by CCSF and modified the decision to clarify that NextG's limited facilities-based CPCN authorized the company to provide radiofrequency transport services involving construction in or on existing utility poles and other existing structures in the PROW.

**6. NextG's Additional Arguments Are Without Merit and Are Not Grounds for Dismissal of the Complaint.**

NextG also argues that the complaint should be dismissed because:

- a) City's claim that the project is not exempt from CEQA is inconsistent with an almost unbroken line of prior Commission decisions finding comparable construction exempt from CEQA, and
- b) In approving NextG's NPC for the installation of facilities in City, the Commission considered the entirety of NextG's proposed project, and the Commission's decision is fully supported by substantial evidence in the record.

However, we cannot determine whether NextG's project is exempt from CEQA or is consistent with other construction that the Commission has found to be exempt from CEQA without reviewing the specific facts related to NextG's project, and this evidence is not before us in this Motion. Similarly, we cannot determine whether ED staff considered the entirety of NextG's project or whether its decision is supported by substantial evidence, because the administrative record of ED staff's decision is not before us at this time.

NextG also argues that entertaining the City's complaint would undermine the Commission's intent in establishing the expedited review process for CEQA-exempt telecommunications projects, such as NextG's project. We disagree. By allowing an opportunity for Commission review of ED staff's determination on NextG's project, we are strengthening the process and are providing protesting parties with a more accessible procedure than seeking review by the California Supreme Court.

**Conclusion**

Based on the above, **IT IS RULED** that:

1. NextG Networks of California Inc. (NextG), Motion to Dismiss on the First and Second Causes of Action in City's complaint is denied.

2. NextG's Motion to Dismiss on the Third Cause of Action in City's complaint is granted, without leave to amend.

Dated November 6, 2008, at San Francisco, California.

/s/ JOHN A. BOHN

John A. Bohn  
Assigned Commissioner

/s/ MYRA J. PRESTIDGE

Myra J. Prestidge  
Administrative Law Judge

**INFORMATION REGARDING SERVICE**

I have provided notification of filing to the electronic mail addresses on the attached service list.

Upon confirmation of this document's acceptance for filing, I will cause a Notice of Availability of the filed document to be served upon the service list to this proceeding by U.S. mail. The service list I will use to serve the Notice of Availability of the filed document is current as of today's date.

Dated November 6, 2008, at San Francisco, California.

/s/ OYIN MILON

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Oyin Milon