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Resolution ALJ-240
Administrative Law Judge Division
August 20, 2009

RESOLUTION

RESOLUTION ALJ-240 Ratification of changes to preliminary categorization of Complaint 08-04-037 pursuant to Rule 7.5.

SUMMARY

This resolution approves the change of the preliminary determination made earlier by the Commission regarding the categorization of Complaint (C.) 08-04-037. We affirm the assigned Commissioner's ruling that C.08-04-037, which was originally categorized as adjudicatory, should be recategorized as ratesetting, based on its consolidation with Application (A.) 09-03-007, a ratesetting proceeding.

BACKGROUND

On April 23, 2008, the City of Huntington Beach filed C.08-04-037, regarding a fiber-optic network project (the project) that NextG Networks of California, Inc. (NextG) plans to construct within the City of Huntington Beach (City).¹ According to NextG, the project, when completed, will allow NextG to offer DAS-based services to support multiple wireless carriers within a single infrastructure. NextG's project involves the construction of three new utility poles and the installation of 19 miles of fiber optic cable within City limits.

¹ The project, as a whole, will run from the City of Westminster through Huntington Beach and the City of Fountain Valley to the Pacific Coast Highway. However, NextG has already completed the portions of the project located in the cities of Westminster and Fountain Valley and part of the project to be located in City pursuant to a Notice to Proceed previously issued by the Commission Energy Division. The cities of Westminster and Fountain Valley are not parties in this proceeding.

The Commission categorized C.08-04-037 as adjudicatory in the Instructions to Answer issued by the Docket Office on May 12, 2007.

NextG filed a Motion to Dismiss C.08-04-037 on June 11, 2009 and an answer to the complaint on June 12, 2008. The assigned Commissioner and the assigned Administrative Law Judge (ALJ) subsequently issued a Joint Ruling denying NextG's Motion to Dismiss, except for the third cause of action which alleged that NextG is not a telephone corporation that is entitled to use the public rights of way for its operations under Public Utilities Code Section 7901.²

On December 26, 2008, the parties stipulated that NextG would file a formal application for the project, along with a Proponent's Environmental Assessment (PEA) as required by Rule 2.4,³ and the parties would jointly request that the Commission's Energy Division conduct environmental review of the project and prepare either a negative declaration, a mitigated negative declaration, or an environmental impact report pursuant to CEQA. The stipulation resolved all issues in C.08-04-037, except for whether the Commission would affirm or reject the Joint Ruling of the assigned Commissioner and assigned ALJ that NextG is a telephone corporation entitled to use the public rights of way for its operations under Section 7901.

On March 3, 2009, pursuant to the stipulation, NextG filed an application for approval of the Project, which was docketed as A.09-03-007, and a PEA, pursuant to the stipulation.

On March 12, 2009, the Commission preliminarily categorized A.09-03-007 as ratesetting, pursuant to Resolution ALJ 176-3230.

On April 7, 2009, City of HB filed a motion to consolidate A.09-03-007 with C.08-04-037. NextG filed opposition a reply to City's protest, which also addressed the motion to consolidate, on April 20, 2009.

On June 18, 2009, following a law and motion hearing, the assigned ALJ issued a ruling granting City's motion to consolidate C.08-04-037 and A.09-03-007, because the two proceedings involve common issues of law and fact.

² All Code references are to the Public Utilities Code, unless otherwise stated.

³ All Rule references are to the Commission Rules of Practice and Procedure, unless otherwise stated.

On July 9, 2009, the assigned Commissioner and assigned ALJ issued a joint ruling regarding recategorization and scoping memo (Scoping Memo) for the consolidated proceeding. The Scoping Memo affirmed the preliminary categorization of A.09-03-007 as ratesetting and recategorized C.08-04-037 to ratesetting, pursuant to Rule 7.1.

DISCUSSION

Senate Bill (SB) 960 (Leonard, ch. 96-0856) requires, among other things, that the Commission categorize proceedings and determine the need for hearing for purposes of determining the applicable restrictions on ex parte communications and other applicable rules. The rules implementing these requirements are found, for the most part, in Articles 7 and 8 of the Rules.

Rule 7.5 requires Commission approval of assigned Commissioner's rulings that change the preliminary determination of category or need for hearing.

Under Rule 7.1(e), if a proceeding may fall within one or more categories, the Commission has discretion to determine which category appears most suitable for the proceeding. If a proceeding does not clearly fit within one category, the proceeding will be conducted under the rules applicable to the ratesetting category, unless the Commission determines that the rules applicable to one of the other categories or some hybrid of the rules are best suited to the proceeding.⁴ Here, although a complaint proceeding would normally be categorized as adjudicatory, we agree with the assigned Commissioner's ruling that the ratesetting category is appropriate for C.08-04-037, as consolidated with A.09-03-007, because the Commission has categorized A.09-03-007 as ratesetting, and most of the remaining issues to be resolved in this consolidated proceeding relate to whether the project should be approved, rather than to the issues raised in the complaint.

The Commission has reviewed the Scoping Memo in this consolidated proceeding and approves the assigned Commissioner's ruling changing the categorization of C.08-04-037 to ratesetting, consistent with the definitions of Rule 1.3 and the requirements of Article 7 of its Rules.

⁴ Rule 7.1(e)(2).

