Decision **DRAFT DECISION OF ALJ GRAU** **(Mailed 12/13/2005)**

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

City and County of San Francisco, Complainant, vs. NextG Networks of California, Inc. (U6754 C), Defendant.	Case 05-03-010 (Filed March 9, 2005)

OPINION RESOLVING COMPLAINT

1. Summary

In Decision (D.) 03-01-061, we authorized NextG Networks of California, Inc. (NextG) to provide competitive local exchange services as a limited facilities-based provider. NextG provides wireless carriers certain radiofrequency transport services, which augment those carriers' geographic wireless coverage and improve system capacity. NextG sought to provide those services in San Francisco, but the City and County of San Francisco (CCSF) claimed those services were outside the authority granted by us. In today's decision, we find NextG did not violate its certificate of public convenience and necessity (CPCN), did not fail to timely exercise the authority granted in D.03-01-061, and did not misrepresent the scope of that authority.

We reaffirm that the authority granted in D.03-01-061 includes the provision of radiofrequency transport services. Our standard limited facilities-based CPCN does not mention the type of service provided by the telephone corporation. However, we have granted authority to carriers providing similar services.

In providing radiofrequency transport services, NextG installs microcells and antennas on existing utility poles. Allowing placement of microcells and antennas on existing utility poles is consistent with limited facilities-based authority, because no construction is involved. We find limited facilities-based authority for carriers providing radiofrequency transport services includes installation in or on existing utility poles.

NextG informed CCSF and other localities about the authority it was granted and the services it provides. CCSF did not rely on this information; it did not permit NextG to operate in San Francisco. Without reliance on a material fact, there is no actionable misrepresentation. NextG followed our procedures for accepting its CPCN, including requesting an extension of time. Because we reaffirm our grant of authority to NextG, we find NextG timely exercised that authority.

2. Procedural Background

CCSF claims that NextG is violating the terms of the CPCN granted in D.03-01-061, because NextG: (1) has failed to timely exercise its authority to offer competitive local exchange or interexchange services, and (2) is representing to CCSF that it is authorized to provide radiofrequency transport services, a service the Commission has not authorized it to provide. CCSF further claims that NextG is violating the terms and conditions of its CPCN because the Commission has not authorized NextG to install either (1) microcell and antenna

facilities in public rights-of-way, or (2) any equipment or facilities on existing utility poles.

On March 30, 2005, NextG moved to dismiss the complaint and to receive expedited consideration of its motion to dismiss. On April 14, 2005, CCSF filed its opposition to the motion to dismiss, its partial opposition to the motion for expedited consideration, and a motion to strike evidence submitted in support of the motion to dismiss. On April 19, 2005, NextG filed its reply. On May 20, 2005, the assigned Administrative Law Judge's (ALJ) ruling requested further briefing on the motion to dismiss. The parties submitted responses on May 27, 2005, and replies on June 9, 2005. A prehearing conference was held on June 13, 2005.

An Assigned Commissioner's ruling and scoping memo (ACR) issued on July 6, 2005. The ACR denied NextG's motion to dismiss; it was premature to find CCSF's complaint alleged no violation of law or order upon which the Commission could grant relief. The parties filed a stipulation of material facts on July 12, 2005. That stipulation is attached to this decision as an attachment. On July 13, 2005, NextG filed in this proceeding the proponent's environmental assessment it filed with its application for a CPCN. The parties filed opening and reply briefs on August 1 and 12, 2005, respectively. CCSF filed a motion to strike NextG's declarations in support of its brief that described NextG's discussions with our staff prior to filing its application. In the interest of expediting resolution of this complaint, NextG withdrew the declarations.

3. Parties' Contentions

The dispute between the parties centers on four issues:

1. Whether the Commission granted NextG the authority to place antennas and microcells on utility poles and in public rights-of-way in D.03-01-061.

2. Whether NextG misrepresented the authority granted it by the Commission in requesting to place microcells and antennas on utility poles in San Francisco and other localities.

3. Whether NextG timely exercised its authority.

4. Whether the placement of microcells and antennas on utility poles by a telephone corporation such as NextG is exempt from the California Environmental Quality Act (CEQA).

If we find NextG has violated state law or our orders or rules, CCSF requests that we revoke NextG's CPCN or order NextG to comply with the terms and conditions of its CPCN. NextG states we should deny each of CCSF's claims. We discuss each of the four issues in the following section.

4. Discussion

To resolve this complaint, we first must determine whether we granted NextG the authority to provide radiofrequency transport services as competitive local exchange services. After resolving concerns regarding the scope of the authority we granted to NextG, we then must decide whether the installation of wireless microcells and antennas on public utility poles has an adverse environmental impact under CEQA. Finally, we must resolve whether NextG timely exercised the authority we granted and/or misrepresented the scope of that authority.

4.1. Authority to Provide Radiofrequency Transport Services

In D.03-01-061, we granted NextG the authority to provide competitive local exchange and nondominant interexchange services. CCSF claims NextG has violated our rules and orders by failing to provide competitive local exchange services. CCSF asserts the radiofrequency transport services provided

by NextG are not competitive local exchange services, primarily because NextG provides those services to wireless carriers who are uncertificated. To ascertain whether NextG's provision of radiofrequency services violates the authority granted in D.03-01-061, we must reexamine that decision, including the authority requested and granted, in the context of our decisions authorizing local exchange competition.

In its application, NextG stated it would provide radiofrequency transport services. Radiofrequency transport services augment geographic wireless coverage and improve system capacity. NextG provides these services to wireless telecommunications service providers. (*See* Material Facts 1 and 2.) NextG does not provide residential or business exchange services to end users. (*See* Material Fact 3.) D.03-01-061 granted NextG a CPCN to "operate as a limited facilities-based and resale provider of competitive local exchange services." (D.03-01-061, Ordering Paragraph 1.)

We initially authorized carriers to provide facilities-based competitive local exchange telecommunications services to residential or business customers. (*See* D.95-12-056.) In establishing facilities-based local exchange services, we stated carriers providing such services must "directly own, control, operate, or manage conduits, ducts, pokes, wires, cables, instruments, switches, appurtenances, or appliances in connection with or to facilitate communications within the local exchange portion of the public switched network." (D.95-07-054, 60 CPUC 2d 611, 642, Appendix A, p. 3.)

Since authorizing facilities-based competitive local exchange services, we have extended competitive local exchange carrier (CLC) authority to other types of carriers. We have found wholesale services to be competitive local exchange services. For example, we granted Southern California Edison a CPCN as a CLC

to provide wholesale services to other CLCs and to other telecommunications providers, including wireless carriers, as a facilitator of local communications services, rather than as a competitor. (D.98-12-053, 84 CPUC 2d 468, 472-473.)

We have made no distinction between carriers providing wholesale services to wireline or wireless carriers or certificated or uncertificated providers. We have stated our rules concerning competitive services necessarily apply to all CLCs, whether they use wireline, wireless or both. (D.95-07-054, 60 CPUC 2d at 629.) 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. Nonetheless, wireless carriers do register with the Commission. We also regulate the terms and conditions of wireless service.

We have granted CLC authority to carriers providing services similar to NextG's. For example, we reaffirmed Teligent Inc.'s authority to install microwave antennas as part of its limited facilities-based authority in D.01-06-019, 2001 Cal. PUC LEXIS 334, *1. We also granted a limited facilities-based CLC CPCN to Crown Castle Solutions Corp., a provider, NextG asserts is operating a distributed antenna network system almost identical to NextG's, in D.05-01-021, 2005 Cal. PUC LEXIS 21. CCSF is correct that our standard limited facilities-based CLC CPCN decision does not mention the specific service the telephone corporation is providing. (See, *e.g.,* Application of Global Internetworking, Inc., D.05-01-013, 2005 Cal. PUC LEXIX 5, *2.) Again, our focus is on the authority we are granting, limiting facilities-based CLC authority.

We further note that the CLC authority we have granted to NextG is consistent with other states' characterization of NextG's services. (*See, e.g.*, Order

No. 05-189, *In the Matter of NextG Networks of California, Inc. dba NextG Networks West,* 2005 Ore. PUC LEXIS 158, *5; *Application of NextG Networks of Illinois, Inc., d/b/a NextG Networks Central for Certification as a Competitive Local Exchange Carrier and Alternative Telecommunications Utility*, 4142-NC-100, 2005 Wisc. PUC LEXIS 282, mailed April 25, 2005; and *Application of NextG Networks Atlantic, Inc. for certificates of public convenience and necessity to provide local exchange and interexchange telecommunications services*, Case No. PUC-2004-00009, 2004 Va. PUC LEXIS 241.)

When examining whether a carrier is providing service that exceeds the authority granted by its CPCN, we have looked for any limitations to that authority. (*See, e.g.*, D.03-12-064, 2002 Cal. PUC LEXIS 1060, *10.) The underlying decision here, D.03-01-016, does not limit the authority granted to NextG.

Because we have granted other carriers similar operating authority and did not limit the authority granted to NextG in D.03-01-061, we conclude our decision grants the authority requested and authorizes NextG to provide radiofrequency transport services. Thus, NextG has not violated D.03-01-061 by providing radiofrequency transport services.

4.2. CEQA

In D.03-01-061, we stated NextG's authority was limited to installation of facilities in existing buildings or structures. (D.03-01-061, Ordering Paragraph 8.) We must determine whether that authority permits NextG to place microcells and antennas on utility poles.

The limitation to installation of facilities in existing buildings or structures is standard in our grant of limited facilities-based CLC authority. In D.99-10-025 we found no material adverse environmental impacts would result from

limited-facilities based service, utilizing equipment installed in previously existing structures, since no external construction would occur. (D.99-10-025, 2 CPUC 3rd 700, 703.) As NextG notes, in the past we have granted limited facilities-based CPCNs that approve "equipment installed solely within or on existing buildings and structures." (*See* D.00-12-009, Ordering Paragraph 1.) However, we no longer do so. A blanket extension allowing installation on existing buildings and structures without limit is too broad for a finding of no material adverse environmental impact. Although NextG's application clearly signaled its intent to install facilities on existing structures, we did not address that issue in D.03-01-061. Thus, we now must consider whether NextG's placement of equipment on existing utility poles is within the scope of its limited facilities-based authority.

NextG constructs microcellular networks that in part transport wireless carriers' voice and data traffic. NextG's network comprises a "hub," which operates like a traditional central switch in the wireline network and a system of fiber optic cables, remote nodes and small antennas attached to poles and other structures. (*See* Material Facts 9 and 10.) Fiber optic cables are strung on existing utility poles or installed in existing underground conduit. (*See* Material Fact 10.) NextG's brief includes pictures and diagrams of the remote nodes and antennas it uses. On distribution poles, directional antennas are approximately 25" long and remotes are approximately 29" long.

Allowing placement of microcells and antennas on existing utility poles is consistent with limited facilities-based authority, because no construction is involved. It is also consistent with our prior decision that installation of fiber

optic equipment on existing utility structures is categorically exempt from CEQA.[1]

CCSF's Planning Department concluded that the installation of antennas, repeaters, wiring, and equipment cabinets on existing utility poles by NextG would have no effect on land use, traffic and circulation, geology/seismicity, water, hazardous materials, biology, archeological resources or public services after ensuring no installation would impact scenic resources. (*See* NextG's Brief, p. 19, n.58.) Our review of the information provided by NextG is in accord. Thus, it can be seen with certainty that there is no possibility that the installation of antennas and microcells will have an adverse effect upon the environment. Having determined the installation of microcells and antennas on existing utility poles will not have an adverse effect, we find that their installation is permissible under limited facilities-based authority. This construction activity is within the scope of the authority granted in D.03-01-016. We conclude that a grant of limited facilities-based authority for carriers providing radiofrequency transport services includes installation in or on existing utility poles.[2]

NextG must file for additional authority, and submit to any required CEQA review, before it can construct facilities other than equipment to be

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[1] In our Metropolitan Fiber Network Services, Inc. proceeding, we found the "installation of optical fiber and related telecommunications equipment on existing utility structures by third-party telecommunications providers . . . is categorically exempt from environmental review under the California Environmental Quality Act (CEQA)." (D.04-04-014, 2004 Cal PUC LEXIS 142, *1.)

[2] This determination does not preclude local jurisdiction from safeguarding scenic resources and from adopting conditions on installations such as those found in permits and rights-of-way agreements. (*See* Declaration of Theresa L. Mueller, Exhibits E and F.)

installed in or on existing buildings or structures. NextG recognized it would need to expand its requested authority if it needed to construct new facilities. (Proponent's Environmental Assessment, n.1.) NextG's request for additional authority should conform to authority granted to carriers with distributed antenna systems networks. NextG should contact our Energy Division in advance of filing a request for expanded authority.

4.3. Misrepresentation

CCSF asserts NextG negligently misrepresented the scope of its authority. The information NextG provided to CCSF and other localities basically derives from D.03-01-061. NextG made the following representations to CCSF: (1) NextG is a facilities-based provider of protocol-agnostic, fiber-aggregated optical-to-radio frequency conversion and microcellular repeater services; (2) NextG will make its radiofrequency transport services available to wireless carriers; (3) the Commission granted NextG a CPCN to operate as a telephone corporation; and (4) NextG will attach microcells and antennas to utility and other poles located in rights-of-way. NextG provided CCSF with a copy of its CPCN. NextG made similar representations to representatives of 67 other localities in California. (*See* Material Facts 13 and 14.) None of these representations is inaccurate. Having reaffirmed that D.03-01-061 authorized NextG to provide radiofrequency transport services, NextG's representation concerning the authority we granted also is not inaccurate.

Further, one element of actionable negligent misrepresentation is reliance on a material fact. (*See* Hydro-Mill Co., Inc., v. Hayward, Tilton, Rolapp Ins. Associates, Inc., 115 Cal. App. 4th 1145, 1154.) All of the representations NextG made to CCSF are material; however, CCSF has not proved it relied on that

information. Instead, CCSF disagreed with NextG's claims. CCSF further has challenged the veracity of that information in this complaint.

NextG also gave localities more specific information concerning its plans. NextG stated it would install fiber optic cable either underground or on existing utility poles and antennas and associated equipment on utility poles and/or streetlight poles. Finally, NextG stated if the locality did not permit NextG to attach to its streetlight or traffic poles, NextG might need to install its own utility poles. (Declaration of Theresa L. Mueller, Exhibit D.) The limited facilities-based authority we granted in D.03-06-016 does not permit NextG to install its own utility poles. Again, although this information is material and some of it is inaccurate, CCSF has not shown it relied on it. CCSF did not permit NextG to engage in any construction.

NextG clarifies that it recognizes it would be necessary to modify its CPCN in order to install poles and that it did not intend to suggest otherwise. NextG agrees to revise the relevant section, contained in its Local Official's Guide, to reflect this understanding. We accept NextG's proposal to revise its Guide.

CCSF has not shown that it relied on any information concerning the scope of authority or business plans provided by NextG. Thus, there is no actionable misrepresentation.

4.4. NextG Timely Exercised Its Authority

We next consider whether NextG timely exercised the authority granted in D.03-01-061. NextG filed a written acceptance of the CPCN on February 25, 2003. On January 23, 2004, NextG requested an extension of time to commence service under its CPCN. The Commission granted the requested extension until July 30, 2004. On July 21, 2004, NextG notified the Commission that it had commenced

providing telecommunications service under its CPCN in California. (Material Facts 7 and 8.) NextG has constructed or is constructing networks in numerous localities in California. (Material Fact 12.)

Having reaffirmed that D.03-01-061 authorized NextG to provide radiofrequency transport services as competitive local exchange services and finding that NextG has provided and continues to provide those services in California, we find that NextG timely exercised the authority granted in D.03-01-061.

5. Assignment of Proceeding

Geoffrey F. Brown is the Assigned Commissioner and Janice Grau is the assigned ALJ in this proceeding.

6. Comments on Draft Decision

We initially categorized this proceeding as an adjudication that would go to hearing. We confirm that the proceeding is adjudicatory but find, with the agreement of the parties, that a hearing is not needed.

The draft decision of the ALJ in this matter was mailed to the parties in accordance with Pub. Util. Code § 311(g)(1) and Rule 77.7 of the Rules of Practice and Procedure. Comments were filed on January 5, 2006 and reply comments were filed on January 10, 2006.

Findings of Fact

1. On July 13, 2005, the parties filed a stipulation of material facts.
2. By D.03-01-061, Ordering Paragraph 1, the Commission granted NextG a CPCN to "operate as a limited facilities-based and resale provider of competitive local exchange services."

3. NextG provides radiofrequency transport services, which augment geographic wireless coverage and improve system capacity, to wireless telecommunications service providers.

4. NextG's network comprises a "hub," which operates like a traditional central switch in the wireline network and a system of fiber optic cables, remote nodes, and small antennas attached to poles and other structures.

5. The Commission has granted competitive local exchange carrier CPCNs to carriers providing services similar to NextG's. In D.01-06-019, the Commission reaffirmed Teligent Inc.'s authority to install microwave antennas as part of its limited facilities-based authority. In D.05-01-021, the Commission granted a limited facilities-based CPCN to Crown Castle Solutions Corp., a provider operating a system similar to NextG's.

6. The Commission's standard limited facilities-based CLC CPCN decisions do not mention the specific service the telephone corporation is providing.

7. D.03-01-061 limited NextG's authority to installation in existing buildings and structures.

8. CCSF's Planning Department concluded that the installation of antennas, repeaters, wiring, and equipment cabinets on existing utility poles by NextG would have no effect on land use, traffic and circulation, geology, seismicity, water, hazardous materials, biology, archeological resources or public services.

9. NextG made representations to CCSF and other localities concerning the nature of its services, the authority it had obtained, and its planned construction.

10. CCSF did not permit NextG to operate in San Francisco.

11. NextG filed a written acceptance of its CPCN on February 25, 2003. On January 23, 2004, NextG requested an extension of time to commence service under its CPCN. The Commission granted the requested extension until July 30,

2004. On July 21, 2004, NextG notified the Commission that it had commenced providing telecommunications service under its CPCN in California.

Conclusions of Law

1. NextG is currently providing telephone service in accordance with the limited facilities-based authority granted in D.03-01-061.

2. It can be seen with certainty that there is no possibility that the installation of antennas and microcells on existing utility poles will have an adverse effect upon the environment.

3. NextG timely exercised the authority granted in D.03-01-061.

4. It is reasonable to conclude CCSF did not rely on any material representation NextG made to CCSF.

5. It is reasonable to make this order effective today in order to resolve this complaint without further delay.

O R D E R

IT IS ORDERED that:

1. The complaint of the City and County of San Francisco is denied as set forth herein.

2. Case 05-03-010 is closed.

This order is effective today.

Dated _____, at San Francisco, California.