

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

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.

Rulemaking \_\_\_\_\_

**ORDER INSTITUTING RULEMAKING**

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**ORDER INSTITUTING RULEMAKING****I. Summary**

This rulemaking seeks to develop and implement changes to the Commission's application of the California Environmental Quality Act (CEQA) to telecommunications utilities under our jurisdiction. The objective is to develop rules and policies that will (1) ensure that the Commission's practices comply with the current requirements and policies of CEQA, (2) promote the development of an advanced telecommunications infrastructure, particularly with regard to facilities that provide broadband capabilities, and (3) make certain that the application of CEQA in the area of telecommunications does not cause undue harm to competition.

It is our intent to develop rules and policies that will provide certainty that the Commission's application of CEQA is workable for, and recognizes the unique characteristics of, the telecommunications industry. The State's telecommunications infrastructure is vital to its economy and plays an increasingly important role in the social fabric of our communities. Broad availability of state-of-the-art telecommunications technologies has been a longstanding objective of this Commission and a clear policy preference of the Legislature, even as technological innovation has rapidly redefined what is considered "state-of-the-art." The competitive nature of the telecommunications market has brought important benefits to consumers in the State, and both federal and state policy support a competitive telecommunications marketplace.

On February 3, 2000, the Commission initiated Rulemaking (R.) 00-02-003 to reform our CEQA policies with regard to telecommunications carriers under our jurisdiction. This proceeding, despite being open over five and a half years,

has not resulted in any new policies or rules.<sup>1</sup> While awaiting Commission action and the promulgation of rules in this rulemaking, potential entrants to the telecommunications markets have not had clear rules or guidelines to assist them as they seek Commission approval of their applications. Perhaps more troubling, the Commission itself has not had the benefit of clear procedures to guide its application of CEQA when presented with an application from a potential entrant.

One of our concerns is that in the past, in particular the past six years, our failure to have a clearly articulated and workable approach to the application of CEQA to telecommunications carriers under our jurisdiction has not served the people of California well. Specifically, we are concerned that uncertainty has deterred investment in our State's critical telecommunications infrastructure and hindered the deployment of advanced telecommunications networks. This rulemaking seeks to end that uncertainty by developing clear, pragmatic and effective policies, programs and requirements for complying with the Commission's obligations under CEQA.

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<sup>1</sup> Comments were filed in R.00-02-003 between March and July of 2000, and the assigned administrative law judge (ALJ) and Commission staff carefully reviewed these filings. However, this proceeding essentially lay dormant from 2001 until it was reassigned to Commission Brown in 2005. On August 24, 2006, the Commission rejected a proposed decision in this proceeding.

## **II. CEQA**

### **A. Overview**

The principal objective of the CEQA, Public Resources Code Sections 21000, *et seq.*,<sup>2</sup> is to develop and maintain a high-quality environment in California in the present and in the future.<sup>3</sup> CEQA requires public agencies<sup>4</sup> to identify the significant environmental effects<sup>5</sup> of their actions, and alternatives to these actions, and to either avoid or mitigate those significant environmental effects, where feasible.<sup>6</sup> CEQA only applies to a government action if (1) it involves a discretionary decision of a public agency, (2) a public agency is approving an activity that may have a significant effect on the environment, and (3) it falls within the definition of a project.<sup>7</sup> In determining whether an activity

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<sup>2</sup> In addition to the provision of the Public Resources Code, the California Resources Agency has adopted regulations, as required by Public Resources Code Section 21083, which provide detailed procedures that public agencies must follow to apply CEQA. The CEQA Guidelines are codified at 14 California Code of Regulations Sections 15000, *et seq.*

<sup>3</sup> Pub. Res. Code, §§ 21000, 21001.

<sup>4</sup> "Public agency" includes any state agency, board, or commission, any county, city and county, city, regional agency, public district, redevelopment agency, or other political subdivision." (Pub. Res. Code, § 21063.)

<sup>5</sup> "Significant effect on the environment" means a substantial, or potentially substantial, adverse change in the environment." (Pub. Res. Code, § 21068.)

<sup>6</sup> "Feasible" means capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, social, and technological factors." (Pub. Res. Code, § 21061.1.)

<sup>7</sup> "Project" means an activity which may cause either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment,

*Footnote continued on next page*

constitutes a project, a public agency must look at all of the parts, components, and phases of the activity.<sup>8</sup>

A “lead agency” determines whether a government action constitutes a project. A lead agency is the public agency that has the principal responsibility for carrying out or approving a project which may have a significant effect upon the environment.<sup>9</sup> A “responsible agency” is a “public agency, other than the lead agency, which has responsibility for carrying out or approving a project.”<sup>10</sup> A responsible agency must actively participate in the lead agency’s CEQA process, review the lead agency’s CEQA documents, and use that document when making a decision on the project.<sup>11</sup>

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and which is any of the following: “(a) An activity directly undertaken by any public agency. (b) An activity undertaken by a person which is supported, in whole or in part, through contracts, grants, subsidies, loans, or other forms of assistance from one or more public agencies. (c) An activity that involves the issuance to a person of a lease, permit, license, certificate, or other entitlement for use by one or more public agencies.” (Pub. Res. Code, § 21065.)

<sup>8</sup> California courts have interpreted the statutory definition of the definition of “project” (particularly the phrase “whole of the action”) as meaning that it is contrary to CEQA to break up a project into smaller components to avoid CEQA requirements. (See CEQA Guidelines, 14 Cal. Code Reg., § 15378(c); *Laurel Heights Improvement Association v. Regents of the University of California* (1988) 47 Cal. 3d 376, \*394-\*396.)

<sup>9</sup> Pub. Res. Code, § 21067.

<sup>10</sup> *Id.*, § 21069.

<sup>11</sup> *Id.*, § 21069; see also CEQA Guidelines, 14 Cal. Code Reg. §§ 15096, 15381. There are also “Trustee Agencies,” which are state agencies that have jurisdiction by law over natural resources affected by a project, that are held in trust for the people of the State of California. (Pub. Res. Code, § 21070.)

Once a lead agency has determined that an activity is a project under CEQA, the lead agency must decide whether an exemption applies. There are four types of exemptions: statutory exemptions, categorical exemptions, general rule exemptions (where it can be seen with certainty that there is no possibility that the activity may have a significant impact on the environment), and disapproved project exemptions.<sup>12</sup>

If an exemption does not apply to a project, then the lead agency must prepare an initial study to determine whether to prepare either a negative declaration<sup>13</sup> or an environmental impact report (EIR).<sup>14</sup> If the lead agency finds that there is no substantial evidence showing that the project will have a significant effect on the environment, it must prepare a negative declaration. In some cases, a public agency may find that certain measures can be incorporated in, or changes made, to the project description that would mitigate any

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<sup>12</sup> CEQA Guidelines, 14 Cal. Code Reg., § 15061(b).

<sup>13</sup> "Negative declaration' means a written statement briefly describing the reasons that a proposed project will not have a significant effect on the environment and does not require the preparation of an environmental impact report." (Pub. Res. Code, § 21064.)

<sup>14</sup> An EIR is a detailed statement discussing any potential significant environmental impacts of a project. An EIR " . . . shall be considered by every public agency prior to its approval or disapproval of a project. The purpose of an environmental impact report is to provide public agencies and the public in general with detailed information about the effect which a proposed project is likely to have on the environment; to list ways in which the significant effects of such a project might be minimized; and to indicate alternatives to such a project . . ." (Pub. Res. Code, § 21061.)

significant environmental impacts, and that an EIR may not be necessary. In those cases, the public agency prepares a “mitigated negative declaration.”<sup>15</sup>

If the lead agency determines that a government activity is a project, is not exempt from CEQA, and may cause significant effects on the environment that cannot be addressed by a mitigated negative declaration, then the lead agency must prepare an EIR. After reviewing a final EIR, a lead agency and responsible agencies may not approve a project that has a significant environmental impact unless the lead and responsible agencies eliminate or substantially lessen all significant effects on the environment where feasible and find that the benefit of the project outweighs any remaining significant environmental effects found to be unavoidable.<sup>16</sup> If the lead and responsible agencies approve a project with significant environmental effects, then they must file a Statement of Overriding Considerations explaining why the agencies will accept and tolerate the significant environmental effects.<sup>17</sup>

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<sup>15</sup> “Mitigated negative declaration’ means a negative declaration prepared for a project when the initial study has identified potentially significant effects on the environment, but (1) revisions in the project plans or proposals made by, or agreed to by, the applicant before the proposed negative declaration and initial study are released for public review would avoid the effects or mitigate the effects to a point where clearly no significant effect on the environment would occur, and (2) there is no substantial evidence in light of the whole record before the public agency that the project, as revised, may have a significant effect on the environment.” (Pub. Res. Code, § 21064.5.)

<sup>16</sup> CEQA Guidelines, 14 Cal. Code Reg., §§ 15092, 15096(h).

<sup>17</sup> Pub. Res. Code, § 21081; CEQA Guidelines, 14 Cal. Code Reg., § 15093.

**B. Compliance with CEQA**

Our objective is to ensure that the Commission is in compliance with the requirements of CEQA. We take our obligations in this arena seriously and we remain fully committed to the objectives of CEQA to ensure that the impacts of our policies on the environment are taken into account in our decision-making process.

Telecommunications carriers seeking to enter the intrastate telecommunications market must receive authority from the Commission by filing an application for a certificate of public convenience and necessity (CPCN), as required by Public Utilities Code Section 1001.<sup>18</sup> The Commission, in issuing such authority, has determined that this is a discretionary decision and therefore, has applied CEQA when reviewing carriers' requests for CPCNs.<sup>19</sup>

In order to ensure compliance with CEQA, the Commission has required applicants seeking authority to undertake projects subject to CEQA to take steps to assure our ability to perform the required CEQA analysis. Furthermore, as required by CEQA, the Commission promulgated rules

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<sup>18</sup> Public Utilities Code Section 1001 provides, in relevant part: "No . . . telephone corporation . . . shall begin construction of a . . . line, plant, or system, or of any extension thereof, without having first obtained from the Commission a certificate that present or future public convenience and necessity require or will require such construction. This article shall not be construed to require any such corporation to secure such certificate for an extension within any city or city and county within which it has theretofore lawfully commenced operations . . . , or for an extension within or to territory already served by it, necessary in the ordinary course of business."

<sup>19</sup> D.95-07-054, *Opinion in Order Instituting Rulemaking on the Commission's Own Motion into Competition for Local Exchange Service; Order Instituting Investigation on the Commission's Own Motion into Competition for Local Exchange Service*, 1995 Cal. PUC LEXIS 604, \*33-\*34, \*85.

*Footnote continued on next page*

implementing CEQA procedures.<sup>20</sup> The Commission's Rules of Practice and Procedure (Rules), as revised and effective September 13, 2006, state:

2.4. (Rule 2.4) CEQA Compliance

(a) Applications for authority to undertake any projects that are subject to the California Environmental Quality Act of 1970, Public Resources Code Sections 21000 *et seq.* (CEQA) and the guidelines for implementation of CEQA, California Administrative Code Sections 15000 *et seq.*, shall be consistent with these codes and this rule.

(b) Any application for authority to undertake a project that is not statutorily or categorically exempt from CEQA requirements shall include a Proponent's Environmental Assessment (PEA). The PEA shall include all information and studies required under the Commission's Information and Criteria List adopted pursuant to Chapter 1200 of the Statutes of 1977 (Government Code Sections 65940 through 65942), which is published on the Commission's Internet website.

(c) Any application for authority to undertake a project that is statutorily or categorically exempt from CEQA requirements shall so state, with citation to the relevant authority.<sup>21</sup>

Some telecommunications providers have been authorized to build out their networks without further review from this Commission. In those instances, there is no need for the Commission to make a discretionary decision that would

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<sup>20</sup> Pub. Res. Code, § 21082; CEQA Guidelines, 14 Cal. Code Reg., § 15022.

<sup>21</sup> 20 Cal. Code of Reg., § 2.4.

require the application of the requirements under CEQA. Other carriers who received a mitigated negative declaration between 1995 and December of 1999, have been authorized to build statewide within existing utility rights-of-way, although there is some variation in the requirements imposed by the various negative declarations.<sup>22</sup> The Commission stopped issuing batch negative declarations in late 1999.<sup>23</sup> Other carriers, including many that obtained their CPCNs after late 1999, received project-specific authority to construct.

### **III. Background.**

In 1993, this Commission articulated a clear policy that all telecommunications markets should be open for competition.<sup>24</sup> The Legislature followed suit, adopting Public Utilities Code Section 709.5, which ordered the opening of all markets to competition. The Commission implemented this statute and opened the local telecommunications markets to competition in D.95-07-054.<sup>25</sup> The federal government subsequently adopted the Telecommunications Act of 1996.

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<sup>22</sup> There is also some uncertainty as to the precise meaning of the term “right-of-way.”

<sup>23</sup> See D.99-12-050, *Opinion in Order Instituting Rulemaking on the Commission’s Own Motion into Competition for Local Exchange Service; Order Instituting Rulemaking on the Commission’s Own Motion into Competition for Local Exchange Service*, 1999 Cal. PUC LEXIS 787.

<sup>24</sup> See *Enhancing California’s Competitive Strength: A Strategy for Telecommunications Infrastructure: A Report to the Governor*, California Public Utilities Commission, November 1993. This report may be found at the following URL: <http://haven.com/calstrat.html>

<sup>25</sup> D.95-07-054, 1995 Cal. PUC LEXIS 604.

The opening of local telephone markets to competition in the 1990s required the Commission to begin granting CPCNs to new carriers. These actions raised the issue of how the Commission can best discharge its obligations under CEQA when granting authority to provide local telephone service.

We initially established rules for granting CPCNs to facilities-based competitive local carriers (CLCs) in D.95-07-054. Under the procedures established in D.95-07-054, we processed a group of 40 CLC CPCN candidates who filed petitions for CPCN approval by September 1, 1995, and granted qualifying CLCs authority, effective January 1, 1996, to provide facilities-based competitive local exchange service. The rules in D.95-07-054 required that all CLCs comply with the provisions of CEQA pursuant to Commission Rules, and that the Commission perform CEQA review for each CLC filing at the level it determined to be appropriate.

As part of the approval process of the initial group of facilities-based CLCs, we prepared and approved a mitigated negative declaration as called for under CEQA. We found that, with the incorporation of appropriate mitigating measures as identified in the negative declaration, the proposed CLC projects would not have a significant adverse environmental impact.<sup>26</sup> We adopted this consolidated mitigated negative declaration in conjunction with our approval of the CLC CPCNs in D.95-12-057.<sup>27</sup>

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<sup>26</sup> D.95-12-057, *Opinion in Order Instituting Rulemaking on the Commission's Own Motion into Competition for Local Exchange Service; Order Instituting Investigation on the Commission's Own Motion into Competition for Local Exchange Service*, 1995 Cal. PUC LEXIS 967, \*11-\*12.

<sup>27</sup> *Id.*, \*39-\*40.

We advised prospective CLCs that any filings for CLC operating authority made after September 1, 1995, would be treated as standard applications and processed in the normal course of the Commission's business.

In D.96-12-020, we instituted a quarterly processing cycle for granting CPCN authority to facilities-based CLCs in order to streamline the approval process.<sup>28</sup> For facilities-based CLCs with environmental impacts similar to those CLCs already approved in prior decisions, the CEQA review process required the quarterly preparation of a consolidated mitigated negative declaration. It is this process that has been referred to as the “batch negative declaration” process. If we found, upon review, that a negative declaration was unsuitable because of the nature of construction or installation of facilities being proposed by a given CLC, we retained the discretion to prepare an EIR.

In D.99-12-050, we revised our administrative procedures for the filing and processing of new entrants CPCN request for facilities-based authority, because of challenges we faced with the batch mitigated negative declaration process.<sup>29</sup> Rather than preparing consolidated negative declarations, we began performing specific environmental reviews of each new entrants’ proposed projects.<sup>30</sup>

Thus, as of January 1, 2000, we reviewed, on an individual basis, each application by a potential entrant before us. If we determined that a negative

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<sup>28</sup> D.96-12-020, *Opinion in Order Instituting Rulemaking on the Commission's Own Motion into Competition for Local Exchange Service; Order Instituting Investigation on the Commission's Own Motion into Competition for Local Exchange Service*, 1996 Cal. PUC LEXIS 1081, \*1.

<sup>29</sup> D.99-12-050, 1999 Cal. PUC LEXIS 787, \*5.

<sup>30</sup> *Id.*, \*5-\*6.

declaration or an EIR was necessary, we prepared it on an individual, project-specific basis. We recognized in D.99-12-050 that this change in our approach to CEQA review for new entrant CPCN applications raised concerns for local competition, and we stressed the need to further address this issue.<sup>31</sup> Less than two months after the issuance of D.99-12-050, we opened R.00-02-030 to address, among others, this concern.

Recently, as we have issued CPCNs for facilities-based networks, we have clarified a process by which carriers may claim that their projects are categorically exempt under CEQA. We first applied this new process for claiming exemptions in D.06-04-030, issued April 13, 2006, where we granted NewPath communications a modification of its CPCN to offer facilities based service.<sup>32</sup> In that decision, we laid out a process for carriers to claim an exemption from CEQA. We have applied the same procedural requirements to other applications for CPCNs or modifications to CPCNs that we have granted since April 2006 on an ad hoc basis pending the development more comprehensive policy.

Under this recent process, if a carrier wishes to engage in full facilities-based construction activities and believes that these activities are exempt from CEQA, the carrier shall first apply to the Commission's Energy Division staff for a determination of exemption from CEQA using the following procedure:

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<sup>31</sup> *Id.*, \*5-\*6.

<sup>32</sup> D.06-04-030, *Application of NewPath Networks, LLC (U-6928-C) for a Modification to its Certificate of Public Convenience and Necessity in Order to Provide Competitive Local Exchange, Access and Non-Dominant Interexchange Services*, 2006 Cal. PUC LEXIS 118.

- Applicant provides the Commission's Energy Division with:
  - A detailed description of the proposed project, including:
    - Customer(s) to be served;
    - The precise location of the proposed construction project; and
    - Regional and local site maps.
  - A description of the environmental setting, including at a minimum:
    - Cultural, historical, and paleontologic resources;
    - Biological resources; and
    - Current land use and zoning.
  - A construction workplan, including:
    - Commission Preconstruction Survey Checklist – Archaeological Resources;
    - Commission Preconstruction Survey Checklist – Biological Resources;
    - A detailed schedule of construction activities, including site restoration activities;
    - A description of construction/installation techniques;
    - A list of other agencies contacted with respect to siting, land use planning, and environmental resource issues, including contact information; and
    - A list of permits required for the proposed project.
  - A statement of the CEQA exemption(s) claimed to apply to the proposed project; and
  - Documentation supporting the finding of exemption from CEQA.

The Commission's Energy Division then reviews the submittal and notifies the applicant, within 21 days, of either its approval or its denial of the applicant's

claim of exemption. If the Commission's Energy Division approves the applicant's claimed CEQA exemption(s), Commission staff prepares a Notice to Proceed (NTP) and files a Notice of Exemption with the State Clearinghouse at the Office of Planning and Research.

However, if the Commission's Energy Division disapproves the applicant's claimed CEQA exemptions, it will issue a letter stating the specific reasons that the claimed CEQA exemptions do not apply to the proposed project. In this case, the applicant must either re-design the specific project and facilities and reapply for a finding of exemption from CEQA, or file a formal application with the Commission seeking the requisite approval and full CEQA review, before commencing any facilities-based construction activities. Applicants are not allowed to engage in any construction activity relating to a pending CEQA exemption request before receiving an NTP from the Commission's Energy Division staff. The CPCNs the Commission is currently issuing make it clear that the requirements regarding CEQA may be changed if the Commission adopts new policies or processes.

#### **IV. Promoting the Development of an Advanced Telecommunications Infrastructure**

State telecommunications policies are set forth in Public Utilities Code Section 709. These policies are as follows:

- (a) To continue our universal service commitment by assuring the continued affordability and widespread availability of high-quality telecommunications services to all Californians.
- (b) To focus efforts on providing educational institutions, health care institutions, community-based organizations, and governmental institutions with access to advanced telecommunications services in recognition of their economic and societal impact.

- (c) To encourage the development and deployment of new technologies and the equitable provision of services in a way that efficiently meets consumer need and encourages the ubiquitous availability of a wide choice of state-of-the-art services.
- (d) To assist in bridging the “digital divide” by encouraging expanded access to state-of-the-art technologies for rural, inner-city, low-income, and disabled Californians.
- (e) To promote economic growth, job creation, and the substantial social benefits that will result from the rapid implementation of advanced information and communications technologies by adequate long-term investment in the necessary infrastructure.
- (f) To promote lower prices, broader consumer choice, and avoidance of anticompetitive conduct.
- (g) To remove the barriers to open and competitive markets and promote fair product and price competition in a way that encourages greater efficiency, lower prices, and more consumer choice.
- (h) To encourage fair treatment of consumers through provision of sufficient information for making informed choices, establishment of reasonable service quality standards, and establishment of processes for equitable resolution of billing and service problems.<sup>33</sup>

This detailed list of state policy objectives sets the goals for telecommunications regulatory policy proceedings, such as this one. It also clearly calls for regulators to adopt policies that encourage increased access to, and usage of, advanced telecommunication services.

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<sup>33</sup> Pub. Util. Code, § 709.

Furthermore, in an effort to bring advanced telecommunication services to all Californians, the Legislature ordered the Commission to “ . . . consider . . . [h]ow to encourage the timely and economic development of an advanced public communications infrastructure, which may include a variety of competitive providers.”<sup>34</sup> It declares that any new policies adopted as a result of this review should seek to achieve the following goals:

- (1) To provide all citizens and businesses with access to the widest possible array of advanced communications services.
- (2) To provide the state’s educational and health care institutions with access to advanced communications services.
- (3) To ensure cost-effective deployment of technology so as to protect ratepayers’ interests and the affordability of telecommunications services . . .<sup>35</sup>

This provision clearly establishes that regulatory policies should encourage access to a wide choice of advanced telecommunication services.

Similar direction is found in statutory provisions regarding universal service. Public Utilities Code Section 871.7 provides that the “feasibility” of redefining universal telephone service to include advanced telecommunication services depends on the following considerations:

- (1) Technological and competitive neutrality.
- (2) Equitable distribution of the funding burden for redefined universal service . . . among all affected consumers and industries, thereby ensuring that regulated utilities’ ratepayers do not bear a disproportionate share of funding responsibility.

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<sup>34</sup> Pub. Util. Code, § 882(c)(2).

<sup>35</sup> Pub. Util. Code, § 882.

(3) Benefits that justify the costs.<sup>36</sup>

Thus, the Legislature reiterated its intent that our policies encourage development of a wide variety of advanced telecommunication facilities and services.

Finally, it is the policy of the State of California, as expressed in Public Utilities Code Section 767.7(a)(1), to “. . . encourage [] the rapid and economic development of telecommunications services to all Californians.” This desire is consistent with that expressed by Congress. The Telecommunications Act of 1996 declares that “[i]t shall be the policy of the United States to encourage the provision of new technologies and services to the public.”<sup>37</sup>

State policy encourages the deployment of advanced telecommunications networks. We must seek to ensure that, in applying CEQA, we do so in a way that minimizes any harm to the State’s clear and oft reiterated policy favoring the widespread deployment and availability of advanced telecommunications services, including broadband and wireless technologies. When we are considering how best to apply CEQA for telecommunications carriers under our jurisdiction, among those proposals that comply with CEQA, we will give significant weight to those that best foster the deployment of an advanced telecommunications network.

We believe that striking this balance is achievable and will be the central focus of this proceeding. Parties are directed to develop proposals for how the Commission can comply with CEQA requirements and to comment on how

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<sup>36</sup> Pub. Util. Code, § 871.7(d).

<sup>37</sup> 47 U.S.C., § 157(a).

these proposals are consistent with California's clearly articulated policy favoring the deployment of advanced telecommunications services. We ask parties to comment on how to best balance the environmental protections provided by CEQA with the myriad benefits deployment of advanced telecommunications facilities brings to California.

For incumbent local exchange carriers (ILECs) such as AT&T and Verizon, and also for certain other telecommunications carriers that have CPCNs, that contain no restrictions, the Commission does not currently perform CEQA review. We seek parties comment on whether CEQA requires review of network expansions by telecommunications carriers under our jurisdiction that already have Commission authority to serve the entire state or a specific service territory. We also request parties to provide us with a legal basis for their conclusions.

## **V. Encouraging and Promoting Competition**

The Public Utilities Code expresses a clear desire to support competitive markets.<sup>38</sup> The very foundation of telecommunications policy both in California, and at the federal level, is competition. For decades, the telecommunications market has been increasingly subject to competition and our policies have been evolving to both reflect the spread of competition and to encourage its further development and use.

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<sup>38</sup> The California Public Utilities Code provides that ". . . the essence of the American economic system of private enterprise is free competition. Only through full and free competition can free markets, reasonable and just prices, free entry into business, and opportunities for the expression and growth of personal initiative and individual judgment be assured." (Pub. Util. Code, § 8281(a).)

The clear policy guidance at both the state and federal level is for Commission policies to favor the development of a competitive telecommunications market so that consumers can reap the benefits such competition engenders. Reducing barriers to entry is a basic requirement for the development of competition. Over the past decade, we have attempted to remove the regulatory barriers that prevent competition in the local telephone market.

We are concerned that our lack of a clearly articulated policy regarding our application of CEQA to telecommunications carriers has, in itself, created a barrier to entry. We are also concerned that, because carriers that have entered the market since 1999 face significantly different requirements for Commission approval of network expansions than the incumbent local exchange carriers (ILECs), or even the CLCs that entered the market prior to 1999, the level of competition is decreased. We also recognize that competition does not only come from new entrants, but also comes from existing carriers. A regulatory process that hinders the ability of existing carriers, particularly those that have authority that predates late 1999, might also serve to reduce the vigor of the competition upon which our telecommunications policy is built.

## **VI. Policy Options for Consideration**

### **A. Multi-Level Review and Approval of Utility Projects**

One possible approach to CEQA as it applies to telecommunications carriers would be to implement a multi-level approach, roughly analogous to the

process used by electric projects under our General Order (GO) 131-D.<sup>39</sup> Pursuant to GO 131-D, electric transmission projects above 200 kilovolts (kV) require the utility to obtain a CPCN from the Commission, projects between 50 kV and 200 kV require a simpler Permit to Construct,<sup>40</sup> and projects under 50kV do not require Commission approval.<sup>41</sup>

We seek comment as to whether such a multi-level system could be developed for application to the telecommunications industry and request concrete definitions of the various levels. We note that under this rubric, no distribution facilities constructed by an electric utility require Commission

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<sup>39</sup> See D.94-06-014, *Opinion in Investigation on the Commission's own motion into the rules, procedures and practices which should be applicable to the Commission's review of transmission lines not exceeding 200 Kilovolts*, 1994 Cal. PUC LEXIS 453, modified by D.95-08-038, 1995 Cal. PUC LEXIS 644.

<sup>40</sup> Review for a permit to construct “. . . focuses solely on environmental concerns, unlike the CPCN process which considers the need for and economic cost of a proposed facility.” (D.94-06-014, 1994 Cal. PUC LEXIS 453, \*2.)

<sup>41</sup> We relied on the following reasoning in our conclusion that lines under 50 kV are exempt from our active regulation, and therefore, do not require a CPCN or permit from the Commission for construction of or modification to these lines: “1. Distribution lines are almost always located on public and private rights of way as needed to supply all qualifying requests for electric service. In most cases, only one route is possible and only one type of construction is feasible. 2. At this time, there are no significant problems or concerns in the construction of these distribution facilities that would justify the extent of regulation set forth in GO 131-D for 50- to 200-kV power lines. 3. Distribution line extensions number into the thousands every year. Meeting GO 131-D requirements would add a large administrative burden and excessive cost for all parties involved. 4. Service requests have short lead times, generally only a few weeks. Delaying construction of the needed distribution facilities would cause major inconvenience and financial loss to those awaiting service.” (D.94-06-014, 1994 Cal. PUC LEXIS, \*25-\*26.)

approval.<sup>42</sup> We believe that it would be instructive for parties to compare the extent of construction of various types of telecommunications projects with the type of electric distribution-level construction done by utilities for which no CEQA review is required. With the advent of fiber optic technologies and the advances in computing technology, many telecommunications facilities are smaller and less intrusive than in the past. Given the nature of telecommunications facilities, it may be the case that the construction of many telecommunications facilities is of a lesser magnitude, and poses less risk of significant harm to the environment, than the distribution-level construction of electric utilities. We ask parties to provide us with information that will assist us in determining whether this is in fact the case.

### **B. Local Review, Siting and Construction Authority**

Another proposal for how to address CEQA requirements would be for the Commission to adopt policies similar to those that we have used for wireless carriers since 1996. The Commission successfully implemented rules regarding the proper process to follow under CEQA for the construction of commercial mobile radio service facilities in California. Since these policies have been in place, we have seen rapid growth in the deployment of wireless facilities resulting in more capacity and greater coverage of wireless carriers. These rules

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<sup>42</sup> D.94-06-014 provides that “[l]ines under 50 kV, which serve distribution functions, are usually built in existing rights of way and are generally noncontroversial. The Commission's complaint procedure insures that if there is a problem it will be addressed.” (1994 Cal. PUC LEXIS 453, \*5.)

have allowed for the development of a competitive market in wireless service and were in place as several new carriers entered the marketplace.

From 1990 to 1996, we used an advice letter notification procedure as promulgated by GO 159.<sup>43</sup> Under this procedure, cellular carriers were required to file advice letters for each cell site, and Commission approval of each filing was required to complete the siting process. The Commission, and almost all parties involved in R.90-01-012, the proceeding to change the rules for siting of cellular facilities, recognized that the advice letter process was too cumbersome and also resulted in the Commission's increased involvement in the interpretation and enforcement of local land use planning regulation and building permit issuance.<sup>44</sup>

In 1996, the Commission promulgated the current rules related to the construction of commercial mobile radio service facilities in California. GO 159-A states that cellular service providers that are subject to our jurisdiction may not begin construction of a cell site or Mobile Telephone Switching Office

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<sup>43</sup> See D.90-03-080, *Interim Opinion in Order Instituting Rulemaking on the Commission's own motion to develop revisions to General Orders and Rules applicable to siting and environmental review of cellular mobile radiotelephone utility facilities*, 1990 Cal. PUC LEXIS 1423, which promulgated GO 159. This decision was issued in R.90-01-012. In D.90-03-080, the Commission adopted GO 159 as interim rules, and continued its rulemaking to examine whether this GO has served its stated purposes and to consider whether this GO must be revised to reflect technological changes in cellular facilities. Ultimately, the Commission revised GO 159 in D.96-05-035, and issued GO 159-A.

<sup>44</sup> D.96-05-035, *Order Instituting Rulemaking on the Commission's own motion to develop revisions to General Orders and Rules applicable to siting and environmental review of cellular mobile radiotelephone utility facilities*, *Opinion Adopting General Order 159-A Rules Relating to the Construction of Cellular Radiotelephone Facilities in California*, 1996 Cal. PUC LEXIS 288; see also D. 94-11-018, 1994 Cal. PUC LEXIS 1090; D.94-11-019, 1994 Cal. PUC LEXIS 1089.

(MTSO) in California without first having obtained all requisite land use approvals required by the relevant local government agency. The cellular service provider must give the Commission a notification letter stating that it has obtained the necessary land use approvals or that land use approvals are not required. GO 159-A also requires cellular service providers to give the Commission a tariff list of its facilities on a quarterly basis.

Thus, GO 159-A streamlined the procedure cellular carriers use to notify us of the construction of new facilities or significant modifications to existing facilities. Specifically, GO 159-A replaced the advice letter process with a notification letter. Cellular carriers provide copies of these notification letters to local government authorities. A significant change in GO 159-A from prior practice is that cellular service providers are no longer required to obtain Commission authorization prior to commencing construction.

The Commission also recognized that local governments had many concerns regarding the siting, design, and construction of cell sites and MTSOs, and as a result, the Commission delegated its authority to regulate the location and design of cellular facilities to local agencies in GO 159-A, except in those instances when there is a clear conflict with statewide interests.<sup>45</sup> In cases of a clear conflict of state interests, we review the need to preempt local jurisdiction, allowing local agencies and citizens an opportunity to present their positions. The cellular carriers have the burden of proof to demonstrate that accommodating local agency requirements for any specific site would frustrate the Commission's objectives. If the cellular carrier is able to prove this point, the

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<sup>45</sup> This is a continuation of a policy established by GO 159.

Commission will preempt local jurisdiction pursuant to its authority under Article XII, Section 8 of the California Constitution.<sup>46</sup>

The rules set forth in GO 159-A have worked well for both the cellular carriers and the consumers in California. GO 159-A strikes a balance in delegating authority to local governments while still preserving state interests. It also recognizes the practicality of delegating certain oversight authority to local governments, and acknowledges that it is not proper for the state to micromanage the siting and construction of cellular facilities, which has primarily localized impacts. In this new rulemaking, we will carefully review both the process by which the rules in GO 159-A were reached, and the specific procedures in these rules. We will examine whether a parallel process and/or procedure would be appropriate for the application of CEQA to other telecommunications utilities under our jurisdiction.

### **C. Statutory or Categorical Exemption**

Both statutory and categorical exemptions to CEQA may assist us in framing a comprehensive proposal in this proceeding. Statutory exemptions are descriptions of types of projects for which the California Legislature has

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<sup>46</sup> Article XII, Section 8 of the California Constitution provides: "A city, county, or other public body may not regulate matters over which the Legislature grants regulatory power to the Commission. This section does not affect power over public utilities relating to the making and enforcement of police, sanitary, and other regulations concerning municipal affairs pursuant to a city charter existing on October 10, 1911, unless that power has been revoked by the city's electors, or the right of any city to grant franchises for public utilities or other businesses on terms, conditions, and in the manner prescribed by law."

provided a blanket exemption from CEQA procedures and policies.<sup>47</sup> One statutory exemption that may be applicable in considering approval for some telecommunications projects under our jurisdiction is the exemption for “ministerial projects.” A ministerial project involves a decision applying fixed, objective standards that do not require a public agency to use its judgment as to how the project should be carried out.<sup>48</sup> The CEQA Guidelines provide that public agencies should decide what constitutes a ministerial project based on an analysis of its own laws.<sup>49</sup> Furthermore, a “. . . public agency should make such determination either as a part of its implementing regulations or on a case-by-case basis.”<sup>50</sup> Actions such as issuing a building permit and issuing a business license are ministerial for CEQA purposes only if the public agency does not exercise any discretion or judgment in taking these actions.<sup>51</sup>

Categorical exemptions are descriptions of types of projects the Secretary of the California Resources Agency has determined do not have a significant effect on the environment.<sup>52</sup> Unlike statutory exemptions, categorical

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<sup>47</sup> Because CEQA is legislative statute, the Legislature has the authority to exempt activities from CEQA review. A comprehensive source of statutory exemptions is found in the CEQA Guidelines, 14 Cal. Code Reg., §§ 15260-15285.

<sup>48</sup> Pub. Res. Code, § 21080(b)(1); CEQA Guidelines, 14 Cal. Code Reg., §§ 15268, 15369.

<sup>49</sup> CEQA Guidelines, Cal. Code Reg., § 15268.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*; see also, CEQA Guidelines, Cal. Code Reg., § 15357.

<sup>52</sup> Pub. Res. Code, §§ 12080(b)(9), 21084. Categorical exemptions are found in the CEQA Guidelines, 14 Cal. Code Reg., §§ 15300-15333.

exemptions are not absolute. There are exceptions to the categorical exemptions depending on the nature or location of the project.<sup>53</sup>

The Commission has utilized categorical exemptions in the past with respect to approvals required for telecommunications network deployment. For example, we have relied on the existing facilities categorical exemption, which applies to “. . . the operation, repair, maintenance, permitting, leasing, licensing, or minor alteration of existing public or private structures, facilities, mechanical equipment, or topographical features, involving negligible or no expansion of use beyond that existing at the time of the lead agency's determination . . .”<sup>54</sup> In D.04-04-014, we found that 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 Section 15301 of the CEQA Guidelines.<sup>55</sup>

Other categorical exemptions may be relevant to our inquiry as well. These include, but are not necessarily limited to: (1) “. . . replacement or reconstruction of existing structures and facilities where the new structure will be located on the same site as the structure replaced and will have substantially

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<sup>53</sup> Pub. Res. Code, §§ 21084(b), (c), (e); CEQA Guidelines, 14 Cal. Code Reg., § 15300.2.

<sup>54</sup> CEQA Guidelines, Cal. Code. Reg., § 15301.

<sup>55</sup> D.04-04-014, *Opinion Granting Pacific Gas and Electric Company's Petition for Modification of Decision 03-05-077, In the Matter of the Application of Pacific Gas and Electric Company (U 39 E) for Commission Approval for Irrevocable Lease for Metromedia Fiber Network Services, Inc. to User Fiber Optic Cable on Certain PG&E Transmission Facilities Under Terms of an Optic Fiber Installation and IRU Agreement*, 2004 Cal. PUC LEXIS 142.

the same purpose and capacity as the structure replaced . . .”;<sup>56</sup> (2) “ . . . construction and location of limited numbers of new, small facilities or structures; installation of small new equipment and facilities in small structures; and the conversion of existing small structures from one use to another where only minor modifications are made in the exterior of the structure . . . [this includes] . . . [w]ater main, sewage, electrical, gas, and other utility extensions, including street improvements, of reasonable length to serve such construction;”<sup>57</sup> and (3) “ . . . minor public or private alterations in the condition of land, water, and/or vegetation which do not involve removal of healthy, mature, scenic trees except for forestry or agricultural purposes, [including] . . . [m]inor trenching and backfilling where the surface is restored.”<sup>58</sup>

We seek comment on whether any statutory or categorical exemptions may apply to projects by telecommunications carriers under our jurisdiction. Also, a public agency may file a request with the State’s Office of Planning and Research to add a class of projects as a categorical exemption.<sup>59</sup> This request must “include information supporting a public agency’s position that the class of projects does, or does not, have a significant effect on the environment.”<sup>60</sup> We therefore ask for proposals on (a) whether we should submit a request for a

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<sup>56</sup> CEQA Guidelines, 14 Cal. Code. Reg., § 15302.

<sup>57</sup> *Id.*, § 15303.

<sup>58</sup> *Id.*, § 15304.

<sup>59</sup> Pub. Res. Code, § 21086(a); *see also* Pub. Res. Code, § 21084.

<sup>60</sup> *Id.*

categorical exemption for certain types of actions by telecommunications carriers under our jurisdiction to the Office of Planning and Research; and (b) if so, what should be the scope of the recommendation to the Office of Planning and Research.

We also seek input from parties regarding the possibility of legislative relief, perhaps in the form of a statutory exemption. Our Broadband Report, issued in May 2005, recommended seeking legislation to streamline CEQA regulations that applied to broadband facilities.<sup>61</sup> We ask parties to comment on what type of legislative action would (1) provide the needed streamlining, (2) allow us to ensure compliance with CEQA and protection of the environment, (3) advance the goals of supporting deployment of advanced telecommunications, including broadband, technologies and (4) promote widespread and vigorous competition.

For example, AB 375 (2005-2006 Session) authored by Assemblyman Cogdill sought to craft just such a statutory exemption for telecommunications facilities. The relevant sections of AB 375 were:

(d) The construction and location of a telecommunications utility extension, including the construction of a reasonable length to serve customers from existing facilities, and including a street improvement of reasonable length to serve the construction, so long as the construction consists of limited numbers of new, small facilities or structures, installation of small new equipment and facilities in small structures, or the conversion of existing small structures

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<sup>61</sup> *Broadband Deployment in California*, California Public Utilities Commission, May 2005, p. 89, <http://www.cpuc.ca.gov/PUBLISHED/REPORT/45539.htm>

from one use to another where only minor modifications are made in the exterior of the structure.

(e) The construction and location of a telecommunications utility facility, including a street improvement to serve the construction, if the construction is within the public right-of-way or on a publicly owned or maintained right-of-way and where the provision of a telecommunications utility facility has been considered in a prior environmental impact report or initial study. The telecommunications utility facility constructed may be different from that considered in the prior environmental impact report or initial study so long as the difference is negligible or minor in nature.

(f) An action by the Public Utilities Commission on an application for approval of financing transactions by a telecommunications public utility pursuant to Article 5 (commencing with Section 816) and Article 6 (commencing with Section 851) of Chapter 4 of Part 1 of Division 1 of the Public Utilities Code, regardless of the use of the funds raised by the financing transaction.

While this particular legislation seeking to create a statutory exemption did not pass in the Legislature, we seek comment from parties as to whether the Commission should pursue a statutory exemption with respect to telecommunications facilities, and if so we seek further comment on the specifics of such an exemption.

#### **D. Program and Master EIRs**

There are several types of EIRs a lead agency may utilize depending on the scope and specificity of the project, and the decision-making process involved. The most common type of EIR, the Project EIR, examines the environmental impacts of a specific development project. A Project EIR focuses on the changes in the environment that would result from the development

project, and examines all phases of the project including planning, construction, and operation.<sup>62</sup>

A review of two other types of EIRs, a Program EIR and a Master EIR, may be fruitful in our effort to develop a plan to apply CEQA to telecommunications carriers under our jurisdiction. A Program EIR “. . . may be prepared on a series of actions that can be characterized as one large project and are related either: (1) Geographically, (2) As logical parts in the chain of contemplated actions, (3) In connection with issuance of rules, regulations, plans, or other general criteria to govern the conduct of a continuing program, or (4) As individual activities carried out under the same authorizing statutory or regulatory authority and having generally similar environmental effects which can be mitigated in similar ways.”<sup>63</sup>

There are advantages to using a Program EIR over a Project EIR, as enumerated in the CEQA Guidelines. These benefits include: “(1) Provid[ing] an occasion for a more exhaustive consideration of effects and alternatives than would be practical in an EIR on an individual action, (2) Ensur[ing] consideration of cumulative impacts that might be slighted in a case-by-case analysis, (3) Avoid[ing] duplicative reconsideration of basic policy considerations, (4) Allow[ing] the Lead Agency to consider broad policy alternatives and program wide mitigation measures at an early time when the agency has greater flexibility to deal with basic problems or cumulative impacts, and (5) Allow[ing] reduction in paperwork.”<sup>64</sup> A Program EIR can also be used as a foundation for a

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<sup>62</sup> CEQA Guidelines, Cal. Code Reg., § 15161.

<sup>63</sup> *Id.*, § 15168(a).

<sup>64</sup> *Id.*, § 15161(b).

*Footnote continued on next page*

determination of whether further environmental review is necessary for subsequent actions.<sup>65</sup>

The CEQA Guidelines encourage the use of a Program EIR, noting that it “ . . . can be used effectively with a decision to carry out a new governmental program or to adopt a new body of regulations in a regulatory program.”<sup>66</sup> Furthermore, “[t]he program EIR enables the agency to examine the overall effects of the proposed course of action and to take steps to avoid unnecessary adverse environmental effects.”<sup>67</sup>

In 1993, the Legislature adopted a procedure for a new type of EIR, the Master EIR.<sup>68</sup> A Master EIR “is intended to streamline the later environmental review of projects or approval included within the project, plan or program analyzed in the Master EIR . . . [and] . . . a Master EIR shall, to the greatest extent feasible, evaluate the cumulative impacts, growth inducing impacts, and irreversible significant effects on the environment of subsequent projects.”<sup>69</sup> If the Commission acts as lead agency for a particular project, it may prepare Master EIR for the following types of projects as they relate to telecommunications carriers:

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<sup>65</sup> *Id.*, § 15168(c).

<sup>66</sup> *Id.*, § 15168, *Discussion*.

<sup>67</sup> *Id.*

<sup>68</sup> Pub. Res. Code, §§ 21156-21158.1; Cal. Code Reg., § 5175.

<sup>69</sup> CEQA Guidelines, Cal. Code Reg., § 15175(a).

- (1) A general plan, general plan update, general plan element, general plan amendment, or specific plan.
- (2) Public or private projects that will be carried out or approved pursuant to, or in furtherance of, a redevelopment plan.
- (3) A project that consists of smaller individual projects which will be carried out in phases.
- (4) A rule or regulation which will be implemented by later projects.
- (5) Projects that will be carried out or approved pursuant to a development agreement . . . <sup>70</sup>

A lead agency is required to provide a “ . . . description of anticipated subsequent projects that are within the scope of the Master EIR, including information with regard to the kind, size, intensity, and location of the subsequent projects . . . ” in order to be able to use this streamlined process.<sup>71</sup>

There are significant benefits to using a Master EIR. A certified Master EIR can serve as the environmental analysis for subsequent projects that are within its scope and which do not have project-specific effects that were not previously discussed.<sup>72</sup> The lead agency conducts a limited environmental review for subsequent projects, which includes an initial study analyzing “ . . . whether the subsequent project was described in the Master EIR and whether the subsequent project may cause any additional significant effect on the environment which was not previously examined in the Master EIR.”<sup>73</sup> If the lead agency finds that the subsequent project will not have any additional

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<sup>70</sup> *Id.*, § 15175(b).

<sup>71</sup> *Id.*, § 15176(a).

<sup>72</sup> *Id.*, § 15177(a), (b).

<sup>73</sup> *Id.*, § 15177(b)(2).

*Footnote continued on next page*

significant environmental impacts, then the subsequent project will be considered within the scope of the Master EIR, and no further review is required.<sup>74</sup> If the lead agency determines that the subsequent project does have significant environmental impacts not considered in the Master EIR, the lead agency must incorporate all feasible mitigation measures and alternatives for the subsequent project in the Master EIR.

There are some limitations to a Master EIR. For example, a Master EIR must be reviewed at least every five years, or if there are changing circumstances, to determine whether it still contains an adequate analysis of the significant environmental effects of the project for which it was prepared. However, a Master EIR may be a useful tool for us as we determine what is the best way to implement CEQA for telecommunications carriers under our jurisdiction.

We request comments on the appropriateness and feasibility of using the Program EIR and/or the Master EIR for CEQA review for telecommunications carriers. Commenting parties should make any distinctions they deem appropriate as to whether there are certain policies and programs that they believe are appropriate for a Program and/or Master EIR, and other policies and programs that they deem not suitable for a Program and/or Master EIR.

## **VII. CEQA Review Pertaining to Cable and Video Franchising.**

AB 2987, the Digital Infrastructure and Video Competition Act of 2006, delegated a new responsibility to the Commission, providing that the

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<sup>74</sup> *Id.*, § 15177(b)(3).

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Commission is the “sole franchising authority” for issuing state franchises to provide video service.”<sup>75</sup> It is the Legislature’s intent that the duties of the Commission in administering AB 2987 shall be strictly limited to those duties described in the provisions on licensing (Section 5840), anti-discrimination (Section 5890), reporting (Sections 5920 and 5960), and regulatory fees (Sections 401, 440-444, and 5840).

The Commission is specifically constrained by state law regarding its role in environmental review. Under AB 2987, a local entity shall also be the lead agency for any environmental review with respect to network construction, installation, and maintenance.<sup>76</sup> Public Utilities Code Section 5820(b) provides, in relevant part:

Nothing in this division shall be construed to eliminate or reduce a telephone corporation’s or video service provider’s obligations under any applicable state or federal environmental protection laws. The local entity shall serve as the lead agency for any environmental review under this division and may impose conditions to mitigate environmental impacts of the applicant’s use of the public rights-of-way that may be required pursuant to the California Environmental Quality Act (Division 13 (commencing with Section 21000) of the Public Resources Code.<sup>77</sup>

The facilities utilized to provide video service, and for which the franchise is granted and construction authorized by the relevant local entity, can also be

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<sup>75</sup> Pub. Util. Code, § 5840(a).

<sup>76</sup> Pub. Util. Code, §§ 5820, 5885.

<sup>77</sup> Pub. Util. Code, § 5820.

used to provide broadband data service telecommunications services. The provisions of these three services offered over a single network and joint facilities are referred to as a “triple play.”

We tentatively conclude that the provision of telecommunications service over such facilities is incidental to the provision of video service and broadband service. Therefore, we do not need to make a discretionary decision prior to the construction of facilities utilized to provide intrastate telecommunications service where the telecommunications service is incidental to the provision of video service. We seek comment on these tentative conclusions.

In addition, we seek comment on whether we should also conclude that we do not need to issue a discretionary decision for the construction of broadband facilities, an interstate service, when those facilities also are used to provide intrastate telecommunications service, and when provision of the telecommunications service is incidental to the provision of broadband service.

### **VIII. Request for Comment**

We seek parties comment on the following issues. We specifically request parties to separate comments on legal requirements of CEQA from any discussion of what CEQA policy the Commission should adopt.

1. How do we best balance the environmental protections provided by CEQA with the myriad benefits deployment of advanced telecommunications facilities brings to this State? Parties are directed to develop proposals for how the Commission can comply with CEQA requirements and to comment on how these proposals are consistent with California’s clearly articulated policy favoring the deployment of advanced telecommunications services.
2. Does CEQA require review of network expansions by telecommunications carriers under our jurisdiction that

- already have Commission authority to serve the entire state or a specific service territory? We also request parties to provide us with a legal basis for their conclusions.
3. Could a multi-level system of CEQA review, such as the one set forth for electric utilities in GO 131-D, be developed for application to the telecommunications industry? We request parties to provide concrete definitions of the various proposed levels and to compare the extent of construction of various types of telecommunications projects with the type of distribution-level construction done by electric utilities for which no CEQA review is required.
  4. Would it be appropriate to use the process developed GO 159-A, and the specific procedures in these rules for wireless carriers, in our application of CEQA to other telecommunications utilities under our jurisdiction?
  5. Do any of the statutory or categorical exemptions set forth in CEQA and the CEQA Guidelines apply to projects by telecommunications carriers under our jurisdiction?
  6. Should we submit a request for a categorical exemption for certain types of actions by telecommunications carriers under our jurisdiction to the Office of Planning and Research? If so, what should be the scope of the recommendation to the Office of Planning and Research?
  7. Should we seek legislative relief, perhaps in the form of a statutory exemption? We ask parties to comment on what type of legislative action would (1) provide the needed streamlining, (2) allow us to ensure compliance with CEQA and protection of the environment, (3) advance the goals of supporting deployment of advanced telecommunications, including broadband, technologies and (4) promote widespread and vigorous competition.

8. Should we consider using the Program EIR and/or the Master EIR for CEQA review for telecommunications carriers? Commenting parties should make any distinctions they deem appropriate as to whether there are certain policies and programs that they believe are appropriate for a Program and/or Master EIR, and other policies and programs that they deem not suitable for a Program and/or Master EIR.
9. We seek comment on our tentative conclusions that (a) the provision of telecommunications service over video service and broadband facilities is incidental to the provision of video service and broadband service and (b) we do not need to issue a discretionary decision prior to the construction of facilities utilized to provide intrastate telecommunications where the telecommunications service is incidental to the provision of video service.
10. Should we determine that we do not need to issue a discretionary decision for the construction of broadband facilities, an interstate service, when those facilities also are used to provide intrastate telecommunications service, and when provision of the telecommunications service is incidental to the provision of broadband service?

## **IX. Scoping Memo**

Rule 7.1(d) of our Rules of Practice and Procedure provides that a rulemaking order “shall preliminarily determine the category and need for hearing, and shall attach a preliminary scoping memo.” This rulemaking is preliminarily determined to be quasi-legislative, as that term is defined in Rule 1.3(d). Further, we preliminarily determine that hearings are not needed in this proceeding. We expect to issue a scoping memo in this proceeding. The Assigned Commissioner and Administrative Law Judge (ALJ) will, by subsequent ruling, provide additional scheduling details and may alter the

schedule contained herein as they deem necessary. We anticipate having a final order issued in this proceeding within 12 months. This is within the 18 month timeframe set forth in Rule 2.1(c).

Any person who objects to the preliminary categorization of this rulemaking, the determination that hearings are not required, or to the schedule may file a motion so stipulating within 30 days of the issuance of this order.

We herein solicit comments and proposals on the existing policies and practices for enforcing CEQA, the impacts of existing policies and proposals, and ways to change them if necessary.

The Commission will issue an official service list following receipt of responses to the questions posed herein or following a workshop, as determined by the Assigned Commissioner and ALJ. Within 20 days from the date of mailing of this OIR, any person or representative of an entity interested in monitoring or participating in this rulemaking shall send a request to be placed on the service list to the Commission's Process Office, 505 Van Ness Avenue, San Francisco, California 94102 or ALJ\_Process@cpuc.ca.gov. Each request shall refer to the proceeding number for this OIR and identify the name, address, e-mail address, and party on whose behalf the request is submitted. The Process Office thereafter will create a service list and post it on the Commission's web site ([www.cpuc.ca.gov](http://www.cpuc.ca.gov)) as soon as is practicable. In the interim, parties must serve all filings on the service list attached to this order.

Any party interested in participating in this rulemaking and who is unfamiliar with the Commission's procedures should contact the Commission's Public Advisor's Office in San Francisco at (415) 703-2074, (866) 836-7875 (TTY-toll free) or (415) 703-5282 (TTY), or in Los Angeles at (213) 649-4782, or send an e-mail to [public.advisor@cpuc.ca.gov](mailto:public.advisor@cpuc.ca.gov).

This proceeding is subject to Article 8 of the Rules of Practice and Procedure, which specifies standards for engaging in *ex parte* communications and the reporting of such communications. Pursuant to Rule 8.2(a), *ex parte* communications will be allowed in this proceeding without any restrictions or reporting requirements unless and until the Commission modifies this determination pursuant to Rule 7.6.

## **X. Procedural Schedule**

### **Opening Comments due November 9, 2006, replies due November 21, 2006.**

Parties may file opening comments in this rulemaking. We ask that parties in their opening comments propose specific areas of inquiry and suggest questions and issues that the Commission should include within the scope of this proceeding. Parties, in their opening comments should respond to the questions and tentative conclusions reached herein. Parties who wish to reply to the opening comments of any party may do so by November 21, 2006.

### **Scoping Workshop in December 2006**

Because we are not anticipating holding evidentiary hearings we will, rather than holding a prehearing conference, schedule a workshop to address and discuss scheduling, procedural issues and to garner input from parties as to what the appropriate scope of this rulemaking should be.<sup>78</sup>

### **Issuance of Scoping Memo Within 30 days of Scoping Workshop**

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<sup>78</sup> We held a similar workshop in R.05-04-005, *Order Instituting Rulemaking on the Commission's Own Motion to Assess and Revise the Regulation of Telecommunications Utilities*.

Within 30 days of the workshop, the Assigned Commissioner will issue a scoping memo that will delineate the scope of the proceeding. This memo will also pose specific questions for parties to respond to. This scoping memo will also lay out further procedural steps that may include further workshops, additional rounds of comments from parties, legal briefs on specific legal issues, and other procedural steps deemed appropriate to ensure good decision making.

### **XI. Resolution of R.00-02-003**

This proceeding closes R.00-02-003. We close R.00-02-003 for several reasons. First, pursuant to Rule 2.1(c) of the Commission's Rules of Practice and Procedure, we have long since passed the statutory deadline of 18 months to issue a decision in this proceeding. Second, we wish to refocus this proceeding on the current telecommunications marketplace. Third, we want to create a fresh record upon which to base our new policy and procedures. We recognize that many thoughtful ideas were presented in R.00-02-003, and we incorporate by reference the record in R.00-02-003 so that parties will not be required to restate previously made positions and proposals.

Therefore, **IT IS ORDERED** that:

1. A rulemaking is instituted 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.
2. The Executive Director shall cause the Order Instituting Rulemaking (OIR) to be served on all parties currently on the service list of R.00-02-003.
3. Within 20 days from the date of mailing of this order, any person or representative of an entity interested in monitoring or participating in the rulemaking shall send a request to the Commission's Process Office,

505 Van Ness Avenue, San Francisco, CA 94102 or e-mail

ALJ\_Process@cpuc.ca.gov, asking that his or her name be placed on the service list. Each request shall refer to the proceeding number for this OIR and identify the name, address, e-mail address, and party on whose behalf the request is submitted.

4. The category of this rulemaking is preliminarily determined to be “quasi-legislative” as that term is defined in Rule 1.3(d) of the Commission’s Rules of Practice and Procedure.

5. Interested parties may file and serve Initial Comments and Replies in this OIR in accordance with the procedural schedule as set forth in the text of this Rulemaking.

6. Proceeding R.00-02-003 is closed. We incorporate by reference the record in that proceeding.

This order is effective today.

Dated \_\_\_\_\_, at San Francisco, California.