

PUBLIC UTILITIES COMMISSION505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3298

June 20, 2005

Agenda ID# _____
Alternate to Agenda ID# 4508
Ratesetting

TO: PARTIES OF RECORD IN APPLICATION 04-05-017

Enclosed is the Alternate Draft Decision of Commissioner Grueneich to the Draft Decision of Administrative Law Judge (ALJ) Thomas previously mailed to you on April 15, 2005.

When the Commission acts on this agenda item, it may adopt all or part of it as written, amend or modify it, or set aside and prepare its own decision. Only when the Commission acts does the decision become binding on the parties.

Parties to the proceeding may file comments on the alternate draft decision as provided in Article 19 of the Commission's "Rules of Practice and Procedure." These rules are accessible on the Commission's website at <http://www.cpuc.ca.gov>.

Comments on the alternate decision are due on July 11, 2005 and reply comments are due on July 15, 2005.

Pursuant to Rule 77.3, opening comments shall not exceed 15 pages. Finally, comments and reply comments with a certificate of service shall be filed with the Commission's Docket Office and copies shall be served on all parties on the same day of filing. The Commissioners and ALJ shall be served separately by overnight service.

/s/ ANGELA K. MINKIN
Angela K. Minkin, Chief
Administrative Law Judge

ANG: dhv

Enclosure

COM/DGX/tcx/dhn

ALTERNATE DRAFT

Alternate Agenda ID #
Agenda ID #4508
Ratesetting

ALTERNATE DRAFT DECISION OF COMMISSIONER GRUENEICH
(Mailed 6/20/05)

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application of WilTel Communications, LLC (U-6146-C) aka Williams Communications, LLC, a Delaware Limited Liability Company, to Amend its Certificate of Public Convenience and Necessity.

Application 04-05-017
(Filed May 3, 2004)

**OPINION DENYING APPLICATION OF
WILTEL COMMUNICATIONS LLC TO AMEND ITS
CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY
AND AUTHORIZING ENERGY DIVISION TO REVIEW PROJECTS FOR
EXEMPTIONS FROM CEQA**

A. Summary

This decision denies the application of WilTel Communications, LLC (WilTel) to amend its certificate of public convenience and necessity (CPCN). WilTel asks us to allow it to build out its fiber optic telecommunications facilities without analysis under the California Environmental Quality Act (CEQA) of the environmental impact of the new construction it proposes. However, in this decision we adopt a process to provide much of the relief WilTel requests while ensuring compliance with CEQA. Our decision adopts a process of delegation to the Director of the Energy Division or the Director’s designee, that ensures review of exempt projects within 21 days.

WilTel explains, correctly, that it is one of the telecommunications carriers subject to a higher level of CEQA review than other telecommunications carriers. These differences flow from the type of operating authority the Commission grants to individual carriers. CEQA is only triggered when we are called upon to issue a “discretionary decision” that either grants new authority or modifies a carrier’s existing authority. The circumstances that require such a decision vary for different types of carriers.

While we are sympathetic to WilTel’s situation, we cannot change our rules as WilTel proposes without a rulemaking designed to establish procedures for an entire industry sector, nor can we ignore our obligations to comply with CEQA. We therefore deny WilTel’s application, but until rule changes are adopted in a rulemaking proceeding, we delegate the authority to staff to review any projects that WilTel contends are exempt from further compliance with CEQA.¹ If Energy Division’s review concludes that a project WilTel proposes is exempt from compliance with CEQA, Energy Division is authorized to issue WilTel a “Notice to Proceed,” and to file a Notice of Exemption” with the State Clearinghouse. This should expedite many if not all of the builds WilTel describes as necessary to connect customers with its backbone network, while at the same time ensuring that the Commission complies with CEQA.

B. Background

The procedural history of this proceeding shows significant back-and-forth communication between WilTel and Commission staff in an attempt to conform

¹ Title 14 of the California Code of Regulations Section 15000 et seq., CEQA Guidelines Section 15205(a)(1) states that in administering CEQA a public agency may assign to its staff the function of determining whether a project is exempt from CEQA review.

this application to the currently existing Commission interpretations of its CEQA obligations.

WilTel first filed its application on May 3, 2004. On June 2, 2004, the assigned Administrative Law Judge (ALJ) asked WilTel to supplement its application with more detail about the location and type of construction WilTel planned. On July 9, 2004, WilTel filed the requested supplement. WilTel explained the delay in supplementation on the ground that it “ha[d] not be[en] able to obtain detailed information about its planned construction until only recently.”² In the supplement, WilTel asked for blanket approval – without Commission CEQA review – of spurs directly or indirectly connecting WilTel’s fiber optic network to new locations so long as 1) all construction is no more than five miles in length, 2) all construction is done inside existing rights of way, 3) WilTel notifies the Commission staff of each qualifying construction project prior to commencing construction, and 4) WilTel fully complies with any CEQA review required by local permitting agencies.³

On January 21, 2005, WilTel sent a letter to the Commission stating that, based on recent discussions with [Commission] staff, WilTel determined that it should file a Second Supplement to its Application to modify its request for relief. Specifically, WilTel will modify its request for relief to adopt programmatic mitigated negative declarations (PND) previously issued by the Commission.⁴

² *Supplement to Application of WilTel Communications, LLC to Amend its Certificate of Public Convenience and Necessity on an Interim Basis and Request for Expedited Ex Parte Relief*, filed July 9, 2004, at 2–3 (First Supplement).

³ *Id.* at 3.

⁴ The January 21, 2005, letter appears as Appendix A to this decision.

WilTel filed the Second Supplement to its application on January 27, 2005.⁵ While it has since withdrawn the Second Supplement, in it WilTel proposed to enable the Commission to comply with CEQA by agreeing to conditions the Commission had imposed on other carriers in prior decisions. Thus, in the Second Supplement, WilTel proposes to adopt and comply with the Yipes Enterprise Services, Inc. (Yipes) and IP Networks, Inc. programmatic mitigated negative declarations (PND) already approved Decision (D.) 04-12-011 and D.03-01-069.

We described the PND approach in D.04-12-011, the Yipes decision:

To adapt to this type of project, the Commission developed the last mile [mitigated negative declaration] MND as a process-oriented approach that sets performance standards for analyzing potential impacts, and identifying and implementing required mitigation measures within the geographic areas studied. . . .

Because the specific locations within the geographic areas studied are not known, the last mile MND takes the conservative approach of presenting all possible impacts and required mitigation measures within those areas. This process provides CEQA compliance for the Commission and responsible agencies, but does not limit the authority of responsible agencies to issue permits and approvals for future project routes. When Applicant knows the precise location of the customers it will serve, it will submit a project description and construction work plan to the Commission, which must demonstrate that it was coordinated with all lead and responsible agencies, obtained all local permits, and complied with the local public notification process. The Commission will review the construction work plan, and if all requirement

⁵ *Second Supplement to Application of WilTel Communications, LLC to Amend its Certificate of Public Convenience and Necessity on an Interim Basis and Request for Expedited Ex Parte Relief*, filed January 27, 2005 (Second Supplement).

and performance criteria are met, it will issue a Notice to Proceed with Construction.⁶

However, on March 8, 2005, WilTel sent another letter to the ALJ withdrawing its Second Supplement and indicating that it wished the Commission to render a decision solely on WilTel's original application and the July 9, 2004 First Supplement.⁷ We analyze the application on that basis below.

C. Discussion

WilTel has already built certain aspects of its fiber optic telecommunications network in California pursuant to various Commission decisions.⁸ With this application, it seeks blanket authorization, without individualized Commission CEQA review, of

spurs directly or indirectly connecting its backbone network to new locations so long as

- All construction is no more than five miles in length;
- All construction is done inside existing rights of way;
- WilTel notifies the Commission staff of each qualifying construction project prior to commencing construction; and
- WilTel fully complies with any CEQA review required by local permitting agencies.

⁶ D.04-12-011, *mimeo.*, at 3–4.

⁷ The March 8, 2005, letter appears as Appendix B to this decision. We grant WilTel leave to withdraw the Second Supplement.

⁸ See D.99-05-022, D.99-10-062, D.00-06-035, D.01-08-052 and D.03-03-029.

WilTel claims that we have authorized other carriers to construct new facilities within existing rights of way without modifying their CPCN.⁹ Prior to D.99-10-025 we issued “full-facilities based” CPCNs¹⁰ that allowed carriers to build within utility rights of way as long as they complied with the mitigation measures set forth in Mitigated Negative Declarations intended to address potential environmental impacts of construction within rights of way. These Mitigated Negative Declarations were not project specific, but attempted to mitigate anticipated impacts that would generally occur in rights of way.

However, in D.99-10-025, citing concerns raised by a number of public agencies regarding the adequacy of implementing CEQA without reviewing specific projects, the Commission suspended the process of issuing facilities-

⁹ WilTel’s Application at page 10 cited D.98-01-006 and D.00-06-018 as examples of granting Level 3, another carrier, a CPCN that allowed it build in rights of way without further Commission review. Neither of these decisions addresses Level 3’s authority to construct telecommunications facilities or its compliance with CEQA. We assume WilTel means D.98-03-066 and D.00-08-016.

D.98-03-066 granted Level 3 authority as both a NDIEC and a CLC to operate as a facilities based carrier and to construct projects within rights of way based on a Mitigated Negative Declaration intended to address generic impacts of projects built in rights of way. The Commission halted this approach in D.99-10-025 after receiving criticism from various public agencies, including the Department of Justice. D.00-08-016 granted Level 3 additional authority to undertake specified network construction outside of the right of way. In that case, Level 3 submitted a project specific proponent’s environmental assessment (PEA) and the Commission engaged an environmental consultant to evaluate the impact of the proposed fiber optic build-out.⁹ We received and took into account comment from several agencies with jurisdiction over the state’s natural resources. We prepared and adopted a Subsequent Mitigated Negative Declaration to require additional project-specific mitigation measures.

¹⁰ All carriers were required to meet the Commission’s financial and other operating requirements.

based CPCNs without reviewing individual projects.¹¹ In D.99-12-048 and D.99-12-050 the Commission stopped the process of issuing facilities based CPCN's without project specific review, and indicated its intent to review the impact on the industry in the near future. The Commission opened R.00-02-003 and accepted comments, but has not moved forward with leveling its application of CEQA for all carriers.

WilTel now proposes that we construe its CPCN as authorizing unspecified construction on a state-wide basis in areas stretching as far as five miles from any given point. It has not identified or submitted a PEA for the proposed builds, specified areas that may have previously received environmental review, or asked that we study the potential environmental impact of the construction in the new areas. With the exception of the five-mile length limit, this is the same type of CPCN that the Commission terminated in 1999 in response to criticism from the California Department of Justice and others that such blanket authority did not comply with CEQA.

We acknowledge WilTel's assertion that we have historically treated various types of telecommunications carriers differently in the level of CEQA analysis we apply to their construction activities. This difference is not a function of any conscious effort to apply different environmental review standards to different carriers. Instead, the difference flows from the fact that CEQA applies to "discretionary" agency decisions, such as approval of a utility

¹¹ In addition to the Department of Justice, other public agencies that raised issues relating to the generic Mitigated Negative Declaration included the Department of Parks and Recreation, Management Division, the Business, Transportation and Housing Agency, the Department of Transportation and the Department of Fish and Game. D.99-12-048, n.1.

application that has the potential to cause either a direct or reasonably foreseeable physical change in the environment.¹² We only are presented with a “discretionary decision” – the type of decision to which CEQA applies – with regard to some carriers’ applications. Where carriers need not request a discretionary decision, CEQA, by its terms, does not apply. Indeed, in opening the rulemaking WilTel cites, Rulemaking (R.) 00-02-003, we acknowledged this disparity:

Recent improvements in our CEQA program may have inadvertently created inequities among carriers and highlight existing inequities. Although D.99-12-048 and D.99-12-050 require new CLECs to be subject to more stringent CEQA review, local exchange carriers with pre-existing authority have not been required to submit to that oversight. Incumbents, such as Pacific Bell, AT&T and cellular carriers need no CEQA review for new facilities construction because we currently have no “discretionary decision” (*see, e.g.* Public Resources Code Section 21080) that would trigger CEQA review. Disparate regulatory treatment of new and existing carriers raises issues regarding fairness and whether carriers have an equal opportunity to compete.¹³

WilTel correctly observes that we have not yet resolved the disparity we acknowledged in R.00-02-003. Those carriers who received CPCN’s prior to the Commission’s 1999 decisions to stop issuing CPCNs that were criticized as not complying with CEQA continue to operate under their original authority while carriers granted authority after 1999 are subject to certain heightened review. Nevertheless, giving WilTel the relief it requests would resume a practice that

¹² CEQA Guidelines §§ 15268, 15369, 15378.

¹³ 2000 Cal. PUC LEXIS 96, at *2-3.

the Attorney General criticized as failing to comply with CEQA,¹⁴ a state law that is binding on all California state agencies.¹⁵ Thus, we will not grant blanket authority to build within a right of way unless we establish a record that supports the practice in a broader Commission proceeding or otherwise develop appropriate environmental compliance criteria that could be applied industry wide.

¹⁴ Nor is it appropriate to refrain from conducting CEQA analysis on the assumption that local agencies will perform the analysis. It is not at all clear that WilTel will be required to obtain a discretionary decision from any particular local entity to do the work it proposes, or that the local entity will perform environmental review. Even if local entity did perform CEQA review, we would still be required to review that environmental assessment as a Responsible Agency under CEQA prior to granting WilTel the authority it seeks here.

¹⁵CEQA Guidelines Section 15000, Public Resources Code Section 21083.

We are nevertheless mindful of WilTel's request that we avoid "needless and lengthy" reviews of projects in disturbed rights of way.¹⁶ WilTel's Application and supplements describe activities that may be exempt from further CEQA compliance under one or more exemptions available under the CEQA Guidelines, including the infill exemption,¹⁷ and some of the exemptions related to existing facilities,¹⁸ replacement or reconstruction,¹⁹ new construction or conversion of small structures,²⁰ minor alteration to land,²¹ or where it can be seen with certainty that there is no possibility that the project will have a significant effect on the environment.²² At this time we do not make any finding regarding the applicability of any of these potential exemptions since their applicability must be determined on a fact specific and case by case basis.

When WilTel proposes to build a specific spur connecting a customer to its backbone that it believes is exempt from further CEQA compliance, it may submit the proposed spur, the proposed exemption and documentation

¹⁶ July 9, 2004 Supplement, p. 3.

¹⁷ D.03-12-017 found that construction proposed by Zephyr Communications was exempt from further CEQA review where the project was consistent with all general plan and zoning requirements, occupied a site of less than five acres entirely within city limits and surrounded by urban uses, was not on a site of value for endangered, rare or threatened habitat, project approval would not result in significant impacts on traffic, noise, air quality, or water quality, and the site could be adequately served by all required utilities and services.

¹⁸ CEQA Guidelines Section 15301.

¹⁹ CEQA Guidelines Section 15302.

²⁰ CEQA Guidelines Section 15303.

²¹ CEQA Guidelines Section 15304.

²² CEQA Guidelines Section 15061(b)(3).

supporting the exemption to the Director of the Energy Division or his designee. We delegate to the Director of the Energy Division the authority to develop the precise details of this process, but we envision written procedures along the lines of those set forth in Attachment A to this Decision whereby WilTel would submit in writing enough information to allow staff to make a reasonable determination of exemption. Thus, we would expect the required information to include the precise location of the spur and customer(s) to be served, a project description and construction work plan, a description of the area in question, a statement of the CEQA exemptions that it believes apply, and documentation, evidence and/or factual information sufficient to support application of the claimed exemption.²³ Energy Division will review proposed projects to determine whether they are in fact exempt from further CEQA compliance within 21 days or less, then for those projects that are in fact exempt, issue a Notice to Proceed to WilTel and file a Notice of Exemption with the State Clearinghouse. We grant this interim relief to WilTel and any other carrier that believes its proposed telecommunications projects are exempt from additional CEQA review until we develop industry wide procedures in the still pending OIR to consider appropriate CEQA requirements for other telecommunications carriers.

²³ For some of the exemptions, this includes documentation that none of the exceptions to the exemption apply. CEQA Guidelines Section 15300.2.

C. Categorization and Need for Hearings

In Resolution ALJ 176-334 dated May 27, 2004, the Commission preliminarily categorized this application as ratesetting, and preliminarily determined that hearings were not necessary. No protests have been received. Given this status public hearing is not necessary and it is not necessary to alter the preliminary determinations made in Resolution ALJ 176-3134.

D. Comments on Draft Decision

The draft decision of the Administrative Law Judge in this matter was mailed to the parties in accordance with Rule 77.6(d) of the Rules of Practice and Procedure. Comments were filed on _____, and reply comments were filed on _____.

E. Assignment of Proceeding

Michael R. Peevey is the Assigned Commissioner and Sarah R. Thomas is the assigned Administrative Law Judge in this proceeding.

Findings of Fact

1. WilTel seeks authorization to build portions of its fiber optic network in areas we have not studied for environmental impact.
2. No protests have been filed.
3. A hearing is not required.
4. The area for which WilTel seeks exemption from the requirement of CEQA review could extend as much as five miles from any given point.
5. We have to make a discretionary decision to allow WilTel to modify its CPCN.
6. We have not resolved the issues raised in R.00-02-003.

Conclusion of Law

We cannot make the change to our rules WilTel proposes without a rulemaking designed to establish procedures for an entire industry sector, but in the interim, we authorize the Director of the Energy Division, or the Director's designee to review proposed projects for which an exemption from CEQA is claimed.

O R D E R**IT IS ORDERED** that:

1. The Application of WilTel Communications, LLC to Amend its Certificate of Public Convenience and Necessity on An Interim Basis and Request for Expedited *Ex Parte* Relief, is denied, without prejudice to WilTel's right to reapply for approval to perform its proposed construction under changed circumstances.
2. The Director of Energy Division or the Director's designee is authorized to review proposed telecommunications projects that a telecommunications carrier claims are exempt from CEQA to determine whether the projects are in fact exempt, and to issue a "Notice to Proceed" to the carrier, and to file a "Notice of Exemption" with the State Clearinghouse, following the procedures set forth in Appendix A.
3. The authority granted herein is interim and will expire upon the issuance of a final decision in either R.00-02-003 or similar rulemaking promulgating CEQA rules applicable to all facilities-based telecommunications carriers.

4. This proceeding is closed.

This order is effective today.

Dated _____, at San Francisco, California.

Appendix A

Procedure for Obtaining CEQA Exemption

- Applicant reviews proposed project to determine that no conditions exist to warrant exceptions to an exemption pursuant to CEQA Guidelines 15300.2
- Applicant submits the following to the Energy Division:
 - A detailed description of the proposed project, including:
 - Customer(s) to be served
 - The precise location of the proposed construction project
 - Regional and local site maps
 - A description of the environmental setting, to include at a minimum:
 - Cultural, historical, and paleontologic resources
 - Biological resources
 - Current land use and zoning
 - A construction workplan, to include:
 - Pre-Construction Survey Checklist – Archaeological Resources (attached)
 - Pre-Construction Survey Checklist – Biological Resources (attached)
 - 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
 - A list of permits required for the proposed project
 - A statement of the CEQA exemption(s) applicable to the proposed project
 - Documentation and factual evidence sufficient to support a finding that the claimed exemption(s) is (are) applicable
- Energy Division will review the Applicant's submission for the proposed project to confirm that the claimed exemption(s) from CEQA are applicable
- Within 21 days from the date of Applicant's submittal Energy Division will issue either:
 - A Notice to Proceed and file a Notice of Exemption with the State Clearinghouse, Office of Planning and Research, or
 - A letter of denial stating the specific reasons why the claimed exemption(s) are not applicable to the proposed project.

California Public Utilities Commission

Preconstruction Survey Checklist – Archaeological Resources

Date: _____

Name of Applicant: _____

Utility ID: _____

Location (Address, Provide Map):

Route
Description: _____

Area Description:

Photo Documentation: Yes

No

- Urban
- Suburban
- Rural

Substrate:

- Asphalt/Concrete
- Soil
- Other:

Archaeological Resources:

- Yes No CHRIS Records Search
- Yes No Request NAHC contact list and query Sacred Lands File
- Yes No Contact Parties on the NAHC list by letter and phone (identify concerns and sites)
- Yes No Site visit/survey (identify architectural, historic, and prehistoric resources)

Notes and Recommendations:

California Public Utilities Commission

Preconstruction Survey Checklist – Biological Resources

Date: _____

Name of Applicant: _____

Utility ID: _____

Location (Address, Provide Map):

Route Description:

Area Description:

- Urban
- Suburban
- Rural

Photo Documentation: Yes No

Substrate:

- Asphalt/Concrete
- Soil
- Other: _____

Permits Required:

USACE	<input type="checkbox"/> Yes	<input type="checkbox"/> No	NMFS	<input type="checkbox"/> Yes	<input type="checkbox"/> No
RWQCB	<input type="checkbox"/> Yes	<input type="checkbox"/> No	USFWS	<input type="checkbox"/> Yes	<input type="checkbox"/> No
CDFG	<input type="checkbox"/> Yes	<input type="checkbox"/> No	Regional Air Quality	<input type="checkbox"/> Yes	<input type="checkbox"/> No
State Lands Commission	<input type="checkbox"/> Yes	<input type="checkbox"/> No	Local Counties and Cities	<input type="checkbox"/> Yes	<input type="checkbox"/> No

CERTIFICATE OF SERVICE

I certify that I have by *U.S. mail*, served to the parties of which an electronic mail address has been provided, a true copy of the original attached *Order Adopting Rules for Utility Construction Contracting* on all parties of record for proceedings A.04-05-017 or their attorneys of record.

Dated June 20, 2005, at San Francisco, California.

/s/ DAVID NG

David Ng

N O T I C E

Parties should notify the Process Office, Public Utilities Commission, 505 Van Ness Avenue, Room 2000, San Francisco, CA 94102, of any change of address to insure that they continue to receive documents. You must indicate the proceeding number on the service list on which your name appears.

The Commission's policy is to schedule hearings (meetings, workshops, etc.) in locations that are accessible to people with disabilities. To verify that a particular location is accessible, call: Calendar Clerk (415) 703-1203.

If specialized accommodations for the disabled are needed, e.g., sign language interpreters, those making the arrangements must call the Public Advisor at (415) 703-2074, TTY 1-866-836-7825 or (415) 703-5282 at least three working days in advance of the event.