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Decision 10-10-007 October 14, 2010

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application of NextG Networks of California, Inc. (U6745C) for Authority to Engage in Ground-Disturbing Outside Plant Construction.	Application 09-03-007 (Filed March 3, 2009)
And Related Matter.	Case 08-04-037 (Filed April 23, 2008)

DECISION DENYING COMPLAINT, ADOPTING NEGATIVE DECLARATION, AND APPROVING APPLICATION

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Appendix A – Extract from "Joint Ruling of the Assigned Commissioner and Assigned Administrative Law Judge Regarding Motion to Dismiss" (Nov. 6, 2008)

DECISION DENYING COMPLAINT, ADOPTING NEGATIVE DECLARATION, AND APPROVING APPLICATION

1. Summary

Today's decision disposes of these two consolidated proceedings. The complaint by the City of Huntington Beach (Case 08-04-037) challenges certain proposed construction of antennas and other facilities by defendant NextG Networks of California, Inc. (NextG). The subsequent application of NextG seeks our formal environmental review and authorization of these facilities. We conclude that Huntington Beach's challenges are all legally flawed, and we dismiss its complaint. We also conclude that NextG's proposed construction is authorized under Certificates of Public Convenience and Necessity we previously granted to NextG. In addition, we confirm that the Notice to Proceed earlier issued by our staff regarding the proposed construction was proper under our rules and not affected by NextG's subsequent application for formal review of the construction in Huntington Beach. Finally, we adopt the Negative Declaration prepared by our staff under the California Environmental Quality Act following NextG's application. These proceedings are closed.

2. Factual Background

2.1. NextG's Operating Authority

NextG Networks of California, Inc. (NextG) builds and owns fiber optic networks. However, NextG does not directly serve the end-use customers whose calls are carried over NextG's networks. Instead, NextG sells capacity on its networks to other companies, who use the capacity, in conjunction with other facilities, to serve their end-use customers. NextG is thus a "carrier's carrier."

NextG first sought operating authority in California by Application (A.) 02-09-019, where it requested a Certificate of Public Convenience and

Necessity (CPCN) to provide limited facilities-based and resale competitive local exchange services and interexchange (long distance) services. We granted this authority.[1] We conditioned the authority in various ways, for example, requiring NextG to comply with rules adopted in Local Exchange Competition proceeding (Rulemaking (R.) 95-04-043/Investigation (I.) 95-04-044) and rules for non-dominant interexchange carriers set forth in D.93-05-010 and D.90-08-032.[2]

In A.06-05-031, NextG sought to expand its existing CPCN to include full facilities-based telecommunications services, specifically, for local exchange services. We granted the expanded authority.[3] In so doing, we noted that "NextG provides radiofrequency transport services for wireless carriers and constructs transport networks consisting of a central switch-like hub and a system of fiber optic cables, remote nodes, and small antennas attached to poles and other structures."[4] We also noted that NextG's intended projects would take place in existing rights-of-way and in utility easements, and that associated construction would include "a limited number of new poles, … small-scale trenching and underground conduit installation of up to five miles, and … micro-trenching and installation of laterals of up to 25 feet."[5] As we did in D.03-01-061, we conditioned the new authority on NextG's compliance with Commission rules and requirements for competitive carriers.[6]

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[1] *See* Decision (D.) 03-01-061 at 6, Ordering Paragraph 1.

[2] *See id.* at 7, Ordering Paragraph 6.

[3] *See* D.07-04-045 at 15, Ordering Paragraph 1.

[4] *Id.* at 2.

[5] *Id.* at 4.

[6] *See id.* at 17, Ordering Paragraphs 7, 11, and 12.

NextG applied for rehearing of D.07-04-045, and we denied rehearing in D.07-07-023, making no modification to the underlying decision. The League of California Cities (Cities) and the City and County of San Francisco (CCSF) had protested A.06-05-031 but did not apply for rehearing of D.07-04-045. Subsequently, both NextG and Cities petitioned for modifications to D.07-04-045; we denied their petitions in D.08-08-010. Thus, despite the subsequent litigation, NextG's authority granted by the Commission continues to be as set forth in the two CPCN decisions, namely, D.03-01-061 and D.07-04-045.

2.2. NextG's Project in Huntington Beach

The construction by NextG in Huntington Beach to which that city objects is part of a larger project running from the City of Westminster through Huntington Beach and the City of Fountain Valley to the Pacific Coast Highway. The project as a whole consists of a fiber optic network that includes about 28.2 miles of aerial networks and 1.8 miles of underground network, all to be located in public rights-of-way within these three cities.

NextG has completed all necessary construction in Westminster and Fountain Valley; only the part of the project located in Huntington Beach remains unfinished. NextG built the parts of the project outside Huntington Beach after NextG requested and received a Notice to Proceed (NTP) from the Commission's environmental staff. By issuing the NTP, staff confirmed that NextG's project is exempt from review under the California Environmental Quality Act (CEQA).[7] The NTP was for all of NextG's project, including the proposed construction in Huntington Beach.

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[7] NTPs are part of an expedited 21-day review process that the Commission has authorized for various facilities-based telecommunications carriers. The Commission

Footnote continued on next page

3. Procedural Background

3.1. Huntington Beach's Complaint (Case 08-04-037)

Shortly after staff issued its NTP, Huntington Beach contacted staff to voice concerns about NextG's project. Huntington Beach followed up with an informal appeal against the NTP. Staff instructed NextG by letter not to pursue the project while staff was investigating Huntington Beach's concerns. Finally, staff notified NextG by letter that the project was consistent with activities identified by the Commission as categorically exempt from CEQA. The letter rescinded the temporary suspension of the NTP during the pendency of Huntington Beach's informal appeal.[8]

Huntington Beach then filed the above-captioned formal complaint. According to the complaint, NextG's Huntington Beach construction, including three new utility poles and an additional 19 miles of fiber optic cable, would necessitate hundreds of street closings and temporary lane closures. Also, the project would require the routing of aerial cables through mature street trees, so that either the trees would have to be removed or wires run into the street. The complaint pleaded the following three causes of action:

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devised the process to determine whether a construction project that the carrier believes to be exempt from CEQA is entitled to the claimed exemption. If Commission staff agrees that the project is exempt, staff issues its NTP. The Commission has authorized NextG to use the 21-day review process. *See* D.07-04-045 at 15-17, Ordering Paragraphs 3-5.

[8] The chronology of these events is as follows: (1) on November 12, 2007, NextG submitted to staff a Notice of Proposed Construction; (2) on December 3, 2007, staff issued its NTP; (3) on or about December 4, 2007, Huntington Beach contacted staff; (4) on or about December 24, 2007, Huntington Beach submitted its informal appeal; (5) on January 4, 2008, staff issued its NTP suspension; and (6) on March 14, 2008, staff rejected the informal appeal and lifted the suspension.

- First Cause of Action (Violation of CEQA). Here, Huntington Beach denies that NextG's project falls within the categorical CEQA exemptions cited by NextG. Consequently, NextG may not proceed with project on the basis of the NTP, which was legally deficient in that it failed to consider the project as a whole and lacked substantial evidence.
- Second Cause of Action (Violation of Huntington Beach Undergrounding Ordinance). Here, Huntington Beach asserts that in the 2007 amendment to its undergrounding ordinance, it prohibited new utility poles installed to support placement of antennas in the public right-of-way. In D.07-04-045, the Commission authorized NextG to install antennas on the new poles only where local ordinances authorize utilities to install new communication poles in the public right-of-way. Consequently, the NTP issued for this project is inconsistent with D.07-04-045, and NextG may not proceed with the project on the basis of the NTP.
- Third Cause of Action (Inapplicability of Public Utilities Code Section 7901). Huntington Beach acknowledges that this statute authorizes a "telephone corporation" to use public rights-of-way. However, Huntington Beach argues that NextG may not rely on this statute, because (1) the Commission has never determined, as a matter of law, that NextG is a "telephone corporation," and (2) the statute applies only to land line carriers. Huntington Beach asserts that NextG is not operating as a land line carrier but as a wireless carrier whose project is in fact an extension of the cellular service provider(s) that would utilize the new facilities.[9]

NextG answered the complaint and moved to dismiss. The assigned Commissioner and assigned Administrative Law Judge (ALJ), by Joint Ruling on

[9] We note that under Section 1 of our General Order 159A, a "cellular service provider," as defined in Section 3 of that general order may not begin construction in California of any cell site or Mobile Telephone Switching Office "without first having obtained all requisite land use approvals required by the relevant local government agency."

November 6, 2008, denied NextG's motion to dismiss as to the first two causes of action. However, as to the third cause of action (inapplicability of Pub. Util. Code § 7901), the Joint Ruling found that, as a matter of law, NextG is a telephone corporation, and is entitled under Section 7901 to use the public rights-of-way for its operations to the extent consistent with the terms of its CPCN and applicable law.

3.2. NextG's Application (A.09-03-007)

Following the Joint Ruling, the assigned ALJ directed the parties to meet and confer for the purpose of further narrowing or resolving the remaining issues. The meet-and-confer resulted in a stipulation filed December 26, 2008. The following are the key terms of the stipulation:

- In order to resolve the disputed issues in this proceeding, NextG agreed to file a formal application for approval of the current project plan and a Proponent's Environmental Assessment (PEA), as consistent with Rule 2.4 of the Commission's Rules of Practice and Procedure, rather than pursuing the project based solely on the NTP.
- The parties jointly requested that the Commission, as the Lead Agency for the project under CEQA, prepare a Negative Declaration, a Mitigated Negative Declaration, or an Environmental Impact Report for the project.
- In reviewing the PEA, Commission staff would consult with and obtain comments from all Responsible Agencies under CEQA, including Huntington Beach and other applicable local jurisdictions.
- The parties reserved the right to make arguments in support of or in opposition to the certification of the environmental document prepared by the Commission for the project and for or against Commission approval of the project.
- The only disputed issues to be determined by the Commission in this proceeding are:

  - Whether the Joint Ruling dismissing the third cause of action should be affirmed or reversed by the full Commission;
  - Whether the Commission should certify the environmental document prepared for the project and, if so, what, if any, mitigation measures should be required; and
  - Whether the Commission should approve the project.
- This proceeding would not adjudicate the validity of Huntington Beach's undergrounding ordinance, wireless ordinance, or other ordinances or regulations.
- The Commission's approval of the project and/or certification of the environmental document for the project will not exempt or excuse NextG from complying with any and all valid local ordinances or regulations, including but not limited to Huntington Beach's undergrounding ordinance, wireless ordinance, or other ordinances or regulation.
- NextG may challenge the validity of Huntington Beach's ordinances or regulations in any federal or state court of law, and is currently challenging the validity of Huntington Beach's undergrounding ordinance in court.

Pursuant to the stipulation, NextG filed this application and concurrently filed its PEA. Huntington Beach protested the application on the following grounds.

- The project, as proposed in the application, would violate Huntington Beach's undergrounding ordinance.
- NextG has not yet sought land use entitlements from Huntington Beach, which may require NextG to relocate its antennas to comply with Huntington Beach's wireless ordinance. Thus, the project as approved by Huntington Beach may differ from the project as proposed in the application.

- NextG's PEA does not adequately address the environmental impacts of the project.

There was a round of pleadings following the protest, after which the assigned ALJ consolidated the complaint with the application and denied Huntington Beach's request to stay these proceedings pending the conclusion of state court litigation between the parties. The assigned Commissioner and assigned ALJ jointly issued a new scoping memo. Among other things, they confirmed the Commission's initial determination that no hearing was necessary in the application. In rejecting Huntington Beach's request for an evidentiary hearing, they noted that Huntington Beach would have multiple opportunities to participate in the Commission's environmental review process, and that aside from that process, neither party had identified material factual issues in dispute. They also confirmed, consistent with the parties' stipulation, that the Commission would not adjudicate in these proceedings the validity of the undergrounding, wireless, or other ordinances or regulations adopted by Huntington Beach.[10]

3.3. Environmental Review of NextG's Project

Our environmental review began with consideration of the completeness of the project application. By letter to NextG on May 21, 2009, our environmental staff gave notice that it found the application to be complete. Staff also hired a consultant to perform the Initial Study and draft the appropriate environmental

[10] As noted above, the stipulation recited that NextG might bring court challenges to Huntington Beach's ordinances or regulations, and in fact was already challenging the undergrounding ordinance in state court.

document (Negative Declaration, Mitigated Negative Declaration, or Environmental Impact Report).

NextG, as applicant and project proponent, described the project as the "Huntington Beach Distributed Antennae System (DAS) Project." The stated purpose of the project is to transmit wireless voice and data communications to clients in Huntington Beach.[11] Upon completion, the project will "provide added diversity within the existing telecommunications network and enhance competition for telecommunication services."[12] The project will also "permit NextG's customers – the wireless carriers – to improve wireless coverage and expand capacity."[13] The project is to be constructed entirely within the public right-of-way in Huntington Beach.[14]

In the process of preparing the Initial Study and the Negative Declaration, our staff and the consultant worked with the state and local agencies that, under CEQA, would have input as Responsible Agencies; these included Huntington Beach. Staff also noticed and held two public comment meetings, one in August 2009 (before any CEQA document had been circulated), and one in December 2009 (following publication of the Draft Negative Declaration).

On November 19, 2009, staff published the Draft Negative Declaration for a 30-day comment period. The draft elicited no written comment from members

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[11] Final Negative Declaration (February 2010) at 1.

[12] *Id.*

[13] *Id.*

[14] *Id.*

of the general public.[15] Written comments were submitted by Huntington Beach, NextG, and three state agencies (the Department of Toxic Substances Control, the Department of Transportation, and the State Clearinghouse and Planning Unit of the Governor's Office of Planning and Research). The comments and responses to the comments are in the Final Negative Declaration.

The Final Negative Declaration was published on February 26, 2010. In response to comments, a few corrections were made to descriptions of certain construction activities, such as depth of trenches. However, both the Draft and Final Negative Declarations conclude NextG's project would have no significant environmental impacts:

> Based on the Initial Study, the project as proposed by NextG, including the Applicant Proposed Measures, would have no significant impacts in the areas of aesthetics, agricultural resources, air quality, biological resources, cultural resources, geology and soils, hazards and hazardous materials, hydrology and water quality, land use and planning, mineral resources, noise, population and housing, public service, recreation, transportation and traffic, and utilities and service systems.[16]

4. Discussion: Huntington Beach's Complaint

As we explain below, we are denying Huntington Beach's complaint. Huntington Beach and NextG stipulated that in resolving these consolidated proceedings, today's decision should address only three disputed issues. We first take up the one issue that is specific to the complaint. This is the issue that the assigned Commissioner and assigned ALJ, in their Joint Ruling, have already

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[15] At the December 2009 public meeting, one local resident offered brief oral comments in which he opposed the installation of fiber optic line on his street.

[16] *Id.* at 9.

determined against Huntington Beach, namely, NextG's status as a "telephone corporation" and its entitlement as such to use public rights-of-way under Pub. Util. Code § 7901.[17] Although our analysis elaborates on certain points, we emphasize that we are here affirming the Joint Ruling as to both its reasoning and its result on this issue.

4.1. Reasonably Construed, the Commission CPCN Decisions Granted Operating Authority to NextG as a Public Utility Telephone Corporation

The Commission has granted two CPCNs to NextG, first in D.03-01-061 (issued January 31, 2003) and second in D.07-04-045 (issued April 12, 2007). The earlier-conferred operating authority allowed NextG to operate as "a limited facilities-based and resale provider of competitive local exchange services, and interexchange services…"[18] The later-conferred operating authority allowed NextG to operate as "a full facilities-based provider of local exchange services" in the territories of California large and mid-sized incumbent local exchange telephone companies.[19]

Neither decision defines terms such as "telecommunications," "local exchange," and "interexchange," but the Commission has used them consistently and uniquely to describe telephone service in its administrative common law comprising hundreds of decisions. Similarly, terms like "competitive,"

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[17] The relevant part of the Joint Ruling is attached to today's decision as Appendix A.

[18] D.03-01-061 at 7, Ordering Paragraph 1.

[19] D.07-04-045 at 15, Ordering Paragraph 1. The specified incumbent local exchange companies with which NextG was now authorized to compete were Pacific Bell Telephone Company, Verizon California Inc., SureWest Telephone, and Citizens Telephone Company.

"facilities-based," and "resale" are used by the Commission to distinguish among the vast array of telephone "carriers" or "service providers" that emerged following the break-up of the former Bell System in 1984. It is not necessary or useful to provide a comprehensive list of decisions, but among the most notable for present purposes are D.90-08-032 (where the Commission adopted rules for "non-dominant" interexchange carriers), D.95-12-056 and D.96-02-072 (where the Commission set terms and conditions for local exchange service competition), and D.98-10-058 (where the Commission determined that "telecommunications carriers," including competitive local carriers, were entitled to construct "telephone lines," and otherwise make use of the public right-of-way, pursuant to Pub. Util. Code § 7901).

Huntington Beach denies that NextG derives any authority under Pub. Util. Code § 7901 to use the public right-of-way. In essence, Huntington Beach argues that (1) the Commission has never determined NextG to be a "telephone corporation" within the meaning of the statute, and (2) the statute was intended to grant public right-of-way access only to landline telephone companies operating in 1905, not to a wireless carrier (which Huntington Beach believes NextG to be).

We hold that NextG is now, and has been continuously since we granted its first CPCN, a "telephone corporation" within the meaning of Pub. Util. Code §§ 234(a) and 7901. We necessarily determined this issue when we granted each CPCN, as we further explain below.

The Commission's jurisdiction over public utilities is constitutional.[20] The Legislature has "plenary power…to confer additional authority and jurisdiction" on the Commission,[21] including even to create additional classes of private corporations that are public utilities.[22] In contrast, the Commission can establish its own procedures,[23] but it is limited to the jurisdiction it derives from the Constitution and statutes.

The Legislature has expressly charged the Commission with authority to issue a "certificate" (that is, a CPCN) to a company seeking to provide service as a public utility in California.[24] Consistent with the constitutional and statutory limitations on its jurisdiction, the Commission can issue a CPCN only to a public utility of one of the types listed in Pub. Util. Code § 1001.[25] It follows that the Commission's CPCN process necessarily includes a determination by the Commission of a company's public utility status.

The plain language of D.03-01-061 and D.07-04-045, in which we granted CPCNs to NextG, can only be construed to treat NextG as a telephone corporation. No legal or technical expertise is required to reach that conclusion.[26]

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[20] Cal. Const., Art. XII.

[21] *Id.*, Section 5.

[22] *Id.*, Section 3.

[23] *Id.*, Section 2.

[24] *See* Pub. Util. Code § 1001.

[25] The listed entities are: a railroad corporation primarily operated by electric energy, a street railroad corporation, a gas corporation, a telegraph corporation, a telephone corporation, a water corporation, and a sewer system corporation.

[26] Of course, terms like "interexchange" and "local exchange" are commonplace within the regulated industry, but our point is that even without specialized knowledge, the

Footnote continued on next page

For example, the decisions refer repeatedly to "telecommunications" services to be provided by NextG, including services specifically intended to compete with those provided by certain other telephone companies. The term "telecommunications" is commonly and ordinarily understood to include telephone service, and that was true long before the restructuring of the telephone industry beginning in the 1980s.[27]

Moreover, the Legislature, like the Commission, has frequently used "telecommunications" to describe the services provided by telephone corporations. *See*, e.g., Pub. Util. Code § 495.7, subdivisions (a) and (b):

> (a) The commission may, by rule or order, establish procedures to allow telephone or telegraph corporations to apply for the exemption of certain telecommunications services from the tariffing requirements of Sections 454, 489, 491, and 495.
>
> (b) The commission may, by rule or order, partially or completely exempt certain telecommunications services, except basic exchange service offered by telephone or telegraph corporations, from the tariffing requirements of Sections 454, 489, 491, and 495 if either of the following conditions is met:

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decisions are easily understood to refer to telephone services to be provided by a telephone corporation.

[27] *See*, *e.g.*, Webster's Seventh New Collegiate Dictionary (1963 ed.), defining "telecommunication" as "communication at a distance (as by cable, radio, telegraph, telephone, or television)." In the context of our CPCN decisions for NextG, from the list in the dictionary definition, only "telegraph" and "telephone" could qualify for a CPCN, and nothing in these CPCN decisions suggests that NextG is a telegraph corporation. (In telegraph service, a key interrupts an electric current in a prescribed on-off code. *See* D.82-06-005, 9 CPUC2d 276, 279.) Even if NextG were a telegraph corporation, Huntington Beach's argument would fail, because telegraph corporations, like telephone corporations, are entitled to use the public right-of-way under Pub. Util. Code § 7901.

> (1) The commission finds that the telephone corporation lacks significant market power in the market for that service for which an exception from Section 454, 489, 491, and 495 is being requested. Criteria to determine market power shall include, but not be limited to, the following: company size, market share, and type of service for which an exemption is being requested. The commission shall promulgate rules for determining market power based on these and other appropriate criteria.
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> (2) The commission finds that a telephone corporation is offering a service in a given market for which competitive alternatives are available to most consumers, and the commission has determined that sufficient consumer protections exist in the form of rules and enforcement mechanisms to minimize the risk to consumers and competition from unfair competition or anticompetitive behavior in the market for the competitive telecommunications service for which a provider is requesting an exemption from Sections 454, 489, 491, and 495. This paragraph does not apply to monopoly services for which the commission retains exclusive authority to set or change rates.

Similarly, in Pub. Util. Code § 709 et seq., "telecommunications" denotes the activity of telephone corporations.[28]

In sum, NextG's CPCNs authorize it to provide various telecommunications services, which in Commission usage, statutory usage, and common usage, means telephone services. The only kind of entity that the Commission could have authorized to provide such services is a telephone corporation.

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[28] Both Pub. Util. Code § 495.7 (added by Stats. 1995, c.809) and § 709 *et seq.* (originally added by Stats. 1987, c.1274, and amended many times since) were enacted long before the Commission had issued its first CPCN to NextG.

Huntington Beach's theory that NextG is a wireless (or cellular) carrier, rather than a landline (or wireline) carrier is inherently at odds with the Commission's decision granting CPCNs to NextG. Under prior federal statute, states are pre-empted from regulating market entry of wireless carriers, so the Commission's grants of a CPCN to NextG necessarily determine that NextG is not a wireless carrier.[29]

Huntington Beach reasons that NextG primarily provides radiofrequency transport services for NextG's wireless carrier customers, therefore NextG itself is a wireless carrier. The reasoning is faulty. That NextG provides transport for the signal of other carriers (a fact that NextG stated explicitly in both of its applications for CPCN) does not constitute it a wireless carrier, rather than a facilities-based carrier. Modern telephony relies on a mix of technologies and may be accomplished with or without transmission wires. The Legislature long ago recognized this fact when it defined "telephone line" to include all real or personal property operated or managed in connection with or to facilitate communication by telephone, regardless of whether the communication uses transmission wires.[30]

As well stated in the Joint Ruling that we affirm today, the plain language of the statutory definition of "telephone line" is sufficiently broad to include

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[29] *See* 47 U.S.C. Section 332, subdivision (c)(3)(A), enacted in 1993 and effective one year thereafter. The statute uses "commercial mobile service" rather than wireless or cellular. *See also* Pub. Util. Code § 216.8 (defining "commercial mobile radio service" to mean "commercial mobile service" as used in federal law).

[30] *See* Pub. Util. Code § 233. We also note that under Pub. Util. Code § 216(c), NextG is a public utility telephone corporation even though it does not directly provide telephone services to any retail customer but rather exclusively serves other telecommunications carriers that in turn serve retail customers.

facilities and equipment installed by carriers in connection with or to facilitate both wireless and landline telecommunications services. The plain language also suggests the Legislature intended to include a broad range of technologies within the definition of "telephone line."[31] We conclude that NextG is a public utility telephone corporation authorized under Pub. Util. Code § 7901 to use the public right-of-way for its operations to the extent consistent with its CPCNs and applicable law.

4.2. The Commission Has Already Determined in a Recent Case that NextG is Authorized to Provide Services Involving Construction in or on Utility Poles and Other Existing Structures.

Case 05-03-010, brought by CCSF against NextG, concerned a dispute with many factual similarities to the current case between Huntington Beach and NextG. In relevant part, CCSF argued that the "radiofrequency transport" services NextG was providing to wireless carriers were not authorized under NextG's CPCN (at the time, NextG held only the CPCN granted in D.03-10-061), and that NextG also was not authorized under its CPCN to install its facilities in the public right-of-way.[32] The Commission resolved both of these issues in NextG's favor.

Discussing the radiofrequency transport services NextG was providing to wireless carriers, the Commission noted that NextG's application for CPCN had

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[31] The Legislature has also stated its policy to promote modernization of California's telecommunications infrastructure by "encourag[ing] 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." Pub. Util. Code § 709(c).

[32] *See* D.06-01-006 at 2.

stated NextG would provide such services, and would not provide services to end-users. Based on the application, the Commission had granted NextG a CPCN to "operate as a limited facilities-based and resale provider of competitive local exchange services."[33] As the Commission explained, "We have found wholesale services to be competitive local exchange services [citing D.98-12-053, granting a CPCN to Southern California Edison Company to provide wholesale services to other telecommunications providers, including wireless carriers]. We have made no distinction between carriers providing wholesale services to wireline or wireless carriers or [to] certificated or uncertificated providers."[34]

Regarding NextG's right to install its facilities (specifically, microcells and antennas), the Commission concluded that placement of such facilities on existing utility poles and other existing structures was consistent with the limited facilities-based authority NextG held at that time.[35] The Commission also concluded, and NextG acknowledged, that NextG would have to apply for and obtain expanded authority before NextG could install its own utility poles.[36] Both of these conclusions speak to NextG's right to use the public right-of-way.

From our reading of D.06-01-006, we see only minor differences between NextG's project of which CCSF complained, and the project of which Huntington Beach now complains. Moreover, Huntington Beach has advocated legal theories that do not differ materially from CCSF's, insofar as both CCSF and

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[33] *Id.* at 3 (quoting D.03-01-061, Ordering Paragraph 1).

[34] *Id.* at 5.

[35] *See id.* at 2, as modified by D.06-07-036 (modifying and denying rehearing of D.06-01-006), Ordering Paragraph 1.a.

Huntington Beach try to limit NextG's operating authority on the basis of the technology that NextG uses or the customers that NextG serves. We conclude that D.06-01-006, with the modifications made in D.06-07-036, is a recent, on-point, and persuasive precedent that should guide us in resolving the present litigation.

4.3. The Commission Has Already Determined That Both Competitive Local Exchange Carriers and Interexchange Carriers are Public Utility Telephone Corporations Entitled to Make Reasonable Use of the Public Right-of-Way.

Our discussion in the preceding two sections of today's decision shows that we have previously determined with specific regard to NextG that it is a public utility and a telephone corporation, and that as such it is entitled to make use of the public right-of-way under Pub. Util. Code § 7901 to the extent consistent with its CPCNs. As we show next, we have also determined these issues generically for broad classes of carriers, including those classes to which NextG belongs by virtue of its CPCNs.

As we have noted, NextG is both a competitive local exchange carrier and an interexchange carrier. Our proceeding to develop rules for competition for local exchange services (R.95-04-043 consolidated with I.95-04-044) addressed, among much else, access to the public right-of-way. After discussing Pub. Util. Code §§ 7901 and 7901.1, we concluded that competitive local exchange carriers "are telephone corporations with all the rights of the incumbent LECs."[37] And

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[36] *See id.* at 11. In D.07-04-045, the Commission granted the expanded authority, as requested in NextG's A.06-05-031.

[37] D.98-10-058, 82 CPUC2d 510, 545.

we also stated "While local governments … may regulate the time, location, and manner of installation of telephone facilities in public streets, they may not arbitrarily deny requests for access by public utilities in public roads or highways that are located within the rights of way. [Pub. Util. Code § 7901] recognizes the rights of telecommunications carriers to obtain reasonable access to public lands and [rights of way] to engage in necessary construction."[38]

Another especially notable proceeding is R.05-04-005, in which we created a "Uniform Regulatory Framework" (URF) for telecommunications utilities. As the title implies, that rulemaking was intended to sort through and coherently organize the rules for the great variety of carriers and services that had evolved as a direct result of emerging competition and technologies in the telecommunications industry. Part of these rules concerns tariff filings and "advice letters" (basically, the means by which a utility communicates officially with the Commission regarding matters that do not require a formal application).[39]

Under the new Telecommunications Industry Rules adopted in D.07-09-019, the Commission defined the term "URF Carrier" to include, among other entities, competitive local exchange carriers and interexchange carriers.[40] It further defined "URF Carrier" as a "Utility" and then defined "Utility" as "a public Utility that is a telephone corporation as defined in the Public Utilities

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[38] *Id.*, 82 CPUC2d at 544.

[39] Advice letter rules for the major utility industries other than transportation (energy and water as well as telecommunications) are contained in General Order (GO) 96-B. For purposes of adopting new Telecommunications Industry Rules, R.05-04-005 was consolidated with the GO 96-B rulemaking (R.98-07-038).

[40] *See* D.07-09-019, Appendix A (Telecommunications Industry Rules), Rule 1.14.

Code."[41] Under these definitions, NextG (along with all other competitive local exchange carriers and interexchange carriers) is a public utility telephone corporation.

4.4. Conclusions

We deny Huntington Beach's complaint. On the basis both of NextG's CPCNs and of our decisions that address classes of telecommunications carriers generically, NextG is authorized to pursue the activities contemplated in its Huntington Beach project, including the use of the public right-of-way for purposes of the project.

5. Discussion: Environmental Review of NextG's Project

Pursuant to its stipulation with Huntington Beach, NextG filed its formal application for approval of that part of the overall project located in that city. The NextG project, a DAS network, is of a type that, in our experience, usually qualifies for an exemption from CEQA review. In our review of this project, we have found nothing contrary to our prior experience with DAS networks. As further discussed below, we adopt the Negative Declaration and approve the project.

5.1. Adoption of the Negative Declaration

Approval of the application would be a discretionary act by the Commission, and consequently, under CEQA, the Commission must consider the environmental impacts of the proposed project in determining whether or not to approve the project. Regarding this project, the Commission acts as the

[41] *Id.*, Rules 1.14 and 1.15.

Lead Agency for CEQA purposes because the Commission is the public agency with the greatest responsibility for supervising or approving the project.

In its capacity as the Lead Agency, the Commission examined the adequacy of NextG's PEA. On May 21, 2009, our staff informed NextG by letter that the application and PEA were complete, and began preparing an Initial Study.

Our independent analysis confirms the PEA's finding that the project will have less than significant impact, or no impact, on all environmental resource categories. Although NextG does not anticipate significant impacts, NextG incorporates specific procedures in the project construction plans as an added measure of protection to environmental resources in the construction (Applicant's Proposed Measures). We adopt the Applicant's Proposed Measures as part of our adoption of the Negative Declaration and approval of the project.

On November 19, 2009, our staff published its draft Initial Statement and Draft Negative Declaration for a 30-day public review and comment period. These documents were distributed to a wide range of interested parties, including federal, state, and local agencies, and property owners with parcels adjacent to the project. Aside from the comments from Huntington Beach, the comments received were few and limited in scope. The Final Negative Declaration retains the finding of no significant effects on the environment.

Huntington Beach contends that the project will have significant effects on the environment. The crux of the contention is that the project is inconsistent with land use requirements of local ordinances.[42] However, what does (or does

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[42] Huntington Beach, in its comments on the Draft Negative Declaration, also offers several photographs of NextG's facilities already constructed in that city. The

Footnote continued on next page

not) constitute a significant effect on the environment is defined under CEQA and the CEQA Guidelines. Huntington Beach has not shown that CEQA law, or any judicial interpretation of the law, compels the finding that inconsistency with local ordinances is, in itself, a significant environmental effect. Our independent judgment and analysis confirms that NextG's project will not have such an effect.

In adopting the Final Negative Declaration, we do not make any determination as to the validity of Huntington Beach's ordinances, nor as to the compliance of NextG's project with these ordinances. Moreover, we do not purport to pre-empt these ordinances. The consequence of any non-compliance (beyond what we have concluded above with respect to CEQA) is a subject for another day, and another forum.

In sum, we find and conclude that the Final Negative Declaration (which incorporates the Draft Initial Statement and Draft Negative Declaration) was prepared in compliance with and meets the requirements of CEQA. We further find and conclude that on the basis of the whole record, there is no substantial evidence that NextG's project will have a significant effect on the environment. The Final Negative Declaration reflects our independent judgment and analysis, and we adopt it in its entirety.

5.2. Approval of the Application

Based on the analysis of the Final Negative Declaration (incorporating the Draft Initial Study and Draft Negative Declaration), the Commission finds and

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photographs are unpersuasive; they show NextG's aerial fiber among other aerial lines at the photographed locations. After consideration, including site visits, staff could find no significant visual impact from the addition of NextG's aerial fiber. Our review of the photographs does not cause us to question staff's finding.

concludes that NextG's project, including the Applicant's Proposed Measures, will not have a significant impact on the environment. Furthermore, we have reviewed the application, and we determine that the construction of NextG's DAS network within Huntington Beach is a type of construction that is consistent with, and authorized by, the CPCNs we have granted NextG in D.03-01-061 and D.07-04-045.

Therefore, we approve NextG's application. Our approval does not relieve NextG from obtaining such local permits or complying with such other requirements as may lawfully be imposed under Pub. Util. Code § 7901.1.

By adopting the environmental document (that is, the Negative Declaration) prepared for NextG's project, and by approving NextG's application for authority to pursue the project, we resolve in NextG's favor the two disputed issues specific to its application that we were requested to resolve in the stipulation of Huntington Beach and NextG.

6. Final Conclusions

As noted earlier, Huntington Beach and NextG stipulated that the Commission determine only the following three issues in this consolidated proceeding:

- Whether the Joint Ruling dismissing the third cause of action should be affirmed or reversed by the full Commission;
- Whether the Commission should certify the environmental document prepared for the project, and, if so, what, if any, mitigation measures should be required; and
- Whether the Commission should approve the project.

For reasons stated in sections 4 to 4.4 of today's decision, we affirm the Joint Ruling's dismissal of the third cause of action. As no other issue remains to be determined from Huntington Beach's complaint, we dismiss the complaint.

For reasons stated in section 5 to 5.2 of today's decision, we adopt the Negative Declaration and approve NextG's project. As no other issue remains to be determined from NextG's application, we close the application.

In short, today's decision fully resolves both matters in this consolidated proceeding, and we therefore close both of these dockets.

7. Comments on Proposed Decision

The proposed decision of ALJ Kotz in this matter was mailed to the parties in accordance with Section 311 of the Public Utilities Code and comments were allowed under Rule 14.3 of the Commission's Rules of Practice and Procedure. Comments were served on October 4, 2010, by Huntington Beach.[43] Reply comments were filed on October 11, 2010, by NextG. We have considered both filings in finalizing today's decision.

8. Assignment of Proceeding

John A. Bohn is the assigned Commissioner and Steven Kotz is the assigned Administrative Law Judge in these consolidated proceedings.

Findings of Fact

1. NextG builds and owns fiber optic networks, on which NextG sells capacity for telecommunications services provided by other carriers that serve end-use customers.

2. NextG holds two CPCNs from the Commission to provide competitive local exchange and interexchange services. Under the earlier (2003) CPCN, NextG was authorized to operate as a limited facilities-based

[43] Filing of Huntington Beach's comments was late due to several technical defects. ALJ Kotz authorized Huntington Beach's comments to be filed late.

telecommunications carrier. Under the later (2007) CPCN, NextG was authorized to operate as a full facilities-based telecommunications carrier. Pursuant to the later CPCN, NextG could both attach its facilities to existing poles and other structures and build new poles on which to attach its facilities.

3. The construction project by NextG in Huntington Beach to which that city objects is part of a larger DAS project running through two other cities to the Pacific Coast Highway. The project as a whole consists of a fiber optic network to be located entirely in public rights-of-way within the three cities. Only the part of the project located in Huntington Beach remains unfinished.

4. NextG built parts of the project outside Huntington Beach after NextG requested and received an NTP from the Commission's environmental staff. The NTP is part of an expedited 21-day review process that the Commission has authorized for various facilities-based telecommunications carriers in connection with certain types of construction projects for which the carrier asserts an exemption from CEQA is applicable. The NTP issued by Commission staff to NextG confirmed that the entire project, including the proposed construction in Huntington Beach, is exempt.

5. In light of Huntington Beach's opposition and formal complaint, NextG agreed to formally apply for Commission approval and full CEQA review of that part of the project located in Huntington Beach. As stated in NextG's Final Negative Declaration, the purpose of the project is to transmit wireless voice and data communications to clients in Huntington Beach.

6. NextG and Huntington Beach stipulated that the only issues to be determined by the Commission in the consolidated complaint and application are: (1) whether to affirm or reverse the Joint Ruling dismissing Huntington Beach's third cause of action; (2) whether to certify the environmental document

prepared for the project (and, if so, what mitigation measures should be required); and (3) whether to approve the project.

7. In the process of preparing the Initial Study and the Negative Declaration, Commission staff and its consultant worked with the state and local agencies that, under CEQA, would have input as Responsible Agencies; these included Huntington Beach. Staff also notices and held two public comment meetings, one in August 2009 (before any CEQA document had been circulated), and one in December 2009 (following publication of the Draft Negative Declaration).

8. On November 19, 2009, staff published the Draft Negative Declaration for a 30-day comment period. The draft elicited no written comment from members of the general public. Written comments were submitted by Huntington Beach, NextG, and three state agencies (the Department of Toxic Substances Control, the Department of Transportation, and the State Clearinghouse and Planning Unit of the Governor's Office of Planning and Research). The comments and responses to the comments are in the Final Negative Declaration.

9. The Final Negative Declaration was published on February 26, 2010. In response to comments, a few corrections were made to descriptions of certain construction activities, such as depth of trenches. However, both the Draft and Final Negative Declarations conclude that based on the Initial Study, the project as proposed by NextG, including the Applicant Proposed Measures, would have no significant impacts in the areas of aesthetics, agricultural resources, air quality, biological resources, cultural resources, geology and soils, hazards and hazardous materials, hydrology and water quality, land use and planning, mineral resources, noise, population and housing, public service, recreation, transportation and traffic, and utilities and service systems.

10. In the context of its CPCN decision, the Commission has used terms such as "telecommunications," "local exchange," and "interexchange" consistently and uniquely to describe telephone service.

11. In the context of its decisions regarding telephone utilities, the Commission has used terms like "competitive," "facilities-based," and "resale" to distinguish among the types of telephone "carriers" or "service providers" that emerged following the break-up of the former Bell System in 1984.

12. The term "telecommunications" is commonly and ordinarily understood to include telephone service.

13. Modern telephony relies on a mix of technologies, and telephone services may be with or without transmission wires.

14. There are only minor differences between NextG's project of which Huntington Beach now complains and the earlier NextG project in San Francisco that the Commission concluded was authorized under the CPCN granted to NextG in D.03-01-061.

15. Consideration of comments and site visits do not support Huntington Beach's allegation that NextG's project has or would have a significant visual impact.

16. On the basis of the whole record, there is no substantial evidence that NextG's project, including the Applicant's Proposed Measures, will have a significant effect on the environment.

Conclusions of Law

1. NextG's agreement with Huntington Beach to request formal CEQA review of NextG's project within that city does not affect the validity of the NTP for the project that the Commission's environmental staff had previously issued to NextG.

2. The authority granted to NextG in its two CPCNs is expressly conditioned on NextG's compliance with Commission rules and requirements for competitive telecommunications carriers. NextG's authority continues to be as set forth in the CPCN decisions, namely, D.03-01-061 and D.07-04-045.

3. The assigned Commissioner and assigned ALJ, by Joint Ruling, dismissed Huntington Beach's third cause of action. The Joint Ruling (reproduced in relevant part in Appendix A to today's decision) determined that NextG is a telephone corporation and is entitled under Pub. Util. Code § 7901 to use public rights-of-way to the extent consistent with the terms of its CPCN and applicable law. This determination of the Joint Ruling should be affirmed.

4. The new scoping memo, issued after the filing of NextG's application and the consolidation of the application with Huntington Beach's complaint, correctly rejected Huntington Beach's request for an evidentiary hearing. There are no material factual issues in dispute; rather, the controversy concerns the legal consequence that follow from facts that, in all material respects, are not disputed.

5. Today's decision does not adjudicate the validity of the undergrounding, wireless, or other ordinances or regulations adopted by Huntington Beach.

6. The Commission's jurisdiction is limited to what it derives from California's Constitution and statutes. Consistent with its jurisdiction, the Commission may issue a CPCN only to a public utility of one of the types listed in Pub. Util. Code § 1001. Thus, the CPCN process necessarily includes a determination by the Commission of a company's public utility status.

7. Under the plain language of D.03-01-061 and D.07-04-045, as well as regulatory and statutory usage of the terms employed, NextG is a "telephone

corporation" within the meaning and for the purposes of Pub. Util. Code §§ 234(a) and 7901.

8. Under federal law effective from 1994, a state may not regulate market entry of a wireless carrier. Consequently, the Commission's grant of CPCNs to NextG in 2003 and 2007 necessarily determined that NextG is not a wireless carrier.

9. NextG's provision of radiofrequency transport services to wireless carriers does not constitute NextG itself a wireless carrier.

10. The fact that NextG does not serve end-use customers but is rather a "carrier's carrier" does not affect its status as a public utility telephone corporation.

11. NextG, pursuant to its CPCNs, is authorized to install its facilities on existing poles and other structures, and to construct new poles within the public right-of-way.

12. D.06-01-006, as modified by D.06-07-036, is persuasive precedent for purposes of adjudicating this consolidated proceeding.

13. The Commission has determined on a generic basis in D.98-10-058 that competitive local exchange carriers, like other telecommunications carriers, are entitled to reasonable access to public rights-of-way pursuant to Pub. Util. Code § 7901.

14. The Commission has determined on a generic basis in D.07-09-019 that competitive local exchange carriers and interexchange carriers are public utilities and telephone corporations as defined in the Public Utilities Code.

15. Approval of NextG's application would be a discretionary act by the Commission; thus, under CEQA, the Commission must consider the environmental impacts of the proposed project in determining whether or not to

approve the project. For purposes of this consideration, the Commission is the Lead Agency.

16. A Draft Initial Statement and Negative Declaration analyzing the environmental impacts of the proposed project were prepared and processed in compliance with CEQA. A Final Negative Declaration (incorporating the drafts) was completed and processed in compliance with CEQA.

17. The proposed project's claimed inconsistency with land use requirements of local ordinances does not, by itself, constitute a significant environmental effect. The Commission's independent judgment and analysis confirms that the proposed project will not have such an effect.

18. The Final Negative Declaration, incorporating the Draft Initial Statement and Draft Negative Declaration, should be adopted in its entirety.

19. NextG's DAS network within Huntington Beach is a type of construction that is consistent with, and authorized by, the CPCNs granted to NextG in D.03-01-061 and D.07-04-045.

20. NextG's application should be approved, and Huntington Beach's complaint should be denied.

21. The three issues identified by stipulation between NextG and Huntington Beach, and set forth in Finding of Fact 6, should all be resolved in NextG's favor. Because no further issues remain to be resolved after today's decision, Case 08-04-037 and A.09-03-007 should be closed.

22. Today's decision does not relieve NextG from obtaining such local permits or complying with such other requirements as may be lawfully imposed under Pub. Util. Code § 7901.1

23. To enable completion of the remaining construction for NextG's project, today's decision should be made effective immediately.

O R D E R

IT IS ORDERED that:

1. The complaint of the City of Huntington Beach vs. NextG Networks of California Inc., Case 08-04-037, is denied. The "Joint Ruling of the Assigned Commissioner and Assigned Administrative Law Judge Regarding Motion to Dismiss" is affirmed insofar as it dismisses without leave to amend the third cause of action in Case 08-04-037.

2. The Final Negative Declaration (incorporating the Draft Initial Study and Draft Negative Declaration) prepared for the project in the City of Huntington Beach that is the subject of Application 09-03-007 is adopted pursuant to the requirements of the California Environmental Quality Act, Public Resources Code Section 21000 et seq.

3. Application 09-03-007 is approved, and NextG Networks of California Inc. is authorized to construct the project as set forth in the application and in the adopted Final Negative Declaration. For purposes of constructing the project, NextG Networks of California Inc. must obtain such local permits and comply with such other requirements as may lawfully be imposed pursuant to Public Utilities Code Section 7901.1.

4. Case 08-04-037 and Application 09-03-007 are closed.

This order is effective today.

Dated October 14, 2010, at San Francisco, California.

MICHAEL R. PEEVEY
President
DIAN M. GRUENEICH
JOHN A. BOHN
TIMOTHY ALAN SIMON
NANCY E. RYAN
Commissioners

APPENDIX A

Extract from "Joint Ruling of the Assigned Commissioner and Assigned Administrative Law Judge Regarding Motion to Dismiss" (Nov. 6, 2008)

Appendix A

Extract from "Joint Ruling of the Assigned Commissioner and Assigned Administrative Law Judge Regarding Motion to Dismiss" (Nov. 6, 2008)

The extract reproduced below (part 5 of the Joint Ruling at 14-17) grants, in part, NextG's motion to dismiss Huntington Beach's complaint. In the dismissed cause of action, Huntington Beach asserted that NextG had never been determined by the Commission to be a "telephone corporation" as defined in the Public Utilities Code, that in any case NextG was not operating as a land line carrier, and that consequently, NextG was not entitled to the use of public rights of way pursuant to Pub. Util. Code § 7901. In the foregoing decision, (section 3), the Commission affirms the Joint Ruling's dismissal of this cause of action without leave to amend.[44]

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

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

City contends that a complaint is an appropriate mechanism to raise violations of law by a public utility, and NextG has violated Section 7901 by proceeding with its project, because none of the Commission decisions granting NextG a CPCN state that NextG is a telephone corporation within the meaning

[44] Note: The Joint Ruling uses "City" to refer to the City of Huntington Beach and the acronym "PROW" to refer to the public right of way.

of Section 7901. City claims that NextG is therefore not entitled to use the PROW without first obtaining approval from City under General Order (GO) 159-A.

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

Section 7901 does not define "telephone corporation." City correctly states that only one court decision, *Sprint Telephony v. County of San Diego*, 140 Cal. App. 4th 748(2006) (*Sprint Telephony*), has addressed whether wireless carriers are entitled to use the PROW under Section 7901, and this decision has been effectively depublished.

However, the Public Utilities Code contains general definitions which govern the construction of the Code, unless the particular Code section or the context requires another interpretation.[45]

Section 234(a) defines "telephone corporation" as follows:

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

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[45] Section 5 states:

> **§ 5. Construction of code**
> Unless the provision or the context otherwise requires, these definitions, rules of construction, and general provisions shall govern the construction of this code.

Section 233 broadly defines "telephone line" as follows:

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

City argued at the hearing on the Motion that since Section 233 was enacted in 1951, before the development of wireless services, the Legislature could not have intended for wireless carriers to qualify as "telephone corporations" under Sections 234(a) and 7901. However, under the principles of statutory construction, statutes are to be interpreted first based on their plain language, because statutory language is generally the most reliable indicator of legislative intent.[46] Unless the statute contains an ambiguity or is reasonably subject to multiple interpretations, it is not necessary to resort to extrinsic aids, such as legislative history, to interpret a statute, and the plain meaning of the statutory language is controlling.[47]

Here, Section 233 contains no ambiguity, and the plain language of Section 233 is sufficiently broad to include facilities and equipment installed by carriers in connection with or to facilitate wireless telecommunications services, as well as landline telecommunications services. The plain language of Sections 233 also suggests a legislative intent to include a broad range of technologies used to provide or facilitate telecommunications services in this state within the definition of "telephone line". Therefore, we find that as a

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[46] *Miklosy v. Regents of the University of California*, 44 Cal. 4th 876 (2008).

[47] *Id.*

matter of law, NextG is a telephone corporation authorized to utilize the PROW for its operations under Section 7901, to the extent consistent with its CPCN and applicable legal requirements.

This conclusion is also consistent with previous Commission decisions. In D.06-01-006, the Commission denied a complaint filed by the City and County of San Francisco (CCSF) against NextG. The complaint alleged that NextG had misrepresented to CCSF that it was authorized to provide radiofrequency transport services, when NextG's limited facilities-based CPCN did not authorize the company to provide this type of service or to install microcell and antenna in PROW or equipment or facilities on existing utility poles. The Commission found that by granting NextG a limited facilities-based CPCN in D.03-01-061, the Commission had authorized NextG to provide radiofrequency transport services and to install microcells and antennas on existing utility poles in the PROW, and did not limit NextG's operations to more traditional forms of telephone service.[48]

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

The Commission reasoned that:

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

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

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

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

(End of Extract)