

Decision 11-01-027

January 13, 2011

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)

**ORDER MODIFYING DECISION (D.) 10-10-007,  
DENYING REHEARING OF DECISION, AS MODIFIED,  
AND DENYING THE REQUEST FOR ORAL ARGUMENT**

**I. SUMMARY**

This order disposes of the application for rehearing of Decision (D.) 10-10-007 (or “Decision”), filed by the City of Huntington Beach (“the City”). This order also disposes of the City’s separate request for oral argument.

D.10-10-007 disposes of the complaint filed by the City of Huntington Beach (“the City”), challenging certain proposed construction of antennas and other facilities by defendant NextG Networks of California, Inc. (“NextG”), and of the application of NextG for formal environmental review and authorization of these facilities. In D.10-10-007, the Commission concluded that the City’s challenges were without merit and dismissed the complaint. The Commission further concluded that the proposed construction was authorized under Certificates of Public Convenience and Necessity (“CPCN”) the Commission previously granted in D.03-01-061 and

D.07-04-045.<sup>1</sup> In addition, the decision adopted the Negative Declaration (“NegDec”) the Commission’s staff prepared pursuant to the California Environmental Quality Act (“CEQA”).

The City timely filed an application for rehearing of D.10-10-007. In its rehearing application, the City alleges the following legal error: (1) Public Utilities Code section 2902 deprives the Commission of jurisdiction to determine that NextG may use the right-of-way under Public Utilities Code section 7901;<sup>2</sup> (2) D.10-10-007 incorrectly concludes that NextG is a “telephone corporation” and operates “telephone lines” within the meaning of Public Utilities Code sections 233 or 7901; (3) the decision is inconsistent with the requirement in D.07-07-023 that NextG comply with local land use requirements in constructing its facilities; and (4) in issuing a Negative Declaration, the Commission violates Public Resources Code section 21080(c) and CEQA Guidelines, section 15070(b). The City also filed a separate request for oral argument on its rehearing application pursuant to Rule 16.3 of the Commission’s Rules of Practice and Procedure.

NextG filed a response to the application for rehearing and the motion for oral argument. In this response, NextG argues that the rehearing application has no merit and the motion should be denied.

We have reviewed each and every allegation of error raised in the City’s rehearing application. We are of the opinion that there is no good cause for granting a rehearing of D.10-10-007. However, we will modify the D.10-10-007 as set forth below. We deny the City’s application for rehearing of D.10-10-007, as modified.

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<sup>1</sup> *In the Matter of the Application of NextG Networks of California, Inc. for a Certificate of Public Convenience and Necessity to Provide Limited Facilities-Based and Resold Competitive Local Exchange, Access and Interexchange Service* [D.03-01-061] (2003) \_\_\_ Cal.P.U.C.3d \_\_\_; *Application of NextG Networks of California, Inc. to expand its existing Certificate of Public Convenience and Necessity [A.02-09-019, D.03-01-061] to include full Facilities-based Telecommunications Services* [D.07-04-045] (2007) \_\_\_ Cal.P.U.C.3d \_\_\_, affirmed in *Order Denying Rehearing of Decision (D.) 07-04-045* [D.07-07-023] (2007) \_\_\_ Cal.P.U.C.3d \_\_\_.

<sup>2</sup> Subsequent section references are to the Public Utilities Code, unless otherwise specified.

## II. DISCUSSION

### A. THE DECISION CORRECTLY CONCLUDED THAT NEXTG IS A TELEPHONE CORPORATION PERMITTED TO USE THE PUBLIC RIGHTS-OF-WAY PURSUANT TO SECTION 7901.

The City contends that the Decision erred in concluding that NextG is now, and has been continuously since the Commission granted its first CPCN, a “telephone corporation” within the meaning of sections 234(a) and 7901. (Rehrg. App. at 4.)

Section 234(a) provides a general definition of a telephone corporation to include “every corporation or person owning, controlling, operating or managing a telephone line for compensation within this state.”

Section 7901 grants access to the public rights-of-way to telephone and telegraph corporations, stating:

Telegraph and telephone corporations may construct lines of telegraph and telephone lines along and upon any public road or highway, along or across any of the waters or lands within this State, and may erect poles, posts, piers, or abutments for supporting the insulators, wires, and other necessary fixtures of their lines, in such manner and at such points as not to incommode the public use of the road or highway or interrupt the navigation of the waters.

Specifically, the City argues that the Commission’s issuance of a CPCN to NextG, in D.03-01-061 and expanded in D.07-04-045, is irrelevant to the issue of whether NextG is a telephone corporation pursuant to section 7901. Rather, the City bases its argument on the premise that the Legislature did not intend to include wireless telephone carriers in the definition of “telephone corporation” in section 7901. (Rehrg. App. at 5.) The City further argues that NextG is a wireless carrier, and thus, is not entitled to the rights conferred under section 7901. The City’s arguments are without merit.

**1. The Commission has exclusive jurisdiction to determine an entity’s public utility status for purposes of implementing and enforcing the Public Utilities Code.**

We are a constitutionally-created agency with the exclusive jurisdiction and broad authority to regulate public utilities.<sup>3</sup> Telephone corporations are public utilities subject to our jurisdiction, control, and regulation. (Pub. Util. Code, § 216, subd. (b).)

Pursuant to section 234, “every corporation or person owning, controlling, operating, or managing any telephone line for compensation within this state” is a “telephone corporation.” Section 233 defines a “telephone line” as “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.” In no other sections of the Public Utilities Code are the terms “telephone corporation” or “telephone line” otherwise defined. These definitions are applicable in the same manner throughout the Code, including section 7901, unless otherwise noted.<sup>4</sup>

As part of our regulation of public utilities, including telephone corporations, the Legislature conferred upon us the *exclusive* authority to grant CPCNs.<sup>5</sup> Section 1001 states, “No...telephone corporation... shall begin the construction of a ... line, plant, or system, or of any extension thereof, without first having obtained *from the*

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<sup>3</sup> *Southern California Edison Co. v. Peevey* (2003) 31 Cal.4<sup>th</sup> 781, 792 [regarding Commission’s broad authority]; *see also Pacific Tel. & Tel. Co. v. Los Angeles* (1955) 44 Cal.2d 272, 289 [regarding Commission’s exclusive jurisdiction to supervise and regulate public utilities].

<sup>4</sup> *See, e.g., Williams Communications, LLC v. City of Riverside* (2003) 114 Cal.App.4<sup>th</sup> 642, 648-49 [applied definition of telephone line in section 233 to section 7901]; *see also*, Discussion at Section A.3.

<sup>5</sup> *See* Pub. Util. Code § 1001; *see also Southern Cal. Gas Co. v. City of Vernon* (1995) 41 Cal. App. 4<sup>th</sup> 209, 215 [“Under the Constitution, as to matters over which the [Commission] has been granted regulatory power, [its] jurisdiction is exclusive.”]

*Commission* a certificate that the present or future public convenience and necessity require or will require the construction.” (Pub. Util. Code, § 1001, emphasis added.)

A CPCN provides telephone corporations (and other public utilities) the requisite licensing authority to operate in California.<sup>6</sup> The Commission issues CPCNs through formal decisions. Importantly, absent some other statutory authority, the Commission cannot issue a CPCN to a company unless it is a public utility (e.g., a “telephone corporation”) as defined in the Code, simply because this is the statutory requirement. It follows then that the Commission’s CPCN process necessarily includes a Commission determination as to a company’s public utility status, namely whether it is a telephone corporation.<sup>7</sup>

Therefore, we possess the exclusive jurisdiction to determine whether an entity is or is not a public utility, specifically a “telephone corporation,” within the meaning of the Public Utilities Code, including section 7901. Here, because NextG controlled, operated, or managed facilities and equipment to facilitate communication by telephone pursuant to section 233, the Decision’s reliance on NextG’s possession of a CPCN to provide telecommunications services as evidence of its status as a “telephone corporation” pursuant to section 234 was proper.<sup>8</sup>

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<sup>6</sup> Pub. Util. Code, §§ 1001 *et seq.* & 1013.

<sup>7</sup> See e.g. *Anderson v. Time Warner Telecom of California* (2005) 129 Cal.App.4th 411, 415 [affirmed trial court’s ruling which found company to be “telephone corporation” within section 7901 because the Commission granted a CPCN]; see also *Application of Wild Goose Storage, Inc. to Amend its Certificate of Public Convenience and Necessity to Expand and Construct Facilities for Gas Storage Operation* [D.03-04-038] (2003) \_\_ Cal.P.U.C.3d \_\_, pp. 9-10 (slip op.), 2003 Cal.P.U.C. LEXIS 247, \*17-\*18 [Commission rejected a challenge on rehearing regarding company’s public utility status as a gas corporation and pointed to its issuance of CPCN as evidence of company’s public utility status].

<sup>8</sup> The City’s contention that NextG is a wireless carrier is of no significance because section 233 specifically encompasses wireless communication. See further discussion in section A.3 below.

**2. The Commission granted a CPCN to NextG as a telephone corporation.**

In granting a CPCN to NextG, we determined that NextG was a “telephone corporation” as defined in the Public Utilities Code. In 2003, we issued Decision (D.) 03-01-061, which granted NextG its initial CPCN. There, we stated the following:

A certificate of public convenience and necessity (CPCN) is granted to NextG Networks of California, Inc. (Applicant) to operate as a limited facilities-based and resale provider of competitive **local exchange services**, and **interexchange services**, subject to the terms and conditions set forth below.

(D.03-01-061, *supra*, at p. 7 [Ordering Paragraph (“OP”) No. 1] (slip op.), emphasis added.)

In a subsequent decision, issued in 2007, we expanded NextG’s operating authority and modified its CPCN accordingly. In D.07-04-045, we authorized NextG to provide service in California as follows:

A certificate of public convenience and necessity (CPCN) is granted to NextG Networks of California, Inc. (NextG) to operate as a full facilities-based provider of **local exchange services** in the service territories of Pacific Bell Telephone Company, Verizon California, Inc., SureWest Telephone, and Citizens telephone Company, subject to the terms and conditions set forth below. This authorization expands NextG’s existing authority to provide limited facilities-based local exchange services in this state.

(D.03-01-061, *supra*, at p. 7 [Ordering Paragraph (“OP”) No. 1] (slip op.), emphasis added.)

In both of the foregoing decisions, we authorized NextG to provide local exchange service, more commonly known as “local telephone service,” and “interexchange service,” more commonly known as “long distance service.” Both “local exchange service(s)” and “interexchange service(s)” are terms of art in the telecommunications industry, and are part and parcel of the regulatory terminology

employed by the Commission and by the Federal Communications Commission. Thus, the CPCN which we issued to NextG conferred authority on NextG to provide “telecommunications services,” notwithstanding the fact that the ordering paragraphs both in D.03-01-061 and in D.07-04-045 do not use the words “telecommunications services.” These decisions employ the terms of art described above that are commonly used by the Commission in other decisions granting CPCN’s to telephone corporations.

Thus, the Commission’s decisions granting NextG its CPCN identified particular services which NextG is licensed to provide; in turn the nature of those services determined the type of license conferred. In the case of NextG, because the company sought authority to provide particular types of “telecommunications services,” the Commission issued a license for NextG to operate in California as a “telephone corporation” pursuant to section 234 of the Public Utilities Code.

As explained above and further below, the definition of “telephone corporation” in section 234 applies to section 7901. Therefore, the Decision did not err in concluding that NextG is a telephone corporation pursuant to sections 234 and 7901.

### **3. Section 7901 applies to wireless carriers, as well as wireline carriers.**

The City’s argument that only wireline telephone corporations may rely upon section 7901 to access the public rights-of-way also fails. (Rehrg. App. at 6-11.) The plain language of section 7901 contains no language limiting this statute to only wireline telephone corporations. In interpreting statutes, the principles of statutory construction prohibit reading language into a statute that was not intended by the Legislature. If the Legislature wanted to make such a limitation, it would have.<sup>2</sup> Absent such limitations in the plain language of section 7901, the City’s argument has no merit.

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<sup>2</sup> *Wolski v. Fremont Investment & Loan* (2005) 127 Cal.App.4th 347, 351 [In reviewing a statute, “[w]e first examine the words themselves because the statutory language is generally the most reliable indicator of legislative intent. [Citation.] The words of the statute should be given their ordinary and usual meaning and should be construed in their statutory context.’ [Citation] If the statutory language is unambiguous, ‘we presume the Legislature meant what it said, and the plain

(footnote continued on the next page)

Moreover, “when the same term or phrase is used in a similar manner in two related statutes concerning the same subject, the same meaning should be attributed to the term in both statutes.” (*Dieckmann v. Superior Court* (1985) 175 Cal. App. 3d 345, 356; see also, *GTE Mobilnet of Cal. Ltd. Partnership v. City and County of San Francisco* (“*GTE Mobilnet*”) (N.D.Cal. 2006) 440 F.Supp.2d 1097, 1103.)

As explained above, section 7901 does not separately define the terms “telephone corporation” and “telephone line,” but those terms are defined in sections 234 and 233, respectively. Further, the plain language of section 7901 does not indicate that different definitions for those terms apply. Therefore, sections 234 and 233 should apply in interpreting section 7901.

Section 234’s definition of “telephone corporation” relies on the definition of “telephone line” in section 233. It is clear from the plain language of section 233 that a telephone line includes wireless communication because the statute explicitly covers communication that “is had with *or without* the use of transmission wires.” (Pub. Util. Code, § 233, emphasis added.) Moreover, recent legislative enactments indicate that the California Legislature understood section 7901 to encompass wireless providers. (See *GTE Mobilnet, supra*. at p. 1103)

Furthermore, courts have applied sections 233 and 234 to their interpretation of section 7901. For example, in *Cox Communs. PCS, L.P. v. City of San Marcos* (S.D.Cal. 2002) 204 F.Supp.2d 1272, 1281, fn. 2, a federal court relied on sections 233 and 234 to find that section 7901 applied to wireless carrier. (See also *GTE Mobilnet, supra*, at p. 1103.)

Therefore, a wireless carrier by definition is a “telephone corporation” for purposes of section 7901, and the definition of “telephone line” in section 7901 is broad enough to reach wireless equipment. (See *GTE Mobilnet, supra*, at p. 1103.) As a result,

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meaning of the statute governs.’ [Citation.]”]; see also, *Whaley v. Sony Computer Entertainment America, Inc.* (2004) 121 Cal.App.4th 479, 485.

City's assertion that section 7901 has no application to a wireless carrier lacks merit. Accordingly, the argument that NextG is a wireless carrier is irrelevant. Therefore, the Decision correctly found that section 7901 applied to NextG as a telephone corporation.

**4. The City's challenge constitutes an impermissible collateral attack on prior Commission decisions.**

The City's attempt to place at issue NextG's status as a telephone corporation also constitutes an improper collateral attack on D.03-01-061 and D.07-04-045. As discussed above, we issued a CPCN and expanded the CPCN to NextG as a telephone corporation within the meaning of the Public Utilities Code. The dispute between the City and NextG arises out of NextG's exercise of its authority granted by D.03-01-061 and D.07-04-045. These decisions are final and unappealable. Thus, the City's challenges constitute impermissible collateral attacks on final Commission decisions.

Section 1709 prohibits such collateral attacks. This statute provides that determinations within the Commission's jurisdiction that have become final are conclusive in all collateral actions and proceedings.<sup>10</sup> Therefore, the City's claim that the Commission's determinations in D.03-01-061 and D.07-04-045 are irrelevant as to NextG's telephone corporation status really constitutes no more than an impermissible collateral attack of these two decisions.

**B. SECTION 2902 DOES NOT DEPRIVE THE COMMISSION OF JURISDICTION TO IMPLEMENT OR ADJUDICATE THE ISSUES REGARDING THE APPLICABILITY OF SECTION 7901.**

The City takes issue with the Decision's Conclusion of Law No. 7, which states:

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<sup>10</sup> Pub. Util. Code, § 1709; see also, *People v. Western Air Lines, Inc.* (1954) 42 Cal.2d 621, 630.

Under the plain language of D.03-01-067 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.

The City correctly interprets Conclusion of Law No. 7 to mean that “the Commission is not merely finding that it had the authority to issue CPCNs to NextG, but is also finding that NextG may access the City-owned right-of way.” (Rehrg. App. at 2.) However, the City contends that section 2902 deprives the Commission of any jurisdiction regarding right-of-way disputes or to otherwise enforce section 7901. (Rehrg. App. at 4.) The City also argues that D.98-10-058 supports this contention.<sup>11</sup> This contention has no merit.

**1. The applicability of section 7901 is a determination that lies exclusively with the Commission in its regulation of telephone corporations.**

Whether an entity may enforce the right to access the public rights-of-way under section 7901 turns on whether, in this particular case, the entity is a “telephone corporation,” as defined in section 234 of the Public Utilities Code.<sup>12</sup> As established above, the meaning of “telephone corporation” in section 7901 relies on the meaning set forth in section 234 and the Commission has the exclusive jurisdiction to determine an entity’s public utility status as a telephone corporation pursuant to section 234. It follows then that the Commission has the exclusive jurisdiction to determine the applicability of section 7901 to telephone corporations such as NextG.

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<sup>11</sup> *Re Competition for Local Exchange Service (“ROW Decision”)* [D.98-10-058] (1998) 82 Cal.P.U.C.2d 510 [full decision not published] [adopting rules governing the nondiscriminatory access to the poles, ducts, conduits, and rights-of way (“ROW”) applicable to all competitive local carriers (“CLCs”) competing ]. Citations to this decision is to the pdf version found on the Commission’s website.

<sup>12</sup> See *GTE Mobilnet, supra*, at p. 1097 [section 7901 applied to wireless carrier because found to be a telephone corporation operating telephone line pursuant to sections 234 and 233, respectively].

**2. The plain language of section 2902 does not deprive the Commission of its exclusive jurisdiction to adjudicate the applicability of section 7901.**

The City argues that “[s]ection 2902 provides that the CPUC has no jurisdiction to determine right-of-way disputes.” (Rehrg. App. at 2.) The City also argues that the Commission concluded in D.98-10-058 that “under [s]ection 2902, it had no jurisdiction to address right-of way disputes between local municipalities and utilities, including the application of [s]ection 7901.” (Rehrg. App. at 2.) The City’s reliance on the statute and D.98-10-058 are misplaced.

Section 2902, found within a chapter of the Public Utilities Code pertaining to the surrender of control by municipal corporations to the Commission, states:

This chapter shall not be construed to authorize any municipal corporation to surrender to the [C]ommission its powers of control to supervise and regulate the relationship between a public utility and the general public in matters affecting the health, convenience, and safety of the general public, including matters such as the use and repair of public streets by any public utility, the location of the poles, wires, mains or conduits of any public utility, on, under, or above any public streets, and the speed of common carriers operating within the limits of the municipal corporation.<sup>13</sup>

(Pub. Util. Code, § 2902.)

Nowhere in the statute is there language that deprives the Commission of any of its exclusive jurisdiction to adjudicate the applicability of section 7901 to public utility telephone corporations. In *Southern Cal. Gas Co. v. City of Vernon* (1995) 41 Cal.App.4<sup>th</sup> 209, the California Court of Appeal rejected a similar reading of section 2902. In that case, a public utility gas corporation attempted to enforce its franchise to lay and use pipes and appurtenances beneath city streets for transmitting and distributing

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<sup>13</sup> A “municipal corporation” means a city and county or incorporated city. (Pub. Util. Code, §2904.)

gas. The City of Vernon refused to issue a street encroachment permit on the grounds that the proposed pipeline had an insufficient depth and would interfere with other pipelines, both of which violated the city's own requirements for the design and construction of pipelines. However, the Court found that the city could not regulate those matters because they fell within the Commission's exclusive jurisdiction and the Commission had exercised that jurisdiction in issuing General Order No. 112-D. In reaching its conclusion, the Court provided the following reasoning:

In sum, under the Constitution a city may not regulate matters over which the [Commission] has been granted regulatory power, the Legislature has granted regulatory power to the [Commission] over the safety of gas pipelines, and the [Commission] in fact has promulgated rules on this subject. Therefore, Vernon cannot purport to regulate the design or construction of the proposed pipeline under the guise of ensuring the pipeline's safety.

*(Southern Cal. Gas Co. v. City of Vernon, supra, at p. 217.)*

The Court found unavailing the City of Vernon's reliance on section 2902 to support its position. The City of Vernon contended that this statute specifically excludes from the Commission's jurisdiction matters such as location of mains of any public utility, on, under, or above public streets. (*Id.* at pp. 217-218.) In rejecting this argument, the Court stated:

Vernon's reliance on the statute is misplaced....This statute does not confer any powers upon a municipal corporation but merely states that certain existing municipal powers are retained by the municipality. The language of *Public Utilities Code Section 2902* simply reflects that the *location* of pipelines beneath city streets, along with the matters involving the flow of traffic and the use and repair of public streets, are matters for the municipal corporation, not the [Commission]. However, viewing this statute in the context of the related constitutional and statutory provisions discussed above [Article XII, section 8 of the California Constitution and sections 701 and 768], we conclude the design and construction of the proposed pipeline are matters within the

regulatory purview of the [Commission], not the municipality.

(*Id.*, emphasis in original and citation omitted.)

Like the City of Vernon in the foregoing case, the City misapplies section 2902 in its argument in the instant case. The Legislature conferred upon the Commission exclusive jurisdiction to determine the public utility status of an entity, a determination that is central to the enforcement of section 7901. Therefore, the applicability of section 7901 is a matter within the regulatory purview of the Commission, not the municipality.

Moreover, the City misreads *ROW Decision* [D.98-10-058], *supra*. In D.98-10-058, the Commission adopted a procedure that reconciled the respective roles of the Commission in relation to the cities resolving disputes with telecommunications carriers over access to the public right-of-way. (*Id.* at p. 40 (slip op.)) The Commission must issue a CPCN to a telecommunications carrier prior to its obtaining access to the public rights-of-way. (*Id.* at p. 39 (slip op.)) Local governments may regulate the time, location, and manner of installation of telephone facilities in public streets, but “they may not arbitrarily deny requests for access by public utilities in public roads or highways that are located in the rights of way.” (*Id.* at p. 37 (slip op.))

Nowhere in D.98-10-058 did the Commission conclude that section 2902 deprives the Commission of jurisdiction to address right-of-way disputes as the City contends. (Rehrg. App. at 2.) Rather, after analyzing the interplay of sections 2902, 7901, 7901.1 and 762, the Commission concluded:

Accordingly, the Commission shall intervene in disputes over municipal ROW access only when a party seeking ROW access contends that local action impedes statewide goals, or when local agencies contend that a carrier’s actions are frustrating local interests. In this manner, the Commission reserves its jurisdiction in those matters which are inconsistent with the overall statewide precompetitive objectives, and ensure[s] that individual local government decisions do not adversely impact such statewide interests.

(*ROW Decision, supra*, at p. 38 (slip op.)) Also, in this decision, we noted that section 762 further authorizes this Commission to order the erection and to fix the site of facilities of a public utility where found necessary ‘to promote the security or convenience of its employees or the public...to secure adequate service or facilities.’ ” (*Id.*)

Here, the Decision is consistent with D.98-10-058 in finding that the Commission has exclusive jurisdiction to issue a CPCN to a telephone corporation. As contemplated by D.98-10-058, the telephone corporation may then use the CPCN to enforce its rights pursuant to section 7901. If the local government body refuses to grant access in accordance with the Commission order (e.g., CPCN decision), the telecommunications carrier’s recourse shall be to file a lawsuit in the appropriate court of civil jurisdiction seeking resolution of the dispute over access (see *ROW Decision, supra*, at p. 40 (slip op.)), which NextG has done. The Decision in this case does not order the City to grant access to NextG; rather it merely confirms the Commission’s prior CPCN decisions. Therefore, the City misreads into the Decision a conflict with section 2902 where none exists.

**3. The City’s interpretation of section 2902 would unlawfully interfere with the Commission’s exclusive jurisdiction and its exercise of this jurisdiction in regulating NextG as a telephone corporation.**

The City’s interpretation of section 2902 effectively would interfere with the Commission’s exclusive jurisdiction over the regulation of telephone corporations, and its prior exercise of this jurisdiction over NextG in D.03-01-061 and D.07-04-045.<sup>14</sup>

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<sup>14</sup> “[A]fter the [C]ommission has assumed jurisdiction over a public utility for the purpose of administering the law applicable to the activities of the utility, the [C]ommission has exclusive jurisdiction over the regulation and control of said utility and may take any action necessary to the proper and complete exercise of this jurisdiction.” (*Ventura County Waterworks Dist. v. Susana Knolls Mut. Water Co.* (1970) 7 Cal.App.3d 672, 679.) As explained above, the Commission’s issuance of a CPCN and the expansion of this CPCN constituted the Commission’s exercise of this exclusive jurisdiction.

Essentially, the City's interpretation of this statute would give the City the right to trump the Commission's exclusive jurisdiction, and permit the City to determine whether NextG is or is not a telephone corporation for the purpose of interpreting section 7901. The City is prohibited from doing so. (*Southern Cal. Gas Co. v. City of Vernon, supra*, 41 Cal.App.4<sup>th</sup> at pp. 217-218.)

Further, as noted above, the plain language of section 2902 does not circumscribe the Commission's otherwise broad constitutional and statutory authority. Thus, the City's interpretation is improper.

It should also be noted that a superior court may not lawfully issue a decision which would "effectually negate" a Commission decision within the Commission's jurisdiction. (*Pellandini v. Pacific Limestone Products, Inc.* (1966) 245 Cal.App.2d 774, 777; see also, *Ventura County Waterworks Dist. v. Susana Knolls Mut. Water Co.* (1970) 7 Cal.App.3d 672, 678.) Similarly, a City's ordinance should not be interpreted in a manner that would interfere with the Commission's exclusive jurisdiction and the exercise of this jurisdiction.

**C. THE PROJECT IS WITHIN THE SCOPE OF NEXTG'S CPCN AND EXPANDED CPCN AUTHORITY.**

The City next argues that, because NextG's CPCN requires it to "accommodate local land use requirements...", and the installation allegedly violates the local ordinance, NextG's project is not within the scope of its CPCN authority. (Rehrg. App. at 11, emphasis removed.) Although the City is correct that a portion of the NextG construction is inconsistent with its undergrounding ordinance, the approved installation is still within the scope of NextG's CPCN.

**1. The undergrounding ordinance is preempted to the extent it is inconsistent with the Commission's authorization.**

As an initial matter, it should be noted that D.10-10-007 does not explicitly discuss whether the NextG installation is consistent with the City's undergrounding

ordinance. The City and NextG stipulated that the “Proceeding will not adjudicate the validity of the City’s Undergrounding Ordinance.” (Dec. 28, 2008 Stipulation, at ¶ 6.) However, at the same time, the parties stipulated that the proceeding should determine “whether the Commission should certify the environmental document for the Project” as well as “whether the Commission should approve the Project.” (Dec. 28, 2008 Stipulation, at ¶ 5.) Some consideration of the ordinance is necessarily within the scope of our approval and review of the NextG installation because CEQA contemplates that an agency will review applicable land use regulations. (Code of Regs., tit. 14 (“CEQA Guidelines”) App. G, § X.b.) Although the City does not mention the NegDec discussion in its current challenge, the NegDec, following the Guidelines checklist, considers the undergrounding ordinance and determines that the project is consistent with the ordinance. (NegDec, Attach. 2, at p. 49.)

Under the plain terms of the stipulation, the Commission necessarily must evaluate the validity of the ordinance to the limited extent that it impacts the Commission’s review and approval of the project. Moreover, in its application for rehearing (Rehrg. App. at 11-12), as well as in its comments during the proceeding, the City has squarely raised the issue of whether its undergrounding ordinance conflicts with NextG’s project.

The City is correct that a small portion of the NextG installation is inconsistent with its undergrounding ordinance. This is contrary to the conclusion reached in the NegDec. Huntington Beach ordinance section 17.64.050 forbids new above-ground poles, with certain exceptions not applicable here. Although there have been questions about whether the City has applied the ordinance consistently, it is clear that the literal wording of the ordinance does not permit NextG’s installation. At the same time, because utilities may need to construct above-ground poles to house antennas, the statewide interest in public utility service preempts this ordinance in the event of a conflict, as is the case here.

Although D.10-10-007 does not specifically rule on the undergrounding ordinance, it adopts the NegDec, and therefore, the NegDec findings. We will modify the

NegDec to correct the statements that the project is consistent with the City's ordinance. Although there is indeed a conflict with the ordinance, this does not impact the viability of the project because utility regulation is a statewide concern, and the Commission has the authority to preempt local ordinances that are inconsistent with its regulation. (Cal. Const., art. XII, § 8.) In addition, we will modify the language in the decision to clarify that we are preempting the City to the extent that the ordinance is inconsistent with the NextG project the Commission is now approving.

**2. NextG's project is within the scope of the expanded CPCN authority.**

The City argues that because there is a conflict with the City's undergrounding ordinance, NextG's project is not within the scope of its CPCN. This argument is incorrect. Despite the conflict with the ordinance, NextG is still within the scope of its expanded CPCN authority.

In 2007, we granted NextG an expanded CPCN for "full facilities-based local exchange services authority and expedited environmental review." (D.07-04-045, *supra*, at p. 11.) In that decision, we outlined a process for expedited environmental review for the construction of future facilities which are exempt from the requirements of CEQA. (*Id.* at p. 15.) Partly because facilities built pursuant to this expedited process would have limited review and no further environmental review from the Commission, we emphasized that NextG should accommodate local land use requirements. Despite efforts to accommodate local regulations, we at all times recognized that the California Constitution provides the Commission, "with preemptive authority over local jurisdictions with respect to the regulation of utilities." (D.07-07-023, *supra*, at p. 6 (slip op.); see also ROW Decision [D.98-10-058], *supra*, at p. 38 (slip op.) [discussed above in Section B.2].) In cases where the expedited review process is not appropriate, we explained that NextG would need to file an application with the Commission and undergo full CEQA review "before commencing any construction activities." (D.07-07-045, *supra*, at p. 5 (slip op.).)

The City also cites Joint Ruling language that states that NextG's CPCN permits it to "install new utility poles in local undergrounding districts only when permitted by local ordinance." (Nov. 6, 2008 Joint ALJ/AC Ruling, at p. 13.) Again, these statements refer to the expedited review process and what NextG was authorized to do without further Commission review. We clearly stated that where local ordinances did not allow the construction, the expedited review process might not be appropriate. (D.07-07-023, *supra*, at p. 6 (slip op.)) The expedited review process was not used here. Because there was disagreement between the City and NextG, NextG filed an application for authority to construct its installation with the Commission, and we undertook a full discretionary review of NextG's proposed construction. Because this was not an expedited review, the current installation is within NextG's CPCN regardless of whether it is consistent with the City's ordinance.

**D. THE CITY HAS NO FAIR ARGUMENT THAT THE PROJECT MAY CAUSE A SIGNIFICANT IMPACT.**

According to the City, we erred in adopting the NegDec because a "fair argument" can be made that the project will have a significant impact. (Rehrg. App. at 12-14.) The City argues that due to the project's impact, the Commission should have prepared an Environmental Impact Report ("EIR"), or Mitigated NegDec.

In general, the standard for whether an agency needs to prepare an EIR (evaluation of environmental impacts), rather than a NegDec (statement that there will be no significant impacts), is whether substantial evidence in the record supports a fair argument that the project would have a significant impact on the environment ("fair argument standard"). (*Friends of "B" Street v. City of Hayward* (1980) 106 Cal.App.3d 988, 1002; Pub. Resources Code, § 21080, subs. (c) & (d).) Mere opinions and generalized concerns are not sufficient evidence to support a fair argument that the project will cause a significant environmental effect. (*Lucas Valley Homeowners Association v. County of Marin* (1991) 233 Cal.App.3d 130, 163-164.)

The City contends that our disregard of its local undergrounding ordinance is inconsistent with the policy we adopted in General Order (“GO”) 159-A of “deference to local government.” (Rehrg. App. at p. 13.) According to the City, because of this conflict, NextG’s project will result in a significant environmental impact. This argument is incorrect because GO 159-A does not apply to NextG’s project, the City misconstrues the policy in this general order, and, in any event, the GO 159-A deference policy does not determine whether an impact is significant.

First, GO 159-A applies to cellular service providers and their construction of cellsites and Mobile Telephone Switching Offices (“MTSOs”). (GO 159-A, § I.) As discussed, NextG has authority as a local exchange service provider (D.07-04-045), and its current project involves fiber optic cable, three new utility poles and the addition of nodes and antennas. By its terms, GO 159-A does not apply to NextG or the current project, and therefore, whether the project is consistent with the policies in GO 159-A is not relevant.

Moreover, the City’s argument that the GO 159-A policies should apply to DAS systems because they are similar to cellular facilities is misplaced. We have had different types of review requirements that have applied to different types of telecommunications facilities. These requirements have developed partly because of when and how the technology and markets developed, and not simply the nature of the facilities themselves. The cellular requirements do not apply to local exchange carriers, but rather these carriers’ construction projects have largely been governed by the terms of their CPCNs.

Even if GO 159-A were relevant to NextG’s project, despite GO 159-A’s policy to “generally” defer to local governments, the GO explicitly recognizes, “the Commission shall retain its right to preempt a local government ... when there is a clear conflict with the Commission’s goals and/or statewide interests.” (GO 159-A, § B.) Thus, even pursuant to GO 159-A, we would still have the authority to preempt the undergrounding ordinance.

Furthermore, to the extent the City is suggesting that the preemption of a local ordinance means that there is a significant environmental impact from the project, they have provided no support for this position. Although, the CEQA Guidelines require that a NegDec evaluate consistency with applicable land use regulations, they allow that such a conflict may be minor and insignificant. (CEQA Guidelines, App. G, § X.b.) Here, the only conflict the project may have with local regulations is a minor conflict with the undergrounding ordinance concerning three poles, which as discussed is preempted to the extent there is a conflict with the Commission's authorization. This does not create a significant environmental impact.

Finally, although the City restates its concerns that the antennas and poles, and future antennas and poles will have a significant visual impact, they provide no evidence that would support a "fair argument" that this is the case. On the other hand, the NegDec undertakes a thorough evaluation of the project's visual impacts. The "Aesthetics" discussion includes an analysis of whether the project would change the scenic vista, degrade visual resources, degrade the visual character, or create new light or glare. (NegDec, at p. 4-1 et seq.) The analysis uses before and after photographic projections illustrating the visual change the project would create. As the NegDec explains, the new poles and other nodes would blend into the existing landscape, which already includes utility poles and would be relatively unobtrusive. Based on these analyses, the NegDec concludes that there will be no significant change from the existing visual environment, and therefore, no significant visual impact from the project.

The City also argues that the cumulative visual impact of future antennae and poles may be significant. As the NegDec explains, any future projects are speculative. (NegDec Attach. 2, at p. 49.) There are no current projects that add to the visual impact of the installation, and there are no probable future projects. The City does not provide evidence that there are any plans to build future facilities or that such future expansion would necessarily occur or that any of these impacts would be "considerable." The City also refers to DAS projects in other cities. These projects, however, would in no way contribute to the visual impact the City claims is potentially significant. DAS

projects in other cities would not visually impact the City's streets. Because the City has presented no evidence supporting its concerns about cumulative impacts, it has failed to support a "fair argument" that cumulative impacts may lead to significant environmental impacts. (See *Leoniff v. Monterey County Board of Supervisors* (1990) 222 Cal.App.3d 1337, 1357.)

For these reasons, the City has failed to support a "fair argument" that the NextG project may have a significant environmental impact.

**E. THE CITY'S REQUEST FOR ORAL ARGUMENT SHOULD BE DENIED AS UNTIMELY.**

The City originally filed its challenge to D.10-10-010 as an "Appeal of Decision" under Rule 14.4 of the Commission's Rules of Practice and Procedure on November 17, 2010.<sup>15</sup> In response to a request from the Commission's Docket Office, the City corrected the title of its filing and resubmitted it as an "Application for Rehearing." The rehearing application was considered as filed on November 17, 2010. On November 23, 2010, the City filed a request for Oral Argument on its application for rehearing, under Rule 16.3.

Under Rule 16.3, "[i]f the applicant for rehearing seeks oral argument, it should request it in the application for rehearing." Although the City explained why it did not make its request with its application for rehearing, it has not technically met the requirement set forth in the Commission rules. Thus, the request is rejected as untimely.

**III. CONCLUSION**

Therefore, for the reasons stated in this decision, no legal error has been demonstrated. Accordingly, the City's application for rehearing of D.10-10-007, as modified, is denied.

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<sup>15</sup> All subsequent reference to rule is to the Commission's Rules of Practice and Procedure, unless otherwise indicated.

**THEREFORE, IT IS ORDERED** that:

1. The first full paragraph on p. 24 of D.10-07-007 is deleted and replaced with:

We note that to the extent Huntington Beach's ordinances are inconsistent with the authority we grant to NextG in today's order, those provisions are preempted as inconsistent with the statewide interest in utility regulation.

2. Conclusion of Law 5 in D.10-10-007 is deleted and replaced with:

To the extent the undergrounding ordinance is inconsistent with NextG's installation as approved by the Commission in this order those provisions of the ordinance are preempted.

3. An addendum to the Final Negative Declaration adopted in D.10-10-007 is attached as Attachment A, and is hereby adopted.

4. Rehearing of D.10-10-007, as modified herein, is denied.

5. The request for order argument is denied.

6. Application (A.) 09-03-007 and Case (C). 08-04-037 are closed.

This order is effective today.

Dated January 13, 2011, at San Francisco, California.

MICHAEL R. PEEVEY  
President  
TIMOTHY ALAN SIMON  
NANCY E. RYAN  
Commissioners