

Decision 06-07-036

July 20, 2006

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

City and County of San Francisco,  
Complainant,

vs.

NextG Networks of California,  
Inc. (U6754 C),

Defendant.

Case 05-03-010  
(Filed March 9, 2005)**ORDER MODIFYING AND DENYING REHEARING OF  
DECISION 06-01-006, AND DENYING MOTION FOR EXPEDITED  
CONSIDERATION**

In September 2002, NextG Networks of California, Inc. (NextG), filed an application for a certificate of public convenience and necessity (CPCN) to provide radio frequency (RF) transport services as competitive local exchange (CLEC or CLC) and interexchange (IEC) telecommunications services. (A.02-09-019.) By D.03-01-061, we found that NextG was a non-dominant inter-exchange carrier (NDIEC) and a CLC. D.03-01-061 approved NextG's application and granted it a CPCN. In its 2002 application, NextG described its construction as "a system of fiber optic cables and small antennas and conversion equipment attached to poles and other structures."

CCSF filed a complaint (C.05-03-010) alleging that NextG failed to timely accept the CPCN authority granted to it by D.03-01-016, misrepresented the scope of its authority, and was installing facilities in non-authorized public rights-of-way. CCSF prayed the Commission either revoke NextG's CPCN or order it to fully comply with the terms of it.

NextG filed a motion to dismiss CCSF's complaint, on the grounds that it failed to state a cause of action under Public Utilities Code section 1702 and was an improper attempt by CCSF to use the Commission's procedures to obstruct a federal proceeding, currently stayed, brought by NextG against CCSF (*NextG Networks of California v. City of San Francisco*, Case No. 05-0658 (N.D. Cal.)).<sup>1</sup> That motion was denied by ruling of the Assigned Commissioner (AC) on July 6, 2005.

Because an allegation involved the California Environmental Quality Act (CEQA), to assist us in determining what, if any, environmental review was necessary, NextG was ordered to re-file the proposed environmental assessment (PEA) it had originally submitted in A.02-09-019.

On July 13, 2005, the parties filed a stipulation of material facts, which is attached to D.06-01-006. D.06-01-006 finds, among other things, that by D.03-01-061, the Commission authorized NextG to operate as a limited facilities-based and resale provider of competitive local exchange services and that in so doing the Commission understood that NextG would provide RF transport services. D.06-01-006 discusses the CPCN authorization provided to other CLCs providing services similar to NextG, finding that, as in the case of D.03-01-061, commonly "standard limited facilities-based CLC CPCN decisions do not mention the specific service the telephone corporation is providing." (D.06-01-006, at p. 13, Finding of Fact No. 6.) D.06-01-006 determines that NextG's "construction activity is within the scope of authority granted in D.03-01-061." (*Id.*, at p. 9.) D.06-01-006 concludes that "NextG is currently providing telephone service in accordance with the limited facilities-based authority granted in D.03-01-061." (*Id.*, at p. 14, Conclusion of Law No. 1.) D.06-01-006 also concludes that NextG timely exercised the authority granted in D.03-01-061. In addition, D.06-01-006 concludes that CCSF did not rely on any material representation NextG made to it, and denies the complaint.

CCSF timely filed an application for rehearing of D.06-01-006. CCSF's application for rehearing of D.06-01-006 alleges the Commission erred in finding that

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<sup>1</sup> All statutory references are to the Public Utilities Code unless otherwise indicated.

NextG was authorized under its CPCN to provide RF transport services, and that its construction of facilities on existing utility poles and structures is categorically exempt from the California Environmental Quality Act (CEQA). CCSF also contends that D.06-01-006 unlawfully modifies D.03-01-061 without adequate notice and opportunity to be heard and in violation of section 1705; and makes a new CEQA finding without evidence to support it and without notice such finding would be made in an adjudicatory docket. NextG filed a timely response opposing CCSF's application for rehearing. NextG also filed a motion for expedited consideration which we deny by this order.

## **I. DISCUSSION**

### **A. Scope of authority granted to NextG by D.03-01-061.**

CCSF argues that there was no discussion in D.03-01-061 that NextG intended to offer only RF transport services or that such services constitute LEC or IEC service.<sup>2</sup> That is correct; D.03-01-061 is very general and provides no specifics regarding what specific type of services NextG will provide, apart from CLC and IEC services. It does, however, reference and approve NextG's application for a CPCN. In its application, NextG stated: "... NextG will provide radiofrequency ... transport and backhaul services.... Using a system of fiber optic cables, small antennas and conversion equipment attached to poles and other structures." (A.02-09-019 at p. 3.) CCSF acknowledges that in its 2002 application for a CPCN, NextG specifically stated that it would be providing RF transport services and described how it would do so. CCSF contends that D.03-01-061 did not authorize NextG to offer RF transport services, implying that RF transport services are not included within CLC (or CLE) or IEC service. CCSF also argues that D.03-01-061 "limits" NextG's authority to CLC or IEC service. (CCSF application for rehearing at pp. 2-3.)

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<sup>2</sup> The parties agreed by stipulation, D.03-01-061 authorized NextG "to operate as a limited facilities-based and resale provider of competitive local exchange services, and interexchange services...." (D.03-01-061 at p. 7, Ordering Paragraph No. 1.) D.03-01-061 also authorizes NextG "to provide local exchange service in the service territories of Pacific Bell Telephone Company, Verizon California Inc., Roseville Telephone Company, and Citizens Telecommunications Company of California, Inc." (*Id.*, Ordering Paragraph No. 2.) Consequently, NextG was required to file tariff schedules for CLC and IEC services.

CCSF contends that since D.03-01-061 did not specifically state that NextG would offer only RF transport services, or that its RF transport services constitute CLC or IEC service, or that NextG is authorized by its CPCN to offer its RF transport services, that NextG did not receive such authority. This is inaccurate for reasons discussed herein and is a re-argument of the issues addressed by D.06-01-006. D.06-01-006 states that the authority granted to NextG by D.03-01-061 to act as a CLC and/or IEC encompasses a variety of telecommunications services. (D.06-01-006 at p. 6.) Addressing CCSF's concern, D.06-01-006 provides:

CCSF is correct that our standard limited facilities-based CLC CPCN decision does not mention the specific service the telephone corporation is providing. [Citation omitted.] ... [O]ur focus is on the authority we are granting, limit[ed] facilities-based CLC authority. (*Id.*, at p. 6.)

As discussed in D.06-01-006, the language used by D.03-01-061 was standard "boilerplate" language used for various services that constitute CLC and/or IEC service. It has been the Commission's policy in such cases, as it did in D.03-01-061, to reference the application in the authorizing decision, rather than actually provide a separate description of the actual service(s) being authorized.

In addition, use of more general terminology to describe existing buildings and structures in D.03-01-061 rather than specific terms such as "public rights-of-way," "streetlight," or "utility poles," does not establish that we did not authorize NextG to construct its facilities on such existing buildings and structures. As noted above, D.03-01-061 did not reject NextG's request for authority to install its equipment "in and on" existing structures. Nothing in D.03-01-061 establishes that we rejected any part of NextG's application.

CCSF contends that D.06-01-006 errs by making findings on issues concerning NextG's RF transport services because, it contends, there is no factual support for the findings in violation of section 1705.<sup>3</sup> Yet, as noted above, CCSF readily admits that NextG's application for a CPCN specified that it would be offering RF transport services.

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<sup>3</sup> Section 1705 requires the Commission to issue a decision that contains "separately stated, findings of fact and conclusions of law ... on all issues material to the order or decision."

By raising the issue in its complaint of whether NextG's RF transport services and construction were authorized within the CPCN granted by D.03-01-061, the Commission necessarily was required to make a finding on whether RF services are contemplated by the authority granted by D.03-01-061 and that is what we did. Further, CCSF's complaint made necessary a finding on whether the authority to install antennas and microcells in or on existing buildings and structures, such as utility poles and/or public rights-of-way, was within the scope of NextG's CPCN. CCSF has not shown the decision errs in its determination of whether RF transport services were within the scope of authority conferred on NextG by D.03-01-061.

**B. CEQA and installation on existing structures.**

CCSF also asserts that in NextG's CPCN decision, D.03-01-061, "[t]he Commission rejected NextG's request for a determination that its construction of its facilities *on* existing streetlights and poles was categorically exempt from CEQA." (CCSF application for rehearing at p. 3, emphasis retained.)<sup>4</sup> CCSF therefore argues that D.06-01-006 errs in finding that NextG's installation of microcells and antenna on existing utility poles is exempt from CEQA, contending D.06-01-006 "is both internally inconsistent and confusing..." citing to pages 8 and 9. (CCSF application for rehearing at p. 6.) CCSF maintains that NextG is only authorized to place its facilities "in" existing structures.

Despite language in D.06-01-006 suggesting that the Commission had not granted NextG authority to place antennas and microcells on existing utility poles, upon reflection we conclude that D.03-01-061 authorized these placements. We acknowledge that the language we originally used in D.03-01-061 authorizing NextG's proposal is ambiguous. As CCSF points out, in some places we discussed authorizing construction "in" existing structures. At the same time, however, we stated that: "Applicant represents

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<sup>4</sup> CCSF is mistaken in its contention that we concluded that NextG's project was "categorically exempt" from CEQA (CCSF application for rehearing at pages 6-9) at any time. Categorical exemptions are a term of art pursuant to CEQA and the Commission never determined that NextG's placement and construction fit within any CEQA categorical exemption. Rather, the Commission concluded it could be seen with certainty that the particular proposals in NextG's application would not result in a significant environmental impact.

that it will not be constructing any facilities other than equipment to be installed in or on existing buildings or structures, for the purpose of providing interexchange or local exchange services. Therefore, it can be seen with certainty that there is no possibility that granting this application will have an adverse effect upon the environment.” (D.03-01-061 at p. 4.)

Moreover, as noted in the discussion of CEQA in D.03-01-061, we clearly understood from NextG’s application that NextG would be constructing facilities “attached to” or “in or on” existing buildings or structures. NextG described its construction as attaching its equipment to existing utility poles and other existing structures. (A.02-09-019 at pp. 3-4.) We note that D.03-01-061 specifically declares: “This ... decision grants the relief requested.” (D.03-01-061 at p. 4.)

Accordingly, we reject CCSF’s restrictive interpretation of NextG’s CPCN language. Although D.03-01-061 reflects concern about granting unlimited authority to place indefinite items “on” existing structures, we concluded in that decision that NextG’s specific proposal, regarding antenna and microcells, should be authorized and would not have a significant impact on the environment. We find that it is a reasonable interpretation of D.03-01-061 that NextG is only required to return for additional authorization for construction or placement on structures *beyond* what was described in NextG’s CPCN application.

For these reasons, upon reconsideration of our language in D.03-01-061, we will alter our conclusions in D.06-01-006 regarding the correct interpretation of the earlier decision. We find that NextG’s interpretation of D.03-01-061, that we authorized it to place antennas and microcells on utility poles and in public rights-of-way, is reasonable. Because we find that we authorized NextG’s proposal in 2003, and at that time concluded there was no need for environmental review of the limited actions NextG planned, we will delete the portions of D.06-01-006 purporting to provide this authority and evaluating the need for environmental review. Moreover, since we concluded there was no potential for environmental impact from NextG’s proposed facilities in our 2003 decision, we decline to

further discuss CCSF's contentions regarding the possible environmental harm of NextG's equipment placement at this time.<sup>5</sup>

We further note that we have a proceeding that is currently pending concerning our CEQA policies for telecommunications utilities. (*Rulemaking on Application of CEQA to Telecommunication Utilities*, R.00-02-003, "rulemaking.") The issue of the regulatory treatment of utilities' placement of equipment "in or on" existing structures is being considered in that proceeding on a broader scale. Both NextG and CCSF should be aware that the final order we issue in the rulemaking may supersede the terms of NextG's CPCN as we have interpreted them in today's decision.

Finally, CCSF also argues that D.06-01-006 modifies D.03-01-061 without adequate notice and opportunity to be heard and made a CEQA finding without evidence to support it and without notice such finding would be made in an adjudicatory docket. As discussed above, as modified by our decision today, D.06-01-006 does not make any new CEQA finding. We clarify, but do not modify, D.03-01-061, and CCSF's allegations of error are unsupported and without merit.

## II. CONCLUSION

We believe that modification of D.06-01-006 is warranted as discussed herein. In view of the modifications we now order, upon reviewing each and every allegation of error raised by CCSF and for all of the foregoing reasons, we find there is no merit supporting the application for rehearing of D.06-01-006, as modified. In addition, we find that there is no good cause shown for granting NextG's motion to expedite this decision and we deny the motion.

Therefore **IT IS ORDERED** that:

1. The following modifications are made to Decision 06-01-006:

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<sup>5</sup> We note that CCSF has identified no new circumstances or particular environmental impact that was mistakenly overlooked. Rather CCSF is solely challenging the conclusions in D.03-01-061, as we interpret that decision. The time for contributing to, or challenging that decision is long past. In the event CCSF had information regarding changed circumstances, or a specific environmental concern, it would be able to bring that to our attention as a complaint pursuant to section 762, et al. This complaint route should be reserved for exceptional circumstances, however.

a. The third full sentence of the second full paragraph on page 2: “We find limited facilities-based authority for carriers providing radiofrequency transport services includes installation in or on existing utility poles,” is deleted and the following added in its place:

The authority granted to NextG by D.03-01-061 to provide limited facilities-based CLC services includes the authority to provide radiofrequency transport services involving construction in or on existing utility poles and other existing structures.

b. The second full sentence in the paragraph entitled “4. Discussion” on page 4: “After resolving concerns regarding the scope of the authority we granted to NextG, we then must decide whether the installation of wireless microcells and antennas on public utility poles has an adverse environmental impact under CEQA,” is deleted in its entirety.

c. The second sentence in the second full paragraph on page 5 is modified to delete the word “pokes,” and add the word “poles” in its place as follows:

In establishing facilities-based local exchange services, we stated carriers providing such services must “directly own, control, operate, or manage conduits, ducts, poles, wires, cables, instruments, switches, appurtenances, or appliances in connection with or to facilitate communications within the local exchange portion of the public switched network.”

d. The last sentence of the second full paragraph on page 6, stating: “Again our focus is on the authority we are granting, limiting facilities-based CLC authority” is modified to delete the word “limiting” and add in its place the word “limited,” as follows:

Again our focus is on the authority we are granting, limited facilities-based CLC authority.

e. Section 4.2, entitled “CEQA,” beginning on page 7 and ending on page 9 is deleted.

f. Finding of Fact No. 7 is deleted and the following added in its place:

7. D.03-01-061 grants NextG a CPCN to provide radio frequency transport services as described in its application.

g. Conclusion of Law No. 2 on page 14 is deleted and the following added in its place:

2. The determination already made in D.03-01-061 that it can be seen with certainty that there is no possibility that granting NextG's application to install its equipment in or on existing buildings or structures for the purpose of providing interexchange or local exchange service will have an adverse effect upon the environment, includes installation by NextG of small antennas and microcells on existing utility poles.

2. The application for rehearing of Decision 06-01-006 as modified herein, filed by the City and County of San Francisco, is denied.

3. The motion of NextG Networks for expedited consideration of complainant's application for rehearing is denied.

4. This proceeding is closed.

This order is effective today.

Dated July 20, 2006, at San Francisco, California.

MICHAEL R. PEEVEY  
President  
GEOFFREY F. BROWN  
DIAN M. GRUENEICH  
JOHN A. BOHN  
RACHELLE B. CHONG  
Commissioners