

Decision 09-02-015 February 20, 2009

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Investigation on the Commission's Own Motion
Into the Operations and Practices of NextG
Networks of California, Inc.

Investigation 08-07-012
(Filed July 10, 2008)

DECISION APPROVING SETTLEMENT

1. Background

NextG Networks of California, Inc. (NextG) is a telephone corporation that constructs and operates Distributed Antenna System (DAS) networks. These DAS networks provide radio frequency (RF) transport and backhaul services to Commercial Mobile Radio Service (CMRS) providers which amplify and extend CMRS providers' RF signals and capacity in difficult coverage areas. On April 12, 2007, in Decision (D.) 07-04-045, the Commission granted NextG's request for expanded facilities-based local exchange services authority and expedited environmental review. In the same decision, the Commission ordered its Consumer Protection and Safety Division (CPSD) to open an investigation to consider whether NextG had violated rules or orders of the Commission. Thereafter, CPSD commenced an investigation to determine whether NextG had violated the terms of its limited facilities-based Certificate of Public Convenience and Necessity (CPCN) or Rule 1.1 of the Commission's Rules of Practice and Procedure (Rules).

Based on CPSD's investigative report (Investigative Report), the Commission instituted this proceeding by issuing its Order Instituting

Investigation (OII) on July 15, 2008. The OII also directed NextG to show cause why a penalty should not be imposed if any violation was proven in the investigation. On September 2, 2008, NextG filed both a Response to the OII and a Motion to Dismiss the OII. In its Response, NextG disputed all of the claims in the Investigative Report. In its Motion to Dismiss, NextG argued that the alleged violations of its limited facilities-based CPCN are based upon licensing and environmental review requirements that are discriminatory and unlawful under Section 253 of the Federal Communications Act.¹

A prehearing conference was held on September 3, 2008 before Administrative Law Judge (ALJ) Karl J. Bemesderfer. CPSD filed both an Opposition to NextG's Motion to Dismiss and a Reply to NextG's OII Response on October 3, 2008. On October 23, 2008, ALJ Bemesderfer issued an order denying NextG's Motion to Dismiss and scheduled an evidentiary hearing in this matter for December 10 and 11, 2008. Subsequently, CPSD and NextG began to engage in settlement negotiations. In late November, the parties advised ALJ Bemesderfer that they had reached agreement on the terms of a settlement and he removed the evidentiary hearing from the calendar.

On December 17, 2008, CPSD and NextG filed a joint Motion for Adoption of a Settlement Agreement. The proposed Settlement Agreement is attached to this decision as Exhibit 1.

2. Discussion

The Investigative Report alleges that NextG engaged in ground-disturbing activities that exceed the authority contained in its limited facilities-based CPCN.

¹ 47 U.S.C. § 253.

It further alleged that an officer of NextG made false statements regarding those activities in violation of Rule 1. In the Settlement Agreement, the parties have agreed that when NextG applied for its full facilities-based CPCN, it should have disclosed in the application any and all construction it had performed that exceeded the authority granted in its limited facilities-based CPCN. The parties have also agreed that the Settlement Agreement is a compromise. It does not constitute an endorsement of any alleged fact or legal argument. By signing the Settlement Agreement,

- (i) NextG does not admit any violation of law or any liability for wrongful acts or untrue or misleading statements and
- (ii) CPSD does not concede that any of its factual or legal allegations were erroneous.

Pursuant to the Settlement Agreement, NextG agrees to pay Two Hundred Thousand Dollars to the General Fund of the State of California, half upon issuance of this decision and the balance on June 30, 2009. The Settlement Agreement contemplates that when NextG has made payment in full, I.08-07-012 will be closed.

This is an all-party settlement agreement. In D.92-12-019, we specified four conditions that must be satisfied in order for us to approve an all-party settlement. The sponsoring parties must show the following:

- (1) The settlement agreement commands the unanimous sponsorship of all parties to the proceeding.
- (2) The sponsoring parties are fairly reflective of the affected interests.
- (3) No term of the settlement contravenes statutory provisions or prior Commission decisions.

- (4) The settlement conveys to the Commission sufficient information to permit it to discharge its future regulatory obligations with respect to the parties and their interests.

The Settlement Agreement satisfies all four conditions. CPSD and NextG are the only parties and represent the only affected interests. Nothing in the Settlement Agreement contravenes any statutory provisions or prior Commission decisions and it provides sufficient information for us to discharge our future regulatory obligations with respect to the parties and their interests.

We have historically favored settlements that are fair and reasonable in light of the record as a whole. In this case, although NextG does not admit any culpability, it will pay a substantial sum to the General Fund and it has already obtained a full facilities-based CPCN pursuant to which any future ground-disturbing activities will be undertaken. The Settlement Agreement resolves a potentially time-consuming and disruptive dispute and avoids future litigation without requiring either party to concede its factual or legal contentions. The benefits to the public, including the payment to the General Fund and avoidance of litigation, clearly outweigh the benefits of continued litigation with its associated cost and uncertainty of outcome. We conclude that the Settlement Agreement is reasonable in light of the record as a whole, consistent with law, and in the public interest.

3. Comments on Proposed Decision

This is an uncontested matter in which the decision grants the relief requested. Accordingly, pursuant to Pub. Util. Code § 311(g)(2) and Rule 14.6(c)(2), the otherwise applicable 30-day period for public review and comment is waived.

4. Assignment of Proceeding

John A. Bohn is the assigned Commissioner and Karl J. Bemesderfer is the assigned ALJ for this proceeding.

Findings of Fact

1. Prior to obtaining its full facilities-based CPCN, NextG engaged in certain ground-disturbing activities that were beyond the authority granted by its limited facilities-based CPCN.

2. NextG contends that it was authorized to engage in these ground-disturbing activities under § 253 of the Federal Communications Act.

3. CPSD alleges that certain statements made by an employee of NextG were in violation of Rule 1.1.

4. NextG denies that the statements of the employee violated Rule 1.1.

5. The Settlement Agreement resolves these disputes without any admission of liability by NextG or any concession of a legal or factual contention by either party.

6. Pursuant to the Settlement Agreement, NextG will pay Two Hundred Thousand Dollars to the General Fund of the State of California, half upon issuance of this decision and the balance on June 30, 2009.

Conclusions of Law

1. The parties have met the conditions for approval of an all-party settlement agreement contained in D.92-12-019.

2. The Settlement Agreement is reasonable in light of the record as a whole, consistent with law, and in the public interest.

3. The Settlement Agreement should be approved.

O R D E R

IT IS ORDERED that:

1. The Settlement Agreement is approved.
2. NextG Networks of California, Inc. (NextG) shall pay to the General Fund of the State of California the sum of Two Hundred Thousand Dollars, half upon the effective date of this decision and the balance on June 30, 2009.
3. This proceeding shall remain open until NextG has paid the full Two Hundred Thousand Dollars. At that point, this proceeding shall be closed by the Commission on its own motion or on the motion of any party.

This order is effective today.

Dated February 20, 2009, at San Francisco, California.

MICHAEL R. PEEVEY
President
DIAN M. GRUENEICH
JOHN A. BOHN
RACHELLE B. CHONG
TIMOTHY ALAN SIMON
Commissioners