

Decision 08-08-010 August 21, 2008

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

Application of NextG Networks of California, Inc. ( U 6745 C) 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.

Application 06-05-031  
(Filed May 19, 2006)

**DECISION ON PETITIONS FOR MODIFICATION**

We dismiss without prejudice NextG Networks of California, Inc.'s (NextG) petition for modification of Decision 07-04-045. The concerns with the notice of proposed construction (NPC) process raised by NextG and the League of California Cities and the City and County of San Francisco (Cities) are best resolved in the California Environmental Quality Act (CEQA) rulemaking for telecommunications carriers, Rulemaking 06-10-006. We deny Cities' petition to modify the same decision. Cities' proposal to expand use of the NPC process to all limited facilities-based construction for NextG conflicts with our prior determinations that limited facilities-based construction requires no CEQA review.

**1. Background**

In Decision (D.) 07-04-045, we granted NextG's request for full facilities-based local exchange services authority and an expedited

environmental review process.<sup>1</sup> The NPC process permits NextG to claim a CEQA exemption for proposed construction projects by providing information on the project to the Commission's Energy Division CEQA staff. CEQA staff responds either with a notice to proceed or a letter of denial. NextG uses the NPC process when it believes the project is exempt from CEQA. This process for expedited environmental review of facilities-based construction projects is consistent with the process granted in D.06-04-063 and D.06-04-067.

## **2. NextG's Petition for Modification**

In its petition for modification, NextG seeks to establish a review and approval process, comparable to the existing advice letter process, when protests are received to NPCs.<sup>2</sup> Cities concur that some modification to the NPC process is necessary but propose that the process require an advice letter that must be served on local government agencies where any construction is planned.<sup>3</sup> Cities also recommend that if a protest is based on disputed issues of law or fact, the Commission should order the filing of a formal application. NextG opposes Cities' recommendations.<sup>4</sup>

Although NextG and Cities concur that changes to the NPC process are necessary, they disagree on the scope of those changes. NextG proposes

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<sup>1</sup> 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 antennae attached to poles and other structures.

<sup>2</sup> NextG filed its petition on November 1, 2007.

<sup>3</sup> Cities filed their partial opposition on December 3, 2007.

<sup>4</sup> NextG filed its response on December 14, 2007.

adopting one aspect of the advice letter process, the use of a resolution for protested NPCs, and the Cities propose replacement of the NPC process with the use of advice letters. In this application proceeding, only the NPC process for NextG was at issue, although comparable procedures are in place for other distributed antenna system (DAS) carriers. Therefore, any changes to the NPC process adopted in this proceeding would not affect other DAS carriers. If changes are warranted, they should be adopted for all DAS carriers. As a result, this proceeding is not the appropriate forum for addressing generic changes to the NPC process.

Rulemaking (R.) 06-10-006 is the appropriate proceeding to address incorporation of any aspect of the advice letter procedure into the NPC process, since it is addressing the application of CEQA to all telecommunications carriers.<sup>5</sup> An expedited procedure for other construction is within the scope of that rulemaking; the April 18, 2008 scoping memo in that rulemaking includes the following issues:

- What type of public notice should an expedited procedure for review and approval of telecommunications construction projects claimed to be exempt from CEQA review [require]?
- Should an expedited procedure for review and approval of telecommunications construction projects claimed to be exempt from CEQA include a process for resolving protests to claimed exemptions? If so, what should this process be?

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<sup>5</sup> As noted in D.07-04-045, the NPC procedure was to remain in place unless we adopted different requirements in R.06-10-006. NextG is a party in R.06-10-006 and has filed comments with the "Joint CLECs." Cities also are parties in the rulemaking and have filed joint comments with other parties.

The telecommunications CEQA rulemaking will address how to resolve protests to NPCs and what notice carriers should provide of their submission of an NPC. Because R.06-10-006 is the appropriate proceeding to resolve the issues raised in the petition for modification, we will dismiss NextG's petition without prejudice.

### **3. Cities' Petition to Modify**

In their petition to modify, Cities request that the NPC procedure be modified to require NextG to include any proposed construction consisting of a DAS, including the limited facilities-based part of any project (installation of facilities in or on existing buildings and structures).<sup>6</sup> NextG characterizes the request to change the definition of full facilities-based authority as an untimely challenge to the decision granting limited facilities-based authority, D.03-01-061, and states this restriction would be placed unfairly on NextG and not on its DAS competitors.<sup>7</sup>

In their reply, Cities contend they were unaware of how the NPC operated and did not realize that certain construction, including installing facilities on existing poles under limited facilities-based authority, would not be part of the NPC process.<sup>8</sup> Cities allege the NPC process is deficient under CEQA, because it fails to consider all planned construction. NextG disagrees. NextG states that the Commission has required the NPC process only for full facilities-based

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<sup>6</sup> Cities filed their petition to modify on December 3, 2007.

<sup>7</sup> NextG filed its response on January 3, 2008.

<sup>8</sup> Cities filed their reply on January 14, 2008.

construction and has permitted DAS carriers to proceed with limited facilities-based construction without CEQA review.<sup>9</sup>

Cities assert their petition for modification is the proper way to review the NPC process for limited facilities-based construction for NextG. We disagree. NextG received limited facilities-based local exchange authority in D.03-06-031. That authority permitted construction projects in or on existing buildings and structures without environmental review.<sup>10</sup> In D.06-07-036, we reaffirmed our earlier conclusion that limited facilities-based construction projects required no CEQA review. In this proceeding, we granted NextG full facilities-based authority and extended the NPC process, already in place for two other DAS carriers, to NextG's full facilities-based construction. Cities' proposal is not a request for modification of that process; instead, it is a request to expand the process to construction addressed in other proceedings. We decline to revisit the necessary CEQA review for limited facilities-based construction in this proceeding. We will briefly address Cities' contentions that there is a cumulative environmental effect from limited facilities-based construction, that excluding such construction from the NPC process is piecemealing, and that the NPC process does not comply with CEQA.

Cities state there are potential environmental impacts from the installation of antennas on utility poles. Cities note that General Order 95 requires that antennas be located at least two feet from the center of the pole. NextG's antennas in San Francisco are installed almost five feet from the center of the pole

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<sup>9</sup> NextG filed its response to Cities' reply on January 25, 2008.

<sup>10</sup> The City of San Francisco challenged this authority in Case (C.) 05-03-010.

and rest on thick cross arms supported by braces. Cities also note there are three additional boxes attached to the pole below the antenna. Cities state the cumulative effect of allowing such installations, plus the potential for installation in historic districts or in front of historic buildings, could have an environmental impact.<sup>11</sup>

We have consistently concluded there is no need for environmental review of projects that consist of NextG's placement of antennas and microcells on utility poles. (See D.03-01-061, D.06-01-006, and D.06-07-036.) In D.06-07-036, we stated a complaint was the appropriate procedural vehicle to raise any contentions that NextG's equipment placement potentially could result in environmental harm.<sup>12</sup> A petition for modification is not the appropriate means to resolve concerns about cumulative or other environmental impacts from NextG's placement of antennas and microcells.

Cities allege that NextG is able to piecemeal environmental review when projects include construction under both limited facilities-based and full facilities-based authority. NextG submits an NPC for the facilities-based component of a project, because the NPC process was limited to facilities-based construction for DAS carriers. We are addressing piecemealing in the telecommunications CEQA OIR, and concerns about piecemealing should be

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<sup>11</sup> NextG states Cities have improperly alleged facts and have failed to authenticate the attached photographs with a declaration. Cities provide a declaration in their reply to NextG.

<sup>12</sup> Complaints are appropriate for allegations of first impression concerning environmental harm.

raised there.<sup>13</sup> In the interim, NextG should provide in the NPC all information on projects that include facilities-based and limited facilities-based construction. CEQA staff needs information on the whole project in order to assess NextG's claimed exemption for the facilities-based portion of the project.

Cities contend the Commission does not comply with CEQA in the use of the NPC process, because projects with limited facilities-based and full facilities-based construction are not reviewed in their entirety. NextG responds that the Commission, both in the DAS carriers' use of the NPC process and in the construction of electric transmission facilities has recognized the distinction between projects requiring CEQA review and projects that are exempt from CEQA review. We also are addressing whether our policies conform to CEQA in the telecommunications CEQA rulemaking.<sup>14</sup> Any concerns about whether expedited CEQA review processes, including the NPC process, comply with CEQA should be raised in that rulemaking. We find no merit in Cities' request to expand the NPC process to limited facilities-based construction projects and deny Cities' petition to modify. Cities' additional concerns about the NPC process should be raised in the telecommunications CEQA rulemaking.

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<sup>13</sup> In R.06-10-006, we have asked: How can the Commission avoid the "piecemealing" or "segmenting" of telecommunications construction projects, including projects claimed to be CEQA-exempt, for the purposes of environmental review?

<sup>14</sup> In R.06-10-006, we have asked: Do the Commission's current policies and procedures for environmental review of telecommunications construction projects fully comply with the requirements of CEQA? If not, how can the Commission improve its CEQA policies and procedures in order to do so?

#### **4. Comments on the Proposed Decision**

The proposed decision of the ALJ 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 filed on July 28, 2008, by Cities and NextG, and reply comments were filed on August 4, 2008, by NextG and Cities.

#### **Assignment of Proceeding**

Rachelle B. Chong is the assigned Commissioner and Janice Grau is the assigned ALJ in this proceeding.

#### **Findings of Fact**

1. R.06-10-006 is addressing the application of CEQA to all telecommunications carriers, including the type of public notice an expedited procedure for review and approval of telecommunications construction projects should require and whether such expedited procedures should include a process for resolving protests to claimed exemptions from CEQA.
2. In its petition for modification, NextG seeks to establish a review and approval process, comparable to the existing advice letter process, when protests to NPCs are received.
3. Cities propose that the NPC process require an advice letter that must be served on local government agencies where any construction is planned.
4. Cities' petition to modify proposes including limited facilities-based construction projects in the NPC process.
5. In D.03-01-061, NextG was granted authority to provide limited facilities-based local exchange services.

6. In D.07-04-045, NextG was granted authority to provide full facilities-based local exchange services. NextG was permitted to use the NPC process for facilities-based construction.

7. In D.06-07-036, the Commission reaffirmed its earlier conclusion that limited facilities-based construction projects require no CEQA review.

### **Conclusions of Law**

1. R.06-10-006 is the appropriate proceeding to address a process for protests to and notice of NPCs.

2. It is reasonable to decline to revisit in this proceeding the necessary CEQA review for limited facilities-based construction projects for DAS carriers.

3. In order to resolve the issue of whether D.07-04-045 should be modified as requested, this order should be effective today.

### **O R D E R**

#### **IT IS ORDERED** that:

1. NextG Networks of California, Inc.'s petition to modify Decision (D.) 07-04-045 is dismissed without prejudice.

2. The League of California Cities and the City and County of San Francisco's petition to modify D.07-04-045 is denied.

3. Application 06-05-031 is closed.

This order is effective today.

Dated August 21, 2008, at San Francisco, California.

MICHAEL R. PEEVEY

President

DIAN M. GRUENEICH

JOHN A. BOHN

RACHELLE B. CHONG

TIMOTHY ALAN SIMON

Commissioners