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Decision 97-02-051 February 19, 1997

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking on the Commission's Own Motion Into Competition for Local Exchange Service.	R.95-04-043 (Filed April 26, 1995)
Order Instituting Investigation on the Commission's Own Motion into Competition for Local Exchange Service.	I.95-04-044 (Filed April 26, 1995)

ORIGINAL

I N D E X

O P I N I O N

This decision denies the petition to modify Decision (D.) 95-12-057 filed by San Francisco Beautiful (SFB).[1]

I. Background

D.95-12-057 was issued by the California Public Utilities Commission (Commission) on December 20, 1995. In that decision, the Commission approved 31 of 40 petitions filed by facilities-based competitive local carriers (CLCs) to offer local exchange service within the service territories of Pacific Bell (Pacific) and GTE-California (GTEC).

In reviewing the 40 petitions, the Commission acted as the lead agency under the California Environmental Quality Act (CEQA). CEQA requires the Commission to assess the potential environmental impact of a project with the objective of avoiding adverse effects, investigating alternatives, and restoring or enhancing environmental quality to the fullest extent possible. To achieve this objective, the Commission Advisory and Compliance Division (CACD)[2] examined the 40 petitions for potentially significant environmental impacts.

Following its assessment of the 40 petitions, CACD prepared a draft Negative Declaration and Initial Study which described the petitioners' projects and their potential

1 The title of SFB's pleading states that the filing is an application for rehearing or a petition for modification. SFB's filing was docketed only as a petition for modification, and was not filed as an application for rehearing.

2 The Commission has recently undergone a reorganization. Telecommunications work performed by CACD has now been taken over by the Telecommunications Division.

environmental effects. These documents were sent to public libraries and local planning agencies throughout the state for review and comment. Public comments were received and reviewed, and forwarded responses were prepared.[3] CACD then finalized a Mitigated Negative Declaration (MND) covering all 40 facilities-based petitions.

Based upon the Initial Study and the public comments, the Commission determined that the proposed projects of the facilities-based CLCs did not have potentially significant environmental effects as long as appropriate mitigation measures were incorporated into the projects. Accordingly, the Commission approved the MND[4] in D.95-12-057.

On January 22, 1996, SFB filed a document entitled an "Application for Rehearing of Decision 95-12-057 or Petition for Modification of Decision 95-12-057" (pleading) and concurrently filed a motion for leave to intervene as an interested party in R.95-04-043/I.95-04-044. SFB argued that the MND environmental document certified in D.95-12-057 was inadequate in several ways, and that the defects should be remedied through rehearing or modification of the Decision. As discussed in Section III.B. below, SFB improperly identified this document as an "Application for Rehearing." Because the document did not meet the procedural requirements for an application for rehearing, we accepted it for filing only as a "Petition for Modification."

Replies in opposition to the SFB pleading were filed on February 6, 1996, by Pacific, GTEC, and jointly by AT&T

3 The public comments and the responses to the comments are included in Subappendix C to the Final Negative Declaration.

4 The Final Negative Declaration is attached to D.95-12-057 as Appendix D.

Communications (AT&T), MCI Telecommunications (MCI), and Sprint Communications (Sprint).

The assigned administrative law judge (ALJ) prepared a draft decision addressing the SFB pleading, which was discussed at the Commission's June 19, 1996, meeting. During the discussion of this agenda item at the Commission meeting, Commissioners Fessler and Neeper stated that further inquiry was warranted regarding certain aspects of the Commission's environmental certification policies and directed that additional comments be solicited from parties before disposing of the SFB matter. Accordingly, the draft decision was withdrawn from the Commission's agenda, and the ALJ issued a ruling dated August 23, 1996, soliciting comments on the questions of concern to the Commissioners relating to the SFB filing, namely: (1) whether there were any differences in the treatment of different categories of telecommunications carriers with respect to environmental review and certification and, if so, what action may be appropriate; and (2) whether any additional minimum environmental and safety standards should be adopted by this Commission to provide local jurisdictions more uniform or explicit guidance in consulting with carriers regarding environmental mitigation measures. Comments in response to the ALJ ruling were received on September 30, 1996, from SFB, Pacific, GTEC, and the California Telecommunications Coalition (Coalition).[5] Based upon consideration of the comments filed by parties, we are now prepared to dispose of SFB's pleading as set forth below.

5 For the purposes of these Comments, the Coalition consists of the following parties: AT&T Communications of California, Inc., MCI Telecommunications Corporation, ICG Telecom Group, Inc., California Cable Television Association, and Teleport Communications Group, Inc. The views expressed represent a consensus of the Coalition's members and may not represent all of the views of the each member of the Coalition.

II. Positions of Parties

A. SFB

As stated in its original pleading, SFB contends that the MND certified by the Commission in D.95-12-057 does not meet the legal standards required under CEQA. SFB argues that the MND fails to adequately mitigate the potentially significant statewide environmental effects of the proposed projects of the CLCs who were certificated in D.95-12-057. For this reason, SFB filed its "Application for Rehearing or Petition for Modification of D.95-12-007."

SFB criticizes the MND because it does not cover the facilities of the incumbent LECs. SFB claims that the Commission's existing environmental review policies provide for a "two-class system" where an incumbent LEC who engages in new construction within its previously authorized service territory is exempt from the CEQA mitigation measures which new CLC entrants must follow. Petitioner cites the example of construction of battery-powered service boxes by Pacific which SFB claims are exempt from CEQA mitigation compliance since they are constructed within Pacific's existing service territory. Petitioner raises the concern that existing providers with preapproved service territories could construct facilities for other petitioners that would otherwise have to follow the MND Mitigation Monitoring Plan.

SFB is also concerned that the MND is ambiguous about the authority of local jurisdictions to alter CLCs' proposed facilities, such as changing facility locations or having them placed underground. The MND prohibits local jurisdictions from imposing requirements that would prevent CLCs from developing their service territories. SFB believes this prohibition weakens the MND's requirement that CLCs must consult with local jurisdictions about the aesthetic impact of proposed facilities since local jurisdictions cannot stop CLCs from installing their facilities.

SFB also claims that its concerns about safety matters and visual and physical obstruction were improperly reduced in the MND to only aesthetic concerns.

SFB recommends that the Commission develop standards for local agencies which would govern the construction of CLC facilities, the assessment of fees to repair deteriorated streets, and safety and size requirements for utility service boxes. SFB believes that local agencies lack the means to develop such standards on their own. SFB also recommends that the Commission advise local agencies on questions regarding proposed CLC facilities, such as what facilities can be undergrounded or have potential dangerous health effects. In addition, SFB states that with telecommunications technology changing so fast, technological information must be provided to local agencies to enable them to effectively evaluate CLC proposals and make informed environmental impact decisions.

SFB also claims the MND does not address standards for proposals by CLCs to extend their facilities beyond existing utility conduits and corridors. SFB believes the lack of such standards is a significant problem since existing utility conduits and corridors in San Francisco are already full as evidenced by utilities regularly excavating downtown streets.

SFB states that the dispute resolution process described in the MND does not include any criteria for resolving disputes, and that no explanation is given for how such criteria will be developed. SFB is concerned that the CPUC will be resolving land-use disputes throughout the state with no criteria and without the benefit of land-use expertise.

In response to the August 23, 1996, ALJ ruling, SFB submitted additional comments on September 30, 1996, in which it raised further criticisms regarding the Commission's CEQA review process. In addition to responding to the specific questions as directed by the ALJ ruling, SFB filed additional comments

augmenting its original pleading which went beyond the scope of the limited comments called for in the ALJ ruling. Nonetheless, we shall consider SFB's additional comments in the interest of a complete record. SFB's additional comments are summarized herewith.

SFB argues that a public agency must prepare an Environmental Impact Report (EIR), and may not rely on a MND, if there is a "fair argument" in the record that the project "may have" any significant adverse environmental impacts, citing P.R.C. §§ 21100, 21151; 14 Cal. Code Regs. (C.C.R.) § 15064(a)(1); see also, Friends of Mammoth v. Board of Supervisors (1972) 8 C3d 247, Sundstrom v. County of Mendocino (1988) 202 CA3d 296.

SFB claims that the comments which were received on the MND certified in D.95-12-057 raised criticisms which meet and surpass the "fair argument" legal standard that triggers the need for an EIR. SFB claims the "fair argument" test presents a "low threshold" for requiring an EIR. (Citizen Action to Serve All Students v. Thornley (1990) 222 CA3d 748.) SFB contends the MND certified in D.95-12-057 is defective for this reason, and that an EIR should have been performed. SFB contends that an EIR must be prepared even if there is "substantial evidence" that a proposed project will cause no significant adverse impacts. (No Oil, Inc. v. City of Los Angeles (1974) 13 C3d 68.)

SFB further claims that the MND is flawed by deferring any specific analysis of critical impact issues to potential future CEQA review processes for specific CLC construction activities. SFB claims that the strategy of deferring disclosure, analysis and decisionmaking regarding specific mitigation requirements to some future date and some other agency has been previously rejected by the courts.

In support of this claim, SFB cites Sundstrom v. County of Mendocino (1988) 202 CA3d 296, wherein a local planning agency approved a project with a MND, based in part on a condition that

required the project proponent to secure approval of a sludge disposal plan from the Regional Water Quality Control Board and another agency. The court held that such deferral was insufficient to justify the lead agency's failure to address sludge-related mitigation requirements itself as part of the CEQA review process, and invalidated the MND based solely on this issue.

SFB characterizes the Commission's delegation of ministerial authority for each CLC project to local agencies as "piecemealing" the review of the entire project. SFB states that piecemealing has been condemned by the courts (citing, e.g., Bozung v. LAFCO (1975) 13 C3d 263; McQueen v. Board of Directors (1988) 202 CA3d 1136.) In the McQueen case, a public agency sought to acquire private property for a public park and failed to disclose, analyze, or mitigate contamination on the subject property -- based in part on the fact that such matters would be considered and resolved by a separate environmental agency at some later date. SFB claims that in this proceeding, the Commission unlawfully defers disclosure, analysis or mitigation of CLC construction outside a utility right-of-way (ROW) in a similar manner. While the MND recognizes that such construction activities may be very invasive and destructive of the environment (e.g., trenching and excavation activities to obtain access to conduits), SFB claims there are no specific mitigation measures specified for these types of invasive impacts. Instead, SFB claims the MND defers to local requirements, and engages in no analysis regarding the extent to which any such local requirements are sufficient to mitigate such invasive adverse environmental impacts.

SFB further criticizes the MND for presumptively concluding that resale petitions would have no potential effect on the environment and thus need not be subject to even the abbreviated MND CEQA process. Finding no evidence in the MND to support this conclusion, SFB claims both D.95-12-057 and the Certified MND are fatally flawed by failing to describe or analyze

the physical effects of approving resale petitions. For example, SFB claims the proliferation of dozens of new resale services will require new or modified mechanical methods of tracking and billing telephone calls. As demand in this market increases, SFB claims current telephone boxes may need to be enlarged or modified to accommodate more and increasingly complex equipment.

B. AT&T Communications of California, MCI Telecommunications, and Sprint Communications Company (Joint Parties)

The Joint Parties, representing the views of CLCs, filed a response on February 6, 1996, opposing SFB's pleading on several grounds. First, they believe that the issues presented by SFB have already been reviewed and addressed by the Commission in preparation of the MND. Second, they believe that SFB has not complied with Commission's Rules of Practice and Procedure (Rule) 47 regarding petitions for modification, asserting that SFB's pleading lacks any justification for the relief requested and lacks specific wording to carry out any modification to D.95-12-057, as required by Rule 47.

C. Coalition

Comments were submitted by the Coalition on September 30, 1996, in response to the August 23, 1996, ALJ ruling. The Coalition believes that environmental and safety requirements should be the same for CLCs and LECs. The Coalition also believes that, beyond local permitting processes, Pacific and GTEC are not subject to any additional environmental or safety requirements under CEQA, so long as their "projects" meet the Commission's specifications, in Rule 17(h) of the Commission's Rules of Practice and Procedure, for projects that are categorically exempt from CEQA. In this respect, the Coalition believes the environmental rules applicable to CLCs are the same as those for LECs.

The ALJ ruling also asked whether any differences in environmental and safety rules between LECs and CLCs created unfairness or anticompetitive concerns in terms of the ability to

site facilities and compete effectively. The Coalition responds that if such differences were to exist (though the Coalition is unaware of any differences), they would be unfair and anticompetitive. The Coalition believes the best means of insuring that no such differences exist is to require that every rule applicable to CLCs also apply to Pacific and GTEC so as to give all carriers a vested interest in insuring that the Commission only adopts rules which are strictly needed to protect legitimate public safety and environmental concerns.

The ALJ ruling also asks for comment on "what additional criteria or standards, if any, should be adopted by this Commission to provide local jurisdictions more uniform or explicit guidance in consulting with petitioners regarding mitigation of any site-specific safety and aesthetic impacts." (ALJ ruling, at p. 3.) The Coalition urges the Commission to refrain from addressing this question at this time. For a state as large and diverse as California, the Coalition believes the range of potential "site-specific safety and aesthetic" concerns is virtually infinite. Moreover, the Coalition is not convinced, at least on the present record, that there is any need for such guidance or that such guidance could ever be "uniform." The Coalition proposes that the existing rule remain in place; namely, that where environmental or safety concerns are implicated, and where local agencies and CLCs or LECs cannot agree on the proper measure for mitigation of possible adverse impacts, the Commission is the final arbiter of all disputes. The Coalition believes this approach has worked well in the past and is not aware of any need for change at this time.

D. GTEC

GTEC opposes SFB's pleading and challenges each of the points raised by SFB. GTEC states that SFB's concerns regarding utility service boxes containing batteries is addressed by Finding No. 9 and Mitigation Measure I of the MND. GTEC states that these

provisions mandate that all above-ground utility service box installations comply with applicable local aesthetic standards.

GTEC disagrees with SFB's claim that Pacific Bell or other LECs may construct facilities on behalf of CLCs without complying with the MND' applicable mitigation measures. GTEC believes that Finding No. 9 and Measure I of the MND prohibit the installation of utility service boxes that do not comply with reasonable local requirements.

GTEC also disagrees with SFB's claim that the MND is unclear about the ability of local jurisdictions to impose aesthetic requirements. GTEC states that the only limitation on local jurisdictions is on their ability to impose prohibitive requirements, and that no further elaboration on the authority of local jurisdictions is necessary.

GTEC opposes SFB's suggestion that the Commission develop prototype standards for construction, street deterioration fees, and utility-service-box safety standards and size requirements. GTEC believes that local agencies have the resources to develop such standards, and that local agencies can generally obtain access to whatever expertise is required to evaluate a specific installation. GTEC further believes that prototype standards would unnecessarily restrict both the utility and the local agency, thereby preventing innovation.

GTEC also opposes SFB's recommendation that the Commission impose standards on CLC facilities that extend beyond the utility corridor. GTEC states that Mitigation Measure A requires all such projects to be the subject of a petition to modify the carrier's CPCN, which will require an appropriate environmental evaluation. GTEC adds that SFB's anecdotal evidence that existing corridors in San Francisco are full, even if true, does not change Mitigation Measure A's requirement that a CLC must first modify its CPCN before initiating construction outside the corridor, which will require appropriate environmental evaluation.

GTEC believes that SFB exaggerates when it suggests that the requirement for CLCs to consult with local agencies about a proposed project will be meaningless since the local agency cannot prohibit the project. GTEC states that the only limit on what a local agency can impose is that it not be so stringent that the project is, in effect, prohibited.

GTEC disagrees with SFB's claim that its concerns for safety matters and visual and physical obstruction were improperly reduced to only aesthetics. GTEC cites Mitigation Measures F and G, which GTEC says address SFB's concerns.

Finally, GTEC does not agree with SFB's recommendation that standards be developed to govern disputes. GTEC believes there is nothing wrong with developing standards on a case-by-case basis as specific disputes arise.

B. Pacific

Pacific also opposes rehearing or modification of D.95-12-057 as requested by SFB in its pleading. Pacific states that SFB's petition to modify violates Rule 43, which Pacific says limits petitions for modification to requesting only minor changes in a Commission decision or order. Pacific states that SFB does not request a minor change to D.95-12-057, and a petition for modification is not the proper vehicle for SFB's "complaint." Pacific also believes that SFB's pleading was not timely filed under Rule 85 which requires applications for rehearing to be filed within 30 days from the date a decision issued. Pacific states that D.95-12-057 was issued on December 20, 1995, while SFB's application is dated January 22, 1996, or more than 30 days after the decision was issued. Finally, Pacific states that granting SFB's pleading would delay competition, in contravention of the stated goals of the Commission and the California Legislature.

III. Discussion

A. Introduction

SFB's Petition for Modification, if granted, would require that we declare the MND underlying the approval of the 31 CLCs approved in D.95-12-057 to be invalid. As a result, the certificates granted to these 31 CLCs would have to be rescinded, and those CLC operations would come to a standstill throughout California. We find no legal basis to justify such a draconian measure which would be a major blow to the development of a competitive telecommunications market throughout California. We conclude that the Petition for Modification of D.95-12-057 of SFB should be denied and the legal validity of the MND should be affirmed for the reasons discussed below.

B. Procedural Issues

SFB's motion to intervene in this proceeding and be added to the service list was not opposed by any party. SFB has stated adequate justification for its intervention in this proceeding, and its motion has, therefore, been granted.

SFB's original pleading purports to be two documents in one, that is, an application for rehearing and a petition for modification. Because of this, SFB's pleading does not comply with Rule 3(b) which states:

> "Separate documents must be used to address unrelated subjects or to ask that Commission or the administrative law judge to take essentially different types of action...."

Since applications for rehearing and petitions for modifications each ask the Commission to take a different type of action, SFB

should have split its pleading into two different documents in order to comply with Rule 3(b).[6]

SFB states that it filed its pleading pursuant to Rule 85. However, Rule 85 requires that:

> "Applications for rehearing of a Commission order or decision...shall be filed within 30 days after the date of issuance...For purposes of this rule, 'date of issuance' means the date when the Commission mails the order or decision to the parties to the action or proceeding."

D.95-12-057 was mailed on December 22, 1995, while SFB's pleading was not received by the Commission's Docket Office until January 24, 1996, or more than 30 days after the decision was mailed. Accordingly, SFB's pleading was not timely filed as an application for rehearing under Rule 85.

SFB's pleading also does not comply with the requirements for as set forth in application for rehearing Rule 86.1 which states:

> "Applications for rehearing shall set forth specifically the grounds on which applicant considers the order or decision of the Commission to be unlawful or erroneous. Applicants are cautioned that vague assertions as to the record or law, without citation, may be accorded little attention."

SFB's original pleading filed on January 22, 1996, contains few, if any, citations to support vague assertions about factual or legal error in D.95-12-057. While SFB substantially augmented its substantive arguments with additional legal citations in supplemental comments filed pursuant to the August 23, 1996, ALJ

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6 Alternatively, SFB should have made it clear whether it was filing a petition for modification or an application for rehearing. As we stated on page 9, supra, SFB's filing is accepted only as a Petition for Modification.

ruling, the supplemental information provided by SFB exceeded the scope of the specific issues permitted for comment in the ALJ ruling. By failing to request or obtain permission for leave to unilaterally supplement its original pleading, SFB's supplemental comments were also procedurally defective.

For these reasons, we find that the pleading fails to meet the procedural requirements for an application for rehearing. Accordingly, we have accepted the pleading for filing purposes only as a petition for modification of D.95-12-057.

Even as a petition for modification, however, SFB's pleading fails to comply with Rule 47(b) which states:

> "A petition for modification must concisely state the justification for the requested relief and must propose specific wording to carry out all requested modifications to the decision."

Since SFB's pleading does not propose any specific wording to carry out any modification to D.95-12-057, it does not comply with Rule 47(b).

Based upon the procedural defects in its original pleading as noted above, there is sufficient legal basis to dismiss SFB's pleading strictly on the grounds of procedural defects. Nonetheless, we believe SFB has raised important public-policy concerns regarding our environmental review of the facilities of telecommunications carriers. Accordingly, in the interests of promoting public assurance that environmental concerns are properly addressed in the facilities-siting process set forth in D.95-12-057, we shall not dismiss SFB's Petition for Modification strictly on procedural grounds. We shall consider whether SFB's substantive arguments warrant a modification of D.95-12-057.

C. Substantive Issues

1. Consistency of Environmental Policies

We find no defect in the MND merely because its adopted mitigation measures only apply to the facilities of the CLC

petitioners while excluding the facilities of incumbent LECs within the LECs' existing service territory. Our MND certified in D.95-12-057 conformed to the standard procedures governing environmental reviews as prescribed by Rule 17.1 of the Rules. The preparation of the MND was required in conjunction with our discretionary authority to certify the CLC petitioners under §§ 1001 and 1002 of the Public Utilities Code. MNDs prescribed under CEQA are intended for the specific purpose of addressing environmental impacts of the projects of those utilities seeking such certification authority from this Commission. Since Pacific and GTEC were not seeking certification authority (except in their capacity as CLCs expanding beyond their existing LEC franchised service territory), they were not subject to the terms of the MND. In their capacity as facilities-based CLCs, Pacific and GTEC are fully bound to the MND. It would be beyond the legally prescribed purpose of the MND, however, to expand it to cover the facilities of other utilities who are not seeking certification authority to establish or expand their service territory.

Moreover, just because a utility may not be covered under the terms of a particular MND, the utility is not free to construct whatever facilities it chooses without regard for mitigating any adverse environmental impacts. As noted by Pacific, the incumbent LECs must comply with local governmental standards and are subject to the local ministerial permitting process in the construction of facilities. These local restrictions require many of the same mitigation measures as found in the MND. For example, the LECs must comply with local noise, erosion, and compaction requirements, state and local air and water quality requirements. The LECs must consult with local agencies to mitigate aesthetic concerns, comply with local construction and safety standards, and minimize the impacts of construction on the public rights of ways. Further, § 7901.1(a) of the PU Code states that municipalities shall have the right to exercise reasonable control as to the time, place, and

manner in which roads, highways, and waterways are to be accessed. Section 7901.1(b) states that the control, to be reasonable, shall, at a minimum be applied to all entities in an equivalent manner.

SFB's characterization of our environmental review process as a "two-class system" is, therefore, unwarranted. All telecommunications service providers are treated in a consistent manner with respect to the Commission's environmental rules. Under those rules, the requirements for various levels of environmental review relevant to a given service provider are determined by local ordinances and by the specific facilities planned by the provider. It was consistent with CEQA requirements to apply the MND only to those carriers that were seeking certification in D.95-12-057. The defined scope of the MND, however, in no way invalidated any of the other existing environmental restrictions on any telecommunications provider seeking to construct facilities. Accordingly, there is no merit in SFB's claim that the MND is inadequate because it does not apply to the incumbent LECs' facilities.

2. Relationship of Local Jurisdictions to the Commission in Facilities Siting Approval

Contrary to SFB's claim, we find no ambiguity in D.95-12-057 regarding the ability of local jurisdictions to alter facilities proposed by CLCs. The MND explicitly requires CLCs to comply with all local standards pertaining to geological resources, water resources, air quality, aesthetics, and other applicable standards. If proposed facilities do not comply with these local standards, the MND allows local authorities to require alteration of the proposed facilities so that they comply with local standards. Local authorities may alter a proposed facility's location, require that the facility be redesigned, or require undergrounding. The only limitation is that local jurisdictions cannot impose standards or permit requirements that would prevent CLCs from developing their service territories or otherwise interfere with the statewide interest in competitive

telecommunications. We find no sound basis to remove this limitation on local jurisdictions as proposed by SFB. In the event a local jurisdiction believed that mutually agreeable mitigation measures could not be adopted for a given CLC's project, the Commission can intervene to resolve such disputes.

In the August 23, 1996, ALJ ruling, we solicited further comments from parties regarding whether more uniformity or clarity was needed regarding the safety siting standards which local jurisdictions are to apply in relation to the state's jurisdiction. Based on review of the comments received on this issue, we find no inadequacy in the MND adopted in D.95-12-057. As noted in the Coalition's comments, the range of potential site-specific safety and aesthetic concerns is virtually infinite for a state as large and diverse as California. Therefore, it is to be expected that there will be variations in the permitting requirements imposed among differing local jurisdictions. Given this diversity, the approach we adopted in the MND is appropriate. We delegated ministerial authority to the local jurisdictions in addressing local requirements for the installation and construction of CLC facilities.

We do not concur with SFB that the rapid pace of change in telecommunications technology means that local agencies are unable to make informed decisions about proposed CLC facilities. To begin with, a local agency may require CLCs to explain their proposed construction to the agency's satisfaction. In addition, technical information is available from a wide variety of sources, including the Commission, universities, consultants, community organizations and private citizens, other towns and cities, the Internet, competitors of the utility. We believe that the MND, which requires CLCs to comply with a comprehensive set of environmental standards, fully addresses SFB's concerns about safety matters and visual and physical obstruction.

Given the power of local authorities to alter CLC facilities, we believe CLCs will take very seriously any local agency's aesthetic concerns. In any event, if a CLC fails to meaningfully consult with a local jurisdiction as required by the MND, the local jurisdiction may seek redress via the dispute resolution process described in Subappendix D of the MND. Subappendix D states that if we find that a CLC has not complied with the Mitigation Measures in the MND (including the consultation requirement), we may halt or terminate the project. Furthermore, any CLC that does not comply with the reasonable environmental requirements established by a local jurisdiction will be subject to a range of sanctions, including the revocation of its CLC certificate.[7]

SFB requests that the Commission advise local agencies on any questions they may have regarding proposed CLC facilities. We have always been available to respond to inquires from local agencies, and have done so on countless occasions. Therefore, SFB's request that the Commission advise local agencies has been and will continue to be met. No modification to D.95-12-057 is needed to accomplish this ongoing process.

The assigned ALJ's ruling provided all parties of record the opportunity to propose minimum standards which the Commission should apply with respect to its CEQA review. SFB was the only party to propose any specific standards. We address SFB's proposed standards below.

The first standard proposed by SFB is that all facilities covered under the MND be subject to all review and permit

7 Conclusion of Law No. 12 of D.95-12-057 states: "Any CLC which does not comply with our rules for local exchange competition adopted herein or in further proceedings, shall be subject to sanctions, including, but not limited to, revocation of its CLC certificate."

requirements of the local jurisdictions. In the event of local siting disputes, SFB proposes that the Commission consider preempting local jurisdiction authority to resolve the dispute under the General Order (GO) 159-A procedure.

GO 159-A addresses the siting, design and construction of cell sites and Mobile Telephone Switching Offices (MTSOs). The provisions of GO 159 presently apply only to cellular carriers. With respect to local government's role in regulating the location and design of cell sites and MTSO's GO 159-A, Section II.B states, in part:

> "The Commission will generally defer to local governments to regulate the location and design of cell sites and MTSOs including a) the issuance of land use approvals; b) acting as Lead Agency for purposes of satisfying the CEQA and c) the satisfaction of noticing procedures for both land use approvals and CEQA procedures.
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> "However, in so doing, the Commission shall retain its right to preempt a local government determination on siting when there is a clear conflict with the Commission's goals and/or statewide interests. In those instances, the cellular service provider shall have the burden of demonstrating that accommodating local government's requirements for any specific site would unduly frustrate the Commission's goals or statewide interests. Further, local government and citizens shall have an opportunity to protest a request for preemption and to present their positions. If a cellular service provider establishes that an action by local government unduly frustrates the Commission's objectives, then the Commission may preempt a local government pursuant to the Commission's authority under the California Constitution, Article XII, section 8."

We do not believe that making CLCs subject to the provisions of GO 159-A would offer any material advantage over the procedure adopted in D.95-12-057. In fact, applying the provisions of GO 159-A to the CLCs would be inconsistent with SFB's own

argument that the Commission should have more - not less - control over the environmental review process. By delegating additional CLC siting authority to the local jurisdictions, as provided for in the GO 159-A, the Commission would have less control over the CLC environmental review process. In any event, GO 159-A does not permit local jurisdictions to impose local standards which unilaterally prevent cellular carriers from serving the public. Likewise, under the standard adopted in the MND, local authorities may not adopt standards which create barriers to entry for CLCs.

The only other minimum environmental standards applicable to local jurisdictions proposed by SFB related to the subcategory of facilities consisting of service boxes and cabinets.

SFB proposed the following standards for service boxes and cabinets (collectively referred to herein as "Service Boxes"):

a. Service Boxes shall be placed underground, entirely below the grade of the street or sidewalk.

b. Where such undergrounding is not feasible, Service Boxes shall be placed above-grade and incorporated as elements of sidewalk furniture that are usable for other public purposes (e.g., bus shelters, benches) to the extent such sidewalk furniture is authorized and approved by the local land use agency.

c. Where such undergrounding is not feasible, and incorporation as public purpose sidewalk furniture is not feasible, authorized, or approved, Service Boxes shall be placed on private property with appropriate fencing and landscaping to assure that the Service Box is not visible from any outdoor public access area (e.g., streets, sidewalks, parks, etc.).

d. Where undergrounding, incorporation as public purpose sidewalk furniture, and mitigated private party siting are not feasible, the local land use agency shall conduct a separate CEQA analysis in order to review and consider other alternatives,

> including but not limited to downsizing, prior to approving the installation, expansion or relocation of such Service Boxes.

Merely because we did not explicitly adopt the requirements for service boxes offered by SFB as minimum mitigation requirements in our MND does not justify a finding that the MND violated CEQA rules or that it is somehow invalid. Less than half of the CLCs certified in D.95-12-057 even planned to install service boxes. No party commenting on the MND during the public-comment period proposed the minimum standards for service boxes which SFB now wants after the fact. We properly considered all parties' filed comments on proposed mitigation measures relating to service boxes prior to certifying the MND in D.95-12-057.

The Commission's GOs 95 and 128 already prescribe minimum construction and safety standards applicable to utility underground and overhead facilities. Furthermore, GOs 95 and 128 are the minimum standards with which utilities must comply. We reserve the right to adopt additional minimum standards in future MNDs, where we find conditions warrant them. We decline, however, to adopt further statewide standards at this time. Local jurisdictions may develop more stringent construction and safety standards than those set forth in GOs 95 and 128, including a requirement for undergrounding of service boxes.

We have never been involved in the determination of street-deterioration fees assessed by local jurisdictions since this is strictly a local matter. And as the comments to the MND show, there is no need for us to become involved since local officials are well acquainted with street-deterioration standards (e.g., MND Subappendix C, Comments #3.2, #16.4, #17.2, and #22).

Since no party, including SFB, even offered any examples of possible minimum safety or environmental standards for facilities other than service boxes, we likewise find no basis to

conclude that the MND was inadequate with respect to minimum safety or environmental standards for facilities other than service boxes.

3. Environmental Review for Facilities Beyond Existing Rights of Way

We disagree with SFB's assertion that D.95-12-057 does not address proposals by CLCs to extend their facilities beyond existing utility conduits and corridors. When building facilities within existing utility rights-of-way, the MND requires CLCs to comply with all local standards pertaining to geological resources, water resources, air quality, aesthetics, and other standards. If a CLC seeks to build beyond the utility right-of-way, Mitigation Measure A requires that the CLC first file a petition to modify its CPCN, which will require an appropriate environmental evaluation.

4. Requirements for an Environmental Impact Report

We disagree with SFB's claim that a fair argument has been made that an EIR is required for the CLC projects covered in D.95-12-057. The case cited by SFB, Citizen Action to Serve All Students v. Thornley (1990 222 CA3d 748), in support of this claim is an example where a petitioner was not able to demonstrate to the court a fair argument that a MND was faulty. This case shows that a party's protest must present sufficient facts to meet the evidentiary threshold indicating that an EIR is needed. The fact that a complaint against a MND exists does not by itself constitute a fair argument that an EIR is required. Such an interpretation could lead to the frivolous filing of complaints.

SFB states that numerous negative comments were filed against the MND. There were 26 comments filed on the MND (five of which were filed after the document was finalized). Many of the comments received by the Commission on the MND made suggestions on how to improve the MND, such as clarifying language, improving mitigation measures, or providing more description of the projects. SFB appears to believe that comments to improve the draft MND

constitute substantial evidence that potential adverse effects require an EIR. We disagree. The fact that many of the comments contained recommendations for improvement does not mean that an EIR is required. Since the purpose of the public-comment period is to gain the insight of other affected agencies or parties, it is not surprising that there were "negative" comments on the MND document. Moreover, only one comment went so far as to state that a MND was inappropriate for the proposed CLC projects, and that commenter provided no substantial evidence that an EIR was required.

As the lead agency under CEQA, the Commission has the discretion to review the initial environmental assessment of the project proponent(s) and determine what level of environmental review is warranted. Based upon this initial assessment, we concluded that an EIR was not required, but that a MND must be performed.

The Commission considered all public comments received in response to the draft MND aimed at improving the MND document, and incorporated all those which were deemed appropriate. For example, regarding the aesthetic impact of service boxes, we modified the proposed mitigation by requiring the petitioners to consult with local agencies on their concerns for construction (MND, Appendix C, p. 2). In many cases, the comments focused on the impact of service boxes from existing telecommunications providers. While SFB's concern regarding aesthetic impacts from the facilities of current providers may be a valid environmental concern, such facilities are not part of the CLCs' proposed project description. CEQA requires the Lead Agency's environmental analysis to focus on the applicants' proposed project description. In this case, the project description is the added facilities of new telecommunication providers, not the existing facilities of current providers.

5. Deferral of Mitigation Measures

SFB alleges that the Commission's MND obfuscates the significance of adverse impacts by deferring to future local jurisdictions' ministerial requirements to mitigate environmental impacts. SFB claims that the Commission has improperly piecemealed the review of numerous related CLC projects by deferring to potential future CEQA review processes for specific CLC construction activity. SFB claims that by this deferral, the Commission prevents any analysis, disclosure, or effective mitigation requirement for the statewide impacts of approving dozens of new CLCs. SFB cites Sundstrom vs. Mendocino County as a case where deferment of mitigation was prohibited.

The Sundstrom case cited by SFB involves circumstances which are markedly different from the circumstances involved in this proceeding. In the case cited, the lead agency, the county planning commission adopted a MND which deferred the preparation of a hydrological study or a sludge disposal plan. The problem with the deferment was that there was no evidence that those plans could effectively mitigate potentially significant impacts. The expectation underlying the Commission's MND, by contrast, is that local government agencies will faithfully process ministerial permits for the proposed projects. These permits are typically building, excavation, encroachment and fire permits. They are considered "ministerial" in that they are relatively straightforward to process and require little discretion (as opposed to conditional-use permits). Such ministerial permits require significantly less complex analysis in contrast to a hydrological study or a sludge disposal plan as was involved in the Sundstrom case. Because many of the environmental impacts identified in the Initial Study are not complex, the MND properly concludes that the impacts can be mitigated by the subject permits at the local level.

Findings of Fact

1. SFB filed a petition to modify D.95-12-057.

2. D.95-12-057 approved 31 of 40 petitions filed by facilities-based CLCs to offer local exchange service within the service territories of Pacific and GTEC.

3. The CEQA requires the Commission to assess the potential environmental impact of a project with the objective of avoiding adverse effects, investigating alternatives, and restoring or enhancing environmental quality to the fullest extent possible.

4. D.95-12-057 allows local jurisdictions to alter proposed CLC facilities to bring the facilities into compliance with local standards. The only limitation is that local jurisdictions cannot impose standards or permit requirements that would prevent CLCs from developing their service territories, or otherwise interfere with the statewide interest in competitive telecommunications.

5. The Commission prepared and approved a MND in D.95-12-057 covering 40 facilities-based petitions.

6. The Commission determined that the proposed projects of the facilities-based CLCs did not have potentially significant environmental effects as long as appropriate mitigation measures were incorporated into the projects.

7. The premise underlying SFB's pleading is the claim that the Commission's environmental approval process in D.95-12-057 failed to comply with CEQA and should be rescinded.

8. Since the MND approved for CLCs certificated in D.95-12-057 is intended only to cover newly certificated carriers, it does not apply to facilities of Pacific and GTEC within their own existing LEC service territory.

9. Just because a telecommunications utility is not covered under the terms of a particular MND, the utility is not free to construct whatever facilities it chooses without regard for adverse environmental impacts, but must comply with the local ministerial permitting process in the construction of facilities.

10. The MND requires CLCs to comply with all local standards pertaining to geological resources, water resources, air quality, aesthetics, and other applicable standards.

11. If proposed facilities do not comply with the local standards, local authorities may alter the proposed facilities so that they do comply, as long as the authorities do not prevent CLCs from developing their service territories and do not interfere with the statewide interest in competitive telecommunications.

12. If a CLC fails to meaningfully consult with a local jurisdiction as required by the MND, the local jurisdiction may seek redress via the dispute resolution process described in the MND, Subappendix D, which can result in halting or terminating the CLC's project and revocation of its CLC certificate if the CLC does not comply with the MND Mitigation Measures.

13. Under GO 159-A, the Commission generally defers to local governments to regulate the location and design of cell sites and MTSOs for cellular carriers.

14. By applying the GO 159-A standard to CLCs, the Commission would have less control over minimum environmental mitigation standards.

15. If a CLC seeks to build beyond the existing utility right-of-way, Mitigation Measure A of the MND requires the CLC to first file a petition to modify its CPCN, which would require an appropriate environmental evaluation.

16. The Commission's GOs 95 and 128 already prescribe minimum statewide construction and safety standards applicable to all utility underground and overhead facilities, including utility service boxes.

17. Local agencies are able to make informed decisions about proposed CLC facilities.

18. Local agencies have the means to develop environmental and safety standards on their own, and are free to develop more

stringent construction and safety standards than those set forth in GOs 95 and 128.

19. Technical information is available to local jurisdiction authorities from a wide variety of sources, including the CPUC, universities, consultants, community organizations, private citizens, other towns and cities, the Internet, competitors of the utility, and other sources.

20. The Commission has never been involved in the determination of street deterioration fees assessed by local jurisdictions since this is strictly a local matter.

21. Local officials are well acquainted with street deterioration standards, as found in the MND, Subappendix C, (Comments #3.2, #16.4, #17.2, and #22).

22. A local agency may require CLCs to explain their proposed construction to the agency's satisfaction.

Conclusions of Law

1. SFB's Petition for Modification of D.95-12-057 is procedurally defective and could be dismissed on procedural grounds alone.

2. SFB's pleading does not comply with Rules 85 and 86.1.

3. SFB's pleading does not comply with Rule 47(b).

4. Because of the public-policy concerns raised by SFB's pleading, it is appropriate to forbear from dismissing the pleading and consider the substantive claims presented by SFB.

5. SFB's pleading does not comply with the Commission's Rule 3(b).

6. SFB has not presented a fair argument that an EIR was required for the CLC projects certificated in D.95-12-057.

7. The alleged legal defects in the MND adopted in D.95-12-057 as set forth in SFB's pleading lack merit and do not warrant reconsideration or modification of D.95-12-057.

8. It is not necessary at this time for the Commission to develop further statewide standards for adoption by local agencies

to govern the construction of CLC facilities, Street Deterioration Fees, and utility-service-box safety and size requirements.

9. SFB's motion to intervene and to be added to the service list of this proceeding should be granted.

10. SFB's petition to modify D.95-12-057 should be denied.

O R D E R

IT IS ORDERED that:

1. San Francisco Beautiful (SFB) is granted leave to intervene in this proceeding and is added to the service list in this proceeding.

2. SFB's petition to modify Decision 95-12-057 is denied.

This order is effective today.

Dated February 19, 1997, at San Francisco, California.

P. GREGORY CONLON
President
JESSIE J. KNIGHT, JR.
HENRY M. DUQUE
JOSIAH L. NEEPER
RICHARD A. BILAS
Commissioners