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Decision 97-04-046 April 9, 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

O P I N I O N

By this decision, we resolve outstanding disputes regarding how the Commission's costs of ensuring compliance with the California Environmental Quality Act (CEQA) are to be recovered from the facilities-based competitive local carriers (CLCs) in connection with the certification of such CLCs.

Background

In July, 1995, the Commission adopted interim rules governing applications by new entrants for authority to provide local exchange service (Decision (D.) 95-07-054). As directed in D.95-07-054, prospective CLCs were directed to file petitions for authority by September 1, 1995, to enable us to act upon and approve them in time to allow local exchange competition for facilities-based CLCs to begin by January 1, 1996. That decision required that "all CLC CPCN applications will need to comply with CEQA at the time of their application pursuant to Commission Rule 17.1." (D.95-07-054, mimeo. at 27.) Rule 17.1[1] prescribes

1 Unless otherwise noted, references herein to "rules" apply to the Commission's Rules of Practice and Procedure.

Commission rules for implementation of the CEQA. Pursuant to this rule, all candidates for CLC authority, both resellers and facilities-based CLCs, submitted Proponent's Environmental Assessment statements summarizing the nature of their proposed projects and the likelihood of any significant adverse effect on the environment that would result if their applications were granted. Based on the information provided by the CLCs, the Commission, as the lead agency under CEQA, prepared a draft Mitigated Negative Declaration (MND) and Initial Study covering the 40 facilities-based petitioners that met the September 1, 1995 filing deadline. This MND document was sent to various city and state government agencies on October 18, 1995, and a notice announcing the preparation of the draft was published for "two successive weeks in 55 newspapers throughout the state." (D.95-12-057, mimeo. at 8.) After reviewing the comments on the MND submitted by interested parties, the Commission modified it appropriately for adoption as the final MND and approved 31 out of 40 initial petitions for facilities-based CLC authority effective January 1, 1996. (Id.)

CLCs seeking certification that did not meet the September 1, 1995 filing deadline were directed to file separate applications that would be processed after January 1, 1996. Although CLCs filed separate applications for authority subsequent to September 1, 1995, the processing of the CEQA review was still conducted by batching the individual CLC applications into consolidated groups in order to streamline the process and economize on costs.

During calendar year 1996, the Commission prepared and approved two additional MNDs, each of which covered a group of eight CLCs, all seeking certification authority to offer facilities-based local exchange service. In a December 9, 1996, Opinion (D.96-12-020), the Commission formally instituted a batching process effective January 1, 1997, whereby the CLC CPCN

filings seeking facilities-based authority received within a certain quarter would go through a consolidated CEQA review process the following quarter.

The Commission subsequently mailed invoices for CEQA cost reimbursement for the second MND. In a letter to the Executive Director of the Commission dated November 26, 1996, the legal counsels representing Bittel Telecommunications, Inc. and the Telephone Connection, Inc. (Bittel et al.) expressed objections to the invoices billed to them to recover the Commission's costs of assessing CEQA compliance in connection with the processing of their CLC applications for facilities-based operating authority. A similar letter was sent to the Executive Director on December 20, 1996, by the counsel for SpectraNet Anaheim (SpectraNet), another CLC that was included within the same group of CLCs as Bittel et al. and that also received a similar invoice.

The charges which were billed to each of these CLCs represented a one-eighth share of the total costs of approximately $54,000 incurred by the Commission for one of the consolidated CEQA reviews conducted during 1996. Bittel et al. and SpectraNet claimed that this invoicing method impermissibly and arbitrarily increased the financial standards applied to facilities-based CLCs as established in D.95-07-054 (Rule 4(B)(1)) which only required a $100,000 minimum cash or cash-equivalent requirement.

Based upon these and other objections, Bittel and SpectraNet asked the Commission to withdraw the invoices which had been submitted for payment of CEQA expenses and forbear from recovering these costs until the Commission has adopted what they consider to be a lawful, nondiscriminatory procedure for doing so.

In his letter in response to Bittel et al. and SpectraNet dated December 4, 1996, the Executive Director stated that the Commission would temporarily forbear from collecting payment on the referenced invoices pending further determination of what action was appropriate. By Administrative Law Judge (ALJ) ruling dated

January 24, 1997, parties were given the opportunity to file comments regarding what process the Commission should use to allocate its costs for assessing CEQA compliance among CLCs seeking facilities-based operating authority.

Comments were filed on February 21, 1997, by Brooks Fiber Communications (Brooks), Cox California Telecom (Cox), SpectraNet International, AT&T Communications, Inc., and the California Cable Television Association (CCTA) (collectively referred to as Commenters).

Parties' Positions

All commenters generally oppose a cost allocation system which separately assigns the costs of each MND to the CLCs covered under that MND, and believe the resulting costs charged to CLCs constitute a financial impediment to entry. Commenters further note that, while the costs incurred by the Commission for a given CEQA review are relatively fixed irrespective of the number of CLCs covered in the review, the allocated cost of the review invoiced to each CLC can vary significantly depending on how many CLCs are included within a given CEQA review. Commenters argued that it is unfair to charge some CLCs more than others for CEQA review merely because of differences in the total number of CLCs included within the review.

Commenters, therefore, objected to an invoicing system which assigns the cost of the CEQA review merely based on the number of CLCs included within a given consolidated review. In their comments, certain CLCs also objected to the overall reasonableness of certain charges reflected in the invoices.

Brooks claims the Commission is not entitled to recover from CLCs the cost of the second and third MNDs, arguing that the publication of these MNDs was redundant to the first MND and unnecessary. Brooks claims that the Commission's publication of the second and third MNDs was based upon a misinterpretation of the Commission's own rules and the CEQA publication requirements.

Rule 17.1(f)(1)(A) requires publication "in the county or counties in which the project will be located." CEQA requires publication "in the area affected by the proposed project." (Cal. Pub. Res. C. § 21092(b)(3)(A).) As a result, argues Brooks, the scope of the publication depends on how the Commission defines "project." If, on the one hand, "project" is defined according to Cal. Pub. Res. C. § 21065(a), as "an activity directly undertaken by any public agency," then Brooks believes that the Commission's decision to authorize competition for local exchange service constitutes the project. Under this scenario, Brooks argues that a single notice published in all counties encompassing Pacific Bell and GTEC territory would satisfy both the Rules and CEQA requirements.

Brooks argues that the notice need not be republished for any new CLC applicant unless the original MND is modified in response to public comments. (Cal. Pub. Res. C. §§ 21064.5, 21080(c)(2); CEQA Guidelines, § 15070(b)(1).) Because the Commission declined to modify the draft MND circulated in October, 1995 in response to the comments it received (D.95-12-057, mimeo. at 8), Brooks claims that the costs of repeated publication are unnecessary and imprudent.

If, on the other hand, the Commission defines the term "project" as the construction of an applicant's proposed facilities, consistent with Cal. Pub. Res. C § 21065(c), then Brooks claims that publication of the MND notice is required only in those counties where an applicant's proposed facilities will be located. (Rule 17.1(f)(1)(A).) Brooks claims statewide publication is not required, and objects to being charged for it.

Several commenters objected to paying the invoiced charges because the Commission had not invoiced the initial group of 40 CLCs for the costs of their CEQA review in connection with their CPCN filings covered in D.95-12-057. These commenters

asserted that it was discriminatory to invoice the later group of CLCs for CEQA reimbursement, but not the original group of 40 CLCs.

CCTA proposes that the Commission aggregate the costs of the first three CEQA reviews into a single total to be collected separately from the costs for any subsequent CEQA reviews for facilities-based CLCs. The first three CEQA reviews are likely to be the most costly. Also, the applicants and petitioners subject to the first three CEQA reviews requested certification before the Commission established its quarterly review process in D.96-12-020, and before the issue of CEQA cost recovery came to the Commission's attention. For these reasons, CCTA believes that the Commission should divide the sum of the costs of the first three MND reviews equally among all of the facilities-based CLCs covered under those three MNDs. This mechanism would spread the most costly reviews among the highest number of CLCs, guaranteeing that each CLC will pay the smallest amount possible.

For subsequent CEQA reviews, CCTA proposes that the Commission divide the yearly costs of the CEQA reviews equally among that year's facilities-based CLC petitioners,[2] with costs associated with CEQA reviews of petitions filed in a given year included in that year's total costs. SpectraNet proposes a similar procedure.

As noted earlier, CCTA's primary concern is that costs are distributed fairly and equally, and that the cost of a CEQA review should not act as a barrier to entry to a CLC, nor as a disincentive to build facilities. CCTA states that imposing high costs for CEQA review could increase the amount of cash-equivalent

2 D.96-12-020 established that after January 1, 1997, facilities-based CLC certification will take place via the petition process in Docket I.95-04-044.

funds a CLC would need to enter the market. CCTA argues that the CEQA cost recovery mechanism should not alter those standards by imposing large financial-entry barriers.

SpectraNet urges this Commission not to impose a deposit requirement on new entrants. SpectraNet proposes that if a deposit is required, however, such a deposit be based on the actual costs incurred by the Commission for the previous year's CEQA review, divided per-carrier. For instance, if the per-carrier charge for 1997 is $2,000, then the deposit required for 1998 applications would be $2,000. At the end of 1998, when the Commission determines actual costs of CEQA review for the year, then SpectraNet proposes that a true-up should be conducted to determine how much more, or less, the per-carrier charge will be. Assuming that subsequent CEQA reviews incur similar costs to previous reviews, this deposit would in turn bear some relation to actual costs for that year and should not result in a large true-up to actual costs. AT&T also suggests $2,000 as a deposit amount per CLC for 1997.

Discussion

The issue before us is what process the Commission should use to allocate its costs for assessing CEQA compliance among individual carriers covered under the MNDs approved in connection with the certification of facilities-based CLCs in D.95-12-057 and subsequent decisions, as well as into the future.

There is no question that CLCs are responsible for reimbursing the Commission for the costs of CEQA compliance. Section 21089 of the Public Resources Code provides: "A lead agency may charge and collect a reasonable fee from any person proposing a project subject to...[CEQA]...in order to recover the estimated costs incurred by the lead agency in preparing a negative declaration...." The Commission implemented this by Rule 17(j) which clearly states: "For any project where the Commission is the lead agency responsible for preparing the EIR or Negative

Declaration, the proponent shall be charged a fee to recover the actual cost of the Commission in preparing the EIR or Negative Declaration." Accordingly, each CLC is liable for the costs incurred by the Commission to prepare each MND in conjunction with the CLC's petition or application for CLC CPCN authority.

Typically, MNDs are prepared for utilities one at a time, with the full cost of the MND incurred pursuant to Rule 17(j) chargeable to the single utility. In the case of our CLC certification program instituted in D.95-12-057, multiple CLCs were seeking very similar CPCN authority simultaneously. We, therefore, found it more efficient to consolidate the MND process and prepare a single MND for the first 40 petitioners seeking CPCN authority. After the initial certification of CLCs in D.95-12-057, we established a subsequent procedure for individual CLCs to file applications for CPCN authority. We performed a second and third MND, each of which included a group of several CLCs within a single MND. We began to process MNDs on a consolidated basis for qualifying CLCs once each quarter effective January 1, 1997.

We shall separately address the cost recovery for (a) the first three MNDs which were completed for the certification of CLCs at the time the billing controversy arose, and (b) the prospective procedure for cost recovery for CLCs that seek facilities-based CPCNs under our quarterly review process which became effective January 1, 1997. The question is how to determine the appropriate charge for each CLC given that the costs were jointly incurred on behalf of multiple CLCs for consolidated MNDs. Moreover, the number of CLCs included within each MND grouping varied significantly between the the first MND and each of the two following MNDs. This means that if the cost which we invoiced to each CLC was assessed based on equally dividing the cost of each MND by the CLCs covered in that MND, there could be significant differences in per-CLC cost, depending on which group the CLC was in.

The Executive Director's previous letters have already indicated that the Commission will ensure that the original 40 CLCs are invoiced for their share of the MND costs. The question is whether the 40 CLCs should only pay for their own MND or should be averaged in with subsequent CLCs, with the aggregate costs being equally divided among all the CLCs.

We summarize the costs incurred to date for each of the first three MNDs, including costs for both MND publication and staff labor. We agree that it would unduly skew the per-CLC costs if we were to charge the costs of the second MND only to the eight CLCs covered thereunder, based on the cost summary below:

Costs Subject to CEQA Reimbursement

	# of CLCs included	Publication Costs	Staff Labor Costs	Average Per CLC
MND #1	40	$ 45,425.00	$ 6,682.00	$1,302.68
MND #2	8	53,984.00	3,192.00	7,147.00
MND #3	8	13,033.00	3,505.00	2,067.25
Totals	56	$112,442.00	$13,379.00	$2,246.80

We conclude that the fairest and most straight forward way to allocate the costs of the first three MNDs is to evenly divide the cost among all of the 56 CLCs covered thereunder. This results in a cost of $2,246.80 per CLC as computed above. Accordingly, we shall invoice each of the 56 CLCs who were covered under one of the first three MNDs a prorata share (1/56th) of the total costs. We shall direct the Commission's Chief Fiscal Officer to promptly prepare and mail invoices for $2,246.80 to each of the 56 CLCs covered under the first three MNDs.

The invoiced amount of $2,246.80 per CLC does not include the final fees for the final filing the MNDs with the State Clearinghouse, as required by law. Once the amount of any necessary subsequent adminstrative filing fees are determined, they shall be separately billed the CLCs under the same allocation process as outlined above.

We find no merit in Brook's claim that dividing the total MND costs among CLCs covered by the MND is anticompetitive, arbitrary, discriminatory, or contrary to the Commission's policies to encourage competition. Brooks claims that charging each CLC a prorata share of the common costs incurred to publish the MND bears no relationship to the actual cost a single carrier would have incurred to publish the notices required by its own specific construction plans. Brooks complains that the costs incurred to process its MND were averaged in with those of other CLCs who required higher MND costs.

We find this complaint ironic. The whole purpose behind invoicing CLCs based on average costs was to pass on to them the economies of scale resulting from preparing one consolidated MND for a group of CLCs rather than separately preparing individual MNDs and billing each CLC for the full costs of each separate MND.

Charging each CLC the prorata share of common costs covering a group of CLCs may result in some differences in the per-CLC cost due to variations in the number of CLCs consolidated within a given group. CLCs, however, enjoy the offsetting cost savings resulting from sharing the common costs of a consolidated MND. We find nothing arbitrary about this cost-allocation approach, but recognize that it is somewhat a function of timing. A CLC's timing of entry into the market will be affected by whatever market and regulatory forces are in place at the time of entry. By entering the market sooner or later, CLCs experience different opportunities or drawbacks, which is a risk of doing business in a competitive market.

We disagree with Brooks' claims that it was not necessary to publish the MND on a statewide basis for all CLCs since some CLCs only proposed initial construction in limited regions of the state. Rule 17 (f)(1) requires that notice of a draft MND be published in the "county or counties in which the project will be located." The location of a CLC's "project" is not limited, however, to the initial geographic region where physical facilities will be constructed, but properly includes the entire service area authorized in the CPCN decision. Once certificated, the CLC will not require any further MND in order to build out its system to additional parts of its authorized service territory. This is also less administratively burdensome on the Commission.

Therefore, it was proper for all counties within the CLCs' authorized service territory to receive notification of the MND since this will be the public's only opportunity to be advised of the pending environmental impacts of the CLCs' operations. In the case of the CLCs covered under the first three MNDs, although the regions targeted for initial construction of facilities may have been limited, the authorized service territory for the CLCs essentially encompassed the entire service territories of Pacific and GTEC. Therefore, publication in newspapers throughout the state covering the service territory for all CLCs was warranted. Comprehensive publication of the MNDs at this initial stage of certification avoided the need for a subsequent publication at a later time as a certificated CLCs build out their system into additional counties.

Brooks' claim that the Commission has unnecessarily repeated the publication of a single unmodified MND is also without merit. Contrary to Brooks' claim, each of the two subsequent MNDs

published covered entirely different CLC projects.[3] While the descriptions of the CLC projects and expected environmental impacts were similar to those of the first MND, the separate publication of the subsequent MNDs was required under CEQA to alert the public to the effects of permitting additional CLCs to engage in construction that were not covered in the first MND. Despite the similarity in project descriptions, the applications of each of these new CLCs constituted new "projects" as defined under CEQA warranting a separate MND to be published. The original MND was not sufficient to alert the public to the effects of subsequent CLC projects.

We disagree with Brooks' claim that charging CLCs for the costs of the MND "impermissibly and arbitrarily" increases the financial standards applied to facilities-based CLCs by D.95-07-054, Rule 4(b)(1), which requires a showing that the CLCs possess $100,000 of cash or cash-equivalents. Brooks has erroneously linked together two unrelated matters. The required showing of $100,000 in cash is intended to provide some minimum assurance that the applicant CLC has sufficient funds to begin operations as a viable going concern. The $100,000 requirement does not determine or limit, however, the amount of actual funds the CLC may actually need in order to finance the necessary costs involved in entering the market and beginning operations. Each CLC must incur various costs in order achieve market entry. The costs of the MND are merely one among many such costs. Whatever actual level of costs the CLC incurs payable to either the Commission, the LECs, or to third parties, there is no change in Commission's Rule

3 We find no basis for the claim of parties such as SpectraNet that the Commission has failed to use a consistent definition of the term "project." We have always treated the filing of each CLC-certificated request as a separate project. Consolidated CEQA processing does not change the individual-project status of each CLC.

4(b)(1) for a showing that the CLC possesses at least $100,000. In fact, the $100,000 requirement is regularly augmented by a showing that applicant can also meet any deposit requirements by underlying carriers. Rule 4(b)(1) has no relevance to the ability of the Commission to lawfully collect CEQA costs or any other mandated fees from CLCs. Brooks' attempts to link MND costs to Rule 4(b)(1) are misplaced.

Parties complain that they were not informed in advance regarding how much they would have to pay for CEQA costs and were, therefore, surprised when they received bills. While the affected CLCs did not know the precise amount ultimately to be invoiced for the MNDs, they had constructive notice of Rule 17(j) regarding their general liability for reimbursement of CEQA costs incurred on their behalf by the Commission. As noted above, Rule 17(j) clearly states that project proponents are responsible for reimbursing the Commission for its CEQA costs. Moreover, Rule 17 does not require the Commission to inform project proponents in advance regarding the precise cost of the CEQA review. The only reference in Rule 17 to advance notice of payment refers to the amount of an advance deposit to be made by the project proponent. The deposit is to be determined as a fraction of the capital cost of the proponent's project. In the event a project lacks a capital-cost basis, the Commission or ALJ, as early as possible, is to indicate the amount of deposit to be charged. Rule 17(j)(3) authorizes the Commission to invoice the proponent for any excess costs not covered by the deposit, and requires no advance notice by the Commission as to how much the actual cost of the CEQA review will be.

For the CLCs involved in the first three MNDs, no advance notice of a deposit was announced by the Commission, and no deposit was required prior to performing the CEQA review. Therefore, while the CLCs complain of lack of advance notice, there was no requirement for any such notice since no advance deposit was assessed. By being relieved of paying an upfront deposit, the CLCs

were actually treated more leniently than provided for under Rule 17. The Commission carried the full cost of the CEQA review performed on behalf of the CLCs until the review was completed. When the Commission finally invoiced the CLCs, it was for the actual cost of the completed CEQA review. As noted previously, Rule 17 requires no advance notice of the actual cost. It does call for payment within 20 days of receipt of the bill. Yet, in response to CLCs' complaints, the Commission exercised forbearance of its right to immediately collect on the invoices and gave parties an opportunity to comment on collection procedures. Therefore, CLCs have no due process basis to claim that they were not properly notified in advance of receiving the invoices for payment pursuant to Rule 17.

Certain CLCs object to reimbursing the publication costs at the advertising rates incurred by the Commission, and argue that the Commission should have published notice of the MND in the Legal Notices Section of the newspaper where listing rates are lower. We find no basis to relieve the CLCs from paying their share of MND publication costs. The Commission exercised its judgment regarding the manner in which MNDs should be published. Because of the novel nature and magnitude of the projects covered by the initial group of CLC petitioners, it was appropriate to publish the MND notice in the general advertising section of the newspaper. Although publication in this manner was more expensive than in the legal notices, it also increased the likelihood that the public would be made aware of the proposed projects and would, therefore, be able to comment on the environmental impacts, consistent with the intent of CEQA.

We did begin to publish the MND notices in the legal notice section of newspapers beginning with the third MND. Although the notice was more obscurely displayed by being placed in the legal notice section, we concluded that it was acceptable given that the notice of the previous MNDs, which were similar, had been

more prominently displayed. Therefore, the publication cost of future MNDs should be noticeably less than that of the first two.

We shall now address the payment procedures to apply prospectively to those facilities-based CLCs who require the preparation of a MND and who were not included in the initial group of 55 CLCs whose billing was addressed above. For those facilities-based CLCs who already have a currently pending petition for CPCN authority filed with the Commission, we shall direct each of them to submit a deposit to the Commission's Fiscal Office covering the estimated cost of processing their MND, due and payable in full within 30 calendar days of the date of this decision.

Since we cannot know the exact cost which will be incurred for MNDs until the work has been completed, the up-front deposit requirement must be based upon an estimate. We believe the proposed deposit amount of $2,000 suggested by AT&T is a reasonable for deposits for MNDs to be conducted during 1997. The $2,000 deposit approximates the amount charged to the group of 55. The $2,000 deposit also appropriates the average cost of the third MND. We believe the third MND is most representative of MNDs during 1997 since it incorporates the lower publication costs from use of the Legal Notice section of the newspaper. It also reflects the approximate number of CLCs we expect to be covered under each MND performed in 1997. Using the third MND as a basis for extrapolating annualized expenses, we conclude that the $2,000 deposit per CLC is appropriate at this time. We may reevaluate the required level of deposits for MNDs performed in future years as needed.

Each facilities-based CLC with a pending CPCN petition (i.e., those covered under the fourth MND or later) are therefore directed to submit to the Commission's Fiscal Office a $2,000 deposit within 30 calendar days of this decision.

Any CLC which files a petition for facilities-based local exchange CPCN authority subsequent to the date of this decision shall be required to submit a $2,000 deposit to the Commission's Fiscal Office within 20 calendar days of their petition filing. The Commission shall make a determination as to whether the deposits are sufficient to cover the actual costs of the MND processing at the end of each fiscal year (June 30). The first such cost determination shall be made at the end of the 1997-98 fiscal year, and shall cover the aggregate costs of MNDs processed beginning in 1997 through the middle of 1998.

The cost per CLC shall be divided equally among all CLCs covered under the MNDs processed during this period of time. The Commission shall invoice each of the CLCs at the end of the 1997-98 fiscal year to compensate for any necessary shortfalls in recovery of costs or shall rebate any overcollections to the CLCs. The invoiced amounts shall be due and payable in full within 20 calendar days of the date of the invoice. Each CLC shall note on their payment check the docket number of the CPCN proceeding (I.95-04-044) to facilitate processing of the payment. We shall follow a similar true up process of MND costs due from CLCs annually at the end of each subsequent fiscal year subject to further notice.

Findings of Fact

1. Under its program to certificate CLCs adopted in D.95-07-054, the Commission has conducted a series of consolidated reviews of the environmental impacts of certain CLCs' proposed projects and prepared mitigated negative declarations (MNDs) pursuant to the requirements of CEQA.

2. Upon receiving invoices for CEQA costs incurred by the Commission in processing the second MND under the CLC certification program, Bittel et al. and SpectraNet objected to payment and requested the Commission to set forth explicit rules regarding how CEQA costs should be recovered from CLCs.

3. The Commission's Executive Director agreed to temporarily forebear from collecting payment of the invoices pending an opportunity for parties to comment on how the costs should equitably be collected.

4. Although invoices for MND costs were not sent to the original 40 CLC petitioners through an oversight, the Executive Director's previous letter to the CLCs indicated that the Commission will ensure that the original 40 CLCs are invoiced for their share of MND costs.

5. In the CLC certification program instituted in D.95-07-054, since multiple CLCs sought similar CPCN authority simultaneously, it was efficient to prepare a single MND for consolidated groups of CLCs.

6. After the initial CLC certification on a consolidated basis granted in D.95-12-057, individual CLCs were directed to file separate applications beginning after September 1, 1995 for CPCN authority.

7. During 1996, the Commission performed a second and third MND, each of which consolidated multiple CLCs' applications for environmental review within a single MND.

8. Effective January 1, 1997, all facilities-based CPCN filings from CLCs are to be processed on a quarterly basis in consolidated groups.

9. Forty CLCs were included within the initial CLC group covered under the first MND approved in D.95-12-057, while significantly smaller groups were covered in each of the following two consolidated MNDs.

10. The Commission has incurred the following costs to date for the publication of and processing of each of the first three MNDs:

Costs Subject to CEQA Reimbursement

	# of CLCs included	Publication Costs	Staff Labor Costs	Average Per CLC
MND #1	40	$ 45,425.00	$ 6,682.00	$1,302.68
MND #2	8	53,984.00	3,192.00	7,147.00
MND #3	8	13,033.00	3,505.00	2,067.25
Totals	56	$112,442.00	$13,379.00	$2,246.80

11. The costs incurred to date for the first three MNDs do not include the costs of final administrative filing fees for the MNDs nor potential litigation costs in the event there are legal challenges to the MNDs.

12. The cost of the third MND is most representative of 1997 MND costs since it incorporates the reduced publication costs from use of the Legal Notice section of newspapers, and also reflects the approximate number of CLCs expected to be covered under a typical quarterly MND during 1997.

13. If the cost invoiced to each CLC was assessed based on equally dividing the cost of each MND by the CLCs covered in that MND, there could be a significant difference in per-CLC cost, depending on the group in which the CLC was processed.

14. A more uniform allocation of the costs of the first three MNDs among CLCs results by averaging the total cost of all three MNDs among all 56 CLCs covered thereunder, instead of separately averaging the costs only among the CLCs covered in each MND.

15. A more uniform allocation of the cost of MND performed after 1997 results from averaging the total cost of all MNDs performed during that year by the total number of facilities-based CLCs certificated.

16. The location of a CLC's "project" is not limited merely to the initial geographic region where physical facilities will be constructed, but properly includes the entire service area authorized in the CPCN decision.

17. MND notification covering all counties within the CLC's authorized service territory provides the public its only opportunity to be advised of the pending environmental impacts of the CLC's operations.

18. In the case of the CLCs covered under the first three MNDs, although the regions targeted for initial facilities constructions were limited, the authorized service territory for the CLCs essentially encompassed the entire service territories of Pacific and GTEC.

19. Comprehensive publication of the MND at the initial stage of certification avoids the need for a subsequent publication at a later time as a CLC builds out its system into additional counties.

20. Each of the two subsequent MNDs covered entirely different CLCs and was required under CEQA to alert the public to the effects of permitting additional CLCs which were not covered in the first MND to engage in construction.

21. The CLCs certificated using the first three MNDs have provided no basis to relieve them from paying their share of MND publication costs.

22. Because of the novel nature and magnitude of the projects covered by the two initial groups of CLC petitioners, publishing the MND notice in the general advertising section of the newspaper increased the likelihood that the public would be aware of the proposed projects, consistent with the intent of CEQA.

23. The Commission began to publish the MND notices in the legal notice section of newspapers beginning with the third MND, given the more prominent notice already provided for the two previous MNDs, and given the cost savings realized.

Conclusions of Law

1. Facilities-based CLCs are responsible for reimbursing the Commission for the costs of CEQA compliance incurred in connection with the processing of their petitions or applications for

certification pursuant to Rule 17(j) of the Rules of Practice and Procedure.

2. The costs for the first three MNDs which were completed for certification of CLCs at the time the billing controversy arose should be consolidated and recovered on an equal pro rata basis from the 55 CLCs that were covered thereunder.

3. The costs incurred for CEQA review on behalf of facilities-based CLCs which are processed subsequent to the first three MNDs should be recovered pursuant to the ordering paragraphs below.

4. Dividing the total MND costs among CLCs covered by the MND is neither anticompetitive, arbitrary, discriminatory, nor contrary to the Commission's policies to encourage competition.

5. The purpose behind invoicing CLCs based on average costs is to pass on to them the economies of scale resulting from preparing one consolidated MND for a group of CLCs rather than separately preparing and billing each CLC for the full costs of a separate MND.

6. It was necessary to publish the MND on a statewide basis pursuant to Rule 17(f)(1), which requires that notice of a draft MND be published in the "county or counties in which the project will be located."

7. Charging CLCs for the costs of the MND does not increase the financial standards applied to facilities-based CLCs by D.95-07-054, Rule 4(b)(1), which requires a showing that the CLC possesses $100,000 of cash or cash-equivalents.

8. The required showing of $100,000 does not determine or limit the amount of actual funds the CLC will actually need in order to finance the necessary costs involved in entering the market and beginning operations.

9. Rule 4(b)(1) of D.95-07-054 has no relevance to the ability of the Commission to lawfully collect CEQA costs or any other mandated fees from CLCs.

10. Rule 17 of the Rules of Practice and Procedure does not require the Commission to inform project proponents in advance regarding the precise cost of the CEQA review.

11. The only reference in Rule 17 to advance notice of payment refers to the amount of an advance deposit to be made by the project proponent.

12. Rule 17(j)(3) authorizes the Commission to invoice the proponent for any excess costs not covered by the deposit, and requires no advance notice by the Commission as to how much the actual cost of the CEQA review will be.

13. In this case, since no advance notice of a deposit was announced by the Commission, no deposit was required prior to performing the CEQA review.

14. CLCs have no basis to claim that they were not properly notified in advance of receiving the invoices for payment pursuant to Rule 17.

15. Using the third MND as a basis for estimating annualized expenses, a $2,000 deposit per CLC is appropriate for the processing of MNDs for applicant facilities-based CLCs during 1997.

16. The required level of deposits for any MNDs performed in 1998 may be reevaluated in the future, and readjusted if necessary, based on actual experience.

O R D E R

IT IS ORDERED that:

1. Those facilities-based competitive local carriers (CLCs) on whose behalf the Commission processes a mitigated negative declaration in connection with their request for a certificate of public convenience and necessity shall reimburse the Commission for its costs in accordance with the provisions in the ordering paragraphs below.

2. Each of the 56 CLCs that were covered under one of the three initial MNDs conducted during 1995 and 1996 related to their application for CPCN authority shall reimburse the Commission in the amount of $2,246.80, representing 1/56th of the total reimbursable costs for the three MNDs. The balance shall be due in full within 20 calendar days of the date stamped on the Commission's invoices.

3. A deposit for the estimated cost of pending and future MND shall be charged, to be due and payable as outlined below.

4. Each CLC who files a petition for facilities-based CPCN authority and on whose behalf the Commission processes a MND or EIR prospectively commencing in calendar year 1997 shall make a deposit with the Commission of $2,000 to be paid in full within 20 days of its petition filing.

5. The initial deposit of $2,000 due from each facilities-based CLC for the processing of the MND shall be nonrefundable in the event that the CLC is not granted CPCN authority.

6. Once the actual costs for the MNDs performed during 1997 through June 30, 1998, are determined, the Commission's Fiscal Officer shall invoice each of the CLCs covered under those MNDs to adjust for any differences between the deposit amount and the actual amount owed. If the actual cost of the MNDs is less than the initial deposit, the excess shall be rebated to the CLCs on a proportionate basis.

7. CLCs shall have 20 calendar days from the date of the Commission invoice to make payment of the actual amount owed for the 1997-98 MNDs.

8. The need, if any, to adjust the CLC deposit amount for 1998 and future MNDs or EIRs will be determined based on actual experience.

9. Those facilities-based CLCs with currently pending petitions in process before the Commission shall pay the $2,000

deposit within 30 calendar days following the effective date of this decision.

10. We shall direct the Commission's Chief Fiscal Officer to promptly prepare and mail invoices to each of the 55 CLCs covered under the first three MNDs in accordance with Ordering Paragraph 2 above.

11. All facilities-based CLCs, including the initial 56 who are to be invoiced pursuant to Ordering Paragraph 2 above shall remain liable for any subsequent administrative MND filing fees incurred by the Commission.

12. Prospectively, each CLC shall be charged for the prorata share of the total costs for all MNDs processed in each fiscal year.

This order is effective today.

Dated April 9, 1997, at San Francisco, California.

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