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Decision 99-12-050 December 16, 1999

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

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

## O P I N I O N

By this decision, we serve notice of our plan to revise the administrative process for the review and approval of competitive local carriers (CLCs) seeking a certificate of public convenience and necessity (CPCN) to offer "facilities-based" service within the areas of California opened to competition for local exchange service.

### Background

We initially established rules for facilities-based CLCs to be granted CPCN in Decision (D.) 95-07-054. Under those procedures, we processed a group of CLC candidates who filed petitions for CPCN approval by September 1, 1995, and granted authority effective January 1, 1996, for qualifying CLCs to provide facilities-based competitive local exchange service.

Our adopted CPCN certification rules require that all CLCs must comply with the provisions of the California Environmental Quality Act (CEQA) pursuant to Commission Rule 17.1. We stated in D.95-07-054 that the

Commission would perform CEQA review for each CLC filing at the level it determines to be appropriate.

As part of the approval process of the initial group of facilities-based CLCs, we prepared and approved a mitigated negative declaration as called for under CEQA. We found that with the incorporation of appropriate mitigating measures as identified in the negative declaration, the proposed CLC projects would not have a significant adverse environmental impact. We adopted this mitigated negative declaration in conjunction with our approval of the CLC CPCNs in D.95-12-057.

We advised prospective CLCs that any filings for CLC operating authority made after September 1, 1995, would be treated as standard applications and processed in the normal course of the Commission's business. We prepared and approved a second mitigated negative declaration covering additional facilities-based CLCs who did not meet the deadline for approval with the previous group of CLCs. Seven subsequent facilities-based CLC applicants not included in the second negative declaration were included under a third draft negative declaration.

By D.96-12-020, we instituted a more standardized schedule for conducting the review of facilities-based CLC CPCN filings, including the required CEQA reviews. Effective January 1, 1997, we instituted a quarterly processing cycle for granting CPCN authority for facilities-based CLCs in order to streamline the approval process.

We reinstituted the procedure used for the CLC CPCNs approved in D.95-12-057 whereby each CLC filing is assigned a separate petition number and docketed under I.95-04-044. Since we had been processing the CEQA review on a consolidated basis for all qualifying CLCs, we concluded it would be more efficient to process other aspects of the CLC filings on a consolidated basis, as

well. Accordingly, any CLC filing on or after January 1, 1997 for facilities-based CPCN authority was instructed to make their filing in the form of a petition to be docketed in I.95-04-044.

All qualifying facilities-based CLCs who filed petitions for CPCN authority within each quarterly cycle were processed together as a single group, subject to a single consolidated CEQA review and utilizing a single decision. Those CLCs within the group who filed a petition during a quarterly period and who satisfied all applicable rules for certification, including the terms of any Negative Declaration, were considered for approval by the Commission in the following quarterly period.

For those facilities-based CLCs that met the threshold of environmental impacts similar to those CLCs already approved in prior decisions, the CEQA review would entail the quarterly preparation for a consolidated mitigated negative declaration. If we found upon review that a negative declaration was unsuitable because of the nature of construction or installation of facilities being proposed by a given CLC, we retained the discretion to institute an Environmental Impact Report (EIR). In the even a CLC requires an EIR, the approval process would extend beyond a single quarterly period.

We have continued to use the quarterly preparation of a negative declaration collectively covering all qualifying CLCs up until the most recent negative declaration published on July 30, 1999. As provided for under CEQA procedures, the draft negative declaration was sent to various city and county planning agencies throughout the state for comment. Unlike previous negative declarations, however, for which little or no substantive comments were received, significant challenges were raised to the July 30, 1999, negative declaration by public agencies. The issues raised by the public agencies included questions concerning the adequacy of the petitioners' project descriptions, the

claimed "piecemeal" nature of the projects presented, and other related concerns. Thus, we deferred granting full facilities-based authority to the pending CLC petitioners pending further review and assessment of the deficiencies in the environmental review process claimed by the public agencies.

Instead, in D. 99-10-025, we granted only a limited form of facilities-based authority to those CLC petitioners, restricted to utilizing unbundled network elements and equipment installed within previously existing buildings or structures. This limited form of facilities-based authority could be seen with certainty not to adversely impact the environment. Thus, no negative declaration or EIR was required in order to grant such authority.

## Discussion

In view of the challenges to the most recently published Negative Declaration, the staff is currently assessing the need to undertake more specific environmental reviews of each individual CLC's proposed project, rather than merely aggregating all of the projects together into a summary project description within a single negative declaration. As a result of this pending change in administration of the environmental review process, the Commission's staff no longer anticipates routinely preparing consolidated negative declarations for all candidates for CLC facilities-based authority on a standardized quarterly cycle.

In view of the public comments received, we conclude that more individualized treatment of the environmental review of each CLC is warranted. Thus, effective with this decision and until further notice, each CLC petition currently pending before us will be individually reviewed and, if it is determined that a negative declaration or EIR is necessary, it will be prepared on an individual basis.

As we stated in D.99-10-025, where a CLC wants facilities-based authority which is limited to installing equipment within previously existing buildings or structures, no negative declaration is required. Likewise, a request limited to resale authority requires no negative declaration. Thus, whether a CLC requires an EIR, a negative declaration, or merely a finding that no adverse environmental impacts will result, the review and processing will be done on an individual basis. Given this change in the administrative processing of the environmental review to a case-by-case basis, the original rationale for treating CLC petitions in consolidated quarterly groupings within the Local Competition Docket no longer applies. It is unduly cumbersome to continue to process facilities-based CLCs through the Local Competition Docket, particularly where there are no offsetting advantages in terms of consolidating the environmental review process.

Accordingly, we hereby place parties on notice of this revision in our administrative procedures for the filing and processing of CLC CPCN requests for facilities-based authority. We shall discontinue the process of batching CLCs for environmental review and approval through a single aggregated negative declaration. In order to adequately address the environmental issues associated with each new CLC, an individual negative declaration or EIR will be separately prepared and reviewed for each CLC where required under CEQA.

On a prospective basis for parties filing after January 1, 2000, we shall therefore no longer review and approve CLC petitions for CPCN authority within the Local Competition dockets. Any party seeking authority for any form of CPCN authority as a CLC filing beginning after January 1, 2000, shall make the filing in the form of a new application. The assignment of petition numbers within the Local Competition docket shall thereafter be discontinued.

Because the parties filing their petitions during the third and fourth quarters of 1999 were not previously apprised of this change in rules, however, we shall continue to apply the quarterly processing schedule to those parties that file in the Local Competition Docket up through December 31, 1999. Thus, although the CLC petitions filed during the third and fourth quarters of 1999 shall be processed on the previously authorized quarterly CPCN schedule, the authority granted shall be limited in a similar manner as we did in D.99-10-025. The third quarter group of CLCs shall be addressed in a decision in the final quarter of 1999. The fourth quarter group of CLCs shall be addressed in a decision in the first quarter of 2000. Where the CLC petitioner is merely asking for limited facilities-based authority involving the use of UNEs or other equipment placed within previously existing buildings or structures, the requested authority can be granted as part of the third or fourth quarterly review cycles, respectively, within this docket. No further review or processing of those petitions will be needed. If, however, such carriers subsequently seek to offer expanded service involving construction activities beyond the limited scope approved in their CPCN, they will have to file a new application for facilities-based CPCN authority and comply with any applicable CEQA requirements for project review and approval.

Those CLC petitions that are docketed as of December 31, 1999, within this proceeding and which seek more extensive facilities-based authority requiring further Commission review on environmental issues shall each be redocketed with a new application number. Included in this group are any CLCs seeking full facilities-based CPCNs which filed their petitions: (1) during the second quarter of 1999, for whom full facilities-based authority was deferred by D.99-10-022; and (2) during the third quarter of 1999, and (3) during the fourth quarter of 1999.

At this point, any CLC petitioners requiring additional CEQA review need not file any additional paperwork to implement this transfer from the Local Competition docket to a new application. We shall direct the Commission's Docket Office to prepare new cover pages for each of the petitions requiring further environmental review, recaptioning each one as a separate application. The Docket Office shall send a notice to each of the petitioners advising them of their newly assigned application number. Instead of uniformly processing all petitions on a quarterly basis, each application shall be processed on its own individual schedule. The amount of time required to process the application will depend on the time required to complete the necessary CEQA review.

This change to an individualized treatment of carriers' CPCN applications may also require that we revise the deposit requirements due from carriers to cover the costs of CEQA review. In D.97-04-046, we required each CLC filing a CPCN petition requiring preparation of a Negative Declaration or EIR must deposit $2,000 within 20 days of filing. The $2,000 deposit was based upon the approximate cost per carrier estimated at that time to prepare a negative declaration based upon aggregating multiple carriers into a single batch. We stated in D.97-04-046 that we may reevaluate the required level of deposits in future years as needed. The change from a batch processing of CLCs as part of a single negative declaration to individualized treatment may be expected to increase the cost per carrier for preparing the negative declaration or EIR. We may address this matter of the required CEQA deposit further in a subsequent order. In the meantime, the $2,000 deposit requirement shall remain in effect.

We recognize that this change in our approach to CPCN review of environmental issues under CEQA may raise various implications for local competition and other public interests that warrant further exploration. Accordingly, we intend to sponsor a Commission Roundtable early in 2000

wherein we shall provide for discussion and input from interested stakeholders of the implications and concerns relating to the policies we address in today's order. We shall provide appropriate advance notice of the specific time and place for the Roundtable once the schedule has been determined.

We shall also direct the Commission staff to file a report, six months from the effective date of the decision, on the effect of the change adopted by this decision in administering applications, and for the ALJ to prepare a recommendation to the Commission. The ALJ's recommendation will deal with what, if any, steps can be taken further to ensure timely processing of applications while addressing the concerns expressed by the Attorney General and other public agencies.

In those cases where a CLC application seeks only resale authority or limited facilities-based authority not requiring a negative declaration, the application may be processed on a more expedited basis. Just because we are phasing out the quarterly batch processing within the Local Competition docket does not mean that we have lessened our resolve to process CPCN filings promptly.

We shall continue to use due diligence to attempt to process CLC CPCN applications within three months of the time of filing where no negative declaration or EIR is required and where there is no protest or other irregularity requiring more time to resolve. We shall continue to employ administratively efficient procedures as appropriate to avoid any undue delays in reviewing and processing all CLC CPCN applications filed with the Commission.

## Comments on the Draft Decision

The draft decision of the ALJ in this matter was mailed to the parties in accordance with Pub. Util. Code § 311(g) and Rule 77.1 of the Rules and Practice

and Procedure, and also to pending CLC petitioners filed in this docket. Comments were filed on November 22, 1999, and reply comments were filed on November 29, 1999. We have taken the comments in account, as appropriate in finalizing this decision.

## Findings of Fact

1. The procedure for facilities-based CLC certification was established in D.95-07-054 which included the requirement that all CLCs must comply with the provisions of the CEQA pursuant to Commission Rule 17.1.

2. A negative declaration was prepared pursuant to CEQA covering the initial CLC petitioners who were granted CPCN authority in D.95-12-057.

3. The CEQA negative declaration process has driven the schedule for granting facilities-based CLC approval because of the time intensive nature of the CEQA process.

4. Beginning in 1997, to improve the efficiency of the commission's CPCN approval process for facilities-based CLCs, a standardized quarterly schedule for processing CEQA reviews for facilities-based CLCs was instituted.

5. The revised approval process reinstituted the petition filing procedure, whereby each facilities-based CLC seeking a CPCN is assigned a petition number, collectively docketed number I.95-04-044, and assigned to a single Commissioner and Administrative Law Judge.

6. In view of the challenges to the most recently published Negative Declaration, the Commission staff is currently anticipating the need to undertake more specific environmental reviews of each individual CLC's proposed project, rather than aggregating projects together into a summary project description within a single negative declaration.

7. Given the change in the administrative processing of the environmental review to a case-by-case basis, the original rationale for treating CLC petitions in consolidated quarterly groupings within the Local Competition Docket no longer applies.

## Conclusions of Law

1. The quarterly schedule for the batched processing of facilities-based CLC CPCNs as directed in D.96-12-020 should be superceded by individual review through separate applications to become effective with filings made beginning after January 1, 2000.

2. Because the parties filing their CPCN petitions during the third and fourth quarters of 1999 were not previously apprised of the change in rules made by this order, the previously adopted quarterly processing schedule should continue to apply to those parties that file up through December 31, 1999.

3. It is unduly cumbersome to continue to process facilities-based CLCs through the Local Competition Docket, particularly where there are no offsetting advantages in terms of consolidating the environmental review process.

4. The Commission should continue to use due diligence to attempt to process CLC CPCN applications within three months of the time of filing where no negative declaration or EIR is required and where there is no protest or other irregularity requiring more time to resolve.

## O R D E R

**IT IS ORDERED** that:

1. Effective with the filings docketed after January 1, 2000, competitive local carriers (CLCs) seeking authority to provide facilities-based competitive local

exchange service shall be processed on an individual basis and no longer subject to a quarterly batched processing schedule within the Local Competition docket.

2. Effective with filings docketed after January 1, 2000, facilities-based CLCs seeking a certificate of public convenience and necessity (CPCN) authority shall make their filing in the form of a separate application and shall no longer be docketed as a petition in Investigation 95-04-044.

3. Those pending petitions that are filed within this proceeding through December 31, 1999 pending Commission review and approval shall each be processed under the D.96-12-020 quarterly review schedule subject to the limitations adopted in D.99-10-022.

4. For those currently pending CLC petitioners that merely seek limited facilities-based authority involving the use of UNEs or other equipment placed within previously existing buildings or structures, the requested authority will be considered as part of the third or fourth quarterly review batches of 1999, respectively, within this docket. Any subsequent expansion of such a carrier's limited authority shall require the carrier to make a new application filing for facilities-based authority and to comply with all applicable California Environmental Quality Act (CEQA) requirements for project review and approval.

5. For those parties that seek to offer expanded facilities-based service in their currently pending petitions involving construction activities beyond the limited scope that can be approved without a negative declaration, their filing shall be redocketed as a new application for facilities-based CPCN authority subject to any applicable CEQA requirements for project review and approval.

6. Currently pending CLC petitioners seeking full facilities-based authority requiring further CEQA review shall be subsequently notified concerning their reassigned application number, and the assigned administrative law judge.

7. The Commission shall schedule a Roundtable Discussion early in the year 2000 to provide interested stakeholders the opportunity to provide input regarding the implications for local competition and other public policies resulting from the issues raised by this decision.

8. The Commission staff is directed to file a report, six months from the effective date of this decision, on the effect of the change adopted by this decision in administering applications, and for the ALJ to prepare a recommendation to the Commission. The ALJ's recommendation will deal with what, if any, steps can be taken further to ensure timely processing of applications while addressing the concerns expressed by the Attorney General and other public agencies.

This order is effective today.

Dated December 16, 1999, at San Francisco, California.

RICHARD A. BILAS
President
HENRY M. DUQUE
JOSIAH L. NEEPER
JOEL Z. HYATT
CARL W. WOOD
Commissioners