BEFORE THE PUBLIC UTILITIES COMMISSION

OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking on the Commission's own motion into the application of the California Environmental Quality Act to applications of jurisdictional telecommunications utilities for authority to offer service and construct facilities.	Rulemaking 06-10-006 (Filed Oct. 5, 2006)

COMMENTS OF SCAN NATOA, INC. IN RESPONSE TO PROPOSED DECISION OF COMMISSIONER BOHN (MAILED 10/20/10) SPECIFYING REVIEW PROCEDURES PURSUANT TO CALIFORNIA ENVIRONMENTAL QUALITY ACT

SCAN NATOA, Inc. (the States of California and Nevada Chapter of the National Association of Telecommunications Officers and Advisors) submits the following comments the Proposed Decision of Commissioner Bohn, mailed on October 20, 2010 (the "PD"), and joins in the comments submitted by the League of California Cities in response to the PD.

SCAN NATOA represents the interests of its nearly 400 members consisting primarily of local government telecommunications officials and advisors located in California and Nevada.

SCAN NATOA has previously filed a joint set of comments in this Rulemaking with the League of California Cities, the City of Walnut Creek, and the City & County of San Francisco on September 10, 2007.

I.

THE PURPOSE OF CEQA

In short, "[t]he purpose of CEQA is not to generate paper, but to compel government at all levels to make decisions with environmental consequences in mind." *Bozung v. Local Agency Formation Com.*, 13 Cal.3d 263, 283 (1975) (emphasis added).

Here, this rulemaking has certainly generated paper. And, given the Commission's (correct) recognition of its prior lack of understanding of the environmental consequences of local wireless projects in GO 159-A, it is hard to fathom the blanket CEQA exemptions offered through the PD, and the implied (but still not clear) inference that local governments may (or may not) be prevented from conducting their own CEQA review of projects subject to the PD.

II.

TWO KEY PROBLEMS WITH SECTION II OF GENERAL ORDER 170

Section II of proposed GO 170 (Attachment A to the PD) deems a variety of future projects to be in compliance with carriers' CPCNs, and, as such, the projects

"do not require further Commission review pursuant to the California Environmental Quality Act." There are two major issues with this section.

1. Problem One – No Factual Basis for "Exemptions by Fiat"

The PD deems exempt the projects described in Section II of proposed GO 170 without any supporting factual basis (nor any legal authority). Presumably, the PD intendeds that the Commission utilize the "common sense" exemption of the CEQA Guidelines. 14 Cal. Code Regs. § 15061(b)(3). This exemption applies only "[w]here it can be seen with certainty that there is no possibility that the activity in question may have a significant effect on the environment . . . " *Id.* (emphasis added) "The exemption can only be relied on if a factual evlauation of the agency's proposed activity reveals that it applies." *Muzzy Ranch Co. v. Solano County Airport Land Use Com.*, 41 Cal.4th 372, 387 (2007).

Despite the PD's sweeping determination to (1) grant a new category of exemption; and/or (2) deem an entire class of projects to fall within the ambit of an existing exemption, the PD still fails the legal requirements of the Guidelines and *Muzzy Ranch*. In fact, no CEQA analysis has been proposed in connection with the adoption of the PD. Thus, even though Section II of proposed GO 170 states that distributed antenna systems ("DAS") are exempt from CEQA review, the Commission has neither prepared nor proposed any factual record nor environmental determination to substantiate the "batch" determination. Indeed,

DAS providers are not mentioned anywhere in the PD. Unless the Commission changes the course of the PD, it is doomed to repeat the practice of approving a "batch" of projects, as it did with "batch" negative declarations over a decade ago.[1]

The legal analysis of the PD's exemption-by-fiat approach fares no better at the implementation stage. From a land use perspective, DAS providers are functionally equivalent to the wireless carriers regulated by General Order 159-A ("GO 159-A"). However, without any explanation, the PD sets forth an inconsistent and discriminatory environmental review process for these functionally equivalent wireless providers.[2] DAS providers offer wireless antenna sites and connectivity to those sites by wireless providers governed by GO 159-A, and in limited cases to other wireless carriers that do not provide wireless telephone services.

By now proposing to exempt DAS providers from environmental review, the Commission carves out a particular species of wireless provider -- the DAS providers -- from the wireless regulations established by the Commission in GO

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[1] The Attorney General notes that the Commission stopped using "batch" approvals of projects in 1999. *See* Reply Comments of the California Attorney General in Response to Administrative Law Judge's May 8, 2007, and August 6, 2007 Rulings, filed on September 10, 2007.

[2] The PD's unequal treatment between DAS and other wireless providers may violate an anti-discrimination provision in the Federal Telecommunications Act. *See* 47 U.S.C. § 332(c)(7)(B)(i)(I).

159-A, which included a mandate that local agencies serve as the lead agency for the environmental review of wireless sites. Instead, the Commission should eliminate the CEQA exemption for DAS activities, and declare that CEQA review of DAS activities should be considered under the clear environmental review rules of GO 159-A.

In D.06-04-030, the Commission previously considered how CEQA applied to the DAS activities of NewPath Networks, but still required environmental review, by way of requiring NewPath to submit to the Energy Division their proposed CEQA exemptions for facilities-based projects. "Exemptions by fiat" is certainly not the way to go for activities defined in D.06-04-030 as follows:

> This application makes clear that Applicant's facilities-based DAS projects will consist of: predominantly aerial fiber optic facilities; the installation of compact "nodes" on existing utility poles; a minor amount of ground disturbance (100-200 feet) associated with connecting equipment enclosures on private property with the aerial right-of-way; aerial fiber runs of short distances, rarely exceeding 1,000 feet in length; all facilities to be located within public utility rights-of-way (with the exception of ingress and egress to and from); and projects and facilities that are widely separated geographically.

And, based on the experience of SCAN NATOA's own members in their local jurisdictions, DAS facilities are at least equally as intrusive as other wireless facilities, and most often substantially more intrusive – casting doubt on any suggestion that DAS activities deserve "red carpet" treatment from the Commission. Typically, DAS providers install thousands of feet, and sometimes

miles, of new fiber optic cables above-ground and underground. These impacts could amount to a significant effect on the environment, thrusting DAS activities out of CEQA's exemption territory, based on (1) the localized installation of a particular DAS node or network of nodes; and (2) the proposed route and installation of interconnecting fiber optic facilities (including for overhead cables the stand, poles, down guys and marker, etc.)..

Additionally, DAS facilities cause an adverse impact on aesthetics (both by the facilities' appearance and potential for obstructing viewsheds), especially in right-of-way wireless facilities in residential neighborhoods. The CEQA Guidelines establish a rebuttable presumption that any substantial, negative aesthetic effect (i.e., the negative effect of the project on public views) is to be considered a significant environmental impact for CEQA purposes. *See Quail Botanical Gardens Foundation, Inc. v. City of Encinitas*, (1994) 29 Cal.App.4th 1597, 1604 (citation).

Finding of Fact number 19 to D.06-04-030 stated that "NewPath's proposed facilities-based project activities are indeed of a limited nature and would in almost all circumstances be highly likely to qualify for an exemption from CEQA." But, the Commission did not deem NewPath's activities exempt under CEQA in that particular decision – the Commission's decision still required environmental review of the DAS activities.

Similarly, the Commission should not jump the gun here. The Commission should still require environmental review for DAS activities like those proposed by NewPath that resulted in D.06-04-030. The Commission cannot issue a blanket exemption for DAS activities in the PD, when it was not even sure in D.06-04-030 that the same activities were exempt from CEQA review.

2. Problem Two – Failure to Describe Whether (or not) Local Governments Can Conduct Their Own CEQA Review

Second, the PD lacks any clarity whether further local review is permitted for the projects covered by the PD. On the other hand, state law does not suffer from any lack of clarity on this issue, compelling the conclusion in this rulemaking that local agencies should assume lead agency status for CEQA where (1) the Commission has not reviewed the details of a particular project (including construction activities, and specific location and appearance of each facility); or (2) there is a possibility that DAS facilities may be subject to a discretionary decision by a local agency. CEQA Guideline 15052 states

> (a) Where a responsible agency is called on to grant an approval for a project subject to CEQA for which another public agency was the appropriate lead agency, the responsible agency shall assume the role of lead agency when any of the following conditions occur:
>
> (1) The lead agency did not prepare any environmental documents for the project, and the statute of limitations has expired for a challenge to the action of the appropriate lead agency.

* * *

14 Cal. Code Regs. § 15052. Exemption determinations are not included in the definition of the term "environmental documents," which is defined as follows:

> "Environmental documents" means initial studies, negative declarations, draft and final EIRs, documents prepared as substitutes for EIRs and negative declarations under a program certified pursuant to Public Resources Code Section 21080.5, and documents prepared under NEPA and used by a state or local agency in the place of an initial study, negative declaration, or an EIR.

14 Cal. Code Regs. § 15361. Therefore, even if the Commission could properly assume "lead agency" status, that determination would not prevent local agencies from also acting in a lead agency capacity when discretionary permits are sought at the local level. Indeed, by stating that local agencies "shall assume the role of lead agency," CEQA mandates local agencies assume lead agency status in that circumstance.[3]

[3] As a practical matter, it also makes more sense for local governments developing and monitoring these types of mitigation measures. The Commission lacks jurisdiction over many of the mitigation measures that may be needed to mitigate potential environmental impacts by telecommunications projects. The Commission does not have authority to regulate public utilities under its jurisdiction "contrary to other legislative directives." *Assembly of State v. Public Util. Com.*, 12 Cal.4th 87, 103. Local governments, not the Commission, are authorized to regulate the "time, place, and manner in which roads, highways, and waterways are accessed" by telephone corporations. Pub.Util.Code § 7901.1. Local governments may not surrender to the Commission their "powers of control to supervise and regulate the relationship between a public utility and the general public in matters affecting the health, convenience, and safety of the general

The result compelled by CEQA Guideline 15052 is consistent with the Commission's rationale in GO 159-A. In that General Order, the Commission expressly declared that local agencies shall serve as the lead agency for CEQA review of projects covered by the PD. Local agencies (not statewide agencies) are best suited to know and understand the particular conditions (proximity to protect habitat or species, wetlands, sensitive coastal zones, viewshed corridors, etc.) that the Energy Division simply is not aware of nor is aware of sufficiently to seek the appropriate mitigation.

Section II(B) of GO 159-A, which is and will remain effective following the adoption of GO-170, states, in part, as follows (with emphasis added):

> The Commission acknowledges that local citizens and local government are often in a better position than the Commission to measure local impact and to identify alternative sites. Accordingly, 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 [sic] CEQA and c) the satisfaction of noticing procedures for both land use approvals and CEQA procedures.

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public. . . " Pub.Util.Code § 2902. Most mitigation measures generated by CEQA review are within the exclusive jurisdiction for local agencies to impose. In other words, these activities relate to things such as measures to take when excavation results in the disturbance of Native American burial grounds, or reducing the size or visibility of wireless or wireline facilities.

Nothing in the PD suggests that local citizens and local governments now lack that same ability to "measure local impact" that the Commission correctly recognized when it adopted GO 159-A back in 1996.

The Legislature has also recognized the primacy of local governments in environmental review of video service providers, some of which are also telephone corporations that are subject to the PD. Specifically, Public Utilities Code §§ 5820 and 5885 provide that local governments serve as the lead agency for any environmental review with respect to network construction, installation, and maintenance of video service facilities.

Furthermore, for cities and counties located long distances away from the Commission's San Francisco headquarters, it is all the more illogical to require local citizens to expend personal monies and local public officials to expend public funds to travel to San Francisco to "be heard" on an issue. Congress was faced with a similar dilemma in considering the Federal Telecommunications Act of 1996 (the "Telecom Act"). As originally written, the Telecom Act would have allowed the Federal Communications Commission (the "FCC") to preempt state or local government right-of-way regulations over telecommunications providers. At the time, Sen. Dianne Feinstein (formerly a local government official herself) opined that FCC jurisdiction over these disputes was improper:

> That means that cities will have to send delegations of city attorneys to Washington to go before a panel of telecommunications

> specialist[s] at the FCC, on what may be [a] very broad question of State or local government rights. In reality, this preemption provision is an unfunded mandate because it will create major new costs for cities and for States.

BellSouth Telecom., Inc. v. Town of Palm Beach, 252 F.3d 1169, 1190 (11th Cir. 2001) (citations). Ultimately, the Senate concurred with Sen. Feinstein's concerns, and courts have since held that the best place to resolve such telecommunications disputes is a local federal court – not the FCC all the way in Washington. *See id.* At 1190-1191.

Putting GO 159-A and the Federal Telecommunications Act in context with the PD, it is clear that the Commission should defer to local government and allow local agencies to serve as the lead agency for CEQA review. That approach would avoid especially onerous results, such as forcing individuals and local officials to travel to San Francisco from, for example, Del Norte or Modoc County (at the north) or San Diego or Imperial County (at the south).

Clarity regarding local government's role in leading CEQA review is needed in the PD. This clarity would limit the multiplicity of PUC proceedings asserting carriers violated CEQA, such as proceedings initiated by the City of Huntington Beach (case 08-04-037, filed April 23, 2008) and the City of Davis (case 10-03-011, filed March 23, 2010).

The DAS providers could have perhaps avoided these proceedings had the Commission simply required that environmental review be conducted by local

agencies, which have greater knowledge and understanding of how to analyze, avoid, and/or mitigate the environmental impacts associated with local projects. And, if the DAS providers were not satisfied with the local decision on environmental review, they could certainly have sought review in the Superior Court – where CEQA actions are heard on an expedited basis, receiving priority over all other civil actions "so that the action or proceeding shall be quickly heard and determined." Pub.Res.Code § 21167.1(a). In contrast to the legally-required expedited Superior Court proceeding, the Huntington Beach case has stalled in the Commission for over two years, and the Davis case has been pending with the Commission for almost eight months.

The Huntington Beach and Davis cases are additional examples of the generation of paper deplored by the Supreme Court in the *Bozung* CEQA decision discussed above. *Bozung*, 13 Cal.3d at 283. The Commission cannot earnestly promise an expedited review process when administrative review of the Energy Division's decisions languishes as it has in the Huntington Beach and Davis cases.[4]

[4] Of course, "CEQA [is] not to be subverted into an instrument for the oppression and delay of social, economic, or recreational development and advancement." *Citizens of Goleta Valley v. Board of Supervisors*, 52 Cal.3d 553, 576 (1990). The carriers may take the position that the Huntington Beach and Davis cases operate as "Exhibit A" for why the Commission should exempt the projects in Section II of GO 170 from CEQA review. However, that argument has no weight -- because the record has no evidence that any of the projects in Section II are, in fact, entitled to an exemption. For example, DAS projects may have a significant effect on the environment, as discussed above.

The Commission's protracted adjudicatory process for challenges of the Energy Division's decisions simply does not allow "the action or proceeding [to] be quickly heard and determined" as it would be through a local agency CEQA process coupled, if necessary, with the (legally-required) expedited hearing process in a local Superior Court.

Page 26 of the PD states that one of its goals is to "enable telephone corporations to pursue their business objectives with greater certainty of regulatory compliance requirements." Having the DAS providers' CEQA review languishing in the Commission, as demonstrated by the Huntington Beach and Davis cases, does not bode well for the carriers to have "greater certainty of regulatory compliance requirements." In fact, since the carriers are already obtaining land use approvals at the local level, it makes sense for the Commission to also defer environmental review to the local level, as well. It will provide for not only expedited review, but the carriers are already obtaining local land use approvals, as well.

Local citizens, local governments, the carriers, and customers of the carriers all deserve a more efficient system for environmental review than that possible through the limited resources of the remote Energy Division. This militates toward a finding that local governments are in the best position to serve as the lead agency for CEQA purposes, given their knowledge of local environmental matters.

There is no question that local agencies are capable of performing reasonable and useful environmental review, and performing that review on a timely basis. Local agencies regularly conduct environmental review for virtually all projects tendered for permitting approvals.

Regardless of the party in the Huntington Beach and Davis proceedings that ultimately declares themselves the "winners," the "losers" are certainly local citizens – both (1) taxpayers and (2) customers of the carriers -- who have paid to prosecute and/or defend legal challenges over drawn-out environmental review issues that could certainly be avoided (or, at least, expedited) in the future. The Commission should state, consistent with GO 159-A, that local governments are in the best position to serve as the lead agency for CEQA purposes where (1) the Commission has not reviewed the details of a particular project (including construction activities, and specific location and appearance of each facility); and/or (2) there is a possibility that DAS facilities may be subject to a discretionary decision by a local agency.

III.

CONCLUSION

SCAN NATOA encourages the parties and the Commission to continue to seek a resolution to this rulemaking that addresses the comments set forth herein.

Dated: November 9, 2010

Respectfully submitted,

/s/ Javan N. Rad

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CERTIFICATE OF SERVICE

I certify that I have by electronic mail this day served a true copy of the original attached COMMENTS OF SCAN NATOA, INC. IN RESPONSE TO PROPOSED DECISION OF COMMISSIONER BOHN (MAILED 10/20/10) SPECIFYING REVIEW PROCEDURES PURSUANT TO CALIFORNIA ENVIRONMENTAL QUALITY ACT on the attached service list.

Dated: November 9, 2010 at Pasadena, California.

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