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.	R.06-10-006 (Filed October 5, 2006)

APPLICATION OF THE LEAGUE OF CALIFORNIA CITIES, THE CALIFORNIA STATE ASSOCIATION OF COUNTIES AND SCAN NATOA, INC. FOR REHEARING OF DECISION 10-12-056

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I. INTRODUCTION AND SUMMARY

In accordance with Rule 16.1 of the Rules of Practice and Procedure of the California Public Utilities Commission ("Commission"), the League of California Cities, the California State Association of Counties, and SCAN NATOA, INC. ("Local Governments") file this Application for Rehearing of Decision ("D.") 10-12-056 ("Decision"). The Decision adopts a new General Order ("GO") 170, which establishes requirements for Commission review under the California Environmental Quality Act ("CEQA") relating to the construction of new telecommunications facilities by telephone corporations subject to the Commission's jurisdiction.

The Decision is replete with fundamental legal errors that render the GO 170 scheme it adopts so legally deficient as to be unsalvageable. If the Decision were allowed to stand, it would thwart the CEQA goal of ensuring that a public agency consider the environmental effects of telecommunications projects before authorizing such activities. Under Public Utilities Code Section 1757.1(a),[1] the Decision must be annulled because it exceeds the Commission's jurisdiction, fails to proceed in the manner required by law, abuses the Commission's discretion, and is not supported by the findings, in the following respects.

First, the Commission exceeded its jurisdiction because the Decision attempts to negate the longstanding authority of California local governments to issue discretionary permits for telecommunications construction projects. The Decision erroneously asserts that only the Commission may issue discretionary permits for such projects. The Commission's authority over telephone corporations, however, does not confer upon it the right to preempt local police power authority. Instead, the law is clear that the inherent police powers of local governments under Article XI, Section 7 of the California Constitution include the right to control their own land use decisions. Moreover, both Article XI, Section 9(b) of the California Constitution and Sections 2902, 7901 and 7901.1 grant local governments the right and obligation to manage the public rights-of-way to protect the public health, safety and convenience of their residents. The Decision blatantly conflicts with all of these authorities and thereby exceeds the Commission's jurisdiction.

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[1] Statutory references are to the California Public Utilities Code unless otherwise indicated.

Second, the Commission unlawfully made this pronouncement for the first time in the Decision and without notice to any interested party. Had the Commission, as basic due process and Commission procedural rules require, afforded interested parties an opportunity to comment on this issue, the Commission would have learned that its authority over telephone corporations does not confer upon it the right to preempt local police power authority.

Third, in violation of CEQA, the Decision fails to identify the discretionary Commission decisions to which the CEQA rules in GO 170 relate. CEQA only applies when a public agency is required to take a discretionary action. The Decision purports to confer exclusive CEQA responsibilities on the Commission with respect to all telephone corporation construction projects in California, without identifying the discretionary decisions by the Commission that justify this significant expansion of the Commission's CEQA authority. Under the terms of their certificates of public convenience and necessity ("CPCNs"), many telephone corporations – incumbents and competitive carriers that were granted CPCNs prior to the year 2000 – are not currently required to obtain Commission approval for construction projects,[2] and the Decision does not modify those CPCNs to impose new requirements for Commission approval. Without identifying the discretionary decisions that trigger the Commission's CEQA rules, GO 170 rests on a legally unsupportable foundation.

Fourth, contrary to CEQA, the Decision obviates the need for any carrier to file an application with the Commission, or engage in any Commission process with respect to most construction projects. For a broad swath of telephone corporation construction activities – those that would benefit from Sections III and IV.A of GO 170 – the Decision allows carriers to self-certify that a CEQA exemption applies to their project. Such self-certification constitutes an unlawful delegation of the Commission's CEQA obligations, which the law requires be carried out by a public agency, not private parties with a financial interest in finding that CEQA does not apply to their projects.

Fifth, the Decision violates CEQA by granting a statewide "general rule" exemption for numerous construction projects in Section III of GO 170. The Decision fails to present the required

[2] See the Decision's discussion of the different approval requirements for different groups of telephone corporations at pages 2-3.

showing for a general rule exemption for any of the enumerated activities – a demonstration that such activity would never have a significant, CEQA-defined environmental effect at any location in California. Absent findings of fact and conclusions of law to justify the general rule exemptions, a reviewing court has no basis on which to determine whether the Commission has considered all of the environmental effects that are protected by CEQA, including impacts on aesthetics, biological resources, cultural/historic resources, and local land use and planning. If the Commission had conducted this analysis, it would have found that many of the activities listed in Section III do not qualify for a sweeping general rule exemption.

Sixth, the Decision's assertion that the Commission is best suited to evaluate the environmental effects of telecommunications projects directly conflicts with the Commission's current policy, in GO 159-A, of deference to local governments in assessing environmental impacts. This arbitrary, unexplained reversal of position is not supported by the record or any findings and constitutes an abuse of discretion.

Seventh, in yet another violation of CEQA, the Notice to Proceed process in Section IV.B invites telephone corporations to forum shop between the Commission and local governments for a favorable CEQA determination. CEQA's lead agency rules require that the involved public agencies, not the project proponent, determine which agency should serve as lead agency.

In sum, the GO 170 scheme is erected on a legally unsound foundation and collapses under its own weight. Correcting the many legal errors would require a major overhaul of GO 170, and the Commission would be left with an unworkable regime imposing impossible-to-meet processing demands on the Commission. The Commission should grant rehearing to annul this legally indefensible Decision.

II. THE DECISION'S ATTEMPT TO NEGATE DISCRETIONARY PERMITS ISSUED BY LOCAL GOVERNMENTS VIOLATES THE CONSTITUTIONALLY-VESTED POLICE POWER AUTHORITY OF LOCAL GOVERNMENTS

The Commission has blatantly over-stepped its authority by attempting to usurp the longstanding police power and land use authority of California's cities and counties. Page 30 of the Decision states: "[T]his Commission is the only agency that can issue discretionary permits for

telecommunications projects because deployment of telecommunications infrastructure is a matter of statewide concern." This statement is apparently carried through to GO 170 in Section III (requiring distributed access system ("DAS") providers exempt from CEQA review to "serve notice on local agencies with a permit to issue") and Section IV(B)(v)(1) (requiring carriers to serve a Notice of Proposed Construction "on all local agencies with a permit to issue"). Simply put, the Commission lacks jurisdiction to attempt to limit police power authority over telecommunications facilities subject to GO 170.

A. Local Governments Enjoy Constitutionally-Based Police Power Authority and Clear Statutory Authority to Regulate Land Use by Telecommunications Facilities

Cities and counties have a constitutional right to "make and enforce within [their] limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws."[3] Local authority to regulate land use permits has recently been described by the Court of Appeal as follows:

> Land use regulation in California historically has been a function of local government under the grant of police power contained in article XI, section 7 of the California Constitution. The power of a city or county to control its own land use decisions derives from this inherent police power, not from the delegation of authority by the state. Thus, local governments have been constitutionally endowed with wide-ranging discretion to formulate basic land use policy.[4]

Since local governments derive their police power from the Constitution, the Commission cannot compel local governments to surrender their police powers through GO 170 by proclaiming that carriers are only subject to ministerial – not discretionary – land use permitting processes at the local level.

Local governments exercise their constitutional land use regulatory authority in a number of ways, including through discretionary approvals of proposed projects:

> Zoning laws regulate land uses in two basic ways: while some uses are permitted as a matter of right, other sensitive uses require discretionary administrative approval in the form of a [conditional use permit] pursuant to criteria specified in the zoning ordinance. *See* Govt.Code § 65091. Such criteria are designed to evaluate whether the discretionary use is compatible with the proposed location.[5]

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[3] Cal. Const., art. XI, § 7.

[4] *Building Industry Assn. of Cent. California v. County of Stanislaus*, (2010) 190 Cal.App.4th 582, 589 (citations omitted).

[5] *Smith v. County of Los Angeles* (1989) 211 Cal.App.3d 188, 197 (citation omitted).

Several authorities recognize that local agencies retain their police power authority over utilities regulated by the Commission. First, Article XI, Section 9(b) of the California Constitution provides that "[p]ersons or corporations may establish and operate works for supplying [communications] services upon conditions and under regulations that the city may prescribe under its organic law." This provision authorizes local governments to control "the particular location of and manner in which . . . telephone lines, are constructed in the streets."[6] As the court further held in that case:

> [B]ecause of the state concern in communications, the state has retained to itself the broader police power of granting franchises, *leaving to the municipalities the narrower police power of controlling location and manner of installation.*[7]

Thus, the state's franchising authority does not allow the Commission to abrogate the authority of local governments to made discretionary decisions about the location of communications facilities.

Second, as the Commission has previously acknowledged, Section 2902 displays a legislative recognition that the Commission may not usurp this local police power.[8] Section 2902 provides that 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 public, including matters such as the use and repair of public streets by any public utility, the location of the poles, wires, mains, or conduits of any public utility, on, under, or above any public streets. (Emphasis added).

Finally, the Legislature has recognized the primacy of local authority over permitting the construction of telephone lines through Section 7901.1(a): "It is the intent of the Legislature, consistent with Section 7901, that municipalities shall have the right to exercise reasonable control as to the time, place, and manner in which roads, highways, and waterways are accessed." In this provision, the Legislature conspicuously (and correctly) omitted reference to any Commission regulation over time, place, and manner over telephone lines. Indeed, the Ninth Circuit Court of

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[6] *Pac. Tel & Tel. Co. v. City & County of San Francisco* (1961) 197 Cal.App.2d 133, 148-149.

[7] *Id.* at 152 (emphasis added).

[8] *Re Competition for Local Exchange Service*, D. 98-10-058, 1998 Cal. PUC LEXIS 879, at p.*57 (October 22, 1998).

Appeals has held that a city's discretionary regulations over a carrier in the public right-of-way are also permissible under Sections 7901 and 7901.1.[9]

Even GO 170 recognizes that local governments play an important role in regulating the installation of telecommunications facilities:

> California telephone and telegraph corporations are required to obtain all applicable state, local, resource, and special use permits when engaging in the above Section III activities.
>
> Certificated and registered entities are and continue to be governed by Public Utilities Code Section 7901. Pursuant to Public Utilities Code Section 7901.1, municipalities shall have the right to exercise reasonable control as to time, place, and manner in which roads, highways, and waterways are accessed.[10]

Yet, without justification or explanation, the Decision has determined that any permits issued by local governments may only be ministerial, regardless of whether the permitting body views them as such. The Decision fails to recognize, or even discuss, the fact that many decisions regarding the appropriate siting of telecommunications facilities require the exercise of discretion.

GO 170, therefore, unlawfully overrides cities' and counties' discretionary permitting processes for telecommunications facilities. Many local governments, in fact, impose their traditional conditional use permit processes[11] and other discretionary permit processes over telecommunications facilities.[12] Many of these processes apply to facilities in the public rights-of-way in addition to private property, such that GO 170's "free pass" of a ministerial permit process for

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[9] *See Sprint PCS Assets, L.L.C. v. City of Palos Verdes Estates* (9th Cir. 2009) 583 F.3d 716, 720, 724 (ordinance provided that city may deny wireless facility for "adverse aesthetic impacts arising from the proposed time, place, and manner of use of the public property").

[10] GO 170, section III.

[11] "[A] conditional use permit . . . is, by definition, discretionary." *Smith v. County of Los Angeles* (1989) 211 Cal.App.3d 188, 197.

[12] *See, e.g.*, Calabasas Municipal Code, § 17.10.010, Table 2-2; Campbell Municipal Code, § 20.34.030(B); Carpinteria Municipal Code, § 14.56.090; Davis Municipal Code, § 40.29.170; Encinitas Municipal Code, §§ 9.70.060-9.70.070; Fontana Municipal Code, § 32-7(a)(1); Fountain Valley Municipal Code, § 21.28.030(2); Irwindale Municipal Code, § 17.90.050(B); Malibu Municipal Code, § 17.08.040(D); Oakland Municipal Code, §§ 17.128.050 (C), 17.128.060(C), 17.128.070(C), 17.128.080(C); Pacifica Municipal Code, §§ 9-4.2612, 9-4.2614; Pasadena Municipal Code, Chapter 17.50.310(E)(10); Roseville Municipal Code, § 19.16.020; Santa Ana Municipal Code, § 41-198.10; San Diego Municipal Code, § 141.0420(e) and (f); San Francisco Public Works Code, Articles 2.4 and 25; San Jose Municipal Code, §§ 20.30.130 and 20.30.140; San Marcos Municipal Code, § 20.126.060.

telecommunications facilities would directly conflict with any discretionary permit processes that are otherwise authorized through the local police power enjoyed through the California Constitution.

Local Governments recognize that "the Legislature has granted the [Commission] comprehensive jurisdiction to regulate the operation and safety of public utilities."[13] However, "[i]t has never been the rule in California that the Commission has exclusive jurisdiction over any and all matters having any reference to the regulation and supervision of public utilities."[14]

In sum, the Commission lacks authority to limit the police powers of local agencies in the manner suggested by the Decision and GO 170. A Commission decision asserting jurisdiction in excess of the Commission's actual authority is unenforceable.[15] The conclusion that "deployment of telecommunications infrastructure is a matter of statewide concern" does not justify usurpation of local governments' constitutional and statutory authority to regulate the placement of telecommunications facilities.[16]

B. California Law Does Not Authorize a CEQA Lead Agency to Limit Local Police Power Authority

"The tension between technological advancement and community aesthetics is nothing new."[17] However, a regulatory proceeding addressing how CEQA should apply to telephone corporations is, without question, the wrong forum for making any determinations with respect to this issue.

In 1970, the Legislature adopted CEQA to maintain "a quality environment for the people of this state now and in the future."[18] The "overriding purpose of CEQA is to ensure that agencies

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[13] *Hartwell Corp. v. Superior Court* (2002) 27 Cal.4th 256, 265.

[14] *Vila v. Tahoe Southside Water Utility* (1965) 233 Cal.App.2d 469, 477.

[15] *See Santa Clara Valley Transp. Auth. v. Pub. Util. Comm'n* (2004) 124 Cal.App.4th 346, 365.

[16] *See, e.g., City of Burbank v. Burbank-Glendale-Pasadena Airport Auth.* (2003) 113 Cal.App.4th 465, 479 (finding that, although state statute regulating expansion of airport facilities "relates to a matter of statewide concern," airports are "subject to local zoning ordinances" and are not regulated by any statewide agency).

[17] *Palos Verdes Estates*, 583 F.3d at 720.

[18] Pub.Res.Code, § 21000(a).

regulating activities that may affect the quality of the environment give primary consideration to preventing environmental damage."[19]

CEQA was not crafted to modify legal requirements for the approval of any projects that may be subject to CEQA, such as a local permit for a telecommunications facility. While environmental review is conducted concurrently with permit review of a project, there is no legal authority for the proposition that a lead agency determination confers any authority to limit or abrogate the permit requirements of any public agency.

III. THE DECISION VIOLATES THE DUE PROCESS RIGHTS OF LOCAL GOVERNMENTS BECAUSE THE COMMISSION DID NOT GIVE THE PARTIES AN OPPORTUNITY TO BE HEARD BEFORE PREEMPTING LOCAL POLICE POWERS

Due process requires adequate notice and an opportunity to be heard when the substantive rights of parties are being determined.[20] Moreover, when a Commission decision incorporates issues beyond those contemplated by the order instituting rulemaking and scoping memos, the decision is invalid for failure to comply with the Commission's own procedural rules.[21]

The Decision's purported invalidation of local governments' discretionary permits egregiously violates the Local Governments' due process rights and the Commission's own procedural rules. Neither the Commission's Order Instituting Rulemaking nor the Scoping Memo gave any notice to parties that this proceeding would potentially address the issue of whether the Commission can or should limit the permitting authority of local governments. The operative language on page 30 of the Decision did not even appear in the Proposed Decision ("PD"), which would have at least given parties an opportunity to comment on it, albeit at a very late stage in these proceedings. Accordingly, this aspect of the Decision is invalid under (1) the Due Process clause of the United States

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[19] *Save Our Peninsula Committee v. Monterey County Bd. of Supervisors* (2001) 87 Cal.App.4th 99, 117 (citation omitted).

[20] *See* Section 1701.1(a); *see also Order Instituting Rulemaking to Implement Senate Bill No. 1488*, D. 09-03-046, 2009 Cal. PUC LEXIS 181, at p.*24 (March 26, 2009) ("the constitutional requirements of due process and equal protection are applicable to . . . Commission proceedings").

[21] *Southern California Edison v. Public Utilities Comm'n* (2006) 140 Cal.App.4th 1085, 1106.

Constitution; and (2) Section 1757.1(a). By failing to follow its own procedural rules, the Commission has failed to proceed in the manner required by law.[22]

IV. THE DECISION FAILS TO IDENTIFY THE DISCRETIONARY ACTIONS THE COMMISSION IS REQUIRED TO TAKE THAT TRIGGER THE APPLICATION OF CEQA

CEQA only applies when a public agency is required to take a discretionary action, including granting approvals for private construction activities.[23] Thus, for CEQA to apply to construction activities by telephone corporations, the Commission must identify the discretionary approval to which CEQA would apply. The Decision ignores this foundational principle by failing to identify any underlying Commission discretionary decision that would trigger CEQA.

This failure is particularly significant with respect to incumbent carriers and competitive carriers awarded a CPCN prior to 2000. As the Decision acknowledges, these carriers' CPCNs allow them to construct telecommunications facilities in California without any additional Commission approval.[24] Consequently, the Commission is not required to make discretionary decisions regarding any construction activities by these telephone corporations. For this reason, the Commission has no need or authority to conduct a CEQA analysis.[25]

Nevertheless, in pursuit of "even-handed" application of CEQA, the Decision states that GO 170 applies to any construction activities by any telephone corporation in California. The problem with this approach is that the Decision has not identified any new discretionary approval that carriers with pre-2000 CPCNs are now required to obtain from the Commission.

If the Commission's intent is to modify all pre-2000 CPCNs, the Decision should have formally modified those decisions and specified the circumstances under which Commission approval

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[22] *Southern California Edison*, 140 Cal.App.4th, at 1106.

[23] Pub.Res.Code, § 21080(a); 14 Cal. Code. Regs., § 15002(b)(3), (i).

[24] Decision, pp. 2-3.

[25] This does not mean that these carriers' construction projects are not reviewed under CEQA. As previously noted, local jurisdictions will frequently require discretionary permits for such projects, thereby triggering CEQA. In addition, if discretionary approval by any other state agency is required, such approval would also trigger CEQA.

is now required.[26] Absent such a modification of its pre-2000 decisions, those decisions remain unchanged, and there is no need for the Commission to conduct any CEQA review for these carriers. Lacking any basis to apply CEQA review to any projects by carriers obtaining CPCNs prior to 2000, the Decision's professed even-handedness is illusory.

V. GO 170 VIOLATES CEQA BY DELEGATING TO TELEPHONE CORPORATIONS THE DETERMINATION OF WHETHER A PROJECT IS EXEMPT FROM CEQA REVIEW

Section IV.A of GO 170 explicitly allows telephone corporations to make their own determinations whether a project qualifies for one of the enumerated categorical exemptions. Under Section IV.A, carriers may "rely on" one of the six listed exemptions "without receiving a Notice to Proceed" from the Commission. In other words, the Commission will delegate entirely to the telephone corporations the judgment of whether a CEQA exemption applies, and the Commission will not review such self-certifications by the carriers, or even know that carriers have made such exemption determinations. Telephone corporations are merely directed to retain records for three years of instances in which they have relied on exemptions.[27]

This delegation violates CEQA. Since CEQA governs the activities of public agencies, the determination of whether an activity is exempt is to be made by the public agency, not the applicant.[28] "A public agency must meet its own responsibilities under CEQA" and may not rely on the analysis of private actors "as a substitute for work CEQA requires the lead agency to accomplish."[29] Under the heading "Delegation of Responsibilities", Section 15025 of the CEQA Guidelines only allows CEQA duties (and only certain duties at that) to be delegated to the public agency's staff. Nothing in CEQA permits a public agency to delegate its duties to private applicants such as the telephone corporations.

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[26] This problem cannot be corrected without re-opening the record. The April 18, 2011 Scoping Memo in this docket did not identify modifying pre-2000 CPCNs as an issue in this docket. Thus, Section 1708's requirement of notice and an opportunity to be heard before modifying a prior decision has not been satisfied in the current record.

[27] GO 170, Section IV.A.

[28] Pub.Res.Code, § 21080; 14 Cal. Code Regs., §§ 15020, 15025(a)(1), 15061(a) ("Once a *lead agency* has determined that an activity is a project subject to CEQA, a *lead agency* shall determine whether the project is exempt from CEQA.") (emphasis added).

[29] 14 Cal. Code Regs., § 15020.

One obvious reason for these rules is that private project proponents have a financial incentive to find that their activities are exempt.

For similar reasons, Section III of GO 170 is improper. Section III lists twelve activities that the Commission deems to be exempt from CEQA by virtue of the so-called "general rule" exemption. Section 15061(b)(3) of the CEQA Guidelines states that CEQA does not apply "[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." An agency relying on the "general rule" exemption must support its finding that there is no possible environmental impact with substantial evidence in the record.[30] The Decision does not do so, and indeed, could not because the determination of whether an activity could possibly affect the environment is necessarily fact specific.[31]

The Commission acknowledges that exceptional circumstances, as identified in CEQA Guidelines Section 15300.2,[32] may render exemptions inapplicable, but the Commission delegates to the telephone corporations the responsibility for deciding whether such an exception applies. The Commission will not review such telephone corporation determinations or even know that such judgment was exercised because the activity will never be presented to the Commission for its consideration or approval.[33]

The determination of whether a Section 15300.2 exception renders an exemption inapplicable must be made before a public agency may find a project exempt from CEQA.[34] As this determination

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[30] *Davidon Homes v. City of San Jose* (1997) 54 Cal.App.4th 106, 116-117.

[31] Section V below demonstrates that this finding is contrary to law with respect to many of the listed activities.

[32] An activity that might otherwise fall within the scope of a categorical exemption would still require CEQA review if one of the exceptions, enumerated in section 15300.2, to the exemptions applies. These exceptions may be based on location, unusual circumstances, cumulative effects, and/or adverse effects on scenic or historical resources. Pub.Res.Code, §§ 21084, 21084.1; 14 Cal. Code Regs., § 15300.2.

[33] Addressing the exceptions to the Section III exempted activities, the Decision states: "We also clarify that if any of the exceptions to the categorical exemptions, as set forth in CEQA Guidelines Section 15300.2, apply to a particular project, then the telephone corporation must file an application for full Commission review of the proposed construction project. . . ." Decision, p. 35. To the extent that this statement is also intended to apply to Section IV.A, this is yet another aspect of the CEQA exemption determination that GO 170 improperly delegates to telephone corporations.

[34] 14 Cal. Code Regs., §§ 15061(a), (b)(2).

is part of the decision as to whether an exemption applies, the Commission may not delegate this responsibility to the telephone corporations, for the same reasons that are discussed above with respect to Section IV.A.[35]

VI. SECTION III OF GO 170 VIOLATES CEQA BY EXEMPTING SEVERAL TYPES OF PROJECTS THAT COULD HAVE A SIGNIFICANT ENVIRONMENTAL EFFECT.

Section III of GO 170 lists twelve activities that do not require Commission review under CEQA because they supposedly qualify for the "general rule" exemption. The Decision explains that, although the twelve activities would also "likely" qualify for CEQA categorical exemptions, the Commission will treat them "as enumerated activities" in order to "ease the administrative burden for activities that the Commission has routinely found have no potential to cause environmental impacts."[36]

For many of the activities listed in Section III, the use of the general rule exemption is improper and a violation of CEQA. The general rule exemption only applies "[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.[37] This is an extremely high standard. To properly sustain the use of the general rule exemption, the Commission must make a separate finding, for each of the activities listed in Section III, that each and every activity of this type ever to be performed in California could never have a significant, CEQA-defined environmental effect.[38] Moreover, the Commission must conclude that specific information about any particular activity or location would never affect the determination that the activity could not cause a significant environmental effect.

Further underscoring the Decision's cavalier approach to the general rule exemption, the Decision fails to enter the findings of fact and conclusions of law required by Section 1705 with

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[35] 14 Cal. Code Regs., §§ 15020, 15025(a)(1), 15061.

[36] Decision, pp. 24-25.

[37] 14 Cal. Code Regs., § 15061(b)(3) (emphasis added).

[38] *Davidon,* 54 Cal.App.4th, at 117 ("the agency's exemption determination must be supported by evidence in the record demonstrating that the agency considered possible environmental impacts in reaching its decision"); *See* Pub. Res. Code § 21060.5 (CEQA defines "environment" to include aesthetics and historical resources).

respect to these significant determinations.[39] As the Supreme Court has stated in overturning a prior decision of the Commission:

> [S]uch findings afford a rational basis for judicial review and assist the reviewing court to ascertain the principles relied upon by the commission and to determine whether it acted arbitrarily, as well as assist parties to know why the case was lost and to prepare for rehearing or review, assist others planning activities involving similar questions, and serve to help the commission avoid careless or arbitrary action.[40]

Application of the general rule exemption is not proper "if legitimate, reasonable questions can be raised about whether the project might have a significant impact."[41] Such reasonable questions clearly exist here, particularly for activities B (service drops "of unlimited length"), G (above-ground vaults etc.), I ("minor facilities" such as DAS systems), J ("minor" above-ground facilities up to 2400 cubic feet in volume in disturbed rights-of-ways), K (trenching of "approximately" 150 feet and 1,000 feet of new aerial facilities), and L (construction activities authorized in a CPCN decision).[42] For each of these categories, the Commission cannot properly find that such projects could never have a significant effect on any CEQA-protected resources, such as historical, cultural, scenic, or biological resources.

For example, antennas, vaults and other above-ground facilities could, in sufficient numbers or in a particular setting, degrade the character of adjacent historic buildings, obstruct scenic vistas, or undermine the character of a residential neighborhood (consider the aesthetic impact of 2400 cubic foot – e.g., 13 feet high by 13 feet wide and deep – vaults, on numerous street corners). Similarly,

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[39] Section 1705 provides in relevant part: "[T]he decision shall contain, separately stated, findings of fact and conclusions of law by the commission on all issues material to the order or decision."

[40] *Greyhound Lines, Inc. v. Pub. Util. Comm'n* (1967) 65 Cal.2d 811, 813 (citations omitted); *see also California Manufacturers Assoc. v. Pub. Util. Comm'n* (1979) 24 Cal. 3d 251, 258-260.

[41] *Cal. Farm Bureau Fed. v. Cal. Wildlife Conserv. Bd.* (2006) 143 Cal.App.4th 173, 194. Local Governments recognize that, for activity A (reselling of local or interexchange service), little analysis of potential environmental effects would be necessary because resale would not have any physical effects on the environment. However, all of the other activities would have physical environmental effects and it is incumbent on the Commission to explain how it arrived at the conclusion that such environmental effects could *never* be significant.

[42] Local Governments pointed out many of these potential significant impacts in their comments on the PD at pages 4-6.

even limited trenching, depending on the location (such as in a riparian or archeologically sensitive area) could affect animal habitats or cultural resources.

The vague and broad wording of many of the activities only serves to highlight their inappropriateness for a general rule exception. Words such as "minor" (used to describe activities I and J) and "minimal" (activity K) are subjective terms. A telephone corporation allowed to self-certify the applicability of a particular exemption might have a different idea from the Commission of what constitutes a minor or minimal project. Likewise, activities F and G are limited to projects that are "necessary for any authorized activity"; the concept of necessity is similarly subjective. Activity B would allow service drops of "unlimited length" and activity G would allow above-ground vaults without any size limitation. Depending on the site, the length or size of such facilities could have a significant adverse effect on scenic views or local land use policies, and local compliance with the American with Disabilities Act. Such subjective or expansive terms fail to set the clear limits on a project that are necessary to ensure that it could never have a significant environmental effect.

Local Governments have a particular concern with the vague wording of activity L. The point of this item may be that, when the Commission has already reviewed a particular project as it affects a particular location, it need not review the exact same project again. If so, this is a self-evident point that does not need to be in a list of exempted activities. However, the vague wording could be interpreted to mean that a general construction program authorized in a CPCN (*e.g.*, Carrier X intends to construct facilities in various unspecified locations in the State) obviates the need for CEQA review of a specific project in a particular location. This would be yet another improper use of the general rule exemption. A general CEQA analysis for purposes of granting a broad CPCN cannot be the basis for a conclusion that any construction project at any location in the state could never have a significant environmental effect.

The Decision does not cure the PD's failure to justify the list of exempted activities even though, in comments on the PD, Local Governments showed that, for many of the listed exemptions, there are situations in which the activities could indeed have a significant environmental effect.[43] The

[43] Local Governments' Comments on the PD, pp. 4-6.

Decision's apparent response to this showing is to "clarify" that, if any exceptions under CEQA Guidelines Section 15300.2 apply to any listed exempt activity, then it is the responsibility of the telephone corporation to file an application for full CEQA review.[44] This statement only serves to underscore the Commission's legal error. To conclude that the general rule exemption applies, the Commission must demonstrate with support in the record that, in all instances and locations, the activity would have no significant environmental effect. The Commission's recognition that it is possible that there could be specific situations in which an activity could have a significant environmental effect, by definition, shows that the general rule exemption is inapplicable.[45]

VII. A STATEWIDE GENERAL RULE EXEMPTION FOR DISTRIBUTED ANTENNA SYSTEM FACILITIES CANNOT BE JUSTIFIED

The general rule exemption in Rule III.I for DAS facilities warrants particular comment. Although the Decision speculates, without any supporting evidence, that Local Governments are unfamiliar with this "new technology,"[46] in fact, local governments in California have been reviewing and granting permits for DAS projects for many years. Local Governments view DAS facilities as a welcome alternative to traditional wireless facilities, because DAS facilities are often smaller and less visually obtrusive.[47]

However, this fact does not mean that DAS facilities could never have a significant environmental effect, which is the showing the Commission must make in order to justify a statewide general rule exemption. DAS facilities, which include antennas and associated electronic equipment, can have a significant visual impact, particularly when they are installed on utility poles with electric facilities. Under GO 95, DAS antennas on such utility poles must be mounted on crossbeams that

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[44] Decision, p. 35.

[45] Moreover, as noted in the previous section, the statement impermissibly delegates a determination a public agency must make to the telephone corporations.

[46] Decision, p. 35.

[47] Even so, it is not always the case that DAS facilities have less visual impact than traditional wireless facilities. DAS facilities are usually located in the public rights-of-way, whereas traditional wireless facilities are often located outside of the public rights-of-way, sometimes on tall stand-alone towers and sometimes on relatively short masts located on building tops. They can also be affixed to the side of a building, and painted to match the color of the building. Depending on the location, a well-designed traditional wireless installation could be less visually obtrusive than DAS facilities located on utility poles along a street.

extend two feet from the center of the pole (if there are not put at the top of the pole), which significantly increases the visibility of the antennas and creates more opportunity for interference with views and scenic vistas.[48] Also, DAS facilities in close proximity to an historic structure can degrade its appearance or historic character and, in sufficient numbers, can degrade the character of an historic district, potentially creating a significant environmental impact. For these reasons, a blanket general rule exemption for DAS facilities violates CEQA.

Even the Decision implicitly recognizes that not all DAS projects qualify for a general rule exemption. The Decision states that "*most* construction for DAS projects properly falls in the enumerated list in Section III."[49] However, for a statewide general rule exemption "most" is not good enough. The Commission must find that DAS projects would *never* cause a significant environmental effect.

Indeed, when the Commission has previously reviewed DAS facilities proposed by a single telephone corporation it has correctly stopped short of finding a general rule exemption is warranted.[50] Instead, the Commission correctly concluded that the DAS projects would "in almost all circumstances" "be highly likely" to qualify for a CEQA exemption.[51] The Decision's failure to explain the Commission's departure from its previous finding is arbitrary and capricious[52] and therefore an abuse of discretion under Section 1757.1(a)(1).

The Decision professes to address the concerns of Local Governments regarding DAS projects by requiring DAS carriers to provide notice to local agencies before beginning construction.[53] This requirement neither addresses Local Government concerns nor mitigates any of the Decision's many legal errors.

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[48] Commission GO 95, § 94.4(E).

[49] Decision, p. 35 (emphasis added).

[50] See *Application of NewPath Networks, LLC (U-6928-C) for a Modification to its Certificate of Public Convenience and Necessity in Order to Provide Competitive Local Exchange, Access and Non-Dominant Interexchange Service,* D.06-04-030, 2006 Cal. PUC LEXIS 118 (April 13, 2006).

[51] *Id.* at p.*8.

[52] See *Motor Vehicles Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co* (1983) 463 U.S. 29, 41-42; see also *FCC v. Fox* (2009) 129 S. Ct. 1800, 1810; and *Henning v. Industrial Welfare Comm'n* (1988) 46 Cal.3d 1262, 1270.

[53] Decision, p. 35.

By virtue of the Section III.I exemption and the supposed invalidation of local discretionary permits, the Decision purports to: (1) allow any DAS project to be constructed anywhere in the state without CEQA review; and (2) prevent local governments from carrying out their responsibility to conduct a CEQA review when DAS projects require a discretionary local permit. It also requires local governments to somehow turn discretionary permits into ministerial permits. Notice to local agencies is nothing more than window-dressing that fails to cure the real problems with the Decision.

VIII. THE DECISION'S STATEMENT THAT THE COMMISSION IS BEST SUITED TO EVALUATE INHERENTLY LOCAL ENVIRONMENTAL IMPACTS IS: (1) NOT SUPPORTED BY THE RECORD; AND (2) ARBITRARILY CONFLICTS WITH THE ESTABLISHED COMMISSION AND LEGISLATIVE POLICY OF DEFERENCE TO LOCAL GOVERNMENTS

The Decision asserts that the Commission is "best suited . . . to evaluate the physical change in the environment caused by telephone corporations' construction projects." (P. 30.) This statement is directly at odds with the record in this case and the Commission's previous conclusions on this issue. Yet, the Decision makes no effort to explain its departure from established Commission policy.

While the Commission has expertise with respect to telecommunications policy and technology, this expertise does not make the Commission the entity that is "best suited" to make the inherently local determination of the impact that particular facilities in a particular location would have on the environment. Such a determination is best made by the public agency with the most knowledge of the local environment that may be affected by a telecommunications construction project. Pertinent to CEQA, the local environment includes scenic, historical, cultural, and biological resources, such as urban and rural parklands, wetlands, protected habitats, historic buildings and districts, and scenic vistas.[54] In almost all situations, a local government and its constituents will have a deeper and more detailed knowledge of these local resources than the Commission.[55]

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[54] Appendix G to the CEQA Guidelines, an Environmental Checklist Form for Public Agencies, provides a list of the types of environmental impacts with which CEQA is concerned. In Section X of the Appendix G checklist, one of the questions asks the public agency to consider whether the project would conflict with "any applicable land use plan, policy, or regulation of an agency with jurisdiction over the project." Local governments should be presumed to have a better knowledge of their land use regulations than the Commission.

[55] Moreover, the CEQA Guidelines provide that a lead agency for CEQA purposes will "normally be the agency with general governmental powers, *such as a city or county*, rather than an agency with a ... limited purpose[.]" 14 Cal. Code Regs. § 15051(b)(1) (emphasis added).

The Decision's statement on page 30 also directly conflicts with GO 159-A, which the Commission has not overruled (nor should it). In GO 159-A, the Commission has found with respect to one increasingly prevalent type of telecommunications project, the construction of wireless facilities, that the impacts of such facilities are "highly localized."[56] GO 159-A accordingly adopts a policy of "deference to local government."[57] Explaining this policy, GO 159-A states that "local citizens and local government are often in a better position than the Commission to measure local impact and identify alternative sites."[58] For this reason, GO 159-A expressly defers to local governments to, among other things, act as the lead agency for purposes of CEQA and satisfy noticing requirements under CEQA.

GO 159-A is right and the Decision is wrong. Local governments are indeed better situated than the Commission to identify, evaluate and measure local impacts. The Decision's failure to explain or justify the reversal of position on this issue is arbitrary and capricious[59] and an abuse of discretion under Section 1757.1(a)(1).[60]

IX. THE NOTICE TO PROCEED PROCESS ALLOWS CEQA FORUM-SHOPPING IN VIOLATION OF CEQA

Section IV.B of GO 170 allows carriers to seek a Notice to Proceed ("NTP"), *i.e.*, a finding from the Commission staff that a particular project is exempt from CEQA review. However, Section IV.B does not tether its process to any discretionary determination by the Commission.[61] Instead, Section IV.B appears to invite carriers to seek an NTP for any project that they think is entitled to an exemption, even if the Commission has no responsibility for approving the project.

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[56] GO 159-A, § II.

[57] *Id.*, § II.B.

[58] *Id.*

[59] See *Motor Vehicles Mfrs. Ass'n*, 463 U.S. at 41-42; see also *FCC v. Fox,* 129 S. Ct. at 1810; and *Henning,* 46 Cal.3d at 1270.

[60] In light of the Commission's previous finding that local governments are better able to assess local environmental impacts, the Decision is also not supported by any credible findings and therefore invalid under Section 1757.1(a)(4).

[61] As noted above, CEQA review is only required when a public agency is required to make a discretionary decision with respect to a project. Pub.Res.Code, § 21080(a).

Consequently, Section IV.B would allow carriers to forum shop, a problem that could arise frequently under GO 170. A common example would be a carrier that has obtained general authority to construct facilities in California pursuant to its CPCN and wishes to construct a particular project in a specific geographic area that was not reviewed as part of the CPCN application. Under current Commission rules, the carrier would not be required to obtain any further Commission approval in order to build the facilities. However, in many cases, the local government will still need to approve the project (or some aspect of it), thereby triggering local CEQA review.[62] Proposed GO 170 would appear to allow the carrier to choose whether to seek a CEQA exemption from the Commission or to obtain CEQA review from the local government.

CEQA's lead agency rules,[63] however, do not allow project proponents to forum shop for the lead agency, as the League of California Cities and other local governments explained in detail in their September 7, 2007 comments in this docket.[64] To prevent such forum shopping, the GO should clearly identify the discretionary decisions of the Commission for which a carrier is entitled to use the NTP process.

[62] For purposes of this section of the application for rehearing, Local Governments assume that the Decision's attempt to block discretionary local permits is held to be invalid.

[63] CEQA Guidelines, 14 Cal. Code Regs., § 15051

[64] Local Governments' September 7, 2007 Comments, pp. 7-9.

X. CONCLUSION

For the reasons set forth above, the Commission should annul the Decision, as required by Section 1757.1(a). GO 170 violates the legal requirements of the United States and California Constitutions, the Public Utilities Code, and CEQA in numerous and fundamental ways and cannot be salvaged.

Dated: January 24, 2011

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CERTIFICATE OF SERVICE

I, **PAULA FERNANDEZ,** declare that:

I am employed in the City and County of San Francisco, State of California. I am over the age of eighteen years and not a party to the within action. My business address is City Attorney's Office, City Hall, Room 234, 1 Dr. Carlton B. Goodlett Place, San Francisco, CA 94102; telephone (415) 554-4623.

On January 24, 2011, I served: **Application of the League of California Cities, the California State Association of Counties, and SCAN NATOA, Inc. for Rehearing of Decision 10-12-056.**

by electronic mail on the attached Service List, Proceeding No. R06-10-006.

The following addressee(s) without an email address were served:

☒ **BY UNITED STATES MAIL**: Following ordinary business practices, I sealed true and correct copies of the above documents in addressed envelope(s) and placed them at my workplace for collection and mailing with the United States Postal Service. I am readily familiar with the practices of the San Francisco City Attorney's Office for collecting and processing mail. In the ordinary course of business, the sealed envelope(s) that I placed for collection would be deposited, postage prepaid, with the United States Postal Service that same day.

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I declare under penalty of perjury pursuant to the laws of the State of California that the foregoing is true and correct.

Executed January 24, 2011, at San Francisco, California.

/S/
PAULA FERNANDEZ