June 5, 2012

The Honorable Ed Reyes
Chair, Planning and Land Use Management Committee
200 North Sprint Street, Room 400
Los Angeles, CA 90815

Re: Regulation and Placement of Cell Towers and Related Equipment
Council File No. 09-2645

Dear Chairman Reyes:

On behalf of the California Wireless Association, I wanted to bring to your attention several developments in the federal and state regulatory environment regarding wireless infrastructure that have occurred since the City Attorney drafted the Report to the City Council on June 7, 2011. I suspect that these developments may be relevant to your consideration of possible modifications to the City of Los Angeles' ordinances that relate to such infrastructure..

As the City Attorney indicated in footnote 4 of his Report, the California Public Utilities Commission ("CPUC") did issue a new General Order 170 that related to telecommunications infrastructure, especially in the public rights of way. As he also noted, there were requests filed that the decision adopting that general order be reconsidered. On December 15, 2011, the CPUC issued Decision 11-12-054 which contained an order granting rehearing of Decision 10-12-056, the CPUC decision adopting General Order 170. (A copy of Decision 11-12-054 is attached.) The CPUC is thus in the process of revising General Order 170. However, you may wish to be aware that CPUC concluded, in granting the rehearing:

> [I]t is well-established that we have the authority to preempt local agencies when acting within the scope of our jurisdiction. This issue does not need to be considered further during this proceeding. We acknowledge, however, that our decision to preempt the local jurisdictions broadly would benefit from greater explanation than we provided.

Given that a major focus of the General Order relates to regulation of telecommunications facilities in the public rights of way, CalWA suggests that action by the City at this juncture is premature.

In addition to this change at the state level, on February 22, 2012, President Obama signed into law the Middle Class Tax Relief and Job Creation Act of 2012. One of the measures included in the Act was the creation of a nationwide interoperable broadband network for first responders. In addition to authorizing the FCC to allocate necessary spectrum for this new interoperable network, the act also contained provisions designed to establish voluntary incentive auctions of wireless spectrum, which are

expected to raise $15 billion over the next eleven years. Seven billion dollars of the auction proceeds have been allocated for public safety broadband network build out.

In order to insure maximum return from the auction, Section 6409 of the Act includes provisions designed to create incentives for the use of collocation opportunities in lieu of the construction of new sites. Thus the Act provides that state and local governments must approve an eligible facilities request for the modification of an existing wireless tower or base station that does not substantially change the physical dimensions of such tower or base station. A copy of this section is attached.

Section 6409 applies to "eligible facilities requests" for modification of existing wireless towers and base stations. The Act defines "eligible facilities request" as any request for modification of an existing wireless tower or base station that involves:

- Collocation of new transmission equipment;
- Removal of transmission equipment; or
- Replacement of transmission equipment.

The Federal Communications Commission ("FCC") has defined "collocation" as "the mounting or installation of an antenna on an existing tower, building or structure for the purpose of transmitting and/or receiving radio frequency signals for communications purposes."[1]

The FCC has also defined a "substantial change" as:

- The mounting of a proposed antenna on the tower that would increase the existing height of the tower by more than 10%, or by the height of one additional antenna array with separation from the nearest existing antenna not to exceed twenty feet, whichever is greater, except that the mounting of the proposed antenna may exceed the size limits set forth in this paragraph if necessary to avoid interference with existing antennas; or
- The mounting of a proposed antenna that would involve adding an appurtenance to the body of the tower that would protrude from the edge of the tower more than twenty feet, or more than the width of the tower structure at the level of the appurtenance, whichever is greater, except that the mounting of the proposed antenna may exceed the size limits set forth in this paragraph if necessary to shelter the antenna from inclement weather or to connect the antenna to the tower via cable.[2]

The FCC has defined a "tower" as "any structure built for the sole or primary purpose of supporting FCC-licensed antennas and their associated facilities.[3] Federal regulations define a "base station" as "[a] station at a specified site authorized to communicate with mobile stations;" or "A land

---

[1] Nationwide Programmatic Agreement for the Collocation of Wireless Antennas (2001), available at 47 C.F.R. Part I, Appendix B ("Collocation Agreement"). *See also Petition for Declaratory Ruling To Clarify Provisions of Section 332(C)(7)(B) To Ensure Timely Siting Review and To Preempt Under Section 253 State and Local Ordinances That Classify All Wireless Siting Proposals as Requiring a Variance,* Declaratory Ruling, 24 FCC Rcd 13994, 14021 1171 (2009) *("Shot Clock Ruling"), recon. denied,* 25 FCC Rcd 11157 (2010), *aff'd, City of Arlington, Tex., et al. v. FCC*, 2012 U.S. App. LEXIS 1252 (5th Cir. 2012).

[2] Collocation Agreement.

[3] *Id.*

station in the land mobile service."[4] The FCC's regulations also indicate that the term "base station" is synonymous with a "cell site."[5]

Also, since the City Attorney's Report, the Fifth Circuit Court of Appeals has upheld the Shot Clock Ruling against a challenge brought by the City of Arlington, Texas and other municipal parties. Thus, under the Shot Clock Ruling, state and local governments have 90 days to act on an application to collocate wireless facilities on existing structures. The City may want to insure that whatever procedures it ultimately adopts do not create a level of complexity that would prevent its compliance with the Shot Clock Ruling.

Thank you for taking the time to review our comments and consider our request to delay action on an amendment to the Above Ground Facilities Ordinance pending the CPUC ruling on GO170.

Regards,

California Wireless Association

By:

Julian K. Quattlebaum, III
Chairman, Regulatory Committee

Enclosures
Cc: Honorable Jose Huizar
Honorable Mitchell Englander
Sharon Gin

[4] *See, e.g.,* 47 C.F.R. §§24.5, 90.7.
[5] *See* 47 C.F.R. §90.674(a).

L/jmc

Date of Issuance
December 19, 2011

Decision 11-12-054 December 15, 2011

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 October 5, 2006)

ORDER GRANTING REHEARING OF DECISION 10-12-056

On January 24, 2011, the League of California Cities, the California State Association of Counties and SCAN NATOA, Inc. ("Cities"), and AT&T California, Frontier, SureWest, and small local exchange carriers (collectively, "Joint Carriers") filed applications for rehearing of Decision (D.)10-12-056 ("Decision"). In the Decision, we adopted General Order ("GO") 170, which sets forth procedures for Commission review of certain telecommunications construction projects. As the Decision describes GO 170, it "implements the Commission's responsibilities pursuant to the California Environmental Quality Act (CEQA) to review possible environmental impacts of [telecommunications] construction projects…." (Decision, at p. 1.) On May 26, 2011, we stayed the Decision and the GO pending resolution of the applications for rehearing.

We have carefully considered the arguments in the applications for rehearing, and are of the opinion that rehearing of the Decision is warranted. Accordingly, in today's order, we grant rehearing of D.10-12-056 and vacate GO 170.

I. DISCUSSION

In their application for rehearing, the Cities include the following arguments: (1) the Decision's attempt to negate local government's discretionary permits violates the California Constitution; (2) the Commission has violated due process because

it did not give parties an opportunity to be heard before preempting local governments; (3) the Decision fails to identify the discretionary actions the Commission is required to take that trigger the application of CEQA; (4) GO 170 unlawfully delegates to telephone corporations the determination of whether a project is exempted from CEQA review; (5) section III of GO 170 violates CEQA by exempting several types of projects that could have significant environmental effects; (6) a statewide general rule exemption for distributed antenna system facilities cannot be justified; (7) the statement that the Commission is best suited to evaluate inherently local environmental impacts is not supported by the record, and conflicts with the established Commission and Legislative policy of deference to local governments; and (8) the Notice to Proceed ("NTP") process allows CEQA forum-shopping in violation of CEQA.

Joint Carriers assert: (1) the Commission unlawfully asserted CEQA review authority where it has no approval authority; and (2) the adoption of GO 170 was based on an erroneous assumption that the GO meets the stated goals for the proceeding, and therefore, the Commission acted arbitrarily and capriciously.

Verizon California, Inc., tw telecom of California lp, and a group of Competitive Local Carriers ("CLECs")[1] filed responses to the applications for rehearing.

A. Grounds for Rehearing

We find that both the Cities and the Joint Carriers present meritorious arguments concerning legal deficiencies in the structure of the GO. In particular, the Decision and GO err in failing to provide a uniform discretionary approval mechanism that would trigger the application of CEQA. In addition, the Decision and GO are inconsistent about the status and application of the exemption process. Moreover, we acknowledge that the Decision failed to support and explain our use of the specific exemptions adequately. Because we find that these arguments present sufficient grounds

[1] NextG Networks of California, Inc., NewPath Networks LLC, Sunesys LLC, ExteNet Systems LLC, Southern California Edison dba Edison Carrier Solutions and AboveNet Communications, Inc.

for us to vacate the Decision and GO, it is not necessary for us to discuss all of the contentions presented in the applications for rehearing. Many of the other arguments are now moot.

1. Discretionary Approval Process

The Joint Carriers argue that the foundation of GO 170 is in error because the Commission has no discretionary approval authority for the majority of telecommunications carriers. Accordingly, they assert that the Commission can not assert CEQA authority because, "the Commission can only exercise CEQA authority over telecommunications projects for which a Commission approval is necessary." (Joint Carriers App. Rehg., at p. 6.) The Cities also assert that GO 170 fails to identify the discretionary action that triggers the application of CEQA. Although Joint Carriers are mistaken concerning the scope of the Commission's authority, both Joint Carriers and the Cities identify a fundamental flaw in GO 170 -- the absence of any type of discretionary approval for many of the carriers subject to the GO.

As the Cities correctly note, CEQA only applies to "discretionary projects proposed to be carried out or approved by public agencies…." (Pub. Resources Code, § 21080 (a).) Because the telecommunications facilities at issue are carried out by private companies, construction of these facilities would only be a CEQA project, triggering the CEQA review requirements for the Commission, if the construction "requires the exercise of judgment or deliberation when the public agency or body decides to approve or disapprove a particular activity…." (Cal. Code Regs., tit. 14 ("CEQA Guidelines"), § 15357.) The CEQA review requirements do not apply where the agency is not making any discretionary decision concerning the proposal, including cases where an agency is only making ministerial decisions. "[A]n agency has no duty of compliance with CEQA unless its actions will constitute (1) 'approval' (2) of a 'project.'" (*Concerned McCloud Citizens v. McCloud Comm. Services Dist.* (2007) 147 Cal.App.4th 181, 191.)

As GO 170 is currently structured, there is no discretionary approval specified for many of the carriers who would be subject to the GO. Depending on the

nature of the project, GO 170 specifies four levels of review, with many projects being exempted from environmental review. However, even for projects which do not fit into any exemptions, and are therefore subject to full environmental review as provided in GO 170 sections II.D. and V.A., there is no specified discretionary approval that is required. All that is specified in section V. is that if the proposed construction does not fit into the exemptions in the GO, the carrier "must file an application and Proponent's Environmental Assessment…." (GO 170, § V.) However, the GO does not specify any discretionary permit or approval that is required beyond requiring an environmental review.

Because no other approval process is specified, the assumption would be that, subsequent to the environmental review, the carrier would be subject to whatever type of construction approval is required under the provisions of that carrier's CPCN. For some carriers, this is a requirement to modify their CPCNs or obtain a NTP. But as Joint Carriers note, for many carriers, including all of the ILECs and many of the earlier competitive entrants, there is no requirement to obtain any approval prior to constructing. Thus, in many cases there would be an environmental review that would not inform any subsequent approval process.

The CLECs argue that we have broad authority, and we agree. There is nothing illegal about the Commission requiring an environmental review for Joint Carriers or other utilities, even without any subsequent discretionary decision. However, this review cannot be considered a CEQA review, or in furtherance of our CEQA compliance, because CEQA is only applicable where an agency makes a related discretionary decision. Moreover, to the extent the GO sets out to level the playing field, it does not fully accomplish that goal. Different carriers would still be subject to differing approval processes. Therefore, if the GO retains the same structure, we would need to devise a uniform discretionary approval requirement that would be required after environmental review. We find that without such a uniform requirement, our efforts to further CEQA compliance and remove competitive obstacles have been unsuccessful.

Accordingly, Joint Carriers are also correct that Conclusion of Law 1 is in error. That conclusion reads:

> This Commission must review construction projects by telephone corporations as defined in … section 234[2]… for compliance with CEQA.

As discussed, the Commission is not in fact required to review these projects, unless the Commission has some permitting or approval requirement that applies. For many projects, there is no such requirement.

2. GO 170 Exemption Process

The Cities also challenge the exemption process in the GO which uses different categories of exemptions to determine whether a proposed project must undergo a CEQA environmental review. According to the Cities, the exemption process violates CEQA by: (1) delegating the determination of whether a project is exempt from CEQA review to the telephone corporations; and (2) exempting several types of projects that could have significant environmental impacts. The Cities' arguments, while not entirely correct, identify deficiencies in the GO 170 exemption process.

In the adopted GO 170, there are three levels of exemptions. The first level is for categories of projects that "do not result in any physical change to the environment," (Decision, at p. 24), and therefore "do not rise to the level of project pursuant to CEQA." (GO 170, § III.) If a carrier determines that project is exempt pursuant to section III., the carrier can proceed to construct the project without providing notice to anyone, or receiving input from the Commission.[3]

Other activities do not fit within the section III exemptions, but fit within one of the six specified "CEQA Exemptions" (activities that the CEQA Guidelines suggest should be exempt from CEQA review). (GO 170, § IV.A.) Carriers may also

[2] Unless otherwise stated, all section references are to the Public Utilities Code.

[3] The only exception to this is that carriers must provide notice of Distributed Antenna System ("DAS") projects to local jurisdictions. (GO 170, § III.)

proceed with construction of these activities without further review, but are obligated to keep records of these projects. (*Ibid.*) For projects which do not fit within these six categories in section IV.A., but are otherwise "exempt from full CEQA review," the carriers need to file a Notice of Proposed Construction ("NPC") explaining the proposed exemption. Construction of those projects can only commence after staff issues a NTP. (GO 170, § IV.B.)

The Cities argue that the GO violates CEQA because the exemption processes outlined in sections III. and IV.A. allow the carriers "to make their own determinations whether a project qualifies" for an exemption. (Cities App. Rehg., at p. 10.) They assert that CEQA requires that lead agencies determine the applicability of CEQA exemptions (CEQA Guidelines, § 15061), and that agency may not delegate its CEQA responsibilities to private parties. (CEQA Guidelines, § 15020.)

As the CLECs correctly note in their response, the projects that are subject to the exemptions in question are not CEQA projects, because they are not subject to any discretionary approval requirement.[4] GO 170 contains an exemption process which, despite the fact that it refers to specific CEQA Guidelines, is entirely outside of, and separate from CEQA. As discussed, CEQA and all of its requirements, including exemptions, are only triggered where there is some discretionary approval requirement. For the projects that are exempt from GO 170 (as well as for some other projects, discussed above, that are not exempt from the GO) there is no approval requirement, and therefore there are no CEQA requirements. Thus, the Cities' reliance on CEQA authority concerning the application of the GO 170 exemptions is misplaced. The fact that CEQA requires a particular process and standard to determine its exemptions does not necessarily mean that those are the required processes for determining GO 170 exemptions.

[4] As stated earlier, for some carriers even the projects which do not fit within any exemptions are not technically CEQA projects. For all carriers and construction, however, projects that are exempted from GO 170 are not CEQA projects.

Despite the fact that the Cities' delegation challenge to the exemption process is not technically correct, it highlights problems with the GO 170 exemption process. We recognize that the Decision and GO 170 are not consistent or clear about whether the exempt projects are CEQA projects which are exempt from review, or simply projects exempt from GO 170 which are not subject to CEQA at all. Because the degree to which CEQA applies to any of the proposed telecommunications projects is fundamental to the Rulemaking and GO, we find the confusion and inconsistency on this point is grounds for rehearing.

The Cities also argue that there is no explanation supporting the choice of twelve exemptions in GO 170 section III., for which the GO states "it can be seen with certainty that these activities would not have a significant impact on the environment…." (GO 170, § III.) Claiming a violation of CEQA, the Cities specifically challenge a number of the exemptions on the grounds that there are possible environmental impacts. Also, the Cities more generally challenge the exemptions, alleging there are no findings supporting the Commission's conclusions that these types of activities will not have a significant impact.

Again, although CEQA does not technically apply to these exempted projects, we acknowledge that there is confusion in this regard. Moreover, we also agree that the chosen exemptions should be more fully explained and supported. We note that even the CLECs concede that the Commission "may… want to modify the Decision" to include more specific findings explaining why the exemptions are justified. (CLEC Response, at p. 28.) We find that rehearing is warranted because the exemptions are not sufficiently explained. In the event that the exemption structure for the GO is retained, additional findings and support will be necessary.

B. Arguments without Merit

Other arguments that warrant discussion include the Cities' argument that the Commission lacks authority to preempt local permitting authority, and the Joint Carriers' argument that the Commission lacks authority to impose permitting requirements on the ILECs. Even though we are granting rehearing of the Decision,

discussion of these points is appropriate, because they have been raised previously. Because neither argument is meritorious, there should be no further briefing or consideration of these issues in this proceeding.

1. Preemption Authority

According to the Cities, our decision to preempt local permitting authority is in error, because the Cities derive local land use police power from the California Constitution, and the Commission cannot divest the Cities of that authority. The Cities also argue that they were deprived of due process because the preemption of local permit authority is beyond what was contemplated in the Rulemaking and the scoping memos. Because the Decision and GO are being vacated today, the Cities' arguments are largely moot. However, the Cities' are incorrect about the scope of our preemption authority.

Contrary to the Cities' claims, the Commission is able to preempt local jurisdictions on telecommunication facilities siting. The long-established law concerning the Commission's preemption of local jurisdictions is straightforward. "'[I]n any conflict between action by a municipality and a lawful order of the commission, the latter prevails.' *Bay Cities Transit Co. v. Los Angeles*, 16 Cal.2d 772 [Citations]." (*Harbor Carriers Inc. v. City of Sausalito* (1975) 46 Cal.App.3d 773, 775.) Indeed, an unbroken string of court cases have recognized that the Commission has, "paramount jurisdiction in cases where it has exercised its authority, and its authority is pitted against local regulation on a matter of statewide concern." (*Orange County Air Pollution Control Dist. v. Public Util.Com.* (1971) 4 Cal.3d 945, 950 [noting exception to longstanding rule where local jurisdiction is acting pursuant to state authority]; see also *Los Angeles Ry. Corp. v. Los Angeles* (1940) 64 Cal.2d 779, 787 [railcar staffing]; *San Diego Gas & Electric Co. v. City of Carlsbad* (1998) 64 Cal.App.4th 785, 803 [sand dredging adjacent to power plant].)

Thus, as long as our order is within the scope of its authority, we are able to preempt local authority. There can be no question that the development and siting of telecommunication facilities is within our jurisdiction. The Commission has authority over telephone corporations (§ 234), and to further the development of

telecommunications services. (See § 767.7 (a).) Moreover, we are specifically empowered to review and approve public utility construction projects. (See §§ 762, 1001.)

The Cities argue that the California Constitution, article XI, section 7 and Public Utilities Code section 2902 grant local jurisdiction authority over the location of communications facilities that the Commission cannot preempt. These arguments are mistaken. Although the Cities have some authority over land use and location of facilities, the Commission's authority is paramount to that of the Cities.

California Constitution, Article XI, section 7 reads, "A county or city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations ***not in conflict with general laws***." (Emphasis added.) As illustrated in the cases discussed previously, "If otherwise valid local regulation conflicts with state law it is preempted by such law and is void." (*Sherwin-Williams Co. v. City of Los Angeles* (1993) 4 Cal.4th 893, 897.)

Similarly, section 2902 does not prevent the Commission from preempting local jurisdictions. That section reads:

> This chapter shall not be construed to authorize any municipal corporation to surrender to the commission its 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 of the poles, wires, mains, or conduits of any public utility, on, under, or above any public streets….

(§ 2902.) This section has never been found to prevent the Commission from preempting local regulations. In fact, section 2902, is contained in a chapter that concerns municipal surrender of public utility regulation, not relevant here. That provision "does not confer any powers upon a municipal corporation but merely states that certain existing municipal powers are retained by the municipality." (*Southern California Gas Co. v. City of Vernon*, (1995) 41 Cal.App.4th 215, 217.) As discussed, these powers can still be preempted if in conflict with general laws.

The Cities cite authority to the effect that local jurisdictions can have concurrent authority over some utility matters. (E.g. *Vila v. Tahoe Southside Water Utility* (1965) 233 Cal.App.2d 469, 477.) However, even where there is concurrent authority, our authority is still paramount, and we are able to preempt local concurrent authority.

Next, the Cities assert that CEQA "does not authorize a CEQA lead agency to limit local police power." (Cities App. Rehg., at p. 7.) This argument is misplaced because we did not rely on any CEQA authority to preempt local jurisdictions. Rather, our plenary authority over utilities allows us to preempt local jurisdictions, as discussed.

Therefore, it is well-established that we have the authority to preempt local agencies when acting within the scope of our jurisdiction. This issue does not need to be considered further during this proceeding. We acknowledge, however, that our decision to preempt the local jurisdictions broadly would benefit from greater explanation than we provided. Thus, although the policy reasons leading us to preempt local discretionary review of telecommunications may be reconsidered, the legal bases for our ability to do so will not.

2. Public Utilities Code Section 7901

Joint Carriers allege that we do not have the authority to require many telecommunications' carriers to be subject to a Commission review process prior to constructing additional facilities. They argue that there are limitations on the Commission's approval authority because many carriers obtained their CPCNs prior to the enactment of CEQA, and section 7901 and its predecessor granted these carriers statewide franchises. (Joint Carriers App. Rehg., at p. 5.) We find that section 7901 does not prevent the Commission from imposing reasonable permitting requirements on telecommunications facility construction projects.

As Joint Carriers note, many carriers obtained operating authority prior to the enactment of CEQA, when environmental factors were not a primary concern. Although section 1001 requires utilities to obtain Commission approval in the form of a CPCN prior to constructing their initial facilities, most utility extensions are exempt from

the section 1001 requirements. Thus, many carriers have no requirement to obtain our approval prior to constructing new facilities. Telecommunications carriers in this position include the incumbent local exchange carriers ("ILECs"), as well as the earliest competitive entrants, who received batch environmental reviews and had no further restrictions placed on their CPCNs. This disparity, with more recent entrants having review requirements, while incumbents have none, is one of the motivations for the current Rulemaking.

Despite the fact that many telecommunications companies do not currently have review requirements for extensions of their facilities, the Commission clearly has the authority to impose such requirements. The Commission has plenary authority over public utilities. (See Cal.Const., art. XII.) In the exercise of its authority, the Legislature has provided that the Commission has broad power, "to do all things necessary and convenient…." (§ 701.) Moreover, the Legislature has specifically conferred on the Commission the authority to review and regulate utility equipment, practices, and facilities, including authority to promulgate rules and order changes to structures. (§§ 761, 762.) The Commission has frequently relied on its plenary authority to order utilities, in telecommunications as well as in other areas, to obtain Commission approval prior to constructing extensions that would otherwise not be reviewed. (See, e.g., GO 131-D.)

Joint Carriers assert that because they were granted statewide franchises without any limitations prior to the State's imposition of environmental or other restrictions, the Commission lacks authority to require them to obtain discretionary approval prior to constructing new facilities. They rely on section 7901 which provides:

> Telegraph or telephone corporations may construct lines of telegraph or telephone lines along and upon any public road or highway, along or across any of the waters or lands within this State, and may erect poles, posts, piers, or abutments for supporting the insulators, wires, and other necessary fixtures of their lines, *in such manner and at such points as not to incommode the public use of the road or highway or interrupt the navigation of the waters*.

(Emphasis added.) As Joint Carriers point out, the California Supreme Court has considered this franchise to be a vested property interest which cannot be abridged by the Legislature or state agencies. (*Los Angeles County v. Southern Cal. Tel. Co.* (1948) 32 Cal.2d 378, 385.)

Joint Carriers are correct that the section 7901 franchise authority places some limitation on our ability to prohibit telecommunications facility construction, but they overstate this limitation. Section 7901 authority has never been held to be absolute, and does not foreclose our regulation of proposed telecommunications facilities. In fact, the statute includes the limitation that the utilities may only construct, "…in such manner and at such point as not to incommode the public use of the road or highway…." (§ 7901.) While we cannot impose any absolute ban on these telephone companies' construction of necessary facilities, we can make the determination of whether the fixture is "necessary" and how, when and where the utilities can construct. California courts have confirmed that these franchise rights are limited property rights to use streets to the extent necessary to furnish service, and that they are subject to relocation and restriction for government use of the streets. (*Pacific Tel. & Tel. Co. v. Redevelopment Agency of City of Redlands* (1977) 75 Cal.App.3d 957, 963.)

We concur with the Ninth Circuit's recent discussion of the limited nature of the section 7901 property right, in the context of Sprint's challenge to the City of Palos Verdes' assertion of jurisdiction to review its facilities.

> The City's consideration of aesthetics in denying Sprint's WCF [wireless telecommunications facilities] permit applications comports with PUC § 7901…. To "incommode" the public use is to "subject [it] to inconvenience or discomfort; to trouble, annoy, molest, embarrass, inconvenience" or "[t]o affect with inconvenience, to hinder, impede, obstruct (an action, etc.)" 7 Oxford English Dictionary 806 (2d ed. 1989); …. The experience of traveling along a picturesque street is different from the experience of traveling through the shadows of a WCF, and we see nothing exceptional in the City's determination that

> the former is less discomforting, less troubling, less annoying, and less distressing than the latter.

(*Sprint PCS Assets v. Palos Verdes Estates* (9th Cir. 2009) 583 F.3d 716, 723.) The same limitations to the carriers' section 7901 rights apply where the Commission is asserting review authority. For this reason, Joint Carriers' assertion that we lack authority to impose permitting requirements in order to review environmental impacts, is incorrect.

Joint Carriers also suggest that "a new permitting scheme" is beyond the scope of the Rulemaking. (Joint Carrier App. Rehg., at p. 8.) Joint Carriers base this assertion on their unjustifiably narrow reading of the April 18, 2008 Scoping Memo. Although the scoping memo does not use the words "new permitting scheme," it includes a number of topics which fairly encompass that possibility. These include whether the Commission's current review of telecommunications projects complies with CEQA and how that review can be improved; removing barriers to open and competitive markets; how the lead agency for telecommunications CEQA projects should be determined; and whether there are circumstances where the Commission should retain discretionary authority over telecommunications projects after a CPCN has been issued. (April 18, 2008 Scoping Memo, at pp. 15-16.) Joint Carriers' assertion that a possible new permitting scheme was not within the scope of these topics is not credible.

II. CONCLUSION

As we grant rehearing today, we recognize that our efforts to promulgate a rule to review telecommunication facilities have continued now for over a decade. We understand the frustration on the part of the CLECs, in particular, some of whom have been most disadvantaged by our current patchwork of review requirements. Although these circumstances are regrettable, they do not justify continuing with a general order that lacks a solid legal foundation. Accordingly, we will move forward with our efforts to promulgate a revised GO 170 expeditiously.

Therefore, **IT IS ORDERED** that:

1. The Cities' and the Joint Carriers' applications for rehearing of D.10-12-056 are granted.

2. General Order 170 is vacated.

3. An Assigned Commissioner or Administrative Law Judge Ruling will be issued detailing the next steps for the rehearing proceeding.

This order is effective today.

December 15, 2011, at San Francisco, California.

MICHAEL R. PEEVEY
President
TIMOTHY ALAN SIMON
MICHEL PETER FLORIO
CATHERINE J.K. SANDOVAL
MARK FERRON
Commissioners

SEC. 6409. WIRELESS FACILITIES DEPLOYMENT.

(a) Facility Modifications-

(1) IN GENERAL- Notwithstanding section 704 of the Telecommunications Act of 1996 (Public Law 104-104) or any other provision of law, a State or local government may not deny, and shall approve, any eligible facilities request for a modification of an existing wireless tower or base station that does not substantially change the physical dimensions of such tower or base station.

(2) ELIGIBLE FACILITIES REQUEST- For purposes of this subsection, the term `eligible facilities request' means any request for modification of an existing wireless tower or base station that involves--

(A) collocation of new transmission equipment;

(B) removal of transmission equipment; or

(C) replacement of transmission equipment.

(3) APPLICABILITY OF ENVIRONMENTAL LAWS- Nothing in paragraph (1) shall be construed to relieve the Commission from the requirements of the National Historic Preservation Act or the National Environmental Policy Act of 1969.

(b) Federal Easements and Rights-of-way-

(1) GRANT- If an executive agency, a State, a political subdivision or agency of a State, or a person, firm, or organization applies for the grant of an easement or right-of-way to, in, over, or on a building or other property owned by the Federal Government for the right to install, construct, and maintain wireless service antenna structures and equipment and backhaul transmission equipment, the executive agency having control of the building or other property may grant to the applicant, on behalf of the Federal Government, an easement or right-of-way to perform such installation, construction, and maintenance.

(2) APPLICATION- The Administrator of General Services shall develop a common form for applications for easements and rights-of-way under paragraph (1) for all executive agencies that shall be used by applicants with respect to the buildings or other property of each such agency.

(3) FEE-

(A) IN GENERAL- Notwithstanding any other provision of law, the Administrator of General Services shall establish a fee for the grant of an easement or right-of-way pursuant to paragraph (1) that is based on direct cost recovery.

(B) EXCEPTIONS- The Administrator of General Services may establish exceptions to the fee amount required under subparagraph (A)--

(i) in consideration of the public benefit provided by a grant of an easement or right-of-way; and

(ii) in the interest of expanding wireless and broadband coverage.

(4) USE OF FEES COLLECTED- Any fee amounts collected by an executive agency pursuant to paragraph (3) may be made available, as provided in appropriations Acts, to such agency to cover the costs of granting the easement or right-of-way.

(c) Master Contracts for Wireless Facility Sitings-

(1) IN GENERAL- Notwithstanding section 704 of the Telecommunications Act of 1996 or any other provision of law, and not later than 60 days after the date of the enactment of this Act, the Administrator of General Services shall--

(A) develop 1 or more master contracts that shall govern the placement of wireless service antenna structures on buildings and other property owned by the Federal Government; and

(B) in developing the master contract or contracts, standardize the treatment of the placement of wireless service antenna structures on building rooftops or facades, the placement of wireless service antenna equipment on rooftops or inside buildings, the technology used in connection with wireless service antenna structures or equipment placed on Federal buildings and other property, and any other key issues the Administrator of General Services considers appropriate.

(2) APPLICABILITY- The master contract or contracts developed by the Administrator of General Services under paragraph (1) shall apply to all publicly accessible buildings and other property owned by the Federal Government, unless the Administrator of General Services decides that issues with respect to the siting of a wireless service antenna structure on a specific building or other property warrant nonstandard treatment of such building or other property.

(3) APPLICATION- The Administrator of General Services shall develop a common form or set of forms for wireless service antenna structure siting applications under this subsection for all executive agencies that shall be used by applicants with respect to the buildings and other property of each such agency.

(d) Executive Agency Defined- In this section, the term `executive agency' has the meaning given such term in section 102 of title 40, United States Code.