Decision **DRAFT DECISION OF ALJ THOMAS** **(Mailed 4/15/2005)**

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application of WilTel Communications, LLC (U-6146-C) aka Williams Communications, LLC, a Delaware Limited Liability Company, to Amend its Certificate of Public Convenience and Necessity.	Application 04-05-017 (Filed May 3, 2004)

OPINION DENYING APPLICATION OF WILTEL COMMUNICATIONS LLC TO AMEND ITS CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY

A. Summary

This decision denies the application of WilTel Communications, LLC (WilTel) to amend its certificate of public convenience and necessity (CPCN). WilTel asks us to allow it to build out its fiber optic telecommunications facilities without analysis under the California Environmental Quality Act (CEQA) of the environmental impact of the new construction it proposes.

Such allowance would change our current practice with regard to CEQA applicable to interexchange (long distance) carriers (IECs) such as WilTel. WilTel explains, correctly, that we have stricter CEQA practices for IECs than for certain other telecommunications carriers. These differences flow from the type of operating authority the Commission grants to individual carriers. CEQA is only triggered when we are called upon to issue a "discretionary decision" that either grants new authority or modifies a carrier's existing authority. The circumstances that require such a decision vary for different types of carriers.

While we are sympathetic to WilTel's situation, we cannot make the change to our rules WilTel proposes without a rulemaking designed to establish procedures for an entire industry sector. Thus, we deny WilTel's application without prejudice, pending changed circumstances.

B. Background

The procedural history of this proceeding shows significant back-and-forth communication between WilTel and Commission staff in an attempt to conform this application to the currently existing Commission interpretations of its CEQA obligations.

WilTel first filed its application on May 3, 2004. On June 2, 2004, the assigned Administrative Law Judge (ALJ) asked WilTel to supplement its application with more detail about the location and type of construction WilTel planned. On July 9, 2004, WilTel filed the requested supplement. WilTel explained the delay in supplementation on the ground that it "ha[d] not be[en] able to obtain detailed information about its planned construction until only recently."[1] In the supplement, WilTel asked for blanket approval – without Commission CEQA review – of spurs directly or indirectly connecting WilTel's fiber optic network to new locations so long as 1) all construction is no more than five miles in length, 2) all construction is done inside existing rights of way, 3) WilTel notifies the Commission staff of each qualifying construction project

[1] *Supplement to Application of WilTel Communications, LLC to Amend its Certificate of Public Convenience and Necessity on an Interim Basis and Request for Expedited Ex Parte Relief*, filed July 9, 2004, at 2–3 (First Supplement).

prior to commencing construction, and 4) WilTel fully complies with any CEQA review required by local permitting agencies.[2]

On January 21, 2005, WilTel sent a letter to the Commission stating that,

> based on recent discussions with [Commission] staff, WilTel determined that it should file a Second Supplement to its Application to modify its request for relief. Specifically, WilTel will modify its request for relief to adopt programmatic mitigated negative declarations (PND) previously issued by the Commission.[3]

WilTel filed the Second Supplement to its application on January 27, 2005.[4] While it has since withdrawn the Second Supplement, in it WilTel proposed to enable the Commission to comply with CEQA by agreeing to conditions the Commission had imposed on other carriers in prior decisions. Thus, in the Second Supplement, WilTel proposes to adopt and comply with the Yipes Enterprise Services, Inc. (Yipes) and IP Networks, Inc. programmatic mitigated negative declarations (PND) already approved Decision (D.) 04-12-011 and D.03-01-069.

We described the PND approach in D.04-12-011, the Yipes decision:

> To adapt to this type of project, the Commission developed the last mile [mitigated negative declaration] MND as a process-oriented approach that sets performance standards for analyzing potential impacts, and identifying and implementing required mitigation measures within the geographic areas studied. . . .

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[2] *Id.* at 3.

[3] The January 21, 2005, letter appears as Appendix A to this decision.

[4] *Second Supplement to Application of WilTel Communications, LLC to Amend its Certificate of Public Convenience and Necessity on an Interim Basis and Request for Expedited Ex Parte Relief*, filed January 27, 2005 (Second Supplement).

> Because the specific locations within the geographic areas studied are not known, the last mile MND takes the conservative approach of presenting all possible impacts and required mitigation measures within those areas. This process provides CEQA compliance for the Commission and responsible agencies, but does not limit the authority of responsible agencies to issue permits and approvals for future project routes. When Applicant knows the precise location of the customers it will serve, it will submit a project description and construction work plan to the Commission, which must demonstrate that it was coordinated with all lead and responsible agencies, obtained all local permits, and complied with the local public notification process. The Commission will review the construction work plan, and if all requirement and performance criteria are met, it will issue a Notice to Proceed with Construction.[5]

However, on March 8, 2005, WilTel sent another letter to the ALJ withdrawing its Second Supplement and indicating that it wished the Commission to render a decision solely on WilTel's original application and the July 9, 2004 First Supplement.[6] We analyze the application on that basis below.

C. Discussion

WilTel has already built certain aspects of its fiber optic telecommunications network in California pursuant to various Commission decisions.[7] With this application, it seeks blanket authorization, without individualized Commission CEQA review, of

> spurs directly or indirectly connecting its backbone network to new locations so long as

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[5] D.04-12-011, *mimeo.*, at 3–4.

[6] The March 8, 2005, letter appears as Appendix B to this decision. We grant WilTel leave to withdraw the Second Supplement.

[7] *See* D.99-05-022, D.99-10-062, D.00-06-035, D.01-08-052 and D.03-03-029.

- All construction is no more than five miles in length;
- All construction is done inside existing rights of way;
- WilTel notifies the Commission staff of each qualifying construction project prior to commencing construction; and
- WilTel fully complies with any CEQA review required by local permitting agencies.

WilTel claims that we have authorized other carriers to construct new facilities within existing rights of way without a CPCN. It cites D.98-01-006 and D.00-06-018 as examples,[8] but examination of those cases reveals that they did not involve CEQA issues or Level 3, the carrier to which WilTel claims the cases pertain. We assume WilTel is referring to D.00-08-016. In that case, however, Level 3 sought additional authority to undertake specified network construction outside of the area that we had previously reviewed for environmental impact. Level 3 submitted a proponent's environmental assessment (PEA), and the Commission engaged an environmental consultant to evaluate the impact of the proposed fiber optic build-out.[9] We received and took into account comment from several agencies with jurisdiction over the state's natural resources. We prepared and adopted a Subsequent Mitigated Negative Declaration to require additional project-specific mitigation measures.

Here, in contrast, WilTel proposes that we approve unspecified construction on a state-wide basis in areas stretching as far as five miles from any given point. It has not submitted a PEA for the areas to be built on, specified

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[8] *Application of WilTel Communications, LLC to Amend its Certificate of Public Convenience and Necessity on An Interim Basis and Request for Expedited Ex Parte Relief,* filed May 3, 2004 (Application), at 3.

[9] *See* 2000 Cal. PUC LEXIS 594, at *8.

areas that may have been previously received environmental review, or asked that we study the potential environmental impact of the construction in the new areas.

We acknowledge WilTel's assertion that we have historically treated various types of telecommunications carriers differently in the level of CEQA analysis we apply to their construction activities. This difference is not a function of any conscious effort to apply different environmental review standards to different carriers. Instead, the difference flows from the fact that CEQA applies to "discretionary" agency decisions, such as approval of a utility application that has the potential to cause either a direct or reasonably foreseeable physical change in the environment. (CEQA Guidelines §§ 15268, 15369, 15378.) We only are presented with a "discretionary decision" – the type of decision to which CEQA applies – with regard to some carriers' applications. Where carriers need not request a discretionary decision, CEQA, by its terms, does not apply. Indeed, in opening the rulemaking WilTel cites, Rulemaking (R.) 00-02-003, we acknowledged this disparity:

> Recent improvements in our CEQA program may have inadvertently created inequities among carriers and highlight existing inequities. Although D.99-12-048 and D.99-12-050 require new CLECs to be subject to more stringent CEQA review, local exchange carriers with pre-existing authority have not been required to submit to that oversight. Incumbents, such as Pacific Bell, AT&T and cellular carriers need no CEQA review for new facilities construction because we currently have no "discretionary decision" (*see, e.g.* Public Resources Code Section 21080) that would trigger CEQA review. Disparate regulatory treatment of new and existing

> carriers raises issues regarding fairness and whether carriers have an equal opportunity to compete.[10]

WilTel correctly observes that we have not yet resolved the disparity we acknowledged in R.00-02-003. However, unless and until we do so, we cannot bend the rules arbitrarily to meet the needs of a single carrier. Much as we empathize with WilTel, we are unable to grant it the relief it seeks.

Nor is it appropriate to refrain from conducting CEQA analysis on the assumption that local agencies will perform the analysis. It is not at all clear that WilTel will be required to obtain a discretionary decision from any particular local entity to do the work it proposes, or that the local entity will perform environmental review. Even if local entity did perform CEQA review, we would still be required to review that environmental assessment as a Responsible Agency under CEQA prior to granting WilTel the authority it seeks here.

Finally, CEQA is state law and is binding on all California state agencies. (CEQA Guidelines Section 15000, Public Resources Code Section 21083.) Thus, absent a broader Commission proceeding that might lead to establishment of environmental compliance criteria that could be applied industrywide, we do not believe that we have authority to "waive" the requirement that we conduct CEQA review, as WilTel proposes.

Thus, we have no choice but to deny WilTel's application. We do so without prejudice to its right to reapply for approval to perform its proposed construction under changed circumstances.

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[10] 2000 Cal. PUC LEXIS 96, at *2-3.

C. Categorization and Need for Hearings

In Resolution ALJ 176-334 dated May 27, 2004, the Commission preliminarily categorized this application as ratesetting, and preliminarily determined that hearings were not necessary. No protests have been received. Given this status public hearing is not necessary and it is not necessary to alter the preliminary determinations made in Resolution ALJ 176-3134.

D. Comments on Draft Decision

The draft decision of the Administrative Law Judge in this matter was mailed to the parties in accordance with Pub. Util. Code § 311(g)(1) and Rule 77.7 of the Rules of Practice and Procedure. Comments were filed on _____, and reply comments were filed on _____.

E. Assignment of Proceeding

Michael R. Peevey is the Assigned Commissioner and Sarah R. Thomas is the assigned Administrative Law Judge in this proceeding.

Findings of Fact

1. WilTel seeks authorization to build portions of its fiber optic network in areas we have not studied for environmental impact.
2. No protests have been filed.
3. A hearing is not required.
4. The area for which WilTel seeks exemption from the requirement of CEQA review could extend as much as five miles from any given point.
5. We have to make a discretionary decision to allow WilTel to modify its CPCN.
6. We have not resolved the issues raised in R.00-02-003.

Conclusion of Law

We cannot make the change to our rules WilTel proposes without a rulemaking designed to establish procedures for an entire industry sector.

O R D E R

IT IS ORDERED that:

1. The Application of WilTel Communications, LLC to Amend its Certificate of Public Convenience and Necessity on An Interim Basis and Request for Expedited *Ex Parte* Relief, is denied, without prejudice to WilTel's right to reapply for approval to perform its proposed construction under changed circumstances.

2. This proceeding is closed.

This order is effective today.

Dated _____, at San Francisco, California.

APPENDIX A B For Thomas A0405017