IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT – DIVISION THREE

CITY OF HUNTINGTON BEACH,

Petitioner,

v.

THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA,

Respondent.

NEXTG NETWORKS OF CALIFORNIA, INC.

Real Party in Interest.

Case No. G044796
California Public Utilities Commission
Decisions: D.10-10-007, D.11-01-027

APPLICATION TO FILE [PROPOSED] BRIEF OF *AMICI CURIAE* LEAGUE OF CALIFORNIA CITIES AND CALIFORNIA STATE ASSOCIATION OF COUNTIES IN SUPPORT OF PETITIONER

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Application Of The League Of California Cities And California State Association Of Counties To File *Amici Curiae* Brief In Support of Petitioner

To the Honorable Presiding Justice of this Court:

The League of California Cities ("League") and the California State Association of Counties ("CSAC") request leave to file an *amici curiae* brief in this case in support of the position of Petitioner City of Huntington Beach.

Many, if not all, of the League's and CSAC's members have ordinances that require telecommunications and electrical facilities to be undergrounded within certain districts or throughout their jurisdictions. Undergrounding has been and currently is an established public policy for the California Public Utilities Commission ("CPUC") and local agencies. While the League and CSAC recognize that the CPUC possesses relatively broad powers with respect to public utilities, these powers must be properly exercised. Here, the CPUC preempted the City's undergrounding regulations without the benefit of a formal rulemaking procedure, the issuance or modification of a certificate of public convenience, or even the issuance of any permit recognized by the CPUC. Rather, it did so in an ad hoc manner through a simple California Environmental Quality Act ("CEQA") review. It is improper for the CPUC to preempt local ordinances in this manner and subjects all local undergrounding ordinances

to similar ad hoc preemption. As such, the issues presented in this case are of deep concern to many cities and counties.

The City's petition for writ of review should be granted. Even assuming that the CPUC may be permitted to preempt undergrounding and similar ordinances,[1] the CPUC must follow proper procedures if it decides to consider and act on this important matter of statewide concern. Here, the CPUC permitted the aboveground installation of facilities to proceed without following any lawful procedure for preempting or negating an important local ordinance. Specifically, it failed to consider this issue and act, if at all, to preempt the ordinance through a lawful and proper manner, such as the issuance of a certificate for public convenience and necessity, pursuant to a general order, or at the very least pursuant to a lawfully authorized CPUC permit. Instead, it impermissibly did so through CEQA review of the proposed project. This denied Huntington Beach and similarly situated cities and counties from participating in the proceeding and stating their views on this important public issue.

Counsel for the League and CSAC are familiar with the issues in this case and the scope of their presentation and believe further argument is

[1] The League and CSAC request permission to submit the attached *amicus brief* on the issue of whether or not the CPUC can preempt a local undergrounding ordinance through CEQA review. It takes no position on the balance of the issues in the case.

needed on the following point: the CPUC is not permitted to preempt a local ordinance through CEQA review.

Dated: January 15, 2013

BEST BEST & KRIEGER LLP

By: _____

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I. INTRODUCTION AND SUMMARY OF ARGUMENT

While the California Public Utilities Commission ("CPUC") has relatively broad powers to regulate public utilities, those powers are not limitless. The CPUC, like all public agencies, has substantive and procedural limitations on its powers. Here, the CPUC overstepped these powers when it preempted the City of Huntington Beach's ("City") local undergrounding ordinance in the course of an environmental review. As cities and counties statewide are potentially subject to similar treatment, *amici curiae* the League of California Cities ("League") and California State Association of Counties ("CSAC") respectfully request that the Court grant the City's petition for writ of review.

As shown below, even assuming the CPUC has the authority to preempt the City's undergrounding ordinance, it cannot do so through the truncated procedures used in this case.[2] The CPUC did not preempt the City's ordinance pursuant to a general order or other regulation or through a certificate of public necessity and convenience ("CPCN") or permit issued to the real part in interest, NextG Networks of California, Inc. ("NextG"). Rather, it did so while the CPUC was conducting an environmental review under the California Environmental Quality Act ("CEQA"). By its terms, CEQA review is limited to assessing the environmental impacts of the

[2] The League and CSAC submit this *amicus brief* on the narrow issue of whether or not the CPUC can preempt a local undergrounding ordinance through CEQA review. It takes no position on the balance of the issues in the case.

proposed project. The CPUC has no authority to use this process to preempt a local ordinance. This procedure further failed to consider the actual and public policy impacts of this decision and failed to consider alternatives to its ad hoc preemption determination.

There is a strong public policy preference for undergrounding utility facilities. Assuming that the CPUC may authorize certain exemptions to this preference, it should be required to carefully consider and process such exemptions providing notice and an opportunity to be heard to all interested parties. Requiring the CPUC to follow proper procedures when preempting local ordinances is consistent with public (and CPUC) policy in favor of undergrounding.

For these reasons, *amici curiae* respectfully request that the Court grant the City's petition for writ of review.

II. INTERESTS OF AMICI CURIAE

The League is an association of 467 California cities dedicated to protecting and restoring local control to provide for the public health, safety, and welfare of their residents, and to enhance the quality of life for all Californians. The League is advised by its Legal Advocacy Committee, which is comprised of 24 city attorneys from all regions of the State. The Committee monitors litigation of concern to municipalities, and identifies those that are of statewide – or nationwide – significance. The Committee has identified this case as having such significance.

CSAC is a non-profit corporation. The membership consists of the 58 California counties. CSAC sponsors a Litigation Coordination Program, which is administered by the County Counsels' Association of California and is overseen by the Association's Litigation Overview Committee, comprised of county counsel throughout the state. The Litigation Overview Committee monitors litigation of concern to counties statewide and has also determined that this case is a matter affecting all counties.

III. LEGAL ANALYSIS

A. Overview of the Relevant Facts

Relevant to this *amicus* brief, there are a number of important facts. This proceeding is part of an on-going dispute between the City and NextG related to the construction of a distributed antenna system ("DAS") within the City. This dispute has resulted in federal and state litigation and administrative proceedings before the CPUC. The present proceeding revolves around NextG's application to the CPUC for CEQA review of the construction of a DAS system in Huntington Beach ("Application"). The Application involves installing aboveground utility facilities in the City and nearby jurisdictions, including some facilities within areas where aboveground facilities are prohibited by City ordinance. These facilities are called "nodes" by NextG and generally consist of large monopoles with cellular antennas attached to them.

NextG first submitted its Application to the CPUC's Energy Division for CEQA approval. Under NextG's CPCN, the Energy Division may determine that NextG's construction activities are categorically exempt from CEQA review through a notice to proceed process ("NTP"). The Energy Division initially determined that the Application was categorically exempt from CEQA review. In part, this determination was based on the fact that the Application was consistent with local ordinances as the City's undergrounding ordinance was subject to a (since lifted) preliminary injunction.

After the City filed a complaint before the CPUC challenging the NTP and categorical exemption under CEQA, the City and NextG entered into a stipulation controlling the issues to be decided in the proceeding (Vol. III, Ex. 19A, Application 09-03-007). The parties stipulated that the proceeding would not adjudicate the validity of the City's undergrounding ordinance. Rather, the proceeding would subject the Application to full CPUC approval and accompanying CEQA review. (Vol. II, Ex. 18.)

Consistent with this stipulation, the CPUC initially issued D.10-10-007 that approved the Application and adopted a negative declaration authorizing NextG to proceed with construction of its DAS facilities. (Vol. Vol. I, Ex. 1.) In doing so, the CPUC noted that, "[t]oday's decision does not adjudicate the validity of the undergrounding, wireless, or other ordinances or regulations adopted by Huntington Beach" and that

"[t]oday's decision does not relieve NextG from obtaining such local permits or complying with such other requirements as may be lawfully imposed under Pub. Util. Code § 7901.1." (Vol. I, Ex. 1, p. 30, 32.)

As portions of the Application are actually inconsistent with the City's ordinance, the City filed a request for rehearing of D.10-10-007 stating that it is not possible for the CPUC to approve the Application and honor the parties' stipulation. Perhaps recognizing its error, the CPUC acknowledged the preemptive effect of its decision on rehearing by modifying D.10-10-007. In D.11-01-027, the CPUC modified conflicting portions of D.10-10-007 to read, "[w]e note that to the extent Huntington Beach's ordinances are inconsistent with the authority we grant to NextG in today's order, those provisions are preempted as inconsistent with the statewide interest in utility regulation." (Vol. VI, Ex. 2, p. 22). The CPUC then modified portions of its negative declaration for the Application to reflect this preemption.

B. Utility Undergrounding Furthers Important Public Policy Goals

The Legislature, CPUC and local agencies have all expressed a strong public policy interest in favor of undergrounding utilities. The CPUC, itself, has had regulations and rules requiring undergrounding for over forty years. (See D.76394, *In re Electric Util.* (November 4, 1969) 70 C.P.U.C. 339.) In 1999, the Legislature passed Assembly Bill 1149,

which required the CPUC to conduct a study as to the ways to amend, revise, and improve the rules for the replacement of overhead electric and communications facilities with underground facilities and to report the results of that study to the Legislature. (Stats. 1999, ch. 844; see D.01-12-009, *Order Instituting Rulemaking Into Implementation of Assembly Bill 1149, Regarding Underground Electric and Communications Facilities* (January 6, 2000) 2000 Cal. PUC LEXIS 21.) The CPUC's regulations generally require all new subdivisions to have utility facilities undergrounded and create procedures for processing and funding the conversion of existing overhead lines underground. (*D.76394*, 70 C.P.U.C. 339.) Consistent with these regulations, electrical and telephone utilities have undergrounding requirements contained in their CPUC-approved utility tariffs. (See, e.g., Pacific Gas & Electric ("PG&E") Electric Rule 16 [service laterals must be installed underground "where required to comply with applicable tariff schedules, laws, ordinances, or similar requirements of governmental authorities having jurisdiction"]; Electric Rule 20 [converting overhead facilities and providing funding for same] *available at http://www.pge.com/tariffs/ER.SHTML#ER*.) In fact, under PG&E Electric Rule 20-A, electric ratepayers will fund converting existing overhead utility lines.

Moreover, the Legislature generally requires that all new facilities along scenic highways be undergrounded. (Pub. Util. Code, § 320.) The

CPUC treats exceptions from this rule so seriously, presumably in light of the importance of undergrounding, that these applications have special procedural and substantive requirements. (See Cal. Code Regs., tit. 14, § 3.12.) This careful process for deviating from underground facilities sharply contrasts with the ad hoc approach the CPUC utilized in this proceeding to preempt the City's undergrounding ordinance.

Cities and counties have embraced undergrounding to prohibit and restrict unsightly aboveground facilities and to create and maintain residential and commercial areas that are well served by utilities, safe fir vehicular and pedestrian traffic and aesthetically pleasing. This is not a new development. Some undergrounding programs predate the CPUC regulations noted above. (See San Jose Municipal Code, Chapter 15.20 [outlining undergrounding districts formed prior to CPUC undergrounding rules].[3])

Nor is it an unusual one. Cities' and counties' protection of local aesthetics is a well-recognized exercise of their police powers. (See *Sprint PCS Assets, L.L.C. v. City of Palos Verdes Estates* (9th Cir. 2007) 583 F.3d 716, 722.)[4] "It is a widely accepted principle of urban planning that streets

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[3] An electronic version of the municipal code is available at http://sanjose.amlegal.com/nxt/gateway.dll/California/sanjose_ca/sanjosemunicipalcode?f=templates$fn=default.htm$3.0$vid=amlegal:sanjose_ca.

[4] The CPUC has noted its concurrence with the Ninth Circuit's decision on the importance of aesthetic regulation. *See* D.11-12-054, Order Granting Rehearing (Dec. 15, 2011) *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.*

may be employed to serve important social, expressive, and aesthetic functions." (*Id.* at p. 723.) The public right of way is part of "the visual fabric from which neighborhoods are made." (*Id.* at p. 724.) A clean right of way unburdened by unsightly poles, antenna and utility boxes is necessarily different and more enjoyable than one shadowed by the impersonal figure of wireless facilities. (See *id.* at p. 723 ["[t]he experience of traveling along a picturesque street is different from the experience of traveling through the shadows of a WCF [wireless communications facility]."].)

C. The CPUC Did Not Properly Preempt the City's Ordinance

Here, even assuming the CPUC has the authority to preempt local undergrounding ordinances despite the established public policy preference for undergrounding, it must properly exercise this power. In this case, the CPUC failed to utilize any accepted method of preempting a local ordinance. Instead, it improperly preempted the ordinance as an afterthought while reviewing the project under CEQA.

1. The CPUC Cannot Preempt the City's Ordinance through CEQA Review

CEQA requires state and local agencies to consider the impacts of specified discretionary actions on the environment. (See *Sierra Club v. Napa County Bd. of Supervisors* (2012) 205 Cal.App.4th 162, 178-79.) Courts have recognized that the purpose of the statute is to "... to minimize

the adverse effects of new construction on the environment. To serve this goal the act requires assessment of environmental consequences where government has the power through its regulatory powers to eliminate or mitigate one or more adverse environmental consequences a study could reveal." (*Ibid. quoting Friends of Westwood, Inc. v. City of Los Angeles* (1987) 191 Cal.App.3d 259, 266–267.) Those discretionary actions include the issuance of a "permit, license, certificate, or other entitlement." (Cal Code Regs., tit. 14, § 15378(a)(3).)

The purpose of the CPUC's CEQA review of the Application, therefore, was to assess the environmental consequences of the proposed project and take appropriate action. That review did not authorize the CPUC to preempt the City's undergrounding ordinance for reasons completely unrelated to environmental concerns. Yet, the CPUC in this case used its CEQA authority to preempt the City's undergrounding ordinance.

In fact, this limited view of CEQA review is consistent with the CPUC's own understanding of its authority. For example, just last year the CPUC attempted, but failed, to adopt regulations concerning its review and approval of telecommunications facilities under CEQA. (See D.11-12-054, Order Granting Rehearing (Dec. 15, 2011) *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.) When explaining its authority to preempt local regulations, the CPUC clarified that this authority arises under its ability to regulate utilities and not under CEQA. (*Id.* at p. 20.)

Here, the CPUC preempted the City's ordinance as an afterthought on rehearing while conducting CEQA review of the Application. It did so without establishing any standards for future preemption or explaining why DAS providers are entitled to special treatment not afforded to electrical, cellular, telephone or other utilities. The City's petition should be granted because the CPUC cannot preempt local ordinances under CEQA.

2. CPUC Has Not Preempted the City's Ordinance by Substantive Rule or Regulation or by Issuance of a CPCN or Permit

The CPUC has argued that its decision in this case is not simply a decision to approve the Project under CEQA but a decision to approve the Project in its capacity as utility regulator. This argument fails for two reasons. First, the CPUC has not exercised its authority as utility regulator to adopt a rule or regulation preempting local undergrounding ordinances for DAS projects. Second, the CPUC was reviewing the Application under CEQA in this case. It was not issuing NextG a lawfully required permit.

The CPUC has relatively broad powers to regulate public utilities. (See Cal. Const., art. XII.) Cities and counties are preempted from regulating matters over which the Legislature has delegated to the CPUC.

(Cal. Const., art. XII, § 8.) The general test for determining whether or not a local ordinance is preempted is examining if the ordinance conflicts with CPUC rules or regulations. (See *Leslie v. Superior Court* (1999) 73 Cal.App.4th 1042, 1046-47; *San Diego Gas & Elec. Co. v. City of Carlsbad* (1998) 64 Cal.App.4th 785, 794-95; see also *City of Los Angeles v. Tesoro Refining & Marketing Co.* (2010) 188 Cal.App.4th 840, 849 [CPUC order trumps inconsistent city ordinance].)

The CPUC did not in this case preempt the City's local undergrounding ordinance though the adoption of an applicable general order or other substantive rule or regulation. Moreover, the CPUC did not preempt the City's undergrounding ordinance through the adoption or modification of NextG's CPCN. No provision of the CPCN purports to preempt local undergrounding ordinances. Rather, the CPCN specifies that some projects that are consistent with local land use restrictions may qualify for categorical exemptions and a NTP. (See D.07-04-045, p. 6.) Therefore, the CPUC has not properly preempted the City's ordinance as it has not established a rule or regulation permitting it to do so.

Any argument that the CPUC properly preempted the City's ordinance is also inconsistent with the facts of the case. This was not a proceeding to preempt a local undergrounding ordinance. It was not a proceeding that carefully weighed the public benefits of undergrounding with the establishment of DAS facilities. It was not a decision that afforded

interested parties the opportunity to submit comments regarding whether and to what extent DAS providers should be excused from undergrounding rules. It was not a proceeding that considered if non-antenna DAS facilities should be undergrounded if some preemption was warranted. Rather, the CPUC was considering the environmental impacts of a single Application under a stipulation between the parties that the CPUC would not adjudicate the validity of the City's undergrounding ordinance. (Vol. II, Ex. 18; Vol. I, Ex. 1, D.10-10-007, p. 30.) Under these circumstances, the CPUC did not have the authority to preempt the City's undergrounding ordinance.

Nor was this a case where the CPUC was granting NextG the authority to construct its facilities by issuance of a CPCN or permit. It is undisputed that the Public Utilities Code authorizes the CPUC to regulate utility facility construction.[5] (Pub. Util. Code, §§ 702, 761, 762.) The CPUC also has the authority to grant certificates of public convenience and necessity to utilities that authorize the construction of particular utility facilities. (Pub. Util. Code, § 1001.) The CPUC has exercised its authority under these sections with respect to electrical utility facilities.[6] (G.O. 131-D, CPUC D.94-06-014, *Investigation into Commission's Own Motion Into*

[5] While outside the scope of this brief, this authority is limited by Public Utilities Code sections 7901 and 7901.1, which authorize local agencies to impose restrictions on the use of public rights-of-way. Further, whether NextG is a wireless carrier not subject to CPUC jurisdiction is an issue outside the scope of this brief.

[6] The CPUC has adopted General Order 159-A for some non-DAS cell sites that also permit the CPUC to preempt local ordinances. The CPUC maintains that the Application is not subject to this rule. (See Vol. I, Ex. 1, D.10-10-007, p. 19.)

the Rules, Procedures and Practices Which Should Be Applicable to the Commission's Review of Transmission Lines Not Exceeding 200 Kilowatts, 55 C.P.U.C.2d 87 (June 8, 1994) [requiring electrical utilities to obtain approval of construction through a CPCN or permit to construct]; see *San Diego Gas & Elec. Co. v. City of Carlsbad*, *supra*, 64 Cal. App. 4th 785, 799 [noting that G.O. 131-D expressly preempts local regulation of electrical facilities].)

The CPUC approves all large construction projects by electrical utilities. When acting pursuant to that authority, the CPUC may preempt local authority. (See G.O. 131-D, § XIV.B.) The CPUC has not exercised similar authority over the construction of facilities by telephone corporations, and did not do so in this case.[7] There was no basis for the CPUC to preempt the City's ordinance.

This Court should grant the City's petition because the CPUC failed to preempt the City's ordinance through any permitted procedure (i.e., pursuant to a general order or other rule or regulation or by modification of NextG's CPCN).

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[7] In granting CPCNs to telephone corporations the CPUC does not generally review or approve the construction of any particular facilities that would be use to provide services.

IV. CONCLUSION

For the reasons set forth above, the League and CSAC support the City of Huntington Beach in urging the Court to grant the petition for writ of review.

Respectfully submitted,

Dated: January 15, 2013

BEST BEST & KRIEGER, LLP

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CERTIFICATION OF WORD COUNT

Pursuant to Rule 8.204(c)(1) of the California Rules of Court, I certify that the League of California Cities and California State Association of Counties' Brief of *Amici Curiae* contains 2,758 words as calculated by the word count function of the word processing program used to prepare the brief.

Dated: January 15, 2013

BEST BEST & KRIEGER, LLP

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Court of Appeal, Fourth Appellate District, Division Three, Case No. G044796

CERTIFICATE OF SERVICE

I, MONIQUE MONCEBAIZ, the undersigned, hereby declare as follows:

1. I am over the age of 18 years and am not a party to the within cause.

2. I am employed by Best Best & Krieger LLP located in the City of Sacramento, California.

3. My business address is 500 Capitol Mall, Suite 1700, Sacramento, California 95814. My electronic email address is monique.moncebaiz@bbklaw.com.

4. On January 15, 2013, in the city where I am employed, I served a true copy of the document titled exactly **APPLICATION TO FILE [PROPOSED] BRIEF OF *AMICI CURIAE* LEAGUE OF CALIFONIA CITIES AND CALIFORNIA STATE ASSOCIATION OF COUNTIES IN SUPPORT OF PETITIONER** by depositing the document(s) listed above via GSO OVERNIGHT DELIVERY on all parties listed below:

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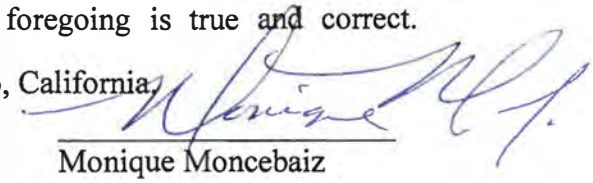
I declare under penalty of perjury that the foregoing is true and correct. Executed this 15th day of January, 2013, at Sacramento, California.



Monique Moncebaiz