

Decision 04-08-016 August 19, 2004

**BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA**

In the matter of the Application of Pacific Gas and Electric Company (U 39 M) for Authorization Under Public Utilities Code Section 851 to Grant a Sublease to Fisher Nickel, Inc.

Application 03-11-021  
(Filed November 24, 2003)

**OPINION DISMISSING APPLICATION**

**Summary**

In this decision, we dismiss the unopposed application of Pacific Gas and Electric Company (PG&E) for authority to sublease available land under Pub. Util. Code § 851.<sup>1</sup> The PG&E property consists of a lease for the premises known as the Food Service Technology Center (FSTC or Center) located in San Ramon, California to Fisher Nickel, Inc. (Fisher Nickel). We deem the arrangement between PG&E and Fisher Nickel for the period of time that Fisher Nickel occupied the FSTC (from September 2002 through February 26, 2004) to be a license authorized by General Order (GO) 69-C.

**Background**

On November 24, 2003, PG&E filed this application for authority to sublease available land under § 851. PG&E initially sought approval of a

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<sup>1</sup> All statutory references are to the Public Utilities Code unless noted otherwise.

sublease to permit Fisher Nickel to operate the FSTC program previously run by PG&E.

The premises consist of office space that PG&E converted into suitable space for operating the FSTC program. At the time PG&E converted the space, PG&E was administering the FSTC program with Commission authorization. Due to budgetary and other reasons, PG&E stopped administering the FSTC program and Fisher Nickel took over the program's administration. PG&E and Fisher Nickel attempted to agree on the terms of a sublease relationship whereby Fisher Nickel could use the converted space to continue administering the FSTC program.

Although Fisher Nickel occupied the premises, PG&E and Fisher Nickel were unable to come to terms on a sublease agreement until September 2003. The negotiated sublease agreement was attached to PG&E's application as Exhibit B. The agreement provided, among other things, that if administration of the FSTC program ever transferred back to PG&E, the sublease would terminate immediately. At the time PG&E filed the application, to and including the present time, this sublease agreement has not yet taken effect, because it was also conditioned upon Commission approval.

On February 26, 2004, the Commission issued Decision (D.) 04-02-059, which decision selected PG&E's proposal to operate the FSTC as a PG&E program and awarded funding for the FSTC program. According to PG&E, this decision effectively transferred administration of the FSTC program back to PG&E, and thereby obviated the need for the sublease.

On March 19 and April 12, 2004, PG&E provided supplemental information and briefing requested by the Administrative Law Judge (ALJ). PG&E informed the ALJ that the proposed sublease has not taken effect, because

it was not approved by the Commission. According to PG&E, Fisher Nickel occupied the premises under an informal sublease arrangement from September 2002 to February 26, 2004, and the arrangement between PG&E and Fisher Nickel terminated on February 26, 2004, the date of issuance of D.04-02-059. During this period, Fisher Nickel made monthly payments to PG&E to reimburse PG&E for PG&E's lease payments.<sup>2</sup>

In its supplement, PG&E clarified for which period of time it seeks Commission approval for the transaction. PG&E states that, initially, it sought approval of the sublease agreement pursuant to § 851. However, when the Commission issued D.04-02-059, it removed the need for prospective approval of the sublease. Therefore, PG&E now seeks an order from the Commission addressing the arrangement between PG&E and Fisher Nickel between September 1, 2002 and February 26, 2004. PG&E seeks confirmation that the arrangement was in effect a license pursuant to GO 69-C, and therefore Commission approval is not required. Alternatively, should the Commission find that § 851 applies to this transaction, PG&E seeks an exemption from the requirement of Commission approval of the arrangement pursuant to § 853(b).

### **Discussion**

Initially, we address PG&E's request that we deem the arrangement between it and Fisher Nickel a license, rather than a sublease. In these unique circumstances, where there was an informal arrangement between PG&E and Fisher Nickel for Fisher Nickel to occupy the premises between

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<sup>2</sup> The Commission took note of Fisher Nickel's administration of the FSTC program in D.02-05-046.

September 1, 2002 through February 26, 2004, and the written sublease (for which PG&E initially sought Commission approval) never took effect and is now terminated, we will deem the arrangement to be a license and examine whether it meets GO 69-C's criteria.

### **GO 69-C**

GO 69-C provides a narrow exception to § 851's requirement for advance Commission approval of any sale, lease, assignment, mortgage or encumbrance of utility property. Under GO 69-C, utilities may, in certain circumstances, convey limited, revocable uses of utility property, such as easements, licenses, permits or other limited use of land, to third parties without prior Commission approval.

GO 69-C provides three key criteria for permitting a utility to grant minor interests in utility property without Commission approval pursuant to § 851 as follows:

- The interest granted must be for a "limited use" of that property;<sup>3</sup>
- The interest granted must not interfere with the utility's operations, practices and service to its customers; and
- The interest granted must be revocable either upon the order of the Commission or upon the utility's own determination that revocation is desirable or necessary to serve its patrons or consumers. (See D.03-11-007; 2003 Cal. PUC LEXIS 555 \*6.)

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<sup>3</sup> GO 69-C does not authorize utilities to grant permanent, irrevocable interests in utility property to third parties or to permit permanent, physical changes to utility property by or on behalf of third parties.

In D.03-11-007, SBC Communications, Inc. (SBC) sought the Commission's authorization to lease space in three of its central office buildings to its affiliate. The Commission treated the transactions, which were originally submitted as leases that were revocable at will, as licenses pursuant to GO 69-C.<sup>4</sup> The Commission held that since the interests granted were for "limited use" of utility property, did not interfere with utility operations, and were revocable at will, the proposed license agreements are authorized by GO 69-C and the requirement for prior Commission approval pursuant to § 851 does not apply. (See also D.04-01-029, 2003 Cal. PUC LEXIS 629.)

We now examine the PG&E/Fisher Nickel arrangement under the GO 69-C criteria.

**Limited Use**

Fisher Nickel's use of the FSTC involved no expansion of the existing use. Fisher Nickel used the premises for the FSTC program, just as PG&E did.

**Non-Interference With PG&E's Operations and Practices**

Fisher Nickel's use did not interfere with PG&E's operation of its facilities, or with provision of service to PG&E's customers. In fact, Fisher Nickel's use of the premises served the public interest by allowing the efficient continuation of the FSTC program.

**Revocability**

The PG&E/Fisher Nickel agreement was revocable by PG&E and in fact, PG&E has revoked it.

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<sup>4</sup> SBC had volunteered to convert the leases into licenses.

We therefore conclude that the license agreement between PG&E and Fisher Nickel for the period of September 2002 through February 26, 2004 for the premises at 12949 Alcosta Boulevard, Suite 101, San Ramon, California, is authorized by GO 69-C and the requirements for prior Commission approval pursuant to § 851 do not apply.

### **Waiver of Comment Period**

This is an uncontested matter in which the decision grants the relief requested. Accordingly, pursuant to Pub. Util. Code § 311(g)(2), the otherwise applicable 30-day period for public review and comment is being waived.

### **Procedural Background; Categorization**

PG&E filed this application on November 24, 2003. No protests were filed. The Assigned Commissioner and ALJ's Scoping Memo, issued on March 5, 2004, confirmed the determination of Resolution ALJ 176-3124 that this is a ratesetting proceeding and that no hearings are necessary.

### **Assignment of Proceeding**

Susan P. Kennedy is the Assigned Commissioner and Janet A. Econome is the assigned ALJ in this proceeding.

### **Findings of Fact**

1. Under the unique circumstances here, Fisher Nickel's arrangement with PG&E for use of the premises at 12929 Alcosta Boulevard, Suite 101, San Ramon, California, from September 2002 through February 26, 2004, should be deemed a license.
2. The license agreement is for a "limited use" consistent with GO 69-C.
3. The license agreement will not interfere with PG&E's operations, practices or provision of services to its customers.
4. The license agreement is revocable at will as required by GO 69-C.

**Conclusions of Law**

1. The license agreement is authorized by GO 69-C and the requirements for prior Commission approval pursuant to § 851 do not apply.
2. Since the Commission need not further consider this application, the application should be dismissed.
3. This decision should be effective today.

**O R D E R**

**IT IS ORDERED** that:

1. The Application of Pacific Gas and Electric Company for authority to sublease the premises located at 12949 Alcosta Boulevard, Suite 101, San Ramon, California, used for the Food Service Technology Center, to Fisher Nickel, Inc. pursuant to the proposed sublease attached to the application is dismissed.
2. This proceeding is closed.

This order is effective today.

Dated August 19, 2004, at San Francisco, California.

MICHAEL R. PEEVEY  
President  
CARL W. WOOD  
LORETTA M. LYNCH  
GEOFFREY F. BROWN  
SUSAN P. KENNEDY  
Commissioners