Decision _____

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application of Pacific Gas and Electric Company (U 39 E) for Commission Approval for Irrevocable Lease for Metromedia Fiber Network Services, Inc. to User Fiber Optic Cable on Certain PG&E Transmission Facilities Under Terms of an Optical Fiber Installation and IRU Agreement.	Application 01-03-008 (Filed March 8, 2001)

OPINION DENYING APPLICATION

I. Summary

We deny the application of Pacific Gas and Electric Company (PG&E) for approval of an irrevocable lease for Metromedia Fiber Network Services, Inc. (MFNS) to use and install fiber optic cable on PG&E's facilities. PG&E has failed to identify with specificity the facilities affected and the exact nature of project activity that would take place. Without this specificity it is impossible for us to determine what we are being asked to approve. Therefore, we find that PG&E has failed to meet its burden of establishing what environmental review is necessary or that the approval it seeks will not cause environmental impacts that require analysis under the California Environmental Quality Act (CEQA). Indeed, PG&E contends CEQA is not applicable here.

Moreover, PG&E's application clearly is intended to benefit MFNS in its attempt to build a San Francisco Bay Area fiber optic network. As such, it is part of a piecemeal approach MFNS has taken to acquiring approval and

environmental review of its project. While this may not be PG&E's fault, we take official notice of the fact that MFNS has several other applications pending before this Commission related to various aspects of its California fiber optic project. Some have received CEQA review, while others have not. The environmental impacts of the project may be greater if analyzed as a whole rather than in pieces. The piecemeal approach creates the risk that the MFNS project will evade CEQA review as a whole.

II. Background

This is one in a series of applications related to MFNS' California fiber optic construction project. MFNS, now in Chapter 11 bankruptcy proceedings,[1] has in separate applications or petitions for modification sought (and received) approval of the San Francisco Bay Area fiber optic installation[2]; sought 82 (and received 80) modifications to that installation project[3]; sought and received permission for additional modifications[4]; sought approval of the San Diego and Sacramento portions of its fiber optic network[5]; and in this application seeks, via a PG&E application, approval of the PG&E–attached portions of its network. The Commission also has an enforcement action pending against MFNS to determine whether MFNS' commencement of construction of the project approved in D.00-09-039 without CEQA review warrants penalties.

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[1] We take official notice of MFNS' bankruptcy filing. MFNS may respond to such notice in comments on this decision.

[2] MFNS Application (A.) 00-02-039/Decision (D.) 00-09-039.

[3] MFNS Petition for Modification filed November 8, 2000, granted in D.00-09-039.

[4] Petition for Modification filed June 15, 2001, granted in D.01-09-018.

[5] MFNS has since asked the Commission to hold A.00-11-039 "in abeyance and defer [its] further processing. . . ."

Both MFNS and PG&E have made clear that this application primarily benefits MFNS' fiber optic network development. In a letter to the Commission dated June 14, 2002 (Appendix A hereto), MFNS states that action on this application is necessary so that "MFN has the regulatory certainty necessary to make an informed decision about treatment of [the portion of its system that is at issue in this application]."[6] PG&E's own letter of June 14, 2002 to the Commission defers entirely to MFNS' desire to have "the Commission . . . proceed with A.01-03-008 so [that MFNS] may have regulatory certainty regarding its use of PG&E fiber and facilities installed as a result of the contract. . . . . Consistent with MFN'S request, PG&E also believes the Commission should proceed with this application." (Appendix B hereto.) PG&E cites no independent reason for its request that the Commission process this application.

PG&E did not seek or receive CEQA review for this project. It claims the project is exempt from CEQA requirements. First, PG&E states that the affected fiber optic installation "is being installed on existing transmission facilities and creates dark fibers for [PG&E's] use in electric and gas utility operations." (Application at 13.) PG&E claims that the project involves the "minor alteration of existing utility facilities" and is exempt from CEQA review.

Second, PG&E claims a cable already built across the San Francisco Bay received a determination from the San Francisco Bay Conservation and

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[6] MFNS also states in this June 14 letter that it "is currently reviewing its plans for the San Francisco Bay Area and has not yet decided whether or not to retain the portion of its system that is at issue in this application." While MFNS complains in its letter that this application has been pending for some time, it also acknowledges that the Commission has acted on three other applications or petitions related to the same project.

Development Commission (BCDC) that CEQA does not apply to this project, and that that determination binds this Commission.

The application does not specify what facilities are involved. In an August 14, 2001 filing, MFNS identified facilities installed to date,[7] but did not identify the future installations for which it seeks approval.

III. Discussion

As a threshold issue, PG&E has not established this application is exempt from CEQA. Moreover, MFNS is pursuing its applications in piecemeal fashion with the effect, whether or not intended, of avoiding CEQA review. Finally, because the application does not identify the actual facilities to be installed, it is impossible to determine what PG&E is asking us to approve. Thus, PG&E has failed to meet its burden of establishing that the Commission should approve its application. We discuss these determinations below.

This Commission studied portions of MFNS' project for D.00-09-039, D.01-05-056 and D.01-09-018. However, it is unclear what construction will occur as a result of this application's approval. We are asked, instead, simply to accept that unidentified new construction may occur without CEQA review.

Similarly, PG&E asks us to approve construction already completed without CEQA review because the BCDC in a letter stated that the project was "categorically exempt from the requirement to prepare an environmental impact

[7] MFNS said it had already installed 1) one fiber optic cable crossing the San Francisco Bay on existing PG&E electric transmission towers parallel to the San Mateo Bridge; 2) a point of presence, or "POP" site, at the East end of this crossing in Hayward; and 3) one 150 foot section of fiber optic cable in existing PG&E telecommunication conduit in San Francisco. Errata to response of [MFNS] to July 26, 2001 questions from [Judge] Thomas, filed August 14, 2001, at 2 (MFNS August 14, 2001 Response).

report." (Application at 4.) However, we do not have evidence before us that BCDC was an appropriate lead agency for the project or that BCDC prepared and filed an approved Notice of Exemption for the project consistent with CEQA. MFNS concedes it does not know whether the BCDC ever consulted this Commission or any other agency in making this determination. MFNS simply asserts BCDC was the lead agency for purposes of environmental review under CEQA. (*Id.*)

We are asked to take on faith that "BCDC's jurisdiction extends beyond San Francisco Bay itself to land immediately to adjacent to the Bay." (*Id.* at 2.) Thus, we are told that construction MFNS has already performed is not our concern even though some of it took place in Hayward or on private land near the Bay. It is possible that all of MFNS' and PG&E's assertions are correct. However, the presentation is not adequate to enable us to make this assessment.

Moreover, we have concerns regarding MFNS' piecemeal approach to its San Francisco Bay fiber optic project. This approach makes it nearly impossible for us to determine the scope of the project, what we (or another agency) have reviewed and approved in compliance with CEQA, what has already been built, what will be built in the future, and whether we will have the opportunity to consider such future construction. Nowhere in the application or in information submitted later does PG&E (or MFNS) identify each item or category of construction in any detail so that we might determine whether or not the construction raises environmental concerns.

We cannot accept PG&E's assertion that the proposed (or already completed) construction is exempt from CEQA on the basis that "the installation was for electric utility facilities" (Application at 4 n. 2) because it is contradicted by the rest of PG&E's application. This project is clearly not solely for PG&E's

electric utility operations, but is intended to assist MFNS in its fiber optic project covering the entire San Francisco Bay Area.

It is precisely because piecemealing of project activities precludes comprehensive environmental consideration of potential environmental impacts that CEQA prohibits it. (*Cf., San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus* (1994) 27 Cal. App. 4th 713, CEQA Guidelines 15165.) It is not the Commission's burden to sort out this confusion. Rather, the burden is on PG&E, or MFNS, or both, to present the project clearly. The confusion presented here makes it impossible for us to understand what we are being asked to approve or what if any environmental review has occurred or should occur. We have no choice but to deny the application.

IV. Comments on Draft Decision

The draft decision of Administrative Law Judge (ALJ) Thomas 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 _____.

V. Assignment of Proceeding

Loretta Lynch is the assigned Commissioner and ALJ Thomas is the assigned Administrative Law Judge.

Findings of Fact

1. MFNS has filed several applications and petitions related to its San Francisco Bay Area fiber optic construction project.
2. MFNS is in Chapter 11 bankruptcy proceedings.
3. This application is not only for the benefit of PG&E, but also benefits MFNS.

4. PG&E states that this application and related project activities are exempt from CEQA.

5. We have no evidence of which agencies the BCDC consulted with in finding a portion of PG&E's project categorically exempt from CEQA.

6. Some of the already-completed construction for which PG&E seeks approval is not on San Francisco Bay property.

7. The application and supplemental submissions do not describe with particularly the construction to be approved.

8. The construction for which PG&E seeks approval is not only for use in its electric utility operations.

9. PG&E's application does not only seek approval of a paper transaction.

Conclusions of Law

1. We are unable to determine that the proposed transaction is exempt from CEQA or what level of CEQA review is required.

2. CEQA prohibits an applicant from piecemealing its project.

3. PG&E has not met its burden of establishing that the Commission should grant its application.

O R D E R

IT IS ORDERED that:

1. This application is denied without prejudice to Pacific Gas and Electric Company's right to make the showings we find it has failed to make in its current application.

2. Application 01-03-008 is closed.

This order is effective today.

Dated _____, at San Francisco, California.

ATTACHMENT A

ATTACHMENT B