

Decision 02-10-021 October 3, 2002

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

Application of Pacific Fiber Link, L.L.C.  
(U-6028-C) for Modification of its Certificate of  
Public Convenience and Necessity ("CPCN") to  
Review Proponent's Environmental Assessment  
for Compliance with the California  
Environmental Quality Act ("CEQA").

Application 99-08-021  
(Filed August 10, 1999)

**OPINION CORRECTING DECISION 02-08-063**

This decision corrects certain errors that appeared in the text of Decision (D.) 02-08-063. The errors do not affect the outcome of the decision.

**Assignment of Proceeding**

Henry Duque is the Assigned Commissioner and Glen Walker is the assigned Administrative Law Judge in this proceeding.

**Findings of Fact**

1. Certain errors appeared in the text of D.02-08-063.
2. In an Assigned Commissioner's Ruling dated August 29, 2002, parties were notified of the errors and our intention to correct those errors.
3. Parties were invited, but not required, to comment on the proposed corrections.

4. No comments were received, and there is no opposition to the proposed corrections.

**Conclusions of Law**

1. No public hearing is necessary.
2. The corrections set forth in the Ordering Paragraphs below should be adopted.

**O R D E R**

**IT IS ORDERED** that the following corrections in Decision 02-08-063 are adopted:

1. On page 2, line 7, the amount of penalty assessed is corrected to read “\$25,000” instead of “\$22,500.”
2. On page 23, the first full paragraph is deleted and replaced with the following:

“We conclude, after review of the record as a whole, that PFL’s cooperation with Commission staff, its efforts to comply with the substantive requirements of CEQA, and the Commission’s own uncertainty in 1998 in dealing with the CEQA requirements for NDIEC entrants, mitigate against sanctions as recommended by CSD. The evidence shows that PFL performed unauthorized construction for 216 days prior to the time it was provided a stop-work order by the Commission’s Executive Director. Pursuant to Pub. Util. Code § 2107, a minimum penalty of \$500 for each of the 216 days in which unauthorized construction took place results in a potential fine amount of \$108,000. However, due to the extensive mitigating factors, the Commission suspends \$83,000 and fines PFL \$25,000.”

3. Ordering Paragraph 1 on page 27 is deleted and replaced with the following:

“1. Pacific Fiber Link, L.L.C. (PFL) is assessed a penalty of \$25,000 payable to the General Fund within 30 days of the effective date of this order.”

4. At page 24, a new Section 11 is added as follows:

**“11. Changes from the Modified Presiding Officer’s Decision**

“Rule 8.2(g) states that when the Commission issues a decision in an adjudicatory proceeding that differs from the decision prepared by the Presiding Officer, the ultimate decision shall include an explanation of all of the changes made to the Presiding Officer’s Decision. An explanation of the changes follows:

“1. The Summary section and the Mitigation subsection have been revised to reflect a different outcome. While the Modified Presiding Officer’s Decision concluded that mitigating factors should reduce the fine to zero, we find, herein, that mitigating factors reduce the fine to \$25,000. The factors leading to this conclusion are thoroughly discussed in the Discussion section.

“2. We have revised the Conclusions of Law and Ordering Paragraphs to reflect the conclusion that PFL should face a fine for violating the Commission’s rules. Since the Administrative Law Judge had concluded otherwise, various changes to the text were necessary, including the insertion of instructions as to how PFL should pay the fine and inform the Commission that it has done so.”

5. Application 99-08-021 is closed.

This order is effective today.

Dated October 3, 2002, at San Francisco, California.

HENRY M. DUQUE  
GEOFFREY F. BROWN  
MICHAEL R. PEEVEY  
Commissioners

We will file a joint dissent.

/s/ LORETTA M. LYNCH  
President

/s/ CARL WOOD  
Commissioner

## **Dissenting Opinion of President Loretta M. Lynch and Commissioner Carl Wood to October 3, 2002, Item 3 Pacific Fiber Link**

We both opposed Decision 02-08-063, which this order would correct, and we oppose this one for all of the same reasons. In addition, this order is internally inconsistent. In its revised text, it states that it will impose a fine of \$108,000 but suspend all but \$25,000 of the fine. However, the ordering paragraphs say nothing about a fine of \$108,000 and nothing about a suspension. This is not a quibble, since a suspended fine has legal and accounting significance. When a fine is suspended, it remains as a liability that the penalized entity must continue to reflect on its books.

This new problem underscores the exceedingly arbitrary nature of what is being done here. It is generally accepted that the imposition of a penalty involves a large degree of discretion. That is why it is particularly important to take a disciplined approach to assigning the level of the penalty. This is done by carefully reflecting on what the Commission's penalty guidelines say about the nature of the offense, taking into account what the Commission has done in other similar situations, and being consistent in the application of such concepts as the suspension of fines. This decision, even in its corrected form, fails to do these things. In addition, because it does not provide a disciplined approach to determining an appropriate penalty, it is of little or no value in informing those we regulate of the cost of non-compliance or in guiding future Commission penalty decisions.

/s/ LORETTA M. LYNCH  
Loretta M. Lynch  
President

/s/ CARL WOOD  
Carl Wood  
Commissioner

San Francisco, California  
October 3, 2002