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Decision 04-04-014 April 1, 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 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 Optic Fiber Installation and IRU Agreement.	Application 01-03-008 (Filed March 8, 2001)

OPINION GRANTING PACIFIC GAS AND ELECTRIC COMPANY'S PETITION FOR MODIFICATION OF DECISION 03-05-077

I. Summary

We grant the petition of Pacific Gas and Electric Company (PG&E) for modification of Commission Decision (D.) 03-05-077 on the ground that the petition raises issues of fact and law that warrant such modification.[1]

We find that the installation of optical fiber and related telecommunications equipment on existing utility structures by third-party telecommunications providers, consistent with the facts of this case, is categorically exempt from environmental review under the California Environmental Quality Act (CEQA).

[1] Some of the claims PG&E raises here should properly have been raised in an Application for Rehearing, which PG&E did not file. Nonetheless, we opt to address PG&E request generally here because it may provide guidance to other parties.

We also find that D.03-05-077 contains factual errors relating to the use and benefits of the facilities installed under the Agreement at issue in this proceeding between PG&E and Metromedia Fiber Network Services (MFNS).

Finally, we find that D.03-05-077 inappropriately rejected as precedent certain Commission decisions setting its approach to CEQA implementation.

We then modify D.03-05-077 to bring it into conformity with our findings.

II. Background

In D.03-05-077, the Commission permitted PG&E to grant MFNS an irrevocable license to use fiber optic cable crossing the San Francisco Bay on existing PG&E electric transmission towers parallel to the San Mateo Bridge. PG&E claimed that the San Mateo Bridge line was subject to a categorical exemption from CEQA on the ground it was a "minor alteration of existing facilities." The cable is to be used by both MFNS and PG&E for communications purposes. PG&E's use of its transmission towers to provide electricity to its customers is not affected in any way by the addition of the wire.

D.03-05-077 noted that CEQA Guideline Section 15301 and Commission Rule 17.1(h)(1)(A)(2) provide for a CEQA exemption for such alterations. However, D.03-05-077 stated that this exemption only applied to an electric utility for minor alterations to and for the purpose of its own electric service. D.03-05-077 found that the modification of electric facilities to install new telecommunications lines was an expansion of the existing use of the facilities enabling telecommunications modernization. Thus, D.03-05-077 concluded that the exemption did not apply. D.03-05-077 concluded on balance, however, that there had been adequate consideration of the installation by the San Francisco Bay Conservation and Development Commission (BCDC), and noted that PG&E

had consulted several other resource agencies. D.03-05-077 therefore granted PG&E's request.

PG&E claims the determination in D.03-05-077 – that the exemption does not apply when an electric utility adds telecommunications facilities to its lines – was in error. PG&E argues that we should focus on the physical nature of the work proposed, rather than the purpose to which the installation will be used: "The physical changes that occur when fiber is added to overhead utility structures are identical, whether the fiber is devoted to utility purposes or other purposes."[2] In particular, PG&E argues that the installation of fiber optic cable on PG&E's transmission towers is a minor alteration of existing facilities and is categorically exempt from CEQA review under section 15301 of the Guidelines for the Implementation of the California Environmental Quality Act, Cal. Code Regs, tit. 14, §§ 15000 *et seq.* ("Guidelines"). Rule 17.1(h) of the Commission's Rules of Practice and Procedure, which incorporates CEQA's categorical exemptions as they apply to utilities, also lists the "minor alteration of existing facilities used to convey or distribute electric power."

PG&E also asserts that the Commission erred factually in concluding that the new fiber optic cable was not intended for the purpose of PG&E's own electric service and not related to existing use of the facilities. PG&E states that, "The MFNS Agreement allows PG&E to use a portion of the new fiber to reinforce its existing telecommunications system, thereby providing improved support to its existing electrical transmission system."[3] PG&E explains that, "the

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[2] *Petition of Pacific Gas and Electric Company for Modification of Decision 03-05-077* (PG&E Petition), filed June 20, 2003, at 6.

[3] *Id.* at 12.

installation at issue will upgrade PG&E's internal communications system and permit intracompany communications over areas not currently served with optical fiber capabilities."[4]

Finally, PG&E challenges the way in which D.03-05-077 distinguishes prior Commission precedent. The Commission found in D.03-05-077 that certain old cases were not precedential because later cases had acknowledged that the Commission's view toward CEQA had evolved over time.

We discuss each of these issues in turn below.

III. Discussion

A. Proposed Project Warrants a Categorical Exemption Under CEQA

CEQA exemptions should be interpreted narrowly, in order to ensure that the environment is protected to the maximum extent possible.[5] We find that the installation on existing electric transmission facilities of telecommunications fiber that allows for telecommunications service in addition to the electric utility's own internal communications use is a "minor alteration of an existing facility" within the meaning of CEQA Guidelines Section 15301. In particular, CEQA Guidelines Section 15301 grants a categorical exemption to the following class of existing facilities:

> Class 1 consists of the operation, repair, maintenance, permitting, leasing, licensing, or minor alteration of existing public or private structures, facilities, mechanical equipment, or topographical features, involving negligible or no expansion of use beyond that existing at the time of the

[4] *Id*. at 13.

[5] *McQueen v. Board of Directors*, (1988) 202 Cal. App. 3d 1136, 1148.

> lead agency's determination. The types of "existing facilities" itemized below are not intended to be all-inclusive of the types of projects which might fall within Class 1. The key consideration is whether the project involves negligible or no expansion of an existing use.

The guidelines proceed to cite examples. The guidelines state as follows:

> Examples include but are not limited to:
>
> (b) Existing facilities of both investor and publicly-owned utilities used to provide electric power, natural gas, sewerage, or other public utility services;

Thus, CEQA guidelines establish a categorical exemption for the minor alteration of existing facilities of utilities used to provide utility service, the exact situation that we have here.

The intent of that CEQA guideline is captured in Rule 17.1(h), which in the relevant parts notes the categorical exemption for:

> 2. The operation, repair, maintenance or minor alteration of existing facilities used to convey or distribute electric power, natural gas, water, or other substance.

Thus, the Commission's rules conform to CEQA and track the CEQA guidelines under which other state agencies also operate. We note, however, that a grant of categorical exemption has limits. In particular, pursuant to CEQA Guideline 15300.2 and G.O. 131-D parameters for electric utilities, categorical exemptions shall not apply when any of the following conditions occur:

> 1) there is a reasonable possibility that the activity may have a significant effect on an environmental resource of hazardous or critical concern;
>
> 2) the cumulative impact of successive projects of the same type in the same place, over time, is significant; or

> 3) there is a reasonable possibility that the activity will have a significant effect on the environment due to unusual circumstances.

We note, however, that Conclusion of Law 1 in D.03-05077 states:

> 1. The BCDC's determination, coupled with PG&E's contacts to the other agencies we list above, ensured that no environmental harm would come from the fiber optic cable's installation on the San Mateo Bridge.

This conclusion of law, coupled with BCDC 's own grant of a categorical exemption under CEQA, indicates that none of these three situations apply.

PG&E notes in its comments that the only area of any sensitivity along the project route, the San Mateo Bridge and its surroundings, is within the jurisdiction of the San Francisco Bay Conservation and Development Commission, which reached the same conclusion. PG&E notes that the BCDC finding was made pursuant to section 11501 of the California Code of Regulations, and that Section 11501, subd. (b), in turn, provides:

> Projects for which the Commission issues administrative permits pursuant to [Section 10601 sections relevant here] are usually categorically exempt under subdivision (a) of this section, *provided that such projects will not be categorically exempt when the either (1) may have an adverse impact on an environmental resource involve a hazard of critical concern or (2) may have a cumulatively adverse impact when considered with successively similar projects.* (Cal. Codes of Regs., § 11501, subd. (b) (emphasis added.))

We also note that Conclusion of Law 1 in D.03-05077 states:

> 1. The BCDC's determination, coupled with PG&E's contacts to the other agencies we list above, ensured that no environmental harm would come from the fiber optic cable's installation on the San Mateo Bridge.

This conclusion, coupled with BCDC 's own grant of a categorical exemption under CEQA, indicates that we and the BCDC have found that none of these three disqualifying situations apply.

Furthermore, if the electric infrastructure upon which a fiber optic installation may be made was originally installed pursuant to an environmental review, there may be mitigation measures regarding on-going operations, maintenance, and other potentially ground-disturbing activities which were originally imposed upon the construction of the electric infrastructure. The application of certain of these mitigation measures may be warranted on an on-going basis when there are construction-related activities being conducted in, on, or around the electric infrastructure. Therefore, the installation of fiber optic facilities (and any associated equipment) must be conducted pursuant to and consistent with such previously established mitigation measures.

B. The Installation of Fiber Optics Serves a Utility Purpose

In addition, we note that this minor modification of a utility tower contemplated here is for utility service. PG&E's agreement with MFNS allows PG&E to use a portion of the new fiber to reinforce its existing telecommunications system, thereby providing improved support to its existing electrical transmission system. Indeed, it is a common practice for electric utilities to establish communications systems in conjunction with electricity transmission. This particular application supplements and enhances PG&E's existing communications system used to support PG&E's utility operations. Thus, this installation constitutes a utility purpose relating to PG&E's existing facilities. Furthermore, we note that MFNS is itself a telecommunications utility, and its use of the transmission towers for its own purposes is also a utility

purpose. Thus, under either consideration, the installation is consistent with CEQA guidelines that require a utility purpose for granting a categorical exemption.

C. This Categorical Exemption is Consistent with Commission Precedent, Policy, and Environmental Concerns

The Commission has repeatedly found that installing fiber optic cable on existing utility structures is categorically exempt form CEQA – regardless of purpose. In particular, the Commission has repeatedly recognized that shared-use arrangements, such as the one here, are categorically exempt from CEQA. D.92-07-007 approved a shared-use arrangement like that approved here for MFNS (45 CPUC 2d at 34, O.P. 1.) Similarly, D.00-01-014 approved a shared-use agreement and found that installing fiber optic cable on overhead transmission lines was categorically exempt from CEQA because it could "be seen with certainty that no significant effect on the environment would result from our granting the requested authorization." These decisions rightly focus on the physical nature of the work proposed.

Moreover, long-standing Commission policies and precedents have supported such joint use of utility facilities by electric utilities and telecommunications utilities for both economic and environmental reasons. The joint use of utility facilities means that telecommunications utilities will not need to construct separate overhead structures or underground conduits for telecommunications networks. The Commission has previously found that the environmental benefits of shared use of utility facilities is a significant and important public benefit that prompts the Commission to approve optical fiber

installations such as those in the application.[6] Such joint use of utility facilities minimizes the environmental impacts of two utilities having to construct duplicative facilities. Requiring CEQA review of the installation of telecommunications facilities to provide external telecommunications service in this case would run counter to our policy that we should encourage joint use of electric facilities with telecommunications providers.

D. The *County of Amador v. El Dorado County Water Agency* is Inapposite

Based on the facts of this case, our grant of a categorical exemption is readily distinguishable from *County of Amador v. El Dorado County Water Agency*.[7] That case involved the sale of a hydroelectric project as part of a plan to increase water supply. The court found that a Class 1 CEQA exemption did not apply because a shift in the project from non-consumptive to consumptive water use was a change in project function and purpose, and not a negligible expansion of current use. Given the substantial physical changes that occur from this new "massive consumptive use" when no water had been permanently diverted before, the court found that no categorical exemption applied to the sale. (76 Cal.App.4th 931, at 967.)

In this case, MFN proposed no such change in use that might trigger physical changes to the environment. On the contrary, MFN's minor installation would have no impact whatsoever on the existing use of the transmission line structures. The function of the utility towers – to hold wires that provide both

[6] See D.00.07-010.

[7] (1999) 76 Cal. App. 4th 931.

electric and telecommunications transmission – remains unchanged. Thus, there in no change in the function or the purpose of the transmission towers.

E. The Lead Agency, Acting Under CEQA, Found the Project Categorically Exempt

We have noted above that BCDC acted as Lead Agency and did make its own determination under CEQA. D.03-05-077 notes that BCDC found that "the project authorized by this amended permit is categorically exempt from the requirement to prepare an environmental impact report." Although we have conducted our own analysis, we reach the same conclusion as BCDC – that this project was categorically exempt under CEQA. Indeed, BCDC's analysis, which is conducted under the same statutory framework as our own (and explicitly cited above), reinforces the conclusion we reach here, that the work proposed by MFN – placing wires on existing structures that hold wires – is a minor alteration that is categorically exempt from CEQA.

IV. Adopted Modifications to D.03-05-077

To bring D.03-05-077 in line with unambiguous Commission precedent, the Commission should delete Finding of Fact No. 9, Conclusion of Law No. 1, and the following language in the body of the Decision:

At D.03-05-077, *mimeo*, pp. 8-9:

> ~~PG&E claims that the San Mateo Bridge line is subject to a categorical exemption from CEQA on the ground it is a "minor alteration of existing facilities." CEQA Guideline Section 15301 and Commission Rule 17.1(h)(1)(A)(2) provide for a CEQA exemption for minor alterations of existing facilities. However, we believe this exemption may only be properly applied to an electric utility for minor alterations to and for the purpose of its own electric service. We do not believe the modification of electric facilities to install new telecommunications lines constitutes negligible or no expansion of existing use. Indeed,~~

~~the change PG&E made to its facilities is not related to existing use of the facilities, but rather enables telecommunications modernization. Thus, the exemption does not apply here. On balance, however, we are satisfied that the BCDC's determination, coupled with PG&E's contacts to the other agencies we list above, ensured that no environmental harm would come from the fiber optic cable's installation.~~

At D.03-05-077, *mimeo*, pp. 15-16:

~~However, each of the decisions – D.92-07-007, decided in 1992, D.96-07-038, decided in 1996, and D.00-01-014, decided in January 2000 – predate changes in the Commission's approach its to CEQA obligations that we have acknowledged openly in decisions. For example, in D.02-08-063, decided in August 2002, we explained that, "The Commission has been compelled to reevaluate its requirements under CEQA to ensure sound environmental practices by regulated utilities. The Commission for the past two years has begun taking a more active role in environmental oversight."~~

~~Implicit in our foregoing statements is an acknowledgement that our prior CEQA decisions are no longer fully relevant. We believe it is better to comply fully with CEQA than to adhere to prior policies and decisions that did not take full account of our obligations to protect the environment. Even the 2000 decision relied on old precedent that is no longer in conformity with our more in-depth approach to environmental review.~~

~~Therefore, we believe that the cases PG&E cites are not applicable, and that where PG&E allows third parties to install facilities on PG&E's transmission lines, primarily for the third party's own use and not for PG&E's purposes, the "minor alteration of existing facilities" exemption does not apply. Such an installation adds new facilities with an entirely new usage, rather than altering existing facilities. In view of our stepped-~~

~~up enforcement of CEQA requirements, it is preferable that we interpret CEQA exemptions narrowly.~~

The deleted language above is replaced with the following:

At D.03-05-077, *mimeo*, pp. 8-9:

Above and beyond the BCDC's review of the San Mateo Bridge line, we find in our capacity as a Responsible Agency reviewing this Section 851 Application that this portion of the installation identified in the Application is categorically exempt from CEQA. We find that it can be seen with certainty that there will be no significant effect on the environment as a result of our granting the requested authorization, and that installation constitutes but a minor alteration to existing facilities. (14 Cal. Code of Regulations §§15061 and 15301.) We have approved similar installations of fiber optic cable and related communications equipment on existing utility structures in previous decisions and found that such installations are exempt from CEQA. (*See* D.00-01-014, D.96-07-038, D.94-06-017, D.93-04-019, and D.92-07-007.)

We agree that the Commission should continue to uphold the CEQA exemptions for minor installations to existing facilities and for activities for which it can be seen with certainty that there will be no significant impact on the environment. We have recognized these CEQA exemptions in previous Commission decisions and continue to do so here because it furthers the very purposes of CEQA, that is, to ensure governmental review of potential significant environmental impacts. Moreover, the joint use of utility property is a policy that the Commission continues to promote. Therefore, the installations conducted pursuant to the Agreement should be exempt from CEQA as minor alternations to existing facilities and because it can be seen with certainty that there is no possibility that the activities in question will have a significant effect on the environment.

Proposed new Conclusion of Law 1:

1. The aerial installation of fiber optic cable across the San Francisco Bay on existing Pacific Gas and Electric Company transmission towers parallel to the San Mateo Bridge is categorically exempt from CEQA as a minor alteration to existing facilities and because it can be seen with certainty that this installation will have no significant effect on the environment.

V. Comments on Draft Decision

The alternate draft decision of Commissioner Susan P. Kennedy 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.

PG&E filed comments on March 25, 2004. We have addressed these comments throughout this decision, and we have amended our decision as appropriate.

There were no reply comments.

VI. Assignment of Proceeding

Loretta M. Lynch is the assigned Commissioner and Sarah R. Thomas is the assigned Administrative Law Judge in this proceeding.

Findings of Fact

1. The Bay Conservation and Development Commission found that the project described herein warrants a categorical exemption under CEQA.

2. It can be seen with certainty that the aerial installation of fiber optic cable across the San Francisco Bay on existing Pacific Gas and Electric Company transmission towers parallel to the San Mateo Bridge will have no significant effect on the environment.

3. The Commission has in previous decisions found that similar projects warrant a categorical exemption under CEQA.

Conclusion of Law

We should alter D.03-05-077 to bring it into conformity with CEQA, with Commission precedent, and to reflect the facts in the record of this proceeding.

O R D E R

IT IS ORDERED that:

1. The Petition of Pacific Gas and Electric Company for Modification of Decision 03-05-077 is granted.
2. Decision 03-05-077 is modified as discussed in section IV herein.
3. This proceeding is closed.

This order is effective today.

Dated April 1, 2004, at San Francisco, California.

MICHAEL R. PEEVEY
President
GEOFFREY F. BROWN
SUSAN P. KENNEDY
Commissioners

I dissent
/s/ LORETTA M. LYNCH
Commissioner
I dissent
/s/ CARL W. WOOD
Commissioner