

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application of Pacific Gas and Electric Company for Commission Approval of Two Irrevocable License Agreements to Permit Use of Utility Support Structures, Optical Fiber and Equipment Sites to IP Networks, Inc.

Application 01-12-033

**ADMINISTRATIVE LAW JUDGE'S RULING
DENYING MOTION OF PACIFIC GAS AND ELECTRIC COMPANY (PG&E)
FOR AN EXPEDITED RULING CONFIRMING THAT IT IS APPROPRIATE FOR
PG&E TO PROCEED WITH TWO MASTER LICENSE AND IRU
AGREEMENTS WITH IP NETWORKS, INC. (IPN)**

This ruling denies the motion of PG&E for confirmation that it is appropriate for PG&E to proceed with work under the revocable license portions of two Master License and Irrevocable Rights to Use (IRU) agreements (agreements) between PG&E and IPN, pending Commission approval of the agreements pursuant to Section 851.¹ PG&E has structured the agreements to convert from revocable licenses to IRUs upon Commission approval of this application.

Background

On December 21, 2001, PG&E filed this application seeking Commission approval of two IRUs that would permit use of its utility support structures, optical fiber and equipment sites by IPN.

¹ All Code references are to the Public Utilities Code, unless otherwise indicated.

Under the first agreement, dated September 1, 2000², PG&E will permit IPN to use two dark fibers along PG&E's Bay Area Loop and to install equipment stations and system electronics in PG&E facilities. The system electronics to be installed by IPN include Dense Wave Division Multiplexing (DWDM) Equipment designed to multiply optical wavelengths onto common fibers. One of the initial wavelengths would be reserved for PG&E's use, another wavelength would be reserved for IPN's use, and two of the remaining wavelengths could be licensed, leased, or otherwise made available for the use of third parties by IPN.

Under the second agreement, dated November 15, 2000,³ PG&E would grant IPN permission to use fiber optic cable, hardware and appurtenant equipment to be installed on or in PG&E facilities and to install small equipment stations on PG&E property to store system electronics needed to operate the system. PG&E will receive fibers in the fiber optic lines installed under the second agreement. In addition, PG&E has the option of receiving full telecommunications services from IPN at each equipment station.

In the application, PG&E states that these agreements will enable PG&E to expand its communications system very cost effectively, and to enhance system control and communication. PG&E would also receive revenues from IPN under the agreements.

PG&E acknowledges in the application that previous Commission decisions have cautioned against the use of revocable licenses as a means of

² This agreement was amended on December 13, 2000.

³ This agreement was amended on December 13, 2000 and January 13, 2001.

avoiding Commission approval of leases under Section 851 and environmental review under the California Environmental Quality Act (CEQA). However, PG&E contends that these decisions should not govern the application here, because the Commission did not clearly adopt a policy against the use of revocable licenses until 2001, after PG&E had entered into the agreements with IPN.

PG&E now seeks an expedited ruling from the assigned Administrative Law Judge (ALJ) to confirm that it is appropriate for PG&E to proceed with certain work to carry out the agreements, pending Commission approval of this application. This work includes: 1) the installation of inner duct and fiber optics within PG&E's distribution system, 2) the installation of equipment shelters and system electronics at various substation sites; and 3) the lighting and use of optical fibers by PG&E and IPN.

Discussion

Under Section 851, the Commission must review transfers of public utility property⁴ to determine if the proposed transfer is adverse to the public interest. Section 851 requires also advance, discretionary approval of transfers of utility property to ensure that financial and other transactions do not proceed until the Commission has had an opportunity to place any appropriate conditions on these transactions.⁵ When the Commission engages in advance review of

⁴ Section 851 applies to public utility property that is necessary or useful in the performance of the utility's duties to the public. If the property is not necessary or useful to the utility in providing service to the public, advance Commission approval of a transfer is not required.

⁵ Decision (D.) 01-03-064.

proposals requiring construction under Section 851, it evaluates a number of factors, including whether environmental analysis under the California Environmental Quality Act (CEQA) is necessary.⁶ CEQA requires the Commission to consider the environmental consequences of a project before it makes a discretionary decision on the application.⁷

Prior Commission decisions make it clear that a public utility cannot segment a transaction to avoid Section 851 and CEQA review by first granting a revocable interest in property pursuant G.O. 69-C⁸, performing construction or other work on the property, and then seeking Commission approval of a longer term transaction, such as the proposed IRUs in this case, pursuant to Section 851. See D.00-06-004, D.00-12-066, D.01-03-064, D.01-08-069, and D.01-08-070. As stated by the Commission, “The use of G.O. 69-C to cement a deal in advance, then seek subsequent section 851 review is troublesome. We do not believe that undertaking a commitment with long term implications is a ‘limited use’ that qualifies for G.O. 69-C treatment.”⁹

Here, PG&E seeks to perform work pursuant to its revocable license with IPN that would ultimately enable PG&E and IPN to light and use the optical

⁶ Id.

⁷ Id.

⁸ G.O. 69-C authorizes public utilities to convey easements, licenses or permits for use or occupancy on, over or under any portion of utility property for rights of way, private roads, agricultural purposes or other limited uses without Commission approval, if these conveyances will not interfere with the operations of the utility or service to the public.

⁹ D.00-12-006 at p. 6.

fibers before the Commission has reviewed this application and performed any necessary CEQA analysis.¹⁰ PG&E has cited no emergency or other circumstances that require the immediate commencement of work in its motion, and delayed for over one year after entering into the agreements with IPN to file this application. Approval of PG&E's request to start work before Commission action on this application would fly in the face of previous Commission decisions, would contravene the purpose of Section 851, and would violate CEQA.

PG&E's argues that since some of the installations are for utility purposes, Commission approval of the application pursuant to Section 851 is not required. This argument is without merit. Public utilities often receive benefits from transactions subject to Section 851. Here, while PG&E states that some of the fiber optics installations will enable PG&E to expand its communication and control systems, PG&E will achieve these results only by entering into an agreement with IPN that is subject to Section 851 review. The fact that PG&E may benefit from the transaction does not insulate PG&E from the requirements of Section 851 and CEQA.¹¹

For the foregoing reasons, PG&E's motion is denied.

¹⁰ PG&E states in the application that no CEQA review is necessary because the work to be performed is addressed in IPN's Preliminary Environmental Analysis (PEA) for Application (A.) 01-03-006 on a programmatic basis and is also categorically exempt from CEQA. However, the Commission has not completed CEQA review of A.01-03-006 or determined if the work to be performed here is categorically exempt from CEQA. Therefore, additional CEQA analysis is required.

¹¹ The motion also states that PG&E will benefit from only "some" of the installations.

In addition, according to the application, PG&E has already commenced work to implement the agreements with IPN, pending a Commission decision on this motion and the application. On page 6 of the application, PG&E states that: “Work that has already occurred to date includes the installation of 20,000 feet of inner duct in existing conduit for future use, and the installation of pull rope for future use.” PG&E further acknowledges on pages 6 and 7 of the application that: “The Company has already improved its communication facilities within the substation by completing certain fiber-connection work within its substation properties, at IPN’s expense... .”

The Commission has an established interpretation of Section 851 that would prohibit this work before the Commission decision on this application.¹² PG&E has also been subject to several orders to show cause and has been criticized in several previous Commission decisions for undertaking construction activity before the Commission had reviewed PG&E’s application pursuant to Section 851 and CEQA.¹³

PG&E is therefore ordered to provide the assigned ALJ with the following information in writing, verified by a corporate officer of PG&E, by no later than February 25, 2002:

1. A description of any work, including site preparation, performed on the site pursuant to the revocable licenses entered into by PG&E and IPN and/or in anticipation of Commission approval of this application;

¹² See D.01-08-069 and decisions cited therein.

¹³ D.01-08-069, D.01-08-070; see also A.00-08-065, ALJ Ruling dated 12/11/2000 ordering PG&E to show cause why certain Rules, General Orders and statutes had not been violated.

2. The dates on which the work was performed and the names, business addresses, and phone numbers of the persons who performed the work;
3. The reason for performing this work and whether it is a prerequisite to or part of other work to be performed under the agreements;
4. A description of any remaining work that needs to be done to implement the agreements, after PG&E has completed the work that is the subject of this motion;
5. Whether any public agency has performed CEQA or other environmental review of the work to date and if so, the type of environmental review performed and the date of its adoption by the public agency;
6. If PG&E contends that the work is exempt from CEQA review, the specific categorical or statutory exemptions upon which PG&E is relying;
7. The reasons for performing the work before Commission approval of the application and CEQA review; and
8. The cost of the work and the allocation of costs between PG&E and IPN.

IT IS SO RULED.

Dated February 11, 2002, at San Francisco, California.

/s/ MYRA J. PRESTIDGE

Myra J. Prestidge
Administrative Law Judge

CERTIFICATE OF SERVICE

I certify that I have by mail, and by electronic mail, to the parties to which an electronic mail address has been provided, this day served a true copy of the original attached Administrative Law Judge's Ruling Denying Motion of Pacific Gas and Electric Company for an Expedited Ruling Confirming that it is Appropriate for PG&E to Proceed with Two Master License and IRU Agreements with IP Networks, Inc. on all parties of record in this proceeding or their attorneys of record.

Dated February 11, 2002, at San Francisco, California.

/s/ TERESITA C. GALLARDO
Teresita C. Gallardo

N O T I C E

Parties should notify the Process Office, Public Utilities Commission, 505 Van Ness Avenue, Room 2000, San Francisco, CA 94102, of any change of address to insure that they continue to receive documents. You must indicate the proceeding number on the service list on which your name appears.

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