

Decision _____

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application of Pacific Pipeline System LLC for
Authorization Pursuant to Public Utilities Code
Section 851 *et seq.* to Permit the Use of Certain
Fiber Optic Telecommunications Facilities.

Application 99-11-027
(Filed November 19, 1999)

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O P I N I O N**I. Summary**

This decision grants the unopposed November 19, 1999 Application of Pacific Pipeline System LLC (PPS) pursuant to Pub. Util. Code § 851 for approval to grant third-party access to fiber optic cable located in PPS' crude oil pipelines. It retroactively approves the construction that PPS has already performed to facilitate such access subject to certain conditions designed to protect the environment.

However, because PPS completed this construction without Commission approval, we impose a penalty on PPS in the amount of \$150,000 for violating Commission Rules 1 and 17.1 and Pub. Util. Code § 702.

II. Background**A. The Application**

PPS owns two crude oil pipelines in California. The first pipeline, the Pacific System, extends 120 miles from Kern County in Southern California to the Los Angeles basin. This Commission approved the Pacific System tariff and the certification of Environmental Impact Statement/Supplemental Environmental Impact Report (EIS/SEIR) on April 10, 1996.¹ The second pipeline, the Line 63 System, extends from the San Joaquin Valley to refineries and delivery points in Los Angeles County. Only the work on the Pacific System (the Project) is at issue in this proceeding.

¹ D.96-04-056 (April 10, 1996), *reh. denied, mod'd*, D.96-07-061 (July 17, 1996).

In addition to carrying oil, the Pacific System pipeline contains fiber optic cable that is used for communications purposes. PPS has excess fiber capacity and seeks to grant access to this excess capacity to third-party governmental entities, and to its own holding company, PPS Holding. The governmental entities will use the fiber for their own communications needs. PPS Holding will grant “telecommunications companies” access to the excess fiber capacity. While PPS did not disclose the name of these telecommunications companies in its initial application, PPS’ subsequent submissions reveal that the fiber optic cable will form part of a network owned and operated by Qwest Communications International, Inc. (Qwest).

In a January 26, 2000 ruling, the assigned Administrative Law Judge (ALJ) directed PPS to submit additional information in support of its application.² The ruling called for PPS to identify any environmental effects of PPS’ proposal. It was not clear from PPS’ Application whether the parties using the excess fiber capacity would have to do any trenching or other construction to facilitate such use.

The assigned ALJ was concerned that the Application sought more than a simple paper transaction to lease fiber space to third parties. If construction activity were to occur, the ALJ inquired “whether the California Environmental Quality Act (CEQA)³ and/or [Commission Rule 17.1] relating to CEQA appl[ied]” to this proceeding.

² *Ruling Requiring Applicants to Provide Additional Information and Granting Motion for Protective Order* (Information Ruling), filed January 26, 2000, at 2.

³ Cal. Pub. Res. Code § 21000 *et seq.*

On February 7, 2000, PPS responded to the ALJ ruling. PPS stated that most of the conduit, cable and other facilities were already installed. However, PPS revealed that certain new construction activities would be necessary in the Angeles National Forest near Los Angeles:

[PPS] is now prepared to pull fiber optic cable through some or all of the existing unoccupied ducts on that portion of the Pacific Pipeline system that is located within the boundaries of the Angeles National Forest.⁴ No trenching will be required, as the conduit is already in place. *However, approximately sixty additional pullboxes will be installed along the existing, disturbed right of way.* A pullbox is a utility manhole that is approximately four feet square that is located immediately over the fiber conduits adjacent to the pipeline and within the right of way The top of the pullbox is flush with the surface. All of the work will be performed on federal lands under the jurisdiction of the United States Forest Service, Angeles National Forest.⁵

PPS contended that CEQA did not apply because all of its construction activity:

[would] occur on federal land under the jurisdiction of the Angeles National Forest and have minimal environmental impacts that are covered by the [Environmental Impact Statement/Subsequent Environmental Impact Report] EIS/SEIR [jointly prepared by the United States Department of Agriculture, Forest Service and this Commission in satisfaction of the requirements of the National Environmental Policy Act

⁴ As shown below, not all of the affected property was within the National Forest.

⁵ *Response of Pacific Pipeline System LLC to Ruling Requiring Applicant to Provide Additional Information* (Original Response), filed February 7, 2000, at 1-2 (emphasis added).

(NEPA)⁶ and CEQA. The Commission certified the EIS/SEIR in D.96-04-056]. No additional action is required under CEQA.⁷

As it turned out, PPS' representation was inaccurate; some of the affected land in the National Forest is private land, and there is also affected private land at the south end of the National Forest. Moreover, it was clear from the ALJ's questions that environmental impact and the applicability of CEQA were of concern. Nor do we agree with PPS' premise that CEQA never applies to projects on federal land.

Rather than wait for a determination of whether its interpretation of CEQA was correct, PPS commenced and completed all of the construction during 2000. As we discuss below, PPS' actions violated Commission Rules 1 and 17.1 and Pub. Util. Code § 702, and merit penalties pursuant to Pub. Util. Code § 2107.

In response to PPS' February 7, 2000 filing, the assigned ALJ directed PPS to submit to the Commission information that PPS had furnished to the United States Forest Service (USFS), and the USFS response. PPS complied on March 7, 2000, March 17, 2000 and April 13, 2000.

In the March 7, 2000 submission, PPS clarified that a small portion of work on private land adjacent to the Angeles National Forest would be required "to tie the work being performed on federal lands into the remainder of [PPS'] fiber optic system."⁸ In addition, maps PPS submitted to the USFS show planned construction on a private "inholding" within the boundaries of the National

⁶ 42 U.S.C. § 4321 *et seq.*

⁷ *Id.* at 2-3.

⁸ *Supplemental Response of Pacific Pipeline System LLC to ALJ's Ruling Requiring Additional Information*, filed March 7, 2000, at 2 n.6.

Forest.⁹ Ultimately, PPS installed 56 pullboxes on USFS land and 4 on private land.¹⁰

PPS also furnished a copy of a report it had provided to the USFS in September 1999 describing the project. That report revealed that the Pacific Pipeline fiber optic cable ultimately would form part of Qwest's 18,815-mile, 150-city nationwide network platform. The Angeles National Forest installation would be part of a central California backbone line expanding Qwest's 1,680-mile western route connecting several western states to a worldwide telecommunications system. The backbone line then only ran from Sacramento to the northern border of the Angeles National Forest, and from the southern boundary of the Forest to Los Angeles.¹¹ The report mapped and described in detail the proposed construction activities.

PPS' March 17, 2000 submission to this Commission attached a supplemental report PPS had provided the USFS on March 15, 2000. In that report, PPS provided additional maps and project detail. It estimated that it would install 62 handholes/pullboxes of 15 square feet each in size, along approximately 19.1 miles of Angeles National Forest land. PPS projected that the work would begin in mid- to late-March 2000, last for 10 weeks, and conclude by the end of May 2000.¹²

⁹ *Id.*, Figure 3E (showing construction through private Paradise Ranch property within National Forest).

¹⁰ *Pacific Pipeline System LLC's Brief Re Issues for Determination in Penalty Phase* (Brief), filed March 28, 2001, at 7, citing *Declaration of Dean Shauers*, ¶ 13.

¹¹ *Id.*, Attachment 1, at 9.

¹² *Second Supplemental Response of Pacific Pipeline System LLC to ALJ's Ruling Requiring Additional Information*, filed March 17, 2000, at 1.

Finally, on April 13, 2000, PPS submitted the USFS' Special Use Permit (Permit) approving the work. The USFS found that the project was "adequately covered by a previous [environmental] survey."¹³ The Permit authorized installation of two conduits and up to sixty 3' x 5' fiberglass pullboxes.¹⁴ However, the "Project Stipulations" attached to the Permit, which contained several conditions on USFS approval, were unsigned.¹⁵ On April 19, the assigned ALJ requested from PPS' counsel a signed copy of the Project Stipulations. PPS' counsel complied on April 28, 2000.

The Commission did not, at that time, agree that CEQA was inapplicable, or otherwise authorize PPS to commence construction.

B. Consideration of Penalties

During July 2000, counsel for PPS informed the assigned ALJ for the first time that the work was already completed. Thereafter, the ALJ issued a ruling to PPS seeking input on whether PPS had violated the law in completing the work without Commission approval.¹⁶ The ruling asked PPS to address the following issues:

¹³ The USFS referenced the survey entitled "Cultural Resources Investigation Pacific Pipeline Emidio Route including West Liebre Gulch Ridge Alignment and Mojave Alternatives Los Angeles and Kern Counties, California (SAIC 1995) (ARR #05-01-00302, USFS951219A)."

¹⁴ *Third Supplemental Response of Pacific Pipeline System LLC to ALJ's Ruling Requiring Additional Information*, filed April 13, 2000, at 1.

¹⁵ *Id.*, Exhibit E.

¹⁶ *Administrative Law Judge's Ruling Commencing Penalty Phase*, dated February 26, 2001. Between July 2000 and the issuance of the ALJ ruling, the ALJ issued a draft decision addressing only PPS' application, and not the issue of penalties. *Draft Decision of ALJ Thomas*, mailed November 7, 2000. That draft decision has since been withdrawn, and this decision deals both with the underlying application and penalties.

1. Why PPS constructed fiber optic facilities in and near the [Angeles National Forest] prior to obtaining Commission authorization or environmental review.
2. Whether PPS violated CEQA,¹⁷ Commission Rules 1¹⁸ or 17.1 *et seq.*,¹⁹ Pub. Util. Code §§ 701 or 2107 *et seq.*, or any other legal requirement, by constructing fiber optic facilities in and near the [Angeles National Forest] prior to obtaining Commission authorization or environmental review.
3. If PPS violated the law or Commission Rules, whether it should be fined, penalized or otherwise sanctioned for such violation, and the amount of such penalty, pursuant to the criteria set forth in Commission Decision (D.) 98-12-075. Those criteria are:

Physical Harm: The most severe violations are those that cause physical harm to people or property, with violations that threaten such harm closely following.

Economic Harm: The severity of a violation increases with (1) the level of costs imposed upon the victims of the violation, and (2) the unlawful benefits gained by the Applicant. Generally, the greater of these two amounts will be used in setting the fine. The fact that economic harm may be hard to quantify does not diminish the severity of the offense or the need for sanctions.

¹⁷ Cal. Pub. Res. Code § 21000 *et seq.*

¹⁸ Rule 1 provides that any person who signs a pleading or brief, enters an appearance at a hearing, or transacts business with the Commission, by such act represents that he or she is authorized to do so and agrees to comply with the laws of this State; to maintain the respect due to the Commission, members of the Commission and its Administrative Law Judges; and never to mislead the Commission or its staff by an artifice or false statement of fact or law.

¹⁹ Because Rule 17.1 *et seq.* is lengthy, we do not reproduce it here. However, the Rule in its entirety is available on the Commission's web site at http://www.cpuc.ca.gov/PUBLISHED/RULES_PRAC_PROC/1590-06.htm#P920_100428.

Harm to the Regulatory Process: A high level of severity will be accorded to violations of statutory or Commission directives, including violations of reporting or compliance requirements.

The Number and Scope of the Violations: A single violation is less severe than multiple offenses. A widespread violation that affects a large number of consumers is a more severe offense than one that is limited in scope.

The Applicant's Actions to Prevent a Violation: Applicants are expected to take reasonable steps to ensure compliance with applicable laws and regulations. The Applicant's past record of compliance may be considered in assessing any penalty.

The Applicant's Actions to Detect a Violation: Applicants are expected to diligently monitor their activities. Deliberate, as opposed to inadvertent wrongdoing, will be considered an aggravating factor. The level and extent of management's involvement in, or tolerance of, the offense will be considered in determining the amount of any penalty.

The Applicant's Actions to Disclose and Rectify a Violation: Applicants are expected to promptly bring a violation to the Commission's attention. What constitutes "prompt" will depend on circumstances. Steps taken by an Applicant to promptly and cooperatively report and correct violations may be considered in assessing any penalty.

Need for Deterrence: Fines should be set at a level that deters future violations. Effective deterrence requires that the Commission recognize the financial resources of the Applicant in setting a fine.

Constitutional Limitations on Excessive Fines:

The Commission will adjust the size of fines to achieve the objective of deterrence, without becoming excessive, based on each Applicant's financial resources.

The Degree of Wrongdoing: The Commission will review facts that tend to mitigate the degree of wrongdoing as well as facts that exacerbate the wrongdoing.

The Public Interest: In all cases, the harm will be evaluated from the perspective of the public interest.

The Role of Precedent: The Commission will consider (1) previous decisions that involve reasonably comparable factual circumstances, and (2) any substantial differences in outcome.

PPS was offered the opportunity for a full evidentiary hearing on these issues, but voluntarily waived such hearing.²⁰ PPS also filed a brief addressing each of the foregoing penalty-related issues. PPS made several arguments against penalties. First, it claimed it had always believed the pulling of additional cable and installation of pullboxes – the work at issue here – was covered by a preexisting environmental review carried out by the USFS. Second, it claimed it kept the Commission advised of its plans, and thus should not be penalized for carrying through with those plans. Finally, it contended that if it had erred, it did so in good faith with no intent to mislead the Commission or to avoid its authority. PPS therefore asked that the Commission impose no penalty.

²⁰ *Pacific Pipeline System LLC's Waiver of Hearing in Penalty Phase*, filed March 28, 2001.

C. Motion for Protective Order

Concurrently with its Application, PPS filed a Motion for Limited Protective Order (Motion) seeking confidential treatment of the Indivisible Right to Use Agreement, as amended (Right to Use Agreement), between PPS and PPS Holding and attached as Exhibit G to the Application. The assigned ALJ granted the unopposed Motion on January 26, 2000. We affirm the ALJ's ruling.

III. Discussion**A. Section 851**

Under Pub. Util. Code § 851, no public utility may transfer property that is necessary or useful in the performance of its duties without first having secured the Commission's authorization.²¹ To obtain such authorization, the applicant must demonstrate that it is in the public interest to allow the transaction. PPS claims it will only lease "excess [fiber] capacity" to third parties:

[PPS] has installed and reserved sufficient fiber optic cable and related access rights to satisfy its ongoing public utility needs. . . . The balance of the fiber optic telecommunications system is now excess to [PPS'] operational requirements. In addition, because the negotiation of rights of way for the pipeline also is complete, [PPS] no longer requires capacity in the fiber optic telecommunications system with which to negotiate with governmental entities.²²

Based on these representations, we find that the leases do not involve property necessary or useful to PPS. Moreover, it is in the public interest to

²¹ Pub. Util. Code § 851.

²² *Application of Pacific Pipeline System LLC* (Application), filed Nov. 19, 1999, at 4.

allow joint use of public utility facilities to limit the environmental and economic impact of constructing duplicate facilities.²³

Moreover, PPS does not operate under a traditional cost-of-service or rate of return regulatory framework. Pursuant to authority granted in D.96-04-056, the rates for PPS' Pacific System are established pursuant to market conditions, and PPS has a market-based tariff for the system. According to PPS, "[t]he granting of an infeasible right to use portions of its fiber optic telecommunications system will not affect the rates charged to [PPS'] customers."²⁴

Based on the PPS' lack of need for the leased fiber capacity, the Commission's interest in avoiding redundant infrastructure where feasible, and the lack of ratepayer impact, we find the leases are in the public interest and grant them pursuant to Pub. Util. Code § 851.

B. Applicability of CEQA to PPS' Plans

We find that CEQA applies to PPS' application. PPS makes three basic arguments to the contrary, all of which we reject, wholly or in part. First, it claims that its application pursuant to Section 851 did not trigger additional environmental review of the fiber optic system. Second, it claims it was enough that it kept the Commission informed that it would be installing fiber optic facilities pursuant to the preexisting USFS EIS/SEIR. Third, it claims there is a

²³ *Pacific Gas & Electric Co.*, D.92-07-007, 45 CPUC 2d 24 (1992), 1992 Cal. PUC LEXIS 599, at *17 (1992) (granting PG&E authority under Pub. Util. Code § 851 to allow MCI to string fiber optic cable on PG&E's transmission towers and to permit MCI to use a portion of PG&E's own fiber optic telecommunications network; "joint use of utility facilities is to be encouraged in appropriate cases, because of the obvious economic and environmental benefits.").

²⁴ Application at 10.

historical division of authority between the USFS and the Commission in overseeing construction affecting federal land, and that it reasonably believed that the USFS took the lead for construction on federal lands.

We find that PPS proceeded at its own risk in engaging in construction without securing approval from the Commission for its activities. It was not up to PPS to decide which environmental laws applied to its activities. PPS' actions violated Pub. Util. Code § 702, which requires every public utility to comply with the orders, decisions and rules of the Commission,²⁵ and Commission Rule 17.1, which sets forth the requirements for preparation and submission of environmental impact reports. We also find a violation of Commission Rule 1, which prohibits those who transact business with the Commission from misleading the Commission or its staff by an artifice or false statement of fact or law. PPS' failure to notify us the work would occur in part off federal land, and its representation to the contrary; its failure to explain at the outset that the application would involve construction; and its failure to inform the ALJ until July 2000 that the work was already complete all justify this finding.

Before discussing penalties for such violations pursuant to Pub. Util. Code § 2107, we address, and reject, PPS' arguments that it fully complied with the law.

²⁵ Under Public Utilities Code § 216, crude oil pipelines are deemed "public utilities," and PPS has been found to be a public utility subject to regulation by this Commission. *In re Pacific Pipeline System, Inc.*, D.96-04-056, 65 CPUC 2d 613, citing D.92-10-048, 46 CPUC2d 102, 1992 Cal. PUC LEXIS 912 (Oct. 21, 1992). PPS concedes this point. Application at 2.

1. Applicability of CEQA to Section 851 Application

PPS claims that the project already received full CEQA review as part of an earlier SEIR the Commission prepared for the installation of the Pacific Pipeline itself. The additional approval PPS now needs under Section 851 does not, PPS contends, trigger a new environmental review.²⁶ PPS contends “the project” for Commission approval was the pipeline itself, which included “the fiber optic system appurtenant to that pipeline.”²⁷ “In the [original] certification process, it was widely know that PPS intended to make the fiber optic system available for use by third parties thereby reasonably raising the expectation that PPS would, at a future date, seek the Commission’s separate approval to allow such third-party use.”²⁸

We disagree that it was up to PPS to determine whether the original pipeline approval encompassed the new construction. Under CEQA, project changes require Commission assessment of whether a subsequent or supplemental EIR is required, and do not allow a party unilaterally to determine that CEQA does not apply.²⁹

PPS conceded that the leases for which it seeks Pub. Util. Code § 851 approval involved new construction, and were not mere paper transactions. The ALJ’s January 26, 2000 Information Ruling asked PPS to describe any “trenching or construction activities [that would occur] incident to the grant [of third party

²⁶ Brief at 15.

²⁷ *Id.*

²⁸ *Id.* at 16.

²⁹ See Cal. Pub. Res. Code § 21166; *City of San Jose v. Great Oaks Water Co.*, 192 Cal. App. 3d 1005, 1016 (1987).

rights to use PPS' pipeline for installing fiber optic facilities].” PPS responded by describing need for installation of “sixty additional pullboxes . . . along the existing, disturbed right of way.”³⁰ Thus, by its own admission, the construction of the pullboxes was “incident to the grant” of third party rights – the rights PPS seeks Commission approval to grant pursuant to Pub. Util. Code § 851.

While we determine here that a new EIR was not required, PPS' unilateral decision in this regard usurped the Commission's authority to make the determination about the adequacy of the original USFS environmental review. We were required to assess the applicability of CEQA to PPS' application. Where “[only] minor additions or changes would be necessary to make the previous EIR adequately apply to the project in the changed situation . . . responsible public agency may choose to prepare a ‘supplement’ to an EIR rather than a subsequent EIR”³¹ Moreover, “in lieu of either a subsequent or supplemental EIR, the responsible agency may prepare an ‘addendum’ to an EIR if none of the conditions requiring the preparation of a subsequent or supplemental EIR have occurred”³² In all cases, it is the “responsible agency,” and not the project proponent, that makes these decisions.

2. Role of PPS in Keeping Commission Informed of Its Plans

PPS also contends that since it kept the Commission informed that it would perform the new construction without CEQA approval, it should not be

³⁰ Original Response at 1.

³¹ *Id.*, citing Cal. Admin. Code, tit. 14, § 15163, subd. (a)-(e) (CEQA Guidelines).

³² *Id.*, citing CEQA Guidelines § 15164.

faulted for having done so. While this may be true, it is beside the point. If the Commission was required to determine the applicability of CEQA, the only place it could do so officially was in a Commission decision or other formal issuance. However, PPS did not wait for a decision to issue; it simply proceeded on its own with construction.

Moreover, it should have been clear to PPS that the assigned ALJ was concerned about the environmental impact of the construction. The ALJ issued a ruling, to which PPS responded no less than four times, aimed at determining the environmental impact of the project. Surely PPS perceived there was concern about whether the new construction would harm the environment or it would not have submitted such extensive environmental materials. Nor was this the type of routine construction PPS makes it out to be³³; its submissions in response to the ALJ's Information Ruling show extensive new examination of the environmental impact of the Project.

PPS proceeded at its own risk in performing construction without knowing whether the Commission would defer to the USFS, especially on private land.

3. Relevance of USFS Involvement

PPS contends that it was entitled to assume the USFS would be solely in charge of overseeing the new constructing because of the "historical division of authority between the Forest Service and the Commission."³⁴ Regardless of how we may have proceeded prior to PPS' new construction, we have an obligation to apply CEQA to all California "projects" planned by utilities we regulate

³³ See Brief at 9 (new construction was "just one more return to the Forest").

regardless of who owns the land.³⁵ Thus, the fact that the USFS conducted environmental review of an earlier aspect of the project does not preclude us from conducting our own separate review. Our jurisdiction over such projects stems from our regulatory authority over the applicant, not the land. It is true that a party must obtain federal approval pursuant to NEPA if a project requires a federal permit or will occur on federal land. However, federal NEPA review and state CEQA review are parallel processes.³⁶

By the same token, we do not believe it is our responsibility under CEQA to conduct a full review that completely duplicates one conducted by the agency whose land is principally affected by the project. This is what occurred here: because virtually all of the project area is on USFS land, USFS conducted a thorough NEPA review of PPS' project. The Forest Service imposed stringent mitigation requirements on PPS' work both on and off USFS lands. We understand that PPS complied with those conditions. Had we completed our own, duplicative review, we would have reached the same result and imposed the same conditions. Thus, under the specific circumstances presented here, we find it unnecessary to duplicate the USFS' efforts by conducting an entirely separate environmental analysis.

³⁴ Brief at 17.

³⁵ See Cal. Pub. Res. Code § 21075(b)-(c); CEQA Guideline 15002(c); *Natural Resources Defense Council, Inc. v. Arcata Nat'l Corp.*, 59 Cal. App. 3d 959, 970-71 (1976) (providing that private activities are subject to CEQA if they involve government participation, financing, or authorization).

³⁶ See CEQA Guidelines § 15221; 40 CFR § 1406.2 (the primary requirement for preparation of joint NEPA/CEQA documents is that the document must fulfill the requirements of both the state and federal statutes). CEQA often has stricter requirements. *Id.*, § 15221.

This conclusion is reinforced by the fact that the Commission performed CEQA review and prepared an EIR at the time PPS first installed the Pacific System Pipeline in 1996. At that time, PPS installed the fiber optic cable and conduit it now plans to lease to third parties. All that the Commission would be doing for this project would be determining whether to perform a subsequent EIR or a Supplement or Addenda to the EIR for the installation of the pullboxes and handholes in the Angeles National Forest. Given the high standards set forth in Public Resources Code § 21166 and CEQA Guideline § 15162 that must be satisfied for preparation of a subsequent or supplemental EIR, combined with the stringent mitigation measures imposed by the USFS, the need for an additional CEQA document does not appear to be triggered here.

However, it was not up to PPS to choose which agency should conduct the necessary environmental analysis. Rather, it should have sought Commission authorization and CEQA review. PPS violated the law and our rules by not seeking Commission authorization to complete the work and should pay a penalty for this violation.

We find adequate the conditions the USFS imposed on PPS, and retroactively adopt those conditions both for purposes of the work in the National Forest and on the two parcels of private land. Therefore, we grant the Application subject to all USFS conditions, whether set forth in the USFS permit or elsewhere. The conditions of which we are aware are contained in Appendix A to this decision.

4. Additional Conditions

Moreover, since we regulate Qwest, and the construction is for the benefit of Qwest, we also impose, retroactively; conditions previously imposed on Qwest for Qwest-related PPS work. In D.97-09-011, we issued Qwest a certificate

of public convenience and necessity (CPCN) and a Negative Declaration for Qwest's project to install fiber optic cable—the same project that PPS' construction will facilitate. In an investigation issued earlier this year, we stated that,

The Commission has received information that Qwest allegedly has not complied with Decision 97-09-011, the certificate of public convenience and necessity granted by the decision and the Negative Declaration issued for Qwest's project to install fiber optic cable. Qwest has allegedly undertaken design and construction for the placement of underground fiber optic telecommunications facilities, and proceeded with the construction or installation phase, without initiating and completing a review of the impact of the project on Native American cultural resource areas.³⁷

The Commission's Energy Division issued a "stop work" order on December 16, 1999, directing Qwest to halt construction on its fiber optic network pending further notice. Ultimately, the Energy Division allowed Qwest to proceed with construction, subject to certain conditions designed to ensure CEQA compliance. Those conditions are set forth in the document appended hereto as Appendix B, and shall be binding on Qwest or its agents with regard to any work on its fiber optic lines, including those located within the Pacific System pipeline. We incorporate those conditions into the permission we grant here.

³⁷ *Investigation into the Operations And Practices Of Qwest Communications Corporation, et al. Concerning Compliance With Statutes, Commission Decisions, and Other Requirements Applicable to the Utility's Installation of Facilities in California for Providing Telecommunications Service*, Investigation (I.) 00-03-001 (filed March 2, 2000).

C. Consideration of Penalties

PPS' actions violated Pub. Util. Code 702, which requires every public utility to comply with the orders, decisions and rules of the Commission; Commission Rule 17.1, which sets forth the requirements for preparation and submission of environmental impact reports; and Commission Rule 1, which governs the representations and statements parties make to the Commission. We therefore proceed to a determination of the proper penalty for this violation.

Under Pub. Util. Code § 2107, the statutory range of Commission penalties is from \$500 to \$20,000 for each offense. Each day of violation is considered a separate violation.³⁸ We have set forth criteria for considering penalties in an unrelated context, in D. 98-12-075, and we find those criteria illustrative here. Those criteria, and our assessment of PPS' conduct in light of them, follow.

1. Physical Harm

According to D.98-12-075, the most severe violations are those that cause physical harm to people or property, with violations that threaten such harm closely following. PPS' actions in engaging in construction without CEQA review threatened, but did not actually cause, environmental harm to sensitive wilderness areas in and around the Angeles National Forest. PPS asserts that this fact ends the inquiry.³⁹ While there is no evidence of any actual harm to the Forest or surrounding areas of which we are aware, this criterion nonetheless recognizes the need for penalties even where actions threaten, but do not cause, harm. By the same token, PPS correctly notes that the work was done under the

³⁸ Pub. Util. Code § 2108.

³⁹ Brief at 21, citing *In Re StormTel, Inc.*, D.00-09-035, 2000 Cal. PUC LEXIS 695, at *9-10 (Sept. 7, 2000).

supervision of the USFS. Had PPS proceeded without oversight by any agency charged with enforcing environmental laws, this would have been a different case. On balance, we find that this factor warrants a decrease in the amount of the penalty due to the involvement of the USFS.

2. Economic Harm

According to D.98-12-075, the severity of a violation increases with (1) the level of costs imposed upon the victims of the violation, and (2) the unlawful benefits gained by the Applicant. Generally, the greater of these two amounts will be used in setting the fine. The fact that economic harm may be hard to quantify does not diminish the severity of the offense or the need for sanctions.

There is no evidence of costs imposed on victims of the violation, but we find that PPS gained benefits by completing its Project far in advance of when it would have had it awaited Commission review. PPS jumped the line ahead of other applicants who complied with CEQA's requirements. Thus, this factor militates in favor of an increase in the penalty.

3. Harm to the Regulatory Process

A high level of severity will be accorded to violations of statutory or Commission directives, including violations of reporting or compliance requirements. This is clearly a case in which PPS failed to afford the Commission the opportunity, in advance, to carry out its obligations under CEQA. We find such action to violate Commission Rule 17.1, and to warrant an increase in penalties.

4. The Number and Scope of the Violations

Under D.98-12-075, a single violation is less severe than multiple offenses. A widespread violation that affects a large number of consumers is a more severe offense than one that is limited in scope. PPS asserts that "any such violation in

this case would be a single, isolated event.”⁴⁰ We disagree, and find each day of unauthorized work to be a separate violation.⁴¹ PPS represents that it engaged in the unauthorized construction “in April and May 2000.”⁴² PPS did not receive its USFS permit “until April 7, 2000.”⁴³ Thus, the evidence demonstrates that the unauthorized construction could have taken place for 53 days at the most (April 8, 2000 – May 31, 2000). Because of the mitigating facts we describe in this decision, we will reduce this number to 30 days.

5. The Applicant’s Actions to Prevent a Violation

The next D.98-12-075 criterion provides that applicants are expected to take reasonable steps to ensure compliance with applicable laws and regulations. The Applicant’s past record of compliance may be considered in assessing any penalty. While PPS asserts that it “made good faith efforts to comply with the law,”⁴⁴ it did not even attempt to comply with CEQA, despite the ALJ’s clear concern with the environmental impact of the project. Thus, we find this factor increases the amount of the penalty.

6. The Applicant’s Actions to Detect a Violation

According to D.98-12-075, applicants are expected diligently to monitor their activities. Deliberate, as opposed to inadvertent wrongdoing, will be

⁴⁰ Brief at 21, citing *In Re NetMoves Corp.*, D.00-12-053, 2000 Cal. PUC LEXIS 1055, at *13 (Dec. 21, 2000).

⁴¹ Cal. Pub. Util. Code § 2108 (each day of a continuing offense is a separate violation).

⁴² Brief at 7.

⁴³ *Id.*

⁴⁴ *Id.* at 22.

considered an aggravating factor. The level and extent of management's involvement in, or tolerance of, the offense will be considered in determining the amount of any penalty. In this case, PPS knowingly proceeded without CEQA authorization. While it appears PPS believed it did not need to wait for CEQA review, this unilateral decision was risky and improper. We find that this factor warrants an increase in the penalty.

7. The Applicant's Actions to Disclose and Rectify a Violation

Applicants are expected promptly to bring a violation to the Commission's attention. What constitutes "prompt" will depend on circumstances. Steps taken by an Applicant promptly and cooperatively to report and correct violations may be considered in assessing any penalty. As we note in the Background section of this decision, during July 2000, counsel for PPS informed the assigned ALJ for the first time that the work was already completed. PPS had completed the work in April and May 2000. We find that this was prompt disclosure. Moreover, the fact that PPS made the disclosure puts PPS' conduct in a more favorable light than it would be in had the Commission discovered on its own that PPS had completed the construction.

On the other side of the equation, PPS failed prominently to disclose the necessary construction in its initial application, that some of the work was not on USFS land, or the involvement of Qwest, which had been the subject of its own environment-related stop work order, in the Project. These factors were material to the merits of the application and should have been disclosed.

On balance, the mitigating and exacerbating facts related to this factor cancel one another out and warrant no change in the penalty.

8. Need for Deterrence

Fines should be set at a level that deters future violations. Effective deterrence requires that the Commission recognize the financial resources of the Applicant in setting a fine. We note that PPS is authorized to transport an annual average of 130,000 barrels of crude oil per day on the Pacific System – the pipeline at issue in this case. For the twelve months ended December 31, 1999, PPS LLC reported it generated total operating revenues of \$ 43,255,000, with a net loss of \$ 953,000.⁴⁵ From May-October 1999, according to Exhibit H to PPS' application, PPS' net income was \$3,342,000. We set the penalty with this financial information in mind.

Under Pub. Util. Code § 2107, each violation carries a potential fine in the range of \$500-\$20,000 per violation. In the case of a “continuing violation,” each day of violation is a separate offense;⁴⁶ PPS concedes that its construction occurred “during April and May 2000.” Each day of unauthorized construction appropriately is the subject of a separate fine. We believe a fine of \$5,000 for each day of PPS' unauthorized construction is appropriate. As noted in Section III (C) (4), we find 30 separate days of violation, although the evidence establishes this number could go as high as 53 days of violation. This calculation results in a fine of \$150,000.

9. Constitutional Limitations on Excessive Fines

Under D.98-12-075, the Commission will adjust the size of fines to achieve the objective of deterrence, without becoming excessive, based on each

⁴⁵ D.00-05-036, 2000 Cal. PUC LEXIS 287, at *5 (May 18, 2000).

⁴⁶ Pub. Util. Code § 2108.

Applicant's financial resources. We have set the penalty with this principle in mind.

10. The Degree of Wrongdoing

In setting penalties, the Commission reviews facts that tend to mitigate the degree of wrongdoing as well as facts that exacerbate the wrongdoing. In this case the facts that mitigate and exacerbate the wrongdoing are the following:

Mitigating Facts:

- Lack of actual environmental harm;
- Active involvement of USFS in monitoring work;
- PPS' apparent belief that CEQA did not apply; and
- PPS' prompt disclosure that work had been performed.

Exacerbating Facts:

- Benefits PPS gained from early construction without CEQA review;
- Harm to the regulatory process by PPS' unilateral decision that CEQA did not apply to its application;
- PPS' lack of effort to prevent violation and comply with CEQA;
- PPS' failure to identify that some work was off USFS land until late in the process; affirmative misstatement that work was all on USFS land; and
- PPS' failure to disclose in its application that Project involved construction or Qwest.

11. The Public Interest

Under D.98-12-075, in all cases, the harm will be evaluated from the perspective of the public interest. In our view, it is in the public interest for applicants planning construction with potential environmental impact to wait for a Commission determination of the need for CEQA review, rather than making unilateral decisions about the inapplicability of the statute. CEQA benefits the

public at large by ensuring proper environmental view prior to construction of projects with potential impacts on surrounding areas. Thus, it is in the public interest for us to penalize PPS to deter such future unilateral action.

12. The Role of Precedent

The Commission will consider (1) previous decisions that involve reasonably comparable factual circumstances, and (2) any substantial differences in outcome. PPS states it is unaware of “any instance in which a utility has been fined by the Commission in similar circumstances.”⁴⁷ We are likewise unaware of any such case. PPS also cites two cases in which we did not impose fines, but neither of the cited cases has similar facts to this one.⁴⁸ Thus, precedent has no bearing on this case.

IV. Conclusion

PPS’ Section 851 application for leasing authority is in the public interest and should be approved. However, PPS should have awaited Commission authorization before completing the work at issue. It was clear from the ALJ’s January 26, 2000 Information Ruling that she was concerned about the environmental impacts of the Project. Indeed, PPS should not have styled its Application as a simple Section 851 paper lease transaction given the significant construction—undisclosed in the original Application—that PPS intended. Just because PPS did not seek advance Commission authorization to engage in such construction does not mean such permission was not required. Therefore, while

⁴⁷ Brief at 23.

⁴⁸ *Id.*, citing *Pacific Gas & Elec. Co.*, D.00-09-013, 2000 Cal. PUC LEXIS 677, at *5-6 (Sept. 7, 2000); *In Re Roseville Tel. Co.*, D.99-06-051, 1999 Cal. PUC LEXIS 308, at *57 (June 10, 1999).

we grant the Application, pursuant to Pub. Util. Code § 2107, we also impose a penalty in the amount of \$150,000 for PPS' violation of Commission Rules 1 and 17.1, and Pub. Util. Code § 702.

Subject to the conditions imposed by the USFS on PPS in its Project Stipulations (Appendix A hereto), and the conditions to which Qwest agreed in the Qwest Fiber Optic Project Cultural Resource Protocols (Appendix B hereto), the Application is granted.

V. Comments on Draft Decision

The draft decision of the ALJ 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. PPS filed comments on July 20, 2001. No reply comments were filed.

PPS asserts that "the fine is predicated on certain erroneous findings and that the amount imposed is out of line with recent Commission precedent, and that it should, for those reasons, be reduced or eliminated."⁴⁹ The allegedly erroneous factual findings relate to Qwest. PPS claims that its application did not actually seek approval to grant rights to Qwest and that in any event it disclosed Qwest's involvement, contrary to statements in the draft decision. We do not believe these issues warrant any change in the amount of the penalty, but address them for the sake of clarifying the record.

1. Qwest as Grantee

It is true that PPS LLC is the applicant, that it seeks to grant rights to PPS Holding Company (PPS Holding), and that PPS Holding will in turn grant rights

⁴⁹ *Pacific Pipeline System LLC's Comments on Proposed Decision*, filed July 20, 2001 (Comments), at 2.

to Qwest. PPS LLC, the applicant, claims, “PPS Holding can only convey those rights upon the Commission’s approval of the IRU [indefeasible right to use] in the Application.” Thus, it is clear that the effect of granting PPS LLC’s application will be to allow PPS Holding to convey rights to Qwest without further Commission review. PPS LLC does not explain why it, and not PPS Holding, applied for leave to consummate the transaction. However, we change Finding of Fact 4 to state “PPS seeks to grant access to this fiber to third parties, including PPS Holding, which in turn will grant access to Qwest, for use in the construction of fiber optic telecommunications networks in California.” We do not believe this change alters the outcome of the proceeding in any way.

2. Disclosure of Qwest Involvement

PPS argues, contrary to the draft decision’s conclusion, that its application did reveal PPS Holding’s intent to convey certain rights to Qwest. We disagree. The application does not mention Qwest, and Exhibit G, to which PPS cites, simply discusses the possibility of an agreement with Qwest, not that Qwest would be the primary beneficiary of the decision PPS sought. Moreover, the draft decision faulted PPS for not disclosing Qwest’s involvement “prominently.”⁵⁰ Even if Exhibit G mentions Qwest, the mention is not at all prominent. Moreover, nothing in the challenged finding is inaccurate; it states “PPS did not reveal that Qwest would be the primary user of the new fiber optic lines until March 7, 2000. . .” and PPS does not challenge this statement.⁵¹ Moreover, the Qwest issue is but one portion of one “exacerbating fact” used to

⁵⁰ Draft Decision of ALJ Thomas, Finding of Fact 18.

⁵¹ *Id.*

set the penalty, out of a total of five “exacerbating facts.” (The relevant “exacerbating fact” describes the “fact” as follows: “PPS’ failure to disclose in its application that [the] Project involved construction *or Qwest*.”⁵²) Finally, the draft decision’s discussion and finding regarding the stop work order the Commission issued to Qwest is relevant to the decision to make the Commission’s order subject to compliance with conditions we previously imposed on Qwest, not to the penalty. Thus, we do not change the decision in this regard.

3. Amount of Penalties

PPS also challenges the amount of the penalty based on allegedly contrary Commission precedent, citing *In re Pacific Fiber Link*, A.99-08-021. It also asserts that the decision did not make adequate findings to find a violation of Commission Rule 1, and that that failure undermines the amount of the penalty.

As to the issue of precedent, the *Pacific Fiber Link* case is distinguishable. The case involved work that occurred in 1998, at a time when Commission policy on CEQA was allegedly less clear to telecommunications companies than it was when PPS performed its work in 2000. The Presiding Officer’s Decision in that case states:

We conclude therefore, after review of the record as a whole, that [Pacific Fiber Link’s] 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 assessment of any further sanctions by this Commission against the company.

None of these factors is present in PPS’ case.

⁵² *Id.* at 25 (emphasis added).

As to PPS' Rule 1 challenge, we find that PPS acted with gross negligence in its failure to notify us the work would occur in part off federal land, and its representation to the contrary; its failure to explain at the outset that the application would involve construction; and its failure to inform the ALJ until July 2000 that the work was already complete. We have made the appropriate adjustment to the corresponding Conclusion of Law. We decline to change the penalty amount, and reject PPS' other challenges to the draft decision.

Findings of Fact

1. PPS does not need the excess fiber capacity it seeks to lease to third parties.
2. It is generally appropriate from an environmental and economic standpoint to have parties share utility infrastructure where feasible.
3. PPS owns two crude oil pipelines in California. The first pipeline, the Pacific System, extends 120 miles from Kern County in Southern California to the Los Angeles basin. This Commission approved the Pacific System tariff and the certification of EIS/SEIR on April 10, 1996.
4. In addition to carrying oil, the Pacific System pipeline contains fiber optic cable that is used for communications purposes. PPS seeks to grant access to this fiber to third parties, including PPS Holding. PPS Holding in turn will grant access to Qwest for use in the construction of fiber optic telecommunications networks in California.
5. PPS' application was not complete until April 28, 2000, when its counsel submitted an executed copy of the USFS Project Stipulations.
6. PPS did not disclose in its initial application that the proposed project would require the installation of approximately 60 additional pullboxes; it made this disclosure on February 7, 2000 in response to an ALJ ruling.

7. PPS did not reveal that Qwest would be the primary user of the new fiber optic lines until March 7, 2000 when it furnished a copy of a report it had provided to the USFS in September 1999 describing the project. That report revealed that the Pacific Pipeline fiber optic cable ultimately would form part of Qwest's 18,815-mile, 150-city nationwide network platform.

8. The Commission's Energy Division had issued a "stop work" order to Qwest prohibiting it from further work in California on its fiber optic network because of alleged CEQA violations. The Commission initiated an investigation into these alleged violations on March 2, 2000.

9. PPS did not disclose that any of the work would occur on private land adjacent to the Angeles National Forest until March 7, 2000.

10. The USFS issued PPS a permit to perform the proposed activity on April 7, 2000. It conditioned the permit on a series of Project Stipulations focused on mitigating the environmental impact of the proposed work.

11. PPS, through its counsel, disclosed to the assigned ALJ for the first time in July 2000 that all of the construction discussed herein had been completed without Commission review.

12. This Commission conducted an environmental review of the Pacific System pipeline in 1996.

13. PPS performed construction of the Project without CEQA review in April and May 2000. The greatest number of days construction could have occurred was 53; from April 8, 2000, the day after the USFS issued a permit for the work, until May 31, 2000.

14. The Commission did not grant PPS permission to proceed without CEQA review; PPS made a unilateral decision that such review was not required.

15. PPS' work did not cause environmental harm, and was overseen by USFS personnel.

16. PPS gained a benefit from proceeding with construction without waiting for Commission approval.

17. PPS promptly disclosed that it had completed the Project without CEQA review.

18. PPS failed prominently to disclose the necessary construction in its initial application, or the involvement of Qwest, which had been the subject of its own environment-related stop work order, in the Project. These factors were material to the merits of the application and should have been disclosed.

19. PPS apparently believed CEQA review of its Project was unnecessary.

20. This application did not seek approval solely of a paper transaction; there was construction incident to the application. PPS conceded this point in responding to the ALJ's ruling seeking information on construction related to the transaction.

21. CEQA benefits the public at large by ensuring proper environmental view prior to projects with potential impacts on surrounding areas.

Conclusions of Law

1. Based on the PPS' lack of need for the leased fiber capacity, the Commission's interest in avoiding redundant infrastructure where feasible, and the lack of ratepayer impact, the leases are in the public interest, and should be granted pursuant to Pub. Util. Code § 851.

2. The work applicant proposes is a "project" not exempt from CEQA review.

3. Even if a project will occur entirely on federal land, it is not exempt from CEQA review. This Commission's jurisdiction over such projects stems from its regulatory authority over the applicant, not the land.

4. Under the unique circumstances present here, we need not conduct a duplicative environmental review of the project.

5. PPS should have sought environmental review by this Commission of the project.

6. The USFS Project Stipulations in Appendix A adequately protect the environment, and should be incorporated herein as conditions. We rely on the USFS conditions under the special circumstances presented in this case, and our decision here shall not be precedential in subsequent cases.

7. The conditions in the Qwest Fiber Optic Project Cultural Resources Protocols (Appendix B) bind Qwest and its agents, and should be binding on the work approved here to the extent it is performed for Qwest's fiber optic network.

8. PPS should be authorized pursuant to Pub. Util. Code § 851 to grant third-party access to fiber optic cable located in PPS' crude oil pipelines. All such access shall be subject to the conditions we impose in this decision.

9. We affirm the assigned ALJ's January 26, 2000 ruling granting PPS' Motion for Limited Protective Order seeking confidential treatment of the Indivisible Right to Use Agreement, as amended, between PPS and PPS Holding and attached as Exhibit G to the Application.

10. PPS violated Commission Rule 17.1 and Pub. Util. Code § 702 by constructing the Project without Commission approval.

11. PPS violated Commission Rule 1. PPS' failure to notify us the work would occur in part off federal land, and its representation to the contrary; its failure to explain at the outset that the application would involve construction; and its failure to inform the ALJ until July 2000 that the work was already complete in combination rise to the level of gross negligence, justifying this finding.

12. PPS committed 30 separate violations.

13. PPS should be fined \$5,000 for each violation, for a total fine of \$150,000.
14. It is in the public interest to impose a fine on PPS.

O R D E R

IT IS ORDERED that:

1. Pacific Pipeline System LLC (PPS) is authorized pursuant to Pub. Util. Code § 851 to grant third-party access to fiber optic cable located in PPS' crude oil pipelines to the extent set forth in the Application.
2. PPS' construction activities necessary to the foregoing third party access is approved retroactively, subject to the conditions set forth herein.
3. PPS and all third parties installing fiber optic cable in PPS' pipelines shall be bound by the conditions set forth in the United States Forest Service Project Stipulations contained in Appendix A hereto. This decision shall not be precedential.
4. The conditions in the Qwest Fiber Optic Project Cultural Resources Protocols (Appendix B) bind Qwest Communications International, Inc. (Qwest) and its agents and affiliates, and shall be binding on the work approved here to the extent it is performed for Qwest's fiber optic network.
5. The ruling of the assigned Administrative Law Judge (ALJ) granting PPS' motion for protective order is affirmed.
6. PPS shall notify the Director of the Energy Division, in writing, of any substantial amendments to, extension of, or terminations of the agreements attached as Exhibits A-G to the Application within 30 days following the execution of such amendments, extensions or terminations.
7. PPS shall be assessed a penalty of \$150,000 payable to the General Fund of the State of California within 30 days of the effective date of this order.

8. Upon making such payment, PPS shall file an advice letter with the Commission's Energy Division attaching a cancelled check or other proof of satisfaction of the penalty obligation we impose in this decision.

9. This proceeding is closed.

This order is effective today.

Dated _____, at San Francisco, California.

(See Formal Files for Appendixes.)