

Decision 02-07-026 July 17, 2002

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

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.

(U 39 E)

Application 01-12-033
(Filed December 21, 2001)

**DECISION GRANTING APPROVAL
UNDER PUBLIC UTILITIES CODE SECTION 851
OF TWO IRREVOCABLE LICENSE AGREEMENTS BETWEEN
PACIFIC GAS AND ELECTRIC COMPANY AND IP NETWORKS, INC.**

1. Summary

This decision grants in part the application of Pacific Gas and Electric Company (PG&E) for Commission authorization under Pub. Util. Code § 851¹ to enter into two master license and irrevocable right to use (IRU) agreements (together, the agreements) to permit use of utility support structures, optical fiber and equipment sites by IP Net.² These agreements will enable PG&E to obtain

¹ All statutory references are to the Public Utilities Code unless otherwise referenced.

² PG&E filed this application on December 21, 2001. In Resolution ALJ 176-3079 (January 9, 2002), we preliminarily categorized this proceeding as ratesetting and determined that no hearing is necessary. The Commission Office of Ratepayer Advocates (ORA) filed a protest, which addressed only the ratemaking aspects of the application, on January 30, 2002. ORA did not request a hearing.

new fiber optics capacity for energy utility communication and control purposes in a cost-effective manner and IP Net to obtain additional fiber optic capacity to expand its broadband telecommunications network.

However, our approval of the agreements permits IP Net to undertake only those activities on PG&E property that are authorized by IP Net's limited-facilities based certificate of public convenience and necessity (CPCN).³ This decision does not authorize IP Net to perform construction activities, contemplated in the agreements, including the installation of new equipment stations on PG&E substation sites and construction of a network operations center on PG&E property, until IP Net has obtained approval of its application for full-facilities based authority currently pending before this Commission,⁴ has undergone additional environmental (CEQA) review of these activities, and has obtained our approval of these activities pursuant to Section 851.

2. Background

A. The Project and the Agreements

PG&E seeks Commission authorization to grant IP Net an irrevocable right to use certain fiber optic lines and facilities and equipment sites on PG&E property. The first agreement, dated September 25, 2000, relates to IPN's use of dark fibers on PG&E's Bay Area loop. The second agreement, dated November 15, 2000, relates to IPN's installation of optical fiber along a certain

³ IP Net currently operates as a Limited-Facilities Based Competitive Local Carrier and a Nondominant Interexchange Carrier (limited facilities based carrier) in California pursuant to Decision (D.) 00-03-030.

⁴ IP Net filed its application for full-facilities based authority, Application (A.) 01-03-006 on March 6, 2001. The Commission is currently performing CEQA review of the activities contemplated in the application.

route referred to as the local loop.^{5 6} Both agreements are structured as revocable licenses, which would convert to irrevocable licenses that contain the same terms upon our approval of this application.

PG&E currently maintains and operates fiber optic facilities and other communication equipment in parts of its utility system to support its provision of electric and gas utility service to the public. In certain areas, PG&E needs additional fiber optic capacity for this purpose. IP Net's services include a broadband telecommunications network that provides advanced voice and data solutions to business customers and transport access and services to competitive service providers. IP Net wishes to obtain additional fiber optic capacity in order to support and expand its telecommunications services.

Under the first agreement, PG&E would permit IP Net to use two dark fibers along PG&E's Bay Area Loop⁷ and to install equipment stations and system electronics in PG&E facilities. The system electronics to be installed by IP Net 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

⁵ Both agreements were amended to update an exhibit related to PG&E's safety requirements on December 13, 2000. The second agreement was also amended on January 11, 2001 to clarify language regarding IP Net's right to use PG&E property and facilities after our approval of this application.

⁶ PG&E specifically requests approval for IP Net to use the following PG&E property: 1) two dark fibers on its Bay Area Loop, 2) land owned by PG&E in fee simple, 3) electric transmission towers and facilities, 4) electric distribution poles, conduits and facilities, and 5) electric transmission and distribution substations.

⁷ The parties have acknowledged that PG&E does not own all of the dark fiber along the Bay Area Loop, but has the right to use certain fiber strands. The rights obtained by IP Net under the agreement cannot exceed PG&E's rights to use these fiber strands.

reserved for IPN's use, and two of the remaining wavelengths could be licensed, leased, or otherwise made available to third parties by IP Net.

Under the second agreement, PG&E would permit IP Net 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 along the local loop.⁸ PG&E would receive fibers installed in the fiber optic lines by IP Net for its own use and may opt to receive full telecommunications services from IP Net at each equipment station. IP Net would market any surplus fiber optic capacity and space in the equipment stations that are not dedicated to PG&E use to third parties. PG&E would have legal title to the fiber optic facilities installed by IP Net.

The equipment stations would store system electronics owned by PG&E, IP Net, and third parties that lease or otherwise obtain a right to use available fiber optic facilities from IP Net.⁹ If A.01-03-006 is approved, IP Net would also construct a Network Operations Center (NOC) on PG&E property, after obtaining necessary permits. The NOC would be used to provide monitoring, provisioning, and network surveillance management of the IPN, PG&E, and third party systems.

PG&E would use the increased fiber optic capacity obtained through these agreements for energy utility communication and control purposes. For example, the increased capacity would support PG&E's internal electric and gas

⁸ This agreement authorizes IP Net to use certain cable routes along the local loop. The parties may agree in writing to permit IP Net to use additional cable routes and cable.

⁹ According to the application, the equipment stations will generally be prefabricated concrete structures with a size of approximately 325 square feet per section.

monitoring and control systems, such as transfer trip schemes, remedial actions schemes, and supervisory control and data acquisition, and will upgrade PG&E's internal voice and data network.¹⁰

The agreements provide that IP Net would pay PG&E a monthly and a minimum annual fee for use of the affected PG&E property and facilities. PG&E and IP Net would also share revenues received from third parties for use of fiber optic capacity or any surplus space in equipment stations. The costs of creating capacity and installing new fiber optic facilities, system electronics and equipment stations will be borne by IP Net. PG&E is not disposing of any property pursuant to the agreements.

Under the agreements, IP Net must use its best efforts to avoid interference with PG&E's operations or the creation of a safety hazard when using PG&E property and facilities. IP Net may not disturb, tamper with, or make contact with PG&E facilities without PG&E's consent, and must comply with PG&E safety requirements. PG&E retains the right to enter its facilities, equipment sites and equipment stations at any time for any purpose that does not interfere with IP Net's operations. IP Net must also comply with applicable legal requirements.

The parties have indemnified and held each other harmless for any liability that may result from their own negligence or intentional misconduct, their breach of the agreements, or from their own unlawful release or

¹⁰ Under the agreements, PG&E has reserved the right to use its portion of the dark fibers and fiber optic capacity for any lawful purpose, including the provision of communication services to others. However, in the application, PG&E states that it does not currently plan to provide telecommunications services to third parties and therefore is not seeking Commission authorization to do so here.

introduction of any hazardous substance which affects the system.¹¹ As additional protection, the agreements require PG&E and IP Net to carry specified insurance coverage that names each other as an additional insured.¹²

B. Environmental Review

The California Environmental Quality Act (Public Resources Code Section 21000, et seq., hereafter CEQA), applies to discretionary projects to be carried out or approved by public agencies. A basic purpose of CEQA is to “inform governmental decision-makers and the public about the potential, significant environmental effects of the proposed activities.” (Title 14 of the California Code of Regulations, hereinafter CEQA Guidelines, Section 15002.)

Since the proposed project is subject to CEQA and the Commission must issue a discretionary decision without which the project cannot proceed (i.e., the Commission must act on the Section 851 application), this Commission must act as either a Lead or a Responsible Agency under CEQA. The Lead Agency is the public agency with the greatest responsibility for supervising or approving the project as a whole (CEQA Guidelines Section 15051(b)).

¹¹ Further, the responsible party must bear all costs of removing, neutralizing, containing or otherwise remediating the hazardous substance. Upon learning of the existence, introduction, or release of hazardous substances on areas which are intended to be equipment sites, the parties shall, to the extent possible, use alternate equipment sites.

¹² The required coverage includes commercial liability insurance in the amount of no less than \$10 million for each occurrence, professional liability insurance for engineering activities in the amount of no less than \$1 million for each claim, automobile liability insurance in the amount of \$3 million for each accident, employer's liability insurance in the amount of \$1 million for each accident, and workers compensation insurance as required by law.

The Commission is the Lead Agency for this proposed project under CEQA because it has the primary responsibility for reviewing this transaction under Section 851. CEQA requires that the Commission consider the environmental consequences of a project that is subject to its discretionary approval.

The structure of the agreements between PG&E and IPN as revocable licenses that convert to irrevocable licenses upon our approval of this application raises issues regarding compliance with CEQA. Under our previous decisions, utilities may not structure agreements for the conveyance of property interests as revocable licenses to be converted to irrevocable or longer-term interests in property (such as leases) under General Order (G.O. 69-C)¹³ in order to circumvent CEQA and Section 851, particularly when the parties perform construction pursuant to the revocable license.^{14 15} However, here, the

¹³ G.O. 69-C provides in pertinent part that "... public utilities covered by the provisions of Section 851...are hereby authorized to grant easements, licenses, or permits for use or occupancy on, over or under any portion of the operative property of said utilities for rights of way, private roads, agricultural purposes, or other limited uses of their several properties without further special authorization by the Commission whenever it shall appear that the exercise of such easement, license or permit will not interfere with the operations, practices and service of such public utilities to and for their several patrons or customers." In order to grant an interest in property pursuant to G.O. 69-C, the public utility must retain the right to resume or continue use of the property when necessary or desirable to do so in the interest of its patrons and consumers.

¹⁴ See D.00-12-006, D.01-08-069, D.01-08-070, and D.01-01-043.

¹⁵ As we previously stated in D.00-12-006:

G.O. 69-C cannot reasonably be read to allow utilities to bifurcate their transactions so that they would perform construction under an agreement not subject to Commission review by virtue of G.O. 69-C, and then, after the facilities are installed, seek approval of the lease arrangements for those facilities. G.O. 69-C allows utilities to enter into

Footnote continued on next page

preliminary work already performed on the site by PG&E was either temporary or was undertaken to allow the interconnection of existing fiber from the tower to PG&E's communication room.¹⁶ We agree with PG&E that these activities do not require a prior discretionary decision by the Commission under CEQA.

Further, we have approved the two agreements in part today, only to the extent that IP Net's activities on PG&E property are included within the scope of IP Net's authority under its limited-facilities based CPCN. Limited-facilities based CPCNs have generally allowed companies to lease existing facilities, install switches in existing buildings, and to install fiber in existing conduit without triggering a new project under CEQA that would require further environmental review. IP Net may not undertake construction activity, such as the installation of equipment stations and construction of a network operations center on PG&E property, pursuant to these agreements unless the Commission

agreements without Commission approval only for "limited uses." We do not believe that it is reasonable to consider a license which involves the construction of new facilities for the benefit of the licensee to be a "limited use" when to do so would circumvent environmental review. Such an interpretation would be contrary to the spirit and intent of GO 69-C as well as Section 851. It would also contravene CEQA's prohibition against "piecemealing." (C.f., San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus (1994), 27 Cal. App. 4th 713; CEQA Guidelines 15165.) The potential to circumvent environmental review by segmenting projects becomes of great concern when we are presented with a transaction that clearly articulates (as in this case) the intention to split the project into two parts, one governed by G.O. 69-C, and the other subject to Section 851 approval as a long-term lease.

¹⁶ Information filed by PG&E in response to a ruling of the Administrative Law Judge (ALJ) denying PG&E's motion for authorization to proceed with work pending our decision on this application indicates that PG&E has performed only temporary, preliminary activities on the site and IPN has performed no work pursuant to the revocable license.

approves both IP Net's application for full-facilities based authority, A.01-03-006 and the proposed construction activities, after additional CEQA review.¹⁷

Under these circumstances, we find it reasonable to approve in part the two agreements today, to permit IP Net to perform activities authorized by its limited-facilities based carrier status. We consolidate this docket with IP Net's application for full-facilities based carrier status, A.01-03-006, so that we may efficiently address the issues related to IP Net's proposed construction activities.

C. Ratemaking Considerations

PG&E requests the Commission to permit the division of license revenues that result from IP Net's use of PG&E's distribution property and facilities between shareholders and ratepayers on a 50%-50% basis pursuant to the interim revenue sharing mechanism for non-tariffed products and services (NTP&S) established in D. 99-04-021. PG&E acknowledges that it has historically accounted for license and lease revenues as above the line credits to ratepayers for Commission general rate cases purposes. However, PG&E contends that the division of license and lease revenues on a 50%-50% basis between shareholders and ratepayers would encourage utilities to use their property for productive purposes and would better serve the public interest.

ORA argues that since the interim NTP&S revenue-sharing mechanism applies only to new products and services, PG&E should treat license revenues as Other Operating Income (OOR).

¹⁷ Since we do not approve IP Net's performance of the construction activities today, IP Net must obtain subsequent authorization to perform these activities pursuant to Section 851.

We agree with ORA that the interim revenue sharing mechanism which allocates NTP&S revenues between PG&E shareholders and ratepayers on a 50%-50% basis applies only to new categories of products and services offered by PG&E.¹⁸ PG&E has acknowledged in this application that the license revenues to be received from IP Net fall within an existing NTP&S category under PG&E's Advice Letter 2063-G/1741-E. Under D.99-04-021, NTP&S revenues included within existing categories of products and services must continue to be treated as OOR.

We note that PG&E has raised the revenue sharing issue in A.00-09-002 and other previous proceedings. A.00-09-002, PG&E's Performance-Based Ratemaking (PBR) proceeding, has been suspended by the assigned Commissioner. However, as consistent with our previous decisions,¹⁹ we believe that the revenue sharing issue should be addressed on a policy basis in another broader proceeding, rather than in this case. We therefore defer consideration of this issue to a subsequent proceeding, such as a Commission rulemaking to be initiated in the future, as time and resources permit.²⁰ In the meantime, PG&E should continue to track revenue received from IP Net for the use of distribution property and facilities in the appropriate memorandum account.²¹

¹⁸ D.99-04-021.

¹⁹ See D.01-10-051 and D.02-04-005.

²⁰ PG&E and several other regulated utilities have also filed a Petition for Rulemaking, P.02-02-003, (February 4, 2002) which asks the Commission to address gain on sale and revenue sharing issues.

²¹ *Id.*

PG&E also contends that revenues received as a result of IP Net's use of PG&E transmission property and facilities should be divided between ratepayers and shareholders pursuant to a recent FERC order. We agree that under the particular circumstances of this case, PG&E may allocate revenue received from IP Net's use of transmission property and facilities according to applicable FERC orders and legal requirements.²² Other revenue received by PG&E based on IP Net's use of non-transmission facilities and property should be allocated as explained above, unless the Commission directs otherwise in a subsequent proceeding.

3. Discussion

Section 851 provides that no public utility "shall . . . encumber the whole or any part of . . . property necessary or useful in the performance of its duties to the public, . . . without first having secured from the Commission an order authorizing it to do so." Since the two irrevocable licenses proposed to be conveyed to IP Net would encumber PG&E property, we apply Section 851 in considering this application.²³

The primary question for the Commission in § 851 proceedings is whether the proposed transaction is adverse to the public interest. In reviewing a § 851 application, the Commission may "take such action, as a condition to the transfer, as the public interest may require."²⁴ The public interest is served when

²² D.02-01-058.

²³ D.01-08-069.

²⁴ D.3320, 10 CRRC 56, 63.

utility property is used for other productive purposes without interfering with the utility's operation or affecting service to utility customers.²⁵

We find that our approval of the two agreements and PG&E's conveyance of the irrevocable licenses to IP Net would serve the public interest. IP Net's activities will not interfere with PG&E's use of its property for utility purposes or with service to PG&E customers, and IP Net will use PG&E property and facilities in a manner consistent with legal requirements. PG&E's grant of the irrevocable licenses to IP Net will also serve the public interest by enabling PG&E to improve its internal utility communications and control systems and to thereby provide enhanced service to the public. IP Net's use of the PG&E property and facilities will also increase the availability of telecommunications services to the public. In addition, in appropriate cases, the shared use of utility property by energy utilities and telecommunications providers results in both economic and environmental benefits, by encouraging energy utilities to use their property productively and reducing the need for construction of new telecommunications project sites.²⁶

However, we are troubled by the emerging pattern of a utility licensing property under G.O. 69-C as a precursor to a planned application for a lease or other longer-term property transaction. Section 851 requires advance Commission approval of sales, leases, and other long-term transactions involving utility property.²⁷ Advance approval is the mechanism by which the Public

²⁵ D.00-07-010 at p. 6.

²⁶ D.94-06-017; D.92-07-007.

²⁷ D.01-03-064.

Utilities Code ensures that financial and other transactions do not occur until the Commission has reviewed and, if necessary, placed conditions on them.²⁸

Here, we are not faced with a situation in which the parties have performed construction pursuant to a revocable license and then requested our approval of a “done deal” under Section 851. Moreover, since the work performed by PG&E at the site prior to this decision required no environmental review, the parties have not used the revocable license as a means of avoiding CEQA requirements. Under these specific facts, we do not find that the parties violated Section 851 by entering into the revocable license pending our decision on this application. Our decision today is limited to the particular circumstances of this case.

As stated in our previous decisions,²⁹ we caution utilities that we will deny agreements which convert G.O. 69-C licenses to leases or other longer-term transactions in the future, when the structure of these transactions is designed to circumvent the advance approval requirements of Section 851 and CEQA.

4. Conclusion

For all of the foregoing reasons, we grant in part the application of PG&E pursuant to § 851, effective immediately, subject to the limitations stated above.

5. Final Categorization and Waiver of Review Period

Based on our review of this application, we conclude that there is no need to alter the preliminary determinations as to categorization and need for a hearing made in Resolution ALJ 176-3079 (January 9, 2002).

²⁸ D.00-12-006.

²⁹ See D.01-08-069, D.01-08-070, D.01-03-064, and D.00-12-006.

The parties have stipulated to a shortened time for review and comment of this decision pursuant to Rule 77.6(g).³⁰ The proposed decision was mailed and transmitted to the parties by facsimile on July 10, 2002, and the parties agreed to submit any comments to the Commission by no later than July 15, 2002.

Comments were received from both parties. We have incorporated ORA's suggestions for clarification of this decision, and have added footnote 20 to reflect the pending Petition for Rulemaking filed by PG&E and other parties (P.02-02-003).

Findings of Fact

1. IP Net's use of the affected PG&E property and facilities under the agreements will not interfere with PG&E's utility operations or service to PG&E customers.
2. The proposed agreements are structured as revocable licenses that will convert into master licenses and irrevocable rights to use (IRUs) PG&E property and facilities upon our approval of this application.
3. The Commission is the Lead Agency for this project under CEQA.
4. The preliminary work performed by PG&E on the site before our approval of this application was either temporary or was undertaken to allow the interconnection of existing fiber from the tower to PG&E's communication room.
5. IP Net currently has a CPCN to operate as a limited-facilities based carrier in California.

³⁰ All Rule citations are to the Commission Rules of Practice and Procedure unless otherwise stated.

6. IP Net's application for full-facilities based authority, A. 01-03-006, is presently pending, and the Commission is currently performing CEQA review of the application as the Lead Agency.

7. Limited-facilities based CPCN's have generally allowed companies to lease existing facilities, install switches in existing buildings, and to install fiber in existing conduit without triggering a new project that requires CEQA review.

8. As a limited-facilities based carrier, IP Net may not perform the construction activities contemplated in the two agreements, such as the installation of equipment stations and construction of a network operations center on PG&E property, until additional CEQA review is completed, and IP Net has obtained our approval of its application for full-facilities based carrier status and the proposed construction activities.

9. License revenues to be received by PG&E based on the license of distribution property and facilities to IP Net under the agreements fall within an existing NTP&S category.

10. Approval of the agreements will enable PG&E to obtain additional fiber optic capacity to expand its utility communications and control system in a cost-effective manner and IP Net to expand its broadband telecommunications network and thereby to offer increased telecommunications services.

11. In appropriate cases, the shared use of utility property by energy utilities and telecommunications providers results in both economic and environmental benefits, by encouraging energy utilities to use their property productively and reducing the need for construction of project sites by telecommunications providers.

12. There is no need to alter the preliminary determinations made as to categorization of this proceeding and the need for a hearing made in Resolution ALJ 176-3079 (January 9, 2002).

Conclusions of Law

1. Based on the specific facts of this case, the parties have not violated CEQA or Section 851 by entering into the revocable licenses pursuant to G.O. 69-C pending approval of this application.

2. The preliminary work performed on the site by PG&E pending approval of this application did not require a discretionary decision by the Commission under CEQA.

3. The work that IP Net may immediately perform pursuant to our partial approval of agreements today does not require CEQA review.

4. PG&E must treat license revenues that result from IP Net's use of PG&E's non-transmission facilities and property as OOR pursuant to D. 99-04-021, and must track these funds in an appropriate memorandum account.

5. PG&E should allocate revenues received from IP Net based on the license of transmission property according to the applicable FERC orders and legal requirements.

6. Approval of the two agreements in part, subject to the conditions stated in this decision, serves the public interest.

O R D E R

IT IS ORDERED that:

1. The two master license and irrevocable right to use agreements (the agreements) between Pacific Gas and Electric Company (PG&E) and I.P. Networks, Inc. (IP Net), as described in Exhibits A and B to the application, are approved in part today, subject to the limitations set forth below.

2. When the final agreements are executed, PG&E shall submit a copy by advice letter within sixty (60) days of this order.

3. Our approval of the agreements is limited to permit IP Net to perform only those activities authorized by its limited-facilities based certificate of public convenience and necessity (CPCN), until the Commission has approved IP Net's application for full-facilities based authority, Application (A.) 01-03-006 and has completed environmental review of that application, and has approved IP Net's proposed construction activities pursuant to Pub. Util. Code § 851.

4. IP Net may not perform construction activities including the installation of equipment stations and the construction of a network operations center, on PG&E property, under the agreements as approved today.

5. This docket is consolidated with A.01-03-006 so that the Commission may consider IP Net's proposed construction activities pursuant to Section 851, together with IP Net's application for full-facilities based authority.

6. PG&E shall allocate license revenues that result from IP Net's use of PG&E's non-transmission property and facilities to Other Operating Revenue and shall track these revenues in an appropriate memorandum account, unless the Commission directs otherwise in a future proceeding related to revenue sharing issues.

7. PG&E shall allocate license revenues that result from IP Net's use of PG&E's transmission property and facilities according to the applicable Federal Energy Regulatory Commission orders and legal requirements.

8. This order is effective today in order to allow the parties to implement the agreements expeditiously.

This order is effective today.

Dated July 17, 2002, at San Francisco, California.

LORETTA M. LYNCH

President
HENRY M. DUQUE
CARL W. WOOD
GEOFFREY F. BROWN
MICHAEL R. PEEVEY
Commissioners