Decision 06-10-027 October 19, 2006

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

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 00-03-001 (Filed March 2, 2000)

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OPINION APPROVING SETTLEMENT

In this decision, we approve a Settlement Agreement and Release (settlement agreement) in this matter entered into between Qwest Communications Corporation and certain of its subsidiaries (Qwest), on the one hand, and the Commission's Consumer Protection and Safety Division (CPSD), on the other. The settlement agreement is appended to this decision as Attachment A. Under the settlement agreement, in exchange for CPSD's agreement to release Qwest from all claims that were asserted or could have been asserted in Investigation (I.) 00-03-001, Qwest will pay $150,000 to the State's General Fund. In addition, Qwest agrees to contribute $30,000 to be distributed at Qwest's election among three groups that promote awareness of Native American sites, archaeology and history within California. Finally, Qwest agrees to (1) continue abiding by the "cultural resource protocols" it entered into with CPSD's predecessor on February 16, 2000, (2) conduct a refresher course in these protocols for all of its California construction employees within six months after approval of the settlement, and (3) offer training on the protocols within the same time frame to any construction contractors Qwest is using in California.

Even though the Salinan Nation Cultural Preservation Association (Salinan Nation or SNCPA), an intervenor in this proceeding, does not join in the proposed settlement, it does not formally oppose the settlement, either. Because we conclude that the settlement agreement is reasonable in light of the whole record, consistent with law, and in the public interest – and thus satisfies the standard for approving settlements set forth in Rule 12.1(d) of our Rules of Practice and Procedure – we will approve the proposed settlement agreement.

A. Background

1. The Allegations in the Order Instituting Investigation (OII)

This proceeding arises out of events that occurred during the Fall of 1999, when Qwest was constructing a fiber-optic network in California. The OII alleged that in carrying out the planning and construction for this project, Qwest had not complied with the Negative Declaration included in Decision (D.) 97-09-011, the decision that granted authority for the project. The OII noted that the Negative Declaration required the applicable Qwest subsidiary to "conduct appropriate data research for known cultural resources in the project area, and avoid such resources in the designing and construction of the project." Instead of conducting such research -- which the OII stated was "the accepted starting point to determine whether a potential project route will destroy or adversely impact a known cultural resource area" -- the OII alleged that Qwest had ignored the requirement:

> "It appears from staff's investigation that in December 1999, Qwest was proceeding with its project in areas of Los Angeles, Santa Clara and San Luis Obispo counties without having conducted the appropriate data research in order to ensure that cultural resources are not destroyed or adversely impacted. It was brought to staff's attention by the Native American Heritage Commission (NAHC) personnel that one of Qwest's construction crews was trenching toward a cultural resource area, and that the utility had not checked with the NAHC about cultural resource area locations." (OII, p. 3.)

The OII continued that in response to this information, "a 'stop work' order was issued by the [Commission's] Energy Division on December 16, 1999, directing Qwest to halt construction until further notice."[1]

The OII noted that design or construction by a utility "that proceeds without having conducted data research for known cultural resources violates Commission requirements," and that a "utility that does not do the required research during the design phase of a project, stands in violation of [these] requirements." (*Id.* at 4.) The OII placed Qwest on notice that the Commission staff's investigation of the alleged violations was continuing, that each violation could subject Qwest to sanctions ranging from $500 to $20,000, and that "the quantification of violations will be advanced by staff at the time its investigative activity is complete and its additional reports or declarations are distributed." (*Id.* at p. 5.) The OII also directed the assigned Administrative Law Judge (ALJ) to hold a prehearing conference (PHC) in the proceeding within 40 days for the purpose of establishing a hearing schedule, handling discovery matters, and determining whether the scope of the proceeding would be limited

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[1] Although the OII does not say so, the Stop Work Order was lifted on February 17, 2000, the day after Qwest agreed to abide by the Qwest Fiber Optic Project Cultural Resource Protocols (cultural resource protocols). In its Statement of the Case, the Settlement Agreement and Release says the following about the development of these protocols:

> "[O]n December 16, 1999, the Commission's Energy Division issued a 'Stop Work' notice, directing Qwest to halt its construction activities until further notice. Qwest immediately halted work and began drafting cultural resource protocols which were reviewed by the Commission and the Native American Heritage Commission. The Stop Work notice was lifted on February 17, 2000, the day after [the cultural resource protocols] were finalized."

to "the design and construction in Santa Clara, San Luis Obispo, and Los Angeles counties only or activity in other localities of . . . California."

2. The First and Second Prehearing Conferences and the Extension Order

Because of scheduling constraints, the first PHC in this matter was not held until May 4, 2000. At the PHC, counsel for applicable staff, the Commission's Consumer Services Division (CSD), stated that CSD would not be able to develop its case on the merits, or to evaluate any settlement proposals, without the assistance of an expert archaeologist. Counsel for CSD also stated that CSD did not expect to able to enter into a contract for the services of an archaeologist until after the beginning of the fiscal year on July 1, 2000.

A second PHC was held on January 24, 2001. At that PHC, counsel for CSD stated that it was not until December 2000 that CSD had secured authorization for the services of an expert archaeologist, Dr. Terry Jones. CSD counsel also stated that Dr. Jones was still conducting his preliminary assessment of the scope of the work.

During the second PHC, CSD and Qwest also disagreed over the scope of Dr. Jones's work. CSD stated its belief that it was charged with investigating all of the construction work undertaken by Qwest from the Fall of 1997 until the stop-work order issued by the Commission on December 16, 1999. Qwest, on the other hand, asserted that the investigation contemplated by the OII was limited to the construction and trenching work undertaken by Qwest in the City of San Jose, San Luis Obispo County, and possibly the City of Los Angeles. Both parties agreed that a threshold issue in the event hearings were held would be whether CSD had the burden of proving that the work at issue took place under the certificate of public convenience and necessity (CPCN) Qwest acquired pursuant to its merger with LCI International Telecom Corp. (a CPCN containing

conditions under the California Environmental Quality Act (CEQA) that Qwest's work in San Jose and San Luis Obispo County admittedly did not comply with), or whether it should be presumed that the construction work took place under a CPCN granted to Qwest's predecessor, Southern Pacific Telecommunications Company (which did not contain CEQA conditions that Qwest was alleged to have violated).

After further discussion at the January 24 PHC, Qwest and CSD agreed that it was appropriate for them to take two more months to conduct additional discovery and attempt to resolve their differences over the scope of the proceeding. They also agreed with the ALJ's suggestion that they should submit detailed status reports on March 15, 2001 outlining how they proposed to proceed.

Because it was obvious at the second PHC that the proceeding could not be completed within the 12-month deadline for adjudication matters set forth in Pub. Util. Code § 1701.2(d), the Commission issued D.01-02-067 on February 22, 2001. This decision directed the ALJ to set a new schedule for the proceeding once the status reports had been submitted, and extended the 12-month deadline "until further order."

3. The 2001 Status Reports and Briefs

On March 15, 2001, both CSD and Qwest submitted status reports summarizing their discovery and setting forth proposals for how the case should proceed. In a ruling issued on April 17, 2001,[2] the ALJ noted that both parties

[2] Administrative Law Judge's Ruling Setting Briefing Schedule, issued April 17, 2001 (hereinafter referred to as the "April 17, 2001 Ruling").

had agreed that a threshold issue was which of three CPCNs was applicable to the trenching activity at issue:

> "According to [Qwest Communications Corporation, or QCC], it is one of three subsidiaries of Qwest Communications International, Inc. (Qwest Inc.) that hold CPCNs from this Commission. The other two are LCI International Telecom Corp. (LCI) and USLD Communications (USLD). LCI and USLD, both of which Qwest Inc. acquired in 1998, are subject to pre-construction conditions imposed by a Commission-adopted negative declaration. QCC, which was originally known as Southern Pacific Telecommunications Company, obtained its CPCN in 1994 and is apparently not subject to such conditions. According to QCC's March 15 status report, all of the construction at issue in this case took place under QCC's certificate, and was conducted by the construction organization that QCC had in place prior to the 1998 transfer of control of USLD and LCI to Qwest Inc. Since no pre-construction conditions were applicable to QCC, and since Decision (D.) 98-06-001 (the decision approving transfer of control of LCI and USLD to Qwest Inc.) apparently did not subject QCC to the same conditions as LCI and USLD, QCC intends to argue that no violation of any Commission decision, order or rule occurred as a result of its activities." (April 17, 2001 Ruling, p. 2; footnote omitted.)

In the April 17, 2001 ruling, the ALJ agreed that it made sense for the parties to brief this threshold issue, and he directed them to submit opening and reply briefs on these issues in June 2001.

4. The Period from June 2001 to August 2003

Owing to the press of other business, especially the additional workload created by the California energy crisis, no ruling was issued during 2001 or 2002 on the questions briefed by the parties in June 2001.

In the summer of 2003, the assigned ALJ sent the parties several e-mail messages inquiring whether it made sense to discuss a settlement of the case in view of the amount of time that had elapsed since issuance of the OII.

On August 5, 2003, the ALJ convened a third PHC for the purpose of discussing these issues. Counsel for the CPSD, successor to CSD, stated that although CPSD was willing to explore the possibility of a settlement with Qwest, such efforts would be hampered by the lack of a ruling on the issues briefed in June 2001:

> "Basically because . . . we have still not had a ruling on that jurisdictional issue, which we all believe[d] was a threshold issue[, w]e don't know the facts yet. And . . . we don't know the law.
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> "Since we do not know whether you were going to rule on jurisdiction or not, . . . we have not had our consultant work up the facts, therefore we don't know the facts. And not knowing the law and the facts, it is really not very wise to go to a settlement." (PHC Tr. at 72.)

Despite those misgivings, CPSD's counsel agreed to explore the possibility of a settlement with Qwest. The ALJ then set October 1, 2003 as the date for a follow-up PHC to consider whether the settlement discussions had borne any fruit.

5. The Renewal of the Parties' Jurisdictional Motion and the October 8, 2003 PHC

Before the follow-up PHC was held, CPSD and the Salinan Nation filed a joint motion on September 19, 2003, renewing their request for a ruling on what they characterized as threshold "jurisdictional" issues. In their motion, CPSD and the Salinans asserted that because the ALJ had not yet ruled on these questions, "CPSD cannot determine what is an appropriate settlement position, nor can it determine the scope of the investigation it should undertake to arrive

at a settlement position." Thus, the moving parties continued, the ALJ's failure to rule was "obstructing this proceeding," and the full Commission should decide the jurisdictional issues so that "the factual evidence can be evaluated and the matter brought to hearing or to the settlement table as expeditiously as possible." (September 19, 2003 Motion, pp. 4-5.)

The follow-up PHC was held on October 8, 2003. At the PHC, the ALJ took note of the joint motion and said that no decision had yet been made on whether the motion would be disposed of through a Commission decision or an assigned Commissioner's ruling. The ALJ also noted CPSD's representation that its expert archaeologist, Dr. Terry Jones, was no longer available, and that a request-for-proposal (RFP) process would be necessary to hire a new archaeologist, which could take four to six months. Qwest's counsel argued that his client was being prejudiced by the delay in the case, because (1) Qwest had largely dismantled its California construction organization, and (2) many of the people involved in the events that gave rise to the OII had left the company. The ALJ responded that the concerns raised by Qwest were commonly encountered in litigation, and that Qwest should take steps to deal with the alleged prejudice. (PHC Tr. at 89-90.)

The PHC closed with the ALJ's observation that the parties should expect to attend another PHC in about six months, after the September 19, 2003 joint motion had been ruled upon and after CPSD had hired another consultant through the RFP process. (*Id.* at 94.) In the meantime, the ALJ suggested, CPSD could pursue discovery on issues that did not require an archaeological consultant, such as how Qwest claimed to acquire construction authority when it used an advice letter process to convert the authority granted in D.93-10-018 to

operate as a switchless reseller into authority to operate as a facilities-based provider. (*Id.* at 81.)

6. The Joint Ruling on the Motion of CPSD and the Salinan Nation Concerning "Jurisdictional" Issues

On December 30, 2003, a joint ruling was issued by Assigned Commissioner Lynch and the ALJ concerning the "jurisdictional" issues first briefed in 2001 and raised again in the September 19, 2003 joint motion.[3] Despite the parties' characterization of these issues as "threshold," the Joint Ruling concluded it was not possible to decide the questions as framed. With respect to CPSD's position that Qwest had conceded at a December 21, 1999 meeting that all of the construction at issue had taken place under the authority granted in D.97-09-110 -- which contained a Mitigated Negative Declaration (MND) that covered "known cultural resources," and with which Qwest had admittedly not complied -- the Joint Ruling concluded that the nature of any concessions made at the meeting was ambiguous. With respect to Qwest's contention that it acquired authority to construct facilities through the advice letter process used in 1994 to convert the authority granted in D.93-10-018 into authority to offer facilities-based services, the Joint Ruling concluded that Qwest had failed to prove that the Commission deemed the advice letter conversion process to include the authority to construct facilities.

[3] Joint Assigned Commissioner's and Administrative Law Judge's Ruling Concerning Joint Motion by the Consumer Protection and Safety Division and the Salinan Nation Regarding "Jurisdictional" Issues, issued December 30, 2003 (hereinafter referred to as the "Joint Ruling" or the "December 30, 2003 Joint Ruling").

Regarding the December 21, 1999 meeting, the Joint Ruling noted that the declarations submitted by Commission attorney Peter Allen and Qwest attorney Mary Wand gave sharply differing accounts of the meeting, and that resolving these differences would likely require a hearing:

> "[E]ven if any admissions made by Qwest's attorneys at the December 21 meeting could be considered determinative of the issue before us, the declarations of Mr. Allen and Ms. Wand essentially talk past each other. Not only do they disagree on the key question of whether Qwest's attorneys specified at the meeting the authority under which Qwest was constructing, but neither declaration is accompanied by any notes or other form of corroboration. Under these circumstances, it would be difficult to determine with any certainty what was said at the December 21, 1999 meeting without having both Mr. Allen and Ms. Wand available for cross-examination." (December 30, 2003 Joint Ruling, p. 8.)

Regarding Qwest's claim that it had acquired authority to construct by virtue of the advice letter used to convert the authority granted in D.93-10-018 into authority to operate as a facilities-based reseller, the Joint Ruling also found the proof wanting. The Joint Ruling noted that "although Qwest has provided the May 23, 1994 advice letter by which the CPCN granted to [Southern Pacific Telecommunications Company] in D.93-10-018 was converted into authority to act as a facilities-based reseller of interLATA services . . ., this advice letter does not indicate on its face that the enlarged authority being sought included any authority to construct facilities." Instead, the Joint Ruling stated, "the question of authority to construct facilities is not addressed in the advice letter . . ." (*Id.* at 7.)

The Joint Ruling continued that while Qwest's claim of authority to construct under the 1994 advice letter was consistent with the history of construction activity in California set forth in the declaration of Qwest vice

president Jack Shives, "the fact remains that QCC has offered no proof that in the period before 1999, the Commission considered facilities-based resale authority obtained through the advice letter process to be sufficient to authorize construction." The Joint Ruling concluded that such a showing would be crucial,

> ". . . because the amount of construction activity carried out by telecommunications companies increased significantly after the Commission decided in 1995 to authorize local exchange competition . . . Recognizing that facilities-based local exchange competition was likely to require much more construction than was necessary for facilities-based interexchange competition (which required mainly a switch), Rule 4.C.(2) of the rules adopted in D.95-07-054 required competitive local carriers to 'comply with CEQA as specified in Rule 17.1 of the Commission's Rules of Practice and Procedure.'" (*Id.* at 9; citations omitted.)

Because of the deficiencies in proof offered by both CPSD and Qwest, the Joint Ruling concluded not only that their respective arguments must be rejected, but that "we believe more briefing and factual development of these issues will be necessary to resolve them." (*Id.* at 3.)

7. The March 10, 2004 PHC and Resulting Procedural Schedule

In keeping with the plan he had announced at the October 8, 2003 PHC, the ALJ convened a fifth PHC on March 10, 2004. He also issued a ruling requiring the parties to submit PHC statements.[4]

[4] Administrative Law Judge's Ruling Directing Filing of Prehearing Conference Statements, issued March 2, 2004.

At the PHC, the ALJ began by noting that the December 30, 2003 Joint Ruling made clear that both CPSD and Qwest still had a significant amount of work to do in the case, and that he hoped the outcome of the PHC would be a workable schedule for bringing the proceeding to a conclusion. Before addressing scheduling issues, however, the ALJ noted with concern some issues raised in the PHC statements of both Qwest and CPSD.

The ALJ's first concern was that Qwest had raised for the first time in its March 8, 2004 PHC Statement the defense that the Commission lacked subject matter jurisdiction over the construction at issue, because this construction related to interstate telecommunications facilities. In its PHC Statement, Qwest described the new defense as follows:

> "It is well settled that the Commission lacks subject matter jurisdiction over interstate telecommunications facilities and that such facilities are subject to the exclusive jurisdiction of the Federal Communications Commission (FCC). *See Phoenix FiberLink v. Electric Lightwave, Inc.*, D.94-07-028, . . . (holding that an NDIEC does not violate California law by engaging in construction in California for the purpose of providing interstate service under authority granted by the FCC pursuant to Section 214 of the federal Telecommunications Act [47 U.S.C. § 214]). Qwest's 1999 construction involved interstate backbone and 'rings' serving the same function as those the Commission held not to be subject to its jurisdiction in *Phoenix FiberLink*. Qwest's situation is indistinguishable from *Phoenix FiberLink*." (Qwest PHC Statement, p. 2.)

The ALJ noted that *Phoenix FiberLink*, which was issued in 1994, had never been cited again at the Commission, so it was not clear that the case continued to be good law. In any event, the ALJ continued, it appeared that under the federal regulations cited in *Phoenix FiberLink*, Qwest would have to offer proof on several issues in order to prevail on the interstate facilities defense,

including proof that Qwest had complied with the FCC's environmental regulations:

> ". . . Qwest couldn't prevail on this defense without showing that it was in full compliance with whatever environmental rules the FCC had in effect . . . [I]t strikes me as entirely possible [these rules] would also deal with the protection of cultural resources, meaning such things as Native American sites.
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> "So [to recap,] I think in order to prevail on this subject matter defense, . . . Qwest would have to show that the facilities . . . at the time in issue [were] considered interstate[,] and that it had complied with the FCC's environmental regulations and that presumes, of course, that indeed [Qwest] still had this authority to construct.
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> "If there no longer was a blanket authority to construct owing to the intervening passage of the 1996 Telecommunications Act or something else, then Qwest is going to have to demonstrate something else to prevail on this kind of a defense." (PHC Transcript, p. 109.)

The ALJ also expressed concern with some of the positions taken in CPSD's PHC statement. First, the ALJ questioned why, in light of the December 30, 2003 Joint Ruling and the fact the OII had referred only to Qwest construction activity in San Jose, San Luis Obispo and Los Angeles, CPSD was now claiming that it needed a statewide archaeological study. Second, after noting CPSD's assertions that (1) a statewide study would cost $100,000, (2) such a sum was beyond CPSD's budget, and (3) CPSD was therefore seeking an order directing Qwest to pay for the study, the ALJ expressed concern that CPSD had cited no authority showing that the Commission had the power to order an adverse party to pay for such a study. (PHC Tr. at 118.) Finally, the ALJ expressed concern about what seemed to be CPSD's position that Qwest could

not rely even upon a facially-valid grant of authority to construct. (*Id.* at 120-121.)

The ALJ then pointed out to both parties that if a two-phase approach to hearings in the case were adopted, some of these difficult issues (such as CPSD's budget constraints) were likely to be reduced or eliminated. The ALJ therefore proposed that in the first phase of hearings, the parties try the two major issues going to liability; *viz.*, (1) whether the advice letter process used to convert the CPCN issued in D.93-10-018 into facilities-based authority conferred on Qwest any authority to construct facilities, and (2) in the alternative, whether the Commission lacked jurisdiction over the Qwest construction because it related to interstate facilities built pursuant to a grant of FCC authority under 47 U.S.C. § 214. (*Id.* at 127-129.)

Assuming Qwest was unsuccessful in proving either of these things, the ALJ proposed a second phase of hearings in which the issue would be the appropriate penalties for Qwest's work in the absence of construction authority. During the second phase, Qwest would be free to present evidence of mitigating factors, such as good-faith reliance on erroneous staff advice that Qwest possessed the necessary construction authority. (*Id.* at 132.) The ALJ indicated that he would allow Qwest a reasonable amount of discovery on these issues, but that Qwest would first have to present a discovery plan, including a demonstration that it had exhausted less intrusive means of gathering the facts (such as interviewing its own prior attorneys). (*Id.* at 130-31, 138-40.)

After an extensive off-the-record discussion, the following schedule was agreed upon for the first phase of hearings:

July 16, 2004	Qwest serves testimony on issues of (1) its authority to construct under Commission decisions, and (2) whether Qwest's facilities are exempt from Commission jurisdiction under 47 U.S.C. § 214.
September 1, 2004	CPSD serves testimony on above-noted issues.
September 17, 2004	Qwest may serve optional rebuttal testimony on above issues.
September 27-October 1, 2004	Hearings on above-noted issues.

8. Qwest's New Counsel, Its Motion to Dismiss and Related Motions, and the July 29, 2004 PHC

On April 1, 2004, Qwest gave notice that it had retained new counsel in this proceeding. On June 29, 2004, Qwest's new counsel filed a series of four motions going to the validity of the underlying proceeding. The first was a motion to dismiss, which is discussed in more detail below. The second was a motion to vacate the procedural schedule adopted at the March 10, 2004 PHC. The third was a motion to refer the entire proceeding to mediation, and the fourth was a motion requesting the preparation of a final scoping memo, including a precise definition of the scope of the proceeding.

On July 12, 2004, the assigned ALJ issued a ruling suspending the July 16 due date for Qwest's testimony on issues assigned to the first phase of the

proceeding and convening a PHC on July 29, 2004.[5] Although noting that many of the claims in Qwest's motion to vacate the procedural schedule seemed exaggerated, the ALJ agreed that a delay was appropriate due to the other hearing commitments of Qwest's new lead counsel, Mark Fogelman. After pointing out that Fogelman was expected to be occupied with hearings in other Commission matters through the due date, the ALJ agreed that these commitments were likely to preclude Fogelman's "full and effective" participation in preparing testimony, and that Fogelman's limited availability might adversely impact Qwest's ability to present its case.

The PHC was held as scheduled on July 29, 2004. As the first order of business, the ALJ presented his preliminary reactions to the series of four motions Qwest had filed on June 29.[6] With respect to the argument in Qwest's motion to dismiss that the order under extending the one-year deadline for the proceeding pursuant to Pub. Util. Code § 1701.2(d) was invalid, the ALJ rejected the argument, noting that the Commission's extension order (D.01-02-067) met all of the statutory requirements. (PHC Tr. at 154-55.)

The ALJ also found little merit in Qwest's alternative argument that the proceeding should be dismissed because of the prejudice Qwest had allegedly suffered due to the amount of time that had elapsed since issuance of the OII.

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[5] Administrative Law Judge's Ruling Suspending Due Date for Testimony and Convening Prehearing Conference, issued July 14, 2004. The ruling notes that its text was e-mailed to the parties on July 12, followed up by a written version of the ruling mailed on July 14, 2004.

[6] The ALJ noted that since the July 12, 2004 ruling, Qwest had also filed a motion to compel responses to data requests, but that the motion to compel would not be addressed at the PHC.

Qwest's argument was based upon the concept of administrative laches, as articulated in *Fountain Valley Regional Hospital and Medical Center v. Bonta*, 75 Cal.App.4th 316 (1999). In that case, the Second District Court of Appeal held that in an administrative action growing out of an attempt by the State Department of Health Services to recover Medi-Cal payments erroneously made to a hospital, the Department Director would have the burden of proving that the hospital had not suffered prejudice as a result of the Department's 10-year delay in seeking to collect the overpayments. In *Fountain Valley*, the Court described the concept of administrative laches as follows:

> "[T]he element of prejudice may be 'presumed' if there exists a statute of limitations which is sufficiently analogous to the facts of the case, and the period of such statute of limitations has been exceeded by the public administrative agency in making its claim. In [this] situation, the limitations period is 'borrowed' from the analogous statute, and the burden of proof shifts to the administrative agency. To defeat a finding of laches the agency . . . must then (1) show that the delay involved in the case . . . was excusable, and (2) rebut the presumption that such delay resulted in prejudice to the opposing party." (75 Cal.App.4th at 324.)

Although recognizing the authority of *Fountain Valley*, the ALJ stated that he agreed with CPSD that the facts of this proceeding were closer to those in *Fahmy v. Medical Board of California,* 38 Cal.App.4th 810 (1995), in which the Court of Appeal rejected a laches argument and held it was not unreasonable for the State Medical Board to have investigated a case for three years before bringing gross negligence charges against a doctor who had failed to diagnose and treat an ectopic pregnancy. In holding that the trial court should not have presumed prejudice, the *Fahmy* court cautioned against assuming that a particular statute of

limitations applies to administrative actions where the Legislature has not seen fit to impose one.[7]

In this case, the ALJ continued, it appeared there had been very little delay, since the OII issued in March 2000 was concerned with construction activity undertaken by Qwest after 1997. Further, Qwest had retained an archaeologist no later than June 2000 to assess possible damage caused by its construction. Under these circumstances, the ALJ continued, since none of the possible limitations periods suggested by Qwest clearly applied to the Commission's investigation, prejudice to Qwest could not be presumed, and dismissal of the proceeding was not warranted. (PHC Tr. at 155-159.)

Finally, the ALJ reviewed what was stated at the March 10, 2004 PHC about the scope of testimony expected from Qwest in the first phase of the

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[7] In this connection, the *Fahmy* Court said:

> "The trial court's determination that a three-year delay is unreasonable as a matter of law flies in the face of the Legislature's informed refusal to impose a statute of limitations on physician disciplinary proceedings. The Legislature has seen fit to impose a limitation on actions in other administrative disciplinary settings . . . The [Medical Judicial Procedure Improvement Act] noticeably lacks a statute of limitations. The Legislature is presumably aware that there are statutes limiting the right to bring action in other, arguably analogous situations. Yet the Legislature chose not to impose any limitation on the Medical Board in this precise situation.
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> "It is important to remember that 'a statute of limitations may not be created by judicial fiat,' . . . and that limitations periods 'are products of legislative authority and control.' . . . By focusing solely on the passage of time, and not on the issue of disadvantage and prejudice, a court risks imposing a de facto – and impermissible – statute of limitations where the Legislature chose not to create a limitation on actions." (38 Cal.App.4th at 815-16; citations omitted.)

hearings. Based on this, the ALJ rejected the argument that the scope of the testimony expected from Qwest in the first phase of hearings was ambiguous. (*Id.* at 161-62.)

Following the ALJ's comments, Qwest counsel Fogelman reiterated his concerns about the alleged vagueness of the proceeding. While acknowledging that the statements on scope made at the March 10 PHC seemed clear, Fogelman insisted that ambiguity remained that the Commission needed to address. He also accepted the ALJ's invitation to submit, by August 10, 2004, a reply brief in support of his motions. (*Id.* at 163-170.)[8]

The final points discussed at the PHC were the question of archaeological reports and settlement. CPSD's counsel stated that the Commission had retained a new consultant, Dr. Mark Basgall, for the purpose of assessing any damage that might have been caused by Qwest's construction, and that Dr. Basgall's report was expected in September. Qwest noted that its archaeological consultant, Cynthia Arrington, had also completed a preliminary report, and that her report had just been made available to CPSD. The ALJ urged the parties to consider a settlement after reviewing these reports, and said that if necessary, he would set new due dates for testimony after receiving the reply and surreply briefs. (*Id.* at 175-79.)

[8] The ALJ also granted CPSD's request to submit a surreply by August 20, 2004.

9. The Archeological Reports and Discovery Thereon

The preparation of Dr. Basgall's report took somewhat longer than anticipated. It was completed at the end of October 2004 and immediately made available on a confidential basis to Qwest and the assigned ALJ.[9]

Dr. Basgall's report was prepared under the auspices of the Archaeological Research Center (ARC) at Sacramento State University and was concerned with sites in Santa Clara and San Luis Obispo Counties. The ARC Report was based upon a thorough literature review, supplemented by visits to five sites. Based on material developed by Qwest after it agreed to the cultural resource protocols signed in February 2000, the parties agreed that there were 240 resources for the two counties shown on the record search maps, but that only 33 of these were deemed close enough to Qwest's right-of-way to be considered potentially at risk. Of these 33 resources, 12 were located in Santa Clara County, and 21 in San Luis Obispo County.

Based on the document research and five site visits, Dr. Basgall and his colleagues determined that there had been a potential impact from Qwest's work to one site in Santa Clara County, and to four sites in San Luis Obispo County. With respect to one of the San Luis Obispo County sites, the ARC Report concluded that it was likely Qwest's construction work had had an adverse impact.

In addition to its assessment of the impacts of Qwest's construction work, the ARC Report also contained a critique of the archaeological report

[9] Although the report was not formally filed, CPSD counsel requested that Qwest and the ALJ treat it as confidential, owing to the sensitivity of information about the location of the cultural resources.

prepared by Cynthia Arrington, Qwest's consultant. The critique consisted of letters from four "peer reviewers" not associated with ARC. In varying degrees the peer reviewers were critical of the methodologies used by Arrington.

On January 31, 2005, counsel for Qwest requested seven deposition subpoenas from the Chief ALJ, which were served upon the three authors of the ARC Report along with the four peer reviewers. On February 4, 2005, CPSD filed a motion to quash the subpoenas and stay the depositions (or in the alternative, to allow only limited depositions).[10] In its motion, CPSD noted that the ARC report had been available to Qwest for three months, yet Qwest had not availed itself of the opportunity to conduct discovery on the report through interrogatories. CPSD argued that the proposed depositions were not only burdensome, but also unnecessary prior to the second phase of hearings, which – if it was necessary to hold them -- would deal with the issue of damage to archaeological sites and the appropriate penalties for such damage.

Pursuant to a directive from the ALJ, Qwest filed an expedited response to the CPSD motion to quash on February 10, 2005. In its response, Qwest argued that under Commission precedent, it was entitled to take depositions unless CPSD could show that the burden, expense and intrusiveness of depositions outweighed the likelihood they would lead to admissible evidence. Qwest continued that in view of the unfavorable contents of the ARC Report and the four peer reviewers' letters, its right to depositions in this proceeding could not reasonably be questioned.

[10] On the same date, CPSD also filed a motion requesting the ALJ to set a new hearing schedule for the proceeding, using the two-phased approach agreed to at the March 10, 2004 PHC.

During a series of conference calls held on February 11, 15 and 16, 2005, the ALJ ruled that all seven of the requested depositions would be allowed, but that (1) Qwest would have to pay the normal hourly fees of the witnesses for both deposition and travel time, (2) Qwest would have to pay the cost of providing a transcript of each deposition to CPSD, (3) each deposition would have to be concluded on the same day it began, and (4) the depositions would have to be scheduled to accommodate the witnesses' work schedules.[11] Pursuant to a schedule worked out between counsel for Qwest and CPSD, all of the depositions were held in Sacramento, California on February 22 and 23, 2005.

On March 10, 2005, counsel for Qwest requested that it be allowed to make a rebuttal submission in support of the Arrington report. The ALJ granted the request, and on March 25, 2005, Qwest submitted a three-volume reply to the ARC Report.[12] In its reply, Qwest argued that (1) the ARC Report's attacks on the Arrington Report were unjustified, because the latter was prepared in response to a CPSD data response and was never intended to be a full, academic-quality archaeological report, (2) Qwest in fact possessed documentation relevant to the sites in Santa Clara and San Luis Obispo Counties that the ARC Report had asserted were missing, (3) the peer reviewers did not understand the limited purpose of the Arrington Report, (4) the authors of the ARC Report did not understand that Qwest's construction methods were less intrusive than those of

[11] The ALJ's oral rulings on these issues were memorialized in a written ruling entitled Administrative Law Judge's Ruling Denying Motion to Quash Subpoenas and Granting Protective Order In Connection With Archaeologists' Depositions, issued March 4, 2005.

[12] Like the ARC Report, Qwest's March 25 reply was not submitted as part of the formal record in this proceeding. However, Qwest asked that the reply be treated as confidential under General Order 66-C and Pub. Util. Code § 583.

its competitors, and (5) despite all of its criticisms, the ARC Report did not conclude or demonstrate that Qwest's construction activities had caused any actual damage to the sites studied in the two counties.[13]

10. The Settlement Negotiations and Settlement Agreement

Late in the spring of 2005, CPSD, Qwest, and the Salinan Nation began negotiations to explore whether all of the issues in the proceeding could be settled. During the summer of 2005, after a temporary impasse was reached, CPSD and Qwest agreed to continue holding settlement discussions without the Salinan representatives. At a PHC that took place on December 19, 2005, Qwest and CPSD reported that they were making progress in their discussions.

On January 27, 2006, counsel for CPSD and Qwest informed the ALJ that they had reached a settlement in principle. On May 30, 2006, Qwest and CPSD filed the settlement agreement appended to this decision as Attachment A, along with a motion for its approval.

As noted in the introduction, the terms of the proposed settlement are relatively simple and straight-forward. Qwest agrees to pay $150,000 to the State's General Fund, and an additional $30,000 to be distributed at Qwest's election among one or more of three groups that promote awareness of Native American history and archaeology in California.[14] In addition, Qwest agrees to (1) continue abiding by the cultural resource protocols it entered into on

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[13] On April 27, 2005, CPSD took the deposition of Qwest's archaeological consultant, Cynthia Arrington.

[14] The three groups are the Society for California Archaeology—Native American Program, the California Indian Storytellers Association, and the Advocates for Indigenous California Language Survival.

February 16, 2000, (2) conduct a refresher course concerning these protocols for all of Qwest's California construction employees within six months after approval of the settlement, and (3) offer training on the protocols within the same time frame to any construction contractor Qwest is using in California. In addition, on the first day of the first full quarter following the effective date of the settlement (which is defined as the date on which the Commission issues a final decision approving the settlement without material modification), Qwest agrees to file quarterly reports with the Commission's Telecommunications Division summarizing Qwest's future construction projects, as required by certain conditions set forth in the Negative Declaration attached as Attachment D to D.97-09-110.[15]

Most of the other provisions are typical of what one finds in settlement agreements. The parties agree that the settlement "resolves and releases Qwest and its affiliates, successors and assigns from all claims and matters which were or could have been raised" in this proceeding. Each party reserves the right to withdraw from the agreement if the Commission (1) rejects all or any portion of the settlement, (2) conditions its approval of the settlement on material changes to its terms, or (3) makes findings of fact or conclusions of law "materially adverse" to the statements in the settlement agreement. In addition, each party reserves the right to withdraw if a court of competent jurisdiction "annuls, reverses or modifies" the Commission decision approving the settlement.

[15] Paragraph 7 of the Settlement Agreement and Release states that "Qwest takes the position that the [cultural resource protocols] supersede and subsume any alleged prior requirement that Qwest file such reports, but for the purpose of this Settlement agrees to file such reports prospectively. Qwest shall notify CPSD of the filing of each such quarterly report by sending a copy each such report to the Director of CPSD."

11. The Comments of the Salinan Nation on the Settlement Agreement

Pursuant to Rule 12.2 of the Commission's Rules of Practice and Procedure, the filing of the settlement on May 30, 2006 triggered a 30-day period in which interested parties could file comments on the settlement agreement. On June 29, 2006, the SNCPA filed comments on the agreement, and was the only party to do so.

In their comments, the Salinans state that although they will not oppose implementation of the settlement, they do not agree with the assertions of Qwest and its archaeological consultant that the impacts from the company's construction activities have been minimal:

> "In real field terms, such activities as Qwest's project construction will always impact whatever scientific and cultural integrity that remains -- which can be considerable, as indicated by the independent consultant's report. Artifacts can and usually are brought to the surface in this type of construction on sites such as existed in the Qwest project path. In the general area of [REDACTED], the most sensitive of sites in our homeland and likely anywhere in the Qwest construction path, artifacts were easily found during that time period [when the Commission was investigating the construction activities of Level 3, a Qwest competitor].
>
> "The CPUC's consultants report summarized by indicating that damage was 'highly likely' in a number of sites. The view of SNCPA, based not only on indigenous cultural values but also on archaeological values as acquired through more than a decade of work in the cultural resource industry . . . concludes that there was damage to all sites as a virtual certainty, in light of Qwest's construction methods." (SNCPA Comments, p. 5.)

The Salinans also make clear that they consider the settlement terms disappointing, and a near-abdication of the Commission's responsibilities under CEQA:

> "It has been our intent with this document to place into the public record the flaws we see in Qwest's position, the CPUC processes as applied in this case and the flawed, weakened outcome that resulted. In this, it is apparent to us that Qwest's legal strategy has worked: they have outlasted the will of the CPUC to proceed and the tiny resources of an indigenous organization to pursue this further within this investigation. It is important to note that, while Qwest clearly should bear all responsibility, the CPUC should hold itself accountable for the obvious failure of its lead agency mandate to pursue the perpetrators and hold them accountable. Although individuals within the system worked hard in seeking justice, the laws and system that the CPUC should have upheld instead failed miserably in the end." (*Id.* at 6.)

B. Discussion

Where the parties to a proceeding settle all disputed issues, the Commission applies the criteria set forth in Rule 12.1(d) of our Rules of Practice and Procedure to evaluate the proposed settlement. This rule requires that the settlement be "reasonable in light of the whole record, consistent with law, and in the public interest."

Before analyzing whether the settlement here meets these criteria, we note that the Commission's decisions express a strong policy favoring the settlement of disputes if a settlement is fair and reasonable in light of the whole record. (*See e.g.,* D.88-12-083 (30 CPUC 2d 189, 221-223); D.91-05-029 (40 CPUC 2d 301, 326); D.05-03-022, *mimeo.,* at 8.) The policy favoring settlements supports many worthwhile goals, including the reduction of litigation expense, the conservation of scarce Commission resources, and the reduction of risk to the parties that

litigation will produce unacceptable results. (*See*, D.92-07-076, 45 CPUC2d 158, 166; D.92-12-019, 46 CPUC 2d 538, 553.)

With these policies in mind, we turn to the question of whether the settlement proposed here satisfies the criteria set forth in Rule 12.1(d).

1. The Settlement is Reasonable in Light of the Whole Record

As indicated by the lengthy procedural history set forth above, this has been a protracted and hard-fought case, even though no hearings have been held. The parties have presented in detail their arguments about legal issues including (1) whether the advice letter process used to convert the CPCN granted in D.93-10-018 into facilities-based resale authority carried with it any authority to construct facilities, and (2) whether the passage of time since issuance of the OII compels dismissal of the proceeding under the doctrine of administrative laches. In addition, Qwest in 2004 raised the issue whether the Commission has jurisdiction over the construction of Qwest's fiber optic backbone, or whether such jurisdiction is preempted under 47 U.S.C. § 214.

In addition to the legal issues, the parties have conducted extensive discovery on the factual question of whether any damage occurred to the cultural resources identified by the parties in Santa Clara and San Luis Obispo Counties. Consultants retained by Qwest and CPSD have each prepared reports and given depositions on these questions. Under these circumstances, the settling parties appear to have as full an understanding of what the ALJ termed the "damage" issue as is possible without hearings. It is also evident that resolving these issues through hearings would be unusually time-consuming.

In view of the complexity of the legal and factual issues, the terms of the settlement are reasonable. Qwest has agreed to (1) pay $150,000 to the General Fund, (2) distribute another $30,000 among three groups that promote

awareness of Native American history and culture, (3) train its own employees and those of its contractors in the requirements of the cultural resource protocols that Qwest accepted in February 2000, and (4) continue abiding by the requirements of these protocols. These terms are consistent with the statement in the OII that one of the purposes of the proceeding was to "examine what orders may be appropriate and reasonable for the Commission to enter in order to remediate for past and to prevent future violations in connection with design and construction activity by Qwest in California . . ." (OII, p. 4.)

2. The Settlement is Consistent with Law

The second requirement for approving a settlement under Rule 12.1(d) is that it be consistent with law. We have no difficulty in concluding that this requirement is satisfied here.

As noted throughout this proceeding, two of the overarching issues have been whether the requirements of CEQA were met, as well as the requirements of the CPCNs held by Qwest. On these questions, the motion for adoption of the settlement agreement points out:

> "[T]he Parties firmly believe that the terms of this settlement are consistent with the Commission's requirements. Notably, Qwest is bound by the Settlement Agreement to comply with the Protocols which were drafted in accordance with the California Environmental Quality Act . . . In addition, the Commission's Energy Division acknowledged in its February 17, 2000 letter releasing Qwest from the December 16, 1999 Stop Work notice which preceded this OII, that the Protocols are consistent with the terms of Qwest's CPCN [granted in D.97-09-11.]" (Joint Motion for Approval of Settlement Agreement, p. 5; citation omitted.)

Qwest's express agreement in the settlement to continue abiding by the cultural resource protocols, coupled with its agreement to report future

construction projects as required by the Negative Declaration appended to D.97-09-110, is clearly consistent with CEQA principles, and thus satisfies the requirement that the proposed settlement be consistent with law.

3. The Settlement is in the Public Interest

As is clear from the history of the proceeding, this has been a hard-fought case, and resolving the issues it has raised through litigation would require a great deal more effort. CPSD and Qwest are surely correct when they state in their motion for adoption:

> "Should the proceeding continue to a full evidentiary hearing on the merits, both parties would need to invest considerable additional time and resources, and the issues raised in I.00-03-001 would not likely be resolved at the Commission level for many more months. In addition, it is possible that one or more of the [p]arties will be dissatisfied with the decision after hearings, and the possibility exists that the litigation would continue on application for rehearing and/or petition for judicial review." (*Id.*)

Since one of the main reasons behind the policy favoring settlements is to avoid the expense and uncertainty of litigation, we agree with Qwest and CPSD that this settlement is in the public interest, notwithstanding the relatively modest sums Qwest has agreed to pay.

In reaching this conclusion, we recognize that although the Salinan Nation does not oppose the settlement, it has not joined in it and is clearly disappointed with the result. We infer from comments made by the Salinans' representative at a PHC that one of the reasons for this disappointment is that the Salinans were hoping for a statewide investigation of Qwest's

construction activities and the cultural impacts thereof.[16] However, we also infer from the consulting archaeologists' sharply differing views over the impacts in Santa Clara and San Luis Obispo Counties that a statewide investigation would be enormously expensive for all parties, and so time-consuming that the issues it raised would likely not be resolved for many years. In our judgment, the public interest is better served by terminating this proceeding now with modest payments and Qwest's agreement to abide by the cultural resource protocols and report on future construction plans, rather than by litigating the statewide impacts of construction undertaken nearly a decade ago.

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[16] For example, after the ALJ asked at the October 8, 2003 PHC whether the OII wasn't concerned mainly with the impacts of construction in Santa Clara and San Luis Obispo Counties, the Salinan representative responded that he thought Monterey was included, and the following colloquy ensued:

> "ALJ MCKENZIE: But it's those two principal areas[?]
>
> "MR. CASTRO: No, I wouldn't say so. That was what – part of the scope would have discovered. I would believe there's archaeological sites all along that line throughout California.
>
> "There was a reason the railroad was put where it was, because those are – the type of terrain it traversed was areas that a lot of the Native American ancestors put their village sites.
>
> "So it's inevitable that they would go through multiple sites. That was one reason long ago the Legislature created – enacted laws like CEQA to protect those sites, because in certain areas it's almost inevitable that [there's] going to be a conflict there between construction and preservation.
>
> "So I'm only – more aware of the sites in our homeland, which is Monterey and San Luis Obispo County, but I'm certain that's – the same issue applies to everywhere along the Southern Pacific Railroad tracks where they did construction." (PHC Tr. at 97-98.)

C. Assignment of Proceeding

Dian M. Grueneich is the Assigned Commissioner and A. Kirk McKenzie is the assigned ALJ in this proceeding.

D. Comments on Proposed Decision

The draft decision (DD) of the ALJ in this matter was mailed to the parties in accordance with Pub. Util. Code § 311(g)(1) and Rule 14.2 of the Rules of Practice and Procedure. Comments on the DD were submitted by CPSD on October 4, 2006, and reply comments were submitted by Qwest on October 10, 2006. Both sets of comments dealt with small technical errors in the DD, which have been corrected herein at appropriate points in the text.

Findings of Fact

1. The OII alleged that Qwest's failure to conduct research on known cultural resources before commencing construction in 1999 in Santa Clara, San Luis Obispo and Los Angeles Counties necessitated an investigation into Qwest's compliance with the conditions set forth in applicable Commission orders.

2. The order directing Qwest to stop work on all construction, which was issued by the Energy Division on December 16, 1999, was lifted on February 17, 2000, the day after Qwest agreed to abide by the cultural resource protocols.

3. CSD was not able to engage a consulting archaeologist to offer it advice in this proceeding until December 2000.

4. Because of CSD's difficulties in hiring a consulting archaeologist, the Commission issued D.01-02-067 on February 22, 2001, which extended the one-year deadline for this proceeding pursuant to Pub. Util. Code § 1701.2(d).

5. The parties submitted briefs on what they contended were threshold jurisdictional issues in June 2001.

6. In September 2003, CPSD and the Salinan Nation jointly renewed the request that a ruling be issued on the threshold jurisdictional issues briefed in June 2001.

7. On December 30, 2003, the Assigned Commissioner and the ALJ issued a joint ruling which held that in view of the state of the record, it was not possible to rule either that (a) Qwest had conceded at a December 21, 1999 meeting that all of the construction at issue took place under the authority granted (and subject to the conditions set forth) in D.97-09-110, or (b) that the advice letter process used by Qwest's predecessor in 1994 to convert the authority granted in D.93-10-018 into authority to offer facilities-based services carried with it any authority to construct telecommunications facilities.

8. At the March 10, 2004 PHC, Qwest announced that one of its defenses against the allegations in the OII would be that the Commission lacked subject matter jurisdiction over the facilities in question, because they were interstate facilities constructed pursuant to a grant of authority from the FCC under 47 U.S.C. § 214.

9. At the March 10, 2004 PHC, at the suggestion of the ALJ, the parties agreed to a two-phase hearing schedule. Under this schedule, the first phase would be devoted to the questions of whether (a) the advice letter process used to convert the CPCN granted in D.93-10-018 into authority to offer facilities-based services conferred any authority on Qwest to construct telecommunications facilities, and (b) whether the Commission lacked jurisdiction over the Qwest construction because it related to interstate facilities build pursuant to a grant of FCC authority under 47 U.S.C. § 214. If Qwest could not establish either of these things, then a second phase of hearings would consider what penalties were

appropriate for Qwest's construction work undertaken in the absence of Commission authority.

10. At the March 10, 2004 PHC, a procedural schedule for the first phase of hearings, as described in the foregoing Finding of Fact (FOF), was adopted.

11. On June 29, 2004, Qwest's new counsel filed four motions going to the validity of the proceeding. They consisted of (a) a motion to dismiss the proceeding, (b) a motion to suspend the procedural schedule adopted at the March 10, 2004 PHC, (c) a motion to refer the proceeding to mediation, and (d) a motion to require the preparation of a final scoping memo, including a precise definition of the scope of the proceeding.

12. On July 12, 2004, the ALJ issued a ruling suspending the due date for Qwest's testimony in the first phase of hearings, and scheduling a PHC for July 29, 2004.

13. At the July 29, 2004 PHC, the ALJ told the parties that his preliminary reaction to Qwest's arguments that (a) the extension order in D.01-02-067 was invalid, (b) the proceeding should be dismissed under the doctrine of administrative laches due to the passage of time since issuance of the OII, and (c) the scope of the proceeding was so vague that Qwest could not reasonably be expected to prepare opening testimony for the first phase of hearings as described in FOF 10, was that all of these arguments lacked merit.

14. At the July 29, 2004 PHC, the ALJ encouraged the parties to discuss a settlement of the proceeding after reviewing each other's archaeological reports concerning the damage, if any, caused by the Qwest construction at issue.

15. In February 2005, under ground rules established by the ALJ, Qwest took the depositions of the three authors and four peer reviewers connected with the

archaeological study prepared by ARC for CPSD concerning the impacts of Qwest's construction.

16. On April 2005, CPSD took the deposition of the Qwest consultant who had authored the archaeological report submitted by Qwest concerning the impacts of its construction activities.

17. In the Spring of 2005, Qwest, CPSD, and the Salinan Nation commenced settlement discussions concerning this proceeding. In the Summer of 2005, CPSD and Qwest agreed to continue the settlement discussions without the participation of the Salinan Nation.

18. At a PHC held on December 19, 2005, CPSD and Qwest reported that they were making progress in their settlement discussions, and that they were optimistic they could reach a settlement.

19. The settlement agreement set forth in Attachment A was filed on May 30, 2006.

20. On June 29, 2006, the Salinan Nation filed comments stating that although it would not oppose the settlement agreement, it was disappointed with the agreement.

21. Under the settlement agreement in Attachment A, Qwest agrees to pay $150,000 to the State's General Fund, as well as an additional $30,000 to be distributed at Qwest's election among one or more of three organizations that promote awareness of Native American history and archaeology in California.

22. In addition to the payments described in the foregoing FOF, the settlement agreement requires Qwest to (a) continue abiding by the cultural resource protocols Qwest entered into on February 16, 2000, (b) conduct a refresher course concerning these cultural resource protocols for all of Qwest's California construction employees within six months after Commission approval of the

settlement, and (c) offer training on the cultural resource protocols within the same time frame to any construction contractor Qwest is using in California.

23. In addition to the foregoing terms, the settlement agreement requires Qwest, beginning on the first day of the first full quarter following Commission approval of the settlement, to file quarterly reports with the Telecommunications Division summarizing Qwest's future construction projects.

24. The settlement agreement set forth in Attachment A resolves all of the issues in this proceeding.

Conclusions of Law

1. The proposed settlement set forth in Attachment A is reasonable in light of the whole record.

2. The proposed settlement is consistent with law.

3. The proposed settlement is in the public interest.

4. The proposed settlement satisfies the requirements of Rule 12.1(d) for approving settlements.

5. The proposed settlement set forth in Attachment A should be approved without condition.

6. Investigation 00-03-001 should be closed.

O R D E R

IT IS ORDERED that:

1. The Settlement Agreement and Release appended to this decision as Attachment A is approved.

2. The Commission preliminarily determined that hearings would be required in this proceeding. Hearings have not been held, and the preliminary determination has been changed from "Yes" to "No."

3. Investigation 00-03-001 is closed.

This order is effective today.

Dated October 19, 2006, at Fresno, California.

MICHAEL R. PEEVEY
President
GEOFFREY F. BROWN
JOHN A. BOHN
RACHELLE B. CHONG
Commissioners

Commissioner Dian M. Grueneich, being necessarily absent, did not participate.