

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Petition of Certain Public Utilities to Adopt, Amend, or Repeal a Regulation Pursuant to Public Utilities Code Section 1708.5 and for an Order Instituting a Rulemaking Regarding General Order 69-C.

Petition 02-02-003
(Filed February 4, 2002)

**ADMINISTRATIVE LAW JUDGE'S RULING
REQUESTING COMMENTS ON
GENERAL ORDER 69-C WORKSHOP REPORT AND
ESTABLISHING ELECTRONIC SERVICE PROTOCOLS**

The workshop report prepared by Commission staff following the workshop on General Order 69-C, held May 28, 2003, is attached to this ruling as Appendix A. The report is filed as a part of this ruling and service of this ruling completes service of the report. Persons or entities wishing to file comments shall do so in accordance with the schedule established below. Comments shall be served in accordance with the electronic service protocols attached as Appendix B. As directed by Decision 02-10-057, I will prepare a draft decision for the Commission's consideration following the receipt of comments and the filing of the final workshop report.

IT IS RULED that:

1. Comments on the staff workshop report attached to this ruling (Appendix A) shall be filed and served by July 30, 2004 and reply comments shall be filed and served by August 20, 2004.

2. Service of all comments shall follow the electronic service protocols attached to this ruling (Appendix B).

Dated June 28, 2004, at San Francisco, California.

/s/ JEAN VIETH

Jean Vieth
Administrative Law Judge

APPENDIX A

Draft Workshop Report on General Order 69-C:

“Easements on Property of Public Utilities”

**Prepared by the Energy Division
California Public Utilities Commission**

1. Introduction

On February 4, 2002, Pacific Gas & Electric Company, Southern California Edison Company, and California-American Water Company (“Petitioners”) filed Petition P.02-02-003 pursuant to Public Utilities (“PU”) Code Section 1708.5 for an Order Instituting Rulemaking (OIR) regarding Commission General Order 69-C (GO 69-C). The Petition was served on the service list established for Rulemaking R.98-07-038, concerning revisions to General Order 96-A. Parties filing responses were: Calpine Corporation (Calpine); Verizon California Inc. (Verizon); Roseville Telephone Company (Roseville); AT&T Wireless Services of California, Inc. (AT&T); and jointly, California Cable & Telecommunications Association (CCTA) and WorldCom, Inc. (WorldCom). A reply was also filed by the Petitioners.

On October 24, 2002, after considering the filings of all of the parties, the Commission issued an Interim Opinion (D.02-10-057) denying the Petition for a rulemaking and directing the Commission staff to convene an informal workshop to discuss the application of GO 69-C. In that Decision, the Commission concluded that it was premature to establish a rulemaking as it would not yield the fact-specific guidance on the application of GO 69-C that the Petitioners sought. In order to reduce any confusion and uncertainty for parties regarding GO 69-C and bring a measure of predictability to its application, a fact-intensive analysis and review of the GO’s application would be required. The Interim Opinion indicated that the Commission’s continued review of pending PU Code Section 851 (Section 851) applications would provide a source of fact-specific guidance regarding the use of leases for irrevocable easements on utility property and, conversely, would provide examples of factual situations where GO 69-C is inapplicable. Indeed, the Interim Opinion indicated that the Commission would continue to monitor the need for a rulemaking as it resolves related pending applications.

The Commission also noted in D.02-10-057 that informal workshops are another means of exploring issues and developing guidance, and the staff were directed to convene a public workshop by the second quarter of 2003 to discuss appropriate and inappropriate uses of GO 69-C and PU Code Section 851, and to solicit proposals for amendments to GO 69-C. Therefore, pursuant to Ordering Paragraph No. 2 of D.02-10-057, the Commission staff were asked to solicit (1) examples of the types of situations where workshop participants were unsure about whether or not they may rely on GO 69-C; and (2) workshop participants' views about the types of changes that might be made to facilitate the proper application of GO 69-C.

Subsequent to the workshop, the staff were given three directives: (1) prepare and file with the assigned ALJ a draft workshop report; (2) establish a schedule for comment by the workshop participants; and (3) file a final workshop report. Upon receipt of the draft report, the assigned ALJ will issue the draft report to the service list for P.02-02-003 for a comment period of at least 30 days. This document represents the first and second of these tasks; the final workshop report will be prepared and filed with the assigned ALJ subsequent to the receipt and analysis of comments on this draft report. Upon receipt of the final workshop report, the assigned ALJ will prepare a ruling indicating whether the Petitioners' motion for a formal rulemaking on the applicability of GO 69-C should be granted.

2. The Workshop

Pursuant to direction from the Commission in D.02-10-057, the Commission staff from the Energy and Legal divisions held a one-day workshop on May 28, 2003, in San Francisco to address specific issues regarding the application and implementation of GO 69-C. Participants were to be prepared to identify and discuss specific examples of issues that are raising concerns with the application of the General Order. Participants were encouraged to propose recommendations that they believed would clarify the implementation of GO 69-C, but that would not interfere with the intent of the General Order.

The workshop was well-attended by interested parties from the energy and telecommunications utilities, as well as from the cable industry and other third parties. The workshop was structured to provide for introductions and an outline of the workshop objective; followed by statements from the participants; and a structured discussion of issues raised and potential solutions. Several

participants provided written presentations at the workshop, which are attached to this report.

The consensus of the Parties attending the workshop was that General Order 69-C itself is not defective and need not be changed. The Parties clearly indicated that clarification and guidance on a number of issues is required. Attendees acknowledged the guidance provided by the Commission's case-by-case approach; however, they noted that it is cumbersome and has not provided the bright-line clarity sought by the Petitioners in this proceeding. A wide variety of issues were raised and discussed at the Workshop and a number of suggestions as to how to proceed were made. This report will present each of the issue-areas raised, outline any approaches or solutions suggested by Workshop participants, and present a list of sample transactions that various Workshop participants believe might potentially be subject to GO 69-C.

Notice should be taken that the "suggested solutions" and the "sample transactions" presented in Sections 7 and 8 of this report do not represent the opinion of either the Commission or the staff: these are exclusively a representation of the Workshop participants' collective views for further consideration by all interested parties.

This report is organized into the following sections:

- Defining "revocability" and "limited use"
- Streamlining Section 851 via the Advice Letter process
- A "legalistic" proposal
- Miscellaneous issues:
 - Deminimus transactions under Section 851
 - A test for "necessary and useful"
 - Transactions with other public agencies
 - Other miscellaneous issues
- Suggested approaches/solutions
- Transactions potentially subject to GO 69-C

3. Defining "Revocability" and "Limited Use"

The most common criticism of GO 69-C was that the Commission's interpretation of the GO is too strict regarding the terms "revocability" and "limited use." Several Parties indicated that the seeming prohibition on construction and ground-disturbing activities currently associated with GO 69-C

appears to be in conflict with the two examples of “limited” uses provided for in the GO: private roads, and agricultural activities. Several Parties agreed that construction should be allowed under GO 69-C if either no CEQA (“CEQA” refers to the California Environmental Quality Act) is required or it is performed at the local level. These Parties also concurred that the term “revocability” requires clarification: does the physical extent of any activity or facilities installed under GO 69-C reflect on their revocability; i.e., does the fact that facilities or structures may be removed or demolished allow that activity to still be considered “revocable?” Finally, Parties suggested that the definition of “limited uses” should be conformed to activities envisioned under PU Code § 767.5 and the “ROW Decision” (D.98-10-058).

4. Streamlining Section 851 via the Advice Letter Process

The consensus among the Parties was that the Commission should use the formal Advice Letter process to streamline Section 851 proceedings for transactions that are de minimis, unchallenged, and either do not involve CEQA or involve CEQA at the local level. Some parties suggested that this process would be very similar to the process currently used by Non-Dominant Inter-Exchange Carriers (D.94-05-051) and Competitive Local Exchange Carriers (D.98-07-094) to seek approval for leasing arrangements by Advice Letter. The consensus was also that such transactions should be allowed initially as licenses under GO 69-C, and that they then be allowed to convert to leases via the Advice Letter process. Parties agreed that the license-to-lease mechanism is a “bridge that works.” Some Parties indicated that the utilities need the flexibility provided by establishing a single agreement with a third party (such as a Master Agreement) that allows the license-to-lease option, especially in cases where the activity involves multiple, serial installations of small devices or equipment. One Party indicated that a separate GO should be established to process office leasing by Advice Letter.

5. A “Legalistic” Proposal

Finally, a number of Parties suggested the following approach to resolving some of the issues raised during the Workshop. Parties suggested that the Commission maintain a purely legalistic approach: (1) once the criteria for “revocability” and “limited use” are clarified, a license is allowable under GO 69-C regardless of what the specific transaction involves (provided it meets the clarified criteria); and (2) if a lease is required by either party to the transaction, or if the specific transaction activity is outside of the bounds of

GO 69-C, then a formal filing with the Commission is required pursuant to Section 851. According to at least one Party, the market will determine if a license or lease is appropriate: a license will be called for when there is a limited use involved, less revenue is involved, revocability is not a problem for the third party, and no significant property right is transferred; a lease would be called for when the third party wants irrevocability, property rights are transferred, and the transaction is a significant financial event. Parties indicated that if the transaction involves construction (and/or demolition) and requires CEQA review, such a review can be obtained at the local level.

Parties noted that under this paradigm, the “uses” themselves are not relevant – a five-story parking structure could be developed pursuant to a license, as long as the third party did not object to the revocability and, if required, local CEQA would be done (note that this example implies potential demolition of the parking structure to satisfy the “revocability” clause). The Commission staff noted that converting such an agreement to a lease pursuant to Section 851 via Advice Letter would likely be problematic for the Commission. If CEQA were required for the transaction, the Commission would have to act as a Responsible Agency under CEQA for Section 851 proceedings and carry out obligations such as making Findings for significant impacts and deliberating Overriding Considerations. The staff indicated that the Advice Letter process might not be adequate for such streamlined Section 851 proceedings or for license-to-lease conversions when either CEQA was required or when a ministerial exemption had been issued at the local level.

6. Miscellaneous Issues

6.1 *Deminimus transactions under Section 851* -- Workshop attendees agreed that the time, cost and uncertainty of the Public Utilities Code Section 851 process (Section 851) effectively prevents many transactions from going forward. Parties agreed that the filing costs and transaction costs outweigh the revenues for small transactions, and suggested that the Commission could establish a “deminimus” transaction test structured in two parts: a dollar ceiling per transaction, and a total dollar cap on transactions per year.

6.2 *A test for “necessary and useful”* -- Some Parties indicated that a test for the term “necessary and useful” as used in Section 851 would be helpful in clarifying the appropriate use of General Order 69-C: the GO only applies to public utilities covered by the provisions of Section 851, and Section 851 only applies to

transactions involving property that is necessary or useful. These Parties suggested that a separate docket be established to deal with how the determination of “necessary and useful” is established. One Party provided an example that would benefit from Commission guidance: some utilities distinguish between *owned* property and *leased* property when considering the applicability of Section 851 and GO 69-C, arguing that owned property can be considered “surplus” and not considered “necessary or useful” and therefore exempt from Section 851, while property leased from a third party would continue to be considered “necessary or useful” and subject to both Section 851 and GO 69-C.

6.3 Transactions with other public agencies -- Several Parties raised the issue of transactions that involve other public agencies. Parties indicated that requests by public agencies often involve constraints reflecting either a need for an expedited schedule or other constraints associated with issues such as obtaining public funding. Examples of these requests might include easements or facility relocations related to road improvement projects, and agreements to attach communications equipment to existing facilities. One Party requested that the Commission clarify that the exemption contained in the GO regarding revocability for government agencies is still applicable. Another Party suggested that the Commission expedite the Section 851 process for transactions between public agencies and public utilities.

6.4 Other miscellaneous issues – There were three additional miscellaneous issues raised by the Workshop attendees. First, one Party indicated that the Commission should resolve any concerns regarding affiliate transactions associated with the GO. This situation would arise when a regulated utility enters into a transaction with one of its own affiliates under the GO or Section 851, either as a license or a lease. The second issue involves the notion that a *transfer of assets* is different from a *use of space*, and that a distinction should be made in the Section 851 process between transactions to transfer assets and transactions to encumber utility property by a lease. Finally, one Party indicated that the Commission should clarify the distinction between a license and a lease, and indicate how these two should be applied in structuring utility transactions with public agencies, other utilities, and third parties. While the legal distinction between a license and a lease is conceivably well known, the notion of which potential utility activities or transactions would more appropriately fall under either a lease or a license is perhaps the real issue, which reduces this issue to the definition of “limited uses” for which a license would be appropriate, leaving all

other activities subject to a lease. The issue of defining “limited use” is examined further below, and a list of potential transactions for which GO 69-C might be applicable was developed from examples provided by Workshop attendees.

7. Approaches & Solutions Suggested by Workshop Attendees

- General Order 69-C itself is not defective and need not be changed
- De-couple any perceived nexus between “revocability” and the physical extent of any activities authorized under the GO
- The definition of “limited uses” should be conformed to activities envisioned under PU Code Section 767.5 and the “ROW Decision” (D.98-10-058)
- Construction should be allowed under GO 69-C if either no CEQA is required or it is performed at the local level (except for ministerial actions)
- Streamline Section 851 proceedings via the Advice Letter process for transactions that are de minimus, unchallenged, and either do not involve CEQA or involve discretionary CEQA at the local level
- Allow transactions initially as licenses under GO 69-C; then allow conversion to leases via the Advice Letter process
- Establish a separate GO to process office leasing by Advice Letter
- Maintain a purely legalistic approach: (1) once the criteria for “revocability” and “limited use” are clarified, a license is allowable under GO 69-C regardless of what the specific transaction involves; and (2) if a lease is required by either party to the transaction, or if the specific transaction activity is outside of the bounds of GO 69-C, then a formal filing with the Commission is required pursuant to Section 851
- Establish a “de minimus” transaction test
- Develop a test for the term “necessary and useful”
 - Open a separate proceeding to deal with how the determination of “necessary and useful” is established and who makes it
 - Address the distinction between owned property and leased property
- Clarify that the exemption contained in the GO regarding revocability for government agencies is still applicable
- Expedite the Section 851 process for transactions between public agencies and public utilities

- Resolve any concerns regarding affiliate transactions associated with the GO
- Clarify the distinction between a license and a lease: transfer of assets is different from a use of space; a distinction should be made in the Section 851 process between transactions to transfer assets and transactions to encumber utility property by a lease

8. Attendees Proposed Transactions Potentially Subject To GO 69-C

- Revocable
- Non-interfering
- No CEQA required, & no ministerial exemption issued
- When there is construction covered by discretionary CEQA
- Non-controversial and unchallenged
- Limited Uses:
 - Trenching, grading, and paving
 - Driveways and private roads
 - Installation of lighting, fencing, landscaping and attendant irrigation
 - Floating boat docks, boat ramps, extensions and appurtenant devices
 - Rip-Rap, erosion control, re-vegetation
 - Office space
 - Other empty building space
 - Leases to employees for employee housing
 - Use of existing parking facilities
 - Seasonal uses & special events
 - Recreational uses: bicycle, pedestrian, equine, skiing, aquatic uses
 - Commercial uses: marinas, resorts
 - Agriculture & aquaculture: nursery, viticulture, orchards, row crops, grazing including facilities integral to such operations and buffer zones
 - Access for testing and monitoring equipment (wells, air quality, etc.) & surveying
 - Inter-utility encumbrances: energy, telecom, water, sewer, transportation
 - Fire control, firebreaks, weed control
 - Use of non-exclusive easements on third party fee land

- Trading (swapping) of equivalent land rights
- Joint use of facilities by utilities, munis, and cable operators
- Installation and use of:
 - Glass fiber
 - Coaxial cable
 - Microwave dishes
 - Antenna hardware and supports
 - Monopoles
 - Small tower attachments
 - Wireless communication facilities
 - Third-Party attachments to utility property

(Note: Commission staff indicated at the Workshop that individual transactions are always fact-specific, and that not all transactions within a category of transactions (e.g., Trenching, grading and paving) would necessarily qualify for treatment under GO 69-C in every case – exceptional circumstances regarding revocability, limited use, and existing settings could remove the transaction from GO 69-C applicability.)

9. Workshop Participants

Representatives of the following Parties attended/participated in the GO 69-C Workshop:

- AT&T Wireless
- California Cable Television Association
- California Public Utilities Commission – Office of Ratepayer Advocates
- Incumbent Local Exchange Carriers
- Pacific Gas & Electric Company
- SBC
- Southern California Edison Company
- Sempra
- Verizon

The Workshop was sponsored and facilitated by representatives of the Commission's Energy Division and Legal Division.

10. Attachments

- Verizon: "G.O. 69-C Workshop – Presentation of Verizon California, Inc."
- Verizon: "Additional Comments of Verizon California, Inc.", June 6, 2003

- PG&E: “Examples of Activities Requiring Commission Clarification”, May 28, 2003
- AT&T: “Key Points Made By AT&T Wireless Services of California, Inc.”, May 28, 2003
- SCE: “SCE Comments – GO 69-C Workshop”
- SBC: “G.O. 69-C Workshop”, May 28, 2003

[End of Appendix A]

APPENDIX B

Draft Amendments to CPUC Rules of Practice and Procedure “TEST” VERSION (from R.04-01-005)

2.3.1. (Rule 2.3.1) Service by Electronic Mail (E-Mail Service)

(a) E-mail service may be used in any proceeding which has been assigned a docket number.

(b) E-mail service may be made by sending the document to be served as an attachment to an e-mail message to any person or entity who has provided an e-mail address for the official service list; or by sending an e-mail Notice of Availability in accordance with Rule 2.3(c) and (d) to any person or entity who has provided an e-mail address for the official service list; or by any other method of e-mail service directed by the assigned commissioner or administrative law judge.

(c) When serving a document as an attachment to an e-mail message, the serving party must include in the subject line of the message the docket number of the proceeding and a brief identification of the document to be served, including the name of the serving party, and must include in the text of the message the electronic format of the document (e.g., PDF, Excel), and the name, telephone number, e-mail address, and facsimile transmission number of the person to whom problems with receipt of the document to be served should be directed. A separate e-mail message must be sent for each document to be served, unless the assigned commissioner or administrative law judge authorizes the attachment of more than one document to an e-mail message.

(d) By providing an e-mail address for the official service list in a proceeding, a person or entity consents to e-mail service in any proceeding in which the person or entity is on an official service list.

(e) By utilizing e-mail service, the serving party agrees, in the event of failure of e-mail service, to promptly serve the document by any means authorized by these rules, provided that e-mail service may be used only if (1) the receiving party consents to the re-use of e-mail service, or (2) the serving party determines that the cause of the failure of e-mail service has been rectified. “Failure of e-mail service” occurs when the serving party receives notification, in any manner, of non-receipt of an e-mail message, the receiving party’s inability to open or download an attached document, or any other inability of the receiving party to access the document to be served. The serving party and receiving party may agree to any form of substitute service allowed by these rules.

(f) In addition to any other requirements of this rule, the serving party must provide a paper copy of all documents served by e-mail service to the assigned administrative law judge, unless the administrative law judge orders otherwise.

(g) The Commission may serve any document in a proceeding by e-mail service, except those documents for which another form of service is required by applicable statutes or these rules.

(h) Nothing in this rule alters any of the rules governing filing of documents with the Commission.

(i) The assigned commissioner or administrative law judge may issue an order consistent with these rules to govern e-mail service in a particular proceeding.

Note: Authority cited: Section 1701, Public Utilities Code; and Section 2, Article XII, California Constitution. References: Section 311.5, Public Utilities Code.

[End of Attachment B]

CERTIFICATE OF SERVICE

I certify that I have by mail this day served a true copy of the original attached Administrative Law Judge's Ruling Requesting Comments on General Order 69-C Workshop Report and Establishing Electronic Service Protocols on all parties of record in this proceeding or their attorneys of record.

Dated June 28, 2004, at San Francisco, California.

/s/ ELIZABETH LEWIS
Elizabeth Lewis

N O T I C E

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

The Commission's policy is to schedule hearings (meetings, workshops, etc.) in locations that are accessible to people with disabilities. To verify that a particular location is accessible, call: Calendar Clerk (415) 703-1203.

If specialized accommodations for the disabled are needed, e.g., sign language interpreters, those making the arrangements must call the Public Advisor at (415) 703-2074, TTY 1-866-836-7825 or (415) 703-5282 at least three working days in advance of the event.