

Decision **DRAFT DECISION OF ALJ O'DONNELL** (Mailed 9/3/2004)

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the matter of the Application of Pacific Gas and Electric Company (U 39 E) for Commission Approval to Permit Williams Communications, Inc., d/b/a Vyvx, Inc. (U-6146-C) to Use Certain PG&E Transmission Facilities for Fiber Optic Communication Equipment.

(U 39 E)

Application 00-03-032
(Filed March 20, 2000)

**OPINION GRANTING APPROVAL
OF AN IRREVOCABLE LEASE ALLOWING WITTEL
COMMUNICATIONS, LLC. TO USE PACIFIC GAS AND ELECTRIC
COMPANY'S TRANSMISSION FACILITIES**

I. Summary

This decision authorizes Pacific Gas and Electric Company (PG&E) under Pub. Util. Code § 851 to enter into an irrevocable lease, pursuant to the Optical Fiber Installation and Indefeasible Right to Use Agreement (agreement) between PG&E and WilTel Communications, LLC. (WilTel), that would permit the installation and use of fiber optic facilities on PG&E's transmission towers, substations, rights-of-way, and other facilities.¹ Our granting of the application does not expand the authority previously granted to WilTel. WilTel is

¹ All statutory references are to the Public Utilities Code unless otherwise referenced. WilTel was formerly known as Williams Communications, Inc.

authorized to undertake only those activities on PG&E's property that are authorized by its certificate of public convenience and necessity (CPCN).²

II. The Agreement

On March 22, 1999, PG&E and WilTel entered into the agreement that would (1) allow WilTel to install underground and overhead fiber optic facilities on PG&E's electric transmission towers, substations and rights-of-way, and in PG&E's gas transmission rights-of-way; (2) vest bare legal title in the fiber optic facilities in PG&E subject to WilTel's right to use the optical fibers to service its customers; and (3) allow PG&E to use a portion of the fibers in connection with its needs. PG&E would maintain ownership of its overhead facilities subject to WilTel's right to use them. WilTel would maintain ownership of any underground fiber optic facilities installed pursuant to the agreement, subject to PG&E's right to use them. PG&E maintains that the agreement enables it and WilTel to expand their fiber optic systems more efficiently than if each proceeded independently. PG&E contends that the agreement will not impair its provision of service to the public. Until the Commission's approval is secured, PG&E has given WilTel a revocable license to enter its facilities to install fiber optic systems. The current revocable license will convert to an irrevocable lease, which contains the same terms, except as provided in the agreement, upon our approval of this application.

² By Decision (D.) 99-05-022, WilTel was granted a CPCN to resell interexchange services. By D.99-10-062, D.00-06-035, D.00-08-017, D.01-08-052, and D.03-03-029 it was authorized to provide facilities-based interexchange services using specified facilities to be constructed pursuant to those decisions.

III. The Project

The project, which is the subject of the agreement, consists of two routes; one from Ukiah to Cortina and one from Fresno to San Luis Obispo. The total number of miles is 210, which includes 3,745 feet of trenching, 148 miles of aerial installation along the Fresno to San Luis Obispo route, and 62 miles of aerial installation along the Ukiah to Cortina route. In addition, two regeneration stations were included on the Fresno to San Luis Obispo route. The project was substantially completed in 1999. Minor construction and cleanup continued until March 1, 2000. Therefore, the project was completed before PG&E filed this application.

IV. Pub. Util. Code § 851

The purpose of § 851 is to enable the Commission to review a proposed transaction before it takes place in order to take such action as the public interest may require. In this case, PG&E granted WilTel a revocable license to use its property and install facilities prior to seeking authority to convert the revocable license into an irrevocable lease. PG&E claims it relied on Commission General Order (GO) 69-C to grant a revocable license to WilTel, and allow construction on its property in anticipation of this application under § 851 for approval of an irrevocable lease as specified in the agreement.

This case poses an issue as to whether the project was appropriately undertaken under a revocable license as opposed to requiring prior Commission approval under a lease. GO 69-C provides an exception to the § 851 requirement for prior approval of, among other things, licenses of utility property for limited uses. GO 69-C establishes three key criteria for the exception:

- (1) The interest granted must not interfere with the utility's operations, practices, and service to its customers;
- (2) The interest granted must be revocable either upon the order of the Commission or upon the utility's determination that revocation is desirable or necessary to serve its patrons or consumers; and
- (3) The interest granted must be for "limited" uses of utility property.

In D.00-12-006, the Commission determined that "GO 69-C's provisions regarding 'limited use' of utility facilities do not extend to the use of facilities that are to be constructed without the benefit of CEQA review."³ The Commission also stated that: "We do not believe that undertaking a commitment with long term implications is a 'limited use' that qualifies for GO 69-C treatment."⁴ In addition, the Commission stated that it would "deny applications to convert GO 69-C agreements to lease agreements in the future, where the structure of those transactions was designed to circumvent the advance approval requirements of Section 851, and the associated CEQA review requirement."⁵

The aerial installation involved in this project may have been a limited use that is easily removed. However, the 3,745 feet of trenching, and especially the two regeneration stations, are significant and permanent structures, and not easily removed. As a result, the project exceeded the scope of the limited uses permitted by GO 69-C. In addition, since the above structures could not be easily

³ D.00-12-006, p. 1, CEQA refers to the California Environmental Quality Act.

⁴ Ibid., p. 7.

⁵ Ibid.

removed, the revocable license is essentially irrevocable for practical purposes. As a result, PG&E has violated § 851. However, D.00-12-006 was adopted after the project was completed, and this application was filed. Under these circumstances, we find that it may not have been clear to PG&E at the time that a § 851 application was needed. As a result, we will not impose a fine for violating § 851.

V. California Environmental Quality Act (CEQA) Analysis

CEQA applies to discretionary projects to be carried out or approved by public agencies. Because the Commission must act on an applicant's request for approval of its application under § 851, the Commission must act as either a lead or responsible agency under CEQA. The lead agency is the public agency with the greatest responsibility for supervising or approving the project as a whole.⁶ The Commission, as the designated lead agency, must consider what review is necessary under CEQA. If appropriate, the Commission must investigate alternatives, require the avoidance of adverse impacts, and require restoration or enhancement of environmental quality to the fullest extent possible.

PG&E claims that the project was exempt under CEQA Guidelines § 15301(b) and § 15061(b)(3), and Commission Rule 17.1(h)(1)(A)(2), which provide a CEQA exemption for "minor alterations of existing... facilities involving negligible or no expansion of use."⁷ In D.04-04-014, we considered the installation of fiber optic cable on existing electric utility structures, and held that

⁶ CEQA Guidelines § 15051(b)).

⁷ CEQA Guidelines § 15301.

the installation qualified as a “minor alteration of existing facilities” and was, therefore, exempt from further analysis under CEQA because none of the following exceptions to the exemption from CEQA applied:

- (1) there is a reasonable possibility that the activity may have a significant effect on an environmental resource of hazardous or critical concern;
- (2) the cumulative impact of successive projects of the same type in the same place, over time, is significant; or
- (3) there is a reasonable possibility that the activity will have a significant effect on the environment due to unusual circumstances.⁸

The exemption granted in D.04-04-014 appeared to contemplate activities that would have no significant environmental impact, such as installing fiber optic cable on existing electric utility structures. Here, in addition to the installation of aerial facilities in electric utility structures, the project includes over three thousand feet of trenching, and the construction of two regeneration stations, including access roads, concrete pads, and several buildings at each site. Therefore, the project involved alterations of existing facilities that were not minor, and that involved physical expansion, beyond the previously existing facility use, that was not negligible, and that could potentially cause environmental impacts. In addition, there is no evidence that the project was reviewed by another agency or in another forum. Therefore, a CEQA review of

⁸ D.04-04-014, p. 6, citing General Order 131-D and CEQA Guidelines § 15300.2.

the entire project was required.⁹ Since PG&E completed the project before this application was filed, it violated CEQA.

CEQA reviews potential environmental impacts relative to a baseline established before the project is constructed in order to allow public input, and to mitigate any potentially significant environmental impacts.¹⁰ In this instance, construction was completed before the application was filed, and no baseline was established. Any environmental impacts due to construction have already occurred, and the opportunity for public comment at this point would be meaningless. Therefore, CEQA review at this time would serve no useful purpose.¹¹ One option at this point is to require removal of the installed facilities. However, that could also impact the environment. Therefore, we will not require removal of the facilities.

Normally, we would consider imposing a fine for a violation of CEQA. Because we find that it may not have been clear to PG&E at the time this project began that a § 851 application was needed, and because the § 851 application is the trigger for Commission CEQA review, the violation here does not warrant a fine. However, we advise PG&E that future applications submitted for approval under § 851 that involve construction must include sufficient information,

⁹ Once a CEQA review is triggered, potential impacts of the entire project must be evaluated, even if some of the construction activities may be exempt. See, e.g., CEQA Guidelines § 15378.

¹⁰ *County of Amador v. El Dorado County Water Association*, (1999) 76 Cal. App; 4th 931, 944, 953.

¹¹ See, e.g., D.04-07-021, pp. 11-12.

including a detailed project description, to allow the Commission to evaluate a claimed CEQA exemption before the facilities are constructed.

VI. Public Interest

Although our past decisions have stated that we would not approve applications where it appears that the applicant structured the transaction to avoid advance approval requirements, we believe that in this instance the violations were inadvertent, and that denying this application and/or requiring removal of the installed facilities would not serve the public interest.

In D.00-07-010, the Commission stated that:

“It is sensible for California’s energy utilities, with their extensive easements, rights-of-way, and cable facilities, to cooperate in this manner with telecommunications utilities that are seeking to build an updated telecommunications network. Joint use of utility facilities has obvious economic and environmental benefits. The public interest is served when utility property is used for other productive purposes without interfering with the utility’s operation or affecting service to utility customers.”¹²

The project results in the joint use of PG&E’s facilities that will help facilitate WilTel’s service to its customers, while avoiding installation of duplicative infrastructure, by making use of existing PG&E outside plant. In addition, the installed facilities form a part of WilTel’s fiber optic network. Since WilTel is a competitor in the telecommunications market, the facilities that are the subject of this application contribute to the development of competition.

¹² D.00-07-010, *mimeo.* at 6, 2000 Cal. PUC LEXIS 576, at *9.

PG&E represents that the annual fee it receives from WilTel represents fair market value for use of its facilities. In addition, PG&E receives dark fiber and for much of the route, the fiber optic facilities will function as static wire.¹³ PG&E also states that the annual fee, and the costs avoided by PG&E to install static wire are comparable to prices negotiated between other providers of rights-of-way and telecommunications companies. We have no reason to disbelieve these representations, and will accept them.

For the above reasons, approval of this application serves the public interest. Thus, in the circumstances presented here, we will approve PG&E's application.

VII. Ratemaking Treatment

In its application, PG&E states that jurisdiction for rates and services over its electric transmission system rests with the Federal Energy Regulatory Commission (FERC). Thus, revenues from a license or lease of FERC jurisdictional property are subject to FERC accounting and ratemaking rather than Commission authority. In this instance, PG&E represents that the leased electric facilities are transmission facilities subject to FERC jurisdiction. We concur that lease revenues related to PG&E's electric transmission system would be addressed by FERC.

For the gas transmission system facilities, PG&E proposes to treat the lease revenues consistent with the Gas Accord, or applicable terms and conditions for the post-Gas Accord period. We agree with PG&E that revenues should be treated consistent with the Gas Accord.

¹³ Static wire provides protection to transmission lines from lightning.

VIII. Response of the Office of Ratepayer Advocates (ORA)

ORA did not file a protest to this application. However, in its response to the application, ORA stated that it did not oppose the application provided that the construction complied with the Overhead Line Safety Requirements in GO 95. ORA recommended that future § 851 applications include engineering studies demonstrating compliance with GO 95, and accepted engineering practices. It also recommended that such applications address the impact on PG&E's ability to expand its transmission capacity. In its reply, PG&E agreed to confirm, in future applications, that the safety and reliability of its system would not be adversely affected, and to address any impact on future expansion of transmission capacity. However, while PG&E agreed to make engineering studies available upon request, it objected to being required to submit them with the application because they are voluminous and contain sensitive information pertaining to facilities and telecommunications equipment agreements. We will require that future applications confirm that the safety and reliability of PG&E's system will not be adversely affected, and address any impact on future expansion of transmission capacity. Because they may be voluminous, we see no need to require that related engineering studies be included with the applications. However, we will require that a detailed description of any proposed construction be included with the application, and that related engineering studies be made available upon request, subject to confidential treatment if appropriate.

IX. Prospective Approval

The purpose of § 851 is to enable the Commission to review a proposed transaction before it takes place in order to take such action as the public interest

may require. In this instance, only prospective approval of the irrevocable lease is requested. However, as discussed previously, the facilities constructed pursuant to the revocable license did not qualify under GO 69-C. Therefore, while we approve this application prospectively, PG&E is at risk for any adverse consequences that may result from its misuse of GO 69-C, violation of § 851, and violation of CEQA. In addition, our approval of this application is limited to those previously completed facilities specifically identified in the application, and subsequent supplements filed in this proceeding.

The second paragraph of § 851 provides that “any disposition of property by a public utility shall be conclusively presumed to be of property which is not useful or necessary in the performance of its duties to the public as to any...lessee...dealing with such property in good faith for value...” The Commission has interpreted this provision as protecting innocent lessees from having their transactions invalidated solely because the utility leased the property without advance approval under § 851.¹⁴ However, this does not invalidate the primary requirement of § 851 for advance Commission approval.¹⁵

The revocable license PG&E granted to WilTel is a form of lease. We assume that WilTel dealt with PG&E in good faith, and intends to be bound by the license. Therefore, PG&E should be able to enforce its rights under the revocable license. It would be inconsistent with § 851, and poor public policy to relieve a licensee of its obligations under a license. To do so would prevent PG&E from using its rights and powers under the revocable license to stop a

¹⁴ D.92-07-007, 45 CPUC 2d 24, 30.

¹⁵ Ibid.

licensee from using PG&E's property in a manner harmful to PG&E's performance of its duties to the public. Therefore, we do not, by this decision, relieve WilTel of its obligations under the revocable license.

X. Motion to File Under Seal

Concurrent with this application, PG&E filed a motion to keep the unredacted version of the agreement under seal. The redacted material includes information such as the number of optical fibers installed for PG&E and WilTel's use, compensation arrangements, length of the agreement and renewal periods, and commercial value of facilities. This application is over four years old. However, PG&E states that public release of the information contained in the unredacted agreement would place it and WilTel at an unfair business disadvantage. Therefore, we will grant the motion for a period of two years after the effective date of this decision.

XI. Categorization and Need for Hearings

In Resolution ALJ 176-3024 dated July 6, 2000, the Commission preliminarily categorized this application as ratesetting, and preliminarily determined that hearings were not necessary. No protests have been received. There is no apparent reason why the application should not be granted. Given these developments, a public hearing is not necessary, and it is not necessary to disturb the preliminary determinations.

XII. Comments on Draft Decision

The draft decision of the ALJ in this matter was mailed to the parties in accordance with Pub. Util. Code § 311(g)(1) and Rule 77.7 of the Rules of Practice and Procedure. Comments were filed on September 23, 2004, by PG&E. Based on these comments, we grant the motion to have the unredacted agreement kept under seal. No other changes were made to the draft decision.

XIII. Assignment of Proceeding

Michael R. Peevey is the Assigned Commissioner and Jeffrey P. O'Donnell is the assigned Administrative Law Judge in this proceeding.

Findings of Fact

1. On March 22, 1999, PG&E and WilTel entered into an agreement that would (1) allow WilTel to install underground and overhead fiber optic facilities on PG&E's electric transmission towers, substations and rights-of-way, and in PG&E's gas transmission rights-of-way; (2) vest bare legal title in the fiber optic facilities in PG&E subject to WilTel's right to use the optical fibers to service its customers; and (3) allow PG&E to use a portion of the fibers in connection with its needs. PG&E would maintain ownership of its overhead facilities subject to WilTel's right to use them. WilTel would maintain ownership of any underground fiber optic facilities installed pursuant to the agreement, subject to PG&E's right to use them.

2. Until the Commission's approval is secured, PG&E has given WilTel a revocable license to enter its facilities to install fiber optic systems.

3. The revocable license will convert to an irrevocable lease, which contains the same terms, except as provided in the agreement, upon the Commission's approval of this application.

4. The project consists of two routes—one from Ukiah to Cortina and one from Fresno to San Luis Obispo. The total number of miles is 210, which includes 3,745 feet of trenching, 148 miles of aerial installation along the Fresno to San Luis Obispo route, and 62 miles of aerial installation along the Ukiah to Cortina route. In addition, two regeneration stations were included on the Fresno to San Luis Obispo route.

5. The project was substantially completed in 1999, with minor construction and cleanup continued until March 1, 2000, before PG&E filed this application.

6. PG&E granted WilTel a revocable license to use its property and install facilities prior to seeking approval of the agreement.

7. GO 69-C provides three key criteria for an exception to the § 851 requirement for prior approval of, among other things, licenses of utility property for limited uses:

- (1) The interest granted must not interfere with the utility's operations, practices, and service to its customers;

- (2) The interest granted must be revocable either upon the order of the Commission or upon the utility's determination that revocation is desirable or necessary to serve its patrons or consumers; and
- (3) The interest granted must be for a "limited" use of utility property.

8. In D.00-12-006, the Commission determined that "GO 69-C's provisions regarding 'limited use' of utility facilities do not extend to the use of facilities that are to be constructed without the benefit of CEQA review." The Commission also stated: "We do not believe that undertaking a commitment with long term implications is a 'limited use' that qualifies for GO 69-C treatment." In addition, the Commission stated that it would "deny applications to convert GO 69-C agreements to lease agreements in the future, where the structure of those transactions was designed to circumvent the advance approval requirements of Section 851, and the associated CEQA review requirement."

9. The 3,745 feet of trenching, and the two regeneration stations are significant and permanent structures that exceed the scope of the limited uses permitted by GO 69-C.

10. D.00-12-006 was adopted after the project was completed, and this application was filed.

11. CEQA applies to discretionary projects to be carried out or approved by public agencies.

12. CEQA Guidelines § 15301(b) and § 15061(b)(3) and Commission Rule 17.1(h)(1)(A)(2), provide a CEQA exemption for minor alterations of existing facilities involving negligible or no expansion beyond the previously existing facility use.

13. There is no evidence that the project was reviewed by another agency or in another forum.

14. CEQA reviews potential environmental impacts relative to a baseline established before the project is constructed in order to allow public input, and to mitigate any potentially significant environmental impacts.

15. Since construction of the project was completed before the application was filed, no baseline was established.

16. Any environmental impacts due to construction of the project have already occurred, and the opportunity for public comment at this point would be meaningless.

17. Removal of the installed facilities could impact the environment.

18. The project results in joint use of utility facilities.

19. Since WilTel is a competitor in the telecommunications market, the facilities that are the subject of this application contribute to the development of competition.

20. The annual fee PG&E receives from WilTel represents fair market value for use of its facilities.

21. Pursuant to the agreement, PG&E receives dark fiber and, for much of the route, the fiber optic facilities will function as static wire.

22. The annual fee, and the costs avoided by PG&E to install static wire are comparable to prices negotiated between other providers of rights-of-way and telecommunications companies.

23. Revenues from a license or lease of FERC jurisdictional property are subject to FERC accounting and ratemaking.

24. The second paragraph of § 851 provides that “any disposition of property by a public utility shall be conclusively presumed to be of property which is not

useful or necessary in the performance of its duties to the public as to any...lessee...dealing with such property in good faith for value..." The Commission has interpreted this provision as protecting innocent lessees from having their transactions invalidated solely because the utility leased the property without advance approval under § 851. However, this does not invalidate the primary requirement of § 851 for advance Commission approval.

25. The revocable license PG&E granted to WilTel is a form of lease.

26. PG&E should be able to enforce its rights under the revocable license.

27. It would be inconsistent with § 851, and poor public policy to relieve a licensee of its obligations under a revocable license because it would prevent PG&E from using its rights and powers under the revocable license to stop a licensee from using PG&E's property in a manner harmful to PG&E's performance of its duties to the public.

28. There were no protests to this application.

29. Hearings are not required.

30. Public disclosure of the unredacted agreement filed under seal would place PG&E and WilTel at an unfair business disadvantage.

Conclusions of Law

1. The purpose of § 851 is to enable the Commission to review a proposed transaction before it takes place in order to take such action as the public interest may require.

2. Since the trenching and regeneration stations could not be easily removed, the revocable license under GO 69-C is essentially irrevocable for practical purposes.

3. PG&E violated § 851.

4. Since D.00-12-006 was adopted after the project was completed, and this application was filed, it may not have been clear to PG&E at the time that a § 851 application was needed; therefore, a fine should not be imposed for violating § 851.

5. Since the project includes over three thousand feet of trenching, and the construction of two regeneration stations, including access roads, concrete pads, and several buildings at each site, it involved alterations of existing facilities that were not minor, and that involved physical expansion beyond the previously existing facility use that was not negligible.

6. A CEQA review was required, but was not conducted.

7. PG&E violated CEQA.

8. A CEQA review at this time would serve no useful purpose.

9. The Commission should not require removal of the facilities installed as part of the project.

10. Since it may not have been clear to PG&E at the time this project began that a § 851 application was needed and since CEQA would be triggered by the application itself, a fine should not be imposed for violating CEQA.

11. Approval of this application serves the public interest because it facilitates WilTel customer service, avoids installation of duplicate infrastructure, and promotes telecommunications competition.

12. PG&E's application should be approved.

13. Lease revenues related to PG&E's gas transmission system facilities should be treated consistent with the Gas Accord.

14. In future § 851 applications involving the use of its transmission facilities, PG&E should be required to confirm that the safety and reliability of its system

will not be adversely affected, and address any impact on future expansion of transmission capacity.

15. In future § 851 applications, PG&E should be required to include a detailed description of any proposed construction with the application, and to make related engineering studies available upon request, subject to confidential treatment if appropriate.

16. PG&E's motion to file the unredacted agreement under seal should be granted.

17. Since the Commission approval of this application should be prospective only, PG&E should be at risk for any adverse consequences that may result.

18. By approving this application prospectively, the Commission should not relieve WilTel of its obligations under the revocable license.

19. Since there were no protests to this application, this order should be effective immediately.

O R D E R

IT IS ORDERED that:

1. Pacific Gas and Electric Company (PG&E) is authorized prospectively under Pub. Util. Code § 851 (§ 851) to enter into an irrevocable lease, pursuant to the Optical Fiber Installation and Indefeasible Right to Use Agreement (agreement) between it and WilTel Communications, LLC (WilTel), that would permit the installation and use of fiber optic facilities on PG&E's transmission towers, substations, rights-of-way, and other facilities.

2. The authority granted herein is limited to those previously completed facilities specifically identified in the application, and subsequent supplements filed in this proceeding.

3. The prospective authorization granted herein does not relieve WilTel of its responsibilities under its revocable license from PG&E.

4. In future § 851 applications involving the use of its transmission facilities, PG&E shall confirm that the safety and reliability of its system will not be adversely affected, and address any impact on future expansion of transmission capacity.

5. In future § 851 applications, a detailed description of any proposed construction shall be included with the application, and related engineering studies shall be made available upon request, subject to confidential treatment if appropriate.

6. PG&E's motion to have the unredacted agreement filed with the application kept under seal is granted for two years from the effective date of this decision. During that period, it shall not be made accessible or disclosed to anyone other than the Commission staff except on the further order or ruling of the Commission, the Assigned Commissioner, the assigned Administrative Law Judge (ALJ), or the ALJ then designated as Law and Motion Judge.

7. If PG&E believes that further protection of the unredacted agreement kept under seal is needed, it may file a motion stating the justification for further withholding of the unredacted agreement from public inspection, or for such other relief as the Commission's rules may then provide. This motion shall be filed no later than one month before the expiration date.

8. This proceeding is closed.

This order is effective today.

Dated _____, at San Francisco, California.