DRAFT Item 7
3/21/2002
Agenda ID #349

Decision **DRAFT DECISION OF ALJ DUDA** (Mailed 3/14/2002)

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application of Pacific Gas and Electric Company for Approval of a Lease for AT&T Wireless Services of California, Inc.'s Use of Certain Pacific Gas & Electric Company Structures for Communication Antennas and Related Equipment.	Application 00-12-017 (Filed December 13, 2000)

OPINION APPROVING LEASE AGREEMENT

I. Summary

Pacific Gas and Electric Company (PG&E) and AT&T Wireless Services of California Inc. ("AT&T Wireless") (collectively "Applicants") seek Commission approval under Public Utilities Code Section 851[1] of a Master License/Lease Agreement ("Master Agreement") between PG&E and AT&T Wireless. The Master Agreement sets forth a framework for the licensing and subsequent leasing of space on PG&E's transmission towers, communication towers, building, structures and real property to AT&T Wireless so that it may attach its wireless communication antennas and associated equipment. The application is approved subject to certain conditions.

[1] All statutory references are to the Public Utilities Code unless otherwise noted.

II. Background

PG&E owns and maintains electric transmission facilities, communication towers, buildings, structures, and other real property for the purpose of providing electric and gas service to customers throughout its Northern and Central California service area. According to PG&E, these facilities and property have sufficient space and strength to accommodate the addition of communication antennas and related equipment.

AT&T Wireless provides wireless communications services throughout Northern and Central California under licenses granted by the Federal Communications Commission (FCC). AT&T Wireless wishes to support and expand its offerings of wireless communications services and therefore seeks to install and operate additional equipment on PG&E's transmission and communication towers, buildings, and other suitable structures. PG&E is amenable to this arrangement as long as use by AT&T Wireless will not impair the provision of utility service or otherwise adversely affect the safety and reliability of PG&E's utility system.

III. The Master Agreement

On January 14, 2000, PG&E and AT&T Wireless entered into a Master Agreement that initially gives AT&T Wireless a revocable license, consistent with General Order (GO) 69-C, to install its antenna and related equipment on PG&E's facilities and real property. AT&T Wireless and PG&E are currently proceeding with installation of communication antennas and related equipment under the license. On December 13, 2000, PG&E and AT&T Wireless filed Application (A.) 00-12-017 with the Commission seeking approval of the Master Agreement and conversion of the license to a lease. AT&T Wireless prefers conversion of this license to a long-term lease to assure that the arrangements will not

terminate prematurely. Therefore, the Master Agreement is structured to convert from a revocable license to an irrevocable lease if Commission approval is granted.

The Master Agreement covers the lease of PG&E's transmission towers which support extra-high voltage electric lines throughout PG&E's service territory, communication towers which support PG&E's intra-company communication systems, buildings including offices, warehouses, and storage areas, and other PG&E property including substations, rights of way, and bare land. Under the Agreement, AT&T Wireless may use only a portion of the property at the sites.

On January 7, 2002, Applicants filed an Amendment to the Master Agreement initially filed in this application. The amendment reflects certain adjustments to the terms of the Master Agreement such as a site reservation provision, a definition of the term "commencement date," and provisions describing the process for AT&T Wireless to acquire land rights from the underlying fee owner.

AT&T Wireless intends to use the antennas and related equipment it will attach to PG&E facilities and property for the transmission or reception of communication signals for its wireless communications system. The Master Agreement and its appendices contain terms of general applicability regarding pricing, site application procedures, safety requirements, indemnification and insurance. AT&T Wireless will pay PG&E a processing and installation fee for each site proposed under the agreement as well as an annual fee for the license of each site. Under the Master Agreement, AT&T Wireless will identify those locations where it wishes to install equipment. Then, PG&E will review the

request to determine if the equipment can be attached safely and without detriment to or interference with PG&E's utility operations.

PG&E states that the agreement is beneficial for AT&T Wireless, PG&E and their respective customers. Applicants contend that AT&T Wireless obtains additional communication capacity on a cost-effective basis and in return, PG&E obtains rental fees for the use of its property which it will share with its ratepayers. PG&E states that the annual fee it negotiated under the Master Agreement represents fair market value for the use of its facilities and other property and is comparable to prices negotiated in other similar agreements. The Master Agreement provides that AT&T Wireless will bear all cost of installing its communication antennas and related equipment.

On January 18, 2001, ORA filed a protest to this application requesting additional detail on equipment installed under this Master Agreement. ORA also urges the Commission to reject PG&E's proposed ratemaking for revenues received under the Master Agreement. We will discuss ORA's protest in more detail below.

IV. Use of General Order 69-C

The parties have structured the current contractual arrangement under which AT&T Wireless is making use of PG&E's property as a revocable license. As stated in Section 4.1 of the Master Agreement, "This License is given pursuant to and subject to the conditions prescribed by CPUC General Order No. 69-C,…."[2]

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[2] GO 69-C states in relevant part:

Footnote continued on next page

Only if and when PG&E's application is granted does the revocability clause of the agreement become inoperative. At that point, AT&T would have a more secure interest in the property covered by the agreement such that PG&E could not revoke the right to use the property whenever PG&E deems it "necessary or desirable to do so" under the terms of GO 69-C.

Not only does the agreement state that the use of PG&E's property is revocable, but based on our review of the application, we find that the use of PG&E's property by AT&T Wireless is neither permanent or so significant that it cannot be terminated quickly if PG&E invokes its right under GO 69-C to revoke the agreement. The equipment that AT&T Wireless is attaching to PG&E's property--namely communications antennas, small microwave dishes, antenna hardware and supports, monopoles, and coaxial cabling--consists of minor installations that can be easily removed if necessary. For this reason, AT&T Wireless' use of the PG&E property is consistent with the "limited uses" for which GO 69-C is reserved.

It is hereby ordered, that all public utilities covered by the provisions of Section 851 of the Public Utilities Code of this State be, and they are hereby authorized to grant easements, licenses or permits for use or occupancy on, over or under any portion of the operative property of said utilities for rights of way, private roads, agricultural purposes, or other limited uses of their several properties without further special authorization by this Commission whenever it shall appear that the exercise of such easement, license or permit will not interfere with the operations, practices and service of such public utilities to and for their several patrons or consumers;

Provided, however, that each such grant, …shall be made conditional upon the right of the grantor, either upon order of this Commission or upon its own motion to commence or resume the use of the property in question whenever, in the interest of its service to its patrons or consumers, it shall appear necessary or desirable to do so.

The use of property at issue in this application contrasts sharply with the use of PG&E property discussed in D.01-08-069 ("Calpine Delta") and D.01-08-070 ("CalPeak"). In the Calpine Delta and CalPeak decisions, the Commission ordered PG&E to show cause why it should not be sanctioned for installing "equipment sufficient to serve two relatively large power plants" prior to obtaining Commission approval. (D.01-08-069, *mimeo* at 21. See also D.01-08-070, *mimeo* at 10.)[3] As explained below, unlike the Calpine Delta and CalPeak decisions, there is no indication in this case that the Applicants have made use of the license arrangement to circumvent environmental review that would otherwise be required in a §851 application.

In light of the fact that, for the reasons stated above, the current use of PG&E's property is both fully revocable and a limited use, it is permissible under GO 69-C.

V. Conversion of License to Lease

According to the application, AT&T Wireless now seeks to transform its revocable license arrangement to a lease in order to gain assurance that its use of PG&E's property for communications equipment will not be terminated abruptly. Because GO 69-C does not apply to leases or to any arrangement that

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[3] The construction in both cases involved preliminary work on electric transmission facilities and gas pipeline facilities to connect electric generation plants to PG&E's system. In Calpine Delta, the Commission stated that:

> These significant and permanent structures were constructed under PG&E's claimed G0 69-C authority. This is in direct contradiction of our clear statement in D.01-03-064 that permanent changes to utility property fall outside the scope of the "limited uses" permitted by GO 69-C. (D.01-08-069, *mimeo* at 21.)

is not revocable as prescribed in GO 69-C, the transformation of the license to a lease requires Commission approval under §851.

While, as we will explain, we are granting this application, we do so with significant reservations. The Applicants in this case negotiated a single "Master License/Lease Agreement" which covers both the license and lease of the property. Under this single agreement, the Applicants have agreed that, upon Commission approval of the §851 application, the provision of the agreement that renders the entire agreement revocable becomes inoperative, which has the effect of transforming a fully revocable arrangement to a more durable lease arrangement.

Our reservations arise from the fact that, by virtue of the single agreement, it appears that the Applicants contemplated that they would eventually be seeking §851 approval. If parties anticipate that they will be entering into an agreement that will require such approval, they should file an application seeking such approval. When parties use the same agreement to convert a license to a lease, our concerns increase that the parties may be attempting to bootstrap upon a GO 69-C license to undermine our analysis of environmental and other factors in the §851 application.

However, we find here that there was no apparent intent to use the single agreement as a means of evading the requirements under §851. As explained above, the current use of the property is consistent with the requirements of GO 69-C, and we explain below that no additional CPUC environmental review is occasioned by the conversion of the license to a lease.

We give notice that single agreements that provide for the conversion of a license to a lease should not be used in the future. To ensure that we are able to meet our obligations under §851, parties should not draft a single agreement that

contemplates the conversion of a license into a lease when they are aware, at the time that they are negotiating the use of utility property, that they will be entering into a lease or other arrangement that will require §851 approval. Instead, they should seek such approval at the outset.

VI. Review of Environmental Effects

Applicants contend that environmental review pursuant to the Califiornia Environmental Quality Act (CEQA) is not required, citing decisions where the Commission concluded that environmental review of agreements to install and share communications facilities on existing sites and structures is not required. According to the application, the communication antennas and related equipment will be installed on utility facilities which are already in place and thus constitute a minor alteration of an existing utility structure involving negligible expansion beyond the previously existing use. Applicants cite sections 15301(b) and 15061(b)(3) of the CEQA Guidelines and Commission Rule 17.1 as support. Further, Applicants state that a license under GO 69-C does not require Commission approval and that simple conversion of such a license to a lease cannot have an effect on the environment.

We do not agree with the Applicants' reasoning that environmental review is unnecessary because a conversion of a license to a lease will necessarily have no effect on the environment. As we have found in previous cases, e.g., Calpine Delta and CalPeak, the implication of such an argument is that parties can evade otherwise applicable environmental review by entering into a license and then converting it to a lease. However, in this case, we find that the Commission need not perform further environmental review. The Commission has stated in General Order 159-A that it has delegated its authority to regulate the location and design of cellular facilities to local agencies, while retaining oversight

jurisdiction in cases of conflict with the Commission's goals and/or statewide interests.[4] The Master Agreement requires AT&T Wireless to apply for all required governmental permits and approvals. Further, AT&T Wireless must comply with GO 159-A and notify the Commission if permits or approvals are granted or if no permits or approvals are necessary. We believe these conditions and requirements provide that environmental review will occur at the appropriate time under the Master Agreement.

Therefore, we find that the licensing of the property under GO 69-C for the location of cellular facilities is not improper as long as the parties comply with the provisions of GO 159-A. For the same reason, we find that the Commission need not perform further environmental review of this application.

Given our finding that the facts of this case do not present a situation where PG&E is using GO 69-C improperly, we may now consider whether to approve the Master Agreement.

VII. Public Interest

We will grant PG&E the requested approval of the Master Agreement, as amended, subject to the conditions set forth below. The arrangement between PG&E and AT&T Wireless makes good sense from several perspectives and we have approved similar agreements for the use of utility facilities for telecommunication equipment.[5]

The Master Agreement makes productive joint use of available space. As we stated in D.00-07-010:

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[4] *See* D.96-05-035 (66 CPUC2d 257).

[5] See in particular D.00-01-014, D.00-07-010, and D.98-02-110.

> 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. (D.00-07-010, mimeo. p. 6.)

The Master Agreement will allow improved service to AT&T Wireless customers and provides prompt access to PG&E's facilities at rates and terms mutually agreed upon by PG&E and AT&T Wireless. This Commission has long had a policy of promoting competition in the telecommunications industry and does not wish its efforts to be frustrated by unduly restrictive or discriminatory access to the sites, facilities and rights-of-way of regulated public utilities. PG&E shall not unduly or unlawfully discriminate in the provision of access to its sites, facilities and rights-of-way and the Master Agreement supports the policies we have set forth on this subject.[6]

The public interest is further served in that AT&T Wireless will not use these facilities to provide service beyond that authorized under licenses from the FCC. Consistent with the Master Agreement, AT&T Wireless shall adhere to strict safety requirements, including the restriction that only PG&E shall install, maintain, or remove equipment attached to transmission towers. In addition, PG&E retains the right to enter and use facilities, land and sites leased to AT&T

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[6] See D.98-10-058, as modified by D.00-03-055.

Wireless. These terms in the Master Agreement will ensure that the lease will not interfere with utility service to PG&E customers.

We do not agree with ORA's position that PG&E should provide additional details regarding the proposed installation of communication equipment under the Master Agreement. Specifically, ORA suggests that PG&E should describe when and where equipment will be installed and provide illustration of the size, placement, and method of attachment of the equipment.

In response, both PG&E and AT&T Wireless jointly urge rejection of ORA's protest. Applicants state that the additional information requested by ORA is superfluous and duplicative given the Commission's General Order 159-A which defers to local agencies for site review and permitting for cellular equipment, including review of the specific equipment and installation details for each site. Applicants contend that AT&T Wireless currently complies with GO 159-A and reports as required to the Commission on the status of local approval before initiating construction on new antenna sites.[7] ORA has not explained why additional equipment installation information is needed. We find that as long as AT&T Wireless complies with the notification procedures in GO 159-A, there is no need for additional reporting.

While we will approve the application based on the current terms of the Master Agreement, as amended in January 2002, we will require PG&E to file under § 851 for advance Commission review of any amendments to the Master Agreement. Furthermore, as we have done in D.96-10-071 and other similar

[7] On March 12, 2001, in response to an inquiry from the ALJ, Applicants filed a supplemental application containing an example of a GO 159-A compliance report.

orders, we shall impose appropriate notification provisions upon PG&E. PG&E shall notify our Energy Division by letter within 30 days of the execution, extension or termination of this Master Agreement. PG&E shall also provide notification of substantive changes regarding plant in service and right of way under the Master Agreement. All notifications should include a description of the site involved.

VIII. Ratemaking

In the application, PG&E explains that historically, license and lease revenues have been credited to the benefit of ratepayers for general rate case purposes. With electric industry restructuring, jurisdiction for rates and services over PG&E's transmission system now rests with FERC. Thus, revenues for license or lease of FERC jurisdictional property are subject to FERC accounting and ratemaking rather than CPUC authority. In contrast, revenues from the license or lease of distribution facilities are subject to Commission jurisdiction.

PG&E now requests that it be allowed to apply the same accounting and ratemaking treatment for revenues received under this Master Agreement as it uses under its interim revenue-sharing mechanism for "non-tariffed products and services" (NTP&S).[8] If approved, PG&E would split net revenues 50/50 between ratepayers and shareholders rather than crediting all revenues to ratepayers based on historical practice.

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[8] In D.99-04-021, the Commission adopted PG&E's proposed ratemaking for revenues from products and services offered by the utility on a non-tariffed basis (often referred to as NTP&S). The revenue sharing mechanism, adopted on an interim basis, splits net revenues 50/50 between ratepayers and shareholders. The decision allowed use of this sharing mechanism only for "new" categories of NTP&S, and specifically excluded "existing" categories from this mechanism.

In its protest, ORA recommends that the Commission deny PG&E's request to deviate from the current revenue-sharing rules for revenues from this Master Agreement. ORA reasons that because the service provided under the Master Agreement qualifies as an "existing" NTP&S rather than a "new" one, the interim mechanism allowing 50/50 net revenue sharing does not apply. Under current ratemaking for "existing" NTP&S, all revenues from this agreement would be included in PG&E's Other Operating Revenue and reflected in the company's next general rate case. ORA states that PG&E has offered no compelling reason to deviate from D.99-04-021 and extend the mechanism to an existing NTP&S.

PG&E acknowledges that the service provided under the Agreement qualifies as an "existing" NTP&S rather than a "new" one.[9] Therefore, the interim revenue sharing mechanism adopted in D.99-04-021 would not automatically apply. Nevertheless, PG&E believes that a 50/50 net revenue sharing for revenues related to lease of transmission and distribution property is "fairer than the present methodology and is supported by Commission precedent."[10] PG&E reasons that because FERC has allowed, on an interim basis, 50/50 sharing of revenues for use of electric transmission facilities, net revenues from distribution facilities should also be shared 50/50. In support of its position, PG&E cites a 1997 Commission order involving Southern California Edison (Edison) that allowed 50/50 sharing of lease revenues for one lease

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[9] PG&E provided a list of existing NTP&S in its Advice Letter 2063-G/1741-E, filed on January 30, 1998 (see Attachment B, p. 4, item N.C.3, "Wireless Attachments").

[10] Reply of PG&E to Protest of ORA, January 29, 2001, p. 3.

pending adoption of generally applicable sharing mechanism. PG&E suggests that 50/50 sharing of net revenues from both new and existing NTP&S provides a better incentive for PG&E to negotiate sensible and lucrative license agreements.

PG&E does not persuade us to deviate from D.99-04-021. In that decision, we adopted PG&E's proposal for 50/50 sharing applicable only to new NTP&S. We did so on an interim basis while we examined a permanent revenue sharing mechanism for PG&E in another proceeding. We will consider revenue sharing issues for PG&E in A.00-09-002 and we do not wish to prejudge that case by applying a new revenue sharing mechanism for an existing NTP&S here.[11] PG&E's arguments regarding treatment of Edison lease revenues are not directly applicable since the sharing arrangements we ultimately adopted for Edison involve further distinctions of "active" and "passive" products and services and a direct comparison is not appropriate. We will require PG&E to credit revenues obtained under this Master Agreement from the license or lease of Commission jurisdictional property to the benefit of ratepayers.

IX. Request for Confidentiality

Applicants requested confidential treatment of portions of the Master Agreement filed as required by Commission Rule 36 and contained in Appendix A of the application. Applicants also request confidential treatment

[11] A.00-09-002 is currently suspended per an Assigned Commissioner ruling. Nevertheless, we prefer to review revenue sharing issues in that docket when it resumes or a successor proceeding.

for portions of the amendment filed in January 2002.[12] Applicants contend that the unredacted version of Appendix A contains commercially sensitive information regarding the financial terms and conditions of the lease that if revealed to competing carriers, could disadvantage AT&T Wireless with respect to competitive communication providers and disadvantage PG&E in negotiations with other carriers over similar agreements. We have granted similar requests for confidential treatment in the past and will do so here.

X. Conclusion

We conclude that the Master Agreement for leasing PG&E facilities and sites to AT&T Wireless is in the public interest and benefits Applicants and ratepayers. We deny ORA's protest requesting additional information on these installations because we find the requirements of GO 159-A provide the Commission with appropriate notification. We grant ORA's protest regarding PG&E's proposed ratemaking because we are not persuaded to deviate from current revenue sharing arrangements. We approve the Master Agreement, as amended, but require PG&E to file under § 851 for advance review of any further amendments to this Master Agreement. In addition, we require PG&E to notify our Energy Division and ORA of substantive changes to plant in service and rights of way under this Master Agreement.

XI. Categorization and Comments

In Resolution ALJ 176-3053 dated December 21, 2000, the Commission preliminarily categorized this proceeding as ratesetting, and preliminarily

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[12] Applicants filed redacted public versions of Appendix A and the January 2002 Amendment.

determined that hearings were not necessary. ORA filed a protest to the application, but stated its view that hearings were not necessary. Based on the record in this matter, public hearing is not necessary, and we affirm the preliminary determinations made in Resolution ALJ 176-3053.

The draft decision of the ALJ in this matter was mailed to the parties in accordance with Section 311(g)(1) and Rule 77.7 of the Rules of Practice and Procedure. Parties agreed to a shortened comment period of five days. Parties filed comments on ____, and reply comments on _____.

Findings of Fact

1. PG&E is a public utility corporation subject to the jurisdiction of this Commission.

2. AT&T Wireless provides wireless communication services under licenses granted by the FCC.

3. PG&E and AT&T Wireless have entered into a Master Agreement that initially gives AT&T Wireless a revocable license, consistent with General Order 69-C, to install its antennas and related equipment on PG&E's facilities and property.

4. The Master Agreement is structured to convert from a revocable license to a lease if Commission approval is granted.

5. The license is fully revocable, as required by GO 69-C.

6. AT&T Wireless' use of PG&E's property is neither permanent nor significant because it involves cellular equipment that can be removed easily.

7. In GO 159-A, the Commission delegated its authority to regulate the location and design of cellular facilities to local agencies while retaining oversight jurisdiction in cases of conflict with statewide interests.

8. AT&T Wireless' installation activities under the Master Agreement must comply with GO 159-A by notifying the Commission if local permits or approvals are granted or if no local permits or approvals are necessary.

9. The Master Agreement makes productive use of available space, allows improved service to AT&T Wireless customers, and does not interfere with utility service to PG&E customers.

10. Revenues from the license or lease of PG&E's transmission system are subject to FERC accounting and ratemaking, and revenues from the license or lease of distribution facilities are subject to Commission jurisdiction.

11. The service provided under the Master Agreement qualifies as an "existing" non-tariffed product or service rather than a "new" one.

12. D.99-04-021 excluded revenues from existing categories of non-tariffed products and services from the 50/50 net revenue sharing mechanism adopted in that order.

13. Applicants requested that certain terms and conditions of the Master Agreement contained in Appendix A be kept under seal.

14. Public disclosure of the pricing and other terms of the Master Agreement contained in Appendix A would disadvantage PG&E and AT&T Wireless in the marketplace.

Conclusions of Law

1. No public hearing is necessary.

2. The use of PG&E's property by AT&T Wireless under the license agreement is a permissible "limited use" under GO 69-C.

3. Joint use of utility property should be encouraged in appropriate cases because of the obvious economic and environmental benefits.

4. No further environmental review of this application is required.

5. The Master Agreement, as amended, is in the public interest and should be approved with the following conditions:

a. Work performed by AT&T Wireless under the Master Agreement shall not go beyond that authorized in its FCC licenses.

b. PG&E shall file under Section 851 for advance Commission review of any amendments to the Master Agreement.

c. PG&E shall notify the Energy Division and the Office of Ratepayer Advocates, through their respective directors, in writing, within 30 days of the execution, extension or termination of this Master Agreement.

d. PG&E shall notify the ED and ORA directors, in writing, of any substantive changes to plant in service resulting from implementation of the Master Agreement, within 60 days of any such change.

e. PG&E shall notify the ORA and ED directors, in writing, if any right-of-way which is the subject of the Master Agreement ceases to be used and useful for the provision of electric service or if there are any substantive changes in the right-of-way segments, within 30 days of any such event.

6. Revenues generated by the license or lease of Commission jurisdictional property under this Master Agreement should be credited to ratepayers.

7. Applicants' request to file under seal certain information in Appendix A should be granted for two years.

O R D E R

IT IS ORDERED that:

1. Application 00-12-017 by Pacific Gas and Electric Company (PG&E) and AT&T Wireless Services of California Inc. (AT&T Wireless) for approval of a Master License/Lease Agreement for Antenna Attachments (Master Agreement)

and the amendment to the Master Agreement is approved subject to the conditions set forth in this order.

2. PG&E shall credit to its ratepayers all revenues generated under the Master Agreement from the license or lease of Commission jurisdictional property.

3. AT&T Wireless shall notify the Commission as required by Section IV.A of General Order 159-A as to whether permits and approvals for installations under the Master Agreement have been granted by local authorities.

4. The protest of the Office of Ratepayer Advocates is denied in part and granted in part.

5. Applicants' request to have certain information, filed in Appendix A and in the amendment filed in January 2002, kept under seal is granted for two years from the effective date of this decision. During that period, the information 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. A redacted version of Appendix A shall be made available to the public upon request.

6. If the applicants believe that further protection of the information kept under seal is needed, they may file a motion stating the justification for further withholding of the information from public inspection, or for such other relief as the Commission rules may then provide. This motion shall be filed no later than one month before the expiration date.

7. This proceeding is closed.

This order is effective today.

Dated _____, at San Francisco, California.