Decision **DRAFT DECISION OF ALJ VIETH (Mailed 8/2/2002)**

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)

OPINION DENYING PETITION FOR RULEMAKING INTO GENERAL ORDER 69-C

Summary

After considering all the comments, we deny the Petition for a rulemaking into General Order (GO) 69-C. GO 69-C permits limited, revocable uses of utility property by third parties and as such, provides an exemption, under applicable facts, from the statutory requirement that the Commission approve, in advance, arrangements for third parties to use utility property. We conclude that a rulemaking will not yield the fact-specific guidance that those who support a rulemaking appear to seek. We restate three principles, articulated in recent decisions, which apply to appropriate use of GO 69-C across utility industries. We will continue to monitor the need for a rulemaking as we resolve related, pending applications.

Background

Pub. Util. Code § 1708.5(a)[1] authorizes "interested persons to petition the commission to adopt, amend, or repeal a regulation." In Decision (D.) 00-07-035, which resolved the first petition filed under § 1708.5, the Commission reviewed the statute's legislative history, including the uncodified statement of legislative intent.[2] We do not repeat that analysis here.

The focus of this Petition is the Commission's GO 69-C, entitled "Easements on Property of Public Utilities," which became effective July 10, 1985.

Procedural History

Pacific Gas and Electric Company (PG&E), Southern California Edison Company (Edison), and California-American Water Company (Cal-Am Water) filed this Petition[3] on February 4, 2002. Petitioners served the Petition upon the service list established for Rulemaking (R.) 98-07-038, which concerns revisions to GO 96-A. An administrative law judge ruling, on February 28, 2002, authorized responses and replies to responses. In accordance with the schedule set in the ruling, on March 29, 2002, the following parties filed responses: Calpine Corporation (Calpine); Verizon California Inc. (Verizon); Roseville Telephone Company (Roseville); AT&T Wireless Services of California of California, Inc. (AT&T Wireless); and jointly, California Cable &

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[1] Unless stated otherwise, all statutory citations refer to the California Public Utilities Code.

[2] See D.00-07-035, 2000 Cal. PUC LEXIS 585.

[3] The full title is *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*.

Telecommunications Association (CCTA) and WorldCom, Inc. (WorldCom). Petitioners filed a reply on April 15, 2002.

Discussion

The Petition asks the Commission to issue a rulemaking to consider whether revisions should be made to GO 69-C and if so, whether the Commission should defer consideration of sanctions (at issue in other proceedings) until the rulemaking process has concluded. Petitioners allege that several recent Commission decisions – *Delta Energy Center* and *Cal Peak Power* -- have created confusion and uncertainty about the application of GO 69-C, but they do not explain what changes should be made to GO 69-C to alleviate the problem alleged.[4] GO 69-C permits limited, revocable uses of utility property by third parties. As such, GO 69-C provides a narrow exemption from the broader requirement under § 851 that the Commission approve, in advance, any sale, lease, assignment, mortgage or other encumbrance of utility property.

Calpine, Verizon and Roseville all support the Petition but offer no additional insight into what part of GO 69-C is "broken" or how a rulemaking might provide a "fix." Though AT&T Wireless also supports the Petition, it responds that our recent decision, *PG&E/AT&T Wireless Lease*, clarifies the permissible scope of GO 69-C under the facts at issue in that proceeding (e.g., siting of wireless antennas and associated equipment on utility buildings and other facilities).[5]

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[4] See *PG&E/Delta Energy Center*, D.01-08-069, 2001 Cal. PUC LEXIS 519; *PG&E/CalPeak Power*, D.01-08-070, 2001 Cal. PUC LEXIS 520.

[5] See *PG&E/AT&T Wireless Lease*, D.02-03-059, 2002 Cal. CPUC LEXIS xxx.

In contrast, CCTA and WorldCom characterize the Petition as "self-serving." They argue, among other things, that Petitioners are attempting to mask their own misuse of GO 69-C, in some instances to evade full Commission review of property transfers subject to § 851 and, in other instances, to inhibit and delay facilities-based competition by requiring licenses which should fall under GO 69-C to be treated as leases under § 851. CCTA and WorldCom suggest that any Commission rulemaking should be narrowly focused on the nature of a license under real property law, consistent with Commission precedent, and should consider what arrangements under GO 69-C will promote competitive infrastructure development without adversely affecting other public interest concerns.

The parties' comments all underscore the fact-intensive nature of any consideration of GO 69-C. While those parties who support a rulemaking suggest that they are merely seeking clearer guidelines, they actually appear to be seeking a degree of predictability that only a fact-specific analysis can yield. A rulemaking will not provide the guidance they seek.

Recent Commission decisions apply the following general principles that underlie appropriate use of GO 69-C across utility industries:

- Permanent, irrevocable rights in utility property may not be granted under GO 69-C.

- GO 69-C may not be used, in lieu of § 851, to evade environmental review under the California Environmental Quality Act (CEQA).

- Activities that involve construction, and which would trigger CEQA, are not permissible under GO 69-C.

Thus, for example, both *PG&E/Delta Energy Center* and *PG&E/Cal Peak Power* follow the reasoning articulated in a prior decision, *Edison/Telecom Licensing*[6], that any proposed physical changes to utility property (e.g., construction) that would require CEQA review if authority were sought under § 851, should be reviewed under § 851. GO 69-C is inapplicable under such circumstances and its use is inappropriate.

Likewise, concerns about misuse of GO 69-C disfavor the use of "license-to-lease" arrangements, where the parties negotiate a revocable license under GO 69-C with the understanding that the same use of utility property will become irrevocable following Commission approval under § 851.

We deny the Petition and decline to open a rulemaking into GO 69-C at this time. However, we will continue to monitor the need for such a rulemaking, particularly as we resolve § 851 applications now pending or those filed in the coming months following issuance of this decision. Our continued review of pending § 851 applications will produce additional, fact-specific guidance regarding the use of leases for irrevocable easements on utility property and conversely, will provide examples of factual situations where GO 69-C is inapplicable.

Extension of Statutory Timeline

Under Section 1708.5(b)(2), we extend the six-month timeline for consideration of this Petition for two months, until October 3, 2002, in order to permit public review and comment under § 311(g). Consistent with § 311(g), the

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[6] See *Edison/Telecom Licensing*, D.00-12-006, mimeo at pp. 5-6, 2000 Cal. CPUC LEXIS 976.

Commission may act on this matter at the first public meeting 30 days from the date the draft decision is mailed for public review and comment.

Comments on Draft Decision

The draft decision in this matter was mailed to the parties in accordance with § 311(g)(1) and Rule 77.7 of the Rules of Practice and Procedure.

Findings of Fact

1. Petitioners allege that several recent Commission decisions have created confusion and uncertainty about the application of GO 69-C, but they do not explain what changes should be made to GO 69-C to alleviate the problem alleged.

2. The parties' comments all underscore the fact-intensive nature of any consideration of GO 69-C. Those parties who support a rulemaking seek a degree of predictability that only a fact-specific analysis can yield.

3. Recent Commission decisions apply three general principles that underlie appropriate use of GO 69-C across utility industries: (a) permanent, irrevocable rights in utility property may not be granted under GO 69-C; (b) GO 69-C may not be used, in lieu of § 851, to evade environmental review under the CEQA; and (c) activities that involve construction, and which would trigger CEQA, are not permissible under GO 69-C.

4. Continued review of pending § 851 applications will produce additional, fact-specific guidance regarding the use of leases for irrevocable easements on utility property and conversely, will provide examples of factual situations where GO 69-C is inapplicable.

5. We should extend the six-month timeline for consideration of this Petition for two months, until October 3, 2002, in order to permit public review and comment under § 311(g).

6. We should deny the Petition.

Conclusions of Law

1. The six-month timeline for consideration of this Petition should be extended by two months, until October 3, 2002. The Commission may act on this matter at the first applicable public meeting 30 days from the date the draft decision is mailed for public review and comment, consistent with § 311(g).

2. The Petition should be denied, effective immediately, to provide the Petitioners and other parties with greater certainty in their business dealings.

O R D E R

IT IS ORDERED that:

1. Pursuant to Public Utilities Code § 1708.5(b)(2), the time for consideration of the Petition of Pacific Gas and Electric Company, Southern California Edison Company, and California-American Water Company for a Rulemaking into General Order 69-C (Petition), filed on February 4, 2002, is extended until October 3, 2002.

2. The Petition is denied, effective immediately.

This order is effective today.

Dated _____, at San Francisco, California.