Decision ALTERNATE MODIFIED PRESIDING OFFICER'S DECISION OF COMMISSIONER BROWN **(Mailed 8/1/02)**

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application of Pacific Fiber Link, L.L.C. (U-6028-C) for Modification of its Certificate of Public Convenience and Necessity ("CPCN") to Review Proponent's Environmental Assessment for Compliance with the California Environmental Quality Act ("CEQA").	Application 99-08-021 (Filed August 10, 1999)

Stephen P. Bowen and Anita C. Taff-Rice, Attorneys at Law, for Pacific Fiber Link, applicant.
Stephen G. Puccini, Attorney at Law, for the California Department of Fish and Game and Catherine A. Johnson and Carol A. Dumond, Attorneys at Law, for the Consumer Services Division, protestants.

OPINION

1. Summary

We are asked to decide whether penalties should apply to a telecommunications carrier that began trenching and installing a fiber optic project in 1998 before it received the formal approval of this Commission under the California Environmental Quality Act (CEQA), Pub. Resources Code §§ 21000-21176. The utility in July 1999 was ordered by this Commission to stop

work until it obtained formal CEQA approval six months later. The evidence shows that the Commission in 1998 had no procedure in place for conducting a CEQA review for the type of utility involved, that the utility was led to believe by Commission staff that an administrative CEQA approval was forthcoming, and that the utility itself retained environmental experts to monitor and direct its work. Nevertheless, we also find that the utility did begin construction wrongfully, in violation of Pub. Util. Code § 702 and Commission Rule 17.1. Because of the mitigating circumstances described below, we assess the minimum penalty supported by this record and fine the utility $22,500.

2. Background

For the most part, the facts in this case are not in dispute.

Pacific Fiber Link, L.L.C. (PFL)[1] was formed in February 1998 with the aim of building a fiber optic telecommunications system between Seattle, Washington, and Portland, Oregon. Depending on the success of that project, PFL intended to continue construction of the system into California, first extending from Portland to Sacramento and, later, to San Diego.

In April 1998, an attorney for PFL spoke by telephone to Commission staff and was advised that PFL could obtain operating authority in California by

[1] PFL, a Washington limited liability company, was formed on February 11, 1998, by Ledcor Industries Ltd. and Mi-Tech Communications for the purpose of constructing a fiber optic telecommunications network. On March 23, 1999, PFL merged into an affiliated corporation, Pacific Fiber Link Por-Sac, Inc., and the name of the surviving entity was changed to Worldwide Fiber Networks, Inc., a Nevada corporation. On June 7, 2000, Worldwide Fiber Networks changed its name to 360networks (USA) inc., a wholly owned subsidiary of 360networks, inc., a publicly traded Canadian corporation (Nasdaq: TSIX). To avoid confusion, we will refer to the company throughout this decision by its original name, or "PFL."

using a simplified registration process. The registration process was available at that time to long distance carriers that were designated as non-dominant interexchange carriers, or NDIECs. On June 17, 1998, PFL filed under the registration process for a certificate of public convenience and necessity. On July 20, 1998, PFL was authorized by this Commission to conduct long distance telecommunications service in California as an NDIEC. (Decision (D.) 98-07-057.) PFL did not as part of the registration process seek Commission review for compliance with the state's environmental protection act.

Unlike the great majority of new long distance entrants, PFL did not intend to use the facilities of other companies to purchase and resell service to consumers. Instead, it intended to construct a fiber optic telecommunications system along the West Coast. It then would lease or sell portions of its fiber optic capacity to other companies.

Accordingly, PFL in 1998 began assembling the local permits it would require to construct a trench along roadside rights-of-way in which to install its conduit and fiber optic cable between Portland and Sacramento. When local authorities began to inquire about PFL's CEQA compliance, PFL in September 1998 called Commission staff to ask about CEQA review. PFL was advised that the Commission had no procedure in place (at that time) for CEQA review of NDIEC applications. PFL was advised that a "batch CEQA review" was available for carriers seeking to provide competitive local carrier (CLC) service, but PFL was not eligible for this process because it did not seek CLC authority. The batch CEQA review was later discontinued in favor of case-by-case review.

Communications between PFL and the Commission's CEQA staff continued through September and October 1998, with no resolution of how PFL was to proceed under CEQA.

In early October 1998, PFL retained the services of Foster Wheeler Environmental Corporation to establish environmental rules for the planned construction and to prepare the reports that would be required for formal CEQA review. On October 15, 1998, PFL met with the Commission's CEQA staff and was advised that staff was still exploring options for conducting an environmental review of the project.

In November 1998, PFL notified the Commission's CEQA staff that PFL had obtained all necessary local permits for construction in Yolo County, California, including a Yolo County notice of exemption from CEQA requirements. PFL stated that it would begin construction in Yolo County after the Thanksgiving holiday unless the Commission directed it not to do so. At hearing, a Commission staff member testified that while he recommended that PFL wait for formal Commission action, he (the staff member) stated that he would not tell PFL not to proceed.

On December 2, 1998, PFL began trenching and installing its fiber optic cable in Yolo County. By the end of the month, it had completed 14.6 miles of installation. As part of the work, PFL also installed conduit for Yolo County's 911 telephone system without charge to the county.

On December 14, 1998, PFL by telephone notified the Commission's CEQA staff of the progress of construction and requested an in-person meeting to determine how to obtain formal CEQA approval. A meeting date was set for December 29, 1998. On December 28, 1998, PFL was advised by staff that the Commission was reviewing the matter internally, that a ruling addressing environmental review for NDIEC applicants was being considered, and that an in-person meeting therefore was premature. The meeting later was rescheduled for February 16, 1999.

PFL and the Commission's staff continued to communicate by telephone in January 1999. At hearing, a CEQA staff member testified that he had made calls on PFL's behalf to agencies in four counties to tell them that the company and the Commission were working together to try to resolve the environmental review question. Meanwhile, work on the fiber optic project continued. By the end of January, 22.65 miles of conduit construction had been completed in Yolo and Sutter counties.

On February 16, 1999, the CEQA staff met with representatives of PFL and its environmental consultant. PFL outlined the progress of its construction and provided the environmental reports that had been conducted in Yolo, Sutter and Butte counties. PFL stated that it had adopted numerous mitigation measures to avoid interference with sensitive biological resources. The Commission's chief CEQA officer was asked whether PFL could continue construction, and he replied "Yes. You can continue doing what you have been doing." (Transcript, at 496.) At hearing, the officer stated that his response addressed continuation of the mitigation measures rather than the construction that was under way.

The Commission's CEQA staff and PFL representatives continued to communicate by telephone in March and April 1999, and during that time PFL completed 90.8 miles of construction of its project. By April, the parties had agreed that PFL should prepare a Proponent's Environmental Assessment as the first step in formal CEQA review. A proposed outline of the assessment was delivered to the Commission on April 13, 1999, by PFL's environmental consultant.

By May 1999, the Commission had retained Entrix, Inc., to conduct an initial study of the PFL project under CEQA guidelines. The Entrix team in June conducted a four-day field examination of completed and proposed work on the

PFL construction route. On June 17, 1999, a project review meeting was conducted at the Commission, and PFL was advised to file a petition to modify the operating authority that had been granted a year earlier to include environmental review and approval.

By letter dated June 25, 1999, the California Department of Fish and Game asked the Commission to issue a stop-work order on PFL's project "until proper project review and approval has been completed and appropriate environmental protections are in place." (Exhibit 13.) A stop-work order was issued by the Commission's Executive Director on July 6, 1999, at which time PFL ceased all construction. A total of 131 miles of conduit construction had been completed at that time.

3. Penalty Phase Proceeding

On August 11, 1999, PFL applied for a modification of its operating authority to include compliance with CEQA. The application included a three-volume Proponent's Environmental Assessment, which evaluated the potential environmental impact of the project. The assessment concluded that if proper mitigation measures were put in place, the conduit project would not create significant adverse effects on the environment.

There were two formal protests to the application. The Commission's Consumer Services Division (CSD) urged that approval not be granted until CSD investigated complaints about construction that already had taken place. The California Department of Fish and Game urged a more thorough environmental analysis. It alleged that applicant had not obtained required determinations from the department to ensure against adverse effects on fish and wildlife resources.

The Commission's CEQA staff, with the help of consultant Entrix, conducted further inspections and review of the application. On October 1, 1999, staff issued a Proposed Mitigated Negative Declaration and Initial Study. Following publication and comments, a Final Mitigated Negative Declaration and Initial Study was issued on November 24, 1999. The report established mitigation measures to govern the construction work and concluded that with these measures and continued oversight, the project would not have significant effects on the environment. In light of this report, CSD withdrew its protest.

In D.00-01-022, issued on January 6, 2000, the Commission adopted the mitigated negative declaration, granted modification of applicant's operating authority to include CEQA approval, and lifted the stop work order that had been in place since July 6, 1999. However, the Commission kept this proceeding open for investigation of whether sanctions should be assessed against PFL for starting construction prior to CEQA review. The Commission stated:

> "We recognize that our stop work order has effectively shut this project down for six months, with attendant financial loss to applicant. We also recognize that applicant has taken steps to mitigate environmental damage. Nevertheless, we believe that further consideration must be given to whether this Commission should levy fines or other sanctions against applicant and its officers. (See, e.g., In Re Coral Communications, D.99-08-017, 1999 Cal. PUC LEXIS 519.) Our concern is that carriers may not have adequate incentives to comply with the law if the only penalty they face for non-compliance is the possibility of delays in construction, delays which would have occurred in the early stages of the project anyway if the carrier had complied with the law and submitted to environmental review and mitigation. Accordingly, we will keep this proceeding open to investigate whether and the extent to which fines or other sanctions should be imposed on [applicant]." (D.00-01-022, p. 12.)

The assigned administrative law judge (ALJ) was directed to "consider whether a fine or other sanctions should be imposed on applicant and its officers for commencing work without appropriate authority and in violation of the law." (D.00-01-022, Ordering Paragraph 10.) CSD, one of the Commission's major investigative units, was directed to investigate the alleged violations by PFL and, depending on the results, to prepare a case against the applicant.

In a Scoping Memo issued on March 9, 2000, Assigned Commissioner Duque identified the issues to be addressed in this proceeding as follows:

(a) Did Worldwide Fiber Networks, Inc. (formerly Pacific Fiber Link, L.L.C.) violate any provision of the California Environmental Quality Act (CEQA), any provision of the Public Utilities Code, or any other relevant law or regulation in its construction activities related to this application?

(b) Has there been any uncorrected environmental damage related to any alleged violation by Worldwide Fiber Networks?

(c) What mitigating circumstances, if any, should be considered by the Commission in assessing any alleged violations by Worldwide Fiber Networks?

(d) What sanctions, if any, should the Commission consider in evaluating this matter?

(e) What case law or other precedents should the Commission consider in evaluating this matter?

Both CSD and the Department of Fish and Game submitted direct testimony on May 26, 2000. Following a stay of proceedings to permit further discovery, PFL responded with its testimony on November 7, 2000. Rebuttal testimony was received on December 18, 2000, and five days of hearings were

conducted on January 8-12, 2001. Final briefs were submitted on March 26, 2001, at which time the matter was deemed submitted for resolution.

4. Position of CSD

CSD argues that sanctions are warranted against PFL for using the registration process instead of an application for authority to operate, and for starting construction of its fiber optic project before obtaining CEQA approval. CSD investigator Stephanie Amato testified that, regardless of conflicting advice that PFL may have received from Commission staff members, PFL knew or should have known that it was not eligible to use the simplified registration process to register as a facilities-based NDIEC in California.

Amato testified that the instructions for the registration process state:

> "Only facilities which meet the requirements for exemption from the California Environmental Quality Act (CEQA) pursuant to Commission Rules of Practice and Procedure 17.1(h)(1)(A)(1) may be included in a CPCN registration. All other facilities will require a formal application."" (Exhibit 1, at 4.)

Amato testified that this instruction is on the Telecommunications Division webpage and is printed out along with the two-page registration form. The rule also is stated in the Commission decision establishing the registration process. (*Re Simplified Registration Process for Nondominant Telecommunications Firms* (1997) D.97-06-107, 73 CPUC2d 288, 298.) The referenced Rule 17.1(h)(1)(A)(1) provides an exemption only for restoration and repair of existing structures where the damage is not substantial, an exemption not applicable to PFL.

According to CSD, PFL should have known that it was ineligible to use the simplified registration procedure and therefore was required by Rule 17.1 to file

a formal application with an accompanying Proponent's Environmental Assessment (Rule 17.1(c) and (d)).

CSD also presented the testimony of three Commission staff members who had dealt with PFL: Joseph McIlvain, regulatory analyst responsible at the time for dealing with NDIEC applications; John Boccio, regulatory analyst in the Environmental Projects Unit of the Commission's Energy Division; and Andrew Barnsdale, environmental programs manager.

McIlvain testified that he receives hundreds of calls from telephone company representatives and he did not recall details of calls from PFL representatives in 1998. On cross-examination, however, he stated that the Commission in 1998 did not do CEQA reviews for applicants seeking only NDIEC authority, and he was likely to have advised callers to check the Commission's web site and use the simplified registration form. McIlvain said that the policy changed in 1999, and he began telling "facilities-based" NDIEC applicants that they would have to file an application and comply with CEQA requirements. Facilities-based carriers are those that plan to construct their own facilities rather than use the facilities of other telephone companies. McIlvain said that only about 20 or 30 of the 738 NDIECs registered with the Commission in January 2000 were facilities-based.

Boccio testified that he had many conversations in 1998 with Anita Taff-Rice, an attorney for PFL. He said that he told her that CEQA review for facilities-based long distance carriers was a "gray area," and no definitive policy was in place at that time. He said that Taff-Rice argued that the authority already granted to PFL should be sufficient to permit construction in roadside rights-of-way. Boccio further testified that he and Barnsdale counseled PFL not to begin construction until the CEQA question was resolved.

On cross-examination, Boccio stated that the CEQA unit in 1998 dealt primarily with energy utilities, and PFL was the first NDIEC telephone applicant to seek CEQA review. He stated that he had explored many options for handling the matter administratively, including the use of the "batch processing" review that was in place for competitive local carriers. (The batch processing of CLC applicants with construction plans took place on a quarterly basis and involved a blanket mitigated negative declaration for all of the carriers. This process was discontinued in 1999 and replaced with a case-by-case review of applicants.) Boccio testified that he worked cooperatively with PFL trying to resolve the CEQA question, and that he made a number of phone calls on PFL's behalf to other agencies.

Like Boccio, Barnsdale testified that PFL's CEQA status was a case of first impression for his unit in 1998. He said that PFL's decision to begin construction on December 6, 1998, was done at the company's initiative and at its own risk. On cross-examination, he acknowledged that incumbents like Pacific Bell, AT&T and cellular carriers are not subject to CEQA review for new facilities construction for various reasons, including claims of exemption, and that differing degrees of CEQA oversight applied in 1998 to new entrants in the telecommunications market depending on the type of service they planned to offer.

In testimony on behalf of the California Department of Fish and Game, James R. Nelson, described his investigation as a conservation supervisor of PFL's trenching in state park areas. He stated that PFL had begun directional drilling and installation of conduit under parkland streams without obtaining streambed alteration agreements from the department. Nelson stated that PFL's permit coordinator told him that the company had completed CEQA review as

part of the authority granted by the Commission, a statement that Nelson determined was untrue. Nelson testified that he was particularly concerned with PFL's failure to clean up spills of betonite, a clay-like drilling substance that in large quantities can adversely affect fish and aquatic organisms. While the Fish and Game Department eventually entered into an agreement with PFL for its drilling operations, Nelson and his manager reported their concerns about the CEQA status of the project to the Commission in June 1999. The Commission's stop-work order issued shortly thereafter.

5. Position of PFL

PFL presented its evidence through the testimony of two environmental specialists retained by the company to monitor the conduit project, two corporate officers who had directed the project, and two attorneys who had dealt with the Commission on CEQA issues. By stipulation, PFL also introduced the deposition transcripts of six wardens for the Department of Fish and Game.

R. John Little, president of Sycamore Environmental Consultants, Inc., and James K. Nickerson, western region science manager for Foster Wheeler Environmental Corporation, testified that their companies were retained by PFL in September 1998 to conduct environmental reviews of the fiber optic project. They stated that they prepared a comprehensive plan to protect sensitive biological, archeological and historical resources along the construction route and worked with local and state agencies to obtain required permits.

Both witnesses testified that they determined that the Commission was the lead agency for CEQA purposes, but that there appeared to be uncertainty within the Commission about what CEQA obligations applied to an NDIEC like PFL. Nickerson stated that he met with the Commission's environmental staff and that "they were aware of, and approved of, the environmental studies being

performed in support of the project." (Exhibit 15, at 7.) He said that the Commission's staff appeared to have no problem with the construction taking place on the rights-of-way of public roads and utilities, but told him that further Commission authorization would be required for regeneration facilities that later would be constructed outside the rights-of-way. Little testified that it was his belief that some sort of paper solution would take place that would satisfy the earlier CEQA requirements for the Commission.

Nickerson testified that PFL obtained all necessary approvals from the Department of Fish and Game, adding that at least two of the department's regional offices had agreed that streambed alteration agreements were not required because PFL planned to drill under waterways and not affect streambeds or banks. He testified that he was not aware of uncorrected betonite spills.

PFL's vice president of planning, James Cox, testified that he thought that the operating authority that the company obtained from the Commission in July 1998 included CEQA authority. He said he knew of three other telecommunications companies that were building fiber optic systems in California and had CEQA approval from the Commission. He learned later that these were competitive local carriers that had obtained their authority under the blanket mitigated declaration process that has since been discontinued. Cox stated that when PFL failed to receive guidance from the Commission on obtaining CEQA approval, the company put together its own environmental review of the project.

In similar testimony, PFL's vice president of operations, Gary D. Anderson, said the company had sought Commission action on CEQA for months. He said that PFL decided to proceed with construction in December

1998 because all local permits were in place, all construction crews had been hired, Yolo County had issued a CEQA exemption for the work, and the word from Commission staff was that the Commission would not stop PFL from beginning work.

Asked in cross-examination about the costs of the Commission's stop-work order between July 1999 and January 2000, Cox testified that losses were not large in terms of the total project value. Anderson, however, estimated that the stop-work order cost PFL approximately $1 million, but he was unable to quantify the loss.

PFL called two lawyers, Julie Hawkins and Anita Taff-Rice, to recount their experiences in dealing with the Commission. Hawkins, practicing with a law firm in Seattle at the time, testified that she was assigned to file for PFL's authority in California in April 1998. She said that she called the Commission's staff on at least 10 occasions and was told to file a registration and not an application for PFL. She said that she was told that the Commission did not do a CEQA review for long distance carriers like PFL. Hawkins said that this did not surprise her because her filings in seven other states had not required environmental review.

On cross-examination, Hawkins acknowledged that she kept no notes of her conversations with Commission staff. She admitted that the two-page registration form she filed on behalf of PFL did not include a description of the fiber optic project, although it did specify that PFL was a facilities-based carrier.

Both Hawkins and Taff-Rice testified that they had reviewed the Commission's Rule 17.1 dealing with the preparation and filing of environmental reports. Both stated that they found the instructions unclear and sought guidance from McIlvain and others on the Commission staff. On cross-

examination, Taff-Rice said she found McIlvain "extremely knowledgeable and very helpful," and thus she had no reason to doubt the filing procedures he described. Taff-Rice went on to state:

> "There were other carriers out there doing precisely what we contemplated and yet they apparently didn't need an exemption and were not filing full-blown [Proponent's Environmental Assessments]. So we tried to read the rule and compare that to what I knew was going on in the real world." (Transcript, at 746.)

6. CSD Recommendations on Sanctions

CSD argues that a preponderance of the evidence shows that PFL in using the simplified registration process instead of an application violated Rule 1 of the Rules of Practice and Procedure ("never to mislead the Commission or its staff by an artifice or false statement of fact or law") and Rule 18 (requirements for filing an application for a Certificate of Public Convenience and Necessity). In starting construction before the Commission had conducted CEQA review, PFL is alleged to have violated Rule 17.1. Rule 17.1 sets forth the requirements for preparation and submission of environmental impact reports. CSD also alleges a violation of Pub. Util. Code § 702, which requires every public utility to comply with the orders, decisions and rules of the Commission.

Under Pub. Util. Code § 2107, the statutory range of Commission penalties is from $500 to $20,000 for each offense. Each day of violation is considered a separate violation. (Pub. Util. Code § 2108.) CSD thus calculates that the penalty for constructing without authority for 216 days from December 2, 1998 to July 6, 1999, could range from $108,000 to $4,320,000.

The Commission has established criteria for determining the size of fines in *Re Standards of Conduct* (1998) D.98-12-075, 190 P.U.R.4th 6. In general, the

Commission considers severity of the offense, the conduct of the utility, the financial resources of the utility, and the totality of the circumstances in the particular case. In addition to these criteria, CSD suggests that the Commission may consider factors in mitigation of a penalty, including the lack of a clear policy in 1998 for dealing with environmental review of telecommunications carriers.

Taking all of these factors into account, CSD recommends a fine in the middle to lower end of the statutory range, or from $1 million to $2 million, depending on the degree of mitigation that the Commission deems appropriate.

7. Discussion

Underlying much of the testimony in this case is the fact (of which we take official notice) that the Commission in the past 15 years has made extraordinary strides in developing competition in the telecommunications markets. The Commission has opened long distance markets for both resellers and facilities-based carriers. More recently, it has opened local exchange markets to competition. Competition in these markets is intended to promote technological innovation, reduce prices, and provide customer choice.

In pursuing these objectives, the Commission has sought ways to ease barriers to entry brought about by regulatory procedures. At the same time, the Commission has faced the challenge of balancing regulatory oversight while dealing with the addition of hundreds of carriers into the marketplace.

As the testimony here shows, the Commission has established a simplified registration process intended to ease market entry for new long distance carriers that intend to compete through existing facilities. For a time, in a process now discontinued, the Commission permitted entrants in the local exchange market to

complete a short-form environmental disclosure and begin operations pursuant to a blanket CEQA authority issued in quarterly batches.

Not surprisingly, this expansion of the telecommunications markets has strained the regulatory process. The Commission has been compelled to reevaluate its requirements under CEQA to ensure sound environmental practices by regulated utilities. The Commission for the past two years has begun taking a more active role in environmental oversight. On at least five occasions in recent months, we have ordered carriers to halt construction of telecommunications facilities following complaints from other government agencies and members of the public about the carriers' compliance with CEQA. In December 1999, we issued D.99-12-048 and D.99-12-050 to discontinue the practice of issuing authority to new CLCs in batches. We now conduct environmental analysis of each application, and we require carriers to file again before starting new construction.

In February 2000, we opened a new rulemaking (R.00-02-003) to explore all of our CEQA practices in the telecommunications field. We called for comments on whether local exchange carriers with pre-existing authority should continue to be exempt from CEQA review by this Commission. We sought guidance on whether local governments have sufficient resources to direct CEQA compliance in place of Commission review. We invited comments on the Commission's existing practice for authorizing new long distance carriers in a manner intended to protect California's environment.

With this said, we turn to the case at hand, a case that exposes some of the weaknesses in our CEQA review process that existed in 1998. In weighing the evidence, we look to CSD to show by a preponderance of the evidence that PFL has violated Commission rules, and that sanctions are merited. (*See, e.g.,*

D.98-10-058 ("Right-of-Way Decision"), Conclusion of Law 73; *Re Facilities-Based Cellular Carriers* (1994), D.94-11-018, 57 CPUC2d 176.)

As CSD correctly reminds us, it is this Commission and other government agencies that are bound by the requirements of the State's Environmental Quality Act. PFL therefore does not stand accused of violating CEQA. Instead, PFL is alleged to have violated rules established by this Commission in order that the Commission can carry out its CEQA responsibilities.

7.1 Did PFL Wrongfully File for Operating Authority Through Registration?

Rule 1 of the Rules of Practice and Procedure establishes a generic requirement that those who transact business with the Commission must not mislead the Commission or its staff by an artifice or false statement of fact or law. D.97-06-107 sets forth the registration process for NDIECs. CSD alleges that PFL violated Rule 1, Rule 18 (governing the procedure for filing applications), and the requirements of D.97-06-107. CSD alleges that PFL misled the Commission by using the simplified registration process instead of an application, thereby implying that PFL intended to conduct its long distance service without constructing new facilities.

The evidence does not show that PFL attempted to mislead the Commission in its filing. The company through its counsel described the fiber optic conduit project to the Commission representative responsible for NDIEC registrations. PFL was told that the Commission did not at that time do CEQA review for NDIEC entrants, the great majority of which did not contemplate construction. PFL was advised to print out the two-page registration form from the Commission's web site, read the instructions, and file the form if it sought to file as an NDIEC. PFL representatives sought further guidance and again were

told that the Commission's procedure required registration for carriers seeking authority to operate as NDIECs.

CSD alleges that regardless of what PFL was told by Commission staff, the instructions on the simplified form, as well as the findings in D.97-06-107, state that the form could not be used by facilities-based NDIECs. The evidence shows, however, that the instructions did not conform at that time to the practice followed by the Commission. All NDIECs were expected to file through registration. A Commission CEQA representative testified that it was not clear in 1998 that the Commission would serve as the lead agency for CEQA compliance for NDIEC entrants or whether other government agencies would fill that role.

Moreover, the particular instruction relied on by CSD – Rule 4 of the registration form – appears to be in error in referring to only one Class A exemption (Rule 17.1(h)(1)(A)(1)), instead of all nine exemptions contained in Rule 17.1(h)(1)(A), as would appear to be the intent.

In any event, PFL in filing its registration identified itself as a "facilities-based" NDIEC, thus negating the suggestion that it was seeking to hide its intention to operate with its own equipment and installations.

The Commission's NDIEC witness testified at hearing that, in his judgment, the Commission should balance PFL's actions with the Commission's uncertainty regarding CEQA compliance for NDIECs. Asked whether he thought it would be fair for PFL to be sanctioned in this case, he replied:

> "A. I would recommend the general policy – I hope this answers your question – that the general policy of this Commission should be the following: We and utilities have been screwing up for years. We're going to change our policy as of today and tell all the utilities that from now on this is what they must do and what we will do, concerning our responsibilities in CEQA as well as the utilities' responsibilities in CEQA.

> Prior to that statement, I think the Commission should not go back retroactively and say, 'Well, you should have known that we didn't mean what we did, but you did mean what you did.'
>
> "Q. Okay. And if that policy were applied by the Commission in this case, wouldn't that mean that any violations concerning CEQA would be fully mitigated?
>
> "A. Yes." (Transcript at 284; McIlvain.)

Rule 1 violations require purposeful intent, recklessness, or gross negligence in regard to communications with the Commission. (*In re Facilities-Based Carriers, supra,* D.94-11-018, at 82.) That showing has not been made on this record. We further find that any violation by PFL of Rule 4 of the registration form and the identical requirement in D.97-06-107 was mitigated by the company's reliance on the existing Commission practice and the unambiguous instructions of Commission staff.

7.2 Did PFL Wrongfully Begin Construction?

The evidence shows that PFL began construction of its fiber optic conduit project on December 2, 1998, at a time when it knew or should have known that Commission approval under CEQA was required and had not yet been obtained. The testimony of PFL's environmental experts shows that they knew that the Commission was the lead agency for CEQA purposes, and that CEQA review was necessary. Indeed, prior to construction, they had begun compiling the reports that their experience told them would be required as part of a Commission-sponsored CEQA analysis. PFL had been told by the Department of Fish and Game and other government agencies that CEQA clearance was necessary. The increased urgency of PFL's lawyers in seeking Commission

action on the environmental issue demonstrates the importance that the company placed on obtaining CEQA review.

We give little credence to the company's defense that it notified the Commission's John Boccio that it was about to begin construction unless he told them they could not do so. First, the request smacks of an ultimatum, and Commission staff members resist ultimatums. Second, it is undisputed that both Boccio and his supervisor, Andrew Barnsdale, had stated that PFL should not proceed without CEQA clearance – they just weren't sure how that clearance would be accomplished. Finally, the fact that PFL through its attorney asked whether the Commission would stop PFL from constructing was itself an admission that Commission authority under CEQA was required. Indeed, the company in its brief states that had the Commission told PFL not to proceed at that point, the company would not have done so. (PFL Reply Brief, at 1.) As Barnsdale later testified, PFL's decision to proceed on December 2, 1998, was made of its own volition and at its own risk.

Accordingly, we agree with CSD that the company's decision to begin work prior to obtaining CEQA clearance from the Commission was a violation of Rule 17.1, which contemplates advance preparation, filing and approval of environmental documents for projects "for which Commission approval is required by law." (Rule 17.1(c).) It follows that we also find a violation of Pub. Util. Code § 702, which requires public utilities to comply with the rules of the Commission.

7.3 Mitigation

We turn next to the more difficult question of whether PFL's violation was mitigated by the facts and circumstances of this case and, if so, to what extent mitigation should apply.

The record shows that PFL in 1998 was the first carrier with only NDIEC authority to seek CEQA approval for contemplated construction. It is equally clear that the Commission staff responsible for CEQA review did not know what to do with that request. Staff was aware that at least some carriers with both NDIEC and CLC authority obtained CEQA review under the blanket mitigated negative declaration procedure available only to carriers seeking CLC authority. Staff did not know whether that or a similar procedure was available for a carrier holding only NDIEC authority. Staff also was aware, as was PFL, that carriers such as Pacific Bell, Sprint and AT&T were permitted to do similar trenching and conduit projects without CEQA approval under various claimed exemptions from the Commission process.

Weeks of meetings and telephone conversations between PFL and the Commission's CEQA staff followed. Meanwhile, PFL retained qualified outside environmental consultants, who reviewed the proposed construction and directed procedures to protect environmental resources. PFL worked closely and cooperatively with the Commission's CEQA staff. The Commission staff made calls to other agencies to explain that the company and the Commission were working toward a resolution. PFL formed a reasonable belief, supported by staff, that PFL's CEQA status would be corrected with a paperwork or administrative solution.

By late November 1998, PFL had obtained all local approvals and permits, had put out bids and had hired crews to begin the work in Yolo County. It had obtained from Yolo County a notice of exemption from CEQA requirements to permit PFL to trench and lay conduit for a county 911 system beside the PFL conduit. The Commission's CEQA staff had called CalTrans to help clear the way for PFL trenching in an adjoining county. Initial work for PFL would take

place within roadway, rail and other rights-of-way, where CEQA approval often is routinely granted or is not required.

After construction began, PFL continued to work with the Commission's CEQA staff, furnishing them with the environmental reports issued by PFL's consultants. The CEQA staff gave implicit approval to the environmental steps that PFL had put in place for its construction.

We believe that the mitigating circumstances described above should be weighed against PFL's violations in starting construction without Commission-approved CEQA review. The Commission at all relevant times admittedly had no procedure in place for conducting a CEQA review for PFL. Based on its conversations with CEQA staff, PFL reasonably could believe that an administrative approval was being fashioned. PFL had retained environmental experts to conduct the kind of proponent's review that ultimately would be required by the Commission.

We note, finally, that the Commission's stop-work order in July 1999 shut down PFL's project for six months, with attendant financial loss to the company. The stop-work order served notice on all telecommunications carriers that failure to comply with the Commission's CEQA requirements could result in an order to stop work, or in other sanctions.

We conclude, after review of the record as a whole, that PFL's cooperation with Commission staff, its efforts to comply with the substantive requirements of CEQA, and the Commission's own uncertainty in 1998 in dealing with the CEQA requirements for NDIEC entrants, mitigate against sanctions in the range of $1 to $2 million as recommended by CSD. The evidence shows that PFL performed unauthorized construction for 45 days prior to the time it arguably was led to believe by a Commission representative that construction could continue.

Therefore, pursuant to Pub. Util. Code § 2107, we assess a penalty of $500 for each of the 45 days in which unauthorized construction took place, for a total of $22,500.

8. Department of Fish and Game

The Department of Fish and Game deferred to CSD for the prosecution of this case before the Commission. The department alleges that PFL violated at least two sections of the Fish and Game Code, but it correctly notes that the Commission lacks jurisdiction to pursue those allegations. The department reserves its right to proceed independently in enforcement of those provisions.

As relevant to this proceeding, the department alleges that betonite spills by PFL went uncorrected. The evidence presented, however, was contradicted by the testimony of PFL's environmental consultants and the Commission's environmental witness. We conclude that the weight of the evidence is insufficient to find that there was uncorrected environmental damage caused by PFL's decision to proceed with construction without formal CEQA approval.

9. Scope of Proceeding

In Resolution ALJ 176-3022, dated September 2, 1999, the Commission categorized this application as ratesetting. In D.00-01-022, dated January 6, 2000, we determined that hearings were necessary in Phase II of this proceeding. By Scoping Memo dated March 9, 2000, Phase II of this proceeding was recategorized as adjudicatory. The scope of this proceeding was set forth in the Scoping Memo of March 9, 2000. Our order today confirms these determinations and confirms that Administrative Law Judge (ALJ) Walker is the presiding officer.

10. Comments

The Commission mailed the alternate draft decision of Commissioner Brown in this matter to the parties in accordance with Pub. Util. Code § 311(g)(1) and Rule 77 of the Rules of Practice and Procedure. Comments were filed by _____.

Findings of Fact

1. PFL on June 17, 1998, filed for a certificate of public convenience and necessity to operate in California as an NDIEC.
2. PFL planned construction of a fiber optic project between Portland and Sacramento.
3. PFL filed under a simplified registration process that in 1998 was used for carriers filing only as NDIECs.
4. PFL informed the Commission of its plans for installation of a fiber optic system at the time of its registration.
5. PFL was told by Commission staff to use the registration process to register as an NDIEC.
6. The great majority of NDIEC applicants intend to use the facilities of other carriers and are not themselves facilities-based.
7. In its registration, PFL identified itself as a facilities-based NDIEC.
8. Operating authority was granted to PFL in D.98-07-057 on July 20, 1998.
9. PFL did not as part of the registration process seek Commission review for compliance with the Commission's CEQA rules.
10. PFL was advised by Commission staff that the Commission had no procedure in place at that time for CEQA review of NDIEC applications.

11. In October 1998, PFL retained the services of Foster Wheeler Environmental Corporation to establish environmental rules for the planned construction.

12. PFL reviewed its environmental plans and its construction plans with the Commission's CEQA staff.

13. On December 2, 1998, PFL began trenching and installing its fiber optic cable in Yolo County.

14. During construction, PFL called and met with Commission staff on numerous occasions to seek CEQA review by the Commission.

15. The Commission's CEQA staff told PFL to continue the environmental safeguards that PFL had put in place for construction.

16. In April 1999, PFL was told to prepare a Proponent's Environmental Assessment as the first step in formal CEQA review by the Commission.

17. In May 1999, the Commission retained Entrix to conduct an initial study of the PFL project under CEQA guidelines.

18. On June 17, 1999, a project review meeting was conducted at the Commission, and PFL was advised to file a petition to modify its earlier operating authority.

19. On June 25, 1999, the California Department of Fish and Game urged the Commission to issue a stop-work order on the PFL project until CEQA review was complete.

20. A stop-work order was issued by the Commission's Executive Director on July 6, 1999.

21. On August 11, 1999, PFL applied for modification of its operating authority to include compliance with CEQA.

22. The Commission's CEQA staff issued a Final Mitigated Negative Declaration and Initial Study for the PFL project on November 24, 1999.

23. The Commission in D.00-01-022, issued on January 6, 2000, granted modification of applicant's operating authority and lifted the stop-work order.

24. The Commission kept this proceeding open to investigate whether sanctions should be assessed against PFL for starting construction prior to CEQA review.

25. CSD conducted an investigation and recommended that sanctions should be imposed.

26. Five days of hearings were conducted January 8-12, 2001, and final briefs were filed on March 26, 2001.

Conclusions of Law

1. The evidence does not support a finding that PFL violated Rule 1, Rule 18 or D.97-06-107 in using the registration process instead of an application for its initial filing.

2. PFL began construction of its fiber optic conduit project at a time when it knew or should have known that Commission approval under CEQA was required and had not yet been obtained.

3. PFL violated Rule 17.1 and Pub. Util. Code § 702 in starting construction of its project prior to receiving approval from the Commission under CEQA.

4. Uncorrected environmental damage from the construction has not been shown.

5. Factors in mitigation include PFL's cooperation with Commission staff, its efforts to comply with the substantive requirements of CEQA, and the Commission's own uncertainty in 1998 in dealing with CEQA requirements for an NDIEC applicant.

6. Based on the record as a whole, a fine of $22,500 is warranted for the violations noted in Conclusion of Law 3.

7. The scope of this proceeding is set forth in the Scoping Memo dated March 9, 2000; ALJ Walker is the designated as the presiding officer.

O R D E R

IT IS ORDERED that:

1. Pacific Fiber Link, L.L.C. (PFL) is assessed a penalty of $22,500 payable to the General Fund within 30 days of the effective date of this order.

2. Upon making such payment, PFL shall file an advice letter with the Commission's Telecommunications Division attaching a cancelled check or other proof of satisfaction of the penalty obligation we impose in this decision.

3. Application 99-08-021 is closed.

This order is effective today.

Dated _____, at San Francisco, California.