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BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application of of WTG-West, Inc., for a Certificate of Public Convenience and Necessity to Construct Fiber Optic Telecommunications Facilities and to Operate as a Facilities-Based Carrier of Inter-LATA Telecommunications Services within California.	Application 89-05-026 (Filed May 11, 1989)
HENRY SINGLETON, Complainant, vs. WTG-WEST, INC. (U-5192-C), Defendant.	Case 89-11-010 (Filed November 13, 1989)
FIVE OAKS, LTD., Complainant, vs. WTG-WEST, INC. (U-5192-C), Defendant.	Case 89-12-033 (Filed December 21, 1989)

Thelen, Marrin, Johnson & Bridges, by Janis L. Harwell, Attorney at Law, for WTG-West, Inc., applicant.
Niven & Smith, by Scott D. Mayer, Attorney at Law, for Five Oaks, Ltd., complainant in C.89-12-033 and protestant in A.89-05-026.

John L. Clark, Attorney at Law, for Henry Singleton, complainant in C.89-11-010 and protestant in A.89-05-026; Dennis J. Kejoe, Attorney at Law, for Fred J. Pfyffer and Lena Pfyffer; George E. McInnis, Attorney at Law, for Roy and Evelyn Bray; and J. R. Ramos, Attorney at Law, for Monterey County; protestants.
Morrison & Foerster, by James M. Tobin, Attorney at Law, for Southern Pacific Telecommunications Co., interested party.

O P I N I O N

WTG-West, Inc. (applicant), a Delaware corporation qualified to do business in California, seeks a certificate of public convenience and necessity (CPC&N) authorizing it to construct telecommunications facilities within California and to operate as a facilities-based carrier of interLATA telecommunications within California. The Commission by ex parte order issued the requested authority (Decision (D.) 89-10-030 dated October 12, 1989). After the decision was issued, protests to the application, and a petition for rehearing of the decision, based upon an alleged inadequacy of notice and an alleged inadequate environmental impact report (EIR), were filed by landowners in Monterey County and by Monterey County. The Commission granted rehearing of D.89-10-030 and stayed the decision pending further order (D.90-01-023 dated January 9, 1990).

The two complaint cases, Case (C.) 89-11-010 and C.89-12-033 make essentially the same allegations as set forth in the protests to the application and were consolidated with the application for hearing. The complainant in C.89-12-033 has settled with applicant and requests that the complaint be dismissed. Protestant Bray has also settled with applicant and has

withdrawn his protest. The remaining protestants are the County of Monterey, Mr. and Mrs. Pfyffer, and Henry Singleton.

Two prehearing conferences were held subsequent to the granting of rehearing. At the first prehearing conference, all parties agreed that the sole issue before the Commission was the adequacy of the environmental impact report relied upon by applicant. No party challenged applicant's showing on need for its service or fitness. After the first prehearing conference, applicant filed a motion to dismiss the protests and complaints. Protestants filed in opposition and the motion was heard at the second prehearing conference.

Background

Applicant is a wholly owned subsidiary of Williams Telecommunications Group, Inc. (WTGI), a Delaware corporation. The Williams Companies (Williams) owns 83.675% of Williams Telecommunications Group, Inc. Williams is a publicly held Delaware corporation.

Applicant and the other facilities-based carriers owned by WTGI are authorized to provide interstate telecommunications services throughout the United States. Applicant is authorized by the Federal Communications Commission (FCC) to operate common carrier microwave facilities. WTG of California, Inc. (WTG California), doing business as Wiltel of California, Inc., is a wholly owned subsidiary of WTGI. WTG California holds a CPC&N from the Commission to operate as a reseller of interLATA telecommunications services within California. WTG California's certificate was issued on March 25, 1987 and its CPUC number is U-5124-C. With the exception of WTG California, neither applicant nor any other subsidiary of Williams owns an interest in any carrier offering telecommunications services within California. Neither applicant nor any other subsidiary of Williams is controlled by any other carrier offering telecommunications services within California.

In the mid-1980's, Williams' management concluded that an opportunity existed for Williams to compete in the interexchange telecommunications market by installing fiber optic cable in its extensive network of decommissioned petroleum and natural gas pipelines. Although Williams was a newcomer to the telecommunications industry, it had a great deal of experience in pipeline network operations, it had substantial financial and organizational resources, and it had the unique ability to offer telecommunications customers cost effective and highly secure transmission by enclosing fiber optic cables in existing steel pipe. With these considerations in mind and, in response to the FCC's policy of deregulating the interexchange telecommunications market, Williams formed a telecommunications group and entered the interexchange telecommunications market. The Williams telecommunications group currently provides telecommunications services nationwide. The Williams telecommunications group initially constructed a fiber optic telecommunications system in the midwestern United States. Then it became a member of National Telecommunications Network (NTN) and obtained access to fiber optic systems operated in the eastern half of the United States.

In 1987, the Williams telecommunications system was expanded to the western United States. Most of the western link of the system is served by a fiber optic system constructed by applicant from Kansas City to Denver, Salt Lake City, Las Vegas, and Los Angeles. A digital microwave network connects major cities in the Pacific Northwest to rest of the Williams system. In addition, the Williams telecommunications group uses facilities leased from other carriers to connect San Francisco and San Diego to its system.

Applicant is one of the entities which comprise the Williams telecommunications group and it operates the western portion of the Williams system. Applicant currently provides interstate interexchange service on a common carrier basis.

Applicant makes its services available to all members of the public. For the most part, applicant has found that its services are used by other interexchange carriers and by large corporations and institutions for their internal telecommunications networks. Applicant also provides a portion of its capacity in California to its affiliate, WTG California and WTG California resells that capacity to California customers under a tariff on file with this Commission.

Applicant requests authority to construct a fiber optic telecommunications facility within California, to operate as a facilities-based carrier providing interLATA telecommunications services within California, and to offer intrastate interexchange telecommunications services to the general public or segments thereof within California. Applicant seeks authority to offer statewide telecommunications services only as an interLATA carrier and will not hold itself out as an intraLATA carrier of such services until it obtains appropriate authority from the Commission.

The services applicant proposes to provide are the same types of services that it currently provides on an interstate basis. To provide intrastate service in California (and in order to provide interstate service to Sacramento and San Francisco over its own facilities), applicant intends to construct a fiber optic telecommunications system from Los Angeles to San Francisco and Sacramento (the California system). Upon completion of the California system, applicant will provide voice grade and high speed digital channels suitable for use in a wide range of voice, data, and image transmission applications. Service will initially be provided between locations in Los Angeles, San Francisco, and Sacramento. With respect to interstate services to be provided over this system, applicant has authority to construct and to offer such services under FCC rules. Most of the 550-mile fiber optic system will be buried in existing or new pipeline or conduit at a

maximum depth of four feet below ground level. Substantially, all of the proposed route will be in existing utility, road, and railroad rights-of-way (ROW). Construction of the California system will take four to six months to complete. Applicant estimates that the California system will cost approximately $28,134,800 to construct. WTGI will finance the construction costs by making a loan to applicant under a long term revolving credit arrangement.

To serve additional cities within California, applicant may lease capacity on microwave, fiber optic, or other telecommunications facilities owned by other carriers or extend its California system by constructing additional fiber optic facilities within California. In the event that applicant decides to extend its California system by constructing additional facilities, applicant will seek authority from this Commission for such construction.

Applicant has selected fiber optic technology for its California system because it is the most advanced telecommunications technology now available. Fiber optic technology is immune from electromagnetic interference, noise, and crosstalk and therefore provides a higher quality of sound and digital data transmission than conventional cable and satellite systems. Fiber optic technology has a broader bandwidth and, as a result, it is capable of transmitting far more information per cable than copper. Applicant's California system will diversify the telecommunications facilities available in California by providing a highly secure telecommunications alternative to facilities owned and operated by other intrastate interLATA carriers.

Applicant's California system generally parallels the I-5 corridor from Los Angeles to Coalinga and then diverges from I-5 to the west and proceeds north through Salinas to San Jose. From San Jose, one leg of the system proceeds north to San Francisco and

another leg of the system proceeds in a northeasterly direction to Sacramento. Applicant asserts that long distance telecommunications facilities owned by other intrastate carriers in California are not in the vicinity of applicant's California system. Facilities owned by Pacific Bell and AT&T generally follow the I-5 corridor, MCI's facilities generally follow the California Aqueduct and Sprint's facilities follow the Southern Pacific railroad ROW along the east side of the San Joaquin Valley. The bulk of applicant's California system is west of the facilities operated by the other major carriers in California. As a result, applicant's project will provide a secure alternative to existing telecommunications networks in California.

In April of 1989, applicant filed an application with the California State Lands Commission (CSLC) for environmental review and approval of the California system. At the same time, applicant submitted an environmental analysis of the California system to CSLC. CSLC is the lead agency for the environmental review of the California system and was the first state agency to act on the project. This Commission is a "responsible agency" as that term is used in the California Environmental Quality Act (CEQA).

CSLC has filed its final environmental impact report and has found that "the proposed action will not result in any significant adverse environmental impacts. All potential adverse impacts will be mitigated to levels of insignificance. The proposed route, which maximizes use of existing idle pipe and existing disturbed rights-of-way, is the preferred alternative of the SLC."

Upon completion of applicant's California system, WTG California and other affiliates of applicant may be merged into applicant as part of a general reorganization of WTGI's subsidiaries. Until then applicant and WTG California will operate as separate legal entities. To the extent that these two carriers offer identical services, their rate structures will be identical.

With respect to intrastate California service, WTG California will continue to act as a reseller of telecommunications services obtained from other carriers; applicant will offer services provided over its own facilities as well as interstate services.

Applicant anticipates that the prices for its services will generally be below the prices offered by AT&T Communications, the dominant carrier in the intrastate interLATA market in California, and below the prices offered by most other providers of intrastate interLATA services in California.

Applicant asserts that public convenience and necessity require its service because:

1. Competition in the interexchange telecommunications market serves the public interest by (a) reducing the cost and increasing the quality of telecommunications services available to consumers, (b) making innovative telecommunications services available to consumers and increasing consumer choice, and (c) increasing the diversification and reliability of supply of communications services.

2. California consumers of intrastate interexchange telecommunications services will directly benefit from the approval of this application because applicant will provide a cost-efficient alternative for long distance intrastate communications using advanced digital technologies and because the resulting competition will reduce long distance communication rates in California.

3. All citizens of California will indirectly benefit from the approval of this application because the increased availability of low-cost, technologically advanced communications services will stimulate California's economy by reducing the cost of goods and services of California businesses and encouraging businesses to locate in California.

4. Applicant's interstate customers will benefit from the approval of this application because they will have the ability to obtain similar intrastate services from the same source.

Environmental Review

As a prerequisite for obtaining a CPC&N for a project such as applicant's, an environmental impact report is required and must be considered by the Commission.

Since a portion of this project runs through state lands, applicant applied for a permit for the project with the California State Lands Commission (CSLC). CSLC accepted applicant's application as complete in April of 1989. In early April of 1989, CSLC acted on the application by issuing a Notice of Preparation (NOP) of an environmental impact report for the project. At the time that CSLC issued its NOP, it was the first public agency to act on this project. CSLC therefore stated in its NOP that it was the lead agency for the environmental review of the project under CEQA. In September of 1988, seven months before CSLC issued its NOP, applicant had contacted a member of the staff of the CPUC to determine whether the CPUC wished to act as the lead agency for the project. The staff member contacted said that the CPUC would not oppose CSLC's designation as the lead agency.

When it issued its NOP for the project in April, 1989, CSLC mailed it together with a copy of the environmental impact analysis (EIA) for the project to a number of public agencies within the state. One of those agencies was the CPUC. The CPUC did not contest CSLC's assumption of lead agency responsibility for this project and did not submit any comments on the project to CSLC in response to the NOP or the EIA. Another public agency which received the NOP and the EIA in April, 1989 was the Monterey County Department of Public Works. The Department of Public Works acknowledged receipt of these documents in a letter to CSLC dated May 4, 1989 and stated that it had no significant objections to the project.

In July of 1989, CSLC completed the draft EIR for this project. CSLC gave notice of the availability of the draft EIR to public agencies by sending a copy of it to the State Clearinghouse

and by mailing a copy of it directly to a number of other agencies. The CPUC and the Monterey County Department of Public Works were two of the public agencies who received copies of the draft EIR directly from CSLC. CSLC gave notice to the public of the availability of the draft EIR by sending notices to newspapers of general circulation in the areas affected by this project. During the 30-day comment period on the draft EIR, CSLC received no comments from the CPUC or the Monterey County Department of Public Works. CSLC also received no comments on the draft EIR from Mr. Singleton or from any other landowner along the project route.

CSLC completed the final EIR for this project in August, 1989 and issued it on September 11, 1989. In the final EIR, CSLC found that the project "will not result in any significant adverse environmental impacts.... All potential adverse impacts will be mitigated to levels of insignificance. The proposed route which maximizes use of existing idle pipe and existing disturbed rights-of-way, is the preferred alternative of [CSLC]." (Final Environmental Impact Report for Proposed WTG-West, Inc. Los Angeles to San Francisco and Sacramento Fiber Optic Cable Project at ¶ 1.4 (August, 1989).)

CSLC filed and posted its Notice of Determination (NOD) with the State Clearinghouse on September 15, 1989. No lawsuit challenging the adequacy of the final EIR has been filed by anyone.

Applicant's Motion

On March 6, 1990, applicant filed its motion regarding environmental and routing issues, supported by affidavits and points and authorities. Protestants filed in opposition to the motion. The motion was heard March 29.

In its motion, applicant requests that the following findings be made with respect to environmental and routing issues:

1. The California State Lands Commission is the lead agency for the environmental review of the fiber optic telecommunications project which is the subject of the proceeding;

2. The California Public Utilities Commission is a responsible agency with respect to the environmental review of this project;

3. The notice given to the public by the California State Lands Commission during the environmental review process satisfied all applicable legal requirements;

4. The final environmental impact report issued by CSLC for this project is adequate under CEQA; and

5. The route selected by WTG-West in Monterey County is the best of the available alternatives.

Applicant argues that under CEQA and the guidelines promulgated thereunder (Guidelines; sometimes abbreviated "G"), the "lead agency" is the only public agency authorized to prepare and circulate the environmental impact report (EIR) for a project such as this one. Pub. Res. C. §§ 21067, 21083; 14 Cal. Admin. Code (also referred to as the Guidelines) §§ 15050(a), 15084, 15087, 15089, 15090, 15092. Public agencies other than the lead agency (responsible agencies) are only authorized to review and comment upon the EIR being prepared by the lead agency. (G. § 15087.)

Under CEQA and the Guidelines, the "lead agency" is the first agency to act on the project. (G. § 15051(c)). See also, Citizens Task Force on Sohio v. Board of Harbor Commissioners of the Port of Long Beach, 23 Cal. 3d 812, 814, 153 Cal. Rptr. 584, 585 (1979). As noted above, CSLC acted on applicant's project in April of 1989 by issuing an NOP of an environmental impact report and it was the first public agency to take any action on the project. As a result, CSLC declared itself to be the lead agency for the environmental review of the project and properly assumed the lead agency responsibility. (G. § 15051(c).)

Applicant contends that the CPUC was not the lead agency for this project. It argues that first, CEQA explicitly states that the state Office of Planning and Research (OPR) is responsible

for preparing and developing guidelines for the implementation of CEQA by public agencies. (Pub. Res. C. § 21083.) The same provision also states that OPR's guidelines "shall include objectives and criteria for the orderly evaluation of projects and the preparation of environmental impact reports and negative declarations in a manner consistent with [CEQA]."

OPR's EIR Guidelines are binding on all public agencies in the state, including the CPUC.

> "The regulations contained in this chapter are prescribed by the Secretary for Resources to be followed by all state and local agencies in California in the implementation of [CEQA]. These Guidelines have been promulgated by [OPR] for adoption by the Secretary of Resources in accordance with Section 21083 [of CEQA]. ... These Guidelines are binding on all public agencies in California." (14 Cal. Admin. Code § 15000 (emphasis added).)

Since the EIR Guidelines provide that the first public agency to act on a project such as this one is the lead agency for the environmental review of the project (G. § 15051(c)) and as CSLC was the first agency to act on the project, it properly acted as the lead agency under CEQA.

Second, the CPUC has recognized that its rules concerning environmental review of utility projects are subject to CEQA and to the Guidelines. Thus, § 17.1 of the CPUC's Rules of Practice and Procedure incorporates CEQA and the Guidelines by reference and it goes on to state that the CPUC "hereby adopts and shall adhere to the principles, objectives, definitions, criteria and procedures of CEQA [and] the EIR Guidelines... ." (CPUC Rules § 17.1(d) (emphasis added).)

Finally, neither applicant nor CSLC attempted to evade the CPUC's jurisdiction. In September of 1988, before it applied for a CSLC permit, applicant contacted the staff of the CPUC to determine whether the CPUC wished to act as the lead agency for the environmental review of this project. The staff member informed

applicant that the CPUC did not wish to assume lead agency responsibility for the project. In April, 1989, the CPUC was one of the public agencies that received CSLC's NOP and that document explicitly stated that CSLC intended to act as the lead agency for applicant's project. Under the Guidelines, the CPUC could have asked CSLC to relinquish the lead agency role (G. §§ 15051(d) and 15053) but the CPUC did not make such a request.

Applicant states that the notice given during the environmental review process satisfied all applicable legal requirements. Under CEQA and the Guidelines, the lead agency has the exclusive responsibility of giving public notice of the availability of the draft EIR and of selecting the manner in which such notice will be given. (G. § 15087.) As noted above, CSLC gave public notice of the availability of the draft EIR for this project in July of 1989 by sending notices to newspapers of general circulation in the areas affected by the project. This method of giving public notice of the draft EIR is explicitly authorized by CEQA and the Guidelines. (Pub. Res. C. § 21092(a); G. § 15087(a)(1); Oceanside Marina Towers Ass'n v. Oceanside Community Dev. Comm'n, 187 Cal. App. 3d 735, 742, 231 Cal. Rptr. 910, 913, (1986).) Section 17.1 of the CPUC's Rules of Practice and Procedure does not alter this analysis as the CPUC's rules concerning environmental review of utility projects are subject to CEQA and the Guidelines.

One of the principles of CEQA and the Guidelines is that the lead agency has exclusive jurisdiction over the environmental review process and over the manner in which public notice of the environmental review process will be given. (G. §§ 15050(a), 15051(c), 15087.) In those cases where the CPUC is the lead agency, CEQA and the Guidelines confer upon the CPUC the exclusive authority to decide how to give public notice of the environmental review process and the right to follow § 17.1 of its rules, even if that approach differs from that of other agencies. Here, however,

CSLC is the lead agency for the project, CSLC had exclusive authority to determine how to give public notice, and CSLC's only obligation was to provide one of the forms of notice authorized by CEQA and the Guidelines and CSLC satisfied that notice requirement.

Responses to the Motion

The Pfyffers, owners of a large cattle ranch in Southern Monterey County, answered applicant's motion by arguing that without a hearing on the merits, the rights to due process, equal protection, and privacy guaranteed by both the federal and state constitutions would be violated. They argue that aside from CEQA issues, the Commission must hold a hearing on the merits to determine the issue of public convenience and necessity, including a determination on the merits of other alternate routes for the proposed telecommunication line. They assert that CEQA has been violated because the required notices have not been given.

The Pfyffers attack the EIR calling it "practically worthless." They contend that there were insufficient alternate routes considered and that those alternates that were considered were not adequately discussed.

In regard to notice, they argue that Rule 17.1 of the Commission's Rules of Practice provides that "notice of the completion of the draft EIR shall be given by direct mail to...owners of land under or on which the project may be located, and owners of land adjacent thereto, and that copies of the final EIR shall be served upon all the parties to the proceeding." CSLC did not comply with this requirement. Finally, they argue that applicant does not have the power of eminent domain and therefore applicant's motion must be denied.

Attached to the motion was the declaration of Robert E. Bosso, an attorney who has represented the Pfyffers in other matters. The declaration states that he has known them for many years, that they are elderly, and that they are opposed to the project. He declares that there are over 18,000 head of prime

steers, deer, elk, long horn sheep, wild boar, and other unique species of wild animals on the Pfyffer ranch. Should applicant be allowed to pursue its project, he predicts environmental damage from: (a) the 10-foot easement, plus a temporary easement of 40 feet, which runs through the rugged mountain which are very susceptible to landslide and erosion when disturbed; (b) one of the easements which runs through a region of 100 mature Yucca plants; (c) the Pyffer's two branded cattle types which must be kept in separate pastures. The proposed easement will traverse the separate pastures and clearing ground for installation of the line may make it impossible to keep the cattle in their proper areas; and (d) the further opening of the area to poaching of the wild animals and cattle on the ranch. He expects damage to the property due to heavy equipment traveling over unpaved surfaces.

Also attached to the Pfyffers' response was the affidavit of a land surveyor who reviewed the complaint in eminent domain brought by WTG-West against the Pfyffers'. He said that the land descriptions in the complaint in his opinion cause him to question whether the descriptions supplied by WTG-West are the proper beginning and ending of the proposed right-of-way. He also described other problems he had with the eminent domain complaint.

Protestant Singleton filed in response to applicant's motion and said that the Commission should provide him and other landowners with a reasonable opportunity to present evidence in opposition to applicant's proposed route. He argues that the Commission is the lead agency for environmental review in proceedings directly related to new construction of utility facilities and cannot be divested of its authority and obligations through inadvertence. He contends that under Rule 17.1 the Commission is the lead agency and that it must assert its authority. Singleton denies that merely because the CSLC acted first by issuing a Notice of Preparation, it was properly the lead agency under the CEQA Guidelines. He argues that as this

Commission has greater responsibility for supervising or approving the project as a whole, this Commission under Guidelines § 15051(b) should perform the function of the lead agency. That section reads "if the project is to be carried out by a non-governmental person or entity, the lead agency shall be the public agency with the greatest responsibility for supervising or approving the project as a whole...." He argues that the Commission has the sole authority to determine the existence and extent of public convenience and necessity that would be afforded by the project. The Commission has the sole authority over the manner of construction and operation of the project. And the Commission, alone, has authority to control the general route of the project through the state as well specific routing to private lands. Therefore, the Commission's supervisory and approval responsibility in this case far exceeds that of the CSLC and under the guidelines should be the lead agency.

Singleton points out that under applicant's view of the case, the proponent of a project is encouraged to forum shop. By filing an application with an agency that does not require notice to individual landowners, the applicant can avoid onerous burdens. Finally, protestant argues that the Guidelines are not necessarily binding on the Commission. Singleton goes on to urge that the failure to provide protestants and other affected landowners with proper notice and a hearing prior to issuing a certificate of public convenience and necessity constitutes a denial of due process. He questions whether the CSLC notice by newspaper publication was adequate in regard to the EIR. He states, "obviously, then, the failure of the Commission to allow protestant and other affected landowners to submit their objections and views on the environmental and other impacts of the proposed project would constitute a denial of due process." He continues that the Commission cannot avoid further review of the environmental impacts of applicant's project. He says that the Commission must make a

determination not only with respect to the environmental impact of applicant's project, but also with respect to the specific impacts the project would have on protestant's use and enjoyment of his land. It must then weigh his interest in preserving those rights against the public convenience and necessity to be afforded by routing the project through his land. Singleton believes that other feasible alternatives may exist to the route that applicant proposes and that alternate routes should be subject to analysis and the right of protestant to be heard as to their adequacy.

The County of Monterey argues that it is not barred from challenging the adequacy of the EIR because notice to the County was inadequate. The notice was sent to the Public Works Department of the County and not to the Planning Department which staffs administration of the coastal program. It argues that the maps attached to the draft EIR submitted to the Public Works Department did not clearly show where the proposed line would run through Monterey County. It did not show that the fiber optic line would go through the coastal zone in Monterey County. The County argues that it was misled as to the route and cannot be held to have received notice. The County asserts that when CSLC sent out its draft EIR in July 1989, WTG-West knew the route approved was false. Next, Monterey argues that the EIR is inadequate because alternatives to the selected route are not discussed. It contends that a legally adequate EIR must consider alternatives and that the CSLC EIR did not make any showing of the impracticability of alternate routes. It argues that the EIR is inadequate because it does not address the conformity of the route with the North Monterey County Local Coastal Program.

Discussion

For the reasons stated below, the motion of applicant is granted. Protestants having failed to raise a substantial issue, there is no need for a public hearing. (Rule 8.2 "the filing of a

protest does not insure that a public hearing will be held; the content of the protest is determinative.")

The fundamental purpose of CEQA is to promote "(t)he maintenance of a quality environment for the people of this state now and in the future..." (Pub. Res. C. § 21000(a)). CEQA states that OPR is responsible for developing guidelines for the implementation of CEQA by public agencies. (Pub. Res. C. § 21083.) OPR has developed and published those guidelines (G. § 15000 et seq.) which are binding on all public agencies in California. CEQA is a legislative act, subject to legislative limitation and legislative amendment. (Napa Valley Wine Train v. PUC (1990) 267 Cal. Rptr. 569, 572.)

Except for very limited purposes, a responsible agency must accept the EIR prepared by the lead agency. This is established by CEQA (Pub. Res. C. § 21166) and implemented by the Guidelines (G. §§ 15050(c) 15052, 15096(e), 15162, and 15163). Clearly, we do not sit as an appellate court to review the manner in which the lead agency performed its functions.

Public Res. C. § 21166 provides:

> "When an environmental impact report has been prepared for a project pursuant to this division, no subsequent or supplemental environmental impact report shall be required by the lead agency or by any responsible agency, unless one or more of the following events occurs:
>
> "(a) Substantial changes are proposed in the project which will require major revisions of the environmental impact report.
>
> "(b) Substantial changes occur with respect to the circumstances under which the project is being undertaken which will require major revisions in the environmental impact report.
>
> "(c) New information, which was not known and could not have been known at the time the environmental impact report was certified as complete, becomes available."

The Guidelines in their implementation of CEQA, set forth the process by which a responsible agency uses the EIR. (G. § 15096.) The responsible agency does not need to state that the EIR or Negative Declaration complies with CEQA. The responsible agency should state that it considered the EIR or Negative Declaration as prepared by a lead agency (§ 15096(i).)

Protestants desire us to find that the final EIR is inadequate. Were we to make that finding, the remedy is restricted to the standards of § 15096(e).

> "(e) Decision on Adequacy of EIR or Negative Declaration. If a Responsible Agency believes that the final EIR or Negative Declaration prepared by the Lead Agency is not adequate for use by the Responsible Agency, the Responsible Agency must either:
>
> "(1) Take the issue to court within 30 days after the Lead Agency files a Notice of Determination;
>
> "(2) Be deemed to have waived any objection to the adequacy of the EIR or Negative Declaration;
>
> "(3) Prepare a subsequent EIR if permissible under Section 15162; or
>
> "(4) Assume the Lead Ageny role as provided in Section 15052(a)(3)."

As there was no appeal of CSLC's EIR subsections (e)1 and (e)2 are inapplicable. Nor is subsection (e)4 applicable, as its prerequisite, meeting the conditions of section 15052(a)(3) did not occur.

Section 15052(a)(3) states:

> "(a) Where a Responsible Agency is called on to grant an approval for a project subject to CEQA for which another public agency was the appropriate Lead Agency, the Responsible Agency shall assume the role of the Lead Agency when any of the following conditions occur:
>
> * * *

> "(3) The Lead Agency prepared inadequate environmental documents without consulting with the Responsible Agency as required by Sections 15072 and 15082, and the statute of limitations has expired for a challenge to the action of the appropriate Lead Agency."

CSLC did consult with the PUC.

The remaining corrective measure permitted the responsible agency is to prepare a subsequent EIR if permissible under Section 15162 which provides, in part, "Where an EIR or Negative Declaration has been prepared, no additional EIR need be prepared unless:

> "(1) Subsequent changes are proposed...which will (have)...new significant environmental impacts....
>
> "(2) Substantial changes occur....
>
> "(3) New information of substantial importance to the project becomes available...." (G. § 15162(a)(1), (2), (3).)

Our inquiry now turns on whether the protestants, or any of them, have alleged any facts which are new, substantive, and would have significant environmental impacts. We have reviewed their pleadings and have found nothing of substance.

Monterey County

The County argues that the following issues must be resolved by a full evidentiary hearing:

1. Is the County of Monterey barred from challenging the inadequacy of the EIR when the EIR did not describe the fiberoptic cable route through the coastal zone, Moro Cojo and Elkhorn Sloughs, as the principal or alternate route?

2. Is the EIR inadequate because alternatives to the selected route are not discussed?

3. Is the EIR inadequate in that it does not address the conformity of the route with

the North Monterey County Local Coastal Program?

4. Was notice of the route given to the Monterey County Planning Commission prior to acquisition when:

   (a) notice of the route was presented with an inadequate EIR.

   (b) notice of the route was presented with an EIR that described an inland route and an oral presentation that described a route through the coastal zone.

The first three points attack the adequacy of the final EIR. As we have discussed above, a responsible agency has limited review of an EIR and that review requires new information or substantive changes that will have significant environmental impacts. (G. § 15162.) The County has presented no facts that show there will be significant environmental impacts on the proposed route because of subsequent changes, substantial changes, or new information. The fourth point goes to notice, which also is an attack on the final EIR, and does not support the need for a subsequent EIR.

Monterey County asserts that the EIR approved a route in the county for the fiber optic cable north from Soledad, but that applicant does not intend to use the approved route and instead, will use a route through the county Coastal Zone and the Moro Cojo and Elkhorn Sloughs. As this new route was neither considered nor approved by the CSLC EIR, it contends that a subsequent EIR must be prepared. (This northern portion of the route does not affect the Singleton or Pfyffer properties.) Applicant responds that the change in route is to allow the cable to go through the right-of-way and conduit system owned by a subsidiary of the Southern Pacific Co. which is already in place and in which two other fiber optic telecommunication lines are currently in use, one

operated by AT&T and one by MCI. Applicant asserts that the county's quarrel is with SP, not applicant.

We agree with applicant. Monterey County has made no showing that there would be a new significant environmental impact if applicant used a conduit system and right-of-way already in use rather than use the right-of-way approved in the EIR. (G. § 15162(1).) We shall attach an addendum to the final EIR setting forth this modification, which does not raise important new issues about the significant effects on the environment. (G. § 15164.)

Protestant Singleton's opposition is equally devoid of facts which would raise a question regarding new environmental impacts.[1] He argues that the notice provided by CSLC to the general public, publication in a local newspaper, was inadequate. He argues that the notice by publication is constitutionally insufficient, that he has a constitutional right to direct mail notice of the environmental review process. We do not agree. As we said earlier, we are not an appellate court reviewing CSLC's procedures. But to respond to the argument, the environmental review process under CEQA does not adjudicate the rights of landowners or anyone else, and therefore does not require personal notice. (Lee v. Lost Hills Water District (1978) 78 Cal. App. 3d 630, 634.) The cases cited by Singleton in support of his claim that direct mail notice is required are not in point. Horn v. County of Ventura (1979) 24 Cal. 3d 605, involved a proposed subdivision of property and Walker v. Hutchinson (1956) 352 US 112, involved a condemnation proceeding. Should applicant have to condemn Singleton's property to construct its pipeline, a condemnation suit would require actual notice. In any event, in this application, Singleton had notice of applicant's motion, is

1 Rule 8.1 states that a protest must contain "an offer of the evidence which the protestant would sponsor or elicit at a public hearing."

familiar with CEQA, and made no showing regarding environmental damage.

Protestant Pfyffers' allegations regarding the inadequacy of the EIR add nothing to the arguments of Monterey County and Singleton and need not be discussed. They did, however, present an affidavit which described the environmental impacts of the proposed route over their land. It is described above, and relates to the disturbances which will occur should applicant go on their land to lay pipe. This damage includes harm caused by heavy equipment moving over unpaved roads, the possible commingling of different types of cattle, a possible increase in poaching and cattle rustling because of new activity, and possible harm to Yucca plants. Those allegations are not sufficient to require a subsequent EIR. They show only the possibility of inconsequential, transient damage; the damage may not occur and if it does occur, it is minor and can be easily mitigated. The CSLC EIR dealt with this issue in its discussion of vegetation and wildlife. In both instances, it found no significant problems and said that a Project Biologist will be monitoring the construction to ensure avoidance of sensitive areas and habitats.

Protestants, having failed to make a showing which would compel the issuance of a subsequent EIR, argue that the Commission is the lead agency for environmental review in proceedings directly related to new construction of utility facilities and cannot be divested of its authority and obligations through inadvertence. Protestants assert that Rule 17.1 specifically states that the Commission is the lead agency in "proceedings directly related to new construction of utility facilities" and that the inadvertent failure of the Commission to assert its lead agency authority did not relieve it of that authority or of its lead agency obligations under CEQA. Singleton argues that the supposed waiver by the Commission was made by an advisor to a commissioner who was not

authorized to resolve lead agency disputes or to waive the Commission's obligations under CEQA.

Protestants contend that the CEQA guidelines do not resolve the lead agency dispute in favor of CSLC. Referring to the standard of G. § 15051(b), they argue that the CPUC has the greatest responsibility for supervising or approving the project, and therefore, should be the Lead Agency. Protestants state that CSLC's responsibility in this case was essentially limited to determining whether the installation of fiber cable in preexisting utility rights-of-way on state land has a proper use while the Commission's responsibility over the project is plenary. They contend that the Commission has sole authority to determine the existence and extent of public convenience and necessity that will be afforded by the project; the Commission has sole authority over the manner of construction and operation of the project; and the Commission, alone, has authority to control the general route of the project through the state as well as specific routing through private lands. In short, they urge, the Commission's supervisory and approval responsibility in this case far exceeds that of CSLC.

Finally, protestants again restate their argument that without the opportunity afforded by a hearing, they are being denied due process of law.

We find protestants' allegation that the CPUC should take lead agency status to be unpersuasive. While it is obvious that this Commission could have been the lead agency had applicant filed with us first, or when we had notice that CSLC was assuming lead agency status we could have challenged that, the facts show that we refrained from challenging. CSLC, by assuming lead agency responsibility, implicitly made the finding that it had a substantial claim to be the lead agency. The procedure for challenging that claim and the time for making our claim known, is set forth in G. §§ 15051 and 15053.

G. § 15051 states, in part:

"(b) If the project is to be carried out by a nongovernmental person or entity, the Lead Agency shall be public agency with the greatest responsibility for supervising or approving the project as a whole.

* * *

"(c) Where more than one public agency equally meet the criteria in subsection (b), the agency which will act first on the project in question shall be the Lead Agency.

"(d) Where...two or more public agencies (have) a substantial claim to be the Lead Agency, the public agencies may by agreement designate an agency as the Lead Agency.

G. § 15053 states that a dispute over which agency should be the Lead Agency shall be resolved by the Office of Planning and Research.

If we were to have challenged CSLC, that challenge must be submitted to the Office of Planning and Research for resolution. Having failed to challenge, we cannot now unilaterally make the determination that we are the lead agency in the face of another lead agency claim, especially now when the EIR is complete. This Commission had at least three opportunities to challenge CSLC's lead agency claim, (1) when the advisor to a commissioner was called, (2) when the NOP was served on us, and (3) when we were served with the draft environmental documents and were asked to comment. At this late date, for us to assume lead agency status, we would have to invoke the procedures of the Guidelines to prepare a subsequent EIR. We have already discussed why we decline to do so. The Guidelines wisely provide for a division of responsibility among state agencies and we have no duty to insist upon our being the lead agency in every matter in which we have a substantial interest.

In regard to protestants' claim that their due process rights have been violated because they did not receive individual notice of CSLC's EIR proceeding and that due process requires us to afford them a hearing, they have made no showing that the CSLC EIR was inadequate or that a subsequent EIR is necessary. Singleton states that "the Commission cannot avoid further review of the environmental impacts of applicant's project." (Response, March 16, 1990, p. 13.) But his argument sets forth no new facts and rests on an alleged violation of "constitutional rights of due process" and an assertion that "the Commission's responsibility in this case transcends the general kind of environmental review undertaken by the CSLC." (Response, p. 13.) However, we have no transcendent jurisdiction; we have only that which the statutes and guidelines give us--and that is limited to new facts with environmental impact. Singleton has provided us with nothing.

In this application, protestants have been given every opportunity to show that new information is needed and is available, which would require a subsequent EIR. They made no such showing. As we said at the beginning of our discussion, merely filing a protest is not sufficient to insure that a public hearing will be held.

Attacking another area, Singleton asserts, in C.89-11-010, that WTG-West "cannot lawfully be deemed to be a "telephone corporation" as that term is defined under Section 616 of the PU Code and cannot lawfully claim the power of eminent domain that is vested in telephone corporations under the statutory provision." (Complaint, para. 18.) The basis for Singleton's assertion is the statement "that it was never the intention of the Legislature in enacting Section 616 to convey the power of eminent domain upon nondominant interexchange telecommunications carriers, such as Defendant." (Complaint, para. 19.) Complainant's allegations are completely without merit. He has not presented any facts to support them. Upon being granted a CPC&N, applicant will

be a telephone corporation operating a telephone line for compensation within California (PU Code § 234) which has the power of eminent domain granted by statute (PU Code § 616). Section 616 draws no distinction between dominant and nondominant carriers.

Public Resources Code § 21081.6 requires the public agency to adopt a reporting or monitoring program for the changes to the project which it has adopted to mitigate or avoid significant effects on the environment. Rather than rely on reports from the project proponent regarding compliance, we shall require WTG-West to provide CACD with a detailed schedule of construction for those areas found to have a potential significant environmental impact in the Final EIR in sufficient time so that CACD may monitor, or cause to be monitored by a consultant, the construction. WTG-West shall pay all costs of this monitoring program. CACD shall take appropriate action to ensure that the mitigation measures in the Final EIR are observed.

This decision was issued as a proposed decision of the administrative law judge and comments were filed by all parties. We have reviewed those comments, which merely repeat arguments previously made, and find no reason to modify the decision.

Findings of Fact

1. Applicant has the ability, equipment, and financial resources to perform the proposed service.

2. Public convenience and necessity require the proposed service.

3. The rates proposed in the application are deemed reasonable.

4. CSLC is the lead agency for this project under the California Environmental Quality Act and on September 11, 1989 approved its final Environmental Impact Report (EIR) which has been filed with the Commission.

5a. The Final EIR identified four areas of potential significant environmental impact.

1. Loss or disturbance of biological communities of concern due to construction;

2. Disturbance of special status plant and animal species caused by construction;

3. The loss or disturbance of sites eligible for the National Register of Historic Places;

4. Loss or disturbance of significant paleontological resources.

b. In each instance the Final EIR proposed mitigation measures which reduced the potential for significant impact to insignificance. Those mitigation measures are set forth in the Final EIR at pages 1-6 through 1-9 and are adopted. (G. § 15091.)

6. The Addendum to the Final EIR set forth in Appendix A is reasonable and is adopted.

7. The Commission has considered the Final EIR and the Addendum on this project and finds that:

a. With implementation of the required mitigation measures, the environmental impact of the proposed action is insignificant.

b. The planned construction is the most feasible and economical that will avoid any possible environmental impact.

c. There are no known irreversible environmental changes involved in this project.

8. The parties in C.89-12-033 have requested that the case be dismissed.

9. Complainant in C.89-11-010 has not set forth any act or thing done or omitted to be done by defendant in violation of any provision of law or of any order or rule of the Commission.

Conclusions of Law

1. The certificate should be granted.

2. Only the amount paid to the State for operative rights may be used in rate fixing. The State may grant any number of

rights and may cancel or modify the monopoly feature of these rights at any time.

3. As a telephone corporation operating as a telecommunication service supplier, applicant is subject to: (a) the current 2.5% surcharge on gross intrastate interLATA revenues, (PU Code § 879), (b) the current 0.3% surcharge on gross intrastate interLATA revenues to fund Telecommunications Devices for the Deaf, (PU Code § 2881; Resolution T-13061), and (c) the user fee provided in PU Code §§ 431-435. For the 1989-90 fiscal year the user fee is 0.1% of gross intrastate revenue.

4. Applicant should be required to send a copy of this decision to concerned local permitting agencies.

5. C.89-11-010 should be denied.

6. C.89-12-033 should be dismissed.

O R D E R

IT IS ORDERED that:

1. A certificate of public convenience and necessity is granted to WTG-West, Inc. for the construction and operation of a public utility fiber optic telecommunications system and to provide interLATA telecommunications services, subject to the following conditions:

   a. Applicant shall offer and provide its services only on an interLATA basis;

   b. Applicant shall not provide intraLATA services;

   c. Applicant shall not hold out to the public that it has authority to provide, or that it does provide, intraLATA services; and

   d. Applicant shall advise its subscribers that they should place their intraLATA calls over the facilities of the local exchange company.

2. To the extent that applicant requests authority to provide intraLATA telecommunication service, it is denied.

3. Within 30 days after this order is effective, applicant shall file a written acceptance of the certificate granted in this proceeding.

4. Applicant is authorized to file with this Commission, 5 days after the effective date of this order, tariff schedules for the provision of interLATA service. Applicant may not offer service until tariffs are on file. If applicant has an effective FCC-approved tariff, it may file a notice adopting such FCC tariff with a copy of the FCC tariff included in the filing. Such adoption notice shall specifically exclude the provision of intraLATA service. If applicant has no effective FCC tariffs, or wishes to file tariffs applicable only to California intrastate interLATA service, it is authorized to do so, including rates, rules, regulations, and other provisions necessary to offer service to the public. Such filing shall be made in accordance with General Order (GO) 96-A, excluding Sections IV, V, and VI, and shall be effective not less than 1 day after filing.

5. Applicant may deviate from the following provisions of GO 96-A: (a) paragraph II.C.(1)(b), which requires consecutive sheet numbering and prohibits the reuse of sheet numbers, and (b) paragraph II.C.(4), which requires that "a separate sheet or series of sheets should be used for each rule." Tariff filings incorporating these deviations shall be subject to the approval of the Commission Advisory and Compliance Division's (CACD) Telecommunications Branch. Tariff filings shall reflect all surcharges to which applicant is subject, as reflected in Conclusion of Law 3.

6. The requirements of GO 96-A relative to the effectiveness of tariffs after filing are waived to the extent that changes in FCC tariffs may become effective on the same date for California interLATA service for those companies that adopt the FCC tariffs.

7. Applicant shall file as part of its individual tariff, after the effective date of this order and consistent with Ordering Paragraph 4, a service area map.

8. Applicant shall notify this Commission in writing of the date service is first rendered to the public within 5 days after service begins.

9. Applicant shall keep its books and records in accordance with the Uniform System of Accounts specified in Part 32 of the FCC rules.

10. Applicant shall file an annual report, in compliance with GO 104-A, on a calendar-year basis using the information request form developed by the CACD Auditing and Compliance Branch and contained in Attachment A.

11. The certificate granted and the authority to render service under the rates, charges, and rules authorized will expire if not exercised within 12 months after the effective date of this order.

12. Applicant shall provide CACD with a detailed schedule of construction for those areas found to have a potential significant environmental impact in the Final EIR in sufficient time so that CACD may monitor, or cause to be monitored by a consultant, the construction. Applicant shall pay all costs of this monitoring program.

13. Applicant shall send a copy of this decision to concerned local permitting agencies not later than 30 days from today.

14. CACD shall file a Notice of Determination with the Office of Planning and Research in accordance with G. 15096(i).

15. The corporate identification number assigned to applicant is U-5192-C which shall be included in the caption of all original filings with this Commission, and in the titles of other pleadings filed in existing cases.

16. Within 60 days of the effective date of this order, applicant shall comply with PU Code § 708, Employee Identification

Cards, and notify the Chief of CACD's Telecommunications Branch in writing of its compliance.

17. C.89-11-010 is denied.

18. C.89-12-033 is dismissed.

This order is effective today.

Dated JUL 18 1990, at San Francisco, California.

G. MITCHELL WILK
President
FREDERICK R. DUDA
STANLEY W. HULETT
JOHN B. OHANIAN
PATRICIA M. ECKERT
Commissioners

I CERTIFY THAT THIS DECISION WAS APPROVED BY THE ABOVE COMMISSIONERS TODAY

NEAL J. SHULMAN, Executive Director

pb

APPENDIX A

ADDENDUM To FINAL ENVIRONMENTAL
IMPACT REPORT FOR the PROPOSED WTG-WEST, INC.
LOS ANGELES to SAN FRANCISCO and SACRAMENTO, CALIFORNIA
FIBER OPTIC CABLE PROJECT Dated August 1989

California State Clearing House No. 89041011
NOTICE of DETERMINATION Filed September 15, 1989 (Sch. Num. 89100119)

WTG-West, Inc. has proposed an alternate route North of Soledad in Monterey County which would permit its cable to go through the right-of-way and conduit system owned by a subsidiary of the Southern Pacific Co. which is already in place and in which two other fiber optic telecommunication lines are currently is use, one operated by AT&T and one by MCI.

There will be no significant effects on the environment caused by WTG-west, Inc. utilizing this alternate route.

(END OF APPENDIX A)