

ALJ/XJV/sid

Mailed 4/1/99

Decision 99-04-014 April 1, 1999

ORIGINAL

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application of PACIFIC GAS
AND ELECTRIC COMPANY for Authority to
Permit The City and County of San Francisco to
Occupy a Portion of Certain Underground
Conduit Pursuant to Public Utilities Sec. 851.

Application 98-07-024
(Filed July 15, 1998)

(Electric and Gas)

(U 39 M)

OPINION APPROVING AMENDED APPLICATION

1. Summary

We approve the amended application of Pacific Gas and Electric Company (PG&E) and authorize use of a portion of PG&E's underground conduit by the City and County of San Francisco (City).

2. Background

PG&E is a public utility corporation, organized in 1905, providing gas and electric service in California, and is regulated by the California Public Utilities Commission (CPUC or Commission). The City is a California Charter City, a Municipal Corporation and a California County.

On July 15, 1998, PG&E filed an application under Public Utilities Code¹ Section 851 requesting authority to permit the City to run fiber optic cable through certain PG&E underground conduit located in San Francisco. The application included, as Exhibit A, a copy of the 1997 Master Agreement which

¹ All statutory references are to the Public Utilities Code unless otherwise stated.

resolves a number of disputes between PG&E and the City,² and as Exhibit B, Appendices A through K to the Master Agreement. PG&E asked that the proceeding be categorized as ratesetting and requested ex parte approval. In Resolution ALJ 176-2997, dated July 23, 1998, we preliminarily categorized this proceeding as ratesetting and preliminarily determined that hearings were unnecessary.

On August 17, 1998, the Office of Ratepayer Advocates (ORA) filed a protest to the application, alleging that PG&E's application was incomplete. According to ORA, the application (1) improperly sought approval of one part of a complex, multi-part agreement when at least two parts are subject to the Commission's jurisdiction and require Commission approval; and (2) provided no quantification of costs and benefits for the approval sought. Thereafter, PG&E informed the administrative law judge assigned to this proceeding that an amendment to the application would be prepared and filed. On January 8, 1999, PG&E filed the amendment and renewed its request for ex parte approval. On February 8, 1999, ORA filed a response stating it does not oppose the application, as amended.

² These disputes included the following: whether PG&E's franchises entitled it to serve Federal Enclaves within the City limits; whether, under a 1987 Interconnection Agreement, PG&E or the City should serve certain municipal load customers; whether PG&E provided inaccurate forecasting data concerning municipal loads and made billing errors under that 1987 Interconnect Agreement; whether PG&E's franchise permitted it to install fiber optic cables for PG&E's internal use within underground conduits in San Francisco or lease "dark fibers" to third parties; and the respective rights and obligations of PG&E and the City regarding the provision of electric service connections to City streetlight facilities in certain underground utility construction projects.

3. Discussion

PG&E explains that its amendment serves several purposes – it addresses both elements of ORA’s protest, substitutes a new Deputy City Attorney, corrects several typographical errors in the original application and provides copies of two documents PG&E and the City have executed since that application was filed. We focus, below, on the issues critical to our consideration.

3.1 The Scope of the Amended Application.

The amendment clarifies the scope of the authority sought: approval, only, of the underground conduit use agreement between PG&E and the City memorialized in the Fiber Optic Cable Agreement (Cable Agreement), effective July 28, 1997, which is Appendix J of the Master Agreement. In the amendment, PG&E represents the Commission need not review the Master Agreement or any of its appendices except the Cable Agreement and Appendix I, which is City Board of Supervisor’s Resolution 693-97 (Resolution), approved July 25, 1997. ORA concurs in this assessment.

The Resolution acknowledges PG&E’s right to install telecommunications circuits, including fiber optic facilities, in its conduits for use in franchised activities in the City and to lease unused capacity to third parties. These issues have been the subject of several disputes between the parties, including those we list in footnote 2. By its terms, however, the Resolution is “null and void” should we reject the Cable Agreement or approve it subject to conditions unacceptable to PG&E and the City.

The Cable Agreement provides that it is an “integrated agreement” which supercedes any prior agreements regarding underground conduit use but which is conditioned upon PG&E obtaining all necessary regulatory approvals. The major, additional provisions of the Cable Agreement include:

- City may install 3/4" fiber optic communications cables within PG&E underground conduits located in the City and maintain and use those cables;
- City's use is limited to providing physical connectivity to public buildings;
- City's use may not be transferred to third parties for their sole use;
- As long as capacity is available (as defined in the agreement), City's use may extend to two additional "supplemental" public buildings in 2000 and 2001 and one "supplemental" public building in each five-year period thereafter for the term of the agreement (which is concurrent with PG&E's electric franchise);
- City shall bear costs if any governmental agency requires PG&E to relocate or remove underground conduit in which City's cable is installed;
- PG&E shall bear costs if it determines to relocate City's cable in order to reclaim the conduit capacity for franchised activities;
- City assumes risk of loss if its cable is damaged by proximity to PG&E energized conductors (unless such loss is attributable to PG&E negligence).

Individually and collectively, these terms do not appear unreasonable. However, we must consider these terms together with the unstated term of the Cable Agreement -- the City need not pay a fee to PG&E for use of PG&E's underground conduit. As PG&E notes, we have previously authorized reciprocal, telecommunications facilities use agreements where no fee was paid by either party. (See generally Decision (D.) 98-09-013, __ CPUC2d __ (1998), where we approved an agreement between PG&E and Tele-Vue Systems, Inc.; D.92-07-007, 45 CPUC2d 24 (1992), where we approved PG&E's agreement with MCI Telecommunications Corporation (MCI).) The Cable Agreement does not

concern reciprocal use, however. Instead, as the Resolution makes clear, consideration for the Cable Agreement, at least in part, is settlement of several disputes between the parties. In this context we examine the ratepayer impacts of the Cable Agreement.

3.2 Ratepayer Impacts of the Amended Application

PG&E identifies five reasons the parties' bargain is in the public interest and beneficial both to PG&E ratepayers and to City taxpayers.

1. Ratepayers' investment is protected by limiting the City's conduit rights to connecting public buildings via unused, PG&E conduit space; on the other hand, PG&E gains maximum flexibility to expand its fiber optic facilities throughout the City for franchised purposes.
2. Settlement of the parties' disputes over PG&E's use of its conduit within the City avoids the costs and uncertainties attendant upon litigation of those disputes and the risk of an adverse, precedential result.
3. Settlement of the parties' disputes over PG&E's use of its conduit within the City avoids any possibility that PG&E might need to obtain alternate conduit to install fiber optic facilities, at additional cost to PG&E's ratepayers.
4. PG&E's pre-existing fiber optic facilities agreement with MCI is not threatened. That agreement permits MCI to use PG&E's "dark fiber" (unused portions of fiber optic cable) in exchange for PG&E's use of other MCI facilities. (D.92-07-007, *supra*.)
5. Settlement of the parties' disputes over PG&E's use of its conduit within the City permits PG&E to contract with other parties for use of excess PG&E dark fiber capacity. PG&E points to our recent decision authorizing it to contract with Tele-View Systems, Inc. (D.98-09-013, *supra*.)

ORA accepts this demonstration of cost and benefits. ORA also states it "is satisfied that the terms of Appendix J provide sufficient protections against any impairment to PG&E's ability to provide electric service and gas service to its ratepayers" and "fairly balances" the litigation risk.

In their pleadings both parties acknowledge – PG&E explicitly and ORA implicitly – that the ratepayer benefit of the Cable Agreement is difficult to quantify. We agree with both parties, however, that there is a benefit. As PG&E suggests, comparison of the "bundle of rights" PG&E and the City each obtain under the settlement yields the conclusion that the Cable Agreement is a "win-win" solution.

3.3 Exhibits to the Amendment

The amendment includes, as Exhibits A and B, two documents PG&E and the City executed subsequent to the filing of the initial application. Exhibit A is a revocable license agreement "effecting the intent of the Fiber Optic Cable Agreement" between PG&E and the City because "the City wishes to begin its occupancy of the PG&E Conduit immediately." The revocable license is executed under the authority of the CPUC's General Order (GO) 69-C, which permits public utilities to grant conditional easements to third parties without express Commission authorization.

Exhibit B is a letter agreement, dated January 8, 1999, which sets out the operating rules and procedures for implementing the Cable Agreement pursuant to the revocable license until PG&E has obtained CPUC approval of the Cable Agreement. The letter agreement establishes notice requirements, provisions for PG&E invoices to the City for any work done and payment timelines.

We are not asked to approve either document and indeed, have no need to do so. It was appropriate, however, for PG&E to append these documents to its amendment for our review and consideration.

3.4 Clarification Regarding the Cesar Chavez Street Property

The amendment states unequivocally that sale of PG&E property at 2323 Cesar Chavez Street, San Francisco, to the City has not been finalized and is not the subject of the pending proceeding. This sale, which would require Commission approval under Section 851, is the subject of an executed Memorandum of Understanding which is Appendix K to the Master Agreement. One of the bases for ORA's initial protest was that PG&E had tendered the Master Agreement in support of its initial application but was not seeking approval of Appendix K. ORA's concern was justifiable. However, the amendment adequately clarifies the nature and the scope of the relief PG&E seeks and remedies the confusion created by its initial filing. As we discuss above, ORA has removed its opposition. Our independent review confirms that we can approve the Cable Agreement without approving the Master Agreement or any of its other appendices, including Appendix K.

3.5 No Environmental Impact

In previous applications, where we have examined agreements about shared use of facilities such as the underground conduit as issue here, we have concluded that environmental review for compliance under the California Environmental Quality Act, Public Resources Code Section 21000 et seq., is not required. The Commission's staff has determined that the action proposed by the applicant constitutes a "project" under the California Environmental Quality Act (CEQA). However, since it can be seen with certainty that no significant effect on the environment could result from our granting the requested

authorization, the proposed project itself qualifies for an exemption from CEQA pursuant to Section 15061(b)(3) of the CEQA Guidelines. Therefore, no further environmental review by the Commission is required.

4. Conclusion

The application, as amended, is in order. We conclude the Cable Agreement is in the public interest and benefits PG&E and its ratepayers. Accordingly, we grant the relief requested and exercise our authority under Section 851, thereby authorizing PG&E to permit the City to use a portion of PG&E's unused, underground conduit in accordance with the terms of the Cable Agreement.

5. Final Categorization and Waiver of Review Period

Based upon our review of the application as amended, and ORA's response to it, we conclude there is no need to alter the preliminary determinations made in Resolution ALJ-2997. Moreover, because this proceeding is now uncontested and because we grant the relief requested, pursuant to Pub. Util. Section 311(g)(2) the otherwise applicable 30-day period for public review and comment is being waived.

Findings of Fact

1. PG&E is a public utility corporation subject to the jurisdiction of the CPUC.
2. The City is a California Charter City, a Municipal Corporation and a California County and is not regulated by the CPUC.
3. The Cable Agreement (Appendix J of the Master Agreement between PG&E and the City) permits the City to use a portion of PG&E's unused, underground conduit located in San Francisco in accordance with the terms set out therein.

4. The City Resolution (Appendix I of the Master Agreement between PG&E and the City) acknowledges PG&E's right to install telecommunications circuits, including optic fiber facilities, in its conduits for use in franchised activities in the City.

5. PG&E's amendment to its application clarifies that PG&E seeks approval, only, of the Cable Agreement.

6. Benefits of the Cable Agreement to PG&E ratepayers include settlement of several disputes with the City, including disputes whether PG&E's franchise permitted it to install fiber optic cables for PG&E's internal use within underground conduits in San Francisco or lease dark fibers to third parties.

7. The Cable Agreement provides protections against impairment of PG&E's ability to provide electric service and gas service to its ratepayers.

8. ORA has reviewed PG&E's application, as amended, and does not oppose the approval requested.

9. It can be seen with certainty that no significant effect on the environment could result from our granting the requested authorization.

Conclusions of Law

1. No public hearing is necessary.

2. The proposed project qualifies for an exemption from CEQA pursuant to Section 15061(b)(3) of the CEQA Guidelines.

3. We should approve the Cable Agreement between PG&E and the City, pursuant to Section 851, and authorize PG&E to permit the City to use a portion of PG&E's unused, underground conduit located in San Francisco, in accordance with the terms set out in the Cable Agreement.

O R D E R

IT IS ORDERED that:

1. Pacific Gas and Electric Company (PG&E) is authorized to permit the City and County of San Francisco (City) to use a portion of PG&E's unused, underground conduit in accordance with the terms of the Fiber Optic Cable Agreement (Appendix J of the Master Agreement between PG&E and the City).

2. PG&E shall notify the Director of the Energy Division, in writing, of any substantial amendments to, extension of, or termination of the Fiber Optic Cable Agreement within 30 days following the execution of such amendments, extension or termination.

3. The issues presented in Application 98-07-024, as amended, are resolved.

4. This proceeding is closed.

This order is effective today.

Dated April 1, 1999, at San Francisco, California.

RICHARD A. BILAS
President
HENRY M. DUQUE
JOSIAH L. NEEPER
Commissioners