Decision _____

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application of Pacific Gas and Electric Company for Authorization Pursuant to Section 851 of the Public Utilities Code to Amend a License Agreement to Allow Construction of a Cabin on Pacific Gas and Electric Company Property.	Application 02-11-025 (Filed November 14, 2002)

DECISION GRANTING APPROVAL UNDER PUBLIC UTILITIES CODE SECTION 851 FOR CONSTRUCTION OF A CABIN ON UTILITY PROPERTY

We grant the Application[1] of Pacific Gas and Electric Company (PG&E) for authority to amend an existing license agreement with a third party to allow construction of a cabin on utility-owned land under Public Utilities Code Section 851.[2] The amended license is sought to permit the licensees Donald R. Buckman and Mari Ann Lucena ("Licensees") to build a cabin on a recreational home site ("Site") located on PG&E property at Bucks Lake, California.

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[1] *Application of Pacific Gas and Electric Company (U 39 M) for Authorization Pursuant to Section 851 of the Public Utilities Code to Amend a License Agreement to Allow Construction of a Cabin on Pacific Gas and Electric Company Property*, filed November 14, 2002.

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

Background

In January 1996, PG&E entered into a ten-year, revocable-at-will license agreement granting Licensees permission to occupy, use and maintain the existing recreational home site and associated boat dock and buoy located on the real property of PG&E at Bucks Lake in Plumas County, California, for a fee of $1,450 per year to $1,600. In 2000, Licensees constructed, with PG&E's approval and in compliance with local zoning and building codes, a cabin on the Site. The cabin subsequently burned down. This application seeks permission for the Licensees to reconstruct the cabin on the Site.

The Application

On November 14, 2002, PG&E filed its application, seeking authorization from the Commission to amend the License with Buckman and Lucena. PG&E's application is made under Section 851, which requires Commission approval before a utility can sell, lease, assign, mortgage, or otherwise encumber the whole or any part of its property that is necessary or useful in the performance of its duties to the public.[3] Leasing utility-owned land for recreational use is

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[3] Section 851 reads:

> "No public utility other than a common carrier by railroad subject to Part I of the Interstate Commerce Act (Title 49, U.S.C.) shall sell, lease, assign, mortgage, or otherwise dispose of or encumber the whole or any part of its railroad, street railroad, line, plant, system, or other property necessary or useful in the performance of its duties to the public, or any franchise or permit or any right thereunder, nor by any means whatsoever, directly or indirectly, merge or consolidate its railroad, street railroad, line, plant, system, or other property, or franchises or permits or any part thereof, with any other public utility, without first having secured from the commission an order authorizing it so to do. Every such sale, lease, assignment, mortgage, disposition, encumbrance, merger, or consolidation made other

Footnote continued on next page

therefore one of the enumerated activities that require approval under Section 851.[4]

Environmental Review

PG&E's application requests Commission authority under Public Utilities Code Section 851 to amend an existing license agreement to allow the named licensees to rebuild a recreational home site located on PG&E property at Bucks Lake. We note that license agreements are generally governed by Commission General Order (G.O.) 69-C. G.O. 69-C provides a narrow exception to the Section 851 requirement for advance Commission approval of any sale, lease, assignment, mortgage or encumbrance of utility property. The General Order provides limited circumstances under which a utility may convey certain

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> than in accordance with the order of the commission authorizing it is void. The permission and approval of the commission to the exercise of a franchise or permit under Article 1 (commencing with Section 1001) of Chapter 5 of this part, or the sale, lease, assignment, mortgage, or other disposition or encumbrance of a franchise or permit under this article shall not revive or validate any lapsed or invalid franchise or permit, or enlarge or add to the powers or privileges contained in the grant of any franchise or permit, or waive any forfeiture. Nothing in this section shall prevent the sale, lease, encumbrance or other disposition by any public utility of property which is not necessary or useful in the performance of its duties to the public, and any disposition of property by a public utility shall be conclusively presumed to be of property which is not useful or necessary in the performance of its duties to the public, as to any purchaser, lessee or encumbrancer dealing with such property in good faith for value; provided, however, that nothing in this section shall apply to the interchange of equipment in the regular course of transportation between connecting common carriers."

[4] As the Commission previously stated: "The language of Section 851 is expansive, and we conclude that it makes sense to read "encumber" in this statute as embracing the broader sense of placing a physical burden, which affects the physical condition of the property, on the utility's plant, system, or property." (D.92-07-007, 45 CPUC 2d 24, 29.)

licenses, easements, permits or other limited uses of land, to third parties without prior Commission approval. Accordingly, we will initially consider whether the license in question falls within the parameters of G.O. 69-C.

G.O. 69-C establishes three key criteria for permitting a utility to grant minor interests in utility property without Commission approval pursuant to Section 851. These are:

1. the interest granted must not interfere with the utility's operations, practices, and service to its customers;
2. the interest granted must be revocable either upon the order of the Commission or upon the utility's own determination that revocation is desirable or necessary to serve its patrons or consumers; and
3. the interest granted must be for a "limited use" of utility property.

Non-Interference with PG&E Operations and Practices

PG&E's application includes information to indicate that there are numerous recreational home sites surrounding Bucks Lake, and that such recreational uses are consistent with and recognized as permissible within the Federal Energy Regulatory Commission (FERC) license for the Bucks Creek Hydroelectric Project. PG&E represents that the proposed activity will not interfere with its utility operations and practices and we are aware of no facts or information that would suggest otherwise.

Revocability

Term number three of the license agreement provides for termination of the license consistent with G.O. 69-C and explicitly states that PG&E may revoke the license at will when it determines it is in the best interest of its patrons or consumers to do so.

Limited Use

Under the license agreement, licensees will reconstruct a recreational home on the property. The agreement provides terms related to the construction of a septic system attendant to the home. While G.O. 69-C does not explicitly define the term "limited use," a number of recent Commission decisions do offer guidance on uses and activities that might reasonably fall within the term. In most circumstances, uses which require construction activities and where structures are erected which are not easily removable in order to restore the land have not been considered as "limited uses." Consequently, we do not believe that the nature of construction and associated effect on property necessary to construct a home and septic system are a "limited use" as contemplated by the G.O. 69-C.

Section 851 Analysis

Because the proposed construction does not meet the definition of "limited use," the agreement between PG&E and the Licensees does not qualify as a license within the meaning of G.O. 69-C. Accordingly, we treat the amended license as a *de facto* lease for environmental review purposes and find that Section 851 authority is required to grant this application.

The California Environmental Quality Act (CEQA, Public Resources Code Section 21000, et. seq.), applies to discretionary projects to be carried out or approved by public agencies. A basic purpose of CEQA is to "inform governmental decision-makers and the public about the potential significant environmental effects of the proposed activities." (Title 14 of the California Code of Regulations, hereinafter CEQA Guidelines, Section 15002.)

Because the Commission must issue a discretionary decision (*i.e.*, grant Section 851 authority) without which the proposed activity cannot proceed, and

because the activity has the potential to result in either a direct physical change in the environment or a reasonably foreseeable indirect physical change in the environment (CEQA Guideline Section 15378), the application is subject to CEQA and the Commission must act as either a Lead or Responsible Agency under CEQA. The Lead Agency is the public agency with the greatest responsibility for supervising or approving the project as a whole. (CEQA Guidelines Section 15051(b).) A Responsible Agency is required to consider the environmental consequences of a project that is subject to its discretionary approval and in particular, to consider the Lead Agency's environmental documents and findings before acting upon or approving a project. (CEQA Guideline Section 15050(b).)

We believe the County permitting authority is the appropriate Lead Agency for purposes of the proposed project. If this application involved the original construction of a home and septic system, we would likely fulfill our obligation as a Responsible Agency by requiring and reviewing the local permits and environmental approvals issued for the project. However, in this instance the original home was destroyed shortly after completion, and the immediate application seeks authority to proceed with the reconstruction of the pre-existing structure.

CEQA Guideline Section 15302 provides a categorical exemption for the replacement or reconstruction of existing structures and facilities where the new structure will be located on the same site as the structure replaces and will have substantially the same purpose and capacity as the structure replaced. We believe that reconstruction of the home proposed by this application is within the reasonable interpretation and intent of Guideline Section 15302. For this reason we find this proposed project is exempt from CEQA review.

Discussion

As a *de facto* lease of utility-owned real property, the proposed license amendment falls squarely within the requirements of Section 851 quoted above. The basic task of the Commission in a Section 851 proceeding is to determine whether the transaction serves the public interest: "The public interest is served when utility property is used for other productive purposes without interfering with the utility's operation or affecting service to utility customers." (D.02-01-058 (2002).) We have reviewed the proposed amended license agreement and find it does not impair PG&E's ability to provide utility service to the public. The presence of the cabin does not interfere with the utility's use of the lake water for hydro-generation purposes or prevent PG&E from gaining access to the lake. We further find that making utility land available to the public for recreation is a productive purpose. In other contexts, we have defined "productive" activities as those that lead to a measurable benefits to ratepayers.[5] In this case, the owners of the reconstructed cabin will pay PG&E a small annual fee. The fee will be treated as "other operating revenue" in PG&E's financial statements. Such revenue is credited toward the utility' overall revenue requirements and, to the extent so credited, relieves ratepayers of that much of the cost of the utility's operations. Accordingly, in the absence of a countervailing detriment, the transaction benefits ratepayers and is in the public

[5] In D.98-04-059, the Commission adopted a requirement that a customer seeking intervenor compensation must demonstrate that its participation was "productive" as that term is used in Pub. Util. Code § 1801.3. In that decision,we defined "productive" to mean that the costs of an activity should bear a reasonable relationship to its benefits. We further required that to demonstrate productivity it is necessary to assign a reasonable dollar value to the associated ratepayer benefit.

interest. Accordingly, we find that the proposed transaction is in the public interest.

Waiver of Comment Period

This is an uncontested matter in which the decision grants the relief requested. Accordingly, pursuant to Public Utilities Code Section 311(g)(2), the otherwise applicable 30-day period for public review and comment is being waived.

Assignment of Proceeding

Geoffrey F. Brown is the Assigned Commissioner and Karl Bemesderfer is the assigned Administrative Law Judge in this proceeding.

Findings of Fact

1. In order for Licensees to reconstruct a cabin on the Site, an amended license from PG&E is required.
2. Reconstruction of the cabin on the Site is consistent with the current uses of the related PG&E properties.
3. The amended license and associated construction will not impair PG&E's ability to provide service to the public.
4. Plumas County has previously issued its building permit for construction of the cabin on the Site.
5. The cabin to be constructed is a replacement of a cabin on the Site that was destroyed by fire.
6. CEQA Guideline Section 15302 provides an exception to CEQA review for reconstruction of existing structures that do not significantly differ from or enlarge the replaced structure.
7. There is no known opposition to granting the authorization requested.

Conclusions of Law

1. It is reasonable to approve the requested license amendment under Section 851, because it is in the public interest to allow utility property to be used for productive purpose when this does not impair the utility's ability to provide service to the public.

2. The transaction is exempt from CEQA review pursuant to Section 15302 of the CEQA Guideline.

3. A public hearing is not necessary.

4. The Application should be granted as set forth in the following Order.

5. This decision should be effective today in order to allow Licensees to begin reconstruction of the cabin as soon as possible.

O R D E R

IT IS ORDERED that:

1. Pacific Gas and Electric Company's (PG&E) application for authority to amend a license agreement to permit reconstruction of a cabin on PG&E-owned land at Bucks Lake is granted, as described above.

2. PG&E shall notify the Director of the Commission's Energy Division in writing of any further amendment, extension or termination of the license agreement, within 30 days after such further amendment, extension or termination is executed.

3. Application 02-11-025 is closed.

This order is effective today.

Dated _____, at San Francisco, California.