

Decision 01-08-069 August 23, 2001

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application of Pacific Gas and Electric Company on an Expedited Basis for Exemption under Section 853 for Easements on PG&E Land Allowing Delta Energy Center, LLC to Maintain an Electric Transition Structure for the Delta Project and CPN Pipeline to Maintain Gas Facilities for the Delta Project and the Los Medanos Energy Center Project, or in the Alternative for Approval of Easements under Section 851. (U 39 M)

Application 01-07-031
(Filed July 26, 2001)

DECISION GRANTING APPROVAL UNDER PUBLIC UTILITIES CODE SECTION 851 FOR EASEMENTS ON UTILITY PROPERTY AND ORDER TO SHOW CAUSE

We grant the Application¹ of Pacific Gas & Electric Company (PG&E) for approval of two easements on PG&E land under Public Utilities Code Section 851.² The two easements are needed for an underground-to-overhead electric transition structure and a gas pipeline and valves associated with a new 880 MW electric generation plant currently under construction in Pittsburg, California, by

¹ *Pacific Gas and Electric Company's Application On An Expedited Basis For Approval Of Easements On PG&E Land For Delta Energy Center To Maintain An Electric Transition Structure For The Delta Project And CPN Pipeline To Maintain Gas Facilities For The Delta Project And The Los Medanos Energy Center Project, Or In The Alternative For Exemption Of Easements Under Section 853(b).*

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

Delta Energy, LLC (Delta Plant).³ We also provide notice that we will consider sanctions against PG&E for its extraordinary delay in filing its Application, and its possible violation of California law and Commission authorities.

Background

The Delta Energy Project

The developers of the Delta Plant filed a Petition for Jurisdictional Determination with the California Energy Commission (CEC) on September 17, 1998, and filed the Application for Certification (AFC) with the CEC on December 18, 1998. The CEC and its staff held multiple public hearings, workshops and evidentiary hearings on the proposed plant in 1999. The Presiding Member's Proposed Decision was published in December, 1999, and after receiving comments, the CEC issued its final Commission decision approving the project in February, 2000. Construction on the Delta Plant began in June, 2000.⁴

The Delta Plant is an 880 MW combined cycle natural gas fired power plant located on a 20-acre parcel owned by Dow Chemical in Pittsburg, California. In addition to the plant itself, the CEC's decision also addressed a new 3.3 mile 230 kV electric transmission line that interconnects the Delta Plant to the transmission grid at PG&E's existing Pittsburg substation, and a new 5.2

³ Delta Energy is a joint venture of Calpine Corporation and Bechtel Enterprises, Inc.

⁴ PG&E did not formally intervene and participate in the CEC process, but the CEC's Commission decision states that Delta Energy (or its predecessor in interest) and the CEC staff worked with PG&E and others in the process leading up to the CEC's decision.

mile natural gas fuel supply line that connects the Delta Plant to PG&E's Line 400 in Antioch.⁵ Specific portions of these linear facilities are the subject of this proceeding.

The electric transmission line runs both overhead and underground in its route from the Delta Plant to the Pittsburg substation. In order to connect with PG&E's facilities at the substation, the transmission line makes a transition from underground to overhead, which requires what has been described as a "Transition Structure" to be constructed on PG&E-owned land. The Transition Structure is being constructed by Delta Energy. PG&E states that: "Pursuant to a letter in May 2001, Delta Energy has performed preliminary site work [on] the Transition Structure, up to and including foundations, but no further construction work has occurred." PG&E does not further identify the content or author of this letter, nor does PG&E explain why construction was permitted to begin, nor why construction has been halted. According to Delta Energy, on May 18, 2001, PG&E and Delta Energy executed a letter agreement dated May 11, 2001, authorizing Delta Energy to drill for and install four foundations for the Transition Structure.

The gas pipeline connects to PG&E's Line 400 in Antioch, on what is referred to as the "Wilbur Avenue property." The gas pipeline supplies gas to both the Delta Plant and the already operational 550 MW Los Medanos Energy Center in Pittsburg. The gas pipeline and related gas valves (Gas Facilities) have already been constructed on and/or under PG&E's property by CPN Pipeline Company, a subsidiary of Calpine. According to PG&E, "CPN Pipeline initiated

⁵ The CEC's Decision also discusses water supply and discharge pipelines, and a smaller electric line serving Dow Chemical.

construction of the Gas Facilities at the Wilbur Avenue property under a letter agreement in summer 2000. CPN Pipeline has completed installation and has placed the Gas Facilities in Service.”

The Application

On July 26, 2001, PG&E filed its application, seeking authorization from the Commission to grant the two easements on PG&E property for the Transition Structure and the Gas Facilities. 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.⁶

⁶ 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 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

Footnote continued on next page

Granting of an easement is an encumbrance, and therefore requires approval under Section 851.⁷ In the alternative, PG&E requested exemption from the requirements of Section 851 pursuant to the provisions of section 853(b).⁸

PG&E's application requested an expedited, *ex parte*, order from the Commission granting the requested easements.

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.

⁷ 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.)

⁸ Section 853(b) reads:

The commission may from time to time by order or rule, and subject to those terms and conditions as may be prescribed therein, exempt any public utility or class of public utility from this article if it finds that the application thereof with respect to the public utility or class of public utility is not necessary in the public interest. The commission may establish rules or impose requirements deemed necessary to protect the interest of the customers or subscribers of the public utility or class of public utility exempted under this subdivision. These rules or requirements may include, but are not limited to, notification of a proposed sale or transfer of assets or stock and provision for refunds or credits to customers or subscribers.

Also on July 26, 2001, Delta Energy filed an Emergency Motion⁹ requesting the immediate issuance of an Assigned Commissioner's Ruling that would allow Delta Energy to complete construction of the Transition Structure. Delta Energy's Emergency Motion did not address the Gas Facilities.

A draft decision addressing the Application was on the agenda for the Commission meeting of August 2, 2001. That decision was held, and was not voted on by the Commission.

On August 3, 2001, Commission President Lynch issued an Assigned Commissioner Ruling Requesting Additional Information In Connection With Emergency Motion And Establishing Procedural Requirements (Ruling). This Ruling requested additional information from Delta Energy relating to its Emergency Motion, shortened the protest and response period for the Application, expanded the service list, and directed PG&E to file and serve the complete environmental review prepared by the CEC.

Delta Energy provided a response to the Ruling on August 3, with an attached declaration. PG&E provided further environmental documentation on August 6. Californians for Renewable Energy, Inc. (CARE) and the Commission's Office of Ratepayer Advocates (ORA) protested the Application.¹⁰

⁹ *Emergency Motion Of Delta Energy Center, LLC For Immediate Issuance Of Assigned Commissioner's Ruling Granting Interim Authorization For Use Of PG&E Land For Electric Transition Structure Necessary To Interconnect Electric Generating Plant To Grid.*

¹⁰ CARE: *Petitioner's Formal Protest of PG&E's Basis For Exemption Under Section 853 And Petition For Leave To Supplement The Administrative Records With The Petitioner's Excerpts From The CEC Dockets Log (98-AFC-3).* ORA: *Protest Of The Office Of Ratepayer Advocates To Pacific Gas And Electric Company's Application For Section 853 Exemption From, Or Approval Under, Section 851 For Creation Of Easements In Pittsburg and Antioch.*

Issues Before The Commission

What should have been a relatively simple Application has become more complicated, and presents a number of issues and questions, only some of which can be resolved today. First, PG&E's Application raises the issue of whether the Commission should approve the granting of the two easements on PG&E property to Delta Energy and CPN Pipeline under Section 851, or in the alternative, find that the transactions are exempt from Section 851 under section 853(b). CARE's Protest raises issues relating to the environmental impact of the Delta Plant itself, primarily in the areas of air emissions, health impacts, and environmental justice. ORA's Protest recommends bifurcating or phasing of the proceeding, and further recommends imposing certain conditions to protect utility ratepayers if the Commission finds that the transactions are exempt from Section 851.

This Decision addresses these issues. The factual peculiarities of the Application, however, raise additional questions that cannot be answered on the record before us. First, we note that the Gas Facilities have already been constructed and placed in service on and under PG&E property. From the record before us, it appears that PG&E allowed the Gas Facilities to be completed by CPN Pipeline under a letter agreement that was not reviewed or approved by the Commission or even Commission staff. By comparison, PG&E allowed Delta Energy to begin construction of the Transition Structure under a similar agreement, but subsequently has not allowed Delta Energy to finish construction of the Transition Structure until the Commission approves the applicable easement. The record is inadequate for us to confidently determine why PG&E believed that it had the authority to grant Delta Energy and CPN Pipeline permission to build significant and permanent structures on utility land without

prior Commission approval. Likewise, we cannot determine with certainty the cause of PG&E's apparent change of heart on this subject.¹¹

Second, in proceeding A.01-06-043, in which PG&E has applied to the Commission under Section 851 to lease utility land to CalPeak Power, LLC, PG&E has admitted that it inadvertently allowed construction activities to occur on PG&E property prior to obtaining Commission approval for such construction. In that proceeding, PG&E apparently believed that GO 69-C allowed it to give permission to third parties to perform significant construction on PG&E property without Commission approval.

It appears possible that PG&E may have violated Section 851. At the very least, PG&E was delinquent in filing its Application, as Delta Energy indicates that it began to discuss the need for easements with PG&E in the fall of 1999. The relatively general record before us is not adequate to determine if PG&E violated the law, and if so, how seriously. Accordingly, we will have further proceedings in this docket to examine this issue.

Both to provide a context for further proceedings and, as an essential part of our determination whether to grant PG&E's Application, we need to review recent Commission decisions discussing the application of Section 851. Our review shows that, in the past year, the Commission has clearly signaled its

¹¹ Delta Energy cites to General Order (GO) 69-C as a basis for the effective granting of easements on utility land without prior Commission approval. Delta Energy's argument overstates the reach of GO 69-C, and is not well founded. GO 69-C is discussed further below.

intention to enforce the requirements of Section 851 and to preclude the use of GO 69-C as a means to evade Section 851's statutory requirements.

Recent And Older Commission Decisions

Beginning in 1993, but most actively in 1996, the Commission approved a number of applications of Southern California Edison (Edison) under Section 851 for leases of space to telecommunications companies who wished to install fiber optic cables in Edison rights-of-way. (See D.93-04-019, D.94-06-017, D.95-05-039, D.96-07-058, D.96-07-038, D.96-10-071, and D.96-11-058.) In all of these cases, Edison had granted the telecommunications company a license to use the utility right-of-way under GO 69-C prior to the filing of an application to the Commission under Section 851. The Commission did not question the propriety of this practice in any of these cases.

On September 3, 1998, the Commission approved a "license and exchange agreement" between PG&E and Tele-Vue, which allowed each of them to use telecommunications facilities of the other, and also gave Tele-Vue access to certain of PG&E's transmission towers and poles for installation of a new fiber optic line. (D.98-09-013.) The Commission did not appear to be troubled by the fact that PG&E and Tele-Vue had entered into an earlier version of the agreement in 1994, yet only sought Commission approval in 1998. During the interim period, PG&E had relied on GO 69-C as its authority for the agreement.

On February, 18, 1999, the Commission addressed a more difficult case. PG&E disclosed that between 1989 and 1996, PG&E had entered into 106 sales agreements with individual customers for sales of utility assets, none of which

had been approved by the Commission.¹² (D.99-02-062.) PG&E stated that it had been under the mistaken impression that Commission approval under Section 851 was not required, and requested either exemption from Section 851 or retroactive approval. According to PG&E, a 1996 decision¹³ of the Commission caused PG&E to realize that Commission approval was required for the transactions, and it filed its Application seeking that approval in 1998.

ORA protested PG&E's request for exemption from Section 851 under section 853(b), but did not oppose retroactive application of Section 851 on a *nunc pro tunc* (i.e., with the same effect as if done earlier) basis, as the revenue from the sales had been properly recorded and served to benefit ratepayers. ORA also requested that PG&E be required to conduct a search for other transactions made without 851 approval. The Commission largely adopted ORA's position, and retroactively approved the 106 transactions under Section 851 and ordered PG&E to search for additional transactions that had not been submitted to the Commission for approval.

PG&E found an additional 73 sales agreements, similar to the previous 106 sales agreements, and in January, 1999 filed an application again seeking an exemption from the requirements of Section 851, or in the alternative, retroactive approval under Section 851. The Commission found that PG&E's failure to obtain Section 851 approval for the sales was again a mistake, and issued a

¹² The assets were electric and gas facilities that were used solely to provide service to an individual customer, and each sale was to that customer.

¹³ D.96-02-054

similar decision on April 22, 1999 retroactively approving the transactions under Section 851. (D.99-04-047.)

On March 4, 1999, the Commission approved conversion of a license granted by PG&E to Metricom under GO 69-C to a lease, pursuant to Section 851. Under the license agreement, and prior to the approval of the lease by the Commission, PG&E permitted Metricom to install 1,100 radio receivers on PG&E poles. Metricom wanted a lease, rather than a license, to ensure that its use of the poles would not be interrupted. The Commission did not question the propriety of this arrangement, and granted similar treatment to applications of PG&E to allow the City and County of San Francisco to use portions of PG&E's underground conduit (D.99-04-014, dated April 1, 1999), and to allow Electric Lightwave to use certain PG&E transmission towers, substations, and rights-of-way (D.00-01-014, dated January 6, 2000).

On August 5, 1999, the Commission struck a very different tone. Koch Pipeline Company sought authorization from the Commission under Section 851 for the already consummated sale of a crude oil pipeline to EOTT Energy Pipeline Limited Partnership. While the Commission did retroactively approve the transaction, it also fined Koch \$8,000 for its failure to get preapproval from the Commission. (D.99-08-007.) In levying the fine, the Commission found that there was no benefit to customers from the transaction, and that inadvertence was not an adequate excuse. The Commission stated that, "We must act to discourage parties from avoiding their statutory duty and bypassing the Commission when entering into agreements to transfer utility assets."

On December 7, 2000, the Commission criticized the practice of a utility issuing a license under GO 69-C and then formally converting that same transaction into a longer term obligation under Section 851. (D.00-12-006.) In a

case generally similar to the earlier ones addressed by the Commission, Edison granted a telecommunications company (in this case Telecom Licensing, Inc.) use of Edison facilities for fiber optic cables by means of a GO 69-C license that was to be converted to a lease via a Section 851 application. Based in part on concerns about possible evasion of environmental review, the Commission stated:

“GO 69-C cannot reasonably be read to allow utilities [to] bifurcate their transactions so that they would perform construction under an agreement not subject to Commission review by virtue of GO 69-C, and then, after the facilities are installed, seek approval of the lease arrangements for those facilities.” In discussing the interplay of GO 69-C and Section 851, the Commission stated:

Public Utilities Code Section 851 generally requires advance Commission approval of the sale, lease, assignment, mortgage, disposal or encumbrance of utility property necessary or useful in the performance of its duties to the public. The use of GO 69-C to cement a deal in advance, then seek subsequent Section 851 review is troublesome. We do not believe that undertaking a commitment with long term implications is a ‘limited use’ that qualifies for GO 69-C treatment.

Nevertheless, based upon the “peculiar facts” of the case, the Commission approved the application. The Commission warned, however, that:

We specifically note that we will deny applications to convert GO 69-C agreements to lease agreements in the future, where the structure of those transactions was designed to circumvent the advance approval requirements of Section 851, and the associated CEQA¹⁴ review requirement.

¹⁴ California Environmental Quality Act.

On January 18, 2001, the Commission approved an application under Section 851 for Edison to lease utility land to Katella Operating Properties for a parking and storage facility. (D.01-01-043.) The Commission also reiterated its concern:

We note that SCE licensed the land to Katella pursuant to GO 69-C and the license agreement specifically contemplated the future conversion of the license into a lease. We are somewhat concerned with the apparent use of GO 69-C to seal a deal in advance, then seek subsequent approval under Section 851.

On March 27, 2001, the Commission strongly condemned the practice of utilities allowing construction to occur on utility land pursuant to GO 69-C in advance of obtaining Commission approval under Section 851, in a case in which it approved the sale of PG&E land to Storage Pro of Richmond for a parking and storage facility. (D.01-03-064.) The Commission said:

We are troubled by the emerging pattern of a utility licensing property under GO 69-C as a precursor to a planned application for sale or lease of the property under Section 851. It appears that utilities may be using GO 69-C as means to give immediate effect to transactions with third parties while awaiting Commission approval of a longer term arrangement.

The Commission continued, and described the proper scope of GO 69-C:

We do not agree with PG&E's assertion that the work performed falls under the "limited uses" described in the underlying general order. Here, PG&E entered into the License Agreement with the stated intention of selling the property. Thus, any work performed by Buyer on the property was most likely intended to be permanent rather than temporary. In contrast, G.O. 69-C requires that easements, licenses or permits "shall be made conditional upon the right of the grantor...to commence or resume the use of the property in question...." This provision makes it reasonable to conclude that when the general order describes "limited uses," it envisioned

temporary ones, or at least uses which would not be incompatible with resumed use of the property by the utility.

While these decisions illustrate a recent trend in Commission proceedings, the issue presented is not a new one, and older examples abound. It appears that utilities have long resisted the requirements of Section 851. The Commission has rejected arguments from Southern California Gas and Kern River Gas Transmission that Section 851 can be evaded by transferring facilities before they are placed into service (D.93-02-055), from Edison and others that utility generation assets were no longer subject to the requirements of Section 851 as a result of market valuation under AB 1890 (D.95-12-063), and from PG&E that Section 851 did not apply to sales of streetlighting facilities to municipal entities (D.84-10-059, citing D.83-06-096 and D.83-12-068).

A 1992 Commission decision is particularly relevant. (D.92-07-007, 45 CPUC 2d 24.) There, PG&E wanted to let MCI Telecommunications use space on its transmission facilities, and argued that Section 851 did not apply to the transaction. One of the arguments made by PG&E to support its claim was that the rights granted to MCI constituted only a license, rather than a lease or an easement. The Commission rejected PG&E's argument. The Commission found that the interest granted was not revocable, and accordingly the transaction was not a license.¹⁵ The Commission also noted that a license does not create an interest in the land of the licensor. While in the present case, neither PG&E nor

¹⁵ In 1996, the Commission rejected a similar argument by Pacific Bell that leases of space in its office buildings did not require review under Section 851, as they were only licenses. (D.96-04-045.) The Commission found that since the agreements in question were not revocable, they could not be considered licenses.

Delta Energy has provided copies of the letters under which PG&E authorized Delta Energy and CPN Pipeline to construct facilities on PG&E land, we have doubts that CalPine and Bechtel would consider the easement containing the gas supply to two large power plants to be revocable, or to not create a property interest.

Analysis And Action

PG&E has requested exemption from the requirements of Section 851, pursuant to section 853(b). We do not grant this exemption, but rather will review the two transactions at issue under Section 851. We note that the determination of whether to exempt a utility or transaction from the requirements of Section 851 is discretionary with the Commission. Section 853(b) does not require the Commission to grant an exemption from Section 851 for transactions such as the ones before us, but rather leaves that determination up to the Commission, with Section 851 remaining the default statute. In this case, there is no factual or legal reason to grant an exemption from Section 851.

We grant PG&E's request under Section 851. In reaching this decision, we have considered the filings of PG&E and Delta Energy, the Protests of ORA and CARE, current state policy on electrical generation plants (as expressed in the Governor's Executive Orders), and applicable state law and Commission decisions.

The purpose of the two easements at issue here is unquestioned. One easement is for a Transition Structure, as described above, to be installed on PG&E property adjacent to PG&E's Pittsburg substation, to permit the electric transmission line from the new Delta Plant to interconnect with the electric transmission grid. The other easement is for Gas Facilities, also described above, to be installed on PG&E property adjacent to PG&E's Line 400, to permit gas to

be supplied to the gas-fired Los Medanos and Delta Plants. We begin with the observation that these uses are consistent with the use of the utility properties in question. One reason for a substation to exist is to allow interconnection of electrical generation facilities, and this is certainly the case for the Pittsburg substation, which has served as the interconnection point for the Pittsburg power plant. Natural gas transmission pipelines, such as Line 400, exist to provide natural gas to those, such as the Delta and Los Medanos plants, that burn natural gas.

PG&E states that the existence, maintenance, and operation of the Transition Structure and the Gas Facilities (and their easements) will not interfere in any way with the operation of PG&E's electric or gas systems, or in the provision of service to PG&E's customers. PG&E notes that the Delta Plant itself will have an effect on customers in PG&E's service territory, and on the electrical grid, but states that those effects would occur even if the Transition Structure was located on non-utility property.

The task of the Commission in a Section 851 proceeding is to review the transaction, “[T]o ensure that it will not impair the utility’s ability to provide service to the public.” (D.96-04-045.) Or, as was stated in relation to section 51(a), the predecessor to Section 851: “The obvious purpose of this section is to enable the Railroad Commission, before any transfer of public utility property is consummated, to review the situation and to take such action, as a condition to the transfer, as the public interest may require.” (Decision No. 3320 (1916) 10 CRRC 56, 63.)

We have reviewed the easement agreements submitted by PG&E, and with minor clarifications and conditions, the easement agreements do not appear to impair PG&E's ability to provide utility service to the public.

In their general provisions, the agreements for the Transition Structure and Gas Facilities are basically the same. Paragraphs 1 and 2 of the easement agreement for the Transition Structure and paragraphs 1 through 4 of the easement agreement for the Gas Facilities describe the uses that can be made of the easements. In defining those uses, we must indicate that the uses of the easements we are approving must not go beyond those approved by the CEC in its environmental review process. Otherwise, we would potentially be approving construction that had not received environmental review.

Paragraphs 12 and 13 of the agreement for the Transition Structure, and paragraphs 15 and 16 of the agreement for the Gas Facilities address assignment of the easements, and require PG&E to execute certain instruments in the event of an assignment of the easements. Should PG&E do so, it cannot via that process grant any additional rights beyond those contained in the agreements before us today without prior Commission approval. Similarly, any assignee does not take any further rights than those contained in the Commission approved agreements.

Paragraph 17 of the agreement for the Transition Structure and paragraph 20 of the agreement for the Gas Facilities address the rights (or absence of rights) of third party beneficiaries. The last sentence of those paragraphs reads: "It is expressly understood and agreed that no modification, in whole or in part, of this Agreement shall require consent or approval on the part of any third party." Modification of the agreements does in fact require consent or approval by this

Commission, and the parties cannot abrogate the Commission's right and duty by contract.¹⁶

We cannot ignore the fact that we are in an energy crisis in California, and we must consider the current conditions and policies of the state in making our decision today. Governor's Executive Order D-26-01, based upon the State of Emergency that was declared as a result of the energy shortage in California, ordered local, regional, and state agencies to expedite the availability of new electric generation sources in the state. In fact, the state has taken extraordinary measures to bring power plants on line. (See, e.g. Governor's Executive Order D-44-01.) Were we to deny PG&E's application, the effect would be to significantly delay, if not totally prevent, the interconnection and operation of the 880 MW Delta Plant. Furthermore, failure to approve the easement for the Gas Facilities could result in the shutdown of the already operational 550 MW Los Medanos plant. Blocking the availability of somewhere between 880 and 1430 MW would not be consistent with state policy, absent some significant and compelling reason. No such weighty counterbalance is present here.

The Commission received two protests to the Application, from ORA and CARE. ORA's protest primarily focuses upon the possibility that the Commission would grant PG&E's request for exemption from Section 851 under section 853(b). Accordingly, ORA asks that certain conditions be applied by the Commission in the event such an exemption is granted. Specifically, ORA

¹⁶ As a practical matter, the Commission only needs to review modifications that alter the rights granted. However, given the context of this Application, the Commission reserves the right to determine whether any particular modification alters the rights granted, and accordingly will require all proposed modifications to be approved in advance by the Commission.

requests that any exemption from Section 851 be limited to the two easements in the Application, that the creation of the easements will not result in an increase in utility revenue requirements or rates, that the creation of the easements will not cause any degradation in the safety or reliability of utility service, and that any revenues received by PG&E as a result of the easements that do not fall under the jurisdiction of the Federal Energy Regulatory Commission (FERC) for ratemaking purposes be brought to the Commission's attention for proper apportionment to ratepayers.

We presume that ORA may want similar assurances even though we are approving the transactions under Section 851, as opposed to section 853(b), although ORA did not request them. ORA did not offer any comments on the contents of the easement agreements themselves, and accordingly we cannot tell if ORA finds the agreements acceptable, or just did not review them. In general, the conditions requested by ORA are not unreasonable, although they are phrased rather broadly. In any event, we agree that the granting of the easements should not directly cause an increase in PG&E's revenue requirements or rates, nor degrade the safety or reliability of utility service, and we will impose those conditions. Since extending these conditions to the indirect impacts of the easements could be interpreted to encompass the impacts of the Delta Plant on the PG&E system, we decline to extend the conditions as far as requested by ORA.

We do not address today the scope of jurisdiction of the Commission versus FERC over electric transmission facilities, but merely note that the Commission, by this Decision, is not ceding any of its jurisdiction. Accordingly,

to the extent the Commission has ratemaking authority relating to the transactions, it retains that authority.¹⁷

ORA also appears to be requesting bifurcation, or at least phasing, of the proceeding, on the basis that only the Transition Structure requires expedited consideration. While ORA is correct that there appears to be less of a need for an expedited review of the already operational Gas Facilities, ORA gives no other reason for having the two easements addressed separately. Given the similarity of and the relationship between the two easements, we see no need to address them separately, and in fact we believe it makes the most sense to address them together.

CARE's protest addresses the environmental impacts of the Delta Plant, with an emphasis on air emissions.¹⁸ CARE argues that the CEC did not adequately address the health and safety impacts on local residents of the Delta Plant's air emissions, and failed to impose adequate mitigation measures. CARE is critical of the state and federal policies expediting the construction of new power plants, and CARE has alleged that the CEC, Delta Energy, and others discriminated against people of color in the siting of the Delta and Los Medanos Plants.¹⁹

¹⁷ PG&E indicates that the property on which the Gas Facilities are located is in PG&E's electric transmission ratebase. While this seems potentially questionable, it does not appear unreasonable based upon PG&E's description of the history and uses of the property. In addition, review of utility assets to ensure that they are in the proper ratebase is far beyond the scope of this proceeding.

¹⁸ Delta Energy filed a Reply to CARE's Protest.

¹⁹ CARE states that it has a pending Title VI complaint on this issue with the US EPA Office of Civil Rights.

CARE does not directly address the easements at issue before this Commission. Instead, CARE's protest is really a collateral attack upon the CEC's permitting process. The CEC, not the CPUC, is the state agency with authority over the siting of new power plants. (See Public Resources Code sections 25500, et. seq.) We have no desire to second-guess the CEC's judgment as to the need for, siting of, or configuration of the Delta Plant, and our authority over the easements does not give us a basis for stepping into the CEC's shoes.²⁰

We also note that CARE's Protest only addresses PG&E's request for exemption under section 853, and not PG&E's request for approval under Section 851. While this may have been an oversight by CARE, CARE's Protest does not specifically identify what action it wants the CPUC to take on PG&E's application. Accordingly, even if we desired to grant CARE's Protest, it is not clear what we would do beyond the action we take today.²¹

The facts underlying this Application, application of long established law, and state policy all support the granting of the Application under Section 851. The Protests do not provide any reason to deny the Application under Section 851. Recent Commission decisions do, however, create a barrier to our approval of the Application, and must be addressed.

As described above, in D.00-12-006 the Commission stated:

²⁰ The bulk of CARE's Protest alleges flaws in the CEC's environmental review process. While we do rely upon the CEC's environmental review in our role as a responsible agency under CEQA, the issues raised by CARE are also largely beyond the scope of our review under CEQA.

²¹ CARE has also requested leave to supplement the record in this proceeding with selected but unidentified documents from the CEC proceeding. This request is denied.

“We specifically note that we will deny applications to convert GO 69-C agreements to lease agreements in the future, where the structure of those transactions was designed to circumvent the advance approval requirements of Section 851, and the associated CEQA review requirement.” In D.01-03-064, the Commission restated this in even broader language:

“The Commission will deny future applications to encumber or dispose of utility property where the structure of the transaction was designed to circumvent the advance review requirements of Section 851 or the appropriate environmental review.”

In order to stay true to our word, we should deny this Application. The Gas Facilities, consisting of equipment sufficient to serve two relatively large power plants, have already been installed on utility land. The foundation of the Transition Structure has already been installed on utility land. These significant and permanent structures were constructed under PG&E’s claimed GO 69-C authority. This is in direct contradiction of our clear statement in D.01-03-064 that permanent changes to utility property fall outside the scope of the “limited uses” permitted by GO 69-C. Now, after the fact, PG&E wishes to gain Section 851 approval for easements that are already permanently encumbering utility property.

Nevertheless, we will grant the Application. In the two decisions in which we so unequivocally stated our intention to deny applications such as this one, the intent was to create a disincentive for this type of behavior. In essence, we were warning utilities that they would not be rewarded for failure to comply

with all applicable authorities, but instead they would be punished by having their applications (which presumably they desired) denied. In this case, that approach has not succeeded, for despite the clarity of our previous decisions, PG&E did not file this Application until July 26, 2001. More significantly, denial of the Application would not really punish PG&E, but rather would most directly harm Delta Energy, and secondarily harm the residents of California who may benefit from the operation of the Delta Plant. In short, our duty to the utility customers of California indicates that we should grant, rather than deny the Application.

At the same time, however, ensuring compliance with Section 851 and other laws and regulations is also part of our duty to uphold the public interest. Accordingly, we are issuing an Order to Show Cause to PG&E as to why it should not be found to have violated Section 851 (and related Commission decisions) and to have misused GO 69-C, and why corresponding sanctions should not be imposed. PG&E will provide to ALJ Allen the documents identified in Appendix A within two weeks of the date of this order. A hearing, to be held not less than two weeks from the date of this order, will be scheduled by separate ALJ Ruling. The hearing will be held in conjunction with a similar hearing to be ordered in A.01-06-043. In order to ensure full development of the record, representatives from Delta Energy and CPN Pipeline with knowledge of the transactions shall attend the hearing.²²

²² Alternatively, one representative with knowledge of both transactions would satisfy this requirement. The Commission is not contemplating sanctions against Delta Energy or CPN Pipeline.

CEQA

The Commission is in the role of responsible agency under CEQA, with the CEC's environmental review role being equivalent to that of a lead agency. As a responsible agency, the Commission has certain legal obligations. The fact that the Gas Facilities have been completely built, and the most environmentally significant portion of the Transition Structure has also been built, tends to make our CEQA review process difficult, if not meaningless. For example, the Commission has potentially been precluded from imposing some mitigation measures it may have had the authority to impose on the Gas Facilities and the already built portion of the Transition Structure. Nevertheless, we will endeavor to comply with CEQA.

First, the scope of our permitting authority under the present Application is limited to the two easements for the Transition Structure and the Gas Facilities. We are not approving the Delta Plant itself, nor are we approving the major portions of the electric transmission line and gas pipeline, and accordingly we are not in a position to make findings relating to those facilities. The CEC reviewed the Delta Plant and its related facilities, including the Transition Structure and the Gas Facilities. We do need to make findings for each significant environmental effect relating to the Transition Structure and the Gas Facilities identified in the CEC's environmental documentation. (CEQA Guideline 15091(a).)²³

²³ Significant impacts relating to other portions of the transmission line and gas pipeline, even if identified by the CEC, are beyond the scope of our review and approval, and do not require findings.

The CEC did not identify any significant environmental impacts relating to the Transition Structure, so no findings regarding the Transition Structure are required of the Commission.

The only potentially significant impact relating to the Gas Facilities identified in the CEC's environmental review was in the category of visual resources, as the pipeline's metering set would be visible from Wilbur Avenue. The location of the metering set in an industrial area, and the CEC's requirement that the metering set be fenced with non-reflective fencing with wooden slats run through the fencing, provide feasible mitigation of this impact.

Under CEQA Guideline 15091(a), the Commission may find that the appropriate mitigation measures are either required or incorporated into the project (subsection (a)(1), or that the mitigation measures are within the responsibility of another public agency (subsection (a)(2). We appear to be precluded, however, from taking the second approach by CEQA Guideline 15091(c), which prohibits use of subsection (a)(2) in the case of concurrent jurisdiction. Accordingly, consistent with CEQA Guideline 15091(a), we adopt the mitigation measures described and approved by the CEC.

Comment on Draft Decision

Rule 77.7(f)(9) of the Commission's Rules of Practice and Procedure provides in relevant part that:

...the Commission may reduce or waive the period for public review and comment under this rule...for a decision where the Commission determines, on the motion of a party or on its own motion, that public necessity requires reduction or waiver of the 30-day period for public review and comment. For purposes of this subsection, "public necessity" refers to circumstances in which the public interest in the Commission adopting a decision before expiration of the 30-day review and comment period clearly outweighs the public

interest in having the full 30-day period for review and comment. "Public necessity" includes, without limitation, circumstances where failure to adopt a decision before expiration of the 30-day review and comment period...would cause significant harm to public health or welfare. When acting pursuant to this subsection, the Commission will provide such reduced period for public review and comment as is consistent with the public necessity requiring reduction or waiver.

PG&E and Delta Energy have both requested extraordinarily expedited action by the Commission, and have stated that a delay in the Commission approving the easements will result in at least a proportional delay in the operational date of the Delta Plant.

We balance the public interest in quickly approving the Application and the resulting easements against the public interest in having a comment cycle on this decision. Our conclusion is that, in this case, speed is more important, for delay has the potential for jeopardizing public health and safety by increasing the potential for rolling blackouts. Accordingly, we are waiving the comment period for this decision.

Findings of Fact

1. In order for Delta Energy to operate and interconnect its Delta Plant, two easements on PG&E property are required.
2. One easement is for an electric underground-to-overhead transition structure, to be located on PG&E land adjacent to PG&E's Pittsburg substation, and constructed by Delta Energy.
3. The other easement is for a gas pipeline and gas valves, to connect to PG&E's Line 400 near Wilbur Avenue in Antioch, and constructed by CPN Pipeline.
4. The electric transition structure has been partially constructed.

5. The gas facilities have been constructed, and are operational.
6. PG&E permitted Delta Energy and CPN Pipeline to perform construction on PG&E property prior to filing this Application.
7. CARE and ORA filed protests to the Application.
8. The purposes of the easements are consistent with the current uses of the related PG&E properties.
9. The easements will not impair PG&E's ability to provide service to the public.
10. California is presently in the midst of an energy crisis.
11. The CEC has conducted an environmental review that includes the electric transition structure and the gas facilities.
12. The Commission is in the role of responsible agency for purposes of CEQA.
13. The environmental mitigation measures adopted by the CEC for the gas facilities are feasible.

Conclusions of Law

1. Granting the requested easements is in the public interest.
2. Exemption from the requirements of Public Utilities Code Section 851 is not necessary.
3. The Protests of CARE and ORA do not present an adequate basis for denying PG&E's application.
4. Significant construction on utility land, as occurred here, exceeds the scope of authority granted by General Order 69-C.
5. It cannot be determined from the record whether PG&E violated state law or Commission authorities.

6. Further proceedings are appropriate to determine if PG&E has violated state law or Commission authorities, and, if so, whether PG&E should be sanctioned.

O R D E R

IT IS ORDERED that:

1. PG&E's Application for authority to grant two easements on utility property is granted, as described above.
2. PG&E will provide the information requested in Appendix A to ALJ Allen within two weeks of the date of this order.
3. PG&E will show cause why it should not be subject to sanctions for violation of Public Utilities Code Section 851, General Order 69-C, Rule 1, and the Commission decisions cited above.
4. A hearing on sanctions, in conjunction with a similar hearing in A.01-06-043, will be scheduled (by separate ALJ Ruling) not less than two weeks from the date of this order.
5. This proceeding will remain open.

This order is effective today.

Dated August 23, 2001, at San Francisco, California.

LORETTA M. LYNCH
President
HENRY M. DUQUE
CARL W. WOOD
GEOFFREY F. BROWN
Commissioners

I dissent.

/s/ RICHARD A. BILAS

A.01-07-031 ALJ/PVA/eap

Commissioner

APPENDIX A

The following information and documents are to be provided to ALJ Allen as directed in the attached decision:

- 1) All written correspondence, including electronic correspondence, between PG&E and Delta Energy relating to the easements or facilities discussed in the attached decision. "Delta Energy" is to be interpreted broadly, and include any affiliated, predecessor, subsidiary, or parent entity and its representatives.
- 2) All written correspondence, including electronic correspondence, between PG&E and CPN Pipeline relating to the easements or facilities discussed in the attached decision. "CPN Pipeline" is to be interpreted broadly, and include any affiliated, predecessor, subsidiary, or parent entity and its representatives.
- 3) All written correspondence, including electronic correspondence, between PG&E and any governmental agency or entity (other than the CPUC) relating to the easements or facilities discussed in the attached decision.
- 4) All notes or other documentation of meetings, telephone conversations, and other oral communications between PG&E and Delta Energy or CPN Pipeline relating to the easements or facilities discussed in the attached decision.
- 5) All notes or other documentation of meetings, telephone conversations, and other oral communications between PG&E and any governmental agency or entity (other than the CPUC) relating to the easements or facilities discussed in the attached decision.
- 6) All PG&E internal written correspondence, including notes, memos, and electronic correspondence relating to Delta Energy, CPN Pipeline, or the easements or facilities discussed in the attached decision.
- 7) All notes or other documentation of internal PG&E meetings, telephone conversations, and other oral communications relating to the easements or facilities discussed in the attached decision.
- 8) Any documents that would have been responsive to this request that have been destroyed shall be identified as completely as possible, and the document retention or destruction policy under which they were destroyed shall be provided.
- 9) Paper copies of electronic communications (such as e-mail) shall be provided.

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(END OF APPENDIX A)