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Decision 04-07-023 July 8, 2004

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application of Pacific Gas and Electric Company (U-39-M) for an Order Under PUC Section 851 Approving the Leases of Certain Public Utility Properties.	Application 00-06-010 (Filed June 6, 2000)

OPINION AUTHORIZING LEASE AND LICENSE AGREEMENTS PURSUANT TO PUBLIC UTILITIES CODE SECTION 851

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OPINION

1. Summary

Pacific Gas and Electric Company (PG&E) requests Commission approval of 105 lease and license agreements pursuant to Pub. Util. Code Section 851. The agreements permit various uses of PG&E's property by third parties. PG&E entered into the agreements prior to obtaining Commission approval for the agreements as required by Section 851.[1]

Today's decision grants Section 851 approval on a prospective basis for 78 agreements that are currently in effect and denies Section 851 approval for 27 agreements that have terminated or relate to property that PG&E has sold. Additionally, today's decision declines to penalize PG&E for its failure to obtain Commission approval prior to entering into the agreements as required by Section 851. Lastly, today's decision finds that any activity that may have warranted an environmental review by the Commission pursuant to the California Environmental Quality Act (CEQA) has already occurred. Accordingly, a CEQA review at this time is moot for practical purposes, and today's decision declines to undertake such a review.

This proceeding is closed.

2. Factual and Procedural Background

PG&E filed Application (A.) 00-06-010 on June 6, 2000. In A.00-06-010, PG&E requests retroactive approval of 114 lease and license agreements pursuant to Section 851. PG&E filed amendments to A.00-06-010 on August 21, 2001, October 2, 2001, and December 15, 2003, and a supplement to A.00-06-010

[1] All statutory references are to the Public Utilities Code unless otherwise indicated.

on November 1, 2001. In its amended Application, PG&E states that eight agreements were inadvertently included in another application, A.03-05-012.[2] PG&E also states A.00-06-010 mistakenly included a maintenance agreement (and not a lease or license agreement). The number of agreements for which PG&E seeks Commission approval in A.00-06-010, as corrected, is 105.

All of the agreements predate A.00-06-010, some by many years. Only 27 of the 105 agreements are still in effect under their original terms. Twenty-four of the agreements have terminated, 3 relate to property that PG&E has sold,[3] and 36 are "holdover agreements." PG&E defines a "holdover agreement" as an expired agreement that the parties have agreed to extend on a month-to-month basis. Another 15 agreements have expired and been replaced by new agreements.[4] The following table summarizes the status of the agreements:

Status	Number of Agreements
Still in Effect	27
Terminated	24
Sold	3
Holdover	36
Replaced by New Agreement	15
Total	105

Appendix A of today's decision shows the status of each of the 105 agreements.

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[2] A draft decision has been issued in A.03-05-012 addressing the eight agreements.

[3] PG&E states that the Commission approved the sales in Decision (D.) 02-04-005 and D.00-12-047.

[4] PG&E provided copies of the new agreements in December 2003.

Section 851 requires a utility to obtain approval from the Commission prior to leasing its property. PG&E explains that it did not obtain Commission approval for the 105 agreements because the company believed at the time that Section 851 did not apply, since the agreements only allowed an adjunct use of PG&E's property in a manner that did not affect PG&E's operations. However, following the issuance of D.96-04-045, PG&E determined that it should file an application to obtain retroactive approval of the agreements under Section 851.

PG&E represents that 37 of the agreements qualify as license agreements under General Order (GO) 69-C. GO 69-C provides utilities with authority to grant licenses for the use of their property without prior Commission approval under Section 851 if certain conditions are met. Although PG&E believes these 37 agreements are exempt from Section 851 pursuant to GO 69-C, PG&E states that it included them in A.00-06-010 out of an abundance of caution.[5]

PG&E requests authority to make minor modifications to the agreements without additional Commission approval. PG&E defines "minor modifications" as (1) extending an agreement by up to 10 years with no change in use; (2) shortening an agreement with no change in use; and (3) adjusting the rent.

3. Summary of the Agreements

3.1. Description of the Agreements

The 105 agreements that are the subject of A.00-06-010 permit various uses of PG&E's property. Appendix A of today's decision briefly identifies the purpose of each agreement (e.g., agriculture, telecommunications, etc.) and provides a short description of the physical changes to PG&E's property that

[5] Amendment to A.00-06-010 filed on August 21, 2001, p. 3.

have occurred as a result of the agreement (e.g., row crops, telecommunications antennas, etc.). None of the agreements is with an affiliate of PG&E.

PG&E represents that the agreements do not impair PG&E's ability to serve its customers. According to PG&E, the agreements only allow uses of PG&E's property that are compatible with PG&E's public utility operations. Typical uses include agriculture, grazing, parking, storage, recreation, and placing telecommunications equipment at PG&E's communications sites.

Most of the agreements contain certain standard terms. For example, most agreements prohibit the tenant from subletting the property without PG&E's consent; from allowing any nuisance or hazard to occur or exist on the property; and from erecting structures without PG&E's consent. Most agreements also require the tenant to observe due diligence in maintaining the property; to comply with all laws and regulations; to avoid adverse impacts on the environment; to maintain adequate insurance for activities on the property; and to indemnify PG&E against all loss, damage, expense, and liability resulting from injury or death to persons on the property. PG&E also reserves the right under some agreements to make such uses of the property as PG&E may deem necessary; to sell, exchange, or lease the property to another; and to grant easements and rights-of-way in, on, and across the property.

Additional terms were negotiated on a case-by-case basis. For example, for property that includes electric lines, the agreements prohibit the tenant from planting any trees, parking vehicles, or storing machinery within a specified distance of the electric lines. Additionally, if the tenant's equipment interferes with the operations of PG&E's facilities, the tenant is required to eliminate the interference in the manner prescribed by PG&E.

Most of agreements require the tenant (and not PG&E) to secure all local, state, and federal permits required for the activities allowed by the agreements. PG&E conducted research to determine what permits had been obtained. The results of PG&E's research are shown in Attachment A of today's decision. However, most of the permits are not in PG&E's possession. Copies of the permits in PG&E's possession were provided by PG&E in its amendment filed on December 15, 2003.

As a general rule, CEQA requires the Commission to consider the environmental consequences of its discretionary decisions.[6] PG&E asserts that the Commission, in deciding whether to approve the agreements pursuant to Section 851, is not required to undertake a CEQA review because (1) the agreements are categorically exempt from CEQA under the Guidelines for the California Environmental Quality Act ("CEQA Guidelines"),[7] or (2) responsibility for CEQA review rests with local authorities. Appendix A of today's decision lists the CEQA exemption(s) that PG&E claims for each agreement. The following section of today's decision summarizes the CEQA exemptions claimed by PG&E.

3.2. CEQA Exemptions Claimed by PG&E

3.2.1. General Order 159-A

Under GO 159-A, the Commission has delegated its authority to regulate the location and design of cellular facilities to local agencies.[8] PG&E's application contains 24 agreements that allow public agencies, public utilities, or

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[6] Pub. Res. Code § 21000, *et seq.*

[7] Pub. Res. Code § 21000, *et seq.*, and Title 14 of the Calif. Code of Regulations, §§ 15000-15387.

[8] *See* D.96-05-035 and D.02-03-059. The Commission retains jurisdiction in cases of conflict with the Commission's goals or statewide interests.

private carriers to install radio, cellular, and other telecommunications facilities on PG&E's property.[9] PG&E asserts that all of these agreements are exempt from CEQA review by the Commission pursuant to GO 159-A.

3.2.2. General Order 69-C

There are 37 agreements for the "limited use" of PG&E's property pursuant to GO 69-C.[10] PG&E asserts, without elaboration, that these agreements are exempt from CEQA review.[11] PG&E also claims that many of these agreements are exempt from CEQA review pursuant to one or more of the CEQA Guidelines.

3.2.3. CEQA Guideline 15301

The CEQA Guidelines enumerate various categorical exemptions to the requirement for environmental review under CEQA. CEQA Guideline 15301 exempts from CEQA review "the operation, repair, maintenance, permitting, leasing, licensing, or minor alteration of existing…structures, facilities, mechanical equipment, or topographical features, involving negligible or no expansion of use…." PG&E asserts that 18 agreements are exempt from CEQA review under Guideline 15301.[12] Some of these agreements allow for the existing use of facilities and property, with no new construction. These agreements

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[9] The 24 agreements are: 212, 371, 418, 458, 468, 470, 473, 478, 2185, 3235, 3237, 3239, 3365, 3377, 3554, 3555, 3556, 3557, 3559, 3560, 3573, 3574, 3584, and 3654.

[10] General Order 69-C is discussed in more detail, *infra*.

[11] The 37 agreements are: 424, 442, 543, 564, 604, 617, 1745, 2042, 2253, 2271, 3246, 3253, 3257, 3263, 3265, 3279, 3280, 3288, 3291, 3295, 3302, 3305, 3388, 3413, 3414, 3417, 3424, 3425, 3426, 3542, 3563, 3601, 3610, 3713, 3725, 3809, and 3829.

[12] The 18 agreements are: 345, 350, 357, 365, 366, 408, 410, 411, 451, 566, 587, 591, 3331, 3379, 3397, 3588, 3891, and 3907. PG&E claims that agreements 566 and 3331 are also exempt under CEQA Guidelines 15311 and 15303, respectively.

include: 350, 357, 411, and 591 (parking); 366 (dog kennel and other buildings); 410 (boat arena); 451 (cottage and garage); 587 (existing wells on substation property); 3331 (substation facilities); 3379 (service center building); and 3397 (maintenance and paint shops). Other agreements involve modifications to existing facilities, structures, or property. These agreements include: 345 (improvements to existing garage); 566 (temporary horse barns); 3331 (fencing); 3588 (interior office alterations); and 408 (new copy on an existing sign).

3.2.4. CEQA Guideline 15303

CEQA Guideline 15303 exempts from CEQA review the "construction and location of limited numbers of new, small facilities or structures; installation of small new equipment and facilities in small structures; and the conversion of existing small structures from one use to another where only minor modifications are made in the exterior of the structure . . . ." Examples include single and multi-family residences, commercial structures, and accessory structures such as garages and fences. PG&E asserts that the following three agreements are exempt from CEQA review under Guideline 15303: 1595 (fence for parking lot); 2364 (temporary teacher housing); and 3347 (two office trailers and a permanent garage structure).[13]

3.2.5. CEQA Guideline 15304

CEQA Guideline 15304 exempts from CEQA review "minor public or private alterations in the condition of land, water, and/or vegetation which do not involve removal of healthy, mature, scenic trees except for forestry or

[13] PG&E asserts that agreement 3347 is also exempt under CEQA Guideline 15311.

agricultural purposes." Included under this exemption are certain activities such as grading with a slope of less than 10%, landscaping, and minor trenching and backfilling where the surface is restored. PG&E asserts that the following six agreements are exempt from CEQA review under Guideline 15304: 356 (paving and gate); 521 (paving, fencing, and drainage pipes); 598 (parking facilities); 2467 (Christmas trees); 2549 (grading, graveling, office shed, bins, and batch plant for masonry storage and supply yard); and 3284 (paving and storage buildings).[14]

3.2.6. CEQA Guideline 15311

CEQA Guideline 15311 exempts from CEQA review "construction or placement of minor structures accessory to (appurtenant to) existing commercial, industrial or institutional facilities." On premises signs and small parking lots may be included within this exemption. PG&E asserts that the following three agreements are exempt from CEQA review under Guideline 15311: 353 and 354 (installation of advertising signs in an urban area); and 1528 (temporary warming hut and cross-country ski trails).[15]

3.3. Ratemaking Treatment of Revenues

PG&E represents that for many years all of the revenues from the agreements were passed through to ratepayers in general rate cases (GRCs). PG&E claims that in recent years the Federal Energy Regulatory Commission (FERC) has had exclusive jurisdiction over PG&E's electric transmission facilities. PG&E anticipates that revenues from the agreements associated with

[14] PG&E claims that most of the agreements that are exempt under Guideline 15304 are also exempt under at least one other Guideline.

FERC jurisdictional property will continue to be subject to applicable FERC accounting and ratemaking treatment.

PG&E states that during electric restructuring, lease revenues from non-nuclear generation property were used to reduce the Competition Transition Charge. That practice ended in January 2001. PG&E believes that lease revenues from non-nuclear generation property will be used to reduce the generation revenue requirement in future GRCs.[16] PG&E also expects that lease revenues from the Diablo Canyon nuclear generation property will accrue to Diablo Canyon. Finally, PG&E reports that lease revenues from electric and gas distribution property have been and will continue to be passed through to ratepayers in GRCs.

4. Protests

The Office of Ratepayer Advocates (ORA) filed a protest on July 10, 2000, in which ORA asked PG&E to provide additional information to facilitate ORA's review of A.00-06-010. PG&E agreed to provide the requested information to ORA. ORA has not participated in this proceeding since its protest.

5. Discussion

5.1. Pub. Util. Code Section 851

The primary issue before the Commission is whether to grant PG&E's application for approval of 105 agreements pursuant to Pub. Util. Code Section 851. Section 851 states, in relevant part, as follows:

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[15] PG&E claims that agreements 353 and 354 are also exempt under Guideline 15303, and that agreement 1528 is also exempt under Guideline 15304.

[16] PG&E comments on the ALJ's Draft Decision, p. 3.

> No public utility . . . shall . . . lease . . . or otherwise . . . encumber . . . any part of its . . . property necessary or useful in the performance of its duties to the public . . . without first having secured from the commission an order authorizing it so to do. Every such . . . lease . . . [or] encumbrance . . . made other than in accordance with the order of the commission authorizing it is void.

Of the 105 agreements for which PG&E seeks Section 851 approval, 24 have terminated and 3 pertain to properties that PG&E has sold. Section 851 does not authorize the Commission to approve agreements that no longer exist or agreements for property that is no longer owned by the utility. Accordingly, we deny PG&E's request for Section 851 approval of these 27 agreements.

We next consider whether to grant Section 851 approval for the 78 agreements that are still in effect. We consider these agreements only in the context of their current status. In particular, if an agreement has expired but remains in effect as a "holdover," we consider whether to grant Section 851 approval for the agreement in its current status as a "holdover." Similarly, if an expired agreement has been replaced with a new agreement, we consider whether to grant Section 851 approval only with respect to the new agreement.

The Commission has broad discretion to determine if it is in the public interest to authorize a transaction pursuant to Section 851.[17] The primary standard used by the Commission to determine if a transaction should be authorized under Section 851 is whether the transaction will serve the public

[17] D.95-10-045, 1995 Cal. PUC LEXIS 901, *18-19; and D.91-05-026, 40 CPUC 2d 159, 171.

interest.[18] Where necessary and appropriate, the Commission may attach conditions to a transaction in order to protect and promote the public interest.[19]

We find nothing in the record that suggests the 78 agreements at issue will adversely affect the public interest. In particular, there is no evidence that the agreements will impair PG&E's ability to serve its customers. To the contrary, most of the agreements require the tenant to operate in a way that does not affect PG&E's ability to serve the public, and many of the agreements allow PG&E to revoke the agreement whenever it appears necessary or desirable for PG&E to resume the use of the property to fulfill its public utility duties.

There is plentiful evidence that demonstrates the 78 agreements will serve the public interest in a number of ways. First, the agreements provide revenues that reduce the rates that PG&E's ratepayers would otherwise have to pay. In addition, many of the agreements require the tenant to share in the cost of maintaining PG&E's facilities (e.g., buildings, roads, and fences). Ratepayers benefit when others share the cost of maintaining PG&E's facilities.

Second, most of the 78 agreements either directly benefit the public (e.g., installation of radio communications equipment by the California Highway Patrol) or allow uses of PG&E's property that indirectly benefit the public at large (e.g., housing for public school teachers, grazing, farming, parking, etc.).

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[18] D.00-06-005, 2000 Cal. PUC LEXIS 281, *4; D.99-04-066, p.5; D.99-02-036, p. 9; D.97-06-066, 72 CPUC 2d 851, 861; D.95-10-045, 62 CPUC 2d 160, 167; D.94-01-041, 53 CPUC 2d 116, 119; D.93-04-019, 48 CPUC 2d 601, 603; D.86-03-090, 1986 Cal. PUC LEXIS 198 *28 and COL 3; and D.8491, 19 CRC 199, 200.

[19] D.95-10-045, 62 CPUC 2d 160, 167-68; D.94-01-041, 53 CPUC 2d116, 119; D.90-07-030, 1990 Cal. PUC LEXIS 612 *5; D.89-07-016, 32 CPUC 2d 233, 242; D.86-03-090, 1986 Cal. PUC LEXIS 198 *84-85 and COL 16; and D.3320, 10 CRC 56, 63.

Finally, the Commission has long recognized that the public interest is served when utility property is used for other productive purposes without interfering with the utility's operations or the provision of utility service to the public.[20] The 78 agreements allow PG&E's property to be used for other productive uses without interfering with PG&E's ability to serve the public.

We conclude that the 78 agreements should be approved pursuant to Section 851. The authority granted by today's decision shall apply prospectively. We deny PG&E's request for retroactive authority. The purpose of Section 851 is to enable the Commission to review a proposed encumbrance of utility property before it occurs in order to take such action as the public interest may require. Granting Section 851 approval retroactively would frustrate the intent of Section 851. PG&E is at risk for any adverse consequences that may result from its having entered into the agreements without prior Commission authority.

Section 851 dictates a different result with respect to the lessees. The second paragraph of Section 851 provides that, as to any lessee "dealing with such property in good faith for value," there is a conclusive presumption that the leased property is not necessary or useful for the utility's performance of its duties. The Commission has interpreted this provision as protecting innocent lessees from having their transactions invalidated solely because a utility has leased its property without Commission authority under Section 851.[21] The

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[20] See, for example, D.02-01-058, D.94-06-017, D.93-04-019, and D.92-07-007.

[21] D.92-07-007, 45 CPUC 2d 24, 30. Importantly, D.92-07-007 clearly indicates that the protection of innocent lessees does not vitiate the primary requirement of Section 851 that the utility obtain Commission approval for a lease prior to consummating the lease. (Ibid.) This central principle of Section 851 makes prior Commission review and approval of Section 851 transactions involving lessees dealing in good faith and for value especially important if the

Footnote continued on next page

record of this proceeding indicates that all the lessees were dealing in good faith and for value. Accordingly, we conclude that the lessees' rights and obligations under the 78 agreements remain in full force and effect for the period of time prior to today's decision.

In its comments on the Draft Decision, PG&E asks that the 78 agreements be exempted from Section 851 pursuant to Section 853(b). Section 853(b) provides, in part, that "[t]he Commission may…exempt any public utility…from…[Section 851]…if it finds that the application thereof with respect to the public utility…is not necessary in the public interest." PG&E states that it is necessary to exempt the 78 agreements from Section 851 in order to avoid the potential harm to PG&E that could result if the agreements are deemed void for the period of time prior to a Commission decision in this proceeding. PG&E is especially concerned about the possibility that it might not be able to enforce any of its rights under the agreements, including indemnification rights.

We decline to grant PG&E's request to use our authority under Section 853(b) to exempt the 78 agreements from Section 851. It is the Commission's policy to grant exemptions only in extraordinary circumstances.[22] The reasons for this policy were set forth in D.02-06-015:

> The public interest test in Section 853 is not met by ordinary transactions that were completed without Commission review as a result of oversight or a business decision to ignore the requirements of the Public Utilities Code. This Commission has a clear practice of invoking Section 853 only

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public is to be protected from harmful transactions that cannot be voided, for practical purposes, after the fact.

[22] D.02-01-055, 2002 Cal. PUC LEXIS 2, at *7.

> to address certain practical difficulties created when transactions have been voided in "extraordinary circumstances." (D.99-02-062) The Commission has made clear the application of Section 853 must be a "seldom used procedure." (Ibid.) Frequent reliance on Section 853 would create an exception that swallowed the rule. If the Commission relied regularly on Section 853**,** it would effectively amend the clear requirements of the other 850 series sections out of the Public Utilities Code. This Commission is not empowered to take such legislative action. (D.02-06-015, *mimeo.*, p. 4. Detailed citation omitted.)

The record of this proceeding shows that the 78 agreements stem from ordinary transactions that were completed without Commission review under Section 851 as a result of PG&E's oversight. There are no extraordinary circumstances that warrant the invoking of Section 853(b).[23]

We grant PG&E's requests for authority to make minor modifications to the 78 agreements without additional Section 851 approval. The specific modifications that PG&E may make without additional approval are as follows: (1) extending an agreement by up to 10 years with no change in use and no new

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[23] Unlike PG&E, we believe there is little possibility that PG&E might not be able to enforce its rights under the leases. First, we conclude, *supra*, that the lessees' rights and obligations remain in full force and effect prior to today's decision. Because the lessees' obligations remain in effect, PG&E should be able to enforce its rights. Otherwise, the lessees would unfairly enjoy all the benefits of the agreements with none of the corresponding obligations. Second, our conclusion that the leases remain in full force and effect prior to today's decision was predicated on our finding, *supra*, that the lessees were dealing in good faith. Any lessee dealing in good faith intends to be bound by the lease. If a lessee is not dealing in good faith, then the lease is automatically void with respect to the lessee pursuant to Section 851. Finally, it would be inconsistent with the intent of Section 851 and poor public policy to relieve the lessees of their obligations under the leases. To do so would prevent PG&E from using its rights and powers under the leases to stop a lessee from using PG&E's property in a manner harmful to the performance of PG&E's duties to the public.

construction; (2) shortening an agreement with no change in use and no new construction; and (3) adjusting the rental rate.

Today's decision does not address the ratemaking treatment of costs and revenues associated with the 78 approved agreements. The ratemaking treatment for these costs and revenues will be decided by the Commission in future GRC proceedings or other appropriate venues.

PG&E violated Section 851 when it executed the 78 agreements without prior approval from the Commission. Although we may impose a financial penalty for the violation pursuant to Section 2107, we decline to do so. PG&E's violation of Section 851 does not appear to have caused any physical or economic harm to others. It also appears that PG&E's violation was inadvertent and that PG&E did not benefit materially from its unlawful conduct

We emphasize that our decision to not penalize PG&E is based on the unique facts and circumstances before us in this proceeding. We will impose fines for violations of Section 851 in other proceedings if the facts so warrant.

5.2. General Order 69-C

GO 69-C exempts license agreements from Section 851 if certain conditions are met. GO 69-C states, in relevant part, as follows:

> [P]ublic utilities covered by…Section 851…are hereby authorized to grant easements, licenses or permits for use or occupancy on, over or under any portion of the operative property of said utilities for…limited uses of their several properties without further special authorization by this Commission whenever it shall appear that the exercise of such easement, license or permit will not interfere with the operations, practices and services of such public utilities to and for their several patrons or consumers.

> PROVIDED, HOWEVER, that each such grant...shall be made conditional upon the right of the grantor, either upon order of this Commission or upon its own motion to commence or resume the use of the property in question whenever, in the interest of its service to its patrons or consumers, it shall appear necessary or desirable to do so[.]

PG&E asserts that 29 of the 78 agreements qualify as license agreements under GO 69-C. PG&E states that although it is not required to obtain Section 851 approval for these 29 agreements, PG&E nonetheless included them in A.00-06-010 out of an abundance of caution.

We decline to consider if any of the 78 agreements is exempt from Section 851 pursuant to GO 69-C. PG&E has requested Section 851 approval for all of the 78 agreements, and we grant that approval prospectively.

5.3. California Environmental Quality Act

CEQA requires the Commission to consider the environmental consequences of its discretionary decisions.[24] PG&E contends that the agreements are either categorically exempt from CEQA or have already undergone a CEQA review by another agency.

We conclude that it is too late to conduct a CEQA review of the agreements or to consider if the agreements are exempt from CEQA as PG&E claims. CEQA requires an environmental review to occur before an activity takes place. Here, all of the activities contemplated by the agreements have already occurred. Consequently, conducting a CEQA review at this time would serve no practical purpose.

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[24] Pub. Res. Code § 21000, et seq.

6. Notice of Application, Categorization, and Need for Hearings

Notice of A.00-06-010 appeared in the Commission's Daily Calendar on June 9, 2000. The Commission received one protest from ORA. Notice of each amendment to A.00-06-010 also appeared in the Daily Calendar. There were no responses to the amendments.

In Resolution ALJ 176-3041, the Commission preliminarily categorized this proceeding as ratesetting and preliminarily determined that hearings were not necessary. Based on the record of this proceeding, we affirm the preliminary determinations.

7. Comments on the Draft Decision

The draft decision of the Administrative Law Judge (ALJ) was mailed to the parties pursuant to Pub. Util. Code § 311(g)(1) and Rule 77.7(b). PG&E filed comments on the draft decision on April 26, 2004. There were no reply comments. These comments have been reflected, as appropriate, in the final decision adopted by the Commission.

8. Assignment of Proceeding

Carl W. Wood is the Assigned Commissioner and Timothy Kenney is the assigned ALJ in this proceeding.

Findings of Fact

1. In A.00-06-010, as amended and corrected, PG&E seeks retroactive approval under Section 851 for 105 lease and license agreements.

2. The 105 agreements permit various uses of PG&E's property by third parties. None of the agreements is with an affiliate of PG&E.

3. The current status of the 105 agreements is as follows: (a) 24 agreements have terminated; (b) 3 agreements relate to property that PG&E has sold;

(c) 36 agreements have been held over, i.e., the agreements have expired but the parties have elected to keep the agreement in effect on a month-to-month basis;
(d) 15 agreements have been superseded by new agreements; and
(e) 27 agreement remain in effect under their original terms and conditions.

4. The agreements do not impair PG&E's ability to serve the public.

5. The agreements are beneficial to PG&E's ratepayers and the public at large.

6. The lessees associated with the 78 agreements approved by today's decision entered into the lease agreements in good faith and for value.

7. It is the Commission's policy to use its authority under Section 853(b) to grant exemptions from Section 851 only in extraordinary circumstances.

8. The 78 agreements stem from ordinary transactions that were completed without Commission review under Section 851 as a result of PG&E's oversight.

9. There are no extraordinary circumstances present that warrant the invoking of Section 853(b).

10. The activities contemplated by the agreements have already occurred.

11. There is no opposition to granting A.00-06-010.

Conclusions of Law

1. This is a ratesetting proceeding.

2. Hearings are not necessary.

3. Section 851 does not authorize the Commission to approve lease and license agreements that (a) no longer exist, or (b) pertain to property that is no longer owned by the utility.

4. PG&E's request for Section 851 approval of the following agreements should be denied: (a) the 24 agreements that have terminated, and (b) the 3 agreements that relate to property that PG&E has sold.

5. The public interest is served when utility property is used for other productive purposes without interfering with the utility's service.

6. The 78 agreements listed in Appendix B of today's decision should be approved pursuant to Section 851. This approval should apply only to the agreements as they currently exist, i.e., to the following: (a) the 36 holdover agreements; (b) the 15 new agreements that have superseded expired agreements; and (c) the 27 agreements that remain in effect under their original terms and conditions.

7. Section 851 provides that, as to any lessee dealing in good faith and for value, there is a conclusive presumption that the leased property is not necessary or useful for the utility's performance of its duties. This provision protects innocent lessees from having their transactions invalidated solely because a utility has leased its property without Commission authority under Section 851.

8. The lessees' rights and obligations under the 78 agreements remain in full force and effect for the period of time prior to today's decision.

9. The 78 agreements should not be exempted from Section 851 pursuant to Section 853(b).

10. The authority granted by today's decision should apply prospectively. Retroactive authority should not be granted.

11. Based on the facts and circumstances of this proceeding, PG&E should not be penalized for its failure to obtain prior approval of the agreements under Section 851.

12. PG&E should be authorized to make the following minor modifications to the approved agreements without additional approval from the Commission: (a) extending the term of an agreement by up to 10 years with no change in use

and no new construction; (b) shortening the term of an agreement with no change in use and no new construction; and (c) adjusting the rental rate.

13. CEQA requires an environmental review to occur before an activity takes place. CEQA review of the agreements is moot, as the activities contemplated by the agreements have already occurred.

14. The following order should be effective immediately.

O R D E R

IT IS ORDERED that:

1. The amended application of Pacific Gas and Electric Company (PG&E) for approval under Pub. Util. Code Section 851 of the 78 agreements listed in Exhibit B of this Order is approved. PG&E's request for Section 851 approval of the other agreements that are the subject of Application 00-06-010 is denied.

2. The agreements set forth in Exhibit B of this Order are approved prospectively from the date of this Order. PG&E's request for retroactive approval of these agreements is denied.

3. PG&E is authorized to make the following minor modifications to the agreements in Exhibit B without additional Section 851 approval from the Commission: (a) extending the term of an agreement by up to 10 years with no change in use and no new construction; (b) shortening the term of an agreement with no change in use and no new construction; and (c) adjusting the rental rate.

4. Application 00-06-010 is closed.

This order is effective today.

Dated July 8, 2004, at San Francisco, California.

MICHAEL R. PEEVEY
President
CARL W. WOOD
GEOFFREY F. BROWN
SUSAN P. KENNEDY
Commissioners

I reserve the right to file a dissent.

/s/ LORETTA M. LYNCH
Commissioner