

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Resolution ALJ-268
Administrative Law Judge Division
August 23, 2012

RESOLUTION

RESOLUTION ALJ-268. Adopts General Order ___, which makes permanent and modifies the Pub. Util. Code § 851 Pilot Program Established in Resolution ALJ-186, as modified by Resolution ALJ-202 and Resolution ALJ-244 and extended in Resolution ALJ-272.

SUMMARY

This resolution adopts General Order (GO) ___ (attached as Appendix A), which makes the Pub. Util. Code § 851¹ pilot program established in Resolution ALJ-186 (adopted August 25, 2005), modified by Resolution ALJ-202 (adopted August 23, 2007) and Resolution ALJ-244 (adopted March 2, 2010) and extended by Resolution ALJ-272 (adopted August 18, 2011) (the pilot program), permanent, makes minor technical amendments to the pilot program regulations for the purpose of clarity, and renumbers and reorders the regulations.

We further direct Commission staff to hold a workshop with interested parties to discuss options for clarification of GO 69-C, which authorizes public utilities to implement certain transactions involving the transfer of minor, revocable interests in utility property, such as certain easements, licenses, or permits, without prior Commission approval, within 180 days of this order and to issue a written report to the Commission with recommendations within the following 120 days. The Director of the Commission Energy Division may extend the time for holding the workshop and/or submitting the workshop report to the Commission for good cause.

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

In addition, pursuant to Section 853(b), we grant PacifiCorp an exemption from Section 851 only for transactions that meet the following criteria: a) the transaction involves PacifiCorp property or assets located entirely outside of California, b) PacifiCorp has received any legally required approval of the transactions from governmental agencies regulating public utilities in other states in which PacifiCorp conducts business, to the extent that such approvals are legally required, c) the fair market value of the transaction allocated to California will not exceed \$10,000, and d) the transaction, if it were reviewed by the Commission as part of making a discretionary decision, would not require environmental review pursuant to the California Environmental Quality Act.

BACKGROUND

A. Commission Adoption of Resolution ALJ-186

On August 25, 2005, the Commission adopted Resolution ALJ-186, which established a two-year pilot program for processing and approving certain transfers of interests in utility property through advice letters, rather than formal applications under Section 851. Section 851 generally requires Commission approval of any sale, lease, encumbrance, mortgage, or other transfer or disposition of an interest in utility property that is necessary or useful in the provision of the utility's services to the public.² The purpose of the Commission's review is to ensure that the proposed transaction is not adverse to the public interest, i.e., does not impair the ability of the utility to provide safe and reliable service to customers at reasonable rates.

Before our adoption of the pilot program, utility transactions involving the transfer or disposition of interests in property necessary or useful in the provision of services to the public generally required a formal application and a Commission decision pursuant to Section 851. The purpose of the pilot program was to expedite and simplify the Commission's review and approval of non-controversial transactions involving the transfer or conveyance of interests in utility property that did not require environmental review by the Commission as a Lead Agency under the California Environmental Quality Act (CEQA), and did not warrant more extensive review by the Commission through the formal application process.

² Exceptions to this requirement apply if the Commission exempts a utility, class of utility, transaction, or class of transactions from the requirements of Section 851 pursuant to Section 853(b), including whether the particular transaction meets the criteria stated in General Order (GO) 69-C.

B. Legislative Adoption of Assembly Bill 736 (Effective January 1, 2006)

Also in 2005, the Legislature adopted Assembly Bill (AB) 736 (Stats. 2005, ch. 370, Section 1), effective January 1, 2006, which amended Section 851. These amendments authorized the utilities to obtain Commission approval of transactions involving transfers or disposition of property interests that are valued at \$5 million or less by filing an advice letter and obtaining a Commission resolution approving the transaction, rather than filing a formal Section 851 application and seeking a Commission decision.³

Under Section 851, as amended by AB 736, the Commission was required to approve or deny advice letter requests within 120 days of the utility's filing of the advice letter by resolution, unless the advice letter application does not include complete information or a timely protest has been filed.

AB 736 also added Section 853(d), to the Public Utilities Code. Section 853(d) provided that:

- The intent of the Legislature is that transactions with monetary values that materially impact a utility's rate base should not qualify for advice letter treatment, so that the utility must file a formal Section 851 application in order to obtain Commission approval of the transaction;
- The intent of the Legislature is that, in reviewing transactions subject to Section 851, the Commission should retain all of its responsibilities under CEQA;
- Public utility transactions that "jurisdictionally trigger" CEQA review by the Commission do not qualify for expedited advice letter treatment.⁴

C. Commission Adoption of Resolution ALJ-202

In August 2007, the Commission adopted Resolution ALJ-202, which amended the pilot program regulations to conform with AB 736 and GO 96-B.⁵ Resolution

³ Under Section 851, the utilities must still file formal Section 851 applications to obtain Commission approval of transactions valued at over \$5 million.

⁴ The then-current version of Section 853(d) stated:

(d) It is the intent of the Legislature that transactions with monetary values that materially impact a public utility's rate base should not qualify for expedited advice letter treatment pursuant to this article. It is the further intent of the Legislature that the commission maintain all of its oversight and review responsibilities subject to the California Environmental Quality Act, and that public utility transactions that jurisdictionally trigger a review under the act should not qualify for expedited advice letter treatment pursuant to this article.

ALJ-202 implemented AB 736's requirement that Section 851 advice letters be approved by Commission resolution. Accordingly, the Resolution characterized Section 851 advice letters as Tier 3 advice letters under GO 96-B.⁶

Based on Section 853(d), Resolution ALJ-202 further required the utilities to file formal applications, rather than advice letters under the following circumstances: (i) to seek approval of transactions that require CEQA review by the Commission as either a Lead Agency or a Responsible Agency,⁷ or (ii) when a transaction will materially impact the ratebase of the utility, even if the transaction is valued at \$5 million or less.⁸

In Resolution ALJ-202, we also extended the pilot program for an additional three years, until August 23, 2010, in order to allow sufficient time to consider whether the pilot program should be continued, allowed to expire, or further modified, and to obtain additional comments from interested parties on these issues.

D. Legislative Adoption of AB 698 (Effective January 1, 2010)

In 2009, the Legislature adopted AB 698 (Stats. 2009, ch. 370), which further amended Sections 851 and 853(d) in order to permit Commission staff approval of certain advice letters and to expand the types of transactions which the Commission may approve by advice letter. AB 698 became effective on January 1, 2010. AB 698 amended Sections 851 and 853 to provide that:

⁵ GO 96-B sets forth procedures governing the processing of advice letters filed with the Commission in general.

⁶ Under GO 96-B, advice letters which require approval by a vote of the full Commission are Tier 3 advice letters.

⁷ We reasoned that any transaction subject to Section 851 which requires CEQA review by the Commission as either the Lead Agency or a Responsible Agency "jurisdictionally triggers" the Commission's oversight and review responsibilities under CEQA and therefore does not qualify for advice letter treatment pursuant to Section 853(d). We noted that even when acting as a Responsible Agency, the Commission has significant duties under CEQA. For example, as a Responsible Agency, the Commission must review the environmental documents prepared by the Lead Agency and make its own findings regarding whether the transaction will have significant environmental impacts, and whether these impacts can be mitigated. *State CEQA Guidelines Sections 15096(f) and (h)*. The Commission may also require additional mitigation measures for significant adverse environmental impacts related to aspects of the project that the Commission decides to carry out, finance, or approve. *State CEQA Guidelines Section 15096(g)*.

⁸ Based on the plain language of the statute, we interpreted the first sentence of Section 853(d) to mean that if a particular transaction is valued at \$5 million or less but still materially impacts the ratebase of a utility, the transaction does not qualify for review through an advice letter, and the utility must file a formal Section 851 application in order to obtain Commission approval of the transaction.

- Authority for Certain Advice Letters to be Approved by Executive Director or Division Director. The Commission Executive Director or the Director of the Commission Industry Division having regulatory jurisdiction over the utility may approve advice letters proposing transfers of utility property, if the transaction is valued at \$5 million or less, and:
 - The advice letter is uncontested;
 - The advice letter does not require CEQA review by the Commission as either the Lead Agency or a Responsible Agency; and
 - The transaction will not materially impact the utility's ratebase.
- Authority for Utilities to Request Commission Approval of Certain Transactions Requiring CEQA Review by the Commission as a Responsible Agency by Advice Letter. If a transaction valued at \$5 million or less requires CEQA review by the Commission as a Responsible Agency only, and the Lead Agency has completed its CEQA review and has certified its environmental documents, the utility may request Section 851 approval of the transaction by advice letter, and the Commission may approve the advice letter by a resolution voted on by the full Commission.⁹

Under AB 698, if the proposed transaction would require CEQA review by the Commission as the Lead Agency, the utility is still required to file a formal application for Commission approval pursuant to Section 851.

AB 698 retained the requirement that the Commission process advice letters within 120 days of their filing by the utility, unless the utility did not submit complete documentation with the advice letter or a protest is filed.

E. Commission Adoption of Resolution ALJ-244

On March 2, 2010, the Commission adopted Resolution ALJ-244 in order to implement AB 698. Resolution ALJ-244 authorized the Executive Director or the Director of the Commission Division having regulatory jurisdiction over the utility to approve, modify, or deny uncontested advice letters for qualifying transactions that do not require CEQA review.¹⁰ We made this change to the pilot program in order to expedite Commission

⁹ Section 851, as amended by AB 698, states that: "If the advice letter is uncontested, approval may be given by the executive director or the director of the division of the commission having regulatory jurisdiction over the utility." Under the principles of statutory construction, "may" is generally interpreted as permissive language, which does not impose a mandatory obligation. Therefore, we believe that the Commission had discretion to determine whether or not to grant this authority to the Executive Director and/or the appropriate Division Director.

¹⁰ Section 853(d), as amended by AB 698 states:

processing of certain routine, non-controversial transactions that meet the requirements of AB 698 for advice letter handling.¹¹ We also amended the pilot program regulations to delete language which stated that an Industry Division may reject an advice letter if its consideration would involve the exercise of discretion by Commission staff, because AB 698 expressly authorizes the Executive Director or the appropriate Industry Division Director to act on certain advice letter applications. We then retained existing language in the pilot program regulations that authorizes the appropriate Industry Division to reject an advice letter because its consideration is otherwise barred by GO 96-B.

Resolution ALJ-244 also amended the pilot program regulations to implement AB 698's amendment of Section 853(d), so that the utilities may file advice letters to seek Section 851 approval of transactions valued at \$5 million or less, in cases that require environmental review by the Commission only as a Responsible Agency under CEQA, when the Lead Agency has completed its CEQA review. Under Resolution ALJ-244, the utilities are still required to file formal Section 851 applications for transactions which require environmental review by the Commission as the Lead Agency under CEQA.

Resolution ALJ-244 retained the provision of our pilot program that requires the utilities to file a formal application when a particular transaction valued at \$5 million or

(d) It is the intent of the Legislature that transactions with monetary values that materially impact a public utility's rate base should not qualify for expedited advice letter treatment pursuant to this article. It is the further intent of the Legislature that the commission maintain all of its oversight and review responsibilities subject to the California Environmental Quality Act, and that public utility transactions that jurisdictionally require a review by the commission, as the lead agency, under the act should not qualify for expedited advice letter treatment pursuant to this article. An advice letter may be filed for transactions by the public utility if the lead agency has completed the appropriate review under the California Environmental Quality Act for the transaction, and the commission is the responsible agency under the act. The advice letter shall be subject to approval by resolution voted upon by the commission.

¹¹ Resolution ALJ-244 specified that our amended pilot program regulations did not apply to transactions involving the transfer of property interests in the Pacific Gas and Electric Company (PG&E) watershed lands to the extent that these transactions were subject to the procedures approved in Decision (D.) 08-11-043. D.08-11-043 has now been modified by D.10-08-004, so that transactions involving the PG&E watershed lands that are subject to Section 851 may be approved by advice letter under specified circumstances. That Resolution also noted that the Commission's decision in Rulemaking (R.) 09-05-006 could affect the applicability of the pilot program to Uniform Regulatory Framework (URF) carriers and would supersede any conflicting pilot program requirements. D.10-05-019, issued in that docket, granted an exemption from Section 851 to California telecommunications providers subject to the URF for the disposition of certain non-controversial assets, for a period of four years.

less warrants a more extensive review or will materially impact the ratebase of the utility. These provisions ensure that the Commission is able to more thoroughly assess proposed transactions when necessary or appropriate in order to protect the public interest.

In addition, Resolution ALJ-244 extended the pilot program for an additional year, or until August 23, 2011, in order to allow time to obtain and consider comments from interested parties regarding whether the pilot program should be continued, made permanent, or discontinued, and any additional suggestions for changes to the pilot program, and directed the Chief Administrative Law Judge (ALJ) to request such comments within 90 days of the effective date of Resolution ALJ-244.

F. Comments of Interested Parties on Section 851 Pilot Program, as Amended by Resolution ALJ-244

On May 14, 2010, the Chief ALJ mailed a letter to the service list for Resolution ALJ-244, requesting comments on whether the pilot program should be continued, discontinued, or made permanent, and any other suggested changes to the pilot program. Notice of the opportunity to file comments was also posted on the Commission website.

Timely opening comments were received from PG&E, PacifiCorp, San Diego Gas & Electric Company and Southern California Gas Company jointly (SDG&E/SoCalGas), Southern California Edison Company (SCE), Southwest Gas Corporation (SW Gas), and the Small LECs.¹² Timely reply comments were received from the Commission Division of Ratepayer Advocates (DRA), PG&E, PacifiCorp, SCE, and the Small LECs. A summary of these comments is attached as Appendix B.

We address the principal comments of the parties in the discussion below.

G. Commission Adoption of Resolution ALJ-272

On August 18, 2011, the Commission adopted Resolution ALJ-272, which extended the pilot program until August 23, 2012, unless sooner extended or made permanent, in order to allow time for the Commission to further consider the comments of the parties on the pilot program and whether the pilot program should be continued or made permanent.

¹² The Small LECs consist of the following companies: Calaveras Telephone Company, Cal-Ore Telephone Co.; Ducor Telephone Company; Foresthill Telephone Company; Happy Valley Telephone Company; Hornitos Telephone Company; Kerman Telephone Company; Pinnacles Telephone Company; the Ponderosa Telephone Co; Sierra Telephone Company, Inc.; the Siskiyou Telephone Company; Volcano Telephone Company; and Winterhaven Telephone Company.

DISCUSSION

Based on the Commission's experience with the pilot program and upon consideration of the comments filed by interested parties, we take the following actions:

1. Making the pilot program permanent. Nearly all of the parties filing comments support continuation of the pilot program and/or making the pilot program permanent. The Commission agrees with the parties that the pilot program has helped to expedite Commission review and approval of transactions subject to Section 851, which saves valuable time and resources for the utilities, third parties engaging in transactions with the utilities, and the Commission. In addition, Section 851, as amended by AB 736 and AB 698 expressly authorizes public utilities to apply for Section 851 advice letters for certain transactions valued at \$5 million or less under specified circumstances. We therefore make the pilot program permanent, effective today, and codify the former pilot program regulations, with the changes discussed below, as GO ____, attached as Appendix A.

We may later consider additional modifications to the Section 851 advice letter program based on any future legislative amendments of Section 851 and the continued experience of the Commission and interested parties with the program.

2. Workshop Regarding Clarification of GO 69-C and Subsequent Staff Report to the Commission. SDG&E/SoCalGas, PG&E, SCE, and the Small LECs all requested in their comments that the Commission clarify when GO 69-C¹³ applies to particular transactions, so that Commission approval of the transaction pursuant to Section 851 is not required. Parties have commented that they are at times uncertain whether

¹³ GO 69-C states in pertinent part:

IT IS HEREBY ORDERED, that all public utilities covered by the provisions of Pub. Util. Code 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 rights of way, private roads, agricultural purposes, or other 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 service 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 ... "

GO 69-C applies to particular transactions, and regarding what constitutes a "limited use" of utility property which may be conveyed to a third party without prior Commission approval pursuant to GO 69-C.¹⁴ As a result, according to the comments of certain parties, utilities may in some cases end up filing unnecessary advice letters or formal applications pursuant to Section 851 for minor transactions which could fall under GO 69-C. If true, this situation could result in expenditures of valuable Commission and utility time and resources on minor transactions.

We note that the Commission has previously considered this issue. In 2002, PG&E, SCE, and California-American Water Company filed a petition for rulemaking under Section 1708.5 (Petition (P.) 02-02-003) seeking clarification and expansion of GO 69-C. In D.02-10-057, the Commission denied the petition for rulemaking on the grounds that the parties did not recommend specific changes to GO 69-C and that a fact-specific analysis is needed to determine whether GO 69-C applies to a particular transaction, but also ordered Commission staff to conduct a workshop on possible amendments to GO 69-C. In D.05-04-055, the Commission adopted the staff report on the workshop held pursuant to D.02-10-057, directed staff to expeditiously develop options for streamlining Section 851 review and clarifying use of GO 69-C for presentation to the Commission, and closed the proceeding. The Commission subsequently adopted Resolution ALJ-186, which established the pilot program, in order to simplify and expedite the process for review of certain transfers of utility property pursuant to Section 851. As stated in D.05-04-055, we believe that further consideration of whether it is possible to clarify when GO 69-C applies to particular transactions, other than on a case-by-case, fact-specific basis, and certain other issues raised by the parties regarding the applicability of GO 69-C, is warranted.

We therefore direct Commission Energy Division staff to hold an additional workshop with interested parties to discuss options for clarifying the scope of GO 69-C within 180 days of this order, and to issue a written report to the Commission with recommendations on these issues within the following 120 days. The Director of the Commission's Energy Division may extend the time for holding the workshop and/or submitting the report to the Commission for good cause.

¹⁴ Under GO 69-C, a transaction involving the transfer of a limited use of utility property, such as a license, easement, or permit, may be exempt from Section 851, if three requirements are met: 1) The interest granted must be for a "limited use" of the utility's property, 2) The interest granted must not interfere with the utility's operations, practices, and service to its customers, and 3) 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 consumers. See D.04-08-048. If these requirements are not met, the utility must apply for advance Commission approval of the transaction pursuant to Section 851.

Commission Energy Division staff shall give at least 30 days advance written notice of the date, time, and place of the workshop to the service lists for this Resolution and any other persons or entities that request such notice. A copy of the workshop notice shall also be posted on the Commission website at least 30 days before the workshop is held, in order to give additional opportunity for public participation.

3. Response to comments filed by the parties regarding GO 69-C/Scope of workshop. Although we wish to give Commission staff and the parties flexibility to consider various ways to clarify GO 69-C, we address certain issues raised in the comments of the parties in order to help define the scope of the workshop and subsequent staff report as follows:

A. Proposed clarification of GO 69-C to specify that if a third party lessee or easement holder can remove its facilities from utility land in 30 days, this use of utility property should be considered a "limited use." We reject PG&E's recommendation that if a third party lessee or easement holder can remove its facilities from utility land within 30 days, this use of utility property should be considered a "limited use" under GO 69-C. Adopting the recommendation would, as a practical matter, permit third parties to construct significant facilities or structures on utility property without CEQA review or Commission authorization pursuant to Section 851. This outcome would conflict with past Commission decisions which state that for GO 69-C to apply, the transaction must not involve a significant or permanent alteration to utility property or facilities,¹⁵ and the proposed use must not require CEQA review, if the Commission were making a discretionary decision on the project. Our previous decisions have generally restricted the term "limited use" under GO 69-C to include temporary uses, uses which are not incompatible with resumed use of the property by the utility, or the installation of facilities on utility property that are easily removable without delay and are not subject to CEQA review.¹⁶

However, we acknowledge that in some cases, the application of GO 69-C to minor uses of utility property, which would not require CEQA review if the Commission were making a discretionary decision on the project, may be appropriate. The parties and Commission staff may consider whether it is possible to further define the types of uses which qualify as "limited uses" of utility property under GO 69-C at the workshop to be held pursuant to this order.

¹⁵ For example, see D.04-10-018, D.04-08-048.

¹⁶ For example, see D.01-03-004; D.02-03-059; D.02-10-047.

B. Proposed presumption that utility acted in good faith in relying on GO 69-C instead of applying for Section 851 approval of transactions. We also reject SCE's recommendation that the Commission create a presumption that a utility acted in good faith in relying on GO 69-C, instead of applying for Section 851 approval of transactions. We acknowledge that in some circumstances, a utility may make a good-faith error in relying on GO 69-C. However, in past cases, some utilities have improperly relied on GO 69-C for certain transactions, instead of applying for Section 851 approval. We therefore do not believe it is appropriate to adopt a presumption that the utility acted in good faith in relying on GO 69-C. However, if a utility relies on GO 69-C and enters into a transaction without prior Commission approval, and the Commission later finds that the transaction required advance approval pursuant to Section 851, we will consider any evidence presented by the utility that it made a genuine error and acted in good faith in determining whether to impose a penalty for violation of Section 851.

4. Response to comments filed by parties regarding pilot program. We respond to the principal comments of the parties regarding proposed modifications to the pilot program, as follows:

A. Proposed Reduction of Time Period for Staff Processing of Section 851 Advice Letters. We decline to adopt PG&E's recommendation that the Commission reduce the review period for Section 851 advice letters to a period less than the 120 days specified by Section 851. Although we agree with PG&E that expediting the review and processing of advice letters for routine transactions subject to Section 851 could save valuable time and resources, the Commission may need the full 120 days allowed by the statute to adequately assess whether a particular transaction is adverse to the public interest. We will not shorten the statutory timeframe for review of advice letters because in some cases, doing so might compromise our ability to adequately protect the interests of the public.

We note that Commission staff has, in many cases, been able to process and approve Section 851 advice letters within a substantially shorter timeframe than 120 days. As pointed out in DRA's comments, Commission staff's average time for processing a Section 851 advice letter is approximately 30 days less than the 120 days permitted by statute. Commission staff has already implemented procedures, including some of those recommended by PG&E, to reduce the time required to process Section 851 advice letters and will continue its efforts to expedite the handling of these matters whenever possible.

B. Proposed Exemption of Certain “De Minimis” Transactions from Section 851 Review. PG&E, SCE, SDG&E/SoCalGas, the Small LECs, and Pacificorp commented that the Commission should consider exempting certain *de minimis* transactions that have a low dollar value from Section 851’s requirement for prior Commission approval by either advice letter or formal application. Under Section 853(b), the Commission has legal authority to exempt certain transactions or classes of transactions from the requirements of Section 851 when doing so is in the public interest.¹⁷

Although we agree that exempting certain minor transactions from the requirements of Section 851 would conserve both Commission and utility time and resources, we decline to adopt the proposal presented by the above parties in their comments. We find it inappropriate to designate a specific dollar amount below which “*de minimis*” transactions are exempt from Section 851 review here, for the following reasons:

- Varying size and financial condition of California’s public utilities. California’s public utilities include both large and small companies which have varying financial resources and conditions. It is therefore difficult to determine a specific dollar amount below which transactions otherwise subject to Section 851 could be exempted from the requirement for prior Commission approval, without violating Section 853(d)’s requirement that the Commission review transactions that will materially impact a utility’s ratebase in some cases. For example, a transaction with a relatively low dollar value could significantly impact the ratebase of a very small utility and the utility’s ability to serve customers, while a transaction with a high dollar value may not materially impact the ratebase or customers of a large utility, such as PG&E. Although parties have suggested a dollar

¹⁷ Section 853(b) states:

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.

amount of between \$30,000 and \$50,000 as the ceiling below which Section 851 review would not be required, we do not believe that a “one size fits all” approach is workable in view of the broad range of utilities operating in this state.

- Need for Commission regulation to protect public safety and the ability of the utility to operate. In some cases, exempting particular transactions from the requirements of Section 851 could also interfere with the Commission’s ability to protect the public safety. For example, in recent years, some of the electric utilities have applied for Commission authorization pursuant to Section 851 to lease or grant easements on their property located under power lines to third parties for various uses, such as a carwash, a vehicle storage facility, or other storage facilities. Although the dollar value of these transactions may be relatively low, the requirement for Section 851 approval has enabled the Commission to ensure that the proposed use would be carried out in a manner consistent with our GOs regarding the proximity of facilities to power lines and other requirements which protect the public safety, and that the lease or easement will not interfere with the utility’s operations and access to its facilities on the property. We do not believe that exempting these types of transactions from Section 851, simply because the transactions have a relatively low dollar value, is in the public interest.
- Protection of the environment. In addition, a transaction which has a small dollar value to the utility may cause significant adverse environmental impacts, depending on the type of activity that the third party acquiring the interest in utility property plans to conduct on-site and whether the utility property is located in an environmentally sensitive area. If the transaction were exempted from Section 851 review because of a low dollar value, the Commission would not be making a discretionary decision on the project that would trigger the requirement for CEQA review.¹⁸

¹⁸ CEQA applies to projects undertaken by parties other than governmental entities only when the public agency is required to make a discretionary decision on the project. *Pub. Resources Code Section 2108(a)*.

Therefore, the Commission would not have the opportunity to conduct environmental review of the proposed project or to require mitigation measures in order to protect the environment.¹⁹

Although we decline to adopt a general exemption from Section 851 for transactions below a specified dollar amount here, the utilities may continue to file applications pursuant to Section 853(b) to request the exemption of particular transactions or classes of transactions from the requirements of Section 851 in appropriate cases.

C. Proposed Ex Parte Process for Section 851 Applications Valued at Over \$5 Million but Less than \$10 Million. We decline to adopt SCE's recommendation that the Commission develop an *ex parte* process for reviewing Section 851 transactions valued at more than \$5 million but less than \$10 million, when no protest is filed. It is uncertain what SCE means by this recommendation, and the Commission already handles unprotested Section 851 applications on an *ex parte* basis, in that no hearing is held in these cases. In addition, since Section 851 limits the applicability of the advice letter process to transactions valued at \$5 million or less, formal Section 851 applications are required for transactions valued at over \$5 million but less than \$10 million.

5. Exemption of Certain Transactions Conducted by PacifiCorp from the Requirements of Section 851, pursuant to Section 853(b). PacifiCorp is a multi-jurisdictional utility providing electric retail service to customers in California, Idaho, Oregon, Utah, Washington, and Wyoming. As stated in its comments, PacifiCorp believes that transactions involving the transfer of its system assets are subject to the requirements of Section 851, because nearly all of its transmission and generation assets are used to serve customers in all six states, including California.

Since PacifiCorp's California service territory represents less than two percent of its customer load, the transactions subject to Section 851 result in sales proceeds allocated to California which PacifiCorp views as *de minimus*. For example, the fair market value of transfers of PacifiCorp system assets allocated to California in 2010 was approximately \$9,000 to \$13,500. All of these transactions occurred in states other than California.

¹⁹ If a project requires a discretionary permit or other discretionary approval from a local agency or public agency other than the Commission, that public agency may then undertake CEQA review of the project. However, otherwise, the project may be able to proceed without environmental review.

PacifiCorp therefore recommends that the Commission explore options for expedited review of transactions subject to Section 851 that occur outside of California, have fair market values allocated to California of \$10,000 or less, and are exempt from review under CEQA.

We agree with PacifiCorp that these types of transactions should be exempted from Section 851, because they will not materially impact PacifiCorp's ratebase and will not impact the ability of PacifiCorp to provide service to California customers at reasonable rates. We believe it is extremely unlikely that these transactions will be adverse to the interests of California ratepayers.²⁰ Therefore, the benefit of Commission review of these transactions pursuant to Section 851 seems minimal, when balanced against the cost to PacifiCorp in preparing an advice letter, the time and resources spent by the Commission in reviewing the transaction, and any resulting delay for PacifiCorp and third parties in carrying out the transaction.

For these reasons, we find that it is in the public interest to grant PacifiCorp an exemption from Section 851 pursuant to Section 853(b) only for transactions that meet the following criteria: a) the transaction involves PacifiCorp property or assets located entirely outside of California, b) PacifiCorp has received approval of the transactions from governmental agencies regulating public utilities in other states in which PacifiCorp conducts business, to the extent that such approvals are legally required, c) the fair market value of the transaction allocated to California will not exceed \$10,000, and d) the transaction, if reviewed by the Commission as part of making a discretionary decision, would fall within a CEQA exemption or would not require CEQA review.

For all other transactions subject to Section 851, PacifiCorp must file an advice letter or formal application to obtain advance Commission approval or file an application to request exemption of the transaction from Section 851 pursuant to Section 853(b).

6. Minor, Technical Amendments of Former Pilot Program Regulations/ Renumbering and Reordering of Former Pilot Program Regulations.

We have made minor technical and clarifying changes to the language, numbering, and format of the former pilot program regulations for the purpose of adopting GO ____, as set forth in Appendix A. In particular, we have amended former pilot program regulation Section II. A. 9. (now GO Rule 3.j) to read as follows, for the purpose of clarity:

²⁰ The purpose of Commission review pursuant to Section 851 is to ensure that the transaction will not harm the interests of members of the public interested in receiving utility service.

If the transaction is a transfer or change in ownership of facilities currently used in regulated utility operations, the transaction will not result in a significant physical or operational change in the facility.²¹

PUBLIC REVIEW AND COMMENTS

The proposed Resolution was mailed to the parties for review and the first round of comment on May 8, 2012, pursuant to Public Utilities Code Section 311(g)(1). Timely comments were received from PacifiCorp, PG&E, SDG&E, and SoCalGas.

PacifiCorp, SDG&E, and SoCalGas support the adoption of this Resolution without changes.

PG&E also supports the adoption of this Resolution, but proposes several revisions to GO ___, which are discussed below.

First, PG&E proposes that the Commission delete Rule 2.5 from the GO. Rule 2.5 states: “Notwithstanding Rule 2.4 above or Rule 8 below, no advice letter filed pursuant to this GO shall be deemed approved due to the passage of time or unless the Commission, the Executive Director, or the appropriate Industry Division Director takes express action by approving, denying, or modifying the advice letter.” PG&E claims that Rule 2.5 conflicts with Rules 2.4 and 7.a(2) and with Section 455.

We disagree. Rule 2.4 states that Section 851 advice letters shall generally be processed pursuant to GO 96-B, unless otherwise specified in this Resolution or by state law. Therefore, Rule 2.4 recognizes that the Commission may adopt different requirements for Section 851 advice letters, as the Commission has done in Rule 2.5. Rule 2.5 also does not conflict with Rule 7.a(2), which merely states that at the end of the initial 30-day review period, Industry Division staff shall notify the utility that the advice letter has been automatically suspended, unless the advice letter has already been rejected or approved. Similarly, Rule 2.4 does not conflict with Section 455, which does not apply to Section 851 advice letters.

Second, PG&E proposes that GO Rule 3.c be amended to state: “Any financial proceeds or revenues from the transaction must comply with applicable Commission directives and may be reviewed during the next general rate case or other applicable proceeding for that utility.” PG&E states that the language of Rule 3.c, as proposed in this

²¹ Former Pilot Program Regulation II.A.9., stated:

If the transaction involves a transfer or change in ownership of facilities currently used in regulated utility operations, the transaction will not result in a significant physical or operational change in the facility other than in the normal course of business.

Resolution, does not reflect the types of transactions for which PG&E typically files Section 851 advice letters, including easements, encroachments, and leases. We decline to make this change.

Third, PG&E requests that the Commission delete proposed GO Rule 10, which requires each utility to submit an annual list of advice letters filed to the appropriate Industry Division by no later than April 1 of each year. PG&E argues that although this report may have had value in the early days of the Section 851 pilot program, the annual report no longer provides any benefit and any modest benefit derived from the report is outweighed by the administrative burden for the utilities. We find that these reports have value to the Commission in administering the advice letter program and decline to make this change.

On July 20, 2012, a revised proposed Resolution was mailed to the service list for review and an additional opportunity to comment. No comments were received.

FINDINGS AND CONCLUSIONS

1. The pilot program originally adopted in Resolution ALJ-186, amended in Resolutions ALJ-202 and ALJ-244, and extended in Resolution ALJ-272, which authorizes the use of advice letters to obtain Commission review and approval of certain transactions subject to Public Utilities Code Section 851, is made permanent, in order to fulfill the legislative intent of the amendments to Public Utilities Code Sections 851 and 853 enacted by AB 736 (2005) and AB 698 (2009).
2. GO ___, attached to this Resolution as Appendix A, largely codifies the current regulations for the Section 851 pilot program.
3. GO ___ (Appendix A) makes minor technical and clarifying changes to the language, numbering, and ordering of the previous pilot program regulations (as set forth in Resolution ALJ-244, Appendix A).
4. Former pilot program regulation Section II. A. 9., (now GO Rule 3.j) should be amended to read as follows, for the purpose of clarity: "If the transaction is a transfer or change in ownership of facilities currently used in regulated utility operations, the transaction will not result in a significant physical or operational change in the facility."
5. It is appropriate for the Commission to hold a workshop, which shall be open to interested parties and members of the public, regarding clarification of GO 69-C, in an effort to resolve any confusion or ambiguity regarding when GO 69-C applies to transactions otherwise subject to Section 851, to address comments previously filed by interested parties regarding GO 69-C, and any additional related issues that may be raised at the workshop.

6. It is appropriate for the Commission to reject the proposal of certain parties that transactions in which structures or facilities could be removed from utility land within 30 days should be exempted from Section 851, because: a) adopting this proposal would allow parties to construct significant facilities or structures on utility land without Commission review of whether these uses would interfere with the utility's ability to operate, would adversely impact ratepayers, or would cause significant adverse environmental impacts, and b) this proposal would conflict with past Commission decisions.

7. It is appropriate for the Commission to decline to adopt a presumption that the utility acted in good faith in relying on GO 69-C, instead of applying for Section 851 approval of a transaction, because in some past cases, utilities have improperly relied on GO 69-C, and the Commission can better assess whether the utility acted in good faith by considering the evidence in each case.

8. It is appropriate for the Commission to decline to shorten the timeframe for processing and approving Section 851 advice letters to less than the 120 days allowed by law because in some cases, the Commission may need the full 120 days to assess whether a particular transaction would be adverse to the public interest pursuant to Section 851.

9. It is appropriate for the Commission to decline to adopt a "*de minimus*" dollar amount below which transactions otherwise subject to Section 851 would be exempted from Section 851 review, for the following reasons: a) in the case of a small utility, a transaction with a relatively low dollar amount may materially impact ratebase, so that Commission review of the transaction is needed in order to protect the public interest, b) even in cases involving transactions which have a relatively low dollar value, the Commission may still need to review and place conditions on transactions in order to protect the public safety and the ability of the utility to operate and serve customers, and c) since even transactions with a relatively low dollar value may have significant adverse environmental impacts, the Commission needs to retain its discretion to approve, disapprove, or place conditions on transactions in order to protect the environment for the benefit of the public.

10. It is appropriate for the Commission to decline to adopt an expedited ex parte process for transactions subject to Section 851 that have dollar values between \$5 million and \$10 million, because this proposal is unclear, and the Commission already reviews transactions subject to Section 851 on an ex parte basis unless a protest is filed.

11. It is appropriate to grant Pacificorp's request for an exemption from Section 851 for certain transactions, as specified below, pursuant to Section 853(b) because it is unlikely that these transactions will have an adverse impact on California ratepayers or the ability of Pacificorp to provide service in California. This exemption shall apply only to transactions that meet all of the following criteria: a) the transaction involves PacificCorp property or assets located entirely outside of California; b) PacificCorp has received any legally required approval of the transactions from governmental agencies regulating public utilities in other states in which PacificCorp conducts business, to the extent that such approvals are legally required; c) the fair market value of the transaction allocated to California will not exceed \$10,000; and d) the transaction, if reviewed by the Commission as part of making a discretionary decision, would not require environmental review pursuant to CEQA.

THEREFORE, IT IS ORDERED that:

1. General Order ___ (attached as Appendix A), which largely codifies the regulations for the former Public Utilities Code Section 851 pilot program with minor technical and clarifying changes and makes the pilot program permanent, is adopted.
2. Within 180 days of the effective date of this order, Commission Energy Division staff shall hold a noticed workshop to discuss potential ways to clarify and simplify the application of General Order 69-C with interested parties and the public. The scope of the workshop shall be consistent with our discussion in this order.
3. The Commission shall give at least thirty (30) days written notice of the date, time, and place of the workshop to be held regarding General Order 69-C to the service lists for this Resolution and Petition 02-02-003 and to any other persons or entities that request such notice. A copy of the workshop notice shall also be posted on the Commission website at www.cpuc.ca.gov at least 30 days before the workshop is held, in order to give additional opportunity for public participation.
4. Within 120 days after the above workshop, Commission Energy Division staff shall submit to the Commission a written workshop report, which contains its recommendations for clarifying the proper application of General Order 69-C.
5. The Director of the Commission's Energy Division may extend the deadlines for holding the above workshop and for submittal of the workshop report to the Commission for good cause.
6. Copies of the above workshop report shall be distributed to all parties on the service list for this Resolution and Petition 02-02-003, all parties that attended the workshop, and to any party that requests a copy. A copy of the workshop report shall also be posted on the Commission website.

7. Pursuant to Public Utilities Code Section 853(b), PacifiCorp is granted an exemption from the requirements of Public Utilities Code Section 851 only for its transactions that meet the following criteria: a) the transaction involves PacifiCorp property or assets located entirely outside of California, b) PacifiCorp has received approval of the transactions from governmental agencies regulating public utilities in other states in which PacifiCorp conducts business, to the extent that such approvals are legally required, c) the fair market value of the transaction allocated to California will not exceed \$10,000, and d) the transaction, if reviewed by the Commission as part of making a discretionary decision, would fall within a statutory or categorical exemption to the requirement for environmental review under the California Environmental Quality Act (CEQA) or would not require environmental review under the CEQA.

This resolution is effective today.

I certify that the foregoing resolution was duly introduced, passed, and adopted at a conference of the Public Utilities Commission of the State of California held on _____, the following Commissioners voting favorably thereon:

PAUL CLANON
Executive Director

APPENDIX A

GENERAL ORDER ____ REGARDING SECTION 851 ADVICE LETTERS

General Order ____**Public Utilities Code Section 851 Advice Letters****Rule 1. Statement of Purpose**

This General Order (GO) modifies and makes permanent the former pilot program regulations for Section 851 advice letters, as adopted in Resolution ALJ-186 (adopted August 2005), amended by Resolution ALJ-202 (adopted August 2007) and Resolution ALJ- 244 (adopted March 2010), and extended by Resolution ALJ-272 (adopted October 18, 2011). These regulations authorize regulated utilities to request Commission approval pursuant to Public Utilities Code Section 851¹ of certain transactions transferring interests in utility property valued at \$5 million or less by advice letter.

Rule 2. General Rules**Rule 2.1. Who May File**

Except as otherwise provided by state law or Commission order, any public utility may file an advice letter to seek Commission approval of any transaction involving the transfer or disposition of utility property valued at \$5 million or less which meets the requirements for advice letter treatment specified in Section 851 and this GO. Approval of transactions involving proposed transfers of interests in Pacific Gas and Electric Company's watershed lands may be requested by advice letter subject to the procedures approved in Decision (D.) 10-08-004 or by subsequent order of the Commission. Public utilities exempted from the requirements of Section 851 by the Commission or state law need not file such advice letters for transactions otherwise subject to Section 851.

Rule 2.2. Right of the Commission to Require a Formal Section 851 Application for Certain Transactions Valued at \$5 Million or Less

Notwithstanding the foregoing, the Commission's Executive Director or the appropriate Industry Division Director may require the utility to file a formal Section 851 application, rather than an advice letter, for certain transactions, based on the reasons stated in Rule 7.a.(3) below.

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

Rule 2.3. Right of Utilities to File Formal Section 851 Applications In Lieu of Advice Letters

Regulated utilities may choose to submit formal applications under Section 851 for transactions that qualify for advice letter treatment pursuant to this GO.

Rule 2.4. Applicability of GO 96-B/Conflicting Regulations

Advice letters filed pursuant to this order shall generally be processed pursuant to GO 96-B or its successor regulation, and shall comply with all applicable requirements under GO 96-B or its successor regulation, except as otherwise specified herein or as required by law.

Rule 2.5. Section 851 Advice Letters Shall Not be Deemed Approved by the Passage of Time or Without Express Action by the Commission, the Executive Director, or the Appropriate Division Director

Notwithstanding Rule 2.4 above or Rule 8 below, no advice letter filed pursuant to this GO shall be deemed approved due to the passage of time or unless the Commission, the Executive Director, or the appropriate Industry Division Director takes express action by approving, denying, or modifying the advice letter.

Rule 2.6. Compliance with Applicable Laws and Commission Requirements

Regulated utilities shall comply with all laws and Commission rules, regulations, and orders that apply to transactions for which advice letters are submitted pursuant to this GO.

Rule 3. Section 851 Transactions Eligible for Advice Letter Treatment

Regulated utilities may file advice letters for transactions which require Commission approval under Section 851 and meet the following criteria:

- a. The activity proposed in the transaction will not require environmental review by the Commission as a Lead Agency under the California Environmental Quality Act (CEQA), either because:
 - (1) A statutory or categorical exemption applies (the applicant must provide a Notice of Exemption from the Lead Agency or explain why it believes that an exemption applies), or
 - (2) The transaction is not a project under CEQA (the applicant must explain the reasons why it believes that the transaction is not a project), or
 - (3) Another public agency, acting as the Lead Agency under CEQA, has completed environmental review of the project, and the Commission is required to perform environmental review of the project only as a Responsible Agency under CEQA.

- b. The transaction will not have an adverse effect on the public interest or on the ability of the utility to provide safe and reliable service to customers at reasonable rates.
- c. Any financial proceeds from the transaction will be either:
 - (1) Booked to a memorandum account for distribution between shareholders and ratepayers during the next general rate case or other applicable proceeding for that utility, or
 - (2) Immediately divided between shareholders and ratepayers based on a specific distribution formula previously approved by the Commission for that utility.
- d. If the transaction results in a fee interest transfer of real property, the property does not have a fair market value in excess of \$5 million.
- e. If the transaction results in a sale of a building or buildings (without an accompanying fee interest transfer of the underlying land), the building(s) does not have a fair market value in excess of \$5 million.
- f. If the transaction is for the sale of depreciable assets (other than a building or buildings), the assets do not have a fair market value in excess of \$5 million.
- g. If the transfer is a lease or a lease-equivalent, the total net present value of the lease payments, including any purchase option, does not have a fair market value in excess of \$5 million, and the term of the lease will not exceed 25 years.
- h. If the transaction conveys an easement, right-of-way, or other less than fee interest in real property, the fair market value of the easement, right-of-way, or other interest in the property does not exceed \$5 million.
- i. The transaction will not materially impact the ratebase of the utility. (This requirement does not apply to telephone corporations subject to the Uniform Regulatory Framework (URF) or which are not subject to rate of return regulation.)
- j. If the transaction is a transfer or change in ownership of facilities currently used in regulated utility operations, the transaction will not result in a significant physical or operational change in the facility.
- k. The transaction does not warrant a more comprehensive review that would be provided through a formal Section 851 application.

Rule 4. Contents of Advice Letters

In addition to other information required by GO 96-B or its successor regulation, advice letters shall include the following:

- a. Identity and addresses of all parties to the proposed transaction;
- b. A complete description of the property, including its present location, condition, and use;
- c. The transferee's intended use of the property;
- d. A complete description of the financial terms of the proposed transaction;
- e. A description of how the financial proceeds of the transaction will be distributed;
- f. A statement of the impact of the transaction on ratebase (except for advice letter applications filed by telephone corporations subject to URF or which are not subject to rate of return regulation), and any effect on the ability of the utility to serve customers and the public;
- g. For sales of real property and depreciable assets, the original cost, present book value, and present fair market value, and a detailed description of how the fair market value was determined (e.g., appraisal);
- h. For leases of real property, the fair market rental value, a detailed description of how the fair market rental value was determined, and any additional information necessary to show compliance with Rule 3 (g) above;
- i. For easements or rights-of-way, the fair market value of the easement or right-of-way and a detailed description of how the fair market value was determined;
- j. A complete description of any recent past (within the prior two years) or anticipated future transactions that may appear to be related to the present transaction, such as sales or leases of interests in the same real property or real property that is located near the property at issue or that are being transferred to the same transferee; or for depreciable assets, sales of the same or similar assets or sales to the same transferee;
- k. Sufficient information and documentation (including environmental documentation) to show that all of the eligibility criteria stated in Rule 3 above have been met;
- l. The filing utility may submit additional information to assist in the review of the advice letter, including recent photographs, scaled maps, drawings, etc;

m. Environmental Information:

(1) If the Applicant Believes that the Transaction is Exempt from Review under CEQA. If the applicant believes that the transaction is exempt from environmental review under a statutory or categorical exemption from CEQA, the applicant shall provide the following information:

- (a) Has the proposed transaction been found exempt from CEQA by another government agency?
 - (i) If yes, the applicant shall attach the Notice of Exemption to the advice letter and shall state the name of the applicable public agency, the date of the Notice of Exemption, and the State Clearinghouse number.
 - (ii) If no, the applicant shall state the specific CEQA exemption or exemptions that the applicant claims apply to the transaction, including citations to the applicable State CEQA Guideline(s) and/or statutes, and an explanation of why the applicant believes that each exemption applies. The applicant shall confirm that no exceptions to the claimed CEQA exemption(s) apply.

(2) If the Applicant Believes that the Transaction is not a Project under CEQA. If the applicant believes that the transaction is not a project under CEQA, the applicant shall include an explanation of its position.

(3) If another Public Agency, Acting as the Lead Agency, has Completed Environmental Review of the Project and the Applicant Believes that the Commission is a Responsible Agency under CEQA. If another public agency, acting as the Lead Agency under CEQA, has completed an environmental review of the project and has approved the final CEQA documents, and the Commission is a Responsible Agency under CEQA, the applicant shall submit the following information to the Commission Energy Division staff handling CEQA issues:

- (a) The name, address, and phone number of the Lead Agency, the type of CEQA document that was prepared (Environmental Impact Report, Negative Declaration, Mitigated Negative Declaration), the date on which the Lead Agency approved the CEQA document, the date on which a Notice of Determination was filed;
- (b) A copy of all CEQA documents prepared by or for the Lead Agency regarding the project and the Lead Agency's resolution or other document approving the CEQA documents;

- (c) A list of section and page numbers for the environmental impacts, mitigation measures, and findings in the prior CEQA documents that relate to the approval sought from the Commission;
- (d) An explanation of any aspect of the project or its environmental setting which has changed since the issuance of the prior CEQA document; and
- (e) A statement of whether the project will require approval by additional public agencies other than the Commission and the Lead Agency, and, if so, the name and address of each agency and the type of approval required.

Rule 5. Notice and Service of Advice Letters

Notification and service of the advice letter shall be made in accordance with GO 96-B or its successor regulation. In all cases, the advice letter shall be noticed in the Commission's *Daily Calendar*. A copy of the advice letter shall be served on the appropriate Industry Division, the Commission Division of Ratepayer Advocates (DRA), the Commission Energy Division staff handling CEQA issues, the relevant departments of the city and county in which any real property involved in a transaction is located, and persons and organizations on the utility's advice letter service list, as required by GO 96-B or its successor regulation. If the CEQA documents filed with the advice letter pursuant to Rule 4. (m) above exceed 15 pages in length, the regulated utility may serve a notice of availability for the CEQA documents, in lieu of the CEQA documents themselves, on persons and organizations on the utility's advice letter service list, except that a full copy of the CEQA documents shall be served on the appropriate Commission Industry Division, DRA, the Commission Energy Division staff handling CEQA issues, and the relevant departments of the city and county in which any real property involved in the transaction is located (unless the city or county prepared the CEQA documents as the Lead Agency under CEQA.)

Rule 6. Protests to Advice Letters

- a. Protests to an advice letter shall be filed with the appropriate Industry Division and served on the utility within 20 days of the filing of the advice letter. All protests and replies shall comply with the requirements of GO 96-B or its successor regulation.
- b. All protests shall be processed and addressed pursuant to the procedures stated in GO 96-B or its successor regulation.

Rule 7. Review Process for Advice Letters**a. Industry Division Review**

(1) Submittal of Advice Letters: Advice letter filings that are eligible for filing pursuant to this GO shall be submitted to the appropriate Industry Division for processing.

(2) Initial 30-Day Review Period: The filing of an advice letter triggers a 30-day review period by the appropriate Industry Division. At the end of the initial 30-day review period, Industry Division staff shall notify the utility that the advice letter has been automatically suspended pursuant to General Rule 7.5.2 of GO 96-B or a successor regulation (unless the advice letter has already been rejected or approved). Industry Division staff may also notify the utility that additional information or documentation is required.

(3) Grounds for Rejection of Advice Letter by Appropriate Industry Division: For any of the following reasons, the appropriate Industry Division may determine that the approval of an advice letter filing under this GO is inappropriate:

- (a) The proposed transaction does not satisfy the criteria for this GO;
- (b) The proposed transaction presents unusual issues of fact or law that require more complete fact-finding and informed decision-making, or otherwise warrants a more comprehensive review;
- (c) The proposed transaction is inappropriate for advice letter consideration because such consideration is otherwise barred by GO 96-B or its successor regulation;
- (d) The monetary value of the transaction will materially impact the ratebase of the utility (except when the applicant is a telecommunications corporation subject to the Uniform Regulatory Framework (URF) or which is not subject to rate of return regulation);
- (e) The transaction involves the division of a single asset that the utility proposes to transfer into smaller parts valued at less than \$5 million in order to avoid a formal application under Section 851;
- (f) The transaction warrants a more comprehensive review or may require an evidentiary hearing based on issues raised in a timely protest; and

- (g) The utility has failed to respond in a timely manner to a request by the appropriate Industry Division for additional information or documentation.

(4) Rejection of Advice Letter by Appropriate Industry Division:

Having stated the reasons for determining that an advice letter filing is inappropriate for this GO program in writing, the appropriate Industry Division may reject the advice letter pursuant to GO 96-B or its successor regulation, without prejudice to the applicant to refile the request as a formal application. In the case of a rejection pursuant to Rule 7. a. (3) (g) above or its successor regulation (due to the utility's failure to respond to a request from the appropriate Industry Division for additional information or documentation), the rejection may be without prejudice to the refiling of the advice letter accompanied by the necessary information or documentation.

(5) Executive Director/Division Director Disposition of Advice Letter:

If an unprotested advice letter is not rejected for any of the reasons stated above, and does not require environmental review by the Commission as a Responsible Agency under CEQA, the Executive Director or the Director of the appropriate Commission Industry Division may issue a disposition letter, which either grants, modifies, or denies the advice letter. The disposition letter shall include a supporting analysis by the Industry Division. A copy of the disposition letter shall be served on all persons on whom the advice letter application was served, and the results of the disposition letter shall be posted on the Commission website. In the alternative, the appropriate Industry Division may prepare a resolution which recommends approving, modifying, or denying the advice letter, for consideration by the Commission at a business meeting.

(6) Preparation of Commission Resolution for Transactions in which the Commission is a Responsible Agency under CEQA. If an advice letter is not rejected for the reasons stated above, and requires environmental review by the Commission as a Responsible Agency under CEQA, the appropriate Industry Division shall prepare a resolution for consideration by the Commission at a business meeting. The Resolution shall recommend granting, denying, or modifying the advice letter and shall include the recommendation of the Industry Division and a supporting analysis. In cases in which the appropriate Industry Division recommends approval or modification of the project, the Resolution shall include the appropriate findings under CEQA.

Rule 8. Timeframe for Commission Action on Advice Letter

Unless a timely protest has been filed or an advice letter contains incomplete information, as determined by the appropriate Industry Division, the Commission or in appropriate cases, the Executive Director or Director of the appropriate Industry Division, shall act upon the advice letter by no later than 120 days after its filing, by either approving, modifying, or denying the advice letter.

Rule 9. Appeal or Review of Commission Action on Advice Letters**Rule 9.1. Appeal or Review of Commission Resolutions Regarding Advice Letters**

Commission resolutions granting, modifying, or denying advice letters may be reviewed or reconsidered through timely filed applications for rehearing or in appropriate circumstances, petitions for modification, as authorized in GO 96-B or its successor regulation and the Commission Rules of Practice and Procedure.

Rule 9.2. Appeal or Review of Executive Director or Industry Division Action on Advice Letters

The utility, persons, or entities that filed a protest to the advice letter, or other persons or entities (to the extent authorized by GO 96-B or its successor regulation) may request Commission review of the Executive Director's or Industry Division's disposition of an advice letter, pursuant to GO 96-B, General Rule 7.7.1 (or a successor regulation).

Rule 10. Annual Report Regarding Advice Letters Filed by Each Utility

Each utility that has filed one or more advice letters shall submit an annual list of advice letters filed to the appropriate Industry Division by no later than April 1 of each year, commencing on April 1, 2010. The first list filed pursuant to this provision shall include all advice letters filed between 2005, the year in which the Section 851 pilot program began, and the date of the list's submission. Subsequent lists shall only include advice letters filed during the preceding year. Each list shall include the following: a) the name of the utility, b) the advice letter number, c) the date on which the advice letter was filed, d) a short summary of each advice letter filed, e) a short summary of the utility's efforts to comply with GO 156 in the transaction addressed in the advice letter, f) the date on which the advice letter was approved or denied, and g) if the advice letter was not approved, a brief statement of the reason.

(END OF APPENDIX A)

APPENDIX B

SUMMARY OF COMMENTS FROM INTERESTED PARTIES ON SECTION 851 PILOT PROGRAM

A. Opening Comments

Pacific Gas and Electric Company (PG&E):

- PG&E states that most of its Section 851 advice letters are not protested and involve routine transactions which have a low financial value.
- Although the pilot program has helped to expedite certain transactions requiring approval under Section 851, PG&E claims that the approval time for approximately one-third of its advice letters exceeds the 120-day deadline specified by Section 851, and that in the past, some uncontested advice letters did not receive Energy Division approval until nine to twelve months after filing.
- PG&E suggests that the Commission Energy Division develop and implement an internal process for routinely using an Energy Director's approval letter for uncontested advice letters that do not require CEQA review and develop internal processes to expedite the processing of uncontested advice letters, in order to reduce the processing time for these advice letters.
- PG&E asks the Commission to consider utilizing Section 853(b) to exempt certain *de minimis* transactions from the requirement for review pursuant to the Section 851 advice letter process or a formal Section 851 application. PG&E suggests that the Commission adopt a threshold of \$30,000 to \$50,000 to trigger the requirement for review of the transaction under the pilot program or a Section 851 application. According to PG&E, the cost incurred by PG&E in preparing these advice letters and the cost of Commission staff time in reviewing and approving them greatly exceeds the dollar value of the transactions. The adoption of a *de minimis* exception to Section 851 requirements would free up valuable Commission staff time to process other advice letters more quickly and to focus on higher priority policy matters, and would reduce the costs to ratepayers for PG&E's preparation of advice letters for transactions with a low dollar value.
- The pilot program should be made permanent, after incorporating the suggested changes above. PG&E states that the Commission cannot legally eliminate the pilot program, because Section 851 specifically provides for the advice letter process for transactions valued at \$5 million or less.

PacifiCorp:

- In PacifiCorp's view, the pilot program has generally been effective in streamlining the approval process and reducing delays for non-controversial advice letters. However, Energy Division review and administrative approval of an advice letter can still take up to 120 days.
- PacifiCorp is a multi-jurisdictional utility providing electric retail service to customers in California, Idaho, Oregon, Utah, Washington, and Wyoming.
- PacifiCorp believes that transactions involving the transfer of its system assets are subject to the requirements of Section 851, because nearly all of its transmission and generation assets are used to serve customers in all six states, including California.
- Since PacifiCorp's California service territory represents less than two percent of its customer load, the transactions subject to Section 851 result in sales proceeds allocated to California which PacifiCorp views as *de minimus*. For example, the fair market value of transfers of PacifiCorp system assets allocated to California in 2010 was approximately \$9,000 to \$13,500. All of these transactions occurred in states other than California.
- PacifiCorp recommends that the Commission explore options for shortening the review process for unprotested advice letters, such as adding additional qualifying criteria and shortening the review period. For example, the Energy Division could review and approve property dispositions that occur outside of California, have fair market values allocated to California of \$10,000 or less, and are exempt from review under the California Environmental Quality Act (CEQA) within thirty or 45 days of advice letter filing.
- At a minimum, the advice letter pilot program should be continued through August 2011 to evaluate the effectiveness of the changes adopted in Resolution ALJ-244. PacifiCorp believes that the pilot program is sufficiently effective to become permanent, with the possibility of future reviews for additional changes.

San Diego Gas & Electric Company/Southern California Gas Company (SDG&E/SoCalGas):

- SDG&E/SoCalGas state that they have had limited need or opportunity to use the pilot program, but appreciate that the pilot program helps to expedite and simplify the Commission's review of non-controversial transactions subject to Section 851.
- SDG&E/SoCalGas support expanding the pilot program to include additional categories of transactions and to clarify the types of transactions which are exempt from Section 851 review pursuant to General Order (GO) 69-C. SDG&E/SoCalGas state that although GO 69-C authorizes the utilities to grant certain "limited uses" of utility property, such as licenses, permits or certain easements, without first obtaining Commission approval pursuant to Section 851, the utilities have hesitated to rely on GO 69-C because of confusion regarding the definition of "limited use" and when a grant of utility property must be made conditional.
- SDG&E/SoCalGas urge the Commission to consider exempting certain *de minimis* transactions, which cannot be reasonably expected to materially impact the utility's ratebase, from the requirements of Section 851. In their view, the current pilot program lacks a cost-effective process for approval of many *de minimis* transactions.
- SDG&E/SoCalGas would be glad to participate in any Commission workshops regarding further refinements to the pilot program or exempting certain *de minimis* transactions from the requirements of Section 851.

Southern California Edison Company (SCE):

- SCE recommends that the Commission develop an *ex parte* process, which would involve the filing of an application for transactions valued at over \$5 million but less than \$10 million, when no protest is filed. According to SCE, the cost of filing a Section 851 application and obtaining Commission approval can discourage third parties from entering into business transactions with public utilities, and a faster *ex parte* process would help to solve this problem.
- The Commission should aim for a turnaround time of 120 days or less for uncontested Section 851 applications, as well as for advice letters submitted under the pilot program.
- The pilot program should be expanded and made permanent.

Southwest Gas Corporation (SW Gas):

- SW Gas has not yet participated in the pilot program, but supports the program because it expedites and simplifies the procedures for review and approval of certain transfers of utility property by advice letter.
- SW Gas supports the extension of the pilot program until August 23, 2011.

The Small LECs:

- The Small LECs support continuation of the pilot program and believe that the program should be made permanent.
- Since the Small LECs have only limited experience in using the pilot program, they do not have specific suggestions for changes, but reserve the right to respond to comments made by other parties.

B. Reply Comments

A summary of the reply comments follows:

The Commission Division of Ratepayer Advocates (DRA):

- DRA states that in most cases, Commission staff has successfully processed advice letters within the 120-day period as required by Section 851. PG&E's opening comments fail to state that most delays beyond 120 days in processing advice letters occurred at the very beginning of the pilot program. Since the Commission's adoption of Resolutions ALJ-202 and ALJ-244, the Commission staff's average time for processing PG&E's advice letters is 91 days or less, which is approximately 30 days less than required by law.
- DRA does not recommend shortening the 120-day timeframe for Commission review and approval of advice letters, because in some cases, due process cannot be achieved in a shorter time. Further, in DRA's view, no party has presented a credible argument that the current 120-day timeframe for processing advice letters is not working.
- DRA does not support SCE's request for *ex parte* treatment of Section 851 applications for transactions valued at more than \$5 million but less than \$10 million. DRA is not certain what SCE means by "ex parte treatment," but points out that under Section 851, SCE is required to file an application for any transaction valued at over \$5 million. Therefore, the procedure for Commission review and approval of these transactions is beyond

the scope of the pilot program and should not be considered as part of suggested modifications to the pilot program. Section 851's requirement that utilities file formal applications for approval of transactions valued at more than \$5 million is not intended to discourage business deals between third parties and the public utilities, but to protect ratepayers from transactions involving the inadvisable disposition and procurement of utility assets.

PG&E:

- PG&E supports SCE's recommendation that the Commission adopt an *ex parte* process for uncontested Section 851 applications valued at over \$5 million but less than \$10 million. PG&E believes that SCE is referring to the fact that these applications would not require a hearing. PG&E agrees that the application process and the requirement for prior Commission approval pursuant to Section 851 can discourage third parties from entering into business transactions with the public utilities.
- PG&E also supports SCE's recommendation that the Commission expand the pilot program to aim for a turnaround time of 120 days for uncontested Section 851 applications, as well as advice letters.
- PG&E suggests that the Commission consider asking the Legislature to amend Section 851 to allow the utilities to file advice letters, rather than formal applications, in order to obtain Commission approval of transactions valued up to \$10 million, provided that the Commission may request that a contested advice letter be refiled as a formal Section 851 application if a hearing appears necessary. PG&E states that this change in procedure would free up Commission and Administrative Law Judge (ALJ) time to focus on other, higher priority matters.
- PG&E further suggests that in the meantime, the Commission should include a procedure for expedited treatment of Section 851 applications valued at more than \$5 million but up to \$10 million.
- PG&E supports SDG&E/SoCalGas' request that the Commission clarify the scope of GO 69-C, in order to further streamline transactions and reduce unnecessary costs for the utilities and the Commission. PG&E suggests that the Commission consider the following clarifications to GO 69-C:
 - Adopting a general guideline that the ability to readily remove any third party facilities from utility property within a 90-day revocability period qualifies the transaction as a "limited use" under GO 69-C;

- Formally adopting the proposed list of transactions that should be considered exempt from Section 851 pursuant to GO 69-C, attached to the Commission's workshop report in Decision (D.) 05-04-055;
- Expressly stating that the Commission will allow utilities to reasonably use their discretion in applying the GO 69-C exemption to particular transactions, without fear of the imposition of a penalty by the Commission, if the Commission later finds that the transaction was subject to Section 851. PG&E recommends that if the utility enters into a transaction without seeking Section 851 approval pursuant to GO 69-C, the utility should be entitled to a presumption of good faith if the Commission later decides to review the applicability of GO 69-C. If the Commission finds that GO 69-C did not apply, the utility should not be subject to a penalty unless the Commission finds that the utility acted in bad faith. "Bad faith" should be defined to mean that there was no reasonable basis for the utility to believe that the transaction falls under GO 69-C.

PacifiCorp:

- PacifiCorp supports PG&E's recommendation that the Commission consider adopting an exception to the requirements of Section 851 for *de minimis* transactions.

SCE:

- SCE supports the recommendation of PG&E and SDG&E/SoCalGas that the Commission establish an exemption from the requirements of Section 851 for *de minimis* transactions valued at under \$5 million that cannot reasonably have a material impact on the utility's ratebase.
- SCE supports SDG&E/SoCalGas's recommendations that the Commission:
a) clarify the applicability of GO 69-C, b) adopt a list of transactions that are presumptively exempt under GO 69-C, and c) create a safe harbor for transactions that are later found not to be exempt under GO 69-C, so long as the utility acted in good faith in relying on GO 69-C.
- SCE supports the recommendations of PacifiCorp and PG&E that the Commission adopt a shortened review process for unprotested advice letters.
- SCE recommends that the Commission adopt an expedited process for approval of uncontested Section 851 applications.

The Small LECs:

- The Small LECs support the recommendation of PG&E and SDG&E/SoCalGas that the Commission revise the pilot program to exempt *de minimus* transactions from any requirement for prior Commission approval pursuant to Section 851. All transactions with a fair market value of less than \$50,000 should be considered *de minimis* and should be subject to a post-transaction informational filing with the Commission only.
- The Small LECs urge the Commission to clarify what types of transactions fall within the scope of GO 69-C, either through revisions to the pilot program or in a separate Resolution.

(END OF APPENDIX B)

APPENDIX C

**UPDATED SERVICE LIST FOR
RESOLUTION ALJ-268**

Please serve Assistant Chief ALJ Janet A. Econome, jjj@cpuc.ca.gov, ALJ Myra J. Prestidge, tom@cpuc.ca.gov, Andrew Barnsdale, bca@cpuc.ca.gov, and Phyllis White, prw@cpuc.ca.gov, as well as the following service list:

P.02-02-003

(See attached service list.)

R.05-04-005

http://www.cpuc.ca.gov/published/service_lists/R0504005_68617.htm

R.06-02-012

http://www.cpuc.ca.gov/published/service_lists/R0602012_72126.htm

R.06-12-016

http://www.cpuc.ca.gov/published/service_lists/R0612016_75168.htm

A.08-02-001

http://www.cpuc.ca.gov/published/service_lists/A0802001_76153.htm

R.08-02-007

http://www.cpuc.ca.gov/published/service_lists/R0802007_76232.htm

A.09-05-026

http://www.cpuc.ca.gov/published/service_lists/A0905026_78405.htm

R.09-06-019

http://www.cpuc.ca.gov/published/service_lists/R0906019_78410.htm

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