PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Resolution ALJ-186
Administrative Law Judge Division
August 25, 2005

R E S O L U T I O N

RESOLUTION ALJ-186. Initiates Pub. Util. Code § 851 pilot program.

Summary

This resolution initiates our Pub. Util. Code § 851 pilot program. We have revised the pilot program from our initial proposal in response to comments that we received. The revised pilot program is attached as Appendix B.

Procedural Background

On March 18, 2005, the Administrative Law Judge (ALJ) Division circulated a proposed pilot program,[1] designed to simplify the disposition of certain types of transactions under Pub. Util. Code § 851, which requires public utilities to obtain prior authorization from the Commission before selling, leasing, assigning, or otherwise disposing of or encumbering utility property.

Comments were received on May 17, 2005, from the California Attorney General (AG), California Water Association (CWA), the Office of Ratepayer Advocates (ORA), Pacific Gas and Electric Company (PG&E), RHC Communities, LLC(RHC), San Diego Gas & Electric Company and Southern California Gas Company (SDG&E/SoCal), Southern California Edison Company (SCE), SureWest Telephone (SureWest), the small local exchange carriers (Small LECs), Cingular Wireless (Cingular), Sprint, SBC, and Verizon.

[1] The original proposed pilot program and cover letter are attached as Appendix A.

In general, the comments supported the initiation of the pilot program. Some comments sought clarification, most sought modifications, and many provided policy, legal, or implementation suggestions. The comments proved to be quite useful, and we appreciate the clarity, thoughtfulness, and sophistication they exhibited. Based upon the comments, we have modified the pilot program. This resolution initiates the pilot program, and addresses the issues raised by the comments.

We wish to reiterate that this is in fact a pilot program, meaning that it is the beginning, not the end, of the process of reforming the Commission's practices under § 851. The results of this pilot program will ultimately be integrated with the results of our General Order 69-C proceeding (P.02-02-003), and we will consider further use of exemptions from § 851 under § 853(b). In order to achieve a more coherent and efficient approach to § 851, we are planning to hold workshops in the fall, followed by a new rulemaking to implement the lessons learned from the pilot program.

Comments and Analysis

Duration

In the original proposal, a 12-month duration was proposed for the pilot program. PG&E and SDG&E/SoCal state that this is too short a period. (PG&E Comments, pp. 11-12; SDG&E/SoCal Comments, pp. 6-7.) As SDG&E/SoCal puts it:

> As a practical matter, it will take a minimum of several months for the Commission to evaluate the results under the pilot program and to issue a decision or general order resolving what program, if any, to adopt on a permanent basis. This means that either: (i) the evaluation will have to begin about only 6 months after the start of the program, to provide a reasonable likelihood that the Commission can act before the program sunsets; or (ii) the program will sunset for at least several months while the Commission decides what to do on a permanent basis. Neither of these options is in the public interest. Six months is too little experience and having the program lapse, especially when the Commission wants to continue it in some form on a permanent basis, is also counter-productive. (*Id.*)

PG&E also argues that a narrow, preset time limit could seriously skew the flow of applications, making evaluation of the pilot program difficult, if not impossible. (PG&E, p. 12.)

These are valid concerns. We accordingly change the duration of the pilot program to 24 months, and we reserve the right to extend it if appropriate. We are reluctant to follow the comments' primary suggestion of no sunset date, as we wish to avoid having a pilot program in perpetuity, and to reinforce the point that this pilot program is only a starting point, not an end point.

Effect on Public Interest

A number of comments noted that the requirement that the transaction "result in a positive effect on the public interest" is more stringent than the Commission's historic practice under § 851, which requires that the transaction not have an adverse effect on the public interest. (See, e.g., Comments of Verizon, CWA, PG&E, and SCE.) While ORA supports use of the higher standard, the other comments on this issue recommend conforming the standard used for the pilot program to the standard used under § 851. Using the standard that is typically used under § 851, as opposed to using a higher standard, will allow more transactions to qualify for the pilot program, and simplify the preparation and review of advice letters. While this is a slightly less cautious approach, the risks appear to be low, and it will enhance the viability of the pilot program. We accordingly change the requirement to be that the proposed transaction not be adverse to the public interest.[2]

Necessary and Useful

Many comments addressed the proposed requirement that the property that is the subject of the transaction no longer be necessary or useful in regulated utility operations. The majority of these comments noted that § 851 does not apply to utility property that is not necessary and useful, meaning that the pilot program would be reviewing transactions that would not require review under § 851. (See, e.g., Comments of CWA, SCE, PG&E, SDG&E/SoCal, Verizon, SureWest, and Small LECs.) In short, this proposed requirement is counterproductive to the purpose of the pilot program, and accordingly it is eliminated.[3]

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[2] SDG&E/SoCal argues that we should only examine whether the transaction is adverse to utility customers, as considering more general public interest is beyond the Commission's duties and expertise. (SDG&E/SoCal Comments, pp. 10-11.) We do not adopt that position. While our primary duty and expertise is to utility customers, that does not mean that we have no obligation to the larger public. For example, we should not approve the sale of a radioactive waste storage pool to a youth camp for use as a swimming pool even if the sale would result in a financial benefit to the utility's customers.

[3] ORA recommends that a mechanism be created to identify and keep track of properties that utilities have removed from rate base as no longer being necessary or useful. (ORA Comments, pp. 4-5.) While we may want to consider the processes by which utility property is determined

Dollar and Term Limits

The proposed $500,000 value limit for sales transactions and the proposed $500,000 value and 10-year term limits for leases drew a number of comments, most of which proposed various alternatives. Cingular recommends raising the qualifying market value for a 10-year lease to $1 million per site. (Cingular Comments, p. 6.) SureWest and the Small LECs recommend raising the dollar limit for sales and leases to $5 million, at least in part on the basis that $5 million is consistent with language in Assembly Bill 736, which is currently before the Legislature. (SureWest Comments, p. 3; Small LECs Comments, p. 3.)

SCE observes that the proposed limits would exclude the vast majority of SCE's lease transactions, most of which had a total net present value over $500,000 and terms far exceeding ten years. According to SCE, longer terms are often necessary for the lease transactions to be economically feasible for tenants. (SCE Comments, p. 5.) Similarly, Verizon notes that the proposed limits would, for example, exclude its recent lease of a parking lot to the city of Los Gatos, as that transaction had a 15-year term and total rent of approximately $1 million. (Verizon Comments, p. 5, citing Decision 03-08-059.)

SDG&E/SoCal and PG&E do not appear to have a problem with the $500,000 limit, but they propose an exemption from review for "de minimis" transactions, which they generally define as having a value no greater than $250,000.[4] As SDG&E/SoCal explains, this would result in transactions below $250,000 being exempt from review, transactions between $250,000 and $500,000 being reviewed via advice letter, and those above $500,000 requiring an application. (SDG&E/SoCal Comments, pp. 4-5.)

These varying comments require us to examine the basic nature of the pilot program. On the one hand, if the dollar and term limits are set high enough to capture the majority of the transactions that would otherwise require an application under § 851, we would have effectively subsumed § 851. That is not the intent of the pilot program. Our intent is for the pilot program to capture a meaningful subset of § 851 transactions, providing relief to the involved parties, while also providing us enough information for our future efforts in this area. On the other hand, if dollar and term limits are set too low, then there is the chance that few transactions will qualify for the pilot program, rendering it worthless as a learning tool and providing no benefits to the parties.[5]

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to be no longer necessary or useful, that is beyond the scope of this resolution, which addresses the pilot program.

[4] While the proposals of PG&E and SDG&E/SoCal are generally similar, there are some differences.

[5] Also, the proposal to completely exempt some transactions from review is inconsistent with the concept of a pilot program as a source of information.

In addition, utilizing a single, bright-line standard dollar value presents several problems. First, it ignores the fact that utilities vary greatly in size; the R.R. Lewis Small Water Company could probably sell all of its assets for a dollar amount that would be considered insignificant to SBC or SCE. The value of a particular asset to ratepayers also may not correspond precisely to the market value of that asset. For example, the value to ratepayers of an electric transmission substation near Coalinga would likely be worth more than office space in downtown Los Angeles, but the market value of the latter would likely be higher.[6] Finally, ORA points out that there is a risk of larger transactions being "piecemealed" or otherwise manipulated in order to fit inside a bright-line standard. (ORA Comments, p. 5.)

In an effort to reflect the realities of the transactions as described in the comments, we are going to raise the dollar limits and use a softer demarcation line for eligibility for the pilot program. We hope that this allows relatively large but otherwise uncontroversial transactions to qualify for the pilot program (such as Verizon's parking lot example), while allowing us to filter out the smaller transactions that could in fact be problematic. Accordingly, transactions involving the sale of property up to a value of $1 million, and leases with a net present value of up to $1 million and a term of up to 15 years, are presumptively eligible for the pilot program.[7] Transactions with a value of up to $5 million for sales, and a net present value of $5 million and a term of up to 25 years, that meet the relevant the California Environmental Quality Act (CEQA) criteria discussed below, are eligible to use the advice letter process, but will be subject to greater scrutiny than the lower-value transactions. Utilities considering using the advice letter process for such transactions should carefully consider the transaction in question to ensure its suitability for the pilot program. Sale transactions with a value over $5 million and lease transactions with a net present value greater than $5 million or a term longer than 25 years are not eligible for the pilot program.

Even with the softer demarcation, we want to ensure that larger transactions are not broken into smaller pieces to fit into the pilot program. In addition to being inconsistent with the pilot program, such "piecemealing" is also inconsistent with CEQA, and will not be allowed. We will require utilities to identify any transactions that may appear to be related, and to confirm that no larger transactions are being piecemealed.

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[6] For some assets, such as PG&E's hydroelectric generation system, there is a high correlation between market value and ratepayer value

[7] Such transactions must also meet the CEQA criteria described below.

PG&E recommends that transfers of depreciable assets, not just fee property transfers and leases, should also be eligible for the pilot program (PG&E Comments, pp. 8, 17.) We adopt this recommendation, and PG&E's suggested value limit of $250,000.[8]

[8] For sales of buildings, however, the $5 million limit applies, rather than the $250,000 limit.

CEQA

In the original proposal for the pilot program, we stated that for a transaction to qualify for the pilot program it had to not require environmental review by the Commission under CEQA, either because no project was involved, or because the transaction was subject to a statutory or categorical exemption.[9] In addition, we expressly sought practical suggestions for how to make the pilot program work in situations where the Commission is acting as a responsible agency under CEQA, where another lead agency has already completed an environmental review on the project.[10]

This last scenario, where the Commission is acting as a responsible agency, is the trickiest to incorporate into the pilot program. Where a transaction genuinely falls under an exemption from CEQA, there is no issue, as such transactions can proceed under the advice letter process with no CEQA review. Where a transaction requires that the Commission act as lead agency in preparing an environmental document under CEQA, again there is no issue, as such transactions are simply unsuitable for the advice letter process. We believe that transactions for which the Commission is a responsible agency under CEQA can be incorporated into the pilot program, with some limitations.

When the Commission is acting as a responsible agency, even though it typically does not need to prepare an environmental document, the Commission still needs to review the previously prepared environmental document or documents, and is required to make findings supported by substantial evidence and issue a notice of determination. (AG Comments, p. 4.)[11] The AG argues that when the Commission is acting as a responsible agency, there must be no possibility that an advice letter can be deemed approved without express agency action. (*Id.*) This appears to be correct, as the Commission could not make the findings required by CEQA absent a Commission resolution or decision.

In order for transactions where the Commission is the responsible agency to be included in the pilot program, we will need more assistance from the applicant than we

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[9] As PG&E pointed out, however, all transactions under § 851 constitute a "project" under CEQA. (PG&E Comments, pp. 12-13.) This language has been modified accordingly.

[10] Transactions for which the Commission is acting as lead agency under CEQA and is preparing a negative declaration, mitigated negative declaration, or an environmental impact report do not qualify for the pilot program.

[11] Some parties underestimate the Commission's legal obligation as a responsible agency, and appear to be recommending that the pilot program not distinguish between transactions that are exempt from CEQA and those that have been reviewed by another agency. Such an approach is inconsistent with the requirements of CEQA.

typically receive. In a regular application, the utility will provide a copy of the environmental document prepared by the lead agency. Commission staff with expertise in CEQA will then review that document for environmental impacts and mitigation measures (relating to the portions of the project that are subject to Commission approval), and assist the assigned ALJ in drafting findings for the decision to be presented to the Commission. Given the size and complexity of many environmental documents, this can be a highly time-consuming process. This process needs to be streamlined if the pilot program is to include transactions for which the Commission is a responsible agency under CEQA. Because the utility proposing a transaction is typically familiar with the environmental document prepared by the lead agency, the utility can provide Commission staff with a head start in reviewing the documents for impacts and mitigation measures relevant to the Commission's approval.

By use of a CEQA checklist, we hope to have the utility and Commission staff start out on the same page, simplifying and shortening the review process. The checklist will also address exemptions from CEQA, again to reduce confusion and speed review.[12]

Below is a preliminary version of the checklist. We welcome further comments on the contents and format of the checklist.

CEQA checklist:

Exemption

1. Has the proposed transaction been found exempt from CEQA by a government agency?

   A. If yes, please attach notice of exemption. Please provide name of agency, date of exemption, and state clearinghouse #.

   B. If no, does the applicant contend that the project is exempt from CEQA? If yes, please identify the specific exemption or exemptions that apply, citing to the applicable CEQA guideline(s).

Prior or Subsequent CEQA review

[12] In the past, some utilities have argued that virtually every application is exempt from CEQA, including projects involving major construction. Such an approach, whether resulting from wishful thinking or an aggressive litigation strategy, will not be productive in the context of the pilot program. Utilities will need to make a careful and conservative evaluation of the level of CEQA review that will be required.

1. Has the project undergone CEQA review by another government agency? If yes, please identify the agency, the CEQA document that was prepared (EIR, MND, etc.) and its date, and provide one copy of any and all CEQA documents to the Director of the relevant Industry Division with a copy of the advice letter. Be prepared to provide additional copies upon request.

2. Identify any aspects of the project or its environment that have changed since the issuance of the prior CEQA document.

3. Identify and provide section and page numbers for the environmental impacts, mitigation measures, and findings in the prior CEQA document that relate to the approval sought from the CPUC.

4. Does the project require approval by governmental agencies other than the CPUC? If so, please identify all such agencies, and the type of approval that is required from each agency.

Need CEQA?

If no exemption is applicable, and no prior review has occurred, please identify what applicant believes is the correct level of CEQA review.

With use of this checklist, transactions that have been subject to prior CEQA review are eligible to participate in the pilot program.

Optional Participation

As originally proposed, participation in the pilot program would be mandatory. Cingular Wireless, PG&E, the Small LECs, and SDG&E/SoCal all recommend that the pilot program be optional, rather than mandatory. In other words, the utility would have the option of submitting a regular application under § 851, even for transactions that would otherwise qualify for the pilot program.

As SDG&E/SoCal points out, the utility may know of issues presented by a particular transaction that require more complete fact finding or briefing than could be done under an advice letter process, and requiring an advice letter to be filed only to be rejected would cause additional delay. This simply makes good sense. There may be situations where a utility wants or needs a formal decision by the Commission under § 851, or where the propriety of using the advice letter process is simply not clear. Accordingly, we make participation in the pilot program optional, on

transaction-by-transaction basis. A utility may still submit an application under § 851 for any applicable transaction, including those that qualify for the pilot program.

Industry Division Review Criteria

Some parties recommended changes to the reasons why the relevant Industry Division of the Commission could reject advice letters, but there was disagreement as to what the changes should be. (See, e.g., SureWest Comments, pp. 5-6; SDG&E/SoCal Comments, pp. 13-14.) Given that this is a pilot program, and we cannot predict the problems that may occur with specific transactions, along with the lack of agreement as to any particular changes, we will leave this aspect of the pilot program unchanged.

Time for Review

Under the original proposal, the Industry Division would have an initial 30 days to review an advice letter, but could extend that period for another 120 days (or longer, with utility agreement). Several parties argue that the 120-day period should be shortened. (See, e.g., SDG&E/SoCal Comments, pp. 14-15.) Cingular proposed that it should be shortened to an additional 30 days (Cingular Comments, pp. 6-7), while PG&E proposed that it should be shortened to an additional 60 days (PG&E Comments, p. 18). Cingular and SDG&E/SoCal also requested clarification of the process for review and approval of the advice letters, and the original proposal did not discuss how protests to advice letters would be handled.

Because of the above criticisms and uncertainties, we will change the structure originally proposed. First, the standard protest period for an advice letter is 30 days, which causes a problem if the initial review period is also 30 days. Commission staff would have to either extend the review period to evaluate the merits of the protest, or simply ignore the protest to allow the advice letter to go into effect. Neither of these is a desirable outcome. Accordingly, we extend the initial review period to 45 days. This will allow staff to evaluate protests prior to the expiration of the initial review period, and should allow for a greater number of advice letters to go into effect automatically after the 45 days.

We clarify that if Industry Division staff takes no action to extend the review period during the first 45 days, the advice letter is deemed approved 45 days from the date of filing. As discussed above, this automatic approval does not apply to transactions where the Commission is a responsible agency under CEQA. Such transactions are automatically extended, even if staff takes no action.[13]

[13] In order to reduce confusion, we direct Industry Division staff to issue notices of extension even in cases where the Commission is acting as a responsible agency, but failure to do so does not mean that the advice letter is automatically approved.

Most of the criticism of the review period focused on the 120-day extended review period. Several parties noted that combined with the initial 30-day period, it becomes a 150-day period, plus the time for a resolution to be placed on the Commission's agenda and voted on by the Commission. (SDG&E/SoCal Comments, pp. 14-15.) The result—a potentially six-month review process for a transaction that does not require the Commission to prepare an environmental document—is not all that expedited. This point is well taken. We will adopt PG&E's recommendation that the subsequent review period be no longer than an additional 60 days, absent agreement of the utility for an extension of the deadline. This results in a total potential review period of 105 days, as compared to 150 days in the original proposal.[14]

Content of Advice Letters

Several comments addressed the requirements for the contents of the advice letters, with most arguing that the originally proposed pilot program required more documentation to be submitted than necessary. (See, e.g., Comments of PG&E, p. 18; Comments of SureWest, p. 6.) SCE notes that the documents necessary to evaluate a lease differ from those necessary to evaluate a sale. (Comments of SCE, p. 6.) ORA recommends that the Commission require additional information than originally proposed. (ORA Comments, pp. 6-8.)

In response to these comments, we have revised the required contents of the advice letters. In general, we have reduced the requirements, but we have followed SCE's recommendation to differentiate between sales and leases. Much of the additional information that ORA recommends be required would in fact be helpful, but much of it is also common sense material that we hope the applicants would include without specific direction, such as the type of property, the street address, and any continued easements.[15] The main point of the content requirements is to ensure that Commission staff has, at the time the advice letter is submitted, enough information to clearly understand the nature of the property at issue and the details of the transaction that is proposed. If information is available that would assist staff's understanding, we recommend that it be submitted. All else being equal, a clear and complete description of the property and the transaction is less likely to trigger an extension of the review period than a description that is sloppy, fuzzy, or incomplete.

Effect on Other Processes

[14] As under the original proposal, at the end of the 105 days, the relevant Industry Division must either issue its disposition or prepare a resolution for the Commission.

[15] We will require the buyer's use of the property to be stated (if known), as that is essential to evaluating the proper level of CEQA review for the property.

A number of comments requested clarification that the initiation of the pilot program would not alter existing Commission practices, including the use of § 851 and General Order 69-C for transactions, and the applicability of General Order 66-C regarding confidentiality of information. (See, e.g., Cingular Comments, pp. 2-4, 7; Sprint Comments, p. 2; SureWest Comments, p. 6.) The pilot program is a new and separate addition, which does not modify or eliminate any existing Commission process; parties may continue to partake of the Commission's existing processes until further notice.[16] The confidentiality rules for the pilot program do not differ from the Commission's more general rules regarding confidentiality,[17] nor do the rules regarding affiliate transactions.

Issues Beyond the Scope of the Pilot Program

Several parties raised issues that are interesting, and that we wish to examine further, but that are beyond the scope of this pilot program. Foremost among these issues is SBC and Verizon's recommendation that telecommunications companies operating under the New Regulatory Framework (NRF) should be completely exempted from the requirements of § 851. Other such issues include RHC's recommendation for treatment of master leases, SDG&E/SoCal's recommendation to exempt de minimis transactions, and ORA's recommendation to track property removed from rate base as no longer being necessary or useful.

Next Steps

We intend to look further into making our processes under § 851 simpler, faster, and more consistent, with a level of review appropriate to the transaction. We will consider issues such as the size, type, and regulatory structure of the various utilities we regulate, along with the above proposals raised by the comments but not incorporated in the pilot program. We will incorporate what we learn from the pilot program into a broader process that will also incorporate the results of our General Order 69-C proceeding (P.02-02-003.), and consider larger issues such as exemption from § 851 under § 853(b). We believe there is room for improvement in our processes, and that we can achieve that improvement in a manner consistent with all of our legal obligations, including CEQA compliance.

In order to implement these improvements, we will begin by holding workshops in the fall to consider how to integrate the use of § 853(b) and General Order 69-C into the

[16] Our determination to make the pilot program optional, rather than mandatory, should also alleviate some of the concerns expressed in the comments.

[17] Controversial or excessive designation of information as confidential could result in an advice letter being found unsuitable for the pilot program.

outcome of the pilot program.[18] Subsequently, we will open a rulemaking proceeding after we have received enough information from the pilot program, so that we can incorporate the lessons from the pilot program into our broader look at § 851. We will open the new rulemaking between eight to twelve months from the date of the start of the pilot program to try to ensure that we have adequate information while still being able to have a decision in the rulemaking before the scheduled expiration of the pilot program.

In addition to maintaining copies of the advice letters submitted under the pilot program, the utilities are directed to maintain a list of the transactions for which advice letters are filed, containing basic information about the transactions, including a description of the property and its location, the parties to the transaction, and the date, nature and dollar value of the transaction. This list and other relevant information regarding transactions under the pilot program shall be provided to the Commission or its staff upon request. In addition to the regular advice letter service requirements, all advice letters shall be served on the relevant departments of the city and county governments where any real property involved in a transaction is located, and shall also be served electronically on Lynn Carew and Peter V. Allen at ltc@cpuc.ca.gov and pva@cpuc.ca.gov.

Comments

Comments on the draft resolution were received from PG&E, SureWest, and the Small LECs. Reply comments were received from Verizon, supporting the comments of SureWest and the Small LECs. Late comments were received from CWA.

PG&E, SureWest and the Small LECs point out one error in the draft resolution. As written, the resolution would bar the sale of a building with a value of more than $250,000. We will adopt a modified version PG&E's proposed remedy, which clarifies that the sale of a building is also subject to the $5 million threshold, rather than the $250,000 threshold generally applicable to depreciable assets.

SureWest and the Small LECs criticize the requirement that the advice letters be served on the local governments where real property is located. The idea behind this requirement is that, by giving early notice to the relevant local governmental agency, it could help avert later problems with local permitting or CEQA. We are looking for a good faith and common sense approach for service – e.g. if you are selling a building and land, tell the local planning department. This requirement should be considered as a way to remove possible future obstacles rather than as an obstacle itself.

[18] This process would make use of relevant portions of the record of our earlier proceeding examining GO 69-C, to avoid duplication of effort.

CWA points out that the modification of the resolution to apply to property that is necessary and useful removes the interaction with Pub. Util. Code § 790, which only applies to property that is no longer necessary and useful. Accordingly, there is no direct interaction between § 790 and § 851, so the provision barring participation of Class A water utilities from the pilot program is unnecessary, and has been removed.

Finally, in response to PG&E's comments, we modify the language in the resolution to clarify that only significant physical or operational changes in a facility used in regulated utility operations disqualify a transaction from the pilot program, rather than the prior implication that any such changes would do so.

IT IS RESOLVED that the Pub. Util. Code § 851 pilot program is initiated, as described above and in Appendix B.

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:

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STEVE LARSON
Executive Director