

Decision 04-08-048 August 19, 2004

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application of Pacific Gas and Electric Company
(U-39-E) for an Order Under Section 851 of the
California Public Utilities Code Approving the
Lease of Real Property to Crockett Generation.

Application 00-08-022
(Filed August 15, 2000)

**OPINION
AUTHORIZING THE LEASE OF UTILITY PROPERTY PURSUANT TO
PUBLIC UTILITIES CODE SECTION 851**

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1. Summary

Pacific Gas and Electric Company (PG&E) requests Commission approval of a lease agreement pursuant to Public Utilities Code Section 851.¹ The agreement allows Crockett Generation (Crockett) to lease approximately 25,000 square feet of real property from PG&E for the purpose of installing equipment to interconnect Crockett's 240 Megawatt (MW) power plant to PG&E's transmission grid. PG&E consummated the agreement in December 1994 without obtaining Commission approval for the agreement as required by Section 851.

This decision grants prospective approval of the Crockett lease agreement pursuant to Section 851. PG&E's request for retroactive approval of the agreement is denied. This decision also finds that any activity that may have warranted an environmental review by the Commission pursuant to the California Environmental Quality Act (CEQA) has already occurred. Accordingly, CEQA review at this time is moot for practical purposes, and this decision declines to undertake such a review. Finally, this decision does not penalize PG&E for its failure to obtain Commission approval for the lease agreement prior to consummating the lease as required by Section 851.

2. Factual Background

Crockett is a California limited partnership that operates the 240 MW Crockett Cogeneration Project (CCP) located in Contra Costa County. Crockett sells the power produced by the CCP to PG&E pursuant to a power purchase agreement (PPA) that was approved by the Commission in a series of decisions, the most recent being Decision (D.) 98-01-016.

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

Crockett delivers power to PG&E via an 8,000-foot underground cable to a transition station for interconnection with PG&E's grid. The transition station is located on 25,000 square feet of property leased from PG&E and taps into PG&E's pre-existing Lakeville-Sobrante #1 230 kilovolt (kV) transmission line. The facilities, equipment, and installations necessary to connect generation stations with transmission grids are commonly referred to as "generation ties."

In 1993, Crockett received authority from the California Energy Commission (CEC) to construct and operate the CCP and the associated generation tie.² In D.93-10-039, the Commission granted PG&E's request for a certificate of public convenience and necessity (CPCN) to construct, own, and operate the generation tie. However, for reasons that are not fully explained in the record of this proceeding, Crockett decided to construct, own, and operate the generation tie pursuant to its authority from the CEC.

In December 1994, PG&E signed an agreement with Crockett that allows Crockett to lease 25,000 square feet of PG&E's property for the purpose of building and operating the transition station described previously (referred to hereafter as the Crockett lease). The transition station became operational in 1996. The CCP has delivered power to PG&E ever since.

The rental rate for the Crockett lease is \$3,000 per year, adjustable every five years. The lease expires six months after the end of the 30-year PPA. PG&E continues to use a portion of the leased property for the maintenance and operation of its transmission facilities.

² CEC Adoption Order No. P800-93-004, Docket No. 92-AFC-1.

3. Procedural Background

PG&E filed Application (A.) 00-08-022 on August 15, 2000, and amendments to A.00-08-022 on October 30, 2000, March 21, 2001, and April 30, 2004. Notice of the application and each amendment appeared in the Commission's Daily Calendar. There were no protests or other opposition to A.00-08-022 or the amendments. Crockett participated in this proceeding by writing, signing, and verifying portions of the amendments filed by PG&E.

4. Summary of the Application

a. Request for Authority Under Section 851

Section 851 requires a utility to obtain Commission approval prior to leasing utility property to a third party. Any lease consummated without Commission authority is void. In A.00-08-022, as amended, PG&E requests retroactive approval of the Crockett lease pursuant to Section 851. PG&E states that it did not seek Section 851 approval prior to consummating the Crockett lease in December 1994 because PG&E believed at the time that Section 851 did not apply. PG&E represents that two Commission decisions issued after the lease was signed convinced PG&E to obtain Commission approval for the lease.³

PG&E maintains that the Crockett lease should be approved because of the benefits it provides to ratepayers and the public. In particular, the lease is a crucial element in PG&E's ability to obtain 240 MW of power from the CCP. PG&E argues that the need for the power provided by the CCP was amply demonstrated during the recent electricity crisis when power shortages caused rolling blackouts throughout much of California.

³ PG&E cites D.96-04-045 and D.94-02-008. We note that D.94-02-008 was issued 10 months before PG&E signed the Crockett lease.

PG&E states that the lease does not impair its ability to serve the public. This is because the lease limits Crockett's use of PG&E's property to purposes associated with the delivery of power to the grid. The lease also prohibits Crockett from interfering with PG&E's public utility operations, from allowing any waste, nuisance, or hazard on PG&E's property, and from constructing anything on PG&E's property without PG&E's prior consent.

PG&E requests authority to make minor modifications to the Crockett lease without having to obtain additional Section 851 approval for the modifications. Specifically, because the term of the lease is quite long, PG&E anticipates there may be a need or desire to: (1) adjust the term of the lease; (2) make minor adjustments to the boundaries of the leased land; or (3) revise provisions in the lease pertaining to insurance, workers' compensation, hazardous waste, and the annual rent.

PG&E argues that it would be a mistake for the Commission to grant prospective, but not retroactive, authority for the Crockett lease. According to PG&E, a denial of retroactive authority would void the lease for the time period prior to the Commission's decision. PG&E is concerned that Crockett's obligations under the lease may be nullified during the time the lease is deemed void. Under the lease, Crockett is obligated to: (1) comply with all laws and regulations relating to hazardous substances; (2) indemnify PG&E for any loss, expense, or liability caused by hazardous substances on the leased premises; and (3) indemnify PG&E for any loss, expense, or liability resulting from property damage, death, or bodily injury occurring on the leased premises. These provisions protect PG&E and its ratepayers from liability associated with Crockett's use of PG&E's property. However, if the lease is deemed void, PG&E believes that Crockett might argue that the provisions protecting PG&E and its

ratepayers are not enforceable. This could have potentially significant adverse consequences for PG&E and its ratepayers, according to PG&E.

PG&E offers several reasons why the Commission should not order PG&E to unwind the lease. First, the power provided by the CCP is critical to the State's energy supply. Second, it may not be possible to remove the generation tie on the leased property without the approval of the Independent System Operator. Third, PG&E cannot predict Crockett's response if the Commission orders PG&E to unwind the lease. Finally, Section 851 provides that utility property is not, as a matter of law, useful or necessary to the utility "as to any...lessee...dealing with such property in good faith for value." PG&E states that because it receives fair value under the Crockett lease, Section 851 may prevent the Commission from voiding and unwinding the lease.

b. Alternative Request for Authority Under General Order 69-C

General Order (GO) 69-C provides utilities with blanket authority under Section 851 to enter into license agreements with third parties that allow for "limited uses" of utility property. PG&E contends that the Crockett lease satisfies the requirements of GO 69-C. PG&E maintains that although it is not required to obtain Section 851 approval for the Crockett lease, PG&E decided to seek such approval out of an abundance of caution. However, if the Commission finds that the Crockett lease is void for any period of time under Section 851, PG&E asks the Commission to find that the agreement is authorized by GO 69-C.

c. Alternative Request for Authority Under Section 853(b)

In the event the Commission finds the Crockett lease is void under Section 851, PG&E asks the Commission to exempt the lease from Section 851 pursuant to Section 853(b). Section 853(b) provides, in part, that the Commission "may ...exempt any public utility...from...[Section 851]...if it finds that the

application thereof with respect to the public utility...is not necessary in the public interest." PG&E states that the Commission has previously exempted transactions from Section 851 to avoid the harsh consequences associated with the voidance of agreements.⁴

PG&E presents several arguments why the Commission should use its authority under Section 853(b), if necessary, to exempt the Crockett lease from Section 851. First, the lease serves the public interest because it has made additional electric generation available for public consumption. Second, the lease allows generation tie facilities to be sited next to existing transmission facilities, thus avoiding the creation of an additional transmission facility site. Finally, prior to the Crockett lease, the Commission directed PG&E to facilitate the development of cogeneration capacity.⁵ PG&E asserts that the Crockett lease is directly responsive to the Commission's mandate.

d. Penalty

PG&E argues that it should not be fined for its failure to obtain Section 851 approval prior to consummating the Crockett lease. PG&E claims that its failure to obtain advance approval has not caused physical or economic harm to others. The only harm that might have occurred is to the regulatory process. PG&E maintains that this harm is mitigated by PG&E's respect for the regulatory process as demonstrated by its acting quickly to disclose the lease and request

⁴ PG&E cites D.02-01-055 wherein the Commission held that because Section 851 does not allow the Commission to grant retroactive approval, the Commission should grant an exemption from Section 851 pursuant to Section 853(b) because it was "not necessary in the public interest to deem the sales void where the sales were reasonable and in the public interest."

⁵ PG&E cites D.91107, issued on December 19, 1979, wherein the Commission held that PG&E's efforts to promote the development of cogeneration were seriously inadequate and, as a result, reduced PG&E's authorized rate of return by 20 basis points.

retroactive approval. PG&E also believes that imposing a fine might deter other utilities from disclosing similar violations. PG&E notes that in several recent decisions where a utility was found to have violated the law, the Commission declined to impose penalties or imposed only a nominal fine.

e. Crockett's Construction of the Lease Facilities

Crockett obtained authority from the CEC to construct the CCP and the associated generation tie, including the facilities eventually constructed pursuant to the Crockett lease. In D.93-10-039, the Commission granted PG&E a CPCN to construct the generation tie. For reasons that are not fully explained in the record of the instant proceeding, Crockett constructed the generation tie instead of PG&E. Crockett did not obtain a CPCN from the Commission to construct the generation tie.

PG&E and Crockett represent that the Commission's jurisdiction is limited to investor-owned utilities.⁶ Crockett states that it did not apply for a CPCN because it does not consider itself to be an "electric public utility" subject to the Commission's jurisdiction.⁷ Crockett adds that even though it is not a regulated by the Commission, Crockett elected to comply with the conditions set forth in

⁶ The circumstances under which the Commission requires CPCNs for the construction of major electric transmission lines are set forth in GO 131-D, Section III(A), which states: "No electric public utility shall begin construction in this state...of major electric transmission line facilities...without this Commission's first having found that said facilities are necessary to promote the safety, health, comfort, and convenience of the public, and that they are required by the public convenience and necessity."

⁷ Crockett represents that the CCP is a "qualifying facility" under the Public Utilities Regulatory Policy Act of 1978 and is certified by the Federal Energy Regulatory Commission as a qualifying cogeneration facility. As such, Crockett claims that it is exempt from Commission's jurisdiction pursuant to Sections 218(b) and 2803. Consequently, Crockett believes that it did not have to obtain a CPCN pursuant to Section 1001.

Ordering Paragraph (OP) 1.c. of D.93-10-039 to the extent applicable to construction. OP 1.c. states, in relevant part, as follows:

1. A certificate of public convenience and necessity is granted to [PG&E] to construct, operate, and maintain a single-circuit 230-kV underground transmission line from the Crockett facility to PG&E's existing Lakeville-Sobrante No. 1 Line, and related facilities (transmission project) in the manner described in this application subject to the following conditions:
 - c. PG&E shall seek the necessary and appropriate encroachment permits from the Department of Transportation for crossing all state highways and freeways, as indicated in Volume 1, page 6, paragraph IV, and page 11, paragraph VIII of PG&E's application. Additionally, PG&E shall follow all existing statutes and agreements currently in effect between the Department of Transportation and PG&E. PG&E shall also follow all existing statutes, agreements, tariffs, and rules in effect between this Commission and PG&E.

Crockett asserts that when it constructed the generation tie, it followed all Commission-related statutes, rules, and regulations applicable to PG&E, including GO 128, GO 131, and Rule 21. As a result, Crockett believes the Crockett lease facilities comply with all Commission requirements.

f. Compliance with CEQA

PG&E argues that the Commission does not have to conduct an environmental review of the Crockett lease pursuant to the CEQA. This is because the CEC conducted a thorough environmental review in accordance with applicable California law when it reviewed Crockett's Application for Certification (AFC) of the CCP and associated generation tie. The CEC

concluded its environmental review in May 1993 when the CEC approved the CCP and generation tie.⁸

Following the CEC's approval of the CCP and generation tie, PG&E filed A.93-08-018 for a CPCN to construct the generation tie. PG&E asserts that the Commission in D.93-10-039 accepted the CEC's environmental review and granted a CPCN for the generation tie. In D.93-10-039, at Footnote 3, the Commission stated:

The CEC's environmental discussion in the May 3, 1993 (AFC) decision states that the CEC's site certification process has been certified by the Resources Agency as the "functional equivalent of the environmental impact report process under CEQA. (Public Resources Code Section 21080.5 and 25541.5.) See also the CEQA guidelines, 14 Cal. Code Regs. Section 1525 (k)). Moreover, PU Code Section 1002(b) provides that the CEC's AFC decision shall take the place of the requirement for consideration by this Commission of the four factors specified in Section 1002(a)...GO 131-C provides that CPCN applicants need not comply with Rule 17.1 of our Rules of Practice and Procedure (Special Process for Implementation of CEQA) when an AFC has been or will also be issued by the CEC.

Additionally, D.93-10-039 noted that "no one in the proceeding has raised any environmental concerns and we have not discovered any."⁹ The Commission concluded, as a matter of law, that:

PG&E should be granted a CPCN to construct operate and maintain a single-circuit 230 kV underground transmission line from the Crockett facility to PG&E's existing Lakeville-Sobrante No. 1 Line and related facilities, in the manner

⁸ CEC Adoption Order No. P800-93-004, Docket No. 92-AFC-1.

⁹ D.93-10-039, Section 3.2.3

described in this application, subject to the conditions set forth in this decision, as well as applicable “conditions of certification and compliance verifications” specified in the decisions issued May 3, 1993 by the CEC in Docket No. 92-AFC-1. (D.93-10-039, Conclusion of Law Number 4.)

Finally, the Commission ordered that:

PG&E shall comply, or use its best efforts to assist Crockett Cogeneration in complying with all application "conditions of certification and compliance verification" concerning the transmission project specified in the decision issued May 3, 1993 by the [CEC] in Docket No. 92-AFC-1.... (D.93-10-039, Ordering Paragraph 1.b.)

PG&E believes the previously cited portions of D.93-10-039 demonstrate that the Commission accepted the CEC's environmental review of the facilities that were eventually constructed pursuant to the Crockett lease. PG&E adds that Crockett complied with all applicable environmental requirements adopted in the CEC's AFC decision, which are the same requirements that would have applied to PG&E. PG&E submitted a declaration from one of Crockett's officers stating that Crockett complied with all the CEC's requirements during the construction process and remains responsible for continuing compliance.

g. Ratemaking Treatment of Revenues

PG&E represents that revenues from the Crockett lease were initially credited above-the-line to ratepayers. PG&E asserts that in D.00-02-046, the Commission’s decision regarding PG&E’s 1999 general rate case (GRC), the Commission adopted PG&E’s proposal of excluding all revenues and rate base associated with generation ties from PG&E’s electric distribution revenue requirement. The result, according to PG&E, is that rates for electric distribution adopted in D.00-02-046 did not reflect revenues from the Crockett lease.

5. Discussion

a. Section 851

A.00-08-022 requests authority for the Crockett lease pursuant to Section 851. Section 851 states, in relevant part, as follows:

No [utility]...shall...lease...any part its plant, system, or other property necessary or useful in the performance of its duties to the public...without first having secured from the commission an order authorizing it to do so. Every such...lease...made other than in accordance with the order authorizing it is void...[Any lease] of property by a public utility shall be conclusively presumed to be of property that is not useful or necessary in the performance of its duties to the public, as to any...lessee...dealing with such property in good faith and for value....

The Commission has broad discretion to determine if it is in the public interest to authorize a transaction pursuant to Section 851.¹⁰ The primary standard used by the Commission is whether the transaction will serve the public interest.¹¹ Where necessary and appropriate, the Commission may attach conditions to a transaction in order to protect and promote the public interest.¹²

The record of this proceeding demonstrates that the Crockett lease provides substantial benefits to the public. In particular, the lease enables the delivery of 240 MW of power to PG&E's transmission grid. This power was vital to California during the recent electricity crisis when power shortages caused

¹⁰ D.01-06-007, *mimeo.*, p. 16.

¹¹ D.00-06-005, 2000 Cal. PUC LEXIS 281, *4; D.99-04-066, p. 5; D.99-02-036, p. 9; D.97-06-066, 72 CPUC 2d 851, 861; D.95-10-045, 62 CPUC 2d 160, 167; D.94-01-041, 53 CPUC 2d 116, 119; D.93-04-019, 48 CPUC 2d 601, 603; D.86-03-090, 1986 Cal. PUC LEXIS 198 *28 and COL 3; and D.8491, 19 CRC 199, 200.

¹² D.01-06-007, *mimeo.*, p. 17.

rolling blackouts. The power remains vitally important today. Moreover, the Commission has long recognized that the public interest is served when utility property is used for other productive purposes without interfering with the utility's operations or the provision of utility service to the public.¹³ The Crockett lease allows PG&E's property to be used for other productive uses, and PG&E has demonstrated that the lease will not interfere with the performance of its duties to the public.

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

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

¹³ See, for example, D.02-01-058, D.94-06-017, D.93-04-019, and D.92-07-007.

authority under Section 851.¹⁴ There is no evidence in this proceeding that Crockett did not deal in good faith and for value for the lease. Accordingly, we conclude that Crockett's rights and obligations under the lease agreement remain in full force and effect for the period of time prior to today's decision.

We decline to grant PG&E's request to exempt the Crockett lease from Section 851 pursuant to Section 853(b). Section 853(b) provides, in part, that "[t]he Commission may...exempt any public utility...from...[Section 851]...if it finds that the application thereof with respect to the public utility...is not necessary in the public interest." PG&E states that it is necessary to exempt the Crockett lease from Section 851 in order to avoid the potential harm to PG&E that could result if the lease is deemed void for any period of time. PG&E is especially concerned that it might not be able to enforce any of its rights under the lease, including indemnification rights.

It is the Commission's policy to grant exemptions from Section 851 pursuant to Section 853(b) only in extraordinary circumstances.¹⁵ The reasons for this policy are set forth in D.02-06-015:

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

¹⁴ D.92-07-007, 45 CPUC 2d 24, 30. Importantly, D.92-07-007 clearly indicates that the protection of innocent lessees does not vitiate the primary requirement of Section 851 that the utility obtain Commission approval for a lease prior to consummating the lease. (Ibid.) This central principle of Section 851 makes prior review and approval of Section 851 transactions by the Commission especially important if the public is to be protected from harmful transactions that cannot be voided, for practical purposes, after the fact.

¹⁵ D.02-01-055, 2002 Cal. PUC LEXIS 2, at *7.

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

The record of this proceeding shows that the Crockett lease stemmed from an ordinary transaction that was completed without Commission review under Section 851 as a result of PG&E's oversight. There are no extraordinary circumstances that warrant the invoking of Section 853(b).¹⁶

PG&E requests authority to make minor modifications to the Crockett lease without having to obtain approval for the modifications under Section 851. Given the 30-year term of the lease, we conclude that it is reasonable to provide PG&E with prospective authority under Section 851 to make minor modifications to the agreement that meet all of the following conditions:

¹⁶ Unlike PG&E, we believe there is little possibility that PG&E might not be able to enforce its rights under the Crockett lease. First, we conclude, *supra*, that the lessee's rights and obligations remain in full force and effect prior to today's decision. Because the lessee's obligations remain in effect, PG&E should be able to enforce its rights. Otherwise, the lessee would unfairly enjoy all the benefits of the agreement with none of the corresponding obligations. Second, our conclusion that the Crockett lease remains in full force and effect prior to today's decision was predicated on our finding, *supra*, that the lessee was dealing in good faith. Any lessee dealing in good faith intends to be bound by the lease. If the lessee is not dealing in good faith, then the lease is automatically void with respect to the lessee pursuant to Section 851. Finally, it would be inconsistent with the intent of Section 851 and poor public policy to relieve Crockett of its obligations under the lease. To do so would prevent PG&E from using its rights and powers under the lease to stop the lessee from using PG&E's property in a manner that is harmful to the performance of PG&E's duties to the public.

- (1) The modification does not involve any change in use of (i) the leased property or (ii) the facilities installed on the property pursuant to the lease.
- (2) The modification does not involve new construction. This condition does not apply to minor repairs and maintenance (e.g., constructing a new fence to replace a dilapidated fence).
- (3) The modification does not adversely affect PG&E, its ratepayers, or the public at large.
- (4) The modification is carried out in accordance with all applicable laws, rules, regulations, and standards.

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

PG&E violated Section 851 when it consummated the Crockett lease without prior approval from the Commission. Although we may fine PG&E for the violation pursuant to Section 2107, we decline to do so. PG&E's violation of Section 851 does not appear to have caused any physical or economic harm to others. It also appears that PG&E did not benefit materially from its unlawful conduct. We emphasize that our decision to not penalize PG&E is based on the unique facts and circumstances before us in this proceeding. We will impose fines for violations of Section 851 in other proceedings if the facts so warrant.

b. GO 69-C

GO 69-C authorizes utilities to grant licenses for the use of their property without having to obtain prior approval from the Commission under Section 851 if certain conditions are met. GO 69-C states, in relevant part, as follows:

[P]ublic utilities covered by...Section 851...are hereby authorized to grant easements, licenses or permits for use or occupancy on, over or under any portion of the operative property of said utilities for...limited uses...whenever it shall appear that the exercise of such easement, license or permit will not interfere with the operations, practices and services of such public utilities to and for their several patrons or consumers.

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

GO 69-C establishes three key criteria for permitting a utility to grant minor interests in the utility's property without Section 851 approval. These are:

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.
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.

PG&E argues that the Crockett lease satisfies all the GO 69-C criteria and, consequently, does not have to be approved by the Commission pursuant to Section 851.¹⁷ If the Commission deems the Crockett lease void for any period of

¹⁷ PG&E explains that even though the Crockett lease satisfies the GO 69-C criteria, PG&E nonetheless filed A.00-06-010 for approval of the lease agreement in order to avoid any questions about Section 851 compliance.

time under Section 851, PG&E asks the Commission to declare that the lease is still valid under GO 69-C.

We begin our analysis by determining whether the Crockett lease satisfies the first criterion, i.e., whether the lease allows only “limited uses” of PG&E’s property. If it does not, then GO 69-C does not apply and there is no need to determine if the lease satisfies the other criteria.

Although GO 69-C does not define the term “limited use,” two recent Commission decisions provide useful guidance. In D.02-10-057, the Commission held that “any proposed physical changes to utility property (e.g., construction) that would require CEQA review if authority were sought under [Section] 851, should be reviewed under [Section] 851. GO 69-C is inapplicable under such circumstances and its use is inappropriate.”¹⁸ As described elsewhere in today’s decision, the facilities constructed pursuant to the Crockett lease required (and underwent) an environmental review by the CEC that was equivalent to a CEQA review. Therefore, based on the guidance provided by D.02-10-057, we conclude that GO 69-C does not apply to the Crockett lease.

In D.03-04-010, the Commission held that the construction of facilities that are not easily removable is not a “limited use” within the meaning of GO 69-C.¹⁹ The Crockett lease allows Crockett to use PG&E’s property “for the installation and maintenance of a 230 kV high pressure pipe filled underground electric transmission line, termination point, transition and metering station and interconnection with the PG&E 230 kV...transmission line, together with auxiliary equipment, buildings, pumping stations, utilities interconnection, and

¹⁸ D.02-10-057, *mimeo.*, p. 5.

¹⁹ D.03-04-010, *mimeo.*, pp. 4 – 5.

other equipment necessary or desirable appurtenant thereto...including, but not limited to, the right to erect...a sign, or signs suitable for advertising purposes, the right to fence the leased premises, and to place any personal property or trade fixtures necessary to such purposes in or on the leased premises.”²⁰ We interpret this provision in the Crockett lease as allowing the construction of facilities on the leased premises that are not easily removable. Photographs of the facilities constructed pursuant to the Crockett lease demonstrate that the facilities are substantial and permanent installations.²¹ We conclude that the facilities allowed by the lease agreement and actually constructed by Crockett are not easily removable and, consequently, are not a “limited use.” Therefore, consistent with the guidance provide by D.03-04-010, we conclude that GO 69-C does not apply to the Crockett lease.

As an aside, we are skeptical of PG&E's claim that when it signed the Crockett lease in 1994, it believed in good faith that the lease was a GO 69-C license agreement based on guidance provided by D.94-06-017 and D.93-04-019.²² Both of these decisions grant authority pursuant to Section 851, and not GO 69-C, for a third party to install fiber optic cables in underground conduit owned by Southern California Edison.²³ Therefore, if PG&E were relying on these two decisions for guidance, PG&E should have known in December 1994 when it signed the Crockett lease that the lease was subject to Section 851.

²⁰ A.00-08-022, Attachment A, paragraph 3.

²¹ The photographs are contained in Attachment 5 of the second amendment to A.00-08-022.

²² PG&E amendment to A.00-08-022 filed on April 30, 2004, pp. 5 - 6.

²³ D.94-06-017, 55 CPUC 2d 126, 128, and 130; D.93-04-019, 48 CPUC 2d 602, 604, and 605.

c. CEQA

CEQA requires the Commission to consider the environmental consequences of its discretionary decisions.²⁴ CEQA also requires an environmental review to occur before an activity takes place. Here, all of the activities contemplated by the Crockett lease have already occurred. Consequently, conducting a CEQA review of the Crockett lease at this time would serve no practical purpose, and we decline to undertake a CEQA review.

We note that the CEC previously conducted an environmental review of the facilities constructed on PG&E's property pursuant to the Crockett lease. The CEC conducted its review in accordance with Public Resources Code Sections 25500 et seq. The CEC found that its adopted conditions ensured that the Crockett lease facilities would have no significant adverse environmental impacts.²⁵ Consistent with CEQA Guideline 15091(a), we adopt the conditions of certification adopted by the CEC that are applicable to the Crockett lease facilities.²⁶

6. Categorization and Need for Hearings

In Resolution ALJ 176-3046, dated September 7, 2000, the Commission preliminarily categorized this proceeding as ratesetting and preliminarily determined that an evidentiary hearing would be necessary. Based on the record, we affirm that this is a ratesetting proceeding.

There does not appear to be a need for an evidentiary hearing. There are no disputed facts that are material to today's decision. Additionally, PG&E has

²⁴ Pub. Res. Code § 21000, et seq.

²⁵ CEC Adoption Order No. P800-93-04, Docket No. 92-AFC-1, p. 1. No environmental concerns were raised in this proceeding and we have not discovered any.

²⁶ Under CEQA Guideline 15091(a)(1), the Commission may find that the appropriate mitigation measures are either required or incorporated into the project.

asked for a hearing only if the Commission imposes a fine.²⁷ Today's decision does not impose a fine. Therefore, consistent with Rule 6.5(b) of the Commission's Rules of Practice and Procedure (Rule), we hereby reverse our preliminary determination in Resolution ALJ 176-3046 that an evidentiary hearing would be necessary.²⁸ We now find that a hearing is not necessary.

7. Comments on the Draft Decision

The draft decision of the assigned Administrative Law Judge (ALJ) was mailed to the parties in accordance with Section 311(g)(1) of the Public Utilities Code and Rule 77.7. PG&E filed comments on the draft decision on July 30, 2004. In its comments, PG&E argues that the draft decision should be modified to approve the Crockett lease agreement retroactively under Section 851 or, alternatively, exempt the Crockett lease agreement from Section 851 pursuant to Section 853(b) for the period of time prior to today's decision.

PG&E's comments do not identify any factual, legal, or technical errors in the draft decision. Therefore, in accordance with Rule 77.3, there have been no substantive revisions to the final decision adopted by the Commission in response to PG&E's comments.²⁹

8. Assignment of Proceeding

Loretta M. Lynch is the Assigned Commissioner and Timothy Kenney is the assigned ALJ in this proceeding.

²⁷ A.00-08-022, Amendment dated October 30, 2000, pp. 11-12, 18.

²⁸ Rule 6.5(b) provides that if the Assigned Commissioner changes the preliminary determination on the need for hearings, the matter shall be placed on the Commission's consent agenda for approval of that change.

²⁹ Rule 77.3 states: "Comments shall focus on factual, legal or technical errors in the proposed decision and in citing such errors shall make specific references to the record. Comments which merely reargue positions taken in briefs will be accorded no weight are not to be filed."

Findings of Fact

1. In A.00-08-022, PG&E requests retroactive approval of the Crockett lease agreement pursuant to Section 851.
2. PG&E signed the Crockett lease agreement in December 1994. The agreement allows Crockett to construct facilities on 25,000 square feet of PG&E's real property for the purpose of connecting the 240 MW CCP to PG&E's transmission grid.
3. Crockett constructed generation tie facilities on PG&E's property pursuant to the Crockett lease agreement. Crockett has used these facilities since 1996 to deliver power from the CCP to PG&E's transmission grid.
4. PG&E consummated the Crockett lease without obtaining prior approval from the Commission pursuant to Section 851.
5. The 240 MW of power provided by the CCP provides substantial benefits to PG&E's ratepayers and the public at large.
6. The Crockett lease serves the public interest by enabling Crockett to deliver 240 MW of power to PG&E's transmission grid.
7. The public interest is served when utility property is used for other productive purposes without interfering with the utility's operations or the provision of utility service to the public.
8. The Crockett lease allows PG&E's property to be used for other productive uses without interfering with PG&E's ability to serve the public.
9. There is no evidence in this proceeding that approval of the Crockett lease pursuant to Section 851 will adversely affect the public interest.
10. There is no evidence in this proceeding that Crockett has not dealt in good faith and for value with respect to the Crockett lease agreement.

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

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

13. GO 69-C authorizes utilities to grant licenses for the use of their property without having to obtain prior approval from the Commission pursuant to Section 851 if certain conditions are met. One such condition is that the license must be for a "limited use" of the utility's property.

14. The facilities constructed on PG&E's property pursuant to the Crockett lease are not a limited use of PG&E's property; they are a substantial and permanent use of PG&E's property.

15. The activities contemplated by the Crockett lease have already occurred.

16. The CEC conducted an environmental review of the Crockett lease facilities in accordance with applicable California law. The CEC found that its adopted conditions would ensure that the Crockett lease facilities would have no significant adverse environmental impacts.

17. In Resolution ALJ 176-3046, the Commission preliminarily determined that this proceeding should be categorized as ratesetting and that hearings would be necessary.

18. There are no contested factual issues.

19. There were no protests or other opposition to A.00-08-022, as amended.

Conclusions of Law

1. This is a ratesetting proceeding.
2. There is no need for hearings.
3. Section 851 requires a public utility to obtain authority from the Commission prior to leasing to a third party any utility property that is necessary

or useful in the performance of the utility's duties to the public. Any such lease that is executed without Commission authorization is void under the statute.

4. The purpose of Section 851 is to enable the Commission to review a proposed transaction, before it takes place, in order to take such action as the public interest may require.

5. The purpose of Section 851 would be frustrated if PG&E were granted retroactive authority under Section 851 for the Crockett lease.

6. The Crockett lease serves the public interest and should be approved pursuant to Section 851. The approval should apply prospectively beginning on the effective date of today's decision. PG&E's request for retroactive approval of the Crockett lease should be denied.

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

8. Crockett's rights and obligations under the lease agreement remain in full force and effect for the period of time prior to today's decision.

9. The Crockett lease agreement should not be exempted from Section 851 pursuant to Section 853(b).

10. PG&E should be authorized to make minor modifications to the Crockett lease agreement without having to obtain additional Section 851 authority for the modifications. A minor modification is one that satisfies all the criteria enumerated in the body of this decision.

11. The appropriate regulatory treatment of the costs and revenues associated with the Crockett lease should be decided by the Commission in PG&E's GRC proceedings or other appropriate proceedings.

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

13. The Crockett lease does not qualify as a GO 69-C license agreement for the reasons stated in the body of this decision.

14. CEQA requires an environmental review to occur before an activity takes place. CEQA review of the Crockett lease agreement by the Commission is moot, as the activities contemplated by the agreement have already occurred.

15. The Commission's approval of the Crockett lease should be conditioned on the parties to the lease agreement complying with any conditions adopted by the CEC that pertain to the Crockett lease facilities.

16. The following order should be effective immediately so that the Crockett lease may become effective under Section 851 as soon as possible.

O R D E R

IT IS ORDERED that:

1. The lease agreement between Pacific Gas and Electric Company (PG&E) and Crockett Generation (Crockett) that is the subject of Application 00-08-022, as amended, is approved pursuant to Public Utilities Code Section 851. This approval applies prospectively beginning on the effective date of this Order.

2. PG&E's request for retroactive approval of the Crockett lease is denied.

3. PG&E is authorized pursuant to Section 851 to make minor modifications to the Crockett lease agreement. A minor modification is one that satisfies all the criteria enumerated in the body of this decision.

4. The authority granted by this Order is conditioned on the parties to the Crockett lease agreement complying with all conditions of certification adopted by the California Energy Commission (CEC) in CEC Adoption Order No. P800-93-004 that apply to (i) the facilities constructed pursuant to the Crockett lease agreement, and (ii) the activities permitted by the lease agreement. Failure to comply with the conditions adopted by the CEC shall invalidate the authority granted by this Order.

5. This proceeding does not require a hearing.
6. This proceeding is closed.

This order is effective today.

Dated August 19, 2004, at San Francisco, California.

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

I dissent.

LORETTA M. LYNCH
Commissioner

I will file a concurrence.

CARL W. WOOD
Commissioner

*Concurrence of Commissioner Carl Wood
Crockett Generation – Section 851
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I believe that the Commission should not be tolerant of a failure to comply with Section 851, or with any other legal obligations under the Commission's authority. However, I see no point to pursuing sanctions against Pacific Gas Electric Company (PG&E) in this case. PG&E should have sought timely 851 approval, which would have enabled the Commission to consider the terms of the transaction and assign the benefits of any net revenues. Yet, PG&E had informed the Commission of the planned use of the land when it requested and received a Certificate of Public Convenience and Necessity to build the generation tie itself. The Energy Commission took into account any relevant environmental factors when it granted Crockett a permit to construct the line and PG&E apparently complied with required mitigation. The rental revenues have been minimal.

I am more concerned that, in the future, PG&E identify and report these proposed transactions before they occur and seek Commission approval, as appropriate. It appears that PG&E has heard this message and has improved its internal screening of these transactions. If, nonetheless, the company flouts the law in the future, the Commission should then impose significant penalties.

/s/ CARL WOOD

Carl Wood
Commissioner

San Francisco, California
August 19, 2004

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