

Decision 98-01-053 January 21, 1998

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BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Joint Application of Pacific Gas and Electric Company (U 39-E), San Diego Gas & Electric Company (U 902-E), and Southern California Edison Company (U 338-E) for an Order under Public Utilities Code Section 853 Exempting Them from the Provisions of Section 851 or in the Alternative for Authority to Convey Operational Control of Designated Transmission Lines and Associated Facilities to an Independent System Operator.

ORIGINAL

Application 97-11-038
(Filed November 25, 1997)

O P I N I O N

Summary

We approve the joint application of Pacific Gas and Electric Company (PG&E), San Diego Gas & Electric Company (SDG&E), and Southern California Edison Company (Edison) (joint applicants) for authority to convey operational control of designated transmission lines and associated facilities to the Independent System Operator (ISO) pursuant to Public Utilities (PU) Code Section 851.

Procedural Background

Joint applicants filed their application on November 25, 1997. The assigned administrative law judge (ALJ) issued an order shortening time for protests and responses to December 10, 1997. The Office of Ratepayer Advocates (ORA), the Modesto Irrigation District (MID), and the Transmission Agency of Northern California (TANC) filed protests or responses. Joint applicants filed a reply to the protests and responses on December 12, 1997. Joint applicants filed a completed form of agreement with the ISO (Transmission Control Agreement) to implement transfer of control on January 6, 1998. The assigned ALJ issued a ruling on January 7, 1998 inviting comment on a draft decision. The joint applicants commented on January 16, 1998.

Request for Exemption under PU Code Section 853(b)

Joint applicants request that the Commission find, pursuant to PU Code Section 853(b), that the application of PU Code Section 851 is not necessary in the public interest. Section 851 of the PU Code provides that no public utility may dispose of any part of 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. PU Code Section 853(b) authorizes the Commission to exempt any utility from the requirements of PU Code Section 851, subject to such terms and conditions as we deem necessary to protect the interests of the affected ratepayers.

Our cases show major differences among the types of applications that have received exemption pursuant to PU Code Section 853(b) from the requirements of PU Code Section 851.

One situation in which we have applied PU Code Section 853(b) is to provide a general rule exempting classes of transactions from PU Code Section 851. For example, we have determined that no purpose would be served by requiring approval under PU Code Section 851 for the encumbrance of property used by passenger stage carriers, because sufficient competition exists to allay concern that property required for the public convenience and necessity might not be available. (*In re Application of SuperShuttle of Los Angeles, Inc.*, 28 CPUC2d 348 (1988).)

Another situation in which we have applied PU Code Section 853(b) is to provide after-the-fact relief from the consequences of PU Code Section 851, which provides that any transaction falling under its provisions that has not received the prior approval of this Commission is void. (*See, e.g., In re Application of Snyder*, (Decision (D.) 93-07-009, approving 1973 sale to prevent certificate of convenience and necessity from reverting to estates of last permitted holders).

For other situations, however, the reasons for allowing exemption pursuant to PU Code Section 853(b) from PU Code Section 851 are less compelling, because the general standards we apply to approvals under the two sections are very similar, if not identical. For that reason, we will deny the joint applicants' request for an exemption under PU Code Section 853(b).

Request for Authorization under PU Code Section 851

Requests Made by the Joint Applicants

Joint applicants seek (1) what they term "ministerial" approval of the transfer to the ISO of operational control of specified transmission lines under the terms and conditions of the Transmission Control Agreement, which was approved by the Federal Energy Regulatory Commission (FERC) on December 17, 1997; (2) ministerial approval of "arrangements" with the ISO to use portions of the joint applicants' communications infrastructure, grid monitoring and control systems, computers, and computer software (collectively, energy management systems); (3) a determination that no review under the California Environmental Quality Act (CEQA) is necessary; (4) an express condition of transfer that affords the joint applicants "the opportunity for full recovery" of their respective competition transition costs and restructuring-related implementation costs as set forth in PU Code Sections 367 to 376 as they existed on October 1, 1997; (5) an express condition of transfer that joint applicants have the ability to finance the transition costs included in such charges or amounts as well as the right of the transition property owner to collect fixed transition amounts to the extent set forth in PU Code Sections 840 to 847 as they existed on October 1, 1997; and (6) recognition that the transfer of operational control of the specified transmission facilities and associated facilities also transfers responsibility for ensuring short- and long-term reliability to the ISO.

Positions of Other Parties

ORA

ORA supports the concept of transfer of operational control, but makes four points: (1) transfer of control should be deemed to be in the public interest for only so long as it remains in the hands of the ISO; (2) joint applicants should have no right to revoke the transfer as a result of future amendments to the PU Code; (3) the transfer of responsibility for reliability needs to be put in proper context; and (4) joint applicants provided only the form of Transmission Control Agreement, but even that is subject to change, and material terms are open.

Under PU Code Section 362, ORA argues, this Commission has a continuing role in assuring system reliability. In particular, if the joint applicants were to terminate the transfer of control to the ISO due to a purported reservation of rights to do so in the event of changes in legislation, it should be made clear that the Commission's regulation of the joint applicants' transmission facilities, to the extent not preempted by the FERC, would resume.

ORA also disputes that the joint applicants should have any permanent right to the provisions of the PU Code as it existed on October 1, 1997.

ORA notes that the joint applicants will continue to be the owners of the transmission facilities, will continue to perform transmission-related functions, and will continue to interact with it as the operators of primary distribution systems in their respective territories. For these reasons, the most that can be said is that *primary* responsibility for system reliability will rest with the ISO.

Finally, ORA notes that the application does not contain an executed agreement with the ISO. Many of the important terms of the Transmission Control Agreement were unknown at the time the application was filed.

MID

MID has an existing interconnection agreement with PG&E. Under that agreement, MID claims rights to certain services provided over transmission facilities that PG&E proposes to transfer control of to the ISO. MID requests that we condition the transfer upon the ISO's recognition of MID's rights under its agreement with PG&E.

TANC

TANC tells us that it is a participant in the California-Oregon Transmission Project (COPT), which is a 500 kV transmission project that extends from the California-Oregon border to the PG&E Tesla Substation. Additionally, TANC informs us that the COPT is interconnected with and operates in coordination with other facilities that the joint applicants propose to transfer operational control of to the

ISO. However, TANC does not take any position with respect to the application other than to explain why it has an interest in the application.

Reply of the Joint Applicants

Joint applicants reply by asserting a "fundamental right" under PU Code Section 851 to ensure that the proposed transfer is made for proper consideration; in this case, "the opportunity to fully recover transition costs, restructuring related implementation costs, and the transmission [sic¹] property owner's right to collect transition costs." They agree with ORA that if the transfer to the ISO were terminated, the Commission would regulate the operation of the facilities by the joint applicants, to the extent the FERC's jurisdiction were not plenary.

Joint applicants disagree with ORA that the lack of an executed agreement with the ISO is a problem, because "it is untenable" for both the FERC and the Commission to have jurisdiction over the same agreement and, in any event, all that is required is a "proposed" agreement, which joint applicants tendered with the application and which they provided in fact with their January 6, 1998 filing.

Joint applicants agree with ORA that the transfer of responsibility for operation of the system to the ISO should be termed "primary responsibility."

Joint applicants assert that the issues raised by MID are within the exclusive jurisdiction of the FERC.

Discussion

Standard of Review

As joint applicants note, PU Code Section 851 is broad in scope, and the proposed transfer falls under the prohibition against "otherwise disposing of" utility property that is used or useful without the Commission's prior approval, even if it might not constitute a sale, lease, assignment, mortgage or encumbrance. In addition, pursuant to PU Code Section 362, in a PU Code Section 851 proceeding, we "must

¹ We think that the reference is to "transition" property, as defined in PU Code Section 840(f).

ensure that facilities needed to maintain the reliability of the electric supply remain available and operational.”

We discharge our obligations under PU Code Sections 362 and 851, consistent with PU Code Section 330, as required by PU Code Section 365. PU Code Section 300 contains several important policy goals of the Legislature: a competitive marketplace for electrical generation; continued regulation of the delivery of electricity over transmission and distribution systems to assure system safety, reliability, environmental protection, and fair access; enhanced reliability of interconnected regional transmission systems; reliability standards set by the ISO and the Commission; and the committing of operational control of both publicly owned and investor owned electrical utilities to the ISO.

These policy goals have been set such that it would be improper for us to question the *ends* sought by joint applicants. But we do not think that the Legislature meant us to neglect the *means* by which these ends are to be achieved. This principle also prevents us from treating this as a ministerial decision in which we have no judgment to exercise. The proposal before us is not the only one that the ISO and joint applicants could have advanced, and we should not approve if we are not satisfied that it is consistent with the goals of the Legislature set forth in PU Code Section 330. This does not bring us into conflict with the jurisdiction of the FERC, which we have previously acknowledged, and to which the Legislature looks for pricing methodologies to result in an equitable return on capital investment in transmission facilities for all ISO participants. (*See* PU Code § 330(m).)

CEQA

The subject matter of this application embraces the operation of existing facilities used to convey electric power. As such, the approval is categorically exempt from the environmental impact report procedures of CEQA. (Rule of Practice and Procedure 17.1(h)(A)(2).)

MID's Existing Rights

The ISO tariff in the form filed at the FERC on August 15, 1997, deals at length with contractual encumbrances on transmission facilities that are made subject to an agreement with the ISO. In particular, Section 2.4.4.4.1.1 states that the "ISO will have no role in interpreting Existing Contracts." Therefore, the ISO, consistent with its FERC tariff, could not "recognize" MID's rights under its existing agreement with PG&E. Rather, the tariff provides that the "Participating TO" (in this case, PG&E) is to attempt to come to agreement with MID and to provide the ISO with joint operating instructions. If that is not possible, MID and PG&E are relegated to the dispute resolution mechanisms included in their existing agreement. Pending resolution, the ISO will implement PG&E's instructions.

This provision adequately protects MID's interests under the existing arrangements by preserving the contractual relationship between MID and PG&E. MID has failed to show how the provisions in the ISO tariff put MID in any different position than it now occupies. We note that MID did not prevail on a related issue before the FERC. (81 FERC ¶ 61,122, at 61,170.) In addition, the FERC explicitly ruled that "[t]o the extent than an existing contract provides for the right to schedule additional transmission service to accommodate load growth, the ISO must accommodate such increased schedules." (*Id.* at ¶61,273.) This is exactly the concern that MID expressed in its protest.

Section 362 Analysis

In proceedings pursuant to PU Code Section 851, such as this application, we are to "ensure that facilities needed to maintain the reliability of the electric supply remain available and operational." There can be no serious question that the transmission facilities under consideration are needed to maintain the reliability of the electric supply. Nor can there be much question that the ISO has the obligation to ensure efficient use and reliable operation of the transmission grid. (PU Code § 345.) The ISO is, in fact, to adopt inspection, maintenance, repair, and replacement standards for facilities under its control. (PU Code § 348.) This is what Section 14.1 of the

Transmission Control Agreement between the ISO and each of the joint applicants provides. Until those standards have been made effective, moreover, the existing maintenance, inspection, repair and replacement standards of the joint applicants continue to apply. (Section 14.2 of the agreement.)

In addition, the FERC requires that prior to the effective date of the Agreement that the ISO, the Power Exchange, and the CEO of each joint applicant certify to the FERC prior to the commencement of operations that all the necessary features are in place to ensure reliable grid operations when the ISO commences operations and that sufficient pre-operational testing will be performed. (81 FERC ¶61,222, at 61,224.) We will require the same certification to be made to this Commission as a condition of transfer. Also, this Commission plans to be active in developing appropriate measures to promote system reliability as it is affected by distribution system reliability. As a result, we will necessarily be involved in the continued development of transmission reliability measures by the ISO and others.

Scope of Approval under PU Code Section 851

Under PU Code Section 851, it is important that the scope of approval be neither overinclusive nor underinclusive. It was of concern that at the time the application was filed that the agreement was still being developed and we did not have before us important appendices to the agreement that contained material terms. That deficiency was cured by the January 6, 1998 filing of the completed form of the agreement (subject to the review of the FERC), which contains appendices to the agreement that were missing from the form attached to the application.

Another aspect of the agreement as presented in the application troubled us. In the form attached as Appendix F to the application, the Transmission Control Agreement provides for five appendices: facilities and equipment; encumbrances; maintenance standards; master definitions supplement; and nuclear protocols. These appendices, which contain material terms and conditions of the transfer, were not even provided in form with the application. To the extent that they govern matters related to the reliable operation of the facilities, their absence from the

record would have prevented us from discharging our obligations under PU Code Section 362 to assure that facilities required for the reliable operation of the system remain available and operational. This is true, even though the FERC has jurisdiction over its terms and conditions. However, review and approval are the not same thing. We review the form of agreement as submitted to the FERC to satisfy ourselves that the transfer of control under the terms and conditions contained in the Transmission Control Agreement will be in the public interest, not to approve the Transmission Control Agreement, itself.

We have now been able to review the Transmission Control Agreement in its entirety. The Transmission Control Agreement contains many provisions that are designed to maintain and enhance system reliability. The Transmission Control Agreement provides an adequate legal framework for the implementation of the ISO's responsibilities under PU Code Section 345. The Transmission Control Agreement contains a detailed listing of the particular facilities to be placed under the ISO's control together with warranties from joint applicants respecting the state of compliance of their systems with applicable reliability criteria. The ISO assumes contractual duties under the Transmission Control Agreement to exercise its control in accordance with applicable reliability criteria, including the operating criteria established by the operating licenses for nuclear generating units (which are detailed in an appendix) and to monitor and observe real time system conditions related to reliability. The Transmission Control Agreement outlines standards for the maintenance, inspection, repair, and replacement of transmission facilities to provide for high-quality, safe, and reliable service, taking into account cost, local geography and weather, applicable reliability criteria, and national electric industry practice. The Transmission Control Agreement provides for detailed, objective measures of performance with respect to system reliability as affected by maintenance and operation activities. Parties are mutually obligated to inform each other of significant events, such as extreme temperatures, storms, floods, fires, earthquakes, earth slides, sabotage, civil unrest, equipment outages, and the like, which that affect the operation of the system. Parties are also mutually obligated to employ only persons

who are appropriately qualified, skilled, and experienced to discharge their duties related to the Transmission Control Agreement.

In this connection, we note that the October 30, 1997 FERC order is conditional and subject to the outcome of future proceedings. We also note that the FERC, which has had this matter before it long before the present application was filed, was willing to grant its interim approval even though the ISO had not yet adopted all required reliability related standards, protocols, and guidelines. (See 81 FERC ¶ 61,122, at 61,210.) We take this as another indication that sufficient reliability safeguards are now in place to permit the transfer.

One of the recitals in the agreement is problematic, however: The joint applicants "are entering into this agreement transferring Operational Control of their transmission facilities in reliance upon California Public Utilities Code Section 367, 368, 375, 376 and 379 enacted as part of AB 1890 which contains assurances and schedules with respect to recovery of transition costs."

We can understand why, out of an abundance of caution, joint applicants might not wish, by their silence, to waive any rights that they might have to assert under the PU Code as it existed at any particular point in time. However, even as against the ISO, the facts recited are not conclusively presumed to be true, because the recital touches upon a contractual consideration. (See Evid. Code § 622.) Out of our own abundance of caution, therefore, we will state that we take no position in this opinion with respect to joint applicants' theory that the bargained-for consideration involved in this transfer of control is some particular regulatory constellation as it existed on October 1, 1997. The law as it stood on that date will have to be interpreted in light of the law as it stands as of the date of any future controversy. In particular, moreover, we note that any future transfer of operational control of the transmission facilities from the ISO will, itself, be subject to review under PU Code Section 851, whether it is to the joint applicants or to some other party. We note that Section 3.3.3 of the Transmission Control Agreement provides that any withdrawal from the Transmission Control

Agreement is expressly conditioned upon the withdrawing party obtaining any necessary regulatory approvals for such withdrawal.²

Moreover, to the extent that joint applicants have the right to be fairly compensated for the use of their respective transmission systems, that right is sufficiently vindicated by the charges they will be entitled to collect pursuant to the ISO's FERC-approved tariffs. Joint applicants are entitled to no less for the use of their transmission systems, but they are also entitled to no more. Their rights for "an opportunity for full recovery" of transition costs and implementation costs are separate and distinct from their rights to be compensated for the use of their transmission systems. Those distinct rights must be vindicated under separate mechanisms from the agreements regarding operation of the transmission system. We cannot, however, provide joint applicants a guarantee in the abstract as to what the law will require of those mechanisms at some unknown date in the future. We agree with ORA's position in this respect.

Findings of Fact

1. Joint applicants are each a utility subject to the jurisdiction of this Commission.
2. Joint applicants seek (a) what they term "ministerial" approval of the transfer to the ISO of operational control of specified transmission lines under the terms and conditions of the Transmission Control Agreement approved by the FERC on October 31, 1997; (b) ministerial approval of "arrangements" with the ISO to use portions of the joint applicants' communications infrastructure, grid monitoring and

² Joint applicants, in their comments on the draft decision, notes that the Transmission Control Agreement does not permit the ISO to assign operational control to third parties. The only situation in which the issue is likely to arise, therefore, is if operational control is to be returned to the joint applicants. The joint applicants make two arguments: first, that the Transmission Control Agreement contemplates such a transfer, and, second, that the ISO is not subject to the jurisdiction of the Commission under PU Code Section 851. If we were able to approve the specific terms and conditions of the Transmission Control Agreement, the joint applicants' first argument might have some merit. The second argument fails because our jurisdiction under PU Code Section 851 is over utility property, and the subject matter of the Transmission Control Agreement remains utility property even under the control of the ISO.

control systems, computers, and computer software (collectively, energy management systems); (c) a determination that no review under CEQA is necessary; (d) an express condition of transfer that affords the joint applicants "the opportunity for full recovery" of their respective competition transition costs and restructuring-related implementation costs as set forth in PU Code Sections 367 to 376 as they existed on October 1, 1997; (e) an express condition of transfer that joint applicants have the ability to financing the transition costs included in such charges or amounts as well as the right of the transition property owner to collected fixed transition amounts to the extent set forth in PU Code Sections 840 to 847 as they existed on October 1, 1997; and (f) recognition that the transfer of operation control of the specified transmission facilities and associated facilities also transfers responsibility for ensuring short- and long-term reliability to the ISO.

3. MID has an existing interconnection agreement with PG&E.
4. The subject matter of this application embraces the operation of existing facilities used to convey electric power.
5. The transmission facilities under consideration are needed to maintain the reliability of the electric supply.
6. The ISO has the obligation to ensure efficient use and reliable operation of the transmission grid.
7. The ISO tariff in the form filed at the FERC on August 15, 1997, deals at length with contractual encumbrances on transmission facilities that are made subject to an agreement with the ISO, and Section 2.4.4.1.1 states that the "ISO will have no role in interpreting Existing Contracts."
8. The FERC requires that, prior to the effective date of the Transmission Control Agreement, the ISO and the CEO of each joint applicant certify to the FERC prior to the commencement of operations that all the necessary features are in place to ensure reliable grid operations when the ISO commences operations and that sufficient pre-operational testing will be performed.
9. The Transmission Control Agreement filed by the joint applicants is complete, subject to FERC approval.

10. The Transmission Control Agreement contains many provisions that are designed to maintain and enhance system reliability.

11. The transfer of control contemplated by the application is an integral part of electrical restructuring and should occur in coordination with the commencement of direct access, as provided in Decision (D.) 97-12-131.

Conclusions of Law

1. The proposed transfer falls under the prohibition against "otherwise disposing of" utility property that is useful or necessary without the Commission's prior approval set forth in PU Code Section 851.

2. The same general standard applies to requests for allowing exemption pursuant to PU Code Section 853(b) from PU Code Section 851.

3. Joint applicants' request for an exemption under PU Code Section 853(b) should be denied.

4. The Transmission Control Agreement ensures that facilities needed to maintain the reliability of the electric supply remain available and operational.

5. The approval is categorically exempt from the environmental impact report procedures of CEQA.

6. The ISO tariff adequately protects MID's interests under the existing arrangements by preserving the contractual relationship between MID and PG&E.

7. The transfer of operational control of the facilities to the ISO is consistent with existing law and is in the public interest.

8. The same certification required to be made to the FERC by the ISO and the CEOs of joint applicants should also be made to this Commission as a condition of transfer.

9. The joint applicants' request for an express condition of transfer that affords the joint applicants "the opportunity for full recovery" of their respective competition transition costs and restructuring related implementation costs as set forth in PU Code Sections 367 to 376 as they existed on October 1, 1997 should be denied without prejudice.

10. The joint applicants' request for an express condition of transfer that joint applicants have the ability to finance the transition costs included in such charges or amounts as well as the right of the transition property owner to collect fixed transition amounts to the extent set forth in PU Code Sections 840 to 847 as they existed on October 1, 1997, should be denied without prejudice.

11. The transfer of operational control of the specified transmission facilities and associated facilities also transfers primary responsibility for ensuring short- and long-term system reliability from joint applicants to the ISO.

12. Joint applicants should continue to be primarily responsible for ensuring short- and long-term reliability of the electrical distribution system.

ORDER

IT IS ORDERED that:

1. Authority is granted to convey operational control of designated transmission lines and associated facilities to the Independent System Operator (ISO) pursuant to Public Utilities (PU) Code Section 851, subject to the terms and conditions substantially in the form of the Transmission Control Agreement filed by Pacific Gas and Electric Company (PG&E), San Diego Gas & Electric Company (SDG&E), and Southern California Edison Company (Edison) (joint applicants) on January 6, 1998,

2. Joint applicants shall provide to the assigned Commissioner the certificates required by the Federal Energy Regulation Commission in connection with the transfer, which shall be addressed to this Commission as well.

3. Joint applicants shall provide to the assigned Commissioner a verified, executed copy of the Transmission Control Agreement in the form approved by the Federal Energy Regulatory Commission with this Commission, including all appendices and all documents incorporated by reference that are not tariffs promptly after execution of the Transmission Control Agreement.

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4. Following satisfactory compliance with Ordering Paragraphs 2 and 3 and the issuance of the ruling of the Coordinating Commissioner, as provided in Decision 97-12-131, the conveyance of operational control shall become effective on the date that direct access commences.

5. Application 97-11-038 is closed.

This order is effective today.

Dated January 21, 1998, at San Francisco, California.

P. GREGORY CONLON
President

JESSIE J. KNIGHT, JR.

HENRY M. DUQUE

JOSIAH L. NEEPER

RICHARD A. BILAS

Commissioners