

Decision 99-04-047 April 22, 1999

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 853 of the California Public Utilities Code for an Exemption from the Requirements of PUC Section 851, or, Alternatively for an Order Under PUC Section 851 Approving 73 Sales Transaction for Certain Public Utility Properties

ORIGINAL

Application 99-01-001
(Filed January 5, 1999)

O P I N I O N

1. Summary

Pacific Gas and Electric Company (PG&E) seeks an exemption from requirements of the Public Utilities Code covering sale of utility assets in 73 sales agreements with individual customers that PG&E entered into between 1985 and 1991. PG&E states that, because of the nature of the agreements, it was under the mistaken impression that sales provisions of the Public Utilities Code did not apply. If an exemption is not granted, PG&E asks that the Commission approve the sales retroactively. The application has been protested by one party. Our order today reviews and approves the agreements at issue. This proceeding is closed.

2. Factual Background

The agreements each involve the sale of PG&E facilities previously operated by PG&E solely to provide electric service to an individual customer. The purchaser in each case was the individual customer served by the facilities. Generally, the purchasers sought to buy the facilities in order to take advantage

of lower rate options, or they asked to acquire the facilities for their own convenience.

Under PG&E's electric tariffs, customers with a maximum demand between 500 and 4,000 kilowatts are eligible to receive primary distribution service. Customers with a maximum demand of 4,000 kilowatts or more are eligible to receive transmission service. Each level of service carries a different rate, with transmission service being the lowest rate alternative and secondary service the most costly. In order to qualify for the lower rate, purchasers typically must construct or buy the facilities necessary to receive service at the desired voltage. The purchasers in the transactions here elected to buy PG&E's facilities.

Section 851 of the Public Utilities Code requires Commission authorization for the sale or transfer of any utility property that is useful or necessary in public service. Without such approval, any such purported sale is deemed void.

PG&E states that it entered into these individual agreements without seeking Commission approval because it believed at the time that approval was not necessary if facilities were used to provide service solely to individual customers. PG&E states that it believed that once the facilities were sold to the individual customers served, the facilities were no longer necessary or useful and thus did not come under the requirements of Section 851.

PG&E states that, in light of Commission decisions in recent years, PG&E has since determined that Commission approval should be obtained pursuant to Section 851 for these sales. In particular, PG&E notes Decision (D.) 96-02-054, 65 CPUC2d 4, in which Southern California Edison Company was authorized to sell certain electric facilities to the trustees of California State University.

3. PG&E's Request for Exemption

The Commission is authorized under Section 853(b) of the Code to grant exemptions from Section 851 if such exemptions are in the public interest.

Section 853(b) provides:

"The commission may from time to time by order or rule, and subject to those terms and conditions as may be prescribed therein, exempt any public utility or class of public utility from this article if it finds that the application thereof with respect to the public utility or class of public utility is not necessary in the public interest."

The Commission has granted exemptions under Section 853(b) "to provide after-the-fact relief from the harsh consequences of Pub. Util. Code § 851, which provides that any transaction falling under its provisions that has not received the prior approval of th[e] Commission is void." (In re Pacific Bell (1995) 59 CPUC2d 237, 238-39.) The Commission also has granted exemptions on the basis that "(n)o benefit to the utility's customers would flow from an exercise of the provisions of Pub. Util. Code § 851." (In re Snyder (1993) 50 CPUC2d 327.)

PG&E states that an exemption is appropriate here to avoid the harsh consequences under Section 851 of rendering these agreements void. PG&E states that purchasers, acting in reliance on the agreements, have since taken possession of, maintained and operated the facilities. If the agreements were rendered void, PG&E and purchasers would be required to devote time and expense to negotiating and executing new agreements -- an effort, PG&E asserts, that would benefit no one.

PG&E states that declaring the transactions void would not benefit other customers. Each of the agreements concerns purchase by an individual customer of facilities used solely to provide electric service to that customer. Since the facilities were not used to serve other customers, PG&E states that there can be no negative impact in service on other customers. PG&E states that it has already

credited the net-after-tax proceeds from each sale to its ratepayers. PG&E states that the sales price in each agreement has been greater than or equal to replacement cost new less depreciation. Thus, PG&E states, its ratepayers have enjoyed a positive rate benefit as a result of the sales.

4. Alternative Relief

If an exemption is not granted, PG&E asks that the Commission approve the sales agreements after the fact pursuant to Section 851 of the Code.

Section 851 requires Commission authorization before a utility may sell, lease, assign, mortgage, or otherwise dispose of or encumber utility property necessary or useful to its operations. As the Commission stated in Re Pacific Bell, supra:

"The Commission reviews these transactions to ensure that the transactions will not impair the utility's ability to provide service to the public. The Commission must also ascertain whether the transactions are accounted for properly. This requires ensuring that any revenue from the transactions are accounted for correctly, and that the utility's rate base, depreciation, and other accounts accurately reflect the transactions. The Commission will also consider benefits to the utility's customers and the public from the proposed lease." (D.97-03-003, 1997 Cal. PUC LEXIS 124, at 3 (March 7, 1997).)

PG&E states that these tests have been met in the agreements here. First, since the facilities served individual customers, other customers were unaffected by the transfers. Second, the original cost and current book value of each of the facilities is included in Attachment A to the application, and PG&E states that the net-after-tax proceeds have been credited to ratepayers. Finally, PG&E asserts that ratepayers have benefited from the proceeds of the sales. PG&E states that, had purchasers elected to build their own facilities, the PG&E facilities would have been idled with no benefit to other ratepayers.

PG&E asks the Commission to waive the requirement of Rule 35 that the application be signed by all of the purchasers. PG&E cites the logistical difficulty of collecting signatures from purchasers or successors to purchasers in 73 agreements. That request was granted by Administrative Law Judge (ALJ) Ruling dated January 26, 1999.

5. Position of Ratepayer Advocates

The Office of Ratepayer Advocates (ORA) objects to the request for a Section 853(b) exemption, arguing that it would thwart the purposes of Section 851 if a utility felt that it could safely sell utility property without Commission approval, then seek an exemption from Code requirements. On the other hand, ORA does not oppose the utility's request that the transactions be reviewed and approved after the fact under Section 851, since the net-of-tax proceeds have been credited to PG&E's depreciation reserve for the benefit of ratepayers. For the same reason, ORA does not recommend that PG&E be fined under Section 2107¹ for its failure to seek approval of the sales. ORA notes that in an earlier, similar application (Application 98-08-018), PG&E was directed to search for and submit all past sales that may be subject to Section 851, instead of imposing penalties on PG&E for failing to do so. The 73 transactions reported here are the result of PG&E's search for all past sales, and ORA states that it has determined that the search was conducted thoroughly and reasonably.

¹ Section 2107 states, in part: "Any public utility which violates or fails to comply with any provision...of this part...or requirement of the commission...is subject to a penalty of not less than five hundred dollars (\$500), nor more than twenty thousand dollars (\$20,000) for each offense."

ORA analyzed accounting data supplied by PG&E and concluded that the utility had properly recorded sale proceeds for accounting purposes. Net-of-tax proceeds were applied in a manner that reduces rate base. ORA does not seek a hearing in this matter.

6. Protest of Modesto Irrigation District

The Modesto Irrigation District protests the application on grounds that the identity of customers who purchased the facilities should be disclosed in order to permit PG&E competitors to offer alternative service to some of these customers. The District also objects to granting a Section 853 exemption, arguing that Section 853 is a seldom-used procedure granted only in extraordinary circumstances. The District states that it does not object to approval of the sales agreements pursuant to Section 851, but it seeks a hearing to air the confidentiality issue.

PG&E responds that it is under regulatory requirements not to release customer-specific information except pursuant to Commission order or with the prior written consent of the customer. (D.97-10-031, *slip op.* at 12; see also Customer List OII, D.90-12-121, 39 CPUC2d 173 (1990).) PG&E argues that deregulation of the electric industry has been widely publicized, and it asserts that most of the customers who have purchased facilities are large businesses that can be presumed to be aware of alternative energy choices.

7. Discussion

Pub. Util. Code § 851 requires Commission authorization before a utility may "sell, lease, assign, mortgage, or otherwise dispose of or encumber" necessary or useful utility property. The purpose of the section is to enable the Commission, before any transfer of useful public utility property is consummated, to review the situation and to take such action, as a condition of

the transfer, as the public interest may require. (San Jose Water Co. (1916)
10 CRC 56.)

Another purpose of the Commission's review is to ensure that any revenue from the transaction is accounted for properly, and that the utility's rate base, depreciation, and other accounts correctly reflect the transaction. (In re Pacific Bell, D.98-07-006 (July 2, 1998).)

In D.99-02-062, issued on February 18, 1999, we granted Section 851 approval retroactively to 106 PG&E single-customer agreements similar to those examined here. We stated:

"We have no reason to believe, and no party suggests, that PG&E's failure to obtain Section 851 approval for these single-customer sales of utility equipment was anything more than a mistake. ORA has conducted a review of the transactions, has suggested certain accounting corrections with which the utility has complied, and has concluded that revenue from the sales was properly recorded. We accept PG&E's representation that the revenue has been adjusted to reflect reduced rate base in rate cases in prior years, as urged by ORA." (D.99-02-062, *slip op.* at 7-8.)

We make the same finding in this application. Further, we agree with ORA and with the Modesto Irrigation District that granting a Section 853 exemption for these transactions is inappropriate. As the District notes, this seldom-used procedure is invoked in extraordinary cases. In the Snyder case cited by PG&E, for example, we faced the question of whether to void the transfer of a 25-customer water company that had been made without approval to unsophisticated buyers and sellers two decades earlier. On those unusual facts, we decided that an exemption was appropriate.

Rather than grant exemptions, we have on occasion granted Section 851 approval to transfers nunc pro tunc, i.e., with the same effect as if done earlier, where the failure to obtain approval has been deemed inadvertent and where our

examination of the transfer revealed no prejudice to ratepayers. (See, e.g., Local Exchange Service, D.97-01-015; WinStar Communications (1995) 59 CPUC2d 635.) Here, ORA has examined these transactions and has concluded that they were properly recorded and that after-tax gains were applied to reduce rate base, thus benefiting PG&E ratepayers. We agree with ORA that after-the-fact approval under Section 851 is appropriate, based on the record before us. Our order today gives Section 851 approval to these transactions on a nunc pro tunc basis.

We agree with ORA that penalties are not appropriate. Among other things, penalties could discourage utilities from coming forward for review and correction of errors made inadvertently.

We do not believe that the Modesto Irrigation District's protest warrants a hearing. A review of the exhibits to the application demonstrates that the District has had the opportunity to review the terms of each of the sales documents in question. The sales agreements (Application, Exhibit A) and the accounting information (Application, Exhibit C) all are part of the public record, with only the customer's identity and location redacted. Even the sales prices are provided in the exhibits, since that information is part of the necessary accounting data.

PG&E has presented the stronger case for maintaining confidentiality of the names and locations of the customers. The agreements were signed between 1985 and 1991, at a time when customers were under the impression that regulatory disclosure of their names was not required. PG&E adds:

"All of the customers with sales agreements in this proceeding are eligible for direct access service over PG&E's system, regardless of whether or not they own the facilities in question. In fact a number of the accounts obtain energy from sources other than PG&E. Obviously, these customers have taken advantage of the choices available to them. And with all the information which has been disseminated to the public and to customers over the last year, these large, sophisticated customers undoubtedly are well aware of their options." (PG&E Reply to Opposition, p. 5.)

California courts have held that a customer has a constitutional right of privacy in his records. The test is whether a person has exhibited a reasonable expectation of privacy. (Burrows v. Superior Court (1974) 13 Cal.3d 236; see also People v. Chapman (1984) 36 Cal.3d 98.) In our earlier decision dealing with 106 similar sales agreements, we concluded that the District had not made a persuasive case for requiring that the names and locations of the individual customers be made public. We reach the same conclusion in this application.

PG&E argues that environmental review of the Sale and Purchase Agreements is not required under applicable law. We do not adopt PG&E's reasoning on this issue, but reach a similar conclusion. Pursuant to the California Environmental Quality Act (CEQA), the Commission considers the environmental consequences of projects that are subject to discretionary review by the Commission. Accordingly, sales of utility assets under Section 851, which are subject to discretionary review by the Commission, are also subject to CEQA review. Based upon the record in the present case, however, the sales at issue here do not have the potential for causing a significant effect on the environment, so we need not perform CEQA review. (CEQA Guideline 15061(b)(3).)

In Resolution ALJ 176-3008 dated January 20, 1999, the Commission preliminarily categorized this proceeding as ratesetting, and preliminarily determined that hearings were not necessary. Our examination of the record persuades us that a public hearing is not necessary, nor is it necessary to alter the preliminary determination in ALJ 176-2999. The application is granted, subject to the terms and conditions set forth below.

8. Comments on Draft Decision

The draft decision of the ALJ in this matter was mailed to the parties in accordance with Pub. Util. Code Section 311(g) and Rule 77.1 of the Rules of

Practice and Procedure. Timely comments were filed only by ORA. ORA states it supports the draft decision and recommends its adoption.

Findings of Fact

1. Between 1985 and 1991, PG&E entered into 73 agreements with individual customers to sell them facilities that served only those individual customers.
2. The individual customers purchased the PG&E facilities in order to take advantage of lower rate options that required the customers to have such facilities.
3. PG&E did not seek approval for these sales under Pub. Util. Code § 851 under the mistaken belief that a sale to the customer of equipment benefiting only that customer was not covered by Section 851.
4. PG&E states that it has since determined that Commission approval should have been obtained for the sales in question.
5. PG&E seeks an exemption from the requirements of Section 851 or, alternatively, it seeks after-the-fact approval of these transactions pursuant to Section 851.
6. ORA opposes an exemption, but it does not object to after-the-fact Section 851 approval following review of the transactions.
7. ORA does not recommend that PG&E be penalized financially for failure to comply with Section 851.
8. An ORA analysis concludes that sale proceeds from these transactions were properly recorded and that after-tax gains from the sales were applied to reduce rate base, thus benefiting ratepayers.
9. The Modesto Irrigation District does not object to Section 851 approval of these transactions, but it protests that the identities of the customers in question should be made public.

Conclusions of Law

1. Pub. Util. Code § 851 requires Commission authorization before a utility may sell or otherwise dispose of or encumber necessary or useful utility property.
2. PG&E's failure to seek Section 851 approval of the transactions at issue was an error.
3. The sale proceeds were properly recorded and were adjusted to reflect reduced rate base in rate cases for prior years.
4. Section 853 exemptions from the requirements of Section 851 are granted in extraordinary cases.
5. The Commission has granted Section 851 approval to transfers nunc pro tunc where the circumstances warrant and where examination reveals no prejudice to ratepayers.
6. The Modesto Irrigation District protest as to confidentiality is unpersuasive in light of the Commission's policy of protecting the privacy of customer records.
7. A hearing is not warranted on the facts of this application.
8. The Commission should give after-the-fact Section 851 approval of these sales transactions.

O R D E R

IT IS ORDERED that:

1. Pursuant to Public Utilities Code § 851, the request of Pacific Gas and Electric Company (PG&E) for approval of the 73 sales transactions set forth in the application is granted. The approval is nunc pro tunc to the date when such authorization would have been granted had proper procedures been followed.
2. The Modesto Irrigation District's protest is denied.
3. The issues presented in Application (A.) 99-01-001 are resolved.

A.99-01-001 ALJ/GEW/jva

4. A.99-01-001 is closed.

This order is effective today.

Dated April 22, 1999, at San Francisco, California.

RICHARD A. BILAS
President
HENRY M. DUQUE
JOSIAH L. NEEPER
Commissioners