

Decision 99-02-062 February 18, 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 Approving the Sale of Certain Public Utility Properties.

Application 98-08-018  
(Filed August 13, 1998)

**OPINION****1. Summary**

Pacific Gas and Electric Company (PG&E) seeks an exemption from requirements of the Public Utilities (Pub. Util.) Code covering sales of utility assets with respect to 106 sales agreements with individual customers that PG&E entered into between 1989 and 1996. PG&E states that, because of the nature of the agreements, it was under the mistaken impression that sales provisions of the Pub. Util. 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 two parties. Our order today reviews and approves the agreements at issue, with conditions. 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 or gas 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 of 1,000 kilowatts or more are eligible to receive secondary distribution, primary distribution or transmission service, depending on the level of voltage required. Each level of service carries a different rate, with transmission service being the least costly and secondary service the most costly. In order to qualify for the lower rate, purchasers typically had to construct or buy the facilities necessary to receive service at the desired voltage (in the case of electric service). The purchasers for the transactions at issue here elected to buy PG&E's facilities.

Section 851 of the Pub. Util. Code requires Commission authorization for the sale or transfer of necessary or useful utility property. 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 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 the 106 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 considerable 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 or gas 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. With

one exception,<sup>1</sup> 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 C to the application, and PG&E states that the

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<sup>1</sup> PG&E states that the one exception involved the sale of distribution facilities where, because of an accounting error, PG&E valued the facilities at \$3,700 instead of the current book cost of \$5,300. The shortfall was not discovered until after PG&E had negotiated the price with the purchaser. Therefore, the utility incurred a loss of \$1,400 from this sale. (Attachment A to the Application, Transaction No. 32.)

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 106 agreements.

##### **5. Position of Ratepayer Advocates**

In a thoughtful analysis, 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 revenue from the sales does in fact benefit ratepayers. For the same reason, ORA does not recommend, in this case, that PG&E be fined under Section 2107<sup>2</sup> for its failure to seek approval for the sales. ORA believes that PG&E should be admonished, but it believes that monetary sanctions are inappropriate because all after-tax gains from the sales were applied to reduce rate base.

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<sup>2</sup> 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 (based on a sampling that covered 65% of total volume) that the utility had properly recorded sale proceeds for accounting purposes. However, ORA protests PG&E's proposal to adjust rate base only in 1997 to reflect these sales. In response, PG&E states that while the adjustments were made in 1997, they did in fact reflect transactions as of the previous years and were calculated to capture the effect of the adjustments in rate base for prior years

ORA does not object to PG&E's request for waiver of the Rule 35 requirement that all purchasers sign the application. ORA recommends that the Commission encourage PG&E and other utilities to review their records and submit applications for approval of past sales for which pre-approval has not been secured under Section 851. ORA does not seek a hearing in this matter.

PG&E does not object to most of ORA's recommendations. It asks however that the requirement that it search for similar sales be limited to sales since the mid-1980s because ownership of single-customer facilities became attractive to customers in the mid-1980s when the declining rate schedules (E-19 and E-20) were first adopted.

#### **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 seeks a hearing on these issues.

PG&E responds that the District's protest essentially is an untimely response to PG&E's motion for confidential treatment of the identities of these customers, a motion that was filed on August 13, 1998, and granted without

objection. PG&E states 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. (Decision (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).)

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.

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 PG&E should be directed to conduct a reasonable search for any other such transactions that have been made without Section 851 approval, but we will limit that direction to transactions made since the mid-1980s for the reasons stated by PG&E. We caution PG&E that transactions not brought before us for approval may, as a matter of law, be void or voidable. We also agree with ORA that penalties are not appropriate here. 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. The District has had the opportunity to review the terms of the sales



documents in question. PG&E has presented the stronger case for maintaining confidentiality of the names and locations of the customers. In any event, an objection to confidentiality should have been made at the time PG&E made its motion to file the information in redacted form. We will grant PG&E's request for a waiver of the Rule 35 signature requirements for the purchasers involved in these transactions.

In Resolution ALJ 176-2999 dated September 3, 1998, 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.

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).)

#### **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. Comments were filed by ORA and the Modesto Irrigation District.

ORA suggests that we set a date certain for a report on PG&E's search for other transactions that may be subject to Section 851 review. We decline to do so. PG&E is required to conduct the search in a reasonable manner, and that direction should be interpreted to include reasonable promptness.

The Modesto Irrigation District repeats its arguments that the names and locations of the customers should be disclosed, and that hearings should be conducted to consider the economic impact of these transactions. We have dealt with these arguments in the decision, and further consideration is not warranted. All interested persons have had access to the details of the PG&E transactions, including sales price, which were included in the unredacted information accompanying the application.

### **Findings of Fact**

1. Between 1989 and 1996, PG&E entered into 106 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 sales of equipment benefiting only an individual customer were 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, but it recommends that PG&E be ordered to review its records for any further transactions that were not pre-approved.

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. PG&E represents that in recording sale proceeds, it reflected previous-year transactions in a manner calculated to capture the effect of the adjustments in rate base for prior years.

10. The Modesto Irrigation District protests the application, arguing that the identities of the customers in question should be made public.

11. The District opposes the grant of an exemption for the transactions in question.

12. PG&E on August 13, 1998, had filed a motion for and obtained a protective order for confidential treatment of the identities of the customers in question. The motion was unopposed.

### **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. PG&E should be directed to conduct a reasonable search of transactions since the mid-1980s to determine whether other sales or transfer should have been submitted for Section 851 approval but were not.

7. The Modesto Irrigation District protest as to confidentiality should have been made at the time that the motion for a protective order was before the Commission.

8. A hearing is not warranted on the facts of this application.

9. 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 106 sales transactions in this proceeding is granted. The approval is nunc pro tunc to the date when such authorization would have been granted had proper procedures been followed.

2. PG&E's motion for waiver of the Rule 35 signature requirement for the purchasers in the transactions at issue is granted.

3. PG&E is directed to conduct a reasonable search for, and submit applications for approval of, past transactions dating from the mid-1980s forward for which pre-approval has not been secured as required by Section 851.

4. The Modesto Irrigation District's request for hearing is denied.

5. The issues presented in Application (A.) 98-08-018 are resolved.

6. A.98-08-018 is closed.

A.98-08-018 ALJ/GEW/eap\*

This order is effective today.

Dated February 18, 1999, at San Francisco, California.

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