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PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

VIA ELECTRONIC MAIL ONLY

To: Myra J. Prestidge at tom@cpuc.ca.gov
Administrative Law Judge
California Public Utilities Commission
505 Van Ness Avenue
San Francisco, CA 94102

**Re: COMMENTS OF SAN DIEGO GAS & ELECTRIC COMPANY (U 902 E)
AND SOUTHERN CALIFORNIA GAS COMPANY (U 904 G) ON THE
PUBLIC UTILITIES CODE SECTION 851 PILOT PROGRAM**

Dear Administrative Law Judge Prestidge:

Pursuant to the request by Chief Administrative Law Judge Karen V. Clopton in her letter dated May 14, 2010, and Resolution ALJ-244 adopted on February 25, 2010, San Diego Gas & Electric (SDG&E) and Southern California Gas Company (SoCalGas) respectfully submit these comments on the 851 Pilot Program (Pilot Program or Program). SDG&E and SoCalGas support the Pilot Program and appreciate this opportunity to comment on permanently extending the Program through the adoption of a General Order (GO) or Commission rule.

I. INTRODUCTION AND BACKGROUND

Section 851 generally requires an order from the Commission authorizing any sale, lease, encumbrance, mortgage, or other transfer or disposition of an interest in utility ratebase property for qualified transactions valued above five million dollars (\$5,000,000).¹ Before the Commission's adoption of the Pilot Program, most utility transactions involving the transfer or disposition of any interests in property necessary or useful in the

¹ Limited exceptions to this requirement exist where the Commission specifically exempts a utility, class of utility, transaction, or class of transactions from the requirements of Section 851 pursuant to Section 853(b), or if the particular transaction meets the criteria stated in GO 69-C.

provision of services to the public required a formal application and a Commission decision pursuant to Section 851.

The Section 851 Pilot Program was adopted on August 25, 2005 in Resolution ALJ-186, which established a two-year pilot program for processing and approving certain transfers of interests in utility property through advice letters, rather than formal applications under Section 851. The purpose of the Pilot Program was to expedite and simplify the Commission's review and approval of non-controversial qualified transactions valued at five million dollars (\$5,000,000) or less, involving the transfer or conveyance of interests in utility property that did not require environmental review by the Commission as a Lead Agency under the California Environmental Quality Act (CEQA), and did not warrant more extensive review by the Commission through the formal application process. Since the Pilot Program's inception, Section 851 was amended by the Legislature to revise or codify certain aspects of the Pilot Program.

In 2005, the Legislature adopted Assembly Bill (AB) 736 (Stats. 2005, ch. 370, section 1), effective January 1, 2006, which amended Section 851. These amendments to Section 851 authorized utilities to obtain Commission approval of transactions involving transfers or disposition of property interests that are valued at five million dollars (\$5,000,000) or less by filing an advice letter and obtaining a Commission resolution approving the transaction, rather than filing a formal application and seeking a Commission decision. AB 736 also added Section 853(d) to the Public Utilities Code, which stated:

- (d) It is the intent of the Legislature that transactions with monetary values that materially impact a public utility's rate base should not qualify for expedited advice letter treatment pursuant to this article. It is the further intent of the Legislature that the Commission maintain all of its oversight and review responsibilities subject to the California Environmental Quality Act, and that public utility transactions that jurisdictionally trigger a review under the act should not qualify for expedited advice letter treatment pursuant to this article.

Based on AB 736 and Section 853(d), the Commission adopted Resolution ALJ-202, on August 23, 2004, which required the utilities to file formal applications, rather than advice letters, to seek approval of transactions that require CEQA review by the Commission as either a Lead Agency or a Responsible Agency, or when a transaction will materially impact the ratebase of the utility, whether or not the transaction is valued at five million dollars (\$5,000,000) or less.² The Commission also extended the Pilot Program for an additional three years, in order to allow sufficient time to consider

² If a particular transaction is valued at five million dollars or less but still materially impacts the ratebase of a utility, the transaction does not qualify for review through an advice letter, and the utility must file a formal Section 851 application in order to obtain our approval of the transaction.

whether the Pilot Program should be continued, allowed to expire, or further modified, and to obtain additional comments from interested parties on these issues.³

In 2009, the Legislature adopted AB 698 (Skinner) (Stats. 2009, ch. 370), effective January 1, 2010, which further amended Sections 851 and 853(d) in order to expand the types of transactions which the Commission may approve by advice letter.

Under AB 698, if a transaction valued at five million dollars or less only requires CEQA review by the Commission as a Responsible Agency, and the Lead Agency has completed its CEQA review and has certified its environmental documents, the utility may request approval of the transaction by advice letter, and the Commission may approve the advice letter only by a resolution voted on by the full Commission. Where the proposed transaction requires CEQA review by the Commission as the Lead Agency, the utility is still required to file a formal application for Commission approval pursuant to Section 851. ALJ-244, adopted February 25, 2010, reflects amendments made to Sections 851 and 853 by AB 698. The Pilot Program was also extended by ALJ -244 for an additional year until August 23, 2011, in order to allow time to for interested parties to evaluate the effectiveness of the Pilot Program as amended by AB 698 and to provide comments on additional proposed changes and whether the Pilot Program should be continued, made permanent, or modified without conflicting with the statute.

The current Pilot Program permits entities regulated by the Commission to request approval for qualified transactions to sale, lease, assign, mortgage, or otherwise dispose of, or encumber the whole or any part of its rate based property valued at five million dollars (\$5,000,000) or less via an expedited advice letter filing rather than the more time-consuming 851 Application process, in cases that require environmental review by the Commission only as a Responsible Agency under CEQA, when the Lead Agency has completed an appropriate CEQA review.

II. DISCUSSION

The Legislature promulgated AB 698 to streamline Pub. Util. Code Section 851 and provide certainty in the Commission's statutory approval process, consistent with a level of review appropriate to specific qualified transactions. In doing so, the Legislature has helped the Commission shape the Pilot Program to limit its consideration of CEQA for certain transactions if the particular transaction meets the criteria stated in Resolution ALJ-244. To date, SDG&E and SoCalGas have had limited need or opportunity to apply the revised Pilot Program, however, it appreciates the benefits the Pilot Program offers to utilities seeking to expedite and simplify the Commission's review and approval of non-controversial transactions involving the transfer or conveyance of interests in utility

³ Several parties submitted comments on ALJ-202 that raised additional issues including, among others, the role of the Commission in expanding the list of transactions exempt from Section 851 and pilot program requirements under Section 853(b) and clarifying the scope and applicability of GO 69-C. As the purpose of ALJ-202 was limited, the Commission took a two-step approach and took no action on these issues but noted "[i]n the future, we may hold workshops or make additional modifications to the pilot program based on the comments of the parties and our continued experience with the pilot program"

property that do not require environmental review by the Commission as a Lead Agency under the CEQA, and do not otherwise warrant more extensive review by the Commission through the formal application process.

To improve the Program, SDG&E and SoCalGas would support expanding the scope of the Pilot Program to explicitly include additional categories and much needed clarification of transactions found exempt under GO 69-C involving real property, such as easements, licenses, permits, or related transactions, as applicable.⁴ While the Commission has previously articulated some criteria for permitting the granting of limited property interests without prior Commission approval under GO 69-C, the precedent applying that standard has varied considerably.⁵ Specifically, the definition of “limited use” and when a grant must be made conditional under GO 69-C have caused confusion among the utilities and resulted in a hesitation to apply this important exemption.⁶

In addition to exempting the above GO 69-C categories that are based on type of use, the Commission should also explore a general exemption category for *de minimis* transactions. The plain language of Section 853(b) authorizes the Commission “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”. SDG&E and SoCalGas believe the Pilot Program, as it pertains to electrical and gas corporations, would benefit from the Commission extending the Pilot Program to include certain exemption categories for *de minimis* transactions, and to proscribe herein a class of specific public utility exemptions for routine transactions valued at less than five million dollars (\$5,000,000) that cannot reasonably impact materially the class of public utility's rate base. As currently adopted, the Pilot Program is a good start but lacks a cost-effective procedure for obtaining approval of many *de minimis* type transactions. To the extent the Commission or other parties believe workshops are necessary to refine the Program or specific exemption categories for which application under Section 851 is not necessary in the public interest, SDG&E and SoCalGas would be open to participating in such forums.

III. CONCLUSION

For the all of the foregoing reasons, SDG&E and SoCalGas respectfully submits these

⁴ Some limited transaction types, e.g., use of office space (D.04-01-029); floating boat docks (D.02-10-047); and the installation of antennae and related equipment (D.02-03-059), have been deemed qualifying categorical exemptions under GO 69-C.

⁵ In D.03-06-052, the Commission found that “G.O. 69-C establishes three key criteria for permitting the granting of easements, licenses or similar interests without prior Commission approval.

⁶ The P.02-02-003 Workshop on GO 69-C revealed that GO 69-C is underutilized due to the need for clarification regarding its scope, unnecessarily increasing the time and resources expended on routine transactions by both utilities and the Commission.

Comments on the Pilot Program and encourages the Commission to take the next step to clarify categorical exemptions and further evaluate the Section 851 Pilot Program prior to making it permanent. SDG&E and SoCalGas would support the extension of the Pilot Program for an additional three years or as necessary upon the expiration of the current one-year extension. This extension will provide stakeholders time to develop a sufficient sampling in order for the Commission to determine whether the program meets the purpose and objectives of expediting and simplifying the Commission's review and approval process pursuant to Section 851, prior to permanently establishing the Program in a GO or Commission rule.

Respectfully submitted,

By: /s/ Allen K. Trial
 Allen K. Trial

Attorney for
SAN DIEGO GAS & ELECTRIC COMPANY
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All parties on the official service lists: R.98-07-038; R.04-09-003; R.05-04-005;
R.06-02-012; R.06-12-016; A.08-02-001; R.08-02-007; A.09-05-026; R.09-06-019