Decision _____

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application of Pacific Gas and Electric Company For an Expedited Order Authorizing PG&E Under Public Utilities Code Section 851 to Grant an Easement to Alpine County for Realignment, Maintenance and Use of a Road on PG&E Land and a License for a Temporary Construction Area on PG&E Land. (U 39 M)	Application 02-04-024 (Filed April 17, 2002)

DECISION GRANTING APPROVAL UNDER PUBLIC UTILITIES CODE SECTION 851 FOR CONVEYANCE OF EASEMENTS BY PACIFIC GAS AND ELECTRIC COMPANY (PG&E) TO ALPINE COUNTY

1. Summary

This decision grants the unopposed application[1] of Pacific Gas and Electric Company (PG&E) for Commission authorization under Pub. Util. Code § 851[2] for PG&E to convey a permanent road easement across its property to Alpine County (the County). This easement will enable the County to reconstruct, improve, maintain, and use a portion of Blue Lakes Road, located on California

[1] The application was filed on April 17, 2002. In Resolution ALJ 176-3087 dated May 2, 2002, we preliminarily categorized this proceeding as ratesetting and preliminarily determined that hearings are unnecessary. No protests to the application were filed.

[2] All statutory references are to the Public Utilities Code unless otherwise referenced.

Forest Highway 134 in Alpine County, California to address traffic and safety issues.[3]

We also approve PG&E's conveyance of a temporary construction easement (referred to as a "license" by PG&E in the application) for the paving of a small parking lot and installation of an informational sign on PG&E property pursuant to § 851.

Our decision on this matter is expedited because the County must obtain both easements as soon as possible in order to meet its construction schedule and retain federal funding for the road improvements.

2. Background

A. The Project

The County proposes to reconstruct and improve a portion of Blue Lakes Road, California Forest Highway 134 (the project), which serves traffic demands in part of the County and the Huymboldt-Toiyabe and Eldorado National Forests. The project includes resurfacing, restoration, and rehabilitation of the existing road, construction of a paved turn-around loop and, realignment of the roadway. This work is necessary to reduce numerous safety hazards and traffic problems caused by inadequate structural sections and poor alignment of Blue Lakes Road. The project also includes the construction of a small parking lot, which will accommodate six parked vehicles, and the installation of an informational sign on PG&E land. The parking lot and informational sign will be owned by PG&E. The FHA has funded and will construct the project for the County as part of a federal project.

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[3] The Federal Highway Administration (FHA) will perform the construction for the County.

The PG&E property involved in the project is part of PG&E's non-nuclear hydroelectric generation facilities.

The project is located in the Sierra Nevada Mountains with elevations that vary from 7100 feet to 8200 feet. This area receives heavy snowfall beginning in late October, and snow remains on the ground until mid-June at the higher elevations. Therefore, the FHA can perform construction on the project during only four or five months out of the year. The County's funding for the project depends upon the completion of construction in 2002 and 2003.[4] In order to meet these requirements, the County must award the bid for the project as soon as possible so that construction may begin in June 2002.[5] The County needs to obtain both easements from PG&E in order to award the bid.

The size of the proposed road easement is approximately 0.15 acres. The size of the area covered by the license for temporary construction is approximately 0.30 acres.

B. The Proposed Agreement between PG&E and the County

PG&E has filed a proposed easement agreement (the agreement) with the County to be executed if the Commission approves this application. In the agreement, PG&E grants a non-exclusive road easement to the County to install, construct, reconstruct, operate, repair, replace, and use a portion of Blue Lakes

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[4] The permits obtained by the County from the Regional Water Quality Control Board, the California Department of Fish and Game, and the U.S. Army Corps of Engineers also require the completion of construction within this timeframe.

[5] PG&E represents that it did not file this application earlier, because the County did not finalize the exact location of the easements until February 2002 and did not previously understand that PG&E would need to file an application pursuant to § 851 before conveying the easements.

Road, and a temporary construction easement, as described in Exhibits A and B of the Application respectively, to be used for the construction of the small parking lot and informational sign on PG&E property. Although a portion of the project will cross PG&E property pursuant to the easement, the agreement provides that the affected PG&E property has not been dedicated to the public. The County may not assign the road easement, except to another governmental agency that may operate the project in the future.

PG&E has reserved the right to use the easement area as necessary and appropriate to serve its patrons, consumers, and the public. The County has acknowledged that the property is devoted to hydroelectric purposes by PG&E and is part of Federal Energy Regulatory Commission (FERC) Project No. 137, and has agreed not to interfere with the overall recreational use of the project area pursuant to FERC requirements. Under the agreement, the County also may not interfere with PG&E's use of the property; may not use the easement area in a way that endangers human health and safety, PG&E facilities, or the environment; and may not create a nuisance. The County's use of the easement area must be compatible with the applicable FERC orders, Commission General Orders and decisions, and other legal requirements. The County must maintain the easement area in good condition and is responsible for the security of the easement area. The County has also agreed not to clear the easement area of snow during the winter, because PG&E wishes the area to be closed when the road may be impassible due to weather conditions.

In addition, with certain exceptions,[6] the County has agreed to indemnify and defend PG&E from any claims for liability for personal injury (including death) or property damage in the easement area or violation of any legal requirement, which arise from the County's occupancy or use of the easement areas, including construction.[7] The County has previously inspected the property and agreed to accept all risks related to its use of the easement area. In order to further protect PG&E from liability, the County must carry adequate insurance during the term of the agreement.[8]

The County will pay a one-time fee of $562.50 for both easements.

C. Environmental Review

The California Environmental Quality Act (Public Resources Code Section 21000, et seq., hereafter CEQA), applies to discretionary projects to be carried out

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[6] The County's indemnification of PG&E does not include any claim arising from the sole negligence or willful misconduct of PG&E, or claims related to the presence of hazardous materials or substances in, on, under, or about the easement area, which do not result from the introduction of hazardous substances or materials on the site by the County, the County's negligence or intentional misconduct, or the exacerbation of environmental conditions on the site by the County. The County otherwise indemnifies PG&E from all claims connected with the release or spill of any hazardous substance connected with the County's use of the easement area. In addition, the County has agreed to take precautions to protect its contractors, employees, and the public from any hazardous materials on the site.

[7] Since this indemnification also includes the County's invitees and permitees in the easement area, it appears to protect PG&E from liability that may result from use of the road by the public.

[8] This insurance must include commercial general liability insurance, which names PG&E as an additional insured, in the amount of $5 million per occurrence, with additional coverage for defense costs; business auto insurance; and workers compensation and employer's liability insurance. As a public agency, the County may self-insure for some or all of these obligations.

or approved by public agencies. A basic purpose of CEQA is to "inform governmental decision-makers and the public about the potential, significant environmental effects of the proposed activities." (Title 14 of the California Code of Regulations, hereinafter CEQA Guidelines, Section 15002.)

Since the proposed project is subject to CEQA and the Commission must issue a discretionary decision without which the project cannot proceed (i.e., the Commission must act on the Section 851 application), this Commission must act as either a Lead or a Responsible Agency under CEQA. The Lead Agency is the public agency with the greatest responsibility for supervising or approving the project as a whole (CEQA Guidelines Section 15051(b)).

Here, the FHA is the lead agency for the project under the National Environmental Policy Act (NEPA).[9] The FHA prepared an Environmental Assessment (EA) and subsequently adopted a Finding of No Significant Impact (FONSI) for the project pursuant to NEPA.[10] [11] The EA and FONSI addressed the paving of the parking lot, as well as the other aspects of the project.

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[9] NEPA (42 U.S.C. Section 4321 et seq.,) provides for environmental review of certain projects that qualify as "federal actions." Federal actions that will significantly affect the quality of the human environment are generally subject to NEPA (42 U.S.C. Section 4332(2)(C). "Federal actions" under NEPA include (but are not limited to) the approval of specific projects, such as private actions approved by federal permits or regulatory decisions, and federal and federally assisted projects. (40 C.F.R. Section 1508.18(b)). For a project to be a "federal action", it must be subject to a sufficient level of federal control and responsibility. Here, the Blue Lakes Road project is a "federal action" subject to NEPA because the FHA is both funding and constructing the project.

[10] The EA and FONSI are similar to an initial study and a negative declaration prepared under CEQA, respectively.

[11] The FONSI found that the project would not cause significant environmental impacts, but also included mitigation measures for identified impacts on the environment.

The County is the lead agency for the project under CEQA. When a project will require approval under both NEPA and CEQA, state and local agencies should rely on the FONSI, rather than preparing a negative declaration, if the following two conditions are met:

(1) The FONSI will be prepared before a negative declaration will be prepared for the project; and

(2) The FONSI meets the requirements of the CEQA Guidelines.

(State CEQA Guidelines Section 15221).

On November 6, 2001, the County adopted a resolution which found that the FONSI adopted by the FHA met all requirements for environmental review under CEQA. Therefore, the County did not prepare additional environmental documents pursuant to CEQA. The resolution also authorized the County to pursue acquisition of the two easements addressed in this application.

The Commission is a Responsible Agency for this proposed project under CEQA. CEQA requires that the Commission consider the environmental consequences of a project that is subject to its discretionary approval. In particular, the Commission must consider the Lead Agency's environmental documents and findings before acting upon or approving the project (CEQA Guideline 15050(b)). The specific activities which must be conducted by a responsible agency are contained in CEQA Guideline Section 15096.

We have reviewed and considered the EA and FONSI prepared by the FHA and the resolution adopted by the County and find that these documents are adequate for our decision-making purposes under CEQA. We find that the FHA and the County reasonably concluded that the conveyance of the proposed easements by PG&E to the County for the project will have no significant

environmental effect and that no additional mitigation measures or consideration of alternatives are required.

D. Ratemaking Considerations

The PG&E land involved in the proposed easement and license is part of PG&E's hydroelectric generation facilities and is therefore considered non-nuclear generation-related property. Compensation received by PG&E from the County for the easements would be credited to Other Operating Revenue according to the accounting guidelines established for the Transition Cost Balancing Account (TCBA). This treatment of revenues from the proposed easements is unopposed.

3. Discussion

Section 851 provides that no public utility "shall . . . encumber the whole or any part of . . . 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." Since the easements proposed to be conveyed to the County would be encumbrances on PG&E property, we apply Section 851 in considering this application.[12]

The primary question for the Commission in § 851 proceedings is whether the proposed transaction is adverse to the public interest. In reviewing a § 851 application, the Commission may "take such action, as a condition to the transfer, as the public interest may require."[13] The public interest is served when

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[12] Decision (D.) 01-08-069.

[13] D.3320, 10 CRRC 56, 63.

utility property is used for other productive purposes without interfering with the utility's operation or affecting service to utility customers.[14]

While this application requests § 851 approval to grant Alpine County 1) an easement for road alignment, maintenance and use, and 2) a **license** for a temporary construction area (for a parking lot and sign) on PG&E land, it is unclear from the underlying transactional documents (Exhibits to the Application) whether PG&E has entered both a license agreement under General Order (GO) 69-C for construction of the parking lot as well as a lease agreement for the remainder of the project activities. It is settled that utilities must not use limited use licenses to bifurcate their transactions in order to perform construction activities under a GO 69-C agreement not subject to Commission review, and then following construction, seek approval of these lease arrangements for project activities including that construction. (See, D.00-12-006.) We will not allow such circumvention of legally required environmental review, nor any "piecemealing" of the CEQA process. (San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus (1994) 27 Cal. App. 4th 713; CEQA Guidelines Section 15165). However in this case the entire project, including the parking lot, did receive environmental review and approval under NEPA. Thus no additional environmental review would be required if any of the transactions presented in this application were actually a GO 69-C license arrangement subject to review under § 851. Given these facts, the requested approvals would not circumvent CEQA.

[14] D.00-07-010 at p. 6.

We find that PG&E's conveyance of the proposed easements to the County would serve the public interest. The proposed easements will not interfere with PG&E's use of the property or with service to PG&E customers, and will be utilized in a manner consistent with FERC and Commission requirements. PG&E's conveyance of the road easement to the County would also serve the public interest by enabling the County and the FHA to make improvements to the Blue Lakes Road which are necessary to address safety hazards and traffic problems. Conveyance of the temporary construction easement will also promote the public interest by enabling the County to pave a small parking lot and install a sign which will be part of a informational station on PG&E property, that will provide information regarding recreational opportunities, such as campgrounds and trails, on the land.

We also approve of the proposed ratemaking treatment for the compensation that PCWA will pay to PG&E for the easements. Since this land is part of PG&E's hydroelectric generation facilities, it is consistent with previously established guidelines that the revenue be credited to the Other Operating Revenue sub-account of the TCBA.

4. Conclusion

For all of the foregoing reasons, we grant the application of PG&E pursuant to § 851, effective immediately.

5. Final Categorization and Waiver of Review Period

Based on our review of this application, we conclude that there is no need to alter the preliminary determinations as to categorization and need for a hearing made in Resolution ALJ 176-3087 (May 2, 2002). Moreover, since this proceeding is uncontested and we grant the relief granted, pursuant to

§ 311(g)(2), the otherwise applicable 30-day period for public review and comment is waived.

Findings of Fact

1. Our consideration of this application is expedited based on representations that the County must obtain the easements as quickly as possible in order to begin construction by June 2002 and to retain its federal funding for the project.

2. The proposed easements will not interfere with PG&E's use of the property or with service to PG&E's customers, and will be utilized in a manner consistent with FERC, Commission, and legal requirements.

3. FHA is the Lead Agency for the proposed project under NEPA.

4. The County is the Lead Agency for the proposed project under CEQA.

5. FHA prepared an EA and subsequently prepared or approved a FONSI for the proposed project, which found that the project as mitigated would have no significant effect on the environment.

6. The County relied on the EA and the FONSI to assess the environmental effects of the proposed project, rather than preparing an initial study and negative declaration.

7. On November 6, 2001, the County adopted a resolution which found that the FONSI met CEQA requirements for environmental review of the proposed project and authorized the County to pursue acquisition of the two easements sought in this application from PG&E.

8. The Commission is a Responsible Agency for the proposed project under CEQA.

9. Consistent with the FHA's and the County's findings and determinations, we find that no significant environmental effect will result from the project.

10. Compensation received by PG&E from PCWA for the proposed easements will be credited to Other Operating Revenue according to accounting guidelines established for the TCBA.

11. The project will enable the County and the FHA make improvements to the project as necessary to address traffic and safety problems and to provide a parking area and sign for the informational station on PG&E property.

Conclusions of Law

1. The EA and FONSI prepared by the FHA and the resolution adopted by the County are adequate for the Commission's decision-making purposes as a responsible agency under CEQA.

2. Consistent with § 851, PG&E's conveyance of the two proposed easements to the County for the project will serve the public interest and should be authorized.

3. The decision should be effective today in order to allow the two easements to be conveyed to the County expeditiously.

O R D E R

IT IS ORDERED that:

1. Pacific Gas and Electric Company (PG&E) is authorized to convey a road easement, and a temporary construction easement, as described in Exhibits A and B of the Application, across its property located in Alpine County in the vicinity of Blue Lakes Road to Alpine County. When the final easement documents are executed, PG&E shall submit a copy by advice letter filing within sixty (60) days of this order.

2. PG&E shall credit the fees of $562.50 to the Other Operating Revenue sub-account of the Transition Cost Balancing Account.

3. This proceeding is closed.

This order is effective today.

Dated _____, 2002, at San Francisco, California.