Decision **DRAFT DECISION OF ALJ WALKER (Mailed 10/28/2003)**

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application of Pacific Gas and Electric Company (U 39 M) for an Order Under PUC Section 851 Approving the Leases and Licenses of Certain Public Utility Properties.	Application 03-05-012 (Filed May 8, 2003)

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O P I N I O N

1. Summary

Pacific Gas and Electric Company (PG&E) seeks Commission approval pursuant to Pub. Util. Code § 851 of certain licenses and leases of PG&E property already in effect (the "agreements" or "transactions"). In total, PG&E seeks approval of 256 transactions. Most of these agreements were entered into several years ago. Each permits various uses of PG&E property by third parties. The transactions did not have prior approval of the Commission pursuant to Pub. Util. Code § 851. PG&E states that it discovered many of these agreements in various branch office files while conducting an extensive search in the PG&E bankruptcy proceeding. Because the 256 transactions may implicate environmental review or may not meet the criteria for General Order (GO) 69-C transactions, PG&E states that it decided it would be prudent to seek formal approval of the transactions under Section 851. In addition, PG&E asserts that Commission environmental review under the California Environmental Quality Act (CEQA) is unnecessary because the majority of the transactions fit within CEQA exemptions, nine received adequate local CEQA review, and six pre-date CEQA and are thus not subject to its requirements. This decision grants Section 851 approval for 255 of the transactions on a prospective basis. We note one of the transactions fits within recent Commission decisions finding agreements allowing floating boat docks as appropriate under GO 69-C. Therefore, our approval here is not required. We decline to impose a penalty for failure to obtain prior approval of the transactions. With respect to CEQA, we note that because all of the agreements are several years old, any activity which may have warranted our environmental review has long since occurred.

Accordingly, our CEQA review at this time has little value for practical purposes. Nevertheless, we will address the CEQA issues raised by PG&E and determine where possible, the applicability of the claimed exemptions. We decline to address as part of this decision, statements by PG&E regarding transactions it states have not been submitted as part of this application because in PG&E's view they are GO 69-C transactions. Finally, we take this opportunity to clarify that Section 851 and CEQA are separate statutory requirements. CEQA is triggered as one element of Commission Section 851 review. However, the fact that an activity may be exempt from CEQA does not negate the Section 851 review and approval requirement. The Office of Ratepayer Advocates (ORA) concluded that PG&E's allocation of the transactions' revenues to ratepayers and shareholders is appropriate. This proceeding is closed.

2. Factual and Procedural Background

On June 1, 2000, PG&E filed Application (A.) 00-06-010 seeking Section 851 approval of 110 lease transactions. In the application, PG&E stated that it had not obtained Commission approval before entering into the leases – some of which were several years old – because the company in good faith believed that Section 851 approval was not required if the lease was for an adjunct use that did not affect the utility's use of the property. PG&E acknowledged that Commission decisions that recently had preceded its application prompted a change in the company's approach to Section 851 issues.

In A.00-06-010, PG&E stated that identifying the lease transactions required a significant amount of time and effort. PG&E owns almost 200,000 acres of land in 49 counties in California. PG&E states that it routinely receives requests from third parties to use utility property for various purposes. Until recent years, such requests were handled by PG&E land personnel located

in the local offices responsible for the property in question. If granted, the documents evidencing the property grants would often be kept in the local offices, and local personnel would handle all communications regarding the transaction.

PG&E states that it has since instituted new policies requiring that all leases and licenses must be reviewed by the Law Department or the Corporate Real Estate Department in San Francisco to ensure compliance with Section 851. The new policies include weekly Section 851 meetings, presentations to the land agents on requirements of Section 851, and review and approval of all proposed encumbrances by PG&E's Land Department in San Francisco.

PG&E states that at the time it filed A.00-06-010, it believed that the central database maintained by its Land Department in San Francisco included records of all encumbrances of utility land, and that the leases and licenses for which approval was sought were limited to the 110 set forth in the application.

In addition to those 110 leases, PG&E in A.00-06-010 identified a number of other transactions that would require Section 851 approval later. These were leases or licenses for recreational use of PG&E property located on lands subject to Federal Energy Regulatory Commission (FERC) hydro-generation licenses. PG&E stated that it did not include these transactions in A.00-06-010 because it intended to include them in a later Section 851 application to be filed in connection with the utility's hydro-generation asset divestiture application. The hydro divestiture proceedings did not go forward. As indicated below, more than 70% of the transactions included in this application relate to lands subject to FERC licenses.

In A.00-06-010, PG&E was required to amend the application to provide specific information on each of the leases, and it was required to submit a brief

addressing whether the leases in question should be deemed void and whether PG&E should be sanctioned for its failure to seek prior approval of the leases. PG&E filed the amendments and brief, and in this application it has filed six three-ring binders with copies of the 256 transactions for which approval is sought. A.00-06-010 remains pending, in part to consider a workshop report on utility license requirements now being developed by Commission staff.

3. Transactions Subject to This Proceeding

On April 6, 2001, PG&E filed for bankruptcy. Under the Bankruptcy Code, PG&E was required to compile a list of all executory contracts, including leases and licenses of its property, and to decide whether to assume or reject each contract. PG&E assigned a team of employees to locate and identify all its executory contracts. After more than a year of effort, the team compiled a 500-page list of these contracts. In order to compile the list, PG&E required all land agents in local offices to search for and identify any and all leases or licenses of property in their local areas.

PG&E states that while the great majority of leases and licenses were included in PG&E's central database, it became clear that others had been filed in local offices without being entered in the central database. As a result, PG&E identified additional transactions that should have been included in A.00-06-010. Accordingly, PG&E has filed this application, A.03-05-012, seeking approval of the recently identified transactions along with the previously identified leases and licenses involving hydro-generation lands.

The 256 transactions for which approval is sought are set forth in Exhibit A of this decision. Also included in Exhibit A are the exemptions to environmental assessment that PG&E asserts are applicable to most of the transactions. PG&E

asserts that environmental review either has taken place or does not apply to the other transactions.

4. Descriptions of the Transactions

Of the transactions included in this application, more than 70% allow third parties to use hydro-generation land for recreational purposes. These are the transactions originally referenced in A.00-06-010. The remainder involve various other uses of PG&E property. PG&E has organized the 256 transactions into five broad categories and we will address them in that manner.

4.1. Category 1 - Recreational Sites on Hydro-Generation Lands

Category 1 includes leases and licenses of recreational sites on hydro-generation property. PG&E has entered into 186 agreements allowing recreational use of its FERC-licensed properties. These transactions include 131 Category 1a agreements involving individual recreational uses, primarily use of recreation sites, cottages and boating docks. For example, Transaction 34 is a 10-year lease to individuals for a cabin with a boat dock at Buck's Lake in Plumas County. Transaction 119 is a 10-year lease to individuals for a cottage at Philbrook Reservoir in Butte County. An additional 55 Category 1b agreements permit group recreational uses such as camping, boating, or hiking on PG&E property. Transactions 138 and 177 are leases for campgrounds used by the Boy Scouts and Girl Scouts, respectively. Transaction 136 is a lease to Bass Lake Enterprises for the operation of a marina on Bass Lake in Madera County. Transaction 179 is a license to Sigor Corporation to operate the Lake Haven Resort, which includes campsites, a store and boating facilities.

PG&E states that FERC strongly encourages the use of FERC-licensed lands for recreational purposes, citing 18 C.F.R. § 2.7 (2001) ("The [FERC] will

evaluate the recreational resources of all projects under Federal license…and seek, within its authority, the ultimate development of these resources….").

4.2. Category 2 – Telecommunications

Category 2 involves licenses and leases with telecommunications companies. There are eight such agreements. For example, in Transaction 189, PG&E in 1983 leased property to Pacific Telephone and Telegraph Company "for the purpose of installing, maintaining, and using a microwave antenna tower together with microwave equipment and associated buildings…."

PG&E states it has also has entered into several transactions (unidentified number) allowing third parties to install telecommunications equipment on existing PG&E poles or in existing communication vaults. PG&E states that these transactions meet the Commission's current requirements for utility licenses under GO 69-C and thus are not included in this application. PG&E states that the Commission has held that such transactions are properly treated as licenses permissible under GO 69-C so long as the license is (1) for limited uses; (2) revocable either upon order of the Commission or upon the utility's determination that revocation is necessary in customers' interest, and (3) not interfering with the utility's operations, practices or service to customers. Prior Commission approval of such license agreements is not required. (*Application of Pacific Gas and Electric Company for Section 851 Approval of Agreements Allowing Access to Electric Distribution Facilities* (2002) D.02-12-018.)

Similarly, according to PG&E, revocable transactions involving minor, removable installations such as communications antennas, monopoles, and overhead or underground coaxial cable have been deemed by the Commission to be "limited uses" of utility property within the meaning of GO 69-C. (*Application of Pacific Gas and Electric Company for Approval of a Lease for AT&T Wireless Services*

of California, Inc.'s Use of Certain Pacific Gas and Electric Company Structures for Communication Antennas and Related Equipment (2002) D.02-03-059, at 5.) Accordingly, PG&E states, licenses that permit telecommunications companies to use existing PG&E facilities and property to attach their equipment or to construct certain removable installations have not been included in this application.

4.3. Category 3 - Vehicle Parking

Category 3 involves licenses or leases that allow individuals to construct or maintain parking lots on PG&E property. Fifteen such leases or licenses are included in this application. PG&E states that the agreements generally allow only minor improvements, such as installation of pavement, gravel, gates or fences. For example, in Transaction 207, PG&E gives permission to the Valley Baptist Church to use PG&E property for a parking lot and to install gravel and gates.

PG&E states that a limited number of additional transactions that permit use of PG&E property for parking are not included in this application because they do not permit any construction. Instead, they merely allow individuals to park cars on existing PG&E lots. Because the transactions do not permit construction and are fully revocable, PG&E states that the transactions are permissible under recent Commission decisions involving GO 69-C and do not require Commission approval.

4.4. Category 4 - Storage

Category 4 involves licenses or leases that permit parties to use PG&E property for storage purposes. PG&E seeks approval of six such transactions. These leases and licenses permit limited improvements, such as fence construction or paving. The storage agreements do not allow the operation of

self-storage businesses but rather permit the temporary storage of items such as equipment, vehicles, or containers. For example, PG&E in Transaction 214 has allowed the San Jose Conservation Corps to store vans and tool containers on PG&E property and to install fencing on the property.

In addition, PG&E states it has entered into a limited number of licenses (unidentified number) that simply permit third parties to store items on its property without any associated construction activity. PG&E states that to the extent these licenses are fully revocable and comply with the other requirements of GO 69-C, they are not included in this application.

4.5. Category 5 - Miscellaneous

Category 5 involves transactions that PG&E terms a catch-all category for agreements that do not fall into any of the categories identified above. There are 41 transactions in this miscellaneous category, including the following:

- Licenses for the construction of barns, corrals and riding areas. (Transactions 216-217.)
- Licenses or leases for the operation of fish hatcheries on utility land. (Transactions 218-222.)
- Licenses or leases that permit the use and/or maintenance of infrastructure for public and private uses, such as roads, water or septic system pipelines, small electrical substations or fire stations. (Transactions 223-233.)
- Licenses and leases that permit mining operations on PG&E land. (Transactions 234-235.)
- A license granting permission for an existing encroachment on utility property. (Transaction 236.)
- Licenses for use of PG&E office space. (Transactions 237-238.)
- A license allowing plant nursery operations on utility land. (Transaction 239.)
- Licenses or leases for recreational uses of land other than hydro-generation lands. (Transactions 240-244.)

- Licenses or leases that permit the construction and maintenance of signs, such as advertising billboards, on PG&E property. (Transactions 245-252.)
- Licenses that permit the construction and maintenance of small accessory structures on PG&E land, such as fencing, stairways, weather equipment or a structure to house an emergency generator. (Transactions 253-256.)

4.6. Transactions for Which Environmental Review Was Performed

Within the five broad categories, PG&E states that environmental review under CEQA was performed for nine of the transactions. Copies of the local environmental review documents for each of the transactions were submitted with the Application as part of Exhibit B. (Transactions 180, 224, 225, 227, 231, 232, 234, 235, and 243.)

4.7. Transactions That Pre-Date CEQA

Within the five broad categories, PG&E states that six of the transactions were entered into before the enactment of CEQA in 1970. Accordingly, PG&E states that no environmental review is necessary because the transactions preceded the environmental review requirement. (Transactions 178, 218, 226, 229, 230, and 252.)

5. Ratemaking Treatment

In the past, revenues from leases and licenses like the transactions in this application have been treated as other operating revenue and credited above-the-line to PG&E's ratepayers in the company's general rate cases. In the company's 2003 general rate case, PG&E has proposed continuing this ratemaking treatment for the lease and license revenues. With electric industry restructuring, however, jurisdiction over the company's electric transmission facilities with respect to rates and service has vested exclusively with FERC. PG&E anticipates that for

FERC jurisdictional electric transmission property, revenues from miscellaneous leases in the future would be assigned to transmission and would be subject to applicable FERC accounting and ratemaking treatment. Lease and license revenues from the company's non-nuclear generation property would continue to be credited to the Transition Cost Balancing Account until such time as the Commission identifies an appropriate replacement.

In its review of this application, ORA states that the allocation of revenues under the licenses and leases that PG&E claims are FERC-jurisdictional would, under FERC accounting rules, be split 50-50 between shareholders and ratepayers. ORA states that it does not intend to challenge this proposed revenue allocation. ORA states that the proposal to treat revenues from other leases and licenses as other operating revenue is dealt with as part of an incentive mechanism in PG&E's general rate case. Under these circumstances, ORA states that it does not take issue with PG&E's revenue proposals. ORA has not participated further in this proceeding.

6. Environmental Review

The CEQA requires the Commission to consider the environmental consequences of its discretionary decisions, such as Section 851 approvals. (Pub. Res. Code § 21000, et seq.) PG&E maintains that environmental review is not required in order for the Commission to approve this application. It states that most of the agreements are categorically exempt from CEQA, while nine of the transactions received environmental review by other agencies, and six of the transactions pre-date the enactment of CEQA and thus are not subject to environmental review requirements. Because most of the agreements submitted for approval as part of this application are several years old, any activity which would have required our timely environmental review has already occurred.

Consequently, for practical purposes meaningful CEQA review at this time would have no effect because we are unable to conduct the review prior to any project or construction activity. Nevertheless, we will address the issue of CEQA exemptions raised by PG&E and determine, where possible, whether the asserted CEQA exemptions apply. For purposes of this decision an agreement will be deemed exempt from CEQA review only if all the activities which took place under the agreement fall within one or more of the CEQA exemptions. Where there is insufficient factual information to determine whether an exemption applies, the agreement will be deemed not exempt. In the case where an application was submitted contemporaneous with our ability to conduct timely CEQA review, we would require additional information to determine the appropriate level of CEQA review. Here, that further inquiry would not be an efficient use of time or resources. Therefore, we merely point out that additional information would normally be expected in this situation.

Finally, we caution that accurate CEQA review, including an assessment of CEQA exemptions requires fact-specific and typically case-by-case analysis. Similar sounding activities may in fact warrant different treatment depending upon the particular project characteristics, scope of work, location and environmental conditions. We prefer a case-by-case review.

6.1. Transactions Subject to Categorical Exemptions

Pub. Res. Code §§ 21000 et. seq., and Title 14 of the California Code of Regulations Sections 15000-15387 (hereafter "CEQA Guidelines") enumerate various categorical exemptions to the requirement for environmental review under CEQA. PG&E's application lists the following categorical exemptions, either individually or jointly, as applicable to the majority of the 256 transactions (Attachment A).

6.1.1. Guideline 15301 Existing Facilities

CEQA Guideline 15301 exempts from CEQA review "the operation, repair, maintenance, permitting, leasing, licensing, or minor alteration of existing public or private structures, facilities, mechanical equipment, or topographical features, involving negligible or no expansion of use…."

6.1.2. Guideline 15302 Replacement or Reconstruction

Guideline 15302 exempts from CEQA review the "replacement or reconstruction of existing structures and facilities where the new structure will be located on the same site as the structure replaced and will have substantially the same purpose and capacity as the structure replaced…"

6.1.3. Guideline 15303 New Construction or Conversion

Guideline 15303 exempts the "construction and location of limited numbers of new, small facilities or structures; installation of small new equipment and facilities in small structures; and the conversion of existing small structures from one use to another where only minor modifications are made in the exterior of the structure…." This exemption includes the construction of commercial projects such as certain residential dwellings, duplexes, or

commercial buildings in residential or urbanized areas. It also exempts accessory (appurtenant) structures such garages, carports, patios, swimming pools and fences.

6.1.4. Guideline 15304 Minor Alterations to Land

Guideline 15304 exempts from CEQA review "minor public or private alterations in the condition of land, water, and/or vegetation which do not involve removal of healthy, mature, scenic trees except for forestry or agricultural purposes." Included under this exemption are certain activities such as grading with a slope of less than 10%, landscaping, and minor trenching and backfilling where the surface is restored.

6.1.5. Guideline 15305 Minor Alterations in Land Use Limitations

Guideline 15305 exempts from CEQA review "minor alterations in land use limitations in areas with an average slope of less than 20%, which do not result in any changes in land use or density." Included under this exemption are minor lot line adjustments and the issuance of minor encroachment permits.

6.1.6. Guideline 15311 Accessory Structures

CEQA Guideline 15311 exempts from CEQA review "construction or placement of minor structures accessory to (appurtenant to) existing commercial, industrial or institutional facilities." On premises signs and small parking lots may be included within this exemption.

6.1.7. Guideline 15316 Transfer of Ownership of Land in Order to Create Parks

Guideline 15316 exempts from CEQA review "the acquisition, sale, or other transfer of land in order to establish a park where the land is in a natural condition or contains historical or archeological resources and either (a) the management plan for the park has not been prepared, or (b) the management

plan proposes to keep the area in a natural condition or preserve the historical or archeological resources. CEQA will apply when a management plan is proposed that will change the area from its natural condition or cause substantial adverse change in the significance of the historical or archeological resource."

6.1.8. Guideline 15323 Normal Operations of Facilities for Public Gatherings

Guideline 15323 exempts from CEQA review "normal operations of existing facilities for public gatherings for which the facilities were designed, where there is a past history of the facility being used for the same or similar kind of purpose. For purposes of this section, "past history" shall mean that the same or similar activity has been occurring for at least three years…"

6.2. Assessment of CEQA Application

6.2.1. Category 1a – Recreational Sites on Hydro-Generation Lands/Individual Uses

PG&E's application contains 131 licenses and leases which allow the recreational use of land by individuals. Of theses 131 transactions, 125 involve the use of pre-existing cabins, cottages, boat docks, etc. No construction or improvements have occurred under these agreements and there has been no change in use of the property or existing facilities. (Transactions 1-15, 17-35, 37-51, 53-81, 83-85, 87-106, 108-131.) PG&E asserts that these agreements are exempt from CEQA review pursuant to CEQA Guideline Section 15301.

As stated above, Section 15301 provides a categorical exemption for "the operation, repair, maintenance, permitting, leasing, licensing, or minor alteration of existing public or private structures…involving negligible or no expansion of use…" We agree that mere continued use of pre-existing structures such as cabins, cottages, boat docks, etc., with no construction, or change of use, fits within the Section 15301 exemption from CEQA review.

Six of the 131 Category 1a transactions involve licenses or leases which allowed either the construction of a new cottage, or the rebuilding of an existing cottage. Transactions 82 and 16 allowed the construction of new cottages. PG&E asserts the agreements are exempt from CEQA review pursuant to CEQA Guideline Section 15303.

As stated above, Section 15303 provides a categorical exemption for "the construction and location of limited numbers of new, small facilities or structures…" The statute, as confirmed in CEQA Guideline notations to Section 15303[1] is intended to apply to "commercial projects which have available all necessary public services and facilities, and which are not located in an environmentally sensitive area." Examples of exempted projects include one to two single-family residences in a residential zone and up to three residences in an urbanized area. (Section 15301(a).) Also potentially exempted are duplexes (Section 15303(b)), and stores, motels, etc. (Section 15303(c)). The construction in question involves cottages on PG&E's FERC-licensed hydro-generation lands. PG&E points out that the FERC licenses may permit and encourage certain recreational uses of these lands, such as camps or cabins. However, that argument misses the point. PG&E has not established that encouragement of certain recreational uses negates the necessity for environmental review. Further, we are not convinced that constructing recreational cottages and cabins on hydro-generation lands fits within an exemption for commercial projects in residential/urbanized areas, i.e., on land that is not environmentally sensitive. Therefore, we do not agree that the CEQA exemption properly applies.

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[1] *See* CEQA Deskbook, 2001 Supplement, Appendix 2, CEQA Guidelines, p. 289.

Transactions 36, 52, 86, and 107 allowed the licensees to use and maintain an existing recreational home site on individual home lots. PG&E's Attachment A indicates that under the agreement cottages were renovated or rebuilt. PG&E asserts these agreements are exempt from CEQA pursuant to CEQA Guideline Section 15302. Section 15320 provides a categorical exemption for "replacement or reconstruction of existing structures and facilities where the new structure will be located on the same site as the structure replaced and will have substantially the same purpose and capacity as the structure replaced…"

PG&E's application and the respective licenses and leases in question do not explicitly indicate that the reconstructions took place on the same site, or that the reconstructions did not involve any significant increase in capacity. If this application had been submitted contemporaneous with our ability to conduct timely CEQA review, we would seek to verify this information in order to confirm applicability of the exemption. However, for purposes of this decision we believe it is reasonable to conclude that since the reconstructions took place on relatively small, single residential lots, the replaced structures were "located on the same site" and having the "same purpose and capacity" within the meaning of Section 15302.

6.2.2. Category 1b – Recreational Sites on Hydro-Generation Lands/Public and Group Recreational Uses

PG&E's application contains 55 licenses and leases which allow the recreational use of land by the public and/or groups. Of these 55 transactions, 36 involve the use of pre-existing facilities including boat docks, ramps, camp sites, cabins, trails, restrooms, boat houses, parking areas, restrooms, etc. (Transactions 133-139, 142-143, 145, 147, 149-156, 158, 159, 161, 163-179, 182-185.) PG&E represents that no construction or improvements have taken place in

association with these agreements and that there has been no change in the pre-existing use of the facilities. PG&E asserts that the agreements are exempt from CEQA review pursuant to CEQA Guideline Section 15301.

Section 15301 provides a categorical exemption for "the operation, repair, maintenance, permitting, leasing, licensing, or minor alteration of existing public or private structures…involving negligible or no expansion of use…" Consistent with our finding regarding similar Category 1a uses, we agree that mere continued use of pre-existing facilities, with no construction or change of use, fits within the Section 15301 exemption from CEQA review.

Nine of the Category 1b transactions involve licenses or leases which allowed improvements on the property. PG&E asserts that these agreements are exempt from CEQA review pursuant to CEQA Guideline Section 15303.

Transaction 132 is a license agreement which allowed the installation and operation of 20 floating boat docks with associated walkways. In D.02-10-047, the Commission assessed under what conditions licenses which allowed for the installation of floating boat docks may properly fall within the scope of GO 69-C. The GO provides an exception to the Section 851 requirement for prior Commission approval of an encumbrance of utility property. Under the GO, there are three criteria which allow for a utility to grant an easement, license or permit for use or occupancy without Commission approval. Specifically, the interest granted must (1) be for a "limited use" of utility property; (2) be revocable either upon order of the Commission or upon the utility's determination that revocation is desirable or necessary to serve its patrons or consumers; and (3) not interfere with the utility's operations, practices, and service to its customers.

Similar to the license evaluated in D.02-10-047, a review of the Transaction 132 agreement appears to meet the GO 69-C criteria. The boat docks and stairways appear to represent a limited overall use of PG&E's property. The license specifies dock floatation material of styrofoam with rigid outer shell. The docks are anchored to the lake bottom by an anchor device that must not consist of metal barrels or corrosive material. According to Exhibit A of Transaction 132, the dock is substantial enough to accommodate 20 boats. However, it is not permanently affixed to the lake bottom and can be removed if either PG&E or the Commission should so order. In its application, PG&E affirmatively represents that the use of the dock will not interfere with its operations or service. Finally, the license provides that the agreement may be revoked by PG&E and/or by order of the Commission. Accordingly, we find that Transaction 132 fits within the scope of GO 69-C and does not require our approval under Section 851. CEQA, therefore, is not triggered and no finding as to the asserted categorical exemption is necessary.

Transaction 140 involves an agreement for the use of an existing camp and RV park. PG&E's Attachment A indicates that under the agreement, a kitchen facility was reconstructed. PG&E asserts that the agreement is exempt from CEQA review pursuant to CEQA Guideline Sections 15301, 15302 and/or 15323.

Consistent with our above discussion of the scope of Section 15301, we agree that activity under the agreement which involved mere use of existing facilities with no construction or change of use is exempt from CEQA review pursuant to this section. However, although Section 15301 allows for some "minor alteration," we are not convinced that reconstruction of a kitchen facility, absent more information to describe the actual nature of the improvements, readily fits within the "minor alteration" language of Section 15301. Therefore,

we do not find Section 15301 applicable to the reconstruction activity. Section 15302 provides an exemption for certain replacement and reconstruction activities which are located on the same site and serve substantially the same capacity or purpose. PG&E's application and attachments do not specify that the reconstruction took place on the same site or did not involve any significant increase in capacity. A diagram attached to the agreement appears to indicate a sizeable property, but without any representation of the existing or replacement structure. For Transactions 36, 52, 86, and 107, we felt it reasonable to apply the exemption due to the limited use of the property (single-family residence/cottage) and the relatively small size of the property. Here, the broader use as RV park and camp suggests the possibility of reconstruction to accommodate greater or differing capacity. Further, the size of the property could allow the possibility to alter the location of reconstruction. It is possible the exemption applies. However, there is not enough information to resolve these uncertainties. We are unable to determine whether the exemption applies. Section 15323 provides a categorical exemption for "the normal operations of existing facilities for public gatherings for which the facilities were designed, where there is a past history of the facility being used for the same or similar kind of purpose." There is nothing in the language of this section to indicate the exemption would encompass construction, improvement, reconstruction or replacement activities. We do not find Section 15323 applicable.

Transaction 141 involves an agreement for the use of an existing lodge, boat docks, cabins, septic systems, well, kitchen and sports field. Under the agreement, the boat dock and pier were replaced and a new caretaker cabin, mobile home and septic system were built. PG&E asserts that the agreement is

exempt from CEQA review pursuant to CEQA Guideline Sections 15301, 15302, and 15323.

We agree that the use of existing facilities which also involved no construction or change of use is exempt from CEQA review under Section 15301. The other listed activities which took place under the agreement involve replacement as well as new construction activity. PG&E's application provides no factual information regarding the specific nature and scope of the construction or whether any local permitting or CEQA review was required. As previously discussed, there is nothing in the language of Section 15323 to suggest it encompasses construction, improvements or reconstruction. Therefore, we do not agree that Section 15323 is applicable. Section 15302 contemplates reconstruction and replacement but not the new construction which also took place. Therefore, we do not agree that any of the asserted CEQA exemptions apply to the new construction activities.

Transaction 144 involves the use of an existing trailer lot/sites, camp sites and boat dock. PG&E's Attachment A indicates a gravel road was put in as the only improvement under the agreement. PG&E asserts that the agreement is exempt from CEQA pursuant to CEQA Guideline Sections 15301 and 15311. We agree that mere use of the listed facilities without construction or change of use fits within the Section 15301 categorical exemption. At question is whether the gravel road is exempt from CEQA review under Section 15311. Section 15311 provides a categorical exemption for "construction or placement of minor structures accessory to (appurtenant to) existing commercial, industrial or institutional facilities, including but not limited to (a) on-premises signs, (b) small parking lots, and (c) placement of seasonal or temporary use items." We do not see the commonality between constructing a gravel road on hydro-generation

land and minor structures appurtenant to commercial, industrial or institutional facilities as specified by the exemption. Accordingly, we do not find Section 15311 applicable to the gravel road.

Transaction 146 involves an agreement for the use of a recreational camp. PG&E's Attachment A indicates that under the agreement there were improvements to the water system, septic system, lodge, cabins, restroom and road. PG&E asserts that the agreement is exempt from CEQA review pursuant to CEQA Guideline Section 15303, which provides an exemption for the construction or conversion of small structures. As previously discussed, the exemption contemplates activities such as the construction of specified residential/commercial structures in residential zones or urbanized areas. (Section 15303(a).) It also includes activities such as water main, sewage, electrical utility system extensions of reasonable length to serve such construction (Section 15303(d)), and accessory structures such as carports, patios and swimming pools (Section 15303(e)). The range of activities which took place under the agreement appears reasonably substantial. However, the application provides only a listing of the activities, without any information regarding the location, nature or scope of those activities. It is not clear if the activities involved any new construction or only reconstruction. We have already expressed concerns regarding construction on the hydro-generation property within the intent of Section 15303, and we see no clear connection between the construction at question here and commercial projects as contemplated under the statute. Accordingly, we do not find the exemption is applicable.

Transaction 148 involves an agreement for the use of lake front property for recreational use. PG&E indicates that improvements under the lease included

a boat ramp, docks and a storage area. PG&E asserts the activities are exempt from CEQA review pursuant to CEQA Guideline Sections 15301 and 15303.

We agree that the mere use of existing facilities, or in this case shoreline, with no construction or change of use is exempt from CEQA pursuant to Section 15301. At question is whether the improvements are exempt under Section 15303. Directly above we discussed the types of activities contemplated by Section 15303. We see no commonality between the construction of boat docks and ramp, etc. under this agreement and the construction of small residential or commercial structures in residential/urban areas, or appurtenant structures contemplated by Section 15303. Further, PG&E's application provides no factual information to elaborate on the actual scope of improvement/construction activity which took place and makes no effort to establish a connection with Section 15303. We find Section 15303 does not apply. We also note that neither the application not the lease agreement itself provide sufficient information to determine if the boat dock improvement is in fact similar to the other floating boat dock agreements which qualify under GO 69-C.

Transaction 157 involves an agreement which allowed the installation and use of floating boat docks, log booms, and associated walkways. PG&E Attachment A also indicates a retaining wall was built under the agreement. PG&E asserts that the agreement is exempt from CEQA review pursuant to CEQA Guideline Sections 15301 and 15303.

With respect to the installation of the floating boat docks and log booms, the agreement appears to be consistent with other agreements which we have stated fall within GO 69-C. Consistent with the GO 69-C criteria, the specifications under the agreement seem to indicate that the agreement is for a limited use of PG&E's property, and the docks and booms are anchored to the

lake bottom and are removable. The agreement is revocable by PG&E or upon order of this Commission. And the agreement specifies that the installation and use of these docks must not interfere with PG&E's operations or service. If we were looking solely at the installation of the docks and log booms, we would find that our Section 851 approval is not necessary and that the agreement falls within GO 69-C.

However, as mentioned, PG&E's Attachment A indicates that a retaining wall was also built under this agreement. The application provides no information with respect to the size or nature of the retaining wall, its location, or the scope of construction necessary to build the wall. There is no information provided in the application to connect this activity to the claimed CEQA exemptions. Section 15301 is not applicable to construction of the retaining wall because it is more than mere use of an existing structure with no construction or change of use. Absent facts to demonstrate otherwise, it is arguably more significant than a "minor alteration" as permitted under Section 15301. Further, to qualify as such under the exemption, it must be a minor alteration to an existing structure, which is not established in the application. We also see no commonality between the construction of a retaining wall and the construction of small residential/commercial structures in residential/urbanized areas, or accessory (appurtenant) structures such as patios and carports permitted under Section 15303. PG&E has offered no information or argument to assist in establishing such a connection. Thus, we find Section 15303 does not apply to provide a CEQA exemption.

Transactions 160 and 162 involve agreements for the use of lakeshore facilities for recreational purposes including boat launching, attachment of boat docks, boat and trailer storage, use of restroom, sunbathing and access to Bass

Lake. PG&E's Attachment A indicates that improvements made under the lease were a boat dock, boat ramp, and storage area. PG&E asserts that these agreements are exempt from CEQA review pursuant to CEQA Guideline Sections 15301 and 15303.

We find the use of existing facilities on the property which involves no construction or change of use to be exempt from CEQA review under Section 15301. With respect to the attachment of boat docks and ramps, Transaction 160 and 162 do not contain some of the provisions we have found in other agreements that appear to characterize limited use, such as provisions that specify the materials and anchoring methods allowed for the docks. There is no information provided in the application to clarify the scope of construction. Thus here, we cannot readily conclude that the docks are merely anchored and removable, or whether they require more substantial construction such as the installation of wood or concrete pylons, etc. There is also no information provided regarding the scope of improvements necessary for the storage areas. They could potentially fit within the exemption contemplated under Section 15303 for accessory (appurtenant) structures. However, there is no factual information under either the agreements themselves or the application. We are, therefore, unable to determine applicability of Section 15303 to these transactions. If this application had been submitted contemporaneous with opportunity for timely CEQA review, we would require additional information in order to determine whether these activities which took place under the agreements are in fact within the exemption or require CEQA review.

Transaction 181 involves an agreement which allows the use of cross country ski trails and mountain bike trails. PG&E's Attachment A indicates that under the agreement a rock climbing wall was constructed. PG&E asserts the

agreement is exempt from CEQA review pursuant to CEQA Guideline Sections 15301 and 15303.

We agree that the mere use of existing trails with no construction or change of use is exempt from CEQA review under Section 15301. In relevant part, Section 15303 provides an exemption from CEQA review for the construction of limited numbers of new small structures under certain conditions and the installation of appurtenant structures. With respect to the improvements, we note that in addition to construction of a rock climbing "bouldering" wall, the agreement refers to the placement of temporary tents. A letter attachment to the agreement refers to temporary tents that must be removed by November 1 of each year. Temporary placement of a tent would seem to suggest no activity which would trigger CEQA review. However, Term 20 under the agreement refers to the placement of six cabins to act as employees' quarters. There is no information regarding the scope of construction required for the cabins, and whether they are permanent or removable structures. Consistent with our prior reasoning, we do not find that cabins on hydro-generation lands are comparable to the Section 15303 exemption. Similarly, we do not find the construction of a "bouldering" wall consistent with the type of commercial projects contemplated by Section 15303. We do not agree that Section 15303 applies to the agreement.

Transaction 186 involves the use of a group recreational campground, with existing facilities including cabins, a chapel, a dining hall, showers, a dormitory, a store and kitchen/dining area. PG&E's Attachment A indicates that under the agreement, improvements included construction of a new dining hall, cabins and showers. PG&E asserts that the agreement is exempt from CEQA pursuant to CEQA Guideline Sections 15301, 15302 and 15323.

The use of existing facilities, with no construction or change of use is exempt from CEQA under Section 15301. Section 15302 provides a CEQA exemption for the replacement or reconstruction of structures and facilities where the new structure will be located on the same site as the structure replaced and will have substantially the same purpose and capacity. The only information in the application which provides some guidance with respect to the actual improvement activities is a diagram attached to the agreement which reflects the existing campground site. The diagram shows a 10-acre site with various buildings and facilities spread throughout. Markings appear to indicate where certain existing structures (unidentified) were to be removed, while new boxes were drawn and designated as the location of a new dining hall, shower and cabins. These new, possibly replacement structures were marked within the same general vicinity as the other buildings, but at differing locations than the structures to be removed. Because the diagram does not identify the use of the removed structures as compared to the new structures, it is not possible to tell whether these were in fact all replacement structures or whether some were simply new/additional structures, beyond the scope of Section 15302. Therefore, we are unable to determine whether Section 15302 applies to this transaction. If this application had been submitted contemporaneous with opportunity for timely CEQA review, we would seek additional information in order to determine the appropriate level of environmental review.

6.2.3. Category 2 – Telecommunications

PG&E's application contains eight licenses and leases which allow for the installation of telecommunications towers, equipment, buildings or vaults on PG&E property. PG&E asserts that all the agreements are exempt from CEQA review pursuant to CEQA Guideline Section 15303.

Of the eight agreements, seven appear to be for the installation of cellular only facilities. (Transactions 187, 188, 189, 190, 191, 193 and 194) The various facilities installed under these agreements include concrete slabs, buildings and radio and microwave towers, a radio communications station, a monopole and vaults. The diagrams attached to the various agreements in some instances reflect fairly substantial towers of up to 150 feet and buildings up to 600+ square feet. Depending upon the location, we would expect that some if not all of these structures may warrant CEQA review and approval. However, the Commission has stated in GO 159-A that it has delegated its authority to regulate the location and design of cellular facilities to local agencies, while retaining oversight jurisdiction in cases of conflict with the Commission's goals and/or statewide interests.[2] The agreements require that all required governmental permits and approvals must be obtained. To comply with GO 159-A, this must also include CEQA review by the local agencies. Specifically, to comply with GO 159-A, the cellular service provider must provide notification to the Commission that it has obtained the requisite land use approvals or that no such approval is required. Where the agreement is for cellular facilities only and where these GO 159-A requirements are met, the agreements are not subject to further environmental review by this Commission.

Transaction 192 is an agreement that according to its terms, allows the installation of electrical equipment and associated facilities (not described) in a PG&E substation in connection with supplying 600-volt DC power for transit operations. The agreement makes no reference to telecommunications

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[2] *See* D. 96-05-035, D.02-03-059.

equipment nor does the diagram attached to the agreement illustrate telecommunications equipment. However, PG&E's Attachment A indicates telecommunications equipment (not described) was installed under the agreement. There is insufficient information in the application regarding the equipment actually installed to make any determination regarding CEQA. If this application had been submitted contemporaneous with the opportunity for timely CEQA review, we would require additional information in order to determine the requisite level of CEQA review. We are unable to determine whether the asserted exemption applies to this agreement.

6.2.4. Category 3 – Vehicle Parking

PG&E's application contains 15 licenses and leases which allow for vehicle parking on PG&E property. (Transactions 195-209.) PG&E's Attachment A indicates that various improvements which occurred under those agreements included landscaping, fences, gravel, paving, grading, protective barriers. PG&E asserts these agreements are exempt from CEQA pursuant to CEQA Guideline Sections 15302, 15304 and 15311.

Section 15302 provides a CEQA exemption for specified replacement and reconstruction activities. Nothing in the application or agreements indicates that any of the activities involved the replacement or reconstruction of structures and facilities. Based on the information provided, we find that Section 15302 does not apply. Section 15304 provides an exemption for "minor public or private alterations in the condition of land, water, and/or vegetation …" with certain restrictions. Activities which fall within the exemption include grading with a slope of less than 10% and new gardening (Section 15304(a)) and landscaping (Section 15304(b)). Section 15311 provides an exemption for the "construction or placement of minor structures accessory to (appurtenant to) existing commercial, industrial, or institutional facilities." Small parking lots are included among the allowed exemptions. (Section 15311(b).) Though not asserted by PG&E, we also note that Section 15303(e) lists fences as among the appurtenant structures exempted under that section. We find that activities which involved grading and landscaping activity are exempt from CEQA review under Section 15304. In reviewing the agreements in question and the attached diagrams, it appears that the improvements such as paving, gravel, and parking lots is on PG&E property adjacent to PG&E substations or similar facilities. In these areas the land is already disturbed and the PG&E facilities could reasonably be construed as

within the meaning of commercial/industrial/institutional under Section 15311. Therefore, we find Section 15311 applies to these activities in this circumstance. Similar activities not appurtenant to such commercial/industrial/institutional facilities would not fit within the exemption. It also appears the fences in question were placed appurtenant to the PG&E facilities. Therefore, we find Section 15303 applies and exempts the fences from CEQA review. All the activities which took place under these agreements fall within one or more of the CEQA exemptions. Therefore, we agree that Transactions 195-209 are exempt from CEQA review.

6.2.5. Category 4 – Storage

PG&E's application contains six licenses and leases which allow the temporary storage of equipment or vehicles on PG&E property. (Transactions 210-215.) PG&E states that none of these agreements allow for the construction of self-storage facilities. PG&E Attachment A lists improvements under the agreements as fences, gates, grading, landscaping and installation of storage containers. PG&E asserts these agreements are exempt from CEQA review pursuant to CEQA Guideline Sections 15303 and 15304.

Under Category 3 we explained the application of Section 15303(e) with respect to fences. As with Category 3, attachments to each of the Category 4 agreements indicate that the improvements occurred on PG&E property adjacent to substations or similar facilities. Accordingly, we find the improvements of fences and gates under Transactions 210-217 are within the Section 15303(e) exemption for such appurtenant structures. Category 3 also discussed the application of Section 15304 to grading and landscaping activity. We similarly find the grading and landscaping under these transactions to be exempt from CEQA review pursuant to Section 15304. With respect to the containers, PG&E

indicates these are temporary structures. Due to the nature of the property in question for these transactions (i.e., already disturbed substation or similar facilities), we believe it is reasonable to view the structures as appurtenant structures consistent with the exemption from CEQA review under Section 15303(e). All the activities which took place under these agreements fall within one or more of the CEQA exemptions. Therefore, we agree Transactions 210-217 are exempt from CEQA review.

6.2.6. Category 5 – Miscellaneous

PG&E's application contains 41 licenses and leases which allow miscellaneous uses of PG&E property not falling into any of the other categories.[3] These agreements are discussed by grouping or separately below.

Barns, Corrals, Riding Areas

Two licenses in PG&E's application allow for the construction and operation of horse riding facilities. Transaction 216 allows for the construction and operation of a horse stabling business to accommodate up to 64 horses. PG&E's Attachment A indicates that construction under the agreement included stables, fences and corrals. Transaction 217 allows for the construction and operation of a riding center. Construction identified in the license agreement included a barn with paddock, storage shed, riding arena, fences, parking area and driveway. PG&E asserts the construction which took place under both transactions is exempt from CEQA review pursuant to CEQA Guideline Section 15303.

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[3] The 28 Category 5 agreements do not include licenses and leases otherwise identified in this category, but which PG&E asserts pre-date CEQA or for which environmental review was performed. Those agreements are discussed separately.

Section 15303 provides a categorical exemption for the construction of "limited numbers of new small facilities or structures…" Section 15303 goes on to state "…the numbers of structures described in this section are the maximum allowable on any legal parcel." As noted in previous discussion, examples of the type of structures contemplated by Section 15303 include one to three single family residences in a residential or urban zone (Section 15303(a)), a duplex or multi-family residential dwelling unit totaling no more than four dwelling units in urbanized areas (Section 15303(b)), and certain commercial buildings in urbanized areas with specific floor area limits. (Section 15303(c).) As discussed in Category 1, CEQA Guideline notations advise that the exemption applies to commercial projects which have all necessary public services and facilities, and which are not located in an environmentally sensitive area. According to diagrams attached to both agreements, both riding centers are located on PG&E substation property. However, the diagrams appear to indicate pasture area where the riding centers are actually located. Thus, even if riding centers could be construed as commercial projects within the meaning of the statute, their location suggests potentially environmentally sensitive areas. Further, there is no indication of what public services or facilities are necessary to service the riding centers and whether the project involved the construction of such facilities. The diagram with Transaction 216 reflects in excess of 14 stables. It is not possible to tell from the diagram for Transaction 217 how many structures are involved. However, the construction under both transactions appears to exceed the number of permissible structures, and be of significantly different type and location than contemplated by Section 15303. The application itself presents no information to resolve these questions or explain why barns and stables in pasture area should qualify for CEQA exemption under a statute that contemplates commercial

projects. Therefore, we find that Section 15303 does not apply to the construction under these two agreements.

Fish Hatcheries

Four licenses and leases in PG&E's application allow the operation of fish rearing ponds on PG&E property and/or the impounding of water for fish rearing ponds. (Transactions 219, 220, 221, 222.) PG&E's Attachment A identifies improvements taking place under the agreements as a fish hatchery, fish ponds, and placement of mobile homes. PG&E asserts that these agreements are exempt from CEQA review pursuant to CEQA Guideline Section 15304.

Section 15304 exempts from CEQA review "minor public or private alterations in the condition of land, water and/or vegetation…." In particular, subsection (d) exempts 'minor alterations in land, water and vegetation on existing officially designated wildlife management areas or fish production facilities which result in improvement of habitat for fish and wildlife resources or greater fish production." Each of the agreements involves the use of PG&E hydro-generation property. Although it would be helpful to have more information in the application as to the extent of construction involved in each case, it does appear that these agreements are of the nature contemplated under the Section 15304(d). Therefore, for purposes of this application we find the exemption applies to these transactions.

Infrastructure Necessary for Public or Private Use

PG&E's application contains three licenses and leases which allow for miscellaneous public or private use of PG&E property.[4]

Transaction 223 and 233 are similar in that they both appear to allow the use of pre-existing cabins along the shore of Buck's Lake. The diagram attached to the agreements reflect approximately 16 parcels under Transaction 223 and approximately 30 parcels under Transaction 233. Presumably there is a cabin on each parcel. Both agreements indicate that the licensees were allowed to replace individual septic systems with a community septic system and leachfield system. PG&E asserts that Transaction 223 is exempt from CEQA review pursuant to CEQA Guideline Section 15301. PG&E asserts that what appears to be the same activity under Transaction 233 is exempt from CEQA review pursuant to CEQA Guideline Sections 15303 and 15304.

PG&E's application offers no explanation why the two transactions are not alike, or to reconcile why different exemptions were asserted for what appears to be the same activity. This information is necessary to reach a determination regarding these two transactions. In addition, we do not see any obvious commonality between the activities in question and the particular exemptions that would allow us to conclude any one of them applies. Specifically, Section 15301 provides an exemption most readily applied to the continued use existing structures or facilities where there is no construction or change of use. Section 15301 does allow for "minor alterations…involving negligible or no

[4] Eight other transactions are listed in Attachment A under this miscellaneous category. However, PG&E has asserted they either pre-date CEQA or received environmental review by local agencies and they are addressed separately in this decision.

expansion of use…," however, no project information is presented to establish that conversion of individual to community septic systems is a minor alteration as contemplated within the exemption. Section 15303 provides an exemption for the construction of limited numbers of new small facilities or structures, and specifically specifies certain residential or commercial structures (Section 15303 (a)(b)(c)) and certain appurtenant structures (Section 15303(e)). Subsection (d), though allowing for certain utility system extensions, including sewage system extension, is phrased to limit the exemption to apply only to extensions of reasonable length to support the residential or commercial construction enumerated under the preceding subsections.[5] Finally, Section 15304 provides an exemption for minor alterations to land such as grading, landscaping, minor trenching or dredging, etc. Nothing in the statute suggests it exempts the construction or conversion of facilities. For these reasons, we find none of the asserted CEQA exemptions apply to Transactions 223 and 233.

Transaction 228 is a license to Plumas County Airport. PG&E's Attachment A indicates that the only improvement which took place under the agreement was the reconstruction of a small part of the airport runway. PG&E asserts that the agreement is exempt from CEQA review pursuant to CEQA Guideline Section 15302.

Section 15302 provides an exemption for the "replacement or reconstruction of existing structures and facilities …located on the same site…

[5] Section 15303(d) exempts "water main, sewage, electrical, gas, and other utility extensions, including street improvements, of reasonable length *to serve such construction*. (Emphasis added.)

will have substantially the same purpose…" We agree that reconstruction of a portion of the runway would appear to fall within this exemption and we find that Section 15302 applies to that activity. We note, however, that the underlying agreement seems to be broader in that it may have allowed for the construction of a new airport runway and roads. We would consider those activities to be beyond the scope of Section 15302 and we would require further inquiry to determine the appropriate level of environmental review.

Minor Encroachments

Transaction 236 is an agreement which allows the licensees to maintain an existing single family dwelling and backyard fencing within the premises. PG&E's Attachment A indicates that no improvements took place under the lease, but that an encroachment permit was obtained for the house, yard and fencing. PG&E asserts this agreement is exempt from CEQA review pursuant to CEQA Guideline Section 15305.

Section 15305 provides an exemption for "minor alterations in land use limitations…which do not result in any changes in land use or density." Included in the type or permissible exemptions is the "issuance of minor encroachment permits. (Section 15305(b).) We agree Section 15305 applies to this transaction.

Office Space in Existing Buildings

Transaction 237 is an agreement to allow the Fall River Valley Library to use PG&E's Fall River Mills business office for a library. PG&E's Attachment A indicates the only improvement which took place under the agreement was placement of an exterior sign. PG&E asserts the agreement is exempt from CEQA review pursuant to CEQA Guideline Sections 15301 and 15311.

Section 15301 provides an exemption for the use of existing public or private structures and facilities with negligible or no expansion of use. We agree that the mere use of the building by the Fall River Library, with no construction and no change of use, is exempt from CEQA review under Section 15301. Section 15311 provides an exemption for the "placement of minor structures accessory to (appurtenant to) existing commercial, industrial, or institutional facilities." Subpart (a) specifically allows for the placement of on-premise signs. It is reasonable to view the PG&E office building as within the meaning of contemplated commercial, industrial or institutional buildings under the exemption. Accordingly, we agree that Section 15311 exempts from CEQA review the placement of the exterior sign.

Transaction 238 is an agreement which allows the San Joaquin Power Employees Credit Union serving PG&E employees and their spouses to use a portion of the PG&E building located at 650 O Street. PG&E's Attachment A and attachments to the agreement indicate that the only improvement to the building under the agreement was the placement of office workstations. PG&E asserts that the agreement is exempt from CEQA review pursuant to CEQA Guideline Sections 15301 and 15302.

We agree the mere use of the building by the Credit Union, with no construction and no change of use, is exempt from CEQA review under Section 15301. Section 15302 provides for the replacement or reconstruction of existing structures or facilities. Examples under the statute include replacement or reconstruction of existing schools and hospitals (Section 15302(a)), replacement of a commercial structure (Section 15302(b)), replacement or reconstruction of utility systems/facilities with negligible or no expansion of capacity (Section 15302(c)). We do not find any connection between the placement of

internal workstations and the replacement and reconstruction activity contemplated by Section 15302. We do not agree that Section 15302 provides an exemption for this activity. However, we do view the placement of workstations as reasonably within the language of Section 15301 which exempts the "minor alteration of existing public or private structures…involving negligible or no expansion of use…" Accordingly, we agree Section 15301 applies to exempt Transaction 238 from CEQA review.

Plant Nurseries

Transaction 239 is an agreement which allows the operation and maintenance of a wholesale nursery business on approximately 15.5 acres of PG&E property. PG&E's Attachment A appears to indicate that the nursery was pre-existing and that no improvements or construction took place under the agreement. PG&E asserts that the agreement is exempt from CEQA review pursuant to CEQA Guideline Section 15301.

Section 15301 provides an exemption for the use of existing public or private structures or facilities with negligible or no expansion of use. Assuming as indicated by PG&E's submission, the nursery was existing at the time the agreement was entered, and there has been no construction or change of use Section 15301 applies to exempt the transaction from CEQA review. However, we also caution that if a new wholesale business were constructed under an agreement to use PG&E property, further inquiry would be necessary to identify the scope of construction and the appropriate level of our environmental review.

Recreational Uses – Non-Hydro-Generation Lands

The application contains four transactions which allow recreational uses on non-hydro-generation PG&E property.[6]

Transaction 240 is an extension to an agreement with the East Bay Regional Park District for the use of PG&E property in Lafayette and Moraga. PG&E's Attachment A indicates the improvement under the agreement was a walking trail. PG&E asserts the agreement is exempt from CEQA review pursuant to CEQA Guideline Section 15316.

Section 15316 provides an exemption for the "acquisition, sale or other transfer of land in order to establish a park where the land is in a natural condition or contains historical or archaeological resources and either (a) the management plan for the park has not been prepared, or (b) the management plan proposes to keep the area in a natural condition or preserve the historic or archaeological resources." However, the statute also states that "CEQA will apply when a management plan is proposed that will change the area from its natural condition…" The application contains no information to assess whether there is a management plan consistent with either subsection a or subsection b. Nor is there any information in the application describing the original condition of the land. While this transaction may fit within the exemption, we are also cognizant that it is a narrow exemption and more information would be required to properly assess its application. We make no determination whether Section 15316 applies. If this application had been submitted contemporaneous

[6] PG&E's Attachment A lists a fifth transaction in this group however, PG&E indicates that environmental review was performed by a local agency and this transaction is addressed separately in this decision.

with the opportunity for timely CEQA review we would require further information to determine the appropriate level of CEQA review.

Transaction 241 is an agreement which allows operation of a trap shooting range on PG&E property. PG&E's Attachment A identifies the construction of a trap shooting building under the lease, but states that the building was constructed pre-CEQA. PG&E asserts the transaction is exempt from CEQA review pursuant to CEQA Guideline Section 15301.

Section 15301 provides an exemption for the use of existing facilities and structures and we agree it would apply to the agreement to the extent it allows continued use of the existing facilities. It would not apply to the original construction of the trap shooting building. However, Pub. Res. Code § 21169 "Grandfather Clause" provides that any project defined in Section 21065 which is undertaken or carried out or approved before the effective date of CEQA is confirmed and declared legally effective. Because the building was constructed before the enactment of CEQA, it is exempt from CEQA.

Transaction 242 is an agreement which allows the operation and maintenance of a rifle and pistol range. PG&E's Attachment A indicates the only improvement which occurred under the agreement was the addition of sanitary facilities. PG&E asserts the transaction is exempt from CEQA review pursuant to CEQA Guideline Sections 15301 and 15302.

Section 15301 provides an exemption for the use of existing structures and facilities with negligible or no expansion of use. The exemption also allows for the "minor alterations…involving negligible or no expansion of use." Assuming the rifle and pistol range was pre-existing at the time the agreement was entered into, Section 15301 would apply to exempt from CEQA review the mere use of those facilities. However, nothing in the application provides information

regarding the scope and location of construction. For example, it is not possible to determine whether the sanitary facilities may be a minor alteration of an existing facility or whether it is a new and separate structure. Section 15301 may apply, but there is not enough information to make that determination. Section 15303 provides an exemption for construction of limited numbers of new small facilities and contemplates commercial projects (Section 15303(a)(b)(c)) as well as certain appurtenant structures. (Section 15303(d).) It is possible the sanitary facilities could be viewed as an appurtenant structure within the exemption, however, again, there is insufficient information to make that determination. Therefore, we are unable to determine whether Section 15303 applies.

Transaction 244 is an agreement that allows the use of the Bear River Campgrounds, including the use of a caretaker's mobile home, shed, restrooms, water system, hiking trails and campsites. PG&E's Attachment A indicates no improvements or construction has taken place under the agreement. PG&E asserts the transaction is exempt from CEQA review pursuant to CEQA Guideline Section 15301.

Consistent with our prior reasoning, we agree this transaction for the use of existing structures and facilities, with no construction or change of use is exempt from CEQA review pursuant to Section 15301.

Signs

PG&E's application contains six agreements which allow the placement of signs on PG&E property.[7] (Transactions 245 – 251) Each of the agreements indicates that the signs are advertising structures ("billboards"), some illuminated, and of varying sizes. PG&E asserts that these agreements are exempt from CEQA review pursuant to CEQA Guideline Section 15311.

As previously discussed, Section 15311 provides an exemption for "minor structures accessory to (appurtenant to) existing commercial, industrial, or institutional facilities…" Subpart (a) includes on-premise signs within the exemption. PG&E submitted diagrams with each of the agreements reflecting the general location of the advertising structures. There is no information regarding the condition of the land where the signs are located. However, the billboards appear to be stand-alone structures not in any proximity to any existing commercial, industrial, or institutional facilities. We also questions whether advertising billboards are within the scope of minor accessory structures intended by this exemption. We do not believe Section 15311 applies to provide a CEQA exemption for these agreements.

Small Accessory Structures – Minor Improvements

Four agreements in PG&E's application involve licenses or leases which allow the construction of various structures on PG&E property. As discussed below, in each instance there is not enough factual information in the application to make a determination regarding the applicability of the asserted CEQA exemptions.

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[7] PG&E Attachment A also lists one other agreement listed under this group. However, PG&E indicates it pre-dates CEQA and it is addressed separately in this decision.

Transaction 253 is an agreement which allows the development and maintenance of a canine exercise facility on 42,000 square feet of PG&E property. PG&E Attachment A indicates that the only improvement which took place under the agreement was the installation of fencing. PG&E asserts the agreement is exempt from CEQA review pursuant to CEQA Guideline Section 15303.

As previously discussed, Section 15303 provides an exemption for specified new small structures and facilities, and includes an exemption for accessory (appurtenant) structures such as garages, patios and fences. It is possible that Section 15303 applies to the fence in this instance. However, the Application does not contain enough information to reach that conclusion. PG&E did not discuss the agreement in the application, and it is not possible to determine from the diagram attached to the agreement whether the fence is free-standing or an accessory/appurtenant structure, its size, the nature of the property where it is located, etc. We make no finding regarding the applicability of this exemption here.

Transaction 254 is an agreement which allows the installation of stairways, sidewalks and associated rock work on PG&E property and adjacent to Lake Almanor. PG&E asserts the agreement is exempt from CEQA review pursuant to CEQA Guideline Sections 15303 and 15304. As discussed, Section 15303 is applicable to specified small new structures (mainly residential and commercial) and specified appurtenant structures. Section 15304 is applicable to certain minor alterations to land including grading, gardening and landscaping, and minor trenching and backfilling. The application contains no information to describe the scope of work, the size of the areas and installed facilities, or the nature of the property, etc. However, the diagram attached to the agreement appears to reflect a fairly substantial area of new concrete sidewalk, a concrete landing and stairs,

and new rockwork. While it is possible these structures could be appurtenant structures as contemplated by Section 15303, the diagram does not so indicate and the application does not clarify. Further, we note that the exemptions as mentioned under Section 15304 (grading, landscaping, etc.) do not allow us to readily conclude that laying concrete and rockwork is appropriate within that exemption. Accordingly, based on the information provided we are unable to determine whether either of these CEQA exemptions applies.

Transaction 255 is an agreement which allows the installation of a radio-reporting weather station on PG&E property. PG&E asserts that the agreement is exempt from CEQA review pursuant to CEQA Guideline Section 15303. Consistent with our reasoning above, here we are also unable to determine whether the radio-reporting weather station fits within the exemption. Neither the application nor agreement contains any description of the property and related placement of the station. There are three diagrams attached to the agreement. The first (marked Exhibit A) appears to be an assessor's map indicating a rectangular grid with circles drawn in each square of the grid. It is impossible to interpret without some accompanying explanation. The second shows the structure to be a 10-foot high metal pipe (diameter not provided) on a prefabricated concrete slab of unidentified size, and the third shows the general station placement across a road from a sub-station yard. Simply based on these diagrams, it is not possible to determine whether this structure could be considered under Section 15303.

Transaction 256 is an agreement which allows the construction of a cinder block building on PG&E property. PG&E asserts the agreement is exempt from CEQA review pursuant to CEQA Guideline Section 15303.

Again, neither the Application nor the agreement contain any description of the scope of construction, the size of the structure, the location of the structure, or the character of the land where it is located. A diagram attached to the agreement appears to show that it is a fairly substantial structure of 30 feet x 30 feet, and that it is free standing near railroad tracks in the relative vicinity of Lake Almanor. While it is possible a CEQA exemption could apply, more information would be required to make such a determination.

6.2.7. Transactions That Pre-Date CEQA

PG&E's application contains six licenses and leases that PG&E states pre-date the enactment of CEQA and are thus are not subject to environmental review. (Transaction 178 under Category 1(b) and Transactions 218, 226, 229, 230, and 252 under Category 5.)

Although not mentioned by PG&E in its application, Pub. Res. Code § 21169 "Grandfather Clause" provides that any project as defined in Section 21065 that was undertaken, carried out or approved prior to the date CEQA became effective is confirmed and declared legally effective. Accordingly, we agree that these agreements which pre-date CEQA are not subject to environmental review.

6.2.8. Transactions for Which Environmental Review was Performed

PG&E's application contains nine licenses and leases which allowed various construction activity subject to environmental review under CEQA. (Transaction 180 under Category 1(b) and Transactions 224, 225, 227, 231, 232, 234, 235, and 243 under Category 5.) PG&E says in each case environmental review was performed by local entities and copies of the relevant environmental review documents were attached with the respective agreements in Exhibit B. In particular, the transactions and related activities and documents are as follows:

- Sky Mountain Christian Camp (Transaction 180). Recreational facilities were expanded by the addition of cabins, restrooms and a chapel. A conditional use permit for the improvements was obtained from Placer County, and a negative declaration was adopted on May 21, 1981 which found that the project would not result in a significant environmental effect.
- Bucks Lake Permitees and Homeowners Association (Transaction 224). The Plumas County Zoning Administrator issued a special use permit. In March 1997 the Plumas City Planning Department adopted a negative declaration finding that the project would not have a significant effect on the environment.
- Chester Sanitary District (Transaction 225). Effluent ditch was included in the wastewater treatment facilities covered by Chester Sanitary District's Environmental Report dated July 20, 1976 (State Clearinghouse # 75033144), adopted August 19, 1976.
- Mega Renewables (Transaction 227). A use permit with a mitigated negative declaration, adopted September 26, 1985 by Shasta County, was obtained for a small hydroelectric power project. The Shasta County Planning Commission resolution (No. 6625) adopting the mitigated negative declaration approved the project with 44 conditions.
- Shasta County Fire Department (Transaction 231). A use permit with a negative declaration, adopted November 9, 1995 by Shasta County, was obtained in relation to a fire station. The Shasta

County Planning Commission adopted the negative declaration and approved the project with specified conditions.

- Shell Oil Company (Transaction 232). Electrical substation was included in the land-use permit and Environmental Impact Report for Shell's fuel processing facilities, adopted by Contra Costa County on October 12, 1983 (State Clearinghouse # 92093028).
- Calaveras Cement (Transaction 234). Continued mining activities are being conducted pursuant to a use permit and a Mining and Reclamation Plan with mitigated negative declaration adopted on October 7, 1993, by Shasta County. The Board of Administrative Review adopted Resolution 94-055 and 94-055, both approving the project with conditions.
- Hat Creek Construction (Transaction 235). Continued mining activities are being conducted pursuant to a Mining and Reclamation Plan with negative declaration. The Shasta County Planning Department filed a Notice of Determination approving the project and adopting the negative declaration in March 1993. By Resolution 93-160 the Board of Administrative review also approved the Reclamation Plan and adopted the negative declaration in March 1993.
- Millbrae Racquet Club (Transaction 243). Recreation facilities are being operated pursuant to a negative declaration, adopted February 5, 1975, by the City of Millbrae as part of a rezoning to accommodate these facilities.

Because CEQA applies to discretionary projects to be carried out or approved by public agencies and because the Commission must act on the Section 851 application and issue a discretionary decision, the Commission must act as either a lead or 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)). A responsible agency is required to consider the lead agency's environmental documents and findings before acting on or approving the project. (CEQA Guidelines Section 15050(b).)

The specific activities that must be conducted by a responsible agency are contained in CEQA Guideline Section 15096.

In this application, PG&E has submitted documents to establish that various local agencies acted as the lead agency under CEQA for the projects which took place under each of the nine agreements. Therefore, the Commission is a responsible agency for each of these projects. Commission review as a responsible agency should occur prior to construction of the projects. Here, the projects have all been completed. Nevertheless, we have reviewed the submitted environmental documents and find that in each instance the documents are adequate for our decision-making purposes. We also find that it appears the lead agencies reasonably found the respective projects to warrant either mitigated negative declarations or environmental impact reports requiring the adoption of mitigation measures. Thus, while we were not able to timely act as responsible agency, we do agree that lead agency CEQA was performed for these projects.

7. Discussion

7.1. Do the Leases and Licenses Serve the Public Interest?

Section 851 requires a utility to obtain approval from the Commission before selling, leasing or encumbering utility property that is "necessary or useful in the performance of its duties to the public…." The Commission applies the following standard in reviewing applications filed under Section 851:

> 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. (*In re Pacific Bell* (1997) D.97-03-003); *see also, Application of PG&E for Approval of Conveyance of Easement to CPN Pipeline for Two Underground Pipes* (2002) D.02-01-058 ("The primary question for the Commission in 851 proceedings is whether the proposed transaction is adverse to the public interest.")).

The transactions included in this application do not impair PG&E's ability to serve its customers, and a review of the transactions in Attachment A (along with the supporting lease and license data contained in Exhibit B) makes it clear that the transactions are not adverse to the public interest. Indeed, most of the transactions either clearly benefit the public (children's camp sites, walking paths, boat docks, parking space, a fire station) or allow for benefits to existing uses (septic tank improvements, new or renovated recreation cottages).

A review of Exhibit B shows that, in all cases, the transactions reserve to PG&E the rights necessary for PG&E to fulfill its public utility functions. The numerous recreational use agreements expressly state that the licensee "shall not in any way interfere with PG&E's use of the premises for its public utility purposes." A significant number of the transaction documents expressly state that PG&E may revoke the transaction whenever it appears necessary or desirable for PG&E to resume the use of the property to fulfill its public utility purposes.

In addition to providing revenue that benefits ratepayers, the transactions serve the public interest in several ways. First, the Commission has consistently recognized that it is in the public interest to permit compatible uses of utility property. (*See,* D.02-01-058, *supra* ("The public interest is served when utility property is used for other productive purposes without interfering with the utility's operation or affecting service to utility customers.")); *In re Southern California Edison Co.* (1993) D.93-04-019 (same); *In re Southern California Edison Co.* (1994) D.94-06-017 (same); *In re Pacific Gas and Electric Company* (1992) D.92-07-007

(same).) The transactions at issue here maintain the use of the property for PG&E while making the property available for other productive uses.

Second, the licenses to various telecommunications companies allow those companies to improve the telecommunication infrastructure of the state. The Commission has held that it is in the public interest to use existing utility property for the siting of telecommunications equipment. (*See, In re Pacific Gas and Electric Company* (2002) D.02-12-026; *Investigation on the Commission's Own Motion for Local Exchange Service* (1998) D.98-10-058, as modified by D.00-03-055 (regarding access to poles, ducts, conduits, and rights-of-way).)

Third, the transactions provide an indirect benefit to ratepayers because they shift burdens of property ownership from the company to the lessee or licensee. The transactions often shift the burden of maintaining the property, require the lessee or licensee to maintain insurance, and require the lessee or licensee to indemnify PG&E for any claims that arise from use of the property. By shifting the management burden, PG&E is able to avoid expenses usually associated with property ownership.

Fourth, many of the licenses provide valuable recreational opportunities to the public. One agreement permits the operation of a horse corral that provides riding opportunities to handicapped children. (Transaction 217.) There are also agreements with the Girl Scouts and Boy Scouts for use of utility property as campgrounds (Transactions 138 and 177). A license agreement with the East Bay Regional Park District permits the District to maintain a hiking trail on PG&E property. (Transaction 240.)

Finally, several of the transactions provide public services to the community. Two leases permit the use of PG&E property for fire stations. (Transactions 224 and 231.) Another agreement allows the operation of a public

library in a PG&E building. (Transaction 237.) Another agreement permits the California Department of Fish & Game to operate a fish hatchery on utility property. (Transaction 218.)

In approving leases and licenses of utility property under Section 851, the Commission traditionally has looked to whether the transactions are adverse to the public interest.[8] While the Commission frequently requires some evidence of public benefit, the traditional threshold standard for approval is moderate, allowing the Commission flexibility in its determination of whether to authorize a requested transaction. The Commission also has interpreted the standard to mean that the proposed transaction must not interfere with a utility's ability to provide adequate service to the public at reasonable rates.[9]

In this application, we deal with relatively modest leases and licenses of utility land and facilities, and PG&E has demonstrated that the transactions are not adverse to the public interest. Indeed, the majority of transactions show

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[8] *See, e.g., Koch Pipeline Company* (1999) D.99-08-007; *Americatel Corporation* (2001) D.01-02-081; *California Water Service Company* (2000) D.00-05-047; *Universal Marine Corporation* (2000) D.84-04-102.

[9] *See, e.g., North American Telephone Network* (1996) D.96-04-045; *Southern California Edison Company* (2003) D.03-01-039. It should be noted that the test is more stringent for the proposed sale and transfer of water utility systems or proposed utility mergers. In these cases, the Commission requires an affirmative showing that the transaction will in fact benefit the affected ratepayers. (*See, e.g., Country Water Estates Water Co.* (2000) D.00-05-027.) This is because water system transfers are reviewed both on the basis of § 851 and § 2718. Section 2718 requires application of an affirmative "public benefit" standard and enumerates a number of factors to be considered. Utility mergers are reviewed on the basis of § 851 and § 854. Section 854 sets forth explicit affirmative public interest requirements for mergers in excess of $500 million and provides guidance for mergers of less than that amount. (*See Wild Goose Storage, Inc.* (2003) D.03-06-069.)

positive benefit to the public through new or improved use of the property. In summary, PG&E has met its burden of showing that the transactions at issue serve the public interest.

7.2. Applicability of GO 69-C Requirements

License agreements are generally governed by GO 69-C. The GO provides an exception to the § 851 requirement for prior Commission approval of an encumbrance of utility property. The GO provides that a utility may convey licenses, easements, permits or other limited uses of land to third parties without prior Commission approval. The GO establishes three key criteria for permitting a utility to grant minor interests in utility property. These are:

(1) The interest granted must not interfere with the utility's operations, practices, and service to its customers;

(2) The interest granted must be revocable either upon the order of the Commission or upon the utility's determination that revocation is desirable or necessary to serve its patrons or consumer; and

(3) The interest granted must be for a "limited use" of utility property.[10]

[10] *See, e.g., Pacific Gas and Electric Company* (2003) D.03-04-010; *Pacific Gas and Electric Company* (2003) D.03-01-030; *Pacific Gas and Electric Company* (2002) D.02-10-047; *Pacific Gas and Electric Company* (2002) D.02-12-018.

In several instances throughout the application, PG&E briefly states that agreements for certain uses of its property have not been included for review and approval because PG&E considers them to properly fall under GO 69-C. We are unable to agree or disagree with the applicability of the GO based solely on brief statements and cursory characterization representing that any particular agreement in fact meets the GO's criteria. For purposes of this decision we simply note PG&E's view of the transactions that have not been submitted. This decision also does not assess whether any individual license agreement may have been outside the Commission's recent more clearly articulated expectations for license and GO 69-C treatment. PG&E has requested Section 851 approval as to all the transactions and that approval is granted in this decision, prospectively.

8. Conclusions

Based on our analysis, we conclude that we should grant PG&E's request that 255 of the 256 transactions at issue be approved as meeting the requirements of Section 851. As discussed herein, the remaining transaction does not require our approval. First, the leases and licenses are not adverse to the public interest and in most cases clearly benefit the public. Second, the leases and licenses do not impair PG&E's ability to serve its customers and in most cases are revocable if the public interest so requires. As we determined in D.03-05-033 and in D.03-06-069, the authority that we grant should apply prospectively, and not on a retroactive basis. The purpose of Section 851 is to enable the Commission to review a proposed encumbrance on utility property before it takes place, in order to take such action as the public interest may require. Granting this application on a retroactive basis would thwart the purpose of Section 851.

While we do not grant retroactive authority, we have in our order exempted the 255 transactions from Section 851 approval for the period of time

prior to the effective date of this decision. This exemption is authorized by Section 853(b) and is explained more fully in Section 9 of this decision. We note that forecasts of revenues from leases and licenses have always been included in past general rate cases for PG&E as other operating revenues. Consequently, it is not unreasonable for PG&E to have concluded that the Commission and its staff were aware of the existence of these miscellaneous leases and licenses of PG&E property and permitted the practice to continue without objection.

We find that a penalty is not appropriate in this case. The company's failure to seek Section 851 approvals for the agreements at issue here caused neither physical nor economic harm to customers or competitors. The company has not benefited from the omission to seek advance Section 851 approval for the agreements, since the pecuniary benefits accrue mainly to ratepayers. To the extent Section 851 was not observed, such noncompliance did not affect any persons adversely.[11]

We also are cognizant of the fact that we soon will be reviewing Commission practices as to GO 69-C and Section 851 as a result of the industry workshop that we ordered in D.02-10-057. We ordered the workshop to determine whether changes to GO 69-C would be worthwhile. It would be

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[11] In the *Final Opinion Adopting Enforcement Rules* (1998) D.98-12-075, the Commission established factors it would use in determining the level of penalty for violation of the Commission's rules. A key factor is "severity of the offense," including actual physical harm, economic harm, competitive harm, and harm to the regulatory processes, as well as the number of violations and number of persons affected. A second key factor is "conduct of the utility," including conduct in preventing, detecting, disclosing and rectifying the violation. (*Id.*, pp. 36-39.) The severity of the offense here is not substantial, and PG&E has disclosed the transactions soon after identifying them and has taken steps to prevent violations in the future.

inappropriate to assess a penalty in this application before we have considered staff recommendations on our interpretation of GO 69-C and Section 851.

PG&E in its application asks that we grant authority for the utility to enter into extensions and minor modifications of the transactions in this application without applying to the Commission for approval of the changes. We grant this request for extensions or modifications of agreements which do not allow for or result in additional construction and may therefore warrant an amended Section 851 approval and environmental review.

Notice of this application appeared in the Commission's Daily Calendar on May 23, 2003. The Commission has received no protests.

In Resolution ALJ 176-3113, the Commission preliminarily categorized this proceeding as ratesetting, and preliminarily determined that hearings were not necessary. We confirm those determinations. As no hearing is required, pursuant to Rule 6.6 of the Rules of Practice and Procedure, Article 2.5 of the Rules ceases to apply to this proceeding.

9. Comments on Draft Decision

The draft decision of the Administrative Law Judge (ALJ) was mailed to PG&E and ORA pursuant to Pub. Util. Code § 311(g)(1) and Rule 77.7(b).

In comments filed on November 17, 2003, PG&E supports the draft decision inasmuch as it prospectively approves the 255 lease and license transactions under Section 851 and determines that one of the 256 transactions (installation and use of floating boat docks) qualifies as a GO 69-C limited-use transaction not subject to Section 851.

PG&E however urges the Commission to reconsider the conclusion that "the transactions are void under Section 851 for the period of time prior to the effective date of this decision" (draft decision, p. 52) and that "PG&E is at risk for

any adverse consequences that may result from its having entered into the contracts without prior Commission authority." (Draft decision, p. 53.)

According to PG&E, the practical effect of the void language is to (1) expose the utility to claims for reimbursement of all rent previously collected under the negotiated terms of the agreements, and (2) potentially invalidate the indemnity provisions of the agreements that require tenants to pay for contamination or personal injury on leased property. Moreover, PG&E states, a tenant in the future may challenge the enforceability of a lease and its indemnity obligations on grounds that the contract has been deemed void for a period of time and cannot automatically become enforceable without the affirmative consent of both parties to the contract.

PG&E's concerns have merit. The sheer number of Section 851 transactions (255) and the fact that many of them go back 10, 20 and 30 years make it all the more likely that at least some confusion will emerge if the transactions are declared void until the date of this decision. Our research suggests that no previous Commission decision has ever applied Section 851 standards to so large a number of transactions in a single application.

PG&E asks that we give retroactive approval to the transactions. Until recent years, we have granted retroactive approval under Section 851 "where the failure to obtain approval has been deemed inadvertent and where….the transfer revealed no prejudice to ratepayers." (*Application of PG&E* (1999) D.99-04-047.) We have found that some of the 255 agreements at issue here were not submitted to the Commission for prior 851 approval due to inadvertence, and the others were not submitted due to a good faith belief that Section 851 approval was not required by Commission precedent at the time. Our decision also recognizes that PG&E did not willfully violate Section 851 and ratepayers have not been harmed.

Recent Commission policy, however, is to grant Section 851 approval on a prospective basis only. As an alternative, therefore, PG&E asks that for the period of time prior to this decision, the Commission exempt the 255 transactions from Section 851 pursuant to Section 853(b). Section 853(b) provides, in part, that "[t]he Commission may from time to time…exempt any public utility…from…[Section 851] 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."

In *Re PG&E* (2002) D.02-01-055, we applied an 853(b) exemption to six transactions on grounds that PG&E had shown extraordinary circumstances that made voiding of the contracts impractical. In that case, PG&E had sold electric distribution facilities to individual customers during an 11-year period ending in 1996 under the mistaken belief that the facilities were no longer necessary or useful in utility service and, therefore, not subject to Section 851. Voiding of the contracts would have required negotiation and execution of new contracts for equipment now many years older. Noting that as a general rule the Commission does not grant exemptions under Section 853(b) except in extraordinary situations, we stated:

> We find that the…circumstances…constitute an extraordinary situation that warrants our granting an exemption…. [The] sales were reasonable and in the public interest for the previously stated reasons. Consequently, it "is not necessary in the public interest" to deem the sales void. Second, the customers who purchased the assets from PG&E did so in good faith and for value. It would be unfair to force these customers or their successors in interest to now relinquish the assets. Finally, the sales occurred 12 years ago. Due to the passage of time, it is probably not possible, as a practical matter, to unwind the sales. For example, some of the assets may no longer exist. In addition, PG&E may not be able to locate the purchasers to unwind the sales, since the customers who purchased the assets have vacated their service locations. (D.02-01-055, 2002 Cal. PUC LEXIS 3, at p. 4; footnotes omitted.)

Our review of the record in this case persuades us that similar extraordinary circumstances justify our granting an exemption under Section 853 to PG&E for the 255 transactions for the period of time they were in effect prior to our approval under Section 851. First, we have found that the leases and licenses were reasonable, serve the public interest and do not impair PG&E's ability to serve its customers. Many of the licenses provide valuable recreational opportunities to the public. Second, the organizations and individuals acquiring use of these properties did so in good faith and for value, and it would be unfair to them and to PG&E to now declare that the leases and licenses were void for a period of years or decades. Third, many of the transactions at the time of execution arguably could have been deemed "not necessary or useful" in utility service and thus exempt from Section 851 approval as that statute was then interpreted. Finally, the number of transactions is so large that an order voiding them is likely to invite unnecessary confusion and controversy.

Accordingly, we have revised the draft decision to prospectively approve the transactions in question and to grant Section 853 exemption for these transactions for the periods of time that the transactions were in effect prior to our approval under Section 851.

10. Assignment of Proceeding

Susan P. Kennedy is the Assigned Commissioner and Glen Walker is the assigned ALJ in this proceeding.

Findings of Fact

1. In A.00-06-010, PG&E sought approval under Section 851 of 110 lease transactions.

2. In that application, PG&E stated that it would later seek approval of a number of leases and licenses for recreational use of PG&E property subject to FERC hydro-generation leases.

3. As part of its bankruptcy proceeding, PG&E was required to do an extensive search in order to list all outstanding leases and licenses.

4. In A.03-05-012, PG&E seeks Section 851 approvals of 256 transactions.

5. Nine of the transactions received environmental review under CEQA by local agencies.

6. Six of transactions pre-date the enactment of CEQA in 1970.

7. CEQA Guideline Section 15301 exempts from CEQA review the operation, repair, maintenance, permitting, leasing, licensing, or minor alteration of existing public or private structures and facilities involving negligible or no expansion of use.

8. CEQA Guideline Section 15302 exempts from CEQA review the replacement or reconstruction of existing structures and facilities where the new structure will be located on the same site and having substantially the same purpose and capacity.

9. CEQA Guideline Section 15303 exempts from CEQA review the construction or location of limited numbers of new small facilities and structures; installation of small new equipment and facilities in small structures; and the conversion of existing structures from one use to another where only minor modifications are made to the exterior.

10. CEQA Guideline Section 15304 exempts from CEQA review minor public or private alterations in the condition of land, water, and/or vegetation.

11. CEQA Guideline Section 15305 exempts from CEQA review minor alterations in land use limitations.

12. CEQA Guideline Section 15311 exempts from CEQA review construction or placement of minor structures accessory to (appurtenant to) existing commercial, industrial, or institutional facilities.

13. CEQA Guideline Section 15316 exempts from CEQA review the transfer of ownership of land to create parks.

14. CEQA Guideline Section 15323 exempts from CEQA review the normal operations of facilities for public gatherings.

15. CEQA Guideline Section 15096 requires a responsible agency under CEQA to review the environmental documents prepared by a lead agency prior to approval and construction of a project.

16. Pub. Res. Code § 21169 is a grandfather clause to exempt from CEQA requirements projects constructed prior to the enactment of CEQA in 1970.

17. All of the 256 transactions involve licenses or leases that permit various uses of PG&E property by third parties.

18. Many of the transactions allow both the use of existing facilities and structures and also allow some construction or improvement on PG&E property.

19. The transactions are categorized into those that involve recreational uses on hydro-generation lands, telecommunications, vehicle parking, storage, and miscellaneous.

20. All of the transactions are several years old and any activities which took place that required CEQA review are already completed.

21. In GO 159-A, the Commission delegated its authority to regulate the location and design of cellular facilities to local agencies, while retaining oversight and jurisdiction in cases of conflict with the Commission's goals and/or statewide interests.

22. Agreements which meet the criteria of GO 69-C do not require Commission approval.

23. An unidentified number of transactions which may qualify for GO 69-C treatment were not submitted as part of this application.

24. In D.02-10-047, the Commission found that specified floating boat dock agreements are within GO 69-C and do not require Commission approval.

25. Much of the revenue from the licenses and leases will be treated as other operating revenue for the benefit of ratepayers on PG&E's general rate case.

26. Revenue from uses of FERC jurisdictional transmission property will be subject to FERC accounting and ratemaking treatment.

27. ORA does not challenge PG&E's proposed revenue allocation.

Conclusions of Law

1. CEQA Guideline Section 15301 applies to exempt all the activities under the following transactions from environmental review: 1-15, 17-35, 37-51, 53-81, 83-85, 87-106, 108-131, 133-139, 142, 143, 145, 147, 149-156, 158, 159, 161, 163-179, 182-185, 238, 239, 244.

2. Where an agreement involves the use of existing facilities pursuant to CEQA Guideline Section 15301 as well as certain construction activity, Section 15301 provides only a partial exemption for that portion of the agreement allowing use of the existing facilities.

3. A transaction is deemed exempt from CEQA review only if all the activities allowed under the agreement fall within one or more of the CEQA exemption statutes.

4. CEQA Guideline Section 15302 applies to exempt the following transactions from environmental review: 36, 52, 86, 107, 228.

5. CEQA Guideline Section 15303 applies to exempt the following transactions from environmental review: 195-209 (for specified activities), 210-215 (for specified activities).

6. CEQA Guideline Section 15304 applies to exempt the following transactions from CEQA review: 195-209 (for specified activities), 210-215 (for specified activities, 219-222.

7. CEQA Guideline Section 15305 applies to exempt Transaction 236 from CEQA review.

8. CEQA Guideline Section 15311 applies to exempt the following transactions from environmental review: 195-209 (for specified activities), 237.

9. Pursuant to GO 159-A, no further environmental review is required by the Commission for the following transactions: 187, 188, 189, 190, 191, 193, 194.

10. Pursuant to Pub. Res. Code § 21169 the following transactions are not subject to CEQA requirements: 241, 218, 226, 229, 230, 252.

11. CEQA lead agency review was conducted by local agencies for the following transactions: 180, 224, 225, 227, 231, 232, 234, 235, 243.

12. We make no finding regarding the applicability of GO 69-C to transactions that were not submitted as part of this application.

13. The CEQA exemptions reviewed in this decision, either individually or in conjunction, do not provide a CEQA exemption for the following transactions: 16, 82, 140, 141, 144, 146, 148, 157, 160, 162, 181, 186, 192, 195-209, 216, 217, 237, 240, 242, 245-251, 253, 254, 255, 256.

14. The transactions included in this application do not impair PG&E's ability to serve its customers.

15. The transactions reserve to PG&E the rights necessary for PG&E to fulfill its public utility functions.

16. The public interest is served when utility property is used for other productive purposes without interfering with the utility's service.

17. PG&E has met its burden of showing that the transactions at issue are not adverse to the public interest.

18. PG&E's application for approval of 255 of the 256 transactions at issue should be granted.

19. Transaction 132 is consistent with D.02-10-047 and GO 69-C and does not require Commission approval.

20. The authority granted should apply prospectively, and not on a retroactive basis.

21. The 255 transactions approved today should be exempted from Section 851 approval pursuant to Section 853(b) for the period of time that they were in effect prior to the date of this decision.

22. No penalty should be assessed for PG&E's failure to obtain prior approval of the transactions under Section 851.

23. Our order should grant PG&E authority to enter into extensions and minor modifications of the transaction in this application without applying to the Commission for approval of the changes.

O R D E R

IT IS ORDERED that:

1. The application of Pacific Gas and Electric Company (PG&E) for approval under Pub. Util. Code § 851 of 256 transactions set forth in Exhibit A of this decision is approved.

2. The 255 of the 256 transactions set forth in Exhibit A of this decision are approved prospectively from the date of this decision.

3. The 255 transactions approved today are exempted from Section 851 approval pursuant to Section 853(b) for the period of time that they were in effect prior to the date of this section.

4. PG&E is authorized to enter into extensions and minor modifications of the transactions set forth in Exhibit A without applying to the Commission for approval of the changes.

5. No penalty is assessed against PG&E for failure to obtain advance approval of the Commission before executing the 256 transactions set forth in Exhibit A of this decision.

6. Application 03-05-012 is closed.

This order is effective today.

Dated _____, at San Francisco, California.