Decision **DRAFT DECISION OF ALJ VIETH** **(Mailed 3/16/2005)**

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Petition of Certain Public Utilities to Adopt, Amend, or Repeal a Regulation Pursuant to Public Utilities Code Section 1708.5 and for an Order Instituting a Rulemaking Regarding General Order 69-C.	Petition 02-02-003 (Filed February 4, 2002)

OPINION RELEASING WORKSHOP REPORT AND CLOSING PROCEEDING

Summary

We release the final report on the public workshop into issues regarding application and implementation of General Order (GO) 69-C. The final report differs very little from the draft report. The parties who commented on the draft report suggested only minor modifications and agreed that it otherwise accurately reflects the concerns and suggestions raised by workshop participants. Significantly, the consensus of workshop participants is that GO 69-C is not defective and need not be changed. However, workshop participants underscore the close relationship between GO 69-C and Pub. Util. Code § 851, which requires Commission authorization before a utility may lease or sell plant, or other property, that is "necessary or useful" to the provision of utility service.[1]

[1] Unless stated otherwise, all statutory citations refer to the California Public Utilities Code.

The majority of workshop participants urge the Commission to streamline review of § 851 transactions, arguing that the time and cost required to process formal applications may prohibit desirable transactions from going forward. Many also ask that we provide additional guidance on appropriate use of GO 69-C. To address these concerns, our staff is using the workshop report to inform their preparation, for our consideration, of options for streamlining § 851 review and for clarifying use of GO 69-C, and will bring those options back to us expeditiously. Accordingly, we close this proceeding.

Background

By Decision 02-10-057, we denied the petition of Pacific Gas and Electric Company (PG&E), Southern California Edison Company (Edison), and California-American Water Company for a § 1708.5 rulemaking into GO 69-C. The decision finds, among other things, that petitioners had failed to explain what changes to GO 69-C they were seeking and that they were seeking a degree of predictability that only fact-specific analysis can yield. Though we denied the petition, we directed staff from the Legal Division and the Environmental Branch of the Energy Division to hold a public workshop into GO 69-C and thereafter, to prepare a workshop report for comment.

Discussion

GO 69-C permits limited, revocable uses of utility property by third parties. As such, GO 69-C provides a narrow exemption from the broader requirement under § 851 that the Commission approve, in advance, any sale, lease, assignment, mortgage or other encumbrance of utility property.

The final workshop report, attached to this decision as Appendix A, outlines the workshop participants' concerns about current application of both the statute and the general order, and identifies their suggestions for reforms in

our processes. The workshop participants' written presentations are attached to the report. The report is concise, and rather than summarize it further, we simply repeat its organizational format:

- Defining "revocability" and "limited use"
- Streamlining § 851 via the Advice Letter process
- A "legalistic" proposal
- Miscellaneous issues:
  - De minimis transactions under Section 851
  - A test for "necessary and useful"
  - Transactions with other public agencies
  - Other miscellaneous issues
- Suggested approaches/solutions
- Transactions potentially subject to GO 69-C

The range of concerns and proposed suggestions for change require further review. While the majority of workshop participants urge us to open a rulemaking to further explore these matters, clear differences of opinion on scope remain. Furthermore, several workshop participants have voiced concern that this petition docket is an inappropriate procedural vehicle for moving forward—they urge us to close this proceeding, to open a new one, and to give broad notice of our intent to look at the interrelationship between § 851 and GO 69-C.

Our staff is preparing, for our consideration, options for streamlining § 851 review and for clarifying use of GO 69-C. Staff is using the workshop report to inform their development of the options and will report back to us expeditiously. Accordingly, we close this proceeding.

Comments on Draft Decision

The draft decision in this matter was mailed to the parties in accordance with § 311(g)(1) and Rule 77.7 of the Rules of Practice and Procedure. The

following workshop participants filed comments on April 5, 2005: PG&E; San Diego Gas & Electric Company and Southern California Gas Company, jointly; SureWest Telephone; and the small Local Exchange Carriers. No reply comments were filed.

The brief comments all commend the Commission for approving, at the March 17, 2005 public meeting, a 12-month pilot program to test procedures for streamlining review of transactions subject to § 851. The comments all urge us to go still further. Some suggest we expand the pilot expressly to include a means for clarifying appropriate use of GO 69-C and/or for expanding the use of exemptions available under § 853(b). Others urge us to open a new rulemaking for those purposes. We expect our staff to consider these suggestions as it prepares additional options, based on the workshop report, for further regulatory reform.

We also refer the comments of the Office of Ratepayer Advocates (ORA) to staff, and to this end, grant ORA's April 19, 2005 motion to file, late, the comments it served on April 15. ORA attributes its lateness to an inadvertent error of counsel. No harm can befall any interested party or workshop participant by the granting of the motion, since today's decision makes no substantive changes based on ORA's comments or the comments received from others. ORA did not participate in the workshop; its comments endorse some of the workshop participants' recommendations and criticize others.

Assignment of Proceeding

Geoffrey F. Brown is the Assigned Commissioner and Jean Vieth is the assigned Administrative Law Judge in this proceeding.

Finding of Fact

Commission staff should use the final workshop report attached to this opinion to inform expeditious development of options for streamlining review of § 851 and for clarifying use of GO 69-C.

Conclusions of Law

1. As this proceeding serves no further purpose, it should be closed, effective immediately.

2. ORA's motion to file comments on the draft decision, late, should be granted.

O R D E R

IT IS ORDERED that:

1. Commission staff shall prepare for further consideration by the Commission, options for streamlining review of Pub. Util. Code § 851 and for clarifying use of General Order 69-C, and shall present those options to the Commission expeditiously.

2. We grant the April 19, 2005 motion of the Office of Ratepayer Advocates to file the comments it served and tendered for filing, late, on April 15, 2005. The comments shall reflect the file date of April 19, 2005.

3. This proceeding is closed.

This order is effective today.

Dated _____, at San Francisco, California.

Final Workshop Report on General Order 69-C:

"Easements on Property of Public Utilities"

Prepared by the Energy Division
California Public Utilities Commission

1. Introduction

On February 4, 2002, Pacific Gas & Electric Company, Southern California Edison Company, and California-American Water Company ("Petitioners") filed Petition P.02-02-003 pursuant to Public Utilities ("PU") Code Section 1708.5 for an Order Instituting Rulemaking (OIR) regarding Commission General Order 69-C (GO 69-C). The Petition was served on the service list established for Rulemaking R.98-07-038, concerning revisions to General Order 96-A. Parties filing responses were: Calpine Corporation (Calpine); Verizon California Inc. (Verizon); Roseville Telephone Company (Roseville); AT&T Wireless Services of California, Inc. (AT&T); and jointly, California Cable & Telecommunications Association (CCTA) and WorldCom, Inc. (WorldCom). A reply was also filed by the Petitioners.

On October 24, 2002, after considering the filings of all of the parties, the Commission issued an Interim Opinion (D.02-10-057) denying the Petition for a rulemaking and directing the Commission staff to convene an informal workshop to discuss the application of GO 69-C. In that Decision, the Commission concluded that it was premature to establish a rulemaking as it would not yield the fact-specific guidance on the application of GO 69-C that the Petitioners sought. In order to reduce any confusion and uncertainty for parties regarding GO 69-C and bring a measure of predictability to its application, a fact-intensive analysis and review of the GO's application would be required. The Interim Opinion indicated that the Commission's continued review of pending PU Code Section 851 (Section 851) applications would provide a source of fact-specific guidance regarding the use of leases for irrevocable easements on utility property and, conversely, would provide examples of factual situations where GO 69-C is inapplicable. Indeed, the Interim Opinion indicated that the Commission would continue to monitor the need for a rulemaking as it resolves related pending applications.

The Commission also noted in D.02-10-057 that informal workshops are another means of exploring issues and developing guidance, and the staff were directed

to convene a public workshop by the second quarter of 2003 to discuss appropriate and inappropriate uses of GO 69-C and PU Code Section 851, and to solicit proposals for amendments to GO 69-C. Therefore, pursuant to Ordering Paragraph No. 2 of D.02-10-057, the Commission staff were asked to solicit (1) examples of the types of situations where workshop participants were unsure about whether or not they may rely on GO 69-C; and (2) workshop participants' views about the types of changes that might be made to facilitate the proper application of GO 69-C.

Subsequent to the workshop, the staff were given three directives: (1) prepare and file with the assigned ALJ a draft workshop report; (2) establish a schedule for comment by the workshop participants; and (3) file a final workshop report. Upon receipt of the draft report, the assigned ALJ will issue the draft report to the service list for P.02-02-003 for a comment period of at least 30 days. This document represents the first and second of these tasks; the final workshop report will be prepared and filed with the assigned ALJ subsequent to the receipt and analysis of comments on this draft report. Upon receipt of the final workshop report, the assigned ALJ will prepare a ruling indicating whether the Petitioners' motion for a formal rulemaking on the applicability of GO 69-C should be granted.

2. The Workshop

Pursuant to direction from the Commission in D.02-10-057, the Commission staff from the Energy and Legal divisions held a one-day workshop on May 28, 2003, in San Francisco to address specific issues regarding the application and implementation of GO 69-C. Participants were to be prepared to identify and discuss specific examples of issues that are raising concerns with the application of the General Order. Participants were encouraged to propose recommendations that they believed would clarify the implementation of GO 69-C, but that would not interfere with the intent of the General Order.

The workshop was well-attended by interested parties from the energy and telecommunications utilities, as well as from the cable industry and other third parties. The workshop was structured to provide for introductions and an outline of the workshop objective; followed by statements from the participants; and a structured discussion of issues raised and potential solutions. Several participants provided written presentations at the workshop, which are attached to this report.

The consensus of the Parties attending the workshop was that General Order 69-C itself is not defective and need not be changed. The Parties clearly indicated that clarification and guidance on a number of issues is required. Attendees acknowledged the guidance provided by the Commission's case-by-case approach; however, they noted that it is cumbersome and has not provided the bright-line clarity sought by the Petitioners in this proceeding. A wide variety of issues were raised and discussed at the Workshop and a number of suggestions as to how to proceed were made. This report will present each of the issue-areas raised, outline any approaches or solutions suggested by Workshop participants, and present a list of sample transactions that various Workshop participants believe might potentially be subject to GO 69-C.

Notice should be taken that the "suggested solutions" and the "sample transactions" presented in Sections 7 and 8 of this report do not represent the opinion of either the Commission or the staff: these are exclusively a representation of the Workshop participants' collective views for further consideration by all interested parties.

This report is organized into the following sections:

- Defining "revocability" and "limited use"
- Streamlining Section 851 via the Advice Letter process
- A "legalistic" proposal
- Miscellaneous issues:
  - De minimis transactions under Section 851
  - A test for "necessary and useful"
  - Transactions with other public agencies
  - Other miscellaneous issues
- Suggested approaches/solutions
- Transactions potentially subject to GO 69-C

3. Defining "Revocability" and "Limited Use"

The most common criticism of GO 69-C was that the Commission's interpretation of the GO is too strict regarding the terms "revocability" and "limited use." Several Parties indicated that the seeming prohibition on

construction and ground-disturbing activities currently associated with GO 69-C appears to be in conflict with the two examples of "limited" uses provided for in the GO: private roads, and agricultural activities. Several Parties agreed that construction should be allowed under GO 69-C if either no CEQA ("CEQA" refers to the California Environmental Quality Act) is required or it is performed at the local level. These Parties also concurred that the term "revocability" requires clarification: does the physical extent of any activity or facilities installed under GO 69-C reflect on their revocability; i.e., does the fact that facilities or structures may be removed or demolished allow that activity to still be considered "revocable"? In addition, some parties urged the Commission to consider the intent of the parties in determining "revocability." These parties argued that oftentimes intent can be discerned from the terms of the transaction and reflects on whether the use is truly revocable. Finally, Parties suggested that the definition of "limited uses" should be conformed to activities envisioned under PU Code § 767.5 and the "ROW Decision" (D.98-10-058).

4. Streamlining Section 851 via the Advice Letter Process

The consensus among the Parties was that the Commission should use the formal Advice Letter process to streamline Section 851 proceedings for transactions that are de minimis, unchallenged, and either do not involve CEQA or involve CEQA at the local level. Some parties suggested that this process would be very similar to the process currently used by Non-Dominant Inter-Exchange Carriers (D.94-05-051) and Competitive Local Exchange Carriers (D.98-07-094) to seek approval for leasing arrangements by Advice Letter. The consensus was also that such transactions should be allowed initially as licenses under GO 69-C, and that they then be allowed to convert to leases via the Advice Letter process. Parties agreed that the license-to-lease mechanism is a "bridge that works." Some Parties indicated that the utilities need the flexibility provided by establishing a single agreement with a third party (such as a Master Agreement) that allows the license-to-lease option, especially in cases where the activity involves multiple, serial installations of small devices or equipment. One Party indicated that a separate GO should be established to process office leasing by Advice Letter.

5. A "Legalistic" Proposal

Finally, a number of Parties suggested the following approach to resolving some of the issues raised during the Workshop. Parties suggested that the Commission maintain a purely legalistic approach: (1) once the criteria for

"revocability" and "limited use" are clarified, a license is allowable under GO 69-C regardless of what the specific transaction involves (provided it meets the clarified criteria); and (2) if a lease is required by either party to the transaction, or if the specific transaction activity is outside of the bounds of GO 69-C, then a formal filing with the Commission is required pursuant to Section 851. According to at least one Party, the market will determine if a license or lease is appropriate: a license will be called for when there is a limited use involved, less revenue is involved, revocability is not a problem for the third party, and no significant property right is transferred; a lease would be called for when the third party wants irrevocability, property rights are transferred, and the transaction is a significant financial event. Parties indicated that if the transaction involves construction (and/or demolition) and requires CEQA review, such a review can be obtained at the local level.

Parties noted that under this paradigm, the "uses" themselves are not relevant – a five-story parking structure could be developed pursuant to a license, as long as the third party did not object to the revocability and, if required, local CEQA would be done (note that this example implies potential demolition of the parking structure to satisfy the "revocability" clause). The Commission staff noted that converting such an agreement to a lease pursuant to Section 851 via Advice Letter would likely be problematic for the Commission. If CEQA were required for the transaction, the Commission would have to act as a Responsible Agency under CEQA for Section 851 proceedings and carry out obligations such as making Findings for significant impacts and deliberating Overriding Considerations. The staff indicated that the Advice Letter process might not be adequate for such streamlined Section 851 proceedings or for license-to-lease conversions when either CEQA was required or when a ministerial exemption had been issued at the local level.

6. Miscellaneous Issues

6.1 De minimis transactions under Section 851 -- Workshop attendees agreed that the time, cost and uncertainty of the Public Utilities Code Section 851 process (Section 851) effectively prevent many transactions from going forward. Parties agreed that the filing costs and transaction costs outweigh the revenues for small transactions, and suggested that the Commission could establish a "de minimis" transaction test structured in two parts: a dollar ceiling per transaction, and a total dollar cap on transactions per year. Some parties suggested that the Commission develop certain types of transactions for which "categorical" Section 853 exemptions might apply.

6.2 A test for "necessary and useful" -- Some Parties indicated that a test for the term "necessary and useful" as used in Section 851 would be helpful in clarifying the appropriate use of General Order 69-C: the GO only applies to public utilities covered by the provisions of Section 851, and Section 851 only applies to transactions involving property that is necessary or useful. These Parties suggested that a separate docket be established to deal with how the determination of "necessary and useful" is established. One Party provided an example that would benefit from Commission guidance: some utilities distinguish between *owned* property and *leased* property when considering the applicability of Section 851 and GO 69-C, arguing that owned property can be considered "surplus" and not considered "necessary or useful" and therefore exempt from Section 851, while property leased from a third party would continue to be considered "necessary or useful" and subject to both Section 851 and GO 69-C. Other parties indicated that it is appropriate that utility management be responsible for determining what is "necessary and useful" and that a definition or test for that term is unnecessary.

6.3 Transactions with other public agencies -- Several Parties raised the issue of transactions that involve other public agencies. Parties indicated that requests by public agencies often involve constraints reflecting either a need for an expedited schedule or other constraints associated with issues such as obtaining public funding. Examples of these requests might include easements or facility relocations related to road improvement projects, and agreements to attach communications equipment to existing facilities. One Party requested that the Commission clarify that the exemption contained in the GO regarding revocability for government agencies is still applicable. Another Party suggested that the Commission expedite the Section 851 process for transactions between public agencies and public utilities.

6.4 Other miscellaneous issues -- There were three additional miscellaneous issues raised by the Workshop attendees. First, one Party indicated that the Commission should resolve any concerns regarding affiliate transactions associated with the GO. This situation would arise when a regulated utility enters into a transaction with one of its own affiliates under the GO or Section 851, either as a license or a lease. The second issue involves the notion that a *transfer of assets* is different from a *use of space*, and that a distinction should be made in the Section 851 process between transactions to transfer assets and transactions to encumber utility property by a lease. Finally, one Party indicated that the Commission should clarify the distinction between a license and a lease,

and indicate how these two should be applied in structuring utility transactions with public agencies, other utilities, and third parties. While the legal distinction between a license and a lease is conceivably well known, the notion of which potential utility activities or transactions would more appropriately fall under either a lease or a license is perhaps the real issue, which reduces this issue to the definition of "limited uses" for which a license would be appropriate, leaving all other activities subject to a lease. The issue of defining "limited use" is examined further below, and a list of potential transactions for which GO 69-C might be applicable was developed from examples provided by Workshop attendees.

7. Approaches & Solutions Suggested by Workshop Attendees

- General Order 69-C itself is not defective and need not be changed
- De-couple any perceived nexus between "revocability" and the physical extent of any activities authorized under the GO
- The definition of "limited uses" should be conformed to activities envisioned under PU Code Section 767.5 and the "ROW Decision" (D.98-10-058)
- Construction should be allowed under GO 69-C if either no CEQA is required or it is performed at the local level (except for ministerial actions)
- Streamline Section 851 proceedings via the Advice Letter process for transactions that are de minimis, unchallenged, and either do not involve CEQA or involve discretionary CEQA at the local level
- Allow transactions initially as licenses under GO 69-C; then allow conversion to leases via the Advice Letter process
- Establish a separate GO to process office leasing by Advice Letter
- Maintain a purely legalistic approach: (1) once the criteria for "revocability" and "limited use" are clarified, a license is allowable under GO 69-C regardless of what the specific transaction involves; and (2) if a lease is required by either party to the transaction, or if the specific transaction activity is outside of the bounds of GO 69-C, then a formal filing with the Commission is required pursuant to Section 851
- Establish a "de minimis" transaction test
- Develop a test for the term "necessary and useful"
    - Open a separate proceeding to deal with how the determination of "necessary and useful" is established and who makes it

        - Address the distinction between owned property and leased property
    - Clarify that the exemption contained in the GO regarding revocability for government agencies is still applicable
    - Expedite the Section 851 process for transactions between public agencies and public utilities
    - Resolve any concerns regarding affiliate transactions associated with the GO
    - Clarify the distinction between a license and a lease: transfer of assets is different from a use of space; a distinction should be made in the Section 851 process between transactions to transfer assets and transactions to encumber utility property by a lease

8. Attendees Proposed Transactions Potentially Subject To GO 69-C

- Revocable
- Non-interfering
- No CEQA required, & no ministerial exemption issued
- When there is construction covered by discretionary CEQA
- Non-controversial and unchallenged
- Limited Uses:
    - Trenching, grading, and paving
    - Driveways and private roads
    - Installation of lighting, fencing, landscaping and attendant irrigation
    - Floating boat docks, boat ramps, extensions and appurtenant devices
    - Rip-Rap, erosion control, re-vegetation
    - Office space
    - Other empty building space
    - Leases to employees for employee housing
    - Use of existing parking facilities
    - Seasonal uses & special events
    - Recreational uses: bicycle, pedestrian, equine, skiing, aquatic uses
    - Commercial uses: marinas, resorts
    - Agriculture & aquaculture: nursery, viticulture, orchards, row crops, grazing including facilities integral to such operations and buffer zones

- Access for testing and monitoring equipment (wells, air quality, etc.) & surveying
- Inter-utility encumbrances: energy, telecom, water, sewer, transportation
- Fire control, firebreaks, weed control
- Use of non-exclusive easements on third party fee land
- Trading (swapping) of equivalent land rights
- Joint use of facilities by utilities, munis, and cable operators
- Installation and use of:
    - Glass fiber
    - Coaxial cable
    - Microwave dishes
    - Antenna hardware and supports
    - Monopoles
    - Small tower attachments
    - Wireless communication facilities
    - Third-Party attachments to utility property

(Note: Commission staff indicated at the Workshop that individual transactions are always fact-specific, and that not all transactions within a category of transactions (e.g., Trenching, grading and paving) would necessarily qualify for treatment under GO 69-C in every case – exceptional circumstances regarding revocability, limited use, and existing settings could remove the transaction from GO 69-C applicability.)

9. Workshop Participants

Representatives of the following Parties attended/participated in the GO 69-C Workshop:

- AT&T Wireless
- California Cable Television Association
- California Public Utilities Commission – Office of Ratepayer Advocates
- Pacific Gas and Electric Company
- San Diego Gas & Electric Company and Southern California Gas Company
- SBC

- Small Local Exchange Carriers (Small LECs)[2]
- Southern California Edison Company
- SureWest Telephone
- Verizon

The Workshop was sponsored and facilitated by representatives of the Commission's Energy Division and Legal Division.

10. Attachments

- Verizon: "G.O. 69-C Workshop – Presentation of Verizon California, Inc."
- Verizon: "Additional Comments of Verizon California, Inc.", June 6, 2003
- PG&E: "Examples of Activities Requiring Commission Clarification", May 28, 2003
- AT&T: "Key Points Made By AT&T Wireless Services of California, Inc.", May 28, 2003
- SCE: "SCE Comments – GO 69-C Workshop"
- SBC: "G.O. 69-C Workshop", May 28, 2003

(END OF APPENDIX A)

Vieth Attachments to Appendix A to 45649

[2] The Small LECs include: Calaveras Telephone Company, Cal-Ore Telephone Co., Ducor Telephone Company, Foresthill Telephone Co., Global Valley Networks, Happy Valley Telephone Company, Hornitos Telephone Company, Kerman Telephone Company, Pinnacles Telephone Co., The Ponderosa Telephone Co., Sierra Telephone Company, Inc., The Siskiyou Telephone Company, Volcano Telephone Company, Winterhaven Telephone Company.