

Decision 89 05 025 MAY 10 1989

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BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application of)
PACIFIC GAS AND ELECTRIC COMPANY)
(U 39-E) For An Order Approving)
Amendment To Nonqualified Nuclear)
Decommissioning Trust Agreement.)

Application 89-03-027
(Filed March 21, 1989)

O P I N I O N

Pacific Gas and Electric Company (PG&E) requests that the California Public Utilities Commission issue an Order approving an amendment to Article 6.01 of the Nonqualified Nuclear Decommissioning Trust Agreement (Nonqualified Agreement). Such an amendment is allowed by Article 2.10 of the Nonqualified Agreement.

Pursuant to Resolution E - 3041, dated June 15, 1987 and Decision (D) 87-03-029, dated March 6, 1987, PG&E established externally managed trusts to administer funds accrued in rates from ratepayers and contributed to the trusts to provide for funding of PG&E's estimated future costs of decommissioning its nuclear generating plants. 1/ PG&E has two Master Trust Agreements, one for the decommissioning funds which qualify for an income tax deduction under Section 468A of the Internal Revenue Code (IRC), the Qualified Trust; and one for the remaining funds, the Nonqualified Trust.

This order grants the authority to execute the amendment requested by PG&E to its Nonqualified Agreement only. This amendment authorizes the Trustee of the Nonqualified Trust to reimburse PG&E for taxes charged to PG&E for the earnings of the Nonqualified Trust.

1/ PG&E owns a 100 percent interest in Unit One of the Diablo Canyon Nuclear Generating Station, a 100 percent interest in Unit Two of the Diablo Canyon Nuclear Generating Station, and a 100 percent interest in Unit Three (Nuclear) of the Humboldt Bay Generating Station.

Background

This Application appeared on the Commission Calendar of March 23, 1989. No protests or comments have been filed. PG&E requested ex parte processing in its application.

Under Section 468A of the IRC the Qualified Trust is a separate taxpaying entity and the Trustee is empowered to pay taxes directly out of the Qualified Trust to the Internal Revenue Service and to the State of California for any imposed taxes. The Nonqualified Trust 2/ does not receive the same treatment as a separate tax paying entity; its earnings, losses and expenses are accrued on the company's tax returns for Federal and state purposes so that PG&E must pay the incremental tax caused by the Nonqualified Trust's operation. As the Nonqualified Agreement currently reads, the Trustee and PG&E believe that the Trustee cannot reimburse PG&E for the incremental taxes incurred by PG&E because of the Nonqualified Trust's earnings. The Commission Advisory & Compliance Division (CACD) has reviewed the issue and concurs with PG&E that an amendment is needed to Section 6.01. The amended language has been reviewed by Harris Trust & Savings Bank. 3/

Section 6.01: Payment of Expenses and Administration.

To pay all ordinary and necessary expenses and other incidental costs including, but not limited to, Investment Manager(s) fees and Committee member(s) fees, reimbursement to the Company for taxes paid on trust earnings, the fees and/or compensation of any professional advisors, legal counsel or administrative support hired by the Committee as provided in Section 3.04,

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- 2/ There are in fact separate trust funds for each generating unit for both qualified and nonqualified decommissioning contributions. A Master Trust Agreement for the qualified portion of the plants applies to each qualified trust fund and a Master Trust Agreement for the nonqualified portion applies to each nonqualified trust fund.
- 3/ Trustee to the Qualified and Nonqualified Master Trust Agreements, as authorized by the Commission in Resolution E-3048, dated November 25, 1987. The Trustee is located in Chicago, Illinois.

expenses and insurance premiums as provided in Section 3.06 incurred in connection with this Master Trust or the Master Trust in the discharge of the Trustee's fiduciary obligations under this Agreement
(Emphasis added).

Committee and Trustee Approval

By a resolution of the Pacific Gas and Electric Company Nuclear Facilities Decommissioning Trust Committee dated March 3, 1989 and by a letter from Harris Trust and Savings Bank dated February 15, 1989, both parties have indicated their approval to the above amendment to Section 6.01. As a signatory of the Trust, the Executive Director of the Commission must sign an amended agreement pursuant to an Order of the Commission concurring in such an amendment. This signature is necessary before any amendment is effective and enforceable.

CACD Staff Review

The CACD has reviewed the proposed amendment and concurs with PG&E that such a change is necessary. The alternatives are not acceptable for several reasons. PG&E could pay the taxes and not be reimbursed. This would unfairly confiscate PG&E's property. The taxes could be included in either base rates or a balancing account for separate recovery. This too is not acceptable because of the complexity it would add and because the rate recovery and tax liability would be difficult to match.

The CACD notes, however, that reimbursement should be limited to the demonstrated increment in taxes accruing to PG&E solely because of the Trust's earnings and should not be at the statutory tax rates. At this time, CACD believes that PG&E will pay the full or maximum tax rate on the Trust's incremental earnings, but at some future time PG&E could be in a less than maximum tax situation and so should only recover the incremental taxes, not a full "statutory" amount. Further, if the Trust yields tax benefits to PG&E in terms of losses in one tax year, the tax benefit should be contributed by PG&E to the Trust and not held by PG&E's shareholders. In the event of a tax loss by the Trust,

there could well be a funding deficiency; by contributing the tax benefit, PG&E will reduce the chance of underfunding the Trust and this will help offset the losses. If the Nonqualified Trust were a separate taxpayer like the Qualified Trust, any losses could be carried forward and backward under the tax laws to offset future or prior tax expenses. PG&E should provide to CACD copies of its calculations approved by external auditors and the request for reimbursement at the time it seeks reimbursement from the Trust or makes a contribution. Reimbursement for taxes and the tax saving due to Trust losses should be reimbursed or contributed at the time PG&E makes its first quarterly tax payment after the close of the Trust's calendar year accounting period. We concur with the CACD.

Findings of Fact

1. PG&E is an electric public utility organized and existing under the laws of the State of California and is subject to the jurisdiction of this Commission.

2. PG&E has two Master Trust Agreements to provide for the ultimate decommissioning of nuclear powered generating facilities which PG&E owns.

3. PG&E has a Qualified Trust under IRC Section 468A and each of the funds under the Trust are separate taxpaying entities. PG&E has funds under a Nonqualified Trust which are treated as a part of PG&E's operations for tax purposes.

4. PG&E and the Nonqualified Trust's Trustee, Harris Trust & Savings Bank, agree that the Nonqualified Trust agreement must be modified to reimburse PG&E for taxes paid to the federal and state governments on the earnings of the Trust.

5. The CACD concurs that the proposed amendment to Section 6.01 of the Master Trust Agreement is reasonable subject to limiting PG&E's reimbursement to those taxes actually paid.

6. It is reasonable to modify the Nonqualified Master Trust Agreement.

Conclusions of Law

1. PG&E is liable for the taxes on the earnings of the Nonqualified Trust and is entitled to recover those costs from the Trust's assets.
2. The proposed modification to the Master Trust Agreement is reasonable.

O R D E R

IT IS ORDERED that:

1. Pacific Gas and Electric Company (PG&E) shall modify its Nonqualified Master Trust Agreement with the Harris Trust & Savings Bank (Harris) as proposed above.
2. PG&E shall limit its reimbursement to only the actual incremental taxes it must pay above the taxes it would have paid before considering the Trust's earnings and must contribute to the Trust any tax savings.
3. The Executive Director is directed to sign a conformed copy of the Nonqualified Master Trust Agreement on behalf of the Commission after such amendment is signed by PG&E and Harris.

This order is effective today.

Dated MAY 10 1989, at San Francisco, California.

G. MITCHELL WILK
President
FREDERICK R. DUDA
STANLEY W. HULETT
JOHN B. OHANIAN
PATRICIA M. ECKERT
Commissioners

I CERTIFY THAT THIS DECISION
WAS APPROVED BY THE ABOVE
COMMISSIONERS TODAY.

Victor Weiss
Victor Weiss, Executive Director

STATE OF CALIFORNIA
DEPARTMENT OF CORRECTIONS
PRISON INDUSTRY AUTHORITY

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That the microfilming or the other photographic processes were accomplished in a manner and on film which meet the standard specification of the United States National Bureau of Standards and A.N.S.I.

That this certificate was made at the time of the taking of this microfilm.

WITNESS my hand and the seal of the Department of Corrections Prison Industry Authority 20, day of Feb. 91

Thomas R. Coupe'
THOMAS R. COUPE'
Industrial Superintendent
P.I.A. Micrographics

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DEPARTMENT OF CORRECTIONS
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