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Decision 97-04-084 April 23, 1997

ORIGINAL

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application of Mather Field Utilities,)
Inc., for a Certificate of Public)
Convenience and Necessity for Its)
Gas Utility Distribution System at)
Mather Field, California.)

Application 96-03-045
(Filed March 21, 1996;
Amended July 12, 1996;
supplemented
August 19, 1996)

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INTERIM OPINION

1. Summary

Mather Field Utilities, Inc. (MFU), having acquired the gas distribution system at the former Mather Air Force Base in Sacramento County, seeks a certificate of public convenience and necessity to become the exclusive gas distribution utility serving Mather Field as it converts to civilian use. This decision authorizes MFU service to the 5,700-acre site, excepting McClellan Hospital, which remains under Air Force control. Pacific Gas and Electric Company (PG&E) is directed to continue serving housing area customers on the base until parties resolve questions of ownership of distribution facilities at those locations.

2. Nature of Application

MFU owns the gas distribution system at the former Mather Air Force Base in Sacramento County. It acquired the system from its predecessor, the Gutierrez Group, which in turn was the

successful bidder for the gas facilities in 1995 during base closure proceedings conducted by the Air Force Base Conversion Agency (AF Conversion Agency).

In this application, as amended and supplemented, MFU seeks a certificate of public convenience and necessity under Public Utilities Code § 1001 to operate as a new gas distribution utility serving the 5,700-acre site now known as Mather Field, California.

The application is opposed by PG&E, which claims that the Commission in 1949 granted PG&E authority to serve all of Sacramento County, including Mather Air Force Base, and that in fact PG&E has furnished service directly and indirectly to the base for more than 50 years. PG&E asserts that MFU is inexperienced and under-financed and has not shown itself capable of providing safe, efficient and economical gas service to customers at Mather Field.

3. Procedural History

MFU filed its application on March 21, 1996. PG&E on May 20, 1996, moved to dismiss the application on grounds, among others, that the application failed to address rates, source of gas supply, and safety requirements. MFU on July 1, 1996, filed an amended application, replacing the original application in its entirety, and filed in opposition to the motion to dismiss on grounds that the amendment cured the alleged deficiencies in the original filing. The administrative law judge (ALJ) denied PG&E's motion without prejudice to refile and set a prehearing conference for August 21, 1996.

PG&E on August 15, 1996, filed its motion to dismiss the amended application, citing many of the same alleged deficiencies that it had raised earlier. At the prehearing conference on August 21, 1996, the ALJ ruled that PG&E's motion would be deemed to be both a protest and a motion to dismiss. Dates were set for exchange of written testimony, and the evidentiary hearing was set for three days in November 1996. On September 17, 1996, the ALJ

issued a ruling directing the Commission's Utilities Safety Branch to conduct a gas safety survey at Mather Field and to report to parties on its findings by November 1, 1996.

Meanwhile, on September 10, 1996, MFU filed for emergency authority to begin operating the Mather Field gas distribution system on an interim basis, alleging that the AF Conversion Agency was about to end its temporary arrangement for gas service at Mather Field. On evidence by PG&E that the AF Conversion Agency had renewed its commitment to temporary provision of gas service, the MFU motion was denied.

Evidentiary hearings were conducted on November 20, 21 and 22, 1996, at which time the Commission heard the testimony of five witnesses for the applicant, five witnesses for PG&E, and a Commission safety engineer. Concurrent opening briefs were received on January 14, 1997, and the application was deemed submitted for decision at the time of reply briefs on January 24, 1997.

4. Background

Mather Field is in the final stages of base conversion, administered by the AF Conversion Agency, which is the federal agency responsible for converting former military bases to civilian use. On March 15, 1994, the California State Lands Commission accepted retrocession¹ of jurisdiction over the former Mather Air Force Base from the Air Force, with the exception of the base

¹ Retrocession is the ceding of land by the federal government back to a state. Government Code § 113 outlines the procedures in California for accepting land retroceded to the state by the federal government.

hospital.² As a result, the State of California and this Commission now have jurisdiction over privately owned public utility service provided at Mather Field. Prior to March 15, 1994, the base was under the jurisdiction of the federal government, and the provision of natural gas distribution service was not subject to Commission jurisdiction.³

Currently, the AF Conversion Agency operates the natural gas distribution system at Mather. The agency accepts gas through PG&E lines at PG&E's master meter and from that point provides service to customers located at the former base. Approximately 50 structures at Mather, housing a variety of private and government offices, are served by the distribution system. In addition, Sacramento County is in the process of requiring air package carriers like Airborne Express, now located at Sacramento International Airport, to relocate to Mather.

The gas distribution system consists of two metering facilities; two gas mains comprised of 44,852 linear feet and 108,924 linear feet; two gas vaporizers, and a cathodic protection

2 Operational control of the hospital at the former Mather Air Force Base was transferred to McClellan Air Force Base. The hospital presently operates under the jurisdiction of the federal government.

3 Federal jurisdiction over military bases is asserted under the "federal enclave doctrine," which has evolved from Article I, Section 8, Clause 17 of the U.S. Constitution (Congress shall have power to exercise exclusive legislation over lands ceded by states for the erection of forts and other military purposes). For a discussion of the federal enclave doctrine as it affected the Presidio of San Francisco, see Re Women's Energy, Inc. (1995) 58 CPUC2d 568, 570.

system with 153 cathodic protectors.⁴ The system in the past has handled loads in excess of 2.2 million therms per year and previously served all of the Mather Air Force Base, including what is now McClellan Hospital.

As part of the base conversion, the AF Conversion Agency auctioned the ownership rights to the electrical, telephone and gas systems at the base, including the right to exclusively operate those systems. The Sacramento Municipal Utility District (SMUD) was the successful bidder on the electrical system. MFU's predecessor company, the Gutierrez Group, was notified on April 28, 1995, that it was the successful bidder for the telephone and gas systems, with bids of \$2,161 and \$1,487 for the two systems, respectively. PG&E declined to bid on the gas distribution system.

MFU acquired the rights to the Mather telephone and gas systems in 1995, paying approximately \$230,000 in cash and notes. MFU operated the telephone system for about four months, then sold it to a Washington-based telecommunications company, Electric Lightwave, Inc.⁵ However, the AF Conversion Agency stated that it would not deliver title to the gas distribution system until MFU received authority from this Commission to operate the system. Once a certificate of public convenience and necessity is issued to MFU, the AF Conversion Agency states that it will execute and deliver a quitclaim deed for the distribution system and turn over operational control of the system to MFU.

⁴ Cathodic protection reduces the corrosion of metal pipes and other metal structures located in the ground. The purpose of the system is to prolong the integrity of the metal and reduce the likelihood of leaks. (See testimony of Commission engineer Sunil Kumar Shori, Transcript, Volume 3, p. 241.)

⁵ Electric Lightwave, Inc., is a subsidiary of Citizens Utilities Company of California. It is authorized to provide telecommunications services in California as a competitive local carrier. (Decision 95-04-033 (April 10, 1996).)

5. Issues in This Proceeding

There are two major issues presented by this application: (1) Has MFU met its burden of showing that public convenience and necessity require that it be authorized to operate as a gas distribution utility at Mather Field, and (2) Should MFU be granted an exclusive right to serve Mather Field. Additionally, the parties disagree on whether MFU has the right to serve McClellan Hospital, and both MFU and PG&E claim title to the gas distribution lines installed at two housing areas on the base.

6. Position of the Applicant

MFU presented unrefuted evidence showing that it has the exclusive right to use the existing gas distribution system at Mather Field, a system which according to the company's consultant would cost between \$3 and \$5 million to duplicate. An MFU witness testified that the company has entered into a three-year contract with Brotherton Pipeline, Inc., an Oregon-based gas contractor, to repair and maintain the system. MFU intends to hire four to five employees, including a facilities engineer and two part-time field technicians. In 1995, MFU retained the firm of Heath Consultants, Inc., to do a leak survey and closed off parts of the gas system where serious leaks were detected. MFU's executive vice president testified that the company will correct all identified leak problems, major and minor, within 30 days of issuance of an operating certificate. The company's witnesses introduced an operating and maintenance manual which they testified will assure compliance with all federal and state requirements for a gas distribution facility.

MFU consultants presented rate exhibits showing that MFU can meet all operating expenses by charging existing customers the same rates that customers now pay to the AF Conversion Agency. Alternatively, the consultants testified, MFU could reduce most rates by about 10% if it were authorized to serve McClellan Hospital (which in 1993 switched to its own gas purchases,

delivered through PG&E lines) and if it were permitted to increase rates for the hospital by about 20%. The rate consultants testified that rates are based on a total investment to date of \$378,000. They testified that MFU shareholders intend to forgo officer salaries (about \$40,000 annually) and return on equity (about \$18,000 annually at 6%) for one to two years, with the expectation that customer base at Mather Field will grow rapidly and, by the third year of operation, will support both a rate decrease and a return on equity.

The estimated current gas consumption by customers located at Mather Field is about 200,000 therms per year. The annual consumption by McClellan Hospital is 400,000 therms. Before base closure, the gas distribution system was supplying more than 2 million therms per year. Consultant Raymond J. Czahar testified that the company expects consumption to reach 1.2 million therms by 1999, stating:

"Over the next few years it is expected that natural gas consumption at Mather Field will increase dramatically as new private sector firms locate offices and facilities at Mather Field. As an example, Sacramento County now requires that the major air freight and package delivery companies, such as Federal Express and UPS, relocate from the Sacramento Airport to Mather Field. Each one of these firms could add between 50,000 and 100,000 therms per year to the gas distribution load." (Exhibit 5, p. 3.)

MFU states that its rate proposal is based on a 1997 test year forecast showing total operating expenses for the first year of \$180,000, including \$65,500 for the cost of purchasing and transporting gas to Mather Field. Estimated capital expenditures during the year are \$200,000, most of them related to safety repairs for the gas system. Forecasted test year revenues were estimated at between \$209,000 and \$263,000, depending on whether

MFU serves the hospital and whether rates to other customers are reduced or are maintained at current levels.

The two principal shareholders of MFU are Bob Williams, a semi-retired owner of a chain of shoe stores in Sacramento, who serves as president and chief executive officer of MFU, and Douglas Chandler, a legislative aide in Sacramento, who serves as treasurer of the company. Williams testified that he anticipates that expenses of the system may exceed income in the first and second year, but that he and other shareholders "are prepared to invest substantially greater amounts, if necessary, [to make] the conversion from military use to civilian use at Mather Field a success." (Exhibit 10, p. 2.)

7. Position of PG&E

PG&E maintains that it was authorized by this Commission to provide gas service to the County of Sacramento, including the Mather Air Force Base, in Decision (D.) 43043 (June 28, 1949).⁶ That decision authorized PG&E to exercise a gas franchise granted to it by the County of Sacramento on November 15, 1948. The franchise, in turn, gives to PG&E

"[t]he right, privilege and franchise (a) of laying, constructing and maintaining gas pipes, mains and appurtenances in so many and at such parts of the public highways, streets, roads and places of said County of SACRAMENTO as the grantee of said right, privilege and franchise may from time to time elect to use for the aforesaid purposes, and (b) of using such gas pipes, mains and appurtenances for conveying, distributing and supplying gas to the public for any and all purposes...." (Exhibit 13, at 2.)

⁶ The decision in digest form is set forth in 48 CPUC 762. The full decision may be found at Exhibit 13, Attachment 1.

PG&E witnesses testified that PG&E in 1941, at the request of the U.S. Army, installed six miles of main and began providing gas to Mather Field for distribution through the Mather distribution system. In 1951, at the request of the U.S. Air Force, PG&E installed 15 miles of pipe to serve some 750 housing units (primarily two-room apartments) that made up the Wherry housing complex on the base. While the Air Force paid for this installation, PG&E states that it retained title and was given a 75-year easement in and around the housing areas for installation and maintenance of the gas lines. (Exhibit 13.)

PG&E showed that in July 1994, following closure of the Mather Air Force Base, the Sacramento Air Logistics Center contracted with PG&E to provide separate service to McClellan Hospital. To do so, PG&E installed a new gas meter and a 4-inch gas line from International Drive, which is outside of and adjacent to Mather Field. PG&E owns these facilities. (Exhibit 15, at 2.) Under this arrangement, PG&E is supplying gas purchased by McClellan Hospital through PG&E pipes without using any of the gas distribution system at Mather Field.

PG&E maintains that these services to customers within Mather Field and to McClellan Hospital are or should be unaffected by the transfer of the Mather Field gas distribution system to MFU. A PG&E lands rights specialist introduced records showing that the transfer to MFU was made subject to existing rights and easements, and that the Air Force quitclaim deed, by definition, conveys to MFU only those ownership rights, if any, possessed by the seller.

PG&E's rate witness testified that if MFU followed traditional cost-of-service ratemaking, its rate proposals would increase McClellan Hospital's costs by \$30,000 annually over what the hospital now pays to PG&E. Rates to Mather Field customers now served by the AF Conversion Agency would be 24 cents per therm higher than PG&E rates in the summer and about 8 cents per therm

higher in the winter, assuming PG&E rates were the same as those for nearby areas. (Exhibit 17.) He testified also that MFU would pay a higher transportation rate for its gas if it does not serve McClellan Hospital, since it would not then qualify for the quantity discount it anticipates.

PG&E presented testimony asserting that it was ready, willing, and able to furnish gas service to customers who locate on Mather Field, although it did not explain how it would extend its own distribution system to offer this service. It argued, instead, that MFU has failed to meet its burden of showing that it can operate the Mather Field system economically, or that it has the experience and skill to operate "a secondhand gas distribution system that admittedly does not meet current safety standards." (Concurrent Brief of PG&E, p. 32.)

8. Commission Safety Survey

Sunil Kumar Shori, an assistant utilities engineer, testified on behalf of the Commission's Utilities Safety Branch.⁷ Shori conducted a safety review of the natural gas distribution system at Mather Field on September 18 and 19, 1996. He stated that gas distribution is accomplished through three distinct systems serving the "industrial area" of the base, the Wherry housing area and an apparently unoccupied area called the Cape Hart housing area.

The gas distribution system within the industrial area operates at approximately 5-7 pounds per square inch gauge. Most of the distribution system consists of welded steel main installed with screwed steel services. A small portion of the system is

⁷ Shori's testimony is set forth in exhibits marked for identification as Exhibits 6 and 7. These exhibits inadvertently were not received into evidence during hearing. Parties were advised that Exhibits 6 and 7 would be deemed received into evidence unless an objection was filed within 10 days of the issue date of the proposed decision. No objection was received.

served by plastic pipe, which Shori said must be tested in future audits to determine whether it meets state and federal standards. Shori stated that the system is protected against electrolytic corrosion by an impressed cathodic protection system, but the level of protection is below standard.

A leak survey conducted in December 1995 disclosed 10 Grade I leaks, 38 Grade II leaks and 18 Grade III leaks. The Grade I leaks, which are the most hazardous, were dealt with by closing gas flow in those parts of the system. Shori recommended that repair of those leaks should take place immediately, and repair of Grade II leaks should take place within 12 months.

The Wherry housing complexes, which now are vacant, are served by gas lines installed by PG&E. Shori said that his inspection disclosed deficiencies in the cathodic protection system for the Cape Hart lines, and that three isolation valves selected at random had failed inspection at that location.

Shori recommended correction of all deficiencies within time limits imposed by the Utilities Safety Branch, along with a further inspection by the Commission within six months after the Mather gas system is put into operation under the Commission's jurisdiction.

9. Discussion

9.1 PG&E Authority at Mather Field

We turn first to PG&E's assertion that when the Commission in 1949 authorized PG&E to provide gas service in Sacramento County in D.43043, that authorization included Mather Air Force Base. That assertion misstates the law. From approximately 1941 to 1993, Mather Air Force Base was a federal enclave under the exclusive jurisdiction of the federal government. (Black Hills Power and Light Co. v. Weinberger (8th Cir. 1987) 808 F.2d 665, 668.) The exclusive power of Congress over federal enclaves "by its own weight, bars state regulation without specific congressional approval." (Black Hills, at 668.) Since this

Commission did not have jurisdiction over gas service at Mather Air Force Base in 1949, it follows that D.43043 that year could not bestow any right on PG&E with respect to gas service at the base. Indeed, in an earlier case involving the former military base at the Presidio of San Francisco, PG&E argued successfully that the Commission lacked jurisdiction to certify the supplier of electricity at the Presidio while the Presidio was under the control of the military.⁸ PG&E offers no reason why the same principle does not apply to the military facility at Mather.

We find that the Commission's order in D.43043 did not grant a certificate of public convenience and necessity to PG&E applicable to Mather Field at any time while the area was a federal enclave.

The next question that arises is whether the 1949 grant of certificate to PG&E automatically confers upon PG&E the right and obligation to serve Mather Field once the area ceased to be a federal enclave. We do not believe that we are prevented from requiring PG&E to serve the area once it ceases to be a federal enclave, should circumstances arise in which no provider offered to serve the area. However, this is not the situation that we face in this proceeding.

This proceeding involves an application by MFU for a certificate of public convenience and necessity. It is not an application by PG&E to serve unserved territory, nor is it an action by the Commission to order a utility to serve a territory. PG&E claims that it need not file anything in order to exercise the right to serve Mather Field granted under its 1949 certificate. However, PG&E did not bid on the distribution system at Mather Field, and it does not currently own facilities to enable it to serve the territory. There is an immediate need to serve the area,

⁸ In re Women's Energy, supra at 571.

and PG&E cannot provide service at this time unless it purchases the distribution system from MFU, or constructs duplicative facilities. MFU does own the distribution facilities, and it is willing to serve immediately.

We will consider the matter before us, which is whether MFU should be granted a certificate of public convenience and necessity. Should MFU be denied a certificate, PG&E (or any other applicant) could attempt to fill the void. However, PG&E's claim to hold an existing valid certificate for Mather Field has no practical meaning in this case. As a related matter, we will examine in this decision whether a certificate granted to MFU should be for an exclusive territory.

9.2 Service to McClellan Hospital

The evidence shows that the hospital at Mather Air Force Base was served for 20 years through the gas distribution system at the base. During the base conversion process, however, the Air Force transferred control of the hospital from Mather to McClellan Air Force Base. On July 26, 1994, the Sacramento Air Logistics Center contracted with PG&E for installation of a gas meter and 4-inch gas line on property outside of Mather Field in order to serve the newly named McClellan Hospital. Under this arrangement, PG&E is supplying gas directly to the hospital through PG&E pipes without using the distribution system at Mather Field.

The contract with PG&E extends through June 30, 1997, renewable thereafter for successive two-year terms. (Exhibit 15, Attachment 2.) Basically, the contract provides a gas transport service, under PG&E's transportation rate schedule G-FTS, with the Defense Fuel Supply Center supplying the gas.

Since the hospital accounts for 400,000 of the 600,000 therms of gas per year previously supplied through the Mather distribution system, MFU in its application seeks to include the hospital within an exclusive Mather Field service territory that it

seeks to serve as a new gas distribution utility. MFU's rate witness Raymond Czahar explained:

"Now, I assumed that the hospital is part of the whole total plan to have a successful conversion from military to civilian use....[T]herefore, the hospital would, as it has in the past, receive its gas service from the distribution system on Mather Field. Therefore, [the hospital] will be receiving service from MFU and...making a contribution to margin." (Transcript, p. 146.)

Regardless of MFU's assumptions, the unrebutted evidence shows that the Air Force retains control of McClellan Hospital, that the hospital has been physically separated from Mather Field (by a cyclone fence), and that it remains an active Air Force facility. While MFU obtained rights to the Mather gas distribution system, and presumably will obtain a quitclaim deed permitting it to own and operate that system, there is nothing in the record that suggests that gas service to the hospital was part of the transaction. On the contrary, by transferring control of the hospital to McClellan Air Force Base and arranging separate gas service through PG&E, the Air Force has evidenced an intent to separate the hospital from the Mather Field transactions. We will not disturb that arrangement. Indeed, as PG&E notes in its brief, it is not clear that this Commission would have jurisdiction to require a continuing military facility to take gas service from a regulated distribution utility.

MFU apparently recognizes the weakness of its position with respect to McClellan Hospital. Both in its testimony and on brief, MFU is careful to point out that it seeks certification regardless of whether it can serve the hospital. As the company states on brief:

"MFU acknowledged at the hearing that, if it did not initially provide service to the hospital, the per therm cost of gas would increase for its other customers....However, even with this increase in cost, MFU could

still provide service at the rates being charged by the [AF Conversion Agency] and maintain the prospects of its long-term viability....[T]he increasing demand for service at Mather ensures that MFU's future revenues will substantially increase over the next several years." (MFU Reply Brief, pp. 11-12.)

We find that MFU has failed to show that its acquisition of the gas transmission system and attendant rights at Mather Field includes any express or implied right to serve McClellan Hospital, or that this Commission should disturb the existing gas service agreement between McClellan Hospital and PG&E.

9.3 Public Convenience and Necessity

In Application of Cloverdale Gas Co. (1966) 66 CPUC 665, 670, the Commission identified four factors to be considered when determining whether public convenience and necessity require the Commission to grant a certificate for the provision of gas service. The factors:

1. Is there sufficient demand for service at the proposed rates to generate enough revenue to make the operation of the system economically feasible.
2. Is the applicant fit, willing and able to conduct the operation.
3. Is the proposed system reasonably compatible with service of natural gas.
4. Is the proposed system of such design and construction as to have the capacity to provide safe, reasonable and uninterrupted service.

9.3.1 Demand for Service

MFU's preferred rate design would increase rates for service to McClellan Hospital and would reduce rates by about 10% for other current customers at Mather Field. Alternatively, if service to McClellan Hospital is not authorized, MFU proposes to

charge remaining customers the rates they now are paying to the AF Conversion Agency for one to two years, at which time MFU anticipates that customer growth will permit a reduction in rates.

The Commission has recognized that reliance on future demand is a legitimate basis for granting a certificate of public convenience and necessity to a new utility. (Re Pacific Gas and Electric (1990) 39 CPUC2d 69, 81.) In granting a certificate in such cases, "[t]he Commission may reasonably rely on estimates of future business to establish need for the service." (39 CPUC2d at 81.) MFU estimates that 10 new customers with an annual demand of 120,000 therms will locate to Mather Field this year. The evidence shows that Sacramento County has developed a general land use strategy for the former base that would significantly increase Mather's natural gas load.

MFU has failed to make a case for service to McClellan Hospital. Even without the hospital, however, MFU estimates that the gas load at Mather will approach 1 million therms by the year 2000. Because the gas distribution system will be capable of distributing gas well in excess of any near-term load, incremental sales of gas can be made with little or no incremental capital investment. As a result, additional gas sales would go directly to MFU's margin, thus allowing MFU to lower rates and permitting MFU's investors to take a return on equity. In the meantime, the principal shareholders have stated that they will forgo a return on equity and will fund necessary expenses in anticipation of greater earnings later.

The evidence shows that MFU has outlined a reasonable rate structure for gas customers that appears to balance the short-term needs of the base conversion with the long-term goal of MFU's continued viability.

9.3.2 Fitness to Provide Service

While MFU's principals have little or no experience in operating a utility, the record shows that they have retained knowledgeable advisers and contractors to run the gas transmission system if certification is granted. MFU commissioned a leak control survey by Heath Consultants, Inc. It contracted with Brotherton Pipeline, Inc., to do leak repairs and to perform ongoing maintenance for the system. MFU states that it will have a fulltime facilities engineer and two part-time field technicians on staff. MFU has not shown that it has a source of natural gas, but it did offer a letter of intent (Supplement, Exhibit C) showing that it has negotiated for gas supply and gas delivery through WWP Energy Solutions, Inc., a subsidiary of the Washington Water Power Company.

The Commission's Utilities Safety Branch engineer testified that the Mather system is in "fairly good condition," and that he is comfortable with it continuing to operate in its present condition for the next six months. He cautioned that 10 Grade I leaks must be corrected immediately, and that other repairs and corrections must be made at various times in accordance with the Commission's General Order 112-E, governing gas operations, and the Federal Pipeline Safety Regulations, 49 CFR Parts 190, et seq. Under special requirements applicable to gas utilities serving former military bases, MFU would be required within three months to produce and deliver to the Commission a study showing all system deficiencies and a schedule for repairs.⁹

PG&E asserts that MFU has not demonstrated that it is financially able to operate a new gas distribution facility. The

⁹ Utilities Safety Branch letter dated March 26, 1996, to all gas and electric utilities, military bases conversion transition teams and other interested parties. The letter is set forth as a reference document in the formal file of this application.

pro forma balance sheet submitted by MFU in the supplement to its amended application shows total assets of \$5.8 million, including \$1 million in cash. (Supplement, Exhibit A.) On this record, MFU's cash reserves may well be sufficient to meet costs of repairs and start-up expenses. However, we have no record as to the exact costs of repairs and other expected expenses, nor do we have reliable estimates. We believe it is reasonable to continue to monitor MFU's financial status. As a condition to granting MFU a certificate for the Mather Field site, we will require reports at the end of the next two years (1997 and 1998), detailing actual expenditures for the year, expected expenditures for the coming year, and an updated balance sheet. We note that MFU has pledged to retain rates at current levels, forgoing a short-run rate of return in expectation of future enhanced revenues. We expect that all needed repairs and system costs will be borne within this pledge, until the completion of a general rate case review.

9.3.3 System Compatibility and Design

The gas distribution system purchased by MFU previously served all of Mather Air Force Base and, as recently as 1989, had throughput of 1.2 million therms. Although the AF Conversion Agency promises to convey only a quitclaim deed for the system (that is, a deed that conveys only such rights, if any, that the agency possesses) the agency represented in the sale that "[a]ll existing right-of-way and access easements...for the operation, inspection, maintenance, repair, replacement of the gas...system...will be conveyed with [the] utility system." (Exhibit 3, p. 13.) Based on the inspection by our Utilities Safety Branch, the system is in adequate condition to begin public service operation today and, with repairs, can serve a growing population at the base in the future.

PG&E argues that it should serve Mather, and that it is ready, willing and able to do so. Throughout this proceeding, however, PG&E has been silent as to how it would provide service at

Mather without using the existing gas distribution system. PG&E elected not to bid on the system when it was offered for sale, and the evidence shows that PG&E would have to invest between \$3 million and \$5 million to duplicate the system. Presumably, that amount would be the basis for PG&E's revenue requirement at the base, unless it sought to distribute those costs to other ratepayers outside of Mather Field.

It seems clear that the utility with the lowest revenue requirement will be the most economically viable gas provider to Mather. Because MFU has the lowest rate base of any potential provider of service, it appears to offer ratepayers the most economical gas service for Mather Field.

10. Exclusive Right to Serve

Generally, exclusivity is not an issue in an application to provide natural gas distribution service to an area previously not subject to a certificate of public convenience and necessity, particularly in an area as small as Mather. Exclusivity, or freedom from competition, traditionally has been a part of certificates granted by the Commission.¹⁰ While this Commission is moving toward increased competition in the gas utility industry, we recognize that exclusivity serves the public interest where the alternative would require installation of duplicate gas mains to serve a relatively small area.

Competition, or non-exclusivity, normally becomes an issue only after a competing entity has applied for a certificate to serve an area already being served by a certificated utility. It is at that time that the Commission determines whether the

¹⁰ See Greyhound Lines, Inc. v. Public Utilities Commission (1968) 68 C.2d 406, 412. ("The general purposes of certificates in utility regulation are to protect the public from speculation and duplication of facilities, and to protect utilities from competition.")

public interest would best be served by having multiple service providers serve a single area.¹¹ For example, if a new utility like MFU did not within a reasonable period of time provide safe and economical gas service to businesses and residences in the area authorized to be served, the Commission would not necessarily protect it against competition in the future. (San Diego and Coronado Ferry Co. v. Railroad Commission (1930) 210 C. 504, 512.)

MFU, by virtue of a successful bid, is the only entity that has the right to operate the distribution system at the former base. PG&E claims the right to serve all of Mather Field by virtue of an earlier certificate. We have found that PG&E cannot at this time, in practical terms, exercise any right that it claims to have to serve the area. It follows, therefore, that if a certificate is to issue to MFU, and if MFU is to have an opportunity to become economically viable, the certificate should provide the applicant exclusivity within the geographic area that now is served by the distribution system, as operated by the AF Conversion Agency. That geographic area is Mather Field, excepting McClellan Hospital.

10.1 Service to Housing Areas

There is no question that the distribution system serves what is called the industrial area of Mather Field. Questions do arise, however, as to the Wherry housing areas of the base.

The evidence shows that the Air Force in 1951 authorized PG&E to design and construct some 15 miles of pipe to serve 750 housing units in the housing areas. The Air Force paid for these facilities, but PG&E claims that title to the gas lines remains

¹¹ See Ventura County Waterworks Dept. v. Public Utilities Commission (1964) 61 C.2d 462, 464, holding that "[a] public utility has no constitutional right to be protected from competition, but is entitled to a hearing before the commission may grant a certificate of public convenience and necessity to a competitor."

with PG&E. PG&E was granted a 75-year easement for the purpose of installing and maintaining these facilities, and PG&E caused the easement to be filed in the County Recorder's Office in Sacramento. (Exhibit 13, Attachment 3.) While the housing units no longer are occupied, and while PG&E has removed most of the meters serving the area, PG&E continues to provide gas service through these facilities to four buildings adjacent to the housing areas.¹² PG&E also inspects and maintains these independent gas lines.

At hearing, MFU showed that the Air Force had executed a formal "Termination of Lease Agreement" purporting to cancel leases held by the developers of the now-unoccupied housing areas. According to MFU, the termination of the leases also extinguishes the easements granted to PG&E. An MFU witness claimed that the the gas lines serving the housing areas were included in the gas transmission facilities conveyed to MFU's predecessor by the AF Conversion Agency, and he claimed that the Air Force was under the impression that ownership of these lines had reverted to the government.

PG&E maintains that it holds title to the 15-mile gas system serving the housing areas, and therefore the conveyance to MFU could not have included that system. Moreover, PG&E maintains that the lease termination was not carried out pursuant to terms of the housing leases, that in any event the easement granted PG&E to maintain the gas lines has not been extinguished, and that PG&E retains the right to serve customers currently served through the housing distribution systems. PG&E notes that the Air Force conveyance to MFU was made "subject to any and all existing reservations, easements, restrictions and rights, recorded and

¹² The four entities are the Spectrum Christian Center, the Kitty Hawk and Mather Heights schools, and the Sacramento Local Area Conservation Corp.

unrecorded, for...utilities...and any other rights of way...."
(Exhibit 3, Special Terms, p. 5.)

There appears to be little question that PG&E negotiated rights to the gas line it installed at the Air Force's request to serve the Mather housing areas. Paragraph 11 of the Air Force-PG&E easement provides that if the easement is terminated, PG&E may at its expense remove the gas line from the premises. If PG&E does not do so, then the government would have the option to take over the gas line or to remove it, without compensation to PG&E.
(Exhibit 13, Attachment 4.)

As the applicant in this matter, MFU has the burden of showing that it owns the gas distribution facilities with which it expects to offer service at Mather Field. It has met that burden, and its ownership rights are unchallenged, as to the system serving the industrial area of Mather Field. It has not shown, however, that it has the right to use the PG&E-constructed distribution system at the housing areas. Nor has it shown that PG&E's easement for those facilities has been extinguished. MFU can take title only to those facilities which the AF Conversion Agency is free to convey. If PG&E in fact has valid title to the facilities serving the housing areas, and if it has a valid easement for their installation and maintenance, then MFU would take title to the Mather gas distribution system subject to those encumbrances.

PG&E argues that it has the right to provide gas distribution at the Wherry complex because, among other things, Public Utilities Code § 1001 permits it to extend its service to a contiguous area not already served by another public utility, and the Mather housing areas generally are adjacent to areas now served by PG&E. As we have discussed previously, however, neither the state nor this Commission had jurisdiction over Mather at the time that it was operated as a military enclave, and therefore PG&E's extension of service to the base was not an extension authorized by

the Public Utilities Code. It follows that PG&E does not now have authorization from this Commission to provide gas service to the Mather housing areas.

Our order today grants a certificate to MFU to serve as the exclusive gas distribution utility at Mather Field, excepting that part of the former base (McClellan Hospital) over which the Air Force continues to exercise control. We do not, and cannot, authorize MFU to use the PG&E-constructed gas distribution system at the Wherry housing areas until MFU is able to show that it has a right to use those facilities. Whether it obtains such a right through negotiation with PG&E or with the AF Conversion Agency, or otherwise, is a matter that we leave to the parties. As a general rule, this Commission has no jurisdiction to adjudicate contract disputes merely because one party is a public utility. (Penaloza v. P.T. & T. Co. (1965) 64 CPUC 496, 497.)

Meanwhile, because MFU now has no undisputed gas lines extending to the housing areas, and because relatively few customers are now served in those areas, our order today directs PG&E to continue to serve existing customers in the housing areas until the dispute over ownership of the gas system there is resolved among the AF Conversion Agency, PG&E and MFU. We encourage PG&E and MFU to reach settlement with the AF Conversion Agency, but we recognize that the contract dispute may have to be resolved in state or federal court. So that we may continue to monitor this matter, our order today keeps this docket open and requires MFU and PG&E in six months (on October 9, 1997) to file written reports on the status of the gas system serving the Wherry housing areas.

11. Conclusion

For the reasons set forth, we grant a certificate of public convenience and necessity to MFU to operate as a gas distribution utility serving the 5,700-acre Mather Field site. We exclude from this authorization that part of Mather Field reserved

by the Air Force for the operation of McClellan Hospital. Because MFU has failed to show that the independent gas distribution systems serving the Wherry housing areas are included in the conveyance by the AF Conversion Agency, we direct PG&E to continue to provide service through those systems pending a resolution of the ownership question or the development by MFU of alternative service to the housing areas.

As a condition of the granting of the certificate herein, we direct MFU within three months of the date of this order to submit to the Utilities Safety Branch a study showing all safety infractions in its system and a schedule for completing work necessary to bring the system up to code. (See, generally, General Order 112-E and Utilities Safety Branch letter dated March 26, 1996.) We also direct MFU to revise its proposed tariffs to show rates no higher than those presently assessed for customers at Mather, and to file pro forma tariffs for review by our Energy Division for form and consistency with General Order 96-A. We also direct MFU within one year of commencing service at Mather Field to file for a general rate case review of its operations.

12. Comments on Proposed Decision

The proposed decision of the administrative law judge in this matter was mailed to the parties in accordance with Public Utilities Code § 311 and Rule 77.1 of the Rules of Practice and Procedure. Comments were required within 20 days of mailing, and replies to comments were permitted five days thereafter.

Both MFU and PG&E suggested that our decision delete references to the Cape Hart housing area, since only the Wherry housing areas are being served now by PG&E. That change has been made in our final decision. Additionally, we have changed an ordering paragraph to make it clear, as intended, that rates currently charged to Wherry area customers will continue in effect without increase if and when service is provided to those customers by MFU. Finally, we have decided to keep this docket open and

require the parties to report back to us in six months on the status of the distribution system serving the Wherry housing complex.

PG&E continues to argue that it has authority to provide service to Mather Field because the 1949 certificate granted to it for Sacramento County obligated it to provide service to the former base. PG&E for the most part simply repeats the arguments that we considered and addressed in our decision. Rule 77.3 provides that "[c]omments which merely reargue positions taken in briefs will be accorded no weight and are not to be filed."

MFU has filed a motion to withdraw its earlier petition to set aside submission of this matter so that it could present additional evidence. The motion to withdraw the petition is granted. PG&E has filed, along with its comments, a motion to set aside submission so that it might introduce a 1963 advice letter that it believes supports its position that it was certificated to serve at least the Wherry housing area at Mather Field. We have examined the 1963 advice letter, and we conclude that it does not change our conclusion that the federal government had exclusive jurisdiction over Wherry gas service in 1963. Accordingly, PG&E's motion to set aside submission is denied.

Findings of Fact

1. Mather Field in Sacramento County is in the final stages of base conversion, administered by the AF Conversion Agency.
2. On March 15, 1994, the California State Lands Commission accepted retrocession of jurisdiction over the base from the Air Force, with the exception of the base hospital.
3. The AF Conversion Agency operates the natural gas distribution system at Mather Field.
4. In 1995, the AF Conversion Agency auctioned the ownership rights to the electrical, telephone and gas systems at Mather Field.

5. MFU's predecessor, the Gutierrez Group, was the successful bidder for the Mather Field gas system, later conveying its rights to the system to MFU.

6. The AF Conversion Agency will deliver a quitclaim deed to the gas distribution system to MFU when MFU demonstrates that it has been authorized by this Commission to operate the system.

7. MFU seeks a certificate of public convenience and necessity from this Commission to operate as the exclusive gas distribution utility serving Mather Field.

8. According to MFU consultants, the gas distribution system at Mather Field would cost between \$3 million and \$5 million to duplicate.

9. MFU has contracted with Brotherton Pipeline, Inc., to repair and maintain the gas system.

10. MFU has presented rate exhibits showing that MFU can meet all operating expenses by charging existing customers in the industrial area the same rates that they now pay to the AF Contracting Agency.

11. Estimated current gas consumption by customers at Mather Field is 200,000 therms per year, but MFU expects consumption to reach some 1 million therms per year by the year 2000.

12. Shareholders of MFU state that they will forgo officer salaries and return on equity for one or two years pending growth in consumption of gas at Mather Field.

13. PG&E opposes MFU's application and claims the right to serve gas customers at Mather Field.

14. PG&E in 1994 installed a line outside Mather Field to serve McClellan Hospital; such service was requested by an Air Force agency.

15. PG&E claims ownership of independent gas distribution pipes serving the Wherry housing complexes at the southern part of Mather Field.

16. PG&E is currently serving three customers at four sites in the Wherry housing area: Two elementary schools of the Folsom-Cordova Unified School District, the Spectrum Christian Center, and the California Conservation Corps.

17. The Commission's Utilities Safety Branch inspected the Mather Field gas facilities in September 1996 and found that, with some corrections, the system is capable of providing service to Mather Field.

18. MFU shows total assets of \$5.8 million, including \$1 million in cash.

Conclusions of Law

1. Because the Commission lacked jurisdiction over Mather Air Force Base when it operated as a military facility, the Commission's order in D.43043 in 1949 did not authorize PG&E to serve Mather.

2. MFU has failed to show that its acquisition of the gas distribution system at Mather Field includes any express or implied right to serve McClellan Hospital, which remains under Air Force jurisdiction.

3. MFU has shown that it is fit, willing and able to provide gas distribution service at Mather Field and that, through its acquisition of the gas distribution system, it has the capability to provide such service.

4. Reliance on future demand is a legitimate basis for granting a certificate of public convenience and necessity to a new utility.

5. If a certificate is to issue to MFU, and if MFU is to conduct a financially viable service, the certificate should provide MFU exclusivity within the geographic area now served by the Mather distribution system, as operated by the AF Conversion Agency.

6. MFU has failed to show that it has the legal right to use the disputed PG&E-constructed distribution systems that served the two housing areas at Mather Field.

7. As a general rule, this Commission has no jurisdiction to adjudicate private contract disputes merely because one party is a public utility.

8. MFU should be granted a certificate of public convenience and necessity to operate as the exclusive gas distribution utility serving the 5,700 acre Mather Field site, excluding McClellan Hospital.

9. PG&E should be directed to continue to serve existing customers in the Wherry housing areas at Mather Field until the dispute involving those facilities is resolved, or until MFU is prepared to offer service to those areas through its own facilities.

10. MFU should be required to report within three months on all safety infractions in its gas distribution system, along with a schedule for completing work necessary to bring the system up to code.

11. MFU should be required to report after the end of 1997 and 1998 on actual and projected expenditures, so as to ensure continued capability to operate and maintain gas distribution system.

12. MFU should file proposed tariffs showing rates no higher than those presently assessed by the AF Conversion Agency for customers in the industrial area, and rates no higher than those currently assessed by PG&E in the Wherry housing areas.

13. MFU should file pro forma tariffs for review by the Commission's Energy Division for form and consistency with General Order 96-A.

14. MFU should be required within one year to file for general rate case review of its gas distribution service at Mather Field.

15. This order should be effective immediately in order to expedite the conversion of Mather Field from military to civilian use.

INTERIM ORDER

IT IS ORDERED that:

1. Pursuant to Public Utilities Code § 1001, a certificate of public convenience and necessity is granted to Mather Field Utilities, Inc. (MFU) to operate as a new gas distribution utility serving the 5,700-acre site at Mather Field, California, excluding the area occupied by McClellan Hospital.

2. The protest of Pacific Gas and Electric Company (PG&E) is dismissed, and PG&E's motion to dismiss this application is denied.

3. Pursuant to Public Utilities Code § 701, PG&E is directed to continue to serve existing customers now served through independent PG&E-constructed distribution systems at the Wherry housing areas until such time as disputed ownership of these systems is resolved or until MFU is prepared to offer such service through its own distribution facilities.

4. As a condition of the granting of the certificate herein, MFU within three months of the date of this order shall submit to the Commission's Utilities Safety Branch a study showing all safety infractions at the Mather Field distribution system, along with a schedule for completing work necessary to bring the system into compliance with General Order 112-E and the Federal Pipeline Safety Regulations, 49 CFR Parts 190, et seq.

5. As a condition of granting the certificate herein, MFU shall by March 30 of 1998 and March 30 of 1999 submit to the Commission's Energy Division an updated balance sheet, details of actual expenditures for the previous year, and details of expected expenditures for the coming year.

6. Prior to implementing service, MFU shall file proposed tariffs to show rates no higher than those presently assessed by the Air Force Conversion Agency for industrial area customers at Mather Field, and rates no higher than those currently assessed by PG&E for customers in the Wherry housing areas.

7. Prior to implementing service, MFU shall file pro forma tariffs for review by the Commission's Energy Division for form and consistency with General Order 96-A.

8. After incorporating such revisions as the Commission's Energy Division recommends, MFU may file its tariffs by Advice Letter.

9. MFU's Advice Letter and tariffs shall become effective on the date filed.

10. Within one year of commencing service at Mather Field, MFU shall file for general rate case review of its utility operation.

11. The corporate identification number assigned to MFU is U-910-G, which shall be included in the caption of all original filings with this Commission, and in the titles of other pleadings filed in existing cases.

12. MFU's motion to withdraw its petition to set aside submission is granted. PG&E's motion to set aside submission is denied.

13. Application 96-03-045 will remain open. MFU and PG&E on or before October 9, 1997, shall file written reports with the Director, Energy Division, and with the assigned administrative law judge describing the status at that time of the gas system serving Wherry housing area customers and recommending what action, if any,

the Commission should consider to help resolve the dispute regarding the Wherry complex gas distribution system.

This order is effective today.

Dated April 23, 1997, Francisco, California.

P. GREGORY CONLON

President

JESSIE J. KNIGHT, JR.

HENRY M. DUQUE

JOSIAH L. NEEPER

RICHARD A. BILAS

Commissioners