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Decision 97-08-016 August 1, 1997

**BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA**

Order Instituting Rulemaking on the Commission's Proposed Policies Governing Restructuring California's Electric Services Industry and Reforming Regulation.

Rulemaking 94-04-031  
(Filed April 20, 1994)

Order Instituting Investigation on the Commission's Proposed Policies Governing Restructuring California's Electric Services Industry and Reforming Regulation.

Investigation 94-04-032  
(Filed April 20, 1994)

**ORIGINAL**

**OPINION ON PACIFIC GAS AND ELECTRIC  
COMPANY'S MOTION FOR ADOPTION OF ADDITIONAL  
GUIDELINE FOR MULTIYEAR QF BUYOUTS**

**I. Summary**

This decision grants Pacific Gas and Electric Company's (PG&E) "Motion for Adoption of Additional Guideline for Multiyear QF Buyouts." This decision determines that multiyear buyouts of QF contracts, as specifically defined in this decision, are not subject to Public Utilities (PU) Code § 818.

**II. Background**

**Procedural Background**

On January 16, 1997, PG&E filed a "Motion for Adoption of Additional Guideline for Multiyear QF Buyouts" in the consolidated proceedings of the Biennial Resource Plan Update and the Transmission Investigation (Investigation (I.) 89-07-004/ I.90-09-050). This motion requests that the Commission adopt an additional guideline for multiyear buyouts of qualifying facility (QF)<sup>1</sup> contracts by determining that

<sup>1</sup> QFs are cogenerators and small power producers who qualify for certain benefits under the Public Utility Regulatory Policies Act of 1978.

multiyear buyouts of QF contracts are not "evidences of indebtedness" under PU Code § 818. On January 30, 1997, Southern California Edison Company (Edison) filed a response thereto, in which Edison supported PG&E's motion.

On April 30, 1997, the Administrative Law Judge (ALJ) assigned to certain QF contract issues in this proceeding issued a ruling transferring the PG&E motion and the Edison response from I.89-07-004/I.90-09-050 to this proceeding for further consideration together with other issues involving QF contract modifications, and attached a copy of PG&E's motion and Edison's response to the ruling.<sup>2</sup> The ALJ ruling explained that because the issue PG&E raises is related to QF contract restructuring issues, it was appropriate to transfer the motion to the Electric Industry Restructuring docket.

In the ruling, the ALJ also requested that PG&E and Edison file supplemental briefing:

"I wish to provide parties in this docket an opportunity to respond to the January 16, 1997 PG&E Motion. However, I am interested first in obtaining additional information from PG&E, as well as Edison, which filed in support of PG&E's motion. The Commission is generally not in the position of giving advisory opinions. Yet, the motion in essence, requests an advisory opinion of the Commission's view of the application of Public Utilities Code Section 818 to certain restructured contracts, without presenting to the Commission the specific contract or contracts. The question I have of PG&E and Edison is what facts or circumstances make it necessary for the Commission to address this issue now, in absence of a specific application? Edison, for example, states that it has submitted multiyear QF buyouts to the Commission for its review in the past, and that neither the Commission, nor any party, has stated that Section 818 applies to those contracts. Based upon these comments, I do not understand what concern is underlying the motion." (April 30 ALJ Ruling at pp. 6-7.)

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<sup>2</sup> By separate ALJ ruling, the ALJ notified parties to I.89-07-004/I.90-09-050 about the transfer, the request for supplemental briefing by PG&E and Edison, and other interested parties' opportunity to respond. The ALJ ruling also stated that if a person is not a party to the Electric Industry Restructuring proceeding, that person should file a motion to intervene in Rulemaking (R.) 94-04-031/I.94-04-032 together with his or her response.

The ALJ's ruling provided for other parties to respond to the motion after PG&E and Edison filed their supplement. On May 12, 1997, both PG&E and Edison filed their supplemental briefing on Section 818 issues. No other party, either in I.89-07-004/ I.90-09-050, or in this proceeding, filed an opposition or response to the motion and the supplemental briefing.

#### **The Motion and Response**

PG&E requests that the Commission adopt an additional guideline for buyouts of QF contracts under which utilities pay the QFs over a period of more than one year (multiyear QF buyouts) by determining that such buyouts are not "evidences of indebtedness" under PU Code § 818, and therefore do not require prior Commission authorization. PG&E cites to prior Commission decisions addressing and encouraging QF contract restructuring for the proposition that these cases "clearly suggest" that the Commission believes that multiyear QF buyouts are not subject to Section 818. (PG&E Motion at p. 4.) PG&E explains that its requested interpretation of Section 818 is consistent with other Commission decisions discussing the scope of Section 818. PG&E believes that prior Commission precedent indicates that "evidences of indebtedness" in Section 818 should be read only to cover agreements of the same general nature as notes or bonds, and that a multiyear QF buyout is not like a note or bond. For example, a multiyear QF buyout is not a unilateral promise to pay, since buyout agreements typically have commitments on the part of the QFs regarding shutting down of projects, any future sales from the projects, and future rights to QF status. PG&E also believes, based on the language of Section 818, that the Legislature had in mind indebtedness in the sense of borrowing, the proceeds of which would be used for utility purposes. PG&E explains that a multiyear QF buyout does not generate any proceeds or create any new financial commitment, but rather, involves a restructuring of an existing contract.

Alternatively, PG&E requests that if the Commission requires prior authorization of multiyear QF buyouts pursuant to Section 818, the Commission should grant generic advance authorization of such buyouts pursuant to PU Code § 701.<sup>3</sup> PG&E does not ask that the Commission prejudge the issue of the reasonableness of individual buyouts, which it concedes would still be subject to Commission review, but to confirm the legality of such buyouts with reference to Section 818.

PG&E explains that it has completed several QF buyouts to date which involve payments to the QFs over more than one year. PG&E has not sought prior authorization for these buyouts, which are pending reasonableness approval in PG&E's 1994 Energy Cost Adjustment Clause (ECAC) proceeding, since PG&E does not believe that these buyouts constitute evidence of indebtedness under Section 818. However, in light of electric industry restructuring and the provisions of Assembly Bill 1890, PG&E states that it expects to increase its QF buyouts significantly. Given the many millions of dollars typically involved in buying out these contracts, PG&E believes it is prudent to seek this authorization.

Edison filed a response in support of PG&E. Edison explains that it has completed several QF multiyear buyouts, which it believes are a benefit to ratepayers since the utility can obtain the benefit of a buyout without increasing rates. Edison states that it has submitted each of its multiyear QF buyouts except one (which Edison submitted in its ECAC filing) in a separate application to the Commission, and that neither the Commission nor any party has suggested that Section 818 applies.

Edison agrees with PG&E's interpretation of Section 818. Furthermore, Edison believes that Section 818's placement within Article 5 of the PU Code, which is entitled "Stocks and Security Transactions," suggests that it is limited to transactions in which the utility issues securities such as stocks and bonds. Edison also joins in PG&E's

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<sup>3</sup> PU Code § 701 states: "The commission may supervise and regulate every public utility in the State and may do all things, whether specifically designated in this part or in addition thereto, which are necessary and convenient in the exercise of such power and jurisdiction."

alternative request that if the Commission concludes that multiyear QF buyouts are subject to Section 818, the Commission should grant generic advance authorization of such buyouts.

#### **Supplemental Responses**

PG&E explains that seeking preapproval of every buyout will diminish the utility's buyout efforts since many of these deals are time-sensitive. The option of paying the full buyout amount to the QF in a single year to avoid the strictures of Section 818 is also costly since it reduces the value of the deal for the QF. PG&E explains that it could assume the risk of Section 818's applicability by doing multiyear QF buyouts without preapproval. In the past PG&E has done numerous buyouts without Commission preapproval. At that time, PG&E believed that the arguments that Section 818 did not apply were strong enough to justify the risks. "However, since then with the advent of electric restructuring and the passage of AB 1890, concern over this issue has risen afresh and with potentially tens of millions of dollars involved, PG&E needs to obtain assurance on this point." (PG&E Supplemental Response at p. 3.) PG&E also cites several Commission decisions where the Commission has granted advisory relief to further the Commission's policies and to provide a timely articulation of our views.

Edison's supplemental response reiterates its earlier comments. Essentially, Edison believes that since PG&E filed its motion, and since Edison has completed a number of multiyear QF buyouts in the past and intends to continue negotiating such transactions in the future, Commission clarification is appropriate and timely in order to avoid future controversies and uncertainties concerning the applicability of Section 818 to multiyear QF buyouts. Edison also explains that since PU Code § 825 provides that debt commitments which do not comply with Section 818 are void, a lingering doubt on this issue could have a chilling effect on the willingness of QFs to enter into buyout agreements providing for installment payments. This might deprive electric ratepayers of any savings offered by multiyear QF buyouts.

### III. Discussion

This motion seeks the issuance of an advisory opinion. In general, in order to conserve our scarce judicial resources, we do not favor issuing advisory opinions. (*Carlin Communications, Inc. v. Pacific Bell*, D.87-12-017, 26 CPUC2d 125, 130; *Re California-American Water Company*, D.95-01-014, 58 CPUC2d 470, 476.) We also disfavor issuing advisory opinions where the issue or controversy is not sufficiently developed to assist the Commission in reaching a reasoned decision.

However, we have the discretion to issue advisory opinions, and have done so, where the matter was of widespread public interest, and where parties might benefit from a timely expression of our views. (See *In re SoCal Edison Co.*, D.93935, 6 CPUC2d 116, 136 (1981) [utility sought preliminary assurance from Commission that costs of a geothermal project reasonably allocated risks and benefits of geothermal development between utility and ratepayers; advisory opinion issued to resolve critical questions respecting the development of alternative energy sources, an issue very important to California ratepayers]; *Carlin Communications, Inc.*, 26 CPUC2d at 130 [no act of wrongdoing alleged in complaint; Commission issued advisory opinion due to the widespread public interest in the operation of "live" 976 telephone service]; *Re California-American Water Company*, 58 CPUC2d at 476 [advisory opinion appropriate on matters of widespread public interest, especially when another governmental agency would benefit from a timely expression of the Commission's views; here, the issue was the Commission's assessment of standby charges for future water and sewer services, which issue was fully briefed by the parties].)

PG&E argues that an advisory opinion on Section 818 is warranted here, because multiyear QF buyouts which save ratepayers money are a key policy objective of the Commission and the potential impacts are widespread. PG&E also believes that the ruling would save time and uncertainty.

We consistently encourage cost-effective QF contract restructurings. (See e.g. D.95-12-063, as modified by D.96-01-009, slip op. at pp. 130-132.) Such cost-effective QF contract restructurings are of widespread public interest and timely, especially if they minimize transition costs as we implement electric industry restructuring. However,

Edison states that it routinely submits its QF contract restructurings or buyouts to the Commission for preapproval, and has not stated that our issuing this advisory opinion will change that course. Thus, this advisory opinion is necessary, if at all, solely for the benefit of PG&E, which does not routinely submit its QF contract restructurings or buyouts for preapproval and does not wish to begin to do so now. Thus, although the necessity of obtaining a timely expression on our views affects just PG&E, given the fact that the parties have had two opportunities to address this issue to date (one in I.89-07-004/I.90-09-050 and one in this proceeding), it is more efficient for us to address this issue here as best we can given the state of the briefing, rather than to refer the issue to yet another proceeding.<sup>4</sup> However, this is a unique situation, and should not be used as precedent for requesting an advisory opinion from us in the future.

PU Code § 818 states:

"No public utility may issue stocks and stock certificates, or other evidence of interest or ownership, or bonds, notes, or other evidences of indebtedness payable at periods of more than 12 months after the date thereof unless, in addition to the other requirements of law it shall first have secured from the commission an order authorizing the issue, stating the amount thereof and the purposes to which the issue or the proceeds thereof are to be applied, and that, in the opinion of the commission, the money, property, or labor to be procured or paid for by the issue is reasonably required for the purposes specified in the order, and that, except as otherwise permitted in the order in the case of bonds, notes, or other evidences of indebtedness, such purposes are not, in whole or in part, reasonably chargeable to operating expenses or to income."

PG&E requests that the Commission determine that multiyear buyouts of QF contracts are not "evidences of indebtedness" under Section 818. As to why it is necessary for the Commission to address this issue now, PG&E merely states that with the advent of electric restructuring and the passage of AB 1890, concern has risen afresh with respect to this issue, especially considering the large amounts of money involved.

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<sup>4</sup> Since this motion raises a legal issue, we address the motion in this decision. Other QF contract restructuring issues, which were the subject of a workshop in late May and a workshop report issued in late June, will be addressed separately from this decision.

PG&E does not cite to any particular section of AB 1890 which might have generated its concern.

Before addressing the question posed by PG&E's motion, it is important to define the characteristics of a multiyear buyout of QF contracts for purposes of this advisory opinion, since we do not have a particular contract or factual circumstance before us. We address buyouts which involve a renegotiation of an existing contract between a utility and a QF, which the Commission, prior to December 20, 1995, had authorized for collection in rates. (See PU Code § 330(s).) Under the buyout, the utility would pay the QF over a period of more than one year. The type of buyout we address should not be a unilateral promise to pay, but rather a bilateral agreement where each party must perform certain duties and obligations, and has certain liabilities. For example, PG&E states that buyouts typically have commitments on the part of the QFs regarding shutting down of the projects, any future sales from the projects, and future rights to QF status. (PG&E Motion at p. 4.)

In interpreting Section 818, the Commission has found that the Legislature intended that the phrase "other evidences of indebtedness" has a narrower, as opposed to a broader reading, so that it would encompass only things "of the same general nature as notes or bonds." (*Delta Lines, Inc. et al.*, D.83-06-055, 11 CPUC2d 779 [1983 Cal. PUC LEXIS 1032].) In *Delta Lines*, the Commission had before it several revolving credit agreements pursuant to which no notes or other evidences of indebtedness were issued. Each credit agreement states that the duty to repay the loan amount is evidenced solely by the credit agreement and the accompanying documents, but the obligation shall not be evidenced by notes or other similar evidences of indebtedness. (See also *Application of Pacific Gas and Electric Company*, D.91-12-057, 42 CPUC2d 421 [1991 Cal. PUC LEXIS 877], where the Commission determined that PG&E's provision of long-term capital support to PG&E's regulated and unregulated subsidiaries and affiliates did not constitute "other evidences of indebtedness" under Section 818.)

Since a multiyear QF buyout, as defined in this decision, is not a unilateral promise to pay, and does not generate any proceeds or create a new financial commitment, but rather involves the restructuring of an existing long-term contract, we



hold that such agreements, as defined above, do not constitute other evidences of indebtedness pursuant to Section 818. In reaching this holding, we understand that no notes or other evidences of indebtedness would be issued within the terms of the specific multiyear QF buyout. Furthermore, this decision does not address nor exempt from Section 818 any financing which the utility might obtain to pay its obligations. (See, e.g., PU Code § 840, et seq.)

The lack of a specific multiyear QF buyout before us makes us hesitant to issue this decision, not because we have doubts about the lack of applicability of Section 818 to these agreements in general, but because the specific terms of a specific agreement might cause our opinion to change, based upon the particular language of the agreement. That is one reason why we hesitate to give general advisory opinions in absence of a case or controversy, where the matter is not fully briefed. In any event, provided the multiyear QF buyout is consistent with the assumptions we make in this decision, we hold that it is not subject to Section 818.

#### **Findings of Fact**

1. PG&E's January 16, 1997 "Motion for Adoption of Additional Guideline for Multiyear QF Buyouts" requests that the Commission adopt an additional guideline for multiyear buyouts of QF contracts by determining that such buyouts are not "evidences of indebtedness" under PU Code § 818.
2. In general, in order to conserve our scarce judicial resources, we do not favor issuing advisory opinions. We also disfavor issuing advisory opinions where the issue or controversy is not sufficiently developed to assist the Commission in reaching a reasoned decision.
3. We have the discretion to issue advisory opinions, and have done so, where the matter is of widespread public interest and where the parties might benefit from a timely expression of our views.
4. We consistently encourage cost-effective QF contract restructurings.

5. This advisory opinion is necessary, if at all, solely for the benefit of PG&E, which does not routinely submit its QF contract restructurings or buyouts for preapproval and does not wish to begin to do so now.

6. In this decision, we address multiyear buyouts of QF contracts, which involve a renegotiation of an existing contract between a utility and a QF, which the Commission, prior to December 20, 1995, had authorized for collection in rates. Under the buyout, the utility would pay the QF over a period of more than one year. The type of buyout we address in this decision should not be a unilateral promise to pay, but rather a bilateral agreement where each party must perform certain duties and obligations, and has certain liabilities. No notes or other evidences of indebtedness would be issued within the terms of the specific multiyear QF buyout.

#### **Conclusions of Law**

1. Our issuance of an advisory opinion in this unique situation should not be used as precedent for requesting an advisory opinion from us in the future.

2. Multiyear QF buyouts, as defined by this decision, should not constitute "evidences of indebtedness" pursuant to PU Code § 818.

3. To help facilitate cost-effective QF contract restructurings, this decision should take effect immediately upon approval.

**O R D E R**

**IT IS ORDERED** that Pacific Gas and Electric Company's January 16, 1997 "Motion for Adoption of Additional Guideline for Multiyear QF Buyouts" is granted insofar as we determine that multiyear buyouts of QF contracts, as specifically defined in this decision, are not subject to Public Utilities Code § 818.

This order is effective today.

Dated August 1, 1997, at San Francisco, California.

**P. GREGORY CONLON**  
President  
**JESSIE J. KNIGHT, JR.**  
**HENRY M. DUQUE**  
**JOSIAH L. NEEPER**  
**RICHARD A. BILAS**  
Commissioners