

ALJ/WRI/tcg

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Decision 99-02-033 February 4, 1999

ORIGINAL

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application of PACIFIC GAS AND ELECTRIC COMPANY, a California corporation, and RICHARD L. WILLS and DONNA M. WILLS for an Order Authorizing the Former to Sell and Convey to the Latter Two Parcels of Land in Alameda County Pursuant to Public Utilities Code Section 851 (Electric) (U 39 E).

Application 97-06-002
(Filed June 2, 1997;
amended April 6, 1998)

INTERIM OPINION

Pacific Gas and Electric Company (PG&E or Seller) and Richard L. Wills and Donna M. Wills (Buyers) jointly apply for authority to transfer two parcels of unimproved land located in Alameda County (the Property) pursuant to a Standard Purchase and Sale Agreement dated July 30, 1996 (the Agreement) and for approval of the ratemaking treatment proposed for the transfer.

This application was first filed on June 2, 1997 and was noticed in the Daily Calendar on June 5, 1997. The Office of Ratepayer Advocates (ORA) filed a conditional protest stating that the application should not be approved until PG&E and Buyers settled on the exact size of the Property and final sales price.

An amended application was filed on April 6, 1998 and was noticed in the Daily Calendar on April 12, 1998. ORA states that its concerns regarding the original application have been satisfied and raises no further objections to the ex parte favorable treatment of the amended application.

No other protests have been received.

Applicants

Since October 10, 1905, PG&E has been an operating public utility corporation, organized under the laws of the State of California, engaged principally in the business of furnishing gas and electric service in California.

The buyers are individuals. They are purchasing the Property to expand their medical instruments manufacturing business which is located on adjacent property.

The Property

The Property consists of a portion of a 4.265-acre parcel designated as Alameda County Assessor's Parcel Number 519-1010-076. PG&E acquired the parcel for substation purposes by deed dated October 22, 1991, and recorded as Serial Number 91300358 in the Official Records of Alameda County. The substation was constructed in the northwest corner of the 4.265-acre parcel, leaving two undeveloped areas: one lying south of the substation; and the other lying east of the substation.

As part of PG&E's ongoing efforts to identify properties for sale and disposition, the Property was identified as a candidate for disposition. Aside from an access road to the substation and limited transmission and storm drainage lines, PG&E does not otherwise make use of the Property. With the exception of retention of adequate easements for access to the substation and for the existing and future electric facilities originating at the substation, it is not foreseeable that the Property will ever again be needed for public utility purposes.

Based on the analysis described above, PG&E determined that it did not need to maintain ownership of the Property in fee, and the fee interest in the Property could be declared surplus if PG&E entered into an agreement whereby public utility easements were created retaining all rights necessary for

maintenance and operation of the existing and future electric lines and for access to the substation. PG&E also believes that by disposing of unused fee interests, retaining easements, and removing the book value of the fee interests from rate base, PG&E would be able to maintain customer service at a reduced cost.

Subsequently, PG&E entered into an agreement with Buyers to convey the fee interest in the Property subject to easements for the public utility lines and access routes. Pursuant to Public Utilities (PU) Code § 851, Commission authority for the sale is necessary for property that is "necessary or useful." Hence, PG&E and Buyers are jointly filing this application.

PG&E will be reserving easements to protect both existing and future utility facilities and the right to access the substation parcel. PG&E will also be reserving utility easements across the Property. These utility easements will reserve to PG&E the rights for its existing underground electric lines and will also reserve to PG&E the right to construct future overhead and underground electric lines on the Property.

PG&E has entered into a Memorandum of Understanding with the U.S. Fish and Wildlife Service for a conservation easement. The conservation easement is required as a mitigation measure for damage done to the wetland area while PG&E was extending electric transmission lines into the substation. It will require Buyers to construct a fence that separates the developable area from the conservation easement area. It will also restrict unauthorized access to the conservation easement area, will preclude the Buyers and any subsequent owners from developing the conservation easement area, and will require that Buyers and any subsequent owners maintain the conservation easement area in a condition free of debris and other human impact.

The utility and conservation easements being reserved are set forth in the Grant Deed (attached to the application) whereby PG&E proposes to sell the

Property to Buyers. However, in addition to the rights specifically reserved in the Grant Deed, PG&E relies on the common law of servitudes to the maximum extent possible. Under the common law of servitudes, PG&E has the right to do such things as are necessary for the full enjoyment of the easements themselves and such rights do not need to be expressly stated in the document which creates the easements.

Thus, the easements reserve to PG&E sufficient express rights for operation and maintenance of all existing and future facilities, along with all the secondary (common law) rights which may be necessary for the full enjoyment of the primary grant. The easements expressly reserve to PG&E the right to reconstruct, replace, remove, maintain, and use the existing facilities together with the right to excavate for, construct, install, repair, reconstruct, replace, remove, maintain and use additional facilities for the transmission and distribution of electric energy and for communication purposes as PG&E may from time to time deem necessary. This includes rights for overhead pole lines and underground lines.

The secondary rights which are being reserved include the right of ingress to and egress from the easement areas, the right to control trees and brush lying within the easement areas or adjacent to the easement areas, the right to prohibit the construction of any building or other activity in and around the easement areas which might interfere with PG&E's operations, and a provision that all successors and assigns of the parties are bound by the terms of the easements and that all covenants shall apply to and run with the Property. In addition, as holder of the dominant tenement, PG&E relies on such other common law rights as the right to use access roads over the servient tenement, or the right to install gates, or the right to mark the easement areas, or any other action or thing that

PG&E finds is reasonably necessary to fully preserve the ratepayer interest in reliable electric facilities and service.

Easements created by reservation, as here, are permanent covenants on the servient tenement (the Property) and cannot be extinguished by any act of Buyers or their successors in interest. Generally, public utility easements, such as those at issue here, are said to "run with the land" for the life of the public utility facilities including however long that life may be extended with ordinary maintenance and replacement programs of the utility. Since, with normal routine maintenance, the public utility facilities will be expected to last forever, the easements too are considered permanent and would last forever.

In reserving these easements, PG&E has considered whether the easements are sufficient not only for present but for all foreseeable future needs. The rights retained by PG&E in the proposed easements are sufficient for all present and future public utility needs. Specifically, the easements reserve to PG&E the rights for its existing facilities as well as for additional facilities in the future. Because PG&E believes that the easements are sufficient for all foreseeable future needs, any cost due to any expansion to the easements which is not funded by new customers pursuant to the tariffs will be borne by the Company and will not be reflected in rates.

Buyers or any successors in interest would acquire all rights incident to fee ownership subject to the express and implied covenants in the deed.

The Purchase Agreement

The terms and conditions of the proposed sale are contained in the Purchase and Sale Agreement by and between PG&E and Buyers. Under the terms of the Agreement, PG&E will sell and convey to Buyers the Property, together with all easements, rights and privileges appurtenant thereto, and all warranties and other agreements related thereto. The purchase price of the

Property is \$613,116. The final acreages of the Property, and the final purchase price, have been determined by property survey which will be reflected in a final parcel map, subject to approval by the City of Fremont, recorded with the Alameda County Recorder.

Proposed Ratemaking

There are two parcels included in the Property being sold which the application identifies as Parcel A and Parcel B. The original cost of Parcel A was \$521,021, and the original cost of Parcel B was \$525,955, resulting in total original cost of the Property of \$1,046,976.

For Parcel A, based on property taxes of \$4,899, annual maintenance costs of approximately \$500, and PG&E's 1998 authorized cost of capital (11.40 percent on equity; 9.26 percent on rate base), the 1998 revenue requirement, including taxes, franchise fees and an allowance for uncollectibles, for Parcel A is \$78,234.

For Parcel B, based on property taxes of \$4,944, annual maintenance costs of approximately \$500, and PG&E's 1998 authorized cost of capital (11.40 percent on equity; 9.26 percent on rate base), the 1998 revenue requirement, including taxes, franchise fees and an allowance for uncollectibles, for Parcel B is \$78,965.

The costs related to the Property (both Parcels A and B) are recovered through base rates as determined in a General Rate Case (GRC).

Because the revenue requirement determined in a GRC is authorized at an aggregate level, it is impossible to specifically identify these costs in a GRC decision. Nevertheless, these costs are presently included in rates since they are embedded in PG&E's adopted rate base and M&O expense estimates. Therefore, in this case, the Property's \$157,199 revenue requirement is included in the GRC revenues ordered by D.95-12-055 (PG&E's 1996 Test Year decision).

PG&E is reserving easements for any existing or proposed facilities. These easements, retaining all rights necessary for maintenance and operation of the

existing and any future electric facilities, will have no effect on PG&E's rate base. Additionally, by selling the Property with the appropriate easements, it allows PG&E to avoid maintenance costs on fee ownership property that was being underutilized for utility purposes.

In order to be competitive in an open market, PG&E states that it will continue to seize the opportunity to reduce the cost-of-service by selling all, or portions of, underutilized properties such as the Property. It is to this end that PG&E desires to shorten the Commission's review and approval process by presenting consistent ratemaking treatment in such sales. In its application to sell land at the former site of a reservoir known as Lake Van Norden (Application 96-06-009), PG&E proposed a mechanism to permit the sale of surplus land (the underutilized fee interest) while ensuring that the Company retains adequate easement rights on the Property. Furthermore, the Lake Van Norden application proposed that net, after-tax proceeds be credited to the Competition Transition Charge (CTC) Revenue Account. The Lake Van Norden application was approved by the Commission in Decision 97-04-024 (Apr. 9, 1997). The Commission agreed with this proposed ratemaking treatment, stating in its decision: "By allocating all after-tax proceeds to the CTC balancing account, the total amount of the transition costs will be recovered sooner, and the CTC charge will be eliminated more quickly, thereby reducing the overall CTC burden on the PG&E ratepayers." The ratemaking proposed in this application for the sale of the Property is the same as in the Lake Van Norden application, except for the fact that this transaction results in a net loss since the proceeds are less than the original cost of the property (\$613,116 - \$1,046,976 = <\$433,860>). We are precluded by § 367 of the PU Code from recovering through transition costs a nongeneration related uneconomic asset.

The Property currently is in PG&E's rate base. PG&E proposes that the \$1,046,976 cost of the Property be removed from rate base. In addition, PG&E proposes to book the net-of-tax proceeds to the CTC Revenue Section of the Transition Cost Balancing Account (TCBA). In summary, PG&E proposes to:

- Retire the asset from rate base.
- Book the net-of-tax proceeds to the CTC Revenue Section of the TCBA.

The initial journal entry required to achieve the ratemaking treatment outlined above would be as follows:

Debit - Cash	\$ 613,116
Debit - Balancing Account	\$ 257,080
Debit - Tax Liability	\$ 176,780
Credit - Land	\$1,046,976

PG&E believes that this proposed ratemaking treatment is consistent with the Commission's history of finding that ratepayers have an interest in the proceeds from the sale of property, and that by applying the after-tax proceeds to the CTC Revenue Section of the TCBA, it also provides incentive to PG&E to maximize any potential gain on the sale of the land.

We do not accept PG&E's proposed ratemaking mechanism which applies the net loss to ratepayers through the TCBA. Pursuant to section 367, the TCBA is designed for transition cost recovery of uneconomic generation-related assets, and not for losses resulting from the sale of substation property. However, we do not wish to delay unnecessarily the transfer of this property. Therefore, we will approve the transfer of the property to the Buyers, but we will require PG&E to propose within 30 days new ratemaking treatment which does not involve

charging the loss to transition costs. The assigned ALJ should issue a ruling to solicit comments on PG&E's proposal from the parties in the case, and we will resolve the issue by subsequent order.

The Proposed Sale Is in the Public Interest

The relevant inquiry in an application for transfer is whether the transfer will be adverse to the public interest. (Re Universal Marine Corporation 14 CPUC2d 644, 646 (1984).) The parties here believe that the proposed sale of the Property to Buyers, under the terms and conditions in the Agreement, is in the public interest because, subject to the easements described above, the Property to be sold is no longer necessary or useful for public utility purposes. PG&E's need for the existing and any future electric facilities will be adequately protected by the proposed easements.

Moreover, the easements will actually be more advantageous to PG&E and its ratepayers than continuing to own the Property. In particular, with an easement, PG&E would retain all rights necessary for current maintenance and future operation of the existing electric lines, including the right to enter on any part of the Property for maintenance purposes, with none of the obligations attendant to ownership of the Property. Specifically, PG&E would no longer be responsible for payment of the maintenance costs or property taxes associated with the Property. Nor would PG&E be responsible for the liability for injury to trespassers or others who may enter onto the Property.

Environmental Matters

A. Compliance with the California Environmental Quality Act (CEQA)

In this application, PG&E seeks authority under PU Code § 851 to transfer two parcels of unimproved land located in Alameda County to Buyers. PG&E believes that the proposed sale is categorically exempt from the

requirements of CEQA because (1) it can be seen with certainty that there is no possibility that the proposed sale may have a significant effect on the environment; and (2) it involves no change in use beyond previously existing uses. (14 Cal. Code of Regulations §§ 15061 (b)(3) and 15301 (b).) Without adopting PG&E's reasoning, the Commission reaches a similar conclusion. The proposed sale, by itself, will not have a significant effect on the environment, and, consequently, no further evaluation by the Commission is required. (Myers v. Board of Supervisors of Santa Clara County, 58 Cal. App. 3d 413, 421-22 (1976), citing No Oil Inc. v. City of Los Angeles, 13 Cal. 3d 68, 74 (19974); see also Southern California Edison Co., D. 94-06-017, 55 CPUC 2d 126, 129 (1994).)

However, the proposed sale may possibly cause an indirect change to the environment. As noted above, the Property has been used by PG&E for an access road and limited transmission and storm drainage lines. While neither PG&E nor Buyers seek authority from the Commission to change the existing uses of the Property, Buyers have stated an intention to utilize the Property for expansion of their medical instruments manufacturing business.

To the extent that Buyers could propose a change in use of the Property, PG&E believes it would be both premature and inappropriate for the Commission to conduct CEQA review at this time. Instead, PG&E urges the Commission to defer to the state and local authorities having jurisdiction over Buyers' proposed changes in use to conduct such environmental review as they may deem appropriate at the time Buyers submit an application for change in use.

CEQA guidelines expressly recognize that the timing of CEQA review "involves a balancing of competing factors," and that such review should occur "as early as feasible in the planning process to enable environmental considerations to influence project program and design and yet late enough to

provide meaningful information for environmental assessment." (14 Cal. Code of Regulations § 15004.)

As noted, Buyers plan to expand their medical instruments manufacturing business, but Buyers' plans are contingent upon numerous factors. In light of these contingencies, PG&E believes that it would be premature for the Commission to conduct CEQA review at this time. Instead, PG&E urges the Commission to defer to the appropriate state and local authorities having jurisdiction over Buyers' proposed changes in use of the Property. These authorities are generally in a superior position to evaluate local environmental impacts and develop appropriate mitigation strategies.

Such deference is appropriate under the circumstances here and will not result in any regulatory gap. CEQA specifically applies to discretionary projects such as issuance of conditional use permits and approval of tentative subdivision maps. (See Pub. Res. Code § 21080; see also Myers, supra, 58 Cal. App. 3d at 424.) Accordingly, if and when Buyers propose any change in use of the Property, the appropriate state and local authorities having authority over such proposed uses must conduct environmental review under CEQA.¹

Furthermore, in lieu of conducting CEQA review at this time, the Commission may condition its approval of the proposed sale on Buyers' compliance with all applicable environmental regulations. Such conditional approval is commonly imposed and is consistent with Commission precedent

¹ While CEQA is a state process, the U.S. Fish and Wildlife Service also has an interest in the Buyers' ultimate use of the Property, as the Fish and Wildlife Service is the holder of a conservation easement on the Property. Accordingly, Buyers shall promptly notify the Fish and Wildlife Service of any proposed changes in the use of the Property.

under CEQA. (See Sundstrom v. County of Mendocino, 202 Cal. App. 3d 292, 308 (1988), citing Perley v. Board of Supervisors, 137 Cal. App. 3d 424, 429 (1982); see also In Re: SpectraNet SGV, D.97-06-020, 1997 Cal. PUC LEXIS 367 at *37 (1997).)

B. Environmental Claims

Pursuant to the Purchase and Sale Agreement, Buyers acknowledge that no report regarding hazardous materials was provided by PG&E, that they have the right to investigate the Property, and that PG&E will not be responsible to Buyers for the presence of hazardous materials either on or affecting the Property.

In Section 5.5(c) of the Agreement, Buyers have waived and relinquished any and all benefits and protections they may have under Section 1542 of the California Civil Code, which Section 1542 reads as follows: "A general release does not extend to claims which the creditor does not know or suspect to exist in his favor at the time of executing the release, which if known by him must have materially affected his settlement with the debtor."

Based on the Agreement and the general release contained therein, the parties do not expect any claim for environmental damage which may affect PG&E or its ratepayers after the close of escrow.

Waiver of Comment Period

PU Code § 311(g)(1) provides that this decision must be served on all parties and subject to at least 30 days public review and comment prior to a vote of the Commission. Section 311(g)(2) provides that this 30-day period may be reduced or waived upon the stipulation of all parties in the proceeding.

All parties in the proceeding have stipulated to waive the 30-day waiting period required by PU Code § 311(g)(1) and the opportunity to file comments on

the draft decision. Accordingly, this matter will be placed on the Commission's agenda directly for prompt action.

Findings of Fact

1. PG&E provides public utility electric service in many areas of California, and in meeting its service obligations over the years has acquired numerous parcels of land which have been used and useful in its provision of service.

2. With the passage of time PG&E's requirement of full use of some of these parcels has diminished, and PG&E is determining that its present and future requirements on some of these parcels can now and for the future be met by retention of easement rights while disposing of the basic fee interests in these parcels.

3. By selling unused fee interests in such properties and retaining easements, the book value of these fee interests can be removed from rate base, enabling PG&E to maintain customer service at reduced costs.

4. The Property consists of 4.265 acres of undeveloped property located in the City of Fremont, county of Alameda, where PG&E has determined that its present and future public utility requirements are capable of being met through use of reserved easements without the necessity of continued retention of the fee interest in the Property or its retention in rate base.

5. PG&E has agreed to sell its fee in the Property to Richard L. Wills and Donna M. Wills, seller retaining agreements sufficient for its present and future utility requirements.

6. PG&E proposes ratemaking treatment as follows:

- a. PG&E's rate base would be reduced by the \$1,046,976 cost of the Property.
- b. PG&E's electric base revenues would be reduced by an annualized amount of \$157,199.

7. The application states PG&E's intention to have shareholders bear any costs associated with the expansion of easements that are not recoverable under applicable tariffs, and states that such costs shall include costs associated with any environmental concerns which arise.

8. The substation property at issue in this case is not an uneconomic generation-related asset as defined in PU Code § 367.

9. Retained easements will adequately protect PG&E's existing and future electric facilities requirements, and removal of fee ownership costs will result in lower costs to both PG&E and its ratepayers; accordingly, the proposed sale and transfer is in the public interest.

10. Because the public interest would best be served by having the sale and transfer take place expeditiously, the ensuing order should be made effective on the date of issuance.

11. As Buyers' plans to expand their medical instruments manufacturing business are presently undefined and contingent upon numerous factors, CEQA review is deferred to the appropriate federal, state, and local authorities having jurisdiction over Buyers' proposed changes in use of the Property.

Conclusions of Law

1. A public hearing is not necessary.
2. The proposed sale and transfer as set forth in the application, except for the ratemaking treatment of the sale proceeds should be approved.
3. PG&E should not recover the loss from the sale of this property through the TCBA because the property is not an uneconomic generation asset.
4. PG&E should submit a new proposal for ratemaking treatment of the sale proceeds within 30 days.

INTERIM ORDER

IT IS ORDERED that:

1. Within six months after the effective date of this order, Pacific Gas and Electric Company (PG&E) may sell and transfer to Richard L. Wills and Donna M. Wills the Property as set forth in Application 97-06-002, subject to the easements and reservations therein described.
2. Within 10 days of the actual transfer, PG&E shall notify the Commission and Office of Ratepayer Advocates in writing of the date of which the transfer was consummated. A true copy of the instrument effecting the sale and transfer shall be attached to the written notification.
3. Upon completion of the sale and transfer authorized by this Commission order, PG&E shall stand relieved of public utility responsibilities for the property except as to the reserved easements.
4. Within 30 days of the effective date of this order, PG&E shall propose new ratemaking treatment for this property transfer which does not involve charging the loss to transition costs.
5. Completion of the sale and transfer authorized by this order shall obligate PG&E's shareholders to bear any costs associated with the expansion of easements that are not recoverable under applicable tariffs, including costs associated with any environmental concerns which arise.

6. Approval of this sale and transfer is conditional upon Buyers' compliance with applicable federal, state, and local environmental regulations.

This order is effective today.

Dated February 4, 1999, at San Francisco, California.

RICHARD A. BILAS
President
HENRY M. DUQUE
JOSIAH L. NEEPER
Commissioners