

Decision 99-01-015 April 1, 1999

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

Application of PACIFIC GAS AND ELECTRIC COMPANY, a California corporation, and THE HATCH 1987 REVOCABLE TRUST, ET AL., for an Order Authorizing the Former to Sell and Convey to the Latter a Certain Parcel of Land in Shasta County Pursuant to Public Utilities Code Section 851 (Electric). (U 39 E)

Application 98-06-053  
(Filed June 29, 1998)

**ORIGINAL**

**O P I N I O N**

Pacific Gas and Electric Company (PG&E or Seller) and numerous trusts and individuals (the Hatch 1987 Revocable Trust, the Hatch Irrevocable Trust, Della Walker Van Loben Sels Trust for the issue of Brooks Walker, Jr., Della Walker Van Loben Sels Trust for the issue of Wellington S. Henderson, Jr., Della Walker Van Loben Sels Trust for the issue of John C. Walker, Della Walker Van Loben Sels Trust for the issue of Ann Hatch Farley, John C. Walker, Jennifer Walker, Lindsey Walker-Silverman, Brooks Walker Jr., Revocable Trust, Brooks Walker III, Kirby Walker, Leslie Walker, The Henderson Grandchildren's Irrevocable Trust, The Henderson Revocable Trust, James A. Henderson, Charles C. Henderson, Elena D. Henderson, Joan H. Henderson, Mark W. Henderson, Myles Walker Danielsen Trust, Clayton Brooks Danielsen Trust, Benjamin Walker Burlock Trust, Reilly Hudson Keenan Trust, Madison Flanders Keenan Trust, Max Walker Silverman Trust and Emma Walker Silverman Trust ) jointly apply for authority to transfer a parcel of unimproved land located in Shasta County (the Property) pursuant to a Standard Purchase and Sale Agreement dated December 9, 1997 (the Agreement) and for approval of the ratemaking treatment proposed for the transfer.

The application was filed June 29, 1998 and was noticed in the Daily Calendar on July 3, 1998. The Office of Ratepayer Advocates (ORA) filed a response stating that the application should be approved with express conditions that PG&E's shareholders will bear any costs that are not recoverable from new customers pursuant to application tariffs and that PG&E will obtain from Buyers a Release and Indemnity Agreement at or prior to the close of escrow. No other protests or responses have been received.

In Resolution ALJ 176-2997, dated July 3, 1998, the Commission preliminarily categorized this proceeding as ratesetting, and preliminarily determined that hearings were not necessary. No protests have been received. Given this status, public hearing is not necessary, and it is not necessary to alter the preliminary determinations made in Resolution ALJ 176-2997.

#### **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.

Buyers are a number of trusts and individuals and intend to manage the Property for timber production.

#### **The Property**

The Property consists of approximately 40 acres of unimproved land located in Shasta County and is designated as Shasta County Assessor's Parcel Number 096-070-01. PG&E acquired the Property from a predecessor company, Northern California Power Company, by general transfer executed on October 3, 1919 (recorded in Book 138 of Deeds at page 30, Shasta County Records).

Since its acquisition, the Property has been used by PG&E as watershed and managed for timber production. There are no utility facilities on the Property. However, the northwest corner of the Property is traversed by a creek. A vicinity map and a detailed map of the Property are attached to this application.

PG&E has retained the Property in fee in order to protect downstream hydroelectric facilities from excessive siltation that might result from unregulated logging of the Property's timbered watershed lands. Today, however, it is no longer necessary to retain full fee ownership rights to protect downstream hydroelectric facilities from siltation resulting from logging practices and road construction.

Pursuant to the Z'berg-Nejedlly Forest Practices Act, Cal. Pub. Res. Code §§ 4511 et seq., anyone intending to harvest trees must first submit a Timber Harvesting Plan (THP) for approval by the California Department of Forestry (CDF). (Id. at §§ 4571, 4581.) The proposed THP must describe the methods to be used in cutting and removing trees and to avoid excessive accelerated erosion from timber operations. (Id. at §§ 4582.4, 4582.6.) As part of its approval process, CDF is required to consider public comments and make recommendations for mitigation necessary to protect the environment. (Id. at § 4583.7.)

Thus, the THP process provides PG&E with full opportunity to review and comment on proposals for logging on watershed lands. Furthermore, the process ensures that downstream beneficial uses -- such as hydroelectric generation, fish habitat, and recreation -- will be protected by orders enforced by CDF. Consequently, PG&E no longer needs to retain full fee ownership in order to protect the watershed and its downstream hydroelectric production.

Based on this analysis, and 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 the reservation of riparian and appropriate rights associated with the Property, it is not foreseeable that the Property will ever again be useful for public utility purposes. PG&E, therefore, determined that it did not need to maintain ownership of the Property in fee, and, as a matter of law, the fee interest in the Property could be declared surplus if PG&E entered into an agreement whereby it retained all riparian and appropriative rights which are annexed to, inherent in, and part and parcel of the Property. PG&E also believes that by disposing of unused fee interests 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 reservations for riparian and appropriative rights. Pursuant to Public Utilities (Pub. Util.) Code § 851, Commission authority for the sale is necessary for property that is "used and necessary" (a term assumed to be synonymous with "used and useful"). Hence, PG&E and Buyers are jointly filing this Application.

### **Reservations**

Pursuant to the Agreement, PG&E shall reserve all riparian and appropriative rights, whether prescriptive or otherwise, which are annexed to, inherent in, and part and parcel of the Property, together with all right, title and interest of any nature whatever in and to the waters which are now or hereafter located or flowing on, under or abutting the Property. However, subject to any and all prior appropriative rights to such waters, Buyers shall be entitled to use reasonable amounts of water for non-commercial domestic uses only. PG&E

shall also reserve the right to enter onto the Property and take such other reasonable action as may be necessary to enforce PG&E's reserved water rights.

PG&E has considered whether the reservations are sufficient not only for present but for all foreseeable future needs. Because PG&E believes that the reservations are sufficient for all foreseeable future needs, any future costs which are not funded by new customers pursuant to the tariffs will be borne by the Company and will not be reflected in rates.

### **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. The purchase price of the Property is \$156,000.

According to the Agreement, the close of escrow for this transaction shall occur within 30 days of receipt of Commission approval of the transaction, but not later than February 7, 1999 (a date which we assume the parties will extend.) If closing does not occur prior to this date, the Agreement is subject to termination.

### **Original Cost, Book Value and Purchase Price**

The total original cost of the Property was \$1,105. The purchase price is \$156,000 payable to PG&E at the close of the sale.

The Property was exposed to a broad market through a written invitation to bid. This was accomplished with the assistance of a real estate broker. The brokerage fee will be \$3,120. The invitation to bid package was mailed to approximately 200 prospective purchasers. Seven offers were received for the

Property. Buyers submitted the best offer. Therefore, the purchase price directly reflects the fair market value of the Property.

### **Environmental Matters**

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

In this application, PG&E seeks authority under Pub. Util. Code § 851 to transfer approximately 40 acres of unimproved land in Shasta 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).) According to PG&E the proposed sale 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. 3e 413, 421-22 (1976), citing No Oil Inc. v. City of Los Angeles, 13 Cal. 3d 68, 74 (1974); see also Southern California Edison Co., D.94-06-017, 55 CPUC 2d 126, 129 (1994).)

While the proposed sale may possibly result in an indirect change to the environment, there is no evidence of such a change in the record before the Commission. As noted above, the Property has been used by PG&E for watershed and timber production. Neither PG&E nor Buyers presently seek authority from the Commission to change the existing uses of the Property. 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 Regs. § 15004.)

As noted above, Buyers plan to use the Property for timber production, 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.

Based upon the record here, such deference is appropriate 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 proposes 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. The Commission conditions its approval of the proposed sale on Buyers' compliance with all applicable environmental regulations.

Consistent with this treatment, PG&E notes that any environmental considerations related to Buyers' proposed use of the Property for timber

production should properly be addressed pursuant to the procedure set forth in the Forest Practices Act. Under Pub. Res. Code § 21080.5, the Secretary of the California Resources Agency may certify a regulatory program of a state agency as exempt from the requirement of environmental impact report (EIR) preparation of a written project plan containing sufficient environmental impact information. (See Environmental Protection Information Center, Inc. v. Johnson, 170 Cal.App.3d 604, 610 (1985).) Pursuant to this section, the Secretary has certified the timber industry as exempt from EIR preparation. In other words, the Secretary has determined that the THP preparation and approval process, as governed by the FPA and its implementing regulations, is a "functional equivalent" to EIR preparation. (Id. at 611, citing Natural Resources Defense Council, Inc. v. Arcata Nat. Corp., 59 Cal.App.3d 959, 976-977 (1976).)

**B. Environmental Claims**

As part of the Purchase and Sale Agreement, PG&E disclosed that at some time during its ownership of the Property, PG&E may have handled, treated, stored or disposed of hazardous substance on or adjacent to the Property. Pursuant to the Agreement, Buyers acknowledge that no report regarding hazardous materials was provided by PG&E, that it has 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.

Buyers have agreed to execute and deliver to Seller at or prior to the close of escrow, a Release and Indemnity Agreement containing a general release in which it waives and relinquishes any and all rights it may have under § 1542 of the California Civil Code, which reads as follows: "A general release does not extend to claims which a 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.

### **Ratemaking Treatment**

The application shows the 1998 revenue requirement associated with the Property. Based on property taxes of \$66, annual timber management costs of approximately \$500, and PG&E's 1998 authorized cost of capital for generation-related facilities (6.77 percent on equity; 7.13 percent on rate base, based on the reduced rate of return adopted in the Competition Transition Charge (CTC) Phase 2, D.97-11-074), the 1998 revenue requirement, including taxes, franchise fees and an allowance for uncollectibles, is \$703. The costs related to the Property are recovered in the Transition Cost Balancing Account (TCBA) through the Hydroelectric/Geothermal Revenue Requirement as established in the Generation Performance-Based Ratemaking (Gen-PBR) Proceeding in D.97-12-096.

Because the revenue requirement determined in the Gen-PBR is authorized at an aggregate level, it is impossible to specifically identify these costs in the Gen-PBR decision. Nevertheless, these costs are presently included in rates since they are imbedded in PG&E's adopted rate base and M&O expense estimates. Therefore, in this case, the Property's \$703 revenue requirement is included in the revenues authorized by D.97-12-096.

As described in Section I above, pursuant to Section 4.2 of the Purchase Agreement, PG&E is reserving all riparian and appropriative rights which are annexed to, inherent in, and part and parcel of the Property. This reservation will have no effect on PG&E's rate base. Additionally, by selling the Property, PG&E avoids maintenance costs on fee ownership property that was being underutilized for utility purposes.

Pursuant to Assembly Bill (AB) 1890 and the Commission's Preferred Policy Decision (D.95-12-063, as modified by D.96-01-009), electric utilities such as PG&E were strongly encouraged to divest voluntarily at least 50% of the fossil-fueled power plants within their service territories. In the Preferred Policy Decision, the Commission stated that transition costs associated with divestiture would be collected through a nonbypassable competition transition charge (CTC) applicable to all retail customers. In D.97-06-060 (CTC Phase 1 Decision), the Commission ordered each electric utility to establish TCBA, with separate sections for costs and revenues. In D.97-11-074 (CTC Phase 2 Decision), the Commission directed that the gain or loss resulting from sales of divested generation assets, including land, should flow through the CTC Revenue Section of each utility's TCBA.

As discussed in Section 1, the Property has historically been used for generation-related purposes. Consistent with the Commission directives discussed above, the gain on sale for the Property should flow through PG&E's TCBA.<sup>1</sup> In addition, upon close of the sale PG&E will remove the property from rate base and adjust the entries in the TCBA to reflect the reduction of the revenue requirement associated with the property. In summary, PG&E should:

- Retire the asset from rate base.
- Adjust the Hydroelectric/Geothermal Revenue Requirement in TCBA.
- Book the proceeds to the CTC Revenue Section of the TCBA. The tax liability that was proposed by PG&E should be denied because PG&E will not have to pay any additional taxes from this sale. All taxable proceeds from this sale will be offset against tax deductible expenses in the TCBA and therefore no tax liability will be owed.

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<sup>1</sup> The Commission approved PG&E's TCBA in Resolution E-3538 (dated June 18, 1998).

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

Debit - Cash	\$152,880
Credit - Land	\$ 1,105
Credit - Balancing Account	\$151,775

The ratemaking treatment is consistent with the Commission's decisions on electric industry restructuring, and by crediting the proceeds to the TCBA it provides benefits to ratepayers and an incentive to PG&E to maximize the potential gain on the sale of the land.

The sale of the Property will result in a reduction of the CTC responsibility for ratepayers of PG&E. The ratemaking mechanism in this decision is consistent with ratemaking directives issued by the Commission in D.97-11-074, and embraces the Commission's goal of having a rapid and smooth transition to retail electric competition.

#### **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. (See RE Universal Marine Corporation 14 CPUC 2d 644, 646 (1984).) The parties here believe that the proposed sale of the Property to the Buyers, under the terms and conditions in the Agreement, is in the public interest because, subject to the reservations described above, the Property to be sold is no longer necessary or useful for public utility purposes. PG&E's need for the riparian and appropriative rights will be preserved by the reservations.

Moreover, selling the Property will actually be more advantageous to PG&E and its ratepayers than continuing to own the Property. In particular, with the reservations, PG&E would retain all riparian and appropriative rights

necessary for current and future operations, with none of the obligations attendant to ownership of the Property. Specifically, PG&E would no longer be responsible for payment of 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.

### **Comments on Draft Decision**

The draft decision of ALJ Wright in this matter was mailed to the parties in accordance with Pub. Util. Code § 311(g)(1) and Rule 77.1 of the Rules of Practice and Procedure. Comments were filed by ORA restating its comments filed in A.98-06-018. Our discussion of those comments and the comments of others in A.98-06-018 is equally appropriate to this proceeding and is as follows:

"On February 9, 1999, the Commission circulated a revised draft decision to the parties in A.98-05-014 and A.98-05-022, and invited informal comments on the regulatory policy being effectuated in the revised draft decision. Comments were received from the Environmental Defense Fund (EDF), the Coalition of California Utility Employee (CUE), ORA, and the Association of California Water Agencies (ACWA).

"The letter from EDF is brief, and primarily expresses concern that this sale could act as a precedent for other, more significant, sales.

"CUE offers a detailed critique of the Commission's application of CEQA in a letter that contains significant legal analysis, supported by extensive case citations. Unfortunately, CUE failed to address the broader issue of regulatory policy that was the basis for the Commission's invitation.

"ORA (a party to this proceeding, unlike the other respondents) similarly devotes virtually all of its letter to CEQA analysis, also ignoring the larger question presented.

"ACWA's letter, while brief, raises two significant and related issues. First, given the context of the now foreseeable disposition of PG&E's hydroelectric assets, notice to potentially interested parties has been

rendered less than optimum. Furthermore, ACWA notes that while the safeguards imposed in the decision may be adequate to protect the interests of the owner of the hydroelectric facility, they may not be adequate to protect the interests of other users of the watershed. Both of these problems can best be addressed by notification of all interested parties. Accordingly, the Commission will add to this decision a modified version of ACWA's proposed Ordering Paragraph No. 7, requiring notice to be given to local jurisdictions of future sales.

"In general, the responses express concern about the Commission's application of CEQA, and the possibility that the decision could act as precedent on CEQA issues. The Commission has considered the comments it has received, and has, to a limited extent, incorporated their recommendations. Given the very fact-specific nature of the decision (and CEQA analysis in general), this decision has no precedential value, and is limited to the record of this proceeding."

#### **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 or, as in this case, the reservation of riparian and appropriative water rights, while disposing of the basic fee interests in these parcels.
3. By selling unused fee interests in such properties and retaining easements or reservations, 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, consisting of approximately 40 acres of unimproved land located in Shasta County, is land where PG&E has determined that present and

future public utility requirements are capable of being met through use of reservation of all riparian and appropriative water rights 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 Buyers, retaining agreements sufficient for PG&E' present and future utility requirements.
6. The adopted ratemaking treatment as follows:
  - a. PG&E's rate base would be reduced by the \$1,105 cost of the Property.
  - b. PG&E's electric base revenues would be reduced by an annualized amount of \$703.
  - c. Proceeds would be booked to the CTC Revenue Section of the TCBA.
7. The application states PG&E's intention to have shareholders bear any costs associated with the reservations for riparian and appropriative water rights which are not funded by new customers pursuant to applicable tariffs.
8. By allocating all proceeds to the CTC Revenue Section of the TCBA, the total amount of the electric industry restructuring transition costs will be recovered sooner, and the CTC will be eliminated more quickly, thereby reducing the overall transition cost burden on ratepayers.
9. Retained reservations of water rights 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 as well as the proposed ratemaking treatment of the gain on sale 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. Buyer currently has not proposed any change in use beyond previously existing uses of the property.

12. As Buyers' plans to utilize the Property are presently undefined and contingent upon numerous factors, CEQA review is deferred to the appropriate federal, state and local authorities having jurisdiction over Buyers' 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 and the ratemaking treatment of the gain on sale as set forth in this decision should be approved.
3. CEQA review is properly deferred to the appropriate state and local authorities having jurisdiction over any proposed changes in use of the property.
4. This decision is based upon the record before the Commission, and has no precedential value.

### **O R D E R**

#### **IT IS ORDERED that:**

1. Within six months of the effective date of this order, Pacific Gas and Electric Company (PG&E) may sell and transfer to Buyers the Property as set forth in Application 98-06-053.
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. The ratemaking treatment set forth in this decision shall be followed by PG&E.

5. Completion of the sale and transfer authorized by this order shall obligate PG&E's shareholders to bear any costs associated with the reservations for riparian and appropriative water rights which are not funded by new customers pursuant to applicable tariffs.

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

7. Approval of this sale and transfer is conditional upon PG&E obtaining from Buyers at or prior to the close of escrow, the Release and Indemnity Agreement described in the application.

8. PG&E is directed to serve any future Pub. Util. Code § 851 applications regarding land and/or hydroelectric facilities on local jurisdictions, such as cities, counties, special use districts, and federal and state resource agencies.

9. Application 98-06-053 is closed.

This order is effective today.

Dated April 1, 1999, at San Francisco, California.

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