

**PUBLIC UTILITIES COMMISSION**505 VAN NESS AVENUE
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December 9, 2011

Agenda ID #10920
Adjudicatory

TO PARTIES OF RECORD IN INVESTIGATION 11-06-010

This is the proposed decision of Administrative Law Judge (ALJ) Yacknin. It will not appear on the Commission's agenda sooner than 30 days from the date it is mailed. The Commission may act then, or it may postpone action until later.

When the Commission acts on the proposed decision, it may adopt all or part of it as written, amend or modify it, or set it aside and prepare its own decision. Only when the Commission acts does the decision become binding on the parties.

Parties to the proceeding may file comments on the proposed decision as provided in Article 14 of the Commission's Rules of Practice and Procedure (Rules), accessible on the Commission's website at www.cpuc.ca.gov. Pursuant to Rule 14.3, opening comments shall not exceed 15 pages.

Comments must be filed pursuant to Rule 1.13 either electronically or in hard copy. Comments should be served on parties to this proceeding in accordance with Rules 1.9 and 1.10. Electronic and hard copies of comments should be sent to ALJ Yacknin at hsy@cpuc.ca.gov and the assigned Commissioner. The current service list for this proceeding is available on the Commission's website at www.cpuc.ca.gov.

/s/ KAREN V. CLOPTONKaren V. Clopton, Chief
Administrative Law Judge

KVC:eam

Attachment

Decision **PROPOSED DECISION OF ALJ YACKNIN** (Mailed 12/9/2011)

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Investigation on the Commission's own motion into Pacific Gas and Electric Company's (PG&E) compliance with Commission Decision D.09-10-049, granting PG&E's request for a Permit to Construct for the Seventh Standard Substation Project, to determine if PG&E violated the laws, rules and regulations of this State; Order to Show Cause why Respondent should not be subject to penalties for such violations.

Investigation 11-06-010
(Filed June 9, 2011)

DECISION APPROVING SETTLEMENT AGREEMENT

1. Summary

This decision approves the settlement between the Commission's Consumer Protection and Safety Division and respondent Pacific Gas and Electric Company (PG&E) resolving this investigation. PG&E shall make a settlement payment to the State of California General Fund in the amount of \$100,000, and a donation to the Endangered Species Recovery Program at Stanislaus State University in the amount of \$50,000, within 30 days of this order. The investigation is closed.

2. Background

Decision (D.) 09-10-049 granted Pacific Gas and Electric Company (PG&E) a permit to construct the Seventh Standard Substation Project subject to PG&E's compliance with the mitigation measures set forth in the Mitigation Monitoring

Plan for the project. The Commission opened this investigation to consider whether to penalize PG&E on the evidence presented by the Consumer Protection and Safety Division (CPSD) that PG&E violated certain mitigation measures set forth in the Mitigation Monitoring Plan.

The assigned Commissioner's July 14, 2011, scoping memo and ruling identified the following issues to be addressed in this proceeding:

1. Did PG&E fail to notify the Commission's Energy Division in advance of the start of construction, so as to enable PG&E to implement, and Energy Division to monitor PG&E's implementation, of mitigation measures that must be implemented prior to construction; fail to implement mitigation measures with respect to San Joaquin kit fox training and protection; and/or start construction less than 14 days after conducting biological surveys, in violation of D.09-10-049 and the mitigation measures adopted therein?
2. If so, should PG&E be sanctioned and, if so, in what amount of fine? Pub. Util. Code § 2107 sets a \$500 minimum and a \$20,000 maximum fine for each offense, and Section 2107 provides that every day is a separate offense. The *Affiliate Rulemaking Decision*, D.98-12-075, provides further guidance with respect to the factors to be considered in assessing fines. We will consider the following factors:
 - a. How many days did each violation continue?
 - b. What harm was caused by virtue of the violations? We consider whether there was physical harm, including harm to the environment; economic harm, either through costs imposed upon victims of the violation or unlawful benefits gained by the utility; and harm to the integrity of the regulatory process. The number of violations is also factor in determining the severity of the harm.
 - c. What was PG&E's conduct in preventing, detecting, correcting, disclosing and rectifying the violation?

We will consider PG&E's history of conduct as well as any evidence of its good faith effort to comply.

- d. What amount of fine will achieve the objective of deterrence based on PG&E's financial resources?
- e. What fine or sanction has the Commission imposed under reasonably comparable factual circumstances?
- f. Under the totality of these circumstances, and evaluating the harm from the perspective of the public interest, what is the appropriate fine or sanction?

In consideration of the parties' indication of interest in exploring settlement of the matter, the scoping memo set a prehearing conference for October 3, 2011, to determine a schedule for evidentiary hearing in the event that the parties did not reach a settlement.

By joint motion filed September 26, 2011, the parties moved for approval of a proposed settlement of the matter.

By unopposed motion filed September 29, 2011, CPSD moved for the admission of its May 25, 2011, Investigation Report into evidence. The motion is hereby granted.

3. Discussion

Pursuant to Rule 12.1(d), the Commission will not approve the settlement unless it is reasonable in light of the whole record, consistent with law, and in the public interest.

As set forth in the order instituting this investigation, CPSD alleged that PG&E violated the Mitigation Monitoring Plan adopted by D.09-10-049 by (1) failing to notify the Commission's Energy Division of the start of construction; (2) failing to utilize a qualified biologist, expert in kit fox and burrowing owl biology and in the regulatory protection afforded those species, to train PG&E's employees and contractors about applicable environmental

restrictions, and by not producing documentation of such training; and (3) commencing construction 10 days after the required biological survey in contravention of the United States Fish and Wildlife Service's minimum standard of 14 days. Violations of Commission orders may be subject to fines pursuant to Pub. Util. Code §§ 2107 and 2108.

PG&E maintains that (1) neither the Mitigation Monitoring Plan nor any other operative document required PG&E to notify the Energy Division of the start of construction; (2) the Mitigation Monitoring Plan required PG&E to retain a person knowledgeable in kit fox biology to conduct employee training about applicable environmental restrictions, which PG&E contends it both did and documented; and (3) irrespective of whether it commenced construction after only 10 days of the required biological survey, PG&E timely provided the survey to the resource agencies of jurisdiction, the survey demonstrated that no kit fox were present on site, and none of the resource agencies commented on the results of the survey.

Based on the whole record, both parties face substantial litigation risk as to whether their respective positions will prevail. The plain language of the Mitigation Monitoring Plan gives rise to reasonable and opposing interpretations of whether violations occurred. The settlement payment amount of \$100,000 and donation amount of \$50,000 reasonably reflects the litigation risk faced by the parties.

Nothing in the settlement agreement contravenes any statute or Commission decision or rule. The settlement agreement is therefore consistent with applicable law.

The settlement agreement avoids the time, expense and uncertainty of further litigating and resolving the matter. By requiring a settlement payment,

the settlement agreement affirms the importance of adherence to the Commission's rules and orders. By requiring a donation to the Endangered Species Recovery Program, the settlement agreement furthers a purpose of the Mitigation Monitoring Plan. The settlement agreement is therefore in the public interest.

4. Assignment of Proceeding

Commissioner Michel P. Florio is the assigned Commissioner, and Administrative Law Judge Hallie Yacknin is the assigned Administrative Law Judge and the presiding officer in this proceeding.

5. Comments on Proposed Decision

The proposed decision of the ALJ in this matter was mailed to the parties in accordance with Section 311 of the Public Utilities Code and comments were allowed under Rule 14.3 of the Commission's Rules of Practice and Procedure. Comments were filed by _____. Reply comments were filed by _____ on _____.

Findings of Fact

1. CPSD maintains that PG&E violated the Mitigation Monitoring Plan adopted by D.09-10-049 by (1) failing to notify the Commission's Energy Division of the start of construction; (2) failing to utilize a qualified biologist, expert in kit fox and burrowing owl biology and in the regulatory protection afforded those species, to train PG&E's employees and contractors about applicable environmental restrictions, and by not producing documentation of such training; and (3) commencing construction 10 days after the required biological survey in contravention of the United States Fish and Wildlife Service's minimum standard of 14 days.

2. PG&E maintains that (1) neither the Mitigation Monitoring Plan nor any other operative document required PG&E to notify the Energy Division of the start of construction; (2) the Mitigation Monitoring Plan required PG&E to retain a person knowledgeable in kit fox biology to conduct employee training about applicable environmental restrictions, which PG&E contends it both did and documented; and (3) irrespective of whether it commenced construction after only 10 days of the required biological survey, PG&E timely provided the survey to the resource agencies of jurisdiction, the survey demonstrated that no kit fox were present on site, and none of the resource agencies commented on the results of the survey.

3. Based on the whole record, both parties face substantial litigation risk as to whether their respective positions will prevail.

4. The settlement agreement avoids the time, expense and uncertainty of further litigating and resolving the matter and, by requiring a settlement payment, affirms the importance of adherence to the Commission's rules and orders.

Conclusions of Law

1. The settlement payment amount of \$100,000 and donation amount of \$50,000 reasonably reflect the litigation risk faced by the parties.

2. Nothing in the settlement agreement contravenes any statute or Commission decision or rule.

3. The settlement agreement is in the public interest.

4. The settlement agreement should be approved, and PG&E should be directed to make a settlement payment to the State of California General Fund in the amount of \$100,000 and a donation payment of \$50,000 to the Endangered

Species Recovery Program at Stanislaus State University within 30 days after the effective date of this order.

5. PG&E should not use ratepayer funds for these payments.
6. This investigation should be closed.
7. This order should be effective immediately.

O R D E R

IT IS ORDERED that:

1. The settlement agreement between Pacific Gas and Electric Company and the Consumer Protection and Safety Division resolving this investigation is approved.

2. The Consumer Protection and Safety Division's May 25, 2011, Investigation Report is admitted into evidence.

3. Pacific Gas and Electric Company (PG&E) must make a settlement payment to the State of California General Fund in the amount of \$100,000 and a donation payment of \$50,000 to the Endangered Species Recovery Program at Stanislaus State University within 30 days after the date when the Commission serves the decision finally resolving any application for rehearing of this decision or, where no application for rehearing has been filed, the period to apply for rehearing has expired. PG&E must pay the \$100,000 settlement payment by check or money order payable to the California Public Utilities Commission and mailed or delivered to the Commission's Fiscal Office at 505 Van Ness Avenue, Room 3000, San Francisco, CA 94102. Write on the face of the check or money order "For deposit to the General Fund per Decision 12-01-XXX." PG&E shall not use ratepayer funds for these payments.

4. Investigation 11-06-010 is closed.

This order is effective immediately.

Dated _____, at San Francisco, California.