

Decision 02-09-024

September 5, 2002

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

Application of Pacific Gas and Electric Company, a California Corporation, and the City and County of San Francisco for an Order Authorizing the Former to Sell and Convey to the Latter a Certain Parcel of Land in the City and County of San Francisco Pursuant to Public Utilities Code Section 851.

Application 01-07-006

**ORDER MODIFYING DECISION 02-04-005**  
**AND DENYING REHEARING**

**I. SUMMARY**

Decision 02-04-005 approved the request of Pacific Gas and Electric Company ("PG&E") to sell a parcel of land to the City and County of San Francisco ("San Francisco"), but deferred to another proceeding treatment of its net proceeds for purposes of ratemaking. PG&E filed an application for rehearing, opposing the deferred treatment. As discussed below, however, deferring treatment of the transaction's net proceeds is well founded and consistent with precedent. It does not constitute retroactive ratemaking. Moreover, PG&E is protected through use of a memorandum account until treatment of the net proceeds may be conclusively resolved. Even so, Decision 02-04-005 should be modified to include additional findings of fact pertinent to how the public interest would be affected.

**II. BACKGROUND**

On July 9, 2001, PG&E filed an application under Section 851 of the Public Utilities Code to transfer 4.09 acres of land to San Francisco at a price of \$3,841,000.

According to the application, PG&E acquired the property in 1922 and 1928 at a total cost of \$82,356 for the storage of natural gas. By 1984, PG&E considered the associated facilities obsolete, and began their dismantling. In 1985, PG&E declared the property surplus and removed it from ratebase. Since 1986, San Francisco has leased the entire site. During the most recent period of July 1, 1996, through June 30, 2001, San Francisco paid a monthly fee of \$24,422. Under the terms of the proposed transfer, PG&E would have the right to maintain and operate an electrical line along the property's western edge. PG&E now requests authority to record the net proceeds from this transaction, which it calculates to be some \$2,127,520, as a gain exclusively for shareholders. On August 10, 2001, the Office of Ratepayer Advocates ("ORA") filed a protest to PG&E's application, recommending that the transfer be approved, but that the treatment of its net proceeds for purposes of ratemaking be determined in a separate proceeding.

On April 4, 2002, the Commission issued Decision 02-04-005, approving the proposed sale and deferring to another proceeding treatment of its net proceeds for purposes of ratemaking. The Commission concluded that the sale is in the public interest because it would allow PG&E to eliminate the costs of ownership while retaining the ability to maintain its electrical lines. Nevertheless, the Commission determined that a rulemaking should be instituted to address the allocation of gain on sale between ratepayers and shareholders as Decision 01-10-051 ordered be done under very similar circumstances, also involving PG&E. In the meantime, consistent with Decision 99-10-001, PG&E was directed to record all proceeds from the transaction after taxes in its Real Property Gain/Loss on Sale Memorandum Account.

On April 18, 2002, PG&E filed an application for rehearing of Decision 02-04-005. In its view, deferral of the treatment of the transaction's proceeds to another proceeding is not supported by any finding or evidence. Also, according to PG&E, the treatment's deferral is contrary to the Commission's precedent that gain from the sale of property held outside of ratebase be allocated entirely to shareholders. Lastly, PG&E asserts that deferral constitutes retroactive ratemaking. By relief, PG&E reiterates its request to have the net proceeds from the transaction allocated entirely to shareholders.

On May 3, 2002, ORA filed a response to PG&E's application for rehearing, recommending denial for failure to state sufficient grounds.

### III. DISCUSSION

Section 851 of the Public Utilities Code provides, "No public utility ... shall sell, lease, assign, mortgage, or otherwise dispose of or encumber the whole or any part of its ... plant, system, or other property necessary or useful in its performance of its duties to the public ... without first having secured from the commission an order authorizing it to do so." The Commission has stated that the statutory purpose here "is to enable the Commission, before any transfer of public utility property is consummated, to review the situation and to take such action as a condition of the transfer, as the public interest may require." Application of Global Crossing, Ltd., Decision 99-06-099, mimeo, at 4. Certainly, nothing in the language of this statute, either express or implied, limits the Commission's review in any way. Rather, the statute confers on the Commission virtually unlimited discretion to determine whether the sale of a public utility's property should be approved -- and on what condition in order that it prove sufficiently beneficial to ratepayers and the public generally. As the California Supreme Court explained, the Commission's authority here "is to be exercised for the protection of the rights of the public interested in the service, and to that end alone." Hanlon v. Eshleman, 169 Cal. 200, 202 (1915). See also Sale v. Railroad Commission 15 Cal.2d 612, 620 (1940).

#### A. **Decision 02-04-005 Is Well Founded But Should Be Modified To Add Findings Of Fact Making More Clear How The Public Interest Would Be Affected.**

PG&E argues, "None of the findings contains any reference to the gain-on-sale issue ... nor do they provide any evidentiary basis for the Commission's decision to defer the gain-on-sale issue to another proceeding." Application at 2. As the text of Decision 02-04-005 makes clear, however, deferral is based on the determination in Decision 01-10-051 to institute a rulemaking to address the treatment of gain on sale. Mimeo at 5. Conclusion of Law 3 reiterates this point: "The issue of the gain-on-sale of the property should be deferred to another proceeding as recommended by ORA." Id.

at 6. In this way, gain on sale here may be reviewed comprehensively and treated consistently with that in other proceedings. Still, additional findings of fact could be added to make more clear how shareholders and ratepayers have benefited to date from PG&E's ownership of the property in question. In particular, according to PG&E's application, the property in question had been included in ratebase for over sixty years. And, at least since 1986, PG&E has received rental income from San Francisco for use of the property. Consideration of these factors, along with the circumstances presented in related proceedings, will better inform the Commission in deciding how to treat gain on sale for the proper benefit of ratepayers and the public generally.

**B. Decision 02-04-005 Is Consistent With Precedent.**

PG&E next argues that “the Commission has consistently held that the gain on sale attributable to non-utility plant (i.e., property that is not in a utility's rate base) should go to shareholders.” Application at 3 (emphasis in original). Contrary to PG&E's implication, however, the Commission is not bound by precedent to treat gain on sale here one way or another. Indeed, pursuant to its authority under Section 851, the Commission has several times recently deferred to a separate proceeding the allocation of a transaction's net proceeds and ordered that they be recorded in a memorandum account until the matter may be comprehensively and consistently resolved. See, e.g., Re Pacific Gas and Electric Co., Decision 99-10-001; Re Pacific Gas and Electric Co., Decision 01-10-051. As a general proposition, whether property was in ratebase at the time of its sale should not determine by itself how net proceeds are allocated between ratepayers and shareholders. See Decision 99-06-099, supra. A more important consideration is whether the property was ever in ratebase. Id. Also pertinent to the allocation of net proceeds is the extent to which ratepayers and shareholders benefited from any revenue generated by the property while surplus to the utility's regulated operations. Id. In sum, whether in separate proceedings or more economically in a single rulemaking, these are factors when the Commission should consider in the treatment of gain on sale.

**C. Deferring Treatment Of The Net Proceeds To A Later Proceeding Does Not Constitute Retroactive Ratemaking.**

PG&E further argues, “To defer the gain-on-sale issue for the instant case to a future, as-yet-uninitiated proceeding would effectively constitute retroactive ratemaking that the Commission has no legal or factual basis to perform.” Application at 5, citing Section 1708 of the Public Utilities Code and Golconda Utilities Company, 68 CPUC 305 (1968). As the California Supreme Court has explained, however, the Commission is not required in every act to operate prospectively. Southern California Edison Co. v. Public Utilities Commission, 20 Cal.3d 813, 816 (1978), appeal dismissed, 439 U.S. 905 (1978). In the Commission’s words, “[W]hile general ratemaking is governed by the rule against retroactive ratemaking, other proceedings are not.” Re Universal Service, Decision 99-05-013, mimeo, at 14, footnote 28. Here, ratemaking of any sort has so far been absent, and a memorandum account has been established to record the transaction’s proceeds until their treatment can be determined.

PG&E’s reference to Section 1708 is also misplaced. Again, no transaction previously adjudicated is now under review. Moreover, Section 1708 fully authorizes the Commission to reopen and reverse any order or decision, provided that parties be given notice and an opportunity to be heard:

The Commission may at any time, upon notice to the parties, and with an opportunity to be heard, as provided in the case of complaints, rescind, alter, or amend any order or decision made by it. Any order rescinding or amending a prior order or decision shall, when served upon the parties, have the same effect as an original order or decision.

See, generally, United Parcel Service, Inc., 71 CPUC 2d 714 (1997). In this regard, the California Supreme Court has long recognized that Section 1708 is an exception to the doctrine of res judicata:

It is true that the Commission’s decisions and orders ordinarily become final and conclusive if not attacked in the manner and within the time provided by law.... This is not to say, however, that such a decision is res judicata in the sense in which that doctrine is applied in the law courts.... The

Commission has continuing jurisdiction to rescind, alter or amend its prior order at any time.

Sale v. Railroad Commission, *supra*, 15 Cal.2d at 616. *See also City of Los Angeles v. Public Utilities Commission*, 15 Cal.3d 680, 706 (1975). And, of course, PG&E will be given a full opportunity to be heard concerning the Commission's eventual treatment of the net proceeds from the proposed transaction.

Golconda Utilities Company is similarly inapplicable. In subsequent cases, consistent with Sale and City of Los Angeles, the Commission has expressed a more expansive view of its authority under Section 1708. *See United Parcel Service, Inc.*, *supra*, 71 CPUC 2d at 717. Also, unlike Golconda, the present proceeding does not involve review of any transaction previously adjudicated. *See Re Universal Service*, *supra*, mimeo, at 16. At no time has the Commission ever determined how the proposed transaction's net proceeds should be treated. Furthermore, the interest of PG&E is well protected through approval now of the transaction and provision for a memorandum account until the matter may be comprehensively and consistently resolved.

#### IV. CONCLUSION

PG&E's application for rehearing of Decision 02-04-005 should be denied.

**THEREFORE, IT IS ORDERED** that

1. Decision 02-04-005 is modified by adding at page 6 Finding of Fact 3.a, as follows:

The property in question had been included in PG&E's ratebase for over sixty years.

2. Decision 02-04-005 is modified by adding at page 6 Finding of Fact 3.b, as follows:

Since at least 1986, PG&E has received rental income from San Francisco for lease of its property.

3. Decision 02-04-005 is modified by adding at page 6 Conclusion of Law 3.a as follows:

A rulemaking should be instituted to address comprehensively and consistently the allocation of gain on sale between ratepayers and shareholders.

4. Decision 02-04-005 is modified by adding at page 6 Conclusion of Law 3.a, as follows:

The previous inclusion in ratebase of the property in question and the income received from its rental are factors which should be considered, along with the circumstances presented in related proceedings, by the Commission in deciding how to treat gain on sale for the proper benefit of ratepayers and the public generally.

5. PG&E's application for rehearing of Decision 02-04-005, as modified, is denied.

This order is effective today.

Dated September 5, 2002, at San Francisco, California.

LORETTA M. LYNCH  
President  
CARL W. WOOD  
GEOFFREY F. BROWN  
MICHAEL R. PEEVEY  
Commissioners

Commissioner Henry M. Duque, being necessarily absent, did not participate.