

Decision\_\_\_\_\_

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

Application of Pacific Gas and Electric Company (U 39 M), a California corporation, and Signature Properties, Inc., a California corporation, for an Order Authorizing the Former to Sell and Convey to the Latter a Certain Parcel of Land in Marin County Pursuant to Public Utilities Code Section 851.

Application 02-07-033  
(Filed July 17, 2002)

**DECISION GRANTING APPROVAL UNDER PUBLIC UTILITIES CODE SECTION 851 FOR CONVEYANCE OF A CERTAIN PARCEL OF LAND IN MARIN COUNTY TO SIGNATURE PROPERTIES, INC.**

**1. Summary**

This decision grants the application of Pacific Gas and Electric Company (PG&E) for Commission authorization under Public Utilities Code Section 851<sup>1</sup> for PG&E to convey a parcel of land located in Marin County to Signature Properties, Inc. (Signature Properties).<sup>2 3</sup> Signature Properties plans to develop the property as a residential subdivision and public park.

<sup>1</sup> All statutory references are to the Public Utilities Code unless otherwise referenced.

<sup>2</sup> The application was filed on July 17, 2002. In Resolution ALJ 176-3092, dated August 8, 2002, we preliminarily categorized this proceeding as ratemaking and preliminarily determined that a hearing was not necessary.

<sup>3</sup> On August 23, 2002, the Commission Office of Ratepayer Advocates (ORA) filed a protest, which opposed deferral of our determination on the allocation of PG&E's gain from the sale of this property between shareholders and ratepayers (the gain on sale issue). ORA did not oppose the sale of the property to Signature Properties.

We also defer consideration of the allocation of PG&E's gain on the sale of this property between shareholders and ratepayers (the gain on sale issue) to a future Commission rulemaking on gain on sale issues.

## **2. Background**

### **A. The Proposed Transaction**

PG&E proposes to sell 17.07 acres of land<sup>4</sup> located in Marin County to Signature Properties for \$7,800,000.00. Signature Properties plans to develop a residential subdivision and a public park on the land. The residential subdivision will include approximately 138 units. Eighteen percent of the units will be designated as affordable housing.

PG&E originally acquired the property in 1950 for the construction of an underground natural gas holder facility. After the development of a more efficient energy system in the 1980's, PG&E abandoned the facility and removed the equipment in 1991. PG&E believes it unlikely that the property will be used again for public utility purposes, except as the site for remaining PG&E gas lines, electric lines and gas over pressure valves on the land. However, PG&E has reserved easements for these facilities as part of this transaction.

The sales price for the property is based on an appraisal performed in August 2001.

### **B. The Proposed Agreements**

#### **1) The Purchase and Sale Agreement**

In the purchase and sale agreement, PG&E agreed to sell the property to Signature Properties for the price of \$7,800,000.00. Signature

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<sup>4</sup> This parcel of land has been identified as Marin County Assessor's Parcel Number 179-131-01.

Properties will receive a credit of \$14,500 toward the purchase price as reimbursement for the appraisal of the property.

Signature Properties may not assign the agreement without the prior written consent of PG&E and the satisfaction of certain other conditions imposed by PG&E. The agreement also addresses escrow instructions and other items typically included in property sales agreements.

PG&E has reserved easements for its facilities as necessary for its operations. Signature Properties must notify PG&E at least 120 days before the closing date if the relocation of PG&E facilities is necessary for the project. PG&E shall then relocate the facilities to a mutually acceptable site. Signature Properties will bear all costs related to relocation of the PG&E facilities performed in accordance with drawings approved by both parties and has deposited \$300,000 into escrow for this purpose. Signature Properties is also required to construct a permanent fence to protect PG&E's above-ground facilities on the property.

The agreement states that PG&E is selling the property to Signature Properties on an "as is" basis, and that PG&E has made no warranties or representations regarding the condition of the property, including the presence of electromagnetic fields (EMFs) or hazardous substances at the site, the condition of the groundwater, or compliance with legal requirements. However, PG&E acknowledged in the agreement that at some point, PG&E may have handled, treated, stored and/or disposed of hazardous substances on the property. The agreement advises Signature Properties to independently investigate all aspects of the condition of the property, including the presence of EMFs and hazardous substances at the site. Under the agreement, Signature Properties assumes all responsibility, costs, and risks associated with the

presence of hazardous materials on or under the property or the migration of hazardous materials to other properties whether before or after the closing date. Signature Properties has approved the condition of the property by entering into the agreement.

Signature Properties has agreed to indemnify, defend and hold PG&E harmless from any liability or causes of action arising out of or connected with the property, including those which result from the active or passive negligence of PG&E.

The agreement also states that its effective date may be delayed because of the need for Commission and Bankruptcy Court approval of this transaction.<sup>5</sup>

## **2) The Release and Indemnity Agreement**

Under the release and indemnity agreement, Signature Properties bears all responsibility, costs and risks associated with the presence of hazardous substances and EMFs on the property. The agreement states that Signature Properties has had the opportunity to perform environmental inspections, tests, and studies, including invasive testing and groundwater sampling on, under, about, or adjacent to the property as necessary to assume this risk of liability. The agreement also states that the parties have considered Signature Properties' assumption of these risks in establishing the purchase price for the property.

Signature Properties has agreed to release, exonerate, and discharge PG&E from any claims or liability that may result from the presence or suspected presence, generation, processing, use, management, treatment, storage, disposal,

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<sup>5</sup> PG&E has filed a petition for bankruptcy, which is currently pending in the Bankruptcy Court for the Northern District of California.

remediation, transportation, recycling, emission, release, or threatened emission or release of any hazardous substances or EMFs on, about under, adjacent to, or affecting the property, whether in the past, present, or future.

Signature Properties has also agreed to indemnify, defend and hold PG&E harmless from any liability or causes of action based on violations of environmental laws or requirements, or personal injury or property damage related to the presence of hazardous substances on or affecting the property or any other property. Signature Properties will be responsible for any legally required remediation of hazardous substances at the site.

Since Signature Properties has waived the protections of Civil Code section 1542, these obligations will apply to future claims based on facts of which Signature Properties is not presently aware.<sup>6</sup>

The terms of the release and indemnity agreement will apply to the successors and assigns of the parties. However, a transfer of the property will not relieve Signature Properties of its obligations under the agreement.

### **C. Environmental Review**

In its application, PG&E states that the proposed sale is not an activity subject to the California Environmental Quality Act (CEQA) because the activity is a purely legal happening and will not result in either a direct physical change in the environment or any indirect changes to the environment.

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<sup>6</sup> Civil Code 1542 states:

Section 1542. General Release

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.

We do not agree. Under CEQA, a project is defined as the whole of an action, which has a potential for resulting in either a direct physical change to the environment or a reasonably foreseeable indirect physical change in the environment (CEQA Guidelines Section 15378(a)). In this instance, neither PG&E nor Signature Properties seek authority from the Commission to change the existing uses of the property, and no change in use of the property is a condition or term of the sale. However, the application clearly indicates that Signature Properties plans to develop the property after the sale into a residential subdivision and public park. Further, CEQA applies to discretionary projects to be carried out or approved by public agencies, and the Commission must act on the Section 851 application and issue a discretionary decision without which the project cannot proceed. Therefore, we find that CEQA applies to this application.

The Commission must act as either a Lead or a Responsible Agency under CEQA. The Lead Agency is the public agency with the greatest responsibility for supervising or approving the project as a whole (CEQA guidelines Section 15051 (b)). Here the City of San Rafael ("City") is the Lead Agency for the project under CEQA. The Commission is a Responsible Agency for this proposed project. CEQA requires that the Commission consider the environmental consequences of a project that is subject to its discretionary approval. In particular, the Commission must consider the Lead Agency's environmental documents and findings before acting upon or approving the project (CEQA Guidelines Section 15050(b)). The specific activities which must be conducted by a Responsible Agency are stated in CEQA Guidelines Section 15096.

In February 2000, Signature Properties submitted planning applications to the City requesting approval of Ranchitos Park, a planned development of 134 residential units, a three-acre neighborhood park, a 0.9-acre parcel for development of a church gymnasium/classroom facility, maintenance of a PG&E gas pressure facility, and a wetland mitigation area on a 17.6 acre site.

The City reviewed a Draft Environmental Impact Report (“DEIR”) was released for public comment on September 6, 2001 (SCH# 2000052017). City Planning staff subsequently conducted workshops on the DEIR to take comments from the public, intervenors; local, state and federal agencies; and the applicant.

A Final Environmental Impact Report (“FEIR”) was prepared and made available on March 13, 2002. The FEIR formally addressed all comments received on the DEIR. Throughout the process, the City sought to develop alternatives that would mitigate the impacts of the project to the greatest extent possible. The FEIR incorporates both resource impact mitigation measures and a monitoring program designed to reduce impacts to a less-than-significant level in a number of areas, including: Land Use; Hydrology and Water Quality; Aesthetics; Biological Resources; Geology; Cultural Resources; and Public Facilities. At the same time, the FEIR acknowledges that there are four areas in which environmental impacts cannot be mitigated to a less-than-significant level, including the cumulative effect of land developments on regional air quality (impact E.4); the exposure of new sensitive uses to outdoor noise levels of just over 60 day night average noise level (DNL) near Los Ranchitos Road, which would be unacceptable for such uses (impact F.2); the potential, future operation of a commuter train service planned along the adjacent North Western Pacific Railroad right-of-way would generate noise levels that would be unacceptable

for the proposed uses on the project site (impact F.3); and the project would contribute to the potential cumulative effect of new development on the US 101/Merrydale Road off-ramp and intersection, if a traffic signal is not approved and installed for this off-ramp (impact D.2).

On April 15, 2002, the City Council held a public hearing on the proposed project and subsequently adopted the Findings of Fact, including applicable Mitigation Measures, the Mitigation Monitoring and Reporting Program and a Statement of Overriding Considerations (Resolution Nos. 11068, 11069, and 11071) A Notice of Determination was subsequently filed with the State Office of Planning and Research, in compliance with Sections 21108 and 21152 of the Public Resources Code.

We have reviewed and considered the DEIR, the FEIR and the discretionary decisions made by the City and find that these documents are adequate for our decision-making purposes under CEQA. We conclude that there is substantial evidence that none of the proposed alternative sites would avoid or substantially lessen any of potential direct, indirect, or cumulative significant impacts of the project and that the alternative analysis complies with the requirements of the Warren-Alquist Act and CEQA. We find that the City reasonably concluded that the proposed project, including the mitigation measures in the FEIR, are feasible and will avoid and/or reduce the majority of potential environmental impacts to less than significant levels. Certain mitigation measures, as described in the FEIR, would lessen but not necessarily eliminate the potential adverse environmental impacts associated with the project and those impacts remain significant and unavoidable. These impacts were in the resource areas of Air Quality, Noise, Traffic and Circulation. We conclude that the City reasonably found that there were no other feasible

mitigation measures or alternatives which would reduce these impacts to less than significant levels, and that to the extent that these impacts would not be substantially lessened or eliminated, specific economic, legal, social, technological, or other considerations and project benefits identified in the Statement of Overriding Considerations, which include providing for a balance of development options, economic growth, and improving the quality of life, support approval of the project.

#### **D. Ratemaking Considerations**

According to the application, PG&E 's net proceeds from the sale after taxes will be approximately \$4,388,407. The original cost of the property to PG&E was \$46,490. PG&E states in the application that its ratebase will decrease by \$46,490 because of the sale.

In its application, PG&E requests deferral of our consideration of the allocation of its sale proceeds between ratepayers and shareholders to a Commission rulemaking or other broad proceeding, which will address gain on sale issues comprehensively. ORA opposes PG&E's request for deferral. ORA argues that although Commissioner Brown raised the issue of opening a generic proceeding to address the allocation of gain on sale between shareholders and ratepayers in June 2001,<sup>7</sup> the Commission has not to date opened a rulemaking. ORA also contends that in order for the Commission to apply any criteria developed in a future rulemaking on gain on sale issues, we must make factual

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<sup>7</sup> *See* Commissioner Brown's concurring opinion in the Joint Application of Citizens Telecommunications Company and GTE California to sell Assets to Citizens, D.02-07-033, at p. 7.

determinations regarding whether ratepayers, as well as shareholders, have benefited from the property being sold to Signature Properties.

We agree with PG&E that that the Commission should determine the allocation of proceeds from the sale of utility property between shareholders and ratepayers in another, broader proceeding, such as a Commission rulemaking, rather than in each individual case. For the past two years, since Commissioner Brown called for a Commission rulemaking on gain on sale issues,<sup>8</sup> we have consistently deferred gain on sale issues to a broader proceeding, in order to address this important policy matter consistently and comprehensively. The Commission has previously expressed its intent to address the gain on sale issue in the future, as time and resources permit. While we must address a number of significant policy issues with limited resources, we currently anticipate the opening of a rulemaking or another proceeding on gain on sale issues within the upcoming year.

We agree with ORA that in D.02-09-024, the Commission articulated several factors that could be considered in determining the allocation of gain on sale between ratepayers and shareholders. These criteria included whether the property had ever been in ratebase and the extent to which ratepayers and shareholders benefited from any revenue generated by the property while surplus to the utility's regulated operations.<sup>9</sup> D02-04-005 to add findings of fact regarding the number of years that the property was in ratebase and whether PG&E received rental income from the property. D.02-09-024 also stated that the

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<sup>8</sup> Id.

<sup>9</sup> D.02-09-024, *mimeo.*, at p.4.

Commission is not bound by previous decisions to allocate the gain on sale of utility property in a particular way. Moreover, D.02-09-024 upheld our decision in D.02-04-005 to defer our determination regarding the allocation the gain on sale between ratepayers and shareholders to a subsequent Commission rulemaking or broader proceeding. While we could bifurcate this proceeding and direct the Administrative Law Judge (ALJ) to conduct hearings as necessary to make findings of fact regarding the criteria stated in D.02-09-024, the Commission could adopt additional or different criteria in the upcoming rulemaking. We therefore believe that bifurcation of this proceeding for the purpose of making these findings of fact may not create an adequate record for our subsequent decision on allocation of the gain on sale and therefore may not effectively utilize the Commission's resources, in view of the upcoming rulemaking.<sup>10</sup>

We therefore decline bifurcate this proceeding in order to make findings of fact related to allocate the proceeds from the sale of PG&E property to Signature Properties between ratepayers and shareholders here.

PG&E should track the revenues received from this transaction, with interest at the applicable rate under PG&E's advice letters in the appropriate memorandum account, pending the outcome of a Commission rulemaking or other broader proceeding on gain on sale issues.

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<sup>10</sup> Also, as noted in PG&E's comments, the ALJ directed the parties to meet and confer and attempt to develop a stipulation on disputed factual issues related to allocation of the gain on sale. However, the parties were unable to reach a stipulation. PG&E has expressed willingness to stipulate to the number of years that the property was in ratebase and whether PG&E previously received rental income from the lease of the

*Footnote continued on next page*

### E. Discussion

Section 851 provides that no public utility “shall . . . sell . . . the whole or any part of . . . property necessary or useful in the performance of its duties to the public, . . . without first having secured from the Commission an order authorizing it to do so.”

The primary question for the Commission in Section 851 proceedings is whether the proposed transaction is adverse to the public interest. In reviewing a Section 851 application, the Commission may “take such action, as a condition to the transfer, as the public interest may require.”<sup>11</sup> We may also consider whether the transfer of property will serve the public interest. The public interest is served when utility property is used for other productive purposes without interfering with the utility’s operation or affecting service to utility customers.<sup>12</sup>

We find that the proposed sale of PG&E property to Signature Properties will serve the public interest. PG&E no longer needs to own the property for utility purposes and has reserved easements as necessary to carry out its operations and to serve its customers and the public. Although PG&E has acknowledged that hazardous substances and EMFs may exist at or around the property, PG&E is adequately protected from any potential liability by the terms of the purchase and sale agreement and the release and indemnity agreement. In addition, the sale of this property to Signature Properties will increase the

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property. ORA’s comments that under D.02-09-024, these factors should be considered in allocating the gain on sale between ratepayers and shareholders.

<sup>11</sup> D.3320, 10 CRRC 56, 63.

<sup>12</sup> D.00-07-010 at p. 6.

availability of housing, and particularly affordable housing, which is much needed in the San Francisco Bay Area. For all of the foregoing reasons, we grant the application of PG&E pursuant to Section 851, effective immediately.

### **3. Final Categorization and Comments on Draft Decision**

Based on our review of this application, we conclude that there is no need to alter the preliminary determinations as to categorization and need for a hearing made in Resolution ALJ 176-3092, dated August 8, 2002. The draft decision was mailed to the parties on February 11, 2003. Comments were received from ORA on March 3, 2003. Late filed comments were received from PG&E on March 11, 2003.<sup>13</sup>

In its comments, ORA argued that the Commission should direct the Presiding Officer to conduct hearings in order to make findings of fact relevant to the allocation of PG&E's gain on sale between ratepayers and shareholders. ORA's comments also suggested revision of the proposed decision to clarify that PG&E must record its net of tax gain on sale, rather than the revenue received or the total sales price, in the applicable memorandum account and that this amount should accrue interest at the rate stated in PG&E's advice letters.

PG&E's comments support our deferral of the allocation of the gain on sale between ratepayers and shareholders to a subsequent rulemaking, which will address this issue comprehensively and consistently. PG&E's comments further state that the Commission need not order hearings in this matter, because PG&E

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<sup>13</sup> PG&E is reminded that under Rule 77.5, reply comments must be filed five (5) days after the filing of comments by opposing parties. If a party wishes to submit reply comments after this date, it must file a motion for leave to give late comments and an accompanying declarations under penalty of perjury, which sets forth the reasons for delay.

is willing to stipulate to certain facts that ORA believes are relevant to allocation of the gain on sale. In addition, PG&E argues that the Commission should not modify the proposed decision to require PG&E to track its net of tax gain on sale, rather than the total revenue received from the sale, in a memorandum account, because until the Commission determines the allocation of the gain on sale between ratepayers and shareholders, PG&E cannot precisely determine the tax effects of the sale.

As discussed in Section D regarding ratemaking issues, we decline to order hearings in this case because the Commission anticipates the opening of a rulemaking on gain on sale issues during this year, depending on Commission resources and priorities.

We have added language to Section D to clarify that D.02-09-024 modified D.02-04-005 on rehearing to add findings of fact related to the number of years that the property was in ratebase and the utility had received rental income from the property and to reflect PG&E's willingness to stipulate to these facts in this case.

We further decline to modify the proposed decision to order PG&E to track the net of tax gain on sale, rather than the revenues received from the sale, in the applicable memorandum account. We agree that PG&E cannot know the tax effects of the sale with certainty until after the Commission has determined the proper allocation of the gain on sale between ratepayers and shareholders in the rulemaking. ORA's proposed change in terminology could also substantially affect the amount of funds available in the memorandum account to be allocated between ratepayers and shareholders as determined in the rulemaking. If ORA wishes to pursue this issue, we believe that the best forum for consideration of this question would be the upcoming gain on sale rulemaking. However, we

have amended the proposed decision to require PG&E to pay interest on the sale revenues tracked in the memorandum account according to PG&E's applicable advice letters.

In addition, we have made several minor corrections to the proposed decision in response to comments from both parties.

#### **4. Assignment of Proceeding**

Michael R. Peevey is the Assigned Commissioner and Myra Prestidge is the assigned Administrative Law Judge in this proceeding.

#### **Findings of Fact**

1. The proposed sale of PG&E property to Signature Properties will not interfere with PG&E's utility operations or with service to PG&E's customers and the public.

2. Although PG&E originally acquired the property as the site for an underground natural gas holder facility in 1950, PG&E abandoned the property and removed the equipment in 1991.

3. PG&E does not anticipate the need to use the property for utility purposes in the future and has reserved easements as necessary to utilize its remaining facilities on the land.

4. This is a discretionary project and CEQA applies to this application.

5. The City of San Rafael is the Lead Agency for the proposed project under CEQA.

6. The City prepared an EIR for the project, which found that (a) the proposed project, the mitigation measures applicable to the project, and the Mitigation Monitoring Program avoid and/or reduce the majority of potential adverse environmental impacts of the project to less than significant levels; (b) there is substantial evidence in the record that each of the identified

alternatives is infeasible because the alternatives would not allow the project to achieve its basic objectives nor accomplish the goals and policies of the County's transportation plans and other adopted County policies; (c) certain mitigation measures as described in the FEIR would lessen but not necessarily eliminate the potential adverse environmental impacts associated with the project, and those impacts in the areas of Air Quality, Noise, Traffic and Circulation remain significant and unavoidable; and (d) there were no other feasible mitigation measures or alternatives which would reduce these impacts to less than significant levels.

7. On April 15, 2002, the City Council exercised its discretionary authority and adopted the Final EIR, including applicable Mitigation Measures, the Mitigation Monitoring and Reporting Program, and a Statement of Overriding Considerations (Resolution Nos. 11068, 11069, and 11071).

8. The Commission is a Responsible Agency for the proposed project under CEQA.

9. Consistent with the City's findings and determinations, we find; (a) the proposed project, the mitigation measures applicable to the project, and the Mitigation Monitoring Program avoid and/or reduce the majority of potential adverse environmental impacts of the project to less than significant levels; (b) there is substantial evidence in the record that each of the identified alternatives is infeasible because the alternatives would not allow the project to achieve its basic objectives and would not accomplish the goals and policies of the City's transportation plans and other adopted Marin County policies; (c) certain mitigation measures as described in the Final EIR would lessen but not necessarily eliminate the potential adverse environmental effect associated with the project; (d) adverse environmental impacts in the areas of Air Quality, Noise,

Traffic and Circulation remain significant and unavoidable; and (e) there are no other feasible mitigation measures or alternatives which would reduce these impacts to less than significant levels.

10. It is not possible for PG&E to know the income tax effects of the sale until the Commission determines the proper allocation of the gain on sale between ratepayers and shareholders in the upcoming rulemaking.

11. Ordering PG&E to record and track its net of tax gain on sale, rather than all revenues received from the sale, in the applicable memorandum account could significantly affect the amount of funds available to be allocated between ratepayers and shareholders after the Commission gain on sale rulemaking.

12. The proposed sale will serve the public interest by increasing the availability of housing, and particularly affordable housing, in the San Francisco Bay Area.

### **Conclusions of Law**

1. Consistent with § 851, PG&E's sale of the property to Signature Properties will serve the public interest and should be authorized.

2. A Commission rulemaking or other broad proceeding should be initiated to address comprehensively and consistently the allocation of gain on sale between ratepayers and shareholders.

3. The EIR, Mitigation Monitoring Program and Statement of Overriding considerations by the City are adequate for the Commission's decision-making purposes as a Responsible Agency under CEQA.

4. We adopt the City's Mitigation Monitoring Program and Statement of Overriding Considerations for purposes of our approval of the sale of PG&E property to Signature Properties for the project.

5. The decision should be effective today in order to allow the property to be conveyed to Signature Properties expeditiously.

**O R D E R**

**IT IS ORDERED** that:

1. Pacific Gas and Electric Company (PG&E) is authorized sell the property, identified as Marin County Assessor's Parcel Number 179-131-01, to Signature Properties, Inc.

2. PG&E shall record and track the revenue received from this transaction, with interest at the applicable rate established in PG&E's advice letters, in its Real Property Gain/Loss on Sale Memorandum Account, pending our resolution of issues related to allocation of the gain on sale between shareholders and ratepayers in a future Commission rulemaking or other broader proceeding. This proceeding is closed.

This order is effective today

Dated \_\_\_\_\_, at San Francisco, California.