

Decision 10-08-004 August 12, 2010

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application of Pacific Gas and Electric Company for Approval under Public Utilities Code Section 851 for (1) a Streamlined Procedure to Convey/Encumber certain properties and (2) a Memorandum Account to Track Potential Environmental Remediation Costs and Recovery of such Costs pursuant to the Bankruptcy Modified Settlement Agreement (U39M).

Application 08-04-020
(Filed April 11, 2008)

**DECISION GRANTING, IN SUBSTANTIAL PART,
PETITION FOR MODIFICATION OF DECISION 08-11-043
AND CONFORMING DECISION WITH ASSEMBLY BILL 698**

1. Summary

Following enactment of Assembly Bill 698, which as relevant here amended portions of Pub. Util. Code § 851 and § 853(d), we modify Decision 08-11-043 to remove two conditions on that decision's approval of an all-party settlement concerning the streamlining of Commission review of the watershed lands transactions which Pacific Gas and Electric Company (PG&E) expects to begin filing later this year. The statutory amendments permit us (1) to authorize the Director of the Commission's Energy Division to approve most uncontested § 851 advice letters and, (2) for those watershed lands transactions where another agency, as lead agency under the California Environmental Quality Act (CEQA), has performed the appropriate environmental review and

where our CEQA review is as a responsible agency, to authorize PG&E to file an advice letter for approval by Commission resolution.

We grant PG&E's request that we remove the two conditions but in the interest of improved clarity, do not adopt, verbatim, the revised language that PG&E has proposed.

2. Background

Decision (D.) 08-11-043 adopts, subject to two modifications, an all-party settlement agreement (settlement) that sets forth a streamlined procedure to implement the Land Conservation Commitment (LCC) which is part of the Commission-adopted settlement in Pacific Gas and Electric Company's (PG&E) bankruptcy proceeding.¹ The streamlined procedure will allow the Commission to efficiently process what is anticipated to be hundreds of filings to consider the disposition under Pub. Util. Code § 851² of approximately 1,000 parcels of land subject to the LCC. The parcels are associated with PG&E's hydroelectric generating system and consist of more than 140,000 acres in the Sierra Nevada and Cascade mountain range watersheds and 655 acres in San Luis Obispo County's Carrizo Plain (collectively, the watershed lands). PG&E expects to begin making the watershed lands filings later this year.

In D.08-11-043, the Commission determined that two modifications to the settlement were necessary to ensure that the streamlined procedure fully

¹ See D.03-12-035 in Order Instituting Investigation 02-04-026.

² Unless otherwise indicated, all subsequent citations to sections refer to the Public Utilities Code, and all subsequent citations to a rule or rules refer to the Rules of Practice and Procedure, which are codified at Chapter 1, Division 1 of Title 20 of the California Code of Regulations.

conformed to then-existing statements of law in §§ 851 and 853. In 2009, the Legislature adopted Assembly Bill (AB) 698 (Stats. 2009, ch. 370), which amended §§ 851 and 853(d), effective on January 1, 2010, to expand the types of transactions which the Commission may approve by advice letter and to authorize certain streamlined approval processes. On February 25, 2010, by Resolution ALJ-244, the Commission modified its § 851 advice letter pilot program to reflect these changes of law.

3. Procedural History; Timeliness of Filing

PG&E filed this unprotested petition for modification (petition) on March 25, 2010. Pursuant to Rule 16.4(d), a petition should be filed within one year of the effective date of the petition proposed to be modified; otherwise, the petitioner must explain the delay. PG&E notes that AB 698, the change of law which triggered the petition, did not become effective until January 1, 2010, more than a year and a half after the effective date of D.08-11-043. These facts justify the late submission.

4. Discussion

D.08-11-043 approved the settlement's proposal to categorize watershed lands transactions into three groups. In summary, these are:

- Category 1 - transactions that do not trigger review under the California Environmental Quality Act (CEQA), either because they involve actions that are categorically or statutorily exempt from CEQA or because the transactions are not defined as a project under CEQA;
- Category 2 - transactions that may be subject to CEQA but do not require environmental review by this Commission because the actions either are too speculative or too unspecific to allow meaningful environmental review by this Commission, and because subsequent local discretionary review will ensure CEQA compliance at a more appropriate time when the actions have been adequately defined and proposed by the applicant; and

- Category 3 – any transactions that do not qualify for the streamlined procedures for Category 1 or Category 2.

The Commission agreed that Category 1 transactions and most Category 2 transactions should be filed and reviewed under a streamlined advice letter process, while Category 3 transactions should continue to be filed and reviewed under the Commission's standard § 851 application process. However, the Commission imposed two conditions on the proposed advice letter procedures to avoid conflict with §§ 851 and 853(d). Now that AB 698 has amended those statutes, PG&E asks us to revise D.08-11-043 to remove the two conditions.

4.1. Advice Letter Approval by Director of Energy Division

The settlement proposed the filing and review of Category 1 and Category 2 watershed lands transactions via an advice letter filing procedure similar in many respects to those applicable to Tier 3 advice letters at that time. One difference, however, concerned approval of an advice letter that was uncontested. The settlement proposed that the Commission's Executive Director or his/her designee approve all Category 1 and Category 2 advice letters where no protests were filed. The Commission determined that it could not delegate approval because § 851, as then codified, required advice letter filings to be approved by "resolution of the Commission." (§ 851, as amended by Stats. 2005, ch. 370, effective January 1, 2006.) The Commission interpreted that language to preclude ministerial actions, such as issuance of an Executive Director's resolution.

As modified by AB 698, § 851 now includes this sentence: "If the advice letter is uncontested, approval may be given by the executive director or the director of the division of the commission having regulatory jurisdiction over the utility." (§ 851, as amended by Stats. 2009, ch. 370, effective January 1, 2010.)

PG&E proposes that we delegate approval authority to the Director of the Commission's Energy Division. That proposal makes sense, as Energy Division will undertake substantive review of all advice letters concerning watershed lands transactions. Therefore, D.08-11-043 should be modified to remove the prohibition on approval of an uncontested Category 1 or Category 2 advice letter by the Commission's Executive Director or an appropriate Division Director. Today's decision instead should authorize the Director of the Commission's Energy Division to approve watershed lands transactions which have been properly filed as Category 1 or Category 2 advice letters, and which are uncontested.³

4.2. CEQA Review Where the Commission is a Responsible Agency

The settlement proposed that Category 2 watershed lands transactions include those transactions where CEQA review has been performed by another agency as lead agency and where the Commission's jurisdictional obligation is that of a responsible agency. As then codified, § 853(d) provided:

It is the further intent of the Legislature that the commission maintains all of its oversight and review responsibilities subject to the California Environmental Quality Act, and that public utility transactions that jurisdictionally trigger a review under the act should not qualify for expedited advice letter treatment pursuant to this article. (§ 853(d), as amended by Stats. 2005, ch. 370, effective January 1, 2006.)

³ This authorization does not extend to the subgroup of Category 2 transactions discussed in Section 4.2 of today's decision.

The Commission concluded that the plain language of § 853(d) required PG&E to file an application for those Category 2 transactions that have been subject to CEQA review by another agency.

AB 698 modified § 853(d) in relevant part to add this language:

An advice letter may be filed for transactions by the public utility if the lead agency has completed the appropriate review under the California Environmental Quality Act for the transaction, and the commission is the responsible agency under the act. The advice letter shall be subject to approval by resolution voted upon by the commission. (§ 853(d), as amended by Stats. 2009, ch. 370, effective January 1, 2010.)

Therefore, D.08-11-043 should be modified to remove the requirement that PG&E file an application for Commission review and approval of Category 2 watershed lands transactions where another agency has performed appropriate CEQA review in its capacity as lead agency and where the Commission will exercise CEQA review as a responsible agency. Today's decision instead should authorize such transactions to be filed for Commission review as Category 2 advice letters, subject to Commission approval by resolution.⁴

4.3. Modifications Required

PG&E's petition includes, as Exhibit 2, suggested edits to D.08-11-043 to accomplish the revisions discussed above. Though PG&E suggests extensive changes to the text of D.08-11-043 (at pages 3, 28, 29, 30, 31, 32, and 33), we need only revise relevant findings of fact, conclusions of law, ordering paragraphs, and the decision's Appendix C (entitled "Summary of Streamlined Section 851

⁴ Approval of Category 2 advice letters of this kind may not be delegated to the Executive Director or a Division Director.

Filing Procedure, Including Target Timelines for Review by Commission Staff and Issuance of Resolution or Decision by Commission”) to reflect the subsequent changes in law on which today’s decision relies. Because approval of the settlement is not before us today, we have no need to rewrite the entirety of D.08-11-043. Nonetheless, the revisions required to accomplish the two modifications discussed above are lengthy, and accordingly, today’s decision sets them out in Attachment A. The revisions incorporate, in substantial part, the revised language that PG&E has proposed, but in the interest of improved clarity, do not adopt PG&E’s proposal verbatim.

5. Comments on Proposed Decision

The proposed decision of the Administrative Law Judge (ALJ) in this matter was mailed to the parties in accordance with Section 311 of the Pub.Util. Code and comments were allowed under Rule 14.3 of the Commission’s Rules of Practice and Procedure. PG&E filed comments on July 26, 2010, stating its support for the proposed decision. No reply comments were filed.

We have corrected several typographical errors and minor omissions in the proposed decision as well as typographical errors in Ordering Paragraph 3 of D.08-11-043.

6. Assignment of Proceeding

Michael R. Peevey is the assigned Commissioner and Jean Vieth is the assigned ALJ in this proceeding.

Findings of Fact

1. AB 698, the statutory enactment which triggered PG&E’s petition, did not become effective until January 1, 2010, more than a year and a half after the effective date of D.08-11-043.

2. The Director of the Commission's Energy Division should be authorized to approve by advice letter watershed lands transactions which have been properly filed as Category 1 or Category 2 advice letters and which are uncontested, unless the circumstances are those described in Finding of Fact 3, below.

3. PG&E should be authorized to file as Category 2 advice letters subject to Commission approval by resolution those watershed lands transactions where another agency has performed appropriate CEQA review in its capacity as lead agency and where the Commission's CEQA review is as a responsible agency.

Conclusions of Law

1. PG&E has justified submission of this petition more than one year after the effective date of D.08-11-043.

2. Amendments to Pub. Util. Code § 851 and § 853(d) pursuant to AB 698 require removal of the two conditions D.08-11-043 imposes on its approval of the settlement reviewed in that decision. Specifically, the Commission should modify D.08-11-043 to remove: (a) the prohibition on approval of an uncontested Category 1 or Category 2 advice letter (whether by the Commission's Executive Director or the Director of the Energy Division), and (b) the requirement that PG&E file an application for Commission review and approval of Category 2 watershed lands transactions where another agency has performed appropriate CEQA review in its capacity as lead agency and where the Commission CEQA review is as a responsible agency.

3. The specific revisions of Findings of Fact, Conclusions of Law, Ordering Paragraphs, and Appendix C to D.08-11-043 set out in Attachment A to today's decision should be approved.

4. In the interests of providing timely guidance regarding watershed lands transactions that will be filed this year, today's decision should be effective today.

O R D E R

IT IS ORDERED that:

1. The Petition of Pacific Gas and Electric Company to Modify Decision 08-11-043 is granted to the extent consistent with Attachment A to this order, entitled "Modifications of Findings of Fact, Conclusions of Law, Ordering Paragraphs, and Appendix C to Decision 08-11-043 to conform to Assembly Bill 698" and is otherwise denied.
2. Application 08-04-020 is closed.

Dated August 12, 2010, at San Francisco, California.

MICHAEL R. PEEVEY
President
DIAN M. GRUENEICH
JOHN A. BOHN
TIMOTHY ALAN SIMON
NANCY E. RYAN
Commissioners

ATTACHMENT A

Modifications of Findings of Fact, Conclusions of Law, Ordering Paragraphs and Appendix C to Decision 08-11-043 to conform to Assembly Bill 698

Findings of Fact

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10. Category 2 would include those transactions which are either too speculative or too unspecific to require CEQA review by the Commission, though such transactions would require CEQA review by a local agency at some time in the future, or transactions where appropriate CEQA review by a local lead agency has already occurred and where the Commission exercises CEQA review as a responsible agency.

11. Category 3 would include all those transactions where the Commission must undertake CEQA analysis as a lead agency as part of its review process.

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Conclusions of Law

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1. As modified by AB 736 (Stats. 2005, ch. 370), utilities may file advice letters to request approval for transactions under § 851, if those transactions are valued at \$5 million or less, and if the Commission issues a resolution approving the advice letters. As subsequently modified by AB 698 (Stats 2009, ch. 370), effective January 1, 2010, the Commission's Executive Director or a Division Director may approve such advice letters.

2. If no protest is filed, The Category 1 and Category 2 advice letters described in the Settlement may be approved, by letter, by the Director of the Commission's Energy Division. ~~If a protest is filed, as modified to provide that~~ the Commission, by majority vote of the Commissioners at a public meeting,

must issue a resolution to dispose of such advice letters, ~~are~~ consistent with the requirements of § 851.

3. Consistent with GO 96-B, we will treat all of the advice letters filed in these matters as Tier 3 advice letters (though we will attempt to process unprotested advice letters more expeditiously than Tier 3 requires). However, where D.08-11-043 as modified by today's decision differs from the requirements for Tier 3, the provisions of D.08-11-043 as modified by today's decision control. ~~This approach is essentially implied in the Settlement. Tier 3 advice letters require approval by a Commission resolution and cannot be deemed approved.~~

....

7. It is reasonable to require the director of the Energy Division to ensure that a "standing item" is listed on the Commission's consent agenda for each regularly-scheduled business meeting to address watershed lands advice letters that must be approved by resolution of the Commission (that is, for all advice letters which are ineligible for approval by letter of the Director of the Energy Division). To the extent these advice letters are not protested and a resolution grants the relief requested, the resolution need not be sent out for comment and review, consistent with § 311(g)(2).

8. For Category 1 and 2 advice letters that are ineligible for approval by the Director of the Commission's Energy Division, eEnsuring that a standing item is listed on the Commission's consent agenda for each regularly-scheduled business meeting will provide the requisite Bagley-Keene notice ~~for advice letters~~ and will permit expeditious handling of appropriate resolutions on Category 1 and 2 advice letters.

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19. D.08-11-043's modification to the Settlement to makes it consistent with § 851 and § 853(d) is no longer necessary, given enactment of AB 698. It is no longer necessary ~~We require~~ that the Commission issue resolutions to dispose of all such advice letters. Specifically, watershed lands ~~These transactions~~ that are the subject of by definition, will fall within Category 1 and Category 2 advice letters, and which are not protested, may be approved by the Director of the Energy Division, except where the Commission is acting as a responsible agency under CEQA. In the latter instance, a Commission resolution is required for transactions that have been subject to appropriate CEQA review by another agency as lead agency. ~~and will be transactions where a statutory or categorical exemption exists or where there is no project for purposes of CEQA (including transactions where Commission environmental review is not required because the environmental effects of the transfer are too speculative or too unspecific to review at the time of the advice letter filing).~~

20. Given AB 698's amendment to ~~In order to comply with the provisions of~~ § 853(d) and State CEQA Guidelines, ~~it is reasonable to require~~ PG&E need not to file an applications but may file an advice letter for the disposition of a Category 2 transactions where appropriate CEQA lead agency review already has been done by another agency, and where the Commission's CEQA review is as a responsible agency. ~~Where an application is required,~~ Such applications must conform with the requirements of Article 2 (entitled "Applications Generally") of the Commission's Rules but otherwise, generally should be complete if PG&E also includes the same categories of information required for the simplified advice letters this decision authorizes for Category 1 and 2 transactions.

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24. The Settlement meets the standards for all-party settlements: all active parties support the Settlement; the interests of parties are fairly represented; the Commission has the information required to discharge its future regulatory obligations; and, with the modification adopted on November 24, 2008, the Settlement does not contravene any then-existing statutory provisions, or prior Commission decisions, ~~with the modification adopted herein~~. However, given AB 698's subsequent amendments to § 851 and § 853(d), the modification is no longer necessary and should be rescinded.

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O R D E R

IT IS ORDERED that:

1. ~~As modified to provide that the Commission must issue a resolution disposing of Category 1 and Category 2 advice letters and that an application must be filed for any transaction where another agency has reviewed the transaction under the California Environmental Quality Act (CEQA), T~~the Settlement Agreement (Settlement), set forth in Appendix A, between Pacific Gas and Electric Company (PG&E), the Division of Ratepayer Advocates, County of Plumas, Bucks Lake Homeowners Association (et al.), Mr. David Albrecht, and Ms. Alice Rothlind is approved. Given enactment of Assembly Bill 698 (Stats 2009, ch. 370), modification previously ordered is no longer necessary.

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3. For Category 2 transactions, PG&E shall submit a simplified advice letter to the Commission that shall include the following five items of information for each proposed transaction (or for each parcel, where multiple transactions are bundled in a single advice letter): (1) Identification of Conservation Property parcel(s); (2) Type of property interest disposition(s); (3) Legal name and

location of receiving party or parties; (4) Potential use(s) and conservation management objectives with reference to applicable section(s) of the LCP; and (5) Local agencies anticipated to perform discretionary review if and when Conservation Activities are no longer too speculative or unspecific for CEQA review. For Category 2 transactions that have been subject to appropriate CEQA review by another agency as lead agency, PG&E shall file an advice letter, but where the Commission is acting as lead agency under CEQA, PG&E shall file an application under Pub. Util. Code § 851, and shall include the first four items of information as well as information regarding the agency that has already performed CEQA review, the results of that review and where the environmental document can be reviewed.

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9. Consistent with the timing of the first Category 1 and Category 2 advice letter filings, the Director of the Energy Division shall ensure that an item is properly noticed on the Commission's consent agenda for each regularly-scheduled Commission meeting to address watershed lands advice letters that may not be approved by a letter from that Director but require approval by a resolution of the Commission.

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(END OF ATTACHMENT A)

Modified APPENDIX C to D.08-11-043
Summary of Streamlined Section 851 Filing Procedure, Including Target Timelines for Review
by Commission Staff and Issuance of Resolution or Decision by Commission

| | Criteria | Advice Letter (AL) Process | Protest and Response Requirements; Commission Review Targets | Approval Process Targets |
|---|---|---|--|---|
| All-Party Settlement Agreement *Category 1* | Does not trigger CEQA review due to: - Categorically or statutorily exempt from CEQA, or - Not a project under CEQA (e.g., no physical changes) | Submit simplified AL with 5 types of information: (1) ID of LCCP parcel(s) (2) Type of property interest dispositions(s) (3) Legal name and location of receiving party or parties (4) Proposed uses and conservation management objectives, referencing LCP (5) Applicable CEQA exemption(s) or explanation of why “not a CEQA project” | 20-day protest period (Same as set forth in G.O. 96B) PG&E has 5 business days from end of protest period to respond Energy Division (ED) has 45 days from AL filing date to process, determine validity, and serve findings on parties Additional ED review period of 45 days with a valid protest (or 75 days with a valid protest of a bundled AL) | - If no protest of any kind filed, ED’s Director issues approval letter. - If protest filed but found invalid, within 15 day of invalidity finding (60 days after AL filing date), either: (a) ED Director issues approval letter, or (b) ED staff drafts resolution and places it on consent agenda for next CPUC public mtg. - If valid protest filed, ED staff drafts resolution within 90 days after AL filing date (or 120 days for a bundled AL). |
| All-Party Settlement Agreement *Category 2a* | May be subject to CEQA and does not require concurrent environmental review by CPUC because actions are too speculative/unspecific at this time, but may be subject to future CEQA review by a local lead agency. | Submit simplified AL with 5 types of information: (1) ID of LCCP parcel(s) (2) Type of property interest dispositions(s) (3) Legal name and location of receiving party or parties (4) Potential uses and conservation management objectives, referencing LCP (5) CEQA showing | 30-day protest period (10 days more than G.O. 96B) PG&E has 5 business days from end of protest period to respond ED has 45 days from AL filing date to process, determine validity, and serve findings on parties Additional ED review period of 45 days with a valid protest (or 75 days with a valid protest of a bundled AL) | - If no protest of any kind filed, within 15 days of end of protest period either : (a) ED Director issues approval letter, or (b) ED staff drafts resolution and places it on the consent agenda for the next CPUC public mtg (target: approval within 60 days of AL filing date). - If protest filed but found invalid, within 15 days of the invalidity finding (60 days after AL filing date), either: (a) ED Director issues approval letter, or (b) ED staff drafts resolution and places it on consent agenda for the next CPUC public mtg. - If valid protest filed, ED drafts resolution within 90 days after AL filing date (or 120 days for a bundled AL). |

A.08-04-020 ALJ/XJV/lil

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|--|---|---|---|--|
| <p>All-Party Settlement Agreement *Category 2b*</p> | <p>May be subject to CEQA and already appropriately reviewed under CEQA by a local lead agency, with CPUC ratification necessary.</p> | <p>Submit simplified Advice Letter with 5 types of information: (1) ID of LCCP parcel(s) (2) Type of property interest dispositions(s) (3) Legal name and location of receiving party or parties (4) Potential uses and conservation management objectives, referencing LCP (5) CEQA showing (attaching relevant CEQA documentation)</p> | <p>30-day protest period from date Application noticed in Daily Calendar – 10 days more than GO 96B 10 days from end of protest period to respond</p> | <p>Resolution required for approval, per AB 698. - If no protest of any kind filed, ED drafts resolution within 15 days of end of protest period (or finding of invalidity) and places it on the consent agenda for the next CPUC public mtg (target: approval within 60 days of the AL filing date). - If protest filed but found invalid, with 15 days of the invalidity finding (60 days after AL filing date) ED staff drafts resolution and places it on consent agenda for the next CPUC public mtg. - If valid protest filed, ED drafts resolution within 90 days after AL filing date (or 120 days for a bundled AL).</p> |
| <p>All-Party Settlement Agreement *Category 3*</p> | <p>All other transactions not qualifying for any streamlined processes above (e.g. those requiring CPUC CEQA review at this time)</p> | <p>Standard S851 Application</p> | <p>30-day protest period (from date Application noticed in Daily Calendar) 10 days from end of protest period to respond</p> | <p>CPUC Decision required for approval. Applications that are not protested should be addressed in an expedited, ex parte manner, targeting a decision within 90-120 days of the filing date.</p> |

(END OF Modified APPENDIX C)