

Decision 08-11-043 November 21, 2008

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 APPROVING, WITH MODIFICATIONS, ALL-PARTY SETTLEMENT AGREEMENT BETWEEN PACIFIC GAS AND ELECTRIC COMPANY, THE DIVISION OF RATEPAYER ADVOCATES, COUNTY OF PLUMAS, BUCKS LAKE HOMEOWNERS ASSOCIATION (ET AL.), MR. DAVID ALBRECHT, AND MS. ALICE ROTHLIND

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DECISION APPROVING, WITH MODIFICATIONS, ALL-PARTY SETTLEMENT AGREEMENT BETWEEN PACIFIC GAS AND ELECTRIC COMPANY, THE DIVISION OF RATEPAYER ADVOCATES, COUNTY OF PLUMAS, BUCKS LAKE HOMEOWNERS ASSOCIATION (ET AL.), MR. DAVID ALBRECHT, AND MS. ALICE ROTHLIND

1. Summary

Pacific Gas and Electric Company (PG&E) filed Application (A.) 08-04-020 to request that the Commission authorize a streamlined procedure to ensure permanent conservation of more than 140,000 acres of the watershed lands associated with its hydroelectric generating system and 655 acres of its Carrizo Plains properties in San Luis Obispo County. These properties were the subject of the Stipulation dated September 25, 2003, that was an integral part of the Settlement Agreement adopted in Decision (D.) 03-12-035 in PG&E's bankruptcy proceeding (Order Instituting Investigation (I.) 02-04-026). With two modifications, this decision adopts an all-party settlement agreement (Settlement) that sets forth a streamlined procedure to allow the Commission to efficiently process what is anticipated to be hundreds of filings to consider the disposition of approximately 1,000 parcels of land under Pub. Util. Code § 851¹ to implement the Land Conservation Commitment (LCC) adopted in D.03-12-035. The proposed uses for these properties are set forth in the Land Conservation Plan (LCP) prepared by the Pacific Forest and Watershed Lands Stewardship Council (Stewardship Council). Pursuant to the Stipulation adopted in D.03-12-035, the Stewardship Council was expressly authorized to undertake these tasks.

¹ Unless otherwise indicated, all subsequent citations to sections refer to the Public Utilities Code, and all subsequent citations to 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.

The goal is to preserve and enhance these watershed lands for a range of beneficial public values.

We make two modifications to the Settlement in order to ensure that it is lawful, consistent with Rule 12.1(d). As part of the streamlining proposal, the Settlement calls for the Executive Director or his/her designee to issue a resolution approving advice letters that are not protested (under Category 1 and Category 2). Because Assembly Bill (AB) 736 (Stats. 2005, Ch. 370) specifically refers to a “resolution of the Commission,” we determine that an Executive Director’s resolution may not be a purely ministerial act. Instead, we instruct the director of the Energy Division to ensure that a “standing item” is properly noticed on the Commission’s consent agenda for each regularly-scheduled business meeting to address watershed lands advice letters. Consistent with § 311(g)(2), resolutions approving advice letters that are not protested and that grant the relief requested need not be sent out for comment and review. This “standing item” approach will provide the notice required under the Bagley-Keene Open Meeting Act² and will also ensure that these matters are handled expeditiously. The Administrative Law Judge (ALJ) Division takes a similar approach with the resolutions addressing preliminary categorization and need for hearing for newly-filed formal proceedings, and we have seen that this method is both pragmatic and expeditious.

We also modify the Settlement to ensure that the procedures outlined for Category 2 advice letters conform to the requirements of §853(d). The Settlement provides that Category 2 advice letters would be filed when the applicability of

² Government Code §§ 11120 - 11132 are known as the Bagley-Keene Open Meeting Act.

the California Environmental Quality Act (CEQA) is either too speculative or the CEQA review has been performed by another agency. We agree that Category 2 advice letters may be filed when CEQA applicability is too speculative to determine that there is a project for CEQA purposes. However, when CEQA review has been performed by another agency and the Commission is therefore a responsible agency, we find that the “jurisdictional review” required by § 853(d) requires that PG&E file an application for these transactions. As PG&E acknowledges, there may be very few transactions in this category. Assuming that the applications are not protested, we expect to address them in an expedited, ex parte manner. We commend the parties for their spirit of cooperation and compromise in undertaking this settlement. The Settlement is attached to this decision as Appendix A.

2. Background

2.1. Genesis and Purpose of the Land Conservation Effort

As part of the 2003 settlement of its electricity crisis bankruptcy filing, PG&E agreed to ensure the permanent conservation of over 140,000 acres of land it owns in California. This acreage consists of approximately 1,000 parcels located in 22 counties. Most of the land is in the Sierra Nevada and Cascade mountain range watersheds and in San Luis Obispo County’s Carrizo Plain. (Today’s decision refers to the properties, collectively, as the watershed lands.) In D.03-12-035, the Commission adopted both the Settlement Agreement between PG&E, PG&E Corporation and the Commission, including the LCC attached to the Settlement Agreement as Appendix E, and also the Stipulation

Resolving Issues Regarding the Land Conservation Commitment, dated September 25, 2003 (Stipulation), which supplements the Settlement Agreement.³ We refer to this Settlement Agreement and the Stipulation, collectively, as the Bankruptcy Settlement and Stipulation. Under the terms of these governing agreements, PG&E will use two different mechanisms, donations of conservation easements or donations in fee simple to an appropriate new owner (as defined in the agreements), to preserve and enhance the watershed lands for the following range of beneficial public values: protection of the natural habitat of fish, wildlife, and plants; preservation of open space; outdoor recreation by the general public; sustainable forestry; agricultural uses; and historic values. The governing agreements condition the conservation effort, however, by providing that existing economic agreements must be respected, by prohibiting interference with hydroelectric and water delivery operations, including maintenance, and by requiring reservation of reasonable public access. The entire process is to be developed and implemented over a ten-year time period and should be completed by April 2013.

The Stewardship Council, a private foundation established under Internal Revenue Code § 501(c)(3) pursuant to the bankruptcy settlement, is charged, among other things, with developing the LCP, the major tool for implementing long-term protection of the watershed lands. The Stewardship Council has

³ The specific terms of the conservation effort are set out in Paragraph 17 of the Approved Settlement Agreement, entitled "Preservation and Environmental Enhancement of PG&E Land" (D.03-12-035, Appendix C), in the Statement of Purpose and in the Commitments found in the Land Conservation Commitment (D.03-12-035, Appendix E to Appendix C), and in the more detailed provisions of the Stipulation (I.02-04-026, Exhibit 181), including Paragraph 12, which elaborates upon the LCP.

structured its review around 47 different, identified planning areas and has released Volumes I and II of the LCP.⁴ In March 2008 the Stewardship Council released a Pilot Plan for development of Volume III, the final volume. The LCP's Executive Summary describes the organization and purpose of this extensive, three-volume document:

- Volume I: The Land Conservation Framework establishes the overall framework for the LCP, including legal requirements, the planning process, methodologies, public involvement, and discussion of relevant regulatory processes.
- Volume II: Planning Unit Concepts documents existing conditions and presents management objectives, potential measures, and conceptual plans to preserve and/or enhance the beneficial public values within each watershed or planning unit.
- Volume III: Disposition Packages will encompass a series of real estate transaction packages that will detail the specific land conservation and/or disposition requirements for each parcel or parcel cluster.

Volume III will be prepared and released in a series of installments beginning in 2009 and most likely continuing into 2013. Each of these installments will consist of the transactional documents for one or more land conservation packages. Under § 851, all dispositions of watershed lands or encumbrances placed on them require Commission approval. The bankruptcy Settlement Agreement expressly recognizes this statutory mandate.

2.2. Procedural History

⁴ PG&E attached these two volumes to its application as Exhibit A.

After PG&E filed this application, the Commission received a number of letters and emails from members of the public, most of the communications registering concerns about the Bucks Lake planning area in Plumas County. The following three parties filed timely Protests: the Commission's Division of Ratepayer Advocates (DRA), the County of Plumas, and jointly, the Bucks Lake Homeowners Association, Bucks Creek Cabin Owners Association, James M. Pollock, Dustin Doyle, Richard Frey, William Nicholau, David Norton, Ron Cooke, Gay Lynch and John Lynch (the Bucks Lake Protestants). PG&E filed a Reply to Protests on May 27, 2008, and on May 29, the Commission set a Prehearing Conference (PHC) for June 27 to be followed that day by a Public Participation Hearing (PPH). A ruling filed on June 9 described the difference between the two June 27 hearings, what each would cover, and who might participate.

The Assigned Commissioner, President Michael Peevey, attended the PHC as did several new parties, in addition to counsel and representatives for PG&E and for each Protestant. The Stewardship Council made a special appearance. No members of the public signed in to speak at the subsequent PPH, however, and no testimony was taken there.

On July 9, the assigned Commissioner issued a Scoping Memo. Among other things, the Scoping Memo confirmed that, as discussed at the PHC, the ALJ would facilitate a Workshop on July 28. The Scoping Memo established the means for parties to provide input beforehand and on July 21, the ALJ issued the Workshop agenda. The Workshop was held as scheduled. On July 30, the ALJ issued a ruling providing for Post-Workshop Briefs and, as the parties' had requested, revising the schedule to accommodate their preferred briefing schedule and a Settlement Conference that PG&E noticed for August 1, 2008.

On August 29, the parties filed a motion for approval of a settlement agreement that would dispose of all issues in this proceeding, with the exception of two matters. DRA reserved the right to brief the issue of the tax deductibility of these transactions and Mr. Albrecht reserved the right to brief the issue of when the streamlining process should commence. PG&E and DRA filed Opening Post-Workshop Briefs on August 29 and PG&E filed a Reply Brief on September 10. Mr. Albrecht did not file a brief.

2.3. Issues Before the Commission

This application asks the Commission to do two things. One, PG&E seeks approval of a streamlined procedure for the Commission's review, under § 851, of the conservation easements and fee simple donations that the Stewardship Council ultimately recommends in Volume III of the LCP. Two, PG&E asks the Commission to establish a memorandum account to record the costs of environmental remediation or mitigation, should hazardous waste be discovered on any watershed lands subject to either type of real estate transaction, and to authorize a process for recovery of those costs from PG&E's ratepayers.

3. All-Party Settlement

As modified by the all-party Settlement, PG&E's streamlining proposal would assign each real estate transaction (or bundles of transactions) to one of three categories for further review depending upon the specific application of CEQA. Proposed Category 1 would include those transactions which do not require review under CEQA, either because the transaction does not meet the definition of a "project" under CEQA or because the transaction falls within a specific CEQA exemption. Proposed Category 2 would include those transactions which are either too speculative or too unspecific to require CEQA review by the Commission, although such transactions would require CEQA

review by a local agency at some time in the future, or would consist of transactions where CEQA review by a local lead agency has already occurred. Category 3 would include all those transactions where the Commission must undertake CEQA analysis as part of its review process. While Category 3 transactions would be filed as applications subject to standard Commission review under § 851, PG&E proposes to file Category 1 and Category 2 transactions as “simplified” advice letters.

As stated by the parties, this Settlement represents a compromise that modifies PG&E’s original proposal to take into account various concerns the parties raised during this proceeding, including in their protests. The Settlement defines a new streamlined procedure to be established for the Commission’s processing of future § 851 filings under the LCP, which we describe below. The Settlement also defines the process by which specified costs tracked in the Land Conservation Plan Memorandum Account (LCPERMA), relating to potential hazardous substance investigation, mitigation, or remediation on the Conservation Properties, would be recovered in rates consistent with the Bankruptcy Settlement and Stipulation.

3.1. Category 1 Transactions

Transactions in Category 1 consist of those transactions under the LCP that do not trigger CEQA review, either because they involve actions that are categorically exempt from CEQA or because the transactions are not defined as a project under CEQA. The Settlement provides examples of activities in both areas. Prior to transferring an interest in any Conservation Property, PG&E will submit a simplified advice letter to the Commission that includes the following five items of information about the proposed transaction (or about each transaction, 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) proposed use(s) and conservation management objectives with reference to applicable section(s) of the LCP; and (5) applicable CEQA exemption(s) (where no exception to the exemption applies) with explanation, if necessary, or reason why transaction is not a “project” under CEQA.

For Category 1 transactions, the Settlement requests that a 20-day protest period apply to these advice letters. As the parties note, this is the same 20-day period required under General Order (GO) 96-B and currently used for advice letters under Resolution ALJ-202’s § 851 Pilot Program, as well as for advice letters filed under GO 131-D.

If no protest is filed, the Settlement requests that Category 1 advice letters be approved within 45 days of the date of the advice letter filing and that such approval be executed by a resolution issued by the Commission’s Executive Director or his/her designee, such as the Director of the Energy Division.⁵ If a protest is filed, PG&E would have five business days from the end of the protest period to reply and the protestant would not be permitted a sur-reply (consistent with GO 96-B Section 7.4.3). The Energy Division would then have up to 45 days from the advice letter filing date to process the advice letter and make a determination of the protest’s validity, and serve its findings on all parties.

⁵ The Settling Parties agree that such delegated decision-making authority should not be exercised by a Commission staff member who is a member or alternate member of the Stewardship Council and represents the Commission at Stewardship Council meetings. As we discuss, this concern is obviated because we require that resolutions be issued to dispose of each advice letter filed under Category 1 and Category 2, and because we require that the Commission act on each of these resolutions.

As defined by the parties, a “valid protest” is one that challenges the accuracy of one or more of the five items of information described above and the more specific grounds for protest described in Section 3.3.2.1.1 of the Settlement. If the Energy Division determines that a protest is not valid, the parties ask that the Energy Division prepare a draft resolution within 15 days of the finding of invalidity (or a total of 60 days after the filing of the advice letter), and place it on the agenda for decision at the next Commission decision conference, pursuant to Commission procedures.

If the Energy Division determines that a protest is valid, it could, at its discretion, take an additional 45 days to process the advice letter so that the draft resolution is issued no later than 90 days after the filing date of the underlying advice letter (for a single transaction). According to the Settlement, the Energy Division’s process for developing a draft resolution on any advice letter with a valid protest may include investigations, either with or without an expedited hearing, if deemed necessary.⁶ Where there is a valid protest and multiple transactions are bundled in a single advice letter, the Energy Division’s additional review period may be increased to as much as 75 days (from the end of the original 45 days from filing) for a draft resolution no later than 120 days from the filing date of the underlying advice letter. The draft resolution would be subject to the comment and review period required by the usual Commission and statutory procedures and the resolution would be placed on the Commission’s next business meeting agenda. The Settlement asks that the final

⁶ As we clarify in our discussion of the Settlement, evidentiary hearings are not held in the informal advice letter process. If evidentiary hearings are required, PG&E must convert the advice letter to a formal application.

resolution be issued within 120 days after the filing of the underlying advice letter, for a single transaction, and not later than 150 days from the filing date of the underlying advice letter, where multiple transactions are bundled in a single advice letter filing.

3.2. Category 2 Transactions

The second category of streamlined review would apply to transactions that may be subject to CEQA, but would not require environmental review by the Commission at this time, because the Conservation Activities at issue are either too speculative or too unspecific to allow meaningful environmental review by the Commission, and because subsequent local discretionary review will ensure subsequent CEQA compliance at a more appropriate time when actions have been adequately defined and proposed by the applicant. The Settlement includes several examples of activities that fit within this category. As defined by the Settlement, for the purpose of these examples, “too speculative or unspecific to allow meaningful Commission review” means that the Conservation Activities included in a particular transaction would simply be stated as a general objective. In general, such activities would likely be planned for many years into the future or would not include a specific timeframe for implementation, and would not define specific location or design of planned improvements nor address the number of potential users, etc. In addition, Category 2 would apply to proposed Conservation Activities that have already been reviewed under CEQA, consistent with GO 131-D practice, for example when a portion of a particular facility is part of a larger project that has already been subject to CEQA review by another agency.

PG&E would submit a simplified advice letter to the Commission that would include information similar to that listed above for Category 1

transactions, either for each Category 2 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; (3) legal name and location of receiving party; (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, or the agency that has already performed CEQA review, the results of that review, and where the environmental document can be reviewed.

The parties ask that a 30-day protest period apply to Category 2 advice letters. This is 10 days longer than the 20-day protest period adopted by the Commission in GO 96-B, as well as 10 days longer than the protest period provided for in ALJ-202 and GO 131-D. If no protest is filed, the Settlement requests that the advice letter be approved within 45 days of the date of advice letter filing through a resolution by the Executive Director or his/her designee.

If a protest is filed, the Settlement provides that PG&E would have five business days from the end of the protest period to reply and the protestant would not be permitted a sur-reply reply (consistent with GO 96-B Section 7.4.3). Energy Division would then have up to 45 days from the advice filing date to process the advice letter and make a determination of the protest's validity, and serve its findings on all parties. Here again, the Settlement provides that a "valid protest" would be a protest that challenges the accuracy of one or more of the five items of information described above and the more specific grounds for protest described in Section 3.3.2.1.1 of the Settlement. If the Energy Division determines that a protest is not valid, the Settlement provides that Energy Division prepare a draft resolution within 15 days of the finding of invalidity (or

a total of 60 days from the filing of the advice letter) and place it on the Commission's next business meeting agenda pursuant to our usual procedures. The resolution should not be issued later than 90 days after the filing of the underlying Category 2 advice letter.

If the Energy Division determines that the protest is valid, the Energy Division could at its discretion take an additional 45 days to process the advice letter so that the draft resolution is issued no later than 90 days after the filing date of the underlying a advice letter (for a single transaction). Again, the Settlement provides that the Energy Division's process for developing a draft resolution on an advice letter with a valid protest may include investigations, either with or without an expedited hearing,⁷ if deemed necessary. Where multiple transactions are bundled in a single advice letter and where there is a valid protest, the Energy Division's additional review period may be increased to as much as 75 days (from the end of the original 45 days from filing), for a draft resolution no later than 120 days from the filing date of the underlying advice letter. The resolution determining whether or not to approve an advice letter that has been subject to a valid protest is to be placed on the Commission's business meeting agenda, pursuant to our usual procedures. The Settlement states that this resolution should not be issued later than 120 days after the filing of the underlying Category 2 advice letter for a single transaction and not later than 150 days from the filing date of the underlying Category 2 advice letter where multiple transactions are bundled in a single advice letter filing.

⁷ See footnote 6, above.

The Settlement also provides that if the staff's determination of a valid protest to a particular transaction includes a finding that the protestant has shown that the Commission is the lead agency for CEQA review purposes, the Commission would require PG&E to convert its advice letter filing into an application that includes all appropriate CEQA showings, prior to decision by the Commission. The parties request that the Commission process these applications in as expedited a manner as possible.

3.3. Category 3 Transactions

The parties agree that any transactions with Conservation Actions that do not qualify for the streamlined procedure outlined above would be reviewed under the Commission's standard § 851 application process. For example, if our staff determines that there are material issues of disputed fact, evidentiary hearings may be required, in which case PG&E would be allowed to convert the advice letter to a formal application. In any case, if CEQA review is required and the Commission is the lead agency, the parties agree that the transaction would be filed as a formal application. Consistent with existing statutory requirements and the Commission's Rules, the assigned ALJ would issue a proposed decision and the Commission would consider that recommended decision in due course. The parties ask that the Commission strive for as expedited a Commission decision as possible.

3.4. Grounds for Valid Protests

As specified in the Settlement, the parties request that because transactions should be consistent with the Bankruptcy Settlement and Stipulation adopted in D.03-12-035, the LCP's Volumes 1 and 2, and California law, a valid protest would include the following showing:

- a) That the transaction is inconsistent with the Bankruptcy Settlement and Stipulation and LCP's provisions regarding tax neutrality;
- b) That the transaction is inconsistent with the Bankruptcy Settlement and Stipulation's provision in Appendix E, Section 1 which requires easements to "honor existing agreements for economic uses" of the lands (such as commercial or residential leases or licenses);
- c) That the transaction is inconsistent with the Bankruptcy Settlement and Stipulation and LCP Volumes 1 and 2, including the 6 Beneficial Public Values identified in the LCP, as it relates to the Bucks Lake Planning Unit or other specific Planning Units identified in the LCP;
- d) That the procedures set forth in the Bankruptcy Settlement and Stipulation and/or the LCP were not followed regarding opportunity to review and comment on the proposed transaction during the Stewardship Council's underlying Land Conservation and Conveyance Plan (LCCP) proceedings for that property;
- e) That the procedures set forth in the Bankruptcy Settlement and Stipulation and/or the LCP were not followed regarding opportunity to comment during the Stewardship Council's underlying process for selecting the fee simple and/or conservation easement holder for that property;
- f) If it is a transaction involving timberlands, that such transaction is shown to be inconsistent with the Bankruptcy Settlement and Stipulation and the LCP's requirements for protecting or enhancing the "beneficial public value" of sustainable forestry as defined in LCP Vol. 1 Appendix 7-3 ("The practice of managing dynamic forest ecosystems to provide ecological,

economic, social, and cultural benefits for present and future generations.");

- g) That the transaction fails to properly take into account nearby or neighboring private property rights (such as the unauthorized use of privately maintained roads, unauthorized general public access across or use of neighboring lands; or new uses on the Conservation Property which may include the potential to adversely impact neighboring properties, such as hunting or off-highway vehicle activity);
- h) That the transaction fails to properly take into account local land use planning requirements (e.g., County or City ordinances and/or General Plan policies); or
- i) That the transaction improperly characterizes the application of CEQA or the type of review required under CEQA.

3.5. The LCPERMA Memorandum Account

The parties ask that we approve a memorandum account⁸ to track costs for potential hazardous waste or hazardous substance mitigation or remediation relating to property under the LCP, and approve a process for the recovery of such costs in rates, consistent with the terms of the Settlement and Section 12(f) of the Bankruptcy Settlement and Stipulation adopted in D.03-12-035. The parties have agreed on the language included in the LCPERMA preliminary statement and specify that actual costs that are recorded in the proposed memorandum account would be recovered by means of PG&E's existing Annual

⁸ Bucks Lake Homeowners Association, et al. takes no position on the memorandum account issue.

Electric True-up proceeding (AET), which provides for an annual Energy Division audit and is subject to protests by any party. The “Purpose” section of the proposed preliminary statement clarifies the eligible and ineligible costs to be recorded in the memorandum account:

PURPOSE: The purpose of the LCPERMA is to record and recover hazardous substance investigation, remediation, or mitigation costs incurred by PG&E related to properties which will be or are encumbered or transferred pursuant to the Land Conservation Commitment (consistent with D.03-12-035). These costs may include, for example: investigation costs, remediation costs, monitoring costs, closure costs, agency oversight fees, permit fees, hazardous waste taxes, and costs to pursue, defend or pay claims relating to hazardous substance remediation or mitigation (provided that recoveries from third parties due to any such PG&E claims shall be recorded as a credit to the LCPERMA).

However, PG&E may not record into the LCPERMA the following costs related to the investigation, remediation, or mitigation of hazardous substances on properties subject to the Land Conservation Commitment: fines or penalties, personal injury damages, or costs of defending personal injury lawsuits related to environmental liabilities or hazardous substances that may be found on these properties. In addition, PG&E may not record into the LCPERMA costs that are otherwise being recovered in rates.⁹

The parties have also agreed that PG&E will provide a notice to the Program Manager of DRA’s Electricity Pricing and Customer Program Branch within 30 days of the end of the month when total LCPERMA costs for any given calendar year exceed \$5 million. If such notice is provided for any given

⁹ Settlement Agreement, Attachment A.

calendar year, then concurrent with its AET update filing in December of that calendar year, PG&E also shall provide DRA with the AET workpapers pertaining to the LCPERMA costs. Such workpapers shall include a list of the types of costs and actions taken, as well as a list of the projects and/or properties involved. Consistent with the Bankruptcy Settlement and Stipulation adopted in D.03-12-035, the sole purpose of this notice as well as the Commission's AET audit review shall be to determine whether the LCPERMA costs have been properly accounted for by the utility and to verify that the reported costs are not already being recovered in rates.

4. Legal Issues

Before turning to our consideration of the Settlement, we list three legal questions that PG&E briefed at the request of the assigned ALJ:

1. Does the provision in § 851 limiting advice letter filings to “qualified transactions valued at five million dollars (\$5,000,000) or less” apply to the transactions that will be developed in Volume III of the LCP to transfer the watershed lands or encumber them with conservation easements?
2. Does the provision in § 851 for authorization of advice letters by “resolution of the Commission” require approval of each advice letter by majority vote of the Commissioners at a public meeting or may the Commission delegate advice letter approval to the Commission's Executive Director or other employee?
3. Does the following provision in § 853(d) limit the authority of the Commission to process watershed land transactions by advice letter under § 851 if the Commission is a responsible agency for the purposes of the California Environmental Quality Act?

“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.”

We address each of these issues below.

5. Discussion

With the exception of two issues that parties reserved the right to pursue in briefs, the proposed Settlement is an uncontested “all-party” settlement.¹⁰ The Commission applies two complementary standards to evaluate such agreements. The first standard, set forth in Rule 12.1(d) is applicable to both contested and uncontested agreements and requires that a “settlement is reasonable in light of the whole record, consistent with law, and in the public interest.” The second standard applies to all-party settlements, and requires that all active parties support the proposed settlement, the parties fairly represent all affected interests, no settlement term contravenes statutory provisions or prior Commission decisions, and settlement documentation provides the Commission with sufficient information to permit it to discharge its future regulatory obligations. *San Diego Gas & Electric*, 46 CPUC2d 538 (1992).

5.1. Reasonable in Light of the Whole Record

¹⁰ DRA filed a post-workshop brief addressing the applicability of charitable deductions to watershed land transactions. Mr. Albrecht did not file a brief regarding the timing of the streamlining process, so we do not discuss this issue.

We turn first to the Rule 12.1(d) standard. We conclude that the Settlement is reasonable in light of the whole record because, as we discuss below, overall we find that the streamlined procedure we approve today provides due process, ratepayer protection and necessary Commission oversight.

In their motion for approval of their Settlement, the parties state that they thoroughly considered their litigation positions, including due process concerns regarding the time period for filing protests, the scope of a valid protest, whether the Commission's Executive Director may have a conflict of interest in approving § 851 matters because the current Executive Director is an alternate member of the Stewardship Council, whether there is piecemeal approach to CEQA issues, whether there is an adequate definition for eligible costs in the proposed memorandum account, whether there is consistency with local land use requirements, and whether there is consistency with the Bankruptcy Settlement and Stipulation regarding tax neutrality and private property rights, especially relating to unauthorized public access.

Most of the issues protestants identified have been addressed through the terms of the Settlement, and the parties state that the agreed-upon procedure, with the exception of two issues reserved for additional briefing¹¹, represents a reasonable resolution. We concur. We strongly favor settlements and commend the parties for negotiating in good faith and achieving a settlement, in the spirit of cooperation and collaboration encouraged by President Peevey and the assigned ALJ.

¹¹ Ultimately, briefs were filed on only one of these issues, the memorandum account.

5.2. Consistent with the Law

We agree with the parties that CEQA does not apply to this streamlining procedure and that accordingly, this application is not subject to review under CEQA. As stated in the Settlement, “. . . this streamlined procedure does nothing to change the applicability of CEQA law and process to future LCP transactions.” Our staff will be monitoring the advice letter filings and any formal applications closely to ensure adherence with CEQA. To the extent that the Commission is a responsible or lead agency for CEQA purposes, we will ensure that our duties under CEQA are carried out, whether such transactions are filed via advice letter or application.

We find that the Settlement is consistent with the requirements specified in the Bankruptcy Settlement and Stipulation adopted in D.03-12-035. First, the parties have agreed that each advice letter must demonstrate that the donee has been vetted by the Stewardship Council, consistent with the requirements of the Bankruptcy Settlement and Stipulation, and has been found to have the financial wherewithal, relevant experience, and expertise required to carry out the conservation activities articulated in the proposed transaction. In addition, PG&E must describe the existing uses of each parcel, including the nature of PG&E's or others' rights of access, and must also describe the proposed use for each transaction, how the transaction conforms to the Bankruptcy Settlement and Stipulation, as well as the LCP, and must attach agreements that effectuate the protection and enhancement of the Conservation Property, such as the proposed conservation easement, the donation or other transfer agreement terms (and deed, if applicable), the land management plan (if applicable), or any local governmental environmental review document or findings (if applicable under CEQA), and other relevant conveyance agreements so that Commission staff can

review the transaction as a whole. As is required by the Bankruptcy Settlement and Stipulation,¹² the LCP must include the following information in recommending the disposition of the watershed lands:

1. Estimates of acreages by parcel and existing economic uses;
2. Objectives to protect and/or enhance the beneficial public values;
3. A recommendation for grant of conservation easement or fee simple donation for each such parcel;
4. A finding that the intended donee of such easement or fee simple has the funding or other capacity to maintain that property interest so as to preserve and/or enhance the beneficial public values;
5. An analysis of tax and other economic and physical impacts of the disposition strategy and a commitment by an appropriate entity to provide property tax revenue, other equivalent revenue source, or a lump sum payment so as to ensure that the totality of dispositions in each affected county will be “tax neutral” for that county;
6. Disclosure of known hazardous wastes, substance contamination, or other environmental liabilities associated with each parcel;
7. Appropriate consideration of parcel splits;
8. Strategy to undertake appropriate physical measures to enhance beneficial public values of individual parcels;

¹² Stipulation, Paragraph 12(a). We summarize the information here, but all required details should be provided, consistent with the Stipulation.

9. A plan to monitor economic and physical impacts of disposition and implementation of enhancement measures; and
10. A schedule for the implementing of transactions and measures.

PG&E should include all of this information in future Category 1 and 2 advice letter filings or Category 3 applications in order to ensure that our staff has the information it requires to effectively carry out its duties. In addition, at the time of a lead agency's review, if it is reasonably foreseeable that the Commission could be a responsible agency then PG&E must inform our staff in a timely manner, so that the Commission may exercise its right to consult with the lead agency. Providing this information will also assist our staff in determining whether a protest is "valid," as specified in the Settlement. Of course, anyone has the right to file a protest and, as the parties recognize, the streamlining procedure is not intended to abrogate any party's rights or the Commission's obligation to ensure that these transactions are "not adverse to the public interest," pursuant to § 851. Consistent with its usual authority, our staff can require additional information from PG&E or a protestant, if necessary.

PG&E has agreed that in developing and processing the first LCCP filings, it will work with the Energy Division to develop a boilerplate template listing the information and documents which routinely should be filed. We direct PG&E to do so, as this will assist both PG&E and our staff in preparing and processing these filings expeditiously.

The Settlement also provides for extensive notice of Category 1, 2, and 3 filings and we agree with these provisions. Prior to finalizing its recommended disposition of any individual parcel, the Stewardship Council must notify the Board of Supervisors of each affected county, city, town, and water supply

entity, each affected tribe and/or co-licensee, and each landowner located within one mile of the exterior boundary of the parcel. PG&E will serve Category 1 and 2 advice letters on the Stewardship Council's parcel-specific list, in addition to serving the service list for this proceeding and its standard service list established for advice letters pursuant to GO 96-B. Pursuant to the Settlement, PG&E will also make reasonable efforts to broadly serve other entities, including "add[ing] to the Stewardship Council's list for then-known leaseholders, property owners, and others that identify themselves to the Stewardship Council or PG&E," as described in the Settlement. PG&E will serve Category 3 applications on the service list to this proceeding, any third parties involved in the specified transaction, and any relevant government agencies, as well as the Stewardship Council's parcel-specific service list.

Finally, we find that the provisions of the LCPERMA are reasonable and consistent with the Bankruptcy Settlement and Stipulation. The adopted language for the preliminary statement is attached to this decision as Appendix B.

5.2.1. Limitations on Advice Letter Filings Pursuant to § 851

We turn now to the question of whether the provision in § 851 that limits advice letter filings to transactions valued at \$5,000,000 or less governs the watershed lands transactions.¹³ PG&E contends that this provision cannot and should not be applied to these transactions, because in AB 736 the Legislature intentionally amended § 851 to streamline the process for handling § 851

¹³ This issue is not addressed in the Settlement; it arises solely in the briefs filed at the ALJ's request.

transfers at the Commission in order to make them more efficient and less costly. Further, PG&E contends that applying this monetary limit to the watershed lands transactions would lead to absurd results, because appraising the lands would not only be costly but would delay the transfer of these lands for the public benefit. PG&E asserts that, because D.03-12-035 adopted the Bankruptcy Settlement and Stipulation, effectively these properties already have been valued at approximately \$300 million, which was PG&E's estimate, at the time, of the total potential value of the watershed lands. According to PG&E, the Commission used this estimate to assess total potential financial impact to ratepayers of foregoing proceeds from fair market value sales of these properties when it issued D.03-12-035 and so no additional valuation is required at the individual property or parcel level.

We agree that it would be quite costly to appraise the lands considered in these transactions but we cannot agree with PG&E's conclusions that the watershed lands should be exempt from § 851. AB 736 was chaptered in September 2005, well after the Bankruptcy Settlement and Stipulation were adopted by this Commission. Using PG&E's own logic, if the Legislature had intended to exempt the watershed lands from the \$5 million limitation, it could have done so. We see no such exception in either the plain language of AB 736 or the legislative history accompanying the bill. However, it is far from clear that a watershed lands transaction will exceed § 851's valuation cap.¹⁴ As PG&E itself recognizes, it is unlikely that any single LCP fee donation or conservation

¹⁴ Although we do not here decide how these transactions should be valued for § 851 purposes, we do note that the consideration paid for land transfers to non-profit or governmental organizations may often be minimal.

easement would exceed \$5 million.¹⁵ We understand that PG&E does not yet know how it will bundle the particular transactions, but we direct PG&E to adhere to the \$5 million limit for advice letters, as required by AB 736's express amendment of § 851. To substantiate that a transaction or group of transactions does not exceed \$5 million, Category 1 and 2 advice letters should include the most recent valuation from the State Board of Equalization for a given LCC parcel.

To the extent that PG&E believes that bundling several transactions is required and that this bundling leads to a valuation greater than \$5 million, or where a single transaction exceeds \$5 million, PG&E must file a formal application. While such an application must conform with the requirements of Article 2 (entitled "Applications Generally") of the Commission's Rules, generally the application should be complete if PG&E also includes the same categories of information required for the simplified advice letters we approve for Category 1 and 2 transactions, together with the most recent State Board of Equalization valuations. If the application is not protested, we will expedite it to the best of our ability and resources.

Should another form of appraisal become necessary for any purpose in support of the LCC, then PG&E may record the costs incurred in the Land Conservation Plan Implementation Memorandum Account (LCPIA) for potential future recovery in rates.¹⁶

¹⁵ PG&E's Post-Workshop Opening Brief, August 29, 2008, p. 7.

¹⁶ Should one or more parcels be transferred to a well-funded entity, it may not be appropriate for ratepayers to pay the costs of such an appraisal, but we need not -- and do not -- decide this matter today.

5.2.2. Commission Resolution is required pursuant to § 851

We clarify certain points in the Settlement with regard to the Commission's own procedures. First, consistent with GO 96-B, we will treat all of the advice letters filed in these matters as Tier 3 advice letters. This approach is essentially implied in the Settlement. Tier 3 advice letters require approval by a Commission resolution adopted by a majority of Commissioners at a public meeting and cannot be deemed approved. Tier 3 advice letters have a 20-day protest period and a 30-day initial review period; the Commission must adopt or reject the advice letter within 120 days from the date the advice letter is filed.

The timelines outlined in the Settlement generally conforms to the timelines specified in GO 96-B and in Resolution ALJ-202, our pilot program for expedited review of § 851 advice letters. This issue was discussed in the July 28, 2008 Workshop. The parties propose that Category 2 advice letters be subject to a 30-day protest period, which mirrors the protest period in place for formal applications. While this is a deviation from the 20-day period set forth in GO 96-B, we will authorize the deviation here to satisfy the Settlement's effort to provide additional due process to interested parties. Because Category 2 advice letters will be widely served and noticed and will address dispositions that are quite speculative under CEQA, or where CEQA review has been previously performed, it is reasonable to provide for a slightly extended protest period. However, as with any settlement, this approach should not be considered precedential.

We also clarify that the advice letter process does not allow for evidentiary hearings. To the extent that our staff determines that evidentiary hearings are required, PG&E must convert its advice letter to an application.

In two respects, we find that the Settlement is not completely consistent with existing law; as a condition of our approval, we modify the Settlement on these points. The first issue concerns the Settlement's call for the Executive Director or his/her designee to issue a resolution approving advice letters that are not protested (under Category 1 and Category 2). Because AB 736 specifically refers to a "resolution of the Commission," we determine that an Executive Director's resolution may not issue as a purely ministerial act. Instead, we instruct the director of the Energy Division to ensure there is a "standing" item listed on the Commission's consent agenda for each regularly-scheduled business meeting to address watershed lands advice letters.

Consistent with § 311(g)(2), resolutions that address advice letters that have not been protested and that grant the relief requested need not be sent out for comment and review. Thus, a standing agenda item provides the requisite notice under the Bagley-Keene Open Meeting Act and ensures that these matters are handled expeditiously. The ALJ Division takes a similar approach with resolutions addressing preliminary categorization and need for hearing for newly-filed formal proceedings, and we have seen that this method is both pragmatic and expeditious. We ask the parties to explicitly state their agreement with this minor modification of the Settlement in their comments on the proposed decision. We discuss the second modification to the Settlement in the next section.

5.2.3. With One Exception Category 1 and 2 Advice Letters are Consistent with the Requirements of § 853(d)

In general, we concur that § 853(d) does not prohibit the processing of watershed land transactions by advice letter for two reasons. First, this decision requires that the Commission issue resolutions to dispose of all such advice

letters. Second, since these transactions by definition will fall within Category 1 and Category 2, these transactions will be ones where a statutory or categorical exemption exists or where there is no project for purposes of CEQA (including transactions that would not require environmental review by the Commission because the environmental effects of the transfer are too speculative or too unspecific to review at the time of the advice letter filing). Based on the plain language of § 853(d) and CEQA Guidelines § 15096(a), however, we conclude that PG&E must file an application for those Category 2 transactions that have been subject to CEQA review by another agency.

AB 736 added specific and precise language to §853, as the ALJ recognized in her ruling of July 30, 2008:

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.

PG&E contends that this interpretation leads to illogical and absurd conclusions. PG&E maintains that the proposed advice letter process for transactions that have already undergone CEQA would be ministerial for transactions that are not protested because they do not trigger a discretionary decision by the Commission. PG&E also contends that even for those transactions that are protested and become subject to the Commission's discretionary authority, since CEQA has already been completed by another agency, the transaction would not "jurisdictionally trigger" further CEQA review.

Based on the specificity of the language in § 853(d) and the provisions of the CEQA Guidelines, we cannot agree with PG&E's arguments. CEQA Guideline § 15096(a) states that a responsible agency "complies with CEQA by considering the EIR [environmental impact report] or Negative Declaration prepared by the Lead Agency and by reaching its own conclusions on whether and how to approve the project involved." CEQA Guideline § 15096(h) also requires a responsible agency to make certain findings regarding the lead agency's review. We conclude that a "review" as that term is used in § 853(d) cannot be considered a ministerial act. CEQA Guideline § 15369 defines ministerial as "a government decision involving little or no personal judgment." Even as a responsible agency, we have significant responsibilities under CEQA, which include, for example, reviewing the environmental documents prepared by the lead agency and making findings required by CEQA, and which also could include requiring additional mitigation for those aspects of the project that we must approve as the responsible agency. This approach is consistent with Resolution ALJ-202, in which we stated:

We further interpret Section 853(d) to mean that if a transaction involving the transfer or disposition of utility property requires the Commission to conduct environmental review as either a Lead Agency or Responsible Agency under CEQA, the advice letter process does not apply, and the utility must file a formal Section 851 application to seek our approval of the transaction. We believe that a formal application is required when the Commission is acting as either the Lead Agency or as a Responsible Agency, because even as a Responsible Agency, the Commission has significant duties under

CEQA to review and address the environmental impacts of the project.¹⁷

Therefore, we also modify the Settlement to ensure that the procedures outlined for Category 2 advice letters conform to the State CEQA Guidelines and the provisions of § 853(d). As stated above, we agree that Category 2 advice letters may be filed when CEQA applicability is too speculative to determine that there is a project for CEQA purposes. When CEQA has been performed by another agency as lead agency and the Commission is therefore a responsible agency, we find that the jurisdictional “review” required by § 853(d) requires that PG&E file an application for these transactions. While such an application must conform with the requirements of Article 2 (entitled “Applications Generally”) of the Commission’s Rules, generally the application should be complete if PG&E also includes the same categories of information required for the simplified advice letters we approve for Category 1 and 2 transactions.

As PG&E acknowledges, there may be very few transactions that require such applications. Assuming that the applications are not protested, we expect to address them in an expedited, ex parte manner that will permit a Commission decision within 90 to 120 days of the filing, or as soon thereafter as possible.

5.2.4. In the Public Interest

Finally, we find that the Settlement is in the public interest because it will allow PG&E and the Stewardship Council to pursue the transfer of the lands in a way that complies both with CEQA and with § 851 and establishes a widely-noticed, reasonable and efficient public process that will permit the watershed

¹⁷ Resolution ALJ-202, August 23, 2007, p. 4, footnotes omitted.

lands to be preserved in perpetuity, consistent with the requirements set forth in the Stipulation adopted in D.03-12-015 and the mission of the Stewardship Council. Therefore, with the modification described herein, we conclude that the Settlement meets the Rule 12.1(d) standards.

5.3. All-Party Settlements

The standards for all-party settlements are met also. All active parties support the Settlement. Indeed, PG&E, DRA, the County of Plumas, the Bucks Lake Protestants, Mr. Albrecht, and Ms. Rothlind are the only parties to this proceeding. The parties fairly represent all affected interests. DRA represents the interests of ratepayers, while the County of Plumas, the Bucks Lake Protestants, Mr. Albrecht, and Ms. Rothlind represent both the local and individual interests in certain properties. As discussed above, with the modifications we have developed to avoid conflict with existing law, the Settlement is consistent with the law, and the procedures adopted today provide the Commission with sufficient information to permit it to discharge its future regulatory obligations. Therefore, as modified, no Settlement term contravenes statutory provisions or prior Commission decisions. As modified, the Settlement satisfies the Commission's requirements for settlements under Rule 12.1(d) and the all-party settlement standards. Accordingly, we approve it.

6. Applicability of Tax Deductions to Land Donations

As proposed by PG&E and the Stewardship Council, the land donation and conservation easement transaction are expected to begin in 2009 and will be completed by 2013. As currently provided in the LCP, PG&E would retain approximately half of the 140,000 acres, subject to conservation easements, while the remainder would be available for donation in fee. DRA explains that Internal Revenue Code § 170 allows tax deductions for charitable contributions, including

qualified conservation contributions. DRA recommends that the Commission require PG&E to pursue obtaining applicable tax deductions for such donations and conservation easements. PG&E contends that it cannot claim such a charitable deduction because the proposed transfers lack “donative intent” and were part of a *quid pro quo*; i.e., PG&E gave up the right to sell its hydroelectric watershed lands in exchange for acceptance of the PG&E bankruptcy settlement agreement. PG&E provides extensive analysis of the applicable tax law and a persuasive discussion of the rulings of the Ninth Circuit.¹⁸ PG&E contends that it would harm both its own and the Commission’s credibility were PG&E to seek a private letter ruling from the over-burdened Internal Revenue Service, without being convinced that PG&E would prevail.

Although all of the cases cited by PG&E occurred at least 20 years ago, PG&E’s reasoning is not without basis. PG&E also cites to a 2007 article in the Wyoming Law Review that provides guidance on the tax aspects of conservation easement donations. This article, while not dispositive, lends additional credence to PG&E’s contention that “the requirement for ‘donative intent’ precludes deductions for conveyances of conservation easements in a number of circumstances, e.g., ‘*quid pro quo*’ situations where the donor obtains a governmental permit in exchange for the contribution of an easement or where an easement is contributed to discharge a contractual obligation.”¹⁹

We need not decide this issue now. As DRA acknowledges, it is more appropriate to decide this issue when PG&E submits its actual land donation

¹⁸ PG&E’s Reply to Protests, May 27, 2008, pp. 17-18 (also attached to PG&E’s Post-Workshop Reply Brief, September 10, 2008).

¹⁹ *Id.*, p. 18.

and conservation easement language to the Commission for approval. As PG&E has offered, DRA and PG&E should meet and confer at that point so that DRA can better understand PG&E's reasoning and DRA can then determine whether it wishes to pursue its recommendation. We will not require PG&E to seek an IRS ruling now, but PG&E may do so if it chooses.

7. Categorization and Need for Hearing

In Resolution ALJ-176-3212, dated April 24, 2008, the Commission preliminarily categorized this proceeding as ratesetting, and preliminarily determined that hearings were not necessary. The Scoping Memo confirmed those determinations.

8. Comments on Proposed Decision

In accordance with § 311(g)(1), the proposed decision of ALJ Vieth was issued for comment on October 22, 2008. Because we proposed to adopt the Settlement as modified to provide that, under existing law (1) the Commission must issue resolutions to dispose of the applicable advice letter filings and (2) PG&E must file applications for certain Category 2 transactions pursuant to § 853(d), we asked the parties to explicitly state their agreement with these minor modifications in their comments to the proposed decision.

On November 12, 2008, the parties filed joint opening comments. The parties state that they accept both modifications to the Settlement recommended in the proposed decision. The comments suggest several clarifications and corrections which we have considered and either incorporate as modifications to existing text or discuss in the summary below. In addition, we have made other, minor clarifications or corrections to improve the decision and ensure consistent use of terms.

As the parties suggest, we have attached to this decision, as Appendix C, a chart which summarizes the procedures and target timelines for processing each type of watershed land transfer contemplated. We have revised the chart to correct typographical errors in the version the parties appended to their opening comments and to specify that the target timelines represent our processing goals. We intend to process Category 1 and 2 advice letters and Category 2 and 3 applications efficiently and responsibly, and will work to meet the target timelines suggested. The targets may prove to be ambitious; in particular, the proposed 15-day turnaround from date of filing, for Energy Division to place a draft resolution on an unprotested advice letter on the consent calendar for the next Commission meeting, may not always be workable. Because future resource constraints and other unforeseen developments may require flexibility we decline to impose rigid timelines. PG&E and the Stewardship Council can reduce delay and improve the likelihood that the Commission will be able to meet the Appendix C processing goals by ensuring that advice letters and applications are clear and unambiguous, properly documented and otherwise in compliance with Commission Rules before they are tendered for filing.

While we interpret § 851 and § 853(d) to apply to watershed lands transfers as discussed in this decision, should subsequent amendments to these statutes permit or require further streamlining, we will review the procedures adopted today and revise them as warranted.

9. Assignment of Proceeding

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

Findings of Fact

1. The watershed lands were the subject of the Stipulation dated September 25, 2003 that was an integral part of the Settlement Agreement reached in PG&E's bankruptcy proceeding (I.02-04-026), as adopted in D.03-12-035.

2. The proposed uses for these properties are set forth in the LCP prepared by the Stewardship Council, which was expressly authorized to undertake these tasks in the Stipulation adopted in D.03-12-035.

3. PG&E will use two different mechanisms, donations of conservation easements or donations in fee simple to an appropriate new owner (as defined in the agreements), to preserve and enhance the watershed lands for the following range of beneficial public values: protection of the natural habitat of fish, wildlife, and plants; preservation of open space; outdoor recreation by the general public; sustainable forestry; agricultural uses; and historic values.

4. The governing agreements condition the conservation effort by providing that existing economic agreements must be respected, by prohibiting interference with hydroelectric and water delivery operations, including maintenance, and by requiring reservation of reasonable public access.

5. The entire process is to be developed and implemented over a ten-year time period and should be completed by April 2013.

6. The Stewardship Council, a private foundation established under Internal Revenue Code § 501(c)(3) pursuant to the bankruptcy settlement, is charged, among other things, with developing the LCP, the major tool for implementing long-term protection of the watershed lands.

7. The Stewardship Council has structured its review around 47 planning areas and has released Volumes I and II of the LCP: Volume 1, the Land Conservation Framework, establishes the overall framework for the LCP;

Volume II, Planning Unit Concepts, documents existing conditions and presents management objectives, potential measures, and conceptual plans to preserve and/or enhance the beneficial public values within each watershed or planning unit; and Volume III, Disposition Packages, will encompass a series of real estate transaction packages that will detail the specific land conservation and/or disposition requirements for each parcel or parcel cluster.

8. As modified by the Settlement, PG&E's streamlining proposal would assign each real estate transaction (or bundles of transactions) to one of three categories for further review depending upon specific application of CEQA.

9. Category 1 would include those transactions which do not require review under CEQA, either because the transaction does not meet the definition of a "project" under CEQA or because the transaction falls within a specific CEQA exemption.

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 CEQA review by a local lead agency has already occurred.

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

12. While Category 3 transactions must be filed as applications subject to Commission review under § 851, PG&E proposes to file Category 1 and Category 2 transactions as "simplified" advice letters.

13. To substantiate that a transaction or group of transactions does not exceed \$5 million, Category 1 and 2 advice letters should include the most recent valuation from the State Board of Equalization for a given LCC parcel.

14. The Settlement defines the process by which specified costs tracked in the LCPERMA, relating to potential hazardous substance investigation, mitigation, or remediation on the Conservation Properties, would be recovered in rates consistent with the Bankruptcy Settlement and Stipulation.

15. Should a form of appraisal other than the most recent valuation from the State Board of Equalization become necessary for any purpose in support of the LCC, then PG&E may record the costs incurred in the LCPIA for potential future recovery in rates

16. If Commission staff determines that there are disputed issues of material fact, that evidentiary hearings may be required, that the Commission is a lead agency for CEQA purposes, or otherwise recommends that an application be filed rather than an advice letter, PG&E must convert the advice letter to a formal application if it wishes to obtain Commission authorization for the transaction or transactions at issue.

17. The parties have agreed on the language included in the LCPERMA preliminary statement and specify that actual costs that are recorded in the proposed memorandum account would be recovered by means of PG&E's existing Annual Electric True-up proceeding, which provides for an annual Energy Division audit and is subject to protests by any party. PG&E will provide appropriate notice to DRA when total LCPERMA costs for any given calendar year exceed \$5 million.

18. The parties thoroughly considered their litigation positions, including due process concerns regarding the time period for filing protests, the scope of a valid protest, whether the Commission's Executive Director may have a conflict of interest in approving § 851 matters because the current Executive Director is an alternate member of the Stewardship Council, whether there is piecemeal

approach to CEQA issues, whether there is an adequate definition for eligible costs in the proposed memorandum account, whether there is consistency with local land use requirements, and whether there is consistency with the Bankruptcy Settlement and Stipulation regarding tax neutrality and private property rights, especially relating to unauthorized public access.

19. As PG&E recognizes, it is unlikely that any single LCP fee donation or conservation easement would exceed \$5 million.

20. While Internal Revenue Code § 170 allows tax deductions for charitable contributions, including conservation easements, PG&E and DRA disagree about the deductibility of these donations. There is no need to address this issue in order to approve the Settlement.

21. It is more appropriate to determine whether PG&E should pursue an Internal Revenue Service ruling after PG&E has submitted its first land donation and conservation easement language to the Commission in a § 851 filing.

22. Appendix C to this decision summarizes the procedures and target timelines for processing each type of watershed land transfer. The target timelines processing goals, not rigid timelines.

Conclusions of Law

1. Under § 851, all dispositions of watershed lands or encumbrances placed on them require Commission approval. The bankruptcy Settlement expressly recognizes this statutory mandate.

2. 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.

3. The Category 1 and Category 2 advice letters described in the Settlement, 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.

4. 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). This approach is essentially implied in the Settlement. Tier 3 advice letters require approval by a Commission resolution and cannot be deemed approved.

5. The protest period set forth for Category 1 advice letters is consistent with GO 96-B and Resolution ALJ-202.

6. While the 30-day protest period required for Category 2 advice letters is a deviation from the 20-day period set forth in GO 96-B and Resolution ALJ-202, we should approve the deviation here to effect the Settlement's effort to provide additional due process rights to interested parties, given the nature of Category 2 advice letters. This requirement is not precedential.

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. 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. Ensuring 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 and permit expeditious handling of resolutions on Category 1 and 2 advice letters.

9. All transactions should be consistent with the Bankruptcy Settlement and Stipulation adopted in D.03-12-035, the LCP, and California law.

10. The Settlement is consistent with the requirements specified in the Bankruptcy Settlement and Stipulation adopted in D.03-12-035, because the parties have agreed that each advice letter must demonstrate that the donee has been vetted by the Stewardship Council, consistent with the requirements of the Bankruptcy Settlement Agreement and Stipulation, and must be found to have the financial wherewithal, relevant experience, and expertise required to carry out the conservation activities articulated in the proposed transaction.

11. PG&E must describe the existing uses of each parcel, including the nature of PG&E's or others' rights of access, and the proposed use for each transaction, how the transaction conforms to the Bankruptcy Settlement and Stipulation and the LCP, and must attach agreements that effectuate the protection and enhancement of the Conservation Property, such as the proposed conservation easement, the donation or other transfer agreement terms (and deed, if applicable), the land management plan (if applicable), or any local governmental environmental review document or findings (if applicable under CEQA), and other relevant conveyance agreements so that Commission staff can review the transaction as a whole.

12. It is reasonable to require PG&E to provide to our staff all of the information required to be included in the LCP, as detailed in the Stipulation, Paragraph 12(a).

13. It is reasonable to require PG&E to inform our staff in a timely manner of a lead agency's review, if it is reasonably foreseeable that the Commission could be a responsible agency, so that the Commission may exercise its right to consult with the lead agency during its review.

14. Consistent with § 314, Commission staff may request additional information from PG&E to carry out its review of advice letters or applications filed under these procedures.

15. It is reasonable to define the criteria for valid protests to ensure that due process rights are preserved but that the advice letter process can be managed efficiently.

16. A valid protest should include the following showing:

- a) That the transaction is inconsistent with the Bankruptcy Settlement and Stipulation and LCP's provisions regarding tax neutrality;
- b) That the transaction is inconsistent with the Bankruptcy Settlement and Stipulation's provision in Appendix E, Section 1 which requires easements to "honor existing agreements for economic uses" of the lands (such as commercial or residential leases or licenses);
- c) That the transaction is inconsistent with the Bankruptcy Settlement and Stipulation and LCP's Volumes 1 and 2, including the 6 Beneficial Public Values identified in the LCP, as it relates to the Bucks Lake Planning Unit or other specific Planning Units identified in the LCP;
- d) That the procedures set forth in the Bankruptcy Settlement and Stipulation and/or the LCP were not followed regarding opportunity to review and comment on the proposed transaction during the Stewardship Council's underlying LCCP proceedings for that property;
- e) That the procedures set forth in the Bankruptcy Settlement and Stipulation and/or the LCP were not followed regarding opportunity to comment during the Stewardship Council's underlying process for selecting the fee simple and/or conservation easement holder for that property;

- f) If it is a transaction involving timberlands, that such transaction is shown to be inconsistent with the Bankruptcy Settlement and Stipulation and the LCP's requirements for protecting or enhancing the "beneficial public value" of sustainable forestry as defined in LCP Vol. 1 Appendix 7-3 ("The practice of managing dynamic forest ecosystems to provide ecological, economic, social, and cultural benefits for present and future generations.");
- g) That the transaction fails to properly take into account nearby or neighboring private property rights (such as the unauthorized use of privately maintained roads, unauthorized general public access across or use of neighboring lands; or new uses on the Conservation Property which may include the potential to adversely impact neighboring properties, such as hunting or off-highway vehicle activity);
- h) That the transaction fails to properly take into account local land use planning requirements (e.g. County or City ordinances and/or General Plan policies); or
- i) That the transaction improperly characterizes the application of the CEQA or the type of review required under CEQA.

17. The Settlement is reasonable in light of the whole record because we find that this expedited procedure provides adequate due process, ratepayer protection, and necessary Commission oversight.

18. Because we are adopting a procedure for reviewing the LCP transactions, we find that CEQA does not apply to this application. The procedures we adopt today do not change the applicability of CEQA law and process to future LCP transactions, and we will ensure that our duties under CEQA are carried out, whether such transactions are filed via advice letter or an application.

19. Our modification to the Settlement makes it consistent with § 851 and § 853(d). We require that the Commission issue resolutions to dispose of all such advice letters. These transactions by definition, will fall within Category 1 and

Category 2, 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. In order to comply with the provisions of § 853(d) and State CEQA Guidelines, it is reasonable to require PG&E to file applications for the disposition of Category 2 transactions where the CEQA lead agency review already has been done by another agency. 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.

21. Pursuant to § 851, any advice letters filed under the procedures adopted today must include transactions valued at \$5 million or less.

22. To the extent that PG&E believes that bundling the transactions is required and that this bundling leads to a valuation greater than \$5 million, PG&E must file a formal application.

23. The Settlement is in the public interest because it will allow PG&E and the Stewardship Council to pursue the transfer of the lands in such a way that complies with CEQA and with § 851 and establishes a widely-noticed, reasonable and efficient public process, that will allow the watershed lands to be preserved in perpetuity, consistent with requirements set forth in the Bankruptcy Settlement and Stipulation adopted in D.03-12-015 and the mission of the Stewardship Council.

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 the Settlement does not contravene any statutory provisions, or prior Commission decisions, with the modification adopted herein.

25. When PG&E submits its actual land donation or conservation easement donation language to the Commission, it is reasonable to require DRA and PG&E to meet and confer on the applicable tax deductions, so that DRA can better understand PG&E's reasoning and whether DRA wishes to pursue its recommendation. We will not require PG&E to seek an IRS ruling now, but PG&E may do so if it chooses.

26. This order should be effective today to provide certainty regarding the streamlining procedures applicable to watershed land transactions.

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), 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.

2. For Category 1 transactions, PG&E shall submit a simplified advice letter to the Commission that shall include the following five items of information for the proposed transaction (and for each transaction, 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) Proposed use(s) and conservation management objectives with reference to applicable section(s) of the Land Conservation Plan (LCP); and (5) Applicable exemption(s) under CEQA (where no exception to the exemption applies) with explanation, if necessary, or reason why transaction is not a “project” under CEQA.

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 transactions (or for each transaction, 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 CEQA review by another agency, 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.

4. Category 3 transactions do not qualify for advice letter treatment and shall be filed as applications under Pub. Util. Code § 851.

5. At the time of a lead agency's review, if it is reasonably foreseeable that the Commission could be a responsible agency, then PG&E shall inform Commission staff in a timely manner so that the Commission may exercise its right to consult with the lead agency during the lead agency's CEQA review.

6. A valid protest to advice letters or applications filed to dispose of watershed lands transactions shall make the following showing (reference to the Bankruptcy Settlement and Stipulation, below, means the Settlement Agreement between PG&E, PG&E Corporation and the Commission, including the Land Conservation Commitment attached to that Settlement Agreement as Appendix E, and also the Stipulation Resolving Issues Regarding the Land Conservation Commitment, dated September 25, 2003, which supplements the Settlement Agreement, both adopted by Decision 03-12-035):

- a) That the transaction is inconsistent with the Bankruptcy Settlement and Stipulation and LCP's provisions regarding tax neutrality;
- b) That the transaction is inconsistent with the Bankruptcy Settlement and Stipulation's provision in Appendix E, Section 1 which requires easements to "honor existing agreements for economic uses" of the lands (such as commercial or residential leases or licenses);
- c) That the transaction is inconsistent with the Bankruptcy Settlement and Stipulation and LCP, Volumes 1 and 2, including the 6 Beneficial Public Values identified in the LCP, as it relates to the Bucks Lake Planning Unit or other specific Planning Units identified in the LCP;
- d) That the procedures set forth in the Bankruptcy Settlement and Stipulation and/or the LCP were not followed regarding opportunity to review and comment on the proposed transaction during the Stewardship Council's underlying

- Land Conservation and Conveyance Plan proceedings for that property;
- e) That the procedures set forth in the Bankruptcy Settlement and Stipulation and/or the LCP were not followed regarding opportunity to comment during the Stewardship Council's underlying process for selecting the fee simple and/or conservation easement holder for that property;
 - f) If it is a transaction involving timberlands, that such transaction is shown to be inconsistent with the Bankruptcy Settlement and Stipulation and the LCP's requirements for protecting or enhancing the "beneficial public value" of sustainable forestry as defined in LCP, Vol. 1 Appendix 7-3 ("The practice of managing dynamic forest ecosystems to provide ecological, economic, social, and cultural benefits for present and future generations.");
 - g) That the transaction fails to properly take into account nearby or neighboring private property rights (such as the unauthorized use of privately maintained roads, unauthorized general public access across or use of neighboring lands; or new uses on the Conservation Property which may include the potential to adversely impact neighboring properties, such as hunting or off-highway vehicle activity);
 - h) That the transaction fails to properly take into account local land use planning requirements (e.g., County or City ordinances and/or General Plan policies); or
 - i) That the transaction improperly characterizes the application of the CEQA or the type of review required under CEQA.

7. Within 30 days of the date of issuance of this decision, PG&E shall file a Tier 1 advice letter to include the Land Conservation Plan Environmental Remediation Account in its Preliminary Statement, consistent with the Settlement and Appendix B of this decision.

8. In addition to the requirements of Ordering Paragraphs 2 and 3, PG&E shall provide the information required in the September 25, 2003, Stipulation Resolving Issues Regarding the Land Conservation Commitment, Paragraph 12(a) (which is an integral part of the Settlement Agreement adopted in Decision 03-12-035) with any transactions submitted as Category 1 or Category 2 advice letters or filed as Category 2 or Category 3 applications, and shall work with Energy Division staff to develop a template approach to the advice letter filings.

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.

10. Application 08-04-020 is closed.

This order is effective today.

Dated November 21, 2008, at San Francisco, California.

MICHAEL R. PEEVEY
President
DIAN M. GRUENEICH
JOHN A. BOHN
RACHELLE B. CHONG
TIMOTHY ALAN SIMON
Commissioners