



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

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Application of Pacific Gas and Electric
Company (U 39 E) for Commission
Approval Under Public Utilities Code
Section 851 to Sell the Chili Bar
Hydroelectric Project to Sacramento
Municipal Utility District.

Application 20-03-015
(Filed March 27, 2020)

(U 39 E)

**REPLY BRIEF OF AMERICAN WHITEWATER, AMERICAN RIVER
RECREATION ASSOCIATION, CALIFORNIA OUTDOORS,
CALIFORNIA SPORTFISHING PROTECTION ALLIANCE, FOOTHILL
CONSERVANCY, FRIENDS OF THE RIVER, HILDE SCHWEITZER,
PLANNING AND CONSERVATION LEAGUE, AND
THERESA SIMSIMAN**

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American Whitewater, American River Recreation Association, California Outdoors, California Sportfishing Protection Alliance, Foothill Conservancy, Friends of the River, Hilde Schweitzer, Planning and Conservation League, and Theresa Simsiman (collectively, American Whitewater et al.) provide this reply brief as permitted under the “Assigned Commissioner’s Scoping Memo and Ruling” issued on June 18, 2020 (Scoping Memo). This follows American Whitewater et al.’s Opening Brief on August 24, 2020.

I. SUMMARY OF ARGUMENT

In deciding whether to approve the sale of the Chili Bar Project (Project) from the Pacific Gas and Electric Company (PG&E) to the Sacramento Municipal Utility District (SMUD), the Commission must determine that the proposed sale would serve the public interest in accordance with Public Utilities Code section 851. Here, the public has a significant interest in the continuation of informal use and access to the conserved lands within the project boundary.

Outdoor recreation at the Project primarily occurs as informal uses. While the Project is

encumbered by a Conservation Easement, its terms permit the Grantor to control, limit, or exclude informal uses. Before the property transfers to a successor beyond the Commission's jurisdiction, the Commission should issue findings clarifying the consultation and notice procedures the Grantor must follow prior to exercising this discretion. Contrary to PG&E's arguments, such action is within the Commission's authority. Further, such action is appropriate and necessary given PG&E's claim that it has already excluded an informal use at the Project without consultation or notice and its refusal during the meet and confers to agree that consultation is required prior to modifying informal uses. American Whitewater et al.'s requested relief is necessary to fulfill PG&E's "promise of perpetual public access" to these conserved lands.¹

II. ARGUMENT

PG&E proposes to sell the Project located on the South Fork American River to SMUD. The Project includes watershed lands encumbered by a Conservation Easement held by Mother Lode Land Trust for the protection of beneficial public uses, including outdoor recreation by the public. While Section 9.2 of the Conservation Easement allows for continued public access for informal uses, Section 9.2.1 gives the Grantor under the easement discretion to control, limit, or exclude informal uses. Consistent with its duty under Section 851 to ensure that the sale of utility property is in the public interest and ensures informal uses are not unreasonably or unilaterally limited or excluded by a Grantor outside of its jurisdiction in the future, the Commission should clarify that this right cannot be exercised, in non-emergency situations, prior to consultation with the Grantee and public notice. PG&E appears to agree that it is required to

¹ CPUC, Decision 03-12-035 (Dec. 18, 2003), p. 62.

consult with Mother Lode Land Trust prior to exercising its discretion under Section 9.2.1,² but nonetheless opposes American Whitewater et al.'s request for formal clarification. The Commission should reject PG&E's arguments against formally clarifying the procedures for consultation and providing for public notice for the reasons stated below.

A. The Commission's Consideration of Whether the Proposed Sale Complies with PG&E's Land Conservation Commitment Is Not Preempted by the Federal Power Act.

PG&E argues that the Commission's authority to condition the Project sale on measures to protect outdoor recreation and public access to the conserved lands at the Project is preempted by the Federal Power Act:

[T]he CPUC's authority in a Section 851 proceeding involving a FERC-licensed hydroelectric project is limited to consideration of "services" and the "rates and charges of payment." For all other matters, including recreation, the FPA "occupies the field" and preempts the CPUC from imposing requirements, directly or indirectly, on a FERC-licensed project in a Section 851 proceeding.³

Under Section 851 of the Public Utilities Code, the Commission is charged with determining that a proposed utility sale is in the public interest: "no public utility 'shall sell ... [property] necessary or useful in the performance of its duties to the public ... without first having secured from the [C]ommission an order authorizing it so to do.' ... the relevant inquiry for the Commission in Section 851 proceedings is whether the proposed transaction is 'adverse to the public interest.'"⁴ Its inquiry may include consideration of the public's interest in recreation on utility lands.⁵

² Opening Brief of Pacific Gas and Electric Company (Aug. 24, 2020) (PG&E Op. Br.), pp. 7-8.

³ *Id.* at 2.

⁴ Opening Brief of American Whitewater et al. (Aug. 24, 2020) (American Whitewater et al. Op. Br.), p. 10 (quoting *In Re Pac. Gas & Elec. Co.*, No. 01-05-076, 2001 WL 1079704 (May 24, 2001)).

⁵ *Id.* at 10, fn. 31.

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The public's interest in the Project for recreation and other beneficial public values is described in the Land Conservation Commitment that PG&E made and which the Commission approved as a condition of its approval of PG&E's plan to exit bankruptcy.⁶

In its Application, PG&E represented the sale would comply with PG&E's Land Conservation Commitment: "The proposed transaction complies with the requirements of PG&E's Land Conservation Commitment as defined in D.03-12035. The Commission approved PG&E's grant of a perpetual Conservation Easement ... to the Mother Lode Land Trust in accordance with the [Land Conservation Commitment] on February 6, 2018."⁷

Contrary to PG&E's arguments, this is not about the Commission's "involvement" in "the regulation of hydroelectric resources."⁸ Rather, this is about whether the Commission, consistent with its Section 851 authority, should clarify the procedural protections for informal uses of the Project to ensure the proposed sale complies with PG&E's Land Conservation Commitment, as that commitment articulates the public's interest in outdoor recreation at the Project.⁹ The information in the record shows the existing informal uses and public access, which primarily occur upstream of SMUD's White Rock Powerhouse, do not implicate hydroelectric operations at the Project.¹⁰

PG&E further argues Commission is preempted by the Federal Energy Regulatory Commission's (FERC) consideration of recreational access issues as part of PG&E's Application for License Transfer.¹¹ The scope of that proceeding is limited to the ability of the transferee

⁶ *Id.* at 6.

⁷ Application, p. 7.

⁸ PG&E Op. Br., p. 2.

⁹ American Whitewater et al. Op. Br., p. 4.

¹⁰ *Id.* at 11.

¹¹ PG&E Op. Br., p. 3.

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(SMUD) to comply with the requirements of the FERC license.¹² The proceeding will not address informal uses under the Conservation Easement, which as the name suggests, are *not* formally protected under the FERC license, or otherwise address PG&E’s Land Conservation Commitment.

Given that PG&E expressly raised the proposed sale’s compliance with the Land Conservation Commitment for the Commission’s consideration in determining whether to approve the sale under Section 851, its arguments regarding federal preemption are perplexing.

B. The Commission Should Protect the Public’s Interest Regarding Continued Informal Use at the Project for Outdoor Recreation.

PG&E argues that the proposed sale does not adversely affect the public interest because it does not “worsen” American Whitewater et al.’s interest in recreational uses.¹³

PG&E is correct that American Whitewater et al.’s interests are centered on avoiding prospective, unreasonable limitation or exclusion of informal uses. In particular, they are concerned with protecting against the possibility that PG&E’s successor would interpret Section 9.2.1 of the Conservation Easement to give it unlimited discretion to control, limit, or exclude informal uses without consultation with the Mother Lode Land Trust or any notice to the public. SMUD is not subject to the Commission’s jurisdiction, so once the Project is sold, the Commission will not have any claim to oversight of the parties’ implementation of the Conservation Easement.¹⁴ Under its terms, the Conservation Easement will be enforceable only by the parties, and under the terms of the Conservation Easement, there is no obligation for either

¹² See PG&E and SMUD, “Joint Application for Transfer of License,” FERC eLibrary no. 20200325-5153 (Mar. 25, 2020); 16 U.S.C. § 801.

¹³ PG&E Op. Br., p. 3.

¹⁴ The Stewardship Council is not designed to provide long-term oversight once it completes the land conservation and conveyance process. See CPUC, Decision 03-12-035 (Dec. 18, 2003), pp. 15-16.

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party to even notify the public of changes to the terms of informal use under Section 9.2.1.¹⁵

The public cannot timely comment on changes to informal uses of which it has no notice, even though such changes are likely to adversely affect their interests.¹⁶ In these circumstances, clarification of the applicable procedures is necessary to provide transparency regarding how the lands will be managed to protect informal outdoor recreation and public access before the land is sold to a non-CPUC regulated utility.

PG&E also argues that American Whitewater et al.'s concerns regarding prospective restriction or exclusion of informal uses are unfounded because PG&E has already excluded the use of informal recreation areas near White Rock Powerhouse for takeout by whitewater boaters.¹⁷

PG&E appears to conflate American Whitewater et al.'s interest in eventually formalizing a takeout location near White Rock Powerhouse with its broader interest in ensuring continued public access to the Project for a range of informal recreational uses. As shown in the Stewardship Council planning documents, the Project lands and waters at the upper end of the Project are used for fishing, swimming, picnicking, and other recreation, not just takeout for whitewater boaters.¹⁸ Outdoor recreation at the Project primarily consists of these informal uses.¹⁹

Further, it is not clear how PG&E's argument that it has already eliminated an informal use without consultation with the Mother Lode Land Trust as the Grantee, or any notice to the public, diminishes or defeats American Whitewater et al.'s arguments that clarification as to the

¹⁵ American Whitewater et al. Op. Br., p. 12; Application, Attachment D, §§ 9.2.1, 10.

¹⁶ Requirements for public notice is commonplace in other land management planning efforts affecting public access and recreation.

¹⁷ PG&E Op. Br., 4.

¹⁸ American Whitewater et al. Op. Br., p. 7.

¹⁹ *Id.* at 6.

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consultation and notice procedures are needed to protect the public's interest in outdoor recreation at the Project. If anything, it demonstrates that informal uses are vulnerable to unreasonable restriction or exclusion by the Grantor without consultation with the Grantee or public notice. PG&E has not previously claimed to have eliminated the informal use of whitewater takeout at the recreation areas at the upper end of the Project. The maps provided in the Land Conservation Plan and Land Conservation and Conveyance Plan adopted by the Stewardship Council both show a takeout for the Slab Creek Whitewater Run at the upper end of the Chili Bar project boundary.²⁰ The Baseline Documentation Report does not purport to restrict or eliminate any of the informal uses identified in prior plans.²¹

PG&E's claim to have unilaterally eliminated one informal use demonstrates the real risk that SMUD (or potentially some other successor to SMUD) will seek to unilaterally eliminate others without any procedures for consultation or public notice. Again, this only heightens the need for the Commission to clarify the procedures for consultation and notice rather than resolving it.

C. PG&E's Concerns Regarding the Safety of Boating Are Not Relevant and Do Not Obviate the Need to Protect Informal Uses at the Project.

PG&E seeks to reduce this dispute to a disagreement regarding one recreational use: whitewater boating. However, American Whitewater et al.'s concern encompasses the protection of *all* existing informal uses and continued public access to the Project to participate in those uses. As described in the Land Conservation Commitment, the public's continued access to project lands for outdoor recreation is important to maintaining "the quality of life of local communities and all the people of California."²²

²⁰ *Id.* at 8.

²¹ *Id.* at 7.

²² American Whitewater et al. Op. Br., p. 6 (quoting CPUC Decision 03-12-035).
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Although American Whitewater et al. was aware of PG&E's prohibition on boating in the Chili Bar Reservoir, prior to the meet and confers, they were not aware that PG&E disputed the public's right to boat the South Fork American River upstream of White Rock Powerhouse. As predicted by PG&E,²³ American Whitewater et al. disagree with PG&E's claims that the prohibition extends to the upper end of the Project upstream of White Rock Powerhouse and that boating is unsafe in this area.²⁴ Regardless, PG&E's dispute regarding one informal use does not obviate the need to ensure the proposed sale is consistent with PG&E's obligation under the Land Conservation Commitment to protect other informal uses documented in the Stewardship Council Planning documents.

D. The Requested Relief Is Appropriate and Necessary.

PG&E argues that American Whitewater et al.'s requested remedy is inapplicable, inappropriate, and unnecessary. All of these arguments fail.

PG&E argues that the remedy is inapplicable because use of the informal recreational areas above White Rock Powerhouse for boating takeout is not a protected informal use, but a prohibited use. Again, the issue raised by American Whitewater et al. pertains to all informal uses, not just whitewater takeout. Further, the record does not show that whitewater takeout is an "Unauthorized Third-Party Use" under Conservation Easement section 9.3. The Stewardship Council planning documents clearly identify these areas as whitewater takeout locations and boating is not listed as a prohibited use in Exhibit F of the Conservation Easement.²⁵ Thus, American Whitewater's request to protect informal uses is applicable.

²³ PG&E Op. Br., p. 5.

²⁴ American Whitewater et al. Op. Br., pp. 8-9.

²⁵ Application, Attachment D, Exhibit F.

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Next, PG&E argues the remedy is inappropriate because it represents a collateral attack on the Conservation Easement. PG&E characterizes American Whitewater et al.’s request as renegotiating the Conservation Easement.²⁶ This is an over-statement. American Whitewater et al. seek narrow clarifications to provide some modicum of transparency and oversight regarding how requirements to protect informal uses will be interpreted by SMUD and other potential successors that are not subject to the Commission’s oversight. They also seek some provision for public *notice*, which is consistent with the PG&E’s commitment to ensure perpetual public access to these conserved lands. They do not seek to substantively alter the Grantor’s right to control, limit, or exclude informal uses under Section 9.2.1 once these procedures are followed.

Lastly, PG&E argues that the remedy is unnecessary because the Conservation Easement “already includes a consultation provision for instances when the owner seeks to eliminate an Informal use.”²⁷ This argument is severely undermined by PG&E’s claim that it has already excluded an informal use without consulting with the Mother Lode Land Trust, as well as its refusal to agree to this clarification in the course of the meet and confers.²⁸

III. RELIEF REQUESTED

American Whitewater et al. request that the Commission clarify that PG&E and any successor Grantor under the Conservation Easement cannot control, limit, or exclude informal uses under Section 9.2.1 of the Conservation Easement without first consulting with the Mother Lode Land Trust. They further request the Commission provide for public notice of changes to informal uses via a method that is likely to be viewed by the interested public, such as posting to FERC’s docket for the Chili Bar Project.²⁹

²⁶ PG&E Op. Br., p. 7.

²⁷ *Id.*

²⁸ American Whitewater et al., Op. Br., p. 12.

²⁹ American Whitewater et al., Op. Br., pp. 12-13.

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IV. CONCLUSION

For the reasons set forth above, American Whitewater et al. request the Commission act to protect the public interest in outdoor recreation at the Chili Bar Project by granting the relief requested.

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Respectfully submitted,



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