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

Application of Pacific Gas and Electric Company (U 39 E) for a Determination Under Section 851 of Whether a Condemnation of Assets by the South San Joaquin Irrigation District Would Serve the Public Interest.	Application No. 24-08-_______ (Filed August 30, 2024)

APPLICATION OF PACIFIC GAS AND ELECTRIC COMPANY (U 39 E) FOR A DETERMINATION UNDER SECTION 851 OF WHETHER A CONDEMNATION OF ASSETS BY THE SOUTH SAN JOAQUIN IRRIGATION DISTRICT WOULD SERVE THE PUBLIC INTEREST

HENRY WEISSMANN

Munger, Tolles & Olson LLP
350 South Grand Avenue
Los Angeles, CA 90071-3426
Telephone: (213) 683-9150
Facsimile: (213) 683-5150
E-Mail: henry.weissmann@mto.com

CLIFFORD J. GLEICHER
JOSHUA S. LEVENBERG
ASHLEY E. MERLO

Pacific Gas and Electric Company
300 Lakeside Drive
Oakland, CA 94612
Telephone: (925) 200-5819
Facsimile: (510) 898-9696
E-Mail: ashley.merlo@pge.com

Attorneys for
PACIFIC GAS AND ELECTRIC COMPANY

Dated: August 30, 2024

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I. INTRODUCTION

Pacific Gas and Electric Company ("PG&E") requests that the California Public Utilities Commission determine whether a proposed condemnation of certain of PG&E's electric assets by the South San Joaquin Irrigation District ("SSJID") would serve the public interest. PG&E files this Application as directed by the July 16, 2024 Order (the "July 16 Order") that the San Joaquin County Superior Court entered in SSJID's condemnation lawsuit against PG&E, captioned *South San Joaquin Irrigation District v. Pacific Gas and Electric Co.*, Case No. STK-CV-UED-2016-0006638 (the "Condemnation Action"). The July 16 Order (which is attached as Exhibit A) states that "PG&E will file a request with the Commission to initiate the Section 851 review within 45 days."[1]

This review arises because SSJID's Condemnation Action asks the Superior Court to authorize its involuntary (eminent domain) taking of thousands of PG&E electric distribution

[1] July 16 Order, at p. 3.

assets located in SSJID's irrigation territory (the "Proposed Condemnation"). SSJID seeks to take PG&E's assets in order to provide its own retail electric service to approximately 43,000 current PG&E customers. Under Public Utilities Code ("PUC") section 851, involuntary takings of utility property, such as the Proposed Condemnation, are void unless the Commission has approved them as in the public interest.[2]

In its July 16 Order, the Superior Court stayed the Condemnation Action pursuant to the primary jurisdiction doctrine. The Court reasoned that it would promote judicial economy and benefit the Court for the Commission to conduct its mandatory PUC section 851 review of the Proposed Condemnation before the Court proceeds. As the Court explained, this is so regardless of whether the Commission denies or approves the Proposed Condemnation. If the Commission denies approval (because the Proposed Condemnation is not in the public interest), any prior judicial order of condemnation would be void and the Condemnation Action would not proceed. And if the Commission grants approval, efficiency gains still would accrue, because the Commission's expert evaluation of the Proposed Condemnation's effects on the public interest—including on quality of service, customer rates, and State energy and climate policies—would inform and facilitate the Court's related analysis.

Accordingly, PG&E files this Application pursuant to PUC sections 851 and 701 and Articles 2, 3, and 7 of the Commission's Rules of Practice and Procedure to initiate the public-interest review required by PUC section 851.

[2] *Id.*, at p. 6; PUC § 851(a).

II. BACKGROUND

A. SSJID Seeks to Acquire PG&E's Assets to Provide Its Own Retail Electric Service

SSJID is a California special district that provides irrigation water and domestic water service within 112 square miles of southern San Joaquin County. PG&E's integrated electric distribution system is laid out and operated without regard to SSJID's boundaries, providing service to customers both within and outside SSJID's territory. Seven PG&E substations provide service to customers within SSJID's territory—two located inside SSJID's boundary and five located outside. SSJID seeks to acquire a portion of PG&E's system, carving an irregularly-shaped polygon from that system and requiring separation at hundreds of points along SSJID's 75-mile border, in order to allow SSJID to provide retail electric service to approximately 43,000 current PG&E customers in and around the Central Valley cities of Manteca, Ripon, and Escalon.

In 2009, SSJID filed an application with the San Joaquin County Local Agency Formation Commission ("SJ LAFCO") seeking approval to provide electric service. At SJ LAFCO's request, the Commission, also in 2009, issued a resolution regarding SSJID's proposal. The Commission found, for purposes of Government Code section 56131, that SSJID's proposal could shift the costs of certain non-bypassable charges to PG&E's remaining customers, could potentially idle PG&E distribution and transmission facilities, and thus could increase rates for PG&E's remaining customers, but that "the magnitude of the estimated increase is small relative to PG&E's current system average rates, and thus does not substantially impair PG&E's ability to provide adequate service at reasonable rates."[3] The Commission

[3] Resolution E-4301 (Dec. 17, 2009), at p. 27.

expressly noted PG&E's claim that SSJID's proposal "will result in the loss of CPUC jurisdiction that will undermine State energy policy objectives,"[4] but found that this issue was "beyond the scope of the CPUC's inquiry under Government Code § 56131."[5] The Commission went on to state that it had "endorsed and [was] seeking a statutory change to expand Government Code § 56131 to require the CPUC to consider the cumulative impacts of public power expansion proposals," including on "the efficiency of the public utilities' programs to implement state energy policy goals and priorities on energy efficiency, renewable portfolio standards, the use of solar energy, and resource adequacy, among others."[6]

The Legislature subsequently amended PUC section 851 (effective January 1, 2020) to require Commission approval of condemnations of utility property, thereby expanding the scope of the Commission's review.[7] The Commission's 2009 findings pursuant to Government Code section 56131 are far narrower than the broad public-interest evaluation that PUC section 851 now requires. Moreover, since 2009, several prominent municipalities other than SSJID have expressed interest in taking utility electric systems by eminent domain, the number of public policy programs and their funding have expanded considerably, and new, pressing Statewide energy and climate priorities have emerged.

In 2014, SJ LAFCO conditionally approved SSJID's application to provide electric service.[8] The conditions imposed by SJ LAFCO included that SSJID's Board, before taking final action to acquire PG&E's assets, adopt a finding based on substantial evidence that it would

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[4] *Id.*, at p. 16.

[5] *Id.*, at p. 17.

[6] *Id.*, at pp. 17-18.

[7] Sen. Bill No. 550 (2019-2020 Reg. Sess.) (Oct. 2, 2019).

[8] SJ LAFCO Resolution No. 1327; SJ LAFCO Certificate of Completion (Mar. 19, 2015).

be able to provide electric service at a 15% discount from PG&E's rates for the first 10 years in which SSJID provides the service.[9]

In 2016, SSJID adopted a Resolution of Necessity (a prerequisite to a public entity's commencement of an eminent domain proceeding) under the Eminent Domain Law with respect to a proposed taking of PG&E's electric assets.[10] The resolution recited that SSJID had found and determined that its proposed taking met the statutory requirements for exercising eminent domain. Because SSJID's resolution concerned utility property, however, it created only a presumption that the resolution met the requirements for exercising eminent domain, which by law PG&E would have the opportunity to rebut.[11]

B. SSJID Files the Condemnation Action in Superior Court

In 2016, after PG&E declined to sell its assets to SSJID, SSJID filed the Condemnation Action in San Joaquin County Superior Court. SSJID's Condemnation Action asks the Court to authorize SSJID's involuntary taking of the portion of PG&E's electric distribution system that overlaps with SSJID's water service territory.

Under the Eminent Domain Law, the Superior Court must hold two trials before entering any judgment of condemnation. The first is a bench trial at which the Court determines whether SSJID has the right to take PG&E's assets. To find in favor of SSJID at that first trial, the Court must find all of the following:

> (a) The public interest and necessity require the project.
>
> (b) The project is planned or located in the manner that will be most compatible with the greatest public good and the least private injury.

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[9] *Id.*

[10] Code Civ. Proc. §§ 1245.220, 1245.230.

[11] Code Civ. Proc. §§ 1245.250(b), 1240.650(c).

(c) The property sought to be acquired is necessary for the project.

(d) The new use is a more necessary public use.[12]

Under the Eminent Domain Law, PG&E has objected to the Proposed Condemnation on each of these grounds.[13] If the Court sustains any of PG&E's objections after the bench trial, the action must be dismissed.[14] If SSJID prevails at the first trial, the Court then would hold a second trial at which a jury would determine the "just compensation" that SSJID must pay PG&E.[15]

In 2017, PG&E moved the Court for rulings on the evidence admissible at trial and on the applicable standard of proof. The Court ruled in SSJID's favor, and PG&E filed a petition for writ of mandate seeking interlocutory review by the Court of Appeal. While the petition was pending, the Court dismissed the Condemnation Action on other grounds and the Court of Appeal dismissed the petition as moot. The Court of Appeal later reversed the dismissal of the Condemnation Action[16] and reinstated it on March 22, 2022.

When the case resumed, PG&E filed a new motion and then a new petition for writ of mandate in the Court of Appeal, again seeking review of the rulings regarding the evidence admissible at trial and the applicable standard of proof. In September 2023, the Court of Appeal issued a peremptory writ of mandate vacating the challenged orders of the Superior Court.[17] The Court of Appeal upheld PG&E's position that, at the right-to-take trial, PG&E "simply must prove that one of the public necessity elements (§ 1240.030) or the more necessary public use

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[12] Code Civ. Proc. §§ 1240.030 & 1240.610.

[13] Code Civ. Proc. §§ 1250.360(f) & 1250.370(b)-(d).

[14] Code Civ. Proc. § 1260.120.

[15] Cal. Constitution Art. I, § 19(a); Code Civ. Proc. §§ 1260.110 & 1260.210.

[16] *Pac. Gas & Elec. Co. v. San Joaquin Loc. Agency Formation Comm'n* (Ct. App., Dec. 15, 2021, No. C0806008) 2021 WL 5913702, at *17.

[17] *Pac. Gas & Elec. Co. v. Superior Court* (2023) 95 Cal.App.5th 819, 837-838.

element (§ 1240.610) is not true by the preponderance of the evidence."[18] Contrary to SSJID's arguments, the Court of Appeal held that PG&E need not show that SSJID "grossly abused its discretion or that the findings in the resolution of necessity are not supported by substantial evidence."[19]

C. **The Superior Court Stays the Condemnation Action to Benefit from the Commission's Public-Interest Review Under PUC Section 851**

The Legislature amended PUC section 851 as of 2020 to require the Commission to approve involuntary takings of utility assets, not just voluntary transactions.[20] Under the amended statute, any judicial order of condemnation of utility assets is void absent the Commission's approval.[21]

Given the Commission's new statutory responsibility, PG&E moved the Superior Court in May 2024 to stay the Condemnation Action to allow the Commission to review the Proposed Condemnation under PUC section 851. PG&E filed its motion under the primary jurisdiction doctrine, explaining that a stay would save substantial resources, that the Commission has greater expertise regarding energy policy matters, and that the Court would benefit from the Commission's broader, statewide view, particularly as other municipalization activities are underway in California.[22] The primary jurisdiction doctrine "advances two related policies:

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[18] *Id.*, at p. 832.

[19] *Id.*

[20] PUC §§ 851(a), 851(b)(1) & 854.2(b)(1)(F).

[21] PUC § 851(a).

[22] The primary jurisdiction doctrine "applies where a claim is originally cognizable in the courts, and comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body; in such a case the judicial process is suspended pending referral of such issues to the administrative body for its views." *Wise v. Pac. Gas & Elec. Co.* (1999) 77 Cal.App.4th 287, 295-296 [quoting *Farmers Ins. Exch. v. Superior Court* (1992) 2 Cal.4th 377, 390].

it enhances court decisionmaking and efficiency by allowing courts to take advantage of administrative expertise, and it helps assure uniform application of regulatory laws."[23]

On July 16, 2024, the Superior Court granted PG&E's motion to stay the Condemnation Action "in order to allow a review and decision by the California Public Utilities Commission of the proposed taking pursuant to Public Utilities Code §851."[24] The Court agreed with PG&E that staying the litigation to allow for the Commission's determination would promote judicial economy and benefit the Court, regardless of the outcome of the Commission's public-interest review:

> Regardless of the Commission's findings in its Section 851 review, judicial efficiency and economy will be served by staying this action in order to allow the Commission's Section 851 review to proceed first. As stated above, the Commission's approval is critical in order for the proposed taking to proceed; a finding that the proposed taking does not serve the public interest is fatal to the project.
>
> If the Commission found that the proposed taking does not serve the public interest and the Commission does not approve the project, the decision would obviate the need for any trial in the eminent domain action.
>
> By the same token, if the Commission found that the proposed taking serves the public interest and approves the project, the Commission's decision on the public interest factor is conclusive as to that factor and may assist the Court in its review of the remaining factors in the eminent domain action. The Commission's decision would certainly narrow the issues to be litigated at the right-to-take trial.[25]

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[23] *Travelers Indem. Co. v. Lara* (2022) 84 Cal.App.5th 1119, 1133 [quotation marks omitted].

[24] July 16 Order, at p. 3 [capitalization modified].

[25] *Id.*, at p. 6. The Court elaborated on this logic at the hearing: "So why would San Joaquin County and the Superior Court waste our resources doing the taking hearing, and then the District prepares on the taking hearing, the valuation hearing, and waste all of those resources, when the Commission might take it all away? Why don't we start with the Commission." July 16, 2024 Hrg. Tr., at p. 6:12-17.

The July 16 Order provided that "PG&E will file a request with the Commission to initiate the Section 851 review within 45 days."[26] The July 16 Order also set a status hearing for November 13, 2024, and ordered the parties to "file a joint statement regarding the status of the Public Utilities [Code] §851 review" in advance of that hearing.[27]

III. THE COMMISSION MUST DETERMINE WHETHER SSJID'S CONDEMNATION WOULD SERVE THE PUBLIC INTEREST

PUC section 851 charges the Commission with reviewing dispositions of utility assets, including condemnations, to ensure that they are in the public interest. In this circumstance, the Superior Court has stated—and PG&E agrees—that substantial efficiency gains would accrue if the Commission conducts its public-interest review of SSJID's Proposed Condemnation now, rather than later. In accordance with the Superior Court's ruling, PG&E submits that the Commission should conduct a proceeding to make the determination that PUC section 851 requires. Doing so will promote comity with the courts, assist the judicial process, conserve public resources, and fulfill the Commission's duty to ensure that the Proposed Condemnation—a taking of utility assets with Statewide ramifications—serves the public interest.

As the Superior Court explained, the Commission's statutory responsibility and extensive expertise make it advisable for the Commission to review the Proposed Condemnation before the Court does so. "The primary standard used by the Commission to determine if a transaction should be authorized under Section 851 is whether the transaction will serve the public interest."[28] Relatedly, the Court would determine at the right-to-take trial whether "public

[26] July 16, 2024 Order, at p. 7.

[27] *Id.*, at p. 8.

[28] D.04-07-023, at pp. 11-12; *see also* D.16-01-035, at p. 8 ["The primary question for the Commission in § 851 proceedings is whether the proposed transaction is adverse to the public interest"].

interest and necessity require the project."[29] But, as the Court acknowledged, the Commission has greater experience and expertise than the Court in evaluating how dispositions of utility property may affect the public interest. The Commission also has a broader vantage point, with the ability to evaluate the public-interest implications of the Proposed Condemnation in view of Statewide policies and priorities.

The parties will be able to provide ample information to assist the Commission in making the public-interest determination. In the 15 years since SSJID filed its 2009 application with SJ LAFCO, including in the eight years since SSJID filed the Condemnation Action, the parties have collected and developed considerable information that will inform the Commission's evaluation of the public interest. The Parties can develop, collect, and exchange any additional relevant information through the Commission's standard discovery process.

Although the actual rate impacts to SSJID's customers and PG&E's remaining customers will depend in part on the final just compensation award, neither the Commission in its PUC section 851 review now, nor the Court in the right-to-take trial, would know that final award at the time of its public-interest assessment. By statute, the Court would have to make its assessment before the jury determines just compensation.[30] A parallel process would occur here. Much as the Court would do at the right-to-take trial, the parties would develop a record in this proceeding that considers rate impacts under a range of possible valuation and severance damages, which the Commission then would assess. As the Court explained, "it is likely that all

[29] Code Civ. Proc. § 1240.030; *see also* July 16 Order, at p. 5 ["Both parties agree that the Commission's Section 851 review must take place at some point in time and both parties agree that the review will determine if the proposed taking serves the public interest and both parties agree that this consideration is one of the required findings by the Court in the eminent domain action."].

[30] The Court's decision on whether SSJID has the right to take occurs "*prior to* the determination of the issue of compensation." Code Civ. Proc. § 1260.110(a) [italics added].

key information is available and/or known regarding valuations, and more. All relevant information can be raised and argued to the Commission."[31]

IV. COMPLIANCE WITH RULES OF PRACTICE AND PROCEDURE

A. Categorization, Hearings, Issues, and Schedule (Rule 2.1(c))

1. Proposed Category

PG&E proposes that the proceeding contemplated by this Application "be conducted under the rules applicable to … ratesetting" proceedings in accordance with Rule 7.1(e)(2).

2. Hearings and Burden of Proof

PG&E believes that hearings are likely necessary to develop a sufficient record for the Commission to determine under PUC section 851 whether the Proposed Condemnation serves the public interest.

Although PG&E is filing this Application consistent with the Court's July 16 Order, *the Proposed Condemnation is an involuntary taking of PG&E's assets that PG&E opposes*. Unlike in a typical proceeding under PUC section 851, the utility in this circumstance is not "asking for Commission authorization or approval."[32] Instead, SSJID is the party that effectively is asking for Commission authorization to condemn PG&E's assets. As such, SSJID should bear the burden of proof.

3. Issues

In reviewing the Proposed Condemnation under PUC section 851, the Commission should consider all facts bearing on the public interest, including the effects of the Proposed Condemnation on the approximately 43,000 PG&E customers that SSJID seeks to serve

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[31] July 16 Order, at p. 7.

[32] D.12-02-038, at p. 14.

("PG&E's Central Valley Customers"), PG&E's millions of remaining customers ("PG&E's Customer Base"), SSJID's existing irrigation customers, and State energy and climate policies and priorities and the Commission's ability to effectuate them. The Commission has applied the criteria of PUC section 854(c) "in one form or another over the years to evaluate transactions under § 851," calling them "a useful framework for analyzing if it is in the public interest to approve" dispositions of utility property.[33] PG&E agrees that section 854(c) provides "a useful framework" and recommends that the Commission review at least the following issues:

State energy policies. The Commission should evaluate whether the Proposed Condemnation would undermine State energy policies and slow progress toward energy and climate goals, including wildfire mitigation, electrification, the gas transition, decarbonization, and low-income energy programs. For example, the Commission is best positioned to assess how the Proposed Condemnation would affect integrated resource planning and greenhouse gas emissions goals, including how the Commission could enforce resource planning obligations that might be transferred to SSJID.

Customer-funded programs. The Commission should consider the extent to which the Proposed Condemnation would result in the loss of revenues that PG&E currently collects from the Central Valley Customers to support State policies, including the Power Charge Indifference Adjustment, Public Purpose Programs, securitization, and other public policy programs. The Commission is the appropriate body to evaluate mechanisms to mitigate the loss of those revenues, including a condition requiring SSJID to pay those charges to PG&E.

Quality of service. Comparing the quality of service that PG&E offers its Central Valley Customers to the quality of service that SSJID would provide is a critical factor in protecting the

[33] D.01-06-007, at pp. 16-17.

public interest. The Commission is uniquely capable to make that evaluation. This assessment should address reliability, including effectiveness of utility responses to emergencies, the experience of utility employees and management, and impacts on SSJID's provision of irrigation service. It also should address the impacts on quality of service during what would be a lengthy and complex transition from PG&E to SSJID electric distribution service.

Safety and risk management. Safety is PG&E's highest priority, and the Commission's assessment of whether the Proposed Condemnation would serve the public interest should prioritize safety considerations. The Commission should evaluate the relative maturity and sophistication of PG&E's and SSJID's risk management programs, including with respect to asset integrity and cybersecurity.

Employee impacts. "[A]s part of its review," the Commission must "determine whether the transaction is fair and reasonable to affected public utility employees."[34] Because the Proposed Condemnation "triggers the application of Section 851,"[35] the Commission should consider whether it might result in "[m]ass displacement of electrical corporation or gas corporation workers" or in SSJID's failing to "maintain[] a qualified and knowledgeable workforce with the ability to ensure safe, efficient, reliable, and continuous service."[36]

Rate impacts. The Commission should evaluate the extent to which the Proposed Condemnation would affect rates for both PG&E's Central Valley Customers and the remainder of PG&E's Customer Base.

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[34] PUC § 851(b)(2).

[35] PUC § 854.2(b)(1)(A).

[36] PUC § 854.2(a)(4) & (5).

Environmental and social justice. The Commission should evaluate the Proposed Condemnation with respect to its Environmental and Social Justice Action Plan. For example, the Commission should consider how the Proposed Condemnation would affect support for low-income customers. The Commission also should consider whether the Proposed Condemnation would implicate the Commission's Tribal Land Transfer Policy, which "works as an overlay on the existing Section 851 process,"[37] and whether the Proposed Condemnation would require further review under the California Environmental Quality Act.

Commission jurisdiction and consumer protection. The Commission should evaluate the risks to customers due to the Commission's loss of jurisdiction over PG&E's electrical service in the area in which SSJID provides water service.

Impacts on State and local economies. The Commission should evaluate how the Proposed Condemnation would affect State and local economies, taking into account the broader context of other municipalization efforts.

Additional public-interest considerations. Additional issues bearing on the public interest may arise as the record is developed. PG&E therefore submits that the Commission should define the scope of the proceeding broadly to permit it to consider any facts that the Commission may later choose to consider.

4. Proposed Schedule

Although PG&E is technically the Applicant, SSJID is actually the party that requires relief from the Commission. As such, the Commission should adopt a schedule in the Scoping Memo after receiving input from SSJID (as well as PG&E) at the Prehearing Conference.

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[37] Investor-Owned Utility Real Property - Land Disposition – First Right of Refusal for Disposition of Real Property Within the Ancestral Territories of California Native American Tribes (Dec. 5, 2019), at p. 1.

B. Legal Name and Location of Applicant (Rules 2.1(a) and 2.1(b))

Since 1905, PG&E has been an operating public utility corporation organized under the laws of the State of California. PG&E is engaged principally in the business of furnishing gas and electric service in California. PG&E's principal place of business is 300 Lakeside Drive, Oakland, California 94612.

Correspondence and service to PG&E for this Application should be addressed to:

Ashley E. Merlo
Pacific Gas and Electric Company
300 Lakeside Drive
Oakland, CA 94612
Email: ashley.merlo@pge.com
Telephone: (925) 200-5819

C. Articles of Incorporation (Rule 2.2)

A certified copy of PG&E's Amended and Restated Articles of Incorporation, effective June 22, 2020, was filed with the Commission on July 1, 2020 with PG&E's Application 20-07-002. These articles are incorporated herein by reference.

D. Authority to Increase Rates (Rule 3.2)

This Application is not subject to Rule 3.2 because it does not seek the "authority to increase rates, or to implement changes that would result in increased rates." Nonetheless, in conducting its review under PUC section 851, the Commission should consider the extent to which SSJID's Proposed Condemnation would result in increased rates.

E. Transfers and Acquisitions (Rule 3.6)

This Application is not subject to Rule 3.6 because it does not ask the Commission to approve the Proposed Condemnation, but rather to make the determination required by PUC section 851 with respect to an involuntary taking proposed by SSJID. Because the Proposed Condemnation is a condemnation of PG&E's property, the categories of voluntary dispositions and associated data set forth in Rule 3.6 do not apply. That data, including SSJID's reasons for the condemnation and all facts purportedly warranting it, can be described more appropriately in testimony to be submitted.

V. SERVICE

This is a new Application. No service list has been established. PG&E will serve electronic and paper copies of this Application on Chief ALJ Michelle Cooke and SSJID.

VI. CONCLUSION

PG&E respectfully requests, pursuant to the July 16 Order in the Condemnation Action, that the Commission initiate a proceeding under PUC section 851 to determine whether SSJID's Proposed Condemnation would serve the public interest.

Respectfully Submitted,

By: */s/ Ashley E. Merlo*
ASHLEY E. MERLO
PACIFIC GAS AND ELECTRIC COMPANY

HENRY WEISSMANN

Munger, Tolles & Olson LLP
350 South Grand Avenue
Los Angeles, CA 90071-3426
Telephone: (213) 683-9150
Facsimile: (213) 683-5150
E-Mail: henry.weissmann@mto.com

CLIFFORD J. GLEICHER
JOSHUA S. LEVENBERG
ASHLEY E. MERLO

Pacific Gas and Electric Company
300 Lakeside Drive
Oakland, CA 94612
Telephone: (925) 200-5819
Facsimile: (510) 898-9696
E-Mail: ashley.merlo@pge.com

VERIFICATION

I, the undersigned, say:

I am an officer of PACIFIC GAS AND ELECTRIC COMPANY, a California corporation, and am authorized, pursuant to Code of Civil Procedure Section 466, paragraph 3, to make this verification for that reason. I have read the foregoing Application and I am informed and believe the matters therein to be true and, on that ground, I allege that the matters stated therein are true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed at San Francisco, California, on August 30, 2024.

Gabriel Briggs

Gabriel Briggs
Assistant Corporate Secretary, Principal
PACIFIC GAS AND ELECTRIC COMPANY

EXHIBIT A

Date: 07/16/2024 09:00 AM **Case Number:** STK-CV-UED-2016-0006638
South San Joaquin Irrigation District, A California Irrigation District et al. vs Pacific Gas and Electric Company, a California corporation et al.
Event Type: Motion **Department:** 11B

Appearances: Presiding Judge: Robert T. Waters. Private Attorney, Jennifer Riel McClure, appears for Plaintiff, South San Joaquin Irrigation District, A California Irrigation District. Private Attorney, George M. Soneff, appears for Defendant, Pacific Gas and Electric Company, a California corporation. Also attending: jmaldonado Court Clerk.

Telephonic appearance by counsel listed above.

Telephonic appearance by Doug Evertz, co-counsel for Plaintiff.

Personal appearance by Gerry Houlihan and Ann Trowbridge, co-counsel for Plaintiff.

Telephonic appearance by Edward Burg, co-counsel for Defendant.

Personal appearance by Henry Weissman, co-counsel for Defendant.

Eric Johnson, C.S.R.#9771, present as Official Reporter Pro Tempore.

Appointment of Official Reporter Pro Tempore filed.

The Court hears oral argument, as set forth on the record, requested by Plaintiff.

The Court adopts and ***MODIFIES** the tentative ruling as follows: 2016-6638 SSJID Motion for Stay 7/16/2024

Defendant Pacific Gas and Electric Company brings a Motion to Stay Action Under Primary Jurisdiction Doctrine. Having read the moving papers, the opposition papers, and reply papers, the court issues the following tentative ruling:

MOTION AND ARGUMENTS

Defendant, Pacific Gas & Electric (PGE), filed a Motion to Stay Action under the primary jurisdiction doctrine and Code of Civil Procedure §128. The premise of the motion is that the California Public Utilities Commission (the Commission) is required by Public Utilities Code §851(a) to review and, if appropriate, approve the involuntary taking of PGE system/assets by Defendant, South San Joaquin Irrigation District (SSJID) if it finds that the proposed taking would serve the public interest. See also, Public Utilities Code §854.2(b)(1)(F). Any sale or disposition that has not been approved by the Commission – even if ordered by the court - is void. Public Utilities Code §851(a). Thus, the proposed taking must be authorized by both the Commission and the Court, although the Commission's review is much narrower than the review required by the Court in the right-to-take trial.

[Under the eminent domain law, the Court holds two trials. First, there is a bench trial on plaintiff's right-to-take. Code of Civil Procedure §1260.110. If plaintiff prevails, there is a jury trial on valuation for payment. Ibid @ §1260.210. During the right-to-take trial, the Court will consider whether public interest is served by the project. The Court will also consider whether necessity requires the project; whether the project is planned or located in a manner that will be most compatible with the greatest public good and lease private injury; whether the property sought to be acquired is necessary for the project; and whether the new use is a more necessary public use. See, Code of Civil Procedure §§1240.030 and 1240.610.]

PGE basically argues that it will be judicially economic and efficient to have the public interest issue (which is the only issue before the Commission and one of several issues before the Court) resolved first with the Commission.

To that end, PGE proposes that the Court exercise its discretion, invoke the primary jurisdiction doctrine and stay this action so that resolution of the public interest issue can be presented, considered and decided by the Commission. PGE argues, "'[T]he primary jurisdiction doctrine advances two related policies: it enhances court decisionmaking and efficiency by allowing courts to take advantage of administrative expertise, and it helps assure uniform application of regulatory laws.'" MPA, page 14:10-12 citing Travelers Indem. Co. v. Lara (2022) 84 C.A.5th 1119, 1122.

PGE urges that a stay for the purpose of referring the case to the Commission will expedite this matter. For example, if the Commission does not find that the proposed taking would serve the public interest and therefore, does not approve it, the Court and the parties will be spared the expense and time of two trials. See, Public Utilities Code §1759 ["(a) No court of this state, except the Supreme Court and the court of appeal, to the extent specified in this article, shall have jurisdiction to review, reverse, correct, or annul any order or decision of the commission or to suspend or delay the execution or operation thereof, or to enjoin, restrain, or interfere with the commission in the performance of its official duties, as provided by law and the rules of court. (b) The writ of mandamus shall lie from the Supreme Court and from the court of appeal to the commission in all proper cases as prescribed in Section 1085 of the Code of Civil Procedure.]. If, on the other hand, the Commission authorizes the proposed taking, after finding that the taking serves the public interest, the Commission's decision "will facilitate this Court's review" of the issue and could "streamline the Court's workload" by resolving factual issues and/or provide a record. MPA, page 17:13-14, 22-23.

SSJID concedes that the Commission must make its review and decision under Public Utilities Code §851 (Section 851 review) in order for there to be any sale or disposition of PGE property to it. Opposition, page 7:3-4. It is the timing of the review that SSJID disputes. SSJID maintains that now is not the time; a stay in this case in order to conduct a Section 851 review before the right-to-take trial and valuation trial would be premature.

SSJID advances many reasons for its position. SSJID points to a different eminent domain action against PGE by the City and the County of San Francisco in which PGE argued that the Commission's review "should follow the Superior Court's condemnation proceeding." Opposition, page 6:24-26 citing PGE's August 23, 2022 brief to the Commission in Petition 21-07-012 [Petition of the City and County of San Francisco for a Valuation of Certain Pacific Gas & Electric Company Property Pursuant to Public Utilities Code Sections 1401-1421], page 25 (emphasis added).

SSJID further argues that there is no transaction for the Commission to review; a conditional order of condemnation is required and so, the eminent domain trials must proceed first. Opposition, page 7:12-

13. In addition, SSJID submits that in order to do a Section 851 review, the Commission must know the value of the PGE assets proposed to be condemned and that valuation won't be done/known until after the right-to-take trial. Opposition, page 7:23-9:17.

SSJID insists that staying the case in order to have the Commission do a Section 851 review first is not efficient because a Section 851 review involves a singular issue with a limited scope of review. SSJID argues that in its motion, PGE overstates the scope of a Section 851 review because PGE is conflating it with a Commission's Section 854 review which is a review of a change in the ownership/control of a public utility – not the acquisition of utility assets which is the case before the Court here. SSJID adds that in this case, several considerations relative to the Commission's Section 851 review have already been addressed; for example, 1) the Commission already found that SSJID's proposed service could raise rates for other customers in the area that PGE will continue to serve but the estimated increase is small and "does not substantially impair PGE's ability to provide adequate service at reasonable rates." (See, Resolution #-4301, December 17, 2009, page 27.); 2) by virtue of the fact that SSJID is a public entity, SSJID "may be entitled to the presumption that [it is] creditworthy and will operate the public utility system in a manner consistent with the public interest[;]" and, 3) San Joaquin County Local Agency Formation Commission (LAFCO) found that SSJID has the administrative, technical and financial ability to operate the system and further set forth the findings and conditions and made determinations required by CEQA (LAFCO Resolution No. 1327, Finding 2).

SSJID also points to procedural questions with the Section 851 review; for example, 1) who may file a Section 851 petition; and, 2) whether the Commission has jurisdiction over public entities such as SSJID. Finally, SSJID stresses that there is no legal authority to argue that the Commission's Section 851 review is a prerequisite or condition precedent to the eminent domain trials.

EVIDENTIARY RULINGS

In support of their respective arguments, both PGE and SSJID have submitted a Request for Judicial Notice. IT IS HEREBY ORDERED THAT THE REQUESTS FOR JUDICIAL NOTICE ARE BOTH GRANTED IN FULL. See, Evidence Code §452(c)[official acts of the legislative, executive and judicial departments of … any state of the United States]; §452 (h)[resolutions, Commission decisions, Bill Analysis, legal databases, state-controlled websites are not reasonably subject to dispute and/or capable of immediate and accurate determination by resort to sources or reasonably indisputable accuracy].

RULING AND ANALYSIS

After due consideration of the arguments made in the motion, the opposition, and the reply and after review of the documentary evidence submitted by both parties, IT IS HEREBY ORDERED THAT THE MOTION TO STAY IS GRANTED IN ORDER TO ALLOW A REVIEW AND DECISION BY THE CALIFORNIA PUBLIC UTILITIES COMMISSION OF THE PROPOSED TAKING PURSUANT TO PUBLIC UTILITIES CODE §851. **Any and all outstanding discovery requests with a current due date in place is to be responded to by the parties. Defendant PG&E will file a request with the Commission to initiate the Section 851 review within 45 days.**

The reasons for the Court's ruling follow.

THE PRIMARY JURISDICTION DOCTRINE

Wise v. Pacific Gas & Electric Co. (1999) 77 Cal.App.4th 287, 293, 295-295, explains the primary jurisdiction doctrine as follows:

'Article VI, section 1 of the California Constitution vests the judicial power of this state in the courts. However, article XII establishes the PUC [i.e., the Commission,] and gives it broad regulatory power over public utilities, "including the power to fix rates, establish rules, hold various types of hearings, award reparation, and establish its own procedures." (Citations.) The Constitution also gives the Legislature "[P]lenary power ... to establish the manner and scope of review of [PUC] action in a court of record ...." (Cal. Const., art. XII, § 5; San Diego Gas & Electric Company v. Superior Court (1996) 13 C.4th 893, 915.)

…

The primary jurisdiction doctrine " 'applies where a claim is originally cognizable in the courts, and comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body; in such a case the judicial process is suspended pending referral of such issues to the administrative body for its views.' " (Farmers Ins. Exchange v. Superior Court (1992) 2 Cal.4th 377, 390 [6 Cal.Rptr.2d 487, 826 P.2d 730] (Farmers Ins. Exchange), quoting United States v. Western Pac. R. Co. (1956) 352 U.S. 59, 63-64 [77 S.Ct. 161, 164-165, 1 L.Ed.2d 126].) The doctrine does not permanently foreclose judicial action, but provides the appropriate administrative agency with an opportunity to act if it chooses to do so. (Shernoff v. Superior Court (1975) 44 Cal.App.3d 406, 409 [118 Cal.Rptr. 680] (Shernoff).)'

The primary jurisdiction doctrine advances two related policies: (1) it enhances judicial efficiency by permitting courts to take advantage of administrative expertise; and (2) it helps to assure uniform application of regulatory laws. (Farmers Ins. Exchange, supra, 2 Cal.4th at p. 391.) Application of the doctrine lies within the court's discretion. (Id. at pp. 391-392.) In applying the primary jurisdiction doctrine the proper procedure is to stay the action pending resolution of the issues within the administrative body's expertise. (Id. at p. 401; South Bay Creditors Trust v. General Motors Acceptance Corp. (1999) 69 Cal.App.4th 1068, 1081 [82 Cal.Rptr.2d 1] (South Bay Creditors Trust); Cellular Plus, supra, 14 Cal.App.4th at p. 1249.)

Courts have frequently applied the primary jurisdiction doctrine and stayed actions where the issues raised in the trial court action were pending before an administrative agency. (Citations.) Administrative agency involvement may serve to resolve factual issues or provide a record for subsequent judicial review. (Citation.) In addition, a stay will conserve judicial and other resources which otherwise would be consumed in litigation of issues that may be resolved by the administrative proceeding. (Citation.)

As explained by the Wise Court, application of the primary jurisdiction doctrine lies within the trial court's discretion. Ibid.

PUBLIC UTILITIES CODE SECTION 851 MANDATES THE COMMISSION REVIEW THE PROPOSED TAKING TO DETERMINE IF PUBLIC INTEREST IS SERVED

Public Utilities Code §851 reads, in pertinent part:

'(a) A public utility, …, shall not sell, lease, assign, mortgage, or otherwise dispose of, or encumber the whole or any part of its … system, or other property necessary or useful in the performance of its duties to the public, …, without first having either secured an order from the commission authorizing it to do so for qualified transactions valued above five million dollars ($5,000,000), or for qualified transactions valued at five million dollars ($5,000,000) or less, filed an advice letter and obtained approval from the commission authorizing it to do so. … Every sale, lease, assignment, mortgage, disposition, encumbrance, merger, or consolidation made other than in accordance with the advice letter and approval from the commission authorizing it is void. ….

(b)(1) Subdivision (a) shall apply to any transaction described in subparagraph (F) of paragraph (1) of subdivision (b) of Section 854.2.

….'

PUBLIC UTILITIES CODE SECTION 854.2(b)(1)(F) PRECISELY DESCRIBES THE CIRCUMSTANCE OF THIS CASE; THAT IS, THE PROPOSED TAKING WOULD EFFECT AN “INVOLUNTARY CHANGE IN OWNERSHIP OF ASSETS FROM AN ELECTRICAL/GAS CORPORATION TO OWNERSHIP BY A PUBLIC ENTITY.”

Thus, circling back, the Legislature has mandated that the Commission review and approve the proposed taking under the provisions of Public Utilities Code Section 851 to determine whether the proposed taking serves the public interest. See, Koponen v. PG&E (2008) 165 C.A.4th 345, 353; see also, D.95-10-045,1995 Cal. PUC LEXIS 901, *18-19; D.91-05-026, 40 CPUC 2d 159,171; D.00-07-010, at 6; and D.3320, 10 CRRC 56,63.

The necessity and object of the Commission’s Section 851 review is not at issue. Both parties agree that the Commission’s Section 851 review must take place at some point in time and both parties agree that the review will determine if the proposed taking serves the public interest and both parties agree that this consideration is one of the required findings by the Court in the eminent domain action. See, MPA, page 10:18-19; see also, Opposition, page 10:18-23.

THIS COURT CANNOT RECONSIDER, MODIFY, REVERSE OR OTHERWISE INTERFERE WITH COMMISSION’S PUBLIC INTEREST DECISION

Public Utilities Code Section 1759 reads:

'(a) No court of this state, except the Supreme Court and the court of appeal, to the extent specified in this article, shall have jurisdiction to review, reverse, correct, or annul any order or decision of the commission or to suspend or delay the execution or operation thereof, or to enjoin, restrain, or interfere with the commission in the performance of its official duties, as provided by law and the rules of court.
(b) The writ of mandamus shall lie from the Supreme Court and from the court of appeal to the commission in all proper cases as prescribed in Section 1085 of the Code of Civil Procedure.'

See also, Pellandini v. Pacific Limestone Products, Inc. (1966) 245 Cal.App.2d 774, 777 [“It is well established that an order of the Public Utilities Commission is not reviewable by any court of this state except the Supreme Court. (Pub.Util.Code, s 1759; People v. Superior Court, 62 Cal.2d 515, 42 Cal.Rptr. 849, 399 P.2d 385.) The superior court, therefore, may not effectually negate a decision of the commission within the latter's jurisdiction.”].
Accordingly, the Commission’s decision in its Section 851 review as to whether the proposed taking will serve the public interest is binding on this Court.

COMMISSION’S FINDING THAT PROPOSED TAKING SERVES THE PUBLIC INTEREST IS NECESSARY TO EFFECTUATE ANY TRANSFER OF PGE ASSETS TO SSJID

Reading Public Utilities Code Section 851 and Section 1759 together, in the context of this case, it is crystal clear that the proposed taking must be approved by the Commission in its Section 851 public interest review because any transfer without the Commission's approval is void. PUC §851(a).

EFFICIENCY AND ECONOMY IS SERVED BY STAYING ACTION TO ALLOW THE COMMISSION'S SECTION 851 REVIEW TO PROCEED FIRST

Regardless of the Commission's findings in its Section 851 review, judicial efficiency and economy will be served by staying this action in order to allow the Commission's Section 851 review to proceed first. As stated above, the Commission's approval is critical in order for the proposed taking to proceed; a finding that the proposed taking does not serve the public interest is fatal to the project.

If the Commission found that the proposed taking does not serve the public interest and the Commission does not approve the project, the decision would obviate the need for any trial in the eminent domain action.

By the same token, if the Commission found that the proposed taking serves the public interest and approves the project, the Commission's decision on the public interest factor is conclusive as to that factor and may assist the Court in its review of the remaining factors in the eminent domain action. The Commission's decision would certainly narrow the issues to be litigated at the right-to-take trial.

SSJID'S OPPOSITION ARGUMENTS ARE NOT COMPELLING TO OVERCOME THE JUDICIAL EFFICIENCY AND ECONOMY THAT WILL BE ACHIEVED BY GRANTING THE MOTION FOR STAY.

As noted previously, SSJID submits several arguments in opposition to the motion to stay. The Court does not find SSJID's arguments to be persuasive or compelling enough to overcome the judicial efficiency and economy that can be achieved by granting the motion.

SSJID references an unrelated eminent domain action against PGE by the City and the County of San Francisco in which PGE argued that the Commission's Section 851 review "should follow the Superior Court's condemnation proceeding." Opposition, page 6:24-26. The fact that PGE made such an argument in a different case is irrelevant. PGE's argument in the San Francisco case is not a concession; it is not an admission. It is merely an argument and notably, the issues in the San Francisco case differ considerably from those to be determined in this case. [The Section 851 petition filed by the City and County of San Francisco involved valuation issues; the petition was filed pursuant to PUC §§1401-1421.]

SSJID suggests that in order for the Commission to do its Section 851 review, a conditional order of condemnation is required and so, the eminent domain trials must proceed first. See, Opposition, page 7:12-13. The Court's review of Public Utilities Code Section 851 undermines the argument. The statute specifically precludes any transaction that transfers a public utility asset until the Section 851 review is done and the proposed transaction is approved. See, PUC Section 851(a) ["A public utility … shall not sell, … or otherwise dispose of … any part of its … system … without FIRST …secur[ing] an order from the commission authorizing it to do so …. Every sale [or] … disposition… made … [without] the commission authorizing it is void." (Emphasis added)].

Moreover, Public Utilities Code Section 851 specifically contemplates eminent domain scenarios for Section 851 review when it references Section 854.2(b)(1)(F) ["[a] … involuntary change in ownership of assets from an electrical or gas corporation to ownership by a public entity"]. Notably, nowhere in the statute did the Legislature state that a conditional order of condemnation is required before the Section 851 review.

Next, SSJID submits that in order to do a Section 851 review, the Commission must know the value of the PGE assets proposed to be condemned and that valuation of the PGE assets proposed to be condemned won't be done/known until after the right-to-take trial. Opposition, page 7:23-9:17. The Commission knows what information is necessary and what information is not necessary for its Section 851 review. If values are critical to the Commission's review, as SSJID urges, the Commission can dismiss the petition as premature, or alternatively, it can issue a conditional order based on the information before it. As the parties are well-aware, this case was filed in 2016 and is currently set for trial in less than a year. Thus, it is likely that all key information is available and/or known regarding valuations, and more. All relevant information can be raised and argued to the Commission. As PGE urges, this challenge is properly directed to the Commission and not to this Court.

In a similar vein, SSJID characterizes the Commission's Section 851 review as involving a singular issue with a limited scope of review. SSJID argues that PGE has overstated the scope of a Section 851 review in order to make its judicial efficiency and economy argument. Regardless of either parties' arguments, the Commission will know the appropriate scope of its review and apply it. Whether singular or broad, it is undisputed that the Commission's Section 851 review and decision is mandated and judicial economy and efficiency favors having the Section 851 review occur before the eminent domain trial in this case.

SSJID adds that in this case, several considerations relative to the Commission's Section 851 review have already been addressed. This circumstance does not persuade the Court that the Section 851 review should follow the eminent domain trial[s]; in fact, if the review is simpler because several relevant considerations have already been addressed and decided, then all the more reason to complete the consideration and have the benefit of the Commission's Section 851 decision before moving forward with the eminent domain action.

SSJID's next argument seems to be that there are procedural inconsistencies as to who may file with the Commission and whether the Commission has jurisdiction over SSJID, a public entity. Neither of these arguments excuse the Commission's mandated Section 851 review and decision. Moreover, PGE has addressed those concerns in its Reply. Typically, a Section 851 review is initiated by a Section 851 petition filed by a public utility. PGE has represented that "if the Court grants the motion, PGE will formally ask the Commission to review the proposed taking." Reply, page 4:12-13. With regard to the Commission's jurisdiction over SSJID, it behooves SSJID to participate in the Section 851 hearing and to submit to the jurisdiction of the Commission because if it elects not to do so, the Commission will not have the benefit of SSJID's arguments and persuasion regarding the public interest served by the proposed taking and without a finding that there is a public interest supporting the project and approval of the proposed taking by the Commission, the project dies. The Court sees no procedural conundrum. The Court, however, notes that SSJID correctly argues that Section 851 review is not a prerequisite to an eminent domain trial.

For all these reasons, IT IS HEREBY ORDERED THAT THE MOTION TO STAY IS GRANTED IN ORDER TO ALLOW A REVIEW AND DECISION BY THE CALIFORNIA PUBLIC UTILITIES COMMISSION OF THE PROPOSED TAKING PURSUANT TO PUBLIC UTILITIES CODE §85. **Any and all outstanding discovery requests with a current due date in place is to be responded to by the parties. Defendant PG&E will file a request with the Commission to initiate the Section 851 review within 45 days.**

Defendant PGE to prepare order for court signature. This matter is set for a status hearing for November 13, 2024, 9:30 am, Dept. 11B. The court will address the status of the scheduled trial date at the November 13, 2024, 9:30 am, Dept. 11B status hearing. The court does note that it will work with the parties to reschedule the trial date if necessary due to the granted stay. The court requests that the parties file a joint statement regarding the status of the Public Utilities §851 review one week prior to the November 13, 2024 status hearing. The parties may attend the November 13, 2024 status hearing remotely via the Department 11B Dedicated Bridge Line. To attend the hearing remotely dial (209) 992-5590 and follow the prompts entering Bridge No. 6941 and Passcode 5564. If either party request a hearing to argue this tentative ruling, the parties may attend the argument remotely via the Department 11B Dedicated Bridge Line.

WATERS
7/15/2024

Motion GRANTED.

Defendant shall prepare a formal order consistent with the orders herein.

Status Hearing re: Section 851 Review is scheduled at 8:30 AM on November 13, 2024 in Department 11B.

The Court Trial set at 1:30 PM on June 23, 2025 remains as previously ordered.