

Decision **DRAFT DECISION OF ALJ PRESTIDGE** (Mailed 1/14/2005)

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

Application of Pacific Gas and Electric Company (U 39 M), a California corporation, and Elena Canepa, as Trustee of the Elena Canepa Living Trust Dated July 29, 1989 for an Order authorizing the Sale and Conveyance of a Certain Parcel of Land in Contra Costa County Pursuant to Public Utilities Code Section 851.

Application 04-06-021  
(Filed June 8, 2004)

**OPINION GRANTING APPROVAL UNDER PUBLIC UTILITIES CODE SECTION 851 FOR CONVEYANCE OF A CERTAIN PARCEL OF LAND IN CONTRA COSTA COUNTY TO ELENA CANEPA AS TRUSTEE FOR THE ELENA CANEPA LIVING TRUST**

**I. Summary**

This decision grants the application of Pacific Gas and Electric Company (PG&E) for Commission authorization under Pub. Util. Code § 851<sup>1</sup> for PG&E to convey a parcel of land located in Contra Costa County to Elena Canepa as Trustee for the Elena Canepa Living Trust (Canepa).<sup>2 3</sup> We defer consideration of

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

<sup>2</sup> The application was filed on June 8, 2004. In Resolution ALJ 176-3136, dated July 8, 2004, we preliminarily categorized this proceeding as ratesetting and preliminarily determined that hearings are unnecessary.

the allocation of the gain on sale between ratepayers and shareholders to a future Commission rulemaking.

## II. Background

### A. The Proposed Transaction

PG&E proposes to sell a parcel of land<sup>4</sup> located in the City of Oakley, Contra Costa County to Canepa for the price of \$46,000. The size of the parcel is approximately 2.45 acres.

PG&E originally acquired the property in 1958 as the site for an electric transmission line corridor for the construction of 110 kV electric transmission lines extending from PG&E's Vaca Dixon-Contra Costa Transmission Line to the Atchison Topeka & Santa Fe Property. PG&E states that since it has reserved easements which permit it to use, access, maintain, and protect its transmission facilities, it no longer needs to own the property in fee.

PG&E states that the sale of the property will benefit both shareholders and ratepayers. According to PG&E, ratepayers will benefit from the sale because they will no longer need to pay maintenance costs for the property and the property will be removed from rate base. PG&E also states that shareholders will benefit from the sale because they will receive the sales proceeds (gain on sale) if this revenue is allocated according to Federal Energy Regulatory Commission (FERC) ratemaking principles.

---

<sup>3</sup> On July 20, 2004, the Commission Office of Ratepayer Advocates (ORA) filed a protest, which addressed only the ratemaking aspects of the application. PG&E and ORA agreed that no hearing was necessary in this case.

<sup>4</sup> This parcel of land has been identified as Contra Costa County Assessor's Parcel Nos. 037-100-08 and 037-110-09 and State Board of Equalization SBE No. 135-07-57-3.

## **B. The Proposed Agreements**

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

In the purchase and sale agreement, PG&E agreed to sell the property to Canepa for the price of \$46,000. PG&E is entitled to reserve easements for all existing or proposed utility facilities located or to be located on or under the property within 30 days of the closing date. Canepa may not assign the agreement without the prior written consent of PG&E and the satisfaction of certain other conditions imposed by PG&E. The agreement also addresses escrow instructions and other items typically included in property sales agreements.

The agreement states that PG&E is selling the property to Canepa on an “as is” basis and that PG&E has made no warranties or representations regarding the condition of the property, including the presence or absence of electromagnetic fields (EMFs) or hazardous substances at the site, the condition of the groundwater, or compliance with legal requirements. However, PG&E acknowledged in the agreement that at some point, PG&E may have handled, treated, stored and/or disposed of hazardous substances on the property. The agreement also discloses that the property is located within a ½ mile of a known contaminated site, other than a leaking storage tank.<sup>5</sup> The agreement advises Canepa to independently investigate all aspects of the condition of the property, including the presence of EMFs and hazardous substances at the site. Under the

---

<sup>5</sup> The property is located within a ½ mile of the Cypress Square Shopping Center in Oakley, California. According to Exhibit G to the agreement, the shopping center is a spill or leak site and is the subject of a remedial investigation.

agreement, Canepa had 60 days after the effective date of the agreement in which to inspect the condition of the property.

The agreement also notes that although PG&E is a debtor in possession in a Chapter 11 reorganization proceeding in the United States Bankruptcy Court, the Bankruptcy Court has issued an order that authorizes PG&E to sell, lease and license certain real and personal property. Therefore, PG&E may sell this property to Canepa without seeking further Bankruptcy Court approval.

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

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

Canepa has agreed to release, exonerate, and discharge PG&E from any claims or liability that may result from the presence or suspected presence, generation, processing, use, management, treatment, storage, disposal, remediation, transportation, recycling, emission, release, or threatened emission or release of any hazardous substances or EMFs on, about, adjacent to, or affecting the property, whether in the past, present, or future.

Canepa has also agreed to indemnify, defend and hold PG&E harmless from liability based on violation of any environmental requirements, or the presence, disposal, dumping, escape, seepage, leakage, spillage, discharge,

emission, pumping, emptying, injecting, leaching, pouring, release or threatened release of any hazardous substance on, under, from or affecting the property, including remediation of any hazardous substances and liability for personal injury (including death) or property damage.

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

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

### **C. Environmental Review**

The California Environmental Quality Act (CEQA, Public Resources Code Section 21000 et seq.) applies to discretionary projects to be carried out or approved by public agencies. A basic purpose of CEQA is to “inform governmental decision-makers and the public about the potential significant environmental effects of the proposed activities.” (Title 14 of the California Code of Regulations, hereafter CEQA Guidelines, Section 15002.)

---

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

Section 1542. General Release

A general release does not extend to claims which a creditor does not know or suspect to exist in his favor at the time of executing the release, which if known by him must have materially affected his settlement with the debtor.

Since the Commission must issue a discretionary decision (i.e., grant Section 851 authority) without which the proposed activity will not proceed, the Commission must act as either a Lead or Responsible Agency under CEQA. The Lead Agency is the public agency with the greatest responsibility for supervising or approving the project as a whole (CEQA Guidelines Section 15051(b)). The Commission is the Lead Agency for this project under CEQA. CEQA requires that the Commission consider the environmental consequences of a project that is subject to its discretionary approval.

PG&E states in its Application that the property to be sold to Canepa is no longer necessary or useful for the company's utility operations, provided that PG&E retains easements to use, access, and protect its transmission facilities. In this application, PG&E requests that the Commission find that there will be no significant environmental impact associated with the sale and transfer of these parcels to Canepa. In support of its request, PG&E has provided in its application a description of the property including its current condition and history; a Purchase and Sale Agreement, including Exhibits A-H; a Grant Deed; and a map identifying the property within its geographical context.

PG&E indicates in its Application that Canepa intends to install an underground water line by means of a trench and subsequent backfill of topsoil. PG&E indicates that the surface, described as mostly dirt without vegetation, will be restored. PG&E further states in its Application that the installation of the water line will be the only physical change contemplated for the property after the transfer is complete. PG&E requests a categorical exemption from CEQA pursuant to CEQA Guidelines Section 15304(f), which provides an exemption for "minor public or private alterations in the condition of land, water, and/or vegetation ..." and specifically for "minor trenching and backfilling where the

surface is restored.” PG&E states in its Application that the categorical exemption clearly applies, and there is no possibility of a significant effect on the environment.

In order to confirm PG&E’s claim that an exemption would be appropriate in this case, the Environmental Review staff of the Commission’s Energy Division issued a data request to PG&E seeking further information on the nature of the planned underground water line. PG&E responded to the staff data request on October 11, 2004. The Company’s response clearly demonstrates that the water line will in fact be a conveyance for rainwater in order to drain storm water from one part of the property and deposit it into a storm drain that feeds into the City of Oakley’s storm drainage system. The storm drain water line will not be a source of new water supply for any further development on the property, will be buried to a depth of approximately three feet, and will be approximately 663 feet in length.

We find that the transfer and sale of these parcels as described by PG&E in its Application and subsequent data responses would have no significant impact on the environment and that an exemption pursuant to CEQA Guidelines Section 15304(f) is appropriate.

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

According to the application, PG&E ‘s net proceeds from the sale after taxes would be \$46,000. The original cost and net book value of the property is \$9,129. The application states that PG&E will receive \$38,514 as the pre-tax gain on sale and an anticipated \$22,821 as the after-tax gain on sale.

The property is currently in PG&E's transmission asset ratebase and is classified as a transmission asset.<sup>7</sup>

---

<sup>7</sup> Joint Case Management Statement and Submission of Stipulated Facts (Stip.) at p. 3.

PG&E claims that under FERC ratemaking principles, the gain on sale should be allocated to shareholders, because the land is classified as transmission property. PG&E further argues that since FERC has jurisdiction over ratemaking issues related to transmission property, the Commission does not have jurisdiction to determine the ratemaking treatment of the gain on sale in this case, except to apply FERC principles.

ORA argues that FERC ratemaking principles do not apply in this case because the property being sold to Canepa is not a transmission asset. ORA reasons that the sale of the property divides it into two separate property interests: (1) a transmission-related easement, and (2) the remaining fee interest in the property, which will no longer be used for transmission-related purposes. ORA also requests that if the Commission finds that the property being sold to Canepa is a transmission-related asset, the Commission's decision on allocation of the gain on sale between ratepayers and shareholders be deferred to the gain on sale rulemaking, Rulemaking (R.) 04-09-003.

Since the property is being used in connection with PG&E transmission facilities, under the FERC Uniform System of Accounts (USOA), the property is a transmission asset.<sup>8</sup> ORA has cited no authority which holds the sale of transmission property, with a reservation of an easement for utility purposes, converts transmission property to non-transmission property for ratemaking purposes.<sup>9</sup>

---

<sup>8</sup> 18 C.F.R. Section 350; see also D.02-01-058.

<sup>9</sup> United States v. Craft, 535 U. S. 274 (2002), cited by ORA, stands only for the proposition that property ownership is a collection of different rights, such as the right to sell the property and the right to exclude others from the property.

However, we agree with ORA that the issue of the Commission's jurisdiction to determine ratemaking issues related to transmission assets and the allocation of the gain on sale in this case should be deferred to the gain on sale rulemaking, R.04-09-003. We believe it is more appropriate to consider these important policy issues in a broader proceeding that offers the opportunity for participation by a greater number of affected parties. In the meantime, we direct PG&E to track this revenue in its Real Property Gain/Loss on Sale Memorandum Account.

### **E. Discussion**

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

The primary question for the Commission in Section 851 proceedings is whether the proposed transaction is in the public interest. In reviewing a Section 851 application, the Commission may "take such action, as a condition to the transfer, as the public interest may require."<sup>10</sup> The public interest is served when utility property is used for other productive purposes without interfering with the utility's operation or affecting service to utility customers.<sup>11</sup>

We find that the proposed sale of PG&E property to Canepa is in the public interest. PG&E no longer needs to own the property for utility purposes and has reserved easements as necessary to carry out its operations and to serve

---

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

<sup>11</sup> D.00-07-010, at p. 6.

its customers and the public. Canepa will be able to use the property for a productive purpose by installing the underground water line. Although PG&E has acknowledged that hazardous substances and EMFs may exist at or around the property, PG&E is adequately protected from any potential liability by the terms of the purchase and sale agreement and the release and indemnity agreement. Our CEQA review of the proposed transaction indicates that the sale of the property to Canepa will not have significant adverse effects on the environment. In addition, the proposed transaction will benefit ratepayers because they will no longer need to pay for maintenance and taxes on the property through rates. For all of the foregoing reasons, we grant the application of PG&E pursuant to Section 851, effective immediately.

### **III. Categorization and Need for Hearings**

Based on our review of this application, we alter the preliminary determination as to the need for a hearing made in Resolution ALJ 176-3136, dated July 8, 2004, because no hearing was necessary in this case.

The draft decision of the ALJ in this matter was mailed to the parties in accordance with Pub. Util. Code § 311(g)(1) and Rule 77.7 of the Rules of Practice and Procedure. Comments were filed on \_\_\_\_\_, and reply comments were filed on \_\_\_\_\_.

### **Assignment of Proceeding**

Susan P. Kennedy is the Assigned Commissioner and Myra J. Prestidge is the assigned Administrative Law Judge in this proceeding.

### **Findings of Fact**

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

2. The property is in PG&E's transmission ratebase and is classified as a transmission asset for ratemaking purposes.

3. The Commission is the Lead Agency for this project under CEQA.

4. The only planned physical change to the property subsequent to the sale involves the installation of an underground water line.

5. Commission staff have confirmed that the proposed water line is in fact a storm drain designed to convey rainwater from the property to the storm drain system of the City of Oakley.

6. The proposed sale is in the public interest because PG&E no longer needs to own the land in fee for utility purposes and Canepa will be able to productively use of the land by installing the underground water line.

7. The proposed sale is also in the public interest because after conveyance of the land to Canepa, ratepayers will no longer have to pay for the costs of maintenance and taxes for the property.

### **Conclusions of Law**

1. The proposed sale and transfer of the property to Canepa qualifies for a categorical exemption from the California Environmental Quality Act pursuant to CEQA Guidelines Section 15304(f) and no further environmental review is required.

2. The property is a transmission asset because it is being used in connection with PG&E transmission facilities.

3. Consistent with § 851, PG&E's sale of the property to Canepa is in the public interest and should be authorized.

4. The question of Commission jurisdiction to determine the ratemaking treatment for the sale of transmission assets and our determination regarding allocation of the gain on sale between ratepayers and shareholders should be

deferred to the Commission gain on sale rulemaking, R.04-09-003 so that these issues can be decided on a broad, policy basis with the opportunity for participation by a greater number of potentially affected parties.

5. This decision should be effective today in order to allow the property to be conveyed to Canepa expeditiously.

## **O R D E R**

### **IT IS ORDERED** that:

1. Pacific Gas and Electric Company (PG&E) is authorized to sell the property, as described in Exhibit B and C to the application, to Elena Canepa, as Trustee of the Elena Canepa Living Trust dated July 29, 1989, pursuant to Pub. Util. Code § 851.

2. PG&E shall record and track the revenue received from the sale of this property in its Real Property Gain/Loss on Sale Memorandum Account, pending our resolution of issues related to allocation of the gain on sale between shareholders and ratepayers in Rulemaking 04-09-003.

3. This proceeding is closed.

This order is effective today.

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