STATE OF CALIFORNIA ARNOLD SCHWARZENEGGER, *Governor*

PUBLIC UTILITIES COMMISSION
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3298

March 9, 2004 **Agenda ID #3326**

TO: PARTIES OF RECORD IN APPLICATION 03-10-044

Enclosed is the draft decision of Administrative Law Judge Allen. The decision will not appear on the Commission's agenda for at least 30 days after the date it is mailed. The Commission may act then, or it may postpone action until later.

When the Commission acts on the draft decision, it may adopt all or part of it as written, amend or modify it, or set it aside and prepare its own decision. Only when the Commission acts does the decision become binding on the parties.

Parties to the proceeding may file comments on the draft decision as provided in Article 19 of the Commission's "Rules of Practice and Procedure." These rules are accessible on the Commission's website at http://www.cpuc.ca.gov. Pursuant to Rule 77.3 opening comments shall not exceed 15 pages. Finally, comments must be served separately on the ALJ and the assigned Commissioner, and for that purpose I suggest hand delivery, overnight mail, or other expeditious method of service.

/s/ Angela K. Minkin
Angela K. Minkin, Chief
Administrative Law Judge

ANG: avs

Decision **DRAFT DECISION OF ALJ ALLEN (Mailed 3/9/2004)**

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application of Pacific Gas and Electric Company (U 39 M) for Authorization to Sell its Kern Facility Pursuant to Public Utilities Code Section 851 and Executive Order D-44-01	Application 03-10-044 (Filed October 22, 2003)

ORDER REGARDING PUBLIC UTILITIES CODE SECTION 377

The proposed sale of Pacific Gas & Electric Company's Kern Facility to North American Power Group is barred by Public Utilities Code Section 377 (§ 377). The application is denied.

Background Chronology

May 15, 2000 - Pacific Gas & Electric Company (PG&E) filed an application (Application 00-05-031) to establish a market value for its Kern Facility, a non-operational gas fired power plant located in Bakersfield, California.

December 13, 2000 - PG&E filed a supplemental application, identifying North American Power Group (NAPG) as the winning bidder of an auction process, and requesting Commission approval of the sale of the Kern Facility to NAPG.

January 18, 2001 - Assembly Bill 6 (ABX1 6), amending § 377, became effective, establishing a moratorium on the divestiture of certain utility electric generation facilities.

April 3, 2001 - The Commission issued Decision (D.) 01-04-004, which held that the proposed sale of the Kern Facility to NAPG was barred by the amended

§ 377, denied PG&E's request to sell the facility, and ordered PG&E to restart the Kern Facility.

July 31, 2001 - Governor Gray Davis signed Executive Order D-44-01, which conditionally suspended § 377 to the extent it would prohibit the transfer of the Kern Facility to NAPG.

October 2, 2001 - The Commission issued D.01-10-002, which denied rehearing of D.01-04-004, closed the previous proceeding, and directed PG&E to file a new application in compliance with the requirements of the Executive Order.

October 22, 2003 - PG&E filed the present application requesting Commission approval of the sale of the Kern Facility to NAPG, asserting that it was in compliance with the requirements of the Executive Order.

November 13, 2003 - Executive Order D-44-01 ceased to be in effect.

The Kern Facility

According to PG&E's application, the Kern Facility is located in Bakersfield, California, and is the site of a power plant that was built between 1945 and 1950, and operated by PG&E from 1948 until 1985. The plant consists of two units, totaling 180 Megawatts, which burned natural gas and fuel oil. In 1985 the plant was placed in cold stand-by, and in 1994 the generation production assets were retired from PG&E's books. The approximately 147 acres of the land associated with the facility remain part of PG&E's generation rate base. PG&E proposes to retain 31 acres for transmission and distribution purposes. The portion of the Kern Facility at issue here consists of the power plant and related structures and approximately 116 acres of land, which PG&E seeks to sell to NAPG.

The Parties

PG&E - PG&E is the current owner of the Kern Facility, and seeks permission to sell it to NAPG. PG&E argues that the sale is not barred by § 377, and that the sale is consistent with the public interest under Pub. Util. Code § 851 (§ 851). PG&E has withdrawn its argument that Executive Order D-44-01 provides a basis for the sale of the Kern Facility via its suspension of § 377.

NAPG - NAPG was the winning bidder in the auction process conducted by PG&E, and seeks to purchase the Kern Facility. NAPG's arguments are generally similar to those of PG&E.

City of Bakersfield - Bakersfield has protested the application, arguing that the sale of the Kern Facility is barred by § 377, and that the sale is adverse to the public interest under § 851. Bakersfield requests that the Commission deny PG&E's application to sell the Kern Facility to NAPG.[1]

ORA - The Commission's Office of Ratepayer Advocates (ORA) filed a protest to the application questioning the proposed sale price of the Kern Facility, but not opposing the sale itself.

Procedural Chronology

October 22, 2003 - PG&E filed its application.

November 10, 2003 - The City of Bakersfield filed a protest to the application.

November 13, 2003 - Bakersfield filed a supplemental statement and exhibit in support of its protest.

November 24, 2003 - ORA filed a protest to the application.

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[1] Bakersfield also presented arguments (disputed by PG&E and NAPG) relating to the California Environmental Quality Act (CEQA).

November 25, 2003 - The assigned Administrative Law Judge (ALJ) issued a ruling requesting additional information from PG&E.

December 4, 2003 - NAPG filed a motion to intervene and for leave to respond to the protest of the City of Bakersfield.

December 15, 2003 - In response to the ALJ ruling, PG&E submitted a supplement to its application containing additional information.

December 17, 2003 - Bakersfield filed a response to NAPG's motion, opposing NAPG's request to respond to Bakersfield's protest.

December 23, 2003 - The assigned ALJ issued a ruling granting NAPG's motion to intervene and to respond to Bakersfield's protest, and identifying topics to be discussed at the previously scheduled pre-hearing conference.

January 8, 2004 - At the pre-hearing conference, the parties and ALJ discussed the process for adjudicating the application. Consistent with the consensus of the parties, the ALJ ruled that the Commission would first address and resolve the issue of whether the sale of the Kern Facility is permissible under § 377, prior to addressing (as needed) the other issues raised by the parties.

January 26, 2004 - The scoping memo for this proceeding was issued.

January 27, 2004 - PG&E, NAPG, and Bakersfield filed and served briefs addressing § 377.

The Statute

§ 377 reads:

> The commission shall continue to regulate the facilities for the generation of electricity owned by any public utility prior to January 1, 1997, that are subject to commission regulation until the owner of those facilities has applied to the commission to dispose of those facilities and has been authorized by the commission under § 851 to undertake that disposal. Notwithstanding any other provision of law, no facility for the generation of electricity owned by a public

> utility may be disposed of prior to January 1, 2006. The commission shall ensure that public utility generation assets remain dedicated to service for the benefit of California ratepayers.

The Cases

There are a number of relevant Commission decisions interpreting § 377. The first, both in time and in impact, is D.01-04-004. In D.01-04-004, this Commission determined that the sale of the Kern Facility was barred by § 377. The Commission held that under the clear wording of the statute, the Kern Facility was both a "generating facility owned by a public utility" and a "public utility generation asset." (*Id.* p. 3.) Accordingly, the Commission determined that it was precluded by § 377 from allowing PG&E to sell the Kern Facility.

In D.01-10-002, the Commission addressed PG&E's and NAPG's applications for rehearing of D.01-04-004, which alleged (among other things) that the Commission erred in its application of § 377. The Commission found that there was no error in its prior application of § 377, and based on both the statutory language and the legislative history, confirmed that sale of the Kern Facility was barred by § 377.

In D.03-06-028, the Commission held that § 377 did not bar the sale of three properties owned by PG&E, two of which had held power plants that had been removed in the 1990s. The Commission determined that since the land "is not and will not potentially be used directly or indirectly for electric generation

purposes," the legislature did not intend to bar sales of this type under § 377. (*Id.* pp. 6-7.)[2]

In D.03-07-031, the Commission held that § 377 did not bar the sale of a fuel oil pipeline and related facilities owned by Southern California Edison (SCE) that had at one time served electric power plants, but that subsequently had been disconnected from those power plants. The Commission concluded that the pipeline facilities were no longer used directly or indirectly for electric generation purposes.

Discussion

This Commission has twice expressly stated its determination that Pub. § 377 bars the sale of the Kern Facility. First in D.01-04-004 and then in D.01-10-002, we held that the express statutory language of § 377 as well as the legislative intent behind § 377 precluded the sale of the Kern Facility prior to January 1, 2006. In those decisions we considered and rejected the arguments of PG&E and NAPG that the non-operational status of the Kern Facility excluded it from the ambit of § 377.

At the time of our previous decisions, there was no factual dispute about the nature of the Kern Facility. As we stated, it has been owned and operated by PG&E as a generation facility, and it is a public utility-owned power plant. (*See*, D.01-10-002, pp. 8-9.) There continues to be no significant dispute about the past history and present status of the Kern Facility.

[2] D.03-06-029 applied the same analysis, but is slightly less on point, as the property at issue never held a power plant.

Arguments Based on Commission Decisions

While the facts have not changed since the previous Commission decisions applying § 377 to the proposed sale of the Kern Facility, PG&E and NAPG argue that the relevant law, in the form of Commission decisions, has changed. PG&E and NAPG argue that D.03-06-028, D.03-06-029 and D.03-07-031 indicate a refinement of the Commission's interpretation of § 377. According to PG&E and NAPG, under the Commission's new and improved interpretation of § 377, the sale of the Kern Facility is no longer barred. We will accordingly examine the impact of those three decisions on the applicability of § 377 to the Kern facility.[3]

D.03-06-028 addressed three properties. The Rodeo property was 23.8 acres, and had been the site of a power plant that was physically removed from the site in 1997. PG&E sought permission to sell 22 acres of the property to Tosco Oil Company, whose refinery surrounded the property. The Martinez property was 11 acres, and also had held a power plant that was removed from the site in 1996. PG&E sought permission to sell approximately seven acres to Equilon Enterprises, whose refinery surrounded the property. Lastly, the Antioch site was 12 acres, and had never been the site of a power plant, but had been leased out for recreational vehicle storage. The lessee of the property submitted a bid to purchase the property.

The Commission granted PG&E's application to sell the three properties, finding that the legislature did not intend for § 377 to prohibit sales of

[3] PG&E and NAPG also repeat arguments they made previously, and which were expressly considered and rejected in D.01-04-004 and D.01-10-002. We agree with Bakersfield's characterization of these arguments as a collateral attack on prior Commission decisions, and we decline to provide a third bite at the apple.

the type of properties at issue. (*Id.* pp. 6-8.) The Commission did in fact engage in a more detailed analysis of § 377 in D.03-06-028, and enunciated a refined standard that the Commission applied to the properties.[4]

Specifically, the Commission stated that it needed to consider "[T]he nature, history, past or future intended use of the asset, including the nexus between it and future generation." (*Id.*, p. 6.) The conclusion reached by the Commission was that the sale was not barred because: "The land is not and will not potentially be, used directly or indirectly for electric generation purposes." (*Id.*)

PG&E and NAPG ask that we apply these newly enunciated criteria to the Kern Facility. Before we do so, we note that D.03-06-028 specifically discusses the Kern Facility, and distinguishes it from the three properties at issue in that case. In D.03-06-028, the Commission cited to D.01-04-004, and noted that the Kern Facility differed from the Rodeo, Martinez, and Antioch properties, as the Kern facility had the ability to sell power to ratepayers (at potentially unreasonable market prices), while the three properties at issue did not have the ability to sell power to ratepayers. (D.03-06-028, p. 7.) The Commission relied upon D.01-04-004 in deciding D.03-06-028, indicating continued support for the outcome of D.01-04-004. In short, even under the standard adopted in D.03-06-028, the Commission still believed that the sale of the Kern Facility would be barred.

PG&E and NAPG are essentially arguing that the Commission was correct in adopting the criteria contained in D.03-06-028, but that the

[4] The analysis and standard used in D.03-06-029 are identical to those used in D.03-06-028.

Commission erred in D.03-06-028 in its discussion of how those criteria would apply to the Kern Facility. We will accordingly reexamine our application of D.03-06-028's criteria to the Kern Facility.

NAPG argues that the Commission should find that the Kern Facility is no longer used directly or indirectly for the generation of electricity, and accordingly its sale is not barred by § 377. (NAPG Brief, p. 13.) However, by focusing exclusively on the current usage of the Kern Facility, NAPG misstates the standard enunciated in D.03-06-028. As Bakersfield correctly points out, D.03-06-028 expressly states that the Commission must examine the future intended use of the asset in question, including the nexus between the asset and future generation. (Bakersfield brief, p. 8, citing D.03-06-028, p.6.)

In the present case, there is a clear nexus between the Kern Facility and future generation. NAPG is expressly planning to use the Kern Facility as the site of a new power plant. (*See, e.g.* Declaration of Michael J. Ruffatto, p. 2, attached as Exhibit A to the Response of NAPG to the Protest of the City of Bakersfield.) Also, while NAPG is not currently proposing to restart the existing gas-fired Kern power plant, they have not unequivocally disavowed that possibility, and they could in fact restart the plant.[5] Either way, NAPG intends to operate the Kern Facility as a power plant.

Applying D.03-06-028 here, the bottom line question is whether the Kern Facility will potentially be used directly or indirectly for electric generation purposes. The answer is clearly yes. The Kern Facility has the potential to be

[5] NAPG consistently uses conditional language in describing its plans for the Kern Facility (*e.g.,* "initial plans"), and has not proposed to dismantle the existing power plant.

used directly for generation.[6] The primary purpose of the application is so that NAPG can use the Kern Facility for generation purposes. Bakersfield is correct that D.03-06-028 does not alter or affect the prohibition on transfer of the Kern Facility previously first described in D.01-04-004. (Bakersfield Brief, p.7.)

Because D.03-06-029 uses the same analysis and criteria as D.03-06-028, it likewise does not alter or affect the prohibition on transfer of the Kern Facility described in D.01-04-004.

D.03-07-031, the other case cited by PG&E and NAPG as changing the criteria used by the Commission in applying § 377, addressed the proposed sale of SCE's fuel oil pipeline, oil storage tanks, and oil pumping and heating stations (oil pipeline facilities). The oil pipeline facilities were used to supply fuel oil to SCE's Los Angeles-area power plants. SCE subsequently sold its power plants, but continued to use the oil pipeline facilities to provide backup fuel oil services to the new operators until 1999, when the California Independent System Operator (ISO) determined that backup fuel oil services were no longer required. The connections between the power plants and the oil pipeline facilities were subsequently dismantled.

The Commission found that the sale of the oil pipeline facilities was not barred by § 377. The Commission held that, while § 377 applied not just to power plants, but to a broader range of generation assets (including the oil pipeline facilities at issue), the oil pipeline facilities were no longer used directly or indirectly for electric generation purposes. (D.03-07-031, pp.11-12.)

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[6] What constitutes an indirect use is not defined in D.03-06-028, but we need not address that issue here, as we find that the Kern Facility has the potential to be used directly for generation.

One key factor in the Commission's determination was the ISO's conclusion that fuel oil capability was no longer required for the power plants served by the oil pipeline facilities. (*Id.*, p.11.) As a result of this conclusion, the connections between the oil pipeline facilities and the power plants were dismantled, and the fuel oil inventory was sold. Between the clear statement of policy and practice of the ISO, and the physical reality of their disconnection, the Commission could reasonably conclude that the oil pipeline facilities no longer had the potential to be used for electric generation.

In the present case, no state energy authority such as the ISO or this Commission has stated that the Kern Facility should not be used for generation purposes. In fact, this Commission in D.01-04-004 ordered PG&E to restore the Kern Facility to operational status.[7] Furthermore, there is no evidence that the interconnections necessary to operate the Kern Facility have been irreversibly dismantled.[8]

Accordingly, applying these criteria used by the Commission in D.03-07-031 to the present facts actually confirms the conclusion that the sale of the Kern Facility is barred by § 377.

Another criterion considered by the Commission in D.03-07-031 was the fact that the Commission itself had affirmatively removed the oil pipeline facilities from the regulatory and accounting category of generation assets, and had re-categorized those facilities as a pipeline. (*Id.*, pp. 11-12.)

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[7] Executive Order D-44-01 sought to allow NAPG to reactivate and operate the Kern Facility.

[8] PG&E may not further dismantle the Kern Facility or its interconnections without express authorization of this Commission.

Here, the land component of the Kern Facility remains in the utility's generation rate base, and while the power plant itself has been removed from the utility's generation rate base, it was not put into another area of rate base (such as transmission or distribution). Accordingly, this second criterion considered by the Commission in D.03-07-031, when applied to the present facts, also confirms the conclusion that the sale of the Kern Facility is barred by § 377.

D.03-06-028, D.03-06-029 and D.03-07-031 do not alter the applicability of § 377 to the Kern Facility as determined by D.01-04-004 and D.01-10-002.

Arguments Based on Implied Intent

PG&E and NAPG argue that language in the expired Executive Order D-44-01 and in proposed legislation known as ABX2 19[9] shows a legislative intent to exempt the Kern Facility from § 377. (*See*, PG&E Brief, pp. 6-8; NAPG Brief, pp. 3-4.)

If adopted, ABX2 19 would have had the effect of exempting the Kern Facility from § 377. ABX2 19 was never signed into law, as the Executive Order was implemented instead. Both ABX2 19 and Executive Order D-44-01 followed the amendment of § 377, and both contained language stating that the prohibition against the sale of generation assets in § 377 "was not intended to apply to non-operational facilities."

PG&E and NAPG argue that the above language is useful in determining the legislative intent of § 377 itself, even though ABX2 19 is not law and Executive Order D-44-01 is not currently in effect. However, it is a

[9] According to the history of this bill, ABX2 19 was returned to the senate and "died at the Senate Desk."

fundamental of statutory construction that after-the-fact statements of legislative intent are not reliable. As one treatise puts it:

> Post-enactment views of those involved with the legislation should not be considered when interpreting the statute…While contemporaneous sponsor statements are frequently used as extrinsic aids to legislative intent, post enactment statements of legislators on legislative intent have been disapproved. They are of limited legal value to an understanding [of] the clear meaning and legal effect of statutes. (Singer, Statutes and Statutory Construction, vol. 2A, pp. 488-489, West Group 2000.)

In short, ABX2 19 and Executive Order D-44-01 are of little or no use in determining the legislative intent behind § 377. More relevant to our determination are actual statutes, enacted into law. Public Utilities Code §§ 377.1 and 377.2 undercut the arguments of PG&E and NAPG, as those statutes show that if the legislature intends to exempt certain facilities from § 377, it can and will expressly state that intention. Those statutes read:

> 377.1. Section 377 does not apply to the four run-of-river hydroelectric project works located on the Truckee River, as referenced in Section 210(b)(17) of Public Law 101-618 or to the two run-of-river hydroelectric projects, also known as the Naches Drop plant and Naches plant, located on the Wapatox Canal on the Naches River in the State of Washington.
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> 377.2. Notwithstanding Section 377, a facility for the generation of electricity, or an interest in a facility for the generation of electricity, that is located outside of this state, is owned by a public utility that serves 60,000 or fewer customer accounts in this state, and is not necessary to serve that public utility's customers in this state may be disposed of upon approval of the commission pursuant to Section 851 or upon exemption by the commission pursuant to Public Utilities Code Section 853.

These statutes indicate that the legislature believes the language of § 377 to be broad in its prohibition of the sale of generation assets, and that exceptions to that broad prohibition can and should be created expressly, by legislation. If the legislature wants to exempt certain facilities from § 377, it can do so. In the case of the Kern Facility, it has not done so, as ABX2 19 never became law. We decline to find an implied exemption from § 377 for the Kern Facility, and accordingly we continue to hold that § 377 bars the sale of the Kern Facility.

Absent an express exemption for the Kern Facility from § 377, PG&E may not legally dispose of the Kern Facility prior to January 1, 2006. Because we find as a matter of law that § 377 bars the sale of the Kern Facility, we do not reach the issue of whether the sale (or PG&E's retention) of the Kern Facility is good policy. While the parties have raised various policy issues that would be appropriate for the Commission to consider in the context of evaluating the proposed sale under § 851, those issues are not relevant to the question of whether or not the sale of the Kern Facility is legally permissible under § 377.[10] Should PG&E seek to sell the Kern Facility on or after January 1, 2006, or if the Legislature enacts a specific exemption from § 377 for the Kern Facility, the Commission would consider those issues in a § 851 proceeding.

In addition, other than prohibiting PG&E from further dismantling of the Kern Facility without prior approval of this Commission, we do not address

[10] These include California's need for energy, the nature of the site and the surrounding community, environmental impacts, renewable fuel usage and development, NAPG's contract with SCE and Commission Resolution E-3816, ownership of generation resources, and ratepayer impacts.

here today what PG&E should do with the Kern Facility, as that issue was not before us in this application proceeding.

The application of PG&E to sell the Kern Facility is denied, and this proceeding is closed.

Comments on Draft Decision

The draft decision of the ALJ in this matter was mailed to the parties in accordance with Section 311(g)(1) of the Public Utilities Code and Rule 77.7 of the Rules of Practice and Procedure. Comments were filed on _____, and reply comments were filed on _____.

Assignment of Proceeding

Michael R. Peevey is the Assigned Commissioner and Peter V. Allen is the assigned Administrative Law Judge in this proceeding.

Findings of Fact

1. This Commission (in D.01-04-004 and D.01-10-002) previously determined that the sale of PG&E's Kern Facility was barred by § 377.
2. Executive Order D-44-01 provided a conditional exemption from § 377 for the Kern Facility.
3. Executive Order D-44-01 expired on November 13, 2003.
4. The legislation known as ABX2 19 was never enacted.

Conclusions of Law

1. Commission decisions D.03-06-028, D.03-06-029, and D.03-07-031 do not alter the applicability of § 377 to the Kern Facility as previously determined by the Commission in D.01-04-004 and D.01-10-002.
2. Expired Executive Order D-44-01 and ABX2 19 do not create an implied exemption for the Kern Facility from § 377.
3. The sale of the Kern Facility is barred by § 377.

O R D E R

IT IS ORDERED that:

1. Because the sale of the Kern Facility is barred by law, the application of Pacific Gas & Electric Company to sell the Kern Facility is denied.
2. This proceeding is closed.

This order is effective today.

Dated _____, at San Francisco, California.