STATE OF CALIFORNIA GRAY DAVIS, *Governor*

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

September 23, 2002 Agenda ID #1121

TO: PARTIES OF RECORD IN APPLICATION 02-03-058

This is the draft decision of Administrative Law Judge (ALJ) Prestidge. It 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.

Pursuant to Rule 77.7(f)(9), comments on the draft decision must be filed within seven days of its mailing and no reply comments will be accepted.

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. In addition to service by mail, parties should send comments in electronic form to those appearances and the state service list that provided an electronic mail address to the Commission, including ALJ Prestidge at tom@cpuc.ca.gov. Finally, comments must be served separately on the Assigned Commissioner, and for that purpose I suggest hand delivery, overnight mail, or other expeditious methods of service.

/s/ ANGELA K. MINKIN for
Carol A. Brown, Interim Chief
Administrative Law Judge

CAB:tcg

Attachment

Decision **DRAFT DECISION OF ALJ PRESTIDGE** **(Mailed 9/23/2002)**

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application of Pacific Gas and Electric Company (U 39 M), a California corporation, and Venge Vineyards, LLC, a California Limited Liability Company, for an Order Authorizing the Former to Sell and Convey to the Latter a Certain Parcel of Land in Napa County Pursuant to Public Utilities Code Section 851.	Application 02-03-058 (Filed March 28, 2002)

DECISION GRANTING APPROVAL UNDER PUBLIC UTILITIES CODE SECTION 851 FOR CONVEYANCE OF A CERTAIN PARCEL OF LAND IN NAPA COUNTY TO VENGE VINEYARDS, LLC

Summary

This decision grants the application of Pacific Gas and Electric Company (PG&E) for Commission authorization under Public Utilities Code Section 851[1] for PG&E to convey a parcel of land located in Napa County to Venge Vineyards, LLC (Venge).[2] [3] Venge will utilize the property as a vineyard.

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[1] All statutory references are to the Public Utilities Code unless otherwise referenced.

[2] The application was filed on March 28, 2002. In Resolution ALJ 176-3086, dated April 22, 2002, we preliminarily categorized this proceeding as ratesetting and preliminarily determined that hearings are unnecessary.

[3] On May 9, 2002, the Commission Office of Ratepayer Advocates (ORA) filed a protest, which addressed only the ratemaking aspects of the application. ORA did not request a hearing. PG&E and ORA agreed to address the ratemaking issues through briefing.

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

Background

A. The Proposed Transaction

PG&E proposes to sell a parcel of land[4] located in the City of St. Helena, Napa County to Venge for the price of $100,000. Venge wishes to use the property as an extension of an existing vineyard. The size of the parcel is approximately 1.56 acres.

PG&E originally acquired the property in 1975 as the site for a substation to support an electric transmission line. Since the transmission line was never constructed, the substation was never built. Therefore, PG&E no longer needs to use this property as the site for the substation.

B. The Proposed Agreements

1. The Purchase and Sale Agreement

In the purchase and sale agreement, PG&E agreed to sell the property to Venge for the price of $100,000. PG&E has reserved easements as necessary to its operations, including an easement related to its existing pole facilities. Venge 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 Venge on an "as is" basis and that PG&E has made no warranties or representations

[4] This parcel of land has been identified as Napa County Assessor's Parcel No. 21-420-22 and State Board of Equalization SBE No. 135-28-17, Parcel 1.

regarding the condition of the property, including the presence 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 advises Venge to independently investigate all aspects of the condition of the property, including the presence of EMFs and hazardous substances.

Under the agreement, Venge had 60 days in which to inspect the condition of the property. The agreement also required Venge to sign a release agreement to protect PG&E from liability based on the presence of EMFs or hazardous substances on, under, about or otherwise affecting the property.

The agreement also notes that its effective date may be delayed because of the need for Commission and Bankruptcy Court approval of this transaction.[5]

2. The Release and Indemnity Agreement

Under the release and indemnity agreement, Venge bears all responsibility, costs and risks associated with the presence of hazardous substances and EMFs on the property. The agreement states that Venge has performed 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

[5] PG&E has filed a petition for bankruptcy, which is currently pending in the Bankruptcy Court for the Northern District of California.

parties have considered Venge's assumption of these risks in establishing the purchase price for the property.

Venge 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.

Venge has also agreed to indemnify, defend and hold PG&E harmless from liability based on 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, whether or not the hazardous substances were present on the property at the time of the transfer of title to Venge.

Since Venge has waived the protections of Civil Code section 1542, these obligations will apply to future claims based on facts of which Venge is not presently aware.[6]

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 Venge of its obligations under the agreement.

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[6] Civil Code 1542 states:

> Section 1542. General Release
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> 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.

C. Environmental Review

The California Environmental Quality Act (Public Resources Code Section 21000, et seq., hereafter CEQA), 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, hereinafter, CEQA guidelines, Section 15002.)

Since the proposed project is subject to CEQA, and the Commission must issue a discretionary decision without which the project cannot proceed (i.e., the Commission must act on the Section 851 Application), this Commission must act as either a Lead or a 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)).

Here, the Commission is Lead Agency for this proposed project under CEQA. CEQA requires that the Commission consider the environmental consequences of a project that is subject to its discretionary approval. Once a Lead Agency has determined that an activity is a project subject to CEQA, the Lead Agency shall determine whether the project is exempt from CEQA. (Section 15061). A project is exempt from CEQA where it can be seen with certainty that there is no possibility that the activity in question may have a significant effect on the environment. (Section 15061(b)(3)).

Here, the property in question was a vineyard before PG&E bought it. (The land had been planted with grapes from approximately 1880 until 1975). PG&E acquired the land in 1975 and intended to use it for a substation. However, PG&E never built a substation and the land remained fallow. The property is zoned agricultural and the buyer intends to plant grapes and incorporate the land into his vineyards, which border the property on three

sides. The planting of grapes on this property would require neither permits nor grading.

We have reviewed and considered all the facts at hand. Based on these facts, we find that this project will not have a significant effect on the environment and is thus exempt from CEQA.

D. Ratemaking Considerations

According to the application, PG&E 's net proceeds from the sale after taxes would be $43,148. The net book value of the property is $24,682. The property is not currently in PG&E's ratebase.

PG&E argues that since the property is not in ratebase and has been accounted for as non-utility property, the net proceeds from the sale should be allocated to shareholders pursuant to previous Commission decisions, because shareholders contributed the funds for the purchase of the property and bore the risks for the property. ORA contends that since the property was in PG&E's ratebase from 1976 to 1995[7], the gain on sale should be proportionally divided between ratepayers and shareholders based on the time that the property was in ratebase. ORA states that ratepayers paid a return on the purchase of the property, as well as related maintenance expenses, insurance, and taxes, through rates while the property was in ratebase.

Although some of our previous decisions have allocated the gain on the sale of utility property that is not included in ratebase to shareholders,[8] these decisions generally have not addressed transactions in which the property was in

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[7] PG&E transferred the property out of ratebase into a non-utility account in 1995 upon determining that the property was not needed for present or future utility purposes.

[8] For example, see D.98-02-032, D.01-02-044.

ratebase for part of the time during the utility's ownership. We recently addressed a similar situation, in which PG&E proposed to sell property that was originally included in ratebase and was later transferred out of ratebase before being sold, in Decision (D.) 02-04-005.

In D.02-04-005, we authorized the sale of PG&E property to the City and County of San Francisco pursuant to Section 851. PG&E had originally intended to use the property as the site for a gasholder facility and included the property in its ratebase. However, PG&E subsequently dismantled the gas holder, reclassified the land as non-utility property, and removed the land from ratebase. In its application for approval of the sale of the property, PG&E argued that since shareholders receive a return on their investment only through the sale of non-depreciable property, the gain on sale should be allocated to shareholders, rather than ratepayers. ORA protested this ratemaking treatment and requested deferral of this issue to a subsequent proceeding. We deferred our determination regarding the allocation of the proceeds from the sale between shareholders and ratepayers to a future Commission rulemaking on gain on sale issues, in order to clarify our policy in a broader context. We also ordered PG&E to record the proceeds from the sale of the property in its Real Property Gain/Loss on Sale Memorandum account, pending our resolution of this issue.

Upon consideration of PG&E's application for rehearing of D.02-04-005, we upheld our decision to defer our determination regarding allocation of the gain on sale between shareholders and ratepayers to a broader Commission rulemaking, because we wish to review this issue comprehensively and

consistently with other proceedings for the benefit of ratepayers and the public.[9] We also rejected PG&E's argument that under Commission precedent, the entire gain on sale should be allocated to ratepayers. We noted that the Commission is not bound by prior decisions to allocate the gain on sale in any particular way and that the Commission has in several recent cases deferred gain on sale issues to a subsequent Commission proceeding. We also reasoned that:

> As a general proposition, whether property was in ratebase at the time of its sale should not determine by itself how net proceeds are allocated between ratepayers and shareholders. See Decision 99-06-099, *supra*. A more important consideration is whether the property was ever in ratebase. *Id*. Also pertinent to the allocation of net proceeds is the extent to which ratepayers and shareholders benefited from any revenue generated by the property while surplus to the utility's regulated operations. *Id*. In sum, whether in separate proceedings or more economically in a single rulemaking, these are factors that the Commission should consider in the treatment of gain on sale. (D.02-09-024, *mimeo.* at p. 4.)

Based on our recent decision in D.02-04-005, we defer consideration of the allocation of revenues from this sale of property to Venge between shareholders and ratepayers to a subsequent Commission rulemaking on gain on sale issues, so that this important policy issue may be determined in a broader context with the participation of a greater number of potentially affected parties. In the

[9] In D.02-09-024, we denied PG&E's application for rehearing of D.02-04-005 but modified the decision to include additional findings of fact and conclusions of law related to our deferral of the gain on sale issue to a subsequent proceeding.

meantime, we direct PG&E to track this revenue in its Real Property Gain/Loss on Sale Memorandum Account.[10] [11]

C. 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 adverse to 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."[12] The public interest is served

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[10] In its reply brief, PG&E also requests deferral of this issue to a subsequent proceeding if the Commission does not award the entire gain on sale of the Venge property to shareholders in this decision.

[11] PG&E also cites D.01-05-076 in support of its argument that the entire gain on sale from the Venge property should be allocated to shareholders. In D.01-05-076, we approved the sale of 320 acres of ranch property by PG&E to Sierra Pacific Holding Company pursuant to Section 851. PG&E had originally acquired the property for a power generating wind farm and had installed a large wind turbine on one of the parcels in 1982. PG&E removed the wind turbine in 1988 because it determined that this method of power generation was not viable. PG&E subsequently removed the property from ratebase in 1990 and reclassified it as non-utility property based on the recommendation of Commission auditors. We approved allocation of the entire gain on sale to shareholders, reasoning that shareholders had borne the risks associated with the property and ratepayers had supported none of the maintenance costs, property taxes or other costs associated with non-utility property. However, D.01-05-076 does not address arguments related to the allocation of the gain on sale between ratepayers and shareholders based on the time that the property was in ratebase, most likely because no protest was filed and these issues were not raised in the proceeding. Moreover, we believe it appropriate to follow our more recent decision in D.02-04-005.

[12] D.3320, 10 CRRC 56, 63.

when utility property is used for other productive purposes without interfering with the utility's operation or affecting service to utility customers.[13]

We find that the proposed sale of PG&E property to Venge is not adverse to 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 its customers and the public. 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.[14] Our CEQA review of the proposed transaction indicates that the sale of the property to Venge for use as a vineyard will not have significant adverse effects on the environment. In addition, the proposed transaction will serve the public interest by enabling PG&E to obtain additional revenue for its operations and making land available for the expansion of a small business.

For all of the foregoing reasons, we grant the application of PG&E pursuant to Section 851, effective immediately.

Final Categorization and Waiver of Review Period

Based on our review of this application, we conclude that there is no need to alter the preliminary determinations as to categorization and need for a hearing made in Resolution ALJ 176-3086, dated April 22, 2002.

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[13] D.00-07-010 at p. 6.

[14] We note that the production of wine is regulated by several state and federal agencies. Venge is required to obtain all necessary permits and to comply with all legal requirements regarding the growing of wine grapes and the operation of a vineyard in order to protect the public health and safety.

The draft decision was mailed to the parties on September 23, 2002 with comments due on September 30, 2002. Pursuant to Rule 77.7(f)(9) of our Rules of Practice and Procedure, we reduce the 30-day period for public review and comment because the parties have stipulated to reduce the review and comment period.

Assignment of Proceeding

Commissioner Wood is the Assigned Commissioner and ALJ Prestidge is the assigned Administrative Law Judge in this proceeding.

Findings of Fact

1. The proposed sale of PG&E property to Venge will not interfere with PG&E's utility operations or with service to PG&E's customers and the public.
2. The Commission is the Lead Agency for the proposed project under CEQA.
3. There is no possibility that the activity in question may have a significant effect on the environment.
4. Since PG&E originally intended to use the property as the site for a substation, the property was included in PG&E's ratebase from 1976 to 1995.
5. Since the substation was never built, PG&E transferred the property out of rate base in 1995 and has accounted for it as non-utility property since that time.
6. The proposed sale will serve the public interest by providing PG&E with additional revenues for its operations and making land available for the expansion of a small business.

Conclusions of Law

1. This project is exempt from CEQA. (Section 15061(b)(3)).
2. Once this decision has been approved, the Commission/Commission staff will file a Notice of Exemption (NOE) with the Office of Planning and Research.

3. The NOE shall include (1) a brief description of the project; (2) a finding the project is exempt from CEQA, including a citation to Section 15061(b)(3); and (3) a brief statement of reasons to support the finding.

4. Consistent with § 851, PG&E's sale of the property to Venge is not adverse to the public interest and should be authorized.

5. A Commission rulemaking should be initiated to address comprehensively and consistently the allocation of gain on sale between ratepayers and shareholders.

6. The previous inclusion of the property in ratebase, the benefits received from the property, and the burdens borne in relation to the property, along with the circumstances in related proceedings, are factors that the Commission should consider in determining the proper allocation of the gain on sale between shareholders and ratepayers in a future rulemaking.

7. The decision should be effective today in order to allow the property to be conveyed to Venge expeditiously.

O R D E R

IT IS ORDERED that:

1. Pacific Gas and Electric Company (PG&E) is authorized to sell the property, identified as Napa County Assessor's Parcel Number 21-420-22 and as described in Exhibit A, B, and C to the application, to Venge Vineyards (Venge).

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 a future Commission rulemaking.

3. This proceeding is closed.

This order is effective today.

Dated _____, at San Francisco, California.