

BEFORE THE PUBLIC UTILITIES COMMISSION

OF THE

STATE OF CALIFORNIA

Application of Pacific Gas and Electric Company (U 39 E) and Pacific Generation LLC for Approval to Transfer Certain Generation Assets, for a Certificate of Public Convenience and Necessity, for Authorization to File Tariffs and to Issue Debt, and for Related Determinations.

Application 22-09-018

(Filed September 28, 2022)

**OPENING BRIEF OF THE
PLACER COUNTY WATER AGENCY**

Nora Sheriff
Gwenn O'Hara
Jonathan Kendrick
Buchalter, a Professional Corporation
425 Market Street, 29th Floor
San Francisco, CA 94105-2491
415.227.3551 office
415.227.0770 fax
nsheriff@buchalter.com

Counsel for Placer County Water Agency

September 18, 2023

TABLE OF CONTENTS

	Page
SUMMARY OF INTRODUCTION.....	iii
I. INTRODUCTION.....	1
II. LEGAL STANDARD.....	4
III. THE PROPOSED TRANSFER IS ADVERSE TO THE PUBLIC INTEREST AS PROPOSED.....	6
a. The Drum-Spaulding Project is Critical Water Infrastructure, and Ensuring That it Continues to Convey Water to the People and Businesses of Placer County is Undeniably in the Public Interest.....	6
b. Ensuring the Adequate Maintenance and Repair of the Drum-Spaulding Project is Critical to the Public Interest	9
1. Pacific Generation Has No History of Operations From Which to Judge Whether It Will be a Capable and Responsible Steward of the Water that Has Historically Served the People of Placer County	9
2. Historical Problems with Maintenance of the Drum-Spaulding Project Raise Concerns over Future Deferred Maintenance	13
3. PG&E's "Trust Us" Approach Rings Hollow.....	16
c. If the Commission Approves PG&E's Application, the Drum-Spaulding Project Should Be Excluded From the Transfer	18
d. If the Commission Approves PG&E's Application with the Drum-Spaulding Project Included, the Commission Should Include Safeguards to Protect the Water Interests of the people of Placer County	20
CONCLUSION	25

TABLE OF AUTHORITIES

	Page
 Statutes	
<i>California Public Utilities Code § 851</i>	4-5
 CPUC Decisions	
<i>Application of San Diego Gas & Electric Company (U902E) for Approval Pursuant to Public Utilities Code Section 851 to Lease Transfer Capability Rights to Citizens Energy Corporation, No. A.09-10-010, Decision 11-05-048</i>	4
<i>In the Matter of the Application of Pacific Gas and Electric Company (U 39 M) for an Order Authorizing Pacific Gas and Electric Company to Grant an Easement to Triad Communities, L. P. to Maintain Slope Stabilization Improvements, No. A.04-04-009, Decision 05-04-022</i>	4-5
<i>Application of Pacific Gas and Electric Company and Lamar Central Outdoor, LLC seeking approval under P.U. Code Section 851 of Lamar Signboards Master License Agreement and related process for future approval of Specific Site Licenses thereunder. (U39E), No. A.08-10-014, Decision 09-07-035</i>	4
<i>Application of Frontier Communications Corporation, Frontier California Inc. (U1002C), Citizens Telecommunications Company of California Inc. (U1024C), Frontier Communications of the Southwest Inc. (U1026C), Frontier Communications Online and Long Distance Inc. (U7167C), Frontier Communications of America, Inc. (U5429C) for Determination that Corporate Restructuring is Exempt from or Compliant with Public Utilities Code Section 854. (U39E), No. A.20-05-010, Decision 21-03-043</i>	22-23
 CPUC Rules of Practice and Procedure	
<i>Rule 13.12</i>	1

Summary of Recommendations

If the Commission approves PG&E's application, approval should be conditioned upon the exclusion of the Drum-Spaulding Project facilities from the assets transferred to Pacific Generation.

If the Commission approves PG&E's application and the Drum-Spaulding Project facilities are included in the asset transfer to PG&E, the following protections and safeguards should be a condition of the transfer to protect the interests of water users in Placer County:

- In the event PG&E's ownership interest in Pacific Generation drops below 50.1%, Placer County Water Agency and the Nevada Irrigation District shall have the right of first offer to jointly purchase all or a portion of the Drum-Spaulding Project facilities; provided, however, that if Nevada Irrigation District opts not to participate in such right of first offer, Placer County Water Agency shall solely have the right of first offer to purchase all or a portion of the Drum-Spaulding Project facilities;
- In the event Pacific Generation seeks to sell or otherwise transfer any portion of the Drum-Spaulding Project facilities, Placer County Water Agency and the Nevada Irrigation District shall have the right of first offer to jointly purchase such portion of the Drum-Spaulding Project facilities; provided, however, that if Nevada Irrigation District opts not to participate in such right of first offer, Placer County Water Agency shall solely have the right of first offer to purchase such portion of the Drum-Spaulding Project facilities;
- In the event PG&E is no longer the primary provider of operations and maintenance services for the Drum-Spaulding Project, Placer County Water Agency and the Nevada Irrigation District shall have the right of first offer to jointly purchase the Drum-Spaulding Project; provided, however, that if Nevada Irrigation District opts not to participate in such right of first offer, Placer County Water Agency shall solely have the right of first offer to purchase the Drum-Spaulding Project;
- Pacific Generation, and its agent PG&E, should be required to prioritize the continued conveyance of consumptive waters from the Drum-Spaulding Project facilities to the people and businesses of Placer County and establish operation and maintenance practices, in consultation with PCWA, to ensure the prioritization is accomplished; and
- The assignment and assumption agreement between Pacific Generation and PG&E, whereby Pacific Generation assumes PG&E's obligations under the PCWA water supply agreement, should expressly state that PG&E shall remain liable to PCWA for the performance of the water supply agreement and that PG&E shall not be released from its obligations under the water supply agreement.

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

Application of Pacific Gas and Electric Company (U 39 E) and Pacific Generation LLC for Approval to Transfer Certain Generation Assets, for a Certificate of Public Convenience and Necessity, for Authorization to File Tariffs and to Issue Debt, and for Related Determinations.

Application 22-09-018

(Filed September 28, 2022)

**OPENING BRIEF OF THE
PLACER COUNTY WATER AGENCY**

Placer County Water Agency (PCWA) submits this opening brief pursuant to Rule 13.12 of the California Public Utilities Commission (Commission) Rules of Practice and Procedure, and the schedule set by Administrative Law Judge (ALJ) Sophia Park in the Administrative Law Judge's Ruling Modifying Schedule dated March 30, 2023.

I. INTRODUCTION

On September 28, 2022, Pacific Gas & Electric Company (PG&E) filed Application (A.) 22-09-018 (the Application), seeking Commission authorization of PG&E's proposal to transfer most, but not all, of PG&E's non-nuclear generation assets to a new, generation-only IOU operating within PG&E's existing service territory and serving PG&E's customers (the Proposed Transfer). This new, generation-only IOU, Pacific Generation, was created by PG&E just days prior to filing the Application for the express purpose of the Proposed Transfer. PG&E additionally proposes to sell up to 49.9% of its membership interest in Pacific Generation to as-of-yet unknown minority investors. The proposal is spun by PG&E as a means of raising equity

capital to fund near-term capital needs while avoiding dilution of PG&E's existing shareholders.¹

Or, as The Utility Reform Network testified, "[the Proposed Transfer] has no essential business other than to avoid share dilution for PG&E's shareholders." ²

In total, PG&E is seeking to transfer approximately 5.6 GW of generating capacity to Pacific Generation.³ A small portion of that generating capacity comes from the hydroelectric facilities of the Drum-Spaulding Project which has a nominal operating capacity of 183.4 MW.⁴ While the generating capacity of the Drum-Spaulding Project is small in relation to the combined generating capacity of the overall Proposed Transfer, the consumptive waters it delivers are the lifeblood of Placer and Nevada Counties. PG&E's own witness, Michael Schonherr, noted that from a "societal perspective," the delivery of water to a community is viewed as very important.⁵ In other words, there is a strong public interest in ensuring that the consumptive water the Drum-Spaulding Project delivers to the people and businesses of Placer and Nevada counties continues to flow in a reliable and safe manner.

The Proposed Transfer does little to provide assurance that the historic use of these consumptive waters—which date back to the mid-1800s and have fueled the growth of Placer County—will be preserved. Indeed, given the unprecedented nature of the Proposed Transfer, and the incumbent uncertainty as to the full scope of potential impacts,⁶ the public interest

¹ See PG&E-01 (Thomason) at p. 1-2:1-10.

² TURN-01 (Dowdell) at p. 3:15-16.

³ Application (A.) 22-09-018 at p. 5.

⁴ PG&E-02 (Schonherr) at p. 2-9: 26-32.

⁵ RT3 at 381:8-10 (PG&E/Schonherr).

⁶ See CALCCA-01 (Dickman) at p.2:6-15.

weighs in favor of excluding the Drum-Spaulding Project facilities from the Proposed Transfer if the Commission approves the broader transaction.

If, however, the Commission is inclined to approve the Proposed Transfer inclusive of the Drum-Spaulding Project facilities, the record supports – and the public interest requires – conditioning that transfer. The conditions required to protect the historic and current use of the consumptive water associated with the Drum-Spaulding Project by the people and businesses of Placer County include:

- In the event PG&E's ownership interest in Pacific Generation drops below 50.1%, PCWA and the Nevada Irrigation District (NID) shall have the right of first offer to jointly purchase all or a portion of the Drum-Spaulding Project facilities; provided, however, that if NID opts not to participate in such right of first offer, PCWA shall solely have the right of first offer to purchase all or a portion of the Drum-Spaulding Project facilities;
- In the event Pacific Generation seeks to sell or otherwise transfer any portion of the Drum-Spaulding Project facilities, PCWA and NID shall have the right of first offer to jointly purchase such portion of the Drum-Spaulding Project facilities; provided, however, that if NID opts not to participate in such right of first offer, PCWA shall solely have the right of first offer to purchase such portion of the Drum-Spaulding Project facilities;
- In the event PG&E is no longer the primary provider of operations and maintenance services for the Drum-Spaulding Project, PCWA and NID shall have the right of first offer to jointly purchase the Drum-Spaulding Project; provided, however, that if NID opts not to participate in such right of first offer, PCWA shall solely have the right of first offer to purchase the Drum-Spaulding Project;
- Prioritization by Pacific Generation, and its agent PG&E, of the continued conveyance of the consumptive waters from the Drum-Spaulding Project facilities to the people and businesses of Placer and Nevada counties and establishment of operational and maintenance practices, in consultation with PCWA, ensuring such prioritization is accomplished; and
- The assignment and assumption agreement between Pacific Generation and PG&E, whereby Pacific Generation assumes PG&E's obligations under the PCWA water supply agreement, should expressly state that PG&E shall remain liable to

PCWA for the performance of the water supply agreement and that PG&E shall not be released from its obligations under the water supply agreement.

II. LEGAL STANDARD

PG&E seeks Commission approval of the Proposed Transfer in accordance with Public Utilities Code section 851, which provides in relevant part for transactions valued above five million dollars (\$5,000,000):

A public utility... shall not sell, lease, assign, mortgage, or otherwise dispose of, or encumber the whole or any part of its... line, plant, 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...

Though section 851 does not expressly provide a standard for Commission approval, in evaluating applications under section 851, the Commission looks to the public interest as its “guiding post.”⁷ The primary question for the Commission in section 851 proceedings is whether the proposed transaction is adverse to the public interest, but transactions that are in the public interest are to be encouraged.⁸ The Commission has broad discretion to determine if a proposed transaction is in the public interest, and where necessary and appropriate, the Commission may attach conditions as the public interest may require.⁹ It is important to note that the “public interest” is not strictly limited to ratepayers of the utility in question, but also includes “[m]embers of the public [that] may be affected by, and therefore interested in, a utility’s facilities even if they are not served by that utility.”¹⁰

⁷ See D. 11-05-048 at p. 7 (*quoting* D. 09-07-035 at 13).

⁸ *Id.*, at p. 8.

⁹ See D. 05-04-022 at p. 9.

¹⁰ See D. 11-05-048 at p. 9.

Here, the people and businesses of Placer County have a strong public interest in the consumptive water of the Drum-Spaulding Project facilities, because the Drum-Spaulding Project is the historic and only water supply for much of the People of Placer County. The Proposed Transfer, as submitted, is adverse to that public interest since: (i) there is no operations history of Pacific Generation from which to judge whether it will be a capable steward of the water, (ii) the Drum-Spaulding Project facilities are intertwined with facilities owned by PCWA and NID in a complicated network for the conveyance and retail delivery of water, (iii) maintenance and repair of water delivery infrastructure could be treated as secondary to maintenance and repair of generation equipment by Pacific Generation, and (iv) there is a risk that Pacific Generation will prioritize the use of water for electric generation without regard to ensuring adequate water supply.

Importantly, exclusion of the Drum-Spaulding Project facilities from the overall transaction would have minimal impact with respect to the amount of generating capacity transferred to Pacific Generation. As discussed further below, the Drum-Spaulding Project facilities constitute just over 3% of the total generating capacity of the Proposed Transfer. Whatever benefits PG&E expects to receive from the Proposed Transfer to Pacific Generation would still largely be available to PG&E without the inclusion of the Drum-Spaulding Project facilities. Thus, the Commission should exclude the Drum-Spaulding Project facilities from the Proposed Transfer under section 851. If the Commission elects to include the Drum-Spaulding Project facilities in the Proposed Transfer, it should exercise its discretion to “take such action, as a condition to the transfer, as the public interest may require”¹¹ and adopt the

¹¹ D. 05-04-022 at p. 9.

recommended conditions to protect the public interest of the people of Placer County.

III. THE PROPOSED TRANSFER IS ADVERSE TO THE PUBLIC INTEREST AS PROPOSED

A. THE DRUM-SPAULDING PROJECT IS CRITICAL WATER INFRASTRUCTURE, AND ENSURING THAT IT CONTINUES TO CONVEY WATER TO THE PEOPLE AND BUSINESSES OF PLACER COUNTY IS UNDENIABLY IN THE PUBLIC INTEREST

The Drum-Spaulding Project facilities are just a small portion of the overall generating capacity PG&E seeks approval to transfer to Pacific Generation. According to PG&E, the Drum-Spaulding Project facilities have a nominal generating capacity of 183.4 MW,¹² which is approximately 3.3% of the overall 5.6 GW generating capacity PG&E claims for the assets in the Proposed Transfer.¹³ While the Drum-Spaulding facilities play a small role in the Proposed Transfer, they play a crucial role in the livelihoods of the people and businesses of Placer County. The Drum-Spaulding Project is the conduit by which water is conveyed from where it falls to its historical place of use in Placer and Nevada Counties. Currently, the Drum-Spaulding Project delivers water that (i) PCWA uses to provide critical water supplies for over 4,200 agricultural customers and 150,000 treated water customers;¹⁴ (ii) NID uses to serve over 25,000 customers in Nevada and Placer County,¹⁵ and (iii) PG&E conveys to PG&E's remaining water customers in Placer County.¹⁶

¹² PGE-02 (Schonherr) at p. 2-9:26-33.

¹³ Application (A.) 22-09-018 at p. 5.

¹⁴ RT-4 (PCWA/Fecko) at p. 577:10-20.

¹⁵ RT-5 (NID/Hanson) at p.627 at 14-20.

¹⁶ RT-3 (PG&E/Schonherr) at pp. 377:13 – 378:18; See also, PCWA-11 at p. 1 (PG&E acknowledging that it still delivers some water for consumptive use to current and former PG&E customers both directly through its own water conveyance facilities or indirectly through PCWA's water conveyance facilities).

As acknowledged by PG&E's witness Michael Schonherr, PG&E and its predecessors have conveyed water to the residents and businesses of Placer County since long before the current contractual relationship between PCWA and PG&E.¹⁷ PG&E's own testimony and data responses show these water deliveries began as early as 1885, and that water was delivered "for a variety of beneficial uses."¹⁸ As Einar Maisch described in his direct testimony on behalf of PCWA, the beneficial use in Placer County of the consumptive waters now delivered by the Drum-Spaulding facility began at least as early as the Gold Rush era of California, and have continued through the modern era.¹⁹ Those waters have played a critical role in the sustained growth of Placer County, which has grown from 77,000 residents to 455,000 residents in the fifty-year span between 1970 and 2020.²⁰ PCWA is reliant upon "the continued operation and maintenance of the Drum Spaulding Project in a manner suitable to maintain a reliable supply of water to meet the needs of PCWA's wholesale and retail water customers."²¹

PG&E witness Michael Schonherr acknowledged, "from a societal perspective" delivery of water to a community is an important issue to address as is the lack of availability of water.²² This "societal perspective" is the public interest. That same public interest is the very interest PCWA has sought to protect in this proceeding. As PCWA witness Andrew Fecko stated, "PCWA's principal interest in this proceeding is to protect the current and future water supply from the Drum-Spaulding Project for the benefit of the residents of Placer County."²³ Protecting

¹⁷ RT-3 (PG&E/Schonherr) at p. 375:9-15.

¹⁸ RT-3 (PG&E/Schonherr) at p. 376:2-11; See also, PCWA-09.

¹⁹ PCWA-02-E (Maisch) at pp. 5:1 – 7:-12.

²⁰ *Id.* at p. 9:8-16.

²¹ *Id.* at p. 8:7-9.

²² RT-3 (PG&E/Schonherr) at p. 381:8-11 and p. 381:22-25.

²³ RT-4 (PCWA/Fecko) at p. 550:9-19.

that water source and maintaining that water supply is absolutely critical to the lives and livelihoods of the people of Placer County.

As Mr. Fecko explained when pressed on whether the real reason PCWA is participating in this proceeding is to force a sale of the Drum-Spaulling Project to PCWA:

No, I'm participating in this proceeding to ensure that 150,000 treated water retail customers and 4,200 and odd agricultural customers continue to receive a reliable water supply, as they have for 150-plus years.

One way to achieve that, in my view, is to purchase the system; another way to achieve that, is to have the safeguards in place, as an outcome of this hearing, that allows me to go back to my board of directors, which reports to the people of Placer County, and is an elected board, and say that we have some safeguards in place for the new ownership of the Drum-Spaulling system.²⁴

From an electrical generation perspective, the nominal capacity of the Drum-Spaulling Project is replaceable by other resources.²⁵ As Einar Maisch testified in his direct testimony, “[t]he electric grid in California is large, with significant redundancies. In most cases, if a generator goes offline unexpectedly for several days or weeks until repairs can be completed... there are often other generators in the system that can pick up the load with no impact to retail customers.”²⁶ From a water delivery perspective, however, the Drum-Spaulling Project facilities are irreplaceable. “If the Drum Spaulding Canal system unexpectedly goes offline—depending upon the time of year, the location of the failure, and the length of time necessary to make repairs—thousands of customers, including homes, businesses, hospitals, and schools,

²⁴ RT-4 (PCWA/Fecko) at pp. 593:23 – 594:13.

²⁵ See RT-4 (PG&E/Toy) pp. 525:22 – 526:1 (Ms. Toy testifying that when one electrical resource goes down, the capacity is replaced by other electrical resources).

²⁶ PCWA-02-E (Maisch) at p. 12:9-13.

could be without water until repairs are completed.”²⁷ When the Bear River Canal portion of those facilities was undermined in mid-April 2011 and suffered a total failure, the water supply to a majority of PCWA’s customers was cut-off.²⁸ It was only through the extraordinary efforts of PCWA, neighboring water systems, and PCWA’s customers, combined with the luck of late spring rains and cool early summer temperatures, that PCWA was able to provide most of its customers with reduced water until repairs could be completed in mid-June.²⁹ The public interest in ensuring the continued reliable operation of the Drum-Spaulding facilities for the conveyance of water to Placer and Nevada counties outweighs the public interest in including the Drum-Spaulding Project facilities in the Proposed Transfer. The Commission should exclude the Drum-Spaulding Project from the Proposed Transfer.

B. ENSURING THE ADEQUATE MAINTENANCE AND REPAIR OF THE DRUM-SPAULDING PROJECT IS CRITICAL TO THE PUBLIC INTEREST

1. Pacific Generation Has No History of Operations From Which to Judge Whether It Will be a Capable and responsible Steward of the Water that Has Historically Served the People of Placer County

As noted by Brian Dickman, testifying on behalf of CalCCA, what PG&E has proposed here is unprecedented.³⁰ The Proposed Transfer “would create a brand-new type of utility—a generation-only IOU with the same service territory as an existing vertically integrated retail utility.”³¹ The Proposed Transfer would involve the Commission “regulating two IOUs providing simultaneous service to the same retail customers in the same service territory without clear

²⁷ *Id.* at p. 13:12-16.

²⁸ RT-4 (PCWA/Fecko) at p. 568:9-14.

²⁹ PCWA-02-E (Maisch) at p. 15:5-8. [add the RT cites and the cross exhibits re the emergency]

³⁰ CALCCA-01 at p.5:6-7.

³¹ *Id.* at p. 5:7-9

delineation of compliance obligations between the two entities.”³² As Mr. Dickman describes in his testimony, the novelty of the transaction means that the full scope of impacts is unforeseeable.³³ When pressed on cross-examination by the ALJ, PG&E’s witness, Stephanie Williams, who prepared direct testimony on the overall policy of the Proposed Transfer, could not identify a comparable utility regulated by the Commission.³⁴

Given this novelty, and given the complete lack of operational history of Pacific Generation, it is unclear whether Pacific Generation will be a capable and responsible steward of the waters that have been irrevocably dedicated to the people and businesses of Placer County. In direct testimony, Einar Maisch, the former General Manager of PCWA, stated that “[t]he Drum-Spaulding Project is an extremely complex system of diversion facilities, reservoirs, and conveyance facilities, with many miles of open channel canals traversing difficult terrain to supply water to PCWA at more than a dozen delivery points.”³⁵ Mr. Maisch further noted that many of the Drum-Spaulding Project components are over 100 years old and that adequately maintaining the project to reliably deliver water is often challenging.³⁶ The systems used by PG&E to wheel water to PCWA and NID are an intricate network of comingled systems that is challenging to operate on a daily and weekly basis.³⁷

PCWA shares the same concern that Jennifer Hanson of NID expressed during cross-examination by PG&E. PG&E’s counsel questioned Ms. Hanson as to why an assignment and

³² *Id.* at p. 5:9-12.

³³ *Id.* at p. 5:12-15.

³⁴ RT-1 (PG&E/S. Williams) at p. 128:4 – 129:1.

³⁵ PCWA-02-E (Maisch) at p. 3:14-16.

³⁶ *Id.* at p. 3:16-19.

³⁷ *See*, RT-5 (NID/Hanson) at pp. 639:19 – 640:4.

assumption of the existing water supply contract between NID and PG&E that does not release PG&E from liability does not address all of NID's concerns about the Proposed Transaction. While acknowledging that such an assignment and assumption would address some concerns related to legal liability for ongoing maintenance, Ms. Hanson stated that NID "[has] concerns regarding the introduction of an additional layer of management as it relates to operations and maintenance with the two companies Pacific Generation and PG&E."³⁸ In this instance, the Proposed Transfer would result in ownership by Pacific Generation, which has no operational history, and PG&E acting in an unfamiliar capacity as a vendor of operations and maintenance services at a large scale to another utility. As acknowledged under cross-examination by the President of Pacific Generation, David Gabbard, the PG&E employees performing vendor services will not report directly to Pacific Generation, but rather up the line of PG&E management.³⁹ Mr. Gabbard explained that his responsibility as President of Pacific Generation will be to monitor PG&E's performance in fulfillment of its obligations under the intercompany agreement.⁴⁰ In the event of poor performance by PG&E, it is unclear what Pacific Generation's response would be given that, as the Proposed Transfer contemplates, Pacific Generation is controlled by its services vendor. The introduction of this additional layer of management unnecessarily complicates the conveyance of water from the Drum-Spaulding Project and raises concerns about the historic water supply of the people of Placer County, and conveyance of that water consistent with PCWA's water supply contract.

³⁸ *Id.* at p. 639:20-23.

³⁹ RT-3 (PG&E/Gabbard) at 483:14-17.

⁴⁰ *Id.* at 483:23-25.

Even more concerning is the ability of Pacific Generation and PG&E to respond to an emergency situation with respect to the Drum-Spaulding Project. Under cross-examination, counsel for PCWA asked Margaret Becker, Vice President and Treasurer of PG&E, about her direct testimony that under the Proposed Transfer “Pacific Generation will be able to meet emergent needs as they arrive.”⁴¹ Ms. Becker indicated that her testimony applied to PG&E hydro infrastructure just as it applies to all assets to be transferred under the Proposed Transfer.⁴² When pressed for specifics on how Pacific Generation would be able to handle the catastrophic failure of an aged hydro asset, Ms. Becker indicated that she was speaking broadly as to risks managed at an enterprise level.⁴³ When cross-examining Michael Schonherr, the Director of Power Generation Planning for PG&E, a witness presented by PG&E as being familiar with the Drum-Spaulding Project, counsel for PCWA asked Mr. Schonherr about a hypothetical catastrophic failure in the Drum-Spaulding Project system. Mr. Schonherr testified that he could “speak... generally to the approach that [PG&E/Pacific Generation] would take in the event of an emergent incident.”⁴⁴ When given the opportunity to further explain, Mr. Schonherr did not outline how emergent situations would be addressed with respect to the Drum-Spaulding Project, other than noting that PG&E would engage with PCWA.⁴⁵ In other words, despite providing testimony that “emergent needs” would be met by Pacific Generation, PG&E was unable to articulate with any specificity how those needs would be met in an emergency situation.

⁴¹ See RT-2 (PG&E/Becker) at pp. 307:9 – 312:8.

⁴² *Id.* at p. 308:9-15.

⁴³ *Id.* at pp. 308:19 – 309:6.

⁴⁴ RT-03 (PG&E/Schonherr) at p. 384:15-19.

⁴⁵ *Id.* at pp. 385:3-9 and 387:1-13.

As will be discussed below, historical problems with maintenance, including the total catastrophic failure of the Bear River Canal in 2011, heighten PCWA's concerns: (i) that a company with no operational history will own the Drum-Spaulding Project; (ii) that the owner of the Drum-Spaulding Project will be controlled by its service vendor; and (iii) that there will be a layer of additional management as to the operation and maintenance of the Drum-Spaulding Project. PG&E has failed to account for these risks; thus, it is unclear whether Pacific Generation will be a capable and responsible steward of the waters that have historically served the people and businesses of Placer and Nevada counties.

2. Historical Problems with Maintenance of the Drum-Spaulding Project Raise Concerns over Future Deferred Maintenance

During cross-examination, Andrew Fecko, PCWA's current General Manager, testified that in the past, deferral of critical maintenance functions have led to failures in the Drum-Spaulding Project facilities.⁴⁶ Mr. Fecko's direct testimony expressed concern that minority investors in Pacific Generation may be incented to demand deferral of critical investments in the Drum-Spaulding Project. PG&E's counsel asked Mr. Fecko how deferral of investments increases returns.⁴⁷ In response to that inquiry, on redirect, Mr. Fecko testified:

Maintenance of a sprawling 100-year old hydroelectric and water supply system that spans from the crest of the Sierra to the valley floor is critical to keep water moving in that system. And so the idea that you would defer -- or PG&E or Pac Gen, as a result of shareholder demands, would defer critical investments in things like maintenance of the system, fixing leaks, guniting canals, et cetera, because they wanted to make a number in a certain year, is a concern. Because when that system's not maintained, even for one year, then the concerns pile into the next year, and the following year.

⁴⁶ RT-04 (PCWA/Fecko) at p. 572:3-10.

⁴⁷ *Id.* at pp. 571:21 – 572:22.

Mr. Fecko's concerns are animated by the past operations and maintenance practices of PG&E. Every year since 2012, except for 2018-2020, there have been outages within portions of the Drum-Spaulding Project lasting longer than three days.⁴⁸ Some of those outages have lasted for significant durations, including a 153-day outage in 2015, a 75-day outage in 2016, a 71-day outage in 2012, 68-day and 39-day outages in 2014, and a 49-day outage in 2022.⁴⁹

The record also demonstrates that the most significant recent outage was the total failure of the Bear River Canal in mid-April 2011. During cross-examination, PG&E witness Schonherr indicated that he remembered the event during which the Bear River Canal collapsed and totally failed, resulting in a complete loss of the 244 cubic feet per second primary water supply normally conveyed to PCWA and its customers.⁵⁰ PG&E failed to provide a plan for either a temporary emergency replacement supply of water or a permanent repair for the Bear River Canal in the two weeks following the collapse.⁵¹ PCWA warned PG&E that “[u]nless PG&E can provide at least significant amounts of temporary water supplies within days, the damage to PCWA’s 150,000 water users, their property, livelihood, their businesses, and their livestock will be dire, if not catastrophic.”⁵² The next day, the Chairman of the Board of PCWA wrote to PG&E explaining that the water supply is not just crucial for the people and businesses of Placer County (including medical facilities, educational institutions, etc.), but that

⁴⁸ RT-03 (PG&E/Schonherr) at p. 392:2-13; *See also* PCWA-13, Attachment 2 (listing all such outages since).

⁴⁹ *See* PCWA-13, Attachment 2.

⁵⁰ RT-03 (PG&E/Schonherr) at pp. 379:17 – 380:1-3.

⁵¹ *Id.* at pp. 383:19 – 384:8; *See also* PCWA-04.

⁵² *Id.* at p. 383:3-12; *See also* PCWA-04.

it is also critically important to sustain flow for fire hydrants and fire suppression.⁵³ The Chairman continued that “[t]he canal is empty. There is no plan. This is unacceptable.”⁵⁴

As Einar Maisch noted in his direct testimony, PCWA was concerned enough over PG&E’s lack of response to PCWA’s inquiries with respect to repairs that he was sent to Washington DC to meet with FERC staff to make sure “they understood the magnitude of the coming water supply disaster if repairs were not expedited.”⁵⁵ FERC began pushing PG&E to develop a plan and complete repairs.⁵⁶ Repairs were finally completed in mid-June 2011, but PG&E’s lack of communication and lack of responsiveness during an emergency situation made a difficult situation that much more challenging.

The record reflects PCWA’s concern over the “slow degradation of the perceived sense of responsibility by PG&E management to maintain its Drum Spaulding Project, and its delivery infrastructure in a manner consistent with the level of water supply reliability required by PCWA to meet the needs of its domestic water customers.”⁵⁷ This degraded sense of responsibility and PG&E’s history of operational and maintenance failures might be explained, to some degree, by past Commission decisions which found that transfers of hydroelectric projects to local water agencies served the public interest because “[w]ater service is not a core PG&E activity.”⁵⁸

⁵³ *Id.* at pp. 385:19 – 386:19; *See also* PCWA-05.

⁵⁴ *Id.* at p. 386:20-22; *See also* PCWA-05.

⁵⁵ EPUC-02-E (Maisch) at p. 15:2-3.

⁵⁶ *Id.* at p. 15:4-5; *See also* RT-03 (Schonherr) at pp. 388:22 – 391:3.

⁵⁷ EPUC-02-E (Maisch) at p. 9:3-6.

⁵⁸ D.96-06-61 at p. 7; *See also* D.99-09-066.

PCWA is concerned that this slow degradation of the perceived sense of responsibility with respect to water delivery will be accelerated if the Proposed Transfer is approved. The entity owning the Drum-Spaulding Project, Pacific Generation, will have no operational or maintenance history. As a generation-only IOU, Pacific Generation's focus will be on electric generation instead of conveying water in a manner consistent with water supply reliability. Pacific Generation will also be an organization subject to pressure from as-of-yet unknown minority investors, either formally through voting power or informally through financial influence, with respect to operations and maintenance of Pacific Generation's assets. At least initially, operations and maintenance will be in the hands of a vendor (PG&E) whose history with the Drum-Spaulding Project is rife with operational and maintenance failures, and has already suffered attrition with respect to employees well-grounded in retail water delivery.⁵⁹ In light of the foregoing, and recognizing past Commission decisions that water service is not a core PG&E activity, the Proposed Transfer without conditions is adverse to the public interest.

3. PG&E's "Trust Us" Approach Rings Hollow

There are two recurrent themes in this proceeding. PG&E says "trust us," and those who deal with PG&E on a daily operational level say, based on PG&E's past performance, "we can't."

Time and again, PG&E posits, that while not all of the details of the Proposed Transfer will be figured out by the time the Commission makes a decision, parties should trust PG&E to ensure that their concerns are met. For example, PG&E tried to assuage parties to this

⁵⁹ See PCWA-02-E (Maisch) pp. 8:19 – 9:6 (explaining that after PG&E divested itself of retail systems in Placer County in 1982, the PG&E employees with an understanding of the responsibilities associated with continuous water delivery for consumptive water customers have since left the company or retired).

proceeding that their concerns with respect to behavior of minority investors in Pacific Generation (concerns which PCWA shares) should be allayed because those minority investors will be subject to a code of conduct.⁶⁰ When pressed on the nature of that code of conduct, Sienna Rogers, PG&E's Senior Director of Corporate Development and Economic Analytics, acknowledged that the code of conduct had not been submitted for stakeholder review.⁶¹ When pressed further, Ms. Rogers admitted that the code of conduct had not been finalized, had not been provided for stakeholder review, would not be on the record of the proceeding, and would only likely be provided upon signing of the initial transaction documents after Commission approval of the application and later included in a Tier 2 advice letter.⁶² Ms. Rogers was hesitant to commit to any aspect of the code of conduct because it wasn't "final."⁶³

Contrast that with the cross-examination testimony of Kevin Kolnowski, the Electric Facility Chief Operating Officer for the City of Santa Clara doing business as Silicon Valley Power (SVP). During cross-examination, he was asked why the assurance of section 854 proceedings in a future hypothetical transaction didn't resolve SVP's concerns with respect to the implications of the Proposed Transfer. In response, Mr. Kolnowski said:

I have full faith in the Commission and their process. My challenge is, if I don't have something in writing in my agreement, my experience has been -- dealing with PG&E has been difficult.⁶⁴

⁶⁰ RT-02 (PG&E/Rogers) at p. 216:17-24.

⁶¹ *Id.* at p. 219:19-21.

⁶² *Id.* at pp. 275:14-278:25.

⁶³ *See, e.g.*, RT-02 (PG&E/Rogers) at p. 278:14-25.

⁶⁴ RT-03 (SVP/Kolnowski) at p. 473:22-25.

During her testimony, Jennifer Hanson of NID, expressed a similar skepticism of any obligation of PG&E contemplated in this Application that isn't reduced to an executed agreement or a condition of approval put in place by the Commission.⁶⁵ Ms. Hanson noted that "[u]ntil we understand better the relationship and agreements are executed between Pacific Generation and PG&E, it is difficult to ascertain how this is going to work moving forward, when we're really only seeing draft agreements."⁶⁶

Similarly, for PCWA, the ability to trust that PG&E or Pacific Generation will follow through on obligations, even if in writing, is influenced both by PCWA's past experiences, such as the delayed repair of the Bear River Canal and PCWA's current experience with PG&E's treatment of the transfer provision contained in the water supply agreement between PCWA and PG&E. As raised by Mr. Schonherr during his cross-examination, PG&E has taken the position that the Proposed Transfer does not trigger the provision in the water supply agreement governing the process for a transfer of the Drum-SpaULDING facilities.⁶⁷ PG&E has tried to play the water supply agreement transfer provision two ways. They've argued that the Proposed Transfer is not a transfer, and therefore PG&E can freely ignore the transfer provision. On the other hand, they've tried to push PCWA into meeting as though the provision had been triggered so long that PG&E isn't bound by any obligations under the provision. PG&E's actions drive PCWA's concerns with the "trust us" stance of PG&E.

C. IF THE COMMISSION APPROVES PG&E'S APPLICATION, THE DRUM-SPAULDING PROJECT SHOULD BE EXCLUDED FROM THE TRANSFER

⁶⁵ See, e.g. RT-05 (NID/Hanson) at pp. 632:19-23, 652:21 – 653:4, 653:5-10, 653:16-22.

⁶⁶ *Id.* at pp. 654:25 – 655:4.

⁶⁷ RT-03 (PG&E/Schonherr) at pp. 393-18 – 394:2.

The waters conveyed by the Drum-Spaulling Project from where they fall to their place of use are the lifeblood of Placer and Nevada counties. In 2011, when the Bear River Canal failed, PCWA urgently pleaded with PG&E to act to provide temporary replacement water supplies until repair, because the consequences to the “water users, their property, their livelihoods, their businesses and their livestock would be dire if not catastrophic.”⁶⁸ The Chairman of PCWA’s Board of Directors attempted to prevail upon PG&E to have an informed and authoritative PG&E representative take command, make decisions, and help resolve the situation, because the Bear River Canal was the primary conveyance of water supplies to PCWA Zone 1.⁶⁹ That water supply was relied upon by “150,000 people and their property, thousands of acres of farm land plus animals and innumerable schools, colleges, medical facilities and businesses,”⁷⁰ and was “critically important to sustain flow for fire hydrants and fire suppression.”⁷¹ In other words, when the canal failed, the lifeblood of Placer County stopped flowing.

The Drum-Spaulling Project is a small piece of the Proposed Transfer. Most, if not all of the benefits PG&E seeks to realize with this novel approach to raising capital equity will be realized whether or not the Drum-Spaulling Project is included in the overall transaction. The risks of the Proposed Transfer to the water supply serving the people and business of Placer County, however, are substantial.

⁶⁸ PCWA-04.

⁶⁹ PCWA-05.

⁷⁰ *Ibid.*

⁷¹ *Ibid.*

Those risks include: (i) an entity with no operational history owning an asset that is essentially an intricate network of co-mingled water delivery systems traversing difficult terrain; (ii) having PG&E act in the unfamiliar capacity as a vendor of operations and maintenance services on a large scale to a separate utility; (iii) whether a vendor can be held truly accountable for its performance by a client the vendor owns a majority interest in; (iv) the addition of another layer of management to the water delivery relationship; (v) the inability of PG&E to explain with any specificity how PG&E and Pacific Generation would address emergency situations such as a catastrophic failure of an aged hydro asset; and (vi) unforeseeable risks whose scope is unknown at this time because of the unprecedented nature of the Proposed Transfer.

The risks attendant to the Proposed Transfer of the water supply serving the people and businesses of Placer County are so dire in consequence that the Proposed Transfer as presented by PG&E can only be seen as adverse to the public interest. For that reason, PCWA requests that if the Proposed Transfer is approved, the Drum-Spaulding Project be an excluded asset from the transfer.

D. IF THE COMMISSION APPROVES PG&E’S APPLICATION WITH THE DRUM-SPAULDING PROJECT INCLUDED, THE COMMISSION SHOULD INCLUDE SAFEGUARDS TO PROTECT THE WATER INTERESTS OF THE PEOPLE OF PLACER COUNTY

There is a fundamental tension in this proceeding between PG&E’s “trust us” approach and those who deal with PG&E on a daily operational level saying, based on PG&E’s past performance, “we can’t” without an executed written agreement or a condition imposed by the

Commission.⁷² As Andrew Fecko testified with respect to the Proposed Transfer, “[i]f the proper safeguards are in place, then I think that we would be satisfied [with the Proposed Transfer]. I haven't seen those yet.”⁷³

The record demonstrates that, if the Proposed Transfer is approved, the Commission will need to condition that approval on appropriate safeguards for those entities dealing with PG&E and Pacific Generation on a daily operational level. With respect to PCWA, if the Proposed Transfer is approved inclusive of the Drum-Spaulding Project, conditions should be fashioned with an eye towards “ensur[ing] that 150,000 treated water retail customers and 4,200 and odd agricultural customers continue to receive a reliable water supply, as they have for 150-plus years.”⁷⁴ Conditions necessary to protect the consumptive water supply of the people and businesses of Placer County generally fall into two categories – operational conditions, and control of future ownership conditions.

Operational conditions would ensure that Pacific Generation, and its agent PG&E, operate the Drum-Spaulding Project in a manner consistent with the reliable conveyance of consumptive water to the people and businesses of Placer County. In this instance, PCWA proposes two operational conditions. The first operational condition would be requiring Pacific Generation, and PG&E as its agent, to establish operational and maintenance practices in consultation with PCWA that prioritize the continued conveyance of consumptive waters from the Drum-Spaulding Project facilities to the people and businesses of Placer County. Doing so

⁷² See, e.g. RT-03 (SVP/Kolnowski) at p. 473:22-25; RT-05 (NID/Hanson) at pp. 632:19-23, 652:21 – 653:4, 653:5-10, 653:16-22, 654:25 – 655:4; and RT-04 (PCWA/Fecko) at p. 594:1-25.

⁷³ RT-04 (PCWA/Fecko) at p. 594:23-25.

⁷⁴ *Id.* at p. 594:2-5.

would ensure that both the owner and the operator of the Drum-Spaulding Project understand their key role in conveying water to Placer County, and would give PCWA a voice in how that water is conveyed. The second operational condition would be to require the assignment and assumption agreement between Pacific Generation and PG&E for the PCWA water supply agreement to expressly state that PG&E shall remain liable to PCWA for the performance of the water supply agreement, and that PG&E shall not be released from its obligations under the water supply agreement. This approach helps mitigate the concerns associated with how a vendor can be held to account for its performance of services for a client the vendor controls. Ensuring that both Pacific Generation and PG&E are liable to PCWA for the performance of the water supply agreement helps provide some level of accountability.

Control of future ownership conditions recognize the compelling public interest a local government has in having a measure of control over the future ownership of critical utility infrastructure serving its jurisdiction. In 2021, in considering (A.) 20-05-010, an application submitted by Frontier Communications Corporation and its subsidiaries in connection with a corporate restructuring (the Frontier Application), the Commission found that the Frontier Application and several proposed settlement agreements with parties to the proceeding were inadequate to establish that the Frontier Application was in the public interest.⁷⁵

To address that deficiency, the Commission determined that additional conditions were necessary for the Frontier Application to be in the public interest.⁷⁶ Among those conditions was the creation of a right of first offer for local governments and tribal communities “to

⁷⁵ D. 21-03-043 at p. 22.

⁷⁶ *Ibid.*

purchase property that Frontier proposes to sell or dispose of and for which Commission approval is required under Public Utilities Code Section 851.”⁷⁷ The decision, recognizing the priority of the Commission’s Tribal Lands Transfer Policy, crafted the condition such that when a tribe and local government have competing claims for the same property, the tribe has priority.⁷⁸ This right of first offer was extended to local governments and tribal communities specifically because of “the compelling public interest in recognizing the value to local governments and tribal communities in having a measure of control over the future ownership of telecommunications property in their jurisdiction through a right of first offer.”⁷⁹

The Commission pointed to how Frontier’s facilities serve a vital interest to local communities by providing essential voice and broadband services, WiFi hotspots, and community access.⁸⁰ The Commission further noted that local and tribal communities served by Frontier were more likely to face elevated risks from the loss of telecommunication services due to their location in rural and remote areas, and the lack of alternative service providers.⁸¹ “The fundamental necessity of telecommunications services to the economic and social well-being of tribal and local communities merits Commission recognition of a tangible, defined purchase right that is not merely transactional.”⁸²

As the record has established in the proceeding, the Drum-Spaulding Project facilities convey essential consumptive water to the people and businesses of Placer and Nevada

⁷⁷ *Id.* at Ordering Paragraph 4(g).

⁷⁸ *Id.* at p. 16.

⁷⁹ *Id.* at p. 22.

⁸⁰ *Id.* at p. 15.

⁸¹ *Ibid.*

⁸² *Ibid.*

Counties. The Drum-Spaulding Project is the conduit for bringing water from where it falls to its place of use in Placer and Nevada Counties. Both Placer County and Nevada County face an elevated risk from the loss of such water delivery due to a lack of alternative service providers, and the challenges associated with maintaining a complex water system traversing difficult terrain. The consumptive waters conveyed by the Drum-Spaulding Project are a fundamental necessity for the economic and social well-being of Placer and Nevada Counties. PCWA's General Manager, recognizing the risks the Proposed Transfer poses and the fundamental necessity of the Drum-Spaulding Project, testified when talking about conditions the Commission might impose, that "[o]wnership of the Drum-Spaulding system for PCWA is -- is something that we would have to do, if necessary."⁸³ Therefore, if the Drum-Spaulding Project is included in the Proposed Transfer, PCWA urges the Commission, just as it did in resolving the Frontier Application, to recognize tangible, defined purchase rights for PCWA to purchase all or a portion of the Drum-Spaulding Project facilities.

PCWA proposes the following three tangible, defined purchase rights be included as conditions of approval: (i) in the event PG&E's ownership interest in Pacific Generation drops below 50.1% PCWA and NID shall have the right of first offer to jointly purchase all or a portion of the Drum-Spaulding Project facilities (but PCWA shall have the sole right of first offer in the event NID opts out of participating); (ii) in the event Pacific Generations seeks to sell or otherwise transfer any portion of the Drum-Spaulding Project facilities, PCWA and NID shall have the right of first offer to jointly purchase such portion (but PCWA shall have the sole right of first offer in the event NID opts out of participating); and (iii) in the event PG&E is no longer

⁸³ RT-04 (PCWA/Fecko) at p. 594:21-23.

the primary provider of operations and maintenance services for the Drum-Spaulding Project, PCWA and NID shall have the right of first offer to jointly purchase the Drum-Spaulding Project (but PCWA shall have the sole right of first offer in the event NID opts out of participating).

Ultimately, though exclusion of the Drum-Spaulding Project from the Proposed Transfer is PCWA's preferred outcome for PG&E's Application, if the operational and control of future ownership conditions described above are imposed by the Commission, PCWA believes that the Proposed Transfer could be found to have mitigated the Application's adversity to the public interest.

IV. CONCLUSION

The Placer County Water Agency appreciates this opportunity to submit this opening brief.

Respectfully submitted,

Buchalter, A Professional Corporation

By:



Nora Sheriff

Counsel for the Placer County Water
Agency

September 18, 2023