

**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 NEVADA IRRIGATION DISTRICT
TO APPLICATION 22-09-018**

September 18, 2023

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SUMMARY OF RECOMMENDATIONS

Nevada Irrigation District (“NID”) submitted a protest in this proceeding. NID’s General Manager, Jennifer Hanson, submitted direct testimony in this proceeding and was subject to extensive cross examination. In this brief, Nevada Irrigation District addresses two principal issues identified in the ALJ’s Scoping Memo:

2. Whether the requests are adequately justified, reasonable, and in the public interest; and
15. Impacts on system reliability.

To address and mitigate potentially negative consequences associated with the proposed transfer, NID recommends the Commission impose the following conditions on any approved transfer:

- A condition requiring PG&E to exclude the Drum Spaulding Project from the proposed transfer. Alternatively, if the Commission does not require PG&E to exclude the Drum Spaulding Project from the transfer, it should impose the following:
 - A condition requiring Pacific Generation to maintain, and not transfer or assign the water rights associated with the supply historically made available to NID for purchase to any entity other than Nevada Irrigation District and Placer County Water Agency.
 - A condition restricting PG&E, or any other subsequent provider of operation and maintenance services, from charging NID rates for operation and maintenance that exceed the cost of providing the service, in accordance with Cost of Service Ratemaking principles.

- A condition requiring, in the event of either: (i) PG&E holding less than a 50.1% ownership interest in Pacific Generation; or (ii) Pacific Generation's intent to sell all, or a part of, the Drum Spaulding Project; NID and Placer County Water Agency shall have the right of first offer to jointly purchase all or a portion of the Drum-Spaulding Project facilities; provided, however, that if Placer County Water Agency opts not to participate in such right of first offer, NID shall solely have the right of first offer to purchase all or a portion of the Drum Spaulding Project facilities.
- A condition requiring PG&E to maintain in direct contractual privity with NID pursuant to the Coordinated Operations Agreement, and for PG&E to remain liable under the Coordinated Operations Agreement for performance and breach, to NID.

I. SUMMARY AND INTRODUCTION

Nevada Irrigation District (“NID”) submits this brief in the above-referenced proceeding in consideration of Pacific Gas & Electric Company’s (“PG&E”) proposed transfer of its non-nuclear generation assets to a new subsidiary of PG&E named Pacific Generation, LLC (“Pacific Generation”). NID’s Brief is in response to the Scoping Memo and Ruling promulgated by the assigned Administrative Law Judge (“ALJ”) on January 20, 2023, and the prepared direct, rebuttal, and cross examination of the Parties submitted in this proceeding.

Pursuant to the proposed transaction, PG&E would transfer to Pacific Generation all of its non-nuclear generation assets, together with related rights and operating contracts associated with the generation facilities, including water rights. Pacific Generation will assume and accept the assigned contracts, including among them, longstanding cooperation and partnership agreements, the continued performance of which are critical to the water supply and human health and safety of tens of thousands of families in Northern California.

A to be formed Pacific Generation Board of Directors will govern its operations. The Board will consist of a mix of appointees designated by Minority Investors, and representatives appointed by PG&E. While PG&E will initially have the right to designate a majority of the Board, that right terminates when and if PG&E no longer possesses a majority financial stake in Pacific Generation.

The proposed transaction, without necessary conditions, is not in the public interest. The non-nuclear generation assets proposed for transfer are not simply power generation facilities. To the contrary, the suite of assets includes water rights, water storage and conveyance facilities, and various coordination and water supply agreements which are critical to maintaining a reliable water supply for Placer and Nevada Counties. PG&E’s representations that ‘nothing will

change’ with respect to the generation assets from a management or operations and maintenance perspective ring hollow in light of the transaction documents introduced in this proceeding.

In contrast to PG&E’s assertions that PG&E will, through intercompany operating agreements, continue to manage, operate and maintain the assets notwithstanding the transfer to Pacific Generation; the documents themselves demonstrate a much different potential outcome – in which PG&E either renegotiates the intercompany agreements (a very real possibility given the absence of arms-length negotiations and lack of equal bargaining power between PG&E and Pacific Generation), or voluntarily cedes majority ownership and control over Pacific Generation to Minority Investors. Under those circumstances, access to clean, reliable water supply, would be subject to the decisions of ‘Minority Investors’ possessing no operating, financial, or regulatory track record of managing assets of the type and complexity at issue in this proceeding.

For the reasons described herein, the California Public Utilities Commission (“CPUC”) should deny PG&E’s proposed transfer, at least with respect to the Drum Spaulding System and the related Coordinated Operations Agreement, because it does not advance the public interest. However, should the CPUC choose to approve the proposed transfer, it must require strong, enforceable conditions to mitigate potentially significant adverse consequences of the proposed transfer. Such conditions should include:

- A condition requiring Pacific Generation to maintain, and not transfer or assign the water rights associated with the supply historically made available to NID for purchase to any entity other than Nevada Irrigation District and Placer County Water Agency.
- A condition restricting PG&E, or any other subsequent provider of operation and maintenance services, from charging NID rates for operation and maintenance

that exceed the cost of providing the service, in accordance with Cost of Service Ratemaking principles.

- A condition requiring, in the event of either: (i) PG&E holding less than a 50.1% ownership interest in Pacific Generation; or (ii) Pacific Generation's intent to sell all, or a part of, the Drum Spaulding Project; NID and Placer County Water Agency shall have the right of first offer to jointly purchase all or a portion of the Drum-Spaulding Project facilities; provided, however, that if Placer County Water Agency opts not to participate in such right of first offer, NID shall solely have the right of first offer to purchase all or a portion of the Drum Spaulding Project facilities.
- A condition requiring PG&E to maintain direct contractual privity with NID pursuant to the Coordinated Operations Agreement, and for PG&E to remain liable under the Coordinated Operations Agreement for performance and breach, to NID.

II. NEVADA IRRIGATION DISTRICT AND ITS LONGSTANDING RELATIONSHIP WITH PG&E.

Nevada Irrigation District ("NID") provides a year-round reliable water supply to more than 20,000 customer accounts and 5,000 irrigation accounts across California's Nevada and Placer Counties. NID is also the licensee of the Federal Energy Regulatory Commission (FERC) licensed Yuba- Bear Project. The Yuba-Bear Project, completed in 1966, provides 79.32 megawatts of clean hydroelectric power and 207,865 acre feet of water storage capacity. (Testimony of Jennifer Hanson, Exhibit NID-01, at pg. 5, ln. 11-21.) The Yuba-Bear Project is physically and operationally intertwined with PG&E's FERC Licensed Drum-Spaulding Project. Simply put, the two systems cannot operate independently, and neither party can obtain the full

benefit of their own water rights and generation assets without the cooperation of the other.
(Exhibit NID-01, pg. 7.)

A. The Coordinated Operations Agreement Between NID and PG&E.

Since 1924, NID and PG&E have contracted to coordinate the operations of their respective water conveyance and delivery projects in Nevada and Placer Counties. The current contract that facilitates the relationship of NID's Yuba-Bear Project and PG&E's Drum-Spaulding Project is known as the Coordinated Operations Agreement ("COA"). Under the COA, PG&E conveys and delivers NID's water through certain reservoirs, canals, and other PG&E owned and controlled facilities; and NID conveys, delivers, and stores PG&E's water in reservoirs and facilities owned and controlled by NID. (*Ibid.*). In 2019, the CPUC expressly authorized PG&E "to enter into and carry out" the Coordinated Operations Agreement. (CPUC Decision 10-10-011, at p. 12).

PG&E proposes to transfer the Drum Spaulding System and related appurtenances, and to assign the Coordinated Operations Agreements, to Pacific Generation. (PG&E Prepared Direct Testimony, Chapter 2 [Ex. PG&E-02], Table 2-1; PG&E Supplemental Testimony, Chapter 2 [Ex. PG&E 02-S] at Schedule 2.2. (a), Schedule 2.2. (c).)

1. *The COA Grants NID the Contractual Right to Purchase Water From PG&E to Supply NID's Domestic and Irrigation Water Supply Customers. This Contract Entitlement is Critical to NID's Water Supply Reliability.*

Appendix B to the Coordinated Operations Agreement requires PG&E to "sell and deliver" to NID specified quantities of water at discrete locations utilizing specific facilities. Depending on year type and demand, PG&E may be required to sell to NID tens of thousands of acre feet of water supply, particularly in Dry, Critically Dry, and Extreme Critically Dry water

years, when such supply is in dire need. (Ex. NID-01, at Exhibit 1, Appx. B, pp. 41-46). NID's General Manager explained that the water supply provided by PG&E pursuant to the Coordinated Operations Agreement is critical to NID's current and future water supply portfolio and water supply reliability for its 80,000 customers.¹

2. The CPUC Approved the Coordinated Operations Agreement.

In 2019, PG&E submitted to the CPUC an "Application for Commission Approval Under Public Utilities Code Section 851 to Sell the Deer Creek Hydroelectric Project to Nevada Irrigation District and for Any Required Approval of Related Agreements."² As part of the Application, PG&E provided the Coordinated Operations Agreement to the CPUC and requested the CPUC to review and determine whether the Agreement was subject to CPUC jurisdiction; and if the CPUC determined to the COA was, in whole or in part, subject to CPUC jurisdiction, to approve the COA, or those portions thereof subject to its jurisdiction. PG&E further requested that if the CPUC determined the COA was not subject to its jurisdiction, the CPUC to so state in its finding in its Order on the Application.³

The CPUC, in its Decision 19-10-011 Authorizing Pacific Gas and Electric Company Sale of Deer Creek Hydroelectric Project to Nevada Irrigation District found in relevant part:

Pacific Gas and Electric Company is authorized to enter into and carry out the Coordinated Operations Agreement and the Deer Creek Development Wheeling Agreement. (Decision 19-10-011 at p. 19.)

¹ "[I]s the ability to purchase water from PG&E's Drum-Spaulling System an important component of NID's water supply reliability? A: It's integral to our current water supply reliability and to our future water supply reliability as we expect supplies to be reduced due to climate change." (Testimony of J. Hanson, Reporter's Transcript, Vol. 5, pg. 678, ln. 5-11).

² Application 19-01-009

³ APPLICATION OF PACIFIC GAS AND ELECTRIC COMPANY (U39E) FOR COMMISSION APPROVAL UNDER THE PUBLIC UTILITIES CODE SECTION 851 TO SELL THE DEER CREEK HYDROELECTRIC PROJECT TO THE NEVADA IRRIGATION DISTRICT AND FOR ANY REQUIRED APPROVAL OF RELATED AGREEMENTS, January 22, 2019, at pg. 11.

The CPUC Decision thus affirmed that the Coordinated Operations Agreement is subject to CPUC Jurisdiction, and approved its terms and conditions.

B. NID's Concerns Regarding the Proposed Transaction.

NID and PG&E have successfully coordinated the operations of the Yuba Bear Project and Drum Spaulding Project for more than 50 years. Throughout that time, NID and PG&E have maintained direct contractual privity with one another, and their interests have aligned in utilizing the projects to accomplish the greatest public good from a water supply and hydroelectric generation perspective. (Exhibit NID-01, pg. 6.) NID is concerned that PG&E's transfer of the Drum Spaulding Project to Pacific Generation will not be in the public interest now or in the future. NID's concerns are based on PG&E's assignment of all rights and obligations under the Coordinated Operations Agreement to Pacific Generation, and Pacific Generation's acceptance and assumption of the same.

Under PG&E's proposed transaction, PG&E would no longer be in contractual privity with NID. Though Pacific Generation would (at least initially) engage PG&E to operate and maintain the Drum Spaulding Project through the proposed Operations and Services Agreement, NID would have no contractual privity with PG&E, and therefore no ability to enforce those obligations, under this arrangement. Said another way, PG&E, the *only* entity with the operating history and personnel necessary to operate and maintain the Drum Spaulding system, has no contractual obligation to NID do so – because it has transferred that responsibility to Pacific Generation under the proposed Separation Agreement.⁴ Because NID would not be a party to

⁴ See e.g., Testimony of Michael Schonherr, Reporter's Transcript Volume 2, pg. 328 ("Q: So, just to summarize, based on the assignment and assumption agreement [Ex. B to the Separation Agreement set forth at Ex. PG&E-02, pp. 2-AtchA58] it's fair to say that assuming the transaction is approved as requested Pacific Generation would be obligated to NID to perform the coordinated operations agreement and PG&E would have no further obligations of liabilities to NID under that agreement; is that right? A: As a clarification, **yes, we will assign the agreements to Pacific Generation who would assume all responsibility for obligations to NID in accordance with the**

the Operations and Services Agreement, it would arguably have no contractual right to compel *PG&E* or its personnel to operate and maintain the assets.

III. STANDARD OF REVIEW

Section 851 provides in relevant part that:

“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 ... secured from the commission an order authorizing it to do so”⁴

Though Section 851 does not specify the standard by which the Commission is to review such requests, past Commission applications of the statute are instructive. In *Pacific Gas & Electric Company, and Lamar Central Outdoor, LLC* (2008) Cal. P.U.C. Dec. No. 09-07-035, Commission noted that in applying Section 851, it:

“historically looked to public interest as its guiding post. While the minimal standard we consider in our review is that the transaction being proposed in a particular application is ‘not adverse to the public interest,’ we do foster and encourage transactions ... where the transaction is also ‘in the public interest.’”

In exercising its Section 851 authority, the CPUC possesses broad discretion. In *Application of Pacific Gas & Electric Company* (2002) Cal. P.U.C. Decision 02-09-024, which denied rehearing of and modified an earlier decision (D.02-04-005) authorizing the sale of property by Pacific Gas and Electric Company. The Commission stated that:

“[Section 851] confers on the Commission virtually unlimited discretion to determine whether the sale of a public utility's property should be approved - and on what conditions in order that it prove sufficiently beneficial to ratepayers and the public generally.”

The Commission has an obligation to evaluate PG&E's proposed transfer to determine whether the transfer is ‘not adverse to the public interest’ and to impose conditions on such a

agreement that's signed.”). (Emphasis added).

transfer to ensure the sale of utility property is beneficial to the public generally. NID's requested conditions are consistent with these adopted standards of review.

IV. THE PROPOSED TRANSFER IS NOT IN THE PUBLIC INTEREST

Included in the proposed transfer is the Drum Spaulding Project, which serves a critical water supply function to a large portion of Nevada and Placer Counties. PG&E has operated and maintained the Drum Spaulding Project for more than 50 years, and has likewise coordinated the operations of that Project with NID's Yuba Bear Project pursuant to the Coordinated Operations Agreement and its predecessor agreements. Under the proposed transfer, PG&E would transfer both the physical Drum Spaulding Assets, and the contractual liabilities and obligations of the COA to Pacific Generation. This arrangement does not serve the Public Interest.

A. PG&E's Proposal to Transfer All Contractual Liabilities and Obligations Under the COA to Pacific Generation Would Deprive NID of its Contractual Privity with PG&E, the One Entity Capable of Performing the Operation and Maintenance of the Drum Spaulding Project and Coordinating its Operation With NID's Yuba Bear Project.

Pursuant to the proposed transfer, PG&E proposes to assign to Pacific Generation 'third party contracts' related to the operation of the assets to be transferred to Pacific Generation. This includes the Drum Spaulding Project and Coordinated Operations Agreement. (PG&E Prepared Direct Testimony, Chapter 2 [Ex. PG&E-02], Table 2-1; PG&E Supplemental Testimony, Chapter 2 [Ex. PG&E 02-S] at Schedule 2.2. (a), Schedule 2.2. (c).)

According to PG&E's Application, in connection with the assignment of the identified contracts to Pacific Generation, "Pacific Generation will assume all obligations of PG&E under such contracts, while PG&E will continue to perform such obligations on behalf of Pacific Generation as the contracted operator of Pacific Generation." (Ex. PG&E 02-S, pg. 2-3).

Indeed, the Separation Agreement provides at Section 2.1., that: “PG&E hereby agrees to contribute assign, transfer, convey, and delivery to the Company [Pacific Generation] on the Closing Date, and the Company hereby agrees to accept from PG&E on the Closing Date, all of PG&E’s right title and interest in and to the Generation Assets, free and clear of any Liens.” The Separation Agreement defines Generation Assets to include, “agreements and arrangements exclusively related to the Generation Assets, to which PG&E is a party including the assets listed in Schedule 2.2 (f) (all such agreements and arrangements, collectively, the “Assumed Contracts”). (Ex. PG&E 02, pg. 2-Atch A -17).

Additionally, Exhibit B to the Separation Agreement is an Assignment and Assumption Agreement which contemplates the complete divestiture by PG&E of its liabilities and obligations related to the defined ‘Assumed Contracts’ (including the COA,’ as follows:

Assignment. Assignor [PG&E] hereby irrevocably assigns and transfers to Assignee all of its right, title, and interest in and to, and all of its duties, liabilities, and obligations under or pursuant to, the Assumed Contracts, if any, first arising and accruing on and after the Effective Date.

Assumption. Assignee [Pacific Generation] hereby assumes and accepts all of Assignor’s right, title, and interest in and to, and all of Assignor’s duties liabilities, and obligations under or pursuant to the Assumed Contracts, if any, first arising and accruing on and after the Effective Date, and further agrees to perform under and be bound by the terms of the Assumed Contracts as of the Effective Date.

(Ex. PG&E 02b pg. 2-Atch A – 58.)

PG&E’s Michael Schonherr affirmed under cross examination that the effect of these various transfers, assignments, and assumptions would be a situation in which, “PG&E will assign the agreements to Pacific Generation who would assume all responsibility for obligations to NID in accordance with the agreement that’s signed.”⁵ In other words, once effective, the

⁵ Testimony of Michael Schonherr, Reporter’s Transcript Volume 2, pg. 328 (“Q: So, just to summarize, based on the assignment and assumption agreement [Ex. B to the Separation Agreement set forth at Ex. PG&E-02, pp. 2-

Separation Agreement and Assignment and Assumption Agreement, deprive NID of its contractual privity with PG&E under the Coordinated Operations Agreement.

Thus, PG&E's assurances that various 'intercompany agreements' will "ensure that Pacific Generation and Pacific Generation's facilities continue to be operated in the same manner as today by the same experienced PG&E personnel" (Ex. PG&E 04 – [Pacific Generation's Future Relationship with PG&E] at p. 4-2) is simply not true. This simplistic assessment obscures a fundamental difference in the contractual relationships that will occur if the CPUC approves the transfer absent appropriate conditions.

The principal difference pre and post transaction is that NID will no longer be in direct contractual privity with PG&E - the entity responsible for the operation and maintenance of the Drum Spaulding System. Pursuant to the COA, each party maintains the complete control over the operation, repair and maintenance of their respective Projects, *subject to* the obligation that each Party "shall operate maintain and repair its respective Project[s] to a standard of care and reliability consistent with the customs and practices of the industry applicable to comparable facilities." (Ex. NID-01, Exhibit 1, pg. 14).

Under the proposed transfer, Pacific Generation will not possess the employees, equipment, or expertise necessary to perform this required operation and maintenance. Instead, Pacific Generation will rely on PG&E to perform this work pursuant to the proposed Operations and Services Agreement. (Ex. PG&E 04, pg. 4-Atch.A 1-40.) NID will not be a party to this Operations and Services Agreement and will have no ability to enforce its terms and conditions.

AtchA58] it's fair to say that assuming the transaction is approved as requested Pacific Generation would be obligated to NID to perform the coordinated operations agreement and PG&E would have no further obligations of liabilities to NID under that agreement; is that right? A: As a clarification, yes, we will assign the agreements to Pacific Generation who would assume all responsibility for obligations to NID in accordance with the agreement that's signed."). (Emphasis added).

Indeed, the Operations and Services Agreement would expressly preclude NID from seeking performance of its terms pursuant to the “No Third Party Beneficiaries” clause. (Ex. PG&E 04, pg. 4 Atch A-33.)

In sum, the proposed transfer and contemplated release of PG&E from its obligations under the Coordinated Operations Agreement would make it much more difficult, if not impossible, for NID to meaningfully enforce the COA’s principal terms against Pacific Generation to ensure the Drum Spaulding system is maintained in accordance with prudent utility standards.

While PG&E asserted in this proceeding that PG&E is amenable to a scenario in which “PG&E is not released from its obligations under the COA through the proposed transaction,”⁶ Mr. Schonherr admitted under cross-examination that there is no existing agreement, and no documentation in the record of this proceeding of an understanding whereby PG&E would remain obligated to NID under the Coordination Operations Agreement notwithstanding the transfer and assignment of that Agreement from PG&E to Pacific Generation.⁷ Importantly, Mr. Schonherr acknowledged that PG&E would not oppose a Commission imposed condition requiring PG&E to remain directly contractually liable to NID:

Q: So PG&E is willing to put in its assignment and assumption agreement that the Public Utilities Commission would approve a provision that PG&E remains obligated under the coordinated operations agreement to NID; is that what you’re saying?

A: Yes. We would remove any requirement for release from NID.⁸

⁶ Exhibit PG&E-14, pg. 2-13, ln. 18-22.

⁷ Reporter’s Transcript, Volume 2, pg. 331.

⁸ Reporter’s Transcript, Volume 2, pg. 336.

B. *The Intercompany Agreements Regarding Operations and Maintenance Costs and Responsibilities are Unexecuted, and Subject to Termination.*

NID has a direct, and irrefutable interest in the proper operation and maintenance of PG&E's Drum Spaulding project. Firstly, each party is obligated to maintain their respective assets pursuant to an appropriate standard of care. (Exhibit NID 01, Exh. 1, at p. 12). Secondly, in the event of certain "extraordinary events" (defined to include events that damages that prevent a conveyance facility from performing its intended function), NID is obligated to reimburse PG&E for up to 100% of replacement costs exceeding \$3 million dollars. (*Ibid.* at Section 4.2 [Reimbursements for Extraordinary Events].) Pursuant to the proposed transfer, Pacific Generation would have no in-house staff capable of performing required operations and maintenance, but would instead rely entirely on PG&E to perform such functions pursuant to a proposed Operations and Services Agreement. (Ex. PG&E 04, pg. 4-Atch.A 1-40.) While the current Operations and Services Agreement contemplates PG&E providing O&M services to Pacific Generation at cost of service based rates (*Ibid* at pg. 4-AtchA-19-20), those agreements are currently executory *and* contain provisions for Amendment. (*Ibid*, at p. 4-Atch-A 29.)

As NID's General Manager observed during examination, the Operations and Services Agreement is not signed by PG&E or by Pacific Generation, and are in fact stamped "Draft" form. ⁹ In short, NID possesses no certainty that it will be able to obtain cost of service based operations and maintenance services related to the Drum Spaulding system because the only documentation of such an understanding are draft, unexecuted documents that contain provisions authorizing amendment.

⁹ Reporter's Transcript, Vol. 5, p. 57.

C. PG&E's Apparent Attempt to Distinguish Between NID's Contractual Right to Acquire Water under the Coordinated Operations Agreement and the Dedication of that Water Supply to the People of Nevada and Placer County From a Public Utilities Commission Perspective Merits CPUC Conditions.

NID asserted in its Prepared Direct Testimony that PG&E water rights associated with the Drum Spaulding system have been dedicated to public use by virtue of the longstanding sale of such water from PG&E to NID pursuant to the Coordinated Operations Agreement:

While it is NID's position that the Coordinated Operations Agreement mandates PG&E to sell to NID a specific quantity of water at specific price points, and that this obligation must be assumed by any transferee of the Drum-Spaulding System, there has been no formal CPUC recognition that the PG&E Water Rights Associated with the Drum-Spaulding System have been dedicated to Public Use. Clearly, said Water Rights *have been* dedicated to Public Use, and clearly, PG&E is contractually obligated to sell specific quantities of water to NID at specific prices. However, PG&E's proposed transfer documents do not impose terms or conditions that prevent or prohibit Pacific Generation, LLC, from revisiting these determinations once Pacific Generation, LLC assumes ownership of the Assets. (Exhibit NID 01, pg. 11).

To address this issue, NID proposed in its Prepared Direct testimony a CPUC imposed condition "that would require Pacific Generation to maintain, and not transfer or assign the Water Rights associated with the supply historically made available to NID for purchase to any entity other than Nevada Irrigation District." (Ibid). Again, under examination, NID's General Manager again affirmed that, while PG&E's contractual obligation to sell water to NID is patent, "the contract does not make a determination as to whether or not Pacific Generation or PG&E could utilize that water right for some other purpose." (Reporter's Transcript, Volume 5, pg. 6299, lines 4-9).

It is of serious concern that PG&E's cross examination of Ms. Hanson focused to a large degree on seeking to characterize NID's rights to continue water from PG&E as *exclusively* contractual in nature. In its examination, PG&E repeatedly sought to highlight that "no determination" with respect to the dedication of PG&E water rights had been made by either

PG&E or the Public Utilities Commission. In an apparent effort to highlight the fact that NID's current right to acquire PG&E water is *only* contractual in nature, PG&E asked variations of same exact question *four times*:

- “So these [NID’s right to purchase water from PG&E] are really contractual terms, not determinations, correct?” (Reporter’s Transcript, Volume 5, pg. 627, lines 21-24).
- “So—it’s –so you’re just referring to NID’s contract rights under - - under the COA?” (*Id.* at pg. 628, lines 2-3).
- “So these are really contractual terms, not determinations. Right? (*Ibid* at lines 7-8).
- “But—but, really, you’re concerned about NID’s contractual rights under the COA. Is that right?” (*Ibid* at lines 23-24).

In response to this line of questioning, NID affirmed its overriding interest that water supplied from PG&E to NID continue to be dedicated to public use:

- “Yeah. It’s important for NID that the water supply continue to be slated for use for public consumptive benefit.” (*Id.* at pg. 628, lines 4-6).
- “I think that the - - the - - whether it’s a determination or a contract interpretation, our concern is related to the ongoing obligation to make that water supply that is associated with Drum-Spaulding system available for purchase by NID for public use. The – currently, there is an obligation within the contract; however, the contract does not make a determination as to whether or not Pacific Generation or PG&E could utilize that water right for some other purpose” (*Id.* at p. 629, lines 5-14).

It is uncontested in this proceeding that the PG&E water rights associated with the Drum Spaulding Project are of critical importance to the people of Nevada and Placer County. However, PG&E’s apparent intent to demonstrate that – to date – such rights are strictly contractual in nature, is troubling. Under redirect examination, NID’s General Manager made NID’s interests in this regard explicit:

Q: [W]ould it be beneficial for the CPUC to impose a condition on the transfer of the Drum-Spaulding system that the required the owner of the system to irrevocably dedicate the domestic water rights associated with the system to the people of Nevada and Placer Counties?

A: Yes.

Q: And to the best of your knowledge, has PG&E or Pac Gen made such a commitment in the transaction documents submitted in this proceeding?

A: No, not that I have seen.

The critical nature of the water rights associated with the Drum Spaulding system to the people of Nevada and Placer Counties is similar to the situation the Commission addressed in *In Matter of Joint Application of Francis Land & Water Co., & Del Oro Water Co., Inc.*, 68 CPUC 2d 177 (Sept. 20, 1996). That proceeding also contemplated a Section 851 Application in which Francis Land and Water Company proposed to transfer a public utility water system and related facilities to Del Oro Water Company. Concerned citizens of Ferndale, who relied on the water rights associated with the transfer sought assurances from the Commission that Del Oro, the proposed transferee, would use these water rights exclusively to benefit the Francis service area, and no other area where Del Oro might provide water service.

In response to these concerns, in its Conclusions of Law, the Commission held:

PU Code § 851, subjecting to prior Commission approval any transfer of property ‘necessary or useful’ in the provision of public utility service, would govern an attempted transfer by a public utility of ‘water rights,’ as the term is used in today's decision. If a public utility were to attempt an unauthorized transfer of such water rights to its affiliate or subsidiary, such subsidiary or affiliate could not maintain that it was acquiring the water rights in good faith. Furthermore, a subsequent purchaser of those rights from the subsidiary or affiliate would not be covered by the exception in PU Code § 851 for good faith purchasers. (*Id.* Conclusions of Law, Par. 3).

And, in its Ordering Paragraph, the Commission again affirmed that the water rights subject to the Section 851 Application that had been dedicated to service to the people of Ferndale could not be subsequently transferred:

3. Pursuant to this Order:

a. Francis shall transfer to Del Oro all water rights that Francis possessed as of the date when Francis was acquired by Citizens Utilities Company of California, including any and all such rights that may be discovered after the effective date of this Order; and

b. Del Oro shall have an ongoing duty to identify, assert, and preserve all such rights by all appropriate means.

(In Matter of Joint Application of Francis Land & Water Co., & Del Oro Water Co., Inc., 68 CPUC 2d 177 (Sept. 20, 1996).)

Thus, the Commission has demonstrated that it has the legal authority to impose conditions limiting or prohibiting the subsequent transfer of water rights that have been dedicated to previous public use. As stated below, the Commission should impose a similar condition on Pacific Generation with respect to the consumptive water rights associated with the Drum Spaulding project.

D. PG&E's Intercompany Documents Contemplate a Reduction in its Majority Stake in Pacific Generation, and the Loss of The Ability to Control the Pacific Generation Board of Directors. It is Not in the Public Interest for Water Supply Reliability to Depend Upon Unknown Minority Investors for Performance of Critical Water Supply Contracts.

PG&E has represented on numerous occasions in this proceeding that PG&E will maintain control over Pacific Generation through its right to appoint a majority of the Pacific Generation Board of Directors. (*See, e.g.*, PG&E Ex. 5 [Transaction & Sale Process, Minority Governance, & Distributions] at pg. 5-12] “[t]he LLC Agreement will provide that PG&E at all times will have the right to appoint a majority of the Board” ; “PG&E will retain the power to control the Board, so long as it continues to own a majority of Pacific Generation Interests.”).

However, Pacific Generation’s assurances that PG&E will continue to control the Pacific Generation Board of Directors are not borne out in the Amended and Restated Limited Liability Company Operating Agreement, which specifically contemplates PG&E’s loss of control:

“[N]otwithstanding anything herein to the contrary, *so long as* PG&E and its Related Parties collectively hold Company Percentage Interests greater than fifty percent (50%), PG&E shall have the right to designate the majority of the Managers to the Board.” (Ex. PG&E 5, pg. 5-AtchA-22).

If and when PG&E no longer controls a greater than 50% interest in Pacific Generation, it will no longer have the right to designate the majority of the Managers to the Pacific Generation Board of Directors.

In the event of a “PG&E Change of Control” of Pacific Generation, Pacific Generation would be governed by a Board controlled by minority investors potentially possessing no demonstrated operational or regulatory experience operating complex hydroelectric and water supply systems such as the Drum-Spaulding Project. It is not in the public interest to facilitate the transfer of critical water supply infrastructure to potential owners that do not possess appropriate qualifications to own, operate, and maintain such assets.

Notably, pursuant to the proposed Operations and Services Agreement, Pacific Generation reserves the right to designate as “Reserved Owner Matters” an unlimited scope of functions including, “services, tasks, duties, liabilities, responsibilities, and other obligations of PacGen as determined by PacGen from time to time with notice thereof provided to PG&E.” (Ex. PG&E 4, pg. 4-AtchA-13.) The Operations and Services Agreement is explicit that “PG&E shall not perform, and PacGen does not engage or appoint PG&E to perform, the Reserved Owner matters.” (*Ibid*). In this regard, a Minority Investor group that came to control Pacific Generation could simply designate operation and maintenance responsibilities for the Drum Spaulding System to be “Reserved Owner Matters” and neither NID, nor PG&E would have any say in such operation and maintenance whatsoever. This is not in the public interest.

E. Minority Investors Would Possess the Right to Veto Capital Expenditures Under Certain Circumstances.

PG&E’s consistent refrain in this proceeding that nothing material will change in the operation of its non-nuclear generation assets following the proposed transfer obscures the fact

that, pursuant to the proposed ‘Amended and Restated Limited Liability Company Operating Agreement of Pacific Generation LLC,’ Minority Investors will possess significant consent rights concerning Pacific Generation’s budgets and capital expenditures. As explained in Exhibit PG&E-5:

If a capital expenditure is not in the approved annual budget, then any Minority Investor with at least a 20 percent interest in Pacific Generation will have a consent right if the capital expenditure involves a total outlay greater than \$50 million in a single transaction or greater than \$150 million in the aggregate per year; provided that there will be no consent right regarding capital expenditures that Pacific Generation reasonably expects will be included in rate base. (Ex. PG&E – 5, pg. 5-15).

While the LLC Agreement contains a limited carveout for ‘Emergency Situations’ it is unclear whether a failure of, for example, a Drum Spaulding water conveyance facility that is critical for water supply, but does not materially contribute to the Project’s electric generation, would qualify under the following provided ‘Emergency Situation’ definition:

“any abnormal condition or situation that, in the Board’s reasonable judgment, adversely affects, or potentially may adversely affect, the integrity of the electric, gas, or other systems of the Company or its Subsidiaries, or the safety of workers or the public, or the property or facilities of others.” (Ex. PG&E-05 [Amended and Restated Limited Liability Company Operating Agreement of Pacific Generation LLC], pg. 5-AtchA-68).

It is not in the public interest for the part owner and operator of critical water supply and delivery infrastructure, i.e., Pacific Generation’s Minority Investors, to have an option, but not an obligation to fund significant capital expenditures.

V. CONDITIONS

The transfer, as proposed, does not serve the public interest of California. PG&E’s transfer of its non-nuclear generation portfolio, including hydroelectric generation assets and related contracts that serve a critical water supply function, to an entity with no demonstrated operational, regulatory, or financial expertise, and which may be controlled by unknown

minority investors, threatens water supply reliability and continuity for the people of Nevada and Placer Counties.

A. Pacific Generation Must Grant Nevada Irrigation District and Placer County Water Agency a Right of First Offer to Acquire the Drum-Spaulding System.

Under similar circumstances, in which the utility assets of an entity subject to Commission Jurisdiction served unique and critical public functions, the Commission imposed as a condition of Section 851 approval a right of first offer to the tribes and local governments that rely on said infrastructure to serve public purposes.

The undisputed evidence in this proceeding makes it clear that PG&E Drum-Spaulding system provides a critical water supply and reliability function. That is the case both by virtue of NID's right to acquire tens of thousands of acre feet of domestic and irrigation water supply from the Project under certain circumstances (Ex. NID 01, p. 7), and due to the interrelated nature of PG&E's Drum Spaulding Project and NID's Yuba-Bear Project. Neither project is capable of functioning as intended for water supply or hydroelectric generation purposes without the coordination and cooperation of the other Project. (*Ibid.*). Additionally, Placer County Water Agency possesses the right to acquire in excess of 100,000 acre feet of water supply from the Drum Spaulding Project on an annual basis , all of which supplies critical water supply reliability to Placer County residents.

In its 2021 decision in *Frontier Communications*¹⁰ the Commission cited “the critical importance of Frontier’s asset commitments to communities” in concluding, “that a right of first offer regarding a proposed Fronter property sale of disposal that is subject to Commission

¹⁰ Application of Frontier Commc'ns Corp., Frontier California Inc. (U1002c), Citizens Telecommunications Co. of California Inc. (U1024c), Frontier Commc'ns of the Sw. Inc. (U1026c), Frontier Commc'ns Online & Long Distance Inc. (U7167c), Frontier Commc'ns of Am., Inc. (U5429c) for Determination That Corp. Restructuring Is Exempt from or Compliant with Pub. Utilities Code Section 854., No. 20-05-010, CPUC Decision 21-03-043 (2021).

approval under Pub. Util. Code Section 851 should extend to tribes and local governments.” (*Id.* at p. 23). Although the Commission’s order referenced Resolution E-5076 concerning the Tribal Land Policy, the order further extended the Right of First Offer condition to include local governments, which in these circumstances, would include NID.

The CPUC’s condition provided as follows:

(g) Right of First Offer to Tribes and Local Governments. Every tribe and local government shall have a right of first offer (ROFO) to purchase property that Frontier proposes to sell or dispose of and for which Commission approval is required under Public Utilities (Pub. Util.) Code Section 851 pursuant to the provisions of this subparagraph. To the maximum possible extent that is not inconsistent with this subparagraph, the “Guidelines to Implement the CPUC Tribal Land Policy” identified as Attachment A to Resolution E-5076 (Guidelines) shall apply to the ROFO, provided that (i) in addition to its application to tribes, the Guidelines shall also apply to a local government wherever possible by construing a Guidelines reference to “Tribe” to refer to the local government and a Guidelines reference to “ancestral territory” or “Indian country” to refer to the legally recognized jurisdiction of the local government, (ii) “disposition” shall mean all sales or disposals of property under Pub. Util. Code Section 851 and not have the meaning set forth in Section 1.3.d of the Guidelines, (iii) “investor-owned utility (IOU)” shall mean Frontier and not have the meaning set forth in Section 1.3.f of the Guidelines, and (iv) if a tribe and a local government have a ROFO under this subparagraph to the same property, the tribe's ROFO shall precede and be preferred to the local government's ROFO. This subparagraph shall not interfere with the terms of the Attachment 3 Settlement Agreement, including the potential acquisition described in Section 7 of the Attachment 3 Settlement Agreement.¹¹

A similar condition should be imposed on PG&E and Pacific Generation concerning any proposed transfer or sale of the Drum Spaulding System. The Right of First Offer enabling Nevada Irrigation District and Placer County Water Agency should be triggered in the event PG&E no longer holds a 50.1% ownership interest in Pacific Generation, or if Pacific Generation evidences an intent to transfer or assign the Drum Spaulding Project to any third party, including

¹¹ Application of Frontier Commc'ns Corp., Frontier California Inc. (U1002c), Citizens Telecommunications Co. of California Inc. (U1024c), Frontier Commc'ns of the Sw. Inc. (U1026c), Frontier Commc'ns Online & Long Distance Inc. (U7167c), Frontier Commc'ns of Am., Inc. (U5429c) for Determination That Corp. Restructuring Is Exempt from or Compliant with Pub. Utilities Code Section 854., No. 20-05-010, 2021 WL 1140527, at *43 (Mar. 18, 2021)

new or existing affiliates or entities related to Pacific Generation or PG&E. If Placer County Water Agency opts not to participate in such right of first offer, NID should be given the right of first offer to purchase all or a portion of the Drum-Spaulding Project facilities.

B. Pacific Generation should maintain, and not transfer or assign, the water rights associated with the supply historically made available to NID for purchase or transfer to any entity other than Nevada Irrigation District and Placer County Water Agency.

It is undisputed that PG&E's water rights associated with the Drum Spaulding system are critical to the water supply for Nevada and Placer Counties, and that both Placer County Water Agency and NID have come to rely on those water rights to meet their customer needs and service obligations. Under similar circumstances, the Commission found as a matter of law that any subsequent transfer of such rights would be subject to Section 851 of the Public Utilities Code, and imposed a condition mandating that the transferee "identify, assert, and preserve all such rights by all appropriate means" for the future benefit of the locality that had come to rely on those rights. (*In Matter of Joint Application of Francis Land & Water Co., & Del Oro Water Co., Inc.*, 68 CPUC 2d 177 (Sept. 20, 1996).)

The Commission should impose a similar condition prohibiting the subsequent transfer of any consumptive PG&E (or, after the transfer, Pacific Generation) water rights associated with the Drum Spaulding System to any entity other than Nevada Irrigation District and Placer County Water Agency.

C. PG&E Must Remain Contractually Obligated to NID to Perform the Coordinated Operations Agreement and Maintain Contractual Privity with NID such that NID Can Require PG&E to Perform Coordination, Operation, and Maintenance Obligations for the Drum Spaulding Project.

It is uncontested that the NID-PG&E Coordinated Operations Agreement is a critical element of water supply and hydroelectric generation for Nevada and Placer Counties.

Notwithstanding the critical nature of the contractual responsibilities under the COA, pursuant to the Proposed Transfer, PG&E proposes to assign all liabilities and obligations under the COA to Pacific Generation, and Pacific Generation would accept and assume all such liabilities and obligations. Meanwhile, through a separate Operations and Services Agreement, Pacific Generation would engage PG&E and PG&E personnel to perform the critical O&M functions of the COA. However, under the proposed arrangement, NID would have no contractual privity with PG&E – the entity with the experience and personnel to actually perform necessary tasks. The Commission should impose a condition that PG&E remain contractually obligated to NID to perform the obligations of the Coordinated Operations Agreement. This condition could be imposed through an exception for the Coordinated Operations Agreement from the list of “Assumed Contracts” subject to the terms of Assignment and Assumption Agreement in the proposed Separation Agreement set forth in PG&E Exhibit 2; or alternatively through a condition articulating that, notwithstanding the transfer, PG&E is not released from its obligations to NID under the Coordinated Operations Agreement.

D. PG&E should be Permitted to Charge No More than Cost of Service Rates for Operation and Maintenance of Non-Nuclear Generation Assets.

Pursuant to the Coordinated Operations Agreement, there are circumstances during which NID may elect, or be obligated, to pay PG&E for the operation and maintenance of the Drum Spaulding or Yuba Bear Projects. Pursuant to the proposed Operations and Services Agreement between PG&E and Pacific Generation, PG&E and PG&E would continue to perform operations and maintenance on behalf of Pacific Generation pursuant to the contract. (Exhibit PG&E-4). While the current Operations and Services Agreement contemplates PG&E charges to Pacific Generation at cost of service rates, there is no provision of the Operations and Services Agreement that prohibits subsequent revisions to that agreement. Accordingly, the Condition

should impose a condition that PG&E will not charge Pacific Generation rates for operations and maintenance that exceed cost of service.

E. Alternatively, PG&E should Exclude the Drum Spaulding System and Coordinated Operations Agreement from the Proposed Transfer.

The Drum Spaulding system is uniquely critical to water supply reliability for large portions of Nevada and Placer Counties of California. The foregoing conditions are a direct and proximate result of the critical nature of this infrastructure. In lieu of imposing the foregoing conditions as a requirement of the proposed transfer, the Commission should require PG&E to exclude the Drum Spaulding System and Coordinated Operations Agreement from the Assets that will be transferred from PG&E to Pacific Generation.

Dated: September 18, 2023

Respectfully submitted,

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