

PUBLIC UTILITIES COMMISSION1415 VAN NESS AVENUE
SAN FRANCISCO, CA 94109-3924

April 17, 2002

VIA HAND DELIVERYCalifornia Supreme Court
350 McAllister Street
San Francisco, CA 94102**Re: Case No. S105807 – *Foundation for Taxpayer and Consumer Rights v. California Public Utilities Contra.***

To the Honorable Chief Justice and the Honorable Justices of the California Supreme Court:

The California Public Utilities Commission and the named Commissioners ("Commission") submit this letter as a preliminary response to the Foundation for Taxpayer and Consumer Rights' ("FTCR's") Petition for Writ of Mandate ("Petition"), filed on April 11, 2002. Although FTCR's legal contentions lack merit, because FTCR's Petition may be disposed of on procedural and mootness grounds, it is not necessary to address FTCR's substantive legal assertions in this preliminary response. The Commission will prepare and file a comprehensive response to FTCR's Petition, if necessary, upon request from the Court.

I. The Commission Will Hold Hearings on the Commission's Plan for Pacific Gas and Electric Company's Reorganization

Contrary to FTCR's fundamental premise -- that the Commission's filing of a Plan of Reorganization for PG&E constitutes ratemaking without public participation or input -- the Commission is in fact holding a proceeding to review its proposal in the Pacific Gas and Electric ("PG&E") bankruptcy, and to address any ratemaking impacts of the proposal. The Commission's issuance of its *Order Instituting Investigation into the ratemaking implications for Pacific Gas and Electric Company pursuant to the Commission's Alternate Plan for Reorganization* ("Bankruptcy OIP") is calendared for the April 22, 2002 Commission Agenda. (See April 22, 2002 Commission Agenda, Item 3, Attachment 1.) This proceeding will provide interested parties an opportunity to be heard concerning the Commission's Alternate Plan and its impact on PG&E's rates. Although the proceeding was planned in advance of FTCR's Petition, it was noticed on April 12, 2002, after FTCR's Petition was filed, pursuant to the notice provisions in Government Code section 11125. Because there will be hearings and a proceeding considering the bankruptcy plan issues of concern to FTCR, FTCR's entire Petition, arguing that there is no opportunity for public input, is moot.

Furthermore, the Commission's Disclosure Statement and Plan of Reorganization for PG&E, filed April 15, 2002 pursuant to the deadline set by the Bankruptcy Court, explicitly provides that all necessary Commission approvals are conditions precedent to the consummation of the Commission's Plan. (Disclosure Statement for the CPUC's Plan of Reorganization, April 15, 2002, United States Bankruptcy Court, Northern District of California, Case No. 01 30923 DM,

Section VI. K. (i), p. 103-104, Attachment 2.) Contrary to FTICR's protests, no "actions with vast impacts on rates" (Pet., at 14) have been taken without an opportunity for public comment. The public will have an opportunity to participate in the Bankruptcy OII, and the Plan cannot be consummated without all required Commission approvals and actions.

II. Mandamus is Not Warranted

Extraordinary relief in the nature of mandamus depends on the absence of "a plain, speedy and adequate remedy in the ordinary course of law." (Code Civ.Proc. § 1086; Phelan v. Superior Court (1950) 35 Cal.2d 363, 366.) The burden is on the petitioner to show the inadequacy of the remedy in the ordinary course of law. (Attorney General v. Superior Court (1953) 41 Cal. 2d 249, 250.) In this case, FTICR failed to pursue its legal remedies, or to exhaust its remedies at the Commission. FTICR simply summarily asserts that it "has no plain, speedy, adequate remedy available to it," and "there are no administrative remedies to exhaust and, if there were, exhaustion would be futile." (Pet. at 14.) Aside from being inaccurate, these assertions fall far short of the showing required to justify mandamus.

There is no evidence that FTICR brought any of its concerns before the Commission at any time, although there were clearly avenues for it to do so. Most obviously, FTICR could have brought a complaint at the Commission for hearing concerning the reasonableness of PG&E's rates. (Pub. Util Code § 1702.)¹ Short of initiating a proceeding, FTICR could have submitted filings in related proceedings, if it had obtained party status, asking that its concerns about PG&E's rates or the Commission's processes be considered in those proceedings. There is no indication that FTICR ever did this, or even actively participated at the Commission. With less effort, FTICR could have brought its concerns to the Commission in the form of a letter requesting a formal response. Even this was not attempted. Notably, the Commission filed a term sheet with the basic terms of the PG&E Plan on February 13, 2002, months in advance of the April 15 filing. FTICR had ample opportunity to pursue an administrative remedy at the Commission concerning the terms of the Plan.

Most significantly, FTICR now has a clear administrative remedy, and remedy in the ordinary course of law, that it has not yet pursued. Because the Commission plans to consider issuance of the Bankruptcy OII on April 22, 2002, FTICR should participate in that proceeding and raise any of its concerns about the Commission's Plan at that time. There is no indication that participation in that proceeding and pursuit of any necessary appeals would not adequately address FTICR's concerns.

In spite of its allegations that it has no remedy at law, FTICR failed to pursue, much less exhaust, its remedies before the Commission. FTICR also fails to show that any of these administrative remedies are inadequate. Because FTICR attempted no administrative remedies, the Commission had no opportunity to address FTICR's concerns in any manner. In this situation, the extraordinary remedy of mandamus is not warranted. (See Stone v. Turton (1963) 220 Cal.App.2d 417, 421.)

Moreover, the vague and expansive relief requested by FTICR is not appropriate for mandamus. Mandamus will only lie when there is a clear present and ministerial duty for a public body or official to take an action, or refrain from taking an action. (Taylor v. Board of Trustees (1984) 36 Cal.3d 500, 507.) "[T]he action commanded cannot invade the area of discretion with which

¹ Other parties have filed this type of complaint concerning PG&E. (C.02-02-027.)

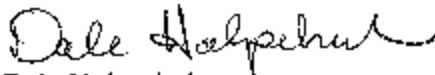
Hon. Chief Justice
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an administrative agency is vested over a given subject matter. [Citations]" (Sklar v. Franchise Tax Board (1986) 185 Cal.App.3d 616, 622.)

The relief FTICR requests in its Petition (Pet. at 20-21) is unclear, overbroad, and intrudes into areas of the Commission's discretion. For instance, FTICR requests that this Court issue writs, "prohibiting and restraining" the Commission from taking action in closed session "preventing the PUC from issuing future orders that would, but for the action taken in closed session, cause rates to be reduced." (Pet. at 21.) This phrase, as well as the surrounding language, falls far short of the definiteness and clarity required for a writ of mandate to issue. There is no clear, present and ministerial duty FTICR is seeking to enforce. Rather, FTICR seeks to broadly restrain the Commission's actions in a manner that neither the Court nor the Commission can clearly foresee. FTICR cannot obtain its requested relief by mandamus.

This is not a brief responding to the substantive issues raised in FTICR's Petition. However, we submit that the foregoing discussion provides sufficient basis for this Court to deny all relief requested by FTICR.

Very truly yours,



Dale Holzschuh
Counsel for the California Public Utilities Commission
(415) 703-2934

Enclosures

cc: The Foundation for Taxpayer and Consumer Rights

Public Utilities Commission of the State of California

Public Agenda 3086

Monday, April 22, 2002, 11 a.m.

San Francisco, California

Commissioners

Loretta M. Lynch, President

Geoffrey F. Brown

Henry M. Duque

Michael R. Peevey

Carl W. Wood

For each agenda item, a summary of the proposed action is included; the Commission's decision may, however, differ from that proposed.

Website: <http://www.cpuc.ca.gov>

Scheduled Commission Meetings

305 Van Ness Avenue, San Francisco

<i>Ratesetting Deliberative Meeting*</i> <i>Room 5305</i> <i>(1:30 p.m.)</i> <i>Closed to the Public</i>	<i>Commission Meeting</i> <i>Auditorium</i> <i>(10 a.m.)</i> <i>Open to the Public</i>
Wednesday, April 17, 2002 (San Francisco)	Monday, April 22, 2002 (San Francisco) 11:00 a.m.
Monday, April 29, 2002 (San Francisco)	Thursday, May 02, 2002 (San Francisco)
Monday, May 13, 2002 (San Francisco)	Thursday, May 16, 2002 (San Francisco)
Monday, June 03, 2002 (San Francisco)	Thursday, June 06, 2002 (San Francisco)

**Ratesetting Deliberative Meeting dates are reserved as noted but will be held only if there are ratesetting matters to be considered and a Commissioner has requested that a Ratesetting Deliberative Meeting be held.*

Matters of Public Interest

For the convenience of the public and media representatives, items of widespread public interest will be taken up at the beginning of the meeting.

For further information contact the Public Advisor
(415) 703-2074 E-mail: public.advisor@cpuc.ca.gov



This location is accessible to people with disabilities. If specialized accommodations for the disabled are needed, e.g. sign language interpreters, please call the Public Advisor at (415) 703-2074 or TTY# (415) 703-5282 or toll free # 1-866-836-7825 three business days in advance of the meeting.

1a **ALTERNATE TO ITEM 359**
360 The Commission determines that a showing has not been made that Bidwell Water Company is unable or unwilling to adequately serve its ratepayers, or has been actually or effectively abandoned by its owners, or is unresponsive to the rules of the Commission. However, the Commission requires the respondents to file a compliance plan to remedy outstanding violations of prior Commission orders.

(Comr Duque)

http://www.cpuc.ca.gov/Cyberdocs/AgendaDoc.asp?DOC_ID=117452

2 **A01-03-022 - Pacific Gas and Electric Company (PG&E), Jon Frazier and Katherine J.**
466 **Frazier.**
This decision grants PG&E's application for authority under Pub. Util. Code § 851 to lease 156 acres of land in Amador County to Jon and Katherine J. Frazier for the operation of a commercial resort. The property has been used as a commercial resort under lease or license from PG&E since 1965. The application is unopposed. This proceeding is closed.

(Comr Lynch - ALJ Walker)

http://www.cpuc.ca.gov/Cyberdocs/AgendaDoc.asp?DOC_ID=98639

3 **I _____ - Order Instituting Investigation into the ratemaking implications for Pacific Gas**
503 **and Electric Company (PG&E) pursuant to the Commission's Alternative Plan of**
Reorganization under Chapter 11 of the Bankruptcy Code for PG&E, in the United States
Bankruptcy Court, Northern District of California, San Francisco Division, In re Pacific Gas
and Electric Company, Case No. 01-30923 DM.

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THIS PROPOSED DISCLOSURE STATEMENT IS NOT A SOLICITATION OF ACCEPTANCES OR REJECTIONS OF THE COMMISSION'S PLAN. ACCEPTANCES OR REJECTIONS MAY NOT BE SOLICITED UNTIL A DISCLOSURE STATEMENT HAS BEEN APPROVED BY THE BANKRUPTCY COURT. THIS PROPOSED DISCLOSURE STATEMENT IS BEING SUBMITTED FOR APPROVAL BUT HAS NOT YET BEEN APPROVED BY THE BANKRUPTCY COURT.

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

In re
PACIFIC GAS AND ELECTRIC COMPANY,
a California corporation,

Debtor.

Federal I.D. No. 94-0742640

Case No. 01 30923 DM
Chapter 11 Case
[No Hearing Requested]

DISCLOSURE STATEMENT FOR THE CALIFORNIA PUBLIC UTILITIES COMMISSION'S PLAN OF REORGANIZATION UNDER CHAPTER 11 OF THE BANKRUPTCY CODE FOR PACIFIC GAS AND ELECTRIC COMPANY
[Dated April 15, 2002]

Counsel for the California Public Utilities Commission:

Gary M. Cohen
Arocles Aguilar
Michael M. Edson
CALIFORNIA PUBLIC UTILITIES
COMMISSION
505 Van Ness Avenue
San Francisco, California 94111
(415) 434-1600

Alan W. Kornberg
Brian S. Hermann
Susan E. Welber
Marc F Skapof
PAUL, WEISS, RIFKIND, WHARTON
& GARRISON
1285 Avenue of the Americas
New York, New York 10019-6064
(212) 373-3000

1 to execute, enter into and deliver the Plan, and to execute, implement and take all actions
2 necessary or appropriate to give effect to the transactions contemplated by the Plan; and

3 (b) the Confirmation Order shall be, in form and substance, acceptable to the
4 Commission.

5 **K. Conditions Precedent to Effectiveness of the Commission's Plan**

6 The Commission's Plan shall not become effective unless and until the following
7 conditions shall have been satisfied or waived pursuant to Section 8.4 of the Commission's Plan:

8 (a) the Confirmation Order, in form and substance acceptable to the
9 Commission, shall have been entered by the Bankruptcy Court on or before October 31, 2002,
10 and shall have become a Final Order,

11 (b) the Effective Date shall have occurred on or before January 31, 2003;

12 (c) all actions, documents, instruments and agreements necessary to
13 implement the Plan shall have been effected or executed;

14 (d) the Reorganized Debtor shall have consummated the sale of the
15 Reorganized Debtor New Money Notes and the Common Stock as contemplated under the Plan
16 and the proceeds thereof shall, in addition to the Debtor's available Cash, be sufficient to pay all
17 Allowed Claims to be paid under the Plan and to fund the escrows for Disputed Claims;

18 (e) the Bankruptcy Court shall have entered an order, which may be the
19 Confirmation Order, approving the Debtor's dismissal with prejudice of the Claims Against the
20 State;

21 (f) the Bankruptcy Court shall have entered an order, which may be the
22 Confirmation Order, approving the Debtor's entry into the New Tax Sharing Agreement and the
23 Debtor shall have executed and delivered the same;

24 (g) the Debtor shall dismiss all Claims Against the State with prejudice and
25 the Debtor shall have executed and delivered to the Commission all pleadings and release
26 documents required by the Commission and the State of California, which shall be in form and
27 substance satisfactory to the Commission and the State.
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1 (h) S&P and Moody's shall have issued credit ratings for the Reorganized
2 Debtor and its debt securities of not less than BBB- and Baaa3, respectively.

3 (i) the Debtor shall have received all authorizations, consents, regulatory
4 approvals, rulings, letters, no-action letters, opinions or documents that are necessary to
5 implement the Plan including, without limitation, any and all Commission approvals and rulings
6 necessary to implement the Plan; and

7 (j) the Plan shall not have been modified in a material way, including any
8 modification pursuant to Section 11.10 of the Plan, since the Confirmation Date.

9 The Commission may waive by a writing signed by an authorized representative(s)
10 and subsequently filed with the Bankruptcy Court, one or more of the conditions precedent
11 set forth in Section 8.2 of the Plan, described above.

12 In the event that one or more of the conditions to the Effective Date described above shall
13 not have occurred or been waived on or before January 31, 2003, (a) the Confirmation Order
14 shall be vacated, (b) no distributions under the Commission's Plan shall be made, (c) the Debtor
15 and all holders of Claims and Equity Interests shall be restored to the status quo ante as of the
16 day immediately preceding the Confirmation Date as though the Confirmation Order had never
17 been entered, and (d) the Debtor's obligations with respect to Claims and Equity Interests shall
18 remain unchanged and nothing contained in the Plan shall constitute or be deemed a waiver or
19 release of any Claims or Equity Interests by or against the Debtor or any Person or Governmental
20 Entity or to prejudice in any manner the rights of the Debtor or any Person or Governmental
21 Entity in any further proceedings involving the Debtor; provided, however, that the amounts paid
22 pursuant to Section 4.2(a) of the Commission's Plan on account of Post-Petition Interest may be
23 recharacterized as a payment upon the applicable Allowed Claims, in the Debtor's sole
24 discretion, but the Debtor will not otherwise seek to recover such amounts.

25 **L. Implementation and Effect of Confirmation of the Commission's Plan**

26 On the Effective Date, except as otherwise transferred, sold or otherwise provided for in
27 the Commission's Plan, the property of the Debtor's estate shall vest in the Reorganized Debtor.
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