UNITED STATES OF AMERICA

BEFORE THE

SECURITIES AND EXCHANGE COMMISSION

In Re Form U-1Application and or Declaration Under the Public Utilities Holding Company Act of PG&E Corporation, Pacific Gas and Electrict Company, and Newco Energy Corporation	)))))	File No 70-10047

PEOPLE OF THE STATE OF CALIFORNIA, EX REL. BILL LOCKYER ATTORNEY GENERAL'S OPPOSITION TO THE APPLICATION OF PG&E CORPORATION, PACIFIC GAS AND ELECTRIC COMPANY AND NEWCO ENERGY CORPORATION PURSUANT TO THE PUBLIC UTILITY HOLDING COMPANY ACT, 15 U.S.C. §§ 79i(b) AND 79c(a)(1)

On or about January 31, 2002, PG&E Corp., Pacific Gas and Electric Company, and Newco Energy Corp. (collectively "PG&E") submitted an application to the SEC for approval of transfer of ownership of public utilities in California and, following the reorganization for further exemption from the Public Utility Holding Company Act ("PUHCA"), 15 U.S.C. § 79c(a)(1). PG&E filed an amended application on June 4, 2002. The People of the State of California, ex rel. Bill Lockyer, Attorney General ("Attorney General") opposes both applications in this brief Opposition and hereby requests a hearing on the basis of the issues set forth in this Opposition and in his Petition for Review and Revocation of PG&E Corporation's Exemption, filed July 5, 2001 (incorporated to this opposition and attached as Ex. 1), and his Supplemental Petition, filed October 4, 2001 (incorporated to this opposition and attached as Ex. 2).

PG&E seeks a section 9(a)(2) declaration because it currently has a PUHCA exemption

under section 3(a)(1). The Attorney General has challenged that exemption in the Petition and Supplement to Petition, and incorporates those pleadings here. The SEC should first determine the applicability of the section 3(a)(1) exemption; if the exemption does not apply to PG&E, PG&E's asset transfer must be reviewed extensively under PUHCA, not just under section 9(a)(2). Now, in its bankruptcy reorganization plan, PG&E attempts to preempt conditions imposed on the holding company by the California PUC relating to the structure of holding company/utility relationship and affiliate rules, thereby underlining the impropriety of the PUHCA exemption and the need for full and complete regulation by the SEC. Second, until the U.S. Court of Appeals for the Ninth Circuit rules on the legality of the Pacific Gas and Electric Company reorganization plan and the Bankruptcy Court determines that the Pacific Gas and Electric Company plan will be approved, the matter is not ripe for SEC review. Third, SEC approval of the PG&E proposal is part and parcel of PG&E's reorganization plan, which, at its heart, requires evisceration of state laws, including environmental protections for land and operations, including hydroelectric facilities, held by PG&E. As a result, the SEC cannot proceed with its review process without full compliance with the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321-4345 et seq., in this case requiring an environmental impact statement.

Relationship to Bankruptcy Proceedings

PG&E's section 9(a)(2) application (for ownership transfer) is entirely dependent upon its bankruptcy plan of reorganization for its California public utility, Pacific Gas and Electric Company, wholly owned subsidiary of PG&E Corporation, the holding company under PUHCA, and currently the subject of extensive litigation in bankruptcy court in California. *In*

Re: Pacific Gas and Electric Co., Case No. 01-30923 DM (U. S. Bankruptcy Court, N.D.Cal., San Francisco Division). PG&E Corp. is a co-proponent of the PG&E plan, and has invested tens of millions of dollars in the plan confirmation process. So far, Pacific Gas and Electric Company and the California Public Utility Commission ("PUC") along with the Official Committee of Unsecured Creditors have submitted competing plans of reorganization. Pacific Gas and Electric Company's reorganization plan is hotly contested by the PUC and a number of other entities and individuals. Pacific Gas and Electric Company (and its parent holding company) seek, through the reorganization plan, to eviscerate state laws, through express or implied preemption. Pacific Gas and Electric Company's express preemption claim is currently on appeal to the U.S. Court of Appeals for the Ninth Circuit, No. 02-16990, following a ruling by the Bankruptcy Court that bankruptcy laws do not allow blanket preemption of state laws, *In Re: Pacific Gas and Electric Company*, 273 B.R. 795 (Bakr. N.D.Cal. 2002), and a reversal of that ruling by the District Court. *In Re: Pacific Gas and Electric Co.,* No C-02-1550 VRW, (N.D.Cal.,August 30, 2002). If Pacific Gas and Electric Company's preemption argument fails or if the PUC plan rather than the Pacific Gas and Electric Company plan is approved, PG&E's SEC application will be moot. The State of California vigorously opposes Pacific Gas and Electric Company's bankruptcy plan of reorganization and will continue to do so in the bankruptcy and appellate courts. PG&E's section 9(a)(2) application should be rejected as not ripe unless the plan is approved, and, at such time, the SEC may properly review the PG&E application.

Requirements of the National Environmental Quality Act

The National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321-4345, requires a

federal agency such as the SEC to prepare a detailed EIS for all major federal actions significantly affecting the quality of the environment. 42 U.S.C. § 4332(2)(C). Preparation of an EIS serves NEPA's underlying purpose, which is to "ensure[] that the agency ... will have available, and will carefully consider, detailed information concerning significant environmental impacts; it also guarantees that the relevant information will be made available to the larger [public] audience." *Blue Mountain Biodiversity Project ("BMBP") v. Blackwood*, 161 F.3d 1208, 1211-12 (9th Cir. 1998), *cert. denied*, 527 U.S. 1003 (1999) (internal quotation omitted, alterations in original). Where a project will "significantly affect" the environment, the federal agency approving or funding the project must prepare an EIS. 42 U.S.C. § 4332(2)(C). As a preliminary step in compliance with NEPA, the federal agency may prepare an EA -- a "concise public document" that provides sufficient evidence and analysis for determining whether to prepare an EIS, aids the agency's compliance with NEPA when no EIS is necessary, and facilitates preparation of an EIS when one is necessary. 40 C.F.R. § 1508.9.

While an agency may avoid preparation of an EIS where there is no evidence that the project will have significant effects on the human environment, *see* 42 U.S.C. § 4332(2)(C), such a decision is supportable only where the agency has taken a "hard look" at the environmental consequences of the action and its decision is "fully informed and well-considered." *Blue BMBP*, 161 F.3d at 1211. A decision not to prepare an EIS cannot be supported by an EA that lacks information relevant to an assessment of whether or not the project will have significant impacts. *Foundation for North American Wild Sheep v. USDA*, 681 F.2d 1172, 1178 (9th Cir. 1982). And an EIS must be prepared if "substantial questions" are raised as to whether a project may have significant effects. *BMBP*, 161 F.3d at 1211; *Wild Sheep*, 681 F.2d at 1179 (finding

that California Department of Fish and Game's letter had raised "serious questions" about road project requiring preparation of EIS).

The following discussion of possible environmental, health and safety impacts of the PG&E proposed plan of reorganization, of which SEC approval of the application is an essential part, is excerpted from the "Objections to Confirmation of the PG&E Plan by the People of the State of California, ex rel. Department of Toxic Substances Control, et al." *In Re: Pacific Gas and Electric Co.*, No. 01 30923 DM (N.D.Cal.), submitted on June 4, 2002.

"PG&E's Plan proposes to transfer valuable and environmentally sensitive electric generation assets, including the largest privately owned hydroelectric generation system in the United States [including 174 dams and diversions on 16 rivers, 99 reservoirs, 26 FERC licenses, and 140,000 acres of watershed lands] from one plan proponent, PG&E Company, to the other plan proponent, PG&E Corp., . . . without prior review and approval by the [PUC] as required by statute. . . .

". . . [T]he PG&E Proponents are also contending that the California Environmental Quality Act ("CEQA") is preempted. The California Legislature enacted CEQA in order to protect the health, safety, and welfare of the citizens of California. Cal. Pub. Res. Code § 21000(b)(c)(d). CEQA is a critically important environmental regulatory statute which applies broadly to all "discretionary projects proposed to be carried out or approved by public agencies," such as the [PUC]. . . .

"For the last 80 years, the [PUC] has created financial incentives for PG&E to operate its hydropower system, and manage its lands at stewardship levels higher than minimum legal standards. These higher stewardship levels have created environmental quality benefits for

public trust resources. Ensuring the continued higher environmental quality levels is part of the review process [that PG&E seeks to enjoin through its plan of reorganization]." *See also,* Memorandum of Environmental Defense in Opposition to Debtor's Second Amended Disclosure Statement, filed in *In Re: Pacific Gas and Electric Co.,* No. 01-30923 DM (Bankr. N.D.Cal. 2002) (setting forth potential environmental impacts of proposed reorganization), attached as Ex. 1.

Previous environmental studies have determined that transfer of PG&E assets to non-regulated utilities would result in at least 49 significant adverse effects, including impacts to water quality, air quality, endangered species, forests, recreation, public safety, and electrical supply reliability.[1] As a result, there can be no question that any SEC action regarding the PG&E application is a major federal action triggering NEPA and requiring full scale environmental review. Thus, the SEC must meet its NEPA obligations before proceeding with any decision on the PG&E application.

The PUHCA Exemption, Additional Considerations

With respect to PG&E's request for continuation of its section 3(a)(1) exemption from PUHCA (presented as part of the section 9(a)(2) application), the Attorney General renews his request for revocation–or denial–of that status. On June 5, 2001, the Attorney General submitted a Petition to the Commission for the review and revocation of the exemption, pursuant to 17 C.F.R. § 250.6. PG&E Corp. filed its Response to the Petition on August 7, 2001, welcoming a hearing. The Attorney General submitted a supplement to the Petition for Review on October 4,

[1]Pursuant to a previous attempt by PG&E to divest its hydroelectric system assets in 1999, the PUC prepared a draft environmental impact report under CEQA. That draft in available at http://Commission-pgehydro.support.net.

2001. The Attorney General now, in light of PG&E's request for asset transfer approval and extension of the exemption, hereby renews its Petition for Review. The original petition and supplement to the petition are attached. The Attorney General continues to believe that PG&E does not qualify for the exemption from PUHCA and that the exemption should be revoked or denied for the reasons set forth in our previous petition, attached hereto as Ex. 2 and 3.

In addition to the reasons set forth in the previously submitted Petition and Supplement, the Attorney General directs the SEC's attention to the fact that a significant (if not overriding) purpose of PG&E's bankruptcy reorganization plan and asset shuffle is an attempt to avoid state regulation, particularly regulation by the California Public Utility Commission. PG&E's PUHCA exemption is predicated on the notion that because the utility operates entirely in California and its holding company operates largely in California (the latter, of course, the Attorney General disputes), State regulation is sufficient to preclude the potential for abuse addressed by PUHCA. Now, as part of PG&E's proposed reorganization, PG&E seeks to eliminate California regulatory scrutiny, thereby directly undercutting the logic of the PUHCA exemption. PG&E sets forth its preemption argument in substantial detail in its Exhibit I to the current application. The State of California believes that PG&E's arguments to eviscerate state law through the bankruptcy reorganization process fail. The State's pleading from the district court proceeding is attached as Ex. 4. Here, ironically, the more successful PG&E is in arguing in bankruptcy that state regulations are preempted, the more the SEC should be scrutinizing PG&E pursuant to PUHCA. See, e.g., Expert Report of Lee S. Friedman, submitted in PG&E bankruptcy proceeding, attached as Ex. 5. The PUHCA exemption exists primarily where state law is sufficient to address the potential abuses that PUHCA seeks to remedy. PG&E now

argues that state law does not apply to it. In this vacuum, created by PG&E for the benefit of PG&E, the SEC cannot appropriately issue PG&E an exemption from scrutiny under PUHCA.

One example is particularly illustrative. The Attorney General has filed an action against PG&E Corporation and its directors for unfair business practices in violation of state law stemming from the upstreaming by PG&E Corp. of billions of dollars of assets from its utility, PG&E Co. (Complaint attached as Ex. 6). PG&E Corp. is attempting to have that action addressed in bankruptcy court, arguing that any claim against the holding company (PG&E Corp.) for illegal transfer of funds from the utility (PG&E Co.) belongs to the utility, and that the bankruptcy proceeding will result in a release of any claims against the holding company, its officers and directors, including claims arising out of the "First Priority Rule," one of the conditions set forth by the PUC to allow deregulation of the electricity market, and the basis of the Attorney General's claims under state law. (PG&E Opposition to Remand pleadings attached as Ex. 7). This is the type of abuse of corporate structure that PUHCA is designed to address, and the type of abuse that the SEC could and should address rather than exempt.

Once again, the Attorney General submits this Opposition and renewal of Petition pursuant to his independent authority to protect the public interest under the California Constitution, common law, and statutes. *See* Cal. Const., art. V, § 13; Cal. Gov. Code §§ 11180 et seq. and 12512; *D'Amico v. Board of Medical Examiners,* 11 Cal.3d 1, 14-15. "The Attorney General . . . is the chief law officer of the state. As such he possesses not only extensive statutory powers but also broad powers derived from the common law relative to the protection of the public interest. He represents the interests of the people in matters of public concern. . . . He has the power to file any civil action or proceeding directly involving the rights and interests

of the state, or which he deems necessary for the enforcement of the laws of the state, the preservation of order, and the protection of public rights and interest." *D'Amico,* 11 Cal.3d at 14-15 (citations omitted). *See also* 15 U.S.C. § 79s (granting authority for participation by State in Commission hearings). This Petition is on behalf of the Attorney General and not on behalf of any other California agency or office.

Notice

Please direct all notice and service in this matter to:

KEN ALEX
Supervising Deputy Attorney General
1515 Clay Street
Oakland, CA 94612-1413

Respectfully submitted,

BILL LOCKYER
Attorney General
TOM GREENE
Senior Assistant Attorney General

Date: November 14, 2002

_____

KEN ALEX
Supervising Deputy Attorney General

Attorneys for People of the State of California ex rel. Bill Lockyer, Attorney General