UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Pacific Gas and Electric Company	)	**Project No. 606-027**
	)	**Kilarc-Cow Creek**

**PACIFIC GAS AND ELECTRIC COMPANY'S
REPLY TO MOTIONS TO INTERVENE;
COMMENTS OPPOSING SURRENDER AND
DECOMMISSIONING OF PROJECT AS PROPOSED;
MOTION FOR IMPOSITION OF TERMS AND CONDITIONS
NECESSARY FOR SURRENDER APPROVAL AND
TO ALLOW CONTINUED OPERATION OF
THE KILARC-COW CREEK PROJECT,
OR IN THE ALTERNATIVE, FOR FULL EVALUATION OF
THE DECOMMISSIONING ALTERNATIVES, INCLUDING RETENTION OF
THE EXISTING KILARC-COW CREEK HYDROELECTRIC PROJECT FACILITIES
AS A REASONABLE AND PREFERRED ALTERNATIVE,
IN THE PUBLIC INTEREST; AND
RECOMMENDATIONS FOR TERMS AND CONDITIONS
OF LICENSE SURRENDER OF
TETRICK RANCH, ABBOTT DITCH USERS, AND SHASTA COUNTY**

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Pacific Gas and Electric Company ("PG&E") respectfully submits these reply comments to the July 13, 2009 filing submitted in the above-captioned proceeding by Tetrick Ranch, the Abbott Ditch Users, and Shasta County (collectively, "Tetrick Parties").[1] The Tetrick Parties'

[1] The Tetrick Parties' July 13, 2009 filing is captioned "Motions to Intervene; Comments Opposing Surrender and Decommissioning of Project as Proposed; Motion for Imposition of Terms and Conditions Necessary for Surrender Approval and to Allow Continued Operation of the Kilarc-Cow Creek Project, or in the Alternative, for Full Evaluation of the Decommissioning Alternatives, Including Retention of the Existing Kilarc-Cow Creek Hydroelectric Project Facilities as a Reasonable and Preferred Alternative, in the Public Interest; and Recommendations for Terms and Conditions of License Surrender of Tetrick Ranch, Abbott Ditch Users, and Shasta County" ("Tetrick Parties' Brief").

filing relates to the license surrender application filed by PG&E for its Kilarc-Cow Creek Hydroelectric Project, FERC Project No. 606 ("Project"). In the event the Project is decommissioned,[2] Tetrick Ranch and the Abbott Ditch Users, who for many years have reaped the water-supply benefits of the Project, ask the Commission to require PG&E to provide information as to whether and how it will supply them with water after the Project is decommissioned, presumably in perpetuity, and at no cost to themselves, or otherwise compensate them for the loss of the water. The Commission should reject the request. As discussed below, the Commission is without jurisdiction to grant the request, which is, in any event, premised on the erroneous assumption that Tetrick Ranch and the Abbott Ditch Users have a legal entitlement to water from their current points of diversion in Hooten Gulch. PG&E would like to note that it has engaged in discussions with Tetrick Ranch and the Abbott Ditch Users and remains hopeful that it can resolve the outstanding water rights issues outside of this proceeding.

I. BACKGROUND.

On March 12, 2009, PG&E filed with the Commission an application to surrender its license for the 5.0 megawatt Project. The Project is located on South Cow Creek and Old Cow Creek in Shasta County, California, and consists of two separate developments, Kilarc and Cow

[2] In their brief, the Tetrick Parties ask, among other things, that the Commission authorize the continued operation of the Project by an entity called Evergreen Shasta Power, LLC ("Evergreen Shasta"). While PG&E does not take a position on the merits of the proposal, PG&E does believe that the information provided by the Tetrick Parties is inadequate to assess Evergreen Shasta's capacity to operate the Project. For example, the engineering and operational qualifications of Evergreen Shasta to operate and maintain a hydroelectric project that includes some seven miles of canals in twenty different sections, with associated flumes, tunnels, and spillways, as well as two powerhouses with associated tailraces, switchyards, equipment, and transmission facilities, are not disclosed; the entity's financial ability to shoulder the substantial costs and potential liabilities associated with operating and maintaining the Project is not described; and its environmental qualifications to work constructively with the resource agencies and to serve as a steward for the watershed are not mentioned. If the Commission decides to explore the Tetrick Parties' conceptual framework further, PG&E respectfully suggests that the Commission require the Tetrick Parties to disclose additional pertinent information so the Commission may have an adequate basis for evaluation.

Creek. PG&E proposes to surrender its license to operate the Project and to decommission Project facilities, as described in the proposed decommissioning plan submitted with the license surrender application.

PG&E initially sought a new license for the Project, filing with the Commission in 2002 a Notice of Intent to relicense the Project. However, after performing initial relicensing studies and consulting with resource agencies and other interested parties, PG&E ultimately concluded that the likely cost of providing the necessary level of protection, mitigation, and enhancement measures for the resources affected by the Project would outweigh the economic benefit of generation from the Project over the life of a new license, and would result in the Project no longer being an economical source of power for PG&E's electric customers. Additionally, PG&E recognized that a cost-effective decommissioning could be achieved at about the same lifecycle economic cost to its customers as continuing the relicensing, but with the significant environmental benefits of improved habitat for anadromous fish.

Consequently, in March 2005, PG&E entered into the Kilarc-Cow Creek Project Agreement ("Agreement") with several resource agencies and non-governmental organizations.[3] Pursuant to the Agreement, PG&E, among other things, agreed not to file an application for a new license by the statutory deadline of March 27, 2005, and instead agreed to support decommissioning the Project. In exchange, the other signatories agreed to support a scope of decommissioning which would address specified subjects, but provide PG&E flexibility to address these subjects in the most cost-effective manner possible. In addition, the Agreement states that PG&E intends, upon receiving a final order from the Commission ending Project power operations, to transfer its appropriative water rights held for operation of the Project to a

[3] The signatories to the Agreement are PG&E, U.S. Fish and Wildlife Service, California Department of Fish and Game, National Park Service, California State Water Resources Control Board, National Marine Fisheries Service, Friends of the River, and Trout Unlimited.

resource agency or other entity that agrees to use the water rights to protect, preserve, and/or enhance aquatic resources, as authorized by applicable laws and regulations, such as Section 1707 of the California Water Code.[4]

When PG&E declined to file a license application by the statutory deadline, the Commission, pursuant to 18 C.F.R. § 16.25, solicited interest from entities wishing to take over the Project. None filed a timely license application. Consequently, PG&E prepared the instant license surrender application and accompanying proposed decommissioning plan.

Decommissioning the Project is likely to benefit steelhead trout, which are listed as threatened under the Federal Endangered Species Act, and fall-run Chinook salmon, designated a species of concern.[5] Decommissioning the Project will improve aquatic habitat in the bypass reaches of South Cow Creek and Old Cow Creek, including designated critical habitat for steelhead in South Cow Creek. Beneficial impacts to aquatic habitat will include restoration of streamflows, release of spawning gravel from behind the dams to downstream habitat, and cooler water temperatures in the bypass reaches during the summer months. In South Cow Creek, removal of the diversion dam[6] would improve fish passage within designated critical habitat for steelhead. Perennial flows will no longer be released to the Cow Creek Powerhouse tailrace in Hooten Gulch. However, no listed species have been documented in Hooten Gulch.

[4] As discussed herein, PG&E is currently proposing to abandon its water rights rather than transfer them to a resource agency.

[5] The Central Valley Steelhead Distinct Population Segment was listed as a threatened species on March 19, 1998 and reaffirmed on January 5, 2006 (71 Fed.Reg. 834). Critical habitat was designated for steelhead in the Central Valley on September 2, 2005 (70 Fed.Reg. 52488). Critical habitat extends through the Action Area on South Cow Creek about seven miles upstream of the Cow Creek Diversion Dam to the mouth of Hagaman Gulch. The Central Valley fall-run and late fall-run Chinook salmon population unit was designated as a species of concern by the National Marine Fisheries Service on April 15, 2004 due to specific risk factors (69 Fed.Reg. 19975).

[6] As currently proposed, dam removal would include removing the concrete cap, removing fill, and removing the bin walls and interior baffles. *See* License Surrender Application, Vol. 2, Appendix A, p. 2-26 (March 12, 2009), *available at eLibrary*, Accession No. 20090312-5109.

Decommissioning may also improve riparian habitat in Old Cow and South Cow creeks, benefiting riparian-dependent birds, amphibians, and other species.

The Tetrick Parties' primary concern, as discussed throughout their brief, is with the cessation of artificial flows to Hooten Gulch that will result from Project decommissioning. The Abbott Ditch Users utilize a diversion that takes water from Hooten Gulch and distributes the water through an unlined canal to its members. Tetrick Ranch owns a small conduit hydro project located on its property and similarly diverts water from Hooten Gulch to serve its hydro project. Tetrick Ranch sells the power generated by the hydro project to PG&E pursuant to a power purchase agreement.

II. THE COMMISSION LACKS JURSIDICTION OVER WATER RIGHTS AND, IN ANY EVENT, THE ABBOTT DITCH WATER USERS AND TETRICK RANCH DO NOT HAVE WATER RIGHTS THAT WILL BE IMPACTED BY DECOMMISISONING.

Tetrick Ranch and the Abbott Ditch Users request that the Commission require PG&E to provide additional information as to "(1) how PG&E intends to continue supplying water to Tetrick Ranch and to the Abbott Ditch Users during the decommissioning period; (2) when the water users would be impacted by losses of water and for what duration; (3) how compensation will be made to the water users for the loss of the use of their property because of the loss of water service; (4) whether PG&E commits itself to pay the water users for the permitting and construction of a new, suitable water conveyance system, including a new diversion site; and (5) how that new water conveyance system will be maintained in the future." Tetrick Parties' Brief at p. 42.[7]

[7] In a more direct statement of the issue, the Abbott Ditch Users wrote a letter to PG&E in 2007 stating that they were "providing notice to PG&E that PG&E is responsible to assure that the Abbott Ditch Water Users have a diversion facility which is equivalent to its current facility, and that PG&E is responsible for the capital cost, and operation and maintenance cost of that new facility." Letter from Scott Morris to Steve Nevares, at pp. 1-2 (September 26, 2007), Exhibit A to the Affidavit of Steve Nevares ("Nevares Affidavit") submitted herewith.

With the exception of (2), above, to which PG&E does not object, the request is premised first on the assumption that PG&E is obligated to provide "water service" to Tetrick Ranch and the Abbott Ditch Users, and, second, on the assumption that the Commission is empowered to enforce that obligation. Both assumptions are incorrect.

A. The Commission May Not Exercise Jurisdiction Over Disputes Arising Under California State Water Law.

As the Commission is well aware, the Federal Power Act reserves to the states all authority "relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein." 16 U.S.C. § 821. Consequently, the Commission has consistently declined to exercise jurisdiction over issues relating to state water rights. *See e.g., Enterprise Mill, LLC* 113 FERC ¶ 62,131 at p. 64,350 (2005)("The Commission does not decide state water rights issues"); *Northern States Power Company*, 106 FERC ¶ 62,185 at p. 64,316 (2004)(same); *El Dorado Irrigation District,* 94 FERC ¶ 61031 at p. 61,119, n. 17 (2001)(declining to resolve question of adequacy of licensee's consumptive water rights, stating "the Commission has no jurisdiction over water rights, which are governed by state law"); *Avista Corp.*, 90 FERC ¶ 61,167 at p. 61,515 (2000)(declining to make a water rights agreement a license condition on the grounds that "we have no jurisdiction over water rights, which are a matter of state law"); *Crown Hydro Company*, 86 FERC ¶ 62,209, 1999 FERC LEXIS 509 at p. *19 (1999)(declining to "place[] conditions in this license to require water rights negotiations as a condition of this license"); *East Bay Municipal Utility District*, 86 FERC ¶ 61,058 at p. 61,198 (1999)("As we have repeatedly observed, the determination of state water rights is a matter for state authorities, and we will abide by their rulings thereon").

Moreover, the Commission has expressly declined to order the specific relief upon which the Tetrick Parties' request for information is premised. In a relatively recent decision, the Commission was asked to require a licensee to engineer, permit, construct and operate a modified powerhouse tailrace diversion structure and conveyance facility so as to facilitate the distribution of water among various water rights holders. *Southern California Edison Co.*, 121 FERC ¶ 61,154, at p, 61,682 (2007). The request came in the form of a settlement agreement, the terms of which the Commission was asked to incorporate into a new license on rehearing. The Commission initially observed that "[i]t is apparent that the proposed revisions [to the license] have been designed principally to address the allocation of powerhouse flows pursuant to water rights." *Id.* at p. 61,691. The Commission further noted that "[s]ubject only to any flow release requirements we might impose here for environmental reasons, we would have no reason to begin exercising control over the powerhouse flows now, since the allocation of flows to satisfy water rights is not a valid basis for the exercise of our regulatory authority." *Id.* Consequently, the Commission rejected that portion of the settlement agreement, concluding that "the allocation of water to satisfy water rights is not a project purpose, so there is no reason for us to require the licensee to file a plan for reconstructing the tailrace diversion structure and water conveyance facility, as the settlement signatories request." *Id.* at p. 61,692. In short, the Commission concluded that "[e]nforcing [licensee]'s distribution of water in accordance with established water rights is not within the Commission's jurisdiction." *Id.* at p. 61,690.

Thus, the Commission has recognized that it is beyond its jurisdiction to require a licensee to construct new diversion and conveyance facilities solely to satisfy established water rights. Yet that is the very premise of the relief sought by Tetrick Ranch and the Abbott Ditch Users.

In another Order issued in the analogous context of a license surrender proceeding, the Commission expressly carved out from its approval of the proposed decommissioning plan a provision, similar to the one contained in the Agreement in the instant matter, that called for the licensee to transfer its water rights to a resource agency. *See Portland General Electric Company*, 107 FERC ¶ 61,158 (2004). The Commission observed that the provision was "not within our jurisdiction. Thus, we do not adopt the plan's disposition of . . . [the] transfer of water rights." *Id.* slip op. at p. 8, n. 21.

Later in the same Order, the Commission declined to require the licensee to mitigate for the alleged harm to residential water wells caused by the removal of a lake that contributed 5 to 7 cubic feet per second to local groundwater resources. The licensee argued that mitigation was inappropriate since its surface water rights were senior to the groundwater rights of the well owners. The Commission abstained from the debate, stating, "[i]n this matter we will defer to state law with respect to any remedies that may be available to well owners whose wells are found to be adversely affected by the removal of Roslyn Lake." *Id.* at p. 12.

In short, this is not the appropriate forum in which to resolve whether PG&E is obligated under established principles of California water law to provide Tetrick Ranch and the Abbott Ditch Users with a firm water supply after the Project is decommissioned. Because the Tetrick Parties' request for information regarding water supply issues is premised upon the existence of such an obligation, the Commission should deny it.

B. PG&E Has No Obligation Under California Law to Provide Water to the Abbott Ditch Water Users.

Even if the Commission had jurisdiction to resolve water rights disputes, PG&E would not be obligated to provide the Abbott Ditch Users with water. The waters of South Cow Creek were adjudicated in 1969 by the Superior Court of California, County of Shasta. *See Decree In*

the Matter of the Determination of the Rights of the Various Claimants to the Water of Cow Creek Stream System Excepting Clover Creek, Oak Run Creek and North Cow Creek in Shasta County, California, No. 38577 (August 25, 1969) (Book 89 of Judgments, Page 484)("Adjudication"). The Adjudication states that the water right claimants of the Abbott Ditch are entitled to divert 13.13 cfs "from the natural flow of the east channel of South Cow Creek" at Diversion Point 73, which diversion point is indicated on the attached map as being located in South Cow Creek below the confluence with Hooten Gulch.[8] Thus, the Abbott Ditch Users have a right to divert water not from Hooten Gulch, but from South Cow Creek. Indeed, the Adjudication makes no mention of any diversions in Hooten Gulch.

The Abbott Ditch Users, while apparently conceding this point, assert that they entered into an agreement with PG&E's predecessor-in-interest, Northern California Power Company, to move their diversion facility to Hooten Gulch below the Cow Creek Powerhouse to facilitate the construction of the Project. *See Affidavit of Steve Tetrick*, Ex. A-1, ¶ 11. No documentation to support the assertion is provided in the filing, nor has PG&E been able to locate any.[9] Nor do the Abbott Ditch Users explain why, if such an agreement existed, the adjudicated water right is to South Cow Creek even though the Adjudication occurred many years after the Project commenced operations.[10]

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[8] Adjudication, p. 20.

[9] Importantly, it is the general rule in California that a water right is an estate in real property and that any transaction involving such an interest is within the statute of frauds and must be in writing. *Hayes v. Fine*, 91 Cal. 391, 398 (1891). *See also* Cal. Code Civ. Proc. § 1971.

[10] To the extent that the Abbott Diversion was re-located to Hooten Gulch prior to the Adjudication, and yet for the Adjudication the Abbott Ditch Users stated a claim to divert water not from Hooten Gulch but from South Cow Creek, that would appear to suggest that the Abbott Ditch Users recognized that they had no right to expect undiminished artificial flows in Hooten Gulch and, therefore, wanted to maintain their claim to the waters in South Cow Creek should the artificial flows in Hooten Gulch cease. If the Abbott Diversion had remained in South Cow Creek, it would not now be affected by PG&E's decommissioning of the Project.

In any event, the Abbott Ditch Users were legally obligated to document the location of the Abbott Diversion during the adjudication proceeding. Cal. Water Code § 2528. It was their submission to the court that located the Abbott Diversion in South Cow Creek. Because the Adjudication places the Abbott Diversion in South Cow Creek and not in Hooten Gulch, the Abbott Ditch Users are now estopped from claiming a right to appropriate water flowing in Hooten Gulch. Cal. Water Code §§ 2773 ("The decree is conclusive as to the rights of all existing claimants upon the stream system lawfully embraced in the determination"); 2774 (when a decree has been entered, any claimant that has failed to submit proof of his claim "shall be barred and estopped from subsequently asserting any rights theretofore acquired upon the stream system embraced in the proceedings, and shall be held to have forfeited all rights to water theretofore claimed by him on the stream system, other than as provided in the decree . . .").

Moreover, even if the Abbott Ditch Users had been diverting water from Hooten Gulch under a claimed legal right, PG&E would still not be obligated under California law to ensure a continued water supply for the Abbott Ditch Users. The water PG&E releases into Hooten Gulch is properly conceived of as an artificial flow since but for PG&E's powerhouse releases into Hooten Gulch, there would be minimal natural flow in Hooten Gulch. Once PG&E ceases its diversions from South Cow Creek, flows in Hooten Gulch will return to their natural state and the previously diverted waters will return to South Cow Creek.

The California Supreme Court has held that "[i]t is the general rule. . . that the producer of an artificial flow is for the most part under no obligation to lower claimants to continue to maintain it. At any time he may forsake the practice, and lower users will not have acquired a right against him, either by appropriation or prescription, to continued augmentation of the natural volume of the stream." *R. Stevens v. Oakdale Irrigation Dist.*, 13 Cal.2d 343, 348

(1939).[11] The Court continued by way of example to note that "The millowner may cease to operate his conduit across the divide, or may cease to operate his mill, or his water wheels, or may change his location, or otherwise take away or alter, in whatever way he pleases, the artificial source of the flow. . . . This principle is well settled in the decisions." Id. at 349 (internal quotation and citation omitted). *See also E. Clemens Horst Co. v. New Blue Point Mining Co.*, 177 Cal. 631 (1918); *Haun v. DeVaurs*, 97 Cal.App.2d 841 (1950); *Dannenbrink v. Burger*, 23 Cal.App. 587 (1913). Similarly, PG&E may cease operating its Cow Creek Powerhouse, and assume no liability thereby, notwithstanding that the artificially augmented flows in Hooten Gulch will also cease.[12]

Finally, even if PG&E were currently obligated to maintain augmented flows in Hooten Gulch, which it is not, such obligation would expire upon its decommissioning of the Project. As the California Supreme Court stated in a case involving the City of Los Angeles, but not involving reliance on artificial flows, "the city, by its long continued diversion of the waters of the Owens River, incurred an obligation to continue that diversion within the reasonable capacity of its aqueduct system, *at least so long as it continued to maintain its aqueduct.*" *People v. City of Los Angeles*, 34 Cal.2d 695, 697-98 (1950)(emphasis added), discussing *Natural Soda*

[11] The Court noted potential exceptions to the rule "where the artificial condition has become inherently permanent and there has been a dedication to the public use, or where the drainage is stopped wantonly to harm a lower party, without other object." *R. Stevens*, 13 Cal.2d at 352. With respect to the permanency and public dedication of the artificial flow, the California Supreme Court has held that the artificial flow must be effectuated "not merely with the temporary and private object of benefiting the property of those by whom it was constructed, such as draining a mine, or a mining district, or the like." *Chowchilla Farms Inc. v. Martin*, 219 Cal. 1, 23 (1933)(internal quotation and citation omitted). To be "permanent", the artificial flow may not be established for "any temporary purpose" or "for private use." *Id.* at 24. An artificial flow is not permanent where "the diversion of the water though long standing might be terminated at any time by those responsible for its diversion." *Id.* at 22. The artificial flows in Hooten Gulch were established by PG&E for its private benefit and on a temporary basis for only so long as the Cow Creek Powerhouse is in operation. Thus, under California law, the artificial flows in Hooten Gulch have not been dedicated to public use nor are they "permanent."

[12] Not only is there no prescription as to the artificial flows in Hooten Gulch, but more generally, there is no prescriptive right against PG&E for continued operation of any part of the Project since prescription as against a public utility is barred under the California Civil Code. Cal. Civ. Code § 1007.

Products Co. v. City of Los Angeles, 23 Cal.2d 193 (1943). Of course, the city was not required to maintain its aqueduct, nor is PG&E required to continue operating its Cow Creek Powerhouse. Consequently, any obligation to maintain flows in Hooten Gulch that attached to PG&E's operation of the powerhouse will cease with cessation of powerhouse operations. Many other jurisdictions are in accord with this proposition.[13]

In summary, decommissioning the Project will not interfere with the water rights of the Abbott Ditch Users since they do not have a right to artificial flows in Hooten Gulch. Therefore, PG&E does not have a legal obligation to provide the Abbott Ditch Users with water in perpetuity, for free.[14]

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[13] Courts have routinely held in the analogous context of dam removal that the fact that one has used or improved his property in reliance on an artificial condition created by a dam confers on him no right to the continued maintenance of the dam for his benefit. Rather, the owner of a dam may abandon and destroy it. *See e.g., Drainage Dist. No. 2 of Snohomish County v. City of Everett*, 171 Wash. 471, 477, 480 (1933)("The acquisition of the right to divert the waters and to maintain a reservoir for impounding those waters, though that artificial condition was maintained by appellant for the prescriptive period, carried with it no reciprocal right to have its maintenance continued for the benefit of the servient estate. . . . and the servient owner acquires no right to insist on its continuance, or to ask for damages on its abandonment")(internal quotation and citation omitted); *Kiwanis Club Foundation, Inc. of Lincoln v. Yost*, 179 Neb. 598, 602 (1966)("where a dam has been built for the private convenience and advantage of the owner, he is not required to maintain and operate it for the benefit of an upper riparian proprietor who obtains advantages from its existence . . . . The owner of a dam . . . may also return the river to its natural state by removing or destroying the dam"); *Hudson v. Village of Homer*, 351 Mich. 73, 76, 83 (1957)("there is no reason lying in the doctrines of prescription, dedication, or estoppel for support of contention that the defendants. . . may not at will alter the level of Homer Mill Pond" including eliminating the pond, notwithstanding that "construction and long-time maintenance of a dam and mill pond reasonably tends – especially when the period of continuity extends from generation through generations – to lead persons simultaneously receiving and enjoying recreational and riparian benefits from the maintained pond to understandable belief that a permanent and valuable right has been acquired, or is being acquired, by them"); *Taft v. Bridgeton Worsted Co.*, 237 Mass. 385, 389 (1921)("plaintiffs had no right to compel the defendant to maintain its dam for their benefit. The defendant had a right at any time to take down its dam or to cease to impound the water for any reason which seemed to it sufficient"); *Labbadia v. Bailey*, 152 Conn. 187, 194 (1964)("plaintiffs have established no basis for any claim that these defendants were under a duty, at their own expense and risk, to maintain the dam for the use and benefit of the plaintiffs").

[14] It is also worth noting that the Abbott Ditch Users currently employ flood irrigation. It is not clear that this method of use is reasonable under California law and under the Adjudication's reasonable use provision. Cal. Const., Art. X, Sec. 2; Adjudication, p. 5; *Peabody v. City of Vallejo* (1935) 2 Cal.2d 351, 383; *People ex rel. State Water Resources Control Bd. v. Forni* (1976) 54 Cal.App.3d 743, 749-750. The Abbott Ditch Users may be legally entitled to something less than their adjudicated right of 13.13 cfs since they could satisfy their water needs with significantly less water were they to adopt modern irrigation methods.

C. PG&E Has No Obligation Under California Law to Provide Water to Tetrick Ranch.

Again assuming the Commission had jurisdiction to resolve water rights disputes, PG&E would not be obligated to provide Tetrick Ranch with water. Under the Adjudication, Tetrick Ranch has a right to divert 1.10 cfs from South Cow Creek for irrigation. *See* Adjudication p. 159 (right of W.G. Wagoner, Tetrick Ranch's predecessor). As is the case with the Abbott Ditch Users, the Adjudication does not confer on Tetrick Ranch any rights to the artificial flows in Hooten Gulch. Thus, the Tetrick Ranch's claim of injury to its water rights caused by decommissioning is unfounded.

Moreover, although Tetrick Ranch states it has water rights for power generation[15], the Adjudication does not list any such rights. Rather, Tetrick Ranch's water rights are limited to irrigation[16] (and, as stated above, may only be exercised by diverting water directly from South Cow Creek -- not from Hooten Gulch). Thus, the Commission should not require PG&E to specify "what steps it will take to compensate the Tetrick Ranch for the loss of its power production."[17]

D. Tetrick Ranch and the Abbott Ditch Users Would Be in the Same Position Were PG&E to Relicense the Project.

While Tetrick Ranch and the Abbott Ditch Users maintain that they will be injured by the decommissioning and that PG&E is, therefore, compelled to compensate them or otherwise make them whole, the fact is they would likely be in nearly the same position if PG&E were to relicense the Project. Given the significantly augmented instream flows that PG&E anticipated

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[15] Tetrick Parties' Brief at p. 12.

[16] "Irrigation Use" is defined in the Adjudication as follows: "Irrigation use is limited to the application of water for the purpose of meeting moisture requirements of growing crops." Adjudication, p. 10.

[17] Tetrick Parties' Brief at p. 25.

would be required under a new license,[18] there would be very little water available in Hooten Gulch for extended periods of time even if the Project remained operational. Indeed, the Project might have had to shut down completely during periods of low natural flow.[19] Yet there can be no credible argument that PG&E would be required under those circumstances to compensate Tetrick Ranch and the Abbott Ditch Users for the fact that PG&E could not run significant quantities of water through the powerhouse. Thus, to the extent that Tetrick Ranch and the Abbott Ditch Users are injured, those injuries are not a result of the Project's decommissioning; rather, they are the result of a decision on their part to rely on the artificial flows in Hooten Gulch.

For all these reasons, the Commission should decline to grant the relief requested by Tetrick Ranch and the Abbott Ditch Users regarding the alleged injury to their claimed water rights.

III. THE TETRICK PARTIES MAKE SEVERAL INACCURATE ASSERTIONS THAT WARRANT CORRECTION.

PG&E is compelled to make several additional points to correct inaccuracies contained in the Tetrick Parties' filing. First, the Tetrick Parties assert that PG&E's proposal to abandon its water rights rather than transfer them to a resource agency is an effort on PG&E's part "to avoid the 1969 state court Decree," "to evade any state water rights adjudication before decommissioning the Project," and to "avoid the court oversight required by the 1969 Decree."[20] In fact, the reason PG&E is proposing to abandon its water rights is precisely because the Abbott Ditch Users (and others) stated strong objections to PG&E seeking the court approval required to

[18] *See* Nevares Affidavit, ¶ 5.

[19] *Id.*

[20] Tetrick Parties' Brief at 39 and n. 28.

effectuate a transfer of its water rights.[21] Abandonment was viewed by all concerned, including the Abbott Ditch Users and Tetrick Ranch, as a way to accomplish the environmental objective of increasing flows in South Cow Creek without potentially disrupting well-settled water rights that would come with re-opening the Adjudication. Thus, the Tetrick Parties' complaint that "[t]his evasion of the state court's decree is not something that would be appreciated by those affected and who could be affected by these tactics,"[22] is misplaced.

Second, the Tetrick Parties assert that PG&E has reneged on a commitment that "the decommissioning would be tailored 'with minimum impact to the local community of water users.'"[23] PG&E made that statement in a letter explaining why it believed abandonment of its water rights was preferable to transferring the rights to the California Department of Fish and Game. As discussed above, the local water users expressed concerns that a transfer of the rights had the potential to upset adjudicated water rights. It was, and remains, PG&E's view that abandonment of its water rights would result in "minimum impact to the local community of water users", as compared to a transfer of those rights. Thus, PG&E was expressing an interest in preserving to the maximum extent feasible adjudicated water rights – it was not expressing an intent to "make whole" all individuals who claimed an adverse impact irrespective of whether they held valid water rights. And, as discussed above, Tetrick Ranch and the Abbott Ditch Users do not hold water rights in Hooten Gulch.

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[21] *See* Letter from Matthew A. Fogelson, PG&E, to Gary Stacey, Cal. Dep't. of Fish & Game, December 10, 2007, at p. 2, n. 3, *available at* eLibrary Accession No. 20071213-0206 ("In our meetings with the community, it has become apparent that there is a high level of concern . . . that a transfer of PG&E's 1908 priority water rights to a governmental agency or environmental group would allow the recipient of those rights to challenge in some manner current diversions and use of Cow Creek water").

[22] Tetrick Parties' Brief at 39 n. 28.

[23] Tetrick Parties' Brief at p. 37 *quoting* Letter from Matthew A. Fogelson, PG&E, to Gary Stacey, Cal. Dep't. of Fish & Game, December 10, 2007, at p. 2, n. 3, *available at* eLibrary Accession No. 20071213-0206.

Third, the Tetrick Parties maintain that "[m]embers of the local community were not generally aware of PG&E's proposed decommissioning until 2007."[24] This statement is simply not accurate. By letter dated February 20, 2004, PG&E advised interested parties that "[d]ue to the complex and competing resource issues associated with the project, decommissioning the project may be a viable alternative to relicensing. Therefore, PG&E plans to explore decommissioning as an alternative tor relicensing the project."[25] The letter invited members of the public to attend a meeting to "start discussion on decommissioning."[26] A call-in number was provided for those that could not attend in person. The distribution list for the letter included several members of the local community. Indeed, an article discussing the fact that PG&E was considering decommissioning the Project was published in a local newspaper, the East Valley Times, on April 15, 2004.[27] Just prior to the article's publication, PG&E received letters from Steve Tetrick and from three of the Abbott Ditch Users acknowledging that PG&E was considering decommissioning the Project and expressing concerns with the approach.[28] PG&E responded to the letters on May 4, 2004.[29] Thus, PG&E began alerting the local community as early as February, 2004 that it was considering decommissioning the Project, and exchanged

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[24] Tetrick Parties' Brief at p. 35. This same assertion is made in comments filed by the Save Kilarc Committee. *See* Letter from Laura Carnley to Kimberly D. Bose, FERC (July 13, 2009) *available at* eLibrary Accession No. 20090713-5192.

[25] Letter from Steve Nevares, PG&E to Parties Addressed (February 20, 2004) *available at* eLibrary, Accession No. 20040302-0074.

[26] *Id.*

[27] A copy of the article is attached as Exhibit B to the Nevares Affidavit.

[28] *See* Letter from Steven P. Tetrick to Steve Nevares, PG&E (April 13, 2004), Nevares Affidavit, Exhibit C; Letter from Art Abbott, Bud Farrell and Dick Jones to Steve Nevares, PG&E (April 8, 2004), Nevares Affidavit, Exhibit D. Interestingly, Mr. Tetrick stated that "We do understand and appreciate PG&E's position. If the new FERC license will in fact have bypass restrictions . . ., power operation would be marginal at best." Letter from Steven P. Tetrick to Steve Nevares, PG&E (April 13, 2004), Nevares Affidavit, Exhibit C.

[29] *See* Letter from Steve Nevares, PG&E, to Art Abott, Bud Farrell and Dick Jones (May 4, 2004), Nevares Affidavit, Exhibit E; Letter from Steve Nevares, PG&E, to Steve Tetrick (May 4, 2004), Nevares Affidavit, Exhibit F.

correspondence regarding decommissioning specifically with Tetrick Ranch and the Abbott Ditch Users at that time. The statement that the local community was not generally aware of the proposed decommissioning until 2007, and the implicit suggestion that PG&E was not completely forthcoming and open about its decision-making process, is inaccurate. The record demonstrates that PG&E advised the community of its decision to explore decommissioning as early as February, 2004.

Finally, the Tetrick Parties assert that when PG&E issued its Notice of Solicitation seeking from outside entities statements of interest in owning, managing, and operating the facilities necessary to continue operation of Kilarc Forebay as a recreational facility, "it crippled that offer by stripping away the power facilities."[30] The Tetrick Parties state that it was "not reasonable for PG&E to offer only the non-power facilities."[31] Yet, as PG&E explained in the Solicitation of Interest document, "PG&E has no authority to authorize continued operation of Project facilities for power generation."[32] Only the Commission has that authority. To suggest, as the Tetrick Parties do, that PG&E intentionally sabotaged the solicitation process to further its chosen outcome is inaccurate.

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[30] Tetrick Parties' Brief at pp. 35-36.

[31] *Id.* at p. 36.

[32] Letter from Stacy Evans and Steve Nevares, PG&E to Interested Parties (March 10, 2008), Nevares Affidavit, Exhibit G.

V. CONCLUSION.

For the reasons stated herein, PG&E respectfully requests that the Commission decline the Tetrick Parties' request for relief regarding issues arising under California water law. Given the jurisdictional bar, the issues are not appropriately addressed in the instant proceeding, and, in any event, would be resolved against the Tetrick Parties in the appropriate forum.

DATED: August 20, 2009

Respectfully submitted,

PACIFIC GAS AND ELECTRIC COMPANY

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served, by U. S. First-Class Mail, the foregoing document upon all parties designated on the official Service List compiled by the Secretary in FERC Project No. 606 (Kilarc-Cow Creek Hydroelectric Project) in accordance with Rule 2010 of the Rules of Practice and Procedure, 18 C.F.R. §385.2010.

Dated at San Francisco, California, this 20th day of August, 2009.

/S/
ELIZABETH J. DIAMOND