BEFORE THE
PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA

Application of Pacific Gas and Electric Company Proposing Cost of Service and Rates for Gas Transmission and Storage Services for the Period 2011-2014 (U39G)	Application 09-09-013 (Filed September 18, 2009)

REPLY BRIEF OF PACIFIC GAS AND ELECTRIC COMPANY TO OPENING BRIEF OF THE UTILITY REFORM NETWORK ON BEHALF OF THE INDICATED SETTLEMENT PARTIES

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I. INTRODUCTION

Pacific Gas and Electric Company ("PG&E") submits this Reply Brief[1] in response to the Opening Brief of The Utility Reform Network On Behalf Of The Indicated Settlement Parties, filed on November 10, 2010.[2]

TURN addresses a single issue in its brief — namely, the position of the Indicated Settlement Parties regarding the ratemaking implications *if* SoCalGas/SDG&E's claim to a contractual right to make deliveries at PG&E's Citygate as a result of PG&E's mistake is granted by the Commission.[3] While taking no position on the *merits* of SoCalGas/SDG&E's claim to a contractual right to make on-system deliveries under its G-XF contract, TURN argues that:

> If SoCalGas is found to have a contractual right to make deliveries at the PG&E Citygate under its G-XF contract, then the resulting revenue loss to PG&E should be the responsibility of PG&E's shareholders and not

[1] PG&E and the Indicated Gas Accord V Settlement Parties are filing a separate brief, currently with this brief, responding to the Opening Brief of the Southern California Gas Company ("SoCalGas") and San Diego Gas & Electric Company ("SDG&E").

[2] The Indicated Settlement Parties on whose behalf TURN filed its Opening Brief are: the Division of Ratepayer Advocates, the California Manufacturers and Technology Association, the California Cogeneration Council, Calpine Corporation, Dynegy Inc., the Northern California Generation Coalition, the Indicated Producers, the City of Palo Alto, the School Project for Utility Rate Reduction, Vista Energy Marketing L.P., and Tiger Natural Gas Inc. For ease of reference, this brief refers only to TURN when discussing the brief filed by TURN on behalf of the Indicated Settlement Parties listed in this footnote.

[3] TURN Opening Brief, pp. 1-2.

its ratepayers, either directly or indirectly, since PG&E alone was responsible for the "mistake" that granted them this right.[4]

TURN asks the Commission to: (1) declare that PG&E will not be able to increase rates to its other backbone customers in order to recover any lost revenue should the Commission grant SoCalGas on-system delivery rights; and (2) direct PG&E to impute additional backbone revenues to the Revenue Sharing balancing account whenever SoCalGas makes deliveries at the PG&E Citygate.[5]

TURN's argument should be rejected for three reasons. First, the result that TURN describes — namely, that the Commission first finds that PG&E made a mistake in filling out the 1997 version of Exhibit A and nevertheless grants SoCalGas an on-system delivery right on the basis of that mistake — is an impossible result that would be contrary to well-established contract law. As a result, were the Commission to grant SoCalGas the right to deliver gas at the PG&E Citygate, that grant cannot be based upon a finding that PG&E made an error in inserting the contract quantity in two blanks on Exhibit A instead of one. If the Commission finds in SoCalGas's favor on some basis other than that PG&E made a mistake, TURN's argument for why the Commission should order PG&E's shareholders to bear the entire shortfall does not apply.

Second, TURN asks the Commission to decide winners and losers with respect to any shortfall resulting from a finding that SoCalGas has on-system delivery rights, when the Settlement Parties explicitly left this question open in Gas Accord V as a topic for further negotiation. In Gas Accord V, the Settlement Parties agreed not to state explicitly in the Settlement whether throughput and rates would be adjusted if any G-XF shipper other than the

[4] TURN Opening Brief, p. 2 (quoting Exhibit 20, p.3).

[5] TURN Opening Brief, pp. 4-6.

Northern California Power Agency ("NCPA") were granted on-system delivery rights. That question was deliberately left open for further discussion. TURN's attempt to have the Commission explicitly rule on that question now is contrary to the Gas Accord V Settlement.

Finally, TURN's suggestion regarding imputing revenues to the Revenue Sharing Mechanism in Gas Accord V (in the event that SoCalGas is granted on-system delivery rights) conflicts with the plain language of the Revenue Sharing Mechanism. The Revenue Sharing Mechanism in Gas Accord V does not exempt certain types of over- or under-collections from operation of the mechanism, and is silent as to the issue addressed in TURN's brief, *i.e.* the loss of revenues resulting from SoCalGas deliveries to the PG&E Citygate. The Settlement Parties should not now upset the balance of burdens in Gas Accord V by having the Commission rewrite the Revenue Sharing Mechanism. In addition, TURN's suggestion for how such an imputation should be performed would likely overstate the imputed revenues from SoCalGas's use of an on-system delivery right.

II. ARGUMENT

A. TURN Describes A Legally Impossible Result

TURN argues that, if the Commission finds that PG&E made a mistake in the 1997 version of Exhibit A that apparently granted SDG&E two delivery points, it should order that any shortfall created by such a "mistake" be borne by PG&E's shareholders, and not by PG&E's other backbone customers. TURN claims that PG&E's customers should not be "forced to indemnify" PG&E for its own error.[6]

However, what TURN describes is a null set in the law. If the Commission finds that the apparent granting of two delivery points to SDG&E in the 1997 Exhibit A was a mistake, it has

[6] TURN Opening Brief, p. 4.

only two choices: (1) it can disregard the erroneous writing[7]; or (2) it can cure the mistake by reforming the contract.[8] It cannot, as TURN's brief suggests, grant on-system delivery rights to SoCalGas if it finds that the 1997 Exhibit A was a mistake.

It is well-established under California law that rights cannot be conferred on a party to a contract on the basis of a mistake. Where, as here, a written instrument contains an error that does not reflect the intent of the parties, the courts have not hesitated to either disregard the erroneous writing, or reform the written contract. *See, e.g., Hess v. Ford Motor Co.,* 27 Cal.4th 516 (2002); *Western Federal Sav. & Loan Ass'n v. Heflin Corp.,* 797 F.Supp. 790 (N.D. Cal. 1992).

Therefore, if the Commission finds — as PG&E urges in this case — that the inclusion of the same contract quantity in the blanks for two delivery points instead of one in the 1997 Exhibit A was a mistake and that that did not reflect the intent of PG&E and SDG&E, then it cannot also find that SoCalGas has on-system delivery rights. It follows that, if the Commission grants SoCalGas on-system delivery rights, the granting of such rights will have to be based on something *other* than PG&E's mistake. In that event, TURN's argument regarding who should bear the costs of any shortfall resulting from the granting of such rights does not apply, because TURN's argument is predicated entirely on the proposition that PG&E should pay for its mistake.

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[7] Cal. Civ. Code § 1640 ("When through fraud, mistake, or accident, a written contract fails to express the real intention of the parties, such intention is to be regarded, and the erroneous part of the writing disregarded").

[8] Cal. Civ. Code §§ 3399-3401.

B. The Issue Of Whether Throughput And Rates Should Be Adjusted If SoCalGas Were Granted An On-System Delivery Right Was Explicitly Left Open In The Settlement Agreement

Even should the Commission order that SoCalGas has the right to deliver gas to PG&E's Citygate, the Commission should decline to order that PG&E's shareholders bear the entire shortfall resulting from SoCalGas's on-system deliveries. The Gas Accord V Settlement Parties were aware of SoCalGas's claim to an on-system delivery right, and explicitly reserved the issue of whether throughput and backbone rates would need to be adjusted if SoCalGas were to prevail on its claim for future negotiation between the parties:

> The rates specified in this Settlement Agreement are not subject to adjustment during the Settlement Period except as provided herein, or as agreed to by the Settlement Parties and approved by the Commission. In particular, the demand forecast underlying the Settlement backbone rates assumes that none of the G-XF contracts except the NCPA contract has on-system delivery rights. **If during the Settlement Period any off-system G-XF shippers receive on-system delivery rights, the demand forecast and backbone rates may need to be adjusted to account for displacement of other on-system services by these G-XF shippers.**[9]

Through that language, the Gas Accord V Settlement Parties deliberately left open in the Gas Accord V Settlement what adjustment to throughput and rates should be made, if any, were SoCalGas to be granted an on-system delivery right. The parties decided not to determine *a priori* in the Settlement Agreement what the adjustment to throughput and rates would be (if any) should SoCalGas prevail. Rather, the intent behind Section 12.1 (as evidenced by the unambiguous language) was to recognize that, if any G-XF shipper other than NCPA were to be granted an on-system delivery right during the Gas Accord V period, throughput and backbone rates *may* need to be adjusted. The Settlement Agreement does not state that backbone rates *will* be adjusted or that they *will not* be adjusted if SoCalGas prevails; rather, it suggests by the

[9] Gas Accord V Settlement Agreement, Section 12.1 (emphasis added).

deliberate use of the term "may" that the Settlement Parties would engage in further negotiations regarding any adjustments to throughput and backbone rates in that event.

Even though TURN quotes this language in its brief, what it asks the Commission to do is substitute TURN's view on the matter of who should bear any shortfall as a result of SoCalGas's on-system deliveries (should it be granted that right), instead of allowing the Gas Accord V Settlement Parties to negotiate an appropriate adjustment to throughput and backbone rates, as contemplated in the Gas Accord V Settlement. Section 12.1 of the Gas Accord V Settlement Agreement left that question up to the Settlement Parties, not the Commission.[10]

C. TURN's Attempt To Change The Revenue Sharing Mechanism Is Contrary To The Gas Accord V Settlement

In addition, TURN argues that, if the Commission decides that SoCalGas has a contractual right to deliver gas to PG&E's Citygate, that it also should direct PG&E to impute additional backbone revenues for purposes of determining the differences between the adopted revenue requirements and actual revenues under Gas Accord V's Revenue Sharing Mechanism.[11] According to TURN, absent adoption of its recommended imputation of revenues, customers would still pick up 50% of the revenue loss resulting from SoCalGas's Citygate deliveries by virtue of the Revenue Sharing Mechanism.

TURN's argument runs directly contrary to the Revenue Sharing Mechanism in Gas Accord V, in which the Settlement Parties agreed that the "difference between the adopted backbone revenue requirement and recorded backbone revenues, whether an over-collection or

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[10] For this reason, PG&E is not asking the Commission to rule that PG&E's other backbone shippers bear the shortfall for on-system deliveries made by SoCalGas if the Commission decides that SoCalGas has that right. Rather, PG&E is asking the Commission to follow the clear language of the Settlement Agreement and leave that question open for the Settlement Parties to negotiate.

[11] TURN Opening Brief, p. 5.

an under-collection, will be shared 50% to customers and 50% to PG&E shareholders."[12] It does not exempt certain types of over- or under-collections from operation of the mechanism. It also is silent as to the issue addressed in TURN's brief — *i.e.,* the loss of revenues resulting from a Commission decision authorizing SoCalGas deliveries to the PG&E Citygate. The Settlement's silence on this issue stands in contrast to Section 12.1, which explicitly addresses the possibility that backbone throughput and rates may need to be adjusted if any G-XF shipper other than NCPA were granted an on-system delivery right. Clearly, the Settlement Parties were aware of SoCalGas's claimed right to an on-system delivery point, and explicitly addressed that possibility in Section 12.1. They could have also negotiated for a provision in the Revenue Sharing Mechanism that would address TURN's suggested imputation of revenues should SoCalGas prevail. They did not. The Settlement Parties should not now attempt to upset the balance of burdens in Gas Accord V by having the Commission rewrite the Settlement Agreement.

Moreover, TURN's suggestion for how such an imputation should be performed would likely overstate the imputed revenues from SoCalGas's use of an on-system delivery right. TURN suggests that imputed revenues should be calculated based on the volume of SoCalGas Citygate deliveries multiplied by the Baja as-available rate in effect at the time of delivery.[13] While PG&E's Rebuttal Testimony calculated a "worst case scenario" of up to a $7.6 million shortfall annually using the Baja as-available rate, using this rate to impute revenues whenever

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[12] Gas Accord V Settlement Agreement, Section 10.1.1.1. Appendix C to the Settlement makes clear that G-XF costs and revenues are excluded from the calculation of revenue under- or over-collections (because of the incremental rate design for G-XF service) and balancing account protected costs and revenues are also excluded (because they do not contribute to a revenue under- or over-collection).

[13] TURN Opening Brief, p. 6.

SoCalGas makes on-system deliveries is likely to overstate the shortfall, because the Baja as-available rate is the highest backbone rate on PG&E's system. To the extent the SoCalGas on-system deliveries displace other backbone services besides Baja as-available service, TURN's method would impute too many revenues.

III. CONCLUSION

For the foregoing reasons, in the event that the Commission finds that SoCalGas has an on-system delivery right, PG&E respectfully requests that the Commission reject TURN's argument. The Commission should not prejudge whether PG&E should have the right to increase rates to its other backbone customers in order to recover any lost revenue resulting from the Commission's grant of on-system delivery rights to SoCalGas. For the same reasons, the Commission should not direct PG&E to impute additional backbone revenues to the Revenue Sharing balancing account whenever SoCalGas makes deliveries at the PG&E Citygate.

Respectfully submitted,

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CERTIFICATE OF SERVICE BY ELECTRONIC MAIL OR U.S. MAIL

I, the undersigned, state that I am a citizen of the United States and am employed in the City and County of San Francisco; that I am over the age of eighteen (18) years and not a party to the within cause; and that my business address is Pacific Gas and Electric Company, Law Department, 77 Beale Street B30A, San Francisco, California 94105.

I am readily familiar with the business practice of Pacific Gas and Electric Company for collection and processing of correspondence for mailing with the United States Postal Service. In the ordinary course of business, correspondence is deposited with the United States Postal Service the same day it is submitted for mailing.

On November 19, 2010, I served a true copy of:

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[XX] By Electronic Mail – serving the enclosed via e-mail transmission to each of the parties listed on the official service list for A.09-09-013 with an e-mail address.

[XX] By U.S. Mail – by placing the enclosed for collection and mailing, in the course of ordinary business practice, with other correspondence of Pacific Gas and Electric Company, enclosed in a sealed envelope, with postage fully prepaid, addressed to those parties listed on the official service list for A.09-09-013 without an e-mail address.

I certify and declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on this 19th day of November 2010 at San Francisco, California.

/s/ Amy S. Yu
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