**BEFORE THE PUBLIC UTILITIES COMMISSION**
**OF THE STATE OF CALIFORNIA**

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| Application of Pacific Gas and Electric Company for Authority, Among Other Things, to Increase Rates and Charges for Electric and Gas Service Effective on January 1, 2011. (U 39 M) | Application 09-12-020 (Filed December 21, 2009) |
| Order Instituting Investigation on the Commission's Own Motion into the Rates, Operations, Practices, Services and Facilities of Pacific Gas and Electric Company | Investigation 10-07-027 (Filed July 29, 2010) |

# REPLY COMMENTS OF SAN DIEGO GAS & ELECTRIC COMPANY (U 902-M) ON THE PROPOSED DECISION OF ADMINISTRATIVE LAW JUDGE FUKUTOME AND THE ALTERNATE DECISION OF COMMISSIONER PEEVEY

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## INTRODUCTION

Pursuant to Rule 14 *et seq*., of the Commission's Rules of Practice and Procedure, San Diego Gas & Electric Company ("SDG&E") hereby files its reply comments on the Proposed Decision ("PD") of ALJ Fukutome and the Alternate Proposed Decision of Assigned Commissioner Peevey ("AD") in the above-entitled proceeding. Pursuant to Rule 14.3(d) these reply comments are "…limited to identifying misrepresentations of law, fact or condition of the record contained in the comments of other parties."[1]

The Opening Comments of TURN/DRA/Aglet/WEM/DACC (hereafter, "Joint Comments") on the AD[2] are primarily argumentative, repetitive of previous briefs, and do not identify specific errors. For example, most of the Joint Comments consist of unsubstantiated assertions like PG&E's shareholders should not get a "gift"[3], or that the AD represents an

[1] Rule 14.3(c) states: "Comments shall focus on factual, legal or technical errors in the proposed or alternate decision and in citing such errors shall make specific references to the record or applicable law. Comments which fail to do so will be accorded no weight." In several instances, parties filing opening comments in this proceeding reargue their positions taken in briefs rather than pointing out specific factual, legal or technical errors. The Commission should give those comments no weight.

[2] "OPENING COMMENTS OF THE UTILITY REFORM NETWORK, DIVISION OF RATEPAYER ADVOCATES, AGLET CONSUMER ALLIANCE, WOMEN'S ENERGY MATTERS, AND DIRECT ACCESS CUSTOMER COALITION ON THE ALTERNATE PROPOSED DECISION OF COMMISSIONER PEEVEY" filed March 14, 2011

[3] SDG&E disagrees that allowing a regulated utility to earn a return on its investment is a "gift."

"increase" in revenue requirement[4] "created out of whole cloth solely for the purpose of giving PG&E a higher return."[5] Joint Comments, p. 1, 2. The Joint Comments then reargue positions taken in prior briefs, primarily TURN's brief. *Compare*, *e.g.*, TURN Opening Brief, pp. 7, 9, *with* Joint Comments, p. 3. Such repetition does not point out any errors in the PD or AD. Therefore, because the Joint Commenter's positions have already been argued in briefs, these redundant comments should be given no weight.

In its own separate comments on the PD, TURN presents unconvincing arguments rather than identifying errors. First, it tries to convince the Commission that the Commission cannot rely on its own prior findings (despite the fact that TURN neither appealed those findings nor ask for a rehearing). Second, TURN offers a misleading comparison. TURN claims that the Commission must distinguish between precedents involving plant that had been used and useful at the time of the decision, and plant that was never used and useful ("abandoned plant"). TURN Comments, p. 9. However, TURN cites only a single decision (D.85-12-108) in support of its argument, but that decision is nowhere close to being on point. D.85-12-108 is readily distinguished from the present circumstance, as it: a) dealt with excess generation capacity on SDG&E's system; b) did not adopt the same ratemaking for all the units[6]; and, c) even to the extent it adopted a "sharing of the burden" for some of the excess generation capacity, it did so on a contingent ratemaking basis only ("we will treat these plants as retired until they are brought back on line"). D.85-12-108, 20 CPUC2d 115, 143. In stark contrast, PG&E's mechanical meters were replaced because the Commission and state policy encouraged it. In D.85-12-108, the Commission allowed that the stored plant could be added back into rate base in a future proceeding. "If the plants are brought back on line, the unrecovered balance will be added back to the rate case…" *Id.* at 143. TURN's claim (at p. 9) that D.85-12-108 addressed "circumstances similar to those here" is fundamentally misleading. Contingent ratemaking for some surplus generation capacity is wholly dissimilar to AMI, which in comparison was a single integrated project that was reviewed and cost-justified on an incremental basis.

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[4] Despite any such characterizations both the PD and AD represent a disallowance to PG&E, not an increase in revenue requirement.

[5] The Joint Comments fail to offer any support for this allegation, which is simply pure speculation as to the thinking of the Assigned Commissioner.

[6] TURN also neglects to note that in D.85-12-108 the excess generation facilities were not all treated alike – for example, South Bay Unit 3 was found to be useful as a yardstick in bargaining for firm purchased power. Id. at 143.

TURN also argues that a 5.73% return is the "absolute maximum" the Commission should "permit" PG&E to earn on meters that have been replaced as a necessary part of Smart Meter implementation.[7] This allegation is arbitrary and lacking in foundation. TURN argues that the return on $341 million should be capped at a maximum of 5.73% (or preferably 0.0%) because PG&E will have invested $1.8 billion in Smart Meters by the end of 2011. This argument is not based on record evidence, and thus fails to comply with Rule 14.3(c). [8]

**The Treatment Of Standard Of Proof By The PD And AD Is Not Erroneous**

DRA's comments (p. 2) claim that the "preponderance of the evidence" standard used by both the PD and AD was in error. Both the PD and AD apply the preponderance of evidence standard to the Pacific Gas & Element ("PG&E") case pursuant to D.09-03-025 (Southern California Edison's most recent GRC). Notably, DRA did not file an application for rehearing of D.09-03-025, nor did DRA seek to appeal that decision (or even file a petition to modify it). TURN's comments make similar arguments. Also like DRA, TURN failed to file an application for rehearing of D.09-03-025, or seek an appeal. TURN therefore has no legitimate basis for its allegation that the precedent is inadequately supported.

DRA's comments in this case also attack the validity of the reasoning in D.09-03-025, by claiming the authority cited in D.09-03-025 (*i.e.*, California Evidence Code §190) is inadequate. DRA's comments claim that "guidance provided by other sections of the California Evidence Code supports the use of the clear and convincing standard in GRCs", but DRA only cites California Evidence Code § 660 as support for this claim.[9] California Evidence Code Section 660 deals with presumptions and states as follows:

> The presumptions established by this article, and all other rebuttable presumptions established by law that fall within the criteria of Section 605, are presumptions affecting the burden of proof.

However, DRA utterly ignores the most relevant section of California's Evidence Code, Section 115, which states:

> "Burden of proof" means the obligation of a party to establish by evidence a requisite degree of belief concerning a fact in the mind of the trier of fact or the court. The burden of proof may require a party to raise a reasonable doubt concerning the existence or nonexistence of a fact or that he establish the existence or nonexistence of a fact by a

[7] TURN Comments, p. 1, p. 3.
[8] TURN's argument is also a non-sequitur. The Commission does not set rates of return for one class of assets based on the magnitude of other investments, particularly future ones.
[9] DRA Comments, p. 3.

> preponderance of the evidence, by clear and convincing proof, or by proof beyond a reasonable doubt. **Except as otherwise provided by law, the burden of proof requires proof by a preponderance of the evidence.**
> California Evidence Code, § 115 (emphasis added).

DRA's comments thus mischaracterize the law by ignoring California Evidence Code §115. They are also wholly inappropriate, in that they constitute a collateral attack on another Commission decision. If DRA disagreed with D.09-03-025, it was entitled to challenge it by seeking rehearing, or by court appeal. It did neither. As such, it cannot now argue over the reasoning utilized by the Commission in that proceeding.

Furthermore, DRA's comments do not point out errors but rather simply reargue positions taken in DRA's brief.[10] However, one portion of its brief that DRA did not repeat in its comments was an admission by DRA that the Commission has applied both standards in prior GRCs:

> With the burden of proof placed on the Applicant in rate cases, the Commission has variously held that the standard the Applicant in a GRC must meet is "clear and convincing evidence" or "preponderance of the evidence."
> DRA Reply Brief, p. 2 (citations omitted).

Although DRA may try to make it sound as if there is only one decision (D.09-03-025) in which the CPUC has applied the "preponderance of the evidence" standard, the Commission has long utilized this standard. In fact, it has referred to it as the "default" standard of proof for regulatory proceedings[11] and has discussed it in many decisions over at least the past decade. For example, the Commission has stated that: a) the preponderance of the evidence standard requires a party to have more weighty evidence on its side than there is on the other side; [12] b) the preponderance standard is one that asks which outcome is 'more likely than not ';[13] and, c) preponderance of the evidence usually is defined in terms of probability of truth, e.g., such evidence as, when weighed with that opposed to it, has more convincing force and the greater probability of truth.[14] Thus, while the PD and AD may only cite one recent decision, a long line of CPUC decisions have applied the preponderance of evidence standard.

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[10] *Compare*, DRA reply brief, pp. 2-3 *with* DRA opening comments, pp. 2-3.
[11] D.08-12-058 at 19, 2008 Cal. PUC LEXIS 534, *28 (citing California Administrative Hearing Practice, 2d Edition (2005), 365).
[12] D.09-07-024 at 3, 2009 Cal. PUC LEXIS 326, *4.
[13] D.00-03-021 at Section 2.5, 2000 Cal. PUC LEXIS 398, Section 2.5 (citing *Leslie G. v. Perry & Associates et al.,* 43 Cal. App. 4th, 472, 489 (1996)).
[14] D.08-12-058 at19, 2008 Cal. PUC LEXIS 534, *28 (citing Witkin, Calif. Evidence, 4th Edition, Vol. 1, 184).

Finally, despite DRA's comment at page 2, the mere fact that the PD and AD did not address each and every one of DRA's legal arguments is not an error. The Commission simply cannot resolve each and every argument raised in a GRC proceeding.

In conclusion, both the PD and AD are in agreement on the standard of proof; even DRA admits that prior precedents have "variously" used standards including "preponderance of evidence"[15]; the most recent Commission GRC decision D.09-03-025 applied that standard; DRA failed to seek timely rehearing or appeal of D.09-03-025; and DRA's comments in this proceeding collaterally attack D.09-03-025. For the reasons above, DRA's comments on this subject of standard of proof should be accorded no weight, and the preponderance of evidence standard adopted in both the PD and AD should not be modified.

**CONCLUSION**

SDG&E urges the Commission to reject the PD's and AD's reduction of the rate of return on meters that were replaced in order to promote smart metering in California. Such a reduction is contrary to precedent and is unreasonable. Utilities made billions of dollars of investments in new meters assuming status quo treatment of the unrecovered costs, based on the Commission's determination that the investment would benefit customers. Accordingly, SDG&E urges the Commission to confirm that the costs of meters replaced as part of California's upgrade to Smart Meters – whether by PG&E or any other utility -- should continue to be included in rate base, earning its authorized rate of return, until their remaining costs are recovered in rates. In the alternative, should the Commission disregard its own precedent and simply choose between the PD and the AD, the Commission should adopt the AD as a more reasonable alternative.

Respectfully submitted,

By: */s/ Keith W. Melville*

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March 21, 2011

[15] DRA Reply Brief at 2.

APPENDIX A

PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

FF 22. ~~Neither D.06-07-028 nor D.09-03-026 contains specific discussion of PG&E's ratemaking proposal for retired meters or includes findings conclusions or ordering paragraphs in which this issue is specifically identified,~~ PG&E's ratemaking proposal was expressly included within the scope of the AMI proceeding, unopposed by the parties, and implicitly adopted in Ordering Paragraphs 1 and 2 of Decision 06-07-027 and Ordering Paragraphs 1 and 2 of Decision 09-03-026.

CL 7. ~~There is good reason to believe that~~ PG&E's ratemaking proposal for retired meters was within the scope and raised in ~~not fully understood and considered by the Commission's in~~ PG&E's two prior AMI proceedings, and was therefore implicitly adopted in Ordering Paragraphs 1 and 2 of Decisions 06-07-027 and 09-03-026.

CL 10. Consistent with prior Commission decisions, it is not reasonable to accelerate the amortization of the net plant balance associated with electromechancial electric meters replaced by SmartMeters ~~to six years~~.

~~CL 11. Consistent with prior Commission decisions, in order to reflect reduced regulatory risk, it is reasonable to reduce the rate of return on equity to 90% of the rate of return on long-term debt in calculating the applicable rate of return for the unamortized net plant balance associated with electromechanical electric meters replaced by SmartMeters.~~

## CERTIFICATE OF SERVICE

I hereby certify that a copy of the **REPLY COMMENTS OF SAN DIEGO GAS & ELECTRIC COMPANY (U 902-M) ON THE PROPOSED DECISION OF ADMINISTRATIVE LAW JUDGE FUKUTOME AND THE ALTERNATE DECISION OF COMMISSIONER PEEVEY** has been electronically mailed to each party of record of the service list in A.09-12-020 and I.10-07-027. Any party on the service list who has not provided an electronic mail address was served by placing copies in properly addressed and sealed envelopes and by depositing such envelopes in the United States mail with first-class postage prepaid.

Copies were also sent via Federal Express to the Administrative Law Judge and Commissioner in this proceeding.

Executed this 21st day of March, 2011 at San Diego, California.

/s/ *LISA FUCCI-ORTIZ*
Lisa Fucci-Ortiz

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