BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking to Consider the Annual Revenue Requirement Determination of the California Department of Water Resources and related issues.	Rulemaking 11-03-006 (Filed March 10, 2011)

PACIFIC GAS AND ELECTRIC COMPANY OPENING BRIEF

CHRISTOPHER J. WARNER
CRAIG M. BUCHSBAUM

Pacific Gas and Electric Company
77 Beale Street, B30A
San Francisco, CA 94105
Telephone: (415) 973-4844
Facsimile: (415) 973-5520
E-Mail: CMB3@pge.com

Attorneys for
PACIFIC GAS AND ELECTRIC COMPANY

Dated: September 22, 2011

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I. INTRODUCTION

Pursuant to the Scoping Memorandum of Assigned Commissioner Florio and Assigned Administrative Law Judge Wilson dated September 7, 2011, PG&E hereby submits its opening brief in the above captioned matter.

The two contested issues the Commission must decide in this proceeding are:

(1) correcting a prior error by the Commission and the parties in order to ensure the proper allocation among customers of the state's three investor-owned utilities (IOUs) of approximately $269 million of discounts provided by Sempra in an electricity supply contract with DWR ("Sempra Contract"), which was initially agreed upon in settlement of a class action lawsuit by representatives of the class and Sempra (hereinafter, the "Continental Forge (CF) Settlement") and

(2) the proper allocation among customers of the state's three IOUs of approximately $130 million in settlement payments from Sempra to DWR pursuant to a 2010 settlement agreement to resolve outstanding disputes before the Federal Energy Regulatory Commission

(FERC) relating to the CF Settlement and resolve alleged overcharges attributable to the Sempra Contract (hereinafter, the "Sempra Long-Term Contract Settlement").

As described in this opening brief, PG&E's position is that the benefits from both of these inter-related settlements must be allocated statewide in proportion to cost burden -- 42.2% to PG&E's customers, 10.3% to SDG&E's customers, and 47.5% to SCE's customers -- and consistent with the allocation treatment approved by the IOUs and the CPUC for all other settlement proceeds previously received by DWR.

A. Continental Forge Settlement (~$269 million)

PG&E's customers have paid 42.2% of the unavoidable cost of the Sempra Contract, either directly or through indifference payments. Notwithstanding this fact, since January 2009, SCE's customers have received through balancing account entries the exclusive benefit of approximately $269 million in billing credits. To comply with the Commission's previous Orders, Findings, and Conclusions and the Court's Order approving the Continental Forge Settlement, the Commission should allocate the benefit of these credits among the IOUs using the permanent allocation percentages such that PG&E's customers receive 42.2% of the benefits, commensurate with the Sempra Contract costs they have borne.

B. Sempra Long-Term Contract Settlement (~$130 million)

Similarly, the Commission should allocate approximately $130 million, which DWR received under the Sempra Long-Term Contract Settlement, among the IOUs using the same permanent allocation percentages. SCE's alternate allocation proposal, submitted in its prehearing conference statement, does not comply with the Commission's previous decisions, is arbitrary and unfair to PG&E's customers, and would entangle the Commission in complex and unwarranted litigation to resolve allocations of settlement proceeds. SCE's proposal should also be rejected because, for the post-January 1, 2009 periods, it allocated 100% of the benefits of the

Sempra Long-Term Contract Settlement to SCE even though PG&E's customers bore 42.2% of the costs that gave rise to the settlement.

II. EXECUTIVE SUMMARY: THE BENEFITS OF $400 MILLION IN SETTLEMENT PROCEEDS AND DISCOUNTS MUST BE FAIRLY ALLOCATED TO ALL CUSTOMERS STATEWIDE TO COMPLY WITH THE COMMISSION'S PRIOR DECISIONS.

This dispute involves the simple question of whether Northern California ratepayers should receive their Commission-designated share (42.2%) of approximately $400 million of energy crisis-related settlement proceeds and discounts based on settlements approved by courts or agencies in litigation.[1] Ensuring these adjustments takes place is necessary to comply both legally and equitably with Commission decisions and the joint utility compliance filing implementing those decisions. It is also necessary to ensure that customers who bore the cost of the overpriced Sempra Contract share in the benefit of the settlements on the same basis.

The Commission's allocation of fixed costs -- 42.2% to PG&E's customers, 10.3% to SDG&E's customers, and 47.5% to SCE's customers -- has been routinely applied to over 40 settlements ever since the Commission adopted the permanent allocation method in Decision 05-06-060. Although the Commission elected in Decision 08-11-056 to substitute indifference payments for the permanent allocation method to facilitate the removal of DWR as the contracting party (i.e., to allow novations of such contracts), the Commission specifically intended to preserve the equities of its prior permanent allocation and to maintain the status quo in distributing costs and benefits among customers.

In Decision 08-11-056, the Commission adopted a specific procedure to retain that indifference and a specific computational method to ensure that indifference would be achieved. The utilities then went about making computations and submitted a joint compliance filing.

1/ Approximately $269 million from the Continental Forge Settlement and $130 million from the Sempra Long-Term Contract Settlement.

DWR's numbers, however, which formed the basis for the utilities to compute the indifference payments, omitted critical amounts relating to the Continental Forge Settlement and did not treat the discounts as future non-avoidable costs of the Sempra Contract. None of the utility personnel responsible for computing the indifference payments were aware that the Continental Forge Settlement numbers had been excluded. It is indisputable that the benefits of the CF Settlement were omitted from the indifference payment schedule and thus the amount allocated among the utilities reflected a far larger amount than actual non-avoidable costs charged, or expected to be charged, under the Sempra Contract– reflecting either an error in that schedule, or, as DWR has explained, reflecting that the discounts were settlement proceeds and thus appropriately addressed outside of that process.

The utilities' compliance filing represented that *all* non-avoidable contract costs had been reflected in the indifference payments and specifically provided that other results of litigation and claims were not included. Regardless of whether one takes the position that the CF Settlement discounts are non-avoidable costs that were erroneously omitted unintentionally so that the indifference computation was wrong, or that these are settlement proceeds that were not covered by the Advice Filing so they can be considered now, the remedy is the same: namely, to treat the proceeds in accordance with the fixed percentages consistent with every other DWR-related settlement and the Commission's decisions.

Some parties may claim that although there was an error made, that the erroneous indifference computations were included in the annexed schedule, and that therefore customers of Southern California Edison should retain the windfall that would result. But there is no reasonable basis for this position. Northern California customers, who would suffer if an adjustment is not made, had nothing to do with any error, delay or omission. This is solely a ratepayer allocation issue, not a shareholder or company benefit, and no error that was made would justify overcharging Northern California ratepayers over $113 million, 42.2% of the

portion of the $269 million CF Settlement discount that has erroneously not yet been credited to Northern California ratepayers, and that instead has flowed to Southern California Edison.

Moreover, if the CF Settlement discounts are not properly allocated, the result would be inconsistent with the Motion which formed the basis of the Court Order adopting the Continental Forge Settlement in 2006. The Court explicitly recognized utility electric customers of the state as a subclass and the Motion stated that all electric customers should benefit proportionate to the costs they have borne. While PG&E is not claiming that the Commission is bound by this allocation, SCE's position that its customers alone should benefit would clearly undermine the intent of the Continental Forge Settlement.

Finally, there is no legal impediment to making the correction. Each utility has been subject to "utility specific balancing accounts" (USBAs), which specifically allow for adjustments and corrections for prior periods. In this case, all that needs to be done is for the Commission to decide that the allocations should be made consistently with the treatment of every other DWR-related settlement. The result will then be that the adjustment will be reflected, as any other USBA adjustment, in either this or a future DWR revenue requirement proceeding.

III. REGULATORY AND FACTUAL BACKGROUND

A. The Permanent Allocation Decision (D.05-06-060)

The proceeds of over 40 settlements have been uniformly allocated in accordance with the permanent allocation percentages adopted in Decision 05-06-060.[2] Those percentages are 10.3% to SDG&E's customers, 42.2% to PG&E's customers, and 47.5% to SCE's customers.

2/ The only exception occurred when the terms of the Mirant settlement specifically provided for an alternative allocation.

By 2005, the output and management of each of the DWR contracts had been assigned to one of the IOUs. The Permanent Allocation Decision resolved to end the disputes between the utilities and adopt a method that once and for all allocated the costs of the DWR contracts. As explained by the Commission:

> All parties agree that the allocation methodology that is adopted here should be permanent. We concur. Annual litigation of the allocation methodology is not an efficient use of the parties' or the Commission's time and resources.... The Commission and the parties have now gained enough experience, particularly with the DWR contracts, that it is appropriate to make our allocation methodology for the DWR revenue requirement permanent, and eliminate the annual litigation process we have used to date.[3]

The permanent allocation method adopted by the Commission divided costs of DWR contracts into two categories: avoidable costs (i.e., those costs that could be avoided by dispatch decisions of the utility) and unavoidable costs (these included capacity charges and charges under take-or-pay contracts). For avoidable costs, the Commission, consistent with earlier decisions, found that those costs should be assigned to the utility making the dispatch decisions. For unavoidable costs, however, the Commission adopted the permanent allocation percentages, recognizing:

> We cannot predict the future, and in this case the past is also of little help, as the DWR contracts at issue were signed at a time of crisis, confusion, and uncertainty, rendering our traditional notions of cost causation inappropriate. In large part we are "spreading the pain" of a unique occurrence, for which our standard methods are ill-suited.

3/ D.05-06-060, mimeo, pp. 5-6.

> We conclude that all of the proposals summarized above represent the range of reasonable possible outcomes. Since the decision we make today is inherently a zero-sum game that involves spreading costs fairly and evenly such that no one set of ratepayers is either harmed or subsidized unnecessarily, [the Commission explained its rationale for the permanent allocation percentages].[4]

As DWR itself states,[5] the results of settlements (i.e. CERS'[6] share of settlement proceeds) had been allocated on a routine basis in accordance with these fixed percentages, including the CF Settlement discount for the period prior to 2009.

B. The Indifference Decision (D.08-11-056)

Two years after the Permanent Allocation Decision, the Commission issued Decision 08-11-056 ("the Indifference Decision"). The stated purpose of the Indifference Decision was to facilitate removal of DWR as a contracting party under DWR contracts, in part to release power reserves and eliminate overlapping administration by the IOUs and DWR. The Commission explicitly stated it did not want to change the equities of the Permanent Allocation Decision, but it did want to ensure that a utility accepting a novation would be held indifferent to allocations that otherwise would have been made. The Commission explained how these dual objectives would be achieved:

> The revised DWR cost allocation methodology adopted in this decision maintains the equity of the permanent cost allocation methodology adopted in D.05-06-060 by implementing a "costs-follow-contracts" methodology with indifference payments to keep each IOU's respective customers indifferent to the attempt to novate DWR contracts.

4/ D.05-06-060, mimeo, p. 16.

5/ CDWR, 2012 Revenue Requirement Allocation Workshop Presentation, p.4.

6/ California Energy Resources Scheduling

> In order to ensure that ratepayers are left indifferent to the effects of a "costs follow contracts" allocation, SCE's proposal calls for developing a schedule of transfer payments to ensure that the allocation equities adopted in D.05-06-060 are preserved.[7]

As for the indifference payments themselves, it was envisioned that these would be computed mechanically as follows:

> Establishing the indifference (transfer) payment schedule requires a determination of the annual difference between the unavoidable DWR contract costs that would have been allocated to each IOU's customers under D.05-06-060 and the unavoidable DWR contract costs that will be allocated to those customers under the CFC methodology, for each year from 2009 until the last DWR contract is scheduled to expire. The indifference payments made by an IOU, or received by an IOU, will equal the amount necessary to allocate the same amount of unavoidable DWR contract costs to the IOU's customers that would have been allocated if D.05-06-060 was not modified.[8]

The utilities were then directed to quickly file a joint compliance advice filing make those computations.

C. The Joint Utilities' Compliance Filing and Utility Specific Balancing Accounts

To make the mechanical computations ordered by the Indifference Decision, the utilities took data from DWR consisting of a schedule of future non-avoidable costs under all contracts. The utilities converted the data consisting of non-avoidable contract costs into a schedule of

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7/ D.08-11-056,Appendix 2, *mimeo*, p. 1 #1, adopted in Ordering Paragraph 9 of that D. 08-11-056 at mimeo, p. 92.

8/ D.08-11-056, Appendix 2, *mimeo*, p. 1 #2, adopted in Ordering Paragraph 9 of D.08-11-056, at mimeo, p. 92.

indifference payments using the method adopted by Decision 08-11-056. No modifications relevant to this issue were made to the mechanical computations undertaken by the utilities.

Because the Sempra contract is entirely a non-avoidable cost contract, all non-avoidable costs comprising that contract were included in the indifference computation. The non-avoidable cost data that DWR provided to the utilities, however, was erroneous because it did not include the discounts reflected under the Continental Forge Settlement.[9] DWR states that it treated those discounts as settlement amounts and has, therefore, never included them in their forecast of DWR's future revenue requirement determination.[10] Because DWR did not provide the data to the IOUs in its forecasts of future unavoidable costs under the contracts, and the utility personnel involved in making the calculations for the compliance filing were not aware of this omission, it was not reflected in the schedule of the indifference payments.

Before January 2009, DWR had recorded the CF Settlement discount the same as its treatment of DWR-related settlements generally, allocating the discounts in each utility's Utility Specific Balancing Account (USBA) in accordance with the fixed percentages. DWR has, however, since 2009 been recording the discounts on the Sempra Contract as part of the Sempra contract costs under the "cost follows contract" regime in the USBAs, even though the Sempra contract itself had not been amended.[11] As a result, since January 2009, SCE customers have

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9/ DWR sent the IOUs a supporting documentation forecasting DWR's non-avoidable contract costs through 2015, as of October 2008, to enable the indifference computation set forth by the Commission in D.08-11-056. (DWR energy model PM14, financial model 15j, October 29, 2008, transmitted by DWR to all three IOUs). This supporting document did not reflect the Sempra discounts to the Sempra Contract, as provided under the CF Settlement, even though payments had commenced.

10/ DWR data response dated September 9, 2011, A2.

11/ After the approval of the CF Settlement by the Court, provision of the discounts was delayed as a result of intervention by the Attorney General of California (AG). The CF Settlement had provided for discounts of $4.15 per MWh beginning on deliveries January, 2006 through October, 2011. However, as a result of the AG's action the discounts did not begin until August, 2008, and the discounts for the prior deliveries were paid over the remaining contract term. $122 million of the $279 million in discounts received by DWR after January 1, 2009, were attributable to contract deliveries prior to August, 2008. The IOU's joint compliance advice filing leaves no doubt that rebates for these deliveries must be allocated based on the permanent allocation method:

Footnote continues on following page.

been receiving the benefits of 100% of the Continental Forge Settlement proceeds received on Sempra power contract deliveries in their USBA. This benefit, first reflected in SCE's USBA for 2009, would have first appeared in a DWR revenue requirement determination effective January 2010.

IV. THE CONTINENTAL FORGE SETTLEMENT PROCEEDS AND DISCOUNTS MUST BE ALLOCATED IN ACCORDANCE WITH THE PERMANENT ALLOCATION PERCENTAGES.

A. The CF Settlement Proceeds And Discounts Must Be Allocated In Accordance With The Fixed Percentages To Comply With The Commission's Prior Decisions Regarding DWR-Related Settlements.

As described above, the Commission established permanent allocation percentages in Decision 05-06-060 on the grounds that "Annual litigation of the allocation methodology is not an efficient use of the parties' or the Commission's time and resources.... The Commission and the parties have now gained enough experience, particularly with the DWR contracts, that it is appropriate to make our allocation methodology for the DWR revenue requirement permanent, and eliminate the annual litigation process we have used to date."[12] Neither the Indifference Decision nor the compliance filings made to implement that decision were intended to modify the allocations made permanent in D.05-06-060. Indeed, the proceeds of over 40 settlements have been uniformly allocated in accordance with the permanent allocation percentages of Decision 05-06-060, including the CF Settlement discounts prior to January 1, 2009.[13]

> For true-ups of costs and remittances for pre-2009 deliveries, the D.05-06-060 cost allocation methodology will be used to calculate true-up amounts. Joint Utility Advice Filing, December 22, 2008, p. 5.

12/ D.05-06-060, *mimeo*, p. 6.

13/ The only exception occurred when the terms of the Mirant settlement specifically provided for an alternative allocation.

Notwithstanding this uniform treatment of applying the permanent allocation to all DWR-related settlement proceeds, some parties may opportunistically seek a different treatment which would leave SCE's customers with virtually all of the proceeds of the Continental Forge Settlement and a disproportionate share of the Sempra Long-Term Contract Settlement, reducing Northern California customers' share by approximately $130 million. Such an outcome is inconsistent with the Commission's general treatment of DWR-related settlement proceeds and the clear direction set forth in the Permanent Allocation Decision and Indifference Decision.

B. The CF Settlement Proceeds And Discounts Must Be Allocated In Accordance With The Fixed Percentages To Comply With The Joint Utilities' Compliance Filing Implementing The Indifference Decision.

Any proposal to ignore or not correct this erroneous allocation is also inconsistent with the language of the joint utilities' compliance filing implementing the Indifference Decision. Specifically, the utilities' filing states:

> Attachment A includes the indifference payments for each year from 2009 until the last DWR contract is scheduled to expire. The indifference payments made by an IOU, or received by an IOU, will equal the amount necessary to allocate the same amount of unavoidable DWR contract costs to the IOU's customers that would have been allocated under D.05-06-060.[14/]

This statement would be untrue if the $269 million of Continental Forge Settlement discounts were classified as an "unavoidable cost," since the Continental Forge Settlement was never reflected in the unavoidable cost data, nor has it been passed through to reduce the indifference payments assessed to PG&E. Thus, under SCE's position, the indifference payments made by an IOU, or received by an IOU, will not equal the amount necessary to allocate the same amount of unavoidable DWR contract costs to the IOU's customers that would

14/ Advice Letters 2051-E (SDG&E), 3384-E (PG&E), and 2304-E (SCE) (the "Joint Utility Advice Filing"), p.3.

have been allocated under D.05-06-060. To be consistent with the joint utilities' compliance filing and the intent of the Indifference Decision, therefore, appropriate adjustments must be made.

There is yet another statement in the joint utilities' compliance filing that precludes failure to adjust the Continental Forge Settlement treatment. Specifically, in the compliance filing, the joint utilities stated:

> The indifference payment calculation includes the costs and revenues associated with unavoidable DWR contract energy deliveries, including unavoidable DWR contract costs.... [15]

Again, if the discount is treated as a non-avoidable cost, then, contrary to the assertion in the joint utilities' compliance filing, the indifference payment calculation would not include the costs and revenues associated with unavoidable DWR contract energy deliveries, including unavoidable DWR contract costs, as the payments would have mistakenly not have reflected the CF Settlement discount. To be consistent with the joint utilities' compliance filing and the Indifference Decision, therefore, any claim for SCE's customers to a disproportionate share of the settlements should be rejected.

In sum, to the extent the CF Settlement discount is viewed as a reduction to non-avoidable Sempra contract costs, the Commission must make take appropriate corrective action to conform to the stated intent of the compliance filing, as quoted above. This requires either modification of the indifference schedule or a special allocation of these discounts to reflect they were mistakenly not taken into account in the indifference computation. Either way, the result is to allocate the CF Settlement discount in accordance with the fixed allocation percentages,

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15/ Joint Utility Advice Filing, p.3.

consistent with the Commission's order in Decision 08-11-056 directing mechanical indifference computations so as to ensure no change in the equities of the Permanent Allocation Decision.

C. The Exception For Settlements And Claims In The Joint Utilities' Compliance Filing Also Justifies PG&E's Position.

The Commission should also correct the allocation to comply with the exception to the indifference computation that was specifically set forth within the joint utilities' compliance filing for settlements and claims. The filing provides:

> The indifference payment calculation includes the costs and revenues associated with unavoidable DWR contract energy deliveries, including unavoidable DWR contract costs…. *The revised DWR cost allocation methodology does not in any way impact or affect the allocation of costs or benefits arising from or in connection with other claims, proceedings, or litigation.*[16]

The CF Settlement discount was not reflected in DWR's schedules because, according to DWR, the CF Settlement discount was the result of a settlement. Therefore, DWR unilaterally chose not to treat the discount as a non-avoidable cost. This means the discount was never captured in the indifference computation. Thus, another way of complying with Commission's orders and the intent of the advice filing is to simply construe the CF Settlement discount as a "benefit arising from or in connection with other claims, proceedings, or litigation." As noted above, all such settlement benefits since 2004 have been shared using the fixed percentages. This, too, would result in the Commission applying the permanent allocation percentage to the CF Settlement discounts, and result in the benefits of the CF Settlement discounts being shared among ratepayers the same as the underlying Sempra Contract costs.

16/ Joint Utility Advice Filing, p.3.

Treatment of the CF Settlement discount as "costs or benefits arising from or in connection with other claims, proceedings, or litigation" is also consistent with the reality that DWR and various state entities had vigorously contested adequacy of the CF Settlement and various elements of the CF Settlement. Those disputes were not resolved until the 2010 Long Term Contract Settlement, which had two essential elements: (1) an amendment to the contract with Sempra relating to implementation of the CF Settlement and resolving outstanding disputes; and (2) the $130 million payment discussed further below. Properly construed, the CF Settlement issues remained a live issue that was not resolved until the 2010 settlement of "other claims, proceedings, or litigation". Both elements of the relief – the $269 million CF Settlement discount and the additional $130 million settlement payment – must be properly shared among ratepayers on the same basis as the underlying Sempra Contract costs.

D. The Permanent Allocation Percentages Also Need To Be Applied To Conform to the Intent of the Representatives of the Electric Class in Settling the CF Lawsuit.

The Court that approved the CF Settlement class action lawsuit identified all IOU electric customers as a subclass in the litigation. While the CF Settlement included many components, the Motion seeking approval of the CF Settlement expressly envisioned that all electric customers statewide would share in the discount proportional to their share of the costs they incurred under the Sempra Contracts with DWR. The motion seeking approval described the allocation as follows:

> 2. Electricity Allocation
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> Every California electricity ratepayer will benefit from the reduced cost of producing electricity attributable to the reduced natural gas costs resulting that will result from the Structural Relief achieved through the settlement. Electricity ratepayers other than ratepayers who purchase electricity from a municipality will receive additional benefits in the form of a unilateral $300 million price reduction to the electricity contract

> between the CDWR and an affiliate of the Sempra Defendants. The benefits of this price reduction would flow to the benefit of both of the existing certified classes based on their allocation of the costs associated with that contract in any given month.[17]

Here, it is indisputable that PG&E's customers have assumed 42.2% of the costs of the Sempra Contract either directly for periods prior to January 1, 2009, and later through indifference payments for periods after January 1, 2009. In order to be consistent with the Motion upon which the approval of the Continental Forge Settlement was based, therefore, the customers who bear the cost of the Sempra Contract must share in the discount on the same basis. This again means that 42.2% of the discount must be allocated to PG&E's customers.

E. There Is No Barrier To The Commission Making Appropriate Adjustments In This Proceeding.

A party may allege that PG&E is seeking to make retroactive adjustment to balancing accounts beginning in 2009, that impacted rates for 2010 and that for this reason alone PG&E's customers should suffer. However, the existence of balancing accounts means there is no legal impediment to make appropriate adjustments to fulfill Commission orders. Instead, all revenue requirement adjustments can be done prospectively, based on a re-computation of the respective utility USBAs, without requiring any retroactive billing adjustments. Moreover, because SCE's power cost revenue requirement is substantially negative in 2012 due to the draw-down of DWR power charge reserves, SCE's customers, even with full reflection of the adjustments proposed

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17/ *Notice of Ex Parte Motion on Shortened Time and Motion in Support of Preliminary Approval of Class Action Settlement; Memorandum of Points and Authorities in Support Thereof*, dated January 10, 2006, p. 35, lines 4-11. The Court's Order makes clear that the CPUC is not bound by the allocation anticipated in the Motion to Approve the CF Settlement. However, the Court Order does express the Settlement Class' anticipation that the settlement will be allocated on the same basis as the allocation of costs, citing D. 03-10-087, which allocated the El Paso settlement proceeds, based on then current allocation methods. *Judgment, Final Order and Decree Granting Final Approval to the Class Action Settlement with the Sempra Defendants*, San Diego Superior Court, dated July 20, 2006, Appendix E, pp. 5-6.

by PG&E, will only see a reduction in the substantial rebate (rate reduction) they will receive from DWR during 2012.[18]

A party may also claim that this adjustment will be a precursor to other adjustments that will be burdensome to the Commission. The Commission should reject this claim. No other adjustments have been identified that are attributable to a simple omission or computational error, nor have any similar claims of this type and magnitude been reported. The Commission could, if it wishes, place time periods and dollar floors on adjustments that it will consider in the future so as to prevent further litigation. However, the instant case involves a relatively recent error involving up to $300 million of settlement proceeds being treated incorrectly and contrary to Commission decisions and the intention of the California Courts – such an error should not be ignored or dismissed.

Along the same lines, a party may claim that PG&E or SDG&E should have identified the failure of DWR's schedules to incorporate the CF Settlement discounts at the time of the compliance filing, and that it is therefore unfair to retroactively adjust the mistake now. However, any such claim is belied by the fact that none of the utility personnel involved at the time – neither PG&E, nor SDG&E, nor SCE -- was aware of the omission. Utility personnel generally rely on materials provided by DWR — the contract owner that was directly involved in settlement negotiations with Sempra, and the responsible party for preparing accurate forecasts of contract costs used in the proceedings before this Commission -- especially since each utility is not directly familiar with the terms and conditions of the other two utilities' contracts. The fundamental issue here is the equitable division among utility customers of settlement benefits lowering the cost of an otherwise over-market contract that all customers paid for using the fixed percentages. Regardless of the reason for the omission by DWR and whether any utility could

18/ PG&E estimates that SCE's 2012 rebate (negative DWR revenue requirement allocation) will still approximate or exceed $200 million, even after the allocations being proposed by PG&E for the CF Settlement and the Sempra Long-Term Contract Settlement.

have identified it, Northern California customers deserve the benefits of these settlements proportional to their incurrence of the underlying costs.

V. THE REFUND OF $130 MILLION THAT DWR RECEIVED UNDER THE SEMPRA LONG-TERM CONTRACT SETTLEMENT MUST SIMILARLY BE ALLOCATED IN ACCORDANCE WITH THE FIXED PERCENTAGES ADOPTED IN THE PERMANENT ALLOCATION DECISION

As distinguished from the Continental Forge Settlement -- which arose from a class action proceeding in state court -- the State of California also had a cause of action against Sempra that was pending at the Federal Energy Regulatory Commission ("FERC"). These claims were resolved by the Sempra Long-Term Contract Settlement and included two components. Unlike the CF Settlement discounts received after 2008, for which SCE claims no allocation is warranted, SCE has conceded that allocations by the Commission are required for both components of the Sempra Long-Term Contract Settlement.

The first component of the Sempra Long-Term Contract Settlement awarded DWR/CERS $106 million in late 2010 to cover claims against Sempra unrelated to the Sempra Contract itself (e.g., claims during the Summer of 2000; claims for short term bilateral purchases during the FERC refund period; etc.). The parties do not dispute that these claims should be allocated using the fixed percentages.

The second component of the Sempra Long-Term Contract Settlement resulted in $130 million of proceeds to DWR in early 2011 and related solely to claims under the Sempra Contract, coupled with resolution of the pending disputes relating to the CF Settlement. The $130 million amount was received to recoup at least a portion of the above-market costs of the Sempra Contract that had been paid over the life of the contract. On this latter sum, SCE is claiming that a portion of the Sempra Long-Term Contract Settlement should be allocated to the post-January1, 2009 deliveries and assigned entirely to SCE on a cost-follows-contract basis, even though the indifference payments were scheduled so that all utilities were effectively

paying the costs of the Sempra Contract. Under SCE's proposal, the Sempra Long-Term Contract Settlement proceeds would be allocated on MWh delivered basis over the years of the Sempra Contract, with different percentages allocated depending on the year in which the proceeds were assigned.

SCE's position with respect to allocation of the $130 million refund from the Sempra Long-Term Contract Settlement is arbitrary, contradictory and would result in continuing controversy regarding allocations of future settlement proceeds of power contract litigation.

First, SCE would allocate the $130 million in proceeds based on MWh delivered without providing any reason why this should be the basis of allocating the $130 million. In fact, much of the overcharge occurred in the early years of the Sempra Contract, when contract prices were higher, while most of the deliveries occurred in the later years of the contract, when arguably the overcharges were less. SCE is trying to skew the allocation by proposing an allocation based on MWh without regard to the actual cost burden of those MWhs.

Second, under SCE's complex approach of attempting to allocate settlement proceeds to different allocation periods, all settlement proceeds should be separately analyzed to determine how such an allocation should be made, not just this one which opportunistically favors SCE. For example, using the logic applied by SCE, PG&E could argue that, because most of the recovery of the $106 million short term settlement (i.e., the first component of the Sempra Long-Term Contract Settlement) related to periods prior to 2004, allocation percentages in effect prior to 2004 should be used, rather than the permanent allocation percentages. As noted above, however, PG&E is not taking such a self-interested position, but rather, all parties agree that this amount should be allocated using the fixed allocation percentages. Lest the Commission be left with never-ending litigation, the Commission should allocate settlements consistently, based on

the permanent allocation percentages, absent some compelling reason why this should not be the case.[19]

Finally, there is no good rationale for allocating the benefits of post- January1, 2009 Sempra Contract reductions entirely to SCE. As discussed extensively in Part IV of this opening brief, PG&E's customers have paid 42.2% of the non-avoidable costs of that contract through indifference payments. The Sempra Long-Term Contract Settlement was intended as an offset to those non-avoidable costs. To match the benefits of the settlement with the customers who are

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19/ In resolving the allocation of El Paso settlement proceeds, the Commission expressed its preference for straightforward allocations, not involving look-backs, but using existing allocation methodologies at the time the consideration is distributed. The Commission stated that its objective was to mitigate and/or eliminate disputes that would be engendered by the "look-back" approach urged by SCE:

> We also mean, to the extent reasonable, the avoidance of complex and controversial additional accounting and ratemaking adjustments that may lead to further litigation and use of the limited resources of parties and the Commission. D. 03-10-087, footnote 5, mimeo, p. 9.

paying the cost, therefore, the Commission should similarly use the fixed percentages of the permanent allocation decision.

Respectfully Submitted,

CHRISTOPHER J. WARNER
CRAIG M. BUCHSBAUM

By: /s/
CRAIG M. BUCHSBAUM

Pacific Gas and Electric Company
77 Beale Street
San Francisco, CA 94105
Telephone: (415) 973-4844
Facsimile: (415) 973-5520
E-Mail: CMB3@pge.com

Attorneys for
PACIFIC GAS AND ELECTRIC COMPANY

Dated: September 22, 2011

APPENDIX A

LISTING OF SETTLEMENTS SINCE 2004

PG&E has identified over 40 settlements since January 1, 2004, relating to the energy crisis etc., that have resulted in consideration (e.g., refunds or proceeds) for DWR. Every settlement, except for one with Mirant that had a special allocation agreed to by all IOUs, has been allocated using the permanent allocation percentages adopted in the permanent allocation decision. A partial listing of these settlements is shown below:

Settlements Received by DWR (from the supporting documentation for DWR's revenue requirement determination)		
Date Received	**Dollars**	**Settling Party**
01/21/04	6,100,000	Portland Electric Settlement
02/11/04	38,000,000	WAPA Interest Settlement
4/2/2004,4/22/2004	2,537,828	Bankruptcy interest settlement
05/18/04	27,655	Bankruptcy interest settlement
06/28/04	160,749,593	El Paso settlement, includes $2.1m in attorney fees
07/14/04	3,507,600	Duke: Settlement Agreement and Mutual Release for CalPX payments for Feb 1 - 7, 2001
11/22/04	98,684,341	Dynegy Settlement
12/24/04	2,702,570	El Paso Settlement
01/04/05	10,014,000	Duke Energy settlement
03/28/05	562,500	EOB on behalf of Duke
03/28/05	362,500	EOB on behalf of Dynegy
04/08/05	5,535,987	El Paso installment payment
05/11/05	108,276,139	Payoff of entire El Paso settlement as one lump sum
06/17/05	76,200,000	Mirant settlement ($43.6 million of total was allocated differently, based on agreement by the IOUs)
12/29/05	95,881,229	Mirant Settlement
01/26/06	18,817,326	Enron Power Marketing, Inc.
01/04/06	1,998	JP Morgan
01/09/06	26,100,199	Reliant
02/07/06	7,231,217	Enron Power Marketing, Inc.
03/08/06	40,010,340	Reliant Settlement
04/12/06	19,942,547	Enron Settlement
05/02/06	73,137,425	Sempra Arbitration Settlement
05/03/06	4,068,317	Enron Litigation Settlement
06/02/06	2,677,764	Enron Litigation Settlement
10/16/06	14,179,208	Enron Litigation Settlement
02/22/07	1,500,999	Reliant FERC OMOI Settlement (EL00-95)
04/10/07	8,320,893	Enron Litigation Settlement
04/23/07	1,120,958	Enron Litigation Settlement

Settlements Received by DWR (from the supporting documentation for DWR's revenue requirement determination)		
Date Received	**Dollars**	**Settling Party**
05/04/07	18,000,000	BP Litigation Settlement
06/15/07	111,693	JP Morgan (ISDA)
01/09/08	45,000	Wellhead Fresno
02/01/08	1,900,000	EUGENE WATER AND ELECTRIC BOARD
04/08/08	3,438,860	ENRON POWER MARKETING INC.
06/10/08	13,768,433	ENRON POWER MARKETING INC.
06/24/08	3,540,324	J P Morgan (ISDA)
07/03/08	311,507	J P Morgan (ISDA)
07/03/08	31,944	J P Morgan (ISDA)
07/24/08	312,700	ENRON POWER MARKETING INC.
07/24/08	2,728,597	CALIFORNIA POWER EXCHANGE CORP
07/24/08	955,394	STRATEGIC ENERGY SETTLEMENT

CERS has received additional settlement proceeds since July 2008 under various global settlements (e.g. LADWP, Public Service New Mexico, Puget Sound Energy, etc.) A supplemental listing of such global settlements and the proceed amounts will be provided in reply briefs.