BEFORE THE PUBLIC UTILITIES COMMISSION

OF THE STATE OF CALIFORNIA

Application of Pacific Gas and Electric Company (U 39E) for Approval of Amended Purchase and Sale Agreement Between Pacific Gas and Electric Company and Contra Costa Generating Station LLC and for Adoption of Cost Recovery and Ratemaking Mechanisms.	Application 12-03-026 (March 30, 2012)

EMERGENCY MOTION OF THE INDEPENDENT ENERGY PRODUCERS ASSOCIATION FOR AN ORDER DIRECTING PACIFIC GAS AND ELECTRIC COMPANY TO CEASE IMPROPER REFERENCES TO THE ANNULLED DECISION AND HEARSAY EVIDENCE

INDEPENDENT ENERGY PRODUCERS ASSOCIATION
Steven Kelly, Policy Director
1215 K Street, Suite 900
Sacramento, CA 95814
Telephone: (916) 448-9499
Facsimile: (916) 448-0182
Email: steven@iepa.com

GOODIN, MACBRIDE, SQUERI, DAY & LAMPREY, LLP
Brian T. Cragg
505 Sansome Street, Suite 900
San Francisco, California 94111
Telephone: (415) 392-7900
Facsimile: (415) 398-4321
Email: bcragg@goodinmacbride.com

December 5, 2012

Attorneys for the Independent Energy Producers Association

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On December 3, 2012, Pacific Gas and Electric Company (PG&E) filed a Notice of Ex Parte Communication with Commissioner Sandoval's energy advisor and chief of staff. The notice included an attachment that was used as a handout in the meeting. The handout includes two pages, attached to this motion, that refer to materials that the Administrative Law Judge (ALJ) expressly ruled were not to be used in the way they are used in PG&E's handout.

On the first day of hearing, the ALJ made a variety of rulings on motions to strike and other topics. Included among the rulings were two clear rulings on two different topics. On the propriety of referring to Decision (D.) 12-10-050, which was annulled by the Court of Appeal, the ALJ said:

> First off, I want to remind all parties that the Court of Appeals did not remand the decision. It annulled it. That means that decision, D10-12-050, is canceled. It's abolished. It is to be given zero weight. And it did so on the principle that the basis for the

> Commission's substantive determination of the merits of the Oakley petition was beyond the scope of the proceeding.

(Reporter's Transcript (RT), p. 11.)

On the use of materials prepared by the California Independent System Operator (CAISO) that was referred to and attached to PG&E's testimony, but not sponsored by any CAISO witness in this proceeding, the ALJ ruled:

> I will not allow these, this evidence, however, to be used for the purpose of proving on this record the truth of the matter asserted; that is, for proving that there is a system reliability need or -- of -- for the purpose of proving that what this ISO says is true, or that the Commission should find on the basis of what the ISO says that the ISO, what the ISO says is true.

(RT, pp. 22-23.)

Despite these clear rulings, PG&E's handout (1) specifically referred to the annulled decision and summarized findings of fact in that decision, and (2) cited the CAISO materials to argue that "need exists" and to support its claim that there is "evidence of significant reliability risk." In direct violation of the ALJ's rulings, PG&E has pursued its advocacy well beyond the bounds set by the ALJ and observed by other parties to this proceeding. The Independent Energy Producers Association (IEP) respectfully asks the Commission for an order directing PG&E to cease referring to the annulled decision or making improper references to the CAISO materials in violation of the ALJ's rulings.

This proceeding is entering a final, critical stage. The ALJ's Proposed Decision and an Alternate Proposed Decision have been issued, and parties are preparing comments on those proposals. At the same time, some parties are communicating with the Commissioners' advisors and seeking meetings with Commissioners to discuss the issues in this proceeding, which concerns PG&E's proposed acquisition of the Oakley project. PG&E's violations of the ALJ's rulings compel the Commission to act expeditiously on this motion so that all parties may

conduct their advocacy on the same basis and the Commissioners may make their decisions based on the record, and not on extraneous information that was untested and was expressly ruled out of bounds in the evidentiary hearings in this proceeding.

I. USE OF REFERENCES TO THE ANNULLED DECISION

On the first day of hearings on PG&E's application for approval of its acquisition of the Oakley plant, the ALJ provided instructions on how parties to this proceeding, including PG&E, should address D.12-10-050. D.12-10-050, as modified by D.11-05-049, was ***annulled***, not merely reversed or remanded, by the Court of Appeal in *The Utility Reform Network v. CPUC* (Court of Appeal (1st Appellate District), March 16, 2012). An annulled decision in effect ceases to exist from a legal perspective. As the ALJ explained at length at the hearing:

> But I do wish to address the treatment, or handling of the Court of Appeals' decision going forward, because there are some references to it elsewhere in the record that we are about to create.
>
> First off, I want to remind all parties that the Court of Appeals did not remand the decision. It annulled it. That means that decision, D10-12-050, is canceled. It's abolished. It is to be given zero weight. And it did so on the principle that the basis for the Commission's substantive determination of the merits of the Oakley petition was beyond the scope of the proceeding.
>
> So for example, when I read PG&E testimony, Exhibit 2 at page 39, with the sentence characterizing a denial of this application as, quote, reversing the PUC's prior decision, unquote, that is an incorrect characterization of the Commission's prior decision. There is no prior decision.
>
> I understand that Mr. Alvarez is not an attorney and I'm not going to seek to strike that testimony, but I will admonish the attorneys to be more sensitive to the legal limitations on the use.
>
> Another example is in the application itself at pages 10 and 11, which cites to that same decision, D10-12-050 for the proposition that Oakley has benefits, there is no such decision, there is no such finding, there is no such Commission determination, and I will not allow that misuse or mischaracterization in briefs.

Are there any questions about that? Okay.

(Reporter's Transcript, pp. 11-12.)

Despite the ALJ's admonition for the attorneys "to be more sensitive to the legal limitations on the use" of the annulled decision, and her specific instructions against citing the decision "for the proposition that Oakley has benefits" and that "there is no such finding, there is no such Commission determination," PG&E's handout improperly states that "D.10-12-050 approved Oakley" and summarizes findings of fact from the decision to create the erroneous impression that the Commission found that the Oakley project offered certain benefits. As the ALJ stated, "there is no such finding," because the annulled decision no longer has any legal status.

PG&E attempts to undercut the effect of the Court's annulment by stating that the decision was annulled "on procedural grounds." As the ALJ explained, however, the annulment was grounded "on the principle that the basis for the Commission's substantive determination of the merits of the Oakley petition was beyond the scope of the proceeding."

IEP and other parties have proceeded to participate in the hearings, prepared and filed briefs, and communicated with decision makers on the assumption that the ALJ had clearly ruled that the parties to this proceeding were not to refer to D.10-12-050 and certainly not to rely on D.10-12-050 as authority for any of the facts or arguments we might assert in this proceeding. PG&E has felt free to ignore the ALJ's ruling and to suggest to decision makers that D.10-12-050 has some relevance to the issues in this proceeding. As the proceeding moves into its final phases, during which time the Commissioners and their advisors may be subject to numerous ex parte communications, it is essential for all parties to be playing by the same rules. IEP therefore respectfully asks the Commission for an order directing PG&E to immediately cease referring to the annulled decision.

II. THE USE OF HEARSAY EVIDENCE

At the first day of hearing, the ALJ also ruled on a motion of the Division of Ratepayer Advocates to strike portions of PG&E's testimony. The testimony in question referred to and included as an attachment a declaration that the CAISO originally submitted to the Federal Energy Regulatory Commission (FERC) in support of the CAISO's request for a waiver of its normal tariff requirements so that it could invoke its Capacity Procurement Mechanism to keep the Sutter project in operation. With regard to testimony that referred to or attached the CAISO's FERC materials, the ALJ ruled:

> I will not allow these, this evidence, however, to be used for the purpose of proving on this record the truth of the matter asserted; that is, for proving that there is a system reliability need or -- of -- for the purpose of proving that what this ISO says is true, or that the Commission should find on the basis of what the ISO says that the ISO, what the ISO says is true.
>
> The ISO's statements are not binding on the Commission, and in that way they are not judicially noticeable authority. And they are subject to dispute. They are being challenged before the PUC.
>
> And so again, I will not strike the attachments, but I will strike the testimony that does cite to those attachments for purposes of the truth.

(RT, pp. 22-23.) When questioned about a specific passage, the ALJ offered additional clarification:

> And again, to the extent what I'm seeking to do is to strike the testimony that relies on the ISO statements for the truth of the matter asserted.
>
> So for example, the Sutter waiver petition is in the record, and you may cite to it for other purposes. You may cite to it for the purpose of proving that the ISO said what it said.
>
> But in this passage, it appears to me that you are using it to prove the truth of what the ISO is saying.

(RT, p. 25.)

Despite these rulings, PG&E in its handout cites to the CAISO's Sutter materials as evidence that "need exists" and that a "significant reliability risk" could arise in 2018. These statements fly in the face of the ALJ's determination that the Sutter materials are not to be used "for proving that there is a system reliability need." IEP again respectfully asks the Commission for an order directing PG&E to immediately cease referring to the CAISO's FERC materials to attempt to show "that there is a system reliability need."

III. RULE 8.3 DOES NOT EXCUSE PG&E'S VIOLATIONS

It is conceivable that PG&E may argue that Rule 8.3(k) allows use in ex parte communications of materials that are ruled to be outside the record. That argument, however, turns Rule 8.3(k) on its head. Rule 8.3(k) provides:

> The Commission shall render its decision based on the evidence of record. Ex parte communications, and any notice filed pursuant to Rule 8.3, are not a part of the record of the proceeding.

By declaring that ex parte communications are not part of the record, Rule 8.3(k) is not declaring an open season on the use of extra-record materials. Instead, the rule clarifies that information conveyed during an ex parte communication, which is not exposed to public scrutiny and is not subject to cross examination, is not part of the record that forms the basis for the Commission's decision. That does not mean that parties are free to ignore the record or other relevant restrictions. For example, ex parte communications are still subject to Rule 1.1's requirement "never to mislead the Commission or its staff by an artifice or false statement of fact or law." A false statement of fact or law would not be excused by Rule 8.3(k) merely because it is not part of the record of the proceeding. False statements of law are still violations of Rule 1.1 if they are made to the Commission or its staff, even if they are outside the record of a specific proceeding.

IV. THE NEED FOR IMMEDIATE ACTION

Because PG&E is likely continuing its ex parte references to D.10-12-050 and to the CAISO's FERC materials, IEP respectfully asks the Commission to rule on this motion at the earliest opportunity. The Commission should order PG&E to immediately cease referring to the annulled decision or the CAISO's FERC materials in its ex parte communications and other forms of advocacy.

For IEP and other parties, this is not a merely technical violation. All parties to this proceeding, including PG&E, were clearly on notice **not** to make inappropriate use of D.10-12-050 and **not** to cite the CAISO's hearsay evidence for the truth of the matter, *i.e.,* "for proving that there is a system reliability need." PG&E's disregard of the ALJ's rulings goes to key elements of the Commission's processes—the authority of the ALJ, procedural clarity, the integrity of the Commission's procedures, and the principle of fundamental fairness—whether all parties will play by the same rules, or whether some parties have a license to ignore rulings that other parties consider binding. IEP respectfully urges the Commission to take immediate action to ensure that PG&E will no longer refer to the annulled decision or the CAISO's FERC materials in its ex parte communications and other forms of advocacy for the duration of this proceeding.

Respectfully submitted this 5th day of December, 2012 at San Francisco, California

GOODIN, MACBRIDE, SQUERI,
DAY & LAMPREY, LLP
Brian T. Cragg
505 Sansome Street, Suite 900
San Francisco, California 94111
Telephone: (415) 392-7900
Facsimile: (415) 398-4321
Email: bcragg@goodinmacbride.com

By */s/ Brian T. Cragg*
Brian T. Cragg

Attorneys for the Independent Energy Producers Association

ATTACHMENT

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Oakley Generating Station
A.12-03-026

November, 2012

PG&E®

Oakley approved once already

- Winning bid from 2008
- Application for approval of Oakley filed September 2009
  - D.10-07-045 found Oakley not needed at that time
  - Petition to modify led to D.10-12-050
- D.10-12-050 approved Oakley, finding (FOF 3-6):
  - Oakley is highly efficient (it has a very low heat rate) and will enable California to meet increasingly stringent GHG reduction goals.
  - Oakley would allow for the retirement of peaking resources with high heat rates.
  - Oakley would allow for renewable integration by providing load following capabilities. The combination of this generation attribute with a low heat rate is uncommon in the current generation fleet.
- Court of appeals annulled D.10-12-050 on **procedural grounds**
  - **Procedural issues have been resolved**
  - **Project's benefits still valid today**

CAISO Studies - Significant Reliability Risk

Even with Oakley, challenge remains to meet flexibility need

- CAISO's Calpine Sutter waiver study shows need exists, assuming Oakley is approved (comments on Draft Resolution E-4471)
- Commission does not need to adopt CAISO's specific finding of 3,750 MW of flexible capacity needs in 2018 to conclude evidence of significant reliability risk.
- Existing Once Through Cooling retirements statewide expected:
  - 8,100 MW retired by 2018
  - 12,100 MW retired by 2020
- Oakley is a viable hedge against risks of significant 2017-2018 flexibility need.