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 No. 12-03-026

PACIFIC GAS AND ELECTRIC COMPANY'S (U 39 E) RESPONSE TO THE INDEPENDENT ENERGY PRODUCERS ASSOCIATION'S EMERGENCY MOTION REGARDING *EX PARTE* COMMUNICATIONS

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As a part of its relentless and ongoing campaign to oppose all utility-owned generation ("UOG") facilities proposed in California, regardless of the merits of a specific facility, the Independent Energy Producers Association ("IEP") has filed numerous motions in this proceeding, or opposed PG&E's requests, in an effort to distract the Commission from the obvious benefits of the Oakley Generating Station ("Oakley Project"). A summary of the results of IEP's efforts to date speaks volumes:

IEP Motion or Response	Outcome
IEP Motion to Dismiss Application (May 10, 2012)	Effectively denied[1]
IEP's opposition to PG&E's motion to seal the evidentiary record (June 13, 2012)	PG&E's motion was generally granted, with some limited exceptions, and IEP's objections were generally denied[2]

[1] IEP's motion has not been ruled on by the Commission and/or Administrative Law Judge ("ALJ") Yacknin and thus has been effectively denied.

[2] PG&E withdrew some confidentiality designations and ALJ Yacknin determined that some limited testimony was not confidential. Most of IEP's objections, however, were denied in the *Administrative Law Judge's Ruling on Motion to Seal the Evidentiary Record* issued June 28, 2012 in this proceeding.

IEP Motion or Response	Outcome
IEP's Motion for Reconsideration of Scoping Memo Schedule (July 2, 2012)	Effectively denied
IEP's Motion for Reconsideration of ALJ's Ruling Sealing Evidentiary Record (July 10, 2012)	Effectively denied
IEP's opposition to PG&E's motion for official notice (July 17, 2012)	Denied[3]
IEP's Motion to Strike references to court of appeal decision in PG&E's pleadings (July 16, 2012)	Denied[4]
IEP's Motion to Strike portions of PG&E's Rebuttal Testimony (August 14, 2012)	Denied[5]

Now, at the eleventh hour of this proceeding, IEP has filed yet another motion intended to distract the Commission from the merits of the Oakley Project and the critical substantive issues that are before the Commission in this proceeding. IEP's *Amendment to 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* filed on December 6, 2012 ("IEP Motion") asserts that in an *ex parte* communication handout PG&E "improperly" referenced: (1) Decision ("D.") 10-12-050, which approved the Oakley Project in December 2010 but was annulled by the Court of Appeal in March 2012; and (2) California Independent System Operator ("CAISO") studies that were admitted into the record in this proceeding subject to ALJ Yacknin's limitations on their use. IEP requests that the

[3] Transcript ("Tr.") at p. 8.

[4] Tr. at p. 10.

[5] Tr. at pp. 29-32.

Commission direct PG&E to cease referring to these materials in future *ex parte* communications.

IEP's latest motion is meritless for three reasons. First, as a preliminary matter, PG&E's *ex parte* communication did not violate the Commission's *ex parte* rules or any specific ruling by ALJ Yacknin in this proceeding. Indeed, as PG&E explains in more detail below, IEP fails to cite any specific ALJ ruling or Commission rule precluding these types of *ex parte* communications.

Second, IEP expresses concern that PG&E's *ex parte* communication handout included references to D.10-12-050. However, PG&E's *ex parte* communication simply provided a brief history of the Oakley Project, including D.10-12-050, and specifically stated that the decision had been annulled. Moreover, contrary to IEP's claims, other parties in this proceeding have referred to D.10-12-050 in *ex parte* communications and their post-hearing briefs. Notably, IEP did not make a motion regarding these parties' reference to D.10-12-050, and thus IEP's motivation for doing so now, only with regard to PG&E, is highly suspect.

Finally, PG&E's references to certain CAISO studies were consistent with ALJ Yacknin's ruling that these studies could be admitted into the record to demonstrate whether the requirements of D.10-07-045 have been satisfied. The reference to these studies in PG&E's *ex parte* communication handout was therefore entirely appropriate.

I. PG&E'S *EX PARTE* HANDOUTS DID NOT VIOLATE THE *EX PARTE* RULES OR ANY SPECIFIC ALJ RULING

IEP claims the handout attached to PG&E's *ex parte* communication notice "refer[s] 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."[6] Despite IEP's contentions, nowhere does it point to an

[6] IEP Motion at p. 1.

"express ruling" by the ALJ that these materials could not be referenced during an *ex parte* communication, or in such a handout. Rather, IEP's Motion improperly attempts to expand the scope of the ALJ's rulings regarding D.10-12-050 and the CAISO findings, and misconstrues the Commission's rules regarding *ex parte* communications. Because *ex parte* communications are outside of the record and will not be considered by the Commission in its decision, the ALJ's prior rulings do not apply to the discussions and materials used during PG&E's *ex parte* meetings with Commissioners and their staff. On this basis alone, IEP's motion should be denied.

Ex parte communications are not part of the record of a proceeding, and the Commission is prohibited from considering them in rendering its decision. Commission Rule of Practice and Procedure ("Rule") 8.3(k) makes it clear that *ex parte* communications are not part of the record of evidence on which the Commission bases its decision: "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.*" (emphasis added).[7] Although IEP attempts to twist Rule 8.3(k)'s plain meaning, it tellingly cites to no supporting authority in doing so.[8]

Here, there is no indication that the ALJ's rulings were meant to apply to anything outside the record of this proceeding. For example, regarding the annulled decision, the ALJ

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[7] *See also* Rule 8.1 (defining an ex parte communication as "a written communication . . . or oral communication [that] ***does not occur*** in a public hearing, workshop, or other public forum noticed by ruling or order in the proceeding, or ***on the record*** of the proceeding" (emphasis added)); D.12-04-018 at p. 5, n.6 ("Southern Californians for Wired Solutions to Smart Meters (SCWSSM) submitted its comments to the ALJ in an *ex parte* communication on January 17, 2012. Pursuant to 8.3(k) of the Commission's Rules of Practice and Procedure . . . we have not considered SCWSSM's comments in this decision.").

[8] IEP Motion at pp. 6-7.

stated that references to D.10-12-050 would not be allowed "in briefs."[9] Similarly, regarding the CAISO findings, the ALJ stated, "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."[10] These rulings were not gag orders; they restricted only what evidence would be considered by the Commission in rendering its decision—that is, what evidence would be part of the evidentiary record. As noted, *ex parte* communications are outside the scope of the record, and therefore, the ALJ's prior orders do not apply to them.

Moreover, the ALJ did not issue a blanket prohibition of any reference to the CAISO findings, as IEP seems to suggest. Instead, the ALJ acknowledged that "[y]ou may cite to it for the purpose of proving that [CAISO] said what it said."[11] The ALJ's ruling on the CAISO findings is narrow, applying only to on-the-record references purporting to prove the truth of the matter asserted, rather than (as here) *ex parte* references pointing to the important fact that CAISO made these findings.

II. PG&E'S REFERENCE TO D.10-12-050

IEP asserts that PG&E's reference to D.10-12-050 on Slide 3 of its *ex parte* communication handout was inappropriate.[12] As described above, this reference did not violate the Commission's *ex parte* rules or ALJ Yacknin's ruling at the hearing. Rather, Slide 3 simply lays out the history of the Oakley Project, including its: winning bid in the 2008 Long-Term Request for Offers; rejection in D.10-07-045; PG&E's petition for modification for that decision; approval in D.10-12-050; the Court of Appeal's annulment of D.10-12-050. In its *ex parte*

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[9] IEP's Motion at p. 3 (quoting Reporter's Transcript at 11-12).

[10] IEP Motion at p. 5 (quoting Reporter's Transcript at 22-23) (emphasis added).

[11] IEP Motion at p. 5 (quoting Reporter's Transcript at 25).

[12] IEP Motion at pp. 3-5.

communication handout, PG&E did not assert that D.10-12-050 had not been annulled, nor did PG&E state that the Commission could rely on that decision as precedent. Rather, PG&E's *ex parte* communication clearly states that D.10-12-050 was annulled.

IEP mistakenly claims that "IEP and other parties have proceeded to participate in hearings, prepared and filed briefs, and communicated with decision makers on the assumption that the ALJ had clearly ruled that parties in 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 facts or arguments we may assert in this proceeding."[13] This statement is simply untrue. For example, The Utility Reform Network ("TURN"), the Division of Ratepayer Advocates ("DRA") and CAlifornians for Renewable Energy ("CARE"), all of whom oppose the Oakley Project, have all referred to D.10-12-050 in their post-hearing briefs, including:

TURN Opening Brief at p. 31 (footnotes included):

> When PG&E revived its request for approval of the Oakley Project later in 2010, it relied on a purported need that was outside the period analyzed in the most recent LTPP, and that had not been the subject of any RFO. The Commission approved the project despite these deficiencies and, in doing so, acted in a manner inconsistent with abandoned its reliable regulatory framework.93 The California Court of Appeal subsequently annulled that approval, finding that in its attempt to approve a project that was virtually the same as a project it had denied earlier in the year, the Commission failed to follow its own rules.94
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> 93 Ex. 6 (Testimony of Kevin Woodruff), p. 21.
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> 94 *TURN v. California Public Utilities Commission*, Case No. A132439, unpublished decision issued on March 16, 2012. While the Court's outcome relied largely on procedural defects leading up to adoption of D.10-12-050, in TURN's view the procedural defects were inextricably linked to the efforts the Commission made to approve the project outside of the adopted regulatory framework for generation procurement.

[13] IEP Motion at pp. 4-5.

DRA Opening Brief at p. 11 (footnotes omitted):

> Further, the California Court of Appeal annulled the Commission's Decision 10-12-050 approving Oakley because the need for the project in 2016 fell outside of the period covered by the need determination in D.07-12-052 and raised issues of need that were not encompassed within the scoping memo in A.09-09-021.[28] The Commission has still never issued a revised scoping memo in A.09-09-021 to give parties notice that it would consider and determine procurement needs starting in 2016 and thus consider the Oakley project with a later in-service date. Accordingly, approving Oakley under D.10-07-045 would leave the decision vulnerable to further legal challenges.

CARE Opening Brief at pp. 3-4 (footnotes omitted, emphasis in original):

> In D.10-12-050, the Commission approved the amended Oakley PSA. The assigned commissioner in this proceeding characterized the approval as an **"Early Christmas Present"** for PG&E on December 16, 2010 when D. 10-12-050 was approved. The Court of Appeals appropriately nullified D.10-12-050 for the Commission's failure to afford the parties the procedural rights to conduct discovery, and to seek evidentiary hearing on the issues precipitated by the PSA's amended on-line date.

CARE Reply Brief at pp. 27 (footnotes omitted, emphasis in original):

> The Commission in the now annulled decision D. 10-12-050bought into the Oakley Project is dead propaganda and issued finding of fact #3 in that decision which stated, ***"Oakley is a highly viable project if the Commission acts today. Financing for this project may no longer be available if the project is not approved in 2010."*** Now two years later after the Commission issued that finding of fact the alleged fact has been proven to be untrue through the passage of time. The Oakley Project is still being proposed almost two years later. The Commission should not give great weight to predictions of doom by PG&E and CCGS.

More fundamentally, other parties have referred to D.10-12-050 in *ex parte* communications. For example, on October 10, 2012, DRA met separately with advisors from Commissioners Peevey's and Sandoval's offices and provided a handout that included the following:

> **Background**
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> - **July 2010:** The CPUC reduced PG&E's 2007 procurement authorization and denied the Oakley project on the grounds that it was not

needed at the time, but allowed PG&E to resubmit under certain specified conditions. [D.10-07-045]

- **August 2010:** PG&E Amended the PSA to delay Oakley's commercial availability date from June 2014 to June 2016 and filed a petition to modify Decision 10-07-045.

- **December 2010:** The Commission approved Oakley. [D.10-12-050]

- **March 16, 2012:** California Court of Appeals annulled the Decision approving Oakley.

- **March 30, 2012:** PG&E filed its third attempt seeking approval of the Oakley project.[14]

DRA provided identical information to Commissioner Florio on September 28, 2012.

Not surprisingly, IEP did not file motions regarding these references to D.10-12-050, nor did IEP mention these pleadings and *ex parte* communications in its motion. In short, although IEP attempts to portray PG&E as being the only party to refer to D.10-12-050, the reality is quite different.

III. PG&E'S REFERENCE TO CAISO STUDIES

IEP also asserts that PG&E's references to CAISO studies on Slide 7 of its *ex parte* communication handout violates ALJ Yacknin's ruling regarding the use of CAISO studies in this proceeding.[15] However, ALJ Yacknin expressly allowed certain CAISO studies into the record in this proceeding to address whether or not the requirements of D.10-07-045 have been satisfied.[16] One of the requirements of D.10-07-045 is that there be final results from CAISO studies which demonstrate that "there are significant negative reliability risks from integrating a 33% Renewable Portfolio Standard."[17] Slide 7 is entitled "CAISO Studies – Significant

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[14] *Notice of Ex Parte Communication of the Division of Ratepayer Advocates*, filed October 15, 2012, Attachment A at p. 1

[15] IEP Motion at pp. 6-7.

[16] Tr. at p. 22, lines 21-25.

[17] D.10-07-045 at p. 41.

Reliability Risks" and goes to the point that there are CAISO studies that demonstrate a significant negative reliability risk associated with renewable integration. In fact, Slide 7 in PG&E's *ex parte* communication handout clearly indicates that the Commission does not need to adopt the CAISO's specific findings. There is nothing inappropriate about referring to these studies for the general principle that there are "CAISO Studies -- Significant Reliability Risks", which is the title of the slide and a required showing under D.10-07-045.

IV. CONCLUSION

As explained in detail above, IEP's Motion is meritless and should therefore be summarily denied.

Respectfully submitted,

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