

**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, 2020 (U39M).

Application No. 18-12-009
(Filed December 13, 2018)

**RESPONSE TO PACIFIC GAS AND ELECTRIC COMPANY'S MOTION FOR
OFFICIAL NOTICE OF FACTS**

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February 11, 2020

On behalf of the Joint CCAs

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OF THE STATE OF CALIFORNIA**

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Pursuant to Rule 11.1(e) of the Rules of Practice and Procedure of the California Public Utilities Commission (“Commission” or “CPUC”),¹ East Bay Community Energy (“EBCE”),² Marin Clean Energy (“MCE”),³ Peninsula Clean Energy (“PCE”),⁴ Pioneer Community Energy (“Pioneer”),⁵ San José Clean Energy (“SJCE”),⁶ and Sonoma Clean Power (“SCP”),⁷ (collectively “JCCAs” or “Joint CCAs”) hereby submit this *Response to Pacific Gas and Electric Company (“PG&E”) Motion for Official Notice of Facts* (“Motion”).⁸

The Joint CCAs oppose this Motion on the grounds that (1) it unfairly leverages PG&E’s lack of due care in the discovery process to its substantial advantage, effectively shutting out the Joint CCAs’ ability to litigate their core issues with accurate data, and that (2) it is contrary to the

¹ All references herein to the Rules are to the Commission’s Rules of Practice and Procedure, unless noted otherwise.

² EBCE is the community choice aggregator (“CCA”) for Alameda County.

³ MCE is the CCA for Marin and Napa Counties, unincorporated Contra Costa County, and the Cities and Towns of Benicia, Concord, Danville, El Cerrito, Lafayette, Martinez, Moraga, Oakley, Pinole, Pittsburg, Richmond, San Pablo, San Ramon, and Walnut Creek.

⁴ PCE is the CCA for San Mateo County.

⁵ Pioneer is the CCA for Placer County.

⁶ SJCE is the CCA for the City of San José.

⁷ SCP is the CCA for the Cities of Cloverdale, Cotati, Fort Bragg, Petaluma, Point Arena, Rohnert Park, Santa Rosa, Sebastopol, Sonoma, Willits and the Town of Windsor, and the Counties of Sonoma and Mendocino.

⁸ A.18-12-009, *Pacific Gas and Electric Company (U 39 M) Motion for Official Notice of Facts* (January 27, 2020) (“PG&E’s Motion”).

Rules and to California law. Further, even if the Commission were to take official notice as requested in the Motion, this notice would not establish the accuracy of the new information provided via the Motion. Despite this opposition, the Joint CCAs truly support the proposition that the Commission should use the most accurate data possible in the disposition of this proceeding. Therefore, instead of requesting that the Commission deny PG&E's Motion, the Joint CCAs are requesting, via this Response and for the additional reasons contained in Joint CCAs' concurrently filed *Motion for Leave to File Sur-Reply Brief*,⁹ an opportunity to file a Sur-Reply Brief in response to *PG&E's Reply Brief on Unresolved Issues* ("Reply Brief").¹⁰

I. THE MOTION WOULD ALLOW PG&E TO UNFAIRLY LEVERAGE ITS OWN ERRORS IN THE DISCOVERY PROCESS TO ITS ADVANTAGE.

Through its Motion, PG&E requests that the Commission take official notice of information contained in PG&E Corporation's and PG&E's Form 10-K Annual Reports.¹¹ This new information contradicts evidence the utility provided the Joint CCAs via its responses to Joint CCAs' Data Request 15, Question 18, and Request 21, Question 1 that it failed to correct for the entire course of the proceeding. PG&E had previously provided annual customer count numbers from 2013 to 2018 in these data responses,¹² which the Joint CCAs relied on to demonstrate that Contact Center calls-handled volume increased from 2015-2017 due to overall increases in the total number of PG&E customers, rather than, as PG&E suggested in its Rebuttal Testimony, because of an increase just in CCA customer counts.¹³ Using this data from PG&E,

⁹ A.18-12-009, *Motion for Leave to File Sur-Reply Brief* (February 11, 2020).

¹⁰ A.18-12-009, *Pacific Gas and Electric Company's (U 39 M) Reply Brief on Unresolved Issues* (January 27, 2020) ("PG&E's Reply Brief").

¹¹ PG&E's Motion, p. 1.

¹² Exh. 108 at 2 (PG&E Data Response to Joint CCAs DR 15, Q18); Exh. 219 and 220 (PG&E Data Response to Joint CCAs DR 21, Q01).

¹³ A.18-12-009, *Opening Brief of the Joint Community Choice Aggregators*, p. 72 (January 6, 2020) ("Joint CCAs Opening Brief").

the Joint CCAs demonstrated that in fact, calls per customer actually declined during the 2015-2018 period while CCA customer counts increased.¹⁴

PG&E now requests official notice of Form 10-K Annual Reports that the utility posits correct its prior Data Responses, on which the Joint CCAs relied. PG&E states that the data that it provided via its prior response to Data Request 15, Question 18 understated the gas customer totals for 2013-2016 relative to the 2017-2018 data,¹⁵ and its revised version of the data response's Table 3 contains electric and gas customer counts as reported in PG&E's filed SEC Form 10-K for the 2013-2018 reporting period.¹⁶

Not only did PG&E fail to comply with its duty to provide accurate discovery responses,¹⁷ and fail to follow up with corrections to its inaccurate responses, but through this Motion, the utility is now attempting to introduce new, self-contradictory evidence right before the record closes to bolster its arguments. This procedural move would prevent the Joint CCAs from making their core arguments with accurate utility data. The Joint CCAs oppose PG&E's Motion on the ground that taking official notice of the requested documents would allow PG&E to leverage its inaccurate data responses and general lack of due care in the discovery process to its own substantial advantage.

¹⁴ Joint CCAs Opening Brief, pp. 72-73.

¹⁵ PG&E's Reply Brief, p. 29.

¹⁶ PG&E's Reply Brief, pp. 29-30.

¹⁷ See Cal. Code Civ. Proc. § 2030.210 (providing that responses to interrogatories must be provided under oath); Cal. Code Civ. Proc. § 2030.220 (providing that "[e]ach answer in a response to interrogatories shall be as complete and straightforward as the information reasonably available to the responding party permits"); Cal. Code Civ. Proc. § 2030.310 (providing for procedural consequences for inaccurate responses to interrogatories, including binding the responding party to their initial answer if the initial failure of the responding party to answer the interrogatory correctly has substantially prejudiced the party who propounded the interrogatory). See also Rule 13.6(a) ("Although technical rules of evidence ordinarily need not be applied in hearings before the Commission, substantial rights of the parties shall be preserved.").

II. THE MOTION IS CONTRARY TO THE RULES AND CALIFORNIA LAW.

In addition to these fairness concerns, the Motion is contrary to the Rules and to California law. Rule 13.9 provides that the Commission may take official notice of matters that may be judicially noticed by the courts of the State of California pursuant to Evidence Code section 450 et seq. Pursuant to Cal. Evid. Code Section 452(h), on which PG&E's Motion relies,¹⁸ judicial notice may be taken of "[f]acts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy."¹⁹

It is simply not reasonable for PG&E to argue that these annual customer count numbers are "not reasonably subject to dispute" after providing data responses inconsistent with the numbers now provided via the Motion,²⁰ failing to correct or update those data responses for the entire course of the proceeding, and failing to object to the responses' admission into the record.²¹ As a simple matter of logic, if the numbers in PG&E Corporation's and PG&E's Form 10-K Annual Reports were "not reasonably subject to dispute" and "capable of immediate and accurate determination[.]" then the record of this proceeding would not reflect contrary evidence both provided and affirmed by the utility.

The California Supreme Court has provided guidance on the kinds of sources that qualify as "sources of reasonably indisputable accuracy." These include, for instance, "treatises, encyclopedias, almanacs, and the like,"²² and "facts which are accepted as established by experts and specialists in the natural, physical, and social sciences, if those facts are of such wide

¹⁸ PG&E's Motion, p. 1.

¹⁹ Cal. Evid. Code § 452(h).

²⁰ Exh. 108 at 2 (PG&E Data Response to Joint CCAs DR 15, Q18).

²¹ 15 Tr. 1610:6-21; 22 Tr. 2420:13 – 2421:22.

²² *People v. Archerd*, 3 Cal. 3d 615, 638 (1970).

acceptance that to submit them to the jury would be to risk irrational findings.”²³ The Joint CCAs do not dispute that the Form 10-K Annual Reports would have provided information responsive to their original discovery request, and that this information may in fact be more accurate than the data that PG&E actually provided in its original response. However, these are public filings of information made by PG&E, and regulated entities like PG&E can and do produce public reports and filings with inadvertent errors, as evidenced by the five errata issued by PG&E just to correct other Customer Care cost allocation issues earlier in this proceeding,²⁴ and generally by PG&E’s voluminous errata filings, comprising over 600 pages, made part of the record in this proceeding.²⁵ Therefore, while the Joint CCAs do not specifically call into question the accuracy of these reports or PG&E’s intention to now provide more accurate data via its Motion, these reports simply do not rise to the level of “indisputable accuracy” required by Cal. Evid. Code Section 452(h).

III. THE MOTION, IF GRANTED, WOULD NOT ESTABLISH THE ACCURACY OF THE NEW CUSTOMER COUNT NUMBERS.

Finally, when courts do take judicial notice, they generally take notice of *the existence* of a document, but not *the truth of its contents*. California courts have consistently found that, in the context of public records, “[w]hile courts take judicial notice of public records, [they] do not take judicial notice of the truth of all matters stated therein.”²⁶ Therefore, if the Commission were to take official notice of the Form 10-K Annual Reports, this notice would not establish the accuracy of the customer count numbers included in those reports.

²³ *People v. Ramos*, 15 Cal. 4th 1133, 1167 (1997).

²⁴ Exh. 216 at 39-41.

²⁵ See generally Exh. 26; Exh. 27.

²⁶ See *Love v. Wolf*, 226 Cal. App. 2d 378, 403 (1964); *People v. Long*, 7 Cal. App. 3d 586, 591 (1970); *Mangini v. R.J. Reynolds Tobacco Co.*, 7 Cal. 4th 1057, 1063-1064 (1994), *overruled on other grounds by In re Tobacco Cases II*, 41 Cal. 4th 1257 (2007).

IV. CONCLUSION.

For the reasons stated herein, the Joint CCAs oppose PG&E's Motion as both an unfair leveraging of PG&E's errors in the discovery process to its advantage, and as contrary to the Rules and to California law. However, rather than requesting that the Commission deny PG&E's Motion, the Joint CCAs seek alternative relief: an opportunity to file a Sur-Reply Brief in response to PG&E's Reply Brief. Despite the Joint CCAs' objections to the Motion on procedural and legal grounds, the Joint CCAs support the Commission using the most accurate data possible in the disposition of this proceeding. Therefore, if the Commission grants PG&E's Motion, it should also grant the Joint CCAs' *Motion for Leave to File Sur-Reply Brief*, in part, to ensure that the Joint CCAs are not completely barred from litigating their core issues in light of the final record.

Dated: February 11, 2020

Respectfully submitted,

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