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**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, 2017. (U39M) | Application 15-09-001<br>(Filed September 1, 2015) |

# OPENING COMMENTS ON THE PROPOSED DECISION OF ADMINISTRATIVE LAW JUDGE ROSCOW BY COLLABORATIVE APPROACHES TO UTILITY SAFETY ENFORCEMENT ("CAUSE")

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# SUMMARY OF RECOMMENDATIONS

The Commission should clarify the standards that it will use to evaluate settlements, especially those reached prior to a full evidentiary hearing, more clearly to articulate when modifications are appropriate. Analogies to class action settlements should be questioned, and Tunney Act procedures endorsed as the more appropriate model.

The Commission should approve the settlement, subject to the proposed modification to maintain the level of funding for undergrounding overhead electrical distribution lines. The Commission should provide for greater public participation, transparency, and reform of corporate governance in the response that the proposed decision orders in anticipation of further critical incidents of flood management at dams controlled by PG&E, or downstream from PG&E-owned dams.

The settlement proposal reflects PG&E's insistence that its "corrective action program" was so effective that its expenses could safely be reduced. Subsequent to the parties' agreement, the federal district court convicted PG&E of obstructing regulatory proceedings on pipeline safety. During the sentencing phase, the court found PG&E's "corrective action" initiative inadequate and required it to develop an effective compliance and ethics program within six months. These events are significant changes that would justify changes to a final judgment, let alone a pending settlement proposal. The Commission should condition approval of the settlement upon a demonstration that the compliance program that PG&E proposes to the court fully addresses the safety objectives of ratepayers. At a minimum, it should direct this program to include a trial of the bubble-up system that CAUSE proposed.

The Commission should end the era in which intervenors must "go along" with settlements to "get along" with compensation requests. If impending motions to reconsider the denial of intervenor compensation are not successful, the Commission should revise the proposed decision to find CAUSE eligible and to ensure that any award includes full compensation for the cost of complying with conditions not regularly imposed on intervenors.

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# OPENING COMMENTS ON THE PROPOSED DECISION OF ADMINISTRATIVE LAW JUDGE ROSCOW OF COLLABORATIVE APPROACHES TO UTILITY SAFETY ENFORCEMENT ("CAUSE")

## I. INTRODUCTION[1]

Disasters provide opportunities to transform the culture and governance of large organizations. Costco became the nation's preeminent leader in food safety, designing a management system that strengthened ISO standards (which had not widely been used in the United States) – but only after four of its members died from an outbreak of e-Coli. When Allied Chemical "killed" the James River in the 1970s, the Securities and Exchange Committee (SEC) imposed the "bubble-up" management system to ensure that its board of directors had complete and unbiased information about unresolved safety risks – as identified by every line employee, down to the lowest level of the organization.[2] Allied embraced this system for decades after the SEC consent decree expired, avoiding any major disaster for the rest of its corporate existence. After Three-Mile Island, the nuclear industry strengthened a system of coinsurance and peer reviews that may exceed the rigor and effectiveness of formal inspections conducted by the Nuclear Regulatory Commission. But a transformative response to corporate accidents or misconduct is neither automatic nor inevitable. In the 20 years since PG&E admitted poisoning the

[1] On March 17, 2017, pursuant to a request from PG&E, Administrative Law Judge Roscow orally authorized the filing of separate comments as long as the subject matter covered by the separate comments did not overlap. CAUSE participated in locating authority for use in proposed joint comments and was in the process of finding common ground. However, since these separate comments do address the standard for evaluating settlements, it was mutually agreed that CAUSE withdraw from the joint comments.

[2] SEC v. Allied Chemical, Civ. No. 77-373 (D.D.C.); SEC News Digest, Issue 77-44 (March 8, 1977).

Hinkley aquifer, PG&E has still failed to develop an effective compliance program, leading to its conviction for criminal obstruction in connection with the San Bruno gas explosion.

Collaborative Approaches to Utility Safety Enforcement ("CAUSE") sought to promote the success of those three pioneering programs in safety regulation. Its fundamental goal was to ensure that PG&E also accepted a more collaborative role with regulators in which PG&E, not Commission and state inspectors, assumes **primary** responsibility to ensure and demonstrate continuous improvement in risk mitigation. CAUSE deferred to TURN's expertise in scrutinizing the costs of safety programs to minimize ratepayer impact. CAUSE avoided duplicating the focus of National Diversity Coalition on executive compensation. However, CAUSE alone advocated for systemic approaches to identify precursors of risk, so that never again would any PG&E ratepayer suffer the effects of a major avoidable incident causing environmental damage, loss of human life, occupational injury, extensive property damage, or secondary damage caused by the lack of resilient and reliable power supplies available during an external disaster or national security emergency.

CAUSE was the last party to accept this settlement, and seriously examined its economic justification with a view toward challenging it without the assistance of TURN and ORA. Ultimately, CAUSE concluded that the settlement, taken as a whole, was a reasonable resolution of the revenue requirement from the standpoint of ratepayers. CAUSE continues to support and to be bound, to the extent of Rule 12 and Commission precedents, to accept the settlement package if the Commission does not modify it.

CAUSE also looks beyond its immediate policy goal and stands to defend the powers and prerogatives of this Commission. Peninsula Ratepayers Association ("PRA") did the same 12 years ago, when it opposed arguments that express preemption by the bankruptcy courts required the Commission to forego rate regulation for nine years. CAUSE fully supports the migration of safety regulation to dockets that can take a more continuous and collaborative approach to safety, but that migration has not yet succeeded. Whether the issue is safety, accounting integrity, or employee relations, the rate case has always been the occasion of maximum influence of any state commission over a regulated utility. The Commission should not extend the dicta of prior decisions to limit its authority to modify inconsistencies with state law or the public interest. Nor should it compel parties who acquiesce in a

reasonable pre-hearing settlement of the revenue requirement also to oppose revenue-neutral modifications that mitigate specific violations of the public interest – even when the proposed decision recommends those modifications. This Commission must never abdicate its exclusive authority to determine the public interest. It cannot delegate, even to a unanimous chorus of intervenors, the authority to arbitrate the public interest or to excuse violations of state law. It should be especially leery when there has been no cross-examination.

CAUSE hereby submits these Opening Comments on the Proposed Decision (PD) issued by the Administrative Law Judge (ALJ) on February 27, 2017, in the above-captioned manner. In these Opening Comments, CAUSE:

- recommends that the Commission revise the February 2, 2017 ruling denying CAUSE intervenor compensation be revised if motions to address concerns raised (late in the proceeding) by the ALJ do not succeed. (CAUSE expects to file these motions as early as tomorrow.)
- affirms the position, to which it is bound, that the settlement, taken as a whole, achieves a reasonable resolution of the revenue requirement;
- recommends that the Commission distinguish, limit, question or overturn language in prior decisions that announce a "strong policy in favor of settlements" or compares its review to the judicial ratification of class action lawsuits;
- recommends that the Commission require that "effective compliance and ethics program" that PG&E must propose as part of its criminal sentencing include, at a minimum, a trial of CAUSE's "bubble-up" management system;
- recommends that the ordered consultations with the Division of the Safety of Dams include participation by the Commission staff and public; provide transparency; and consider developing a management system that makes PG&E primarily responsible for maintaining and reporting regulatory compliance.
- supports modifications in the PD regarding undergrounding, provided that PG&E does not show that they materially change the agreed revenue requirement;

- proposes that there be a rebuttable presumption that proximate costs of any remedial or preventive actions imposed by the federal monitor are not included in the revenue requirement;
- recommends that the Commission provide for a true-up if the $300 million in recently announced cost reductions to the extent that costs were claimed in filings and that the scope for reductions was not included in the projections disclosed to the settling parties;

## II. THE INTEGRITY OF THIS SETTLEMENT AND FUTURE PROCEEDINGS REQUIRES THAT CAUSE RECEIVE A REASONABLE AWARD OF INTERVENOR COMPENSATION.

In 2003, the Commission began what the Legislature has called the "era of go-along, get-along" when an ALJ denied PRA eligibility to claim intervenor compensation after PRA objected to a settlement proposal favored by former President Peevey.[3] Shortly after the current settlement proposal, the Legislature enacted SB 512 (2016) to end that era. Senate Floor Analysis, at 7. PRA insisted that the Commission not abdicate its constitutional authority by accepting conditions that settling parties claimed the bankruptcy court would approve. Here, CAUSE insists that the Commission not delegate to intervenors its authority to determine the public interest. Both parties served as lonely voices defending the principles of Article XII and the essential powers of this Commission. CAUSE also advocated for safety, when it had no internal champion at the Commission, and no other intervenor would assume this role. Now, after 14 months of delay, the ALJ has denied eligibility. PD, Ordering Clause 20 at 225. The Commission should reverse the ALJ, as it did in 2003.

CAUSE reasonably relied on the statutory deadline of 30 days, compliance with which the Commission committed to the State Auditor in 2012 but which apparently is still ignored. See State Auditor Report 2012-118, Response to Rec. #1 at 17, 35 The deferral of compensation already places a significant risk on new intervenors, but suspense as to eligibility from November 2015 until August 2016 (coupled by unanticipated new requirements in February 2017) compromised the quality of CAUSE's advocacy; contributed to the stated concerns perceived by the ALJ; and imposed intolerable financial hardship on the customer who has borne 100% of the fees and expenses that CAUSE has

[3] PG&E (Bankruptcy) D.03-12-035 at 79.

incurred. CAUSE was unable to recruit the two experts it proposed to retain, or even to hire regular secretarial assistance. CAUSE has been unable to find any precedent for many of the conditions the ALJ has imposed, which include requirements that contradict the stated purposes of the statute and, in some cases, are simply misplaced. Despite weeks of studying possible work-arounds to accommodate the most recent demands, CAUSE remains concerned that they violate the privacy of all its members and threaten to compromise the ability of its non-executive directors to limit their personal liability. The Corporations Code appears to prevent changes in the bylaws to satisfy the new and apparently unprecedented requirements without unanimous consent of the entire membership. This ordeal is particularly inappropriate because the ALJ has never questioned the ability of CAUSE's president to represent broader interests as a Category 1 customer, as he volunteered to do, even though it would compromise his family's privacy by requiring a showing of financial hardship. The purpose of Category 3 is to provide the "comparison test" to avoid this disclosure.

CAUSE will respectfully address its efforts at compliance in the impending motions to the ALJ. CAUSE believes that his perceptions of inconsistency and discrepancy are erroneous or not material and will ask to be relieved of conditions that adversely affect the rights of its members and directors. The ALJ may not have fully apprehended either the direct costs of his conditions, or the prejudice they have produced to CAUSE's full presentation to this Commission of safety issues. The Commission should ensure that the award compensates CAUSE both for the substantial contribution that it has been able to make to this settlement and for the reasonable efforts expended in attempt to comply with conditions that are not regularly imposed on other intervenors.

## III. THE COMMISSION SHOULD MODIFY ANY PROVISION OF A SETTLEMENT THAT OFFENDS STATE LAW OR THE PUBLIC INTEREST.

When John Bryson was its president, this Commission took the leading role among state regulators in supporting modifications to the final judgment in United States v. Western Electric, 552 F.Supp. 131, 147 & n.60 (D. D.C. 1982), which were entered into pursuant to the Tunney Act, Pub. L. 93-528. These modifications preserved state authority to regulate common carriers, led to a decade of rates that were lower than would otherwise have occurred, and made it possible to develop and market the technological innovations that established Silicon Valley's dominance in semiconductors and information technology. Had Judge Greene deferred to the proposal of the parties, none of these epic

benefits would have been realized. The Tunney Act was authored by one of California's United States Senators in 1974, and reflects the same values of transparency and judicial integrity that underlay the contemporaneous proposition extending Article XII of the California Constitution to the regulation of gas and electric utilities.[4] The Tunney Act requires federal courts to receive public comments and to make an ***independent*** determination that entry of antitrust settlements is in the public interest. It remains the best model and precedent for the public interest determination that this Commission has the exclusive authority to make in this case. Respect for this non-delegable authority of this Commission also demonstrates why, as PRA correctly predicted, the bankruptcy court preserved its control over PG&E in 1982, and why the federal district court protected this Commission's safety jurisdiction when it designed the remedy for the federal criminal violations arising from the San Bruno explosion.[5]

On its face, Rule 12.1(d) (formerly Rule 51.1(e)) still requires the Commission to reject any settlement that is not in the public interest: "The Commission will not approve settlements, whether contested or uncontested, unless the settlement is reasonable in light of the whole record, consistent with law, and in the public interest." CAUSE agrees with the other settling parties that the PD (at 34) misstates the standard for evaluation:

> For each section, we provide Settling Parties' description of the issue, and address that issue. If we agree with the resolution, we state that the outcome is reasonable and should be adopted.

The Commission should not evaluate *reasonableness* issue by issue. However, CAUSE files separate comments to argue that the Commission ***should*** modify any single provision that, as proposed, contravenes the public interest, ideally doing so with any adjustments necessary to preserve the fundamental bargain that the parties sought.

However, since its pivotal role in the AT&T divestiture, the Commission has repeatedly referred to the "strong public policy in favor of settlement." It has even used the term of art, "standard of

[4] Proposition 12. Res.Ch. 88, 1974.

[5] "The Monitor does not have authority to supplant the CPUC's authority over, or decisions related to, gas transmission operations or pipeline safety. Nor does the Monitor have authority to take action that would, directly or indirectly, require PG&E to take action contrary to the directives of its regulators." United States v. PG&E, Case 3:14-cr-00175-THE, N.D. Cal., Document 916, filed Jan. 28, 2017.

review," which suggests a level of appellate deference[6] – as if the settling parties themselves had already decided the public interest as a matter of fact. The contravenes the principle that the Commission is the exclusive arbiter of the public interest, which requires that it make this determination de novo.

The Commission may be seen as an outlier among state regulators in its predisposition to encourage settlements. For example, when the New York Commission staff, the state Attorney General, and State Consumer Advocate supported New York Telephone's (NYT's) proposed settlement increasing rates, but three private individuals opposed it in the initial hearing, the public agencies changed their position. The Commission approved a very different settlement seven years later, with modifications, after initiating two investigations on its own motion, forcing the company to restructure, imposing the largest telephone disallowance in its history, requiring a $1 million retrospective audit, and ordered substantial refunds. NYT's response also included implementation of a compliance system similar to the "bubble-up" proposal that CAUSE advocated for PG&E.

During the course of the seven years of multiple proceedings, the New York Commission established the following standard for settlements:

> A desirable settlement should strive for a balance among (1) protection of the ratepayers, (2) fairness to investors, and (3) the long term viability of the utility; should be consistent with sound environmental, social, and economic policies of the Agency and the State; and should produce results that were within the range of reasonable results that would likely have arisen from a Commission decision in a litigated proceeding. New York Telephone (Investigation of Commission's Own Motion) Opinion No. 97-9, Cases No. 90-C-0912, 92-C-0272, at 7.

By contrast to the New York Commission's use of a balancing test to determine the public interest, in Calpine (Show Cause Order re Violation of Resource Adequacy), D.10-04-033, this Commission reviewed its "long history" of deferentially approving settlements, without suggesting that the relaxed policy was more appropriate to settlements of fines than of major rate cases:

> [W]e have often acknowledged California's strong public policy favoring settlements. This policy supports many worthwhile goals, such as reducing litigation expenses, conserving scarce resources of parties and the Commission, and allowing parties to reduce the risk that litigation will produce unacceptable results. In assessing settlements we consider individual settlement provisions but, in light of strong public policy favoring settlements, we do not base our

[6] As a matter of definition, "The standard of review focuses on the deference an appellate court affords to the decisions of a District Court, jury or agency." Paul G. Ulrich, P.C. & Sidley Austin, LLP, 1 Fed. Appellate Prac. Guide 9th Cir. 2d § 4:1 (2011).

> conclusion on whether any single provision is the optimal result. Rather, we determine whether the settlement as a whole produces a just and reasonable outcome.

While it may not be relevant whether "any single provision is the optimal result," a single provision that contravenes the public interest should be modified. In the text of Rule 12.1(d), consideration "in light of the whole record" relates only to overall "reasonableness," and not to the additional elements of consistency with law and conformity to the public interest.[7] Even under former Rule 51.1(e), some decisions seemed to extend evaluation "as a whole" in a way that could excuse particular violations of the public interest that could have been modified in a manner that would not upset any of the parties' overall bargain. In SDG&E (rate case), D.92-12-019, (1992) 46 CPUC 2d 538, 551, the Commission suggested that it would approve "[i]n so long as the settlements as a whole are reasonable and in the public interest.")

One decision, which has been repeated (usually in dicta) by numerous subsequent cases, advances an unfortunate analogy to the judicial ratification of class action settlement. In re PG&E (*Diablo Canyon)*, D. 88-12-083, (1988) 30 CPUC 2d 189, 222. Rate cases and other proceedings before this Commission are very unlike class actions. While some class actions are "mega-cases," every rate case for a major utility in the most populous state in the nation inevitably involves billions of dollars. Actual litigation expenses before this Commission pale by comparison to the stakes – or to fee awards routinely approved in much smaller class actions. To focus on "conserving [these] scarce resources" is simply bad economics. Class actions relate to past injuries; they do not require the plaintiffs to accept the terms and conditions governing future transactions. Nor do class actions settlements ordinarily restrain the future conduct of defendants; injunctive relief is disfavored compared to a mass liquidation of damages. Class actions seldom involve rights or entitlements under the California or federal constitutions, nor do they typically involve access to essential monopoly services. Most critically, class actions involve a defined group of people, each of whom is given notice and an opportunity to pursue a claim independently. If they are not adequately represented, it has been a matter of choice. By contrast, the filed rate doctrine binds every member of the public, precluding

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[7] The critical distinction is further muddied in PG&E's GRC Revenue Requirement, D.07-03-044, *at* 13, because the reference for the redundant phrase "[assessment] as a whole" appears to extend beyond the element of reasonableness and to dismiss the need to modify specific violations of the public interest. "The purpose of our issue-by-issue review is not to second guess the Settlement outcome for every individual issue, but to assess whether the Settlement as a whole is reasonable in light of the entire record, consistent with applicable law, and in the public interest.").

any collateral litigation. Most critically, class actions do not address public interests; "cy pres" remedies that benefit the public generally rather than the specific class are strongly disfavored.[8] Fairness to the class, not promotion of the public interest is the object of judicial review.

Even more distressing is the reality that a federal class actions receive far more judicial scrutiny than many of the Commission's precedents suggest for regulatory decisions of far greater moment. The fairness hearing follows an extended opportunity for unmediated public comment and presumptively allows for participation by new representatives. Judges often appoint impartial experts to take a fresh look at the proposal. Official guidance to federal judges requires such independent actions.

> Be aware that the adversarial clashes usually end with the settlement. Indeed, most settlements preclude the parties and attorneys from opposing the settlement's provisions, especially the stipulations about attorney fees. Thus, you need to take independent steps to get the information you'll undoubtedly need to review a settlement agreement. Op.cit. n.8 at 8.

Generally, settlements are unfavorable to ratepayers because of the asymmetry of information about the true costs of the utility. The need for a rigorous, independent determination of the public interest is particularly important in rate proceedings, and increased further when the proposed settlement precedes the evidentiary hearing. At the onset of this proceeding, the Safety and Enforcement Division (SED) observed that "the traditional tools of intervenor testimony, evidentiary hearings and cross-examination of witnesses [would] provide the Commission with a complete record for its decisions."[9] From the standpoint of SED, any settlement may mean that this case will not substantially advance the progress of risk-informed decision-making. This case exhibits two of the "additional factors" that the Commission identified as conditions of approval in D.10-04-033:

> b. Sponsoring parties are fairly reflective of the affected interests; …
> d. The settlement conveys sufficient information to permit the Commission to discharge future regulatory obligations with respect to parties and their interests.

Here, the delay and ultimate proposed denial of eligibility for intervenor compromised CAUSE's ability to take discovery and to present a fully developed case, and there was no other party reflecting safety interests or the need for collaborative compliance systems. By admitting evidence not subject to cross-examination,

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[8] Rothstein & Willging. MANAGING CLASS ACTION LITIGATION: POCKET GUIDE FOR JUDGES (Federal Judicial Center, 2005) at 12.

[9] Safety and Enforcement Division, Risk Assessment Section, Staff Report, "Pacific Gas and Electric Company (PG&E) 2017-2019 General Rate Case, Application A.15-09-001," March 7, 2016, at 73.

some of which appears to be inconsistent with the subsequent criminal sentencing order, the settlement deprives the Commission of the information it needs to improve safety outcomes at PG&E. These factors are far more critical in a major rate case than in the settlement of a fine between staff and a single entity.

## IV. SUBSEQUENT TO CAUSE'S ACCEPTANCE OF THE PROPOSED SETTLEMENT, THE CONVICTION AND SENTENCING OF PG&E DEMONSTRATED THAT MAINTENANCE OF ITS EXISTING COMPLIANCE SYSTEM IS CONTRARY TO THE PUBLIC INTEREST.

### A. The Commission Should Require "Bubble-Up"

In presenting the settlement, PG&E represented itself as "the industry leader" in risk management, justifying its refusal to consider changes to its compliance and ethics program. The settlement actually requires PG&E to reduce the expenses of its Enterprise Corrective Action Plan. PG&E pledges no more than to "continue" its top-down program of having high-level officers train subordinate line employees on how the officers believe they should maintain safely. It refuses to create a paper trial that holds each level of management accountable for resolving issues identified by their subordinates, who are closer to the safety risks. The settlement recites that it achieves a "fair balance between safety … and affordability" and enables PG&E to maintain service as necessary to promote the safety of its customers, employees and the public (*See* Settlement Motion at 9), but the district court has now found otherwise. Had PG&E implemented the measures advocated by CAUSE at the time of its criminal obstruction, it might well have reduced its culpability score for purposes of the federal sentencing guidelines by three points. 2016 Chapter 8 – Sentencing Guidelines for Organizations, §8C2.5 (f)(1) at 34.

If the Commission disagrees with adverse finding of the federal court, reached only after a 5-1/2 week trial, it owes the Legislature a detailed explanation of why it believes that PG&E's Enterprise Corrective Action Plan is, as PG&E contends, the industry-leading state of the art in managing safety compliance and how it plans to reduce the expenses of the program.

### B. The Commission Should Consider Whether Executive Compensation Incentives Have a Perverse and Unintended Effect on the Quality of Risk Information Management Provides to the Board.

An inherent problem in sentencing organizations in the failure to hold culpable individuals accountable for what they did or what they failed to prevent. The Sentencing Guidelines do not consider executive compensation, but they recognize that an organization cannot build a culture of compliance if it invests with "substantial authority" those who engaged in "conduct inconsistent with an effective

compliance and ethics program." Id., §8C2.5(b)(3). The organization must implement hiring and promotion practices that exclude such persons from high-level positions. Id., Application Note 4(B). Furthermore, the board of directors must have the knowledge necessary to exercise reasonable oversight. Id., §8C2.5(b)(2)(A).

The SEC addressed the Allied's disastrous Keypone contamination of the James River as a failure of corporate governance. Its consent decree developed the "bubble up" system that requires each employee periodically to make an affirmative certification stating the extent to which he is aware of any safety hazards or acts of regulatory non-compliance – and required each manager to resolve each risk identified by their subordinates of to report any unresolved issues up to their superiors. This process continued all the way up to the Board of Directors. It effectively eliminated the ability of any level of management – including the most senior executives – to conceal adverse safety information from the Directors. It also created a paper trail that would identify any nonfeasance after the fact of an adverse incident. The consent decree lasted two years, but Allied embraced the system for the remaining 25 years of its existence.

PG&E rejects both bubble up and the isolation of those who act contrary to the effectiveness of its compliance program. PG&E promotes what it calls a "no fear" culture of collective responsibility. Unfortunately, the immunity from personal consequence extends not only to encourage disclosures from line employees, but also to protect executives who fail to disclose risks appropriately. PG&E also purports to promote safety by increasing its weight to 50% of the short-term incentive program, but these bonus payments are awarded collectively to the entire organization. The recommended calculations are presented by the senior management itself, without third-party verification. The seemingly inevitable result is to encourage a rosy view of progress in risk prevention, in which everyone, knowingly or not, may collectively overlook or minimize incipient risks in order to maximize the bonuses in which all will share. Any individual disclosure would adversely affect the entire organization, and could be consciously or unconsciously discouraged. In this case, the board may lack the unbiased information in needs to ensure that PG&E complies with the regulatory obligation to operate safely and with the terms of its criminal probation.

### C. There Should be a Rebuttable Presumption that Costs Proximately Caused by Requirements Imposed by the Federal Monitor Will Not be Recovered in Rates.

The settling parties relied on PG&E's assurance that the agreed revenue requirement is sufficient to enable to company to operate safely, consistent with risk management principles overseen by this

Commission. Senior Judge Thelton Henderson has directed his appointed monitor, Judge Mark Filip, to defer to the primary regulatory authority of this Commission. If Judge Filip finds it necessary to prescribe specific actions, it is presumably because PG&E has either failed its commitment to operate safely within the settled revenue requirement or because the remediation is necessary to serve some additional objective of the probation. In either event, the ratepayers should not pay more than the settlement allowed. (Of course, PG&E may argue that the probation so transforms the company that every cost will increase due to the probation, so this presumption is limited to those costs identifiably and proximately caused by compliance with a specific mandate of the Monitor.

## V. DAM SAFETY SHOULD RELY ON AN EFFECTIVE COMPLIANCE SYSTEM, NOT ONLY PRIVATE CONFERENCES WITH STATE INSPECTORS.

The PD finds that PG&E "should undertake additional communication and coordination with the California Division of the Safety of Dams (DSOD)," concluded that PG&E should tell the Commission when and how it will report "the progress and outcome of PG&E's discussion with DSOD regarding the development of a structured risk portfolio management program … to mitigate risks in a ***timely*** manner." PD 4.1.4.1 at 83, Finding 8 at 214, Conclusion 10 at 217. PG&E will serve one initial report on the service list 60 days after the final decision. PD Ordering Clause 13 at 224.

It is important that the Commission respect the primary jurisdiction of DSOD. But, based on the second-hand account provided by SED, DSOD is complaining of the same failures of self-regulation that is the basis for CAUSE's general proposals to reform PG&E's compliance system. CAUSE believes that the parties, as well as the 200,000 people already evacuated due to the risk of a dam-related flood.[10] Furthermore, DSOD's assessment is at odds with PG&E's assurances that its use of ISO 55001:204 and PAS 55:2008 "provide highest level of rigor for managing the company's large number of physical assets." They also call into question the settlement's general assurance that PG&E is able to maintain safety system-wide. Given the intensity of DSOD's dissatisfaction with PG&E, it seems

[10] As the FERC licensee, the State Water Project has primary responsibility for Oroville Dam, but PG&E personnel operate turbines at this location. PG&E also owned 7 upsteam dams, including the FERC-licensed Canyon Dam at Lake Almanor, which are capable under certain circumstances, of helping manage near overflow conditions at Orovolle. PG&E owns a total of 170 dams.

inappropriate to give such great discretion to the company in determining when and how to keep the Commission informed.

PG&E is not the only risk that DSOD is managing in this year of extraordinary change in California's water situation. Its headcount is limited. With the prospect of flooding during the melt of the almost unprecedented water content in the Sierra snowpack, the opportunity for "timely" action is also critical.

PG&E, not DSOD, has the resources necessary to prepare for future flood risks on the urgent basis that is necessary. Those resources are under the jurisdiction of the Commission, and they should begin to provide detail to the Commission and the parties in less than 60 days and do so on a continuing basis.

## VI. CAUSE FULLY SUPPORTS THE MODIFICATION RESTORING CURRENT LEVELS FOR UNDERGROUNDING

The ALJ granted party status to the City of Hayward at the workshop/hearing following the settlement. Hayward represented views held by municipalities throughout PG&E's service area that undergrounding projects should be funded at ratepayer expense at levels at least equal to those authorized in the past. The ALJ also identifies issues with the failure to account for past authorizations, with the result that the allowances are chronically underspent. To the extent that PG&E demonstrates some public interest in reducing the liability implied by the Rule 20A balances, it should give municipalities a full opportunity to raise necessary contributory funds, which may take several years.

Undergrounding, and the related issue of trimming heritage trees near overground distribution lines, has important safety benefits, but there are also issues of esthetics and property values. As a safety priority, it did not raise to the level that CAUSE could sponsor testimony (given the suspense of its eligibility determination).

It is difficult to understand why PG&E or other parties object to the modification, in light of the compelling evidence mustered by the ALJ to support the proposed findings and conclusions. If the modification materially affects the negotiated fee level, PG&E may be entitled to an adjustment. But this would only be the case if there was a significant deficiency net of any offsetting revenues resulting from other revenues and from any unspent balance in previously authorized recovery.

## VII. THE PROPOSED REVENUE REQUIREMENT SHOULD BE REDUCED TO ANY EXTENT THAT IT INCLUDES ANY OF THE $300 MILLION IN COST SAVINGS THAT PG&E SUBSEQUENTLY ANNOUNCED.

$300 million is 4 percent of the total revenue requirement, which is the most essential term of the negotiated settlement. PG&E's decision to cut $300 million in expenses after the settlement was agreed but before it is approved against demonstrates the asymmetry of information and bargaining power that is so often prejudicial to ratepayers. The ambiguity could have been explored has the rate case progressed to the normal evidentiary hearing. CAUSE expects to reply to any explanation that PG&E offers in its comments regarding the relationship between the reported costs, on the basis of which TURN and ORA negotiated the overall revenue requirement and the savings announced to the press on January 11, 2017. See discussion PD at 126, ff.; Ordering Clauses 4-6 at 221-222. CAUSE submits that the Commission should require such a reconciliation before, not after, it issues the final decision approving a modified settlement.

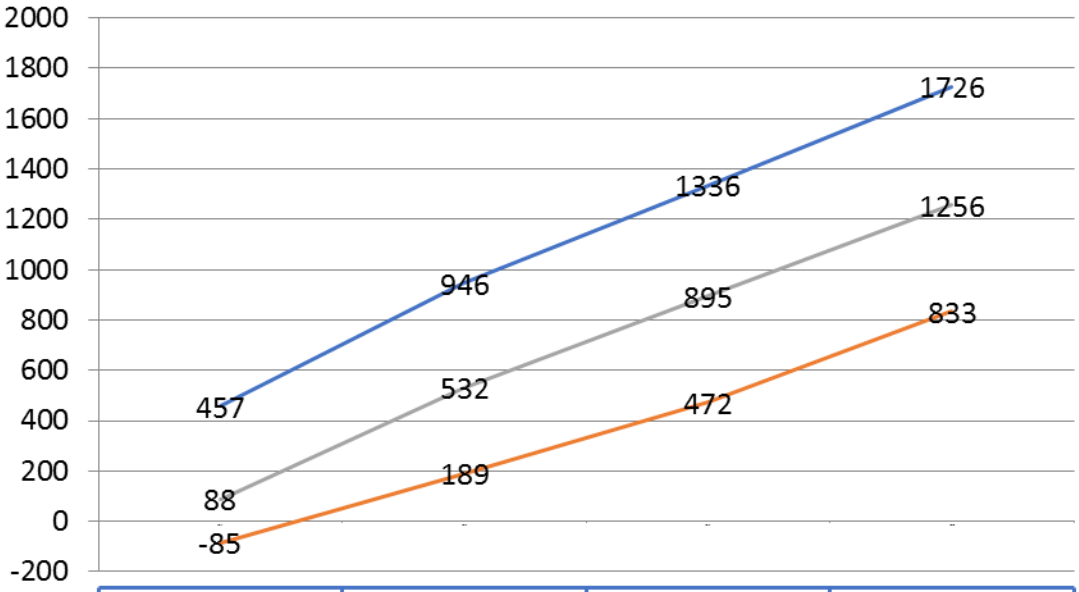
## VIII. CAUSE CONTINUES TO OPPOSE THE THIRD POST-TEST YEAR

CAUSE is pleased by the replacement of the somewhat cryptic term "attrition year," but the traditional wording does acknowledge that, the longer the interval between rate cases, the more something attrites[11]. That something is the accuracy with which the Commission can make an advance determination that rates will be just and reasonable. CAUSE's assurance that this settlement is reasonable cannot be extended to a third post-test year.

Prior to the settlement, ORA was the only party to seek a third post-test year. PG&E proposed a rate case for a test year of 2020, and changed this position only over in connection with the settlement. PG&E emphasized that "operating expenses were not expected to follow a normal pattern over the rate case cycle," even assuming that the cycle was three years, not four. PG&E-11 at 1-9. PG&E claimed that net plant additions would exceed inflation. Id., 1-7. It also claimed that operating expenses would exceed the previously employed price index. It stressed simplicity, not reliability, as the primary virtue of its proposals for the two test-years. Furthermore, PG&E unequivocally admitted that the

[11] At least some dictionaries recognize this word as a transitive verb meaning "to make smaller by attrition." http://www.dictionary.com/browse/attrite; http://www.thefreedictionary.com/attrite

Commission's prescription of risk-based decision-making was part of an "integrated whole" that dictated the three-year cycle. PG&E-11 at 1-5.




| | 2017 | 2018 | 2019 | 2020 |
|---|---|---|---|---|
| PGE | 457 | 946 | 1336 | 1726 |
| ORA | -85 | 189 | 472 | 833 |
| settlement | 88 | 532 | 895 | 1256 |

CUMULATIVE INCREASE IN REVENUE REQUIREMENT IN MILLIONS OF DOLLARS

Consistent with the settlement, CAUSE does not dispute any of the factors used to calculate the post-test year revenue requirement for 2018 and 2019. However, there has been no showing as to how those factors can reasonably be extrapolated into 2020. By 2020, the settlement will allow revenue requirement to have a cumulative increase of 16% without further Commission review. This is 1.5 times ORA's proposal. Over this period, PG&E and California's energy market face more than the usual number of uncertainties, such as those regarding market share and structure, the effects of changing tax treatment for depreciation and for certain investments to develop renewal energy12, the extent of climate change, the effectiveness of demand response, and the impending transition away from nuclear power. It is simply impossible to predict how these uncertainties will offset and reinforce each other over a four year period.

[12] Currently, the Protecting Americans from Tax Hikes Act expires in 2019, Pub. L. 114-113, so 2020 will be PG&E's first year without exceptional tax benefits based on 50% bonus depreciation. Tax credits for certain wind and solar expire. 129 Stat. 3038.

Of particular concern to CAUSE is the effect on safety. As PG&E acknowledged again and again, it is inappropriate to allow four years to pass before the next rate case given the fundamental changes that the Commission has mandated for risk-based decision-making. This rate case occurs in the midst of a transition to a new emphasis on safety and risk management. Our joint comments explain how the change would affect the timing of the next RAMP proceeding. It is inappropriate to allow an additional year to pass before the Commission takes a comprehensive look at how successful (and how costly) the new initiatives are.

The settlement significantly reduces the number of capital projects related to safety that the Commission would normally "specify" in its order after hearing. *See, e.g.,* Settlement 3-2-1-4. It would be inappropriate to allow PG&E's performance under the limited safety areas that the Settlement does specify to "drift" for an additional year.

## IX. PG&E SHOULD DEVELOP FACILITY-SPECIFIC RISK METRICS TO PRIORITIZE REPLACEMENT DECISIONS, RATHER THAN UNIFORM SERVICE CYCLES.

### A. Uniform Replacement Cycles Are Inappropriate.

The settlement proposes a "minimum 3-year service cycle" for gas leak management a potentially ambiguous term which is intended to reflect an agreement that PG&E would inspect each of the specified units no less frequently than every three years. The joint comments address this disputed issue in some detail, with an emphasis on the economic consequences.

CAUSE wishes to add that the prescription of uniform inspection frequencies for entire classes of equipment is almost certainly not optimal. In the past, PG&E has engendered controversy by failing to achieve all the capital projects specified by the Commission to reduce risk, or by changing its priorities in the mitigation of safety risks. The existing mechanisms of RIBA and RET cannot tailor competing safety prirotities so that each initiative achieves an equal amount of marginal risk mitigation per dollar spent, which is the condition necessary to maximize safety at any particular level of expenditure. PG&E should not stop replacing poles that are about to fall down simply because it has not completed mitigation of some other risk type that has a higher aggregate RIBA score. Without a management system capable of more granular evaluations, PG&E has never been able to justify reallocating resources, nor can it conclude with confidence that it has adequately addressed any specific risk type without having inspected every single affected unit.

The settlement did not include any trial of the "bubble-up" proposal for an internal management system to identify and prioritize the particular units that are most likely to fail and to target maintenance to mitigate these risks. CAUSE submits that this proposal should provide for some process to engage front-line personnel in identifying the units most at risk for urgent remediation. There should also be some interative system of "active learning" to learn which units are most likely to fail, so that they can be repaired first.

**B. The Commission Should not Authorize a Balancing Account to Recover these Costs.**

CAUSE shares in the concerns that TURN has expressed opposing a "New Environmental Regulatory Balancing Account" that allows staff to approve recovery of costs that PG&E claims to be incurred as a result of additonal requirements regarding control of these gas emissions. The Proposed Decision (at 198) denies this reject without prejudice to determination in R.15-01-008. CAUSE adds that it is inconsistent with the Commission's commitment to placing safety first to allow streamlined recovery of any safety cost instead of a system of rigorous regulatory scrutiny to be prescribed in here or in R.15-01-008.

CONCLUSION

The Commission should adopt the ALJ's well-reasoned modification to maintain current levels of undergrounding pending an audit of unspent authorizations. It should require PG&E to demonstrate that its dams satisfy its obligation to maintain safe utility facilities. Regarding issues left disputed by the settlement, the Commission should not authorize a third-test year; mandate that gas leaks be managed with site-specific metrics, not uniform replacement cycles; and deny the requested environmental balancing account. Prior to approve a settlement with these modifications, PG&E should require PG&E to disclose any extent to which PG&E's proposal to reduce costs by $300 million includes any cost claims upon which the settling parties based the agreed revenue requirement.

In response to the conviction and sentencing of PG&E, which occurred subsequent to the settlement, the Commission should (1) require PG&E's management system to include bubble-up reporting of safety risks reported by line employees, (2) ensure that compensation plans do not provide collective safety bonuses to executives who have not promoted effective compliance and ethics systems,

and (3) create a rebuttable presumption that PG&E may not recover from ratepayers any direct costs of actions mandated by the federal monitor.

Finally, if motions to reconsider the ruling denying CAUSE eligibility for intervenor compensation do not succeed, the Commission should revise the proposed decision to direct that CAUSE receive an award that compensates reasonable fees and expenses incurred in the making of its substantial contribution, as well as in its supererogatory compliance with conditions imposed by the ALJ.

Respectfully submitted,

/s/
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