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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 Approval of Economic Development Rate for 2013-2017 (U39E) | Application 12-03-001<br>(Filed March 1, 2012) |

# OPENING COMMENTS OF THE LOCAL GOVERNMENT PARTIES ON THE PROPOSED DECISION OF ALJ CLARK

Dated: August 29, 2013

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# OPENING COMMENTS OF THE LOCAL GOVERNMENT PARTIES ON THE PROPOSED DECISION OF ALJ CLARK

Pursuant to the Commission's Rules of Practice and Procedure, (Rule 14), the Local Government Parties (LGP) submit these opening comments on the Proposed Decision (PD) of Administrative Law Judge Clark, issued August 9, 2013, in the above-noted proceeding.

Two things have been consistently evident throughout this proceeding, from the Public Participation Hearing, in testimony, during the Hearings and in briefs; 1) there is a *significant need* for both standard and enhanced economic development rates (EDR) and 2) that *uncertainty* is bad for the effectiveness of any EDR. Further, these consistent themes are matched by widespread acceptance among the parties, as the PD acknowledges. The LGP therefore applauds the PD for its recognition of these two consistent features and for addressing them by *approving* both EDR options sought in the Application.

Specifically, the LGP welcomes the PD authorization of a Standard EDR, without some of the encumbrances of past rates. The greater level of interest in the enhanced EDR (or E-EDR) on the part of the LGP arises because, for the most part, our local jurisdictions are those parts of PG&E's service area that are suffering most in terms of unemployment and economic distress. Therefore the LGP is especially appreciative of the PD's authorization of an enhanced EDR, and, specifically, recognition that the rate for that E-EDR might rise to the full number sought in the PG&E Application, i.e. a discount of up to 35% off qualified customers' otherwise applicable tariffs.

However, in meeting those needs that are so well documented in the proceeding, the PD does so in ways that either are unclear as to methodology or are unlikely to reach the goals stated in the PD. Specifically, removing the 'claw-back' used in past EDR programs, provisions that were utterly friendless in this proceeding, highlights the need for certainty. However, replacing the 'claw-back' with an unwieldy range of potential discounts – from 12% to 35% – *and* making any final discount number(s) payable in refunds, enshrines, rather than eliminates, uncertainty - clouding the promise of an E-EDR.

Thus in one stroke the central concerns of the proceeding, the need for both EDR options and for a level of certainty to make those options effective job magnets, are undermined.

- *The PD should not simply acknowledge the need for the EDR options and that those options should be free from uncertainty, the PD must give effect to those undisputed objectives.*

The PD errs, therefore, in setting forth the means for reaching the overall objectives it sets and in several other specifics, all as more fully described below.

## I. THE PD ERRS IN FAILING TO PROVIDE CERTAINTY OR SIMPLICITY FOR POTENTIAL E-EDR CUSTOMERS

The PD expressly acknowledges the widespread support for greater certainty in the EDR discounts stipulating:

> **"[a]ll parties hope to eliminate the "claw-back" provisions of the previous Commission approved EDR programs, because it results in uncertainty to businesses and has sometimes unfairly resulted in EDR participants having to pay back part of the discount previously afforded them."** [1]

Further, the PD also stipulates that:

"**[T]he EDR needs to be accessible in order to be effective**" [2]

However, in approving an E-EDR with a range of possible discounts, from 12-35%, that can change annually and are payable only as refunds, the outcome appears neither certain or accessible.

The rationale for this level of uncertainty and inelegance is articulated as the need to identify the benefits of the EDR through a positive contribution to margin (CTM) and to ensure payment of all Non-bypassable Charges (NBCs). Taken together these items can be described as the 'floor price', but that concept is ill defined and renders the PD unclear in parts. Yet the record supports a much different outcome, one that delivers certainty and simplicity.

### 1) PD ERRS BOTH IN (i) ESTABLISHING A RANGE OF E-EDR RATES AND (ii) IN SETTING 12% AS A RATE OF E-EDR DISCOUNT

(i) There is no specific testimony on the marketability, or lack thereof, of a range of discounts from 12 to 35%, because that outcome was not proposed by any party or

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[1] PD at p. 27.
[2] PD at p. 22.

anticipated at any point in the proceeding. Because this is not derived from the record, it is not possible to cite for purposes of rebuttal. However, given the ample record challenging the marketability of past EDR options on grounds of uncertainty, it is not difficult to extrapolate an objection to any proposal that offers no certainty, as being un-sellable.

(ii) Nowhere in the record is 12% calculated as an enhanced EDR discount. To the contrary, it shows that, even adopting DRA's approach, the lower range of its floor price would not be 12%, but an average of 22%. Beyond that, as PG&E shows in PG&E-4, Table 2-5, when the E-EDR program is broken out by customer class, even using DRA's approach (i.e. NBCs in the floor price & a five-year term) would assure positive CTM at higher levels of discount, *an average of at least 31.3%*, for every customer class but one. (The single exception being transmission-level E-EDR customers on the E-20T tariff. That discount would top out at 24.5%). Moreover, as PG&E's numbers show, using assumptions from DRA's 'modified floor price', discounts of even greater than 35% would *still* result in a positive CTM.

In fact the only numbers *not* supported by the record is the '12-35% range of discounts' found in the PD. This option has the twin disadvantages, therefore, of having been proposed by no one and offering an un-marketable E-EDR.

**2) THE PD ERRS IN PROPOSING ANNUAL REVISIONS OF DISCOUNTS**

The PD errs in its annual revision approach to E-EDR discounts. The annual revision of each discount, under an annual review approach, is unnecessary if average-customer-class CTM is replaced by a per-customer-class basis as described above. Moreover, the annual approach is cumbersome and significantly diminishes the potential for an effective E-EDR. This was recognized by DRA where witness Levin testified that it "was reasonable to enforce the floor provisions over the five-year contract period as opposed to… trying to enforce it on an annual basis and having this fallback that customers would find upsetting."[3] In fact there is no support in the record for an annual adjustment of the CTM per E-EDR customer.

### 3) THE PD ERRS IN ITS APPROACH TO CALCULATING THE CTM

On the issue of calculating the CTM, the PD errs in two additional areas: (i) the record does not support discount payments as *ex-post* refunds; (ii) the PD requires greater clarity as to the components to be used in any methodology for calculating CTM.

(i) In light of the evidence in the record to support a 35% discount for all customer classes but one (see above), requiring that discounts be paid as annual refunds is both unnecessary and significantly diminishes the marketability of the E-EDR. If, as illustrated above, a positive CTM can clearly be shown with discounts of 35% for all customer classes but one, that one *outlier* customer class should be separated and the remaining classes should be afforded the certainty of a specified discount for the life of their contract (assuming they otherwise qualify). That is the best outcome for those areas of California awaiting relief and expecting approval of an effective E-EDR with meaningful discounts.

However, concerns reflected in the PD, that *ex-ante* CTM calculations *themselves* create some uncertainty, are not lost on the LGP. As a compromise position, therefore, and notwithstanding that refunds *per se* do not appear in the record, the Commission might consider fixing the '*ex-ante discount'* at a rate lower than the full 35% but adding *ex-post refunds* – where a positive CTM indicates it to be appropriate – that would 'top up' the customer's discount to achieve the full E-EDR potential. Such numbers might be: setting the discount at 30%, for qualified E-EDR customers; taken off their monthly bills for the life of

[3] Transcript p. 380, lines 7-11.

the contract; *plus* granting an additional 5% discount, paid *ex-post*, following the results of the utility's annual tracking of costs. By such means the concern identified in the PD is recognized and addressed, yet potential E-EDR customers may still be reached by marketing a number-certain discount (with a potential adder). The impact of the enhanced discount option is thereby undiminished.

(ii) LGP believes that the PD requires greater clarity as to the methodology for calculating the CTM. In Opening Brief, SCE described a clear basis for calculating CTM. Given a five-year contract, as the PD now proposes, SCE looks to what it calls a short-run marginal costs approach.[4] At its simplest; short-term contract – short-term costs. That means excluding, e.g. Marginal Generation Capacity Costs, which SCE notes DRA already does for its modified floor price.[5] Generation costs are excluded for good reason; they are long-term costs disconnected from our shortened contract period and are more connected to the avoided costs absent the E-EDR customer's load. As SCE points out, generation components (energy and capacity) are more properly addressed in long-term, cost allocation Phase 2 GRC proceedings. This approach (akin to DRA's modified floor price) should be clarified as the benchmark for CTM and CTM should not include long-term costs, costs that are not only disconnected from the proposed 5-year E-EDR, but costs that would tend to lower the discount by eliminating headroom.

### 4) THE PD ERRS IN FAILING ITS DESCRIPTION OF NON-BYPASSABLE CHARGES AND THE FLOOR PRICE

The PD errs in lacking clarity on the interrelation between NBCs, CTM and the floor price. Because NBCs cannot be discounted or eliminated, and because they can be described

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[4] SCE-1 pp. 2-4.
[5] DRA-1 p. 2-6.

as part of a floor, it does not automatically follow that they will be used in any methodology for calculating CTM. This should be clear in the language of the PD, otherwise the resulting confusion can be misused as a means of reducing headroom to limit an E-EDR discount.

As the record shows, PG&E's Application has, at no time, sought to discount or eliminate an E-EDR customer's liability for NBCs. The issue has rather been whether, as a matter of policy and approach, NBCs are enumerated *as part of* any CTM calculation – i.e. comingled with marginal service costs. PG&E, describing this in economics and ratemaking terms, correctly asserts that:

> "**Nonbypassable charges…should not be included in the benchmark, as these costs do not increase when sales are retained or attracted through the EDR.**" [6]

Even though it might wish to see the two run together, for purposes of asserting what constitutes the 'benefit' of an EDR program, DRA too, in testimony, accepts the distinction between marginal costs and NBCs.[7]

However, the PD seems to exclude NBCs from CTM in one breath but include them in another. Specifically, the PD cites Decision 96-08-025 quoting that "CTM is the difference between the average rate paid by a customer and the marginal cost of serving that customer."[8] Elsewhere, however, such as the description of the floor price found at Appendix, A-1, the PD appears to run NBCs and marginal costs together – implying that they all constitute the floor price, which the PD proposes to retain and which is then used for determining the rate of discount. If those matters, which the record correctly parses, are not clearly separate in the PD, then confusion results.

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[6] PG&E Opening Brief, p. 6.
[7] Transcript pp. 378-379, starting at line 12.
[8] PD p. 8.

Therefore, to correct the elements in which the PD failed to provide certainty or simplicity for potential E-EDR customers, the PD requires the following revisions:

- *The PD should be revised to eliminate the uncertainty of a 12-35% potential discount range.*
- *The PD should be revised to eliminate the annual adjustment of CTM for each E-EDR customer.*
- *The PD should be revised to consider CTM by customer class, based on the applicable PG&E tariffs.*
- *The PD should be revised to separate the single customer class identified in the record, as unable to attain a full 35% discount (E-20T customers) and fix the upper level of that customer-class discount at 24.5%.*
- *The PD should be revised to eliminate the ex-post refund provision completely and pay the full E-EDR as a discount off customers' bills; or*
- *The PD should be revised use ex-post refunds merely as a minimal top up (i.e. 5%) while still providing for the bulk of the discount (i.e. 30%) as reductions from customers' monthly bills.*
- *The PD should be revised to clarify that in any CTM 'benchmark' calculation NBCs and Marginal Generation costs will not be included*

## II. OTHER ERRORS

### A) THE PD ERRS IN REQUIRING THAT PG&E SHAREHOLDERS BEAR THE ADMINISTRATIVE COSTS OF EITHER EDR OPTION

The PD anticipates that PG&E will bear the costs of administering the EDR programs.

This approach is based upon reference to Resolution E-3654.[9] Not only does E-3654 predate both the restructured energy markets ushered in by AB1890 *and* the subsequent retreat from full competitive markets through AB1X[10] but it references competition and market share that are implicitly internal to California. The EDR options, however, are explicitly extra-California in nature and are intended to generate jobs in California instead of "in other states."[11]

Moreover, this requirement appears contrary to statute. P.U. Code 740.4(h) provides that if an economic development program is authorized, because there is benefit to ratepayers, then the Commission "*shall* allow rate recovery of expenses and rate discounts" (emphasis added). As two EDR options are approved in the PD, 740.4(h) seems to require the recovery of "expenses", i.e. the costs of administering the program.

- *The PD should be revised to remove recovery of costs from PG&E shareholders.*

### B) THE PD ERRS IN DESCRIBING THE TESTIMONY OF PARTIES

The language of the PD is loose in its descriptions of the testimony of various parties and, consequently, the PD inaccurately reflects the record. For example, on p. 17 the PD stipulates that: "No party opposes the removal of the annual back-billing mechanism but all parties, except PG&E and LGP, oppose the removal of the floor price." This is inaccurate. The City of Oakland, for example, makes no submission on the issue while SCE only advocates for a specific moderated outcome on the potential "*should* the Commission

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[9] PD at p. 36
[10] See LGP Reply Brief, Section V pp. 12-14.
[11] PG&E Application p. 6.

ultimately adopt a floor price in this proceeding;"[12] i.e. no statement opposing removal of the floor price.

- *The PD on p. 15 should be revised to read: "No party opposes the removal of the annual back-billing mechanism ~~but all parties, except PG&E and LGP,~~ <u>but several parties</u> oppose the removal of the floor price."*
- *The PD should be revised to remove or correct blanket assertions of what positions were taken by the parties.*

### C) THE PD ERRS IN USING THE TERMS SUBSIDY AND SUBSIDIZED

The PD errs where it refers to the EDR options as either a "subsidized tariff" or a "subsidy". Those terms are found in sections 1, 4.3, 4.5 and Finding of Fact 34.

"Subsidy" is an inaccurate term to describe the EDR and is not been used by the Commission in past Decisions to describe EDR programs. The statutory authority for EDR programs, as accepted in the PD, is Section 740.4 of the P.U. Code. Therein the following terms are used: *economic development programs,* (740.4. (a)); *incentives,* (740.4. (f)); *rate discounts,* (740.4. (g)); and *reduced monthly rates,* (740.4. (g) (1)). The term "subsidy" is not used.

Moreover, the PG&E Application does not seek authorization for any "subsidy", the LGP did not support a "subsidy" and the record shows nowhere that the EDR is determined to be a "subsidy". To the contrary, the only reference to subsidy on the record was where the LGP witness declined to call the EDR a "subsidy" and cross-examining counsel then dropped the matter.[13] There is no other use of that term in the Hearing record.

- *The PD should be revised and the term "subsidized tariff" should be replaced with*

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[12] SCE Opening Brief, p. 3 *emphasis added*.
[13] Transcript p. 563, lines 6 & 7.

*"reduced tariff" and "subsidy" replaced with "discount", as appropriate.*

### D) THE PD ERRS IN THE LANGUAGE USED TO DESCRIBE TESTIMONY

The PD errs in singling out LGP witness Renzas for an improperly derisory description of testimony under cross-examination. Although California law recognizes a judge has broad discretion in commenting on evidence, any comments must be "temperate rather than argumentative." (*People v. Cook*, 33 Cal. 3d 400, 409 (1983).)

- *The PD should be revised and the word "feebly" (section 4.3. at p. 22) should be stricken from the Decision.*

## III. CONCLUSION

The LGP appreciates the opportunity to submit these comments on the PD and to address the matters described herein. LGP respectfully urges that the PD be revised as proposed and submitted for approval by the Commission.

Dated: August 29, 2013

Respectfully submitted,
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