BEFORE THE PUBLIC UTILITIES COMMISSION

OF THE STATE OF CALIFORNIA

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Order Instituting Rulemaking to Examine the Commission's Energy Efficiency Risk/Reward Incentive Mechanism.	Rulemaking 09-01-019 (Filed January 29, 2009)

PETITION OF THE UTILITY REFORM NETWORK FOR MODIFICATION OF DECISION 10-12-049

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I. INTRODUCTION AND SUMMARY

Pursuant to Rule 16.4 of the California Public Utilities Commission's (CPUC or Commission) Rules of Practice and Procedure (Rule), The Utility Reform Network (TURN) files this Petition for Modification (Petition) of Decision 10-12-049 (Decision). The Decision completed the true-up of the interim energy efficiency awards for the 2006-2008 period and authorized a combined additional $68,158,522 in awards for Pacific Gas & Electric Company (PG&E), Southern California Edison Company (SCE), San Diego Gas & Electric Company (SDG&E) and Southern California Gas Company (SoCal Gas) (collectively IOUs).

TURN files this Petition in response to a recently released document that provides strong evidence that improper dealings took place between one of the parties, PG&E, and a decision-maker, President Peevey. In particular, an email written by PG&E's Vice President for Regulatory Affairs described a conversation in which President Peevey expressed his willingness to give PG&E an additional $26 million in ratepayer-funded energy efficiency (EE) incentives in exchange for PG&E financial contributions to oppose a pending ballot measure. This evidence and the record of R.09-01-019 strongly suggest that these improper dealings influenced the outcome of this proceeding. If indeed the new evidence is accurate, President Peevey should have been disqualified from participating in the proceeding because his quid pro quo deal with PG&E resulted in him being irreparably biased in this matter.

The best way to remove the cloud of doubt surrounding this Decision is to rescind it and re-start the process from the issuance of the proposed decision, the last point that was free of the taint. However, in the event the Commission believes it needs more evidence before deciding this Petition, the Commission should re-open the record, and allow parties to engage in the

necessary discovery -- supported by subpoenas of relevant witnesses -- in order to get to the bottom of the extremely troubling matters described in the PG&E email.

II. TURN'S PETITION COMPLIES WITH RULE 16.4

Rule 16.4(d) requires that a petition for modification provide an explanation of why the petition could not have been presented within one year of the effective date of the decision, which in this case was December 16, 2010. As explained in the accompanying Declaration of Thomas J. Long (Appendix A to this Petition), evidence of the secret deal between PG&E and President Peevey regarding this proceeding was served on the parties of A.13-12-012/ I.14-06-016 on October 6, 2014 in an ex parte notice. That notice was the first time TURN could have known about the improper dealings that are the basis for this Petition.[1] In compliance with Rule 16.4(b), attached as Appendix B is TURN's proposed language to carry out the requested modifications to the Decision.[2]

III. NEWLY DISCLOSED EVIDENCE RAISES SERIOUS DOUBTS ABOUT THE BASIC FAIRNESS OF THE DECISION-MAKING PROCESS LEADING TO THE ISSUANCE OF D.10-12-049

A. The May 31, 2010 PG&E Email Presents Strong Evidence That President Peevey's Involvement in Decision 10-12-049 Corrupted the Decision-Making Process

On October 6, 2014, PG&E filed an update to its "September 15, 2014 Notice of Ex Parte Communications" filed in Docket Number A.13-12-012/I.14-06-016. Exhibit A of the October 6, 2014 Disclosure contains an email from Brian Cherry, PG&E's Vice President of Regulatory Relations at the time, to Tom Bottorff, PG&E's Senior Vice President of Regulatory Relations

[1] Declaration of Thomas J. Long (Long Declaration), paragraphs 2-4.

[2] Although Rule 16.4 does not expressly use the word "rescind", one of the statutes that is the cited as a reference for the rule is Public Utilities Code Section 1708, which authorizes the Commission to "rescind, alter, or amend" any order or decision. TURN is not aware of any other Commission Rule governing requests by a party to rescind a prior decision.

("the Cherry Email").[3] The email states that Mr. Cherry and President Peevey shared a dinner on May 30, 2010, in which they discussed multiple active CPUC proceedings, including the then-upcoming decision at issue in this Petition.

Following is the portion of Mr. Cherry's Email explaining the details of his discussion with President Peevey (referred to as "Mike" in the email) regarding this EE incentives proceeding.

> "EE Incentives - Mike complained that [Commissioner] Bohn has been ineffective in moving this matter quickly. He was hopeful that we would resolve the final true up this year. He suggested that Peter[4] have lunch or dinner with John [Bohn] and tell him to speed things up. Mike supports us getting incentives but told me not to expect too much given the large amounts we got the last two years. I suggested to Mike that the numbers were still subject to debate, but we could reach some agreement. **I jokingly suggested that if he gave us $26 million, we could come up with $3 million or so for AB 32[5]** (Proposition 23)**. He said that is a deal he could live with** - but we both agreed lots of things above my pay grade have to happen before that is a reality." (Emphasis and footnotes added)

According to the Cherry Email, during the same get-together, President Peevey told Mr. Cherry that "he expects PG&E to step up big and early in opposition to the AB32 ballot initiative (Proposition 23) … he (Peevey) told Peter (PG&E's President) that we need to spend at least $1 million."

Thus, the email describes a quid pro quo "deal [President Peevey] could live with" that offered PG&E $26 million of ratepayer money for additional EE incentives in exchange for significant PG&E financial contributions to oppose a pending ballot measure.

TURN is aware of at least two contributions PG&E made to the No on Proposition 23

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[3] A copy of the Cherry Email is attached to the Long Declaration.
[4] Presumably Peter Darbee, PG&E's CEO at the time.
[5] Proposition 23 would have suspended AB 32 requirements until California's unemployment levels drop below 5.5 percent and stay there for at least one year. Proposition 23 was defeated by California voters on the November 2, 2010 ballot.

campaign, on October 21, 2010 totaling $500,000.[6] True to the deal described in the Cherry Email, less than a month later, President Peevey filed his Alternate Decision (Alternate) granting PG&E over $29 million in additional EE incentive payments. The Alternate awarded PG&E these additional payments despite the fact that the Energy Division's Energy Efficiency Evaluation Report (Energy Division Report) found PG&E had met only 60% of its megawatt (MW) goal and 63% of its MMTh (one million therms) goals,[7] well below the minimum performance standard (MPS) of 80-85% that D.07-09-043 had established as the minimum threshold necessary to justify the award of incentives.[8]

Nevertheless, President Peevey's Alternate was adopted as the Commission's final Decision on December 16, 2010.[9] President Peevey and two other Commissioners voted for the Decision and two Commissioners voted against it.[10] Thus, but for President Peevey's efforts, the Alternate he sponsored would not have been adopted as the Commission's decision.[11]

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[6] California Secretary of State, Cal-Access record of donations to Californians to Stop the Dirty Energy Proposition, available at http://cal-access.ss.ca.gov/Campaign/Committees/Detail.aspx?id=1324059&view=late1. A recent news report cited $650,000 in PG&E contributions: http://www.nbcbayarea.com/investigations/Utility-Regulator-in-More-Legal-Trouble--282432511.html There may be other PG&E or PG&E-related contributions (such as contributions from PG&E officers or employees) of which TURN is unaware.

[7] 2006-2008 CPUC Energy Efficiency Evaluation Report, July 2010, p. 100. Available at fftp://ftp.cpuc.ca.gov/gopher-data/energy%20efficiency/2006-2008%20Energy%20Efficiency%20Evaluation%20Report%20-%20Full.pdf.

[8] D.07-09-043, p. 28.

[9] D.10-12-049, p. 78.

[10] *Id.*, pp. 78-79.

[11] Based on the deal described in the Cherry Email, PG&E's (at least) $500,000 in contributions to the No on Proposition 23 campaign qualify as "behest payments" subject to regulation by the California Fair Political Practices Commission (FPPC). California Government Code Section 82015(b)(2)(D)(3) specifically requires that payments made at the behest of a member of the CPUC for legislative, governmental, or charitable purposes, and equal to or in excess of $5,000, be reported within 30 days. However, according to the CPUC webpage "Form 803 Behested Payment Reports filed by Commissioners", this behest payment was not reported. (CPUC Website, Form 803 Behested Payment Reports filed by Commission, available at http://www.cpuc.ca.gov/PUC/aboutus/Commissioners/form803reports.htm). As an indication of the importance that California law places upon disclosure of such behest payments sought by CPUC

As discussed more fully below, the issue raised by the Cherry Email is whether the Decision can be allowed to stand in light of evidence that the adopted Peevey Alternate was the product of an extra-record deal that had no relation to the merits of the case. Although this pleading does not require the Commission to make a finding that the Cherry Email is accurate in all respects, the Cherry Email is more than sufficiently reliable to justify the Commission action requested in this Petition. Because Mr. Cherry wrote the email the day after the meeting took place, the discussion was fresh in his mind and likely to be accurately recalled. Also, there is no reason to believe that Mr. Cherry was motivated to recount the events of the meeting untruthfully. To the contrary, Mr. Cherry wrote the email to his supervisor, Mr. Bottorff, which indicates that he would try to be thorough and accurate in recounting the details of the meeting. If Mr. Cherry exaggerated or misstated President Peevey's statements or intent, Mr. Bottorff would likely find out and Mr. Cherry's credibility would be undermined.[12]

In any event, even if not accepted as conclusive proof of the matters discussed, the Cherry Email raises significant doubt regarding the appropriateness of President Peevey's participation in D.10-12-049. To address the cloud of doubt that now hovers over the Decision, the Commission should rescind the Decision and re-start the decision-making process from the point at which the process is free of taint. Alternatively, as discussed in Section V.B below, the Commission could re-open the record and allow a thorough investigation of the facts surrounding the May 30, 2010 dinner and the discussion of EE incentives.

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commissioners, a violation of this reporting requirement is not just a civil offense, but a crime subject to fines and removal from office (California Govt. Code § 91000 *et seq*).

[12] TURN understands that the related Petition for Modification by the Office of Ratepayer Advocates provides additional reasons why the Cherry Email is sufficiently reliable to justify re-visiting the tainted Decision. In any event, as noted, to grant TURN's requested relief, it is not necessary to find that the Cherry Email is accurate in all respects.

B. The Procedural History of the Case Reinforces the Likelihood that President Peevey Took Extraordinary Steps to Implement a Secret, Extra-Record Deal With PG&E

To grant the $68 million in additional incentives to the IOUs, the Peevey Alternate that became Decision 10-12-049 had to ignore both the clear Commission guidelines for EE incentives and the results of a Commission-sanctioned Energy Division Report.[13]

Decision 05-09-043 and D.07-09-043 both made clear that the final true-up of the IOU's energy savings would be done using ex post (post installation) parameters and not with ex ante (forecast) parameters.[14] Based on these enunciated guidelines, the Energy Division Report[15] measured each IOU's energy efficiency savings using ex post parameters and found that PG&E met only 60% of its MW goal and 63% of its MMTh goals, SCE met only 64% of its MW goals, SDG&E met only 37% of its MMTh goals, and SoCalGas achieved 67% of its MMTh goals. Thus, independently verified numbers demonstrated that the IOUs' energy savings were well under the MPS of 80-85% that needed to be met in order to justify the award of incentives.

It should also be recalled that Decision 10-12-049 was the third of three decisions awarding profits to the IOUs' shareholders for alleged energy savings for program years 2006-2008. The first two Decisions had already awarded the four IOUs a total of $143.7 million in interim incentives for the proposed energy savings in 2006-2008.[16] Thus, the issue that was

[13] For a fuller discussion of the history of EE incentive payments and the procedural history leading up to the Decision, see the related Petition for Modification concurrently filed by the Office of Ratepayer Advocates.
[14] See D.05-09-043, pp. 97-98 and p. 170, FoF #7. See also D.07-09-043, p. 212, FoF #158.
[15] The Energy Division Report was the product of almost three years of field-based energy efficiency research completed at a cost of $97 million by leading evaluation professionals under the direction of the Commission's Energy Division.
[16] D.10-12-049, p. 2.

addressed in D.10-12-049 was whether the IOUs had met the energy savings requirements for even more incentive payments.

Based on these enunciated guidelines, the Proposed Decision (PD) of ALJ Pulsifer, issued on September 28, 2010, proposed finalizing the true up of 2006-2008 incentive earnings based upon consideration of ex post updates of relevant parameter measures as evaluated by Energy Division and its consultants. The PD explained that the IOUs were not entitled to any additional incentive payments:

> Based on a reasonable approximation of IOU savings accomplishments for the 2006-2008 cycle, . . . the IOUs are not eligible for any additional incentive payments for the 2006-2008 pursuant to adopted RRIM [Risk/Reward Incentive Mechanism] formulas and protocols.[17]

In contrast, the Peevey Alternate, issued on November 16, 2010, proposed that the final true up of incentive earnings for the 2006-2008 cycle be evaluated based upon ex ante assumptions, not the ex post parameter measures specified in D.07-09-043 and evaluated in the Energy Division Report.[18] Based on this new rationale, the Alternate calculated approximate IOU "savings accomplishments" for the 2006-2008 cycle and found that the IOUs were eligible for additional incentive payments for the 2006-2008 period, in the amount of $29.1 million to PG&E, $18.6 million to SCE, $5.1 million to SDG&E, and $9.9 million to SCG.

The two commissioners who voted against the Peevey Alternate, Commissioners Grueneich and Ryan, filed vigorous dissents. The Dissent of Commissioner Ryan supported the conclusion reached in the PD, that the IOUs' energy savings performances were insufficient to merit further rewards. Commissioner Ryan pointed out that "prior decisions clearly stated our

[17] PD, p. 73 (Conclusion of Law 6).
[18] D.07-09-043, p. 212, FoF 158.

expectation that the utilities would be judged based on ex post updates" and that they should not be awarded additional incentives for failing to adjust their portfolios accordingly.[19]

Commissioner Grueneich agreed with Commissioner Ryan and took pains to show that "the factual premise of the alternate decision – that the utilities had no reasonable basis to know their assumptions were not realistic and did not reflect changing market conditions – is untrue."[20] Commissioner Grueneich then listed multiple pieces of evidence, including language from D.05-09-043, which showed that the IOUs knew that their portfolio assumptions were too high and needed to be adjusted in order to qualify for additional incentives using ex post evaluation parameters.[21] The Grueneich Dissent concluded, "The alternate decision amends the Commission's adopted incentive mechanism"[22] and "adopts a policy that undermines the basic structure of ratepayer-funded energy efficiency."[23]

In light of the revelations of the Cherry Email, it can now be seen that the extraordinary efforts of the Peevey Alternate to justify additional ratepayer-funded payments to PG&E and the other IOUs were entirely consistent with the extra-record deal discussed in that email. As explained by the dissenting opinions of his fellow commissioners, President Peevey's willingness to ignore the Commission's previously enunciated standard of using ex post parameters to true up the IOUs' energy savings incentives and the years of careful analysis reflected in the Energy Division Report was not based on the facts and procedural history of this proceeding. Instead, the Alternate corroborates that President Peevey went to great lengths to effectuate the quid pro quo deal described in the Cherry Email.

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[19] Dissent of Commissioner Ryan, December 16, 2010, p. 2.
[20] Dissent of Commissioner Grueneich, December 16, 2010, p. 2.
[21] Id., pp. 2-3.
[22] Id., p. 1.
[23] Id., p. 4.

IV. THE IMPROPER DEAL RECOUNTED IN THE CHERRY EMAIL, IF TRUE, VIOLATED THE DUE PROCESS RIGHTS OF THE PARTIES

A. The Apparent Deal Rendered President Peevey, and His Alternate, Irreparably Biased, in Violation of Due Process

The Cherry Email strongly suggests that President Peevey made a deal with PG&E in which he guaranteed a favorable outcome in this proceeding in exchange for PG&E's financial contribution to a political campaign in which President Peevey had a personal and professional interest. PG&E's belated disclosure of the Cherry e-mail creates substantial doubt as to whether President Peevey acted as an impartial decision-maker in this proceeding. The revelations in the Cherry Email have degraded the integrity of D.10-12-049 to the point that it must be rescinded in order to uphold the due process rights of all parties in the proceeding and to preserve the integrity of the Commission's decision-making process.

It is well established that, when due process requires a hearing, the adjudicator must be impartial.[24] With regard to administrative proceedings, the United States Supreme Court has held that according to the procedural requirements "demanded by rudimentary due process" in that setting, "an impartial decision-maker is essential."[25] The Supreme Court has further held that "a biased decisionmaker is constitutionally unacceptable."[26] In the present case, there is strong evidence suggesting that President Peevey was a biased decision-maker and that his involvement in the proceeding violated the due process rights of the parties.

The Commission has held that, in non-adjudicatory proceedings, "a decision-maker can be disqualified from voting upon a 'clear and convincing showing that the agency member has

[24] *Haas v. County of San Bernardino,* (2002) 27 Cal.4th 1017, 1025.
[25] *Goldberg v. Kelly,* (1970) 397 U.S. 254, 267, 271.
[26] *Withrow v. Larkin* (1975) 421 U.S. 35, 47.

an unalterably closed mind on matters critical to the disposition of the proceeding.'"[27] Here, the evidence provided in the Cherry Email, if accurate, indicates that President Peevey made up his mind regarding the outcome of the proceeding at the time the quid pro quo deal was made with PG&E. A corollary of the apparent deal is that President Peevey was not receptive to the record evidence that pointed to no additional EE incentives for PG&E or the other IOUs. Accordingly, if the Cherry Email is true, President Peevey should have been recused from the proceeding because the deal he made with PG&E resulted in him having an unalterably closed mind on the key issue, the EE incentive awards.

The secret pact described in the Cherry Email reflects a predisposition that goes far beyond the mere preferential statements that were at issue in the *Association of National Advertisers v. F.T.C.* decision quoted in D.05-06-062. This is not a matter of President Peevey stating his preference for one form of a rule over another. Rather, the described deal required President Peevey to work to achieve a certain result in this proceeding in exchange for PG&E's contribution to a political campaign. The information in the Cherry Email and President Peevey's actions in this proceeding suggest that, once it became clear that the PD would not achieve the result he promised PG&E, President Peevey sponsored and voted for an Alternate that did achieve that result.

[27] D.05-06-062, p. 14, quoting *Association of Nat. Advertisers, Inc. v. F.T.C.* (D.C. Cir. 1979) 627 F.2d 1151, 1170. By citing to the Commission's previous statement of this standard, TURN does not indicate agreement that this is the correct standard for a ratesetting case such as this one, and reserves the right to argue in this and other cases that a less strict standards is appropriate in ratesetting cases.

B. The Apparent Deal Led to a Decision that Violated the Requirement that Decisions be based on the Evidentiary Record

It is a fundamental principle that CPUC Decisions must be based on the evidentiary record, as reflected in Public Utilities Code Section 1757[28] and Commission Rule 8.3.[29] The Cherry Email strongly suggests that President Peevey's deciding vote was not based on the record, but rather a secret extra-record deal with PG&E. Analysis of the Peevey Alternate that became D.10-12-049 fully corroborates this conclusion.

President Peevey faced two serious problems as he tried to craft an Alternate that, consistent with the Cherry Email, would grant significant additional incentive payments to the utilities: (1) the Commission had made clear in a previous decision, D.05-09-043, that it would true up EE performance results using evaluated ex post numbers; [30] and (2) the results of the Energy Division Report showed that, according to the application of the evaluated ex post numbers, the IOUs' energy savings had not met the minimum threshold necessary to justify the award of incentives. Thus, to live up to the deal described in the Cherry email, President Peevey had to find a way to avoid applying ex post numbers.

The Peevey Alternate achieved the desired result by relying on the rationale that it was unfair to the IOUs to true up EE performance results with evaluated ex post numbers because they could not have known changes to their EE portfolios were necessary to meet the MPS of 80-85% if ex post numbers were applied.[31] However, as noted above and in the Dissents of

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[28] See P.U. Code § 1757(a): The criteria for judicial review include the following: "The decision of the commission is not supported by the findings"; and "The findings in the decision of the commission are not supported by substantial evidence in light of the whole record."

[29] Rule 8.3(K) states: "The Commission shall render its decision based on the evidence of record."

[30] D.05-09-043, pp. 97-98.

[31] D.10-12-049, p. 69, FoF 16.

Commissioners Grueneich and Ryan, this rationale is incorrect.[32] The rationale also conflicts directly with the Commission's 2005 and 2007 decisions that made clear that ex post numbers would be used for a true up of EE performance results.[33]

The Alternate's rationale was also at odds with key facts in the record. The PD and the Dissent of Commissioner Grueneich both point to multiple pieces of documentary evidence in the record that show the IOUs knew that ex post numbers would be used to evaluate their energy savings and thus adjustments to their portfolios were necessary in order to qualify for incentive awards.[34] The Dissent of Commissioner Grueneich additionally points to SCE's mid-course adjustment of its portfolio assumptions as "further evidence that the utilities received sufficient signals to adjust course."[35]

The Grueneich Dissent further references an Assigned Commissioner's Ruling issued on October 5, 2007 in R.06-04-010, the predecessor rulemaking addressing EE policy issues. In that Ruling, Commissioner Grueneich detailed the history of Commission policy concerning ex post parameter true ups and listed multiple pieces of evidence showing the IOUs were aware that updates to their portfolio assumptions were necessary.[36] The Ruling described the contents of a Joint Case Management Statement, filed by PG&E on July 18, 2005, acknowledging that changes to its 2006-2008 portfolio assumptions were necessary in order to meet the MPS under ex post updated numbers.[37]

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[32] Dissent of Commissioner Ryan, December 16, 2010, p. 2, and Dissent of Commissioner Grueneich, December 16, 2010, p. 2.
[33] D.05-09-043, pp. 97-98 , and D.07-09-043, p. 170, FoF #7.
[34] R.09-01-019, Proposed Decision of ALJ Pulsifer, September 28, 2010, pp. 52-53; and R.09-01-019, Dissent of Commissioner Grueneich, December 16, 2010, pp. 2-3.
[35] Dissent of Commissioner Grueneich, p. 3.
[36] Dissent of Commissioner Grueneich, December 16, 2010, pp. 2-3.
[37] Assigned Commissioner Ruling, October 5, 2007 in R.06-04-010, Attachment A, p. 8.

Commissioner Grueneich's Dissent explains that President Peevey's Alternate explicitly deleted the footnote in the text of the PD[38] that referenced this Ruling.[39] In other words, the Alternate (which became the Decision) deleted a historical fact showing that PG&E knew changes to its portfolio assumptions were necessary, a fact that directly undermined the rationale for the Peevey Alternate.

In sum, the Cherry Email describes a secret agreement to award EE incentives regardless of whether the actual record of the case supported such an award of ratepayer money. True to that apparent agreement, the Peevey Alternate disregarded the record and applicable precedent in order to find a way to achieve the outcome agreed to in the secret deal with PG&E. Basing the Decision on such a deal, and not the record, is a blatant violation of due process, the Public Utilities Code, and the Commission's Rules.

V. THE COMMISSION MUST TAKE DECISIVE ACTION TO REMOVE THE TAINT OF BIAS FROM D.10-12-049 AND RESTORE THE CREDIBILITY OF THE COMMISSION'S DECISION-MAKING PROCESS

The foregoing sections of this Petition have shown that the Decision is tainted and appears to violate basic requirements of due process. These due process violations are egregious and cannot be ignored by the Commission. Indeed, the revelations in the Cherry Email have shaken the public's confidence in the Commission and cast a cloud of doubt on the legitimacy of the agency. The Commission must take decisive action to dispel the serious due process doubts that have enveloped D.10-12-049.

[38] Proposed Decision of ALJ Pulsifer, September 28, 2010, p. 53, footnote 39.
[39] Dissent of Commissioner Grueneich, December 16, 2010, p. 3.

A. To Erase the Taint Resulting from the Revelations in the Cherry Email, the Commission Should Rescind Decision 10-12-049 and Re-Start the Process from the Issuance of the Proposed Decision

The best way to erase the taint regarding D.10-12-049 is to rescind the Decision. The revelations in the Cherry Email strongly suggest that, as of May 30, 2010, President Peevey had an unalterably closed mind concerning the outcome of the proceeding and had no intention of basing his decision on the record of the case. From that point on, he should have been disqualified from any further participation in the case. As such, the Alternate issued by President Peevey and the Decision based upon the Alternate should be deemed null and void.

There is clear precedent for the Commission to rescind a decision tainted by an apparent due process violation. In D.93-10-033,[40] the Commission was forced to confront evidence that one of the commissioner officers had allowed a key utility witness in the case to engage in substantive editing and unreported ex parte contacts in the process of preparing the final decision (known as the "IRD decision").[41] The Commission became aware of the due process concerns shortly after the issuance of that decision and took immediate action. Even though the decision was a long-awaited, complex and industry-shaping effort, the Commission determined that it needed to rescind the decision in its entirety "in order to nullify any procedural error associated with its adoption."[42] The Commission then went to great lengths to remedy the procedural violations, including allowing parties to review all communications between the utility and the Commission related to the decision, taking two rounds of comments on changes that should be

[40] 51 CPUC 2d 528.
[41] The acronym IRD refers to the Implementation and Rate Design phase of that case, I.87-11-033. The tainted decision, a landmark (and massive – 333 *single-spaced* pages in the CPUC 2d volume) telecommunications decision that had been in the works for two years, was D.93-09-076. See 51 CPUC 2d 32,55-56 (stating that the phase of the docket that led to the decision "spanned two years").
[42] D.93-10-033, 51 CPUC 2d 528, 529.

made to the rescinded decision in light of the revelations, and re-writing much of the decision.[43] The issuance of the final decision was delayed by a full year and "required extraordinary attention and time commitments from the Commissioners" in part because of "the need to ensure that public confidence in our decisionmaking process is fully restored."[44]

Although it was a serious crisis at the time, the legacy of the IRD decision is a positive example of the Commission taking difficult, but proactive, steps to restore the agency's credibility. When the Commission discovered evidence of a potentially serious due process violation that called into question the fairness and credibility of the decision, the Commission recognized that rescinding the tainted decision was critical in order to gain the trust of the parties and the public. This is a critical lesson for the Commission to be mindful of today, as the public's faith in the institution has been seriously shaken by PG&E's recent disclosures.

The facts here present an even more compelling case for rescission than the IRD crisis. With respect to the IRD decision, there was evidence of a commissioner office passively allowing a utility to have improper influence over a decision.[45] Here, there is evidence that a commissioner actively and intentionally colluded with a utility to shape the outcome of the case and render the record irrelevant. Rescission of the tainted IRD decision was fully warranted; here rescission is an absolute necessity for the Commission to salvage its deeply damaged credibility.

In its order rescinding D.10-12-049, the Commission should follow the IRD example and re-start the process from the point at which the case was free of taint. Here, that point is the issuance of the PD. Accordingly, the Commission should take the following steps:

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43 The measures the Commission took are detailed in the subsequent re-issued decision, D.94-09-065, Section II.A.3, 56 CPUC 2d 117, 142-144.
44 *Id.*, 56 CPUC 2d at 144.
45 D.93-10-033, 51 CPUC 2d at 529.

- Immediately recuse President Peevey from any further participation in this matter;[46]
- Rescind D.10-12-049 and put the IOUs on notice that the incentive awards approved in the Decision may need to be refunded to ratepayers, depending on the outcome of the new decision;
- Re-issue the PD, updated as the ALJ Division deems necessary and appropriate;[47]
- Allow parties to provide comments on the PD;
- Allow the decision-making process to run its course, including the potential for the issuance of one or more Alternate decisions by current commissioners,[48] in accordance with applicable statutes and rules;
- Issue a new decision that is based on the record of the proceeding.

B. If the Commission Needs Further Evidence, It Should Order a Full Investigation of the Matters Revealed in the Cherry Email, Including Allowing Parties to Examine All Relevant Witnesses under Oath

The foregoing has shown that the Cherry Email raises significant doubt about the basic fairness of the process leading to the Decision and fully warrants rescission of D.10-12-049. However, if the Commission disagrees and feels that it needs more evidence before making a determination, then the Commission should reopen the record under Rule 13.14 and order a full investigation into the matters revealed in the Cherry Email. The investigation should include the opportunity for parties to examine all relevant witnesses under oath. To this end, the Commission should issue subpoenas as necessary in accordance with Rule 10.2. Based on such investigation, parties should be allowed to present evidence in an evidentiary hearing regarding the matters discussed in the Cherry Email.

[46] Needless to say, this would include withdrawing the Peevey Alternate from consideration.
[47] Because the PD would not allow any true-up incentive awards, one change that will be necessary to the PD is to order refunds, pursuant to Public Utilities Code Section 453.5, of the ratepayer-funded incentives ordered in D.10-12-049.
[48] Because Commissioner Bohn is no longer a commissioner, his Alternate Decision should be withdrawn.

Although TURN is not advocating this approach, it would be entirely necessary if the Commission has any inclination to deny this Petition on the grounds that TURN has not "proven" the quid pro quo deal described in the Cherry Email. As discussed, that Email is at least sufficiently reliable to raise serious doubts about the fairness of the decision-making process in this case. The Commission would do a grave disservice to the credibility of this institution if it were to place ratepayer advocates such as TURN in the "Catch-22" position of requiring conclusive proof while at the same time refusing to permit any investigation into the facts.

VI. CONCLUSION

For the reasons stated above, the Commission should grant this Petition for Modification. The Commission should rescind D.10-12-049 and take the other steps outlined in Section V.A, as reflected in the recommended Findings of Fact, Conclusions of Law and Ordering Paragraphs set forth in Exhibit B. These steps are necessary to erase the taint of corruption in this proceeding and to cure the apparent due process violations that plagued D.10-12-049.

Date: November 19, 2014

Respectfully submitted,

By: _____/s/_____
Thomas J. Long

Thomas J. Long, Legal Director
Elise Torres, Staff Attorney
THE UTILITY REFORM NETWORK
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Email: TLong@turn.org

APPENDIX A

DECLARATION OF THOMAS J. LONG

Declaration of Thomas J. Long

I, Thomas J. Long, declare as follows:

1. I am the Legal Director of The Utility Reform Network (TURN) and am TURN's lead counsel of record in PG&E's Gas Transmission and Storage rate case application and companion investigation, A.13-12-012/I.14-06-016 (GT&S Application). I submit this declaration in support of TURN's Petition for Modification of Decision 10-12-049 (Petition).

2. On October 6, 2014, in the GT&S Application, PG&E filed a document titled "Pacific Gas and Electric Company's Update Re September 15, 2014 Notice of Improper Ex Parte Communications" (October 6, 2014 Notice). A copy of the portions of the October 6, 2014 Notice that are pertinent to this Petition are attached to this declaration.

3. Exhibit A to the October 6, 2014 Notice is a copy of an email dated May 31, 2010 from Brian Cherry, PG&E's then Vice President of Regulatory Affairs to Thomas Bottorff, PG&E's then- Senior Vice President of Regulatory Affairs (the Cherry Email). The Cherry Email describes matters discussed between Mr. Cherry and CPUC President Michael Peevey at a private dinner on May 30, 2014. The matters discussed included the Commission's then-upcoming decision on energy efficiency incentives in R.09-01-019. The discussion of energy efficiency incentives recounted in the Cherry e-mail is the new information that has prompted TURN to file this Petition.

4. I did not know about the private discussion between Mr. Cherry and President Peevey that is recounted in the Cherry Email, or any of the contents of that discussion, until I read the Cherry Email when it was served in the GT&S Application on October 6, 2014. To the best of my knowledge, the same is true for all other TURN employees.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

DATED: November 19, 2014 /s/
Thomas J. Long

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA

Application of Pacific Gas and Electric Company Proposing Cost of Service and Rates for Gas Transmission and Storage Services for the Period 2015-2017 (U 39 G)	Application 13-12-012 (Filed December 19, 2013)
And Related Matter.	Investigation 14-06-016

PACIFIC GAS AND ELECTRIC COMPANY'S UPDATE RE SEPTEMBER 15, 2014 NOTICE OF IMPROPER EX PARTE COMMUNICATIONS

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Attorneys for
PACIFIC GAS AND ELECTRIC COMPANY

Dated: October 6, 2014

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA

Application of Pacific Gas and Electric Company Proposing Cost of Service and Rates for Gas Transmission and Storage Services for the Period 2015-2017 (U 39 G)	Application 13-12-012 (Filed December 19, 2013)
And Related Matter.	Investigation 14-06-016

PACIFIC GAS AND ELECTRIC COMPANY'S UPDATE RE SEPTEMBER 15, 2014 NOTICE OF IMPROPER EX PARTE COMMUNICATIONS

On September 15, 2014, Pacific Gas and Electric Company ("PG&E") filed a Notice of Improper Ex Parte Communications ("Notice"). In the Notice, PG&E "caution[ed] that its evaluation of the facts and circumstances surrounding these communications is ongoing" and stated that "PG&E will provide notice in the event additional ex parte communications are identified."

In response to PG&E's Notice, on September 17, 2014, the Commission issued an Order to Show Cause ordering PG&E to appear and to show cause why it should not be held in contempt and punished for violating Rules 1.1 and 8.3(f) of the Commission's Rules of Practice and Procedure. On September 24, 2014, Administrative Law Judge Hallie Yacknin issued an E-Mail Ruling Providing Requested Clarification and Denying Motion for PHC. The E-Mail Ruling stated, in part, that "[t]he question of how the Commission will address evidence of additional PG&E misconduct that has not yet been fully revealed is beyond the scope of this order to show cause."

PG&E hereby provides notice that it has identified additional ex parte communications that it failed to disclose as required by Commission Rule 8.4. None of these communications concerns this proceeding. PG&E today sent a letter to the Commission's Executive Director, Paul Clanon, regarding one of these communications and filed a Late Notice of Ex Parte Communications concerning the remainder of these communications. A copy of PG&E's letter to Mr. Clanon, which attaches all of the above-referenced communications, is attached hereto as Exhibit A.

Respectfully Submitted,

MARTIN S. SCHENKER

By: */s/ Martin S. Schenker*
MARTIN S. SCHENKER

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PACIFIC GAS AND ELECTRIC COMPANY

Dated: October 6, 2014

Exhibit A

Cooley LLP

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VIA HAND DELIVERY & E-MAIL

October 6, 2014

Mr. Paul Clanon
Executive Director
California Public Utilities Commission
505 Van Ness Avenue
San Francisco, CA 94102

Re: Pacific Gas and Electric Company's Late Notice of Ex Parte Communications

Dear Mr. Clanon:

On September 15, 2014, Pacific Gas and Electric Company ("PG&E") filed a Notice of Improper Ex Parte Communications ("Notice"). The improper ex parte communications identified in the Notice were discovered through PG&E's voluntary review of communications with the Commission since early 2010. In the Notice, PG&E "caution[ed] that its evaluation of the facts and circumstances surrounding these communications is ongoing" and stated that "PG&E will provide notice in the event additional ex parte communications are identified."

PG&E has identified additional ex parte communications that it failed to disclose as required by Commission Rule 8.4.

The first communication was an oral communication between PG&E's then-Vice President of Regulatory Relations and President Michael Peevey that occurred on May 30, 2010. The content of the communication is described in an e-mail, a copy of which is attached hereto as Exhibit A. As described in Exhibit A, the communication concerned the following Commission proceedings:

- 2011 General Rate Case (A0912020);
- Application of Approval of 2008 Long-Term Request for Offer Results (A0909021);
- Application for Approval of the Manzana Wind Project (A0912002); and
- Energy Efficiency Risk/Reward Incentive Mechanism Rulemaking (R0901019)

The first three of these proceedings are closed. The fourth proceeding, R0901019, is open; however, the docket contains a "Closed Alert," which reads, in part, as follows: "This Proceeding was closed on 1/12/2012 by R.12-01-005. However, it remains OPEN ONLY to consider (a) Existing Petitions for Modification, (b) Applications for Rehearing and (c) Requests for ICOMP. NO OTHER DOCS SHOULD BE FILED HEREIN."

Given the status of these proceedings, PG&E is sending this letter to you and to the Commission's Acting General Counsel, and will be sending this letter to the final service list in each proceeding.

The remaining communications are e-mail exchanges between PG&E and Commission personnel concerning the Order Instituting Rulemaking on the Commission's Own Motion to Adopt New Safety and Reliability Regulations for Natural Gas Transmission and Distribution Pipelines and Related Ratemaking Mechanisms (R11-02-019). As to those communications, PG&E today filed with the Commission in R11-02-019 a Late Notice of Ex Parte Communications, a copy of which is attached hereto as Exhibit B.

Very truly yours,

Martin S. Schenker

MSS:ra

Enclosures

cc: Acting General Counsel (via Hand Delivery and E-Mail)
Service Lists (via E-mail)(as soon as PG&E obtains the service lists)

Exhibit A

From: Cherry, Brian K
Sent: 5/31/2010 9:29:59 PM
To: Bottorff, Thomas E (/O=PG&E/OU=CORPORATE/CN=RECIPIENTS/CN=TEB3)
Cc:
Bcc:
Subject: Re: Peevey

Also, he is opposed to Manzana. He said that he will not approve the project if the Fed's don't give us a permit. He said that the CA Fish and Game is ok with the project, but the Dept of the Interior needs to give their ok. Without it, he won't approve it.

----- Original Message -----
From: Cherry, Brian K
To: Bottorff, Thomas E
Sent: Mon May 31 21:27:43 2010
Subject: Peevey

Tom - Sara and I dinner with Mike last night. Carol had a political commitment in LA today and had to leave early so it was just the three of us and my daughter. The evening was social but we did delve into some work matters:

Oakley - Mike insisted again that he was putting Oakley last, to be filled in if some of the other projects don't get built. I told him again that if that was his intent, then the PD needed revision because it didn't approve, even conditionally, Oakley's MWs. He reiterated that wasn't true, but I told him he was mistaken and that we would come in and point out what needed to be corrected. Mike intimated that the Oakley problem would be addressed in the DWR Novation PD (second revision) but I told him that was risky. We needed changes to the LTPP itself if we wanted to keep Oakley alive. Mike was fine with that and said he would look into it.

Mike mentioned that Steve Larson had scheduled a visit to talk to him about Oakley and that Steve had already met with Clanon. I let Mike know that the developers, not PG&E had hired him. I also told Mike that a successful outcome on Oakley was important to Steve for growing his business with Capital Strategies and Mike understood the implication of that very clearly. I told him that Steve and Chevron were going directly to Schwarzenegger to get Oakley approved and Mike needed to be aware of that. Mike was very dismissive of the Governor, calling him a lame duck. That said, he didn't tip his hand on the issue. Mike and Arnold and Steve are all close. We have our work cut out for us.

AB32 - Mike stated very clearly that he expects PG&E to step up big and early in opposition to the AB32 ballot initiative. He said it would undermine our reputation if we didn't fund it, especially given the hits we have taken lately over SmartMeter, Marin and Prop 16 activities. Mike said he told Peter we need to spend at least $1 million. I asked for clarification and he said 'at least' doesn't mean $1 million, it means a lot more. Mike said that we couldn't spend $50 million on Prop 16 and then claim to be poor. He has approached Sempra and Edison and said we would have egg on our face if they came out in opposition to the initiative before we did. He said it would be a positive move that could help to repair fences with opponents of Prop 16.

Anniversary of PUC - at the end of January, the PUC is hosting a celebration of the Commission's 100th Anniversary. Mike has put together a Committee headed by Pete Arth, Steve Larson and Bill Bagley who are forming a 501.3c committee (under Mike's oversight). He expects PG&E, Sempra, Edison and AT&T to contribute $100,000 each to the celebration committee (Edison and AT&T have already confirmed they will contribute) . He said he mentioned it to Peter but wasn't sure if he had mentioned it to anyone else - but that I was on notice. The amount is steep because the Committee expects to spend $150k or so and use the rest to fund other future Commission events that the State is unwilling to fund. For example, he mentioned he hosted 2 delegations from China recently and he had to fund the dinner for them out of his own pocket because the state is broke. At another event, John Bohn and Mike ponyed up $3,500 out of their own pocket for a lunch. He doesn't want future Commissioners to face the same dilemma.

GRC - Mike is aware that we are looking for a good GRC decision. He said we have a decent judge who listens but that we couldn't expect to win everything. I suggested we could live with $625 million and Mike chuckled a bit. I told him that we were concerned about restoring our infrastructure and Mike agreed, noting that TURN and DRA would ruin the industry if left to their own devices. He said to expect a decision in January - around the time of the PUC's 100th Anniversary celebration. I told him I got the message.

Prop 16 - Mike confirmed that he dropped a Commission resolution opposing Prop 16 because he couldn't get Simon on Board. He was quite pleased with his editorial against Prop 16 and the positive feedback he received on it to date. He said he told Peter he thinks Prop

16 will win but also said the Board should hold Peter personally responsible if it fails. Mike thinks win or lose we have sullied our reputation and that it will be a long haul to burnish our credentials again. Mike said he received a call from David Baker regarding PG&E and our recent downfall from PR grace. He said David was looking for dirt and wanted to write an article that would show that our duplicity between what we say and what we do, particularly the contrast between how we behave in Washington and how we behave in California in regards to being Green. However, Mike said he told Baker that PG&E was a leader in CA too and that despite our heavy-handedness in Marin and in SFO on CCA, that we were making major strides to green our business - more so than Edison and Sempra.

CCA - Mike reiterated his belief that our "low road" tactics were not only ineffective but beneath us and have caused more harm than good. He believes we need to simply compare services and take a more positive and proactive outreach. He believes the negative campaign that we have utilized has created the perception again that we are the bully on the block. Mike said he doesn't really support CCA, but it is the law. He believes that nasent CCAs will fail but campaigns like ours turn off even the greatest admirers of our company.

EE Incentives - Mike complained that Bohn has been ineffective in moving this matter quickly. He was hopeful that we would resolve the final true-up this year. He suggested that Peter have lunch or dinner with John and tell him to speed things up. Mike supports us getting incentives but told me not to expect too much given the large amounts we got the last two years. I suggested to Mike that the numbers were still subject to debate, but we could reach some agreement. I jokingly suggested that if he gave us $26 million, we could come up with $3 million or so for AB 32. He said that is a deal he could live with - but we both agreed lots of things above my pay grade have to happen before that is a reality.

Meeting with Peter - Mike wanted to know how the meeting between him and Peter was received. I told him the feedback I had heard was all good and that Peter appreciated meeting with him.

Summit - Mike wants to talk about the direction we are headed as a Company - what we support moving forward relative to renewable policy, CCA, the City and County of SFO and our communication strategy for getting back in the public's good graces.

All in all, we had a nice evening a polished off two bottles of good Pinot. Mike is in Sacramento tomorrow and doesn't get back to the Commission until Wednesday.

That's all.

APPENDIX B

PROPOSED MODIFICATIONS TO FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDERING PARAGRAPHS OF D.10-12-049

Strike out all existing findings of fact, conclusions of law, and ordering paragraphs and replace them as shown below:

Findings of Fact

1. The May 31, 2010 email authored by Brian Cherry raises serious questions about whether Decision 10-12-049 was reached in accordance with the requirements of due process.

Conclusions of Law

2. To ensure that our decision is this case is free of any taint of due process violations, Decision 10-12-049 should be rescinded.

O R D E R

IT IS ORDERED that:

1. D.10-12-049 is rescinded in its entirety.

2. The Administrative Law Judge Division shall reissue Administrative Law Judge Pulsifer's September 28, 2010 Proposed Decision, updated to reflect this decision, for comment within 30 days of the issuance of this decision.

3. Pacific Gas & Electric Company, Southern California Edison Company, San Diego Gas & Electric Company, and Southern California Gas Company are put on notice that the full amount of the incentive awards set forth in Ordering Paragraph 3 of D.10-12-049 is subject to refund depending on the outcome of the new process ordered by this decision.