

Decision **PROPOSED DECISION OF ALJ WEATHERFORD**

(Mailed 9/30/2013)

**BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA**

Rolando Menendez,

Complainant,

vs.

Pacific Gas and Electric Company  
(U39E),

Defendant.

Case 11-10-024  
(Filed October 20, 2011)

**DECISION APPROVING SETTLEMENT AGREEMENT  
AND CLOSING PROCEEDING**

**1. Summary**

This Decision adopts a Settlement Agreement (appended here as Attachment A) between the parties, Rolando Menendez and Pacific Gas and Electric Company and closes the adjudication.

**2. Background**

**2.1. Facts Represented**

No evidentiary hearings (EH) were held in this adjudication. In reaching the instant decision we are accepting the following representation of facts made by Rolando Menendez (Menendez; Complainant) and Pacific Gas and Electric

Company (PG&E; Defendant) (the Parties) in their Joint Motion for Approval of Settlement Agreement, at 2-3.

Mr. Menendez, the Complainant in this matter, is the owner of a single-family residence at 105 South Leigh Avenue, Campbell, California (the Property) which was part of a 1952 subdivision known as the Arroyo Seco Subdivision.

The 10-foot area along the southern edge of the Property is traversed by a Public Utility Easement (PUE) found in the original map of the Arroyo Seco Subdivision. Within this PUE, PG&E has installed overhead electric (12,000 Volt) primary lines, part of PG&E's El Patio 1104 circuit. This part of the overhead distribution circuit extends from a pole near the front of the Property on Leigh Avenue, along the side and over the roofline of the Menendez residence, to a secondary pole at the rear fence line of the Property and continues within the PUE in a westerly direction to a recloser pole near the street at Peter Drive.

On May 21, 2009, the Peter Drive line recloser cross-phased, which damaged the recloser and resulted in an electric arc on the overhead lines, causing the lines to fail and fall to the ground starting two grass fires and a fence fire on the Property and adjacent properties to the West and South.

Some months thereafter, PG&E had redesigned the overhead electric primary line and sought to reconstruct the lines in the existing Arroyo Seco PUE and replace the damaged line recloser. However, on October 20, 2011, Mr. Menendez filed the subject complaint, Case (C.) 11-10-024 seeking a permanent injunction to prevent PG&E from reconstructing the overhead primary lines in the PUE and to require the lines to be installed either underground or in an alternative alignment.

**2.2. Procedural History**

Mr. Menendez filed his Complaint on October 20, 2011, and PG&E filed its Answer on December 5, 2011. The dispute was assigned to a neutral for Alternate Dispute Resolution (ADR) on December 22, 2011, but after extensive and unsuccessful mediation efforts it returned to the assigned Administrative Law Judge (ALJ) at the end of July 2011 for the setting of hearings. In Decision (D.) 12-09-030 filed on September 27, 2012, the California Public Utilities Commission (Commission) extended the statutory deadline to and including July 20, 2013. An ALJ Ruling on October 10, 2012, instructed the Parties to be prepared to state their positions on a number of topics and issues at the Prehearing Conference (PHC) set for October 22, 2012.

Following the PHC, the assigned Commissioner issued his Scoping Memo and Ruling (filed November 7, 2012), confirming the initial categorization of the matter as adjudicatory, designating assigned ALJ Gary Weatherford, as the Presiding Officer, identifying the issues that defined the scope of the adjudication, and setting a schedule for further discovery and EH. Guidelines for the EH were sent to the Parties in a December 18, 2012 ALJ Ruling.

Several discovery issues subsequently arose, some involving historical and not easily accessible documents, prompting both an ALJ Ruling on February 25, 2013 resetting the schedule, and Commission's D.13-03-016 (filed March 21, 2013) further extending the statutory deadline to April 20, 2014. Further, discovery efforts disposed the Parties to think that another effort at ADR could result in a settlement and accordingly, another neutral, ALJ Melissa K. Semcer, was assigned to the dispute on April 5, 2013.

The second facilitated mediation successfully led to the June 6, 2013 Joint Motion for Approval of Settlement Agreement and its attached Settlement Agreement that are the subjects of this decision.

### **3. Issues Presented**

#### **3.1. Scoping Memo and Ruling**

On the basis of the pleadings and the PHC, the following issues were determined in the Assigned Commissioner's Scoping Memo and Ruling<sup>1</sup> to define the scope of this adjudication:

- Should the Commission order PG&E to refrain from replacing facilities in the existing right of way? If not, on what basis and on what terms should conditions be set for the replacement of facilities in the existing right of way, and what, if any, aspects of the May 2009 line failure and fire ought to inform the setting of such terms and conditions?
- Should the Commission order PG&E to relocate or rearrange underground in a different right of way the facilities needed to serve the Complainant?
- Are there grounds arising out of the condition of the relevant facilities at the time of the incident for the imposition of a fine or penalty against PG&E? If so, what would be an appropriate fine or penalty?

As discussed below, the Settlement Agreement reasonably resolves these issues.

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<sup>1</sup> Scoping Memo and Ruling, at 3.

### **3.2. Joint Motion for Approval of Settlement Agreement**

The Joint Motion poses the issue whether the proposing parties have met their burden of proving that the Settlement Agreement should be adopted by the Commission pursuant to the standard of review for settlements.

## **4. Application of Standard of Review to Terms of Settlement Agreement**

### **4.1. Standard of Review**

The standard of review is whether the Settlement Agreement is, “reasonable in light of the whole record, consistent with law, and in the public interest.” (Rule 12.1(d).) The proposing parties have the burden of proof as to whether the Settlement Agreement should be adopted by the Commission.

The Commission concludes that the Settlement Agreement resolves the issues between the Parties, and further, is reasonable in light of the whole record, consistent with law, and in the public interest.

### **4.2. Analysis of Settlement Agreement**

#### **4.2.1. Terms and Conditions of the Settlement Agreement (Attachment A)**

In the main,<sup>2</sup> the Parties agreed that:

- Within 45 days of Commission approval of the Settlement Agreement PG&E will begin engineering design for “a new underground primary line to replace the existing overhead line;”

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<sup>2</sup> The description of the Settlement Agreement in this decision is selective and not intended to modify or interpret the terms of the agreement.

- The project design will be done within 15 days and submitted to Mr. Menendez who will review it and can ask for modifications;
- The Parties “will work in good faith to resolve issues regarding the underground design;”
- Within 60 days of acceptance of the final project design, PG&E will schedule construction and inform Mr. Menendez of the scheduled construction date not less than 30 days before construction begins;
- Within 30 days of the Commission’s adoption of the Settlement Agreement, PG&E is to deliver to Mr. Menendez for record owner signature and then recordation for a new easement to cover underground primary lines and associated facilities;
- “PG&E will commence and prosecute the work necessary to complete the project with reasonable diligence in accordance with General Order 128,” completing the project work within 15 “consecutive days” absent unforeseen circumstances;
- PG&E will remove the overhead power line along the Southern boundary of the Property;
- PG&E will be responsible for meeting regulatory rules, for following and enforcing safety measures and will be responsible to Mr. Menendez and adjacent neighbors for any damages that PG&E or subcontractors may cause; and
- Mr. Menendez is to pay PG&E \$10,000 toward the cost of the project within 120 days after Commission’s approval of the Settlement Agreement but in any event not later than five days before construction is scheduled to begin.

Additional provisions of the Settlement Agreement can be viewed in Attachment A.

**4.2.2. Conclusion**

As noted above, pursuant to Rule 12.1(d), the Commission will not approve a settlement unless it is reasonable in light of the whole record, consistent with law, and in the public interest.

We have historically favored settlements that are fair and reasonable in light of the record as a whole. Concerning the record in this proceeding, the representation of facts in the Settlement Agreement constitutes a clear and succinct description of the pleaded facts surrounding the dispute between the Parties.

According to the Parties' joint motion to accept the settlement, the Settlement Agreement represents a compromise of the parties' litigation positions and resolves the issues posed in the "Assigned Commissioner's Ruling and Scoping Memo."<sup>3</sup> We find that the Settlement Agreement reasonably resolves a potentially time-consuming dispute and that each party has made significant concessions to resolve the issues in this proceeding in a manner that reflects a reasonable compromise of their respective litigation positions.

Further, we find that nothing in the Settlement Agreement contravenes any statutory provisions or prior Commission decisions, and that it provides sufficient information for the Commission to discharge its future regulatory obligations with respect to the Parties and their interests and obligations. The Settlement Agreement does not contradict current Commission rules, and it does not constitute a precedent regarding any principle or issue in this proceeding or any pending or future proceeding.

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<sup>3</sup> At 3.

The Settlement Agreement is in the public interest. This adjudication directly involved matters of public safety. The Complaint arose because a line recloser on a 12,000 Volt line apparently cross-phased, damaging the recloser, resulting in an electric arc on the overhead lines that caused lines to fail and fall to the ground, starting fires in a residential area. Public utilities are bound to promote the “safety” and “health” of the public,<sup>4</sup> and the Commission should take account of that responsibility in its decisions.<sup>5</sup> We conclude that the Settlement Agreement will promote public safety by having the electric line placed underground in the affected area and that the customer’s contribution toward the cost of undergrounding is fair, reasonable, and in the public interest.

The Settlement Agreement is consistent with the Commission’s well-established policy of supporting resolution of disputed matters through settlement, it reflects a reasonable compromise, and it avoids the time, expense, and uncertainty of EH and further litigation. We find that the benefits to the public outweigh any potential value of continued litigation and its associated cost.

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<sup>4</sup> Pub. Util. Code § 451 provides, in part:

Every public utility shall furnish and maintain such adequate, efficient, just, and reasonable service, instrumentalities, equipment, and facilities...as are necessary to promote the safety, health, comfort, and convenience of its patrons, employees, and the public.

<sup>5</sup> See *San Diego Gas & Electric Company v. Superior Court of Orange County* (1996), 13 Cal.4th 893, 923-924.

Pursuant to Public Resources Code § 21080(b)(8), this decision is exempt from the California Environmental Quality Act (CEQA) as it will facilitate the raising of funds for a capital project that is necessary to maintain service within an existing service area.

In summary, we find the Settlement Agreement is reasonable in light of the record as a whole, consistent with law, and in the public interest. It resolves all issues before the Commission in this proceeding. Accordingly, this decision adopts the Settlement Agreement.

#### **5. Comments on Proposed Decision**

The proposed decision of the ALJ in this matter was mailed to the parties in accordance with Section 311 of the Public Utilities Code and comments were allowed under Rule 14.3 of the Commission's Rules of Practice and Procedure. Comments were filed on October 14, 2013 by PG&E. No reply comments were filed. The comments have been considered and appropriate changes have been made.

#### **6. Assignment of Proceeding**

Michel Peter Florio is the assigned Commissioner and Gary Weatherford is the assigned ALJ in this proceeding.

#### **Findings of Fact**

1. The Settlement Agreement resolves all of the issues between the Parties, Rolando Menendez and PG&E.
2. The overall result of the Settlement Agreement lies between the initial positions of the Parties.
3. The Settlement Agreement will provide affected customers with safe, adequate and reliable service.

4. The Commission's approval of the Settlement Agreement facilitates actions necessary to maintain service within an existing service area.

5. The Settlement Agreement provides the Commission with sufficient information to carry out its future regulatory obligations with respect to the Parties and their interests.

**Conclusions of Law**

1. EH are not needed.

2. The Settlement Agreement does not violate any statute or Commission decision or rule.

3. Pursuant to Public Resources Code § 21080(b)(8), this decision is exempt from CEQA as it will facilitate the raising of funds for a capital project that is necessary to maintain service within an existing service area.

4. The Settlement Agreement is reasonable in light of the whole record, consistent with law, and in the public interest.

5. The settlement should be approved.

**O R D E R**

**IT IS ORDERED** that:

1. The Settlement Agreement attached hereto as Attachment A, is approved and adopted.

2. The Joint Motion for Approval of the Settlement Agreement is granted.

3. All remaining unresolved motions or requests are denied.

4. No evidentiary hearings are necessary.

5. Case 11-10-024 is closed.

This order is effective today.

Dated \_\_\_\_\_, at San Francisco, California.

# **ATTACHMENT A**

## **SETTLEMENT AGREEMENT**

**SETTLEMENT AGREEMENT AND RELEASE**

This Settlement Agreement and Release ("Agreement") is entered into by and between Complainant Rolando Menendez, a private individual ("Mr. Menendez"), and Pacific Gas and Electric Company, a California corporation ("PG&E"). Mr. Menendez and PG&E are sometimes referred to in this Agreement individually as "Party" and collectively as the "Parties."

**RECITALS**

A. Mr. Menendez is the owner of a single-family residence project at 105 South Leigh Avenue, Campbell, California (the "Property").

B. The 10-foot area along the southern edge of the Property is traversed by a public utility easement ("PUE") found in the original map of the Arroyo Seco Subdivision. Within this PUE, PG&E has installed overhead electric (12,000 Volt) primary lines, part of PG&E's El Patio 1104 circuit. This part of the overhead distribution circuit extends from a pole near the front of the Property on Leigh Avenue, along the side of the Menendez residence, to a secondary pole at the rear fence line of the Property and continue within the PUE in a westerly direction to a recloser pole near the street at Peter Drive.

C. On May 21, 2009, the Peter Drive line recloser cross-phased which damaged the recloser. The actual cause of the recloser failure is disputed but resulted in an electric arc on the overhead lines, causing the lines to fail and fall to the ground starting two grass fires and a fence fire on the Property as well as adjacent properties to the West and South of the Property.

D. Thereafter, PG&E sought to reconstruct the overhead primary lines in the PUE and replace the damaged line recloser. However, Mr. Menendez filed a formal complaint against PG&E with the California Public Utilities Commission (the "CPUC"), Case No. C.11-10-024, ("Complaint") seeking to prevent PG&E from reconstructing the overhead primary lines in the PUE.

E. PG&E wants to replace the primary lines and recloser to provide a second source of power and additional safety for distribution customers in this area of Campbell. However, all work to replace these primary lines has been stayed pending resolution of this Complaint. PG&E's essential need for such line is in dispute.

F. The Parties have conducted prehearing discovery and considered several alternative designs for the replacement primary lines and, with the assistance of CPUC-sponsored mediation have reached an agreement which will avoid the time, expense, and uncertainty of further litigation and resolve all demands arising out of the Complaint without any admission of liability.

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AGREEMENT

Therefore, in full and complete settlement of all demands relating to the Complaint, the Parties agree as follows:

1. Within 45 days after this Agreement is accepted by the CPUC PG&E shall commence the engineering design of an underground primary system to replace the existing (currently de-energized) primary lines between the Leigh Avenue pole and the back yard pole at the rear of the Property ("the Project").

The Project design will be completed within 15 days, absent unforeseen circumstances. A copy of the complete Project design will be sent to Mr. Menendez for comment. Mr. Menendez shall have the right to review and, if necessary, request modification of the Project design consistent with CPUC rules and the terms of this agreement. Mr. Menendez shall have the right to review and, if necessary, request modifications to the easement documentation prior to signing and recording consistent with CPUC rules and the terms of this agreement. Mr. Menendez and PG&E shall work in good faith to resolve any issues related to Project design and easement.

PG&E shall design the Project such that the construction will require no relocation or modification of any existing structures and services, both above or below ground, on the Property.

Within 60 days of acceptance of the final Project design, PG&E will schedule the underground construction and notify Mr. Menendez of that scheduled construction date as far in advance as practicable but no less than 30 days before commencing work on the Property.

As soon as practicable after this Agreement is accepted by the CPUC , but not later than 30 days before construction is scheduled to begin, PG&E shall deliver a new easement for the electric lines on the Property. As part of this easement, PG&E will abandon all rights in the PUE and the record owners of the Property will grant a new easement for underground primary lines and associated facilities along the south side of the Property and overhead secondary lines and associated facilities along the west side of the Property, including secondary rights for ingress, egress and maintenance. The new underground primary easement area shall be bounded by the south side of the Property and shall be sufficient for Project work and existing utility facilities but so arranged that the new easement will not encumber any portion of the existing Menendez residence including roof overhangs. The underground easement shall not extend outside the original East-West South boundary easement on the Property. No alternate route easement on the Property is conveyed explicitly or implicitly by this agreement. PG&E will record the duly executed easement so that it is binding on all successors and assigns of the Parties.

On or before the date scheduled, PG&E will commence Project work and prosecute the work necessary to complete the Project with reasonable diligence in

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accordance with General Order 128 ("Rules for Construction of Underground Electric Supply and Communication Systems") of the CPUC. Absent unforeseen circumstances, PG&E shall complete all Project work on the Property within 15 consecutive days.

PG&E shall physically remove all overhead power lines over the span between the poles on the East-West South boundary easement of the Property as part of the Project. PG&E shall be solely responsible to clean up and remove any excess trench spoil and to restore to a good and serviceable condition any improvements of whatever nature located on the Property. In particular, PG&E shall avoid disturbance and damage to building foundations and any walkways or other hardscape features on the Property. However, the Parties acknowledge that, except for the front of the Property, the proposed trench route for the Project is not landscaped and need not be landscaped as part of Project restoration.

PG&E is responsible to Mr. Menendez and adjacent neighbors for any and all damages PG&E or its subcontractor may cause regardless of whether or not the work was done by a subcontractor, except to the extent that such damage is caused by the negligence or willful misconduct of Mr. Menendez or his neighbors.

PG&E is responsible for maintaining and enforcing safety measures during the work, including closing trenches and restoring closed gates to backyard when PG&E crew is not present. No tools or equipment shall be left unattended at any time on the public or private areas of the property where a passerby could harm themselves or others.

PG&E must meet all State and Federal regulatory rules for design, installation, usage and work area safety compliance, including sole responsibility to contact Underground Service Alert sufficiently in advance of the Project and prosecute the work so as to avoid damage to existing underground utility (e.g. water, sewer, gas) lines on the Property.

2. Within 120 days after this Agreement is accepted by the CPUC, but in no event later than five (5) business days before construction is scheduled to begin, Mr. Menendez shall pay to PG&E the total sum of Ten Thousand Dollars (\$10,000) toward the cost of the Project. PG&E shall be solely responsible for all Project costs over that amount including restoration.

3. In consideration of the settlement of the Complaint and in consideration of the mutual covenants, promises, terms and conditions herein, each Party, on behalf of itself, its agents, employees, successors-in-interest and assigns shall and hereby releases, discharges and covenants not to sue the other Party for any and all claims, demands or causes of action, of every kind and nature whatsoever, in law and equity, which arise out of or are directly related to the Complaint, including the claims and allegations raised in Case No. C.11-10-024.

As a part of this release, the Parties knowingly, voluntarily, and unconditionally waive the provisions of Section 1542 of the Civil Code of the State of California, which provides:

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A general release does not extend to claims which the creditor does not know or suspect to exist in his favor at the time of executing the release, which if known by him must have materially affected his settlement with the debtor.

This covenant not to sue shall become effective upon acceptance of this Agreement by the CPUC. This covenant not to sue does not cover subsequent actions before the CPUC by any Party for failure by the other Party to perform the actions required under the terms of this Agreement.

4. Each Party declares that prior to the execution of this Agreement, he, she or it or his, her or its duly authorized representatives have apprised themselves of sufficient relevant data, either through experts or other sources of their own selection, in order that each Party might intelligently exercise its judgment in deciding whether to execute, and in deciding on the contents of, this Agreement. Each Party assumes the risk that facts, other than those facts that are represented or warranted to be true in this Agreement, may later be found to be other than or different from the facts now believed by it to be true. Each Party declares that its decision to execute this Agreement is not influenced by any representation not contained in this Agreement.

5. Neither the transfer of any consideration, the doing of any of the acts referred to in this Agreement, nor anything else contained in this Agreement shall be construed to be an admission on the part of any of the Parties of any liability for or merit of any claims asserted by any of the other Parties. The Parties deny all such claims.

6. Each Party represents and warrants that it has the sole right and exclusive authority to execute this Agreement, and that it has not sold, assigned, transferred, conveyed, or otherwise disposed of any claim or demand against the other relating to any matter covered by this Agreement. Each Party represents that it is duly authorized to enter into this Agreement, and each person signing on behalf of an entity represents that he or she is duly authorized to sign on behalf of that entity.

7. This Agreement shall be construed in accordance with, and governed by, the laws of the State of California applicable to contracts between California residents made and to be performed in California.

8. The Parties mutually acknowledge that they have participated in the preparation and negotiation of this Agreement. In cases of uncertainty this Agreement shall be construed without regard to which of the Parties caused the uncertainty to exist.

9. Nothing in this Agreement is intended to or shall confer any benefits, rights or remedies on any person or entity other than the persons and entities expressly identified herein.

10. This Agreement may be executed in multiple counterparts, each of which shall be deemed an original, and counterpart signature pages may be assembled to form a single original document. The Parties agree that signatures received via facsimile transmission shall in all respects be deemed to be original signatures.

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11. Each Party shall bear its own fees and costs incurred as of the date of this Agreement.

12. This Agreement sets forth the entire understanding of the Parties relating to the transactions it contemplates, and supersedes all prior understandings relating to them, whether written or oral. There are no obligations, commitments, representations or warranties relating to them except those expressly set forth in this Agreement.

13. No amendment of, supplement to or waiver of any obligations under or provisions of this Agreement will be enforceable or admissible unless set forth in a writing signed by the Party against which enforcement or admission is sought.

14. If legal action or other proceeding, whether in contract, tort or otherwise, is commenced as a result of a dispute which arises under or relates to any provision of this Agreement, the losing party shall pay the prevailing party's actual attorneys' fees, costs, expert witness fees and other expenses incurred in preparation for and conduct of that action or proceeding, appeal of judgment, and enforcement and collection of judgment or award. These fees and expenses include but are not limited to those spent on arbitration, confirming an arbitration award in court, and collection of the resulting judgment. All these fees and expenses shall be made part of any judgment or award entered as a result of any dispute arising under or relating to any provision of this Agreement.

15. This Agreement shall be binding on and shall inure to the benefit of the respective successors, assignees and personal representatives of each of the parties, except to the extent of any contrary provision in this Agreement.

ROLANDO MENENDEZ

PACIFIC GAS AND ELECTRIC COMPANY,  
a California corporation

By: *[Signature]*

By: *[Signature]*

Name: ROLANDO MENENDEZ

Name: Chris Hughes

Date: JUNE 5, 2013

Date: 5/5/13

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COMPLAINANT AND SOLE OWNER OF  
RECORD OF PROPERTY

ACTING SUPERVISOR,  
ELECTRIC DISTRIBUTION  
COMPLIANCE

(END OF ATTACHMENT A)