Decision **PROPOSED DECISION OF ALJ DUDNEY** **(Mailed 8/12/16)**

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

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

DECISION ADOPTING SETTLEMENT AGREEMENT

Summary

This decision approves and implements the Settlement entered into among Pacific Gas and Electric Company (PG&E), the Office of Ratepayer Advocates and The Utility Reform Network (set forth in Attachment A hereto). The Settlement resolves all issues in the rehearing ordered in Decision (D.) 15-09-026 that relate specifically to PG&E. All rehearing issues pursuant to D.15-09-026 relating to investor-owned utilities (IOUs) other than PG&E are not addressed by the Settlement and remain pending.

D.15-09-026 granted applications for rehearing regarding three decisions [1] that approved awards to eligible investor-owned utilities for success in achieving energy efficiency savings for the 2006-2008 cycle through the

[1] The applications for rehearing are identified as follows: For D.08-12-059, filed February 2, 2009, by The Utility Reform Network (TURN) and the Division of Ratepayer Advocates (DRA) (in Rulemaking 06-04-010). For; for D.09-12-045, filed January 28, 2010 by TURN (in R.09-01-019.) For019); for D.10-12-049, filed January 26, 2011 by TURN and DRA (in R.09-01-019.) Rehearing of these decisions was consolidated in R. 09-01-019. DRA was renamed the Office of Ratepayer Advocates (ORA) effective September 26, 2013, pursuant to Senate Bill No. 96.

"Risk/Reward Incentive Mechanism" (RRIM). Interim awards were approved in D.08-12-059 and D.09-12-045, respectively, with a final award granted in D.10-12-049. Taken together, the three decisions awarded total incentive payments of $211,853,077 to the eligible IOUs covering the entire 2006-2008 cycle. PG&E's share of these RRIM awards totaled $104.1 million.

As discussed below, ORA, TURN, and PG&E entered into a Settlement to resolve all of the rehearing issues relating only to RRIM awards made to PG&E. The rehearing issues are to determine a just and reasonable incentive level and how to implement any necessary refunds. Nothing in the Settlement or in this decision constitutes precedent with respect to disposition of any pending issues in this rehearing applicable to any IOU other than PG&E.

Based upon our review, we find the Settlement is reasonable in light of the whole record, consistent with law, and in the public interest. Accordingly, we approve it. By adopting the Settlement, we lay to rest the long protracted controversy involving the RRIM, specifically with respect to PG&E, and the associated RRIM payments to PG&E for the 2006-2008 program cycle. We defer to a separate decision disposition of the rehearing issues relating to the IOUs other than PG&E.

Pursuant to the adopted Settlement, PG&E shall return to ratepayers the RRIM amount that was adopted as a final installment in D.10-12-049, totaling $29,115,011. This return of funds shall be implemented over a five-year period through offsets to PG&E's energy efficiency performance awards pursuant to the Efficiency Savings and Performance Incentive (ESPI) mechanism.[2] Effective September 2016, PG&E shall reduce its ESPI award request by at least $5,823,000

[2] The ESPI is the successor mechanism to the RRIM in offering monetary incentives to participating IOUs to promote energy efficiency goals. (*See* D. 12-12-032.)

per year. This minimum ESPI reduction shall continue annually for five years until the full offset of $29,115,011 has been applied. This full offset will be returned to ratepayers even if PG&E's future ESPI awards prove insufficient to offset the full amount after the five years following the effective date of this decision.

1. Background

Commission initiatives to encourage investments in Energy Efficiency (EE) through the Risk-Reward Incentive Mechanism (RRIM) have a long procedural history. Decision (D.) 07-09-043 created the RRIM in order to provide incentives for the Investor Owned Utilities[3] (IOUs) to "create a 'win-win' regulatory framework" for both investors and ratepayers and encourage the IOUs to "exceed our 2006-2008 energy savings goals."[4] D.08-12-059, D.09-12-045, and D.10-12-049 adopted RRIM payments to the IOUs for the 2006-2008 cycle.

RRIM methodologies for assessing incentive earnings, however, proved more complex and contentious than originally contemplated. Controversies ultimately led to applications for rehearing by the Office of Ratepayer Advocates (ORA) and The Utility Reform Network (TURN). D.15-09-026 granted applications for rehearing of D.08-12-059, D.09-12-045, and D.10-12-049 and described the procedural background of those decisions and associated applications for rehearing.

On January 21, 2016, the ~~Assigned~~assigned Commissioner and Administrative Law Judge (ALJ) issued an Amended Scoping Memo and Ruling in the rehearing granted by D.15-09-026. To address the rehearing, two

[3] Pacific Gas and Electric Company (PG&E), San Diego Gas & Electric Company (SDG&E), Southern California Gas Company (SoCalGas), and Southern California Edison Company (SCE).

[4] D.07-09-043, at 2-3. Footnote omitted.

prehearing conferences have been held and parties have filed and served various pleadings. On March 18, 2016, the following parties submitted proposals to resolve the issues in scope: Natural Resources Defense Council (NRDC), ~~Office of Ratepayer Advocates (ORA)~~ORA jointly with ~~The Utility Reform Network (~~TURN~~)~~, PG&E, SDG&E jointly with SoCalGas as the "Joint Utilities," and SCE.[5] On April 8, 2016, the same parties submitted comments in reply to the proposals.

The primary dispute in this rehearing proceeding is the appropriate level of RRIM incentive payments to each of the IOUs for the 2006-2008 cycle, including whether or not the RRIM payments authorized in D.08-12-059, D.09-12-045, and D.10-12-049 should be changed. The relative merits of the underlying principles, assumptions and data used to attribute the EE savings achieved, and therefore the RRIM payments awarded, are contested issues. Specifically, parties disputed whether the previously authorized award amounts, set based on *ex ante* (pre-installation) assumptions, should be sustained, or whether final awards should have been trued up based on *ex post* (post-installation) data.[6] Assuming a true-up based on *ex post* data, parties disagree as to whether to rely on the Commission's Energy Division Evaluation Measurement and Verification (EM&V) data or other *ex post* sources.

[5] On April 5, 2016, PG&E filed a motion to correct certain errors in its original proposal. PG&E's motion was granted by ALJ ruling dated July 12, 2016. PG&E's Proposal inadvertently attached a draft of Attachment 5 *CPUC & PG&E Analysis of Reported Versus Evaluated Savings Results for PG&E's 2006 to 2008 Energy Efficiency Portfolio*. PG&E filed an Amended Proposal on July 20, 2016, which included the final version of Attachment 5.

[6] *Ex ante* refers to EE parameter values predicted at the outset of the 2006-2008 program cycle. *Ex post* refers to those same parameters measured and verified after completion of the program cycle.

The IOUs and NRDC submitted a Motion for Evidentiary Hearing on April 15, 2016. The moving parties asserted that evidentiary hearings are not required if the previous RRIM awards are sustained. However, moving parties asserted, the Commission cannot rely on *ex post* data as reported by the Energy Division to change the previously authorized RRIM payments without evidentiary hearings. Although the ALJ ruled on July 12, 2016, that evidentiary hearings relating to the IOUs other than PG&E may be appropriate, hearings have not yet been scheduled and testimony has not yet been submitted. In view of our adoption of the pending Settlement, however, no evidentiary hearings are required to resolve rehearing issues that relate to PG&E.

2. Settlement Agreement

On June 24, 2016 PG&E, ORA, and TURN submitted a Motion for Approval of Settlement Agreement. PG&E, ORA, and TURN (Settling Parties) assert that the Settlement resolves all issues in this rehearing related to the appropriate incentive payments to PG&E for the 2006-2008 cycle. The Settlement does not address any other issues or impact parties' positions regarding the 2006-20008 RIM incentive payments applicable to the other IOUs. No party contests the Settlement.

The primary outcome proposed by the Settlement is that PG&E will offset the RRIM award amount authorized in D.10-12-049, totaling $29,115,011 against its future EE incentive requests under the Efficiency Savings and Performance Incentive (ESPI) or a successor mechanism. The Settlement requires PG&E to offset its ESPI Advice Letter due September 1, 2016 by $5,823,000, conditional on our approval of the Settlement. PG&E will continue to offset its ESPI award for four additional years by $5,823,000 per year. The Settlement authorizes

PG&E to accelerate this offset. If any individual year's ESPI award is less than the offset amount, the entire award shall be offset, and the balance applied to the following year's offset. In the event that the entire $29,115,011 is not offset within five years of the effective date of the Settlement,[7] PG&E will credit the Customer Energy Efficiency Incentive Adjustment Balancing Account in order to reduce revenues by the remaining balance.

The Settling Parties agree that the Settlement resolves all rehearing issues in R.09-01-019, including disputes related to D.07-09-043, D.08-01-042, D.08-12-059, D.09-12-045, D.10-12-049[8] and D.15-09-026 in regards to PG&E.

3. Issues ~~Before~~before the Commission

The Commission must decide whether the Settlement should be approved, and implemented. Although we generally favor the settlement of disputes, we have established appropriate rules regarding the conduct and evaluation of settlements. In evaluating the Settlement here, we consider specifically whether it meets the requirements of Article 12 of the Commission's Rules of Practice and Procedure regarding settlements.

3.1. Effects on the Safety of Utility Operations

No party has raised any safety issues in the rehearing of this proceeding. We find no provisions in the Settlement that would be inconsistent with PG&E's continuing obligations to provide utility service to its retail customers in a safe manner.

3.2. Requirements of Article 12

Article 12 of the Commission's Rules of Practice and Procedure specifies certain requirements for settlements in Commission proceedings. Rule 12.1(d)

[7] The Settlement specifies that it is effective on the mailing date of a final decision approving the terms of the Settlement.

[8] Including all issues in the Petitions for Modification.

states the standard for approving settlements: "The Commission will not approve settlements, whether contested or uncontested, unless the settlement is reasonable in light of the whole record, consistent with law, and in the public interest." Rule 12.1 also specifies procedural requirements on, for example, the timing of settlements and settlement conferences.

4. Discussion and Analysis

In order to evaluate the Settlement against the requirements of Rule 12.1, we consider four subjects: procedural requirements, reasonableness in light of the record, consistency with law, and the public interest. We find that the Settlement meets each of these requirements, and therefore, as discussed in further detail below, we approve the Settlement.

4.1. Procedural Requirements

We find that the Settling Parties have met the procedural requirements of Rule 12.1.

- Rule 12.1 (a) requires that settlements be proposed by written motion after the first prehearing conference and within 30 days after the last day of hearings. The Settlement meets this requirement.
- Rule 12.1 (a) requires that "the motion shall contain a statement of the factual and legal considerations adequate to advise the Commission of the scope of the settlement and of the grounds on which adoption is urged." The Motion for Approval of Settlement Agreement meets this requirement.
- Rule 12.1 (b) requires a settlement conference, with seven days advance notice and opportunity to participate for all parties, before a settlement is signed. The Settling Parties noticed a settlement conference on June 15, 2016, and held the conference on June 23, 2016, before signing the Settlement. The Settlement meets this requirement.

4.2. Reasonable in Light of the Whole Record

We find that the Settlement is reasonable in light of the whole record. In assessing reasonableness, we consider individual settlement provisions but in light of the strong public policy favoring settlements, we do not base our conclusion on whether any single provision is necessarily the optimal result. Rather, we determine whether the settlement as a whole produces a just and reasonable outcome. When viewed in total, we conclude that the Settlement before us produces a reasonable outcome.

Although the Settlement is not sponsored by all active parties, no party contests the Settlement insofar as it relates only to PG&E. In considering uncontested settlements generally, we have previously stated:

> In judging the reasonableness of a proposed settlement, we have sometimes inclined to find reasonable a settlement that has the unanimous support of all active parties in the proceeding. In contrast, a contested settlement is not entitled to any greater weight or deference merely by virtue of its label as a settlement; it is merely the joint position of the sponsoring parties, and its reasonableness must be thoroughly demonstrated by the record.[9]

In particular, we note that the Settlement is a compromise between the very different litigation positions of the Settling Parties.[10]

PG&E's pre-settlement proposal argued that it should be allowed to retain its entire award for each year of the 2006-2008 period. In support, PG&E argued, among other things, that the Commission was justified in relying on *ex ante* data rather than *ex post* data in finalizing 2006-2008 awards. PG&E argued that Energy Division's determinations that PG&E narrowly missed its megawatt

[9] D.02-01-041 at 13.

[10] Parties' litigation positions were set forth in proposals filed March 18, 2016, and in reply comments filed April 8, 2016, as noted above.

target, and thus, was subject to penalties, was incorrect due to claimed errors and omitted savings values.[11] PG&E also argued that if the Commission chose to rely on *ex post* data as the basis for final awards, factual disputes must be litigated regarding the Energy Division's *ex post* findings. PG&E also provided an alternative *ex post* analysis, relying on its own proposed adjustments to certain disputed parameters, to support its proposed outcome.

ORA and TURN's joint pre-settlement proposal argued, among other things, that the Commission erred by failing to follow RRIM rules adopted in D.07-09-043 and modified in D.08-01-042, including by using *ex ante* rather than *ex post* data to true up final incentive awards. ORA/TURN argued that 2006-2008 RRIM awards should be based on the *ex post* findings of the Energy Division EM&V Report. Based on Energy Division data, ORA and TURN argued that PG&E failed to exceed the minimum performance threshold required under the RRIM rules in order to retain any incentive awards from the 2006-2008 cycle. Therefore, ORA and TURN argued, PG&E should be required to refund the entirety of its 2006-2008 RRIM payments previously awarded, approximately $104 million.

In support of their disparate pre-settlement positions, the parties have raised a variety of factual and policy arguments. At this time, the Commission has not fully litigated the merits of these arguments and factual disputes. We recognize, however, that the Settlement reflects material concessions by opposing interests to resolve complex and strongly contested issues in dispute. The Settlement benefits ratepayers by deducting the amount of the third RRIM installment payment against future shareholder incentive earnings. PG&E,

[11] Pursuant to the RRIM formulas, PG&E would be subject to penalties if it achieved less than 65 percent of adopted energy efficiency savings goals.

however, is allowed to retain the first and second RRIM installments. The Settlement effectively resolves all rehearing disputes relating to PG&E through a release by TURN and ORA of all claims arising from PG&E's 2006-2008 RRIM awards.

The fact that parties with very different interests can reach such a compromise that is acceptable from opposing viewpoints indicates to us that the overall outcome is reasonable. We make this judgment, in particular, in view of the extensive history of controversy over these issues, the record underlying the 2006-2008 RRIM awards, and pleadings filed to date in the rehearing. Based on these considerations, we conclude that the compromise represented in the Settlement is reasonable in light of the whole record.

4.3. Consistent with Law

We find that the Settlement is consistent with law and with rules the Commission adopted for the RRIM in D.07-09-043 and D.08-01-042. We do not detect, and it has not been alleged, that any element of the Settlement is inconsistent with any part of the Public Utilities Code or Commission decisions.

4.4. Public Interest

We conclude that the Settlement is in the public interest. As previously determined, a settlement that "commands broad support among participants fairly reflective of the affected interests" and "does not contain terms which contravene statutory provisions or prior Commission decisions" meets the "public interest" criterion.[12]

A critical factor in our decision to adopt this settlement is confidence that it is fairly reflective of the affected interests. Here, the settlement is sponsored by the affected public utility and two well-recognized consumer interest groups.

[12] *See* D.10-06-015, ~~mimeo.~~ at 11-12, citing D.92-12-019, ~~mimeo.~~ at 7.

These parties represent the range of interests that have been at issue throughout the dispute regarding PG&E's 2006-2008 RRIM awards. The fact that these parties all recommend adoption of the settlement convinces us that the settlement is "fairly reflective of the affected interests."

5. Conclusion

Based on careful consideration, and for the reasons discussed above, we conclude that the Settlement before us warrants adoption. The Commission has long favored resolution of disputes through settlements. This policy supports worthwhile goals, including reducing litigation costs, conserving scarce resources, and allowing parties to reduce the risk that litigation will produce unacceptable results. As a result of entering into the Settlement here, the parties as well as Commission staff avoid the expenditure of time and resources otherwise required to fully litigate the longstanding controversies underlying these rehearing issues. Particularly in view of the passage of time, changes in energy efficiency programs since the underlying decisions were issued, and the age of the data involved, the Settlement offers an appropriate resolution of the rehearing issues relating to PG&E's RRIM awards.

6. 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. Comments were filed ~~by _____, and~~on September 1, 2016 by ORA and TURN (jointly) and PG&E; each of these parties supported the proposed decision. No other comments or reply comments were filed ~~on _____~~. No changes have been made to this decision, other than acknowledging comments.

7. Assignment of Proceeding

Carla J. Peterman is the assigned Commissioner and Kevin Dudney is the assigned ALJ in this proceeding.

Findings of Fact

1. On June 24, 2016, a Joint Motion was filed in this proceeding for Approval of Settlement Agreement Between and Among ORA, TURN, and PG&E.
2. All disputes among the parties relating to PG&E are resolved in the Settlement as attached to the June 24, 2016, Joint Motion.
3. The Settlement is uncontested.
4. The Settlement was proposed by written motion after the first prehearing conference and within 30 days after the last day of hearings, in this proceeding on rehearing.
5. The Motion for Approval of Settlement Agreement contains a statement of the factual and legal considerations adequate to advise the Commission of the scope of the Settlement and of the grounds on which adoption is urged.
6. The Settling Parties noticed a settlement conference on June 15, 2016, and held the conference on June 23, 2016 before signing the Settlement.
7. The parties to the Settlement are fairly reflective of the affected interests.
8. No term of the Settlement contravenes statutory provisions or prior Commission decisions.
9. The Settlement is reasonable in light of the record, is consistent with law, and is in the public interest.

Conclusions of Law

1. The Settlement in Attachment A to this decision meets the Commission's criteria for approval, as prescribed in Rule 12. It is (a) reasonable in light of the

whole record, (b) consistent with law, and (c) in the public interest. Accordingly, the Settlement should be approved in its entirety and without modification.

2. Adoption of the Settlement in Attachment A is not binding on any utility other than PG&E and does not constitute approval of, or precedent regarding, any principle or issue in the proceeding or in any future proceeding.

3. Except as expressly provided for in the Settlement, each of the Settling Parties may advocate, in current and future proceedings, positions, principles, assumptions, arguments and methodologies which may be different than those underlying the Settlement.

4. In order to give effect to the Settlement expeditiously, this decision approving the Settlement should be effective today.

O R D E R

IT IS ORDERED that:

1. The Settlement Agreement between and among the Office of Ratepayer Advocates, The Utility Reform Network, and Pacific Gas and Electric Company (the Settling Parties) is adopted, as attached to the June 24, 2016, Joint Motion of the Settling Parties (Joint Motion). Accordingly, the Joint Motion for adoption of the Settlement Agreement (set forth in Attachment A of this decision) is granted.

2. Pursuant to the Settlement, as resolution of all outstanding disputes relating to it in this rehearing, Pacific Gas and Electric Company (PG&E) shall comply with all terms of the adopted Settlement, set forth in Attachment A, including the requirement to return to ratepayers the amount of $29,115,011, representing the amount that was authorized in Decision 10-12-049. The return of these funds shall be implemented as follows:

a. PG&E shall include in its Efficiency Savings Performance Incentive (ESPI) Advice Letter due September 1, 2016, a request to offset the amount of its otherwise authorized ESPI incentive award by $5,823,000.

b. PG&E shall include in its ESPI Advice Letter due each year thereafter, a request to offset the amount of its ESPI incentive award for each respective year by $5,823,000, for a period of five years following the effective date of this decision.

c. If the total of $29,115,011 has not been fully offset from ESPI incentive awards (or other successor mechanism) by the end of the five-year period following the Effective Date of this decision, PG&E shall reduce electric and gas revenues in an amount equal to the remaining balance that PG&E had not previously requested to offset against energy efficiency shareholder incentive earnings.

d. The revenue reduction described above in sub-paragraph (c) shall be administered as a credit to the Customer Energy Efficiency Incentive Adjustment Balancing Account, a subaccount of the umbrella Customer Energy Efficiency Adjustment mechanism, and shall be reflected in PG&E's annual electric and gas true-up advice letters that year.

3. This rehearing proceeding remains open for purposes of further proceedings as necessary to resolve remaining issues pursuant to Decision 15-09-026 other than those that relate specifically to Pacific Gas and Electric Company.

This order is effective today.

Dated _____, at San Francisco, California.