BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA

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Application of Pacific Gas and Electric Company to Revise its Gas Rates and Tariffs to be Effective July 1, 2010 (U 39)	Application 09-05-026 (Filed May 29, 2009)

OPENING BRIEF OF CLEAN ENERGY FUELS CORPORATION

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I. INTRODUCTION AND SUMMARY.

In accordance with the Scoping Memo and Ruling of Assigned Commissioner and Administrative Law Judge, dated August 11, 2009, Clean Energy Fuels Corporation ("Clean Energy") submits this Opening Brief.

PG&E has failed completely to sustain its burden of proof in this proceeding on the disputed compression cost issue. It has failed to demonstrate that its proposed compression rate component is adequately cost-based as required by Commission policy, recovers at forecast throughput its full cost of service associated with owning and operating its 24 public access NGV stations, would not be cross subsidized by PG&E's non-participating core residential and commercial customers, and is consistent with the clear policy direction that the Commission has provided in decisions directly relevant to the question of setting NGV refueling rates charged at the public access refueling stations of California's gas distribution companies. The methodology PG&E employed in its Compression Cost Study and the resulting $0.744 per therm compression cost component of the G-NGV2 rate it proposes, for the reasons explained in this brief, should be rejected.

The only estimate presented in this proceeding of PG&E's total cost of service associated with the ownership and operation of its 24 PG&E stations which provide public access refueling services (i.e., $3,491,711) is presented in the Prepared Direct Testimony of Warren Mitchell (Exhibit 9, page 21). The only estimate presented in this proceeding, $1.00 per therm, of the compression cost component which over forecast throughput would fully recover PG&E's estimated total cost of service in providing public access refueling services requiring no cross-

subsidies and generating none is also shown in Mr. Mitchell's testimony. This per therm estimate, along with the method Clean Energy employed in developing it was not challenged by PG&E in its Rebuttal Testimony. PG&E simply alleged that it was based on a "flawed" average cost approach rather than the highly unusual quasi-incremental cost approach proposed by PG&E in its Testimony which relied exclusively on a 5 station sample that, as was clearly demonstrated in the Prepared Direct Testimony of Warren Mitchell, is not representative of the typical PG&E public access refueling station.

PG&E does not challenge in its Rebuttal Testimony the fact that $1.00 per therm is the appropriate number to adopt if the Commission decides as it should that the proper methodology to use is one based on PG&E's average, rather than quasi-incremental costs of providing public access refueling services at all 24 of its stations. (PG&E's Rebuttal Testimony).

The fact is that the G-NGV2 rate is being charged at each of these 24 stations and, therefore, the total costs and throughput of all 24 stations need to be taken into account in developing the compression cost component which will be collected through the G-NGV2 rate that is charged for public access refueling services at each of these stations.

The $1.00 per therm compression cost component proposed by Clean Energy is based on the estimated total PG&E cost of service, including both third party and fleet costs, associated with owning and operating all 24 of its public access refueling stations divided by the total forecast throughput at those stations, including third party and fleet refueling volumes. It is based on an average cost approach, similar to the one which was recently adopted by the Commission for SoCalGas and SDG&E in their recently completed BCAP proceeding, and Clean Energy believes is required by D.95-11-035 when the underlying cost study is based on embedded as opposed to marginal costs. Both the SEUs' "compression adder" and PG&E's Compression Cost Study are based on embedded costs.

PG&E's quasi-incremental cost-based approach to estimating the compression cost component suffers three fatal flaws: (1) it is fundamentally inconsistent with the Commission's clear rate setting policy direction for third party refueling services provided by California's gas distribution companies; (2) at forecast throughput PG&E's proposed compression rate component of its G-NGV2 rate will fail to recover all of the costs of service associated with providing third party refueling services at its public access stations; and, (3) the revenue shortfall which results from charging a below cost compression rate component will result in a continuing

cross-subsidy of public access refueling station costs which through the operation of PG&E's Core Fixed Cost Account ("CFCA") will be borne almost entirely by PG&E's non-participating core residential and commercial customers. Such a cross-subsidized rate component is prohibited by the express provisions of D.95-11-035.

Clean Energy's $1.00 per therm recommendation is the one which should be adopted by the Commission in this proceeding.

II. BACKGROUND.

In PG&E's last BCAP (A.04-07-044), Clean Energy filed testimony indicating that the proposed compression rate component of the G-NGV2 rate, $0.27644 per therm (consisting of operating and maintenance and capital recovery expenses), did not reflect PG&E's then current costs of providing public access refueling services and was in violation of the provisions of D.95-11-035 which required that the compression rates for CNG refueling services should reflect the "fully allocated costs" of the service being provided and not be cross-subsidized by other PG&E customers.

In PG&E's last BCAP, PG&E presented no current cost data which supported and justified its proposed $0.27644 per therm compression cost component. PG&E's proposal at the time was "based on a five year forecast that was developed in 1996, a forecast the foundation of which entirely rested on only nine months of 1996 historical data." (Prepared Direct Testimony of Warren Mitchell, A.04-07-044, page 8, lines 24-25).

PG&E's lack of awareness about its then current compression costs is reflected in the statement made by PG&E's witness, Shaun Halverson, in Rebuttal Testimony filed in the proceeding. She said:

> "PG&E agrees that the cost studies and throughput data underlying the rate components for compressor maintenance and new station capital recovery are outdated. However, updating these rate components may not necessarily result in higher G-NGV2 rate levels compared to those currently adopted by the Commission." (Rebuttal Testimony of Shaun E. Halverson, page 4-16, lines 1-5).

After the filing of testimony and the cross-examination of PG&E's and Clean Energy's witnesses, the two parties reached a Settlement Agreement which provided for an immediate $0.15 per therm increase in the compression cost component upon implementation of the Commission's decision in the BCAP to be followed by $0.03 per therm increases each following

January 1 until new rates were put in place in PG&E's next BCAP. The Settlement Agreement provided:

> "PG&E will conduct a study of the cost to provide compression service under Schedule G-NGV2 and present the cost study, and a proposal to update the compression rate, in its next BCAP. The cost study will provide sufficient detail so that PG&E's proposed compression rate can be evaluated by parties using various cost and rate determination methodologies. PG&E reserves the right to propose a compression rate and Clean Energy reserves its right to support or challenge PG&E's proposal in the next BCAP." ("Settlement Agreement between PG&E and Clean Energy on Natural Gas Vehicle Fueling Charges, Section 3.3, page 3).

The Compression Cost Study developed and presented by PG&E in its current BCAP testimony ignored clear Commission policy direction as articulated in D.95-11-035 and failed to "…provide sufficient detail so that PG&E's proposed compression rate can be evaluated by parties using various cost and rate determination methodologies."

At the time of the last BCAP, before PG&E began work on the Compression Cost Study presented in this BCAP, PG&E was aware of the CNG pricing policies articulated by the Commission in D.95-11-035 because many of them were articulated in Warren Mitchell's Prepared Direct Testimony.

PG&E's witness in this proceeding acknowledged on cross examination that he was aware of the relevant provisions of D.95-11-035. He said he was under the impression that the decision was only effective for 6 years after it was issued. (Transcript, page 37, lines 1-2). He chose to ignore them completely in developing his Compression Cost Study.

Throughout this proceeding, PG&E has repeatedly demonstrated a complete lack of sensitivity to the adverse anti-competitive implications of its below cost cross-subsidized NGV refueling rates on non-utility entities, such as Clean Energy who directly competes with PG&E's refueling stations on price at their San Francisco NGV refueling stations. It is indisputable that Clean Energy has had to discount its retail prices substantially in order to mitigate load loss to PG&E's San Francisco Folsom Street station and has suffered substantial revenue losses as a result.

III. PG&E'S REPEATED INTERCHANGEABLE USE OF THE TERM, "INCREMENTAL COST" WITH TWO COMPLETELY DIFFERENT MEANINGS ADDED UNNECESSARY CONFUSION TO ITS COMPRESSION COST STUDY AND TO THE RECORD IN THIS PROCEEDING.

In its Prepared Direct and Rebuttal Testimony, and in the cross examination of Warren Mitchell by Michael Reidenbach, PG&E has used interchangeably a term, "incremental costs" with two distinct and separate meanings. Clean Energy believes that the way PG&E has in its testimony and in subsequent written and oral communications with Clean Energy referred to the "incremental costs" related to public access NGV refueling services is very confusing and highly misleading. Economists define incremental costs to be the increase or decrease in total costs which result from one more or one less unit of output. "Incremental cost" as the term is used by economists is closely equivalent to the terms "marginal costs" or "variable costs."

In one context, PG&E refers to its "incremental costs" as those costs which are associated with providing public access refueling services, separate from the costs of serving PG&E's fleet refueling requirements. Rather than describe these too as "incremental costs," a less confusing way of referring to these costs would be to describe them as those station costs which are in addition to the costs of serving PG&E's fleet at the 24 public access stations and are exclusively associated with providing third party refueling services or, simply, "third party refueling costs." The reason it is misleading for PG&E to describe these as "incremental costs" is that third party refueling costs include both fixed and variable costs.

In a second context, PG&E repeatedly refers to "incremental costs" as the cost of providing third party refueling services leaving out entirely or minimizing the presence of refueling station fixed costs. The costs which PG&E has developed in its Compression Cost Study are fully allocated embedded costs, including both fixed and variable costs for its five station sample. At page 4-27 of its testimony at lines 29-31, PG&E wrongly states: "Costs included were those incremental to the cost of serving the PG&E fleet, including O&M and capital costs specific to the fueling stations as well as A&G, taxes, franchise fees and uncollectibles." It is highly unusual in an effort to measure unit station "variable costs," PG&E's would start from a cost data set which includes the fully allocated costs, both fixed and variable, of owning and operating its public access stations. PG&E then went on to select a sample from among its highest volume stations which had the effect of minimizing the unit fixed and variable costs reflected in its proposed compression cost component thus producing a significantly lower

compression cost component estimate. It is undisputed that there are significant economies of scale associated with the ownership and operation of NGV refueling stations since the variable costs associated with delivering increased volumes are small in relationship to the fixed costs of owning and operating refueling stations.

Confusingly, PG&E includes "capital costs specific to the fueling stations" in one of its definitions of incremental costs. Despite saying that it did develop separately the costs which are in addition to the costs of refueling PG&E's fleet, PG&E never did so. In fact, PG&E only provided data measuring the total costs of third party and fleet refueling combined. To avoid this confusion, where applicable, Clean Energy will refer to those costs which are in addition to the PG&E costs of providing fleet refueling services as "third party refueling costs." With regard to the truly "incremental costs," as an Economist would define them, we will refer to them in this brief as "variable costs."

IV. PG&E HAS NO RELEVANT COMMISSION AUTHORIZATION TO JUSTIFY PROPOSING A COMPRESSION COST COMPONENT OF ITS G-NGV2 RATE WHICH ONLY OR MOSTLY RECOVERS THE VARIABLE COSTS OF PROVIDING PUBLIC ACCESS REFUELING SERVICES, AND CITES NONE.

PG&E has no relevant Commission authority whatsoever, and cites none, for proposing a compression cost component of its G-NGV2 rate which only or primarily recovers the mostly variable costs of service it incurs in providing public access refueling service at its stations which provide such service under the G-NGV2 rate. In addition, PG&E's use of this kind of approach is diametrically inconsistent with the Commission's directives in D.95-11-035 that the compression rates of California's gas distribution companies at public access refueling stations recover the "fully allocated" costs of the service being provided and not be cross-subsidized by other PG&E customers. Fully allocated costs include both the total applicable fixed and variable costs. Nor is it authorized to "cherry pick" a high volume 5 station sample which, because of economies of scale, will result in a significantly lower calculated compression cost component than if it relied on a sample of stations which in a statistically meaningful way were representative of all 24 stations, or included cost data for all 24 of its public access stations.

V. PG&E'S WITNESS IN HIS REBUTTAL TESTIMONY AND ON CROSS EXAMINATION MAKES A NUMBER OF FLAT ASSERTIONS WHICH WHEN VIEWED IN THE MOST CHARITABLE LIGHT ARE SIMPLY FALSE.

On page 1 of PG&E's Rebuttal Testimony, the witness asks:

> "Q 2 What is Clean Energy's basic criticism of PG&E's compression cost rate component?"
>
> "A 2 Clean Energy alleges that PG&E has computed a rate component that is too low and that this component estimate results in a G-NGV2 rate that is subsidized by other gas distribution customers."
>
> "Q 3 Is this criticism valid?"
>
> "A 3 No. PG&E appropriately developed a rate that is based upon an estimate of the incremental cost of providing natural gas vehicle (NGV) refueling service to the public. This methodology is appropriate because PG&E's NGV stations were built primarily to serve PG&E's NGV fleet and refueling services to the public are only made on a secondary, as-available basis. Clean Energy, on the other hand, proposes a rate that includes all of the costs for PG&E's NGV stations. This average cost approach overstates the costs of serving the public because it includes costs associated with serving PG&E's fleet." (Rebuttal Testimony, page 1, lines 14-28).

When PG&E's witness states that PG&E's compression component has not and will not be "subsidized by other gas distribution customers," he is flatly wrong. As will be described in greater detail later in this brief, Table 4-14 of PG&E's Prepared Direct Testimony shows that PG&E's compression cost component has been cross-subsidized by other customers in the past and continues to be cross-subsidized in 2010. As shown in Warren Mitchell's Prepared Direct Testimony, Clean Energy estimates that while it costs PG&E a $1.00 per therm for public access refueling, it only proposes to collect in the G-NGV2 rate a $0.744 per therm compression cost component. Clean Energy believes that if PG&E's proposal was approved by the Commission, the compression cost component of the G-NGV2 rate would be cross subsidized by other PG&E customers to the extent of $0.257 per therm.

The assertion that "this average cost approach overstates the costs of serving the public because it includes costs associated with serving PG&E's fleet" is false. The fact is that the only relatively hard cost data which PG&E developed in the course of conducting its Compression Cost Study measured the total costs of owning and operating PG&E's public access stations, including both third party refueling and fleet refueling costs. Unlike SoCalGas and SDG&E in

developing the "compression adder" for their compressed natural gas refueling rate recently approved by the Commission, PG&E did not segregate the third party costs from the fleet costs.

Also, what PG&E fails to note is that when calculating its recommended $1.00 per therm compression cost component, Clean Energy divided its estimate of the total cost of service associated with owning and operating the 24 public access stations by total forecast refueling throughput including both third party and fleet refueling volumes at those stations. In effect, Clean Energy's method allocated the fixed stations costs on an equal cents per therm (ECPT) method. In this way, if fleet use constitutes the predominant share of the total station volume the predominant share of fixed costs are in effect assigned to fleet use.

PG&E's claim that the third party and the fleet cost data are inseparable (Rebuttal Testimony, page 6, line 15) is without any foundation in fact whatsoever. In the absence of more definitive cost allocation methods, the Commission often allocates joint and common costs on an ECPT. The way the Sempra Energy Utilities ("SEUs") accomplished this separation was to compare stations costs between stations that provided public access services and those that did not. The resulting difference provided the estimate they relied on in dividing total third party refueling costs by third party refueling volumes (an average cost calculation) to develop the "compression rate adder" that was proposed, and adopted by the Commission in the SEUs' recent BCAP proceedings. To assert that third party and fleet refueling costs are "inseparable" is just incorrect.

On page 2 of PG&E's Rebuttal Testimony, PG&E's witness asked:

> "Q 5 In Mr. Mitchell's testimony, Clean Energy alleges that PG&E is '…proposing a compression cost component of its G-NGV2 transportation charge which is significantly below the level that would be sufficient for PG&E to fully recover its cost of service associated with owning and operating its 24 public access refueling stations.' Is this allegation valid?"
>
> "A 5 No, it is not. The above allegation is based on the incorrect premise that all of the costs of the NGV stations should be included in the compression cost estimate for public access service included in the G-NGV2 rate. Including all NGV station costs in this estimate would overstate the associated costs since it would include the costs associated with serving PG&E's NGV fleet."

What PG&E's witness fails to note is that all of PG&E's station cost data presented in its Compression Cost Study includes both third party and fleet refueling costs combined. Also, Clean Energy's approach is not based on the premise that ". . . all of the costs of the NGV

stations should be included in the compression cost estimate for public access service included in the G-NGV2 rate." Clean Energy's approach does not assign all of the costs to public access service; it only assigns those costs which are attributable to third party service. PG&E's statement would be correct if Clean Energy, in calculating its recommended compression cost component, took the total station costs and divided them by third party refueling volumes. Clean Energy did not do this. It took the estimated total cost of service for the 24 stations and divided that number by total refueling station throughput, including fleet volumes. Also, as was noted previously, PG&E did not disaggregate its station costs between those incurred to provide third party service and those associated with meeting fleet needs.

At page 8 of the Rebuttal Testimony, PG&E's witness asks:

> "Q 24 Does Clean Energy acknowledge that the appropriate way to conduct the analysis of the third-party (i.e., public refueling service) compression component is too (sic) focus on third-party costs?"
>
> "A 24 Yes, Clean Energy acknowledges that the study should be conducted only on third-party costs in its testimony. While Clean Energy acknowledges the need to focus on third-party costs, it chose a method that instead used all costs, including those for serving PG&E fleet. To justify the switch to a different method, Clean Energy states, 'Despite this methodological preference, Clean Energy believes that the per therm costs of third party and fleet refueling are likely to be closely similar?'"

PG&E's witness is incorrect in suggesting that Clean Energy executed a "switch" to a different method. The fact is that through a prolonged and arduous discovery dispute, Clean Energy tried to identify PG&E's total 24 station cost of service disaggregated between third party costs and fleet costs. As noted in Mr. Mitchell's Prepared Direct Testimony, Clean Energy's preferred approach to setting PG&E's compression cost component was to take the total cost of service associated with providing third party refueling services and divide that total cost amount by forecast third party refueling volumes. Despite the fact that PG&E agreed (Exhibit 4, page 2 of the Declaration of Nielson D. Jones) that this approach was also PG&E's preferred approach in conducting its Compression Cost Study, PG&E did not separately estimate the cost of service associated with providing third party refueling services and the cost of service associated with providing fleet refueling. To suggest that Clean Energy switched its approach is incorrect on its face. Clean Energy pursued its second most preferred approach because PG&E hadn't developed the data necessary to implement its most preferred approach.

On page 9 of his Rebuttal Testimony, PG&E's witness asks:

> "Q 30 On p. 13 of Clean Energy's testimony regarding a Public Utilities Code Section 740.3(c.) and on pp. 14-15, where there are quotations from Decision 95-11-035, Clean Energy contends that PG&E has violated the strictures against 'unfair' competition contained in those references. Do you agree that PG&E has committed such violations?"
>
> "A 30 No I do not. This allegation involves the same complaint that I have already addressed, namely, that PG&E is proposing a rate that does not fully recover the cost of providing public NGV service. In PG&E's view, and as previously explained, PG&E's proposed rate does recover the full cost of providing public NGV refueling service. In PG&E's opinion, the whole premise of Clean Energy's argument about "subsidized" rates is flawed. Clean Energy's average cost methodology grossly overstates the G-NGV2 rate beyond PG&E's costs for providing this service and would unduly injure customers who are dependent upon this refueling service."

It is clear from the facts and evidence presented in this proceeding that what PG&E denies doing is exactly what it did. The above referenced question is the only place in PG&E's Testimony where PG&E acknowledges the existence of P.U. Code Section 740.3(c.) and D.95-11-035. On cross examination, the witness indicated that he had some familiarity with the provision of D.95-11-035, at the time he prepared the Compression Cost Study but it is clear from a review of the Compression Cost Study itself that he didn't assign any weight to those provisions in developing PG&E's study. How he can flatly deny violating provisions that he at best was only partially aware of at the time the Study was conducted is at best confusing to Clean Energy.

Furthermore, there is no evidence in this proceeding to support the proposition that Clean Energy's proposed compression cost component of $1.00 per therm overstates PG&E's unit cost of providing third party refueling service at its public access stations.

On page 13 of his Rebuttal Testimony, the witness asks:

> "Q 31 Clean Energy alleges that PG&E did not fulfill its obligation under the BCAP settlement to conduct a study. Did PG&E follow the settlement agreement reached with Clean Energy in the last BCAP proceeding, Application 04-07-044?"
>
> "A 31 Yes. PG&E made extensive efforts to collect and analyze the cost data associated with providing NGV public refueling service. First, it should be noted that PG&E began its analysis in 2005. Extensive data gathering was involved at the outset because historical capital expenditure

> data dating back to 1991 was required to develop rate base (i.e., the appropriate current non-depreciated capital cost to assign to each station)."

PG&E goes on to explain further in A 31 the work that went into developing its Compression Cost Study. Once again, PG&E baldly makes a flat assertion that is not supported by the evidence in this proceeding. PG&E claims it "followed the settlement agreement reached with Clean Energy." The Settlement Agreement provided:

> "The cost study will provide sufficient detail so that PG&E's proposed compression rate can be evaluated by parties using various cost and rate determination methodologies." (Settlement, Section 3.3 page 3).

Contrary to PG&E's assertion, the Compression Cost Study PG&E prepared did not provide "sufficient detail" to make it possible for Clean Energy or any other party to evaluate the study results "using various cost and rate determination methodologies." Among the possible alternative cost and rate determination methodologies are: (1) an average cost-based methodology; (2) a long run marginal cost-based methodology; and (3) a short run marginal cost-based methodology. A compression cost component estimate could not be developed based on hard data for any of these alternative methodologies given the highly limited data that PG&E worked long and hard (over just 8 weeks [Exhibit 4, page 6]) to produce and presented in its Compression Cost Study. In addition, Clean Energy believes that it would have been helpful for PG&E to have included in its study more data on the sensitivity of unit compression costs to station volumes.

Clean Energy believed that at a minimum, PG&E's study would include a calculation based on average costs. For a study based on embedded rather than marginal costs, such as the one PG&E conducted, Clean Energy believes that the methodology required by Commission policy is an average cost-based method based on the fully allocated cost of providing public access refueling services. On Cross Examination, PG&E's witness acknowledged having done an average cost-based calculation of the compression cost component extrapolating from data included in the 5 station sample. Apparently, according to the witness, the results of this analysis no longer exist. PG&E never provided this information to Clean Energy. Clean Energy doesn't understand why this average cost information wasn't included in some way in PG&E's Compression Cost Study. The fact is that the only cost data PG&E developed and presented in its Compression Cost Study was for a highly biased and non-representative sample of 5 public access refueling stations exhibiting significantly higher than the average per station throughput

for all 24 of its refueling stations. And PG&E has the audacity to assert that it complied with the provisions of the settlement?

At page 47 of the Transcript, Administrative Law Judge (ALJ) Wong asks PG&E's witness about an average cost calculation that the witness said he had made:

> "So the data that you did the back-of-the-envelope calculation for all 24 stations, all that data was then provided to Clean Energy except for the distribution expenses or the distribution and expense costs; is that right? The witness answers: "Yes, that's correct, yes."

The plain fact is that PG&E never provided any information to Clean Energy showing an estimate of the compression cost component based on an average cost approach. At page 44 of the Transcript, starting at line 5, the witness says: "I said I did back-of-the-envelope calculations. Those are just calculations just done maybe on a spreadsheet, maybe done on some legal paper, but there were never put, ***saved*** [emphasis added] or put in any kind of a proceeding." At page 43 of the Transcript at lines 16-21, the witness says:

> "I don't recall, but as I said earlier, I did some back-of-the-envelope calculations, so those calculations really don't exist. They were done probably around 2006. I answered your question truthfully, but those were not available any longer, the documents that I had retained working on this case."

It is worth noting that at page 40 of the Transcript, in response to a question asking whether or not PG&E had calculated a compression cost component for all 24 stations on an average cost basis, PG&E's witness said, "I have worked on the study for four years off and on, and I probably did some back-of-the-envelope calculations, not too much different than what you presented in this proceeding." (Lines 3-6). At lines 17-18 on the same Transcript page, the witness said about the calculations "it was basically similar to what you did."

On pages 14-15 of his Rebuttal Testimony, the witness asks:

> "Q 33 "Clean Energy alleges that PG&E's proposal fails to comply with the Commission policy directive that 'the compression cost component of the G-NGV2 rate should recover the direct and fully allocated embedded costs of the service being provided." Is this allegation correct?"
>
> "A 33 No."

The witnesses' answer is flatly incorrect. PG&E has repeatedly said during this proceeding that it believes that none or virtually none of the public access station fixed costs should be assigned or allocated to be paid for by public access refueling customers.

Clean Energy agrees with one statement that PG&E's witness made: ". . . I don't think the Commission would approve of subsidized rates." (Transcript, page 64, lines 8-9).

VI. PG&E'S COMPRESSION COST STUDY IGNORES OTHER CLEAR COMMISSION POLICY DIRECTIVES.

In D.95-11-035 the Commission stated:

> "Any future utility refueling station program must be designed to avoid giving the utility ***any*** [emphasis added] market advantage**,** based on its monopoly status. Among other things, construction, operation, and commodity charges must be fully compensatory." (D.95-11-035, page 88).

Clean Energy submits that the CFCA confers a huge market advantage that non-utility enterprises don't have available to them because it allows PG&E to charge a below cost compression cost component of its G-NGV2 rate and to have the resulting revenue shortfall subsequently recovered from other core customers rather than being borne by shareholders as would be the case for non-utility enterprises.

In D.93-07-054, the Commission said:

> "The utility will be required to demonstrate that each element of its LEV program is not unfairly competitive with nonutility enterprises, and to discontinue the offending program element if, and when, it interferes with the development of a competitive market." (D.93-07-054, page 27).

The witness indicated on Cross Examination that he was vaguely aware of the requirements of D.93-07-054 (Transcript, page 53, line 15), but was certain that his Compression Cost Study complied with them. (Transcript, page 57, lines 4-7). Nowhere in PG&E's testimony is there any information which demonstrates that its proposed compression cost component is not unfairly competitive and that it properly recovers, without any cross-subsidy, the full cost of service associated with providing third party refueling services. From Clean Energy's vantage point what PG&E did in its Compression Cost Study was to structure a study to produce a result which is exactly "unfairly competitive with non-utility enterprises."

PG&E's proposed below cost compression rate component, because it is based on a so-called "incremental" rather than an average cost methodology and relies on cross subsidies from other customers to recover its full cost of service, fails to comply with the pricing policy direction provided by D.95-11-035. (See pages 13-16 of Warren Mitchell's Prepared Direct Testimony).

The provisions of the settlement that was negotiated between Clean Energy and PG&E in the last BCAP have allowed PG&E in the intervening period to charge a compression cost component of its GNGV-2 rate which is well less than PG&E's per therm cost of service of providing third party compression services at its 24 public access stations. This fact is demonstrated by PG&E's own BCAP testimony.

As Table 4-14 on page 4-36 of PG&E's testimony shows, PG&E's compression cost component in 2008 was $0.51644 per therm (line 1) at a time when its own compression cost study (which Clean Energy believes resulted in a proposed compression cost component amount well below PG&E's unit costs of providing compression services) shows that PG&E's cost of providing compression services was $0.75165 per therm. For 2009, the compression cost component of the G-NGV2 rate was $0.54644 per therm while its estimated cost of providing service was $0.79142. So far in 2010, PG&E has been collecting $0.57644 per therm while its estimated costs are 0.76611 per therm. It is self evident, based on its own study results that PG&E's G-NGV2 customers have been subsidized, at a minimum, by $0.19 to $0.25 per therm over the past three years by PG&E's core residential and commercial customers.

Furthermore, as shown in Warren Mitchell's Prepared Direct Testimony, Clean Energy believes that PG&E's proposed $0.744 per therm compression cost component should be about $0.26 per therm higher to eliminate the cross-subsidy. Clean Energy believes that whenever PG&E is charging a compression cost component which is below its full per therm fully allocated costs, including both applicable fixed and variable costs, of providing third party compression services the rate is being cross-subsidized by other non-participating PG&E customers and Clean Energy suffers economic harm because of the need to discount its prices to compete against a below cost PG&E rate.

As Clean Energy stated in its prepared direct testimony: "The particular rate determination methodology that Clean Energy believes to be the one most methodologically sound and defensible in establishing the compression cost component of the G-NGV2 rate is to

start with the aggregate annual cost of service associated with providing third party refueling (exclusive of the cost of service associated with refueling PG&E's NGV fleet at these station) at all 24 of PG&E's public access refueling stations which serve third parties under the G-NGV2 rate schedule, and then divide those aggregate costs by the aggregate forecast annual throughput to the third party refueling customers who actually pay the G-NGV2 rate at all 24 refueling stations."

As Clean Energy noted in its prepared direct testimony, the data necessary to implement this methodology was not available from PG&E. Clean Energy does not believe that the compression cost component of the GNGV-2 rate should be set in this proceeding based on PG&E's variable costs of providing third party compression services. Who is going to pay the missing fixed costs? In PG&E's approach it is non-participating core residential and commercial customers who will pay them, not the G-NGV2 customers on whose direct behalf some of the costs are being incurred.

VII. THE ARGUMENT THAT THE SO-CALLED "AS AVAILABLE' SERVICE PROVIDED AT PG&E'S PUBLIC ACCESS REFUELING STATIONS JUSTIFIES A LOWER RATE IS WITHOUT MERIT.

The assertion by PG&E that the compression rate component should be lower than would otherwise be appropriate because public access refueling services are provided on an "as available" basis has no merit. If the so-called "as available" service that PG&E provides at its public access refueling stations provided a justification for a lower compression rate component than would otherwise be appropriate, PG&E surely would have taken that factor into account in its Compression Cost Study. PG&E's Testimony did not cite "as available service" as a consideration directly affecting the amount of the appropriate compression cost component of the G-NGV2 rate until it filed its Rebuttal Testimony.

It appears from the evidence introduced into this proceeding that PG&E's "as available" service is actually "highly available." In Exhibit 20, an e-mail from Jill Egbert to PG&E's witness Neil Jones, Ms. Egbert, describes the 6 out of 24 stations which don't provide service on a 24 hours a day, 7 days a week basis. This means that there are 18 which do provide 24/7 availability. On balance, Exhibit 20 describes a highly available service. It is worth noting that the Folsom Street station, which is by far PG&E's highest volume station, is closed to public access service from 9 AM to Noon on Mondays through Fridays. This three hour per weekday

"as available" limitation on public access hasn't prevented the Folsom Street station from being the highest volume station on PG&E's entire system. PG&E's refueling customers simply schedule their refueling activities at times when the stations are available for public access refueling.

Also, the level of service being provided at PG&E's public access refueling stations is already reflected in the cost of owning and operating those stations. Presumably, if all 24 stations were available for public access refueling on a 24/7 basis, and other service attributes were of a higher quality, PG&E's total cost of service would be higher, commensurate with the additional costs that would be incurred as a result of providing a higher level of service availability or quality.

VIII. PG&E'S ARGUMENT THAT SINCE ITS PUBLIC ACCESS STATIONS WERE BUILT TO SERVE ITS FLEET VEHICLES, ALL OR VIRTUALLY ALL OF THE FIXED COSTS OF THESE STATIONS SHOULD BE ASSIGNED TO FLEET USE IS WITHOUT MERIT.

PG&E has argued in Rebuttal Testimony and other documents that since the 24 public access refueling stations were originally built to serve PG&E's NGV fleet, the fixed costs of the stations should be charged to PG&E's fleet and not to public access refueling services. As Karen Lang said in her Declaration (Exhibit 22, page 5): "The primary purpose of PG&E's NGV stations, even those with public access, is to serve PG&E vehicles. Therefore, the fixed costs associated with these stations should appropriately be allocated to PG&E vehicles and operations, not non-PG&E vehicles." On page 7, she goes on to say: "PG&E purposely chose stations with high throughput to minimize the average per unit fixed costs since these costs are more appropriately allocated to PG&E's fleet."

It is worth noting that this is an argument that PG&E first raised in Testimony in its Rebuttal Testimony. The Compression Cost Study presented in PG&E's Prepared Direct Testimony did not assign all of the fixed costs of PG&E's refueling stations to the PG&E fleet and did not make the argument that none or very few of the fixed costs of the stations should be recovered from third party refueling customers.

To argue that third party refueling customers should bear none or almost none of the fixed stations costs that are associated with providing them service is consistent with the kind of "anti-competitive" mindset that PG&E has consistently revealed throughout this proceeding.

The fact is that capital-related expense is being incurred by PG&E to provide public access refueling service at its public access stations. Again, the question is if in PG&E's view third party refueling customers shouldn't bear their share of this expense, who instead should pay them? Clean Energy submits that it is far more appropriate for third party refueling customers to pay the share of the station fixed costs which are attributable to serving them, rather than have core residential and commercial customers bear them though the operation of the CFCA.

The reason why PG&E built the stations now providing public access refueling service has no bearing on what the G-NGV2 rate should be for serving third party refueling customers at those stations. As PG&E has repeatedly indicated, all of its public access stations were initially built to meet fleet refueling requirements. This assertion however is disputable. D.91-07-018 at page 24 says: "PG&E has proposed a two-year program to cost approximately $12.5 million which will provide:"

> "Installation of 19 additional CNG refueling stations to service PG&E and customer NGVs in 1991 and 1992. . ."

D.91-07-018 goes on to say at page 25:

> "DRA asserts that by the end of January 1991, PG&E will have a total of 14 CNG refueling stations located at various PG&E sites throughout the Bay Area. Seven of these 14 stations will permit full public access. Five of these 14 stations will only permit PG&E vehicles to be refueled there. Two of the 14 stations will allow limited customer access, meaning the customer's vehicle enters PG&E's service yard to be refueled by a PG&E employee."
>
> "When PG&E built these refueling facilities, PG&E intended to make CNG available to PG&E customers at these sites and, considering the current number of NGV customers and the number of CNG refueling stations that are in operation, it is apparent that the current PG&E infrastructure is underutilized."

For example, to argue that the seven stations which were intended to "permit full public access" were built exclusively to serve PG&E's fleet refueling requirements is disingenuous at best.

It is true that if 35 PG&E's CNG refueling stations did not provide third party refueling services, the full cost of the stations, including the fixed costs, would be recovered in base rates from all core customers. The simple fact though is that 24 of those stations now provide public access refueling services charged at the G-NGV2 rate. Because 24 of the stations are now also

being devoted to providing public access refueling services, then the fixed costs of those stations should be allocated between public access and fleet refueling usage, not all charged to fleet refueling. It is a basic principle of cost allocation that those customers who benefit from the costs should also bear them. It makes no sense as PG&E argues that the fleet should, therefore, bear all of the fixed costs of those stations, regardless of how the stations are now being used. This argument, if accepted by the Commission, would have the effect of shifting public access station fixed costs onto non-participating core residential and commercial customers rather than to the public access refueling customers on whose behalf they are being incurred and to whom they should be assigned.

IX. PG&E REPEATEDLY MISLEADINGLY STATES OR IMPLIES THAT THE STATIONS IT CHOSE TO EXCLUDE FROM ITS COMPRESSION COST STUDY ARE THOSE LOCATED IN REMOTE OR RURAL LOCATIONS.

In PG&E's Testimony (Exhibit 1, page 4-27 lines 7-9), its Rebuttal Testimony (Exhibit 4, page 6, lines 30-31) and its Cross Examination of Clean Energy's witness, PG&E repeated states or implies that the stations it chose not to include in its 5 station sample are those located in remote or rural areas. In his Rebuttal Testimony (at page 6, lines 30-31) PG&E's witness said: "Therefore, PG&E correctly excludes NGV stations with low public throughput, typically located in remote locations." From a review of the documents, it appears that PG&E considers its stations in Grass Valley, Marysville, Los Banos and Chico to be in remote or rural locations. Chico has a population of 107,000, hardly a "rural" location.

PG&E has identified 4 of the 19 stations that it chose to exclude from the scope of its Compression Cost Study as being located in remote or rural locations. Among the remaining 15 stations which were excluded, included are such locations as San Jose, Sacramento, Richmond, San Rafael, Fresno, Davis, Merced, Salinas, Santa Cruz and Stockton, among others. It would require a stretch of the imagination to consider these locations as being either rural or remote. In fact, they are urban locations.

In his cross examination of Warren Mitchell, PG&E's attorney cited PG&E's station located in Los Banos as being in a remote location. (Transcript, page 148, line 16). While it is certainly remote, Los Banos is located at the intersection of two major state highways, Highway 5 and Highway 152. Highway 5 is the main highway artery connecting the Bay Area and the Los Angeles Metropolitan area. Highway 152 carries traffic back and forth between its

intersection with Gilroy and Highway 101, and Los Banos and its intersection with Highway 5. While Los Banos is in a remote location, that fact doesn't mean that Los Banos is a low volume location for a public access refueling station.

X. PG&E'S ATTORNEY IN HIS CROSS EXAMINATION OF CLEAN ENERGY'S WITNESS ADDED MORE CONFUSION TO THE RECORD IN THIS PROCEEDING.

In his cross examination of Warren Mitchell, PG&E's attorney frequently employed the tactic of asking questions of the witness in which factually incorrect premises were embedded, and then asking the witness to agree that the question was true. Much of the resulting confusion arose because PG&E repeatedly interchangeably used the term "incremental costs" relying on two different definitions of the term. One definition is variable costs and the other definition describes third party refueling costs.

For example, on page 318 of the Transcript, line 9, PG&E's attorney asks the witness: "And do you agree with me that long-term marginal cost is more like incremental than it is like average, correct? In the question, it is not clear what PG&E's attorney means by "incremental." In fact, long-term marginal cost is closer in meaning to average cost than it is to variable costs, since both former cost measures take into account the capital- related expense arising from the fixed costs associated with providing public access refueling station services. On page 317 of the Transcript, PG&E quotes from the Commission's Resolution G-3380 as saying: "In D.95-11-035, we instructed the utilities to update their NGV rates according to the long-term marginal costs of providing the service. In ALs 1510-G-A and 3475-A, the utilities estimated the current ***incremental cost*** [emphasis added] of compression service using the embedded costs presented in their dismissed BCAPs."

Attachment C to SoCalGas' Advice Letter 3475-A which was approved by Resolution G-3380 clearly shows that the costs it took into account in proposing a compression surcharge of $0.74624 per therm included total fixed and variable costs for providing third party refueling services. The surcharge was not at all based solely or primarily on variable costs or so-called "incremental costs." Attachment B to SDG&E's Advice Letter 1510-G-B which was also approved in Resolution G-3380, clearly shows that the costs it took into account in proposing a compression surcharge of $0.80063 per therm included the total fixed and variable costs associated with providing public access refueling services. What SoCalGas and SDG&E did was

to include all of the fixed and variable costs associated with providing third party refueling services and then to calculate the appropriate compression surcharge using an average cost approach. No costs associated with refueling the SEUs' fleet were included in the calculation. As a result, SoCalGas' and SDG&E 's approach, unlike PG&E's, identified the costs associated with third party refueling which were in addition to the costs of providing fleet refueling services. But the costs included, as PG&E proposes, were not based primarily on the variable costs of providing refueling services. Consequently, the reference to "incremental cost" in Resolution G-3380 was a reference to the fact that the costs considered were those third party costs that are in addition to the costs of providing fleet refueling services. By this reference, the Commission wasn't approving a method of setting a utility public access refueling rate which was based largely on the variable costs associated with providing the service as PG&E's attorney implies, and as PG&E proposes in this proceeding.

In another example of creating confusion for the witness, the ALJ and the Record, relying again on the use of the term "incremental cost" in Resolution G-3380, PG&E's attorney goes on to attempt (at pages 321-322 of the Transcript) to discredit an answer Clean Energy provided to a PG&E data request in which Clean Energy said: "Clean Energy is not aware of the Commission ever having allowed an' incremental cost' approach as proposed by PG&E . . .in its Compression Cost Study in this proceeding to be used in setting the compression cost components of the public access refueling rates charged by California's gas distribution companies." In this context, Clean Energy was using the Economist's definition of "incremental cost," as being equivalent to "variable cost." Contrary to PG&E's attorney's mischaracterization, the data request response was completely accurate as originally submitted to PG&E. The Commission's reference to "incremental cost" in Resolution G 3380 was a reference to third party refueling costs, not variable refueling costs.

XI. THE SCOPE AND DEPTH OF THE DATA DEVELOPED BY PG&E IN ITS COMPRESSION COST STUDY ARE NOT CONSISTENT WITH THE PROVISIONS OF THE SETTLEMENT REACHED BETWEEN CLEAN ENERGY AND PG&E IN PG&E'S LAST BCAP WHICH REQUIRED PG&E TO PRESENT A NEW COMPRESSION COST STUDY IN THIS PROCEEDING.

The Compression Cost Study presented by PG&E in this BCAP was required by a Settlement Agreement which was reached between Clean Energy and PG&E in PG&E's last BCAP proceeding. As was noted earlier, the Settlement provides:

> "PG&E will conduct a study of the cost to provide compression service under Schedule G-NGV2 and present the cost study, and a proposal to update the compression rate in it next BCAP proceeding. The cost study will provide sufficient detail so that PG&E's proposed compression rate can be evaluated by parties using various cost and rate determination methodologies." (Settlement, pages 2-3).

The Compression Cost Study developed by PG&E only includes cost of service data for a sample of 5 significantly higher than average throughput stations that are not representative of the statistically average or typical PG&E public access refueling station.

Significant PG&E data limitations forced Clean Energy to base its recommended compression cost component proposal on its second most preferred approach and significantly limited its ability to evaluate "various cost and rate determination methodologies" in developing its recommended compression rate component. PG&E's data limitations also forced Clean Energy to rely more than it would have liked to on estimated rather than measured recorded data.

As noted in its testimony, Clean Energy's preferred approach would be to base the compression cost component on the PG&E cost of service associated with providing public access refueling at all 24 of its public access refueling stations and dividing that amount by forecast throughput to the third party retail customers who pay the G-NGV2 rate. PG&E does not charge itself the G-NGV2 rate when refueling its fleet. PG&E acknowledged (Exhibit 4, page 2 of the Declaration of Nielson D. Jones) that Clean Energy's and PG&E's preferred approaches were the same. Despite the fact that this approach was preferred by PG&E, and PG&E had almost 4 years to develop the data necessary to implement it, PG&E failed to do so.

Because PG&E in its Compression Cost Study did not disaggregate the costs of providing public access refueling service from the costs associated with refueling PG&E's fleet, Clean Energy was forced to base its recommended compression cost component on cost data which also included the PG&E costs of refueling its fleet.

XII. ONLY PG&E'S COSTS AND THROUGHPUT ARE RELEVANT IN DETERMINING THE PROPER COMPRESSION COST COMPONENT OF PG&E'S G-NGV2 RATE.

PG&E's rates should be based on PG&E's costs and throughput while SoCalGas' and SDG&E's rates should be based on SoCalGas' and SDG&E's costs respectively and SoCalGas' and SDG&E's throughput, respectively. The costs and prices of municipal refueling stations are also not relevant in calculating a compression cost component for PG&E.

XIII. SOCALGAS AND SDG&E WERE ABLE TO DO WHAT PG&E CONTENDS IT COULDN'T DO (I.E., SEPARATING THIRD PARTY COSTS FROM FLEET COSTS) IN DEVELOPING THEIR PROPOSED COMPRESSION COST COMPONENT.

PG&E complains in its prepared direct testimony that it was unable to segregate the costs associated with third party refueling from the costs associated with fleet refueling. It referred to them as "inseparable." In contrast to PG&E, the recently adopted decision (D.09-11-006, issued on 11/24/2009) in SoCalGas' and SDG&E's BCAP proceedings approved a proposed "compression cost adder" which was based solely on the estimated cost of providing third party refueling services using an embedded cost approach. The task which PG&E found impossible to accomplish was accomplished by SoCalGas and SDG&E. The SEUs "compression rate adder" was based on the average unit cost of providing third party refueling services, including both the fixed and variable costs of providing public access refueling.

In contrast, the obstacle that PG&E claimed it wasn't able to surmount, to segregate the cost data between third party and fleet refueling was overcome by SoCalGas and SDG&E. It's hard to imagine why PG&E couldn't have done the same thing, if it had wanted to.

XIV. HAVING A FULLY COST-BASED COMPRESSION COST COMPONENT OF UTILITY NGV RATES FOR PROVIDING PUBLIC ACCESS REFUELING SERVICES IS MORE IMPORTANT THAN MITIGATING THE AMOUNT OF THE RATE INCREASES NECESSARY TO ACHIEVE THEM.

While Clean Energy's recommended compression cost component of $1.00 per therm represents a significant increase from the PG&E compression cost component which is recovered through the G-NGV2 rate today (i.e., $0.57644 per therm), the increases in the compression cost component are well below the percentage increases in SoCalGas' and SDG&E's "compression cost adders" approved by the Commission in Resolution G-3380 which was issued in September,

2005 in response to Advice Letter filings of the two utilities. The rate increases (for SoCalGas, a 113 percent increase and for SDG&E, an 155 percent increase, in contrast to the 74 percent increase recommended by Clean Energy from what PG&E proposed in this proceeding) were proposed as a result of SoCalGas' and SDG&E's own initiative and their desire to have NGV rates in place which complied with D.95-11-035 by fully recovering the costs that were incurred by each of the two utilities in providing public access NGV refueling services.

Despite the protests of two parties who complained that the rate increases were too high, the Commission decided that having fully cost-based NGV refueling rates in place was more important than minimizing the resultant rate increases. In approving the Advice Letter filings of SoCalGas and SDG&E the Commission also approved an embedded-cost methodology for developing NGV refueling rates which recovered the utilities' average costs of providing third party refueling services.

Two parties protested SoCalGas' requested rate increase on the grounds that it was "excessive." In Resolution G-3380, which approved SoCalGas' and SDG&E's requested rate increases, the Commission said: "We deny the protests of Painter and Hargrave. SoCalGas has provided a sufficient showing indicating that the proposed rates are cost-based." (Resolution, G-3380, page 12). The Commission assigned greater importance to approving rates that were adequately cost-based, and to allow SoCalGas and SDG&E to achieve compliance with the Commission's direction in D.95-11-035, than to avoiding what were viewed by some as "excessive" rate increases. The CNG rates approved by the Commission in G-3380 were well above the percentage rate increase which would result from adopting Clean Energy's proposed compression cost component in PG&E's current BCAP.

It is an unfortunate situation that the compression cost component PG&E has been charging for at least the past 12 years is so far below its actual cost of providing public access refueling services that to correct the problem requires such a significant rate increase now. If PG&E had complied as directed by the Commission (in D.95-11-035) and increased its compression cost component to a level which would recover its fully allocated costs of providing compression services not later than January 1, 1997, there would be no "rate shock" issue in this proceeding concerning the G-NGV2 rate. The "rate shock" issue is entirely one of PG&E's own creation.

XV. IF THE COMMISSION AS IT SHOULD ADOPTS CLEAN ENERGY'S RECOMMENDED COMPRESSION COST COMPONENT, PG&E'S G-NGV2 RATE WILL STILL BE SIGNIFICANTLY BELOW [I.E., BY MORE THAN $0.70 PER GASOLINE GALLON EQUIVALENT (GGE)] RETAIL REGULAR GASOLINE PRICES IN THE BAY AREA.

The increase in the compression cost component that Clean Energy recommends will not cause PG&E to lose a significant price advantage at PG&E's public access refueling stations relative to the gasoline prices CNG is competing with. (See page 23 of Warren Mitchell's Prepared Direct Testimony in this proceeding). At the time Clean Energy's Testimony was filed, adopting a $1.00 per therm compression cost component would still leave PG&E G-NGV2 rate about $0.74 per gallon less than the then current average price of regular grade gasoline in the Bay Area.

XVI. CONCLUSION.

For the reasons explained in this Opening Brief, the results of PG&E's Compression Cost Study should be disregarded and Clean Energy's proposed $1.00 per therm compression cost component of the G-NGV2 rate should be adopted by the Commission.

Respectfully submitted,

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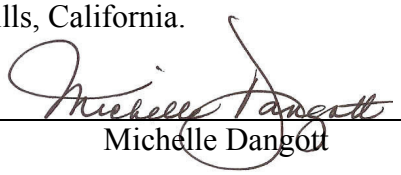
February 19, 2010

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of ***Opening Brief of Clean Energy Fuels Corporation*** on all parties of record in proceeding ***A.09-05-026*** by serving an electronic copy on their email addresses of record and by mailing a properly addressed copy by first-class mail with postage prepaid to each party for whom an email address is not available.

Executed on February 19, 2010, at Woodland Hills, California.



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