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

Application of Pacific Gas and Electric Company (U 39 M), San Diego Gas & Electric Company (U 902 E), and Southern California Edison Company (U 338 E) for Authority to Increase Electric Rates and Charges to Recover Costs of Research and Development Agreement with Lawrence Livermore National Laboratory for 21st Century Energy Systems

A.11-07-008

**RESPONSE OF PACIFIC GAS AND ELECTRIC COMPANY
(PG&E), SAN DIEGO GAS & ELECTRIC COMPANY (SDG&E)
AND SOUTHERN CALIFORNIA EDISON COMPANY (SCE)
TO MOTION TO DISMISS APPLICATION**

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Dated: November 17, 2011

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I. INTRODUCTION

On November 7, 2011, the Utility Reform Network (TURN) filed a motion (Motion) with the CPUC asking the Commission to dismiss the above captioned joint application. This untimely protest and unsupported request for dismissal is not warranted. Pursuant to the Commission's Rules of Practice and Procedure, Rules 11.1 and 11.2, Pacific Gas and Electric Company (PG&E), Southern California Edison Company (SCE), and San Diego Gas & Electric Company (SDG&E) (collectively, referred to as (Joint Applicants) or the investor-owned utilities (IOUs)) submit this response to the motion.

II. DISCUSSION

The motion fails both substantively and procedurally, and should be promptly and summarily denied. Procedurally the motion fails to comply with the Commission's rules.¹ Substantively, the motion is a rehash of TURN's September 9, 2011 protest and September 19,

¹ As set forth below, among other procedural defects the Motion is really an untimely amended protest disguised as a Motion to Dismiss the Amended Application with evidentiary testimony filed by Joint Applicants.

2011 comments set forth at the pre-hearing conference (PHC), and fails to support a motion to dismiss for reasons set forth below. Because the Motion contains rehashed arguments from prior comments, the IOUs will not burden the Commission by repeating their prior replies to those comments, but rather incorporates by reference its earlier pleadings, reply to protest, PHC comments, and joint application, which have already addressed these frivolous arguments.

To the extent that the Motion contains any new legal argument(s), these are erroneous and unsound. For example, the motion alleges that the Joint Applicants have not “met the utilities’ burden of proof”;² however the fact is that Movant (not the Applicant) has the burden of proof on a motion to dismiss. The standard of review on a motion to dismiss is as follows:

“Standard of Review

A motion to dismiss essentially requires the Commission to determine whether the party bringing the motion wins based solely on undisputed facts and on matters of law.”

D.06-04-010, p. 3.

The Commission considers and rules on a motion to dismiss in the same manner as any court – i.e., it is black letter law that in considering a motion to dismiss, the pleadings are construed in the light most favorable to the nonmoving party. Recently this point has been confirmed by Commissioner Bohn:

“A motion to dismiss requires the Commission to determine whether the party filing the motion wins based solely on undisputed facts and matters of law. (footnote citing to: D.01-08-061, 2001 Cal. PUC LEXIS 512, see also D.06-04-010, 2006 Cal. PUC LEXIS 116) . The Commission generally treats motions to dismiss as a court would treat motions for summary judgment in civil practice. *Id.*”
Ruling of Commissioner Bohn and Assigned ALJ dated November 6, 2008, p. 6.³

Moreover, the Commission has time-and-time-again consistently reached the same conclusion:

² See Motion, at p.3.

³ See JOINT RULING OF THE ASSIGNED COMMISSIONER AND ASSIGNED ADMINISTRATIVE LAW JUDGE REGARDING MOTION TO DISMISS, available at <http://docs.cpuc.ca.gov/efile/RULINGS/93461.pdf> .

The Commission treats a motion to dismiss essentially as a trial court would treat a motion for summary judgment. The Commission is thus required to decide whether the party bringing the motion is entitled to prevail, based solely on undisputed facts and matters of law. *State of California Department of Transportation v. Crow Winthrop Development Limited Partnership*, D. 01-08-061, 2001 Cal. PUC LEXIS 512.⁴

Clearly this Movant does not rely solely on “undisputed facts” in their arguments nor have they demonstrated in any way that they are entitled to prevail as a matter of law.

Accordingly, the IOUs note that an ALJ Ruling (or Assigned Commissioner Ruling) is sufficient to reject the motion.

In considering a motion to dismiss, the pleadings are construed in the light most favorable to the nonmoving party, and the facts alleged must be taken as true. *Hamm v. Groose*, 15 F.3d at 112; *Ossman v. Diana Corp.*, 825 F. Supp. 870, 879-80 (D. Minn. 1993). Any ambiguities concerning the sufficiency of the claims must be resolved in favor of the nonmoving party. *Ossman*, 825 F. Supp. at 880. Thus this motion to dismiss should be considered with all ambiguities resolved in the Joint Applicants’ favor, on the assumption that all factual assertions made by the IOUs are true; and would be decided in favor of Movant *only if they prove that the IOUs cannot possibly prevail as a matter of law, using undisputed facts.*

TURN’s Motion focuses on Joint Applicants’ burden of proof (often on specific issues which are not even identified in the October 18, 2011 Assigned Commissioner Ruling and Scoping Memo (Scoping Ruling)). Contrary to the Motion, in fact, Movant has the burden of proof on a motion to dismiss, and here TURN has completely failed to meet that burden.

The Commission’s review of the IOUs application is a prudent and necessary step to address “both the factual issues concerning the reasonableness of the research proposals and the

⁴ ADMINISTRATIVE LAW JUDGE’S RULING DENYING MOTION TO DISMISS, see <http://docs.epuc.ca.gov/Published/Graphics/26290.PDF>.

issues concerning the authority of the Commission to fund the proposed research”,⁵ and the motion to dismiss the application is premature, unsupported, and unwarranted. The Commission need not and should not allow its regulatory process to be sidetracked. Not only is the motion itself inadequate support for a dismissal, but the arguments in the motion are not new, and as such the Commission should address them when its own processes are complete, and consistent with the adopted schedule. For example, as agreed to consensually by the parties at the Prehearing Conference, the Scoping Memo provides a full and open process for the parties to litigate the issues raised in their protests and in TURN’s Motion to Dismiss, including an opportunity for Reply and Rebuttal Testimony, and evidentiary hearings to determine if the Joint Utilities have met their burden of proof to demonstrate that the Application is reasonable and complies with law. Movant has offered no justification for cutting short this process, which will aid the Commission’s decision-making by developing a complete record. Instead TURN offers unsupported, premature arguments such as “[i]f a utility finds that it has additional R&D needs between rate cases, the utility is free to divert other GRC approved revenue requirements to such needs or use shareholder money for this purpose. The Joint Applicants have failed to explain why this request deserves another bite at the apple, outside the rate case process. If the Commission allows this Application to move ahead, it sets a dangerous precedent that would encourage utilities to file other applications for R&D funding outside the GRC cycle as a means of obtaining more money from ratepayers.”⁶

Movant also ignores substantial evidence supporting the Application. For example the Commission has before it record evidence of the fact that Public Utilities Code Sections 740 and 740.1 authorize the Commission to allow the inclusion of the reasonable costs of research and

⁵ See Scoping Ruling, at p. 5.

⁶ See Motion, at p. 8.

development activities in utility rates. Contrary to the implication of TURN's Motion,⁷ there is no Commission precedent or order restricting the availability of ratepayer funds for R&D performed under an IOU partnership with a premier research and development institution for science and technology, as long as such R&D activities "offer a reasonable probability of providing benefits to ratepayers" in meeting one or more statutory objectives, including development of solutions to the emerging challenges of the 21st century energy system (electric and natural gas) for California.⁸ Further, Movant ignores the numerous Commission precedents showing that the Commission has a long history of supporting ratepayer funding for research and development activities and projects.⁹ Accordingly, the Motion to Dismiss should be rejected because it utterly fails to justify making a premature decision on the merits of the Application while the Commission's own review processes are still underway.

II. CONCLUSION

The Joint Applicants respectfully request that the Motion to Dismiss the Joint Application of PG&E), SCE, and SDG&E be rejected so that the Commission can fully consider the IOUs' Amended Application on the merits and based on the facts in the record.

⁷ See Motion, at pp. 8-9.

⁸ See Public Utilities Code Section 740.1.

⁹ See *e.g.*, the Amended Application with evidentiary testimony filed by Joint Applicants on October 19, 2011.

Dated in San Diego, California, this 17th day of November, 2011.

Respectfully submitted,

By: /s/ Allen K. Trial

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