

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



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**Order Instituting Rulemaking to Examine the
Commission's Post-2005 Energy Efficiency
Policies, Programs, Evaluation, Measurement
and Verification, and Related Issues.**

**R.06-04-010
(Issued April 13, 2006)**

**RESPONSE OF PACIFIC GAS AND ELECTRIC COMPANY
TO APPLICATION FOR REHEARING
OF D.08-12-059 FILED BY DRA AND TURN**

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February 17, 2009

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OF THE STATE OF CALIFORNIA**

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Pursuant to Rule 16.1 of the California Public Utilities Commission's (Commission) Rules of Practice and Procedure, Pacific Gas and Electric Company (PG&E) files this response in opposition to the Application for Rehearing of Decision 08-12-059 filed by the Division of Ratepayer Advocates (DRA) and The Utility Reform Network (TURN). The Commission should reject DRA/TURN's Application for Rehearing since they fail to demonstrate legal error in the Commission's decision.

I. INTRODUCTION

None of DRA/TURN's allegations amounts to legal error, requiring rehearing of the Commission's decision. The Commission's determination to award PG&E and the other utilities incentive payments for energy efficiency achievements based on the utilities' interim claims is well supported in the record, and is fully within the Commission's discretion. The issues raised in the Petition for Modification (PFM) that were the subject of D.08-12-059 required the Commission to reevaluate the status of its Risk/Reward Incentive Mechanism (RRIM) it had adopted in September 2007 (D.07-09-043), and modified in January 2008 (D.08-01-042). Given the unexpected circumstances over the course of 2008, i.e., the significant delay in the issuance of updates to the *ex ante* assumptions that would be used to evaluate the utilities' interim claim,

and the corresponding delay in the issuance of the Verification Report, the Commission was faced in December 2008 with:

[T]he apparent dilemma of either choosing to proceed with the process we approved in prior decisions, which places a premium on protecting ratepayers from overpayment, but compromises timeliness; or choosing to grant interim payments as proposed by the IOUs, which places a premium on timeliness, though potentially to the detriment of ratepayers.

However, this need not be an either/or proposition. (D.08-12-059, p. 16)

After thoroughly evaluating its prior decisions, its policy objectives, and the consequences of adopting the options available to it, the Commission ultimately chose a compromise position that granted the utilities a portion of their requested award for their energy efficiency performance, while protecting ratepayers from excessive cost by holding back a large portion of the incentive award. The Commission did exactly what is expected of a quasi-legislative constitutional agency, which is to review the substantial evidence in light of the record as a whole, and reach the right policy conclusions.

II. BACKGROUND

After many months of discussion and litigation, the Commission issued Decision 07-09-043, which adopted an energy efficiency risk/reward shareholder incentive mechanism to incent utilities to aggressively pursue the Commission's energy efficiency goals. This mechanism was intended to provide incentives for energy efficiency achievements similar to earnings, both in size and regularity, which can result from investments in utility plant such as power plants.^{1/} Decision 08-01-042 granted a petition for modification to make changes to the adopted incentive

^{1/} D.07-09-043, p. 4.

mechanism to enable the utilities to book any earnings resulting from interim claims. In both of these decisions, the Commission recognized the importance of making energy efficiency and any resulting earnings a regular part of the utilities' business:

- The adopted incentive mechanism “ensure[s] that utility investors and managers view energy efficiency as a core part of the utility’s regulated operations that can generate meaningful earnings for its shareholders.”^{2/}
- “Utilities must be able to recognize, or book, incentives on a regular basis for accounting purposes in a manner that can be expected and anticipated by the investment community. Otherwise earnings from energy efficiency programs are not truly on par with generation resources in the minds of investors...If incentives are not booked at regular intervals, they would result in a one time earnings adjustment that would likely be excluded from operating earnings, which are the basis for a company’s financial valuation. The uncertainty could result in a higher cost of financing. As a consequence, the utilities would not receive the full benefit of these shareholder incentives from the financial markets.”^{3/}
- [W]e recognized that an effective mechanism must include provisions for earnings (or penalties) at interim points during the three-year program cycle...the effectiveness of our adopted incentive mechanism is seriously undermined if the utilities cannot book authorized interim earnings...^{4/}
- “The interim claims become a reward or penalty for the success or failure in implementing the energy efficiency programs and the final claim a reward or penalty for the measured load impacts resulting from the programs...it ensures that the utilities and investment community can actually recognize or “book” the interim earnings that we may authorize.”^{5/}

While the utilities submitted their earnings reports on time in February 2008, the Energy Division (ED) failed to issue its evaluation assumptions and final Verification Report according

^{2/} D.07-09-043, p. 4.

^{3/} D.08-01-042, pp. 9-10, citing Amended Joint Petition for Modification, p. 13.

^{4/} *Id.*, p. 10.

^{5/} *Id.*, p. 24.

to the Commission's schedule adopted in Attachment 6 of D.07-09-043. Given the inexplicable delay in issuing the necessary reports to determine incentive payments or penalties, in October 2008 the Joint Utilities (PG&E, Southern California Edison Company, San Diego Gas & Electric Company, and Southern California Gas Company) filed a Petition for Modification of the Commission's prior decisions that requested a change in the process for evaluating the utilities' incentive claims. Rather than rely on the very controversial Verification Report, which would not be finalized until sometime in 2009, the Joint Utilities requested the Commission use the utilities earnings reports for purposes of determining the 2006-2007 interim claim. The Commission, in D.08-12-059, reviewed the entire record in the proceeding, evaluated its prior decisions establishing the RRIM, and determined the best course to take under the circumstances.

III. STANDARD OF REVIEW

Rule 16.1(c) of the Commission's Rules of Practice and Procedure require Applications for Rehearing to "[S]et forth specifically the grounds on which the applicant considers the order or decision of the Commission to be unlawful or erroneous, and must make specific references to the record or law. The purpose of an application for rehearing is to alert the Commission to a legal error, so that the Commission may correct it expeditiously." The standard for review by the courts set forth in Public Utilities Code section 1757(a) "shall not extend further than to determine, on the basis of the entire record ... whether any of the following occurred: (1) The Commission acted without, or in excess of, its powers or jurisdiction; (2) The Commission has not proceeded in the manner required by law; (3) The decision of the commission is not supported by the findings; (4) The findings in the decision of the commission are not supported by substantial evidence in light of the whole record; (5) The order or decision of the commission was procured by fraud or was an abuse of discretion; [and] (6) The order or decision of the

commission violates any right of the petitioner under the Constitution of the United States or the California Constitution.” There is “a strong presumption favoring the validity of a Commission decision.”^{6/} In addition, “findings of fact by the Commission are to be accorded the same weight that is given to jury verdicts and the findings are not open to attack for insufficiency if they are supported by any reasonable construction of the evidence.”^{7/} [Citation omitted]

DRA/TURN allege that D.08-12-059: (1) resulted in unjust and unreasonable rates; (2) lacked a rational basis for awarding the incentive payments; and (3) reflected an abuse of discretion. DRA/TURN also allege that the underlying Petition for Modification failed to demonstrate changed circumstances, and thus, the Commission committed legal error when it adopted the PFM. In reality, these allegations reflect a fundamental disagreement with the Commission’s policy decision in this case, and they do not amount to legal error requiring rehearing.

IV. THE INCENTIVE PAYMENTS AUTHORIZED IN D.08-12-059 REFLECT A REASONED DECISION TO BALANCE THE DESIRE TO REWARD UTILITIES FOR THEIR ENERGY EFFICIENCY PERFORMANCE WHILE PROTECTING RATEPAYERS FROM OVERPAYMENT; THE RESULT IS BOTH JUST AND REASONABLE TO RATEPAYERS

DRA/TURN accuse the Commission of violating Public Utilities Code section 451, claiming that D.08-12-059 resulted in unjust and unreasonable rates by granting the utilities interim incentive awards for 2006-2007 energy efficiency performance.^{8/} They point to the Commission’s rejection of the Draft Verification Report to support their argument. Reliance on the Draft Verification Report to support their legal error argument is inapposite. First, the Draft

^{6/} *Toward Utility Rate Normalization v. Public Utilities Com.* (1978) 22 Cal.3d 529, 537 (citations omitted).

^{7/} *Id.*

^{8/} DRA/TURN Application for Rehearing, pp. 10-11.

Verification Report was far from representing a final conclusion regarding the utilities' energy savings performance. It was still in draft form, and very controversial. There was no final, fully-vetted Verification Report for the Commission to rely on in addressing the issues raised in the PFM. Second, and more importantly, the Commission had already determined that adopting a Risk/Reward Incentive Mechanism for energy efficiency activities benefitted ratepayers.^{9/} As long as the Commission had a reasonable basis for awarding the interim claims to the utilities, it met its obligation under section 451 in ensuring just and reasonable rates.

The Commission decided in September 2007 that it was good public policy to adopt an incentive mechanism whereby utilities would be encouraged, through financial incentives, to invest in energy efficiency rather than energy supply infrastructure. In that public policy decision, the Commission weighed the costs and benefits to ratepayers of incenting utilities to invest in energy efficiency, and determined that ratepayers ultimately benefited from adopting such an incentive scheme.^{10/}

The Commission, in D.08-12-059, did not revisit the costs and benefits of whether to adopt an incentive mechanism. It continues to believe that a Risk/Reward Incentive Mechanism for energy efficiency performance benefits ratepayers and California in general. Rather, the Commission was faced with making a decision on how best to implement this policy under the circumstances it was facing at the end of 2008. Before it, the Commission had a very controversial draft verification report issued by Energy Division that had yet to be formally vetted. It also had timely-filed utility interim savings claims which had not been verified. Moreover, it was faced with the potential for delay beyond the calendar year, which it had

^{9/} D.07-09-043.

^{10/} D.07-09-043, pp. 2-3.

determined in its prior decisions to negatively impact the effectiveness of the RRIM.^{11/}

While clearly DRA/TURN would have preferred the Commission use the draft verification report as the basis to determine interim claims, the Commission was not under any legal obligation to do so. Having already determined that ratepayers benefited from an incentive mechanism for energy efficiency performance, the Commission was merely implementing that policy determination in the instant decision by deciding how best to determine energy savings performance when the evaluations of performance had not been completed pursuant to the adopted schedule. The Commission's decision to rely on the utilities' interim claim reports rather than a draft and unvetted Verification Report, and adopt interim incentive awards with significant holdback to protect ratepayers, reflects a just and reasonable result for ratepayers, as well as utilities.

V. THE COMMISSION'S THOROUGH REVIEW OF THE CIRCUMSTANCES SURROUNDING THE INCENTIVE CLAIMS IN D.08-12-059 IS SUPPORTED BY THE RECORD AND DEMONSTRATES A RATIONAL BASIS FOR ITS DECISION

A. Applying the "Substantial Evidence" Standard to the Commission's Decision Supports The Lawfulness of the Commission's Decision

DRA/TURN raise many objections to the reasoning and support cited in the Commission's decision, and there is no doubt that if DRA/TURN were the decision-makers on this matter, their decision would be quite different. However, their disagreement with the Commission's reasoning and support in the decision does not amount to legal error. Recently, the Commission articulated its "substantial evidence" standard in its decision denying TURN and ORA's^{12/} joint application for rehearing of the Commission's decision to transfer control of

^{11/} D.08-01-042, p. 10.

^{12/} ORA refers to the Office of Ratepayer Advocates, the predecessor organization to the Division of Ratepayer Advocates.

AT&T Communications of California and its related California affiliates from AT&T to SBC.

In their rehearing application, TURN and ORA alleged the Commission's decision was not supported by the record. The Commission interpreted the "substantial evidence" standard as follows:

Conflicts of evidence are to be resolved in favor of the findings of the administrative agency, and the fact that evidence is contradicted does not have a bearing on whether that evidence meets the substantial evidence test. Moreover, if findings are based on inferences reasonably drawn from the record, an administrative order is considered to be supported by substantial evidence in light of the whole record, and it will not be reversed.^{13/} [Citations omitted]

The fact that our findings differ from those proffered by TURN and ORA does not mean that we refused to consider relevant evidence. As the Decision states: "Our rejection of TURN's argument stems not from a failure to review its evidence, but from a decision that finds the evidence weak and the analysis faulty." (D.05-11-029, p. 118.) The fact that TURN and ORA disagree with our conclusions in the Decision does not demonstrate legal error, and we are under no obligation to reweigh the evidence in response to TURN and ORA's allegations.^{14/}

DRA/TURN, in the instant application for rehearing, make the same mistake as TURN and ORA made in the AT&T/SBC merger case. While DRA/TURN do not agree with the Commission's decision and the outcome, they incorrectly characterize the Commission's decision as without basis in the record. In fact, the Commission's reasoning in D.08-12-059 reflects a very rational basis for adopting the relatively modest incentive awards.

^{13/} *In the Matter of the Joint Application of SBC Communications, Inc. and AT&T Corp. for Authorization to Transfer Control of AT&T Communications of California, TCG Los Angeles, Inc., TCG San Diego, and TCG San Francisco to SBC, Which Will Occur Indirectly as a Result of AT&T's Merger With a Wholly-Owned Subsidiary of SBC, Tau Merger Sub Corporation*, D. 06-04-074, p. 26 citing *In re USP&C*, D.03-04-062, pp. 8-9; see also, *Toward Utility Rate Normalization v. Public Utilities Com.* (1978) 22 Cal.3rd 529, 538.

^{14/} *In the Matter of the Joint Application of SBC Communications, Inc. and AT&T Corp. for Authorization to Transfer Control of AT&T Communications of California, TCG Los Angeles, Inc., TCG Sand Diego, and TCG San Francisco to SBC, Which Will Occur Indirectly as a Result of AT&T's Merger With a Wholly-Owned Subsidiary of SBC, Tau Merger Sub Corporation*, D.06-04-074, p. 26.

B. None of DRA/TURN's Allegations of Insufficient Support in the Record Has Merit

DRA/TURN challenge Findings of Fact 3, 7, 8, 10, 11, and 12 in their attempt to show insufficient support in the record. In each of these challenges, DRA/TURN disagree with the findings, but fail to demonstrate legal error. Each of the findings of fact is supported by evidence in the record, just not the evidence that DRA/TURN agree with. As stated above, “[c]onflicts of evidence are to be resolved in favor of the findings of the administrative agency, and the fact that evidence is contradicted does not have a bearing on whether that evidence meets the substantial evidence test.”^{15/}

The Commission thoroughly analyzed the issue of timeliness in issuing incentive payments by reviewing its prior decisions, and evaluating the positions of the parties in this proceeding. Based on this analysis, it determined that timely issuance of incentive payments is critical to achieving the goal of creating a meaningful linkage between utility investments in energy efficiency and utility earnings. It then analyzed the basis for issuing interim incentive awards, taking into consideration the Energy Division’s draft assumptions and Verification Report, the parties’ positions reflected in the comments and replies to the PFM, and the potential impact on ratepayers of adopting awards for the utilities. Its ultimate decision to significantly increase the holdback applicable to the interim claim while still awarding the utilities for their energy savings performance demonstrates the rational nature of its final decision to award the \$82 million. The fact that the Commission’s findings and conclusions differ from those supported by DRA/TURN does not demonstrate legal error. The Commission’s decision is well-reasoned and fully supported.

^{15/} *Id.*

VI. THE COMMISSION APPROPRIATELY EXERCISED ITS DISCRETION IN DECIDING HOW BEST TO IMPLEMENT THE RRIM UNDER THE CIRCUMSTANCES

DRA/TURN allege that the Commission abused its discretion by awarding the utilities interim payments for their energy efficiency performance in 2006-2007. An abuse of discretion is established if: (1) an agency does not proceed in a manner required by law; (2) an order or decision is not supported by the findings; or (3) the findings are not supported by the record.^{16/} As described above, D.08-12-059 is fully supported by the record as a whole. It reflects a well-reasoned decision that balances the interests of ensuring an effective incentive mechanism that will drive energy efficiency performance to higher levels against the interest of protecting ratepayers from unjust and unreasonable rates. Contrary to DRA/TURN's allegations, the Commission's decision was based on substantial evidence presented in this case, resulting in the right policy conclusions.^{17/}

VII. THE COMMISSION DID NOT COMMIT LEGAL ERROR IN ADOPTING PARTS OF THE PFM. THE INEXPLICABLE DELAY IN THE ISSUANCE OF THE VERIFICATION REPORT, COUPLED WITH THE INACTION OF THE ALJ TO ADDRESS THE DELAY DEMONSTRATE CHANGED CIRCUMSTANCES FROM THE PROCESS ADOPTED BY THE COMMISSION IN D.07-09-043 AND D.08-01-042

DRA/TURN claim that the Commission committed legal error in adopting a portion of the Petition for Modification filed by the Joint Utilities because, from their perspective, nothing had changed to warrant a modification. Obviously DRA/TURN do not appreciate the changed circumstances caused by the Energy Division's inexplicable delay in issuing its evaluation

^{16/} D.08-03-023, p. 6 citing *Davis v. Civil Service Commission* (1997) 55 Cal.App.4th 677, 686-687; *Sierra Club v. State Board of Forestry* (1994) 7 Cal.4th 1215, 1236-1237.

^{17/} It is "within the discretion of the Commission to determine the factors material to public convenience and necessity . . ." and to state "what those factors are and to make findings on the material issues that ensue therefrom." *California Motor Transport Co. v. Public Utilities Com.* (1963) 59 C.2d 270, 275. The Commission used its broad discretion when it reviewed the totality of the record in this case and granted the IOUs' interim awards.

assumptions and Verification Report. D.07-09-043 adopted a schedule that parties were to rely on to ensure an orderly processing of the incentive mechanism. While DRA/TURN make much of their assertion that delays in the schedule were contemplated, in fact, the decision did not contemplate delays in the schedule for anything but extraordinary and unforeseen circumstances.^{18/} At no time did ED declare an extraordinary circumstance. And nothing unforeseen occurred to cause the delay that we all experienced. From February 2008, the utilities waited for ED to complete its studies, and ED would continuously string the parties along by committing to dates, and then missing them. It wasn't until October 2008, after the PFM was filed, that the ALJ altered the schedule. To this day, there is no explanation for the delay in the reports. To say that the apparently routine delay that was experienced in this proceeding was contemplated in the decisions is wrong. The Joint Utilities waited as long as they could before filing the PFM, waiting for some explanation or some change in the schedule. Hearing nothing, the Joint Utilities filed the PFM, pointing out the negative consequences of the unexpected delay in the reports.

The unexplained delay in issuing the necessary reports to evaluate the utilities' interim energy savings claims caused a significant change to the contemplated Risk/Reward Incentive Mechanism process. The Commission appropriately addressed this changed circumstance through its evaluation and resolution of the PFM.

VIII. CONCLUSION

DRA/TURN have failed to allege legal error in D.08-12-059. The Commission exercised its authority to review the RRIM in D.08-12-059 and issued a thorough and well-reasoned decision. DRA/TURN's Application for Rehearing should be denied.

^{18/} D.07-09-043, p. 125.

Respectfully submitted,

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By: _____ /s/
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February 17, 2009

CERTIFICATE OF SERVICE BY ELECTRONIC MAIL

I, the undersigned, state that I am a citizen of the United States and am employed in the City and County of San Francisco; that I am over the age of eighteen (18) years and not a party to the within cause; and that my business address is Pacific Gas and Electric Company, Law Department, PO Box 7442, San Francisco, CA 94120.

On the 17th of February, 2009, I caused to be served a true copy of:

**RESPONSE OF PACIFIC GAS AND ELECTRIC COMPANY TO APPLICATION
FOR REHEARING OF D.08-12-059 FILED BY DRA AND TURN – R.06-04-010**

Via electronic mail to all parties in R.06-04-010:

(See Attached Service Lists)

Via U.S. Mail to any party not showing an email address on the official service list in R.06-04-010.

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

Executed on this 17th day of February, 2009, at San Francisco, California.

By: _____ /s/
PAMELA J. DAWSON-SMITH

THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA EMAIL SERVICE LIST

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