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Decision 04-03-009 March 16, 2004

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Investigation into the ratemaking implications for Pacific Gas and Electric Company (PG&E) pursuant to the Commission's Alternative Plan of Reorganization under Chapter 11 of the Bankruptcy Code for PG&E, in the United States Bankruptcy Court, Northern District of California, San Francisco Division, In re Pacific Gas and Electric Company, Case No. 01-30923 DM. (U 39 M)	Investigation 02-04-026 (Filed April 22, 2002)

ORDER MODIFYING DECISION (D.) 13-12-035 AND DENYING REHEARING OF THE DECISION, AS MODIFIED

In this order, we dispose of the applications filed by: (1) City and County of San Francisco ("CCSF"); (2) City of Palo Alto ("Palo Alto"), (3) Aglet Consumer Alliance ("Aglet"), and (4) Office of Ratepayer Advocates, CCSF and Aglet (collectively, "Joint Applicants") for rehearing of Commission Decision (D.) 03-12-035. We have carefully considered each and every argument presented by Applicants and are of the opinion that no grounds for rehearing have been demonstrated. However, we shall modify D.03-12-035 to clarify the admission of testimony filed by Peninsula Ratepayers' Association ("Peninsula"). Rehearing of D.03-12-035, as modified, is denied.

I. BACKGROUND

On July 1, 2003, the Commission was asked to consider whether to adopt a proposed settlement agreement ("Settlement" or "PSA") entered into by Pacific Gas and Electric Company ("PG&E"), PG&E Corporation and Commission Staff. The PSA would allow PG&E to emerge from bankruptcy protection as a financially healthy and integrated utility. The PSA was structured to bring PG&E out of bankruptcy, to help PG&E achieve creditworthiness and to pay off all of its creditors. Creditworthiness required obtaining an investment grade credit rating, which would give PG&E access to the capital markets with low interest rates and enable the utility to continue providing safe, reliable and responsive service to ratepayers on a lowest cost basis. The PSA provided for rate reductions for ratepayers. Under the PSA, the utility's generation would continue to be subject to the Commission's jurisdiction. Parties to the proceeding were permitted to offer limited modifications to the PSA. On December 18, 2003, the Commission adopted D.03-12-035, which modified the PSA and approved this modified settlement agreement ("MSA").[1]

Applications for rehearing were timely filed by: (1) City and County of San Francisco ("CCSF"); (2) City of Palo Alto ("Palo Alto"), (3) Aglet Consumer Alliance ("Aglet"), and (4) Office of Ratepayer Advocates, CCSF and Aglet (collectively, "Joint Applicants").

CCSF raises the following legal errors: (1) The decision's requirement for ratepayer contributions violates the "just and reasonable" standard set forth in the Public Utilities Code, as the settlement proponents have allegedly failed to meet their burden of proof that the settlement is fair and necessary, and the decision contains no, or legally inadequate, findings on important issues concerning whether the amount of money is necessary to make PG&E creditworthy, justifies the settlement of the outstanding litigation, or is needed to ensure that PG&E would remain subject to CPUC jurisdiction; (2) the Commission acted arbitrarily and capriciously in failing to detail the basis for the revenues provided to PG&E and errs in allowing PG&E to recover costs for which there was no legal basis; (3) the decision unlawfully requires ratepayers to

[1] The Commission issued Resolution No. EX-1, dated January 8, 2004, in which the Commission confirmed and ratified counsel's approval of the form and substance of the bankruptcy court's order confirming PG&E's Chapter 11 Plan of Reorganization.

contribute capital to PG&E and allows PG&E to earn a return on such contribution; (4) the Commission errs in approving provisions in the PSA that impermissibly bind subsequent Commissions; (5) the decision unlawfully affords the bankruptcy court control over key Commission responsibilities; (6) due process was denied with respect to issues involving the TURN/PG&E settlement, the rejection of CCSF's request to set aside submission and reopen the proceeding for the taking of additional evidence, and alleged role of Commissioner Peevey in the negotiation of the PSA. CCSF also makes a request for oral argument.

In its rehearing application, Palo Alto also challenges D.03-12-035 on the basis that the decision unlawfully binds future Commissions to the terms of the settlement. Palo Alto further asserts that the decision unlawfully impinges upon the Commission's ratemaking and regulatory authority, and the Commission has impermissibly abdicated its authority to the Bankruptcy Court.

Aglet raises several due process challenges to D.03-12-035 based on the procedure and schedule adopted for the proceeding. Aglet argues that the schedule was legally flawed in that it failed to provide a meaningful opportunity for discovery and analysis. It also alleges that the procedure unlawfully permitted the improper admission of previously excluded testimony on land use commitment that was not subject to cross-examination, and precluded the review and consideration of alternate plans presented by customer representatives such as Aglet. In addition, Aglet raises the following legal arguments: (1) The decision lacks sufficient record to justify why the MSA is just and reasonable, and the decision also fails to provide the required findings of fact and conclusions of law on the financial consequences of the MSA, in violation of Public Utilities Code Section 1705; (2) there is no legally adequate evidence to support the determination that "there is no question regarding the motives, independence, or profession competence" of the Commission Staff that negotiated the Proposed Settlement Agreement"; (3) the decision permits unjust and unreasonable rates, in terms of the approved regulatory asset, authorized returns on transition costs and authorized return on equity; and (4) there is no substantial evidence to support the funding of $30 million by ratepayers to provide wilderness experiences and urban parks, or for an additional $15 million for clean air technology. Like CCSF and Palo Alto, Aglet also argues that the Commission has no authority to bind future Commissions, and has unlawfully transferred its ratemaking jurisdiction to the Bankruptcy Court. In addition, Aglet alleges that the decision unlawfully "cedes Commission jurisdiction to commercial firms that plainly serve investor over ratepayer interests," and challenges the importance of the issuance of the investment grade ratings.

Joint Applicants claim that D.03-12-035: (1) unlawfully prevents this Commission and future ones from discharging their responsibility to set a reasonable and just return on equity; (2) unlawfully permits PG&E to recover from ratepayers costs incurred to benefit shareholders and costs imprudently incurred for ratepayers, and thus, results in unjust and unreasonable rates; (3) violates the Commission's responsibility to balance ratepayer and shareholder benefits and costs, and to achieve its goals at the minimum cost to ratepayers; (4) impermissibly fails to require PG&E to meet its burden of proving the reasonableness of costs to ratepayers; (5) indirectly prejudges as reasonable the Annual Transition Cost Proceeding costs without the benefit of hearings or brief; (6) is not support by a record to establish that ratepayer costs to return PG&E immediately to creditworthiness are reasonable; (7) fails to comply with Public Utilities Code Section 1705, in that the Commission failed to make findings concerning the relative effects on ratepayers and shareholders; (8) erroneously concludes that PG&E will only receive 60 cents on a dollar under the Settlement; and (9) violates the parties' rights to procedural due process and law, including how the TURN/PG&E settlement was addressed.

PG&E and the Official Committee of Unsecured Creditors ("Committee") filed responses to the applications for rehearing. Both respondents oppose the granting of the applications for rehearing.

II. Discussion

A. The MSA complies with state law and is binding on future Commissions.

Each of the rehearing applicants challenge whether the Commission may enter into a settlement that would bind future Commissions.[2] They contend the Commission's authority to adopt the MSA is limited by certain sections of the Public Utilities Code. (CCSF's Application for Rehearing, p. 15; Aglet's Application for Rehearing, pp. 7-8; Joint Applicants' Application for Rehearing, pp. 5-6; Palo Alto's Application for Rehearing, pp. 4-5.) In this instance, they assert that by adopting a settlement that ignores Public Utilities Code Sections 451, 453, 457, 728 and 1708, the Commission has exceeded its authority under state law. These assertions are without merit.

As an initial matter, none of the statutes listed by the rehearing applicants contain specific limits on the Commission's authority to enter into a settlement. (See Southern California Edison Co. v. Peevey (2003) 31 Cal.4th 781, 792 ["If PUC lacked substantive authority to propose and enter into the rate settlement agreement at issue here, it was not for lack of inherent authority, but because this rate agreement was barred by some specific statutory limit on [Commission's] power to set rates."].) The code sections relied on by the rehearing applicants do not prohibit us from entering into a settlement nor limit the terms under which we may do so. Further, as discussed below, the terms of the

[2] Paragraph 21 of the MSA reads in relevant part: "This Agreement and the Settlement Plan, upon becoming effective, and the orders to be entered by the Court as contemplated hereby and under the Settlement Plan, shall be irrevocable and binding upon the Parties and their successors and assigns, notwithstanding any future decisions and orders of the Commission."

MSA are not contrary to state law.[3]

Public Utilities Code Sections 451 and 728 require the Commission to ensure that utility rates are just and reasonable. (Pub. Util. Code, §§ 451, 728.) CCSF and Aglet contend that these sections are violated because the MSA prevents the Commission from protecting PG&E consumers from unjust and unreasonable rates during the term of the Settlement. (CCSF's Application for Rehearing, p. 16; Aglet's Application for Rehearing, p. 8.) We disagree. As discussed in greater detail in Part II.B below, while the MSA establishes the parameters for establishing one component of PG&E's rate, the Regulatory Asset, we have retained authority to establish PG&E's overall retail electric rates during the term of the Settlement. (D.03-12-035, pp. 28, & 32.) Additionally, as discussed in Part II.C below, we have determined that the provisions for setting the rates for the Regulatory Asset are just and reasonable. Therefore, there is no violation of Sections 451 and 728 of the Public Utilities Code.

Public Utilities Code Section 1708 permits the Commission to "at any time . . . rescind, alter or amend any order or decision made by it." (Pub. Util. Code, §1708.) Both CCSF and Palo Alto argue that since the Commission is voluntarily entering into a settlement by means of a Commission decision, Public Utilities Code Section 1708 is applicable. They contend that since the MSA binds the Commission to certain predetermined factors when setting rates, D.03-12-035 has precluded the Commission's ability to exercise its powers under section 1708. (CCSF's Application for Rehearing, p. 16; Palo Alto's Application for Rehearing,

[3] Palo Alto contends that the Commission's reliance on Southern California Edison Co. v. Peevey is misplaced, as the issues in that case did not "specifically relate[ ] to the Commission's ability or authority to bind future Commissions." (Palo Alto's Application for Rehearing, p. 3.) CCSF raises a similar argument in its rehearing application. (CCSF's Application for Rehearing, p. 17.) These arguments are without merit. In Southern California Edison Co. v. Peevey, the issue was whether the Commission acted consistently with Government Code Sections 11120 through 11132.5 and Public Utilities Code Section 454 when it adopted a settlement with Edison. (See generally, Southern California Edison Co. v. Peevey, supra, 31 Cal.4th at pp. 797-805.) Similarly, in this instance, we had to determine whether we were acting consistently with state law when we adopted a settlement with PG&E. Thus, we correctly relied on this California Supreme Court decision for our analysis of whether we could adopt the MSA.

pp. 4-5.) This assertion is incorrect. Public Utilities Code Section 1708 concerns the Commission's authority to modify its own decisions; it does not grant the Commission authority to modify contractual obligations, such as a settlement. While it is true we adopted the MSA though a decision, this decision does not, by itself, bind the Commission.[4] Rather, it is the MSA that binds the Commission, as well as the Bankruptcy Court's order confirming the MSA. (See Exhibit 122, Exh. D, p. 6.) As explained in D.03-12-035

> "There is a fundamental difference between the Commission's authority within the scope of its own proceedings, and the Commission's efforts to resolve litigation in courts. The Commission must abide by court orders and a subsequent Commission does not have the authority to ignore a court order approving a settlement to which the Commission is a party. Particularly here, where the public interest would be greatly served by getting PG&E out of bankruptcy, the Commission must have the ability to exercise its regulatory and police powers to resolve through a settlement the Bankruptcy Court litigation. Upon approval by the Bankruptcy Court of such a settlement agreement, there is no question that subsequent Commissions cannot disregard the court order approving the settlement agreement."

(D.03-12-035, p. 25.) Moreover, "to permit a governmental entity simply to repudiate any contract to which it had previously agreed would undercut a third party's ability to contract with a governmental entity." (Exhibit 122, Exh. D, p. 6.)

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[4] The rehearing applicants once again raise the argument that by approving a settlement by way of a Commission decision, the Commission's determination in Re Pacific Gas and Electric Company ("Diablo Canyon") [D.88-12-083] (1988) 30 Cal.P.U.C.2d 189, 223-225 that it lacks the power to approve settlements that bind future Commissions is applicable. (CCSF's Application for Rehearing, p. 16; Palo Alto's Application for Rehearing, p. 3; Aglet's Application for Rehearing, pp. 5-7.) This argument is still unpersuasive. In Diablo Canyon, we ordered a settlement between parties, whereas in this case, we are one of the parties entering into a settlement. Clearly, we cannot bind future Commissions to a settlement where we are not a party. However, as a party entering into the settlement, future Commissions are bound not only as a result of the contractual obligations of the settlement, but also by the Bankruptcy Court's order confirming the settlement. Moreover, adoption of such a settlement by way of a Commission decision does not turn the settlement into a Commission decision subject to Public Utilities Code Section 1708.

Finally, Bankruptcy Code Section 1129(a)(3) precludes confirmation of a settlement if California Law is violated. (11 U.S.C. § 1129(a)(3).) The Bankruptcy Court specifically addressed this issue in its amended memorandum decision approving the MSA and concluded: "this court is satisfied that the Settlement Agreement can be read not to bind future commissions beyond what is permitted by California law. Similarly, the Settlement Agreement can be read not to permit any greater delegation than is permitted by California law." (In Re Pacific Gas and Electric Company ["Confirmation Order"] (Bankr. N.D.Cal. 2004) 304 B.R. 395 (slip op., p. 36).) Thus, the Bankruptcy Court was also satisfied that there was no violation of state law.

For these reasons, we concluded that the MSA complied with state law. Accordingly, the MSA would be binding on future Commissions. Therefore, there are no grounds for granting rehearing on this issue.

B. The MSA does not cede any of the Commission's regulatory authority to the Bankruptcy Court or the rating agencies.

The rehearing applicants next identify three paragraphs in the MSA that they believe unlawfully cede the Commission's police power. This argument is unpersuasive. The Commission's authority to regulate public utilities in the State of California is pursuant to the State's police power. (See Motor Transit Company v. Railroad Commission of the State of California (1922) 189 Cal. 573, 581.) This includes ensuring that PG&E's ratepayers are protected from unjust and unreasonable rates or practices during the term of the MSA. (See D.03-12-035, p. 27.) As discussed below, entering into the MSA is a legitimate exercise of our police power, as it permits PG&E to emerge from Chapter 11 and ensure that it is able to provide safe and reliable electric and gas services to its customers. (See Santa Margarita Area Residents Together v. San Louis Obispo County Bd. of Supervisors (2000) 84 Cal.App.4th 221, 233 [concluding that zoning freeze in a development agreement was "a legitimate exercise of governmental police power in the public interest than as a surrender of police power to a special interest."].)

The rehearing applicants first point to Paragraph 22, which states: "The Parties agree that the Court shall retain jurisdiction over the Parties for all purposes relating to enforcement of this Agreement, the Settlement Plan and the Confirmation Order." (D.03-12-035, Appendix C, ¶ 22.) They maintain that this paragraph violates Public Utilities Code Section 1759 by allowing the Bankruptcy Court to review Commission decisions regulating PG&E rather than the California Supreme Court or Courts of Appeal. (CCSF's Application for Rehearing, p. 18; Palo Alto's Application for Rehearing, p. 5; Aglet's Application for Rehearing, pp. 11-12.) They are incorrect. Public Utilities Code Section 1759 provides in relevant part: "No court of this state, except the Supreme Court and the court of appeal . . . shall have jurisdiction to review, reverse, correct or annul any order or decision of the commission." (Pub. Util. Code, §1759.) The Bankruptcy Court is not a "court of this state," but a federal court. Public Utilities Code Section 1759 does not prevent the federal courts from also reviewing Commission decisions, so long as there is jurisdiction under federal law or the United States Constitution. Moreover, D.03-12-035 specifically modified the PSA such that

> "the modifications we have required to the PSA will result in the Commission retaining the authority over PG&E's rates and services subject to judicial review in the California appellate courts. <u>Except for its enforcement of the specific provisions in the settlement, as modified, the Bankruptcy Court will not be supervising the Commission's determinations as to PG&E's rates and services</u>."

(D.03-12-035, p. 34, emphasis added.) Thus, contrary to the rehearing applicants' contentions, the Bankruptcy Court will only be reviewing those decisions necessary to enforce the MSA. Further, the Bankruptcy Court echoes the conclusion set forth in D.03-12-035. (See Exhibit 122, Exh. C, pp. 6-10 - 6-11 [Bankruptcy Court Judge Montali providing examples of the Bankruptcy Court's limited role in reviewing Commission decisions and stating that "[a]ny order confirming the plan should expressly and explicitly state that this Court is not undertaking to supplant the state administrative and judicial procedures that traditionally govern the affairs of the debtor as a public utility."]; see also, Confirmation Order, p. 36 (slip op.) ["[T]he Settlement Agreement can be read not to permit any greater delegation than is permitted by California law."].)

Palo Alto further contends that paragraph 22 is more expansive than the authority granted to the Court under the Bankruptcy Code and grants jurisdiction over Commission decisions unrelated to enforcement of the MSA. (Palo Alto's Application for Rehearing, pp. 5-6.) This contention has no merit. As discussed above, the Bankruptcy Court envisions its role as solely enforcing the provisions of the MSA. Further, the Bankruptcy Court acknowledges that in the event there is a dispute between the Commission and PG&E over interpretation of the MSA, it will be up to the court to determine the issue. However, "the Settlement Agreement can be read not to permit any greater delegation than is permitted by California law." (Confirmation Order, p. 36 (slip op.).) "[U]tility ratemaking is the province of governmental regulatory commissions, such as the Commission, rather than the Bankruptcy Court" and the Bankruptcy Court has previously determined that it is best to leave this regulatory function to the Commission. (D.03-12-035, pp. 22-23.) Furthermore, the Bankruptcy Code specifically provides that the Bankruptcy Court may, "in the interest of justice, or in the interest of comity with State courts or respect for State law, [abstain] from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11." (28 U.S.C. § 1334(c)(1).) Thus, contrary to Palo Alto's belief, the MSA does not grant the Bankruptcy Court jurisdiction beyond what is permitted under the Bankruptcy Code and State Law, nor has the Bankruptcy Court interpreted the MSA to have done so.

Both CCSF and Palo Alto also argue that paragraph 22 would permit the Bankruptcy Court to interpret matters reserved for the Commission, such as ratemaking. (CCSF's Application for Rehearing, pp. 19-20; Palo Alto's Application for Rehearing, p. 6). This assertion is equally unavailing. The Bankruptcy Court has shown great deference to the Commission's authority and indicated: "the [Bankruptcy] Court is being asked to enforce the reorganization agreement. Nothing more." (Exhibit 122, Exh. C, p. 6-10.) In the Confirmation Order, the Bankruptcy Court also states that the MSA "does not improperly surrender the Commission's section 728 ratemaking authority, nor does it transform this court into a 'regulatory Supreme Court.' " (Confirmation Order, pp. 23-24 (slip op.).) Further, D.03-12-035 modified and clarified certain provisions of the settlement "which could otherwise have arguably restricted the Commission's overall authority to set rates for PG&E."[5] (D.03-12-035, p. 35.)

More importantly, the MSA only establishes the parameters, but not the actual amounts, for one component of PG&E's rates, the Regulatory Asset. The Regulatory Asset represents approximately 5.4% of PG&E's 2004 bundled rate. (D.03-12-035, p. 28; see also, Exhibit 122, p. 9 (Clanon/Commission Staff).) Additionally, the remaining 95% of PG&E's bundled rate would be set by the Commission in future ratemaking proceedings. (D.03-12-035, pp. 28 & 81 [Conclusion of Law No. 7].) Thus, notwithstanding the MSA, we retain our discretionary authority to determine the overall retail electric rates for PG&E's customers, consistent with the exercise of our regulatory authority.

Aglet further contends that paragraph 32 of the MSA unlawfully "preempts" state law. (Aglet's Application for Rehearing, pp. 12-13.) We are not sure what this contention means. Aglet cites to paragraph 32 of the PSA, which had provided that the settlement agreement, the settlement plan and any court orders would be enforceable under federal law, "notwithstanding any contrary state law." (Aglet's Application for Rehearing, p. 13; see also, D.03-12-035,

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[5] PG&E has also testified that it does not intend to put any constraints on the Commission's regulatory authority, nor does it believe that the Bankruptcy Court has authority to set PG&E's rates. (RT Vol. 8, pp. 650 & 653 (Smith/PG&E).)

Appendix A, ¶ 32.) However, we deleted this last phrase from D.03-12-035, as "the settlement agreement, as modified by this decision, is not contrary to state law." (D.03-12-035, p. 26.) Thus, to the extent that Aglet considered this phrase to constitute a "preemption" of state law, the issue is now moot, as the phrase has been deleted in the MSA.[6]

Finally, Aglet asserts that paragraph 16(a) cedes Commission jurisdiction to commercial credit rating agencies because an investment grade credit rating is a condition precedent to the effectiveness of the MSA. (Aglet's Application for Rehearing, p. 13.) It is obvious that this provision does not constitute a ceding of our jurisdiction, as we have not granted the rating agencies any regulatory decision-making authority over PG&E. Moreover, since we had determined that it is in the public interest to have PG&E achieve an investment grade credit rating (D.03-12-035, pp. 40-42), it is only reasonable that we should make this a condition precedent to the effectiveness of the MSA.

Therefore, there is no basis for finding that we have ceded our police power to the Bankruptcy Court or the ratings agencies. Accordingly, there is no basis for granting rehearing.

C. The MSA is just and reasonable.

In reviewing and approving the MSA, we applied a just and reasonable standard. (See generally, D.03-12-035, pp. 17-21.) Under this standard, we were required to determine whether the Settlement Agreement, as a whole, was "fair, reasonable and in the public interest." (D.03-12-035, p. 20.) The standard was consistent with the requirements of Public Utilities Code Sections 451, 454 and 728, as well as Rule 51. Further, we were guided by the standards set forth in Commission precedents (e.g., San Diego Gas & Electric

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[6] Moreover, based on the arguments presented, it appears that Aglet may actually be alleging that the Commission is acting contrary to state law. However, as discussed extensively in this order, the MSA complies with state law. Therefore, this would also not be a basis for granting rehearing.

Company [D.92-12-019] (1992) 46 Cal.P.U.C.2d 538, 551; In Re Pacific Gas and Electric Company ("Diablo Canyon") [D.88-12-083] (1988) 30 Cal.P.U.C.2d 189) and court decisions (e.g., FPC v. Hope Natural Gas Co. (1944) 320 U.S. 591, 602, Officers for Justice v. Civil Service Commission (9th Cir. 1982) 688 F.2d 615, 625; Southern California Edison Co. v. Peevey, supra, 31 Cal.4th at p. 791).

> We noted:
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> "Under Rule 51 and §§451, 454, and 728, we review and approve a settlement if its overall effect is 'fair, reasonable and in the public interest.' California and U.S. Supreme Court decisions provide that we may consider the overall end-result of the proposed settlement and its rates under the 'just and reasonable' standard, whether the settlement or its individual constituent parts conform to any particular ratemaking formula. (*FPC v. Hope Natural Gas Co.* (1944) 320 U.S. 591, 602.)
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> In reviewing a settlement we must consider individual provisions but we do not base our conclusion on whether this or that provision of the settlement is, in and itself, the optimal outcome. Instead, we stand back from the minutiae of the parties' positions and determine whether the settlement, as a whole, is in the public interest."

(D.03-12-035, p. 20, emphasis added.) In applying the just and reasonable standard, we found:

> "The MSA is fair, just and reasonable and in the public interest. First, it adopts the regulatory asset and the cash allowances of the PSA, and therefore will pay creditors in full, and improve PG&E's credit metrics. Second, the MSA calls for the amortization of the regulatory asset 'mortgage style' over nine years. Third, it offers the state significant environmental benefits. Fourth, it provides for reduction of the regulatory asset on account of any refunds obtained from energy suppliers. Finally, it contains PG&E's commitment not to unilaterally attempt to disaggregate for the life of the plan."

(D.03-12-035, p. 38.) In our full discussion of the different provisions of the PSA and our weighing of the evidence in the record, we lawfully concluded that the MSA was fair, just and reasonable, and in the public interest. (See generally, D.03-12-035, pp. 21-65, analyzing whether the PSA was lawful and in the public interest.)

CCSF, Aglet and Joint Applicants argue that the Settlement Agreement, as modified, was not fair, just and reasonable, and in the public interest. In this context, many of the issues related to whether there were sufficient findings and evidence to support the determinations in D.03-12-035. Discussions about the adequacy of the findings and the sufficiency of the record can be found in Part II.D below; issues surrounding whether the Commission can bind future Commissions and whether the Commission has relinquished its regulatory authority to the Bankruptcy Court or the rating agencies are discussed in Parts II.A and II.B above.

These discussions are not repeated here. Instead, this section focuses on the following issues: (1) whether the Commission's assessment of the 9th Circuit decision in Southern California Edison v. Lynch was correct (2) whether the Commission erred by not considering alternative plans; (3) whether the Regulatory Asset could be treated as rate base; and (4) whether the 11.22% ROE on the Regulatory Asset was unreasonably high.

In its rehearing application, CCSF accuses the Commission of not considering, or giving little weight to the impacts of the Ninth Circuit determination in Pacific Gas and Electric Company v. California (9th Cir. 2003) 350 F.3d 932, on the risks for disaggregation. (CCSF's Application for Rehearing, pp.9-10.) In that decision, the Ninth Circuit dealt with the issue of express preemption. This argument is without merit.

In its opening comments, CCSF advocated a finding that the Ninth Circuit's decision on express preemption diminished the risk that PG&E could implement a disaggregation strategy and necessitated revisiting the Settlement to achieve a more accurate balancing of risk and reward.[7] (CCSF's Opening Comments to the ALJ PD and Peevey Alternates, filed December 8, 2003, pp. 2 & 6-7.) We did not find this argument persuasive and stated:

> "From the perspective of the Commission and ratepayers, the risks of continued litigation in PG&E's bankruptcy proceeding and the federal court are that some combination of the Bankruptcy Court and federal district and/or appellate courts ultimately may approve PG&E's request for injunctive relief, as well as its proposal to disaggregate its traditional utility business into four separate entities, three of which would be permanently outside the jurisdiction of the Commission. The U.S. Court of Appeals for the Ninth Circuit has recently ruled against PG&E's argument on express preemption issues. See *Pacific Gas and Electric Co. v. People of the State of California* (9th Cir. 2003) 2003 U.S. App. LEXIS 23568. However, even if there is no express preemption a Bankruptcy Court judge has affirmed the right of the Bankruptcy Court to impliedly preempt the Commission where necessary to implement a financially viable plan. (*Memorandum Decision Regarding Preemption and Sovereign Immunity*, February 7, 2002, *In Re. Pacific Gas and Electric Company,* Bankruptcy Case No. 01-30923DM, United States Bankruptcy Court, Northern District of California.) [Footnote omitted.]
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> Moreover, the Commission's costs and delays of further litigating against PG&E are likely to be massive, given the possibility of appeals through several layers of the federal court system, possibly all the way to the U.S. Supreme Court. On the other hand, PG&E faces similar risks, expenses, and delays. Even if it were to prevail in persuading the Bankruptcy Court to impliedly or expressly preempt state law and in so doing limit the Commission's jurisdiction, the Commission has vowed to appeal and further

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[7] The ALJ sent out a ruling on November 20, 2003, asking the parties: "In your comments on the proposed decisions in this proceeding, please comment on the effect, if any, of PG&E v. State of California, CPUC, et al. (9th Cir. 2003) 2003 U.S. App. LEXIS 23568), on each of the proposed decisions." (ALJ Ruling, dated November 20, 2003.)

> challenge PG&E's plan through the courts. If PG&E were not to prevail, the Joint Amended Plan would reduce the amount of money sought by PG&E."

(D.03-12-035, pp. 43-44.) CCSF cites to no law that required us to change our assessment of the litigation risk. Thus, CCSF's criticism has no merit.

Aglet contends that by not considering alternative plans, the Commission has unlawfully approved rates and ratepayer obligations that are not just and reasonable, as required by Public Utilities Code Section 451.[8] (Aglet's Application for Rehearing, p. 2.)

Pursuant to its broad constitutional and statutory authority, the Commission has the discretion to determine the scope of the proceeding. (See Cal. Const., art. XII, §§2 & 5;Pub. Util. Code, §§1701.1 & 701.) There is no legal requirement that we had to consider alternative plans. The proceeding was to determine whether the PSA was fair, just and reasonable, and in the public interest, and to determine whether the rates and ratepayer obligations were just and reasonable, pursuant to the law. With respect to the ratepayer issues concerning just and reasonableness, there was nothing to stop parties from making comparisons to the other existing plans of reorganization and to proposing modifications to the PSA, which TURN did. Thus, excluding alternative plans from the scope of the proceeding did not mean that the rates and ratepayer obligations adopted in D.03-12-035 were unjust and unreasonable.

Various rehearing applicants argue that there is no justification for: (1) treating the Regulatory Asset as rate base, and permitting ratepayer recovery of costs associated with the Regulatory Asset; (2) allowing the 11.22% return on equity ("ROE") on the Regulatory Asset; (3) failing to reduce the Regulatory Asset to reflect the costs that were denied to PG&E Corporation; (4) permitting

[8] Aglet makes this contention in the context of a due process argument. It claims that the Commission denied the parties due process when it failed to consider alternative plans. Aglet offers no legal support for this due process argument. Thus, there are also no grounds for finding a due process violation.

recovery of costs for the cancellation of the gas hedging contracts because P&GE could not maintain its credit rating; (5) permitting the recovery of costs for the bankruptcy and the related costs because PG&E has not demonstrated that the filing for bankruptcy was reasonable and prudent.

In raising these issues, these parties are essentially asking us to individually assess the recovery of each and every cost from ratepayers, and to affirmatively determine their reasonableness. In the context of considering a settlement agreement this does not make sense. "California and U.S. Supreme Court decisions provide that we may consider the overall end-result of the proposed settlement and its rates under the "just and reasonable" standard, not whether the settlement or its individual constituent parts conform to any particular ratemaking formula. (*FPC* v. *Hope Natural Gas Co.* (1944) 320 U.S. 591, 602.)" (D.03-12-035, p. 20.) There is nothing in Public Utilities Code Sections 451, 454 and 728 that prohibits us from taking such an approach in the context of a settlement.

With respect to the Regulatory Asset, CCSF argues that D.03-12-035 unlawfully requires ratepayers to contribute capital to PG&E and allows PG&E to earn a return on such contributions for over 9 years. (CCSF's Application for Rehearing, pp. 13-15.) Aglet raises similar issues about the Regulatory Asset and the ROE. (Aglet's Application for Rehearing, p. 10.)

CCSF cites to two decisions, City and County of San Francisco v. Public Utilities Comm'n (1971) 6 Cal.3d 119 and Southern California Edison Co. v. Public Utilities Comm'n (1978) 20 Cal.3d 813, to support its assertion that PG&E cannot earn a return on the Regulatory Asset. These two cases are distinguishable. The former decision involved allowing the utility to include as an expense for rate making purposes a large amount of federal income taxes." (City and County of San Francisco v. Public Utilities Comm'n, supra, 6 Cal.3d at p. 128.) In comparison, PG&E is liable for the Regulatory Asset as a part of an overall settlement structure to bring PG&E out of bankruptcy, to help PG&E

achieve creditworthiness, and to pay off all of its debts to creditors. Therefore, the Regulatory Asset represents a mechanism for the payment of existing bankruptcy indebtedness. Southern California Edison Co. v. Public Utilities Comm'n, supra, involved the Commission's consideration of recovery of current and future expenses, and not the payment of an existing debt. Thus, these decisions cited by CCSF are not applicable.

Since the Regulatory Asset is a mechanism that addresses PG&E's existing bankruptcy indebtedness, and not a capital contribution of ratepayers, and is considered part of ratebase, shareholders are permitted to earn a ROE on this asset.[9]

As to whether the 11.22% is too high, we looked at the evidence and determined that it was reasonable. (D.03-12-035, pp. 12-13.) The 11.22% would be a factor that could help PG&E achieve a needed investment grade credit rating. (D.03-12-035, p. 12, citing Exhibit 112, pp. 7-6 & 7-16 (Murphy/PG&E).) Also, the evidence in the record addresses the concerns that the 11.22% ROE floor for 9 years is unreasonably fixed. PG&E witness Walter Campbell testified that he disagreed with ORA, TURN and Aglet's assertion that shareholders would be guaranteed a return of 11.22 percent irrespective of changes in market conditions during the life of the Settlement Agreement. (See Exhibit 109, pp. WLC-6 to WLC-7 (Campbell/PG&E).) Campbell stated:

> "First, the Settlement Agreement does not guarantee a return of 11.22 percent. PG&E's actual returns will vary, as they always have, with PG&E's ability to manage its costs within the authorized revenues. To the extent that costs vary from those used to establish revenue requirements and rates, PG&E may or may not earn its authorized return. Also, as economic conditions change, the Commission can adjust PG&E's authorized ROE to appropriately reflect those

[9] PG&E Witness Paul Murphy testified that rating agencies would look at the $2.21 billion of the Regulatory Asset principal as the "functional equivalent of rate base." (RT Vol. 11, p. 1163 (Murphy/PG&E).)

> changes, subject to Section 2b and 3b of the Settlement Agreement. . . .PG&E believes that the 11.22 percent ROE floor is reasonable given current and projected interest rates. For example, the Commission recently affirmed that 11.6 percent continues to be a reasonable ROE for SCE, stating that 'Interest rate projections during the 2003 test year COC proceeding have not changed materially.' (D.03-08-063, mimeo at p. 4.)."

(Exhibit 109, p. WLC-7 (Campbell/PG&E).) Campbell further noted: "The implication is that firms that aspire to achieve ratings greater than BBB must actually be able, on average, to earn more than 10.9 percent. For example, the median earned return for firms rated single A is 12.5 percent, which would suggest that an authorized ROE of 11.22 may well be too low to achieve credit ratings higher than BBB." (Exhibit 109, p. WLC-7 (Campbell/PG&E).) Accordingly, we determined that the 11.22% ROE was just and reasonable.

CCSF further argues that D.03-12-035 errs in affording PG&E funds to retroactively increase its return on equity in place in 2001, because there is a category in Exhibit 184 labeled "Return and Taxes on Retained Generation Plant" for $387 million. (CCSF's Application for Rehearing, p. 12.) This argument has no merit. The 11.22% ROE floor is applied prospectively and not retroactively on the Regulatory Asset, that is a mechanism that addresses PG&E's existing bankruptcy indebtedness, in rate base. As discussed above, therefore, the Regulatory Asset is not an expense, such as a tax.

Three of the rehearing applicants claim that the Regulatory Asset should be reduced to reflect the fact that the decision disallowed recovery from ratepayers of bankruptcy-related costs of PG&E Corporation or any other PG&E affiliate related to the bankruptcy. As discussed below, there was no need to reduce the Regulatory Asset since that money not paid would become part of cash flow, and thus, reduce debt.

It was reasonable to permit recovery from ratepayers certain costs resulting from PG&E's filing of bankruptcy and related costs. As discussed below, and contrary to the assertions made in the rehearing applications, the record establishes that ratepayers benefited, namely from continued safe, reliable and responsive service. (CCSF's Application for Rehearing, pp. 11-12, Aglet's Application for Rehearing, p. 14, and Joint Applicants' Application for Rehearing, pp. 11-13.)

Finally, contrary to the assertion in CCSF's Application for Rehearing, p. 13, there is no basis to conclude that we should have reduced the Regulatory Asset to offset $96 million in net costs incurred regarding the gas hedging contract that was prematurely cancelled due to PG&E's inability to maintain creditworthiness. (See Exhibit 184, p. 5.) CCSF offers no legal basis why we needed to reduce the Regulatory Asset by this amount. In fact, the record shows that any reduction in the Regulatory Asset could have had implication to the investment grade credit rating, as discussion below.

Accordingly, for the reasons discussed, we properly and lawfully determined that the MSA was just and reasonable, and in the public interest.

D. The decision complies with Public Utilities Code Section 1705.

Aglet, CCSF and Joint Applicants argue that the Commission has violated Public Utilities Code Section 1705. These rehearing applicants raise sufficiency of findings and evidentiary arguments. For the reasons stated below, these arguments have no merit.

1. The decision contains adequate findings of fact.

Aglet contends that there is no finding concerning the financial consequences of the Modified Settlement Agreement. (Aglet's Application for Rehearing, p. 3.)

CCSF argues that there are no, or inadequate, findings regarding: "1) the amount of money provided under the settlement is needed to make PG&E

creditworthy, or 2) the amount of money provided is justified to settle outstanding litigation, or 3) the amount of money provided is needed to ensure that PG&E would remain subject to CPUC jurisdiction." CCSF also asserts that there is no finding of the strength of PG&E's claim and the litigation risks to ratepayers. (CCSF's Application for Rehearing, pp. 4 & 7.)

Joint Applicants argue that findings were lacking on the following: (1) "A ratepayer funded regulatory asset of $2.21 billion is necessary to achieve creditworthiness"; (2) "No regulatory asset less than $2.21 million can achieve PG&E creditworthiness"; (3) "PG&E cannot achieve safe and reliable electric service without a regulatory asset of $2.21 billion"; (4) "It is fair and reasonable balance of ratepayer and shareholder interests for shareholders to return to their earning level before the energy crisis, while PG&E ratepayers pay significant crisis costs for 10 or 20 years"; (5) "PG&E's declaration of bankruptcy was unavoidable, and was the only means PG&E had to continue safe and reliable service to ratepayers" (or in the alternative, "the Commission supports ratepayer funding for all utility costs, regardless of whether the utility has demonstrated that the costs were prudently incurred costs, or were incurred to benefit PG&E ratepayers"); (6) "The Commission has weighed all ratepayer and shareholder benefits and costs, and has arrived at a balance consistent with the law and the Commission's responsibilities"; and (7) "A settlement based on 100% or more of all lawful costs is reasonable." Joint Applicants assert that because they were contested issues, the Commission was required to make findings on these issues. (Joint Applicants' Application for Rehearing, p. 18.) Further, Joint Applicants contend that there is no finding regarding assessing a higher Regulatory Asset that needed. (Joint Applicants' Application for Rehearing, p. 16.) They also allege that the Commission by having no findings concerning the allocation of costs between ratepayers and shareholders, and why PG&E should be immediately return to creditworthiness at a significant expense to ratepayer cost. (Joint Applicants' Application for Rehearing, p. 17.)

Public Utilities Code Section 1705 provides that the Commission decision "shall contain, separately stated, findings of fact and conclusions of law by the [C]ommission on all issues material to the order or decision." (Pub. Util. Code, §1705.) In California Manufacturers Association v. Public Utilities Commission (1979) 24 Cal.3d 251, 258-259, the California Supreme Court held that such findings and conclusions are necessary to "afford a rational basis for judicial review and assist the reviewing court to ascertain the principles relied upon by the [C]ommission and to determine whether it acted arbitrarily, as well as to assist parties to know why the case was lost and to prepare for rehearing and review."

A review of the findings of fact in D.03-12-035, pp. 73-80, demonstrates that the Commission made all the separately stated, findings of fact on all issues material to the decision. Contrary to Aglet's assertion, the decision does contain findings of fact regarding the financial consequences of the MSA. (See D.03-12-035, pp. 76-77, 78-79 [Finding of Fact Nos. 20, 21 & 30].) Contrary to the claims of CCSF and Joint Applicants, there are findings of fact involving the Commission's assessment of the claims and the benefits of the Settlement Agreement, and the balancing of the litigation risks for PG&E, the Commission, and ORA, and the reasonableness of adopting the Settlement Agreement in light of this balancing. (See D.03-12-035, pp. 75-76 [Finding of Fact Nos. 13 & 14].) Finding of Fact No. 15 addresses the issue about returning PG&E immediately to creditworthiness. With respect to Joint Applicants' arguments regarding the Regulatory Asset, this determination is supported by Finding of Fact Nos. 16 and 21, as well as Conclusion of Law No. 7.

Also, the rehearing applicants are essentially asking us to make a finding on each and every issue raised during the proceeding. Public Utilities Code Section 1705 does not require separately stated findings of fact on every issue raised, just those that are material to the decision. (See Pub. Util. Code, §1705.) This statute only requires findings that are sufficient to "afford a rational basis for judicial review and assist the reviewing court to ascertain the principles relied upon by the [C]ommission and to determine whether it acted arbitrarily, as well as to assist parties to know why the case was lost and to prepare for rehearing and review."

The separately stated findings of fact in D.03-12-035, along with detailed discussion in the text, support our determinations on the material issues in the decision. They are sufficient to provide an understanding of our determinations, so that the parties can prepare for rehearing and review. Thus, the findings of fact are sufficient, and comport with the statutory requirements.

2. The decision is supported by the evidentiary record.

The rehearing applicants raised evidentiary arguments related to the following: PG&E's creditworthiness; the allocation between ratepayers and shareholders of risks and costs, the size of the Regulatory Asset; the filing of the bankruptcy and related bankruptcy costs; the 11.22% return on equity ("ROE") and the use of this ROE as a floor; the investment grade crediting rating and exit from bankruptcy; the additional funding for wilderness experiences and urban parks and for clean air technology; and the adequacy of representation. Some of these arguments are based on allegations that the Commission failed to weigh the evidence in the rehearing applicants' favor. For the reasons discussed below, none of these arguments have merit.

Generally, the law requires that the decision be supported by substantial evidence in light of the whole record. (Pub. Util. Code, §1757, subd. (a)(4); see also, Hillsboro Properties v. Public Utilities Commission (2003) 108 Cal.App.4th 246, 254 & 261.) " 'If such substantial evidence be found, it is of no consequence that the [decision-maker] believing other evidence, or drawing other reasonable inferences, might have reached a contrary conclusion.' " (9 Witkin, Cal. Procedure (4th ed. 1997) Appeal, §362, p. 412, citing Bowers v. Bernards

(1984) 150 Cal.App.3d 870.) It is the Commission that weighs the evidence. (See Eden Hospital Dist. v. Belshe (1998) 65 Cal.App.4th 908, 915.)

a) PG&E's Creditworthiness

Joint Applicants claim that the evidence does not support the Commission's objective of returning PG&E immediately to creditworthiness. (Joint Applicants' Application for Rehearing, pp. 16-17.) CCSF argues that there is inadequate evidence in the record as to the amount actually required to bring PG&E out of bankruptcy or investment grade, and thus, creditworthy. (CCSF's Application for Rehearing, p. 5.) These evidentiary challenges concerning creditworthiness are without merit.

The evidence clearly demonstrates the importance of achieving creditworthiness for PG&E. "Absent creditworthiness, major projects that are needed in the next few years are at risk. Without creditworthiness, P&G&E can not access the capital markets, thus limiting PG&E's expenditures for investment needed for safe, reliable service." (RT Vol. 8, pp. 555-557 (Smith/PG&E).) PG&E witness, Thomas E. Lumsden, testified that the settlement was the most expeditious way in terms of meeting financial feasibility requirements, getting PG&E out of bankruptcy and bringing PG&E "to financial health and essentially provide safe and reliable service to ratepayers on a lowest cost basis." (RT Vol. 9, p. 871 (Lumsden/PG&E); see also, Exhibit 123, p. 1.) He further testified that the settlement has a greater likelihood of success in exiting bankruptcy. (RT Vol. 9, p. 890 (Lumsden/PG&E).)

In this instance, creditworthiness required obtaining an investment grade credit rating, which was "necessary for PG&E to emerge from Chapter 11 and will directly benefit PG&E's ratepayers by reducing the cost of the financings (i) required for emergency and (ii) required to fund future operations and capital expenditures. (Exhibit 101, p. 1-4 (Smith/PG&E).) Further, investment grade credit rating was vital for the Company's future ability to serve its customers. (Exhibit 101, p. 1-6 (Smith/PG&E).)

The record demonstrates that creditworthiness was important to obtaining low cost credit and financing of major projects that would benefit ratepayers. Delay would have negative effects on costs for ratepayers. In his prepared rebuttal testimony, PG&E witness Jeremy McGuire noted: "The most identifiable market risk associated with delay is the interest rate environment." (Exhibit 115, p. JRM-7 (McGuire/PG&E).) He further testified that delay would mean increased costs in interest. (Exhibit 115, pp. JRM-7 to JRM-9 (McGuire/PG&E).) McGuire further observed: "Given the current relatively low credit spread environment, delay to effectiveness could result in higher interest rates. . . . Combined, the interest rate and credit spread risks of delay could result in an additional $2 billion of interest cost over the life of the debt. . . .." (Exhibit 115, p. JRM-9 (McGuire/PG&E).) Other PG&E witnesses concurred with this assessment. (See Exhibit 103, p. 2-2 (Harvey/PG&E); Exhibit 110, pp. 6-3 & 6-10 (Fetter/PG&E); Exhibit 112, pp. 7-4 & 7-10 (Murphy/PG&E).) Thus, this evidence supports the objective of returning PG&E immediately to creditworthiness.

Evidence also supported our determination that the Settlement, as modified, provided the required amount to bring PG&E to creditworthiness. PG&E witness Steven Fitch noted that based on his experience as a former Managing Director of the Global Power Group at Fitch, rating agencies would likely give a low investment-grade rating based on both quantitative statistics and qualitative factors. (Exhibit 110, pp. 6-12 (Fitch/PG&E).) Additionally, Paul Murphy, Managing Director at SG Barr Devlin agreed that "PG&E will likely be afforded weak investment grade credit rating" under the settlement agreement.[10] (Exhibit 112, p. 7-3 (Murphy/PG&E).) Murphy further noted: "[A]ny substantive

[10] This evidence also rebuts Joint Applicants' incorrect contention that the Settlement Agreement gets PG&E out of bankruptcy comfortably. (Joint Applicants' Application for Rehearing, p. 16.)

change in the terms of the Settlement would significantly impair the ability of PG&E to obtain investment grade credit ratings." (Exhibit 112, p. 7-4 (Murphy/PG&E).)

b) Allocation of Litigation Risks and Costs Between Ratepayers and Shareholders

Joint Applicants also make a broad argument that there is no evidence regarding the relative effects of the decision on ratepayers and shareholders. (Joint Applicants' Application for Rehearing, pp. 14-15 & 18-19.) They are apparently arguing that the record does not support the allocation between ratepayers and shareholders of the bankruptcy risks and costs. This argument has no merit.

D.03-12-035 cites to record evidence in evaluating risks and costs arising from the Settlement for both ratepayers and shareholders. (See generally, D.03-12-035, pp. 42-50 & 52-59, with references to Exhibits 120, 120c & 121 (McManus/PG&E); Exhibit 122 (Clanon/Commission Staff).) Weighing the evidence in the record, we assessed the risks and costs, as well as the benefits, that the Settlement would have on both ratepayers and shareholders. Based on this assessment, we determined that the allocation of costs proposed in the Settlement was in the public interest. (D.03-12-035, pp. 42-52 & 75-76 [Finding of Fact Nos. 13 & 14].)

In a related argument, Joint Applicants claim that there is no evidence to support the Commission's determination that "[t]he Settlement Agreement would allow ratepayers to settle PG&E's $11.8 billion in pre-settlement claims at a cost of $7.1 or $7.2 billion, or about 60 cents on the dollar, with PG&E giving up $4.6 billion in claims." (D.03-12-035, p. 46.) This claim is also unfounded.

PG&E presented testimony that identified $11.8 billion in unrecovered costs of utility service. (Exhibits 120 & 120c (McManus/PG&E).) Commission Staff estimated ratepayer contribution to be approximately $7.1 to $7.2 billion. (Exhibit 122, p. 8 (Clanon/Commission Staff); see also D.03-12-035,

p. 45, fn. 42.) Based on this record, we concluded that the ratepayer costs of the Settlement would be approximately 60% of those claims. (D.03-12-035, p. 47.) In other words, the ratepayers would be paying 60 cents on the dollar.[11] Accordingly, our determination is supported by record evidence.

c) The Size of the Regulatory Asset

In their rehearing application, Joint Applicants discuss why the record supports the claim that the Regulatory Asset was unreasonable and should be reduced, but the record is lacking as to how much.[12] (See Joint Applicants' Application for Rehearing, pp. 15-16.) By inference, Joint Applicants appear to be challenging the sufficiency of the evidence regarding the size of the Regulatory Asset.

The record evidence supports a Regulatory Asset of $2.21 billion. For example, a Regulatory Asset of $2.21 billion "provides sufficient cash flow and earning to support investment grade company credit ratings." (Exhibit 101, p. 1-7 (Smith/PG&E).) Paul Murphy testified that rating agencies look at the $2.21 billion of Regulatory Asset principal as the functional equivalent to rate base. (RT Vol. 11, p. 1163 (Murphy/PG&E).) Christie McManus testified that achieving an investment grade credit rating would result in savings of $2.1 billion over 10 years. (RT Vol. 12, p. 1321 (McManus/PG&E).) When asked about the necessity of the

[11] Joint Applicants also argue that because of a mathematical error, $2.5 billion in revenues collected in 2000 should have been netted against the $11.8 billion damage figure. Thus, they argue that ratepayers are really paying 100 percent of the damages. (Joint Applicants' Application for Rehearing, pp. 19-20, citing to Exhibit 184.) We were not persuaded by the argument to net out $2.5 billion in revenue and, thus, determined that PG&E and its shareholders were giving up $4.6 billion in claims. (D.03-12-035, pp. 46-48.) Joint Applicants have provided no new arguments to support reducing PG&E's damages claim by $2.5 billion. Therefore, their argument remains unpersuasive.

[12] The Regulatory Asset with a starting value of $2.21 billion is a new, separate and additional part of PG&E's rate base. (RT Vol. 8, p. 642 (Smith/PG&E); RT Vol. 11, p. 1163 (Murphy/PG&E).) It would be reduced with refunds from generators. "The reduction in the Regulatory Asset and the revenue requirements associated with it would allow a further rate reduction over the life of the Regulatory Asset. It is a 'mortgage-style' basis over nine years starting on January 1, 2004." (Exhibit 101, p. 1-7 (Smith/PG&E).)

Regulatory Asset to achieve the saving, McManus answered that "the settlement as a whole is necessary to achieve those ratings, and the [R]egulatory [A]sset is one part of that." (RT Vol. 12, pp. 1321-1322 (McManus/PG&E).) Susan Tierney testified that use of the Regulatory Asset "allows PG&E to repay its obligations in a manner that not only avoids rate shock for customers, but also affords near-term rate reductions." (Exhibit 107, p. 4-18 (Tierney/PG&E).) In response to an ORA proposal that "excess" cash could be return to ratepayers by reducing the size of the Regulatory Asset, PG&E witness Patterson stated: "PG&E plans to pay creditors by borrowing no more than necessary and using all its available cash, leaving only its restricted cash and a prudent level of working cash – there simply wouldn't be any excess cash." (Exhibit 191, p. 1 (Patterson/PG&E).) Further, this witness noted that the Settlement Agreement contains "explicit mechanisms for the possibility of greater cash receipts due either to more headroom in 2003 or refunds from generators or other energy suppliers." (Exhibit 191, p. 1 (Patterson/PG&E).)

Moreover, evidence demonstrated the possible harm from reducing the Regulatory Asset. In response to assertion that the Regulatory Asset was too high, PG&E witness Steven Fetter stated:

> "The quantitative factors used by the credit rating agencies will all deteriorate if the Regulatory Asset is reduced. More importantly, as I stated in my opening testimony, 'the credit rating agencies will want to see the CPUC approve the Settlement Plan substantially in the form under review in this proceeding . . . . If the Commission were to reduce the Regulatory Asset, as suggested by these parties, that action would likely cause the rating agencies to question the [Commission's] commitment to provide a supportive regulatory environment going forward. If this is the case, it would be less likely that PG&E would achieve company credit ratings of investment grade."

(Exhibit 111, pp. SMF-4 to SMF-5 (Fetter/PG&E).)

CCSF also argues that the Commission erred by not reducing the size of the Regulatory Asset when it disallowed the reimbursement of professional fees to PG&E Corporation. (CCSF's Application for Rehearing, p. 12.) We disagree. In D.03-12-035, we explained why we did not reduce the Regulatory Asset. " 'To the extent that PG&E's not reimbursing PG&E Corporation results in PG&E having more cash available at emergence from Chapter 11, this cash should be used to pay valid creditor claims and reduce the amount PG&E has to borrow.' " (D.03-12-035, p. 48, citing TURN/PG&E Joint Reply Comments.) Thus, it was reasonable not to reduce the disallowed professional fees from the Regulatory Asset and there is no basis for finding error.

Accordingly, the record evidence supported the size of the Regulatory Asset. Thus, we find no grounds for granting rehearing on this issue.

d) The Filing of Bankruptcy and Related Bankruptcy Costs

In their rehearing application, Joint Applicants assert that there is no evidence to support the assertion that ratepayers benefited from the bankruptcy and, thus, should pay for costs related to the filing for bankruptcy. (Joint Applicants' Application for Rehearing, pp. 11-12.) This assertion is without merit.

The evidence supports a determination that ratepayers benefited and, thus, are subject to bankruptcy related costs. With the energy crisis, PG&E lost its investment grade credit rating. (Exhibit 103, p. 2-1 (Harvey/PG&E).) "The loss of investment grade ultimately denied the Company access to credit and equity markets, undermined the Company's ability to pay its creditors, rendered the Company unable to continue procuring electricity (and even natural gas for a short time) in the open market, handicapped the Company's ability to continue making necessary investments in the energy delivery infrastructure, ..." (Exhibit 103, pp. 2-1 - 2-2 (Harvey/PG&E).) PG&E witness Gordon Smith testified that the bankruptcy was filed so as "to continue to allow the company to provide safe, reliable, responsive service." (RT Vol. 8, p. 569 (Smith/PG&E).) He further testified that the company was "running out of cash," and that meant that "suppliers, vendors, natural-gas suppliers were demanding up-front payments", and the bankruptcy allowed the Company to "continue to raise money and pay for ongoing service costs." (RT Vol. 8, p. 569 (Smith/PG&E).) In response to the question of whether there were other means for achieving safe and reliable service other than the filing of bankruptcy, Smith answered that PG&E did try to achieve a solution through either governmental agencies or the Legislature, but the Company believed that bankruptcy was the only means to stop the creditors from demanding up-front payment. (RT Vol. 8, p. 569 (Smith/PG&E).) PG&E witness Christie McManus also noted in a data request from CCSF: "The Chapter 11 protection for which PG&E filed in April 2001 enabled PG&E to continue to operate the utility business as it had in the past without further actions by suppliers and vendors to withhold goods or services." (Exhibit 172, Question and Answer #37.)

Obviously action which permits PG&E to continue to provide safe, reliable, responsive service is a ratepayer benefit. Getting PG&E out of bankruptcy would allow the utility to continue to adequately service its customers. Therefore, we reasonably determined that ratepayers should assume a share of the bankruptcy-related costs.

e) 11.22% Return on Equity ("ROE") As a Floor

In D.03-12-035, we approved setting a floor on the return on equity ("ROE") of no less than 11.22 percent until PG&E achieved a company credit rating of either A- from Standard and Poor or A3 from Moody's. (D.03-12-035, p. 12.) Aglet argues that the record was lacking to justify the adoption of the 11.22% ROE. (Aglet's Application for Rehearing, p. 11.) Joint Applicants further argue that there is no evidence that PG&E needs an ROE floor to emerge from bankruptcy or to maintain creditworthiness. (Joint Applicants' Application for Rehearing, pp. 7 & 15.)

The evidence, however, demonstrates that the floor of 11.22% for the ROE was reasonable and necessary to achieve the investment grade credit rating that was important for exiting bankruptcy. "To ensure that the Regulatory Asset provides the necessary financial strengthening, the proposed settlement provides a floor on the authorized return on equity (ROE) and the equity component of the capital structure associated with the Regulatory Asset (paragraph 2b)." (Exhibit 101, p. 1-8 (Smith/PG&E).) Smith also testified: "The 11.22 percent ROE is the ROE the Commission has currently authorized for PG&E. As the testimony of Paul J. Murphy (Chapter 7) demonstrates, this capital structure, with its 52 percent equity ratio, is necessary to support the investment grade credit metrics contemplated by the proposed settlement." (Exhibit 101, p. 1-10 (Smith/PG&E).) Walter Campbell, PG&E witness, testified that the 11.22% ROE was reasonable given current and projected interest rates. (RT Vol. 11, p. 1183; see also, Exhibit 109, pp. WLC-6 to WLC-7 (Campbell/PG&E).) In his prepared rebuttal testimony, Campbell stated:

> "To the extent that costs vary from those used to establish revenue requirements and rates, PG&E may or may not earn its authorized return. Also, as economic conditions change, the Commission can adjust PG&E's authorized ROE to appropriately reflect those changes, subject to Section 2b and 3b of the Settlement Agreement. . . . PG&E believes that the 11.22 percent ROE floor is reasonable given current and projected interest rates. For example, the Commission recently affirmed that 11.6 percent continues to be a reasonable ROE for SCE, stating that 'Interest rate projections during the 2003 test year COC proceeding have not changed materially.' (D.03-08-063, mimeo at p. 4.)."

(Exhibit 109, p. WLC-7 (Campbell/PG&E).)

Thus, there is a reasonable justification, supported by the record, for adopting a floor of 11.22% for the ROE.

f) The Need For An Investment Grade Credit Rating To Exit Bankruptcy

Aglet claims that "[t]here is no credible evidence that investment grade ratings are necessary for PG&E to exit bankruptcy." (Aglet's Application for Rehearing, p. 14.) This claim has no merit.

The record supports our determination that an investment grade rating is needed for PG&E to exit bankruptcy. PG&E witness Kent Harvey testified that the utility needs access to liquidity and efficiency of investment grade debt market in order to raise approximately $8 billion required to emerge from bankruptcy. (RT Vol. 8, pp. 700-701 (Harvey/PG&E).) In his prepared testimony, Harvey stated: "Without investment grade credit ratings for the securities to be issued for the exit financing, it is highly unlikely and without close precedent that PG&E could raise sufficient debt to pay all credits and emerge from Chapter 11." (Exhibit 103, p. 2-2 (Harvey/PG&E).) Jeremy McGuire testified on behalf of PG&E that achieving investment grade was critical upon exiting bankruptcy. (RT Vol. 10, pp. 1029-1030 (McGuire/PG&E).) D.03-12-035 also discusses evidence supporting the need for an investment grade credit rating. (See D.03-12-035, p. 40.)

The fact that Aglet may not consider this evidence credible is not controlling. Rather the task of weighing the evidence and determining the persuasive or credibility of the evidence rests with the decision-maker, namely the Commission. (See <u>Eden Hospital Dist. v. Belshe</u>, <u>supra</u>, 65 Cal.App.4th at p. 915.) In this instance, we considered the evidence presented and concluded it was credible. Thus, there was no error in relying on this evidence to conclude that an investment grate credit rating was necessary for PG&E to exit bankruptcy.

g) Additional Funding for Wilderness Experiences and Urban Parks and for Clean Air Technology

Aglet asserts that there is no record to support the additional $30 million ratepayer funding for wilderness experiences and urban parks, or additional

$15 million for clean air technology. (Aglet's Application for Rehearing, p. 15.) This assertion is without merit.

Aglet itself acknowledges there is evidence in the record to support the additional amount of funding with the reference to Exhibit 136, pp. 4-6, which is the prepared testimony of John Gamboa, Executive Director of Greenlining Institute and Latino Issues Forum ("Greenlining"). In this testimony, Gamboa recommended "total amount of cash available be increased by at least 50% and that the entire addition of $35 million also be used to recover administrative expense and costs of environmental enhancements to the urban land acquired." (Exhibit 136, pp. 4-5.) Further, Gamboa testified that the funding for clean energy technology should be increased from $15 million to $30 million, so that support "research and investment in clean energy technologies with particular emphasis on technologies that are available to and affordable by low-income communities, small businesses, new immigrants and working class families." (Exhibit 146, p. 6.) This testimony constitutes substantial evidence in light of the whole record for the Commission's determination to increase funding for wilderness experiences and urban parks, and clean air technology.[13]

That fact that the evidence is "opinion" does not mean that it does not constitute substantial evidence. The "opinion" is one provided by an expert witness, who was available for cross-examination. Parties did not cross-examine this witness. Further, this evidence was uncontroverted since no one offered any evidence in rebuttal. Thus, Aglet's argument that the testimony was not evidence has no merit.

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[13] In D.03-12-035, we determined that the additional $30 million was necessary to ensure that PG&E's urban ratepayers would realize the environmental benefits from the settlement, and the additional $15 million for clean energy technology would ensure "adequate planning and funding." (See D.03-12-035, pp. 64-65.)

h) Adequacy of Representation

Aglet raises an evidentiary argument regarding the adequacy of representation of ratepayer interests during the negotiation. (Aglet's Application for Rehearing, pp. 3-4 & 9-10.) Aglet makes this argument due to an inability of determining who negotiated for the Commission. The identities of the negotiators were not disclosed because of a gag order issued by the Bankruptcy Judge. (RT Vol. 7, pp. 377-383.) The fact that the identities of those who negotiated for the Commission Staff have not been disclosed does not minimize the fact that there is evidence that there was adequate representation, including that of the ratepayers.

A letter from the United States Bankruptcy Court judge who supervised and mediated the settlement negotiations noted that the Commission Staff provided adequate representation of ratepayers' interests, and performed this representation with "diligence, competence and professionalism." (Exhibit 146, p. 2.) Further, Commission Staff's witness, Paul Clanon, testified that he knew that prior to the negotiation, the personnel, whoever it was, who negotiated the Settlement Agreement had a standard they were interested in meeting before they actually entered the settlement. (RT Vol. 7, p. 388 (Clanon/Commission Staff).) This standard was a general public interest standard for resolution of the bankruptcy, and was the same one the Commission used in its "public filings in court and elsewhere." (RT Vol. 7, pp. 388-389 (Clanon/Commission Staff).) The standard included "weighing the long-term benefits to the ratepayers against the costs to the ratepayers within the context of a business climate for the utility itself." (RT Vol. 7, p. 389 (Clanon/Commission Staff).)

In D.03-12-035, we further noted the adequacy of representation for three reasons:

> "First, there is no question regarding the motives, independence, or professional competence of the governmental representatives in the negotiations. Second, the Commission staff has represented the Commission in the Bankruptcy Court on the

> Commission's own plans of reorganization for PG&E. Finally, the Commission staff has played a prominent role in representing the Commission before the Legislature, the investment community, the rating agencies, and other constituent groups throughout the California energy crisis. We do not doubt the technical, financial, and ratemaking expertise of the Commission staff."

(D.03-12-035, p. 50.) These conclusions are also supported by the testimony of PG&E's witness, Dr. Sandra Tierney, who observed:

> "When I took the settlement and read that it was the result of arms length negotiation between the staff of a public agency whose mission is to examine consumers' interests in balance with shareholders' interests of the regulated enterprise, I absolutely believed that there was a <u>voice for consumers</u> in the settlement room."

(RT Vol. 9, p. 860 (Tierney/PG&E), emphasis added.) Thus, contrary to Aglet's assertions, there is evidence that that the interests of the ratepayers was represented, and thus, there was "customer participation."

Furthermore, we noted that the adequacy of representation during the settlement negotiation is now moot because the fairness of the PSA in terms of ratepayer interests has been adequately represented by several parties, among them, "ORA, TURN, Aglet, and CCSF" during the proceedings. (D.03-12-035, pp. 50-51.) Accordingly, Aglet's arguments regarding the lack of evidence to demonstrate the adequacy of representation are unpersuasive.

E. There is no basis for finding unjust discrimination.

Public Utilities Code Section 453 prohibits public utilities from making or granting any preference or advantage or from establishing or maintaining any unreasonable difference "as to rates, changes, service, facilities or in any other respect." (Pub. Util. Code, §453.) Joint Applicants contend that by setting PG&E's ROE floor at 11.22% for nine years, the Commission has discriminated against Edison's and SDG&E's shareholders and ratepayers, whose

ROE will be set based on "timely local factors." (Joint Applicants' Application for Rehearing, pp. 6-7.) However, when considering a discrimination allegation under Public Utilities Code Section 453, the Commission must determine whether the difference in treatment of two similarly situated customers is justified by the circumstances. "A showing that rates lack uniformity is by itself insufficient to establish that they are unreasonable and hence unlawful. To be objectionable, discrimination must 'draw an unfair line or strike an unfair balance between those in like circumstances having equal rights and privileges.' " (Hansen v. City of San Buenaventura (1986) 42 Cal.3d 1172, 1180.)

In this instance, Joint Applicants have not demonstrated that PG&E, Edison and SDG&E ratepayers are similarly situated, or that establishing an ROE floor for PG&E customers rises to the level of unjust discrimination in violation of Public Utilities Code Section 453. Further, Joint Applicants' argument is speculative as what the Commission will or will not do with the ROE of the other utilities. Moreover, the issue is not before the Commission in this proceeding. Thus, there is no basis for finding unjust discrimination.

F. The decision complies with due process.

The rehearing applicants raise several due process arguments involving: (1) the alleged "compressed" schedule for the proceedings, (2) the Commission's adoption of the joint recommendation filed by TURN and PG&E for the refinancing/replacement of the Regulatory Asset with the DRC, once enabling legislation is passed; (3) the rejection of CCSF's petition to set aside submission in order to admit additional evidence; (4) the admission into evidence the Peninsula Testimony; and (5) the dismissal of Phase 2 of the ATCP.

Due process requires that parties be given notice and opportunity to be heard. There must be due notice and an opportunity to be heard, and the procedure must be consistent with the essentials of a fair trial, and the Commission must act upon the evidence and not arbitrarily. (Railroad Commission of California v. Pacific Gas & Electric Co. (1938) 302 U.S. 388, 393.) Due process requires a meaningful opportunity to be heard. (Alaska Roughnecks & Drillers Ass'n v. N.L.R.B. (9th Cir. 1977) 555 F.2d 732, 735, citing Armstrong v. Manzo (1965) 380 U.S. 545, 552.) However, this does not mean that something less that a full evidentiary hearing is not sufficient; rather the amount of process due depends on the particular situation. (Mathews v. Eldridge (1976) 424 U.S. 319, 343.)

In the case of ratemaking, there is no constitutional right by which an evidentiary hearing would be required. As noted by the California Supreme Court in Wood v. Public Utilities Commission (1971) 4 Cal.3d 288, 292:

> " 'Public utility regulation, historically, has been a function of the legislature; and the prescription of public utility rates by a regulatory commission, as the authorized representative of the legislature, is recognized to be essentially a legislative act. [Citation omitted]. As a ratepayer would have no constitutional right to participate in a legislative procedure setting rates, this right to be heard in a commission proceeding exists at all only as a statutory and not a constitutional right.' "

Thus, in the instant case, which is a ratemaking proceeding, there are no constitutional due process rights involved.

Further, the Commission has the authority to determine the type of "hearing" that will be used, subject to due process, public policy, and statutory requirements. (Pub. Util. Code, §1701.1, subd. (a), which provides: "The [C]ommission shall determine whether the matter requires a quasi-legislative, an adjudication, or a ratesetting hearing.") There are no due process requirements as to how long the proceeding must be; only that certain proceedings should not take longer than a designated period, e.g. resolution of adjudications within 12 months of initiation and ratesetting or quasi-legislative case within 18 months of the date of the issuance of the scoping memo. (Pub. Util. Code, §§1701.2, subd. (d) & 1701.5, subd. (a).)

1. The Schedule for the proceeding on the Settlement Agreement did not violate due process.

The proceeding on the PSA commenced on July 1, 2003, when PG&E filed and served the PSA, the Settlement Plan and a disclosure statement. A prehearing conference was held on July 9, 2003, to determine the scope of the proceedings for the Commission to consider the PSA. After the prehearing conference, the Assigned Commissioner issued a scoping memo to establish the scope and schedule for the proceedings. The Scoping Memo, as amended, provided "the proceeding was limited to determining whether the PSA should be approved by the Commission, including whether the settlement is fair, reasonable, and in the public interest, using the criteria encompassed in various Commission, state, and federal court decisions," and "[e]xcluded from the proceeding were alternative plans, rate allocation and rate design, and direct access issues." (D.03-12-035, p. 9; see also, Scoping Memo and Ruling of Assigned Commissioner, dated July 17, 2003, p. 1.) Parties conducted discovery and prepared their testimony, and evidentiary hearings were conducted on September 10, 11, 12, 22, 23, 24, 25, and 26. Numerous parties filed opening briefs on October 10, 2003 and reply briefs on October 20, 2003, when the matter was submitted. (See Formal File Nos. 7A to 11A.) The ALJ's Proposed Decision, along with two alternates from President Peevey, was issued on November 18, 2003. A number of parties filed opening comments and reply comments, which were required to be filed by December 8, 2003 and December 16, 2003, respectively. Alternates from Commissioners Brown, Lynch and Wood followed on December 4, 2003. Numerous parties submitted opening comments and reply comments to these alternates, which were required to be filed by December 12, 2003 and December 17, 2003, respectively. (See Comments filed on the ALJ's Proposed Decision and the Alternates in Formal File Nos. 12A to 15A.) Oral argument was held on December 2, 2003.

In its rehearing application, Aglet asserts that the adopted schedule was "compressed" so as to not allow parties a fair opportunity for "in-depth review of the detailed, complex showings made by the proponents of the [PSA]." (Aglet's Application for Rehearing, p. 2.) CCSF echoes a similar sentiment in its application for rehearing. (See CCSF's Application for Rehearing, p. 21.) Both Aglet and CCSF fail to cite to any constitutional provision or statute prohibiting the schedule that was applied, and thus, their assertion on this issue is unpersuasive.

Further, the schedule did provide the parties ample and fair opportunities to be heard on the PSA throughout the proceeding. As discussed above, the parties participated in a prehearing conference where the scope of the proceeding was discussed. The parties were given time to conduct discovery and prepare testimony. The evidentiary hearings provided the parties an opportunity to present their testimony as well as cross-examine witnesses. Parties were permitted to argue their positions in the opening briefs and reply briefs. Parties were afforded an opportunity to file opening and reply comments to the ALJ's Proposed Decision and the alternate decisions. The parties were also provided with an opportunity to discuss the effects of the Ninth Circuit decision and the modifications recommended by TURN/PG&E in their joint reply comments. The proceedings on the PSA lasted from July 1, 2003 to December 17, 2003. The duration of the proceedings were approximately five and a half months, and thus, was not unfairly "compressed" as Aglet alleges.

"When the rate-making agency of the State gives a fair hearing, receives and considers the competent evidence that is offered, affords opportunity through evidence and argument to challenge the result, and makes its determination upon evidence and not arbitrarily, the requirements of procedural due process are met. (Railroad Commission of California v. Pacific Gas & Electric Co. (1938) 302 U.S. 388, 393-394.) As discussed above, we provided parties ample and fair opportunity to develop their positions on the record and to present the arguments in support of their position. The schedule did not need to be lengthened, and no law required that we do so. Accordingly, due process was not violated.

2. TURN/PG&E Recommendation

On December 15, 2003, TURN and PG&E filed Joint Reply Comments on the Alternative Decisions of Assigned Commissioner Peevey ("Joint Reply Comments"). In these joint comments, TURN and PG&E recommended modifications to the second alternate proposed by President Peevey. They recommended the use of a dedicated rate component ("DRC") to refinance the Regulatory Asset, and set forth details for the recommended modification. (Joint Reply Comments, pp. 3-5.) The parties were given an opportunity to respond to this recommendation, albeit one day. Among those filing comments were ORA and CCSF, who provided substantial comments on the recommendation. In D.03-12-035, we adopted the recommendation, and observed "there has sufficient development in the current record to fully support the adoption of the TURN/PG&E recommendation." (D.03-12-035, pp. 70-72.)

In their rehearing applications, CCSF and Joint Applicants argue that there was not an adequate opportunity to comment on the recommendation in the Joint Reply Comments of PG&E and TURN. Specifically, CCSF argues that the one-day commenting period provided an inadequate opportunity to file comments on an "alleged" proposed settlement between TURN and PG&E. (CCSF's Application for Rehearing, p. 22.) Joint Applicants raise similar criticism of the short period of time to respond. (Joint Applicants' Application for Rehearing, pp. 21-22.) CCSF also contends that the record provides no information on the TURN/PG&E recommendation. (CCSF's Application for Rehearing, p. 23.) Thus, they both argue that due process was violated. (CCSF's Application for Rehearing, pp. 21-23; Joint Applicants' Application for Rehearing, pp. 21-22.)

We disagree. The allegation that the TURN/PG&E recommendation was a settlement, and thus, more time should have been given for comment has no merit. The TURN/PG&E recommendation was not a settlement, but a proposed modification to the Settlement Agreement.

The DRC was a subject of extensive hearings and briefing. The record supports the basis for the recommendation – in light of the savings for ratepayers with the use of the DRC. (See Exhibit 141, pp 2, 4 & 16 (Florio/TURN); Exhibit 143, p. 15 (McDonald/TURN).) Also, witnesses for TURN provide sufficient evidence for understanding the details concerning the substitution of the DRC for the Regulatory Asset. This substitution is no different from the TURN/PG&E recommendation, except in terms of timing. There was ample cross-examination of testimony regarding the use of DRC in lieu of the Regulatory Asset. (See Cross Examination of Michel Peter Florio (RT Vol. 14, pp. 1583-1615); Sandra McDonald (RT Vol. 12, pp. 1405-1439; RT Vol. 13, pp. 1434-1501); McDonald, Margaret Meal (RT Vol. 12, pp. 1386-1404).) The prepared testimony of these witnesses also provided sufficient details. (See generally, Exhibit 141 (Florio/TURN); Exhibit 142 (Meal/TURN); Exhibit 143 (McDonald/TURN). Other witnesses were cross-examined about the DRC. (See generally, Cross-Examination of Paul Clanon for Commission staff (RT Vol. 7, pp. 422-445); Susan F. Tierney for PG&E (RT Vol. 9, pp. 872-874); Steven M. Fetter for PG&E (RT Vol. 10, pp. 945-948).) Furthermore, parties briefed the DRC-related issues. (See generally, Aglet's Opening Brief, filed October 10, p. 29; ORA's Opening Brief, filed October 14, 2003, pp. 29-31; PG&E's Opening Brief, filed October 10, 2003, pp. 69-80; Opening Brief of California Manufacturers & Technology Association (CMTA), filed October 14, 2003, pp. 6-8; ORA's Reply Brief, filed October 20, 2003, p. 6; PG&E's Reply Brief, filed October 21, 2003, pp. 33-34; Commission Staff's Reply Brief, filed October 20, 2003 pp. 23-25.) Moreover, CCSF and Aglet had demonstrated their understanding of the savings of the DRC to the ratepayers, and shown their support of the DRC. (See CCSF's Comments to the Alternate Decisions of Commissioners Brown, Lynch & Wood, filed December 11, 2003, p. 2; Aglet's

Comments to the Alternate Decision of Commissioner Lynch, filed December 9, 2003, p. 3.) Thus, based on the above, the argument that there was a lack of sufficient information to be able to comment on the TURN/PG&E recommendation is baseless.

Even with the shortened period for commenting, many parties filed comments, including ORA, Aglet and CCSF. Other parties who filed comments were: the Official Committee of Unsecured Creditors (OCC); Merced Irrigation District (Merced); Coalition of California Utility Employees (CUE); the California Large Energy Consumers Association (CLECA) and the California Manufacturers & Technology Association (CMTA); the Energy Producers and Users Coalition, California Chamber of Commerce, Western States Petroleum Association, Silicon Valley Manufacturing Group, California Retailers Association, the Agricultural Energy Consumers Association, (Business Coalition); the Peninsula Ratepayers Association; and the City of Palo Alto. (D.03-12-035, p. 71.) The comments filed were detailed and gave explanatory reasoning for adopting or rejecting the TURN/PG&E recommendation.

Based on the record available to the parties for consideration of the TURN/PG&E recommendation and the amount of the comments received, including those from ORA, Aglet and CCSF, the one day turnaround to submit comments was adequate, and thus, the parties had a "meaningful" opportunity to be heard. Accordingly, there was not a due process violation.

In addition, interested parties will have a further opportunity to be heard on the matter, when PG&E and TURN file a future petition at the Commission for expeditious approval of the replacement of the regulatory asset by a DRC. During the review of this petition, we will need to make a determination that, on a net present value basis, the refinancing will save ratepayers money compared to the Regulatory Asset over the term of the securitized debt. (D.03-12-035, pp. 71-72.)

3. The Commission properly denied CCSF's petition to take new evidence after the record had been closed.

CCSF asserts that the Commission acted in an arbitrary and capricious manner by summarily denying its Petition to Set Aside Submission and Reopen the Proceeding for the Taking of Additional Evidence. (CCSF's Application for Rehearing, p. 23.) It contends that discussion of why the petition was denied is warranted because the evidence to be submitted concerned "whether the amount of cash flowing to PG&E under the proposed settlement could be reduced without jeopardizing the investment grade credit rating desired for the company." (CCSF's Application for Rehearing, p. 23.) This assertion is without merit.

Our review of the proposed settlement was not to determine whether each provision was the optimal outcome, but rather whether the settlement, as a whole, was in the public interest. (D.03-12-035, p. 20.) As discussed above, and acknowledged by CCSF, there was extensive briefing on the size of the Regulatory Asset. (CCSF's Application for Rehearing, p. 24.) CCSF's assertion that the proffered evidence would demonstrate that the size adopted in the MSA would result in a rating "one notch above the minimum BBB- rating required by the PSA" simply goes to the "optimal" size of Regulatory Asset, not whether the settlement, as a whole, was in the public interest. Further, as noted by Commission Staff, the proffered evidence did not differ from evidence already in the record, but would contribute to disruption of the proceeding. (Commission Staff's Opposition to Petition of the City and County of San Francisco to Set Aside Submission and Reopen the Proceeding, filed November 14, 2003, pp. 5-6.) Thus, there was no harm in rejecting this evidence.

Admitting CCSF's proffered evidence would also result in a delay in the proceeding. Although CCSF contends that there would be no need for additional hearings on this testimony because "the Commission the OCC and

PG&E were represented by counsel at the deposition" (CCSF's Application for Rehearing, p. 24), they are not the only parties to this proceeding. Therefore, there would be a possible due process violation if we were to admit this evidence without first providing all parties an opportunity to be heard.[14] The ALJ had also already warned parties that he was unlikely to allow anything into the record after the record had been closed stating: "I've got to stop the flow of paper. I mean, there won't be a decision." (RT Vol. 12, pp. 1267-1268.) This is exactly what happened in this instance. Therefore, CCSF should not be surprised that its petition was summarily denied. Accordingly, we did not act in an arbitrary or capricious manner when we summarily denied CCSF's petition.

4. The Decision is Clarified to Limit the Admission of Peninsula Ratepayers' Association's Testimony.

Aglet contends that due process was violated because the Commission improperly admitted direct and rebuttal testimony by Peninsula Ratepayers' Association ("Peninsula") regarding PG&E's land use commitment without permitting parties an opportunity to cross-examine Peninsula's witness on its merits.[15] (Aglet's Application for Rehearing, p. 2.) We find that a clarification is needed to address this point. In an ALJ bench ruling on September 9, 2003, the ALJ excluded this testimony, and prohibited cross-examination of the Peninsula's witness on its merit, on the grounds that it was duplicative. (RT PHC-2, pp. 44 & 51-52; see also, RT Vol. 9, p. 769.) However, in D.03-12-035, this ruling was

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[14] Commission Staff also disputes CCSF's claim that they were represented at the deposition, noting: "the Commission is not a party to this OII. Commission Staff is a party, is a proponent of the Settlement Agreement, was *not* present at Mr. Hulse's deposition, and had no opportunity to question him there." (Commission Staff's Opposition to Petition of the City and County of San Francisco to Set Aside Submission and Reopen the Proceeding, filed November 14, 2003, p. 4, fn. 2 (emphasis in original).)

[15] The ALJ bench ruling also excluded Peninsula from conducting any cross-examination during the hearing. (RT PHC-2, p. 52.) Aglet has raised this as a separate ground for finding a denial of due process. (Aglet's Application for Rehearing, p. 2.) However, Peninsula has not sought rehearing of this issue, and Aglet has no standing to raise it on Peninsula's behalf.

reversed and the testimony was admitted, and Peninsula was given intervenor compensation status. (D.03-12-035, p. 72.)

In admitting this testimony, it was not our intent to admit all of Peninsula's testimony, but rather only those portions that had been referenced or used by other parties in their testimony. For example, Greenlining's witness referred to portions of Peninsula's testimony in its supplemental testimony. (See, e.g., Exhibit 137-A, pp. 4 & 6 (Supplemental Testimony of Michael Phillips/Greenlining).) Admission of those portions would not violate due process, as there was an opportunity to cross-examine the parties referring to Peninsula's testimony. Therefore, we shall clarify the decision so as to better identify the limited portions of the Peninsula's testimony that are admitted. We note that our decision to authorize Peninsula to seek intervenor compensation, however, remains unchanged.

5. The MSA properly includes dismissal of the Phase 2 ATCP.

Joint Applicants challenge the inclusion, as part of the MSA, the dismissal of Phase 2 of the Annual Transition Cost Proceeding ("ATCP").[16] Phase 2 of the ATCP involves issues raised by ORA concerning PG&E's PX purchases. (RT Vol. 8, p. 659 (Smith/PG&E).) Gordon Smith, PG&E's witness, testified that the dismissal of the proceeding is part of the consideration for the Settlement Agreement. (RT Vol. 8, p. 659 (Smith/PG&E); see also, Exhibit 101-A, p. 17; RT Vol. 11, pp. 1262-1263.)[17]

[16] Paragraph 9 of the Settlement Agreement states in relevant part: "Commission shall resolve Phase 2 of the presently pending ATCP Application with no adverse impact on PG&E's cost recovery as filed." (D.03-12-035, Appendix C, ¶ 9.)

[17] In response to a question from the ALJ, PG&E witness, Christie McManus noted that if the $434 million was disallowed and $100 million was subtracted from the headroom, the disallowance would constitute a change in the Settlement Agreement to which PG&E had not agreed. (RT Vol. 11, pp. 1262-1263 (McManus/PG&E).) By inference, the change could be significant to whether there would still be a settlement.

Joint Applicants argue that by permitting the dismissal of Phase 2 of the ATCP, the Commission "in effect [found] PG&E's procurement activities to be reasonable, without the benefit of hearings or briefs." Thus, they raise a due process challenge.[18] (Joint Applicants' Application for Rehearing, p. 14.)

Joint Applicants' due process challenge is unfounded. They incorrectly concluded that the Commission has prejudged the prudence of the procurement activities with the approval of the Settlement Agreement. Rather, the decision simply allows the dismissal of the proceeding to be part of the consideration of the Settlement Agreement.

Throughout the proceeding, the parties, including ORA, had ample opportunities to be heard on this issue, including whether it was reasonable to consider the dismissal as part of the consideration and the likelihood of who would prevail. ORA took the opportunities to be heard by presenting testimony (Exhibit 139, pp. 5-11 to 5-12 (Burns/ORA)), cross-examining witnesses, RT Vol. 11, pp. 1262-1264 (McManus/PG&E); RT Vol. 10, pp. 1046-1047 (Montana/PG&E)), filing briefs (ORA's Opening Brief, filed October 10, 2003, pp. 15-16; ORA's Reply Brief, filed October 20, 2003, p. 6. QA), and submitting comments (see, e.g. ORA'S Opening Comments to PD and Peevey Alternates, p. 12; Opening Comments to Lynch, Brown and Wood, p. 9). Other parties, including PG&E and

[18] They further argue that the Commission has unreasonably passed on to ratepayers ATCP costs regardless of whether PG&E incurred them imprudently. (Joint Applicants' Application for Rehearing, p. 14.) This argument has no merit. The allocation of alleged unreasonable costs was not at issue. Instead, the issue was whether it was reasonable to include the dismissal of this litigation as consideration for PG&E entering into the Settlement Agreement. (See RT Vol. 8, p. 659 (Smith/PG&E); see also, Exhibit 101-A, p. 17.) It was on this issue that the Commission found that the MSA was, as a whole fair, just and reasonable, and in the public interest. Without the inclusion of the resolution of all energy-related litigation, including Phase 2 of the ATCP, there might not have been a settlement or exclusion may have affected on how the rating agencies look at the terms of the settlement in determining whether to give PG&E an investment grade credit rating. This is because rating agencies look at regulatory certainty and stability in assessing credit rating. (See Exhibit 110, p. 6-5 (Fetter/PG&E) & RT Vol. 11, p. 1123 (Murphy/PG&E), regarding the importance of regulatory certainty to rating agencies.)

California Farm Bureau Federation, also took a position in their pleadings on the issue. (See, e.g. PG&E's Opening Brief, filed October 10, 2003, pp. 48-49; Farm Bureau's Opening Comments on the Alternate Decisions of Commissioner Brown, Commissioner Lynch and Commissioner Wood, dated December 11, 2003, p. 3.)

Accordingly, ORA and the parties to the proceeding had a sufficient opportunity to be heard on whether this item should have been part of the Settlement.

G. President Peevey was not disqualified from voting on the MSA.

CCSF maintains that fairness and due process were further compromised because President Peevey represented the Commission in negotiating the Settlement, served as the Assigned Commissioner of this proceeding, and voted on the Decision adopting the MSA. (CCSF's Application for Rehearing, p. 25.) Thus, it asserts that as a result of his "multiple roles," President Peevey should have been disqualified from voting on whether to adopt the Settlement on the grounds that he was not an impartial decisionmaker. (CCSF's Application for Rehearing, p. 25.)

"[D]ue process requires a hearing by an impartial tribunal. . . . Certainly, a body that has prejudged the outcome cannot render a decision that comports with due process." (Bakalis v. Golembski (7th Cir. 1994) 35 F.3d 318, 325-326; see also, Fox v. Workers' Comp. Appeals Bd. (1992) 4 Cal.App.4th 1196, 1206.) Therefore, if a Commissioner were found to not be an impartial decisionmaker, due process would have required that he not vote on the decision. In this instance, there are no grounds for finding that President Peevey should not have voted on adoption of the MSA.

As an initial matter, CCSF has waived its right to even raise the issue of disqualification, since it failed to raise it earlier. Courts have found that "where an objection to the judge on the grounds of his disqualification was not made at the earliest practicable opportunity, it was waived by the conduct of the parties. . . ." (Sacramento Etc. Drainage Dist. v. Jarvis (1959) 51 Cal.2d 799, 801.) In this instance, there was sufficient evidence presented to conclude that President Peevey had likely participated to some degree.

The parties were well aware that the Bankruptcy Court had required settlement negotiations between PG&E and the Commission Staff. (D.03-12-035, p. 4.) During the first day of evidentiary hearings, there was discussion whether President Peevey had participated in these negotiation discussions. (RT Vol. 7, pp. 484-485.) The ALJ had also stated that, based on the evidence provided, he would conclude that President Peevey had participated in the settlement negotiation. (RT Vol. 7, p. 491.) No additional information has been provided since then. Had CCSF believed that President Peevey should have been disqualified from voting on the Settlement, it should have raised it at that time. At a minimum, it should have raised this issue in its comments to the proposed decision or President Peevey's alternate decisions. Yet it failed to do so until after the Commission adopted a settlement it did not like. Thus, not only did CCSF fail to raise this issue at the earliest practicable opportunity, but its failure to do so in any prior filings with the Commission would constitute a waiver of this right.

Assuming arguendo that CCSF had not waived its right to raise this issue, it is still without merit. Courts require a "clear and convincing showing that the agency member has an unalterably closed mind on matters critical to the disposition of the proceeding" before he would be disqualified. (Association of Nat. Advertisers, Inc. v. F.T.C. (D.C. Cir. 1979) 627 F.2d 1151, 1170.) CCSF simply asserts that due to President Peevey's multiple roles in this proceeding, there is a "likelihood that he (quite naturally) would be biased in favor of a settlement he helped negotiate." (CCSF's Application for Rehearing, p. 25.) Such a statement clearly does not meet the "clear and convincing showing" required by the courts, since CCSF has not demonstrated that President Peevey had already made up his mind and was not receptive to the evidence presented. In fact, President Peevey's willingness to modify the PSA based on arguments and evidence presented during the course of the proceeding demonstrates that he was not biased in favor of the PSA.

Finally, we note that CCSF's objection to President Peevey's "multiple roles" arises from his voting in favor of D.03-12-035, not that he had been allowed to vote in the first place. (CCSF's Application, p. 25.) In fact, CCSF failed to object to President Peevey's role as a decisionmaker in this proceeding until after the MSA was adopted. If CCSF had truly believed there was an appearance of unfairness, it should have raised it earlier. For these reasons, President Peevey's vote for a decision that CCSF did not like is not a denial of a fair hearing. Thus, we find no grounds for concluding that President Peevey should have been disqualified from voting on whether to adopt the MSA.

H. CCSF has failed to demonstrate grounds for granting its request for oral argument.

In its rehearing application, CCSF makes a request for oral argument. Its request states: "Pursuant to Rule 86 CCSF requests oral argument on this application for rehearing. Given the importance of this matter for PG&E and its ratepayers, this request is justified under the criteria set forth in Rule 86.3." (CCSF's Application for Rehearing, p. 2.)

Rule 86.4 of the Commission Rules of Practice and Procedure spells out the requirement for requesting oral argument on an application for rehearing. It states: "A party desiring oral argument should request it in the application for rehearing. The request for oral argument should explain why the issues raised in the application meet the criteria stated in Rule 86.3. . . ." (Code of Regs., tit. 2, § 86.4.)

Rule 86.3 sets forth the criteria for the granting of an oral argument. This rule provides: "An application for rehearing for rehearing will be considered for oral argument if the application or a response to the application (1) demonstrates that oral argument will materially assist the Commission in resolving the application, and (2) the application or response raises issues of major significance for the Commission . . . ." (Code of Regs., tit. 2, §86.3.) Further, "[t]he Commission has complete discretion to determine the appropriateness of oral argument in any particular matter." (Code of Regs., tit. 2, §86.3.)

In its application for rehearing, CCSF fails to explain why its request for oral argument meets the criteria set forth in Rule 86.3. It fails to demonstrate how oral argument will assist the Commission in resolving the application. Further, in support of its oral argument request, CCSF merely makes a brief and broad claim of "given the importance of this matter for PG&E and its ratepayers," and no other specifics. Therefore, CCSF's request for oral argument fails to meet the criteria set forth in Rule 86.4 and Rule 86.3. Accordingly, CCSF's request for oral argument is denied.

III. CONCLUSION

The rehearing applicants have failed to demonstrate grounds for granting rehearing of D.03-12-035. However, D.03-12-035 shall be modified to clarify the admission of the testimony filed by Peninsula Ratepayers' Association. Rehearing of D.03-12-035, as modified, shall be denied.

THEREFORE, IT IS ORDERED THAT:

1. On page 72 of D.03-12-035, the last sentence on the page is deleted and replaced with the following:

> "The rulings of the ALJ regarding admissibility of evidence, status as an intervenor, and status regarding intervenor compensation are affirmed, except for the following: (1) those portions of Peninsula Ratepayers' Association testimony that were referenced or used by other parties in this proceeding are admitted, and (2) Peninsula Ratepayers' Association is authorized to seek intervenor compensation."

2. On page 85 of D.03-12-035, Ordering Paragraph 8 is deleted and replaced with the following:

> "8. The rulings of the Presiding Administrative Judge are affirmed, except that Peninsula Ratepayers'

Association is authorized to seek intervenor compensation."

3. CCSF's request for oral argument is denied.

4. Rehearing of D.03-12-035, as modified, is denied.

This order is effective today.

Dated March 16, 2004, at San Francisco, California.

MICHAEL R. PEEVEY
President
GEOFFREY F. BROWN
SUSAN P. KENNEDY
Commissioners

I abstain, and reserve the right to file my reasons for abstaining.

/s/ CARL W. WOOD
Commissioner

I abstain, and reserve the right to file my reasons for abstaining.

/s/ LORETTA M. LYNCH
Commissioner

D0403009 Wood and Lynch Statement Attachment
Cover Letter to D0403009 March 16, 2004