

**DRAFT**

**PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA**  
**ENERGY DIVISION**

**I.D. # 10854**  
**RESOLUTION G-3429**  
**December 15, 2011**

**R E S O L U T I O N**

Resolution G-3429. Pacific Gas and Electric Company (PG&E) requests approval to execute a Servicing Agreement between the utility and the ClimateSmart Charity and to modify its ClimateSmart balancing accounts.

PROPOSED OUTCOME: PG&E's Servicing Agreement and the changes to its ClimateSmart balancing accounts as proposed in its supplemental advice letter are approved. Ordering Paragraph No. 7 of Decision 06-12-032 is modified to reflect the interest provisions of the Servicing Agreement. PG&E shall report to the Commission annually on the status of greenhouse gas (GHG) emission reduction contracts that were executed for the ClimateSmart program.

ESTIMATED COST: None.

By AL 2958-G-A/3344-E-A filed on November 9, 2011.

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**SUMMARY**

**The ClimateSmart program was approved in Decision (D.)06-12-032. It is a voluntary program with subscribers agreeing to pay PG&E an additional amount or premium on their utility bills to fund GHG emission reduction projects. This Resolution approves PG&E's request to execute a Servicing Agreement with the ClimateSmart Charity (Charity) designating the utility as the Charity's agent. The Servicing Agreement is needed to enable PG&E to forward funds collected from ClimateSmart program subscribers and also applicable interest to the Charity. The Charity will then use these funds to**

**pay for GHG emission reductions procured under the program.<sup>1</sup> Using the Charity to hold the funds and administer the program preserves the tax deductibility of the ClimateSmart premiums paid by program subscribers.**

We find the Servicing Agreement and corresponding balancing account changes filed in Supplemental AL 2958-G-A/3344-E-A to be consistent with the intent of D.06-12-032. We also find that the Servicing Agreement as amended in the supplemental advice letter has satisfactorily addressed concerns of Commission staff and is consistent with the Charity's outside legal counsel's<sup>2</sup> (Tax Counsel) analysis.

D.06-12-032 is modified to reflect the treatment of interest specified under the Servicing Agreement approved herein. PG&E is also ordered to file annual reports containing specified ClimateSmart program information.

## **BACKGROUND**

**The ClimateSmart program was approved in D.06-12-032 and will terminate at the end of 2011.<sup>3</sup> The program is voluntary, with subscribers agreeing to pay PG&E an additional amount (a premium) on their utility bills to fund GHG emission reduction projects. ClimateSmart provides PG&E customers with an opportunity to mitigate the GHG emissions that are produced as a result of their electricity and natural gas usage. That decision also directed PG&E to investigate the feasibility of making residential customer premium payments**

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<sup>1</sup> Until the Servicing Agreement is approved, PG&E has provided funds to the Charity via an escrow account, as described below.

<sup>2</sup> The Charity's outside legal counsel is Winston & Strawn LLP, which was involved in the formation of the Charity and the preparation of IRS filings. The Tax Counsel's analysis is in a letter dated 10/1/09, which was signed by Barry J. Hart, a lawyer with that firm. That analysis addressed the Servicing Agreement as filed in the original AL.

<sup>3</sup> The ClimateSmart program was initially set to terminate at the end of 2009. D.09-11-018 extended the program until a final decision could be rendered in Application (A.) 09-05-016 (PG&E's request to extend the program). D.10-10-025, the final decision issued in A.09-05-016, extended the program through the end of 2011.

**tax deductible.**<sup>4</sup> **This investigation led to PG&E's creation of the Charity.**<sup>5</sup> The Internal Revenue Service (IRS) and Franchise Tax Board (FTB) have determined that contributions to the Charity are tax deductible.<sup>6</sup> The Charity's directors, officers and other staff are all PG&E employees.<sup>7</sup> Although the ClimateSmart program will end shortly, PG&E and staff believe approving the Servicing Agreement is important in order to be consistent with representations made to the IRS.<sup>8</sup> Additionally, there are a number of provisions in the Servicing Agreement, some of which are discussed below, that will continue in effect at least until the Charity continues to pay for GHG emission reductions on behalf of PG&E.

**In AL 2958-G/3344-E, PG&E requested authorization to execute a "Servicing Agreement" between it and the Charity. The Servicing Agreement formally designates PG&E as the billing agent of the Charity and specifies various responsibilities that the utility and the Charity are to assume. The utility also sought to make corresponding revisions to its ClimateSmart balancing accounts to account for the transfer of ClimateSmart contributions and accrued**

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<sup>4</sup> D.06-12-032, Ordering Paragraph 18.

<sup>5</sup> PG&E AL 2813-G/2999-E. The Charity is a Nonprofit Public Benefit Corporation. (Articles of Incorporation of ClimateSmart Charity)

<sup>6</sup> On December 17, 2007, the IRS issued a ruling stating, "we have determined that [the Charity is] exempt from Federal income tax under section 501(c)(3) of the Internal Revenue Code. Contributions to [the Charity] are deductible under section 170 of the Code." On May 12, 2008, the FTB confirmed that the Charity had tax-exempt status under state law.

<sup>7</sup> PG&E February 10, 2009 response to Energy Division data request Question #1: "As required by the Charity's amended bylaws (Article X, Section 4), all Board members and officers are employees of PG&E." (PG&E 2/10/09 response to Question #1 of ED's 1/22/09 data request) "In terms of administrative matters, the Charity has no staff. All administrative expenses will be covered by the utility." (PG&E response to ED data request of 9/5/08, Question 6) "(T)he Charity will have no separate employees or offices ...". (PG&E response to ED data request of 9/5/08 question #9 b) The work performed by PG&E employees for the Charity is considered part of their normal duties and their time commitment is considered de de minimus and does not require any additional incremental expense. (PG&E response to ED data requests of 9/7/10 and 12/7/10)

<sup>8</sup> PG&E 9/5/08 response to ED data request Question # 1. b).

**interest to the Charity.**<sup>9</sup> PG&E currently bills and collects ClimateSmart premiums from participants and will do so until the program terminates at the end of 2011. The utility also accepts donations to the program. Through an escrow account, PG&E has transferred funds to the Charity to pay for contracted GHG emission reductions. PG&E explained to ED that the escrow account is meant to be an interim arrangement until the utility's relationship with the Charity is formalized through the Servicing Agreement in conformity with representations made to the IRS.<sup>10</sup>

Under the Servicing Agreement and as the Charity's billing agent, PG&E would continue to collect funds for the purpose of procuring GHG emission reductions. The escrow account would be replaced by a "Segregated Account".<sup>11</sup> The Segregated Account is the mechanism whereby PG&E would transfer funds to the Charity pursuant to the schedule specified in the Servicing Agreement.<sup>12</sup>

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<sup>9</sup> When the ClimateSmart program was adopted, PG&E established two balancing accounts (one for its gas tariff and the other for its electric tariff) to record the collection and disposition of ClimateSmart contributions.

<sup>10</sup> PG&E response to ED 9/5/08 data request.: Under current arrangements, billed ClimateSmart premium amounts and donations PG&E has collected have remained recorded in the ClimateSmart balancing accounts accruing interest at PG&E's cost of capital rate. Funds flowing through the escrow account to the Charity are from another PG&E cash account. When the Servicing Agreement takes effect, the amount recorded in the balancing accounts would be trued-up with the amount of money PG&E previously provided to the Charity via the escrow account. See PG&E response to ED 9/5/08 data request Question # 1 a. and # 5 a) Per Section 4.4 of the Servicing Agreement, the Charity would receive the remaining funds in the escrow account and the balancing account would be reduced by the amount of such remaining funds as well as amounts paid to GHG emission reduction projects from the escrow account. Whatever remains in the balancing account, including interest, would then be transferred to the Charity pursuant to Sections 4.3 and 4.4 of the Servicing Agreement. See PG&E's 2/10/09 response to ED data request, Question #25.

<sup>11</sup> In the amended Servicing Agreement filed in the supplemental AL, the ClimateSmart premium subaccounts are the Segregated Account.

<sup>12</sup> Per Section 4 of the Servicing Agreement, within 10 business days of the last calendar day of each month, PG&E shall calculate and record into the Segregated Account the ClimateSmart contributions corresponding to the prior calendar month. Within 15 business days of the last calendar day of each calendar month, PG&E shall remit to the Charity all ClimateSmart

*Footnote continued on next page*

Funds in the Segregated Account would earn interest at PG&E's cost of capital rate.<sup>13</sup> Once in the Charity's possession, the funds would earn interest according to the Charity's investment decisions. Additionally, the Servicing Agreement specifies duties PG&E is required to perform as well as those that the Charity will undertake such as record keeping.

Because the Charity was formed after the ClimateSmart balancing accounts were adopted, PG&E is proposing to change these balancing accounts to provide for the transfer of the recorded funds to the Charity. Currently, the amount in these balancing accounts, which consists of ClimateSmart premiums and accrued interest, is about \$4.5 million.

**In response to the Tax Counsel's analysis and discussions with ED and Legal staff, PG&E amended its originally filed Servicing Agreement and the proposed changes to its ClimateSmart balancing accounts in Supplemental AL 2958-G-A/3344-E-A. The supplemental AL supersedes the original AL in its entirety.** The amended Servicing Agreement does not alter the basic elements of the document as described above. The amendments generally provide language specifying that the Charity must use the funds it receives from PG&E and the interest it earns on those funds to buy GHG emission reductions for the ClimateSmart program and language clarifying the flow of funds from PG&E to the Charity. Non-substantive editorial changes were also made throughout. A further description of the substantive Servicing Agreement amendments appears below.

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contributions collected in the Segregated Account. Once the Servicing Agreement is in effect, amounts provided to the Charity via the escrow account would be trued-up with the ClimateSmart contributions PG&E recorded to the ClimateSmart balancing accounts.

<sup>13</sup> D.06-12-032, Ordering Paragraph 7 requires PG&E to pay interest on funds collected from ClimateSmart customers at the same rate of interest as its authorized cost of capital. PG&E's ClimateSmart balancing accounts specify that the recorded amounts earn PG&E's cost of capital rate of interest.

## **NOTICE**

Notices of AL 2958-G/3344-E and AL 2958-G-A/3344-E-A were made by publication in the Commission's Daily Calendar. PG&E states that copies of the Advice Letters were mailed and distributed in accordance with Section IV of General Order 96-B. In the ALs, PG&E also indicated that it provided a copy of the ALs to parties on the A.06-01-012 (ClimateSmart proceeding) service list.

## **PROTESTS**

AL 2958-G/3344-E was not protested. A protest period for AL 2958-G-A/3344-E-A was not authorized by ED.

## **DISCUSSION**

**After PG&E filed the advice letter, Commission staff followed up with the Charity's Tax Counsel on the Servicing Agreement and the tax deductibility of ClimateSmart contributions.** Commission staff asked the Tax Counsel about the Servicing Agreement filed in the original AL and PG&E's procedures as the Charity's agent. Tax Counsel's response was that the provisions of the Servicing Agreement should not affect the tax deductibility of ClimateSmart contributions.<sup>14</sup> The following paragraphs cover the various topics raised with the Tax Counsel and any resulting changes made to the Servicing Agreement that were subsequently included in the amended Servicing Agreement filed by PG&E in the supplemental AL.

### Comingling premium payments with other bill collections

PG&E deposits premium payments from ClimateSmart participants in the same bank accounts it uses for depositing its customers' other utility bill payments.<sup>15</sup> Tax Counsel stated that PG&E's process for collecting ClimateSmart contributions does not affect tax deductibility because the utility is the Charity's

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<sup>14</sup> Letter from Barry J. Hart of Winston & Strawn LLP dated 10/1/09 letter addressed to PG&E's Law Department. PG&E provided this letter to CPUC Staff with the Tax Counsel's acknowledgment. Tax Counsel considered only the U.S. Federal income tax consequences and did not address any potential California state or local tax consequences in its letter.

<sup>15</sup> PG&E response to 1/22/09 ED data request Question #19.

agent. This ensures that the Charity retains beneficial ownership over the funds at all times. Although PG&E may have legal title to the funds, the Charity will be deemed to be the beneficial owner of the funds and to have constructively received them by virtue of PG&E's receipt, even if they are not kept in a separate bank account.<sup>16</sup>

#### Funds transfer and write-off adjustments

Under the Servicing Agreement, PG&E will record ClimateSmart contributions in the Segregated Account for remittance to the Charity.<sup>17</sup> The recorded amounts may be based on ClimateSmart premium billings adjusted for uncollected amounts. Basing remittances on billed amounts, rather than collected amounts, may result in the utility remitting to the Charity more than actually collected from PG&E's customers in some years and less in other years, because bills are not always paid in the same year in which they are rendered, nor are they always paid in full.

In his letter, Tax Counsel noted that tax law dictates that an individual may be entitled to a deduction for amounts paid according to the year in which *payment* was made. (As pointed out above, the year in which the amounts are paid may differ from the year in which they appear on the customer's bill.) Because PG&E is the Charity's agent, amounts are deemed paid to the Charity when they are received by the utility. Indeed, Tax Counsel notes that U.S. Treasury regulations do not require funds constructively received to be actually remitted to the intended recipient within a specified time period, or even at all, so long as the funds are legally subject to the direction and control of the intended recipient (i.e., the Charity).

Additionally, the original Servicing Agreement proposed to use a proxy for the uncollectible amount. If a proxy were used, the amount of money PG&E

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<sup>16</sup> Tax Counsel cited Section 1.451-2(a) of the Treasury Regulations as explaining the constructive receipt doctrine, as follows: "income although not actually reduced to a taxpayer's possession is constructively received by him in the taxable year during which it is credited to his account, set apart for him, or otherwise made available so that he may draw upon it at any time, or so that he could have drawn upon it during the taxable year if notice of intention to withdraw had been given." See also, Rev. Rul 85-184.

<sup>17</sup> Servicing Agreement, Section 4.1.

ultimately transfers to the Charity would likely not equal the amount of premiums PG&E actually collected, because the uncollected amounts would only be estimated. Tax Counsel believes that use of the proxy would not affect the tax deductibility of contributions; nonetheless, PG&E deleted the proxy provision in the amended Servicing Agreement filed in the Supplemental AL. Instead, there will either be no adjustment for uncollectibles, and the actual uncollected amount will be deducted.

#### Partial bill payments

For partially paid bills, PG&E first applies the money it collects to revenue related charges (e.g., utility service) and then on a pro-rated basis to liabilities such as ClimateSmart premiums. PG&E follows this procedure for each successive payment it receives until a customer's outstanding balance is either paid or eventually written-off.<sup>18</sup> Subordinating the premiums to other billing charges may contradict the intentions of a ClimateSmart participant who wanted to pay his premiums in full and only a portion of the other part of his bill.

Tax Counsel stated that PG&E's partial payment practice is consistent with applicable tax law and IRS rules and that such a practice should not affect the tax deductibility of contributions to the Charity<sup>19</sup>

#### GHG emission reduction contracts

PG&E is the signatory to the existing GHG emission reduction contracts, which will be assigned to the Charity once the servicing agreement takes effect. PG&E expects that most new GHG emission reduction contracts, if any, will be entered into by the Charity, with PG&E possibly acting as a guarantor. In any event, if premium collections and program revenues are insufficient to pay for the minimum amount of GHG emission reductions that PG&E is required to procure by D.06-12-032, PG&E is responsible to make up any shortfall.<sup>20</sup>

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<sup>18</sup> PG&E response to 1/22/09 ED Data Request Question #31

<sup>19</sup> Tax Counsel noted that IRS Revenue Ruling 85-184 supported this conclusion. Of course, only the amounts paid during the tax year actually applied by PG&E to ClimateSmart would be deductible, regardless of the participant's intention as to how his payments should be allocated.

<sup>20</sup> D.06-12-032 Ordering Paragraph 6

Tax Counsel stated that PG&E's current and future practices of entering into contracts on behalf of the Charity or having the Charity enter into these contracts itself is not directly relevant to the issue of tax deductibility.

**The amendments to the Servicing Agreement contained in the Supplemental AL should not have any bearing on the tax deductibility of ClimateSmart contributions because the amendments either were consistent with the Tax Counsel's analysis or are unrelated to the issue of tax deductibility (e.g., changes made to clarify the responsibilities of each party, editorial in nature, etc.).** The amended Servicing Agreement is the product of discussions between PG&E and Commission staff, including consideration of Tax Counsel's analysis. The substantive amendments, including any discussed above, to the original Servicing Agreement are as follows:

- 1) A provision in Section 4.1 was eliminated which allowed write-offs to be based on a proxy agreed to by PG&E and the Charity. Instead, write-offs are to be based upon actual data or, if PG&E and the Charity agree, zero.
- 2) Section 4.3 was changed to specify that PG&E is to remit to the Charity the interest PG&E has accrued on the ClimateSmart contributions it has collected. The original version of the Servicing Agreement did not explicitly provide for the transfer of accrued interest.
- 3) The ClimateSmart premium subaccounts have been designated to be the "Segregated Account". This will ensure clear tracking of the ClimateSmart contributions from PG&E to the Charity.
- 4) Section 4.4 concerning the reconciliation of escrow amounts was changed to correctly show how the remaining amount in the escrow account will be reconciled with the amount recorded in the Segregated Account (the ClimateSmart balancing accounts).
- 5) Two new sections were added to the Servicing Agreement under the new heading "Charity Obligations."<sup>21</sup> Section 5.1 specifies that the Charity must use

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<sup>21</sup> Section numbering in the amended Servicing Agreement was revised to reflect the addition of these new sections.

the remittances from PG&E and interest the Charity earns on the remittances to reduce greenhouse gas emissions pursuant to the ClimateSmart program adopted by the Commission. Pursuant to Section 5.2, the provisions of Section 5.1 will remain in effect even after the Servicing Agreement is terminated. The sections were added because the original version of the Servicing Agreement did not explicitly state how the Charity was to use the funds it receives from PG&E as well as any earnings the funds achieve after they are remitted by PG&E.

6) The following sentence from Section 13.2 in the original Servicing Agreement was deleted: "Utility will not be required at any time to advance or pay any of its own funds in the fulfillment of its responsibilities hereunder with respect to ClimateSmart™ Charges". The sentence was deleted because Tax Counsel stated that it may conflict with original Servicing Agreement Section 7 (Section 8 in the amended Servicing Agreement) which requires PG&E to reimburse the Charity for any reasonable expenses the Charity incurs in administering the program.<sup>22</sup> Elimination of this sentence, also addresses Staff's concern that the deleted sentence might conflict with PG&E's responsibility to secure a minimum amount of GHG reductions, if premiums and contributions do not cover their cost.<sup>23</sup>

7) The Servicing Agreement was changed to specify that ED is to receive copies of all audit reports on the Charity's operations prepared by independent certified public accountants. This will help keep the Commission informed about the Charity's activities.

8) A provision was added stating that material changes to the Servicing Agreement require Commission approval.

These revisions to the Servicing Agreement do not raise any Staff concerns about the tax deductibility of the ClimateSmart premiums.

**The amended Servicing Agreement is generally consistent with D.06-12-032 and generally does not alter PG&E's ClimateSmart responsibilities. Further discussion below addresses inconsistency concerning interest payments.**

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<sup>22</sup> Winston & Strawn LLP 10/1/09 letter to PG&E's Law Department, p. 5.

<sup>23</sup> See D. 06-12-032 Ordering Paragraph 6.

D.06-12-032 authorized PG&E to bill and collect premiums from ClimateSmart participants as well as accept donations to the program. These funds are to be used to pay for GHG emission reductions.

Under the amended Servicing Agreement, PG&E as the Charity's agent would continue to be responsible for collecting program funds, as D.06-12-032 prescribes, which will be used to pay for GHG emission reduction projects. Although PG&E handles the funds initially, the Charity is the beneficial owner of the ClimateSmart contributions and, under the amended Servicing Agreement, PG&E will remit the funds it collects to the Charity per the specified schedule, thereby ensuring premium payments will be tax deductible as contemplated by D.06-12-032.<sup>24</sup> As further discussed below, the interest that will be earned on the ClimateSmart contributions under this arrangement necessitates modification of D.06-12-032.

**The interest provisions of the amended Servicing Agreement are reasonable, and D.06-12-032 should be modified to reflect them.** On the subject of interest, D.06-12-032 specified the following:

“PG&E shall pay interest at the same rate as its authorized cost of capital percentage on funds collected from CPT [Climate Protection Tariff, original name of the ClimateSmart program] customers but not yet paid out on contractual commitments.” (Ordering Paragraph 7 of D.06-12-032)

Presumably, the rationale for this requirement was that PG&E would likely spend the bulk of the money it collected many years in the future as long-term GHG emission reduction contract payments come due. At the time the Commission imposed this requirement, the Charity had yet to be created and therefore the procedure for transferring ClimateSmart contributions from PG&E to the Charity was not considered. Now, the interest requirement in D.06-12-032 needs to be evaluated in light of the Charity's involvement in the ClimateSmart program.

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<sup>24</sup> Ordering Paragraph 18 of D.06-12-032 directed PG&E to investigate the feasibility of making residential customer premium payments tax deductible.

Under the amended Servicing Agreement, ClimateSmart collections would earn PG&E's cost of capital interest rate until the funds are remitted to the Charity.<sup>25</sup> Once in the Charity's possession, the funds would earn a market-based interest rate.<sup>26</sup>

This two-tiered approach for paying interest is reasonable. PG&E would remain obligated to pay interest equal to its cost of capital on the funds in its possession. When the funds are transferred by PG&E to the Charity, the money will be invested in accordance with the Charity's policies and any applicable IRS regulations. As PG&E will then no longer have the use of the money it is appropriate for the Charity to earn whatever interest rate it is then able to obtain under then-prevailing market conditions without placing ClimateSmart contributions at undue risk.

Accordingly, Ordering Paragraph No. 7 of D.06-12-032 should be modified by replacing the reference to "CPT" with the current terminology and adding language at the end of the Ordering Paragraph to reflect when PG&E's obligation to pay interest at the ordered rate ends. More specifically, Ordering Paragraph No. 7 should be modified to read:

PG&E shall pay interest at the same rate as its authorized cost of capital percentage on funds collected from ClimateSmart customers but not yet paid out on contractual commitments, except that this obligation shall cease when and to the extent that these funds have been transferred to the ClimateSmart Charity from the ClimateSmart Balancing Account Premium Subaccounts.

Under this language, PG&E will continue to accrue interest at its authorized cost of capital on the amounts recorded in its Premium Subaccounts until such time as those amounts are subtracted from the Premium Subaccounts pursuant to the provisions of the Servicing Agreement approved by this Resolution. Accordingly, the fact that PG&E has previously paid monies to the Charity out of

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<sup>25</sup> Servicing Agreement Section 4.2

<sup>26</sup> PG&E response to Questions # 4.f. and # 5 of ED 9/5/08 data request.

the escrow account will not affect the amount of interest PG&E ultimately transfers to the Charity.

**Based on the Tax Counsel's response and our assessment that the amended Servicing Agreement is consistent with D.06-12-032 as modified here, we find the amended Servicing Agreement filed in Supplemental AL 2958-G-A/3344-E-A reasonable and it is approved.**

**PG&E's proposed ClimateSmart balancing account changes filed in Supplemental AL 2958-G-A/3344-E-A are reasonable and are adopted. PG&E is proposing to change the ClimateSmart balancing accounts because these balancing accounts were established prior to the creation of the Charity. The revisions specify that the recorded amounts would be transferred to the Charity less any amounts the utility spent for GHG emission reductions. These modifications are consistent with D.06-12-032 and the Servicing Agreement approved by this Resolution.**

**PG&E shall annually make an unredacted Information-only Filing , pursuant to General Rule 6 of GO 96-B, (Information-only Filing) on the status and performance of each GHG emission reduction contract executed for the ClimateSmart program. The first filing is due March 15, 2013. Successive reports are due March 15<sup>th</sup> of each year thereafter until all the procured GHG emission reductions have been delivered, including those procured by PG&E to meet the D.06-12-032 performance guarantee.<sup>27 28</sup> In D.06-12-032, and as extended in D.10-10-025, the Commission required PG&E to file unredacted annual reports describing ClimateSmart program results as well as GHG emission reduction contracts. <sup>29</sup> This reporting requirement will cease after**

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<sup>27</sup> If March 15<sup>th</sup> of a particular year falls on a weekend or recognized state holiday, the report shall be due on the next business day.

<sup>28</sup> D.06-12-032 Ordering Paragraph 6 required PG&E to guarantee that the ClimateSmart program produces 1.5 million tons of carbon dioxide equivalent reductions (performance guarantee).

<sup>29</sup> D.06-12-032, Ordering Paragraph 14. D. 10-10-025, Ordering Paragraphs 4 and 5. D.09-08-006 denied PG&E's petition to modify D.06-12-032 asking for permission to file redacted versions of GHG emission reduction contracts.

PG&E issues the comprehensive evaluation report by June 15, 2012.<sup>30</sup> However, we find that there is a need to establish a post-program reporting requirement because the terms of some executed ClimateSmart contracts extend beyond 2011.<sup>31</sup> It is important the Commission continue to monitor the performance of the executed GHG emission reduction contracts and to be informed of any additional GHG emission reduction purchases. Therefore, we will require PG&E to make an unredacted annual, Information-only Filing containing, at minimum, the following information:

- 1) A description of the general terms (e.g., seller, project, duration, etc.) of each executed GHG emission reduction contract (contract) stating whether the contract has either expired and its terms have been fulfilled or the contract is in effect.
- 2) By contract, the total amount of GHG emission reductions contracted for and the amount of GHG emission reductions to be delivered each year.
- 3) By contract, the amount of GHG emission reductions delivered each year.
- 4) Total amount of GHG emission reductions contracted for and delivered since the ClimateSmart program began.
- 5) Amount of GHG emission reductions delivered in comparison to the 1.5 million short ton CO<sub>2</sub>e emission reduction performance guarantee adopted in D.06-12-032. PG&E is to note in the appropriate report when the GHG emission reductions necessary to meet the performance guarantee have been delivered and identify the source of funding used to procure the

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<sup>30</sup> D.10-10-025 Ordering Paragraph 5 stated in lieu of an annual report for 2011, PG&E is to file a comprehensive evaluation report.

<sup>31</sup> For example, PG&E noted that two contracts call for payments through 2013 and one through 2022. (PG&E response to ED 9/5/08 data request).

GHG emission reductions (e.g, ClimateSmart premiums, shareholder funds, etc.).<sup>32</sup>

- 6) In the event a contract falls out of compliance or is in default, PG&E shall identify the contract and describe the circumstances of the non-performance or default.
- 7) Identify any contracts that have been assigned and the assignee.
- 8) Identify any contracts that have been amended, describe the amendment and submit an unredacted copy of the amended contract with the annual report.
- 9) Include unredacted copies of all GHG emission reduction contracts that were not submitted in a prior annual report.
- 10) Amount of interest earned by the Charity on ClimateSmart contributions and the disposition of this interest.
- 11) Any issues regarding contract administration that should be brought to the Commission's attention.

We expect that the Charity will fully cooperate with PG&E if the utility needs information in the Charity's possession in order to comply with this reporting requirement. PG&E shall notify ED if the Charity does not cooperate, if requested, with the utility in the preparation of the annual reports.

**PG&E shall report to ED through an Information-only Filing the results of all audits of the Charity that the utility undertakes. PG&E is responsible to ensure that the Charity complies with D.06-12-032 and all Commission**

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<sup>32</sup> "We hold consistent with D.06-12-032, the PG&E shareholder obligation is the difference between the minimum performance guarantee of 1.5 million short tons minus the total GHG reductions supported through customer collections through December 31, 2011." D.10-10-025, p. 23.

**decisions, orders, and directives.**<sup>33</sup> Under the Servicing Agreement approved in this Resolution, PG&E may request to audit the Charity's records and procedures or engage an independent certified public account (CPA) to do so.<sup>34</sup> It is important that the Commission be fully informed of the Charity's activities as well. Therefore, we direct PG&E to provide ED with the results of every audit of the Charity it initiates. We also expect that the Charity will promptly honor requests we may have for information and will provide Commission staff with complete access to its records.<sup>35</sup> PG&E shall also promptly comply with our requests that the utility obtain information or records from the Charity for our review.

The creation of the Charity does not relieve PG&E of its obligations to comply with D.06-12-032 and all other Commission decisions or orders. Furthermore, we hold PG&E accountable for the Charity's actions because the Charity, which is an independent organization that PG&E created, assumed duties that PG&E previously undertook (e.g., payment of ClimateSmart contracted GHG emission reductions) and is entrusted with funds collected by PG&E from utility customers. Moreover, the Charity is staffed by PG&E personnel. Accordingly, PG&E is responsible to ensure that the Charity: (i) acts in such a way that PG&E complies with D.06-12-032; (ii) spends all the contributions it receives from PG&E, and interest earned thereon, to pay for GHG emission reductions; and (iii) does not engage in any activities that are contrary to that decision or any other

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<sup>33</sup> "Because the charity is not a regulated entity, the Commission would use its authority over the utility - and the rights provided under the servicing agreement to the utility - to obtain access to the charity's records. For example, if the Commission wanted access to charity records, the Commission could order the utility to obtain such records, which the utility would have the right to obtain under [former] Section 8.3 [Section 9.3 in amended Servicing Agreement]." (PG&E response to ED 9/5/08 data request, Question # 6. d). See also Section 6 of the Servicing Agreement.

<sup>34</sup> Amended Servicing Agreement Sections 9.3 and 9.5.

<sup>35</sup> PG&E stated that the Commission could use its authority over PG&E to obtain access to records which the utility would have a right to obtain under Section 9.3 (amended Servicing Agreement) - Utility Audit Rights. (see ED 9/5/08 data request Question 6. d) Furthermore, the Commission could conduct an audit of the Charity through its authority over PG&E (ED 9/5/08 data request question 6. e.)

pertinent Commission decisions or orders.<sup>36</sup> So that PG&E meets this responsibility, we shall require PG&E to actively oversee the Charity's activities through its authority under the Servicing Agreement (e.g., audit rights, etc.) and by other available means. In the event PG&E finds that the Charity is acting or has acted in a manner that is inconsistent with D.06-12-032 or any other pertinent Commission decision or order, or the requirements of the approved Servicing Agreement and surviving provisions, the utility shall promptly notify the Commission and shall endeavor to compel the Charity to correct every instance of non-compliance.<sup>37</sup>

We further expect that the Charity will cease any procedures or activities that are inconsistent with D.06-12-032 or any other pertinent Commission orders, or the approved Servicing Agreement and its surviving provisions, and make any restitution, if necessary, upon our command (either issued directly to the Charity or communicated through PG&E). We will provide Commission staff with the authority to determine whether the Charity has engaged in any such improper behavior and to issue any directives for the Charity it deems necessary. If a directive for the Charity is issued by the Commission to PG&E in order to forward on to the Charity, the utility shall immediately present the directive to the Charity. PG&E shall be responsible to ensure that the Charity complies with the Commission's directives.

**PG&E shall execute the approved Servicing Agreement within 5 days of the effective date of this resolution and provide ED with a copy of the executed Servicing Agreement within 5 days of its signing by both parties through an**

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<sup>36</sup> "To the extent that action (or inaction) of the Charity causes PG&E to fall out of compliance with CPUC orders and decisions, PG&E expects that the Commission would continue to hold PG&E accountable for such noncompliance." (PG&E response to 1/22/09 ED Data Request Question #50)

<sup>37</sup> The Charity must abide by its Articles of Incorporation. In particular, Article III states that: "The specific and primary purpose of the Corporation [Charity] is to reduce the burden facing the State of California in protecting the environment by pursuing the ClimateSmart program authorized by the California Public Utilities Commission in order to reduce the level of greenhouse gases in the earth's atmosphere through forestry sequestration and, as appropriate, other greenhouse gases."

**Information-only Filing. Additionally, through an Information-only Filing, PG&E shall promptly provide ED with the following:**

- 1) All changes to the approved Servicing Agreement that are not subject to prior Commission approval per Section 11(c) of the Servicing Agreement.
- 2) All changes to the Charity's bylaws and Articles of Incorporation from the versions that were provided to ED staff in the utility's February 10, 2009 data request response.

**Finally, we note that the Charity is staffed with PG&E personnel. Although the Charity is an independent organization, the use of PG&E employees to carry out the Charity's functions (e.g., making payments pursuant to GHG emission reduction contracts) is appropriate since the utility would be undertaking these duties had the Charity not existed. Furthermore, the Charity was established in response to the Commission's order that PG&E investigate the feasibility of residential ClimateSmart premium tax deductibility. In the event the Charity intends to employ or enlist non-PG&E personnel, the utility shall promptly notify ED.**

**COMMENTS**

Public Utilities Code section 311(g)(1) generally provides that resolutions must be served on all parties and subject to at least 30 days public review and comment prior to a vote of the Commission. Because this resolution modifies the interest provisions of D.06-12-032,<sup>38</sup> this draft resolution was mailed to all parties

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<sup>38</sup> General Order 96-B, General Rule 5.2 provides that utility must file an application, or petition for modification where the utility requests modification of a decision issued in a formal proceeding. In AL 2958-G/3344-E, did not expressly request any modification of D.06-12-032. However, it now appears that authorizing the Servicing Agreement, whose approval was requested by that advice letter, will in fact result in a modification of D.06-12-032, with respect to the accrual of interest.

General Rule 1.3, of General Order 96-B, however, states that the Commission in a specific instance may authorize an exception to the operation of this General Order where appropriate. We will do so here, and waive the requirement for a formal proceeding, in order to avoid further delay in considering the Servicing Agreement. This waiver is appropriate here, where

*Footnote continued on next page*

to that decision for comment, and will be placed on the Commission's agenda no earlier than 30 days from the mailing date.

## **FINDINGS AND CONCLUSIONS**

1. PG&E's ClimateSmart program was adopted in D.06-12-032 and was extended in D.09-11-018 and D.10-10-025. The program is set to expire at the end of 2011. It is a voluntary program that allows PG&E's customers to pay for the purchase GHG emission reductions to offset the program participants' use of electricity and natural gas.
2. D.06-12-032 directed PG&E to investigate the feasibility of the tax deductibility of residential ClimateSmart premiums.
3. PG&E established the ClimateSmart Charity so that ClimateSmart premium payments and donations could be tax deductible.
4. The amended Servicing Agreement would formally designate PG&E as an agent of the Charity and prescribe various details about the interaction of PG&E and the Charity.
5. Tax Counsel found that the Servicing Agreement filed in PG&E AL 2958-G/3344-E, including its provisions concerning funds transfer, write-off adjustments, and partial bill payments and the facts that the Servicing agreement allows commingling of funds and that either PG&E or the Charity may enter into the GHG reduction contracts, should not affect the tax deductibility of ClimateSmart contributions.
6. The Servicing Agreement, filed in AL 2958-G-A/3344-E-A, amended the Servicing Agreement filed in AL 2958-G/3344-E. The amendments involve items that should not affect the tax deductibility analysis performed by Tax Counsel.

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the modification to the decision is relatively minor and, as explained above, is consistent with the intent of D.06-12-032.

7. The Charity is staffed by PG&E personnel.
8. PG&E will be responsible to ensure that the Charity satisfactorily responds to Commission requests for information and directives.
9. In compliance with D.06-12-032, and to ensure clear tracking of ClimateSmart contributions, PG&E should continue to use the Premium Subaccounts in the Electric and Gas ClimateSmart Balancing Accounts, and should not establish a separate "Segregated Account."
10. The Servicing Agreement and balancing accounts contained in PG&E AL 2958-G-A/3344-E-A are reasonable and should be approved.
11. PG&E's obligation to pay interest on ClimateSmart contributions at a rate equal to its cost of capital should terminate once PG&E no longer has possession of the funds and Ordering Paragraph No. 7 of D. 06-12-032 should be modified accordingly.
12. The amended Servicing Agreement is consistent with D.06-12-032, as thus modified.
13. The proposed balancing account modifications are consistent with D.06-12-032 and the Servicing Agreement approved by this resolution.
14. It is reasonable for PG&E to oversee the Charity's activities and ensure that the Charity acts in a manner consistent with D.06-12-032 and all other pertinent Commission decisions and orders and that the Charity spends all the contributions it receives from PG&E, and interest earned thereon, to pay for GHG emission reductions, because the Charity has assumed duties the utility previously undertook and the Charity was created by PG&E and staffed by PG&E personnel.
15. The creation of the Charity does not relieve PG&E of its obligations under D.06-12-032, as amended herein, and all other Commission decisions and orders.
16. It is reasonable to establish a reporting requirement for PG&E in order to monitor the performance of ClimateSmart GHG emission reduction contracts.

17. Material amendments to the Servicing Agreement or the surviving provisions of the Servicing Agreement should be subject to Commission approval.

**THEREFORE IT IS ORDERED THAT:**

1. PG&E AL 2958-G-A/3344-E-A is approved, including both the attached Servicing Agreement and tariff sheets.
2. The tariff sheets attached to PG&E AL 2958-G-A/3344-E-A (which modify the ClimateSmart balancing accounts) are approved to be effective on the date of this Resolution.
3. Ordering Paragraph No.7 of D.06-12-032, is modified to read:

PG&E shall pay interest at the same rate as its authorized cost of capital percentage on funds collected from ClimateSmart customers but not yet paid out on contractual commitments, except that this obligation shall cease when and to the extent that these funds have been transferred to the ClimateSmart Charity from the ClimateSmart Balancing Account Premium Subaccounts.
4. PG&E shall execute the approved Servicing Agreement within 5 days of the date of this resolution and provide Energy Division, through an Information-only Filing, a fully executed copy of the Servicing Agreement within 5 days following its signing by both parties.
5. PG&E shall promptly provide Energy Division, through an Information-only Filing, with the results of any audit of the Charity it initiates and copies of CPA reports on the Charity's activities it receives.
6. PG&E shall provide Energy Division, through an Information-only Filing, with copies of any changes or amendments to the Charity's bylaws and Articles of Incorporation as soon as it is practical, and also notify Energy Division if the Charity intends to employ non-PG&E personnel.
7. PG&E shall be responsible to ensure that the Charity promptly responds to Commission requests for information and data.
8. PG&E shall arrange for the Charity to provide the Commission with complete access to the Charity's records if requested.

9. PG&E shall actively oversee the Charity's activities to ensure that the Charity acts in a manner consistent with D.06-12-032 and all other pertinent Commission decisions, orders and directives, and that the Charity spends all the contributions it receives from PG&E, and interest earned thereon, to pay for GHG emission reductions. PG&E shall be accountable for any Charity activities not in conformance with these requirements.
10. PG&E shall ensure that the Charity: (i) acts in such a way that PG&E complies with D.06-12-032; (ii) spends all the contributions it receives from PG&E, and interest earned thereon, to pay for GHG emission reductions; and (iii) does not engage in any activities that are contrary to that decision or any other pertinent Commission decisions or orders.
11. PG&E shall promptly notify the Commission if the utility finds that the Charity has acted or is acting in a manner that is inconsistent with D.06-12-032 or any other pertinent Commission decision, order or directive, including this Resolution and the requirements of the Servicing Agreement, including those provisions that survive termination of the Servicing Agreement, and PG&E shall endeavor to compel the Charity to correct every instance of non-compliance.
12. Staff is authorized to determine whether the Charity has engaged in any non-compliant actions, and to issue any directives for the Charity it deems necessary to correct them.
13. PG&E shall promptly forward to the Charity all Commission directives that it receives from the Commission that are relevant to the Charity and shall ensure that the Charity complies with them.
14. PG&E shall provide an unredacted report annually to Energy Division, through an Information-only Filing, containing, at minimum, the information specified in Attachment A. The first report is due March 15, 2013. Successive reports are due on March 15<sup>th</sup> of each year thereafter except in the event March 15<sup>th</sup> of a particular year falls on a weekend or recognized state holiday. In that case, the report shall be due on the next business day. This reporting requirement shall remain in effect until all procured GHG emission reductions have been delivered, including those procured by PG&E to meet the D.06-12-032 performance guarantee.

15. PG&E shall promptly comply with Commission requests that the utility obtain information and records from the Charity for Commission review.
16. PG&E shall promptly provide Energy Division, through an Information-only Filing, with all changes to the approved Servicing Agreement that is not subject to prior Commission approval per Section 11(c) of the approved Servicing Agreement.
17. PG&E shall promptly provide Energy Division, through an Information-only Filing, with all changes to the Charity's bylaws and Articles of Incorporation from the versions that were supplied to Energy Division in the utility's February 10, 2009 data request response.
18. PG&E shall promptly notify Energy Division if the Charity does not cooperate with PG&E, if requested by the utility, in the preparation of the reporting requirement in Ordering Paragraph 13.
19. PG&E shall promptly notify Energy Division if the Charity intends to employ or enlist non-utility personnel.
20. PG&E shall file a Tier 3 advice letter to request Commission approval of any proposed material amendments to the Servicing Agreement or the surviving provisions of the Servicing Agreement as well as any agreement to replace the Servicing Agreement. Any such proposals will not become effective prior to Commission approval.

This Resolution is effective today.

I certify that the foregoing resolution was duly introduced, passed and adopted at a conference of the Public Utilities Commission of the State of California held on December 15, 2011 the following Commissioners voting favorably thereon:

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Paul Clanon  
Executive Director

## ATTACHMENT A

### Information to be provided in reports specified in Ordering Paragraph 13.

- 1) A description of the general terms (e.g., seller, project, duration, etc.) of each executed GHG emission reduction contract (contract) stating whether the contract has either expired and its terms have been fulfilled or the contract is in effect.
- 2) By contract, the total amount of GHG emission reductions contracted for and the amount of GHG emission reductions to be delivered each year.
- 3) By contract, the amount of GHG emission reductions delivered each year.
- 4) Total amount of GHG emission reductions contracted for and delivered since the ClimateSmart program began.
- 5) Amount of GHG emission reductions delivered in comparison to the 1.5 million short ton CO<sub>2</sub>e emission reduction performance guarantee adopted in D.06-12-032. PG&E is to note in the appropriate report when the GHG emission reductions necessary to meet the performance guarantee have been delivered and identify the source of funding used to procure the GHG emission reductions (e.g, ClimateSmart premiums, shareholder funds, etc.).
- 6) In the event a contract falls out of compliance or is in default, PG&E shall identify the contract and describe the circumstances of the non-performance or default.
- 7) Identify any contracts that have been assigned and the assignee.
- 8) Identify any contracts that have been amended, describe the amendment and submit an unredacted copy of the amended contract with the annual report.

**ATTACHMENT A (con't)**

- 9) Include unredacted copies of all GHG emission reduction contracts that were not previously submitted in a prior annual report.
- 10) Amount of interest earned by the Charity on ClimateSmart contributions and the disposition of this interest.
- 11) Any issues regarding contract administration that should be brought to the Commission's attention.

**END**

**PUBLIC UTILITIES COMMISSION**

505 VAN NESS AVENUE  
SAN FRANCISCO, CA 94102-3298



November 15, 2011

RESOLUTION G-3429  
December 15, 2011 Commission Meeting  
I. D. # 10854

TO: Parties to Decision (D.)06-12-032 and Pacific Gas and  
Electric Company (PG&E)

Enclosed is draft Resolution G-3429 of the Energy Division. It will be on the agenda at the next Commission meeting which is at least 30 days after the mailing date of this letter. The Commission may then vote on this Resolution or it may postpone a vote until later.

The draft Resolution would authorize PG&E to enter into an agreement with the ClimateSmart Charity (Charity). The draft Resolution would also make changes to the tariffs for PG&E's ClimateSmart Balancing Account Premium Subaccounts to account for transfer of amounts in these Subaccounts to the Charity. The Charity was created to allow ClimateSmart contributions to be tax deductible.

**The draft Resolution would also modify Ordering Paragraph 7 of Decision 06-12-032**, issued in Application 06-01-012.

Currently, Ordering Paragraph 7 of D.06-12-032 requires PG&E to pay interest on the ClimateSmart premiums it collects at the same rate as its cost of capital. The draft Resolution would modify that Ordering Paragraph and specify that PG&E would no longer be required to pay interest on the funds that it transfers to the Charity from the ClimateSmart Premium Subaccounts.

When the Commission votes on a draft Resolution, it may adopt all or part of it as written, amend, modify or set it aside and prepare a different Resolution. Only when the Commission acts does the Resolution become binding on the parties.

Parties may submit comments on the draft Resolution. An original and two copies of the comments, with a certificate of service, should be submitted to:

Honesto Gatchalian  
Energy Division  
California Public Utilities Commission  
505 Van Ness Avenue  
San Francisco, CA 94102  
Fax: 415-703-2200

A copy of the comments should also be submitted **in electronic format** to:

Eugene Cadenasso and Richard Myers  
Energy Division  
California Public Utilities Commission  
505 Van Ness Avenue  
San Francisco, CA 94102  
e-mail: [cpe@cpuc.ca.gov](mailto:cpe@cpuc.ca.gov) and [ram@cpuc.ca.gov](mailto:ram@cpuc.ca.gov)

Any comments on the draft Resolution must be received by the Energy Division by December 5, 2011. Those submitting comments must also serve a copy of their comments on the entire service list to the draft Resolution and the Director of the Energy Division on the same date that the comments are submitted to the Energy Division.

Comments shall be limited to fifteen pages in length plus a listing of the recommended changes to the draft Resolution and an appendix setting forth the proposed findings and conclusions and proposed ordering paragraphs.

Comments should focus on any errors in the draft Resolution.

Replies to comments on the draft Resolution will not be accepted.

/s/ Richard A. Myers

**Richard A. Myers**, Program and Project Supervisor  
Energy Divisio

Enclosure: Certificate of Service and Service List

**CERTIFICATE OF SERVICE**

I certify that I have served a true copy of Draft Resolution G-3429 on the attached service list via electronic mail and via first class US mail to those parties without email addresses.

Dated November 15, 2011 at San Francisco, California.

/s/ Honesto Gatchalian

*Honesto Gatchalian*

**NOTICE**

Parties should notify the Energy Division, Public Utilities Commission, 505 Van Ness Avenue, Room 4002 San Francisco, CA 94102, of any change of address to insure that they continue to receive documents. You must indicate the Resolution number on the service list on which your name appears.

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