BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA

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Application of PACIFIC GAS AND ELECTRIC COMPANY to issue, sell, and deliver one or more series of Debt Securities and to guarantee the obligations of others in respect of the issuance of Debt Securities, the total aggregate principal amount of such long-term indebtedness and guarantees not to exceed $6.1 billion; to execute and deliver one or more indentures; to sell, lease, assign, mortgage, or otherwise dispose of or encumber utility property; to issue, sell and deliver in one or more series, cumulative Preferred Stock -- $25 Par Value, Preferred Stock -- $100 Par Value, Preference Stock or any combination thereof; to utilize various debt enhancement features; and enter into interest rate hedges. (U39M)	Application 18-11-001

COMMENTS OF THE PUBLIC ADVOCATES OFFICE TO THE PROPOSED DECISION OF COMMISSIONER PICKER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Pages

CASES

FEDERAL STATUTES

CPUC DECISIONS

CALIFORNIA PUBLIC UTILITIES CODE

CALIFORNIA RULES OF PRACTICE AND PROCEDURE

I. INTRODUCTION

Pursuant to Rule 14.3 of the California Public Utilities Commission's (Commission) Rules of Practice and Procedure (Rules) and the January 23, 2019 *Assigned Commissioner's Scoping Memo and Ruling* (Scoping Memo) , the Public Advocates Office at the California Public Utilities Commission (Cal Advocates) hereby submits its Comments to the proposed decision (PD) of President Picker granting the Motion of Pacific Gas and Electric Company (PG&E) to exempt debtor-in-possession (DIP) financing from the requirement for Commission approval under Public Utilities (PU) Code Sections 817, 818 and 851.[1]

PG&E filed its Motion on January 18, 2019. That same day, Administrative Law Judge (ALJ) Cooke sent an email ruling noticing a prehearing conference (PHC) on January 23, 2019. At the PHC, parties were provided an opportunity to respond to PG&E's Motion, as well as identify any conditions that should be attached if the Commission were to grant an exemption.[2] The Public Advocates Office recommended that prior to granting an exemption, the Commission should require PG&E to provide the analysis that supported PG&E's determination that a Chapter 11 bankruptcy filing was in the public interest and the terms and conditions that it is seeking with creditors. The Public Advocates Office further recommended that the Commission impose the following conditions if it ultimately determined that an exemption should be granted:

1. The DIP financing is to fund only those operations necessary to keep the lights on, that is, paying suppliers and contractors for ongoing operations. PG&E should not use DIP financing to pay for management bonuses or for management retention purposes.
2. The first priority of the DIP financing is to the utility, and not the holding company.
3. PG&E shall advocate in its bankruptcy filing for the creation of a Ratepayers' Committee to represent the interests of ratepayers throughout the bankruptcy proceeding.
4. The exemption is only applicable if PG&E files for Chapter 11 bankruptcy.

[1] *Decision Granting Pacific Gas and Electric Company an Exemption From Public Utilities Code Sections 817, 818 and 851 for the Limited Purpose of Debtor-in-Possession Financing*, issued January 24, 2019.

[2] Reporters Transcript (RT), p. 49:4-7.

5. The exemption would be limited to the $5.5 billion in the commitment letter and there would be no ongoing exemption.[3]

The PD, however, ignores the Public Advocates Office's recommendations and grants PG&E's request. In doing so, the PD fails to consider the public interest and proposes an outcome that is not in ratepayers' interests.

II. THE PD ERRS IN GRANTING PG&E'S MOTION FOR EXEMPTION

A. The Record Does Not Support A Finding That An Exemption Is In The Public Interest

An exemption under both PU Code Section 829(c) and Section 853(b) requires a finding by the Commission that the application of Sections 817 and 818 and Section 851, respectively, is not necessary in the public interest. However, based on what PG&E has filed to date, PG&E has not demonstrated that an exemption would be in the public interest.

PG&E's January 14, 2019 Form 8-K Filing merely states that PG&E's Board of Directors, after review with its management and legal and financial advisors, considered a number of factors and "concluded that a court-supervised Chapter 11 reorganization, through which such boards expect PG&E will be able to obtain DIP financing, is ultimately the only viable option to restore PG&E's financial stability and make sure PG&E has sufficient liquidity to fund its ongoing operations and provide safe service to customers."[4] Rather than evidence, PG&E has provided unsupported opinion and speculation; PG&E has not provided any information on what other financing alternatives were considered nor why these alternatives were not considered viable options.

At the January 23, 2019 prehearing conference (PHC), the Public Advocates Office urged the Commission to require PG&E to provide the terms and conditions of the DIP Facilities, especially since, as disclosed in PG&E's January 21, 2019 Form 8-K, borrowing under the DIP Facilities would be "secured by substantially all of the Utility's assets."[5] Based on PG&E's January 23, 2019 Form 8-K, this would mean that substantially all of PG&E's $61.2 billion in assets (at book value) would be encumbered to obtain $5.5 billion in DIP Facilities. Determining

[3] RT, pp. 64:17 – 65:16.

[4] Form 8-K, filed January 14, 2019, p. 8.

[5] Form 8-K, filed January 21, 2019, p. 1.

whether such a transaction is in the public interest necessitates knowing the terms and conditions of the DIP financing.

PG&E opposed this argument, stating: "It's not normal or typical for the Commission to require that all of the terms and conditions be presented to the Commission in connection with a request for financing authority."[6] However, it is also not normal or typical for a utility to pledge substantially all of its assets in connection with a request for financing authority. Based on the unique circumstances presented here, the Commission should review the terms and conditions of the DIP Facilities to ensure that granting an exemption will not result in harm to ratepayers and other stakeholders. The statement made by PG&E's counsel at the PHC that there is a low risk that any of the encumbered assets would be the subject of foreclosure is not sufficient enough to support a finding that granting an exemption is in the public interest.

The PD echoes PG&E's argument, stating "in typical financing applications, the Commission sets parameters for a regulated entity to obtain financing an does not review the granular terms of a utility's specific financing. We do not find there is a reason to depart from this practice in this circumstance."[7] It is astounding that the Commission would summarily conclude that a company seeking an exemption under Sections 817, 818 and 851 so that it may encumber substantially all of its assets as part of a Chapter 11 bankruptcy filing has filed a "typical financing application."

Finally, the PD cites to Decision (D.) 02-01-055 to justify providing an exemption to Sections 817, 818 and 851 and noting that exemptions are warranted in "extraordinary circumstances, based on the totality of the facts presented."[8] That reliance, however, is misplaced. In D.02-01-055, the Commission found that PG&E had sold utility assets without first obtaining Commission authority under PU Code Section 851. Nonetheless, the Commission found that granting an exemption was warranted because PG&E's ratepayers benefitted from the sale, the sales did not harm ratepayers or other customers, and it would be difficult to unwind the sales as they occurred 12 years prior and many of the assets no longer existed.[9] In this instance, on the other hand, the Commission has presented no facts to demonstrate that this is an

[6] Reporter's Transcript (RT), p. 73:7-11.

[7] PD, p. 8.

[8] PD, p. 9.

[9] D.02-01-055, pp. 4-5 (slip op.).

extraordinary circumstance. Rather, it makes the obvious statement "Ensuring PG&E's continued ability to operate and provide safe and reliable service in the event of the bankruptcy clearly is in the public interest."[10] This statement does not provide any substantive details as to how not obtaining the DIP financing, as requested in this application, would inhibit the ability of PG&E to operate safely and reliably over the near term period. A critical question that remains unexamined is how such financing is necessary, what sources of funds are already available, and what obligations will need to draw from those funds.

B. It is not in the public interest to encumber essentially all of PG&E's assets to secure DIP financing

PG&E's January 21, 2019 Form 8-K states that it has entered into a commitment letter for DIP financing with JP Morgan Chase Bank, Bank of America, Barclays Bank and Citigroup Global Markets, under which these commitment parties would provide $5.5 billion in senior secured super priority DIP credit facilities (DIP Facilities) to be secured by substantially all of PG&E's assets.[11] PG&E has provided no explanation why it believes the $5.5 billion DIP financing will be sufficient, nor why it is in the public interest to encumber all of its assets, totaling $61.2 billion, to obtain this financing. Indeed, in opposing the Public Advocates Office's recommendation that any exemption granted be limited to the $5.5 billion DIP financing referenced in its Motion, PG&E revealed for the first time that an (undisclosed) term in the commitment letters with the DIP lenders would allow PG&E to seek an additional $4 billion in financing. The Commission would be abrogating its responsibility to ensure the public interest to allow PG&E to use these assets for additional funding without any Commission oversight or approval.

Due to PG&E's failure to explain why encumbering all of its assets to secure between $5.5 and $9 billion in DIP financing is in the public interest, the Public Advocates Office can only surmise that the proposed financing is actually only in PG&E's interest. For example, if the Commission were to grant PG&E's Motion, a bankruptcy court may be reluctant to order PG&E to divest itself of certain assets. Thus, PG&E's Motion could be construed as a means to preserve PG&E's assets in their entirety, not to serve the public interest. This is especially true

[10] PD, pp. 9-10. Indeed, it is also clearly in the public interest to ensure that PG&E can continue to operate and provide safe and reliable service in the event of an earthquake or snowstorm.

[11] Form 8-K, filed January 21, 2019, p. 1.

if, as PG&E's counsel has proposed, any creditor seeking to exercise its foreclosure right in the event of a default would implicate PU Code 851.[12] This would suggest that PG&E is in effect sheltering assets by pledging assets that its creditors would have no ability to obtain.

C. The Requested Exemptions Would Create Rather Than Avoid The Jurisdictional Conflict PG&E States It Seeks To Avoid.

At the January 23, 2019 PHC PG&E stated:

> The reason that we sought an exemption is because we would solicit and hope that the Commission would see its way clear to granting us the ability to move forward with a DIP loan without having to create a jurisdictional conflict between the authority of the bankruptcy court and the authority of the Commission.[13]

The jurisdictional conflict PG&E purportedly seeks to avoid lies where the Commission, pursuant to its statutory grant of authority, issues an order that is contradicted by an order of the bankruptcy court. Here, by seeking issuance of a Commission order providing for the exemptions prior to seeking bankruptcy protection, by requesting expedited treatment of its request, and by virtue of the statement above, PG&E implies, that a jurisdictional conflict between the bankruptcy court and the Commission can be avoided where the Commission provides the requested exemption and allows PG&E to encumber its assets in advance of the bankruptcy proceeding. This claim is logically and legally unsound.

By inducing the Commission to act and provide the requested exemptions, PG&E would set the stage for the very type of jurisdictional conflict it purportedly seeks to avoid. Specifically, should the Commission grant the requested exemptions PG&E will be free to encumber "substantially all of the Utility's assets" prior to bankruptcy.[14] Where PG&E thereafter declares bankruptcy, it would come to the bankruptcy court as an entity with all of its assets encumbered. Bankruptcy courts have the power to undo pre-petition transfers of money or property under their avoiding power[YAC1] if it finds that these transfers unfairly benefitted one creditor over others.[15] Therefore, the bankruptcy court could choose to exercise its avoiding

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[12] RT, p. 77:14-23.

[13] RT, p. 71: 14-21.

[14] PG&E's seeking expedited approval of its request is consistent with its intent encumber the assets prior to entering into bankruptcy.

[15] See, 11 U.S.C. § 362.

powers if it were to find the Commission's grant of an exemption was an unfair prepetition transfer. This would create a conflict between the bankruptcy court's authority under the Bankruptcy Code and the Commission's statutory jurisdiction and finding that PG&E's encumbrance of all its assets was necessary and in the public interest.

If PG&E genuinely sought to avoid a jurisdictional conflict the prudent approach would be to ask that the Commission either not assert jurisdiction or that it cede jurisdiction to the bankruptcy court on the exemption issue, if and when the issue arises. Just as no right rests where no right is asserted,[16] no jurisdictional conflict lies where jurisdiction is not asserted or contested.

III. THE PD DENIES PARTIES DUE PROCESS

The Scoping Memo, issued on January 23, 2019 presents the false premise that an expedited process is necessary because of PG&E's "stated intention to file for Chapter 11 bankruptcy on, or about, January 29, 2019."[17] As a result, the Commission has acted to address PG&E's Motion in a manner that severely abridges parties' due process rights and fails to develop a record to support the PD's proposed outcome.

In order to enable PG&E to meet its desired Chapter 11 bankruptcy filing date of January 29, 2019, the Commission has adopted an expedited schedule to resolve PG&E's Motion. This has included noticing the January 23 PHC by email at 5:01 p.m. on January 18, the Friday before a holiday weekend; providing parties with essentially one business day to provide oral responses to PG&E's Motion; providing a little over 26 hours to review and prepare comments on a PD; and allowing only a single round of comments. This has prevented the development of a proceeding record that contains sufficient evidence to determine whether it is in the public interest to exempt the DIP financing from PU Code Sections 817, 818 and 851.

The Public Advocates Office agrees that an expedited schedule and swift Commission action is warranted in the event of an emergency. However, that is not the case here. PG&E's January 14 Form 8-K states that the company has $1.5 billion in cash reserves and could access a "significant amount of capital" outside of a restructuring under Chapter 11."[18] Thus, there is no

[16] See *Berghuis v. Thompkins* (2010) 560 U.S. 370.

[17] Scoping Memo, p. 1.

[18] Form 8-K, filed January 14, 2019, p. 5.

imminent need for PG&E to seek bankruptcy protection immediately after the expiration of the 15-day advance notice period required under PU Code Section 854.2(d).[19] While the Commission repeatedly states that PG&E's decision on whether to file for bankruptcy is solely its decision, it fails to acknowledge that it is also PG&E's decision **when** to file for bankruptcy. Simply put, there is no statutory, regulatory, or financial imperative for PG&E to file its Chapter 11 bankruptcy on January 29, 2019 – PG&E just wants to file on that date. In effect, PG&E has devised an exigent situation where none exists, and the Commission has unnecessarily compromised parties' due process rights to accommodate PG&E's illusion of urgency.

The lack of urgency to adopt such an abbreviated schedule is further underscored by a report issued on January 24, 2019 by the California Department of Forestry and Fire Protection (CalFIRE) that found PG&E equipment was not the cause of the Tubbs Fire in 2017.[20] While this may not change PG&E's decision whether to file for bankruptcy, much of PG&E's alleged urgency to file on January 29, 2019, no longer exists.

Finally, the Commission violates PU Code Section 311 by impermissibly shortening the 30-day comment period. PU Code Section 311(g) allows for the reduction or waiver of the 30-day comment period in an "unforeseen emergency situation, upon the stipulation of all parties, for any uncontested matter in which the decision grants the relief requested, or for an order seeking temporary injunctive relief." Under Rule 14.6, an "unforeseen emergency situation" includes "activities that severely impair or threaten to severely impair public health or safety" or "crippling disasters that severely impair public health or safety." As discussed above, PG&E's decision to file for bankruptcy on January 29, 2019 is self-imposed, and the Commission has articulated no reason why "the public interest in the Commission adopting a decision before expiration of the 30-day review and comment period clearly outweighs the public interest in having the full 30-day period for review and comment."[21] Indeed, even if the

[19] Section 854.2(d) requires in relevant part: "No later than 15 days before the effective date of a change of control, the predecessor employer shall cause to be posted public notice of the change of control at each principal place of employment of any covered employee." This Section, however, does not mandate that a change in control must occur once the 15-day notice has elapsed.

[20] See, e.g., https://www.sacbee.com/news/state/california/fires/article225032230.html.

[21] Rule 14.6(b)(10).

Commission could justify reducing the comment period, there is no reason why the comment period should be reduced to 26 hours, and not provide the opportunity to file reply comments.[22]

IV. THE PD ERRS BY FAILING TO REQUIRE THE NECESSARY CONDITIONS TO PROTECT RATEPAYER INTERESTS

A. The Conditions Imposed By The PD Are Meaningless, Do Not Protect Ratepayers And Are Not In The Public Interest.

The PD purports to impose two conditions as a part of its grant of exemption to address concerns raised by the Public Advocates Office and The Utility Reform Network (TURN). These conditions are a cap on PG&E's DIP financing amount and a requirement that PG&E notify the Commission of PG&E's Chapter 11 bankruptcy filing and the terms of any DIP financing.[23] These conditions, however, are meaningless, since the PD sets the limit for DIP financing at $10 billion, nearly double the $5.5 billion that PG&E has received in commitment letters and fails to identify the specific terms of the DIP financing that should be provided to the Commission.

PU Code Section 1705 requires that a decision contain "separately stated, findings of fact and conclusions of law by the commission on all issues material to the order or decision." There is no discussion in the PD, nor are there any findings of fact or conclusions of law to explain why the Commission is adopting a DIP financing limit of $10 billion when PG&E's Motion and Form 8-K filings state that PG&E has secured $5.5 billion in DIP financing. This is a reversible error.[24] Accordingly, the PD should be revised to limit the DIP financing to $5.5 billion, as recommended by the Public Advocates Office. As discussed above, this condition will ensure that PG&E does not further encumber utility assets without first notifying the Commission and receiving approval.

Ordering Paragraph 3 of the PD should also be revised to identify the specific terms of the DIP financing that should be provided to the Commission. This will ensure that the Commission has the necessary information to determine the reasonableness of the DIP loan. Unless the specific terms are identified, PG&E would have the discretion to determine what

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[22] At the PHC, there was no discussion of the schedule. Rather, ALJ Cooke told parties "The next thing that I'm sure everybody wants to know is schedule. Al right, and this is not going to be a discussion item. I'm going to tell you what I think." (RT, p. 86:22-26.)

[23] PD, p. 12 (Ordering Paragraphs 3 and 5).

[24] See, *California Motor Transport Co. v. Public Utilities Com*. (1963) 59 Cal. 2d 270.

terms of the DIP financing should be provided to the Commission. Appendix A proposes revisions to Ordering Paragraph 3 to ensure the necessary terms are provided.

B. The PD Incorrectly Concludes That Conditions Designed To Protect Ratepayers And The Public Interest Are Outside The Scope Of This Proceeding.

The Public Advocates Office proposed that any exemption granted to PG&E contain the following conditions:

1. The DIP financing is to fund only those operations necessary to keep the lights on, that is, paying suppliers and contractors for ongoing operations. PG&E should not use DIP financing to pay for management bonuses or for management retention purposes.
2. The first priority of the DIP financing is to the utility, and not the holding company.
3. PG&E shall advocate in its bankruptcy filing for the creation of a Ratepayers' Committee to represent the interests of ratepayers throughout the bankruptcy proceeding.
4. The exemption is only applicable if PG&E files for Chapter 11 bankruptcy.
5. The exemption would be limited to the $5.5 billion in the commitment letter and there would be no ongoing exemption.[25]

The PD, however, rejects the first three proposed conditions with no rational justification, and does not address the fourth recommendation at all. The PD's treatment of the Public Advocates Office's fourth proposed condition is discussed in section IV.A above.

The Public Advocates Office's first proposed condition seeks to ensure that DIP financing is used to fund only those operations necessary to keep the lights on. The Public Advocates Office seeks to prevent the use of DIP financing, which encumbers utility assets, for non-operational purposes, such as management bonuses or for management retention purposes. The purpose of this condition is not, as the PD presumes, to determine the reasonableness of whether bonuses paid to executives are reasonable for cost recovery purposes.[26] Rather, this condition will ensure that PG&E customers receive safe and reliable gas and electric service

[25] RT, pp. 64:17 – 65:16.

[26] PD, p. 8.

during the pendency of PG&E's Chapter 11 reorganization, consistent with PU Code Section 451.

Similar to its first proposal, the Public Advocates Office's second condition seeks to ensure that DIP financing is used to fund utility operations necessary to provide safe and reliable service, and not simply funneled to the holding company. This proposed condition is consistent with Decision 99-04-068, which imposed certain conditions on PG&E's holding company structure. In that decision, the Commission stated in Ordering Paragraph 8:

> Ordering Paragraph 17 of D.96-11-017 is modified to read as follows: "The capital requirements of PG&E, as determined to be necessary and prudent to meet the obligation to serve or to operate the utility in a prudent and efficient manner, shall be given first priority by PG&E Corporation's Board of Directors."[27]

The PD seems satisfied that this condition is not needed because PG&E has responded that the DIP loan proceeds will be paid to PG&E.[28] However, it is irrelevant which entity would be paid by the lenders. The purpose of the condition is to ensure that the DIP financing be used to fund necessary utility operations, not for the enrichment of the holding company.

Finally, the PD rejects the Public Advocates Office's third proposed condition, that PG&E agree to a Ratepayer Committee in the Chapter 11 bankruptcy, on the grounds that it is "beyond the scope of this proceeding."[29] However, other than stating that PG&E did not believe this proposal should be a mandatory requirement, the PD gives no explanation why this important ratepayer protection mechanism is outside the scope of this proceeding.[30] It is clear that the Commission cannot say that adoption of condition to ensure that ratepayer interests are represented in PG&E's bankruptcy proceeding is not in the public interest. Therefore, the only way for the Commission to reject this proposed condition is to say it is not within the scope of the proceeding.

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[27] *Application of Pacific Gas and Electric Company for Authorization to Implement a Plan of Reorganization Which will result in a Holding Company Structure*, 1999 Cal. PUC LEXIS 242 *151.

[28] PD, pp. 8-9.

[29] PD, p. 9.

[30] PD, p. 9.

V. CONCLUSION

The Public Advocates Office respectfully recommends that the PD be revised as discussed in these comments and in Appendix A.

Respectfully submitted,

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APPENDIX A

APPENDIX A

Proposed Changes to Ordering Paragraphs (deletions in ~~strikeout~~ and additions in red and underline:

ORDERING PARAGRAPHS:

3.Within three days of filing for Chapter 11 bankruptcy, Pacific Gas and electric Company shall file and serve a compliance filing in this proceeding notifying the Commission of its filing and ~~setting forth~~ providing all the terms and conditions of any Debtor-in-Possession financing, including, but not limited to~~.~~:

a. DIP Facility Size
b. Amount of DIP Facility available upon the issuance of (a) the Interim Order and (b) the Final Order
c. Commitment expiration date(s)
d. Interest rate
e. All other transaction fees
f. Costs associated with extending the maturity date to December 31, 2021
g. Conditions and terms for obtaining incremental funding

5.Pacific Gas and Electric Company shall not incur more than ~~$10~~ $5.5 billion in Debtor-in-Possession financing without further Commission authorization.

6.Pacific Gas and Electric Company shall use the Debtor-in-Possession financing to fund only those operations necessary to provide safe and reliable service.

7.Pacific Gas and Electric Company shall ensure that the utility, and not Pacific Gas Corporation, will receive first priority for use of funds provided by the Debtor-in-Possession financing.

8.Pacific Gas and Electric Company shall advocate in its bankruptcy filing for the creation of a Ratepayers' Committee to represent the interests of ratepayers throughout the bankruptcy proceeding