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BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking to Implement Public Utilities Code Section 451.2 Regarding Criteria and Methodology for Wildfire Cost Recovery Pursuant to Senate Bill 901 (2018).	Rulemaking 19-01-006 (Filed January 10, 2019)

WILD TREE FOUNDATION
OPPOSITION TO PG&E APPLICATION FOR REHEARING

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Pursuant to the Rule 16.1 of the Commission Rules of Practice and Procedure, Wild Tree Foundation ("Wild Tree") submits the following Opposition to Pacific Gas and Electric Company's ("PG&E") Application For Rehearing Of Decision 19-06-027 ("Application") regarding D.19-06-027 ("Decision") in the above captioned proceeding. Wild Tree urges the Commission to deny the Application forthright with prejudice as PG&E has set forth no legal error upon which rehearing should be granted having only put forth the same unsuccessful arguments it made in the proceeding.

STANDARD OF REVIEW

The Commission's Rules of Practice and Procedure, Rule 16.1(c) allows a party to apply for rehearing to "alert the Commission to a legal error."[1] Applications must specify the grounds on which the applicant considers a decision "unlawful or erroneous."[2] In judicial review, no new or additional evidence shall be introduced and the findings and conclusions of the Commission on findings of fact shall be final and shall not be subject to review.[3] A Decision may be invalidated based upon the following limited grounds: The order or decision of the commission was an abuse of discretion; The commission has not proceeded in the manner required by law; The commission acted without, or in excess of, its powers or jurisdiction; The decision of the commission is not supported by the findings; The order or decision was procured by fraud; or The order or decision of the commission violates any right of the petitioner under the Constitution of the United States or the California Constitution.[4]

ARGUMENT

A. The Commission Properly Concluded that a Utility that Has Filed for Bankruptcy was Ineligible for Ratepayer Recovery Pursuant to a Stress Test

1. The Legislature Intended to Prevent PG&E Bankruptcy in Promulgating Section 451.2 and PG&E's Voluntary Bankruptcy Filing Makes is Impossible for the Commission to Apply 451.2

In the Decision, the Commission correctly determined that section 451.2 is inapplicable to a utility in bankruptcy because it is unable to determine the financial status under such

[1] Commission Rules of Practice and Procedure, Rule 16.1(c); see also Pub. Util. Code, § 1732 (application for rehearing "shall set forth specifically the ground or grounds on which the applicant considers the decision or order to be unlawful").
[2] Commission Rules of Practice and Procedure, Rule 16.1(c).
[3] Pub. Util. Code, § 1757.1
[4] *Ibid.*

conditions: "An electrical corporation that has filed for relief under chapter 11 of the Bankruptcy Code may not access the Stress Test to recover costs in an application under Section 451.2(b), because the Commission cannot determine the essential components of the corporation's 'financial status.'"[5] Public Utilities Code section 451.2[6] requires the Commission to "consider the electrical corporation's financial status and determine the maximum amount the corporation can pay without harming ratepayers or materially impacting its ability to provide adequate and safe service."[7]

In it Application, PG&E claims that the Decision should be overturned because it is contrary to legislative intent. PG&E cites to an assembly floor analysis as evidence that "the purpose of SB 901 to "establish[] a comprehensive framework to address and prevent catastrophic wildfires including . . . standards to stabilize electrical corporations (IOUs) in the event of extensive liability resulting from claims under inverse condemnation."[8]

The documents PG&E relies upon as evidence of legislative history were not submitted into evidence in the proceeding and PG&E has not moved for judicial notice of these materials. An application for rehearing cannot be based on evidence that could have been, but was not, entered into evidence in the proceeding and so any discussion regarding the analyzes should be disregarded as impermissible extra-record evidence. Regardless, the statements that PG&E relies upon regarding an intention to "stabilize electrical corporations" actually demonstrates that the purpose of SB 901 in regards to 2017 fires was to prevent PG&E from going into bankruptcy. PG&E's description of the statutory history omits the fact that SB 901 was passed and enacted

[5] D.19-06-027 at p. 26 ("Decision").
[6] All references to Code sections are to the Public Utilities Code unless otherwise noted
[7] Pub. Util. Code, § 451.2, subd. (b).
[8] R.19-01-006, Pacific Gas and Electric Company's Application For Rehearing Of Decision 19-06-027 at p. 5 ("Application").

prior to PG&E filing for bankruptcy and section 451.2 was intended to prevent PG&E from needing to enter into bankruptcy.

Four months after SB 901 was enacted, PG&E voluntarily filed for bankruptcy and thereby made 451.2 inapplicable to itself. PG&E now attempts to place blame on the Commission for putting PG&E in a position of financial instability: "Having filed for Chapter 11 protection, PG&E faces precisely the harms that section 451.2 was designed to mitigate: financial instability for the utility and higher costs to customers stemming from anticipated wildfire costs. Section 451.2 can provide a basis for the treatment of 2017 wildfire liabilities in the Chapter 11 process as part of a Plan of Reorganization ("POR") that will necessarily resolve liabilities arising from the 2017 and 2018 Northern California wildfires."[9]

But, PG&E's financial instability and decision to file for bankruptcy are entirely creatures of its own making. We are all aware of the role it played in causing death and destruction in 2017 and 2018. Even before filing for bankruptcy, PG&E had a sub-investment grade credit rate that S&P Global Ratings statements, cited by PG&E in the proceeding, explain was as a result of "Pacific Gas & Electric Downgraded to 'D' from 'CC' on Missed Interest Payment."[10] PG&E apparently made a business decision to not make an interest payment, prior to filing for bankruptcy, and this action led to the downgrade in its credit rating. PG&E decided to file for bankruptcy despite the fact its filings state that it has considerably more assets than debts.[11]

By its own action, PG&E has made section 451.2, which was promulgated with the intent of helping PG&E avoid bankruptcy, inapplicable to itself. In regards to PG&E and the 2017

[9] PG&E Application at p. 5.
[10] R.19-01-006, Wild Tree OIR Comments at p. 8. citing PG&E OIR Comments at p. 9, fn 12.
[11] R.19-01-006, Wild Tree OIR Comments at p. 7 citing *In re PG&E Corporation and Pacific Gas and Electric Company* (ND.Cal. 2019) Case No. 19-30088, Chapter 11 Voluntary Petition.

Napa Sonoma Fires, the Commission correctly determined in the Decision that "Any reorganization plan of an electrical corporation in a chapter 11 case confirmed by the Bankruptcy Court and approved by the Commission in the future will inevitably address all prepetition debts, including 2017 wildfire costs, in the bankruptcy process."[12] Had PG&E sought to avail the resources of the Commission that they now demand, they should not have filed for bankruptcy, thereby limiting the control that Commissions has over the ultimate outcome of claims for damages from fires and PG&E's finances. As with PG&E's 2001 voluntary bankruptcy filing, the Bankruptcy Court, the Commission, and perhaps FERC will have overlapping jurisdiction. The fact the Bankruptcy Court has permitted a state court trial regarding the cause of the Tubbs Fire demonstrates how out-of-the-loop the Commission presently is in regard to addressing the cost of the 2017 fires through section 451.2 or any other means.[13]

PG&E has provided no compelling argument that the Commission committed legal error in deciding that it cannot determine the financial status of a utility in bankruptcy. Even while admitting in the Application that the Commission will not be able to determine its financial status, PG&E demands access to a ratepayer bailout through the stress test, stating "while the total amount of the utility's liabilities may not be known, the [customer harm threshold] can be determined without regard to that liability amount."[14] This assertion demonstrates the lengths to which PG&E seeks special treatment in contradiction to the law. The Application is little more than a lengthy recitation of the special treatment PG&E believes it is due. The stress test can most certainly not be applied prior to reasonableness review and absent critical information regarding utility liabilities. PG&E could have received special treatment under section 451.2

[12] Decision at p. 26.
[13] *In re PG&E Corporation and Pacific Gas and Electric Company* (ND.Cal. 2019) Case No. 19-30088, August 16, 2019 Memorandum Decision Regarding Motions For Relief From Stay.
[14] Application at p. 9.

that many, including Wild Tree, argue it is not due but, instead, it chose to file for bankruptcy where claims will be adjudicated en masse with an eye towards protecting PG&E as a private, for-profit entity rather than making victims whole. The Commission's Decision reflects the reality of PG&E's decision to file for bankruptcy. PG&E may not like it, but that does not make the Decision in legal error.

2. Ratepayers Would be Harmed by the Application of Stress Test to a Utility in Bankruptcy

The Commission was also correct in deciding that 451.2 is inapplicable to PGE& because, if section 451.2 were applied to a utility in bankruptcy and/or with a junk credit rating, ratepayers would be harmed thus violating the statutory requirement that ratepayer recovery pursuant to a stress test not harm ratepayers. PG&E's Application does not address the fact that it currently has a junk credit rating and that a company in bankruptcy will retain a junk credit rating. The Staff Stress Test Proposal explicitly states that "If a utility has already been downgraded to a junk credit rating, the Stress Test may not be the right tool to prevent ratepayer harm and may not be sufficient to prevent material impacts to the utility's ability to provide adequate and safe service."[15] In other words, the Staff Stress Test Proposal will violate section 451.2 requirements if applied to a utility with a junk credit rating. PG&E will maintain its junk status while in bankruptcy and thus section 451.2 cannot be applied without violating its own requirements.

[15] Decision at Stress Test Methodology (May 24, 2019) at p. 13.

B. The Decision Does not Violate Bankruptcy Law

PG&E's claim that the Decision violates Bankruptcy law is meritless. The Commission has not denied, revoked, suspended, or refused to renew any license, permit, charter, franchise, or other similar grant in its Decision because there are no rights afforded by section 451.2. PG&E again attempts to cite to legislative history in claiming that "the Commission's denial of access to the CHT falls within the scope of prohibited conduct under section 525(a)."[16] PG&E did not seek to bring into evidence the cited legislative history document in the proceeding and has not sought judicial notice here. This material should not be disregarded as prohibited extra-record evidence. Either way, PG&E has not cited to any authority that the Commission has denied a right enumerated in the Bankruptcy Code.

PG&E has no right to any ratepayer recovery even if section 451.2 was applied to it. The Commission could, in compliance with section 451.2, determine that any ratepayer recovery would harm ratepayers or that PG&E's finances would not be stressed by not receiving any ratepayer recovery. PG&E's assertion that "The CHT is tantamount to a legal agreement between the Commission and a utility, which gives the utility the right to recover costs above the CHT in rates" (PG&E at p. 7.) is backed by no authority. This statement well demonstrates PG&E's dismissive attitude towards ratepayers but does not prove that the Decision is in error.

The Commission has also committed no discrimination prohibited by the Bankruptcy Code. As explained above, the Commissions has provided PG&E exactly what it sought – adjudication of 2017 Napa and Sonoma Fires damages costs in the bankruptcy court instead of

[16] Application at p. 6.

the Commission. PG&E was not forced into bankruptcy, it made the decision on its own to pursue that course and must accept the consequences of its actions.

PG&E is not the victim here. PG&E is a for-profit company whose failure to prioritize safety over profits has resulted in a staggering loss of life, homes, entire communities, and damage to property and our environment. PG&E is a convicted criminal that caused and lied about safety violations that resulted in the death and destruction of the 2010 San Bruno explosion. In the 7 years between the San Bruno explosion and Napa Sonoma Fires, despite being under federal probation, PG&E failed to take necessary action to protect the public safety from fire risk of its equipment. The Commission is not now discriminating against PG&E as some sort of hapless victim. The Commission is executing the law to the best of its abilities given the decision of PG&E, despite having been handed a get-out-of-jail free card in the form of SB 901, to file for bankruptcy.

There is also no federal preemption that invalidates the Decision. This is a well-worn argument for PG&E. In the Application, PG&E cites to dicta in a memorandum decision from the Bankruptcy Court entered in its last bankruptcy as support for the contention that the Decision is preempted by the Bankruptcy Code because the Decision "frustrates the utility's ability to recover from financial adversity."[17] Setting aside the fact that a memorandum decision is not generally considered precedent even for matters actually decided, rather than merely mentioned as dicta, the bankruptcy court held in this case that "This Memorandum Decision rejects outright Proponents' across-the-board, take-no-prisoners preemption strategy in the Plan and Disclosure Statement."[18] PG&E attempted to challenge the applicability of a number of Public Utilities Code sections including section 451 as preempted by federal law and the court

[17] Application at p. 8.
[18] *In re Pacific Gas Electric Company* (Bankr. N.D. Cal. 2002) 273 B.R. 795, 820.

roundly rejected this argument. Ultimately, the reorganization strategy for which PG&E was arguing was not implemented and the court ruled that PG&E's attempts at having the Bankruptcy Court issue declarative and injunctive relief against the Commission was a violation of sovereign immunity.[19]

The Court explained that the Bankruptcy Code does not mandate "that *every company* be reorganized at all costs, but rather to establish a preference for reorganizations, where they are legally feasible and economically practical;" that deference to areas of traditional state regulation including public utilities regulation is due; and there is no preemption of ongoing regulatory requirements.[20] In the previous PG&E bankruptcy and in this case, "for Proponents to preempt state law. . . they will need to rely on more than just the general policy of Chapter 11 favoring reorganizations. They must show that enforcing such state law would be an 'obstacle to the accomplishment and execution of the full purposes of the bankruptcy laws.'"[21] The Commission's Decision is due deference and PG&E has not and cannot show that the Commission's Decision makes it impossible for it to reorganize or that the Decisions otherwise poses an obstacle to the purpose of the bankruptcy laws. There is, therefore, no issue of federal preemption.

C. Section 451.2 By It Plain Language Requires Reasonableness Review to be Conducted First and Be Limited to 2017 Fires

The Commission correctly determined that the plain language of section 451.2 requires application of the stress test following reasonableness review based upon an application, limited

[19] *Id.* at pp. 818-820.
[20] *Id.* at pp. 804-805.
[21] *Id.* at p 813 citing *In re Baker Drake, Inc.* (9th Cir. 1994) 35 F.3d 1348, 1353.

to the 2017 fires. PG&E's argument that stress test can be determined prior to reasonableness review and that it can be applied to 2018 fires is based upon omission of critical language in section 451.2 and creation of a new definition for the word "when." These arguments are not persuasive and certainly do not meet the standard for a rehearing.

PG&E's argument that the Commission has not proceeded in the manner required by law seems to reply upon assigning special meaning to the order that clauses in section 451.2 appear in the statute. PG&E states:

> First, section 451.2, subdivision (b), directs the Commission to "determine the maximum amount the corporation can pay" (first sentence) and then states that the Commission "shall ensure that the costs or expenses [from 2017 wildfires] that are disallowed for recovery in rates … do not exceed that amount" (second sentence). That language contemplates that the Commission would determine the CHT *before* it ensures that disallowed costs do not exceed the CHT, and by implication suggests that the Commission can determine the CHT before determining the disallowed costs. The second sentence of section 451.2(b) bolsters that interpretation by using the present tense to refer to costs "that *are* disallowed," rather than costs that *have been* disallowed.[22]

The clause order does not dictate the results PG&E claims but, if it did, then one must, of course, look to subdivision (a) before looking at subdivisions (b) and (c). Subdivision (a) reads, "In an application by an electrical corporation to recover costs and expenses arising from, or incurred as a result of, a catastrophic wildfire with an ignition date in the 2017 calendar year, the commission shall determine whether those costs and expenses are just and reasonable in accordance with Section 451."[23]

PG&E's omission of subdivision (a) in this discussion here borders on a lack of candor. In no uncertain terms, in black letters law, section 451.2, subdivision (a) limits its application to applications for cost recovery for 2017 fires whereby the Commission determines if costs are just

[22] Application at pp. 10-11.
[23] Pub. Util. Code, § 451.2, subd. (a).

and reasonable and then applies the stress test. PG&E's argument that "it is unreasonable for the Commission to determine that the CHT is only available through a traditional cost recovery application or a separate application addressing costs that have already been disallowed"[24] completely ignores the black letter law of section 451.2, subdivision (a). PG&E's argument that 451.2 can somehow be applied to 2018 fires also relies upon willful ignorance of subdivision (a). PG&E claims that "The Commission has interpreted section 451.2 to govern costs and expenses arising only from a catastrophic wildfire that occurred in 2017. . . Section 451.2, subdivision (b), authorizes the Commission to set a maximum disallowance for 2018 as well as 2017 wildfire costs."[25]

PG&E also complains that the Commission has the authority to make a stress test determination without an application for cost recovery, but chose not to use it: "Third, the statute at a minimum preserves the Commission's inherent authority to determine the procedure for implementing section 451.2. The Commission is therefore empowered to first determine the CHT and second apply the CHT in connection with traditional prudence review."[26] The Commission does not have the authority to do so as it would be in violation of the directive of section 451.2. But, if they did have the discretion to do so, they likewise have the discretion to not do so. PG&E has thus provided an argument supporting the Decision wherein the Commission has determined how it will undertake review.

PG&E also attacks the judgment of the Commission: "That position is arbitrary and capricious because it constitutes a clear error in judgment."[27] The Commission has committed no

[24] Application at p. 13.
[25] *Ibid.* at p. 18.
[26] *Ibid.* at p. 11.
[27] *Ibid.* at p. 18.

error in judgement and "a clear error in judgment" is not a legal standard and does not meet the definition of arbitrary and capricious.

In regards to claim that section 451.2 should apply to 2018 fires, PG&E is noticeably silent as to legislative history. There is no need to rely upon extra-record evidence to demonstrate that the Legislature enacted SB 901 prior to the catastrophic 2018 Camp Fire caused by PG&E. The Legislature did not contemplate that PG&E would cause an even more deadly and destructive fire just a month after SB 901 was enacted than the ones it caused in 2017 and did not make any allowances for such an occurrence in the code. While perhaps somewhat naïve, the fact is, SB 901 did not make any special provisions for 2018 utility-caused fires. One does not need to resort to legislative history to show that future fires were considered: SB 901 also included the promulgation of section 451.1 that applies to "a catastrophic wildfire occurring on or after January 1, 2019."

Having exhausted efforts to interpret section 451.2 piecemeal, PG&E resorts to repeating it failed argument that the word "when" should be redefined to meet its purposes. When means when and PG&E has provided no legal grounds upon which a new definition of this word invalidates the Decision.

CONCLUSION

The Application for Rehearing should be denied because PG&E has demonstrated no erroneous or unlawful aspects of Decision.

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(signature page follows)

Respectfully submitted,

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