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

In the Matter of the Application of Pacific Gas and Electric Company for (1) Administration of Stress Test Methodology Developed Pursuant to Public Utilities Code Section 451.2(b) and (2) Determination That \$7.5 Billion of 2017 Catastrophic Wildfire Costs and Expenses Are Stress Test Costs That May Be Financed Through Issuance of Recovery Bonds Pursuant to Section 451.2(c) and Section 850 et seq. (U39E)

Application 20-04-023
(Filed April 30, 2020)

**WILD TREE FOUNDATION
APPLICATION FOR REHEARING**

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**WILD TREE FOUNDATION
APPLICATION FOR REHEARING**

Pursuant to Rule 16.1 of the Commission Rules of Practice and Procedure, Wild Tree Foundation (“Wild Tree”) respectfully files this application for rehearing of D.21-04-030, issued April 23, 2021 granting the Application of Pacific Gas and Electric Company for Administration of Stress Test Methodology Developed Pursuant to Public Utilities Code Section 451.2(b) (“Decision”).

ARGUMENT

I. STANDARD OF REVIEW

A. Application for Rehearing and Judicial Review

Rule 16.1(c) requires an application for rehearing to set forth the “grounds on which the applicant considers the order or decision of the Commission to be unlawful or erroneous,” with references to the record or law. Rule 16.1(c) further states “[t]he purpose of an application for rehearing is to alert the Commission to a legal error, so that the Commission may correct it expeditiously.” Pursuant to Public Utilities Code¹ section 1757, a decision is unlawful and is subject to judicial review where: (1) the Commission has acted without, or in excess of, its powers of jurisdiction; (2) the Commission has not proceeded in the manner required by law; (3) the Commission’s decision is not supported by the findings; (4) the Commission’s findings are not supported by substantial evidence in light of the whole record; (5) the Commission’s decision was procured by fraud or was an abuse of discretion; or (6) the decision violates any right of the petitioner under the United States or California Constitution.²

If the Commission “fail[s] to comply with required procedures, appl[ies] an incorrect legal standard, or commit[s] some other error of law,” its decision is reversible.³ Pursuant to section 1705, Commission decisions “shall contain, separately stated, findings of fact and conclusions of law by the commission on all issues material to the order or decision.”⁴ The

¹ Hereinafter, all Code section references are to the Public Utilities Code unless otherwise specified.

² Pub. Util. Code § 1757(a).

³ *Pedro v. City of Los Angeles* (2014) 229 Cal.App.4th 87, 99.

⁴ Pub. Util. Code § 1705.

California Supreme Court has explained that such “[f]indings are essential to ‘afford a rational basis for judicial review and assist the reviewing court to ascertain the principles relied upon by the commission and to determine whether it acted arbitrarily.’”⁵

Substantial evidence is evidence of “ponderable legal significance,”⁶ that is “reasonable in nature, credible, and of solid value such that a reasonable mind might accept it as adequate to support a conclusion.”⁷ It is not synonymous with “any evidence.”⁸ Thus, a Commission decision will not be upheld if it is “devoid of evidentiary support” or “contrary to facts [which are] universally accepted as true.”⁹ Critically, “in light of the whole record,” means the reviewing court “cannot just isolate the evidence supporting the findings and call it a day, thereby disregarding other relevant evidence in the record.”¹⁰ Instead, the Commission must consider all relevant evidence, which necessarily “involves some weighing of the evidence to fairly estimate its worth.”¹¹

Judicial review of Commission decisions pursuant to the Public Utilities Code is broader where constitutional issues are presented. “Notwithstanding Sections 1757 and 1757.1, in any proceeding wherein the validity of any order or decision is challenged on the ground that it violates any right of petitioner under the United States Constitution or the California Constitution, the Supreme Court or court of appeal shall exercise independent judgment on the

⁵ *California Manufacturers Assn. v. P.U.C.* (1979) 24 Cal.3d 251, 258-59.

⁶ *People v. Johnson* (1980) 26 Cal.3d 557, 576 (internal citations omitted).

⁷ *S. Coast Framing, Inc. v. Worker’s Compensation Appeal Bd.* (2015) 61 Cal.4th 291, at p. 8 (quotation omitted).

⁸ *Roddenberry v. Roddenberry* (1996) 44 Cal.App.4th 634, 651-52.

⁹ *Larson v. State Pers. Bd.* (1994) 28 Cal.App.4th 265, 273.

¹⁰ *Util. Reform Network v. P.U.C.* (2014) 223 Cal.App.4th 945, 959 (quotation omitted).

¹¹ *County of San Diego v. Assessment Appeals Bd. No. 2* (1983) 148 Cal.App.3d 548, 555-58 (Assessment Board erred in determining the correct method of valuation to be the market value approach and then subsequently ignoring all competent evidence presented on market value, making its own determination of value based upon speculation and conjecture).

law and the facts, and the findings or conclusions of the commission material to the determination of the constitutional question shall not be final.”¹²

B. Due Process

Due process requires a fair proceeding whenever an individual is to be deprived of property for a public purpose. Ratepayers’ due process right to safe and effective utility service is a recognized right protected by due process; “*Utility service is a necessity of modern life; indeed, the discontinuance of water or heating for even short periods of time may threaten health and safety.*”¹³ Pursuant to the 14th Amendment, “No state shall ... deprive any person of life, liberty, or property, without due process of law.”¹⁴ Likewise, under the California Constitution, “A person may not be deprived of life, liberty, or property without due process of law.”¹⁵ A fundamental requirement of due process is “the opportunity to be heard.”¹⁶ “It is an opportunity which must be granted at a meaningful time and in a meaningful manner.”¹⁷

The United States Supreme Court has long held that due process in proceedings by the Commission requires a fair hearing. In *Railroad Com. of California v. Pacific Gas & Electric Co.*, the Court explained that the requirements of procedural due process are met only where “the rate-making agency of the State gives a fair hearing, receives and considers the competent evidence that is offered, affords opportunity through evidence and argument to challenge the result, and makes its determination upon evidence and not arbitrarily.”¹⁸

¹² Pub. Util. Code, § 1760.

¹³ *Memphis Light, Gas Water Div. v. Craft* (1978) 436 U.S. 1, 18.

¹⁴ U.S. Const., 14th Amend.

¹⁵ Cal. Const., art. I, § 7, subd. (a).

¹⁶ *Grannis v. Ordean* (1914) 234 U.S. 385, 394.

¹⁷ *Armstrong v. Manzo* (1965) 380 U.S. 545, 552.

¹⁸ *Railroad Com. of California v. Pacific Gas & Electric Co.* (1938) 302 U.S. 388, 393-394.

The Constitutional guarantee of a fair hearing requires decision-makers to act free of bias. “When...an administrative agency conducts adjudicative proceedings, the constitutional guarantee of due process of law requires a fair tribunal. [Citations omitted] A fair tribunal is one in which the judge or other decision maker is free of bias for or against a party. [Citations omitted].”¹⁹ Further, “[v]iolation of this due process guarantee can be demonstrated not only by proof of actual bias, but also by showing a situation ‘in which experience teaches that the probability of actual bias on the part of the judge or decision maker is too high to be constitutionally tolerable. [Citations omitted].’”²⁰

Due process and the Public Utilities Code require the Commission to comply with the law and its own rules. The Commission may not “disregard ... express legislative directions to it, or restrictions upon its power found in other provisions of the act or elsewhere in general law.”²¹ The Public Utilities Code and other express statutory provisions do not represent the only limits upon the Commission's authority. Significantly, the Commission must abide by its own rules²²and Commission rules and procedures must be consistent with due process.²³ As the court recognized in *Southern California Edison Co. v. Public Utilities Commission*, the Commission's failure to follow its own rules in adopting a particular decision constitutes a failure to proceed as required by law, and, if prejudicial, invalidates that decision.²⁴

¹⁹ See *Morongo Bd. of Msn. Indians v. State W. Resources* (2009) 45 Cal.4th 731.

²⁰ *Id.* at p. 737.

²¹ *PG & E Corp. v. Public Utilities Com.* (2004) 118 Cal.App.4th 1174, 1199.)

²² *Southern California Edison Co. v. Public Utilities Commission* (2006)140 Cal.App.4th 1085, 1106 (“*Edison*”).

²³

Southern California Edison Co. v. Public Utilities Commission, supra, 140 Cal.App.4th at p. 1085.

²⁴ *Southern California Edison Co. v. Public Utilities Commission*, supra, 140 Cal.App.4th at pp. 1104, 1106; Pub. Util. Code § 1757, subd. (a)(2).

In Edison, the court concluded the Commission had failed to proceed in the manner required by law when it violated its own rules.²⁵ In that case, the Commission instituted a rulemaking proceeding and then, months after issuance of the scoping memo, the ALJ permitted a party to file comments with 400 pages of materials and new proposals.²⁶ The parties objected that the new proposals were beyond the issues identified in the scoping memo, but the ALJ amended the scope of the proceeding to include the new proposals and allowed three additional business days to respond on the merits.²⁷ In annulling the Commission's decision, the Edison court noted that the Commission adopted its rules pursuant to its rulemaking authority and these rules have “the force and effect of law.”²⁸

Due process also calls for a decision to be based on a record. “[T]he decisionmaker’s conclusion . . . must rest solely on the legal rules and evidence adduced at the hearing. To demonstrate compliance with this elementary requirement, the decisionmaker should state the reasons for his determination and indicate the evidence he relied on, though his statement need not amount to a full opinion or even formal findings of fact and conclusions of law.”²⁹ Commission decisions must go further: Commission decisions “shall contain, separately stated, findings of fact and conclusions of law by the commission on all issues material to the order or decision.”³⁰ “Every issue that must be resolved to reach that ultimate finding is ‘material to the order or decision,’ and findings are required of the basic facts upon which the ultimate finding is

²⁵ *Southern California Edison Co. v. Public Utilities Commission*, supra, 140 Cal.App.4th at pp. 1091–1092.

²⁶ Id. at pp. 1092–1093, 1105–1106.

²⁷ Id. at p. 1106.

²⁸ Id. at p. 1092fn3.

²⁹ *Goldberg v. Kelly* (1970) 397 U.S. 254.

³⁰ Pub. Util. Code, § 1705; See also *Clean Energy Fuels Corp. v. Public Utilities Com.* (2014) 227 Cal. App. 4th 641.

based. . .[S]uch findings afford a rational basis for judicial review and assist the reviewing court to ascertain the principles relied upon by the [PUC] and to determine whether it acted arbitrarily, as well as assist parties to know why the case was lost and to prepare for rehearing or review, assist others planning activities involving similar questions, and serve to help the [PUC] avoid careless or arbitrary action.”³¹

II. THE COMMISSION VIOLATED THE DUE PROCESS GUARANTEES OF THE UNITED STATES AND CALIFORNIA CONSTITUTIONS AND PUBLIC UTILITIES CODE SECTION 1757, SUBDIVISIONS (4) AND (6) THAT COMMISSION DECISIONS BE MADE FREE OF BIAS AND BE BASED UPON SUBSTANTIAL EVIDENCE IN LIGHT OF THE WHOLE RECORD AND FAILED TO ACT IN A MANNER REQUIRED BY LAW AND ACTED IN EXCESS OF ITS POWER IN VIOLATION OF PUBLIC UTILITIES CODE SECTION 1757, SUBDIVISION (A) (1) AND (2)

The Commission violated its own rules, violated the due process rights of ratepayers, and made a biased decision when it permitted PG&E to amend its application long after the scoping memo was issued and after submission of testimony and the evidentiary hearing; made a decision contrary to and not based upon the record; and limited parties’ rights to appeal by shortening the deadline for applications for rehearing from 30 to 10 days.

As the court recognized in *Southern California Edison Co. v. Public Utilities Commission*, the Commission's failure to follow its own rules in adopting a particular decision constitutes a failure to proceed as required by law, and, if prejudicial, invalidates that decision.³²

³¹ *Clean Energy Fuels Corp. v. Public Utilities Com.* (2014) 227 Cal. App. 4th 641 quoting *Greyhound Lines, Inc. v. Public Utilities Com.* (1967) 65 Cal.2d 811 (citation omitted.)

³² *Southern California Edison Co. v. Public Utilities Commission*, supra, 140 Cal.App.4th at pp. 1104, 1106; Pub. Util. Code, § 1757, subd. (a)(2).

Furthermore, Commission decisions “must rest solely on the legal rules and evidence adduced at the hearing.”³³ In ratemaking proceeding, “The commission shall render its decisions based on the law and on the evidence in the record.”³⁴

In approving the Decision, the Commission violated not only the requirements that decisions be based upon the record but also the due process rights of ratepayers to have Commission decisions be made free of bias. “When...an administrative agency conducts adjudicative proceedings, the constitutional guarantee of due process of law requires a fair tribunal. [Citations omitted] A fair tribunal is one in which the judge or other decision maker is free of bias for or against a party. [Citations omitted].”³⁵ Further, “[v]iolation of this due process guarantee can be demonstrated not only by proof of actual bias, but also by showing a situation ‘in which experience teaches that the probability of actual bias on the part of the judge or decision maker is too high to be constitutionally tolerable. [Citations omitted].’”³⁶

In allowing PG&E to file amended applications via its Opening Brief and PD comments, the Commission violated its own rules and demonstrated actual bias in favor of PG&E. At the very least, such action would demonstrate the probability of actual bias too high to be constitutionally tolerable. In making a decision based upon unproven claims made by PG&E after submission of testimony and the evidentiary hearing and in permitting PG&E to defer the second \$1 billion initial shareholder contribution, the Commission failed to make a decision based upon substantial evidence in light of the whole record. In shortening the time for which

³³ *Goldberg v. Kelly* (1970) 397 U.S. 254.

³⁴ Pub. Util. Code, § 1701.1; Rule 8.2.

³⁵ See *Morongo Bd. of Msn. Indians v. State W. Resources* (2009) 45 Cal.4th 731.

³⁶ *Id.* at p. 737.

parties may apply for rehearing of the decision, the Commission has violated the Code, its own Rules, and Constitutional due process rights of ratepayers to review of Commission decisions.

A. Amended Application

The Decision approves an amended application that was submitted in violation of the Code, Rules and Constitutional due process rights of ratepayers. In implementing due process rights of ratepayers to actually be able to address the application upon which the Commission will rule, Rule 1.12 requires that “an amendment to an application, protest, complaint, or answer must be filed prior to the issuance of the scoping memo.” The Commission committed legal error when it allowed PG&E to submit an amended application in the fashion that it did.

The Decision states, “In testimony, and detailed in its briefing materials filed on January 15, 2021, PG&E proposed modifications to its proposed structure.”³⁷ Firstly, this statement is misleading as it obscures the fact that in its filed testimony – Direct, Rebuttal, and Supplemental – PG&E did not make the amendments upon which the Decision acts. Some aspects of the amended application may have been discussed during the evidentiary hearing but it was not until many months following submission of written testimony, in the midst of the evidentiary hearing, that PG&E filed its amended application. Secondly, the Decision completely ignores the fact that PG&E amended its application long after the Scoping Memo was issued in clear violation of the Rules.

The Commission could have taken one of two courses to an legal decision: 1.) ignore PG&E’s impermissible attempts to amend the application and act upon the application as filed in April of 2020 or 2.) allow PG&E to file an amended application and reset the clock for the

³⁷ Decision at p. 8.

proceeding allowing new protests, setting a new prehearing conference, scheduling submission of new intervenor testimony, and scheduling an additional evidentiary hearing. Instead, acting in clear bias for PG&E, the Commission acted as if nothing untoward had happened and pretended that PG&E's had made only some kind of permissible "revisions" to its proposal that required no additional process.

The Commission's legal error in allowing PG&E to file an impermissibly amended application is highly prejudicial to ratepayers and results in a decision not based upon the record. PG&E never filed any updated testimony to support the amendments. This is an application which requires consideration of numbers – forecasting of risk to ratepayers, potential surplus and deficit in the customer credit trust, etc. The amendments that PG&E made changes the numbers yet no new evidence was submitted to support the change and thus the Commission determination that "We recognize PG&E's characterization that such risks are minimal and the adjusted proposal reduces risks of near term shortfalls to near zero and probabilities of any shortfalls to minuscule levels"³⁸ is not supported by substantial evidence, or any evidence whatsoever, in the record.

B. Application for Rehearing

Pursuant to section 1731, subdivision (b)(1), parties are permitted 30 days following issuance of a decision to file an application with the Commission for a rehearing. The deadline is shortened to 10 days "in the case of an order issued pursuant to either Article 5 (commencing with Section 816)." This statutory requirement is repeated in the Commission's Rules of

³⁸ Decision at p. 66.

Practice and Procedure, Rule 16.1. In the Decision, the Commission attempts to manufacture a justification for applying the shortened deadline applicable to Article 5 despite the absolutely incontrovertible fact, as explicitly stated in the Decision, that the order was made pursuant to section 451.2, *not* sections 850 et seq. The Commission denied PG&E’s motion to consolidate A.20-04-023 and A.21-01-004 and the Decision does not address any of the requirements of Article 5. The Decision explicitly does not address sections 850 et seq. (Article 5.8), stating “Additional issues relating to PG&E’s proposed issuance of a financing order under §§ 850 et seq., will be resolved separately in our disposition of A.21-01-004.”³⁹ The Decision also explicitly does not answer the question “Should the Commission Issue a Financing Order Under Sections 850 et. seq.?” stating, “The Commission will address this issue in A.21-01-004.”⁴⁰ The Proposed Decision in A.21-01-004 also makes clear that distinction between the two applications stating, “On April 30, 2020, PG&E filed an application, A.20-04-023, with the Commission pursuant to Section 451.2 to determine the costs and expenses arising from, or incurred as a result of, catastrophic wildfires with an ignition date in the 2017 calendar year”⁴¹ and “As proposed [in A.21-01-004], PG&E asks the Commission to issue a Financing Order for authority pursuant to Article 5.8 of the Public Utilities Code to issue \$7.5 billion of Recovery Bonds.”⁴²

Yet, in what can be attributed to nothing other than a clear bias towards PG&E and against the due process rights of ratepayers, the Decision claims that the 10 day deadline applies:

As noted above this order construes, implements, or interprets the provisions of Public Utilities Code Article 5.8. Therefore, applications for rehearing and judicial review of this Order are subject to §§ 1731(d) and 1756. These laws provide that any application for rehearing of this decision must be filed within 10 days of the issuance of a final decision.⁴³

³⁹ Decision at p. 16.

⁴⁰ Decision at p. 80.

⁴¹ Decision at p. 8.

⁴² Decision at p. 9.

⁴³ Decision at p. 79.

The order is not made pursuant to Article 5, as required by statute, and thinly veiled attempt to tie the decision to Article 5 by comparing section 850.1's just and reasonableness requirements to section 451 does not make this Decision "issued pursuant to [] Article 5" as required by the Code for a 10 day deadline to apply. The Decisions states:

Throughout this decision we have directly and indirectly referred and interpreted the provisions of § 850 *et seq.* because they related to the relief requested. Below we explicitly construe how § 850.1(a)(1)(A)(ii) applies in these circumstances and identify a procedural consequence of the fact that we interpret portions of § 850.1 here.⁴⁴

This is followed by a recitation of the parties' positions regarding application of section 451 and a four sentence discussion of section 850.1 that *explicitly* defers any analysis of section 850.1 to A.21-01-004:

Section 850.1 separately states that the Commission must find "[t]he issuance of the recovery bonds, including all material terms and conditions of the recovery bonds, including, without limitation, interest rates, rating, amortization redemption, and maturity, and the imposition and collection of fixed recovery charges as set forth in an application," are among other things "just and reasonable."²⁷⁸ This question will be addressed in A.21-01-004, and if the Commission determines PG&E has met the "just and reasonable" standard of § 850.1(a)(1)(A)(ii), we need not look any further.²⁷⁹

Nonetheless, the Commission then claims that "As noted above this order construes, implements, or interprets the provisions of Public Utilities Code Article 5.8."⁴⁵ The Decision does not such thing and, even if it did, it still was not made pursuant to Article 5. The Commission has violated parties' due process appellate rights by wrongly limiting statutory timeframe for filing an application for rehearing. A shortening of the time frame in which parties have to prepare application for rehearing from 30 to 10 days on an extremely complicated decision that would

⁴⁴ Decision at pp. 75-76.

⁴⁵ Decision at p. 79.

saddle ratepayers with risk of significant loss is highly prejudicial to the rights of ratepayers and those parties that advocate on their behalf including Wild Tree.

C. Record

PG&E failed its burden of proof that its application met any of the requirements of section 451.2. The Decision reaches the conclusion that approval is warranted only by ignoring critical record evidence from intervenors that PG&E has not met its burden of proof that its proposal is just and reasonable and meets the legal requirements of SB 901 for a ratepayer-backed bailout. Wild Tree has argued these points extensively in this proceeding and hereby incorporates by reference the allegations it has made in its Opening Brief, Reply Brief, and Comments on the Proposed Decision regarding PG&E's failure to demonstrate the following: Compliance with SB 901 and D.19-06-027 Stress Test Methodology; Necessity of recovery bond to prevent harm to ratepayers or provide adequate and safe service; \$7.5 billion of 2017 wildfire claims costs are eligible for securitization; Bond will be Ratepayer neutral.

In its Application for Rehearing, TURN has also detailed many instances in which the Decision ignores and is contrary to the record. Wild Tree endorses all allegations of legal error made by TURN in its Application for Rehearing and incorporates those allegations by reference here.

CONCLUSION

For all the foregoing reasons Wild Tree urges the Commission to grant this application for rehearing.

Respectfully submitted,

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