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By email and U.S. Mail

Energy Division
California Public Utilities Commission
505 Van Ness Avenue
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Re The California Community Choice Association's (CalCCA) Comments on Draft Resolution E-4990

To Energy Division – Tariff Unit:

Draft Resolution E-4990 addresses risks magnified by Pacific Gas and Electric Company's (PG&E's) bankruptcy with respect to risks for third-party service providers (TPPs) by requiring PG&E and the other investor-owned utilities (IOUs) to segregate funds they receive as billing agents for TPPs from other funds received by the IOUs.[1] As a primary matter, CalCCA appreciates the Commission's timely efforts to provide additional certainty for TPPs. The Commission's action in issuing the Draft Resolution on its own initiative comes on the heels of Decision (D.)19-01-025 and D.19-01-026, relating to PG&E's Debtor-in-Possession (DIP) financing, in which the Commission affirmed that the revenue PG&E collects as a fiduciary

[1] Since the principal predicate for Draft Resolution E-4990 is presumably PG&E's bankruptcy and the fact that "PG&E collects amounts paid by the [Community Choice Aggregator (CCA)] customers for payment of CCA charges" (Draft Resolution E-4990 at 3), CalCCA's comments are aimed at PG&E and associated concerns related to PG&E's bankruptcy, although the essence of these comments applies equally to the other IOUs.

agent on behalf of TPPs is not part of PG&E's assets, but rather (as stated by PG&E) belongs exclusively to the TPPs.[2] Again, CalCCA appreciates the Commission's attention to this matter.

While CalCCA appreciates the Commission's continuing attention to this matter, the administrative burden and risk arising from fund segregation appear to outweigh the incremental risk mitigation this measure would provide to TPPs. In lieu of fund segregation, CalCCA suggests that the Commission use Resolution E-4990 for two overarching purposes, both of which are currently reflected in the draft resolution. First, the Commission can reduce uncertainty by continuing to conclude as a matter of law that CCA customer payments collected on behalf of CCAs are not ever the property of PG&E, which has no legal, equitable or beneficial interest therein, and may not be used to satisfy any other utility obligations. Instead, such CCA customer payments are continuously "public moneys" being collected in accordance with statutory directives and Commission-approved tariffs for the CCAs. Second, CalCCA also requests that the Commission add further certainty to PG&E's relationships with TPPs by clarifying that PG&E's rejection of CCA service agreements in bankruptcy would serve no legitimate business purpose and would harm CCAs without benefitting PG&E, since PG&E's obligations would continue under applicable law and regulations to the same effect as provided in the CCA service agreements.

1. Confirming that TPP Funds Collected by PG&E Are Not PG&E's Property and Cannot Be Used for Other Purposes Will Reduce TPP Risk without Additional Action by PG&E.

TPPs face a risk resulting from the commingling in a single account funds PG&E collects on behalf of TPPs with other funds PG&E receives. Draft Resolution E-4990 explains that PG&E acts as the "exclusive billing agent for the CCA."[3] The U.S. Bankruptcy Court for the Northern District of California (Bankruptcy Court) has recognized the billing agent role PG&E

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2 *See, e.g.,* D.19-01-025 at 9 (referencing the Reporter's Transcript at 80:16-21).

3 Draft Resolution E-4990 at 2. *See also* D.19-01-025 at 9.

plays in an interim order authorizing PG&E to continue to perform its obligations with respect to TPPs.[4] Despite the Bankruptcy Court's recognition of this role (as codified in Bankruptcy Code §541(d)), a residual burden to TPPs remains because some of their lenders, suppliers and investors perceive the risk of possible disruptive disputes. If funds are not segregated, for example, commingled TPP funds could be inadvertently entangled in a "sweep" of PG&E's accounts by the DIP lender if PG&E were to default on its obligations.

While CalCCA appreciates the Commission's proposed account segregation to address this risk, the administrative burden and risk arising from fund segregation under PG&E's cash management system outweigh the measure's incremental benefit. Customers make a single payment to PG&E each month, covering both PG&E's delivery services and the CCA's supply service. Practically, it is not clear how PG&E could, at the time of receipt, split the deposit of a payment between two accounts. Even if it could, this measure would add unnecessary administrative burden and potential delays in remitting the payment to the CCA.[5] If splitting a deposit is not feasible, the only means of segregation would be to deposit the entire customer payment into a commingled account and then subsequently transfer the TPP portion to a TPP-designated account. In CalCCA's view, however, segregation using this approach would not

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[4] Case Nos. 19-30088 and 19-30089, *Interim Order Pursuant to 11 U.S.C. §§105(a) 363(b) and 507(a)(7) and Fed. R. Bankr. P. 6003 and 6004(1) Authorizing Debtors to (A) Maintain and Administer Customer Programs including Public Purpose Programs, and (B) Honor any Pre-Petition Obligations Relating Thereto; and Authorizing Financial Institutions to Honor and Process Related Checks and Transfers,* issued January 31, 2019, Docket No. 216 (Third-Party Program Order). PG&E defined "Third-Party Programs" to include third-party programs pursuant to which the "Debtors invoice Customers on behalf of third parties that have purchased and provide electricity or natural gas to Customers using the Debtors' transmission and distribution facilities…." *Motion of Debtors Pursuant to 11 U.S.C. §§105(a) 363(b) and 507(a)(7) and Fed. R. Bankr. P. 6003 and 6004(1) Authorizing Debtors to (A) Maintain and Administer Customer Programs including Public Purpose Programs, and (B) Honor any Pre-Petition Obligations Relating Thereto; and Authorizing Financial Institutions to Honor and Process Related Checks and Transfers*, filed January 29, 2019, Docket No. 16 at 11.

[5] *See, e.g.* PG&E Rule 21, §Q.3.b (requiring PG&E in most instances to remit customer payment to the CCA on the next business day after the payment is received from the customer).

materially mitigate concerns, such as the risk of a DIP sweep; a sweep could theoretically occur before funds are transferred to a CCA-designated account.

Taking all of these factors into consideration, it would best serve the interests of all parties not to mandate segregation but, instead, to reiterate the nature and continuous ownership of TPP funds to inform PG&E's plan of reorganization. Specifically, CalCCA requests that the Commission clarify and reiterate in Resolution E-4990 the Commission's previous conclusion, namely, that the funds collected on behalf of TPPs are not the legal, equitable or beneficial property of PG&E and may not be used to satisfy any other utility obligations, but instead the funds are, and even when commingled remain, exclusively the legal, equitable and beneficial property of the TPPs (and in the case of CCAs are public moneys.) While this confirmation cannot entirely mitigate all concerns, such as the limited risk of a sweep of CCA funds in a commingled account, it would continue to reduce any uncertainty regarding the ownership of the funds, especially in the event of PG&E's default.

2. Clarifying the Nature of CCA Service Agreements Would Also Reduce Uncertainty in the Relationship Between PG&E and CCAs

CalCCA offers the following comments on the assumption that the Commission's efforts in issuing the Draft Resolution on its own initiative is motivated in part by a desire to provide greater clarity of matters affecting PG&E and CCAs with respect to customer payments. Again, CalCCA commends the Commission for this effort. In this regard, the Commission has the ability to clarify another key TPP issue within its jurisdiction to inform PG&E's plan of reorganization and treatment of relevant contracts. A CCA must enter into a CCA Service Agreement[6] and, in some cases a Specialized Services Agreement[7] (CCA Agreements), to enable

6 *See, e.g.,* Rule 23, §F.1.b.5. and §F.4.a.
7 *See id., e.g.,* §F.5.a. and §O.2.

operation pursuant to Rule 23 of PG&E's tariff. The Commission's authority over these contracts is expressly articulated in Rule 23, §B.17.d:

> The Commission shall have initial jurisdiction to interpret, add, delete or modify any provision of this Rule or the CCA Service Agreement, and to resolve disputes regarding PG&E's performance of its obligations under PG&E's tariffs, the CCA Service Agreement and requirements related to CCA Service, including any disputes regarding delays in the implementation of CCA.

The Bankruptcy Court should defer to the Commission's jurisdiction in addressing CCA service agreements since these agreements are part of PG&E's tariffs and accordingly have the force of law. In other words, under the bankruptcy code PG&E must continue to comply with applicable law and regulations, and therefore Commission-approved service agreements, which embody and implement those laws and regulations, will have the force of law, and are distinguishable from PG&E's private contracts. Indeed, the Bankruptcy Code requires the Court to receive the Commission's approval for any rate changes before confirming any Bankruptcy Plan:

> The court shall confirm a plan only if … Any governmental regulatory commission with jurisdiction, after confirmation of the plan, over the rates of the debtor has approved any rate change provided for in the plan, or such rate change is expressly conditioned on such approval.[8]

Rule 23 is part of PG&E's "tariffs," subject to the Commission's jurisdiction, and as such Rule 23 has the force of law.[9]. Consequently, the Commission has jurisdiction over or, at a minimum, can influence PG&E's treatment and disposition of CCA Agreements in bankruptcy.

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[8] 11 U.S.C. §1129(a)(6).

[9] *See, e.g.* General Order 96-B, §3.15 (applying Cal. Pub. Util § 489). *See also Trammell v. Western Union Tel. Co.* (1976) 57 Cal.App.3d 538, 549–550; *Wood v. Public Utilities Commission* (1971) 4 Cal.3d 288, 292–293; *Pacific Bell v. Public Utilities Com'n* (2000) 79 Cal.App.4th 269, 273–274; *Southern California Edison Co. v. City of Victorville* (2013) 217 Cal.App.4th 218, 228 (each of which relating to Commission-approved tariffs having the force of law).

Even if the Commission could not condition PG&E's plan of reorganization on the assumption of CCA Agreements, rejection of these contracts would not meet the Bankruptcy Court's "business judgment" test, especially recognizing that all debtors in possession are fiduciaries for their counterparties under bankruptcy law. A bankruptcy court may find a debtor's rejection of an executory contract reasonable if the "rejection would benefit the general unsecured creditors."[10] The debtor must at least show that the contract is "burdensome" to the estate,[11] especially if the debtor is solvent. The court may also determine whether the "debtor-in-possession acted prudently, on an informed basis, in good faith, and in the honest belief that the action taken was in the best interests of the bankruptcy estate."[12]

Rejecting CCA Agreements would not benefit PG&E's bankruptcy estate. Execution of CCA Agreements is mandated by Rule 23. If PG&E were to reject a CCA Agreement, which CalCCA contends is not possible for the reasons described above, PG&E would still be obligated by Rule 23 to immediately offer the *same* agreement to the CCA, assuming the CCA continues to meet the tariff's applicability requirements. The bankruptcy estate would not benefit from this action, neither gaining value nor reducing costs. While the impact on PG&E and its estate would be material (*e.g.*, the need to commit additional administrative resources to reinstate the agreement, to pay damages for breach under §365(g), and to suffer the consequences of a violation of continuously applicable law and regulations that cannot be rejected), this impact would not be as significant as the impact on a CCA. In contrast, a CCA would be detrimentally affected; rejecting a CCA Agreement could interfere with the CCA's service of its customers by potentially leaving a time gap between PG&E's rejection of the agreement and execution of a new agreement and needlessly alarming lenders, suppliers, investors, and customers. As such,

10 *In re Chi-Feng Huang*, 23 B.R. 798, 800, 801 (9th Cir. BAP 1982).
11 *See In Re Minges*, 602 F.2d 38, 42 (2nd Cir. 1979).
12 *See Navellier v. Sletten*, 262 F.3d 923, 946 n.12 (9th Cir. 2001); *FDIC v. Castetter*, 184 F.3d 1040, 1043 (9th Cir. 1999).

PG&E could not "on an informed basis, in good faith, and [] honest belief"[13] reject a CCA force of law agreement, especially as a fiduciary.

The Commission has the authority and opportunity to prevent PG&E from exercising its rights in bankruptcy to disrupt CCAs service to their customers. CalCCA thus requests confirmation in Resolution E-4990 that *PG&E's rejection of a CCA Agreement would serve no legitimate business purpose and would be detrimental to the interests of CCAs*.

CalCCA appreciates the opportunity to provide these comments.

Sincerely,
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A Professional Corporation

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Service List R.17-06-026
Service List R.14-03-002
Service List R.07-05-025

[13] *Id.*