**BEFORE THE ENVIRONMENTAL APPEALS BOARD**
**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**
**WASHINGTON, D.C.**

| | | |
|---|---|---|
| In re:<br><br>Russell City Energy Center<br><br>PSD Permit No. 15487 | ) | PSD Appeal Nos. 10-01, 10-02, 10-03, 10-04 & 10-05 |

**RUSSELL CITY ENERGY COMPANY, LLC'S EXHIBITS TO ITS OPPOSITION TO PETITIONERS' MOTIONS FOR LEAVE TO FILE A REPLY BRIEF AND REQUEST FOR EXPEDITED CONSIDERATION**

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**RUSSELL CITY ENERGY COMPANY, LLC'S**
**EXHIBITS TO ITS OPPOSITION TO PETITIONERS' MOTIONS FOR LEAVE TO FILE A REPLY BRIEF AND REQUEST FOR EXPEDITED CONSIDERATION**
**(PSD APPEAL NOS. 10-01, 10-02, 10-03, 10-04 & 10-05)**

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# Exhibit 35

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March 31, 2009

**Via Email weyman@baaqmd.gov**
**And U.S. Mail**
Weyman Lee, P.E.
Senior Air Quality Engineer
Bay Area Air Quality Management District
939 Ellis Street,
San Francisco, California 94109

Re: **RCEC's Representations Concerning Chabot-Las Positas Objections And Comments to Draft "Federal 'Prevention of Significant Deterioration' Permit" For The Russell City Energy Center, BAAQD Application No. 15487.**

Dear Mr. Lee:

On behalf of the Chabot-Las Positas Community College District, this is to address some of the issues which have come to our attention that were raised at a meeting on March 19, 2009, that we understand was attended by you and three other technical or engineering staff members Nishimura, Lusher, Young, Brian Bateman and BAAQMD's attorney Alexander Crockett, held by the attorneys for the applicant Russell City Energy Center (RCEC) or Calpine Corporation ("Calpine").

From what we understand, the scope of the discussions was initially identified for the purpose of "settlement" discussions. We were surprised to learn of the District's attendance at such a meeting given you have not re-circulated a new draft permit, responded to pending comments and no one yet has initiated litigation. Also in attendance to listen to RCEC's private presentation were the Sierra Club attorney and counsel representing Citizens Against Pollution, attorneys from the Law Clinic for Golden Gate University and Earthjustice..

We were surprised to learn that although neither your office nor Calpine contacted Chabot-Las Positas concerning this, the attorneys for RCEC focused on the information presented in Chabot-Las Positas's February 6, 2009 correspondence to you. (For that matter, to date neither has your office has never contacted Chabot-Las Positas seeking a

response to Calpine's assertions.[1]) Despite this failure to contact Chabot-Las Positas, this is to confirm that Chabot-Las Positas remains ready and willing to respond to any inquiries or to provide you with any follow-up information. **Moreover, we would expect that before you rely on any contentions by RCEC disputing Chabot-Las Positas information, BAAQMD would provide Chabot-Las Positas the opportunity to respond.** This is particularly important since as the documents attached by email and enclosed by mail reflect, we suspect that the District did not receive reliable information from RCEC.

Further, **this confirms that Chabot-Las Positas expects this attached and enclosed evidence, and any other evidence responsive to RCEC's attacks on the opposing parties' technical positions presented on or by February 6, 2009, to be incorporated and included in the record for consideration of RCEC's application.**

**1. The Allegation That RCEC Will Generate 828 lbs of CO2/MWh Is *At Full Baseload* Capacity, Which Is Not The Actual Expected Operation Of RCEC Under The Proposed PSD Permit Sought.**

We understand that RCEC contends that it will satisfy the Emissions Performance Standard ("EPS") adopted by the CPUC in Decision ("D.") 07-01-039 which requires that the net emissions rate of generation facilities such as the RCEC Project be no higher than 1,100 lbs. of carbon dioxide (CO2) per megawatt hour based on capacity factors, heat rates and corresponding emissions rates reflecting the ***actual, expected operations of the powerplant.*** (Opinion: Interim Opinion On Phase 1 Issues: Greenhouse Gas Emissions Performance Standard, D.07-01-039, 2007 (Jan.25, 2007), emphasis and italics added.) Further, we are aware that PG&E recently filed its public response submitting EPS documentation (*albeit* without the documentation) that "the RCEC Project . . . with allowance for reasonable degradation, to maintain a guaranteed heat rate of XXX mmbtu/MWh ***at full load (baseload capacity***) [fn], which translates to 828 lbs of CO2/MWh." (PG&E Response filed March 20, 2009 in *Application of Pacific Gas and Electric Company for Expedited Approval Of The Amended Power Purchase Agreement For The Russell City Energy Company Project(U 39 E),*Application 08-09-007.)

The problem, however, is that as reflected by your draft permit, and RCEC's own admission against interest by Barbara McBride of Calpine's November 13, 2008 e-mail to you entitled "RCEC vs. FP 10 emissions***," the proposed duty cycle described by RCEC for this PSD permit is "intermediate to baseload," with the potential for daily startups and extended weekend downtime following by a cold start***. So, although PG&E's representations are interesting, **because this is not the actual expected**

[1] Dr. Joel Kinnamon's telephone number was clearly stated on the letterhead and he directly emailed you his February 6, 2009 letter; when he is unavailable, he has assistants who take messages and there is voicemail. Your office never attempted to contact him or his office.

**operation and duty load as sought to be approved by RCEC for this permit, those representations are irrelevant and inapplicable.**[2]

**2. RCEC's Contention That The Utah And Long Island Plants Identified By Chabot-Las Positas Do Not Exist As Described Is Wrong.**

Our February 6, 2009, letter, pages 5-7, Chabot-Las Positas also pointed out that your "statement of basis is seriously flawed in that it mistakenly asserts that Siemens equipment is not available when in fact it and other alternatives are commercially available and in operation." (Relying on SOB, p. 41 and footnote 31 on page 40.) We additionally pointed out that the statement that "a low-load operation flexibility (LLOF) system for its turbines. . . . it has not yet been validated and is not commercially available at this time" simply is factually wrong and that the District must revisit these points. (February 6, 2009 letter, pp. 6-7.)

Citing the engineering publications by Siemens, such as by H. Emberger, E. Schmid, E. Gobrecht – Siemens Power Generation Germany, *Fast Cycling Capability for New Plants and Upgrade Opportunities*, published by Siemens AG, 2005, we discussed the development of two combined cycle fast start plant models: the Flex-Plant (FP)[3] 10 for peaking to intermediate duty applications, using a simplified once-through heat recovery steam generator (HRSG), and the FP 30 high efficiency fast start plant using a high efficiency HRSG for intermediate to baseload applications. (February 6, 2009 letter, p. 7 & fn. 10.)

We pointed out that based on our investigation, "there are many off-the-shelf alternatives, both new F-class combined cycle alternatives and upgrade packages to operational facilities, that dramatically reduce startup/shutdown emissions relative to the startup/shutdown emission limits identified by the District as startup/shutdown BACT for RCEC. . . . [H[owever, that this Statement of Basis fails to provide any sound technical basis for concluding that by simply following "operating instructions" for the older 501FD2 gas turbine represents state-of-the-art startup/shutdown BACT for the RCEC gas turbines." (Feb. 6, 2009 letter, p. 9.)

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[2] See Chabot-Las Positas February 6, 2009 letter: "As your Statement of Basis acknowledges, p. 10, this facility is designed for conventional baseload operation using Siemens' *older* Westinghouse 501FD2 gas turbines.[2] **Baseload operation, meaning continuous operation at or near the design output of the plant, generally results in only a handful of startups and shutdowns each year. Startup/shutdown emissions may be a relatively minor component of overall annual emissions in a baseload application, even if individual startup/shutdown events produced significant emissions.** However the proposed duty cycle described by RCEC for this permit is "intermediate to baseload," with the *potential* for *daily* startups and extended weekend downtime following by a cold start." (Emphasis added.)

[3] The Flex-Plant or FP is a trademark technology. All references to "FP" are to the trade marked technology.

In support, we referred you to the following projects that should be examined:

> The Lake Side Power Plant in Utah - a 2x1 combined cycle project utilizes FP 30 technology and has been in operation since December 2007; and
>
> The Caithness Energy Long Island Power 1x1 combined cycle plant currently under construction also is permitted to use FP 30 technology.

(Feb. 6, 2009 letter, p. 13.)

Although you have never contacted us to provide you the validating documentation, we understand that at this meeting RCEC contended that these plants as identified above do not exist. **RCEC's contention is grossly incorrect and this is to reiterate that before the District relies on anything asserted by RCEC disputing a point raised, the District provide the proponent of the point the opportunity to respond.** ***In this regard, if we are "misstating" RCEC's contention, please promptly notify us as to just what does RCEC dispute and provide us an adequate opportunity to respond.***

Attached via email and enclosed by mail are copies of the following documents:

> October 4, 2004 Approval for Lake Side Power Plant
> Utah County, CDS A; NA; NSPS, NESHAPS, HAPs, TITLE V MAJOR, PSD MAJOR, NAA/NSR MAJOR
>
> January 6, 2005 Approval Order For The Lake Side Power Plant issued by the Utah Air Quality Board (we suggest you compare the emission limits)
>
> January 13, 2005 Response to Comments received on Summit Vineyard LLC Project (N3031-001) discussing limitations on daily start-up & shut down emissions; and
>
> http://en.wikipedia.org/wiki/Lake_Side_Power_Plant.

This last entry is the link for Wikopedia showing the picture of the Utah power plant operating and referring to the local newspaper's articles concerning its completion which RCEC apparently contends does not exist as described.

Also, enclosed by mail and attached via email are the following documents reflecting that the Long Island facility is presently under construction, a point which we earlier discussed and that apparently RCEC also disputes:

> The August 1, 2006 Environmental Conservation Permit for the CAITHNESS LONG ISLAND ENERGY CENTERZORN BLVD|SCTM# 777-01-28.4.

:

The Long Island air permit describes the facility as follows:

> This facility consists of one Siemens-Westinghouse 501F combustion turbine, which shall fire natural gas as its primary fuel with distillate oil as a back-up fuel. The gas turbine shall operate as a combined cycle unit with a nominal power output of 346 MW. The heat recovery steam generator (HRSG) contains supplemental firing from a natural gas only duct burner. The turbine employs dry low NOx, steam injection, and a selective catalytic reduction unit (SCR) for control of oxides of nitrogen and catalytic oxidation unit (CO catalyst) for the control of carbon monoxide***. The facility also consists of an auxiliary boiler which fires primarily natural gas with distillate oil back-up. The auxiliary boiler employs a low NOx burner and flue gas recirculation (FGR) to control emissions of NOx***. Finally the facility has a natural gas fired fuel gas heater, a diesel fire pump, a steam turbine generator, and a 20,000-gallon aqueous ammonia storage tank..

(Emphasis and italics added.) As reflected by the attached and enclosed documents, both permits for both plants include emission limits for the auxiliary boiler, which is the signature of the Flex Plant technology.

**3. RCEC's Reliance On *Sumas Energy* Should Be Dismissed As Both Decisions Are Unpublished, The 2005 Decision Never Reaches Substantive Issues On BACT Analysis Applicable To Startups And Shut Downs, And For Those Issues It Reaches, It Supports Chabot-Las Positas' Position**.

We also understand that RCEC's attorneys contend that a decision in *In re Sumas Energy 2 Generation Facility*, PSD Appeal No. 02-10 & 02-11 provides legal support for their argument that BACT analysis does not apply to startups and shut downs. If, of course, we have their contention incorrect, please let me know and we will address it. Nevertheless, assuming we correctly state RCEC's position, this is to bring to your attention that the *Sumas* decisions are unpublished, expressly never reach the applicability of BACT to startups and shutdowns because it was not preserved for review, and upon examination, in fact supports Chabot-Las Positas's position.[4]

First, unlike the objectors in *Sumas*, Chabot-Las Positas has made clear that the BACT analysis is flawed, specifically with respect to start ups and shut downs. (*Compare, id* at slip opn. 15: "none of these comments asserted that EFSEC's BACT analysis was flawed in any way.") Further, to make sure there is no confusion, this again confirms Chabot-Las Positas's earlier contention on February 6, 2009 that your District has "failed to conduct a top-down BACT analysis regarding emissions during startup and shutdown." (*Id*. at slip opn. p. 15.)

[4] There are in fact two *Sumas* decisions, both of which were unpublished. We address the latter 2005 decision that was rendered after the 2003 unpublished decision reversed and affirmed in part the prior PSD permit.

Most significantly, *Sumas* actually supports Chabot-Las Positas's position. *Sumas* observed that the PSD permit at issue there "included significantly more restrictive limitations on emissions during startup and shutdown in the final permit." (*Id*. at slip opn. p. 17 ["EPA guidance indicates that if emission limits specified for normal operation are not feasible under startup or shutdown, **PSD permits must specify startup and shutdown emission limits that are protective of the NAAQS,**" emphasis added] & p. 19.) Unlike the numerous limitations on emissions required in *Sumas*, the proposed **PSD draft for RCEC presently imposes no limitations whatsoever on startup and shutdown**s. (BAAQMD Statement of Basis (SOB), p. 121.)

**4. The Data For Palomar That We Identified Is Available From The San Diego Air District And Confirms Chabot-Las Positas's Points.**

In response to the District's attempt to justify its failure to examine Palomar Energy, in San Diego, which optimized its operating procedures and reduced its startup emissions by applying the OpFlex control software and early ammonia injection, the District claimed supporting data is limited and therefore it is not possible to determine what reductions are attributable to the OpFlex control software and early ammonia injection. (Statement of Basis, p. 41.)

Chabot-Las Positas challenged that summary as incorrect and specifically cited and referred to San Diego Gas & Electric's Report, entitled "OpFlex and Early Ammonia Effects on Startup emissions," San Diego County APCD Variance No. 4073, dated March 6, 2007, which documents the breakdown for emissions reduction. Apparently, we understand that RCEC announced at this meeting that no such documentation exists. Attached and enclosed is a copy of the March 6, 2007 Report.

Additionally, by some time next week, we expect to receive the inspection reports from the San Diego County Air District concerning its records on the continuous emissions monitoring system ("CEMS") data from Palomar Energy. We also can provide you with the contact information of the EPA personnel who we understand collect hourly detailed CEMs reports for Palomar.

**5. Any Modifications Or Updating Of Equipment By RCEC, Including A Possible Benson Boiler, Needs To Be Put In Writing And Incorporated In The Application And Proposed Permit, And Circulated For Public Comment.**

Contrary to its earlier position contending that an auxiliary boiler would offset emission benefits and that it had "no room" for a boiler, arguments which Chabot-Las Positas disputed, we understand that RCEC's attorneys announced at this meeting that RCEC has or intends to acquire a Benson boiler and that it has made or intends to make substantial modifications to its equipment which it contends were not available at the time of RCEC's application.

Given a Benson boiler is a significant piece of equipment which has significant substantive consequences for startup and shutdown emissions, this equipment and such modifications must be addressed in writing in any proposed permit. With this substantial change and/or modifications of equipment, we would expect this application to be amended and the proposed permit circulated based on this new information. In this regard, it is unfortunate that RCEC earlier failed to inform the District of this information, and amend its application to incorporate whatever modifications and new equipment it contemplates, prior to the District and numerous members of the public and organizations taking substantial time to review an application and draft permit which allegedly is now "superceded."

Given the important issues presented concerning the enforcement of the Clean Air Act for the District, which already is out of compliance with the Clean Air Act, the **District may not rely on such verbal representations by RCEC without detailed information reduced in writing and including supporting documentation to allow you to properly analyze this new information, re-circulate a draft and to allow for public comment**. We refer you to the October 6, 1999 letter from Robert B. Miller, EPA Chief Permits and Grants Section, to Michigan's Permit Section for its State Department of Environmental Quality, making it clear that approval of a PSD permit may be reversed if the BACT decision is based on misleading information. (*See* p. 1: "grounds for overturning a BACT decision include an inappropriate review (BACT procedures not correctly followed), an incomplete review (BACT decisions not correctly justified), or a review based on false or misleading information." *Relying on* 40 CFR 52.21.)

Please let me know what, if any, additional information you may require or whether there are any additional questions you may have. Your attention concerning these important issues is greatly appreciated.

Sincerely,

Jewell J. Hargleroad

Cc: (Via Email Only)
Deputy County Counsel, Alameda County
Lindsey Stern
Professor Helen H. Kang, Director
Environmental Law & Justice Clinic
Golden Gate University School of Law
Paul Cort, Earthjustice
Sanjay Narayan, Sierra Club
Shana Lazerow, Communities for a Better Environment

# Exhibit 36

CALPINE
NYSE CPN



# GHG BACT Analysis Case Study
# Russell City Energy Center

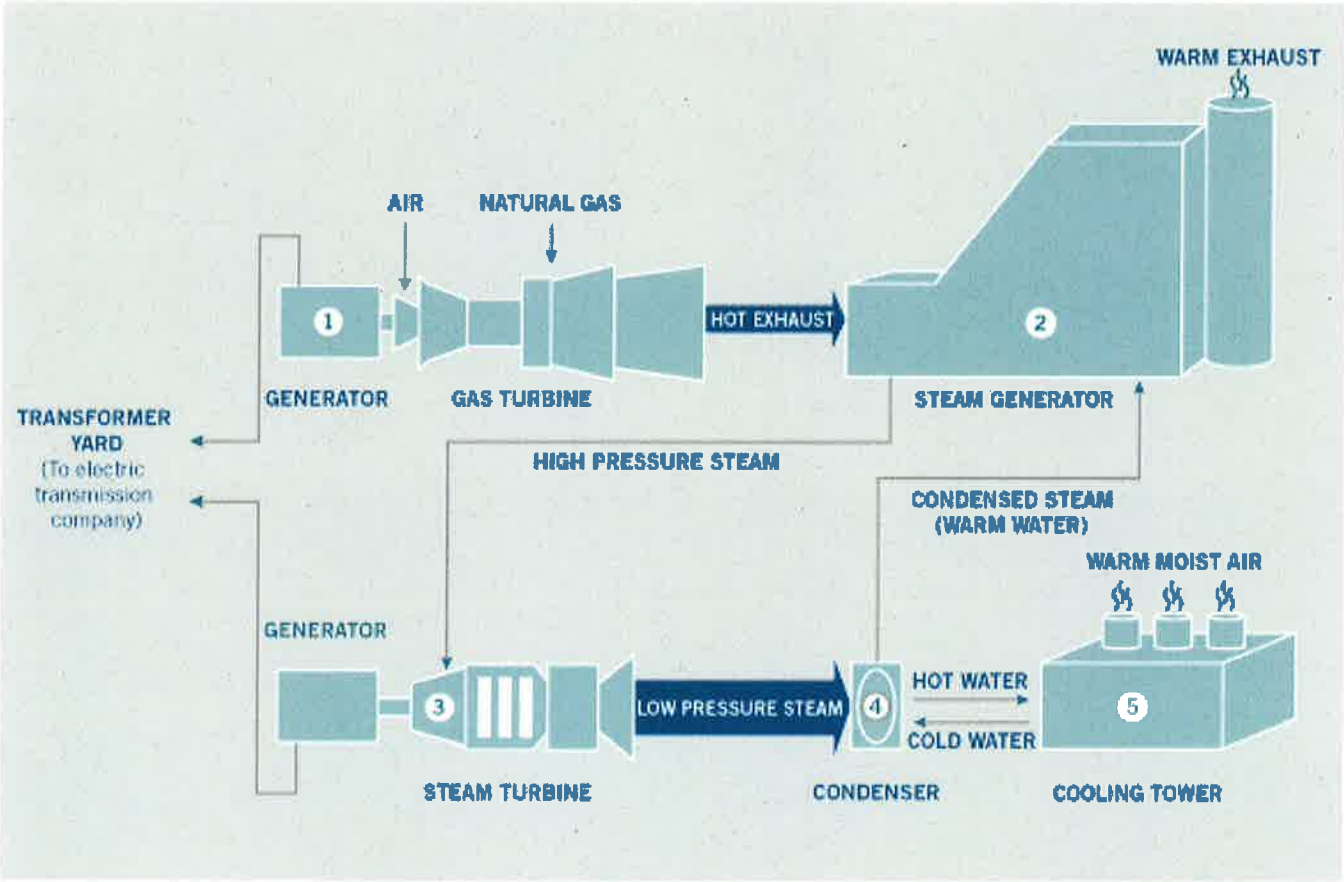
November 2009
Updated February 3, 2010

# Project Description

CALPINE® NYSE CPN

- 612 megawatt natural gas fired combined cycle power plant in Hayward, CA.
- GHG emission sources
  - 2 Siemens Westinghouse 501FD3 combustion turbines - natural gas fired
  - 2 Heat Recovery Steam Generators with supplemental firing - natural gas fired
  - 1 Emergency Fire Pump - diesel fired
  - 5 Circuit breakers - SF6
- Emission controls
  - Dry Low NOx Combustors
  - Selective Catalytic Reduction
  - Oxidation catalyst
- Power purchase agreement with PG&E
- Permits required from California Energy Commission and Bay Area Air Quality Management District

# Project Description




# Air Permit History

- Bay Area Air Quality Management District issued combined Authority to Construct and PSD Permit on November 1, 2007
  - Appeal to Air District Hearing Board denied
  - Petition to EAB resulted in remand of PSD Permit on July 29, 2008
  - EAB Deseret decision issued November 13, 2008
  - Johnson Memo December 18, 2008

- Draft PSD Permit issued December 8, 2008.
  - Public hearing held January 21, 2009
  - Public comment period extended until February 6, 2009
  - EPA approved Petition for Reconsideration February 19, 2009

- Revised Draft PSD Permit and Additional Statement of Basis Issued August 3, 2009
  - Included GHG BACT and voluntary GHG limits to address Deseret uncertainty
  - Public hearing held September 2, 2009
  - Public comment period closed September 16, 2009
  - Awaiting final permit

- http://www.baaqmd.gov/Divisions/Engineering/Public-Notices-on-Permits/2009/080309-15487/Russell-City-Energy-Center.aspx

# General Approach

- Followed the 5 Step Approach
- Initial BACT Analysis in December 2008
- BACT Analysis modified in August 2009
  - Responses to comments
- Resulted in voluntary federally-enforceable GHG limits

# Step 1 - Identify Control Technologies

- Combustion controls
  - No way to alter the chemical reaction ($CH4 + 2O_2 = CO_2 + 2H_20$)
  - Thermal efficiency was the only combustion control identified
- Post-combustion controls
  - Carbon capture and storage
  - Nothing else
- Response to comments
  - Evaluation of non-fossil electricity generation
    - BAAQMD sympathetic but deferred to California Energy Commission
    - BAAQMD states "... the federal BACT framework is clear that it does not require consideration ... of non-fossil-fuel-fired alternatives ..."

# Step 2 - Eliminate Technically Infeasible Options

CALPINE® NYSE CPN

- Combustion controls
  - Energy efficiency is feasible and proven
- Post combustion controls
  - CCS not commercially available
  - DOE expects commercial deployment in 2025 (73 FR 44370)
  - Appropriate sequestration sites in bay area not demonstrated
  - Need further evaluation of environmental impacts of CCS
- Conclusion that high-efficiency power generation technology is the only available and feasible control technology
- Since top control technology chosen no further analysis required per EPA top-down BACT approach

# BACT Emission Limit

- High efficiency power generation the only option
  - CEC data indicated CCGT can achieve 56% efficiency
  - Original project featured 501FD2 turbines achieving 55.8% efficiency
  - Project revised to FD3 achieving 56.45 efficiency
- Comparable projects

| Facility | CEC Application Date | Facility Size (MW) | Thermal Efficiency (LHV) |
|---|---|---|---|
| Colusa Generation Station | 11/6/2006 | 660 | 56% |
| Blythe Energy Project Phase II | 2/19/2002 | 520 | 55-58% (est.) |
| Lodi Energy Center | 9/10/2008 | 255 | 55.6% |
| CPV Vaca Station Power Plant | 11/18/2008 | 660 | 55% |
| Victorville 2 Hybrid Power Project | 2/28/2007 | 563 | 52.7% (w/ duct burn) |
| Avenal Energy Power Plant[44] | 2/21/2008 | 600 | 50.5% |
| Palomar Energy Project | 8/2003 | 550 | 55.3% (w/o duct firing)<br>54.2% (w/ duct firing) |
| SMUD Consumnes Phase I | 9/13/2001 | 500 | 55.1% |

# BACT Emission Limit

CALPINE® NYSE CPN

- BAAQMD determined CO2 emissions achievable for the level of efficiency
- CDC data showed CCGT power plants with emission rates ranging from 794 to 1058 lb/mwh
- BAAQMD cites EPA guidance that BACT limits should not necessarily reflect the maximum possible emissions control efficiency under the most favorable conditions but rather at levels that will allow facilities to achieve compliance consistently over time under all operating conditions
- Factors reducing CCGT efficiency:
  - Hot weather
  - Starting up or shutting down
  - Loads below 100 percent
  - Duct firing
  - Air cooling
- In December 2008 BAAQMD Proposed BACT Limit for CO2 of 1100 lb/mwh
  - Lowest regulatory limit at the time (CA SB 1368)
  - Enforced through heat input limit

# Revised BACT Limit - Comments on December 2008 BACT

CALPINE® NYSE CPN

- More efficient CCGT configurations exist - "G" and "H" turbine technology
  - G technology would be less efficient at 612 mw configuration
  - H technology not yet demonstrated at 60 Hz (Inland Empire just starting)
  - BAAQMD concluded FD3 was most efficient for this project

- BACT limit issues
  - BACT was established as thermal efficiency (%) but expressed as mass emissions per unit of power output (lb/mwh)
  - The permit limit of 1100 lb/mwh was developed to accommodate older, higher emitting facilities and should be considered a floor
  - Data shows achievable emission from new CCGT power plants as low as 800 lb/mwh
  - There was no justification for the compliance margin
  - Heat input limit justification was 35% higher than the rated maximum for the turbines
  - Heat input limit should instead be an output based limit - emissions could rise as efficiency declines yet heat input would remain the same

- BAAQMD legal counsel worked with Calpine and counsel for key commenters to revise limits
  - Absolute based on heat input
  - Efficiency based on heat rate
  - Monitoring and testing provisions

# GHG BACT - Mass Emissions Limits

- Based on permitted heat input limits
- Expanded to include other GHGs
- Monitored real time
  - Fuel flow more accurate than CO2 CEMS
- Based on common emission factors (EPA and CARB)
- Most permits contain heat input limits

| Averaging Period | Heat Input Limit (MMBtu) | Greenhouse Gas Emissions Limits (metric tons $CO_2E$) | | | |
|---|---|---|---|---|---|
| | | $CO_2$ | $CH_4$ | $N_2O$ | $CO_2E$ |
| 1-Hour | 4,477.2 | 242 | 0.08 | 0.14 | 242 |
| 24-Hour | 107,452.0 | 5,797 | 2.03 | 3.33 | 5,802 |
| Annual | 35,708,858.0 | 1,926,399 | 675 | 1,107.48 | 1,928,182 |

# GHG BACT- Output Based Efficiency Limits

CALPINE® NYSE CPN

- Heat Rates (no duct firing)

| Condition | Heat Rate (Btu/kwh) |
|---|---|
| Net Design Base (new and clean) | 6,852 |
| Installed Design Base (3.3% design margin) | 7,080 |
| Degraded Base (degradation between major overhauls and compliance margin) | 7,730 |

- Factors affecting heat rate
  - Gas pressure variability
  - Gas quality variability
  - Cooling water quality variability
  - Turbine exhaust flow degradation
  - Steam turbine performance degradation
  - Gas turbine performance degradation
  - Parasitic load (water treatment)

# Miscellaneous

- Fire pump BACT was limiting operation to testing and emergencies to achieve annual limit of 7.6 metric tons CO2E

- Circuit Breakers
  - Each breaker contains about 145 pounds SF6
  - No direct emissions - potential for fugitive emissions from leaks

- 5 Step BACT for breakers
  - Step 1: Identified SF6 alternatives (oil or air-blast) and SF6 breakers with leak detection
  - Step 2: SF6 alternatives eliminated due to space/safety considerations
  - Step 3: SF6 breakers with leak detection ranked highest but alternatives evaluated
  - Step 4: SF6 alternatives would require more land, generate more noise, and increase the risk of dielectric fluid release
  - Step 5: SF6 breakers with leak detection selected to maintain emissions below 39.3 metric tons CO2E per year

# GHG BACT Permit Conditions

CALPINE®
NYSE CPN

- Mass limits per previous table measured continuously
- Efficiency limit of 7,730 Btu/kwh
  - Initial compliance test within 90 days of commissioning
  - Annual compliance tests thereafter
  - ASME Performance Test Code on Overall Plant Performance (ASME PTC 46-1996)
  - BAAQMD concluded continuous monitoring not possible
  - Efficiency limit measured during baseload operation
- No substantive comments on GHG BACT of the 140 plus comment letters received



# Lessons Learned

CALPINE® NYSE CPN

- Project configuration will drive the efficiency determinations
  - Simple cycle vs. combined cycle
  - Turbine scale (larger is more efficient but not always marketable)
  - Customer defines project configuration
    - Size (megawatts)
    - Characteristics (ramp rate, peaking capacity)

- Companies should be amenable to reasonable GHG limits based on efficiency
  - Important to maintain realistic estimate of heat rate degradation
  - Vendor heat rate projections cover first 48K hours

- Difficult to define efficiency except where design bases and heat rate guarantees exist
  - Many factors degrade efficiency

CALPINE®

NYSE CPN

# Exhibit 37

CALIFORNIA ENERGY COMMISSION
1516 NINTH STREET
SACRAMENTO, CA 95814-5512
www.energy.ca.gov

December 24, 2009

U.S. Environmental Protection Agency
EPA Docket Center, EPA West
Docket ID No. EPA-HQ-OAR-2009-0517
Mailcode: 2822T
1200 Pennsylvania Avenue, NW
Washington, D.C. 20460

**SUBJECT: COMMENTS OF THE CALIFORNIA ENERGY COMMISSION ON PREVENTION OF SIGNIFICANT DETERIORATION (PSD) AND TITLE V GREENHOUSE GAS TAILORING RULE**

To the Administrator:

The California Energy Commission (or Energy Commission) supports EPA's efforts to find regulatory mechanisms to "tailor" the major source applicability thresholds for GHG emissions for PSD[1] and Title V permitting. The Energy Commission has a critical role in the State of California's efforts to reduce greenhouse gas (GHG) emissions to 1990 levels by 2020 and 80 percent below 1990 levels by 2050.

We believe the proposed rule offers ample justification for setting the PSD/Title V "threshold" at a level higher than the 100/250 ton thresholds applicable to criteria pollutants in order to avoid regulatory gridlock and departure from the legislative intent of the Clean Air Act. However, we are gravely concerned that EPA's current proposal will likely create a huge administrative burden for the agencies that must implement expanded federal permit programs during a period of scarce agency resources, resulting in major delays for the very infrastructure investments that are necessary to reduce GHG emissions. For this reason, the Energy Commission recommends that EPA consider a more "staged" approach in its tailoring regulations to avoid these problems. These recommendations are detailed below.

[1] The tailoring rule applies to both PSD and Title V permitting. These comments are principally addressed to the proposed regulations in a PSD context, as PSD permits are currently required for new gas-fired power plants that trigger criteria pollutant PSD thresholds, and under the tailoring rule would be required for all gas-fired power plants. The federal PSD permit process, when it currently is applicable to power plants, is a separate process that normally results in permit issuance after the state permitting process concludes, and is an essential preconstruction requirement for such facilities. By contrast, the Title V permit is not a preconstruction requirement, and is therefore of less interest to state energy policy. Even so, many of these comments on PSD permit tailoring provisions have equal application to Title V permit tailoring.

## I. BACKGROUND.

In 2006 the California Legislature enacted the Global Warming Solutions Act (better known as "AB 32"), a bill which requires the state to "cap" GHG emissions at the 1990 level by 2020. Meeting this target will require an approximate 15 percent reduction from current emission levels and an approximate 30 percent cut in projected 2020 emissions. The California Air Resources Board (ARB) is the agency charged with the implementation of AB 32 goals, and it has developed an overall strategy—the "Scoping Plan"-- to achieve these goals. AB 32 directs ARB to consult with the Energy Commission and the California Public Utilities Commission on energy-related elements of its Scoping Plan, which relies heavily on significant reductions in GHG emissions from the electricity sector. The bulk of these reductions will come from greater efficiency in the use of energy and by converting much of the electric generation system to renewable generation through RPS requirements. A state cap and trade program currently under development will produce even further reductions.

The Energy Commission has an important role in meeting the state's AB 32 requirements. In addition to consulting with ARB in the development and implementation of the Scoping Plan, the Energy Commission is responsible for adopting the state's efficiency standards for buildings and appliances, and for licensing all new thermal electric generating plants of 50 megawatts or greater. Thus, the Energy Commission is the licensing agency for both gas-fired electric generation and the renewable thermal generation that will comprise an increasing part of the state's generation and transmission system.

Because of the state's efforts to implement AB 32, California is at the cusp of transforming its complex system for generating and serving electricity to consumers. This transformation will mean that an increasing amount of electricity generated in the state will come from renewable sources such as wind and solar generation. Such generation is "intermittent" by nature, meaning that it depends on sunlight and wind conditions, and thus must be supported by gas-fired generation that provides back-up reliability. Thus, a critical part of the transformation of the California system requires new, more flexible and efficient, gas-fired electric generation that will preserve system reliability when renewable power is less available.

Currently, PSD requirements apply only to large "base-load" power plants that emit more than 100 tons per year of criteria pollutants. Most of the new gas-fired peaking facilities that California needs to integrate renewable generation do not currently trigger PSD permit thresholds, and are thus not subject to this federal permit process. However, with the extension of PSD application to GHG emissions, particularly at the 25,000 ton level proposed by the tailoring rules, all gas-fired power plants in California, including even peakers that are too small to be within the jurisdiction of the Energy Commission, will require PSD permitting. In fact, even some solar thermal generators that use gas-fired backup to augment generation or prevent fluid from freezing will, under the current tailoring proposal, trigger PSD permit requirements.

## II. EPA'S PROPOSED PSD TAILORING THRESHOLD JEOPARDIZES CALIFORNIA'S RENEWABLE ENERGY STRATEGY.

The Energy Commission is concerned that extending PSD requirements to relatively small peaker and some renewable power plants will jeopardize California's efforts to transform its system to one that is much more reliant on renewable sources. As discussed above, an essential piece of the state's renewable strategy is to construct new, very efficient, gas-fired power plants that will be essential to support a more renewable-based system. These gas-fired power plants will typically have fast-start capability, are highly efficient, and can quickly "ramp" up and down to support fluctuating generation from wind and solar facilities. This allows the electric system to avoid reliability problems that renewable generation can cause by their normal fluctuations, which will otherwise result in too little generation or too much generation without flexible gas-fired backup.

A tailoring rule of 25,000 tons will require PSD permitting for all of these flexible and efficient proposed natural gas peaking facilities (regardless of size), for all new biomass renewable facilities, and for some solar facilities with gas-fired augmentation. Such projects are currently (with some exceptions) below the PSD threshold. A 25,000 ton threshold will result in a several-fold increase in the number of PSD permits required in California.[2] Unfortunately, current agency resources are insufficient to process PSD permits without substantial delay, and there are no plans for new resources (either at Region 9 or at the air district level) to meet the significant new demand for PSD permits. Thus, it is likely the proposed rule, even at the 25,000 ton threshold, will cause gridlock of the air permit process.

This federal permit gridlock has the potential to substantially interfere with California's transformation of the electric generation system to greater reliance on renewable generation. In addition, by delaying new, more efficient, gas-fired peaking infrastructure, it will force continued reliance on a fleet of aging, inefficient gas-fired boiler units that were not designed to provide flexible peaking support. This consequence of expanded PSD permitting may thus retard, rather than facilitate, reductions in GHG emissions from the electricity sector—a cornerstone of California energy policy.

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[2] EPA's estimate that a 25,000 ton threshold will result in only 400 additional PSD applications nationwide is almost certainly a grave underestimate. In California peaker power plant projects (and likely other project proposals) are often carefully designed to be below the 100 ton threshold, but all of these projects would become subject to PSD requirements. Of course, extending PSD to this new, much lower level because of GHG will subject these facilities to additional criteria pollutant analysis requirements, adding greatly to the administrative burden and delay for such projects.

## III. THE TAILORING PROPOSAL FAILS TO CONSIDER DELAY FROM REVIEW BY THE ENVIRONMENTAL APPEALS BOARD (EAB).

In addition to delays in the PSD permitting process described above, the proposed rule would greatly increase the number of cases appealable to the Environmental Appeals Board (EAB), which will likely cause extraordinary delay in the development of new projects critical to California's GHG emissions goals. The Notice fails to consider this impact.

All PSD permits are subject to review before the EPA's EAB. In California, PSD requirements are typically met by an EPA-issued permit, issued either by EPA Region 9 or, for two air districts, by local air districts delegated that EPA duty. Thus, nearly all facilities that trigger the PSD threshold in California will be required to obtain a PSD permit, and this permit is subject to review at the EAB.[3]

While the EAB has been effective in resolving controversies between parties, the EAB process has also proven to be an effective tool for delaying the development of projects. Standing requirements under the EAB process are easily met, and because the PSD process is "preconstruction review," the filing of an appeal has the effect of enjoining a project until the appeal is fully resolved. As a consequence, even frivolous appeals often lead to lengthy delays in the construction of power plants in California.

Opponents of California power plant projects (and there are often opponents, for both renewable and gas-fired facilities) have learned how user friendly the EAB appeal process is and how easily it can be used to stop a project almost indefinitely. Rather than going to court to get an injunction, which would require a showing of likelihood of prevailing on the merits, and a balancing of harm, opponents can get the same effect (preconstruction injunction) without even hiring a lawyer by merely filing a comment letter and then re-filing it with the EAB.

Delay is further exacerbated by the fact that EAB is overburdened and not subject to time requirements for its decisions. Therefore, there is no way for a state licensing agency or project proponent to have any idea how long it will take to resolve PSD permit issues. Even under the current workload, appeals typically take more than a year (and often much more than a year) to resolve – adding at least an additional year to the permit process even if the appeal is denied.[4] It is difficult to imagine how the EAB could

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[3] Only five smaller air districts (where there are few projects subject to PSD requirements) have their PSD function incorporated into their State Implementation Plan (SIP), which enables them to avoid EPA-issuance of PSD permits on a project-by-project basis.

[4] In one recent and typical example, a defective PSD permit notice for a California power plant led to a 7-month EAB proceeding, followed by an opinion more than 40 pages in length, and finally required remand of the permit to the air district. It has taken the delegated air district more than 16 months to reissue a permit meeting all PSD requirements (in fact, as yet the permit is still not issued). The new permit is almost certain to be contested once again at the EAB when it is finally issued.

cope with the crush of appeals that would almost certainly result from the proposed decision.

The negative impact on power plant projects delayed by EAB review is almost inestimable. Financing for such projects (often on the order of hundreds of millions of dollars) is complex, reliant on contracts with utilities for the power to be provided, and subject to time-based milestone agreements. Open-ended delay at the EAB can prevent satisfaction of such milestones, making such contracts voidable. Thus, EAB review—even under its current, limited caseload—has the potential to kill projects even if the objections raised are specious or nonsubstantive.

By making a new universe of projects subject to the PSD permitting process, the proposed rule would exponentially increase the number of projects subject to EAB review. The Notice does not appear to consider this consequence, and the "streamlining" proposals mentioned do not address this source of open-ended delay. We believe that the proposed 25,000 ton threshold will greatly increase EAB's caseload, and will bring power plant project development to a halt, unless substantial changes are made to the EAB process.

## IV. THE TAILORING RATIONALE IS VALID.

EPA's notice of the tailoring provisions includes a convincing rationale of the need for tailoring. The Clean Air Act provisions have legislative history indicating that PSD permitting was to be required for truly "major" new emission sources (or modifications). Setting the PSD threshold at 100/250 tons per year for GHG emissions would extend the permit program far beyond what Congress intended. As the Proposed Rule Notice states, congressional intent would be contravened:

> "The legislative history of the PSD provisions makes clear that Congress intended the PSD program to apply only to larger sources, and not to smaller sources, in light of the larger sources relatively greater ability to bear the costs of PSD; and their greater responsibility for the pollution problems . . . . [A] literal application of the threshold to GHG emitters, without streamlining, would sweep in large numbers of small sources and subject them to the high costs of determining and meeting individualized BACT requirements, while also overwhelming permit authorities' capacity to process those applications." (Proposed Rules, 74 Fed. Reg. 55305 (Oct. 27, 2009 [cited hereafter as "Notice"].)

Without a tailoring rule, the Notice envisions a "150-fold" increase in permit applications that would "far exceed administrative resources," and that would lead to a 10 year lead time for processing PSD permits. (*Ibid.*) In addition, while recognizing the PSD statutory threshold, the Notice provides extensive and convincing elaboration regarding the legal doctrines of "absurd results" and "administrative necessity" that the federal courts have held to justify deviating from an unworkable statutory provision. The

statements of congressional intent that PSD requirements are to promote economic growth while protecting the environment would, as the Notice recognizes, be contrary to a process that increased the annual PSD preconstruction requirement for permitting authorities "from 300 to 41,000 permits," which would "severely undermine this purpose of facilitating economic growth . . . until permitting authorities can develop streamlining methods and ramp up resources." (Notice, p. 55308). Rather than promoting economic growth, a PSD rule based on too broad a focus will result in "many thousands of sources [facing] multi-year delays in receiving their permits, and . . . be forced to place on hold indefinitely their plans to construct or modify." (*Ibid.*)

The Notice also emphasizes that PSD permit requirements are "individualized to the source," in that they apply on a source-by-source basis for individual equipment BACT determinations, and apply separately to each criteria pollutant. Congress designed applicability requirements within 28 different source categories that emit at least 100 tons per year, and provided exemptions for smaller sources. "The legislative history shows that Congress's limitation of PSD to larger sources was quite deliberate, and was based on its determination to limit the costs that PSD permitting to larger sources in certain industries"; this legislative intent has been recognized in federal appellate decisions. (Notice, p. 55308.) As one court aptly put it: "Though the costs of compliance with [the PSD] requirements are substantial, they can reasonably be borne by facilities that actually emit . . . the large tonnage thresholds specified in [the Clean Air Act]." (*Ibid.,* citing *Alabama Power Co. V. Costle* (D.C. Cir. 1979) 636 F.2d 323, 353.) The Notice quotes extensively from expressions of congressional intent that accompanied adoption of the Clean Air Act that PSD requirements be limited to only the largest projects that affect air quality, and that "there were a large number of sources below those cut-offs that Congress explicitly contemplated would not be included in PSD."

In other words, EPA has offered a compelling rationale for tailoring PSD requirements for GHG emissions to make them consistent with congressional intent, and to avoid the "absurd result" of imposing such requirements on small projects. EPA recognizes that without such tailoring, huge new administrative resources will be required for PSD permitting, years will be required (at least initially) to achieve such permits, and that worthy projects will be delayed indefinitely even if their impact on air quality is relatively negligible.

Unfortunately, EPA's proposed tailoring concept only lessens this absurd impact without avoiding it. Its proposal of 25,000 tons as the PSD threshold is incompatible with congressional intent that only projects with "major" emissions be subject to these requirements.

This is best illustrated by comparing the power plant projects currently subject to PSD for their criteria pollutant emissions to those that will be additionally covered under the proposed rule. PSD requirements currently apply to virtually all coal-fired power plants; as such plants have relatively large criteria emissions that exceed 100 tons of certain

criteria pollutants. PSD also may apply to large (e.g., 500+ MW) gas-fired power plants that are permitted for more than a certain number of hours of a year (so called "mid merit" peakers). PSD requirements may not apply to even large peakers (up to 500 MW or more) that will be utilized relatively few hours (e.g., 20 percent) of the year. And the current PSD threshold would never be reached for peaker facilities that are less than 300 MW. In other words, PSD provisions currently apply to "major" emission sources, because only large sources exceed 100 tons per year of any given criteria pollutant.

Using EPA's proposed 25,000 ton per year threshold for PSD is disproportionately small in this context. All of the above projects, even small 30 MW peakers, may have the "potential to emit" in excess of 25,000 tons of GHGe. Even solar thermal plants with gas-fired augmentation may trigger such a low threshold. In other words, EPA's tailoring proposal extends the PSD requirements to much smaller projects that Congress never intended to be subject to this kind of permitting.

Using this very low threshold will require far more PSD permitting, yet resources are lacking for the permitting that is currently undertaken. Neither Region 9 nor the air districts have the capacity to greatly expand the resources spent on PSD permitting. In California, much of the current permitting is by Region 9, as many air districts have resisted delegation agreements. If PSD permitting requires significantly more air district resources in the delegated districts, it is foreseeable that even the delegated districts might return their delegation, and let Region 9 undertake the entire responsibility. The predictable result is the regulatory gridlock that the tailoring rule is supposed to avoid. However, this unfortunate result can be avoided, and EPA can still comply with its responsibilities, by adopting the "staged" approach to extending its GHG authority as described below.

## V. ADOPT A BETTER SOLUTION: SEQUENCING THE IMPLEMENTATION BY PROGRESSIVE STEPS.

As stated above, the tailoring proposal is well-justified, but is unfortunately inadequate to avoid the quagmire it describes. Even with EPA's proposal, administrative agencies will be greatly overburdened, PSD permitting will be subject to indefinite delay, and all projects that eventually receive permits will be subject to the burdensome review of the EAB. EPA can and must provide a better solution.

That solution is the "staging" concept discussed but not effectively utilized by the EPA proposal. The EPA approach is simply far too modest. What is needed, and would be more likely to avoid the regulatory gridlock EPA has described, is to move by progressive "stages," starting with a relatively high GHG threshold and lowering it in successive increments every two or three years, until the desired level is met. The staging concept is perhaps more important than the exact threshold number, but it is essential that the initial threshold be set far higher than the 25,000 ton proposal. The Energy Commission believes the following approach would be sensible and avoid most disastrous consequences outlined above.

We propose the "first stage" of the tailoring proposal require GHG PSD analysis for all sources over a threshold of one million tons GHG. This would expand GHG analysis to most of the projects currently subject to PSD permit requirements for their criteria pollutant emissions (a result roughly consistent with proposed federal "cap and trade" legislation). During this initial two year period EPA would have an opportunity to explore the viability of the streamlining measures that they propose to explore in the Notice. Equally important, state and local air permitting agencies would have an opportunity to decide whether they should adopt and place PSD requirements "in the SIP" to avoid a federal permit process and the interminable consequent review that can occur at the EAB.

The second stage, after a two year period, could cut in half the threshold to 500,000 tons per year—a considerable expansion of the number of projects subject to the threshold, but a far more gentle impact than what EPA currently proposes. For power plants, this would subject larger gas-fired peakers to PSD permit requirements, but smaller peakers that are currently exempt would remain unaffected.

The third stage, after another two years, could again cut in half the threshold number, to 250,000 tons (or lower). Again, this would be an incremental, if relatively substantial, increase in administrative burden, but because it is incremental and because there would have been four years to plan for it, it is more likely to be manageable. A fourth stage two years later could reduce the threshold still further, to whatever a desirable and practical long-term threshold is (whether 250,000, 100,000 or 25,000 tons), based on the experience gained during the prior six years. The Energy Commission notes that the permanent and final stage should be one commensurate with the "major" emission sources that Congress intended the PSD provisions to apply, which might reasonably be interpreted to be no less than 250,000 tons per year for GHG emissions.

The above proposal would truly "tailor" the new PSD requirements for GHG emissions, and should avoid the permit agency gridlock and economic dislocation that the current threshold proposal will almost certainly cause. States like California would find this more graduated approach to PSD permitting far less disruptive of efforts to replace aging generation infrastructure with renewable generation backed up by modern, efficient, and flexible gas-fired generation.

## VI. PROJECTS IN THE PERMIT PROCESS BUT NOT CURRENTLY SUBJECT TO PSD SHOULD BE "GRANDFATHERED".

Projects currently subject to PSD requirements often require more than a year to obtain their permits. Any new threshold imposed for PSD will add significantly to that time period. Many projects currently in state or local air permit processes will thus be subject to significant delay if they become subject to PSD requirements, as they will suddenly need to obtain both counsel and experts who can guide them through the application process, and then wait for beleaguered agency staff to finally issue a permit. This potential for catastrophic delay of current proposals that have not been subject to PSD

requirements, and the considerable economic consequences of such, can be avoided by a "grandfathering" provision that exempts projects that are currently in a state or local application process. The Energy Commission proposes that projects be exempt if they have filed applications with local air pollution control agencies that have been accepted as complete before the effective date of the new tailoring rule.

## VII. CONCLUSION.

EPA has provided justification for a well-designed tailoring of new PSD requirements for GHG. Unfortunately the current tailoring proposal is far too modest, and will likely result in same gridlock in the federal PSD permit process that the proposed rule is intended to avoid. This gridlock has the potential to substantially interfere with California's transformation of the electric generation system to greater reliance on renewable generation. In addition, by delaying new, more efficient, gas-fired peaking infrastructure, it will force continued reliance on a fleet of aging, inefficient gas-fired boiler units that were not designed to provide flexible peaking support. Thus, the proposed rule will likely retard, rather than facilitate, reductions in GHG emissions from the electricity sector—a cornerstone of California energy policy.

The Energy Commission asks the EPA to consider amending its tailoring rule, so that it is implemented in a graduated or "staged" manner proposed herein. We believe such an approach would avoid the disruptive effect of the current EPA proposal, which would in turn allow states like California to effectively pursue their GHG reduction policies and therefore cause a net decrease in GHG emissions from the electricity sector. Consequently, we are confident that our proposal is most consistent with the ultimate intent of Congress when it created the PSD permit process through the Clean Air Act.

MELISSA JONES
Executive Director

# Exhibit 38

**UNITED STATES COURT OF APPEALS**
**FOR THE**
**NINTH CIRCUIT**

| | |
|---|---|
| Petitioner,<br>Robert James Simpson<br>vs.<br>United States Environmental Protection Agency, United States Environmental Protection Agency Administrator<br>Lisa Jackson In her official capacity, North Coast Unified Air Quality Management District, Pacific Gas and Electric Corporation,<br>Bay Area Air Quality Management District,<br>Calpine Corporation, California Energy Commission, and California Public Utilities Commission | Case No.: 10- 71396<br><br>Petition for Review |



## PETITION FOR REVIEW

PETITIONER'S INFORMAL BRIEF

1. JURISDICTION:

• Date proceedings initiated; *On September 29, 2008*

• Date agency's decision entered; *The EPA Administrator has not heard or even docketed my petition*

• Date petition for review filed; *April, 29, 2010*

2. WHAT ARE THE FACTS OF YOUR CASE?

*Below Identified as; "Summary"*

3. PROCEEDINGS BEFORE THE AGENCY

• What forms of relief did you request? *Objection to permit/ remand of permit*

• What did the agency do? *Ignored my petition*

4. PROCEEDINGS BEFORE THE NINTH CIRCUIT:

• What issues are you raising in this Court? *Below*

What do you think the agency did wrong? *Ignored my petition*

• What legal arguments support your position? *Below*

• Do you have any other cases pending in this Court? If so, give the name and docket number of each case. *No*

• Have you filed any previous cases that have been decided by this Court? If so, give the name and docket number of each case. *No*

## Introduction

Pacific Gas & Electric (PG&E) and its contractors[1] increase their financial position through the illegal burning of fossil fuels which they generally cause to be imported into the State of California, and their captive customers pay the bill. PG&E has defrauded the public to overbuild its fleet of fossil fuel fired facilities under the threat of an electricity shortages, like the one fabricated by the fossil fuel industry at the turn of the Century in 2000. Electrical outages cause injury, loss of income and even loss of life as the blackouts of June 14, 2000 caused in the San

[1] For example Calpine.

Francisco bay area. These facilities provide a California Public Utilities Commission (CPUC) guaranteed rate of return from customers regardless of, how much, or whether the facilities operate at all.[2] PG&E defrauds the public of their rights to meaningful and informed participation in the environmental assessment of their sponsored projects and violates the Clean Air Act with impunity from prosecution.

Prior to PG&E's filing for Bankruptcy, as a result of its participation in the contrived Western energy crisis of 2000-1, it appears that PG&E transferred approximately six point seven billion dollars ($6,700,000,000)[3] of ratepayers money to its then newly formed out of state "parent company PG&E National Energy Group, Inc. PG&E is presently investing at least thirty five million dollars ($35,000,000) of ratepayers money, from these activities, into passage of California Proposition 16 which, if passed, would protect its monopoly by eliminating potential competition and preventing the development of renewable resources. I received misleading propaganda by U.S. Mail promoting the passage of Proposition 16. It stated "major funding from Pacific Gas And Electric" I am a captive PG&E customer who would like lower electricity rates, cleaner electricity

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[2] See Humboldt Decision http://docs.cpuc.ca.gov/PUBLISHED/FINAL_DECISION/63628.htm
See Gateway Decision http://docs.cpuc.ca.gov/PUBLISHED/FINAL_DECISION/57179.htm
See Russell City Decision http://docs.cpuc.ca.gov/PUBLISHED/FINAL_DECISION/100001.htm

[3] See http://elibrary.ferc.gov/idmws/common/opennat.asp?fileID=12067647

generation and more secure locally generated electricity, by more secure I mean secure from resource price manipulation, curtailment and redirection of rates paid, to fund a criminal enterprise. I suffer the effects of global warming and environmental degradation from the burning of fossil fuels, as do all people. Our economy suffers from focus on manufacturing a product, which is subsequently burned, leaving no lasting value or economic opportunity for others, as development of renewable energy resources could do. Governmental agencies have violated my civil rights to protect the fossil fuel industry, and PG&E.

Pacific Gas and Electric (PG&E) is presently installing 10 reciprocating engines, of a type typically used for Eastern European ocean ships, at its Humboldt Bay Generating Station, for the production of electricity. The Engines are permitted to burn up to 271,877 gallons of diesel fuel daily. The site is less than 1000 feet from South Bay elementary school. The air quality impacts will be comparable to over 11,000 heavy diesel trucks at idle next to the school. PG&E misrepresented the project impacts to the public, The North Coast Unified Air Quality Management (District) did not provide Public Notice of the Air Quality impacts of the facility. The public has not been informed of the threat.

The California Energy Commission (CEC) licensed the project in violation of the Clean Air Act. The Administrator of the United States Environmental

Protection Agency (EPA) failed to consider my Title V permit appeal. 2 out of 3 District Hearing Board members voted to sustain my appeal, but the appeal was denied. The permit terms violate the Clean Air Act and PG&E is violating the permit terms also in violation of the Clean Air Act. The permit(s) fail to regulate greenhouse gases. This is but one in a series of illegal power plant sitings in California.

## Summary

On October 20, 2006 Pacific Gas & Electric Company (PG&E) submitted an Application for Certification (AFC) for the Humboldt Bay Repowering Project.

On October 22, 2007 the North Coast Unified Air Quality Management (District) issued document titled; "Preliminary Determination Of Compliance (PDOC) On October 29, 2007 the California Energy Commission (CEC) docketed this item and identified it as

NORTH COAST UNIFIED AIR QUALITY MANAGEMENT DISTRICT PDOC

On October 23, 2007 North Coast Unified Air Quality Management (District) issued a "Preliminary Determination Of Compliance Permit to Construct Evaluation" On October 29, 2007 the California Energy Commission (CEC) docketed this item and identified it as; " NORTH COAST UNIFIED AIR

QUALITY MANAGMENT DISTRICT PDOC+ PERMIT TO CONSTRUCT" [4]

On January 2, 2008 I filed an appeal of PG&E's affiliate Calpine Corporation's Prevention of Significant Deterioration Permit (PSD) to the U.S. EPA Environmental Appeals Board (EAB). The permit was issued by The Bay Area Air Quality Management District. On July 29, 2008 the EAB remanded the permit EAD 08-01.[5] The EAB implicated the California Power plant licensing scheme and the California Energy Commission (CEC). "The District's almost complete reliance upon CEC's certification related outreach procedures to satisfy the District's notice obligations regarding the draft permit resulted in a fundamentally flawed notice process." [EAD 08-01 Pg. 3] I informed the CEC and the District of the decision and the similarity with the Humboldt Bay notice process. They chose not to correct their deficiencies. On February 4, 2010 BAAQMD issued a new PSD permit. On March 3, 2010 I, and host of environmental and community groups, filed appeals of the new permit to the EAB.[6]

On April 8, 2008 The District issued a document titled; "FINAL DETERMINATION OF COMPLIANCE AUTHORITY TO CONSTRUCT

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[4] See http://www.energy.ca.gov/sitingcases/humboldt/documents/others/NORTH_COAST_UNIFIED_AIR_QUALITY_MANAGEMENT_DISTRICT_PDOC_2007-10-22_TN-43074.PDF

[5] See http://yosemite.epa.gov/OA/EAB_WEB_Docket.nsf/Dockets/PSD+08-01

[6] See http://yosemite.epa.gov/OA/EAB_WEB_Docket.nsf/ce9f7f898b59eae28525707a00631c97/df250cdc9ddc2bce852576ef00513d84!OpenDocument

EVALUATION THE HUMBOLDT BAY REPOWERING PROJECT." On April 23, 2008 the CEC docketed this item and identified it as North Coast Unified Air Quality Management District Final Determination of Compliance.[7]

On April 14, 2008 The District issued a document titled; "TITLE V FEDERAL OPERATING PERMIT NCUAQMD PERMIT TO OPERATE AND FINAL DETERMINATION OF COMPLIANCE ATC PERMIT NO: 443-1" also identified by the District as (ATC PSD Original Permit.pdf)[8]

On April 23, 2008 the CEC docketed this document and identified it as "Title V Operating Permit"

On April 14, 2008 The District issued a Document titled; "AUTHORITY TO CONSTRUCT, PREVENTION OF SIGNIFICANT DETERIORATION AND TEMPORARY PERMIT TO OPERATE ATC / PSD PERMIT NO: 443-1 also identified by the District as (ATC PSD Amendment Final.pdf)[9] This Item does not appear to be docketed by the CEC but appears substantially similar to the Document identified as a "Title V Operating permit" but without the Title V Operating permit integrated, as it is on the CEC version.

On September 24, 2008 the California Energy Commission licensed the project The License included; "..a Final Determination of Compliance (FDOC)

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[7] See http://www.energy.ca.gov/sitingcases/humboldt/documents/others/2008-04-08_FDOC_TN-45996.PDF

[8] See http://www.ncuaqmd.org/files/Public%20Notice/PG&E/ATC%20PSD%20Original%20Permit.pdf

[9] Seehttp://www.ncuaqmd.org/files/Public%20Notice/PG&E/ATC%20PSD%20Amendment%20Final.pdf

which ensures that all federal, state, and local air quality requirements will be met by the project. (Ex. 206, 6/17/08 RT 34.) The FDOC also serves as the Authority to Construct (ATC) and the federal Prevention of Significant Deterioration (PSD) Permit." pg.97 "on the evening of last day of the 30-day comment period, letters were filed by Rob Simpson, of Hayward, California, and from Californians for Renewable Energy (CARE), based in Soquel, California. Additional oral comments were made at the full Commission hearing on September 24, 2008, by Mr. Simpson and by Mr. Robert Sarvey, of Tracy, California." pg. 121

"FEDERALLY ENFORCEABLE GENERAL REQUIREMENTS Title V Permit Modifications and Renewal AQ-1 This Permit shall serve as the Prevention of Significant Deterioration preconstruction permit for the sources identified herein, and is issued pursuant to 40 Code of Federal Regulations (C.F.R.), Part 70 and Regulation V of the Rules and Regulations of the North Coast Unified Air Quality Management District. [NCUAQMD Reg 5 Rule 405(b)] [NCUAQMD Reg V Rule 502 § 2.2 (5/19/05)] [40 C.F.R. 70.5(a)(1)(iii).] " Pg. 130

It appears that this represents a PSD permit issued by the CEC.

On April 21, 2010 the CEC approved an amendment to the Air Quality and Public Health conditions of its original decision. Despite my participation in the licensing they did not provide Public Notice to me of the amendment or decision.

On April, 29, 2009 I began participation in the Avenal Energy Project proceeding. I informed the San Joaquin Valley Air Pollution Control District of deficiencies in its Public Notice for the project. I also informed the CEC of the issue. I intervened in the CEC proceeding. The CEC refused to consider my grievances and refused to consider my evidence. I presented my evidence to the EPA for its concurrent PSD permitting activity. The CEC licensed the project on December 16, 2009 in violation of my rights, Due process and the Clean Air Act. I believe that based upon the same evidence that I submitted to the CEC the US EPA has, to date, declined to issue a permit for the facility. The permit is now the subject of AVENAL POWER CENTER, v U.S. EPA Case 1:10-cv-00383-RJL Filed 03/09/10.[10]

On September 29, 2008 I filed identical appeals of the permit for the Humboldt Bay project to the Environmental Appeals Board (EAB) and the Administrator of the United States Environmental Protection Agency.[11] The EAB considered responses from the District, PG&E and US EPA Region 9. On December 10, 2008 the EAB denied review concluding; "[t]he permit was issued under State authority, not pursuant to a federal delegation. Whether the permit is

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**10** See http://www.regulations.gov/search/Regs/home.html#docketDetail?R=EPA-R09-OAR-2009-0438

**11** Seehttp://yosemite.epa.gov/OA/EAB_WEB_Docket.nsf/ce9f7f898b59eae28525707a00631c97/cbea426032375225852574d6006195c3!OpenDocument

valid as a matter of State law, or whether a permit still needs to be obtained from EPA as a matter of federal law, are questions outside the scope of Board review." Order Denying Review Pg. 7 The Administrator has, to date, not considered or even docketed my appeal. PG&E commenced construction but has not yet began operations.

On May 5, 2009 I filed an appeal (appeal No. 09-02) to the EAB regarding PG&E's Gateway Generating Station. [12]

I had expressed an interest in the permitting prior to operation of the facility but the BAAQMD failed to provide Public Notice to me of the action. Mr. Robert Sarvey submitted comments on a draft permit. Instead of issuing a final permit BAAQMD allowed PG&E to commence operations without the required PSD permit. The EAB concluded that there was no permit to review therefore they denied review. The EPA issued a Notice of Violation (NOV) on May 22, 2009 and subsequently pursued a presently pending action *United States v. Pacific Gas & Electric Company*, Civil Action No. 09-4503 (N.D. Cal.) and D.J. Ref. No. 90-5-2-1-09753 .

On August 26, 2009 the CEC granted the Gateway Generating Station a

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**12**

See http://yosemite.epa.gov/OA/EAB_WEB_Docket.nsf/ce9f7f898b59eae28525707a00631c97/e21ed03510b6c284852575ae006ce586!OpenDocument

modification of their license to continue operating despite knowledge of the NOV.[13]

On February 17, 2010 The CEC dismissed my complaint regarding the Gateway Generating Station. It was ; "dismissed based upon a determination of the insufficiency of the complaint and a determination of lack of merit." The Commission had received 3 complaints with identical issues which it consolidated into one proceeding. My complaint raised substantive issues based upon my appeal to the EAB and the Subsequent NOV.

My complaint also incorporated the complaint filed by the Contra Costa branch of the Association of Community Organizations for Reform Now ( ACORN). The Commission held that the Acorn complaint had merit and that the third complaint which only incorporated the Acorn complaint also had merit and fined PG&E.[14]

On June 11, 2009 I provided 60 day notice of my intent to sue the EPA for failing to consider my Title V appeal of the Humboldt Bay permit.

On September 14, 2009 the District issued a revised ATC/PSD draft permit for the Humboldt Bay Generating Station for public comment.

On September 30, 2009 the District issued ENGINEERING EVALUATION FOR PROPOSED AMENDMENT TO AUTHORITY TO CONSTRUCT / PSD

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[13] See http://www.energy.ca.gov/sitingcases/gateway/compliance/2009-08-26_Filing_of_Notice_of_Decision_TN-53027.pdf

[14] See http://www.energy.ca.gov/sitingcases/gateway/compliance/2010-01-26_Decision_of_Siting_Committee.pdf

PERMIT which intended to; "Clarify what type of permit PG&E holds for HBGS" Pg 4. Robert Sarvey and I submitted comments.

On October 8, 2009 The San Diego Air pollution Control District (SDAPCD) Hearing Board heard my complaint regarding the Final Determination of Compliance (FDOC) that the SDAPCD had issued for the Carlsbad Energy Center. The CEC participated in the proceeding and informed the Hearing Board that they did not have authority to hear an appeal pursuant the preclusive nature of the Warren Alquist Act. The Warren Alquist Act serves to allow the CEC to violate the Clean Air Act by interjecting itself between the California Air Districts and their responsibilities under the Clean Air Act. The Hearing Board agreed with the CEC's construction of the rules and denied the appeal. I am participating as an intervenor in the CEC process for this facility. The CEC in each proceeding violates my rights. In this proceeding they denied my request to join the other intervenors in their opening briefs or put another way; "peaceably to assemble, and to petition the Government for a redress of grievances" (First amendment) Throughout each proceeding the CEC attempts to preclude my and others informed public participation.

On October 13, 2009 the District issued a public Notice of a  Proposal to Modify Title V Permit to Operate NCU 059-12 for the PG&E Humboldt Bay

Generating Station. Mr. Sarvey and I submit comments.

On December 2, 2009 the District issued an "AUTHORITY TO CONSTRUCT, PREVENTION OF SIGNIFICANT DETERIORATION AND TEMPORARY PERMIT TO OPERATE ATC / PSD PERMIT NO: 443-1" and issued a significantly revised ENGINEERING EVALUATION FOR PROPOSED AMENDMENT TO AUTHORITY TO CONSTRUCT / PSD PERMIT without the opportunity for public comment.

On January 4, 2010 I filed an appeal to the District Hearing Board. I included a petition for fee waiver. My Appeal was not accepted by the Air Pollution Control Officer because I did not have the $500 filing fee and a fee waiver hearing would not be conducted without first paying the fee. I joined an appeal filed by Mr. Sarvey. The appeal was heard by 3 members of the Hearing board. 2 of the 3 members agreed with our appeal and voted to sustain the appeal. Apparently the Hearing board actually had 5 members and 2 had to recuse themselves, ostensibly due to affiliation with PG&E. The hearing Board interpreted their rules as requiring a quorum (3) of the 5 members to decide. On April 2, 2010 I was served a "Final Order" of the Hearing Board denying our appeal.

I filed a lawsuit in the Sacramento Superior Court against false and misleading Ballot initiative Proposition 16 that PG&E placed on the California

Ballot using captive customers rates to protect its monopoly. On March 18, 2010 A host of municipalities took this cause in Sacramento Superior Court; MODESTO IRRIGATION DISTRICT; SACRAMENTO MUNICIPAL UTILITY DISTRICT; CITY AND COUNTY OF SAN FRANCISCO; SAN FRANCISCO LOCAL AGENCY FORMATION COMMISSION; CITY OF MORENO VALLEY; CALIFORNIA MUNICIPAL UTILITIES ASSOCIATION; CITY OF REDDING; SAN JOAQUIN VALLEY POWER AUTHORITY; and MERCED IRRIGATION DISTRICT; v. DEBRA BOWEN, in her official capacity as CALIFORNIA SECRETARY OF STATE,

On April 7, 2010 Mr. Sarvey filed an appeal of the new Title V permit to the EPA Administrator and I reiterated my original appeal. To date there is still no Docket identifying either appeal.

## Discussion

The California Environmental Quality Act (CEQA) states; "Every citizen has a responsibility to contribute to the preservation and enhancement of the environment. Chapter 1 Policy**§ 21000.**

In 2007 two Fossil fuel burning power plant plans were pending in my community, Hayward California, by affiliates of PG&E. Upon review it appeared to me that the permits were being issued without the opportunity for informed

public participation. I filed an appeal of the permit for a plant called the Russel City Energy Center (RCEC) to the EAB. The plant was actually to be developed in the City of Hayward. The EAB eventually agreed with my appeal and remanded the permit. EAD 08-01. The other plant planned was called the Eastshore Energy Center. It was to be much smaller than RCEC but was determined to have a higher air quality impact. It would have used the same combustion engine configuration as that planned in Humboldt Bay instead of turbine engines typically used for electrical generation. Instead of firing exclusively on natural gas, the Humboldt Bay plan would utilize a Diesel pilot for Natural gas ignition and could operate exclusively on diesel. The plan in my community was defeated which would have been the first plant of this type in the State. With the knowledge that I gained in the RCEC remand I investigated other planned plants throughout the state and discovered systems that served to preclude public participation and review in violation of the Clean Air Act. The CEC and Air Districts were not informing the public in their Notices of the projects effects on air Quality pursuant the National Ambient Air Quality Standards (NAAQS) or otherwise.

I informed the North Coast District of my concerns with its Humboldt Bay permitting scheme in hopes that they would correct deficiencies to allow informed public participation. They chose not to. I filed the above identified appeals of the

permit(s).

After the EAB denied review of my Humboldt Bay appeal, it appeared to me that my Title V appeal was still pending and in the appropriate venue for satisfaction of my claims. It also appears that the permit identified as a Title V permit which wholly integrated in to the AUTHORITY TO CONSTRUCT, PREVENTION OF SIGNIFICANT DETERIORATION AND TEMPORARY PERMIT TO OPERATE ATC / PSD PERMIT NO: 443-1 precluded any other appeal of the permit. I was not informed that the District and EPA had decided that the permit identified as a Title V permit was to be re-categorized as another type of permit until after I gave 60 day Notice of intent to sue. When the District eventually issued the amendment to the permit, shortly after the expiration of the 545 day permit, they precluded review of the original permit claiming that the opportunity had expired, shortly after the original permit was issued, and only consideration of the changes to the permit were open to comment. At no time was an opportunity to seek review of the, newly named, original permit offered. Had I known that the original permit was not (as titled) a Title V permit, that it may have been some permit that was not a Title V permit, I could have appealed the permit to a more appropriate venue. I believe that the permit was renamed to preclude review. At the end of the public comment period for the amended permit the

District issued Notice of a Title V permit for the facility. No longer integrated but timed to shield review of the new permit, a Title V permit was issued. I reiterated my appeal to the EPA Administrator, and it has still, to my knowledge, not been docketed. Mr. Sarvey also filed an appeal of the Title V permit with the Administrator.

**Cause One**

**Objection to Title V permit**

"The text of § 7607, which allows for direct review of regionally applicable EPA action in the geographically appropriate circuit court of appeals, also makes clear that this form of judicial review is exclusive, stating that '[a]ction of the Administrator with respect to which review could have been obtained under [this section] shall not be subject to judicial review in civil or criminal proceedings for enforcement.' 42 U.S.C. § 7607(b)…

"Any denial of such petition shall be subject to judicial review under" 42 U.S.C. § 7607, a CAA provision concerning judicial review of agency actions…

"[11] Title V permits are by no means wholly insulated from the CAA's citizen suit provision. To the contrary, when the CAA was amended in 1990 to add Title V, the citizen suit provision was also amended to add to the definition of 'emission standard or limitation,' an alleged violation of which authorizes any

person to bring an enforcement action, “any other standard, limitation, or schedule established under any permit issued pursuant to title V, . . . any permit term or condition, and any requirement to obtain a permit as a condition of operations.” 42 U.S.C. § 7604(f)(4). In other words, if IEEC had violated a term or condition of the permit the air district issued to it, or if it had sought to begin building and operating the power plant in *Romoland* without obtaining a permit under SCAQMD’s merged Title V/construction permit system, either of those alleged violations would have been grounds for a citizen suit in district court under 42 U.S.C. § 7604.”

Because these challenged terms are part of a permit issued under Title V, we must consider Title V’s administrative and judicial review provisions for challenging a permit. Those provisions require persons objecting to the issuance of a Title V permit to “petition the Administrator,” and provide for judicial review regarding such petitions in the courts of appeal under 42 U.S.C. § 7607, not through citizen suits in the district courts via § 7604. 42 U.S.C. § 7661d(b)(2).,"Those provisions require persons objecting to the issuance of a Title V permit to “petition the Administrator,” and provide for judicial review regarding such petitions in the courts of appeal under 42 U.S.C. § 7607, not through citizen suits in the district courts via § 7604. 42 U.S.C. § 7661d(b)(2)." *ROMOLAND SCHOOL v. INLAND EMPIRE ENERGY* No. 06-56632  D.C. No. v. CV-06-02514-

AG OPINION

The Administrator's failure to consider my appeal of the permit identified on its face as a "Title V Permit" allowed construction of the facility under the guise of a Title V permit. It served to shield earlier review of the permitting action. The District has now re-categorized the permit, after its 545 day term expired, concluding that although identified on its face as a Title V permit and 60 more times throughout the permit the permit was never a Title V permit which could serve to moot the appeal to the Administrator. The amended permit precluded comment on the original permit claiming that the opportunity to comment on the, newly named, permit expired years before it was issued. The District invited comment only the amendments to the permit. The Administrators inaction threatens to preclude review of the original faulty permit and allow the operation of an otherwise illegal pollution source, with no limits on greenhouse gas emissions. This is a global and individual threat to all people and the planet. The Administrator should be compelled to object to the newly named permit until such time as the underlying permit is publicly Noticed with an opportunity for comment and review.

The permit which once appeared integrated is now issued as 2 separate permits with the Title V permit timed so closely after the preconstruction permit as to evade review of the preconstruction permit outside of this venue. The permit

violates emission standards and the emission credits used to justify the permit are not valid, as discussed in the permit appeals. The permit violates the California Environmental Quality Act (CEQA)

Remedy Under 42 U.S.C. § 7607 The Administrator should make a ruling on my original appeal. The Present Title V permit should be remanded or an opportunity to comment on and hear an appeal of the underlying permit should be created.

## Cause Two

## Fraud/Misrepresentation

PG&Es monopolistic actions constitute an ongoing criminal conspiracy. They serve to block the development of alternative electrical generation resources to preserve the fossil fuel burning profit scheme.

PG&E and its affiliates systematically misrepresent; the need for their projects, the environmental impacts and illegally manipulate regulatory permits (see RCEC and Gateway Generating Station). Humboldt Bay is no exception PG&E sold the concept of the project to the local community publishing a promise that the "***New Power Plant will be 35% More Efficient with 90 % Fewer Air Emissions***" than the existing plant. (page 178 of 225 hearing board packet)[15] The air emissions are actually as much as 5 times higher than the existing plant or 500

[15] See http://www.ncuaqmd.org/files/Hearing%20Board/Hearing%20Board%20Packet%202-5-2010.pdf

times what PG&E promised, with a much greater impact on the community from the shorter smoke stacks and continuous diesel use in reciprocating engines.

In the Gateway proceeding ample evidence has been presented that PG&E conspired with the Bay Area Air Quality Management District to specifically preclude Mr. Sarvey and I from public participation in violation of our rights and to knowingly operate the facility without permits in violation of the Clean Air Act.

PG&E's Proposition 16 is misleading and PG&E is misrepresenting the effects of Proposition through the U.S. mail and otherwise.

PG&E's subcontractor, Calpine Corporation is misleading the public regarding its RCEC power plant plan.

PG&E is in violation of its state Renewable Energy Portfolio Standard established by the State of California that requires it to procure 20% of its portfolio of renewable energy by 2010.

Remedy; These actions should be reviewed civilly and criminally pursuant the ; **Racketeer Influenced and Corrupt Organizations Act (RICO)[16].** PG&E

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**16** Section 1962(c)'s utility stems from its breadth. Section 1962(a) and (b) claims are relatively narrow. To have standing under sections 1962(a) and (b), the plaintiff must allege more than injury flowing from the racketeering activity. Under section 1962(a), a civil plaintiff has standing only if he has been injured by reason of the defendants' investment of the proceeds of racketeering activity. Under section 1962(b), a civil plaintiff has standing only if he has been injured by reason of the defendants' acquisition or maintenance of an interest in or control over an enterprise through a pattern of racketeering activity. These distinctions will be discussed in greater detail in the section of this memorandum that is particularly concerned with the section 1962(a) and 1962(b) claims.

RICO's interstate commerce requirement racketeering shared common goals (increasing and

and its subcontractors should be enjoined from the development of fossil fuel burning facilities at least until they have developed renewable resources consistent with the law.

## Cause Three

### Appeal of Hearing Board Decision.

The District issues permits pursuant the Federal Clean Air Act. This appeal is pursuant 42 U.S.C. § 7604 and 7661d(b)(2) et al. The District Hearing Board erred in the failure of the appeal. Numerous procedural violations occurred. I was not offered an equal opportunity for justice. My "petition (to) the Government for a redress of grievances" (First amendment) was not heard due to my inability to pay the $500 filing fee. The Districts refused to allow a fee waiver hearing without first paying the fee. Therefore, I joined Mr. Sarvey in his appeal. He paid the fee and a fee waiver hearing was conducted for his fee. In the fee waiver hearing the District argued for denial of the fee waiver because the fee was paid; "Hearing Board Filing

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protecting the financial position of the enterprise) and common victims (those who threatened its goals), and drew their participants from the same pool of associates (those who were members and associates of the enterprise)).

A state agency's interpretation of a federal statute is not entitled to deference. See *Orthopaedic Hosp. v. Belshe*, 103 F.3d 1491, 1495 (9th Cir. 1997) (review is de novo); cf. *JG v. Douglas County Sch. Dist*., 552 F.3d 786, 798 n.8 (9th Cir. 2008) (explaining that although a state agency's interpretation of federal law is not entitled to deference, "the Secretary's approval of that agency's interpretation is due some deference because it shows a federal agency's interpretation of the federal statute that it is charged to administer.")

1. The plaintiff has suffered an actual or threatened injury;
2. The conduct of the defendant is a cause of the plaintiff's injury; and
3. If the plaintiff wins the lawsuit, his injury will be corrected or compensated for

Fees specifies that the appropriate fee for the petition is $500.00 and that said fee must accompany the petition in order for it to be processed by the Clerk. The Petitioners were so advised and subsequently remitted payment in the correct amount. Therefore, prompt and accurate payment of the fee by personal check indicates that the petitioners were able to satisfy this requirement." in addition the District requested that the Hearing Board consider charging us an additional $7,501.09.[17] The Hearing board initially denied the fee waiver but upon further briefing reversed its decision. Although I gained party status with Mr. Sarvey's generous cooperation, I was still prejudiced in the proceeding by not having my own appeal heard and not receiving service of documents. Documents were served to Mr. Sarvey.

Three Hearing Board members heard the appeal. Two of the three members voted to sustain the appeal,  The Doctor on the Board expressed concerns with the public health effects of the plant and the attorney on the Board contended that the District failed their duties under the California Environmental Quality Act (CEQA) and the dissenting voter did not appear to understand the proceedings.  Apparently the Hearing Board originally had 5 members. The Hearing Board construed their rules as requiring a unanimous vote of the 3 siting members to carry a quorum of the 5 member board. The Hearing board Chairman then dismissed the appeal

[17] See http://www.ncuaqmd.org/files/Hearing%20Board/Memos%20To%20Hearing%20Board.pdf

without a further vote.

The first hearing was continued. The Hearing Board did not follow the required procedure for continuance pursuant California Government Code; 54955. The legislative body of a local agency may adjourn any regular, adjourned regular, special or adjourned special meeting to a time and place specified in the order of adjournment. Less than a quorum may so adjourn from time to time. If all members are absent from any regular or adjourned regular meeting the clerk or secretary of the legislative body may declare the meeting adjourned to a stated time and place and he shall cause a written notice of the adjournment to be given in the same manner as provided in Section 54956 for special meetings, unless such notice is waived as provided for special meetings. A copy of the order or notice of adjournment shall be conspicuously posted on or near the door of the place where the regular, adjourned regular, special or adjourned special meeting was held within 24 hours after the time of the adjournment. When a regular or adjourned regular meeting is adjourned as provided in this section, the resulting adjourned regular meeting is a regular meeting for all purposes. When an order of adjournment of any meeting fails to state the hour at which the adjourned meeting is to be held, it shall be held at the hour specified for regular meetings by ordinance, resolution, bylaw, or other rule.

54955.1. Any hearing being held, or noticed or ordered to be held, by a legislative body of a local agency at any meeting may by order or notice of continuance be continued or re-continued to any subsequent meeting of the legislative body in the same manner and to the same extent set forth in Section 54955 for the adjournment of meetings; provided, that if the hearing is continued to a time less than 24 hours after the time specified in the order or notice of hearing, a copy of the order or notice of continuance of hearing shall be posted immediately following the meeting at which the order or declaration of continuance was adopted or made."

The Hearing Board did not post Notice of the continued Hearing "within 24 hours after the time of the adjournment" it did not post it until several hours before the hearing and only after my request. The Hearing was held at the Eureka City Hall. The District contended that they posted the Notice at their District headquarters several miles away.

**Cause Four**

**Civil Right Violations and due process.**

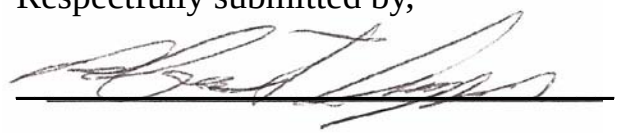
The CEC and Air Districts violate Due Process, the Clean Air Act and Civil Rights in permitting polluters. The Warren Alquist Act serves to hijack the public

participation processes put in place through the Clean Air Act. The CEC and Air districts violate my civil rights and due process. BAAQMD conspired with PG&E to preclude my participation in the Gateway action. BAAQMD violated my right to informed participation in the RCEC proceeding. The North Coast District violated my rights under the Equal Access to Justice Act. I request that the Court allow further briefing on this and the other causes identified in this petition.

## Conclusion

I am not presently represented by counsel. I apologize to the court for any difficulty that this presents. I am presently seeking representation and hope to secure it prior to further briefing. I hope that my presentation of the issues is sufficient for the Court to understand and allow this matter to move forward. I hereby certify under the penalty of Perjury under the laws of the United States that the forgoing is true and correct to the best of my knowledge

Respectfully submitted by,



Dated this April 29, 2010

Robert James Simpson

27126 Grandview Avenue

Hayward CA.94542

510-909-1800 Rob@redwoodrob.com

**CERTIFICATE OF SERVICE**

Case Name Robert Simpson

v.

United States Environmental Protection Agency,

United States Environmental Protection Agency Administrator

Lisa Jackson In her official capacity,

North Coast Unified Air Quality Management District,

Pacific Gas and Electric Corporation,

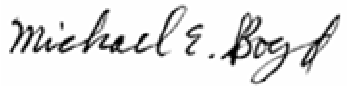
Bay Area Air Quality Management District,

Calpine Corporation, California Energy Commission, and

California Public Utilities Commission

9th Cir. Case No.: _10-71396____

I certify that on April 30, 2010 I sent a copy of the Petition for Review and Petitioner's Informal Brief and any attachments was served, either by e-mail or by US mail, on the persons so listed below.



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**By E-mail Service Only:**

## California Energy Commission
## Attn: Docket No. 06-AFC-07

**BEFORE THE ENERGY RESOURCES CONSERVATION AND DEVELOPMENT COMMISSION OF THE STATE OF CALIFORNIA**

**APPLICATION FOR CERTIFICATION FOR THE HUMBOLDT BAY GENERATING STATION BY PACIFIC GAS AND ELECTRIC COMPANY**

**Docket No. 06-AFC-7**
**PROOF OF SERVICE**

**(Revised 3/21/2008)**

**INSTRUCTIONS: All parties shall 1) send an original signed document plus 12 copies OR 2) mail one original signed copy AND e-mail the document to the web address below, AND 3) all parties shall also send a printed OR electronic copy of the documents that shall include a proof of service declaration to each of the individuals on the proof of service:**

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Attn: Docket No. 06-AFC-07
1516 Ninth Street, MS-4
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docket@energy.state.ca.us

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

Application of Pacific Gas and Electric Company for Expedited Approval of the Amended Power Purchase Agreement for the Russell City Energy Company Project (U39E).

Application 08-09-007
(Filed September 10, 2008)

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# Exhibit 39

Decision 06-11-048 November 30, 2006

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

| | |
|---|---|
| Application of Pacific Gas and Electric Company for Approval of Long-term Request for Offer Results and for Adoption of Cost Recovery and Ratemaking Mechanisms. | Application 06-04-012 (Filed April 11, 2006) |

# OPINION APPROVING RESULTS OF LONG-TERM REQUEST FOR OFFERS

# OPINION APPROVING RESULTS OF LONG-TERM REQUEST FOR OFFERS

## I. Summary

We approve the seven long-term agreements to procure 2,250 megawatts (MW) of new generation resources resulting from Pacific Gas and Electric Company's (PG&E) 2004 Long-Term Request for Offers (RFO).[1] We also adopt ratemaking mechanisms for the recovery of the reasonable costs of the approved contracts and projects.

Decision (D.) 04-12-048 adopted a long-term plan for each utility that provides direction on the procurement of resources over a 10-year horizon through 2014. Taking into account the expected load growth and retirements of aging power plants through the turn of the decade, energy efficiency and demand response programs, solar and other renewable development and combined heat and power on-site generation incentives, the long-term procurement plan adopted for PG&E established that there is a need for 2,200 megawatts (MW) of new generation in northern California by 2010. Accordingly, D.04-12-048 directed PG&E to initiate an all-source solicitation to secure these resources.

PG&E conducted its all-source solicitation, receiving over 50 bids for projects totaling in excess of 12,000 MW. Of these, PG&E selected and seeks approval for five power purchase agreements (PPAs) with terms from 10 to 20 years, a Purchase and Sale Agreement (PSA) for the Colusa project that will be

[1] PG&E first issued the RFO on November 2, 2004, but suspended it on January 7, 2005, in order to conform it to the requirements contained in D.04-12-048, and reissued it on March 18, 2005.

developed by a power plant developer and purchased and operated by PG&E after the plant is operable and has passed performance tests, and an Engineering, Procurement and Construction (EPC) contract for new generation at PG&E's Humboldt Power Plant (Humboldt) which, together, will result in the construction of 2,250 MW of new generation facilities in northern California.

## II. Procedural Background

PG&E filed this application on April 11, 2006, seeking an expedited order by November 2006 on the basis that delaying an order until after that time creates the risk that necessary resources will not be on line by the 2009 and 2010 summer peak periods. On May 17, 2006, protests were filed by the following parties:

- Coalinga Cogeneration Company, Salinas River Cogeneration Company and Sargent Canyon Cogeneration Company, filing jointly;
- Constellation Energy Commodities Group, Inc., Constellation Generation Group Inc. and Constellation Newenergy, Inc., filing jointly;
- Division of Ratepayer Advocates (DRA);
- Alliance for Retail Energy Markets (AReM), California Large Energy Consumers Association (CLECA), California Manufacturers & Technology Association (CMTA), Direct Access Customer Coalition, Energy Producers and Users Coalition, Energy Users Forum, Sempra Global and Silicon Valley Leadership Group, filing jointly;
- Western Power Trading Forum;
- Aglet Consumer Alliance (Aglet);
- The Utility Reform Network (TURN);
- California Municipal Utilities Association; and
- Merced Irrigation District and Modesto Irrigation District, filing jointly.

Many of the protests took issue with PG&E's apparent request, implied by the caption of the application and by PG&E's prayer for relief, that the Commission adopt a cost-allocation proposal that was then pending in the Long-Term Procurement Rulemaking (R.) 06-02-013. Specifically, PG&E and other parties jointly proposed, in R.06-02-013, that the Commission allocate the benefits and net costs of resource additions (including those that are the subject of this application) to all customers in PG&E's service territory, not just bundled customers. Some of the protests objected to PG&E's application as an improper attempt to relitigate the issue in this proceeding, while others protested the merits of the cost-allocation proposal. PG&E clarified, in its May 17, 2006, reply and at the May 25, 2006, prehearing (PHC) conference, that it did not intend for the Commission to determine the cost allocation issue in this proceeding.

Four additional parties entered appearances at the May 25, 2006, PHC: Southern California Edison Company (Edison), Calpine Corporation, Coalition of California Utility Employees (CUE) and California Unions for Reliable Energy (CURE), and California Department of Water Resources. (The California Independent System Operator appeared at the August 24, 2006, evidentiary hearing, at which time it requested and was also granted party status.)

The June 1, 2006, scoping memo and ruling of the assigned Commissioner adopted PG&E's, DRA's, TURN's and Aglet's jointly stipulated schedule of the proceeding, determined that the cost allocation issue is outside the scope of this proceeding, and identified the following issues for resolution:

- Should the Commission approve the PPAs, PSA and EPC contract resulting from PG&E's RFO?
- What ratemaking should apply to the costs of the contracts?

- Should the Commission grant a certificate of public necessity and convenience (CPCN) for the proposed Humboldt Bay Power Plant?
- Are the projects exempt from California Environmental Quality Act (CEQA) review by the Commission?
- Does PG&E have the authority to condition concluding the RFO on approval of the cost allocation proposal in R.06-02-013?

On July 20, 2006, the Commission issued D.06-07-029 adopting, with modification, the cost allocation proposal that had been pending in R.06-02-013. D.06-07-029 requires utilities to elect or waive the approved cost allocation mechanism at the time they file an application for approval of power purchase agreements. D.06-07-029 further provides that utility-owned new generation is not eligible for the new cost allocation methodology, but is subject to the 10-year non-bypassable charge established in D.04-12-048. In its prepared rebuttal testimony served on August 11, 2006, PG&E responded to D.06-07-029 by proposing to defer its election with respect to the power purchase agreements presented in this application, and to extend the non-bypassable charge applicable to the utility-owned projects to 30 years; no party opposed the testimony as beyond the scope of this proceeding.

Hearings were held on August 22-25 and 28, 2006. By consensus of the active parties, opening briefs were filed on September 22, 2006, and the proceeding was submitted upon the filing of reply briefs on September 29, 2006.[2]

[2] DRA's September 22, 2006, motion to file the proprietary version of its opening brief under seal, and Aglet's September 28, 2006, motion to file its reply brief under seal are granted.

The proposed decision of the Administrative Law Judge (ALJ) mailed on October 17, 2006. Comments on the proposed decision were filed on November 6, and reply comments were filed on November 13, 2006. The parties' comments identified a factual ambiguity in the record, namely, whether PG&E had included its proposed owner's contingency, which it sought to have included in the initial capital cost for the Humboldt and Colusa projects, was included in the project bid prices submitted and analyzed in the solicitation and contract selection process. By ruling dated November 11, 2006, the ALJ set aside submission and reopened the evidentiary hearing to take evidence on this factual issue. The record was re-submitted at the conclusion of evidentiary hearing on November 21, 2006.

## III. Long Term RFO Results

### A. Summary and Review Criteria

The final contracts selected by PG&E in this long term RFO are summarized in the following table:

| FACILITY | SIZE (MW) | CONTRACT TYPE | PLANNED OPERATIONAL DATE | TERM (YEARS) |
|---|---|---|---|---|
| Calpine Hayward | 601 | PPA | June 2010 | 10 |
| EIF Firebaugh | 399 | PPA | Aug 2009 | 20 |
| EIF Fresno | 196 | PPA | Sept 2009 | 20 |
| Starwood Firebaugh | 118 | PPA | May 2009 | 15 |
| Black Hills | 116 | PPA | May 2009 | 20 |
| E&L Westcoast Colusa | 657 | PSA | May 2010 | life |
| Wartsila Humboldt | 163 | EPC | May 2009 | life |
| **TOTAL** | 2,250 | | | |

We approve the contracts on the basis that they (1) resulted from a fair, open and competitive bidding process, (2) comport with PG&E's procurement

authority granted in our prior decisions, and (3) are cost-effective and reasonable.

Aglet recommends that we include, in this list of review criteria, consideration of whether the bidder can be reasonably expected to meet its contractual obligations. We address Aglet's particular concern with regard to this issue (the viability of the Calpine Hayward contract) in the context of whether the particular contracts reasonably meet the ratepayers' needs.

### B. Solicitation and Contract Selection Process

PG&E conducted an open, competitive and fair solicitation and contract selection process. We are pleased to make this finding based on the report of the Independent Evaluator, who monitored and critically reviewed the process,[3] and the general consensus opinion of the active parties to this proceeding.

### C. MW Amount

We approve as reasonable the amount of new generation that is anticipated to result from the selected contracts. We previously established that there is a need for 2,200 MW new generation in northern California by 2010 and directed PG&E to initiate an all-source solicitation to secure these resources. (D.04-12-048.) Although the 2,250 MW represented by the selected contracts exceed the authorized amount by 50 MW, this discrepancy is minimal and reasonably reflects the practical likelihood that the outcome of the RFO will not exactly match the authorized amount. In addition, the 2,250 MW includes the

[3] D.04-12-048 requires the use of an independent evaluator in resource solicitations where there are affiliate bidders, bids for utility-built projects, or bids for turnkey projects to be acquired by utility.

163 MW Humboldt project, which is essentially a replacement for an existing, old plant and is designed primarily to serve local reliability needs.[4]

DRA and TURN contend that, taking into account the 530 MW Contra Costa 8 project recently authorized by the Commission (D.06-06-035), PG&E's proposal to add 2,250 MW of new generation exceeds the authorized amount of 2,200 MW by 580 MW (or 417 MW, excluding Humboldt). DRA and TURN contend that PG&E has not justified this excess amount, and therefore recommend that we reject some of the contracts.

We do not count the Contra Costa 8 project against the 2,200 MW authorized in D.04-12-048, as doing so would undermine our commitment to a comprehensive and cohesive process for evaluating the utilities' long-term procurement plans and to a competitive bidding and bid evaluation process for procuring resources pursuant to those plans. D.04-12-048 determined a need for 2,200 MW of new generation and directed PG&E to conduct a competitive bidding process to obtain it. Although we admonished the utilities that negotiated bilateral agreements are discouraged, we provided that such agreements would be evaluated on a case-by-case basis. PG&E's Application (A.) 05-06-029 applied for approval of the Contra Costa 8 project outside of the competitive bidding process, and we evaluated it on its individual merits and approved it without revising our prior procurement authorization. (D.06-06-035.) In the interest of preserving the integrity of our planning and procurement processes, we decline to revise it now.

[4] D.04-12-048, Ordering Paragraph 4, authorized PG&E to justify to the Commission why higher MW levels may be desirable.

DRA, in its comments on the proposed decision, counters that it will undermine the integrity of the long-term planning process if we do *not* count Contra Costa 8 against the authorized 2,200 MW. DRA's point is well-taken: Long-term planning and competitive solicitation are equally critical to fair and rational energy planning and procurement, and actions that undermine one side of the equation may be as damaging to the process as a whole as actions that undermine the other. In this case, as DRA's witness testified, the general view was that Contra Costa 8 was "a bargain that PG&E was able to snap up and go forward on. It seems to be separate from what is going on in the long-term RFO, if I understand." (Tr. Vol. 3, p. 259, DRA/Burns.) The project was already substantially permitted and partially constructed at the time PG&E acquired it, and its planned operation date is a year in advance of the planned operational dates of any of the projects selected in this RFO. (D.06-06-035, p. 11.) We did not count Contra Costa 8 against the authorized 2,200 MW when we approved the project; balancing the interests and circumstances, we determine that we will not do so now.

In its comments on the proposed decision, TURN charges that this determination is arbitrary and capricious because it is based on a rationale that is made after the issuance of D.04-12-048.[5] This is not error. In our decision approving the Contra Costa 8 project, we acknowledged this issue, raised by the

[5] TURN also claims that the rationale is inappropriate since no party in this proceeding proposed it until PG&E filed its reply brief. We remind TURN that we are bound by the record evidence and the law, not by the parties' characterizations of either. Thus, for example, the fact that no party challenged the ratemaking proposals for Colusa and Humboldt for violating Commission precedent until TURN and others filed comments on the proposed decision – and even if no party had ever done so -- does not bar us from considering that legal basis, as appropriate.

Independent Energy Producers (IEP), of whether, in light of our directive in D.04-12-048 that competitive solicitations are the preferred method for selection of new energy resources, it was appropriate to consider the project outside of such a solicitation. We determined that this issue should be considered in R.06-02-013 "or in another appropriate proceeding." (D.06-06-035, p. 4.) We necessarily address it here.

As a related matter, we note that some parties sought to challenge, in this proceeding, our need determination in D.04-12-048 either on the basis that it overstated need (*e.g.,* because it underestimated departing load) or that it understated it (*e.g.,* because it did not account for demand levels experienced during the recent heat storms of August 2006). We affirm the ALJ's rulings barring testimony on this issue as beyond the scope of this proceeding.[6] Our long term procurement proceedings are intended to monitor changes in forecasts. In order to permit timely action in response to Commission determinations of need for new generation resources, it is crucial that we not be sidetracked by second-guessing recent determinations absent evidence of significant errors.

### D. Cost-Effectiveness and Reasonableness

TURN, DRA, and Aglet challenge certain aspects of particular contracts and recommend that the Commission adopt various measures to remedy the alleged deficiencies. We reject their recommendations. It is undisputed that all of the selected contracts are cost-effective. We find that they reasonably meet the resource need identified in D.04-12-048.

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[6] *See, e.g., ALJ's Ruling Striking Testimony of Modesto Irrigation District, Merced Irrigation District, and Pacific Gas and Electric Company*, August 15, 2006.

TURN asserts that the Colusa PSA, which provides for the developer to build the plant and then sell it to PG&E, is inferior to a PPA structure for the project, which was also offered to PG&E. Specifically, the Colusa PPA option provided somewhat greater economic benefits according to PG&E's and the Independent Evaluator's quantitative analyses, and would have provided performance guarantees that would require PG&E to pay the seller less if the plant does not perform up to the negotiated standards. TURN recommends that the Commission adopt a set of performance-based ratemaking mechanisms for Colusa to compensate for the PSA's estimated lower value to ratepayers.

We reject TURN's recommendation. PG&E's selection of the Colusa project, as proposed for transfer to PG&E, is reasonable under Commission standards. Among other things, a utility action is reasonable if it comports with what a reasonable manager would do, and if it resulted from a reasonable process; it need not be the optimum act, but must be within the spectrum of reasonable acts.[7] It is undisputed that the Colusa PSA was selected pursuant to a fair and competitive process. We also consider whether the utility action can be logically expected to accomplish the desired result at the lowest reasonable cost consistent with good utility practices,[8] taking into account non-quantitative factors, the choice between a Colusa PPA and a Colusa PSA was at best a "close call."

In its comments, TURN asserts that the proposed decision factually errs in stating that no party disputes that all of the selected contracts are cost-effective. TURN asserts that, to the contrary, the EIR Fresno and

[7] *Re Southern California Edison Company* [D.90-09-088] 37 CPUC2d 488, 499-500.

Tierra Energy Hayward PPAs are not cost-effective and that this lack of cost-effectiveness formed the primary basis for TURN's recommendation that they be rejected. TURN's statement of its litigation position is contrary to its testimony and briefs. In its opening brief, TURN addressed the relative value of the EIF Fresno and Tierra Energy Hayward PPAs in the context of its position, rejected above, that approval of all of the selected contracts will result in the overprocurement of resources. While TURN's witness Mr. Woodruff characterized the contracts as having the least value of any of the selected contracts, and recommended that the Commission reject them if the Calpine project does not go forward, he did not recommend that they be rejected for not being cost-effective. Notably, neither TURN nor any other party challenged the evidence presented by Aglet that demonstrated, using the Black model, that all seven of the proposed contracts are cost-effective.

DRA recommends that the Commission authorize cost recovery for only nine of the 10 engine generators in the proposed Humboldt replacement project, on the basis that PG&E's own transmission planning personnel recommend replacing the existing 135 MW with no more than 150 MW (as compared to the 163 MW represented by 10 engine generators). The record evidence, however, indicates that PG&E's transmission planning personnel subsequently recommended maximum replacement generation of 168 MW, that the project as proposed was selected through an open, competitive and fair solicitation and contract selection process, and that the 10th engine generator provides value at relatively low incremental price. PG&E's selection of the

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[8] *Ibid.*

10-engine generator Humboldt project is reasonable under the Commission standards described above, and there is not sufficient cause to modify its action.

Aglet recommends that the Commission approve the Calpine Hayward PPA only if PG&E obtains step-in rights in the event Calpine fails to honor the contract, on the basis that Calpine cannot be reasonably expected to meet its contractual obligations as demonstrated by its efforts, in bankruptcy court, to invalidate an existing power purchase contract with PG&E. We are not persuaded that the Calpine Hayward PPA poses an undue or exceptional risk of nonperformance. PG&E is dealing with a Calpine entity that is not in bankruptcy, and one of the parties to the agreement is General Electric, which is undisputed to be one of the nation's soundest counterparties. There is insufficient cause on this record to require PG&E to obtain step-in rights which, at this juncture, could adversely affect project financing and likelihood that the project will be built.

## IV. Cost Recovery for Humboldt and Colusa

### A. Capital Costs

#### 1. Background and Summary

D.04-12-048 provides that the capital cost of a utility-owned project selected in an RFO shall be capped at the project bid price, and that any savings below the project bid price shall be shared 50/50 between ratepayers and shareholders. D.05-09-022 granted limited rehearing on the issue of the 50/50 sharing mechanism, but provides that the 50/50 sharing mechanism will continue to apply pending the outcome of the limited rehearing, subject to adjustment.

PG&E, Aglet and DRA each propose ratemaking for the capital costs of the Humboldt and Colusa projects that would provide PG&E the opportunity to

# Exhibit 40

Decision 09-04-010 April 16, 2009

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

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| Application of Pacific Gas and Electric Company for Expedited Approval of the Amended Power Purchase Agreement for the Russell City Energy Company Project (U39E). | Application 08-09-007 (Filed September 10, 2008) |

# DECISION APPROVING SETTLEMENT AGREEMENT REGARDING THE SECOND AMENDED AND RESTATED POWER PURCHASE AGREEMENT

## Summary

This decision approves a settlement agreement entered into by Pacific Gas and Electric Company (PG&E), Russell City Energy Company, LLC (RCEC), Division of Ratepayer Advocates (DRA), The Utility Reform Network (TURN), and California Unions for Reliable Energy (CURE) (collectively "Joint Parties") requesting approval of an amended power purchase agreement. PG&E, RCEC, DRA, TURN, and CURE fairly reflect a wide array of affected interests in this proceeding.

The Commission first approved the power purchase agreement in Decision 06-11-048. The major amendments to the original power purchase agreement are to the online date and contract price. This amended power purchase agreement is comparable in price and other criteria to the current market for power purchase agreements established in PG&E's 2008 long-term request for offers.

Three parties did not join the settlement and filed opposing comments urging the Commission to not adopt the settlement. The dissenting parties are Californians for Renewable Energy, Inc. (CARE), Rob Simpson, and "Group Petitioners," which consists of the California Pilots Association, Skywest Townhouse Homeowners Association, and Hayward Area Planning Association.

## 1. Background

In Decision (D.) 04-12-048, the Commission adopted a long-term procurement plan for PG&E, among other utilities, that provided direction on the procurement of resources over a 10-year horizon through 2014. Pursuant to that plan, D.04-12-048 identified for PG&E a need for 2,200 megawatts (MW) of new generation in northern California by 2010, and directed PG&E to initiate an all-source solicitation to secure these resources. In D.06-11-048, the Commission approved PG&E's conduct of its 2004 long-term request for offer (2004 LTRFO) and approved its resulting projects, including the original Power Purchase Agreement (PPA) with RCEC, finding them to be needed and cost-effective.

On November 8, 2007, RCEC notified PG&E that the RCEC Project had encountered permitting delays and cost increases and requested modifications to the original PPA to (1) delay the RCEC project on-line date by two years to June 2012; (2) revise the contract price; and (3) make other amendments.

On May 30, 2008, RCEC provided PG&E with a notice of termination of the original PPA. On June 6, 2008, RCEC and PG&E signed a letter agreement that provided the parties could negotiate modifications to the PPA and upon agreement the notice of termination would be deemed rescinded. These parties now consider the RCEC notice of termination rescinded. PG&E and RCEC

completed negotiations on August 4, 2008, with the results embodied in the (First) Amended PPA (1st APPA) submitted with the initial application as set forth below.

On September 10, 2008, PG&E filed the application for approval of the 1st APPA. Protests to the application were filed by DRA on October 10, 2008 and by TURN on October 15, 2008.

Administrative Law Judge (ALJ) Darling conducted a prehearing conference (PHC) on October 29, 2008 attended by PG&E, RCEC, DRA, TURN, CURE, Independent Energy Producers Association,[1] and Rob Simpson.

On November 17, 2008, assigned Commissioner Peevey issued a Scoping Memo setting the scope and procedural schedule for the proceeding and granting TURN's Motion for Supplemental Testimony by PG&E. Commissioner Peevey expressly rejected the proposal by some parties that the Commission review in this proceeding the need for RCEC's 601 MW capacity, saying:

> "The Commission has previously determined the need for the PPA with the RCEC Project in D.04-12-048. The cost-effectiveness of the original PPA was approved as part of PG&E's 2004 LTRFO in D.06-11-048…. I disagree with [DRA] and [TURN] that the underlying need for the 601 MW capacity of RCEC must be re-examined in this proceeding. That issue may be appropriate for consideration in the determination of the next long-term procurement plan, but is beyond the scope of issues to be

[1] Independent Energy Producers Association appeared at the PHC but did not seek party status, and did not appear again in the proceeding.

considered in this application for approval of amendments to a previously approved PPA."[2]

The Scoping Memo identified the following issues as within the scope of the proceeding:

1. Are the terms and conditions of the Amended PPA for the RCEC Project just and reasonable, particularly when compared with bids in PG&E's 2008 LTRFO?
2. Have the increased costs asserted by RCEC as the basis for increased price in the amended PPA been independently verified?
3. Are there any outstanding permitting delays that would result in the RCEC Project not being viable as of its projected construction start date of September 10, 2010?
4. Should any adjustments be made to the Amended PPA prior to Commission approval?[3]

The Scoping Memo also granted TURN's motion directing PG&E to serve Supplemental Testimony by December 8, 2008 as follows:

1. A side-by-side comparison of the [First] Amended PPA with short-listed bids in the 2008 LTRFO using the same quantitative and qualitative criteria PG&E considered relevant in its evaluation of the 2008 LTRFO bids;
2. A review by PG&E's 2008 Independent Evaluator of the evaluation of RCEC's [First] Amended PPA for its comparability to 2008 LTRFO bids, including adjustments as necessary to account for comparison of an amended contract to proposed bids for power purchase;

[2] Scoping Memo at 2-3.

[3] Scoping Memo at 3.

3. An independent review of the reasonableness of RCEC's claimed increases to various costs from its 2004 Power Purchase Agreement asserted to support the price increase in the Amended PPA;
4. The overall impact on ratepayers if the Amended PPA is approved as compared to the original PPA; and
5. An updated status report about the pending appeals of (i) the July 31, 2008 extension granted by California Energy Commission to RCEC's license which authorizes RCEC to begin construction no later than September 10, 2010; and (ii) the amended Prevention of Significant Deterioration air permit issued November 1, 2007 by the Bay Area Air Quality Management District.

In a December 10, 2008 ruling, ALJ Darling extended the dates set in the Scoping Memo for service of testimony at the request of PG&E because serious settlement discussions were underway and PG&E had issued a Notice of Settlement Conference to all parties pursuant to Rule 12.1 of the Commission's Rules of Practice and Procedure (Rules). Two days later, the California Pilots Association, Skywest Townhouse Homeowners, and Hayward Area Planning Association moved to be granted party status together as "Group Petitioners." They received party status in a December 16, 2008 ruling and participated in settlement discussions with the other parties.

On December 23, 2008, the Joint Parties filed a Joint Motion for Approval of Second Amended and Restated Power Purchase Agreement, stating that the 2nd APPA was a settlement of all issues raised by and among the Joint Parties. The ALJ then suspended the procedural schedule pending Commission review of the settlement.

Rob Simpson and CARE timely filed Joint Comments in opposition to the proposed settlement, as did Group Petitioners. PG&E filed Reply Comments on February 3, 2009. These Comments and Reply Comments are discussed in detail below. On February 6, 2009, ALJ Darling issued a ruling determining that evidentiary hearings were not necessary on the Joint Motion because neither CARE/Rob Simpson nor Group Petitioners had identified any material contested issues of fact, and therefore no hearing is required pursuant to Rule 12.3.

Both TURN and CARE filed timely Notices of Intent (NOI) to Claim Intervenor Compensation. In response to a December 12, 2008 motion by Group Petitioners to allow a late-filed NOI, ALJ Darling ruled that Group Petitioners could file the NOI but determined that Group Petitioners were ineligible to claim intervenor compensation.[4] On February 2, 2009, Group Petitioners filed a motion for reconsideration.

## 2. The Settlement

RCEC plans to construct a 601 MW combined-cycle facility in Hayward, California which would provide PG&E with a 10-year contract for energy capacity and energy.[5] The project design and operational benefits did not change between the original PPA and the 2nd APPA. The RCEC project design is intended to operate at a relatively low heat rate, use less natural gas and emit

[4] ALJ's Ruling Granting Motion by Group Petitioners to Accept Late Filing of Notice of Intent and Finding Group Petitioners are not Eligible to Claim Intervenor Compensation, issued January 23, 2009.

[5] Application at 10.

less greenhouse gas (GHG) per unit of electricity than existing, older fossil fuel-fired plants.[6] The project was originally scheduled to be online by June 2010,[7] but the 1st and 2nd APPAs both delay the online date by two years to June 2012. This date conforms with an extension RCEC received from the California Energy Commission (CEC) to begin project construction.

The Joint Parties describe the 2nd APPA as having terms that are substantially better for ratepayers than the 1st APPA. In Revised Public Supplemental Testimony, PG&E analyzed the original and the 1st APPA using the same valuation date, forward curves, and valuation models and found the primary difference was that the 1st APPA had higher net customer costs that reflected the rapid escalation of construction costs. However, PG&E also concluded that these costs would be partially offset by the delayed start date when market values of the energy and capacity are expected to be higher.[8]

The 2nd APPA significantly reduces the proposed costs to ratepayers compared to the 1st APPA , but includes about a 30% cost increase over the terms of the original PPA. Other changes relate to keeping the project on time to meet the scheduled start date and online date, as well as consequences of possible incidents of default. A few minor changes made are intended to conform the 2nd APPA operating provisions to the requirements of the 2008 LTRFO. The 2nd APPA also shifts certain risks from the developer to PG&E's customers related to

[6] *Id*. at 11.

[7] D.06-11-048 at 6.

[8] PG&E Testimony 1-2 to 1-5.

control of future GHG emissions. PG&E dropped its option to use the CAM/Energy Auction Mechanism provided for in D.06-07-029 (in the 1st APPA, PG&E elected to use the CAM/Energy Auction).

## 3. Parties' Positions

### 3.1. Joint Parties

The Joint Parties state that the 2nd APPA represents the settlement of all issues raised by the settling parties and "renders moot the protests previously filed by DRA and TURN."[9] The Joint Parties contend the 2nd APPA is a reasonable resolution of the proceeding in light of the whole record that is consistent with the law and in the public interest for several reasons. First, Joint Parties point out that the Commission has already approved the original PPA in D.06-11-048 as necessary to help PG&E meet an identified resource need.[10] Second, according to the Joint Parties, the terms and conditions of the 2nd APPA are substantially better for customers than the 1st APPA, largely based on a lower capacity price than initially proposed in PG&E's application. Third, the Joint Parties believe the 2nd APPA represents a reasonable, viable and timely addition of a new generation resource to PG&E's portfolio of resources at a time when

[9] Joint Motion at 1. This settlement does not extend to the issue of what standards the Commission should use going forward to consider requests to approve amendments to PPAs that the Commission has previously approved in a competitive solicitation process. The Joint Parties state their understanding that the Commission will address this issue as a policy matter in Phase 2 of the 2008 long-term procurement plan rulemaking, Rulemaking 08-02-007.

[10] PG&E Testimony at 2-1.

two of the five previously approved PPAs from PG&E's 2004 LTRFO have been terminated.[11]

The settlement represented by the 2nd APPA is also consistent with the law, according to Joint Parties, because the substance of the 2nd APPA is consistent with existing Commission policies and decisions, in part because it will satisfy an identified resource need, encourage retirement of aging plants, and provide PG&E sufficient operational flexibility to accommodate the "intermittent nature of renewable resources."[12]

Additionally, the Joint Parties assert that approval of the 2nd APPA is in the public interest because it will help assure PG&E has adequate resource capacity from a new, efficient generation source at a reasonable and competitive price to ratepayers.[13]

### 3.2. CARE/Simpson

CARE and Rob Simpson (collectively "CARE") oppose the settlement based on several arguments, some specific to the 2nd APPA and other more general objections to the underlying RCEC project. Specifically, CARE argues that Section 10.4 of the 2nd APPA provides for transfer of ownership and operation of the RCEC facility without notice or opportunity for comment by affected communities, and "ratepayers with a dispute over the operation and

[11] *Id*. at 1-2.

[12] PG&E Testimony at 1-7 to 1-8.

[13] Joint Motion at 8.

emissions of [RCEC] will have no recourse through the Commission complaint procedures."[14]

CARE agrees that the test for reasonableness could be met by comparison of the 2nd APPA to the 2008 LTRFO, but did not "see evidence to support the contention that the RCEC Project is just and reasonable when compared with bids in PG&E's 2008 LTRFO."[15] CARE also rejects PG&E's independent verification of RCEC's increased costs because the results were not "independently verified."[16]

CARE's other objections can be divided into two categories: (1) concern about RCEC performing and PG&E enforcing the 2nd APPA's terms, and (2) numerous environmental criticisms about the siting and permitting of the RCEC power plant. Concerns about the RCEC project site are primarily articulated in a number of petitions attached to CARE's Comments in which signatories, stating they are residents in the Hayward area, have signed under several pre-printed paragraphs which state objection to:

- PG&E's development of fossil fuel fired electricity generation without satisfying the 20% renewable energy portfolio requirements;
- the proposed site of the Plant next to the San Francisco Bay without a "Formal Biological Opinion from the U.S. Department of Fish and Wildlife";

[14] CARE/Simpson Comments at 1-2.

[15] *Id*. at 3.

[16] *Id*.

- the propensity to site plants in neighborhoods of color and/or low income;
- Bay Area Air Quality Management District (BAAQMD) or United States Environmental Protection Agency issuing air pollution permits for the project; and
- Erroneous projections of increased demand to justify ratepayers funding the project.

### 3.3. Group Petitioners

Group Petitioners comments opposing the settlement [17] largely relate to the site of the proposed RCEC facility rather than the terms of the 2nd APPA contract. The arguments specific to the 2nd APPA are described first.

Group Petitioners reject the Joint Parties' claim that issues raised in the initial protests are moot, and reprise arguments offered in protests made by DRA and TURN to the 1st APPA. Group Petitioners first argue that approval of the settlement would violate the Commission's policy of competitive bidding, citing D.08-11-004 issued November 6, 2008 (*Tesla* Decision), in which the Commission said "long-term power should be obtained through 'competitive procurements,' rather than through preemptive actions by the investor-owned utilities, except in

[17] Group Petitioners filed a "Public" and a "Confidential" version of "Contest and Opposition to Joint Motion for Approval of Second Amended and Restated Power and Purchase Agreement" (GP Comments) along with a motion to file under seal, which have different page numbers and much non-confidential material redacted from the version labeled "Public." Unless otherwise stated, references to GP Comments refer to the so-called "Confidential" version, albeit to information we do not think is market sensitive.

truly extraordinary circumstances."[18] Group Petitioners view the 2nd APPA as a new bilateral contract which goes far beyond simple amendment.

Group Petitioners also object to a shift of burden of GHG compliance costs from RCEC to PG&E that is still present in the 2nd APPA. Group Petitioners also argue that the entire 2nd APPA is flawed because it fails to identify all material government approvals. According to Group Petitioners, this omission misleads the Commission as to the viability of the RCEC project primarily because the BAAQMD permit is likely to be denied.[19]

Group Petitioners have several other concerns about the underlying RCEC power plant, both financial and environmental, which they argue should be considered in this decision. They question the financial reliability of the project and argue RCEC should disclose who might become an equity partner in the future, presumably as it relates to the likelihood of obtaining project financing.[20] Other objections raised by Group Petitioners relate to the RCEC project location and include alleged airport hazards, violation of Federal Aviation Administration (FAA) flight rules, and failure of the CEC to consider the airport-related problems, noise pollution, and safety problems.[21]

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[18] GP Comments at 4.

[19] *Id*. at 8-10.

[20] *Id*. at 7.

[21] *Id*. at 10-22.

### 3.4. Reply Comments

In Reply Comments, the Joint Parties state none of the arguments offered by CARE/Simpson or Group Petitioners identify any material contested issue of fact warranting a hearing or demonstrate why the 2nd APPA should not be approved by the Commission.

With regard to the Commission's policy requiring competitive bids, Joint Parties argue the 2nd APPA was subject to market comparisons in its current and prior form, and point to at least three events. PG&E found the 1st APPA to be "within range of market values for contracts executed in the 2004 LTRFO."[22] The 1st APPA also compared favorably in a side-by-side comparison with PG&E's 2008 LTRFO short list.[23] Lastly, both DRA and TURN applied PG&E's analysis of the 1st APPA to the 2nd APPA and found it competitive with the short-listed 2008 LTRFO bids if it were bid into that RFO.[24] Thus, Joint Parties conclude the 2nd APPA has been compared to potentially competitive bids, does not violate the Commission's policy requiring competitive bids, and need not meet the "truly extraordinary circumstances" standard discussed in the *Tesla* decision, even if *Tesla* were analogous.[25]

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[22] PG&E Testimony at 3-4.

[23] Confidential Revised Supplemental Testimony at Attachment 1-2.

[24] Joint Motion at 6.

[25] Joint Parties Reply at 7.

The Joint Parties address Section 10.4[26] Assignment and Change of Control in the 2nd APPA, which was singled out by CARE in a comment that suggested CARE believed it eliminated some public rights. The Joint Parties reply that these concerns are speculative, and that the Joint Parties made revisions to the default provisions to improve the ratepayers' position upon default and see no further need for changes.[27]

Concerning CARE's objection to the independent verification of the increased costs claimed by RCEC, the Joint Parties state that the costs were independently verified by Sargent & Lundy, LLC.[28] If CARE is saying the independent verification should be independently verified again, then the Joint Parties counter that CARE failed to identify any particular part of the report with which they disagree.[29]

Joint Parties reject all arguments related to airport and aviation safety as outside the scope of the proceeding.[30] RCEC additionally argues that these issues were previously addressed by the CEC in consideration of the permit issued to RCEC when it found the aviation risk "less than significant."[31] The Joint Parties

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[26] Ordinarily this contract provision would be confidential pursuant to D.06-06-066 but PG&E waived that status when it addressed the concern in the Public version of the Joint Parties Reply.

[27] Joint Parties Reply at 9-10.

[28] Revised Supplemental Testimony Chapter 2 Attachment 2-1.

[29] Joint Parties Reply at 11.

[30] Joint Parties Reply at 2.

[31] Joint Parties Reply at 2-3, citing to the CEC Commission Adoption Order, 07-0926-04 (Oct. 2, 2007) (CEC Decision), Docket No. 01-AFC-7C. A copy of the CEC Decision is

*Footnote continued on next page*

argue that any re-examination of the need for RCEC should be similarly rejected as outside the scope of the proceeding. With respect to questions raised as to the project's viability, Joint Parties reply that the fact additional public comment time was added to the rehearing of the BAAQMD permit is no indication of the outcome of the permit process or of a significant delay.[32]

## 4. Discussion

### 4.1. Standard of Review for Settlements

We review this contested settlement pursuant to Rule 12.1(d) which provides that, prior to approval, the Commission must find a settlement "reasonable in light of the whole record, consistent with the law, and in the public interest." We find the settlement agreement meets the criteria for a settlement pursuant to Rule 12.1(d), and discuss each of these three criteria below.

### 4.2. Reasonable in Light of the Whole Record

#### 4.2.1. Amendment is Justified

Ordinarily, a question about utility rates is measured by whether the price is "just and reasonable." (See California Pub. Util. Code § 451.) We first examine whether a proposed increase to the previously approved capacity price is just, that is, justified by actual delays and cost increases incurred by RCEC. We find that it is.

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available at http://www.energy.ca.gov/2007publications/CEC-800-2007-003/CEC-800-2007-003-CMF.PDF.

[32] Joint Parties Reply at 12.

PG&E and RCEC entered negotiations to amend the original PPA because RCEC claimed it could no longer perform its obligations due to project delays and increased costs. In the Application, PG&E described its efforts to review the claimed delays and cost increases, particularly the detailed estimates of RCEC's increased costs for equipment, materials, and labor. The permitting delays are a matter of public record.

In May 2008, pursuant to a confidentiality agreement, RCEC provided PG&E with a cost comparison for the RCEC project between March 2006 and May 2008.[33] PG&E later provided the Commission an independent evaluation of RCEC's claimed costs by Sargent & Lundy, LCC, global energy consultants, which found, "[a]t a summary level, the 2008 estimate is appropriately comprehensive and provides an overall cost estimate that is within reason for a facility of the proposed size and scope."[34] (Public Revised Supplemental Testimony at 2-A1-1.) Sargent & Lundy provided an itemized list of costs and found some individual items lower or higher than RCEC estimates , but the result overall was "reasonable." Therefore, an amendment to price from the original PPA is justified.

#### 4.2.2. Price is Reasonable

We now turn to whether the proposed capacity price increase is reasonable. The Commission has not yet developed standards for reviewing amendments, including price, to existing PPAs for non-renewable resources.

[33] Application at 6.

[34] Revised Supplemental Testimony at 2-A1-1.

However, a price amendment to a renewable PPA will only be considered if it is compared with bids in a recent RPS solicitation.[35] We find this a suitable guideline to determine whether this settlement is reasonable.

Group Petitioners argue the 2nd APPA is an improper bilateral contract and, absent "extraordinary circumstances," approval would violate the Commission's policy of competitive bidding based on the *Tesla* decision as noted above. However, the RCEC project was selected in an RFO, and the terms and conditions of the 2nd APPA have been subject to a comparative analysis with bids received in both the 2004 and 2008 LTRFO solicitation. Consequently, the *Tesla* decision is inapplicable.

The original PPA was approved in D.06-11-048 with other 2004 LTRFO contracts after "a fair, open and competitive bidding process."[36] The 1st APPA was generally similar to the original PPA with some important differences including price. In response to the Scoping Memo, PG&E submitted both its own side-by-side comparison of the 1st APPA and short-listed bids in PG&E's 2008 LTRFO, and a review of that comparison by an independent evaluator.[37] The independent evaluator, Alan Taylor of Sedway Consulting, concluded that the pricing and economic characteristics of the 1st APPA were reasonably comparable to the economics of the short-listed offers in PG&E's 2008 LTRFO

[35] Resolution E-4150 at 8.

[36] D.06-11-048 at 6-7.

[37] PG&E Revised Supplemental Testimony at 1-1, Attachment 1-2; Confidential Revised Supplemental Testimony at Attachments 1-1, 1-2.

and compared favorably in overall ranking.[38] DRA and TURN reviewed this comparative information and performed their own comparison of the 2nd APPA, taking into account all the evaluation criteria, and concluded RCEC would be competitive with the short-listed bids in the 2008 LTRFO if it were bid into that RFO. Therefore, Joint Parties have shown that the 2nd APPA is comparable, in price and other criteria, to the current market for PPAs, as established by PG&E's contemporary 2008 LTRFO.

Although the 2nd APPA has several changes, we find the basic transaction intact and reasonably modified to reflect current market conditions. Based on the foregoing, we find that the policy of competitive procurement is not violated by the amendments to the original PPA which resulted in the 2nd APPA before us here. Because no violation of competitive bidding occurred, the "extraordinary circumstances" standard from the *Tesla* decision does not apply.

#### 4.2.3. Other Provisions are Reasonable

CARE and Group Petitioners contend the settlement is not reasonable in light of all the facts, which they argue must include not only contract provisions, but more speculative concerns such as the identity of future equity holders and environmental issues related to the physical site where the RCEC project will be constructed. However, most of the issues raised by CARE and Group Petitioners are not within the jurisdiction of the Commission or the scope of this proceeding.

Joint Parties assert the terms and conditions of the 2nd APPA are substantially better for ratepayers than the 1st APPA. As previously discussed,

[38] *Id*. at 1-A2-2 to 1-A2-3.

terms and conditions other than price were included in the independent evaluation of the 1st APPA which compared favorably to short-listed bids in PG&E's 2008 LTRFO using the same evaluation criteria.

PG&E identified the following broad criteria used to select the 2008 LTRFO bids: "PG&E will primarily consider Market Valuation, Portfolio Fit, Credit, Participant Qualification, Project Viability, Technical Reliability (of equipment), Environmental Leadership, and Conformance with PG&E's non-price terms and conditions."[39] Based on our review of the 2nd APPA, we observe that it would likely fare better than the 1st APPA in a side-by-side comparison, largely based on price but also on higher probability of performance by RCEC. From this information, it is appropriate to infer that the 2nd APPA's terms and conditions are reasonably comparable to the current market. DRA and TURN reached this conclusion as set forth in the Joint Motion and no specific objection was made by any party.

CARE mistakenly claimed that § 10.4 in the 2nd APPA would permit transfer of ownership and operation of the RCEC project without notice or opportunity for the public to comment. However, the provision reflects parties' rights and obligations regarding potential assignment of the Agreement or rights thereunder. It is unclear how CARE links the provision to some loss of public rights.

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[39] From PG&E's 2008 LTRFO Protocol at 13, found at http://www.pge.com/b2b/energysupply/wholesaleelectricsuppliersolicitation/allsourcerfo/.

Group Petitioners correctly note that Section 9.3 of the 2nd APPA addresses the parties' rights and obligations for taxes, charges, fees or other costs for compliance with GHG regulations. However, they argue that the treatment of GHG costs is unreasonable because the actual costs are unknown. According to the Joint Parties, the fact that certain costs are unknown but will become known does not render a delegation of costs unreasonable. While DRA did briefly raise the issue in its Protest of the 1st APPA, it has now overcome that objection by approving the overall settlement agreement set forth in the 2nd APPA. We find the 2nd APPA represents a reasonable compromise of the parties' positions such that not all settling parties agree with every provision, but taken as a whole each finds the totality reasonable.

The next group of objections made by the non-settling parties can be described as opinion or speculation. For example, Group Petitioners believe RCEC should identify potential future equity holders. They also question the project's viability by stating that RCEC and PG&E have misled the Commission by failing to accurately describe the potential for further delays getting the air permit from BAAQMD or reveal that CEC may reopen the permit because RCEC has not filed required reports and paid certain fees. Similarly, CARE speculates that RCEC may not be able to timely meet project milestones and that PG&E will not enforce damages because it allegedly has failed to do so.

These arguments were largely unsupported and not helpful to the analysis. Although the future physical and financial viability of RCEC is unknown, the project now has all but one permit, RCEC says it owns or holds long-term leases for all of the land for the project site, has secured the necessary

emission credits and water rights for the project, and already owns the gas and steam turbines.[40] These are substantial preliminary steps that place RCEC in an advanced position to complete the project in order to recoup its costs.

The third type of objections made by CARE and Group Petitioners can be broadly described as environmental concerns related to the actual RCEC project site. These parties assert that the 2nd APPA for fossil-fueled capacity represents a move away from procurement of renewables and the power plant itself will adversely impact the surrounding community. However, the Commission has no jurisdiction over the siting and permitting of the RCEC project and, not surprisingly, such issues are outside the scope of the proceeding. In particular, Group Petitioners repeatedly, and despite clear direction to the contrary, kept offering information and argument about the potential for thermal plumes and other air hazards from the RCEC project site which they believe could affect the Hayward airport, local aviation,[41] and nearby communities. We do not diminish the importance of such concerns, but after consistently advising Group Petitioners that the Commission lacked any jurisdiction over such matters, we do not address these issues further here because they are outside the scope of this review.[42]

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[40] Testimony at 1-4, 1-6.

[41] CEC denied a request for reconsideration by Group Petitioners based on the airport safety concerns because CEC found the underlying decision addressed airport and aviation issues in detail. (Order Denying Petitions for Reconsideration, etc. (Nov. 7, 2007) at 6-7.)

[42] CARE, Rob Simpson, and Group Petitioners submitted information which indicates each has been actively involved in the CEC, BAAQMD, and local planning process for

*Footnote continued on next page*

We also take into consideration that the Commission has long favored the settlement of disputes. This policy supports many worthwhile goals, including reducing the expense of litigation, conserving scarce Commission resources, and allowing parties to reduce the risk that litigation will produce unacceptable results.[43]

Therefore, we find the 2nd APPA is reasonable in light of the whole record.

### 4.3. Consistent With the Law

The 2nd APPA submitted for approval by the Joint Parties conforms to the requirements for settlements set forth in Article 12 of the Rules. In accordance with Rules 12.1(a) and (b), a properly noticed settlement conference was held on December 18, 2008 to discuss the terms of the settlement and the Joint Motion contained a statement of the factual and legal considerations adequate to advise the Commission of the scope of the settlement and of the grounds on which adoption is urged.

The Joint Parties believe that the terms of the 2nd APPA comply with all applicable statutes and prior Commission decisions, and reasonable interpretations thereof. In agreeing to the terms of the 2nd APPA, the Joint Parties claim they have explicitly considered the relevant statutes and Commission decisions and believe that the settlement is consistent with them.

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the RCEC project. These parties are knowledgeable about the multi-layered approval process for power plants and seem poised to continue their efforts and arguments in the proper forum.

[43] See D.08-01-043, citing D.05-03-002.

We agree with Joint Parties that the 2nd APPA is substantively consistent with the Commission's policies and decisions. The Commission has previously determined the need for the project and the 2nd APPA will satisfy that new resource need. The facility will be modern and will provide PG&E certain operational and environmental benefits consistent with Commission direction that new generation resources be flexible to accommodate the intermittent nature of renewable resources and lead to the retirement of aging plants.[44]

Group Petitioners argue that approval of the 2nd APPA would violate various federal laws regarding air traffic and safety, reward RCEC for misleading the CEC, and contradict Commission policies that favor competitive procurement. We have previously concluded that the 2nd APPA does not violate the policy of competitive procurement and the alleged violations of federal laws or CEC permit conditions by RCEC are outside the scope of this proceeding.

Therefore, we find that the 2nd APPA is consistent with the law.

### 4.4. In the Public Interest

As shown above, the 2nd APPA is a reasonable compromise of the Joint Parties' respective positions on individual issues and taken as a whole is fair and reasonable. There is a sound record basis for our findings and a representative array of parties in support of the settlement. In particular, the settlement represents the interests of ratepayers through DRA and TURN, employees who build, operate, and maintain power plants through CURE, and the seller and

[44] See D.07-12-052 at 23, 106.

buyer of the energy capacity and energy through RCEC and PG&E, the parties to the 2nd APPA.

The proposed settlement is in the interest of PG&E's customers because approval of the 2nd APPA provides an opportunity for PG&E's customers to receive 601 MW of power beginning 2012. The City of Hayward has shown its support through an agreement with RCEC to exchange some real estate parcels and RCEC will donate $10 million to help fund a new Hayward Library.[45]

Since environmental concerns were argued vigorously by the non-settling parties, it is important to note that such matters have been considered by the appropriate governmental agencies. Finally, the agreement between the Joint Parties may avoid the cost of further litigation.

Based on the foregoing, we find that approval of the 2nd APPA is in the public interest.

### 4.5. Emissions Performance Standard

In January 2007, the Commission adopted the Emissions Performance Standard (EPS),[46] which requires that baseload generation facilities designed and intended to provide electricity at an annualized plant capacity factor of at least 60 percent demonstrate that the net emissions rate of each baseload facility underlying a covered procurement is no higher than 1,100 lbs. of carbon dioxide ($CO_2$) per megawatt hour. Based on the definitions provided in the EPS decision,

[45] PG&E Testimony at 1-6.

[46] D.07-01-039 at 3.

the RCEC contract is a covered procurement. The EPS decision further requires that investor-owned utilities indicate in their applications that resources comply with the EPS requirements. However, PG&E filed its original application for this project in April 2006, before the EPS was adopted, and it did not address this issue in its applications for the 1st and 2nd APPAs.

On March 20, 2009, PG&E filed documentation in this docket that indicated the project would be in compliance with the EPS. Comments on this filing pointed out that the heat rate value used by PG&E to derive an emissions rate for the unit may not represent average operating conditions (e.g., factoring in cold starts and operation below full capacity). Energy Division staff have re-calculated the emissions rate for more conservative, average heat rate, and the Commission is satisfied that the project does comply with the EPS based on likely average emissions rates for the project.

## 5. Change in Determination on Need for Hearings

The November 17, 2008 Scoping Memo confirmed the categorization of this proceeding as ratesetting and that evidentiary hearings were necessary. However, the proposed settlement is governed by Rules 12.1 *et seq*. which provide that no hearing is necessary if there are no material contested issues of fact, or if the contested issue is one of law.

After review of the filed Comments and Reply Comments, ALJ Darling determined that neither CARE/Rob Simpson nor Group Petitioners had identified any material contested issue of fact and concluded no hearing was required pursuant to Rule 12.3. We therefore change the designation regarding hearings and determine that no hearings are necessary.

## 6. Motions

After PG&E filed its original Application for approval of the 1st APPA, there have been numerous motions filed in this proceeding. Most have been resolved through a specific ruling.

### 6.1. Motions by Group Petitioners

#### 6.1.1. Motions for Reconsideration

Group Petitioners' asked to be recognized together as one party and were allowed to submit a late NOI as one party asserting "Category 3" customer status, a group or organization authorized by its articles of incorporation or by-laws to represent the interests of residential and/or small commercial ratepayers. (§1802(b)(1)(C).) ALJ Darling's January 23, 2009 Ruling found Group Petitioners' ineligible for intervenor compensation because insufficient information was submitted to establish that all members of Group Petitioners were entitled to "customer" status and that each would suffer significant financial hardship. Group Petitioners filed a timely Motion for Reconsideration (GP Motion) which claimed to cure the prior omissions or, in the alternative, seek consideration of member organizations under any of the three possible categories of "customer." The GP Motion is denied due to insufficient information, the same reason set forth in the prior ruling.

A threshold barrier for Group Petitioners is their mistaken claim that as long as any one member organization is an eligible customer, the entire party should be considered an eligible customer. (GP Motion at 3.) To adopt their view would open the door for non-customer members of a coalition-party to obtain intervenor compensation since it would file one Request for Compensation and reimburse all coalition members for the costs of participation. (D.98-04-059, 79 CPUC2d at 643.)

Group Petitioners also seek to recast the representative authority of Skywest Homeowners Association and HAPA by reliance on D.04-10-012 for the proposition that Articles of Incorporation need only state an organization represents "the interests of customers" or "residents" to qualify as a Category 3 customer. However, this decision, which found union Local 483 was an eligible "customer," was vacated and reversed in D.05-02-054. Although the union group was a party in the proceeding, it was "not authorized to represent the interests of residential ratepayers in its articles or by-laws." (D.05-02-054 at 5.) Two pages from amended Articles of Incorporation for California Pilots Association were submitted, but none of the three groups' Articles grant specific authority to represent residential ratepayers nor suggest the groups were formed for such purposes. (D.05-02-054.) To the contrary, each appears formed for rather specific and narrow purposes unrelated to the regulation of public utilities, with the possible exception of HAPA.

Turning to their request that the Commission instead consider Group Petitioners as Category 1 or 2 customers, Group Petitioners stated they qualify "like Local 483" and offered copies of PG&E bills to establish Skywest as a Category 1 customer.[47] Even if we accept counsel's offer of proof that the other groups qualify as Category 1 customers[48] and we infer their representation is beyond self-interest, Group Petitioners did not demonstrate that undue financial hardship will occur as a result of each group's participation here. (§ 1802(g).) D.98-04-059, 79 CPUC2d at 651, requires Category 1 and 2 customers seeking a

[47] GP Motion at 10.

[48] Counsel for Group Petitioners affirmed her review of PG&E bills sent to the chair of HAPA and the regional chair of the California Pilots Association.

finding of significant financial hardship to disclose their financial information to the Commission, under appropriate protective order. Group Petitioners did not submit any financial information at all.

In reaching the conclusion that Group Petitioners are ineligible for intervenor compensation due to insufficient information, we do not alter our support for "a robust intervenor compensation program, which strengthens the Commission in its decision-making process by enabling participation by parties whose voices would not otherwise be heard." (TURN Comments on PD at 6.) Instead we affirm that eligibility standards are "an important part of the accountability and control mechanisms appropriate to the compensation program's administration." (D.98-04-059 at 642.) It is the duty of an intervenor to establish eligibility, including customer status and significant financial hardship, rather than offer unsupported statements and inferences from which the Commission is to derive rather specific elements of qualification. While it is possible Group Petitioners could qualify if given enough time to further supplement their NOI, there is no authority that binds the Commission to wait indefinitely.

#### 6.1.2. Motion to File Under Seal

Along with their January 23, 2009 Comments on the proposed settlement, Group Petitioners also filed a Motion to File Under Seal Certain Portions of the Contest and Opposition to Joint Motion for Approval of Second Amended and Restated Power and Purchase Agreement. No opposition to the motion was filed. However, the "redacted," or Public, version of their Comments omits a significant amount of the document including portions that do not contain any market sensitive information subject to confidential treatment according to

D.06-06-066. Group Petitioners apparently acknowledge this overreaching because they say the motion was filed in "an abundance of caution" and urge PG&E to advise them as to which parts should be kept confidential.[49]

The Motion is vague as to what was omitted from the Public version. Accordingly, we partially grant Group Petitioners' motion to file confidential material in their "Contest and Opposition to Joint Motion" (GP Comments) under seal for just two portions of the requested material. First, because the specific language of section 9.3 is disclosed, we agree that lines 15–21 on page 6 of the "Confidential" version of Group Petitioners comments are confidential and should be filed under seal. We also agree that lines 12-19 (through the sentence ending in "letter") on page 7 of the "Confidential" version of their comments disclose some content from the letter.

### 6.2. Motions by PG&E

In a February 6, 2009 Ruling, ALJ Darling granted PG&E's motion to seal the evidentiary record as to the Confidential Testimony but only partially granted PG&E's motion to seal the evidentiary record as to the Confidential Supplemental Testimony. The Ruling directed PG&E to serve on all parties a revised version of the Public Supplemental Testimony which it did on March 3, 2009. On March 6, 2003, PG&E filed a motion to Offer Testimony into Evidence and a Motion to Seal the Evidentiary Record as to revised Confidential Supplemental Testimony. No opposition has been filed and both of these motions are granted.

[49] Group Petitioners Confidentiality Motion at 3.

## 7. Comments on Proposed Decision

The proposed decision of the ALJ in this matter was mailed to the parties in accordance with Section 311 of the Public Utilities Code and comments were allowed under Rule 14.3 of the Commission's Rules of Practice and Procedure. Timely comments were filed by Group Petitioners, CARE, TURN and Joint Parties on or before April 6, 2009. Joint Parties amended their Comments on April 8. CARE and Joint Parties filed Reply Comments on April 13, 2009. Based on the Comments and Reply Comments, additional text has been added to the decision to clarify the analysis and disposition of Group Petitioners' Motion for Reconsideration. In addition, small changes have been made throughout the decision to improve its clarity and correct typographical and other small errors.

## 8. Assignment of Proceeding

Michael R. Peevey is the assigned Commissioner and Melanie M. Darling is the assigned ALJ in this proceeding.

## Findings of Fact

1. Joint Parties PG&E, RCEC, DRA, TURN, and CURE have filed a settlement agreement in the form of the 2nd APPA. The 2nd APPA resolves all of the disputed issues among the Joint Parties.

2. CARE, Simpson, and Group Petitioners oppose approval of the proposed settlement agreement.

3. PG&E, RCEC, DRA, TURN, and CURE fairly reflect a wide array of affected interests in this proceeding.

4. The 2nd APPA is a revision of the original Power Purchase Agreement executed by PG&E and RCEC that arose out of the PG&E's 2004 LTRFO process to acquire future capacity and ensure future reliability.

5. The Commission has previously determined the need for the project and that the 2nd APPA will satisfy that new resource need.

6. PG&E and RCEC renegotiated the PPA because of unforeseen permit delays and unexpected cost increases which have delayed the RCEC project start and on-line dates by two years.

7. An amendment to price from the original PPA is justified.

8. The increased costs claimed by RCEC have been independently verified.

9. The 2nd APPA has been independently reviewed and found comparable to current short-listed bids in PG&E's 2008 LTRFO.

10. The 2nd APPA represents a reasonable compromise of the parties positions such that not all settling parties agree with every provision, but taken as a whole each finds the totality reasonable.

11. The non-settling parties did not raise any contested issue of material fact.

12. The 2nd APPA provides an opportunity for PG&E's customers to receive 601 MW of power beginning in 2012, and PG&E elects to not use the CAM/Energy Auction for this resource.

13. The Commission has no jurisdiction over the siting and permitting of the RCEC project.

14. Group Petitioners did not establish they were a "customer" and otherwise qualified to claim intervenor compensation.

15. Group Petitioners established that a portion of their Comments are confidential and should be filed under seal.

16. PG&E timely filed a Motion to Offer Testimony into Evidence and a Motion to Seal the Evidentiary Record as to Revised Confidential Supplemental Testimony.

17. The RCEC project complies with the Emissions Performance Standard adopted in D.07-01-039.

## Conclusions of Law

1. The settlement agreement, represented by the 2nd APPA, meets the settlement requirements of Rule 12.1 in that it is reasonable in light of the whole record, consistent with law, and in the public interest.

2. The 2nd APPA should be approved.

3. Group Petitioners' Motion for Reconsideration of January 23, 2009 Ruling that Group Petitioners are not eligible to claim intervenor compensation should be denied.

4. Group Petitioners' Motion to Seal the Evidentiary Record as to Revised Confidential Supplemental Testimony should be granted in part, as set forth below.

5. PG&E's Motion to Offer Testimony into Evidence should be granted. PG&E's Motion to Seal the Evidentiary Record as to Revised Confidential Supplemental Testimony should be granted as set forth below.

6. The designation of this proceeding should be changed so that hearings are no longer necessary.

7. This decision should be effective immediately so that the RCEC project can proceed expeditiously.

## O R D E R

**IT IS ORDERED** that:

1. The December 23, 2008 Joint Motion of Pacific Gas and Electric Company (PG&E), Russell City Energy Company, LLC, Division of Ratepayer Advocates, California Unions for Reliable Energy, and The Utility Reform Network for Approval of Second Amended and Restated Power Purchase Agreement (2nd APPA) is approved.

2. PG&E is authorized to recover costs associated with the 2nd APPA through its Energy Resource Recovery Account.

3. Group Petitioner's February 2, 2009 Motion for Reconsideration of the January 23, 2009 Administrative Law Judge Ruling that Group Petitioners are not eligible to claim intervenor compensation is denied.

4. Group Petitioners' Motion to Seal the Evidentiary Record as to Revised Confidential Supplemental Testimony is granted in part, as set forth below. Two portions of the "Confidential" version of Group Petitioners Comments shall be placed under seal as set forth in Ordering Paragraphs 6 and 7: Page 6, lines 15-21, and page 7, lines 12-19 (through the sentence ending in "letter").

5. PG&E's Motion to Offer Testimony into Evidence is granted.

6. PG&E's Motion to Seal the Evidentiary Record as to Revised Confidential Supplemental Testimony is granted as set forth in Ordering Paragraphs 6 and 7.

7. The material identified in Ordering Paragraphs 3 and 5 above shall remain under seal for a period of three years from the date of this order, except for data under category VII.B of Decision 06-06-066, which are confidential for three years from the date the contract states deliveries are to begin.

8. During the three-year period, the documents identified in Ordering Paragraphs 3, 5, and 6 shall not be made accessible or disclosed to anyone other than Commission staff except pursuant to (a) further order or ruling of the Commission, the assigned Commissioner, the assigned Administrative Law Judge (ALJ), or the ALJ then designated as Law and Motion Judge, or (b) the terms of a reasonable nondisclosure agreement for purposes of this proceeding.

9. Application 08-09-007 is closed.

This order is effective today.

Dated April 16, 2009, at San Francisco, California.

MICHAEL R. PEEVEY
President
DIAN M. GRUENEICH
JOHN A. BOHN
RACHELLE B. CHONG
TIMOTHY ALAN SIMON
Commissioners

# Exhibit 41

FILED
05-08-09
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**BEFORE THE PUBLIC UTILITIES COMMISSION**
**OF THE STATE OF CALIFORNIA**

| | |
|---|---|
| Application of Pacific Gas and Electric Company for Expedited Approval Of The Amended Power Purchase Agreement For The Russell City Energy Company Project (U 39 E) | Application No. 08-09-007 (Filed September 10, 2008) |

# GROUP PETITIONERS' APPLICATION FOR REHEARING DECISION NO. 09-04-010 APPROVING SETTLEMENT AGREEMENT REGARDING THE SECOND AMENDED AND RESTATED POWER PURCHASE AGREEMENT AND REQUEST FOR ORAL ARGUMENT BY GROUP PETITIONERS

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California Pilots Association, Skywest
Townhouse Homeowners Association and
Hayward Area Planning Association

Pursuant to rule 16.1 of the Commission's Rules of Practice and Procedure, Group Petitioners California Pilots Association, Skywest Townhouse Homeowners Association, and Hayward Area Planning Association (collectively "GP") apply for a rehearing of the Commission "Decision [No. 09-04-010 ] Approving Settlement Agreement Regarding the Second Amended and Restated Power Purchase Agreement" issued on April 20, 2009. In doing so, GP further join in the petition for rehearing by CARE and Rob Simpson also filed in this proceeding (collectively referred to as "joint opposing parties.") This Decision was adopted on April 20, 2009 under the Commission's Consent Calendar without the parties receiving any specific notice of this hearing or that it would be set on the consent calendar.

Pursuant to rule 14.3, the joint opposing parties timely filed their respective comments on April 3 and April 6, 2009, identifying, commenting on and objecting to the factual, legal and technical errors of the proposed decision, including lack of evidence, approving a settlement agreement regarding the second amended and restated power purchase agreement ("2nd APPA") served on March 17, 2009 ("PD"). The Decision before the Commission approves a settlement agreement among PG&E and other joint parties[1] purporting to relate back to an unperformed original March 21, 2006 purchase power agreement, for which the developer RCEC gave notice of termination on May 30, 2008 that it could not perform. (Decision, p. 2.) When approving the contract in D.06-04-012, this project was challenged as one where the applicant, Calpine, "cannot be reasonably expected to meet its contractual obligations."

Despite the Commission's confidence three years ago "that the Calpine Hayward PPA [does not] pose[] an undue or exceptional risk of nonperformance" as challenged, D.06-04-012, that PPA has been abandoned under the auspices of an "amendment." This Decision arises from

[1] The joint parties who agree to the 2nd APPA are PG&E, Russell City Energy Center (RCEC), Division of Ratepayers Agency, TURN and CURE.

the "third" contractual go around resulting in a second amended and restated PPA after DRA and TURN protested the first APPA (the second contract) as consisting as a bilateral contract. After the pre-hearing conference scheduled an evidentiary hearing and GP joined, DRA and TURN agreed to a 2nd APPA, GP's objections were dismissed as not controverting an issue of fact and GP's motions seeking to establish their eligibility for compensation, with PG&E bills in hand, were deemed not customers. After objecting and commenting on the proposed Decision, joint opposing parties proceed under rules 16.1 and 16.3 setting forth the grounds on which the Decision issued on April 20, 2009 is erroneous and unlawful and request oral argument before the Commission identifying the following important issues.

**Request For Oral Argument Under Rule 16.3**

Pursuant to rule 16.3 of the Commission's Rules of Practices and Procedure, joint parties request oral argument before the Commission on the basis that this Decision raises the following issues of major significance:

1. Should the Commission approve settlements allowing bilateral contracts which violate binding Decisions requiring that price be evaluated including GHG value and that the developer bear that cost rather than the ratepayer as this Decision does here?

2. May a bilateral contract be deemed "comparable" to competitive bids submitted in response to the 2008 LTTR if that comparison, for which no evidence was submitted, does not include the evaluation GHG adder and shifts GHG costs to the ratepayer rather than onto the developer as required to be deemed responsive?

3. Should the Commission approve settlements which fail to satisfy the requirements of *Tesla* and open the door to developers to negotiate new bilateral contracts without satisfying the

requirements of Decision 04-12-048 under the auspices of "amending" an unperformed contract which otherwise cannot be performed and is terminated?

4. Is the Commission bound by state decisional law holding that the issue of whether a purported "amended" contract constitutes a new bilateral contract or is an amended contract constitutes a controverted issue of fact, which under the Commission's rules and procedures, requires an evidentiary hearing?

5. Is it an abuse of discretion to rely on a Decision that a project is "needed" when in fact under that Decision the timeframe for that need already has passed?

6. Does this Decision exceed the Commission's power by finding a group of non-profit corporations, including one which is a rate payer to PG&E at both residential and small commercial rates authorized by its articles of incorporation to "exercise any and all powers, rights and privileges which a corporation organized under the General Nonprofit Corporation Law of the State of California by law may now or hereafter have or exercise" "to promote the health, safety and welfare of [its] residents," ineligible to request intervenor compensation?

7. Does the Decision deprive Group Petitioners equal protection and due process by failing to provide GP notice or leave to provide financial documentation and finding GP ineligible to request compensation, including on a pro rata basis, contrary to the Commissions' laws and procedures because GP failed to provide financial documentation which otherwise is inapplicable to their initially identified customer category.

## ARGUMENT

### A. The Decisions 04-12-048 And 06-11-048 Upon Which This Decision Relies Precludes Approval And Confirms That This Is An Unauthorized New Improper Bilateral Contract By Shifting GHG Costs And Risks From The Developer To The Customers In Violation Of D.04-12-048 And 06-07-029.

The Decision relies on Decisions 04-12-048 and 06-11-048 to dismiss the initial contentions of DRA and TURN and which was preserved and joined in by GP that there is no need for this facility (Decision, pp., 3-4.) According to Commissioner Peevey, "'The Commission has previously determined the need for the PPA with the RCEC Project in D.04-12-048. The cost –effectiveness of the original PPA was approved as part of PG&E's 2004 LTRFO in D.06-11-048.'" (Decision, p. 3.) However, neither of these Decisions supports these assertions and in fact this Decision violates and contradicts several key points.

As reflected by the findings of fact of D.06-04-012, no. 1, the purpose of accepting the Calpine PPA was to enable necessary resources to "be on line by the 2009 and 2010 summer peak periods." . D.06-04-012 at pp. 7, 9 & 38. Obviously, as we approach the summer of 2009, this project is not on line nor will be on line for some years. On April 24, 2009, the application by Calpine for a PSD permit was stayed by the EPA for three months and construction once commenced is contemplated to take approximately two years. Under the permit awarded to Calpine in response to its last two-year application for an extension of time to construct, it has until September 10, 2010 to commence construction. *See* attached April 27, 2009 Order by EPA & CITE FROM CEC RE TIME. Additionally, the BAAQMD to date has not responded to the hundreds of comments received in opposition to this application which, many pointed out, requires to be reviewed under the nonattainment New Source Review standards which to date has not been done. http://www.baaqmd.gov/pmt/public_notices/2009/15487/letters/index.htm.

Under the original contract approved by D.06-04-012, included as part of the evaluation of Calpine's contract was the GHG adder which D.04-12-048 requires "to be added to the prices bid in future procurement, . . . and used to develop a more accurate price comparison between and among fossil, renewable and demand-side bids." (D.04-12-048, findings 79 through 81.) As the Decision acknowledges, unlike in the original contract which satisfied D. 04-12-048, the "2nd APPA also shifts certain risks from the developer to PG&E's customers related to control of future GHG emissions." (Decision, pp. 7-8 & 20 [Section 9.3 addresses "taxes, charges, fees or other costs for compliance with GHG compliance.") As a result, contrary to the moving parties position, "the substance of the 2nd APPA"" is not consistent with existing Commission policies and decisions because it does not satisfy D. 04-12-048 nor can it be deduced that the price is competitive to ratepayers since it fails to include a key economic evaluation point which other bids must include. (Decision, p. 9; Compare, D. 04-12-048 Ordering Para 17 & purpose is to protect ratepayers from bearing GHG risks.)

As D. 04-12-048 acknowledges,

> To further the state's clear goal of promoting environmentally responsible energy generation, **we also adopt a policy that reflects and attempts to mitigate the impact of GHG emissions** in influencing global climate patterns. As described in this decision, **the IOUs are to employ a "GHG adder" when evaluating fossil generation bids.** This method, which will be refined in future proceedings, **will serve to internalize the significant and under-recognized cost of GHG emissions, help protect customers from the financial risk of future GHG regulation,** and will continue California's leadership in addressing this important problem.

(D.04-12-048, p. 81.) Joint opposing parties submit that this settlement's abandonment of this important protection clearly violates this Commissions laws and procedures.

This Decision, in addition to violating D.04-12-048, D.06-11-048 and R.06-02-013 [contracts "to which the IOUs elect not to apply this cost allocation [CAM energy auction], are

still subject to the rules of D.04-12-048"] also contradicts this Commission's positions before the Legislature:

> With 33% RPS and AB 32 mandates, the marginal MWh of energy procurement is no longer fossil energy. ***To meet these mandates, every procurement decision must be a renewable one and fossil energy will only be built if needed for system reliability.*** Comparing renewables to a fossil fueled energy source does not reflect the present context of climate policy, in which the more appropriate comparison may be between renewable energy costs and other GHG reduction measures.

(Commission's Office of Gevernmental Affairs April 30, 2009 Memo to Commission Members for May 7, 2009 Meeting concerning SB 805 (Wright)-Energy: renewable energy resources: procurement, italics and emphasis added.) Given the Commission's acknowledgment, the Decision's dismissal of this important point should be vacated and the matter remanded back for an evidentiary hearing and a proper determination of whether RCEC is "needed for system reliability."

Instead, joining in with PG&E and RCEC, the joint parties" argue that ***any re-examination of the need for RCEC should be similarly rejected as outside the scope of the proceeding***." Decision, p. 15. Joint opposing parties disagree that application of the proper standards and this Commissions earlier decisions are "outside the scope of the proceeding." In light of this Commission's positions to the Legislature and legislative mandate, the determination that "need" for such a fossil fuel plant which was identified as problematic in Decision 06-04-012, pp. 9 & 13, "falls outside of the scope of this proceeding" is clearly a prejudicial erroneous conclusion unsupported by any substantial evidence and contrary to the law.

## B. GP Were Unlawfully Denied Their Due Process Right To Present Evidence On Controverted Issues Of Fact That This 2nd APPA Constituted An Illegal Novation Which Required To Be Subject To Competitive Bidding.

### 1. The Decision's Acknowledged Lack Of Applicable Standard

As admitted by the Decision,

> The Commission has not yet developed standards for reviewing amendments, including price, to existing PPAs for non-renewable resources. However, a price amendment to a renewable PPA will only be considered if it is compared with bids in a recent RPS solicitation.[FN] We find this a suitable guideline to determine whether this settlement is reasonable.

Decision, pp. 16-17. Footnoted in reliance is resolution E-4150 based on an advice letter and involving an amended renewable contract complying with the Renewable Portfolio Standard procurement guidelines to which no protests were made nor comments received other than the applicant's. Although a redacted opinion, the resolution is silent on any comparisons with other bids, instead adding as appendices an "overview" and "ranking" of the 2007 solicitation bids provided that same year, documents satisfying Rule 12.1:

> The amended renewable contract provides for an increase in price, project capacity, and energy output. The contract duration, contract terms and conditions, and project's Commercial Operation Deadline (COD) are not affected by the amended contract.

The test was "whether SDG&E's amended renewable contract complies with the Renewable Portfolio Standard (RPS) procurement guidelines."

Most significantly, unlike here, in *Bull Moose* no party controverted issues of fact that the project presented a hazard nor argued that the amendments sought "was an improper bilateral contract."

> On November 20, 2007, SDG&E filed Advice Letter (AL) 1946-E requesting Commission approval of an amended renewable procurement contract with Bull Moose Energy, LLC (Bull Moose). Resolution E-4073 approved the original power purchase agreement on March 15, 2007. The PPA results from SDG&E's

> September 30, 2005 solicitation for renewable bids, which was authorized by D.05-07-039 on July 21, 2005.[fn]
>
> The Commission's approval of the PPA **will authorize SDG&E to accept future delivery of incremental renewable generation**, which will contribute towards the 20 percent renewables procurement goal required by California's RPS statute.

Unlike here, there was no allegation that without such an amendment, the developer would not be able to perform the underlying the contract.

Virtually acknowledging that an amendment to an ongoing renewable procurement contract should not be placed on the same footing as a fossil fuel plant, the Decision contradicts its earlier "guideline," footnoting that

> This settlement ***does not extend to the issue of what standards the Commission should use going forward to consider requests to approve amendments to PPAs that the Commission has previously approved in a competitive solicitation process***. The Joint Parties state their understanding that the **Commission will address this issue as a policy matter in Phase 2 of the 2008 long-term procurement plan rulemaking, Rulemaking 08-02-007**.

(Decision, p. 8, fn. 9.) Although purporting to set no precedents, this Decision in violation of its earlier decisions and representations to the Legislature, places a contract for fossil fuel plant whose time has passed on the same footing as a renewable contract while allowing that fossil fuel project to shift all the GHG risks and costs to the ratepayer. This violates this Commissions decisions and must be reheard so that the appropriate standards may be applied.

**2. The Decision's Rationalization That *Tesla* Does Not Apply But That If It Did Apply It Would Be Comparable To Solicitations Does Not Satisfy D.04-12-048 Because Those Solicitations Include GHG Controls Nor Does It Satisfy Rule 12.1 Because No Comparisons Were Provided Nor Does This Decision Reflect How RCEC Satisfies This Commissions' Emissions Performance Standard.**

The Decision relies on the following comments by joint moving parties:

> With regard to the Commission's policy requiring competitive bids, Joint [Moving] Parties argue the 2nd APPA was subject to market comparisons in its current and prior form, and point to at least three events. PG&E found the 1st

> APPA to be "within range of market values for contracts executed in the 2004 LTRFO." The 1st APPA also compared favorably in a side-by-side comparison with PG&E's 2008 LTRFO short list. Lastly, both DRA and TURN applied PG&E's analysis of the 1st APPA to the 2nd APPA and found it competitive with the short-listed 2008 LTRFO bids if it were bid into that RFO. Thus, **Joint Parties conclude the 2nd APPA has been compared to potentially competitive bids, does not violate the Commission's policy requiring competitive bids, and need not meet the "truly extraordinary circumstances" standard discussed in the Tesla decision, even if Tesla were analogous.**

(Decision, p. 13m, emphasis added.)

In concluding that this 2nd APPPA primarily "relates back" to the "online date and contract price" of the original unperformed contract, p. 1, the Decision engages in long comparisons between the 2nd APPA to the 1st APPA objectionable to all but PG&E and RCEC. *See e.g.*, Decision, p. 7 (2nd APPA has terms "substantially better for ratepayers *than the 1st* APPA. . . . 2nd APPA significantly reduces the proposed costs to ratepayers *compared to the 1st* APPA." Italics added.) Even the "operating provisions" of the 2nd APPA had to be "conformed to the 2008 LTRFO" and "risks" associated with GHG emissions are "shift[ed] . . . . from the developer to PG&E's customers," risks which the original contract and the 2008 solicitations bear as required by D.04-12-048 and D.06-07-029. Decision, pp. 7-8.[2]

Here, the Decision contends that because the original unperformed PPA was selected in an RFO over three years ago in D.06-11-048, that a new substituted contract with new terms and conditions need no longer be competitively bid because "the basic transaction [is] intact and reasonably modified to reflect current market conditions." (Decision, p. 18.) But, that factual issue of whether the "basic transaction is intact" is exactly what GP objected to and controverted as a question of fact. *See.*, Objections, pp. 2, 4-5 & 10. Conceded is the decisional and statutory

[2] See R.06-02-0123: "Contracts . . . to which the IOUs elect not to apply this cost allocation mechanism at the time seeking Commission approval … are still subject to the rules of D.04-12-048.

law raised by GP that whether 2nd APPA was a novation of a new bilateral contract that raised a controverted issue of fact to which GP are entitled to a present evidence. (*See*, April 3, 2009 Objections and Comments, pp. 2, 4-5 & 10 & Civil Code Sec. 1530 & 1531 and *William v. Reed* (1952) 113 Cal.App.2d 195 [novation is a question of fact].)

The Decision attempts to escape from the requirements of competitive bidding by contending without reference to any supporting evidence, as none was presented contrary to rule 12.1 subdivision (d),[3] that the "terms and conditions of the 2nd APPA have been subject to a comparative analysis with bids received in both the 2004 and 2008 LTRFO. Decision, pp. 17-18. Unlike with the comparison of the 1st APPA by PG&E, no expert testimony was introduced in support of the settlement motion. Instead, the Decision finds that

> *the policy of competitive procurement is not violated* by the amendments to the original PPA which resulted in the 2nd APPA before us here. *Because no violation of competitive bidding occurred, the 'extraordinary circumstances' standard from the Tesla decision does not apply.*

*(Id*. at 18.) This simply is unsupported by state decisional and statutory law. As *Wells Fargo Bank v. Bank of America* (1995) 32 Cal.App.4th 424, observed,

> "**Novation is the substitution of a new obligation for an existing one." (Civ. Code, § 1530.) The substitution is by agreement and with the intent to *extinguish the prior obligation***. ([Citations].) The substitution of a new obligation for an existing one may be either (1) a new obligation between the same parties, or (2) a new obligation arising because of new parties, either a new

[3] The Decision states that "DRA and TURN reached" the conclusion and therefore "it is appropriate to *infer* that the 2nd APPA's terms and conditions are reasonably comparable to the current market." But, this is not evidence nor did DRA and TURN purport to present evidence. (See GP's Confidential Response, p. 3: "absent from this motion as required by Rules 12.1 is any comparison exhibit. [GP] contend . . . there is none . . ." As a result, that "no specific objection was made by any party" as this Decision purports, p. 19, is incorrect. In addition to n pointing out no "comparison exhibit" has been filed as required by rule 12.1, GP subsequent objections to the proposed decision consistently objected that the evidence presented did not support the conclusion or that there was no evidence presented to support the conclusion. Objections, pp. 4-5.

> debtor or new creditor. ([Citations] [novation exists where new debtor is substituted for prior one, who is released from contractual obligations by the creditor].) "Novation is made by contract, and is subject to all the rules concerning contracts in general." ([Citations.]) **A novation thus amounts to a new contract which supplants the original agreement and "completely extinguishes the original obligation** ...." ([Citations].)

(Quoting Civ. Code, secs. 1530, 1531 & 1532 and relying in part on *see* 1 Witkin, Summary of Cal. Law (9th ed. 1987) Contracts, § 906, p. 811, emphasis and italics added.)

As a result, with no comparison exhibit in hand as required by rule 12.1,[4] the Decision accepts the joint parties invitation to abandon the Commission's requirements in *Tesla* by accepting bilateral contracts without competitive bidding by an undocumented "inferred" "compar[ison] to potentially competitive bids" having to satisfy more onerous requirements. (*Ibid*.) As a result, out of date solicitations such as Calpine's which cannot be performed are allowed to be abandoned in exchange for new bilateral fossil fuel contracts omitting this Commission's important and needed environmental requirements otherwise imposed on those seeking to compete and based on "inferred" comparisons otherwise in violation of rule 12.1.

Any comparisons with solicitations should be on equal footing requiring Calpine to satisfy the same GHG requirements and burdens as all other fossil fuel developers. Likewise, GP pointed out that PG&E's "documentation . . . that indicated the project would be in compliance" with the EPS was wrong, as pointed out by GP, albeit unacknowledged by this Decision, at 25. Although this challenge led to the Energy Division staff recalculating the emissions, p. 25, GP object to the Decision's failure to disclose to the emissions rate and basis for the conclusion that "the Commission is satisfied that the project does comply with the EPS

[4] Rule 12.1 concerning settlements for ratemaking cases provides in part that the "**motion *must* be supported by a *comparison exhibit* indicating the impact of the settlement** in relation to the utility's application and, if the participating staff supports the settlement, in relation to the issues staff contested, or would have contested, in a hearing." (Emphasis and italics added.)

based on likely average emissions rates for this project." There is no information whatsoever to support this contention nor have the parties been served with any information whatsoever.

As a result, this Decision simply exceeds this Commission's legal authority by abandoning its own requirements otherwise applied to other energy producers, including such minimum requirements of rule 12.1.

### C. The Decision Denies GP Due Process And Equal Protection By Finding That They Are Not Customers Eligible To Request Compensation Without Providing Any Opportunity Or Leave To Supplement Their Application Contrary To The Commissions Laws.

Without any discussion of the substantial documentation provided in their motion for reconsideration, including the residential and commercial PG&E bills of Skywest, an organization which ***is*** a ratepayer, the proposed decision summarily denies GP's motion for reconsideration of ALJ Darling's Ruling peremptorily finding, without providing any leave to amend, that GP's were not "customers" of PG&E eligible to request intervenor compensation.

In response to comments, which included those by TURN which "very rarely comments on the Commission's treatment of intervenor compensation," *albeit* without changing their erroneous findings of fact, no. 14, or conclusions of law, no. 3, or order, para. 3, p. 33, the Decision nevertheless prejudicially denies GP's motion, however with two pages of discussion.

According to the Decision, "each [organization] appears formed for rather specific and narrow purposes unrelated to the regulation of public utilities, with the possible exception of HAPA," which would fall within category 3. (Decision, pp. 26-27.) But, rather than acknowledging HAPA as a customer, the Decision misstates GP's motion contending that GP's "claim that as long as any one member organization is an eligible customer, the entire party should be considered eligible" for "costs of participation." (Decision, p. 26.)

GP's motion, however, asserts that if any one organization satisfies the statutory criteria, "***that*** organization is entitled to qualify," since "just because one of the Group members may not satisfy all of the criteria" does not mean that those "customers satisfying the definition under section 1802 somehow 'forfeit' ***their*** statutory eligibility or entitlement." (Motion, p. 3.) Nowhere does the Motion contend that "all coalition members" must be reimbursed "for costs of participation" as erroneously stated by this Decision. (Decision, p. 26.)

Clearly, given the Decision's recognition that HAPA may be a "customer" otherwise satisfying section 1802(b)(1)(C), known as a "category 3" customer, which statutorily has no obligation to provide any financial records to be eligible, this Decision violates HAPA's federally protected due process and equal protection entitlements and clearly is against the law. (*Compare*, D.98-04-059: category 1 and 2 customers required to disclose financial information, cited in the Decision, pp. 27-28.) As pointed out in GP's motion, HAPA's articles authorize it to advocate to protect the environment of the Hayward area, just as NRDC was recognized in D.05-10-007 at 4 as satisfying the definition of "customer" "focus[ing] on environmental issues, particularly the financial risk that customers and utilities face due to the likely regulation of greenhouse gas (GHG) emissions, and provid[ing] detailed recommendations to the Commission to protect customers from that financial risk."[5]

Likewise, without addressing Skywest's broadly worded articles of incorporation authorizing Skywest any and all authority to protect its residents' property, health, safety and

[5] GP also bring to the Commission's attention that the "Comments" on PG&E's filings that RCEC satisfied the emissions performance standard "pointed out that the heat rate value used by PG&E to derive an emissions rate for the unit may not represent average operating conditions . . . Energy Division staff have recalculated the emissions rate for more conservative, average heat rate." (Decision, p. 25.) Although the Decision "is satisfied that the project does comply with the EPS," GP object on the basis that there has been no new filings disclosing this important information and new calculations to the parties signatory to the nondisclosure agreements such as GP.

welfare as satisfying category 3, the Decision identifies Skywest's purposes as "narrow" and "self interested," and prejudicially denies the motion on the ground GP "did not submit any financial information at all," although acknowledging that **"[w]hile it is possible [GP] could qualify if given enough time to further supplement their NOI, there is not authority that binds the Commission to wait indefinetly**." (Decision, p. 28, emphasis added.)

***GP submit that the Commission has not waited a "nano-second***." As the record undisputedly establishes and the Decision does not dispute, GP have never been provided any notice or opportunity to amend or supplement their application, unlike other intervenors who have received that minimum notice and opportunity:

> On December 5, 2003, CARE filed a motion to intervene out of time with an attached NOI. WEM filed a petition to intervene out of time and an NOI on December 2, 2003, and amended these filings on December 15, 2003. On March 11, 2004, **the assigned ALJ ruled to accept CARE's NOI as timely, found insufficient information to determine whether CARE meets the definition of customer or the significant financial hardship condition, *and allowed CARE to amend its NOI on or before March 25, 2004***. CARE filed a supplement to its NOI on March 25, 2004. On May 10, 2004, the assigned ALJ found that CARE was a customer . . . met the significant financial hardship condition, and would be eligible for compensation.. . . .. ***In response to requests by the ALJ***, CARE **provided supplemental information** via several e-mails, which have been placed in the correspondence file in this proceeding.
>
> **The March 11, 2004 ALJ ruling also accepted WEM's amended NOI and found that WEM is a customer under the Public Utilities Code as a representative of Dorothy J. Edwards and Jesse Mason, PG&E ratepayers, but that WEM had not provided documentation necessary to show significant financial hardship.** WEM timely filed its request for compensation on October 22, 2004, and amended its request on April 1, 2005. **WEM also filed supplemental information regarding its compensation request on October 26 and November 1, 2004. On October 27, 2004, WEM filed a motion for leave to file under seal certain confidential materials regarding its clients' personal financial information, along with a motion for protective order regarding this information. These motions were granted** by ALJ ruling dated November 10, 2004.

D.06-04-018, emphasis added. (*Compare*, ALJ Darling Ruling, summarily denying eligibility without leave to amend or supplement & this Decision [same].)

Rather than recognizing this alleged "insufficiency" as the basis for the purported finding that GP are allegedly not "customers" because they were not given any notice or opportunity to cure, the Decision prejudicially leaves untouched the factual finding, no. 14, that GP "did not establish they were a 'customer," and the related conclusions of law and ordering paragraph that GP "are not eligible." Clearly, such a Decision deprives GP's minimum due process and equal protection afforded to others.

Dated: May 8, 2009

Respectfully submitted,

_____/S/_____

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## Verification

I am an the attorney for of the Intervening Group Petitioners in this proceeding and am authorized to make this verification on their behalf. The statements in the foregoing document are true of my own knowledge, except matters, which are therein stated on information and belief, and as to those matters I believe them to be true.

I declare under penalty of perjury that the foregoing is true and correct. Executed on this 8rth day of May 2009, in Hayward, California.

_____/S/_____
Jewell J. Hargleroad

## Certificate of copy sent electronically

To reduce the burden of service in this proceeding, the Commission will allow the use of electronic service, to the extent possible using the electronic service protocols provided in this proceeding. All individuals on the service list should provide electronic mail addresses. The Commission and other parties will assume a party consents to electronic service unless the party indicates otherwise.

I hereby certify that I have this day served the document **GROUP PETITIONERS APPLICATION FOR REHEARING OF THE DECISION 09-04-010 APPROVING SETTLEMENT AGREEMENT AND RESTATED POWER PURCHASE AGREEMENT AND REQUEST FOR ORAL ARGUMENT** under CPUC Docket A.08-09-007. Each person designated on the official service list, has been provided a copy via e-mail, to all persons on the attached service list on May 11, 2009 for the proceedings.

_____/S/_____
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mwt@cpuc.ca.gov
md2@cpuc.ca.gov
unc@cpuc.ca.gov
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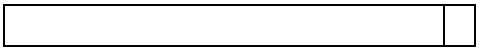

# Exhibit 42

FILED
05-19-09
08:12 AM

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

| | |
|---|---|
| Application of Pacific Gas and Electric Company for Expedited Approval Of The Amended Power Purchase Agreement For The Russell City Energy Company Project (U 39 E) | Application No. 08-09-007 (Filed September 10, 2008) |

# CARE AND ROB SIMPSON'S APPLICATION FOR REHEARING OF D.09-04-010

Rob Simpson and CAlifornians for Renewable Energy, Inc. (CARE) request rehearing of Decision (D.) 09-04-010 ("Decision") that was issued on April 20, 2009. CARE and Rob Simpson were parties to the proceeding and so are eligible to file a rehearing request pursuant to Rule 16.1[1] of the Commission's Rules of Practice and Procedure. This request is timely because it is filed less than 30 days after the decision was issued.

[1] **16.1. (Rule 16.1) Application for Rehearing**

(a) Application for rehearing of a Commission order or decision shall be filed within 30 days after the date the Commission mails the order or decision, or within 10 days of mailing in the case of an order relating to (1) security transactions and the transfer or encumbrance of utility property as described in Public Utilities Code Section 1731(b), or (2) the Department of Water Resources as described in Public Utilities Code Section 1731(c). An original plus four exact copies shall be tendered to the Commission for filing.

(b) Filing of an application for rehearing shall not excuse compliance with an order or a decision. An application filed ten or more days before the effective date of an order suspends the order until the application is granted or denied. Absent further Commission order, this suspension will lapse after 60 days. The Commission may extend the suspension period.

(c) Applications for rehearing shall set forth specifically the grounds on which the applicant considers the order or decision of the Commission to be unlawful or erroneous, and must make specific references to the record or law. The purpose of an application for rehearing is to alert the Commission to a legal error, so that the Commission may correct it expeditiously.

Rob Simpson and CARE have reviewed and agree with the rehearing request filed by "Group Petitioners," which consists of the California Pilots Association, Skywest Townhouse Homeowners Association, and Hayward Area Planning Association.

**ISSUES**

1. § 10.4 in the Amended Power Purchase Agreement for the Russell City Energy Company Project ("2nd APPA") deprives the ratepayers of the right of notice and review should the Russell City Energy Center be sold or transferred to another owner or operator.

2. The calculations showing compliance with Environmental Performance Standards were not provided to the parties for review.

**Request for Oral Argument Under Rule 16.3**

Pursuant to rule 16.3 of the Commission's Rules of Practices and Procedure, CARE and Rob Simpson request oral argument before the Commission on the basis that this Decision raises the following issue of major significance: § 10.4 in the 2nd APPA would permit transfer of ownership and operation of the RCEC project without notice or opportunity for the public to comment. Both the Proposed Decision and Decision 09-04-010 expressed confusion about how the public would be deprived of its rights of notice and comment with provision § 10.4.

CARE needs the opportunity of oral argument to address this issue to explain its position.

CARE also would like to argue the issue of the Environmental Performance Standards but cannot because Rule 16.3 states that "Arguments must be based only on the evidence in the record." However, this data is not in the record even though D.09-04-010 uses[2] this data as a basis for approving the order.

[22] D.09-04-010 states on page 25:

"On March 20, 2009, PG&E filed documentation in this docket that indicated the project would be in compliance

## DISCUSSION

Rule 16.1 explains that an application for rehearing shall set forth specifically the grounds on which the applicant considers the order or decision of the Commission to be unlawful or erroneous, and must make specific references to the record or law.

**ISSUE 1**

The specific reference is the statement on page 19:

> "CARE mistakenly claimed that § 10.4 in the 2nd APPA would permit transfer of ownership and operation of the RCEC project without notice or opportunity for the public to comment. However, the provision reflects parties' rights and obligations regarding potential assignment of the Agreement or rights thereunder. It is unclear how CARE links the provision to some loss of public rights."

As explained in CARE's comments on the Settlement:[3]

"The loss of public rights by § 10.4 in the 2nd APPA is that there is no opportunity for public review or comment upon the exercise of that 2nd APPA provision. If PG&E owned the facility and found an opportunity to transfer it to some other entity, PG&E would have to first seek Commission approval. See California Public Utilities Code section 851:

> "No public utility . . . shall sell, lease, assign, mortgage, or otherwise dispose of or encumber the whole or any part of its . . . plant, system, or other property necessary or useful in the performance of its duties to the public, or any franchise or permit or any right thereunder, nor by any means whatsoever, directly or indirectly, merge or consolidate its railroad, street railroad, line, plant, system, or other property, or franchises or permits or any part

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with the EPS. Comments on this filing pointed out that the heat rate value used by PG&E to derive an emissions rate for the unit may not represent average operating conditions (e.g., factoring in cold starts and operation below full capacity). Energy Division staff have recalculated the emissions rate for more conservative, average heat rate, and the Commission is satisfied that the project does comply with the EPS based on likely average emissions rates for the project."

[3] http://docs.cpuc.ca.gov/efile/CM/99437.pdf

thereof, with any other public utility, without first having either secured an order from the commission authorizing it to do so . . .."

"If the applicant in this proceeding, which is not a public utility, found an opportunity to transfer it to some other entity, the applicant would not have to first seek Commission approval. See California Public Utilities Code section 853:

"a) This article does not apply to any person or corporation which transacts no business subject to regulation under this part, except performing services or delivering commodities for or to public utilities or municipal corporations or other public agencies primarily for resale or use in serving the public or any portion thereof, but shall apply to any public utility, and any subsidiary or affiliate of, or corporation holding a controlling interest in, a public utility, if the commission finds, in a proceeding to which the public utility is or may become a party, that the application of this article is required by the public interest. . .."

"Therefore, the provision leads to the loss of the public right, "notice or opportunity for the public to comment."

The proposed decision and now the final decision just repeat the phrase: "It is unclear how CARE links the provision to some loss of public rights." without addressing CARE's clear statement that the loss of the public right of "notice or opportunity for the public to comment." is an error that should be corrected. It is very clear that if PG&E owned this power plant, that the public would receive notice and the opportunity for comment should the power plant be sold. The public will not receive notice or the opportunity to comment if the 2nd APPA is approved. Merely stating that this is unclear does not make it unclear to the public, that is why CARE is participating in this proceeding. The public's interest is not being represented by any other party as evidenced by this repeated statement that the public's right of notice and the opportunity to comment is not a public right.

Therefore, the 2nd APPA § 10.4 should be amended to provide for Commission approval before any transfer of ownership and operation of the RCEC project.

**ISSUE 2**

The documents provided to the parties as the record for this proceeding did not contain accurate information and the corrected data were not provided to the parties for review. Therefore, the Commission should schedule a rehearing for D.09-04-010 after this data is provided and time for discovery is allowed.

D.09-04-010 states on page 25:

> "On March 20, 2009, PG&E filed documentation in this docket that indicated the project would be in compliance with the EPS. Comments on this filing pointed out that the heat rate value used by PG&E to derive an emissions rate for the unit may not represent average operating conditions (e.g., factoring in cold starts and operation below full capacity). Energy Division staff have recalculated the emissions rate for more conservative, average heat rate, and the Commission is satisfied that the project does comply with the EPS based on likely average emissions rates for the project."

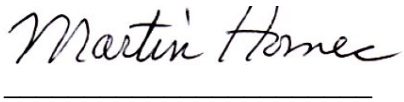
The record does not contain these recalculations and so they are not evidence that can be used as a basis for this decision. Rule 13.14 provides that the record should be reopened to introduce this evidence if it is to be considered as a basis for D.09-04-010.

## CONCLUSION

CARE requests that the proposed decision concerning the above captioned project not be approved for the reasons discussed.

May 19, 2009

Respectfully submitted



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Attorney for CALIFORNIANS FOR RENEWABLE ENERGY and Rob Simpson

## Verification

I am the attorney for of the Intervening Group Petitioners in this proceeding and am authorized to make this verification on their behalf. The statements in the foregoing document are true of my own knowledge, except matters, which are therein stated on information and belief, and as to those matters I believe them to be true.

I declare under penalty of perjury that the foregoing is true and correct. Executed on this 19th day of May 2009, in Davis, California.

Martin Homec

_____

Martin Homec
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Tel.: (530) 867-1850

**Certificate of copy sent electronically**

To reduce the burden of service in this proceeding, the Commission will allow the use of electronic service, to the extent possible using the electronic service protocols provided in this proceeding. All individuals on the service list should provide electronic mail addresses. The Commission and other parties will assume a party consents to electronic service unless the party indicates otherwise.

I hereby certify that I have this day served the document "CARE and Rob Simpson's Application for Rehearing of D.09-04-010" under CPUC Docket A.08-09-007. Each person designated on the official service list, has been provided a copy via e-mail, to all persons on the attached service list on May 19, 2009 for the proceedings.

Lynne Brown

_____

Lynne Brown Vice-President
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# Exhibit 43

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

| | |
|---|---|
| Application of Pacific Gas and Electric Company for Expedited Approval Of The Amended Power Purchase Agreement For The Russell City Energy Company Project (U 39 E) | Application No. 08-09-007 (Filed September 10, 2008) |

# GROUP PETITIONERS' PETITION FOR MODIFICATION OF DECISION NO. 09-04-010 APPROVING SETTLEMENT AGREEMENT REGARDING THE SECOND AMENDED AND RESTATED POWER PURCHASE AGREEMENT

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Attorney for Intervenor Group Petitioners
California Pilots Association, Skywest
Townhouse Homeowners Association and
Hayward Area Planning Association

## PETITION FOR MODIFICATION

Pursuant to rule 16.4 of the Commission's Rules of Practice and Procedure, Group Petitioners California Pilots Association, Skywest Townhouse Homeowners Association and Hayward Area Planning Association (collectively "GP") petition the Commission to modify "Decision No. 09-04-010 Approving Settlement Agreement Regarding the Second Amended and Restated Power Purchase Agreement" which was issued and adopted on April 20, 2009. This petition is supported by the accompanying declaration of Jewell J. Hargleroad seeking official notice of new and changed facts under Rule 13.9, which are subject to judicial notice by the courts of the State of California under Evidence Code sections 451(a), 452 (b), 452 (f), and 453.

On May 8 and May 19, 2009, GP and Californians for Renewable Energy, Inc. (CARE) and Rob Simpson (Simpson) respectively timely petitioned for rehearing and requested oral argument. The joint moving parties to the second amended and restated Power purchase agreement (2nd APPPA) served their response on June 3, 2009. To date the Commission has not ruled on the opposing joint parties respective petitions for rehearing.

The Decision before the Commission approves a settlement agreement among PG&E and other joint parties[1] purporting to relate back to an unperformed original March 21, 2006 purchase power agreement, for which the developer Russell City Energy Center (RCEC and also known and referred to as Calpine) gave notice of termination on May 30, 2008 that it could not perform. (Decision, p. 2.) When approving the contract in D.06-04-012 in 2006 this project was challenged as one where the applicant, Calpine, "cannot be reasonably expected to meet its contractual obligations." The facts that GP seek official notice applied to the terms of the 2nd

[1] The joint parties who agree to the 2nd APPA are PG&E, Russell City Energy Center (RCEC), Division of Ratepayers Agency, TURN and CURE.

APPA establish that Calpine already is in default and will not meet its contractual obligations and critical milestones.

As part of GP's petition setting forth numerous bases for rehearing that the Decision is erroneous and unlawful, GP attached a copy of the April 24, 2009 letter from the Environmental Protection Agency Administrator Lisa Jackson staying for three months any applications for PSD permits utilizing the invalid "surrogate PM 10 analysis" which the District of Columbia's Court of Appeal held violated the Clean Air Act and which applies to RCEC's pending application. (GP's Peti. for Rehearing at 4.) In response, on June 3, 2009, the joint moving parties argued that this Commission "may not consider" this relevant information as it is not included in the record, but summarily contended without explanation that the stay "does not suggest, must less demonstrate, any error of fact or law." (Joint Moving Parties Response, p. 2 & fn. 5.)

Since the issuance of that April 24, 2009 letter, prior to the joint moving parties' response served on June 3, 2009, on June 1, 2009, the Federal Register published the stay order, which now is effective through September 1, 2009. Under the terms of the 2nd APPA, the Seller RCEC is and will be default subject to termination, since due to the stay, it is impossible for RCEC to satisfy the terms of the contract, and obtain the necessary authority to construct and satisfy the necessary critical milestone's of the 2nd APPA. *See*, Exhibit B-37-39, Sec. 5.1 (a)(xiv), defining RCEC's default; *also see* page B-64-66: Sec. 11.1 (conditions precedent) & 11.1(a)(iv) (termination of contract), and B-65-66, section 11.1(b) & (c)(vi).[2] Based on this stay order precluding BAAQMD from issuing any PSD permit through September 1, 2009, RCEC cannot satisfy the contract conditions of the 2nd APPA.

[2] All references to the terms of the 2nd APPA are to Exhibit B submitted in support of the joint motion to approve the settlement agreement.

GP therefore now petition the Commission to modify its Decision to take into account the accompanying official notice of facts to include the stay order published in the federal register establishing that as a matter of law RCEC already is in default and cannot satisfy multiple contract conditions. Applying these official facts, of which GP seek official notice under Rule 13.9 based on the accompanying declaration of Jewell J. Hargleroad, to rule 12.1, Decision No. 09-04-010 must be modified to deny the motion to approve the settlement agreement. For this Commission to approve such a contract would not be reasonable, consistent with the law or in the public interest.

**PROPOSED MODIFICATION**

Rule 16.4, subdivision (b) requires that the petition "must propose specific wording to carry out all requested modifications to the decision. GP propose the following:

GP's request for official notice of Exhibits A through C, which includes the Federal Register, Exhibit B, Environmental Protection Agency, 40 CFR Parts 51 and 52, RIN 2060-AN86 entitled "Implementation of the New Source Review Program for Particulate Matter Less Than 2.5 Micrometers (PM 2.5)" is granted. This reflects that "Effective June 1, 2009, in §52.21, paragraph (i)(1)(xi) is administratively delayed until September 1, 2009." GP's request for official notice of the petition for reconsideration by Natural Resources Defense Council and Sierra Club, Exhibit C, which is the petition by NRDC and the Sierra Club forming the basis for the stay is granted. This reflects that the project RCEC is subject to this stay. (*See* Exhibit C: petition for reconsideration entitled "In the Matter of: Final Rule Published at 73 Fed.Reg. 28321 *(May 16, 2008), entitled "Implementation of the New Source Review (NSR) Program for Particulate Matter Less Than 2.5 Micrometers (PM 2.5)," docket no. EPA-HQ-OAR-2003-0062, at pp. 8-9. Exhibit C specifically identifies RCEC in Hayward as an "affected plant."

Based on these new facts that RCEC will not be issued a final and nonappealable PSD permit by or before the necessary dates under the 2nd APPA under multiple terms of that contract, we find as a finding of fact that RCEC will be in default under multiple terms of the proposed 2nd Amended PPA, subject to liquidated damages and termination. As such, based on these new facts, it cannot be found that the terms of the 2nd Amended PPA are "reasonable" given RCEC will be in default and will not be able to meet its critical milestones, rendering it inappropriate for this Commission to approve a contract for a party in default which is subject to termination prior to this Commission's Decision becoming a final Decision.

We therefore modify our Decision and vacate our approval of the 2nd Amended PPA and deny the joint moving parties' motion to approve the settlement agreement to approve the 2nd Amended PPA. Further, we modify our conclusions of law to provide that 1. the settlement agreement, represented by the 2nd APPA, does not meet the settlement requirements of Rule 12.1 in that it is not reasonable in light of the whole record as officially noticed, nor consistent with law or in the public interest. Therefore, 2. the 2nd APPA is not be approved.

IT IS ORDERED that

1. The Order approving the December 23, 2008 Joint Motion of Pacific Gas and Electric Company (PG&E), Russell City Energy Company, LLC, Division of Ratepayer Advocates, California Unions for Reliable Energy, and The Utility Reform Network for Approval of Second Amended and Restated Power Purchase Agreement (2nd APPA) is modified to provide that the December 23, 2008 Joint Motion of Pacific Gas and Electric Company (PG&E), Russell City Energy Company, LLC, Division of Ratepayer Advocates, California Unions for Reliable Energy, and The Utility Reform Network for Approval of Second Amended and Restated Power Purchase Agreement (2nd APPA) is denied.

## ARGUMENT

Subdivision (a) of Rule 16.4 authorizes GP to "ask[] the Commission to make changes to an issued decision." Subdivision (b) provides the following

> (b) A petition for modification of a Commission decision must concisely state the justification for the requested relief and must propose specific wording to carry out all requested modifications to the decision. Any factual allegations must be supported with specific citations to the record in the proceeding or to matters that may be officially noticed. Allegations of new or changed facts must be supported by an appropriate declaration or affidavit.

GP have satisfied all these requirements. (*See* accompanying declaration of Jewell J. Hargleroad.)

The Scoping Memo identified the following issues as relevant and within the scope of this proceeding:

> 3. Are there any outstanding permitting delays that would result in the RCEC Project not being viable as of its projected construction start date of September 10, 2010?

Decision at p. 4. And,

> 5. An updated status report about . . . the amended Prevention of Significant Deterioration air permit issued November 1, 2007 by the Bay Area Air Quality Management District.

Decision at p. 4. Applying the facts of which GP seek judicial notice to the contract terms of the 2nd APPA, this contract is ineffective, in default and RCEC already cannot satisfy its critical milestones.

Section 11.1 (a)(iv) is in breach under necessary conditions precedent. (Exhibit B64-B65.) The condition precedent of 11.1(a) is not satisfied rendering this contract ineffective under its own terms. *Compare,* page B-82 (defining CPUC Approval).

Section 5.1 at pages B37-B39 defines default by RCEC. Under subdivision (xiv) of section 5.1, and section 11.1(b), RCEC is and will be in default.

Applying the facts sought to be officially noticed, RCEC cannot satisfy its "Critical milestone" defined under section 11.2(c)(vi), pages B66-B67. The PSD is the authority to construct and necessary prior to issuance of any notice to proceed. (Also *compare* page B-86 defining "Force Majeure Event," and subdivision (vi) [exclusions] & p. B-84 [defining "EPA Contract."])

As a result, the 2nd APPA under its own contract terms is not effective, RCEC is in default, the contract is subject to termination and RCEC will miss its critical milestone under section 11.2(vi). Based on these important new and changed facts, rule 12.1 requires the Commission to grant GP's petition to modify this Decision and deny the approval of the 2nd APPA.

Dated: June 22, 2009

Respectfully submitted,

_____/S/_____

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Attorney for Intervenor Group Petitioners
California Pilots Association, Skywest
Townhouse Homeowners Association and
Hayward Area Planning Association

## Verification

I am an the attorney for of the Intervening Group Petitioners in this proceeding and am authorized to make this verification on their behalf. The statements in the foregoing document are true of my own knowledge, except matters, which are therein stated on information and belief, and as to those matters I believe them to be true.

I declare under penalty of perjury that the foregoing is true and correct. Executed on this 22nd day of June 2009, in Hayward, California.

_____/S/_____
Jewell J. Hargleroad

## Certificate of copy sent electronically

To reduce the burden of service in this proceeding, the Commission will allow the use of electronic service, to the extent possible using the electronic service protocols provided in this proceeding. All individuals on the service list should provide electronic mail addresses. The Commission and other parties will assume a party consents to electronic service unless the party indicates otherwise.

I hereby certify that I have this day served the document GROUP PETITIONERS' PETITION FOR MODIFICATION OF DECISION NO. 09-04-010 APPROVING SETTLEMENT AGREEMENT REGARDING THE SECOND AMENDED AND RESTATED POWER PURCHASE AGREEMENT under CPUC Docket A.08-09-007. Each person designated on the official service list, has been provided a copy via e-mail, to all persons on the attached service list on June 22, 2009 for the proceedings.

_____/S/_____
JEWELL J. HARGLEROAD, ESQ.
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1090 B Street, No. 104
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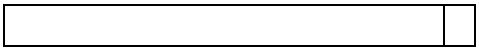

# Exhibit 44

**BEFORE THE PUBLIC UTILITIES COMMISSION**

**OF THE STATE OF CALIFORNIA**

| | |
|---|---|
| Application of Pacific Gas and Electric Company for Expedited Approval Of The Amended Power Purchase Agreement For The Russell City Energy Company Project (U 39 E) | Application No. 08-09-007 (Filed September 10, 2008) |

# REQUEST FOR OFFICIAL NOTICE OF FACTS AND DECLARATION OF JEWELL J. HARGLEROAD IN SUPPORT OF GROUP PETITIONERS' PETITION FOR MODIFICATION OF DECISION NO. 09-04-010 APPROVING SETTLEMENT AGREEMENT REGARDING THE SECOND AMENDED AND RESTATED POWER PURCHASE AGREEMENT

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Attorney for Intervenor Group Petitioners
California Pilots Association, Skywest
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Hayward Area Planning Association

## REQUEST FOR OFFICIAL NOTICE OF FACTS

Pursuant to Rule 13.9, this Commission may take "[o]fficial notice . . . of such matters as may be judicially noticed by the courts of the State of California." Under the provisions of Evidence Code sections 451(a), 452 (b), 452 (f), and 453, Group Petitioners California Pilots Association, Skywest Townhouse Homeowners Association, and Hayward Area Planning Association ("Group Petitioners" or GP) request that the Commission take official notice of the following records of the Environmental Protection Agency (EPA) establishing as a matter of fact that the permitting authority Bay Area Air Quality Management District will not issue any permit to prevent the significant deterioration of the air (PSD) for Russell City Energy Center by or before September 1, 2009 in any form that is final and non-appealable.

Based on these records, it is a fact that RCEC is and will be in default of multiple material provisions of the second amended purchase power agreement (2nd APPA) subject to Decision No. 09-04-010. Given these facts, the Commission should take official notice of the facts reflected in the pro-offered documents, modify the Decision approving the 2nd APPA and modify the order granting the motion to approve the 2nd APPA so that the motion will be denied by a modified order. GP seek official notice of facts supported by the following records of the EPA as otherwise required under the above provisions of the Evidence Code.

1. April 24 2009 letter from EPA Administrator Lisa Jackson to attorney Paul Cort of Earthjustice notifying Mr. Cort that the petition for reconsideration on behalf of the Natural Resources Defense Council and the Sierra Club is granted and a three month stay issued applicable to any pending applications for permits utilizing the invalidated PM 10 "surrogate" analysis.

2. Federal Register, Environmental Protection Agency, 40 CFR Parts 51 and 52, RIN 2060-AN86 entitled "Implementation of the New Source Review Program for Particulate Matter Less Than 2.5 Micrometers (PM 2.5)" that "[e]ffective June 1, 2009, 40 CFR 52.21(i)(1)(xi) [surrogate PM 10 analysis] is stayed for a period of three months, until September 1, 2009."

3. Petition for reconsideration and stay by the Natural Resources Defense Council and the Sierra Club "In the Matter of : Final Rule Published at 73 Fed.Reg. 28321 *(May 16, 2008), entitled "Implementation of the New Source Review (NSR) Program for Particulate Matter Less Than 2.5 Micrometers (PM 2.5)," docket no. EPA-HQ-OAR-2003-0062 executed on February 10, 2009. In this petition for reconsideration which is granted, RCEC is specifically identified as a pending application which "invokes the grandfathering exemption of the final rule to justify its refusal to evaluate PM 2.5 impacts .. . The Russell City Energy Center is a perfect example of why this grandfathering exemption is so clearly illegal." (Pages 8-9 of Exhibit C.)

Dated: June 22, 2009

Respectfully submitted,

_____/S/_____

JEWELL J. HARGLEROAD, ESQ.
Law Office of Jewell J. Hargleroad
1090 B Street, No. 104
Hayward, California 94541

Attorney for Intervenor Group Petitioners
California Pilots Association, Skywest
Townhouse Homeowners Association and
Hayward Area Planning Association

**SUPPORTING DECLARATION OF JEWELL J. HARGLEROAD**

1. I, Jewell J. Hargleroad, declare:

2. 1. I am an attorney admitted to practice before all courts of the State of California and principal of the Law Office of Jewell J. Hargleroad, counsel for group petitioners California Pilots Association, Skywest Townhouse Homeowners Association, and Hayward Area Planning Association ("Group Petitioners or GP). I have personal knowledge of the facts set forth below and would and could testify competently to the following if called as a witness in this matter.

3. Attached as Exhibit A is a true and correct copy of the April 24, 2009 letter from the Environmental Protection Agency Administrator Lisa Jackson to attorney Paul Cort of Earthjustice granting the petition for reconsideration by the Natural Resources Defense Council and the Sierra Club "In the Matter of : Final Rule Published at 73 Fed.Reg. 28321 *(May 16, 2008), entitled "Implementation of the New Source Review (NSR) Program for Particulate Matter Less Than 2.5 Micrometers (PM 2.5)," docket no. EPA-HQ-OAR-2003-0062.

4. On June 3, 2009, the joint moving parties Pacific Gas and Electric Company (PG&E), Russell City Energy Company, LLC (RCEC), Division of Ratepayer Advocates (DRA), The Utility Reform Network (TURN), and California Unions for Reliable Energy (CURE) (collectively "Joint Moving Parties") argued that this Commission "may not consider" this relevant information as it is not included in the record, but summarily contend without discussion that the stay "does not suggest, must less demonstrate, any error of fact or law." (Response executed and served on June 3, 2009, p. 2 & fn. 5.)

5. Prior to the joint moving parties' opposition, however, on June 1, 2009, the Federal Register published the stay, which now is effective through September 1, 2009. Attached as Exhibit B is a true and correct copy of the Federal Register, Environmental Protection Agency,

40 CFR Parts 51 and 52, RIN 2060-AN86 entitled "Implementation of the New Source Review Program for Particulate Matter Less Than 2.5 Micrometers (PM 2.5)" that "[e]ffective June 1, 2009, 40 CFR 52.21(i)(1)(xi) [surrogate PM 10 analysis] is stayed for a period of three months, until September 1, 2009."

6 Attached as Exhibit C is a true and correct copy of the petition for reconsideration by the Natural Resources Defense Council and the Sierra Club "In the Matter of : Final Rule Published at 73 Fed.Reg. 28321 *(May 16, 2008), entitled "Implementation of the New Source Review (NSR) Program for Particulate Matter Less Than 2.5 Micrometers (PM 2.5)," docket no. EPA-HQ-OAR-2003-0062. In this petition, RCEC is specifically identified as a pending application which "invokes the grandfathering exemption of the final rule to justify its refusal to evaluate PM 2.5 impacts .. . The Russell City Energy Center is a perfect example of why this grandfathering exemption is so clearly illegal." (Exhibit C: Pages 8-9 of Petition.)

7. According to the Scoping Memo issued by Commission Peevey, an issue was whether there "[a]re there any outstanding permitting delays that would result in the RCEC Project not being viable as of its projected construction start date of September 10, 2010?" Decision at p. 4. As established by the accompanying petition for modification, the terms of the 2nd APPA, clearly contemplates that RCEC would be able to satisfy certain critical milestones. These facts of which GP seek official notice establish that RCEC will not satisfy those milestones and already is in default under the terms of the 2nd APPA. GP assert that to approve such a contract where the contracting party is already in default and as a matter of law may not satisfy critical milestones is "not reasonable, consistent with the law or to the public interest."

I declare under penalty of perjury under the laws of the State of California that the

foregoing is true and correct. Executed this 22nd day of June, 2009, in Hayward, California.

_____/S/_____
Jewell J. Hargleroad

**Certificate of copy sent electronically**

To reduce the burden of service in this proceeding, the Commission will allow the use of electronic service, to the extent possible using the electronic service protocols provided in this proceeding. All individuals on the service list should provide electronic mail addresses. The Commission and other parties will assume a party consents to electronic service unless the party indicates otherwise.

I hereby certify that I have this day served the document REQUEST FOR OFFICIAL NOTICE OF FACTS AND DECLARATION OF JEWELL J. HARGLEROAD IN SUPPORT OF GROUP PETITIONERS' PETITION FOR MODIFICATION OF DECISION NO. 09-04-010 APPROVING SETTLEMENT AGREEMENT REGARDING THE SECOND AMENDED AND RESTATED POWER PURCHASE AGREEMENT under CPUC Docket A.08-09-007. Each person designated on the official service list, has been provided a copy via e-mail, to all persons on the attached service list on June 22, 2009 for the proceedings.

_____/S/_____
JEWELL J. HARGLEROAD, ESQ.
Law Office of Jewell J. Hargleroad
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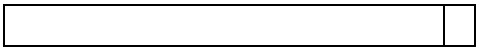

# Exhibit 45

L/jmc

**Date of Issuance**
**March 2, 2010**

Decision 10-02-033 February 25, 2010

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

| | |
|---|---|
| Application of Pacific Gas and Electric Company for Expedited Approval of the Amended Power Purchase Agreement for the Russell City Energy Company Project (U39E). | Application 08-09-007 (Filed September 10, 2008) |

# ORDER MODIFYING DECISION (D.) 09-04-010 FOR PURPOSES OF CLARIFICATION, AND DENYING REHEARING OF THE DECISION, AS MODIFIED.

## I. INTRODUCTION

In Decision (D.) 04-12-048, we adopted a long-term procurement plan for Pacific Gas and Electric Company ("PG&E"), among other utilities, which provided direction on PG&E's procurement of resources over a 10-year horizon through 2014.[1] In D.06-11-048, we approved PG&E's results of its 2004 long-term request for offer ("2004 LTRFO"). This decision also approved PG&E's resulting projects, including the original Power Purchase Agreement. ("Original PPA") with Russell City Energy Company, LLC ("RCEC").[2] We also determined in D.06-11-048 that the projects were needed and cost-

[1] *Opinion Adopting Pacific Gas and Electric Company, Southern California Edison Company and San Diego Gas & Electric Company's Long-Term Procurement Plans* ("*Utilities' LTPP Decision*") [D.04-12-048] (2004) ) ____ Cal.P.U.C.3d ___.

[2] *Opinion Approving Results of Long-Term Request for Offers* ("*Order Approving LTRFO Results*") [D.06-11-048, pp. 6-7 (slip op.)] (2006) ___ Cal.P.U.C.3d ___. The RCEC Project is the 601 MW combined-cycle listed as "Calpine Hayward." (See *id.* at p. 6 (slip op.).) RCEC is an affiliate of Calpine Corporation. (See Exhibit PG&E-1, p. 1-1, fn. 1 [Public Version].) The Original PPA involved a 10 year contract to provide PG&E with energy capacity and energy from this facility in Hayward, California. (Application of PG&E for Expedited Approval of the Amended Power Agreement for the Russell City Energy Company Project ("PG&E Application"), A.08-09-007, filed September 10, 2008, p. 10 [Public Version]; see also, *Order*

(*footnote continued on the next page*)

effective. (*Id.* at pp. 6-7, 38 [Finding of Fact No. 3], 42 [Conclusion of Law No. 1], & p. 45 [Ordering Paragraph No. 1] (slip op.).)

On November 8, 2007, RCEC notified PG&E of permitting delays and cost increases (e.g. in equipment, materials and labor), and requested modifications to the original PPA. The modifications included a delay of the on-line date of the RCEC project by two years to June 2012, revision of the contract price, and other amendments.

On June 6, 2008, RCEC and PG&E signed a letter agreement that provided the parties could negotiate modifications to the Original PPA. The results of the negotiation were embodied in the First Amended PPA ("1st APPA), which was submitted for Commission approval in Application (A.) 08-09-007. The Division of Ratepayer Advocates ("DRA") and The Utility Reform Network ("TURN") filed protests to this application.

PG&E, RCEC, Division of Ratepayer Advocates ("DRA"), The Utility Reform Network ("TURN"), and California Unions for Reliable Energy ("CURE") (collectively, "Joint Parties") reached settlement on the issues raised in this application,[3] and submitted the Second Amended and Restated Power Purchase Agreement ("2nd APPA"),[4] stating that the 2nd APPA was a settlement among the Joint Parties. California Pilots Association, Skywest Townhouse Homeowners ("Skywest"), and Hayward Area Planning Association ("HAPA") (collectively, "Group Petitioners") and Californians for Renewable Energy, Inc. ("CARE") and Rob Simpson (collectively, "CARE/Simpson") opposed the settlement. In D.09-04-010, the Commission approved

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(*footnote continued from previous page*)

*Approving LTRFO Results* [D.06-11-048], *supra,* at p. 6 (slip op.).)

[3] For a list of the specific issues, see Assigned Commissioner's Scoping, dated November 17, 2008 (" Scoping Memo"), pp. 2-3.)

[4] A copy of the 2nd APPA can be found as Exhibit A in Joint Motion of Pacific Gas and Electric Company, Russell City Energy Company, LLC, Division of Ratepayer Advocates, California Unions for Reliable Energy, and The Utility Reform Network for Approval of Second Amended and Restated Power Purchase Agreement ("Joint Parties' Motion for Approval of 2nd APPA"), dated December 23, 2008 [Confidential (Under Seal].

the Joint Parties' settlement agreement, and thus, approved the 2nd APPA. In determining whether the settlement was reasonable in light of the whole record, we considered comparisons made by PG&E and DRA and TURN, including those that lead us to conclude that the
2nd APPA was competitive with PG&E's 2008 LTRFO. (See D.09-04-010, pp. 15-18.)

Group Petitioners timely filed a joint application for rehearing. A rehearing application was also timely filed by CARE/Simpson. Joint Parties filed a response, stating its opposition to both applications for rehearing.

In their joint rehearing application, the Group Petitioners allege the following legal errors: (1) The Decision is inconsistent with D.04-12-048 and D.06-11-048, which allegedly preclude new bilateral contracts that shift greenhouse gas ("GHG") costs and risks from the developer to the customers; (2) Group Petitioners were denied due process when the rehearing applicants were not allowed to present evidence that the amended power purchase agreement constituted an unlawful novation and was subject to competitive bidding; (3) the Decision denied the Group Petitioners due process and equal protection by finding that they were not customers eligible to request intervenor compensation, since they were not permitted any opportunity or leave to supplement their request. The rehearing application also asks for oral argument under Rule 16.3 of the Commission Rules of Practice and Procedure.

In their rehearing application, CARE/Simpson support the Group Petitioners' application for rehearing. In addition, CARE/Simpson argue that section 10.4 of the 2nd APPA deprives the ratepayers of the right of notice and review should the Russell City Energy Center be sold or transferred to another owner or operator, and the parties were denied review of the calculations showing compliance with Environmental Performance Standards ("EPS"). CARE/Simpson also request oral argument.

We have reviewed each of the allegations raised in both rehearing application, and are of the opinion that legal error has not been demonstrated. However, we will modify the Decision to clarify a statement which lead Group Petitioners to

believe that we had relied on a calculation outside the record. Rehearing of D.09-04-010, as modified, is denied.

## II. DISCUSSION

### 1. The Commission is not legally required to reexamine the determinations of need and cost-effectiveness that were made in D.04-12-048 and D.06-11-048.

#### a. D.09-04-010 correctly concluded that the issues regarding reliability need and cost effectiveness were beyond the scope of the proceeding.

In their rehearing application, Group Petitioners allege that D.09-04-010 is inconsistent with D.04-12-048 and D.06-11-048, with respect to the determinations regarding reliability need and cost-effectiveness.[5] (Group Petitioners' Rehrg. App., pp. 4-6.) Their allegation and discussion in their rehearing applications on pages 4-6 constitute no more than an attempt to relitigate the need and cost-effectiveness that were already determined in these two decisions. We found these issues beyond the scope of the proceeding. (See D.09-04-010, pp. 3-4; see also, Scoping Memo and Ruling of Assigned Commissioner Setting Schedule and Scope of Proceeding and Granting Motion by TURN Directing PG&E to File Supplemental Testimony ("Scoping Memo"), filed November 17, 2008.) Accordingly, this allegation of error is without merit.

In D.04-12-048, the Commission approved PG&E's long-term procurement plan ("LTPP") involving 2200 MW.[6] In its LTPP, PG&E identified a need for 2,200 megawatts ("MW") of new generation in northern California by 2010,[7] and directed PG&E to initiate an all-source solicitation to secure these resources. (See D.09-04-010, p. 2.)

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[5] Group Petitioners incorrectly refer to D.06-11-048 as D.06-04-012. (See Group Petitioners' Rehrg. App., pp. 4-5.)

[6] *Utilities' LTPP Decision* [D.04-12-048], *supra*, at p. 237 [Ordering Paragraph No. 2] (slip op.).

[7] *Id.* at p. 238 [Ordering Paragraph No. 4] (slip op.).

In D.06-11-048, the Commission approved PG&E's results of the utility's 2004 LTRFO. This decision also approved PG&E's resulting projects, including the Original PPA with RCEC.[8] The 2nd APPA is an amendment to the Original PPA.

Thus, D.09-04-010 is not inconsistent with D.04-12-048 or D.06-11-048. Accordingly, there is no need to reexamine the reliability need and cost-effectiveness determinations made in these two decisions. As noted in the Scoping Memo, and affirmed by the Decision, there was need to relook at these issues because:

> The Commission has previously determined the need for the PPA with the RCEC Project in D.04-12-048. The cost-effectiveness of the original PPA was approved as part of PG&E's 2004 LTRFO in D.06-11-48.

(Scoping Memo, pp. 2-3; D.09-04-010, p. 3.)

**b. The 2nd APPA is not a new bilateral contract or a novation requiring a new need and cost-effectiveness analysis.**

Group Petitioners' allegation that the 2nd APPA is a new bilateral contract is incorrect. What Group Petitioners fail to see is that the proceeding on the 2nd APPA was about the amendment to the Original PPA, where the need and cost-effectiveness of the contract for energy capacity and energy had already been determined. The flaw in Group Petitioners' allegation and discussion is that they view the Original PPA and the 2nd APPA as two separate "bilateral contracts" requiring two separate determinations of need and cost-effectiveness. (See Group Petitioners' Rehrg. App., pp. 2-3, Question #2 – Question #4.) However, their view is wrong because there is only one contract, and that contract has been amended. The amendments made to the Original PPA do not change the essence of the original contract, namely, the agreement by RCEC to provide PG&E energy capacity and energy from its 601 MW combined-cycle facility in Hayward for a 10-year term.

[8] *Order Approving LTRFO Results* [D.06-11-048], *supra*, at pp. 6-7 (slip op.).

Group Petitioners also advocate that the 2nd APPA constitutes a novation, and thus, is a new contract. (Group Petitioners' Rehrg. App., pp. 10-11, citing Civil Code, §§1530-1532, 1 Witkin, Summary of Cal. Law (9th ed. 1987) Contracts, §906, p. 811; *Wells Fargo Bank v. Bank of America* (1995) 32 Cal.App.4th 424, 431.) This argument is flawed because the amendments to the Original PPA in the 2nd APPA do not constitute a novation, because there was no substitution of a new obligation for an existing one, and there was no intent to extinguish the obligations in the Original PPA. (See Civil Code, §1530, defining novation as "the substitution of a new obligation for an existing one; see also *Wells Fargo Bank v. Bank America*, *supra*, 32 Cal.App.4th at p. 431; 1 Witkin, Summary of Cal. Law (10th ed. 2005) Contracts, §961, pp. 1052-1053.) There was no extinguishment of the essence of the contract obligating RCEC to provide energy capacity and energy to PG&E. For there to have been a novation, PG&E and RCEC must have clearly "intended to extinguish rather than merely modify the original agreement." (*Howard v. County of Amador* (1990) 220 Cal.App.3d 962, 977; see also, 1 Witkin, Summary of Cal. Law (10th ed. 2005) Contracts, §963, pp. 1054.) Here, the clear intent was to modify, and there is no evidence of any intent to novate.

For these reasons, Group Petitioners' assertion that we must reexamine the needs and cost-effectiveness determinations has no validity.

**2. Group Petitioners were not denied due process when they were not allowed to present evidence that the amended power purchase agreement constituted an unlawful novation and was subject to competitive bidding.**

**a. Group Petitioners did not have a right to an evidentiary hearing.**

Group Petitioners argue that Decision denied them a right to present evidence on the issue of whether the 2nd APPA constituted an unlawful novation which they alleged should have been subject to competitive bidding. (Group Petitioners' Rehrg. App., pp. 7, 9-10.) In their rehearing application, Group Petitioners pose the question: "Is the Commission bound by state decisional law holding that issue of whether the

purported 'amended' contract constitutes a new bilateral contract or is an amended contract constitutes a controverted issue of fact, which under the Commission's rules and procedures, requires an evidentiary hearing?" (Group Petitioners' Rehrg. App., p. 3.) However, they fail to cite to any specific statues or Commission rule supporting their argument of a required evidentiary hearing. Thus, they have failed to comply with Public Utilities Code section 1732 and Rule 16.1(c ) of the Commission Rules of Practice and Procedure.[9] Section 1732 requires the rehearing application specify the grounds of legal error. (Pub. Util. Code, §1732.) Rule 16.1(c ) states that "[a]pplications for rehearing shall set forth specifically the ground on which the applicant considers the order or decision of the Commission to be unlawful or erroneous, and make specific references to the record or law." (Code of Regs., tit. 20, §16.1, subd. (c ).) Since Group Petitioners has failed to comply with section 1732 and Rule 16.1, we reject this claim.

Even if we were to consider the claim, it has no merit. The Decision noted that the settlement was "governed by Rules 12.1 et . seq. which provide that no hearing is necessary if there are no material contested issues of fact, or if the contested issue is one of law." D.09-04-010, p. 15.) However, the Administrative Law Judge ("ALJ") determined that none of the opponents to the settlement agreement identified any material contested issue of fact, and concluded no evidentiary hearing was required pursuant to Rule 12.3. Only in their Comments to the Proposed Decision did the Group Petitioners raise the contested factual issue regarding whether the 2nd APPA was a new bilateral contract or novation. However, they made no request for evidentiary hearing. Further, the issue of whether the 2nd APPA constituted a novation is one of law, and the record contains sufficient evidence, including the Original PPA and the 2nd APPA, to make this legal determination. Thus, the claim that an evidentiary hearing was required has no merit.

[9] All subsequent "section" references are to the Public Utilities Code, unless otherwise specified. All subsequent "rule" references are to the Commission Rules of Procedure and Practice, unless otherwise noted.

**b. The Commission correctly determined that the *Tesla* decision requiring competitive bidding did not apply.**

Group Petitioners argue that we erred in concluding that the *Tesla* decision did not apply to the contract modification.[10] (Group Petitioners' Rehrg. App., pp. 8-12.) In *Tesla*, the Commission dismissed an application for approval of a PG&E proposal because it failed to conform to Commission policies under which all long-term power should be obtained through competitive procurements, except in truly extraordinary circumstances.[11] Group Petitioners rely on *Tesla* to allege that the approval of the 2nd APPA would violate the Commission's policy requiring competitive bids. Specifically, they claim that the 2nd APPA has not been subject to any comparative analysis and that it does not meet the "truly extraordinary circumstances" standard discussed in *Tesla*.[12] These claims have no merit.

Group Petitioners' claim that *Tesla* applies rests on whether the 2nd APPA is a new bilateral contract or novation. (Group Petitioners' Rehrg. App., pp. 9-11.) They allege that since the 2nd APPA is a new contract, *Tesla* required competitive bidding and a comparison exhibit under Rule 12.1(d) of the Commission Rules of Practice and Proceeding. (Group Petitioners' Rehrg. App., pp. 10-12.) As discussed above, they are wrong that the 2nd APPA is a new contract requiring competitive bidding. As we explained:

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[10] Application of PG&E for Expedited Approval of the Tesla Generating Station and Issuance of a Certificate of Public Convenience and Necessity and Request for Interim Order Authorizing Early Project Commitment to Stabilize Costs ("*Tesla*") [D.08-11-004] (2008) ___ Cal.P.U.C.3d ___, p. 2 (slip op.).

[11] *Id.* at p. 2 (slip op.).

[12] *Id.* at p. 14 (slip op.), citing D.07-12-052, regarding unique circumstances for . . . approval outside of a competitive solicitation on a case-by-case basis via an IOU application." (*Opinion Adopting Pacific Gas and Electric Company's, Southern California Edison Company's and San Diego Gas & Electric Company's Long-Term Procurement Plans* [in R. 06-02-013] [D.07-12-052] (2007) ___ Cal.P.U.C.3d ___, at pp. 212-213 (slip op.), rehearing denied, in *Order Modifying Decision (D) .07-12-052, and Denying Rehearing of Decision, As Modified* [D.08-09-045] (2008) ___ Cal.P.U.C.3d ___.)

> Although the 2nd APPA has several changes, we find the basic transaction intact and reasonably modified to reflect current market conditions. Based on the foregoing, we find that the policy of competitive procurement is not violated by the amendments to the original PPA which resulted in the 2nd APPA before us here. Because no violation of competitive bidding occurred, the "extraordinary circumstances" standard from the *Tesla* decision does not apply.

(D.09-04-010, p. 18.) This explanation is correct, and resulted in a lawful interpretation of *Tesla* and its competitive bidding requirement, except "in truly extraordinary circumstances." (See *Tesla*, *supra*, at p. 2 (slip op.) Simply put, competitive bidding is required in the making of a new contract not the amendment of an existing contract adopted through a competitive bidding process. In D.06-11-048, the Commission approved the Original PPA that was the result of RCEC being a winning bidder in PG&E's 2004 LTRFO.

Further, during the proceeding, PG&E was required to provide a side-by-side comparison. The 2nd APPA has been compared to potentially competitive bids, and shown to be competitive under the comparisons of the bids from PG&E's 2008 LTRFO. (See Reply of Joint Parties to Comments on Joint Parties' Motion for Approval of 2nd APPA, filed February 3, 2009, pp. 6-7.)

**c. The Commission did not err in applying a guideline that compares the price amendment to bids in a recent RPS solicitation.**

In reviewing whether the capacity price increase was reasonable, we acknowledged in the Decision that we had "not yet developed standards for reviewing amendments, including price, to existing PPAs for non-renewable resources." (D.09-04-010, p. 16.) However, the Commission determined that a suitable guideline as to whether or not to approve the settlement was to compare the price amendment to bids in a recent RPS solicitation, similar to what we had done for a price amendment to a

renewable PPA. (D.09-04-010, p. 16, citing Resolution E-4150, issued April 15, 2008, p. 8.)

Group Petitioners criticize the Commission for using this guideline, and assert that the approach taken in Resolution E-4150 should not be used, as it is distinguishable from the instant situation. (Group Petitioners' Rehrg. App., pp. 7-8.) Group Petitioners argue that Resolution E-4150's approach was limited to renewable contracts, and not for an allegedly "improper bilateral contract," where there would be a "shift of all GHG Risks and costs to ratepayers." (Group Petitioners' Rehrg. App., pp. 7-8.) Their criticism has no validity.

First, the 2nd APPA was not an "improper bilateral contract." As discussed above, the 2nd APPA was neither a new contract nor a novation requiring a new reliability or cost-effectiveness analysis. (See discussion, *supra*.)

Further, there is no law, and Group Petitioners cite to none, that prohibits the Commission from evaluating the reasonableness of a settlement by comparing the capacity price increase in the 2nd APPA to the bids in a recent RPS solicitation. Moreover, the differences between a renewable contract and a non-renewable contract that Group Petitioners describe are not controlling. Nothing precludes the Commission in the context of a settlement from exercising its expertise, and applying the same approach used for a renewable contract to determine whether the amendment price in a non-renewable contract was reasonable in light of the whole record. (See Commission Rules of Practice and Procedure, tit. 20, §12.1, subd. (d).)

Moreover, there was evidence to support this evaluation of the settlement. PG&E provided the evidence to make this comparison between the amendment price of the 1st APPA and short-listed bids in PG&E's 2008 LTRFO. (See Joint Parties' Motion for Approval of 2nd APPA, filed December 23, 2008, p. 6, citing to Supplemental Testimony of PG&E (Exh. PG&E-2), Chapter 1 at p. 1-5 [Confidential (Under Seal)].) DRA and TURN reviewed this evidence for the 2nd APPA, and concluded the pricing would be competitive if it had been bidded into that RFO. From this evidence, the

Commission concluded that amended contract price was reasonable. (D.09-04-010, p. 18.)

We observed in the Decision that the Joint Parties believed that the "settlement [did not] extend to the issue of what standards the Commission should use going forward to consider requests to approve amendments to PPAs that the Commission [had] previously approved in a competitive solicitation process." (D.09-04-010, p. 8, fn. 9.) The Decision also noted that the Joint Parties stated that this issue was "a policy matter in Phase 2 of the 2008 long-term procurement plan rulemaking, Rulemaking 08-02-007." (D.09-04-010, p. 8, fn. 9.) Based on these observations, Group Petitioners allege we acted inconsistently. They argue that although we acknowledged that there was no standard for reviewing an amendment to a PPA and one would be considered in R.08-02-007, we still adopted the comparison guideline as the standard for reviewing an amendment to a PPA. However, they are wrong. In D.09-04-010, we applied the comparison guideline for reviewing the amendment price to determine whether or not to approve the settlement agreement as reasonable in the light of the whole record. We did not adopt the guideline as the standard for reviewing amendments to a PPA.

**d. Contrary to Group Petitioners' assertion, a comparison analysis was performed.**

The Group Petitioners assert that we failed to do a comparison analysis as required by Rule 12.1 of the Commission's Rules of Practice and Procedure. (Group Petitioners' Rehrg. App., p. 11)[13] This assertion lacks merits. As fully described in the Decision, a comparison was done, and used to determine whether the settlement agreement was reasonable in light of the whole record. (See generally, D.09-04-010, pp. 15-22.)

[13] Group Petitioners assert that the same rule required a comparison exhibit. They are wrong, as this proceeding is not a general rate case, or subject to the rate case plan "in which a comparison exhibit would ordinarily be filed." (See Reply of Joint Parties to Comments on Joint Parties' Motion for Approval of 2nd APPA, filed February 3, 2009, pp. 5-6.)

To ensure the amendments were just and reasonable, we required PG&E to provide a side-by-side comparison of the 2nd APPA with short-listed bidders in PG&E's 2008 LTRFO. (See Scoping Memo, p. 5.) On December 8, 2008, PG&E submitted Supplemental Testimony that included side-by-side comparison of the 1st APPA with short-listed bids from PG&E's 2008 LTRFO, as well as a review of PG&E's comparison by an independent evaluator. (PG&E Supplemental Testimony, Chapter 1, Attachments 1-1 and 1-2 [Confidential (Under Seal)].) In their own comparison DRA and TURN concluded that the "revised terms" in the 2nd APPA, in particular the lower capacity price would be competitive with the short-listed bids in the 2008 LTRFO if it were actually bid into the RFO. Thus, contrary to Group Petitioners' assertion, the 2nd APPA had been subject to a comparative analysis with bids received in a long-term resource solicitation. Group Petitioners had access to this comparison. So even if *Tesla* were applicable, the 2nd APPA had been shown to be competitive with comparisons to the bids from PG&E's 2008 LTRFO. (See Reply of Joint Parties to Comments on Joint Parties' Motion for Approval of 2nd APPA, filed February 3, 2009, pp. 6-7.)

**e. The GHG-related costs in the 2nd APPA were appropriately considered.**

In their rehearing application, Group Petitioners further claim that the Decision does not properly consider the GHG-related costs in the 2nd APPA. Specifically, they argue that this amended agreement is not consistent with existing Commission policies and decisions and does not satisfy D.04-12-048 and the price can not be deduced to show that the agreement is competitive since it fails to include the GHG-related costs.[14] (Group Petitioners' Rehrg. App., p. 5.) This claim has no merit.

[14] Group Petitioners also make references to D.06-07-029 and R.06-02-012 for the proposition that contracts that do not apply the cost allocation mechanism ("CAM") at the time Commission approval was sought are still subject to the rules of D.04-12-048. (Group Petitioners' Rehrg. App., p. 9.) As discussed in this memo, D.09-04-010 is consistent with D.04-012-048, and thus, references to D.06-07-029 and R.06-02-012 have no meaning on this issue of GHG-related costs.

D.04-12-048 requires the IOUs to employ a "GHG adder" when evaluating fossil and renewable generation bids in all-source open RFPs. (*Utilities' LTPP Decision* [D.04-12-048], *supra*, at pp. 3-4, 43, 80-81, 120, 127, 151-153, 216 [Finding of Fact No. 80], 232 [Conclusion of Law No. 23], and p. 237 [Ordering Paragraph No. 3(c )] (slip op.).)

The 1st APPA was compared with the short-listed bids from PG&E's 2008 LTRFO applying the same evaluation criteria used to evaluate and compare bids in the 2008 LTRFO. This comparison took into account all the criteria used to evaluate and compare bids, including consideration for GHG-related costs. DRA and TURN compared the 2nd APPA (which contained identical provisions concerning GHG-related costs as in the 1st APPA) with the short-listed bids in PG&E's 2008 LTRFO. DRA and TURN took into account the GHG-related costs associated in their comparison of the 2nd APPA and the short-listed bids in PG&E's 2008 LTRFO.[15] Thus, the comparisons in the record assisted the Commission in determining that the 2nd APPA was competitive. Therefore, Group Petitioners are wrong that the Decision did not include a consideration of the GHG-related costs, including those negotiated costs that were assumed by PG&E and its ratepayers. D.04-12-048 does not preclude the settlement parties from agreeing to such an allocation of GHG-related costs.

**3. The Commission did not err in concluding that the Group Petitioners had failed to establish its eligibility to receive intervenor compensation, since they failed to provide sufficient documentation.**

Group Petitioners assert that D.09-04-010 denies them due process and equal protection in concluding that they are not customers eligible to request intervenor compensation. They argue that the Commission unlawfully did not provide them with

[15] See Joint Parties' Motion for Approval of 2nd APPA, filed December 23, 2008, p. 6 [Public Version]; see also, Joint Parties' Motion for Approval of 2nd APPA, Exhibit A, pp. A-47 to A-48 [Confidential (Under Seal)] & Exhibit B, pp. B-52 to B-53 [Confidential (Under Seal)].

any opportunity or leave to supplement their NOI. (Group Petitioners' Rehrg. App., pp. 12-15.) We find no merits to these claims.

In a late-filed motion, filed December 12, 2008, Group Petitioners sought party status and permission to file a late notice of intent to claim intervenor compensation. Group Petitioners asked to be recognized "collectively" as one party and were "asserting 'Category 3' customer status, as a group or organization authorized by its articles of incorporation or bylaws to represent the interest of residential and/or small commercial ratepayers." (D.09-04-010, p. 29, citing Pub. Util. Code, §1802, subd. (b)(1)(C).) The ALJ issued a ruling on January 23, 2009, granting their motion to accept late filing of notice of intent, but finding Group Petitioners ineligible to claim intervenor compensation. (January 23, 2009 ALJ Ruling, pp. 1 & 6.) The grounds for finding ineligibility was that Group Petitioners failed to establish each of the group members were "customers" within the meaning of section 1802(b)(1), and that they failed to provide any documentation that showed their organizations' members' inability to pay the costs of participation. (January 23, 2009 ALJ Ruling, pp. 2-5.)

On February 2, 2009, Group Petitioners filed a motion for reconsideration of the January 23, 2009 ALJ Ruling. This time, Group Petitioners sought to be a "customer" under any of the three possible categories. (Motion for Reconsideration, pp. 2-3; see also, D.09-04-010, p. 26.) In their motion, Group Petitioners also argued that: "As long as any one organization satisfies the statutory criteria, that organization [was] entitled to qualify as an intervenor eligible to request compensation." (Motion for Reconsideration, pp. 3-4.) They cited D.03-12-058 [16] and D.04-10-012[17] in support of this argument. (See generally, Motion for Reconsideration, pp. 5, 9-10.) These decisions involved the eligibility of a labor union.

[16] *Decision Granting Local 483 Utility Workers Union of America Eligibility for Intervenor Compensation* [D.03-12-058] (2003) ___ Cal.P.U.C.3d ___.

[17] *Order Denying Rehearing of Decision 03-12-058* [D.04-10-012] (2004) ___ Cal.P.U.C.3d ___.

We denied Group Petitioners' motion for reconsideration because they failed to file sufficient information. This is the same basis for denying their original request for eligibility. (D.09-04-010, p. 26.) In the Decision, we explained why Group Petitioners did not qualify as customers under any of the three categories of a "customer." (D.09-04-010, pp. 26-28.) Further, the Decision rejected Group Petitioners' argument that an organization could be eligible if one of its members of the organization was eligible. (D.09-04-010, p. 26.) We noted that to adopt Group Petitioners' mistaken "view would open the door for non-customer members of a coalition-party to obtain intervenor compensation. . . ." (D.09-04-010, p. 26, citing *Re Commission's Intervenor Compensation Program* [D.98-04-059] (1998) 79 Cal.P.U.C.2d 628, 643.) We further observed that the decisions (D.03-12-058 and D.04-10-012) that they relied upon had been vacated and reversed in D.05-02-054.[18] (D.09-04-010, p. 27.) The Commission also found even if they could be assumed to be a customer, Group Petitioners did not demonstrate significant financial hardship. (D.09-04-010, pp. 27.) In sum, our denial of eligibility was based on the fact that Group Petitioners did not provide sufficient information to support its alleged customer status and/or significant financial hardship.

In their rehearing application, Group Petitioners argues that the Decision violates HAPA's federal due process and equal protection rights. (Group Petitioners' Rehrg. App., p. 13.) Specifically, they claim that the Decision has misread the motion for reconsideration to mean that "so long as any one member organization is an eligible customer, the entire party should be considered 'eligible' for 'costs of participation.' " By denying the Group Petitioners eligibility, they argue that the Commission has unlawfully denied one qualifying member in its group, namely HAPA, of eligibility. We fine this argument to be without merit.

[18] *Oder Granting Rehearing of Decision (D.) 04-10-012, Vacating D.04-10-013 and D.03-12-058, and Denying Eligibility for Intervenor Compensation* [D.05-02-054] (2005) ___ Cal.P.U.C.3d ___.

The NOI requests eligibility for the Group Petitioners collectively. (See NOI Request, p. 1.) No separate NOIs were filed by each member. Group Petitioners did not ask the Commission to consider the eligibility of each of its members individually. Although Group Petitioners do state that "as a matter of law that ineligibility of "one" of the members of a group of intervenors may not forfeit the statutory entitlements of the remaining organizations, . . . ," this statement has no meaning in light of the assertion: "As Long As Any One Organization Satisfies The Statutory Criteria, That Organization Is Entitled To Qualify As An Intervenor Eligible To Request Compensation." (Motion for Reconsideration, p. 3 [Subheading A.1.].) Thus, it was Group Petitioners' eligibility that was at issue, and since not all its member qualified, we properly concluded that Group Petitioners were ineligible to receive intervenor compensation.

Further, in denying Group Petitioners eligibility, we did not preclude HAPA from demonstrating eligibility on its own. Similarly, that is the same case for Skywest if it had proven representation and significant financial hardship. However, for both members, more information would have been needed. Therefore, Group Petitioners' argument that we somehow denied these individual members of their statutory entitlement has no merit.

Also, in their rehearing application, Group Petitioners assert that unlike for other intervenors, they were given no notice or opportunity to amend or supplement their applications. (Group Petitioners' Rehrg. App., p. 14.) Group Petitioners specifically point to two situations involving other intervenors, CARE and WEM,[19] whereby these parties were given notice and opportunity to amend or supplement their applications. (Group Petitioners' Rehrg. App., p. 14.) By this assertion, they raise an equal protection argument which has no merit.

[19] Group Petitioners do not cite to the proceedings where these situations happened.

Group Petitioners are simply wrong that they were treated differently such that they were denied notice and opportunity to amend or supplement their NOI. In fact, they received notice and two opportunities to demonstrate their eligibility with sufficient documentation. For their original NOI Request, Group Petitioners were permitted to file their documentation through a series of emails and a mailing. (January 23, 2009 ALJ Ruling, p. 2.) This constituted their first opportunity to demonstrate their eligibility. In denying them eligibility, the ALJ explained why the original NOI request and accompanying documentation did not demonstrate eligibility. (See January 23, 2009 ALJ Ruling, pp. 2-5.) Group Petitioners could have used this explanation as a roadmap for correcting their defective NOI.

Their second opportunity to establish their eligibility was when they filed a motion for reconsideration. The motion for reconsideration constituted an amendment to their NOI. Again, their NOI request was found lacking of adequate documentation. (See generally, D.09-04-010, pp. 25-28.) Group Petitioners were noticed of this finding in the ALJ's Proposed Decision. (See Proposed Decision, filed March 17, 2009, p. 26, stating that their motion for reconsideration was denied because "they had not met the evidentiary threshold to establish they were a "customer" and otherwise qualified to claim compensation.") In their comments, Group Petitioners make reference to the PG&E bills of Skywest which were submitted with the motion for reconsideration, but offer no more documentation. (Group Petitioners' Comments to Proposed Decision, dated April 6, 2010, pp. 10-11.) However, we pointed out that even assuming that these bills were enough to establish Skywest as a Category 1 customer, there was no information demonstrating undue financial hardship. (D.09-04-010, p. 27.)

Group Petitioners' eligibility rests on the fact that they failed to provide sufficient documentation on customer status for all three members and/or significant financial hardship. Unlike the two situations to which Group Petitioners refer, those intervenors did provide sufficient documentation. (See Group Petitioners' Rehrg. App., p. 14.) Thus, Group Petitioners' equal protection claims have no validity, since they are not similarly situated.

Moreover, at no point since they became a party in the proceeding have we denied Group Petitioners an opportunity to amend or supplement their eligibility request. Group Petitioners faults the Commission for not telling them that they should amend their request and provide sufficient documentation. No law requires that the Commission specifically inform an intervenor that they should amend their request by providing sufficient documentation. In the instant proceeding, Group Petitioners apparently understood that they could "amend" because they did file a Motion for Reconsideration, and did provide more documentation, but the information proved to be insufficient to establish eligibility.

Further, as we observed: "It is the duty of an intervenor to establish eligibility, including customer status and significant hardship, rather than offer unsupported statements and inferences from which the Commission to derive rather specific elements of qualifications." (D.09-04-010, p. 28.) Thus, providing sufficient documentation is the intervenors' responsibility, and not the Commission's.

How long the Commission will wait depends on the circumstances of the case, but as we observed: "[T]here is no authority that binds the Commission to wait indefinitely." (D.09-04-010, p. 28.) Here, we believe that Group Petitioners had sufficient time, as well as adequate notice and opportunity, to amend their deficient NOI request, as evidenced by the fact they filed their motion for reconsideration as a means for amending their defective NOI.

**4. Section 10.4 of the 2nd APPA does not affect any public right to notice and review should the Russell City Energy Center be sold or transferred to another owner or operator.**

In their rehearing application, CARE/Simpson argue that section 10.4 in the 2nd APPA would result in a loss of public rights whereby there would be no opportunity for public review or comment upon the exercise of this provision. (CARE/Simpson's Rehearing, pp. 3-5, citing to Pub. Util. Code, §§851 & 853, in support.) Specifically, CARE/Simpson argue that section 10.4 would permit the transfer of ownership and

operation of the RCEC project without notice or opportunity for the public to comment. (CARE's Rehrg. App., pp. 3-5.) This argument lacks merit.

CARE/Simpson's argument is flawed because they mistakenly read section 10.4 of the 2nd APPA as involving the assignment of the ownership and operation of the RCEC project. This contract provision provides for assignment of the obligations under the 2nd APPA for the purchase and sales and delivery of capacity, not the ownership and operation of the facilities. (See generally, 2nd APPA, pp. A-7 to A-11 [Section 3.1 – Transaction] & pp. A-53 to A-54 [Section 10.4 -- Assignment and Change of Control] [Confidential (Under Seal)].) As the we stated:

> CARE mistakenly claimed that § 10.4 in the 2nd APPA would permit the transfer and operation of the RCEC project without notice or opportunity for public to comment. However, the provision reflects parties' rights and obligations regarding potential assignment of the Agreement or rights thereunder. It is unclear how CARE links the provision to some loss of public rights.

(D.09-04-010, p. 19.)

Because they are mistaken that the assignment provisions in section 10.4 of the 2nd APPA apply to a transfer and operation of the RCEC plant, CARE/Simpson's reliance on sections 851 and 853 is misplaced. These statutes do not apply to an assignment of the obligations under the 2nd APPA for the purchase and sales and delivery of capacity. Thus, there is no legal requirement for public review or comment upon the exercise of section 10.4. Accordingly, CARE/Simpson's section 10.4 argument has no merit.

**5. Based on the record evidence and application of the method for calculating the emission rate set forth in D.07-01-039, the Commission has lawfully determined that the RCEC Project complied with the Environmental Performance Standards.**

In D.09-04-010, the Commission stated: "Energy Division staff have recalculated the emission rate for more conservative, average heat rate, and the Commission is satisfied that the project does comply with the EPS based on likely

average emission rates for the project." (D.09-04-010, p. 25.) From this statement, CARE/Simpson mistakenly assumed that the Commission relied on evidence not in the record.

CARE/Simpson alleges that the "recalculations" were not part of the record, and thus, the parties were denied an opportunity to review them. Accordingly, these parties claim that the Decision's use of these recalculations denied them due process. (CARE/Simpson's Rehrg. App., p. 5.) This argument has no merit, although we believe that the Decision should be modified to clear up a misunderstanding that we did not rely on the record on determining whether the 2nd APPA met EPS.

In response to Group Petitioners' comments to the Proposed Decision regarding whether the 2nd APPA met the EPS set forth in D.07-01-039,[20] the Commission had the Energy Division, which assists the Commission and ALJs on complex technical issues, to perform some calculations to determine whether the 2nd APPA was in compliance of the EPS. (See Group Petitioners' Comments to the PD, filed April 6, 2009, pp. 9-10; see also, D.09-04-010, p. 25.)

A review of the evidentiary record shows that PG&E supplied a variety of heat rates. (Motion of Joint Parties, dated December 23, 2008, Attachment A, pp. A-98 [Confidential (Under Seal)].) By using each of these heat rates, including one averaging all these heat rates, and applying the Conversion Methodology adopted in D.07-01-039,[21] the resulting emissions rate for each of these heat rates falls below the EPS threshold of 1,100 lbs of carbon dioxide ($CO_2$) per megawatt hour.

Accordingly, CARE/Simpson are wrong that we relied on evidence not in the record to conclude that RCEC project complied with the EPS. Thus, they were not denied an opportunity to be heard on the recalculations.

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[20] *Interim Opinion on Phase 1 Issues: Greenhouse Gas Emissions Performance Standard* ("*EPS Decision*") [D.07-01-039] (2007) ___ Cal.P.U.C.3d ___, pp. 70, 235 [Finding of Fact No. 57 & 58] (slip op.), adopting an EPS of no higher than 1,100 lbs. of carbon dioxide ($CO_2$) per megawatt hour.

[21] See generally, *id.* at pp. 108-114 (slip op.), for a description of this methodology.

However, the statement regarding Energy Division's "recalculations" was ambiguous and subject to a misreading. Thus, in order to eliminate any possible erroneous conclusion that we used evidence outside the record, we will modify D.09-04-010 as specified in the ordering paragraph below.

**6. The rehearing applicants' requests for oral argument under Rule 16.3 shall be denied.**

In their joint rehearing application, Group Petitioners request oral argument pursuant to Rule 16.3 of the Commission Rules of Practice and Procedure. They set forth seven questions, which they broadly and without explanation claim are issues of major significance. (Group Petitioners' Rehrg. App., pp. 2-3.) In their rehearing application, CARE/Simpson ask for oral argument to better explain their position on Section 10.4 of the 2nd APPA which is a provision involving any transfer of ownership and operation of the RCEC project, and to discuss the issue of EPS compliance. (CARE/Simpson's Rehrg. App., p. 2.)

The Commission has complete discretion to determine the appropriateness of oral argument in any particular matter. (See Rule 16.3(a) of the Commission's Rules of Practice and Procedure, Cal. Code of Regs., tit. §20, 16.3, subd. (a).)

Rule 16.3(a) states:

> If the applicant for rehearing seeks oral argument, it should request it in the application for rehearing. The request for oral argument should explain how oral argument will materially assist the Commission in resolving the application, and demonstrate that the application raises issues of major significance for the Commission because the challenged order or decision: (1) adopts new Commission precedent or departs from existing Commission precedent without adequate explanation; (2) changes or refines existing Commission precedent; (3) presents legal issues of exceptional controversy, complexity, or public importance; and/or (4) raises questions of first impression that are likely to have significant precedential impact.

(Rule 16.3(a) of the Commission's Rules of Practice and Procedure, Code of Regs., tit. 20, § 16.3, subd. (a).)

The requests for oral argument do not meet the requirements specified by the Commission's Rules. Group Petitioners and CARE/Simpson fail to demonstrate how oral argument will materially assist the Commission in resolving their rehearing applications. Further, their requests do not even set forth detailed reasons warranting the grant of oral argument, including those specified in Rule 16.3(a)(1) through (a)(4). The rehearing applicants merely state that oral argument is requested because the issues have "major significance." Accordingly, there is no basis to conclude oral argument would benefit disposition of the applications for rehearing.

## III. CONCLUSION

For the reason discussed above, legal error has not been demonstrated. However, we modify D.09-04-010 to clarify that the Commission did not rely on evidence that was not in the record. Rehearing of D.09-04-010, as modified, is denied.

**THEREFORE, IT IS ORDERED** that:

The first full paragraph on page 25 of D.09-04-010 is modified to read as follows:

"On March 20, 2009, PG&E filed documentation in this docket that indicated the project would be in compliance with the EPS. Comments on this filing pointed out that the heat rate value used by PG&E to derive an emissions rate for the unit may not represent average operating conditions (e.g., factoring in cold starts and operation below full capacity). In their testimony, PG&E provided several heat rates, including the heat rate used in their response. (See Joint Parties' Motion for Approval of the 2nd APPA, dated December 23, 2008, Attachment A, p. A-98 [Confidential (Under Seal)]. Using the other heat rates, including one that averages all of the heat rates in the record, and applying the method adopted in D.07-01-039 for calculating the emission rate, we are satisfied that the project does comply with the EPS based on likely average emissions rates for the project."

1. Group Petitioners' and CARE/Simpson's requests for oral argument under Rule 16.3 of the Commission's Rules of Practice and Procedure are denied.

2. Rehearing of D.09-04-010, as modified, is hereby denied.

This order is effective today.

Dated February 25, 2010, at San Francisco, California.

MICHAEL R. PEEVEY
President
DIAN M. GRUENEICH
JOHN A. BOHN
TIMOTHY ALAN SIMON
NANCY E. RYAN
Commissioners

# Exhibit 46

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

**FILED**
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| Application of Pacific Gas and Electric Company for Expedited Approval Of The Amended Power Purchase Agreement For The Russell City Energy Company Project | ) ) ) ) | A.08-09-007 (Filed September 10, 2008) |

# JOINT PETITION OF PACIFIC GAS AND ELECTRIC COMPANY, RUSSELL CITY ENERGY COMPANY, LLC, DIVISION OF RATEPAYER ADVOCATES, CALIFORNIA UNIONS FOR RELIABLE ENERGY, AND THE UTILITY REFORM NETWORK FOR MODIFICATION OF DECISION 09-04-010, AS MODIFIED BY DECISION 10-02-033 (PUBLIC VERSION)


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April 15, 2010

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

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| Application of Pacific Gas and Electric Company for Expedited Approval Of The Amended Power Purchase Agreement For The Russell City Energy Company Project | ) ) ) ) | A.08-09-007 (Filed September 10, 2008) |

# JOINT PETITION OF PACIFIC GAS AND ELECTRIC COMPANY, RUSSELL CITY ENERGY COMPANY, LLC, DIVISION OF RATEPAYER ADVOCATES, CALIFORNIA UNIONS FOR RELIABLE ENERGY, AND THE UTILITY REFORM NETWORK FOR MODIFICATION OF DECISION 09-04-010, AS MODIFIED BY DECISION 10-02-033 (PUBLIC VERSION)

Pursuant to Rule 16.4 of the California Public Utilities Commission ("Commission") Rules of Practice and Procedure, Pacific Gas and Electric Company ("PG&E"), Russell City Energy Company, LLC ("RCEC"), Division of Ratepayer Advocates ("DRA"), California Unions for Reliable Energy ("CURE") and The Utility Reform Network ("TURN") (collectively, "Joint Parties") submit this petition for modification of Decision ("D.") 09-04-010, as modified by D.10-02-033.[1] Specifically, the Joint Parties request that D.09-04-010 be modified to approve an amendment to the previously approved Second Amended and Restated Power Purchase and Sale Agreement by and between PG&E and RCEC ("1st Amendment to 2nd APPA").[2]

As discussed below, the 1st Amendment to 2nd APPA consists of limited modifications to the Second Amended and Restated Power Purchase and Sale Agreement ("2nd APPA"). These limited modifications will continue to ensure the addition of a new, efficient generation resource to PG&E's portfolio that will help meet an identified resource need at a price to customers that is

[1] For purposes of this joint petition for modification, references to D.09-04-010 should be understood to mean D.09-04-010, as modified by D.10-02-033. The proposed modifications to D.09-04-010 are attached hereto at Appendix A.

lower than the previously approved 2nd APPA. As a result, approval of the 1st Amendment to 2nd APPA will preserve the benefits already identified by the Commission in D.09-04-010 with substantial customer savings over the term of the contract. In addition, the Joint Parties are requesting that the Commission modify D.09-04-010 to implement the cost recovery mechanism recently adopted by the legislature in Senate Bill ("SB") 695.

## I. PROCEDURAL HISTORY

In D.06-11-048, the Commission approved a power purchase and sale agreement between PG&E and RCEC ("Original PPA") that was the result of RCEC being a winning bidder in PG&E's 2004 long-term request for offers ("LT RFO"). Among other things, the Original PPA contemplated that RCEC was to develop, construct and operate a nominal 601 MW (579 MW summer peak rating) combined cycle, gas-fired power plant located in Hayward, California known as the Russell City Energy Center Project ("RCEC Project") and sell the entire output from the RCEC Project to PG&E for a term of ten years.

Subsequent to Commission approval of the Original PPA, RCEC encountered certain permitting delays and cost increases.[3] These permitting delays were related to RCEC obtaining a Prevention of Significant Deterioration ("PSD") permit from the Bay Area Air Quality Management District ("BAAQMD") and an amendment to RCEC's license from the California Energy Commission. To account for these delays and cost increases, PG&E and RCEC agreed to amend the Original PPA through the execution of an Amended and Restated PPA ("1st

[2] D.09-04-010 was effective as of April 16, 2009 and was "issued" by the Commission on April 20, 2009. Accordingly, this joint petition for modification is being filed within one year of the effective date of the decision. *See* Rule 16.4(d) of the Commission's Rules of Practice and Procedure.
[3] D.09-04-010, mimeo at 2.

APPA"), dated August 4, 2008. Among the revisions to the Original PPA, the 1st APPA set forth new pricing terms and extended the expected initial delivery date to 2012.[4]

TURN and DRA timely filed protests to Commission approval of the 1st APPA asserting, among other issues, that the new pricing under the 1st APPA was not reasonable. In addition, CAlifornians for Renewable Energy, Inc. ("CARE"), Rob Simpson ("Simpson") and Group Petitioners[5] opposed Commission approval of the 1st APPA on various grounds. After a prehearing conference was held, the Joint Parties participated in settlement discussions and reached an agreement on the terms and conditions set forth in the 2nd APPA. Relative to the 1st APPA, the 2nd APPA contained the same 2012 expected initial delivery date but reduced the capacity price to be paid over the term of the agreement.[6]

In D.09-04-010, the Commission approved the 2nd APPA. In approving the 2nd APPA, the Commission found the change in price from the Original PPA to be justified and reasonable,[7] that the RCEC Project was still needed, and that approval was consistent with Commission policies and decisions:

> We agree with Joint Parties that the 2nd APPA is substantively consistent with the Commission's policies and decisions. The Commission has previously determined the need for the project and the 2nd APPA will satisfy that new resource need. The facility will be modern and will provide PG&E certain operational and environmental benefits consistent with Commission direction that new generation resources be flexible to accommodate the intermittent nature of renewable resources and lead to the retirement of aging plants.[8]

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[4] *Application of Pacific Gas and Electric Company (U 39 E) For Expedited Approval of the Amended Power Purchase Agreement for the Russell City Energy Company Project*, A. 08-09-007, filed September 10, 2008.
[5] Group Petitioners consist of California Pilots Association, Skywest Townhouse Homeowners and Hayward Area Planning Association. *See* D.10-02-033, mimeo at 2.
[6] D.09-04-010, mimeo at 7.
[7] D.09-04-010, mimeo at 16-18, 31 (Findings of Fact No. 7).
[8] D.09-04-010, mimeo at 23 (citing to D.07-12-052, mimeo at 23, 106).

Group Petitioners and CARE/Simpson filed applications for rehearing of D.09-04-010. In D.10-02-033, the Commission modified D.09-04-010 for purposes of clarification but otherwise denied the applications for rehearing.[9] In denying the applications for rehearing, the Commission reaffirmed the need for the RCEC Project[10] and the reasonableness of the change in price.[11]

## II. FURTHER PERMITTING DELAYS HAVE NECESSITATED AMENDING THE 2ND APPA

As has already been described in the underlying record, the 2nd APPA was necessitated in part by a permitting delay related to obtaining a PSD permit for the RCEC Project. In particular, the delay was related to an appeal to an amended PSD permit that BAAQMD issued for the RCEC Project in November 2007.[12] On July 29, 2008, the Environmental Appeals Board ("EAB") of the Environmental Protection Agency issued a decision remanding the PSD permit to the BAAQMD to correct a procedural defect on the part of the BAAQMD related to federal "notice" requirements and ordering the BAAQMD to reissue the permit in compliance with such requirements.[13]

At the time the Joint Parties requested approval of the 2nd APPA,[14] BAAQMD had already issued a Draft PSD permit for public comment in compliance with the EAB remand decision.[15] As a result, RCEC believed that, based on its experience, a Final PSD permit would

[9] The modification to D.09-04-010 clarified that the Commission did not rely on evidence not in the record to determine that the RCEC Project complied with the Emissions Performance Standard. D.10-02-033, mimeo at 20-21.
[10] D.10-02-033, mimeo at 4-5.
[11] D.10-02-033, mimeo at 11-12.
[12] PG&E Prepared Testimony (PG&E-1), Chapter 1 at 1-5 - 1-6.
[13] PG&E Prepared Testimony (PG&E-1), Chapter 1 at 1-5; *see also* Declaration of Richard L. Thomas in Support of Joint Petition ("Thomas Declaration") at ¶ 4. The Thomas Declaration is attached hereto at Appendix B.
[14] The Joint Parties filed a motion requesting Commission approval of the 2nd APPA on December 23, 2008.
[15] Thomas Declaration at ¶¶ 5-7.

be issued in time to allow it to meet the expected initial delivery date in the 2nd APPA.[16] The Final PSD permit, however, was not issued by BAAQMD until February 3, 2010 – approximately 18 months after the EAB remand decision.[17] Given the unexpected length of time it took for BAAQMD to issue the Final PSD permit and the fact several parties have again appealed BAAQMD's issuance of the permit, it has become necessary to extend the expected initial delivery date in the 2nd APPA by one year.[18]

## III. SUMMARY OF 1ST AMENDMENT TO 2ND APPA

The 1st Amendment to 2nd APPA would make limited changes to the 2nd APPA to account for delays associated with the PSD permit for the RCEC Project. These limited changes do not change the fundamental purpose of the previously approved agreement - PG&E obtaining capacity and energy from the RCEC Project – but include a reduction in the capacity price and a one year extension to the expected initial delivery date. A matrix comparing the terms in the 1st Amendment to 2nd APPA to the corresponding terms in the 2nd APPA is attached hereto at Appendix C. A copy of the 1st Amendment to 2nd APPA is attached hereto at Appendix D.

## IV. A PETITION FOR MODIFICATION IS THE APPROPRIATE PROCEDURAL VEHICLE FOR OBTAINING COMMISSION APPROVAL OF CHANGES TO A PREVIOUSLY APPROVED PPA

Requesting approval of the 1st Amendment to the 2nd APPA through a petition for modification of D.09-04-010 is consistent with prior Commission practice. Specifically, in D.06-09-021, the Commission approved revisions to a previously approved ten-year PPA through the granting of a petition for modification. The case involved a ten-year PPA between San Diego Gas & Electric Company ("SDG&E") and Otay Mesa Energy Center, LLC, relating

[16] Thomas Declaration at ¶ 7
[17] Thomas Declaration at ¶ 13.
[18] Thomas Declaration at ¶¶ 14 and 15-18.

to a new 583 MW combined cycle, gas-fired power plant to be built in southern San Diego county (the "Otay Mesa Plant").[19]

Subsequent to Commission approval of the Otay Mesa PPA,[20] SDG&E and Calpine agreed to certain changes to the PPA, including a 16-month extension in the on-line date for the Otay Mesa Plant.[21] During the course of the negotiations with Calpine, SDG&E also held discussions with TURN, DRA and the Utility Consumers' Action Network ("UCAN"), who were also parties in the proceeding.[22] Upon conclusion of these discussions, SDG&E, TURN, DRA and UCAN filed a joint petition for modification requesting approval of the revised PPA.[23]

In D.06-09-021, the Commission granted the petition for modification and approved the revised Otay Mesa PPA, finding that the revised PPA would preserve and, in some cases increase, the benefits of the previously approved agreement:

> As discussed further below, the Revised PPA accomplishes the primary objectives of SDG&E which is to preserve and improve upon the terms of the original PPA and get a state-of-the-art generation facility built in its service territory.[24]

Similar to the Otay Mesa proceeding, PG&E and RCEC have agreed to amend the 2nd APPA as a means to preserve the benefits to be realized by customers from the RCEC Project and to better ensure the RCEC Project is built. As discussed below, TURN, DRA and CURE have reviewed and analyzed the 1st Amendment to 2nd APPA and support Commission approval.

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[19] OMEC is a wholly-owned indirect subsidiary of Calpine Corporation ("Calpine"). D.06-09-021, mimeo at 1.
[20] The Otay Mesa PPA was approved by the Commission in D.04-06-011 and then again de novo on rehearing in D.06-02-031.
[21] Other changes included "put" and "call" options which provided SDG&E with the opportunity to acquire the Otay Mesa Plant following the expiration of the PPA. D.06-09-021, mimeo at 2, 16 (Findings of Fact Nos. 7 and 8).
[22] D.06-09-021, mimeo at 4.
[23] D.06-09-021, mimeo at 4, 16 (Findings of Fact No. 9).
[24] D.06-09-021, mimeo at 4. The Otay Mesa Plant came on-line in October 2009. *See* http://www.energy.ca.gov/sitingcases/all_projects.html

## V. THE 1ST AMENDMENT TO 2ND APPA SHOULD BE APPROVED BECAUSE IT WILL PRESERVE THE BENEFITS OF THE 2ND APPA AT A SIGNIFICANTLY LOWER COST TO CUSTOMERS

Approval of the 1st Amendment to 2nd APPA is in the public interest because it will help ensure the addition of a new, efficient generation resource to PG&E's portfolio of resources at a price to customers that is *less* than the previously approved 2nd APPA.

In D.06-11-048, the Commission approved the Original PPA, finding that the 601 MW RCEC Project will help to meet the resource need identified in D.04-12-048.[25] Nevertheless, at several points during the course of the Commission's consideration of changes to the Original PPA, certain parties asserted that the need for the RCEC Project should be re-examined.[26] In D.09-04-010, the Commission found that the 2nd APPA should be approved because it was consistent with the essence of the Original PPA and preserved important benefits of the agreement.[27]

In rejecting the applications for rehearing of D.09-04-010, the Commission re-affirmed that the 2nd APPA did not change the essence of the Original PPA, "namely, the agreement by RCEC to provide PG&E energy capacity and energy from its 601 MW combined-cycle facility in Hayward for a 10-year term."[28] The 1st Amendment to 2nd APPA makes limited changes to the 2nd APPA that also preserve the fundamental purpose of the Original PPA and helps ensure that the benefits acknowledged by the Commission in D.06-11-048, D.09-04-010, and D.10-02-033 are realized at a lower cost to customers.

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[25] D.06-11-048, mimeo at 38 (Findings of Fact No. 6).

[26] *See e.g.*, Prehearing Conference Statement of CAlifornians for Renewable Energy, Inc, at 2 (Oct. 24, 2008); Motion to Seek Party Status by Group Petitioners at 1-2 (Dec. 11, 2008) ; Comments Contesting Settlement by CAlifornians for Renewable Energy, Inc. and Rob Simpson at 3 (Jan. 22, 2009) Group Petitioners Contest and Opposition to Joint Motion for Approval of Second Amended and Restated Power and Purchase Agreement at 6 (Jan. 22, 2009); Group Petitioners Comments and Objections to Proposed Decision of ALJ Darling Approving Settlement Agreement Regarding the Second Amended and Restated Power Purchase Agreement at 2-3 (Apr. 6, 2009).

[27] D.09-04-010, mimeo at 24.

In approving the 2nd APPA, the Commission found that, based on a comparative analysis that was independently reviewed by the Independent Evaluator, DRA and TURN, the 2nd APPA would be competitive with the short-listed bids in the 2008 LTRFO if it were bid into that RFO.[29] As addressed in the attached declarations, PG&E, DRA and TURN have each performed a comparative analysis of the 1st Amendment to 2nd APPA, and all have concluded that the 1st Amendment to 2nd APPA will result in reduced customer costs, is in the public interest, and should be approved.[30] Thus, the 1st Amendment to 2nd APPA will provide customers with the same benefits as the previously approved 2nd APPA but at a lower cost.

As was well documented in the underlying proceeding, the development of new generation facilities in California presents significant challenges.[31] Approval of the 1st Amendment to 2nd APPA represents a reasonable, viable and timely path for the addition of a new generation resource to PG&E's portfolio of resources. The RCEC Project is well-located to serve local area reliability needs and to provide PG&E with an operationally flexible and environmentally beneficial new generation resource. With a summer peak rating of 579 MW, the RCEC Project is a significant contributor to ensuring a reliable future for Californians. As discussed above, the Commission has already determined and reaffirmed on several occasions that the RCEC Project meets an identified resource need, and will provide PG&E with operational and environmental benefits.

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[28] D.10-02-033, mimeo at 5.

[29] D.09-04-010, mimeo at 17-18 ("PG&E submitted both its own side-by-side comparison of the 1st APPA and short-listed bids in PG&E's 2008 LTRFO, and a review of that comparison by an independent evaluator. The independent evaluator, Alan Taylor of Sedway Consulting, concluded that the pricing and economic characteristics of the 1st APPA were reasonably comparable to the economics of the short-listed offers in PG&E's 2008 LTRFO and compared favorably in overall ranking. DRA and TURN reviewed this comparative information and performed their own comparison of the 2nd APPA, taking into account all the evaluation criteria, and concluded RCEC would be competitive with the short-listed bids in the 2008 LTRFO if it were bid into that RFO."

[30] *See* Declaration of Charles E. Riedhauser in Support of Joint Petition attached hereto at Appendix E; Declaration of Joseph P. Como in Support of Joint Petition attached hereto at Appendix F; Declaration of Michel Peter Florio in Support of Joint Petition attached hereto at Appendix G.

In short, the 1st Amendment to 2nd APPA should be approved because it:

- makes limited changes to the 2nd APPA that are necessary to preserve the fundamental purpose and benefits of the previously approved agreement;
- reduces overall contractual costs for customers as compared to the previously approved 2nd APPA, resulting in substantial savings for customers over the term of the contract;
- helps satisfy an identified resource need in PG&E's service territory; and
- provides PG&E with an operationally flexible and environmentally beneficial new generation resource at a time when it is extremely difficult to develop new generation facilities in California.

When considered within the context of the existing record and previous Commission decisions approving the Original PPA and 2nd APPA, the 1st Amendment to 2nd APPA is justified and in the public interest because it reduces the cost to ratepayers, and should be approved.

## VI. THE COMMISSION SHOULD MODIFY THE COST RECOVERY CONSISTENT WITH SENATE BILL 695.

After D.09-04-010 was issued, SB 695 was enacted to allow for the limited re-opening of direct access. SB 695 also addresses the allocation of net capacity costs associated with new generation resources, such as the RCEC Project. In particular, under SB 695, which is now codified in Public Utilities Code section 365.1, the Legislature established a mechanism for the recovery of net capacity costs when the Commission approves:

> [A] contract with a third party, or orders, in the situation of utility-owned generation, an electrical corporation to obtain generation resources that the commission determines are needed to meet system or local area reliability needs for the benefit of all customers in the electrical corporation's distribution service territory, the net capacity costs of those generation resources are allocated on a fully nonbypassable basis consistent with departing load provisions as determined by the commission, to all of the following: (i) Bundled service customers of the electrical corporation. (ii) Customers that

[31] PG&E Testimony (PG&E-1), Chapter 1 at 1-2.

> purchase electricity through a direct transaction with other providers. (iii) Customers of community choice aggregators.[32]

SB 695 further provides that:

> The resource adequacy benefits of generation resources acquired by an electrical corporation pursuant to subparagraph (A) shall be allocated to all customers who pay their net capacity costs. Net capacity costs shall be determined by subtracting the energy and ancillary services value of the resource from the total costs paid by the electrical corporation pursuant to a contract with a third party or the annual revenue requirement for the resource if the electrical corporation directly owns the resource.[33]

The Joint Parties request as a part of this petition that D.09-04-010 be modified to implement SB 695 for the RCEC PPA. Specifically, the Commission should modify D.09-04-010 to provide that the determination of net capacity costs will be accomplished through a methodology approved by the Commission in D.07-09-044,[34] and allocate these costs to bundled, Community Choice Aggregation ("CCA") and direct access customers, as prescribed by SB 695. Further, "benefitting customers" will not only be allocated the net capacity costs, but they will also be allocated the Resource Adequacy ("RA") benefits associated with the RCEC Project. Thus, bundled, CCA and direct access customers will receive benefits because they will be allocated some of the valuable Local RA capacity associated with the RCEC Project. Specific language to implement SB 695 is included in Appendix A.

## VII. THE COMMISSION SHOULD ACT IN AN EXPEDITED MANNER

The Joint Parties request that the Commission consider this petition on an expedited basis to ensure the RCEC Project is timely put in-service. Given the identified need for the RCEC Project and in light of the existing record and previous Commission decisions approving the

[32] Pub. Util. Code sec. 365.1(c)(2)(A).

[33] *Id*., sec 365.1(c)(2)(B).

[34] D.07-09-044, Appendix A, Section IX (approving settlement that included stranded cost allocation methodology under to be used prior to an energy auction).

Original PPA and 2nd APPA, the Joint Parties believe expedited Commission action is reasonable, necessary and warranted.

## VIII. CONCLUSION

For the reasons discussed above, the Joint Parties request that D.09-04-010 be modified to approve 1st Amendment to 2nd APPA.

Respectfully submitted,

/s/


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Dated: April 15, 2010

# Appendix A

## Proposed Modifications to D.09-04-010

**Findings of Fact**

4. The 1st Amendment to the 2nd APPA is a revision of the 2nd APPA ~~original Power Purchase Agreement~~ executed by PG&E and RCEC that arose out of the PG&E's 2004 LTRFO process to acquire future capacity and ensure future reliability.

5. The Commission has previously determined the need for the project and ~~that~~ the 1st Amendment to the 2nd APPA will satisfy that new resource need.

6. PG&E and RCEC renegotiated the PPA because of unforeseen permit delays and unexpected cost increases which have delayed the RCEC project start and on-line dates by three ~~two~~ years.

7. An amendment to price from the original PPA and 2nd APPA is justified.

12. The 1st Amendment to the 2nd APPA provides an opportunity for PG&E's customers to receive 601 MW of power beginning in 2013.~~2012~~, ~~and PG&E elects to not use the CAM/Energy Auction for this resource.~~

**Conclusions of Law**

2. The 1st Amendment to the 2nd APPA should be approved.

**Ordering Paragraphs**

2. PG&E is authorized to recover costs associated with the 1st Amendment to the 2nd APPA through its Energy Resource Recovery Account. The Commission has determined that the RCEC Project is needed to meet system or local area reliability needs for the benefit of all customers in PG&E's distribution service territory, and thus the net capacity costs of the RCEC PPA are allocated on a fully nonbypassable basis to all of the following: (i) bundled service customers of the electrical corporation; (ii) customers that purchase electricity

through a direct transaction with other providers; (iii) customers of community choice aggregators (collectively "Benefitting Customers"). This ordering paragraph implements Public Utilities Code section 365.1(c)(2). The net capacity costs associated with the RCEC PPA will be determined by subtracting the Project Revenues from the Project Costs, where:

"Project Costs" include the following:

a. All actual unavoidable costs incurred by the utility for the Project (*e.g.*, capacity payments, the cost of posting collateral, if any, and the annual non-fuel revenue requirement for a utility-owned plant).

b. Imputed avoidable fuel costs calculated as the product of: (i) the quantity of natural gas that would be utilized by the Project, and (ii) the price of natural gas, (i) and (ii) being applicable for periods when the Project would recover its avoidable operating expenses from the day-ahead energy and/or ancillary services markets (*i.e.*, for periods when it would have been "economic" to "run" the Project, based on day-ahead prices).

   (1) For purposes of this calculation, the price of natural gas for each hour shall be the daily spot index price for the applicable day as reported by an established industry publication (*e.g.*, *Gas Daily* or *NGI*) for the trading point closest to delivery point of the Project plus any applicable Project gas transportation charges and Local Distribution Company (LDC) tariff charges.

   (2) The CAISO hourly day-ahead nodal price for the Project's "injection point" shall be utilized for energy.

c. Imputed avoidable non-fuel Project costs for all assumed dispatched energy from subsection (b) above. For example, if the Project requires a variable O&M charge of $2.00/MWh for delivered energy, the imputed avoidable non-fuel Project costs for a given hour would be the amount of energy assumed to have been dispatched times the $2.00/MWh variable O&M charge.

"Project Revenues" include the following:

a. The imputed day-ahead energy revenues for hours in which the Project is determined to have been economic to dispatch. The imputed energy revenues shall be calculated as the product of the: (i) the calculated energy assumed to be dispatched by the Project, and (ii) the CAISO hourly day-ahead nodal energy price for the Project's "injection point".

b. The imputed day-ahead ancillary services revenues. For hours in which it was determined that the Project would not have been economic to be scheduled in the day ahead energy market, an assessment of whether it would have been economic

to offer non-spinning reserves (assuming the Project provides such services) shall be performed using hourly CAISO day-ahead energy prices and natural gas prices described in the definition of "Project Costs" Item (b)(1) above and the CAISO published day-ahead non-spinning reserves price. The imputed day-ahead ancillary service revenue calculation shall be constrained by the amount of capacity available under the Project to be offered into non-spinning reserves market and any other relevant operating limitation (*e.g.*, minimum load requirements or maximum operating hours). The imputed day-ahead ancillary services revenues shall be calculated net of any calculated operating costs that would have to be incurred to offer ancillary services capacity (*e.g.*, start-up costs). The imputed day-ahead ancillary services revenues calculation will not assume real-time incremental dispatch of energy by the CAISO.

PG&E shall file an advice letter with the Commission implementing the above methodology for the RCEC Project six months prior to the proposed effective date of the Net Capacity Charge.

PG&E shall forecast the annual net capacity costs, which are defined above. This calculation shall be subject to an annual review and balancing account true-up. PG&E shall use the net cost forecast it has developed to establish an annual revenue requirement for all Benefiting Customers to recover the net capacity cost of the RCEC Project. All Benefiting Customers shall be charged monthly for their respective portion of the net capacity costs based on the established revenue requirement. System and local RA benefits associated with the RCEC Project will be allocated quarterly to load serving entities (LSEs) that serve Benefitting Customers based on each LSE's percentage of peak load. LSEs shall be notified in July of each year of the System and Local RA capacity they will be receiving for each month in the next calendar year.

## Appendix B

## Thomas Declaration

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

| | | |
|---|---|---|
| Application of Pacific Gas and Electric Company for Expedited Approval Of The Amended Power Purchase Agreement For The Russell City Energy Company Project | ) ) ) ) | A.08-09-007 (Filed September 10, 2008) |

**DECLARATION OF RICHARD L. THOMAS IN SUPPORT OF JOINT PETITION OF PACIFIC GAS AND ELECTRIC COMPANY, RUSSELL CITY ENERGY COMPANY, LLC, DIVISION OF RATEPAYER ADVOCATES, CALIFORNIA UNIONS FOR RELIABLE ENERGY, AND THE UTILITY REFORM NETWORK FOR MODIFICATION OF DECISION 09-04-010, AS MODIFIED BY DECISION 10-02-033**

I, Richard L. Thomas, declare:

1. I am a Vice-President for the Russell City Energy Company, LLC ("RCEC"). In this capacity, I am familiar with the process undertaken by RCEC to obtain a Prevention of Significant Deterioration ("PSD") permit from the Bay Area Air Quality Management District ("BAAQMD").
2. On November 1, 2007, the BAAQMD issued an amended PSD permit to RCEC under delegated authority from the Environmental Protection Agency ("EPA").
3. On January 3, 2008, an individual filed an appeal of the PSD permit with the Environmental Appeals Board ("EAB") of the EPA.
4. On July 29, 2008, the EAB issued a decision remanding the PSD permit to correct a procedural defect on the part of the BAAQMD related to federal "notice" requirements and ordering the BAAQMD to reissue the permit in compliance with such requirements.
5. On December 8, 2008, BAAQMD issued a Draft PSD permit for public comment in compliance with the EAB remand decision.

6. On December 23, 2008, Pacific Gas and Electric Company ("PG&E"), RCEC, Division of Ratepayer Advocates, California Unions for Reliable Energy, and The Utility Reform Network (collectively, "Joint Parties") filed a joint motion requesting California Public Utility Commission ("Commission") approval of the Second Amended and Restated Power Purchase and Sale Agreement by and between PG&E and RCEC ("2nd APPA").
7. Thus, at the time the Joint Parties requested Commission approval of the 2nd APPA, the Draft PSD permit had already been issued. Based on its experience, RCEC believed a Final PSD permit would be issued in time to allow RCEC to meet the expected initial delivery date in the 2nd APPA.
8. On January 21, 2009, BAAQMD held a public hearing on the Draft PSD permit and accepted public comments on the Draft PSD permit until February 6, 2009.
9. By Decision 09-04-010, issued on April 20, 2009, the Commission approved the 2nd APPA.
10. On April 24, 2009, EPA granted reconsideration of, and stayed a "grandfathering" provision concerning fine particulate matter, which BAAQMD had relied upon in its issuance of the Draft PSD permit.
11. On August 3, 2009, BAAQMD issued an Additional Statement of Basis and revised Draft PSD permit, addressing issues raised during the prior public comment period and resolving issues related to the EPA's stay of the grandfathering provision.
12. On September 2, 2009, BAAQMD held another public hearing on the revised Draft PSD permit and accepted public comments on the revised Draft PSD permit until September 16, 2009.

13. On February 3, 2010 - approximately 18 months after the EAB remand decision - BAAQMD issued a Final PSD permit for the RCEC project, along with a 235-page Responses to Public Comments. BAAQMD set the date for appeals to be filed with the EAB as March 22, 2010.
14. Between March 22, 2010 and March 24, 2010, the EAB received seven petitions appealing BAAQMD's issuance of the Final PSD permit.
15. On March 25, 2010, the EAB wrote to BAAQMD, requesting that BAAQMD file a response seeking summary disposition of any petition by April 8, 2010 and/or provide a response on the merits by April 23, 2010.
16. On April 8, 2010, BAAQMD sought summary disposition of four of the seven petitions.
17. On April 8, 2010, the EAB wrote to BAAQMD, informing BAAQMD that three additional petitions had been filed between April 1 and April 6, 2010 and requesting a response seeking summary disposition of these three petitions by April 23, 2010 and/or a response on the merits by May 10, 2010.
18. On April 14, 2010, the EAB ordered two petitioners to show cause for why their petitions should not be dismissed and, with respect to two other petitioners, denied BAAQMD's and RCEC's requests for summary dismissal, requesting responses on the merits to those two petitions, as well as to the orders to show cause, by April 23, 2010.
19. Given the unexpected length of time it took for BAAQMD to issue the Final PSD permit and the fact several parties have again appealed BAAQMD's issuance of the permit, it has become necessary to extend the expected initial delivery date in the 2nd APPA by one year.

I declare under the penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this 14th day of April, 2010, at Dublin, CA.

/s/

Richard L. Thomas

## Appendix C

## Comparison Matrix

Summary of Amended Terms and Conditions

| Reference | Second Amended and Restated PPA | First Amendment to the Second Amended and Restated PPA | Explanation of Amendment Change |
|---|---|---|---|
| 3.8(b) | Phrase “at the Electrical Delivery Point” | Replaced with “within the boundaries of the Site, adjusted to reflect actual physical delivery of Energy at the Electrical Delivery Point,” | Change made to reflect updated and actual plant configuration and design. |
| 4.3(a)(i) | (i) Capacity Payment Rate ("CPR") shall equal [redacted]; | (i) Capacity Payment Rate (“CPR”) shall equal [redacted]; | Reduction negotiated as part of the exchange for allowing certain extensions and other modifications requested by RCEC to the terms in the Second Amended and Restated PPA. |
| 5.1(a)(vi) | [redacted] | [redacted] | [redacted] |
| 5.1(a)(ix) | [redacted] | [redacted] | [redacted] |
| 5.1(a)(xiv) | [redacted] | [redacted] | [redacted] |

| Reference | Second Amended and Restated PPA | First Amendment to the Second Amended and Restated PPA | Explanation of Amendment Change |
|---|---|---|---|
| | | [redacted] | [redacted] |
| 5.2 | [redacted] | [redacted] | [redacted] |

| Reference | Second Amended and Restated PPA | First Amendment to the Second Amended and Restated PPA | Explanation of Amendment Change |
|---|---|---|---|
| | [redacted] | [redacted] | |
| 11.1(a)(iv) | [redacted] | [redacted] | [redacted] |

| Reference | Second Amended and Restated PPA | First Amendment to the Second Amended and Restated PPA | Explanation of Amendment Change |
|---|---|---|---|
| | [redacted] | [redacted] | |
| 11.1(a)(v) | [redacted] | (v) [intentionally omitted] | [redacted] |
| 11.1(a)(vi) | (vi) [intentionally left blank] | [redacted] | [redacted] |

| Reference | Second Amended and Restated PPA | First Amendment to the Second Amended and Restated PPA | Explanation of Amendment Change |
|---|---|---|---|
| | | [redacted] | |
| 11.1(a)(vii) | [redacted] | [redacted] | [redacted] |
| 11.2(b) | [redacted] | [redacted] | [redacted] |

| Reference | Second Amended and Restated PPA | First Amendment to the Second Amended and Restated PPA | Explanation of Amendment Change |
|---|---|---|---|
| | [redacted] | | |
| 11.2(c) | Critical Milestones. The Seller shall use commercially reasonable efforts to cause the development and construction of the Facility to meet each of the following milestones ("Critical Milestones") by the date set forth below (subject to Sections 11.2(d) and 11.5):<br><br>[redacted] | Critical Milestones. The Seller shall use commercially reasonable efforts to cause the development and construction of the Facility to meet each of the following milestones ("Critical Milestones") by the date set forth below (subject to Sections 11.2(d), 11.2(f) and 11.5):<br><br>(i) [intentionally omitted];<br><br>(ii) [intentionally omitted];<br><br>(iii) [intentionally omitted];<br><br>(iv) [intentionally omitted];<br><br>(v) [intentionally omitted];<br><br>[redacted] | The Critical Milestones were updated to reflect RCEC's current financing structure and the new development stages, including the new Expected Initial Delivery Date of June 1, 2013. |

| Reference | Second Amended and Restated PPA | First Amendment to the Second Amended and Restated PPA | Explanation of Amendment Change |
|---|---|---|---|
| | [redacted]<br><br>(xi) Expected Initial Delivery Date is June 1, 2012. | [redacted]<br><br>(xi) Expected Initial Delivery Date is June 1, 2013. | |
| 11.2(f) | | [redacted] | [redacted] |

| Reference | Second Amended and Restated PPA | First Amendment to the Second Amended and Restated PPA | Explanation of Amendment Change |
|---|---|---|---|
| | | [redacted] | [redacted] |
| 11.2(g) | | [redacted] | [redacted] |
| 11.3(a) | The Initial Delivery Date shall occur upon the date designated by Seller which shall be the first day of a month and shall not occur more than 30 days prior to the Expected Initial Delivery Date nor prior to the day on which each of the following conditions precedent have been satisfied or waived by written agreement of the Parties. | The Initial Delivery Date shall occur upon the date designated by Seller which shall not occur prior to May 1, 2013 nor prior to the day on which each of the following conditions precedent have been satisfied or waived by written agreement of the Parties. | The section was amended to reflect a one month limit on the date for an early Initial Delivery Date and to allow such date to be on a day other than the first day of the month. |

| Reference | Second Amended and Restated PPA | First Amendment to the Second Amended and Restated PPA | Explanation of Amendment Change |
|---|---|---|---|
| 11.4 | [redacted] | [redacted] | [redacted] |
| 11.5 | | [redacted] | [redacted] |
| 14.2(d)(ii) | [redacted] | [redacted] | [redacted] |

| Reference | Second Amended and Restated PPA | First Amendment to the Second Amended and Restated PPA | Explanation of Amendment Change |
|---|---|---|---|
| | [redacted] | [redacted] | |
| Appendix I - Definitions | | [redacted] | [redacted] |

| Reference | Second Amended and Restated PPA | First Amendment to the Second Amended and Restated PPA | Explanation of Amendment Change |
|---|---|---|---|
| | | [redacted] | [redacted] |
| Appendix XI – | | [redacted] | [redacted] |

| Reference | Second Amended and Restated PPA | First Amendment to the Second Amended and Restated PPA | Explanation of Amendment Change |
|---|---|---|---|
| Material Government Approvals | | [redacted] | [redacted] |
| | | | |

**Appendix D**

**Confidential**

**First Amendment to Second Amended & Restated PPA**

# Appendix E

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

| | | |
|---|---|---|
| Application of Pacific Gas and Electric Company for Expedited Approval Of The Amended Power Purchase Agreement For The Russell City Energy Company Project | ) ) ) ) | A.08-09-007 (Filed September 10, 2008) |

**DECLARATION OF CHARLES E. RIEDHAUSER IN SUPPORT OF JOINT PETITION OF PACIFIC GAS AND ELECTRIC COMPANY, RUSSELL CITY ENERGY COMPANY, LLC, DIVISION OF RATEPAYER ADVOCATES, CALIFORNIA UNIONS FOR RELIABLE ENERGY, AND THE UTILITY REFORM NETWORK FOR MODIFICATION OF DECISION 09-04-010, AS MODIFIED BY DECISION 10-02-033**

I, Charles E. Riedhauser, declare:

20. I am Director of Quantitative Analysis. I support energy procurement activities by leading contract valuation and portfolio analysis.

21. This declaration examines and illustrates the cost-effectiveness of the First Amendment to the Second Amended and Restated PPA (First Amendment) between Pacific Gas and Electric Company (PG&E or the Company) and Russell City Energy Company, LLC (RCEC). The First Amendment's market value is analyzed and compared to the Second Amended and Restated PPA (2d APPA). This comparison shows that the First Amendment is more cost-effective and provides ratepayer benefits.

22. The valuation of the First Amendment was developed using an approach similar to the approach that PG&E used in its 2008 LTRFO. The analysis calculates the benefits and costs of a resource from a market perspective. Benefits include energy, capacity, and ancillary services. Costs encompass fixed costs and variable costs. An option-based model is used to estimate the energy gross margin. The energy gross margin is the value of the energy produced minus costs for fuel and variable operation and maintenance (O&M). Market value is estimated as the mean of all benefits minus all costs, that is, energy gross margin plus capacity benefit plus ancillary service benefit minus fixed costs. Market value is reported in levelized dollars per kilowatt-year (kW-year) and in dollars of net present value. The higher the estimated market value for a resource, the more attractive the resource is from the perspective of customers, all else being equal. More details on the valuation approach

may be found in Section C.1 of Chapter 3 of the testimony supporting PG&E's 2008 LTRFO application (i.e., A.09-09-021).

23. Inputs to the option-based model include price information and the particulars of the First Amendment. Forward price curves for power and natural gas are based on market information available August 4, 2009. August 2009 forward price curves are used for consistency with the 2d APPA's prepared testimony. Forward curves have been adjusted to reflect the inclusion of a greenhouse gas (GHG) adder.

24. The representations of the First Amendment and the 2d APPA that were used for modeling purposes in the analysis provided below are identical except for the following:

    a. The 2d APPA is assumed to start in June 1, 2012 and run for 10 years while the First Amendment is assumed to start one year later and run for 10 years;

    b. [redacted]

The heat rates and capacities of the two PPAs are assumed to be identical but for the start date.

25. Market value and its components are reported in Table 1. The market value of the First Amendment is [redacted]. Table 1 below shows a comparison of the two PPAs in terms of levelized dollars per kW-year. The First Amendment entails significantly lower fixed annual payments than the 2d APPA, and also yields a higher capacity benefit. This result is due primarily to the fact that the capacity price of the First Amendment has decreased and the amendment requires the PPA to start one year later than the 2d APPA. (The benefit values in Table 1 and 2 provided below exclude the value of local Resource Adequacy.)

**TABLE 1**
**PACIFIC GAS AND ELECTRIC COMPANY**
**VALUATION RESULTS FOR RCEC FIRST AMENDMENT AND 2D APPA**
**(DOLLARS PER KW-YEAR, LEVELIZED)**

| Line No. | Item | 2D APPA | First Amendment |
|---|---|---|---|
| 1 | Benefits | | |
| 2 | Energy Gross Margins | [redacted] | [redacted] |
| 3 | Capacity Benefit (System RA) | [redacted] | [redacted] |
| 4 | Total Benefits | [redacted] | [redacted] |
| 5 | Costs | | |
| 6 | Contract Capacity Payments | [redacted] | [redacted] |
| 7 | Fixed O&M | | |
| 8 | Total Costs | [redacted] | [redacted] |
| 9 | Market Value | [redacted] | [redacted] |

Table 2 below compares the values of the two PPAs in present value terms discounted to August 4, 2009. This was the same date used for the 2008 LTRFO application. Based on the present values, the First Amendment provides a [redacted] reduction in net customer costs.

**TABLE 2**
**PACIFIC GAS AND ELECTRIC COMPANY**
**VALUATION RESULTS FOR RCEC FIRST AMENDMENT AND 2D APPA**
**($ MILLIONS, DISCOUNTED TO JANUARY 1, 2009)**

| Line No. | Item | 2D APPA | First Amendment |
|---|---|---|---|
| 1 | Benefits | | |
| 2 | Energy Gross Margins | [redacted] | [redacted] |
| 3 | Capacity Benefit (System RA) | [redacted] | [redacted] |
| 4 | Total Benefits | [redacted] | [redacted] |
| 5 | Costs | | |
| 6 | Contract Capacity Payments | [redacted] | [redacted] |
| 7 | Fixed O&M | | |
| 8 | Total Costs | [redacted] | [redacted] |
| 9 | Market Value (Without Local RA) | [redacted] | [redacted] |

In conclusion, the First Amendment entails lower net customer costs than the 2d APPA and so represents improved value for PG&E's customers.

I declare under the penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this _____ day of April, 2010, at _____

_____/s/_____
**CHARLES E. RIEDHAUSER**

# Appendix F

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

| | | |
|---|---|---|
| Application of Pacific Gas and Electric Company for Expedited Approval Of The Amended Power Purchase Agreement For The Russell City Energy Company Project | ) ) ) ) | A.08-09-007 (Filed September 10, 2008) |

**DECLARATION OF JOSEPH P. COMO IN SUPPORT OF JOINT PETITION OF PACIFIC GAS AND ELECTRIC COMPANY, RUSSELL CITY ENERGY COMPANY, LLC, DIVISION OF RATEPAYER ADVOCATES, CALIFORNIA UNIONS FOR RELIABLE ENERGY, AND THE UTILITY REFORM NETWORK FOR MODIFICATION OF DECISION 09-04-010, AS MODIFIED BY DECISION 10-02-033**

I, Joseph P. Como, declare:

27. I am an attorney for the Division of Ratepayer Advocates].

28. In A.08-09-007, Pacific Gas and Electric Company ("PG&E") provided testimony comparing the Amended and Restated Power Purchase and Sale Agreement by and between PG&E and the Russell City Energy Company, LLC ("RCEC") ("1st APPA") to other bids received in PG&E's 2008 long-term request for offers ("LT RFO") and had an independent consultant verify RCEC's stated cost increases.[35]

29. As stated in Decision ("D.") 09-04-010, the Division of Ratepayer Advocates ("DRA") reviewed the comparative information between the 1st APPA and the short-listed bids in PG&E's 2008 LTRFO with the 2nd APPA, taking into account all the evaluation criteria, and concluded that RCEC would be competitive with the short-listed bids in the 2008 LTRFO if it were bid into that RFO.

30. DRA has reviewed the First Amendment to the 2nd APPA ("1st Amendment to 2nd APPA"), including in particular the adjustments to the capacity price and expected initial delivery date.

31. The 1st Amendment to 2nd APPA will reduce the capacity price relative to the 2nd APPA, resulting in significant savings for customers over the term of the contract.

[35] PG&E-2, Attachment 1-1 and Attachment 1-2.

32. Based on DRA's knowledge of the existing record in this proceeding, and its review and analysis of the 1st Amendment to 2nd APPA, DRA has concluded that the 1st Amendment to 2nd APPA is in the public interest and should be approved.

I declare under the penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this 14th day of April, 2010, at San Francisco, CA.

_____/s/_____
Joseph P. Como

# Appendix G

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

| | |
|---|---|
| Application of Pacific Gas and Electric Company for Expedited Approval Of The Amended Power Purchase Agreement For The Russell City Energy Company Project | A.08-09-007<br>(Filed September 10, 2008) |

**DECLARATION OF MICHEL PETER FLORIO IN SUPPORT OF JOINT PETITION OF PACIFIC GAS AND ELECTRIC COMPANY, RUSSELL CITY ENERGY COMPANY, LLC, DIVISION OF RATEPAYER ADVOCATES, CALIFORNIA UNIONS FOR RELIABLE ENERGY, AND THE UTILITY REFORM NETWORK FOR MODIFICATION OF DECISION 09-04-010, AS MODIFIED BY DECISION 10-02-033**

I, Michel Peter Florio, declare:

1. I am Senior Attorney for The Utility Reform Network and have served as TURN's primary representative throughout this proceeding.
2. In A.08-09-007, Pacific Gas and Electric Company ("PG&E") provided testimony comparing the Amended and Restated Power Purchase and Sale Agreement by and between PG&E and the Russell City Energy Company, LLC ("RCEC") ("1st APPA") to other bids received in PG&E's 2008 long-term request for offers ("LTRFO") and had an independent consultant verify RCEC's stated cost increases.[36/]
3. As stated in Decision ("D.") 09-04-010, The Utility Reform Network ("TURN") reviewed the comparative information between the 1st APPA and the short-listed bids in PG&E's 2008 LTRFO with the Second Amended and Restated Power Purchase and Sale Agreement ("2nd APPA"), taking into account all the evaluation criteria, and concluded that the 2nd APPA would be competitive with the short-listed bids in PG&E's 2008 LT RFO if it were bid into that RFO.[37/]
4. TURN has reviewed the First Amendment to the 2nd APPA ("1st Amendment to 2nd APPA"), including in particular the adjustments to the capacity price and expected initial delivery date.
5. The 1st Amendment to 2nd APPA will reduce the capacity price relative to the 2nd APPA, resulting in significant savings for customers over the term of the contract.

[36]/ PG&E-2, Attachment 1-1 and Attachment 1-2.
[37]/ D.09-04-010, mimeo at 18.

6. Based on TURN's knowledge of the existing record in this proceeding, and its review and analysis of the 1st Amendment to 2nd APPA, TURN has concluded that the 1st Amendment to 2nd APPA is in the public interest and should be approved.

I declare under the penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed this 14th day of April, 2010, at San Francisco, California.

/s/
Michel Peter Florio

CERTIFICATE OF SERVICE
BY ELECTRONIC MAIL, U.S. MAIL, OR HAND DELIVERY

I, the undersigned, state that I am a citizen of the United States and am employed in the City and County of San Francisco; that I am over the age of eighteen (18) years and not a party to the within cause; and that my business address is Pacific Gas and Electric Company, Law Department B30A, 77 Beale Street, San Francisco, CA 94105.

I am readily familiar with the business practice of Pacific Gas and Electric Company for collection and processing of correspondence for mailing with the United States Postal Service. In the ordinary course of business, correspondence is deposited with the United States Postal Service the same day it is submitted for mailing.

On the 20th day of April, 2010, I caused to be served a true copy of:

**JOINT PETITION OF PACIFIC GAS AND ELECTRIC COMPANY, RUSSELL CITY ENERGY COMPANY, LLC, DIVISION OF RATEPAYER ADVOCATES, CALIFORNIA UNIONS FOR RELIABLE ENERGY, AND THE UTILITY REFORM NETWORK FOR MODIFICATION OF DECISION 09-04-010, AS MODIFIED BY DECISION 10-02-033 (PUBLIC VERSION)**

**[XX]** By Electronic Mail – by electronic mail on the official service lists for A08-09-007, who have provided an e-mail address.

**[XX]** By U.S. Mail – by U.S. mail on the official service lists for A08-09-007, who have not provided an e-mail address.

**[ ]** By hand delivery to the following:

I certify and declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on the 20th day of April, 2010.

/s/
Sharon E. Mortz

# THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA
# EMAIL SERVICE LIST

Last updated: April 15, 2010

## CPUC DOCKET NO. A0809007

abb@eslawfirm.com;ALR4@pge.com;bcragg@goodinmacbride.com;californiadockets@pacificorp.com;cce@cpuc.ca.gov;cec@cpuc.ca.gov;cem@newsdata.com;centralfiles@semprautilities.com;CentralFiles@semprautilities.com;crmd@pge.com;dbp@cpuc.ca.gov;dcarroll@downeybrand.com;Diane.Fellman@nrgenergy.com;dmarcus2@sbcglobal.net;dws@r-c-s-inc.com;ELL5@pge.com;glw@eslawfirm.com;hayley@turn.org;jdh@eslawfirm.com;jeffgray@dwt.com;jewellhargleroad@mac.com;jjj@cpuc.ca.gov;jluckhardt@downeybrand.com;kdw@woodruff-expert-services.com;kerry.hattevik@nrgenergy.com;LauckhartR@bv.com;liddell@energyattorney.com;martinhomec@gmail.com;md2@cpuc.ca.gov;mdjoseph@adamsbroadwell.com;mflorio@turn.org;mjd@cpuc.ca.gov;mjh@cpuc.ca.gov;mrw@mrwassoc.com;mwt@cpuc.ca.gov;MWZ1@pge.com;regrelcpuccases@pge.com;rob@redwoodrob.com;sarveybob@aol.com;Sean.Beatty@mirant.com;ska@cpuc.ca.gov;tnhc@pge.com;unc@cpuc.ca.gov;wkeilani@semprautilities.com;

# Exhibit 47

# RUSSELL CITY
(2 x 2 x 1) - COMBINED CYCLE

| DESCRIPTION | | 2009 Jun -15 | Jul -14 | Aug -13 | Sep -12 | Oct -11 | Nov -10 | Dec -9 | 2010 Jan -8 | Feb -7 | Mar -6 | Apr -5 | May -4 | Jun -3 | Jul -2 | Aug -1 | Sep 1 | Oct 2 | Nov 3 | Dec 4 | 2011 Jan 5 | Feb 6 | Mar 7 | Apr 8 | May 9 | Jun 10 | Jul 11 | Aug 12 | Sep 13 | Oct 14 | Nov 15 | Dec 16 | 2012 Jan 17 | Feb 18 | Mar 19 | Apr 20 | May 21 | Jun 22 | Jul 23 | Aug 24 | Sep 25 | Oct 26 | Nov 27 | Dec 28 | 2013 Jan 29 | Feb 30 | Mar 31 | Apr 32 | May 33 | Jun 34 |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| **OWNER MILESTONE DATES** | | | | | | | | | | | | | | | | | NTP | | | | | | | | | | | | | DEL CTG #2 | | | | | | | | | | | | | | | | | | | | | |
| | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | DEL CTG #1 | | | | | | | | | | | | | | | | | | | | | |
| | | | | | | | | | | | | | | | | | COMPLETE DEMOLITION AND REMEDIATION 3rd PARTY VERIFY SITE CLEANLINESS | | | | | | | | | | | | | | DEL STG | | | | | | | | | | | | | | | | | | | | | |
| **PROJECT MILESTONE DATES** | | | | | | | | | | | | | | | | EARTHWORK MOBILIZATION | | | | | | | | | | | | | | | | | | | | | | | | | | | | MECHANICAL COMPLETION | | | | | |
| | | | | | | | | | | | | | | | | | START DETAILED ENGINEERING | | | | | | | | | | | | | | DEL 1ST MOD Unit | | | | | | | | | | | | FIRST FIRE #1 | | TARGET COMPLETE | | | |
| | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | DEL 1ST MOD Unit | | | | | | | | | | | | TR | | | | | |
| | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | FIRST FIRE #2 | | SCHEDULED SUBSTANTIAL CMPLT 1-May-13 | | | |
| GEOTECH / SITE SURVEY/ EARTHWORK | 1 | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | |
| PILING | 2 | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | |
| UNDERGROUND UTILITIES | 3 | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | |
| CIRC WATER PIPE | 4 | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | |
| HRSG FOUNDATIONS | 5 | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | |
| HRSG #2 | 6 | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | |
| HRSG #1 | 7 | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | |
| CTG FOUNDATIONS | 8 | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | |
| CTG #2 (Purchased by Owner) | 9 | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | |
| CTG #1 (Purchased by Owner) | 10 | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | |
| STG FOUNDATIONS | 11 | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | |
| STG (Purchased by Owner) | 12 | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | |
| CONDENSER | 13 | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | |
| MECHANICAL EQUIPMENT (BFP/CWP) | 14 | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | |
| WATER TREATMENT FOUNDATIONS | 15 | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | |
| WATER TREATMENT (RWF/ZLD) | 16 | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | |
| COOLING TOWER | 17 | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | |
| STRUCTURAL STEEL | 18 | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | |
| PIPING & INSTRUMENTATION | 19 | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | |
| ELECTRICAL EQUIPMENT | 20 | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | |
| RACEWAY & CABLE | 21 | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | |
| SWITCHYARD | 22 | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | |
| MAIN TRANSFORMERS | 23 | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | |
| STARTUP / COMMISSIONING | 24 | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | |

STEEL #2 #1 — 1ST MOD — ERECT HRSG #2 — HYDRO — CLEAN — STEAM BLOW & RESTORE

STEEL #1 — 1ST MOD — ERECT HRSG #1 — HYDRO — CLEAN & RESTORE — STEAM BLOW

#2 #1 — COMPLETE MISC CONCRETE

SITE — INSTALL CTG #2 — TEST FIRE

SITE — INSTALL CTG #1 — TEST FIRE

STG — INSTALL STG — C/O — TURNING GEAR

ENERGIZE — TR — FINE TUNE & TEST — CHECKOUT

LEGEND:
- SCHEDULE MILESTONE EVENT
- ACTIVITY NODE
- P.O OR SUBCONTRACT AWARD
- RELEASE FOR FABRICATION
- SITE DELIVERY
- SCHEDULED ACTIVITY
- INTERMITTENT ACTIVITY
- CRITICAL / NEAR CRITICAL

PROGRESS/PCST — DATA DATE

ABBREVIATIONS:

| | |
|---|---|
| BEA | BID, EVALUATE, AWARD |
| BFP | BOILER FEEWATER PUMP |
| CTG | COMBUSTION TURBINE GENERATOR |
| CPT | COMPLETE |
| CWP | CIRCULATING WATER PUMP |
| DEL | DELIVER |
| FAB | FABRICATE |
| FDN | FOUNDATION |
| FREP | FORM, REBAR, EMBEDS, PLACE |
| HRSG | HEAT RECOVERY STEAM GENERATOR |
| NTP | NOTICE TO PROCEED |
| RFE | RELEASE FOR ENGINEERING |
| RFF | RELEASE FOR FABRICATION |
| RWF | RAW WATER FILTRATION |
| SPEC | SPECIFICATION |
| STG | STEAM TURBINE GENERATOR |
| SWGR | SWITCHGEAR |
| TR | TURBINE ROLL |
| U/G | UNDERGROUND |
| VI | VENDOR INFORMATION |
| ZLD | ZERO LIQUID DISCHARGE |

MAJOR EQUIPMENT BASIS:
- CTG: Siemens 501FD
- STG: GENERAL ELECTRIC
- HRSG: TBD

| F NO. | 01/06/10 DATE | ISSUED FOR REVIEW REVISION | EGK CHKD |
|---|---|---|---|

BECHTEL
FREDERICK, MD

RUSSELL CITY
CALIFORNIA, USA
(2 x 2 x 1) - COMBINED CYCLE

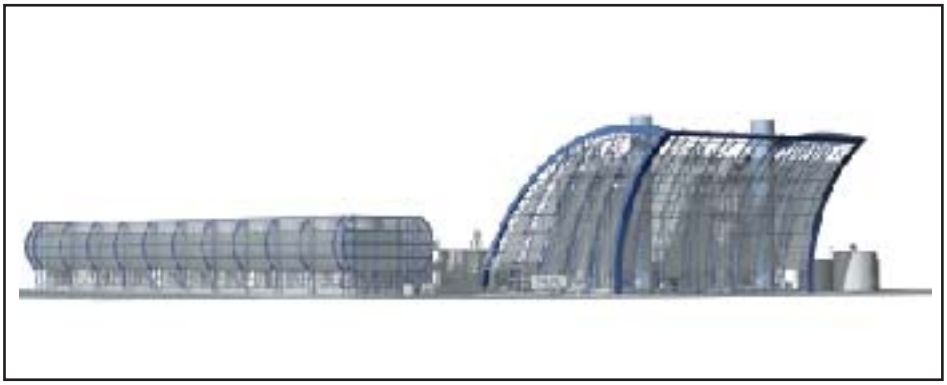
| JOB NO. | SCHEDULE NUMBER | REV. |
|---|---|---|
| 25483-001 | SCH-001 | F |

# Exhibit 48

CALIFORNIA
ENERGY
COMMISSION

# RUSSELL CITY ENERGY CENTER

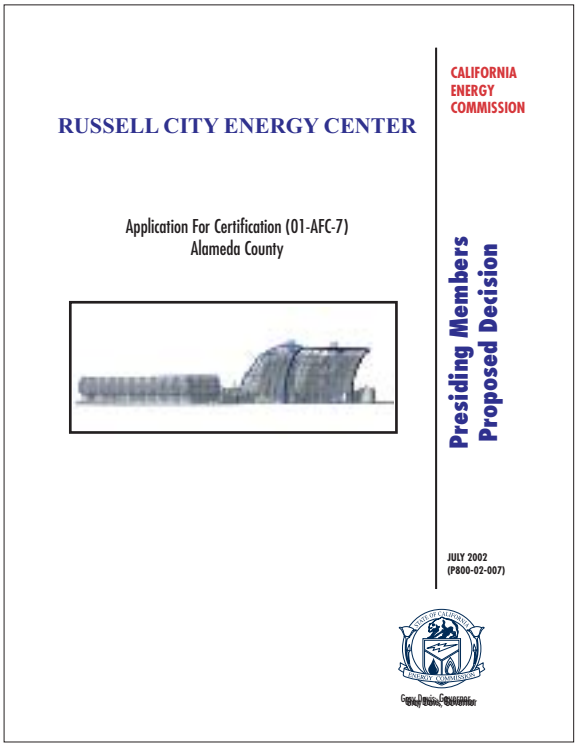
## Application For Certification (01-AFC-7)
## Alameda County



## Commission Decision

JULY 2002
(P800-02-007)

Gray Davis, Governor




# CALIFORNIA ENERGY COMMISSION

1516 9th Street
Sacramento, CA 95814
*www.energy ca.gov/sitingcases/russell city*

WILLIAM J. KEESE
*Chairman* and *Presiding Member*

ROBERT PERNELL
*Commissioner and Associate Member*

GARY FAY
*Hearing Officer*

**BEFORE THE ENERGY RESOURCES CONSERVATION AND DEVELOPMENT COMMISSION OF THE STATE OF CALIFORNIA**

| | |
|---|---|
| **In the Matter of:**<br><br>**Application for Certification for the the Russell City Energy Center** | **Docket No. 01-AFC-7**<br>(AFC Accepted 7/11/01)<br><br>**Order No.** 02-0911-02 |

## COMMISSION ADOPTION ORDER

This Commission Order adopts the Commission Decision on the Calpine Russell City Energy Center Project. It incorporates the Presiding Member's Proposed Decision (PMPD) in the above-captioned matter and the Committee Errata issued on September 5,2002. The Commission Decision is based upon the evidentiary record of these proceedings (Docket No. 01-AFC-7) and considers the comments received at the September 11, 2002 business meeting. The text of the attached Commission Decision contains a summary of the proceedings, the evidence presented, and the rationale for the findings reached and Conditions imposed.

This ORDER adopts by reference the text, Conditions of Certification, Compliance Verifications, and Appendices contained in the Commission Decision. It also adopts specific requirements contained in the Commission Decision which ensure that the proposed facility will be designed, sited, and operated in a manner to protect environmental quality, to assure public health and safety, and to operate in a safe and reliable manner.

## FINDINGS

The Commission hereby adopts the following findings in addition to those contained in the accompanying text:

1. The Russell City Energy Center is a merchant power plant whose capital costs will not be borne by the State's electricity ratepayers.

2. The Conditions of Certification contained in the accompanying text, if implemented by the Applicant, ensure that the project will be designed, sited, and operated in conformity with applicable local, regional, state, and federal laws, ordinances, regulations, and standards, including applicable public health and safety standards, and air and water quality standards.

3. Implementation of the Conditions of Certification contained in the accompanying text will ensure protection of environmental quality and assure reasonably safe and reliable operation of the facility. The Conditions of Certification also assure that the project will neither result in,

nor contribute substantially to, any significant direct, indirect, or cumulative adverse environmental impacts.

4. Existing governmental land use restrictions are sufficient to adequately control population density in the area surrounding the facility and may be reasonably expected to ensure public health and safety.

5. The evidence of record establishes that no feasible alternatives to the project, as described during these proceedings, exist which would reduce or eliminate any significant environmental impacts of the mitigated project.

6. The evidence of the record does not establish the existence of any environmentally superior alternative site.

7. The Decision contains measures to ensure that the planned, temporary, or unexpected closure of the project will occur in conformance with applicable laws, ordinances, regulations, and standards.

8. The proceedings leading to this Decision have been conducted in conformity with the applicable provisions of Commission regulations governing the consideration of an Application for Certification and thereby meet the requirements of Public Resources Code, sections 21000 et. seq., and 25500 et. seq.

## ORDER

Therefore, the Commission ORDERS the following:

1. The Application for Certification of the Calpine Corporation, Russell City Energy Center, as described in this Decision, is hereby approved and a certificate to construct and operate the project is hereby granted.

2. The approval of the Application for Certification is subject to the timely performance of the Conditions of Certification and Compliance Verifications enumerated in the accompanying text and Appendices. The Conditions and Compliance Verifications are integrated with this Decision and are not severable therefrom. While Applicant may delegate the performance of a Condition or Verification, the duty to ensure adequate performance of a Condition or Verification may not be delegated.

3. This Decision is final, issued, and effective within the meanings of Public Resources Code sections 25531 and 25901, as well as 20 Cal. Code of Regs. section 1720.4, when voted upon by the Commission. Anyone seeking judicial review of the Decision must file a Petition for Review with the California Supreme Court no later than thirty (30) days from September 11, 2002.

4. For purposes of reconsideration pursuant to Public Resources Code section 25530 and 20 Cal. Code of Regs. section 1720(a), this Decision is adopted when it is filed with the Commission's Docket Unit. Anyone seeking reconsideration of this Decision must file a petition for reconsideration no later than thirty (30) days from the date the Decision is docketed. The filing of a petition for reconsideration does not extend the 30 day period for seeking judicial review mentioned above, which begins on September 11, 2002.

5. The Commission hereby adopts the Conditions of Certification, Compliance Verifications, and associated dispute resolution procedures as part of this Decision in order to implement the compliance monitoring program required by Public Resources Code section 25532. All conditions in this Decision take effect immediately upon adoption and apply to all construction and site preparation activities including, but not limited to, ground disturbance, site preparation, and permanent structure construction.

6. The Executive Director of the Commission shall transmit a copy of this Decision and appropriate accompanying documents as provided by Public Resources Code section 25537 and California Code of Regulations, title 20, section 1768.

Dated: September 11, 2002

ENERGY RESOURCES CONSERVATION
AND DEVELOPMENT COMMISSION

WILLIAM J. KEESE
Chairman

ROBERT PERNELL
Commissioner

ARTHUR H. ROSENFELD, Ph.D.
Commissioner

JAMES D. BOYD
Commissioner

JOHN L. GEESMAN
Commissioner

# Exhibit 49

*Amendment*

# Russell City Energy Center

**Hayward, California**

**(01-AFC-7)**

# Amendment No. 1

Submitted to

**California Energy Commission**

Submitted by

**Russell City Energy Company, LLC**

With Technical Assistance by


2485 Natomas Park Drive
Sacramento, California 95833

November 2006

# Executive Summary

Russell City Energy Center, LLC, as project owner, petitions the California Energy Commission (CEC or Commission) to amend the certification for the Russell City Energy Center (RCEC) (01-AFC-7, issued September 11, 2002). This Amendment has several components:

- Moving the project facilities approximately 1,300 feet north and west of the location described in the Application for Certification (AFC) (300 feet boundary to boundary)
- Adding a Zero Liquid Discharge facility, significantly reducing wastewater discharge and slightly reducing recycled water use
- Adding a Title 22 Recycled Water Facility
- Removing the Advanced Water Treatment facility
- Removing the Standby Generator
- Relocating a small portion (approximately 500 to 1,000 feet) of the transmission line route from the RCEC to Pacific Gas and Electric Company's (PG&E) Grant-Eastshore existing transmission corridor (use of the existing PG&E transmission corridor remains unchanged)
- A new natural gas pipeline route that will run entirely in Depot Road
- New construction laydown and added worker parking areas in close proximity to the site

Section 1.0 provides an overview of the Amendment and a review of the ownership of the project, the necessity for the proposed change, and the consistency of the changes with the Commission Decision certifying the facility. Section 2.0 provides a complete description of the proposed modifications, including updated drawings. Section 3.0 assesses the potential environmental effects of the proposed changes in terms of 14 environmental discipline areas. This assessment indicates that adoption of the Amendment will not result in any significant, unmitigated adverse environmental impacts. Similarly, the project as amended will continue to comply with all applicable laws, ordinances, regulations and standards. The findings and conclusions contained in the September 11, 2002 Commission Decision granting certification of the RCEC are still applicable to the project, as amended. A few of the Conditions of Certification in the Commission Decision require minor revisions to reflect the proposed project changes. For the sections affected, a proposed markup of the Conditions of Certification is included.

The project owner has entered into a Letter of Intent with PG&E to enter into a long-term Power Purchase Agreement (PPA), and is prepared to begin construction on a schedule to support the commercial operation date of June 1, 2010 as soon as all regulatory approvals are complete. Similarly, because the project owner proposes to construct an energy center

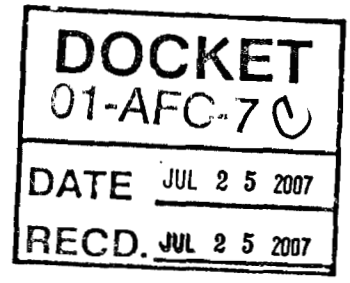
with superior environmental performance at an already certified site, timely review of this Amendment by the Commission is requested.

Unlike many merchant power plants in the California market, this project will enter into a long-term PPA to secure the financing needed to fund construction. Financing cannot be secured until all regulatory approvals are complete. Construction must begin in spring 2008 in order to meet the summer loads of Northern California in 2010. Therefore, in order to complete financing and engineering prior to the start of construction, the Applicant requests a Commission determination on this Amendment no later the June 2007.

# Exhibit 50

STATE OF CALIFORNIA

Energy Resources Conservation
and Development Commission




| | | |
|---|---|---|
| In the Matter of: | ) | |
| | ) | Docket No. 01-AFC-7C |
| Amendment to the Application for Certification of the Russell City Energy Center Project | ) | |

**PETITION FOR EXTENSION OF DEADLINE FOR COMMENCEMENT OF CONSTRUCTION FOR THE RUSSELL CITY ENERGY CENTER**

ELLISON, SCHNEIDER & HARRIS L.L.P.
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Attorneys for Russell City Energy Company, LLC

STATE OF CALIFORNIA

Energy Resources Conservation
and Development Commission

| | | |
|---|---|---|
| In the Matter of: | ) | |
| | ) | Docket No. 01-AFC-7C |
| Amendment to the Application for Certification of the Russell City Energy Center Project | ) | |

**PETITION FOR EXTENSION OF DEADLINE FOR COMMENCEMENT OF CONSTRUCTION FOR THE RUSSELL CITY ENERGY CENTER**

1. Pursuant to Section 1720.3 of the California Energy Commission's Rules of Practice and Procedure Russell City Energy Company, LLC ("Project Owner") requests a one year extension of the deadline for the commencement of construction of the Russell City Energy Center. The Commission Decision for the Russell City Energy Center was adopted on September 11, 2002. The current deadline for commencement of construction is September 10, 2007. The Project Owner requests an extension of the deadline for commencement of construction for the Russell City Energy Center to September 10, 2008.

2. The requested extension is necessary because the Project Owner will not be able to commence construction by September 10, 2007. Prior to commencing construction, the following three steps must be completed: (1) The Project Owner must receive a decision from the Commission approving Amendment #1, (2) PG&E must secure a Certificate of Public Convenience and Necessity ("CPCN") for construction of the transmission line that will connect the Russell City Energy Center to PG&E's

transmission system, and (3) the Project Owner must complete financing of the Project. These steps will not be completed by September 10, 2007, but are likely to be completed in the last quarter of 2007. The Project Owner anticipates commencement of construction in the first quarter of 2008.

3. The Project Owner filed Amendment #1 on November 17, 2006. The Project Owner has sought to process this Amendment as expeditiously as possible, to provide all information requested by Staff on or before the dates specified by Staff and, wherever possible, to resolve disputed issues by compromise and thereby avoid adjudication. However, due to circumstances beyond the Project Owner's control, there were substantial delays in completion of the Staff Assessment. As a result of these delays, the Staff Assessment that was originally scheduled for release on February 20, 2007, was not completed until July 2, 2007.

4. A decision on Amendment #1 is expected in the near future. Evidentiary hearings have been completed and the matter is submitted for decision without the need for post-hearing briefs. The decision on Amendment #1 will update and revise, where necessary, all of the conditions set forth in the original licensing decision. Once a decision is issued on the Amendment, PG&E will immediately apply for a CPCN. Once the CPCN is approved, project financing will be promptly completed.

5. The Project Owner has entered into a long-term Power Purchase Agreement with PG&E and will commence construction on a schedule to support the commercial operation date of June 1, 2010. Extension of the deadline for commencement of construction to September 10, 2008 is in the public interest because it

will allow the Russell City Energy Center to be completed and to provide a vital new source of clean, reliable electricity in the region.

6. Therefore, for good cause shown, the Project Owner requests that the Commission extend the deadline for commencement of construction of the Russell City Energy Center to September 10, 2008.

July 25, 2007

Respectfully submitted,

ELLISON, SCHNEIDER & HARRIS L.L.P.

By _____

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Attorneys for Russell City Energy Company, LLC

STATE OF CALIFORNIA

Energy Resources Conservation
and Development Commission

| | | |
|---|---|---|
| In the Matter of: | ) | |
| | ) | Docket No. 01-AFC-7C |
| Amendment to the Application for Certification of the Russell City Energy Center Project | ) | |

**PROOF OF SERVICE**

I, Ron O'Connor, declare that on July 25, 2007, I deposited copies of the attached *Petition for Extension of Deadline for Commencement of Construction for the Russell City Energy Center* in the United States mail in Sacramento, California, with first-class postage thereon fully prepaid and addressed to all parties on the attached service list.

I declare under the penalty of perjury that the foregoing is true and correct.

Ron O'Connor

**SERVICE LIST**
**01-AFC-7C**

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Folsom, CA 95630

Marianna Isaacs, Admin. Mgr.
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Doug Davy
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Parker Ventures, LLC
c/o Reneon & Roberts
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Paul N. Haavik
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# Exhibit 51

CALIFORNIA ENERGY COMMISSION
1516 NINTH STREET
SACRAMENTO, CA 95814-5512



**STATE OF CALIFORNIA**
**ENERGY RESOURCES CONSERVATION**
**AND DEVELOPMENT COMMISSION**

| | | |
|---|---|---|
| In the Matter of:<br>RUSSELL CITY ENERGY CENTER | )<br>) | Docket No. 01-AFC-7C |
| | ) | Order No. 07-0829-5 |
| | ) | ORDER APPROVING Extension |
| | ) | of the Deadline for Commencement |
| | ) | Construction |

On July 25, 2007, Russell City Energy Company, LLC, filed a petition to extend the deadline for the commencement of construction of the Russell City Energy Center, located in Hayward, California. Petitioner requests an extension of one year, from September 10, 2007, to September 10, 2008. The deadline, set by regulation, is otherwise five years from the effective date of the Energy Commission's decision, but an applicant, before the deadline, may request and the Commission may order an extension for good cause. (Cal. Code Regs., tit. 20, § 1720.3.)

This matter was heard at the regularly scheduled Business Meeting held on August 29, 2007, at which time staff and petitioner addressed the Commission. Staff had no objections to extending the deadline and recommended approval of petitioner's request based on the reasons stated in the petition.

Through its petition and these proceedings, petitioner Russell City Energy Company, LLC asserted that this extension is necessary because the project owner will not be able to commence construction by September 10, 2007 due to three steps needing first to be completed: 1) Energy Commission's approval of the proposed amendment to relocate the project, 2) Public Utility Commission approval of PG&E's application to construct a transmission line for the project and 3) project financing. No other person offered comments.

## CONCLUSION AND ORDER

There being no objection and good cause having been shown by petitioner, the California Energy Commission hereby grants the petition to extend the start of construction of the Russell City Energy Center from September 10, 2007, to September 10, 2008.

IT IS SO ORDERED.

Date: August 29, 2007

STATE OF CALIFORNIA
ENERGY RESOURCES CONSERVATION
AND DEVELOPMENT COMMISSION

JACKALYNE PFANNENSTIEL, Chairman

# Exhibit 52

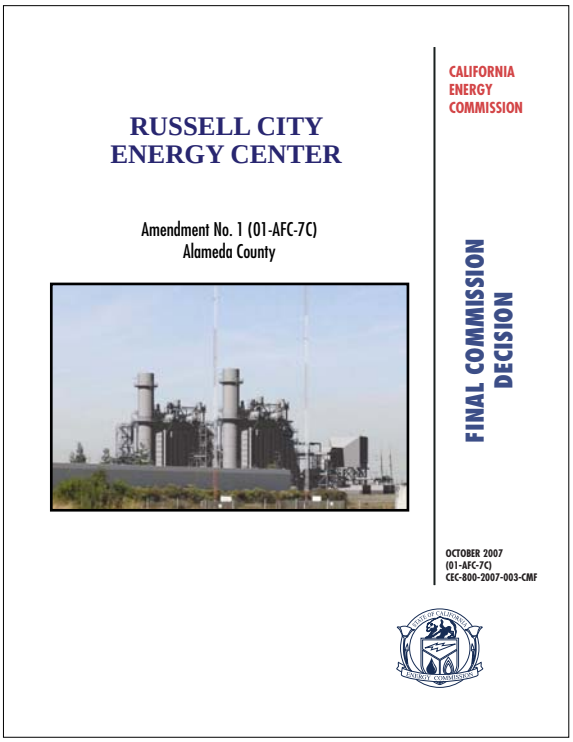
CALIFORNIA
ENERGY
COMMISSION

# RUSSELL CITY ENERGY CENTER

Amendment No. 1 (01-AFC-7C)
Alameda County

FINAL COMMISSION DECISION

OCTOBER 2007
(01-AFC-7C)
CEC-800-2007-003-CMF




# CALIFORNIA ENERGY COMMISSION

1516 9th Street
Sacramento, CA 95814
*www.energy.ca.gov/sitingcases/russellcity_ammendment/index.html*

JOHN L. GEESMAN
*Chair, Presiding Member*

JEFFREY D. BYRON
*Commissioner, Committee Member*

PAUL KRAMER
*Hearing Officer*

***COMMISSIONERS-***

JACKALYNE PFANNENSTIEL
*Chair*

JAMES D. BOYD
*Vice Chair*

ARTHUR H. ROSENFELD, Ph. D.
*Commissioner*

**BEFORE THE ENERGY RESOURCES CONSERVATION AND DEVELOPMENT COMMISSION OF THE STATE OF CALIFORNIA**

**IN THE MATTER OF:**

**PETITION TO AMEND THE COMMISSION DECISION APPROVING THE APPLICATION FOR CERTIFICATION FOR THE *RUSSELL CITY ENERGY CENTER***

**DOCKET NO. 01-AFC-7C**

**Order No. 07-0926-04**

## COMMISSION ADOPTION ORDER

This Commission Order adopts the Commission Decision on the ***RUSSELL CITY ENERGY CENTER Amendment No. 1***. The Commission Decision is based upon the evidentiary record of these proceedings (Docket No. 01-AFC-7C) and considers the comments received at the September 12, 2007, business meeting. The text of the attached Commission Decision contains a summary of the proceedings, the evidence presented, and the rationale for the findings reached and Conditions imposed.

This **ORDER** adopts by reference the text, Conditions of Certification, Compliance Verifications, and Appendices contained in the Commission Decision, which is compiled from the Presiding Member's Proposed Decision, modified by the Errata and Revisions to the Presiding Member's Proposed Decision dated and including the further modifications to Condition of Certification **TRANS-10** proposed by the September 25, 2007 letter from William C. Withycombe, FAA Regional Administrator, to James Adams (Exhibit 110). It also adopts specific requirements contained in the Commission Decision which ensure that the proposed facility will be designed, sited, and operated in a manner to protect environmental quality, to assure public health and safety, and to operate in a safe and reliable manner.

## FINDINGS

The Commission hereby adopts the following findings in addition to those contained in the accompanying text:

1. The petition meets all the filing criteria of Title 20, California Code of Regulations, section 1769(a), concerning post-certification project modifications;

2. The project will remain in compliance with all applicable laws, ordinances, regulations, and standards; and

3. There will be no unmitigated significant environmental impacts associated with the proposed modification. Pursuant to the Global Warming Solutions Act of 2006 (AB32), the adoption of measures to mitigate greenhouse gas emissions from the project is within the responsibility and jurisdiction of the California Air Resources Board; the ARB can and should adopt appropriate standards and requirements for greenhouse gas emissions.

## ORDER

Therefore, the Commission **ORDERS** the following:

1. The Petition to Amend the ***RUSSELL CITY ENERGY CENTER*** project as described in this Decision, including the two alternative transmission lines connecting the project site to the PG&E Eastshore Substation, is hereby approved and an amended certificate to construct and operate the project is hereby granted.

2. The amended certificate is subject to the timely performance of the Conditions of Certification and Compliance Verifications enumerated in the accompanying text and Appendices. The Conditions and Compliance Verifications are integrated with this Decision and are not severable therefrom. While the project owner may delegate the performance of a Condition or Verification, the duty to ensure adequate performance of a Condition or Verification may not be delegated.

3. The Commission hereby adopts the Conditions of Certification, Compliance Verifications, and associated dispute resolution procedures as part of this Decision in order to implement the compliance monitoring program required by Public Resources Code section 25532. All conditions in this Decision take effect immediately upon adoption and apply to all construction and site preparation activities including, but not limited to, ground disturbance, site preparation, and permanent structure construction.

4. This Decision is adopted, issued, effective, and final on September 26, 2007.

5. Reconsideration of this Decision is governed by Public Resources Code, section 25530.

///

///

6. Judicial review of this Decision is governed by Public Resources Code, section 25531.

Dated September 26, 2007, at Sacramento, California.

**JACKALYNE PFANNENSTIEL**
**Chairman**

-absent-
**JAMES D. BOYD**
**Vice Chair**

**JOHN L. GEESMAN**
**Commissioner**

**ARTHUR H. ROSENFELD**
**Commissioner**

**JEFFREY D. BYRON**
**Commissioner**

# Exhibit 53

CALIFORNIA ENERGY RESOURCES
CONSERVATION AND DEVELOPMENT COMMISSION

| | | |
|---|---|---|
| Amendment to the Application for Certification of the Russell City Energy Center Project | ) | Docket No. 01-AFC-7C |

**ORDER DENYING PETITIONS FOR INTERVENTION AND DENYING PETITIONS FOR RECONSIDERATION, ETC.**
November 7, 2007



Introduction and Summary

In this Order we deny the petitions for intervention and reconsideration recently filed by the County of Alameda ("County"), the Chabot-Las Positas Community College District ("Chabot"), and the Group Petitioners (the California Pilots Association, Citizens for Alternative Transportation Systems, San Lorenzo Homeowners Association, Skywest Townhouse Homeowners Association, Hayward Democratic Club, and Hayward Area Planning Association). We deny the petitions for intervention because they were filed months past the legal deadline for such petitions (as all petitioners acknowledge), and because no good cause for the delay has been shown. As a result, none of the petitioners are "parties" to the proceeding. Therefore, we must also summarily deny their petitions for reconsideration (and for reopening, etc.), because such petitions may be filed only by parties. Moreover, even had the reconsideration petitions been properly filed, we would deny them. This is because the substantive grounds upon which reconsideration is sought are legally inadequate, and because some of those grounds were not raised during the proceeding, which also makes them ineligible to be heard upon reconsideration.

Most of the issues raised in the reconsideration petitions, and all issues raised in the intervention petitions, concern the adequacy of the notice of the proceeding provided by the Commission to the petitioners. In fact, notice was extensive and more than legally adequate.

Because we are denying all of the petitions for reconsideration that have been filed in this proceeding, the Commission's decision approving the amendment to the Russell City Energy Project certificate, and thereby approving the modification to the Project, remains unchanged in all respects and effective as of the date we adopted it, September 26, 2007.

Procedural History

On May 22, 2001, an Application for Certification ("AFC") for the Russell City Energy Center ("RCEC") Project was filed at the Commission. The Project is a 600-megawatt, natural-gas-fired, combined cycle powerplant to be located in the "Industrial Corridor" of the City of Hayward, which is in the County of Alameda. After a thorough, 14-month review of the proposed Project, in which Alameda County participated, in July 2002 we approved a 244-page Decision certifying the RCEC Project. The Decision contains hundreds of Conditions of Certification designed to ensure that the project will conform with all applicable laws and will not cause any significant adverse environmental impacts. Every condition requested by Alameda County was included in the Decision. No one sought judicial review.

After certification, the RCEC Project did not proceed to construction, because the project owner was unable to obtain financing. However, when the Project was selected by Pacific Gas & Electric for future electricity purchases, through the California Public Utilities Commission's Request for Offer process, the project became financially viable – if it could begin operations no later than June 2010.

On November 17, 2006, the RCEC owner filed a petition to amend the AFC Decision and to modify the Project by moving the facility about 1300 feet northwest of the location described in the current certificate – but still within the same industrial area – and for ancillary changes. The change in location avoids two important effects of the project as originally certified – the destruction of a small fresh-water marsh, and the relocation of a radio tower adjacent to a shorelands park – and thereby eliminates the need for the expensive mitigation required by our original Decision. (The new location was analyzed during the original AFC proceeding but it was unavailable for purchase at that time.)

Although the RCEC amendment proceeding nominally dealt only with a relatively minor modification to a previously-approved project, in its breadth and depth the case closely resembled a full-blown AFC proceeding. After carefully considering all applicable environmental, health, safety, and other issues, on September 26, 2007, we issued a Final Decision granting the amendment to the certificate and approving the modification of the project.

In late October 2007, the three petitions for reconsideration (which also asked for re-opening of the record and similar relief) were timely filed. Correctly recognizing that reconsideration petitions can be filed at the Commission only by "parties" that have intervened in the underlying siting proceeding, and acknowledging that they are not "parties," the reconsideration petitioners simultaneously filed petitions to intervene.

Public Notice

For the RCEC amendment, the Commission provided the same type of thorough public notice that it does for certification proceedings, even though such notice is not required for amendment proceedings. Less than two weeks after the amendment petition was filed, the Commission sent a Request for Agency Participation in the Review of the RCEC Project and a Notice of Informational Hearing and Site Visit to all agencies that had participated in the RCEC AFC proceeding, and any other agency identified as having a potential interest. This included the City of Hayward and no less than seven departments within the government of Alameda County.[1] (When the amendment petition was filed, the project site was partly within the City of Hayward and partly within an unincorporated part of Alameda County. During the amendment proceeding, the County and the City agreed on and implemented the City's annexation of the previously-unincorporated land.)

The Commission also provided written notice of the amendment petition to all property owners within 1,000 feet of the project site or 500 feet of the proposed natural gas pipeline, or the proposed electric transmission line associated with the project. To ensure that all of the people potentially most affected by the Project would be informed, before the first informational hearing and site visit the Public Adviser conducted outreach to sensitive receptors in the area such as local schools, daycare centers, elder care facilities, and nonprofit organizations (youth sports associations, outdoor interest groups, children's organizations, and the like).

In addition, the Commission established a public website for the RCEC amendment proceeding, upon which were posted all notices and orders issued in the proceeding and all of the major documents filed by participants. The website included a detailed written guide to public participation in the siting process, including specific instructions on how and when to file a Petition to Intervene. Information about the project was also posted on the websites of the City of Hayward and of Assemblywoman Mary Hayashi, whose district includes the project site.

Public notice activities continued throughout the entire proceeding. Thus every person or entity on any one (or more) of the Commission's three RCEC mailing lists received paper notice of all events, whether or not the person or entity was a formal party in the proceeding. The "interested agency" list included roughly 30 local, regional, state, and federal agencies, including two Alameda County departments (the

[1] The seven departments are the Department of Agriculture, Department of Environmental Health, Hazardous Materials Team, County Assessor, County Auditor, Department of Public Works, and County Sheriff's Department. The County Mosquito Abatement District also received notice.

Hazardous Materials Office and the Department of Public Works). The "general list" included more than 80 citizens, several interested businesses, and agencies that were not on the "interested agency" list – including seven Alameda County departments. Finally, the "property owner" list included 129 names of entities or persons owning property adjacent to or near the RCEC project. And in addition to the paper mailing lists, the Commission used an e-mail list to provide, to 260 public citizens and agency employees, all documents filed in the case.

As the proceeding progressed, the Commission staff held publicly noticed workshops in the community on such issues as air quality, public health, hazardous materials use, land use, and aviation safety. Subsequently, the Commission held publicly noticed evidentiary hearings on a wide range of issues, and a hearing to take comment on the proposed decision, at Hayward City Hall.

In addition to the Commission's extensive public notification and outreach, the RCEC amendment proceeding received frequent media coverage in local outlets such as the *Oakland Tribune*, the *TriValley Herald*, the *San Jose Mercury-News*, the *Contra Costa Times*, and KPFA radio. Informal meetings and discussions were held throughout the project area, for example at Chabot College.

Describing the results of all this activity, Michael Monasmith of the Public Adviser's Office reported to the Commission that "there's been the highest degree of public involvement that I've experienced in my four years with the Commission, with these two cases."

Legal Framework

Reconsideration of Commission decisions is available only in facility siting proceedings, and then only upon the motion of the Commission itself or upon "petition of any *party*." (Pub. Resources Code, § 25530 [emphasis added]; see also Cal. Code Regs., tit. 20, § 1720, subd. (a).) Apart from the applicant and the Commission Staff, the only "parties" in siting proceedings are those "person[s] who ha[ve] been granted leave to intervene . . . ." (Cal. Code Regs., tit. 20, § 1702, subds. (i)-(j).) In the RCEC amendment proceeding, there was only one intervenor (and thus only one "party" other than the applicant and the Staff): an interested local citizen, Paul Haavik.

Because the reconsideration petitioners knew that they were not parties and therefore could not petition for reconsideration, they submitted petitions for intervention. In siting cases, the Commission's regulations establish a deadline for intervention petitions that is related to the first hearing (or the prehearing conference) (Cal. Code Regs., tit. 20, § 1207, subd. (b)); late petitions may be granted "only upon a showing of good cause by the petitioner" (*id.* § 1207, subd. (c)).

The deadline for intervention petitions in the RCEC amendment proceeding was July 3, 2007. Obviously, the three intervention petitions at issue here were filed well after the deadline. Therefore, they can be granted only if we find that the petitioners have demonstrated "good cause" for missing the deadline (and that they meet the other legal criteria for intervention). And only if we grant an intervention petition (and thereby confer "party" status on the petitioner) may we even consider that entity's reconsideration petition, for only "parties" may file reconsideration petitions.

## I. THE PETITIONS FOR INTERVENTION.

All three petitioners assert that the "good cause" for not filing their intervention petitions on a timely basis is that they did not receive adequate notice of the RCEC amendment petition in sufficient time to allow them to file.[2] Yet the record very clearly shows that all three petitioners had (1) no legal right to notice, (2) notice from the Commission at the beginning of the proceeding, or (3) actual knowledge of the proceeding in plenty of time to file punctually, or some combination thereof. Therefore, no good cause exists for any petitioner's failure to meet the filing deadline, and we must deny each intervention petition.

### A. Alameda County.

Alameda County admits that the Commission sent notice to seven of its departments very early in the proceeding, but the County asserts that the notice was inadequate because (1) notice was not directed to the County Development Agency ("CDA"), the County's Airport Land Use Commission ("ALUC"), or the Board of Supervisors; and (2) the initial notice erroneously referred to the project site as being located entirely within the City of Hayward. (The actual location was partially within unincorporated County land and partially within the City of Hayward – which is itself entirely within the County.) Both rationales are specious.

The County cites no legal authority for the proposition that notice to one County department (or seven County departments) with interest in a Commission proceeding does not constitute notice to the County itself. Such a principle would elevate form quite unreasonably far over substance. In any event, the Board of Supervisors, and the CDA and the ALUC, actually knew about the RCEC Project well before the deadline

[2] It is unclear from the Warren-Alquist Act and our regulations whether (1) the notice requirements for siting proceedings are applicable to amendment cases, (2) reconsideration is available in amendment cases, and (3) intervention is available at the reconsideration stage. We will assume, without deciding, that the answer to each question is Yes.

for intervention petitions, and all three had detailed knowledge about the site location and its relationship to the boundaries of the County and the City of Hayward.

On December 19, 2006 – only a month after the amendment application had been filed at the Commission, but more than six months before the intervention deadline of July 3, 2007 – the Board approved an agreement concerning the RCEC Project site (the agreement is generally referred to as the "Mount Eden Agreement"). The Agreement was executed by the Board itself, the County Redevelopment Agency (which is part of the CDA), and the City of Hayward, and it dealt with the City's annexation of the previously-unincorporated County land and the division of the property tax revenues from the site among the three entities after construction of the RCEC. Among other things, the Agreement obligated the City of Hayward to "use diligent good faith efforts" to secure the licensing of the facility so that the revenues for both the County and the City would be increased. A cover memorandum urging the Board to approve the Agreement was provided by the Executive Director of the CDA, James E. Sorensen.

The Mount Eden Agreement flatly contradicts Mr. Sorensen's claims, both in his personal appearance at the Commission on September 12, 2007, and in his sworn declaration supporting the County's petitions for intervention and reconsideration, that he and his staff were confused about where the project was located because the Commission's notice indicated that the location was the City of Hayward, and that but for this "false impression" the County would have participated more vigorously. Moreover, if a false impression that the project was entirely within the City of Hayward justified the County's failure to intervene before the annexation, then the same "impression," which is now true as a result of the annexation, indicates that the County has no interest justifying intervention at this time.

Finally, several County representatives participated actively in the Commission's RCEC proceeding. As early as February 6, 2007, for example, an employee wearing both CDA and ALUC hats participated in a public workshop, and she and other County representatives participated throughout the case.

In sum, the notion that the County did not receive adequate notice, and that its participation in the RCEC amendment proceeding was thereby somehow compromised, is false. The County has shown no good cause for its failure to intervene on time, and its petition is denied.

**B. Chabot.**

Chabot asserts that it was entitled to notice under section 1714 of the Commission's regulations. Not so. The provision requires the Commission to provide notice to various specified agencies, and to any other agency that would have

jurisdiction over an electricity facility but for the Commission's exclusive "one-stop" siting authority. (Cal. Code Regs., tit. 20, § 1714, subd. (c).) Chabot is not such an agency. It is, then, in the exact same position legally as all other individuals and entities that might have an interest in a project that requires a government permit in their locale. In such proceedings (or in any other kind of administrative proceeding), there is no requirement that the licensing agency provide direct notice to every person and organization in the area (however that area might be defined), which often, as here, will include literally millions of individuals. Many, many intervenors in Commission proceedings have become informed of projects in their vicinity without direct notice. Chabot has no legal claim to special treatment here.

Moreover, Chabot College, one of the two colleges that make up the Chabot-Las Positas District, received direct notice from the Commission, and at least one community (non-Commission) meeting concerning the Project was held there. This certainly appears sufficient to have informed the District itself. The District's petition to intervene is denied.

### C. Group Petitioners.

As is the case for Chabot, the Group Petitioners were not legally entitled to notice from the Commission. Furthermore, several members of petitioners had actual knowledge of the proceeding and participated in it from its early stages. For example, the California Pilots Association received regular communications from the Commission Staff and testified at hearings. Mr. Toth and Mr. Wilson, declarants for the Group Petitioners, have been following the case since February 2007 and have spoken at workshops and hearings. And the Citizens for Alternative Transportation Systems was represented by counsel during the case. Thus the Group Petitioners had months during which they could have intervened in a timely manner. No good cause exists for their failure to do so, and their petition is denied.

## II. THE PETITIONS FOR RECONSIDERATION.

Because the petitions for intervention are denied, the petitioners do not have party status, so they are not entitled to file petitions for reconsideration. The latter petitions are, therefore, summarily denied. Moreover, reconsideration petitions "must fully explain why the matters set forth could not have been considered" during the proceeding. (Cal. Code Regs., tit. 20, § 1720, subd. (a).) Because none of the reconsideration petitions did so, we would be required to deny those petitions even if they had been filed by parties.[3] Nevertheless, we briefly set forth some observations on

[3] All three reconsideration petitioners argue that they could not have raised their issues during the proceeding because of lack of notice. We have thoroughly dealt with those

the major substantive arguments they present.

Conformance with LORS. Group Petitioners argue that the RCEC Project does not conform with local or regional laws, ordinances, regulations, or standards. No evidence is offered to support the argument, and it is directly refuted by the reams of evidence in the record that support the Commission's findings of conformance. The City of Hayward, the local agency within whose territory the Project now exclusively lies, supports those findings.

CEQA Issues. Group Petitioners and Chabot argue, without supporting evidence, that the RCEC will cause unmitigated significant adverse environmental impacts. The Decision is rife with requirements for mitigation that will avoid all impacts or reduce them to insignificant levels. Group Petitioners also argue that the Commission's siting process is inconsistent with CEQA in that it is more formal that the procedures required by CEQA. Nothing in CEQA prevents an agency from crafting its own procedures, as long as CEQA's minimums are met. Moreover, CEQA's procedural requirements (as opposed to its substantive criteria) are not applicable to the Commission, which operates under a certified regulatory program. (See Cal. Code Regs., tit. 14, §§ 15250, 15251, subd.(j).) In addition, many of the requirements in the Commission's siting process are necessary to adhere to the provisions in the State Administrative Procedure Act on quasi-adjudicatory proceedings.

Air Quality. Group Petitioners argue that the methodology used for calculating air emissions and mitigation is flawed. This argument is based solely on the declaration of Michael Toth, who has no air quality or modeling expertise, and who failed to raise all but one of his methodology issues at the evidentiary hearing in which he participated. The one issue he did raise was directly addressed by the Staff's witness. Group Petitioners also contend, incorrectly, that the project does not use best available control technology ("BACT"). The Bay Area Air quality Management District ("BAAQMD") determined that the RCEC will use BACT, as is required by law.

Aviation Safety. Group Petitioners point out that the ALUC has recently asserted that NOTAM alerts (restriction of airspace) "are not mitigation." ALUC's advisory opinion is not legally binding. Moreover, it would not be entitled to any more weight (even had it been timely) than the considerable body of evidence in the record, including that presented by the Federal Aviation Administration ("FAA"), which supported a NOTAM requirement as one of several measures to reduce what it concluded was "acceptable risk." The County claims that it did not have adequate time to respond to

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claims in Part I. of this Order. The County's argument concerning the Commission's alleged failure to delay the final decision is essentially a repetition of the County's notice argument, and nothing more needs to be said about it here.

the FAA's most recent presentation (at the September 26 hearing), but no one objected to the introduction of the FAA's evidence at that time, and it is too late for the County to raise an objection now. In any event, the County's ALUC, which appears to be the County department with expertise in the matter, participated throughout the proceeding, so the County has no cause for complaint.

The Amendment Process. Group Petitioners assert that the Commission should have processed the RCEC amendment as a full-blown AFC and that the Commission must find that amendments are "needed." It is far too late to object to the Commission's decision, made almost a year ago, that the minor location change qualified as an amendment. In any event, the combination of the consideration of the new location in the original AFC proceeding, and the quasi-AFC treatment of the new location in the amendment proceeding, ensured that examination of the current RCEC has been exhaustive and certainly as extensive as is required by law. With regard to "need," there is no "need" requirement in AFC proceedings and therefore none in amendment cases.

Conclusion

The petitions for intervention are denied because no good cause for their tardiness was shown. Because none of the petitioners are parties, their petitions for reconsideration must be, and are, summarily denied. In addition, the allegations in the reconsideration petitions fall short of substantive and procedural legal requirements. In light of these conclusions and the discussion above, we need not address other issues raised by petitioners or the responding parties.

November 7, 2007

ENERGY RESOURCES CONSERVATION AND DEVELOPMENT COMMISSION

JACKALYNE PFANNENSTIEL
Chairman

JAMES D. BOYD
Vice Chair

ARTHUR H. ROSENFELD, Ph.D.
Commissioner

JOHN L. GEESMAN
Commissioner

[absent]
JEFFREY D. BYRON
Commissioner

**BEFORE THE ENERGY RESOURCES CONSERVATION AND DEVELOPMENT COMMISSION OF THE STATE OF CALIFORNIA**

**Amendment to the APPLICATION FOR CERTIFICATION OF THE RUSSELL ENERGY CENTER POWER PLANT PROJECT**

**Docket No. 01-AFC-7C**
**PROOF OF SERVICE**
**(Revised 7/6/07)**

**INSTRUCTIONS: All parties shall 1) send an original signed document plus 12 copies OR 2) mail one original signed copy AND e-mail the document to the web address below, AND 3) all parties shall also send a printed OR electronic copy of the documents that shall include a proof of service declaration to each of the individuals on the proof of service:**

**CALIFORNIA ENERGY COMMISSION**
**Attn: Docket No. 01-AFC-7C**
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**docket@energy.state.ca.us**

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## DECLARATION OF SERVICE

I, Lynn Tien-Tran, declare that on November 13, 2007, I deposited copies of the attached ORDER DENYING PETITIONS FOR INTERVENTION AND DENYING PETITIONS FOR RECONSIDERATION, ETC. November 7, 2007 to the Russell City Energy POS List in the United States mail at Sacramento, California with first-class postage thereon fully prepaid and addressed to those identified on the Proof of Service list above.

***OR***

Transmitted via facsimile transmission to those identified above with a Fax number.

***OR***

Transmission via electronic mail was consistent with the requirements of California Code of Regulations, title 20, sections 1209, 1209.5, and 1210. All electronic copies were sent to all those identified on the Proof of Service list above.

I declare under penalty of perjury that the foregoing is true and correct.

*Lynn Tien-Tran*

# Exhibit 54

CALIFORNIA ENERGY COMMISSION

1516 NINTH STREET

**STATE OF CALIFORNIA**
**ENERGY RESOURCES CONSERVATION**
**AND DEVELOPMENT COMMISSION**



| | | |
|---|---|---|
| **In the Matter of:** | ) | |
| **Russell City Energy Center Project** | ) | **Docket No. 01-AFC-7C** |
| | ) | |
| **Russell City Energy Company, LLC** | ) | **Order No.** 08-730-3 |
| | ) | **ORDER APPROVING** a Petition to Extend |
| | ) | the Deadline for Commencement of |
| | ) | Construction |

On May 30, 2008, Russell City Energy Company, LLC, filed a petition to extend the deadline for the commencement of construction of the Russell City Energy Center (RCEC), located in Hayward, California. Petitioner requests an extension of two years, from September 10, 2008, to September 10, 2010. The deadline, set by regulation, is otherwise five years from the effective date of the Energy Commission's final decision on the application for certification. An applicant, before the deadline, may request and the Commission may order an extension for good cause. (Cal. Code Regs., tit. 20, § 1720.3.)

This matter was heard at the regularly scheduled Business Meeting held on July 30, 2008, at which time staff and petitioner addressed the Commission. Staff had no objections to extending the deadline as requested, and recommended approval of petitioner's request to extend the deadline to commence construction based on the reasons stated in the petition.

Through its petition and these proceedings, petitioner Russell City Energy Company, LLC asserts that this extension is necessary because the project owner will not be able to complete project financing and commence construction by September 10, 2008. The project owner's inability to commence construction is due to multiple past appeals related to the Commission's decision and a pending appeal of the project's PSD permit, a federal air permit, at the Environmental Appeals Board of the U.S. Environmental Protection Agency.

The Commission received several public comments protesting the extension, but there was no evidence refuting the petitioner's statements and reasons supporting its request for the extension.

**CONCLUSION AND ORDER**

Good cause having been shown by the petitioner, the California Energy Commission hereby grants the petition to extend the start of construction of the Russell City Energy Center from September 10, 2008, to September 10, 2010.

**IT IS SO ORDERED.**

Date: July 30, 2008

STATE OF CALIFORNIA
ENERGY RESOURCES CONSERVATION
AND DEVELOPMENT COMMISSION

JAMES D. BOYD, Vice Chair

# Exhibit 55

STATE OF CALIFORNIA
ENERGY RESOURCES CONSERVATION AND DEVELOPMENT COMMISSION

| | | |
|---|---|---|
| Amendment to the Application for Certification of the Russell City Energy Center Project | ) ) ) ) | Docket No. 01-AFC-7C<br>Order No. 08-924-06 |



# ORDER DENYING PETITIONS FOR RECONSIDERATION CONCERNING EXTENSION OF CONSTRUCTION DEADLINE

## I. Introduction and Summary

On July 30, 2008, the Energy Commission extended the previously-established one-year deadline for the start of construction of the Russell City Energy Center ("RCEC"), by approving an additional two years for construction to be commenced. (Docket No. 01-AFC-7C, Order No. 08-730-3 (July 30, 2008).) On August 27, 2008, petitions for reconsideration ("Petitions") of that decision were filed by two groups of interested persons: (1) Rob Simpson ("Simpson"), Californians for Renewable Energy ("CARE"), Hayward Area Planning Association, and Citizens Against Pollution ("the Simpson Petition"); and (2) CARE and Simpson ("the CARE Petition"). On September 3, 2008, we invited responses to the Petitions, and several were submitted. On September 24, 2008, we heard arguments at the Commission's regularly-scheduled Business Meeting. In this Order we deny both Petitions.

## II. Legal Criteria

The Warren-Alquist Act and the Commission's regulations allow any party in a power facility proceeding to file a petition for reconsideration of a decision or order. (Pub. Resources Code, § 25530; Cal. Code Regs., tit. 20, § 1720, subd. (a).) A petition for reconsideration must specifically set forth either (1) new evidence that despite the diligence of the petitioner could not have been produced during evidentiary hearings on the case; or (2) a demonstration that the decision being challenged contains an error in fact or law, or that there has been a change in applicable law. (*Id.*, § 1720, subd. (a).)

The Commission must grant or deny a petition for reconsideration within 30 days of its filing. (*Id.*, § 1720, subd. (b).) If the Commission does not grant the petition, the original determination stands. If the Commission grants the petition, that does not mean that the original decision is changed; rather, it simply means that the Commission then holds a subsequent hearing (which may include the taking of evidence), within 90 days, to consider whether to change the original determination. (*Id.*, § 1720, subds. (b)-(c).)

## III. Standing of the Petitioners

As we noted above, the law allows a "party" in a power facility proceeding to file a petition for reconsideration. The Project Owner asserts that none of the petitioners are "parties," and, indeed, that achieving "party" status is legally possible only in notice of intention ("NOI") or application for certification ("AFC") proceedings, and not in a proceeding such as the instant one. Because we are denying the Petitions, we need not resolve that matter here. Instead, we will assume, without deciding, that the Petitions are properly before us.

## IV. The Petitions

### A. The CARE Petition

The CARE Petition does not indicate the name or address of the person submitting it, in violation of our regulations. (Cal. Code Regs., § 1209, subd. (b)(4).) For that reason alone we reject the Petition. Moreover, it raises no issues that are not also raised in the Simpson Petition, and our discussion of those issues, below, is applicable to both Petitions.

### B. The Simpson Petition

The Simpson Petition appears to assert that:

(1) the Commission's deadline-extension decision failed to take appropriate account of the U.S. Environmental Appeals Board's ("EAB") recent remand of the project's Prevention of Significant Deterioration ("PSD") permit to the Bay Area Air Quality Management District ("BAAQMD");

(2) the Commission improperly noticed the July 30, 2008 hearing at which we granted the deadline extension;

(3) the alleged loss by the Commission of various materials allegedly submitted by the Mr. Simpson for the July 30 hearing prevented him from participating; and

(4) the Commission improperly ignored section 1769, subdivision (a)(1) of its regulations when granting the deadline extension.

We address each contention in turn.

1. The EAB Remand of the PSD Permit

The RCEC must obtain a "prevention of significant deterioration" ("PSD") air quality permit before construction may begin. Although PSD permits are federal permits, they are usually issued by local air districts that have been delegated the authority to issue them by the U.S. Environmental Protection Agency "EPA"). (See *Greater Detroit Res. Recovery Auth. v. U.S.E.P.A.* (6th Cir. 1990) 916 F.2d 317, 320-321, 323-324; *In re Russell City Energy Center* (EAB 2008) PSD Appeal No. 08-01 [slip opinion], p. 4, fn.1.) That was so here, where RCEC's PSD permit was issued by the Bay Area Air Quality Management District "BAAQMD").

Petitioner Simpson appealed the RCEC's PSD permit to U.S. EPA's Environmental Appeals Board ("EAB"), which recently remanded the permit to BAAQMD. Indeed, it was the existence of the appeal that led the Energy Commission to grant the construction deadline extension to the RCEC on July 30.

The Commission's certificate is a state permit. However, as is required by state law, in granting the RCEC certificate we found that the project would comply with all applicable federal laws, including those relating to the PSD permit. We did so both in granting the certificate originally in 2002, and in amending the certificate in 2006. (See Docket No. 01-AFC-7C, Order No. 07-0926-04, p. 85, Finding 2, & Condition AQ-SC6.)

The Simpson Petition asserts that our extension of the construction deadline is inconsistent with EAB's remand of the PSD permit. (See Petition, pp. 3 - 7.) That is not so. First, when we found that the RCEC would be consistent with substantive PSD requirements, we clearly contemplated that the PSD permit would be obtained

after our certification (but before construction). (See Docket No. 01-AFC-7C, Order No. 07-0926-04, p. 85, Finding 2, & Condition AQ-SC6.) Nothing about the EAB appeal or remand changes that: the PSD permit will still need to be obtained prior to the commencement of construction. Second, EAB's remand is not a denial of the PSD permit, it is merely a continuation of the permit process. We have no reason to believe that BAAQMD will not re-affirm the PSD permit on remand or that the EAB will not ultimately uphold it, but if for some reason the PSD is not issued, our extension of the state permit will not change the status quo: construction still cannot begin without a valid PSD permit. Third, the time for challenging the Energy Commission's 2002 certificate for the RCEC, and the 2006 amendment, has long since passed. (See Pub. Resources Code, § 25531.) The challenge to a *federal* permit in a separate forum does not disturb the Commission's certification authority under state law, invalidate our state certificate, or preclude the Commission from using its authority to extend the construction deadline that exists in the state certificate. We found good cause to grant an extension on July 30, and nothing in the Petition changes that.

The Petition also refers to asserted problems with BAAQMD's notice of its PSD hearing. Obviously, any such issues would be irrelevant to the propriety of our proceedings.

2. Notice of the July 30 Hearing

The Simpson Petition argues that the Commission improperly noticed the July 30 hearing. (Petition, pp. 7 - 12.) This argument fails for three reasons. First, the Petition discusses not the public notice of the hearing – i.e., the agenda for the July 30 Business Meeting (see Gov. Code, § 11125, subds. (a)-(b)) – but rather a "Notice of Receipt" of the request for an extension. Second, the Petition appears to assert that the "Notice of Receipt" was improper because it refers to section 1769 of the Commission's regulations (see Petition, pp. 7 - 9), but the Petition itself also argues that "[t]he Extension of the Construction is . . . subject to review under 1769(a)(1)" (*id.*, p. 14; see also *id.*, p. 3). Petitioners cannot have it both ways. Third, the actual notice of the July 30 hearing was entirely adequate. The agenda item was as follows:

> 3. RUSSELL CITY ENERGY CENTER (01-AFC-7C). Possible approval of Russell City Energy Company LLC's petition to extend the deadline for commencement of construction of the Russell City Energy Center in Hayward, California from September 10, 2008, to September 10, 2010. Contact: Kevin Bell and Mary Dyas. (30 minutes)

This was more than sufficient to comply with legal requirements. The Open Meeting Act simply requires that state agency meeting agendas contain "a brief general description" of each item to be considered, which "generally need not exceed 20 words." (Gov. Code, § 11125, subd. (b).) The Commission provided clear notice that it would consider a petition for extension of the RCEC construction deadline. No more than this was required, and it was obviously sufficient to allow Mr. Simpson to have actual notice that the Commission would hear this matter at that time because he did appear at the Commission's business meeting and provided information about the EAB decision of July 29th. If there was any technical defect in the "Notice of Receipt," it did not prejudice Mr. Simpson in any way.

3. Mr. Simpson's Participation in the July 30 Hearing.

Mr. Simpson submitted a large amount of material to the Commission before the July 30 hearing. Apparently some of the material, including all of Mr. Simpson's arguments to EAB, was misplaced, and it might not have been available to all Commissioners before the hearing. (See Petition, pp. 13 - 14.) Even assuming that this was true, however, Mr. Simpson seems not to have been hampered in his participation. (See *idem*; see also para. 2, immediately above.) Moreover, the Petition indicates that the temporarily-missing material dealt with the EAB's remand of the PSD permit (*id.*, p. 14 ["what you didn't receive was the bulk of the EPA appeal"]) which, as we have discussed above, is irrelevant to our determination on the construction deadline. In sum, there was no error here.

4. The Applicability of Section 1769.

The Petition argues that the Energy Commission should have reviewed the construction deadline extension under section 1769, subdivision (a)(1) of our regulations. (Petition, pp. 14 - 15.) That provision authorizes "modifications . . . to the project design, operation, or performance requirements" that have been established in the Commission's final decision on a project. (Cal. Code Regs., tit. 20, § 1769, subd. (a)(1).) It is doubtful that a construction deadline is a "project design, operation, or performance requirement[]," so it is unlikely that section 1769, subdivision (a)(1) is applicable at all. Moreover, even if it were nominally applicable, it would be superseded by section 1720.3, which deals expressly with construction deadlines:

> Unless a shorter deadline is established pursuant to [Pub. Resources Code] § 25534, the deadline for the commencement of construction shall be five years after the effective date of the decision. Prior to the deadline, the applicant may request, and the commission may order, an extension of the deadline for good cause.

(Cal. Code Regs., tit. 20, § 1720.3.) A specific provision relating to a particular subject, such as section 1720.3, controls that subject as against a more general provision, such as section 1769, even if the general provision is broad enough to include the subject to which the more specific provision relates. (See, e.g., *People v. Superior Court* (2002), 28 Cal.4th 798, 808.)

## V. Conclusion

The Petitions present no new evidence, nor do they demonstrate that there was an error in fact or law, or that there has been a change in applicable law. Therefore, the Petitions lack merit under our regulations (Cal. Code Regs., tit. 20, § 1720, subd. (a)), and they are denied.

September 24, 2008

Energy Resources Conservation
and Development Commission

(ABSENT)
JACKALYNE PFANNENSTIEL
Chairman

JAMES D. BOYD
Vice-Chair

Art Rosenfeld
ARTHUR H. ROSENFELD, Ph.D.
Commissioner

JEFFREY D. BYRON
Commissioner

KAREN DOUGLAS
Commissioner

BEFORE THE ENERGY RESOURCES CONSERVATION AND DEVELOPMENT COMMISSION OF THE STATE OF CALIFORNIA

**Amendment to the APPLICATION FOR CERTIFICATION OF THE RUSSELL ENERGY CENTER POWER PLANT PROJECT**

**Docket No. 01-AFC-7C**
**PROOF OF SERVICE**
**(Revised 7/6/07)**

**INSTRUCTIONS: All parties shall 1) send an original signed document plus 12 copies OR 2) mail one original signed copy AND e-mail the document to the web address below, AND 3) all parties shall also send a printed OR electronic copy of the documents that shall include a proof of service declaration to each of the individuals on the proof of service:**

**CALIFORNIA ENERGY COMMISSION**
**Attn: Docket No. 01-AFC-7C**
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## DECLARATION OF SERVICE

I, Lynn Tien-Tran, declare that on September 24, 2008, I deposited copies of the attached **ORDER DENYING PETITIONS FOR RECONSIDERATION CONCERNING EXTENSION OF CONSTRUCTION DEADLINE** in the United States mail at Sacramento, California with first-class postage thereon fully prepaid and addressed to those identified on the Proof of Service list above.

***AND/OR***

Transmission via electronic mail was consistent with the requirements of California Code of Regulations, title 20, sections 1209, 1209.5, and 1210. All electronic copies were sent to all those identified on the Proof of Service list above.

I declare under penalty of perjury that the foregoing is true and correct.

Lynn Tien-Tran

# Exhibit 56

# Russell City Energy Center
# (01-AFC-7C)
# Petition for Amendment No. 2

Submitted by

**Russell City Energy Company, LLC**

November 2009

**With Technical Assistance by**

CH2MHILL

2485 Natomas Park Drive
Suite 600
Sacramento, California 95833

# Executive Summary

Russell City Energy Company, LLC, as project owner, petitions the California Energy Commission (CEC or Commission) to amend the certification for the Russell City Energy Center (RCEC) (01-AFC-7, issued September 11, 2002, and amended October 3, 2007).

This Petition for Amendment includes the following components:

- Adding four new parcels as construction worker parking and construction laydown areas.
- Routing the potable water supply and sanitary sewer pipelines to connect with Depot Road instead of Enterprise Avenue. This new route will be shorter and entirely within the RCEC parcel as currently licensed.
- Updating the Conditions of Certification concerning air quality to meet current best available control technology (BACT) standards.

Section 1.0 provides an overview of the Amendment and a review of the ownership of the project, the necessity for the proposed changes, and the consistency of the changes with the Commission Decision certifying the facility. Section 2.0 provides a complete description of the proposed modifications, including updated drawings. Section 3.0 assesses the potential environmental effects of the proposed changes in terms of 14 environmental discipline areas. This assessment indicates that adoption of the Amendment will not result in any significant, unmitigated adverse environmental impacts. Similarly, the project as amended will continue to comply with all applicable laws, ordinances, regulations and standards. The findings and conclusions contained in the September 11, 2002 Commission Decision granting certification of the RCEC and amended on October 3, 2007, are still applicable to the project, as amended.

The addition of the parking and laydown areas and the revision of the water and sewer line route do not require changes to any Conditions of Certification. Proposed changes to the air quality Conditions of Certification are attached in Appendix A.

# Exhibit 57

**CONTACTS:** **NEWS RELEASE**


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# Calpine Obtains Permit to Build Nation's First Power Plant with Federal Limit on Greenhouse Gas Emissions

**HAYWARD, Calif. – February 4, 2010 –** Calpine Corporation (NYSE: CPN) today received approval to build the nation's first power plant with a federal limit on greenhouse gas emissions – putting both the plant and the company at the forefront of the fight against global warming.

As national and world leaders continue to move toward regulation of global warming pollutants, Calpine, long a leader in generating environmentally responsible renewable and natural gas fired electric power, has worked to establish a first-of-its-kind limit on emissions of carbon dioxide ($CO_2$) and other greenhouse gases from the company's planned 600-megawatt Russell City Energy Center located in the City of Hayward in Alameda County, Calif. Construction of the natural gas-fired power plant is expected to begin later this year.

Today's action by the Bay Area Air Quality Management District (BAAQMD) to grant a Prevention of Significant Deterioration (PSD) permit is the final federal regulatory approval needed for the project to move forward. This action comes the day after the U.S. Environmental Protection Agency's senior policy advisory committee voted on guidelines for issuing permits to major sources of greenhouse gas emissions that contribute to global climate change, such as power plants and oil refineries. At the committee's meeting in Washington, DC, the groundbreaking PSD permit for Russell City Energy Center was presented as a "case study" for how the existing Clean Air Act can be used to regulate emissions of heat-trapping pollutants.

"Since our inception in 1984, Calpine has been an environmental leader investing in power plants that use modern emissions control technology and consistently outperform conventional fossil-fueled plants in curbing emissions that contribute to global warming," said Jack A. Fusco, president and chief executive officer of Calpine. "By utilizing these environmentally responsible technologies, at plants such as Russell City, Calpine will help meet California's growing demand for electricity while dramatically decreasing emissions."

The Russell City facility will be designed to operate in a way that produces 50 percent fewer greenhouse gas emissions than even the most advanced coal-fired plants and 25 percent fewer greenhouse gas emissions than the standard set by the California Public Utilities Commission.

"Once again California is demonstrating leadership on greenhouse gas related issues. We applaud the BAAQMD and Calpine for going beyond existing federal law and being the first in the nation to require an enforceable greenhouse gas limit," said Linda Adams, California State Secretary for Environmental Protection. "This action furthers efforts at a statewide level to balance our economic needs while meeting our environmental challenges. Aggressive and early action like this is needed to fight global warming and is critical to our economic recovery."

Using the most advanced emissions control technology available today for a natural gas-fired power plant, Russell City Energy Center will be an energy efficient supplier of electricity to the Bay Area. The facility is expected to play a critical role in helping to meet the region's growing demand for cleaner energy as older, emissions-intensive power plants are shut down.

"Carbon emissions have clearly emerged as a critical indicator of environmental performance for power plants, and we commend Calpine for acknowledging as much by securing the first plant-specific mandatory limits on greenhouse gas emissions," said Ralph Cavanagh, Energy Program Co-Director for the Natural Resources Defense Council (NRDC). "We look forward to the not-too-distant day when all power plants will operate under greenhouse gas performance standards."

The California Independent System Operation (CAISO), the nonprofit public benefit organization that operates the state's electric transmission grid, has been enthusiastic and supportive of the project.

"CAISO is encouraged by plants such as the Russell City facility which help ensure the reliable and efficient delivery of power to hundreds of thousands of consumers in the Bay Area," said Jim Detmers, CAISO's Vice President of Operations. "In addition to the plant's environmental benefits, Russell City Energy Center will assist with successful integration of California's ambitious renewable portfolio."

Powered by cleaner burning natural gas, plants like the Russell City Energy Center that use advanced combined-cycle technology are significantly cleaner than older power plants currently in operation. By providing a reliable backstop for intermittent renewable generating resources, such as wind and solar, these plants will help meet Governor Schwarzenegger's aggressive goals that, by 2020, 33 percent of California utilities' power be generated by renewable sources and statewide greenhouse gas emissions be reduced by 15 percent from current levels.

In addition to the environmental benefits, Russell City Energy Center will produce significant economic benefits for the City of Hayward and the Bay Area, creating 650 union construction jobs, injecting millions into the local economy and generating approximately $30 million in one-time tax revenue and more than $5 million annually in property tax revenue to help fund local government services.

The facility also will use 100 percent reclaimed water from the City of Hayward's Water Pollution Control Facility for cooling and boiler makeup. This environmentally responsible process conserves water and prevents nearly four million gallons of wastewater per day from being discharged into San Francisco Bay.

Russell City Energy Center also will donate $10 million to help build a new library for Hayward and is working with stakeholders to make improvements and support programs that enhance the enjoyment of the San Francisco Bay shoreline.

The California Energy Commission granted a license for the plant in September 2007, and the California Public Utilities Commission approved a 10-year power purchase agreement in April 2009 under which PG&E will purchase the electricity generated by the plant.

The Russell City project is jointly owned by Calpine Corporation, which holds a 65 percent equity interest and serves as development manager, and an affiliate of GE Energy Financial Services, which holds a 35 percent equity interest.

For more information about Russell City Energy Center, visit www.russellcityenergycenter.com.

Details about PSD permit can be found at www.baaqmd.gov.

**Calpine's Commitment to California**
Calpine has built and operated power plants in the State of California for 25 years and prides itself in developing innovative and environmentally responsible energy solutions for the people of California. Taken as a whole, Calpine's projects produce enough electricity to satisfy the power needs of more than six million California households.

Calpine remains committed to California by providing clean, efficient and renewable power generation. With 5,800 megawatts in operation, including the newly commissioned, state-of-the-art 600 MW Otay Mesa Energy Center in San Diego, additional development projects include the 600 MW Russell City Energy Center in Hayward discussed above, the Los Esteros Critical Energy Center upgrade project and continuing expansion at The Geysers.

**About Calpine**
Calpine Corporation is helping meet the needs of an economy that demands more and cleaner sources of electricity. Founded in 1984, Calpine is a major U.S. power company, currently capable of delivering nearly 25,000 megawatts of clean, cost-effective, reliable and fuel-efficient electricity to customers and communities in 16 states in the United States and Canada. Calpine owns, leases, and operates low-carbon, natural gas-fired, and renewable geothermal power plants. Using advanced technologies, Calpine generates electricity in a reliable and environmentally responsible manner for the customers and communities it serves. Please visit www.calpine.com for more information.

**Forward-Looking Information**
This release contains forward-looking statements within the meaning of Section 27A of the Securities Act of 1933, as amended, and Section 21E of the Securities Exchange Act of 1934, as amended. Words such as "believe," "intend," "expect," "anticipate," "plan," "may," "will" and similar expressions identify forward-looking statements. Such statements include, among others, those concerning expected financial performance and strategic and operational plans, as well as assumptions, expectations, predictions, intentions or beliefs about future events. You are cautioned that any such forward-looking statements are not guarantees of future performance and that a number of risks and uncertainties could cause actual results to differ materially from those anticipated in the forward-looking statements. Please see the risks identified in this release or in

Calpine's reports and registration statements filed with the Securities and Exchange Commission, including, without limitation, the risk factors identified in its Quarterly Report on Form 10-Q for the three months ended September 30, 2009, and its Annual Report on Form 10-K for the year ended December 31, 2008. These filings are available by visiting the Securities and Exchange Commission's web site at www.sec.gov or Calpine's web site at www.calpine.com. Actual results or developments may differ materially from the expectations expressed or implied in the forward-looking statements, and Calpine undertakes no obligation to update any such statements.

###

# Exhibit 58

State of California
EMPLOYMENT DEVELOPMENT DEPARTMENT
Labor Market Information Division
2450 S. Bascom Ave.
Campbell, CA 95008

April 16, 2010

Contact: Janice Shriver
(408) 558-0689

**OAKLAND-FREMONT-HAYWARD METROPOLITAN DIVISION (MD)**
**(ALAMEDA AND CONTRA COSTA COUNTIES)**
***Seasonal gains in education and in leisure and hospitality led month-over job changes***

The unemployment rate in the Oakland-Fremont-Hayward MD was 11.9 percent in March 2010, up from a revised 11.6 percent in February 2010, and above the year-ago estimate of 9.8 percent. This compares with an unadjusted unemployment rate of 13.0 percent for California and 10.2 percent for the nation during the same period. The unemployment rate was 11.9 percent in Alameda County, and 12.0 percent in Contra Costa County.

**Between February 2010 and March 2010**, the total number of jobs located in the East Bay counties of Alameda and Contra Costa increased by 2,200 jobs to reach 942,500.

- Government recorded a net seasonal gain of 800 jobs, on par with its average increase between February and March over the past 20 years. State public schools gained 800 jobs, while other state government entities added 100 jobs. City government lost 100 jobs.

- Leisure and hospitality added 700 jobs seasonally, largely in food services and drinking places (up 500 jobs).

- Private educational services rose by 300 jobs, varying from its usual seasonal pattern of a 100-job loss between February and March.

- Seasonal farm employment posted a typical increase of 300 jobs.

- Meanwhile, financial activities and information each fell by 200 jobs over the month.

**Between March 2009 and March 2010**, the total number of jobs in the East Bay decreased by 37,700 jobs or 3.8 percent.

- Trade, transportation, and utilities contracted by 8,300 jobs. Retail trade experienced scattered losses, trimming 4,500 jobs.

- Government lost 7,200 jobs from last March. Local public schools accounted for nearly three-fifths of those jobs.

- Professional and business services contracted by 6,400 jobs, largely in professional, scientific, and technical services. Computer systems design fell by 1,100 jobs, while architectural, engineering, and related services declined by 800 jobs.

- In its 35th consecutive month of cutbacks on a year-over basis, construction fell by 6,000 jobs. The bulk of those job losses occurred in specialty trade contractors.

- Other major industries with losses of at least 2,100 jobs each included manufacturing, financial activities, and information.

# # # # #

State of California
EMPLOYMENT DEVELOPMENT DEPARTMENT
Labor Market Information Division
2450 S. Bascom Avenue
Campbell, CA 95008

April 16, 2010

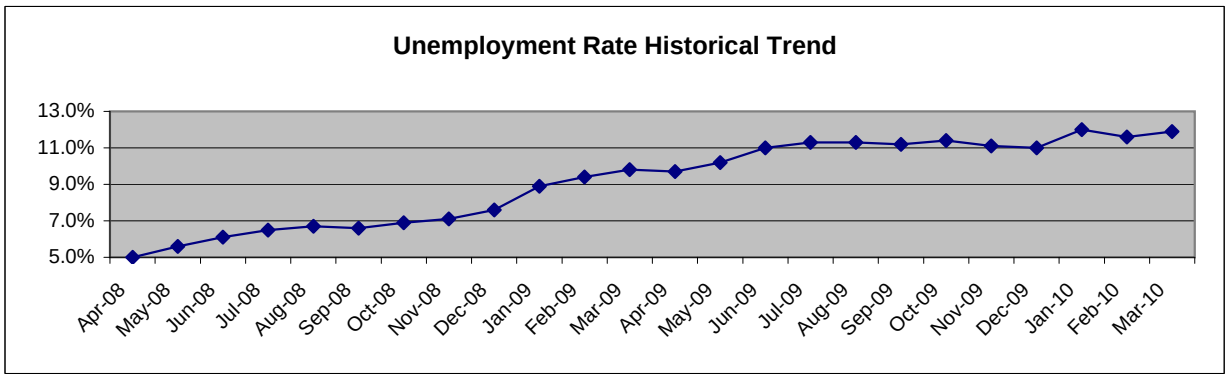
Janice Shriver
408/558-0689

IMMEDIATE RELEASE

OAKLAND-FREMONT-HAYWARD METROPOLITAN DIVISION (MD)

**(Alameda and Contra Costa Counties)**

The unemployment rate in the Oakland-Fremont-Hayward MD was 11.9 percent in March 2010, up from a revised 11.6 percent in February 2010, and above the year-ago estimate of 9.8 percent. This compares with an unadjusted unemployment rate of 13.0 percent for California and 10.2 percent for the nation during the same period. The unemployment rate was 11.9 percent in Alameda County, and 12.0 percent in Contra Costa County.




| Industry | Feb-2010 Revised | Mar-2010 Prelim | Change | | Mar-2009 | Mar-2010 Prelim | Change |
|---|---|---|---|---|---|---|---|
| Total, All Industries | 940,300 | 942,500 | 2,200 | | 980,200 | 942,500 | (37,700) |
| Total Farm | 1,200 | 1,500 | 300 | | 1,300 | 1,500 | 200 |
| Total Nonfarm | 939,100 | 941,000 | 1,900 | | 978,900 | 941,000 | (37,900) |
| Mining and Logging | 1,200 | 1,200 | 0 | | 1,200 | 1,200 | 0 |
| Construction | 47,700 | 47,900 | 200 | | 53,900 | 47,900 | (6,000) |
| Manufacturing | 80,700 | 80,900 | 200 | | 84,800 | 80,900 | (3,900) |
| Trade, Transportation & Utilities | 172,400 | 172,300 | (100) | | 180,600 | 172,300 | (8,300) |
| Information | 24,300 | 24,100 | (200) | | 26,200 | 24,100 | (2,100) |
| Financial Activities | 51,100 | 50,900 | (200) | | 53,100 | 50,900 | (2,200) |
| Professional & Business Services | 144,700 | 144,700 | 0 | | 151,100 | 144,700 | (6,400) |
| Educational & Health Services | 130,100 | 130,500 | 400 | | 131,600 | 130,500 | (1,100) |
| Leisure & Hospitality | 83,500 | 84,200 | 700 | | 84,000 | 84,200 | 200 |
| Other Services | 33,400 | 33,500 | 100 | | 34,400 | 33,500 | (900) |
| Government | 170,000 | 170,800 | 800 | | 178,000 | 170,800 | (7,200) |

Notes: Data not adjusted for seasonality. Data may not add due to rounding
Labor force data are revised month to month
Additional data are available on line at www.labormarketinfo.edd.ca.gov

April 16, 2010

Employment Development Department
Labor Market Information Division
(916) 262-2162

# Oakland Fremont Hayward MD

**(Alameda and Contra Costa Counties)**

Industry Employment & Labor Force

March 2009 Benchmark

Data Not Seasonally Adjusted

| | Mar 09 | Jan 10 | Feb 10 Revised | Mar 10 Prelim | Percent Change Month | Year |
|---|---|---|---|---|---|---|
| Civilian Labor Force (1) | 1,295,400 | 1,275,300 | 1,278,000 | 1,286,500 | 0.7% | -0.7% |
| Civilian Employment | 1,168,700 | 1,122,600 | 1,129,600 | 1,133,100 | 0.3% | -3.0% |
| Civilian Unemployment | 126,600 | 152,700 | 148,300 | 153,400 | 3.4% | 21.2% |
| Civilian Unemployment Rate | 9.8% | 12.0% | 11.6% | 11.9% | | |
| (CA Unemployment Rate) | 11.0% | 13.2% | 12.8% | 13.0% | | |
| (U.S. Unemployment Rate) | 9.0% | 10.6% | 10.4% | 10.2% | | |
| Total, All Industries (2) | 980,200 | 936,900 | 940,300 | 942,500 | 0.2% | -3.8% |
| Total Farm | 1,300 | 1,100 | 1,200 | 1,500 | 25.0% | 15.4% |
| Total Nonfarm | 978,900 | 935,800 | 939,100 | 941,000 | 0.2% | -3.9% |
| Total Private | 800,900 | 767,100 | 769,100 | 770,200 | 0.1% | -3.8% |
| Goods Producing | 139,900 | 130,000 | 129,600 | 130,000 | 0.3% | -7.1% |
| Mining and Logging | 1,200 | 1,200 | 1,200 | 1,200 | 0.0% | 0.0% |
| Construction | 53,900 | 48,800 | 47,700 | 47,900 | 0.4% | -11.1% |
| Construction of Buildings | 12,400 | 10,600 | 10,500 | 10,400 | -1.0% | -16.1% |
| Residential Building Construction | 7,500 | 6,200 | 6,000 | 6,100 | 1.7% | -18.7% |
| Nonresidential Building Construction | 4,900 | 4,400 | 4,500 | 4,300 | -4.4% | -12.2% |
| Heavy & Civil Engineering Construction | 6,400 | 5,900 | 5,600 | 5,600 | 0.0% | -12.5% |
| Specialty Trade Contractors | 35,100 | 32,300 | 31,600 | 31,900 | 0.9% | -9.1% |
| Building Foundation & Exterior Contractors | 7,400 | 6,800 | 6,700 | 6,800 | 1.5% | -8.1% |
| Building Equipment Contractors | 13,800 | 12,700 | 12,600 | 12,600 | 0.0% | -8.7% |
| Specialty Trade Contractors - Residual | 13,900 | 12,800 | 12,300 | 12,500 | 1.6% | -10.1% |
| Manufacturing | 84,800 | 80,000 | 80,700 | 80,900 | 0.2% | -4.6% |
| Durable Goods | 51,800 | 48,300 | 49,000 | 49,100 | 0.2% | -5.2% |
| Computer & Electronic Product Manufacturing | 17,600 | 15,900 | 16,100 | 16,200 | 0.6% | -8.0% |
| Transportation Equipment Manufacturing | 7,000 | 6,800 | 6,900 | 6,900 | 0.0% | -1.4% |
| Durable Goods - Residual | 27,200 | 25,600 | 26,000 | 26,000 | 0.0% | -4.4% |
| Nondurable Goods | 33,000 | 31,700 | 31,700 | 31,800 | 0.3% | -3.6% |
| Petroleum & Coal Products Manufacturing | 8,100 | 7,900 | 7,900 | 7,900 | 0.0% | -2.5% |
| Chemical Manufacturing | 6,500 | 6,300 | 6,200 | 6,200 | 0.0% | -4.6% |
| Non-Durable Goods - Residual | 18,400 | 17,500 | 17,600 | 17,700 | 0.6% | -3.8% |
| Service Providing | 839,000 | 805,800 | 809,500 | 811,000 | 0.2% | -3.3% |
| Private Service Producing | 661,000 | 637,100 | 639,500 | 640,200 | 0.1% | -3.1% |
| Trade, Transportation & Utilities | 180,600 | 173,400 | 172,400 | 172,300 | -0.1% | -4.6% |
| Wholesale Trade | 44,400 | 42,500 | 42,500 | 42,400 | -0.2% | -4.5% |
| Merchant Wholesalers, Durable Goods | 21,500 | 19,900 | 19,800 | 19,800 | 0.0% | -7.9% |
| Merchant Wholesalers, Nondurable Goods | 17,700 | 17,500 | 17,500 | 17,400 | -0.6% | -1.7% |
| Wholesale Trade - Residual | 5,200 | 5,100 | 5,200 | 5,200 | 0.0% | 0.0% |
| Retail Trade | 102,500 | 99,100 | 97,900 | 98,000 | 0.1% | -4.4% |
| Motor Vehicle & Parts Dealer | 10,500 | 9,600 | 9,600 | 9,600 | 0.0% | -8.6% |
| Food & Beverage Stores | 23,600 | 23,100 | 23,100 | 23,100 | 0.0% | -2.1% |
| Health & Personal Care Stores | 7,000 | 6,900 | 6,800 | 6,800 | 0.0% | -2.9% |
| Clothing & Clothing Accessories Stores | 8,400 | 8,200 | 7,900 | 7,900 | 0.0% | -6.0% |
| Sporting Goods, Hobby, Book & Music Stores | 5,400 | 5,300 | 5,100 | 5,100 | 0.0% | -5.6% |
| General Merchandise Stores | 19,100 | 19,600 | 19,200 | 19,000 | -1.0% | -0.5% |
| Retail Trade - Residual | 28,500 | 26,400 | 26,200 | 26,500 | 1.1% | -7.0% |
| Transportation, Warehousing & Utilities | 33,700 | 31,800 | 32,000 | 31,900 | -0.3% | -5.3% |
| Transportation & Warehousing | 30,100 | 28,300 | 28,500 | 28,400 | -0.4% | -5.6% |
| Truck Transportation | 6,300 | 5,700 | 5,800 | 5,800 | 0.0% | -7.9% |
| Couriers & Messengers | 6,800 | 6,500 | 6,400 | 6,400 | 0.0% | -5.9% |
| Warehousing & Storage | 4,200 | 3,900 | 3,900 | 3,900 | 0.0% | -7.1% |
| Transportation and Warehousing - Residual | 12,800 | 12,200 | 12,400 | 12,300 | -0.8% | -3.9% |
| Transportation, Warehousing, and Utilities - R | 3,600 | 3,500 | 3,500 | 3,500 | 0.0% | -2.8% |
| Information | 26,200 | 24,100 | 24,300 | 24,100 | -0.8% | -8.0% |
| Publishing Industries (except Internet) | 6,100 | 5,000 | 5,000 | 5,000 | 0.0% | -18.0% |
| Telecommunications | 11,600 | 10,800 | 10,700 | 10,600 | -0.9% | -8.6% |
| Information - Residual | 8,500 | 8,300 | 8,600 | 8,500 | -1.2% | 0.0% |

April 16, 2010
Employment Development Department
Labor Market Information Division
(916) 262-2162

**Oakland Fremont Hayward MD**
**(Alameda and Contra Costa Counties)**
Industry Employment & Labor Force
March 2009 Benchmark

Data Not Seasonally Adjusted

| | Mar 09 | Jan 10 | Feb 10 Revised | Mar 10 Prelim | Percent Change Month | Year |
|---|---|---|---|---|---|---|
| Financial Activities | 53,100 | 50,800 | 51,100 | 50,900 | -0.4% | -4.1% |
| Finance & Insurance | 37,700 | 36,000 | 36,200 | 36,000 | -0.6% | -4.5% |
| Credit Intermediation & Related Activities | 16,800 | 16,100 | 16,100 | 16,100 | 0.0% | -4.2% |
| Finance and Insurance - Residual | 5,700 | 5,100 | 5,400 | 5,100 | -5.6% | -10.5% |
| Insurance Carriers & Related | 15,200 | 14,800 | 14,700 | 14,800 | 0.7% | -2.6% |
| Real Estate & Rental & Leasing | 15,400 | 14,800 | 14,900 | 14,900 | 0.0% | -3.2% |
| Real Estate | 11,100 | 10,700 | 10,700 | 10,700 | 0.0% | -3.6% |
| Real Estate and Rental and Leasing - Residual | 4,300 | 4,100 | 4,200 | 4,200 | 0.0% | -2.3% |
| Professional & Business Services | 151,100 | 143,400 | 144,700 | 144,700 | 0.0% | -4.2% |
| Professional, Scientific & Technical Services | 81,700 | 77,500 | 77,300 | 77,100 | -0.3% | -5.6% |
| Architectural, Engineering & Related Services | 15,700 | 14,900 | 14,900 | 14,900 | 0.0% | -5.1% |
| Computer Systems Design & Related Services | 18,800 | 17,700 | 17,600 | 17,700 | 0.6% | -5.9% |
| Professional, Scientific, and Technical Services | 47,200 | 44,900 | 44,800 | 44,500 | -0.7% | -5.7% |
| Management of Companies & Enterprises | 22,600 | 22,600 | 22,600 | 22,600 | 0.0% | 0.0% |
| Administrative & Support & Waste Services | 46,800 | 43,300 | 44,800 | 45,000 | 0.4% | -3.8% |
| Administrative & Support Services | 42,100 | 38,900 | 40,600 | 40,800 | 0.5% | -3.1% |
| Employment Services | 14,100 | 14,100 | 14,200 | 14,300 | 0.7% | 1.4% |
| Investigation & Security Services | 8,000 | 7,500 | 7,600 | 7,600 | 0.0% | -5.0% |
| Services to Buildings & Dwellings | 11,400 | 10,400 | 10,400 | 10,500 | 1.0% | -7.9% |
| Administrative and Support Services - Residu | 8,600 | 6,900 | 8,400 | 8,400 | 0.0% | -2.3% |
| Administrative and Support and Waste Manage | 4,700 | 4,400 | 4,200 | 4,200 | 0.0% | -10.6% |
| Educational & Health Services | 131,600 | 128,300 | 130,100 | 130,500 | 0.3% | -0.8% |
| Educational Services | 22,300 | 19,900 | 21,400 | 21,700 | 1.4% | -2.7% |
| Health Care & Social Assistance | 109,300 | 108,400 | 108,700 | 108,800 | 0.1% | -0.5% |
| Ambulatory Health Care Services | 39,400 | 39,400 | 39,300 | 39,200 | -0.3% | -0.5% |
| Hospitals | 34,100 | 33,600 | 33,600 | 33,700 | 0.3% | -1.2% |
| Nursing & Residential Care Facilities | 18,800 | 18,800 | 19,000 | 19,100 | 0.5% | 1.6% |
| Social Assistance | 17,000 | 16,600 | 16,800 | 16,800 | 0.0% | -1.2% |
| Leisure & Hospitality | 84,000 | 83,800 | 83,500 | 84,200 | 0.8% | 0.2% |
| Arts, Entertainment & Recreation | 13,400 | 13,500 | 13,700 | 13,900 | 1.5% | 3.7% |
| Accommodation & Food Services | 70,600 | 70,300 | 69,800 | 70,300 | 0.7% | -0.4% |
| Accommodation | 6,800 | 6,400 | 6,500 | 6,500 | 0.0% | -4.4% |
| Food Services & Drinking Places | 63,800 | 63,900 | 63,300 | 63,800 | 0.8% | 0.0% |
| Other Services | 34,400 | 33,300 | 33,400 | 33,500 | 0.3% | -2.6% |
| Repair & Maintenance | 10,400 | 9,900 | 10,000 | 10,100 | 1.0% | -2.9% |
| Personal & Laundry Services | 9,100 | 8,600 | 8,600 | 8,700 | 1.2% | -4.4% |
| Religious, Grants, Civic, Professional & Like Org | 14,900 | 14,800 | 14,800 | 14,700 | -0.7% | -1.3% |
| Government | 178,000 | 168,700 | 170,000 | 170,800 | 0.5% | -4.0% |
| Federal Government | 17,100 | 16,700 | 16,500 | 16,500 | 0.0% | -3.5% |
| Department of Defense | 300 | 300 | 400 | 400 | 0.0% | 33.3% |
| Federal Government excluding Department of D | 16,800 | 16,400 | 16,100 | 16,100 | 0.0% | -4.2% |
| State & Local Government | 160,900 | 152,000 | 153,500 | 154,300 | 0.5% | -4.1% |
| State Government | 39,900 | 36,700 | 38,400 | 39,300 | 2.3% | -1.5% |
| State Government Education | 27,500 | 24,300 | 25,900 | 26,700 | 3.1% | -2.9% |
| State Government Excluding Education | 12,400 | 12,400 | 12,500 | 12,600 | 0.8% | 1.6% |
| Local Government | 121,000 | 115,300 | 115,100 | 115,000 | -0.1% | -5.0% |
| Local Government Education | 63,100 | 59,300 | 58,800 | 58,800 | 0.0% | -6.8% |
| County | 23,000 | 22,900 | 23,000 | 23,000 | 0.0% | 0.0% |
| City | 18,900 | 17,700 | 17,800 | 17,700 | -0.6% | -6.3% |
| Special Districts plus Indian Tribes | 16,000 | 15,400 | 15,500 | 15,500 | 0.0% | -3.1% |

**Notes:**

(1) Civilian labor force data are by place of residence; include self-employed individuals, unpaid family workers, household domestic workers, & workers on strike.
Data may not add due to rounding. The unemployment rate is calculated using unrounded data.

April 16, 2010

Employment Development Department
Labor Market Information Division
(916) 262-2162

**Oakland Fremont Hayward MD**
**(Alameda and Contra Costa Counties)**
Industry Employment & Labor Force
March 2009 Benchmark

Data Not Seasonally Adjusted

| | Mar 09 | Jan 10 | Feb 10 Revised | Mar 10 Prelim | Percent Change Month | Year |
|---|---|---|---|---|---|---|

(2) Industry employment is by place of work; excludes self-employed individuals, unpaid family workers, household domestic workers, & workers on strike.
Data may not add due to rounding.

These data are produced by the Labor Market Information Division of the California Employment Development Department (EDD). Questions should be directed to: Janice Shriver 408/558-0689 or Ruth Kavanagh 650/413-1812

These data, as well as other labor market data, are available via the Internet at http://www.labormarketinfo.edd.ca.gov. If you need assistance, please call (916) 262-2162.

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# Exhibit 59

BAY AREA AIR QUALITY MANAGEMENT DISTRICT

# NEWS

**FOR IMMEDIATE RELEASE**
**February 4, 2009**

**CONTACT:** **Kristine Roselius**
**415.749.4900**

## Air District approves landmark permit for Hayward power plant

*First power plant in the nation to accept greenhouse gas limits*

**SAN FRANCISCO** - The Bay Area Air Quality Management District yesterday approved a federal permit for the proposed Russell City Energy Center power plant in Hayward that is the first in the nation to have limits on greenhouse gas emissions.

"In developing this permit, Calpine will go beyond existing federal law and become the first power plant in the country to accept enforceable limits on greenhouse gases," said Jack Broadbent, executive officer of the Air District. "This permit is the most stringent the Air District has ever issued."

Using the most advanced emissions-control technology available today, the Russell City Energy Center will be an energy-efficient supplier of electricity to the Bay Area. Combined-cycle plants like the Energy Center are generally much cleaner than older plants currently in operation.

The Air District is issuing this Prevention of Significant Deterioration Permit on behalf of the U.S. Environmental Protection Agency. Permit approval comes after a lengthy public engagement process, in which the Air District received extensive input from environmental organizations and local community members and amended the permit to address their concerns. The resulting permit is more stringent and will include the tightest emission limits of any power plant in the Bay Area.

The project is a 600-megawatt, natural gas-fired, combined-cycle power plant proposed by Russell City Energy Company, LLC, a Calpine Corporation affiliate. The planned location is 3862 Depot Road in Hayward, near the corner of Depot Rd. and Cabot Blvd.

The proposed power plant would consist of two combustion turbine generators, two heat recovery steam boilers, a steam turbine generator and associated equipment, a wet cooling system and a diesel fire pump. The approved permit includes the Air District's requirement that the power plant be equipped with state-of-the-art air pollution control equipment, including selective catalytic reduction and oxidation catalysts. The facility will also use 100-percent reclaimed water from the City of Hayward's Water Pollution Control Facility for cooling and will convert it to steam for electricity production.

The Bay Area Air Quality Management District (www.baaqmd.gov) is the regional agency chartered with protecting air quality in the Bay Area.

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*2010-007*