

Decision 09-04-010 April 16, 2009

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)

**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 (1stAPPA) 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

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

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 10.4²⁶ 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

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

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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.

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.

³⁹ From PG&E's 2008 LTRFO Protocol at 13, found at <http://www.pge.com/b2b/energysupply/wholesaleelectricssuppliersolicitation/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

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

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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.

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 (CO₂) 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 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.

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 customers⁴⁸ 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