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January 11, 2010

Honesto Gatchalian, Energy Division
California Public Utilities Commission
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Re: Comments of Pacific Gas and Electric Company on Second Draft Resolution E-4250

Dear Mr. Gatchalian:

Pacific Gas and Electric Company (PG&E) respectfully provides its opening comments in response to the Energy Division's Second Draft Resolution E-4250, issued on December 22, 2009.

As an initial matter, PG&E appreciates the attention that the Commission paid to the utilities' First Amendment-related concerns regarding the First Draft Resolution E-4250, and believes this version of the Draft Resolution contains a number of improvements from the prior version. However, PG&E continues to have several concerns regarding the revised Second Draft Resolution, as outlined below.

I. The Proposed CCA Tariff Changes in Ordering Paragraph 1 Must Be Modified to Ensure Accuracy.

The Energy Division's proposed changes to PG&E's Electric Tariff Rule 23 B.22 must be modified to ensure that they are accurate. Specifically, the Energy Division's proposed changes to Subsection B.22[1] could be interpreted to limit customers to exercising their statutory right to opt out prior to Automatic Enrollment only during the 60-day Initial Notification Period, when in fact a customer continues to have the right under Public Utilities Code Section 366.2(c)(13)(A) to opt out any time after the Initial Notification Period begins (per Second Draft Resolution E-4250) and before the customer's actual Automatic Enrollment in the CCA program. In other words, the initial statutory 60-day notice period relates to the time period in which the CCA must provide at least two notices to customers prior to Automatic Enrollment; it does not limit the customer to opting out only during that 60-day period.

This is a small but important detail, since Automatic Enrollment does not occur immediately upon the conclusion of the Initial Notification Period (as the Draft Resolution appears to suggest) but instead occurs between 30 and 45 days after the end of the Initial Notification Period.[2] The Energy

[1] The Energy Division proposes to require the utilities to replace the words "at any time prior to the" with the bolded words "during a 60 day period prior to the" in the following sentence: "A customer may exercise its opt-out right **during a 60 day period prior to the** Automatic Enrollment of a customer's account in CCA Service and during an additional 60 day period subsequent to the Automatic Enrollment of a customer's account in CCA Service...."

[2] Rule 23.J provides: "PG&E shall provide a Mass Enrollment process whereby all eligible CCA customers that have

Division's proposal could be read to prohibit customers from exercising their right to opt out during this additional 30-45 day period, contrary to statutory intent.

For this reason, PG&E proposes the following alternative language in Subsection B.22:

> A customer may exercise its opt-out right **during the Initial Notification Period, after the Initial Notification Period but prior to Automatic Enrollment, or** during an additional 60 day period subsequent to the Automatic Enrollment of a customer's account in CCA Service.

II. The Energy Division's Proposal to Restrict PG&E's Sales of Excess Electricity Exceeds the Commission's Jurisdiction and Is Unnecessary.

Ordering Paragraph 6 would prohibit electric utilities from "refus[ing] to make economic sales of excess electricity to a CCA, or refus[ing] in advance to deal with any CCA in selling electricity." This general prohibition appears to stem from the Energy Division's misunderstanding of a letter that PG&E sent to the Marin Energy Authority (MEA) in response to MEA's invitation to PG&E to respond to MEA's request for bidders willing to provide *full requirements electricity* to supply MEA's load under its CCA program. The Energy Division appears to have interpreted PG&E's decision as conflicting with the Commission's long-term procurement criteria under which utilities' procurement plans require each utility to dispatch its resources on a least-cost basis.[3]

In fact, PG&E's decision was fully consistent with its approved procurement plan and least-cost dispatching criteria, as MEA was *not* inviting PG&E to bid to sell *excess power*, but, rather, was inviting PG&E to bid to supply MEA on a *full requirements, 5-year basis*. Under these circumstances, bidding to supply wholesale power to a wholesale customer such as MEA on a full requirements basis under long-term contracts would not involve "excess" power; it would require PG&E to carefully evaluate whether such a multi-year, firm commitment would adversely affect PG&E's obligation to its existing retail customers, because its priority obligation is to serve the full requirements of those retail customers on a forecast basis.

In any event, if the intent of Ordering Paragraph 6 is to reaffirm PG&E's obligation to dispatch its electricity portfolio on a least-cost basis consistent with its CPUC-approved procurement plan, including dispatching excess power in wholesale markets consistent with maximizing benefits to bundled retail customers, PG&E agrees. However, Ordering Paragraph 6 as written is overbroad and

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not opted out of CCA Service shall be automatically enrolled in CCA Service on the customers' regular scheduled meter read dates over a one (1) billing month period, subject to phasing."

Rule 23.J.3 provides: "The mass enrollment shall commence at a time not less than thirty (30) days and not more than forty-five (45) days after the conclusion of the Initial Notification Period, unless another date is mutually agreed to by the CCA and PG&E…." (Emphasis added.)

[3] Second Draft Resolution E-4250, p. 14.

implies that utilities are under a general CPUC mandate to make economic sales of excess electricity to CCAs at any time. Such a general mandate to make wholesales sales of electricity or to deal with particular wholesale customers is within the exclusive jurisdiction of the Federal Energy Regulatory Commission under the Federal Power Act.

Therefore, PG&E recommends that Ordering Paragraph 6 be revised to read as follows:

> **Electric utilities are obligated to dispatch their excess electricity resources on a least-cost basis in compliance with their Commission-approved electricity procurement plans, including dispatching any excess electricity for the benefit of retail bundled customers to wholesale customers, including CCAs.**

III. The Energy Division's Proposal to Impose Restrictions on a Utility's Use of Its Shareholder Funds Is Unnecessary and Unlawful.

Ordering Paragraph 5 would generally prohibit electric utilities from offering anything of value to a local government or electricity customers in exchange for the local government or customer not participating in a CCA program. The prohibition would apply not only to ratepayer funds, but also to utility shareholder funds.

PG&E agrees that the Commission has generally prohibited utilities from using ratepayer funds to compete with CCAs, and previously endorsed the Commission's reaffirmation of that prohibition in the context of PG&E's use of Customer Energy Efficiency (CEE) funds.[4] Thus, Ordering Paragraph 5 appears duplicative of the Commission's already-existing restriction on use of ratepayer funds in the CEE area, and thus unnecessary.

Expanding the prohibition to cover utilities' use of their shareholder funds for non-utility-related activities that are not within the Commission's jurisdiction is likewise unnecessary and is beyond the Commission's authority. PG&E agrees with the public policy that retail electricity providers, including both public utilities and CCAs, should engage in fair and open competition in full compliance with all applicable laws. However, competitive activities that may be outside the jurisdiction of the Public Utilities Code, whether involving government funding used by CCAs or shareholder funding used by utilities, are governed by unfair competition, antitrust and other laws, not by the Public Utilities Code. Thus, it is unnecessary and beyond the Commission's authority to oversee the utilities' use of their shareholder funds for competitive activities, because existing federal and state anti-competitive statutes and rules already govern these activities.

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[4] See PG&E "Reply Comments on Draft Resolution E-4250," September 3, 2009, p. 5, referencing the fact that this issue already has been raised and addressed in the CPUC's 2009-2011 Energy Efficiency Programs proceeding, A.08-07-031. (See D. 09-09-047, Ordering Paragraph 39 at p. 272, finding no clear evidence in the record but requiring utilities not to use energy efficiency funds in any way that would discourage or interfere with a local government's efforts to consider or to become a Community Choice Aggregator.)

Therefore, PG&E requests that Ordering Paragraph 5 be revised to delete the prohibition on uses of shareholder funds. PG&E supports the continued prohibition on use of ratepayer funds for these purposes, absent express Commission approval of such expenditures.[5]

IV. PG&E Continues to Object to Any Implication in Ordering Paragraph 2 That Its Prior Early Opt Out Option Violated Existing CCA Tariffs.

As noted in the Energy Division's comments in the Second Draft Resolution,[6] PG&E objected to language included in the First Draft Resolution which would have ordered PG&E to send a letter to customers who currently have opted out of CCA service, stating in part that "PG&E solicited your CCA opt out request in error."

PG&E appreciates that the Energy Division has removed this "in error" language from the Second Draft Resolution at Ordering Paragraph 2.D. However, Ordering Paragraph 2 continues to state in its introduction that: "PG&E…shall take the following actions to correct the misunderstanding that PG&E's early CCA opt-out option has created…." (Emphasis added.) A possible implication of the words "to correct" is that PG&E offered the early opt out option improperly and now must take steps "to correct" that situation.

Consistent with its prior comments on this issue, and with the Energy Division's response to those comments, PG&E respectfully requests that this language be modified to state simply that:

> PG&E… shall take the following actions **to address any misunderstanding that customers may have about their ability to opt out of CCA prior to the Initial Notification Period**.

V. PG&E Does Not Object to Ordering Paragraph 2.B, As Modified Below.

The language that the Energy Division proposes in Ordering Paragraph 2.B to be included on PG&E's ratepayer-funded CCA website should be modified as outlined below to help ensure that a customer is able to make an informed decision regarding whether or not to opt out of CCA service:

> …The terms and conditions provided to you during a CCA's formal notification period will inform you of any potential fees charged to – or service limitations placed on – your account by the CCA offering generation service to you**, including any potential limitations on your**

[5] This is consistent with Ordering Paragraph 3, which would establish a notification and review process for the utilities' ratepayer-funded CCA websites regarding information contained on those websites relating to CCA programs, as well as with the draft resolution's rejection of requests by other parties that the utilities be generally prohibited from marketing at all, even with shareholder funds. See Second Draft Resolution, pp. 9-10.

[6] Second Draft Resolution E-4250, p. 11.

ability to return to utility bundled service or fees a CCA may charge you to return to utility bundled service.[7]

Without this additional explanatory language, a customer may well interpret the proposed language "fees charged to… your account" and "service limitations placed on…your account" to mean something more ordinary or inconsequential than potentially significant "exit fees" and potentially lengthy time restrictions on the ability to return to utility bundled service.[8] With the requested modifications, PG&E does not object to Ordering Paragraph 2.B.[9]

VI. PG&E Has Previously Agreed to and Implemented Ordering Paragraph 4.

Prior to the issuance of the First Draft Resolution, after consultations with the Energy Division, PG&E ceased providing the opportunity to its customers to opt out of a CCA program before the program's Initial Notification Period.

VII. Conclusion.

PG&E appreciates the opportunity to submit these opening comments on the Energy Division's Second Draft Resolution E-4250.

Respectfully Submitted,

CHRISTOPHER J. WARNER
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/s/
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Attorneys for
PACIFIC GAS AND ELECTRIC COMPANY

[7] PG&E proposes the same modification to the identical language proposed by the Energy Division at Ordering Paragraph 2.D.

[8] See Comments of Pacific Gas and Electric Company on [First] Draft Resolution E-4250, August 27, 2009, pp. 4-5, for a discussion of a CCA customer's potential "termination fee" and time commitment under the San Joaquin Valley Power Authority's February 2009 Implementation Plan.

[9] PG&E likewise does not object to Ordering Paragraph 3, which would establish a notification and review process for the utilities' ratepayer-funded CCA websites.

CERTIFICATE OF SERVICE BY U.S. MAIL OR ELECTRONIC MAIL

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, California 94105.

On **January 11, 2010**, I caused to be served true copies of:

COMMENTS OF PACIFIC GAS AND ELECTRIC ON SECOND DRAFT RESOLUTION E-4250

by electronic mail, or (for those parties without valid electronic mail addresses) by placing it for collection and mailing, in the course of ordinary business practice, with other correspondence of Pacific Gas and Electric Company, enclosed in a sealed envelope, with postage fully prepaid, addressed to:

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(original and two copies via hand delivery)

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All parties on the official service lists for **R.03-10-003** and **A.07-12-032** (See attached service lists.)

All CPUC Commissioners (See attached list.)

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 **January 11, 2010**.

/s/
Redacted

THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA SERVICE LIST

Last Updated: December 31, 2009

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