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

RESPONSE OF THE ALLIANCE FOR RETAIL ENERGY MARKETS TO THE JOINT PETITION FOR MODIFICATION OF DECISION 09-04-010, AS MODIFIED BY DECISION 10-02-033

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I. INTRODUCTION AND SUMMARY

In accordance with Rule 16.4(f) of the Commission's Rules of Practice and Procedure, the Alliance for Retail Energy Markets ("AReM")[1] submits this response to the Petition for Modification of Decision ("D.") 09-04-010 ("Petition"), as modified by Decision ("D") 10-02-033 ("Petition"), which was filed jointly on April 15, 2010 by Pacific Gas and Electric Company ("PG&E"), Russell City Energy Company ("RCEC"), LLC, Division of Ratepayer Advocates ("DRA"), California Unions for Reliable Energy ("CURE"), and The Utility Reform Network ("TURN"), referred to herein as Joint Petitioners. One purpose of this filing is to request approval of "limited modifications"[2] to the Second Amended and Restated Power Purchase and Sale Agreement ("2nd APPA") between PG&E and RCEC to reflect continued permitting delays. AReM does not offer any comments with respect to those proposed modifications.

[1] AReM is a California mutual benefit corporation formed by electric service providers that are active in California's direct access market. The positions taken in this filing represent the views of AReM but not necessarily those of individual members or affiliates of its members with respect to the issues addressed herein.

[2] See Petition, page 1.

However, the Petition also requests that, on an expedited basis,

> "the Commission modify D.09-04-010 to implement the cost recovery mechanism recently adopted by the legislature in Senate Bill ("SB") 695."[3]

AReM's response to the Petition is limited to this issue raised by the Petition with respect to cost allocation. First, as explained in more detail in Section II below, PG&E has already made and received approval of its cost allocation election, as provided for by Decision 06-07-029 ("D.06-07-029"), and there is no provision in that decision that allows PG&E to retroactively modify that election. Second, as explained in more detail in Section III below, the provisions of SB 695 with respect to the type of cost allocation treatment that the Petition seeks are applicable to contracts that the Commission authorizes on a going-forward basis; the limited changes requested in the Petition to an already approved contract do not open the door for those provisions of SB 695 to be applied to this pre-existing contract.

II. THE PROPOSED MODIFICATIONS VIOLATE D.06-07-029, WHICH REQUIRES AN ELECTION AT THE TIME THE UTILITIES SEEK CONTRACT APPROVAL AND DOES NOT PERMIT A RETROACTIVE CHANGE TO THAT ELECTION ONCE THE ELECTION HAS BEEN APPROVED.

In D.06-07-029, the Commission adopted an interim cost allocation mechanism ("CAM") for new generation capacity to meet system or local resource adequacy needs that would be applicable to all benefiting customers, if approved by the Commission. However, the utilities were required to meet a number of conditions in order to employ the CAM. Most relevant here is the requirement that the utility elect at the time they apply for contract approval whether they intend to use the CAM, and that if CAM was elected, then PG&E must conduct an energy auction in order to determine the portion of the PPA costs that would be allocated to all

[3] See Petition, page 2.

customers.[4] The Commission must then approve the utility's election and ensure that all the required conditions have been met. This requirement is clearly stated in Conclusion of Law 6:

> 6. The IOUs shall make an election at the time they seek contract approval from this Commission whether or not they intend that the cost allocation mechanism adopted by this decision should apply to the contract. The Commission's decision on the IOUs' applications will determine the cost allocation mechanism that will apply.[5]

And, as further explained in Ordering Paragraph 3:

> 3. The IOUs are to follow the guidelines set forth herein in order to have the cost allocation mechanism applicable to their new generation resources.[6]

Therefore, D.06-07-029 is clear that the utilities are required to make an election at the time they seek contract approval in order to qualify for use of the CAM.

In Decision 06-11-048, the Commission approved PG&E's request to defer its cost allocation election with respect to its contract with RCEC until a decision had been issued by the Commission in Rulemaking ("R.") 06-12-013 on the details of the energy auction. Those details were established in Commission Decision 07-07-044, issued on September 21, 2007.

Over a year later, on October 10, 2008, PG&E filed Application 08-09-007, which included, among other things, an election for CAM treatment of the RCEC projects. During the course of that proceeding, PG&E and other parties entered into a settlement, and apparently by the conclusion of those discussions, PG&E decided to change its CAM election[7], as evidenced in

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[4] AReM notes that SB 695 does eliminate a requirement that an IOU must conduct an energy auction.

[5] D.06-07-029, p. 60.

[6] D.06-07-029, p. 62.

[7] AReM notes that the Settlement Agreement does not appear to be publicly available as it is not available on the Commission website; therefore AReM does not have the benefit of gaining any understanding of how or why the settlement resulted in a desire on PG&E's part to change its CAM election.

Decision 09-04-010, issued on April 16, 2009, which contained the following Finding of Fact #12:

> 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.[8]

and Ordering Paragraph #2:

> 2. PG&E is authorized to recover costs associated with the 2nd APPA through its Energy Resource Recovery Account.[9]

The Petition conveniently fails to note that PG&E has already made – and received approval for – its cost allocation mechanism. Moreover, the Petition makes no case whatsoever that this filing is tantamount to a request for "contract approval" of the RCEC PPA, which, therefore, might somehow open the door for a cost allocation election under D.06-07-029. Indeed, there is no such case to be made. The modifications to the 2nd APPA requested in the Petition are, as admitted by the Joint Petitioners, limited in nature, as reflected by the related changes proposed to D.09-04-010, namely changing the reference to the contract name and changing the delivery year from 2012 to 2013. There is no rational argument that the proposed PPA amendments requested in the Petition are the same as requesting approval of the underlying contracts, which would therefore represent an opportunity for the cost allocation "election at the time they seek contract approval from this Commission."[10] Indeed, that time has long passed.

In summary, the Petition is wholly inconsistent with prior Commission decisions on the cost allocation mechanisms that are available to PG&E, and should be denied on those grounds.

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[8] See D.09-04-010, page 31.

[9] See D.09-04-010, page 33.

[10] D.06-07-029, Conclusion of Law 6, p. 60.

Likewise, as detailed in the next section, there is no logical interpretation of SB 695 that supports a retroactive cost allocation election.

III. SB 695 DOES NOT REPEAL THE REQUIREMENT FOR ELECTION AT THE TIME OF CONTRACT APPROVAL NOR DOES IT PERMIT A RETROACTIVE COST ALLOCATION ELECTION

The Petition suggests that SB 695 presents an opportunity for PG&E to reverse the cost allocation mechanism that it elected and had approved by the Commission. There is no plain reading of SB 695 that supports that suggestion. In its entirety, what Section 365.1(c)(2)(A) says is that the Commission shall

> (2) (A) Ensure that, in the event that the commission authorizes, in the situation of 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 purchase electricity through a direct transaction with other providers.
> (iii) Customers of community choice aggregators.[11]

There is simply no construction of this language that supports its retroactive application to contracts that have already been authorized by the Commission. Nor, as explained in the section above, can the Petition's proposed ministerial modifications to a previously authorized contract be construed as a request for approval of a new contract.

Indeed, SB 695 merely reiterates the existing *principle* that, under certain specified conditions, and when approved by the Commission, the utilities may recover net capacity costs

[11] See Statute section 365.1(c)(2)(A)

from all customers found to "benefit" from the procurement.[12] Significantly, SB 695 contains no language that repeals the Commission's requirement for an election of CAM treatment at the time the utility requests approval of the PPA. Moreover, the Commission has already signaled its intent to evaluate the extent to which the strictures of SB 695 will impact utility procurement and cost allocation, if at all, on a going-forward basis in the relevant subject matter proceedings.[13] There are strong arguments to be made, and likely will be made in those umbrella proceedings, that existing Commission decisions, such as D.06-07-029, are entirely consistent with the language contained in SB 695. Therefore, for the Petition to suggest that SB 695 creates some sort of new requirement that the Commission must rule on in this proceeding on an expedited basis is nothing more than an attempt to front run a more careful and deliberate analysis of the impact of the statute to be applied prospectively, and should be rejected as such.

IV. CONCLUSION

The Petition's request to retroactively change PG&E's previously approved cost allocation mechanism must be denied. If it is not denied, it will open the floodgates to similar petitions, all seeking to modify established cost allocation matters in individual past proceedings. The mischief that could be created by providing an opportunity to exercise such discretion to seek or not seek a revised cost allocation mechanism retroactively would introduce an

[12] PUC §§ 365.1 (c)(2)(A) and 365.1 (c)(2)(B), as cited on pp. 9-10 of the Petition to Modify.

[13] *Assigned Commissioner's Ruling Amending Scope of Issues Related to Direct Access Phase*-In, December 17, 2009, p. 4. As evidence, the Commission recently approved Rulemaking 10-05-006, issued May 13, 2010, which will address "refinements" of D.06-07-029 to comply with of SB 695. AReM notes that the Preliminary Scoping Memo for this proceeding states that SB 695 "eliminates the CAM election process." AReM believes this to be inaccurately stated. Specifically, SB 695 eliminated the Commission requirement that the utility be required to use an *energy auction* when electing the CAM in § 365.1 (c)(2)(B) (although the utility may choose to use the auction). That is the only change made to the "CAM election process" in SB 695. In any event, those issues will be addressed and resolved in Rulemaking 10-05-006 and thus are not relevant to this Petition.

unwarranted and harmful market uncertainty, and would likely clog the proceedings calendar of this Commission.

Therefore, AReM respectfully requests that the Commission reject the Joint Petitioners' request to (1) modify Finding of Fact 12 of D.09-04-010 and (2) modify Ordering Paragraph 2 to adopt a new cost allocation mechanism, which would retroactively and impermissibly reverse PG&E's previous election not to use CAM treatment for the RCEC project in violation of D.06-07-029.

Respectfully submitted,

/s/ Sue Mara

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Consultant to
ALLIANCE FOR RETAIL ENERGY MARKETS

Date: May 17, 2010

VERIFICATION

I, Susan J. Mara, am a consultant to the Alliance for Retail Energy Markets ("AReM") and I am authorized to make this Verification on AReM's behalf. The statements in the foregoing Response Of The Alliance For Retail Energy Markets To Joint Petition For Modification of Decision 09-04-010, As Modified By Decision 10-02-033, filed in A.08-09-007, are true to my own knowledge, except as to matters which are therein stated on information or 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 and executed on May 17, 2010 at Redwood City, California.

/s/ Susan J. Mara
SUSAN J. MARA

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of ***Response of the Alliance for Retail Energy Markets to Joint Petition for Modification of Decision 09-04-010, as Modified by Decision 10-02-033*** on all parties of record in ***A.08-09-007*** by serving an electronic copy on their e-mail addresses of record and, for those parties without an e-mail address of record, by mailing a properly addressed copy by first-class mail with postage prepaid to each party on the Commission's official service list for this proceeding.

This Certificate of Service is executed on May 17, 2010 at Redwood City, California.

/s/ Susan J. Mara
SUSAN J. MARA

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