

**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' OPPOSITION TO MOTION OF PACIFIC GAS AND  
ELECTRIC COMPANY (U 39 E) FOR LEAVE TO FILE PURPORTED CONFIDENTIAL  
PORTIONS OF JOINT PETITION OF PG&E, DIVISION OF RATEPAYER  
ADVOCATES, CALIFORNIA UNIONS FOR RELIABLE ENERGY, AND THE UTILITY  
REFORM NETWORK FOR MODIFICATION OF DECISION 09-094-010 AS MODIFIED  
BY DECISION 10-02-033**

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As authorized under the Rules of Procedure and Practice, rule 11.6, Group Petitioners California Pilots Association, Skywest Townhouse Homeowners Association and Hayward Area Planning Association (collectively “GP”) submit their response to the motion by Pacific Gas and Electric for leave to file confidential portions of the Joint Petition Of PG&E, Division Of Ratepayer Advocates, California Unions For Reliable Energy, and The Utility Reform Network For Modification Of Decision 09-094-010 As Modified By Decision 10-02-033. (See April 26, 2010 authorization by Administrative Law Judge Melanie Darling extending the time for all parties to respond to and including May 4, 2010.)

#### **SUMMARY OF STATUS OF PROCEEDINGS**

On June 22, 2009, 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”) petitioned the Commission to modify “Decision No. 09-04-010 Approving Settlement Agreement Regarding the Second Amended and Restated Power Purchase Agreement” which was issued on April 16, 2009 in response to a joint motion by Pacific Gas and Electric Company (PG&E), Russell City Energy Company, LLC (RCEC), California Unions for Reliable Energy (CURE), Division of Ratepayers Agency (DRA) and The Utility Reform Network (TURN).

On July 22, 2009, three out of the five joint parties which sought approval of the second amended purchase power agreement (2<sup>nd</sup> APPA) submitted a response to the petition for modification, namely, PG&E, RCEC and CURE. Accompanying that response was a concurrent motion by PG&E to file a portion of the response by PG&E, RCEC and CURE confidentially relying on Decision 06-06-066, Public Utilities Code Section 583, and General Order 66-C. On August 3, 2009, GP timely opposed in part that motion and to date no ruling has been rendered.

On July 29, 2009, as authorized by Rule 11.1, subdivision (f), GP also sought to reply to the opposition by PG&E, RCEC and CURE. That same day the Hon. Melanie Darling, Administrative Law Judge, responded that once she was prepared to decide whether a reply was necessary, she would provide GP with ten days to file a reply. (July 29, 2009 Email Communication from ALJ Darling to Jewell Hargleroad responding to request to reply.) To date, GP's request remains pending.

## **ARGUMENT**

### **A. PG&E's Motion Must Be Denied In Its Entirety Or Resubmitted To Satisfy Its Minimal Burden.**

Decision 06-06-066, upon which PG&E relies in support of its motion, was modified by Decision 07-05-032 on May 3, 2007, which was a specific response to "Senate Bill (SB) No. 1488 (2004 Cal. Stats., Ch. 690 (Sept. 22, 2004). SB 1488 [which] require[d] that [the Commission] examine [CPUC] practices regarding confidential information to ensure meaningful public participation in our proceedings and open decision making, while taking account of our obligations under §§ 454.5(g) and 5831 to protect the confidentiality of certain information." (Decision 07-05-032.)

Unless the information falls within the matrix as developed by the Commission, PG&E as the moving party bears the burden of proving that they contain "market sensitive information" which "must have the potential to materially affect an electricity buyer's market price for electricity. Data that can have no material impact on this price are not 'market sensitive.'" (Decision 07-05-032, pp. 22 [burden of proof] & 37-38 [definition of market sensitive].)

As the February 6, 2009, Administrative Ruling A.08-09-007 partially denying an earlier motion to redact portions of its pleadings and evidence by PG&E in this case summarized,

In D.06-06-066, the Commission set forth standards for designating information as confidential. In Appendix 1 to D.06-06-066, the Commission set forth

a Matrix that identified several categories of data and the level of confidentiality granted to each category. Specifically, **in Ordering Paragraph (OP) 2 the Commission stated: “[w]here a party seeks confidentiality protection for data contained in the Matrix, its burden shall be to prove that the data match the Matrix category.** Once it does so it is entitled to the protection the Matrix provides for that category.”

When an IOU files materials with the Commission and seeks confidential treatment, the IOU must concurrently file a motion with any proposed designation of confidentiality, establishing:

- 1) That the material it is submitting constitutes a particular type of data listed in the Matrix,
- 2) Which category or categories in the Matrix the data correspond to,
- 3) That it is complying with the limitations on confidentiality specified in the Matrix for that type of data,
- 4) That the information is not already public, and
- 5) That the data cannot be aggregated, redacted, summarized, masked or otherwise protected in a way that allows partial disclosure. (D.08-04-023.)

(Feb. 6, 2009, Ruling, pp. 5-6, emphasis and italics added.)

Here, PG&E’s motion sets forth this threshold showing, p. 2, but makes no effort whatsoever to establish why any of the provisions it seeks to conceal fall within the categories.

**Not one sentence of the motion is dedicated to addressing any of these standards.**

Immediately following the quotation of Decision 08-04-023 in the motion is a sentence from section 583 of the Public Utility Code. (Motion, p. 2.) The next sentence in the motion quotes a portion of paragraph 2.8 of the General order 66-C. (Motion, p. 2.) However, neither of these authorities authorize PG&E as the moving party to escape from satisfying its minimal burden to establish why its appendices, particularly appendix C, expressly consisting of contract summaries, to its joint petition must be concealed and the parties improperly burdened by having

to brief these non-market price issues “confidentially.”<sup>1</sup> (GP notes that just because PG&E may insert an item within the matrix, does not mean the material necessarily falls within the matrix.)

Given PG&E’s failure to even attempt to satisfy its minimal threshold burden, the motion either needs to be denied in its entirety or PG&E instructed to satisfy the minimum requirements.

**B. The Justification PG&E Sets Forth In Its Matrix To Conceal Most Of Appendix C Entitled “Summary of Amended Terms” Constitutes Non-Protected Summaries Attempting To Change Non- Protected Timeline Terms Subject To GP’s Petition For Modification**

Without waiving their entitlement to supplement this response or to further respond, assuming PG&E is directed to set forth a proper motion, GP point out that under the auspices of “modifying” the April 16, 2009 Decision 09-04-010, the JP seeks “to approve a[] [contract] amendment to the previously approved second amended and restated power purchase and sale agreement,” called the “1<sup>st</sup> Amendment to the 2<sup>nd</sup> APPA.” (Joint Petition dated April 15, 2010, p. 1 (“JP”). The JP’s theory is that such amendments are necessary to “preserve” this contract.

As the underlying record establishes, these issues concerning RCEC’s performance and ability to obtain necessary material government approvals, specifically the PSD permit, have nothing to do with protected “market sensitive information,” but concern length of contract and online dates, contract terms expressly excluded from the confidentiality provisions of the Matrix.

As the record reflects, just when or whether RCEC obtains a PSD permit has been a material and public issue starting with the Commission’s November 18, 2008 Scoping Memo:

**3. Are there any outstanding permitting delays that would result**

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<sup>1</sup> Further, this burden has become exacerbated by RCEC’s threats, a market participant, that the non-disclosure agreement to which they became signatory in order to participate in a settlement conference, now improperly authorizes them to utilize the non-disclosure agreement to intimate and threaten non-profit organizations which rang the bell that their most recent purchase power agreement or 2<sup>nd</sup> APPA is “over” by its own terms. (See July 22, 2009, response by PG&E, RCEC and CURE to GP’s petition for modification and GP’s August 3, 2009 Opposition to PG&E’s Motion to File Confidential Material And Request to Strike Part II Of PG&E, RCEC and CURE’s Response and for Sanctions.)

**in the RCEC Project not being viable as of its projected construction start date of September 10, 2010?**

(November 18, 2008 Scoping Memo, page 3, emphasis added, also see Scoping Memo, p. 6, requiring PG&E to provide status report on Prevention of Significant Deterioration air permit issued November 1, 2007 by the Bay Area Air Quality Management District.)

Likewise, approval of material government permits was an issue raised by the “joint” application to approve the 2<sup>nd</sup> APPA filed on December 23, 2009, given the Environmental Appeals Board’s reversal of that November 1, 2007 “amended” PSD permit:

**With the exception of a final amended Prevention of Significant Deterioration (“PSD”) permit from the Bay Area Air Quality Management District (“BAAQMD”), RCEC has received all permits and regulatory approvals necessary to move forward with the RCEC Project upon Commission approval of the Second Amended PPA.[FN] The BAAQMD issued a draft amended PSD permit the week of December 8-12, 2008. [Fn.] RCEC expects BAAQMD to issue the final amended PSD permit in early 2009. [Fn.]**

(Dec. 23, 2008 Application, p. 7; GP disputed this assertion.) Footnoted in the Joint

Petitioner’s December 23, 2009 application is the following:

Attached hereto as Attachment C is a **letter from RCEC to PG&E providing an updated status report regarding the amended PSD permit. Attachment C addresses the procedural schedule related to the amended permit** and replaces the December 4, 2008 status report provided by RCEC to PG&E, as it relates to the amended PSD permit. The December 4, 2008 status report is attached as Attachment 2-2 to PG&E-2

(Dec. 23, 2008 Application, p. 7 & fn. 17. “TURN, DRA and CURE [ took] no position on the reasonableness of RCEC’s expectation regarding this timeframe.” Dec. 23, 2008 Application, p. 7 & fn. 18.)

Clearly, just “when” RCEC might be able to obtain a PSD permit and its application to the 2<sup>nd</sup> APPA has been an issue repeatedly publicly discussed going to the length of the terms of the contract and online delivery dates.

In this regard, the April 16, 2009 Decision that the JP seeks to modify to change the 2<sup>nd</sup> APPA terms, relies on D. 06-06-066, to find that general discussion of section 11 of the 2<sup>nd</sup> APPA is not protected.

#### 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.

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.**

(April 16, 2009 Decision 08-09-007, pp. 28-29, italics and emphasis added.) This Decision therefore recognizes that GP’s discussion concerning section 11 of the 2<sup>nd</sup> APPA in Section E, p. 8, discussing material government approvals is not protected and requires Appendix C to be resubmitted consistent with this Commission’s Decision.

Sections 5 and 11 also are the two contract sections upon which GP’s June 2009 petition for modification relies on to establish that RCEC is in default and will not and has not met certain project milestones. (*Compare*, April 13, 2009 Joint Comments to Proposed Decision, pp. 4-5.)<sup>2</sup>

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<sup>2</sup> In response to GP’s objections to the Proposed Decision, on April 13, 2009, the joint parties,

Appendix C, the “comparison matrix,” contains twelve pages primarily dedicated to modifying sections 5 and 11, the same sections upon which GP’s petition for modification is based. (GP’s June 2009 Petition, pp. 1-2 & 5.) Most of the “explanation of amendment change[s]” are concealed, although for the most part they do not contain contract terms or “market sensitive” price information. (See e.g., Appendix C, explanations concerning section 5.1(a)(vi), 5.1(a)(ix), 5.1(a)(xiv), 5.2, 11.1(a), and so forth, entitled “Summary of Amended Terms and Conditions,” *compare with* Matrix, p. 1, justifying appendix C’s concealed terms as “showing] terms *other than contract summary terms*, which are terms *other than . . . length of contract and online date.*”(Italics added.)

The result is that the discussion in the JP is not fully consistent with the actual concealed changes that attempt to “rejuvenate” an already defaulted and unperformed contract, which

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including PG&E, RCEC and CURE argued that

Both the Group Petitioners and CARE/Simpson assert that the PD improperly relies on speculation by PG&E and RCEC regarding the issuance of the PSD permit by BAAQMD. <sup>[Fn]</sup> **The Group Petitioners and CARE/Simpson also raise the specter of future appeals related to the PSD permit as a reason for the Commission to conclude that the 2<sup>nd</sup> APPA will “fail”<sup>[fn]</sup> or that RCEC will not timely meet certain project milestones.** <sup>[Fn]</sup> These assertions are not supported by the record, and do not support the modification or rejection of the PD.

. . . . **The PSD permit represents the only outstanding material government approval for the project. The mere fact that BAAQMD’s issuance of the PSD may be appealed . . . does not demonstrate, . . . that the RCEC will not meet its *current construction start date.*** Moreover, the threat of future appeals to BAAQMD’s issuance of the permit . . . should not impair Commission action in this case. **The length of time needed to resolve any appeal that might be filed is pure speculation. There is nothing in the record that requires the Commission to conclude that the threat of appeal makes the completion date impossible to meet.** On the contrary, . . . the completion date for this project is reasonable.

(April 13, 2009 Joint Comments, pp. 4-5, emphasis and italics added.)



cannot and has not satisfied its critical milestones. Given PG&E's failure to satisfy its minimum burden and this JP's April 15, 2010 petition attempts to modify the same terms establishing RCEC's multiple defaults upon which GP's June 2009 petition is based, satisfaction of Decisions 06-06-066 and 07-05-032 to allow meaningful public participation becomes all the more important.

### **CONCLUSION**

Because PG& E's motion fails to satisfy this Commission's minimum criteria and Appendix C's "summary" of contract terms in fact attempts to conceal contract summaries which are not protected by the matrix and concern the same terms subject of GP's June 2009 pending petition, PG&E's motion must be denied with leave to resubmit a motion satisfying a party's minimum criteria "to ensure meaningful public participation in [CPUC] proceedings and open decision making." Likewise, because the concealed contract summaries in appendix C fall outside of the matrix, PG&E must satisfy its burden to establish why these timeline provisions contain "market sensitive information" which "have the potential to materially affect an electricity buyer's market price for electricity" (Decision 07-05-032, pp. 22.)

Dated: May 4, 2010

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 4th<sup>day</sup> of May 2010, 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' Opposition To Motion Of Pacific Gas And Electric Company (U 39 E) For Leave To File Purported Confidential Portions Of Joint Petition Of PG&E, Division Of Ratepayer Advocates, California Unions For Reliable Energy, And The Utility Reform Network For Modification Of Decision 09-094-010 As Modified By Decision 10-02-033

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 the 4th of May, 2010 for the proceedings.

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