

**PUBLIC VERSION**

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

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

**JOINT RESPONSE OF PACIFIC GAS AND ELECTRIC COMPANY,  
RUSSELL CITY ENERGY COMPANY, LLC, AND CALIFORNIA UNIONS FOR  
RELIABLE ENERGY TO GROUP PETITIONERS' PETITION FOR MODIFICATION  
OF DECISION 09-04-010 AND DECLARATION IN SUPPORT OF JOINT RESPONSE**

**REDACTED PUBLIC VERSION**

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Pursuant to Rule 16.4 of the California Public Utilities Commission ("Commission") Rules of Practice and Procedure, Pacific Gas and Electric Company ("PG&E"), Russell City Energy Company, LLC ("RCEC"), and California Unions for Reliable Energy (collectively "Joint Parties") hereby respond to the petition to modify Decision ("D.") 09-04-010 filed by California Pilots Association, Skywest Townhouse Homeowners Association and Hayward Area Planning Association (collectively "Group Petitioners").

**I. THE GROUP PETITIONERS HAVE NOT SET FORTH GROUNDS  
JUSTIFYING ANY CHANGE TO D.09-04-010.**

The petition to modify D.09-04-010 represents the latest of several attempts by the Group Petitioners to collaterally attack the Commission's approval of the Second Amended and Restated Power Purchase Agreement ("2<sup>nd</sup> APPA") by trying to introduce siting and permitting issues related to the Russell Center Energy Center project ("RCEC project"). In this instance, the Group Petitioners assert that an administrative "stay" issued by the Environmental Protection Agency ("EPA") effectively prevents the Bay Area Air Quality Management District ("BAAQMD") from issuing a Prevention of Significant Deterioration ("PSD") permit for the project.

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Contrary to the assertions of the Group Petitioners, the EPA did not stay the issuance of a PSD permit for the RCEC project and BAAQMD is, in no way, precluded from issuing a PSD permit to RCEC during the stay period. Rather, EPA stayed a “grandfathering provision” contained in a rule implementing EPA’s New Source Review Program for particulate matter less than 2.5 micrometers (“PM2.5”).<sup>1</sup> The grandfathering provision allowed permitting agencies, in certain circumstances, to continue using a “surrogate policy” for purposes of demonstrating compliance with PM2.5 requirements.<sup>2</sup>

On June 23, 2009, BAAQMD posted on its website a draft of an additional statement of basis and PSD permit for the RCEC project, along with updated supporting technical analyses.<sup>3</sup> These drafts and analyses do not rely on the surrogate policy to demonstrate compliance with PM2.5 requirements.<sup>4</sup> As a result, the issuance of the PSD permit for the RCEC project is not subject to the EPA stay and BAAQMD is continuing to move forward with the PSD permitting process.

Moreover, the sections in the 2<sup>nd</sup> APPA that the Group Petitioners assert are affected by the EPA stay do not implicate D.09-04-010. Rather, the provisions address certain rights of RCEC and PG&E under the 2<sup>nd</sup> APPA.<sup>5</sup> To the extent these rights, or any other right under the 2<sup>nd</sup> APPA, may be triggered at some point in the future (irrespective of the reason), it would be a contract issue to be addressed by the parties to the agreement.

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<sup>1</sup> 74 Fed. Reg. 26098.

<sup>2</sup> See 40 CFR 52.21(i)(1)(xi).

<sup>3</sup> Declaration of Jeffrey P. Gray in support of Joint Response of Pacific Gas and Electric Company, Russell City Energy Company, LLC, and California Unions for Reliable Energy to Group Petitioners’ Petition for Modification of Decision 09-04-010 (“*Gray Declaration*”) at ¶4.

<sup>4</sup> *Gray Declaration* at ¶4.

<sup>5</sup>

[REDACTED]

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The Group Petitioners have not set forth grounds justifying any change to D.09-04-010.

Accordingly, the Commission should reject the petition for modification of D.09-04-010.

### II. THE GROUP PETITIONERS HAVE VIOLATED D.06-06-066, THE FEBRUARY 6, 2009 RULING OF ADMINISTRATIVE LAW JUDGE DARLING REGARDING CONFIDENTIALITY AND A NONDISCLOSURE AGREEMENT WITH PG&E AND RCEC

At the outset of this proceeding, PG&E filed a nondisclosure agreement (“NDA”) with the Commission as part of its initial request for leave to file confidential material under seal.<sup>6</sup> In the *September 2008 Confidentiality Motion*, PG&E noted that the NDA was “taken from the model Protective Order and NDA approved by [the] Commission in D.08-04-023.”<sup>7</sup>

On December 18, 2008, Group Petitioners executed the NDA.<sup>8</sup> Section 3 of the NDA provides:

PG&E may designate as Confidential Material any information or documents that PG&E customarily treats as confidential or proprietary, which are not available to the public, and which, if disclosed freely, would, in PG&E's judgment, adversely affect either its ratepayers or PG&E. Confidential Material also includes information or documents in PG&E's possession that PG&E received from persons who consider the information or documents confidential or proprietary.

In addition to the NDA, Group Petitioners also executed an Amendment to Nondisclosure Agreement (“ANDA”). The ANDA provides that:

PG&E and [Group Petitioners] acknowledge that the release, attempted release, or use of Confidential Material or Highly Confidential Material RCEC has provided to PG&E other than as contemplated by the NDA may cause RCEC irreparable injury. Accordingly, PG&E and [Group Petitioners] agree that RCEC shall have the right to enforce all terms and conditions in the NDA

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<sup>6</sup> See *Motion of Pacific Gas and Electric Company (U 39 E) for Leave to File Confidential Material in Application Under Seal Consistent with the Confidentiality Protections of Decision 06-06-066, Public Utilities Code Section 583, and General Order 66-C (September 10, 2008)* (“*September 2008 Confidentiality Motion*”).

<sup>7</sup> *September 2008 Confidentiality Motion* at 3.

<sup>8</sup> *Gray Declaration* at ¶5; Attachment 1.

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with respect to Confidential Material or Highly Confidential Material provided to [Group Petitioners].<sup>9</sup>

On December 23, 2008, the 2<sup>nd</sup> APPA was filed under seal with the Commission concurrently with a motion by PG&E requesting confidential treatment of the 2<sup>nd</sup> APPA pursuant to Decision 06-06-066, Public Utilities Code section 583, and General Order 66-C (“December 23, 2008 Confidentiality Motion”).<sup>10</sup> As filed with the Commission and served on the Group Petitioners, the 2<sup>nd</sup> APPA was clearly marked “confidential.” Thus, Group Petitioners had actual knowledge that the 2<sup>nd</sup> APPA was confidential and protected from disclosure pursuant to the terms of the NDA.

On February 6, 2009, ALJ Darling issued a ruling granting both PG&E’s *September 2008 Confidentiality Motion* (to which the NDA was attached) and its *December 23, 2008 Confidentiality Motion* (“February 6, 2009 Confidentiality Ruling”). In doing so, the February 6, 2009 *Confidentiality Ruling* ordered that, for a three-year period, the 2<sup>nd</sup> APPA:

shall not be made accessible or disclosed to anyone other than Commission staff except pursuant to (a) the 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. Any party intending to include information which this ruling places under seal, in any document submitted for filing in this proceeding shall submit the unredacted version of the document under seal, together with a redacted version for the public record.<sup>11</sup>

In their Petition for Modification, the Group Petitioners state that (1) an EPA stay has been issued effective through September 1, 2009; and that (2) in light of the stay, under the terms

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<sup>9</sup> *Gray Declaration* at ¶5; Attachment 1.

<sup>10</sup> See *Motion of Pacific Gas and Electric Company (U 39 E) for Leave to File Confidential Information Under Seal Consistent with the Confidentiality Protections of Decision 06-06-066, Public Utilities Code Section 583, and General Order 66-C* (December 23, 2008).

<sup>11</sup> *Administrative Law Judge’s Ruling Partially Granting Motions by Pacific Gas and Electric Company to File Confidential Material and Information Under Seal, and to Seal the Evidentiary Record as to Confidential Testimony and Supplemental Testimony* at 7 (Ruling Paragraph 7). This ALJ Ruling also addressed other confidential material and information in addition to the 2<sup>nd</sup> APPA.

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of the 2<sup>nd</sup> APPA - specifically citing sections 5.1(a)(xiv), 11.1(a)(iv), 11.[2](b), 11.2(c)(vi), and 11.2(vi) - "RCEC is and will be default subject to termination, since due to the stay, it is impossible for RCEC to satisfy the terms of the contract, and obtain the necessary authority to construct and satisfy the necessary critical milestone's of the 2<sup>nd</sup> APPA."<sup>12</sup>

Although the Group Petitioners do not recite actual language verbatim from the 2<sup>nd</sup> APPA (or exact dates), their statements disclose that a failure to obtain a PSD permit before September 1 would trigger certain rights under the 2<sup>nd</sup> APPA.<sup>13</sup> As a result, these statements effectively disclose confidential provisions in the 2<sup>nd</sup> APPA that are specifically protected from disclosure by the *February 6, 2009 Confidentiality Ruling* and the NDA.

In D.06-06-066, the Commission provided for confidential treatment of all contract terms between utilities and non-affiliated third parties, such as RCEC, for a three year period with the limited exception that contract "summaries" addressing counterparty, resource type, location, capacity, expected delivery point, length of contract and online date could be made public.<sup>14</sup> Consistent with D.06-06-066, the *February 6, 2009 Confidentiality Ruling* requires that any party intending to include information protected by the ruling in any document filed with the Commission "shall submit the unredacted version of the document under seal, together with a redacted version for the public record." Information disclosed by Group Petitioners in the petition for modification addresses terms in the 2<sup>nd</sup> APPA other than counterparty, resource type, location, capacity, expected delivery point, length of contract and online date. Accordingly, the Group Petitioners failure to file the petition for modification under seal violates D.06-06-066, the *February 6, 2009 Confidentiality Ruling* and NDA.

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<sup>12</sup> Group Petitioners Petition for Modification at 2 .

<sup>13</sup> [REDACTED]

<sup>14</sup> See Decision 06-06-066, as modified by D.07-05-032, Appendix 1 at 15 (IOU Matrix, section VII(B)).

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**III. CONCLUSION**

For the reasons discussed herein, the Commission should reject the Group Petitioners' petition for modification of D.09-04-010 and find that, in failing to file an unredacted version of the petition for modification under seal, the Group Petitioners have violated D.06-06-066, the *February 6, 2009 Confidentiality Ruling* and the NDA.<sup>15</sup>

Respectfully submitted,

/s/

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Dated: July 22, 2009

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<sup>15</sup> PG&E and RCEC do not waive any of their respective rights under the NDA or NDA Amendment.

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**DECLARATION OF JEFFREY P. GRAY IN SUPPORT OF  
JOINT RESPONSE OF PACIFIC GAS AND ELECTRIC COMPANY;  
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I, JEFFREY P. GRAY, declare:

1. I am an attorney with Davis Wright Tremaine LLP and the counsel of record for Russell City Energy Company, LLC ("RCEC") in this proceeding. My business address is 505 Montgomery Street, Suite 800, San Francisco, California 94111.
2. I make this declaration in support of the "Joint Response of Pacific Gas and Electric Company, Russell City Energy Company, LLC, and California Unions for Reliable Energy to Group Petitioners' Petition for Modification of Decision 09-04-010" filed concurrently with this declaration.
3. In the June 1, 2009 Federal Register,<sup>16</sup> the Environmental Protection Agency ("EPA") provided notice that it had administratively stayed a "grandfathering provision" contained in a rule implementing EPA's New Source Review Program for particulate matter less than 2.5 micrometers ("PM2.5"). The grandfathering provision allowed permitting agencies, in certain circumstances, to continue using a "surrogate policy" for purposes of demonstrating compliance with PM2.5 requirements.

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<sup>16</sup> 74 Fed. Reg. 26098.



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4. On June 23, 2009, the Bay Area Air Quality Management District (“BAAQMD”) posted on its website a draft of an additional statement of basis and Prevention of Significant Deterioration (“PSD”) permit for the Russell Center Energy Center project (“RCEC project”), along with updated supporting technical analyses. This information can be found at <http://www.baaqmd.gov/Divisions/Engineering/Public-Notices-on-Permits/2009/062309-15487/Russell-City-Energy-Center.aspx>. These drafts and analyses do not rely on the surrogate policy to demonstrate compliance with PM2.5 requirements. As a result, the issuance of the PSD permit for the RCEC project is not subject to the EPA stay and BAAQMD is continuing to move forward with the PSD permitting process.
5. On December 18, 2008, attorney Jewell Hargleroad executed, on behalf of Group Petitioners, a Nondisclosure Agreement (“NDA”) with PG&E, a Nondisclosure Certificate related to the NDA, and an Amendment to Nondisclosure Agreement (“ANDA”). The ANDA provides that “RCEC shall have the right to enforce all terms and conditions in the NDA with respect to Confidential Material or Highly Confidential Material provided to [Group Petitioners].” True and correct copies of these documents are attached to my declaration at Attachment 1.

I declare under the penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this 21st day of July 2009, at San Francisco, California.

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/s/

Jeffrey P. Gray

