

**PUBLIC VERSION**

**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)

**CARE'S APPLICATION FOR REHEARING OF D. 10-09-004**

CALifornians for Renewable Energy, Inc. (CARE) requests rehearing of Decision (D.) 10-09-004 ("Decision") that was issued on September 3, 2010. CARE was a party to the proceeding and so is eligible to file a rehearing request pursuant to Rule 16.1<sup>1</sup> of the California Public Utilities Commission's ("Commission")'s Rules of Practice and Procedure. This request is timely because the decision was issued on September 3, 2010.

**Decision 10-09-004<sup>2</sup>**

Decision (D.) 09-04-010 approved a settlement embodied in a *Second Amended Power Purchase Agreement (2<sup>nd</sup> APPA) between Pacific Gas and Electric Company (PG&E) and Russell City Energy Company, LLC (RCEC)* that was also supported by Division of Ratepayer Advocates (DRA), The Utility Reform Network (TURN), and California Unions for Reliable

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<sup>1</sup> 16.1. (Rule 16.1) Application for Rehearing

(a) Application for rehearing of a Commission order or decision shall be filed within 30 days after the date the Commission mails the order or decision, or within 10 days of mailing in the case of an order relating to (1) security transactions and the transfer or encumbrance of utility property as described in Public Utilities Code Section 1731(b), or (2) the Department of Water Resources as described in Public Utilities Code Section 1731(c). An original plus four exact copies shall be tendered to the Commission for filing.

(b) Filing of an application for rehearing shall not excuse compliance with an order or a decision. An application filed ten or more days before the effective date of an order suspends the order until the application is granted or denied. Absent further Commission order, this suspension will lapse after 60 days. The Commission may extend the suspension period.

(c) Applications for rehearing shall set forth specifically the grounds on which the applicant considers the order or decision of the Commission to be unlawful or erroneous, and must make specific references to the record or law. The purpose of an application for rehearing is to alert the Commission to a legal error, so that the Commission may correct it expeditiously.

<sup>2</sup> See [http://docs.cpuc.ca.gov/PUBLISHED/FINAL\\_DECISION/123017.htm](http://docs.cpuc.ca.gov/PUBLISHED/FINAL_DECISION/123017.htm)

**PUBLIC VERSION**

Energy (CURE). The original power purchase agreement was first approved by the Commission in D.06-11-048 as part of PG&E's 2004 Long-Term Procurement Plan. A minor clarification made in D.10-02-033, in response to two applications for rehearing otherwise denied, did not affect the Commission's overall approval of the 2<sup>nd</sup> APPA.

This Decision denies the Petition for Modification of D.09-04-010 filed by Group Petitioners on the grounds that the arguments are speculative, lack relevance, and are moot. This Decision also grants the Petition for Modification of D.09-04-010, as modified by D.10-02-033,<sup>3</sup> filed by PG&E, RCEC, DRA, CURE, and TURN on the grounds that it is reasonably justified and in the public interest. The effect of this modification is to approve the First Amendment to the Second Amended Power Purchase Agreement between PG&E and RCEC, which provides limited changes to the terms and conditions of the Agreement, including a reduction in price and deferral of the delivery date by one year. The First Amendment was necessary largely due to a delay, until February 3, 2010, of the issuance of the Final Prevention of Significant Deterioration permit by the Bay Area Air Quality Management District, and several subsequently filed appeals.

No disputed issues of material fact have been presented and no hearing was held. Based on the written record, we grant this Petition for Modification, but in recognition of a withdrawn issue and in the interest of improved clarity, we do not adopt, verbatim, the revised language that PG&E and the other joining parties have proposed. [*Emphasis* added]

According to the Decision at pages 7 to 9:

Group Petitioners rest their petition on the "new" fact that RCEC did not receive its PSD permit before September 1, 2009, a claimed default date under the 2nd APPA which, they speculate, renders the 2nd APPA "unreasonable" and unqualified to meet the standard for adoption of a settlement. Without opining on all the potential rights and liabilities of the contracting parties under the 2nd

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<sup>3</sup> An issue related to a cost recovery mechanism has been withdrawn from the Petition for Modification.

**PUBLIC VERSION**

APPA, we disagree because this singular, and temporary, “fact” is not crucial to the overall settlement approved in D.09-04-010. The PSD permit has now been issued, and the extension of performance dates has been corrected in the First Amendment to the 2nd APPA contained in the Joint Petition filed in April 2010 which is granted below.

Group Petitioners assert relevance of the permit delay by reference to the Scoping Memo which inquired about the status of RCEC’s PSD permit. PG&E had requested expedited hearings on its original application but other parties questioned whether this was necessary. Therefore, the Commission requested information about the status of the air permit, which PG&E said was the last pending permit needed prior to commencement of construction. It was not established that a delay of the PSD permit was also relevant to the analysis in D.09-04-010 which considered whether an amended power purchase contract, proposed in settlement, was reasonable in light of the whole record, consistent with the law, and in the public interest.

We also note that in its opposition to the 2nd APPA, Group Petitioners similarly questioned the viability of the RCEC project and alleged that the Joint Parties had misled the Commission by failing to accurately describe the potential for further delays in getting the PSD permit or that CEC might reopen the site permit. The Commission rejected these arguments, acknowledged the future physical and financial viability of RCEC was “unknown,” and said that RCEC was in an “advanced position” to complete the project. Therefore, the Commission has previously considered the approval status of the one final, pending permit for operation of the RCEC power plant and found it to be inconsequential when considering the overall value of the power purchase agreement.

The importance of the 2nd APPA is the potential for ten years of energy capacity and energy, rather than certain contractual rights and liabilities designed to keep the project on track or compensate the parties upon possible default. Thus, the Commission has already decided that the delayed issuance of the PSD permit is insufficiently relevant to justify rejection of the 2nd APPA approved in D.09-04-010 as unreasonable or unsuitable for approval under the standards for settlement.

Moreover, even if the PSD permit had not yet been issued, and the parties’ contingent rights upon occurrence of certain events were found to be substantially relevant, the matter is now moot. The permit has been issued as of February 3, 2010 with an effective date of March 22, 2010. In addition, the Joint Parties promptly thereafter filed the Joint Petition to adopt an amendment to the 2nd APPA to conform certain performance dates to the timeline driven by the newly issued PSD permit and to modify some contingent performance rights and liabilities. We approve the Joint Petition below and thus, the date-driven provisions in the 2nd APPA of concern to Group Petitioners are no longer viable. Therefore, the Group Petition is moot. . [*Emphasis added*]

## PUBLIC VERSION

Over the last three years the State of California and the rest of the nation have experienced the worst economic downturn since the great depression. Demand for electricity has fallen sharply but in fact supplies have steadily increased. This is reflected in the CAL-ISO summer assessments for the last three years. The 2008 CAL-ISO summer assessment predicted a 19.9% planning reserve margin in PG&E's territory.<sup>4</sup> The CAL-ISO 2009 summer assessment predicted a planning reserve margin of 30.6% in PG&E's service territory.<sup>5</sup> The CAL-ISO 2010 assessment predicted a 38% planning reserve margin for the 2010 summer.<sup>6</sup>

Despite this obvious glut in generation resources the Decision refuses to examine the need for the Russell City Energy Center despite the fact that the need assessment performed in the 2004 LTRFO is obviously inaccurate as it did not contemplate the downturn in energy usage from the current recession. The PD continues the Commissions trend of approving unneeded natural gas generation at the expense of energy efficiency and renewable energy projects which are needed to meet the State's Renewable Portfolio and Greenhouse Gas Standards. The Commission cannot in good faith continue this trend when it is clear ratepayers lack sufficient resources to support both unneeded natural gas generation and needed renewable and energy efficiency projects. Since 2005, this Commission has allowed PG&E rates to rise 28%. The Commission should only allow this first amendment to the second amended restated power purchase and sale agreement for the Russell City on a clear demonstration of necessity. That standard is not met here.

### Issues

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<sup>4</sup> <http://www.caiso.com/1fb7/1fb7855eed50.pdf> Page 3

<sup>5</sup> <http://www.caiso.com/23ab/23abd69829524.pdf> Page 4

<sup>6</sup> <http://www.caiso.com/2793/2793ae4d395f2.pdf> Page 4

## PUBLIC VERSION

Rule 16.1 explains that an application for rehearing shall set forth specifically the grounds on which the applicant considers the order or decision of the Commission to be unlawful or erroneous, and must make specific references to the record or law.

1. On May 4, 2010 in Docket No. EL10-64-000, the CPUC submitted a petition for declaratory order in which it requests that the Commission find that sections 205 and 206 of the Federal Power Act (FPA), section 210 of the Public Utility Regulatory Policies Act of 1978 (PURPA) and Commission regulations do not preempt the CPUC's decision to require California utilities to offer a certain price to combined heat and power (CHP) generation facilities of 20 MW or less that meet energy efficiency and environmental compliance requirements.

In 132 FERC ¶ 61,047 the FERC found<sup>7</sup> regarding the California Public Utilities Commission (CPUC) petition for declaratory order:

*The Commission's authority under the FPA includes the exclusive jurisdiction to regulate the rates, terms and conditions of sales for resale of electric energy in interstate commerce by public utilities.*<sup>8</sup> While Congress has authorized a role for States in setting wholesale rates under PURPA, Congress has not authorized other opportunities for States to set rates for wholesale sales in interstate commerce by public utilities, or indicated that the Commission's actions or inactions can give States this authority. We disagree with the characterization of the CPUC's AB 1613 Decisions as merely establishing an "offering price" by the purchaser of power. Rather, we agree with the Joint Utilities that *the CPUC's AB 1613 Decisions constitute impermissible wholesale rate-setting by the CPUC. Because the CPUC's AB 1613 Decisions are setting rates for wholesale sales in interstate commerce by public utilities, we find that they are preempted by the FPA.*

As noted above, however, a *state commission may, pursuant to PURPA, determine avoided cost rates for QFs.*<sup>9</sup> Although the CPUC has not argued that its AB 1613 program is an implementation of PURPA, we find that, to the extent the CHP generators that can take part in the AB 1613 program obtain QF status,

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<sup>7</sup> At paragraphs 64 and 65 of 132 FERC ¶ 61,047(July 15, 2010).

<sup>8</sup> 16 U.S.C. §§ 824, 824d, 824e (2006); e.g., *Mississippi Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354 (1988).

<sup>9</sup> See 16 U.S.C. § 824a-3 (2006); 18 C.F.R. § 292.304 (2010).

**PUBLIC VERSION**

the CPUC's AB 1613 feed-in tariff is *not* preempted by the FPA, PURPA or Commission regulations,<sup>10</sup> subject to certain requirements,... [*Emphasis* added]

Because the FERC found the CPUC lacked authority to set the wholesale rate, except for QFs, therefore those energy generation sources that the CPUC approved contracts for, that where not for QFs are in violation of the FERC's jurisdictional authority over wholesale rates.

Since "the CPUC submitted a petition for declaratory order in which it requests that the [FERC] find that sections 205 and 206 of the Federal Power Act (FPA), section 210 of the Public Utility Regulatory Policies Act of 1978 (PURPA) and [FERC] regulations do not preempt the CPUC's decision to require California utilities to offer a certain price " and the FERC determined its regulations do in fact preempt the CPUC's decisions therefore CPUC has waived any claims of sovereign immunity from the FERC's authority to hear and decide CARE's September 1, 2010 Complaint<sup>11</sup> against any of those contracts that CPUC has approved outside of the Commission's FPA authority or in excess of the utilities' avoided cost cap as determined by the Commission including those contracts approved by Decision (D.) 10-09-004.

2. Group Petitioners' facts that RCEC did not receive its PSD permit before September 1, 2009, and the claimed default date under the 2nd APPA, are not speculative whatever. There is no disputing that Russell City did not receive its PSD permit before September 1, 2009 and the claimed default date under the 2nd APPA is matter that is part of the

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<sup>10</sup> 18 C.F.R. § 292.101 *et seq.* (2010).

<sup>11</sup> See FERC's Notice of Complaint [http://elibrary.FERC.gov/idmws/file\\_list.asp?accession\\_num=20100901-3033](http://elibrary.FERC.gov/idmws/file_list.asp?accession_num=20100901-3033) September 1, 2010, **Docket EL10-84-000** " pursuant to the Federal Power Act, 16 USC 824d, 824e, 825e, and 825h (2008) and Rule 206 of the Federal Energy Regulatory Commission's (Commission) Rules of Practice and Procedure, 18 CFR 385.206, (2010), Californians for Renewable Energy, Inc. (Complainant) filed a complaint against Pacific Gas and Electric Company, Southern California Edison Company, San Diego Gas & Electric Company, and the California Public Utilities Commission (Collectively Respondents), alleging that the Respondents are violating the Federal Power Act by approving contracts for capacity and energy that exceeds the utilities' avoided cost cap and which also usurps the Commission's exclusive jurisdiction to determine the wholesale rates for electricity under its jurisdiction."

## PUBLIC VERSION

written record in this proceeding. Therefore the Decision is in error where it states these facts are speculative.

3. There are outstanding permitting delays that would result in the RCEC Project not being viable as of its projected construction start date of September 10, 2010. The RCEC is currently undergoing PSD review. The transcript for the oral argument has recently been posted.<sup>12</sup> Any prediction of the date the PSD permit will be approved is speculative.

The Decision is in error where it states the “PSD permit has now been issued”. “Moreover, even if the PSD permit had not yet been issued, and the parties’ contingent rights upon occurrence of certain events were found to be substantially relevant, the matter is now moot. The permit has been issued as of February 3, 2010 with an effective date of March 22, 2010.” [Decision at 9]

As Mr. Robert Sarvey states in his Oral Arguments before the US EPA Environmental Appeals Board (EAB),

16 As the District's public notice  
17 for this permit states, pursuant to 40 C.F.R.  
18 124.15(b), this PSD permit becomes effective  
19 March 22, 2010, unless a petition for review  
20 is filed with the EPA's environmental appeals  
21 board by that date period pursuant to 40  
22 C.F.R. Section 124.19.  
1 Under 40 C.F.R. 124.19(f)(1), a  
2 final permit that has been appealed is issued  
3 by the administrator when the Environmental  
4 Appeal Board issues notice to the parties that  
5 the review has been denied or when the  
6 Environmental Appeals Board issues a decision  
7 on the merits of the appeal and the decision  
8 does not include a remand of the proceedings  
9 or upon completion of the remand proceedings –

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<sup>12</sup> Oral Argument transcript held on July 22, 2010, at pages 41 to 42. Case Name: Russell City Energy Center, EAB Appeal Number(s): PSD 10-01; PSD 10-02; PSD 10-03; PSD 10-04; PSD 10-05; PSD 10-12; PSD 10-13 *See* [http://yosemite.epa.gov/OA/EAB WEB Docket.nsf/Filings%20By%20Appeal%20Number/11BD7BC865502DD585257770006B0CF2/\\$File/Oral%20Argument...121.pdf](http://yosemite.epa.gov/OA/EAB_WEB_Docket.nsf/Filings%20By%20Appeal%20Number/11BD7BC865502DD585257770006B0CF2/$File/Oral%20Argument...121.pdf)

## PUBLIC VERSION

Therefore since the EAB has yet to issue a Decision the PSD permit has not been issued and the Decision is therefore in error.

CARE alleges that this error is intentional and CPUC is involved in an unlawful conspiracy with BAAQMD, US EPA, and the City of Hayward California for allowing Russell City LLC to commence construction without a District approved Authority to Construct (ATC) permit and PSD permit.<sup>13</sup> This is a CALifornians for Renewable Energy, Inc. (CARE) 60-days notice to file a citizens suit pursuant to 42 U.S.C. 7604 against Bay Area Air Quality Management District (BAAQMD), US EPA, CPUC, and the City of Hayward California for allowing Russell City LLC to commence construction without a District approved Authority to Construct (ATC) and PSD permit.

4. The Decision stated, “[c]omments were filed by CALifornians for Renewable Energy on August 13, 2010. To the extent Reply Comments exceeded the scope permitted by Rule 14.3(a), they were given no weight. No changes to the proposed decision have been made.” The Decision not to give any weight to CARE’s reply comments is a discretionary one. The failure of the Final Decision therefore to address any of CARE’s substantive comments is an abuse of discretion. The Commission therefore ignores these comments at its own risk and CARE is free to raise them in any ensuing litigation.

5. The terms and conditions of the Amended PPA for the RCEC Project are not just and reasonable, particularly when compared with bids in PG&E’s 2008 LTRFO. The projected market value of the Russell City Energy Center according to PG&E’s calculations is minus [REDACTED]

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<sup>13</sup> We incorporate by reference the 60-days Notice of CARE to BAAQMD, USEPA, and City of Hayward and the e-mail correspondence between Mr. Simpson and City of Hayward that necessitated the Notice (Exhibit 1), the building permit approved to start construction by City of Hayward (Exhibit 2) and the project site plan drawing submitted by Russell City LLC to the City of Hayward (Exhibit 3).



**PUBLIC VERSION**

██████████.<sup>14</sup> It is appropriate to pay above market prices when there is a demonstrated need for the project. In this case the need for Russell City has not been demonstrated. The current planning reserve margins in PG&E's service territory and the assessment of need in A. 09-09-021 illustrate the RCEC is not needed.<sup>15</sup>

PG&E's provides the only valuation of the amended PPA's value. There are no other valuations from independent parties presented and PG&E's calculations have not been presented in the testimony. Several parties have attested that they have evaluated the amended PPA but they are parties to the joint agreement and their valuation and calculations have also not been provided. Examining what is in the record before us demonstrates it lacks evidentiary value.

PG&E's testimony is clearly inconsistent with the only other valuation in this record.<sup>16</sup> The commission merely has to examine PG&E's valuation results of the RCEC Amended PPA provided in Table 1-1 in its Amended Power Purchase Agreement for the Russell City Energy Company Project Prepared Supplemental Testimony dated December 8, 2008 with the valuation presented in the joint motion's declaration of Charles Reidenhauser Table 1.

The majority of the RCEC's project value lies in an inflated capacity benefit which is presented without supporting calculations. In Table 1-1 of PG&E's December 8, 2008 supplemental testimony the capacity benefit of the RCEC is listed as ██████ dollars per KW-year.

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<sup>14</sup> Declaration of Charles Reidhauser in support of joint motion.

<sup>15</sup> Testimony of Robert Sarvey Page 3, [https://www.pge.com/regulation/LongTermRFO-Solicitation2008-II/Hearing-Exhibits/CARE/2010/LongTermRFO-Solicitation2008-II\\_Exh\\_CARE\\_20100407-Exh402.pdf](https://www.pge.com/regulation/LongTermRFO-Solicitation2008-II/Hearing-Exhibits/CARE/2010/LongTermRFO-Solicitation2008-II_Exh_CARE_20100407-Exh402.pdf) Exhibit 403,404,405

<sup>16</sup> AMENDED POWER PURCHASE AGREEMENT FOR THE RUSSELL CITY ENERGY COMPANY PROJECT PREPARED SUPPLEMENTAL TESTIMONY Page 1-4

PUBLIC VERSION

TABLE 1-1  
PACIFIC GAS AND ELECTRIC COMPANY  
VALUATION RESULTS FOR RCEC AMENDED AND ORIGINAL PPAS  
(DOLLARS PER KW-YEAR, LEVELIZED)

Line No.	Item	Amended PPA	Original PPA
1	<u>Benefits</u>		
2	Energy Gross Margins		
3	Capacity Benefit		
4	Total Benefits		
5	<u>Costs</u>		
6	Annual Contract Capacity Payments		
7	Fixed O&M		
8	Total Costs		
9	Market Value		

17

In Table 1 in the declaration of Charles Ridenhauser included in the joint motion (below) the capacity benefit of the RCEC is double at [REDACTED] dollars per KW-year. In fact in the December 8 valuation the first amended PPA’s capacity benefit doubled from [REDACTED] dollars per KW-year to [REDACTED] dollars per KW-year for the exact same contract.

TABLE 1  
PACIFIC GAS AND ELECTRIC COMPANY  
VALUATION RESULTS FOR RCEC FIRST AMENDMENT AND 2D APPA  
(DOLLARS PER KW-YEAR, LEVELIZED)

Line No.	Item	2D APPA	First Amendment
1	<u>Benefits</u>		
2	Energy Gross Margins		
3	Capacity Benefit (System RA)		
4	Total Benefits		
5	<u>Costs</u>		
6	Contract Capacity Payments		
7	Fixed O&M		
8	Total Costs		
9	Market Value		

The evidence in the record does not support the valuation of the RCEC presented in the joint motion to amend the second PPA.

<sup>17</sup> AMENDED POWER PURCHASE AGREEMENT FOR THE RUSSELL CITY ENERGY COMPANY PROJECT PREPARED SUPPLEMENTAL TESTIMONY Page 1-4

## PUBLIC VERSION

Even assuming that there is a need for additional generation and the market value of the RCEC is accurate the ratepayer would be better off if the Oakley Generating Station PSA was approved which has a better market value than the RCEC.

6. The RCEC is not suited to backup renewable generation. The RCEC as a product of the 2004 LTRFO does not have the fast starting attributes that are currently needed to back up intermittent renewables. The RCEC PSD permit lists start times as 180 minutes for a warm start and 360 minutes for a cold start.

Gas Turbine Warm and Hot Start-up Mode: The lesser of the first 180 minutes of continuous fuel flow to the Gas Turbine after fuel flow is initiated or the period of time from Gas Turbine fuel flow initiation until the Gas Turbine achieves two consecutive CEM data points in compliance with the emission concentration limits of conditions 19(b) and 19(d).<sup>18</sup>

Gas Turbine Cold Start-up Mode: The lesser of the first 360 minutes of continuous fuel flow to the Gas Turbine after fuel flow is initiated or the period of time from Gas Turbine fuel flow initiation until the Gas Turbine achieves two consecutive CEM data points in compliance with the emission concentration limits of conditions 19(b) and 19(d).<sup>19</sup>

Accordingly the RCEC does not meet the most important term of the projects in the 2008 LTRFO fast start times needed to support intermittent renewables therefore the RCEC does not compare favorably with the 2008 LTRFO winners. The record in this proceeding does not contradict this conclusion proceeding. Therefore the Decision is in error where it states theses facts are speculative.

### Conclusions

CARE recommends denial of the amendment for the reasons stated above.

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<sup>18</sup> Russell City PSD Permit Page 4

[http://www.baaqmd.gov/~media/Files/Engineering/Public%20Notices/2010/15487/PSD%20Permit/B3161\\_nsr\\_15487\\_psd-permit\\_020410.ashx](http://www.baaqmd.gov/~media/Files/Engineering/Public%20Notices/2010/15487/PSD%20Permit/B3161_nsr_15487_psd-permit_020410.ashx)

<sup>19</sup> Russell City PSD Permit Page 4

[http://www.baaqmd.gov/~media/Files/Engineering/Public%20Notices/2010/15487/PSD%20Permit/B3161\\_nsr\\_15487\\_psd-permit\\_020410.ashx](http://www.baaqmd.gov/~media/Files/Engineering/Public%20Notices/2010/15487/PSD%20Permit/B3161_nsr_15487_psd-permit_020410.ashx)

**PUBLIC VERSION**

Respectfully submitted,



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September 3, 2010

**Verification**

I am an officer of the Intervening Corporation herein, and am authorized to make this verification on its 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 3<sup>rd</sup> day of September 2010, at Soquel, California.



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Michael E. Boyd President  
CALifornians for Renewable Energy, Inc. (CARE)  
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**Certificate of Service**

I hereby certify that I served the foregoing document "*CALifornians for Renewable Energy, Inc. (CARE) application for rehearing of Decision (D.) 10-09-004*" under CPUC Dockets A. 08-09-007. Each person designated on the official service list, has been provided a copy via e-mail, to all persons on the attached service lists on September 2, 2010 transmitting the copies via e-mail to all parties who have provided an e-mail address. First class mail will be used if electronic service cannot be effectuated.

I declare under penalty of perjury that the foregoing is true and correct.  
Executed on this 3<sup>rd</sup> day of September 2010, at Soquel, California.



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Michael E. Boyd President

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