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	A.08-09-007 (Filed September 10, 2008)

JOINT RESPONSE OF PACIFIC GAS AND ELECTRIC COMPANY, RUSSELL CITY ENERGY COMPANY, LLC, DIVISION OF RATEPAYER ADVOCATES, CALIFORNIA UNIONS FOR RELIABLE ENERGY AND THE UTILITY REFORM NETWORK TO APPLICATION FOR REHEARING OF DECISION 10-09-004

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September 20, 2010

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Pursuant to Rule 16.1 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"), Division of Ratepayer Advocates ("DRA"), California Unions for Reliable Energy, and The Utility Reform Network ("TURN") (collectively "Joint Parties") hereby respond to the application for rehearing of Decision ("D.") 10-09-004 filed by CAlifornians for Renewable Energy, Inc. ("CARE").

In D.10-09-004, the Commission granted the Joint Parties' petition to modify D.09-04-010 (as modified by D.10-02-033) to approve the First Amendment to the Second Amended Power Purchase Agreement between PG&E and RCEC ("1st Amendment to 2nd APPA").[1] D.10-09-004 represents the third time the Commission has evaluated and approved a power purchase agreement ("PPA") between PG&E and RCEC for the RCEC project. In each instance, the Commission found (or re-affirmed) that the RCEC project is needed[2] and that the PPA price is just and reasonable.[3] The 1st Amendment to 2nd APPA makes limited changes to

[1] D.10-09-004, mimeo at 2. D.10-09-004 also denies the petition for modification of D.09-04-010 filed by Group Petitioners. *See* D.10-09-004, mimeo at 5-9.
[2] *See* D.09-04-010, mimeo at 23 (citing to D.07-12-052, mimeo at 23, 106).
[3] *See* D.06-11-048, mimeo at 10; D.09-04-010, mimeo at 16-18, 31 (Findings of Fact No. 7).

the terms and conditions of the previously approved 2nd APPA, including a *reduction* in the contract price that the Commission has previously found to be just and reasonable.[4]

CARE's application for rehearing of D.10-09-004 is the second request for rehearing that it has filed in this proceeding and is the latest in a series of scattershot filings made by CARE before the Commission and the Federal Energy Regulatory Commission ("FERC")[5] opposing the Commission's approval of a PPA between PG&E and RCEC. What is particularly disconcerting in this instance, however, is that CARE seeks rehearing even though it never filed a written response to the Joint Parties' petition for modification or opening comments on the proposed decision.[6]

Although CARE did file "reply" comments on the proposed decision, the reply comments did not "directly address" the opening comments on the proposed decision as required by Commission Rule 14.3; but rather, sought to belatedly introduce "three issues (need, price, and generation start-up time)" that went directly to the substance of the Joint Parties' petition for modification.[7] Significant portions of CARE's reply comments appear to have been cut and pasted verbatim into its application for rehearing.[8]

Procedurally, the issues raised in CARE's reply comments and application for rehearing should have been raised months ago in filed comments on the petition for modification.

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[4] D.10-09-004, mimeo at 2.

[5] On September 1, 2010, CARE filed a complaint against the Commission (and others) at FERC alleging that the Commission is preempted by FERC from approving contracts for capacity and energy. *See* Complaint of CAlifornians for Renewable Energy (filed September 1, 2010), Docket EL-10-84-000. As discussed below, CARE raises this same issue in its application for rehearing of D.10-09-004.

[6] CARE appeared at the May 17, 2010 prehearing conference ("PHC") and generally indicated that it was "disputing the just and reasonableness issue." *See* PHC Tr. at 95. However, the PHC was held prior to the deadline for filing responses to the Joint Parties petition for modification and CARE never filed a written response to the petition further articulating its position in the proceeding.

[7] *Administrative Law Judge's Ruling on Motion by CAlifornians for Renewable Energy to File Under Seal a Confidential Version of its Reply Comments on the Proposed Decision* (Aug. 17, 2010) at 3.

[8] *See, e.g.*, the "Introduction" to CARE's reply comments appears verbatim at page 4 of its application for rehearing; CARE's reply comments and application for rehearing also include the same "market value" discussion (CARE Reply Comments, at 2-4; CARE Application for Rehearing, at 9-11).

Substantively, as discussed below, the arguments have no merit. In short, CARE's application for rehearing does not set forth grounds upon which D.10-09-004 is unlawful or erroneous. Accordingly, the Commission should reject the application for rehearing.

I. CARE HAS NOT SET FORTH ANY GROUNDS UPON WHICH D.10-09-004 IS UNLAWFUL OR ERRONEOUS

CARE asserts that rehearing of Decision 10-09-004 is necessary for six reasons: (1) the Federal Power Act ("FPA") and various FERC regulations preempt the Commission from approving the 1st Amendment to 2nd APPA;[9] (2) RCEC was in default under the 2nd APPA;[10] (3) the Commission "is involved in an unlawful conspiracy with [the Bay Area Air Quality Management District ("BAAQMD")], [the United States Environmental Protection Agency ("U.S. EPA")], and the City of Hayward California [sic] for allowing Russell City LLC [sic] to commence construction without a District approved Authority to Construct (ATC) permit and [Prevention of Significant Deterioration ("PSD")] permit;"[11] (4) the failure to address the substantive issues raised in CARE's reply comments is an abuse of discretion;[12] (5) the terms and conditions of the 1st Amendment to 2nd APPA are not just and reasonable;[13] and (6) RCEC is not suited to backup renewable generation.[14]

A. The Commission Did Not Set A Wholesale Rate in D.10-09-044 and Is Not Preempted from Approving the 1st Amendment to 2nd APPA

CARE alleges that FERC's exclusive jurisdiction to determine wholesale rates for electricity precludes the Commission from approving the 1st Amendment to 2nd APPA.[15] In support of its position, CARE places primary, if not exclusive, reliance on FERC's recent order

[9] CARE Application for Rehearing, at 5-6.
[10] CARE Application for Rehearing, at 6-7.
[11] CARE Application for Rehearing, at 7 (footnote omitted).
[12] CARE Application for Rehearing, at 8.
[13] CARE Application for Rehearing, at 8-11.
[14] CARE Application for Rehearing, at 11.
[15] CARE Application for Rehearing, at 5-6.

on a petition filed by the Commission in Docket No. EL10-64 regarding whether Commission decisions that required electric utilities offer a certain price to combined heat and power ("CHP") generating facilities ("AB 1613 Decisions") were preempted under the FPA.[16] In response to the petition, FERC generally concluded that the AB 1613 Decisions constitute impermissible wholesale ratesetting by the Commission, which is preempted by the FPA.[17] CARE advances the argument that the Commission's decision approving the 1st Amendment to 2nd APPA similarly amounts to impermissible wholesale ratesetting.[18]

This argument is based on a fundamental misunderstanding of the purpose of the Commission's review of the 1st Amendment to 2nd APPA and applicable legal precedent. PG&E recovers the costs of its power purchase contracts in retail rates. However, PG&E cannot change any retail rate without a finding by the Commission that PG&E's new rates are justified. Specifically, California Public Utilities Code section 454(a) provides:

> Except as provided in Section 455, no public utility shall change any rate or so alter any classification, contract, practice, or rule as to result in any new rate, *except upon a showing before the [CPUC] and a finding by the [CPUC] that the new rate is justified.*[19]

Specific cost recovery provisions exist for PG&E's procurement of energy and capacity to serve its customers pursuant to a Commission-approved procurement plan:

> The [CPUC] shall provide for expedited review and either approve or reject the individual contracts submitted by the electrical corporation to ensure compliance with its procurement plan. To the extent the [CPUC] rejects a proposed contract pursuant to this criteria, the [CPUC] shall designate alternative procurement

[16] CARE Application for Rehearing, at 5-6.
[17] *California Public Utilities Comm'n*, 132 FERC ¶61,037 (2010). Though FERC did generally conclude that the Commission was impermissibly setting wholesale rates, FERC did note that the CPUC could set rates that do not exceed avoided costs for those CHPs that become qualifying facilities.
[18] CARE Application for Rehearing at 5-6.
[19] Cal. Pub. Util. Code § 454 (2010) (emphasis added).

> choices obtained in the procurement plan that will be recoverable for ratemaking purposes.[20]

The Commission's approval of bilateral contracts does not relieve the contracting parties of any obligations they may have under the Federal Power Act ("FPA"), the Public Utility Regulatory Policies Act of 1978 ("PURPA"), or the Commission's rules. The Commission's approval merely allows PG&E to pass the costs of the contracts through to its customers in retail rates.

The courts have long recognized the right of state commissions to review contracts for the purpose of determining whether the costs of those contracts should be included in retail rates. This principle is known as the *Pike County* exception to the Filed Rate Doctrine.[21] In *Pike County*, the court distinguished between FERC's exclusive jurisdiction to regulate wholesale sales in interstate commerce, and the state utility's commission's jurisdiction to review the *prudence* of the utility's power purchase costs for determining retail rate recovery. The court stated, "[t]he regulatory functions of the FERC and the PUC thus do not overlap, and *there is nothing in the federal legislation which preempts the PUC's authority to determine the reasonableness of a utility company's claimed expenses.* In fact, we read the Federal Power Act to expressly preserve that important state authority."[22]

Later courts and FERC have upheld the state commissions' ability to review the prudence of power purchases. For example, in acknowledging the *Pike County* exception to the Filed Rate Doctrine, a federal court of appeals upheld a state commission's authority to find that a distributor had imprudently purchased gas from its affiliate, even though both the distributor and

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[20] Cal. Pub. Util. Code § 454.5(c)(3).
[21] *Pike County Light & Power Co. v. Pennsylvania Public Utility Comm'n,* 77 Pa. Commw. 268, 273-274 (1983).
[22] *Pike County Light & Power Co.*, at 275 (footnote omitted)(emphasis added).

the pipeline were subject to FERC jurisdiction and FERC had found the pipeline's rates just and reasonable. The court observed as follows:

> Although *Nantahala* underscores that a state cannot independently pass upon the reasonableness of a wholesale rate on file with FERC, it in no way undermines the long-standing notion that a state commission may legitimately inquire into whether the retailer prudently chose to pay the FERC-approved wholesale rate of one source, as opposed to the lower rate of another source.[23]

Similarly, in *Central Vermont Public Service Corp.*,[24] FERC provided an in-depth explanation of the ability of states to consider the prudence of power purchases. FERC concluded that:

> [its] decisions and its longstanding practice in setting wholesale rates support the *Pike County* exception to the [Filed Rate] doctrine. The Commission has consistently recognized that wholesale ratemaking does not, as a general matter, determine whether a purchaser has prudently chosen from among available supply options. . . . [A] state commission is not precluded under the FPA from reviewing the prudence of a wholesale purchase that was made at Commission-approved rates if the purchaser had other legal choices available.[25]

FERC has explained that "[t]he recovery of costs of utility-constructed generation would be regulated by the state," whereas "the rates for wholesale sales would be regulated by this Commission on a cost-of-service or market-based rate basis, as appropriate."[26] FERC has also recognized that state commissions have authority to review the prudence of a utility's decision to enter into a particular wholesale power contract:

> [FERC] has consistently recognized that wholesale ratemaking does not, as a general matter, determine whether a purchaser has

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[23] *Kentucky West Virginia Gas Co. v. Pennsylvania Public Utility Com.,* 837 F.2d 600, 609 (3d Cir.), *cert. denied*, 488 U.S. 941 (1988) (citing *Nantahala Power & Light Co. v. Thornburg*, 476 U. S. 953 (1986)).
[24] 84 FERC ¶ 61,194 (1998).
[25] 84 FERC ¶ 61,194, at 61,975 (footnote omitted).
[26] *Southern California Edison Co., et. al.*, 70 FERC ¶ 61,215, at 61,676 (1995).

> prudently chosen among available supply options. That is generally a question that the state commissions address.[27]

CARE's argument ignores both court and FERC precedent providing states the right to review contracts for prudence under the *Pike County* exception.

To support its arguments, CARE relies solely on FERC's recent opinion on PG&E's and the Commission's respective petitions for declaratory order.[28] FERC's *AB 1613 Declaratory Order* concludes that: (1) the Commission's AB 1613 Decisions were preempted by the FPA because they set rates for wholesale sales in interstate commerce;[29] and (2) the AB 1613 program would not be preempted by the FPA and PURPA as long as the participating generators are Qualifying Facilities ("QFs") and the rate established does not exceed the avoided cost of the purchasing utility.[30]

The *AB 1613 Declaratory Order* simply reiterated FERC's previous precedent establishing that the Commission cannot compel any wholesale purchase from non-QFs at a state-set price, or compel a purchase from a QF at a price above the purchasing utility's avoided cost.[31] Here, CARE does not allege that the Commission has committed either of these errors. Rather, CARE simply alleges that the Commission has "approved" the 1st Amendment to 2nd APPA. As discussed above, there is an important legal distinction between "approving" a bilateral contract between two freely contracting parties for purposes of retail rate recovery – *i.e.*, making a prudence determination – and mandating that a contract's rate be set at a specific price.

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[27] *Ameren Energy Marketing Co.,* 96 FERC ¶ 61,306, at 62,189 (2001)(footnote omitted).
[28] CARE Application for Rehearing, at 3-5, citing *Cal. Pub. Utils. Comm'n*, 132 FERC ¶ 61,047 ("*AB 1613 Declaratory Order*").
[29] AB 1613 Declaratory Order, at P 64.
[30] AB 1613 Declaratory Order, at P 67.
[31] AB 1613 Declaratory Order, at P 70.

B. CARE Has Not Identified Any Error Regarding PSD Issues Related to the 2nd APPA

CARE asserts that the delays in obtaining a PSD permit for the RCEC project placed RCEC in default under the 2nd APPA and that the Commission's failure to acknowledge this "fact" is error.[32] CARE mischaracterizes the record and fails to identify any error.

The Joint Parties have acknowledged that a permitting delay related to obtaining a PSD permit for the RCEC project necessitated the need to extend the expected initial delivery date in the 2nd APPA by one year.[33] As a result, PG&E and RCEC agreed to amend the 2nd APPA as a means for ensuring that the benefits of the 2nd APPA would be preserved for ratepayers at a significantly lower cost to ratepayers.[34] Contrary to CARE's assertion, in D.10-09-004, the Commission expressly acknowledges RCEC's past permitting delays[35] and, in approving the 1st Amendment to 2nd APPA, specifically considers whether the changes to the previously approved 2nd APPA necessitated by permitting delays were reasonable and in the public interest.[36]

Moreover, provisions in the 2nd APPA that relate to the issuance of the PSD permit do not implicate the Commission's previous approval of the 2nd APPA or its recent approval of the 1st Amendment to 2nd APPA. The 2nd APPA has been amended. Thus, issues regarding the terms and conditions of that agreement are now moot.

C. The Commission Has Not Allowed RCEC to Commence Construction Without an ATC or PSD Permit

CARE asserts that Decision 10-09-004 incorrectly finds that RCEC has obtained a PSD permit and accuses the Commission of conspiring with BAAQMD, the U.S. EPA, and the City

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[32] CARE Application for Rehearing, at 6-7.
[33] Joint Parties Petition for Modification of Decision 09-04-010, as modified by Decision 10-02-033 at 4-5.
[34] Joint Parties Petition for Modification of Decision 09-04-010, as modified by Decision 10-02-033 at 7-9.
[35] D.10-09-004, mimeo at 16 ("We do not find it unreasonable that Joint Parties found it necessary to propose a 1st Amendment to the 2nd APPA after numerous appeals were filed against the Final Permit issued in February 2010.")
[36] D.10-09-004, mimeo at 17.

of Hayward to allow RCEC to commence construction without an ATC or PSD permit.[37] CARE's assertion regarding the issuance of the PSD is factually incorrect and misleading, and its outlandish accusation regarding a conspiracy demonstrates a complete and flagrant misrepresentation of the action taken by the Commission in D.10-09-004.

With respect to the issuance of the PSD permit, on February 3, 2010, BAAQMD issued a Final PSD Permit for the RCEC project, along with a 235-page Responses to Public Comments document.[38] As the Commission acknowledges in D.10-09-004, several petitions for review of the PSD permit were subsequently filed with the Environmental Appeals Board.[39] As a result of these petitions, the effectiveness of the PSD permit has been automatically stayed pending resolution of the petitions.[40] Contrary to CARE's assertion, however, RCEC is not "currently undergoing PSD review."[41] The consideration of these petitions is different from BAAQMD's PSD review process (which has been completed), and the mere filing of them did not affect BAAQMD's issuance of the permit.

Little needs to be said with respect to CARE's conspiracy theory. The Commission has not authorized RCEC to commence construction of the RCEC project without an ATC or PSD permit and clearly does not have the authority to do so. D.10-09-004 simply approves the 1st Amendment to 2nd APPA consistent with the Commission's well established authority. CARE's accusation is meritless and reckless.

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[37] CARE Application for Rehearing at 7-8.
[38] *See* Joint Parties Petition for Modification of Decision 09-04-010, as modified by Decision 10-02-033, Appendix B (Thomas Declaration) at ¶13.
[39] *See* D.10-09-004, mimeo at 19 ("The Final PSD permit has been issued and the expected delivery date is in sight, assuming the pending permit appeals are promptly resolved.")
[40] *See* 40 Code of Federal Regulations ("CFR") § 124.15(b) (providing that a final permit decision shall become effective 30 days after service of notice of the decision or on any later date specified in the decision, unless review of the decision by the Environmental Appeals Board is requested).
[41] CARE Application for Rehearing at 7.

D. The Commission's Consideration of CARE's Reply Comments on the Proposed Decision Was Entirely Consistent with the Commission's Rules of Practice and Procedure

CARE asserts that the Commission's failure to address any of the substantive points raised in CARE's reply comments on the proposed decision is an abuse of discretion.[42]

The Commission's Rules of Practice and Procedure provide that reply comments "shall be limited to identifying misrepresentation of law, fact or condition of the record *contained in the comments of other parties*."[43] The Joint Parties were the only parties to file opening comments on the proposed decision and the substance of their comments consisted of the following sentence:

> The Joint Parties support the PD and respectfully request that the Commission adopt it as written.[44]

CARE's reply comments did not refer to or even mention the Joint Parties' opening comments; but rather raised several issues that addressed the substance of the underlying petition for modification.[45] Accordingly, the Commission concluded that, "[t]o the extent [CARE's] Reply Comments exceeded the scope permitted by Rule 14.3(a), they were given no weight."[46] In light of the substance of CARE's reply comments, the Commission's actions are entirely appropriate, consistent with its Rules of Practice and Procedure, and not an abuse of discretion.

E. The Record Supports Approval of the 1st Amendment to 2nd APPA

CARE asserts that the terms and conditions of the 1st Amendment to 2nd APPA are not just and reasonable.[47] CARE raised this issue in its reply comments on the proposed decision

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[42] CARE Application for Rehearing at 8.
[43] Rule 14.3 (emphasis added).
[44] *Joint Opening Comments of Pacific Gas and Electric Company, Russell City Energy Company, LLC, Division of Ratepayer Advocates, California Unions for Renewable Energy, and The Utility Reform Network on Proposed Decision* (Aug. 9, 2010), at 2.
[45] *Administrative Law Judge's Ruling on Motion by CAlifornians for Renewable Energy to File Under Seal a Confidential Version of its Reply Comments on the Proposed Decision* (Aug. 17, 2010) at 3.
[46] D.10-09-004, mimeo at 20.
[47] CARE Application for Rehearing, at 8-11.

and significant portions of CARE's reply comments have been included verbatim in its application for rehearing. CARE's position is not supported by the record.

The undisputed record in this proceeding demonstrates that:

- In approving the 2nd APPA, the Commission found that, based on a comparative analysis that was independently reviewed by the Independent Evaluator, DRA and TURN, the 2nd APPA would be competitive with the short-listed bids in the 2008 LTRFO if it were bid into that RFO.[48]
- The 1st Amendment to 2nd APPA reduces the price of the 2nd APPA.
- PG&E, DRA and TURN each performed a comparative analysis of the 1st Amendment to 2nd APPA, and all concluded that the 1st Amendment to 2nd APPA will result in reduced customer costs.[49]

In its application for rehearing, CARE does not dispute these facts. Thus, the record demonstrates that the 1st Amendment to 2nd APPA is just and reasonable and supports Commission approval of the Joint Parties' petition for modification.

F. D.10-09-004 Does Not Address the Backup Generation Issue Raised By CARE

CARE asserts that the record does not support a finding that the RCEC project is suited to backup renewable generation and that "the Decision is in error where it states theses [sic] facts are speculative."[50] CARE misrepresents the decision and its position is not supported by the record.

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[48] D.09-04-010, mimeo at 17-18 ("PG&E submitted both its own side-by-side comparison of the 1st APPA and short-listed bids in PG&E's 2008 LTRFO, and a review of that comparison by an independent evaluator. The independent evaluator, Alan Taylor of Sedway Consulting, concluded that the pricing and economic characteristics of the 1st APPA were reasonably comparable to the economics of the short-listed offers in PG&E's 2008 LTRFO and compared favorably in overall ranking. DRA and TURN reviewed this comparative information and performed their own comparison of the 2nd APPA, taking into account all the evaluation criteria, and concluded RCEC would be competitive with the short-listed bids in the 2008 LTRFO if it were bid into that RFO" (footnotes omitted).

[49] *See* Joint Parties Petition for Modification of Decision 09-04-010, as modified by Decision 10-02-033 at Appendix E (Declaration of Charles E. Riedhauser); Appendix F (Declaration of Joseph P. Como); and Appendix G (Declaration of Michel Peter Florio).

[50] CARE Application for Rehearing, at 11.

Contrary to CARE's claim, D.10-09-004 does not address the backup generation issue raised by CARE, much less include any finding or speculation as to the suitability of the RCEC project to backup renewable generation. Thus, CARE's alleged "error" is entirely misplaced and unrelated to the decision. In contrast, what the record demonstrates – and what the decision does find – is that the RCEC project is "a state-of-the-art, low heat-rate, clean facility in PG&E's service territory" that "gives PG&E a cost-effective, local area reliable resource, with a lower long-term cost to the utility's ratepayers than the 2nd APPA."[51] In light of these benefits, approving the 1st Amendment to 2nd APPA is in the public interest and not unlawful or erroneous.

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[51] D.10-09-004, mimeo at 19 (footnote omitted).

II. CONCLUSION

CARE has not identified any factual, legal or technical issue that warrants rehearing. The record and the law support the findings and conclusions in D.10-09-004. Accordingly, the Commission should reject CARE's application for rehearing.

Respectfully submitted,

/s/

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Dated: September 20, 2010

CERTIFICATE OF SERVICE BY ELECTRONIC MAIL OR U.S. 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, CA 94105.

I am readily familiar with the business practice of Pacific Gas and Electric Company for collection and processing of correspondence for mailing with the United States Postal Service. In the ordinary course of business, correspondence is deposited with the United States Postal Service the same day it is submitted for mailing.

On the 20th day of September, 2010, I caused to be served a true copy of:

JOINT RESPONSE OF PACIFIC GAS AND ELECTRIC COMPANY, RUSSELL CITY ENERGY COMPANY, LLC, DIVISION OF RATEPAYER ADVOCATES, CALIFORNIA UNIONS FOR RELIABLE ENERGY AND THE UTILITY REFORM NETWORK TO APPLICATION FOR REHEARING OF DECISION 10-09-004

[XX] By Electronic Mail – serving the enclosed via e-mail transmission to each of the parties listed on the official service list for A.08-09-007 with an e-mail address.

[XX] By U.S. Mail – by placing the enclosed 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 those parties listed on the official service list for A.08-09-007 without an e-mail address.

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 this 20th day of September, 2010 at San Francisco, California.

/s/
STEPHANIE LOUIE