

**DRAFT**

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

**ENERGY DIVISION**

**ID #10490  
RESOLUTION E-4413  
July 14, 2011**

**REDACTED**

**R E S O L U T I O N**

Resolution E-4413. Pacific Gas and Electric Company request approval of amendments to two existing Qualifying Facility Power Purchase Agreements with Berry Petroleum Company.

PROPOSED OUTCOME: This Resolution approves the contractual and pricing amendments sought by PG&E via AL 3811-E. In authorizing these amendments, this resolution approves cost recovery for the additional costs incurred, specifically those related to modifying the price paid for firm power deliveries made by Berry Petroleum Company to Pacific Gas and Electric Company for the period from January 1, 2010 to December 31, 2011. The power purchase agreement amendments are approved without modification. This resolution does not grant PG&E's request that the Commission find the amended contracts fulfill PG&E's obligations to the Seller pursuant to section 3.3.4 of the Settlement.

ESTIMATED COST: Costs for Qualifying Facilities are currently \$91.97/kW-yr for firm capacity, \$41.22/kW-yr for as-available capacity and \$67.11/MWh for energy.<sup>1</sup> Total contract costs over the two-year period will vary depending on the total amount of energy delivered.

By Advice Letter (AL) 3811-E Filed on March 4, 2011.

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<sup>1</sup> Prices reflected above were directly drawn from PG&E's qualifying facilities prices webpage.

## **SUMMARY**

**This Resolution approves proposed amendments to two existing Qualifying Facility (QF) Power Purchase Agreements (PPAs) between Pacific Gas and Electric Company (PG&E) and Berry Petroleum Company.**

By AL 3811-E filed on March 4, 2011 PG&E asks the Commission to:

- 1.) Approve without modification, as just and reasonable, amendments to two existing QF standard offer contracts with a 37 megawatt (MW) and a 17 MW Combined Heat and Power (CHP) facility, owned and operated by Berry Petroleum Company (the Seller);
- 2.) Authorize recovery of the costs associated with the amended QF PPAs through PG&E's Energy Resource Recovery Account and recovery of stranded costs consistent with D.08-09-012; and
- 3.) Determine that the amended QF PPAs satisfy PG&E's obligation with respect to the Seller under section 3.4.4 of the QF/CHP Settlement.

Under the current contract with Berry Petroleum, PG&E pays for energy deliveries based on PG&E's posted Short Run Avoided Cost (SRAC) and for capacity deliveries at the Commission-approved price for as-delivered capacity. This Resolution approves PG&E's request to amend pricing and other terms under the contracts as described below as well as PG&E's requested cost recovery treatment. We do not grant PG&E's request that the Commission find the amended contracts fulfill PG&E's obligations to the Seller pursuant to section 3.3.4 of the QF/CHP Settlement.

In the event that the QF/CHP Settlement is approved as final and non-appealable, both projects have the opportunity to negotiate new contracts based on the procurement pathways presented to them under the Settlement. Notably, both projects can elect to sign a Transition PPA or extend their existing contracts pursuant to the terms of the Settlement.

## **BACKGROUND**

*Overview of the California QF Program*

The Public Utilities Regulatory Policy Act (PURPA) of 1978 established provisions whereby qualifying cogeneration and renewable generation facilities (QFs) are compensated for power delivered to energy utilities at a rate representing the utilities' avoided cost of generation, the price the utility would have paid to procure power but for the existence of the QF. In April 2004, the Commission opened Rulemakings (R.) 04-04-003/R.04-04-025 to update the avoided cost of energy pricing, develop new long-term standard offer contracts and address various procurement policies associated with QFs.

In September 2007, the Commission issued D.07-09-040 adopting an updated SRAC energy price for QFs and setting capacity payment prices for firm and as-available generation. The SRAC, adopted as the Market Index Formula (MIF), was further developed and implemented upon Commission approval of Resolution E-4246 in July 2009, effective in August 2009. Table 1 outlines the current as-available and firm capacity payments for QFs per D.07-09-040 and PG&E's average SRAC payment during 2010.

**Table 1. QF Pricing pursuant to D.07-09-040**

<b>QF Firm Capacity Price</b>	<b>QF As-available Capacity Price</b>	<b>SRAC Energy Payment</b>
\$91.97/kW-yr	\$41.22/kW-yr <sup>2</sup> (Current)	\$67.11/MWh

On December 16, 2010, the Commission adopted the QF/CHP Settlement with the issuance of D.10-12-035. The QF/CHP Settlement resolves a number of longstanding issues regarding contractual obligations and procurement options for facilities operating under legacy and new QF contracts. It provides an orderly transition from the existing QF program to the new QF/CHP program for QFs greater than 20 MWs and allows projects less than 20 MW to participate

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<sup>2</sup>Payments for as-available capacity are based on the fixed cost of a Combustion Turbine (CT) as proposed by The Utility Reform Network (TURN), less the estimated value of Ancillary Services (A/S), as proposed by San Diego Gas & Electric Company (SDG&E) and capacity value that is recovered in market energy prices, as proposed by TURN and SDG&E. The price was established to be \$35.87/kW-yr in 2008. The as available price is escalated annually to reflect changes in the Consumer Price Index. See D.07-09-040 p.91

competitive procurement or continue under the traditional PURPA procurement program.

Furthermore, under the terms of the Settlement, in section 3.4.4, PG&E agreed that certain specified QFs that currently provide as-available capacity but formerly delivered firm capacity pursuant to a firm capacity PPA could sign a new CHP PPA with PG&E (referred to as a Transition PPA). The Transition PPA requires the delivery of firm capacity and the payment of the previously approved firm capacity price of \$91.97 kW-yr, retroactive beginning January 1, 2010. The Settlement states that a CHP facility that is currently selling to an IOU under a Legacy PPA or an extension thereof that is expiring during the Transition Period (by July 1, 2015), may sign a Transition PPA with the same IOU-Buyer.

The Berry Petroleum QF Facilities relevant to this resolution qualify for a Transition PPA. However, rather than execute a Transition PPA, PG&E and the Seller have elected to amend the existing QF PPAs under which these facilities are currently delivering energy.

#### *Overview of the Berry Petroleum QF Facilities*

In AL 3811-E, PG&E seeks to modify the pricing terms for two natural gas fired combined heat and power facilities operated by Berry Petroleum: (1) a 37 MW enhanced oil recovery (EOR) facility and (2) a 17 MW EOR facility in the Midway-Sunset Oilfield. Both facilities are located near Taft, California, in Kern County.

In January 2004, the terms of agreement and the terms for delivery and capacity payments under these contracts were modified pursuant to D.04-01-050. In particular, this decision required the utilities to renew existing QF contracts for a minimum of five years, using the Standard Offer 1 (SO1) contract structure at existing SRAC prices and the posted as-available capacity price for energy deliveries. In compliance with D.04-01-050, PG&E modified the facilities' respective PPAs to extend the term of agreement by five years, and extended these PPAs such that they would expire on December 31, 2011. In addition, in

the case of the 17 MW facility, PG&E removed the requirements to deliver firm capacity.

*Overview of Advice Letter 3811-E*

On March 4, 2011, PG&E filed the advice letter 3811-E (AL 3811-E) requesting approval of amendments to the two expiring Berry Petroleum QF contracts. PG&E submitted this proposal via advice letter consistent with D.06-12-009, which allows the utility to request approval of QF contract amendments by advice letter if the amendment has a term of less than five years. Energy Division suspended the advice letters on April 4, 2011.

The following summarizes the amendments for which PG&E is seeking Commission approval for each respective contract.

Contract Amendments to the 37 MW Berry Petroleum QF:

- (1) The USO1 PPA currently in effect will be terminated as of the effective date of CPUC approval of the advice letter.
- (2) The previously-terminated SO2 PPA will be reinstated and will be in effect during the period of January 1, 2010 through December 31, 2011.
- (3) Seller will receive an additional lump sum payment for prior deliveries of capacity measured by the difference between \$91.97 per kW-year and the as-delivered capacity price paid to Seller for deliveries from January 1, 2010 forward provided that the Seller's deliveries meet the firm capacity delivery requirements in the SO2 PPA during this period.
- (4) Beginning on the first day of the first month following Commission approval and through December 31, 2011, PG&E will pay for firm capacity deliveries from the facility at the price of \$91.97 per kW-year under the terms of the SO2 PPA.
- (5) PG&E will have the right to request Seller to curtail deliveries from the facility as specified in the amendment; and

(6) Seller will provide PG&E with scheduling and forecasting information.

Contract Amendments to the 17 MW Berry Petroleum QF:

- (1) The firm capacity delivery terms of the SO2 PPA will be reinstated for the period beginning January 1, 2010 through December 31, 2011.
- (2) Seller will receive an additional lump sum payment for prior deliveries of capacity measured by the difference between \$91.97 per kW-year and the as-delivered capacity price paid to Seller for deliveries prior to Commission approval of the amendment provided that the Seller's deliveries met the firm capacity delivery requirements in the SO2 PPA during this period.
- (3) Beginning on the first day of the first month following Commission approval and through December 31, 2011, PG&E will pay for firm capacity deliveries from the facility at the price of \$91.97 per kW-year under the terms of the SO2 PPA.
- (4) PG&E will have the right to request Seller to curtail deliveries from the facility as specified in the amendment; and
- (5) Seller will provide PG&E with scheduling and forecasting information.

In its AL filing, PG&E claims that these amendments offer a relatively superior operational benefit compared to the Transition PPA, noting that the amended PPAs provide for curtailment rights in 2011 that are not contained in the CHP settlement, among other amended contract provisions. PG&E also states that the amended PPAs satisfy PG&E's obligations to Berry Petroleum under the Settlement. A more detailed discussion of the amended curtailment rights and other changes to the contract terms is included in Confidential Appendix A of this resolution.

On March 24, 2011 the Division of Ratepayer Advocates (DRA) protested PG&E's AL 3811-E. Upon further review, discovery and discussion with PG&E, DRA filed a subsequent modified protest on April 1, 2011, changing their

original request that the Commission deny PG&E's advice letter and instead recommending that the Commission approve the proposed amendments.

### **NOTICE**

Notice of AL 3811-E was made by publication in the Commission's Daily Calendar. PG&E states that a copy of the Advice Letter was mailed and distributed in accordance with Section 3.14 of General Order 96-B.

### **PROTESTS**

**Advice Letter 3811-E was timely protested by the Division of Ratepayer Advocates on March 24, 2011.**

**PG&E timely responded to the protests of the DRA on April 1, 2011.**

**On May 9, 2011 DRA modified its protest to AL 3811-E.**

On March 4, 2011 DRA filed a protest against AL 3811-E, and on April 1, 2011 PG&E responded to DRA's protests. DRA's protest consists of two arguments: (1) PG&E's request does not comply with the QF/CHP Settlement, and (2) approving this advice letter would conflict with Commission precedent. Subsequently, on May 9, 2011 DRA filed a confidential supplement to its protest, indicating a substantial shift in DRA's position with regard to the contract amendments, changing its original request that the Commission deny PG&E's request to recommending the Commission approve the proposed contract amendments.

DRA also supports PG&E's request that the Commission find PG&E's retroactive payments to Berry Petroleum satisfy any future obligation PG&E may have under section 3.4.4 of the Settlement due to signing the Transition PPAs with Berry Petroleum Company. DRA's modified position regarding the proposed amendments is grounded in the view that the amendments provide a superior value to ratepayers relative to the Transition PPA these facilities would, in all likelihood, otherwise sign.

DRA also requested the Commission include the following language in this resolution: “The Commission approves the contract provisions whereby PG&E pays Berry at the retroactive rate of \$91.97 kW-yr because these contract amendments benefit ratepayers more than the Transition PPAs. Any future requests by a utility to pay retroactive rates to QFs outside of a Transition PPA will need to show the contract provides more ratepayer benefits than the Transition PPA.”

## DISCUSSION

Energy Division has reviewed PG&E’s advice letter and DRA’s protest as modified by its supplement. We examined the proposed PPA amendment on multiple grounds:

- Consistency with D.06-12-009 and D.07-09-040 (authorizing QF contract extensions)
- Consistency with the Emissions Performance Standard per D.07-01-039
- Consistency with QF Capacity Pricing per D.07-09-040
- Consistency with the CHP QF Settlement per D.10-12-035
- Reasonableness of the contract price and terms
- Procurement Review Group (PRG) participation

### **Consistency with D.06-12-009 and D.07-09-040 (authorizing QF contract extensions)**

The filing of AL 3811-E is consistent with Commission procedures for the extension of QF contracts. D.04-12-048, which adopts the IOUs’ long-term procurement plans, concludes that “contracts with duration five years or longer [shall] be submitted with an application to the Commission for preapproval.”<sup>3</sup> D.06-12-009 clarifies that based on D.04-12-048, QF contract extensions for less than five years should be authorized through the advice letter process. Furthermore, D.07-09-040 states that “in recognition of the often lengthy process involved in negotiating contract terms... the QF may extend the non-price terms and conditions of the expiring contract and continue service with the pricing set forth in this Decision until the final [QF Standard Offer] contract is available.”<sup>4</sup>

<sup>3</sup> D.04-12.048 at p.108.

<sup>4</sup> D.07-09-040 at p.126.



### **Consistency with the Emissions Performance Standard per D.07-01-039**

In 2007, the Commission adopted D.07-01-039, implementing Senate Bill 1368 (Stats. 2006, ch. 598) which prohibited the utilities from entering into new, long term financial commitments with base load generating facilities that have an emissions rate greater than combined cycle natural gas base load generation. Pursuant to the statute, “Long-term financial commitments” was defined as either a new ownership investment in base load generation or a new or renewed contract with a term of five or more years, which includes procurement of base load generation. Because the requested amendments in the instant advice letter do not extend the contracts for these facilities beyond the current expiration dates (December 31, 2011) of their existing contracts, they do not constitute a new long term financial commitment pursuant to the EPS, and therefore the EPS does not apply.

### **Consistency with QF Capacity Pricing per D.07-09-040**

Under the current contracts both Berry Petroleum projects are providing firm capacity and are being paid as-available prices. The amendments would true up the value of the provided firm capacity to firm capacity prices upon both facilities demonstrating that they in fact provided firm capacity to PG&E during the January 1, 2010 to December 31, 2011 term. The true up payment is calculated as the difference between the as-delivered capacity payment made to the facility during the term and the firm capacity payment of \$91.97 kW-yr. The firm capacity payment of \$91.97 kW-yr is consistent with D.07-09-040 which approved energy and capacity pricing for Qualifying Facilities.<sup>5</sup>

### **Consistency with the CHP QF Settlement per D.10-12-035**

On December 16, 2010, the Commission adopted the QF/CHP Settlement with the issuance of D.10-12-035. In this decision, the Commission reviewed the QF/CHP Settlement and found that it meets established criteria for approval of settlements, and therefore approved it. However, the QF/CHP Settlement will

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<sup>5</sup> D. 07-09-040 page 99.

not become effective until it receives non-appealable approval from the Federal Energy Regulatory Commission (FERC), which is expected later this year. The amendments discussed in this resolution will not become effective until the QF/CHP Settlement effective date.

In section 3.4.4 of the QF/CHP Settlement nine eligible petitioners were identified, the two Berry Petroleum facilities among them. These facilities were specifically chosen and granted an option to sign a Transition PPA under which they would be paid firm capacity prices for power deliveries beginning on January 1, 2010.

Although Berry Petroleum is not electing to sign a Transition PPA at this time, in regards to capacity payments the Proposed Amendments to the existing contracts are the same as those the facilities would receive under a Transition PPA. Specifically, under a Transition PPA or the Proposed Amendment the facility will receive firm capacity payments at \$91.97 kW-yr from the period beginning January 1, 2010 to December 31, 2011.<sup>6</sup> Thus, we find that the Proposed Amendments to true up capacity payments from as-delivered to firm capacity prices for the proposed term are consistent with the QF/CHP Settlement.

While we approve the amendments to true up capacity payments to the Berry Petroleum facilities, we do not grant PG&E's request that the amended QF PPAs satisfy PG&E's obligation with respect to the Seller under section 3.4.4 of the QF/CHP Settlement. In D.11-03-010, the Commission rejected a similar request, reasoning that PG&E had no obligation under 3.4.4 that it needed to satisfy, given that the obligations under that section only exist if a Seller elects to take a Transition PPA. In keeping with D.11-03-010, although we approve the contractual amendments PG&E identifies in the instant Advice Letter, we do not find that the amended PPAs satisfy PG&E's obligations under section 3.3.4 of the QF/CHP Settlement as no such obligation exists unless the Berry Petroleum facilities elect to enter into a Transition PPA. In this case, they are specifically not electing to sign a Transition PPA and are instead electing to sign a bilaterally negotiated contract.

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<sup>6</sup> Section 3.4.4 of the Term Sheet of the QF/CHP Settlement.

### **Reasonableness of the contract price and terms**

As stated above, the Proposed Amendments would provide the Berry Petroleum facilities with capacity payments consistent with the QF/CHP Settlement. Specifically, the Berry Petroleum facilities will receive capacity payments at \$91.97 kW-yr from the period beginning January 1, 2010 through the end of their current contract term, December 31, 2011.

In addition, under the Proposed Amendments the facilities would continue to receive energy payments based on PG&E's SRAC, according to the methodology that is approved and may be revised by the Commission. Currently, SRAC is calculated using the Market Index Formula as defined in D.07-09-040. Upon QF/CHP Settlement effectiveness, SRAC for Transition Contracts will be calculated based on Section 10 of the Settlement Term Sheet.

The QF/CHP Settlement, including the provision to provide the Berry Petroleum facilities with firm capacity payments, was approved by the Commission under D.10-12-035 and is pending final, non-appealable approval from FERC. Since the capacity payments for these facilities have already been approved by D.10-12-035 and since the Proposed Amendments would not take effect until non-appealable FERC approval of the QF/CHP Settlement, we find that the proposed capacity payments for the period January 1, 2010 through December 31, 2011 to be reasonable.

Furthermore, we agree with PG&E and DRA that the non-price contract amendments negotiated bilaterally between Berry Petroleum and PG&E offer a superior value to ratepayers relative to the Transition PPA that would otherwise be available to the Berry Petroleum facilities. Notably, the Proposed Amendments include changes to curtailment rights which appear to offer some additional operational benefits relative to the Transition PPA in the QF/CHP Settlement.

Although we do not specifically adopt DRA's proposed language regarding future requests by a utility to pay retroactive rates to QFs outside of a Transition PPA, we believe that the spirit of this language is reflected in the determinations and rationale provided in this resolution. Our approval of the contract

amendments identified in this advice letter is based on the superior value these amendments provide ratepayers relative to the Transition PPA for which the underlying facilities are eligible.

A more detailed discussion of the amendments to the contract terms is included in Confidential Appendix A.

### **Procurement Review Group (PRG) participation**

PG&E's PRG consists of: the California Department of Water Resources, the Union of Concerned Scientists, the Division of Ratepayer Advocates, the Coalition of California Utility Employees, The Utility Reform Network, Jan Reid as a PG&E ratepayer, and the Commission's Energy Division.

PG&E discussed the Proposed Amendments with its PRG on September 27, 2010, and PG&E provided its PRG with a description of the Amended QF PPAs.

### **COMMENTS**

Public Utilities Code section 311(g) (1) provides that this resolution must be served on all parties and subject to at least 30 days public review and comment prior to a vote of the Commission. Section 311(g)(2) provides that this 30-day period may be reduced or waived upon the stipulation of all parties in the proceeding.

### **FINDINGS AND CONCLUSIONS**

1. The filing of AL 3811-E is consistent with Commission procedures for the extension of QF contracts.
2. The Emissions Performance Standard does not apply to these amendments because they do not extend the expiration dates for the contracts with the Berry Petroleum facilities beyond the expiration date of their current contracts. As such they do not represent a new long term financial commitment as defined in statute and implemented per D.07-01-039 for purposes of determining the applicability of the Emission Performance Standard.

3. The firm capacity payment of \$91.97 kW-yr under the Proposed Amendment is consistent with D.07-09-040 which approved energy and capacity pricing for Qualifying Facilities.
4. The Berry Petroleum facilities relevant to this Resolution are eligible for a Transition Power Purchase Agreement with firm capacity payments beginning from January 1, 2010 under section 3.4.4 of the Qualifying Facility/Combined Heat and Power Settlement.
5. Consistent with the Transition PPA in the QF/CHP Settlement, the as-available prices (\$42.22/kW-year) would be trued up to firm capacity prices (\$91.97/kW-year), contingent on Berry Petroleum meeting the performance standards and prerequisites of satisfactorily providing firm capacity for the period between January 1, 2010 and December 31, 2011.
6. The firm capacity payment of \$91.97 kW-yr under the Proposed Amendment is consistent with D.10-12-035 which approved the Qualifying Facility/Combined Heat and Power Settlement.
7. The Proposed Amendments will not become effective until the QF/CHP Settlement receives non-appealable approval from the Federal Energy Regulatory Commission (FERC), which is expected later this year.
8. If the amendments for which PG&E is seeking approval go into effect, the Berry Petroleum facilities would continue to be eligible for a Transition PPA as they would still be selling to PG&E under extensions of Legacy PPAs, consistent with the eligibility criteria of Section 3.1.1.
9. The proposed amendments were presented to the Pacific Gas & Electric's Procurement Review Group (PRG) on September 27, 2010.
10. The PPA amendments for which PG&E seeks approval, which include specified curtailment rights, offer additional operational benefits relative to the Transition PPA for which these facilities are eligible in the QF/CHP Settlement.

**THEREFORE IT IS ORDERED THAT:**

1. Pacific Gas and Electric Company's proposed amendments to two existing contracts with Berry Petroleum Company, as described in its advice letter are found to be just and reasonable and are approved without modification.
2. Pacific Gas and Electric Company shall recover the costs associated with the amended contracts through the Energy Resource Recovery Account and shall recover any stranded costs associated with these contracts consistent with D.08-09-012.

This Resolution is effective today.

I certify that the foregoing resolution was duly introduced, passed and adopted at a conference of the Public Utilities Commission of the State of California held on July 14, 2011; the following Commissioners voting favorably thereon:

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Paul Clanon  
Executive Director

## Confidential Appendix A

[REDACTED]

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