

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

Application of Pacific Gas and Electric
Company for Approval of a Power Purchase
Agreement with Mariposa Energy, LLC

(U 39-E)

Application 09-04-001
(Filed April 1, 2009)

**PREHEARING CONFERENCE STATEMENT
OF PACIFIC GAS AND ELECTRIC COMPANY (U 39-E)**

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OF THE STATE OF CALIFORNIA**

Application of Pacific Gas and Electric
Company for Approval of a Power Purchase
Agreement with Mariposa Energy, LLC

(U 39 E)

Application 09-02-019
(Filed April 1, 2009)

**PREHEARING CONFERENCE STATEMENT
OF PACIFIC GAS AND ELECTRIC COMPANY (U 39-E)**

I. INTRODUCTION AND SUMMARY

Pacific Gas and Electric Company (“PG&E”) submits this Prehearing Conference (“PHC”) statement in compliance with *the Assigned Commissioner’s Ruling Opening a New Phase in This Proceeding, Preliminarily, Changing Categorization of New Phase To Adjudicatory, and Setting New Prehearing Conference* (“ACR”), filed October 18, 2011.

As discussed below, the Assigned Commissioner should reconsider this second phase of the proceeding. PG&E respectfully notes that Public Utilities Code section 1708 requires a vote of the Commission to re-open a closed proceeding. Given that the proceeding was reopened without a Commission vote, the second phase of the proceeding should be dismissed. The Commission should instead issue a decision on the long-outstanding petition for modification of D.09-10-017 (“PFM”) filed by CALifornians for Renewable Energy (“CARE”) that is the subject of the ACR. The Commission has already determined, as a matter of law, in D.11-07-012 and in D.11-05-029 that PG&E did not exceed its procurement authorization, as CARE claimed in its PFM. Accordingly, the PFM should be denied.

For these reasons, PG&E respectfully requests the ACR be revised to dismiss Phase 2 and the PFM be denied.

II. REGULATORY BACKGROUND

PG&E submits this statement of the factual background of the matters discussed in the ACR to explain that there are no material factual disputes regarding PG&E's compliance with the Mariposa Settlement Agreement and that the Commission can and should determine, as a matter of law, that PG&E's actions both complied with the Mariposa Settlement Agreement and were authorized and approved in Commission decisions.

PG&E filed Application ("A.") 09-04-001, on April 1, 2009, for approval of the Mariposa Power Purchase Agreement ("PPA"), a ten-year PPA for the output of a 184 megawatt ("MW") new generation resource to be located near Byron, California. The Mariposa Project was one of the winning offers in PG&E's 2008 Long-Term Request for Offers ("LTRFO"). A number of parties, including CARE, protested the Application. Ultimately, all of the active parties negotiated a settlement that was presented to the Commission on September 3, 2009 (*i.e.* the Mariposa Settlement). The Commission approved the Mariposa Settlement without modification in the Mariposa Decision. The Mariposa Settlement also included provisions stipulating how PG&E would seek to fulfill the remaining need authorization in D.07-12-052. As noted in the ACR, the Mariposa Settlement provided:

- A. The Parties agree that the total need to be procured from the 2008 LTRFO will be limited to 1,512 MW, inclusive of the Mariposa PPA (184 MW). The Parties support approval of the Mariposa PPA under the terms of this Settlement Agreement.
- B. The balance of PG&E's need authorization in the LTPP Decision (1,328 MW) will be met, but not exceeded, by one application for approval of additional agreements resulting from PG&E's 2008 LTRFO.^{1/}

^{1/} See Motion Of Pacific Gas And Electric Company (U 39 E), The Division Of Ratepayer Advocates, The Utility Reform Network, Californians For Renewable Energy, California Unions For Reliable Energy For Approval Of Settlement Agreement, filed September 3, 2009, in A.09-04-001, which attached the Mariposa Settlement.

As discussed further below, PG&E complied with each of these conditions of the Mariposa Settlement.

A. The LTRFO and Novation Proceedings.

Consistent with the Mariposa Settlement, PG&E filed a single, second application for approval of the remaining winning offers arising out of the 2008 LTRFO. PG&E requested approval of four winning contracts arising out of the 2008 LTRFO in A.09-09-021 (the “LTRFO Proceeding”). Two of the four contracts were for existing generation facilities and the other two contracts were for new generation resource -- the Marsh Landing Generating Station (“Marsh Landing”), a 719 MW combustion turbine facility, and the Oakley Generating Station (“Oakley”), a 586 MW combined-cycle facility. The total new generation resource megawatts proposed in A.09-09-021 was 1,305 MW and were proposed to fill the need for new generation resources by 2015 identified in the LTPP Decision.

Separate from its 2008 LTRFO application (*i.e.*, A.09-09-021), PG&E also filed two applications to novate certain existing Department of Water Resources (“DWR”) PPAs and the approval of certain PPAs for new generation resources resulting from the upgrade of two existing facilities. In particular, PG&E requested approval of the GWF Transaction in A.09-10-022 and the Los Esteros Critical Energy Facility (“LECEF”) Transaction in A.09-10-034. Part of the GWF Transaction included a new PPA for the proposed upgrade to the GWF Tracy Facility (“GWF Tracy Upgrade PPA”). Similarly, the LECEF Transaction included a new PPA for an upgrade to the LECEF facility (“LECEF Upgrade PPA”). The GWF Tracy and LECEF Upgrades were not winning offers in the 2008 LTRFO. Instead, the Upgrade PPAs were proposed by PG&E as a part of an overall DWR novation package to support the Commission’s policy to encourage novations of the DWR contracts.^{2/} The GWF and LECEF Transaction

^{2/} See *e.g.* D.08-11-056, Ordering Paragraph (“OP”) 5.

applications were subsequently consolidated by the Commission (collectively “Novation Proceeding”). PG&E repeatedly stated in the Novation Proceedings that the two PPAs were not presented for approval to meet the authorized need in D.07-12-052 and that while GWF and Calpine bid into the 2008 LTRFO, the bids did not prevail and were not selected.^{3/}

For example, PG&E’s rebuttal testimony in the Novations Proceeding stated:

The Tracy and LECEF Upgrades were not intended to meet the need established by the Long Term Procurement Plan (LTPP) decision, Decision 07-12-052, and cannot take the place of the projects that PG&E has selected through its LTRFO to meet the LTPP need. If the Commission does not agree that additional, incremental capacity is needed to mitigate the risk of potential project delays or terminations, it should not approve the Applications.^{4/}

The Commission later “acknowledged that the Tracy and LECEF Transactions were not the winning bids in PG&E’s 2008 LTRFO.”^{5/}

B. The Commission’s Decisions in the LTRFO Proceeding and the Novation Proceeding, And CARE’s Applications for Rehearing.

In D.10-07-042, issued in the Novation Proceeding, the Commission conditionally rejected the GWF Tracy and LECEF Upgrades PPAs, but indicated that the PPAs may be approved if either the Marsh Landing or Oakley Projects were rejected in the LTRFO Proceeding.^{6/} The Commission directed PG&E to file a Tier 1 advice letter for approval of the GWF Tracy and LECEF Upgrade PPAs if the Marsh Landing and/or Oakley Projects were rejected.^{7/} In addition to addressing the GWF Tracy and LECEF Upgrade PPAs, D.10-07-042

^{3/} See PG&E’s Reply to Protests, A. 09-10-022 (Nov. 30, 2009); PG&E’s Reply to Protests, A.09-10-034 (Dec. 17, 2009); PG&E’s Prehearing Conference Statement (Dec. 14, 2009); PG&E’s Supplemental Testimony, pp. 1-18 (Jan. 11, 2010).

^{4/} PG&E’s Reply Testimony (Exhibit 4) filed in the Novation Proceeding, p. 4 (Jan. 22, 2010).

^{5/} D.10-12-063, p. 7.

^{6/} D.10-07-042, OP 2.

^{7/} *Id.*

also discussed the Mariposa Settlement. In particular, the Commission determined that the GWF Tracy and LECEF Upgrade PPAs should be counted against the remaining MWs to fill the LTRFO need determination in the Mariposa Settlement, which, assuming the projects for the winning bidders in A.09-09-021 were all approved, would exceed the MW in the Mariposa Settlement.^{8/}

In D.10-07-045, issued in the LTRFO Proceeding, the Commission approved the PPA for the Marsh Landing Project, but conditionally rejected the Oakley Purchase and Sale Agreement (“PSA”). Commissioner Bohn, in his concurrence to D.10-07-045 indicated that the Commission would reconsider approving the Oakley PSA if it were modified to include a later on-line date.^{9/} As a result of the rejection of the Oakley PSA, PG&E, pursuant to the Commission’s express instructions in D.10-07-042, then filed a Tier 1 advice letter seeking Commission approval of the GWF Tracy and LECEF Upgrade PPAs.^{10/} PG&E’s advice letter was approved on September 1, 2010.

C. PG&E’s Petition for Modification and D.10-12-050.

On August 23, 2010, PG&E petitioned to modify D.10-07-045, explaining that PG&E and the developers of the Oakley Project had agreed to amend the Oakley PSA to extend the guaranteed commercial availability date to 2016, a period after the LTPP need determination.

^{8/} *Id.*, at pp. 54-55.

^{9/} Concurrence of Commissioner Bohn in D.10-07-045, p. 2. During the Commissioners’ discussion of the 2008 LTRFO application at the July 29, 2010 meeting, some of the Commissioners indicated they could potentially support the Oakley Project if the contract were modified to allow for an availability date later than June 1, 2014. Commission President Peevey remarked that the Oakley Project may have been approved with a later availability date and Commissioner Bohn remarked “[w]hat I would have liked to have seen, for example, is to have the opportunity to consider approving the Oakley Project, with its newer technology and superior flexibility but with a later date for construction and operation so as to better match the needs of PG&E and its ratepayers with the estimated turn in the economy and increase in demand.”

^{10/} *See* PG&E Advice Letter 3711-E.

PG&E argued that, based on this changed circumstance, D.10-07-045 should be modified and the amended Oakley PSA approved.

In comments on the alternate proposed decision (“APD”) of Commissioner Bohn, which was ultimately adopted by the Commission, CARE and DRA, both parties to the Mariposa Settlement, argued that PG&E’s petition to modify should be denied because the Mariposa Settlement limited the amount of MW that could be approved arising from the 2008 LTRFO, and that PG&E had already satisfied the 2006 Long-Term Procurement Plan (“LTPP”) Decision (*i.e.*, D.07-12-052) need authorization.^{11/}

On December 16, 2010, the Commission issued D.10-12-050 denying PG&E’s petition for modification of D.10-07-045, but approving the amended Oakley PSA on its own motion, rejecting the allegations of CARE and DRA that the additional procurement would exceed PG&E’s procurement authorization in D.07-12-052.^{12/} CARE applied for rehearing of D.10-12-050 and again asserted that the Commission’s approval of Oakley was inconsistent with the Mariposa Settlement.^{13/} In D.11-05-029, the Commission modified D.10-12-050 but otherwise rejected CARE’s application and, specifically, CARE’s argument that PG&E exceeded its LTPP procurement authorization. The Commission stated: “*The Commission considered approval of the Oakley Project for 2016 and beyond, and not for the purpose of the need authorized in D.07-12-052 for PG&E’s procurement by 2015.*”^{14/}

^{11/} *Comments on Proposed Decision of Californians for Renewable Energy, Inc. (CARE)*, A.09-09-021, p. 7, (Nov. 20, 2010); See also *Comments on the Revised Alternative Proposed Decision of Commission Bohn of Californians for Renewable Energy, Inc. (CARE)*, A.09-09-021, pp. 12-13 (Dec. 14, 2010).

^{12/} *Id.*, p. 12.

^{13/} CARE’s Application for Rehearing of D.10-12-050, p. 15 (Jan. 11, 2011).

^{14/} D.11-05-049, p. 12 (emphasis added).

CARE later petitioned to modify D.10-07-042 (in which the Commission approved the Novations PPAs) asserting, once again, that approval of the Oakley Project filled the procurement authorization in D.07-12-052 and therefore approval of the Novations PPAs should be rescinded.^{15/} In D.11-07-012, the Commission considered and rejected CARE's argument that PG&E had exceeded its need determination, again stating in clear terms that the Oakley PSA was not approved to fill the need determination in D.07-12-052:

In D.10-12-050, the Commission approved the Oakley Project. Importantly, the new capacity approved by D.10-12-050 will not come online until 2016, which is after the 2015 timeframe for the new capacity authorized by D.07-12-052. *Consequently, the Commission's approval of the Oakley Project, in addition to the Tracy and LECEF Projects, does not cause PG&E to exceed the new capacity authorized by D.07-12-052.*^[FN]

[FN] D.10-07-045 reduced PG&E's authorized new capacity to 1,262 – 1,312 MW through 2015. *PG&E's approved projects do not exceed this limit.*^{16/}

The Conclusions of Law in D.11-07-012 provide:

1. Approval of the Oakley Project by D.10-12-050, in addition to the Tracy and LECEF Projects, does not result in PG&E procuring more new generation capacity than authorized by D.07-12-052 or D.10-07-045.

According to the Commission decisions discussed above, the PPAs approved to fill PG&E's LTPP need authorization were: Mariposa, Marsh Landing, GWF Tracy and LECEF. The combined total of new generation procurement as a result of these four PPAs is 1,157 MW, which is 355 MW *less* than the maximum amount the parties stipulated in the Mariposa Settlement could be procured consistent with the LTPP need authorization.^{17/}

D. CARE's Petition for Modification of D.09-10-017.

^{15/} CARE's Petition for Modification of D.09-10-017, p. 6 (Jan. 16, 2011).

^{16/} D.11-07-012, pp. 5-6, fn. 6 (emphasis added).

^{17/} Mariposa Settlement, Condition A.

On October 11, 2010, CARE filed the PFM that is the subject of the ACR. CARE argued that PG&E violated conditions A and B of the Mariposa Settlement by signing contracts to procure 1,743 MW, which, it alleged, exceeded the LTPP need authorization and the stipulations in the Mariposa Settlement regarding the remaining need authorization. On November 10, 2010, PG&E opposed the CARE PFM, and pointed out that it was untimely and did not meet the standards to modify a Commission decision in Commission Rule 16.4 as it did not refute the Commission's findings and conclusions in the Mariposa Decision that the Mariposa PPA was just and reasonable and in the public interest. It also did not "propose specific wording to carry out all requested modifications to the decision" As Rule 16.4 requires. The Commission has not yet issued a proposed decision on the PFM.

Subsequent to the filing of CARE's PFM and PG&E's reply to that PFM, the Commission has further clarified its LTRFO procurement decisions. In both D.10-12-050 and D.11-07-012, the Commission clarified that its approval of the Oakley Project, in addition to the Tracy and LECEF Projects, do not cause PG&E to exceed the new capacity limits authorized by the LTPP Decision. It would not be a good use of the Commission's limited resources to reopen this proceeding to reconsider whether or not PG&E has exceeded its "need authorization in the LTPP Decision (1,328 MW)"^{18/} as the Commission has already determined that PG&E did not. Further, the Commission cannot find merit in CARE's PFM that asserts PG&E "signed contracts to procure a total of 1,743 MW of new capacity from the 2008 LTRFO"¹⁹ when the Commission has already determined that the PPAs approved to fill PG&E's LTPP need authorization total 1,157 MW. CARE's PFM should be denied.

As PG&E discusses below, the issue of whether PG&E violated the Mariposa Settlement by exceeding the need authorization in the LTPP decision can and should be determined as a

^{18/} *Id.*, Condition B.

¹⁹ CARE PFM, p. 5.

matter of law in a decision on CARE's PFM based on the undisputed facts and Commission decisions discussed herein.

III. DISCUSSION

A. The Assigned Commissioner Lacks Authority To Reopen A Closed Proceeding.

Section 1708 of the Public Utilities Code authorizes the Commission to re-open a closed proceeding.^{20/} Section 1708 provides:

The *commission* may at any time, upon notice to the parties, and with the opportunity to be heard as provided in the case of complaints, rescind, alter, or amend any order or decision made by it. Any order rescinding, altering or amending a prior order or decision shall, when served upon the parties, have the same effect as an original order or decision.^{21/}

Reopening Commission proceedings should only occur in the most extraordinary of circumstances, not present here. As the Commission has noted:

Our past decisions recognize that the authority to reopen proceedings under Section 1708 must be exercised with great care and justified by extraordinary circumstances. Particularly where, as here, one or more parties have relied on decisions granting authority to construct a major generating facility, with substantial investments of time, money, and other resources in accordance with the terms therein, reopening can be justified only under the most compelling of circumstances.^{22/}

Only the full Commission has authority to reopen a Commission proceeding pursuant to Section 1708. As stated by the California Supreme Court in *City of Los Angeles v. Public Utilities Commission*: "That section...permits the *commission* at any time to reopen proceedings even after a decision has become final."^{23/} The authority to re-open a Commission proceeding is

^{20/} *City of Los Angeles v. Public Utilities Comm.*, 15 Cal. 3d 680, 706 (1975); *Re Southwest Gas Corporation*, D. 98-07-031; 81 CPUC 2d 63, 68-69 (1998); *Re United Parcel Service Inc.*, D.97-04-049, 71 CPUC 2d 714, 719-720 (1997).

^{21/} Pub. Util. Code § 1708 (emphasis added).

^{22/} *Re Applications of PG&E Co.*, D.92058, 4 CPUC 2d 139, 149-150 (1980).

^{23/} *City of Los Angeles*, 15 Cal.3d at 706 (emphasis added); *see also Re Applications of PG&E*, D.92058, 4 CPUC 2d 139, COL 1 ("Section 1708 of the Public Utilities Code confers discretionary

not conferred upon a single Commissioner. Public Utilities Code section 20(a), which defines terms used in later provisions of the Code, defines “‘Commission’ as the Public Utilities Commission created by Section 1 of Article XII of the California constitution and ‘commissioner’ means a member of the commission.” Public Utilities Code section 310 provides in relevant part that a majority of the commissioners “constitutes a quorum for the transaction of any business, for the performance of any duty, or for the exercise of any power of the commission.” Thus, the “commission” can exercise the authority to re-open a proceeding in Section 1708 under extraordinary circumstances, but a single Commissioner lacks this statutory authority. Because this proceeding was closed by order of the Commission in D.09-10-017, re-opening of the closed proceeding through an ACR is not permitted by Section 1708.

B. If This Phase Of The Proceeding Is Not Dismissed, The Scope of the Proceeding Should Include Additional Issues.

Section 5.2 of the ACR allows the parties to propose additions or changes to the scope of the proceeding as set forth in Section 5.1. In order to determine whether PG&E violated Condition B of the Mariposa Settlement, the Commission would necessarily need to determine as a matter of law that PG&E filed multiple applications for the purpose of satisfying the need authorization in D.07-12-052 and D.09-10-017 and that PG&E’s procurement exceeded the need authorization in D.07-12-052. If the Assigned Commissioner decides to proceed with a new phase to this proceeding despite the facts and procedural history described herein, PG&E proposes that the scope of Phase 2 be modified to include the following additional questions.

1. Did PG&E submit Applications A.09-09-021, A.09-10-022 and A.09-10-034 for the purpose of satisfying PG&E’s need authorization in D.07-12-052?

authority upon the Commission to reopen proceedings for the taking of further evidence, but only under extraordinary circumstances.”).

2. Did the Commission approve the Oakley Project for the purposes of satisfying PG&E's need authorization in D.07-12-052?

3. Can PG&E be penalized by the Commission pursuant to Public Utilities Code Section 2107 for violating D.09-10-017 when PG&E sought and obtained the Commission's approval of each long-term procurement agreement?

II. Hearings Should Not Be Required At This Time.

As discussed above, the Assigned Commissioner should dismiss Phase 2 of this proceeding and deny the CARE PFM as a matter of law. To the extent that the Assigned Commissioner and Administrative Law Judge determine that evidentiary hearings are required, PG&E requests that the hearings be strictly limited to disputed issues of fact that are within the scope of the proceeding and that evidentiary hearings be scheduled, if at all, only after the Commission issues a decision on the legal issue of whether PG&E can be subject to penalty under Section 2017 for violating a Commission decision under the facts and circumstances presented. If the Commission determines as a matter of law that PG&E's conduct violated a Commission decision and such violation is not excused by Commission decisions, the Commission could then schedule evidentiary hearings for the purpose of determining whether PG&E should be penalized and, if so, the amount of the penalty, given the factors listed in Section 5 of the ACR.

III. The Assigned Commissioner Should Adopt PG&E's Revised Schedule.

Section 5.2 (2) of the ACR invites the parties to comment on a proposed procedural schedule. As discussed above, PG&E requests this ACR to be dismissed and the Commission issue a proposed decision on the CARE PFM. If the Assigned Commissioner disagrees with this recommendation, the procedural schedule for Phase 2 should be staged to first permit briefing on the legal issue of whether PG&E violated the Mariposa Settlement by exceeding the need

authorization in D.07-12-052 and, if so, whether the Commission has authorized PG&E's actions. PG&E proposes the following schedule for briefing and deciding on the core legal issue.

Activity	Proposed Schedule
Opening briefs on legal issue	December 1, 2011
Reply briefs on legal issue	December 9, 2011

If the Commission determines at that point that the issues cannot be resolved as a matter of law, PG&E suggests that the Commission establish a subsequent schedule for testimony and evidentiary hearings.

IV. CONCLUSION

PG&E requests that the Assigned Commissioner terminate Phase 2 of this proceeding. In the event that Phase 2 is not terminated, PG&E recommends that a revised scoping memo and schedule be issued consistent with the requests in this pre-hearing conference statement.

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