

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

Order Instituting Rulemaking to Integrate and
Refine Procurement Policies and Consider
Long-Term Procurement Plans.

Rulemaking 10-05-006
(Filed May 6, 2010)

**PANOCHÉ ENERGY CENTER, LLC'S
COMMENTS ON PROPOSED DECISION OF ALJ ALLEN ON
SYSTEM TRACK I AND RULES TRACK III OF THE
LONG-TERM PROCUREMENT PLAN PROCEEDING
AND APPROVING SETTLEMENT**

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I. INTRODUCTION

Pursuant to California Public Utilities Commission (“CPUC” or “Commission”) Rules of Practice and Procedure Rule 14.3, Panoche Energy Center, LLC (“PEC”) provides the following comments on the Proposed Decision of Administrative Law Judge (“ALJ”) Peter V. Allen on System Track I and Rules Track III of the Long-Term Procurement Plan Proceeding and Approving Settlement (“Proposed Decision”). Specifically, PEC provides comments on Section 3.6., “IEP Motion,” of the Proposed Decision.

PEC is an independent power producer (“IPP”) that is a party to a pre-A.B. 32 contract with Pacific Gas and Electric Company (“PG&E”). The contract does not allocate responsibility for greenhouse gas (“GHG”) compliance costs associated with the California Cap on Greenhouse Gas Emissions and Market-Based Compliance Mechanisms (“Cap and Trade Program”). PEC filed a Motion to Become a Party in Rulemaking (“R.”) 10-05-006 on January 31, 2012

specifically to participate in this proceeding on the issues raised in the Motion by the Independent Energy Producers Association.¹

II. INDEPENDENT RENEGOTIATION OF THE PEC CONTRACT HAS REACHED A STALEMATE.

The California Air Resources Board (“CARB”) recognized in its Initial Statement of Reasons for the Cap and Trade Program that power purchase agreements that pre-date A.B. 32 may lack a mechanism for the allocation of the costs of complying with the Cap and Trade Program. In that vein, during the Cap and Trade rulemaking, CARB urged utilities and IPPs with such contracts to independently renegotiate their pre-A.B. 32 contracts to allow for cost recovery.²

Accordingly, PEC has been in communications with PG&E over the past several months to attempt to renegotiate its power purchase agreement with PG&E governing the Panoche Energy Center (“PEC contract”). PG&E and PEC have not been able to reach agreement on modifications to the PEC contract, though PEC’s proposed modifications were consistent with a recent application to the CPUC by San Diego Gas & Electric, requesting modifications to its pre-A.B. 32 power purchase agreement with Otay Mesa Energy Center. PEC and PG&E have thus reached an impasse in any renegotiation.

The Proposed Decision now directs the utilities to renegotiate the pre-A.B. 32 contracts at issue, as CARB previously suggested in the Cap and Trade rulemaking. This renewed direction from the Commission will not change PG&E’s stance on renegotiation with PEC. The

¹ ALJ Allen has not yet ruled on the Motion of PEC to Become a Party to R.10-05-006.

² CARB Notice of Public Availability of Modified Text and Availability of Additional Documents, p. 19 (July 25, 2011); CARB Proposed Regulation to Implement the California Cap-and-Trade Program Staff Report: Initial Statement of Reasons, p. II-32, fn. 22 (Oct. 28, 2010).

Commission's reiteration of the same proposal put forth by CARB in 2010 and 2011, which did not bring any resolution to most affected parties, is not an effective solution under the current circumstances.

III. THE COMMISSION SHOULD TAKE ACTION ON THIS ISSUE WITHOUT DELAY.

Cap and Trade compliance obligations for electrical generators commence January 1, 2013; the first auctions for the procurement of Cap and Trade compliance instruments start in a matter of months. IPPs and utilities both need certainty regarding their responsibility for GHG compliance costs – for PEC, ranging in the millions of dollars – in order to effectively plan for such costs and participate in the 2012 allowance auctions. The Proposed Decision states that if contracts have not been renegotiated and submitted to the Commission for approval 60 days from the effective date of the Decision, the Commission will address and resolve this issue in R.11-03-012. Moving the compliance costs issue back to R.11-03-012 would result in further delay in resolving this issue at a time when the affected parties are most in need of certainty. In addition to causing delay, shifting the issue of GHG compliance costs to R.11-03-012 would be inconsistent with the joint ruling issued in R.10-05-006 and R.11-03-012 in August 2011, which provided that issues related to GHG risk management, procurement, and compliance costs would remain within the scope of R.10-05-006.

PEC agrees that the Commission “is not in the business of bailing unregulated market participants out from their own past missteps....” (Proposed Decision, p. 57.) The Commission rightfully shies away from rewriting contracts. (*Id.* at p. 58.) However, some contracts negotiated before the passage of A.B. 32, and long before the details of the Cap and Trade Program were known and adopted more than four years later, do not address responsibility for GHG compliance costs under that Program. For a generator with a pre-A.B. 32 contract, not

renegotiated, who bears the full cost of purchasing GHG allowances and offsets under Cap and Trade, it is as if the pre-A.B. 32 contract has been rewritten to require the generator to bear full responsibility for new GHG compliance costs that were unknown at the time the contract was executed. This result inadvertently creates the “unfair competitive impacts” the Commission is seeking to avoid. (*Id.*)

In addition, the carbon price signal that Legislature aimed to provide to the market with A.B. 32 programs, such as Cap and Trade, is nullified in this situation. There is no price signal for the GHG emissions associated with the generation of power by PEC at the Panoche Energy Center, where PG&E bears no cost for the emission of GHGs at the facility, yet PG&E has the right to dispatch the Panoche Energy Center under the terms of the PEC contract. The Cap and Trade Program sought to place a price on carbon emissions from electricity generation, as GHG allowances are not distributed without cost to generators, as they are to other industries under the Program. This goal of Cap and Trade is undermined where pre-A.B. 32 power purchase agreements do not account for the price of GHG emissions associated with the energy produced. The Proposed Decision accurately notes that it is somewhat arbitrary and unfair for the recovery of GHG compliance costs to vary for IPPs with pre- and post-A.B. 32 contracts. (Proposed Decision, p. 57.) PEC believes that not only is it arbitrary and unfair, but the disparate allocation of financial responsibility is inconsistent with the purpose of A.B. 32.

Therefore, PEC asks that the Commission address the issue of pre-A.B. 32 contracts, where renegotiations have reached a stalemate, as soon as possible. PEC agrees with the Proposed Decision that the Commission should not act based on the limited record it has on pre-A.B. 32 contracts. Indeed, the Commission should take the opportunity now to gather the information it needs to handle this issue in an informed and fair manner.

IV. CONCLUSION.

For the reasons set forth above, PEC respectfully requests that the Proposed Decision be revised to propose a process to resolve the issue of GHG compliance costs related to pre-A.B. 32 contracts in a timely manner.

DATED: March 12, 2012

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VERIFICATION

I am the attorney for Panoche Energy Center, LLC (“PEC”), and am authorized to make this verification on PEC’s behalf. PEC is unable to verify the foregoing document in person as PEC is located outside of the County of San Francisco, where my office is located. I have read the foregoing **PANOCHÉ ENERGY CENTER, LLC’S COMMENTS ON PROPOSED DECISION OF ALJ ALLEN ON SYSTEM TRACK I AND RULES TRACK III OF THE LONG-TERM PROCUREMENT PLAN PROCEEDING AND APPROVING SETTLEMENT** and am informed and believe, and on that ground allege, that the matters stated are true and correct to the best of my knowledge.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed this 12th day of March, 2012, at San Francisco, California.

/s/ Seth D. Hilton

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