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)

REPLY COMMENTS OF WELLHEAD ELECTRIC COMPANY, INC. ON PROPOSED DECISION ON SYSTEM TRACK I AND RULES TRACK III OF THE LONG-TERM PROCUREMENT PLAN PROCEEDING AND APPROVING SETTLEMENT

Douglas E. Davie, Vice President
Wellhead Electric Company, Inc.
650 Bercut Dr., Suite C
Sacramento, CA 95811
Tel: (916) 447-5171
Fax: (916) 447-7602
E-mail: ddavie@wellhead.com

Douglas K. Kerner
Ellison, Schneider and Harris L.L.P.
2600 Capitol Avenue, Suite 400
Sacramento, CA 95816
Tel: (916) 447-2166
Fax: (916) 447-3512
E-mail: dkk@eslawfirm.com

Attorneys for Wellhead Electric Company, Inc.

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I. INTRODUCTION

Pursuant to Rule 14.3 of the California Public Utilities Commission's ("CPUC") Rules of Practice and Procedure, Wellhead Electric Company, Inc. ("Wellhead") respectfully submits these Reply Comments on the February 21, 2012 Proposed Decision ("PD") in the above-captioned matter.

In review of opening comments, no one has disagreed with the PD's interest in negotiated resolutions involving power purchase agreements ("PPAs") that do not contain a cost recovery mechanism for GHG compliance costs.[1] Pacific Gas & Electric ("PG&E") does aver that this principle is not relevant because all of its PPAs already contain provisions that address the issue. As discussed below, this is not entirely accurate as Wellhead is aware that not all PPAs meet PG&E's implicit test for negotiation. If PG&E's aversion were true then, assuming PG&E had a good faith interest in resolving the matter, it would have negotiated resolutions to the issue by now and neither the Commission nor the parties would continue to be involved in the problem. Southern California Edison ("SCE") avers that the PD's interest is premature or without factual foundation for any PPA lacking such a cost recovery mechanism. SCE's lack of current

[1] As Wellhead and others have discussed in many papers before, a cost recovery mechanism may involve a specific provision or it may exist by virtue of a payment structure that is based on Settlement or market prices.

awareness of a specific PPA that should be involved in a negotiation on the PD's principles does not counsel against the PD's direction to enter into such negotiations under appropriate circumstances.

II. COMMENTS

A. The Potential Risk of Greenhouse Gas Compliance Costs And to Whom They Might Apply Was Perfectly Unknown Prior to the California Air Resources Board's Implementing Regulations, Let Alone as Early As AB 32 Being Signed Into Law.

In its opening comments, PG&E does not disagree that negotiated amendments to PPAs may be appropriate; but does cite three reasons in support of why amendments to certain pre-AB 32 PPAs are not required for determining how to treat greenhouse gas ("GHG") compliance costs. They are:

> **First:** "with regard to PG&E's recent PPAs executed about four to six months before AB 32 was signed into Law, Cap and Trade regulation was a known and likely event as AB 32 was under consideration in the California legislature and thus Sellers were aware of the potential for GHG compliance cost."

PG&E's take on historical knowledge is wrong. The pre-AB 32 Contract issue was identified by the Market Advisory Committee in its report ("MAC Report") to the California Air Resources Board ("CARB") containing recommendations for implementing GHG-reduction strategies in California.[2] What the MAC Report could not have considered is that under the adopted cap-and-trade regulation, the utilities would be permitted to claim the GHG emissions produced by pre-AB 32 Contracted independent power generators and count these same emissions toward their total GHG emissions portfolio. CARB then used the utilities' overall GHG emissions portfolio to arrive at the total number of free allowances that each utility would receive under the cap-and-trade program for use by the utilities toward their own compliance

[2] Recommendations of the Market Advisory Committee to the California Air Resources Board June 30, 2007, section 6.1.2 Use of Allowance Value, Footnote 48 on p.56: http://www.energy.ca.gov/2007publications/ARB-

obligations. As a result of this allowance allocation structure, independent power generators without a pre-AB 32 contractual cost recovery mechanism continue to be required to purchase allowances for the GHG emissions they produce, while the utilities are given the perverse benefit of free allowances for the exact same GHG emissions profile. Surely, the parties could not reasonably have contemplated an allowance scheme that disconnects compliance responsibility from cost recovery, as is the case with the apparently tiny class of PPAs at issue.

PG&E also attempts subtlety to reduce the issue to a transfer of cost responsibility from independent generators to it or its ratepayers, BUT cost responsibility for ratepayers is a cornerstone of the GHG regulatory scheme.[3]

> **Second:** "relevant PPAs explicitly consider the issue of new laws or regulation or new taxes and thereby have a mechanism for addressing cap and trade compliance costs."

Wellhead is aware that not all PG&E PPAs provide such a mechanism. As discussed in footnote 2, no one anticipated the specific consequence of yet to be determined CARB regulations implementing AB 32 and had such a contract mechanism existed as PG&E supposes then PG&E should have resolved the issue by now. PG&E's argument effectively imputes to its PPAs a Change of Law provision (that does not exist) AND that acts in its favor by allowing it to retain Allowance benefits for which the independent generator is not compensated That is not respecting the balance of risks and benefits that would be expected if PG&E were right..

> **Third:** "to the extent that PG&E and the Seller disagree, the PPAs have explicit language for addressing disputes."[4]

This comment is inapplicable in a PPA that did not address the question potentially "in dispute" in the first place.

By PG&E's own logic, to the extent a PPA does not contain the provisions it claims

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[3] Consumers will not see the cost of GHG emissions if the distribution utility does not pay such costs -- the intended transparency to encourage consumers to modify their behaviors to reduce GHG emissions will be lost.

would govern, then a negotiation to address that vacancy is suggested. The Commission should affirm the PD's conclusion, as adjusted to Wellhead's "Opening Comments" Ordering Paragraph 11 ("OP 11") directing the utilities to negotiate in good faith ~~contracts~~ with independent generators, amendments to contracts that do not currently address the allocation of AB 32 greenhouse gas compliance costs so that they reasonably address those costs.

B. SCE Also Provides No Reason to Abandon the PD's Primary Direction for Good Faith Negotiations Addressing Pre-AB 32 Contract Compliance Costs.

In opening comments, SCE requests that the Commission remove OP 11 from the PD in the absence of any factual basis for concluding that a PPA fails to already address GHG cost allocation. Wellhead respectfully suggests that the apparent fact that SCE is presently unaware of any PPAs that should be the subject of good faith negotiation is no reason to eliminate the PD's general requirement that the utilities' negotiate amendments in good faith in those limited instances where such a PPA exists.

III. CONCLUSION

Every pertinent document issued by any jurisdictional entity recognizes both the fact that certain Pre-AB32 Contracts do not account for GHG compliance costs and that they should. The IOUs refusal even to acknowledge the condition, and extraordinary reluctance to even engage in a good faith amendment to correct this deficiency of obvious concern. Nonetheless, Wellhead remains optimistic that the negotiation process will have a good chance of success provided that the Commission sets forth a clear expectation for success and policy guidance and frequent status reports on the progress of these negotiations.

[4] PG&E Opening Comments, p.10

Wellhead believes that its' proposed changes to OP 11 strikes an appropriate balance that considers all those affected, the Commissions time required to resolve this issue, and facilitates the objectives and requirements encapsulated in AB 32.

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Respectfully submitted,

By: 

Douglas K. Kerner
Ellison, Schneider & Harris
2600 Capitol Avenue, Suite 400
Sacramento, CA 95816
Tel: (916) 447-2166
Fax: (916) 447-3512
E-mail: dkk@eslawfirm.com

Attorneys for Wellhead Electric Company, Inc.