BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA

Application of Pacific Gas and Electric Company for Approval of Amended Purchase and Sale Agreement Between Pacific Gas And Electric Company and Contra Costa Generating Station LLC and for Adoption of Cost Recovery and Ratemaking Mechanisms (U 39 E)	Application 12-03-026 (Filed March 30, 2012)

PROTEST OF COMMUNITIES FOR A BETTER ENVIRONMENT

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PROTEST OF COMMUNITIES FOR A BETTER ENVIRONMENT

Communities for a Better Environment (CBE) respectfully submits this protest to Application (A.) 12-03-026, the application of Pacific Gas and Electric (PG&E) approval of a Purchase and Sale Agreement with Contra Costa Generating Station, LLC, and for adoption of cost recovery and ratemaking mechanisms. This protest is timely filed and served pursuant to Rule 2.6 of the Commission's Rules of Practice and Procedure.[1]

INTRODUCTION

CBE is a community-driven organization that employs community organizers, researchers, and lawyers to serve the cause of environmental justice by empowering underrepresented communities. Established in 1978 in California, CBE works with community members in low income communities of color to fight pollution. CBE's members in the Bay Area suffer disproportionately from the impacts of local and regional air pollution. Specifically, in Northern California, CBE works with communities in Alameda and Contra Costa counties, where stationary industrial pollution sources exacerbate the impacts from goods movement and mobile sources from ports and the freeways that bisect these traditionally disempowered

[1] A.12-03-026 was first noticed in the Commission's Daily Calendar of April 11, 2012. Commission Rule 2.6(a). This protest is thus timely filed on or before May 11, 2012. *Id.*, see also Commission Rule 1.15 (computation of time).

communities. Residents of the communities where CBE works in East Oakland and Contra Costa county are predominantly people of color whose voice often is not heard by those who decide how much pollution they will breathe.

At the direction of its members, CBE works statewide to ensure that new sources of energy are as clean they can be, and to prevent new power plants from exacerbating existing environmental injustice. CBE has specific concerns around construction of new fossil-fueled power plants in this era of increased awareness of the cumulative impacts from particulate matter, ground-level ozone and its precursors like nitrogen oxide (NOx) and volatile organic compounds (VOCs), carbon monoxide, and hazardous air pollutants. CBE has also long sought to end the harmful impacts of existing once-through cooling facilities on its members who engage in subsistence fishing. CBE's members are increasingly concerned about the disproportionate impacts that global climate change will have on low-income communities of color, and strongly object to the prospect of increasing our dependency on energy sources that emit greenhouse gases.

Commission Rule 2.6 requires a protest to

1) articulate the "facts or law constituting the grounds for the protest,"

2) "the reasons the protestant believes the application, or a part of it, is not justified."

3) "the effect of the application on the protestant," and

4) in the event the protestant requests an evidentiary hearing, as CBE does, "the protest must state the facts the protestant would present at an evidentiary hearing to support its request for whole or partial denial of the application."

Each of these requirements is detailed below, based on currently available information. Based on this information, in this protest CBE presents facts and law showing that approval of

A.12-03-026 would violate the Public Utilities Code, PUC rules, and lack any basis in law or fact.

Because of these factual and legal flaws, CBE and its members will harmed. CBE therefore protests the application, and requests that the Commission either deny the application outright, or hold an evidentiary hearing to consider evidence of environmental and environmental justice impacts.

FACTS AND LAW CONSTITUTING GROUNDS FOR CBE'S PROTEST AND REASONS CBE BELIEVES A.12-03-026 IS NOT JUSTIFIED

Approval of the Application would be contrary to Commission rules and contrary to facts in the record. A.12-03-026 seeks approval of a contract that fails to comply with PG&E's 2008 Long-Term Request for Offers (LTRFO) and this Commission's Long-Term Procurement Plan (LTPP) Decisions D.07-12-052 and D.12-04-046. It fails to meet the requirements set out in 10-07-045 for PG&E to reapply for approval of the Oakley project. The "facts" on which it is based are patently false.

A. Approval of the Application Would Not be Just and Reasonable

The Commission's mandate is to review proposed contracts to determine whether they are just and reasonable for ratepayers. Specifically, the Public Utilities Code requires "just and reasonable" rates.[2] The Public Utilities Code contains several provisions designed to protect ratepayers. In particular, transactions must be used and useful to receive rate base treatment.[3]

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[2] *See* Cal. Pub. Utilities Code Section 454; *see also* Pub. Util. Code §§ 451, 554.8, 701.10(a), 727.5(e), 790(b) & (e); *see Toward Utility Rate Normalization v. Public Utilities Com.*, 44 Cal.3d 870, 877 (Section 454.8 codifies the "key principle that costs borne by ratepayers should closely match benefits they receive") (internal quotation marks omitted); *accord* D.09-06-049 ("the Commission has an ongoing duty to ensure that utility investments result in infrastructure that is used and useful");*see also* Pacific Environment Opening Br. at pp. 16-17 (discussing Commission's duty to ensure just and reasonable rates as codified in various sections of the Public Utilities Code).

[3] *See* Pub. Util. Code §§ 454.8, 701.10(a), 727.5(e), 790(b) & (e); *see Toward Utility Rate Normalization v. Public Utilities Com.*, 44 Cal.3d 870, 877 (Section 454.8 codifies the "key principle that costs borne by ratepayers should closely match benefits they receive") (internal quotation marks omitted); *accord* D.09-06-049 ("the Commission has an ongoing duty to ensure that utility investments result in infrastructure that is used and useful").

Public Utilities Code Section 451 further requires that charges to ratepayers are "[j]ust and reasonable rates . . . based on the cost to serve."[4] Overprocuring fossil fuel energy by allowing PG&E to procure energy would not be useful, just, or reasonable for the ratepayers.

Foremost, over-procurement is not needed.[5] To determine whether a transaction is used and useful, a utility must show a "reasonable need."[6] PG&E does not have a reasonable need,[7] and therefore procurement of additional fossil fuel plants is not useful, just, or reasonable.

In addition, as the Commission has recently stated, the Code requires additional analysis of resources procured under the plan:

> First, Section 454.5 directs utilities in the development of their overall procurement plans, and does not directly address Commission approval of specific resources proposals. The provisions cited . . . require development of energy efficiency and demand reduction strategies and technologies more broadly, rather than the adoption of every specific proposal for increasing demand response. In addition, this section states that adopted resources must be cost effective, reliable, and feasible, and allows for the rejection of proposals that do not meet all three criteria.[8]

Section 454.5 also specifically states that it does not alter, modify or amend the "Commission's oversight of affiliate transactions under its rules and decisions" such as the affiliate transactions at issue in this application.[9] The Utilities Code does not require the Commission to approve specific transactions, nor does it authorize approval without a showing that the transaction is needed. The Commission should not gamble on PG&E's unsupported arguments at the ratepayers' and the public's expense.

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[4] Cal. Pub. Util. Code § 451; *see also* D.04-12-048.
[5] *See supra* at Section III.B.
[6] *Cf.* D.05-12-020 at 20 (finding equipment was "used and useful" because utility had established its "reasonable need").
[7] PG&E's allegations of need are discussed below.
[8] D.09-08-027 at p. 180.
[9] Pub. Util. Code § 454.5(h). These rules include the Commission's most recent rules governing Utility Owned Generation (approved with the 2010 LTPP.) To the extent PG&E contends it is not seeking approval of this PSA pursuant to the 2006 LTPP and the 2008 LTRFO, it is subject to the new UOG rules, with which it does not comply.

B. PG&E Does Not Need Any New Capacity

The PSA for the Oakley project was CCGS's response to PG&E 2008 LTRFO. PG&E issued the 2008 LTRFO to meet a need identified in the 2006 Long Term Procurement Plan (LTPP). Since the Commission decided the 2006 LTPP the energy landscape has significantly changed and PG&E's demand for new fossil fuel capacity has been eliminated. This significant change is reflected by PG&E's agreement in the 2010 LTPP that no new generation was needed before 2020. It is further reflected by the fact that the California Independent System Operator (CAISO) has predicted that PG&E's North of Path 26 territory will operate with a 37.6% reserve margin during this year's summer peak.[10] PG&E needs no additional new fossil fuel capacity. Approving the Oakley project would put ratepayers on the hook for hundreds of millions of dollars in unnecessary spending for a fossil fuel facility in a community already overburdened by pollution. The Commission should not allow PG&E to increase its already extraordinarily high reserve margin at the expense of the ratepayers and local communities.

PG&E alludes to a need for flexible[11] capacity, or capacity to support the Bay Area's local reliability. However, PG&E does not even need Oakley under the CAISO's extremely conservative local reliability 1 in 10 analysis for 2021. In its 2011/2012 Transmission Plan, CAISO calculated whether the Greater Bay Area would have any need for transmission upgrades or procurement in 2021 during the hottest day in a ten year period when two contingencies occur. This analysis is much more conservative than the assumptions that the Commission has historically evaluated to determine long-term needs because it uses conservative transmission assumptions and assumes no demand response and uncommitted energy efficiency. In that

[10] *http://www.caiso.com/Documents/Briefing_SummerLoads_ResourcesOperationsPreparednessAssessment-Report-MAR2012.pdf*

[11] As described below, the Oakley projected is not permitted to allow it to serve as a flexible plant with frequent cycling to support variable output from renewable generation.

analysis, CAISO reviewed local reliability needs in the Bay Area under four different scenarios. When that LCR need subtracts the available resources without the Oakley facility, there is still not a need assuming that less than half of the demand response resources from the 2010 LTPP are on line.[12] This analysis includes no uncommitted energy efficiency, further supporting how conservative these assumptions are.

Portfolio[13]	LCR (MW)	Resources	LCR Need for Oakley?
Trajectory	5773	5285 MW (existing NQC) – 1,303 MW (OTC) + 2308 MW (new generation) – 586 MW (Oakley) + 1000 MW (DR) = 6704 MW	No
Environmental	4728	6704 MW	No
Base	5778	6704 MW	No
Time	6572	6704 MW	No

Decision D.07-12-052 authorized PG&E to procure 800-1200 MW by 2015.[14] Even though PG&E's demand was drastically reduced after the 2006 LTPP, it still requested filling the authorization for MW above and beyond the authority that was granted in the 2006 LTPP. At the time it requested authorization, even PG&E agreed that its demand forecast has been reduced

[12] The 2010 LTPP Scoping Memo assumed 2001 MW of demand response would be on-line in the PG&E area in 2020.
[13] CAISO 2011-2012 Transmission Plan, pp. 225 and 226.
[14] *See* D.07-12-052 at p.116.

since the 2006 LTPP[15] and that procurement of new resources could cause "excess" and some "lumpiness."[16] Despite the fact that approval led to excess and lumpiness, PG&E has received approval of: 184 MW of new capacity from Mariposa Energy,[17] 254 MW of upgraded capacity from the California Department of Water Resources (DWR) contracts,[18] and the 930 MW Marsh Landing facility.[19] In addition to the projects discussed above, PG&E recently started construction and/or operation of the following new fossil fuel facilities: the 533 MW Gateway Generating Station, the 120 MW Starwood Midway facility; the 400 MW Panoche Facility, and the 660 MW Colusa facility.[20] These facilities can meet any perceived need that PG&E has for new fossil fuel generation. Thus, PG&E has already filled its 2006 LTPP procurement authorization, even though it was not needed. If it wants to procure more resources, it will need to demonstrate a need in the 2012 LTPP. Importantly, the Commission has stated that procurement authority must be reviewed under the LTPP framework.[21]

C. PG&E and CCGS Lack All Necessary Permits

PG&E touts the worthiness of the Oakley project in large part because it asserts that the project has "all necessary permits."[22] This statement is incorrect. The Oakley project lacks air permits sufficient to allow it to proceed.

First, PG&E and CCGS failed to apply for a federal air permit to regulate the Oakley project's greenhouse gas (GHG) emissions. Any project that begins construction after July 1,

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[15] *See* Ex. 5 (PG&E Reply Test.) at p. 7; PG&E Opening Br. at p. 21.
[16] PG&E Opening Br. at pp. 21, 23.
[17] *See* D.09-10-017 (approving Mariposa Energy contract).
[18] *See* A.09-10-022.
[19] See A.09-09-021.
[20] *See* CEC, Status of All Projects, *available at* http://www.energy.ca.gov/sitingcases/all_projects.html (describing status of power plants in California and showing that PG&E has recently brought on-line or is constructing over 2400 MW of electricity).
[21] *See* D.08-11-056, at p. 81 ("contracts should . . . be reviewed by the Commission for consistency with long-term procurement planning criteria.").
[22] A.12-03-026, p. 7.

2011 must apply for a federal Prevention of Significant Deterioration (PSD) permit to regulate its GHG emissions.[23] "Begin actual construction" means "in general, initiation of physical on-site construction activities on an emissions unit which are of a permanent nature. Such activities include, but are not limited to, installation of building supports and foundations, laying underground pipework and construction of permanent storage structures."[24] In other words, for federal purposes, beginning construction means not only holding all final necessary permits, it means making significant progress, beyond merely grading or beginning to pour a concrete pad. The Oakley project did not begin construction by July 1, 2011, and indeed lacked a permit to do more than preliminary site preparation by that date.

Further, in order to avoid federal air permit requirements for other pollutants, PG&E and CCGS agreed to limit operation of the Oakley plant. The Bay Area Air Quality Management District (BAAQMD) issued an authority to construct that is conditioned on limited cold and warm starts, which would keep Oakley's emissions of oxides of nitrogen below the requirement to secure a federal PSD permit. However, in A.12-03-026, contrary to the contentions on which the application is based, PG&E expounds extensively on the abilities of the Oakley project to cycle in support of intermittent renewable wind and solar generation. Under federal law, an air permit issued on a false premise, such as representations that it will operate under limited conditions to control emissions, is void ab initio.[25]

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[23] 75 Fed. Reg. at 31594; *see also* 40 C.F.R. § 52.21(b)(49)(v) (defining when GHGs are subject to regulation after July 1, 2011).

[24] 40 C.F.R. § 52.21(b)(11); id. § 51.155(b)(11). An "emissions unit", in turn, is defined as "any part of a stationary source that emits or would have the potential to emit any regulated NSR pollutant." Id. § 52.21(b)(7); see also id. § 52.21(b)(50) (defining the pollutants that are considered NSR pollutants, including all criteria pollutants, certain precursors to criteria pollutants, hazardous air pollutants and any pollutant subject to regulation under 40 C.F.R. § 52.21(b)(49), which now includes GHGs).

[25] Memorandum, Guidance on Limiting Potential to Emit in New Source Permitting, from Terrell E. Hunt, Associate Enforcement Counsel, EPA Office of Enforcement and Compliance Monitoring, Air Enforcement Division, and John S. Seitz, Director, EPA Office of Air Quality Planning and Standards, Stationary Source Compliance Division (hereinafter, "Sham Permit Policy"), Jun. 13, 1989, 12.

> An example is construction of an electric power generating unit, which is proposed to be operated as a peaking unit but which by its nature can only be economical if it is used as a base-load facility.[26]

In this case, the inverse of the foregoing example is true: PG&E contends that the Oakley project was designed and is intended to provide high-efficiency firming power to facilitate integration of intermittent renewables, while its permit assumes and indeed authorizes relatively little cycling, as though it were the type of "conventional" combined cycle facility it seeks to replace.[27] At fewer than six start-up events per turbine per week, the Oakley project cannot possibly provide the attributes for which PG&E says it has been designed and is intended, such as fast-starting capability, "similar to a simple cycle peaking gas turbine."[28]

Had PG&E and CCGS gone through the requisite federal permitting processes, they would have triggered review by the federal Fish and Wildlife Service (FWS). In the Energy Commission permitting process, FWS repeatedly wrote seeking consideration of the impacts the Oakley project would have on endangered species. The Energy Commission permit failed to give due deference to FWS concerns. Litigation is pending before the California Supreme Court, seeking vacature of the Energy Commission's decision authorizing the Oakley project, and that permit is therefore not final. In addition, CBE and its allies in the environmental community have notified PG&E and CCGS of their intent to sue under the federal Endangered Species Act and the federal Clean Air Act for failing to secure all necessary permits. Thus, rather than having already secured all necessary permits, the Oakley project cannot be said to hold a single necessary permit that is clear and final.

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[26] New Source Review Workshop Manual: Prevention of Significant Deterioration and Nonattainment Area Permitting, DRAFT, October 1990, A.9; *available at*: http://www.epa.gov/ttn/nsr/gen/wkshpman.pdf.
[27] *See* A.12-03-026, p.14.
[28] I*d.* at 15.

D. None of the Conditions Under Which PG&E Could Seek Approval of the Oakley Project Have Occurred

On July 29, 2010 the Commission issued D.10-07-045 rejecting the PSA between PG&E and CCGS. The Commission specifically concluded that the Oakley plant was not needed, as it exceeded the generation limit in PG&E's LTPP. However, it noted that PG&E could submit a new application for PSA approval if certain events transpired creating a need for the Oakley plant. These included: (1) if a previously approved projects failed to come online (2) if certain aging powerplants were retired three years ahead of schedule; and (3) if a statewide renewable integration study shows significant reliability risks. The Commission subsequently approved the Oakley project for delivery (as currently proposed in A.12-03-026) in 2016. On March 16, 2012, the California Court of Appeal annulled the Commission's approval, reinstating D.10-07-045. None of the conditions in D.10-07-045 that would allow PG&E to seek approval of the Oakley project has been met.

EFFECT OF APPLICATION ON CBE

As described above, CBE is a community-based that organizes low-income communities of color in the Bay area and the Los Angeles area. CBE's members have directed it to work both regionally and statewide to ensure that new sources of energy are as clean they can be, and to prevent new power plants from exacerbating existing environmental injustice. CBE believes its members and the communities at large are entitled to just and reasonable rates, which approval of this application would deny them. Further, CBE believes that since the Oakley project meets none of PG&E's identified needs, approval would violate state law and commission rules, impeding CBE's ability to secure procedurally and substantively fair results before this Commission. CBE has specific concerns around the construction of the proposed Oakley project. If approved, the application will negatively impact its members in Contra Costa County, in the region, and potentially statewide.

ISSUES REQUIRING EVIDENTIARY HEARING

CBE believes that an evidentiary hearing would be required before the Commission could approve application A.12-03-026. Such a hearing would include evidence including, but not limited to:

1) evidence regarding lack of local reliability need;

2) evidence regarding lack of need for renewables integration;

3) evidence regarding conditions on operation of the Oakley project that would prevent it from meeting local reliability or renewables integration needs;

4) demand projections and need to procure additional resources in the PG&E service area.

CONCLUSION

In sum, CBE protests A.12-03-026. CBE requests that the Commission either deny the application outright, or provide for a thorough evidentiary hearing to explore the serious environmental and environmental justice issues the Application raises.

Respectfully submitted,

May 11, 2012 /s/ SHANA LAZEROW
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