BEFORE THE PUBLIC UTILITIES COMMISSION

OF THE STATE OF CALIFORNIA

Application of Pacific Gas and Electric Company (U 39E) 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.	Application 12-03-026 (March 30, 2012)

PROTEST OF THE INDEPENDENT ENERGY PRODUCERS ASSOCIATION

INDEPENDENT ENERGY PRODUCERS ASSOCIATION
Steven Kelly, Policy Director
1215 K Street, Suite 900
Sacramento, CA 95814
Telephone: (916) 448-9499
Facsimile: (916) 448-0182
Email: steven@iepa.com

GOODIN, MACBRIDE, SQUERI, DAY & LAMPREY, LLP
Brian T. Cragg
505 Sansome Street, Suite 900
San Francisco, California 94111
Telephone: (415) 392-7900
Facsimile: (415) 398-4321
Email: bcragg@goodinmacbride.com

Attorneys for the Independent Energy Producers Association

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This application is the third attempt by Pacific Gas and Electric Company (PG&E) to obtain the Commission's approval of its Purchase and Sale Agreement (PSA) with Contra Costa Generating Station LLC for the construction and transfer to PG&E of the Oakley Generation Station.[1]

PG&E's initial attempt was rejected in Decision (D.) 10-07-045, but the Commission allowed PG&E to submit another request for approval "via application" if one of three conditions occurred first: (1) other approved projects failed and created an "open need" for new capacity on the scale of the 586 MW Oakley plant; (2) PG&E was able to retire a plant using once-through cooling of comparable size at least three years ahead of schedule; or (3) the final result of the renewables integration study performed by the California Independent System Operator (CAISO) demonstrated that there are "significant negative reliability risks" associated

[1] Filing of the application was noticed in the Commission's Daily Calendar on April 11, 2012, and this protest is filed within the time permitted by Rule 2.6(a) of the Commission's Rules of Practice and Procedure.

with renewables integration, even after considering the capacity of projects already approved by the Commission.[2]

For its second attempt, PG&E filed a petition for modification of D.10-07-045—not an application as the Commission had instructed—which the Commission *sua sponte* converted into an application in D.10-12-050. The Commission's procedural improvisations led the Court of Appeal to reverse the Commission's decision in an unpublished opinion.[3]

In this application, PG&E's third attempt at approval, PG&E again fails to follow the clear requirements of D.10-07-045. This time, PG&E filed an application, as the Commission instructed, but it fails to demonstrate that any of the conditions the Commission set as a prerequisite for filing the application have occurred. As the Independent Energy Producers Association (IEP) discusses in more detail in its motion to dismiss filed today, PG&E has not (1) shown that other projects failed and created an open need for new capacity; (2) identified any once-through cooled plant that retired at least three years early; or (3) cited any "significant negative reliability risks" found in the final report of the CAISO's renewables integration study (which has not yet been issued).

In short, PG&E again disregarded the explicit instructions the Commission gave in D.10-07-045. Moreover, even if we assume that PG&E's application is not governed by D.10-07-045, the application fails to meet the requirements for UOG established in D.07-12-052 or D.12-04-046, the other potentially applicable standards. For the reasons discussed in IEP's motion to dismiss and for the reasons discussed below, IEP respectfully protests Application 12-03-026.

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[2] D.10-07-045, pp. 40-41.
[3] *TURN v. California Public Utilities Commission,* Case No. A132439, Cal. Ct. App. 1st Dist., March 16, 2012.

I. PG&E'S PERSISTENT REQUESTS FOR APPROVAL OF THE OAKLEY PROJECT DISPLAY PREFERENTIAL TREATMENT OF UTILITY-OWNED GENERATION

The Commission has determined that PSAs, also known as build-own-transfer or turnkey arrangements, are classified as utility-owned generation (UOG).[4] The Oakley project clearly fits into this category, because when the project is completed, it will be turned over to PG&E and the price PG&E paid for the purchase will be added to PG&E's ratebase. The only difference between a utility-initiated project and Oakley is that title to the Oakley plant will not transfer to PG&E until at or around the commercial operation date, and the risks of construction are borne by the PSA counter-party, not by PG&E. Once the Oakley plant becomes operational, it will be indistinguishable from other UOG, and the ongoing, long-term financial and operational risks of the plant will fall on PG&E and ultimately its ratepayers.

PG&E's willingness to disregard the requirements the Commission established in D.10-07-045, D.07-12-052, and D.12-04-046 is one manifestation of PG&E's extraordinary persistence in attempting to obtain the Commission's approval of the Oakley project, an enthusiasm that is perhaps attributable to the fact that Oakley is a UOG project. It seems highly unlikely to IEP that PG&E would undertake such extraordinary efforts to seek approval of a power purchase agreement (PPA) with an independent power producer. These extraordinary efforts include, among others:

- **Possible favoritism in bid evaluation.** In the original consideration of the Oakley project as part of PG&E's 2008 RFO, The Utility Reform Network (TURN), which has access to the underlying confidential information, questioned whether PG&E had fairly evaluated the Oakley project in comparison with bids for PPAs in the 2008 RFO. In particular,

[4] D.07-12-052, p. 197, fn.233.

TURN criticized PG&E's comparison methodology, noting that "the 30-year life of the Oakley Project (compared to 10 years for the PPAs) introduces a much greater level of uncertainty into the analysis of the resource's levelized value."[5] In rejecting the Oakley project, the Commission cited the concerns raised by TURN.[6]

- **Extraordinary action to amend the agreement.** After the Oakley project was rejected in D.10-07-045, PG&E quickly amended the Oakley PSA to extend the Guaranteed Commercial Availability Date by two years, then sought approval of the extension and the Oakley project through what it thought would be an expedited procedure—a petition to modify D.10-07-045—rather than file a new application as the Commission had instructed. The amendment of the Oakley PSA and the filing of the petition for modification were accomplished in less than a month after the Commission's initial rejection of the Oakley project. To be clear, quick amendments in response to the Commission's concerns and attempts to seek expedited approval of PG&E's commitments are appropriate *provided* that PG&E extends the same efforts on behalf of all of its commitments, and not just those for UOG.
- **Cutting procedural corners.** Over a year later (thanks to PG&E's procedural "shortcuts"), PG&E again asks for the Commission's approval of the Oakley project, even though it has not and cannot claim that any of

[5] Quoted in D.10-07-045, p. 37.
[6] D.10-07-045, p. 39.

the prerequisites the Commission prescribed for a new application have occurred.

PG&E's extraordinary efforts on behalf of a UOG project raise the same concerns about favoritism and preferential treatment that very nearly led the Commission to bar all UOG, including PSAs, from participating in the competitive generation market in 2007. The Proposed Decision leading to D.07-12-052 was so concerned about the potential for favoritism and preferential treatment of proposed UOG projects that it barred all forms of UOG, including PSAs, from participating in competitive solicitations (while at the same time declaring the Commission's commitment to competitive mechanisms) "until a functional, transparent methodology for comparing the bids on a level playing field has been established." In D.07-12-052, however, the Commission was persuaded to "relax *for the moment* the proposed restriction to exclude head-to-head competition between PPAs and PSAs . . . ."[7] The Commission's attitude toward UOG was far from relaxed, however, and D.07-12-052 includes statements like "While we do not explicitly disallow utility ownership options in the generation market we continue to look unfavorably on this procurement option . . . ."[8]

PG&E's unflagging efforts to secure the Commission's approval of the Oakley project bring these concerns about favoritism and preferential treatment to the fore once again. Even if the Commission ignores the procedural irregularities associated with PG&E's application and the unusually quick pace of PG&E's pursuit of the Commission's approval, at a minimum the Oakley PSA warrants special scrutiny (if not dismissal as IEP requests in its separate motion) to ensure that PG&E's significant interest in getting Oakley approved is not allowed to distort the comparison of Oakley with other non-utility projects.

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[7] D.07-12-052, p. 206 (emphasis added).
[8] D.07-12-052, p. 213.

II. CONSIDERATION OF THE OAKLEY PROJECT IS PREMATURE

Although the Oakley project was originally bid into a solicitation in 2008 to fill resource needs identified in 2007, PG&E now states that the present application is not meant to fill any need identified in D.07-12-052 as implemented through the 2008 RFO.[9] Since the 2008 RFO, the Commission has not identified any additional need for an all-source procurement.

D.10-07-045 allowed PG&E to re-submit an application for approval of the Oakley PSA if PG&E could demonstrate that one of three conditions had occurred. As discussed above and in IEP's motion to dismiss, PG&E has failed to show that any of the three prerequisites for re-submission of the Oakley PSA that the Commission imposed in D.10-07-045 have been met, or that there is any other legal foundation for its application. PG&E has not alleged, much less demonstrated, that the first two prerequisites had occurred—*i.e.,* that other projects selected by PG&E expected to be available were not available, which created an open need for new capacity, or that any once-through cooled plants retired at least three years early.

The third prerequisite is that the final result of the renewables integration study performed by the CAISO demonstrated that there are "significant negative reliability risks" associated with renewables integration, even after considering the capacity of projects already approved by the Commission. Although the application claims that Oakley "integrates renewable energy resources," this claim is not related to the CAISO's final study on renewables integration. The CAISO has yet to release the final results of its renewables integration study referred to in D.10-07-045. The final results of that study will inform a modeling effort to determine whether generating facilities with certain locational or operational attributes are needed to maintain the reliability of the grid. The order instituting the new long-term

[9] *Pacific Gas and Electric Company's (U 39-E) Response to Communities for a Better Environment's Application for Rehearing of D. 12-03-008*, p. 4, filed in A. 09-04-001 on April, 27, 2012 ("the Oakley Project will meet a need outside of the 2006-2015 need identified in D. 07-12-052 and the 2008 LTRFO").

procurement proceeding, Rulemaking 12-03-014, where the CAISO study is expected to be considered, described one of the general issues to be addressed in that proceeding as:

> Identify CPUC-jurisdictional needs for new resources to meet local or system resource adequacy (RA), renewable integration, or other requirements and to consider authorization of IOU procurement to meet that need.[10]

The order also stated that the Commission anticipated a decision on these issues by the end of 2012, an expectation reiterated by the Assigned Commissioner at the prehearing conference on April 18, 2012. Thus, the CAISO study will provide the information the Commission requires to inform it about the need for additional system or local resources, an issue scheduled for the Commission's determination by the end of the year, but that information is not currently available for use in evaluating the Oakley application. Furthermore, the Oakley project would be eligible to participate in any future procurement authorized as a result of the Commission's consideration of the need for additional system or local resources to accommodate the integration of renewable resources.

In addition, PG&E has acknowledged that further study is needed to determine whether additional resources are required to mitigate the effects of renewables integration—the role it now proposes for the Oakley project. PG&E was a party to a settlement in the 2010 LTPP proceeding, R.10-05-006,which the Commission approved in D.12-04-046. The settlement stated, "The resource planning analyses presented in this proceeding do not conclusively demonstrate whether or not there is need to add capacity for renewable integration purposes through the year 2020, the period to be addressed during the current LTPP cycle." Because the resource planning analysis was inconclusive, the settling parties, including PG&E, urged the Commission to "continue the work undertaken thus far in this proceeding to refine and

[10] Order Instituting Rulemaking 12-03-014, p. 5.

understand the future need for new renewable integration resources, either as an extension of the current LTPP cycle or as part of the next LTPP, which should be initiated expeditiously in the first quarter, 2012."[11]

In light of the fact that the Commission, as planned, is on the verge of assessing whether additional resources are needed for renewables integration or other uses and that PG&E joined in a settlement that concludes that this further assessment is required, it is premature for the Commission to review and possibly approve a UOG project before considering what other options may be available to maintain the grid's reliability.

Given that none the prerequisites the Commission established for re-submission of the Oakley PSA have occurred and that PG&E has failed to show how its application complies with other requirements for consideration of UOG, the Commission should not reward PG&E for favoring its UOG application over a full consideration of the competitive alternatives or for failing to respect the prerequisites the Commission established for a new Oakley application. The Commission would be justified if it dismissed PG&E's application, as IEP has requested in a motion to dismiss filed with this protest, because PG&E has not met the requirements for approval of a UOG project that, by PG&E's own admission, is not part of a competitive procurement process and has not satisfied the prerequisites established in D.10-07-045.

III. PROCEDURAL REQUIREMENTS

A. Grounds for the Protest and the Effect on IEP (Rule 2.6(b))

The grounds for IEP's protest are set forth in the preceding sections of this protest and in IEP's motion to dismiss, filed today. IEP represents the interests of independent non-

[11] *Motion for Expedited Suspension of Track 1 Schedule, and for Approval of Settlement Agreement*, Attachment, pp. 5, 6, filed on Aug. 3, 2011 in R.10-05-066.

utility generators in California, and those generators are disadvantaged whenever fair competition is skewed toward UOG.

B. Classification of the Proceeding, Need for Hearing, the Proposed Schedule, and the Issues to be Considered (Rule 2.6(d))

IEP has no objection to PG&E's proposed classification of this proceeding as a ratesetting proceeding.

IEP is submitting a motion to dismiss along with this protest. IEP believes that its motion should be granted, and consequently IEP does not believe that hearings will be needed on PG&E's application. If IEP's motion is not granted, hearings will be needed.

PG&E's proposed schedule is highly accelerated for a case of this significance and magnitude. PG&E's schedule allows little time for intervenors to issue data requests on PG&E's testimony and receive responses, especially if multiple rounds of data requests are required, as is often the case. At a minimum, intervenor testimony should be due no less than three months after PG&E serves its testimony. PG&E's proposed briefing schedule is also excessively compressed. Opening briefs should be due no less than one month after the close of hearings, with reply briefs following at least two weeks later.

IEP expects to participate in the hearings through testimony, cross-examination of PG&E's witnesses, or both, and to file post-hearing briefs. If IEP's motion to dismiss is not granted, the issues to be considered at the hearings should be expanded to include:

- whether or not PG&E complied with the requirements the Commission has established for the consideration of UOG projects
- what standards the Commission will use to evaluate PG&E's application
- impact on rates and ratebase

- whether PG&E can substantiate its claims about the unique benefits and operational characteristics of the Oakley project, including the claims associated with:
    - operational flexibility to meet CAISO needs
    - enhancing reliability
    - integrating renewable resources
    - reducing greenhouse gas emissions
    - facilitating the retirement of resources using once-through cooling

C. Request for Party Status (Rule 1.4(a)(2))

IEP respectfully requests party status for this proceeding, pursuant to Rule 1.4(a)(2)(i). IEP will be represented by:

Brian T. Cragg
Goodin, MacBride, Squeri, Day & Lamprey, LLP
505 Sansome Street, Suite 900
San Francisco, California 94111
Telephone: (415) 392-7900
Facsimile: (415) 398-4321
Email: bcragg@goodinmacbride.com

IV. CONCLUSION

For the reasons stated in IEP's motion to dismiss and in this protest, IEP respectfully protests Application 12-13-026.

Respectfully submitted this 10th day of May, 2012 at San Francisco, California

GOODIN, MACBRIDE, SQUERI,
DAY & LAMPREY, LLP
Brian T. Cragg
505 Sansome Street, Suite 900
San Francisco, California 94111
Telephone: (415) 392-7900
Facsimile: (415) 398-4321
Email: bcragg@goodinmacbride.com

By */s/Brain T. Cragg*
Brian T. Cragg

Attorneys for the Independent Energy Producers Association

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