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)

MOTION OF THE INDEPENDENT ENERGY PRODUCERS ASSOCIATION TO DISMISS APPLICATION

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

May 10, 2012

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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.

PG&E states that its application is submitted pursuant to Article 2 of the Commission's Rules of Practice and Procedure,[1] which sets forth the general requirements for applications. According to the Commission's determinations in Decision (D.) 07-12-052, resources procured using PSAs are utility-owned generation (UOG). Applications related to the procurement of generating resources, especially UOG, however, are subject to special requirements and restrictions. PG&E has failed to address these restrictions in the application. In fact, the application fails to meet the requirements of any of the possible bases for the application:

[1] Application, p. 1. The application also cites Public Utilities Code sections 451, 454, 454.5, and 701 as authority for the application. Application, p. 22.

- The application is *not* a continuation of the process for seeking the Commission's approval of projects selected in PG&E's 2008 Long-Term Request for Offers (RFO), as PG&E has acknowledged.
- The application is *not* the application permitted in D.10-07-045, because the Commission in that decision established three prerequisites that had to occur before PG&E could file an application, and none of those prerequisites have occurred.
- The application does *not* come under any of the exceptions described in D.07-12-052 to the Commission's general rule (in effect when this applications was filed) that UOG proposals must be subject to a competitive solicitation. PG&E here seeks approval of a UOG project outside of an RFO without demonstrating that a competitive RFO is infeasible and that one of the exceptions applies.
- The application does *not* meet the standard the Commission recently adopted in D.12-04-046 (which took effect after this application was filed). That decision required a showing that an RFO had "failed" before a utility could seek approval of a UOG.

Because the application fails to meet the requirements for submission of a UOG project under any of the possible bases for this type of application, it would be a "fruitless effort" and a waste of the parties' and the Commission's resources to consider the application any further. PG&E's application is inconsistent with the Commission's policies on UOG. For these

reasons, the Independent Energy Producers Association (IEP) respectfully moves to dismiss Application 12-03-026.[2]

I. THE OAKLEY PROJECT IS UTILITY-OWNED GENERATION

In D.07-12-052, the Commission addressed several of the issues raised by the hybrid market structure in which UOG competes with generating projects developed by independent power producers. The Commission recognized that there are several varieties of UOG that differ according to what risks the utility assumes during the design, permitting, and construction phases of the development of the project. What all varieties of UOG have in common, however, is that ownership is transferred to the utility, typically no later than the commercial operation date and, unless the utility requests otherwise, the cost of the project is put in ratebase when the plant begins commercial operation.[3]

In D.07-12-052, the Commission stated, "the term UOG includes, but is not limited to, utility-built, Engineer, Permit and Construct (EPC), and Purchase and Sale Agreement (PSA) acquired resources."[4] The Oakley project is the subject of a PSA, an arrangement that is also referred to as a build-own-transfer or turnkey arrangement. For purposes of the Commission's procurement policies, the Oakley project is classified as UOG.

II. THE OAKLEY APPLICATION IS NOT PART OF PG&E'S 2008 RFO

The Oakley project first came before the Commission as part of a cluster of projects selected through PG&E's 2008 Long-Term RFO that in turn was initiated to acquire the new generating capacity the Commission authorized in the 2006 long-term procurement plan

[2] IEP is also filing a protest of Application 12-03-026 today. Under Rule 1.4(a)(2) of the Commission's Rules of Practice and Procedure, filing a protest will confer party status on IEP. As a party, IEP files this motion under Rule 11.1.

[3] The ratemaking treatment for Oakley is subject to the provisions of a partial settlement approved in D 10-07-045 but follows the basic cost-of-service ratemaking model.

[4] D.07-12-052, p. 197, fn.233. This basic definition was affirmed in D.12-04-046: "UOG facilities may either be constructed by the utility itself, or purchased by the utility" (p. 28).

(LTPP) proceeding. In D.10-07-045, however, the Commission found that "The Oakley Project is not needed at this time" and denied PG&E's request for approval of the Oakley acquisition.[5]

Although the Commission allowed PG&E the possibility of filing a second Oakley application when certain need-based preconditions were met, as discussed in the next section, PG&E has already stated that it no longer considers Oakley in the context of the 2008 RFO. In its response to an application for rehearing of the Mariposa decision,[6] PG&E stated that "the Oakley Project will meet a need outside of the 2006-2015 need identified in D.07-12-052 and the 2008 LTRFO."[7]

If, as PG&E states, "the 2008 LTRFO was initiated to meet the need identified in D.07-12-052"[8] and approval of the Oakley PSA is outside the 2008 RFO, then clearly the current application cannot be grounded in the procedures for considering the results of competitive solicitations like the 2008 RFO. Put differently, if PG&E is not proposing to procure Oakley to meet the need identified in D.07-12-052 by means of the resulting 2008 RFO, what need is Oakley intended to fill? As discussed below, PG&E's answers to the question founder on other procurement-related requirements that the Commission has established.

III. THE CURRENT OAKLEY APPLICATION IS NOT THE APPLICATION PERMITTED IN D.10-07-045

Another possible basis for PG&E's application is the option the Commission put forward in D.10-07-045. Although it concluded that the Oakley project was not needed, the Commission authorized PG&E to file another application if any one of three circumstances occurred first: (1) other approved projects failed and created an "open need" for new capacity on

[5] D.10-07-045, pp. 53 (Finding of Fact No. 18), 54 (Conclusion of Law 13), 55 (Ordering Paragraph 3).
[6] D.12-03-008 in Application 09-04-001.
[7] *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.
[8] *Id.*, p. 3.

the scale of the 586 MW Oakley plant; (2) PG&E was able to retire a comparably sized plant using once-through cooling 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 with renewables integration, even after considering the capacity of projects already approved by the Commission.[9]

The present application fails to demonstrate that any of the conditions the Commission set as a prerequisite for filing a second Oakley application has occurred. Specifically, 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).

IEP notes that the first two prerequisites are based on the emergence of an unfilled need within the procurement authorized in D.07-12-052 and procured through PG&E's 2008 RFO. As discussed above, however, PG&E's view is that Oakley will fill a need "outside of the 2006-2015 need identified in D.07-12-052 and the 2008 LTRFO." PG&E has reached a similar conclusion about Oakley's potential role in mitigating the effects of renewables integration. 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

[9] D.10-07-045, pp. 40-41.

far in this proceeding to refine and 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."[10]

Thus, both the omission of any attempt to show that any of the three prerequisites has occurred and PG&E's explicit statements in other proceedings support the conclusion that this application is not the application the Commission described in D.10-07-045.

IV. THE APPLICATION DOES NOT QUALIFY FOR AN EXCEPTION UNDER THE RULES GOVERNING PROCUREMENT OF UOG IN EFFECT WHEN THE APPLICATION WAS FILED

The Commission has determined that resources procured using PSAs are UOG. Procurement of UOG is subject to special procedures or considerations designed to guard against favoritism by the utility. When this application was filed on March 30, 2012, the rules on procurement of UOG were those set forth in D.07-12-052, as modified in D.08-11-008. Those rules state that a utility could not seek the Commission's authority for a UOG project outside of a competitive solicitation, except under four extraordinary circumstances: (1) market power mitigation; (2) preferred resources; (3) unique opportunity, and (4) reliability.[11]

PG&E has made no claim that the Oakley project was needed to mitigate market power or that it is a preferred resource. Although PG&E's application argues that Oakley is a good value, the descriptions of the unique opportunity and reliability exceptions in D.07-12-052 make it clear that PG&E cannot claim that Oakley is a unique opportunity or is needed for reliability purposes. A unique opportunity is described as "an attractively priced resource resulting from a settlement or bankruptcy proceeding (we anticipate that these opportunities will

[10] *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.
[11] Another extraordinary circumstance identified in D.07-12-052 was expansion of existing facilities, but that was deleted in D.08-11-008.

diminish over time)," and Oakley is the product of neither a settlement nor bankruptcy. The reliability exception applies to "resources needed to meet specific, unique reliability issues (particularly under circumstances in which it becomes evident that reliability may be compromised if new resources are not developed, and the only means of developing new resources in sufficient time is via UOG."[12] No such claims are made for Oakley.

Thus, the Oakley application does not meet the requirements in effect when the application was filed for seeking approval of a UOG project outside of a competitive solicitation.

V. THE APPLICATION IS NOT CONSISTENT WITH THE NEW RULES ON PROCUREMENT OF UOG

After this application was filed, on April 19, 2012, the Commission approved D.12-04-046 in the 2010 LTPP proceeding. That decision elaborated on the requirements for the Commission's consideration of a UOG proposal. The decision barred UOG from competing in the utility's RFO, and stated that a UOG project would be considered only if the RFO had "failed."

While there can and should be additional discussion of what constitutes a "failed" RFO, there can be no question that the Oakley application was not preceded by a failed RFO. The Oakley project was originally considered in PG&E's 2008 long-term RFO, which selected several projects that are now under construction.[13] A solicitation that resulted in so many viable projects could not be considered failed. Furthermore, PG&E has stated that Oakley is not intended to fill the need targeted by the 2008 RFO. In addition, PG&E has given no indication that the Oakley project was bid into its 2010 Intermediate Term RFO for Resource Adequacy capacity or that the 2010 RFO was a "failed" solicitation.

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[12] D.07-12-052, p. 212.

[13] Specifically, in D.10-07-045, the Commission considered PG&E's request to approve five agreements selected in its 2008 RFO: Mariposa, Marsh Landing, Contra Costa 6&7, Oakley, Midway Sunset. All except Oakley were approved.

VI. THE LEGAL GROUNDS FOR GRANTING A MOTION TO DISMISS

The Commission has determined that it can dismiss an application "on policy grounds, to husband limited resources, to avoid conflict with statutory policy, to avoid inefficiency and for many other reasons."[14] A motion to dismiss an application will be granted if, even after assuming all the facts asserted in the application to be true, the Commission will nevertheless reject the application for being inconsistent with law or current Commission policy.

In D.99-11-023, the Commission granted PG&E's motion to dismiss an application by Western Gas Resources-California, Inc. for a certificate of public convenience and necessity to serve customers in the existing service territory of PG&E. In evaluating the motion, the Commission considered whether "the Commission and the parties would be squandering their resources by proceeding to an evidentiary hearing when the outcome is a foregone conclusion under the current law and policy of the Commission."[15]

Applying this standard, the Commission granted PG&E's motion and dismissed Western Gas' application, because granting the application would be inconsistent with the Commission's existing policy of disfavoring competition between gas utilities for customers in established service areas. Because the facts alleged by Western Gas could not change the Commission's policy and the action the application requested was inconsistent with that policy, the Commission found that hearings on the application would be a "fruitless effort" and dismissed Western Gas' application.

In the present case, the Commission has provided four possible paths for consideration of UOG projects but has established requirements grounded in policy for each path. Even though the Commission clearly stated these requirements, PG&E has chosen to

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[14] Re Western Gas Resources-California, Inc., D.99-11-023, 1999 Cal. PUC LEXIS 856, *8 (citations omitted).
[15] Re Western Gas Resources-California, Inc., D.99-11-023, 1999 Cal. PUC LEXIS 856, *3.

disregard the Commission's instructions and its policies on procurement and UOG and has filed an application that cannot be justified under the Commission's existing policies and requirements for UOG. Even if all other facts alleged in the application are accepted as true, the fact remains that PG&E has not met any of the requirements for any of the four possible paths leading to the Commission's consideration of a UOG proposal. The Commission will not change its policies on procurement and UOG as a result of an application for a single UOG project, and further proceedings would be a "fruitless effort." For the reasons discussed in this motion, the Commission should dismiss PG&E's application.

VII. CONCLUSION

If PG&E had filed this application before the Commission adopted the hybrid market structure nearly ten years ago, there would be no basis for this motion. By 2012, however, the Commission had carefully considered and at times struggled with the role of UOG in California. In several decisions, the Commission established clear rules on the circumstances in which it would consider UOG projects outside of a competitive solicitation, and the Commission provided at least four paths for consideration of UOG, as described in this motion.

PG&E's application ignores the last ten years of the development of the hybrid market structure and, more egregiously, ignores the clear requirements the Commission established governing its consideration of request for approval of UOG. In light of the Commission's recognition of the potential for conflict of interest associated with UOG development, this application certainly does not justify disregarding the Commission's requirements. The Commission should not reward PG&E's actions by considering this application any further.

For the reasons stated in this motion, IEP respectfully urges the Commission to grant this motion and dismiss Application 12-03-026.

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/ Brian T. Cragg*
Brian T. Cragg

Attorneys for the Independent Energy Producers Association

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