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 (Filed March 30, 2012)

PROTEST OF THE UTILITY REFORM NETWORK

May 11, 2012

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On March 30, 2012, Pacific Gas and Electric Company (PG&E) submitted its application seeking Commission approval of the "Amended and Restated Purchase and Sale Agreement" (Amended PSA) between PG&E and Contra Costa Generating Station LLC (CCGS) for the proposed Oakley Generating Station (Oakley Project) located in Oakley, California. Pursuant to Rule 2.6 of the Commission's Rules of Practice and Procedure, The Utility Reform Network (TURN) submits this protest to the utility's application.

PG&E's application seeks approval of the Amended PSA, but does not appear to have included the Amended PSA for which approval is sought. Nowhere in the application does PG&E mention the proposed cost of the Oakley Project, or the annual revenue requirement increase that approving the Amended PSA would impose upon PG&E ratepayers.[1] The discussion of "need" for the plant is largely based on Commission decisions that the Court of Appeal has recently annulled. The application refers to the Oakley Project as having had "one of the best market valuations" when considered in PG&E's 2008 Long-Term Request for Offers (LTRFO), without acknowledgment that "best" still means "above-market." While there might be circumstances under which it is appropriate to require PG&E customers to shoulder above-market costs, PG&E has utterly failed to demonstrate that such circumstances are present here. PG&E alludes to the ratemaking proposed in a settlement agreement from A.09-09-021, but makes no effort to explain why that ratemaking is reasonable as applied

[1] TURN's understanding from the record in A.09-09-021 is that the total cost of the plant was expected to be approximately $1.5 billion, with an estimated initial annual revenue requirement in excess of $200 million during at least the first years of its operation.

to the present circumstances. Indeed, PG&E did not submit any testimony in support of its application, instead promising to provide it later (after the protest due date). Finally, PG&E proposes an extremely aggressive schedule[2] without any showing that there are exigent circumstances warranting such an expedited timeline.

Rule 2.6(b) directs that a protest is to contain a statement of the facts or law constituting the grounds for the protest, including the reasons the protestant believes the application is not justified, the facts the protestant would present at an evidentiary hearing to support its request to deny the application in whole or in part, and the issues to be considered.[3] TURN submits that PG&E's application as presented, particularly the absence of any testimony in support of that application, makes it more difficult than normal to strictly comply with Rule 2.6, given that protesting parties are left largely to guess at what support the utility might present to justify the application, and the facts that might need to be presented to counter that support.

Rule 2.6(b) also directs a protesting party to state the effect of the application on the protestant. TURN represents the interests of PG&E's residential and small business customers who would pay higher rates and bills if the Commission were to approve this application.[4]

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[2] For example, PG&E asks that intervenors serve testimony a mere three weeks after receiving PG&E's testimony, despite having given itself six weeks after filing the application to serve its own testimony.

[3] Rule 2.6(b) and (d).

[4] According to PG&E's application, the bill of a bundled service residential customer using 550 kWh per month would increase by $1.32 per month, while a customer using 850 kWh per month would see a $5.24 monthly increase. PG&E Application, Appendix C.

I. Issues Likely To Be Disputed

TURN's review of the PG&E application has identified the following issues that TURN may dispute. As noted earlier, PG&E's unilateral decision to delay submission of its testimony in support of the application renders it more difficult than usual to have confidence that the issues discussed below represent a complete list of the issues TURN may dispute. Therefore, the Commission may need to permit parties an opportunity to update the list of disputed issues once PG&E's testimony arrives and interested parties have a reasonable amount of time to review and consider that testimony.

A. There is No Established Need For This Plant, Or Any Evidence That This Plant Represents The Least Cost/Best Fit Option for Addressing Any Need For Capacity.

1. The Annulment of D.10-12-050 and D.11-05-049 Mean Those Decisions No Longer Have Any Force or Effect, So The Commission's Last Valid Word On Any Need For The Oakley Project is D.10-07-045.

PG&E cites D.10-12-050 as continuing to represent the Commission's determination that the Oakley Project includes features that make it a uniquely valuable addition to PG&E's resource mix.[5] In the Court of Appeal's decision addressing TURN's Petition for Writ of Review, the Court annulled D.10-12-050, as well as D.11-05-049. The meaning of the word "annul" is "to make void or null." Once annulled, TURN submits that there is nothing precedential or cite-worthy in either D.10-12-050 or D.11-05-049.

The Commission should recognize that while the earlier Oakley decisions were annulled largely on procedural grounds, the Court of Appeal addressed some of the

[5] Application, p. 15, citing D.10-12-050, p. 10.

substantive flaws as well. For example, the Court specifically noted that the 2016 in-service date for the Oakley Project was "outside the period covered by the need determination in D.07-12-052 and necessarily raised a question as to the need for the project in 2016, an issue not encompassed within the scoping memo in A.09-09-021."[6] In this light, any notion that D.10-12-050 still represents a valid determination of need for the project, even after the Court's decision annulling that decision, is baseless.

In D.10-07-045, the most recent still-valid decision issued in PG&E's 2008 LTRFO application, the Commission identified three specific conditions that might justify PG&E re-submitting the Oakley Project by application.[7] PG&E's application here summarizes those conditions,[8] but does not make any showing that any of those conditions have been met.

2. The Application Contains No Demonstration Of Current Need For The Oakley Project Or Any Similar Capacity In The Foreseeable Future, And No Citation To An Actual Commission Determination Of Need.

PG&E's application contains no reference to any resource planning analysis that conclusively demonstrates a need to add any capacity in PG&E's service territory, or that conclusively demonstrates a need for the Oakley Project. Absent such a demonstration of need, the Commission must deny PG&E's proposal for a $1.5 billion generation plant that will cause a $200 million revenue requirement increase when it goes into operation.

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[6] *TURN v. California Public Utilities Commission*, Case No. A132439, unpublished decision issued on March 16, 2012, at pp. 12-13.

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

[8] Application, pp. 9-10 ("(1) another approved new generation resource failed; (2) PG&E was able to retire an OTC plant at least three years ahead of schedule; or (3) the CAISO Renewable Integration Study demonstrates that 'there are significant negative reliability risks from integrating a 33% Renewable Portfolio Standard.'")

The Commission's most recent statements on this question indicate that the agency has not identified any need for the Oakley Project in the foreseeable future. In D.10-07-045, the Commission determined that the Oakley Project is not needed through 2014, the time frame under consideration in the 2008 Long Term Procurement Plan (LTPP) rulemaking.[9] In the 2010 LTPP rulemaking, the Commission recently adopted a proposed settlement (sponsored in part by PG&E) that defers to the next Long Term Procurement Plan (LTPP) cycle (or an extension of the current LTPP cycle) further examination of system resource need and the integration of intermittent renewable resources. The settlement also states that the resource planning analyses presented in that rulemaking do not conclusively demonstrate that there is a need to add capacity for renewable integration purposes through the year 2020.[10] The Commission stated, "In looking at the whole record, it would be reasonable to find that there is no need for additional generation by 2020 at this time, and accordingly it is reasonable to defer authorization to procure additional generation based on system and renewable integration need."[11]

1. The Commission Should Defer Action Until It Has Determined Through Its LTPP Process Whether and When There Will Be A Need For Additional Generation Capacity IN PG&E's Service Area Or To Meet Identified System Needs.

The Commission has in place an established process for identifying generation capacity needs through the LTPP process, then conducting solicitations to identify options for capacity additions that would be the least cost/best fit solution to that need.

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[9] D.10-07-045, Finding of Fact 18 and Conclusion of Law 13.

[10] D.12-04-046, pp. 6-7 (citing Settlement Agreement).

[11] *Id.*, p. 10. The Commission added the *sua sponte* observation that it is also reasonable to defer procurement of generation for any estimated need after 2020. *Id.*, fn. 9.

PG&E has presented no reason that might warrant the Commission deviating from this established process. Therefore, the Commission should deny PG&E's application without prejudice to the utility returning with this project if and when it can demonstrate that there is a Commission-identified need for additional generation capacity, and that this project is a least cost, best fit solution to such need and otherwise meets the requirements for utility-owned generation (UOG) established in D.07-12-052 and recently updated in D.12-04-046.

The Commission should decline to make some sort of one-off determination of need based solely on the circumstances of this plant. For one thing, it is an inefficient use of agency and party resources. Furthermore, it would undermine the regular and predictable approach for identifying generation capacity needs that the Commission sought to establish when it developed the LTPP process.

In the past the Commission has engaged in such a one-off review where it was necessary to take advantage of a significantly discounted purchase price and capital costs below that of the market.[12] PG&E's application seems to hint at such a situation when it reminds the Commission that the Oakley Project had "one of the best market valuations in the 2008 LTRFO" when it was denied in D.10-07-045.[13] But in A.09-09-021, the Commission was selecting among generation capacity options that shared a common trait – they were all "above-market." PG&E has not presented anything that would suggest that the Oakley Project has changed in this regard, and the Commission should assume it continues to be an above-market procurement option. While there may be circumstances

[12] D.03-12-059 (SCE's Mountainview), Finding of Fact 13, Conclusion of Law 16.

[13] Application, pp. 1 and 21.

warranting adding new generation capacity at above-market prices, PG&E has not demonstrated that any such circumstances are present here.

In sum, PG&E has failed to present any evidence that would demonstrate the reasonableness of determining whether there is any need for the Oakley Project outside of the normal LTPP process.

2. If the Commission Decides That It Will Address The Need Issue In This Proceeding, PG&E Must First Demonstrate (With The Level of Analytical Detail And Rigor Appropriate For A Proposed $1.5 Billion Price Tag) The Need For Additional Capacity, And Then The Reasonableness Of Selecting The Oakley Project As The Least Cost/Best-Fit Resource To Meet That Need.

PG&E's Application cites to no specific Commission finding of need for generation capacity that the Oakley Project would fill. Instead, the utility points to more general assertions about the role that plants such as Oakley might play in dealing with renewable integration and the potential shutdown of once-through cooling (OTC) plants. It cites a "straw proposal" recently put forward by the CAISO staff (but not yet approved by the CAISO Board).[14] But the Straw Proposal's discussion of the need to ensure capacity is available to provide adequate system flexibility produced two "guiding principles," one of which is to continue to actively participate in the Commission's LTPP and resource adequacy (RA) proceedings.[15] TURN could not find anything in the Straw

[14] Application, p. 12, citing CAISO Straw Proposal of March 7, 2012 in its Flexible Capacity Procurement Stakeholder Process. , p. 32 ("The ISO … anticipates seeking ISO Board approval at the July Board Meeting.") However, PG&E misquotes the cited passage from that document. According to PG&E, the CAISO concluded that "[w]hile the energy production of [existing] conventional resources is being displaced by intermittent resources, the ISO will need even more flexible capacity that many conventional resources provide . . . ." Application, p. 12,citing CAISO Straw Proposal of March 7, 2012, p. 8. PG&E omitted two words. What the report actually says is "the ISO will need even more <u>of the</u> flexible capacity that many conventional resources provide."

[15] Straw Proposal, pp. 13-14.

Proposal that suggests the Commission should approve the procurement of *new* flexible resources in the near term at above-market prices.

PG&E also cites the contents of a memo from the CAISO's Chief Executive Officer to the CAISO Board as having "highlighted the critical need for new and flexible generation capacity."[16] While it is true that the memo discusses the need for flexible generation capacity, it says nothing about a need for new capacity *per se*. Rather, consistent with the Straw Proposal, the memo describes the challenge of simultaneously integrating higher amounts of renewable generation capacity while eliminating once-through cooling, and touts how the CAISO is working closely with the Commission to define the system's flexible capacity requirements, with the short-term step being a request that the Commission focus on local capacity requirements in the long term procurement proceedings.

In short, the CAISO statements that PG&E cites agree on a central proposition – these issues should be considered and worked through in the Commission's LTPP processes. PG&E incorrectly interprets the statements as support for a "build first, ask questions later" approach that finds little if any support in the CAISO staff documents to which PG&E refers.

The Commission should firmly reject PG&E's suggestion that these types of statements (much less mere assertions from a party's reply comments or statements made in an *ex parte* meeting[17]) establish a need for the Oakley Project. If approval of the Amended PSA is the "no-brainer" that PG&E seems to believe that it is, the utility should

[16] Application, p. 12.

[17] Application, p. 13, citing Independent Energy Producers' reply comments on a proposed decision and a statement made by GenOn Energy's representative at an all-party meeting.

have no trouble gathering and presenting evidence that there is an identified need starting in 2016 for generation capacity of this type, and that the process it went through in determining that the Oakley Project is the least cost/best fit alternative for meeting that need was reasonable and fair. The application does not contain such a showing, and absent such a showing the Commission must not approve the Amended PSA.

B. PG&E's Proposed Ratemaking Is Insufficiently Described And Supported.

PG&E's proposed ratemaking relies entirely on the partial settlement it entered into in A.09-09-021 with TURN, DRA, CUE and CURE "that addressed ratemaking and cost recovery issues associated with the Marsh Landing and Oakley Projects." The utility goes on to describe D.10-07-045 as having approved the partial settlement "as 'just, reasonable, and in the public interest.'"[18] But the decision makes clear that its finding of reasonableness applies only to "the projects approved" in that decision.[19] The Oakley Project was not approved in that decision. Therefore, PG&E's implication that the Commission approved the partial settlement as it applied to ratemaking and cost recovery issues associated with Oakley is false.

The fact that the ratemaking proposed here is purported to be the same as the ratemaking set forth in a settlement that the Commission did not adopt is an insufficient basis for finding the proposed ratemaking reasonable. Indeed, it is not clear that the

[18] Application, p. 21.

[19] D.10-07-045, Finding of Fact 15 and Conclusion of Law 11.

terms of the proposed-but-not-adopted settlement are even admissible absent agreement of all of the settling parties.[20]

In addition, the partial settlement from A.09-09-021 addressed a range of potentially contentious issues, including estimates of ongoing O&M and capital costs, provisions affecting recovery of costs in excess of the initial estimates, and similar items addressing the costs that PG&E would have incurred during the first years of the Oakley Project's operation had the Commission approved rather than denied the PSA in D.10-07-045. PG&E presumes without explanation that other than updating the commercial operation date to 2016 instead of 2014, each of the other terms or conditions remains reasonable. In the absence of any PG&E testimony explaining the basis for the utility's presumption, TURN is unable to say anything on this point other than PG&E's presumption is inadequately supported.

II. The Commission Should Reject PG&E's Insufficiently Supported Claim That Expeditious Action is Necessary Here.

PG&E claims that expeditious Commission action is necessary because "it is imperative that the Oakley Project complete construction milestones within the envisioned timeframe."[21] PG&E has presented nothing in its Application that would explain what the "envisioned timeframe" is, or why the Commission should join the utility in finding it "imperative" that construction be completed within that timeframe. PG&E alludes to "project milestones within the contract" as well as the "construction

[20] Rule 12.6 of the Commission's Rules of Practice and Procedure: ""If a settlement is not adopted by the Commission, the terms of the proposed settlement [are] also inadmissible unless their admission is agreed to by all parties joining in the proposal." PG&E made no effort, so far as TURN is aware, to gain the agreement of all parties joining in the proposal put forward in A.09-09-021.

[21] Application, p. 22.

milestones" reference quoted above, without explaining the difference between these two types of milestones. Nowhere does PG&E attempt to explain why a Commission decision is necessary by October 2012 (rather than early 2013, for example) in order to preserve the ability to meet these project or construction milestones.

In considering PG&E's current position about the need for expeditious action, the Commission needs to keep in mind that PG&E itself is largely responsible for the fact that we do not already have a final decision on the Amended PSA. Had the utility filed a new application rather than the "petition for modification" it filed in A.09-09-021 on August 23, 2010, the parties and the Commission could have reviewed and addressed these issues at a more reasonable pace than PG&E proposes here. Even with ample time for discovery, testimony preparation, hearings and briefing, the Commission would likely have issued a final decision by the end of 2011. For reasons known only to the utility, it opted instead to try to obtain relief through the ill-considered petition for modification. PG&E should not be heard to complain now about the repercussions of the wrong choice it made in 2010, when that choice was entirely the product of its own management acuity and legal judgment.

III. The Commission Should Adopt a Reasonable Schedule That Appropriately Recognizes The Utility's Failure To Serve Testimony And The Demands On The Limited Resources Of The Commission and Intervenors.

The Commission should establish a schedule that gives TURN and other interested parties ample time to analyze the application and, once PG&E serves it, the supporting testimony; to engage in discovery[22]; and to prepare their own testimony.[23]

[22] TURN served our first set of discovery on April 27, 2012. However, that discovery was limited to the utility's assertions as set forth in its application. It is impossible to assess how much discovery will be warranted until the utility has provided the supporting direct testimony

The schedule should also consider the limited resources of the Commission's staff and intervenors in terms of covering the multitude of active proceedings. In particular, for parties who intend to be active in this proceeding as well as the 2012 LTPP rulemaking or the SDG&E purchase power tolling agreement (PPTA) application, the same individuals are likely to be covering all the proceedings.

TURN proposes the following schedule:

August 31, 2012	Testimony of DRA and Intervenors
September 28, 2012	Rebuttal testimony
October 24-26, 2012	Evidentiary hearings
November 16, 2012	Opening Briefs
November 30, 2012	Reply Briefs

TURN submits that a schedule such as this could reasonably be expected to produce a proposed decision by mid- to late-February 2013 and a final decision before the end of the first quarter of 2013.

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and workpapers, and parties have a sense of whether the Commission will rely on its existing need determinations or pursue a one-off need determination in this proceeding.

[23] PG&E's proposed three weeks between service of its direct testimony and the due date for testimony from other parties does not seem like a serious position, particularly given that the utility gave itself six weeks after service of the application to prepare its own testimony.

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Respectfully submitted,

By: _____/s/_____

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