BEFORE THE
PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking to Address Utility Cost and Revenue Issues Associated with Greenhouse Gas Emissions	Rulemaking No. 11-03-012 (Filed March 24, 2011)

PACIFIC GAS AND ELECTRIC COMPANY'S (U 39 E) REPLY COMMENTS ON ADMINISTRATIVE LAW JUDGE'S RULING ON TRACK 1 PHASE 2 ISSUES

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The *Administrative Law Judges' Ruling Setting Forth Next Steps in Track 1 Phase 2 of this Proceeding*, issued August 7, 2012 ("Ruling"), included a list of issues to be considered in this phase of the Greenhouse Gas ("GHG") Order Instituting Rulemaking ("OIR"), as well as eligibility criteria to determine the contracts that may "receive compensation, if compensation is awarded in this proceeding."[1] The Ruling invited comments on the Issues List and Eligibility Criteria, as well as a summary of relevant guidance from Commission decisions.[2] In its opening comments, Pacific Gas and Electric Company ("PG&E") included a description of Commission decisions addressing GHG cost responsibility for pre-Assembly Bill ("AB") 32 contracts, as well as specific recommendations for modifications to the Issues List and Eligibility Criteria.

Nine other parties filed opening comments addressing the Issues List and Eligibility Criteria. Some of these opening comments were general, while others were contract specific. In these Reply Comments, PG&E addresses the following issues raised in parties' opening comments:

(1) the requirement that pre-AB 32 contracts have "specific" or "explicit" GHG cost responsibility provisions is unclear and this language should be deleted from the Issues List and Eligibility Criteria;

[1] Ruling at p. 3.

[2] *Id.* at p. 4.

(2) Wellhead Electric Company's ("Wellhead") suggestion that the Investor-Owned Utilities ("IOUs") transfer GHG allowances to generators should not be adopted at this time because it is premature;

(3) Panoche Energy Center's ("Panoche") proposal that all generators with pre-AB 32 contracts executed before January 1, 2007 be compensated for GHG compliance costs, regardless of whether the utility and the generator had previously agreed on responsibility for these costs, should be rejected;

(4) Panoche's continued efforts to avoid the dispute resolution provisions in its Power Purchase Agreement ("PPA") with PG&E and its attempt to litigate PPA issues in this proceeding should be rejected once and for all; and,

(5) Southern California Edison Company's ("SCE") proposal that contracts executed after January 1, 2005 should be excluded from eligibility in this proceeding should be adopted.

I. REQUIREMENTS FOR "SPECIFIC" OR "EXPLICIT" CONTRACT PROVISIONS ADDRESSING GHG COST RESPONSIBILITY ARE UNCLEAR.

Issue 1 in the Ruling provides "[s]hould generators that executed bilateral contracts with utilities prior to the passage of AB 32 that lack specific terms and conditions assigning GHG cost responsibility receive some form of relief for GHG costs?" Similarly, Eligibility Criteria 3 refers to a contract providing for the recovery of GHG costs "explicitly." In opening comments, none of the parties defined what would constitute a "specific" or an "explicit" contract term addressing GHG cost responsibility. Moreover, these terms are not defined in the Ruling. The terms "specific" or "explicitly" are, at best, unclear and ambiguous. This ambiguity may lead parties to assert that because the exact phrase "GHG cost responsibility" is not included verbatim in a pre-AB 32 contract, the contract does not address GHG costs.

This type of literal reading of the terms "specific" and "explicitly" in the Issues List and Eligibility Criteria could create confusion in this proceeding. For example, in PG&E's 2004 Long-Term Request for Offer ("LTRFO"), the parties agreed to address GHG cost responsibility through PPA provisions regarding governmental charges and approvals. Parties may argue that

because the phrase "GHG cost responsibility" is not included verbatim in the 2004 LTRFO PPAs, these agreements are not "specific" or do not "explicitly" address the GHG costs. However, the parties to these agreements expressly discussed GHG compliance cost responsibility in negotiations and agreed that the generators would take on responsibility for GHG compliance costs through the governmental charges and approval provisions in the PPAs. To avoid any confusion, and given the lack of definition in any of the parties' opening comments or in the Ruling, the Commission should adopt PG&E's proposal to eliminate the terms "specific" and "explicitly" from the Issues List and Eligibility Criteria.

The only party that discussed the term "explicitly" was Panoche, who attempted to further limit the type of provision that could be considered as allocating the GHG cost responsibility by suggesting that the contract term had to be "express and explicit."[3] Panoche's proposal only creates further ambiguity as to what is meant by the term "express." For example, Panoche explains that "mere references" to GHG reporting, environmental attributes or emissions reductions are not sufficiently "express or explicit"[4], which begs the question as to what would be considered "express and explicit." Rather than including in the Issues List and Eligibility Criteria terms such as "specific" and "explicitly", which will only cause further ancillary disputes between the parties, the Issues List and Eligibility Criteria should be modified to delete these ambiguous terms.

Finally, use of the terms "specific" or "explicitly" contradict the Commission's direction in D.12-04-046. The Commission's guidance in that decision was that the central test is whether or not the pre-AB 32 contracts took the passage of AB 32 into consideration.[5] The Commission did not require that the PPA itself include "specific" or "explicit" terms, but instead indicated

[3] Panoche Comments at pp. 1-2, 13.

[4] *Id.* at p. 2.

[5] D.12-04-046 at p. 62.

that the intent of the parties was the key issue.

II. WELLHEAD'S PROPOSAL TO TRANSFER GHG ALLOWANCES TO GENERATORS IS PREMATURE.

In its opening comments, Wellhead proposes that generators with pre-AB 32 contracts that do not address GHG cost responsibility be compensated by the utility by transferring to the generator "allowances necessary to fully meet a generator's GHG compliance obligations."[6] This specific compensation proposal should not be adopted. The California Air Resources Board ("CARB") has not yet finalized all of its guidance documents for implementing AB 32, and one of the issues that is still outstanding is the ability of the IOUs to transfer GHG allowances to generators. The final CARB guidance documents may effectively limit the IOUs' ability to procure and/or transfer allowances for generators. In addition, the CARB guidance documents may also create allowance holding limits which would preclude the IOUs from purchasing a sufficient amount of allowances such that the IOUs could transfer a portion to generators.[7] Moreover, even if the guidance documents allow the flexibility to directly discharge a generator's obligation, holding limit constraints may make it impossible to "universally" apply a direct discharge methodology and therefore create a situation where an IOU is forced to choose among sellers as to which will receive allowances. Finally, with the upcoming 2015 requirements for including natural gas in Cap and Trade, PG&E may need to use its holding limit for natural gas. In short, there are too many unknowns to pre-determine how the IOUs should compensate generators. Given that many of the AB 32 rules and guidelines still need to finalized, Wellhead's proposal to transfer allowances is premature and the Commission should not adopt this proposal, which may later turn out to be infeasible.

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[6] Wellhead Comments at p. 3.

[7] As a result, the IOUs may need to financially settle GHG compliance cost obligations with a generator if reimbursement is provided for in the generator's contract.

III. PANOCHE'S PROPOSAL FOR A GENERIC APPROACH TO PRE-AB 32 CONTRACTS SHOULD BE REJECTED.

In its comments, Panoche urges the Commission to require utility customers to bear all GHG compliance costs for contracts executed before January 1, 2007, regardless of whether the contracting parties had already addressed GHG compliance costs.[8] Panoche appears to be content burdening utility customers with additional GHG costs, even if the generator had previously agreed to bear these costs, simply for the "sake of efficiency and administrative simplicity . . .."[9] This proposal should be rejected. The Commission should not ignore the agreement of contracting parties to allocate GHG compliance costs, and instead make utility customers bear these costs, simply because adopting a bright-line test of requiring the IOUs to assume all GHG compliance costs for contracts executed before January 1, 2007 would be "administratively simple." Administrative ease does not justify imposing on utility customers costs that a generator had previously agreed to pay. Moreover, as the Commission has stated, it is "not in the business of bailing unrelated market participants out of their own past missteps."[10]

Panoche also tries to justify its proposal for a generic approach under which the IOUs' customers would bear all GHG compliance costs for pre-January 1, 2007 contracts by asserting that generators may not be able to continue to operate.[11] This argument is a red herring. When PG&E negotiated Panoche's PPA, GHG compliance cost responsibility was expressly discussed and presumably Panoche included the estimated costs in its contract price. Having included GHG compliance costs in its price, Panoche cannot now claim that it will be unable to operate if it cannot foist these costs on utility customers. Moreover, none of the generators from the 2004 LTRFO, including Panoche, have definitively stated that they will cease operations if they are

[8] Panoche Comments at p. 1.

[9] *Id.*

[10] D.12-04-046 at p. 61.

[11] *Id.* at p. 11.

required to pay GHG compliance costs. Panoche's unsupported statements that unnamed generators "may not be able to continue to operate" are not a sufficient basis for shifting GHG compliance costs from generators that agreed to bear these costs to utility customers.

IV. PANOCHE'S EFFORTS TO LITIGATE ITS CONTRACTUIAL DISPUTE IN THIS PROCEEDING SHOULD BE REJECTED.

As it has done in all of its pleadings to date in this proceeding, Panoche continues to ignore the dispute resolution provision in its PPA with PG&E and instead effectively seeks to litigate its contract dispute in this proceeding. Panoche does not dispute that its PPA includes a dispute resolution provisions that requires the parties to participate in a dispute resolution process for all disputes arising under the PPA, which would include disputes about GHG cost responsibility. Despite this, Panoche continues to file comments in this proceeding attempting to characterize the PPA, including numerous erroneous statements regarding the PPA negotiating history and the parties' understanding, and implicitly seeking Commission resolution of the dispute between the parties.

Many of Panoche's assertions regarding the PPA are simply wrong. For example, Panoche incorrectly claims that: (1) the PPA does not address GHG cost responsibility, which it does; (2) the PPA was drafted by PG&E and provided to Panoche on a "take-it-or-leave-it" basis, which is incorrect given the negotiating history of the Panoche PPA; and (3) there was no understanding among the parties as to GHG cost responsibility, which is contradicted by the terms of the PPA and the parties' understanding.[12] However, the Commission need not address these PPA specific issues in this proceeding. Instead, disputes about the terms and conditions of the Panoche PPA should be resolved through the dispute resolution process included in the PPA and agreed to by the parties. Rather than allowing Panoche to continue to file pleadings and propound discovery in this proceeding regarding its contractual dispute with PG&E, the

[12] *Id.* at pp. 6-7.

Commission should direct Panoche to abide by the dispute resolution provisions that Panoche agreed to in the PPA.

V. SCE'S PROPOSAL REGARDING THE ELIGIBILITY CRITERIA SHOULD BE ADOPTED.

In its comments, SCE urges the Commission to exclude from eligibility for compensation any contracts executed after January 1, 2005, instead of January 1, 2007. PG&E concurs that January 1, 2005 is the appropriate date to use for determining eligibility of contracts. Given that AB 32 was introduced into the legislature in December 2004, generators should have been aware at that time that there was the potential for future GHG regulations. Just a few months later, in June, 2005, the Governor issued an executive order that established GHG emission reduction targets for the state. Clearly, the likelihood of GHG legislation was established well in advance of AB 32's final adoption date in August 2006. The key date to be used for eligibility should establish whether generators were or should have been on notice that GHG regulations were possible, not the legislation's effective date of January 1, 2007. The state served such notice on the public when its representatives initiated legislation by introducing AB 32 in the legislature in 2004. As the Commission itself noted in Decision 12-04-046, "contracts negotiated and executed when AB 32 was working its way through the legislature should have taken the potential impacts of AB 32 into consideration. Even those negotiating contracts shortly before then might also have reasonably foreseen that this issue could arise."[13] Using January 1, 2005 will allow the Commission to decide whether a generator should be eligible for compensation while excluding those generators that knew or should have known that GHG regulations could impact their obligations as they negotiated their future agreements.

[13] D.12-04-046 at p. 61.

VI. CONCLUSION

For the foregoing reasons, PG&E respectfully requests that the Commission adopt the modifications to the Issues List and Eligibility Criteria proposed in PG&E's opening comments, reject Wellhead's proposal for a transfer of GHG allowances, reject the eligibility criteria proposed by Panoche, and direct Panoche to resolve its contract dispute with PG&E through the dispute resolution process agreed to in the PPA. In addition, the Commission should adopt the eligibility criteria proposed by SCE limiting eligibility to contracts executed before January 1, 2005.

Respectfully submitted,
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Dated: September 5, 2012

CERTIFICATE OF SERVICE
BY ELECTRONIC MAIL, U.S. MAIL, AND COURIER

I, the undersigned, state that I am a citizen of the United States and am employed in the City and County of San Francisco; that I am over the age of eighteen (18) years and not a party to the within cause; and that my business address is Pacific Gas and Electric Company, Law Department B30A, 77 Beale Street, San Francisco, CA 94105.

I am readily familiar with the business practice of Pacific Gas and Electric Company for collection and processing of correspondence for mailing with the United States Postal Service. In the ordinary course of business, correspondence is deposited with the United States Postal Service the same day it is submitted for mailing.

On the 5th day of September, 2012, I caused to be served a true copy of:

PACIFIC GAS AND ELECTRIC COMPANY'S (U 39 E)
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[XX] By Electronic Mail – serving the above via e-mail transmission to each of the parties listed on the official service list for R.11-03-012 with an e-mail address.

[XX] By U.S. Mail – by placing the above for collection and mailing, in the course of ordinary business practice, with other correspondence of Pacific Gas and Electric Company, enclosed in a sealed envelope, with postage fully prepaid, addressed to those parties listed on the official service list for R.11-03-012 without an e-mail address.

[XX] By Courier – By serving the above document, via courier, to the following:

Melissa Semcer
Administrative Law Judge
California Public Utilities Commission
505 Van Ness Avenue, 5th Floor
San Francisco, CA 94102

(Courtesy Copy)
Michael R. Peevey, President
California Public Utilities Commission
505 Van Ness Avenue, 5th Floor
San Francisco, CA 94102

Jessica T. Hecht
Administrative Law Judge
California Public Utilities Commission
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I certify and declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on this 5th day of September, 2012, at San Francisco, California.

/s/ Stephanie Louie
STEPHANIE LOUIE