CALIFORNIA COGENERATION COUNCIL
A Combined Heat and Power Association

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Re: Comments of California Cogeneration Counsel on Alternate Resolutions E-4569 and E-4529 proposed by Commissioner Mark Ferron

Introduction

The California Cogeneration Council ("CCC") provides these comments on Alternative Resolutions ("ARs") E-4569 (Southern California Edison Company ("SCE")) and E-4529 (Pacific Gas & Electric Company ("PG&E")), issued by Commissioner Mark Ferron (together the "Ferron ARs"). The Ferron ARs deny, without prejudice, SCE and PG&E Advice Letters 2771-E (SCE) and 4074-E (PG&E) (together the "ALs"). The Ferron ARs also provide that SCE and PG&E may resubmit for California Public Utilities Commission ("CPUC") consideration the agreements in the ALs within the CPUC's established resource adequacy ("RA") framework. If such submittals are made, the associated megaWatts ("MWs") will not count toward the Combined Heat and Power Program ("CHP Program") targets established by the CPUC in Decision ("D.") 10-12-035. The Ferron ARs also provide guidance on CHP Program solicitations in the future.

The CCC supports the Ferron ARs. While the Ferron ARs reject the ALs as filed by SCE and PG&E, they leave open the option for the associated RA-only agreements to be brought back to the CPUC as part of the CPUC's RA program. Within the context of that program, the RA-only contracts can be fully and appropriately evaluated. As the CCC has consistently stated in its comments on the ALs, the original draft resolutions ("Draft Resolutions") and the President Peevey Alternate Resolutions ("Peevey ARs"), the CCC does not oppose approval by the CPUC of RA-only agreements with the subject facilities if RA-only resources are needed by the investor-owned utilities ("IOUs") and the RA-only agreements provide the requisite system and ratepayer benefits. However, to preserve the integrity of the CPUC's CHP Program and RA Program[1], and to avoid forum shopping, RA-only agreements should not be part of the CHP Program. This is precisely what is proposed in the Ferron ARs.

Further, the Ferron ARs make clear that the IOUs shall not solicit and the CPUC will not consider additional RA-only agreements in the current or future CHP Program solicitations. For several reasons, this additional guidance is critically needed. One, other RA-only agreements from the first CHP solicitations are still pending approval by the CPUC. Two, despite the strong statements by Commissioners at the April 4, 2013 Commission meeting, PG&E chose thereafter to move forward with its second solicitation and specifically solicited capacity-only bids. Therefore, it is critical that the CPUC's resolution of AL E-4529 state explicitly that the prohibition on RA-only bids and contracts in subsequent CHP solicitations includes PG&E's second CHP RFO, which is already underway. Three, clearly demonstrating the risk of any ambiguity, SCE has even argued in filings on the ALs that all RA-only agreements are allowed within the CHP Program, no matter how large.[2]

While the CCC supports the Ferron ARs, set forth herein are comments on several issues that require some refinement or adjustment to resolve ambiguities and avoid challenges regarding the ineligibility of RA-only products under the CHP Program.

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[1] As noted in the Ferron ARs "In fact….the Commission recognized in its comments to the Federal Energy Regulatory Commission (FERC) that the RA-only market is separate and distinct from the QF/CHP market. Ferron AR E-4569 at 12; Ferron AR E-4529 at 10.

[2] See, e.g., Comments of SCE on Draft Resolution at 2:' "SCE Agrees that All RA-Only Contracts, No matter How Large Must Count Toward the Statewide MW Target."

Discussion

A. The CPUC should distinguish Section 4.2.2 facility eligibility from product eligibility and clarify that Section 4.2.2 of the CHP Program Term Sheet alone does not resolve the RA-only eligibility issue.

As set forth above, the Ferron ARs accept the notion that the CPUC needs to address the ambiguity in the CHP Settlement Term Sheet regarding the eligibility of RA-only agreements within the CHP Program. As stated in the Ferron ARs "In adopting D. 10-12-035, we agree that the Commission was silent on if capacity-only contracts are eligible for the QF/CHP Program. We take this opportunity to speak to this point as it pertains to future RFOs conducted for CHP".[3] The Ferron ARs appropriately set forth the legal analysis and rational in support of a finding that for subsequent CHP solicitations, no RA-only bids shall be accepted.[4]

While the conclusion of ineligibility of RA-only agreements is ultimately clear, adoption of the Ferron ARs as written might leave the CPUC open to challenge in the courts based upon the language found in the prior section of the Ferron ARs entitled "Eligibility of the Facility and Consistency of RA-only Contracts with CHP Requests for Offers (CHP RFOs)". Specifically, based upon a reading of Section 4.2.2 of the CHP Term Sheet, the CPUC would find that "both the LMEC and Gilroy *facilities* are consistent with the Settlement's eligibility requirements, allowing LMEC and Gilroy to *participate* in the utility's CHP request for offers."[5]. The CPUC's resolution would be considerably more likely to preclude or withstand a court challenge were it to state explicitly that, while under Section 4.2.2 LMEC and Gilroy *as qualifying CHP facilities* were eligible to participate in the CHP Program bid process, eligibility of a facility to participate does not mean RA-only products from such facilities are eligible for the CHP Program. In other words, Section 4.2.2 establishes the right to participate in the CHP Program, but that eligibility alone is not determinative of the right to bid RA-only products that were never contemplated to be part of the CHP Program.[6] If LMEC and Gilroy had bid products commensurate with the CHP Program, they could have been awarded winning positions and contracts associated with the CHP Program. As set forth in both the Peevey ARs and the Ferron ARs, they did not.

Based upon Calpine's limited comments on the Peevey ARs, it is clear that the CPUC needs to be more specific as to its analysis and findings on eligibility. In its comments, Calpine notes that the CPUC would find that LMEC and Gilroy satisfy the eligibility requirements to bid into the CHP RFOs. [7] Calpine then follows up with a final paragraph supporting the CPUC adopted procurement process.[8] The CPUC should protect itself against a court challenge based upon what might be argued as an inconsistency on eligibility in the CPUC's decision; i.e. that the facilities are eligible for the CHP Program, but that the CPUC nonetheless rejected agreements procuring a RA-only product from those facilities. In light of court deference to the expertise of the CPUC and the CPUC's authority to implement its own CHP Program, the CPUC's determination regarding the ineligibility of RA-only contracts should prevail if challenged, but by clearly drawing a distinction between the *eligibility of a facility* for the CHP Program and the *eligibility of a particular product from a facility* for the CHP Program, the CPUC's determination would be even less susceptible to being overturned by a court. The failure to look beyond Section 4.2.2 of the CHP Term sheet is the genesis of the controversy now before the CPUC. The CPUC should explicitly state that while a facility might be eligible to participate in a CHP RFO, any and all products from a facility are not. Simply put, an RA-only or capacity-only product is not a CHP product and thus, under the terms of the CHP Settlement, the CPUC can reject the ALs, which ask for approval of RA-only or capacity-only contracts.

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[3] Ferron AR E-4569 at 12; Ferron AR E-4529 at 9.
[4] Ferron AR E-4569 at 2; Ferron AR E-4529 at 2.
[5] Ferron AR E-4569 at 11 (emphasis added); Ferron AR E-4529 at 8 (emphasis added).
[6] The Commission should also explicitly note that the provision in the SCE and PG&E PPAs providing the IOUs an **option** to terminate the PPAs if the LMEC or Gilroy facilities are unable to maintain Qualifying Cogeneration Facility status would not be acceptable in context of the CHP Program. If such status is not maintained, the generation facility is not eligible to participate in the CHP Program and the CHP PPA must terminate. See, Ferron AR E-4569 at 10-11; Ferron AR E-4529 at 8.
[7] Comments of Calpine Corporation on Draft Alternative Resolution E-4569 2 and E- 4529 at 2.
[8] Id.

B. The CPUC should be explicit that the prohibition on RA-only bids and agreements in subsequent CHP RFOs includes the first and current RFOs.

In the Ferron ARs, it is clear that the CPUC would prohibit the inclusion of RA-only bids and contracts in subsequent CHP RFO solicitations. As stated several times therein: "The Commission clarifies in this Resolution for subsequent CHP solicitations that no RA-only bids shall be accepted"[9]; "Going forward, IOUs should not solicit RA-only contracts as part of their CHP solicitations. We will reject any contracts that are brought forth as capacity-only in the context of the QF/CHP Program."[10]; "We also prohibit RA-only solicitations and contracts as part of the QF/CHP RFOs in future solicitations, including PG&E's subsequent RFOs."[11]

Unfortunately, in defiance of the directives given by all five Commissioners from the dais on April 4, 2013, PG&E chose to continue to request specifically capacity-only bids in its second CHP RFO that was already underway on April 4, 2013. Bids in that solicitation were submitted on May 2, 2013. Thus, for PG&E's AL 4074-E, the use of the words "subsequent", "going forward" and "future" create an ambiguity that needs to be removed from the Ferron ARs. Otherwise, contrary to the CPUC's intent, PG&E may argue that its second CHP RFO was exempted from the prohibition. It might also argue that other RA-only bids from the first CHP RFO solicitation or bilateral negotiations are not covered. This ambiguity can be easily corrected by clearly stating in the Ferron AR E-4529 that the prohibition applies to PG&E's first, current and subsequent RFOs, including any bilateral negotiations.

Although SCE has not initiated its second CHP RFO, insertion of "first" and "including any bilateral negotiations" into the Ferron AR E-4569 will also remove any ambiguity that no other RA-only contracts will be entertained by the CPUC from SCE's initial CHP RFO solicitation or otherwise. This is important as other contracts from the first SCE RFO solicitation are awaiting CPUC action.

C. The CPUC should clarify the use of RA-only agreements, Capacity-only agreements, UPF agreements and Tolling Agreements to avoid further ambiguity and problems.

Throughout the Peevey ARs and Ferron ARs, the nomenclature for the type of agreements being addressed is inconsistent. At times the LMEC and Gilroy agreements and the prohibitions are referred to as RA-only agreements; at other times, capacity-only agreements are discussed. As in the Peevey ARs, the Ferron ARs take the position that only contracts that include energy can be solicited through a CHP RFO.[12] Further, the ARs state that the CPUC also finds that the Settlement Agreement explicitly contemplates some type of option for RA-only contracts that might result from the CHP solicitations by defining Utility Prescheduled Facilities (UPFs)."[13] Tolling Agreements are not discussed in the Ferron ARs, and is not a term used anywhere in the QF CHP Term Sheet. Rather, Tolling Agreements are referenced in Option C.1 of the Legacy Amendment adopted by the CPUC as part of the CHP Settlement.

As a preliminary matter, the description of UPF agreements and their place in the CHP Program should be refined to avoid additional problems. As the CCC has noted in prior comments, the UPF option was specifically adopted to provide an option for a limited number of QFs that were under existing QF legacy PPAs or extension contracts with the IOUs as of September 20, 2007 and were losing thermal hosts or the thermal demand was being reduced upon expiration of those contracts. To avoid compelling these specific CHP facilities from having to make uneconomic investments in alternative thermal applications merely to participate in the new CHP Program, they would be permitted to bid into the CHP Program and to obtain new UPF PPAs. The Ferron ARs' characterization of UPF contracts as RA-only contracts should be modified. The UPF PPAs are not capacity-only or RA-only contracts. They are dispatchable capacity and energy contracts. Thus, they meet the requirement that only contracts that include energy can be solicited through a CHP RFO. In particular, UPF contracts are not and should not be discussed as a form of RA-only or capacity-only contracts.

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[9] Ferron AR E-4569 at 2; Ferron AR E-4529 at 2.
[10] Ferron AR E-4569 at 12; Ferron AR E-4529 at 9.
[11] Ferron AR E-4529 at 11; Ferron AR E-4569 at 13 (using "including SCE's subsequent RFOs").
[12] Ferron AR E-4569 at 2; Ferron AR E-4529 at 2.
[13] Ferron AR E-4569 at 13; Ferron AR E-4529 at 10.

Likewise, the Ferron ARs should be amended to avoid confusion regarding Tolling Agreements. Tolling Agreements are described in the Legacy Amendment as agreements "pursuant to which Seller shall cause the Generating Facility to be dispatchable and buyer shall purchase electric *energy and related attributes* from Seller on a dispatchable basis."[14] Clearly, Tolling Agreements were different from and did not include RA-only or capacity-only agreements. One, there are energy purchases associated with Tolling Agreements. Two, Tolling Agreements are amendments to legacy contracts and only count toward the Settlement GHG Emissions Reduction Target; they do not count toward the MW Targets.

Further, as related to the LMEC and Gilroy facilities, it is also clear that these facilities did not and do not qualify for UPF contracts and the RA-only agreements should not count toward MW Targets. The Ferron ARs explicitly concur.[15] UPFs are addressed in Section 4.8 of the Term Sheet. Specifically, under Section 4.8.1.1: "A CHP Facility that met the PURPA efficiency requirements as of September 20, 2007 and converts to a Utility Prescheduled Facility is eligible to participate in a CHP RFO or to obtain a PPA through bilateral negotiations or amend an existing Legacy PPA through bilateral negotiations."[16] Under Section 4.8.1.2 "New PPAs with Utility Prescheduled Facilities (not Legacy PPA Amendments) count towards the MW Targets if the existing QF PPA expires before the end of the Transition Period."[17]

The LMEC and Gilroy facilities were not Existing CHP Facilities with existing PPAs that expired before the end of the Transition Period. In fact, neither facility had an existing QF PPA. Thus, it is clear that neither LMEC nor Gilroy had or have the option to convert to UPFs. It is also clear that Section 4.8.1.2 provides legal support for the finding in the Ferron ARs that RA-only generation from the LMEC and Gilroy facilities cannot count toward the MW Targets. The LMEC and Gilroy facilities were not Existing CHP Facilities with existing QF PPAs and did not and cannot qualify for the UPF option. Thus, as set forth in Section 4.8.1.2, the RA-only products from these facilities cannot count toward the CHP Program MW Targets. No changes to the CHP Settlement are needed for the CPUC to conclude that RA-only and capacity-only PPAs do not count toward the CHP Program MW Targets.

D. In its decision on the ALs, the CPUC should remove language stating that the majority of the capacity and energy from CHP Facilities are devoted to industrial hosts.

In distinguishing the CPUC's RA Program from its CHP Program, the Ferron ARs contain the same language found in the Peevey ARs stating that "The QF/CHP settlement was designed to provide opportunities to CHP Facilities whose primary, if not exclusive, purpose is to provide energy and heat to a host industrial facility, while also remaining interconnected to the grid and available to provide some benefits to the utilities."[18] The Ferron ARs also state that "The majority of CHP facilities may have some flexibility to offer RA-only, additional dispatchable capacity or ancillary services products to the grid, but the majority of their capacity and energy is devoted to their industrial hosts."[19]

Although well intentioned, there are several reasons why references to "primary" or "majority" sales to industrial hosts should be eliminated from the CPUC's decision on the ALs. First, in subsequent CHP RFOs, the IOUs may misuse such language in support of penalizing or eliminating legacy CHP Facilities that bid into the subsequent CHP RFOs. Second, the references to "primary" and "majority" sales creates confusion as to the applicable standard for certification of QFs by the Federal Energy Regulatory Commission ("FERC") and how it is to be applied in context of the requirements in the State's CHP Program. While a "primary use" criteria was adopted in the Energy Policy Act of 2005[20] and implementing regulations[21] for new CHP facilities seeking QF certification from FERC, existing facilities are grandfathered or exempt from such a requirement.

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[14] See, Legacy Amendment Option C.1.
[15] Ferron AR E-4569 at 13; Ferron AR E-4529 at 10.
[16] Term Sheet at 25.
[17] Term Sheet at 25.
[18] Ferron AR E-4569 at 12; Ferron AR E-4529 at 9.
[19] Ferron AR E-4569 at 12; Ferron AR E-4529 at 10.
[20] Energy Policy Act of 2005, Sec. 1253. 119 Stat. 970 Public Law 109-58-August 5, 2005
[21] 18 C.F.R. 292.205(d).

IOU resistance to contracting with Legacy QFs was a primary factor in the establishment of the CHP Program and CHP-only RFOs. It is no secret that the IOUs did not want to sign new PPAs with Legacy QFs. Thus, in listing the policy objectives, the Term Sheet was explicit that the purpose of the CHP Program "is to encourage the continued operation of the State's Existing CHP Facilities. . . ."[22] The policy section also sates "These policies and purposes will be achieved by a State CHP Program that procures CHP as set forth in the Settlement, *retains existing efficient CHP*. . . ."[23] Many of the exiting CHP Facilities that have or will bid into the CHP RFOs are efficient but do not, and are not required to, meet the primary use standard. The Settlement Term Sheet never imposed such a standard on existing CHP Facilities and the CPUC should endeavor to ensure that the IOUs do not try to do so based upon ambiguous language in the decision on the ALs.

This issue can be addressed by simply striking certain words, as set forth below in the two sentences in the Ferron ARs containing such references to primary and majority purposes, without altering the substance of the sentences or the pertinent discussion in the ARs.

> The purpose of the QF/CHP program is different from the RA program. The QF/CHP settlement was designed to provide opportunities to CHP Facilities whose ~~primary if not exclusive,~~ purpose is to provide energy and heat to a host industrial facility, while also remaining interconnected to the grid and available to provide ~~some~~ benefits to the utilities.[24]
>
> ~~The majority of~~ CHP facilities may have some flexibility to offer RA ~~only~~, additional dispatchable capacity or ancillary services products to the grid, but ~~the majority of~~ their capacity and energy is inextricably linked to providing service ~~devoted~~ to their industrial host.[25]

Conclusion

For the foregoing reasons, the CCC urges adoption of the Ferron ARs with the limited refinements suggested herein. All RA-only contracting should be kept separate and apart from the CHP Program. The CCC supports the resubmittal of the LMEC and Gilroy RA-only contracts, without prejudice, in the RA Program solicitations where they can be appropriately evaluated based upon the requirements and criteria in that program. RA-only contracts should not be a part of the CHP Program and the MWs associated with any approved RA-only contract should not count toward the MW targets set in the CHP Program. The CCC also requests that the CPUC adopt the changes in the Ferron ARs set forth in the Indices and Appendices that are attached hereto.

As set forth more fully in the CCC's comments on the Peevey ARs[26], the CPUC should not be dissuaded from clarifying the ambiguity regarding the eligibility of RA-only contracts for the CHP program , no matter what any interested party advocates or threatens. The Commission has the power and the authority to address the ambiguity that has arisen in its CHP Program and its decision is most likely to be given complete deference by a reviewing court. Such clarification does not change or alter the CHP Settlement Agreement or the CPUC's decisions adopting the CHP Settlement Agreement.

Respectfully submitted,

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Executive Director, California Cogeneration Counsel

CC: Michael Colvin, Advisor for Commissioner Ferron
Cem Turhal, Analyst, Energy Division
Damon Franz, Supervisor, Energy Division

[22] Term Sheet at 5.
[23] Term Sheet at 5 (emphasis added).
[24] Ferron AR E-4569 at 12; Ferron AR E-4529 at 9.
[25] Ferron AR E-4569 at 12; Ferron AR E-4529 at 10.
[26] CCC Comments on Peevey ARs at 5.

Index of Recommended Changes to
Proposed Alternate Resolution of Commissioner Ferron on E-4569

Page	Recommended Changes to Alternate Resolution
10	Revise the third full paragraph to add a new last sentence: "However, the eligibility of a facility to participate in the CHP RFO is different from the eligibility of RA-only products to be procured under the QF/CHP Program."
11	Delete the first full paragraph in its entirety and replace with the following text: "As eligible QF CHP facility per Section 4.2.2 of the Term Sheet, LMEC and Gilroy bid into SCE's CHP RFO as qualifying facilities, however, they did not bid products commensurate with the QF/CHP Program into SCE's CHP RFO. SCE's shortlisting and selection of the LMEC and Gilroy facilities was erroneous because, while both the LMEC and Gilroy facilities meet the eligibility requirements under Section 4.2.2.1 of the QF/CHP Settlement Term Sheet, RA-only and capacity-only products are not eligible for procurement under the QF/CHP Program."
12	Delete the first sentence of the first full paragraph and replace with the following text: "RA-only and capacity-only products have never been eligible under the QF/CHP Program, we will not approve any RA-only or capacity-only contracts under the QF/CHP Program, and going forward, IOUs should not solicit, or submit for Commission approval, RA-only or capacity-only contracts as part of their CHP solicitations or bilateral negotiations (including in SCE's first solicitation)."
12	Delete the second full paragraph in its entirety and replace with the following text: "The purpose of the QF/CHP program is different from the RA program. The QF/CHP settlement was designed to provide opportunities to CHP Facilities whose purpose is to provide energy and heat to a host industrial facility, while also remaining interconnected to the grid and available to provide benefits to utilities."
12	Delete the fourth sentence of the third full paragraph and replace with the following text: "CHP facilities may have some flexibility to offer RA, additional dispatchable capacity or ancillary services products to the grid, but their capacity and energy is inextricably linked to providing service to their industrial host."
13	Delete the second full paragraph in its entirety and replace with the following text: "In addition to this basic policy and reasoning, the Commission also finds that the Settlement Agreement explicitly contemplates some type of option for dispatchable capacity and energy contracts that might result from the CHP solicitations by defining Utility Prescheduled Facilities (UPFs). The UPF option was specifically adopted to provide an option for a limited number of QFs that were under existing QF legacy PPAs or extension contracts with the IOUs as of September 20, 2007 and were losing thermal hosts or the thermal demand was being reduced upon expiration of those contracts. To avoid compelling these specific CHP facilities from having to make uneconomic investments in alternative thermal applications merely to participate in the new CHP Program, they would be permitted to bid into the CHP Program and to obtain new UPF PPAs. The UPF PPAs are not capacity-only or RA-only contracts. They are dispatchable capacity and energy contracts. Thus, they meet the requirement that only contracts that include energy can be solicited through a CHP RFO. Similarly, Tolling Agreements are described in the Legacy Amendment as agreements "pursuant to which Seller shall cause the Generating Facility to be dispatchable and buyer shall

Page	Recommended Changes to Alternate Resolution
	purchase electric *energy and related attributes* from Seller on a dispatchable basis." (Footnote to the Legacy Amendment Option C.1). Tolling Agreements are thus different from and did not include RA-only or capacity-only agreements because there are energy purchases associated with Tolling Agreements. Moreover, Tolling Agreements are amendments to legacy contracts and only count toward the Settlement GHG Emissions Reduction Target; they do not count toward the MW Targets. The fact that the parties to the QF/CHP Settlement explicitly included UPFs and Tolling Agreements, but made no mention of RA-only or capacity-only products, provides compelling evidence that the procurement of RA-only and capacity-only products under the QF/CHP Program was not intended. We emphasize that, unlike RA-only contracts, UPF contracts and Tolling Agreements include energy procurement and thus meet the requirement that only contracts that include energy can be solicited through a CHP RFO."

Appendix A
Proposed Findings and Conclusions and Ordering Paragraphs

Set forth below are the California Cogeneration Council's proposed changes to the findings, conclusions and ordering paragraphs set forth in Resolution of Commissioner Ferron on E-4569. Deletions are shown in ~~strikethrough~~ and additions are shown in double underline.

FINDINGS AND CONCLUSIONS

1. The LMEC facility is an eligible CHP resource with two steam hosts; is a CHP facility with a nameplate capacity larger than 5 MW; meets the definition of cogeneration facility under California Public Utilities Code §216.6; meets the federal definition of a qualifying cogeneration facility under 18 CFR §292.205 implementing PURPA; and meets the Emissions Performance Standard established by Public Utilities Code §8341 (Senate Bill 1368), however, the product bid from the LMEC facility into SCE's CHP RFO is not commensurate with the QF/CHP Program.

2. The Gilroy facility is an eligible CHP resource with a steam host; is a CHP facility with a nameplate capacity larger than 5 MW; meets the definition of cogeneration facility under California Public Utilities Code §216.6; meets the federal definition of a qualifying cogeneration facility under 18 CFR §292.205 implementing PURPA; and is exempt from the Emissions Performance Standard established by Public Utilities Code §8341 (Senate Bill 1368), however, the product bid from the Gilroy facility into SCE's CHP RFO is not commensurate with the QF/CHP Program.

3. Pursuant to the QF/CHP Settlement, Section 4.2.2, capacity-only products are not expressly authorized to compete in CHP-only RFOs. They are not expressly prohibited either. We hereby clarify that RA-only and capacity-only products have never been and are not eligible for procurement under the QF/CHP Program. We will not approve any RA-only or capacity-only contracts under the QF/CHP Program, and going forward, IOUs should not solicit, or submit for CPUC approval, any RA-only or capacity-only contracts as part of their CHP solicitations or bilateral negotiations (including in SCE's first solicitation).

4. A provision for Utility Prescheduled Facilities (UPFs) is expressly provided for in the QF/CHP Settlement Agreement. UPF contracts include energy procurement and thus meet the requirement that only contracts that include energy can be solicited through a CHP RFO; the products offered by UPFs are distinct from RA-only and capacity-only products.

5. The QF/CHP Settlement Agreement's express inclusion of ~~is silent as to whether capacity-only products, other than from~~ Utility Prescheduled Facilities and silence regarding RA-only products provides substantial evidence that the parties to the QF/CHP Settlement did not intend to include RA-only and capacity-only products as eligible products under the QF/CHP Program~~, are invited in CHP-only RFOs~~.

6. The current LMEC and Gilroy Agreements in Advice Letter 2771-E should be rejected because capacity-only contracts are ineligible to participate and because approval of the contracts would occupy too many reserved CHP MW with a capacity-only contract, removing opportunities for other CHP facilities to provide benefits to SCE.

7. The Commission should deny these contracts without prejudice. If SCE were to execute modified Agreements, consistent with the existing RA-only framework, the Commission shall consider them in due course.

THEREFORE IT IS ORDERED THAT:

1. The request of Southern California Edison (SCE) in Advice Letter 2771-E for Commission approval of the Los Medanos Energy Center and Gilroy Agreements with Calpine in its entirety are denied without prejudice.

2. Southern California Edison shall not invite, ~~or~~ accept or submit for CPUC approval any capacity-only contracts in or from their first, current ~~existing~~ or future Combined Heat and Power solicitations or bilateral negotiations., ~~except as Utility Prescheduled Facilities as defined in the Qualifying Facility/Combined Heat and Power Settlement Agreement adopted in D.10-12-035.~~

Index of Recommended Changes to
Proposed Alternate Resolution of Commissioner Ferron on E-4529

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8	Revise the third full paragraph to add a new last sentence: "However, the eligibility of a facility to participate in the CHP RFO is different from the eligibility of RA-only products to be procured under the QF/CHP Program."
9	Delete the first full paragraph in its entirety and replace with the following text: "As an eligible QF CHP facility per Section 4.2.2 of the Term Sheet, LMEC bid into PG&E's CHP RFO as a qualifying facility, however, it did not bid a product commensurate with the QF/CHP Program into PG&E's CHP RFO. PG&E's shortlisting and selection of the LMEC facility was erroneous because, while the LMEC facility meets the eligibility requirements under Section 4.2.2.1 of the QF/CHP Settlement Term Sheet, RA-only and capacity-only products are not eligible for procurement under the QF/CHP Program."
9	Delete the first sentence of the last paragraph and replace with the following text: "RA-only and capacity-only products have never been eligible under the QF/CHP Program, we will not approve any RA-only or capacity-only contracts under the QF/CHP Program, and going forward, IOUs should not solicit, or submit for Commission approval, RA-only or capacity-only contracts as part of their CHP solicitations or bilateral negotiations (including in PG&E's first or current solicitation)."
10	Delete the first full paragraph in its entirety and replace with the following text: "The purpose of the QF/CHP program is different from the RA program. The QF/CHP settlement was designed to provide opportunities to CHP Facilities whose purpose is to provide energy and heat to a host industrial facility, while also remaining interconnected to the grid and available to provide benefits to utilities."
10	Delete the fourth sentence of the second full paragraph and replace with the following text: "CHP facilities may have some flexibility to offer RA, additional dispatchable capacity or ancillary services products to the grid, but their capacity and energy is inextricably linked to providing service to their industrial host."
10-11	Delete the paragraph that extends across these two pages in its entirety and replace with the following text: "In addition to this basic policy and reasoning, the Commission also finds that the Settlement Agreement explicitly contemplates some type of option for dispatchable capacity and energy contracts that might result from the CHP solicitations by defining Utility Prescheduled Facilities (UPFs). The UPF option was specifically adopted to provide an option for a limited number of QFs that were under existing QF legacy PPAs or extension contracts with the IOUs as of September 20, 2007 and were losing thermal hosts or the thermal demand was being reduced upon expiration of those contracts. To avoid compelling these specific CHP facilities from having to make uneconomic investments in alternative thermal applications merely to participate in the new CHP Program, they would be permitted to bid into the CHP Program and to obtain new UPF PPAs. The UPF PPAs are not capacity-only or RA-only contracts. They are dispatchable capacity and energy contracts. Thus, they meet the requirement that only contracts that include energy can be solicited through a CHP RFO. Similarly, Tolling Agreements are described in the Legacy Amendment as agreements "pursuant to which Seller shall cause the Generating Facility to be dispatchable and buyer shall

Page	Recommended Changes to Alternate Resolution
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Appendix A
Proposed Findings and Conclusions and Ordering Paragraphs

Set forth below are the California Cogeneration Council's proposed changes to the findings, conclusions and ordering paragraphs set forth in Resolution of Commissioner Ferron on E-4529. Deletions are shown in ~~strikethrough~~ and additions are shown in double underline.

FINDINGS AND CONCLUSIONS

1. The LMEC facility is an eligible CHP resource with two steam hosts; is a CHP facility with a nameplate capacity larger than 5 MW; meets the definition of cogeneration facility under California Public Utilities Code §216.6; meets the federal definition of a qualifying cogeneration facility under 18 CFR §292.205 implementing PURPA; and meets the Emissions Performance Standard established by Public Utilities Code §8341 (Senate Bill 1368), however, the product bid from the LMEC facility into PG&E's CHP RFO is not commensurate with the QF/CHP Program.

2. Pursuant to the QF/CHP Settlement, Section 4.2.2, capacity-only products are not expressly authorized to compete in CHP-only RFOs. They are not expressly prohibited either. We hereby clarify that RA-only and capacity-only products have never been and are not eligible for procurement under the QF/CHP Program. We will not approve any RA-only or capacity-only contracts under the QF/CHP Program, and going forward, IOUs should not solicit, or submit for CPUC approval, any RA-only or capacity-only contracts as part of their CHP solicitations or bilateral negotiations (including in PG&E's first and current solicitation).

3. A provision for Utility Prescheduled Facilities (UPFs) is expressly provided for in the QF/CHP Settlement Agreement. UPF contracts include energy procurement and thus meet the requirement that only contracts that include energy can be solicited through a CHP RFO; the products offered by UPFs are distinct from RA-only and capacity-only products.

4. The QF/CHP Settlement Agreement's express inclusion of ~~is silent as to whether capacity-only products, other than from~~ Utility Prescheduled Facilities and silence regarding RA-only products provides substantial evidence that the parties to the QF/CHP Settlement did not intend to include RA-only and capacity-only products as eligible products under the QF/CHP Program~~, are invited in CHP-only RFOs~~.

5. The LMEC Agreement in Advice Letter 4074-E should be rejected because capacity-only contracts are ineligible to participate and because approval of the contract would occupy too many reserved CHP MW with a capacity-only contract, removing opportunities for other CHP facilities to provide benefits to PG&E.

6. The Commission should deny this contract without prejudice. If PG&E were to execute a modified Agreement, consistent with the existing RA-only framework, the Commission shall consider ~~that~~ it in due course.

THEREFORE IT IS ORDERED THAT:

1. The request of Pacific Gas and Electric Company in Advice Letter 4074-E for Commission approval of the Los Medanos Energy Center Agreement with Calpine in its entirety is denied without prejudice.

2. Pacific Gas and Electric Company shall not invite, ~~or~~ accept or submit for CPUC approval any capacity-only contracts in or from their first, current ~~existing~~ or future Combined Heat and Power solicitations or bilateral negotiations., ~~except as Utility Prescheduled Facilities as defined in the Qualifying Facility/Combined Heat and Power Settlement Agreement adopted in D.10-12-035.~~