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July 11, 2013

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Re: Comments of The Independent Energy Producers Association on Commissioner Mark J. Ferron's Alternate Draft Resolution(s) E-4569 (SCE) and E-4529 (PG&E).

To the Energy Division:

Independent Energy Producers Association ("IEP") respectfully submits these comments opposed to the captioned draft Resolution.[1]

As more fully discussed below, the reasons for IEP's opposition is that the proposed Resolution rejects the outcome of an approved, fairly conducted, competitive resource solicitation process based on an after the fact interpretation of the program that IEP thinks is without basis. Specifically, the proposed SCE Resolution finds that while "both the LMEC and Gilroy facilities are consistent with the Settlement's eligibility requirements, thereby allowing LMEC and Gilroy to participate in the utility's CHP requests for offers," SCE was not eligible to procure RA-only contracts with LMEC and Gilroy. In reaching this conclusion, the proposed Resolution misunderstands the purpose of the QF/CHP Settlement Agreement and, as a result, risks the viability of the Settlement.[2]

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[1] As a participant in, and supporting member of, Commission Decision (D.) 10-12-035 adopting the "*Qualifying Facility and Combined Heat and Power Program Settlement Agreement*," ("QF/CHP Settlement") dated December 16, 2010, IEP submitted comments supporting the Energy Division's original Draft Resolution(s) E-4569 and E-4529 that followed the spirit of the QF/CHP Settlement. These primary draft resolutions approved Los Medanos (and Gilroy) contracts and "count" their generating capacity towards Southern California Edison's ("SCE") and Pacific Gas and Electric Company's ("PG&E") 2011 CHP competitive bid RFO MW targets. On May 24, 2013, President Peevey issued a set of Alternate Resolution(s) that rejected the contracts as originally conceived, but invited resubmittal if certain conditions were met that reduce/limit the MWs that "count." IEP disagreed with the logic of this alternate but pointed out that an amendment to the Settlement Agreement was for the parties to determine. These Comments filed today are also applicable to both SCE and PG&E's condition.

[2] *See* CHP Program Settlement Agreement at p. 4 ("Each Party shall review any Commission orders regarding

IEP is particularly troubled by the proposed Resolution's misunderstanding of the context in which the Settlement Agreement was developed, reflected by its assertion that "the CHP RFOs are designed to work for the *majority of CHP facilities* for which the Settlement Agreement was intended to meet their needs to cover their steam hosts while also providing *some* electricity to the grid." [emphasis added] IEP finds no basis for the conclusion that only some otherwise eligible QF CHP operations are now permitted to be considered for a procurement contract with the IOUs. Equally important, this conclusion has embedded within it that there is a minimum amount of electricity provided to the grid. IEP finds no basis for determining what that minimum amount is or ought to be in light of the QF CHP Settlement Agreement, PURPA, or even state policy.

In point of fact, the Settlement Agreement constituted a new procurement paradigm to "create a smooth transition from the existing QF CHP PURPA Program to a state-administered CHP Program." (QF CHP Settlement Agreement, at 1.1.2). While the FERC's suspension of the PURPA Section 210(m) "must buy" provision was in light of a market-based, competitive replacement procurement mechanism for CHP (and renewables via the RPS), IEP believes that state-administration must not discriminate against QFs CHP otherwise eligible to participate. In now imposing a viewpoint that only a (not specifically defined) "majority" of otherwise eligible QF CHP facilities have an opportunity to compete in the CHP RFOs, to the obvious exclusion of a significant minority, the Commission risks achieving the discrimination that the QF CHP Settlement was designed to avoid.

The original draft Resolution(s) (E-4569, dated March 1, 2013 and E-4529, dated March 4, 2013) approving the subject projects should be upheld and voted out favorably, for several reasons:

- The QF/CHP Settlement establishes megawatt ("MW"), not MWh, procurement targets and greenhouse gas ("GHG") emissions reduction targets that the investor-owned utilities are required to meet by entering into contracts with eligible CHP Facilities, as defined in the Settlement.
- The successful projects were eligible participants within the meaning of the Settlement.
- The IOU customers involved, properly evaluated, conducted and selected the projects.

this Settlement Agreement to determine if the Commission has changed, modified, or severed any portion of the Settlement Agreement, deleted a term, or imposed a new term…[f]ailure to resolve such change, modification, severance, deletion, or new term to this Settlement Agreement to the satisfaction of all Parties within ninety (90) calendar days of notification, and to obtain Commission Approval of such resolution promptly thereafter, shall cause this Settlement Agreement to terminate.").

- The RFO was conducted in regular course and in consideration of eligibility requirements and of the rules and protocols associated with consideration.
- The IOU customers properly sought and received review and approval from the Independent Evaluator.
- The Commission's Energy Division, whose primary charge is to administer energy policies and programs to serve the public interest, advising the Commission, and ensuring compliance with the Commission's decisions and statutory mandates, also reviewed, and therefore recommended, approval of the projects.

The idea, advanced in the current proposed Alternate (and for that matter the prior Peevey Alternate) that lack of specific "RA counts" language allows these projects' rejection is belied by other elements of the Settlement. In other contexts where disparate treatment was intended based on an eligible CHP's class, the Settlement clearly called it out. (See, e.g. Section 5.2.4.2 "Coal-fired, wood waste and renewable QFs in an IOU's portfolio as of July 2010 will not count towards the IOU's MW targets.") IEP did not agree with this result but, as the Commission notes in its approval of the Settlement, "no party got everything they wanted." (Cal. P.U.C. Dec. No. 10-12-035, dated December 16, 2010) If, as supposed by the Ferron Alternate, the RA projects at issue were to not count, the Settlement would have stated this clearly.

The eligibility criteria are spelled out in the Term Sheet. Section 4.2.2 says, among other things, "[a]ny CHP Facility with a nameplate rating larger than 5 MW may bid into the CHP RFO…provided that the CHP Facility meets the definition of cogeneration under California Public Utilities Code [section] 216.6 and the Emissions Performance Standard established by Public Utilities Code [section] 8341…" As all of the draft Resolutions agree, every eligibility criterion is met by the proposed projects.

If the Commission is surprised or otherwise dissatisfied with the outcome of its authorized and properly conducted CHP RFO, it is most appropriate to take the necessary steps to make adjustments in future RFOs or for the Decision (D.10-12-035) adopting the QF/CHP Settlement to be explicitly modified. As Edison points out in its comments before, a modification to the protocols at this stage will likely involve a consultation period with the QF/CHP Settling Parties and their assent, or in the alternative, the Commission could convene a mediation-like process similar to what it conducted and that led to the primary Settlement. Then the participants can proceed with known protocols going forward.

Respectfully submitted,

Douglas K. Kerner

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Re: Comments of The Independent Energy Producers Association on Alternate Draft Resolution(s) E-4569 (SCE) and E-4529 (PG&E).

To the Energy Division:

In comments previously filed, IEP supported the original Draft Resolution(s) E-4569 and E-4529 supporting Southern California Edison Company's Advice Letter (AL) 2771-E and Pacific Gas & Electric Company's Advice Letter (AL) 4074-E. Those comments are attached for convenience. The essential basis of that recommendation is that the projects are consistent with the terms of the Settlement. There is nothing in the Alternate Draft Resolution(s) or the advances of the antagonists to this competitive outcome that changes IEP's view that the subject projects should be approved.

The Alternate Draft Resolutions and the positions of antagonists that underly it admit the conformance of the RFO outcome with the letter of the Settlement but rely on some concept of unintended consequences (the "spirit of the deal") as a basis for adjusting that outcome. IEP submits that a party's, or the CPUC's surprise or even dissatisfaction at the outcome of a competitive auction that was approved by it, whose terms were known, relied upon and for which bids were prepared at non insubstantial expense, and was properly conducted is not a proper basis for adjusting the outcome. If the inclusion in the RFO of certain (RA) eligible CHP was incompatible with the rules, action taken to result in stopping the RFO process in its tracks could have been taken. IEP would probably have opposed such a move (IEP didn't get everything it wanted out the Settlement either), but the action was never taken. Again, mere dissatisfaction or surprise at the outcome is not a sound basis for altering its results.

The suggestion that the affected contracts, being RA agreements, are somehow in the guise of a purported CHP operation are without merit. The Settlement explicitly contemplates 1) counting rules based on megawatts, not production 2) accommodates differential or special operational products like dispatchability, and 3) negotiated outcomes that differ from the pro forma templates. The mere fact that the prevailing project(s) do not look like projects that did not prevail is sour grapes and regret; moreover, since there is an apparent stipulation that the non-prevailing projects were not competitive IEP does not understand the concern since by virtue of the process customers are getting the highest value CHP participant. The Alternate Draft Resolution(s) seems to be machinating to ensure the position of a sub-class of eligible CHP. That, IEP respectfully submits, is not within the proper "spirit" of any arrangement and certainly not one it would have endorsed. As raised in IEP's prior comments, the use of MWs of capacity as the counting metric, without specific reference to CHP energy production, is necessarily the correct implementation of the QF/CHP Settlement. Otherwise, unless a project had a perfect (100%) capacity factor, the MW counting would be uncertain depending upon actual operation over time. That obviously is not and could not practicably be the case. Moreover, the QF/CHP Settlement specifically contemplates that eligible projects that are selected and counted toward the MW target are not required to operate continuously or at any particular level. Furthermore, no requisite nexus exists between MW counting and actual CHP energy production in the QF/CHP Settlement.

Notwithstanding these facts, as further developed in IEP's comments before (attached) the Alternate Draft Resolution(s) reaches the conclusion that the QF/CHP Settlement Agreement contains "ambiguity" that the Commission will clarify in subsequent CHP RFOs so that no RA-only bids shall be accepted, while acknowledging in the interest of fairness that a reasonable compromise is necessary to address the RA-only contracts that were successful during the first CHP RFO solicitation. IEP does not agree that there is any ambiguity in the Settlement. If, however, the CPUC believes a ban on RA-only participation going forward is warranted, it can certainly take that up in proper order. The Alternate Draft Resolution(s) also concludes that in the interest of fairness, a concept that IEP embraces, the projects may go forward (albeit on adjusted rules that are largely undefined). CPUC is essentially conditioning approval on a contract amendment and presumably subsequent request for approval. Whether that outcome is acceptable is a matter for the contracting parties to decide; with regard to either AL 2771-E (SCE) and AL 4074-E (PG&E).

Respectfully submitted,

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Re: Comments of The Independent Energy Producers Association on Draft Resolution E-4529 Addressing Pacific Gas and Electric Company's Advice Letter (AL) 4074-E.

To the Energy Division:

The Independent Energy Producers Association ("IEP") supports the Energy Division's ("ED") proposed outcome in Draft Resolution E-4529 for approval of 280.5 megawatts ("MW") of new Combined Heat and Power Resource Adequacy ("RA–only") capacity associated with the Los Medanos Energy Center ("LMEC Agreement"). As disused in greater detail below, this RA–only transaction complies with the requirements of the Qualifying Facility and Combined Heat and Power Program Settlement Agreement ("QF/CHP Settlement") established with the issuance of Decision ("D.") 10-12-035. IEP urges the Commission to expeditiously approve the LMEC Agreement resulting from Pacific Gas and Electric Company's ("PG&E") *first Combined Heat and Power Request for Offers ("CHP RFO")* ("AL 4074-E").

In timely protests filed by Shell Energy North America (US), L.P. ("Shell Energy"), the Marin Energy Authority ("MEA"), and the Alliance for Retail Energy Markets ("AReM"), collectively ("Joint Parties"), a number of arguments were made to suggest that (1) the QF/CHP Settlement did not contemplate RA–only contracts as eligible under PG&E's CHP RFO, (2) the RA capacity costs from the LMEC Agreement was not approved in D. 10-12-035; and (3) the LMEC Agreement does not comport with the CPUC's QF/CHP Program Settlement standards for MW targets. The suggestion is that the only MWs that count towards the target are those associated with simultaneous production of CHP energy. That suggestion is clearly wrong, and Resolution (E-4529) correctly repudiates these arguments.

As an initial matter, the use of MWs of capacity as the counting metric, without specific reference to CHP energy production, is necessarily the correct implementation of the QF/CHP Settlement. Otherwise, unless a project had a perfect (100%) capacity factor, the MW counting would be uncertain depending upon actual operation over time. That obviously is not and could not practicably be the case. Moreover, the QF/CHP Settlement specifically contemplates that eligible projects that are selected and counted toward the MW target are not required to operate continuously or at any particular level. Furthermore, no requisite nexus exists between MW counting and actual CHP energy production in the QF/CHP Settlement. The following QF/CHP Settlement Term Sheet excerpts support this fact.

For example:

- 4.2.12 PPA Options in CHP RFOs

As part of the bid package…"each IOU may request offers with specific… (3) dispatchability terms that differ from the CHP RFO Pro Forma PPA."

"As part of the bid package, IOUs may also offer the all source RFO in addition to the CHP–Only RFO and may also sign a hybrid contract of the two."

The QF/CHP Settlement therefore contemplates variations in both operational and PPA Pro Forma terms that are consistent with the LMEC Agreement with PG&E. So long as the cogeneration facility is a QF[1] and is available to operate when called upon, nothing in the QF/CHP Settlement limits or prohibits the parties from negotiating alternative operational characteristics, including for example, enhanced dispatchability.

- 4.2.6 PPA Modifications

Consistent with the foregoing, the QF/CHP Settlement, that includes a number of pro forma PPAs, provides "[t]he CHP Pro-Forma PPA may be modified on a bilateral basis during negotiations for a particular CHP PPA…As set forth in Section 4.2.12…the IOUs may also offer other contract options in the CHP RFO." IEP believes other CHP RFP proposed projects are involved with modified pro forma PPAs.

- 4.3 Bilaterally Negotiated PPAs

"Bilaterally negotiated and executed CHP PPAs or Utility Prescheduled Facilities PPAs are part of the procurement options in this CHP Program." (Term Sheet 4.3.1)

[1] The Draft Resolution recognizes that participation in a CHP RFO is open to QFs that meet applicable requirements under applicable regulations; which requirements vary depending on the configuration of the project. Accordingly, some will apply to LMEC and some, such as the so-called "fundamental use test" in the Federal rules, will not.

Here again the QF/CHP Settlement provides eligible CHP facilities the ability to negotiate procurement alternatives under the CHP Program, none of which expressly prohibit capacity–only contracts with CHP facilities.

- 5.2 MW Counting Rules

> "The MWs counted for New PPAs executed with Existing CHP Facilities will be the published Contract Nameplate value, unless otherwise noted in this Settlement." (Term Sheet 5.2.3.1)
>
> "CHP PPAs executed with QFs who formerly sold to the IOUs and are not listed in the July 2010 Semi-Annual Reports will count towards the MW Targets based on the Contract Nameplate…" (Term Sheet 5.2.3.2)

Hereto, the QF/CHP Settlement directly addresses the IOU's MW targets, and how these targets are to be determined. As properly assessed and determined by ED staff, fifty-percent (50%) of Calpine's Los Medanos Energy Center's reported nameplate capacity of 561 MW (i.e., 280.5 MW) properly counts toward PG&E's MW Target. This too is consistent with the LMEC Agreement and with the MW accounting methodology outlined in the QF/CHP Settlement.

Given that the MW's associated with the LMEC Agreement are eligible per the QF/CHP Settlement eligibility requirements; that the QF/CHP Settlement clearly provides multiple procurement pathway options to meet PG&E's MW and greenhouse gas targets; and that no nexus exists between the MW counting and actual cogeneration energy production, IEP requests Commission approval of Draft Resolution E-4569.

Respectfully submitted,

Douglas K. Kerner

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March 21, 2013

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Re: Comments of The Independent Energy Producers Association on Draft Resolution E-4569 Addressing Southern California Edison Company's Advice Letter (AL) 2771-E.

To the Energy Division:

The Independent Energy Producers Association ("IEP") supports the Energy Division's ("ED") proposed outcome in Draft Resolution E-4569 for approval of two separate Agreements for Combined Heat and Power Resource Adequacy ("RA") Capacity Product: (1) 280.5 Megawatts ("MW") of new RA–only capacity associated with Calpine's Los Medanos Energy Center, LLC, and (2) 120 MW of RA–only capacity associated with Calpine's Gilroy Cogen, L.P. facility ("Calpine Agreement"). As discussed in greater detail below, these RA–only transactions comply with the requirements of the Qualifying Facility and Combined Heat and Power Program Settlement Agreement ("QF/CHP Settlement") established with the issuance of Decision ("D.") 10-12-035. IEP urges the Commission to expeditiously approve the Calpine Agreement resulting from Southern California Edison Company's ("SCE") *2011 Combined Heat and Power Request for Offers ("CHP RFO")* ("Advice 2771-E").

In timely protests filed by the following parties: (1) Shell Energy North America (US), L.P. ("Shell Energy"), the Marin Energy Authority ("MEA"), and the Alliance for Retail Energy Markets ("AReM"), collectively ("Joint Parties"); (2) Energy Producers and Users Coalition ("EPUC"); and (3) California Cogeneration Council ("CCC"), collectively ("Protesting Parties"), a number of arguments were made to suggest that (1) the QF/CHP Settlement did not contemplate RA–only contracts as eligible under SCE's CHP RFO, (2) the RA capacity costs from the Calpine Agreement was not approved in D. 10-12-035; and (3) the Calpine Agreement does not comport with the CPUC's QF/CHP Program Settlement standards for MW targets. The suggestion is that the only MWs that count towards the target are those associated with simultaneous production of CHP energy. That suggestion is clearly wrong, and Resolution (E-4569) correctly repudiates these arguments.

As an initial matter, the use of MWs of capacity as the counting metric, without specific reference to CHP energy production, is necessarily the correct implementation of the QF/CHP Settlement. Otherwise, unless a project had a perfect (100%) capacity factor, the MW counting would be uncertain depending upon actual operation over time. That obviously is not and could not practicably be the case. Moreover, the QF/CHP Settlement specifically contemplates that eligible projects that are selected and counted toward the MW target are not required to operate continuously or at any particular level. Furthermore, no requisite nexus exists between MW counting and actual CHP energy production in the QF/CHP Settlement. The following QF/CHP Settlement Term Sheet excerpts support this fact.

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  "As part of the bid package, IOUs may also offer the all source RFO in addition to the CHP–Only RFO and may also sign a hybrid contract of the two."

The QF/CHP Settlement therefore contemplates variations in both operational and PPA Pro Forma terms that are consistent with the Calpine Agreement with SCE. So long as the cogeneration facility is a QF and is available to operate when called upon, nothing in the QF/CHP Settlement limits or prohibits the parties from negotiating alternative operational characteristics, including for example, enhanced dispatchability.

- 4.3 Bilaterally Negotiated PPAs

  "Bilaterally negotiated and executed CHP PPAs or Utility Prescheduled Facilities PPAs are part of the procurement options in this CHP Program." (Term Sheet 4.3.1)

Here again the QF/CHP Settlement provides eligible CHP facilities the ability to negotiate procurement alternatives under the CHP Program, none of which expressly prohibit capacity–only contracts with CHP facilities.

- 5.2 MW Counting Rules

  "The MWs counted for New PPAs executed with Existing CHP Facilities will be the published Contract Nameplate value, unless otherwise noted in this Settlement." (Term Sheet 5.2.3.1)

  "CHP PPAs executed with QFs who formerly sold to the IOUs and are not listed in the July 2010 Semi-Annual Reports will count towards the MW Targets based on the Contract Nameplate…" (Term Sheet 5.2.3.2)

Hereto, the QF/CHP Settlement directly addresses the IOU's MW targets, and how these targets are to be determined. As properly assessed and determined by ED staff, fifty-percent (50%) of Calpine's Los Medanos Energy Center's reported nameplate capacity of 561 MW (i.e., 280.5 MW); and 120 MW of Calpine's Gilroy facilities reported nameplate capacity properly counts toward SCE's MW Target. This too is consistent with the Calpine Agreement and with the MW accounting methodology outlined in the QF/CHP Settlement.

Given that the MW's associated with the Calpine Agreement are eligible per the QF/CHP Settlement eligibility requirements; that the QF/CHP Settlement clearly provides multiple procurement pathway options to meet SCE's MW and greenhouse gas targets; and that no nexus exists between the MW counting and actual cogeneration energy production, IEP requests Commission approval of Draft Resolution E-4569.

Respectfully submitted,

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