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VIA ELECTRONIC MAIL

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Re: Pacific Gas and Electric Company's Comments on the California Electricity Generation Facilities Standards Committee's Proposed General Duty Standards

Dear Committee Members:

Pursuant to the schedule set forth in Commissioner Wood's notice dated May 9, 2003, Pacific Gas and Electric Company ("PG&E") hereby offers the attached comments on the California Electricity Generation Facilities Standards Committee's ("Committee") proposed General Duty Standards.

PG&E hopes the Committee finds these comments helpful in this proceeding.

Sincerely,

/s/

Janet C. Loduca

cc: Electronic Service List, Rulemaking 02-11-039

**PACIFIC GAS AND ELECTRIC COMPANY'S COMMENTS ON THE
CALIFORNIA ELECTRICITY GENERATION FACILITIES STANDARDS
COMMITTEE'S PROPOSED GENERAL DUTY STANDARDS**

I. Background

On April 16, 2003 Commissioner Wood issued a notice proposing that the California Electricity Generation Facilities Standards Committee (Committee) adopt three General Duty Standards (GDS) applicable to generating facilities in California at its next meeting. Parties served comments on the GDS on April 23, 2003. On April 29, 2003, parties were electronically served with a revised version of the GDS, which incorporated some of the parties' comments and added three additional standards. At the May 2, 2003 Committee meeting, the Committee adopted the initial three GDS as revised, but agreed to provide parties with an opportunity to file written comments on the new standards. PG&E submits these comments in accordance with the schedule set forth in Commissioner Wood's notice dated May 9, 2003.¹

II. Overview of GDS

The revised GDS consist of the following six standards:

1. Each Facility shall be operated and maintained in a safe, reliable and efficient manner that reasonably protects the public health and safety of California residents, businesses, employees, and the community.
2. Consistent with prudent industry practice, each Facility shall be operated and maintained so as to be reasonably available to meet the demand for electricity, and promote electric supply system reliability.
3. Each Facility shall comply with the protocols of the California Independent System Operator for the scheduling of powerplant outages.
4. No Facility shall be operated and maintained in a manner that its output is scheduled, delivered, adjusted or withheld: (a) for the purpose of unfairly, unjustly or unreasonably influencing wholesale electricity generation prices established by the Federal Energy Regulatory Commission, (b) by falsely declaring that a Facility has

¹ Commissioner Wood's May 9, 2003 notice stated that the Committee was specifically seeking comments on GDS 4, 5, and 6, but that parties were also permitted to comment on GDS 1, 2, and 3.

been forced out of service or otherwise become unavailable, or (b) by failing to comply with the must-offer conditions of a participating generator agreement.²

5. Consistent with prudent industry practice, each Facility shall maintain reasonable logs of operations and maintenance.
6. Each Facility shall be operated and maintained in a reasonable and prudent manner consistent with industry standards, and the legislative finding that each facility is an essential facility providing a critical and essential good to the California public.

Consistent with California Public Utilities Code § 761.3(d)(1)³, the GDS explicitly exempt nuclear-powered generating facilities that are regulated by the Nuclear Regulatory Commission (NRC) and participate as members of the Institute of Nuclear Power Operations (INPO). The GDS also exempt other types of facilities specifically listed in Section 761.3(h).

The Resolution adopting the GDS explains the relationship between the GDS and the more specific maintenance and operating standards established by the CEGFSC as follows:

The General Duty Standards for Operation and Maintenance complement the more specific Standards that the Committee has adopted, or may subsequently adopt. To the extent addressed by a more specific Standard, compliance with the specific Standard shall satisfy compliance with the general Standard.

III. Jurisdictional Issues

PG&E fully supports the goals stated in the GDS. PG&E strives to operate and maintain all of its generating facilities in a safe, reliable, and efficient manner that ensures availability to meet customer demand and complies with all laws and regulations, as well as the California Independent System Operator (ISO) Tariff and protocols. However, as discussed at length in earlier comments in this proceeding, PG&E believes the Committee and California Public Utilities Commission (Commission) lack authority to adopt or enforce maintenance and

² PG&E notes that the version of GDS 4 contained in Commissioner Wood's notice dated May 9, 2003 differs from the version contained in the revised draft of the GDS served on April 29, 2003. PG&E assumes the May 9, 2003 version is the most current.

³ All statutory references are to the California Public Utilities Code unless otherwise noted.

operations standards (including general duty standards) for hydroelectric projects licensed by the Federal Energy Regulatory Commission (FERC), based on FERC's exclusive jurisdiction over such facilities under Part I of the Federal Power Act (FPA). PG&E has briefed the federal preemption issue for FERC-licensed hydroelectric generating facilities in previous comments in this proceeding. We will not repeat those arguments here, but incorporate them by reference.

PG&E is also concerned that the proposed GDS 4 extends into areas within FERC's exclusive jurisdiction, as explicitly acknowledged by the legislature when it enacted SB39XX. PG&E addresses these and other concerns below.

III. Specific Comments On The GDS

A. GDS 4 Exceeds The Committee's Statutory Authority And Violates Principles Of Federal Preemption.

The proposed GDS 4 prohibits generators from "unfairly, unjustly or unreasonably influencing" wholesale electricity prices, falsely declaring a facility out of service or unavailable, and failing to comply with the must-offer conditions of a Participating Generator Agreement (PGA). PG&E respectfully submits that each of these prongs exceeds the authority granted to the Committee and Commission by Section 761.3 and violates principles of federal preemption.

1. The Legislature Has Acknowledged The Commission Must Seek FERC's Approval To Enforce The PGAs.

Addressing subsection (c) of GDS 4 first, in enacting Section 761.3 the legislature explicitly acknowledged FERC's exclusive jurisdiction over enforcement of the FERC-approved PGAs by stating that the Commission should "seek enforcement capability from the Federal Energy Regulatory Commission regarding the private generator agreement to provide for broader state control of operational activities of generation facilities in the state." Senate Bill No. 39

(2001-02 2d Ex. Sess.) § 1(c). GDS 4 appears to put the cart before the horse, imposing a state duty on generators to comply with the PGAs, before the state has any enforcement authority.

It is important to note that the PGAs already contain specific enforcement and penalty provisions.⁴ The PGA obligates generators to comply with the ISO Tariff and provides that the ISO may terminate the PGA if a generator fails to remedy any material default under the ISO Tariff. *See* PGA § 3.2.1 (ISO may terminate the PGA for “any material default under this Agreement and/or the ISO Tariff” that is not excused or remedied within thirty (30) days of written notice of default) & § 4.2 (“The Parties will comply will all applicable provisions of the ISO Tariff, including Section 2.3.2, 2.5.3.4 and 5. This Agreement shall be subject to the ISO Tariff which shall be deemed to be incorporated herein.”)

The PGA also grants the ISO authority to impose penalties and sanctions on Participating Generators for failure to comply with any provision of the PGA (including the obligation to comply with the ISO Tariff), and contains specific dispute resolution procedures. PGA §§ 5.1 & 7.1; ISO Tariff § 13. Disputes that are not resolved through negotiation or specified alternative dispute resolution procedures may be appealed to FERC or a court of competent jurisdiction. ISO Tariff § 13.4. FERC orders resulting from appeals are subject to judicial review pursuant to the FPA. ISO Tariff § 13.4.5.⁵

⁴ As noted in earlier comments in this proceeding, all generators that schedule energy with the ISO (including PG&E) are required to sign the FERC-approved PGA and are subject to the ISO Tariff and protocols. A copy of the current version of the PGA can be found at the ISO’s website at <http://www.caiso.com/docs/09003a6080/03/e3/09003a608003e3ac.pdf>.

⁵ Any change to the ISO Tariff or the PGA, including the enforcement and dispute resolution provisions, must be filed with and approved by FERC.

PG&E respectfully submits that the legislature's acknowledgment that the state must seek enforcement capability from FERC, coupled with the existing enforcement provisions within the PGA and ISO Tariff, render the Committee's adoption of GDS 4(c) inappropriate and premature.

2. The Legislature Has Acknowledged That FERC Has Exclusive Jurisdiction To Regulate Wholesale Electricity Prices.

Subsection (a) of GDS 4 prohibits generators from “unfairly, unjustly or unreasonably influencing wholesale electricity generation prices established by the Federal Energy Regulatory Commission.” Once again, PG&E respectfully submits this standard encroaches on an area reserved to the exclusive jurisdiction of FERC, as specifically acknowledged by the legislature.

Section 761.3(c) states, “Nothing in this section authorizes the commission to establish rates for wholesale sales in interstate commerce from those facilities. . . .” Under Part II of the FPA, FERC is granted exclusive jurisdiction over the “sale of electric energy at wholesale in interstate commerce.” 16 U.S.C. § 824(b)(1); Nantahala Power and Light Company v. Thornburg (1986) 476 U.S. 953, 956. FERC is obligated to ensure that all rates charged for wholesale electricity are “just and reasonable.” 16 U.S.C. § 824d(a).

Significantly, Section 206 of the FPA also grants FERC the authority to investigate and correct any unjust and unreasonable “rule, regulation, *practice*, or contract” that affects such rates. 16 U.S.C. § 824e(a) (emphasis added). Thus, FERC's exclusive jurisdiction extends not only to wholesale rates, but also to “any rule, regulation, practice or contract affecting such” rates. Proposed GDS 4(a) seeks to regulate conduct that falls squarely within this – *conduct and practices* which unjustly or unreasonably influence wholesale electric rates. PG&E respectfully submits that this standard is both beyond the authority granted to the Committee and Commission as reflected in Section 761.3(c), and violates clear principles of federal preemption.

3. GDS 4(b) Also Exceeds The Committee’s Statutory Authority.

Subsection (b) of GDS 4 prohibits generators from “falsely declaring that a Facility has been forced out of service or otherwise become unavailable.” As an initial matter, PG&E questions the relationship between the Committee’s mandate to establish operation and maintenance standards and a standard that prohibits making false statements regarding a unit’s availability. PG&E assumes the intent of GDS 4(b) is to prohibit and punish generators that falsely withhold generation in order to manipulate the market or gain some economic advantage. As with GDS 4(a), PG&E respectfully submits that GDS 4(b) is simply another attempt to regulate “unjust and unreasonable” practices that affect wholesale electricity rates and is beyond the Committee’s and the Commission’s jurisdiction and authority under Section 761.3.

As the Committee is aware from comments filed earlier in this proceeding, generators are already under an obligation to notify the ISO of any forced outages pursuant to the ISO Tariff and Outage Coordination Protocol (OCP).⁶ ISO Tariff §§ 2.3.3.9.2; ISO OCP § 6. The ISO Tariff also provides that within forty-eight (48) hours of the commencement of the forced outage, generators must provide the ISO with information explaining the cause of the forced outage, as well as any remedial actions taken. ISO Tariff § 2.3.3.9.5. As noted above, all Participating Generators are obligated to comply with the ISO Tariff and OCP.

Significantly, the ISO Tariff states that “[i]f the ISO determines that any Forced Outage may have been the result of gaming or other questionable behavior by the Operator, the ISO

⁶ FERC directed the ISO to establish its OCP to “ensure that sufficient generation capacity is available to meet anticipated market needs.” *San Diego Gas & Electric Company v. Sellers of Energy and Ancillary Service Into Markets Operated by the California Independent System Operator and the California Power Exchange*, 95 FERC ¶ 61,115, *6. On October 23, 2001, FERC accepted in part and rejected in part the ISO’s proposed Tariff revisions for outage coordination. 97 FERC ¶ 61,066, * 1 (October 23 Order). In response to the October 23 Order, the ISO filed revised Tariff sheets, which were approved by FERC on February 27, 2002. 98 FERC ¶ 61,202, *5.

shall submit a report describing the basis for its determination to FERC.” Id. (emphasis added).

As discussed above, FERC has exclusive jurisdiction under Part 206 of the FPA to investigate and correct unjust and unreasonable practices that affect wholesale electricity rates. 16 U.S.C. § 824e(a). Accordingly, PG&E submits that GDS 4(b) exceeds the Committee’s authority as limited by Section 761.3(c) and violates principles of federal preemption by encroaching on FERC’s exclusive jurisdiction.

B. For The Same Reasons, The Committee Should Rescind Its Adoption Of GDS 3.

For the same reasons discussed above with respect to GDS 4(b), PG&E submits that GDS 3 (requiring generators to comply with the ISO’s OCP) exceeds the Committee’s authority. PG&E also notes that FERC has rejected the Commission’s argument that the state, either alone or in conjunction with FERC under section 209 of the FPA, has authority to implement or enforce the ISO Tariff provisions and protocols related to scheduling and coordination of outages for generating facilities. *San Diego Gas & Electric Co. v. Seller of Energy and Ancillary Services Into Markets Operated by the California Independent System Operator and the California Power Exchange, et al.*, 98 FERC ¶ 61,204, *2 (February 27, 2002). Accordingly, PG&E urges the Committee to rescind its adoption of GDS 3.

C. GDS 5 Is Unnecessary Given The Committee’s Adoption Of Specific Logbook Standards.

GDS 5 requires generators to “maintain reasonable logs of operations and maintenance.” PG&E questions the need for this standard in light of the Committee’s recent adoption of more specific logbook requirements for thermal energy generating facilities, and its current consideration of logbook requirements for hydroelectric generating facilities. PG&E had

understood the original impetus behind adoption of GDS to be a concern that the Committee would not be adopting final maintenance and operation standards for some time. Given the Committee's progress on the specific logbook requirements, GDS 5 appears to add little value and may only serve to create confusion regarding what standards really apply when it comes to compliance and enforcement.

D. PG&E Believes GDS 6 Is Subsumed Within GDS 1 And 2 And Is Therefore Unnecessary.

GDS 6 requires generators to operate and maintain their facilities in a "reasonable and prudent manner consistent with industry standards while satisfying the legislative finding that each facility is an essential facility providing a critical and essential good to the California public." While PG&E supports the general principles stated in this standard, it is unclear what more this standard is intended to cover beyond the obligations stated in GDS 1 and 2. GDS 1 requires generators to operate and maintain their facilities in a "safe, reliable and efficient manner that reasonably protects the public health and safety," while GDS 2 requires generators to operate and maintain their facilities "so as to be reasonably available to meet the demand for electricity, and promote electric supply system reliability." PG&E believes GDS 6 is subsumed in GDS 1 and 2 and therefore unnecessary. However, to the extent the Committee intends GDS 6 to create obligations above and beyond those stated in GDS 1 and 2, PG&E requests the Committee to more clearly define the intent and scope of GDS 6.