

BEFORE THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF CALIFORNIA



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Application of Pacific Gas and Electric  
Company for Approval of a Power  
Purchase Agreement with Mariposa  
Energy, LLC.

(U39E)

A.09-04-001

(Filed April 1, 2009)

**REPLY COMMENTS OF THE  
DIVISION OF RATEPAYER ADVOCATES  
ON IMPACT OF DECISION 10-12-050  
ON PETITION FOR MODIFICATION FILED BY CALIFORNIANS  
FOR RENEWABLE ENERGY**

**I. INTRODUCTION**

Pursuant to Administrative Law Judge (ALJ) Angela Minkin's January 7, 2011 Ruling requesting concurrent opening and reply comments from parties on the impact of Decision (D.) 10-12-050 on the petition for modification (PFM) filed by Californians for Renewable Energy's (CARE), DRA submits the following reply comments.

DRA filed timely opening comments on January 28, 2011. The following reply comments respond only to Pacific Gas and Electric Company's (PG&E) comments. CARE's PFM maintains that PG&E breached the provisions of an all-party settlement that PG&E signed to resolve all issues in PG&E's Application for Approval of a Power Purchase Agreement (PPA) with Mariposa Energy, LLC. Specifically, Articles A and B of the agreement, (Mariposa Settlement Agreement) required PG&E to file one application for approval of all the remaining new resources arising from PG&E's 2008 Long-Term Request for Offers (LTRFO) solicitation, a total of 1,328 MW. The 184 MW Mariposa project also arose from the 2008 LTRFO but was submitted ahead of the other projects because PG&E claimed it was able to execute the agreement far ahead of

negotiations on the other projects. In order to prevent PG&E from submitting other projects from the LTRFO separately, thereby causing confusion, duplication of efforts and a waste of resources, the parties to the Mariposa Settlement Agreement agreed that all remaining new resources necessary to meet PG&E's LTRFO needs must be submitted with one application. DRA's opening comments indicated that PG&E has previously breached these provisions of the Mariposa Settlement Agreement by filing applications for approval of two other projects to be developed by Calpine Energy and GWF Tracy. In addition, in response to PG&E's PFM, the Commission's approval of the Oakley project as an application further violated the aforementioned provisions of the Mariposa Settlement agreement and resulted in a fourth PG&E applications for new resources arising from the 2008 LTRFO.

## **II. PG&E'S CLAIM THAT DECISION 10-12-050'S APPROVAL OF THE OAKLEY PROJECT WAS NOT A VIOLATION OF THE MARIPOSA SETTLEMENT AGREEMENT IS WITHOUT MERIT**

PG&E seeks to pass the buck for its violation of the Mariposa Settlement Agreement to the Commission by claiming that the Commission approved the Oakley project on its own motion. This argument is clearly disingenuous because PG&E filed a Petition asking the Commission to modify its earlier decision and to approve the Oakley project. What the Commission did on its own motion was to convert PG&E's Petition PG&E filed to an Application, because the Commission had earlier informed PG&E that it could only resubmit the Oakley project through the Application process.

The terms of the Mariposa Settlement Agreement also make it clear that the parties' responsibilities under the agreement are binding without regards to what the Commission might subsequently decide if PG&E files an application that violates the agreement.

Article A of the Agreement provides:

The Parties agree that the total need to be procured from the 2008 LTRFO will be limited to 1,512 MW, inclusive of the Mariposa

PPA (184 MW). The Parties support approval of the Mariposa PPA under the terms of this Settlement Agreement.

The essence of PG&E's argument that the Commission's approval of the Oakley project is not a violation of the Mariposa Settlement Agreement is perhaps that PG&E could not stop the Commission from choosing to exceed the limit the parties agreed to under the agreement. Thus, PG&E argues that because the Commission has clear statutory authority to modify previous Commission decisions, its approval of the Oakley project could not possibly be a violation of the Mariposa Settlement Agreement. However, this argument by PG&E is illogical. Had PG&E respected the terms of the agreement, PG&E would not have filed and asked the Commission to approve another project that would take PG&E's procurement over the agreed limit. Also, had PG&E not made the request, the Commission would not have approved the project. PG&E's decision triggered the Commission's decision to approve the project.

Indeed, Article B of the settlement agreement which PG&E also violated should have informed PG&E that the Commission's subsequent actions on an application that violates the agreement could not excuse the violation.

Specifically, Article B of the Agreement provides:

The balance of PG&E's need authorization in the LTPP Decision (1,328 MW) will be met, but not exceeded, *by one application* for approval of additional agreements resulting from PG&E's 2008 LTRFO. Emphasis added.

Under this provision, all the Commission needs to review to determine whether PG&E breached the agreement is the *number of applications* PG&E filed for the balance of the need authorized in the LTPP Decision. It is irrelevant to this decision whether the Commission in fact approves all those applications or only some of them.

It is undisputed that D.10-07-042 approved new resources that count towards "[t]he balance of PG&E's need authorization in the LTPP Decision" from two separate applications. It is also undisputed that D.10-12-050 further approved the Oakley project as a new resource arising from PG&E's need authorization in the LTPP Decision. In

fact, the Oakley project approved in D.10-12-050 came from a separate application than the Oakley project rejected in D.10-07-045. Therefore, it is unreasonable for PG&E to argue that it filed only one application for the balance of the need authorized in the LTPP decision. As D.10-07-042 clearly established, what PG&E filed is not defined by the labels PG&E places on the application to avoid its obligation under the Settlement Agreement but what the facts determine and the Commission finds as to whether the application is for the balance of the need authorized in the LTPP.

### **III. PG&E'S CLAIM THAT THE CALPINE AND GWF TRACY TRANSACTIONS AS WELL AS THE OAKLEY PROJECT ARE OUTSIDE THE 2006 LTPP DECISION IS UNREASONABLE**

PG&E's claim that the approval of the Novation resources in D.10-07-042 and the Oakley Project in D.10-12-050 were outside the 2006 LTPP need determination is without merit. In D.10-07-042, the Commission reaffirmed the long established rule that the LTPP decisions provide the utilities their only authority for procurement of new resources. (D.10-07-042, p.40). Thus, D.10-07-042 held that if the GWF Tracey Upgrade and Los Esteros Critical Energy Facility (LECEF) Upgrade transactions were approved, in addition to the Mariposa, Marsh Landing, and Oakley transactions, PG&E would violate the Mariposa Settlement Agreement.

PG&E has signed contracts to procure a total of 1,743 MW of new capacity from the 2008 LTRFO (254 MW from the Upgrade PPAs, 1305 MW from the Marsh Landing and Oakley projects, and 184 MW from the Mariposa project). Consequently, we conclude the Upgrade PPAs do not comply with the Mariposa Settlement Agreement and D.09-10-017. (Decision 10-07-042, page 55).

Likewise, Finding of Fact #7 from the same Decision states:

7. D.07-10-017 and the Mariposa Settlement Agreement limit PG&E's procurement of new capacity from the 2008 LTRFO to no more than 1,512 MW.

In light of the foregoing determinations that these projects were part of the LTRFO and subject to the 2006 LTRFO need determination, PG&E clearly violated the Mariposa Settlement Agreement by filing several applications for their approval.

Similarly, PG&E's claim that the GWF Tracy and LECEF Upgrades were not winning offers in the 2008 LTRFO should be dismissed. As PG&E noted, this argument is barred by collateral estoppel because the Commission has already determined this issue in previous decisions.

Decision 10-07-042 states that:

PG&E selected the Tracy Upgrade from the many bids it received in response to its 2008 long-term request for offers (LTRFO). To demonstrate the Tracy Upgrade PPA is a good deal, PG&E provided a comparison of the levelized net market value of the Tracy Upgrade PPA to other short-listed bids. (D.10-07-042, page 8.)

PG&E selected the LECEF Upgrade from the many bids it received in response to its 2008 LTRFO. To demonstrate the LECEF Upgrade PPA is a good deal, PG&E provided a comparison of the levelized net market value of the Tracy Upgrade PPA to other short-listed bids. (D.10-07-042, page 11.)

In its comments on the proposed decision, Calpine argues that the LECEF Upgrade PPA is not subject to the Mariposa settlement because the LECEF Upgrade was procured through the novation process, and not the 2008 LTRFO. *Calpine's argument is unpersuasive.* The LECEF Upgrade was bid into the 2008 LTRFO by Calpine, was evaluated extensively by PG&E during the 2008 LTRFO process, and was placed on PG&E's shortlist of offers from the 2008

LTRFO.<sup>1</sup> Given the provenance of the LECEF Upgrade, *we conclude that it is subject to the Mariposa settlement's limit on procurement from the 2008 LTRFO. (D. 10-07-042, page 55; emphasis added.)*

The above statements provide evidence that the upgrades were short-listed by PG&E and confirmed that these upgrades were subject to the Mariposa Settlement limit from the 2008 LTRFO. At this point, PG&E was already in violation of the Mariposa Settlement Agreement when it requested the approval of the GWF Tracy and Calpine LECEF Transactions in two applications (A.09-10-022 and A.09-10-034). Contrary to PG&E's claim, the Commission has already established that the upgrades count against the agreed upon MW limit memorialized in the Mariposa Settlement Agreement.

**IV. PG&E CLAIM THAT CARE'S PFM ISSUES IN A.09-09-021 AND A.09-04-001 WOULD RESULT TO A COLLATERAL ATTACK ON D.10-12-050 PROHIBITED BY P.U. CODE SECTION 1709**

PG&E's argument that CARE's PFM is barred by collateral estoppel misapplies the doctrine of collateral estoppel. It is interesting that PG&E makes this argument because it defeats PG&E's position and proves CARE's case. As PG&E noted, the doctrine provides that "once an adjudicating body has decided an issue of fact or law necessary to its judgment, collateral estoppel precludes relitigation of the issue in a different cause of action involving a party to the first proceeding." What PG&E fails to note is that, when an issue that has previously been litigated arises in a proceeding, the adjudicating body must accept the earlier resolution of that litigated issue. Therefore, the Commission and PG&E must accept D.10-07-042's determination that GWF Tracy and Calpine Los Esteros Critical Energy Facility Transactions consisted of two applications to meet the balance of the need authorized in the 2006 LTPP decision. CARE's PFM is litigating a different cause of action, which seeks to impose sanctions against PG&E for violation of the Mariposa Settlement Agreement. It is absurd for PG&E to claim that CARE had the opportunity to address these issues in the Applications that PG&E filed as the issues in those

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<sup>1</sup> PG&E Opening Brief at 20 – 21.

applications were primarily framed by PG&E. The scoping memo does not support this argument and the decision did not purport to address what if anything should happen to PG&E for the violation of the agreement. Therefore, PG&E's argument that CARE's PFM is barred by collateral estoppel is without merit.

However, even if collateral estoppel applies, it applies to ensure that the Commission in determining whether PG&E violated the Mariposa Settlement Agreement accepts the earlier rulings in D.10-07-042 and D.10-07-045 showing that PG&E acted in excess of the agreement. All that remains for this adjudicating body therefore, is deciding what sanctions are appropriate against PG&E.

## **V. CONCLUSION**

Based on the foregoing, the Commission should disregard PG&E's claims and rule that PG&E breached the Mariposa Settlement Agreement and should impose sanctions against PG&E.

Respectfully submitted,

/s/ NOEL A. OBIORA

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Noel A. Obiora

Attorney for the Division of Ratepayer  
Advocates

California Public Utilities Commission  
505 Van Ness Ave.  
San Francisco, CA 94102  
Phone: (415) -703-5987  
Fax: (415) 703-2262

February 18, 2011

**CERTIFICATE OF SERVICE**

I hereby certify that I have this day served a copy of **REPLY  
COMMENTS OF THE DIVISION OF RATEPAYER ADVOCATES ON  
IMPACT OF DECISION 10-12-050 ON PETITION FOR MODIFICATION  
FILED BY CALIFORNIANS FOR RENEWABLE ENERGY** to the official  
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**E-Mail Service:** sending the entire document as an attachment to all known  
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Executed on **February 18, 2011** at San Francisco, California.

/s/ ALBERT HILL

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Albert Hill

## SERVICE LIST

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martinhomec@gmail.com  
mdjoseph@adamsbroadwell.com  
nao@cpuc.ca.gov  
mflorio@turn.org  
MAGq@pge.com  
sarveybob@aol.com  
cassandra.sweet@dowjones.com  
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dbp@cpuc.ca.gov  
jnr@cpuc.ca.gov  
shi@cpuc.ca.gov  
skg@cpuc.ca.gov