BEFORE THE
PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA

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Application of Pacific Gas and Electric Company for Approval of Agreements Related to the Novation of the California Department of Water Resources Agreement with GWF Energy LLC, Power Purchase Agreement with GWF Energy II LLC, and Associated Cost Recovery (U39E).	Application 09-10-022 (Filed October 16, 2009)
Application of Pacific Gas and Electric Company for Approval of the Novation of the California Department of Water Resources Agreements Related to the Calpine Transaction, and Associated Cost Recovery (U39E).	Application 09-10-034 (Filed October 30, 2009)

CARE'S APPLICATION FOR REHEARING OF D. 10-07-042

CAlifornians for Renewable Energy, Inc. (CARE) requests rehearing of Decision (D.) 10-07-042 ("Decision") that was issued on August 4, 2010. CARE was a party to the proceeding and so is eligible to file a rehearing request pursuant to Rule 16.1[1] of the

[1] 16.1. (Rule 16.1) Application for Rehearing

(a) Application for rehearing of a Commission order or decision shall be filed within 30 days after the date the Commission mails the order or decision, or within 10 days of mailing in the case of an order relating to (1) security transactions and the transfer or encumbrance of utility property as described in Public Utilities Code Section 1731(b), or (2) the Department of Water Resources as described in Public Utilities Code Section 1731(c). An original plus four exact copies shall be tendered to the Commission for filing.

(b) Filing of an application for rehearing shall not excuse compliance with an order or a decision. An application filed ten or more days before the effective date of an order suspends the order until the application is granted or denied. Absent further Commission order, this suspension will lapse after 60 days. The Commission may extend the suspension period.

(c) Applications for rehearing shall set forth specifically the grounds on which the applicant considers the order or decision of the Commission to be unlawful or erroneous, and must make specific references to the record or law. The purpose of an application for rehearing is to alert the Commission to a legal error, so that the Commission may correct it expeditiously.

California Public Utilities Commission's ("Commission")'s Rules of Practice and Procedure. This request is timely because the decision was issued on August 4, 2010.

Decision 10-07-042[2]

In Application (A.) 09-10-022 and A.09-10-034, Pacific Gas and Electric Company (PG&E) requested CPUC approval of three transactions. The purported purposes of the transactions is to novate existing power purchase agreements (PPAs) from the CDWR to PG&E, and then replace the novated agreements with new long-term PPAs. The new PPAs would procure 1,090 megawatts (MW) of fossil-fuel capacity, including 254 MW of new capacity.

This decision approves the Peakers Transaction under which PG&E will procure 502 MW of capacity, energy, and ancillary services from existing facilities through 2017, and 325 MW through 2021. This decision grants conditional authority for PG&E to proceed with the Tracy Transaction and the Los Esteros Critical Energy Facility (LECEF) Transaction, which together provide 588 MW of capacity, including 254 MW of new capacity. Specifically, today's decision requires PG&E to proceed immediately with both of these transactions if PG&E's request for approval of the proposed Marsh Landing Project and/or Oakley Project is denied in A.09-09-021. If other events occur that create an unfilled need for the new capacity authorized by Decision 07-12-052 or subsequent decisions, PG&E may resubmit one or both of these transactions for Commission approval via a Tier 3 advice letter.

Issues

[2] CARE Exhibit 2 attached in Adobe format.
See http://docs.cpuc.ca.gov/PUBLISHED/FINAL_DECISION/121596.htm

Rule 16.1 explains that an application for rehearing shall set forth specifically the grounds on which the applicant considers the order or decision of the Commission to be unlawful or erroneous, and must make specific references to the record or law.

1. On May 4, 2010 in Docket No. EL10-64-000, the CPUC submitted a petition for declaratory order in which it requests that the Commission find that sections 205 and 206 of the Federal Power Act (FPA), section 210 of the Public Utility Regulatory Policies Act of 1978 (PURPA) and Commission regulations do not preempt the CPUC's decision to require California utilities to offer a certain price to combined heat and power (CHP) generation facilities of 20 MW or less that meet energy efficiency and environmental compliance requirements.

In 132 FERC ¶ 61,047 the FERC found[3] regarding the California Public Utilities Commission (CPUC) petition for declaratory order:

> The *Commission's authority under the FPA includes the exclusive jurisdiction to regulate the rates, terms and conditions of sales for resale of electric energy in interstate commerce by public utilities*.[4] While Congress has authorized a role for States in setting wholesale rates under PURPA, Congress has not authorized other opportunities for States to set rates for wholesale sales in interstate commerce by public utilities, or indicated that the Commission's actions or inactions can give States this authority. We disagree with the characterization of the CPUC's AB 1613 Decisions as merely establishing an "offering price" by the purchaser of power. Rather, we agree with the Joint Utilities that *the CPUC's AB 1613 Decisions constitute impermissible wholesale rate-setting by the CPUC. Because the CPUC's AB 1613 Decisions are setting rates for wholesale sales in interstate commerce by public utilities, we find that they are preempted by the FPA.*

[3] At paragraphs 64 and 65 of 132 FERC ¶ 61,047.
[4] 16 U.S.C. §§ 824, 824d, 824e (2006); *e.g.*, *Mississippi Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354 (1988).

> As noted above, however, a *state commission may, pursuant to PURPA, determine avoided cost rates for QFs*.[5] Although the CPUC has not argued that its AB 1613 program is an implementation of PURPA, we find that, to the extent the CHP generators that can take part in the AB 1613 program obtain QF status, the CPUC's AB 1613 feed-in tariff is *not* preempted by the FPA, PURPA or Commission regulations,[6] subject to certain requirements,... [*Emphasis* added]

Because the FERC found the CPUC lacked authority to set the wholesale rate, except for QFs, therefore those energy generation sources that the CPUC approved contracts for, that where not for QFs are in violation of the FERC's jurisdictional authority over wholesale rates.

Since "the CPUC submitted a petition for declaratory order in which it requests that the [FERC] find that sections 205 and 206 of the Federal Power Act (FPA), section 210 of the Public Utility Regulatory Policies Act of 1978 (PURPA) and [FERC] regulations do not preempt the CPUC's decision to require California utilities to offer a certain price " and the FERC determined its regulations do in fact preempt the CPUC's decisions therefore CPUC has waived any claims of sovereign immunity from the FERC's authority to hear and decide CARE's September 1, 2010 Complaint[7] against any of those contracts that CPUC has approved outside of the Commission's FPA authority or in excess of the utilities' avoided cost cap as determined by the Commission including those contracts approved by Decision (D.) 10-07-042.

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[5] See 16 U.S.C. § 824a-3 (2006); 18 C.F.R. § 292.304 (2010).
[6] 18 C.F.R. § 292.101 *et seq*. (2010).
[7] *See* FERC's Notice of Complaint http://elibrary.FERC.gov/idmws/file_list.asp?accession_num=20100901-3033 September 1, 2010, **Docket EL10-84-000** " pursuant to the Federal Power Act, 16 USC 824d, 824e, 825e, and 825h (2008) and Rule 206 of the Federal Energy Regulatory Commission's (Commission) Rules of Practice and Procedure, 18 CFR 385.206, (2010), CAlifornians for Renewable Energy, Inc. (Complainant) filed a complaint against Pacific Gas and Electric Company, Southern California Edison Company, San Diego Gas & Electric Company, and the California Public Utilities Commission (Collectively Respondents), alleging that the Respondents are violating the Federal Power Act by approving contracts for capacity and energy that exceeds the utilities' avoided cost cap and which also usurps the Commission's exclusive jurisdiction to determine the wholesale rates for electricity under its jurisdiction."

2. The Direct Access proceeding R.07-05-025 resulted in Decision D. 08-11-056, which directed the IOUs to pursue novation or replacement of the DWR long-term contracts in order to expedite DWR's removal from the electric supply marketplace. PG&E has attempted to use this mechanism to add another 254 MW of new generation through upgrades to the existing GWF and LECEF facilities.[8] D. 07-12-052 authorized PG&E to procure 800- 1200 MW of new generation and also authorized PG&E to procure another 312 MW to replace projects that failed from the previous RFO bringing the total authorized need to 1,112 to 1,512 MW. PG&E has already submitted and gained approval for the 184 MW Mariposa Project in 09-04-001. In A. 09-09-021 PG&E has submitted for approval two projects the Oakley Project and the Marsh landing Project which totals 1,305 MW bringing the total requested approval for new generation to 1,489 MW. PG&E now seeks to re-litigate their need determined in D. 07-12-052 by adding an additional 254 MW through the approval of the LECEF and GWF Upgrades.

D.09-08-031 states that the Commission will not be making any findings as to the reasonableness of any existing California Department of Water Resources (DWR) contracts which are included for Commission approval in the applications as the novated contracts. Therefore, the Commission should not approve the novated contracts requested in these applications. Instead, the Commission should consider all the proposed power plants including the replacement contracts proposed in the above captioned proceedings as options that could be chosen to achieve a maximum of 1,112 MW of new generating capacity.

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[8] January 29, 2010 Opening Brief of CARE at 4. *See* http://docs.cpuc.ca.gov/efile/BRIEF/113169.pdf
CARE Rehearing Application on Decision 10-07-042

This recommendation is consistent with the terms of the existing and the proposed contracts because the novated GWF power purchase agreement expires before the proposed replacement contract requires delivery of services, CARE recommends rejecting the Calpine 2 replacement and novated contracts, and the Calpine 3 contract extends the terms of the existing contract.

The issue of novating existing contracts for wholesale electricity purchases entered into by the California Department of Water Resources during the western energy crisis of 2000-1 was addressed in Commission Rulemaking (R.) 07-05-025. CARE was a party to that proceeding and disagreed with the Decision (D.) 08-11-056 ending the proceeding because the United States Supreme Court[9] found that the validity of the contracts could not be assured without further review and remanded the review of those contracts to the Federal Energy Regulatory Commission (FERC), since contracts may not be valid if they are not negotiated properly:

> "Like fraud and duress, unlawful market activity that directly affects contract negotiations eliminates the premise on which the Mobile-Sierra presumption rests: that the contract rates are the product of fair, arms-length negotiations.[10]"

The Commission appears to agree that the contracts proposed for novation should not be addressed in any manner that would indicate Commission approval or a finding that the contracts were reasonable,[11] D.09-08-031, p. 3. Therefore, CARE believes that

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[9] *Morgan Stanley Capital Group, Inc. v. Public Utility District No. 1 of Snohomish County* (*"Morgan Stanley"*) (2008) 128 S.Ct. 2733

[10] *Ibid.*

[11] "The Decision states that the Commission will review any replacement agreement executed pursuant to DWR contract novation or other negotiations to determine whether the replacement contract is "just and reasonable" under Public Utilities Code section 451.[] However, as the Decision notes: "the review of [the replacement contracts] will be separate and distinct from the setting in which the previously executed DWR contracts were negotiated and subsequently litigated." (D.08-11-056, p. 83.) The Decision also states that CARE Rehearing Application on Decision 10-07-042

the Commission should not approve the novated contracts, but instead to remove those contracts from consideration. The above captioned applications should be reviewed without approval of the novated contracts.

Additionally, the California Legislature adopted SB 695 which removed the requirement for novation of the remaining contracts entered into by the State of California in 2001. SB 695 was signed into law during October 2009. Among other things, SB 695 amended Section 80110(e) of the Water Code to eliminate the requirement that the suspension of direct access continue until DWR no longer supplied power pursuant to the applicable Water Code provisions. Therefore, the PG&E effort to novate the GWF and Calpine DWR contracts is no longer required

This does not mean that there should be two contracts operating simultaneously; the replacement contracts should be crafted to begin after the contracts proposed for novation have expired.

The issue of how much electric generating capacity is needed was addressed in the R.04-04-003 proceeding by D. 07-12-052 which determined that PG&E needed between 800 and 1200 MW, but also allowed PG&E to procure resources to replace those that were chosen in the 2006 LTRFO but were not ever placed in service. CARE believes that the combined electric power generation capacity requested in A.09-04-001, A.09-09-021, A.09-10-022, and A.09-10-034 should be considered as the new capacity contemplated by D.07-12-052.

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any reasonableness review of the replacement agreements under section 451 should in no way be construed as affecting the disposition of any pending litigation relating to existing DWR contracts. (D.08-11-056, p. 90 [Conclusion of Law 8].) ”

3. The upgrades are a bad deal for ratepayers and several projects from the short list have better market values. In both this proceeding and A.09-09-021, PG&E has submitted undisputed evidence that the Oakley Project has a significantly better market value than the upgrade PPAs.[12] In addition to the evidence presented by PG&E, TURN's analysis reveals that another project selected to the short list has better market value than the upgrades using PG&E's metrics.[13] The Independent Evaluator's (IE's) supplemental [14] report on the LECEF for example, provided as Appendix A to PG&E's January 11 Supplemental Testimony, computes even worse values for the incremental portions of the LECEF Upgrade.[15] When comparing the IE's calculated value of market value the upgrades five projects from the short list have better market values than the LECEF Upgrade for example.[16] DRA, and TURN provided confidential testimony that describes in detail why the cost of the upgrades are above market and a poor deal for ratepayers. Thus, the 2008 LTRFO demonstrates unequivocally that the cost of upgrades exceeds the market-clearing price for new capacity. The decision states, "We do not need to decide whether to use one or both methods, as either approach reaches the same result: the cost of each Upgrade PPA exceeds the market price for projects selected in the LTRFO."[17] But as the record reflect using the IE's market valuation or the market valuation of DRA, and TURN the upgrades ranks below five other projects that were not selected as winners form the short list. By the Decision's own reasoning and the

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[12] *See* Ex. 1-C, PG&E Prepared Testimony for A.09-10-022, Confidential Appendix 3 (showing market valuation of Oakley Project and Upgrade Projects), and Ex. 3-C, "Supplement to IE Report for PG&E's 2008 LTRFO/All source Solicitation for New Power Supplies", Confidential Appendix A-2.
[13] TURN Opening Testimony Page 15
[14] CARE Exhibit 12-C at 2 – 4, DRA Exhibit 7-C at 9 – 21, and TURN Exhibit 5-C at 13 - 15.
[15] PG&E Supplemental Testimony, Appendix A-1 (Supplement to Independent Evaluator Report), p. A-2-5.
[16] TURN Opening Testimony Page 15
[17] Decision Page 52

evidence in the record the upgrades are not just and reasonable since other projects had better market values as computed by the IE and the other parties. Approval of the upgrades is not in the best interests of the ratepayers because projects with better market values provide better benefit to the ratepayers. Additionally this sends a message to other prospective market participants that even if they offer the best value and the best project they may not be selected. The Decision allows a loser in the LTRFO to go forward while several projects with better market values and benefits for ratepayers are left with multi-million dollar application losses.

4. PG&E's Solar PV Program should count against the 2006 LTPP Decision need amount and eliminates any need for the LECEF Upgrade. D. 07-12-052 opined that, "Our primary focus in reviewing the LTPPs was whether the utilities are procuring preferred resources as set forth in the Energy Action Plan (EAP), in the order of energy efficiency, demand response, renewables, distributed generation and clean fossil-fuel.[18] While PG&E has just received approval for its 500 MW PV Program the Decision in A.09-09-021 fails to count that amount or a portion of that amount towards PG&E's need determined in D. 07-12-052. The Decision continues to send mixed messages to the utilities on the need to acquire renewable resources to satisfy their resource adequacy. A portion of the PG&E's 500 MW Solar Program should be counted against the need determined in D. 07-12-052 to be consistent with the RPS and Greenhouse Gas priorities of the State of California. In counting a portion of the 500 MW Solar application the need for the Los Esteros Upgrade is eliminated.

[18] D. 07-12-052 Page 2

5. No comments by the Parties where allowed after substantial modification to the final decision the Commission actually voted on. This violated CARE's right to due process. CPUC by failing to allow Parties opportunity to comment on substantial changes to the Decision before the full Commission vote was taken on the Decision, combined with FERC's July 15, 2010 Order, necessitated CARE to file its Complaint EL10-84 *et al* on September 1, 2010[19] to challenge the Decision at the FERC therefore.

Respectfully submitted,

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September 2, 2010

Verification

I am an officer of the Intervening Corporation herein, and am authorized to make this verification on its behalf. The statements in the foregoing document are true of my own knowledge, except matters, which are therein stated on information and belief, and as to those matters I believe them to be true.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 2nd day of September 2010, at San Francisco, California.

Lynne Brown Vice-President
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24 Harbor Rd
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[19] *See Complaint* http://elibrary.ferc.gov/idmws/common/opennat.asp?fileID=12427577

Certificate of Service

I hereby certify that I served the foregoing document "*CAlifornians for Renewable Energy, Inc. (CARE) application for rehearing of Decision (D.) 10-07-042"* under CPUC Dockets A.09-10-022 and A.09-10-034. Each person designated on the official service list, has been provided a copy via e-mail, to all persons on the attached service lists on September 2, 2010 transmitting the copies via e-mail to all parties who have provided an e-mail address. First class mail will be used if electronic service cannot be effectuated.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 2nd day of September 2010, at Soquel, California.

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