BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

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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)
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)

PREHEARING CONFERENCE STATEMENT OF CALPINE CORPORATION

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PREHEARING CONFERENCE STATEMENT OF CALPINE CORPORATION

Pursuant to the December 2, 2009 Ruling of Administrative Law Judge Kenney, ("December 2 Ruling"),[1] Calpine Corporation ("Calpine") respectfully submits this prehearing conference statement.[2] The December 2 Ruling identifies several issues to be addressed in prehearing conference statements related to the request of Pacific Gas and Electric Company ("PG&E") for approval of five contracts which constitute the novation of two 2002 contracts between DWR and affiliates of Calpine.[3] As discussed below, the issues to be addressed in this proceeding should be limited to determining whether the Calpine Transaction is just and reasonable and whether the Calpine Transaction should be approved.

[1] Administrative Law Judge's Ruling Setting a Consolidated Prehearing Conference (PHC) and Requiring PHC Statements (Dec. 2, 2009).

[2] The December 2 Ruling set a consolidated prehearing conference in A.09-10-034 and A.09-10-022. In A.09-10-022, PG&E requests Commission approval of five contracts that it has executed with the GWF Energy LLC entities ("GWF") related to the novation of a power purchase agreement executed by GWF and the California Department of Water Resources ("DWR") (the "GWF Transaction"). Calpine is currently not a party in A.09-10-022.

[3] The DWR Contracts consist of: (1) the "Calpine 2 Contract," a contract for 180 megawatts ("MW") of energy and capacity for output from the Los Esteros Critical Energy Facility ("LECEF"); and (2) the "Calpine 3 Contract," a contract for 495 MW of energy and capacity from 11 peakers facilities identified in the contract through July of 2011. Collectively, the contracts which comprise the novation of the Calpine 2 Contract and the Calpine 3 Contract are referred to as the "Calpine Transaction." *See* Application at 1.

I. ISSUES IDENTIFIED IN THE DECEMBER 2 RULING

1. The exact issues that need to be decided in A.09-10-034 and A.09-10-022

The exact issues that need to be decided in A.09-10-034 and A.09-10-022 consist of:

- Whether the Calpine Transaction and the GWF Transaction are each just and reasonable and thus should be approved by the Commission pursuant to Decision 08-11-056.
- Whether the LECEF Upgrade Power Purchase Agreement ("LECEF Upgrade PPA") under the Calpine Transaction and the Tracy Upgrade Power Purchase Agreement ("Tracy Upgrade PPA") under the GWF Transaction each meets Emissions Performance Standard ("EPS") requirements.
- Whether PG&E should be authorized to recover costs incurred pursuant to the PPAs associated with the Calpine Transaction and the GWF Transaction in the ERRA and recover any stranded costs.

While the above issues to be considered by the Commission in A.09-10-034 and A.09-10-022 are the same, the consideration of these issues with respect to the Calpine Transaction and the GWF Transaction is highly fact-specific and based on the unique attributes of each transaction. As a result, the Commission's evaluation of the Calpine Transaction and the GWF Transaction should occur separately in their respective dockets.

2. The issues that should be excluded from A.09-10-034 and A.09-10-022

Several issues have been raised in protests that should be excluded from the scope of A.09-10-034 and A.09-10-022. These issues include:

a. Consideration of the LECEF Upgrade PPA and the Tracy Upgrade PPA as separate contracts distinct and severable from the Calpine Transaction and GWF Transaction respectively

In its protest, The Utility Reform Network ("TURN") asserts that the LECEF Upgrade PPA "is a separate contract" that is not necessary to achieve "the novation of the Calpine 2 DWR contract."[4] CAlifornians for Renewable Energy, Inc. ("CARE") suggests that the LECEF Upgrade PPA should be evaluated as a distinct contract to be considered along with the resources

[4] TURN Protest (A.09-10-034) at 5 (emphasis omitted)

for which PG&E has requested approval in A.09-09-021.[5] Simply put – these parties are wrong. As described in PG&E's application for approval of the Calpine Transaction and its supporting testimony and attachments (in particular, the contracts themselves), the contracts which comprise the novation of the Calpine 2 Contract constitute a single transaction that cannot be de-linked for approval purposes.

In Decision 08-11-056, the Commission rejected requests to limit or otherwise prejudge the scope of renegotiated DWR contracts[6] and instead gave parties the "flexibility" to pursue "*more expansive revisions . . . which provide mutual benefits*."[7] As demonstrated by the Calpine Transaction, PG&E and Calpine pursued and agreed to certain revisions to the terms and conditions contained in the underlying DWR contracts that provide significant benefits to California, PG&E ratepayers and the parties. The fact that these revised terms and conditions are being effectuated through the execution of several contracts in no way suggests that the individual contracts are severable or can be otherwise de-linked. On the contrary, the contracts are interrelated and the benefits associated with them are contingent on the Commission approval of each and every contract. For these reasons, consideration of the LECEF Upgrade PPA on its own and independent from the Calpine Transaction should be rejected and specifically excluded from the scope of this proceeding.

b. Competitive procurement/solicitation issues

The Alliance for Retail Energy Markets and the California Large Energy Consumers Association ("AReM/CLECA") assert that the Commission cannot approve "New MW

[5] CARE Protest (A.09-10-034) at 5-6.
[6] Decision 08-11-056, mimeo at 73 ("We conclude that the choice of whether to execute novation by replacing the contract "as is," or to seek more extensive revisions at the same time is best evaluated on a contract-by-contract basis, rather than simply requiring a one-size-fits-all approach.")
[7] Decision 08-11-056, mimeo at 74 (emphasis added).

Agreements"[8] absent participation in a competitive solicitation consistent with Decision 07-12-052.[9] This issue, however, has already been resolved by the Commission and should not be considered within the scope of this proceeding.

In Decision 08-11-056, the Commission determined that IOU procurement plans do not require that power be procured solely via a competitive request for offers process.[10] Notwithstanding this determination, in addressing subsequent implementation measures, the Division of Ratepayer Advocates ("DRA") argued that "the just and reasonableness determination [of renegotiated DWR contracts] should take into account the results of the existing competitive procurement process."[11] DRA's position – now being taken up by AReM/CLECA - has been clearly and unequivocally rejected by the Commission:

> As a general principle, each replacement contract will be reviewed on its own merits as a bilateral contract. In this regard, the standard of review for bilateral transactions, as noted above by PG&E could prove useful in evaluating replacement contracts. *DRA's recommendation is not adopted to evaluate replacement contracts based on a competitive RFO standard*.[12]

Evaluating the Calpine Transaction and GWF Transaction as if they were part of a competitive solicitation authorized pursuant to Decision 07-12-052 is also inconsistent with several other aspects of Decision 08-11-056. For instance, in Decision 08-11-056, the Commission recognized that the novation and renegotiation of DWR contracts would *not* occur on a set schedule. As a result, the Commission determined that:

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[8] AReM/CLECA define "New MW Agreements" as the LECEF Upgrade PPA, the CES Replacement Agreement, and the GEC Replacement Agreement. AReM/CLECA Protest (A.09-10-034) at 3. The AReM/CLECA protests does not define the CES Replacement Agreement, and the GEC Replacement Agreement.
[9] AReM/CLECA Protest (A.09-10-034) at 5-10.
[10] Decision 08-11-056, mimeo at 52.
[11] Assigned Commissioner and Administrative Law Judge's Ruling Regarding Implementation Measures for Phase II (A)(2), R.07-05-025, issued on Feb. 4, 2009 at 8.
[12] Assigned Commissioner and Administrative Law Judge's Ruling Regarding Implementation Measures for Phase II (A)(2), R.07-05-025, issued on Feb. 4, 2009 at 10 (emphasis added).

> [R]eview of replacement contracts will be scheduled to occur promptly for each replacement contract *as negotiation is completed* . . . .[13]

Given that the Commission fully contemplated reviewing renegotiated DWR contracts on a transaction-by-transaction basis as they were submitted by the utilities, the Commission could not have intended or otherwise expected to consider the Calpine Transaction and GWF Transaction as part of PG&E's recent long-term resource solicitation as AReM/CLECA suggests.

c. Senate Bill ("SB") 695

AReM/CLECA assert that Decision 08-11-056 has been rendered moot by SB 695 and that, as a result, "D.08-11-056 may no longer provide the appropriate framework for evaluation of" renegotiated DWR contracts.[14] The assigned Commissioner in R.07-05-025, however, has already considered this issue and directed the utilities to "each independently continue their best efforts to implement novation or renegotiation of DWR contracts where it is cost-effective to do so."[15] Thus, SB 695 is not an issue that should be considered part of the Commission's evaluation of the Calpine Transaction.

d. Authority to execute long-term agreements

DRA believes the scope of this proceeding should include whether Decision 08-11-056 "directed utilities to execute long[-]term procurement agreements, as exemplified by the LECEF Upgrade PPA."[16] The type of modification to DWR contracts, such as an extended term for increased capacity, is not an issue within the scope of this proceeding; but rather a settled issue that allows the Commission to move directly to consider the reasonableness of the proposed Calpine and GWF transactions separately and on their own merits.

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[13] Decision 08-11-056, mimeo at 83 (emphasis added).
[14] AReM/CLECA Protest (A.09-10-034) at 4, 10-11. CARE and DRA also believes the impact of SB 695 should be within the scope of the proceeding. *See* CARE Protest (A.09-10-034) at 3; DRA Protest (A.09-10-034) at 3.
[15] Assigned Commissioner's Ruling on Procedures to Address Senate Bill 695 Issues relating to Direct Access Transactions, issued on Nov. 18, 2009 at 8.

As discussed above, in Decision 08-11-056, the Commission gave parties the "flexibility" to pursue "expansive revisions" to the DWR contracts, without any limitations as to the form such revisions may take.[17] The reason the Commission gave parties such negotiating flexibility is simple – placing limitations on renegotiated DWR contracts could deprive ratepayers of potential benefits. Notwithstanding this flexibility, because every novated or renegotiated DWR contract will be subject to the Commission's review and approval under a "just and reasonable" standard, ratepayers are protected. Accordingly, the underlying authority of PG&E to execute long-term agreements as part of the novation and renegotiation of DWR contracts should be excluded from the scope of this proceeding.

e. The *Morgan-Stanley* decision

CARE asserts that the validity of the underlying DWR contracts is an issue in this proceeding. The Commission, however, has addressed this issue several times, most recently in its denial of CARE's application for rehearing of Decision 08-11-056:

> The Decision [Decision 08-11-056] 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."[18]

In considering the Calpine Transaction and the GWF Transaction, the Commission would not be determining the just and reasonableness of the underlying DWR contracts. On the contrary, the Commission would be considering the reasonableness of these transactions separately and on their own merits.

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[16] DRA Protest (A.09-10-034) at 3.

[17] Decision 08-11-056, mimeo at 74 (emphasis added).

[18] Decision 09-08-031, mimeo at 3 (citations omitted).

3. The division of issues between A.09-10-034 and A.09-10-022

As discussed above, the issues to be considered by the Commission in A.09-10-034 and A.09-10-022 are the same. The consideration of these issues, however, is highly fact-specific and based on the unique attributes and merits of each transaction. Thus, the Commission's consideration of theses issues and its evaluation of the Calpine Transaction and the GWF Transaction should occur separately in their respective dockets.

4. The division of issues between: (1) A.09-10-034 and A.09-10-022, and (2) A.09-09-021

The transactions that are the subject of A.09-10-034 and A.09-10-022 are authorized by a Commission decision that was issued in a different and unrelated proceeding than the transactions at issue in A.09-09-021. Thus, as a matter of policy, it is inappropriate to apply the standards for evaluating the transactions at issue in A.09-09-021 to the Calpine Transaction and GWF Transaction. As a result, issues such as the amount of megawatts PG&E has been authorized to procure by Decision 07-12-056 should not be a factor, much less a controlling factor, in the Commission's evaluation of the Calpine Transaction and the GWF Transaction.

Furthermore, the goals and benefits at issue in A.09-10-034 and A.09-10-022 are different than the goals and benefits at issue in A.09-09-021. For example, in Decision 02-12-069, the Commission identified the return to full utility responsibility for energy market related activities as a "fundamental short-term goal[]."[19] In Decision 08-11-056, the Commission re-affirmed this goal and further identified specific benefits that would accrue to ratepayers as DWR contracts were novated and renegotiated.[20] These goals and benefits are not at issue in A.09-09-021.

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[19] Decision 02-12-069, mimeo at 8.
[20] *See e.g.*, Decision 08-11-056, mimeo at 29.

Given theses fundamental differences, the Commission's consideration of A.09-10-034 and A.09-10-022 should be undertaken separately and independently from its consideration of A.09-09-021.

5. What additional information, if any, PG&E should be required to provide and when the information should be provided

Calpine believes PG&E has provided the Commission with the information necessary for the Commission to issue a decision approving the Calpine Transaction.

6. The procedures that should be used to resolve disputed issues (e.g., workshops, written comments, evidentiary hearings, etc.)

Based on Calpine's review of the protests filed in A.09-10-034 and its participation in the December 9, 2009 teleconference held by PG&E pursuant to the December 2 Ruling ("December 9 Teleconference"), any and all disputed issues can, and should, be resolved through the submission of written testimony and/or the filing of briefs. As discussed below, at the December 9 Teleconference, parties reached consensus on a procedural schedule that includes written testimony and briefs but does not call for workshops or evidentiary hearings. Calpine fully supports this procedural schedule.

7. Whether evidentiary hearings are necessary. Any party that believes hearings are needed must list and describe the factual issues that will be addressed at the evidentiary hearings and summarize the evidence that the party intends to offer

As discussed above, any and all disputed issues can, and should, be resolved through the submission of written testimony and/or the filing of briefs, and without the need for an evidentiary hearing.

8. The dates and milestone for a proceeding schedule that result in a proposed decision being ready for the Commission meeting on April 22, 2010. The schedule should: (1) identify the date for major milestones, such as written testimony, evidentiary hearings, and briefs; and (2) assume that reply briefs, if any, will be filed no later than February 6, 2010

At the December 9 Teleconference parties reached consensus on the following procedural schedule:

Event	Date
Intervenor Testimony	January 15, 2010
Rebuttal Testimony	January 22, 2010
Opening Briefs	January 29, 2010
Reply Briefs	February 5, 2010

During the teleconference, DRA reserved the right to request an evidentiary hearing after the exchange of rebuttal testimony on January 22. In requesting an evidentiary hearing, DRA must list and describe the factual issues that it will address at the evidentiary hearing and summarize the evidence that it intends to offer.[21] If an evidentiary hearing should be held, it must still allow for a proposed decision to be prepared for consideration by the Commission at the Commission's April 22, 2010 business meeting. Calpine fully supports the above procedural schedule and would oppose any change that might delay a proposed decision being ready for the Commission meeting on April 22, 2010.

II. TIME IS OF THE ESSENCE

The Commission has determined that the return to full utility responsibility for energy market related activities is an important goal with potentially significant benefits to California. To ensure the timely consideration of transactions that would remove DWR from the role of supplying power, the Commission concluded that "the 'just-and-reasonable' review of

[21] *See* December 2 Ruling at 3-4.

replacement contracts will be scheduled to occur *promptly* for each replacement contract as negotiation is completed ….”[22]

As demonstrated in PG&E’s application for approval of the Calpine Transaction and its supporting testimony and attachments, the Calpine Transaction will provide significant benefits to California and PG&E ratepayers. To ensure these benefits are realized, it is critical that the Commission issue a decision in A.09-10-034 no later than its April 22, 2010 business meeting.

Respectfully submitted,

/s/ Jeffrey P. Gray

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Dated: December 14, 2009

[22] Decision 08-11-056, mimeo at 83 (emphasis added).

CERTIFICATE OF SERVICE

I, Judy Pau, certify:

I am employed in the City and County of San Francisco, California, am over eighteen years of age and am not a party to the within entitled cause. My business address is 505 Montgomery Street, Suite 800, San Francisco, California 94111-3834.

On December 14, 2009, I caused the following to be served:

PREHEARING CONFERENCE STATEMENT OF CALPINE CORPORATION

via electronic mail to all parties on the service lists A.09-10-034 and A.09-10-022 who have provided the Commission with an electronic mail address and by First class mail on the parties listed as "Parties" and "State Service" on the attached service lists who have not provided an electronic mail address.

/s/
Judy Pau

VIA U.S. MAIL AND EMAIL

President Michael R. Peevey
Administrative Law Judge Timothy Kenney