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TO PARTIES OF RECORD IN APPLICATION 11-12-003

This is the proposed decision of Administrative Law Judge (ALJ) Melissa K. Semcer. It will not appear on the Commission's agenda sooner than 30 days from the date it is mailed. The Commission may act then, or it may postpone action until later.

When the Commission acts on the proposed decision, it may adopt all or part of it as written, amend or modify it, or set it aside and prepare its own decision. Only when the Commission acts does the decision become binding on the parties.

Parties to the proceeding may file comments on the proposed decision as provided in Article 14 of the Commission's Rules of Practice and Procedure (Rules), accessible on the Commission's website at www.cpuc.ca.gov. Pursuant to Rule 14.3, opening comments shall not exceed 15 pages.

Comments must be filed pursuant to Rule 1.13 either electronically or in hard copy. Comments should be served on parties to this proceeding in accordance with Rules 1.9 and 1.10. Electronic and hard copies of comments should be sent to ALJ Semcer unc@cpuc.ca.gov and the assigned Commissioner. The current service list for this proceeding is available on the Commission's website at www.cpuc.ca.gov.

/s/ KAREN V. CLOPTONKaren V. Clopton, Chief
Administrative Law Judge

KVC:acr

Attachment

Decision **PROPOSED DECISION OF ALJ SEMCER** (Mailed 9/4/2012)

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application of Pacific Gas and Electric
Company (U39E) for Approval of
Amendments to Qualifying Facility Power
Purchase Agreement With Thermal Energy
Development Partnership, L.P.

Application 11-12-003
(Filed December 8, 2011)

**DECISION GRANTING IN PART AND DENYING IN PART APPLICATION
FOR APPROVAL OF CONTRACT AMENDMENTS**

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DECISION GRANTING IN PART AND DENYING IN PART APPLICATION FOR APPROVAL OF CONTRACT AMENDMENTS**1. Summary**

This decision grants in part and denies in part Pacific Gas and Electric Company's (PG&E) application seeking Commission approval of two amendments to an existing Qualifying Facility Standard Offer Power Purchase Agreement between PG&E and Thermal Energy Development Partnership, L.P. (Thermal Energy) for operation of Thermal Energy's biomass facility located in Tracy, California. The Energy Price Amendment is approved as proposed with an effective date of September 1, 2011; the Firm Capacity Amendment is denied. PG&E shall recover costs associated with the Energy Price Amendment through its Electric Revenue Recovery Account. This proceeding is closed.

2. Procedural History

On December 8, 2011, Pacific Gas and Electric Company (PG&E) filed Application (A.) 11-12-003 seeking Commission approval of two amendments to an existing Qualifying Facility (QF) Standard Offer Power Purchase Agreement (PPA) between PG&E and Thermal Energy Development Partnership, L.P. (Thermal Energy) for operation of Thermal Energy's biomass facility located in Tracy, California (Facility). A protest was timely filed by Robert Sarvey (Sarvey) on January 7, 2012, and PG&E timely filed a reply on January 20, 2012. A prehearing conference (PHC) was held on February 1, 2012; Sarvey was not present. Per the scoping memo issued in this proceeding on February 17, 2012, PG&E and Sarvey filed and served concurrent opening briefs on February 29, 2012. In addition, Sarvey filed a motion for leave to file confidential material under seal cited in his opening brief. PG&E and Sarvey filed and served concurrent reply briefs on March 14, 2012, and both filed motions for leave to file

confidential material under seal contained in reply briefs. All three motions for confidential treatment pertaining to material in opening and reply briefs are addressed in a separate ruling. No requests for hearings were filed as of the February 29, 2012 deadline in the scoping memo, and there are no disputed issues of fact. Therefore, hearings are not needed in this proceeding, and we change the preliminary determination in Resolution ALJ 176-3286, issued on December 15, 2011.

3. Background

The Facility is a 21 megawatt (MW) nameplate capacity generator that uses biomass as its fuel and has been delivering Renewable Portfolio Standard (RPS)-eligible energy. The existing PPA between PG&E and Thermal Energy is a 30-year Interim Standard Offer 4 QF contract that expires on May 30, 2020. Thermal Energy has delivered electricity generated by the Facility under the PPA since the Facility began operations; however, firm capacity deliveries commenced in 1990. In 2010, Thermal Energy approached PG&E and indicated that it had become uneconomic to operate the Facility under the existing PPA terms and conditions. Of particular concern to Thermal Energy was the insufficiency of the Short Run Avoided Cost energy price to justify continued operation of the Facility. PG&E and Thermal Energy executed the amendments described below in September 2011. Over the past year, PG&E has executed a number of other amendments with biomass facilities and has submitted those amendments for approval through the Commission's advice letter process. To date, all such amendments have been approved.¹ PG&E submitted the instant

¹ See, e.g. Resolutions E-4412, E-4427, E-4455, and E-4491.

amendments via application rather than advice letter because, as described below, the Firm Capacity Amendment has duration greater than five years.

4. Description of the Proposed Amendments and Authority Sought

In this application, PG&E seeks approval of two separate amendments (together, the Amendments) to the existing PPA with Thermal Energy. The Energy Price Amendment provides Thermal Energy with a higher price for RPS-eligible delivered energy in exchange for stricter performance obligations, among other terms and conditions. PG&E states that the Energy Price Amendment is necessary in order for Thermal Energy to continue to operate the Facility for a minimum of three years. The Energy Price Amendment can be extended twice at PG&E's election. The first option is for a one-year extension and the second option, which can only be exercised if the first option has been exercised, is for an additional eleven months. If PG&E elects to exercise the first and second extensions, the Energy Price Amendment would have a term of four years and eleven months. If approved, PG&E requests that the Energy Price Amendment take effect retroactive to September 1, 2011.

The second amendment for which PG&E seeks approval is the Fifth Amendment to the PPA and is referred to in the application as the Firm Capacity Amendment. The Firm Capacity Amendment increases the existing PPA firm capacity from 13 MW to 18 MW and also modifies the firm capacity price paid under the PPA for the incremental deliveries between 13-18 MW.² PG&E similarly requests that the Firm Capacity Amendment take effect September 1,

² The capacity price for the first 13 MW remains unchanged per the existing PPA.

2011, and it will remain in effect until the PPA expires on May 30, 2020. In the event the Commission rejects the Firm Capacity Amendment, parties have negotiated an alternate energy price under the Energy Price Amendment.

Finally, PG&E requests authority to recover costs incurred under the Amendments through its Energy Resource Recovery Account (ERRA) or other appropriate ratemaking mechanism, subject only to the Commission's ongoing review of the reasonableness of PG&E's contract administration.

5. Issues Before the Commission

The Commission considers the following issues in evaluating the proposed Amendments:

1. Are the Amendments just and reasonable? In deciding this overarching issue, we considered the following factors:
 - a. Are the Amendments in the best interest of PG&E's ratepayers?
 - b. Are the Amendments cost-effective?
 - c. Are the Amendments necessary to enable Thermal Energy to continue to generate and sell to PG&E RPS-eligible power from its biomass facility?
 - d. Are the Amendments consistent with the QF and Combined Heat and Power Program Settlement Agreement adopted in D.10-12-035?³
 - e. Do the Amendments contain all relevant RPS non-modifiable standard terms and conditions as compiled in D.08-04-009, D.08-08-028, and D.10-03-021 as modified by D.11-01-025?

³ Issues 1.d., 1.e., 1.f., and 1.g. are included as part of the scope of this proceeding to provide decisional consistency to the aforementioned amendments evaluated through the advice letter process.

- f. Is the Thermal Energy Facility needed to meet PG&E's RPS portfolio requirements and are the Amendments consistent with the RPS resource needs identified in PG&E's 2011 RPS Procurement Plan?
 - g. Were the Amendments presented to PG&E's Procurement Review Group (PRG) as required by D.02-08-071?
2. Should the Amendments be approved?
 - a. If approved should the Amendments be effective September 1, 2011, or should the Amendments become effective upon final Commission approval?
 3. Should PG&E be authorized to recover the costs of the Amendments through the ERRA or other appropriate ratemaking mechanism?

6. Discussion

The primary consideration before us is whether the proposed Amendments are reasonable and in the best interest of ratepayers. After evaluating the proposed Amendments against the above criteria and based upon the record before us, we find the Energy Price Amendment to be just and reasonable and approve that amendment retroactive to September 1, 2011. We deny PG&E's application for approval of the Firm Capacity Amendment for reasons detailed below. PG&E may recover costs associated with the Energy Price Amendment through its ERRA.

6.1. Are the Amendments Just and Reasonable?

In order make a finding that the proposed Amendments are just and reasonable, we evaluate them against several criteria such as cost effectiveness, which includes a weighting of the proposed increased energy price against negotiated enhanced performance requirements, project viability, necessity of the amendments to ensure continued operation of the Facility, and the role of the Facility in achieving PG&E's RPS obligations. In addition, we evaluate the

Amendments against various guiding Commission decisions as well as previous treatment of similarly situated facilities.

6.1.1. Ratepayer Interest

PG&E argues that the proposed Amendments are in the interest of ratepayers for several reasons. First, PG&E states that the Amendments will allow Thermal Energy to continue to operate the Facility and provide a reliable, consistent source of RPS-eligible energy that has been in commercial operation for more than 20 years. The energy produced by the Facility is currently included in PG&E's baseline of RPS-eligible deliveries. Second, the Amendments enable Thermal Energy to maintain deliveries of RPS-eligible energy at historical levels but with stricter performance requirements that require Thermal Energy to deliver a specific amount of RPS-eligible energy on a year-round basis, rather than limiting deliveries to certain seasons as occurs under the existing QF PPA. Third, the Energy Price Amendment includes specific forecasting and scheduling requirements that allow PG&E to more accurately schedule the Facility in the California Independent System Operator (CAISO) markets. Fourth, the Amendments include specific outage reporting and scheduling requirements that are not included in the existing QF PPA and will allow PG&E to be aware of and better plan for outages of the Facility, as well as notifying the CAISO of outages. Finally, the Energy Price Amendment includes a curtailment provision that is absent in the existing QF PPA.

Sarvey argues that the Amendments are not cost effective and are overly generous given Thermal Energy's financial situation and do not strike the correct balance between cost and ratepayer risk. In addition, Sarvey contends that the Facility is not needed to meet PG&E's 33% RPS requirement, nor should operations of the Facility be maintained in order to comply with

Executive Order S-06-06, which establishes a goal of 20% RPS-eligible energy sourced from biomass facilities.

We examine each of the arguments made by PG&E and Sarvey in more detail below; however, on balance, we find the Energy Price Amendment to be in the interest of ratepayers for several reasons. First, the Energy Price Amendment strikes an adequate balance between price and ratepayer benefit in the form of increased performance obligations described above. Second, based upon a statement by Thermal Energy's management and the evaluation of the Independent Evaluator (IE), we are convinced that the Energy Price Amendment is needed in order to ensure continued operations of the Facility in the short-term. Third, we find the Energy Price Amendment to be consistent with various Commission decisions guiding the negotiation of amendments generally and QF amendments, specifically. Fourth, we find that approval of the Energy Price Amendment allows PG&E's customers to continue to receive RPS-eligible energy deliveries from an existing and viable resource and allows PG&E to compare the Facility against other available resources in determining whether to extend the Energy Price Amendment for up to an additional one year and eleven months. Such flexibility allows PG&E the option to continue to receive energy deliveries from the Facility at the agreed upon price after the first three years if such energy is needed and competitive, thus benefiting ratepayers by allowing PG&E to contract with the most competitive and viable resources available at the time.

We do not, however, find the Firm Capacity Amendment to be in the best interest of ratepayers. PG&E offers little explanation as to the necessity of the additional capacity or the benefit it provides ratepayers and fails to convince us that additional capacity from the Facility is necessary. In the case of other

existing biomass generators, we have granted energy price amendments to ensure continued operation of those facilities. In this case PG&E asks that we also approve procurement of additional capacity without adequately justifying the need for that additional capacity or its price relative to other market opportunities. Given this, we do not approve the Firm Capacity Amendment between PG&E and Thermal Energy.

6.1.2. Cost Effectiveness

PG&E argues that, according to both its analysis and the analysis of the contract IE⁴ the market value and contract price of the Amendments rank as moderate compared to similarly situated groups of competing RPS-eligible proposals. PG&E notes that the additional performance requirements contained in the Amendments make them cost effective for customers; in particular, if Thermal Energy fails to substantially provide the amount of RPS-eligible energy it agreed to provide, PG&E customers will not be required to pay the full contract amount. In addition, the Energy Price Amendment caps the sum of yearly energy and capacity payments on a dollars per megawatt-hour basis, in order to protect PG&E's customers from excessive payments.

Sarvey argues that the Amendments do not warrant approval because they prolong the life of an aging facility where cheaper and cleaner RPS-alternatives exist. Furthermore, Sarvey argues that there are other potential projects that could come on-line that would potentially exceed the performance of the Facility, both in terms of price and cleanliness. In addition, Sarvey is concerned that

⁴ An IE is not required to review amendments with existing QF PPAs; however PG&E voluntarily elected to have Lewis Hashimoto of Arroyo Seco Consulting review the Amendments.

certain negotiated terms and conditions do not adequately compensate ratepayers in the event that the Facility ceases to perform under its contract.

We find that, although the Facility is aging, as noted by Sarvey, the Energy Price Amendment is cost effective when evaluated against the increased performance obligations that are included in the contract. Contracts that include such provisions as scheduling requirements and penalties for failure to perform under the terms of the contract enable PG&E and the CAISO to better plan for and provide energy at the lowest cost to ratepayers. Furthermore, the Energy Price Amendment is within the price range of previously approved amendments for similarly situated biomass facilities, and the price cap provides price certainty for ratepayers. We do acknowledge Sarvey's argument that the Facility is aging and better priced alternatives may exist in the future; however, we feel that any future risk to ratepayers of paying too high a cost for this resource is mitigated by the provision that PG&E may elect not to extend the Energy Price Amendment if better alternatives exist. Finally, we note that, although alternative projects may exist, those projects have not been brought before PG&E, and PG&E cannot make planning or cost assumptions about projects it has not yet had the opportunity to evaluate.

We agree with Sarvey and find that the Firm Capacity Amendment is not cost effective. PG&E has failed to show how the additional MWs of capacity offered under the Firm Capacity Amendment are competitive or preferable for ratepayers when compared to other capacity resources PG&E could procure, nor has PG&E indicated an outstanding need for additional capacity, regardless of price. In making this finding, we take into consideration the slightly different energy price that will be paid under the Energy Price Amendment as a result of our denial of the Firm Capacity Amendment. That energy price, inclusive of the

alteration, is within the scope of previously approved prices for other biomass facilities, and is therefore cost effective.

6.1.3. Necessity of the Amendments

In evaluating the necessity of the Amendments in this section, we focus our attention on the claims made by Thermal Energy that price relief is required in order for the Facility to continue operations, rather than the necessity of the Facility's energy deliveries to meeting PG&E's RPS procurement targets, which is addressed in Section 6.1.6 below. In Confidential Appendix D to the Application, PG&E provides the declaration of Stephen Mullinex, a Senior Vice President of the General Partner of Thermal Energy, attesting to the necessity of the Amendments to allow for continued operation. In addition, PG&E notes that the IE reviewed the cash flow models provided by Thermal Energy and concluded that substantial price relief is justified to motivate continued operation of the Facility.

Sarvey, in his opening brief, argues that some price relief appears to be needed; however, Sarvey is concerned that future estimated costs and revenues have been calculated using un-audited financial statements provided by Thermal Energy and that a lower energy price is warranted. In his reply brief, Sarvey states that, after further analysis, the Amendments do not appear to be necessary to generate sufficient cash flow for Thermal Energy.

In contacting PG&E to negotiate the Amendments in question, Thermal Energy asserts that price relief is necessary in order to continue operations. While we do not support entities coming forward to ask for price relief if such relief is not needed, the bulk of our evaluation of the Amendments focuses upon cost effectiveness versus benefit of the Amendments to the ratepayers on their own merits. From our standpoint, while preferable, it is not required that any

entity opens its books to PG&E or the Commission when making claims of financial hardship. In his reply brief, Sarvey sets forth a number of assertions regarding the financial health of Thermal Energy that we cannot fully verify. In this case, all we can do is rely upon the declarations of Thermal Energy and our own evaluation (along with that of the IE) of the necessity of price relief given the provided cash-flow model. Based on these materials, we find that the Energy Price Amendment is needed in order for Thermal Energy to continue operations given the price it would otherwise receive under its existing contract for its energy output.

In making this finding, however, we note that PG&E does not assert that payments for additional capacity are necessary in order for Thermal Energy to continue operations of the Facility. Furthermore, PG&E and Thermal Energy have considered possible rejection of the Firm Capacity Amendment and have negotiated a slightly different price under the Energy Price Amendment absent such approval. This strongly suggests that payments for additional capacity are not required in order to enable the facility to continue operating in the near term. Therefore, we find that only the Energy Price Amendment is necessary at this time.

6.1.4. Consistency with D.10-12-035 (QF/Combined Heat and Power (CHP) Settlement)

On December 16, 2010, the Commission adopted the QF/CHP Settlement (Settlement) with the issuance of D.10-12-035. The Settlement resolved a number of outstanding QF disputes and provided for an orderly transition away from the existing QF program to a new QF/CHP program. Although the Settlement focuses primarily on CHP resources and does not specifically address RPS-eligible biomass resources such as the Facility in question, PG&E states that

the Amendments are consistent with the intent of the Settlement on a number of fronts including providing specific forecasting requirements. Sarvey did not contest consistency with the QF/CHP Settlement. We find that the Amendments are consistent with the QF/CHP Settlement, which allows for bilaterally negotiated contracts. We have made similar findings in other resolutions addressing bilaterally negotiated amendments with QF biomass resources.⁵ We note that since the Facility is not a CHP resource, it does not count towards PG&E's MW and greenhouse gas reduction targets under the Settlement.

6.1.5. RPS Non-Modifiable Conditions

The Commission adopted a set of standard terms and conditions required in RPS contracts, some of which are considered "non-modifiable." These standard terms and conditions were compiled in D.08-04-009 and subsequently amended in D.08-08-028. Non-modifiable terms and conditions related to Tradable Renewable Energy Credits were finalized in D.10-03-021, as modified by D.11-01-025.

The Facility is currently operating under a QF PPA and will continue to do so under the proposed Amendments. In order to ensure consistency across projects, because the Facility is delivering RPS-eligible energy, it is prudent to ensure that the amended contract includes the most recent RPS non-modifiable terms and conditions. In its Opening Brief,⁶ PG&E provides a table detailing the location of the RPS non-modifiable terms and conditions, all of which are located in the Energy Price Amendment. Sarvey does not contest the existence of any

⁵ See, e.g. Resolution E-4491, Resolution E-4427.

⁶ PG&E Opening Brief at 9.

RPS non-modifiable terms and conditions. We find that PG&E has met the requirement to include all RPS non-modifiable terms and conditions in the Energy Price Amendment.

6.1.6. Necessity of the Amendments to Achieve RPS Portfolio Requirements

In D.11-12-020, the Commission established enforceable RPS compliance targets for three periods (2011-2013, 2014-2016, and 2017-2020) towards achieving 33% renewable energy deliveries by 2020. PG&E asserts that by allowing the Facility to continue to operate, the Amendments will facilitate deliveries during the first compliance period and for a short time in the second compliance period. Furthermore, PG&E states, the deliveries from the Facility are currently in PG&E's RPS baseline of deliveries and the Amendments allow PG&E to continue to receive these deliveries during the first and second compliance periods. PG&E states that it is relying upon continued deliveries from operational facilities as part of its effort to comply with RPS requirements in addition to signing contracts with new facilities, which contain some risk as to project viability.⁷ PG&E also notes that the two options to extend the Energy Price Agreement allow PG&E the ability to retain the Facility and its output based upon an assessment of need and value at the time, as opposed to committing PG&E and ratepayers to future procurement today that may prove unnecessary and/or costly relative to other projects.

⁷ Project viability is considered in the Commission RPS contract approval process; however, there is always inherent risk that a new project may not come on-line as specified due to any number of factors.

Sarvey argues that the Facility's output is not needed to meet PG&E's RPS compliance targets, especially in the medium to long-term; therefore, Sarvey requests that, at a minimum, the Commission deny the two options to extend the Energy Price Amendment for one year and eleven months, respectively (although Sarvey advocates for full denial of both Amendments). Rather, Sarvey suggests that, after three years, PG&E should return to the Commission with a new contract and compare the price to renewable energy projects at that time. Furthermore, Sarvey argues that we should not put weight on PG&E's statement that the output of the Facility is necessary to meet the targets set forth in Executive Order S-06-06.

We disagree with Sarvey that PG&E does not need deliveries from the Facility in order to meet its RPS compliance obligations, especially in the short-term. As noted by PG&E, deliveries from the Facility are included in PG&E's baseline calculations and, as such, the absence of deliveries from the Facility would represent a step backwards towards achieving the compliance obligations. Furthermore, short-term projections necessarily rely more heavily upon existing generation resources as many new projects have yet to come online. The Facility, as an existing resource, can be viewed as a highly viable project and the loss of highly viable existing projects is to the detriment of ratepayers in the short-term. Furthermore, we note that PG&E has the option, but not the obligation, to extend the Energy Price Amendment for up to an additional one year and eleven months. As such, if more cost effective and viable resources come on-line, PG&E could elect not to extend the Amendment, which, in that case, would be to the benefit of ratepayers. Therefore, we find that the Energy Price Amendment, inasmuch as it keeps an existing viable resource online that is already included in PG&E's baseline RPS calculation, is necessary

to achieve PG&E's shorter-term RPS compliance obligations. We do acknowledge Sarvey's argument that the Facility may not be necessary in the long-term as a resource to achieve PG&E's RPS compliance obligation. However, we believe that the Energy Price Amendment should be approved without modification because PG&E has the option, but not the obligation, to extend the Energy Price Amendment only if the Facility remains a competitive resource in the future.

Regarding Executive Order S-06-06, Sarvey argues that the Facility should not be maintained as a means of achieving the goals adopted therein. We disagree in that as a viable biomass operation, the Facility contributes toward achievement of 20% RPS-eligible energy sourced from biomass facilities. We do agree that this contribution alone, absent any of the other benefits contained in the Energy Price Amendment, would not be enough to warrant approval of the Amendment. However, as we describe throughout this decision, the Energy Price Amendment provides sufficient value to merit approval.

The additional capacity, on the other hand, does not provide any value towards PG&E RPS goals, which are measured solely based upon energy output. If PG&E and Thermal Energy wish to pursue the additional five MW of capacity, PG&E should consider putting forth the additional capacity in a competitive solicitation process where the incremental capacity can be more readily evaluated against other proposed projects.

6.1.7. Consistency with PG&E's 2011 RPS Procurement Plan

In D.11-12-020, the Commission also approved PG&E's 2011 RPS Procurement Plan (Plan). Pursuant to statute, PG&E's Plan includes an assessment of supply and demand to determine the optimal mix of renewable

generation resources, and in the plan, PG&E indicated that it was pursuing both “short- and long-term contracts to meet statutory goals.”⁸ Thus, at the most basic level, the Amendments, as shorter-term RPS biomass contracts, are consistent with PG&E’s Plan.

6.1.8. Consistency with D.02-08-071 (Procurement Review Group)

D.02-08-071 established a PRG for each of the three investor-owned utilities and set forth requirements about what types of procurement activities must be reviewed by the respective PRGs. In its opening brief, PG&E states that on June 14, 2011, it provided its PRG with a presentation regarding QF Restructuring Amendments and, specifically, a strategy for retaining existing biomass QFs. On July 12, 2011, PG&E provided the PRG with a Biomass Portfolio Update. On September 14, 2011, PG&E provided additional information to the PRG regarding the status of the Amendments. In his opening brief, Sarvey asserts that PG&E has failed to meet the requirements of D.02-08-071 because PG&E has failed to provide evidence it discussed the specific terms and conditions of the particular Amendments that are the subject of this application with the PRG. In its reply brief, PG&E responds that the Amendments were discussed at the September 14, 2011 PRG meeting.

While PG&E does not include any specific documentation showing that the Amendments were discussed with the PRG on September 14, 2011, in this case, PG&E’s assertion, as bound by the parameters of Rule 1.1 of the Commission’s Rules of Practice and Procedure, is sufficient. Furthermore,

⁸ PG&E’s 2011 RPS Procurement Plan at 8.

Commission staff, as *ex officio* members of PG&E's PRG, have been apprised of this and all other QF biomass amendments that have been brought before the Commission. Finally, we note that no member of the PRG protested this application on the grounds that insufficient information was provided to the PRG as required by D.02-08-071. Therefore, we find that PG&E's PRG was adequately notified of the Amendments.

6.2. Should the Amendments be Approved?

Based upon our evaluation of the Amendments, we conclude that the Energy Price Amendment is just, reasonable, and in the best interest of ratepayers and approve the amendment inclusive of the two proposed extensions of one year and eleven months, respectively, at the election of PG&E. We find that the Energy Price Amendment is necessary in order for Thermal Energy to continue to operate the facility, and the price is of moderate value when compared to other similarly situated facilities. Furthermore, the enhanced performance requirements are to the benefit of ratepayers in that they provide year-round access to the energy produced by the Facility, provide scheduling certainty, and contain performance obligations that, if not met, will result in a reduction of payment to Thermal Energy. The Energy Price Amendment is consistent with relevant Commission decisions and contains the necessary RPS non-modifiable terms and conditions. The Energy Price Amendment will enable PG&E to maintain previously accounted for RPS-eligible energy as it moves towards the 33% renewable energy requirement. Finally, we find the Energy Price Amendment to be consistent both in terms of price and performance requirements with other QF biomass amendments approved by this Commission.

We do not approve the Firm Capacity Amendment, which would increase firm capacity of the Facility by an additional five MW. PG&E has failed to make a convincing argument that payments to the facility for additional capacity is necessary to enable the facility to continue operating in the near term, and has also failed to provide sufficient evidence to convince us that the additional capacity provides value to ratepayers.

Finally, we note that approval of the Energy Price Amendment is contingent upon demonstration that the Facility meets the RPS Resource Eligibility Guidelines. Pursuant to Public Utilities Code Section 399.25, the California Energy Commission (CEC) certifies eligible renewable energy resources. Generation from a resource that is not CEC-certified cannot be used to meet RPS requirements. To ensure that only CEC-certified energy is procured under a Commission-approved RPS contract, the Commission has required standard and non-modifiable “eligibility” language in all RPS contracts. That language requires a seller to warrant that the project qualifies and is certified by the CEC as an “Eligible Renewable Energy Resource,” that the project’s output delivered to the buyer qualifies under the requirements of the California RPS, and that the seller uses commercially reasonable efforts to maintain eligibility should there be a change in law affecting eligibility.⁹

The Commission requires a standard and non-modifiable clause in all RPS contracts that require Commission approval to include an explicit finding that “any procurement pursuant to this Agreement is procurement from an eligible renewable energy resource as certified by the CEC for purposes of determining

⁹ See, e.g., D.08-04-009 at Appendix A.

Buyer's compliance with any obligation that it may have to procure eligible renewable energy resources pursuant to the California Renewables Portfolio Standard (Public Utilities Code Section 399.11 et seq.), D.03-06-071, or other applicable law."¹⁰

The Commission has no jurisdiction to determine whether a project is an eligible renewable energy resource, nor can the Commission determine prior to the final CEC certification of a project, that "any procurement" pursuant to a specific contract will be "procurement from an eligible renewable energy resource."

Therefore, while we include the required finding here, this finding has never been intended, and shall not be read now, to allow the generation from a non-RPS-eligible resource to count towards an RPS compliance obligation. Nor shall such finding absolve the seller of its obligation to obtain CEC certification, or the utility of its obligation to pursue remedies for breach of contract. Such contract enforcement activities shall be reviewed pursuant to the Commission's authority to review the utilities' administration of contracts.

6.3. Effective Date

In this Application, PG&E requests that, if approved, the Amendments take effect retroactive to September 1, 2011, and PG&E would true-up payments to the Facility to that date. In his opening brief, Sarvey argues that the Energy Price Amendment should not become effective until the date of final Commission approval. Sarvey asserts that the owner of the Facility should bear

¹⁰ *Ibid.*

the risk of improper forecasting of revenues and expenses, and ratepayers should not be required to supplement the Facility during the time period between contract signing and contract approval.

As PG&E notes in its reply brief, Thermal Energy has been operating the Facility consistent with the performance requirements in the Amendments; therefore PG&E customers have already received the benefits of enhanced performance.¹¹ Furthermore, as Sarvey notes in his opening brief, the Commission has previously approved a number of biomass QF amendments that allowed the price to be paid from the date of contract execution.¹² Given that the Facility has operated according to the terms and conditions of the Amendments in question beginning September 1, 2011, and consistent with previous Commission policy, we see no reason that the effective date of the Energy Price Amendment should not be September 1, 2011. PG&E should provide true-up payments to Thermal Energy retroactive to the effective date of the Energy Price Amendment.

6.4. Cost Recovery

As noted in its opening brief, before PG&E executed the Amendments, PG&E recovered costs associated with the existing QF PPA with Thermal Energy through its ERRA and seeks continued cost recovery related to the proposed Amendments through the same mechanism. PG&E currently recovers its procurement costs associated with all QF contracts through ERRA; therefore, it is reasonable for PG&E to recover costs associated with the approved Energy Price

¹¹ PG&E Reply Brief at 9.

¹² See Resolutions E-4412, E-4427, E-4455, E-4491.

Amendment in ERRRA. PG&E shall recover all costs associated with the Energy Price Amendment in its ERRRA.

7. Request for Official Notice

Pursuant to Rule 13.9, in his opening brief,¹³ Sarvey presents information pertaining to the Facility's performance under various air quality permits and requests that the Commission take official notice of several supporting air district and Environmental Protection Agency documents. As discussed in the scoping memo to this proceeding, the existing PPA between Thermal Energy and PG&E extends, absent any Amendments, until May 30, 2020, and the Facility has received all necessary permits to operate from the CEC or other entities with jurisdiction over health and safety matters. To the extent that the Thermal Energy Facility has violated safety and air quality permits, such violations should be considered in a different venue and are therefore out of the scope of this proceeding. Therefore, Sarvey's motion for official notice is denied.

8. Comments on Proposed Decision

The proposed decision of the assigned ALJ for this proceeding was mailed to parties in accordance with Pub. Util. Code § 311, and comments were allowed in accordance with Rule 14.3 of the Commission's Rules of Practice and Procedure. Comments were filed on _____. Reply comments were filed on _____ by _____.

9. Assignment of Proceeding

Michel Peter Florio is the assigned Commissioner and Melissa K. Semcer is the assigned ALJ in this proceeding.

¹³ Sarvey Opening Brief at 7.

Findings of Fact

1. The Facility is a 21 MW nameplate capacity non-CHP generator that uses biomass as its fuel and has been delivering RPS-eligible energy under an existing 30-year QF PPA with expiration date of May 30, 2012.

2. The Commission has recently approved several energy price amendments for existing biomass facilities in Resolutions E-4412, E-4427, E-4455, and E-4491. None of these amendments allowed for the provision of additional capacity from the facilities in question.

3. The Energy Price Amendment provides Thermal Energy, which owns the Facility, with a higher price for RPS-eligible energy in exchange for enhanced performance obligations, among other terms and conditions.

4. The Energy Price Amendment has an initial term of three years, which can be extended twice at the option of PG&E. The first option is for a one-year extension; the second, which can only be exercised if the first option has been exercised, is for an additional eleven months. If PG&E elects to exercise the first and second extension options, the Energy Price Amendment would have a term of four years and eleven months.

5. The Firm Capacity Amendment increases the existing PPA firm capacity from 13 MW to 18 MW and modifies the firm capacity price paid under the existing PPA for the incremental capacity. The capacity price for the first 13 MW remains unchanged per the existing PPA.

6. The Energy Price Amendment contains several enhanced performance requirements in exchange for an increased energy price. The enhanced performance obligations contained in the Energy Price Amendment allow for more reliable year-round deliveries of RPS-eligible energy, adopt certain

scheduling and forecasting requirements, and impose certain penalties upon Thermal Energy for failure to perform under the contract.

7. Absent Commission approval of the Firm Capacity Amendment, the energy price in the Energy Price Amendment will be slightly altered.

8. The energy price contained in the Energy Price Amendment, inclusive of the alteration as a result of Commission denial of the Firm Capacity Amendment, is within the range of previously approved amendments for other biomass facilities.

9. Future price risk for ratepayers is mitigated because PG&E may elect not to extend the Energy Price Amendment if better priced alternatives exist.

10. The Energy Price Amendment is cost effective.

11. Stephen Mullinnex, a Senior Vice President of the General Partner of Thermal Energy, submitted a declaration attesting to the necessity of the Amendments to allow for continued operation of the Facility.

12. While preferable, it is not required that any entity open its books to PG&E or the Commission when making claims of financial hardship.

13. The Energy Price Amendment is needed in order for Thermal Energy to allow for continued operation of the Facility.

14. PG&E has failed to show that the additional capacity offered under the Firm Capacity Amendment is cost effective or preferable when compared to other incremental generation.

15. The additional five MW of capacity offered in the Firm Capacity Amendment is not necessary to ensure continued operations of the Facility.

16. The Amendments are consistent with the bilateral contracting provisions allowed in D.10-12-035, which adopts the QF/CHP Settlement.

17. The Energy Price Amendment contains the most recent RPS non-modifiable terms and conditions set forth in D.08-04-009, D.08-08-009, and D.10-03-021 as modified by D.11-01-025.

18. PG&E must rely heavily upon deliveries from existing facilities when making short-term RPS energy delivery projections because many new facilities have yet to come on-line.

19. The Facility, as an existing generator of RPS-eligible energy, is considered to be viable.

20. Energy deliveries from the Facility are included in PG&E's baseline calculations toward achievement of the RPS compliance obligations adopted in D.11-02-020. Loss of the existing energy deliveries would represent a step backwards for PG&E towards achievement of its RPS compliance obligations.

21. Deliveries from the Facility will help fulfill PG&E's near term RPS obligations. However beyond the initial term, the need for the energy from the Facility is less certain given the contracting PG&E has done to date and potential future contracting activities.

22. Energy delivered by the Facility counts towards the 20% biomass target adopted in Executive Order S-06-06.

23. PG&E has failed to show that the five MW of additional capacity contained in the Firm Capacity Amendment is needed given its existing capacity position.

24. PG&E has failed to show that the cost of the five MW of additional capacity contained in the Firm Capacity Amendment is competitive with other capacity procurement opportunities.

25. Assuring continued energy deliveries from this facility is consistent with the resource needs identified in PG&E's 2011 RPS Procurement Plan adopted in D.11-02-020.

26. PG&E's PRG was properly notified of the Amendments pursuant to D.02-08-071.

27. Thermal Energy has been operating the Facility consistent with the performance requirements in the Amendments since the date of contract execution, September 2011.

28. The Commission has previously approved several biomass QF amendments that allowed the price to be paid from the date of contract execution.

29. PG&E has previously recovered costs associated with the existing QF PPA through its ERRAs.

30. Issues pertaining to the Facility's performance under various air quality permits were ruled outside the scope of this proceeding in the February 17, 2012 scoping memo.

31. No requests for hearings were received by the February 29, 2012 deadline. There are no disputed issues of fact in A.11-12-003.

Conclusions of Law

1. The Energy Price Amendment represents a just and reasonable approach to addressing the needs of Thermal Energy and PG&E's ratepayers and is consistent with previous guiding Commission decisions as well as previous treatment of similarly situated facilities. The Energy Price Amendment should be approved retroactive to September 1, 2011 and PG&E should true-up payments to Thermal Energy retroactive to that date.

2. The Firm Capacity Amendment is not cost effective, nor is it needed to ensure continued operations of the Facility; therefore, the Firm Capacity Amendment should be denied.

3. PG&E should recover all costs associated with the Energy Price Amendment in its ERRA.

4. The Facility, as a non-CHP resource, does not count towards PG&E's MW and greenhouse gas reduction targets as provided for in the QF/CHP Settlement adopted in D.10-12-035.

5. Sarvey's request for this Commission to take official notice of several air district and Environmental Protection Agency documents should be denied.

6. The designation of this proceeding should be changed to show that hearings are not necessary.

7. An order in this proceeding should be effective immediately.

O R D E R

IT IS ORDERED that:

1. Pacific Gas and Electric Company's Application 11-12-003, filed December 8, 2011, requesting Commission approval of two amendments to an existing Qualifying Facility contract with Thermal Energy Development Partnership, L.P. is granted in part and denied in part. The Energy Price Amendment, which adopts a three year amendment to the energy price currently paid under the existing contract with an option to extend the proposed amendment by one year, and subsequently, an additional eleven months, is approved without modification inclusive of the alternate price that is triggered as a result of rejection of the Firm Capacity Amendment. The Firm Capacity

Amendment, which expands capacity provided under the existing contract from 13 megawatts to 18 megawatts, is denied.

2. The effective date of the Energy Price Amendment is September 1, 2011. Pacific Gas and Electric Company shall provide payment pursuant to the terms and conditions of the Energy Price Amendment to Thermal Energy Development Partnership, L.P. retroactive to September 1, 2011.

3. Costs associated with the Energy Price Amendment shall be recovered through Pacific Gas and Electric Company's Electric Revenue Recovery Account.

4. Deliveries under the contract between Pacific Gas and Electric Company and Thermal Energy Development Partnership, L.P. do not count towards Pacific Gas and Electric Company's megawatt and greenhouse gas reduction targets as provided for in the Qualifying Facility/Combined Heat and Power Settlement adopted in Decision 10-12-035.

5. Robert Sarvey's request for this Commission to take official notice of several air district and Environmental Protection Agency documents is denied.

6. A hearing is not needed in this proceeding.

7. Application 11-12-003 is closed.

This order is effective today.

Dated _____, at San Francisco, California.