

**PUBLIC UTILITIES COMMISSION**505 VAN NESS AVENUE  
SAN FRANCISCO, CA 94102-3298**FILED**11-19-12  
11:35 AM

November 19, 2012

**Agenda ID #11736  
and Alternate Agenda ID#11737  
Ratesetting**

TO PARTIES OF RECORD IN APPLICATION 12-03-026

Enclosed are the proposed decision of Administrative Law Judge (ALJ) Yacknin previously designated as the presiding officer in this proceeding and the alternate proposed decision of Commissioner Peevey. The proposed decision and the alternate proposed decision will not appear on the Commission's agenda sooner than 30 days from the date they are mailed.

Pub. Util. Code § 311(e) requires that the alternate item be accompanied by a digest that clearly explains the substantive revisions to the proposed decision. The digest of the alternate proposed decision is attached.

This matter was categorized as ratesetting and is subject to Pub. Util. Code § 1701.3(c). Upon the request of any Commissioner, a Ratesetting Deliberative Meeting (RDM) may be held. If that occurs, the Commission will prepare and publish an agenda for the RDM 10 days beforehand. When an RDM is held, there is a related ex parte communications prohibition period. (See Rule 8.3(c)(4).)

When the Commission acts on these agenda items, it may adopt all or part of the decision as written, amend or modify them, or set them 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 and alternate proposed decision as provided in Pub. Util. Code §§ 311(d) and 311(e) and in Article 14 of the Commission's Rules of Practice and Procedure (Rules), accessible on the Commission's website at [www.cpuc.ca.gov](http://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 Yacknin at [hsy@cpuc.ca.gov](mailto:hsy@cpuc.ca.gov) and Commissioner Peevey's advisor, Damon Franz at [DF1@cpuc.ca.gov](mailto:DF1@cpuc.ca.gov). The current service list for this proceeding is available on the Commission's website at [www.cpuc.ca.gov](http://www.cpuc.ca.gov).

/s/ MARYAM EBKE for  
Karen V. Clopton, Chief  
Administrative Law Judge

HSY:avs

Attachment

**DIGEST OF DIFFERENCES BETWEEN  
ADMINISTRATIVE LAW JUDGE YACKNIN'S PROPOSED DECISION  
AND THE ALTERNATE PROPOSED DECISION  
OF PRESIDENT PEEVEY**

Pursuant to Public Utilities Code Section 311(e), this is the digest of the substantive differences between the proposed decision of Administrative Law Judge Yacknin (mailed on November 19, 2012) and the proposed alternate decision of President Peevey (also mailed on November 19, 2012) in the matter of Application 12-03-026, the application of Pacific Gas and Electric Company for approval of amended Purchase and Sale Agreement between Pacific Gas and Electric Company (PG&E) and Contra Costa Generating Station LLC and for Adoption of Cost Recovery and Ratemaking Mechanisms.

The proposed decision of Administrative Law Judge Yacknin denies the application.

- The proposed decision concludes that Decision (D.) 10-07-045 does not authorize the Oakley project because (1) its authority extended only until the Commission's subsequent LTPP review and determination, which concluded with the issuance of D.12-04-046, and (2) the Commission has yet to determine a need for new resources to integrate a 33% Renewables Portfolio Standard, which is currently under review in the 2012 LTPP (Rulemaking 12-03-014).
- The proposed decision concludes that there is no specific, unique reliability need for the Oakley project, or system reliability risk posed by regulatory lag, or evidence that Oakley is the least-cost, best-fit alternative for meeting an as-yet undetermined need that provides a basis to approve the Oakley project outside of the LTPP process.
- The proposed decision does not reach the issues of contract reasonableness or cost recovery mechanism.

The proposed alternate decision of President Peevey grants the application.

- The proposed alternate decision concludes that the Oakley project is authorized by D.10-07-045.
- The proposed alternate decision concludes that compelling reasons of the Oakley project's readiness to proceed and to serve as a hedge against risks caused by regulatory lag, its ability to reduce pollution and help integrate renewable resources, its use of less water than other conventional resources, and its likely beneficial impact on electricity market prices merit approval of the application.

The proposed alternate decision approves the contract as reasonable and adopts a cost recovery mechanism.

Decision PROPOSED DECISION OF ALJ YACKNIN (Mailed 11/19/2012)

**BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA**

Application of Pacific Gas and Electric Company (U39E) for Approval of Amended Purchase and Sale Agreement Between Pacific Gas And Electric Company and Contra Costa Generating Station LLC and for Adoption of Cost Recovery and Ratemaking Mechanisms.

Application 12-03-026  
(Filed March 30, 2012)

(See Appendix A for List of Appearances)

**DECISION DENYING APPLICATION FOR APPROVAL OF  
AMENDED PURCHASE AND SALE AGREEMENT**

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## **DECISION DENYING APPLICATION FOR APPROVAL OF AMENDED PURCHASE AND SALE AGREEMENT**

### **1. Summary**

This decision denies Pacific Gas and Electric Company's application for approval of the amended agreement with Contra Costa Generating Station LLC for the purchase and sale of the Oakley Generating Station. This proceeding is closed.

### **2. Project Description**

The proposed Oakley Generating Station (Oakley) project is a 586 megawatt (MW) combined-cycle facility that would be located in Oakley, California. Pursuant to the amended purchase and sale agreement (PSA), Contra Costa Generating Station LLC would construct and sell the Oakley project to Pacific Gas and Electric Company (PG&E), with a commercial on-line date of June 2016. The transaction would result in an annual revenue requirement of approximately \$200 million to allow PG&E to recover the non-fuel costs of constructing and operating the project.

### **3. Background**

The Commission's biennial procurement review process, established pursuant to Assembly Bill 57 (Stats. 2002, ch. 835), Decision (D.) 04-01-050 and D.04-12-048, requires that investor-owned electric utilities submit long-term procurement plans that serve as the basis for utility procurement activities until refinement during the next biennial planning cycle. Rulemaking (R.) 06-02-013 (the 2006 Long-Term Procurement Proceeding (LTPP)) undertook the second

biennial procurement review<sup>1</sup> and reviewed the utilities' long-term procurement plans for 2007 to 2016. D.07-12-052 (as modified by D.08-11-008) approved the 2006 LTPP and, among other things, directed PG&E to issue a request for offer (RFO) to obtain contracts for 800 to 1,200 MW of new operationally flexible and dispatchable capacity by 2015.

PG&E issued the 2008 RFO on April 1, 2008. By Application (A.) 09-09-021, PG&E sought Commission approval of the results of the 2008 RFO, including the Oakley project PSA.<sup>2</sup> By D.10-07-045, issued on July 29, 2010, the Commission approved some of the results of the 2008 RFO, but not the Oakley PSA. However, the Commission provided that PG&E may renew its request for approval of the Oakley PSA prior to its next RFO upon showing that it had all necessary permits, and that a need for the capacity had opened up by (1) the failure of approved projects, (2) the early retirement of once-through cooling (OTC) plants, or (3) the California Independent System Operators' (CAISO) issuance of its final report on its renewable resource integration study demonstrating significant negative reliability risks from integrating a 33% Renewables Portfolio Standard (RPS).

By petition filed on August 23, 2010, PG&E petitioned to modify D.10-07-045 to approve the Oakley PSA, on the basis that PG&E and Contra Costa Generating Station LLC had amended the PSA to delay the commercial on-line date to June 2016. By D.10-12-050, the Commission granted the petition and approved the amended Oakley PSA. The Court of Appeals annulled

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<sup>1</sup> R.04-04-003 (the 2004 LTPP) undertook the first of the biennial procurement reviews and reviewed the utilities' long-term procurement plans for 2005 to 2014.

<sup>2</sup> The original Oakley project PSA had a commercial on-line date of June 2014.

D.10-12-050 for the Commission's failure to afford the parties the procedural rights to be apprised of the issues to be considered pursuant to Pub. Util. Code § 1701.1(b) and Rule 7.3, to conduct discovery, and to seek evidentiary hearing on the new issues presented by the petition. (*TURN v. California Public Utilities Commission*, Case No. A.132439, March 16, 2012 [unpublished].)

Meanwhile, because the 2006 LTPP had just concluded with the issuance of D.07-12-052 immediately before the institution of R.08-02-007 (the 2008 LTTP), the Commission determined that, rather than requiring the utilities to file new procurement plans, the 2008 LTTP would address a series of policy proposals to refine technical practices used to develop resource and procurement plans, and consider other procedural matters. Order Instituting Rulemaking 10-05-006 (the 2010 LTTP) closed R.08-02-007 and undertook the review of the utilities' long-term procurement plans for 2011 to 2020. That review concluded with the issuance of D.12-04-046, which approved a settlement to defer generation procurement until after 2020. R.12-03-014 (the 2012 LTPP), undertaking the review of the utilities' long-term procurement plans for 2013 to 2022, is currently pending.

By this application, PG&E renews its request for approval of the amended Oakley PSA and for associated ratemaking and cost recovery. After the prehearing conference (PHC) on May 22, 2012, the assigned Commissioner issued a scoping memo and ruling on May 25, 2012, identifying the issues to be determined by the Commission in resolving the application and setting a schedule for addressing those issues. The issues are summarized as follows:

1. Authority and Need:
  - a. Does approval of the Oakley PSA require a certificate of public convenience and necessity (CPCN) pursuant to D.12-04-046 and/or Pub. Util. Code § 1001 et seq.?

- b. Is the Oakley PSA barred by D.12-04-046 for being utility-owned generation (UOG) procured outside of a competitive process and not needed to meet PG&E's authorized procurement due to a failed request for offers?<sup>3</sup>
  - c. Is the Oakley PSA barred or authorized pursuant to D.07-12-052, which requires all UOG to be selected through a competitive process unless it is needed to meet a specific, unique reliability issue?<sup>4</sup>
  - d. Is the Oakley project barred or authorized pursuant to D.10-07-045?
    - i. Does the Oakley project have all necessary permits?
    - ii. Has the CAISO issued its final report on its renewable resource integration study demonstrating significant negative reliability risks from integrating a 33% RPS?<sup>5</sup>
  - e. Is there a need to procure new UOG outside of the Commission's on-going LTPP process and in exception to Commission policies and precedents regarding long-term procurement?
2. Contract reasonableness: Is the Oakley PSA reasonable?
3. Ratemaking and cost recovery treatment: What ratemaking and cost recovery treatment should apply to the Oakley project, considering but not limited to the ratemaking and cost recovery treatment that was

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<sup>3</sup> PG&E stipulated that the project is not needed to meet its authorized procurement due to a failed request for offers. (May 22, 2012, PHC Transcript (Tr.) at 16.)

<sup>4</sup> PG&E stipulated that the other authorized purposes for procuring UOG outside of a competitive process pursuant to D.07-12-052 (to mitigate market power, because the project is a preferred resource, or because the project is a unique opportunity) do not apply. (PHC Tr. at 15.)

<sup>5</sup> PG&E stipulated that the other authorized conditions for renewing this application pursuant to D.10-07-045 (failure of approved projects, or early retirement of once-through cooling plants) do not apply. (PHC Reporter's Transcript (RT) at 12-13.)

adopted in A.09-09-021, updated to reflect the 2016 commercial operation date?

Evidentiary hearings were held on August 15 through August 17, and August 20, 2012. Parties filed opening briefs on September 17, 2012, and reply briefs on October 1, 2012, upon which the record was submitted.<sup>6</sup>

#### **4. Application for Approval of the Oakley PSA Does Not Require A CPCN**

Pub. Util. Code §1001 prohibits a utility from beginning the construction of major utility plant “without first having obtained from the commission a certificate that the present or future public convenience and necessity require or will require such construction.” Contra Costa Generating Station LLC, as the developer of the Oakley project, is the owner of the project until and unless it is transferred to PG&E pursuant to the PSA. Accordingly, pursuant to the plain language of Section 1001,<sup>7</sup> PG&E does not require a CPCN for approval of the Oakley PSA.

Some of the parties argue that this strict interpretation of Section 1001 would create a loophole by which the Oakley project might be constructed without a Commission determination of need for the project. This argument overlooks the Commission’s responsibility and authority to ensure

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<sup>6</sup> The September 18, 2012, informal ruling of the ALJ granting PG&E’s, DRA, CARE, and the Coalition of California Utility Employees’ and California Unions for Reliability Energy’s (CUE/CURE) motions to file opening and closing briefs under seal is hereby affirmed. The September 27, 2012, informal ruling of the ALJ granting Communities for a Better Environment’s (CBE) motion to introduce evidence into the record is hereby affirmed. The September 27, 2012, informal ruling of the ALJ granting Contra Costa Generating Station, LLC’s motion to withdraw its motion for party status is hereby affirmed. All other pending motions are deemed denied.

<sup>7</sup> All statutory references are to the Public Utilities Code.

that "[a]ll charges demanded or received by any public utility ... shall be just and reasonable" (Section 451) and the statutory constraint that "no public utility shall change any rate : except upon a showing before the commission and a finding by the commission that the new rate is justified" (Section 454(a)). We enforce these requirements by approving rate recovery only for utility costs that are necessary and reasonable, regardless of whether they are incurred as a result of utility construction of major plant, or purchase of major plant, or purchase of power without the acquisition of major plant, or indeed any capital and operations and maintenance cost. For example, rate recovery of power purchase costs is contingent upon the Commission's "certification" that the purchases are needed and reasonable, typically (in the context of the LTPP procedures) upon review of a utility's request for approval of the results of an RFO. Rate recovery of forecasted capital and operations and maintenance costs is contingent upon the Commission's "certification" that they are needed and reasonable, typically in the utilities' general rate cases. Those determinations are not "CPCNs" pursuant to Section 1001, although they effectively certify that the costs are publicly convenient and necessary.

Likewise here, in this application, we review the need for and reasonableness of the proposed Oakley PSA. Contra Costa Generating Station LLC does not require our determination of need and reasonableness in order to construct its project, and arguably PG&E does not require it, either, as a prerequisite to purchasing the project. PG&E does, however, require our determination of need and reasonableness in order to recover its costs of the project in rates. Although such determination is not a CPCN under these circumstances, the issue of need and reasonableness for PG&E to incur and recover the costs of the Oakley project is squarely before us.

**5. D.12-04-046 Supersedes Authority for the Oakley Project Pursuant to D.07-12-052, But Not Pursuant to D.10-07-045**

D.12-04-046 bars UOG unless it is needed to meet the utility's authorized procurement due to a failed RFO. Thus, as set forth in the scoping memo, we consider whether D.12-04-046 bars the amended Oakley PSA for being UOG procured outside of a competitive process and not needed to meet PG&E's authorized procurement due to a failed request for offers. Put another way, the issue is whether D.12-04-046 supersedes authority for the Oakley PSA pursuant to D.07-12-052 and/or D.10-07-045, or otherwise binds the Commission from approving the Oakley PSA.

**5.1. D.12-04-046 supersedes Authority for UOG Pursuant to D.07-12-052**

D.12-04-046 supersedes authority pursuant to D.07-12-052 to procure UOG. D.07-12-052, which was issued in the 2006 LTPP (R.06-02-013), established our policy to allow a utility to procure UOG outside of a competitive process if, among other things not at issue here, it is needed to meet a specific, unique reliability issue. D.12-04-046, which was issued in the 2010 LTPP (R.10-05-006), amended that policy to bar UOG unless it is needed to meet the utility's authorized procurement due to a failed request for offers. These policies were established in rulemakings for all electric utilities, and are applicable to all electric utilities. To the extent that PG&E seeks approval of the Oakley PSA on the basis of the Commission's LTPP policies, this application is governed by the Commission's most recent statements of such policies.

PG&E argues that D.12-04-046 (dated April 19, 2012) should not be applied retroactively to this application, which was filed a month previously on March 30, 2012. To the contrary, PG&E does not have a vested right to the

application of Commission policy as it existed at the time PG&E filed this application. Neither Commission custom nor logic supports the view that the Commission should evaluate this application on the basis of a snapshot of the world as it existed on the date that a proceeding is opened. Indeed, on that premise, we would be obliged to ignore all record evidence of events that occurred since that date including, e.g., testimony of Independent Energy Producers (IEP) witness Monsen in the 2012 LTPP proceeding regarding the lead time for constructing new resources (*see* PG&E opening brief at 24), testimony of PG&E witness Maring who described continuing construction activities to date (*id.* at 37), the CAISO's public statements and its testimony in the 2012 LTPP regarding the need for resources to integrate the 33 percent RPS (*id.* at 42-43), and the 2012 LTPP scoping memo that indicates that the earliest the Commission will issue a decision in that matter will be December 2012 (*id.* at 51). That is not the case.

**5.2. D.12-04-046 Does Not Supersede Authority  
for the Oakley Project Pursuant to D.10-04-075**

D.12-04-046 does not supersede authority for the Oakley PSA pursuant to D.10-07-045. D.10-07-045, which issued in PG&E's application for approval of the results of its 2008 RFO (A.09-09-021), conferred specific authority on PG&E to renew its application for the Oakley PSA under certain circumstances.

D.10-07-045 conferred this specific authority within the scope of PG&E's particular procurement need as previously determined in the 2006 LTPP and the offers vetted in PG&E's application for approval of the results of its authorized 2008 RFO. Just as a specific provision prevails over a general provision for purposes of statutory construction, the specific authority to renew a request for the Oakley PSA as conferred by D.10-07-045 prevails over the general policy

against UOG unless it is needed to meet the utility's authorized procurement due to a failed request for offers.

**5.3. D.12-04-046 Does Not Bind the Commission**

It is well-established that the Commission is not bound by its own precedent. (*In re Pacific Gas & Electric Co.* (1988) 30 CPUC2d 189, 223-225.) D.12-04-046 does not bind the Commission from approving the amended Oakley PSA contrary to any established policy.

**6. D.07-12-052 Does Not Provide Authority for the Oakley Project**

D.07-12-052 requires all UOG to be selected through a competitive process unless, among other things not at issue here, it is needed to meet a specific, unique reliability issue. PG&E maintains that, to the extent that the requirements of D.07-12-052 apply to the Oakley project, it meets those requirements because there is a specific and unique reliability need for new, flexible resources by 2017-2018 as identified by the CAISO, and the Oakley project is the only means to address this need in sufficient time.

As discussed above, D.07-12-052's policy allowing UOG if needed to meet a specific, unique reliability issue is superseded by D.12-04-046, which bars UOG unless it is needed to meet the utility's authorized procurement due to a failed request for offers. However, we address PG&E's claims that the Oakley project is needed to satisfy a specific, unique reliability issue in the context of whether there is a basis for approving it outside of the LTPP process (scoping memo issue 1.e) in Part 8.1, below.

## **7. The Commission Has Yet to Determine a Need for New Resources to Integrate A 33% RPS**

D.10-07-045 provided that PG&E may renew its request for approval of the Oakley PSA, “prior to the next PG&E [long-term] RFO,” upon showing that it had all necessary permits, and that a need for the capacity had opened up by, among other things not at issue here, the CAISO’s issuance of its final report on its renewable resource integration study demonstrating significant negative reliability risks from integrating a 33% RPS. (D.10-07-045 at 40-41.) D.10-07-045 does not provide authority for approving the amended Oakley PSA for the reasons discussed below. Accordingly, we do not reach the issue of whether the Oakley project has its necessary permits.

### **7.1. The Application is Beyond the Authority Granted by D.10-07-045**

First, the application is untimely with respect to the scope of authority granted by D.10-07-045. D.10-07-045, which addressed the results of PG&E’s 2008 RFO, allowed PG&E to renew its request for approval of the Oakley PSA “prior to the next PG&E [long-term] RFO.” In so doing, D.10-07-045 carried the expectation that PG&E’s next RFO would timely issue pursuant to its next approved procurement plan. As it turned out, the subsequent LTPP (R.08-02-007, the 2008 LTPP) did not review or approve utility procurement plans for 2009 to 2018. However, the Commission did undertake review of utility procurement plans for 2011 to 2020 in R.10-05-006 (the 2010 LTPP). That review concluded with the determination, upon approval of a settlement to defer new generation procurement until after 2020, that no new generation is needed in the meantime. (D.12-04-046 at 11-12.) With that determination, the authority

to renew a request for approval of the Oakley PSA pursuant to D.10-07-045 expired.

## **7.2. The Commission Has Yet to Determine a Need for New Resources to Integrate a 33% RPS**

Second, the Commission has yet to determine whether the CAISO's renewable resource integration study establishes a need for new resources in order to avoid significant reliability risks from integrating a 33% RPS. We initiated our review of the CAISO's study in workshops in the 2010 LTPP (R.10-05-006), and the CAISO served prepared testimony in the proceeding on July 1, 2011. (Ex. 6 at 5-8.) However, the proceeding was resolved without a determination of the need for new resources to integrate a 33% RPS. Instead, the Commission approved a settlement among most of the active parties, which it characterized as:

[...] in essence, a punt. The settling parties have agreed to defer determination of the core issue in this proceeding: the utilities' future need for additional generation. To the extent there may be any such need, it appears to be primarily driven by the necessity to integrate higher levels of renewable generation onto the system, in anticipation of a 33% renewable portfolio standard (RPS) target. The settling parties state that: "There is general agreement that further analysis is needed before any renewable integration resource need determination is made." [Citation omitted.]

(D.12-04-046 at 6.)

As of the date of this decision, the Commission continues to review the CAISO's work in the 2012 LTPP (R.12-03-014), where the CAISO has offered testimony that "the ISO is continuing its study work [regarding the potential need for system capacity needed to integrate renewable resources] and believes the ultimate system decision can be taken up in 2013 after being informed by the

commission's decision on local capacity needs at the end of this year." (Ex. 30 at 2.) Accordingly, PG&E's renewed application for approval of the Oakley project pursuant to D.10-07-045 is premature.

Granted, the plain language of D.10-07-045 refers, not to a Commission *determination* of need, but only to a *demonstration* of need by the CAISO's renewable integration study:

Prior to the next PG&E LTRFO the conditions under which PG&E may resubmit the Oakley Project are, if:

[...]

3) If the final results from the CAISO Renewable Integration Study demonstrates that, even with the projects approved by the Commission, there are significant negative reliability risks from integrating a 33% Renewable Portfolio Standard.

(D.10-07-045 at 40-41.) Thus, PG&E maintains that D.07-10-045 does not require a specific determination of need by the Commission.

We necessarily interpret D.10-07-045 to require, as a condition to PG&E renewing its request for approval of the Oakley PSA, the Commission's independent determination that there are significant reliability risks from integrating a 33% RPS and of a need for new generation in order to avoid them. To do otherwise would be an impermissible delegation of the Commission's authority and responsibility to establish resource adequacy requirements for all load-serving entities. (Pub. Util. Code § 380(a).) While it is appropriate and, indeed, statutorily mandated for the Commission to consult the CAISO regarding resource adequacy requirements (Pub. Util. Code § 380(a)), the Commission cannot delegate the determination of need to the CAISO.

## **8. There is no Other Compelling Record Basis to Approve the Oakley Project**

PG&E maintains that, even if the Commission determines that D.07-12-052 and D.10-07-045 do not apply, the Commission should nevertheless approve the Oakley project pursuant to our broad authority under Pub. Util. Code § 701 to do all things which are necessary and convenient in the exercise of our authority over public utilities. As discussed below, we do not find a compelling basis to approve the amended Oakley PSA in exception to the Commission's long-term planning policies and procedures.

### **8.1. Specific, Unique Need<sup>8</sup>**

PG&E asserts that there is a specific, unique reliability need for the Oakley project as evidenced by various statements of the CAISO, including its Sutter Waiver Petition at the Federal Energy Regulatory Commission (FERC), opining as to the need for an estimated 3570 MW of new capacity by 2017-2018. (PG&E opening brief 30; PG&E reply brief at 18 and throughout.) PG&E's use of this hearsay evidence as evidence of the truth of the matters asserted violates due process and the repeated rulings of the administrative law judge at evidentiary hearing. (RT at 22-24.) The CAISO is not a party to this proceeding, so there has been no opportunity to probe its out-of-record statements in the context of the specific issues presented here. Conversely, the CAISO was a party to the 2010 LTPP and the settlement approved by D.12-04-046, in which the settling parties (including PG&E) stipulated that:

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<sup>8</sup> Although D.07-12-052, which used this term in the context of limiting UOG to circumstances of a failed RFO and a specific, unique reliability issue, is superseded for this purpose as discussed in Part 6, we consider whether a specific, unique reliability issue otherwise compels approval of the Oakley project.

The resource planning analyses presented in this proceeding do not conclusively demonstrate whether or not there is need to add capacity for renewable integration purposes through the year 2020, the period to be addressed during the current LTPP cycle [...]. There is general agreement that further analysis is needed before any renewable integration resource need determination is made [...]. [T]he Commission should, in collaboration with the CAISO, continue the work undertaken thus far in this proceeding to refine and understand the future need for new renewable integration resources, either as an extension of the current LTPP cycle or as part of the next LTPP.

*(R.10-05-006, Motion for Expedited Suspension of Track I Schedule, and for Approval of Settlement Agreement, August 3, 2011, Attachment at 5, approved in D.12-04-046.)*

Furthermore, the CAISO is a party to the 2012 LTPP where it has offered testimony and been subject to cross-examination, and where the Commission will ultimately determine this issue.

Even assuming the CAISO's stated need for 3570 MW of additional capacity by 2017-2018 to be true, it is not a specific or unique reliability issue. Rather, it would be a pervasive, general need that is more appropriately addressed in a comprehensive manner, as is done in our long-term planning process.

## **8.2. System Reliability Risks Posed by Regulatory Lag**

PG&E asserts that the Oakley project is needed to mitigate system reliability risks posed by regulatory lag. In addition to any need that may ultimately be determined in the 2012 LTPP proceeding, PG&E asserts that there may be a need for new generation resources in the event of the failure or delay of proposed generation projects and/or the early retirement of Southern California Edison Company's San Onofre Nuclear Generating Station (SONGS) and PG&E's

Diablo Canyon nuclear generating plant. PG&E asserts that, given the lengthy amount of time required to develop and build projects in California, as well as the time for the Commission to make a need determination and for the utility to develop and conduct an RFO and obtain Commission approval of its results, it is unlikely projects other than the Oakley project will be available to meet that need. PG&E asserts that, if the Commission does not approve the Oakley PSA in this application, the Oakley project will cease to be available or at least more costly when that urgent need arises.

We find that the public interest in adhering to our established long-term planning procedures and practices outweighs these system reliability risks. First, as discussed previously, the Commission has yet to determine a need for new generation resources, much less the characteristics of such resources, and there is no basis to find such need on the record of this proceeding. It is therefore impossible to determine whether the Oakley project is the least-cost, best-fit alternative for meeting an as-yet-to-be-determined need for new generation because, by definition, the existence and characteristics of such need have yet to be determined.

Second, as the Commission recently determined when we carefully considered the ramifications of approving the settlement in the 2010 LTPP, the public interest in conducting a sound analysis of need for procurement outweighs the risk that new generation is needed:

If there is in fact a pressing need for procurement of more generation, approving the settlement and deferring that procurement would not be in the public interest. That determination, however, must be made based upon the record of this proceeding, which in this case means that the analysis of whether the settlement is in the public interest

is similar to the above analysis of whether the proposed settlement is reasonable in light of the whole record.

As discussed above, we conclude that it is reasonable to defer authorization of procurement of new generation. Given the record currently before us, deferring procurement of new generation will not cause a problem. The record clearly supports a conclusion that no new generation is needed by 2020, and the record does not clearly support a conclusion that new generation is needed even after 2020.

Deferring authorization for such procurement is not adverse to the public interest, and two additional factors lead to the conclusion that deferring procurement authorization is in the public interest. First, if there is no need to authorize procurement of generation, then there is no need to incur the costs for procurement of generation, meaning that deferral of that procurement results in lower rates. Second, what the parties propose to do with more time – conduct a better analysis of the need for procurement, particularly for renewables integration, with updated information – may provide a significant benefit. Accordingly, we conclude that the proposed settlement’s deferral of generation procurement is in the public interest, and we approve the proposed settlement.

(D.12-04-046 at 11-12.)

While the possibility of the early retirement of SONGS looms, it is not apparent that the Oakley project is the least cost/best fit to address that development. As for Diablo Canyon, any prediction of its early retirement is entirely speculative on this record. Finally, as for the failure or delay of proposed generation projects, the Commission has previously considered and rejected the notion that a utility’s need determination should be increased to reflect such contingencies, stating it “would expect the [investor owned utilities] to handle this contingency in a similar manner that they did with the many

viability challenges that plagues the vertically integrated utility era – delaying retirements (in this case, by via contract extensions with aging facilities) until these uncertainties are addressed.” (D.07-12-052 at 94-95.) These potential developments do not merit abandoning our established LTPP practices and procedures. Rather, they are best monitored and addressed in the course of our established LTPP process.

Third, it is not evident that the only means of developing new generation in sufficient time to meet an as-yet undetermined need is with the Oakley project. Even assuming that the 2012 LTPP results in a determination of need for new generation beginning in 2018, it is reasonable to expect that results of an RFO to meet that need can be approved and on-line in a timely fashion.

PG&E testifies that, based on its experience with its 2004 and 2008 LTRFOs, it takes 16 months to develop and conduct an RFO for new generation resources, not counting the time required to bring an application and obtain Commission approval of its results. (Ex. 2 at 9.) However, the Commission has also seen, in the case of Southern California Edison Company’s Summer 2007 RFO, this process take only three months from the time the utility was directed to procure new generation to the time the utility brought an application for approval of the winning bid, and Commission approval of the application two months later. (See D.07-01-041, *In re Long Beach Generation Facility*.) While this example is exceptional, it illustrates that an RFO process need not take 16 months to complete and that the Commission can likewise process a compelling application expeditiously.

Regardless of whether it is feasible to develop and conduct an RFO in a timely fashion, PG&E argues that new projects cannot be developed in sufficient time to meet a 2018 need. PG&E asserts that potential projects identified by the

parties generally do not have permits, final configurations or, in some cases, CAISO queue positions. (PG&E opening brief at 27 and reply brief at 16.) However, as stated in the July 25, 2012, data response of Fairfield/Madera upon which PG&E relies for this assertion, the proposed configurations are being updated to reflect the latest PG&E and CAISO requirements and attributes of renewable integration needs, Fairfield/Madera expect each project to complete development and permitting work to achieve a commercial operation date in 2017, and that, pursuant to an CAISO memo on the subject, Fairfield/Madera expect to obtain a Large Generator Interconnection Agreement (LGIA) in mid-2015 and a commercial operation date in 2017. (Ex. 33.) PG&E asserts that three other facilities identified by DRA may never be developed. (PG&E opening brief at 28 and reply brief at 15.) However, the testimony of CUE/CURE witness Marcus upon which PG&E relies for this assertion makes no mention of the projects' developmental status beyond noting that one of the projects is still in process of obtaining one of its permits, a second of the projects has potential transmission constraints and will be dependent for its interconnection on new substations that are not yet constructed, and two of the three projects currently lack a buyer for their output. (Ex. 4-C at 4-6.) The weight of the evidence does not support a finding that new projects cannot be developed in time to meet a 2018 need.

On balance, in the absence of evidence beyond mere speculation that there will be an urgent need for new generation by 2018, that it will not be possible to conduct a timely RFO and obtain Commission approval of its results, and that it will not be possible for projects to be developed in time to meet this hypothetical need, we find that the public interest in adhering to our established

long-term planning procedures and practices outweighs these system reliability risks.

### **8.3. Benefits of the Oakley Project**

PG&E asserts that the Commission should approve the Oakley project because of its numerous attributes and for being the least cost/best fit to meet system needs. The record demonstrates that the Oakley project would use state-of-the-art (or nearly state-of-the-art)<sup>9</sup> technology with substantially better operating capabilities than existing facilities as well as other facilities currently under construction. It has the lowest or one of the lowest heat rates in California for a combined-cycle facility. It has the best start-up times of any combined-cycle facility in PG&E's portfolio. To the extent that the Oakley project was to replace less efficient resources, it would cause a decrease in overall electricity system greenhouse gas emissions. To the extent that the Oakley project was to foster the addition of renewable generation into the system, it would further reduce system greenhouse gas emissions.<sup>10</sup> PG&E also asserts that the Oakley project would likely have a beneficial impact on market prices because, due to its low heat rate, its bidding into the CAISO markets would have the net effect of lowering the single-price auction market price.

Nevertheless, as discussed previously, it is impossible to determine whether the Oakley project is the least-cost, best-fit alternative for meeting an as-

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<sup>9</sup> Some of the parties dispute whether the technology is state-of-the-art given the passage of time since it was first proposed.

<sup>10</sup> Some of the parties dispute whether, due to its permitted air pollution emissions limits, the Oakley project would be able to offer the type of flexible operation, i.e., fast ramping and quick starts, rather than as a baseload resource as was presented in the 2008 RFO.

yet-to-be-determined need for renewable resources integration because, by definition, the existence and characteristics of such need have yet to be determined. Just as the fact that a new car may be more efficient (and hotter) than one's current ride is not determinative of whether it is financially prudent to trade up, the fact that the Oakley project is more efficient and flexible than PG&E's existing fleet is not determinative of whether it is prudent for ratepayers to incur its costs.

#### **8.4. Resource Planning Uncertainty and Risk Under California Regulatory Framework**

PG&E asserts that California has a reputation for being one of the most difficult states in which to permit and site new resources, and that resource planning has become more uncertain due to the absence of planning criteria for integrating renewable generation. PG&E argues that these conditions support erring on the side of excess capacity and deviating from past practices to approve the Oakley project.

To the contrary, deviating from past practices to approve new generation in the absence of any planning criteria to support it will increase uncertainty and risk, not decrease it. The way to reduce uncertainty and risk under California's regulatory framework is to establish planning criteria and procedures, and to adhere to them.

#### **9. Contract Reasonableness and Cost Recovery**

For the reasons discussed above, we do not approve the amended Oakley PSA. Accordingly, we do not reach the issues of whether the terms of the amended Oakley PSA or PG&E's rate recovery proposal are reasonable.

## **10. Comments on Proposed Decision**

The proposed decision of the ALJ in this matter was mailed to the parties in accordance with Section 311 of the Public Utilities Code and comments were allowed under Rule 14.3 of the Commission's Rules of Practice and Procedure. Comments were filed on \_\_\_\_\_, and reply comments were filed on \_\_\_\_\_ by \_\_\_\_\_.

## **11. Assignment of Proceeding**

Michael R. Peevey is the assigned Commissioner and Hallie Yacknin is the assigned ALJ in this proceeding.

### **Findings of Fact**

1. The original Oakley PSA, with its June 2015 on-line date, was solicited in the 2008 RFO pursuant to D.07-12-052 (the decision on the 2006 LTPP) for purposes of procuring new capacity by 2015.
2. The amended Oakley PSA has a June 2016 on-line date.
3. The Commission has yet to determine whether there is a need for new resources in order to avoid significant reliability risks from integrating a 33% RPS.
4. D.12-04-046 approved a settlement in which the settling parties, including PG&E and the CAISO, stipulated that the resource planning analyses presented in the 2010 LTPP did not conclusively demonstrate whether or not there is need to add capacity for renewable integration purposes through the year 2020, that further analysis is needed before any renewable integration resource need determination is made, and that it should be made either as an extension of the then-current 2010 LTPP cycle or as part of the next LTPP.
5. As of the date of this decision, the Commission continues to review the CAISO's work in the 2012 LTPP (R.12-03-014).

6. While the possibility of the early retirement of SONGS looms, it is not apparent that the Oakley project is the least cost/best fit to address that development.

7. Any prediction of the early retirement of the Diablo Canyon nuclear facility is entirely speculative on this record.

8. It is reasonable to expect a utility to handle the contingency of delayed or failed generation projects by delaying retirements, i.e., by contract extensions with aging facilities.

9. Even assuming that the 2012 LTPP results in a determination of need for new generation beginning in 2018, it is reasonable to expect that results of an RFO to meet that need can be approved and on-line in a timely fashion.

10. The weight of the evidence does not support a finding that new projects cannot be developed in time to meet a 2018 need.

11. It is impossible to determine whether the Oakley project is the least-cost, best-fit alternative for meeting an as-yet-to-be-determined need for renewable resources integration because, by definition, the existence and characteristics of such need have yet to be determined.

### **Conclusions of Law**

1. The amended Oakley PSA is not subject to Pub. Util. Code §1001.

2. Approval of the amended Oakley PSA and rate recovery of its costs is subject to a Commission determination that the amended Oakley PSA is needed and reasonable pursuant to Pub. Util. Code §§ 451 and 454(a).

3. The Commission's general long-term procurement planning policy barring UOG unless it is needed to meet the utility's authorized procurement due to a failed request for offers, adopted in D.12-04-046 (2010 LTPP decision), supersedes the Commission's previous general long-term procurement planning policy,

adopted in D.07-12-052 (2006 LTPP decision), which allowed a utility to procure UOG outside of a competitive process if, among other things not at issue here, it is needed to meet a specific, unique reliability issue.

4. PG&E does not have a vested right to the application of Commission policy as it existed at the time the application was filed.

5. D.12-04-046 (2010 LTPP decision) does not supersede the specific authority conferred in D.10-07-045, which issued in PG&E's application for approval of the results of its 2008 RFO (A.09-09-021), to renew its application for the Oakley PSA under certain circumstances.

6. D.12-04-046 does not bind the Commission from approving the amended Oakley PSA contrary to any established policy.

7. D.10-04-075's authority to bring a renewed application for approval of the Oakley PSA extended only until PG&E's subsequent RFO or the Commission's subsequent determination of need for new generation resources.

8. With the Commission's determination in the 2010 LTPP that no new generation is needed (D.12-04-046), D.10-04-075's authority to bring a renewed application for approval of the Oakley PSA expired.

9. In providing that PG&E may renew a request for approval of the Oakley PSA in the event that the CAISO issued its final report on its renewable resource integration study demonstrating significant negative reliability risks from integrating a 33% RPS, D.10-07-045 did not delegate to the CAISO the Commission's responsibility to independently determine whether there are such risks and whether there is a need for new generation in order to avoid them to the CAISO.

10. Hearsay statements of the CAISO opining as to the need for an estimated 3570 MW of new capacity by 2017-2018 may not be used as evidence of the truth of the matter asserted.

11. The public interest in adhering to our established long-term planning procedures and practices outweighs the system reliability risks posed by regulatory lag.

12. The way to reduce uncertainty and risk under California's regulatory framework is to establish planning criteria and procedures, and to adhere to them.

13. The application for approval of the amended Oakley PSA should be denied.

14. Because we do not approve the amended Oakley PSA, we do not reach the issues of whether the terms of the amended Oakley PSA or PG&E's rate recovery proposal are reasonable.

15. The ALJ's September 18, 2012, informal ruling granting motions to file opening and closing briefs under seal should be affirmed.

16. The ALJ's September 27, 2012, informal ruling granting CBE's motion to receive evidence should be affirmed.

17. The ALJ's September 27, 2012, informal ruling granting Contra Costa Generating Station, LLC's motion to withdraw its motion for party status should be affirmed.

18. All other pending motions should be deemed denied.

19. A.12-03-026 should be closed.

**O R D E R**

**IT IS ORDERED** that:

1. The March 20, 2012, application of Pacific Gas and Electric Company (PG&E) (U39E) for Approval of Amended Purchase and Sale Agreement Between PG&E and Contra Costa Generating Station LLC and for Adoption of Cost Recovery and Ratemaking Mechanisms is denied.
2. The Administrative Law Judge's September 18, 2012, informal ruling granting motions to file opening and closing briefs under seal is affirmed.
3. The Administrative Law Judge's September 27, 2012, informal ruling granting Communities for a Better Environment's motion to receive evidence is affirmed.
4. The Administrative Law Judge's September 27, 2012, informal ruling granting Contra Costa Generating Station, LLC's motion to withdraw its motion for party status is affirmed.
5. All other pending motions are deemed denied.
6. Application 12-03-026 is denied.
7. Application 12-03-026 is closed.

This order is effective today.

Dated \_\_\_\_\_, at San Francisco, California.

## APPENDIX A

\*\*\*\*\* SERVICE LIST \*\*\*\*\*

Last Updated on 19-NOV-2012 by: AMT  
A1203026 LIST

\*\*\*\*\* PARTIES \*\*\*\*\*

Marc D. Joseph  
Attorney At Law  
ADAMS BROADWELL JOSEPH & CARDOZO  
601 GATEWAY BLVD. STE 1000  
SOUTH SAN FRANCISCO CA 94080  
(650) 589-1660  
mdjoseph@adamsbroadwell.com  
For: California Unions for Reliable Energy and Coalition of  
California Utility Employees

---

Nora Sheriff  
ALCANTAR & KAHL, LLP  
33 NEW MONTGOMERY STREET, SUITE 1850  
SAN FRANCISCO CA 94105  
(415) 421-4143  
nes@a-klaw.com  
For: Fairfield Energy Center, LLC/Madera Energy Center, LLC

---

Michael E. Boyd  
President  
CALIFORNIANS FOR RENEWABLE ENERGY, INC.  
5439 SOQUEL DRIVE  
SOQUEL CA 95073-2659  
(408) 891-9677  
michaelboyd@sbcglobal.net  
For: CALifornians for Renewable Energy, Inc.

---

Shana Lazerow  
Attorney  
COMMUNITIES FOR A BETTER ENVIRONMENT  
1904 FRANKLIN STREET, STE 600  
OAKLAND CA 94612  
(510) 302-0430 X-18  
slazerow@cbeval.org  
For: Communities for a Better Environment

---

Brian T. Cragg  
GOODIN, MACBRIDE, SQUERI, DAY & LAMPREY  
505 SANSOME STREET, SUITE 900  
SAN FRANCISCO CA 94111  
(415) 392-7900  
bcragg@goodinmacbride.com  
For: Independent Energy Producers Association (IEPA)

---

Candace Morey  
Legal Division  
RM. 5037  
505 Van Ness Avenue  
San Francisco CA 94102 3298  
(415) 703-3211  
cjm@cpuc.ca.gov  
For: DRA

Charles R. Middlekauff  
WILLIAM V. MANHEIM  
Attorney  
PACIFIC GAS AND ELECTRIC COMPANY  
77 BEALE STREET, B30A  
SAN FRANCISCO CA 94105  
(415) 973-6971  
CRMd@pge.com  
For: Pacific Gas & Electric Company

---

Robert Finkelstein  
General Counsel  
THE UTILITY REFORM NETWORK  
115 SANSOME STREET, SUITE 900  
SAN FRANCISCO CA 94104  
(415) 929-8876 X-307  
bfinkelstein@turn.org  
For: The Utility Reform Network

---

Daniel W. Douglass  
Attorney  
DOUGLASS & LIDDELL  
21700 OXNARD ST., STE. 1030  
WOODLAND HILLS CA 91367  
(818) 961-3001  
douglass@energyattorney.com  
For: Western Power Trading Forum/ Alliance for Retail Energy  
Markets (AREM)

---

Jaime Rose Gannon  
Energy Division  
AREA 4-A  
505 Van Ness Avenue  
San Francisco CA 94102 3298  
(415) 703-2818  
jrg@cpuc.ca.gov

Xiao Selena Huang  
Division of Ratepayer Advocates  
RM. 4102  
505 Van Ness Avenue  
San Francisco CA 94102 3298  
(415) 703-5247  
xsh@cpuc.ca.gov

Chloe Lukins  
Division of Ratepayer Advocates  
RM. 4101  
505 Van Ness Avenue  
San Francisco CA 94102 3298  
(415) 703-1637  
clu@cpuc.ca.gov

Yuliya Shmidt  
Division of Ratepayer Advocates  
RM. 4108  
505 Van Ness Avenue  
San Francisco CA 94102 3298  
(415) 703-2719  
ys2@cpuc.ca.gov

Hallie Yacknin  
Administrative Law Judge Division  
RM. 5108  
505 Van Ness Avenue  
San Francisco CA 94102 3298  
(415) 703-1675  
hsy@cpuc.ca.gov

\*\*\*\*\* STATE EMPLOYEE \*\*\*\*\*

David B. Peck  
CPUC  
ELECTRICITY PLANNING & POLICY BRANCH  
EMAIL ONLY  
EMAIL ONLY CA 00000  
(415) 703-1213  
dbp@cpuc.ca.gov

Damon A. Franz  
Energy Division  
AREA 4-A  
505 Van Ness Avenue  
San Francisco CA 94102 3298  
(415) 703-2165  
df1@cpuc.ca.gov

Ross Van Ness  
ALCANTAR & KAHL  
1300 SW FIFTH AVE., STE. 1750  
PORTLAND OR 97209  
(503) 402-9900  
rvn@a-klaw.com

Karen Terranova  
ALCANTAR & KAHL, LLP  
33 NEW MONTGOMERY STREET, SUITE 1850  
SAN FRANCISCO CA 94105  
(415) 421-4143  
filings@a-klaw.com

Barbara R. Barkovich  
BARKOVICH & YAP, INC.  
EMAIL ONLY  
EMAIL ONLY CA 00000  
(707) 937-6203  
brbarkovich@earthlink.net

Scott Blaising  
BRAUN BLAISING MCLAUGHLIN P.C.  
EMAIL ONLY  
EMAIL ONLY CA 00000  
(916) 682-9702  
blaising@braunlegal.com

CALIFORNIA ENERGY MARKETS  
425 DIVISADERO ST. STE 303  
SAN FRANCISCO CA 94117-2242  
(415) 936-4439  
cem@newsdata.com

\*\*\*\*\* INFORMATION ONLY \*\*\*\*\*

Elizabeth Klebaner  
ADAMS BROADWELL JOSEPH & CARDOZO  
601 GATEWAY BLVD., STE. 1000  
SOUTH SAN FRANCISCO CA 94080  
(650) 589-1660  
eklebaner@adamsbroadwell.com

Jamie Mauldin  
ADAMS BROADWELL JOSEPH & CARDOZO, PC  
601 GATEWAY BLVD., STE. 1000  
SOUTH SAN FRANCISCO CA 94080  
(650) 589-1660  
jmauldin@adamsbroadwell.com

Roger Lin  
COMMUNITIES FOR A BETTER ENVIRONMENT  
1904 FRANKLIN ST., STE. 600  
OAKLAND CA 94612  
(510) 302-0430 X-16  
roger@cbeval.org

Will Mitchell  
COMPETITIVE POWER VENTURES, INC.  
505 SANSOME STREET, STE. 475  
SAN FRANCISCO CA 94111  
(415) 293-1469  
will.mitchell@cpv.com

William Dietrich  
CPUC  
INFRASTRUCTURE PLANNING BRANCH  
505 VAN NESS AVE., AREA 4-A  
SAN FRANCISCO CA 94105-3214  
(415) 703-1146  
dietrichlaw2@earthlink.net

DAVIS WRIGHT TREMAINE LLP  
EMAIL ONLY  
EMAIL ONLY CA 00000  
(415) 276-6500  
dwtcpucdockets@dwt.com

Jeffrey P. Gray  
DAVIS WRIGHT TREMAINE, LLP  
505 MONTGOMERY STREET, SUITE 800  
SAN FRANCISCO CA 94111-6533  
(415) 276-6587  
jeffgray@dwt.com

Avis Kowalewski  
CALPINE CORPORATION  
4160 DUBLIN BLVD, SUITE 100  
DUBLIN CA 94568  
(925) 557-2284  
kowalewskia@calpine.com

Matthew Barmack  
CALPINE CORPORATION  
4160 CUBLIN BLVD., SUITE 100  
DUBLIN CA 94568  
(925) 557-2267  
BarmackM@calpine.com

William R. Galstan  
City Attorney - Special Counsel  
CITY OF OAKLEY  
3231 MAIN STREET  
OAKLEY CA 94561  
(925) 625-7045  
For: City of Oakley

---

Sean Beatty  
Director - West Regulatory Affairs  
GENON ENERGY, INC.  
PO BOX 192  
PITTSBURG CA 94565  
(925) 427-3483  
sean.beatty@genon.com

Johannes Hubert Epke  
HELPING HAND TOOLS  
1108 FIFTH AVE., STE. 202  
SAN RAFAEL CA 94901  
(415) 717-5049  
jhpepke@gmail.com  
For: Helping Hand Tools

---

Robert Simpson  
HELPING HAND TOOLS  
2716 GRANDVIEW AVENUE  
HAYWARD CA 94542  
(510) 909-1800  
rob@redwoodrob.com

Steven Kelly  
Policy Director  
INDEPENDENT ENERGY PRODUCERS ASSCIATION  
1215 K STREET, STE. 900  
SACRAMENTO CA 95814  
(916) 448-9499  
steven@iepa.com

Anjani Vedula  
DEUTSCHE BANK  
60 WALL STREET  
NEW YORK NY 10005  
(215) 300-3328  
anjani.vedula@db.com

Jonathan Arnold  
DEUTSCHE BANK  
60 WALL STREET  
NEW YORK NY 10005  
(212) 250-3182  
jonathan.arnold@db.com

Dale Fredericks  
DG POWER INTERNATIONAL  
EMAIL ONLY  
EMAIL ONLY CA 00000  
(925) 938-9098  
dfredericks@dgpower.com

David Marcus  
PO BOX 1287  
BERKELEY CA 94701  
(510) 528-0728  
dmarcus2@sbcglobal.net

Elizabeth Rasmussen  
Reg. And Legal Counsel  
MARIN ENERGY AUTHORITY  
781 LINCOLN AVENUE, SUITE 320  
SAN RAFAEL CA 94901  
(415) 464-6022  
ERasmussen@MarinEnergy.com

John W. Leslie, Esq.  
MCKENNA LONG & ALDRIDGE LLP  
EMAIL ONLY  
EMAIL ONLY CA 00000  
(619) 699-2536  
jleslie@McKennaLong.com

MRW & ASSOCIATES, LLC  
EMAIL ONLY  
EMAIL ONLY CA 00000  
(510) 834-1999  
mrw@mrwassoc.com

Dennis Kanuk  
Attorney  
LATHAM & WATKINS LLP  
355 SOUTH GRAND AVENUE  
LOS ANGELES CA 90071  
(213) 891-7717  
dennis.kanuk@lw.com

James L. Arnone  
LATHAM & WATKINS LLP  
355 S. GRAND AVENUE  
LOS ANGELES CA 90071  
(213) 485-1234  
jim.arnone@lw.com

Laura A. Godfrey  
JAMES L. ARNONE  
LATHAM & WATKINS LLP  
600 WEST BROADWAY, SUITE 1800  
SAN DIEGO CA 92101-3375  
(619) 236-1234  
laura.godfrey@lw.com  
For: Contra Costa Generating Station, LLC

---

Ed Lucha  
Case Coordinator  
PACIFIC GAS AND ELECTRIC COMPANY  
PO BOX 770000, MAIL CODE B9A  
SAN FRANCISCO CA 94177  
(415) 973-3872  
ELL5@pge.com

Matthew Gonzales  
Senior Case Manager  
PACIFIC GAS AND ELECTRIC COMPANY  
77 BEALE STREET, ROOM 918  
SAN FRANCISCO CA 94105  
(415) 973-8466  
mrgg@pge.com

Andra Pligavko  
EMAIL ONLY  
EMAIL ONLY CA 00000  
(415) 425-5154  
andra.pligavko@gmail.com

Sue Mara  
Principal  
RTO ADVISORS, LLC  
164 SPRINGDALE WAY  
REDWOOD CITY CA 94062  
(415) 902-4108  
sue.mara@RTOadvisors.com

Martin A. Mattes  
NOSSAMAN LLP  
50 CALIFORNIA STREET, SUITE 3400  
SAN FRANCISCO CA 94111  
(415) 438-7273  
mmattes@nossaman.com

Daniel Patry  
PACIFIC GAS & ELECTRIC COMPANY  
77 BEALE STREET, ROOM 910  
SAN FRANCISCO CA 94105  
(415) 973-6146  
DbP0@pge.com

Alice Gong  
PACIFIC GAS AND ELECTRIC COMPANY  
PO BOX 770000, MAIL CODE B9A  
SAN FRANCISCO CA 94177  
axl3@pge.com

Case Coordination  
PACIFIC GAS AND ELECTRIC COMPANY  
EMAIL ONLY  
EMAIL ONLY CA 00000  
(415) 973-2776  
RegRelCPUCCases@pge.com

Melissa A. Hovsepian  
SOUTHERN CALIFORNIA EDISON COMPANY  
2244 WALNUT GROVE AVE. / PO BOX 800  
ROSEMEAD CA 91770  
(626) 302-6054  
Melissa.Hovsepian@sce.com

Kevin Woodruff  
WOODRUFF EXPERT SERVICES  
EMAIL ONLY  
EMAIL ONLY CA 00000  
(916) 442-4877  
kdw@woodruff-expert-services.com

Robert Sarvey  
501 W. GRANTLINE RD.  
TRACY CA 95375  
(209) 835-7162  
sarveybob@aol.com

Carol Schmid-Frazee  
SOUTHERN CALIFORNIA EDISON CO.  
2244 WALNUT GROVE AVE./PO BOX 800  
ROSEMEAD CA 91770  
(626) 302-1337  
carol.schmidfrazee@sce.com

Case Administration  
SOUTHERN CALIFORNIA EDISON COMPANY  
2244 WALNUT GROVE AVENUE, PO BOX 800  
ROSEMEAD CA 91770  
(626) 302-6906  
case.admin@sce.com

**(END OF APPENDIX A)**