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

Order Instituting Rulemaking to Implement
the California Renewables Standard
Program.

R. 04-04-026

**REPLY COMMENTS OF
PACIFIC GAS AND ELECTRIC COMPANY (U 39-E)
ON THE PROPOSED DECISION ON AMENDED
PETITION FOR MODIFICATION OF D. 04-06-014
(STANDARD TERMS AND CONDITIONS)**

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I. INTRODUCTION AND SUMMARY

Pursuant to Rule 14.3(d) of the Commission’s Rules of Practice and Procedure, Pacific Gas and Electric Company (“PG&E”) provides the following reply comments on the proposed decision of Administrative Law Judge (“ALJ”) Mattson issued October 1, 2007 (the “Proposed Decision”) granting, in part, the joint amended petition of PG&E and Southern California Edison (“SCE”) to modify Decision (“D.”) 04-06-014.

Opening comments again demonstrated the unanimity of both buyers and sellers on the reforms needed to ensure that Renewables Portfolio Standard (“RPS”) standard terms and conditions (“STCs”) promote the goals of the RPS program. PG&E submits these reply comments to correct the erroneous conclusions of the Division of Ratepayer Advocates (“DRA”) regarding the consumer impacts of changes to the “Assignment” STC, to support the approach to the “Eligibility” STC proposed by San Diego Gas & Electric Company (“SDG&E”), and to support SCE’s analysis on the newly proposed verification requirements for changes to modifiable STCs.

II. SELLERS' FINANCIAL STABILITY, NEEDED TO PERFORM OR PAY PENALTIES, IS ENHANCED BY LIMITED ASSIGNMENTS.

DRA's opening comments suggest that a modification to the "Assignment" STC could lessen the likelihood of recovering penalties due for underperformance.¹ In actuality, allowing a third-party lender to enter into a partial or contingent assignment provides financial stability to sellers, enhancing their ability to continue to perform under the contract (reducing the likelihood of any penalties accruing) and their financial strength (decreasing the likelihood of sellers going into bankruptcy, and increasing the likelihood that if a penalty accrues, the seller will be in a position to pay). As required by the STC, PG&E would not consent to any assignment that was not reasonable; an essential factor of reasonableness is that the likelihood of performance or ability payment of penalties would be maintained, if not increased.

Lenders are neither well-suited nor likely to assume all payment and performance obligations of electric generators under normal conditions. Requiring them to do so would chill the desire of many lenders to support renewables projects, and increase the cost of the any financing that remains available, which in turn would raise customer cost. Raising barriers to the partial or contingent assignments appropriate to third-party financing would thus create potentially fatal obstacles to many RPS contracts. The Commission should adopt the request of SCE to make the "Assignment" STC modifiable, or expressly acknowledge that partial or contingent assignments for the purposes of third-party financing are appropriate and acceptable.

¹ DRA, "Comments of the Division of Ratepayer Advocates on the Opinion on Amended Petition for Modification of Decision 04-06-014 Regarding Standard Terms and Conditions," at p. 2.

III. THE COMMISSION SHOULD ADOPT SDG&E’S APPROACH TO THE “ELIGIBILITY” STC.

PG&E fully concurs with SDG&E’s discussion of the “Eligibility” STC, and with its recommendations for Commission action. As SDG&E explains, it may literally be “impossible” for some renewable projects to meet new standards, and would “not [be] reasonable to place the seller in breach of the contract if it cannot reasonably comply with the eligibility rules as a result of a change in law.”² To require more would, as SDG&E, SCE and the Independent Energy Producers Association (“IEP”) all note, endanger renewable project financing and impair the ability to attract renewable projects to the California marketplace.³

The recommendation of buyers and sellers alike to the Commission, that the Commission convert the “Eligibility” STC to a modifiable provision to allow buyers and sellers to negotiate the change of law risk to meet the needs and circumstances of individual projects, would provide the best result for the RPS program and California consumers. The approach of the Proposed Decision, in contrast, would place an insurmountable burden on prospective renewable sellers. If the Commission ultimately decides not to grant the request of both buyers and sellers for flexibility, PG&E urges the Commission to adopt the compromise language offered by SDG&E. A uniform approach cannot provide the benefits of tailoring the division of change of law risk to the extremely heterogeneous array of renewables projects, but the SDG&E language provides a balanced approach to protecting buyer, seller and customer interests, enabling continued renewable development, and

² SDG&E, “San Diego Gas & Electric Company (U 902 E) Comments on Proposed Decision Regarding Amended Petition for Modification of Decision 04-06-014,” at pp. 3-4.

³ IEP, “Independent Energy Producers Association’s Comments on Draft Opinion on Amended Petition for Modification of Decision 04-06-014 Regarding Standard Terms and Conditions,” at p. 3; SCE, “Comments of Southern California Edison Company (U 338-E) on Proposed Decision,” at pp. 3-5 (“SCE Opening Comments”).

furthering the goals of the RPS program as it evolves. The proposed SDG&E language is as follows:

Seller, and, if applicable, its successors, represents and warrants that throughout the Delivery Term of this Agreement: (i) the Project qualifies, is certified by the CEC, and, [sic⁴] ~~in the event of changes in law continues to be certified by the CEC, as an Eligible Renewable Energy Resource~~ continues to qualify for certification under the rules for CEC certification as an Eligible Renewable Energy Resource; and (ii) the Project's output delivered to Buyer qualifies under the requirements of the California Renewables Portfolio Standard. To the extent a change in law occurs after execution of this Agreement that causes this representation and warranty to be materially false or misleading, it shall not be an Event of Default if Seller has used commercially reasonable efforts to comply with such change in law.

IV. THE VERIFICATION REQUIREMENT WOULD NEEDLESSLY BURDEN AND DELAY THE RENEWABLES CONTRACTING PROCESS

SCE's opening comments explain that the Proposed Decision's requirement for verification by sellers and buyers of whether changes to modifiable STCs are "substantive" would not add anything of value to the Commission or its RPS contracting review process.⁵ SCE correctly notes that, pursuant to Rule 1.1 of the Commission's Rules of Practice and Procedure, the Investor-Owned Utilities ("IOUs") are prohibited from submitting false or misleading material to the Commission; the addition of a verification requirement would be, as SCE concludes, simply "redundant."⁶ Moreover, as SCE points out, a verification of what ultimately is a subjective legal interpretation would be unenforceable.⁷

The resources of the Commission, IOUs, and sellers must remain keenly focused on constructive renewable contracting efforts to achieve the Commission's RPS goals. The

⁴ Preceding comma should be stricken.

⁵ SCE Opening Comments at pp. 9-10.

⁶ Id. at p. 9.

