

**PUBLIC UTILITIES COMMISSION**505 VAN NESS AVENUE
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September 22, 2008

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Ratesetting

TO PARTIES OF RECORD IN APPLICATION 08-07-018

This is the proposed decision of Administrative Law Judges (ALJ) Carol Brown and Timothy J. Sullivan. It will not appear on the Commission's agenda for at least 30 days after 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 either electronically pursuant to Resolution ALJ-188 or with the Commission's Docket Office. 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 Carol Brown at cab@cpuc.ca.gov, and ALJ Timothy J. Sullivan at tjs@cpuc.ca.gov, and the assigned Commissioner Michael R. Peevey. The current service list for this proceeding is available on the Commission's website at www.cpuc.ca.gov.

/s/ ANGELA K. MINKINAngela K. Minkin, Chief
Administrative Law Judge

ANG: lil

Attachment

Decision **PROPOSED DECISION OF ALJ BROWN AND ALJ SULLIVAN**
(Mailed 9/22/2008)

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application of Pacific Gas and Electric Company
for Expedited Approval of The Tesla Generating
Station And Issuance of a Certificate of Public
Convenience and Necessity and Request For
Interim Order Authorizing Early Project
Commitment to Stabilize Costs (U39E)

Application 08-07-018
(Filed July 18, 2008)

**DECISION GRANTING MOTION TO DISMISS OF WESTERN POWER
TRADING FORUM/THE ALLIANCE FOR RETAIL ENERGY MARKETS AND
THE INDEPENDENT ENERGY PRODUCERS ASSOCIATION**

1. Summary

This decision grants the motions to dismiss of the Western Power Trading Forum/the Alliance for Retail Energy Markets and the Independent Energy Producers Association of the Application of Pacific Gas and Electric Company (PG&E) for Expedited Approval of the Tesla Generating Station and Issuance of a Certificate of Public Convenience and Necessity. This is reasonable because PG&E's proposal fails to conform to Commission policies under which all long-term power should be obtained through "competitive procurements, rather than through preemptive actions by the Investor-owned Utilities, except in truly extraordinary circumstances."¹

¹ Decision (D.) 07-12-042 at 209 (emphasis in original).

More specifically, the Commission finds that facts that PG&E has alleged in its application do not adequately establish that conducting a request for offer is infeasible; a central requirement to proposing utility owned generation outside of a competitive process, as required by Decision 07-12-052.²

2. Procedural Background

On July 18, 2008, PG&E filed Application (A.) 08-07-018 seeking expedited approval and the issuance of a Certificate of Public Convenience and Necessity (CPCN) for the Tesla Generating Station, a 560 megawatts (MWs) natural gas-fired combined-cycle generating facility to be located in eastern Alameda County. In addition, PG&E also requests that the Commission issue an “expedited interim order by September 18, 2008 confirming that, if the Commission ultimately denies PG&E’s request for a CPCN, PG&E’s reasonable termination costs, including Allowance for Funds Used During Construction (AFUDC), will be eligible for recovery in rates as ‘abandoned project’ costs.”³ Finally, PG&E seeks expedited consideration of the application “because prompt action is required to develop the Tesla Generating Station to serve as a replacement for the 913 MWs of planned Northern California generation projects resulting from PG&E’s 2004 LTRFO [Long-Term Request for Offers] that have been terminated by the developers or are at-risk and in need of additional regulatory and permitting approvals in order to be able proceed [sic] with development.”⁴

² *Id.* at 210-211.

³ A.08-07-018 at 2.

⁴ *Id.*

Simultaneously with the filing of this application, PG&E made prepared testimony⁵ available to interested parties and filed a motion requesting to file some material in the Application under seal⁶ and a motion to file some material in its testimony under seal.⁷

On July 21, 2008, PG&E amended its application⁸ and testimony⁹ to reflect the fact that since the bid deadline in the 2008 LTRFO had passed, release of the initial capital costs and revenue requirements associated with the Tesla Generating Station did not require confidential treatment. Despite these modifications, both the application and the testimony still include material for which PG&E seeks confidentiality protections, and PG&E also filed an amended

⁵ Pacific Gas and Electric Company Tesla Generating Station Prepared Testimony, July 18, 2008.

⁶ Motion of PG&E for Leave to File Confidential Material in Application Under Seal Consistent with the Confidentiality Protections of D.06-06-066, Public Utilities Commission (PUC) Section 53, and General Order 66-C, July 18, 2008.

⁷ Motion of PG&E for Leave to File Confidential Testimony Under Seal Consistent with the Confidentiality Protections of D.06-06-066, PUC Section 53, and General Order 66-C, July 18, 2008.

⁸ Amendment to Application of PG&E for Expedited Approval of the Tesla Generating Station and Issuance of a CPCN and Request for Interim Order Authorizing Early Project Commitment to Stabilize Costs, July 21, 2008; Amended Application of PG&E for Expedited Approval of the Tesla Generating Station and Issuance of a CPCN and Request for Interim Order Authorizing Early Project Commitment to Stabilize Costs (Public and Confidential Versions), July 21, 2008 (Application).

⁹ Amendment to Prepared Testimony in Support of Application of PG&E for Expedited Approval of the Tesla Generating Station and Issuance of a CPCN and Request for Interim Order Authorizing Early Project Commitment to Stabilize Costs, July 21, 2008; Pacific Gas and Electric Company Tesla Generating Station Project Prepared Testimony (Amended Public Version and Amended Confidential Version), July 21, 2008.

motion to protect certain material in the application¹⁰ and an amended motion to protect certain material in the testimony.¹¹

Resolution ALJ 176-3218 (July 31, 2008) categorized the proceeding as ratesetting and reached a preliminary determination that hearings would prove necessary for the resolution of this matter.

Protests were timely filed by the Division of Ratepayer Advocates (DRA),¹² the Western Power Trading Forum and the Alliance for Retail Energy Markets (WPTF/AREM),¹³ the Independent Energy Producers Association (IEP),¹⁴ Mirant California, LLC, Mirant Delta, LLC and Mirant Potrero, LLC (filing jointly) (Mirant)¹⁵, Californians for Renewable Energy, Inc. (CARE),¹⁶ the City of Tracy (Tracy),¹⁷ and the City and County of San Francisco (CCSF).¹⁸ In addition, a

¹⁰ Amended Motion of PG&E for Leave to File Confidential Material in Application Under Seal Consistent with the Confidentiality Protections of D.06-06-066, PUC Section 53, and General Order 66-C, July 21, 2008.

¹¹ Amended Motion of PG&E for Leave to File Confidential Testimony Under Seal Consistent with the Confidentiality Protections of D.06-06-066, PUC Section 53, and General Order 66-C, July 21, 2008.

¹² Protest of the Division of Ratepayer Advocates (DRA Protest), August 20, 2008.

¹³ Protest of the Western Power Trading Forum and the Alliance for Retail Energy Markets (WPTF/AREM Protest), August 20, 2008.

¹⁴ Protest of the Independent Energy Producers Association (IEP Protest), August 20, 2008.

¹⁵ Protest of Mirant California, LLC, Mirant Delta, LLC and Mirant Potrero, LLC (Mirant Protest), August 20, 2008.

¹⁶ Protest of Californians for Renewable Energy, Inc. (CARE Protest) August 19, 2008.

¹⁷ Protest of the City of Tracy (Tracy Protest), August 19, 2008.

¹⁸ Protest of the City and County of San Francisco of Pacific Gas and Electric Company's Application for Expedited Approval of the Tesla Generating Station (CCSF Protest), August 18, 2008.

limited protest was filed by The Utility Reform Network (TURN)¹⁹ and a response to the application was filed by the California Energy Commission (CEC).²⁰

On August 19, 2008, Patterson Pass, LLC (Patterson Pass) filed a motion to intervene.²¹ On August 20, 2008, IEP filed a motion to dismiss the application²² and a separate motion asking the Commission “to institute a formal investigation proceeding to examine utility behavior under the hybrid market structure.”²³ On August 21, 2008, WPTF/AREM also filed a motion to dismiss.²⁴

On August 22, 2008, PG&E filed a reply responding to the protests and to the motion of IEP.²⁵

On August 27, 2008, a prehearing conference (PHC) was held in San Francisco to address the issues concerning the management of this proceeding. As part of the discussion at the PHC, it was determined that several parties had

¹⁹ Limited Protest of the Utility Reform Network (TURN Limited Protest), August 20, 2008.

²⁰ Response of the California Energy Commission to the Application of Pacific Gas and Electric Company for Expedited Approval of the Tesla Generating Station and Issuance of a Certificate of Public Convenience and Necessity and Request for Interim Order Authorizing Early Project Commitment to Stabilize Costs (CEC Response), August 20, 2008.

²¹ Motion to Intervene of Patterson Pass, LLC, August 19, 2008.

²² Motion of the Independent Energy Producers Association to Dismiss PG&E’s Application (IEP Motion to Dismiss), August 20, 2008.

²³ Motion of the Independent Energy Producers Association for an Investigation (IEP’s Motion for Investigation), August 20, 2008, at 1.

²⁴ Motion to Dismiss of the Western Power Trading Forum and the Alliance for Retail Energy Markets (WPTF/AREM Motion), August 21, 2008.

failed to receive all of the motions of IEP and WPTF/AREM. As a result, the Administrative Law Judge (ALJ) ordered IEP and WPTF/AREM to serve the motions on August 28 to a service list that was updated after the PHC. The ALJ set September 8, 2008 as a date for all parties to respond to the motions.²⁶

Patterson Pass was granted party status in the proceeding.²⁷

On September 4, 2008, PG&E responded to the motion of WPTF/AREM.²⁸

On September 4, 2008, SCE filed a response to IEP's Motion for Investigation.²⁹ Subsequently SCE filed a motion to become a party in the proceeding.³⁰

On September 8, 2008, the Coalition of California Utility Employees and California Unions for Reliable Energy (CUE/CURE) opposed the motions to dismiss and the motion for an investigation.³¹

²⁵ Pacific Gas and Electric Company's (U39E) Reply to Protests and Response to IEP's Motion to Dismiss and Motion for an Investigation, August 22, 2008 (PG&E Reply).

²⁶ TR 8: 22-23.

²⁷ TR 7: 12-14.

²⁸ Pacific Gas and Electric Company's (U39E) Reply to Motion to Dismiss of the Western Power Trading Forum and the Alliance for Retail Energy Markets (PG&E Reply to WPTF/AREM Motion), September 4, 2008.

²⁹ Southern California Edison Company's (U338E) Response to Motion of the Independent Energy Producers Association for an Investigation (SCE Response to IEP's Motion for Investigation), September 4, 2008.

³⁰ Motion of Southern California Edison Company (U338E) to Become a Party to the Proceeding, September 5, 2008.

³¹ Opposition of the Coalition of California Utility Employees and California Unions for Reliable Energy to the Motions to Dismiss the Application and the Motion for an Investigation, September 8, 2008.

On September 9, 2008, SDG&E filed a response to IEP's Motion for Investigation³² and a motion to become a party to the proceeding.³³

On September 15, an assigned Commissioner's Ruling and Scoping Memo (ACR) denied the motion to dismiss of IEP and of WPTF/AReM.

3. Legal Authority

The Commission has clearly stated how it decides whether to grant a motion to dismiss:

By assuming that the facts as alleged in the application are true for the purposes of deciding whether to grant a motion to dismiss, we assume that the applicant will be able to prove everything the applicant alleged in its application to the Commission in order to gain a CPCN. We do not accept as true the ultimate facts, or conclusions, that Applicant alleges, for instance, that granting the CPCN would be in the public interest. After accepting the facts as stated, the Commission then merely looks to its own law and policy. The question becomes whether the Commission and the parties would be squandering their resources by proceeding to an evidentiary hearing when the outcome is a foregone conclusion under the current law and policy of the Commission.³⁴

³² Response of San Diego Gas & Electric Company (U902E) to the Motion of the Independent Energy Producers Association for an Investigation (SDG&E's Response to IEP's Motion for Investigation), September 9, 2008.

³³ Motion of San Diego Gas & Electric Company (U902E) to Become a Party, September 9, 2008.

³⁴ *Application of Western Gas Resources-California, Inc., for a Certificate of Public Convenience and Necessity to Provide Public Utility Gas Transmission and Distribution Services Through the Use of Certain Existing Facilities and to Construct Additional Interconnection Facilities*, D.99-11-023, 1999 Cal. PUC LEXIS 856, 10-11 (Cal. PUC 1999), footnotes omitted.

In D.07-12-052, the Commission articulated its policy “that all long-term procurement should occur via competitive procurements, rather than through pre-emptive actions by the [investor-owned utility] IOU, except in truly extraordinary circumstances.”³⁵ In addition, “if an IOU proposes a UOG [Utility owned generation] outside of a competitive request for offer (RFO), the IOU must make a showing that holding a competitive RFO is infeasible.”³⁶ The Commission divided the “unique circumstances warranting some form of utility ownership into five categories.”³⁷

4. Issues before the Commission

The critical issue before the Commission is whether to grant either the WPTF/AREM’s Motion to Dismiss or IEP’s Motion to Dismiss. If granted, the motions will bring this proceeding to a close and the Tesla Generating Station, in its current incarnation, will not receive a CPCN.

4.1. Postion of Parties

WPTF/AREM’s Motion to Dismiss argues that:

The Commission has established clear and precise standards for an application for utility owned generation (UOG) acquired outside a competitive process in D.07-12-052 issued just last December in the Commission’s Long-Term Procurement Plan (LTPP) proceeding, R.06-12-013. The PG&E Application asserts

³⁵ *Opinion Adopting Pacific Gas and Electric Company’s, Southern California Edison Company’s, and San Diego Gas & Electric Company’s Long-Term Procurement Plans*, D.07-12-052 at 209, emphasis in original.

³⁶ *Id.* at 211.

³⁷ *Id.* at 210.

but fails to demonstrate to [sic] compliance with those standards.³⁸

WPTF/AReM contends that “PG&E’s application represents a fundamental departure from the procurement framework the Commission established in prior decisions.”³⁹ WPTF/AReM argues that PG&E fails to meet the “truly extraordinary circumstances”⁴⁰ criterion set forth in D.07-12-052 and therefore “[p]roceeding with an Application that is unquestionably inconsistent with the policy the Commission adopted calling for competitive sourcing of utility long-term procurement is an inefficient use of Commission and party resources and undermines the credibility and robustness of the procurement practices the Commission has endorsed.”⁴¹

More specifically, WPTF/AReM contends that the Application does not comply with Commission procurement policy because it meets neither the “unique opportunity”⁴² nor the “reliability needs”⁴³ criteria set forth in D.07-12-052 for the development of UOG outside of a RFO process. WPTF/AReM also argues that the Application “fails to comply with Commission policy that an RFO must be demonstrated to be infeasible”⁴⁴ and

³⁸ WPTF/AReM Motion at 4.

³⁹ *Id.* at 5.

⁴⁰ D.07-12-052 at 209.

⁴¹ WPTF/AReM Motion at 5.

⁴² *Id.* at 6.

⁴³ *Id.* at 7.

⁴⁴ *Id.* at 8.

that PG&E fails to show that the power is “attractively priced.”⁴⁵ WPTF/ AReM further argues that “[g]ranting PG&E’s application will likely lead to the diminution of competition in the California generation market”⁴⁶ and that the application “effectively constitutes a petition to modify D.07-12-052, for which parties have not received legally sufficient notice.”⁴⁷

Like the Motion of WPTF/ AReM, IEP’s Motion to Dismiss also discusses the policies set forth in D.07-12-052 and argues that PG&E’s Application “should be dismissed because it fails to meet the requirements the Commission has established for this type of request.”⁴⁸ IEP contends that PG&E “fails to show that holding a competitive RFO is infeasible”⁴⁹ and that PG&E “fails to show that the Tesla project qualifies under the ‘extraordinary circumstances’ exception.”⁵⁰

In reply to WPTF/ AReM’s Motion, PG&E states that “the Commission has set a high standard for a motion to dismiss an application.”⁵¹ PG&E contends that the Commission should not dismiss this Application because: 1) “The Tesla Generating Station satisfies the unique opportunity requirement;”⁵² 2) “PG&E has demonstrated that there is a reliability need for the Tesla Generating

⁴⁵ *Id.* at 9.

⁴⁶ *Id.* at 10.

⁴⁷ *Id.* at 12.

⁴⁸ IEP Motion to Dismiss at 3.

⁴⁹ *Id.*

⁵⁰ *Id.* at 4.

⁵¹ PG&E Reply to WPTF/ AReM Motion at 2.

⁵² *Id.* at 4.

Station;”⁵³ 3) “PG&E has demonstrated that an RFO is infeasible;”⁵⁴ and 4) “PG&E has demonstrated that the Tesla Generating Station is an attractively priced resource.”⁵⁵ PG&E argues that these assertions of WPTF/ AReM are at best “disputed factual issues that warrant evidentiary hearings and Commission review on the merits.”⁵⁶ Finally, PG&E contends that “WPTF/ AReM’s policy arguments are not appropriate for resolution in a motion to dismiss;”⁵⁷ and that its “asserted ‘other grounds’ for dismissal demonstrate the need for hearings.”⁵⁸

Concerning the IEP Motion to Dismiss, PG&E argues that IEP’s claims that PG&E failed to demonstrate that an RFO is infeasible and that extraordinary circumstances exist “ignore the evidence presented by PG&E and, at best, raise a disputed issue of material fact.”⁵⁹ PG&E asserts that “not only is there a triable issue of fact, but PG&E has demonstrated that these facts support its Application.”⁶⁰

In opposing the motions to dismiss, CUE/CURE presents a detailed and lengthy argument directly addressing the issue of whether a unique opportunity is limited to those that arise in a “settlement or bankruptcy” proceeding. CUE/CURE states that:

⁵³ *Id.* at 5.

⁵⁴ *Id.* at 6.

⁵⁵ *Id.*

⁵⁶ *Id.* at 4.

⁵⁷ *Id.* at 7.

⁵⁸ *Id.* at 8.

⁵⁹ PG&E Reply at 21.

⁶⁰ *Id.*

Although both WPTF and IEP argue that this category [unique opportunity] is limited only to those resources which are subject to a settlement or a bankruptcy proceeding, it is apparent that the Commission intended for this category to encompass all circumstances in which a unique opportunity exists to obtain “attractively priced resource.”⁶¹

CUE/CURE supports its interpretation by analyzing the context of the discussion of unique opportunity contained in D.07-12-052. CUE/CURE argues that “each of the other four categories described [in the decision] contain general and inclusive language;” that the decision states that the Commission will consider UOG approval on a “case-by-case basis;” and the Commission states that “the needs highlighted in these five categories may change.”⁶² CUE/CURE concludes:

It follows that the reference to settlement and bankruptcy proceedings within the “unique opportunity” category is not meant to be exclusive, but is rather intended merely to *highlight* or provide examples of certain “attractively priced resources.”⁶³ Finally, had the Commission intended to categorically exclude every unique and “attractively priced” opportunity for UOG that did not stem from a settlement or bankruptcy proceeding – no matter how attractively prices, and no matter how unique the opportunity – it would have said so explicitly.⁶⁴

In addition, CUE/CURE argues that there is an open issue as to whether the facts alleged in the Application may lead to a situation that “*may* compromise

⁶¹ CUE/CARE Opposition at 6.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*, emphasis in original.

reliability.”⁶⁵ CUE/CURE concludes by arguing that neither IEP nor WPTF/AReM have met the applicable legal standards for a motion and “should be denied.”⁶⁶

4.2. Ruling and Rationale of ACR

The ACR evaluated PG&E’s assertion that the proposed project meets the criteria warranting UOG in two of the five exception categories identified in D.07-12-052 because it “provides a unique opportunity or is needed to meet specific, unique reliability needs.”⁶⁷

The ACR determined that concerning these two categories, D.07-12-052 states as follows:

- Unique Opportunity – an attractively priced resource resulting from a settlement or bankruptcy proceeding (we anticipate that these opportunities will diminish over time); and
- Reliability – resources needed to meet specific, unique reliability issues (particularly under circumstances in which it becomes evident that reliability may be compromised if new resources are not developed, and the only means of developing new resources in sufficient time is via UOG).⁶⁸

Furthermore, in a summary of its approach, D.07-12-052 states: “We shall consider these unique circumstances for UOG approval outside of a competitive solicitation on a case-by-case basis via an IOU application.”

⁶⁵ *Id.* at 8, emphasis in original.

⁶⁶ *Id.* at 12.

⁶⁷ PG&E Reply to WPTF/AReM Motion at 3.

⁶⁸ D.07-12-052 at 212.

In considering whether to grant the motions to dismiss, the ACR sought to determine whether, even if PG&E's factual assertions were to be proven true, Commission policy would still require denial of the application. The ACR found that PG&E had asserted facts in its application that would, if proven true, indicate that holding an RFO to solicit power is not possible in this current situation.

The ACR first examined the set of facts pertaining to the "unique opportunity" offered by this Application. The ACR noted that PG&E does not assert that this "unique opportunity" arises from a settlement or a bankruptcy. Still, the facts pertaining to the advanced position in regulatory reviews and the facts pertaining to the order status of the turbine generators are clearly unique, but the ACR then cited the argument of CUE/CURE, which stated that the goal of the Commission is to permit a utility to acquire "attractively priced resources" and the words "resulting from a settlement or bankruptcy"⁶⁹ are illustrative of the type of situation that produces an "attractively priced resource,"⁷⁰ not qualifying conditions.

The ACR observed that the Commission may be persuaded by this argument in light of the strong commitment articulated in D.07-12-052 to a case-by-case approach to examining proposed UOG projects. The ACR concluded that the Commission may wish to clarify whether D.07-12-052 has set a policy that would limit its examination of unique circumstances to only those situations

⁶⁹ *Id.*

⁷⁰ *Id.*

that arise from a settlement or from a bankruptcy. Thus, the ACR concluded there were insufficient grounds for dismissing PG&E's application.

The ACR also analyzed the issue of whether the Tesla Generating Station could qualify as a UOG project under the reliability exception. The ACR noted that PG&E has pointed out that without this project, it will fail to meet the Commission-adopted Planning Reserve Margin in 2013.⁷¹ The ACR further noted that PG&E asserts that the Tesla Generating Station is the "most viable alternative to meet customer needs."⁷² If PG&E were to prove that there is a reliability issue, then the project would clearly qualify for the "reliability" exception created in D.07-12-052.

Turning now to IEP's Motion to Dismiss, the ACR found unpersuasive IEP's arguments that the Application should be dismissed because "PG&E fails to show that holding a competitive RFO is infeasible"⁷³ and that "PG&E fails to show that the Tesla project qualifies under the 'extraordinary circumstances' exception."⁷⁴ The ACR held, PG&E has made factual claims that, if determined to be valid, "would show that an RFO is infeasible"⁷⁵ and that the project does meet the "extraordinary circumstances" exceptions.

Based on all these considerations, the ACR concluded that the Commission should have the opportunity to evaluate the evidence presented in the

⁷¹ Application at 17.

⁷² *Id.* at 18.

⁷³ IEP Motion to Dismiss at 3.

⁷⁴ *Id.* at 4.

⁷⁵ ACR. at 16.

Application. The motions to dismiss of WPTF/ AReM and IEP were therefore denied.

4.3. Analysis: Motion of WPTF/AReM and IEP Warrants Dismissal of Application

Typically the Commission does not consider interlocutory appeals or re-examine rulings issued in a proceeding. However, PG&E's request for an interim decision granting recovery of any project termination costs that it may incur should the Commission decline to grant a CPCN for the Tesla Generating Station would, if approved, place ratepayers at risk of approximately \$59 million in termination costs before the issue of the reasonableness of the project came before the full Commission.⁷⁶ In light of this fact, it is reasonable for the Commission to examine on its own motion whether to reverse the ACR that denied the motions to dismiss.

In D.07-12-052, the Commission established standards for an application for utility UOG acquired outside a competitive process. In that decision the Commission stated that a utility, in its application seeking approval for a UOG resource procured outside of a competitive procurement, must demonstrate that conducting an RFO is not feasible.

As the WPTF/ AReM Motion states:

... PG&E fails to comply with Commission policy that an RFO must be demonstrated to be infeasible. As noted in the joint WPTF/ AReM protest of the application filed August 20, 2008, D.07-12-052 provides: "Because the Commission has a strong preference for competitive solicitations, in all cases, if an IOU proposes a UOG outside of a competitive RFO, *the IOU must make*

⁷⁶ [Application at 8.](#)

a showing that holding a competitive RFO is infeasible.” Further, in allowing the possibility that UOG could be built under any of the five categories, the Commission again emphasized that “we firmly believe that all long-term procurement should occur via competitive procurements, except in truly extraordinary circumstances,” and specified that “while we do not explicitly disallow utility ownership options in the generation market we continue to look unfavorably on this procurement option but realize that in extraordinary times this may be the optimal method for meeting the needs of California’s ratepayers. Here, however, PG&E makes no showing that holding a competitive RFO was (or is) infeasible, thus again failing to comply with explicit Commission policy in that regard.⁷⁷

On this same issue, the IEP Motion to Dismiss states:

As IEP points out in its protest, the time between the issuance of an RFO and the commercial operation date of a winning plant has been as little as a year. PG&E notes but then ignores the fact that Southern California Edison Company’s Fast Track RFO will take about four years from issuance of the RFO to commercial operation.⁷⁸

We agree with WPTF/AReM and IEP that PG&E fails to meet the truly extraordinary circumstances criterion set forth in D.07-12-052. In particular, they have provided no real evidence – only argument – that an RFO is infeasible. As a consequence, proceeding with this application is inappropriate as it is an inefficient use of time and resources and could potentially undermine the procurement policies recently established by this Commission.

⁷⁷ WPTF/AReM Motion at 8-9, footnotes omitted.

⁷⁸ IEP Motion to Dismiss at 3.

5. Conclusion

We find it reasonable to grant the Motions to Dismiss of the Western Power Trading Forum/the Alliance for Retail Energy Markets and the Independent Energy Producers of the Application of Pacific Gas and Electric Company for Expedited Approval of the Tesla Generating Station and Issuance of a Certificate of Public Convenience and Necessity (CPCN). Even if we assume that the facts alleged in the in the application are true, we do not find that PG&E has met the criteria set in D.07-12-052 for UOG. We reiterate here that in D.07-12-052, we set a clear preference for a markets-first approach and set an intentionally high bar for UOG in support of this preference. We do not find that PG&E's application for the Tesla Generation Station has met that high threshold. Specifically, PG&E has not sufficiently demonstrated that conducting an RFO is infeasible; a central requirement to proposing UOG outside of a competitive process. We therefore find it reasonable to grant the motions to dismiss, therefore closing this proceeding.

6. 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 _____.

7. Assignment of Proceeding

Michael R. Peevey is the assigned Commissioner and Carol A. Brown and Timothy J. Sullivan are the assigned Administrative Law Judges in this proceeding.

Finding of Fact

The Application of PG&E fails to demonstrate that an RFO for additional power is infeasible.

Conclusions of Law

1. The Application of PG&E for Expedited Approval of the Tesla Generating Station and Issuance of a CPCN does not meet the UOG exceptions of D.07-12-052.
2. It is reasonable to grant the WPTF/AREM and IEP Motions to Dismiss.

O R D E R

IT IS ORDERED that:

1. The motions of Western Power Trading Forum, the Alliance for Retail Energy Markets, and the Independent Energy Producers Association to dismiss Pacific Gas and Electric Company's Application for Expedited Approval of the Tesla Generating Station and Issuance of a Certificate of Public Convenience and Necessity are granted.
2. Application 08-07-018 is closed.

This order is effective today.

Dated _____, at San Francisco, California.

INFORMATION REGARDING SERVICE

I have provided notification of filing to the electronic mail addresses on the attached service list.

Upon confirmation of this document's acceptance for filing, I will cause a Notice of Availability of the filed document to be served upon the service list to this proceeding by U.S. mail. The service list I will use to serve the Notice of Availability of the filed document is current as of today's date.

Dated September 22, 2008, at San Francisco, California.

/s/ LILLIAN LI

Lillian Li