

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA



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Application of Pacific Gas and Electric Company (U 39 E) 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)

**RESPONSE OF THE DIVISION OF RATEPAYER ADVOCATES
IN SUPPORT OF IEP'S MOTION TO DISMISS
THE OAKLEY APPLICATION**

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I. INTRODUCTION

The Division of Ratepayer Advocates (“DRA”) files this response in support of the Motion (“Motion”) of the Independent Energy Producers Association (“IEP”) to dismiss Pacific Gas and Electric Company’s (“PG&E”) Application 12-03-026 (the “Application”).¹

Even taking as true the facts alleged in the Application for the purpose of evaluating the motion, PG&E’s third attempt to gain approval of the Purchase and Sale agreement (“PSA”) for the Oakley Generation Station should be dismissed because:

- 1) PG&E’s Application fails to allege facts that could satisfy the requirements of D.10-07-045 for re-submitting the Oakley project via Application for the Commission’s consideration, and

¹ DRA files this response pursuant to Rule 11.1(e) of the Commission’s Rules of Practice and Procedure.

- 2) The Application cannot be approved on any other basis because PG&E indisputably failed to comply with Commission policies dictating that long-term power cannot be procured through preemptive actions by the Investor-Owned Utilities except in truly extraordinary circumstances, as articulated in D.07-12-052 and reaffirmed by Commission's most recent policy statements on UOG in D.12-04-046.

Accordingly, the Commission should grant IEP's Motion to Dismiss PG&E's request for approval of the Amended Purchase and Sale Agreement for the Oakley project submitted in A.11-2-03-026.

II. APPLICABLE STANDARDS

A. Legal Standard for a Motion to Dismiss an Application

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.

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, D.08-11-004, 2008 Cal. PUC LEXIS 447 (Cal. PUC 2008), at *11 (quoting Application of Western Gas Resources-California, Inc., for a Certificate of Public Convenience and Necessity, D.99-11-023, 1999 Cal. PUC LEXIS 856, *10-11.)

Importantly, in determining the ultimate question of whether the Commission and the parties would be squandering their resources by proceeding to an evidentiary hearing, the Commission does not accept as true the ultimate facts, or conclusions, that the Applicant alleges. Western Gas Resources at * 10-11.

B. The Commission’s authorizing conditions required for PG&E to resubmit the Oakley Project.

In addition to receiving necessary permits,² the Commission’s Decision 10-07-045 required that PG&E must meet one of three authorizing conditions in order to resubmit the Oakley Project, via Application, for the Commission’s consideration. As PG&E admits that the first two authorizing conditions are not satisfied, only the third is relevant here:

Prior to the next PG&E LTRFO [long-term request for offers], 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.

These criteria are consistent with the Commission’s stated environmental and procurement objectives, and our goal of maintaining high levels of reliability for ratepayers.

D.10-07-045 at 40-41.

C. The Commission’s requirements and policies on Utility Owned Generation (UOG) projects.

In Decision (D.) 07-12-052, the Commission emphasized its support for a “competitive market first” approach and stated its firm belief that “all long-term procurement should occur via competitive procurements, except in truly extraordinary circumstances.” D.07-12-052 at 212-213 (emphasis in original). See also D.08-11-004 at 8. Thus, “in all cases, if an IOU proposes a UOG outside of a competitive request for

² DRA does not currently take any position on whether Oakley has or lacks necessary permits (although it believes this is an issue that would be subject to further discovery) if the notice to dismiss is denied.

offer (RFO), the IOU must make a showing that holding a competitive RFO is infeasible.” *Id.* at 210-211 (emphasis added). The Commission recognizes only four “unique circumstances” in which an IOU may propose UOG outside of a competitive RFO:

- 1) the proposed UOG is necessary to mitigate market power by a private owner;
- 2) the proposed UOG is a preferred resource;
- 3) the proposed UOG is a unique opportunity; or
- 4) the proposed UOG is necessary to ensure system reliability.

See D.07-12-052 at 210-212; see also D.08-11-008 at 30 (deleting a fifth category, “Expansion of Existing Facilities”).

PG&E contends that only one of the circumstances is relevant here (see Response of PG&E to Motions to Dismiss), which is the “reliability” category:

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 UOG).

D.07-12-052 at 212 (emphasis added). However, even “in instances in which an IOU submits an application for UOG that falls into one of the [categories of “unique circumstances”], the IOU should request in its application to hold a competitive RFO for turnkey project development of the resource (a PSA)” or explain why it is not appropriate. D.12-07-052 at 212.

The Commission’s most recent policy statements on UOG adopted a requirement that a UOG project must be preceded by a “failed” RFO. D.12-04-046 at 38. Thus, the Commission now clearly requires that “utility owned generation shall be procured only after a corresponding utility request for offers has failed.” *Id.* at Ordering Paragraph 6. Thus, before an IOU may submit an application for a UOG project, the Commission must issue a resolution determining that an RFO has failed, in response to the utility’s filing of a Tier 3 advice letter setting forth the reasons why the RFO should be considered

“failed.” Id. at 38-39. In setting forth this requirements, the Commission also clarified that the pre-existing rules remain in place “except as modified by this decision.” Id. at 31.

III. ARGUMENT

A. **PG&E’s Application Does Not Allege Any Facts Which, If Taken As True, Support A Finding That Any Final Results From A CAISO Renewable Integration Study Demonstrates Significant Reliability Risks From Integrating A 33% Renewable Portfolio Standard.**

PG&E’s Application makes a number of vague assertions regarding the CAISO’s identification of a “need” for flexible gas-fired resources. But PG&E’s application does not substantiate these allegations with any credible assertions (1) that any “final results” from the CAISO Renewable Integration Study exist, (2) that any such results demonstrate “significant negative reliability risks” from integrating renewable resources, or (3) that such study results have taken into account the projects approved by the Commission.

In fact, the 33% renewable integration studies the CAISO has completed since D.10-07-045 issued have already been considered by the Commission when it determined that “[t]here is clear evidence on the record that additional generation is not needed by 2020” in its decision on System Track I issues in the 2010 Long Term Procurement Planning (LTPP) proceeding. This fact is indisputable.

Ultimately, since each of PG&E’s references to CAISO “studies” emanate from the 33% renewable integration modeling scenarios the CAISO conducted in the 2010 LTPP, There are no other “final results” to consider.”

PG&E’s remaining allegations of a need for resources point only to CAISO statements, memoranda, or letters. These references are problematic for several reasons, including that none constitutes “final results from the CAISO Renewable Integration Study” (except to the extent they refer back to the scenarios conducted for the 2010 LTPP). Thus, these references individually and collectively are insufficient to satisfy the requirements of D.10-07-045.

PG&E certainly has had ample notice of, and opportunity to comply, with the requirements set out by D.10-07-045. Thus, dismissing the Application for PG&E's failure to comply with D.10-07-045 could not violate due process. Accordingly, the Commission should not expend any additional resources considering PG&E's third request for approval to purchase the Oakley facility.

1. PG&E's unsubstantiated references to "CAISO studies" are mere statements of the ultimate conclusion PG&E would like the Commission to reach—not allegations of fact that could support such a finding.

The Application alleges that the Oakley project is beneficial and alludes vaguely to CAISO statements identifying "a need" for flexible gas-fired resources. But none of these references can satisfy the authorizing condition of D.10-07-045. Indeed, these references are wholly unsubstantiated and fail to identify any CAISO study by name, date, proceeding, CAISO stakeholder initiative, or any other identifying information. For example, PG&E states that:

The only thing that has changed since December 2010 ... is that the need for this [facility] is even greater today than it was 15 months ago. The Oakley Project is beneficial for the system and exactly the kind of facility that the CAISO has identified is needed in California.

(Application at 4.) Similarly, PG&E states that the need for resources "like the Oakley Project has only increased since December 2010, as evidenced by the recent CAISO studies addressing grid reliability concerns." Application at 15.

The Application does not identify these "studies" in any way that could substantiate their existence or support PG&E's conclusions regarding their meaning. They are no more than PG&E's statements of the ultimate conclusion that PG&E would like the Commission to reach (that such CAISO studies exist and show a need for new resources). Thus, these allegations need not be taken as true by the Commission. Western Gas at *10-11. These and all similar unsupported statements in PG&E's

Application, testimony, and briefing should be disregarded because they cannot support a finding that PG&E has complied with D.10-07-045.

2. PG&E’s citation to CAISO letters or statements by the CAISO’s CEO cannot satisfy the conditions imposed by D.10-07-045.

The Application also cites to letters sent by the CAISO and statements by the CAISO’s CEO to support allegations regarding a need for “new and flexible generation capacity.” Application at 12. Even if the Commission accepts (for the purposes of evaluating the motions to dismiss) the truth of the CAISO’s statements in these materials, such references cannot satisfy the authorizing condition regarding CAISO studies set forth in D.10-07-045.

PG&E cites a memorandum report to the CAISO board in which the new Chief Executive Officer of the CAISO refers to a “potential for a shortfall of flexible resources.” Application at 12. This is a short, two-paragraph blurb in a two-page memorandum presented to the CAISO Board that reports on the CAISO’s current “Flexible Capacity Procurement” initiative. It does not purport to present new results of any renewable integration studies. The blurb includes a statement that “the system is still likely to be short several thousand megawatts of ramping capacity.” *Id.* Even if taken as true, this statement does not even purport to assert “final results” from any CAISO study—it is simply an update of ongoing work given by a CEO to his Board members. Nor does the CAISO’s CEO opine that the potential “shortfall” would create significant negative reliability risks.³ Accordingly this memorandum from the CAISO CEO cannot satisfy the condition set forth in D.10-07-045.

PG&E also cites to a February 1, 2010 letter from the CAISO to the Commission that PG&E interprets as identifying a “need” for flexible gas-fired resources. PG&E did

³ Indeed, the key concern of the CAISO’s Flexible Capacity Procurement initiative is issues that might arise if existing resources retire over the next five years. See Flexible Capacity Procurement Straw Proposal (Mar. 7), p. 10 (cited by the Application, footnote 26). By contrast, identifying new generation needs should occur in the long term procurement process—which the CAISO participated in as a party to the 2010 LTPP settlement approved in D.12-04-046.

not attach a copy of this letter to the Application. Even if it had, a letter from the CAISO to the Commission does not qualify as “final results” from a CAISO study, and therefore it cannot meet the clear requirements of D.10-07-045.

First, this letter pre-dates the issuance of D.10-07-045 and preceded the service of rebuttal testimony (March 10, 2010) and briefing (April 22, 2010) in A.09-09-01. Accordingly, if such a letter was pertinent to any reasons for approving Oakley, it should have been submitted by PG&E into the record of A.09-09-021 for the Commission’s consideration—not held back by PG&E for submission two years later. If the Commission had meant for a simple letter or statement by CAISO to be sufficient to overcome the evidence that led the Commission to reject Oakley as being not needed in the first place, then it would have used different words when crafting D.10-07-045. But it did not. Rather, the Commission clearly stated that PG&E must allege “final results” from a CAISO study—not a smattering of opinions of CAISO staff from correspondence or internal CAISO memoranda. Further, any “letter” or CAISO statements should be disregarded by the Commission unless they are submitted by the CAISO, in this proceeding, through a pleading, declaration, testimony, or some other form in which such evidence might properly come before the Commission in a manner that allows for cross-examination by adverse parties.

3. PG&E’s Citations to the CAISO’s Flexible Capacity Procurement Initiative do not meet the requirements of D.10-07-045.

PG&E’s Application also refers to the CAISO’s alleged “conclusion” that it “will need even more flexible capacity that many conventional resources provide in order to maintain grid reliability under the 33 percent RPS.” Application at 12 and footnote 26 (citing CAISO’s Flexible Capacity Procurement Straw Proposal). This refers to the CAISO’s initiative that concerns maintaining existing resources—not a need for new ones: “[c]onsequently, the need to ensure that a sufficient fleet of flexible resources is maintained will only increase.” Application at 12 (quoting CAISO Straw Proposal). The statements are also from a CAISO Straw Proposal, which by definition is not “final.”

Accordingly, PG&E's references to the CAISO's statements in the Flexible Capacity Procurement initiative cannot be relied on to find allege any "significant reliability risks" exists. And even if they are taken as true these statements from a Straw Proposal cannot support a finding that "final results" from a CAISO study demonstrate a need for the Oakley plant as explained in the following section. That is because they refer to study results (from the 33% renewable integration scenarios) that the Commission has already determined do not demonstrate that there is a need for a new resources by 2020.

B. The Indisputable Fact Is That The Commission Has Already Determined That The Results Of The CAISO's 33% Renewable Integration Studies Conducted For 2010 LTPP Do Not Demonstrate A Need For New Generation By 2020

The only actual CAISO study results that are referenced (albeit indirectly) by PG&E's Application, which were conducted since D.10-07-045 issued, are the CAISO's modeling of 33% renewable integration scenarios conducted as a part of the CPUC's 2010 LTPP.

But as PG&E admits, the CAISO's Flexible Capacity Procurement Straw Proposal describes, and the Commission's recent decision closing the 2010 LTPP confirms, the CAISO's renewable integration studies conducted since D.10-07-045 issued have already been submitted for the Commission's consideration in the 2010 LTPP. The Commission has determined that, even considering all results from the CAISO's studies on the need to add capacity for the 33% renewable integration standard, "[t]here is clear evidence on the record that additional generation is not needed by 2020."⁴ D.12-04-046 at 6 (emphasis added).

Thus, unless the Commission here decided to reach a wholly contradictory outcome—only months later and based on the exact same CAISO studies—then the

⁴ D.12-04-046, p. 6.

CAISO's 2010 LTPP studies cannot support a finding that a "significant negative reliability risk" currently exists from integrating a 33% Renewable Portfolio Standard.

1. The ultimate source of statements about CAISO "studies" or findings is from the modeling of 33% renewable integration planning scenarios conducted in the 2010 LTPP.

PG&E's Application omits the actual source of the CAISO studies that underlie the cited statements on the need for flexible capacity to support renewable generation. PG&E does this by alluding to (but never citing) the "CAISO studies" and presenting statements from the Straw Proposal on Flexible Capacity Procurement without identifying the source studies presented in that proposal. But as the CAISO's Flexible Capacity Procurement Straw Proposal explains, following the August 2010 "Integration of Renewable Resources: Operational Requirements and Generation Fleet Capability at 20% RPS" studies, the CAISO conducted additional renewable integration studies as part of the CPUC's 2010 LTPP. See Flexible Capacity Procurement Straw Proposal at 7. The CAISO's Flexible Capacity Procurement Straw Proposal describes the studies as follows:

In 2011, the ISO undertook a number of studies to quantify the flexible capacity needed to reliably integrate the 33 percent RPS. Using assumptions provided by the CPUC, the ISO analyzed if a projected future generation fleet will be able to reliably integrate a 33 percent RPS. The study results indicate downward load following shortfalls in excess of 500 MWs in two of the CPUC's four priority scenarios. Additionally, the ISO studies found a shortfall of 4,600 MW of upward load following in the 'High Load, Trajectory Scenario.' This 'High Load, Trajectory Scenario' was constructed to demonstrate the implications of under-forecasting load by 10 percent and demand side management under-achieving the stated goals.

Id. (emphasis added).

The Commission has already considered the CAISO's 33% renewable integration modeling results in the 2010 LTPP. For example, these studies are described by the statements submitted by the Settling Parties to the 2010 LTPP and quoted by Decision:

[T]he Settling Parties agree that...

- All references to a potential “need to add capacity for renewable integration purposes” shall be interpreted within the context of the CAISO process which considers alternatives as further described in Section III.C below to determine the type of resources (including existing units) available to meet any defined needs. There is no presumption that any Phase 1 “need” requires the addition of new gas-fired generation resources above and beyond those needed to meet the current planning reserve margin.
- As requested by the Commission, the CAISO developed a methodology for assessing renewable integration resource needs (the “CAISO methodology”), and applied this methodology with the assistance of the IOUs to assess the need for flexible capacity for the four CPUC-Required Scenarios and one other CPUC scenario analyzed by the CAISO. **The results show no need to add capacity for renewable integration purposes above the capacity available in the four scenarios for the planning period addressed in this LTPP cycle (2012-2020).** The additional scenario studied by the CAISO did show need.
- The IOUs applied the same CAISO methodology for the IOU Common Scenarios using different assumptions from those used in the CPUC-Required Scenarios. The results of the IOUs’ modeling show need for additional capacity for renewable integration purposes under certain circumstances.
- **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.** The Settling Parties have differing views on the input assumptions used in, and conclusions to be drawn from the modeling. **There is general agreement that further analysis is needed before any renewable integration resource need determination is made.** [...] (Settlement Agreement at 4-5.)

D.12-04-046, p. 7 (emphasis added). As the second bullet point indicates, the CAISO studies submitted in the 2010 LTPP are the same studies described in the CAISO’s Flexible Capacity Procurement Straw Proposal.

Thus, the Commission (and the parties to the settlement) expressly considered that one set of modeling results did indicate a need for additional capacity for renewable

integration purposes under certain circumstances. (I.e., the CAISO’s “High-Load, Trajectory Scenario”, which used alternative assumptions rather than the Commission-mandated planning scenarios). Still, the parties to the settlement (including both PG&E and the CAISO) all agreed that the resource planning analysis “do not conclusively demonstrate whether or not there is a need to add capacity for renewable integration purposes through the year 2020.” Id. The settling parties also agreed that “further analysis is needed before any renewable integration resource need determination is made.” Id. at 6 . The Commission also agreed after taking its own critical look at the record: “[t]here is clear evidence on the record that additional generation is not needed by 2020, so there is record support for deferral of procurement.” Id. at 10.

2. Finding now that a “significant negative reliability risk” exists based on the CAISO’s 33% renewable integration modeling from the 2010 LTPP would be exactly contrary to the findings in D.12-04-046.

If the Commission now finds that PG&E has satisfied the dictates of D.10-07-045 based on the CAISO study results, it would have to be based on the very same CAISO studies conducted in 2011 (for the 2010 LTPP) on the 33% renewable integration scenarios. The Commission would necessarily have to find that these studies are “final results” that “demonstrate” that there are “significant negative reliability risks from integrating a 33% Renewable Portfolio Standard.” **But a finding would be completely contradictory to the Commission’s decision that issued just over one month ago based on the very same evidence.**

Moreover, PG&E’s position in this Application is wholly contrary to the position taken in the settlement PG&E signed and which PG&E actively supported. Id. at 8 (“It is important to note that the utilities, who are the parties that proposed assumptions that would result in a need for generation by 2020, are themselves actively supporting the settlement.”) The Commission should be skeptical of PG&E’s reversing itself for this litigation on the need for new resources to support renewables integration. Further, PG&E’s claim that “no party would have anticipated that the Track 1 Settlement would bar the [Oakley] project from proceeding” strains credibility. Response of PG&E to

Motions to Dismiss, p. 11. TURN filed the petition for writ of review of the Oakley decision June 27, 2011—well before the settlement was executed⁵—and PG&E has had ample ongoing notice of the potential that the Commission’s decision approving Oakley ultimately not withstand judicial review.

C. PG&E’s References To The CAISO’s Sutter Waiver Filing (Submitted After The Application) Cannot Satisfy D.10-07-045.

PG&E’s Reply to the Motions to Dismiss cites a waiver request CAISO submitted on January 25, 2012 to the Federal Energy Regulatory Commission (“FERC”) for authority to exercise administrative backstop procurement to maintain operations of Calpine’s Sutter Energy Center (the Sutter Waiver Request). PG&E Reply to Motions to Dismiss at 7.

First, this information should be disregarded in the Commission’s determination of the Motion to Dismiss because it is not included in PG&E’s Application filed on March 30, 2012— which was well over two months after the CAISO filed the Sutter Waiver Request. PG&E has been on notice since July, 2010 of the three authorizing conditions imposed by the Commission for re-submitting an Application for the Oakley project, and PG&E’s should have included in the application all allegations it deemed material to supporting the required conditions. It did not. Accordingly, the Commission should disregard any statements or proffered “evidence” of the need for generation resources from the CAISO’s Sutter Waiver Filings.

Second, even if the Commission considers the statements that relate to the Sutter Waiver Request as true for purposes of evaluating the Motion to Dismiss, the ultimate source of these “studies” is, once again, the very same CAISO modeling studies conducted on 33% renewable integration scenarios for the Commission’s 2010 LTPP. See PG&E Direct Testimony, Chapter 5, Attachment 1, pp. 6, 11 (“The ISO then agreed

⁵ "The Settlement Agreement was finalized and executed on August 3, 2011." R.10-05-006, Motion for Expedited Suspension of Track 1 Schedule and for Approval of Settlement Agreement, August 3, 2011, p. 7.

to evaluate potential system needs using new resource portfolio assumptions developed by the CPUC energy division staff. The updated ISO study results were submitted to the CPUC in testimony and supporting documentation that I [Mark Rotheleder] provided in the long-term procurement plan proceeding in July and August 2011”, p. 15 (explaining that the CAISO also studied a fifth scenario which the ISO refers to as the “operations planning scenario”), p. 16 (“The ISO’s study of the need for the Sutter plant in July 2018 used assumptions from the operations planning scenario...”), p. 17 (“The ISO based its analysis of the potential need for the Sutter plant on the operations planning scenario from the CPUC proceeding.”). Accordingly, for the same reasons as explained in section III(B) above, any CAISO statements submitted in support of the Sutter Waiver Filing cannot support a finding that PG&E has complied with D.10-07-045.

Finally, the Sutter Waiver Filing identifies a potential shortage (under the CAISO’s High-Load, Trajectory Scenario) for meeting system-wide needs by the end of 2017. This is beyond the planning period addressed by the 2006 LTRFO and PG&E’s 2008 Long Term Request for Offers (“LTRFO”), the results of which were concluded by D.10-07-045. Further, the Commission imposed a clear time limit for PG&E to re-submit the Oakley project: “[P]rior to the next PG&E LTRFO.” D.10-07-045, p. 40. Clearly, the Commission did not contemplate an unlimited back-door option for PG&E to revive Oakley while sidestepping outcomes from the Commission’s ongoing LTRFO processes. Although the Decision did not specify a firm “expiration date,” the 2010 LTRFO concluded with a finding of no need for additional resources—and hence concluded that there is no need for an immediate PG&E to conduct an LTRFO at this time. Accordingly, the Commission should disregard PG&E’s allegations that suggest a need for resources starting in 2017 because they are outside of the time period for resubmitting Oakley contemplated in D.10-07-045.

D. PG&E’s Application Cannot Proceed Under Any Other Basis Because It Violates Commission Policies For Considering UOG.

PG&E contends that D.07-12-052 is not applicable because PG&E submitted the Application pursuant to D.10-07-045, which was issued after D.07-012-052 and

identified the specific circumstances in which PG&E could submit the Oakley Project. Response of PG&E to Motions to Dismiss, p. 12. But if the Commission rejects PG&E's claim that the Oakley application meets the more specific requirements of D.10-07-045, as it should, then the Commission must next determine if Oakley satisfies the pre-existing "more general requirements" of D.07-12-052. *Id.* The indisputable facts show that it does not.

PG&E contends only the Oakley Project meets only one of the "exceptional circumstances" under which the Commission will consider UOG outside of a competitive solicitation.⁶ PG&E does not claim that holding a competitive RFO is (or was) infeasible.⁷ Response of PG&E to Motions to Dismiss, p. 12.

The indisputable facts show that PG&E failed to comply with Commission's requirements considering UOG projects. Therefore, the Application must be dismissed.

First, the application should be dismissed for failure to comply with D.07-12-052 because PG&E has not even alleged that holding a competitive RFO is infeasible or inappropriate. This requirement applies even if the Applicant alleges that the UOG project meets one of the "extraordinary circumstances" exists. See D.07-12-052 at 211 ("in all cases, if an IOU proposes a UOG outside of a competitive request for offer (RFO), the IOU must make a showing that holding a competitive RFO is infeasible."). Indeed, the Commission explicitly sets forth that this requirement applied even to UOG projects alleged to constitute "unique circumstances":

In instances in which an IOU submits an application for UOG that falls into one of the [four] categories, the IOU should request in its application to hold a competitive RFO for turnkey project development of the resource (a PSA). If a competitive solicitation for a PSA contract to build the UOF is

⁶ Further, although PG&E does not contend that Oakley was subject to a competitive RFO, if PG&E makes that argument it must be rejected. The projects submitted for approval in A.09-09-012 (including Oakley) did result from PG&E's 2008 long term RFO. However D.10-07-045 determined which of the resulting projects would gain approval. It rejected Oakley as not needed, and thus concluded consideration of any results from that solicitation. Accordingly, if the Application does not comply with the authorizing requirements for resubmitting the project that were articulated in D.10-07-045, then the Oakley PSA cannot be considered as having resulted from any RFO.

⁷ IEP Motion at 6.

not appropriate, in its application the IOU should explain why this is the case and propose either an EPC (Engineering, Procurement, and Construction) or straight utility build project approach, depending on the circumstances.

Id. at 212 (emphasis added). Accordingly, the Application should be dismissed because PG&E's application fails to satisfy this threshold requirement of D.07-12-052.

Second, even if the Commission disagrees that the IOU must always make a showing that holding a competitive RFO is infeasible if it can demonstrate "unique circumstances," the Oakley Project cannot satisfy any of the "truly extraordinary circumstances" in which the Commission will consider if UOG "may be the optimal method for meeting the needs of California's ratepayers." D.07-12-052 at 213.

DRA is not aware of any clear Commission guidance on what demonstrates that a UOG project is needed for "reliability," and PG&E cites none. However, PG&E's Application does not even make any factual allegations that would demonstrate how Oakley meets the reliability exception. It does not even identify the criteria relevant to evaluating the reliability exception in the Application.

Neither does PG&E's Response to IEP's motion to dismiss allege any facts that would demonstrate that UOG (Oakley) is the "only means of developing new resources" in "sufficient time" to meet "specific, unique reliability issues." Instead, PG&E states only that it "explained the need for the significant need for [sic] flexible operating resources" in its Application. Response of PG&E to Motions to Dismiss, p. 12. But despite PG&E's best wishes, "reliability" is not a one-size-fits-all concept. When it comes to justifying UOG project, the reliability need must be "specific and unique" and the UOG must be the "only means" of developing new resources in time. D.07-12-052 at 212.

At best, PG&E's Application (through its citations to the CAISO) alleges general, preliminary, system-wide (i.e., California-wide) needs that might arise in five more years, by the end of 2017. Nothing in the Application or the CAISO statements that PG&E references suggests that only UOG can fill this potential need. PG&E has not even alleged, let alone identified facts that would support an allegation, that only the Oakley

UOG project can fill potential system-wide needs for flexible capacity to support renewable integration. Identifying need alone is insufficient to meet the high bar set by D.07-12-052. See D.08-11-004 (granting motion to Dismiss PG&E’s application for Tesla Generating Station as a UOG resource) (“What PG&E did not do is produce facts showing that the short term, short fall identified in the application could only be met with the Tesla resource procured outside of any competitive process.”).⁸ For example, in a letter from the CAISO to the Commission that PG&E attached its Prepared Testimony, the CAISO states only that “[t]he development of resources such as the Oakley project is important to maintain reliability.” PG&E Prepared Testimony, Chapter 5, Attachment 2. But, the CAISO took “no position on whether the project should be utility-owned or merchant-owned generation.” *Id.* The materials submitted can only support a conclusion that Oakley does not satisfy the criteria for demonstrating that the resource is needed to meet an exceptional “reliability” circumstance.

In sum, PG&E’s argument that Oakley fulfils the “reliability” exception is nothing more than a conclusory statement of the ultimate issue that PG&E must prove to overcome D.07-12-052. The Commission need not accept this statement as true for the purposes of assessing IEP’s Motion to Dismiss. Further, it is appropriate for the Commission to determine on a motion to dismiss that a UOG proposal fails to meet the threshold requirements required by D.07-12-052. See D.08-11-004 at 18 (dismissing application for UOG proposal finding “[i]n particular, PG&E did not show how the specific resource needs it projects for years in the future could not be met in other ways.”)

⁸ For example, in A.11-03-023, San Diego Gas & Electric has submitted contracts for approval of 450 MW of new proposed merchant generator projects. The CAISO has submitted testimony in which it asserts that the Commission should authorize SDG&E to procure sufficient flexible resources to meet any local capacity requirements in the San Diego area. Testimony of Mark Rothleder on Behalf of the California Independent System Operator Corporation, A.11-05-023. While DRA disagrees that SDG&E has any need for new resources to meet such local needs, the CAISO’s testimony suggests that the Oakley project is certainly not the only flexible resource that could be procured to meet any such needs for flexible capacity.

Finally, rejecting PG&E's UOG proposal here is entirely consistent with the Commission's most recent policy statements on utility ownership. The Commission's December 2011 decision clearly moved in the direction of requiring even more stringent analysis of UOG proposals. In fact, the Commission significantly increased the procedures that the IOUs must follow before they can even propose a UOG projects. See, D.12-04-046 at 38-39. Now a utility must first have a Commission resolution as a pre-requisite to filing for a UOG project. Taking a position in this proceeding that relaxes or loosely applies the pre-existing rules from D.07-12-052 would run contrary to the direction that the Commission is otherwise moving with respect to UOG: increasing scrutiny and stringency for the conditions in which UOG might be justified.

IV. CONCLUSION

For the reasons stated above, the Commission should grant the Motion of IEP to Dismiss Application 12-03-026.

Respectfully submitted,

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