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

**ITEM # 3 ID #10679**

**ENERGY DIVISION** **RESOLUTION E-4424**

**December 1, 2011**

**R E S O L U T I O N**

Resolution E-4424. Pacific Gas and Electric Company, San Diego Gas and Electric Company and Southern California Edison Company request approval of tariffs and power purchase agreements for eligible combined heat and power facilities.

PROPOSED OUTCOME: This Resolution approves with modifications tariff sheets and two standard offer contracts provided by Pacific Gas and Electric Company, San Diego Gas and Electric Company and Southern California Edison Company for the purchase of excess power from eligible combined heat and power facilities. This Resolution requires the named utilities to file Tier 1 compliance advice letters with approved modifications to the tariff sheets and contracts within seven (7) days of Resolution approval.

ESTIMATED COST: Actual costs are unknown at this time.

By PG&E Advice Letter 3696-E-C, SDG&E Advice Letter 2179-E-B and SCE Advice Letter 2485-E-B, filed on May 16, 2011.

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## SUMMARY

In response to the Waste Heat and Carbon Reduction Act (Assembly Bill 1613), the California Public Utilities Commission (CPUC or the Commission) opened Rulemaking 08-06-024. AB 1613 requires the Commission to establish a feed-in tariff (FiT) for combined heat and power (CHP) systems that are small (less than 20 megawatts), new, and highly efficient. Commission Decision (D.) 09-12-042, as modified by D.10-04-055, D.10-12-055 and D.11-04-033, required the Investor Owned Utilities (IOUs) to submit advice letters with tariff sheets and contracts to implement AB 1613. This resolution adopts, with modifications, AB 1613 tariffs and two contracts, one Standard Contract and one Simplified Contract, for

Pacific Gas and Electric Company (PG&E), San Diego Gas and Electric Company (SDG&E) and Southern California Edison (SCE).

## BACKGROUND

Assembly Bill 1613 (Blakeslee 2007) as amended by Assembly Bill 2791 (Blakeslee 2008) directed the California Energy Commission, the California Public Utilities Commission (the Commission or CPUC), and the Air Resources Board to implement the Waste Heat and Carbon Emissions Reduction Act. Codified in PU Code 2840, Assembly Bill (AB) 1613 requires the Commission to establish a feed-in tariff (FiT) for combined heat and power (CHP) systems that are small (less than 20 megawatts), new and highly efficient.

In response to AB 1613, the Commission opened Rulemaking (R.) 08-06-024 and on December 17, 2009, the Commission issued Decision (D.) 09-12-042 which established the rules for the tariff, price and two standard offer contracts for the AB 1613 program.

Following the initial decision in this proceeding, the AB 1613 program was challenged through multiple petitions for modification, applications for rehearing and petitions at the Federal Energy Regulatory Commission (FERC), as summarized below. This has led to further development of the program and multiple iterations of the contracts.

Pursuant to D.11-04-033, the last decision in this proceeding, PG&E, SDG&E and SCE (collectively the Joint Utilities or IOUs) filed supplemental advice letters (ALs) with updated tariff sheets and contracts for the AB 1613 program. These advice letters were filed on May 16, 2011, and are the subject of this resolution. Previous advice letters, although included in the procedural history below, are not considered in the discussion in this resolution. A number of the issues raised in protests to previous advice letters were resolved or rendered moot through subsequent supplemental filings of the advice letters and/or through the rulemaking process that resulted in the subsequent filings. All remaining issues were raised in protests to the May 2011 advice letters.

## PROCEDURAL BACKGROUND

On June 26, 2008, the Commission opened R. 08-06-024 in response to AB 1613.

On December 17, 2009, the Commission issued Decision (D.) 09-12-042 which established the rules for the tariff, price and two standard offer contracts for the AB 1613 program.

On January 20, 2010, the IOUs jointly filed an Application for Rehearing and, concurrently, a Motion to Stay D.09-12-042. Separately and on the same day, the Alliance for Retail Energy Markets also filed an Application for Rehearing of D.09-12-042.

Both Applications for Rehearing, along with the Motion to Stay, were denied by the Commission in D.10-04-055. Decision 10-04-055 clarified that the price established in D.09-12-042 is an avoided cost and ordered the utilities to file advice letters with tariff sheets and contracts to implement the AB 1613 program.

On June 21, 2010, PG&E, SDG&E and SCE filed advice letters 3696-E, 2179-E and 2485-E respectively, as required by D.10-04-055. These advice letters were suspended by Energy Division on July 20, 2010 and further suspended on October 11, 2010.

On February 22, 2010, the Joint Utilities filed a Petition for Modification of D.09-12-042 (Joint Petition). The Joint Petition requested several modifications to the approved pricing for the program as well as "clean-up" to the contract language.

On May 4, 2010, the Commission submitted a petition for declaratory order to FERC to find that the Federal Power Act (FPA), the Public Utility Regulatory Policies Act of 1978 (PURPA) and FERC regulations do not preempt the Commission's decision to require California utilities to offer a certain price to CHP generating facilities of 20 MW or less that meet specified energy efficiency requirements.

On May 11, 2010, the Joint Utilities filed a separate petition for declaratory order with the FERC in which they argued that D.09-12-042 was preempted by the FPA insofar as it set rates for wholesale electric energy.

On July 15, 2010, FERC issued an order granting in part and denying in part the cross-petitions for declaratory order (FERC Declaratory Order), which found: that "[a]lthough the CPUC has not argued that its AB 1613 program is an implementation of PURPA, we find that to the extent the CHP generators that can take part in the AB 1613 program obtain Qualifying Facility (QF) status, the CPUC's AB 1613 feed-in-tariff is not preempted by the FPA, PURPA or FERC regulations, provided that the rate established by the CPUC "does not exceed the avoided cost of the purchasing utility."[1]

On August 16, 2010, the Commission filed with FERC a request for clarification of the FERC Declaratory Order, or, in the alternative, a request for rehearing.

On September 9, 2010, the Commission issued an Amended Scoping Memo and Ruling. The September 9 Ruling amended the November 4, 2008 Scoping Memo to account for issues related to the FERC Declaratory Order and asked for further comment on certain issues brought up in the Joint Petition for Modification of D.09-12-042.

On October 21, 2010, FERC issued an order, which granted the Commission's August 16, 2010 request for clarification (FERC Clarification Order).[2] In this order, FERC clarified that the state has a wide degree of latitude in setting avoided cost, can utilize a multi-tiered avoided cost rate structure, and that this approach is consistent with the avoided cost requirements set forth in Section 210 of PURPA.

On December 16, 2010, the Commission issued D.10-12-055 which granted in part and denied in part the Joint Utilities' Petition for Modification of D.09-12-042 and addressed the FERC rulings regarding the AB 1613 CHP program. The decision further ordered the utilities to file updated advice letters with approved modifications.

On January 31, 2011, PG&E, SDG&E and SCE filed updated advice letters 3696-E-A, 2179-E-A and 2485-E-A respectively, as ordered in D.10-12-055. On February 18, 2011, Energy Division provided notice of the suspension of these advice letters. On February 22, 2011, PG&E filed a revised advice letter 3696-E-B, with corrections to the previous filing.

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[1] *California Public Utilities Commission et al.*, 132 FERC ¶ 61,047 at PP 65 and 67.

[2] *California Public Utilities Commission*, 133 FERC ¶ 61,059.

On January 6, 2011, the Joint Utilities filed a Motion to Stay D.10-12-055, which was denied through a Commission Ruling on January 12, 2011.

On January 18, 2011, the Joint Utilities filed a Request for Rehearing of and, concurrently, a Motion to Stay D.10-12-055.

On April 14, 2011, the Commission issued D.11-04-033 which granted limited rehearing of D.10-12-055 on the issue of greenhouse gas (GHG) compliance costs, made a number of clarifications regarding the avoided cost basis for its prior decisions on the AB 1613 CHP program, and issued conformed decisions of D.09-12-042 and D.10-12-055. D.11-04-033 ordered the utilities to file supplemental advice letters, consistent with the modifications made to D.09-12-042 and D.10-12-055.

Pursuant to D.11-04-055, on May 16, 2011, PG&E, SDG&E and SCE filed advice letters 3696-E-C, 2179-E-B and 2485-E-B, respectively. On June 20, 2011, Energy Division provided notice of suspension of these advice letters.

On September 2, 2011, Energy Division released a draft resolution on these advice letters for public comment. On September 22, 2011, we received timely comments from the IOUs, and on September 26, 2011, we received late-filed comments from EPUC.

## NOTICE

Notice of AL 3696-E-C, AL 2179-E-B and AL 2485-E-B were made by publication in the Commission's Daily Calendar. PG&E, SDG&E and SCE state that copies of the Advice Letters were mailed and distributed in accordance with Section 3.14 of General Order 96-B.

## PROTESTS

**Advice Letters 3696-E-C, 2179-E-B and 2485-E-B were protested.**

PG&E Advice Letter 3696-E-C, SDG&E Advice Letter 2179-E-B and SCE Advice Letter 2485-E-B were timely protested by San Joaquin Refining (SJR) and jointly by FuelCell Energy, Inc. and California Clean DG Coalition (FuelCell/CCDC).

The PG&E and SCE Advice Letters were additionally timely protested by Energy Producers & Users Coalition (EPUC).

On June 16, 2011, PG&E and SCE responded to the EPUC, SJR and FuelCell/CCDC protests; SDG&E responded to FuelCell/CCDC protest. On June 28, 2011, SDG&E was granted a request to file a late response to the protest of SJR due to a clerical error in receiving the protest. The late response from SDG&E was filed on July 5, 2011.

## DISCUSSION

Energy Division reviewed the IOU advice letter filings, parties' protests, and responses from utilities. In their advice letters, the IOUs have proposed several amendments to the AB 1613 contracts, some of which provide clarity and are consistent with the Commission decisions, while others are unnecessary and/or go beyond the direction given in the decisions in this proceeding. Protests by parties both support and contest aspects of each utility's filings.

In addition, after initially filing this draft resolution on September 2, 2011, several comments were received. Upon carefully considering these initial comments, substantive changes to the draft resolution have been made. In that regard, Energy Division is re-issuing this draft resolution for public comment. To the extent that comments from parties are not reflected in the discussion below, we invite parties to re-submit those comments for consideration in the final resolution.

The following discussion summarizes the protested issues. Based on consistency with Commission decisions issued in this proceeding, this resolution either accepts, rejects, or modifies each protested issue in the utility advice letters.

### Summary of Relevant Commission Decisions

There are four Commission decisions that provide direction to the IOUs regarding the contracts for the AB 1613 program. Energy Division has evaluated each issue raised in the protests based on whether or how it conforms with these decisions:

- D.09-12-042 adopts two separate contracts for the purchase of excess electricity from eligible CHP systems. A Standard Contract will be available to all eligible CHP systems up to 20 MW and a Simplified Contract will be available to CHP systems that export no more than 5 MW. D.09-12-042 sets the price offered under the AB 1613 contracts based on the costs of a new combined cycle gas turbine, and a location bonus shall be applied to eligible CHP systems located in local reliability areas. Unless otherwise exempted, all California electrical corporations shall be required to offer these contracts.

- D.10-04-055 denies rehearing of D.09-12-042, clarifies that the price established in D.09-12-042 is an avoided cost price, and makes other corrections and clarifications regarding D.09-12-042.

- D.10-12-055 grants in part and denies in part the Joint Utilities Petition for Modification and addresses the FERC rulings regarding the AB 1613 program. Among other things, this decision revises the methodology for setting the price to be offered by the utilities to utilize pricing inputs from the most recent Market Price Referent. It corrects language in the adopted form contracts to clarify that the "Fixed Price Component" of the price is to be a constant value during the entire contract term and makes other modifications to the form contracts to clean up contractual language. It also grants a request to allow either the Buyer or Seller to procure greenhouse gas allowances on behalf of the Seller necessary to comply with the cap-and-trade program being implemented by the California Air Resources Board (ARB) pursuant to Assembly Bill 32. D.10-12-055 denies the request to reduce the price to be offered to reflect an as-available price.

  This decision also modified D.09-12-042 to be consistent with two subsequently issued FERC orders which require: (1) AB 1613 generators to obtain QF status; and (2) that the rate paid to AB 1613 generators not exceed avoided cost.

- D.11-04-033 ordered the utilities to file supplemental advice letters to amend the tariff sheets and contracts associated with the AB 1613 program with updated direction regarding the management of GHG compliance costs. D.11-04-033 also granted Energy Division authority to address further contract amendments through the resolution and advice letter process to the extent the

AB 1613 contracts require such amendment to be consistent with the Commission's decisions in this proceeding.[3]

**Resource Adequacy**

*Background*

AB 1613 requires that "the physical generating capacity of the combined heat and power system shall count toward the resource adequacy requirements of load-serving entities."[4] In turn, the contracts approved by D.09-12-042 obligate the Seller to commit to the Buyer the facility's generating capacity for the Buyer to use in meeting its resource adequacy (RA) obligations.[5] Decision 11-04-033 recognized this resource adequacy obligation as part of the rationale for the price paid under AB 1613. Specifically, D.11-04-033 states:

[W]hen a utility contracts with an AB 1613 CHP, it avoids a resource adequacy procurement obligation equivalent to the *full capacity* of the AB 1613 CHP (in other words, all of the power generated by the CHP), but the CHP is not paid for the full value of this avoided cost. Instead, the generator only receives a payment for the excess energy it sells to the utility.[6]

*Parties' Positions*

In their filings on May 16, 2011, the IOUs referenced the RA discussion in D.11-04-033 and incorporated substantial changes in the AB 1613 tariff sheets and contracts purporting to address RA issues. Among other things, the IOUs added a requirement to the tariff sheets for the participating CHP facility to obtain "Full Capacity Deliverability Status" and modified provisions in Sections 2.01, 3.02,

[3] D.11-04-033, Ordering Paragraphs 5 and 7.

[4] PU Code 2841(f).

[5] D.09-12-042, Attachment A, Section 3.02 and Attachment B, Section 3.02.

[6] D.11-04-033 at p. 11.

3.06, 3.07, 3.22, and 6.01, Exhibit A, Exhibit E and Exhibit H of the Standard Contract and corresponding sections and exhibits in the Simplified Contract.

EPUC, SJR and FuelCell/CCDC provided lengthy protests on both the procedural and substantive impacts of the utilities' proposed contract amendments on this issue. These protests are summarized below.

Procedural protests:

- Each of the protests contest that the IOU advice letters have gone beyond the changes authorized by D.11-04-033, which limited contract modifications to GHG compliance cost issues and other changes necessary for the contracts to conform to previous decisions in the rulemaking.
- SJR further contends that the RA requirements are not new and if the utilities were going to address this issue, it should have been addressed earlier in the proceeding, in the utilities' petition for modification and applications for rehearing.
- FuelCell/CCDC assert that the added provisions related to RA requirements violate the Commission's General Order 96-B because the changes proposed by the utilities were not authorized by statute or Commission order and are not properly proposed through the advice letter process.

Substantive protests from EPUC:

- The added RA provisions would create a new delay in the program given the time it would take to obtain deliverability studies from the CAISO. As a result, generators would not be able to meet their obligations to start delivering energy until August 2013.[7]
- The added RA provisions would prevent the CPUC from exercising jurisdiction over interconnection of the participating facilities because it would force generators to seek interconnection through the utilities' FERC-filed

[7] According to EPUC, this is the date provided to them by PG&E as to when one of the generators they represent could have a completed deliverability study.

wholesale distribution access tariffs (WDATs) rather than the Commission-jurisdictional Rule 21 interconnection process.

- As a solution, EPUC suggests an interim approach granting a rebuttable presumption in favor of deliverability for generators connecting under Rule 21 and the Fast Track and Independent Study Processes under the utilities' WDATs.

Substantive protests from SJR:

- The AB 1613 contracts already obligate the Seller to comply with the CAISO tariff so there is no need to specify deliverability requirements, especially if a change in CAISO rules in the future would allow other deliverability options for AB 1613 facilities.
- In R.09-10-032, PG&E asked the Commission to "deem deliverable" for RA purposes all new distributed generation projects that interconnect to PG&E's distribution system which suggests that PG&E does not believe that there is any significant chance that the RA capacity of these resources is not physically deliverable to load.
- Amended contract provisions will be cost prohibitive for generators interested in participating in the program.
- Amended contract provisions regarding the availability incentive mechanism are also unnecessary as existing contract language already obligates the generator to comply with CAISO rules.

Substantive protests from FuelCell/CCDC

- In addition to other sections, SCE and SDG&E made unauthorized language modifications to Sections 3.02(c) and (d) of the Standard Contract pertaining to RA requirements. Specifically, the utilities have removed the word "reasonable" before the word "action" in Section 3.02(c) and removed the following phrase from Section 3.02(d):

…provided, however, if such demonstrations could interfere with the operations of Seller, Seller shall be entitled to challenge such requirements with the CPUC or other relevant agency. Absent a ruling or other action granting a stay, Seller's compliance shall be required pending resolution of the challenge.[8]

The utilities strongly disagree with the issues raised in the protests. In response to the procedural concerns, the IOUs argue that they are well within the scope of D.11-04-033 and General Order 96-B to amend the RA provisions of the contracts. PG&E contends that the RA value of the AB 1613 generation did not become a cornerstone of AB 1613 procurement until D.11-04-033 was issued. Similarly, SCE argues that D.11-04-033 relied repeatedly on the ability of AB 1613 CHP facilities to provide RA capacity as justification for the price under the program. SDG&E claims that the amended language responds to D.11-04-033 and clarifies that "what is being delivered should provide RA value."[9] SCE also points to language in D.11-04-033, which allows the utilities to amend the tariff sheets and contracts in this program to be "consistent with the holdings in this [D.11-04-033] order."[10]

In regards to specific, substantive issues raised in EPUC's protest, PG&E does not dispute the claim that the added RA provisions require a longer timeline for project development. However, PG&E argues that if Sellers cannot meet the performance requirements, they have the option of developing and selling under other power purchase agreements (PPAs) with lower capacity availability standards. PG&E and SCE dispute EPUC's claim that the RA requirements would somehow prevent the Commission from exercising its jurisdiction. SCE asserts that the Commission can monitor the progress of the Rule 21 working group and resume Rule 21 interconnections for new QFs under the AB 1613 program, instead of using WDAT, as soon as feasible.

[8] Protest of Fuel Cell, Inc. and California Clean DG Coalition to Advice 2485-E-B, Advice 2179-E-B and Advice 3696-E-C, June 6, 2011, at pp. 4, 5 and 6.

[9] Response of San Diego Gas & Electric Company to FuelCell Energy, Inc. and California Clean DG Coalition protest of SDG&E Advice Letter 2179-E-B, June 13, 2011, at p.2.

[10] Response of Southern California Edison Company to Protests to Advice 2485-E-B, June 13, 2011, at p. 1.

Finally, SCE and PG&E reject EPUC's proposal to presume full deliverability for certain generators. They argue that this would violate due process in the RA proceeding and new rules should not be created through the advice letter process. Furthermore, SCE notes that EPUC's proposal would create "counting fiction" between the CPUC and CAISO.

Regarding the protest from SJR, SCE argues that the amended contracts are simply clarifying "*how and when*" the CHP facility needs to meet its contractual obligation with regards to the RA rules. If there is no difference to the CAISO tariff, then SJR should not object to the inclusion of a full deliverability requirement. SDG&E contends that the proposed contract language "should not create a significant cost barrier for small AB 1613 projects."[11] In general, the utilities argue that generator complaints that RA terms will reduce benefits that Sellers had hoped to realize should not prevent the implementation of sufficient RA terms.

Lastly, SCE asserts that language regarding generator obligations to meet CAISO Standard Capacity Product requirements help ensure that the facility actually provides the number of RA megawatts that the facility specified it would provide in the year-ahead and month-ahead RA filings and supply plans. SCE states that such contract language will ensure that the scheduling coordinator, in this case the purchasing utility, will be made whole for any failure by the CHP facility to be available as required by CAISO. Similarly, PG&E argues that, as the scheduling authority, it would be subject to non-availability charges and without being explicit in the AB 1613 contracts on responsibility for these charges, PG&E customers would not receive the full value of the product being purchased under the AB 1613 tariff.

In regards to protests from FuelCell/CCDC, SCE argues that the reasonableness language in Section 3.02(c) could limit the actions that a Seller under an AB 1613 contract must take to satisfy the RA-conveyance requirements of AB 1613. Similarly, SCE further argues that the proviso in Section 3.02(d) "could provide a

[11] Response of San Diego Gas & Electric Company to FuelCell Energy, Inc. and California Clean DG Coalition protest of SDG&E Advice Letter 2179-E-B, June 13, 2011, at p.2.

Seller with the opportunity to fail to fulfill the RA requirements of AB 1613 but continue to receive all of the benefits."[12] SDG&E also disagrees with the protest on the grounds that "the Seller should take all actions necessary to comply" with RA rulings.[13]

Overall, the IOUs argue that the added RA provisions provide necessary assurance that the energy delivered by the Seller is eligible to count towards the Buyer's RA obligation *before* the generator begins receiving compensation at the AB 1613 price. Otherwise, they argue, the purchasing utility would have to pay the AB 1613 CHP generator for capacity, and then acquire the same capacity in the market to fulfill its RA obligation. The utilities conclude that paying for the same capacity twice would violate the ratepayer indifference requirement in AB 1613;[14] they imply that this would also result in an AB 1613 price that is in excess of avoided cost. PG&E notes that the terms it has added to the contract reflect those included its Photovoltaic Request for Offers and Renewable Auction Mechanism PPAs.

*Findings and Recommendations*

Energy Division carefully reviewed the concerns raised by parties and responses from utilities and makes the following findings and recommendations.

1. *Requirements for "Full Capacity Deliverability Status" To Demonstrate RA Value*

a. Utility Positions

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[12] Response of Southern California Edison Company to the Protests to Advice 2485-E-B, June 13, 2011, at p.11.

[13] Response of San Diego Gas & Electric Company to FuelCell Energy, Inc. and California Clean DG Coalition protest of SDG&E Advice Letter 2179-E-B, June 13, 2011, at p.2.

[14] PU Code Section 2841(b)(4).

In its response to protests, PG&E acknowledges that the AB 1613 contracts approved by D.09-12-042 already obligate the Seller to pledge any RA value from this generation to the Buyer. Furthermore, these contracts also require the Seller to "comply with any demonstration" [15] required for RA rulings, while allowing for changes in the RA program at either the Commission or the CAISO to flow through to the contracts.

However, PG&E argues that requiring the CHP facility to receive "Full Capacity Deliverability Status" from the CAISO is essential to ensure that Sellers take the necessary steps so that the Buyer actually receives the RA value.[16] SCE similarly contends in its reply comments that:

> simply requiring the CHP generator to 'take reasonable action' to comply with the CAISO Tariff may not guarantee that AB 1613 generators obtain deliverability in any particular time frame.[17]

In this regard, the utilities claim that the more specified and narrowly defined RA and full deliverability contract provisions clarify that the CHP facility must take all action necessary to achieve full deliverability status before receiving payment for power under the AB 1613 contract.

b. Discussion

We in part agree and in part disagree with the utilities. The FuelCell/CCDC protest correctly notes that Section 5.1 of the Commission's General Order 96-B limits the use of the advice letter process for a utility to "change its tariffs in a

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[15] D.11-04-033, Peevey's Attachment A to Attachment B Conformed D0912042, Standard Contract for Eligible CHP Facilities, Section 3.02 (d).

[16] Response of Pacific Gas & Electric Company to the Protests of Advice 3696-E-C, June 13, 2011, at p .2.

[17] Response of Southern California Edison to the Protests of Advice 2485-E-B, June 13, 2011, at p. 4.

manner previously authorized by statute or Commission order" or to "conform the tariffs to the requirements of a statute or Commission order."[18] This section also describes the advice letter process as a "quick and simplified review of the types of utility requests that are expected neither to be controversial nor to raise important policy questions."[19]

The amendments proposed by the IOUs to the RA requirements in the AB 1613 contracts go beyond contract clarification and instead impose a new program requirement that the generator obtain full deliverability as a "condition precedent" to the start of the AB 1613 contract term.[20] SCE argues that this change is justified because the AB 1613 statute requires it and the Commission has based the AB 1613 price on a CHP generator's "ability to relieve the purchasing utility of capacity procurement and RA procurement."[21]

As an initial matter, we note that when presented with new, controversial contract language, D.10-12-055 rejected any changes which were not mere corrections or mutually agreed to. However, there is merit in the utilities' argument regarding the need for deliverability studies in some circumstances. We adopt two alternative mechanisms here to address this concern, based upon the type of interconnection process used by an AB 1613 CHP generator.

c. Generators Interconnecting Pursuant to a WDAT or CAISO Tariff

The utilities are correct that current practice requires the CAISO to perform a deliverability assessment and find the output (in this case the excess power) of the generator deliverable before a resource can count towards RA and receive RA credit in the regulatory sense. In addition, we recognize that CHP facilities

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[18] Protest of Fuel Cell, Inc. and California Clean DG Coalition to Advice 2485-E-B, Advice 2179-E-B and Advice 3696-E-C, June 6, 2011, at p. 2.

[19] Id., at p. 2.

[20] Response of Southern California Edison to the Protests of Advice 2485-E-B, June 13, 2011, at p. 4.

[21] Id.

up to 20 MW are eligible to participate in the AB 1613 program. Currently, for facilities that interconnect through a WDAT or CAISO tariff (typically larger facilities) a deliverability study is appropriate to properly assess the capacity that the generator is able to provide to the utility to meet its RA obligations.

In regards to a generator's obligation to achieve full capacity deliverability status following the outcome of a deliverability study, in comments to this draft resolution, FuelCell/CCDC supported the finding in the draft resolution that "'full capacity deliverability status' as a requirement for the excess power generated by an AB 1613 facility too narrowly defines options for RA status for DG resources."[22] The utilities countered in their comments to the draft resolution that a combined cycle gas turbine, the generator on which the AB 1613 avoided cost price is based, cannot receive payment for its full capacity without a CAISO finding that its full capacity is deliverable. Therefore, the utilities argue, in order for the AB 1613 price to be compliant with the PURPA avoided cost, the AB 1613 generator must demonstrate full capacity deliverability status and provide RA for the power purchased by the utility.[23] Otherwise, the facility should receive the Commission approved SRAC payment for energy deliveries.[24]

We agree with the utilities that, currently, the only way for the excess power of an AB 1613 generator to count toward the purchasing utility's RA requirement is for it to be fully deliverable under CPUC and CAISO rules. Both PG&E and SCE, in comments to this draft resolution, provided revised contract language to capture this requirement for AB 1613 CHP facilities that interconnect through a WDAT or CAISO tariff. In reviewing these proposed edits, we adopt modified contract language for section 3.02(d)(iii) of the Standard Contract and section 3.02 of the Simplified Contract as stated in Subsection e. "Contract Changes" below.

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[22] Fuel Cell Energy, Inc. and California Clean DG Coalition, Comments in support of Revised Draft Resolution E-4424, October 31, 2011, at p.2.

[23] See Comments of Southern California Edison Company on Revised Draft Resolution E-4424, October 31, 2011, at p.2.

[24] See Comments of San Diego Gas & Electric Company on Revised Draft Resolution E-4424, October 31, 2011, at p. 2.

Our intent is to reflect that a generator will only be required to meet CPUC and CAISO resource adequacy requirements, which may or may not require a deliverability study and/or full deliverability to count towards resource adequacy.
We take this approach understanding that rules regarding full deliverability and deliverability studies for distributed generation may change under the recently opened CPUC rulemaking regarding DG interconnection issues (R.11-09-001), the Commission's current RA proceeding (R.09-10-032) and/or a future CAISO stakeholder process addressing deliverability. Following the outcome of these proceedings, we reserve the right to revisit AB 1613 contracts (both executed and the tariffs) and update appropriately. We also note that each of the utilities concede in their comments to the draft resolution that if upgrades required for full capacity deliverability status "interfere with the operations of the generator," the generator may request the Energy Division to issue an exemption from the full deliverability requirement and continue to be paid the AB 1613 price.[25]

Finally, while PU Code § 2841(f) requires that the "physical generating capacity" of the CHP facility "shall count toward the resource adequacy requirements of load-serving entities," we do not believe that the intent of this statute was for it to be implemented to the detriment of the CHP facilities it was designed to incentivize. Consequently, a qualifying CHP facility shall be entitled to an AB 1613 contract as soon as the contracts are available, notwithstanding resource adequacy requirements. Where a CHP facility then interconnects through a WDAT or the CAISO tariff and is able to begin energy deliveries before meeting resource adequacy counting requirements, that facility shall be paid energy and capacity payments, as appropriate, for energy delivered to the purchasing utility pursuant to the "Standard Contract for Qualifying Facilities with a Power Rating that is Less than or Equal to 20MW" as provided in the QF/CHP Settlement, Attachment A, Exhibit 6.[26] When the CHP facility can be counted for resource adequacy purposes, it shall be immediately transitioned to the AB 1613 price.

[25] See Comments of Pacific Gas and Electric Company to Revised Draft Resolution E-4424 (on agenda November 10, 2011), October 31, 2011, at p. 1.

[26] See the Joint Motion for Approval of Qualifying Facility and Combined Heat and Power Program Settlement Agreement, Attachment A, Exhibit 6, approved by D. 10-12-035.

The IOUs shall update the AB 1613 tariff sheets to allow a CHP generator to execute an AB 1613 contract pending fulfillment of applicable CPUC and CAISO resource adequacy requirement while, simultaneously, receiving payment pursuant to the "Standard Contract for Qualifying Facilities with a Power Rating that is Less than or Equal to 20MW" as provided in the QF/CHP Settlement, Attachment A, Exhibit 6.

To be clear, this two tiered pricing system for WDAT and CAISO tariff interconnected CHP generators does not impact our initial conclusion that the price paid to AB 1613 generators is an avoided cost that properly assumes that resource adequacy value is provided by the generators and this pricing structure shall not be construed as precedential for future feed in tariffs.

d. Generators Interconnecting at the Distribution Level Pursuant to a Non-WDAT Process

For smaller generators that interconnect at the distribution level pursuant to a non-WDAT process, there are several barriers to obtaining a deliverability study. First, there is no clear process to obtaining a deliverability study. Second, to the extent these generators elect to request the CAISO to perform a deliverability study, current rules require them to enter the CAISO interconnection queue and participate in a study process that may take up to 18 months. Third, the costs to participate in such a study process would likely be economically prohibitive for small CHPs.

To address these barriers for AB 1613 CHPs that interconnect at the distribution level through a non-WDAT process, a deliverability study will not currently be required and the total RA obligation of the service area will be decreased by the full generation capacity of these CHP generators.

This is an interim solution. In comments received on the draft resolution, all parties generally supported this proposal on an interim basis. The utilities specifically requested clarifying contract language to ensure that any decrease in the RA obligation flows solely to the purchasing utility and not the "service area".[27] We agree that this can be clarified and have adopted such clarifying language in Subsection e. "Contract Changes" below. Furthermore, SCE recommends that a determination on RA and DG issues be pursued in other Commission proceedings.[28] Going forward, we anticipate that the RA deliverability status and requirements for these resources will be resolved in either or both the recently opened rulemaking regarding DG interconnection issues (R.11-09-001) or the Commission's current RA proceeding (R.09-10-032). Following the outcome of these proceedings, a deliverability study may or may not be required for AB 1613 resources. We reserve the right to require appropriate amendments to both existing contracts and the tariffs, as necessary, to address this issue.

e. Contract Changes

To implement the discussion above, the utilities should strike all of their proposed new contract provisions in their May 2011 advice letter filings regarding "full capacity deliverability status" and instead modify existing Section 3.02 of the Standard and Simplified Contracts, which details Resource Adequacy obligations, as follows:

> (d) Comply with CPUC and CAISO requirements to count towards Resource Adequacy; *provided, however*:
>
> (i) if such requirements could interfere with the Operations of Seller, Seller shall be entitled to challenge such requirements with the CPUC or other relevant agency. Absent a ruling or other action granting a stay, Seller's compliance shall be required pending resolution of the challenge; and

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[27] See Comments of San Diego Gas & Electric Company on Revised Draft Resolution E-4424, October 31, 2011, at p. 3.

[28] Southern California Edison Company, Comments on Revised Draft Resolution E-4424, October 31, 2011, at p.2.

(ii) if Seller interconnects the Generating Facility pursuant to a non-FERC-jurisdictional interconnection tariff, Seller shall not be required to provide Resource Adequacy Benefits, and Buyer's total obligation to obtain Resource Adequacy Benefits pursuant to the Resource Adequacy Rulings with respect to the service area of Buyer will be decreased by the Generating Facility's generating capacity, provided that, if the outcome of any CPUC proceeding requires Seller to obtain a deliverability study, Seller shall promptly obtain such deliverability study and provide it to Buyer upon the completion of such deliverability study.

*2. Requirements regarding the CAISO availability incentive mechanisms*

As described above, nothing under D.11-04-033 authorized changes to the AB 1613 contracts regarding the CAISO tariff, including compliance with availability incentive mechanisms. Exhibit H (1.) of the Standard Contract (and Exhibit E of the Simplified Contract) approved by D.09-12-042 already specifies that if any sanction or penalty related to scheduling is imposed on the CHP facility or on the Buyer as the Scheduling Coordinator, that such sanctions or penalties will be the Seller's responsibility.

However, in their advice letter filings, the utilities added provisions to the Standard and Simplified Contracts to specify that "Non-Availability Charges and Availability Incentive Payments" per the CAISO Tariff will be for the benefit of and responsibility of the Seller. In its response to protests, SCE claims that:

> if an AB 1613 generator fails to be available as required by the CAISO, the scheduling coordinator will be

> assessed a charge. It is appropriate to pass this charge through to the generator that failed to be available…[29]

PG&E similarly claims that it would be "subject to non-availability charges and backstop charges for replacement power"[30] without these added provisions. While we believe that the Exhibit H and E of the Standard and Simplified Contracts, respectively, specifically address "sanctions and penalties," they do not address "charges" that could be incurred by the IOUs. In this regard, we agree with the utilities' added provisions as we believe they provide clarity on the pass-through of CAISO availability charges. As with other current procurement, Availability Charges are the responsibility of the Seller. We see no reason to change standard practice in this matter.

In their comments to the draft resolution, FuelCell/CCDC argue that the Commission should not adopt the IOU's proposal to add provisions to the AB 1613 contracts that the "Non-Availability Charges and Availability Incentive Payments" are for the benefit and responsibility of the Seller. They contend that such changes are not authorized by AB 1613, they contradict a carefully negotiated, Commission-approved contract term and they are not necessary given the draft resolution's proposal for non-WDAT interconnected facilities.

To address the concerns from FuelCell/CCDC, we note that the Exhibit E of the Simplified Contract (and Exhibit H of the Standard Contract) would only apply in the case that a facility is obligated to provide RA benefits. Under the interim solution proposed in this resolution, generators that interconnect through a non-WDAT or CAISO tariff do not have an RA must offer obligation and therefore, the contract provisions and exhibits related to the CAISO availability incentive mechanism do not apply. Furthermore, Section 4.01(g) of the Simplified Contract, as noted in the FuelCell/CCDC comments, is in specific regards to

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[29] Response of Southern California Edison to the Protests of Advice 2485-E-B, June 13, 2011, at p. 7.

[30] Response of Pacific Gas & Electric Company to the Protests of Advice 3696-E-C, June 13, 2011, at p .9.

deviation charges, which is separate from availability penalties and charges associated with the RA program.
RA-related contract amendments regarding the CAISO availability incentive mechanisms proposed by the utilities clarify the Standard and Simplified contracts in a manner consistent with the CAISO Tariff.

In this regard, we accept IOU amended contract language regarding availability incentives and charges, as they are consistent with the CAISO Tariff.

3. *Other protested issues*

Parties raised several other substantive concerns related to the utilities' proposed RA-related contract amendments. These include concerns of cost and time burdens imposed on CHP facilities and arguments that the proposed amendments would limit the Commission from exercising its jurisdiction over interconnection. Another protest includes an alternative proposal to "deem deliverable" AB 1613 CHP facilities as an interim solution to servicing the utilities' RA requirements with these resources. Regardless of the merit of each of these protests, provided that the Commission accepts Energy Division's recommendation of two alternative mechanisms to address RA based upon the type of interconnection process used by an AB 1613 CHP generator, these concerns are moot. Instead of discussing concerns that are not relevant given our recommendation, we do not address these protests individually here.

Protests regarding delays and costs to the project developer, impacts on Commission jurisdiction and alternative proposals to "deem deliverable" AB 1613 CHP facilities are moot provided that the Commission accepts Energy Division's recommendation of two alternative mechanisms to address RA, based upon the type of interconnection process used by an AB 1613 CHP generator.

**Modifications to Avoided Cost Payments**

Based on the record, D.09-12-042, as clarified by D.10-04-055, finds that a combined-cycle gas turbine represents a reasonable proxy for the generation that a utility would have to procure if not for a CHP facility participating in the AB

1613 program.[31] Decision 10-12-055 makes further clarification with regards to updating pricing components of the avoided cost formula for AB 1613. Specifically, it states that:

> Updated pricing inputs shall only apply to new contracts executed after the effective date of this decision. The pricing for executed contracts shall be based on the pricing inputs in effect at the time the contract was executed. We do not require parties to modify contracts that have already been executed because it is important to protect contract stability and the expectations of the contracting parties.[32]

In their protests to the utilities' advice letter filings, SJR and FuelCell/CCDC contest an "Avoided Cost" clause added by the IOUs in the Standard and Simplified Contracts. This clause specifies that the Commission may "modify or update" the contract price and "modify Buyer's payment obligations to Seller" during the term of the PPA. While they acknowledge that the Commission may adjust avoided cost pricing over time, SJR and FuelCell/CCDC claim that such a change would not "modify" the prices in existing AB 1613 contracts. The protesting parties assert that the added Avoided Cost provision misrepresents the Commission's approved terms of the PPAs, would introduce uncertainty into the PPA, and may discourage participation in the program.

In response, SCE states that the Avoided Cost provision is consistent with SCE's standard offer contracts with QFs less than 20 MW. SCE acknowledges that the Commission has approved QF contracts at a set avoided cost rate on a net present value basis before. However, they claim that "there is no evidence in this [R.08-06-024] proceeding that a fixed rate for the term of the AB 1613 agreement is equal to SCE's avoided cost on a net present value basis."[33] SDG&E, in its

[31] D.09-12-042 at p. 35.

[32] D.10-12-055 at p. 10.

[33] Response of Southern California Edison Company to the Protests to Advice 2485-E-B, June 13, 2011, at p. 9.

response to protests, claims that the added provision "strikes a reasonable balance between inequitable overpayment to the CHP by ratepayers and contract certainty should the FERC determine the mandated rates are [un]lawful [sic]."[34] PG&E argues that the added contract language to modify Buyer's payment obligations to Seller during the term of the contract is "consistent with the fact that the price is premised on the Commission's finding that generation from the facility counts towards PG&E's RA [requirements]."[35]

We do not agree with the utilities that the added Avoided Cost provision is necessary. The utilities' proposed language is too broad and, as the CHP representatives have argued, could give investors the impression that the Commission seeks to retain authority to modify the price terms of executed contracts. It is the Commission's intent that the current price formula be used throughout the term of executed contracts, consistent with the Commission's Constitutional obligations not to impair contracts.[36] To the extent the Commission makes material changes to the price formula, those changes will only be applied to new contracts.

<u>The amended contract provision allowing the Buyer to modify its payment obligations to Seller is not consistent with decisions in this proceeding.</u>

Again, the utilities have gone beyond the scope of permissible contract amendments to be filed by advice letter as ordered by D.11-04-033 or other decisions in this proceeding. In this regard, the utilities should strike the added provision to Exhibit C of the AB 1613 Standard Contract regarding modifications to avoided cost payments and the corresponding provision in the AB 1613 Simplified Contract.

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[34] Late Filed Response of San Diego Gas & Electric Company to San Joaquin Refining protest of SDG&E Advice Letter 2179-E-B, July 5, 2011, at p. 2.

[35] Response of Pacific Gas & Electric Company to the Protests of Advice 3696-E-C, June 13, 2011, at p. 10.

[36] U.S. Const., Art. I, § 10 and Cal. Const., Art. I, § 9.

**Reservation of Rights**

The Standard Contract approved by D.09-12-042, Attachment A, contains a specific provision allowing each party to "reserve all rights" with respect to the decision. Specifically, Section 9.08(o) of the Standard Contract states that:

> Each Party reserves all rights, claims and defenses with respect to this Agreement, the Decision, and any application for rehearing or appeal filed with respect to the Decision.[37]

No similar term was included in the Simplified Contract approved by D.09-12-042, Attachment B.

In their protest to SDG&E and SCE's advice letter filings, FuelCell/CCDC contest the retention of an unauthorized "reservation of rights" clause in the Simplified Contract, which allows parties to seek remedies in the event any price in the Agreement is found to be in violation of any Applicable Law. This clause was included in earlier advice letter filings in the same rulemaking and also was protested previously by FuelCell/CCDC. Each of the IOUs in their most recent advice letter filings also modified the "reservation of rights" clause in the Standard Contract. FuelCell/CCDC claim that the language will create an appearance of litigation risk and discourage participation by eligible CHP customer generators.

SCE claims that the "reservation of rights" clause is mutual and allows all parties to reserve their "rights, claims and defenses" with respect to the contracts. Furthermore, SCE argues that the provision is necessary because the utility continues to maintain that the price under the AB 1613 contract does not represent SCE's avoided costs and SCE continues to evaluate its legal options. SDG&E claims that the assertions by FuelCell/CCDC are unfounded and fail to address the risk that SDG&E's ratepayers will be contractually obligated to purchase at unlawful prices.

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[37] D.09-12-042, Attachment A, Standard Contract for Eligible CHP Facilities, Section 9.08(o).

Revisions to this section of the AB 1613 contracts do not appear to have been approved in D.10-12-055. Consequently, consistent with D.10-12-055, which rejects any changes which are not corrections or mutually agreed to, we do not accept the SCE and SDG&E modifications to this section. However, the modifications made by PG&E to the reservation of rights at Section 9.08(o) takes into account the possibility of FERC action. PG&E's revisions clarify, but do not materially alter, the version of Section 9.08(o) that was approved in D.09-12-042, Attachment A. Furthermore, while the reservation of rights provision was not included in the Simplified Contract previously, we believe it is reasonable to include there, as proposed by the utilities. Regardless of the size of the CHP facility participating in the program, the same reservation of rights should apply.

The amended contract provision proposed by PG&E regarding the reservation of rights in Section 9.08(o) of the Standard Contract clarifies, but does not materially alter, language approved in D.09-12-042, Attachment A.

The amended contract provision proposed by SCE and SDG&E regarding the reservation of rights in Section 9.08(o) of the Standard Contract does not conform with D.09-12-042, Attachment A.

Consequently, all three IOUs should adopt PG&E's "reservation of rights" provision as set forth in Section 9.08(o) for the Standard Contract and should add the same clause in the Simplified Contract.

**Participation in Other Utility Programs**

In D.09-12-042, the Commission ruled that "AB 1613 does not prohibit an eligible CHP facility or host customer from receiving ratepayer funded incentives, provided the facility is eligible for them."[38]

In line with D.09-12-042, FuelCell/CCDC contest in their protest that Special Condition 2 in SCE's and SDG&E's AB 1613 tariff sheets limits a generator's ability to participate in other utility programs. Specifically, this Condition states that a generator may participate in other programs, including demand-side

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[38] D.09-12-042, Finding of Fact 61.

programs and Net Energy Metering, if the generator meets the eligibility requirements for that program and is not otherwise compensated for the excess energy which is purchased by the utility under AB 1613.

FuelCell/CCDC protests that the language of the provision is too narrow and may preclude an AB 1613 generator from participating in other programs, even if authorized by the Commission. FuelCell/CCDC recommends specific changes to the language of Special Condition 2 to make it less restrictive. Specifically, FuelCell/CCDC recommends that the Commission instruct SCE and SDG&E to eliminate Special Condition 2 or to modify the first sentence as follows:

> "Participating Eligible customer-Generators may participate in any other SDG&E [or SCE] ~~demand side management~~ program or NEM tariff if the customer meets the eligibility requirements of the program ~~or tariff and provided that the program or tariff does not otherwise compensate the customer for energy which is exported and purchased under this schedule~~."[39]

SDG&E responded that they are willing to accept the changes proposed by FuelCell/CCDC to Special Condition 2. However, while SCE agrees to remove specific reference to demand side management and Net Energy Metering in this provision, SCE does not agree with other proposed edits. Specifically, it does not agree with the removal of language that would preclude the generator from being compensated twice for energy sold to the purchasing utility.

We agree with FuelCell/CCDC and SDG&E. Eligibility to participate in other programs and the manner in which those other programs would provide incentives or otherwise support CHP facilities participating in the AB 1613 program is outside the scope of this resolution. However, we also agree with SCE that Sellers should not be paid twice for excess power that is sold under an AB 1613 contract.

[39] Protest of Fuel Cell, Inc. and California Clean DG Coaltion to Advice 2485-E-B, Advice 2179-E-B and Advice 3696-E-C, June 6, 2011, at p. 4 and 5.

Special Condition 2 of SCE's and SDG&E's AB 1613 tariff sheets limiting a CHP facility's participation in other utility programs does not conform with D.09-12-042.

In that regard, SCE and SDG&E should ensure that Special Condition 2 of the tariff sheets for AB 1613 does not limit a CHP facility's participation in other utility programs and should retain amended language disallowing double compensation for excess energy purchased under an AB 1613 contract, if proposed.

**Exemption for Public Entities**

D.10-12-055 addresses the FERC Declaratory Order's proposal that the AB 1613 program operate under PURPA, including the requirement that all CHP facilities participating in the program obtain QF certification. However, since public entities are exempt from FERC jurisdiction under United States Code Section 824(f), in order to participate in the AB 1613 program, they do not need to obtain QF status from FERC. In D.10-12-055, the Commission clarified that an "Eligible Facility" would be defined as:

> A facility, as defined by Public Utilities Code Section 2840.2, subdivisions (a) and (b) that, (1) meets the guidelines established by the California Energy Commission pursuant to Public Utilities Code § 2843 and, (2) meets the requirements of 18 Code of Federal Regulations § 292.201, et seq., *if applicable*.[40] (emphasis added)

In their protest to PG&E's advice letter, FuelCell/CCDC notes that PG&E fails to include an exemption in Special Condition 5 of its tariff sheet regarding generator certification as QF.

We acknowledge and agree with this protest from FuelCell/CCDC. While each IOU properly amended the definition of an "Eligible Facility" in Exhibit A of the

[40] D.10-12-055 at p. 30.

AB 1613 contracts, PG&E failed to make corresponding changes to its AB 1613 tariff sheet.

PG&E fails to exempt public entities from obtaining QF certification in its AB 1613 tariff sheet as ordered by D.10-12-055.

Therefore, PG&E should update its AB 1613 tariff sheet, Special Condition 5, to clarify that the condition applies unless the Seller is a public agency exempt from FERC jurisdiction under United States Code Section 824(f).

**Cap on GHG Compliance Costs**

Decision 11-04-033 caps the GHG-related costs paid by the utility to the AB 1613 facility at the avoided GHG compliance costs of the proxy generator the Commission has relied on to establish the avoided costs for energy. Specifically, this cap is set at the heat rate of the current MPR, or 6,924 Btu/kWh.

In their protests, FuelCell/CCDC and SJR state that they do not object to the revised contract language that the IOUs have proposed to implement the limited change ordered by D.11-04-033. However, SJR notes that PG&E's formula to cap the pass-through of GHG costs uses an MPR heat rate of 6,294 Btu/kWh, which is incorrect. In its response to this protest, PG&E acknowledges the error and agrees to correct the formula to list the correct MPR heat rate as 6,924 Btu/kWh. We agree with this correction.

The market price referent (MPR) heat rate cited by PG&E to cap the pass-through for GHG compliance costs as ordered in D.11-04-033 is incorrect.

In this regard, PG&E should amend the erroneous reference to the MPR heat rate in its contracts for the AB 1613 program to conform with D.11-04-035.

## COMMENTS

Public Utilities Code section 311(g)(1) provides that this resolution must be served on all parties and subject to at least 30 days public review and comment prior to a vote of the Commission. Section 311(g)(2) provides that this 30-day period may be reduced or waived upon the stipulation of all parties in the proceeding.

The 30-day comment period for the draft of this resolution was neither waived or reduced. Accordingly, this draft resolution was mailed to parties for comments on October 11, 2011.

Timely comments on the draft resolution were submitted by FuelCell/CCDC, PG&E, SDG&E and SCE on October 31, 2011. All comments were considered carefully and to the degree necessary, included in the discussion above.

The principle areas of revisions in the text of the draft resolution are noted here:

- Regarding Resource Adequacy, the requirements for generators interconnecting pursuant to a WDAT or CAISO tariff have been revised to require a generator to obtain all deliverability studies that are appropriate in order for the Buyer to receive Resource Adequacy benefits from the purchased electricity.

- Regarding Resource Adequacy, for generators interconnecting pursuant to a WDAT or CAISO tariff, if the generator is interconnected before it is found to deliver RA benefits, the generator may exercise its right to a less than 20 MW PURPA contract as approved by the QF/CHP Settlement and receive payment for the full amount of power purchased by the utility equal to energy and capacity payments under that contract. The facility shall be able to enter such contract for a short term as appropriate for the generator. When the generator is able to satisfy AB 1613 RA requirements, it shall transition to an AB 1613 contract and receive the AB 1613 price. A facility shall be allowed to execute an AB 1613 contract at any point during this period and according to Section 2.01 of the Standard and Simplified contracts.

## FINDINGS AND CONCLUSIONS

1. For facilities that interconnect through a WDAT or CAISO tariff (typically larger facilities) a deliverability study is appropriate to properly assess the capacity that the generator is able to provide to the utility to meet its RA obligations.

2. Currently, the only way for the excess power of an AB 1613 generator to count toward the purchasing utility's RA requirement is for it to be fully deliverable under CPUC and CAISO rules.

3. Where a CHP facility interconnects through a WDAT or the CAISO tariff and is able to begin energy deliveries before meeting resource adequacy counting requirements, that facility shall be paid energy and capacity payments, as applicable, for energy delivered to the purchasing utility pursuant to the "Standard Contract for Qualifying Facilities with a Power Rating that is Less than or Equal to 20MW" as provided in the QF/CHP Settlement, Attachment A, Exhibit 6.

4. As an interim solution, for AB 1613 CHPs that interconnect at the distribution level through a non-WDAT process, a deliverability study will not currently be required and the total RA obligation of the service area will be decreased by the full generation capacity of these CHP generators.

5. Following the outcome of the Interconnection (R.11-09-001) and Resource Adequacy (R.09-10-032) proceedings, a deliverability study may or may not be required for all AB 1613 resources. We reserve the right to require appropriate amendments, as necessary, to address this issue.

6. RA-related contract amendments regarding the CAISO availability incentive mechanisms clarify the Standard and Simplified contracts in a manner consistent with the CAISO Tariff.

7. Protests regarding delays and costs to the project developer, impacts on Commission jurisdiction and alternative proposals to "deem deliverable" AB 1613 CHP facilities are moot provided that the Commission accepts Energy Division's recommendation of two alternative mechanisms to address RA, based upon the type of interconnection process used by an AB 1613 CHP generator.

8. The amended contract provision allowing the Buyer to modify its payment obligations to Seller, based on Commission updates to avoided cost pricing, does not conform with D.10-12-055.

9. The amended contract provision proposed by PG&E regarding the reservation of rights in Section 9.08(o) of the Standard Contract clarifies, but does not materially alter, language approved in D.09-12-042, Attachment A.

10. The amended contract provision proposed by SCE and SDG&E regarding the reservation of rights in Section 9.08(o) of the Standard Contract does not conform with D.09-12-042, Attachment A.

11. Special Condition 2 of SCE's and SDG&E's AB 1613 tariff sheets does not conform with D.09-12-042.

12. PG&E fails to exempt public entities from obtaining QF certification in its AB 1613 tariff sheet as ordered by D.10-12-055.

13. The market price referent (MPR) heat rate cited by PG&E to cap the pass-through for GHG compliance costs as ordered in D.11-04-033 is incorrect.

**THEREFORE IT IS ORDERED THAT:**

1. Within seven (7) days of approval of this Resolution, Pacific Gas & Electric Company, Southern California Edison Company and San Diego Gas & Electric Company each shall file a Tier 1 compliance advice letter with finalized AB 1613 Tariff Sheets, Standard Contracts and Simplified Contracts that:

    a. Strikes the amended provisions regarding "full capacity deliverability status" and instead modifies existing Section 3.02 of the Standard and Simplified Contracts, which details Resource Adequacy obligations, as follows:

        (d) Comply with CPUC and CAISO requirements to count towards Resource Adequacy; *provided, however*:

        i. if such requirements could interfere with the Operations of Seller, Seller shall be entitled to challenge such requirements with the CPUC or other relevant agency. Absent a ruling or other action granting a stay, Seller's compliance shall be required pending resolution of the challenge; and

ii. if Seller interconnects the Generating Facility pursuant to a non-FERC-jurisdictional interconnection tariff, Seller shall not be required to provide Resource Adequacy Benefits, and Buyer's total obligation to obtain Resource Adequacy Benefits pursuant to the Resource Adequacy Rulings with respect to the service area of Buyer will be decreased by the Generating Facility's generating capacity, provided that, if the outcome of any CPUC proceeding requires Seller to obtain a deliverability study, Seller shall promptly obtain such deliverability study and provide it to Buyer upon the completion of such deliverability study.

iii.

b. Updates the AB 1613 tariff sheets to allow a CHP generator to execute an AB 1613 contract pending fulfillment of applicable CPUC and CAISO resource adequacy requirement while, simultaneously, receiving payment pursuant to the "Standard Contract for Qualifying Facilities with a Power Rating that is Less than or Equal to 20MW" as provided in the QF/CHP Settlement, Attachment A, Exhibit 6.

c. Strikes the added provision to Exhibit C of the AB 1613 Standard Contract regarding modifications to avoided cost payments and the corresponding provision in the AB 1613 Simplified Contract;

d. Adopts Pacific Gas & Electric Company's "reservation of rights" provision as set forth in Section 9.08(o) for the Standard Contract and add the same clause in the Simplified Contract;

e. For Southern California Edison Company and San Diego Gas & Electric Company, ensure that Special Condition 2 of the tariff sheets for AB 1613 does not limit a CHP facility's participation in other utility programs and retain amended language disallowing double compensation for excess energy purchased under an AB 1613 contract, if proposed;

f. For Pacific Gas & Electric Company, modifies Special Condition 5 of the AB 1613 Tariff Sheet to clarify that the condition applies unless the Seller is a public agency exempt from FERC jurisdiction under United States Code Section 824(f);

g. For Pacific Gas & Electric Company, corrects the erroneous reference to the MPR heat rate;

This Resolution is effective today.

I certify that the foregoing resolution was duly introduced, passed and adopted at a conference of the Public Utilities Commission of the State of California held on December 1, 2011; the following Commissioners voting favorably thereon:

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Paul Clanon
Executive Director