

Decision 08-11-004 November 6, 2008

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

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

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

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

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

1. Summary

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

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

2. Procedural Background

On July 18, 2008, PG&E filed Application (A.) 08-07-018 seeking expedited approval and the issuance of a Certificate of Public Convenience and Necessity (CPCN) for the Tesla Generating Station, a 560 megawatts (MWs) natural gas-fired combined-cycle generating facility to be located in eastern Alameda

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

² *Id.* at 210-211.

County. In addition, PG&E also requests that the Commission issue an “expedited interim order by September 18, 2008 confirming that, if the Commission ultimately denies PG&E’s request for a CPCN, PG&E’s reasonable termination costs, including Allowance for Funds Used During Construction, will be eligible for recovery in rates as ‘abandoned project’ costs.”³ Finally, PG&E seeks expedited consideration of the application “because prompt action is required to develop the Tesla Generating Station to serve as a replacement for the 913 MWs of planned Northern California generation projects resulting from PG&E’s 2004 LTRFO [Long-Term Request for Offers] that have been terminated by the developers or are at-risk and in need of additional regulatory and permitting approvals in order to be able proceed [sic] with development.”⁴

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

³ A.08-07-018 at 2.

⁴ *Id.*

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

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

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

On July 21, 2008, PG&E amended its application⁸ and testimony⁹ to reflect the fact that since the bid deadline in the 2008 LTRFO had passed, release of the initial capital costs and revenue requirements associated with the Tesla Generating Station did not require confidential treatment. Despite these modifications, both the application and the testimony still include material for which PG&E seeks confidentiality protections, and PG&E also filed an amended motion to protect certain material in the application¹⁰ and an amended motion to protect certain material in the testimony.¹¹

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

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

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

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

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

Protests were timely filed by the Division of Ratepayer Advocates (DRA),¹² the Western Power Trading Forum and the Alliance for Retail Energy Markets (WPTF/AReM),¹³ the Independent Energy Producers Association (IEP),¹⁴ Mirant California, LLC, Mirant Delta, LLC and Mirant Potrero, LLC (filing jointly) (Mirant)¹⁵, Californians for Renewable Energy, Inc. (CARE),¹⁶ the City of Tracy (Tracy),¹⁷ and the City and County of San Francisco (CCSF).¹⁸ In addition, a limited protest was filed by The Utility Reform Network (TURN)¹⁹ and a response to the application was filed by the California Energy Commission (CEC).²⁰

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

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

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

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

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

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

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

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

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

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

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

On August 27, 2008, a prehearing conference (PHC) was held in San Francisco to address the issues concerning the management of this proceeding. As part of the discussion at the PHC, it was determined that several parties had failed to receive all of the motions of IEP and WPTF/ AReM. As a result, the Administrative Law Judge (ALJ) ordered IEP and WPTF/ AReM to serve the motions on August 28 to a service list that was updated after the PHC. The ALJ set September 8, 2008 as a date for all parties to respond to the motions.²⁶ Patterson Pass was granted party status in the proceeding.²⁷

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

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

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

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

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

²⁶ TR 8: 22-23.

²⁷ TR 7: 12-14.

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

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

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

On September 9, 2008, San Diego Gas & Electric Company (SDG&E) filed a response to IEP's Motion for Investigation³² and a motion to become a party to the proceeding.³³

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

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

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

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

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

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

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

3. Legal Authority

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

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

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

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

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

³⁶ *Id.* at 211.

Commission divided the “unique circumstances warranting some form of utility ownership into five categories.”³⁷

4. Issues before the Commission

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

4.1. Postion of Parties

WPTF/ARem’s Motion to Dismiss argues that:

The Commission has established clear and precise standards for an application for utility owned generation (UOG) acquired outside a competitive process in D.07-12-052 issued just last December in the Commission’s Long-Term Procurement Plan (LTPP) proceeding, R.06-12-013. The PG&E Application asserts but fails to demonstrate to [sic] compliance with those standards.³⁸

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

³⁷ *Id.* at 210.

³⁸ WPTF/AReM Motion at 4.

³⁹ *Id.* at 5.

⁴⁰ D.07-12-052 at 209.

long-term procurement is an inefficient use of Commission and party resources and undermines the credibility and robustness of the procurement practices the Commission has endorsed.”⁴¹

More specifically, WPTF/ AReM contends that the Application does not comply with Commission procurement policy because it meets neither the “unique opportunity”⁴² nor the “reliability needs”⁴³ criteria set forth in D.07-12-052 for the development of UOG outside of a RFO process. WPTF/ AReM also argues that the Application “fails to comply with Commission policy that an RFO must be demonstrated to be infeasible”⁴⁴ and that PG&E fails to show that the power is “attractively priced.”⁴⁵ WPTF/ AReM further claims that “[g]ranted PG&E’s application will likely lead to the diminution of competition in the California generation market”⁴⁶ and that the application “effectively constitutes a petition to modify D.07-12-052, for which parties have not received legally sufficient notice.”⁴⁷

Like the Motion of WPTF/ AReM, IEP’s Motion to Dismiss also discusses the policies set forth in D.07-12-052 and reasons that PG&E’s Application “should be dismissed because it fails to meet the requirements the Commission

⁴¹ WPTF/ AReM Motion at 5.

⁴² *Id.* at 6.

⁴³ *Id.* at 7.

⁴⁴ *Id.* at 8.

⁴⁵ *Id.* at 9.

⁴⁶ *Id.* at 10.

⁴⁷ *Id.* at 12.

has established for this type of request.”⁴⁸ IEP contends that PG&E “fails to show that holding a competitive RFO is infeasible”⁴⁹ and that PG&E “fails to show that the Tesla project qualifies under the ‘extraordinary circumstances’ exception.”⁵⁰

In reply to WPTF/ AReM’s Motion, PG&E states that “the Commission has set a high standard for a motion to dismiss an application.”⁵¹ PG&E contends that the Commission should not dismiss this Application because: (1) “The Tesla Generating Station satisfies the unique opportunity requirement;”⁵² (2) “PG&E has demonstrated that there is a reliability need for the Tesla Generating Station;”⁵³ (3) “PG&E has demonstrated that an RFO is infeasible;”⁵⁴ and (4) “PG&E has demonstrated that the Tesla Generating Station is an attractively priced resource.”⁵⁵ PG&E argues that these assertions of WPTF/ AReM are at best “disputed factual issues that warrant evidentiary hearings and Commission review on the merits.”⁵⁶ Finally, PG&E contends that “WPTF/ AReM’s policy

⁴⁸ IEP Motion to Dismiss at 3.

⁴⁹ *Id.*

⁵⁰ *Id.* at 4.

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

⁵² *Id.* at 4.

⁵³ *Id.* at 5.

⁵⁴ *Id.* at 6.

⁵⁵ *Id.*

⁵⁶ *Id.* at 4.

arguments are not appropriate for resolution in a motion to dismiss;⁵⁷ and that its “asserted ‘other grounds’ for dismissal demonstrate the need for hearings.”⁵⁸

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

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

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

CUE/CURE supports its interpretation by analyzing the context of the discussion of unique opportunity contained in D.07-12-052. CUE/CURE argues that “each of the other four categories described [in the decision] contain general

⁵⁷ *Id.* at 7.

⁵⁸ *Id.* at 8.

⁵⁹ PG&E Reply at 21.

⁶⁰ *Id.*

⁶¹ CUE/CARE Opposition at 6.

and inclusive language;” that the decision states that the Commission will consider UOG approval on a “case-by-case basis;” and the Commission states that “the needs highlighted in these five categories may change.”⁶² CUE/CURE concludes:

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

In addition, CUE/CURE argues that there is an open issue as to whether the facts alleged in the Application may lead to a situation that “*may* compromise reliability.”⁶⁵ CUE/CURE concludes by arguing that neither IEP nor WPTF/AReM have met the applicable legal standards for a motion and “should be denied.”⁶⁶

4.2. Ruling and Rationale of ACR

The ACR evaluated PG&E’s assertion that the proposed project meets the criteria warranting UOG in two of the five exception categories identified in

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*, emphasis in original.

⁶⁵ *Id.* at 8, emphasis in original.

⁶⁶ *Id.* at 12.

D.07-12-052 because it “provides a unique opportunity or is needed to meet specific, unique reliability needs.”⁶⁷

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

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

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

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

The ACR first examined the set of facts pertaining to the “unique opportunity” offered by this Application. The ACR noted that PG&E does not assert that this “unique opportunity” arises from a settlement or a bankruptcy.

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

⁶⁸ D.07-12-052 at 212.

Still, the facts pertaining to the advanced position in regulatory reviews and the facts pertaining to the order status of the turbine generators are clearly unique. The ACR then cited the argument of CUE/CURE, which stated that the goal of the Commission is to permit a utility to acquire “attractively priced resources” and the words “resulting from a settlement or bankruptcy”⁶⁹ are illustrative of the type of situation that produces an “attractively priced resource,”⁷⁰ not qualifying conditions.

The ACR observed that the Commission may be persuaded by this argument in light of the strong commitment articulated in D.07-12-052 to a case-by-case approach to examining proposed UOG projects. The ACR concluded that the Commission may wish to clarify whether D.07-12-052 has set a policy that would limit its examination of unique circumstances to only those situations that arise from a settlement or from a bankruptcy. Thus, the ACR concluded there were insufficient grounds for dismissing PG&E’s application.

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

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ Application at 17.

⁷² *Id.* at 18.

reliability issue, then the project would clearly qualify for the “reliability” exception created in D.07-12-052.

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

Based on all these considerations, the ACR concluded that the Commission should have the opportunity to evaluate the evidence presented in the Application. The motions to dismiss of WPTF/ AReM and IEP were therefore denied.

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

Typically the Commission does not consider interlocutory appeals or re-examine rulings issued in a proceeding. However, PG&E’s request for an interim decision granting recovery of any project termination costs that it may incur should the Commission decline to grant a CPCN for the Tesla Generating Station would, if approved, place ratepayers at risk of approximately \$59 million in termination costs before the issue of the reasonableness of the project came

⁷³ IEP Motion to Dismiss at 3.

⁷⁴ *Id.* at 4.

⁷⁵ ACR at 16.

before the full Commission.⁷⁶ In light of this fact, it is reasonable for the Commission to examine on its own motion whether to reverse the ACR that denied the motions to dismiss.

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

As the WPTF/ AReM Motion states:

. . . PG&E fails to comply with Commission policy that an RFO must be demonstrated to be infeasible. As noted in the joint WPTF/ AReM protest of the application filed August 20, 2008, D.07-12-052 provides: “Because the Commission has a strong preference for competitive solicitations, in all cases, if an IOU proposes a UOG outside of a competitive RFO, *the IOU must make a showing that holding a competitive RFO is infeasible.*” Further, in allowing the possibility that UOG could be built under any of the five categories, the Commission again emphasized that “we firmly believe that all long-term procurement should occur via competitive procurements, except in truly extraordinary circumstances,” and specified that “while we do not explicitly disallow utility ownership options in the generation market we continue to look unfavorably on this procurement option but realize that in extraordinary times this may be the optimal method for meeting the needs of California’s ratepayers. Here, however, PG&E makes no showing that holding a competitive RFO was (or is) infeasible, thus again failing to comply with explicit Commission policy in that regard.”⁷⁷

⁷⁶ Application at 8.

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

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

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

We agree with WPTF/AREM and IEP that PG&E fails to meet the threshold requirement of showing that holding a RFO is infeasible or that the Tesla project meets the truly extraordinary circumstances criterion as required by D.07-12-052. In 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. While we have examples of other utilities filling needs by way of repowering projects or a series of peaker units, we are not suggesting that PG&E had to support its application in any particular way. 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.

In summary, PG&E did not meet the standards articulated in D.07-12-052 that would allow us to consider Tesla as a UOG resource chosen outside of a competitive solicitation. This supports granting the motions to dismiss.

5. Motions

Since PG&E filed the application for Tesla, there have been numerous motions filed in this proceeding as well as a pending interlocutory appeal. Many motions were addressed in the September 15, 2008 ACR, including IEP's Motion

⁷⁸ IEP Motion to Dismiss at 3.

for an Investigation of the Hybrid Market which was denied. IEP has since filed a Motion for Reconsideration of the ruling in the ACR. The Motion for Reconsideration is denied for the same reasons set forth in the ACR. With the Commission's approval of the Proposed Decision (PD) granting the Motion to Dismiss, this proceeding will be closed. This proceeding, an application filed by one utility regarding a specific generating facility, Tesla, is not the appropriate forum for an investigation into the hybrid market that would impact all three IOUs as well as numerous other parties not litigating the Tesla facility.

Any other outstanding motions in this proceeding not already addressed by a specific ruling are deemed denied.

6. Comments on Proposed Decision

Comments to the PD were received from DRA, TURN, IEP, WPTF/AReM, SDG&E, CUE and PG&E. Reply comments were received from IEP, PG&E and WPTF/AReM.

All the comments and replies were read and carefully considered. Some changes were made to the PD in response to the comments and the changes have been incorporated into the final decision. In general, however, many parties repeated the arguments for or against the Tesla project that they had presented to the Commission in protests to the application or in the moving papers or the responses to the motions to dismiss.

TURN's position on the PD is that they are disappointed that ratepayers lost an opportunity for what TURN perceived to be a good deal. However, TURN does not recommend a different outcome at this juncture since TURN argues that the issuance of the PD itself, denying PG&E's request for authority for interim payments for equipment orders, caused PG&E to cancel the order. Without the interim payments for the equipment, Tesla can not be developed for

the price PG&E proposed in the application, and therefore the issue as to the existence of Tesla is moot. TURN suggests dismissing the application without a decision. Since PG&E did not chose to withdraw the application after the interim payment authority was denied, we are going forward with the decision granting the motion to dismiss the application in order to close the proceeding.

IEP urges the Commission to adopt the PD without modification. As a moving party for the Motion to Dismiss, IEP argues that the PD correctly finds that PG&E failed to make a showing that “holding a competitive RFO is infeasible.”⁷⁹ While IEP is supportive of the PD, IEP argues that the problems with the Tesla application just highlight the problems with the hybrid market and again argue in support of an Investigation. As discussed above, IEP’s Motion for an Investigation was denied and IEP’s Motion for Reconsideration is also denied.

In its Reply Comments, IEP raises some arguments to PG&E’s allegations that referring to SCE’s RFO in 2006 for resources for 2013 is proof that a RFO for resources needed in less than seven years is not feasible. The Commission is familiar with SCE’s RFOs and the projects chosen in both the Summer 2007 and the Fast-Track RFOs, and we agree with IEP that the date when projects come on-line is not always indicative of the length of time necessary for a RFO or for development of the project, but rather is often a question of when the utility needs the resource.

WPTF/AReM, who also brought a Motion to Dismiss the Tesla application, urges the Commission to approve the PD on the same grounds

⁷⁹ IEP Opening Comments to Proposed Decision, October 14, 2008, p. 3.

argued by IEP: that PG&E did not adequately establish that “conducting a request for offer is infeasible”⁸⁰

DRA also supports the PD’s granting of the motions to dismiss, but suggests that the Commission explain how the IOUs are to evaluate UOG opportunities in a competitive solicitation. DRA’s comments are persuasive and the Commission has changed the language in the final decision to specify that when an IOU is evaluating both Power Purchase Agreements (PPAs) and UOGs in a competitive solicitation, there is no preference for the PPAs. We agree with DRA that the decision should be clear that in a competitive solicitation we are not establishing a “higher bar” for a UOG project. We clarify that UOG must overcome a “high bar” when solicited outside of a competitive bidding process,⁸¹ but in a competitive solicitation there is no preference for a PPA over a UOG project.

CUE argues against the PD, and instead asks the Commission to “recognize that new UOG is an essential part of California’s future energy portfolio.”⁸² From CUE’s perspective, the Commission should reevaluate Tesla in light of the “failed ideology of deregulation” and prohibiting UOG except in “extraordinary circumstances” is supporting that failed ideology. CUE, instead, urges the Commission to evaluate Tesla under current market conditions, and is confident that Tesla will be found to be in the best interest of ratepayers. We do not disagree with CUE that with changing market conditions we may be asked to approve more UOG projects. What this decision finds, however, is that when an

⁸⁰ WPTF/AReM Opening Comments to Proposed Decision, October 14, 2008, p. 3.

⁸¹ DRA Opening Comments to the Proposed Decision, October 14, 2008, p. 2.

⁸² CUE Opening Comments to the Proposed Decision, October 14, 2008, p. 2.

IOU chooses a UOG project outside of a competitive solicitation, the IOU must make an affirmative showing that conducting an RFO is infeasible and the project meets an exception to the Commission's stated preference for projects chosen via the competitive market.

Both SDG&E and PG&E also contend that the PD is flawed and must be revised. SDG&E argues that the PD sets an unrealistically high bar for consideration of a UOG project. SDG&E is concerned that in the current financial and economic market that UOG projects are important options for the utilities and the Commission must ensure that they can be examined fairly and promptly by the utilities. SDG&E asks that the Commission give PG&E a full and fair opportunity to show why Tesla would fit the Commission's high standards for a UOG project.

PG&E, as the applicant, strongly urges the Commission to reject the PD and issue a final decision that gives PG&E the opportunity to develop a full record showing that the Tesla project would provide a low-cost, reliable supply source for PG&E customers by summer 2012 when it is needed. PG&E contends, as does SDG&E, that the PD is "legally erroneous" because it grants the motion to dismiss "based on a disputed issue of material fact."⁸³ PG&E argues that it presented sufficient evidence and facts in its testimony to demonstrate that an RFO is infeasible, and presents a litany of those facts in its Comments to the PD. We disagree with SDG&E and PG&E that the fact that PG&E's showing in the Tesla application would have proved unpersuasive even if accepted as true constitutes a disputed issue of material fact.

⁸³ PG&E Opening Comments to the Proposed Decision, October 14, 2008, p. 2.

PG&E, IEP and WPTF/AReM filed reply comments addressing arguments advanced in the comments. IEP and WPTF/AReM again urge the Commission to adopt the PD and ignore comments suggesting that the PD should be rejected. PG&E recommends that the Commission reject the PD and consider the Tesla project on its merits. Nothing in the reply comments persuades the Commission to veer from its position that the motions to dismiss the application should be granted.

7. Conclusion

The Tesla application as presented to the Commission on July 18, 2008 asked for an interim decision by September 18, 2008 to assure PG&E recovery of a \$59 million equipment payment due that date. PG&E asked for this interim decision before the Commission could conduct evidentiary hearings on whether or not to grant a CPCN and approve the Tesla project. \$59 million constitutes approximately 7% of the projected total cost of \$850 million for the facility. PG&E's application did not make a showing sufficient to support a finding by the Commission, in less than 60 days and without evidentiary hearings, that ratepayers should be put at risk for the \$59 million.

In addition to requesting that the PD be rejected, PG&E requests findings in the final decision that if the application is dismissed, PG&E should have the opportunity to recover its reasonably and prudently incurred costs related to Tesla either through a separate application or its general rate case. We decline to address this subject in this decision since PG&E has appropriate proceedings in which to present its case for cost recovery.

We find it reasonable to grant the motions to dismiss of the WPTF/AReM and the IEPs of the Application of PG&E for Expedited Approval of the Tesla Generating Station and Issuance of a CPCN. Even if we assume that the facts

alleged in the in the application are true, we do not find that PG&E has met the criteria set in D.07-12-052 for UOG. We reiterate here that in D.07-12-052, we set a clear preference for a markets-first approach and set an intentionally high bar for UOG when chosen outside of a competitive bidding process. We find that PG&E's application for the Tesla Generation Station has not met that high threshold. Specifically, PG&E has not sufficiently demonstrated that conducting an RFO is infeasible; a central requirement to proposing UOG outside of a competitive process. We therefore find it reasonable to grant the motions to dismiss, therefore closing this proceeding.

8. Assignment of Proceeding

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

Finding of Fact

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

Conclusions of Law

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

O R D E R

IT IS ORDERED that:

1. The motions of Western Power Trading Forum, the Alliance for Retail Energy Markets, and the Independent Energy Producers Association to dismiss Pacific Gas and Electric Company's Application for Expedited Approval of the

Tesla Generating Station and Issuance of a Certificate of Public Convenience and Necessity are granted.

2. Application 08-07-018 is closed.

This order is effective today.

Dated November 6, 2008, at San Francisco, California.

MICHAEL R. PEEVEY
President
DIAN M. GRUENEICH
JOHN A. BOHN
RACHELLE B. CHONG
TIMOTHY ALAN SIMON
Commissioners