



BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA

FILED

12/10/18
04:59 PM

A1812014

Application of the Public Advocates Office
for Rehearing of Resolution E-4949

Application _____

**APPLICATION OF THE PUBLIC ADVOCATES OFFICE FOR REHEARING
OF RESOLUTION E-4949**

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December 10, 2018

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I. INTRODUCTION

Pursuant to Rule 16.1 of the California Public Utilities Commission's (Commission) Rules of Practice and Procedure and Section 1731(b) of the California Public Utilities Code,¹ the Public Advocates Office at the California Public Utilities Commission (Cal Advocates), formerly the Office of Ratepayer Advocates (ORA),² submits this application for rehearing of Resolution E-4949 (Resolution).³ The Resolution "approves cost recovery for three power purchase agreements and one engineering, procurement and construction (EPC) agreement for four energy storage facilities with the following counterparties: mNOC, Dynegy, Hummingbird Energy Storage, LLC, and Tesla."⁴

The Resolution commits legal error because it failed to comply with the Commission's own rules.⁵ The Resolution also deprived stakeholders in the Advice Letter 5322-E (AL-5322) process of the right to notice and the meaningful opportunity to be heard. For these reasons, as set forth below, the Commission should grant rehearing and issue an order that denies AL-5322.

II. BACKGROUND AND PROCEDURAL HISTORY

On January 12, 2018, the Commission issued Resolution E-4909 in response to the California Independent System Operator's (CAISO) November 2, 2017 submission of three Reliability Must Run (RMR) agreements for the Federal Energy Regulatory

¹ Unless otherwise specified, all further section references are to California Codes. General Rule 8.1 of the Commission's General Order 96-B provides that a person seeking rehearing of a Commission resolution may apply for rehearing pursuant to the Rules and Section governing rehearing of other Commission decisions.

² The Office of Ratepayer Advocates was renamed the Public Advocates Office of the Public Utilities Commission pursuant to Senate Bill No. 854, which was signed by the Governor on June 27, 2018 (Chapter 51, Statutes of 2018).

³ Resolution E-4949. Pacific Gas and Electric Company request approval of four energy storage facilities with the following counterparties: mNOC, Dynegy, Hummingbird Energy Storage, LLC, and Tesla, issued November 9, 2018.

⁴ Resolution, p. 1.

⁵ The Resolution is inconsistent with the Commission's GO 96-B, General Rules 5.1 (Matters Appropriate to Advice Letters) and 5.2 (Matters Appropriate to Formal Proceedings) and 7.51 (Additional Information; Supplements).

Commission's (FERC) approval. The CAISO, after receiving notifications in 2016 and 2017 that Calpine Corporation (Calpine) was considering removing five of its generators from the market in 2018,⁶ conducted studies that concluded three of the five generators were needed to meet local reliability needs. The CAISO backstopped (procured) the resources through RMR agreements for service throughout 2018 and annual renewal as needed.⁷

The Commission in Resolution E-4909 expressed concerns that the three RMR agreements could create market distortions and increase ratepayer costs since the RMR agreements procured energy resources outside of the typical competitive solicitation process.⁸ Resolution E-4909 authorized Pacific Gas and Electric Company (PG&E) to conduct a competitive solicitation for energy storage and/or preferred resources to address the deficiencies identified by CAISO that were intended to be met by the three RMR agreements.⁹

The Commission directed PG&E to select resources¹⁰ that would be "online and operational on or before a date sufficient to ensure" that one or more of the RMR contracts "will not be renewed for any year from 2019 through 2022, if feasible and represent a reasonable cost to ratepayers."¹¹ The Commission required PG&E to

⁶ In November 2016, Calpine notified the CAISO of its intent to remove four "peaker" generating units from their Participating Generator agreements, making them unavailable for CAISO dispatch by 2018 (Resolution E-4909, p. 2). In June 2017, Calpine notified CAISO that it was considering making its Metcalf Energy Center (Metcalf) power plant unavailable to the market in 2018 as well. See Calpine Corporation letter to CAISO, June 2, 2017. Available at: https://www.caiso.com/Documents/CalpineLetter_CAISO_MetcalfEnergyCenterRetirementAssessment.PDF

⁷ Calpine filed the RMR agreements with the Federal Energy Regulatory Commission (Docket ER18-230 and 240) on November 2, 2017 and participated in a settlement before certification on March 27, 2018 and execution on May 1, 2018.

⁸ Resolution E-4909, p. 5.

⁹ Resolution E-4909, p. 5, Ordering Paragraph 1, p. 20.

¹⁰ Resolution E-4909, Finding 7, p. 18. The Commission authorized procurement in the South Bay-Moss Landing, Pease and Bogue subareas pursuant to the conditions set forth in Resolution E-4909.

¹¹ Resolution E-4909 Ordering Paragraph 5, p. 20. The Commission further specified that "reasonable cost to ratepayers" must consider the cost and value to PG&E, previous solicitations in which PG&E has award contracts to similar resources, and the cost of the RMR contracts with adjustments for contract terms such as contract length and expedited delivery date. Resolution E-4909 Ordering Paragraph 7, p. 20

consider new or in-development transmission solutions that would reduce or eliminate the need for the RMR agreements.¹²

Resolution E-4909 also ordered PG&E to “coordinate with the CAISO on its proposed portfolio and its effectiveness in reducing or eliminating the deficiencies.”¹³ The Commission included this requirement in Resolution E-4909 after PG&E and other stakeholders expressed concern that the procured resources might not effectively alleviate the local capacity deficiencies identified by CAISO or meet the CAISO’s reliability standards. Energy storage and preferred resources have operating characteristics and use limitations that differ from those of natural gas generation, which can limit their ability to meet CAISO-determined reliability standards.¹⁴

In comments on draft Resolution E-4909, community choice aggregators (CCA Parties)¹⁵ and the Public Advocates Office argued that the advice letter process proposed for approval of procurement that resulted from PG&E’s solicitation was not appropriate. The CCA Parties stated that the resolution/advice letter process did not provide sufficient due process to ensure just and reasonable rates, especially considering the potential magnitude of the proposed procurement and cost of energy storage and preferred resources.¹⁶ The Public Advocates Office similarly recommended that the Commission review any procurement resulting from PG&E’s solicitation via a formal application rather than an advice letter, because Resolution E-4909 did not adequately define the criteria for the resources to obviate the need for the RMR contracts, and an application would allow parties to submit testimony and have evidentiary hearings on disputed issues

¹² Resolution E-4909 acknowledged that in-process transmission solutions would obviate the need for RMR agreements in the Pease and Bogue sub-areas (which the Yuba City and Feather River RMR agreements were active) by 2022. Resolution E-4909, p. 12. See also Resolution E-4909, p. 7 and 12 and Ordering Paragraph 8, p. 20.

¹³ Resolution E-4909, p. 10; *see also* Ordering Paragraphs 9 and 10, p. 20.

¹⁴ Resolution E-4909, pp. 10-11. PG&E, Western Power Trading Forum, and the Public Advocates Office pointed to the CAISO study conducted to explore alternatives to the Puente Plant. Resolution E-4909, p. 10

¹⁵ Community Choice Aggregator Parties: East Bay Community Energy, City of Lancaster, Marin Clean Energy, Peninsula Clean Energy, Silicon Valley Clean Energy, Sonoma Clean Power Authority.

¹⁶ CCA Parties’ Comments on Draft Resolution E-4909, December 29, 2017, pp. 4-5.

of fact.¹⁷ The Commission nevertheless approved the advice letter process, citing its use in renewable and demand response procurement.¹⁸

On June 29, 2018, PG&E submitted AL-5322 requesting approval of four energy storage projects, totaling 567.5 megawatts (MW) of capacity, selected through its Local Sub-Area Energy Storage (LSA ES) Request for Offers (RFO) (LS ES RFO) to comply with Resolution E-4909.¹⁹ The projects were located solely in the South Bay-Moss Landing sub-area to address the Metcalf RMR agreement.²⁰

PG&E conceded that transmission upgrades eliminated the need for the Metcalf RMR²¹ agreement by 2019.²² PG&E nevertheless requested authorization for its proposed energy storage projects by referring to a CAISO study forecasting an increased reliability requirement in South Bay-Moss Landing in 2023 and claiming that its proposed energy storage projects may help meet that need.²³ PG&E also expressed concern that the expiring local resource contracts created a “continued risk of backstop procurement from the CAISO.”²⁴ PG&E stated that its selected resources would “add capacity to the constrained South Bay-Moss Landing local sub-area. Together [with transmission solutions] they may alleviate the need for backstop procurement by the CAISO.”²⁵

PG&E acknowledged Resolution E-4909’s requirement to coordinate with the CAISO to “evaluate the portfolio of resources procured” and “indicate whether the

¹⁷ ORA Comments on Draft Resolution E-4909, December 29, 2017, pp. 4-5.

¹⁸ Resolution E-4909, p. 16.

¹⁹ AL-5322, p. 1.

²⁰ PG&E did not submit proposed projects for the Pease or Bogue sub-areas, explaining that proposed transmission solutions mitigate the need in those sub-areas. AL-5322, pp. 15-16.

²¹ On March 22, 2018 the CAISO approved a Transmission Plan which would also remove the need for the Metcalf RMR agreement that served the South Bay-Moss Landing deficiency by the start of 2019. See the CAISO 2017-2018 Transmission Plan, p. 259-263, available at: http://www.caiso.com/Documents/BoardApproved-2017-2018_Transmission_Plan.pdf.

²² AL-5322, pp. 13, 23.

²³ AL-5322, pp. 13-14.

²⁴ AL-5322, p.14.

²⁵ AL-5322, p. 23.

CAISO agrees they address the deficiencies identified.”²⁶ PG&E submitted a letter from CAISO that supported “the procurement of storage as a general matter,”²⁷ claiming that the letter satisfied the coordination required by Resolution E-4909.²⁸ Contrary to PG&E’s claim, the CAISO letter failed to evaluate PG&E’s specific portfolio of resources or whether those resources “partially or wholly eliminate the need for, or extension of, one or more of the RMR contracts” at issue in Resolution E-4909.²⁹ Instead, the CAISO noted only generally that “energy storage can reduce the risk of future local capacity deficiencies in the event of generation retirement, especially in the South Bay-Moss landing sub-area.”³⁰

A number of stakeholders protested and responded to AL-5322.³¹ The stakeholders’ arguments included: AL-5322 did not comply with Resolution E-4909, since transmission upgrades could fully address the deficiencies that created the need for the RMR contract;³² PG&E failed to provide an analysis of the cost of the proposed storage projects compared to the RMR agreement or otherwise justify costs;³³ PG&E failed to coordinate with the CAISO;³⁴ and the advice letter process was not appropriate for PG&E’s proposed projects.³⁵

PG&E argued in its July 26, 2018 Reply to Protests of AL-5322 that Resolution E-4909 “should not be read, as the Protesting Parties would prefer, as preventing the

²⁶ AL-5322, p. 3.

²⁷ AL-5322, Appendix J (May 21, 2018 letter of Keith Casey of the CAISO to Fong Wan of PG&E), p. 1.

²⁸ AL-5322, p. 23 and Appendix J.

²⁹ Resolution 4904-E, Ordering Paragraph 10, p. 20.

³⁰ AL-5322, Appendix J, p. 1.

³¹ The following organizations filed protests to AL-5322: Direct Access Customer Coalition (DACC), Calpine, California Community Choice Association (CalCCA), and the Public Advocates Office. The following organizations filed responses to AL-5322: California Energy Storage Alliance, Earthjustice, Union of Concerned Scientists, California Environmental Justice Alliance, Sierra Club, Environmental Defense Fund, and Monterey Bay Community Power.

³² Protests of: DACC, p. 3; Calpine, pp. 3-4; ORA, pp. 5-7.

³³ Protests of: DACC, p. 3; Calpine, pp. 6-7; ORA, pp. 9-10.

³⁴ Protests of: DACC, pp. 3-4; CalCCA, p. 4; Calpine, pp. 4-5; ORA, pp. 7-9.

³⁵ Protests of: CalCCA, pp. 4-5; Calpine, pp. 8-9; ORA, pp. 10-12.

Commission from approving the very procurement it sought by issuing the Resolution” and that PG&E’s “procurement complies with the parameters established by [Resolution E-4909].”³⁶ PG&E included for the first time in its Reply to Protests of AL-5322 “Evaluation of Resources per Ordering Paragraph 7 in Resolution E-4909.”³⁷ PG&E’s Reply to Protests of AL-5322 also introduced new information that the Gilroy Cogen Unit, located in South Bay-Moss Landing, declared its intention to retire on June 28, 2018.³⁸ PG&E used this information to speculate that expiring local contracts may not be renewed, and to raise a new issue not considered in Resolution E-4909; the need for procurement of local capacity requirement (LCR) resources beginning in 2023.³⁹ PG&E also used this information to support its new argument that “the Commission should approve AL-5322 in order to ensure that there is a competitive market for capacity in this local sub-area and to mitigate the ongoing and future risk that the retirement of even one plant will cause additional backstop procurement by the CAISO.”⁴⁰ In response to stakeholders’ concerns regarding the insufficiency of the advice letter process, PG&E cited the Commission’s previous justification to use the advice letter process rather than an application process.⁴¹

The Commission issued Draft Resolution E-4949 (Draft Resolution) on September 20, 2018. On October 10, 2018, PG&E and stakeholders submitted opening comments and, on October 15, 2018, submitted reply comments. On November 9, 2018, the Commission issued the final Resolution, which approved PG&E’s requested relief for cost recovery of the four energy storage facilities identified in AL-5322.

³⁶ PG&E Reply to Protests of AL-5322, p. 2.

³⁷ AL-5322, Appendix A (Evaluation of Resources per Ordering Paragraph 7 in Resolution E-4909).

³⁸ PG&E Reply to Protests of AL-5322, p. 5.

³⁹ PG&E Reply to Protests of AL-5322, pp. 5-8.

⁴⁰ PG&E Reply to Protests of AL-5322, p. 8.

⁴¹ PG&E Reply to Protests of AL-5322, p. 15.

III. DISCUSSION

A. The Resolution Errs Because It Fails to Follow the Requirements of General Order 96-B

By adopting the Resolution, the Commission violated its own regulations and, thereby committed a prejudicial abuse of discretion.⁴² In General Order (GO) 96-B,⁴³ the Commission promulgated regulations that precisely define: (1) when a utility is permitted to request relief through an advice letter;⁴⁴ (2) when a utility's requested relief must be considered in a formal application;⁴⁵ and (3) the procedural process for rejecting advice letters as improperly submitted.⁴⁶ In *Pacific Bell v. Public Utilities Commission* (*Pacific Bell*), the Court of Appeal stated that “[w]hether a utility may proceed by an advice letter or instead must file a formal application for a particular tariff change is a decision peculiarly within the [Commission’s] expertise and judgment [internal citation omitted], not the court’s.”⁴⁷ The court held “[w]e will not disturb the [Commission’s] selection between the procedures absent a manifest abuse of discretion or an unreasonable interpretation of the statutes governing its procedures [internal citation omitted].”⁴⁸

⁴² Public Utilities Code Sections 1757.1(a)(1-2). See also, California Code of Civil Procedure 1094.5(b).

⁴³ GO 96-B provisions adopted by D.01-07-026 (July 12, 2001), D.02-01-038 (January 9, 2002), D.05-01-032 (January 13, 2005), D.07-01-024 (January 25, 2007), D.07-09-019 (September 6, 2007), D.08-05-019 (May 15, 2008), Resolution ALJ-221 (August 21, 2008), Resolution W-4749 (March 26, 2009), and D.09-04-005 (April 16, 2009), Resolution T-17327 (January 12, 2012) and Resolution ALJ-346 (May 10, 2018).

⁴⁴ GO 96-B, General Rule 5.1(1) authorizes a utility to submit an advice letter when the utility “has been authorized or required, by statute, by [GO 96-B], or by other Commission order, to seek the requested relief by means of advice letter[.]”

⁴⁵ GO 96-B, General Rule 5.2 (1-2) requires a utility to file a formal application if: (1) “[t]he utility . . . seeks relief that the Commission can grant only after holding an evidentiary hearing, or by decision rendered in a formal proceeding;” or (2) “[t]he utility seeks Commission approval of a proposed action that the utility has not been authorized . . . by other Commission order, to seek by advice letter[.]”

⁴⁶ GO 96-B, General Rule 5.3 (Withdrawal; Rejection Without Prejudice) stated that “[w]henver the reviewing Industry Division determines that the relief requested or the issues raised by an advice letter require an evidentiary hearing, or otherwise require review in a formal proceeding, the Industry Division will reject the advice letter without prejudice.”

⁴⁷ *Pacific Bell v. Public Utilities Commission*, 76 Cal.App.4th 269, 282-283 (2000); citing *Wood v. Public Utilities Commission*, *supra*, 4 Cal.3d at pp. 292-293, 93 Cal.Rptr. 455, 481 P.2d 823.

⁴⁸ *Pacific Bell*, 76 Cal.App.4th 269, 283 (2000); citing *Greyhound Lines, Inc. v. Public Utilities Commission*, (1968) 68 Cal.2d 406, 410-411, 67 Cal.Rptr. 97, 438 P.2d 801.

Thus, the Commission has the authority to promulgate regulations under its delegated authorities.⁴⁹ However, once the Commission acts to promulgate a regulation, that regulation becomes law and the Commission is required to comply with it. In *Southern California Edison Company v. Public Utilities Commission (Edison)*, the California Court of Appeal stated that “[a] regulation adopted by an administrative agency under its rulemaking authority has the force and effect of law.”⁵⁰ The court held that the Commission’s failure to comply with its own regulations is therefore “prejudicial.”⁵¹ Here, the Commission committed legal error through its failure to comply with the regulations it promulgated in GO 96-B, which, in part, governs the procedures for utility advice letter submittals.⁵²

1. GO 96-B, General Rule 5 prohibits a utility from submitting an advice letter without prior Commission authorization

The Commission failed to comply with its own regulations because it approved AL-5322 rather than rejecting it as noncompliant. In GO 96-B, General Rule 5.1, the Commission set forth the specific rules that allow a utility to submit an advice letter. Rule 5.1 of GO 96-B states that a utility may request relief by means of an advice letter where the utility: “(1) has been authorized or required, by statute, by this General Order, or by other Commission order, to seek the requested relief by means of an advice letter[.]”

⁴⁹ Generally, see Public Utilities Code Section 701. Specific to GO 96-B, see Public Utilities Code Section 454; *Pacific Bell*, 76 Cal.App.4th 269, 274 (2000) [“Only by following procedures specified in or developed under section 4654 may the utility then change its published tariff.”]

⁵⁰ *Southern California Edison Company v. Public Utilities Commission*, 140 Cal.App.4th 1085, 1092 n.3 (2006); citing *Agricultural Labor Relations Bd. v. Superior Court*, (1976) 16 Cal.3d 392, 401, 128 Cal.Rptr. 183, 546 P.2d 687; *California Teachers Assn. v. California Com. On Teacher Credentialing*, (2003) 111 Cal.App.4th 1001, 1008, 4 Cal.Rptr.3d 369.

⁵¹ *Edison*, 140 Cal.App.4th 1085, 1106 [“The PUC’s failure to comply with its own rules . . . therefore was prejudicial.”]

⁵² GO 96-B, General Rule 1.1 (Structure; Purpose; Applicability).

PG&E explicitly stated that it submitted AL-5322 pursuant to the authorities granted to it by Resolution E-4909.⁵³ As such, Resolution E-4909 established the universe of authorities and conditions under which the Commission authorized PG&E to submit an advice letter for approval of the results of its LSA ES RFO. In particular, the Commission directed PG&E to conduct a solicitation(s) to procure preferred resources and energy storage,⁵⁴ and authorized PG&E to request approval of the results of its solicitation through the submittal of an advice letter.⁵⁵ The Commission, however, issued specific orders that instituted restraints on PG&E's authority to submit an advice letter. Specifically, the Commission ordered that:

Resources procured pursuant to this solicitation must be on-line and operational on or before a date sufficient to ensure that one or more of the RMR contracts for the three plants – Metcalf Energy Center, Feather River Energy Center, and Yuba City Energy Center – will not be renewed for any year from 2019 through 2022, if feasible and represent a reasonable cost savings to ratepayers.⁵⁶

In AL-5322, PG&E conceded that the Commission's authorization to procure preferred resources and energy storage to eliminate the need for the Metcalf Energy Center RMR in the years 2019 through 2022 was no longer necessary. Specifically, PG&E admitted that "planned transmission solutions for the South Bay – Moss Landing local sub-area will eliminate the original local capacity area deficiency by the expected completion date of February 2019."⁵⁷ The CAISO confirmed that the planned transmission solutions eliminated the specific need identified in Resolution E-4909.⁵⁸

⁵³ AL-5322, p. 1. See also, AL-5322, Advice Letter Submittal Summary, pdf. p. 28/247.

⁵⁴ Resolution E-4909, Orders 1 and 3, p. 20.

⁵⁵ Resolution E-4909, Order 13, p. 21.

⁵⁶ Resolution E-4909, Order 5, p. 20 [emphasis added].

⁵⁷ AL-5322, p. 22.

⁵⁸ AL-5322, Appendix J, p. 1. ["Since the [Commission] issued [Resolution E-4909], the [CA]ISO finalized its 2017-2018 Transmission Plan, which identified mitigations either already underway or approved in the plan to address the specific needs that led to the reliability must-run designations. These mitigations consist of transmission upgrades which are expected to be in place for 2019 in the South Bay-Moss Landing area[.]"]

Thus, it is an uncontroverted fact that planned transmission upgrades eliminate the need to procure preferred resources and energy storage to ensure an RMR contract for the Metcalf Energy Center will not be renewed for any year from 2019 through 2022.⁵⁹ With the original procurement authorization satisfied, PG&E's AL-5322 improperly advanced a new theory to justify its request for approval of the four energy storage contracts. PG&E argued that the four energy storage contracts were reasonable because the CAISO forecasted a potential capacity need in the South Bay – Moss Landing subarea in 2023.⁶⁰ As stated above, Rule 5.1 of GO 96-B allows a utility to submit an advice letter if the Commission has issued a specific order permitting the submittal of an advice letter. PG&E did not have the authority to request approval of the four energy storage facilities through an advice letter outside of the 2019 through 2022 period; thus, it did not have authorization to submit an advice letter requesting approval of resources to meet a potential 2023 objective.⁶¹

The Commission should have rejected PG&E's advice letter as unauthorized because it failed to comply with Rule 5.1 of GO 96-B. The Commission committed a prejudicial abuse of discretion by approving AL-5322 because it failed to comply with its own GO 96-B regulations. The Commission's failure to comply with its own regulations constitutes legal error under *Edison*.⁶²

⁵⁹ Resolution, Finding 3, p. 41 ["The CAISO-approved upgrades eliminate the original deficiency cause by Metcalf."]

⁶⁰ AL-5322, pp. 13-14.

⁶¹ Pursuant to GO 96-B, General Rule 7.4.2, the Public Advocates Office, CalCCA, and Calpine protested AL-5322 because "[t]he relief requested in [AL-5322] would violate statute or Commission order, or is not authorized by statute or Commission order on which the utility relies[.]" [ORA Protest, pp. 10-11; CalCCA Protest, p. 2; and Calpine Protest, p. 2] Specifically, the Public Advocates Office stated that "PG&E improperly attempts to support its procurement of four energy storage projects by stating it may need resources in 2023. However, the Resolution 4909-E procurement authorization is explicitly confined to the years 2019-2022." [ORA Protest, p. 10] CalCCA noted that "[b]ecause the projects no longer mitigate a specific local capacity issue, PG&E has no clear authorization for the procurement and must seek Commission approval of the projects pursuant to authority other than the now unnecessary special carve-out provided for in Resolution E-4909." [CalCCA Protest, p. 5]

⁶² See Public Utilities Code Section 1757.1(a)(2) (The Commission commits legal error if it "has not proceeded in the manner required by law;" Public Utilities Code Section 1757.1(a)(1); (The Commission commits legal error if it the "order or decision of the commission was an abuse of discretion;" see also, California Code of Civil Procedure 1094.5(b) ("Abuse of discretion is established if the respondent has

2. GO 96-B, General Rule 5 requires a utility to file a formal application for approval of a proposed action that has not previously been authorized

The Commission further failed to comply with its own regulations because it failed to reject AL-5322 as an unauthorized use of the advice letter process. General Rule 5.2 of GO 96-B requires that a utility must file an application if the Commission has not previously authorized the utility to submit an advice letter for a specific requested relief. Because the relief sought in PG&E's AL-5322 was not authorized by a Commission order, Rule 5.2 of GO 96-B directs PG&E to seek authorization of its the proposed action through a formal application. By failing to reject AL-5322, the Commission failed to comply with this provision of Rule 5.2 of GO 96-B.

In Resolution E-4909, the Commission explicitly limited PG&E's authority to request approval of the results of its LSA ES RFO through an advice letter if the resources procured ensure an RMR contract for the Metcalf Energy Center will not be renewed for any year from 2019 through 2022.⁶³ In fact, Resolution E-4909 makes no other reference to procurement needs in the South Bay – Moss Landing subarea outside of the 2019 through 2022 timeframe. In AL-5322, PG&E admitted that it no longer needed to procure resources in order to renew an RMR for the Metcalf Energy Center between the years 2019 through 2022 because transmission solutions eliminated that need.⁶⁴ Instead, PG&E argued that it needed the four energy storage contracts because the CAISO projected a capacity deficiency in the South Bay – Moss Landing subarea in 2023.⁶⁵ However, the Commission did not authorize PG&E to submit an advice letter for approval of resources to meet a potential need for capacity in the South Bay – Moss Landing subarea in 2023. Thus, Rule 5.2 of General Order 96-B required PG&E to file an application for approval of resources to meet a potential 2023 need in the South Bay –

not proceeded in a matter required by law . . .”).

⁶³ Resolution, Finding 3, p. 41 [“The CAISO-approved upgrades eliminate the original deficiency cause by Metcalf.”].

⁶⁴ AL-5322, p. 13.

⁶⁵ AL-5322, pp. 13-14.

Moss Landing. Therefore, the Commission failed to comply with its own GO 96-B regulations because it failed to reject AL 5322 as an unauthorized use of the advice letter process. The Commission’s failure to comply with its own regulations constitutes legal error under *Edison*.⁶⁶

3. GO 96-B, General Rule 7.5.1 requires a utility to submit a supplement or withdraw its advice letter without prejudice in order to make major revisions

PG&E lacked authority to submit an advice letter for approval of resources to meet a 2023 capacity need in the South Bay – Moss Landing subarea in 2023 for the reasons explained in Sections A.1 and A.2 above. However, assuming *arguendo* that Resolution E-4909 did somehow authorize PG&E to submit an advice letter for resources outside the 2019-2022 timeframe, the Commission failed to comply with its own regulations because it improperly allowed PG&E to supplement its advice letter through its Reply to Protests. GO 96-B, General Rule 7.5.1 states that a utility “shall submit a supplement or withdraw the advice letter without prejudice in order to make major revisions or corrections.” A utility is not required to submit a supplement or withdraw its advice letter if it merely seeks to make “minor revisions or corrections” to its advice letter.⁶⁷ The Commission violated Rule 7.5.1 of GO 96-B when it allowed PG&E to make major and substantive revisions to its advice letter without submitting a supplement or withdrawing its advice letter.

PG&E failed to comply with its obligations under Resolution E-4909 because AL-5322 did not include information to show that “[r]esources in [PG&E’s solicitation] should be at a reasonable cost to ratepayers, taking into consideration the cost and value

⁶⁶ See Public Utilities Code Section 1757.1(a)(2) (The Commission commits legal error if it “has not proceeded in the manner required by law;” Public Utilities Code Section 1757.1(a)(1); (The Commission commits legal error if it the “order or decision of the commission was an abuse of discretion;” *see also*, California Code of Civil Procedure 1094.5(b)(“Abuse of discretion is established if the respondent has not proceeded in a matter required by law . . .”).

⁶⁷ GO 96-B, General Rule 7.5.1 states that minor revisions or corrections include “a correction of a typographical or other insubstantial error; a language clarification; or a later effective date.”

to PG&E, previous solicitations . . . [and] the cost of the specific RMR contracts[.]”⁶⁸ The Public Advocates Office stated “PG&E did not compare the four energy storage contracts to previous energy storage solicitations.”⁶⁹ Calpine argued that the “Commission should reject [AL-5322] for failing to provide the type of cost comparison analysis that would help ensure ratepayers are not burdened with unreasonable costs.”⁷⁰ PG&E then improperly made a major and substantive revision to AL-5322 by including, for the first time, a costs comparison in its Reply to Protests.⁷¹

By allowing PG&E to improperly revise AL-5322 through its Reply to Protests, rather than requiring submittal of a supplement or withdrawal of its advice letter, the Commission violated its own GO 96-B regulations.⁷² The Commission’s failure to comply with its own regulations constitutes legal error under *Edison*.⁷³

B. The Resolution Errs by Failing to Provide an Opportunity to Address the New Information and Arguments that PG&E introduced in its Reply to Protests to AL-5322

AL-5322 failed to demonstrate that “[r]esources in [PG&E’s solicitation] should be at a reasonable cost to ratepayers, taking into consideration the cost and value to PG&E, previous solicitations . . . [and] the cost of the specific RMR contracts”⁷⁴ as required by Resolution E-4909. When stakeholders, including the Public Advocates

⁶⁸ Resolution E-4909, Ordering Paragraph 7, p. 20.

⁶⁹ ORA Protest, p. 10. Also stating that “PG&E also did not demonstrate that it considered the cost of the new and planned transmission upgrades that obviate the need for the Metcalf RMR in the years 2019 through 2022.”

⁷⁰ Calpine Protest, p. 7.

⁷¹ PG&E Reply to Protests of AL-5322, Appendix A (Evaluation of Resources per Ordering Paragraph 7 in Resolution E-4909), July 26, 2018.

⁷² GO 96-B, General Rule 7.4.3 prohibits stakeholders from responding to the utility’s reply to protest. [“The protestant may not reply to the utility’s reply.”]

⁷³ See Public Utilities Code Section 1757.1(a)(2) (The Commission commits legal error if it “has not proceeded in the manner required by law;” Public Utilities Code Section 1757.1(a)(1); (The Commission commits legal error if it the “order or decision of the commission was an abuse of discretion;” see also, California Code of Civil Procedure 1094.5(b)(“Abuse of discretion is established if the respondent has not proceeded in a matter required by law . . .”).

⁷⁴ Resolution E-4909, Ordering Paragraph 7, p. 20.

Office pointed out this deficiency,⁷⁵ PG&E used its Reply to Protests of AL-5322 to argue that its proposed energy storage contracts were cost-effective by including a never before seen cost comparison.⁷⁶ Also, for the first time in its Reply to Protests of AL-5322, PG&E raised the fact that Gilroy Cogen announced its intention to retire June 28, 2018.⁷⁷ PG&E further provided new arguments and new evidence alleging that the proposed energy storage contracts are needed to meet a potential need in 2021 and 2022.⁷⁸ There was no meaningful opportunity to address these issues because the Commission's GO 96-B, General Rule 7.4.3 does not permit stakeholders to reply to the utility's reply.

Nor was there a meaningful opportunity to comment on the Draft Resolution regarding the new information PG&E provided in its Reply to Protests. Pursuant to Rule 14.5 of the Commission's Rules of Practice and Procedure, comments on a draft resolution must be "in accordance with the instructions accompanying the notice." The Draft Resolution's revised notice, filed on September 21, 2018, stated the "[c]omments shall focus on factual, legal or technical errors in the Proposed Resolution."⁷⁹ Thus, when the Draft Resolution indicated that it was grounding its proposed approval of AL-5322 on the new information PG&E included in its Reply to Protests, stakeholders' only recourse was to inform the Commission that inclusion of that new information was prejudicial. This was the only position stakeholders were afforded to take because the Draft Resolution's revised notice prohibited stakeholders from introducing new evidence and advancing new arguments to challenge the underlying reasonableness of PG&E's new information about the Gilroy Cogen or the new cost evaluation information. To do

⁷⁵ ORA Protest, pp. 9-10.

⁷⁶ PG&E Reply to Protests of AL-5322, Appendix A (Evaluation of Resources per Ordering Paragraph 7 in Resolution E-4909), July 26, 2018.

⁷⁷ PG&E Reply to Protests of AL-5322, p. 5.

⁷⁸ This new allegation is directly contradicted by the evidence produced in AL 5322. Specifically, PG&E asserted that the original deficiency in the South Bay – Moss Landing Subarea was cured by the planned transmission upgrades. [See, AL 5322, p. 22.]

⁷⁹ E-4949 Draft Resolution Revised Comments Letter, p. 2 (filed September 21, 2018).

so would run afoul of the Commission's instructions that only allowed comments to narrowly focus on errors with the Draft Resolution, not to investigate and present new evidence that may challenge or rebut the underlying evidence that the Draft Resolution relied upon.

Restricting stakeholders' opportunity to be heard on PG&E's new information, which the Draft Resolution relied upon, was prejudicial. The fact that the Commission's final Resolution focused on that information to approve AL-5322, not the justification for which PG&E was originally authorized to submit AL-5322⁸⁰ is made clear by the following findings in the Resolution:

- Finding 4: Most gas fired generation in the South Bay Moss Landing subarea will no longer be under contract as early as 2019.
- Finding 5: At least one plant – the Gilroy Cogen plant – serving the South Bay Moss Landing subarea has signaled possible retirement with a letter to the CAISO.
- Finding 7: Lack of long-term contractual commitments, and an increase in projected capacity need in the South bay Moss Landing subarea, recreate the conditions for possible exercise of market power, potentially creating the need to extend the Metcalf RMR agreement.
- Finding 13: The projects in AL 5322-E provide greater value to ratepayers than these other procurement options.
- Finding 14: The cost of the four storage agreements under AL 5322-E are reasonable in comparison to prior storage solicitations.⁸¹

⁸⁰ Resolution, pp. 23-24 [emphasis added]:

The scope of Resolution E-4909 was specific to the three plants in question at the time – Yuba City, Feather River and Metcalf Energy Centers – and the capacity or voltage issues in their respective subareas that their retirements would create. If there were no indication of future capacity retirements in the subarea, which may create a need to extend the RMR agreement for Metcalf, then we would likely concur with parties that this procurement should be submitted in an Application. However, given we do have such an indication, the original direction of Resolution E-4909 applies, and the Advice Letter and Resolution process remains appropriate for the procurement represented by AL 5322-E.

⁸¹ Resolution, Findings 2-7, 13-14, p. 41.

Findings 4-5, 7, and 13-14 are based upon the new information PG&E provided in its Reply to Protests. The inability of stakeholders to provide meaningful comments on facts related to PG&E's proposed procurement – the analysis required by Resolution E-4909 justifying the costs as reasonable when compared to other solicitations and the RMR agreement, and the newly announced retirement of Gilroy Cogen – deprived them of due process. The Commission's failure to provide due process in its approval of the Resolution is unlawful.⁸²

IV. CONCLUSION

For the reasons stated above, the Public Advocates Office requests that Commission grant rehearing of Resolution E-4949 and issue an order denying the request reliefs sought in PG&E AL-5322.

Respectfully submitted,

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December 10, 2018

⁸² See Public Utilities Code Section 1757.1(a)(6). (The Commission commits legal error if an “order or decision of the commission violates any right of the petitioner under the Constitution of the United States or the California Constitution.”)