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Decision 10-02-033 February 25, 2010

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application of Pacific Gas and Electric Company for Expedited Approval of the Amended Power Purchase Agreement for the Russell City Energy Company Project (U39E).	Application 08-09-007 (Filed September 10, 2008)

ORDER MODIFYING DECISION (D.) 09-04-010 FOR PURPOSES OF CLARIFICATION, AND DENYING REHEARING OF THE DECISION, AS MODIFIED.

I. INTRODUCTION

In Decision (D.) 04-12-048, we adopted a long-term procurement plan for Pacific Gas and Electric Company ("PG&E"), among other utilities, which provided direction on PG&E's procurement of resources over a 10-year horizon through 2014.[1] In D.06-11-048, we approved PG&E's results of its 2004 long-term request for offer ("2004 LTRFO"). This decision also approved PG&E's resulting projects, including the original Power Purchase Agreement. ("Original PPA") with Russell City Energy Company, LLC ("RCEC").[2] We also determined in D.06-11-048 that the projects were needed and cost-

[1] *Opinion Adopting Pacific Gas and Electric Company, Southern California Edison Company and San Diego Gas & Electric Company's Long-Term Procurement Plans* ("*Utilities' LTPP Decision*") [D.04-12-048] (2004)) ____ Cal.P.U.C.3d ___.

[2] *Opinion Approving Results of Long-Term Request for Offers* ("*Order Approving LTRFO Results*") [D.06-11-048, pp. 6-7 (slip op.)] (2006) ___ Cal.P.U.C.3d ___. The RCEC Project is the 601 MW combined-cycle listed as "Calpine Hayward." (See *id.* at p. 6 (slip op.).) RCEC is an affiliate of Calpine Corporation. (See Exhibit PG&E-1, p. 1-1, fn. 1 [Public Version].) The Original PPA involved a 10 year contract to provide PG&E with energy capacity and energy from this facility in Hayward, California. (Application of PG&E for Expedited Approval of the Amended Power Agreement for the Russell City Energy Company Project ("PG&E Application"), A.08-09-007, filed September 10, 2008, p. 10 [Public Version]; see also, *Order*

(*footnote continued on the next page*)

effective. (*Id.* at pp. 6-7, 38 [Finding of Fact No. 3], 42 [Conclusion of Law No. 1], & p. 45 [Ordering Paragraph No. 1] (slip op.).)

On November 8, 2007, RCEC notified PG&E of permitting delays and cost increases (e.g. in equipment, materials and labor), and requested modifications to the original PPA. The modifications included a delay of the on-line date of the RCEC project by two years to June 2012, revision of the contract price, and other amendments.

On June 6, 2008, RCEC and PG&E signed a letter agreement that provided the parties could negotiate modifications to the Original PPA. The results of the negotiation were embodied in the First Amended PPA ("1st APPA), which was submitted for Commission approval in Application (A.) 08-09-007. The Division of Ratepayer Advocates ("DRA") and The Utility Reform Network ("TURN") filed protests to this application.

PG&E, RCEC, Division of Ratepayer Advocates ("DRA"), The Utility Reform Network ("TURN"), and California Unions for Reliable Energy ("CURE") (collectively, "Joint Parties") reached settlement on the issues raised in this application,[3] and submitted the Second Amended and Restated Power Purchase Agreement ("2nd APPA"),[4] stating that the 2nd APPA was a settlement among the Joint Parties. California Pilots Association, Skywest Townhouse Homeowners ("Skywest"), and Hayward Area Planning Association ("HAPA") (collectively, "Group Petitioners") and Californians for Renewable Energy, Inc. ("CARE") and Rob Simpson (collectively, "CARE/Simpson") opposed the settlement. In D.09-04-010, the Commission approved

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(*footnote continued from previous page*)

Approving LTRFO Results [D.06-11-048], *supra,* at p. 6 (slip op.).)

[3] For a list of the specific issues, see Assigned Commissioner's Scoping, dated November 17, 2008 (" Scoping Memo"), pp. 2-3.)

[4] A copy of the 2nd APPA can be found as Exhibit A in Joint Motion of Pacific Gas and Electric Company, Russell City Energy Company, LLC, Division of Ratepayer Advocates, California Unions for Reliable Energy, and The Utility Reform Network for Approval of Second Amended and Restated Power Purchase Agreement ("Joint Parties' Motion for Approval of 2nd APPA"), dated December 23, 2008 [Confidential (Under Seal].

the Joint Parties' settlement agreement, and thus, approved the 2nd APPA. In determining whether the settlement was reasonable in light of the whole record, we considered comparisons made by PG&E and DRA and TURN, including those that lead us to conclude that the
2nd APPA was competitive with PG&E's 2008 LTRFO. (See D.09-04-010, pp. 15-18.)

Group Petitioners timely filed a joint application for rehearing. A rehearing application was also timely filed by CARE/Simpson. Joint Parties filed a response, stating its opposition to both applications for rehearing.

In their joint rehearing application, the Group Petitioners allege the following legal errors: (1) The Decision is inconsistent with D.04-12-048 and D.06-11-048, which allegedly preclude new bilateral contracts that shift greenhouse gas ("GHG") costs and risks from the developer to the customers; (2) Group Petitioners were denied due process when the rehearing applicants were not allowed to present evidence that the amended power purchase agreement constituted an unlawful novation and was subject to competitive bidding; (3) the Decision denied the Group Petitioners due process and equal protection by finding that they were not customers eligible to request intervenor compensation, since they were not permitted any opportunity or leave to supplement their request. The rehearing application also asks for oral argument under Rule 16.3 of the Commission Rules of Practice and Procedure.

In their rehearing application, CARE/Simpson support the Group Petitioners' application for rehearing. In addition, CARE/Simpson argue that section 10.4 of the 2nd APPA deprives the ratepayers of the right of notice and review should the Russell City Energy Center be sold or transferred to another owner or operator, and the parties were denied review of the calculations showing compliance with Environmental Performance Standards ("EPS"). CARE/Simpson also request oral argument.

We have reviewed each of the allegations raised in both rehearing application, and are of the opinion that legal error has not been demonstrated. However, we will modify the Decision to clarify a statement which lead Group Petitioners to

believe that we had relied on a calculation outside the record. Rehearing of D.09-04-010, as modified, is denied.

II. DISCUSSION

1. The Commission is not legally required to reexamine the determinations of need and cost-effectiveness that were made in D.04-12-048 and D.06-11-048.

a. D.09-04-010 correctly concluded that the issues regarding reliability need and cost effectiveness were beyond the scope of the proceeding.

In their rehearing application, Group Petitioners allege that D.09-04-010 is inconsistent with D.04-12-048 and D.06-11-048, with respect to the determinations regarding reliability need and cost-effectiveness.[5] (Group Petitioners' Rehrg. App., pp. 4-6.) Their allegation and discussion in their rehearing applications on pages 4-6 constitute no more than an attempt to relitigate the need and cost-effectiveness that were already determined in these two decisions. We found these issues beyond the scope of the proceeding. (See D.09-04-010, pp. 3-4; see also, Scoping Memo and Ruling of Assigned Commissioner Setting Schedule and Scope of Proceeding and Granting Motion by TURN Directing PG&E to File Supplemental Testimony ("Scoping Memo"), filed November 17, 2008.) Accordingly, this allegation of error is without merit.

In D.04-12-048, the Commission approved PG&E's long-term procurement plan ("LTPP") involving 2200 MW.[6] In its LTPP, PG&E identified a need for 2,200 megawatts ("MW") of new generation in northern California by 2010,[7] and directed PG&E to initiate an all-source solicitation to secure these resources. (See D.09-04-010, p. 2.)

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[5] Group Petitioners incorrectly refer to D.06-11-048 as D.06-04-012. (See Group Petitioners' Rehrg. App., pp. 4-5.)

[6] *Utilities' LTPP Decision* [D.04-12-048], *supra*, at p. 237 [Ordering Paragraph No. 2] (slip op.).

[7] *Id.* at p. 238 [Ordering Paragraph No. 4] (slip op.).

In D.06-11-048, the Commission approved PG&E's results of the utility's 2004 LTRFO. This decision also approved PG&E's resulting projects, including the Original PPA with RCEC.[8] The 2nd APPA is an amendment to the Original PPA.

Thus, D.09-04-010 is not inconsistent with D.04-12-048 or D.06-11-048. Accordingly, there is no need to reexamine the reliability need and cost-effectiveness determinations made in these two decisions. As noted in the Scoping Memo, and affirmed by the Decision, there was need to relook at these issues because:

> The Commission has previously determined the need for the PPA with the RCEC Project in D.04-12-048. The cost-effectiveness of the original PPA was approved as part of PG&E's 2004 LTRFO in D.06-11-48.

(Scoping Memo, pp. 2-3; D.09-04-010, p. 3.)

b. The 2nd APPA is not a new bilateral contract or a novation requiring a new need and cost-effectiveness analysis.

Group Petitioners' allegation that the 2nd APPA is a new bilateral contract is incorrect. What Group Petitioners fail to see is that the proceeding on the 2nd APPA was about the amendment to the Original PPA, where the need and cost-effectiveness of the contract for energy capacity and energy had already been determined. The flaw in Group Petitioners' allegation and discussion is that they view the Original PPA and the 2nd APPA as two separate "bilateral contracts" requiring two separate determinations of need and cost-effectiveness. (See Group Petitioners' Rehrg. App., pp. 2-3, Question #2 – Question #4.) However, their view is wrong because there is only one contract, and that contract has been amended. The amendments made to the Original PPA do not change the essence of the original contract, namely, the agreement by RCEC to provide PG&E energy capacity and energy from its 601 MW combined-cycle facility in Hayward for a 10-year term.

[8] *Order Approving LTRFO Results* [D.06-11-048], *supra*, at pp. 6-7 (slip op.).

Group Petitioners also advocate that the 2nd APPA constitutes a novation, and thus, is a new contract. (Group Petitioners' Rehrg. App., pp. 10-11, citing Civil Code, §§1530-1532, 1 Witkin, Summary of Cal. Law (9th ed. 1987) Contracts, §906, p. 811; *Wells Fargo Bank v. Bank of America* (1995) 32 Cal.App.4th 424, 431.) This argument is flawed because the amendments to the Original PPA in the 2nd APPA do not constitute a novation, because there was no substitution of a new obligation for an existing one, and there was no intent to extinguish the obligations in the Original PPA. (See Civil Code, §1530, defining novation as "the substitution of a new obligation for an existing one; see also *Wells Fargo Bank v. Bank America*, *supra*, 32 Cal.App.4th at p. 431; 1 Witkin, Summary of Cal. Law (10th ed. 2005) Contracts, §961, pp. 1052-1053.) There was no extinguishment of the essence of the contract obligating RCEC to provide energy capacity and energy to PG&E. For there to have been a novation, PG&E and RCEC must have clearly "intended to extinguish rather than merely modify the original agreement." (*Howard v. County of Amador* (1990) 220 Cal.App.3d 962, 977; see also, 1 Witkin, Summary of Cal. Law (10th ed. 2005) Contracts, §963, pp. 1054.) Here, the clear intent was to modify, and there is no evidence of any intent to novate.

For these reasons, Group Petitioners' assertion that we must reexamine the needs and cost-effectiveness determinations has no validity.

2. Group Petitioners were not denied due process when they were not allowed to present evidence that the amended power purchase agreement constituted an unlawful novation and was subject to competitive bidding.

a. Group Petitioners did not have a right to an evidentiary hearing.

Group Petitioners argue that Decision denied them a right to present evidence on the issue of whether the 2nd APPA constituted an unlawful novation which they alleged should have been subject to competitive bidding. (Group Petitioners' Rehrg. App., pp. 7, 9-10.) In their rehearing application, Group Petitioners pose the question: "Is the Commission bound by state decisional law holding that issue of whether the

purported 'amended' contract constitutes a new bilateral contract or is an amended contract constitutes a controverted issue of fact, which under the Commission's rules and procedures, requires an evidentiary hearing?" (Group Petitioners' Rehrg. App., p. 3.) However, they fail to cite to any specific statues or Commission rule supporting their argument of a required evidentiary hearing. Thus, they have failed to comply with Public Utilities Code section 1732 and Rule 16.1(c) of the Commission Rules of Practice and Procedure.[9] Section 1732 requires the rehearing application specify the grounds of legal error. (Pub. Util. Code, §1732.) Rule 16.1(c) states that "[a]pplications for rehearing shall set forth specifically the ground on which the applicant considers the order or decision of the Commission to be unlawful or erroneous, and make specific references to the record or law." (Code of Regs., tit. 20, §16.1, subd. (c).) Since Group Petitioners has failed to comply with section 1732 and Rule 16.1, we reject this claim.

Even if we were to consider the claim, it has no merit. The Decision noted that the settlement was "governed by Rules 12.1 et . seq. which provide that no hearing is necessary if there are no material contested issues of fact, or if the contested issue is one of law." D.09-04-010, p. 15.) However, the Administrative Law Judge ("ALJ") determined that none of the opponents to the settlement agreement identified any material contested issue of fact, and concluded no evidentiary hearing was required pursuant to Rule 12.3. Only in their Comments to the Proposed Decision did the Group Petitioners raise the contested factual issue regarding whether the 2nd APPA was a new bilateral contract or novation. However, they made no request for evidentiary hearing. Further, the issue of whether the 2nd APPA constituted a novation is one of law, and the record contains sufficient evidence, including the Original PPA and the 2nd APPA, to make this legal determination. Thus, the claim that an evidentiary hearing was required has no merit.

[9] All subsequent "section" references are to the Public Utilities Code, unless otherwise specified. All subsequent "rule" references are to the Commission Rules of Procedure and Practice, unless otherwise noted.

b. The Commission correctly determined that the *Tesla* decision requiring competitive bidding did not apply.

Group Petitioners argue that we erred in concluding that the *Tesla* decision did not apply to the contract modification.[10] (Group Petitioners' Rehrg. App., pp. 8-12.) In *Tesla*, the Commission dismissed an application for approval of a PG&E proposal because it failed to conform to Commission policies under which all long-term power should be obtained through competitive procurements, except in truly extraordinary circumstances.[11] Group Petitioners rely on *Tesla* to allege that the approval of the 2nd APPA would violate the Commission's policy requiring competitive bids. Specifically, they claim that the 2nd APPA has not been subject to any comparative analysis and that it does not meet the "truly extraordinary circumstances" standard discussed in *Tesla*.[12] These claims have no merit.

Group Petitioners' claim that *Tesla* applies rests on whether the 2nd APPA is a new bilateral contract or novation. (Group Petitioners' Rehrg. App., pp. 9-11.) They allege that since the 2nd APPA is a new contract, *Tesla* required competitive bidding and a comparison exhibit under Rule 12.1(d) of the Commission Rules of Practice and Proceeding. (Group Petitioners' Rehrg. App., pp. 10-12.) As discussed above, they are wrong that the 2nd APPA is a new contract requiring competitive bidding. As we explained:

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[10] Application of PG&E 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 ("*Tesla*") [D.08-11-004] (2008) ___ Cal.P.U.C.3d ___, p. 2 (slip op.).

[11] *Id.* at p. 2 (slip op.).

[12] *Id.* at p. 14 (slip op.), citing D.07-12-052, regarding unique circumstances for . . . approval outside of a competitive solicitation on a case-by-case basis via an IOU application." (*Opinion Adopting Pacific Gas and Electric Company's, Southern California Edison Company's and San Diego Gas & Electric Company's Long-Term Procurement Plans* [in R. 06-02-013] [D.07-12-052] (2007) ___ Cal.P.U.C.3d ___, at pp. 212-213 (slip op.), rehearing denied, in *Order Modifying Decision (D) .07-12-052, and Denying Rehearing of Decision, As Modified* [D.08-09-045] (2008) ___ Cal.P.U.C.3d ___.)

> Although the 2nd APPA has several changes, we find the basic transaction intact and reasonably modified to reflect current market conditions. Based on the foregoing, we find that the policy of competitive procurement is not violated by the amendments to the original PPA which resulted in the 2nd APPA before us here. Because no violation of competitive bidding occurred, the "extraordinary circumstances" standard from the *Tesla* decision does not apply.

(D.09-04-010, p. 18.) This explanation is correct, and resulted in a lawful interpretation of *Tesla* and its competitive bidding requirement, except "in truly extraordinary circumstances." (See *Tesla*, *supra*, at p. 2 (slip op.) Simply put, competitive bidding is required in the making of a new contract not the amendment of an existing contract adopted through a competitive bidding process. In D.06-11-048, the Commission approved the Original PPA that was the result of RCEC being a winning bidder in PG&E's 2004 LTRFO.

Further, during the proceeding, PG&E was required to provide a side-by-side comparison. The 2nd APPA has been compared to potentially competitive bids, and shown to be competitive under the comparisons of the bids from PG&E's 2008 LTRFO. (See Reply of Joint Parties to Comments on Joint Parties' Motion for Approval of 2nd APPA, filed February 3, 2009, pp. 6-7.)

c. The Commission did not err in applying a guideline that compares the price amendment to bids in a recent RPS solicitation.

In reviewing whether the capacity price increase was reasonable, we acknowledged in the Decision that we had "not yet developed standards for reviewing amendments, including price, to existing PPAs for non-renewable resources." (D.09-04-010, p. 16.) However, the Commission determined that a suitable guideline as to whether or not to approve the settlement was to compare the price amendment to bids in a recent RPS solicitation, similar to what we had done for a price amendment to a

renewable PPA. (D.09-04-010, p. 16, citing Resolution E-4150, issued April 15, 2008, p. 8.)

Group Petitioners criticize the Commission for using this guideline, and assert that the approach taken in Resolution E-4150 should not be used, as it is distinguishable from the instant situation. (Group Petitioners' Rehrg. App., pp. 7-8.) Group Petitioners argue that Resolution E-4150's approach was limited to renewable contracts, and not for an allegedly "improper bilateral contract," where there would be a "shift of all GHG Risks and costs to ratepayers." (Group Petitioners' Rehrg. App., pp. 7-8.) Their criticism has no validity.

First, the 2nd APPA was not an "improper bilateral contract." As discussed above, the 2nd APPA was neither a new contract nor a novation requiring a new reliability or cost-effectiveness analysis. (See discussion, *supra*.)

Further, there is no law, and Group Petitioners cite to none, that prohibits the Commission from evaluating the reasonableness of a settlement by comparing the capacity price increase in the 2nd APPA to the bids in a recent RPS solicitation. Moreover, the differences between a renewable contract and a non-renewable contract that Group Petitioners describe are not controlling. Nothing precludes the Commission in the context of a settlement from exercising its expertise, and applying the same approach used for a renewable contract to determine whether the amendment price in a non-renewable contract was reasonable in light of the whole record. (See Commission Rules of Practice and Procedure, tit. 20, §12.1, subd. (d).)

Moreover, there was evidence to support this evaluation of the settlement. PG&E provided the evidence to make this comparison between the amendment price of the 1st APPA and short-listed bids in PG&E's 2008 LTRFO. (See Joint Parties' Motion for Approval of 2nd APPA, filed December 23, 2008, p. 6, citing to Supplemental Testimony of PG&E (Exh. PG&E-2), Chapter 1 at p. 1-5 [Confidential (Under Seal)].) DRA and TURN reviewed this evidence for the 2nd APPA, and concluded the pricing would be competitive if it had been bidded into that RFO. From this evidence, the

Commission concluded that amended contract price was reasonable. (D.09-04-010, p. 18.)

We observed in the Decision that the Joint Parties believed that the "settlement [did not] extend to the issue of what standards the Commission should use going forward to consider requests to approve amendments to PPAs that the Commission [had] previously approved in a competitive solicitation process." (D.09-04-010, p. 8, fn. 9.) The Decision also noted that the Joint Parties stated that this issue was "a policy matter in Phase 2 of the 2008 long-term procurement plan rulemaking, Rulemaking 08-02-007." (D.09-04-010, p. 8, fn. 9.) Based on these observations, Group Petitioners allege we acted inconsistently. They argue that although we acknowledged that there was no standard for reviewing an amendment to a PPA and one would be considered in R.08-02-007, we still adopted the comparison guideline as the standard for reviewing an amendment to a PPA. However, they are wrong. In D.09-04-010, we applied the comparison guideline for reviewing the amendment price to determine whether or not to approve the settlement agreement as reasonable in the light of the whole record. We did not adopt the guideline as the standard for reviewing amendments to a PPA.

d. Contrary to Group Petitioners' assertion, a comparison analysis was performed.

The Group Petitioners assert that we failed to do a comparison analysis as required by Rule 12.1 of the Commission's Rules of Practice and Procedure. (Group Petitioners' Rehrg. App., p. 11)[13] This assertion lacks merits. As fully described in the Decision, a comparison was done, and used to determine whether the settlement agreement was reasonable in light of the whole record. (See generally, D.09-04-010, pp. 15-22.)

[13] Group Petitioners assert that the same rule required a comparison exhibit. They are wrong, as this proceeding is not a general rate case, or subject to the rate case plan "in which a comparison exhibit would ordinarily be filed." (See Reply of Joint Parties to Comments on Joint Parties' Motion for Approval of 2nd APPA, filed February 3, 2009, pp. 5-6.)

To ensure the amendments were just and reasonable, we required PG&E to provide a side-by-side comparison of the 2nd APPA with short-listed bidders in PG&E's 2008 LTRFO. (See Scoping Memo, p. 5.) On December 8, 2008, PG&E submitted Supplemental Testimony that included side-by-side comparison of the 1st APPA with short-listed bids from PG&E's 2008 LTRFO, as well as a review of PG&E's comparison by an independent evaluator. (PG&E Supplemental Testimony, Chapter 1, Attachments 1-1 and 1-2 [Confidential (Under Seal)].) In their own comparison DRA and TURN concluded that the "revised terms" in the 2nd APPA, in particular the lower capacity price would be competitive with the short-listed bids in the 2008 LTRFO if it were actually bid into the RFO. Thus, contrary to Group Petitioners' assertion, the 2nd APPA had been subject to a comparative analysis with bids received in a long-term resource solicitation. Group Petitioners had access to this comparison. So even if *Tesla* were applicable, the 2nd APPA had been shown to be competitive with comparisons to the bids from PG&E's 2008 LTRFO. (See Reply of Joint Parties to Comments on Joint Parties' Motion for Approval of 2nd APPA, filed February 3, 2009, pp. 6-7.)

e. The GHG-related costs in the 2nd APPA were appropriately considered.

In their rehearing application, Group Petitioners further claim that the Decision does not properly consider the GHG-related costs in the 2nd APPA. Specifically, they argue that this amended agreement is not consistent with existing Commission policies and decisions and does not satisfy D.04-12-048 and the price can not be deduced to show that the agreement is competitive since it fails to include the GHG-related costs.[14] (Group Petitioners' Rehrg. App., p. 5.) This claim has no merit.

[14] Group Petitioners also make references to D.06-07-029 and R.06-02-012 for the proposition that contracts that do not apply the cost allocation mechanism ("CAM") at the time Commission approval was sought are still subject to the rules of D.04-12-048. (Group Petitioners' Rehrg. App., p. 9.) As discussed in this memo, D.09-04-010 is consistent with D.04-012-048, and thus, references to D.06-07-029 and R.06-02-012 have no meaning on this issue of GHG-related costs.

D.04-12-048 requires the IOUs to employ a "GHG adder" when evaluating fossil and renewable generation bids in all-source open RFPs. (*Utilities' LTPP Decision* [D.04-12-048], *supra*, at pp. 3-4, 43, 80-81, 120, 127, 151-153, 216 [Finding of Fact No. 80], 232 [Conclusion of Law No. 23], and p. 237 [Ordering Paragraph No. 3(c)] (slip op.).)

The 1st APPA was compared with the short-listed bids from PG&E's 2008 LTRFO applying the same evaluation criteria used to evaluate and compare bids in the 2008 LTRFO. This comparison took into account all the criteria used to evaluate and compare bids, including consideration for GHG-related costs. DRA and TURN compared the 2nd APPA (which contained identical provisions concerning GHG-related costs as in the 1st APPA) with the short-listed bids in PG&E's 2008 LTRFO. DRA and TURN took into account the GHG-related costs associated in their comparison of the 2nd APPA and the short-listed bids in PG&E's 2008 LTRFO.[15] Thus, the comparisons in the record assisted the Commission in determining that the 2nd APPA was competitive. Therefore, Group Petitioners are wrong that the Decision did not include a consideration of the GHG-related costs, including those negotiated costs that were assumed by PG&E and its ratepayers. D.04-12-048 does not preclude the settlement parties from agreeing to such an allocation of GHG-related costs.

3. The Commission did not err in concluding that the Group Petitioners had failed to establish its eligibility to receive intervenor compensation, since they failed to provide sufficient documentation.

Group Petitioners assert that D.09-04-010 denies them due process and equal protection in concluding that they are not customers eligible to request intervenor compensation. They argue that the Commission unlawfully did not provide them with

[15] See Joint Parties' Motion for Approval of 2nd APPA, filed December 23, 2008, p. 6 [Public Version]; see also, Joint Parties' Motion for Approval of 2nd APPA, Exhibit A, pp. A-47 to A-48 [Confidential (Under Seal)] & Exhibit B, pp. B-52 to B-53 [Confidential (Under Seal)].

any opportunity or leave to supplement their NOI. (Group Petitioners' Rehrg. App., pp. 12-15.) We find no merits to these claims.

In a late-filed motion, filed December 12, 2008, Group Petitioners sought party status and permission to file a late notice of intent to claim intervenor compensation. Group Petitioners asked to be recognized "collectively" as one party and were "asserting 'Category 3' customer status, as a group or organization authorized by its articles of incorporation or bylaws to represent the interest of residential and/or small commercial ratepayers." (D.09-04-010, p. 29, citing Pub. Util. Code, §1802, subd. (b)(1)(C).) The ALJ issued a ruling on January 23, 2009, granting their motion to accept late filing of notice of intent, but finding Group Petitioners ineligible to claim intervenor compensation. (January 23, 2009 ALJ Ruling, pp. 1 & 6.) The grounds for finding ineligibility was that Group Petitioners failed to establish each of the group members were "customers" within the meaning of section 1802(b)(1), and that they failed to provide any documentation that showed their organizations' members' inability to pay the costs of participation. (January 23, 2009 ALJ Ruling, pp. 2-5.)

On February 2, 2009, Group Petitioners filed a motion for reconsideration of the January 23, 2009 ALJ Ruling. This time, Group Petitioners sought to be a "customer" under any of the three possible categories. (Motion for Reconsideration, pp. 2-3; see also, D.09-04-010, p. 26.) In their motion, Group Petitioners also argued that: "As long as any one organization satisfies the statutory criteria, that organization [was] entitled to qualify as an intervenor eligible to request compensation." (Motion for Reconsideration, pp. 3-4.) They cited D.03-12-058 [16] and D.04-10-012[17] in support of this argument. (See generally, Motion for Reconsideration, pp. 5, 9-10.) These decisions involved the eligibility of a labor union.

[16] *Decision Granting Local 483 Utility Workers Union of America Eligibility for Intervenor Compensation* [D.03-12-058] (2003) ___ Cal.P.U.C.3d ___.

[17] *Order Denying Rehearing of Decision 03-12-058* [D.04-10-012] (2004) ___ Cal.P.U.C.3d ___.

We denied Group Petitioners' motion for reconsideration because they failed to file sufficient information. This is the same basis for denying their original request for eligibility. (D.09-04-010, p. 26.) In the Decision, we explained why Group Petitioners did not qualify as customers under any of the three categories of a "customer." (D.09-04-010, pp. 26-28.) Further, the Decision rejected Group Petitioners' argument that an organization could be eligible if one of its members of the organization was eligible. (D.09-04-010, p. 26.) We noted that to adopt Group Petitioners' mistaken "view would open the door for non-customer members of a coalition-party to obtain intervenor compensation. . . ." (D.09-04-010, p. 26, citing *Re Commission's Intervenor Compensation Program* [D.98-04-059] (1998) 79 Cal.P.U.C.2d 628, 643.) We further observed that the decisions (D.03-12-058 and D.04-10-012) that they relied upon had been vacated and reversed in D.05-02-054.[18] (D.09-04-010, p. 27.) The Commission also found even if they could be assumed to be a customer, Group Petitioners did not demonstrate significant financial hardship. (D.09-04-010, pp. 27.) In sum, our denial of eligibility was based on the fact that Group Petitioners did not provide sufficient information to support its alleged customer status and/or significant financial hardship.

In their rehearing application, Group Petitioners argues that the Decision violates HAPA's federal due process and equal protection rights. (Group Petitioners' Rehrg. App., p. 13.) Specifically, they claim that the Decision has misread the motion for reconsideration to mean that "so long as any one member organization is an eligible customer, the entire party should be considered 'eligible' for 'costs of participation.' " By denying the Group Petitioners eligibility, they argue that the Commission has unlawfully denied one qualifying member in its group, namely HAPA, of eligibility. We fine this argument to be without merit.

[18] *Oder Granting Rehearing of Decision (D.) 04-10-012, Vacating D.04-10-013 and D.03-12-058, and Denying Eligibility for Intervenor Compensation* [D.05-02-054] (2005) ___ Cal.P.U.C.3d ___.

The NOI requests eligibility for the Group Petitioners collectively. (See NOI Request, p. 1.) No separate NOIs were filed by each member. Group Petitioners did not ask the Commission to consider the eligibility of each of its members individually. Although Group Petitioners do state that "as a matter of law that ineligibility of "one" of the members of a group of intervenors may not forfeit the statutory entitlements of the remaining organizations, . . . ," this statement has no meaning in light of the assertion: "As Long As Any One Organization Satisfies The Statutory Criteria, That Organization Is Entitled To Qualify As An Intervenor Eligible To Request Compensation." (Motion for Reconsideration, p. 3 [Subheading A.1.].) Thus, it was Group Petitioners' eligibility that was at issue, and since not all its member qualified, we properly concluded that Group Petitioners were ineligible to receive intervenor compensation.

Further, in denying Group Petitioners eligibility, we did not preclude HAPA from demonstrating eligibility on its own. Similarly, that is the same case for Skywest if it had proven representation and significant financial hardship. However, for both members, more information would have been needed. Therefore, Group Petitioners' argument that we somehow denied these individual members of their statutory entitlement has no merit.

Also, in their rehearing application, Group Petitioners assert that unlike for other intervenors, they were given no notice or opportunity to amend or supplement their applications. (Group Petitioners' Rehrg. App., p. 14.) Group Petitioners specifically point to two situations involving other intervenors, CARE and WEM,[19] whereby these parties were given notice and opportunity to amend or supplement their applications. (Group Petitioners' Rehrg. App., p. 14.) By this assertion, they raise an equal protection argument which has no merit.

[19] Group Petitioners do not cite to the proceedings where these situations happened.

Group Petitioners are simply wrong that they were treated differently such that they were denied notice and opportunity to amend or supplement their NOI. In fact, they received notice and two opportunities to demonstrate their eligibility with sufficient documentation. For their original NOI Request, Group Petitioners were permitted to file their documentation through a series of emails and a mailing. (January 23, 2009 ALJ Ruling, p. 2.) This constituted their first opportunity to demonstrate their eligibility. In denying them eligibility, the ALJ explained why the original NOI request and accompanying documentation did not demonstrate eligibility. (See January 23, 2009 ALJ Ruling, pp. 2-5.) Group Petitioners could have used this explanation as a roadmap for correcting their defective NOI.

Their second opportunity to establish their eligibility was when they filed a motion for reconsideration. The motion for reconsideration constituted an amendment to their NOI. Again, their NOI request was found lacking of adequate documentation. (See generally, D.09-04-010, pp. 25-28.) Group Petitioners were noticed of this finding in the ALJ's Proposed Decision. (See Proposed Decision, filed March 17, 2009, p. 26, stating that their motion for reconsideration was denied because "they had not met the evidentiary threshold to establish they were a "customer" and otherwise qualified to claim compensation.") In their comments, Group Petitioners make reference to the PG&E bills of Skywest which were submitted with the motion for reconsideration, but offer no more documentation. (Group Petitioners' Comments to Proposed Decision, dated April 6, 2010, pp. 10-11.) However, we pointed out that even assuming that these bills were enough to establish Skywest as a Category 1 customer, there was no information demonstrating undue financial hardship. (D.09-04-010, p. 27.)

Group Petitioners' eligibility rests on the fact that they failed to provide sufficient documentation on customer status for all three members and/or significant financial hardship. Unlike the two situations to which Group Petitioners refer, those intervenors did provide sufficient documentation. (See Group Petitioners' Rehrg. App., p. 14.) Thus, Group Petitioners' equal protection claims have no validity, since they are not similarly situated.

Moreover, at no point since they became a party in the proceeding have we denied Group Petitioners an opportunity to amend or supplement their eligibility request. Group Petitioners faults the Commission for not telling them that they should amend their request and provide sufficient documentation. No law requires that the Commission specifically inform an intervenor that they should amend their request by providing sufficient documentation. In the instant proceeding, Group Petitioners apparently understood that they could "amend" because they did file a Motion for Reconsideration, and did provide more documentation, but the information proved to be insufficient to establish eligibility.

Further, as we observed: "It is the duty of an intervenor to establish eligibility, including customer status and significant hardship, rather than offer unsupported statements and inferences from which the Commission to derive rather specific elements of qualifications." (D.09-04-010, p. 28.) Thus, providing sufficient documentation is the intervenors' responsibility, and not the Commission's.

How long the Commission will wait depends on the circumstances of the case, but as we observed: "[T]here is no authority that binds the Commission to wait indefinitely." (D.09-04-010, p. 28.) Here, we believe that Group Petitioners had sufficient time, as well as adequate notice and opportunity, to amend their deficient NOI request, as evidenced by the fact they filed their motion for reconsideration as a means for amending their defective NOI.

4. Section 10.4 of the 2nd APPA does not affect any public right to notice and review should the Russell City Energy Center be sold or transferred to another owner or operator.

In their rehearing application, CARE/Simpson argue that section 10.4 in the 2nd APPA would result in a loss of public rights whereby there would be no opportunity for public review or comment upon the exercise of this provision. (CARE/Simpson's Rehearing, pp. 3-5, citing to Pub. Util. Code, §§851 & 853, in support.) Specifically, CARE/Simpson argue that section 10.4 would permit the transfer of ownership and

operation of the RCEC project without notice or opportunity for the public to comment. (CARE's Rehrg. App., pp. 3-5.) This argument lacks merit.

CARE/Simpson's argument is flawed because they mistakenly read section 10.4 of the 2nd APPA as involving the assignment of the ownership and operation of the RCEC project. This contract provision provides for assignment of the obligations under the 2nd APPA for the purchase and sales and delivery of capacity, not the ownership and operation of the facilities. (See generally, 2nd APPA, pp. A-7 to A-11 [Section 3.1 – Transaction] & pp. A-53 to A-54 [Section 10.4 -- Assignment and Change of Control] [Confidential (Under Seal)].) As the we stated:

> CARE mistakenly claimed that § 10.4 in the 2nd APPA would permit the transfer and operation of the RCEC project without notice or opportunity for public to comment. However, the provision reflects parties' rights and obligations regarding potential assignment of the Agreement or rights thereunder. It is unclear how CARE links the provision to some loss of public rights.

(D.09-04-010, p. 19.)

Because they are mistaken that the assignment provisions in section 10.4 of the 2nd APPA apply to a transfer and operation of the RCEC plant, CARE/Simpson's reliance on sections 851 and 853 is misplaced. These statutes do not apply to an assignment of the obligations under the 2nd APPA for the purchase and sales and delivery of capacity. Thus, there is no legal requirement for public review or comment upon the exercise of section 10.4. Accordingly, CARE/Simpson's section 10.4 argument has no merit.

5. Based on the record evidence and application of the method for calculating the emission rate set forth in D.07-01-039, the Commission has lawfully determined that the RCEC Project complied with the Environmental Performance Standards.

In D.09-04-010, the Commission stated: "Energy Division staff have recalculated the emission rate for more conservative, average heat rate, and the Commission is satisfied that the project does comply with the EPS based on likely

average emission rates for the project." (D.09-04-010, p. 25.) From this statement, CARE/Simpson mistakenly assumed that the Commission relied on evidence not in the record.

CARE/Simpson alleges that the "recalculations" were not part of the record, and thus, the parties were denied an opportunity to review them. Accordingly, these parties claim that the Decision's use of these recalculations denied them due process. (CARE/Simpson's Rehrg. App., p. 5.) This argument has no merit, although we believe that the Decision should be modified to clear up a misunderstanding that we did not rely on the record on determining whether the 2nd APPA met EPS.

In response to Group Petitioners' comments to the Proposed Decision regarding whether the 2nd APPA met the EPS set forth in D.07-01-039,[20] the Commission had the Energy Division, which assists the Commission and ALJs on complex technical issues, to perform some calculations to determine whether the 2nd APPA was in compliance of the EPS. (See Group Petitioners' Comments to the PD, filed April 6, 2009, pp. 9-10; see also, D.09-04-010, p. 25.)

A review of the evidentiary record shows that PG&E supplied a variety of heat rates. (Motion of Joint Parties, dated December 23, 2008, Attachment A, pp. A-98 [Confidential (Under Seal)].) By using each of these heat rates, including one averaging all these heat rates, and applying the Conversion Methodology adopted in D.07-01-039,[21] the resulting emissions rate for each of these heat rates falls below the EPS threshold of 1,100 lbs of carbon dioxide (CO_2) per megawatt hour.

Accordingly, CARE/Simpson are wrong that we relied on evidence not in the record to conclude that RCEC project complied with the EPS. Thus, they were not denied an opportunity to be heard on the recalculations.

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[20] *Interim Opinion on Phase 1 Issues: Greenhouse Gas Emissions Performance Standard* ("*EPS Decision*") [D.07-01-039] (2007) ___ Cal.P.U.C.3d ___, pp. 70, 235 [Finding of Fact No. 57 & 58] (slip op.), adopting an EPS of no higher than 1,100 lbs. of carbon dioxide (CO_2) per megawatt hour.

[21] See generally, *id.* at pp. 108-114 (slip op.), for a description of this methodology.

However, the statement regarding Energy Division's "recalculations" was ambiguous and subject to a misreading. Thus, in order to eliminate any possible erroneous conclusion that we used evidence outside the record, we will modify D.09-04-010 as specified in the ordering paragraph below.

6. The rehearing applicants' requests for oral argument under Rule 16.3 shall be denied.

In their joint rehearing application, Group Petitioners request oral argument pursuant to Rule 16.3 of the Commission Rules of Practice and Procedure. They set forth seven questions, which they broadly and without explanation claim are issues of major significance. (Group Petitioners' Rehrg. App., pp. 2-3.) In their rehearing application, CARE/Simpson ask for oral argument to better explain their position on Section 10.4 of the 2nd APPA which is a provision involving any transfer of ownership and operation of the RCEC project, and to discuss the issue of EPS compliance. (CARE/Simpson's Rehrg. App., p. 2.)

The Commission has complete discretion to determine the appropriateness of oral argument in any particular matter. (See Rule 16.3(a) of the Commission's Rules of Practice and Procedure, Cal. Code of Regs., tit. §20, 16.3, subd. (a).)

Rule 16.3(a) states:

> If the applicant for rehearing seeks oral argument, it should request it in the application for rehearing. The request for oral argument should explain how oral argument will materially assist the Commission in resolving the application, and demonstrate that the application raises issues of major significance for the Commission because the challenged order or decision: (1) adopts new Commission precedent or departs from existing Commission precedent without adequate explanation; (2) changes or refines existing Commission precedent; (3) presents legal issues of exceptional controversy, complexity, or public importance; and/or (4) raises questions of first impression that are likely to have significant precedential impact.

(Rule 16.3(a) of the Commission's Rules of Practice and Procedure, Code of Regs., tit. 20, § 16.3, subd. (a).)

The requests for oral argument do not meet the requirements specified by the Commission's Rules. Group Petitioners and CARE/Simpson fail to demonstrate how oral argument will materially assist the Commission in resolving their rehearing applications. Further, their requests do not even set forth detailed reasons warranting the grant of oral argument, including those specified in Rule 16.3(a)(1) through (a)(4). The rehearing applicants merely state that oral argument is requested because the issues have "major significance." Accordingly, there is no basis to conclude oral argument would benefit disposition of the applications for rehearing.

III. CONCLUSION

For the reason discussed above, legal error has not been demonstrated. However, we modify D.09-04-010 to clarify that the Commission did not rely on evidence that was not in the record. Rehearing of D.09-04-010, as modified, is denied.

THEREFORE, IT IS ORDERED that:

The first full paragraph on page 25 of D.09-04-010 is modified to read as follows:

"On March 20, 2009, PG&E filed documentation in this docket that indicated the project would be in compliance with the EPS. Comments on this filing pointed out that the heat rate value used by PG&E to derive an emissions rate for the unit may not represent average operating conditions (e.g., factoring in cold starts and operation below full capacity). In their testimony, PG&E provided several heat rates, including the heat rate used in their response. (See Joint Parties' Motion for Approval of the 2nd APPA, dated December 23, 2008, Attachment A, p. A-98 [Confidential (Under Seal)]. Using the other heat rates, including one that averages all of the heat rates in the record, and applying the method adopted in D.07-01-039 for calculating the emission rate, we are satisfied that the project does comply with the EPS based on likely average emissions rates for the project."

1. Group Petitioners' and CARE/Simpson's requests for oral argument under Rule 16.3 of the Commission's Rules of Practice and Procedure are denied.

2. Rehearing of D.09-04-010, as modified, is hereby denied.

This order is effective today.

Dated February 25, 2010, at San Francisco, California.

MICHAEL R. PEEVEY
President
DIAN M. GRUENEICH
JOHN A. BOHN
TIMOTHY ALAN SIMON
NANCY E. RYAN
Commissioners