

Decision 10-09-004 September 2, 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)

**DECISION DENYING GROUP PETITIONERS' PETITION
FOR MODIFICATION OF DECISION 09-04-010 AND GRANTING
JOINT PETITION 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 MODIFICATION OF
DECISION 09-04-010, AS MODIFIED BY DECISION 10-02-033**

Summary

Decision (D.) 09-04-010 approved a settlement embodied in a Second Amended Power Purchase Agreement (2nd APPA) between Pacific Gas and Electric Company (PG&E) and Russell City Energy Company, LLC (RCEC) that was also supported by Division of Ratepayer Advocates (DRA), The Utility Reform Network (TURN), and California Unions for Reliable Energy (CURE). The original power purchase agreement was first approved by the Commission in D.06-11-048 as part of PG&E's 2004 Long-Term Procurement Plan. A minor clarification made in D.10-02-033, in response to two applications for rehearing otherwise denied, did not affect the Commission's overall approval of the 2nd APPA.

This Decision denies the Petition for Modification of D.09-04-010 filed by Group Petitioners on the grounds that the arguments are speculative, lack relevance, and are moot. This Decision also grants the Petition for Modification of D.09-04-010, as modified by D.10-02-033,¹ filed by PG&E, RCEC, DRA, CURE, and TURN on the grounds that it is reasonably justified and in the public interest. The effect of this modification is to approve the First Amendment to the Second Amended Power Purchase Agreement between PG&E and RCEC, which provides limited changes to the terms and conditions of the Agreement, including a reduction in price and deferral of the delivery date by one year. The First Amendment was necessary largely due to a delay, until February 3, 2010, of the issuance of the Final Prevention of Significant Deterioration permit by the Bay Area Air Quality Management District, and several subsequently filed appeals.

No disputed issues of material fact have been presented and no hearing was held. Based on the written record, we grant this Petition for Modification, but in recognition of a withdrawn issue and in the interest of improved clarity, we do not adopt, verbatim, the revised language that PG&E and the other joining parties have proposed.

1. Background

This proceeding considered an Application by Pacific Gas and Electric Company (PG&E) for approval of an Amended Power Purchase Agreement with Russell City Energy Company, LLC (RCEC). On December 23, 2008, PG&E, RCEC, Division of Ratepayer Advocates (DRA), California Unions for Reliable

¹ An issue related to a cost recovery mechanism has been withdrawn from the Petition for Modification.

Energy (CURE), and The Utility Reform Network (TURN) (collectively “Joint Parties”), filed a Joint Motion for Approval of a Second Amended Power Purchase Agreement (Joint Motion) which represented a settlement of all issues raised by and among the Joint Parties. California Pilots Association, Skywest Townhouse Homeowners Association, and Hayward Planning Association (collectively, “Group Petitioners”) and Californians for Renewable Energy, Inc. (CARE) and Rob Simpson (collectively, CARE/Simpson) opposed the Joint Motion and the underlying Settlement.

In Decision (D.) 09-04-010, issued on April 16, 2009, the Commission approved the Joint Parties’ settlement agreement, and thus, approved the Second Amended Power Purchase Agreement (2nd APPA). Both CARE/Simpson and Group Petitioners each timely filed an application for rehearing, both of which were opposed by the Joint Parties. On February 25, 2010, the Commission adopted D.10-02-033 which made a minor clarification to D.09-04-010, and otherwise denied both applications for rehearing.

On June 22, 2009, Group Petitioners filed a Petition for Modification of D.09-04-010² (Group Petition), a Request [Motion] for Official Notice of Facts, and Declaration of Jewell J. Hargleroad in support of the Group Petition. PG&E, RCEC, and CURE filed a timely Joint Response to the Group Petition (Joint Response), which it later amended to include an omitted attachment.³ In support

² For purposes of this decision, references to D.09-04-010 should be understood to mean D.09-04-010, as modified by D.10-02-033.

³ The omitted attachment was the Non-Disclosure Agreement (NDA) signed by counsel for Group Petitioners applicable to this proceeding. The Joint Response alleged that Group Petitioners had improperly disclosed in the Group Petition certain confidential

Footnote continued on next page

of the Group Petition, Group Petitioners filed two other Requests for Official Notice of Facts on August 27, 2009 and February 2, 2010.⁴

On April 15, 2010, the Joint Parties filed a Joint Petition for Modification of D.09-04-010, as modified by D.10-02-033 (Joint Petition). The Joint Petition sought approval of “limited modifications” to the 2nd APPA approved in D.09-04-010, and addition of language to implement the cost recovery mechanism “recently adopted by the legislature in Senate Bill (SB) 695.” With the permission of the ALJ, Group Petitioners filed a late Response to the Joint Petition (Group Response) on May 20, 2010.

At the Prehearing Conference held on May 17, 2010 to consider the schedule, discovery issues, whether a hearing was necessary, the pending motions, and other procedural matters, two new groups made appearances: Alliance for Retail Energy Markets (AReM) and Womens Energy Matters (WEM). AReM and WEM requested and received party status related to the Joint Petition issue of whether to add to D.09-04-010 certain language to implement the cost recovery mechanism set forth in SB 695. Marin Energy Authority (MEA) subsequently filed a motion to become a party in this proceeding for purposes of participating in the cost recovery issue. On June 10, 2010, the Joint Parties filed a motion to withdraw the SB 695-cost recovery issue from the Joint Petition. Based on the removal of the issue of interest to these parties, the ALJ issued a ruling on June 18, 2010 which reversed the grant of

market sensitive information. This matter was disposed of in the June 18, 2010 ruling by the Administrative Law Judge (ALJ).

⁴ The ALJ’s Ruling, issued on June 18, 2010, denied the June 22, 2009 and February 2, 2010 requests, but granted, in part, the August 27, 2009 request.

party status to AReM and WEM, and denied party status to MEA, all without prejudice, in addition to resolving several other outstanding motions by the parties.

2. Group Petition

On June 22, 2009, Group Petitioners timely filed a petition to modify D.09-04-010 to reverse the Commission's approval of the 2nd APPA by seeking to establish that "Calpine [RCEC] already is in default and will not meet its contractual obligations."⁵ The alleged bases of default arise from various claimed delays related to issuance of the Final Prevention of Significant Deterioration (PSD) permit by the Bay Area Air Quality Management District (BAAQMD).

Group Petitioners supported the petition by its counsel's declaration and three motions for official notice of facts that purport to relate in some way to (1) actions by or before the United States Environmental Protection Agency (EPA) involving a stay to issuance of certain air permits,⁶ and (2) California Energy Commission (CEC) consideration of a petition to amend the permit to construct the underlying Russell City power plant. However, in the June 18, 2010 ruling, the ALJ denied official notice to nearly all of the "facts" requested on the grounds that the documents were either not shown to be relevant to the proceeding or not suitable for official notice.

The one "fact" that was accepted for "official notice" was a "Notice of Public Hearing and Notice Inviting Written Public Comment on Draft Federal

⁵ Group Petition at 2.

⁶ BAAQMD is the regional agent for the U.S. EPA for issuing the PSD permits.

Prevention of Significant Deterioration Permit for Russell City Energy Center (Public Notice)” issued by BAAQMD. Group Petitioners claimed the “fact” of the Public Notice was relevant because the public hearing would be held, and public comments would be due, after September 1, 2009. Therefore, RCEC was, according to Group Petitioners, unable to obtain the PSD permit in a final, non-appealable form on or before September 1, 2009 and thus provided a basis to reverse D.09-04-010.

Group Petitioners point to several provisions of the 2nd APPA, filed under seal, which refer to events of default and critical milestones, and argue that, based on the new fact of the PSD permit delay, the 2nd APPA is no longer reasonable, consistent with the law, or in the public interest. A contract subject to termination and liquidated damages cannot be reasonable, argues Group Petitioners, and thus cannot meet the standards for approval of a settlement. Therefore, they seek a complete reversal of the findings of fact, conclusions of law, and orders of D.09-04-010.

2.1. Response to the Group Petition

A Joint Response (public and confidential versions) was filed on July 22, 2010 by PG&E, RCEC, and CURE. The Joint Response argued that the Group Petition did not set forth grounds to justify any modifications to D.09-04-010 and, instead, was “the latest of several attempts by the Group Petitioners to collaterally attack the Commission’s approval” of the 2nd APPA by trying to introduce siting and permitting issues that are outside the scope of the proceeding.⁷

⁷ Joint Response at 1.

The Joint Response stated that Group Petitioners have mischaracterized the actions of the EPA, the issuance of the PSD permit was not directly implicated by the EPA's actions, and BAAQMD was continuing to move the processing of RCEC's PSD permit. Furthermore, the Joint Response contended that the sections in the 2nd APPA allegedly affected by delay of the PSD permit do not implicate D.09-04-010 because contingent rights and liabilities under the terms of the agreement are a contract issue between the parties rather than the subject of the power purchase itself.

As noted above, the Joint Response also took significant issue with Group Petitioners' identification of several provisions within the 2nd APPA filed under seal in this proceeding, which were also the subject of a Non-Disclosure Agreement. This matter has been resolved by the June 18, 2010 ruling by the ALJ and need not be further discussed here.

2.2. Discussion

The Group Petition was timely filed because, pursuant to Rule 16.4(d) of the Commission's Rules of Practice and Procedure (Rules), a petition should be filed within one year of the effective date of the decision proposed to be modified.

Group Petitioners rest their petition on the "new" fact that RCEC did not receive its PSD permit before September 1, 2009, a claimed default date under the 2nd APPA which, they speculate, renders the 2nd APPA "unreasonable" and unqualified to meet the standard for adoption of a settlement. Without opining on all the potential rights and liabilities of the contracting parties under the 2nd APPA, we disagree because this singular, and temporary, "fact" is not crucial to the overall settlement approved in D.09-04-010. The PSD permit has now been issued, and the extension of performance dates has been corrected in the First

Amendment to the 2nd APPA contained in the Joint Petition filed in April 2010 which is granted below.

Group Petitioners assert relevance of the permit delay by reference to the Scoping Memo which inquired about the status of RCEC's PSD permit. PG&E had requested expedited hearings on its original application but other parties questioned whether this was necessary. Therefore, the Commission requested information about the status of the air permit, which PG&E said was the last pending permit needed prior to commencement of construction. It was not established that a delay of the PSD permit was also relevant to the analysis in D.09-04-010 which considered whether an amended power purchase contract, proposed in settlement, was reasonable in light of the whole record, consistent with the law, and in the public interest.

We also note that in its opposition to the 2nd APPA, Group Petitioners similarly questioned the viability of the RCEC project and alleged that the Joint Parties had misled the Commission by failing to accurately describe the potential for further delays in getting the PSD permit or that CEC might reopen the site permit. The Commission rejected these arguments, acknowledged the future physical and financial viability of RCEC was "unknown,"⁸ and said that RCEC was in an "advanced position"⁹ to complete the project. Therefore, the Commission has previously considered the approval status of the one final, pending permit for operation of the RCEC power plant and found it to be

⁸ D.09-04-010 at 20.

⁹ *Id.* at 21.

inconsequential when considering the overall value of the power purchase agreement.

The importance of the 2nd APPA is the potential for ten years of energy capacity and energy, rather than certain contractual rights and liabilities designed to keep the project on track or compensate the parties upon possible default. Thus, the Commission has already decided that the delayed issuance of the PSD permit is insufficiently relevant to justify rejection of the 2nd APPA approved in D.09-04-010 as unreasonable or unsuitable for approval under the standards for settlement.

Moreover, even if the PSD permit had not yet been issued, and the parties' contingent rights upon occurrence of certain events were found to be substantially relevant, the matter is now moot. The permit has been issued as of February 3, 2010 with an effective date of March 22, 2010.¹⁰ In addition, the Joint Parties promptly thereafter filed the Joint Petition to adopt an amendment to the 2nd APPA to conform certain performance dates to the timeline driven by the newly issued PSD permit and to modify some contingent performance rights and liabilities. We approve the Joint Petition below and thus, the date-driven provisions in the 2nd APPA of concern to Group Petitioners are no longer viable. Therefore, the Group Petition is moot.

3. Joint Petition

On April 15, 2010, the Joint Parties filed a petition to modify D.09-04-010 to approve an amendment to the previously approved 2nd APPA between PG&E and RCEC (1st Amendment to 2nd APPA). The key changes include a reduction to

¹⁰ BAAQMD website: <http://www.baaqmd.gov/Divisions/Engineering/Public-Notices-on-Permits/2009/080309-15487/Russell-City-Energy-Center.aspx>

the energy capacity price and a one year extension to the expected delivery date. The Joint Petition seeks approval of the 1st Amendment to the 2nd APPA on the grounds that (1) the changes are necessary to preserve the fundamental purpose and benefits of the previously approved agreement, (2) it reduces the overall contract costs for customers, (3) it helps satisfy an identified resource need in PG&E's service territory, and (4) it provides PG&E with an "operationally flexible and environmentally beneficial new generation resource at a time when it is difficult to develop new generation in California."¹¹

Attached to the Joint Petition in support were the following appendices:

- **Appendix A** - specific language for proposed changes to D.09-04-010
- **Appendix B** – Declaration of Richard L. Thomas (Thomas Declaration), Vice President of RCEC, describing the chronology of approval for RCEC's PSD permit
- **Appendix C** – comparison matrix summarizing the amended terms and conditions between the 2nd APPA and the 1st Amendment and an explanation of the changes
- **Appendix D** – specific language of the 1st Amendment to the 2nd APPA
- **Appendix E** – Declaration of Charles E. Riedhauser (Riedhauser Declaration), PG&E's Director of Quantitative Analysis for energy procurement, describing the cost-effectiveness of the 1st Amendment to the 2nd APPA using an approach similar to the approach that PG&E used in its 2008 LTRFO, and concluding it will result in lower net customer costs than the 2nd APPA and so represents improved value for PG&E's customers
- **Appendix F** – Declaration of Joseph P. Como (Como Declaration), attorney for DRA, describing his review of the 1st Amendment to the 2nd APPA, his finding of significant savings for customers over the life

¹¹ Joint Petition at 9.

of the contract, and his conclusion that its adoption is in the public interest

- **Appendix G** – Declaration of Michel Peter Florio (Florio Declaration), senior attorney for The Utility Reform Network, describing his review of the 1st Amendment to the 2nd APPA, his finding of significant savings for customers over the life of the contract, and his conclusion that its adoption is in the public interest

PG&E filed a motion to allow portions of Appendices C and E, and all of Appendix D to be filed under seal pursuant to the protections granted to market sensitive information as set forth in D.06-06-066. The motion was granted by the ALJ's June 18, 2010 ruling.

3.1. The PSD Permit Delays

Joint Parties explained that the ever-changing status of the PSD permit is the primary reason that PG&E initially sought to amend the original PPA approved in D.06-11-048, and again is the primary reason for the proposed 1st Amendment to modify the adopted 2nd APPA. A history of the PSD process for RCEC is set forth in detail in the Thomas Declaration, is undisputed, and is summarized here.

BAAQMD issued an amended PSD permit to RCEC on November 1, 2007 and an appeal was filed. In July 2008, the Environmental Appeals Board (EAB) of the EPA remanded the PSD permit to BAAQMD to correct a defect in the federal notice requirements. PG&E submitted its application, A.08-09-007, to amend the PPA on September 10, 2008. On December 8, 2008, BAAQMD re-issued a Draft PSD, two weeks prior to the settlement proposed by the Joint Parties represented by the 2nd APPA. Joint Parties state that RCEC believed, based on its experience, that the final PSD permit would be issued in time to

allow it to meet the expected delivery date contained in the 2nd APPA. The 2nd APPA was approved by the Commission on April 20, 2009.

However, on April 24, 2009, under a new federal administration, the EPA granted reconsideration and stay of a “grandfathering” provision concerning fine particulate matter, which BAAQMD had relied upon in its issuance of the Draft PSD permit. It was not until August 3, 2009, that BAAQMD issued a revised Draft PSD addressing public comments and the EPA stay. BAAQMD held another public hearing on the revised Draft PSD on September 2, 2009 and, after receipt of public comments, issued a Final PSD permit on February 3, 2010, along with a 235-page response to public comments. Ten appeals were subsequently filed, BAAQMD sought summary dismissal of four, and on April 14, 2010, EAB agreed as to two and ordered those appellants to show cause why the appeals should not be dismissed. The other appeals are currently pending.

3.2. Summary of 1st Amendment to 2nd APPA

The Joint Petition claims the proposed changes account for delays associated with the PSD permit and help “ensure that the benefits acknowledged by the Commission in D.06-11-048, D.09-04-010, and D.10-02-033 are realized at a lower cost to customers.”¹² We are cognizant that the actual bi-lateral contract terms and conditions of power purchase agreements between utilities and non-affiliated third parties, other than defined contract summary terms, are presumed to be market sensitive for the benefit of ratepayers pursuant to D.06-06-066, and were filed under seal herein by authority granted in the

¹² Joint Petition at 7.

ALJ Ruling of June 18, 2010. With that in mind, the changes to the 2nd APPA contained in the 1st Amendment are summarized below:

- A reduction to the Capacity Payment Rate
- A one-year extension to the expected initial delivery date to June 2013
- Modifications to date-driven provisions involving development, conditions precedent, critical milestones, and delivery of the project
- Modification of date-driven rights and liabilities of the parties related to issues of termination and default
- Other minor changes, i.e., correction of clerical errors, clarifications, administrative efficiencies, and updates on the project's status

PG&E, DRA, and TURN, who were among the parties to the settlement of PG&E's original application, state they reviewed and analyzed the 1st Amendment prior to filing the Joint Petition.¹³ The changes, say the Joint Parties, do not alter the essence of either the original PPA or the 2nd APPA, "namely, the agreement by RCEC to provide to PG&E energy capacity and energy from its 601 MW combined-cycle facility in Hayward for a ten-year term."¹⁴

3.3. Response to the Joint Petition

On May 20, 2010, Group Petitioners' filed a Response to the Joint Petition and stated that because the Group Petition was filed before the Joint Petition, it "must be" ruled upon first.¹⁵ The Group Response is very brief. The primary argument appears to be that the Joint Petition is an admission that some of the terms and conditions contained in the 2nd APPA are no longer viable and,

¹³ Joint Petition at 8.

¹⁴ D.10-02-033 at 5.

¹⁵ Group Response at 1.

therefore, the petition itself is “an admission against interest and evidence in support of granting” the Group Petition.¹⁶

Their position is somewhat clarified when read in conjunction with the three motions for official notice of facts, previously ruled upon by the ALJ.¹⁷ In the three motions, designed to get “facts” arguably related to the PSD permit delays before the Commission, Group Petitioners claimed that because RCEC would not have the permit by September 1, 2009, it would be in default under the terms of the 2nd APPA. The Group Response concludes that the 2nd APPA is “over” and that if PG&E and RCEC want to enter into a new PPA, they must follow “appropriate procedures.”¹⁸

The Group Response also specifically disputes a contention in the Joint Petition that the Commission has previously affirmed, in D.09-04-010 and D.10-02-033, that the RCEC project is a needed energy source. Instead, there has been no such affirmation of need because, the Group Response states, the subject was excluded from the proceeding by the Scoping Memo, a fact noted in both decisions.

Finally, the Group Response addresses the cost recovery mechanism issue but, since the issue has been withdrawn, the arguments will be neither described nor addressed here.

¹⁶ Group Response at 1.

¹⁷ ALJ Ruling on various Motions dated June 18, 2010.

¹⁸ Group Response at 2.

3.4. Discussion

The Joint Petition was timely filed within one year of the effective date of the petition proposed to be modified, pursuant to the requirements of Rule 16.4(d). It is also consistent with prior Commission practice for the Joint Parties to seek approval of the 1st Amendment to the 2nd APPA through a Petition for Modification (PFM). For example, in D.06-09-021, the Commission approved revisions to a previously approved ten-year PPA that were proposed in a PFM and included an extension of the on-line date for the underlying power plant. The Commission approved the PFM and found that the revised PPA, which reflected more extensive changes in terms than proposed here,¹⁹ would preserve the benefits of the previously approved PPA and ensure that a state-of-the-art generation facility would be built. The facts are sufficiently similar to support the Joint Parties' use of this procedural avenue of relief.

Group Petitioners instead argue that the Commission should view each of the PFMs separately and in the order filed: first, to grant the Group Petition reversing approval of the 2nd APPA because it is in default and unreasonable and, second, to deny the Joint Petition by finding it the improper avenue of relief after the 2nd APPA has been rejected. No legal support was offered for the position that the Commission must selectively view the facts or petitions in a particular chronological order, nor is there anything in the Commission's Rules that requires it. The Commission has undertaken its review of both petitions at the same time, following the Commission's action on two applications for rehearing

¹⁹ For example, put and call options were added to give San Diego Gas & Electric Company an option to purchase the power plant at the end of the ten-year contract term (D.06-09-021 at 2).

which was concluded earlier this year. Recognition of the procedural efficiencies of first determining whether D.09-04-010 would be subject to rehearing was a prudent use of resources, before commencing the analysis of whether to modify that decision, which was in fact clarified in D.10-02-033.

The substance of Group Petitioner's argument flows through the Group Petition, Group Response, and supporting motions for notice of facts. It asks the Commission to find that, as of the date the Group Petition was filed on June 22, 2009, the EPA's reconsideration and stay of a "grandfathering" provision concerning fine particulate matter, would delay BAAQMD's issuance of the Draft PSD permit. In the various filings, Group Petitioners sought to establish that the PSD permit would not be issued within the contemplated time frame of the 2nd APPA, that this was in fact a contract default, and that the contract was no longer feasible or operative. This request is speculative, exceeds the scope of the Commission's review in this proceeding, and is now moot, as discussed above. The parties to the contract have not claimed any default, nor asked the Commission to determine such. The Commission's review here is focused on whether the proposed changes to the previously approved 2nd APPA are reasonable and in the public interest.

The Joint Parties concede and rely upon the delay, albeit unexpected, in the issuance of the PSD permit. The history of the permit process set forth above illustrates the unusual set of actions that resulted in a span of twenty six months from the time the first Draft PSD permit was issued, until the Final PSD permit was issued. We do not find it unreasonable that Joint Parties found it necessary to propose a 1st Amendment to the 2nd APPA after numerous appeals were filed against the Final Permit issued in February 2010. The 1st Amendment to the

2nd APPA makes limited changes to extend the expected online delivery date by one year and reduce the capacity price to reflect recent market trends.

In considering whether the changes are reasonable and in the public interest, the Commission's review prioritizes the capacity price and expected delivery date of the resources. In both of these categories, the 1st Amendment to the 2nd APPA is acceptable. When approving the 2nd APPA, the Commission required an independent review of PG&E's first amendments to the PPA, and established the amendment to price was justified and reasonable when placed in comparison to short-listed bids in the 2008 Long Term Request for Offer (LTRFO) solicitation.²⁰ DRA and TURN, ratepayer representatives, then reviewed this information and performed their own comparison to the terms of the 2nd APPA offered in settlement. Taking into account all of the evaluation criteria, each concluded that the 2nd APPA would be competitive with short-listed bids in the 2008 LTRFO, and was thus comparable in price and other criteria, to the current market for PPAs.

As set forth in the Como Declaration and Florio Declaration, DRA and TURN have once again performed a qualitative comparative analysis of the proposed changes and concluded that the 1st Amendment to the 2nd APPA will result in reduced customer costs, is in the public interest, and should be adopted. No evidence to the contrary has been submitted.

Group Petitioners also indirectly raised the issue of whether the energy capacity was still needed by disputing that the Commission affirmed the need in D.09-04-010 and D.10-02-033, as alleged in the Joint Petition. Their argument is

²⁰ D.09-04-010 at 16-17.

mistaken because the Commission has acknowledged the need in those decisions and elsewhere. In D.09-04-010, the Commission referred to the Scoping Memo issued in this proceeding where the proposal by some parties to review the need for the project was rejected because “[T]he Commission has previously determined the need for the PPA with the RCEC project in D.04-12-048.”²¹ In D.10-02-033, the Commission said it was “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.”²²

We generally agree that, at some point, a previously approved PPA which has been subject to numerous delays and revisions, should eventually be re-considered in the next Long Term Procurement Planning proceeding. Notably, in the proposed decision on PG&E’s 2008 LTRFO (A.09-09-021), the Commission examined issues of reduced projected demand in relation to previously projected resource adequacy needs and planning reserve margins. The Commission acknowledged that the projected need included the delayed RCEC project and said :

While we acknowledge that a potential failure of the Russell City project could have an impact on PG&E’s procurement, we do not believe it appropriate to weigh this factor in our deliberations here. In addition to the project’s failure being wholly speculative at this time,²³ we note that should the project fail, the terms of D.07-12-052 allow PG&E to procure generation in an offsetting amount. (Proposed Decision at 25.)

²¹ D.09-04-010 at 3, citing Scoping Memo and Ruling at 2.

²² D.10-02-033 at 4.

²³ Reference to the Joint Parties filing of the Joint Petition on April 15, 2010.

Therefore, we decline to visit the issue of need which the Commission has repeatedly found to be outside the scope of this proceeding. However, we caution PG&E that if there is insufficient progress towards the actual construction of the RCEC project by the commencement of its next LTRFO proceeding, then the Commission may decide to include the project in its re-evaluation of the utility's future procurement needs.

The Joint Petition's request to modify D.09-04-010 should be granted. We approve the 1st Amendment to the 2nd APPA for RCEC because we find that it gives PG&E a cost-effective, local area reliable resource,²⁴ with a lower long-term cost to the utility's ratepayers than the 2nd APPA. The plant will be a state-of-the-art, low heat-rate, clean facility in PG&E's service territory with the potential for many years of benefits. The Final PSD permit has been issued and the expected delivery date is in sight, assuming the pending permit appeals are promptly resolved. Thus, the RCEC project remains viable and the originally approved ten-year PPA essentially intact. The project design and operational benefits for RCEC did not change between the original PPA, the 2nd APPA, and the 1st Amendment to the 2nd APPA. The primary changes in the 1st Amendment to the 2nd APPA were to account for unforeseen permit delays, and provide a reasonable agreement among representative parties which is in the public interest.

3.5. Modifications Required

The Joint Petition includes, as Appendix A, suggested edits to D.09-04-010, as modified by D.10-02-033, to accomplish the revisions discussed above. A

²⁴ Joint Petition at 8.

substantial portion of the proposed revisions related to the issue of the cost recovery mechanism for RCEC which was withdrawn by the Joint Parties from the Joint Petition. Therefore, the revisions required to accomplish the modifications discussed above have been set out in Attachment A to this decision. The revisions incorporate, in substantial part, the revised language proposed in the Joint Petition, but in the interest of improved clarity, do not adopt the proposal verbatim.

4. Assignment of Proceeding

This proceeding was categorized as ratesetting. The assigned Commissioner is Michael R. Peevey and the assigned ALJ is Melanie M. Darling.

5. Comments on Proposed Decision

The proposed decision of ALJ Darling in this matter was mailed to the parties in accordance with Pub. Util. Code § 311 and comments were allowed under Rule 14.3 of the Commission's Rules of Practice and Procedure. Comments were filed by the Joint Parties on August 9, 2010, and Reply Comments were filed by CALifornians for Renewable Energy on August 13, 2010. To the extent Reply Comments exceeded the scope permitted by Rule 14.3(a), they were given no weight. No changes to the proposed decision have been made.

Findings of Fact

1. The Final Prevention of Significant Deterioration permit for Russell City Energy Center, LLC (RCEC) was issued by the Bay Area Air Quality Management District to RCEC on February 3, 2010 after numerous procedural delays.

2. The Petition for Modification of Decision (D.) 09-04-010 filed on June 22, 2009 by Group Petitioners does not set forth grounds to justify any modifications to D.09-04-010.

3. The proposed changes in the First Amendment to the Second Amended Power Purchase Agreement contained in the Petition for Modification of D.09-04-010, as modified by D.10-02-033, filed on April 15, 2010 by Pacific Gas and Electric Company, Russell City Energy Company, LLC, Division of Ratepayer Advocates, California Unions for Reliable Energy, and The Utility Reform Network, are reasonable, consistent with the purposes of D.09-04-010, and in the public interest.

Conclusions of Law

1. The Commission should deny the Petition for Modification of D.09-04-010 filed on June 22, 2009 by Group Petitioners.

2. The Commission should approve the Petition for Modification of D.09-04-010, as modified by D.10-02-033, filed on April 15, 2010 by Pacific Gas and Electric Company, Russell City Energy Company, LLC, Division of Ratepayer Advocates, California Unions for Reliable Energy, and The Utility Reform Network in the form remaining after the cost recovery mechanism issue is removed.

ORDER

IT IS ORDERED that:

1. The Petition for Modification of Decision 09-04-010 filed by Group Petitioners is denied.

2. The Petition for Modification of Decision 09-04-010, as modified by Decision 10-02-033, filed by Pacific Gas and Electric Company, Russell City Energy Company, LLC, Division of Ratepayer Advocates, California Unions for

Reliable Energy, and The Utility Reform Network is approved, in the form remaining after the cost recovery mechanism issue is removed and as set forth in Attachment A.

3. Application 08-09-007 is closed.

This order is effective today.

Dated September 2, 2010, at San Francisco, California.

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

ATTACHMENT A
Modifications to D.09-04-010

Findings of Fact

4. The 1st Amendment to the 2nd APPA is a revision of the 2nd APPA ~~original~~
~~Power Purchase Agreement~~ executed by PG&E and RCEC that arose out of the PG&E's 2004 LTRFO process to acquire future capacity and ensure future reliability.
5. The Commission has previously determined the need for the project and ~~that~~ the 1st Amendment to the 2nd APPA will satisfy that new resource need.
6. PG&E and RCEC renegotiated the PPA because of unforeseen permit delays and unexpected cost increases which have delayed the RCEC project start and on-line dates by three ~~two~~ years.
7. An amendment to price from the original PPA and 2nd APPA is justified.
12. The 1st Amendment to the 2nd APPA provides an opportunity for PG&E's customers to receive 601 MW of power beginning in 2013, ~~2012~~, and PG&E elects to ~~not use the CAM/Energy Auction for this resource~~.

Conclusions of Law

2. The 1st Amendment to the 2nd APPA should be approved.

Ordering Paragraphs

2. PG&E is authorized to recover costs associated with the 1st Amendment to the 2nd APPA through its Energy Resource Recovery Account.

(END OF ATTACHMENT A)