Decision 11-05-049 May 26, 2011

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application of Pacific Gas and Electric Company for Approval of 2008 Long-Term Request for Offer Results and for Adoption of Cost Recovery and Ratemaking Mechanisms (U 39 E).	Application 09-09-021 (Filed September 30, 2009)

ORDER MODIFYING DECISION (D.) 10-12-050, AND DENYING REHEARING OF DECISION AS MODIFIED

I. SUMMARY

In Decision (D.) 10-12-050 (or "Decision"), the Commission approved a proposal for Pacific Gas and Electric Company ("PG&E") to acquire, via turnkey contract, the proposed new Contra Costa Generating Station in Oakley, California ("Oakley Project"), a 586 megawatt ("MW") natural gas-fired, combined cycle generating facility. The Decision assures PG&E full cost recovery of the costs of the plant in PG&E's retail electricity rates. In the Decision, the Commission denied a petition for modification of D.10-07-045 submitted by PG&E, and instead reviewed the request for approval as an application, and on this basis approved the project.

CAlifornians for Renewable Energy, Inc. ("CARE"), Community for a Better Environment ("CBE") and Sierra Club, The Utility Reform Network ("TURN"), and Division of Ratepayer Advocates ("DRA") timely filed applications for rehearing of the Decision. CARE also filed a related motion for leave to file confidential material.

In its rehearing application, CARE contends the following errors: (1) the Commission in issuing D.10-12-050 violated the Bagley-Keene Open Meeting Act ("Bagley-Keene Act") and Rule 15.2(a) of the Commission's Rules of Practice and

Procedure because the Commission changed the action that had been publicly noticed;[1] (2) the decision relied on facts that were not in the evidentiary record; (3) D.10-12-050 was prejudicial to other bidders in the long term request for offer ("LTRFO") and will erode the competitive market; (4) the Decision conflicts with D.07-12-052 in violation of Public Utilities Code section 1708;[2] (5) D.10-12-050 conflicts with D.10-07-045 regarding need; (6) the approval of the Oakley Project in a separate proceeding conflicts with D.09-10-17; and (7) D.10-12-050 conflicts with D.10-07-042 with respect to earlier projects approved. CARE filed a motion for leave to file confidential material referenced in its rehearing application.

TURN alleges the following in its application for rehearing: (1) Parties were denied due process by not being afforded any procedural rights for an application, including the filing of a protest and doing discovery; (2) D.10-12-050 violates Public Utilities Code section 311(e) and Rule 14.1(d) of the Commission's Rules of Practice and Procedure; (3) the Commission relied on facts not in the evidentiary record for the proceeding or any other proceeding; and (4) D.10-12-050 unlawfully modified D.07-12-052 in violation of section 1708 of the Public Utilities Code.

In their joint rehearing application, CBE & Sierra Club assert: (1) the Commission failed to satisfy the requirements of section 454.5(d), and made a determination of need for ratepayer-purchased power in 2016 without record evidence; (2) D.10-12-050 improperly reversed D.10-07-045; (3) the Commission violated the parties' due process rights allegedly by circumventing the application procedure and the scope of its current LTPP, using *sua sponte* powers it does not have.

DRA argues: (1) By converting the petition for modification into an application, the Commission denied the parties their legal due process rights to protest, to

[1] Subsequent references to rule are to the Commission's Rules of Practice and Procedure, unless otherwise specified.

[2] All subsequent section references are to the Public Utilities Code, unless otherwise noted.

object to the categorization and to be heard on the issues; (2) D.10-12-050 denied ratepayers their right to a statutory notice that their rates would increase under the new application; (3) approving the Oakley Project based on a new online date was unlawful; (4) the decision modified several Commission decisions (D.07-12-052, D.09-10-017 and D.10-07-042) without giving notice to parties in those proceedings; and (5) the Commission improperly relied on facts not in evidence.

Responses to the rehearing applications were filed by TURN, Western Power Trading Forum ("WPTF") and the Alliance for Retail Energy Markets ("AReM"), and PG&E. In its response, TURN supports the rehearing applications, and urges the granting of rehearing of the D.10-10-050 on the grounds set forth by the four applications for rehearing. (TURN's Response, pp. 2-3.) TURN also offers a correction to the procedural history leading to the issuance of the Decision that was presented in CBE and Sierra Club's application for rehearing. (TURN's Response, pp. 3-4.) In their joint response, WPTF and AReM support the granting of a rehearing. In its response, PG&E opposes the rehearing applications.

We have reviewed each and every allegation in the rehearing applications. We are of the opinion that that good cause has not been demonstrated for the granting of the applications for rehearing of D.10-12-050. Also, based on our review, we will modify the Decision to clarify the decision in the matter set forth below. Therefore, we deny rehearing of D.10-12-050, as modified.

II. DISCUSSION

A. Due Process allegations

1. The Commission did not violate the Bagley-Keene Act or Rule 15.2(a).

In its rehearing application, CARE contends that Commission violated the Bagley-Keene Act and Rule 15.2(a) of the Commission's Rules of Practice and Procedure because the Commission changed the action that had been publicly noticed.

(CARE's Rehrg. App., pp. 2-3 & 17-20.)[3] Specifically, CARE argues that the agenda notice on the Commission's Public Agenda was legally insufficient to adopt D.10-12-050. CARE's contention has no merit.

a. The legal requirements for an agenda notice are set forth in Government Code sections 1125(a) & (b), and implemented by the Commission in Rule 15.2(a).

In support of its Bagley-Keene argument, CARE cites to Government Code sections 11125(a) and 11125(b), and Rule 15.2(a).

Government Code section 11125(a) states: "The state body shall provide notice of its meeting to any person who requests that notice in writing. Notice shall be given and also made available on the Internet at least 10 days in advance of meeting. . . ." (Gov. Code, §11125. subd. (a).)

Government Code section 11125(b) provides: "The notice of a meeting of a body that is a state body shall include a specific agenda for the meeting containing a brief description of the items of business to be transacted or discussed." (Gov. Code, §11125, subd. (b).)

Rule 15.2(a) of the Commission's Rules of Practice and Procedure states: "At least ten days in advance of the Commission meeting, the Commission will issue an agenda listing the items of business to be transacted or discussed by publishing it, on the Commission's Internet website. The agenda is also available for viewing . . . at the Process Office." (Cal. Code of Regs., tit. 20, §15.2, subd. (a).)

[3] All subsequent references to CARE's rehearing application are to the public version.

b. The agenda notice for D.10-12-050 was legally adequate.

D.10-12-050 was a revised Alternate Proposed Decision ("APD") of Commissioner Bohn to the Proposed Decision ("PD"), and was Item #53a on the Commission's Public Agenda. The agenda notice for this alternate stated:

> **Item 53a** [9924] **ALTERNATE TO ITEM 9922**
>
> **PROPOSED OUTCOME:** Grants Pacific Gas and Electric Company's Petition for Modification of Decision 10-07-045 and, approves the purchase and sales agreement with Contra Costa Generating Station in Oakley, California for the generating facility known as the Oakley Project with one condition: that no ratepayer funds be expended on this contract prior to 2016.

(Commission's Public Agenda for December 16, 2010 Meeting, p. 55, emphasis in the original.)[4]

CARE argues that this agenda notice did not comply with the Bagley-Keene requirements. Specifically, CARE asserts that because the agenda notice for D.10-12-050 proposed that the petition for modification would be granted, and did not state that the petition would be treated as an application, the Commission violated the Bagley-Keene Act. Essentially, CARE's contention is that the Commission violated this law when the agenda notice did not reflect what was eventually adopted by the Commission, and a revised agenda notice regarding the denial of the petition for modification was not issued 10 days before the Commission meeting. (See CARE's Rehrg. App., pp. 2-3 & 17-20.)

We disagree with CARE's contention. The agenda notice was legally sufficient in that it "contain[ed] a brief description of the items of business to be

[4] An electronic copy of this agenda notice can be found on the Commission's website as follows: http://docs.cpuc.ca.gov/published/agenda/docs/3266.pdf

transacted or discussed," within the meaning of section 11125(a) of the Government Code. The agenda notice specified the approval of the revised Oakley Project, which states: "approves the purchase and sales agreement with Contra Costa Generating Station in Oakley, California for the generating facility known as the Oakley Project with one condition: that no ratepayer funds be expended on this contract prior to 2016." This was exactly what the Alternate, which became D.10-12-050, did. There is no legal error because the Decision denied the petition for modification, and then treated the request for approval as an application.

Nothing in the Bagley-Keene Act requires that the Commission's agenda notice must set forth the exact disposition, or limits the Commission from deviating procedurally in its disposition. There is no case law to the contrary, and CARE cites to none. The change on the disposition on the petition for modification did not alter the outcome – the approval of the Oakley Project – that was publicly noticed. Government Code section 11125(b) mandates that the agenda notice should be sufficient enough to give notice to the public as to the "business to be transacted or discussed." The agenda notice for D.10-12-050 gave proper notice of the "business to be transacted or discussed" – namely, the Alternate's intention to act on the PG&E's request for approval of the Oakley Project.

Since the agenda notice provided proper notice, the Commission did not have to issue another agenda notice for 10 days prior to the Commission meeting before adopting D.10-12-050. Thus, there was no violation of Government Code section 11125(b) nor Rule 15.2(a). Accordingly, CARE's contention of a violation of the Bagley-Keene Act and Rule 15.2(a) has no merit.

c. CARE's motion to recuse Commission Bohn lacked merit.

CARE tried to delay the vote on the Oakley Project by filing a motion to recuse Commissioner Bohn. (See CARE's Motion to Recuse Commissioner Bohn and Request for Continuance of December 16, 2010 Business Meeting Items 53 and 53A

("CARE's Motion to Recuse"), filed December 9, 2010.) The motion alleged that Commissioner Bohn had prejudged the outcome of the proceeding. CARE claims that the change in the Alternate from a grant to a denial of the petition for modification and an alleged violation of Bagley-Keene notice requirements demonstrate that he had "the kind of unalterably closed mind necessary to require recusal." (CARE's Motion to Recuse, pp. 4-5.)[5]

The standard of "unalterable closed mind" is one set forth in *Association of Nat. Advertisers, Inc. v. F.T.C.* ("*ANA*") (D.C. Cir. 1979) 627 F.2d 1151, 1170. This standard is usually applied in rulemaking proceedings involving motion to disqualify.[6] CARE appears to seek to apply this standard in this application proceeding.

The standard is as follows:

> "[A] Commissioner should be disqualified only when there has been a clear and convincing showing that the agency member has an unalterably closed mind on matters critical to the disposition of the proceeding. The 'clear and convincing' test is necessary to rebut the presumption of regularity." (*Id.*)

Based on the speculative facts alleged in the motion, and under the *ANA* standard, CARE's claims of prejudgment and bias have no merit. Merely because the procedural basis changed for the approval of the Oakley does not demonstrate grounds for recusal. Thus, CARE has failed to make a clear and convincing showing. To conclude otherwise would mean the recusal of any Commissioner who makes a change

[5] PG&E filed a response. (See *infra*.)

[6] Although this *ANA* case involved a rulemaking proceeding, the Commission has applied this "unalterably closed mind" test to application proceedings. (See *Application of Southern California Edison Company to Establish Marginal Costs, Allocate Revenues, And Design Rates – Order Denying Rehearing of Decision* (*D.) 09-08-028* [D.10-05-023] (2010) ___ Cal.P.U.C.3d ___, pp. 3-5 (slip op., reviewed granted in *Ames v. Public Util. Commission* (California Court of Appeal, Fourth Appellate District, Division 3) (Case No. G043087) and Oral Argument heard on April 22, 2011); *In the Matter of the Joint Application of Verizon Communications, Inc. ("Verizon") and MCI, Inc. ("MCI") to Transfer Control of MCI's California Utility Subsidiaries to Verizon, Which Will Occur Indirectly as a Result of Verizon's Acquisition of MCI [*D.06-04-075] (2006) __ Cal.P.U.C.3d ___, pp. 41-42 (slip op.).)

that was not exactly specified in the agenda notice, which include changes made in response to comments to the proposed decision or the alternate. This would be an illogical result.

D.10-12-050 does not dispose of the recusal motion. CARE's rehearing application makes note of this fact. (CARE's Rehrg. App., p. 3.) By not acting on the motion, CARE alleges that its due process rights have been violated. CARE fails to explain the legal basis for these rights. Accordingly, CARE's unspecified due process claims need not be addressed, and should be denied. (See Pub. Util. Code, §1732 [The rehearing application "shall set forth specifically the ground or grounds on which the applicant considers the decision or order to be unlawful."]; see also, Rule 16.1(c) [The rehearing application "must make specific references to the record and law."])

However, we will modify D.10-12-050 to dispose of this motion. The motion will be denied as without merit.

2. The due process claims under section 1708 arguments have no merit.

All four rehearing applications raise arguments that the Commission has unlawfully modified or acted inconsistent with various Commission decisions. Specifically, CARE claims that D.10-12-050 conflicts with D.07-12-052 in violation of section 1708. (CARE's Rehrg. App., pp. 13-14.) In its rehearing application, TURN raises a similar claim by alleging that the Decision unlawfully modifies D.07-12-052 in violation of section 1708. (TURN's Rehrg. App., pp. 5-6.) CBE and Sierra Club raise a similar argument by asserting that D.10-12-050 improperly reverses D.10-07-045. (CBE & Sierra Club's Rehrg. App., pp. 7-10.) DRA argues that the Decision modified several Commission decisions (D.07-12-052, D.09-10-017 and D.10-07-042) without giving notice to parties in those proceedings. (DRA's Rehrg. App., pp. 17-21.) CARE also contends that the approval of the Oakley conflicts with these same decisions, as well as D.10-07-045. (CARE's Rehrg. App., pp. 13-17.) These section 1708 arguments have no merit.

a. D.07-12-052, D. 09-10-017, D.10-07-042, and D.10-07-045 are decisions regarding the IOU's Long-Term Procurement Plans for the period 2007-2016.

The decisions cited in the rehearing applications involve the Long-Term Procurement Plans ("LTPP") of the investor-owned utilities ("IOUs"), including PG&E. All these decisions involve the LTPP for the period 2007-2016, and new capacity purchased by 2015.

In D.07-12-052, the Commission approved the three IOUs' LTPPs for the period 2007-2016.[7] This decision authorized PG&E to procure 800-1200 megawatts of new capacity by 2015. (*Id.* at p. 300. [Ordering Paragraph No. 4] (slip op.).)[8] In this same decision, PG&E was authorized to issue requests for offers ("RFOs") to obtain and execute long-term power purchase agreements ("PPAs") for this new capacity. (See *id.* at p. 300 [Ordering Paragraph Nos. 3 & 4] (slip op.); see also, D.10-12-050, pp. 2-3.) This number was subsequently increased to 928-1,328 MW to adjust for previously approved projects that were cancelled after D.07-12-052 was issued. (See D.10-12-050, pp. 2-3.)[9]

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[7] *Opinion Adopting Pacific Gas and Electric Company's, Southern California Edison Company's, and San Diego Gas & Electric Company's Long-Term Procurement Plans* ("*IOUs' LTTP Decision*") [D.07-12-052] (2007) ___ Cal.P.U.C.3d ___, affirmed in *Order Modifying Decision (D). 07-12-052*, and *Denying Rehearing of Decision, As Modified* [D.08-09-045] ___ Cal.P.U.C.3d ___, pp. 2 & 270 [Finding of Fact No. 1] (slip op.).)

[8] See also, *id.* at pp. 105, 277 [Finding of Fact No. 42], & 291 [Conclusion of Law No. 7].)

[9] D.10-07-042 indicates that PG&E's need was authorized by D.07-12-052 as 1,112 MW to 1,512 MW. (*Decision Approving One Power Purchase Agreement and Conditionally Approving Two Other Power Purchase Agreements* ("*Decision Involving Novation, Peakers Transaction, Tracy Transaction & Los Esteros Critical Energy Facility Transaction*") [D.10-07-042] (2010) ___ Cal.P.U.C.3d ___, at p. 46 (slip op.).) D.10-07-042 was affirmed in *Order Denying Rehearing of Decision (D.) 10-07-042* [D.10-12-063] (2010) ___ Cal.P.U.C.3d ___. The amount of needed new capacity changed from 800-1200 MW to 1,112 and 1,512 MW because two projects from PG&E's 2004 Request for Offer (amounting to 312 MW) were terminated. This amount was subsequently reduced to 928-1328 because of the 184 MW associated with the Mariposa project approved in D.09-10-017. (See *Decision on PG&E's 2008 Long-Term Request for Offer Results and*

(*footnoted continued on the next page*)

In D.09-10-017,[10] the Commission adopted an all-party Settlement Agreement, and approved the first LTPP agreement, resulting from PG&E's 2008 Long-Term Request for Offers ("LTRFO") for the period 2007-2016. The first LTPP agreement was between PG&E and Mariposa Energy Center ("Mariposa PPA") for 184 MWs. The Commission found that this quantity (184 MW) "reasonably contributes toward the range of need previously authorized in D.07-12-052. (*Id.* at p. 1, 5 [Finding of Fact No. 5], 14 [Conclusion of Law No. 3] (slip op.), 16 [Ordering Paragraph No. 2] slip op.).)

Among several matters it approved, the Commission in D.10-07-042[11] conditionally granted authority for PG&E to proceed immediately with the Tracy Transaction and the Los Esteros Critical Energy Facility Transaction, if PG&E's request for approval of the proposed Marsh Landing and/or Oakley Project was denied in A.09-09-021. (*Id.* at pp. 2, 56, 67 [Conclusion of Law No. 6], & 69-70 [Ordering Paragraph Nos. 2 & 3] (slip op.).) The Tracy and Los Esteros projects were part of the offers received by PG&E in response to its 2008 LTRFO. (See *id.* at pp. 38-39 (slip op.).) "The purpose of the latter two projects [was] not to fill the need authorized by D.07-12-052, but to hedge the risk that other projects [would] fail or be delayed significantly." (*Id.* at p. 4 (slip op.).) Only if there were an unfilled need authorized by D.07-12-0252 would these two projects be reconsidered, upon PG&E's resubmittal in an advice letter filing. (*Id.* at p. 57 (slip op.).)

(*footnote continued from the previous page*)

Adopting Cost Recovery and Ratemaking Mechanisms ("*PG&E's 2008 LTRFO Decision*") [D.10-07-045] (2010) ___ Cal.P.U.C.3d ___, at p. 23 (slip op.).)

[10] *Decision Adopting All-Party Settlement Agreement Regarding Pacific Gas and Electric Company's Request for Power Purchase Agreement with Mariposa Energy, LLC* [D.09-10-017] (2009) ___ Cal.P.U.C.3d ___.

[11] *Decision Involving Novation, Peakers Transaction, Tracy Transaction & Los Esteros Critical Energy Facility Transaction* [D.10-07-042], *supra*.

In D.10-07-045,[12] the Commission granted, in part, the application PG&E for approval of its 2008 Long-Term Request for Offers ("LTRFO") results and adopted a cost recovery and ratemaking mechanism related to this approval. (*Id.* at p. 2 (slip op.).) D.10-07-045 approved PG&E's Marsh Landing, Contra Costa 6 & 7, and Midway Sunset procurement agreements.

Importantly, D.10-07-045 denied the Oakley Project, finding it was not needed for PG&E's procurement need for the period 2007-2016. (*Id.* at p. 2, 54 [Conclusion of Law Nos. 12-13] (slip op.).)[13] The decision further approved a multi-party settlement that provided for cost recovery associated with the approved procurement. (*Id.* at p. 2 (slip op.).) PG&E's LTRFO was conducted consistent with the requirements set forth in D.07-12-052. (See *id.* at pp. 18-21 (slip op.).)

b. D.10-12-050 did not unlawfully modify or act inconsistent with any previous Commission decisions.

The rehearing applications argue that D.10-12-050 violated section 1708 by modifying D.07-12-052, D.09-10-017, D.10-07-045, and D.10-07-045, without notice

[12] *PG&E's 2008 LTRFO Decision* [D.10-07-045], *supra*. An application for rehearing of this decision was filed by CARE, and later withdrawal. (See *Order Dismissing Application for Rehearing of Decision (D.) 10-07-045* [D.10-09-019] (2010) ___ Cal.P.U.C.3d ___.)

[13] Although it denied the Oakley Project, the Commission observed:

> "Though we deny the Oakley Project at this time, we understand that developing and building a power plant in California is a long process, fraught with pitfalls. Given this risk and the fact that we believe this plant has numerous beneficial attributes, PG&E may resubmit the Oakley Project, via application, for Commission consideration under the specific conditions. . . ."

(*Id.* at pp. 40-41 & 54 [Conclusion of Law No. 14] (slip op.).) These conditions included an open need created if another approved project or projects failed; a retirement of an OTC plant at least 3 years ahead of schedule; or significant negative reliability risks from integrating a 33% Renewable Portfolio Standard, as demonstrated by he CAISO Renewable Integration Study. (*Id.*)

and opportunity to be heard, or acted inconsistent with these decisions. Their arguments are without merit.

Section 1708 provides:

> The [C]ommission may at any time, upon notice to the parties, and with opportunity to be heard as provided in the case of complaints, rescind, alter, or amend any order or decision made by it. Any order rescinding, altering, or amending a prior order or decision shall, when served upon the parties, have the same effect as an original order or decision.

(Pub. Util. Code, §1708.)

Contrary to the arguments of the rehearing applicants, D.10-12-050 does not modify or act inconsistent with these cited decisions, which involve PG&E's LTPP for the period 2007-2016. In fact, the Decision denies PG&E's petition for modification of D.10-07-045, so that the revised Oakley Project was not considered authorized for PG&E's LTPP for this time period. (See generally, D.10-12-050, pp. 7-8.) Thus, the Commission did not modify D.10-07-045. Rather, the Commission considered approval of the Oakley Project for 2016 and beyond, and not for the purpose of the need authorized in D.07-12-052 for PG&E's procurement by 2015. (See *id.* at p. 12 (slip op.).) Thus, the need for new capacity authorized in D.07-12-052 has not been changed. (D.10-12-050, p. 12.) As stated in the Decision: "This decision does not modify our determination in D.07-12-052, or reflect any determination that PG&E's immediate need for new capacity has changed." (D.10-12-012, p. 12.) D.10-12-050 does not change the conditional approval of the Tracy and Los Esteros Projects in D.10-07-042, or the approval of the Mariposa PPA in D.09-12-017.

Therefore, since the Commission did not "rescind, alter, or amend" any of these decisions cited in the rehearing applications, or act inconsistent with these decisions, section 1708 does not apply. Accordingly, the rehearing applicants' arguments based on a violation of this statute are without merit.

However, we will modify D.10-12-050 to remove the following statement: "For these reasons, we will approve the revised Oakley Project despite the fact that this authorization will result in PG&E's procurement of generation capacity in excess of the range of need established by the Commission in D.07-12-052." (See D.10-12-050, p. 12.) This statement appears to be inconsistent with the next sentence in the Decision, which states: "This decision does not modify our determination in D.07-12-052, or reflect any determination that PG&E's immediate need for new capacity has changed." (See D.10-12-050, p. 12.) We will also modify the Conclusion on pp. 12-13 accordingly.

3. The due process challenges to the Commission's treatment of PG&E's approval request, sua sponte, as an application are not valid.

TURN argues that the parties were denied due process by not being afforded any procedural rights for an application, including the filing of a protest and doing discovery. (TURN's Rehrg. App., pp. 5-7.) CBE and Sierra Club raises a similar argument, by their asserting that Commission violated the parties' due process rights when the Decision circumvented the application procedure and the scope of its current LTPP, using sua sponte powers it does not have. (CBE & Sierra Club's Rehrg. App., pp. 10-15.) DRA raises a related issue, alleging that the approval of the Oakley Project based on a new online date was unlawful, because this date was beyond the scope of the initial proceeding and the new application was not scoped. (DRA's Rehrg. App., pp. 13-17.) DRA also argues that D.19-12-050 committed legal error by approving an application that had the very same defects as the petition for modification that the Commission denied. (DRA's Rehrg. App., pp. 16-17.)

a. The Commission had the authority to treat PG&E's request for approval of the Oakley Project, sua sponte, as an application.

In their application for rehearing, CBE and Sierra Club argue that the Commission lacks the authority to treat PG&E's request for approval, sua sponte, as an

application, while rejecting the petition for modification. (CBE & Sierra Club's Rehrg. App., pp. 10-11.) This argument lacks merit.

The Commission has broad constitutional and statutory authority to establish its own procedures, including those for handling proceedings. The California Constitution provides: "Subject to statute and due process, the [C]omission may establish its own procedures." (Cal. Const., art. XII, §2.) Section 1701 permits the Commission to determine its rules and procedures. (Pub. Util. Code, §1701, subd. (a).) This statutory section also states: "No informality in any hearing, investigation, or proceeding, or in the manner of taking testimony shall invalidate any order, decision or rule made, approved, or confirmed by the [C]omission." (Pub. Util. Code, §1701, subd. (a).)

Further, section 701 provides: "The [C]omission may supervise and regulate every public utility in the State and may do all things, whether specifically designated in this part or in addition thereto, which are necessary and convenient in the exercise of such power and jurisdiction. (Pub. Util. Code, §701.) "Additional powers and jurisdiction that the [C]omission exercises, however, 'must be cognate and germane to the regulation of public utilities. . . . .' [Citations omitted.]" (*Consumers Lobby Against Monopolies v. Public Utilities Com.* (1979) 25 Cal.3d 891, 905-096.) Where `the authority sought is 'cognate and germane' to utility regulation, the [Commission's] authority under section 701 has been liberally construed. [Citations omitted.] (*PG&E Corp. v. Public Utilities Com.* (2004) 118 Cal.App.4th 1174, 1198.) The only limitation for the exercise of its broad regulatory authority is that the Commission may not exercise its powers "contrary to other legislative directives, or expressed restrictions placed upon the Commission's authority by the Public Utilities Code." (*Assembly v. Public Utilities Com.* (1995) 12 Cal.4th 87, 103 [Decisions annulled because the Commission exceeded its authority by failing to comply with section 453.5, in not returning refunds to ratepayers].)

Based on our powers to define the procedures it would use for the request for approval of the Oakley Project, and to all things necessary and convenient, we have the authority to treat the request for approval of the Oakley Project as an application, while denying the petition for modification. The sua sponte treatment of PG&E's request as an application was not contrary to any express law. Thus, we acted lawfully, including meeting all the necessary due process requirements for an application, as discussed below.

Moreover, as an implementation of section 1701, Rule 1.2 permits the Commission to deviate from its procedural rules "to secure just, speedy, and inexpensive determination of issues presented." (Cal. Code of Regs., tit. 20, §1.2.) This rule also states: "In special cases and for good cause shown, the Commission may permit deviations from the rules." (Cal. Code of Regs., tit. 20, §1.2.)

Here, "due to the opportunities and benefits associated by the project," the Commission decided to consider the request for approval of the Oakley Project as an application. (D.10-12-050, p. 8.) After observing the "merits of the operational characteristics, viability and the costs and benefits of the Oakley Project have already been thoroughly litigated," the Commission concluded that it "must act now to guarantee its construction." (D.10-12-050, p. 10.) Further, the Commission mentioned the "substantial risk for capacity shortfalls" for not considering the Oakley Project and letting time lapse. (D.10-12-050, p. 12.) Consequently, there was good cause shown for the Commission to consider the approval as an application, sua sponte, while rejecting the petition for modification on procedural vehicle grounds.[14]

[14] Interestingly, some of the same parties who now challenge the Commission's action in their respective requests for rehearing themselves advocated for an application process for the petition for modification. For example, TURN argued that PG&E had employed the incorrect procedural vehicle for bringing the Oakley Project lack for Commission consideration. (TURN's Response to PG&E's Petition for Modification, filed September 22, 2010, p. 2.) DRA also acknowledged: "The only way the Oakley Project in the [petition for modification] could be disassociated from the Oakley Project denied in D.10-07-045 is by PG&E filing a new Application, even if on the same conditions set forth in

(*footnoted continued on the next page*)

b. The Commission did not act beyond the scope of the proceeding when it concluded need for the Oakley Project for the period 2016 and beyond.

CBE and Sierra Club argue that the petition for modification was not an application within the meaning of the Commission Rules, which must be followed to afford due process. Thus, they argue that the Commission failed to follow its own rules for an application. (See generally, CBE & Sierra Club's Rehrg. App., pp. 10-15.) Specifically, they criticize the Commission for not making a determination of whether there should be an evidentiary hearing. (CBE & Sierra Club's Rehrg. App., p. 11.) Further, these rehearing applicants argue that there should have been a categorization of the proceeding, and a schedule for considering the matter. (CBE & Sierra Club's Rehrg. App., p. 11.) They contend that the Commission in accordance with the normal procedures for a new application erred because the petition for modification failed to contain information required of an application. (CBE & Sierra Club's Rehrg. App., pp. 12-13, citing to Rule 3.1 for the construction or extension of facilities.)[15] They argue:

> [The petition for modification] did not make a showing of public convenience and necessity justify[ing] construction, . . . , or articulate the annual cost of operation for the "new" start and end dates of operation It did not provide evidence that Contra Costa LLC and PG&E are capable of financing the

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(*footnote continued from the previous page*)

the [petition for modification]. This was why D.10-07-045 stated that the conditions for resubmitting the Oakley Project must be presented 'via application'." (DRA's Opening Comments to Bohn Alternate, filed November 22, 2010, p. 13.) Thus, when we decided to treat the petition for modification as an application, we were essentially responding to these recommendations, although determining that a new application to be filed in a separate proceeding from
A.09-09-021.

[15] CBE and Sierra Club also raise an issue of required environmental review under the application process. (CBE & Sierra Club's Rehrg. App., p. 11.) However, such a review by the Commission is not required because the California Energy Commission has jurisdiction over the siting and environmental review of thermal power plants, such as the Oakley Project.

> plant with a new delivery date. It did not provide three year load and generation capacity for the three year period relevant to the "new" application.

(CBE & Sierra Club's Rehrg. Application, p. 13.) Further, they assert they were denied due process because they were given only 3 days to comment on the Revised Alternate Proposed Decision of Commissioner Bohn ("Revised Bohn Alternate"). (CBE & Sierra Club's Rehrg. App., pp. 14, citing to *Southern California Edison Co. v. Public Utilities Com.* ("*Edison*") (2006) 140 Cal.App.4th 1085.) CBE and Sierra Club contend that the Commission acted outside the its scoping memo and long term procurement process, where PG&E should have filed an application for a 2016 start date in the 2010 LTPP. (CBE & Sierra Club's Rehrg. App., p. 14.)

DRA concurs with CBE and Sierra Club's allegations of error. DRA also argues that approving a new online date for the Oakley Project was beyond the scope of the proceeding, and the new application was not scoped. (DRA's Rehrg. App., pp. 13-14.) DRA alleges: "The elements of an application and the process used to consider the application in a proceeding are completely different from those of a [petition for modification.] Thus, none of the opportunities provided for hearing on the [petition for modification] can be considered as providing a party with the opportunity to respond to the new application." (DRA's Rehrg. App., p. 4.)

PG&E's request for approval in the petition for modification defined the scope of the proceeding. More particularly, PG&E sought approval of the Oakley Project based on the record provided in of the application, A.09-09-021. The extension of the commencement date from 2014 to 2016 was the only change sought by PG&E. Thus, the scope of the proceeding remained the same.

At the heart of this debate is whether treating the approval of the Oakley Project (with a 2016 commencement date) as an application somehow altered the scope of the proceeding. In terms of the attributes (e.g., commercial viability, renewable integration capabilities, reduction of GHG, and effects of regulatory lag), the answer is

no. (See Assigned Commissioner's Ruling and Scoping Memo, filed February 1, 2010, p. 8; PG&E's Petition to Modify, filed August 23, 2010, pp. 1-3.) The issue, therefore, is whether, in granting PG&E's request for approval of the Oakley Project with a 2016 commencement date rather than the originally proposed 2014 commencement date, the Commission impermissibly expanded or altered the scope of the proceeding. We believe that we acted lawfully.

The essential facts and issues in this case are identical in all respects but one with the facts and issues in the earlier proceedings concerning the Oakley Project. The Commission decision now under challenge involves the exact same power plant, with the same physical capacity and the same operational characteristics, in the same geographic location and the same point of interconnection with the grid. Literally only one fact has changed, and that is the commencement date for PG&E's acquisition of the plant – from 2014 to 2016.

CBE and Sierra Club cite to *Edison*, *supra*, 140 Cal.App.4th 1085, in support of their argument. *Edison* involved a rulemaking initiated by the Commission in September 2003 on the subject of bidding practices for utility capital projects. The focus of the rulemaking was on abusive practices by prime contractors on capital projects, specifically, "bid shopping" and "reverse auctions." More than a year later, in October 2004, as the proceeding was nearing its conclusion, a labor organization submitted late-filed comments (with over 400 pages of supporting materials), urging the Commission to adopt a rule requiring labor agreements for such projects to include provisions assuring that "prevailing wages" would be paid to workers. The utility companies objected to the adoption of such rules on several grounds, including the argument that the question of prevailing wages was outside the scope of the rulemaking, and the fact they were given only three business days to respond. The Commission summarily overruled their concerns and adopted the prevailing wage rule urged by the unions. The utilities then challenged the rule on judicial review, and the Court of Appeal agreed. The court annulled this portion of the Commission order.

We believe that the instant case is readily distinguishable from *Edison*. In this case, the scope of the question at issue is whether the Oakley Project should be approved and the costs authorized for recovery from PG&E's ratepayers. All of the facts and arguments about this question were fully aired in the earlier proceedings before the Commission. The only difference now, upon the filing of the petition for modification by PG&E – and its consideration by the Commission as an application – is whether the Oakley Project should be approved with a new in-service date, namely, January 1, 2016. In the prior proceedings, the focus was on an in-service date two years earlier, namely, January 1, 2014. We do not believe this change, to a later commencement date for PG&E's acquisition of the plant, standing alone, is not enough to invalidate the Commission's action under the rationale of the foregoing *Edison* case.

CBE and Sierra Club also rely on the *Edison* case to support their allegation that three days to respond to the Revised Bohn Alternate was legally insufficient. In the *Edison* case, the Court determined that "[t]hree business days was insufficient time for the parties to comment on the issues raised by the proposals for prevailing wages, including issues of public policy, economic effects, legal implications, and effective administration and implementation of the proposed new rules." (*Edison*, *supra*, 140 Cal.App.4th at p. 1106.) *Edison* involved a new proposal with over 400 pages of material.

Here, in contrast, the dispute centers on a proposal by Commissioner Bohn decision to treat PG&E's petition for modification as an application – a different procedural vehicle, to be sure, but with the exact same substantive content, namely, a proposal to approve the Oakley Project with a commencement date of January 1, 2016. The parties were afforded three days within which to file comments on this procedural proposal, which appeared in the Revised Bohn Alternate, and they took advantage of the opportunity. (See Joint Comments of TURN, AReM and WPTF in Opposition to the Revised Bohn Alternate, filed December 14, 2010; CBE Comments Regarding Bohn Alternate, filed December 14, 2010; DRA's Comments on the Revised Bohn Alternate, filed December 14, 2010; and CARE's Comments on the Revised Bohn Alternate, filed

December 14, 2010.) These facts are distinguishable from the facts in the *Edison* case, which involved an entirely new substantive proposal introduced at the eleventh hour along with 400 pages of supporting materials. The parties to the instant case were afforded adequate notice and an opportunity to be heard concerning the proposed conversion of PG&E's petition for modification into an application, as presented in the Revised Bohn Alternate. The parties took the opportunity to file comments, and so they were heard on the revisions.

Therefore, the assertions, alleging that the Commission has acted outside the scope of the proceeding and related due process issues have no merit. Thus, we deny rehearing on these issues.

c. The facts generally show that the parties were afforded their procedural rights.

In its rehearing application, TURN argues that the Commission impermissibly failed to afford the procedural rights that are normally afforded to parties in an application proceeding. (TURN's Rehrg. App., pp. 2-3.) Specifically, TURN argues that when the Commission treated the request as an application, it denied TURN its rights to file a protest or to request evidentiary hearings, or even to state the facts that it would have presented at such a hearing. (TURN's Rehrg. App., p. 3.)

DRA raises similar issues in its rehearing application.[16] Specifically, DRA argues that it was denied its right to protest, and thus, was prevented from performing its statutory obligations on behalf of ratepayers to ensure customers pay the lowest possible rates consistent with reliable and safe service levels. (See generally, DRA's Rehrg. App., pp. 6-9.) DRA also argues that there was no litigation of the operational attributes of the

[16] DRA also raises the argument that section 454(a) required statutory notice of rate increase under the new application. (DRA's Rehrg. App., pp. 12-13.) This argument has no merit, because D.10-12-050 does not approve any rate increase. Rather it merely approved a cost allocation. (See Pub. Util. Code, §454 [ratepayer notice is not required if "the change is only reflecting and passing through to customers only new costs . . . ."])

Oakley Project with a new online date of 2016. (DRA's Rehrg. App., p. 9.) DRA claims that the parties were denied their right to object to the categorization, and to evidentiary hearing on the issues. (DRA's Rehrg. App., pp. 9-12.)

We disagree that the parties were denied an opportunity to file protests, to conduct discovery, to object to categorization, and to request evidentiary hearing. As discussed above, PG&E's request for approval in the petition for modification defined the scope of the proceeding. In particular, PG&E sought approval of the Oakley Project based on the record provided in of the application, A.09-09-021, plus the additional declaration accompanying the Petition for Modification.

As to the attributes of the Oakley project in A.09-09-021, the parties were afforded an opportunity to file protests, and the following parties did file protests or responses to the application filed by PG&E on September 30, 2010: CARE, Pacific Environment, TURN, CBE, Sierra Club, California Municipal Utilities Association, and DRA. The Responses to the Petition for Modification were in the nature of protests. The following parties filed responses on September 22, 2010: DRA, WPTF and AReM (jointly), CCUE and CURE (jointly), and TURN.

Discovery in the form of data requests was allowed. (See e.g. Exh. 12 through Exh. 29 (PG&E's responses to DRA's data requests); Exh. 44 through 46-C (PG&E's responses to TURN's data requests); Exh. 47 through 69 (PG&E's Response to CARE's data requests.) Written Testimony was submitted by PG&E, DRA, TURN, CCUE and CURE, Pacific Environment, and CARE. (See List of Exhibits for A.09-09-021; see also CBE & Sierra Club's Rehrg. App., p. 13, acknowledging that in A.09-09-021, PG&E "submitted an application along with written testimony," and that "[m]any parties intervened, participated in discovery, all-party meetings, and settlement negotiations, and submitted comments and briefs.")

The categorization of the proceeding, A.09-09-021, did not change. The proceeding was categorized as needing evidentiary hearing, and such a hearing was set. However, no evidentiary hearing took place, because, after the parties served their written

testimony, the parties agreed that evidentiary hearings were not necessary. The written testimony was admitted into the record pursuant to Rule 13.8.[17] (See D.10-07-045, p. 4 (slip op.).)[18] In their responses to the Petition for Modification, no party required an evidentiary hearing. There was no new Scoping Memo requested. Thus, the Commission reasonably could conclude that there was no need for an evidentiary hearing based on the parties' previous waiver of such a hearing for the attributes of the Oakley Project.

Accordingly, the facts show that the parties were afforded their procedural rights. Thus, we deny rehearing of these due process allegations.

4. D.10-12-050 is consistent with section 311(e) and Rule 14.1(d).

TURN asserts that D.10-12-050 violates Public Utilities Code section 311(e) and Rule 14.1(d) of the Commission's Rules of Practice and Procedure. (TURN's Rehrg. App., pp. 3-4.) TURN's assertion has no merit.

Public Utilities Code section 311(e) provides:

> Any item appearing on the commission's public agenda as an alternate item to a proposed decision or to a decision subject to subdivision (g) shall be served upon all parties to the proceeding without undue delay and shall be subject to public review and comment before it may be voted upon. For purposes of this subdivision, "alternate" means either a substantive revision to a proposed decision that materially

[17] Rule 13.8 prescribes how prepared written testimony may be admitted into the evidence in lieu of oral testimony. (Cal. Code of Regs., tit. 20, §13.8.)

[18] In another application proceeding, the Commission considered the transactions approved in D.10-07-042 without evidentiary hearings. These transactions included the novated agreements and the Peakers Transaction. D.10-07-042 also conditionally approved the Tracy and Los Esteros Transactions. (See D.10-07-042, *supra*, at p. 2 (slip op.). D.10-07-042 involved A.09-10-022 and A.09-10-034. During the proceeding, the parties submitted written testimony that was admitted under Rule 13.8, which formed the basis of the record. Although the Scoping Memo provided for an evidentiary hearing in A.09-09-021, none was requested. (*Id.* at pp. 3-4 (slip op.).)

> changes the resolution of a contested issue or any substantive addition to the findings of fact, conclusions of law, or ordering paragraphs. The commission shall adopt rules that provide for the time and manner of review and comment and the rescheduling of the item on a subsequent public agenda, except that the item may not be rescheduled for consideration sooner than 30 days following service of the alternative item upon all parties. The alternate item shall be accompanied by a digest that clearly explains the substantive revisions to the proposed decision. The commission's rules may provide that the time and manner of review and comment on an alternate item may be reduced or waived by the commission in an unforeseen emergency situation.

(Pub. Util. Code, §311, subd. (e).) Rule 14.1(d) provides:

> "Alternate" means a substantive revision by a Commissioner to a proposed decision or draft resolution not proposed by that Commissioner which revision either:
>
> (1) materially changes the resolution of a contested issue, or
>
> (2) makes any substantive addition to the findings of fact, conclusions of law, or ordering paragraphs.

(Cal. Code of Regs., tit. 20, §14.1, subd. (d).)

By citing to section 311(e) and Rule 14.1(d), TURN is essentially arguing that the revisions made to the Bohn Alternate, which became D.10-12-050, transformed it into a separate alternate that should have been issued for comment for 30 days.[19] This argument has no merit.

The revision did not transform the Revised Bohn Alternate into a new "alternate" within the meaning of section 311(e) and Rule 14.1(d). The revisions did not materially alter the Bohn Alternate's resolution of the contested issue – whether to approve or not approve the revised Oakley Project. The revision did not materially

[19] The Revised Bohn Alternate was posted on the Commission's website on December 9, 2010.

change the Bohn Alternate's approval of the project. The revision did not substantively alter any findings of fact, conclusions of law, or ordering paragraphs regarding the approval proposed by that alternate. Rather, the revision rejected the PG&E's Petition for Modification as being an improper procedural vehicle for this project's approval. (See Revised Bohn Alternate, pp. 7-8.)

This revision was made to address the issue raised in some of the comments regarding whether a petition for modification of D.10-12-045 was the appropriate vehicle for PG&E's request for approval of the Oakley Project, or whether an application was required. (See PG&E's Reply Comments in Support of Bohn Alternate, filed November 29, 2010, p. 5; see also, CARE's Comments on PD, filed November 22, 2011, p. 6, citing D.10-07-045, p. 55 [Ordering Paragraph No. 4] [ordering that PG&E could resubmit the Oakley Project, via application, if certain conditions were met]; CBE's Reply Comments Regarding PD and Bohn Alternate, filed November 24, 2010, p. 3 [discussing the petition for modification as an "application" or "re-application" permitted by D.10-07-045, if certain conditions were met].)

The revision in the Bohn Alternate was responsive to comments on the issue of whether the PG&E's request for approval of the Oakley Project should have been by a petition for modification or an application.[20] This is demonstrated by the fact that the Bohn Alternate was revised to reject the petition for modification as an improper procedural vehicle to seek project approval. (See Revised Bohn Alternate, p. 8; see also, D.10-12-050, p. 8.) The Revised Bohn Alternate further noted that the request should have been made in an application as specifically instructed by the Commission in D.10-07-045. (Revised Bohn Alternate, p. 8.) Accordingly, the Revised Bohn Alternate

[20] In response to TURN's comments, the Revised Bohn Alternate also removed the possibility that PG&E could assume ownership before January 1, 2016. (See Revised Bohn Alternate, p. 13; TURN's Comments in Support of the PD and Opposition of Bohn Alternate, filed November 22, 2010, pp. 7-8; see also, WPTF and AReM's Comments to the PD and Bohn Alternate, filed November 22, 2010, p. 5 [raising an issue about costs to ratepayers pre-2016 start date].)

considered the PG&E's request for approval of the Oakley Project, sua sponte, as an application.[21]

Because the revisions were made in consideration of the comments filed on the Bohn Alternate, the Revised Bohn Alternate was not transformed into an alternate of the original alternate. In implementing section 311(e), Rule 14.1(d) provides:

> A substantive revision to a proposed decision or draft resolution is not an "alternate" if the revision does no more than make changes suggested in prior comments on the proposed decision or draft resolution, or in a prior alternate to the proposed decision or draft resolution.

(Cal.Code of Regs., tit. 20, §14.1, subd. (d).) Accordingly, the Revised Bohn Alternate was not an "alternate" within the meaning of section 311(3) or Rule 14.1(d). Thus, the TURN's argument under these provisions has no merit.

We noted that several parties filed comments to the revisions in Bohn Alternate. (See Joint Comments of TURN, AReM and WPTF in Opposition to the Revised Bohn Alternate, filed December 14, 2010; CBE Comments Regarding the Revised Bohn Alternate, filed December 14, 2010; DRA's Comments on the Revised Bohn Alternate, filed December 14, 2010; and CARE's Comments on the Revised Bohn Alternate, filed December 14, 2010.) Thus, the parties to the proceeding had notice of the Revised Bohn Alternate, and took the opportunity to file comments and make their views known on the matter.

B. The evidentiary record supports the Commission's basis for approving the Oakley Project.

In their applications for rehearing, CARE, DRA and TURN assert that the Decision unlawfully relied on facts that were not in the evidentiary record. (CARE's Rehrg. App., pp. 6-9; DRA's Rehrg. App., pp. 21-22; TURN's Rehrg. App., pp. 4-5.)

[21] The issue of whether the Commission had authority to treat the petition for modification as an application, sua sponte, is discussed *infra*.

Despite this characterization, what these parties really appear to be arguing is that there is legally inadequate evidence in the record to support the Commission's determination in approving the Oakley Project.

Specifically, DRA asserts that the Decision must have relied on evidence outside the record to support Finding of Fact Nos. 3 and 7, because there is no evidence in the record. (DRA's Rehrg. App., pp. 21-22.) These findings relate to financing for the project. (DRA's Rehrg. App., pp. 21-22.) Finding of Fact No. 3 states: "Oakley is a highly viable project if the Commission acts today. Financing for this project may no longer be available if the project is not approved in 2010." (D.10-12-050, p. 14.) Finding of Fact No. 7 states: "Oakley reduces the risk that California will have an insufficient supply of generating resources due to lack of available financing for capital projects and regulatory lag." (D.10-1-050, p. 14.) TURN makes the same challenge to these findings. (TURN's Rehrg. App., pp. 4-5.)

Although it characterizes its argument as the Decision's reliance "upon facts not in evidence in the record," CARE is arguing that the record does not support the Commission's determination in D.10-12-050. CARE focuses on the Commission's determinations regarding the viability of the Oakley Project. (See generally, CARE's Rehrg. App., pp. 6-9.)[22] Specifically, CARE attacks the statement: "The Commission recognized that the Oakley Project is uniquely viable because it has nearly completed the permitting process." (CARE's Rehrg. App., p. 9, citing D.010-12-05, p. 9.)[23] In the

[22] CARE also raises issues regarding viability in a manner that asks the Commission to reweigh the evidence in the record. For example, CARE cites to PG&E's testimony to support its claim that the Oakley Project was not viable. (See CARE's Rehrg. App., pp. 6-9.) Thus, this argument constitutes an attempt to relitigate the viability issue. Relitigation does not constitute an allegation of legal error for a rehearing application. (See Pub. Util. Code, §1732 [The application for a rehearing shall set forth specifically the ground or grounds on which the applicant considers the decision or order to be unlawful]; see also, Rule 16.1(c), Cal. Code of Regs., tit. 20, §16.1, subd. (c) ["The purpose of an application for rehearing is to alert the Commission to a legal error,
. . . ."].) Accordingly, CARE's attempt to relitigate this issue should be denied.

[23] CARE defends this argument by citing to a statement made at the California Energy

(*footnoted continued on the next page*)

context of viability, CARE also challenges Finding of Fact No. 3, which states: "Oakley is a highly viable project if the Commission acts today," and the following statement in D.10-09-050: "It is anticipated that the opportunity to bring this project to fruition will be lost, due to financing concerns, if this project is not approved in 2010."[24] (CARE's Rehrg. App., pp. 6-9.)

Similarly, in their rehearing application, CBE & Sierra Club challenge the record basis for Finding of Fact Nos. 3, 8 and 9, as well as Finding of Fact No. 10. (CBE & Sierra Club, Rehrg. App., p. 9.) Most of these findings of fact concern project viability, and a shortfall in power plant capacity due to a regulatory lag.

The Commission's reasons for approving the Oakley Project were as follows:

- The Oakley Project would allow for renewable integration by providing load following capabilities. Specifically, its combination of this generation attribute with a low heat rate is uncommon in the current generation fleet. (D.10-12-050, pp. 8-10 & 14.)

- There is a need for plants capable of integrating intermittent renewal resources, and the Oakley Project has those unique operational attributes. It will also displace older, less efficient plants, thereby reducing California's GHG emissions. (D.10-12-050, pp. 8-10 & 14.)

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Commission ("CEC") on December 3, 2010 (see CARE's Rehrg. App., p. 9.) The Commission should not consider this evidence in disposing of the rehearing applications.

[24] CARE defends this claim by citing from the transcripts for the CEC Proceeding on December 7, 2010. (CARE's Rehrg. App., pp. 9-11, citing to Reporter's Transcript, Mandatory Scheduling Conference for CEC Proceeding on December 7, 2010.) Again, CARE attempts to support its claim by citing to evidence outside the record. The Commission should not consider this evidence in disposing of the rehearing applications.

- The Oakley Project would allow for the retirement of older, less efficient plants, helping California to meet its increasingly stringent GHG reduction goals. (D.10-12-050, pp. 8, 10, 14.)

- The Oakley Project was highly viable if the Commission acted immediately. The Commission expected that the financing available for the project would no longer be available if the project was not approved in 2010. (D.10-12-050, pp. 8-10, 14 [Finding of Fact No. 3].)

- The Oakley Project reduces risk that California will have an insufficient supply of generating resources due to lack of available financing for capital projects and regulatory lag. (D.10-12-050, pp. 9, 11-12, & 14 [Finding of Fact No. 7].)

- Because it was likely that California would need to bring additional projects such as the Oakley Project on-line, it was worth the risk of short-term over procurement to ensure that resources such as the Oakley Project were available in the longer-term, requiring that the Commission acted now so that it would be operational by 2016. (D.10-12-050, pp. 9.)

- Because there has been no updated LTPP needs determination since D.07-12-052, there is a risk of capacity shortfall in 2016 and beyond, which the Oakley Project would help mitigate. (D.10-12-050, p. 9 & 14 [Finding of Fact Nos. 9 & 10].)

The foregoing determinations are reasonably supported by evidence in the record. The evidence is as follows:[25]

- PG&E provided evidence that there is a need for plants capable of integrating intermittent renewable resources, and the Oakley Project has those unique operational attributes. This evidence also shows that the project will also displace older, less efficient plants, thereby reducing California's GHG emission. (See

[25] All citation to the evidence is to the public version, unless otherwise noted.

generally, PG&E's Reply Testimony (Monardi & Alvarez), dated March 10, 2010, pp. 16-22; see also, PG&E Application, A.09-09-021, dated September 29, 2009, pp. 5 & 13.)

- In his rebuttal testimony, David Marcus, witness for Coalition of California Utility Employees and California Unions for Reliable Energy ("CCUE & CURE"), testified:

> "[T]he only power plants whose output would be reduced by Oakley would be other fossil-fired thermal plants. And because of its low heat rate, and the fact that it will be subject to bidding into the ISO, we can be sure that the thermal plants displaced by Oakley when it runs will be plants with higher heat rates. Thus, the net effect of Oakley will be a reduction in greenhouse gas emissions due to reduced generation and emissions at other thermal power plants."

(Exh. 301: CCUE & CURE's Rebuttal Testimony (Marcus), dated March 10, 2010, p. 4; see also, (Exh. 300: CCUE & CURE's Prepared Testimony (Marcus), February 22, 2010, p. 16, for additional testimony regarding the environmental benefits of Oakley.) This evidence goes to how the Oakley Project can help in the reduction of GHG emissions.

- Mr. Marcus also noted that CARE's witness in the LTFRO Proceeding endorsed the Oakley's operating flexibility. (Exh. 301: CCUE & CURE's Rebuttal Testimony (Marcus), dated March 10, 2010, p. 15.)

- PG&E's reply testimony describes how the contractual operating characteristics of the plant are fully consistent with the LTPP RFO and exceed the operational characteristics sought in the RFO. (Exh. 5: PG&E's Reply Testimony (Monardi & Alvarez), dated March 10, 2010, pp. 16-22; see also, Exh. 5: PG&E's Reply Testimony, dated March 10, 2010, Attachment A (Declaration of Lamberg), p. 2.); see also, Exh. PG&E-3 (A.09-09-021) [confidential], dated September 30, 2010, p. 46.)

- In its application, PG&E stated: "The Oakley Project was expected to have a heat rate of 6,752 Btu/kWh, which is the lowest heat rate in PG&E's portfolio of gas-fired resources, and would provide operational flexibility in the form of ancillary services, load following and quick start capabilities. This operational flexibility would be would become increasingly

important as California added more intermittent renewable resources. The Oakley Project also qualifies for San Francisco Bay Area Resource Adequacy capacity." (PG&E's Application, A.09-09-021, dated, October 20, 2009, p. 5.) This record demonstrated that the Oakley Project would be efficient and capable of renewable integration.

- The testimony of PG&E's witnesses, Marino Monardi and Antonio J. Alvarez indicated that the Oakley Project will be able to provide the following ancillary services, which the CAISO has identified as necessary to provide the operational flexibility to integrate increasing amounts of renewable energy into the grid and maintain system reliability: regulation up and regulation down, spinning reserve, non-spinning reserve, and voltage support. The operational flexibility of the Oakley Project is greatly superior to the operational characteristics of the old steam units that the CAISO currently relies on to adjust for changes in system conditions. (See generally, Exh. 5: PG&E's Reply Testimony (Monardi & Alvarez), dated March 10, 2010, pp. 16-22.) This evidence shows that the Oakley Project's capabilities of renewal integration.

- PG&E indicated that "the 2010 LTPP proceeding [was] still in the beginning stages and a Scoping Memo still [had] not been issued. It is unlikely that the 2010 LTPP proceeding will conclude by 2011, and it may go well into 2012." (PG&E's Reply to Responses to Petition to Modify Decision 10-07-045, dated October 4, 2010, p. 7.) PG&E further noted that the Oakley Project could not wait for 2-3 years for approval and remain viable. (PG&E's Reply to Responses to Petition to Modify Decision 10-07-045, dated October 4, 2010, p. 7.) PG&E stated: "This type of regulatory delay will effectively terminate project development and result in the loss of an environmentally-beneficial, cost effective new generation resource." (PG&E Reply to Responses to Petition to Modify Decision 10-07-045, dated October 4, 2010, p. 7.) This record confirms the risk of a regulatory lag the Commission observed in D.10-07-045, when it stated: "Though we deny the Oakley Project at this time, we understand that developing and building a power plant in California is a long process, fraught with pitfalls." (D.10-07-045, supra, at p. 40 (slip op.).) Further, in D.07-12-052, the Commission noted:

> "Recent experience suggests that the time required to develop and carry out competitive long-term RFOs, then finance, permit and construct new generation resources – including a cushion to account for unanticipated delays – requires that these procurement decisions be made up to seven years in advance of when the resources are needed. Otherwise, we are forced to perform "just-in-time" procurement that threatens reliability, drives up the costs of delivering power, and typically does not result in additional preferred/renewable resources. Given this up to seven-year lag from authorization to in-service date and the one-year schedule slip in this decision, the need determinations made in this decision are based on the IOUs' summer 2015 residual net short."

(D.07-12-052, *supra,* at p. 21.) Thus, based on this evidence and the conclusions in D.10-07-045 and D.07-12-052, the Commission lawfully concluded in the Decision that there would be a seven-year lag from authorization to the in-service date of power plants. It also supports the concern that regulatory lag can create shortfalls in power plant capacity. This record also supports Finding of Fact Nos. 9 and 10 regarding the risk of a shortfall in 2016 and beyond because there is no LTPP determination for this period, and how the Oakley Project could cure this shortfall.

- In its prepared testimony, PG&E noted that the Guaranteed Commercial Date of June 2014 could be delayed day to day if Commission approval is not obtained within eight months of filing this Application." (Exh. 1: PG&E's Prepared Testimony, dated September 30, 2009, p. 3-22.) This evidence supports an inference that the Oakley Project would take at least 5 years to build, and thus, approval needed to be by 2010 to meet any shortfalls commencing in 2016.

- PG&E's Portfolio Management Director, Marino Monardi, declared under penalty of perjury: "The guaranteed commercial availability date for the Oakley Project in the PSA was originally June 2014. Under the Amendment, the guaranteed commercial availability date has been extended to June 1, 2016. . . . (Declaration of Marino Monardi [public version] accompanying PG&E's Petition for Modification of D.10-07-045, dated August

20, 2010.) This evidence supports the Commission's conclusion regarding the commercial viability of the project.

- PG&E's reply testimony discusses the permit requirements from the CEC and the Bay Area Air Quality Management District ("BAAMD"). (Exh. 5: PG&E's Reply Testimony, dated March 10, 2010, Attachment A (Declaration of Lamberg), p. 3.) This record shows the progress the project sponsor was making in obtaining needed permits for construction and operation of the Oakley Project, although it may fall short of showing that the permitting process for the power was "nearly completed."

- In his direct testimony, CCUE and CURE's witness, David Marcus, stated: "The 928-1328 Mw range will increase in the future if any projects already approved should fail to be built." (Exh. 300: CCUE & CURE's Prepared Testimony (Marcus), February 22, 2010, p. 4.) This evidence supports that other proposed projects might fail, and thus, the anticipated need for the Oakley Project. This testimony supports Finding of Fact No. 7 regarding regulatory lag.

- PG&E's witness, Antonio R. Alvarez, noted: "In the 2009 CED Adopted Forecast [by the CEC], the average annual electricity consumption growth rate was forecast to be 1.27 percent for PG&E's planning areas, <u>which is higher electricity consumption growth rate over the 2010-2018 period than was forecast in 2007</u>." (Exh. 5: PG&E's Prepared Testimony (Alvarez), dated March 10, 2010, p. 5, emphasis in the original.) This evidence supports the prospect of consumption growth over the 2010-2018 period, above what was forecasted in 2007.

- PG&E-1 Table indicates that there might have been to a need of at least 137 MW in 2016. (See Exh. 1: PG&E Testimony, Table.)

In D.10-12-050, the Commission granted PG&E's request for approval of the Oakley Project on the grounds that the project: (1) was commercially viable so long as Commission approval was obtained in 2010; (2) would allow for renewable integration; (3) could help California to meet its increasingly stringent GHG goals; (4) would reduce the risk of insufficient supply of generating resources resulting from

regulatory lag and (5) could address a possible shortfall in capacity. The evidence cited above generally support these grounds for approving the Oakley Project.

However, we will modify the Decision for purposes of clarification, including removing any inconsistency. Therefore, we will modify language in the statement that Oakley Project has "nearly completed the permitting process." (See D.10-12-050, p. 9.) This modification is made to make the statement reflect the evidence. We will also modify Finding of Fact No. 7 to remove the language, "lack of available financing for capital projects." Further, we will modify Finding of Fact No. 10 to remove the words "and beyond."

Also, we will modify our discussion on page 9 and Finding of Fact No. 8, regarding whether the Commission has "approved projects that exceed, in their first couple of years of operation, the Commission's projections of the number of MW needed for reliability." (See D.10-12-050, p. 9 & 14 [Finding of Fact No. 8].) We will modify the discussion and the finding to state: "The Commission has in the past approved projects prior to the need determination made in a LTPP proceeding."

C. CARE's assertion as to effects of the approval of the Oakley Project on other bidders in the LTRFO and competitive market has no merit.

CARE asserts that D.10-12-050 is prejudicial to other bidders in the LTRFO and erodes the competitive market. (CARE's Rehrg. App., pp. 12-13.) This assertion lacks merit.[26]

The Commission in approving the Oakley Project relied on the bidding information received from the LTRFO. (D.10-12-050, pp. 6 & 8.) By its assertion,

[26] The assertion is a policy argument, and does not raise an allegation of legal error. The purpose of an application for rehearing is to set forth legal error; it is not to relitigate policy determinations made by the Commission. (See Pub. Util. Code, §1732; see also Rule 16.1, subd. (c) [The purpose of an application for rehearing is to alert the Commission to a legal error, ..."])

CARE is arguing that the Commission cannot use this information because the bidding process was for a different time period, and the results of the bidding might have been different if the horizon had been set for 2016 and beyond. (CARE's Rehrg. App., p. 13.) CARE's assertion does not withstand scrutiny.

The record supports that the Oakley Project was part of a bidding process, in which the project was selected as one of two preferred bids during the LTRFO. As bid in, the Oakley Project was a Purchase and Sale Agreement ("PSA"). PG&E would take over the plant once it was operational. (See PG&E's Application, A. 09-09-021, filed September 29, 2009, pp. 5 & 13.) It met the criteria PG&E was looking for, including competitive pricing. (See PG&E's Application, A.09-09-021, filed September 29, 2009, pp. 11 & 13.)

This record includes the following:

- Exh. 1: PG&E's Prepared Testimony, pp. 5-6, Appendix 2.2 (pp. 13-15), Chapter 3 (pp. 3-2 to -3.4 & 3-20 to 3-24), Chapter 5 (pp. 5-5 to 5-6), & Appendix 5.1 (p. 25), which discusses market valuation and competitiveness during the LTFRO process.

- In his direct testimony, David Marcus, witness for Coalition of California Utility Employees and California Unions for Reliable Energy ("CCUE & CURE"), stated: "I have reviewed PG&E's testimony regarding Marsh Landing and Oakley, and agree with PG&E that they would result in economic benefits relative to the other new projects that were bid into the LTFO but not selected, and would be in compliance with the Commission's directives regarding new PG&E resource acquisition in Decision 07-12-052." (Exh. 300: CCUE & CURE's Prepared Testimony (Marcus), February 22, 2010, p. 2.)

- David Marcus also testified: "In the current LTRFO evaluation, PG&E has looked at both price and project viability, and the [Independent Evaluator ("IE")] has verified the appropriateness of its review." (Exh. 300: CCUE & CURE's Prepared Testimony (Marcus), February 22, 2010, p. 14.)

- CCUE & CURE stated: "The Oakley Project is economically superior to most projects bid into PG&E's 2008 RFO." (CCUE & CURE's Response to PG&E's Petition for Modification, filed September 22, 2010, p. 1, citing Exh. 300: CCUE & CURE's Prepared Testimony (Marcus), February 22, 2010, pp. 2 & 13 and Exh. 67: PG&E/Esguerra, Answer 2.)

- The Oakley Project made the short list of the highest value projects in the 2008 LTRFO. (Exh. 300: CCUE & CURE's Prepared Testimony (Marcus), dated February 22, 2010, pp. 14-15.)

From this evidence, which is in the existing record, the Commission drew reasonable inferences as to the market value to the ratepayers and whether the project was competitive. The Commission is permitted to draw reasonable inferences from the record.[27]

CARE asserts that the Commission by its action here changed the requirements of the 2008 LTRFO two years after the solicitation. CARE is wrong. D.10-12-052 made no such modifications to PG&E's LTPP or the 2008 LTRFO. Rather, the Commission used this evidence in the record to draw reasonable inferences in order to evaluate whether the Oakley Project should be approved for 2016 and beyond. Further, CARE fails to cite to a legal requirement that a new bidding process was necessary. As discussed, the Commission could properly draw a reasonable inference from the record

[27] Like the courts, the Commission must look to the direct evidence, but also can draw reasonable inferences derived from the evidence, so long as these inferences are reasonable and not based on " 'speculation, conjecture, imagination or guesswork.' " (See *Waschek v. Department of Motor Vehicles* (1997) 59 Cal.App.4th 640, 647.) Also, the Commission has observed that "courts have held that if findings are based on inferences reasonably drawn from the record, an administrative order is considered to be supported by substantial evidence in light of the whole record and will not be reversed. (See, e.g., *Lorimore v. State Personnel Board* (1965) 232 Cal.App.2d 183, 187.) Further, "a reasonable inference drawn from circumstantial evidence may be believed as against direct evidence to the contrary." *(Halstead v. Paul* (1954) 129 Cal.App.2d 339, 341 [citations omitted].)" (*Order Instituting Rulemaking on the Commission's Own Motion to establish Consumer Rights and Protection Rules Applicable to All Telecommunications Utilities – Order Modifying Decision (D.) 06-03-013 and Denying Rehearing of the Decision, As Modified* [D.06-12-042] (2006) ___ Cal.P.U.C.3d ___, p. 8 (slip op.), 2006 Cal.PUC LEXIS 505, *14.)

evidence that supports the determination about the market value of the Oakley Project to ratepayers and whether it was competitive.

Consequently, CARE assertions regarding the effects of the approval of the Oakley Project on other bidders in the LTRFO and competitive market has no merit. Thus, rehearing is denied on this issue.

D. The Commission's approval of the Oakley Project was proper under section 454.4(d).

In their rehearing application, CBE and Sierra Club argue that section 454.5(d) requires the filing of a procurement plan "consistent with their obligation to serve, and that plan must be approved by the Commission, so that customers pay "just and reasonable rates."[28] They assert that "the procurement process is meant to serve Californians ratepayers by identifying their need and filling it." (CBE & Sierra's Rehrg. App., p. 5.) Thus, they assert that there is no evidence for what they characterize as a change to the finding of need previously adopted by the Commission. (CBE & Sierra's Rehrg. App., pp. 5-6.)[29] Although CBE and Sierra Club look at "need" in terms of the

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[28] DRA raises a similar issue, by alleging that the reasonableness of the Oakley Project in the new application was never examined, and thus, the Commission violated sections 451 and 454. (DRA's Rehrg. App., p. 15.) Section 451 provides in relevant part: "All charges demanded or received by any public utility . . . shall be just and reasonable. Every unjust or unreasonable charge. . . is unlawful." (Pub. Util. Code, §451.) DRA cites section 454 for the purpose that there must be a showing of reasonableness prior to increasing rates. (DRA's Rehrg. App., p. 15.) Compliance with sections 451 and 454, in terms of "just and reasonable rates" and reasonableness allocation of costs to ratepayers can be substantiated by need based on numerical evidence for the 586 MW. However, as discussed *infra*, the record is lacking.

CARE asserts a broad just and reasonable argument in its rehearing application regarding marginal cost. (CARE's Rehrg. App., pp. 11-12, but relies on evidence outside the record to support its assertion.) CARE's assertion on this issue should be rejected because it relies on evidence outside the record. Also, CARE fails to cite to a law that has been violated. Therefore, CARE's just and reasonable argument fails to meet the specificity requirements of section 1732 or Rule 16.1(c), and thus, we reject this assertion.

[29] CBE and Sierra Club claim that the Commission has abused its discretion by approving the Oakley Project "with an unheard-of increase over anticipated demand of 69%." (CBE &

(*footnoted continued on the next page*)

2007-2016 time horizon, they effectively challenge the adequacy of the record to support what is needed in the years 2016 and beyond. (CBE & Sierra Club's Rehrg. App., p. 6.) They state: "There was absolutely no mention or any analysis, study, or evidence that this plant's 586 MW of power will be any more useful to the ratepayers in 2016 than they were in 2014." (CBE & Sierra Club's Rehrg. App. p. 6.)[30]

The legal question presented by these allegations is whether the Commission was required to make a need determination based on numerical evidence for the period 2016 and beyond. D.10-12-050 contains no discussion of need based on numerical evidence for the period 2016, and beyond. Accordingly, the rehearing applicants allege that the Commission has failed to satisfy the statutory requirement that ratepayers be served at "just and reasonable rates,' pursuant section 454(d). We do not believe that our approval of the power plant project can only be based on numerical evidence of need.

Section 454.5(d) states, in relevant parts:

> A procurement plan approved by the commission shall accomplish each of the following objectives:
>
> (1) Enable the electrical corporation to fulfill its obligation to serve its customers at just and reasonable rates.

(*footnote continued from the previous page*)

Sierra Club's Rehrg. App., pp. 4-7.) Their argument here is about compliance with section 454.5(d) and no record support for a determination under this statute. It should be noted that there is no mention of the 69% in the Decision, and the record does not contained this figure. Rather, the Dissent refers to a "69% reserve margin in 2020 without Oakley." (See Commissioner Grueneich's Dissent, p. 2.) Accordingly, this claim is rejected as not based on the record.

[30] In their rehearing application, CBE and Sierra Club argue that when the Commission did not make this specific need determination, it violated section 1705 for failing to make a finding of fact on this material issue, and thus, violated section 1705. (CBE and Sierra Club, Rehrg. App., pp. 7-8.) This argument lacks merit, because D.10-12-050 contains sufficient findings of fact to address the material issue of need. (See generally, Finding of Fact Nos. 3-10, setting forth the basis of this need.)

> (2) Eliminate the need for after-the-fact reasonableness reviews of an electrical corporation's actions in compliance with an approved procurement plan, including resulting electricity procurement contracts, practices, and related expenses. . . .
>
> (3) Ensure timely recovery of prospective procurement costs incurred pursuant to an approved procurement plan. The commission shall establish rates based on forecasts of procurement costs adopted by the commission, actual procurement costs incurred, or combination thereof, as determined by the commission. The commission shall establish power procurement balancing accounts to track the differences between recorded revenues and costs incurred pursuant to an approved procurement plan. . . .
>
> (4) Moderate the price risk associated with serving its retail customers, including the price risk embedded in its long-term supply contracts, by authorizing an electrical corporation to enter into financial and other electricity-related product contracts.
>
> (5) Provide for just and reasonable rates, with an appropriate balancing of price stability and price level in the electrical corporation's procurement plan.

(Pub. Util. Code, §454.5, subd. (d).)

We agree that our approval of any project under the LTPP mandated by section 454.5(d) must consider need. As a matter of practice and in the exercise of our regulatory expertise, the need has been based on a previously determined number. (See e.g. D.07-12-052, D.09-10-017, D.10-07-042, and D.10-07-045 involving the IOUs' LTPP.) We have consistently made an empirical finding of need, measured in MW, in considering the section 454.5(d) requirement that the procurement plans "fulfill [the utility's] obligation to serve its customers at just and reasonable rates." In this case, an allocation of the costs for 586 MW of capacity (i.e., the capacity of the Oakley plant) to ratepayers must be based on evidence as to the level of need that must be fulfilled to ensure "just and reasonable rates." This interpretation is reasonable in light of the language in this statute requiring that customers be served "at just and reasonable rates."

The circumstances underlying the instant case warrant an exception to our general past practice of relying specifically on numerical evidence to approve a power plant project. Here, the circumstances would be those related to the prospect of a shortfall in power plant capacity due to a regulatory lag, which has been demonstrated by the evidentiary record. The determination of a numerical amount will not happen until the completion of the 2010 LTPP, which is pending as Rulemaking (R.) 10-05-006. It is a very complex proceeding, with many phases. Further, PG&E noted correctly that the 2010 LTPP proceeding was only beginning, and might go into 2012. (PG&E's Reply to Responses to Petition to Modification Decision 10-07-045, dated October 4, 2010, p. 7.) Thus, the Commission in this case legitimately is concerned about the prospect of a regulatory lag if the Oakley plant is not approved now, which in turn could cause a shortfall in power plant capacity. (See D.10-07-045, *supra,* at p. 40 (slip op.) Such a shortfall unquestionably would be harmful to ratepayers, potentially driving up the cost of delivering power. (See D.07-12-052, *supra*, p. 21 (slip op.).) Further, as the record establishes, the Oakley project presents a unique, fleeting opportunity for the Commission to obtain for ratepayers the benefits of a large, mature project, and to avoid the pitfalls associated with the long period of regulatory delay if this opportunity is allowed to pass. (See Discussion, *infra.*)

There is nothing in the language of section 454.5(d) that would prohibit the Commission from considering these circumstances. Although we deviate from our past practice, our approval of the Oakley is based upon sound reasoning and we have exercised our regulatory expertise based on the evidence before us.

The law is clear that the Commission's interpretations of the Public Utilities Code, as the agency constitutionally authorized to administer its provisions, are given great weight. (*Southern California Edison Co. v. Peevey* (2003) 31 Cal.4th 781, 796.) In *Greyhound Lines, Inc. v. Public Utilities Commission* (1968) 68 Cal.2d 406, the Court noted that there is a "strong presumption of validity of the commission's decisions" and stated that "the commission's interpretation of the Public Utilities Code should not be

disturbed unless it fails to bear a reasonable relation to statutory purposes and language." (*Id.* at pp. 410-411 [citation omitted]; see also *Pacific Bell v. Public Utilities Commission* (2000) 79 Cal.App.4th 269, 283 [Courts will not disturb Commission decisions absent a "manifest abuse of discretion or an unreasonable interpretation of the statutes" at issue].)

E. CARE's motion for leave to file confidential material under seal.

CARE filed a motion for leave to file confidential material referenced in its rehearing application. The motion should be granted.

III. CONCLUSION

For the reasons discussed above, good cause does not exist for the granting of a rehearing of D.10-12-050. However, we will modify D.10-12-050 to clarify the decision in the manner set in the ordering paragraphs. Accordingly, we deny rehearing of D.10-12-050, as modified.

THEREFORE, IT IS ORDERED that:

1. D.10-12-050 is modified as follows:

   a. On page 12, lines 4-7, the following statement is deleted:

      "For these reasons, we will approve the revised Oakley Project despite the fact that this authorization will result in PG&E's procurement of generation capacity in excess of the range of need established by the Commission in D.07-12-052."

   b. The first sentence of the first paragraph in Section 4.6 Conclusion on pp. 12-13 is modified to read as follows:

      "When the considerations discussed herein are viewed in total, in particular the benefits associated with the amended Oakley Project with the delayed on-line date, it is prudent to allow PG&E to procure the new capacity provided by the project commencing 2016."

   c. The third sentence in 5) on page 9 is modified to read as follows:

"As a result, the Commission has in the past approved projects prior to the need determination made in a LTPP proceeding. See e.g., *Application of San Diego Gas & Electric Company for Approval of Election to Exercise Option to Purchase Power Plant Owned by El Dorado LLC* [D.07-11-046] (2007) ___ Cal.P.U.C.3d ___, pp. 4, 7-8 & 23 (slip op.), which approved a power plant for SDG&E while the last LTPP was still being decided.)."

d. Finding of Fact No. 9 is modified to read:

"The Commission has in the past approved projects prior to the need determination made in a LTPP proceeding."

e. Finding of Fact No. 10 on page 14 is modified to remove the words "and beyond."

f. Finding of Fact No. 7 is modified to read as follows:

"Oakley reduces risk that California will have an insufficient supply of generating resources due to a regulatory lag."

g. In the third sentence in the first full paragraph in Section 4.3 on page 9 is modified to read as follows:

"The Commission recognized that the Oakley Project is uniquely viable, with the project sponsor having commenced the permitting process."

h. The following discussion shall be added on page 13:

"**8. CARE's Motion to Recuse**

On December 9, 2010, CARE filed a motion to recuse Commissioner Bohn and requested a continuance of the matter to the next Commission meeting. The motion alleged that Commission had prejudged the outcome of the proceeding. CARE asserts that the change in the Alternate from a grant to a denial of the petition for modification and an alleged violation of Bagley-Keene notice requirements demonstrated that Commissioner Bohn had had "the kind of unalterably closed mind necessary to require recusal." (Motion to Recuse, pp. 4-5.) PG&E filed a response on December 13, 2010.

> We have reviewed the allegations in this motion and believe that the claims of prejudgment have no merit. Thus, CARE's motion is denied."

2. CARE's motion for leave to file confidential material referenced in its rehearing application is granted.

3. Rehearing of D.10-12-050, as modified, is denied.

4. Application (A) 09-09-021 is hereby closed.

This order is effective today.

Dated: May 26, 2011, at San Francisco, California.

MICHAEL R. PEEVEY
President
TIMOTHY ALAN SIMON
CATHERINE J.K. SANDOVAL
MARK FERRON
Commissioners

Commissioner MICHEL PETER FLORIO, being necessarily absent, did not participate.