

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA

Application of Pacific Gas and Electric
Company (U39E) for Approval of 2008
Long-Term Request for Offer Results
and for Adoption of Cost Recovery and
Ratemaking Mechanisms.

A.09-09-021
(Filed September 29, 2009)

**APPLICATION FOR REHEARING OF
DECISION 10-12-050**

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TABLE OF CONTENTS

	Page
I. INTRODUCTION.....	1
II. D.10-12-050 DENIED PARTIES THEIR LEGAL RIGHTS TO RESPOND TO AN APPLICATION AND ADDRESS THE ISSUES IN THE APPLICATION	3
A. D.10-12-050 DENIED PARTIES THE RIGHT TO PROTEST.....	6
B. D.10-12-050 DENIED PARTIES THE RIGHT TO OBJECT TO THE CATEGORIZATION	9
C. D.10-12-050 DENIED PARTIES THE RIGHT TO A HEARING ON THE ISSUES	11
III. D.10-12-050 DENIED RATEPAYERS THEIR RIGHT TO A STATUTORY NOTICE THAT THEIR RATES WILL INCREASE UNDER THE NEW APPLICATION.....	12
IV. APPROVING THE PSA UPON THE CONDITION THAT IT HAS A NEW ONLINE DATE WAS LEGAL ERROR.....	13
A. THE NEW ONLINE DATE WAS BEYOND THE SCOPE OF THE INITIAL PROCEEDING AND THE NEW APPLICATION WAS NOT SCOPED	14
B. THE REASONABLENESS OF THE PROJECT IN THE NEW APPLICATION WAS NEVER EXAMINED	15
C. D.10-12-050 COMMITTED LEGAL ERROR BY APPROVING AN APPLICATION THAT HAD THE VERY SAME DEFECTS AS THE PFM THE DECISION DENIED.....	16
V. D.10-12-050 MODIFIED SEVERAL COMMISSION DECISIONS WITHOUT GIVING NOTICE TO PARTIES IN THOSE PROCEEDINGS	17
A. D.07-12-052.....	17
1. Violation of AB57	18
B. D.09-10-017	20
C. D. 10-07-042.....	21
VI. D.10-12-050 RELIES UPON FACTS NOT IN EVIDENCE.....	21
VII. CONCLUSION	22
CERTIFICATE OF SERVICE	

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I. INTRODUCTION

Pursuant to Rule 16.1 of the Commission's Rules of Practices and Procedure, the Division of Ratepayer Advocates ("DRA") hereby files this timely application for rehearing of Decision (D.) 10-12-050 which authorized Pacific Gas and Electric Company (PG&E) to enter into a Purchase and Sale Agreement (PSA) with Contra Costa Generating Station LLC (CCGS). D.10-12-050 was issued in response to PG&E's Petition for Modification (PFM) of D.10-07-045 that denied PG&E's Application for approval of a PSA with CCGS. In considering PG&E's PFM, D.10-12-050 made a legally erroneous decision by converting the PFM to an application and approving the *new* application *sua sponte*. D.10-12-050 stated that the PFM was not the proper procedural vehicle for resubmitting the PSA, but in approving the project did not change any of the procedural elements of the PFM or allow for any of the procedures for considering an application.

D.10-12-050 correctly held that a PFM is not the proper procedural vehicle for resubmitting the PSA. However, it was legal error to convert the PFM to an application without affording parties their due process rights, including notice and the opportunity to

be heard as required by the Commission's Rules of Practice and Procedure, Rules 2.1 and 2.6. D.10-12-050 committed legal error in approving an 'application' that did not meet the legal requirements set in the Commission's Rules of Practice and Procedure for applications, and in doing so eliminated parties' rights to protest or respond to the application, state their issues with the application, appeal the categorization of the application, and examine the factual basis for the new application pursuant to Public Utilities Code Section 1701 et. seq. This is a clear case of the Commission abusing its discretion in how it handles its proceedings, and in so doing, denying due process to DRA and other parties. DRA submits that the Commission must grant rehearing and order PG&E to refile its PFM as an application, to provide parties with due process.

The primary difference in the PSA the Commission denied in D.10-07-045 and the PFM the Commission *denied* but converted to an application and *approved* as such in D.10-12-050 is the change in the online date of the Oakley Project. The initial online date the Commission considered in D.10-07-045 was June 1, 2014, but the PSA PG&E subsequently submitted with the PFM had "a guaranteed commercial availability date of June 1, 2016". D.10-12-050 committed several legal errors in approving the application without providing parties the opportunity to address the legal implications and ramifications of the change in online date. These legal errors include: (1) The change in online date effectively took the PSA outside the scope of the proceeding from which the PFM arose because that proceeding was only scoped to consider projects arising from PG&E's procurement authority in D.07-12-052; (2) The change in online date also required the Commission to review the reasonableness of the cost of the project and the need for the project in light of the new online date before approving the project pursuant to Public Utilities Code Section 454.5 but the Commission failed to do so; and (3) The change in online date did not obviate the need for any of the due process requirements such as notice and the opportunity to be heard that made the PFM an improper vehicle for resubmitting the PSA.

Finally, the Commission has violated Section 1708 since D.10-12-050 modified several Commission decisions by approving the ‘application’ it created *sua sponte*, without giving notice and opportunity to be heard to the parties who participated in those decisions. Specifically, D.10-12-050 modified: (1) D.07-12-052 that determined the need levels for the investor owned utilities (IOU) in California, (2) D.09-10-017 that adopted an all-party settlement agreement, and (3) D.10-07-045 that conditionally approved two PG&E Power Purchase Agreements (PPAs) on the condition that the Oakley Project was denied. These modifications of prior Commission decisions without giving notice and opportunity to be heard to the parties in the proceedings that reached those decisions is legal error.

II. D.10-12-050 DENIED PARTIES THEIR LEGAL RIGHTS TO RESPOND TO AN APPLICATION AND ADDRESS THE ISSUES IN THE APPLICATION

The Commission denied parties their due process rights to file protests, request a hearing or appeal the categorization of the new application that D.10-12-050 created.¹ All investigations, hearings and proceedings within the Commission are governed by the provisions of the Public Utilities Code § 1701 et. seq. and the Commission’s Rules of Practice and Procedure, which were formulated pursuant to that Code. Therefore, the Commission cannot just discard the processes set forth in these rules for parties to respond to an application.

Public Utilities Code § 1701(a) provides:

All hearings, investigations, and proceedings shall be governed by this part and by rules of practice and procedure adopted by the Commission, and in the conduct thereof, the technical rules of evidence need not be applied....

D.10-12-050 did not just ignore the technical rules of evidence or conduct the proceeding informally, it deprived parties of their fundamental federal and state

¹ Public Utilities Code Section 1701 et. seq.

constitutional rights to due process.² The United States Supreme Court stated a party's due process rights in Commission proceedings as follows:

The right to a fair and open hearing is one of the rudiments of fair play assured to every litigant by the Federal Constitution as a minimal requirement. Ohio Bell Telephone Co. v. Public Utilities Commission, 301 U.S. 292, 304, 305, 57 S.Ct. 724, 730, 81 L.Ed. 1093. There must be due notice and an opportunity to be heard, the procedure must be consistent with the essentials of a fair trial, and the Commission must act upon evidence and not arbitrarily. Interstate Commerce Commission v. Louisville & Nashville R.R. Co., 227 U.S. 88, 91, 33 S.Ct. 185, 57 L.Ed. 431; St. Joseph Stock Yards Co. v. United States, 298 U.S. 38, 51, 73, 56 S.Ct. 720, 725, 735, 80 L.Ed. 1033; Morgan v. United States, 298 U.S. 468, 480, 481, 56 S.Ct. 906, 911, 80 L.Ed. 1288;

(Railroad Commission of California vs. Pacific Gas and Electric Company, (1938) 58 S.Ct. 334 at 338, 302 U.S. 771, 82 L.E.d. 319.)

The U.S. Supreme Court in Railroad Commission vs. Pacific Gas and Electric Company³, supra, emphasized the difference between a claim of denial of due process where parties maintain that the process provided was inadequate and a claim of denial of due process where no process was provided at all. The Court in Railroad Commission noted that the latter instance where no process was provided is always a violation of due process rights provided in the Fourteenth Amendment of the United States Constitution. DRA's claim in this Application for Rehearing is that no process was provided at all for considering the application created in D.10-12-050. The elements of an application and the process used to consider the application in a proceeding are completely different from those of a PFM. Thus, none of the opportunities provided for hearing on the PFM can be considered as providing a party with the opportunity to respond to the new application.

Commission's Rules of Practices and Procedure provide:

² Railroad Commission of California vs. Pacific Gas and Electric Company (1938) 58 S.Ct. 334, 302 U.S. 771, 82 L.E.d. 319.

³ Hereinafter "Railroad Commission"

All applications shall state clearly and concisely the authorization or relief sought; shall cite by appropriate reference the statutory provision or other authority under which Commission authorization or relief is sought; shall be verified by at least one applicant (see Rule 1.11); and, in addition to specific requirements for particular types of applications, shall state the following:

...

(c) The proposed category for the proceeding, the need for hearing, the issues to be considered, and a proposed schedule. (See Article 7.) The proposed schedule shall be consistent with the proposed category, including a deadline for resolving the proceeding within 12 months or less (adjudicatory proceeding) or 18 months or less (ratesetting or quasi-legislative proceeding).

(Commission's Rules of Practice and Procedures, Rule 2.1.)

In construing its rules, the Commission has broad discretion. See Public Utils. Code § 1701 and California Rules of Practices and Procedure Rule 1.2. However, this discretion is not unfettered. While the Commission may permit deviations from its rules in special cases, it must establish good cause for doing so. Rule 1.2. The Commission did not identify this proceeding as a special case, nor did it show good cause for taking the unprecedented step of converting the PFM to an application *sua sponte*. It must be noted that none of the reasons that D.10-12-050 stated in support of the development of the Oakley Project can establish good cause for the Commission's disregard of the rules and procedures that protect parties' constitutional rights in Commission proceedings. Courts have held that the Commission may not disregard its own rules of practice in the Commission's proceedings.⁴ D.10-12-050 approved the application it created from a PFM *sua sponte*. Therefore, the application was never submitted as a separate document containing the elements required by the Rules of Practice and Procedure. Parties did not

⁴ Southern Cal. Edison Co. v. Public Utilities Com. (2006) 140 Cal.App.4th 1085, 1106, stating that the Commission's failure to follow its own rules and procedures was prejudicial; see also, Southern Cal. Edison Co. v. Public Utilities Com. (2000) 85 Cal.App.4th 1086, 1105, recognizing that the Commission must not abuse its discretion in selecting between advice letter and application procedures.

have any opportunity to see or examine the various elements that the Commission's Rules 2.1 through 2.7 require of an application. Further, the immediate approval of the application denied parties their legal right to respond to the basis for the application by filing protests or responses, as well as questioning and appealing the categorization of the application. Some of the key processes for considering an application that D.10-12-050 denied parties follow.

A. D.10-12-050 DENIED PARTIES THE RIGHT TO PROTEST

D.10-12-050 denied parties their right to fully and substantially participate in the Commission proceeding when it approved the application for the Oakley PSA in the same decision that created the application. Under State law and the Commission's Rules of Practice and Procedure, each party has a right to appear before the Commission and participate in any proceeding that may affect his interests and the interests of other ratepayers. The primary process for entering an appearance and participating in such proceeding is a protest, response or answer to the application.

Commission Rules of Practice and Procedure, Rule 2.6 states:

- (a) Unless otherwise provided by rule, decision, or General Order, a protest or response must be filed within 30 days of the date the notice of the filing of the application first appears in the Daily Calendar, and shall be concurrently served on each person listed in the certificate of service of the application. □
- □(b) A protest objecting to the granting, in whole or in part, of the authority sought in an application must state the facts or law constituting the grounds for the protest, the effect of the application on the protestant, and the reasons the protestant believes the application, or a part of it, is not justified. If the protest requests an evidentiary hearing, the protest must state the facts the protestant would present at an evidentiary hearing to support its request for whole or partial denial of the application.

In Southern Cal. Edison Co. v. Public Utilities Com., *supra*, the California Court of Appeals held that “a regulation adopted by an administrative agency under its

rulemaking authority has the force and effect of law.”⁵ Therefore, the Commission cannot arbitrarily deny parties the force and effect of the provisions in its rules requiring notice of certain elements in an application.

The opportunity to file a protest represents the minimum due process requirement that the Commission must afford parties once it accepts an application for filing. By approving the application in the same decision that created it, D.10-12-050 essentially denied parties all process in the proceeding. Indeed, the Commission ensured that there was no proceeding at all to consider the application when it approved the application *sua sponte*. There is no special circumstance that justifies denying parties all their fundamental due process rights under the Constitution and as stated earlier, the decision has not identified any.

DRA was created by the California State Legislature “to obtain the lowest possible rate for service consistent with reliable and safe service levels” for ratepayers. In this case, the total revenue requirement for the Oakley power plant is over \$1.5 billion⁶. This amount will clearly result in increased rates for ratepayers. In addition, D.10-07-045, which previously denied approval of the PSA, held that there was no need for the power plant in the time frame that it has been approved to come on online. Therefore, the cost of electricity from this plant will be unnecessary. DRA is required by its statutory mandate to protest this PSA or otherwise examine the basis for its approval. In denying DRA the opportunity to do so, D.10-12-050 barred DRA from performing its statutory obligation on behalf of ratepayers and thereby contravened the legislation that created DRA.

⁵ (2006) 140 Cal.App.4th 1085, at 1092, citing: ([*Agricultural Labor Relations Bd. v. Superior Court* \(1976\) 16 Cal.3d 392, 401, 128 Cal.Rptr. 183, 546 P.2d 687](#); [*California Teachers Assn. v. California Com. on Teacher Credentialing* \(2003\) 111 Cal.App.4th 1001, 1008, 4 Cal.Rptr.3d 369.](#))

⁶ This figure comes from D.10-07-045, Appendix A, Partial Settlement Agreement (public version), p. 4. D.10-07-045 approved a joint party settlement which among other things agreed on the cost recovery and ratemaking for the Oakley Project. Though the Oakley PSA that was submitted with the initial application was denied in D.10-07-045, PG&E and CCGS claim the original PSA is the same as the PSA in the decision approved in D.10-12-050 except for the change in online date.

D.10-12-050 states that the PFM proceeding supplemented the prior proceeding, that reached a decision in D.10-07-045.⁷ The Commission cannot argue that the opportunity for a hearing from the inception of A.09-09-021 substitutes for a hearing on the converted application. This argument is without merit and makes a sham of the requirements for Commission proceedings. As the Commission’s rules provide, the opportunity to file a protest must be made available for every new application⁸. The denial of PG&E’s PFM in D.10-12-050 illustrates this requirement. D.10-12-050 denied PG&E’s PFM because “[i]n D.10-07-045, the Commission specifically instructed PG&E that, if the Oakley Project came back before us, it should return as an application.⁹” The fallacy underlying the Commission’s rationale in the instant decision is shown by D.10-07-045’s requirement that PG&E resubmit the PSA via application. There would be no need for D.10-07-045 to require that PG&E file a new application when resubmitting the PSA, if the issues in the new application have already been litigated in reaching D.10-07-045.

Similarly, the proceedings for considering PG&E’s PFM could not possibly be a substitute for proceedings on the application created *sua sponte*, because a PFM and an application have vastly different processes. Under Commission Rules, there is no opportunity to file a protest, request a hearing, state a party’s counter-issues, or appeal categorization in a PFM proceeding.

Even if D.10-12-050 were right in stating that many of the operational attributes of the Oakley power plant have been litigated, the new “guaranteed online date of 2016” that formed the basis of the decision was never litigated in reaching D.10-07-045. As stated in D.10-12-050, the attributes that were litigated in reaching D.10-07-045 were the following:

⁷ D.10-12-050, p. 8.

⁸ Commission’s Rules of Practice and Procedure, Rule 2.6.

⁹ D.10-12-050, p.8.

Many of the operational attributes of this plant were litigated in reaching D.10-07-045, as supplemented by the instant proceeding. In particular it has been established that:

- 1) Oakley is highly viable if the Commission acts today...
- 2) Oakley is highly efficient (it has a very low heat rate) and will enable California to meet increasingly stringent greenhouse gas (GHG) reduction goals...
- 3) Oakley would allow for renewable integration by providing load following capabilities...
- 4) Oakley reduces risk that California will have an insufficient supply of generation resources due to lack of available financing for capital projects and regulatory lag...
- 5) Generation investment is, by its nature, not well suited to the acquisition of small incremental assets...

(D.10-12-050, pp. 8-9.)

The new online date has significant legal implications and ramifications that parties never had the opportunity to address in D.10-07-045. Therefore, the Commission has not provided any opportunity to DRA and other parties for a fair hearing consistent with due process in approving the converted application for the Oakley PSA.

B. D.10-12-050 DENIED PARTIES THE RIGHT TO OBJECT TO THE CATEGORIZATION

The Commission must determine the categorization of the proceeding before it approves the application that initiated that proceeding¹⁰. The right of a party to object to that categorization is both a statutory right under California law and a constitutional right, by virtue of the due process implications of that right. Public Utilities Code §1701.1 provides:

- (a) The Commission, consistent with due process, public policy, and statutory requirements, shall determine whether a proceeding requires a hearing. The Commission shall determine whether the matter requires a quasi-legislative, an

¹⁰ Public Util. Code § 1701.1

adjudication, or a ratesetting hearing. The Commission’s decision as to the nature of the proceeding shall be subject to a request for rehearing within 10 days of the date of that decision...[Emphasis added.]

The use of mandatory language, “shall”, in Section 1701.1(a) makes it absolutely clear that the Commission has no discretion to disregard the obligation to establish the categorization of the case and allow parties the right to appeal that categorization once an application has been filed. Therefore, D.10-12-050 committed legal error in failing to establish the categorization of the new application and to allow parties the opportunity to appeal that categorization.

Section 1701.1(a) provides that parties can waive their right to challenge the Commission’s failure to determine the categorization of a case, if they fail to request a rehearing of that categorization within 10 days of the date it was determined. Consequently, DRA filed a protest on December 15, 2010, five days from the date the Revised Proposed Alternate Decision (RAPD) was issued. The Commission’s docket office accepted DRA’s protest on December 21, 2010 as E-file #38348. However, on December 28, 2010, the Docket office informed DRA that its protest has been removed from the docket and “unpublished” pursuant to the instruction of Administrative Law Judge Jacqueline Reed, the Docket Office Advisor.¹¹ DRA maintains that regardless of this removal of its protest from the docket, the protest preserved DRA’s right to challenge the categorization or lack of categorization of the new application created in D.10-12-

¹¹ **From:** Lau, George M.
Sent: Wednesday, December 22, 2010 11:29 AM
To: Obiora, Noel
Cc: Reed, Jacqueline A.; Lau, George M.
Subject: A.09-09-021. Protest of DRA and Request for a hearing, submitted (e-file #38348) on 12/15/2010.

Hi, Noel. This electronic mail message is to notify you that the document submitted on 12/15/2010, accepted on 12/21/2010 as E-file #38348; CIS# 101210549 has been unpublished and removed from CIS pursuant to instructions from Docket Office Advisor ACALJ Jacqueline Reed. The Legal Division's Appellate Section has advised that the proper procedural vehicle for the Division of Ratepayer Advocates' request is an Application for Rehearing. Thank you. George Lau

050¹². In the protest, DRA requested a hearing on the categorization of the new application created in D.10-12-050. DRA presumed that since D.10-12-050 did not assign a new case number to the new application it created and did not state the categorization of the new application, the new application was under the same categorization as A.09-09-021. Consequently, DRA maintained that using the ratesetting categorization from A.09-09-021 was legally erroneous because there was insufficient information on which the categorization of the new application could be determined. DRA requested a hearing on categorization. A copy of the protest and the email from the Commission's Docket Office are attached to the Declaration of DRA's Counsel, Noel A. Obiora, and made an exhibit in this proceeding.

C. D.10-12-050 DENIED PARTIES THE RIGHT TO A HEARING ON THE ISSUES

D.10-12-050 committed legal error in approving the application before the Commission has determined the issues in the application and scoped it as provided by the Rules. In D.10-12-050, the Commission presumed that it knew what issues would arise in the new application and concluded that most of those issues have already been litigated in reaching D.10-07-045. This presumption is nothing but speculation and the conclusion that all the issues have already been litigated is erroneous.

In application proceedings, each party must have the opportunity to raise its own issues with the application and seek a hearing on those issues. Thus, the Commission holds a Preliminary Hearing Conference (PHC) to try to sort the issues in determining the appropriate scope of the proceeding. Where the Commission has not allowed parties to file protests or responses to the new application as in the instant case, the Commission cannot possibly know what issues parties may state in the proceeding. Therefore,

¹² Rule 2.6 (d): Any person protesting or responding to an application shall state in the protest or response any comments or objections regarding the applicant's statement on the proposed category, need for hearing, issues to be considered, and proposed schedule. Any alternative proposed schedule shall be consistent with the proposed category, including a deadline for resolving the proceeding within 12 months or less (adjudicatory proceeding) or 18 months or less (ratesetting or quasi-legislative proceeding).

D.10-12-050 committed legal error in denying parties the opportunity to be heard on their issues.

III. D.10-12-050 DENIED RATEPAYERS THEIR RIGHT TO A STATUTORY NOTICE THAT THEIR RATES WILL INCREASE UNDER THE NEW APPLICATION

Public Utils. Code §454(a) requires PG&E to give notice to its customers whenever it submits an application that would result in an increase in rates, but D.10-12-050 denied ratepayers this right by approving the application in the same decision that approved it.

Section 454(a) provides:

(a) Except as provided in Section 455, no public utility shall change new rate or so alter any classification, contract, practice, or rule as to result in any new rate, except upon a showing before the Commission and a finding by the Commission that the new rate is justified. Whenever any electrical, gas, heat, telephone, water, or sewer system corporation files an application to change any rate, other than a change reflecting and passing through to customers only new costs to the corporation which do not result in changes in revenue allocation, for the services or commodities furnished by it, the corporation shall furnish to its customers affected by the proposed rate change notice of its application to the Commission for approval of the new rate.

Indeed, as previously noted, D.10-12-050 did not allow any process related to the application it created or based on it. The application was approved before PG&E even knew that it had been created. Therefore, PG&E never met its statutory obligation to ratepayers as provided in Section 454(a). PG&E may argue that it complied with Section 454(a) because the new application was approved within the old proceeding number (A.09-09-021), and it had given notice of the rate increase that would arise from the initial application. However, this argument is without merit because Public Utils. Code § 454(a) requires a new notice with every new application that would result in an increase in rates, and D.10-12-050 clearly held that the only vehicle for considering and approving

the resubmitted Oakley PSA was a new application. D.10-12-050 converted the modified PSA to a new application in order to be consistent with D.10-07-045 which directed that PG&E may only resubmit the new Oakley project with a new application.

Further, as previously noted, the new application has different and additional cost implications and ramifications than the old application. The amount by which it increases rates for ratepayers is different than the amount by which the old application increased rates. For instance, while the original PSA in denied in D.10-07-045 would come online in 2014 thus requiring credit and financing guarantees that start immediately, the new application would come online in 2016 thus requiring a different set of credit and financing guarantees that would likely be higher and more uncertain because they may start later. Similarly, if the plant would come online in 2014 and be run as a merchant plant from 2014 to 2016 when it goes into rates for PG&E's customers, the rate increase would also be substantially different from the rate that PG&E gave notice of in A.09-09-021. Unfortunately, there is no way to know how much this new PSA would increase rates because the Commission has not considered the reasonableness of the cost of the project.

IV. APPROVING THE PSA UPON THE CONDITION THAT IT HAS A NEW ONLINE DATE WAS LEGAL ERROR

D.10-12-050 approved the PSA because it has a new and different online date than the project that was denied in D.10-07-045, but D.10-12-050 failed to address the legal ramifications of changing the online date without changing any of the other elements of the PSA. Further, this change in the original online date provided in the PSA placed the new application beyond the scope of the prior proceeding that was denied in D.10-12-045, resulting in legal error.¹³

¹³ Southern Cal. Edison Co. v. Public Utilities Com. (2006) 140 Cal.App.4th 1085, 1106.

A. THE NEW ONLINE DATE WAS BEYOND THE SCOPE OF THE INITIAL PROCEEDING AND THE NEW APPLICATION WAS NOT SCOPED

The Commission fails to proceed in the manner required by law if it considers or decides an issue that was beyond the scoping memo in a proceeding or rather fails to scope a proceeding.¹⁴ In Southern Cal. Edison Co. v. Public Utilities Com., supra, the Court of Appeals held that the Commission must issue a scoping memo and that the scoping memo “shall finally determine” the schedule and issues in the case.¹⁵ In this case, the Commission’s approval of the new application created in D.10-12-050 was beyond the scope of the proceeding in which a new application was created by Commission action and was approved. Parties must presume that the scoping memo in A.09-09-021 is the same scoping memo applicable to the new application because the Commission approved the application created in D.10-07-050 under A.09-09-021.

D.10-07-050 approved the PSA primarily because of its new online date which was outside the range of dates for projects considered in A.09-09-021. The Scoping Memo in A.09-09-021 stated that the proceeding would only consider projects for the need authorized in D.07-12-052, and that decision required only consideration of projects scheduled to come online by 2015. By approving this PSA to come online in 2016, D.10-12-050 went beyond the scope of the issues to be considered in this proceeding. Therefore, the Commission violated its own scoping memo by considering the new issues and this violation is a legal error.¹⁶

¹⁴ *Id.*, p.1106.

¹⁵ *Id.*, p.1104

¹⁶ *Id.*, p.1106.

B. THE REASONABLENESS OF THE PROJECT IN THE NEW APPLICATION WAS NEVER EXAMINED

D.10-12-052 approved the new application based on a new online date that delays the project for two years, but leaves the cost of the project the same as the previous PSA that was scheduled to start two years earlier. There was no upfront review of the reasonableness of the new PSA to determine whether the two year delay might occasion a reduction in the cost of the project.

Further, D.10-12-052 does not actually bar the project from coming online sooner than 2016 but provides that ratepayers will only pay for the project starting from 2016. This raises additional reasonableness issues regarding the cost of the project. Should the project come online in 2014 as previously scheduled and is used by CCGS as a merchant power plant until 2016, by the time ratepayers begin to pay for it, the plant would have depreciated by two years. However, the price approved in D.10-12-050 was the same price for a new power plant in the PSA that was denied in D.10-07-045. DRA maintains that the price for the depreciated plant should be discounted. However, as it currently stands the Oakley Project was approved as a new plant based on the price in the original PSA. D.10-07-050 has not provided parties any forum for examining these cost implications of the new online date. This is a violation of the Commission's responsibility pursuant to section 451 of the Public Utilities Code to ensure rates are just and reasonable.

Public Utils. Code §451, in relevant part, states:

All charges demanded or received by any public utility, or by any two or more public utilities, for any product or commodity furnished or to be furnished or any service rendered or to be rendered shall be just and reasonable. Every unjust or unreasonable charge demanded or received for such product or commodity or service is unlawful.

It is also a violation of Section 454 of the Public Utilities Code that there be a showing of reasonableness prior to increasing rates.

C. D.10-12-050 COMMITTED LEGAL ERROR BY APPROVING AN APPLICATION THAT HAD THE VERY SAME DEFECTS AS THE PFM THE DECISION DENIED

The Commission's conduct in approving the application was arbitrary and capricious. In converting the PFM to an application sua sponte, and approving the application without affording parties the rights they were entitled to with the filing of any new application, D.10-12-050 simply renamed the PFM but did not substantively change it to an application.

The PFM was denied because "the Commission specifically instructed PG&E that, if the Oakley Project came back before us [the Commission], it should return as an application."¹⁷ The reason D.10-07-045 required PG&E to file an application if the project returned is to allow parties the proper vehicle for examining whether the new Oakley Project meets the conditions set forth in the decision for resubmitting the project. Specifically, the Commission listed those conditions as follows:

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 below.

Prior to the next PG&E LTRFO the conditions under which PG&E may resubmit the Oakley Project are, if,:

1) Another, approved project or projects fail, creating an open need such that the total capacity of all projects approved in this decision, other decisions approving capacity that the Commission determines should be counted towards PG&E authorized procurement, and the total net capacity difference do not sum to greater than the midpoint of the total range, currently 1128 MW,

¹⁷ D.10-12-050, p.8.

2) If PG&E is able to retire an OTC plant (other than Contra Costa 6 & 7) of comparable size, at least 3 years ahead of schedule, or

3) If the final results from the CAISO Renewable Integration Study demonstrates that, even with the projects approved by the Commission, there are significant negative reliability risks from integrating a 33% Renewable Portfolio Standard.

It is clearly arbitrary to deny the PFM because it did not provide parties the opportunity to examine these conditions, but approve in its place an application that also did not afford parties the opportunity to examine the same conditions. In fact, none of the conditions for resubmitting the Oakley Project as required by D.10-07-045 have been met by the PFM or the new converted application. For all intents and purposes, the PFM and the converted application are the same. Mere change in semantics does not provide due process to parties.

V. D.10-12-050 MODIFIED SEVERAL COMMISSION DECISIONS WITHOUT GIVING NOTICE TO PARTIES IN THOSE PROCEEDINGS

D.10-12-050 committed legal error by modifying prior Commission decisions without giving notice and opportunity to be heard as required by Section 1708 to the parties in the proceedings that reached those decisions. In D.07-12-052, the Commission determined the long-term need of the investor owned utilities (“IOUs”) and held that the IOUs shall not procure more resources than were approved in the LTPP decision. In D.09-10-017, the Commission approved and adopted an all party settlement between PG&E and certain ratepayer advocates whereby PG&E agreed to be bound by and not procure more resources than the LTPP decision formally authorized. In D.10-07-042, the Commission conditionally approved two power projects under the condition that the Oakley project would be denied.

A. D.07-12-052

In D.07-12-052, the Commission required all three IOUs to procure the resources approved for them in the LTPP by 2015. The Commission also mandated that no IOU

may issue a Request for Offers (RFO) for new fossil fuel resources that have not been formally authorized in an LTPP decision.¹⁸ However, D.10-12-050 authorized PG&E to procure the Oakley project by 2016, beyond the date provided in D.07-12-052. Further, because the Oakley project is a new fossil fuel resource, it is clearly subject to the limitation barring PG&E from procuring new fossil fuel resources that have not been formally authorized in the LTPP decision. These two aspects of D.10-12-050 modify the LTPP decision without giving parties in that proceeding notice and opportunity to be heard.

The Oakley project would be a new fossil fuel resource that was not formally authorized in the LTPP decision because its size would exceed the need determined for PG&E in the LTPP decision. Consequently, in both D.10-07-045 and D.10-07-042, the Commission found that PG&E would exceed need authorized in the LTPP decision if the Oakley Project and the other projects arising from its Long-Term Request for Offers (LTRFO) were *all* approved. Consistent with D.07-12-052, the Commission denied the Oakley Project in D.10-07-045. By approving the PSA in D.10-12-050 when PG&E has not met any of the conditions for resubmitting the project, the Commission effectively modifies D.07-12-052 in violation of Section 1708 to let PG&E procure new resources that have not been formally authorized in the LTPP.

1. Violation of AB57

D.07-12-052 limited IOUs to procuring only the new fossil fuel resources that have been formally authorized in the LTPP because Assembly Bill (AB) 57 requires it. Under AB 57 all utility long-term procurement activities must be made pursuant to a long-term plan approved by the Commission in the LTPP proceeding. Therefore, any procurement made outside the parameters of the LTPP would not only violate the LTPP decision but also AB 57, which forms the basis for that proceeding and the decision.

¹⁸ Conclusion of Law, No. 27, p.295

D.10-12-050 violates AB 57 by authorizing PG&E to procure new fossil fuel resources beyond the authority granted in the LTPP.

It should be noted that AB57, which established the LTPP, was enacted in response to the electricity crisis after it was determined that California's lack of planning for new long-term resources was the primary basis for the paucity of new project investments in the State. In the Rulemaking to return the utilities to procurement and establish the LTPP¹⁹, independent power producers identified regulatory certainty as the key element of long-term planning that would ensure that power producers make the necessary investment for new projects in California²⁰.

We do not agree that Edison and PG&E need to obtain an investment grade credit rating prior to resuming the procurement role. We share the goal of Edison and PG&E regaining an investment grade rating, but this is not a necessary precondition to resuming procurement. In fact, many in the energy industry today do not have an investment grade credit rating and are able to conduct business. On the record developed in this proceeding, CCC states that its members are willing to enter contracts with both utilities. In its opening brief, Sempra Energy (SER) (SER) states 'if the Commission were to adopt procurement rules and mechanisms providing reasonable assurances to sellers that they will not face undue exposures to defaults or payment delays resulting from **regulatory uncertainties** or litigation, SER would make its offers to Edison accordingly, regardless of any actions taken by Moody's and/or Standard & Poor with respect to Edison's credit rating.' Therefore, in this decision we adopt procedural processes and timely cost recovery mechanisms that are designed to make Edison and PG&E capable of entering into procurement transactions without undue **regulatory uncertainties**.

¹⁹ Rulemaking 01-10-024

²⁰ D.02-10-062, Re Policies and Cost Recovery Mechanisms for Generation Procurement and Renewable Resource Development (220 P.U.R.4th 377, 2002 WL 31557334 (Cal.P.U.C.)

(D.02-10-062, p.12.)

Subsequently, the Commission took several steps to assure the electricity industry that the LTPP would be a legitimate and authoritative proceeding which they can look to and rely on in making long-term investment decisions for the development of new resources in California. D.10-12-050 has now undermined that assurance and rendered the LTPP decision unreliable by modifying the very language in the decision that investors were supposed to look to in making long-term investment decisions for the procurement of new resources in California. If the LTPP would direct PG&E to limit its solicitations for long-term resources to only those resources that will come online by 2015, while the Commission allows PG&E to pick a project that would come online in 2016, why would investors incur the costly expense of preparing offers when solicited for new projects in California?

B. D.09-10-017

D.09-10-017 adopted an all party settlement agreement regarding PG&E's request for a Power Purchase Agreement with Mariposa Energy, LLC. The primary goal of the settlement was to ensure that PG&E's total procurement from the LTRFO would not exceed the need formally authorized in D.07-12-052. D.09-10-017 adopted the all party settlement agreement without modification and expressly incorporated its key provisions in the Order of the decision.

D.10-12-050 modifies the following orders in D.09-10-017:

- a. The parties agree that the total need to be procured from the 2008 Long-Term Request for Offers (LTRFO) will be limited to 1,512 MWs under peak July conditions, inclusive of the 184 MWs included in the Mariposa PPA.
- b. The parties agree that the balance of PG&E's need authorization (1,328 MWs) will be met, but not exceeded, by one application for approval of additional agreements resulting from PG&E's 2008 LTRFO.

The size of new fossil fuel resources that PG&E would procure with the approval of the Oakley Project in D.10-12-050 now exceeds the need authorized in the LTPP

decision. To the extent rates will increase due to this approval, this approval of Oakley not only violates Section 1708, but sections 451 and 454.5 as well.

C. D. 10-07-042

D.10-07-042 directed PG&E to proceed with the development of two new fossil fuel resources, namely the GWF Tracy Transaction and the Calpine Los Esteros Critical Energy Facility (LECEF), if the Commission rejects the Oakley Project in A.09-09-021.

If the Commission rejects the proposed Marsh Landing Project and/or the Oakley Project in A.09-09-021, PG&E should proceed immediately with the Tracy Transaction and the LECEF Transaction. To demonstrate compliance with this requirement, PG&E should submit executed contracts for both transactions via a Tier 1 advice letter.

(D.10-07-042, Conclusions of Law, No. 6, pp. 67-68.)

Therefore, when D.10-07-045 denied the first PSA, D.10-07-042 effectively approved the Tracy Transaction and the Calpine LECEF transactions. PG&E filed the relevant compliance Advice Letter submitting the executed contracts.

By approving the Oakley Project, the rejection of which formed the basis for the approval of the GWF Tracy and Calpine LECEF transactions, D.10-12-050 now modifies D.10-07-042 without giving notice to the parties who participated in that proceeding.

VI. D.10-12-050 RELIES UPON FACTS NOT IN EVIDENCE

D.10-12-050 commits legal error by relying on facts there were not on the record of this proceeding to justify the project. Specifically, Finding of Fact 3, finds that:

“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)

The record in A.09-09-021 has been closed for some time and no party, including PG&E ever stated or argued that financing for the project may no longer be available. There is nothing on the record that supports the notion that the Oakley Project will have financing issues if it does not get approved by the December 31, 2010.

Similarly, Find of Fact No. 7 states that:

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.

Not only was there no record in this proceeding to support Finding of Fact No. 7, but the availability of financing for capital projects in California is far beyond the scope of this proceeding or any proceeding seeking to approve new fossil fuel projects for that matter. Such broad policy issues affecting procurement, like regulatory lag and availability of capital projects, belong in the LTPP.

Therefore, D.10-12-050 commits legal error by relying on facts not in evidence in the record of this proceeding.

VII. CONCLUSION

WHEREFORE, the Commission should grant rehearing of D.10-12-050 because it is erroneous as a matter of law, contravenes public policy and relies on facts outside the record of this proceeding. The decision is erroneous as a matter of law because it converted a PFM into an application but denied parties their State and Federal due process rights and the opportunity to be heard on the application it created. In so doing, D.10-12-050 also violated several statutes, including Public Utilities Code §§ 1701(a), 1701.1, 1708, 451, 454.5 and 309.5, the last of which created DRA. Finally, D.10-12-050 modified three prior Commission decisions without giving notice to the parties who participated in proceedings leading up to those decisions, in violation of Public Utils. Code §1708 and AB 57, while relying on facts outside the record to claim that the project might face financing issues if it is not approved with all these legal errors.

Respectfully submitted,

/s/ NOEL OBIORA

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January 19, 2011

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application of Pacific Gas and Electric Company (U39E) for Approval of 2008 Long-Term Request for Offer Results and for Adoption of Cost Recovery and Ratemaking Mechanisms

A.09-09-021
Filed September 29, 2009

**DECLARATION OF NOEL A. OBIORA
IN SUPPORT OF APPLICATION FOR REHEARING OF
DECISION 10-12-050**

I, Noel A. Obiora, hereby declare as follows:

1. I am an attorney duly licensed and authorized to practice in all the Courts of the State of California and the attorney for the Division of Ratepayer Advocates (DRA) in this proceeding, A.09-09-021.

2. I was responsible for reviewing the Commission's proposed decisions (PD) and revised alternate proposed decision (RAPD) on the Petition for Modification filed by Pacific Gas and Electric Company (PG&E), and filing comments on them.

3. The Commission issued the RAPD on December 9, 2010, and in the RAPD the Commission converted PG&E's PFM to an application and proposed to approve the application in the same RAPD.

4. Consistent with Commission's Rules of Practice and Procedure, I immediately filed a timely protest to the new application on behalf of DRA on December 15, 2010, and in the protest requested a new categorization for the new application. A copy of DRA's protest to the new application is attached hereto as Exhibit A.

5. The Commission's Docket Office accepted the DRA protest on December 21, 2010 as E-file #38348, but on December 22, 2010 the Commission Docket Office

informed me that it has been directed to reject the protest I filed on December 15, 2010 because the proper procedural vehicle for DRA is to request an application for rehearing. A copy of the Docket Office's December 22, 2010 email is attached hereto as Exhibit B.

6. At the time I filed the protest, the Commission had not yet issued a final decision on the RAPD, and the application which was created in the RAPD did not yet have a final decision.

I declare under penalty of perjury under the laws of the State of California that the foregoing are true and correct and if called upon to testify thereto I could competently do so.

Executed on this 19th day of January 2011 in San Francisco, California.

Respectfully submitted,

/s/ NOEL OBIORA

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BEFORE THE PUBLIC UTILITIES COMMISSION
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Application of Pacific Gas and Electric
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Long-Term Request for Offer Results
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Ratemaking Mechanisms

A.09-09-021
Filed September 29, 2009

**PROTEST OF THE DIVISION OF RATEPAYER ADVOCATES
AND REQUEST FOR A HEARING**

I. INTRODUCTION

Pursuant to Rule 2.6 of the Commission's Rules of Practice and Procedure, Section 1701.1 et. seq. of the California Public Utilities Code and the Revised Alternate Proposed Decision (RAPD), the Division of Ratepayer Advocates (DRA) submits its Protest to the Second Application of Pacific Gas and Electric Company's (PG&E) for Approval of the Purchase and Sale Agreement (PSA) between PG&E and Contra Costa Generating Station, LLC, in the 2008 Long-Term Request for Offer Results (LTRFO) and for Adoption of Cost Recovery and Ratemaking Mechanisms. PG&E filed a Petition for Modification of Decision (D.) 10-07-045 on August 23, 2010 seeking approval of the PSA after it was rejected. The Administrative Law Judge issued a PD denying the PFM, but Commissioner Bohn issued an Alternate Proposed Decision (APD) approving the PFM. However, on December 9, 2010, three working days to the last Commission meeting of 2010, Commissioner Bohn revised the APD and in the RAPD held that the PFM was an inappropriate procedural vehicle for approving the PSA, but *sua sponte* changed the PFM to an Application for approval of the PSA.

II. DRA REQUESTS A HEARING ON THE CATEGORIZATION OF THE OF NEW APPLICATION DETERMINED SUA SPONTE BY THE RAPD

DRA objects to the categorization of the Application in the RAPD and requests a hearing on categorization. Section 1701.1 of the California Public Utilities Code provides that a party may request a hearing on the categorization of any Application before the Commission within 10 days of the Commission decision on categorization. In this proceeding the RAPD converted the PFM to an Application, but did not assign a new docket number to the new Application, hence implicitly leaving it under the same categorization as the originally filed PFM. Therefore, DRA objects to the continuing categorization of the new Application as ratesetting upon the grounds that there is insufficient information on the new Application upon which such categorization could be implied. Further, DRA objects upon the grounds that the categorization of a new Application must be explicit not implicit and all parties must be given the opportunity to object to the categorization and request an appeal of the categorization.

DRA is entitled to a hearing on the categorization of the new Application as required by the Public Utilities Code and the Commission's Rules of Practice and Procedure, Rule 2.6 (d). Public Utilities Code Section 1701.1 provides:

(a) The commission, consistent with due process, public policy, and statutory requirements, shall determine whether a proceeding requires a hearing. The commission shall determine whether the matter requires a quasi-legislative, an adjudication, or a ratesetting hearing. The commission's decision as to the nature of the proceeding shall be subject to a request for rehearing within 10 days of the date of that decision....

DRA hereby requests a hearing on the Commission's determination that this proceeding is a ratesetting proceeding, and in the alternative, the Commission's failure to establish a categorization for this proceeding.

III. DRA REQUESTS A HEARING ON THE REASONABLENESS OF NEW APPLICATION DETERMINED SUA SPONTE BY THE RAPD

The RAPD did not give parties to this proceeding an opportunity to request a hearing on the myriad issues in the new Application created *sua sponte* in the RAPD because the RAPD decided the application *sua sponte* as well. DRA believes the new Application has substantial cost implications for ratepayers, far in excess of the cost of the original Application, because the new application would deliver the Oakley Power Plant two years later than the original application for a shorter life span (by two years) but still cost ratepayers the same as the original application and with a revenue requirement of more than \$1.5 billion dollars.

Therefore, DRA requests a hearing on the reasonableness of the revised terms of the PSA in the new Application and reserves the right to raise other issues as they arise.

Respectfully submitted,

/S/ NOEL A. OBIORA

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December 15, 2010

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of “**PROTEST OF THE DIVISION OF RATEPAYER ADVOCATES AND REQUEST FOR A HEARING**” to the official service list in **A.09-09-021** by using the following service:

E-Mail Service: sending the entire document as an attachment to all known parties of record who provided electronic mail addresses.

U.S. Mail Service: mailing by first-class mail with postage prepaid to all known parties of record who did not provide electronic mail addresses.

Executed on **December 15, 2010** at San Francisco, California.

/S/ MARTHA PEREZ

Martha Perez

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of **APPLICATION FOR REHEARING OF DECISION 10-12-050** to the official service list in **A.09-09-021** by using the following service:

E-Mail Service: sending the entire document as an attachment to all known parties of record who provided electronic mail addresses.

U.S. Mail Service: mailing by first-class mail with postage prepaid to all known parties of record who did not provide electronic mail addresses.

Executed on **January 19, 2011** at San Francisco, California.

/s/ Imelda Eusebio
Imelda Eusebio

N O T I C E

Parties should notify the Process Office, Public Utilities Commission, 505 Van Ness Avenue, Room 2000, San Francisco, CA 94102, of any change of address and/or e-mail address to insure that they continue to receive documents. You must indicate the proceeding number on the service list on which your name appears.

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