

BEFORE THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF CALIFORNIA

Application of Pacific Gas and Electric Company (U39E) for Approval of Amended Purchase and Sale Agreement between Pacific Gas and Electric Company and Contra Costa Generating Station LLC and for Adoption of Cost Recovery and Ratemaking Mechanisms.

Application 12-03-026  
(Filed March 30, 2012)

**OPENING BRIEF  
OF THE DIVISION OF RATEPAYER ADVOCATES  
(PUBLIC VERSION)**

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**TABLE OF CONTENTS**

	<b>Page</b>
<b>I. INTRODUCTION.....</b>	<b>1</b>
<b>II. SUMMARY OF DRA’S RECOMMENDATIONS .....</b>	<b>3</b>
<b>III. BACKGROUND ON PG&amp;E’S PROCUREMENT AUTHORIZATION.....</b>	<b>4</b>
<b>IV. ARGUMENT.....</b>	<b>7</b>
A. Oakley is not authorized under D.10-07-045 because it is outside of the procurement timeframe and there is no evidence of a “significant negative reliability risk” (issue 1(d)).....	9
1. Oakley cannot be authorized pursuant to D.10-07-045 because its commercial operations date is <i>after</i> the procurement timeframe considered in A.09-09-021.....	9
2. PG&E’s entire evidentiary showing of final results demonstrating significant negative reliability risks is derived from CAISO studies considered in the 2010 LTPP.....	11
3. The CAISO has indisputably concluded that its 33% Renewable Integration Studies are not “final” results that can support new procurement at this time. ....	14
4. The Commission has already determined that the CAISO’s results do not demonstrate a “significant negative reliability risk” from integrating renewable generation. ....	16
B. The Oakley project cannot be authorized under D.07-12-052 (issue 1(c)).....	18
1. PG&E has no remaining procurement authorization from D.07-12-052 that can support Oakley’s approval. ....	18
2. If Oakley is not approved under D.10-07-045, it must meet the conditions in D.07-12-052 for submitting UOG proposals. ....	19
3. Oakley is barred by D.07-12-052 because PG&E has not met its burden of proving a unique reliability issue exists that requires its approval.....	20
4. Oakley is barred by D.07-12-052 because PG&E has not made any credible demonstration that a competitive RFO is infeasible.....	22
C. Authorizing the Oakley facility outside the Commission’s LTPP proceedings will undermine public confidence in the Commission’s regulatory processes (issue 1(e)).....	23

D.	PG&E has not met its burden of proof to demonstrate that the Amended Oakley PSA is reasonable today compared to potential least cost/best fit alternatives for providing operational flexibility. ....	26
1.	D.10-07-045 did not pre-determine the reasonableness of the Amended Oakley PSA. ....	26
2.	PG&E’s 2008 analysis is outdated and does not reflect the current technological options or potential market value of flexible resources. ....	27
3.	Comparisons of Oakley to the cost of retaining existing plants under the CPM mechanism are irrelevant and do not support a finding that the Amended PSA is reasonable.....	30
E.	DRA’s Recommended Revisions to PG&E’s Proposed Ratemaking and Cost Recovery Treatment.....	32
1.	The Commission should reject automatic increases to the initial capital costs under the cost sharing bands. ....	32
2.	The Commission should reject PG&E’s request for authority to increase initial capital costs and O&M expenses via expedited advice letter process. ....	34
3.	Operations and Maintenance (O&M) costs should be fixed for the first ten years of Oakley’s operations.....	35
4.	The [REDACTED] (SVA) is not reasonable and should be rejected even if Oakley is approved. ....	35
V.	<b>CONCLUSION</b> .....	<b>37</b>

**TABLE OF AUTHORITIES**

**Page**

**COURT CASE**

*Utility Reform Network v. Public Utilities Commission*, 2012 Cal. App. Unpub. LEXIS 2049 (Cal. App. 1st Dist. Mar. 16, 2012) at \*49 ..... 7

**CPUC DECISIONS**

D.06-11-048..... 34, 35  
D.07-12-052..... passim  
D.08-11-004..... 20  
D.08-11-008..... 20  
D.10-07-042..... 5, 10, 11, 18,  
D.10-07-045..... passim  
D.10-12-050..... 10, 11  
D.11-07-012..... 5, 18, 19  
D.12-04-046..... passim

**CALIFORNIA PUBLIC UTILITIES CODE**

Section 451 ..... 26  
Section 454.5 ..... 23, 24

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**I. INTRODUCTION**

It is time for the Commission to finally close the book on Pacific Gas & Electric Company's (PG&E) bid to saddle ratepayers with over \$1.54 billion in capital costs for just the first eight years of operations after PG&E takes ownership of the Oakley facility.<sup>1</sup> Even in this third chapter of the Oakley saga, PG&E has not met its evidentiary burden of proving that the 586 MW Oakley power plant is needed or otherwise authorized, or that utility ownership of this large new generation facility is warranted under longstanding Commission precedent.

PG&E's evidentiary case relies entirely on PG&E's interpretation of hearsay statements from the California Independent System Operator (CAISO). These statements have been ruled inadmissible for the purpose of proving that there is in fact a system-wide need for new flexible generation resources for reliability purposes. Even still, PG&E's arguments that the CAISO study results demonstrate a reliability risk exists without Oakley are squarely contradicted by both (1) the recent determination from the 2010 Long Term Procurement Planning (LTPP) proceeding that no additional system procurement is needed by 2020 to support system flexibility needs and (2) the CAISO's own testimony and cross examination elicited recently in

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<sup>1</sup> Ex. 1 (PG&E Prepared Testimony) at 6-1.

the current 2012 LTPP confirming that additional system resource procurement is not needed prior to a determination in Track 2 of the 2012 LTPP.

With nothing more than its unsupportable interpretation of CAISO statements regarding system procurement needs, PG&E cannot meet its burden of proof to satisfy the requirements for re-submitting Oakley via application set forth in D.10-07-045. Nor can this hearsay evidence support a finding of need authorizing PG&E's purchase of the facility outside of (and in exception to) the Commission's ongoing work to determine system needs in the 2012 LTPP proceeding. Further, with no evidence that the Oakley facility is needed to come online in 2016 to mitigate a specific and unique reliability risk, approving the project would fly in the face of the Commission precedent that pre-dates the filing of A.12-03-026 and disfavors utility ownership of generation facilities. Accordingly, there is no factual or legal basis to support approval of the Amended Purchase and Sale Agreement (PSA) for the Oakley project.

Further, even if the Commission were to endorse PG&E's position that additional flexible generation is needed in California to mitigate reliability risks posed by renewable resources, there is no basis to conclude that Oakley would be the least-cost, best-fit resource to meet such needs, or that PG&E's ratepayers would be responsible for procuring 586 MW of new capacity.<sup>2</sup>

The technological, regulatory and market landscapes for flexible (as opposed to generic) capacity have all changed significantly since PG&E conducted its Request for Offers (RFO) under the 2008 LTPP. Updating the solicitation to allow bids from new projects under development and technology options, and to reflect new capacity markets that are expected to value for flexibility attributes, may reveal that other projects are more competitive than Oakley. PG&E has not, and cannot, present any evidence that Oakley would remain competitive today compared to other potential alternatives, including several new generation facilities that are already well along in the development process.

Nevertheless, if the Commission does approve the Amended Oakley PSA, the Division of Ratepayer Advocates (DRA) recommends that the Commission include as conditions of approval several modifications to PG&E's proposed cost recovery and ratemaking proposal. DRA's

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<sup>2</sup> To the contrary, PG&E admitted that any residual system need for new flexible resources would not fall entirely on the shoulders of PG&E's ratepayers. Trx. Vol. 2 299:2-300:9 (PG&E Witness Alvarez).

conditions would protect ratepayers from under-performance by the facility or unexpected increases in initial capital or Operations & Maintenance (O&M) costs. Such ratepayer protections are critical for maintaining an even risk-reward balance for Utility Owned Generation (UOG) projects relative to independent merchant-funded facilities.

## **II. SUMMARY OF DRA'S RECOMMENDATIONS**

DRA recommends that the Commission deny Application 12-03-026 in which PG&E seeks approval of the Amended Oakley PSA in its entirety. DRA recommends that the Commission's findings of fact and conclusions of law include the following points, which are sufficient to support an order denying PG&E's request for approval of the Amended Oakley PSA:

- The Amended Oakley PSA cannot be authorized pursuant to D.10-07-045 (which resolved proceeding A.09-09-021 in which PG&E originally filed for approval of the Oakley facility) or D.07-12-052 because (1) the commercial operations date of Oakley is outside of the time period of procurement authorized by D.07-12-052 and contemplated in A.09-09-021, and (2) the Commission has never issued an amended Scoping Ruling in A.09-09-021 to alter the procurement planning time horizon considered in that proceeding.
- The Amended Oakley PSA cannot be authorized pursuant to D.10-07-045 because there is insufficient evidence to support a finding that the final results of a CAISO study demonstrate significant negative reliability risks of integrating the 33% Renewables Portfolio Standard, as required to under the conditions imposed by D.10-07-045 to re-submit Oakley for the Commission's consideration.
- The Amended Oakley PSA cannot be authorized pursuant to D.07-12-052 because PG&E has no remaining procurement authorization from that decision and there is no evidence to support a finding that PG&E has met the requirements of D.07-12-052 for submitting a proposal for UOG.
- It would be unreasonable as a policy matter, and there is insufficient factual basis to approve PG&E's request for new UOG outside of the Commission's on-going long-term procurement process (LTPP) and in

exception to Commission policies and precedents regarding long-term procurement.

- D.10-07-045 does not establish the reasonableness of the Oakley PSA because the Commission did not make any determination, did not enter any findings of fact, and did not conclude as a matter of law that the Oakley PSA submitted in A.09-09-021 was reasonable or competitive.
- D.10-07-045 does not establish the reasonableness of the Amended Oakley PSA, because the Amended PSA was not submitted for approval in A.09-09-021 and the amendment included a material change to the commercial availability date of the project.
- Even if the Commission determines there is a need for additional flexible resources, there is insufficient evidence to support a finding that the Amended Oakley PSA is just and reasonable because PG&E has not submitted any evidence that Oakley is the least cost / best fit alternative compared to other flexible generation projects available today.

In the event that the Commission determines that the Oakley project should be approved, DRA recommends that the Commission nevertheless find that several aspects of PG&E's proposed ratemaking and cost recovery treatment are unreasonable. Accordingly, DRA recommends that the Commission adopt the revisions to the ratemaking and cost recovery proposal specified by DRA in Section IV(E).

### **III. BACKGROUND ON PG&E'S PROCUREMENT AUTHORIZATION**

The Commission adopted a Long Term Procurement Plan (LTPP) for PG&E in D.07-12-052, which initially authorized PG&E to procure 800-1200 MWs of new capacity by 2015 and authorized PG&E to issue requests for offers (RFOs) to obtain and execute long-term PPAs for that new capacity.<sup>3</sup> The Commission subsequently approved a PG&E contract for the Mariposa

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<sup>3</sup>D.10-07-045 at 4-5.

facility.<sup>4</sup> PG&E submitted additional projects for approval in Application 09-09-021, including the Oakley project.

In D.10-07-45 the Commission resolved PG&E's application for additional generation procurement. First, the Commission reduced PG&E's total procurement authorization to between 950-1000 MW of new generation resources from the 1200 MW limit in D.07-12-052.<sup>5</sup> Second, the Commission approved PG&E's PPAs for Mirant Marsh Landing, Midway Sunset, and Contra Costa 6 & 7.<sup>6</sup> Third, the Commission rejected the Oakley PSA, finding that it was "not needed at this time."<sup>7</sup> The Commission determined that PG&E's remaining procurement need under D.07-12-052 was between 231 and 281 MW.<sup>8</sup>

Simultaneously D.10-07-042 (which issued the same day as D.10-07-045) conditionally approved PG&E's contracts with GWF Tracy and Calpine Los Esteros Critical Energy Facility (LECEF) projects (totaling 254 MW) if the Commission rejected either the Marsh Landing Project and/or the Oakley Project.<sup>9</sup> Because D.10-07-045 rejected Oakley, PG&E subsequently filed Advice Letter 3711-E to proceed immediately with the GWF Tracy and LECEF projects. The Energy Division approved the Advice Letter on September 1, 2010.<sup>10</sup>

In its decision denying the original Oakley PSA, the Commission provided that PG&E could "resubmit the Oakley Project, via application, for Commission consideration" under three specific conditions (and contingent upon PG&E's demonstration that the Oakley project has

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<sup>4</sup> Id. at 5, 35.

<sup>5</sup> Id. at 33.

<sup>6</sup> Id. at 54 43-39.

<sup>7</sup> Id. at 54 (Conclusion of Law No. 13).

<sup>8</sup> Id. at 54 (Conclusion of Law No. 9).

<sup>9</sup> Id. at 55-58, 69 (Ordering Paragraph No. 2).

<sup>10</sup> See D.11-07-012 at 3.

received the necessary permits).<sup>11</sup> PG&E admits that the first two conditions are not satisfied,<sup>12</sup> so only the third is relevant here:

Prior to the next PG&E LTRFO [long-term request for offers], the conditions under which PG&E may resubmit the Oakley Project are ...

- 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.<sup>13</sup>

Further, the Commission expressly added that “except as noted previously in this section, PG&E shall not procure new generation in excess of the total 950-1000 MW we have identified as appropriate while under the current LTRFO.”<sup>14</sup> Indeed, former Commissioner Bohn filed a concurrence in which he recognized concerns that approving both Oakley and Mirant Marsh landing “will result in an excess of generation capacity and thereby result in higher costs and rates for PG&E’s ratepayers.”<sup>15</sup> He noted, however, that the decision allowed PG&E to bring Oakley back for reconsideration “should those excess capacity concerns diminish.”<sup>16</sup>

Notwithstanding this decision rejecting the Oakley project, the Commission subsequently approved Oakley following an amendment to move the commercial availability date back by 2 years, from June, 2014 to June, 2016. The Utility Reform Network (TURN) successfully

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<sup>11</sup> D.10-07-045 at 40. DRA does not currently take any position on whether Oakley has or lacks necessary permits, although it believes that other parties may provide arguments on this issue.

<sup>12</sup> PG&E stipulated that the two other conditions for renewing this application pursuant to D.10-07-045 do not apply. Assigned Commissioner’s Scoping Memo and Ruling, May 25, 2012 (Scoping Memo) at 4, n.4.

<sup>13</sup> D.10-07-045 at 40-41.

<sup>14</sup> *Id.* at 41.

<sup>15</sup> Concurrence of Commissioner John A. Bohn Regarding Decision 10-07-045.

<sup>16</sup> *Id.*

challenged the decision in court, however, and the California Court of Appeals annulled the decision authorizing Oakley on March 6, 2012.<sup>17</sup>

Just prior to issuing D.10-07-045 the Commission also issued an Order Instituting Rulemaking 10-05-006 opening the 2010 LTPP. Track 1 considered system procurement needs and found no need for new generation through 2020 pursuant to a proposed Settlement Agreement (which both PG&E and the CAISO signed). The Commission noted that to the extent there was any future need for additional generation, “it appears to be primarily driven by the necessity to integrate higher levels of renewable generation onto the system, in anticipation of a 33% renewable portfolio standard (RPS) target” and that settling parties agreed to defer a determination on need.<sup>18</sup> The Commission concluded:

In looking at the whole record, it would be reasonable to find that there is no need for additional generation by 2020 at this time, and accordingly it is reasonable to defer authorization to procure additional generation based on system and renewable integration need.<sup>19</sup>

On March 22, 2012, the Commission issued an Order Instituting Rulemaking 12-03-014 which opened the 2012 LTPP. Under Track 2 of the 2012 LTPP the Commission “will consider issues related to system variability, such as renewable integration, into the state’s energy future” as well as “[w]hat specific Commission authorization of IOUs and/or LSEs is required for them to procure to meet long-term system reliability needs.”<sup>20</sup>

#### **IV. ARGUMENT**

The Scoping Memo identifies three primary avenues for finding that the Oakley project may be either barred or approved, depending on the existence of procurement authority and need.

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<sup>17</sup> Util. Reform Network v. Public Utilities Commission, 2012 Cal. App. Unpub. LEXIS 2049 (Cal. App. 1st Dist. Mar. 16, 2012) at \*49.

<sup>18</sup> D.12-04-046 at 6.

<sup>19</sup> *Id.* at 10.

<sup>20</sup> Ex. 5 (DRA Prepared Testimony), Attachment J (Scoping Memo and Ruling of Assigned Commissioner and Administrative Law Judge in R.12-03-014, May 17, 2012) at 9-10.

They are D.10-07-045 (issue 1(d)), D.07-12-052 (issue 1(c)), or a rogue grant of authority made outside of any LTPP process (issue 1(e)).

The evidentiary record clearly establishes that the Oakley facility cannot be authorized under either D.10-07-045 or D.07-12-052. First, as a threshold matter, the Amended Oakley PSA cannot be authorized by D.10-07-045 because the new commercial operations date for Oakley in 2016 falls beyond of the planning horizon addressed by the 2008 LTPP and D.10-07-045. Nor can PG&E meet its burden of proof that a “significant negative reliability risk” exists that would allow PG&E to re-file the Oakley application under the conditions imposed by D.10-07-045. The Commission has already determined that the very same CAISO studies PG&E relies on here to prove “reliability risk” show no need to procure new flexible resources by 2020 to support renewable resource integration. Authorizing Oakley now based on CAISO studies would require a completely contrary factual finding based on the same evidence that was considered in D.12-04-046.

Second, because it cannot be authorized under D.10-07-045, the Oakley facility should be rejected for failure to comply with the requirements of D.07-12-052. PG&E has no remaining procurement authority from D.07-12-052. Nor has PG&E satisfied the conditions for proposing utility owned generation set forth in D.07-12-052.

Third, authorizing Oakley outside of and “in exception to Commission policies and precedents regarding long-term procurement” would contravene existing Commission precedent and make bad public policy. DRA also believes that approving Oakley on this basis would perpetuate uncertainty and leave Oakley to further legal challenges due to the lack of any evidence or need or pre-existing procurement authorization to support the facility.

But even if the Commission devises an avenue to authorize PG&E to procure the amount of generation equivalent to Oakley’s MWs, the project should still not be approved. There is simply no evidence or basis for the Commission to find that the Amended PSA is reasonable and competitive compared to other projects under development in California. Thus, if the Commission determines there is a need for new flexible generation (even though such a finding would contravene the decision reached just last December in the 2010 LTPP proceeding), it should order PG&E to refresh or conduct a new solicitation that properly accounts for costs and value of flexibility attributes. The Commission should not just rubber-stamp utility ownership of

this large new facility when so many years have passed since PG&E evaluated the competitive options.

Finally, even if the Commission finds that the Oakley project is needed and reasonable, it should incorporate ratepayer protections by limiting aspects of PG&E's ratemaking and cost recovery proposal. DRA outlines these modifications in Section E.

**A. Oakley is not authorized under D.10-07-045 because it is outside of the procurement timeframe and there is no evidence of a "significant negative reliability risk" (issue 1(d)).**

The Assigned Commissioner's Scoping Memo and Ruling identifies as a key issue for determination whether "the Oakley project [is] barred or authorized pursuant to D.10-07-045?"<sup>21</sup> The Oakley project cannot be authorized pursuant to D.10-07-045. First, the new commercial operations date for Oakley exceeds the time horizon of PG&E's previous procurement authorization. Second, a Commission finding that a "significant negative reliability risk" warrants approving Oakley would have to be based upon the very same CAISO renewable integration studies that the Commission recently determined do not warrant new resource procurement at this time.

1. Oakley cannot be authorized pursuant to D.10-07-045 because its commercial operations date is *after* the procurement timeframe considered in A.09-09-021.

As an initial matter, the Amended Oakley PSA cannot be authorized pursuant to D.10-07-045 because the Amended PSA delayed the commercial operations date for Oakley by 2 years and thus moved the project outside of the procurement timeframe addressed in A.09-09-021. The Oakley PSA submitted for approval in A.09-09-021 specified a guaranteed commercial availability of June 4, 2014, but under the Amended PSA Oakley has a guaranteed commercial availability date of June 1, 2016.<sup>22</sup> Commission approval would therefore require the determination of issues (procurement to meet needs starting in 2016) that is outside the scope of the issues considered in A.09-09-021.

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<sup>21</sup> Scoping Memo at 4.

<sup>22</sup> Ex. 2 (PG&E Prepared Testimony) at 4-3, 5-16.

Nothing in the issues considered in A.09-09-021 or the language of D.10-07-045 indicated that the Commission would approve Oakley to meet alleged procurement needs for a period starting after the procurement horizon authorized in D.10-07-045 and D.07-12-052. By contrast, in D.11-07-012 the Commission relied on this same change to the commercial operation date as a basis for distinguishing the Amended Oakley PSA from the original Oakley PSA in denying a Petition for Modification of D.10-07-045 filed by Californians for Renewable Energy (CARE). CARE argued that the Commission should have rescinded its approval of the GWF Tracy and Los Esteros Critical Energy Facility (LECEF) Projects after the Commission approved Oakley in D.10-12-050.<sup>23</sup> CARE reasoned that because the Oakley Project was ultimately approved, PG&E did not have authority under D.10-07-042 to proceed with the GWF Tracy and LECEF projects—because their approval was conditioned upon the rejection of Oakley.<sup>24</sup>

The Commission rejected CARE’s Petition for Modification, noting that “[i]n D.10-07-042, the Commission held that PG&E should not contract for more new capacity than authorized by D.07-12-052” and that approval of all three facilities (Oakley, Tracy, and LECEF) “would result in more new capacity than authorized by D.07-12-052.”<sup>25</sup> Nevertheless, the Commission averted the procurement limitations of D.07-12-052 (as amended by D.10-07-045) by reasoning that

the new capacity approved by D.10-12-050 will not come online until 2016, which is after the 2015 timeframe for the new capacity authorized by D.07-12-052. Consequently, the Commission’s approval of the Oakley Project, in addition to the Tracy and LECEF Projects, does not cause PG&E to exceed the new capacity authorized by D.07-12-052.<sup>26</sup>

The fact remains true today that when D.10-07-042 was issued, the Oakley Project proposed by PG&E “was within the 2015 timeframe for new capacity authorized by D.07-12-052,” but under

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<sup>23</sup> D.11-07-012 at 4.

<sup>24</sup> Id.

<sup>25</sup> Id. at 5.

<sup>26</sup> Id. at 5-6 (emphasis added), Finding of Fact No. 2 (“The Oakley Project approved by D.10-12-050 is intended to fill PG&E’s need for new capacity beginning in 2016.”)

the Amended PSA it is not.<sup>27</sup> This dictates that Oakley cannot be approved pursuant to PG&E's procurement authorization granted in D.07-12-052 and resolved in D.10-07-045.

Further, the California Court of Appeal annulled the Commission's Decision 10-12-050 approving Oakley because the need for the project in 2016 fell outside of the period covered by the need determination in D.07-12-052 and raised issues of need that were not encompassed within the scoping memo in A.09-09-021.<sup>28</sup> The Commission has still never issued a revised scoping memo in A.09-09-021 to give parties notice that it would consider and determine procurement needs starting in 2016 and thus consider the Oakley project with a later in-service date. Accordingly, approving Oakley under D.10-07-045 would leave the decision vulnerable to further legal challenges.

In short, because the Oakley project submitted in this application is no longer the Oakley project that was contemplated in A.09-09-021 or D.10-07-045, it cannot be approved under that proceeding or pursuant to D.10-07-045.

2. PG&E's entire evidentiary showing of final results demonstrating significant negative reliability risks is derived from CAISO studies considered in the 2010 LTPP.

On July 1, 2011, the CAISO submitted testimony in the 2010 LTPP that presenting the CAISO's analysis of four different Commission-mandated renewables integration scenarios and one additional sensitivity analysis—the high-load, trajectory scenario.<sup>29</sup> In the Commission-mandated scenarios, there was no identified need for new resources.<sup>30</sup> Only the results of the high-load, trajectory sensitivity analysis showed a need for approximately 4,600 MW of new resources in 2020, based on an assumption of 10% higher load than in the four mandated

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<sup>27</sup> Id. at 7.

<sup>28</sup> See Util. Reform Network v. Public Utilities Commission, 2012 Cal. App. Unpub. LEXIS 2049 (Cal. App. 1st Dist. Mar. 16, 2012), \*45-49.

<sup>29</sup> See Ex. 5 (DRA Prepared Testimony) at 2-1 to 2-4.

<sup>30</sup> Ex. 5 (DRA Prepared Testimony), Attachment C (Opening Brief of the California Independent System Operator on Track I Issues, filed September 16, 2011 in R.10-05-006) Figure 2 in Ex. 1 at 7.

scenarios.<sup>31</sup> Each of these renewable integration study scenarios and the high load trajectory sensitivity assumed that Oakley was not available as a resource.<sup>32</sup>

All of the CAISO statements and materials that PG&E has submitted in this case are the results of, or are derived from, the high load, trajectory analysis.<sup>33</sup> PG&E does not directly dispute DRA's contention on this point. Instead, PG&E vaguely claims that PG&E is "not proposing to modify Decision 12-04-046" because "the record of the 2010 LTPP proceeding did not include additional information presented by the CAISO after July 2011."<sup>34</sup> PG&E further claims "the 2010 LTPP and subsequent CAISO studies are sufficient to satisfy the requirement in D.10-07-045."<sup>35</sup> PG&E's witness testified that by such additional information PG&E means (1) the Sutter Waiver Petition, (2) statements PG&E described in Chapter 5 of its Prepared Testimony, and (3) additional exploratory work being conducted by the CAISO advisory group.<sup>36</sup> The first two categories do not present any new or different results compared to the renewable integration modeling CAISO presented in the 2010 LTPP, and the third category does not satisfy the requirement of presenting "final" results.

In Chapter 5 of PG&E's Prepared Testimony, PG&E cites a plethora of CAISO statements, testimony and legal briefs submitted in other fora, internal CAISO memoranda, and even draft market proposals from the Flexible Capacity Procurement initiative. But the indisputable fact is that the statements in these documents simply reiterate the results of the high load trajectory sensitivity analysis and/or the Sutter Waiver Petition, which was derived from the

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<sup>31</sup> Ex. 5 (DRA Prepared Testimony), Attachment D (Track I Direct Testimony of Mark Rothleder on Behalf of The California Independent System Operator Corporation in R.10-05-006, filed July 1, 2011), Ex. 1 slide 11.

<sup>32</sup> Ex. 5 (DRA Prepared Testimony) at 2-4, Attachment F (Joint IOU Supporting Testimony in R.10-05-006, filed July 1, 2011) at 5-19.

<sup>33</sup> Id. at p. 2-2, Table 1.

<sup>34</sup> Ex. 2 (PG&E Rebuttal Testimony) at p. 30 (emphasis added).

<sup>35</sup> Ex. 2 (PG&E Rebuttal Testimony) at 24.

<sup>36</sup> Trx. Vol. 3, 429:17-431:25, Trx. Vol. 2, 340:6-26 (PG&E Witness Alvarez).

high load trajectory study.<sup>37</sup> They do not constitute “final” results that differ from the conclusions submitted in the CAISO’s 2010 LTPP testimony. In fact, PG&E admitted that for each CAISO statement claimed identified a need for new capacity, the source was either the renewable integration studies filed in the 2010 LTPP or the CAISO’s Sutter Waiver Request.<sup>38</sup>

Second, although PG&E attempts to cast the Sutter Waiver Petition as a “supplemental sensitivity analysis,” it is not a new or different analysis. It is just the 2010 LTPP high load trajectory model with the output (results) adjusted for an earlier year (2018, not 2020) and with slight modifications to the resources that CAISO assumed would be available to meet system needs.<sup>39</sup> Further, in the Sutter Waiver Petition the CAISO did not even present or include results in 2018 for the four other Commission-mandated planning scenarios—it only evaluated the high-load trajectory scenario in producing the sensitivity analysis to support the petition.<sup>40</sup> Re-running the worst-case scenario for an earlier year and getting a similar result cannot satisfy the requirement that “final results” demonstrate “significant negative reliability risks.”

Third, it is unclear whether PG&E will argue that Oakley can be authorized under D.10-07-045 based on “additional” ongoing studies being conducted under the CAISO advisory group.<sup>41</sup> But clearly such ongoing studies cannot constitute the “final” results required by D.10-

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<sup>37</sup> See Ex. 5 (DRA Prepared Testimony) at 2-1 to 2-4, Attachment A (PG&E Response to DRA-03-005), Attachment B (PG&E Response to DRA-05-001).

<sup>38</sup> Ex. 5 (DRA Prepared Testimony), at 2-2, Table 1.

<sup>39</sup> See Ex. 5 (DRA Prepared Testimony) at 2-3; Trx. Vol. 2, 276:1–9, 295:22-296:11, 296:25-297:1, 342:16-24 (PG&E Witness Alvarez), Ex. 1 (PG&E’s Prepared Testimony), Attachment 1 to Chapter 5 (Sutter Waiver Request) at 31; Ex. 29 (Transcript of Cross-Examination of Mark Rothleder in R.12-03-014) at 323:10-18 (testifying that the Sutter Waiver Petition mentioned the residual results of the 4600 MW study from the 2010 LTPP, but that “the results there was an additional sensitivity that was not in the 2020 case but 2018 scenario that was developed from that case”).

<sup>40</sup> Trx. Vol. 3, 425:17-426:14 (PG&E Witness Alvarez); Ex. 29 (Transcript of Cross-Examination of Mark Rothleder in R.12-03-014) at 323:19-28 (“Q. Did the ISO also provide the results of the other scenarios in supporting the waiver for the Sutter facility? A. ... We didn’t take their scenarios and look at 2018.”).

<sup>41</sup> Trx. Vol. 3, 431:16-20 (PG&E Witness Alvarez).

07-045. In any event, PG&E has not even presented actual results from such work that allegedly demonstrate a need for new resources.<sup>42</sup>

3. The CAISO has indisputably concluded that its 33% Renewable Integration Studies are not “final” results that can support new procurement at this time.

The evidence is clear that PG&E’s case relies entirely on the CAISO renewable integration modeling and studies that were submitted and considered in the 2010 LTPP. But there is plausible way to conclude that the CAISO (or really even PG&E) believe that the 33% renewable integration study results are “final” results that demonstrate a “significant negative reliability risk” that warrants new resource procurement.

By contrast, in the 2010 LTPP both the CAISO and PG&E agreed that the CAISO’s resource planning analyses “do not conclusively demonstrate whether or not there is a need to add capacity for renewable integration purposes through the year 2020.”<sup>43</sup> And as the Commission noted in approving the settlement “[t]here is general agreement that further analysis is needed before any renewable integration resource need determination is made.”<sup>44</sup>

The CAISO has also repeatedly and recently confirmed that it is not recommending that the Commission authorize any new resource procurement to meet system flexibility needs ahead of a determination in Track 2 of the 2012 LTPP. For example, in testimony served on May 23, 2012 “[t]he [CA]ISO recommends that the Commission’s assessment of the need for new system resources to meet renewable integration needs should take place in this docket during calendar year 2013 with a decision on system needs by 2013.”<sup>45</sup> In reply testimony addressing the high

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<sup>42</sup> Cf Trx. Vol. 3 at 443:17-444:10 (PG&E Witness Alvarez) (admitting that although PG&E believes there is a need to look at additional sensitivities that have not been considered in the 2010 LTPP scenario, that would have to be conducted as a new study).

<sup>43</sup> D.12-04-046 at 8 (quoting from Settlement Agreement).

<sup>44</sup> Id. at 8. See also Ex. 29 (Transcript of Cross-Examination of Mark Rothleder in R.12-03-014) at 322:9-323:9 (discussing the results of the high load trajectory scenario, the “4600 MW scenario” and agreeing that there is general agreement that further analysis is needed before any renewable integration resource need determination is made).

<sup>45</sup> Ex. 21 (Testimony of CAISO Witness Mark Rothleder in R.12-03-014) at 7 (“The ISO recommends that the Commission’s assessment of the need for new system resources to meet renewable integration

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load trajectory scenario results from the renewable integration studies, the CAISO again confirmed that it “is continuing its study work and believes the ultimate system decision can be taken up in 2013 after being informed by the Commission’s decision on local capacity needs at the end of this year.”<sup>46</sup> The CAISO submitted all of this testimony after PG&E filed its latest application for approval of Oakley (March 30, 2012) and after the CAISO submitted the Sutter Waiver Petition (January 25, 2012) that PG&E relies upon so extensively in this proceeding.

All of this evidence clearly demonstrates that even the CAISO’s recognizes that its studies are not final—they are continuing and evolving and should not be relied on to support new procurement at this time. Instead, the Commission should wait until this issue is resolved through Track 2 of the 2012 LTPP.<sup>47</sup>

Even PG&E has previously argued that further analysis is needed beyond the 33% renewable integration results can support capacity additions.<sup>48</sup> PG&E argued “[w]ith respect to renewables integration, the IOUs have established that the analysis of the issue that has been presented in this proceeding ‘should be viewed as an initial effort to understand the complex problems of accommodating the significant increase in renewable energy ...’”<sup>49</sup> It is unsurprising that PG&E is taking a different position in this proceeding compared to the position it advanced in the LTPP, given that billions of dollars in revenue requirements for PG&E’s

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needs should take place in this docket during calendar year 2013 with a decision on system needs by 2013. ... Furthermore, if there are identified flexibility needs, an assessment of best location for such resources can be performed.”).

<sup>46</sup> Ex. 30 (Reply Testimony of CAISO Witness Mark Rothleder in R.12-03-014) at 2.

<sup>47</sup> Ex. 5 (DRA Prepared Testimony), Attachment J (Scoping Memo and Ruling of Assigned Commissioner and Administrative Law Judge in R.12-03-014, May 17, 2012) at 9-10.

<sup>48</sup> Ex. 26 (Excerpt of PG&E Opening Brief on Tracks I and III, R.10-05-006, Sept. 16, 2011) at 5 (“With respect to system need, ... the Commission should determine that further analysis is necessary before it can make a conclusive need determination.”), 6 (“key features of the Track 1 Settlement Agreement are” ... It’s conclusion that the resource planning analyses presented in this proceeding do not conclusively demonstrate whether or not there is a need to add capacity for renewable integration purposes through the year 2020.”).

<sup>49</sup> Id. at 7.

shareholders hinge on Oakley’s approval. But PG&E’s litigation position here that the CAISO studies are “final” is belied by its position in the 2010 LTPP that the renewable integration studies are an “initial effort.”

4. The Commission has already determined that the CAISO’s results do not demonstrate a “significant negative reliability risk” from integrating renewable generation.

The Assigned Administrative Law Judge (ALJ) ruled during hearings that PG&E’s evidence consisting of CAISO studies and statements are inadmissible for the purpose of proving that there is a system reliability need for Oakley due to integrating higher amounts of renewable resources. Granting in part DRA’s Motion to Strike PG&E’s evidence of CAISO statements and documents submitted for the purpose of proving that there is a system reliability need for new resource procurement, the ALJ ruled:

I will not allow these, this evidence, however, to be used for the purpose of proving on this record the truth of the matter asserted; that is, for proving that there is a system reliability need. . . . The ISOs’s statements are not binding on the Commission, and in that way they are not judicially noticeable authority. And they are subject to dispute. They are being challenged before the PUC.<sup>50</sup>

In clarifying the scope of the ruling later in the hearings, the ALJ admonished DRA not to question PG&E’s witnesses on CAISO evidence for the purpose of determining if there is a residual need for flexible resources that can only be met by Oakley, which DRA contended related to the requirement that PG&E demonstrate a significant negative reliability risk. The ALJ clarified that “we cannot use the ISO for that. . . . The third party documentation is for whether there’s a final ISO report.”<sup>51</sup>

The CAISO does not determine new resource procurement needs—the Commission does. But even if the Commission was convinced that the CAISO at least believes the 33% renewable integration studies constitute “final” results demonstrating significant reliability risks, that is still

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<sup>50</sup> Trx. Vol. 1, 22:5-23:14 (ALJ Yacknin).

<sup>51</sup> Trx. Vol. 2, 438:18-439:15 (ALJ Yacknin).

insufficient to support authorizing Oakley because it would contradict and violate the Commission's recent precedential decision resolving Track 1 of the 2010 LTPP.

In approving the Track 1 settlement agreement in the 2010 LTPP, the Commission expressly considered the entire record before it and found there was no need to authorize new resource procurement. The decision approving the settlement specifically noted that all of the CAISO analyses were considered, including the CAISO's high-load trajectory scenario:

As requested by the Commission, the CAISO developed a methodology for assessing renewable integration resource needs and applied this methodology with the assistance of the IOUs to assess the need for flexible capacity for the four CPUC-Required Scenarios and one other CPUC scenario analyzed by the CAISO. The results show no need to add capacity for renewable integration purposes above the capacity available in the four scenarios for the planning period addressed in this LTPP cycle (2012-2020). The additional scenario studied by the CAISO did show need.<sup>52</sup>

Nevertheless, the Commission found, "there is clear evidence on the record that additional generation is not needed by 2020."<sup>53</sup>

If the Commission wants to reverse-course and now find that the high-load trajectory scenario demonstrates a need to authorize new resource procurement (and hence approve Oakley), it would essentially be modifying D.12-04-046.<sup>54</sup> There is simply no credible way to square a decision that now authorizes new system procurement for renewable integration purposes with the Commission's Decision deferring procurement for system needs through 2020. Thus, regardless of what the CAISO thinks its study results mean, there is no credible factual support for a finding that PG&E has proven "significant negative reliability risks" from integrating renewable resources that justify approving Oakley.

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<sup>52</sup> D.12-04-046 at 7.

<sup>53</sup> Id. at 8.

<sup>54</sup> Such action would require giving notice and an opportunity to be heard on the change to all parties to the 2010 LTPP. See Pub. Util. Code Section 1708 ("The commission 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.") (emphasis added).

**B. The Oakley project cannot be authorized under D.07-12-052 (issue 1(c)).**

Oakley cannot be authorized under D.07-12-052 for three reasons. With the new online date of June, 2016, the Oakley project no longer falls within the procurement time-frame covered in D.07-12-052 and thus cannot be approved pursuant to that authority. But even setting aside this bar, D.07-12-052 cannot provide authorization for the Oakley project because PG&E has no remaining procurement authorization from that decision. Further, PG&E has not met the conditions specified in D.07-12-052 under which a utility can submit a proposal for utility owned generation.

1. PG&E has no remaining procurement authorization from D.07-12-052 that can support Oakley's approval.

PG&E has no remaining authorization to procure additional MW of new generation to support approval of Oakley. “In D.10-07-042, the Commission held that PG&E should not contract for more new capacity than authorized by D.07-12-052.”<sup>55</sup> Taking into account the approval of the Marsh Landing, Contra Costa 6 & 7, and Midway Sunset PPAs, PG&E was further authorized to procure between 231–281 MW of new generation pursuant to the authority granted it in D.07-12-052.<sup>56</sup> D.10-07-045 also admonished that “any approved MW should be counted against the authorized procurement,” including the GWF Tracy and LECEF projects (totaling 254 MW).<sup>57</sup> As the Commission itself has noted:

To ensure that PG&E did not procure more capacity than authorized by D.07-12-052, the Commission in D.10-07-042 determined that PG&E should not proceed with both (1) the Tracy and LECEF Projects, and (2) the Oakley Project, as proceeding with all of these projects would result in more new capacity than authorized by D.07-12-052.<sup>58</sup>

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<sup>55</sup> D.11-07-012 at 4.

<sup>56</sup> D.10-07-045 at 55 (Ordering Paragraph No. 5).

<sup>57</sup> Id. at 12-15.

<sup>58</sup> D.11-07-012 at 5.

The Tracy and LECEF Projects were authorized following the initial rejection of Oakley.<sup>59</sup> Thus, PG&E must either meet the specific conditions set out in D.10-07-045 for procuring Oakley in excess of its original procurement authorization, or convince the Commission to eschew the LTPP processes entirely and authorize the project under Issue 1(e) in the Scoping Memo. But the Commission cannot approve Oakley under PG&E’s procurement authorization from D.07-12-052.<sup>60</sup>

2. If Oakley is not approved under D.10-07-045, it must meet the conditions in D.07-12-052 for submitting UOG proposals.

If Oakley is not approved under D.10-07-045, which dispensed of the projects PG&E submitted for approval from its 2008 RFO, then the proposed UOG facility cannot be considered to have resulted from any competitive solicitation process. Accordingly, Oakley must meet the conditions imposed by D.07-12-052, which were still in force when PG&E filed the Oakley Application in May, 2012 and before they were supplemented by additional restrictions and limitations on UOG projects implemented by D.12-04-046.

Further, Oakley should be subject to the conditions of D.07-12-052 because the Amended Oakley PSA materially altered the commercial operations date of the facility—delaying it by 2 full years from June, 2014 to June, 2016. Only the Oakley project developers received an opportunity to delay the commercial operations date to accommodate the Commission’s determination that PG&E did not need more new generation by 2015. PG&E never re-opened the 2008 RFO to allow other projects to submit or alter exiting bids in response to this change to the development timeline. Because Oakley was the only project allowed to modify its bid in response to the Commission’s changed determination of need, it cannot be considered to have resulted from the solicitation results evaluated in D.10-07-045. Accordingly, PG&E must demonstrate that it has met the requirements of D.07-12-052 relating to UOG proposals.

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<sup>59</sup> See *id.* at 3.

<sup>60</sup> D.10-07-045 at 41 (“However, except as noted previously in this section [setting out the conditions for resubmitting Oakley], PG&E shall not procure new generation in excess of the total 950 – 1000 MW we have identified as appropriate while under its current LTPP.”).

3. Oakley is barred by D.07-12-052 because PG&E has not met its burden of proving a unique reliability issue exists that requires its approval.

In D.07-12-052 the Commission emphasized its support for a “competitive market first” approach and stated its firm belief that “all long-term procurement should occur via competitive procurements, except in truly extraordinary circumstances.”<sup>61</sup> Thus, “in all cases, if an IOU proposes a UOG outside of a competitive request for offer (RFO), the IOU must make a showing that holding a competitive RFO is infeasible.”<sup>62</sup> The Commission recognizes only four “unique circumstances” in which an IOU may propose UOG outside of a competitive RFO, one of which PG&E contends applies here: “the proposed UOG is necessary to ensure system reliability.”<sup>63</sup> The Commission defines the “reliability” exception as follows:

Reliability – resources needed to meet specific, unique reliability issues (particularly under circumstances in which it becomes evident that reliability may be compromised if new resources are not developed, and the only means of developing new resources in sufficient time is UOG.<sup>64</sup>

PG&E has no evidence that a “specific unique reliability issue” that requires new resources or that Oakley is the only means of meeting such a need. Following the ALJ’s ruling on DRA’s motion to strike, the only evidence PG&E submitted on this point is the statement that “the CAISO has identified a ‘2,535 MW deficiency in flexible capacity requirements, resulting in an estimated 3,570 MW of additional capacity needs’ by 2017-2018” with a citation to the CAISO’s Sutter Waiver Petition.<sup>65</sup> This hearsay evidence of statements by a third party cannot be used to establish as a true fact PG&E’s claim that there is in fact a need for 3,570 MW of additional capacity by 2017-2018.

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<sup>61</sup> D.07-12-052 at 212-213 (emphasis in original). See also D.08-11-004 at 8.

<sup>62</sup> Id. at 210-211 (emphasis added).

<sup>63</sup> See D.07-12-052 at 210-212; D.08-11-008 at 30 (deleting a fifth category, “Expansion of Existing Facilities”).

<sup>64</sup> D.07-12-052 at 212 (emphasis added).

<sup>65</sup> Ex. 2 (PG&E Rebuttal Testimony) at 17.

Further, there is no support for PG&E’s claim that results submitted in the Sutter Waiver Petition require new resource additions. The CAISO submitted the Sutter Waiver Petition due to concerns that the retirement of existing resources may create reliability issues—not to support new generation procurement.<sup>66</sup> By contrast, Mr. Rothleder of the CAISO testified in the 2012 LTPP (after the CAISO filed the Sutter Waiver Petition) that there is general agreement that further analysis is needed before any renewable integration resource need determination is made.<sup>67</sup>

PG&E has also not accounted for other resources besides Oakley that could meet system flexibility needs arising by 2017-2018. New resources may be approved as a result of San Diego’s application A.11-05-023 (which would come online by 2014), or to meet Local Capacity Requirements in Southern California Edison’s territory as a result of Track 1 in the 2012 LTPP. Further, even if a “residual system shortage” existed beyond these potential resource additions, Mr. Rothleder expressly pointed out “I’m not asking for that need to be authorized at this point. If it was authorized at some point in the future, I think potentially in Track 2 [of the 2012 LTPP], then as a system need it may be the commission could distribute that authorization ... in various ways.”<sup>68</sup> Mr. Rothleder also agreed that additional time should be taken to evaluate system needs—“especially the residual system needs and look at what the alternatives are for that.”<sup>69</sup> There is simply no evidence that Oakley—a large, utility-owned facility—is the potential solution alleviating potential system needs in 2017 or 2018.

In sum, PG&E simply has no admissible evidence of a specific, unique reliability risk. Even taking into account the CAISO studies on potential system needs in 2017-2018, in light of Mr. Rothleder’s testimony there is no support for a finding that the Oakley UOG facility is the only means of addressing such risks.

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<sup>66</sup> Trx. Vol. 2, 342:25-343:2 (PG&E witness Alvarez).

<sup>67</sup> Ex. 29 (Hearing transcript of cross examination of Mark Rothleder in .12-03-014, Aug. 8, 2012) at 232:4-9.

<sup>68</sup> Id. at 284:5-23.

<sup>69</sup> Id. at 289:25-290:27.

4. Oakley is barred by D.07-12-052 because PG&E has not made any credible demonstration that a competitive RFO is infeasible.

The Commission has also ruled that even “in instances in which an IOU submits an application for UOG that falls into one of the [categories of “unique circumstances”], the IOU should request in its application to hold a competitive RFO for turnkey project development of the resource (a PSA)” or explain why it is not appropriate.<sup>70</sup> PG&E has not offered a sufficient explanation of why a competitive RFO is not appropriate, it simply claims that it is infeasible to complete an RFO for new generation resources to be developed by 2018.<sup>71</sup>

PG&E’s self-serving and conclusory claim that it could not conduct an RFO that would result in generation coming online by 2018 is dubious at best and not supported credible evidence. An RFO would not be limited to accepting bids from projects that are “starting from scratch” in the development process, yet PG&E’s argument requires overlooking the numerous other projects that are already under development in California that could submit competitive bids for to achieve commercial operations before 2018. FEC/MEC submitted testimony that at least four other resources could be commercially operational by 2018—including projects in Fairfield, Madera, Stockton, and the Vacaville.<sup>72</sup> PG&E argues that these projects are not under “advanced development” and cannot be online within 6 years because they have not executed a Large Generator Interconnection Agreement. The only support for this argument is PG&E’s claim that the CAISO interconnection process takes “several years.”<sup>73</sup> But there are more than “several years” before 2018, and PG&E’s disagreement with the FEC/MEC witnesses does not negate their claims that six years would be a sufficient development timeline for the projects.

PG&E also overlooks three other specific projects that even PG&E admits could be considered as alternatives to the Oakley project.<sup>74</sup> While PG&E dismisses these projects for

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<sup>70</sup> D.12-07-052 at 212.

<sup>71</sup> Ex. 2 (PG&E Rebuttal Testimony) at 7-16.

<sup>72</sup> Ex. 11 (FEC/MEC Direct Testimony) at 14-15.

<sup>73</sup> Ex. 2 (PG&E Rebuttal Testimony) at 15.

<sup>74</sup> Ex. 2-C (PG&E Rebuttal Testimony) at 16 (confidential portions indicating the identity of three

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various reasons, the fact is that they are all actively being pursued by developers and could bid into an RFO. PG&E and the Commission should not pre-judge the outcome of giving these (and other) resources an opportunity to compete with Oakley under terms of the amended commercial operations date (or an even later date). At the very least there is no evidence demonstrating that holding a competitive RFO is infeasible. Accordingly, the Oakley application is barred by D.07-12-052.

**C. Authorizing the Oakley facility outside the Commission’s LTPP proceedings will undermine public confidence in the Commission’s regulatory processes (issue 1(e)).**

Issue 1(e) in the Scoping Memo asks whether there is “a need to procure new UOG outside of the Commission’s on-going long-term procurement process (LTPP) and in exception to Commission policies and precedents regarding long-term procurement?”<sup>75</sup> The clear answer must be “no.” Authorizing procurement of Oakley outside of the Commission’s continuously ongoing LTPP processes would violate existing Commission precedent. It would also undermine public and market participants’ confidence in the Commission’s commitment—and ability—to implement long term resource planning under a transparent, predictable and reliable regulatory framework.

“The Commission is required by Public Utilities Code Section 454.5 to adopt a long-term procurement plan (LTPP) for each Investor-owned Utility (IOU).”<sup>76</sup> To fulfill this statutory mandate, the Commission routinely and consistently initiates LTPP rulemakings to ensure that California’s IOUs could resume and maintain procurement responsibilities on behalf of their customers in the wake of the Energy Crisis of 2000-2001.<sup>77</sup> Indeed, for at least the past 8 years, the first paragraph in every Order instituting the Commission’s next LTPP proceeding includes

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projects).

<sup>75</sup> Scoping Memo at 4.

<sup>76</sup> D.10-07-045 at 4.

<sup>77</sup> See Order Instituting Rulemaking to Integrate and Refine Procurement Policies and Consider Long-Term Procurement Plans, dated Mar. 27, 2012 (R.12-03-014) at 3.

language confirming that the Commission will consider long-term procurement planning in an integrated fashion and within the forum of the LTPP:

We open this rulemaking to continue our efforts to ensure a reliable and cost-effective electricity supply in California through integration and refinement of a comprehensive set of procurement policies, practices and procedures underlying long-term procurement plans. This is the forum in which we shall consider the Commission’s electric resource procurement policies and programs and how to implement them.<sup>78</sup>

Authorizing procurement of any new resources outside of the LTPP processes—and especially a huge (586 MW) utility-owned generation facility—is entirely inconsistent with the Commission’s longstanding commitment to conducting electric resource procurement in an integrated and single forum.

Granting PG&E additional and new procurement authority outside of the LTPP and in this individual application would also require disregarding existing Commission precedent. The Commission has ruled that PG&E’s procurement authority is based on PUC Section 454.5, “which sets forth the LTPP process,” and that PG&E failed to identify any authority that allows it to procure MW in excess of those allotted in its LTPP.<sup>79</sup> The 2010 LTPP clearly determined PG&E did not need any new procurement authorization through 2020.<sup>80</sup> This was not due to “regulatory lag”—it was the result of the settlement agreement reached between PG&E, the

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<sup>78</sup> Id. at 1 (emphasis added). See also Order Instituting Rulemaking to Integrate and Refine Procurement Policies and Consider Long-Term Procurement Plans, dated May 6, 2010 (R.10-05-006) at 1, Order Instituting Rulemaking to Integrate and Refine Procurement Policies and Consider Long-Term Procurement Plans, dated February 14, 2008 (R.08-02-007) at 1 (“This LTPP proceeding ... will be the forum in which we consider, in an integrated fashion, the Commission’s electric resource procurement policies and programs.”) (emphasis added), Order Instituting Rulemaking to Integrate Procurement Policies and Consider Long-Term Procurement Plans, dated February 16, 2006 (R.06-02-013) at 1, Order Instituting Rulemaking to Promote Policy and Program Coordination and Integration in Electric Utility Resource Planning, dated April 1, 2004 (R.04-04-003) at 1.

<sup>79</sup> D.10-07-045 at 14.

<sup>80</sup> D.12-04-046 at 10 (“In looking at the whole record, it would be reasonable to find that there is no need for additional generation by 2020 at this time, and accordingly it is reasonable to defer authorization to procure additional generation based on system and renewable integration need”). See also n. 9 (“It is important to note that the record similarly does not support a finding of need for additional generation beyond 2020.”).

CAISO, and numerous other parties (including DRA) in that regulatory proceeding. The Commission took action based on the record presented to it—the action was to not authorize new resource procurement at this time.

Further, in D.10-07-045 the Commission established as a general rule and “to support decisional consistency and discourage the parsing of projects into different applications as a mean to circumvent our rulings,” the principle that if procurement is allowed outside of the LTPP proceeding “any approved MW should be counted against the authorized procurement.”<sup>81</sup> This rule pre-supposes a grant of procurement authorization by the Commission in the LTPP. It does not sanction the approval individual projects first, followed by general procurement determinations second. The last LTPP decision granted no new procurement authorization, and there is no justifiable legal or factual basis to reverse that settled outcome now simply because PG&E has been seeking approval of Oakley for a number of years. Accordingly, the Amended Oakley PSA must be rejected at this time.

The Commission should be mindful that over-procurement of fossil generation diminishes the cost-effectiveness of preferred resource programs. It will further strain PG&E’s ratepayers, who continue (with all Californians) to suffer through ongoing and sustained economic downturn. Now is just not the time to approve a large new generation facility without any admissible evidence that it is needed for reliability purposes. Instead, the Commission should signal its intent and ability to return to implementing long-term procurement for the IOUs in a predictable and reliable manner within the integrated LTPP proceedings by denying the Oakley project. If the Commission issues a need system determination in the 2012 LTPP and authorizes PG&E to procure additional generation consistent with that need, then PG&E could re-submit the Oakley project—or another winner of an updated RFO—for approval consistent with the Commission’s policies regarding UOG.

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<sup>81</sup> D.10-07-045 at 14.

**D. PG&E has not met its burden of proof to demonstrate that the Amended Oakley PSA is reasonable today compared to potential least cost/best fit alternatives for providing operational flexibility.**

1. D.10-07-045 did not pre-determine the reasonableness of the Amended Oakley PSA.

The Commission has the statutory responsibility and obligation to ensure that all utility rates are just and reasonable.<sup>82</sup> Issue 2 in the Scoping Memo identifies the “consideration of whether D.10-07-045 already establishes the reasonableness of the Oakley PSA” as an issue relevant to this proceeding. But D.10-07-045 did not and cannot “establish the reasonableness” of the Oakley PSA. Accordingly, the current Commission clearly must make a determination that the Amended Oakley PSA is just and reasonable in order to justify saddling ratepayers with the plant.

The Commission has never made any determination that the original Oakley PSA—let alone the Amended Oakley PSA—is just and reasonable. Decision 10-07-045 did nothing more than deny the Oakley project, in part because of its lack of competitiveness compared to the other projects that were approved that fulfilled most of PG&E’s then-existing procurement authorization. No text in that decision provides a tenable factual or legal basis to support a finding that the original or Amended Oakley PSA is reasonable. Although the Commission described conditions under which PG&E could resubmit the Oakley Project for consideration, the findings and conclusions of law regarding Oakley were merely that “[t]he Oakley Project is not needed at this time”, which supported Ordering Paragraph 3, “[t]he Oakley Project is denied at this time.”<sup>83</sup> No language in the decision suggests that the reasonableness of any element of the PSA would be treated as already established or that the Oakley PSA is already determined to be reasonable.

More significantly, D.10-07-045 addressed an Oakley proposal with an online date in 2014, submitted in response to an RFO that addressed system needs through the 2015 planning

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<sup>82</sup> Pub. Util. Code Section 451 (“All charges demanded or received by any public utility ... for any product... shall be just and reasonable”).

<sup>83</sup> D.10-07-045, Finding of Fact 18 and Conclusion of Law 13.

horizon. It did not consider or address an Oakley project with an Amended PSA and an online date of 2016 to meet an alleged system need arising in 2017 or 2018. PG&E has never allowed developers of the other shortlisted bids or any other potential competitors to respond to this material change to the contract term and project development timeline. Because critical aspects of the Oakley project changed, the Amended PSA is a different contract than the one the Commission contemplated in A.09-09-021 and accordingly could not have been found to be reasonable in D.10-07-045.

2. PG&E's 2008 analysis is outdated and does not reflect the current technological options or potential market value of flexible resources.

PG&E has not met its burden of proving that the Amended Oakley PSA is reasonable, because it has failed to present any evidence of the relative costs and benefits of Oakley compared to other flexible generation options available today. PG&E has simply compared Oakley to other plants that have already been approved and are being built, and not other resources that might be viable competitors to Oakley today.<sup>84</sup>

First, results of the 2008 LTRFO do not demonstrate that the Amended PSA is “competitive” because the results are outdated and technologies have advanced for increasing operating flexibility since the LTRFO was conducted. PG&E agrees with DRA that “technology is always developing,”<sup>85</sup> but it still has not evaluated the market to determine if there are current resource options that can provide the same or similar services as Oakley, but at a lower cost to PG&E’s ratepayers.

Numerous companies have been working since 2008 to develop flexible technologies. For example, Siemens offers its own technology that appears to have attributes similar to those of the GE Rapid Response technology.<sup>86</sup> According to Siemens, there are three plants under construction that are using the Flex-Plant technology (Marsh Landing, El Segundo, and Lodi

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<sup>84</sup> Ex. 1-C (PG&E Prepared Testimony), Table 5-1 at 5-15.

<sup>85</sup> Ex. 2 (PG&E Rebuttal Testimony) at 74.

<sup>86</sup> Ex. 5 (DRA Prepared Testimony) at 3-3.

Energy Center).<sup>87</sup> PG&E indicates that Mitsubishi has a similar technology.<sup>88</sup> Further, Fairfield-Madera has also expressed concerns with the Oakley design.<sup>89</sup> Among other issues, Fairfield-Madera concluded that the Oakley plant is “not useful as a renewable integration resource.”<sup>90</sup> When questioned under cross-examination, the Fairfield and Madera witness explained the possibility of “technological refreshing” and explained “there are now technologies out there that can be added to the bids that were put together in ‘09 to make them more attractive.”<sup>91</sup>

If you were buying a new car today, you might start with a “shortlist” of options that you developed in 2008. But you probably would not (and should not) rely completely on your old first choice without even considering more recent technological developments and current prices. It would be more reasonable to refresh your assessment of the market. That should be the minimum effort required before committing PG&E’s ratepayers to fund PG&E’s purchase when the costs will exceed billions of dollars just in the first eight years of its 30-year life.<sup>92</sup>

Second, PG&E analysis in 2008 did not take account of recent CAISO and Commission developments that may create new methods of valuing and sources of revenue for flexible operating characteristics and should at least be considered in assessing the relative value of competing flexible resources today. For example, the CAISO is developing a new Flexible Ramping Product to procure ramping capability via economic bids.<sup>93</sup> The CAISO’s intent is to develop market-based products that address the operational needs posed from increasing

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<sup>87</sup> Id.

<sup>88</sup> Id.

<sup>89</sup> Ex. 11 (FEC/MEC Prepared Testimony) at 8.

<sup>90</sup> Id. at 10.

<sup>91</sup> Trx Vol 2, 332:6 – 332:12 (FEC/MEC witness Roberts).

<sup>92</sup> Ex. 1 (PG&E Prepared Testimony) at 6-1.

<sup>93</sup> Ex. 5 (DRA Prepared Testimony) at 2-10; Trx. Vol. 1, 144:1-146:15 (PG&E Witness Monardi) (discussing Flexible Ramping Product and positing that “a more flexible resource may get more revenues [from the flexible ramping product] than a less flexible resource.”).

renewable integration.<sup>94</sup> The Commission is also considering procurement obligations for flexible capacity (rather than generic capacity) under the Commission’s Resource Adequacy program.<sup>95</sup> PG&E admitted that these initiatives, if implemented, would create revenue streams and provide more compensation to more flexible resources compared to less flexible resources.<sup>96</sup> But PG&E’s 2008 LTRFO did not evaluate potential revenues from these emerging markets.<sup>97</sup>

Instead, PG&E evaluated flexibility “qualitatively”—not “quantitatively”—when it analyzed bids in response to the 2008 RFO.<sup>98</sup> PG&E used an option valuation models to quantify how operating flexibility contributed to market valuation.<sup>99</sup> But PG&E also admitted that the option model could not capture certain levels of granularity (such as sub-hourly) or operational constraints relating to flexibility such as minimum uptime, minimum downtime, and start-up time.<sup>100</sup> Thus, even though PG&E assigned a numerical score to resources that was used in weighting offers in its market valuation, the score was based on a qualitative assessment of flexibility, not a market value based on potential revenues or cost savings<sup>101</sup>

PG&E’s “qualitative” approach may have been the only feasible way to evaluate a resource’s flexibility characteristics when bids were analyzed in 2008. But such potential revenue streams could be evaluated today and might reveal that other projects have a higher expected net market values compared to Oakley. Indeed, PG&E’s witness admitted that even if

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<sup>94</sup> Ex. 5 (DRA Prepared Testimony) at 2-10.

<sup>95</sup> Trx. Vol. 1, 146:22-148:16 (PG&E Witness Monardi).

<sup>96</sup> Trx. Vol. 1, 145:28-146:15, 147:21-148:16 (PG&E Witness Monardi).

<sup>97</sup> Trx. Vol 1, 146:16-21, 148:17-149:22 (PG&E Witness Monardi).

<sup>98</sup> Trx. Vol 1, 148:24-149:22 (PG&E Witness Monardi).

<sup>99</sup> Ex. 7 (TURN Woodruff Rebuttal Testimony) at 5:22, 8:18-20 (quoting PG&E’s September 2009 Testimony in A.09-09-021).

<sup>100</sup> Trx. Vol 1, 151:11-152:15 (PG&E Witness Monardi) (“The option model that we used in our evaluation can’t capture that level of granularity or that level of operational constraints,” and describing “the type of constraints that we’re – we’re talking about, constraints regarding ramping, is minimum uptime, minimum downtime, how fast can you start.”)

<sup>101</sup> Trx. Vol. 1, 149:23-150:11 (PG&E Witness Monardi).

he did not know exactly how PG&E would go about it, “I would suspect that we would consider” the value of resource adequacy and/or the CAISO’s flexible ramping products in developing a net market valuation.<sup>102</sup> The impacts of such developments should be considered and factored into any least-cost, best-fit evaluation of resources that are currently available to satisfy any system flexibility needs the Commission determine exist.

Because the regulatory and market landscape relating to flexible resource operating characteristics has changed dramatically since PG&E evaluated the results of the 2008 RFO, it is not reasonable to conclude that Oakley would have the best market valuation today compared to other options.

3. Comparisons of Oakley to the cost of retaining existing plants under the CPM mechanism are irrelevant and do not support a finding that the Amended PSA is reasonable.

PG&E’s comparison of Oakley to the cost of retaining existing plants (such as Sutter) by paying them under the Capacity Procurement Mechanism (CPM) are irrelevant to a determination of whether the Amended PSA is just and reasonable for PG&E’s customers. It cannot provide factual support for a finding that it would be just or reasonable for PG&E’s ratepayers fund the Oakley UOG for 30-years.

First, the CPM provision in the CAISO tariff does not currently allow the CAISO to designate resources under the CPM that are needed for reliability purposes more than one-year beyond the current resource adequacy year.<sup>103</sup> Right now, the CAISO simply does not have tariff authority to pay the CPM to resources unless it can demonstrate they are needed for reliability purposes within the current or next Resource Adequacy compliance year. That is true even if the CAISO believes it will need the resource more than two years into the future for reliability reasons.<sup>104</sup>

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<sup>102</sup> Trx. Vol. 1, 149:5-12 (PG&E Witness Monardi).

<sup>103</sup> Trx. Vol. 2, 349:15-26 (PG&E Witness Alvarez).

<sup>104</sup> Id. See also Ex. 7 (TURN Woodruff Rebuttal Testimony) Attachment R3 (CAISO Flexible Capacity Procurement Phase 1: Risk of Retirement, Draft Final Proposal, July 26, 2012) at 4 (“The existing CPM tariff provisions for generation units at risk of retirement allow the ISO to procure capacity that is not under RA contract in the upcoming year, but will be needed for reliability in the subsequent year.”).

Second, it is true that the CAISO is currently seeking to develop tariff provisions that will allow the CAISO to procure resources that are at risk of retirement that the CAISO believes are needed for reliability purposes two to five years into the future. This initiative is named Flexible Capacity Procurement (FCP).<sup>105</sup> But even under the FCP initiative, the CAISO proposes paying existing conventional resources that are at risk of retirement a unit-specific, cost-based award, not the administratively-set CPM price.<sup>106</sup> Although the FCP initiative has not yet been approved by FERC, under the CAISO's proposal the cost to keep existing capacity online due to reliability concerns would be lower than the administrative CPM price.<sup>107</sup>

Third, the IOUs are currently paying considerably lower prices for capacity from the Sutter Power Plant than the CPM costs that PG&E postulates.<sup>108</sup> These indisputable facts render PG&E's comparison to Sutter—or any flexible resource that may be at risk of retirement—irrelevant to this proceeding.

Finally, even if the CAISO receives and uses an administrative procurement mechanism to maintain existing resources, it may not need to be used at all—and it likely would not be used for the full 30 years over which PG&E's ratepayers will pay for the Oakley plant. In sum, PG&E's comparisons of Oakley to the Sutter facility or costs to maintain a similarly-sized existing resource cannot provide any evidentiary support for a conclusion that the Amended Oakley PSA is competitive or reasonable.

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<sup>105</sup> Ex. 7 (TURN Woodruff Rebuttal Testimony) Attachment R3 at 4. See also Ex. 5 (DRA Prepared Testimony) at 2-10-2-11; Trx. Vol.2, 351:27-354:9 (PG&E witness Alvarez).

<sup>106</sup> Ex. 7 (TURN Woodruff Rebuttal Testimony) Attachment R3 at 25-26. See also Trx. Vol.2, 353:7-354:9 (PG&E witness Alvarez).

<sup>107</sup> Trx. Vol, 1, 50:17-21 (TURN Witness Woodruff). (The CAISO Board of Governors approved the proposal on September 13, 2012. See [http://www.caiso.com/Documents/ISO\\_BoardApprovesRule\\_KeepNeededFlexibleGenerationCapacity.pdf](http://www.caiso.com/Documents/ISO_BoardApprovesRule_KeepNeededFlexibleGenerationCapacity.pdf)).

<sup>108</sup> Ex. 6 (TURN Woodruff Prepared Testimony) at 25-27.

**E. DRA’s Recommended Revisions to PG&E’s Proposed Ratemaking and Cost Recovery Treatment.**

Aspects of PG&E’s proposed cost recovery and ratemaking treatment are not reasonable because they would shift the risk of cost overruns in the initial capital cost and increased Operations and Maintenance costs for years 9-10 that would typically be borne by a developer under a Power Purchase Agreement onto ratepayers. DRA therefore recommends modifications to PG&E’s proposal.

PG&E requests that the ratemaking and cost recovery treatment adopted in the Partial Settlement Agreement (Settlement) in A.09-09-021 should also be adopted here. But the prior Settlement is not binding upon the parties to the current application, and it should not be applied here.<sup>109</sup> Settlements are not “precedential” regarding any principle or issue in the proceeding or in any future proceeding.<sup>110</sup> Accordingly, the Commission should reject PG&E’s request for recovery of costs in excess of its initial capital cost estimate.<sup>111</sup> In addition, The Commission should reject PG&E’s request for authority to increase initial capital costs and O&M expenses via “expedited” advice letter process.<sup>112</sup>

1. The Commission should reject automatic increases to the initial capital costs under the cost sharing bands.

Under PG&E’s proposal, the utility could recover costs in excess of the initial capital cost estimate (up to \$54 million in cost overruns) without the need for an after-the-fact reasonableness review.<sup>113</sup> The Commission should reject the proposed “cost sharing bands” and instead require PG&E to submit for approval of any cost overruns through either an Application or at least a Tier 3 Advice Letter.

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<sup>109</sup> Ex. 5 (DRA Prepared Testimony) at 4-1.

<sup>110</sup> Rule 12.5 of the Commission’s Rules of Practice and Procedure.

<sup>111</sup> Ex. 1 (PG&E Prepared Testimony) at 6-3.

<sup>112</sup> Ex. 1 (PG&E Prepared Testimony) at 6-2 – 6-4.

<sup>113</sup> Ex. 1 (PG&E Prepared Testimony) at 6-3.

First, if PG&E is allowed to fully recover through rate base up to \$54 million of cost overruns without any Commission review (with the first \$20 million at no cost to PG&E's shareholders) it would eviscerate PG&E's agreement to remove \$24.5 million in contingency costs from the initial capital cost estimates. The reduction in the contingency would be more than offset by the potential increases under PG&E's proposed cost sharing bands.

Second, PG&E's shareholders would make a profit of PG&E's authorized rate of return—currently 8.79% pre-tax—on the increased initial capital costs.<sup>114</sup> This creates a clear incentive for PG&E to spend more rather than managing costs within the initial cost estimates, because any cost overruns will further increase the total amount added to PG&E's rate base and would earn PG&E's authorized rate of return over the 30-year project life.<sup>115</sup> The first \$20 million in cost overruns would be added to rate base (and thus increase shareholder profits) at no cost to shareholders. The remaining \$40-\$60 million in overruns would come at a “cost” of sharing \$6 million in overruns by PG&E's shareholders, but that cost would be offset by the profits on PG&E's increased rate base over 30 years. Therefore, even if shareholders fund a portion of the overruns for the \$20-40 million and \$40-60 million bands, shareholders would still profit from the ratepayer portion of overruns. This creates an incentive for PG&E to agree to scope changes without any Commission oversight of whether such changes are reasonable.

Furthermore, the cost sharing bands of up to \$60 million are excessive given that costs that would be funded under the cost sharing bands are mostly for scope changes. To the extent there might be cost overruns or costs coming in at higher than forecasted figure, those would be costs first incurred by the developer, CCGS.<sup>116</sup> The cost sharing bands are not for the initial costs to oversee construction and the commencement of operations (which are just [REDACTED]).<sup>117</sup> Accordingly, DRA recommends that the Commission disallow the three

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<sup>114</sup> Trx. Vol 4, 677:24-677:25 (PG&E Witness O'Flanagan).

<sup>115</sup> Trx. Vol. 4, 677:6-678:4 (PG&E Witness O'Flanagan).

<sup>116</sup> Trx. Vol. 4, 632:28-633:16 (PG&E Witness O'Flanagan).

<sup>117</sup> Ex. 22-C (Chapter 7 from PG&E's Testimony filed in A.09-09-021, “Capital Cost of Contra Costa Generating Station) Table 7-2.

cost sharing bands. If costs are in excess of the initial capital cost estimate, PG&E should be required to either fund them (as would a developer under a PPA), or file an application (or at least a Tier 3 Advice Letter) for Commission approval to recover the costs upon a demonstration that they are reasonable.

2. The Commission should reject PG&E's request for authority to increase initial capital costs and O&M expenses via expedited advice letter process.

PG&E requests authority to increase initial capital costs via expedited advice letter process if the following occur: (1) delays in closing the Amended PSA; or (2) operational performance enhancements; or (3) changes beyond PG&E's control, including new permit or regulatory requirements, greenhouse gas changes, and costs incurred under the Major Legal Change mechanism of the Amended PSA.<sup>118</sup> PG&E also requests authority to adjust its O&M expenditures via expedited advice letter process prior to the end of the eight-year period for: (1) delays in closing; (2) increases caused by governmental agency requirements or changes in permitting assumptions; (3) changes in operating profile from the maximum assumed in the O&M forecast.<sup>119</sup>

With the exception of costs that are beyond PG&E's control (such as new permit, regulatory requirements, and greenhouse gas changes) DRA recommends that the Commission require PG&E to seek increases in initial capital costs or O&M expenditures through an application, or at the very least a Tier 3 advice letter.

As explained in D.06-11-048, the advice letter process is not an appropriate method to seek increases when there is no information on record available to determine the reasonableness of the additional capital costs:

For example, it is appropriate to use the advice letter process for adjustments upon payment or receipt of incentives under the pre-approved terms of the contract. In contrast, there is no record basis to predetermine that additional capital costs associated with a delay

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<sup>118</sup> Ex. 1 (PG&E Prepared Testimony) at 6-4.

<sup>119</sup> Ex. 1 (PG&E Prepared Testimony) at 6-2.

in the closing date, operational enhancements, or undefined external events are necessarily reasonable.<sup>120</sup>

Accordingly, parties should be able to examine the basis for any increases in capital costs or O&M to ensure that increases such as “delays in closing the Amended PSA” are reasonable, and not due to events that occurred prior to this instant application or events for which the developers expected and were compensated for in the cost of the plant.

3. Operations and Maintenance (O&M) costs should be fixed for the first ten years of Oakley’s operations.

The O&M expenses adopted in this application be fixed for the first ten years of Oakley’s operations.<sup>121</sup> This would create a consistent approach between proposals for utility-owned generation (UOG) and PPAs. It would also eliminate any incentive could be created for utilities to underestimate O&M costs in an application and then recover higher O&M costs after a UOG project has been approved.

Should the Commission reject DRA’s recommendation to fix the O&M costs for the first ten years, it should require PG&E to file an application, or at least a Tier 3 advice letter, if PG&E seeks to increase costs during the first eight years of operations.<sup>122</sup>

4. The [REDACTED] (SVA) is not reasonable and should be rejected even if Oakley is approved.

The terms of the Amended PSA include a [REDACTED] (SVA) which allows for CCGS to [REDACTED] of the plant.<sup>123</sup> Should CCGS take advantage of this option [REDACTED]. PG&E has not even attempted to demonstrate why [REDACTED]. Indeed, PG&E’s witness admitted that [REDACTED]

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<sup>120</sup> D.06-11-048 at 25.

<sup>121</sup> Ex. 5 (DRA Prepared Testimony) at 4-2.

<sup>122</sup> Ex. 5 (DRA Prepared Testimony) at 4-3 - 4-4.

<sup>123</sup> Trx. Vol 1, 161:10-161:20 (PG&E Witness Monardi).

[REDACTED] <sup>124</sup>

Although a power plant is not a new car, straight-line depreciation is undeniably applied to value the asset over its 30-year life. DRA therefore recommends that the Commission either reject the SVA provision of the Amended PSA or require PG&E [REDACTED] that occurs during any period in which [REDACTED] the SVA [REDACTED].

Furthermore, the SVA should be rejected because PG&E has not proven that [REDACTED] [REDACTED] <sup>125</sup> [REDACTED] [REDACTED] <sup>126</sup> [REDACTED]

<sup>127</sup> It is also unclear if PG&E will need or be able to [REDACTED] <sup>128</sup>

There is just not sufficient certainty about the [REDACTED]

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<sup>124</sup> Trx. Vol 1, 162:17-162:20 (PG&E Witness Monardi).

<sup>125</sup> Trx. Vol 1, 163:2-163:20 (PG&E Witness Monardi).

<sup>126</sup> Trx. Vol 1, 165:26-166:4 [REDACTED] ; 172:11-173:14 ( [REDACTED] (PG&E Witness Monardi).

<sup>127</sup> Trx. Vol 1, 165:26-166:23; 1723:7-9 [REDACTED] (PG&E Witness Monardi).

<sup>128</sup> See Trx. Vol 1, 172:11-173:18 [REDACTED] (PG&E Witness Monardi).

[REDACTED]

[REDACTED].

The terms of the SVA are confusing, and PG&E clearly has not proven that the SVA is overall a reasonable value for ratepayers. Accordingly, even if the Commission otherwise approves the Amended Oakley PSA, it should condition such approval on PG&E's filing of a Tier 1 Advice Letter demonstrating either that (1) a further amendment to the PSA has been executed that removes the SVA from the agreement, or (2) PG&E has [REDACTED] [REDACTED] SVA.

**V. CONCLUSION**

For the reasons stated above, the Commission should deny PG&E's Application for approval of the Amended Purchase and Sale Agreement for the Oakley facility. If the Commission determines in the current Long-Term Procurement Plan proceeding that PG&E should be authorized to procure additional system resources, then PG&E can seek approval of the Oakley facility if it is appropriate and conforms to Commission requirements for UOG proposals. Finally, should the Commission decide to approve the Oakley facility it should nevertheless adopt DRA's cost recovery and ratemaking suggestions enumerated above.

Respectfully submitted,

/s/ CANDACE J. MOREY

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