UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

CAlifornians for Renewable Energy, Inc., (CARE), Complainant, v. Pacific Gas and Electric Company (PG&E), and California Energy Commission (CEC) Respondents.	Docket No. EL09-73-000

MOTION FOR REHEARING BY CALIFORNIANS FOR RENEWABLE ENERGY, INC. (CARE)

This motion is filed pursuant to the Federal Energy Regulatory Commission ("FERC") Rules of Practice and Procedure, 18 CFR Part 385[1]. CAlifornians for Renewable Energy, Inc.

[1] **385.713 Request for rehearing (Rule 713).**
(a) *Applicability.* (1) This section applies to any request for rehearing of a final Commission decision or other final order, if rehearing is provided for by statute, rule, or order.
(2) For the purposes of rehearing under this section, a final decision in any proceeding set for hearing under subpart E of this part includes any Commission decision:
(i) On exceptions taken by participants to an initial decision;
(ii) When the Commission presides at the reception of the evidence;
(iii) If the initial decision procedure has been waived by consent of the participants in accordance with Rule 710;
(iv) On review of an initial decision without exceptions under Rule 712; and
(v) On any other action designated as a final decision by the Commission for purposes of rehearing.
(3) For the purposes of rehearing under this section, any initial decision under Rule 709 is a final Commission decision after the time provided for Commission review under Rule 712, if there are no exceptions filed to the decision and no review of the decision is initiated under Rule 712.
(b) *Time for filing; who may file.* A request for rehearing by a party must be filed not later than 30 days after issuance of any final decision or other final order in a proceeding.
(c) *Content of request.* Any request for rehearing must:
(1) State concisely the alleged error in the final decision or final order;
(2) Conform to the requirements in Rule 203(a), which are applicable to pleadings, and, in addition, include a separate section entitled "Statement of Issues," listing each issue in a separately enumerated paragraph that includes representative Commission and court precedent on which the party is relying; any issue not so listed will be deemed waived; and

(CARE) hereby request rehearing and clarification of the November 19, 2009 *Order Dismissing Complaint* (129 FERC ¶ 61,141) under Docket EL09-73 *et al.*

Error in 129 FERC ¶ 61,141, issued November 19, 2009

"CARE does not explain why PG&E's alleged violation of the operating permit requirements constitutes a manipulative or fraudulent behavior under section 4A of the NGA, section 222 of the FPA, and Order No. 670. PG&E's alleged wrongdoing is related to the operation of the generating facility and does not involve the purchase or sale of natural gas or transportation service under the NGA, or electric energy or transmission services under the FPA." [Order Dismissing Complaint at 11]

"CARE has not cited any precedent invoking the Commission's authority under Subchapter I of the FPA to monitor, regulate, or investigate operating permits for non-hydropower generating facilities issued by other federal and/or state agencies." [Order Dismissing Complaint at 11]

129 FERC ¶ 61,141, issued November 19, 2009 was in error because it failed to state the Commission had exercised its jurisdiction in determining "the most appropriate method to use to assess emissions costs because they were incurred in connection with clean air requirements" and finding incorrectly "CARE has not cited any precedent invoking the Commission's authority." Admittedly CARE may have not provided the appropriate cited precedent and therefore we attempt in good faith to do so herein.

CARE contends that emissions from fossil fuel fired power plants that deliver power to the California Independent System Operator Corporation ("California ISO" or "ISO") controlled grid and the emissions produced thereby that are subject to regulation under the Clean Air Act ("CAA") by the United States Environmental Protection Agency ("USEPA") affects the Commission authority to determine the cost allocation for those emission's regulatory costs through Commission authorized wholesale rates charge by utilities like PG&E. PG&E's ability to "knowingly" operate its Gateway Plant without the requisite CAA permit unlawfully gives

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(3) Set forth the matters relied upon by the party requesting rehearing, if rehearing is sought based on matters not available for consideration by the Commission at the time of the final decision or final order.

PG&E an economic advantage from deferred costs of compliance with CAA which CARE's complaint sought to demonstrate constitutes unlawful energy market manipulation.

In *Illinois Commerce Commission v. Federal Energy Regulatory Commission*, 576 F.3d 470, 476 (7th Cir. 2009) *reh'g and reh'g en banc denied*, October 20, 2009; in determining whether enough benefit is derived, the court compared the costs assessed against a party to the burdens imposed or benefits drawn by that party. *Id*., citing *Midwest ISO Transmission Owners v. FERC*, 373 F.3d 1361, 1368 (D.C. Cir. 2004). The Court found that based on the record developed in the Commission proceeding, the benefits cited in that proceeding, namely an improvement in reliability, were too small compared to the costs in question to be allocated to the utility. *Id.* at 476.[2] The court held, substantively, that costs may not be assessed to customers unless there is a specific and substantial showing of commensurate benefits. According to the Court,

> FERC is not authorized to approve a pricing scheme that requires a group of utilities to pay for facilities from which its members derive no benefits, or benefits that are trivial in relation to the costs sought to be shifted to its members. "[A]ll approved rates [must] reflect to some degree the costs actually caused by the customer who must pay them." *KN Energy, Inc. v. FERC,* 968 F.2d 1295, 1300 (D.C. Cir. 1992); *Transmission Access Policy Study Group v. FERC,* 225 F.3d 667, 708 (D.C. Cir. 2000); *Pacific Gas & Elec. Co. v. FERC,* No. 03-1025, 373 F.3d 1315, 1320-21 (D.C. Cir. 2004). "Not surprisingly, we evaluate compliance with this unremarkable principle by comparing the costs assessed against a party to the burdens imposed or benefits drawn by that party." *Midwest ISO Transmission Owners v. FERC*, 373 F.3d 1361, 1368 (D.C. Cir. 2004)….To the extent that a utility benefits from the costs of new facilities, it may be said to have "caused" a part of those costs to be incurred, as without the expectation of its contributions the facilities might not have been built, or might have been delayed.

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[2] Overview: As to the pricing of existing transmission facilities, the RTO charged its customers for the costs of building its existing facilities and recovered those costs fully and now wanted to recover them all over again from another group of consumers. The court agreed that the RTO was permitted to charge for the service--***just not to include in the charge its sunk costs***. As to the financing of new transmission facilities, FERC decided that all the utilities in the RTO's region should contribute pro rata to the higher-voltage facilities (their rates should be raised by a uniform amount sufficient to defray the facilities' costs). The FERC was not authorized to approve a pricing scheme that required a group of utilities to pay for facilities from which its members derived no benefits, or benefits that were trivial in relation to the costs sought to be shifted to its members. The court was not authorized to uphold a regulatory decision that was not supported by substantial evidence on the record as a whole. Although the court's review of decisions by the FERC was deferential, the agency failed to make a reasoned decision based upon substantial evidence in the record.

This is not a rogue decision, but consistent with earlier judicial and Commission precedent, the court notes. See also, e.g., *Pennsylvania Electric Company v. FERC*, 11 F.3d 207 at 211 (1993) ("Utility customers should normally be charged rates that fairly track the costs for which they are responsible."), citing *Town of Norwood v. FERC*, 962 F.2d 20 (D.C. Cir. 1992); *Union Electric Co. v FERC*, 890 F. 2d 1193, 1198 (D.C. Cir. 1989). It is also consistent with the way the Commission approaches investment to meet incremental load on natural gas pipeline systems. As the court in *ICC v. FERC* comments that the Commission itself has opined: "A claim of generalized system benefits is not enough to justify requiring existing shippers to subsidize the uncontested increase…"[3] The language quoted by the court was in the context of a decision implementing the Commission's 1999 *Policy Statement Concerning Certification of New Interstate Natural Gas Pipeline Facilities.*[4] Describing the 1999 *Policy Statement in Transcontinental Gas Pipe Line Corp.,*[5] the Commission commented:

> Under this new policy, when a project is first certificated, the Commission requires that existing shippers not be required to subsidize the expansion. This generally means that expansions will be priced incrementally so that expansion shippers will have to pay the full costs for the project, without subsidy from the existing customers through rolled-in pricing. This will help ensure that the market finds the project viable, because either the expansion shippers or the pipeline must be willing to fully fund the project.[6]

In an December 19, 2001 Order under the 2000-1 western energy crisis refund proceedings in Docket EL00-95 *et al*, the Commission found that "total gross load was the most appropriate method to use to assess emissions costs because they were incurred in connection with clean air requirements, and the reliability function served by the CAISO's markets benefited all customers".[7]

In August 23, 2000, the Commission had initiated a formal investigation (referred to herein as the "California Refund Proceeding") to determine the justness and reasonableness of

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[3] Id., citing *Transcontinental Gas Pipe Line Corp.,* 112 FERC 61,170, 61,294-61,295 (2005).
[4] 88 FERC 61,227 (1999), 90 FERC ¶ 61,128) (2000), *reh'g* 92 FERC ¶ 61,094 (2000).
[5] 106 FERC ¶ 61,299
[6] *Id.* at P 57
[7] December 19, 2001 Order, 97 FERC ¶ 61,275.

rates for sales into the California ISO and PX markets. That investigation also examined whether the tariffs and institutional structures and bylaws of the California ISO and PX were adversely affecting the efficient operation of competitive wholesale electric power markets in California and needed to be modified.[8] This proceeding arose as a result of price spikes in the California ISO and PX markets during the summer of 2000. The Commission set a "refund effective date," i.e., the first day for which refunds could be allowed, of October 2, 2000,[9] the earliest day permitted under the Federal Power Act (FPA) at that time. The Commission may also be able to order disgorgement of unjust profits for the period between January 1, 2000 and October 2, 2000.[10]

In November 2000, the Commission issued an order[11] in the California Refund Proceeding based on the results of a Commission Staff fact-finding investigation of the California power markets[12] which had begun in July 2000 and which concluded that a number of factors contributed to the California electricity crisis of 2000 and 2001. These included: flawed market rules; inadequate addition of generating facilities in the preceding years; a drop in available hydropower due to drought conditions; a rupture of a major pipeline supplying natural gas into California; strong growth in the economy and in electricity demand; unusually high temperatures; an increase in unplanned outages of extremely old generating facilities; and market manipulation by many of the sellers of energy and ancillary services (including emissions) in to the markets operated by the ISO and PX.

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[8] *San Diego Gas & Electric Co. v. Sellers of Energy and Ancillary Services into Markets Operated by the California Independent System Operator and the California Power Exchange*, 92 FERC ¶ 61,172 (2000).

[9] See San Diego Gas & Electric Co. v. Sellers of Energy and Ancillary Services into Markets Operated by the *California Independent System Operator and the California Power Exchange*, 93 FERC ¶ 61,121 at 61,370 (2000).

[10] The Court of Appeals for the Ninth Circuit ruled in *Lockyer v. FERC*, 383 F.3d 1006 (2004), that the FPA allows market-based rates for public utilities lacking market power and that the Commission has authority under the FPA to order retroactive remedies for sellers that failed to comply with the Commission's reporting requirements. The Ninth Circuit interpreted the FPA to provide the Commission with broader authority than the Commission believed the Act provided. Parties have sought rehearing of the court's opinion, but the court has not acted; the Commission is still awaiting the issuance of a court mandate returning the record to the Commission.

[11] San Diego Gas & Electric Co. v. Sellers of Energy and Ancillary Services into Markets Operated by the California Independent System Operator and the California Power Exchange, 93 FERC ¶ 61,122 (2000).

[12] Staff Report to the Federal Energy Regulatory Commission on Western Markets and the Causes of the Summer 2000 Price Abnormalities, Docket No. EL00-95-000 (November 1, 2000). The Staff investigation was directed by the Commission in *Investigation of Electric Bulk Power Markets*, 92 FERC ¶ 61,160 (2000).

The Commission took a number of steps in an effort to end the crisis: correcting market rules that were contributing to the crisis, mitigating prices, adopting prospective mitigation rules, and providing for an after-the-fact determination of refunds attributable to prices above just and reasonable levels. By way of example, in December 2000 the Commission eliminated the State's AB 1890 legislative requirement that the investor-owned utilities in California sell all of their generation into and buy all of their generation from the PX.[13] The Commission also required sellers to report and justify sales above certain prices,[14] as well as to offer for sale to California markets all power available from their facilities (referred to as the "must offer" requirement).[15] Because of the regional impact of the 2000-2001 crises, the Commission extended the "must offer" requirement to generators throughout the West in June 2001.[16] Similarly, it imposed price mitigation throughout the West.[17]

The results of the mitigation measures imposed by the Commission are best demonstrated in the July 1, 2009 Testimony of Michael Boyd of CARE under Docket EL02-71 *et al.*[18]

> It was difficult but I was able to transcribe PG&E's response to the May 31, 2002 Order from the TIF format to MS Excel format. [FERC submission 20020705-0036] I certify that this data is equivalent to that presented in TIF format by PG&E in its 2002 response. This Excel spreadsheet [CARE EL02-71 exhibit ___ PG&E Electric Market Sales 2000-01.xls] includes all the calculations and data processing necessary to determine that PG&E sold its electricity in the PX Day Ahead Market at $4,097,657,294 above their unweighted average price ($/MWh) from 1/1/00 to 4/1/00 of $29.75/MWh.[19] Based on the information[20] provided to me in separate testimony by Barbara Goudey, I estimate that with a 32% profit margin (on $29.75/MWh) that the net cost of service (before profit) would be $22.5/MWh and that PG&E sold its electricity in the PX Day Ahead Market at $5,642,652,237 above this cost based on the data PG&E has provided. These PX Day Ahead Market sales only covered January 1, 2000 through December 27,

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[13] *San Diego Gas & Electric Co. v. Sellers of Energy and Ancillary Services into Markets Operated by the California Independent System Operator and the California Power Exchange*, 93 FERC ¶ 61,294 (2000).
[14] *Id*.
[15] *San Diego Gas & Electric Co. v. Sellers of Energy and Ancillary Services into Markets Operated by the California Independent System Operator and the California Power Exchange*, 95 FERC ¶ 61,115 (2001).
[16] *San Diego Gas & Electric Co. v. Sellers of Energy and Ancillary Services into Markets Operated by the California Independent System Operator and the California Power Exchange*, 95 FERC ¶ 61,418 (2001).
[17] *Id*.
[18] See http://elibrary.ferc.gov/idmws/common/opennat.asp?fileID=12067647 Submittal 20090701-5035
[19] The actual calculations can be viewed selecting the PG&E Report tab on the bottom left of the Excel spread sheet presented at the first cell in column B at the top left of the page.
[20] Source: from PG&E's SEC filings from 1997 through 2001.

2000.[21] The averaged daily volume of energy sold by PG&E in the Day Ahead Market was 157,343 MWh.[22] See Figure 1 PG&E's average daily sales price for electricity in to the ISO and PX markets.

It is my testimony that PG&E's sales into the PX Day Ahead Market in 2000 exceeded the 20% market share threshold and should therefore be subject to refunds. I also testify that because "PG&E's authority to sell electric energy at market-based rates into the PX and ISO was granted, subject to mitigation and monitoring requirements, in the Commission's order issued on October 30, 1997, *Pacific Gas and Electric Co., et al.,* 81 FERC 61,122 (1997)" and an order was issued by FERC based on PG&E's agreement not to exercise its presumed market power therefore FERC should issue refunds for the entire year of 2000 period identified for the amount of $5,642,652,237.

In the ISO's Hour-ahead Market the unweighted average price ($/MWh) from 1/1/00 to 4/1/00 was $32.01/MWh.[23] The averaged daily volume of energy sold by PG&E in the Hour-ahead Market was 14,345 MWh.[24] The Hour-ahead price is weighted higher towards non-compliance with just and reasonable rates by three outliers where the price spiked to $64.60/MWh on 1/15/00, $40.60 on 3/08/00, and to $45.80 on 3/14/00. [See Table 1] Also in ISO's Real-time Market the unweighted average price ($/MWh) from 1/1/00 to 4/1/00 was $31.08/MWh.[25] The averaged daily volume of energy sold by PG&E in the Real-time Market was 1,053 MWh.[26] The Real-time price is weighted higher towards non-compliance with just and reasonable rates by three outliers where the price spiked to $41.30/ MWh on 1/15/00, $46.90 on 3/08/00, and to $81.8 on 3/14/00. I also note a trend in the Real-time Market towards greater volatility (sigma) in the price over the 1/01/00 through 4/01/00 time period so I therefore must conclude despite a much lower volume of energy being sold the exercise of market power by PG&E in the PX Day-Ahead Market has affected the ISO Hour-ahead and Real-Time Markets. Therefore the FERC should issue refunds for the entire year of 2000 through 2001 period identified for the amount of $76,045,176 for PG&E's sales in to the ISO Real-time Market and for the amount of $1,020,913,040 for sales in to the Hour-ahead Market. Total refunds amounts to $6,739,610,453.

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[21] Based on 93 FERC ¶ 61,294 (2000) as described at footnote 8 herein.
[22] The actual calculations can be viewed selecting the PG&E Report tab on the bottom left of the Excel spread sheet presented at the first cell in column E the top in the middle of the page.
[23] The actual calculations can be viewed selecting the PG&E Report tab on the bottom left of the Excel spread sheet presented at the first cell in column D at the top left of the page.
[24] The actual calculations can be viewed selecting the PG&E Report tab on the bottom left of the Excel spread sheet presented at the first cell in column G the top in the middle of the page.
[25] The actual calculations can be viewed selecting the PG&E Report tab on the bottom left of the Excel spread sheet presented at the first cell in column C at the top left of the page.
[26] The actual calculations can be viewed selecting the PG&E Report tab on the bottom left of the Excel spread sheet presented at the first cell in column F at the top in the middle of the page.

For Delivery Date (mm/dd/yy)	Day-ahead Un-weighted Average Price ($/MWh) 1/1/00 to 4/1/00 $29.75/MWh	Real-time Un-weighted Average Price ($/MWh) 1/1/00 to 4/1/00 $31.08/MWh	Hour-ahead Un-weighted Average Price ($/MWh) 1/1/00 to 4/1/00 $32.01/MWh
01/15/00	27.2	41.3	64.6
03/08/00	28.7	46.9	40.6
03/14/00	28.1	81.8	45.8
04/11/00	28.3	47.7	54.0
04/26/00	29.7	138.8	115.4
04/30/00	38.7	43.5	45.6
05/01/00	55.9	73.9	63.3
05/22/00	110.4	133.5	327.9
05/23/00	255.3	91.8	86.8
05/24/00	109.3	52.2	59.5
06/13/00	95.4	511.1	465.3
06/14/00	302.2	380.5	435.2
06/15/00	374.4	135.9	139.3
06/21/00	67.0	291.6	270.5
06/27/00	262.3	474.9	422.4
06/28/00	443.8	518.8	419.7
07/19/00	52.3	265.7	227.7
07/24/00	186.6	280.4	210.1
07/25/00	124.4	323.2	204.6
07/31/00	251.8	383.1	383.1
08/01/00	249.1	448.6	349.4
12/12/00	583.0	238.6	240.8
12/13/00	258.2	226.1	235.6
12/14/00	297.7	244.9	242.8
12/15/00	374.6	246.4	248.1
12/16/00	249.3	238.8	233.5
12/17/00	344.4	243.7	238.4
12/18/00	407.8	231.1	235.5
12/19/00	416.6	248.7	245.2
12/20/00	406.6	249.4	241.7

Table 1

I also note several other spikes in the PX and ISO Markets in Table 1 and greater volatility (sigma) in the price of electricity sold over the remainder of 2000 and in to 2001 when PG&E filed for bankruptcy protection.

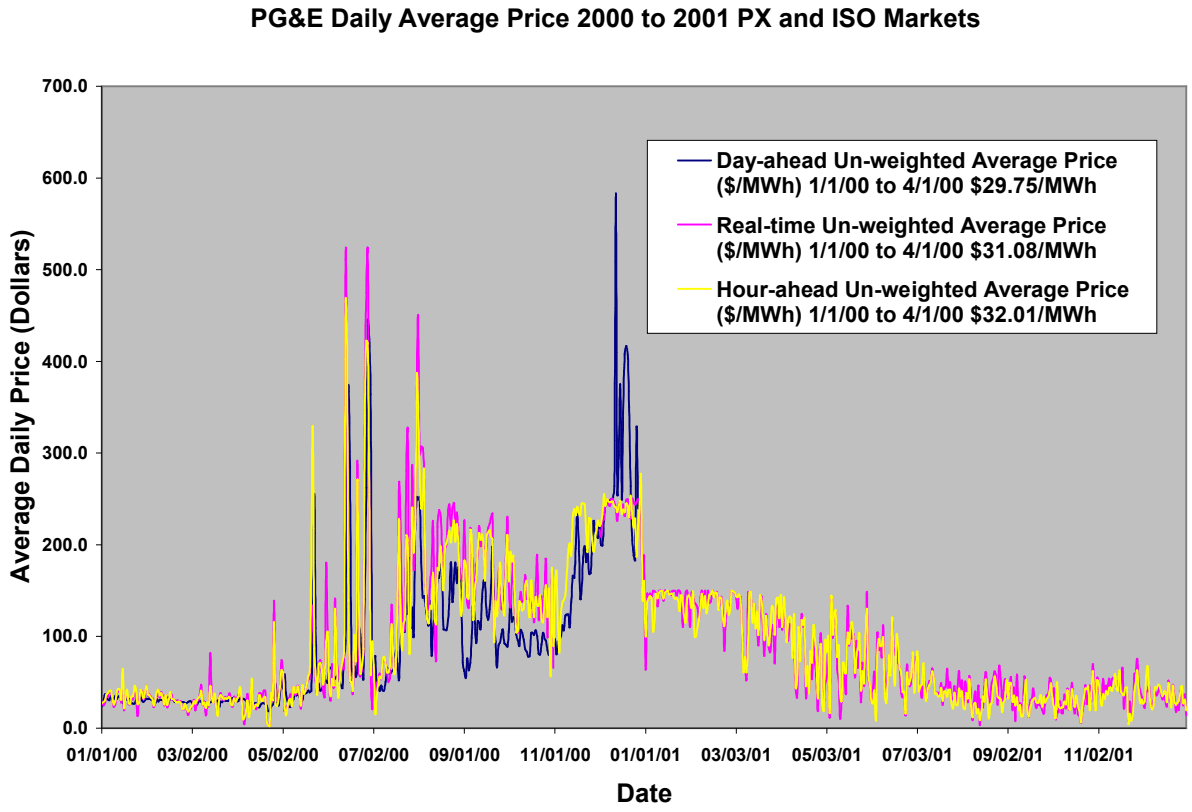

Figure 1

I have reviewed the other Parties submissions to discovery by California Parties' interrogatories. The data provided is inadequate to determine if individual Party's had the ability to pass the 20% market screen. And since no common format exists for the quarterly reports that were provided, it is impossible for me to do so. It is my testimony that all market participants in the wholesale markets regulated by the FERC must be ordered to provide their quarterly transaction data for the 2000 through 2001 period, in a common format, preferably Excel format, for quarterly reporting data to be useable to determine if individual sellers had control over 20% of the market at a given time and a given hub individually or in concert with other sellers of energy and ancillary services. It is further my testimony that the ALJ or Commission should order all sellers to provide all transactions for this period for all sales in the western markets cover by the WECC including the PX, ISO, and CERS, and any other contract for power. All sellers include PG&E and the other two investor owned utilities Southern California Edison Company (SCE) and San Diego Gas and Electric Company (SDG&E), all publicly owned utilities (POUs), any entity that sold energy and ancillary services in to the markets within the WECC.

In February 2002, the Commission established a fact-finding investigation of potential market manipulation of electric and natural gas prices in the West. The investigation was time- and resource-intensive involving extensive data gathering and analysis. Staff reported it received in excess of 70 boxes of written materials and an equivalent of more than 900 compact discs of electronic data.[27] In March 2003, the Commission Staff released a Final Report,[28] finding evidence of significant market manipulation in Western energy markets during 2000 and 2001. The Final Report also concluded that published indices of natural gas prices in or near California were not reliable. This spawned additional formal investigations of sellers, and the Commission pursued disgorgements of unjust profits of sellers that engaged in market manipulation (referred to herein as the "Market Manipulation Proceedings"). As part of the Market Manipulation Proceedings, Commission Staff conducted an investigation of potential anomalous bidding behavior and practices in the PX and California ISO markets, and instances of illegal gaming and physical withholding.

Having found that electricity spot prices in the California ISO and PX markets were unjust and unreasonable, the Commission in July 2001 ordered refunds based upon a mitigated market price.[29] The Commission set forth a formula to use in calculating the mitigated market price and established an evidentiary hearing proceeding before an Administrative Law Judge (ALJ) to, among other things, compile the data needed for the formula which relied on heat rates of generating units and natural gas prices as published by indices. The evidentiary hearing took 18 months to complete and involved more than 100 parties including CARE. The complete hearing record spans 5,945 pages. The supporting exhibits sponsored by more than 100 active parties and Staff takes up more than 20 shelf feet and there is more than a yard of briefs which address the stipulated issues. In December 2002, the ALJ issued an initial decision on the

[27] This number is an approximation derived from 1200 gigabytes of data submitted, as reported in Final Report on Price Manipulation in Western Energy Markets: Fact Finding Investigation of Potential Manipulation of Electric and Natural Gas Prices, Docket No. PA02-2-000 (March 26, 2003) (Final Report).
[28] *See id*.
[29] *San Diego Gas & Electric Co. v. Sellers of Energy and Ancillary Services into Markets Operated by the California Independent System Operator and the California Power Exchange*, 96 FERC ¶ 61,120 (2001).

formula and found that power suppliers owed an estimated $1.8 billion in refunds and that the California ISO and PX owed suppliers cash payments of $3 billion.[30]

Three months later, in March 2003, the Commission issued an order largely adopting many of the ALJ's findings.[31] However, based on the finding in the Final Report that, because of manipulation, the published fuel price indices were not reliable, the Commission revised the formula for determining the mitigated market prices and required the use of marginal fuel costs (i.e., reported natural gas prices in production fields plus pipeline transportation costs) instead of fuel price indices. This had the overall effect of increasing refund liabilities and potentially causing certain individual sellers to under-recover their costs of providing electricity for sale to California spot markets.

The FPA mandates that the Commission cannot set rates at confiscatory levels. Suppliers of energy or service must be allowed to recover legitimate and verifiable costs incurred in providing the energy or service, plus a reasonable rate of return. If the refund liabilities exceed the costs incurred by sellers in producing and/or delivering energy, the refund amounts may be challenged in courts. If refunds are found to be confiscatory, the Commission would have to revisit the refund issues, which would delay issuance of refunds by years. For these reasons, in accordance with its statutory obligation to prevent setting confiscatory rates, the Commission stated it would allow sellers the opportunity to recover their actual costs in excess of revenues received as a result of the mitigated market price. The Commission will permit sellers who are able to demonstrate such legitimate costs to offset these costs against their refund liability. The Commission: (1) *established a separate expense category for demonstrable emissions costs, including NO_X costs and other environmental mitigation fees*, which sellers may subtract from their respective refund obligations;[32] (2) provided generators the opportunity to claim an allowance for demonstrated fuel costs in excess of the amount allowed under the mitigated

[30] *San Diego Gas & Electric Co. v. Sellers of Energy and Ancillary Services into Markets Operated by the California Independent System Operator and the California Power Exchange*, 101 FERC ¶ 63,026 (2002).
[31] *San Diego Gas & Electric Co. v. Sellers of Energy and Ancillary Services into Markets Operated by the California Independent System Operator and the California Power Exchange*, 102 FERC ¶ 61,317 (2003).
[32] *San Diego Gas & Electric Co. v. Sellers of Energy and Ancillary Services into Markets Operated by the California Independent System Operator and the California Power Exchange*, 96 FERC ¶ 61,120 at 61,519 (2001).

market price formula;[33] and (3) provided an opportunity for all sellers to submit evidence demonstrating that the refund methodology creates an overall revenue shortfall for their transactions made during the refund period.[34] The purpose of this has been to ensure that no seller's mitigated revenues fall below the cost the seller incurred to serve California markets.[35]

The Commission, in the August 2005 Order in Docket EL00-95 *et al*, revised the procedural schedule for the California Refund Proceeding to accelerate the issuance of refunds. Specifically, the August 2005 Order condensed several previously-established deadlines, altered the compliance phase, and strongly encouraged parties to settle by early November 2005. The Commission also directed that parties inform the Commission of any outstanding disputes no later than December 1, 2005. In response, the California Parties made a filing addressing disputes in regard to offsets claimed by sellers in fuel cost allowance, *emissions costs*, and cost filing submissions and other stages of the California Refund Proceeding. In general, the *California Parties* do not question the need to allow offsets but rather *challenge the process* the Commission has *employed to determine offsets, largely claiming that insufficient opportunity for discovery was provided*.[36]

129 FERC ¶ 61,141, issued November 19, 2009 is in error because PG&E's economic advantage from deferred costs of compliance with CAA constitutes energy market manipulation pursuant to FPA § 824v, PG&E's answer knowingly provided "false information" regarding the CAA permit to the Commission in violation of FPA § 824u, and FERC's enforcement authority pursuant to 15 USC § 3414 extends to PG&E's operation of the Gateway Generating Station without required federal permits.

The issues for which CARE intends to seek review are as follows:

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[33] *See supra* n. 24.
[34] See *San Diego Gas & Electric Co. v. Sellers of Energy and Ancillary Services into Markets Operated by the California Independent System Operator and the California Power Exchange*, 97 FERC ¶ 61,275 (2001).
[35] See *San Diego Gas & Electric Co. v. Sellers of Energy and Ancillary Services into Markets Operated by the California Independent System Operator and the California Power Exchange*, 105 FERC ¶ 61,065 at P 20 (2003).
[36] *See* California Parties' Disputes Relating to Cost Offsets and Refund Re-Runs, Docket No. EL00-95-000, at 3, December 1, 2005.

1. CARE will seek review of the question of does PG&E's economic advantage from deferred costs of compliance with CAA constitute energy market manipulation pursuant to FPA § 824v?[37]

2. The question for review is did PG&E's answer knowingly provide "false information" regarding the CAA permit to the Commission in violation of FPA § 824u?[38]

3. Does FERC's enforcement authority pursuant to 15 USC § 3414[39] extend to PG&E's operation of the Gateway Generating Station without required federal permits?

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[37] **§ 824v. Prohibition of energy market manipulation**
http://www4.law.cornell.edu/uscode/16/usc_sec_16_00000824---v000-.html
(a) In general
It shall be unlawful for any entity (including an entity described in section 824 (f) of this title), directly or indirectly, to use or employ, in connection with the purchase or sale of electric energy or the purchase or sale of transmission services subject to the jurisdiction of the Commission, any manipulative or deceptive device or contrivance (as those terms are used in section 78j (b) of title 15), in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of electric ratepayers.
(b) No private right of action
Nothing in this section shall be construed to create a private right of action.

[38] **§ 824u. Prohibition on filing false information**
http://www4.law.cornell.edu/uscode/16/usc_sec_16_00000824---u000-.html
No entity (including an entity described in section 824 (f) of this title) shall willfully and knowingly report any information relating to the price of electricity sold at wholesale or the availability of transmission capacity, which information the person or any other entity knew to be false at the time of the reporting, to a Federal agency with intent to fraudulently affect the data being compiled by the Federal agency.

[39] **§ 3414. Enforcement**
(a) General rule
It shall be unlawful for any person to violate any provision of this chapter or any rule or order under this chapter.
(b) Civil enforcement
(1) In general
Except as provided in paragraph (2), whenever it appears to the Commission that any person is engaged or about to engage in any act or practice which constitutes or will constitute a violation of any provision of this chapter, or of any rule or order thereunder, the Commission may bring an action in the District Court of the United States for the District of Columbia or any other appropriate district court of the United States to enjoin such act or practice and to enforce compliance with this chapter, or any rule or order thereunder.
(2) Enforcement of emergency orders
Whenever it appears to the President that any person has engaged, is engaged, or is about to engage in acts or practices constituting a violation of any order under section 3362 of this title or any order or supplemental order issued under section 3363 of this title, the President may bring a civil action in any appropriate district court of the United States to enjoin such acts or practices.
(3) Repealed. Pub. L. 101–60, § 3(a)(4)(B), July 26, 1989, 103 Stat. 158

(4) Relief available
In any action under paragraph (1) or (2), the court shall, upon a proper showing, issue a temporary restraining order or preliminary or permanent injunction without bond. In any such action, the court may also issue a mandatory injunction commanding any person to comply with any applicable provision of law, rule, or order, or ordering such other legal or equitable relief as the court determines appropriate, including refund or restitution.
(5) Criminal referral
The Commission may transmit such evidence as may be available concerning any acts or practices constituting any possible violations of the Federal antitrust laws to the Attorney General who may institute appropriate criminal proceedings.
(6) Civil penalties
(A) In general
Any person who knowingly violates any provision of this chapter, or any provision of any rule or order under this chapter, shall be subject to—
(i) except as provided in clause (ii) a civil penalty, which the Commission may assess, of not more than $1,000,000 for any one violation; and
(ii) a civil penalty, which the President may assess, of not more than $1,000,000, in the case of any violation of an order under section 3362 of this title or an order or supplemental order under section 3363 of this title.
(B) "Knowing" defined
For purposes of subparagraph (A) the term "knowing" means the having of—
(i) actual knowledge; or
(ii) the constructive knowledge deemed to be possessed by a reasonable individual who acts under similar circumstances.
(C) Each day separate violation
For purposes of this paragraph, in the case of a continuing violation, each day of violation shall constitute a separate violation.
(D) Statute of limitations
No person shall be subject to any civil penalty under this paragraph with respect to any violation occurring more than 3 years before the date on which such person is provided notice of the proposed penalty under subparagraph (E). The preceding sentence shall not apply in any case in which an untrue statement of material fact was made to the Commission or a State or Federal agency by, or acquiesced to by, the violator with respect to the acts or omissions constituting such violation, or if there was omitted a material fact necessary in order to make any statement made by, or acquiesced to by, the violator with respect to such acts or omissions not misleading in light of circumstances under such statement was made.
(E) Assessed by Commission
Before assessing any civil penalty under this paragraph, the Commission shall provide to such person notice of the proposed penalty. Following receipt of notice of the proposed penalty by such person, the Commission shall, by order, assess [1] such penalty.
(F) Judicial review
If the civil penalty has not been paid within 60 calendar days after the assessment order has been made under subparagraph (E), the Commission shall institute an action in the appropriate district court of the United States for an order affirming the assessment of the civil penalty. The court shall have authority to review de novo the law and the facts involved, and shall have jurisdiction to enter a judgment enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part, such assessment.
(c) Criminal penalties
(1) Violations of chapter

4. The question for review is did CEC's answer knowingly provide "false information" regarding the CAA permit to the Commission in violation of FPA § 824u?

5. Does Subchapter I of Title 16 of the United States Code addressing the regulation of the development of water power and resources apply to PG&E's operating permit for Gateway Generating Station?

Statement of Issues

1. CARE will seek review of the question of does PG&E's economic advantage from deferred costs of compliance with CAA constitute energy market manipulation pursuant to FPA § 824v?

On September 24, 2009 the United States Department of Justice ("USDOJ") lodged a "Consent Decree" before the US District Court for the Northern District of California.[40] FPA § 824 the declaration of policy for application of subchapter (a) of the federal regulation of transmission and sale of electric energy "declare[s] that the business of transmitting and selling electric energy for ultimate distribution to the public is affected with a public interest, and that Federal regulation of matters relating to generation to the extent provided in this subchapter and

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Except in the case of violations covered under paragraph (3), any person who knowingly and willfully violates any provision of this chapter shall be subject to—
(A) a fine of not more than $1,000,000; or
(B) imprisonment for not more than 5 years; or
(C) both such fine and such imprisonment.
(2) Violation of rules or orders generally
Except in the case of violations covered under paragraph (3), any person who knowingly and willfully violates any rule or order under this chapter (other than an order of the Commission assessing a civil penalty under subsection (b)(4)(E) of this section), shall be subject to a fine of not more than $50,000 for each day on which the offense occurs.
(3) Violations of emergency orders
Any person who knowingly and willfully violates an order under section 3362 of this title or an order or supplemental order under section 3363 of this title shall be fined not more than $50,000 for each violation.
(4) Each day separate violation
For purposes of this subsection, each day of violation shall constitute a separate violation.
(5) "Knowingly" defined
For purposes of this subsection, the term "knowingly", when used with respect to any act or omission by any person, means such person—
(A) had actual knowledge; or
(B) had constructive knowledge deemed to be possessed by a reasonable individual who acts under similar circumstances.

[40] See http://www.justice.gov/enrd/2060.htm

subchapter III of this chapter and of that part of such business which consists of the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce is necessary in the public interest, such Federal regulation, however," pursuant to subpart (3) "Any United States district court located in the State in which the State commission referred to in paragraph (1) is located shall have jurisdiction to enforce compliance with this subsection." Therefore while it is clear that the US District Court for the Northern District of California has jurisdiction over the "Consent Decree" it is not clear what authority (if any) the Court has over the disposition of CARE's complaint herein. CARE asks the Commission to provide clarification on the question of who has jurisdiction.

PG&E will have saved and earned hundreds of thousands of dollars through its noncompliance. The central component of developing a civil penalty, as codified in the CAA (as well as other federal statues) and repeated countless times in EPA's guidance documents, is that a civil penalty must at least be set at an amount that deters future violations. In order to effectively deter future violations, a penalty must negate any economic benefit or savings conferred on a company as a result of its illegal conduct. 42 U.S.C.A. § 7524(c)(2) (penalty must consider "the economic benefit or savings (if any) resulting from the violation."); *see also* Calculation of the Economic Benefit of Noncompliance in EPA's Civil Penalty Enforcement Cases, 70 Fed. Reg. 50326-01 (Aug. 26, 2005) ("The Agency's policy is that any civil penalty should *at least* recapture the economic benefit the violator has obtained through its unlawful actions.") (emphasis added); Clean Air Act Stationary Source Civil Penalty Policy at 4 ("any penalty should, at a minimum, remove any significant economic benefit resulting from noncompliance")[41] (emphasis in original); A Framework for Statute-Specific Approaches to Penalty Assessment at Appendix at 6-11 (Framework) (discussing importance of negating economic benefit);[42] Combined Enforcement Policy at 6-7 (same);[43] Clean Air Act Stationary

[5] Document available at: http://www.epa.gov/compliance/resources/policies/civil/caa/stationary/penpol.pdf
[6] Document available at: http://www.epa.gov/compliance/resources/policies/civil/penalty/penasm-civpen-mem.pdf.
[7] Document available at: http://epa.gov/compliance/resources/policies/civil/caa/stationary/caa112r-enfpol.pdf.

Source Civil Penalty Policy at 4 (same);[44] Policy on Civil Penalties: EPA General Enforcement Policy # GM-21[45] (same). This economic deterrence figure is the minimum level at which a penalty should be set. As a general rule, EPA should never settle for less than this deterrence amount. Framework at 11.

The Decree's proposed $20,000 penalty does not negate the economic benefit and savings PG&E received as a result of its violations of the Clean Air Act. Here, PG&E (a) earned significant revenues by operating several months before it would have been able to under the permit process; (b) saved money by avoiding the lengthy, and likely contentious, permit process; and (c) saved money by not having to comply with BACT during its initial operations, and, if the CD is approved, it will save money by not having to comply with the level of BACT the Air District currently requires. These savings and earnings likely resulted in hundreds of thousands of dollars for PG&E.

In particular, each day that PG&E has commercially operated GGS during at least the last nine months is a day that it has earned revenue from its illegal operation. Had PG&E complied with the Clean Air Act, and waited to begin construction and operation of the facility until it had received the proper certification and permitting, PG&E would have been delayed from operating GGS, and thus acquiring any revenue from its operation until much later than now. *See, e.g.,* Russell City 8/3/09 Draft Permit (company that applied for PSD permit before GGS is still waiting for final permit); *see also* Framework at 7 (stating that company gains an economic advantage from deferred costs of compliance).

PG&E's illegal actions also conferred an economic benefit by circumventing the required permitting process. The PSD permitting process would have cost PG&E a minimum of $100,000 dollars.[46] This does not include attorney fees, consultant fees, and other expenditures that are necessary parts of the permitting process. Thus, the Decree's unreasonably low penalty of $20,000 means that at the very least, PG&E actually *saved* money by not applying for the

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[8] Document available at: http://www.epa.gov/compliance/resources/policies/civil/caa/stationary/penpol.pdf .

[9] Document available at: http://www.epa.gov/compliance/resources/policies/civil/penalty/epapolicy-civilpenalties021684.pdf.

[10] *See* BAAQMD Fee Calculation Guidance, available at: http://hank.baaqmd.gov/pmt/handbook/rev02/PH_00_06_03.pdf.

required PSD permit. *See also* Framework at 9 (company gains an economic advantage from avoiding permitting costs).[47]

By avoiding permitting fees and the delay from waiting for a permit, PG&E gained a competitive advantage through its illegal operation of GGS. Law abiding companies will spend hundreds of thousands of dollars maneuvering through the permitting process.

For example, in comparison to Calpine, which owns RCEC, PG&E has been rewarded for violating the law and has gained a significant competitive advantage. Like GGS, RCEC had a PSD permit issued several years ago, in 2002. Also like GGS, RCEC amended its plans and applied for a new permit. In 2007, the Air District issued Calpine, owners of RCEC, a PSD permit. Several administrative and judicial proceedings and appeals followed, challenging the Air District's compliance with PSD's public participation requirements during the issuance of the RCEC PSD permit. Ultimately, the EAB remanded the RCEC permit, requiring the Air District to re-notice the PSD permit for public review using the stricter federal notice requirements. RCEC was then issued a draft permit in December 2008. After extensive public comment and a public hearing, which Calpine had originally avoided because of the District's defective notice, the District decided to re-notice the draft PSD permit in August 2009. Surely RCEC has spent thousands of dollars complying with PSD requirements and adhering to the public process.

The CD's penalty fails to create a "level playing field" between companies who abide by the law and those that do not. Thus, the penalty does not deter future violations.

Further, the economic deterrence level is the minimum amount at which a penalty should be set. EPA should increase the penalty based on a variety of factors including the size of the violator and its ability to pay. Framework at 3 (size of violator is relevant factor when setting penalty); Penalty Policy at 15 (size of violator is relevant consideration and "in the case of a company with more than one facility, the size of the violator is determined based on the company's entire operation, not just the violating facility").

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[47] PG&E did apply for a modified PSD permit in late 2007. However, PG&E withdrew this application before any modifications were granted and yet pushed forward with the GGS project anyway. PG&E thereby never completed the PSD permitting process.

Since it fails to come close to covering the amount PG&E saved by violating the law, the penalty does not penalize PG&E at all. While a $20,000 penalty may be appropriate deterrence level for a small company, it fails to consider PG&E's size and financial stability. PG&E is a multi-billion dollar company.[48]

PG&E is also expanding. In fact, it is involved with two new proposed facilities in the same area: the proposed Contra Costa and Marsh Landing Facility. *See* CPUC A.09-09-021.[49] Not only is this evidence of its ability to pay a higher penalty, but PG&E's expansion makes a proper penalty even more important in order to encourage CAA compliance with regard to its new facilities. EPA has even assessed higher penalties against PG&E in another consent decree. In 1997, PG&E agreed to settle a case for $14 million dollars, including $7.1 million in civil penalties, over violations of federal and state water laws pertaining to another California power plant.[50] In addition, because PG&E is a high-profile polluter, other facilities will look to PG&E, and how EPA responds to its CAA violations, when determining whether it is economically advantageous to comply with the CAA. By setting such a low penalty, EPA has given the green-light to PG&E and other companies to rationalize CAA violations as cost-effective.

Therefore PG&E's economic advantage from deferred costs of compliance with CAA constitutes energy market manipulation pursuant to FPA § 824v.

2. The question for review is did PG&E's answer knowingly provide "false information" regarding the permit to the Commission in violation of FPA § 824u?

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[48] "In total, [PG&E] grew net income by 33 percent compared with 2007, to $1.34 billion or $3.63 per share, as reported under generally accepted accounting principles (GAAP)." 2008 Annual Report at 2. PG&E is in the "top 25% of among comparable utilities." *Id.* "Total spending capacity last year was $3.7 billion, consistent with our plans to invest an average of $3.5 to $4 billion per year over the 2008 through 2011 timeframe." *Id.*. 2008 Annual Report available at: http://www.pgecorp.com/investors/financial_reports/annual_report_proxy_statement/ar_html/2008/index.html

[49] *See* PUC 09-09-021, http://docs.cpuc.ca.gov/published/proceedings/A0909021.htm (PG&E applying for funding to add two new plants to this area).

[50] PG&E To Pay $14 Million to Settle Diablo Canyon Missing Data Case, available at: http://yosemite.epa.gov/opa/admpress.nsf/d0cf6618525a9efb85257359003fb69d/ab6685d34a474acf852570d8005e1256!OpenDocument

"CARE also fails to explain specifically what fraudulent device, scheme or artifice PG&E employed and whether it made any untrue statements of a material fact or any omissions and whether it committed any act or engaged in any practice or course of business for the purpose of committing a fraud or deceit in connection with the purchase or sale of electric energy or transmission services, or in connection with the purchase or sale of natural gas or transportation services. " [Order Dismissing Complaint at 11]

On September 8, 2009, CARE filed a complaint requesting that the Commission impose civil penalties on PG&E under Part II of the Federal Power Act (FPA) for operating the Gateway Generating Station without a permit required under the Clean Air Act. CARE argues that PG&E's operation of the Gateway Generating Station without required permits violates section 4A of the Natural Gas Act (NGA) and sections 31(a) and 222 of the FPA, as well as the Commission's rules.

CARE's complaint included an attached August 4, 2008 e-mail[51] from the Bay Area Air Quality Management District ("BAAQMD")'s attorney that stated "Sandy Crockett provided a summary of the [USEPA Environmental Appeals Board] EAB decision on the Russell City Energy Center [RCEC] PSD permit amendment and the timing implications of at EAB appeal for GGS. District was taken to task by EAB for not complying with noticing requirements of 40 CFR 124 and is concerned that the notice provided for the GGS amendment might also be viewed by EAB as deficient. Sandy is concerned that the EAB plaintiff in the RCEC case would appeal the GGS permit to the EAB on the same grounds. He indicated that the RCEC plaintiff [who is a CARE member] had been in contact with [CARE member] Bob Sarvey, who had submitted public comments on the GGS draft permit. He noted that power plant project opponents such as Sarvey appear to have discovered that the EAB appeal process is an effective means of delaying projects since an EAB appeal stays the PSD permit for 6 months or more even if EAB ultimately rejects the appeal…. Gary noted that under EPA policy, once a facility starts up, a non-major amendment no longer requires PSD review and public notice, so if amendment issuance were to be delayed until after startup the PSD issues could be moot. However, District would appear to be circumventing the regulatory process if it were to delay. If GGS were to

[51] See http://elibrary.ferc.gov/idmws/common/opennat.asp?fileID=12140873 Submittal 20090928-5082 at pages 3 and 4.

withdraw permit amendment until after commissioning it would be hard for District staff to support, and the Hearing Board to grant, a variance." The BAAQMD at that time and currently has a delegation agreement with USEPA for PSD permits for facilities such as GGS.

On August 12, 2009 the United States Environmental Protection Agency ("USEPA") issued its "Finding and Notice of Violation" ("FNOV") regarding the PSD permit for the project or lack thereof.[52] On September 24, 2009 the United States Department of Justice ("USDOJ") lodged a "Consent Decree" before the US District Court for the Northern District of California.

The Consent Decree filed with the court included a Complaint which stated "As set forth more fully herein, PG&E constructed the Gateway Generating Station ('GGS'), a natural gas-fired power plant in Antioch, California, without first obtaining an appropriate PSD permit authorizing this construction and without installing appropriate technology to control emissions of nitrogen oxides and carbon monoxide, as required by the Act and the Act's implementing regulations. As a result of the Defendant's operation of the GGS following this unlawful construction, in the absence of appropriate controls, excess amounts of nitrogen oxides and carbon monoxide has been and are still being released into the atmosphere."

On September 28, 2009 PG&E filed its Answer and Motion to Dismiss CARE's Complaint, stating "PG&E completed and began operating the facility in February 2009 in reliance upon the 2001 BAAQMD PSD Permit and subsequent permit extension….PG&E contests that conclusion and continues to believe it lawfully constructed Gateway Generating Station in compliance with, and in good faith reliance upon, the permits issued to it by the BAAQMD."[PG&E Answer at pages 6 and 7]

The August 4, 2008 e-mail and the United State's September 24, 2009 Complaint filed in the US District Court for the Northern District of California that "PG&E constructed the Gateway Generating Station ('GGS'), a natural gas-fired power plant in Antioch, California, without first obtaining an appropriate PSD permit authorizing this construction and without installing appropriate technology to control emissions of nitrogen oxides and carbon monoxide" demonstrates that PG&E had actual "knowledge" within the meaning of 15 USC § 3414 (B) that it did not have a valid PSD permit and therefore on September 28, 2009 PG&E knowingly

[52] The FNOV was attached to CARE's Complaint.

provided "false information" regarding the permit to the Commission in violation of FPA § 824u.

3. Does FERC's enforcement authority pursuant to 15 USC § 3414 extend to PG&E's operation of the Gateway Generating Station without required federal permits?

The Emission Reduction Credits Are Illegal. It appears under the Decree that PG&E can count a portion of the emission reductions achieved under the Decree as credits to offset emission increases for specific future modifications. This, in part, is because the Decree's limit for NO_X does not account for any reductions in startup or shutdown emissions from the mitigation technology and gives PG&E the advantage of having the more favorable NO_X annual limit until June 1, 2010. Further, it allows PG&E the benefit of not having to obtain offsets for the time it was operating illegally at levels that did not reflect current day BACT. For all of these reasons, the CD's failure to address offsets when settling out these requirements is illegal under the Clean Air Act, which prohibits use of offsets from "[e]mission reductions otherwise required by this chapter." CAA Section 173(c)(2). The emission reductions in this Decree are being required of PG&E pursuant to the CAA's New Source Review provisions. Therefore, the reductions are being required under CAA's judicial enforcement provisions. CAA Section 113.

Further, the Decree fails to include any limitation on using the emissions reduced under the Decree for netting or offsets. This is contrary to many decrees entered with similar facilities. *See, e.g.,* Nevada Power CD ("For any and all actions taken be Nevada Power to comply with the requirements of this Consent Decree . . . any emission reductions shall not be considered a creditable contemporaneous emission decrease for the purpose of obtaining a netting credit"), *available at* http://www.epa.gov/region09/air/enforcement/consent-docs/cd-nevada-power-clark-station-081307.pdf; *U.S. v. SIGECO* CD (stating same).

In its June 18, 2009 *Order on Rehearing and Request for Clarification* under Docket EL00-95 *et al*. (127 FERC ¶ 61,250) the Commission determined the relevance of emission costs to the 2000-1 energy crisis mitigated market clearing price ("MMCP") as follows: "sellers whose costs were not sufficiently covered under the MMCP refund methodology were allowed to show that they incurred costs in excess of the MMCP through the fuel cost allowance and cost offset

process. Significantly, however, emissions costs[53] differ from the fuel cost allowance and cost offsets in that they are not related to the MMCP calculation at all. Rather, emissions costs were incurred in connection with the CAISO's reliability directives. The recovery of the emissions costs, therefore, is not tied to whether the MMCP is confiscatory with respect to any individual seller. Emissions costs were not included in the MMCP calculation and, as such, the Commission made the determination of the manner in which sellers could recover the emissions costs that were incurred during the Refund Period. The December 19, 2001 Order found that total gross load was the most appropriate method to use to assess emissions costs because they were incurred in connection with clean air requirements, and the reliability function served by the CAISO's markets benefited all customers.[54] These are what are referred to as "sunk costs" in *Illinois Commerce Commission v. Federal Energy Regulatory Commission*, 576 F.3d 470, 476 (7th Cir. 2009). "While the link between reliability and clean air may not be intuitively obvious, during the Refund Period, the CAISO directed certain resources to run for reliability purposes, even though this resulted in those resources incurring emissions costs imposed by clean air regulations. In the absence of this directive, these resources could have avoided the emissions costs by electing not to run. Since these resources did run for reliability purposes, however, the Commission found it appropriate to assess emissions costs against all buyers or load served on the CAISO's transmission system, on the basis of control-area gross load. The Commission also reasoned that "total gross load" was the most appropriate method to use to allocate emissions costs.[55] The rationale for this allocation methodology was that these costs should be socialized to all CAISO/PX customers because they all benefited from greater reliability and from cleaner air.[56] "

The 2005 Energy Policy Act's provisions against market manipulation is clear "[i]t shall be unlawful for any entity… directly or indirectly, to use or employ, in connection with the

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[53] Emissions costs were costs incurred by some sellers in order to comply with certain emissions restrictions and environmental compliance fees. March 26, 2003 Order, 102 FERC ¶ 61,317 at P 98. These costs were not factored into the MMCP and were incurred when generators were required to run in accordance with CAISO dispatch instructions and the must offer requirement. *Id.* P 14; Emissions Costs Order, 95 FERC ¶ 61,418 at 62,562.

[54] December 19, 2001 Order, 97 FERC ¶ 61,275.

[55] *Id*. at 62,370.

[56] *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 114 FERC ¶ 61,313, at P 20 (2006).

purchase or sale of electric energy or the purchase or sale of transmission services subject to the jurisdiction of the Commission, any manipulative or deceptive device or contrivance…in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of electric ratepayers."

Since the Commission's December 19, 2001 Order found that "total gross load was the most appropriate method to use to assess emissions costs because they were incurred in connection with clean air requirements, and the reliability function served by the CAISO's markets benefited all customers" therefore pursuant to Commission Orders and precedents established therein; FERC's enforcement authority pursuant to 15 USC § 3414 extends to PG&E's operation of the Gateway Generating Station without required federal permits.

4. The question for review is did CEC's answer knowingly provide "false information" regarding the CAA permit to the Commission in violation of FPA § 824u?

"CARE also does not explain how the CEC's regulatory decision within its jurisdiction in regard to PG&E's operating permit was in violation of the NGA, FPA, and Order No. 670." [Order Dismissing Complaint at 11]

FPA § 824 the declaration of policy for application of subchapter (a) of the federal regulation of transmission and sale of electric energy "declare[s] that the business of transmitting and selling electric energy for ultimate distribution to the public is affected with a public interest, and that Federal regulation of matters relating to generation to the extent provided in this subchapter and subchapter III of this chapter and of that part of such business which consists of the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce is necessary in the public interest, such Federal regulation, however, to extend only to those matters which are not subject to regulation by the States."

The Commission's authority does extend to CEC to the extent CEC "knowingly" files false information to the Commission. Pursuant FPA § 824 u there is a prohibition on filing false information which also applies to CEC stating "[n]o entity (including an entity described in

section 824 (f) of this title[57] shall willfully and knowingly report any information relating to the price of electricity sold at wholesale or the availability of transmission capacity, which information the person or any other entity knew to be false at the time of the reporting, to a Federal agency with intent to fraudulently affect the data being compiled by the Federal agency."

CEC's September 28, 2009 answer states "CARE seeks relief from the FERC for what it has identified as the CEC's 'August 26, 2009 actions to approve PG&E's amended permit allowing continued operations of the Gateway project under CEC Docket Number 00-AFC-1C, Gateway Generating Station ('GGS'), without a PSD permit.'[] Relief would be improper for two reasons. First, the CEC's 'August 26, 2009 actions' merely authorized several minor changes to the ongoing operations of the Gateway facility. They did not concern the project's PSD permit at all, and CARE's concern about the alleged lack of a PSD permit is a separate matter that is being heard before the United States Environmental Protection Agency ('EPA'). We support PG&E's filing in the instant matter on this issue. Second, as discussed below, CARE has no legal basis to file a Complaint with the FERC against the CEC, which is a statutorily-established state agency."

Since of CEC's answer to "support PG&E's filing in the instant matter on this issue" therefore the CEC had actual "knowledge" within the meaning of 15 USC § 3414 (B) that it PG&E did not have a valid PSD permit; therefore on September 28, 2009 the CEC knowingly provided "false information" regarding the permit to the Commission in violation of FPA § 824u.

On the issue of a "legal basis to file a Complaint with the FERC against the CEC, which is a statutorily-established state agency" it is CARE's understanding that FERC maintains it authority under PURPA over CEC's role as a "State regulatory authority"[58] as well as over "electric consumer[s]" and also authority under PURPA over the California Energy Resources Scheduling division of the California Department of Water Resources ("CERS") [another State agency] under its definition as an "electric utility". The terms "electric consumer" and "electric

[57] "No provision in this subchapter shall apply to, or be deemed to include, the United States, a State or any political subdivision of a State, an electric cooperative that receives financing under the Rural Electrification Act of 1936 (7 U.S.C. 901 et seq.)"
[58] Within the meaning given that term in section 796 (21) of title 16.

utility" have the meanings given those terms in section 2602 of title 16.[59] Therefore CARE maintains all its procedural due process rights to bring this complaint against CEC under PURPA as well as FPA.

5. Does Subchapter I of Title 16 of the United States Code addressing the regulation of the development of water power and resources apply to PG&E's operating permit for Gateway Generating Station?

"'CARE's reliance on section 31(a) of the FPA to support its position is misplaced. Section 31(a) authorizes the Commission to "monitor and investigate compliance with each license and permit issued under [Subchapter I]…' (*emphasis added*). Subchapter I of Title 16 of the United States Code addresses the regulation of the development of water power and resources and does not apply to PG&E's operating permit for Gateway Generating Station. CARE has not cited any precedent invoking the Commission's authority under Subchapter I of the FPA to monitor, regulate, or investigate operating permits for non-hydropower generating facilities issued by other federal and/or state agencies"

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[59] TITLE 42 CHAPTER 149 SUBCHAPTER XII Part E § 16471
§ 16471. Consumer privacy and unfair trade practices
(f) Definitions
For purposes of this section:
(1) State regulatory authority
The term "State regulatory authority" has the meaning given that term in section 796 (21) of title 16.
(2) Electric consumer and electric utility
The terms "electric consumer" and "electric utility" have the meanings given those terms in section 2602 of title 16.
TITLE 16 CHAPTER 46 § 2602
§ 2602. Definitions
As used in this Act, except as otherwise specifically provided—
(1) The term "antitrust laws" includes the Sherman Antitrust Act (15 U.S.C. 1 and following), the Clayton Act (15 U.S.C. 12 and following), the Federal Trade Commission Act (15 U.S.C. 14[41] and following), the Wilson Tariff Act (15 U.S.C. 8 and 9), and the Act of June 19, 1936, chapter 592 (15 U.S.C. 13, 13a, 13b, and 21A).
(2) The term "class" means, with respect to electric consumers, any group of such consumers who have similar characteristics of electric energy use.
(3) The term "Commission" means the Federal Energy Regulatory Commission.
(4) The term "electric utility" means any person, State agency, or Federal agency, which sells electric energy.
(5) The term "electric consumer" means any person, State agency, or Federal agency, to which electric energy is sold other than for purposes of resale.

Subchapter I of Title 16 includes FPA § 812 which governs public-service licensee; regulations by State or by commission as to service, rates, charges, etc. stating "as a condition of the license, every licensee under this chapter which is a public-service corporation, or a person, association, or corporation owning … or distributing power for sale or use in public service, shall abide by such reasonable regulation of the services to be rendered to customers or consumers of power, and of rates and charges of payment therefore, as may from time to time be prescribed by any duly constituted agency of the State in which the service is rendered or the rate charged. That in case of the development, transmission, or distribution, or use in public service of power by any licensee under this chapter or by its customer engaged in public service within a State which has not authorized and empowered a commission or other agency or agencies within said State to regulate and control the services to be rendered by such licensee or by its customer engaged in public service, or the rates and charges of payment therefore, or the amount or character of securities to be issued by any of said parties, *it is agreed as a condition of such license that jurisdiction is conferred upon the commission, upon complaint of any person aggrieved* or upon its own initiative, *to exercise such regulation and control until such time as the State shall have provided a commission or other authority for such regulation and control*: Provided, That the jurisdiction of the commission shall cease and determine as to each specific matter of regulation and control prescribed in this section as soon as the State shall have provided a commission or other authority for the regulation and control of that specific matter (*emphasis added*)."

Since PG&E in addition to operating it Gateway Facility without a CAA permit PG&E operates hydroelectric facilities regulated under the Commission's authority as well; CARE believes that PG&E is also subject Section 31(a) authorizing the Commission to "monitor and investigate compliance with each license and permit issued under [Subchapter I]…"

Request for Relief

CARE has participated before the Commission these last ten years without the benefits of legal counsel to prepare and represent CARE before the Commission. Without funding for qualified experts and legal counsel CARE recognizes it has been unable to properly file a complaint before the Commission that meets the standards for the Commission to provide its review. The Order Dismissing CARE's complaint, under Docket EL09-73 *et al.* states; "The Commission's Rules of Practice and Procedure require a complainant to meet certain minimum

requirements. Specifically, Rule 203 requires that all pleadings contain the "relevant facts," and the 'position taken by the participant... and the basis in fact and law for such position.'[60] Similarly, Rule 206 requires complainants to '[c]learly identify the action or inaction which is alleged to violate applicable statutory standards or regulatory requirements [and] [e]xplain how the action or inaction violates applicable statutory standards or regulatory requirements.'[61] A complainant must state a legally recognizable claim that the Commission has the statutory or regulatory power to address."[62] [Order Dismissing Complaint at 2]

CARE has requested and been denied funding to properly participate before the Commission as an Intervener with financial hardship in the energy crisis "Refund" proceedings where CARE has been seeking refunds for ratepayers (customers) who where overcharged for electric services during the crisis.

In response to CARE's request for financial assistance the ALJ stated on November 5, 2001 "CARE's request for financial assistance in the form of attorney's fees is premature. The established practice for Commission proceedings is for parties appearing before the Commission to bear their own legal fees. The public interest is represented by Commission Staff and state agencies and private interests are represented by interested parties who retain separate counsel. Any grant of attorney's fees and costs would fall under the discretionary authority of the Commission, and not this tribunal."[63]

On October 27, 2009 the Commission Chairman Wellinghoff testified before the Committee on Environment and Public Works, United States Senate regarding proposed changes to Section 151 of S. 1733 that would establish an Office of Consumer Advocacy ("OCA"). The legislation under consideration proposes in order to ensure its independence from FERC, OCA should be placed within another agency or created as a separate agency.[64]

In response the Chairman proposed the very mechanism under which CARE would be able to fund qualified experts and legal counsel necessary for CARE to participate fully and

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[60] *See* 18 C.F.R. § 385.203(a) (2009).
[61] 18 C.F.R. § 385.206(b) (2009).
[62] *See, e.g., CAlifornians for Renewable Energy v. Cal. Indep. Sys. Operator Corp.*, 117 FERC ¶ 61,072, at P 8-11 (2006).
[63] See http://elibrary.ferc.gov/idmws/common/opennat.asp?fileID=6002604 Issuance 20011106-0397
[64] See http://www.ferc.gov/EventCalendar/Files/20091027115535-Wellinghoff-10-27-09.pdf

meaningfully before this Commission in behalf of the customers CARE seeks to represent, and in particular those customers that are low income and people of color. "Congress may want to consider funding the Office of Public Participation identified in section 319 of the Federal Power Act, in lieu of enacting section 151. While this Office was intended to, among other things, compensate participants in FERC cases for their litigation costs under certain circumstances, Congress has never funded this Office."

CARE asks the Commission accommodate CARE's hardship in participating before the Commission. CARE asks for the following relief, and any other relief the Commission deems appropriate.

1. A finding that PG&E's economic advantage from deferred costs of compliance with CAA constitute energy market manipulation pursuant to FPA § 824v,
2. A finding that PG&E's answer knowingly provided "false information" regarding the CAA permit to the Commission in violation of FPA § 824u,
3. A finding that FERC's enforcement authority pursuant to 15 USC § 3414 extends to PG&E's operation of the Gateway Generating Station without required federal permits,
4. A finding that CEC's answer knowingly provide "false information" regarding the CAA permit to the Commission in violation of FPA § 824u, and
5. A finding that as an operator of FERC jurisdictional hydroelectric facilities PG&E is also subject to Subchapter I of Title 16 of the United States Code addressing the regulation of the development of water power and resources apply to PG&E's operating permit for Gateway Generating Station?

Respectfully submitted,

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Michael E. Boyd President (CARE)
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5439 Soquel Drive
Soquel, CA 95073

Verification

I am an officer of the Complaining Corporation (where applicable) herein, and am authorized to make this verification on its behalf. The statements in the foregoing document are true of my own knowledge, except matters, which are therein stated on information and belief, and as to those matters I believe them to be true.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on December 18th, 2009, at Soquel, California

Michael E. Boyd – President, CARE
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Certificate of Services

I hereby certify that I have this day served the foregoing document upon each Respondent and the Secretary of the Commission via US mail, and other Interested Agency via email if available. Rule 2010(f) (3) provides that you may serve pleadings by email. I further certify that those parties without electronic mail have been served this day via US mail.

Dated on the 18th day of December 2009.

Respectfully submitted,

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