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California Energy Commission
Docket Unit
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Subject: **PG&E'S COMMENTS ON THE SITING COMMITTEE'S PROPOSED
ORDER ON ITS REQUEST FOR EXTENSION OF CONSTRUCTION
DEADLINE
DOCKET NO. (01-AFC-21C)**

Enclosed for filing with the California Energy Commission is the original of **PG&E's
COMMENTS ON THE SITING COMMITTEE'S PROPOSED ORDER ON ITS
REQUEST FOR EXTENSION OF CONSTRUCTION DEADLINE** for the Tesla Power
Project Docket No. (01-AFC-21C).

Sincerely,



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STATE OF CALIFORNIA

Energy Resources
Conservation and Development Commission

In the Matter of:

TESLA POWER PROJECT

DOCKET NO. 01-AFC-21C

**PG&E'S COMMENTS ON THE
SITING COMMITTEE'S PROPOSED
ORDER ON ITS REQUEST FOR
EXTENSION OF CONSTRUCTION
DEADLINE**

INTRODUCTION

Pacific Gas and Electric Company (PG&E) hereby submits its comments on the Siting Committee's Proposed Order on its Request For Extension of Construction Deadline dated September 14, 2009. PG&E disagrees with some of the findings and the ultimate conclusion to deny extension of the construction deadline. It appears that the Commission has fashioned a standard for PG&E that is different and distinct from the standards applied for granting extension requests by non-utility project owners.

**PG&E IS NOT SEEKING AN EXTENSION FOR A PROJECT DIFFERENT FROM THE
PROJECT LICENSED BY THIS COMMISSION**

PG&E requests that the construction deadline for the Tesla Project be extended. PG&E has not requested extension of any other project. The Tesla Project Certificate allows the owner to construct the Project as defined if the Project is constructed in accordance with the Conditions of Certification. The Proposed Order bases its conclusion that the

extension request is for an undefined different project on two principles. The first is reliance on one statement, not evidence, made by counsel at the June 3, 2009 Commission Business Meeting. The second principle is evidence that PG&E sought approval from the California Public Utilities Commission (CPUC) to construct one of the two trains of the project. As was described in the testimony of William Manheim, PG&E was not seeking to build a different project but just one-half of the fully permitted facility. At page 43 of the Official Transcript of the Evidentiary Hearing held on July 20, 2009 (43 RT 7/30/09) the following testimony was presented to respond to a question from Commissioner Byron concerning PG&E's CPUC filings.

MR. GALATI: And Mr. Manheim in response to Commissioner Byron's question earlier about what was proposed at that time. Do you remember whether the plant project description was different than the license?

MR. MANHEIM: There was a difference in timing. In the CPUC application PG&E was proposing to proceed with only one-half of the project or about 560 megawatts of the project. So one train of the two that had been permitted. What we were proposing in the application though was that the common facilities, the facilities that would be needed to serve both trains of the project would be sized to allow for potential future development of the second train. So why we were only seeking authorization for the first train at the time, we were reserving the potential for developing the entire project down the road.

No evidence was presented to rebut this testimony. To our knowledge the Commission has never previously held that an applicant was not authorized to construct a portion of the fully licensed project as long as it complied with the conditions of certification of the license. Not only is the Proposed Decision factually incorrect in stating that PG&E was seeking extension for a project not licensed by the Commission, the Proposed Order sets a dangerous precedent. It would serve no environmental or regulatory purpose to hold that an applicant with a project that can clearly be constructed in stages could not construct that project in stages. The Tesla Project was fully evaluated for all impacts assuming all stages were constructed and operated, and construction of the first train only would actually reduce environmental impacts. If the second train was never needed, nothing in the Warren Alquist Act, or the Commission Decision requires it be constructed.

It is also important to note the manner in which the energy needs of the state are met is dynamic. Facilities generally do not get constructed unless constructed by a load serving entity to serve its own load or if the developer has a power purchase agreement. The Commission should not adopt an Order or policy that would interfere with the ability of developers to design, and in some cases redesign, projects to fit the changing needs of the state. To hold that a license for a large facility requires actual construction of the entire facility is such a policy. In addition, constructing a smaller facility or staging construction of a larger facility can often be the best choice for good environmental stewardship and resource management.

The Proposed Order also adopts a policy that an amendment to a License must be pursued prior to any request for extension. The Proposed Order relies on the unique case of Russell City Energy Center to support this policy. Russell City had a Power Purchase Agreement approved by the CPUC prior to its amendment request and it was this agreement that defined the project. The applicant sought an extension only because there were delays in successfully obtaining approvals of the amendment in time to begin construction. However, to be clear it was the existence of the Power Purchase Agreement that provided clear definition of the project and ensured construction.

The Proposed Order also relies on, and distinguishes Tesla from, the extension granted to the East Altamont Energy Center on the grounds that it believed that since Calpine did not seek any modifications at the time, or before the extension, that it was committed to constructing the entire 1100 MWs contained in its Decision. In doing so, the Commission has articulated an arbitrary rule in this Proposed Order that would preclude any amendment after a license is extended, yet no such condition is placed on East Altamont in its construction extension. We agree that no conditions should be placed on East Altamont and it should be allowed to file an amendment should it enter into a power purchase agreement that would require changes to the project description. That is also consistent with East Altamont's Petition.

Should the Project Owner enter into a power purchase agreement for the EAEC and ***should that agreement require any modifications to the***

project, or changes in the conditions of certification or, should any external circumstances requires changes in the conditions of certification, the Project Owner will file a timely petition to amend the license prior to the commencement of construction (EAEC Petition for Extension of Construction Deadline, dated May 16, 2008, page 2).

This is not, nor should the Commission construe it as, a commitment by Calpine to construct the full project. Further, we do not believe that any applicant should be estopped from filing an amendment if the circumstances of a power purchase agreement or the determined need for the project change in response to demand and evolving state energy policy. Calpine, PG&E, and all other developers should be allowed to seek an amendment when conditions or circumstances warrant such changes. This should be independent of whether those changes occur before or after a license extension.

PG&E requests that the Proposed Order reflect that PG&E was not seeking an extension for a different project and that the rationale for denying the extension request on that ground be deleted. Anything less would reflect the arbitrary and capricious nature of the decision and show a clear abuse of discretion as there is no evidence in the record to support such a finding.

We also request that the Commission not adopt a policy whereby license extensions can only be filed after amendments. The Proposed Order would then accurately reflect the facts and evidence presented in this case and would not have the unintended consequences of further restricting energy developers from sizing projects to fit the particular needs at the time of construction.

GOOD CAUSE STANDARD

For the reasons articulated in both our initial and post-hearing briefs, we disagree with the ultimate good cause standard identified in the Propose Order. First, the Commission has not applied that standard to any developer except PG&E and on that basis the standard is discriminatory. Second, the standard as articulated is dependent upon the stated intent of the developer to start construction once the extension is

granted. The Commission, in this case, relies heavily on the fact that PG&E has been open about its plans to develop the Tesla Project and how the need for the project will be the subject of its Long Term Planning Process at the CPUC in its 2010 proceedings. It is possible, and likely that during that planning process, there will be clear direction on the role of the Tesla Project and how the Tesla Project would benefit PG&E's customers. As articulated in its letter of support for the extension, TURN believes the Tesla Project provides a positive benefit to PG&E customers. Good cause should not rest on a project owner's immediate desire to construct because desire alone does not result in construction of a plant. Every applicant and project owner desires to construct its asset. The actual decision to construct is based on many contingencies including financing, energy procurement and in some cases regulatory approvals.

As discussed in detail in both our initial and post-hearing briefs, the correct standard for good cause for a license extension has been outlined by the Legislature when it adopted PRC Section 25534. That section provides guidance that is directly on point for the factors that the Commission must consider when establishing good cause for license extension. Ignoring that section on the basis that it only applied to good cause extension for a project that failed to start construction within 12 months is a narrow interpretation that will create the unintended consequences outlined above.

DILIGENCE IN STARTING CONSTRUCTION

PG&E disagrees that it did not diligently pursue construction and by the evidence in the record it clearly desired to do so. First, it sought CPUC approval to construct. Second it made financial commitments and payments to obtain the steam turbines.

MR. GALATI: And Mr. Manheim did PG&E order and then cancel turbine contracts?

MR.MANHEIM: Yes we did. We entered into an agreement, an expedited agreement with GE to purchase turbines that would have allowed the Tesla Project to be on-line no later than summer of 2012. And we incurred significant costs to terminate those agreements when the PUC decided that we should not pursue with the project as proposed. (46 RT 7/30/09)

There is no stronger evidence of a desire and commitment to construct than the expenditure of several million dollars. The Commission has imputed the fact that FPL did not construct the Tesla Power Project against PG&E. When looking at whether good cause exists for a license extension, the Commission should look at the actions of ***the applicant requesting the extension***. To do otherwise would not be consistent with past practices nor with common sense. Why should the inability of one developer to construct a project preclude the sale to a developer that desires to construct that project? If FPL had requested a license extension it would be appropriate to inquire and evaluate FPL's conduct. The Commission's concern about a straw-man conveyance for the purpose of absolving a prior owner of inaction can be detected with a modicum of inquiry, and is nowhere present in these facts. The Commission should evaluate PG&E's activities only. The Commission should not adopt an Order that finds that the expenditure of several million dollars towards the purchase of equipment for a project is not diligently pursuing construction of that project.

Finally, by accepting the stated intent, as in East Altamont, of an independent power producer to bid a project in to a utility RFO as sufficient showing to establish good cause, but finding a utility's analogous intent to proceed through the CPUC's LTPP proceeding to be indicative of "no plans to begin construction," the Commission here creates a separate standard for utility-owned licenses.

FIVE-YEAR EXTENSION

The Proposed Order states that PG&E failed to establish an adequate reason it requested five years for the extension. Specifically Footnote 2 to the Proposed Order states that the actual request for 5 years is proof that PG&E does not intend to construct the project. For the reasons discussed above, we believe it is not good policy to make good cause determinations on the Commission's speculation of what an applicant desires. Mr. Manheim explained the reason PG&E requested 5 years was related to procurement policies implemented by the CPUC.

MR. MANHEIM: There's one other addition. The question was raised by Counsel, why did PG&E ask for five years as opposed to the three years that East Altamont asked for, for example? In my testimony I described that PG&E's plan is to address the potential development of Tesla in the next long term plan proceeding that will be filed with the Public Utilities Commission. And the five years allows that process to play out. And if Tesla were potentially selected through that process as a resource to be developed we would need the full five years. So I can take you briefly through the timeline as to how we'd get to five years on that. This is speculation on my part because the PUC has not established the full schedule for all of these steps. But based on our experience with prior long-term plan proceedings and long term RFOs my estimate is that we would submit our long-term plan, next one, at the Public Utilities Commission in the first quarter of 2010. We would expect a decision by the CPUC in the fourth quarter of 2010 and that decision would identify the resource need, if any, that PG&E would pursue. We would issue our next RFO in the first quarter of 2011. So the next long-term RFO would be a 2011 long-term RFO. And that would really be the first opportunity for utility-owned or independently- owned generation to participate in an RFO for new generation. We'd expect that RFO would be completed by the end of the year in 2011 and that we would then have to apply to the Public Utilities Commission for approval of the winners in the RFO. And we would expect a CPUC decision about midyear of 2012 on that. So if Tesla were to be selected as a resource to be developed we'd have a CPUC green light about midyear of 2012. So with a five year extension that would give PG&E two years to complete the significant updating of the license and any amendments that would be required and start construction.

MR. GALATI: And do you believe that that would be a similar timeline if this were an independent energy producer sitting here with this application?

MR. MANHEIM: Yes. I mean, to the extent independent producers wanted to sell to PG&E in conjunction with our long-term RFO they would be subject to the same constraints and time framework. (44-46 RT 7/30/09)

Further, as described in Exhibit 3:

PG&E will address the issue of the development of the Tesla Power Project in its next Long Term Plan to be filed at the CPUC in early 2010. After the close of its 2008 LTRFO (which is expected to occur in the third quarter of 2009), the 2010 Long Term Plan will constitute the next opportunity for evaluation of PG&E's long term customer needs. To the extent the 2010 Long Term Plan indicates there is a need for new

conventional generation resources, PG&E will evaluate whether Tesla Power Plant is a viable and economic resource to fill the need. In this context, PG&E will consider the possibility of marketing the Project to other power plant developers if doing so is in the best interest of its customers.

The Proposed Order uses this testimony to draw the conclusion that the Tesla Project should begin construction in 3 years and because PG&E requested 5 years, it clearly does not intend to construct the facility. A more accurate and fair reading of the testimony is that Mr. Manheim has estimated the amount of time for agency action over which PG&E does not control the timing. Second, as Mr. Manheim clearly states, if his estimates are correct additional time would be needed to prepare and file an amendment to the License in accordance with the Condition proposed by PG&E in this proceeding and in order to potentially market the asset to other power plant developers. Allowing 2 years for a sale and/or an amendment seemed prudent rather than requesting an amount of time whereby it would be unlikely that PG&E or any other developer could begin construction. If the Commission believes a shorter amount of time for an extension is warranted PG&E would support a shorter extension over denial.

FACTORS BEYOND PG&E'S CONTROL

PG&E disagrees with the assertion that the action of the CPUC effectively prohibiting development of the Tesla Project is a factor within PG&E's control. If it were, the Decision would have been different and PG&E would likely be constructing the project at the moment. Moreover, any independent power producer that requests an extension following an unsuccessful RFO round may be said to have similarly failed to "meet its burden of proof."

While PG&E acknowledges the Commission's letter to the CPUC in opposition to PG&E's position that development of the Tesla Power Project fit within an exception to the general rule prohibiting utility-owned generation, the Commission should be careful that its commitment to a desired result does not lead to the creation of bad policy with

unintended consequences. PG&E believes that if a regulatory agency denied the ability of an independent energy producer to construct a facility (e.g. agency permits, court decisions, approval of Priority Reserve rules; etc.), such action is by its very nature factors beyond the applicant's control. As PG&E has consistently testified and argued before the Commission, the license extension request should be separate and distinct from the approval of PG&E to construct the Tesla Project. The authority to prohibit utility-owned generation is with the CPUC and not this Commission. To hold that the CPUC's actions are within PG&E's control is not supported by the evidence and is inaccurate to say the least.

TIME AND RESOURCES EXPENDED

The Proposed Order relies on statements by Jack Caswell that the Tesla Project amendment would require approximately 1 year to complete. Given Staff's workload and reduced work hours, PG&E agrees. However, the Proposed Order ignores the testimony filed by PG&E that asserts that such an amendment would be significantly less complicated than a full AFC. Additionally, to state that an amendment will take 1 year and that is similar to the amount of time necessary to review and AFC at this time, ignores that the Commission has not completed an AFC Proceeding in 12 months since 2001. In fact the average amount of time prior to the current batch of renewable energy filings and imposed furloughs is over 20 months for those projects that did not qualify for expedited treatment under rules adopted during the energy crisis and after. The only evidence before the Commission in this proceeding is that an amendment to construct half of the project and to update environmental analyses that may have grown stale would be significantly less than the amount of time and resources for the Commission to process a new AFC.

CONCLUSION

We urge the Commission to reconsider and change its Proposed Order to reflect the true facts of this case and grant PG&E's request for license extension. The Proposed Order constructs a standard for investor-owned utilities that is different from that applied to independent generators, yielding a result that is consistent with opposition to the hybrid market. The forum to express that concern is the CPUC. The Commission expressed that concern during the Tesla CPUC proceedings. The Commission should examine the evidence presented in this extension request alone, should treat PG&E the same as any other applicant, and should grant the extension. Otherwise the Commission would be acting arbitrarily and capriciously.

In the unfortunate event that the Commission denies this request, the Commission should at a minimum revise the Proposed Order to remove the justifications as discussed above that can only have negative and adverse unintended consequences on all energy developers. While we understand that this Decision is not being adopted procedurally as a Legal Precedential Decision, practically speaking the Decisions of the Commission on matters of this importance will still have a precedential effect on future Commission actions.

Respectfully Submitted,

Dated: September 21, 2009



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APPLICATION FOR CERTIFICATION
FOR THE *Tesla Power Project*

DOCKET No. 01-AFC-21C

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DECLARATION OF SERVICE

I, Marie Mills, declare that on September 21, 2009, I served and filed copies of the attached **PG&E's COMMENTS ON THE SITING COMMITTEE'S PROPOSED ORDER ON ITS REQUEST FOR EXTENSION OF CONSTRUCTION DEADLINE**. The original document, filed with the Docket Unit, is accompanied by a copy of the most recent Proof of Service list. The document has been sent to both the other parties in this proceeding (as shown on the Proof of Service list) and to the Commission's Docket Unit, in the following manner:

(Check all that Apply)

For service to all other parties:

sent electronically to all email addresses on the Proof of Service list;

by personal delivery or by depositing in the United States mail at Sacramento, California with first-class postage thereon fully prepaid and addressed as provided on the Proof of Service list above to those addresses **NOT** marked "email preferred."

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sending an original paper copy and one electronic copy, mailed and emailed respectively, to the address below **(preferred method)**;

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depositing in the mail an original and 12 paper copies, as follows:

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


Marie Mills