Docket No. 06-OIR-1
Greenhouse Gases Emission Performance Workshop
California Energy Commission

Post-Workshop Supplemental Comments
of Pacific Gas and Electric Company
January 16, 2007

Pacific Gas and Electric Company (PG&E) provides the following supplemental post-workshop comments on the California Energy Commission's implementation of a greenhouse gas emissions performance standard (EPS) applicable to local publicly-owned utilities pursuant to recently enacted Senate Bill (SB) 1368. PG&E's comments are intended to supplement and clarify oral comments provided by it and others at the Commission's January 11, 2007, public workshop. PG&E's comments address the following three issues: (1) Differences and similarities between its and SMUD's proposals for treatment of "unspecified contracts," "substitute energy," and "system energy" under the EPS; (2) Various proposals for "after-the-fact," "self-certification" of compliance by local publicly owned utilities subject to the EPS; and (3) The Commission staff's proposal that power sales agreements entered into under PURPA be exempt from the EPS.

1. PG&E's and SMUD's Proposals for Unspecified Contracts Are Different and Therefore the Commission Should Adopt The Elements of Both

At the January 11th workshop, representatives of PG&E, SMUD, and CMUA discussed with Commissioners and Commission staff PG&E's and SMUD's respective proposals for a limited exemption of unspecified contracts from the EPS. In particular, PG&E described its "15 percent substitute energy" proposal contained in its comments on the CPUC's proposed decision implementing an EPS, and pointed out that its proposal

was intended to exempt from the EPS the limited use of "substitute energy" to backup both new renewable and non-renewable unit specific contracts where the amount of substitute energy forecasted to be delivered under the contract would not exceed 15 percent over a time period specified in the contract.[1]

Representatives of SMUD and CMUA also discussed SMUD's proposal for exempting "unspecified contracts" and "system energy," contained in proposed CMUA revisions to the draft Commission staff EPS regulation.[2] In the discussion, Commissioners, staff and interested parties, including PG&E, asked and responded to questions concerning similarities and differences between PG&E's proposal and SMUD's. At one point, Commissioner Geesman asked whether SMUD's proposal for use of substitute energy to backup new renewable contracts would allow 100 percent substitute energy, versus PG&E's 15 percent limitation. SMUD's representatives referred to their and CMUA's comments but did not appear to confirm or reject Commissioner Geesman's interpretation.

PG&E is in the process of reviewing SMUD's proposal and obtaining additional clarification from SMUD regarding its scope. However, based on the workshop discussion as well as CMUA's pre-workshop written comments, PG&E believes that the elements in its and SMUD's proposals may be substantively different in their treatment of new renewable contracts, and therefore the elements of both proposals should be adopted. Here is why:

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[1] PG&E's opening and reply comments on the CPUC Proposed Decision are attached and incorporated by reference for the Commission's consideration in this proceeding.

[2] See, *Pre-Workshop Comments of the California Municipal Utilities Association on the CEC Staff-Proposed EPS Regulations*, Docket 06-OIR-1, January 9, 2007.

Section 2908.5 proposed in CMUA's comments contains two subsections, (a) and (b). Subsection (b) by its terms applies to "firmed unit specific contracts," and appears intended to apply a 15 percent substitute energy exemption to both renewable and non-renewable unit specific contracts, similar to PG&E's "15 percent" proposal. However, subsection (a) by its terms applies *only* to "firmed renewable contracts," and appears intended to limit any "substitute energy" used to back up such renewable contracts to an amount that does not cause the total energy supplied under the contract to exceed the total amount produced by the renewable resource under the contract.

PG&E's believes that subsection (a) of the CMUA/SMUD proposal may be intended to address "banking" issues relating to differences in deliveries over different time periods under renewables contracts, where the renewable energy produced for purposes of Renewable Portfolio Standard (RPS) compliance is calculated based on total renewable energy supplied over the term of the contract, even if actual renewable energy supplied varies from year to year or month to month, with "system energy" or "market energy" used to make up the difference. Under subsection (a), it appears that differences in deliveries are permitted, but provided, however, that the total renewable energy equals the RPS-eligible amounts and that the Renewable Energy Credits (RECs) are conveyed under the contract. Under this approach, "substitute energy" is not permitted or necessary during unit unavailability, outages or maintenance, because over time the buyer and seller will still "make up" the difference between contract deliveries and actual deliveries in order to ensure that total energy delivered does not exceed the total contracted amount of renewable energy.

On the other hand, PG&E believes that subsection (b) of the CMUA/SMUD proposal most closely resembles PG&E's "15 percent" proposal, provided that it is clarified to apply to both renewable and non-renewable unit specific contracts, based on calculation of the 15 percent limit over the contract-specified period during which "substitute energy" is permitted to be supplied. In this way, the "15 percent" limit would be permitted consistent with the 'banking" calculation included in subsection (a), because the 15 percent would be measured over a specified period of the contract, as a result of a deviation between renewable energy generation and the energy schedule over that period.

PG&E also notes that both CMUA and SMUD commented at the January 11, workshop on the need for additional flexibility under PG&E's 15 percent proposal, including avoiding overly-prescriptive conditions on when the 15 percent could be used. PG&E agrees with CMUA's and SMUD's comments, and recommends that the Commission seek to incorporate such flexibility into its EPS rule, subject to up-front demonstration of compliance as recommended below.

PG&E expects to participate in the January 18, workshop, and will be available to provide further comments and respond to further questions on this important implementation issue.

2. Compliance Requirements for All Load Serving Entities Should Be Applied "Up Front" and Should Be Consistent

Proposed sections 2921 and 2922 of the Commission staff's draft EPS regulation would only require local publicly owned utilities (LPOUs) to demonstrate compliance with the EPS by an annual "after the fact" self-certification filing at the Commission, unless the Commission staff on its own motion convenes a formal compliance

investigation. This approach contrasts sharply with the up-front formal filing for approval that the CPUC has proposed for investor-owned utilities (IOUs) in its proposed EPS rule. This difference is not merely procedural, but in fact would subject IOUs and LPOUs to radically different compliance burdens, with the burden of proof on IOUs to demonstrate compliance while LPOUs would be presumed in compliance unless proven otherwise.

Moreover, "after the fact" reporting by the LPOUs would put the Commission in an untenable position regarding power contracts and financial commitments entered into before the LPOU files its annual compliance report. To the extent that an LPOU enters into a contract or makes a substantial financial commitment in a good faith belief that it is in compliance with the EPS, it is highly unlikely that the Commission would be able to penalize or enjoin the LPOU from operating in violation of the EPS "after the fact," where such a penalty or injunction would impair the LPOU's contractual rights or cause it to breach its financial commitments. This may be a problem even if the "after the fact" annual certification attests that the LPOU's contract or investment is "null and void" if non-compliant, because the certification still comes "after the fact" and subject to any contractual obligations and financial commitments that have "vested" before the certification.

For these reasons, PG&E recommends that the Commission require up-front, "before the fact" demonstration of compliance, consistent with the approach included in the CPUC Proposed Decision.

3. PURPA Does Not Exempt QFs from SB 1368 and Other Environmental Rules

Section 2909 of the Commission staff proposed EPS regulation would exempt PURPA contracts from EPS, reasoning that PURPA's "must take" provisions may preempt the application of the EPS to such contracts.

In fact, PURPA does not preempt the EPS or other environmental regulations in any way whatsoever, and therefore Section 2909 should be deleted from the proposed regulation. The Federal Energy Regulatory Commission has affirmed that under PURPA, the states may regulate environmental issues related to QFs: "While [the PURPA] legislation permits certain facilities to be exempt from State and Federal laws, it excludes exemptions from environmental laws. Thus, a qualifying facility may not be built or operated unless it complies with all applicable local, State, and Federal zoning, air, water, and other environmental quality laws, and unless it obtains all required permits."[3] No argument could be made that the PURPA purchase mandate overrides the Commission's authority to reject a QF contract that fails to meet California, Commission or CAISO safety, reliability, environmental or resource adequacy criteria. Likewise, the Commission does not violate the PURPA purchase mandate if it applies an EPS equally to QFs and non-QFs alike as part of that same authority.

PG&E appreciates the opportunity to provide these supplemental comments and looks forward to providing further comments as the Energy Commission moves forward with its EPS rulemaking in this docket.

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[3] *Small Power Production and Cogeneration Facilities – Environmental Findings,* 10 FERC ¶61,314 at 61, 632 (1980).