STATE OF CALIFORNIA ENERGY RESOURCES CONSERVATION AND DEVELOPMENT COMISSION

In the Matter of the	)	Docket No. 01-AFC-21C
	)	
Tesla Power Plant Extension	)	Robert Sarvey's Rebuttal Testimony
	)	Resume, Declaration and Exhibit List

REBUTTAL TESTIMONY TO PG&E RESPONSE TO QUESTION 3(a)

The Tesla Project is not "Shovel Ready"

PG&E states on page 4 of its testimony that the Tesla Project is a benefit since it is a shovel ready project that can be constructed quickly. Assuming a reliability need was identified PG&E would have to go to the CPUC to obtain a Certificate of Public Convenience and Necessity (CPCN). In PG&E's recent application for approval of the Tesla Project CPUC proceeding No. 08-07-018, PG&E requested an expedited decision that would have provided a fast track approval at the CPUC of 6 months. It would likely take much more time considering the number of parties who protested the PG&E application in 08-07-018. Once that approval is granted PG&E would then need to amend its license with the CEC assuming they decided to build an 1169 MW project. PG&E's current testimony by Jeremy Salamy states on page 11 that the estimated time to renew the permit with an amendment would be 6 to 12 months. PG&E will need 12 to 24 months just to amend the license and obtain the CPUC approval. A shovel ready project would be a project that had all the necessary material government approvals to begin construction immediately when a reliability need is identified. Since PG&E does not intend to build an 1169 MW project they should file a new AFC for the size project they intend to build as it would take about the same amount of time.

PG&E is already asking the ratepayers to support 4.9 million dollars in expenditures it made in its failed attempt to receive a CPCN.

PG&E states in its testimony on page 4 that the project can remain in a shovel ready state at a low cost. PG&E has recently filed for recovery of $4.9 million dollars from the ratepayers for expenses from the Tesla Project as "**abandoned project" cost.** PG&E's application states:

"In D.08-11-004, the Commission dismissed PG&E's Application 08-07-018 for approval of the proposed Tesla Generating Station, a 560-megawatt natural gas fired combined-cycle power plant to be located in Eastern Alameda County. The Commission stated that "PG&E has appropriate proceedings in which to present its case for [abandoned project] cost recovery." (D.08-11-004, p. 22). In this Application, PG&E is requesting the recovery of $4.9 million dollars of expense as "abandoned project" cost." [1]

REBUTTAL TESTIMONY TO PG&E RESPONSE TO QUESTION 3 (b)

Extending the construction date for the Tesla Project damages current attempts to develop a competitive market and harms ratepayers and the general public.

Because of the current method of procurement at the CPUC PG&E has access to all of the confidential offers. PG&E performs the analysis to determine the market value and choose which projects should be selected for long term contracts. Other market participants are not allowed access to PG&E's information which demonstrates the cost effectiveness of the projects. PG&E can evaluate its own projects over a useful life of 30 years. The other offers submitted by independent generators are limited to contracts of 10 years in duration. Allowing PG&E to determine who gets a contract to construct a power plant is already skewed without PG&E having a project it owns or can sell to another developer and easily demonstrate that their offer is better than the other offers in the long term procurement. As long as PG&E is in possession of a license for 1169 MW it is a disincentive for other independent energy producers to make the substantial investment in participating in the procurement process

[1] http://docs.cpuc.ca.gov/efile/A/101809.pdf page 5

and licensing the project with the CEC knowing that PG&E has a license which if approved would eliminate all other competitors from the process.

Allowing PG&E to hold the Tesla License by extending the construction deadline at the CEC will allow PG&E to continue to assert emergency situations and unique circumstances to gain approval to build the Tesla Power Plant. This will damage the current attempts to establish a completive market. As The California Energy Commission stated in their comments in CPUC proceeding 08-07-018 :

"The Energy Commission has serious concerns that PG&E's CPCN application for the Tesla Power Project is the most recent example of generating resources acquisitions being characterized by CPUC-jurisdictional utilities as "unique circumstances" in order to justify acquisition outside of the competitive RFO process. Each of the utilities over the years has acquired power plants outside of the formal solicitation process:

• Southern California Edison (SCE) signed a power purchase agreement with an affiliate company for the 1,054MW Mountain View Project in a one-on-one negotiated agreement approved by the CPuc.
• San Diego Gas &Electric (SDG&E) acquired two turn-key projects, the 550-MW Palomar Project and the 45-MW Ramco Project.
• PG&E acquired the rights to construct the partially-completed 530 MW Contra Costa 8 Project as part of the Mirant settlement of claims from the 2000-2001 energy crisis.
• PG&E received approval for a Purchase and Sale Agreement for the Colusa Project that was to be developed by a power plant developer and purchased and operated by PG&E.

As the Energy Commission stated in the 2005 Integrated Energy Policy Report (IEPR), " ...requiring the state's utilities to engage in long-term procurement now is the highest priority for California to ensure an affordable, reliable, safe, and environmentally sound electricity system." In order to maintain an efficient and viable competitive process necessary to support long-term procurement, it is critical that market participants have faith in that process, and that it not be circumvented unnecessarily. A white paper commissioned by the National Association of Regulatory Utility Commissioners stressed that the fairness and integrity of a procurement process is affected not only by the actions of the utility, but also by regulatory oversight of the procurement process: " ***...regulators should align their own procedures and actions to support the development of a competitive response. Regulators' own actions can positively - and in some cases negatively - affect the integrity and outcomes of a procurement process. Positive signals can arise, for example, by... enforcing elements of the procurement design that enhance the overall fairness and objectivity of the process and the integrity of the procurement results."*** [2]

[2] **http://docs.cpuc.ca.gov/efile/RESP/87068.pdf Exhibit 201**

There is ample evidence that PG&E is seeking preemptive actions guised as reliability needs or "unique circumstances. If the CPUC had approved the first power train of 1169 MW Tesla project, then 1910 MW, or around 66% of PG&E's completed or pending projects, would have been Utility Owned Generation. Of that total, between 1090 MW and 1747 MW was acquired through preemptive actions. Approving the construction extension for Tesla gives PG&E two chances to create unique circumstance and fill that void with the two 560 MW Tesla power trains.

Extending the construction deadline will put ratepayers at risk for existing project termination costs of 4.9 million dollars.

The competitive market and the ratepayers are also harmed by PG&E's ability to ask the CPUC for ratepayer money to cover project development costs. As mentioned above PG&E is requesting 4.9 million dollars of ratepayer money for the Tesla Project as an **abandoned project cost**. This money has not been approved by the CPUC yet. PG&E in the current market structure should not be allowed to recover costs for a project which did not come to fruition. The other market participants such as Tierra Energy who sponsored the failed Eastshore Project were not allowed to ask the ratepayers for reimbursement for their costs. In the new competitive market environment PG&E should not be allowed a competitive advantage over other market participants. Extending the construction license for Tesla will allow PG&E to continue to request ratepayer funding for the Tesla Power Project.

Extending the construction deadline will put ratepayers at risk for 59 million dollars in Tesla Acquisition costs.

PG&E's in its application 08-07-018 for a CPCN requested an interim decision granting project termination costs of 59 million dollars that it would incur should the Commission decline to grant a CPCN for the Tesla Generating Station. The commission stated in its decision:

*"Typically the Commission does not consider interlocutory appeals or reexamine rulings issued in a proceeding. However, PG&E's request for an interim decision granting recovery of any project termination costs that it may incur should the Commission decline to grant a CPCN for the Tesla Generating Station would, if approved**, place ratepayers at risk of approximately $59 million in termination costs** before the issue of the reasonableness of the project came before the full Commission.76 In light of this fact, it is reasonable for the Commission to examine on its own motion whether to reverse the ACR that denied the motions to dismiss."* [3]

According to PG&E's testimony on page 6 "PG&E's current plan is to have the project classified as "Plant Held for Future Use" in its 2011 CPUC General Rate Case. This will authorize PG&E to recover in rates the carrying costs associated with the asset until a decision is made about its development or disposition." Denying the construction extension will prevent PG&E from classifying the project as plant held for future use and provide the CPUC with a reason to make PG&E shareholders responsible for acquisition and carrying costs rather that the ratepayers. If the construction extension is granted by the Commission additional costs will be incurred by PG&E which may be passed on to the ratepayers.

When independent power producers develop a new generating plant, they have to incur costs and make financial commitments. If the project is later cancelled, Independent power producers have no claim on ratepayer funds for reimbursement of the costs of the abandoned plant; the unrecovered costs are borne by the company's shareholders.

PG&E's has opposed other power producer's efforts to construct projects creating unique circumstances.

The City and County of San Francisco alleged that PG&E actively opposed their two power projects.

[3] http://docs.cpuc.ca.gov/efile/PD/91226.pdf page 16

PG&E should not be able to claim as an emergency justifying expedited treatment, a reliability situation it played a substantial role in creating. The Tesla application and supporting PG&E testimony portrays the reliability situation in PG&E's service area as approaching a crisis with impending catastrophic generation shortages beginning in 2012. PG&E actually includes as a factor supporting this outcome, the fact that two small power plants under development by the City are currently pending before, but have not yet been acted upon, by the San Francisco Board of Supervisors.

These representations are startling considering that PG&E undertook a concerted campaign to oppose development of two small City power plants, the San Francisco Electric Reliability Project, a 145 MW plant and a 48 MW plant at the San Francisco International Airport. Several of the almost weekly fliers distributed by PG&E at the time the City Board of Supervisors was actively considering the proposed City power plants are attached to this protest. They aver that additional fossil generation is not needed and that reliability needs can be meet with energy efficiency and renewable resources. The City projects were slated for commercial operation by 2010, well before the 2012 deadline by which PG&E claims a critical reliability need for more generation will materialize. PG&E should not be allowed to actively and aggressively seek to defeat necessary projects proposed by other parties, and then use the resulting generation shortfalls to justify extraordinary procedures for approval of PG&E owned projects.[4]

PG&E engaged in marketing efforts to suppress the San Joaquin Valley Power Authority's attempt to build a combined cycle project in Parlier.

The San Joaquin Valley Power Authority attempted to build a combined cycle project in Parlier. PG&E used ratepayer money to oppose the project. [5] PG&E's marketing efforts led the San Joaquin Valley Power authority to file a complaint with the state Public Utilities Commission in 2007, claiming PG&E broke state rules. "We probably somewhat naively felt neutral meant neutral and expected something far different from them," Orth said of PG&E. In a settlement of the PUC complaint, PG&E agreed to reveal the costs of its marketing efforts to oppose the authority's program: about $2.5 million from May 2007 to January 2009.

PG&E failed to support projects as needed for reliability from the 2004 procurement process

[4] http://docs.cpuc.ca.gov/efile/P/86907.pdf CCSF Protest Exhibit 202

[5] http://www.fresnobee.com/local/story/1515804.html

In the Eastshore proceeding the applicant's attorney raised some significant issues with PG&E's request to approve the Tesla application:

13 And then the last issue that was raised
14 by Mr. Sarvey about the power purchase agreement.
15 That's right. We begged and pleaded to get a
16 decision out of you before those decisions had to
17 be made. Before millions of dollars were at stake
18 in agreeing to a power purchase agreement with
19 PG&E.
20 And we find it extremely troubling that
21 PG&E, who would never stand up in this proceeding
22 and say that this project was needed or necessary
23 to support the load, has now turned around and
24 filed an application to purchase the Tesla power
25 plant because there is such a need for energy in
the PG&E system by 2012.
2 We find that to be incredibly, you
3 know, double-sided on behalf of PG&E to say those
4 things. To make that claim in its filing with the
5 PUC that the power is absolutely necessary, it's
6 needed. That they are not going to make their
7 planning reserve margins or their planning reserve
8 margins are insufficient. Therefore they must
9 immediately receive approval to purchase and build
10 the Tesla power plant. When in this proceeding
11 they would never stand up, not once, and say that
12 this power was necessary. We find that incredibly
13 frustrating. [6]

A PG&E amendment would consume Commission Resources and Taxpayer Money.

The cost to file an AFC for an 1169 MW power plant is $462,426 to cover the extensive Commission review of the project. If an amendment is filed for the Tesla Project the new analysis performed by Commission Staff and funded by the public would presumably be subject only to the annual compliance fee of $15,000. As staff council stated on June 3 about an amendment , " It would be a rather substantial undertaking I think particularly in the area of air quality where we are especially constrained in terms of staff resources."[7]

[6] http://www.energy.ca.gov/sitingcases/eastshore/documents/2008-07-21_TRANSCRIPT.PDF 97-99 http://www.energy.ca.gov/sitingcases/eastshore/documents/2007-11-26_TRANSCRIPT.PDF page 73 Galati

[7]

REBUTTAL TESTIMONY TO PG&E RESPONSE TO QUESTION 3 (g)

Baseline conditions and regulations for the project have changed dramatically since the project was certified in 2004 making the project's environmental review stale.

Air Quality

The applicant's consultant has stated that he is not aware of any changes in the environmental baseline. Since 2001 the City of Tracy population has increased by 25%. This has led to a large increase in mobile and area source emissions. In FPL's amendment request to the CEC which is in this compliance docket FPL performed a PSD analysis of the project area.[8] Over 31 major sources and 26 minor sources were identified for the PSD increment analysis. The maximum modeled 24-hour average PM10 increment consumption was 140 μg/m3, and the annual average PM10 increment consumption was 30 μg/m3.[9] That analysis did not include two projects currently undergoing CEC review the expansion of the Tracy Peaker Plant[10] and the construction of the Mariposa Energy Center.[11]

Green house gas issues have emerged as an immediate concern of State Regulators. In 2004 when this project was analyzed no green house gas regulations had been approved.

Nitrogen deposition on native plants has become an important biological concern. This project's NOx and ammonia emissions must now be evaluated on the sensitive species in the project area.

On April 8, 2004 EPA's Regional Administrator signed a final rule that grants the State of California's request to reclassify the San Joaquin Valley from severe

[8](http://www.energy.ca.gov/sitingcases/tesla/compliance/amendment/TPP_Petition_for_Post_Cert_Amendments_Nov_2006.pdf page 10.

[9]http://www.energy.ca.gov/sitingcases/tesla/compliance/amendment/TPP_Petition_for_Post_Cert_Amendments_Nov_2006.pdf page 10.

[10] http://www.energy.ca.gov/sitingcases/tracyexpansion/index.html

[11] http://www.energy.ca.gov/sitingcases/mariposa/index.html

to extreme for the national 1-hour ozone standard. EPA proposed the rule in February 2004 with a 30-day public comment period.[12]

In 2006, EPA revised the 24-hour PM 2.5 standard to 35 ug/u3. Both the BAAQMD and the SJVUAPCD are in non compliance with the new standard. SJVUAPCD is in non compliance with the annual standard. The EPA finalized its regulations to implement the New Source Review (NSR) program for fine particulate matter on July 15, 2008. The project would need to be analyzed under the new standards.

The applicants AQMA with the SJVUAPCD was based on the location of the projects ERC's which the project owner no longer owns. A new AQMA analysis must be conducted and the costs to mitigate a ton of NOx has increased from $5,000 a ton to $51,373 a ton. If the projects ERC's were in the same location as previously the project owner would owe $3,282,734. [13]

Water supply

The applicant has had five years to secure a wastewater agreement with the City of Tracy. The applicant has failed to do so. The City of Tracy is currently negotiating with two power projects to supply treated wastewater.[14] The City also has committed to supply wastewater for the Gateway Project in February of 2009.[15] The City of Tracy has plans to establish a wetlands using their recycled water.

Soil and water condition 9 requires the project owner to negotiate a backup water supply form the City of Tracy. The city is currently experiencing cutbacks of their freshwater supplies and maybe unable to provide a backup water supply.[16] Tracy will also have to perform an analysis pursuant to SB 610. A

[12] http://www.epa.gov/region/air/sjvalley/#0404

[13] http://www.energy.ca.gov/sitingcases/tracyexpansion/documents/applicant/2009-04 22_RESPONSE%20_TO_PDOC_TN-51290.PDF page 7

13 http://www.ci.tracy.ca.us/uploads/fckeditor/File/city_council/agendas/2009/02/17/01d.pdf

[15] http://www.ci.tracy.ca.us/uploads/smartsection/105_Full_Notice.pdf

[16] http://www.ci.tracy.ca.us/uploads/fckeditor/File/city_council/agendas/2009/02/17/01b.pdf

large majority of the analysis that was conducted for this project revolved around the water supply. The project currently does not have one and a new water supply and a lengthy CEQA analysis may be needed.

The Environmental Analysis is Stale

Jeremy Salamy's testimony on page 10 states that he believes that the environmental analysis is not stale. Most of the analysis for this project was completed in April of 2003 over six years ago. Background conditions at the site have changed dramatically since the project was evaluated as evinced by the PSD increment analysis performed in November of 2006 which is in this compliance docket.[17]

The applicant is requesting a five year extension which if granted could lead to this project commencing construction 11 years after the initial analysis. Granting this construction extension will lead to some of the project being analyzed under the LORS of 2003 and the rest of the analysis being conducted under LORS in existence in 2014. This would certainly be the definition of a piecemeal analysis.

Conclusion

PG&E is asking the Commission to extend a license for an 1169 MW project that they have no intention of building. What they do intend to build is unclear. The applicant's attorney made it clear that they don't even know what the project size will be.[18] PG&E estimates that the time to get approval for the amendment, the ATC, and the authority to construct will be about 6 to 12 months. It will also take PG&E about 6 to 12 months to get a CPCN to build the project once they decide exactly what it is they want to build. Their CPUC and CEC approval process will take 12 to 24 months. Clearly in this case a new AFC could be filed

[17] http://www.energy.ca.gov/sitingcases/tesla/compliance/amendment/TPP_Petition_for_Post_Cert_Amendments_Nov_2006.pdf

[18] Business Meeting RT 6/3/09 pages 26,27 lines 23-14

in this time frame which would accurately reflect the project description and the impacts from the project.

Resume of Robert Sarvey

Academic Background

BA Business Administration California State University Hayward 1975
MBA California State University Hayward 1985

Experience

San Joaquin Valley Air Pollution Control District Citizens Advisory Board Industry Representative: Analyzed proposed air quality regulations and made recommendations to the Governing Board for approval.

GWF Peaker Plant 01-AFC-16: Participated as an Intervenor in the project and helped negotiate and implement a 1.3 million dollar community benefits program. Successfully negotiated for the use of local emission reduction credits with GWF to offset local air quality impacts.

East Altamont Energy Center 01-AFC-14: Participated as an Intervenor and helped develop the conditions of certification for hazardous materials transportation, air quality, and worker safety and fire protection. Provided testimony for emergency response and air quality issues.

Tesla Power Project 01- AFC-04: Participated as an Intervenor and provided air quality testimony on local land use and air quality impacts. Participated in the development of the air quality mitigation for the project.

Modesto Irrigation District 03-SPEE-01: Participated as Intervenor and helped negotiate a $300,000 air quality mitigation agreement between MID and the City of Ripon.

Los Esteros : 03-AFC-2 Participated as an Intervenor and also participated in air quality permitting with the BAAQMD. Responsible for lowering the projects permit limit for PM-10 emissions by 20%.

SFERP 4-AFC-01: Participated as an Intervenor and also participated in the FDOC evaluation. My comments to the BAAQM D resulted in the projects PM - 10 emission rate to be reduced from 3.0 pounds per hour to 2.5 pounds per hour by the District. Provided testimony on the air quality impacts of the project.

Long Beach Project: Provided the air quality analysis which was the basis for a settlement agreement reducing the projects NOx emissions from 3.5ppm to 2.5ppm.

ATC Explosive Testing at Site 300: Filed challenge to Authority to Construct for a permit to increase explosive testing at Site 300 a DOE facility above Tracy. The permit was to allow the DOE to increase outdoor explosions at the site from 100 pounds per charge to 300 pounds per charge and also grant an increased annual limit on explosions from 1,000 pounds of explosive to 8,000 pounds of explosives per year. Succeeded in getting the ATC revoked.

CPUC Proceeding C. 07-03-006: Intervened in proceeding and negotiated a settlement with PG&E to voluntarily revoke Resolution SU-58 which was the first pipeline safety waiver of GO 112-E granted in the State of California.

East shore Energy Center: 06-AFC-06 Intervened and provided air quality testimony and evidence of cancellation of Eastshore's power purchase agreement with PG&E.

Colusa Generating Station: 06-AFC-9 Participated as air quality consultant for Emerald Farms. Filed challenge to the PSD Permit.

CPUC Proceeding 08-07-018: Tesla Generating Station CPCN participated in proceeding which was dismissed due to motion by IEP. Reviewed all filings, filed protest, signed confidentiality agreement and reviewed all confidential testimony.

GWF Tracy Combined Cycle 08-AFC-07: Participated in negotiation of the Air Quality Mitigation Agreement with the San Joaquin Valley Air Pollution Control District and GWF.

DECLARATION OF
Robert Sarvey, MBA, BS

I Robert Sarvey declare as follows

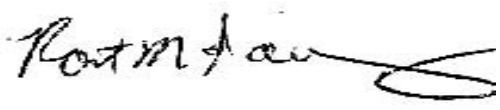
1) **I prepared the rebuttal testimony of Robert Sarvey on PG&E's Request for Extension of the Tesla Power Plant Certification.**

2) **It is my professional opinion that the prepared testimony is valid and accurate with respect to the issues addressed therein.**

3) **I am personally familiar with the facts and conclusions related in the testimony and if called as a witness could testify competently thereto.**

4) **A copy of my professional qualifications is attached.**

I declare under penalty of perjury , under the laws of the State of California, that the forgoing is true and correct to the best of my knowledge and belief, and that this declaration was executed on July 13, 2009 in Tracy, California.



Signed 7/13/09

Tesla Extension Exhibit List Sarvey

Exhibit 200 Rebuttal Testimony of Robert Sarvey

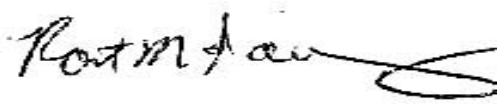
Exhibit 201 RESPONSE OF THE CALIFORNIA ENERGY COMMISSION TO THE APPLICATION OF PACIFIC GAS AND ELECTRIC COMPANY FOR EXPEDITED APPROVAL OF THE TESLA GENERATING STATION AND ISSUANCE OF A CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY AND REQUEST FOR INTERIM ORDER AUTHORIZING EARLY PROJECT COMMITMENT TO STABILIZE COSTS Application 08-07-018 (Filed July 18, 2008) **http://docs.cpuc.ca.gov/efile/RESP/87068.pdf**

Exhibit 202 PROTEST OF THE CITY AND COUNTY OF SAN FRANCISCO OF PACIFIC GAS AND ELECTRIC COMPANY'S APPLICATION FOR EXPEDITED APPROVAL OF THE TESLA GENERATING STATION Application No. 08-07-018 Filed 8-18-08 http://docs.cpuc.ca.gov/efile/P/86907.pdf

DECLARATION OF SERVICE

I, Robert Sarvey , declare that on July 13 , 2009, I served electronic copies of the attached, Robert Sarvey's Rebuttal Testimony, Resume, Declaration and Exhibit List , dated July 13 , 2009 to all parties on the proof of service list.. The original document, filed with the Docket Unit, is accompanied by a copy of the most recent Proof of Service list, located on the web page for this project at: [www.energy.ca.gov/sitingcases/tesla].

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



Robert Sarvey

STATE OF CALIFORNIA ENERGY RESOURCES CONSERVATION AND DEVELOPMENT COMISSION

In the Matter of the	)	Docket No. 01-AFC-21C
	)	
Tesla Power Plant Extension	)	Robert Sarvey's Rebuttal Brief
	)	on good cause

CONSEQUENCES OF EXPIRATION OF THE CONSTRUCTION DEADLINE

The applicant in his brief has implied that the Energy Commission must take affirmative action to revoke the Commission License after the 5 year construction deadline has passed. A clear reading of Section 1720.3 demonstrates otherwise.

> Unless a shorter deadline is established pursuant to Section 25534, the deadline for commencement of construction shall be five years after the effective date of the decision. Prior to the deadline, the applicant may request, and the commission may order, an extension of the deadline for good cause.

There is nothing in the language of section 1720.3 that would imply or prescribe any other treatment.

The applicant has opined that the provisions of Section 25534 apply to the construction deadline. The relevant portions of Section 25534 provide that if the owner of a project that does not start construction of the project within 12 months after the date all permits necessary for the project become final and all administrative and judicial appeals have been resolved provided the California Consumer Power and Conservation Financing Authority notifies the commission that it is willing and able to construct the project pursuant to subdivision the license may be revoked. The California Consumer Power and Conservation Financing Authority, no longer exists therefore Section 25534 is irrelevant.

GOOD CAUSE

2. In determining whether "good cause" exists for an extension under Section 1720.3, what factors may the Energy Commission consider in any given case? What factors should it consider? What factors must it consider?

The applicant's brief implies that all the applicant has to do is show a good faith effort to construct the project and circumstances beyond their control prevented it. The applicant also sites as good cause that the construction deadline will be missed even though PG&E made a good faith effort to meet it. I believe that the Committee has identified the proper issues to consider in the hearing order. I would only add two more factors that should be considered:

1) Intent of the applicant to construct the projects as licensed.
2) Due diligence by the applicant and previous owner to keep the license and all material government approvals current.

1) Intent of the applicant to construct the projects as licensed.

PG&E began negotiations on this project in June 2008. PG&E was well aware that the project had a construction deadline of June 2009 when they purchased the project. PG&E showed no intention of building the project as permitted. They instead elected to file for a CPCN for only 560 MW of the 1169 MW project. It is doubtful that PG&E will ever build an 1169 MW power plant with the current state of procurement a fact that was noted by PG&E's attorney. (RT June 3, 2009 business meeting Page 19) Currently the CPUC has identified a need for 800 to 1200 MW of rapid response power plants to support renewable projects. Tesla at 1169 MW is a poor portfolio fit as it represents almost all of the authorized procurement and as licensed has a six hour cold start up time.

2) Due diligence by the applicant and previous owner to keep the license and all material government approvals current.

Even if PG&E had received approval to build this project from the CPUC they have made no effort to prepare for construction. PG&E has made no effort to update the needed material government approvals necessary to commence

construction. The project lacks an authority to construct and a PSD permit. PG&E has not negotiated a water agreement with the City of Tracy nor have they renegotiated their AQMA with the SJVUAPCD. PG&E has not filed and amendment to the CEC. PG&E has not demonstrated that they have made a good faith effort to prepare this project for construction.

FPL made no attempts to keep the project permits current. FPL filed for an amendment in November of 2006 and failed to answer staffs data requests issued in February of 2007 over 2 years ago. FPL asked the BAAQMD to update the ATC and PSD permit and never followed up on the request.

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA

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Application of Pacific Gas and Electric Company for Expedited Approval of the Tesla Generating Station and Issuance of a Certificate of Public Convenience and Necessity and Request for Interim Order Authorizing Early Project Commitment to Stabilize Costs. (U39E)	Application 08-07-018 (Filed July 18, 2008)

RESPONSE OF THE CALIFORNIA ENERGY COMMISSION TO THE APPLICATION OF PACIFIC GAS AND ELECTRIC COMPANY FOR EXPEDITED APPROVAL OF THE TESLA GENERATING STATION AND ISSUANCE OF A CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY AND REQUEST FOR INTERIM ORDER AUTHORIZING EARLY PROJECT COMMITMENT TO STABILIZE COSTS

August 20, 2008

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BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA

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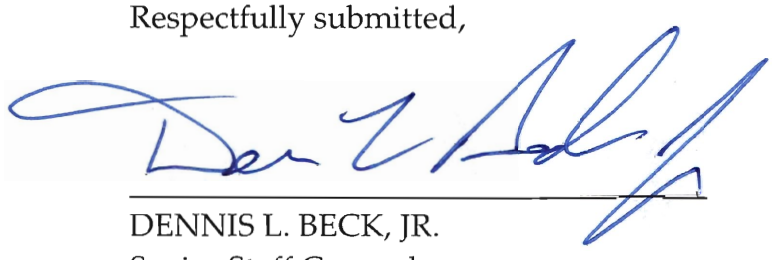
Pursuant to Commission Rule 2.6(c), the California Energy Commission submits the following letter in response to the application of Pacific Gas and Electric Company for expedited approval of the Tesla Generating Station and Issuance of a Certificate of Public Convenience and Necessity and Request for Interim Order Authorizing Early Project Commitment to Stabilize Costs.

August 20, 2008

Respectfully submitted,



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STATE OF CALIFORNIA – THE RESOURCES AGENCY

ARNOLD SCHWARZENEGGER, *Governor*

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August 20, 2008

Michael R. Peevey
President
California Public Utilities Commission
505 Van Ness Avenue
San Francisco, CA 94102

Dear President Peevey:

On July 18, 2008, you received an application from Pacific Gas and Electric Company (PG&E) for expedited approval of the Tesla Generation Station and issuance of a Certificate of Public Convenience and Necessity (CPCN). The Tesla Generating Station, a new, 560 megawatt (MW) natural gas-fired combined-cycle generating facility, would be located in eastern Alameda County. The Energy Commission originally granted a license to Midway Energy LLC[1] for the Tesla Power Project on June 16, 2004, as an 1,120 MW combined-cycle generating facility. On July 16, 2008, PG&E entered into an agreement to acquire all of the interests and development rights associated with the Tesla Power Project site and now seeks a CPCN to construct the first power train. Under the acquisition agreement, PG&E retains an option to proceed with the future development of the second power train.

In its application, PG&E characterizes the Tesla project as a "unique opportunity" to develop a cost-effective, environmentally-sensitive new generation resource that is needed to replace, in part, 913 MW of projects from its 2004 Long Term Request for Offers that have been terminated or delayed. PG&E asserts that this generation is needed by the summer of 2012 in order to maintain long-term reliability and that it is the only available feasible alternative. With the application, PG&E asserts that it meets the California Public Utility Commission's (CPUC) requirements for utility ownership of a generating resource acquired outside of the competitive Request for Offer (RFO) process.

[1] Midway Energy LLC is a wholly-owned subsidiary of ESI Energy LLC, which is a wholly-owned subsidiary of FPL Energy, LLC.

The Energy Commission has serious concerns that PG&E's CPCN application for the Tesla Power Project is the most recent example of generating resources acquisitions being characterized by CPUC-jurisdictional utilities as "unique circumstances" in order to justify acquisition outside of the competitive RFO process. Each of the utilities over the years has acquired power plants outside of the formal solicitation process:

- Southern California Edison (SCE) signed a power purchase agreement with an affiliate company for the 1,054 MW Mountain View Project in a one-on-one negotiated agreement approved by the CPUC.
- San Diego Gas &Electric (SDG&E) acquired two turn-key projects, the 550-MW Palomar Project and the 45-MW Ramco Project.
- PG&E acquired the rights to construct the partially-completed 530 MW Contra Costa 8 Project as part of the Mirant settlement of claims from the 2000-2001 energy crisis.
- PG&E received approval for a Purchase and Sale Agreement for the Colusa Project that was to be developed by a power plant developer and purchased and operated by PG&E.

As the Energy Commission stated in the 2005 *Integrated Energy Policy Report (IEPR)*, "...requiring the state's utilities to engage in long-term procurement now is the highest priority for California to ensure an affordable, reliable, safe, and environmentally sound electricity system."[2] In order to maintain an efficient and viable competitive process necessary to support long-term procurement, it is critical that market participants have faith in that process, and that it not be circumvented unnecessarily. A white paper commissioned by the National Association of Regulatory Utility Commissioners stressed that the fairness and integrity of a procurement process is affected not only by the actions of the utility, but also by regulatory oversight of the procurement process: "...regulators should align their own procedures and actions to support the development of a competitive response. Regulators' own actions can positively – and in some cases negatively - affect the integrity and outcomes of a procurement process. Positive signals can arise, for example, by... enforcing elements of the procurement design that enhance the overall fairness and objectivity of the process and the integrity of the procurement results."[3]

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[2] 2005 *IEPR*, p. 53

[3] *Competitive Procurement of Retail Electricity Supply: Recent Trends in State Policies and Utility Practices*, July, 2008, p. 8.

Indeed, the CPUC itself recognized the importance of preserving faith in the competitive procurement process when it stated in D. 07-12-052 that: "We firmly believe that all long-term procurement should occur via competitive procurements, except in truly extraordinary circumstances. While we do not explicitly disallow utility ownership options in the generation market, we continue to look unfavorably on this procurement option but realize that in extraordinary times this may be the optimal method for meeting the needs of California's ratepayers."[4] The CPUC specified five categories of unique circumstances warranting some form of utility ownership[5]:

- market power mitigation
- preferred resources
- expansion of existing facilities
- unique opportunity
- reliability

The Energy Commission agrees wholeheartedly that truly extraordinary and unique circumstances must exist before any long-term procurement is allowed to occur outside of the competitive process. If this standard becomes eroded over time such that utility ownership of facilities outside the competitive process becomes a common exception to the rule, the robustness of the procurement process will surely suffer. In fact, PG&E's acquisition agreement contains an option allowing it to proceed with the future development of the second power train. With this option, PG&E already seems to be planning for another opportunity to add to its own stock of generation resources, implying that yet another "extraordinary circumstance" may be just around the corner.

The 2005 *IEPR* found that while the CPUC did not prohibit IOUs from entering into long-term contracts, utilities had shown little interest in doing so.[6] It noted that utilities released some RFOs for long-term contracts, but they accounted for less than 20 percent of solicitations, totaling 2,000 MW of the approximately 12,500 MW under recent solicitations.[7] As in 2005, it

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[4] D. 07-12-052, pp. 212-213

[5] D. 07-12-052, pp. 211-212

[6] 2005 *IEPR*, p. 61.

[7] 2005 *IEPR*, p. 62.

remains critical in 2008 that there are enough long-term commitments for California to meet future need due to increasing electricity demand growth and to modernize its generation fleet. The CPUC must assure that the framework it has enacted for competitive long-term procurement continues in the most efficient manner possible, unabated by the impression that the process may be easily enough circumvented at the request of an investor-owned utilities (IOUs). It can do this by signaling to IOUs and other market participants that it regards the competitive RFO process to be the proper avenue for long-term procurement and that any exceptions will be allowed only under truly extraordinary circumstances. Therefore, we strongly encourage the CPUC to critically examine PG&E's Tesla Application in this light and ensure that the spirit as well as the letter of D. 07-12-052 is met.

Sincerely,

JACKALYNE PFANNENSTIEL
Chairman

Cc: Dian M. Grueneich, Commissioner
John Bohn, Commissioner
Rachelle Chong, Commissioner
Timothy Alan Simon, Commissioner

CPUC Home

CALIFORNIA PUBLIC UTILITIES COMMISSION
Service Lists

PROCEEDING: A0807018 - PG&E - TELSA GENERAT
FILER: PACIFIC GAS AND ELECTRIC COMPANY
LIST NAME: LIST
LAST CHANGED: AUGUST 19, 2008

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CERTIFICATION OF SERVICE

I, **SCOTT MCDONALD**, certify that I have caused copies of the **RESPONSE OF THE CALIFORNIA ENERGY COMMISSION TO THE APPLICATION OF PACIFIC GAS AND ELECTRIC COMPANY FOR EXPEDITED APPROVAL OF THE TESLA GENERATING STATION AND ISSUANCE OF A CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY AND REQUEST FOR INTERIM ORDER AUTHORIZING EARLY PROJECT COMMITMENT TO STABILIZE COSTS,** to be served by electronic mail, on or before **AUGUST 20, 2008,** on all parties who provided e-mail addresses for the identified service list **A.08-07-018** provided by the California Public Utilities Commission for this proceeding. I have also served by overnight mail two copies to ALJ Timothy J. Sullivan and two copies to Commissioner Michael R. Peevey of the California Public Utilities Commission on August 20, 2008.

August 20, 2008

DECLARANT
(Service Lists attached to the original only.)

BEFORE THE PUBLIC UTILITIES COMMISSION OF
THE STATE OF CALIFORNIA

FILED
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Application of Pacific Gas and Electric Company for Expedited Approval Of The Tesla Generating Station and Issuance of a Certificate of Public Convenience and Necessity and Request for Interim Order Authorizing Early Project Commitment to Stabilize Costs	Application No. 08-07-018

PROTEST OF THE CITY AND COUNTY OF SAN FRANCISCO OF PACIFIC GAS AND ELECTRIC COMPANY'S APPLICATION FOR EXPEDITED APPROVAL OF THE TESLA GENERATING STATION

In accordance with the Commission's Rules of Practice and Procedures, Rule 2.6, the City and County of San Francisco (City or CCSF) respectfully protests the application filed by Pacific Gas and Electric Company (PG&E) on July 18, 2008, for expedited approval of the Tesla Generating Station and issuance of a certificate of public convenience and necessity and request for interim order authorizing early project commitment to stabilize costs (Tesla application). PG&E's application is inconsistent with the Commission's policies and the requirements for such applications.

- PG&E's application fails to demonstrate how the Tesla application fits into PG&E's greenhouse gas (GHG) reduction strategy.
- PG&E has not demonstrated that the Commission should allow its utility-owned generation (UOG) proposal outside a competitive solicitation process.
- PG&E's reliance on a four-year old decision (D.04-12-048) to avoid a competitive process for the Tesla application is misplaced.
- PG&E should not be able to claim as an emergency justifying expedited treatment, a reliability situation it played a substantial role in creating.

- Approval of the Tesla application would impose substantial costs and risk on ratepayers.

I. PG&E's application fails to demonstrate how the Tesla application fits into PG&E's greenhouse gas reduction strategy.

In D.07-12-052, the Commission required that "[a]ny application for fossil generation filed in response to this decision, shall demonstrate how the resource fits into the investor owned utility's (IOU)GHG reduction strategy." D. 07-12-052, at 299 (Ordering Paragraph # 3). Neither the application nor the supporting testimony include such a demonstration. The documents include only conclusory statements that the facility's low heat rate will ensure that less GHG are burned, and that because it is flexible, the facility complements renewable resources. The application contains no description of PG&E's broader GHG reduction plans and how the addition of 560 to 1,120 MWs of fossil fueled generation fits into these plans. The application is accordingly inconsistent with D.07-12-052.

Moreover, the statements that are made in the application supporting the plant's environmental advantages and compatibility with renewables require additional investigation. For example, PG&E contends that the proposed plant will have a very low heat rate, around 7,000 Btu/kWh, but claims that the plant will be operationally flexible, with the capability to start up quickly and frequently. Typically, plants operating as combined cycle plants have low heat rates but are not capable of very quick or frequent starts. More likely, the quick start capability is associated with the ability to fire up the combustion turbines to operate as simple cycle plants, a configuration with a substantially higher heat rate than ~7,000 Btu/kWh. Moreover, an efficient base load plant often competes more directly than would a peaker plant with certain renewable resources.

These are simply two points which demonstrate that a much more thorough review of the compatibility of the proposed Tesla plant with PG&E's long-term renewable resources and GHG mitigation plans is warranted.

II. PG&E has not demonstrated that its utility-owned generation (UOG) proposal should be allowed outside a competitive solicitation process.

In D.07-12-052, the Commission stated:

> We again express our support for our "competitive market first" approach. By taking these steps we believe we are moving further along in our transition to a robust competitive generation market. We firmly believe that all long-term procurement should occur via competitive procurements, except in truly extraordinary circumstances. While we do not explicitly disallow utility ownership options in the generation market we continue to look unfavorably on this procurement option but realize that in extraordinary times this may be the optimal method for meeting the needs of California's ratepayers.

D.07-12-052 at 211. The Tesla application fails to meet the high standard established in D.07-12-052.

PG&E was authorized in D.07-12-052 to undertake a competitive solicitation for 800 to 1,200 MW of new capacity by 2015. PG&E's application provides no details of the schedule for such solicitation or why the Tesla proposal cannot be included in that process. Instead, PG&E merely states that an RFO process *can* take up to seven years and that the Tesla project cannot afford such a delay. However, *PG&E* controls the timing of both the Tesla application and the competitive solicitation. Moreover, the RFO process need not take seven years, particularly since, according to PG&E's application, that seven-year period includes the negotiation and approval of individual contracts, which in the case of the Tesla application has already taken place. Thus, PG&E has not demonstrated why the Tesla application could not be tested through a competitive process.

Moreover, other than an urgent reliability need (which PG&E helped to create as is discussed further in this protest), PG&E's justification for an expedited process appears to be the expiration of the California Energy Commission permit. However, such permits can be, and routinely are, extended for good cause. See California Energy Commission Rules of Practice and Procedure, Rule 1720.3. Moreover, while PG&E avers that the proposed plant has a favorable position in the California Independent System Operator (CAISO) interconnection queue, this position is, according to PG&E, dependent on the time when the interconnection request was made. Thus, it does not appear that having the Tesla application undertaken in the context of a competitive process, and with an adequate opportunity for review by the Commission, would change the position of the plant in the CAISO's interconnection queue.

Rather than demonstrating a compelling case for dispensing with a competitive solicitation, it appears that, among other benefits, PG&E seeks to avoid the Commission's determination in D.07-12-052 that utilities would not be able to recover from ratepayers bid development costs for losing bids." See D.07-12-052 at 285, 296. By arguing extraordinary circumstances and circumventing the competitive process, PG&E would shift to ratepayers all risk of project development costs.

III. PG&E's reliance on a four year old decision to justify an exemption from a competitive process is misplaced.

PG&E purports to submit the application pursuant to D.04-12-048 as a "replacement" for projects selected through the competitive process authorized in that decision. The Commission more recently examined PG&E's need for generation in D.07-12-052, including the status of generation purchases approved in the prior decision. Accordingly, PG&E's proposal should be evaluated against the requirements of the more

recent decision, D.07-12-052. Moreover, PG&E advances the novel theory that a UOG project which a utility claims is a "replacement" for a project selected in a prior competitive process, should per se be excused from demonstrating that it qualifies for the limited exemption from participating in a competitive process. PG&E application at 13. There is no support for this suggestion in either D.07-12-052 or D.04-12-048.

Moreover, the total capacity from defunct projects that were awarded in the 2004 competitive process, is 212 MWs, whereas just phase I of the Tesla project would be 560 MWs of generation, more than twice the amount of generation to be "replaced". If both phases go forward, the Tesla project would be 1,120 MWs, more than four times the capacity of the defunct projects. Although PG&E avers that the Tesla project will replace 913 MWs of generation, in fact 601 MWs of this figure correspond to the Russell City project, which PG&E explains could be on line by 2012. Thus, even if PG&E's argument that "replacement" projects are held to a lower standard had any validity (which it does not), this argument would not justify the Tesla application.

IV. PG&E should not be able to claim as an emergency justifying expedited treatment, a reliability situation it played a substantial role in creating.

The Tesla application and supporting PG&E testimony portrays the reliability situation in PG&E's service area as approaching a crisis with impending catastrophic generation shortages beginning in 2012. PG&E actually includes as a factor supporting this outcome, the fact that two small power plants under development by the City are currently pending before, but have not yet been acted upon, by the San Francisco Board of Supervisors.

These representations are startling considering that PG&E undertook a concerted campaign to oppose development of two small City power plants, the San Francisco

Electric Reliability Project, a 145 MW plant and a 48 MW plant at the San Francisco International Airport. Several of the almost weekly fliers distributed by PG&E at the time the City Board of Supervisors was actively considering the proposed City power plants are attached to this protest. They aver that additional fossil generation is not needed and that reliability needs can be meet with energy efficiency and renewable resources. The City projects were slated for commercial operation by 2010, well before the 2012 deadline by which PG&E claims a critical reliability need for more generation will materialize. PG&E should not be allowed to actively and aggressively seek to defeat necessary projects proposed by other parties, and then use the resulting generation shortfalls to justify extraordinary procedures for approval of PG&E owned projects.

V. Approval of the Tesla application would impose substantial costs and risk on ratepayers.

PG&E avers that the Tesla project is a cost-effective choice for ratepayers as compared other power purchase agreements (PPA), including a PPA proposed by FLP Energy, LLC to PG&E, and PPAs approved by the Commission in the 2004 procurement process. The City has no way of verifying this statement or examining PG&E's analysis as all relevant information is redacted from the public version of the Tesla application. However, there are several observations that can be made even from a review of the public information.

First, PG&E seeks to make ratepayers entirely responsible for all development costs regardless of whether the Tesla plant is ultimately built. Thus, ratepayers shoulder the entire development risk. This result is inconsistent with the determination in D.07-12-052 that ratepayers should not be at risk for utility bid development costs for projects that are not selected. The Tesla application explicitly requests that PG&E be guaranteed

recovery of all its development costs, regardless of how high, even if the Tesla project does not go forward. Such a result places PG&E in a more favorable competitive situation than independent power producers seeking to develop generation in California who do not recover any development costs unless and until they are selected in the context of a competitive bidding process.

Second, it appears from the public versions of the application and testimony that PG&E attempts to show that in all cases, utility ownership of a generating unit will always be cost-effective as compared to a power purchase agreement with an independent power producer. Without access to the numbers or the underlying workpapers, the City cannot examine PG&E's analysis, but this conclusion is inconsistent with the Commission's policy determination to promote a competitive generation market and allow for utility development of generation outside such process only in extremely limited circumstances.

VI. Conclusion.

The Tesla application is inconsistent with the Commission's policies for protecting ratepayers, reducing greenhouse gases and promoting a fair competitive generation market. The Commission should hold the utilities to the high standard set forth in D.07-12-052 for side-stepping a competitive process for their own projects, and should require PG&E to vet the Tesla proposal through a competitive process.

Respectfully submitted,

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ATTORNEYS FOR THE CITY AND COUNTY OF SAN FRANCISCO

August 18, 2008

CERTIFICATE OF SERVICE

I, **PAULA FERNANDEZ,** declare that:

I am employed in the City and County of San Francisco, State of California. I am over the age of eighteen years and not a party to the within action. My business address is City Attorney's Office, City Hall, Room 234, 1 Dr. Carlton B. Goodlett Place, San Francisco, CA 94102; telephone (415) 554-4623.

On August 18, 2008, I served **PROTEST OF THE CITY AND COUNTY OF SAN FRANCISCO OF PACIFIC GAS AND ELECTRIC COMPANY'S APPLICATION FOR EXPEDITED APPROVAL OF THE TESLA GENERATING STATION** by electronic mail on Service List No. A0807018.

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on August 18, 2008, at San Francisco, California.

/s/
PAULA FERNANDEZ