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**DOCKET**  
**01-AFC-21C**

|       |             |
|-------|-------------|
| DATE  | Aug 03 2009 |
| RECD. | Aug 03 2009 |

August 3, 2009

California Energy Commission  
Docket Unit  
1516 Ninth Street  
Sacramento, CA 95814-5512

Subject: **PG&E'S POST-HEARING BRIEF IN SUPPORT OF ITS REQUEST FOR EXTENSION OF CONSTRUCTION DEADLINE DOCKET NO. (01-AFC-21C)**

Enclosed for filing with the California Energy Commission is the original **PG&E'S POST-HEARING BRIEF IN SUPPORT OF ITS REQUEST FOR EXTENSION OF CONSTRUCTION DEADLINE**, for the Tesla Power Project Docket No. (01-AFC-21C).

Sincerely,

Marie Mills

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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 POST-HEARING BRIEF IN  
SUPPORT OF ITS REQUEST FOR  
EXTENSION OF CONSTRUCTION  
DEADLINE**

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**INTRODUCTION**

Pacific Gas & Electric Company (PG&E) hereby submits its Post-Hearing Brief in support of its Request for Extension of Construction Deadline as directed by the Siting Committee's Post-Hearing Briefing Schedule dated July 21, 2009 (Order). The Order specifically directed the parties to address six legal questions. Each question is addressed separately below.

**REASONABLE TIME FOR EXTENSION**

- 1. Section 1720.3 of the Commission's regulations sets a 5-year deadline for the "commencement of construction," but it does not establish a limit on the extension timeframe. When a project owner requests a license extension under section 1720.3, what is a reasonable time to extend a license? Could the Commission grant an extension for 5 years, 10 years, 20 years?***

It is clear that Section 1720.3 of the Commission's regulations does not specify the length of an extension of the "commencement of construction" deadline. However, a

reasonable interpretation is that a “commencement of construction” deadline should be no greater than 5 years since the original certification contains a 5-year deadline

### **EFFECT ON LICENSE IF COMMISSION DID NOT ACT TO REVOKE**

***2. If PG&E’s position on section 1720.3 is correct, the license would not expire even if construction did not commence within 5 years unless the Commission acted affirmatively to terminate the license. What are the implications of allowing certification to last in perpetuity?***

PG&E’s position regarding the difference between the term of the license and the “commencement of construction” deadline is outlined in its Initial Brief dated June 29, 2009. According to this interpretation of the law, it is theoretically possible for a project license to continue to exist after the passing of the “commencement of construction” deadline. We see no adverse implications of such an approach. If the Commission wishes to terminate the license, it can do so under its revocation power pursuant to PRC Section 25534 after a noticed hearing. If the Commission believes that there may be some value in not revoking the license, it may choose not to do so. A Project Owner who allows the “commencement of construction” deadline to pass without requesting an extension would certainly do so at its own peril. In such a case, the Project Owner would be required to file a motion requesting the ability to file a late request for extension with the Commission and the Commission would have to find that there is good cause for allowing such a late filing. If the Commission found good cause to allow a late filing, the Project Owner would then have to demonstrate good cause to the Commission for allowing the deadline to be extended and the Commission could condition the approval as it wishes. For example, as in the case of Calpine’s East Altamont and as proposed for Tesla by PG&E, the approval could be conditioned on updating any environmental analysis in an amendment to comply with the California Environmental Quality Act (CEQA) before construction.

This interpretation would allow the Commission the most flexibility in maintaining the value of a license. A permitted site is much easier to update, local planning agencies can incorporate into its long-term planning efforts the location of a site that is permitted but not yet constructed, and transmission planning can also benefit from the knowledge

of where plants could be constructed in the future. Additionally, nothing prevents the Commission from deciding to revoke a license that will have no value to the state. Therefore, we believe it is in the best interests of the Commission and the state to allow the possibility for certain licenses to continue.

### **GOOD CAUSE STANDARD**

#### ***3. PG&E has identified the reasons for requesting the license extension. What general factors should the Commission consider in determining “good cause” for a license extension?***

PG&E has outlined the standards that we believe the legislature intended for the Commission to consider when determining whether good cause exists for extension of a construction deadline as outlined in our Initial Brief dated June 29, 2009. Those standards are outlined in PRC Section 25534 as:

(e) A finding by the commission that there is good cause for failure to meet the start-of-construction deadline required by paragraph (4) of subdivision (a) or any subsequent milestones of subdivision (c) shall be made if the commission determines that any of the following criteria are met:

- (1) The change in any deadline or milestone does not change the established deadline or milestone for the start of commercial operation.
- (2) The deadline or milestone is changed due to circumstances beyond the project owner's control, including, but not limited to, administrative and legal appeals.
- (3) The deadline or milestone will be missed but the project owner demonstrates a good faith effort to meet the project deadline or milestone.
- (4) The deadline or milestone will be missed due to unforeseen natural disasters or acts of God that prevent timely completion of the project deadline or milestone.
- (5) The deadline or milestone will be missed for any other reason determined reasonable by the commission.

It is important to note that according to the plain language of Subsection (e) the legislature directed the Commission that it must find good cause exists, if the Commission can make one of the above findings. Not all findings need be made. In the case of the Tesla Power Project the Commission can make the following findings and therefore, must find that good cause exists for extension.

### **APPLICATION OF GOOD CAUSE STANDARD**

#### **THE FAILURE TO MEET THE START OF CONSTRUCTION DEADLINE IS DUE TO CIRCUMSTANCES BEYOND PG&E'S CONTROL.**

As described in the Testimony of Fong Wan and William Manheim, in 2008 PG&E petitioned the California Public Utilities Commission (CPUC) for the authority to construct and operate the Tesla Power Project for the benefit of its customers. The CPUC denied PG&E's request which prevented PG&E from constructing the Project. This regulatory action satisfies the requirement that circumstances beyond PG&E's control prevented it from meeting the commencement of construction deadline.

#### **THE START OF CONSTRUCTION DEADLINE WILL BE MISSED EVEN THOUGH PG&E MADE A GOOD FAITH EFFORT TO MEET IT**

As described in the Testimony of Fong Wan and William Manheim, PG&E expended considerable time and effort in beginning design of the Tesla Power Project and in acquiring the major power island equipment components. PG&E believed in good faith that it would obtain CPUC authorization to construct and operate the Tesla Power Project pursuant to its interpretation of CPUC policy. The fact that the CPUC disagreed with PG&E's assessment does not negate the fact that PG&E was acting in good faith on behalf of its customers.

### **TIMING OF ADDITIONAL LICENSE EXTENSIONS**

- 4. If a project owner applies for another license extension when an existing extension expires, when should the request be filed and what time period would be appropriate for a second extension?***

Any request for an additional extension of the “commencement of construction” deadline should be made prior to expiration of the original extension. As described above, failure to meet the filing deadline could only be excused upon a showing of good cause. The time period for a second extension should be based on the facts and circumstances at the time of the extension. As described in the Testimony of Fong Wan and William Manheim, the circumstances of this extension are related to the procurement process existing at this time and are unrelated to whether the Tesla Project is developed by a utility or an independent energy company. It is our position that the timing of all extensions should be determined based on the facts of the particular case as they exist at the time of the extension.

## **CONDITIONS OF EXTENSION**

### ***5. If the Commission decides to grant PG&E’s request for an extension of the Tesla Power Plant license, what conditions should be attached to such an order?***

PG&E has agreed to a condition requiring an amendment be filed with the Commission to update the Laws, Ordinances, Regulations, and Standards (LORS) and the environmental analysis prior to construction of the Tesla Project. We offer the following language that is consistent with that imposed upon the East Altamont Energy Center.

The Project Owner shall file a Pre-Construction Petition to modify conditions of certification as needed by project changes or changes in applicable laws, ordinances, rules, or standards and update any necessary environmental analyses associated with changes to the project or to reflect changes in the environmental baseline conditions. Such petition for modification and its processing by the Commission shall be a prerequisite for construction of the project to begin.

PG&E has also agreed to a condition requiring as part of that update that the Tesla Project renew the Air Quality Mitigation Agreement (AQMA) with the San Joaquin Valley Air Pollution Control District (SJVAPCD). We offer the following suggested language for consideration:

The Project owner shall update and renew the previously expired Air Quality Mitigation Agreement (AQMA) with the San Joaquin Valley Air Pollution Control District (SJVAPCD) and include the renewed AQMA in its Pre-Construction Petition.

## **CONCLUSION**

PG&E respectfully requests the Commission grant its request for extension of the construction deadline for a period of five years subject to the conditions identified above.

Respectfully Submitted,

Dated: August 3, 2009



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Scott A. Galati  
Counsel to Pacific Gas and Electric Company



BEFORE THE ENERGY RESOURCES CONSERVATION AND DEVELOPMENT  
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APPLICATION FOR CERTIFICATION  
FOR THE *TESLA POWER PROJECT*

Docket No. 01-AFC-21C

PROOF OF SERVICE

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**DECLARATION OF SERVICE**

I, Ashley Y. Garner, declare that on August 3, 2009, I served and filed copies of the attached **PG&E'S POST-HEARING BRIEF IN SUPPORT OF 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:**

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

X  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."

**AND**

**For filing with the Energy Commission:**

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

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**CALIFORNIA ENERGY COMMISSION**

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



**Ashley Y. Garner**