



ORA

Office of Ratepayer Advocates
California Public Utilities Commission

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PUBLIC VERSION

CPUC, Energy Division
Attention: Tariff Files, Room 4005
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Subject: **Protest of the Office of Ratepayer Advocates (ORA) of PG&E Advice Letter 4761-E (Approval of Forbearance Agreements between Pacific Gas and Electric Company and Solar Partners II, LLC and Solar Partners VIII, LLC for Ivanpah Units #1 and #3) – REDACTED**

I. INTRODUCTION

The Office of Ratepayer Advocates (ORA) protests Pacific Gas and Electric Company's (PG&E) Advice Letter 4761-E (AL 4761). In AL 4761, PG&E seeks California Public Utilities Commission (Commission) approval of Forbearance Agreements between PG&E and Solar Partners II, LLC and Solar Partners VIII, LLC, (jointly “Solar Partners”) for Ivanpah Units #1 and #3 (jointly “Projects”).

ORA recommends the Commission deny PG&E’s request of Approval of the Forbearance Agreements with the Solar Partners, and order PG&E to declare an Event of Default, as it is in the best economic interests for ratepayers. Alternatively, the Commission should consider conditional approval of the Forbearance Agreements, with modifications as described below. Contrary to PGE’s assertions, the Forbearance Agreements do not provide benefit to PG&E’s customers.

II. BACKGROUND

Ivanpah is a 392 MW concentrating solar power plant co-owned by BrightSource Energy, NRG Energy, and Google (collectively “Solar Partners”), which began commercial operations in January 2014. The plant features innovative solar thermal technology using mirrors—called heliostats—that reflects light onto water-filled boilers on top of the three separate 450 foot towers, creating high-temperature steam to drive a conventional steam turbine.¹

On August 2009, the Commission approved PG&E power purchase agreements (PPAs) with Solar Partners II, LLC for the Ivanpah Unit #1 project and with Solar Partners VIII, LLC for the

¹ <http://energy.gov/lpo/ivanpah>

Ivanpah Unit #3 project.² The Ivanpah Unit #1 project was originally designed to be a 110 MW solar thermal facility. Ivanpah Unit #3 was originally designed to be a 200 MW solar thermal facility.

In October 2010, the Commission approved amendments to the PPAs, increasing capacity of Ivanpah Unit #1 from 110 MW to 118 MW and decreasing capacity of Ivanpah Unit #3 from 200 MW to 130 MW, due to permitting and financing constraints.

The PPAs are structured to provide a specified amount of Guaranteed Energy Production (GEP) from each unit, measured over a rolling 24-month period. If either unit delivers less than the specified GEP, PG&E, at its option, may declare an Event of Default for the applicable PPA. In case of default, the PPAs include certain requirements and potential remedies, including PPA termination. Because of the contract amendments, the projects started deliveries in mid to late January 2014 with the 2-year GEP to be calculated effective February 1, 2016.

In February 2015, Solar Partners notified PG&E to discuss the performance of the projects. NRG, one of the primary stakeholders, reported the projects may not meet their GEP for the initial period.

In this advice letter, PG&E requests Commission approval of two proposed Forbearance Agreements PG&E entered into with Solar Partners II, LLC for the Ivanpah Unit #1 project and Solar Partners VIII, LLC for the Ivanpah Unit #3 project. The Forbearance Agreements, in part, include the following provisions:

- The term of the Forbearance Agreements starts January 31, 2016 and terminates after July 31, 2016.³
- In consideration of PG&E not exercising its right to declare an Event of Default under the contract, Solar Partners will pay compensation of [REDACTED] for Ivanpah Unit #1 and [REDACTED] for Ivanpah Unit #3 for the shortfall in Solar Partner's deliveries to PG&E through November 30, 2015.⁴
- PG&E has the option to require a true up amount for December 2015 and January 2016.⁵
- During the Forbearance Period, if either unit does not deliver a monthly target volume equal to [REDACTED] of the expected output for that month, the Seller will pay PG&E [REDACTED] multiplied by the amount of the shortfall.⁶
- PG&E has the option to extend the terms of the Forbearance Agreement through January 30, 2017, and include consideration during this period of any GEP shortfall.

² Resolution E-4266

³ Forbearance Agreement, p. 1

⁴ Forbearance Agreement, p. 2.

⁵ Forbearance Agreements, p. 2.

⁶ PG&E Response to Data Request 1, pp. 2-3.

III. DISCUSSION

In its advice letter request, PG&E seeks approval of the Forbearance Agreements on the basis that they provide a number of benefits for PG&E's customers. First, PG&E claims Commission approval helps assure the continued operation of two innovative solar thermal facilities which are currently providing RPS-eligible energy to PG&E and its customers. Second, PG&E states the Forbearance Agreements are of limited duration, and do not waive PG&E's right to enforce the GEP provisions at a later time. Third, PG&E says approval of the Forbearance Agreements ensures ratepayers consideration for the GEP shortfall, which they are not currently entitled to under the PPAs. Finally, approving the Forbearance Agreements does not limit Commission review of any future changes to the PPAs.⁷

A. Continued Operation Is Not Necessary for RPS Compliance Obligations And Is Not In Ratepayers' Economic Interests

PG&E states the Agreements provide an uninterrupted stream of revenue to the Projects, and that in the Event of Default, the Projects may cease operation. PG&E states that continuing operation of innovative RPS-eligible energy furthers state and federal policy goals.⁸ These arguments cannot sustain approval of the Agreements based on the numbers alone.

PG&E does not need the Agreements to meet its RPS obligations. In its 2015 RPS Procurement Plans, PG&E states it is positioned to meets its RPS compliance requirements for the second (2014-2016) and third (2017-2020) compliance periods.⁹ In fact, PG&E states should it declare an Event of Default,

¹⁰ Recent passage of Senate Bill (SB) 350 increased the RPS target to 50% by 2030, but consideration of how best to implement SB 350 is currently under consideration in the RPS Rulemaking 15-02-020. Further, PG&E has not claimed or demonstrated that this project is necessary to meet that new target.

Even if additional RPS is a future concern, the two PPAs and subsequent amendments are very expensive, with energy delivery costs of [REDACTED]/MWh and [REDACTED] MWh for Ivanpah Units #1and #3, respectively. Since adoption of the initial PPAs, solar prices have dramatically declined, with current prices at approximately [REDACTED] MWh. Based on the structure of the Forbearance Agreements, PG&E's request obligates ratepayers to pay [REDACTED] MWh over current market prices. This premium will continue for energy deliveries not only during the term of the proposed Forbearance Agreement, but also risks locking in ratepayers to the same excessive rate for 25 years if Solar Partners meets or exceeds its expected deliveries to force continuation of the initial contract. Thus, it is not in the ratepayers' economic interest for PG&E to allow a time extension while maintaining higher rates.

⁷ PG&E Advice Letter 4761-E, p. 4.

⁸ PG&E Advice Letter 4761-E, p. 4.

⁹ PG&E 2015 RPS Plan, p. 1.

¹⁰ PG&E Response to ORA Data Request 1, p. 3.

Declaring an Event of Default is the best, if not most, economic decision, based on the Commission’s principles of contract management and least cost dispatch.¹¹ It is important to note the Commission ordered the utilities to comply with minimum standards of conduct, including Standard of Conduct 4 (SOC 4), which states: “The utilities shall prudently administer all contracts and generation resources and dispatch the energy in a least-cost manner.”¹² This standard also applies to administration of contracts and generation resources in addition to Least Cost Dispatch (LCD). The utility bears the burden of proving compliance. This avoids the danger of the Commission “agreeing to an interpretation of AB 57/SB [Senate Bill] 1976 that would remove our continuing oversight of utility operational performance and, hereby, remove the Commission’s ability to meet its statutory requirement to assure ‘just and reasonable’ rates.”¹³

Also, the Commission must consider why the projects did not meet their GEP for the initial period. When the PPAs were adopted in August 2009, the price of the PPAs reflected the market at the time, and the Commission agreed that the terms, conditions, and payments made under the PPA were “reasonable and in the public interest.”¹⁴ PG&E states the Solar Partner’s failure to meet its GEP was a result of outages and reduced generation caused by the Solar Partners’ overestimation of generation forecast in their model, in addition to operation and management problems related to boiler issues, turbine vibrations, gas valve issues, steam tube leaks, unusually high cloud coverage.¹⁵ While contracted prices may have reflected market value in 2009, it is reasonable, due to the questionable operation and potential mismanagement of the projects, for the Commission to reevaluate the pricing terms and conditions adopted in the original agreements when considering adoption of PG&E’s advice letter request. It is also reasonable for the Commission, under these circumstances, to consider whether the past two years is sufficient time to evaluate project performance, and at what point it is in the ratepayers’ best interest for PG&E to declare a default.

PG&E further explains that under the current PPAs, PG&E’s customers are not affected by the Solar Partners’ failure to meet its contract obligations as PG&E only pays for energy delivered. PG&E will continue to receive deliveries and only pay for the energy actually delivered by the facilities. However, the continued operation of two very expensive solar thermal facilities that have failed to perform may be in the interest of the Solar Partners but is not in the ratepayers’ best interest. These projects failed to comply with their obligation to deliver no less than the GEP for the performance measurement period. Innovative renewable technologies¹⁶ should not come at the expense of reliability or PG&E’s responsibility to ratepayers. The Commission may have supported an innovative and promising technology when approving the initial PPAs, but the projects’ failure to delivery indicates that the technology is not successful in this instance.

¹¹ D.02-12-074, Interim Opinion p. 49-50.

¹² D.02-10-062, p. 52 and Conclusion of Law 11, p. 74.

¹³ D.02-12-074, p. 53–4. The “just and reasonable rate” requirement is established in Public Utility Code, sections 454.5(d)(1), (5).

¹⁴ Resolution E-4266, p. 19.

¹⁵ Response to ORA Data Request 1, p. 2.

¹⁶ PG&E Advice Letter 4761-E, p. 4.

Disallowing unsuccessful contracts such as these projects could allow room for new, potentially innovative renewable contracts at a better value for ratepayers.

B. The Limited Duration Of The Forbearance Agreements Provides No Future Assurances Nor Benefit Ratepayers

PG&E claims the limited duration of the Forbearance Agreements does not waive PG&E's right to enforce the GEP provisions at a later time.¹⁷ The Agreements provide PG&E and the Solar Partners time to assess whether these Projects will be able to meet GEP for the remaining term of the PPAs.

The Forbearance Agreements appear to be a short term solution for a longer term problem. PG&E admits it had limited discussions with Solar Partners to renegotiate a new contract, asserting the time and complexity of renegotiation. PG&E has known that the facilities would likely not meet GEP for the past year, and yet, rather than negotiate a new contract reflective of current market conditions, PG&E decided to negotiate a short term resolution to provide more time to evaluate the performance of the projects.¹⁸ There is little incentive for ratepayers—other than the compensation discussed below—to allow additional time to perform, and maintain the continued operations under the terms of the PPA. Further, as PG&E has the option for an additional six-month extension under the Forbearance Agreements,¹⁹ ratepayers will maintain the premium payments for up to one year with no guarantees by PG&E to mitigate the high price of the current contract for the longer term.

C. Calculation Of The Consideration For The Forbearance Period And Any Shortfalls Are Questionable And Do Not Provide Long Term Benefits for Ratepayers

PG&E states the Forbearance Agreements provide its customers with monetary consideration for the GEP shortfall which they are not currently entitled to under the PPAs. As consideration for PG&E's agreement to forbear, the Solar Partners shall make a payment [REDACTED]

[REDACTED] for Ivanpah Unit #1 and [REDACTED] for Ivanpah Unit #3 for the shortfall in Solar Partner's energy deliveries to PG&E through November 30, 2015.²⁰ Additionally, during the Forbearance Agreements' term, if a facility does not deliver a monthly target volume equal to [REDACTED] % of the expected output for that month, the Seller will pay PG&E [REDACTED]/MWh multiplied by the amount of the shortfall.²¹

ORA questions the calculation of payments, and whether PG&E made a good faith effort to negotiate better terms for ratepayers. PG&E explains that in determining the amount of consideration the Solar Partners had to pay for any shortfall, [REDACTED]

¹⁷ PG&E Advice Letter 4761-E, p. 4.

¹⁸ PG&E Response to ORA Data Request 1, p. 3.

¹⁹ PG&E Advice Letter 4761-E, p. 1.

²⁰ Forbearance Agreements, p. 2.

²¹ PG&E Response to ORA Data Request 1, pp. 2-3.

as the damage calculation multiplied by the amount of shortfall in delivered volumes of energy during the measurement period.²² PG&E did not explain how [REDACTED] as the damage calculation benefits ratepayers when ratepayers pay approximately [REDACTED] for energy delivered. As noted above, neither the Commission nor PG&E should ignore that the reliability issues experienced—the outages and reduced generation—were caused by the Solar Partners. Such issues give rise to the question of whether the current contract prices are worth its value, and whether PG&E should exert its current leverage with its right to declare an Event of Default to negotiate better terms for ratepayers.

D. PG&E’s Assurances The Agreements Do Not Limit Commission Review Of Future Changes To The PPAs Is Not A Compelling Reason To Approve The Agreements

Finally, PG&E argues approval of the Forbearance Agreements does not limit Commission review of any future changes to the PPA, and considers this last point a “benefit” to its customers.²³ The advice letter states, “If PG&E and the Solar Partners determine that changes to the PPAs are necessary, PG&E will then file an advice letter describing these amendments or modifications and seeking Commission approval.”²⁴

This final argument does not provide any assurances that PG&E is looking out for ratepayer’s interests. Under the proposal, any specific changes to the contract terms are not guaranteed. Further, vague assertions that “if PG&E and the Solar Partners determine that changes to the PPAs are necessary” does not justify approving the Agreements nor help sustain a Commission’s finding of reasonableness as required by Public Utilities Code Sections 451 and 701.²⁵ Lastly, PG&E must—in any case—present specific changes to the PPAs for Commission review, and parties are always allowed notice and an opportunity to be heard on proposed modifications or amendments. As such, PG&E’s arguments should hold no weight in the Commission’s determination to approve this advice letter.

IV. ORA RECOMMENDATION

Ratepayers would be in a better economic position if the Commission rejects PG&E’s AL 4761 and PG&E declares an Event of Default. Based on available evidence provided by PG&E, the Commission can easily make a finding the agreements fail to meet the just and reasonable standard, and that if PG&E does not declare an Event of Default, it would not meet its obligation of compliance under Standard of Conduct 4.

²² PG&E Response to ORA Data Request 1, p. 2.

²³ PG&E Advice Letter 4761-E, p. 4.

²⁴ PG&E Advice Letter 4761-E, p. 4.

²⁵ P.U. Code § 415 requires any product or commodity furnished or to be furnished or any service rendered by a public utility “shall be just and reasonable.” P.U. Code § 701 allows the commission to regulate a public utility and “do all things” that are “necessary and convenient in the exercise of such power and jurisdiction.”

Alternatively, if the Commission finds reason to approve the agreements, it should do so conditionally with modifications. PG&E is in an advantageous position to renegotiate much lower contract prices based on current market rates and ratepayer protections based on project failure to date. If the Commission can make a finding the agreements are, in fact, necessary, the Commission may conditionally approve a forbearance based on certain modifications to the agreements:

- The Commission should order PG&E and Solar Partners to modify the amount of consideration to be paid to PG&E to be raised to [REDACTED] to account for any GEP shortfall through November 30, 2015, and any True-Up period.
- The Commission should order PG&E and Solar Partners to set the current penalty amount of [REDACTED]

This raises the proposed penalty amount from [REDACTED] and [REDACTED]. The penalty amounts should reflect the energy prices PG&E would have paid for its promised energy deliveries. A [REDACTED] penalty is unreasonable given the extraordinary prices approved for the initial PPAs and problems experienced since commercial operation resulting in the GEP shortfall for the measurement period ending January 21, 2016.

Lastly, the Forbearance Agreements could be conditionally approved upon the termination of the original PPA and subsequent amendments by the end of the Forbearance Agreement. During this time, the Commission should order the parties to renegotiate new PPAs by a date certain to renegotiate new PPAs terms with the Solar Partners. A termination date for the original agreements is in order for the parties to negotiate better rates.

V. CONCLUSION

ORA recommends that the Commission deny PGE's request of Approval of the Forbearance Agreements with the Solar Partners, and order PG&E to declare an Event of Default, as it is in the best economic interests for ratepayers. Alternatively, the Commission should consider conditional approval of the Forbearance Agreements, with modifications as described above.

Please contact Chari Worster at chari.worster@cpuc.ca.gov or at (415) 703-1585 with any questions regarding these comments.

/s/ Chloe Lukins

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