

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA



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Application of Pacific Gas and Electric
Company for Approval of 2008 Long-Term
Request for Offer Results and for Adoption of
Cost Recovery and Ratemaking Mechanisms

Application 09-09-021
(Filed September 30, 2009)

(U 39 E)

CARE'S APPLICATION FOR REHEARING OF D. 10-07-045

CALifornians for Renewable Energy, Inc. (CARE) requests rehearing of Decision (D.) 10-07-045 ("Decision") that was issued on August 4, 2010. CARE was a party to the proceeding and so is eligible to file a rehearing request pursuant to Rule 16.1¹ of the California Public Utilities Commission's ("Commission")'s Rules of Practice and Procedure. This request is timely because the decision was issued on August 4, 2010.

Decision 10-07-045²

On September 30, 2009, Pacific Gas and Electric Company (PG&E) filed Application (A.) 09-09-021 requesting approval of four agreements arising from its 2008 Long-Term Request for Offers (LTRFO). In particular, PG&E seeks approval of: (1) a power purchase agreement (PPA) with Mirant Marsh Landing for the net output of the Marsh Landing

¹ 16.1. (Rule 16.1) Application for Rehearing

(a) Application for rehearing of a Commission order or decision shall be filed within 30 days after the date the Commission mails the order or decision, or within 10 days of mailing in the case of an order relating to (1) security transactions and the transfer or encumbrance of utility property as described in Public Utilities Code Section 1731(b), or (2) the Department of Water Resources as described in Public Utilities Code Section 1731(c). An original plus four exact copies shall be tendered to the Commission for filing.

(b) Filing of an application for rehearing shall not excuse compliance with an order or a decision. An application filed ten or more days before the effective date of an order suspends the order until the application is granted or denied. Absent further Commission order, this suspension will lapse after 60 days. The Commission may extend the suspension period.

(c) Applications for rehearing shall set forth specifically the grounds on which the applicant considers the order or decision of the Commission to be unlawful or erroneous, and must make specific references to the record or law. The purpose of an application for rehearing is to alert the Commission to a legal error, so that the Commission may correct it expeditiously.

² See http://docs.cpuc.ca.gov/PUBLISHED/FINAL_DECISION/121605.htm

Generating Station (Marsh Landing Project), a new natural gas-fired combustion turbine (CT) facility that is expected to produce 719 megawatts (MW) at peak July conditions beginning May 1, 2013; (2) a PPA with Mirant Delta LLC that would eventually require the closure of the Contra Costa units 6 and 7 (Contra Costa 6 & 7) which rely on once-through cooling technologies;¹ (3) a purchase and sale agreement (PSA) with Contra Costa Generating Station LLC (Contra Costa LLC) for the Contra Costa Generating Station in Oakley, California (Oakley Project), a new natural gas-fired combined cycle facility that is expected to produce 586 MW of generation at July peak conditions beginning June 4, 2014;² and (4) a PPA with Midway Sunset Cogeneration Company (Midway Sunset) for the partial output of an existing natural gas-fired cogeneration plant that will deliver 129 MW of Qualifying Facility (QF) generation under peak July conditions for five years beginning at Commission approval, and 61 MW under peak July conditions through September 30, 2016.

Decision 10-07-045 grants, in part, the application of Pacific Gas and Electric Company for approval of its 2008 Long-Term Request for Offer results and adopts a cost recovery and ratemaking mechanism related thereto. In particular, it approves Pacific Gas and Electric Company's Marsh Landing, Contra Costa 6 & 7, and Midway Sunset procurement agreements. Additionally, it denies the Oakley Project. It also approves a multi-party settlement agreement that provides for recovery of the costs associated with the above procurement.

Issues

Rule 16.1 explains that an application for rehearing shall set forth specifically the grounds on which the applicant considers the order or decision of the Commission to be unlawful or erroneous, and must make specific references to the record or law.

1. On May 4, 2010 in Docket No. EL10-64-000, the CPUC submitted a petition for declaratory order in which it requests that the Commission find that sections

205 and 206 of the Federal Power Act (FPA), section 210 of the Public Utility Regulatory Policies Act of 1978 (PURPA) and Commission regulations do not preempt the CPUC's decision to require California utilities to offer a certain price to combined heat and power (CHP) generation facilities of 20 MW or less that meet energy efficiency and environmental compliance requirements.

In 132 FERC ¶ 61,047 the FERC found³ regarding the California Public Utilities Commission (CPUC) petition for declaratory order:

*The Commission's authority under the FPA includes the exclusive jurisdiction to regulate the rates, terms and conditions of sales for resale of electric energy in interstate commerce by public utilities.*⁴ While Congress has authorized a role for States in setting wholesale rates under PURPA, Congress has not authorized other opportunities for States to set rates for wholesale sales in interstate commerce by public utilities, or indicated that the Commission's actions or inactions can give States this authority. We disagree with the characterization of the CPUC's AB 1613 Decisions as merely establishing an "offering price" by the purchaser of power. Rather, we agree with the Joint Utilities that *the CPUC's AB 1613 Decisions constitute impermissible wholesale rate-setting by the CPUC. Because the CPUC's AB 1613 Decisions are setting rates for wholesale sales in interstate commerce by public utilities, we find that they are preempted by the FPA.*

As noted above, however, a *state commission may, pursuant to PURPA, determine avoided cost rates for QFs.*⁵ Although the CPUC has not argued that its AB 1613 program is an implementation of PURPA, we find that, to the extent the CHP generators that can take part in the AB 1613 program obtain QF status, the CPUC's AB 1613 feed-in tariff is *not* preempted by the FPA, PURPA or Commission regulations,⁶ subject to certain requirements,... [*Emphasis added*]

Because the FERC found the CPUC lacked authority to set the wholesale rate, except for QFs, therefore those energy generation sources that the CPUC approved contracts for, that were not for QFs are in violation of the FERC's jurisdictional authority over wholesale rates.

³ At paragraphs 64 and 65 of 132 FERC ¶ 61,047 (July 15, 2010).

⁴ 16 U.S.C. §§ 824, 824d, 824e (2006); e.g., *Mississippi Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354 (1988).

⁵ See 16 U.S.C. § 824a-3 (2006); 18 C.F.R. § 292.304 (2010).

⁶ 18 C.F.R. § 292.101 *et seq.* (2010).

Since “the CPUC submitted a petition for declaratory order in which it requests that the [FERC] find that sections 205 and 206 of the Federal Power Act (FPA), section 210 of the Public Utility Regulatory Policies Act of 1978 (PURPA) and [FERC] regulations do not preempt the CPUC’s decision to require California utilities to offer a certain price “ and the FERC determined its regulations do in fact preempt the CPUC’s decisions therefore CPUC has waived any claims of sovereign immunity from the FERC’s authority to hear and decide CARE’s September 1, 2010 Complaint⁷ against any of those contracts that CPUC has approved outside of the Commission’s FPA authority or in excess of the utilities’ avoided cost cap as determined by the Commission including those contracts approved by Decision (D.) 10-07-045.

2. There are outstanding motions that must be answered before the decision can be rendered. On August 30 the Commission circulated D. 10-08-023, “Order Correcting Error” which ordered abeyance of D. 10-07-045 for 30 days presumably to respond to the unanswered motion of the Contra Costa Generating Station filed on July 20, 2010.⁸ While CARE fundamentally disagrees with the contents of the motion CARE supports the right of Contra Costa Generating Station to have its motion answered before a Decision on the matter is rendered. Contra Costa Generating Station’s motion is particularly germane to the decision as the decision approves the Marsh Landing Generating Station over the Contra Costa Generating Station based on finding 17 which states, “The Marsh Landing project, Contra Costa 6 & 7

⁷ See FERC’s Notice of Complaint http://elibrary.FERC.gov/idmws/file_list.asp?accession_num=20100901-3033 September 1, 2010, **Docket EL10-84-000** “ pursuant to the Federal Power Act, 16 USC 824d, 824e, 825e, and 825h (2008) and Rule 206 of the Federal Energy Regulatory Commission’s (Commission) Rules of Practice and Procedure, 18 CFR 385.206, (2010), CALifornians for Renewable Energy, Inc. (Complainant) filed a complaint against Pacific Gas and Electric Company, Southern California Edison Company, San Diego Gas & Electric Company, and the California Public Utilities Commission (Collectively Respondents), alleging that the Respondents are violating the Federal Power Act by approving contracts for capacity and energy that exceeds the utilities’ avoided cost cap and which also usurps the Commission’s exclusive jurisdiction to determine the wholesale rates for electricity under its jurisdiction.”

⁸ <http://docs.cpuc.ca.gov/efile/MOTION/120930.pdf>

tolling agreement and the Midway Sunset PPA are reasonable and in the best interest of PG&E's customers and thus, should be approved by the Commission.

3. While there is ample evidence in the record that at this time PG&E has no need, CARE understands that this argument is outside the scope of the proceeding. However the record does not support the conclusion that the Marsh Landing Generating Station is in the best interests of the ratepayer. Even without the issues presented by Contra Costa Generating Station in its motion the facts of the record do not support finding 17 which states that the Marsh Landing Generating Station is in the best interests of PG&E's customers. The decision lacks a factual and legal basis to make this conclusion. CARE provided a detailed analysis of the strengths and weaknesses of each facility in its testimony and reply briefs. While the proposed decision adequately documents the shortcomings of the Oakley Project as elaborated by CARE both the proposed decision and the final decision ignore CARE's testimony and the facts of the record which demonstrate that the Marsh Landing Generating Station is not in the best interests of the ratepayers when compared to the Oakley Project. The Oakley Project has superior environmental performance with much lower green house gas emission per Megawatt.⁹ D. 07-12-052 Finding 57 states that "Zero-or low-GHG resources are to receive priority over other procurement options."¹⁰ Oakley's criteria pollutant emissions are much lower per megawatt. The Oakley Project can produce almost twice the number of megawatts per Btu of natural gas consumed saving ratepayers millions of dollars in fuel costs. The Marsh Landings operating constraint of 167 starts per year does not support the morning and evening ramp that the utilities were directed to prioritize in D. 07-12-052 to back up intermittent renewables. Despite claims

⁹ PG&E Opening comments on Proposed Decision: "Indeed, the Oakley Project's heat rate at full load is approximately 3,000 Btu/kWh better than both the Marsh Landing and Mariposa Projects."

<http://docs.cpuc.ca.gov/efile/CM/119461.pdf> Page 14

¹⁰ D. 07-12-052 Page 299 Finding 57: Zero-or low-GHG resources are to receive priority over other procurement options.

by PG&E to the contrary the 167 starts and the 1,752 hours per year of operation of the Marsh Landing license do not meet the requirements of PG&E's 2008 LTRFO.¹¹ "New renewable resources need to be integrated not only at the peak, but throughout the day. The Marsh Landing Project has operational constraints limiting it to 1,752 hours per year. However, the Oakley Project is currently being permitted for various scenarios of operation up to 6,924 hours per year, which allows for flexible operation throughout the day. The Oakley Project is a resource that can be operated throughout the year to integrate renewables, which is a critical operational need."¹² The decision lacks a factual basis to conclude that the Marsh landing Project is environmentally superior or in the best interest of the ratepayer.

4. PG&E's Solar PV Program should count against the 2006 LTPP Decision need amount. D. 07-12-052 opined that, "Our primary focus in reviewing the LTPPs was whether the utilities are procuring preferred resources as set forth in the Energy Action Plan (EAP), in the order of energy efficiency, demand response, renewables, distributed generation and clean fossil-fuel."¹³ While PG&E has just received approval for its 500 MW PV Program the Decision fails to count that amount or a portion of that amount towards PG&E's need determined in D. 07-12-052. The Decision continues to send mixed messages to the utilities on the need to acquire renewable resources to satisfy their resource adequacy. A portion of the PG&E's 500 MW Solar Program should be counted against the need determined in D. 07-12-052 to be consistent with the RPS and Greenhouse Gas priorities of the State of California.

¹¹ "In this solicitation, PG&E has a strong preference for operationally flexible, dispatchable resources. In general, PG&E will assess the value of the Offer's operating flexibility versus the Offer's costs. Resources that are capable of being committed to production a high number of times per year and those capable of **multiple starts and stops per day are preferred. For example, flexible resources should be capable of being "cycled" on and off at least 300 times per year.**" 2008 Long Term request for Offers Page 5

See also: PG&E's Opening comments on the proposed decision. "Moreover, the Oakley Project's operating profile, specifically the number of starts, is consistent with the 2008 LTRFO Solicitation Protocol"

<http://docs.cpuc.ca.gov/efile/CM/119461.pdf>

¹² PG&E Opening comments on the proposed decision: <http://docs.cpuc.ca.gov/efile/CM/119461.pdf> Page 13

¹³ D. 07-12-052 Page 2

5. No comments by the Parties were allowed after substantial modification to the final decision the Commission actually voted on. This violated CARE's right to due process. CPUC by failing to allow Parties opportunity to comment on substantial changes to the Decision before the full Commission vote was taken on the Decision, combined with FERC's July 15, 2010 Order, and the retraction of the August 30 Commission circulated D. 10-08-023, "Order Correcting Error" necessitated CARE to file its Complaint EL10-84 *et al* on September 1, 2010¹⁴ to challenge the Decision at the FERC therefore.

Respectfully submitted,



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September 2, 2010

Verification

I am an officer of the Intervening Corporation herein, and am authorized to make this verification on its behalf. The statements in the foregoing document are true of my own knowledge, except matters, which are therein stated on information and belief, and as to those matters I believe them to be true.

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

Executed on this 2nd day of September 2010, at San Francisco, California.



Lynne Brown Vice-President
CALifornians for Renewable Energy, Inc.
(CARE)

¹⁴ See Complaint <http://elibrary.ferc.gov/idmws/common/opennat.asp?fileID=12427577>

Certificate of Service

I hereby certify that I served the foregoing document “*Californians for Renewable Energy, Inc. (CARE) application for rehearing of Decision (D.) 10-07-045*” under CPUC Dockets A. 09-09-021. Each person designated on the official service list, has been provided a copy via e-mail, to all persons on the attached service lists on September 2, 2010 transmitting the copies via e-mail to all parties who have provided an e-mail address. First class mail will be used if electronic service cannot be effectuated.

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

Executed on this 2nd day of September 2010, at Soquel, California.



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