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BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application of Pacific Gas and Electric Company for Approval of Agreements Related to the Novation of the California Department of Water Resources Agreement with GWF Energy LLC, Power Purchase Agreement with GWF Energy II LLC, and Associated Cost Recovery (U39E).

Application 09-10-022
(Filed October 16, 2009)

**ADMINISTRATIVE LAW JUDGE'S RULING
DENYING MOTION TO DISMISS**

This ruling denies the motion to dismiss that was filed by the Alliance for Retail Energy Markets and the California Large Energy Consumers Association.

Background and Summary of the Motion to Dismiss

In Application (A.) 09-10-022, Pacific Gas and Electric Company (PG&E) requests approval of five contracts for the procurement of power from GWF Energy LLC entities (referred to hereafter as "GWF"). PG&E's transaction with GWF has two main elements. First, the existing power purchase agreements (PPAs) between the California Department of Water Resources (DWR) and GWF will be novated to PG&E so that PG&E replaces DWR as the buyer. The novated agreements expire no later than October 31, 2012. Second, PG&E will buy power from a to-be-upgraded GWF facility beginning as early as June 2012 under a new long-term PPA (referred to hereafter as the "New Power Agreement").

PG&E states that it filed A.09-10-022 because, in part, it was following the Commission's directive in Decision (D.) 08-11-056 that investor-owned utilities

(IOUs) should pursue novation and/or renegotiation of the existing PPAs between DWR and various counterparties, including GWF.

On November 20, 2009, the Alliance for Retail Energy Markets (AReM) and the California Large Energy Consumers Association (CLECA) jointly filed a motion to dismiss those parts of A.09-10-022 that pertain to the New Power Agreement. They do not object to the remainder of A.09-10-022. AReM and CLECA are referred to hereafter as the "Joint Parties."

The Joint Parties aver that the standard for determining whether a motion to dismiss an application should be granted is set forth in D.99-11-023. There, the Commission held that a motion to dismiss may be granted if, after assuming all the facts asserted in the application to be true, the application is contrary to law or Commission policy.

The Joint Parties assert that the New Power Agreement violates several Commission policies. First, they contend that although D.08-11-056 directed IOUs to pursue the novation or renegotiation of DWR's PPAs, D.08-11-056 did not intend for this process to result in new long-term PPAs such as the New Power Agreement.

Second, the Joint Parties assert that the Commission's policy for procuring long-term PPAs is set forth in D.07-12-052. According to the Joint Parties, D.07-12-052 requires all long-term PPAs to be obtained through competitive solicitations. The Joint Parties allege that PG&E circumvented this policy by negotiating the New Power Agreement without a competitive solicitation.

Third, the Joint Parties state that D.07-12-052 limited PG&E's new long-term PPAs to no more than 1,200 megawatts. The New Power Agreement exceeds this authority, according to the Joint Parties.

Finally, the Joint Parties maintain that D.08-11-056 required IOUs to pursue the novation or renegotiation of the DWR's existing PPAs in order to facilitate the reopening of direct access. The Joint Parties argue that the need to novate or renegotiate DWR's PPAs in order to facilitate direct access has been rendered moot by Senate Bill (SB) 695 that was signed into law before A.09-10-022 was filed.¹ Consequently, D.08-11-056 no longer provides a basis for approving the New Power Agreement.

Summary of PG&E's Response

PG&E filed the only response to the Joint Parties' motion. PG&E disputes the Joint Parties' claim that D.08-11-056 did not intend for new long-term PPAs to result from the process of novating or renegotiating DWR's PPAs. PG&E responds that D.08-11-056 did not limit the term of renegotiated contracts. Rather, the Commission held that it would review each renegotiated contract on its own merits.²

PG&E also disputes the Joint Parties' assertion that D.07-12-052 requires all long-term PPAs to be acquired through competitive solicitations. PG&E responds that D.08-11-056 allows new long-term PPAs to be obtained through the process of novating or renegotiating DWR's PPAs.³

PG&E disagrees with the Joint Parties' assertion that the New Power Agreement will result in the procurement of more generation capacity than

¹ Chapter 337, Statutes of 2009.

² D.08-11-056, pp. 69-70.

³ D.08-11-056, pp. 48-49.

authorized by D.07-12-052. PG&E maintains that the New Power Agreement is fully consistent with D.07-12-052.

Finally, PG&E disputes the Joint Parties' assertion that the novation-renegotiation process contemplated by D.08-11-056 has been rendered moot by SB 695. PG&E states that the issue of whether SB 695 supersedes D.08-11-056 was recently addressed by an Assigned Commissioner's ruling in Rulemaking (R.) 07-05-025. After assessing the impact of SB 695, the Ruling determined that:

The utilities should . . . continue their best efforts to implement novation or renegotiation of DWR contracts where it is cost-effective to do so.⁴

Ruling

Parties to a proceeding may file a motion to dismiss an application pursuant to Rule 11.2 of the Commission's Rules of Practice and Procedure (Rules).⁵ To grant a motion to dismiss, the Commission must determine that there are no triable issues of material fact and that the moving party is entitled to a judgment as a matter of law.⁶ Dismissal is a "drastic remedy, and all doubts must be resolved against the moving party."⁷

PG&E has presented colorable arguments that the New Power Agreement is consistent with existing law and Commission policy. Because all doubts must

⁴ Assigned Commissioner's Ruling on Procedures to Address Senate Bill 695 Issues Relating to Direct Access Transactions, R.07-05-025 (November 18, 2009), pages 8-9.

⁵ Rule 11.2 states that a "motion to dismiss a proceeding based on the pleadings (other than a motion based upon a lack of jurisdiction) shall be made no later than five days prior to the first day of hearing."

⁶ D.05-10-028, p. 10.

⁷ D.97-09-113, 75 CPUC 2d 695, 704.

be resolved against the moving party, this ruling finds that the Joint Parties have not met their burden to demonstrate that they are entitled to a judgment in their favor as a matter of law.

The scope of this ruling is limited. Today's ruling holds only that, as a matter of law, the Commission may consider PG&E's application. The Commission will carefully review PG&E's proposed New Power Agreement for compliance with D.08-11-056, D.07-12-052, other Commission decisions, and relevant laws. This ruling does not prejudice the outcome of this review.

This ruling was made after consultation with the Assigned Commissioner's Office.

Therefore, **IT IS RULED** that the motion to dismiss parts of Application 09-10-022 is denied.

Dated December 10, 2009, at San Francisco, California.

/s/ TIMOTHY KENNEY

Timothy Kenney
Administrative Law Judge

