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BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking on the Commission's Own Motion into combined heat and power Pursuant to Assembly Bill 1613.

Rulemaking 08-06-024
(Filed June 26, 2008)

**ASSIGNED COMMISSIONER AND ADMINISTRATIVE LAW JUDGE'S
RULING DENYING MOTION TO STAY DECISION 09-12-042**

This Assigned Commissioner and Administrative Law Judge's Ruling (Ruling) denies the joint motion filed by Pacific Gas and Electric Company (PG&E), Southern California Edison Company (SCE) and San Diego Gas & Electric Company (SDG&E) (collectively, Joint Utilities) to stay Decision (D.) 09-12-042.

Background

In D.09-12-042, the Commission adopted the policies and procedures for purchase of excess electricity from eligible Combined Heat and Power (CHP) systems by an electrical corporation under The Waste Heat and Carbon Emissions Reduction Act, Assembly Bill (AB) 1613 (Stats. 2007, ch. 713). Among other things, this decision adopted a standard contract available to all eligible CHP systems up to 20 megawatts (MW) and a simplified contract for CHP systems that export no more than 5 MW and directed Joint Utilities to file, within 45 days of the decision, these adopted tariffs and standard contracts.¹

¹ D.09-12-042, Ordering Paragraph 3.

On January 20, 2010, Joint Utilities filed a joint application for rehearing of D.09-12-042. Concurrently, Joint Utilities filed a Motion for Stay of D.09-12-042, which requested that the Commission stay the decision for 90 days. On January 27, 2010, pursuant to Rule 16.6 of the Commission's Rules of Practice and Procedure, SCE, on behalf of itself, PG&E, and SDG&E requested a 90-day extension of time to comply with Ordering Paragraph 3. This request for extension was granted, as was a further request for extension of time to comply with Ordering Paragraph 3. Based on these extensions, Joint Utilities are now to file the tariffs and standard contracts adopted in D.09-12-042 by June 21, 2010.²

On February 2, 2010, Joint Utilities filed a Petition for Modification of D.09-12-042. The petition requested that the pricing methodology adopted in the decision be updated to use data from the 2009 Market Price Referent (MPR), rather than the 2008 MPR, and other contract cleanup language.

On April 26, 2010, the Commission issued D.10-04-055, which denied Joint Utilities' rehearing application. The Commission then filed a Petition for Declaratory Order (PUC Petition) at the Federal Energy Regulatory Commission (FERC) on May 4, 2010. The PUC Petition asked the FERC to find that D.09-12-042 and D.10-04-055 are not preempted by the Federal Power Act,

² Joint Utilities also sought an extension of time to comply with Ordering Paragraph 6 of D.09-12-042. Ordering Paragraph 6 directed the electric corporations, including Joint Utilities, to convene a working group with CHP parties to develop an even further simplified contract for eligible CHP systems less than 500 kilowatts and file, within six month of the effective date of D.09-12-042, an advice letter to implement this further simplified contract. Since this further simplified contract was to be based on the standard contracts filed pursuant to Ordering Paragraph 3, Joint Utilities request was granted. Pursuant to a letter issued by the Commission's Executive Director on May 25, 2010, Joint Utilities are to comply with the requirements of Ordering Paragraph 6 by October 18, 2010.

the Public Utilities Regulatory Policies Act and FERC regulations. Joint Utilities filed their own Petition for Declaratory Order (Utilities Petition) at FERC on May 11, 2010.

On May 27, 2010, Joint Utilities filed a Motion for Stay of D.09-12-042 until the FERC issues a final decision on the PUC Petition and Utilities Petition. Responses opposing the motion were filed by San Joaquin Refining Company, Inc., and jointly by FuelCell Energy Inc. and the California Clean DG Coalition (DG Parties).

Discussion

In determining whether to grant a motion for stay, the Commission generally considers the following factors:

- (1) whether the moving party will suffer serious or irreparable harm if the stay is not granted;
- (2) whether the moving party is likely to prevail on the merits [];
- (3) a balance of the harm to the moving party (or the public interest) if the stay is not granted and the decision is later reversed, against the harm to the other parties (or the public interest) if the stay is granted and the decision is later affirmed; and
- (4) other factors relevant to the particular case.³

³ *Pac-West Telecomm, Inc. v. Pacific Centrex Services, Inc.* [D.08-04-044] (2008), 2008 Cal. PUC LEXIS 155 at *4-5.

Joint Utilities assert that a consideration of these factors support a stay of the decision. First, they contend that if a stay were not granted, they would suffer serious and irreparable injury by being “forced to execute long-term contracts with above-market pricing.”⁴ Joint Utilities next assert that they are likely to prevail on the merits of their petition.⁵ They further maintain that there is greater harm in having Joint Utilities enter into the AB 1613 contracts than by having parties seeking to enter into these contracts “wait a little longer to do so.”⁶ Finally, Joint Utilities argue that it would be in the best interest of all parties to “obtain clarification concerning the validity of [D.09-12-042’s] pricing requirements before entering into long term contracts.”⁷

We do not find any of these arguments warrant staying D.09-12-042. First, Joint Utilities simply conclude that they would suffer serious and irreparable harm by entering into contracts adopted under AB 1613. However, they have failed to provide any explanation of the type of harm that would be incurred, other than to allege that the contracts are at above market pricing. This allegation has been refuted by the Commission in both D.09-12-042 and D.10-04-055. Moreover, even if Joint Utilities were harmed by entering into contracts under AB 1613, which they are not, there would still no basis for staying the decision. “Economic loss, does not, in and of itself, constitute

⁴ Motion at 5-6. Since the Motion for Stay is not paginated, page references are to their location in the entire document. Thus, this citation appears on fifth and sixth pages of the filed document.

⁵ Motion at 7.

⁶ Motion at 8.

⁷ Motion at 8.

irreparable harm. . . . Recoverable monetary loss may constitute irreparable harm only where the loss threatens the very existence of the movant's business."⁸ It is unclear how entering into a contract for no more than 20 megawatts (MW) of power, and whose costs would be recovered from ratepayers, would threaten the economic viability of Joint Utilities.

Joint Utilities also fail to demonstrate that they would likely prevail on the merits of the Utilities Petition. The arguments advanced by Joint Utilities in the Utilities Petition have already been considered and rejected by the Commission in both D.09-12-042 and D.10-04-055. More importantly, the PUC Petition fully explains why these arguments must fail.

Joint Utilities' "balance of harm" argument rests solely on their belief that the AB 1613 contracts are priced above market. In doing so, Joint Utilities ignore one of the primary objectives of AB 1613, which is the reduction of greenhouse gas (GHG) emissions. As noted in D.10-04-055, "[t]he Commission has long recognized the serious threats posed by GHG emissions and global warming. (Citation.) Through the AB 1613 program, the Commission is exercising its jurisdiction to reduce GHG emissions."⁹ Courts have generally found that monetary damages are not a basis for granting an injunction when balanced against irreparable environmental damages.¹⁰ As noted by San Joaquin

⁸ *Wisconsin Gas Co. v. F.E.R.C.* (1985) 758 F.2d 669, 674. See also, *American Trucking Ass'n, Inc. v. City of Los Angeles* (2009, 9th Cir.) 559 F.3d 1046, 1058 (finding irreparable harm because "the carrier will be forced to incur large costs which, if it manages to survive those, will disrupt and change the whole nature of its business in ways that most likely cannot be compensated with damages alone.").

⁹ D.10-04-055 at 5 (citation omitted).

¹⁰ See *American Tunaboat Ass'n v. Brown* (1995) 67 F.3d 1404, 1411.

Refining, staying D.09-12-042 would not only negatively impact utility customers who have already devoted significant effort and expense to developing AB 1613-compliant CHP projects but also hamper their efforts to comply with impending GHG reduction requirements.

Finally, Joint Utilities state that a stay is warranted due to alleged “uncertainty surrounding the regulatory obligations of AB 1613 generators.”¹¹ We disagree that there is any uncertainty concerning the obligations of the AB 1613 generators, and thus do not find this argument a basis for granting a stay.

DG Parties proposed in their response that a limited stay be granted pending the resolution of Joint Utilities’ Petition for Modification of D.09-12-042. We do not believe a limited stay is warranted. Joint Utilities’ Petition for Modification seeks to clarify certain language in the AB 1613 contracts. None of these requested clarifications would result in extensive changes to the adopted contracts. Moreover, any changes adopted by a decision resolving the Petition for Modification could be incorporated either during the pendency of Energy Division’s review of Joint Utilities’ June 21, 2010 advice letter filings to implement the AB 1613 contracts or through a separate advice letter filing. For these reasons, we do not believe staying the decision pending resolution of Joint Utilities’ Petition for Modification is warranted.

¹¹ Motion at 8.

Therefore, **IT IS RULED** that the Motion of Pacific Gas and Electric Company, Southern California Edison Company and San Diego Gas & Electric Company for Stay of Decision 09-12-042 is denied.

Dated June 17, 2010, at San Francisco, California.

/s/ MICHAEL R. PEEVEY
Michael R. Peevey
Assigned Commissioner

/s/ JANET A. ECONOME for
Amy C. Yip-Kikugawa
Administrative Law Judge

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Dated June 17, 2010, at San Francisco, California.

/s/ GLADYS M. DINGLASAN
Gladys M. Dinglasan

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