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11-15-10
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**BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA**

Rio Bravo Rocklin,

Complainant,

vs.

Pacific Gas and Electric Company (U 39 E)

Defendant.

C. 10-07-020

**PRE-HEARING CONFERENCE STATEMENT
OF
PACIFIC GAS AND ELECTRIC COMPANY (U 39-E)**

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Dated: November 15, 2010

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OF THE STATE OF CALIFORNIA**

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Pursuant to the “Administrative Law Judge’s Ruling Setting Prehearing Conference” (“ALJ’s Ruling”) issued on November 4, 2010, Pacific Gas and Electric Company (“PG&E”) hereby submits its Pre-Hearing Conference Statement (“PHC Statement”) in advance of the PHC scheduled for November 22, 2010. PG&E has previously filed its Answer to the Complaint of Rio Bravo Rocklin (“Answer”) and concurrent Motion to Dismiss Complaint of Rio Bravo Rocklin (“Motion to Dismiss”) and by this reference, PG&E incorporates the contents of those pleadings herein.

Rio Bravo seeks \$2 million in additional payments under the Interim Standard Offer 4 (“ISO 4”) power purchase agreement (“PPA”) executed on October 30, 1984 (“ISO4 PPA”) with PG&E, that Rio Bravo might have received if, in 1999, it had requested and paid for a line loss study that showed that its generation did not cause transmission system losses in excess of 150% of the system average line loss, or in other words, was entitled to a “non-remote” capacity loss adjustment factor (“CLAF”). Rio Bravo asserts that PG&E has access to information that shows Rio Bravo was no longer a remote facility by June 1999 and that PG&E would be unjustly enriched if it is not ordered to remit \$2 million, plus interest, to Rio Bravo.

In its Answer, PG&E denied that either PG&E or its customers have been unjustly enriched by paying Rio Bravo a price based on the CLAF set forth in the ISO4 PPA because the Seller is responsible

for requesting the line loss studies by which the CLAF is determined. PG&E explained that the ISO4 PPA requires Seller to request an initial CLAF determination; that the initial CLAF remains in place unless revised at the request of the Seller; that PG&E is under no obligation to either advise the Seller of a potential change in remote status or to conduct an unsolicited CLAF study; and that PG&E does not have the information to determine that Rio Bravo became “non-remote” before March 2009, when PG&E performed the CLAF redetermination at Rio Bravo’s request.

PG&E moved to dismiss Rio Bravo’s Complaint for failure to assert any violation of law, order, or rule of the Commission by PG&E. Rio Bravo has cited no authority for its proposition that PG&E is required to inform Seller that its CLAF status might change and that PG&E must initiate CLAF studies - the cost of which is borne by the Qualifying Facility (“QF”) - on behalf of Seller. As explained in more detail below, a QF is responsible for requesting a redetermination of its CLAF. This principle was adopted by PG&E’s Final Line Loss Report, which was approved by the Commission in D.84-03-092 and D.88-09-026, and incorporated by reference in the ISO4 PPA.¹

Rio Bravo’s bald assertion that “Contrary to PG&E’s representation, Decision 84-03-092 actually finds that PG&E’s September 30, 1983 study is inadequate and had not undergone review and approval” is totally unsubstantiated and misleading; D.84-03-092 actually approved PG&E’s use of the Final Line Loss Report.² Rio Bravo’s attempt to re-write the Commission’s nine-year long record supporting PG&E’s administration of the CLAF³ is simply a ploy to distract the Commission from the fact that Rio Bravo slept on its rights for over twenty years and failed to request a CLAF redetermination study until September 2008 or pay for the study until March 2009.

¹ See “The Calculation and Administration of Line Loss Adjustment Factors – Final Report of Pacific Gas and Electric Company to the California Public Utilities Commission”, September 1993, filed in A.82-03-026 (“Final Line Loss Report”).

² Rio Bravo Response to PG&E’s Motion to Dismiss, p.4 cites D.84-03-092 at 36 as authority; however, line losses are not discussed on that page. D.88-03-026 fn 31 confirms that the Final Line Loss Report was approved by D.84-03-092.

³ “Today’s decision completes a nine-year process. In this process, we have developed various standardized power purchase contracts (Standard Offers 1 through 4) to help integrate electrical generation from certain non-utility sources (Qualifying Facilities or QFs) in the electric utilities’ supply mix.” D.88-09-026, at p. 1.

Rio Bravo is barred by its execution of the ISO4 PPA from claiming that PG&E was “unjustly enriched” and should therefore pay it an additional \$2 million. Rio Bravo does not assert breach of contract by PG&E. A quasi-contract action for unjust enrichment does not lie where express binding agreements exist and define the parties’ rights. In fact, Rio Bravo admits that a quasi-contract action for unjust enrichment “might” not lie where the subject matter of a claim is unambiguously preempted by an express binding agreement.⁴ Although Rio Bravo asserts that “PG&E’s representation that the dispute is governed by the terms of Rio Bravo’s PPA is factually inaccurate”, this assertion is totally unsubstantiated. Mere rhetoric cannot overcome the fact that - but for the parties’ execution of the ISO4 PPA in 1984 - the deliveries and payments that Rio Bravo complains of would not have occurred.

Rio Bravo’s Complaint does not raise any issues of fact for the Commission to resolve. Rio Bravo’s alleged issues of fact are irrelevant as a matter of law because the responsibility to seek a CLAF redetermination rests with Rio Bravo and not with PG&E.

The questions posed by the ALJ’s Ruling are addressed, below.

1. Do the parties agree that the Standard Offer 4 (S04) Agreement is controlling? If not, what other authority should be considered?

Preliminarily, it should be noted that the parties have not discussed Question 1. The ISO4 contract between the parties is controlling in at least two respects: **(1)** whether the plaintiff has stated a valid cause of action, and **(2)** whether plaintiff’s request for relief is valid. As noted above, the ISO4 PPA is the basis of the transactions that gave rise to Rio Bravo’s Complaint and conclusively establishes that Rio Bravo may not claim reimbursement for those deliveries under the theory of unjust enrichment. Thus, Rio Bravo has failed to state a justiciable claim and its Complaint should be dismissed.

In addition to the IS04 PPA, Rio Bravo’s claim for relief is governed by Commission decisions regarding the use of line loss factors in QF standard offer contracts and PG&E’s Final Line Loss Report on the use of Capacity Loss Adjustment Factors.

⁴ Rio Bravo Response to PG&E’s Motion to Dismiss, p. 6.

A. The ISO4 PPA presents the terms of Seller’s agreement to deliver 22 MW of firm capacity and 3MW of as-delivered capacity to PG&E for a term of thirty years, with payment determined in accordance with Appendix E (ISO4 PPA, p. 10), and to receive forecasted energy prices under Energy Payment Option 1 (ISO4 PPA, p. 7.) Article 6 of the PPA states that, “Capacity Loss Adjustment Factors shall be as shown in Appendices D and E (for Firm Capacity payments)”.

B. The CLAF and the Final Line Loss Study by which PG&E administers the CLAF were incorporated in the ISO4 PPA by a series of CPUC decisions. In D.82-12-120, the Commission found that PG&E’s initial line loss study did not differentiate between remote sites and other QFs and directed PG&E to undertake another study in accordance with the terms of the decision. PG&E convened an industry-wide study group which developed The Final Line Loss Report. This report utilized a “Project Specific Methodology” in place of the “aggregate vs. remote” approach and interim loss adjustment factor of 1.0 for energy as adopted in D.82-12-120. The Final Line Loss Report also recommended the adoption of loss adjustment factors for capacity⁵, and in terms of administration, stated: “A QF may request a redetermination of its loss adjustment factors, either transmission or primary distribution or both, at its expense.”⁶ In D.83-10-093, the Commission confirmed that PG&E filed the line loss study required by D.82-12-120, OP 12. k. on September 30, 1983.

The Commission specifically decided that the outcome of PG&E’s line loss studies should be incorporated into ISO4. In D.83-09-054, the Commission adopted ISO4 in principle and held that, to provide QFs with the regulatory certainty needed to obtain financing, the usual clause making utility contracts subject to change by regulatory authority should be omitted and replaced with a clause that designated line losses as subject to retroactive incorporation. The Decision states: “The terms in SO 4, Options 1 through 3, are subject to change and retroactive application in contracts signed by both parties after the effective date of a decision in A.82-03-026 et al., and, depending on the outcome in that

⁵ Final Line Loss Report, p. 2, ll. 18-21.

⁶ Final Line Loss Report, p. 17, ll. 6-8.

proceeding, with respect to . . . 1. PG&E’s line loss factor⁷.” This requirement is embodied in Article 8 of the ISO4 PPA.⁸

PG&E’s Final Line Loss Report was ratified by D.84-03-092. Based on the Project Specific Methodology and the recommendation to apply a line loss factor to for capacity payments contained in the Final Line Loss Report, PG&E applied a CLAF to its standard offer contracts for generators that were non-remote, and project-specific factors to remote QFs as individually determined by line loss studies for each project. In response to a request for modification of D.82-12-120 by Independent Energy Producers (“IEP”), the Commission found that because standard offer capacity prices are fixed into the future, capacity line losses should be specifically stated in all QF contracts. PG&E’s non-remote transmission and distribution voltage CLAFs of .989 and .991 were approved, and PG&E was authorized to calculate adjustments for line losses for “remote” QFs until further order. Accordingly, D.84-03-092 denied IEP’s request for modification.⁹

Any trace of doubt regarding the validity of the Final Line Loss Report was erased by D. 88-09-026, the CPUC’s final decision on the development of standard offer contracts. In November of 1983, Ultrasystems Inc. and Occidental Geothermal, Inc. requested the Commission hold an evidentiary hearing before acting upon the Final Line Loss Report. Five years later, the Commission stated, “. . . in D.84-03-092, we approved PG&E’s line loss adjustments for capacity, and we also directed PG&E to determine such adjustments for remote QFs on an individual basis.”¹⁰ The request for hearing was dismissed.¹¹

C. The Final Line Loss Report countermands Rio Bravo’s assertion that PG&E should have done something to induce Rio Bravo to seek a CLAF redetermination. The Final Line Loss Report, which

⁷ D.83-09-054, Ordering Paragraph (“OP”) 4.f.

⁸ This requirement is implemented by Article 8, at p. 12 of the ISO4 PPA, which states, “Pursuant to Ordering Paragraph 1(f) of CPUC Decision No. 83-09-054 (September 7, 1983), after the effective date of the CPUC’s Application 82-03-026 decision relating to line loss factors, Seller has the option to retain the relevant terms of this Agreement or have the results of that decision incorporated into this Agreement. To retain the terms herein, Seller shall provide written notice to PG&E within 30 days after the effective date of the relevant CPUC decision on Application 82-03-026. Failure to provide such notice will result in the amendment of this Agreement to comply with that decision.”

⁹ D.84-03-092, pp. 47-52.

¹⁰ D.88-09-026, fn. 31.

¹¹ D.88-09-026. OP 3.

effectively modifies the ISO4 PPA through Article 8, states on p. 17, “Loss Adjustment Factor Revision - A QF may request a determination of its loss adjustment factors, either transmission or primary distribution or both, at its expense. If the QF exercises this option and a new loss study is performed, the new loss adjustment factors must be applied to the QFs contract.” Under this provision, it would be unreasonable to expect a utility to initiate a CLAF study, the cost of which must be borne by QFs and put the QFs at risk for a less favorable, but mandatory, new CLAF.

2. Under the SO4 Agreement, would Rio Bravo have been entitled to higher capacity payments than it received if it had changed from a “remote QF” to a “non-remote QF”?

Yes. If a study requested and paid for by Rio Bravo Rocklin had determined that Rio Bravo Rocklin’s system losses were non-remote, the CLAF would have been changed from .945 to .989 in accordance with Tables D-1 and E-1, which appear on pp. D-4 and E-9 of the ISO4 PPA. This would have resulted in higher capacity payments effective from the date of study completion.

3. What specific provisions, if any, of the SO4 agreement oblige PG&E to notify Rio Bravo if Rio Bravo becomes eligible for a change from a “remote QF” to a “non-remote QF”?

None. A QF’s status as either remote or non-remote for purposes of determining its CLAF does not change unless change is indicated by the results of a CLAF study. A QF is eligible to request PG&E to re-determine its CLAF at any time.

4. What specific provisions, if any, of the SO4 agreement oblige Rio Bravo to request a new CLAF?

The ISO4 PPA requires Rio Bravo to request an initial CLAF;¹² none of its terms require Rio Bravo to request a redetermination of its CLAF. However, if a QF wishes a new CLAF, it is the QF’s responsibility to request the line loss study to re-determine its CLAF, pay for the study, and accept the findings of the study whether the resulting CLAF is higher or lower than the initial CLAF.

5. Did PG&E have (exclusive access to and/or control over) evidence of the potential change from “remote QF” to “non-remote QF” status?

¹² Footnote 2 at p. E-9 of Appendix E requires Seller to request PG&E to perform a capacity loss adjustment factor study after execution of the PPA to determine whether the facility is remote or non-remote.

No. A project-specific loss adjustment factor, calculated using the Project-Specific Methodology described on pp. 13-15 of the Final Plan, is the only acceptable evidence that a generator deemed to be “remote” may become non-remote. There was no evidence of the potential of Rio Bravo to change from remote to non-remote status until Rio Bravo requested a CLAF redetermination study in 2009.

6. *What is the appropriate standard of notice to be applied to Rio Bravo?*

PG&E is not required to notify Rio Bravo of its option to request a re-study of line losses leading to a redetermination of its CLAF. By executing the ISO4 PPA, Rio Bravo agreed to Article 8, which states that the ISO4 PPA provisions regarding line loss factors are subject to revision through the retroactive application of the Commission’s decisions regarding standard offer contracts. The Final Line Loss Report, which was approved by D.84-03-092 and D.88-09-026 and was accordingly incorporated as a term of the ISO4 PPA, notifies QFs of their right to request a re-study.

- a.** Why did (or did not) PG&E’s advising Rio Bravo that PG&E intended to increase the voltage and corresponding capacity of the line through which the facility delivers electricity to PG&E from 60 Kilovolts (kV) to 115 kV put Rio Bravo on notice of the potential for it to become non-remote?

The increase in voltage of the line to which Rio Bravo interconnects could have affected the base case identified under the Project Specific Methodology adopted in the Final Line Loss Report. See, “Calculating Project-Specific Loss Adjustment Factors” on pages 13-14 of the Final Line Loss Report for more detail. However, unless a specific study for Rio Bravo is completed, PG&E could not have known whether Rio Bravo’s CLAF might have increased or decreased.

- b.** How did (or did not) PG&E’s publishing of its transmission system assessments, transmission expansion plan, and base case models in 1998 put Rio Bravo on notice of the potential for it to become non-remote?

Any change in transmission system assessments, transmission expansion plan, and base case models creates the potential for the Project Specific Methodology to result in a different outcome for a particular QF.

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7. *What is the basis for Rio Bravo's claim that PG&E had/has information showing that Rio Bravo should have been treated as a non-remote QF? Has Rio Bravo conducted discovery in this area?*

There is no legitimate basis for this claim. The only basis for treating Rio Bravo as a non-remote QF would be a CLAF study conducted in accordance with the Final Line Loss Report. No such study was undertaken until Rio Bravo requested and paid for a CLAF redetermination study in 2009.

8. *Has discovery concluded? If not what, if any, discovery disputes remain?*

Discovery has not concluded. PG&E will provide an update on discovery at the Pre-Hearing Conference.

In summary, the IS04, as modified by the Final Line Loss Report, holds the Seller responsible for requesting a redetermination of its CLAF and further specifies that the loss study conducted to revise loss adjustment factors must be based on a representation of systems at the time of the study.¹³ Rio Bravo does not dispute the fact that it failed to request and pay for a CLAF study until 2009; it cannot legitimately demonstrate any entitlement to non-remote status before this date. Rio Bravo should take nothing by its Complaint.

DATED: November 15, 2010

Respectfully submitted,

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By: _____ /S/
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¹³ Final Line Loss Report, p. 17, II.21-24.

**CERTIFICATE OF SERVICE
BY ELECTRONIC MAIL**

I, the undersigned, state that I am a citizen of the United States and am employed in the City and County of San Francisco; that I am over the age of eighteen (18) years and not a party to the within cause; and that my business address is Pacific Gas and Electric Company, Law Department B30A, 77 Beale Street, San Francisco, CA 94105.

I am readily familiar with the business practice of Pacific Gas and Electric Company for collection and processing of correspondence for mailing with the United States Postal Service. In the ordinary course of business, correspondence is deposited with the United States Postal Service the same day it is submitted for mailing.

On the 15th day of November, 2010, I served a true copy of:

**PRE-HEARING CONFERENCE STATEMENT
OF
PACIFIC GAS AND ELECTRIC COMPANY (U 39 E)**

[XX] Electronic Mail: By serving the enclosed document, via electronic mail transmission, to each of the parties with an electronic mail address listed on the official CPUC Service List for Docket No.C.10-07-020.

I certify and declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on this 15th day of November, 2010 at San Francisco, California.

/S/
ELIZABETH J. DIAMOND