

Decision 03-06-073

June 19, 2003

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking to
Establish Policies and Cost Recovery
Mechanisms for Generation
Procurement and Renewable Resource
Development.

Rulemaking 01-10-024
(Filed October 25, 2001)

ORDER DENYING REHEARING OF DECISION (D.) 02-08-071

In this decision, we deny the applications filed by Pacific Gas and Electric Company (“PG&E”) and Southern California Edison Company (“Edison”) for rehearing of Commission Decision (D.) 02-08-071 (“Decision”). The Decision was issued as part of the Commission’s rulemaking on procurement issues (R.01-10-024) and responded to a motion filed by Edison for approval to immediately begin procuring capacity even though it had not yet returned to an investment grade credit rating. The motion proposed that the California Department of Water Resources (“DWR”) serve as the creditworthy party and buyer of any power contracted under these contracts until Edison regained its investment grade credit rating. At that time, Edison would assume all legal and financial responsibility for these contracts, and DWR would have no further responsibilities. (*Motion of Southern California Edison Company for An Interim Decision Granting Approval of Process for Early Procurement of Capacity* (“Edison Motion”), filed May 7, 2002.) In a May 31, 2002 letter to the Commission (“May 31 letter”), DWR stated that while it was not opposed to Edison’s proposal, it had specific concerns regarding Edison’s motion. Of particular note for this rehearing decision, DWR believed that before it could enter

into any contracts as the creditworthy party, Edison's motion would need to be modified to be in compliance with Assembly Bill 1 of the First Extraordinary Session of 2001 ("AB 1X") (Stats. 2001, Chapter 4). (May 31 letter, at p. 2.)

On August 22, 2002, the Commission issued the Decision, which modified Edison's motion to address the concerns raised in DWR's May 31 letter and granted Edison's motion, as modified. (D.02-08-071, at p. 42, OP 1.) Both Edison and PG&E were authorized to enter into interim contracts in participation with DWR.¹ Additionally, the Decision adopted a procedural process to review and approve these interim contracts and established the requirements for procurement of renewable and QF power between the effective date of the Decision and January 1, 2003. (D.02-08-071, at p. 43, OP 5-7.)

On September 25, 2002, PG&E and Edison filed timely applications for rehearing of the Decision. Responses to the applications for rehearing were filed by California Biomass Energy Alliance ("CBEA"), The Utility Reform Network ("TURN"), the Center for Energy Efficiency and Renewable Technologies ("CEERT"), Independent Energy Producers Association ("IEP"), Ridgewood Olinda, LLC, Union of Concerned Scientists, and California Wind Energy Association. These parties all opposed Edison's rehearing application. We have carefully considered the arguments presented by PG&E and Edison and are of the opinion that no grounds for rehearing have been demonstrated. Therefore, PG&E and Edison's applications for rehearing of the Decision are denied.

¹ San Diego Gas and Electric Company ("SDG&E") was authorized to execute interim contracts as well. However, because of its creditworthy status, it was not authorized use DWR's credit support. (D.02-08-071, at p. 10.)

I. DISCUSSION

In its rehearing application, PG&E contends that the Decision is unlawful to the extent that it imposes Commission reasonableness reviews on the interim contracts during the period that DWR is a party to those contracts. PG&E also requests that the Decision be clarified to state that Commission review of utility administration of the contracts will be in accordance with Assembly Bill (“AB”) 57.² Edison’s rehearing application requests that the Commission clarify the requirements regarding procurement of renewable energy.

A. PG&E’s Rehearing Application

PG&E raises two issues in its rehearing application. First, it states that it is unclear whether the Decision contemplates that the Commission will conduct “reasonableness review[s] of utility administration” during the period when DWR serves as the creditworthy party to the interim contracts. If it does, then PG&E asserts that such review would conflict with Water Code section 80110 and AB 1X. (PG&E App., at p. 4.) PG&E maintains that only DWR may conduct such a review pursuant to Water Code section 80110. We disagree. AB 1X does not apply to the interim contracts, as DWR is not entering into the contracts as part of the Power Purchase Program (Water Code, § 80100). Rather, DWR would enter into these contracts and serve as the creditworthy party and purchaser of power on behalf of the utility *only if* the utility has not regained investment-grade credit rating at the time the contract commences. (*See*, Edison Motion, at pp. 3-4.) Indeed, DWR specifically notes in the May 31 letter that “DWR and [the utility] would be signatories to any contract,” and once the utility becomes creditworthy, DWR’s name will be removed from the contracts.

² AB 57 (Stats. 2002, Chap. 835) established guidelines for procurement of electricity by the utilities after January 1, 2003, and for Commission review of the utilities’ procurement plans. It was signed into law on September 24, 2002 as an urgency measure. Immediately afterward, Senate Bill (“SB”) 1976 (Stats. 2002, Chap. 850) was enacted and superseded AB 57 as the chaptered text. The provisions in AB 57 raised by PG&E in its rehearing application are also contained in SB 1976.

Additionally, there is no basis for concluding that costs incurred under the interim contracts would be “properly reviewed and approved by DWR” under Water Code section 80110 as claimed by PG&E. Edison’s Motion proposes that the utility, not DWR, solicit and negotiate the contracts. (Edison Motion, at p. 3.) In its May 31 letter, DWR does not indicate that it plans to perform any reasonableness review prior to serving as Edison’s creditworthy party. Rather, it merely states that its “costs for interim payment under the contracts [will be] recovered through DWR’s revenue requirement.” (May 31 letter, at p. 2.) DWR’s conditions simply reflect the requirement under AB 1X that when DWR serves as the seller of power, it must receive all revenues associated those sales. However, this does not mean that the interim contracts are subject to AB 1X nor that all the conditions of AB 1X would apply. Accordingly, any reasonableness review conducted by the Commission of the interim contracts during the period when DWR serves as the creditworthy party is not contrary to Water Code section 80110 or AB 1X.³

PG&E next states that the Decision should be clarified to state that any Commission review of the interim contracts would be consistent with the reasonableness review requirements specified in AB 57.⁴ Otherwise, it fears that

³ Furthermore, if the interim contracts were subject to the provisions of AB 1X, then the Decision would have been subject to the expedited rehearing requirements of Public Utilities Code section 1731(c). In that instance, PG&E’s rehearing application would have been untimely as it was filed after the statutory deadline specified in section 1731(c).

⁴ AB 57 provides that

“A procurement plan approved by the commission shall . . . [e]liminate the need for after-the-fact reasonableness reviews of an electrical corporation’s actions in compliance with an approved procurement plan, including resulting electricity procurement contracts, practices, and related expenses. However, the commission may establish a regulatory process to verify and assure that each contract was administered in accordance with the terms of the contract, and contract disputes which may arise are reasonably resolved.” (Cal. Pub. Util. Code, § 454.5, subd. d(2).)

the Decision could “imply that the Commission will exercise unbounded reasonableness review of utility administration in the post-DWR period.” (PG&E App., at p. 5.) As an initial matter, we note that PG&E’s request for clarification does not meet the requirements of Public Utilities Code section 1732, which states that “[t]he application for a rehearing shall set forth specifically the ground or grounds on which the applicant considers the decision or order to be unlawful.” PG&E has failed to state why such an interpretation of the Decision would be unlawful. Thus, rehearing could be denied on these grounds alone.

In this instance, we deny rehearing because we find that PG&E’s request for clarification is unsupported and moot. PG&E’s request is premised on its belief that DWR, not the Commission, will conduct reasonableness reviews of its administration of the interim contracts for the period when DWR serves as the creditworthy party. However, as discussed above, this is not the case. Accordingly, we will be conducting ongoing reasonableness reviews of PG&E’s administration of the interim contracts. PG&E has cited no grounds to conclude that we would perform an after-the-fact reasonableness review after the time it regains an investment grade credit rating and DWR no longer serves as the creditworthy party. Moreover, in D.02-12-074, the Commission adopted PG&E’s updated procurement plan, which includes the interim contracts entered into under this Decision. Thus, review of the interim contracts are now subject to the provisions of AB 57 and PG&E’s request for clarification is now moot. Accordingly, for the reasons stated, we find no basis for making the clarification requested by PG&E.

B. Edison’s Rehearing Application

Edison requests that the Decision be clarified to state that the 5.37 cents/kWh benchmark for renewable contracts is to “provide guidance concerning the pricing level at which the Commission will deem contracts reasonable for purposes of cost recovery in rates” and that the 1% additional renewal capacity is

merely a reiteration of the state’s policy and does not “create an open-ended procurement obligation” on the part of the utilities. (Edison App., at pp. 3-4.) Edison believes that absent such clarification, a renewable stakeholder could interpret the Decision as creating a new standard offer contract and requiring Edison to enter into contracts with all renewable suppliers offering to sell power at or below the 5.37 cents/kWh benchmark regardless of need. (Edison App., at p. 3.) Such an interpretation, according to Edison, would be unsupported by the record and contrary to AB 57, SB 1078⁵ and PURPA⁶.

We note that we did clarify the 5.37 cents/kWh benchmark in D.02-10-062, which specifically states: “Utilities are not required to procure all resources that offer prices of less than 5.37 cents per kWh (the interim benchmark price). That benchmark was set for purposes of determining *per se* reasonableness for cost recovery purposes, but does not require that utilities acquire all resources at that price.” (D.02-10-062, at p. 23.) Thus, the clarification Edison seeks in its rehearing application has essentially been made and further clarification of the Decision is not required.

Even absent this clarification, we do not believe clarification of the Decision is necessary. Edison’s rehearing application is based on a strained reading of the Decision and its arguments are premised on its belief that the 5.37 cents/kWh benchmark could be interpreted as a market price. (Edison App., at p. 4.) However, there is no basis to support such an interpretation. The Decision clearly notes that this provisional benchmark is to provide guidance only on what would be deemed *per se* reasonable, and that a competitive solicitation will be used to procure renewable resources. (D.02-08-071, at pp. 33, 35.) The competitive solicitation could result in contract prices below or above the 5.37 cents/kWh benchmark. Furthermore, there is nothing in the Decision that would

⁵ SB 1078 (Stats. 2002, Chap. 516) established the California Renewables Portfolio Standard Program.

⁶ 16 U.S.C. § 824a-3 et seq.

lead a party to interpret the Decision as requiring a utility to accept all bids at or below the 5.37 cents/kWh benchmark regardless of need. The Decision simply states that utilities are required to “hold a separate competitive solicitation for renewable resources in the amount of at least an additional 1 percent of their annual electricity sold beginning January 1, 2003.” (D.02-08-071, at p. 33.) Since the Decision is neither establishing a market price for renewable energy nor requiring utilities to purchase energy from all renewable resources who bid at or below 5.37 cents/kWh, Edison’s arguments that the Decision violates AB 57, SB 1078 and PURPA are without merit. Similarly, since no market price is being established, Edison’s arguments that the evidentiary record does not support a market price of 5.37 cents/kWh are outside the scope of the Decision and are not considered here.

II. CONCLUSION

PG&E and Edison have failed to demonstrate grounds for finding legal error in Commission Decision (D.) 02-08-071.

THEREFORE, IT IS ORDERED:

The rehearing applications filed by Pacific Gas and Electric Company and Southern California Edison Company of D.02-08-071 are denied.

This order is effective today.

Dated June 19, 2003 at San Francisco, California.

MICHAEL R. PEEVEY
President
CARL W. WOOD
LORETTA M. LYNCH
GEOFFREY F. BROWN
SUSAN P. KENNEDY
Commissioners