BEFORE THE PUBLIC UTILITIES COMMISSION

OF THE STATE OF CALIFORNIA

FILED
07-03-12
02:15 PM

Order Instituting Rulemaking to Address Utility Cost and Revenue Issues Associated with Greenhouse Gas Emissions.	R.11-03-012 (Filed March 24, 2011)

MOTION TO AMEND SCOPING RULING FOR EXPEDITED CONSIDERATION OF GHG COMPLIANCE COST RESPONSIBILITY FOR CONTRACTS EXECUTED PRIOR TO AB 32

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Dated: July 3, 2012

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I. INTRODUCTION

Pursuant to Rule 11.1 of the California Public Utilities Commission ("Commission" or "CPUC") Rules of Practice and Procedure and decision ("D.")12-04-046, Panoche Energy Center, LLC ("PEC") respectfully submits this motion to amend the scoping ruling so that the Commission can consider, on an expedited basis, the issue of GHG compliance cost responsibility in contracts executed prior to the passage and implementation of California Global Warming Solutions Act of 2006, Assembly Bill 32 ("AB 32").[1] The instant motion is filed concurrently with PEC's motion for party status.

The PPA between PEC and PG&E does not address GHG compliance cost responsibility and does not compensate PEC for the costs of obtaining GHG allowances for the purpose of complying with the Cap and Trade Regulation. If PEC is not compensated for GHG compliance costs resulting from PG&E's dispatch of the PEC facility, it will result in unjust and significant financial harm to PEC and will undermine the objectives of the Cap and Trade program. The scoping ruling in the instant proceeding should be amended so that the Commission can clarify that in legacy contracts where of GHG cost responsibility is unclear, including the PEC PPA, such costs should be passed through to the utility and recoverable from ratepayers.

[1] Also referred to as "legacy contracts" or "legacy PPAs."

II. BACKGROUND

A. About PEC

PEC owns and operates the Panoche Energy Center, a 400 megawatt natural-gas fired electrical generating facility in western Fresno County. PEC is wholly owned by Energy Investors Funds. PEC has been selling energy to Pacific Gas & Electric Company ("PG&E") since 2009 under a 20-year power purchase agreement ("PPA") that was executed March 28, 2006.

B. Procedural History

On March 30, 2011, the Commission initiated this rulemaking to address, in part, revenues generated from the sale of greenhouse gas ("GHG") emissions allowance as well as treatment of potential GHG compliance costs associated with electricity procurement. On August 4, 2011 the Administrative Law Judges in R.10-05-006 and R.11-03-013 issued a joint ruling clarifying that issues related to GHG procurement and compliance costs would remain within the scope of R.10-05-006. On April 24, 2012 the Commission issued D.12-04-046 in the Long Term Procurement Plan proceeding, R.10-05-006. In D.12-04-046 the Commission directed "utilities to renegotiate the contracts at issue so that they reasonably address the allocation of AB 32 compliance costs." The Commission's order to renegotiate followed earlier directives from CARB urging the utilities to resolve this issue through bilateral negotiations.[2] D.12-04-046 further provided that "if the contracts have not been renegotiated and submitted to the Commission for approval 60 days from the effective date of [D.12-04-046]" the Commission would resolve the issue in R.11-03-012, R.12-03-014 or a successor proceeding.[3] On June 15, 2012 Pacific Gas & Electric Company requested a 60-day extension to the time period granted in D.12-04-046 for renegotiating and submitting amended legacy contracts. On June 20, 2012 the

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[2] CARB Notice of Public Availability of Modified Text and Availability of Additional Documents, p. 19 (July 25, 2011); CARB Proposed Regulation to Implement the California Cap-and-Trade Program Staff Report: Initial Statement of Reasons, p. II-32, fn. 22 (Oct. 28, 2010).

[3] *See* D.12-04-046, *Decision on System Track I and Rules Track III of the Long-Term Procurement Plan Proceeding and Approving Settlement*, 2012 Cal. PUC LEXIS 192 ("D.12-04-046, 2012 Cal. PUC LEXIS 192"), *94, fn. 21.

CPUC denied PG&E's extension request and clarified that the legacy contract GHG cost responsibility issue would be addressed within the context of R.11-03-012.[4]

III. MOTION TO AMEND SCOPING RULING

PEC respectfully requests that the assigned ALJs amend the scoping ruling to consider the pass through of GHG compliance costs in power purchase agreements executed prior to the passage of AB 32. Prior rulings excluded this issue from the scope of R. 11-03-012 on the grounds that it fell more properly within the scope of the Long Term Procurement Plan proceeding ("LTPP").[5] D.12-04-046 in the LTPP proceeding declined to resolve the issue, however, and directed utilities to negotiate amendments to legacy contracts that did not address GHG compliance cost responsibility. D.12-04-046 further provided that if the contracts were not renegotiated within 60 days, the Commission would resolve the issue in R.11-03-012 or R.12-03-014. The June 20, 2012 letter from the CPUC's Executive Director clarified that the issue would be addressed in R.11-03-012.

Despite the Commission's direction in D.12-04-046, and despite prior CARB directives urging resolution of the issue, PEC believes that PG&E has failed to make a good faith effort to negotiate a GHG cost responsibility amendment to the PPA and has apparently terminated negotiations. PG&E maintains that the PPA assigns responsibility for GHG costs to PEC and compensates PEC for such costs. PG&E has failed, however, to support this position. In addition PG&E has refused to respond to PEC data requests for specific support relevant to PG&E and PEC's respective positions.

In light of the direction in D.12-04-046, the Executive Director's June 20, 2012 letter, and PG&E's refusal to negotiate, the scoping ruling in the instant proceeding should be amended so that the Commission can clarify that in legacy contracts where GHG cost responsibility is not

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[4] Letter from Executive Director Paul Clanon, "Re: PG&E request for extension of 60-day time period pursuant to Decision (D.) 12-04-046", dated June 20, 2012.

[5] *See Joint Administrative Law Judge's Ruling Clarifying Venue for Consideration of Costs Related to Procurement of Greenhouse Gas Allowances*, filed August 4, 2011; *Assigned Commissioner and Administrative Law Judges Joint Scoping Memo and Ruling*, filed September 1, 2011.

assigned, including the PEC PPA, such costs should be borne by the utility and recoverable from ratepayers.

IV. THE COMMISSION SHOULD CLARIFY GHG COST RESPONSIBILITY FOR LEGACY CONTRACTS WITHOUT DELAY.

A. Forcing PEC to bear AB 32 compliance costs will result in significant financial harm to PEC, harm ratepayers and is inconsistent with Commission policy

Cap and Trade compliance obligations for electrical generators commence January 1, 2013; the first auctions of Cap and Trade compliance instruments occur in November. If this issue is not clarified, PEC will be faced with up to an estimated five million dollars in unrecoverable costs per year, depending on the price of allowances. This would result in significant financial harm to PEC and would jeopardize PEC's ability to continue to operate under the PPA, thereby undermining reliability.

In addition, if PEC is stranded with the GHG costs, PG&E and its ratepayers would be fully insulated from any GHG price signal, which is contrary to the purpose of AB 32 and Cap and Trade.[6] This Commission and CARB have consistently recognized that GHG costs should be passed through to ratepayers in order to provide a GHG price signal.[7] A clear GHG price signal is the mechanism that influences market participant behavior and, over time, results in GHG reductions. Under the terms of the PEC PPA, however, PG&E has full control over the dispatch of the PEC facility. If PG&E refuses to compensate PEC for the cost of obtaining GHG allowances to cover emissions caused by PG&E's dispatch decisions, the link between the GHG cost of operating the facility and the value of the electricity produced will be severed.

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[6] Final Statement of Reason, p. 593, available at http://www.arb.ca.gov/regact/2010/capandtrade10/fsor.pdf ("FSOR").

[7] *See* D.08-10-037, *Order Instituting Rulemaking to Implement the Commission's Procurement Incentive Framework and to Examine the Integration of Greenhouse Gas Emissions Standards into Procurement Policies,* 2008 Cal. PUC LEXIS 354,* 327; Comments of Michael R. Peevey, Carbon Governance Project, University of California Berkeley (March 29, 2012); *available at* http://www.cpuc.ca.gov/NR/rdonlyres/0675DF33-6E3F-451F-A89C-7B4FECB58A4F/0/Speech_on_Carbon_Governance_Project_March_29_2012.pdf; *See also* CARB Initial Statement of Reasons, p. II-32, *available at* http://www.arb.ca.gov/regact/2010/capandtrade10/capisor.pdf; FSOR, p. 25; CARB Response to Comment I-49, pp. 592-593 (*id.*).

Furthermore, forcing PEC to bear the costs of GHG while PG&E controls dispatch is fundamentally inequitable.

B. The PPA does not address AB 32 compliance costs

The PEC PPA includes no provision that can be reasonably read to assign GHG cost responsibility to PEC. At the time the PPA was signed, it would have been impossible to guess the cost of any future potential GHG program. The PPA was executed five months before the current language of AB 32 existed in bill form; six months before AB 32 was signed into law; two years before the Commission issued its recommendation decision to CARB; and 5 1/2 years before CARB finalized the Cap and Trade Regulation. In 2005 and 2006, neither PG&E nor PEC could have foreseen that generators, as opposed to retail utilities, would serve as the point of regulation. Nor could either party have possibly foreseen any of the significant regulatory features of the Cap and Trade framework, such as the quantity of allowances available, the free allocation of allowances to retail utilities, and the availability of offsets, that would have been relevant to any decision to assume GHG compliance cost risk. As such, PG&E's position that PEC assumed responsibility for GHG compliance costs and priced this cost into the price of energy in the PPA is not only completely unsupported by any provision in the PPA but also contrary to common sense. PEC could not have priced GHG compliance costs into the PPA because GHG compliance costs were speculative and unquantifiable at the time the PPA was executed.

The two provisions in the PPA that PG&E relies on in support of its position that PEC agreed to bear the GHG compliance costs are inapplicable and inconclusive. Neither provision explicitly references AB 32, Cap and Trade, or GHG allowances. The PPA is a standard form contract drafted by PG&E. Under California law, when a standard form contract is ambiguous or uncertain, it must be interpreted against the drafter.[8]

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[8] Civ. Code § 1654; *Victoria v. Superior Court*, 40 Cal. 3d 734 (Cal. 1985).

V. PROPOSED SCHEDULE

Any further delay in the resolution of the GHG cost responsibility issue is to the detriment of PEC and other power producers operating under legacy power purchase agreements. As such PEC urges the Commission to amend the scoping ruling resolve its request for clarification on an expedited schedule and with a final Commission decision prior to the November GHG allowance auction. PG&E and the other investor owned utilities, as well as other stakeholders, were put on notice in D.12-04-046 that if negotiations failed, the GHG cost responsibility issue would be addressed in R.11-03-012. Since the Commission has already determined that this issue will be revisited, PEC requests that the period for response to the instant motion be waived or reduced to 10 days.

PEC Motion to Amend Scoping Ruling Filed	July 3, 2012
Responses to PEC Motion to Amend Scoping Ruling	Waived OR July 13, 2012
Amended Scoping Ruling	July 18, 2012
Prehearing Conference	July 24, 2012
Opening Testimony (only if evidentiary hearing required)	August 13, 2012
Rebuttal Testimony (only if evidentiary hearing required)	September 3, 2012
Opening Briefs (only if evidentiary hearing required)	September 24, 2012
Reply Briefs (only if evidentiary hearing required)	October 8, 2012
Hearing (only if evidentiary hearing is required)	October 22 - 26, 2012
Draft Decision (if no protest filed) or Proposed Decision (if protest filed)	+ 45 Days
Final Decision	+30 Days

VI. CONCLUSION

For the reasons stated herein, PEC respectfully requests that the Commission grant its Motion to amend scoping ruling for expedited consideration of GHG compliance cost responsibility in contracts executed prior to the passage and implementation of AB 32.

Dated: July 3, 2012

Respectfully submitted,

By: */s/ David L. Huard*

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