

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA



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Application of Pacific Gas and Electric Company for Approval of the Novation of the California Department of Water Resources Agreements Related to the Calpine Transaction, and Associated Cost Recovery

(U 39 E)

Application 09-10-034
(Filed October 16, 2009)

PROTEST OF CALIFORNIANS FOR RENEWABLE ENERGY, INC. (CARE) TO PACIFIC GAS AND ELECTRIC COMPANY'S APPLICATION FOR APPROVAL OF THE NOVATION OF THE CALIFORNIA DEPARTMENT OF WATER RESOURCES AGREEMENT RELATED TO THE CALPINE TRANSACTION AND ASSOCIATED COST

Pursuant to Rule 2.6¹ of the Commission's Rules of Practice and Procedures Californians for Renewable Energy, Inc. ("CARE") respectfully protests the Application of Pacific Gas and Electric Company ("PG&E") for Approval of the Novation of the California Department of Water Resources Agreements Related to the Calpine

¹ 2.6. (Rule 2.6) Protests, Responses, and Replies.

(a) Unless otherwise provided by rule, decision, or General Order, a protest or response must be filed within 30 days of the date the notice of the filing of the application first appears in the Daily Calendar, and shall be concurrently served on each person listed in the certificate of service of the application.

(b) A protest objecting to the granting, in whole or in part, of the authority sought in an application must state the facts or law constituting the grounds for the protest, the effect of the application on the protestant, and the reasons the protestant believes the application, or a part of it, is not justified. If the protest requests an evidentiary hearing, the protest must state the facts the protestant would present at an evidentiary hearing to support its request for whole or partial denial of the application.

(c) Any person may file a response that does not object to the authority sought in an application, but nevertheless presents information that the person tendering the response believes would be useful to the Commission in acting on the application.

(d) Any person protesting or responding to an application shall state in the protest or response any comments or objections regarding the applicant's statement on the proposed category, need for hearing, issues to be considered, and proposed schedule. Any alternative proposed schedule shall be consistent with the proposed category, including a deadline for resolving the proceeding within 12 months or less (adjudicatory proceeding) or 18 months or less (ratesetting or quasi-legislative proceeding).

(e) An applicant may file replies to protests and responses within 10 days of the last day for filing protests and responses, unless the Administrative Law Judge sets a different date. Replies must be served on all protestants, all parties tendering responses, and the assigned Administrative Law Judge.

Transaction, and Associated Cost Recovery. The novation of these contracts is no longer necessary, the cost of these contracts is unjust and unreasonable and the Los Esteros Upgrade Contract is a contract for new long term resources and the application for this resource properly belongs in proceeding Application 09-09-021.

INTRODUCTION

Pacific Gas and Electric Company (“PG&E”) seeks California Public Utilities Commission approval of five contracts which constitute the novation of two 2002 contracts between the California Department of Water Resources (“DWR”) and affiliates of Calpine Corporation (“Calpine”). The DWR Contracts consist of: (1) the “Calpine 2 Contract,” a contract for 180 megawatts (“MW”) of energy and capacity for output from the Los Esteros Critical Energy Facility (“LECEF”); and (2) the “Calpine 3 Contract,” a contract for 495 MW of energy and capacity from 11 peakers facilities (“Peakers”) identified in the contract through July of 2011. Collectively, the contracts which comprise the novation of the Calpine 2 Contract and the Calpine 3 Contract are referred to as the “Calpine Transaction.”

The novation of the Calpine 2 contract consists of: (1) a Novation Agreement executed by DWR, PG&E and Calpine Energy Services, that establishes the terms and conditions for novating the existing contract among the parties; (2) a Replacement Agreement that provides PG&E with additional operational benefits not provided under the Calpine 2 Contract and facilitates an upgrade to LECEF; and (3) the LECEF Upgrade Power Purchase Agreement (“LECEF Upgrade PPA”) which provides PG&E with additional local area capacity from an efficient and operationally flexible combined-cycle resource that combines the operational flexibility of a peaker facility with the efficiency benefits of a base load combined cycle plant.

The novation of the Calpine 3 Contract consists of: (1) a Novation Agreement executed by DWR, PG&E and Gilroy Energy Center, LLC, a Calpine affiliate, that establishes the terms and conditions for novating the existing contract among the parties; and (2) a Replacement Agreement that extends Calpine’s commitment to provide energy, capacity and ancillary service to PG&E.

Novation Agreements

Governor Schwarzenegger signed SB 695 into law on October 11, 2009. SB 695 amended Section 80110 (e) of the Water Code to eliminate the requirement that DWR must get out of the power procurement business before direct access could resume. It is no longer necessary to novate the DWR contracts as it is no longer required as a prerequisite for the reopening of direct access. This legislation eliminates the need for PG&E to absorb these inflated contracts.

The Calpine Contract is Unjust and Unreasonable.

The California Parties and PG&E have already objected to these contracts as unjust and unreasonable at the FERC. CARE believes that the contracts negotiated during the western energy crisis of 2000-1 are not valid contracts. These contracts were negotiated without the participation of the ratepayers who were assigned to pay for excessive amounts for electricity generated and transmitted for a far lower cost-of-service. These ratepayers were represented by groups that were not a party to the negotiations; the negotiations were conducted by only market participants and regulatory agencies none of which were responsible for paying the costs.

Statement of Issues

1. The current law is that stated in the recent Supreme Court *Morgan-Stanley* decision and the application does not address the issue that the underlying DWR contracts may not be valid and so should not be approving the novation agreement.
2. Contracts not subject to FERC's initial review that are negotiated without the participation of the ratepayers must be presumed to be unlawful under *Morgan- Stanley*.

Morgan-Stanley stated that:

“[R]espondents alleged before FERC that some of the petitioners in these cases had engaged in market manipulation in the spot market. See, e.g., 105

- FERC, at 61,989 (“Snohomish and Nevada Companies argue that their contracts were the product of market manipulation by Enron, Morgan Stanley and other Respondents, which, as established by the Commission Staff, engaged in market manipulation”. The Staff Report concluded, as we have said, that the abnormally high prices in the spot market during the energy crisis influenced the terms of contracts in the forward market. But the Commission dismissed the relevance of the Staff Report on the ground that it had not demonstrated that forward market prices were so high as to overcome the *Mobile-Sierra* presumption. **We conclude, however, that if it is clear that one party to a contract engaged in such extensive unlawful market manipulation as to alter the playing field for contract negotiations, the Commission should not presume that the contract is just and reasonable.** Like fraud and duress, unlawful market activity that directly affects contract negotiations eliminates the premise on which the *Mobile-Sierra* presumption rests: that the contract rates are the product of fair, arms-length negotiations. The mere fact that the unlawful activity occurred in a different (but related) market does not automatically establish that it had no effect upon the contract—especially given the Staff Report’s (unsurprising) finding that high prices in the one market produced high prices in the other. We are unable to determine from the Commission’s orders whether it found the evidence inadequate to support the claim that respondents’ alleged unlawful activities affected the contracts at issue here.”
3. CARE objects to the procedural barriers the DWR novations create for CARE as the lone representative of “electric consumer(s)” as defined by 16 U.S.C. § 2602(5) of the “Public Utility Regulatory Policies Act of 1978” (“PURPA”) before the FERC and the US 9th circuit court of appeals in the recovery of refunds for overcharges to the ratepayers under the said DWR contracts.

Los Esteros Upgrade and Power Purchase Agreement

PG&E’s April 1, 2008 Long-Term Request for Offers (LTRFO) sought 800 – 1,200 MW of new dispatchable and operationally flexible resources to fill a regional capacity need identified by the Commission in *Opinion Adopting Pacific Gas and Electric Company’s, Southern California Edison Company’s, and San Diego Gas & Electric Company’s Long-Term Procurement Plans*, Decision (D.) 07-12-052 (LTPP Decision). The Commission previously approved five Power Purchase Agreements

(PPAs) arising from PG&E's 2004 LTRFO, two of which were subsequently terminated by the sellers. The two terminated PPAs represent 312 MW. As the Commission determined in the LTPP Decision, PG&E's procurement authority for these MW remains. Accordingly, PG&E is currently authorized by the Commission to obtain up to 1,512 MW of new generation resources.

On April 1, 2009, PG&E filed Application 09-04-001 requesting approval of a PPA with Mariposa Energy, LLC (Mariposa). Mariposa is a nominal 184 MW project. PG&E in a binding settlement with CARE and the other parties in A.09-04-001 agreed to file a second application for approval of other agreements arising from the LTRFO to meet a total need of no more than 1,512 MW, inclusive of the Mariposa PPA (184 MW). The second application was to be limited to 1,328 MW. (Mariposa Settlement Agreement) The second application was filed on September 29, 2009. In that application PG&E is seeking approval of two agreements that would provide 1,305 megawatts (MW) of natural gas generation the Oakley project and the Marsh landing Project. The total MW of the three new power plants PG&E is seeking authorization for is 1499 MW.

On October 16, 2009 PG&E filed an application seeking another 145 MW of new power generation, the GWF Tracy Upgrade which would bring PG&E's total request for procurement in the LTPP to 1,644 MW. The Commission has authorized PG&E to procure no more than 1,535 MW so the request for the Tracy upgrade is in excess of what the CPUC has authorized PG&E to procure.

Now PG&E is also requesting commission approval of another 109 MW of unauthorized procurement in the upgrade of the Los Esteros Project in A-09-10-034.

The commission should consolidate the request for the Los Esteros upgrade with GWF Tracy Upgrade A-09-10-022 and PG&E's other request for additional procurement application A0909021. PG&E should not be allowed to procure more generation than authorized in D.07-12-052. By separating these proceedings PG&E is attempting to disguise additional procurement as DWR contract novations. Because of economic conditions and a decrease in demand related to energy efficiency programs PG&E should be procuring at the lower end of their procurement authority granted in D.07-12-52. Under no circumstances should PG&E be allowed to procure more MW than the commission authorized in D.07-12-052.

In September of 2009 the California Energy Commission Staff issued the California Energy Demand 2010-2020 forecast, a revised demand and peak load forecast. The 2007 California Energy Demand forecast was utilized to determine PG&E's needs in D.07-12-052. "The current forecast is markedly lower than the forecast in the *2007 Integrated Energy Policy Report*, primarily because of lower expected economic growth in both the near and long term as well as increased expectations of savings from energy efficiency." The new forecast predicts that peak demand in 2010 will be 779 MW lower than the 2007 forecast utilized for the LTPP. According to the CEC's revised forecast peak demand in 2015 will be 886 MW lower than the 2007 forecast. The 2018 peak demand is 1,012 MW or 5.28% lower than the forecast Utilized in the LTPP. The new forecast was approved at the December 2, 2009 CEC Business meeting. The commission instead of granting PG&E additional procurement authority should look to the new 2009 California Energy Demand Forecast and reevaluate PG&E's procurement authority.

REQUEST FOR HEARINGS AND DISCOVERY

CARE reiterates its request for consolidation of the GWF Tracy Upgrade, the Lose Esteros Upgrade, and PG&E's requested additional procurement in D. 09-09-021. This consolidation will give the commission an opportunity to re determine PG&E's procurement authority and allow the best projects to be selected once the commission makes its need determination. CARE believes that the Los Esteros Upgrade and the GWF Upgrade may represent projects which are more closely aligned with the commission directives in D.07-12-052. Both of these projects are brown field projects. Both projects reduce greenhouse gas emissions and criteria air pollutants as they convert simple cycle facilities into combined cycle facilities. Both the Los Esteros project which already has received CEC approval and the GWF Project which has already had evidentiary hearings at the Energy Commission are highly viable as opposed to the projects PG&E has already selected and proposed to the commission in D. 09-09-022. Neither project has environmental justice implications like Oakley and Marsh Landing.

CARE believes hearings will be required after sufficient time for an opportunity for discovery to deduce additional facts in addition to those presented above.

CORRESPONDENCE AND COMMUNICATION REGARDING THE APPLICATION

Correspondence regarding this Application should be directed to CARE's Officers listed below.

Respectfully submitted,



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Verification

I am an officer of the Protesting Corporation herein, and am authorized to make this verification on its behalf. The statements in the foregoing document are true of my own knowledge, except matters, which are therein stated on information and belief, and as to those matters I believe them to be true.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 7th day of December 2009, at San Francisco, California.



Lynne Brown Vice-President
CALifornians for Renewable Energy, Inc.
(CARE)

Certificate of copy sent electronically

To reduce the burden of service in this proceeding, the Commission will allow the use of electronic service, to the extent possible using the electronic service protocols provided in this proceeding. All individuals on the service list should provide electronic mail addresses. The Commission and other parties will assume a party consents to electronic service unless the party indicates otherwise.

I hereby certify that I have this day served the foregoing document "*Protest of Californians for Renewable Energy, Inc. (CARE) to Pacific Gas and Electric Company's Application for Approval of the Novation of the California Department Of Water Resources Agreement related to the Calpine Transaction And Associated Cost*" under CPUC Docket Application 09-10-034. Each person designated on the official service list, has been provided a copy via e-mail, to all persons on the attached service list on December 7, 2009, for the proceeding, Application 09-10-034.



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