



FILED

04-12-12

04:59 PM

BEFORE THE
PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA

In the Matter of the Application of Pacific
Gas and Electric Company (U 39-E) for
Approval of a Power Purchase Agreement with
Mariposa Energy, LLC.

Application 09-04-001
(Filed April 1, 2009)

COMMUNITIES FOR A BETTER ENVIRONMENT
APPLICATION FOR REHEARING
OF DECISION (D.)12-03-008

SHANA LAZEROW
Communities for a Better Environment
1904 Franklin Street, Suite 600
Oakland, CA 94612
slazerow@cbeocal.org
Telephone: (510) 302-0430
Facsimile: (510) 302-0437

On behalf of
COMMUNITIES FOR A BETTER ENVIRONMENT

April 12, 2012

APPLICATION FOR REHEARING

I. INTRODUCTION

Pursuant to Article 16 of Commission Rules of Practice, Communities for a Better Environment ("CBE") hereby applies for rehearing of Public Utilities Commission ("PUC" or "Commission") Decision ("D.") 12-03-008. The Commission issued D.12-03-008 on March 16, 2012, and this application is timely filed within 30 days.

II. ISSUES

Commission Rule of Practice 16.1(c) provides that “Applications for rehearing shall set forth specifically the grounds on which the applicant considers the order or decision of the Commission to be unlawful or erroneous.” A decision is unlawful where the Commission has “acted without, or in excess of, its power or jurisdiction,” “has not proceeded in the manner required by law,” has issued a decision “not supported by the findings,” has issued findings “not supported by substantial evidence in the light of the whole record,” or has violated “any right of the petitioner under the United States or California Constitution.”* This application addresses three major areas in which D.12-03-008 is unlawful or erroneous: failing to find that PG&E violated its commitment in the Mariposa Settlement Agreement that it set a limit on procurement under PG&E’s 2008 Long Term Request for Offers (“LTRFO”); failing to find that the Oakley PSA could only be approved under the 2006 LTPP because no other need has been identified; and failing to provide an adequate remedy to address PG&E’s breach of the Mariposa Settlement Agreement.

III. BACKGROUND

On September 3, 2009, PG&E entered into an all parties settlement agreement with CARE as well as the Division of Ratepayers Advocates (“DRA”), The Utilities Reform Network (“TURN”), and California Unions for Reliable Energy. The Agreement was unopposed and was adopted in full without an evidentiary hearing by the

Commission in D. 09-10-017. In exchange for the right to proceed with the Mariposa project, PG&E agreed to two limitations: (A) PG&E would not procure more than 1,512 MW (inclusive of the 184 MW in Mariposa's PPA) in its 2008 LTRFO ("Condition A"), and (B) that PG&E would seek to fulfill the balance of its need in one application resulting from its 2008 LTRFO ("Condition B").¹

In direct contravention of these conditions, PG&E filed three separate applications asking for approval of four projects totaling 1,743 MW. Application A.09-09-021 sought approval of the Oakley (586 MW) and Marsh Landing (719 MW) projects, while A.09-10-022 and A.09-10-034 related to upgrades at GWF Tracy (145 MW) and Los Esteros ("LECEF") (109 MW), respectively.²

The Commission initially rejected the contracts for Tracy and LECEF ("Upgrade PPAs"), finding that the power from those projects should count towards the limit set in the Mariposa Agreement and that approving both, along with Oakley and Marsh Landing, would put PG&E above that limit.³ The Commission would allow PG&E to continue with those projects only if either the Oakley or Marsh Landing projects fell through.⁴

The Commission then approved the Marsh Landing contract but rejected the Oakley contract, finding that there was no need.⁵ In response, PG&E filed advice letters to proceed with the Upgrade PPAs, which were approved in Advice Letter 3711-E. PG&E also requested a modification of D. 10-07-045, asking that the Oakley project be allowed to proceed with an on-line date of 2016 instead of the original 2014. This request was *sua sponte* treated as a new application and approved by the Commission on December 16, 2010.⁶ CBE and TURN both appealed this decision. On January 9, 2012, the California Court of Appeal issued a writ setting that decision aside and reinstating D.

¹ See D.12-03-008, p. 3.

² See D.12-03-008, p. 2.

³ D. 10-07-042, p. 53.

⁴ *Id.*, OP 2.

⁵ D. 10-07-045, pp. 39-40; OP 3.

⁶ D. 10-12-050.

10-07-045.⁷ On March 30, 2012, PG&E submitted a new application to the Commission seeking approval of the amended PSA.⁸

IV. GROUNDS ON WHICH D.12-03-008 IS ERRONEOUS AND UNLAWFUL

Pursuant to Rule 16.1(c), this Application for Rehearing specifically sets forth the following grounds on which the Applicants consider the decision of the Commission, D. 12-03-008, to be unlawful or erroneous.

A. PUC’S FINDING THAT PG&E DID NOT VIOLATE CONDITION A IS NOT SUPPORTED BY PUC’S OTHER FINDINGS OR SUBSTANTIAL EVIDENCE IN LIGHT OF THE WHOLE RECORD

Condition A of the Mariposa settlement provided that PG&E’s procurement “from the **2008 LTRFO**” would be limited to 1,512 MW.⁹ In its Conclusions of Law, the Commission finds that Oakley, Marsh Landing, LECEF, Tracy, and Mariposa, do not result in PG&E procuring more new generation than authorized by the **2006 LTPP**, and on that basis found no violation of Condition A.¹⁰ However, it also finds that the filing of three separate applications seeking approval of contracts resulting from the 2008 LTRFO constituted a violation of Condition B.¹¹ The second finding is correctly based on the Commission’s earlier decisions, which concluded that the Upgrade PPAs were pursuant to the 2008 LTRFO.¹² In so holding, the Commission rejected PG&E’s argument that the Upgrade PPAs somehow fell outside of the 2008 LTRFO process.¹³

There is thus no question that the Mariposa, LECEF, Tracy, and Marsh Landing projects all fall under the 2008 LTRFO and that the power they generate should count towards the Condition A limit of 1,512 MW. There is, further, no question that PG&E’s

⁷ *TURN v. CPUC*, Court of Appeal, Second Appellate District Case No. A132439 (writ granted 9 January 2012).

⁸ A. 12-03-_____.

⁹ Settlement Agreement, p. 3.

¹⁰ D.12-03-008, p. 18.

¹¹ *Id.*

¹² D. 10-07-042, p. 53.

¹³ *See* D.12-03-008, p. 12.

original application for approval of its Oakley PSA was brought under the 2008 LTRFO.¹⁴ Thus there is no question that PG&E sought 1,743 MW under the 2008 LTRFO, well over the agreed upon limit. And it is undeniable that all of these projects had Commission approval from December 16, 2010, when D.10-12-050 approved the amended Oakley application, and January 9, 2012, when the Court of Appeals set that approval aside. Even if signing contracts to procure this amount of generation did not violate Condition A until those contracts were approved by the Commission, Condition A was violated when the Oakley plant was subsequently approved.

In understanding why the Decision reaches a different conclusion, the timeline must be examined step by step. The Decision first explains that by temporarily rejecting the Upgrade PPAs in D.10-07-042 until the Oakley project was denied in D.10-07-045, the limit was never actually reached.¹⁵ Even after this rejection, PG&E continued to seek over 1,512 MW by both writing an advice letter to allow immediate progress on the Upgrade PPAs and by requesting a modification of the Oakley denial. Although both were granted, the decision finds that Condition A was still not violated because by this time PG&E's PSA for the Oakley Plant was amended to include an on-line date of 2016, outside of the 2006 LTPP capacity authorization date range.¹⁶

This focus, however, ignores the plain language of the Mariposa Settlement Agreement. While it may be true that the Oakley project was approved outside of the 2006 LTPP and thus did not violate D.07-12-052, Condition A of the Agreement expressly states that “the need to be procured **from the 2008 LTRFO** will be limited to 1,512 MW...”¹⁷ The Commission has already correctly determined, and PG&E admits, that the Oakley project was part of the 2008 LTRFO.¹⁸ Whether the amended PSA is

¹⁴ See A. 09-09-021, p. 13 (describing Oakley's excellent fit with 2008 LTRFO); D. 10-07-045, p. 1 (noting that the decision grants in part and denies in part PG&E's request for approval of its 2008 LTRFO results).

¹⁵ See D.12-03-008, p. 10.

¹⁶ *Id.*, pp. 10-11.

¹⁷ Mariposa Settlement Agreement, p. 3.

¹⁸ See also PG&E Application for Approval of Modified PSA, A. 12-03-___, pp. 8-9 (explaining that the proposal for the Oakley plant arose pursuant to the 2008 LTRFO).

approved pursuant to the 2006 LTPP or based on a hypothetical, never-determined need beyond the 2006 LTPP does not change the fact that PG&E solicited the offer through its 2008 LTRFO, vetted it through the 2008 LTRFO process, and no other RFO has been issued to which the Oakley application could even arguably have responded. Concurrent approval of both Oakley and the Upgrade PPAs brought PG&E into violation of Condition A no less than approval of the initial applications would have. Any other reading of the Agreement is contrary to the evidence on the record and the Commission's earlier findings.

The distinction between the Agreement's language and the Decision's reading is not one without a difference. Certainly it is conceivable that the Oakley project might be included in a future request for offers to satisfy a need established in a future LTPP, but it is also conceivable that the glowing reviews Oakley received would be dampened by future technological developments allowing for better offers. Limiting PG&E's ability to procure generation from the 2008 LTRFO – and forcing it to wait for future RFOs to meet unforeseen capacity demands – was precisely what the parties bargained for, and this is precisely what they should receive.

B. INTERPRETING OAKLEY'S APPROVAL AS OUTSIDE OF THE 2006 LTPP IS CONTRARY TO LAW

Assembly Bill 57, passed by the California legislature in 2002, mandates that a procurement contract be approved only if it falls within the range of power allowed in a utility's LTPP. LTPPs are critical to assuring that rates are "just and reasonable."¹⁹ If the Commission's approval of the Oakley PSA was indeed outside of the purview of the 2006 LTPP, then it was unlawful. The Decision responds to this concern by noting that D.11-05-049 modified D.10-12-050, which approved the Oakley PSA, to include references to prior situations in which the Commission has approved projects prior to the

¹⁹ Pub. Util. Code. §454.5(d)(1), (5).

need determination in an LTPP.²⁰ The Decision does not explain that D.11-05-049 contains only one reference to a unique and entirely different situation in which San Diego Gas & Electric Company needed to execute an agreement under a specific timeframe and had a pending LTPP that would not be complete on time, but which already had proposed decisions showing future needs that the project would meet.²¹

Here, to the contrary, a proposed decision on the 2010 LTPP quotes a settlement agreement that notes there is no evidence proving or disproving need through the 2010 LTPP period.²² PG&E is a signatory to that settlement agreement and conceded that in the 2010 LTPP, which projects need to 2020, it could not prove that a need existed, let alone a need as large as the Oakley plant. Approval of the Oakley project under these terms would be unprecedented and if the only way for Condition A to remain unbroken is for the Oakley project to be considered outside of the 2006 LTPP, then it is unlawful in any event.

C. PROVIDING NO REMEDY IS ERRONEOUS AND UNLAWFUL

The plain terms of the Mariposa Settlement Agreement provide that the rights of the objecting parties to demand evidentiary hearings were being exchanged for PG&E's promises. Even if the Commission finds that Condition A was not violated, Condition B undoubtedly was. This violation, moreover, directly prejudices the interests the parties were seeking to protect. Conclusion of Law #6 ignores this bargain by finding that the Mariposa PPA is "reasonable in light of the whole record, consistent with the law, and in the public interest," because it forces the parties to give up their rights to discover and present evidence to the contrary.

Furthermore, the Decision refuses the request to stay or suspend the Mariposa PPA because this would "unnecessarily and unfairly harm Mariposa LLC for subsequent

²⁰ See D.12-03-008, p. 11.

²¹ See D.11-05-049 (referencing only above example); D.07-11-046 (approval of SDG&E application).

²² February 21, 2012 Proposed Decision, p. 7, R. 10-05-006.

actions taken by PG&E,”²³ but also refuses the request to impose any form of fine or sanction on PG&E for actions that it took on its own.²⁴ The rationale for this latter refusal is that PG&E’s actions did not hinder the Commission’s ability to adequately analyze each application.²⁵ But this reasoning fundamentally ignores another benefit of the bargain: making it easier for the settlement parties to bring their own challenges to PG&E’s applications. By refusing to streamline its applications as required, PG&E forces not only the Commission but public interest organizations to expend unnecessary organizational hours. Not holding PG&E accountable for this blatant disregard of its self-imposed obligations renders the Commission-approved Agreement meaningless.

The Commission’s “hope that PG&E will consider more thoroughly its ability to meet its settlement obligations before signing such agreements in the future” rings hollow when no enforcement action is taken. And it rings particularly hollow in light of PG&E’s recent application for approval of the Amended Oakley PSA, which was submitted on March 30, 2012, while this action was still pending and after the February publication of the proposed decision. PG&E makes no mention of the Mariposa Settlement Agreement or any of the other 2008 LTRFO projects, as this Decision requires if the PSA was pursuant to the 2006 LTPP, nor does it mention any future applications and estimated filing dates, as this decision requires if it was pursuant to a future LTPP.²⁶ Further, as mentioned above, PG&E entered into a settlement agreement in the 2010 LTPP that specifically acknowledged the evidence did not establish a need to procure new resources, even out to 2020.²⁷ In exchange for PG&E’s acknowledgement that the

²³ Mariposa was on notice that its contract approval was subject to this Petition for Modification long before it incurred any actual construction costs. CARE filed its Petition for Modification on October 10, 2010. Mariposa Energy did not even receive its license from the CEC until May 18, 2011, seven months later. While CBE is not advocating that the Commission penalize Mariposa for the Commission’s own delay in the proceeding, Mariposa had full notice that it was moving forward with the unresolved question of whether its contract approval would be overturned. It would be absurd to sacrifice the integrity of Commission approval of settlement agreements for the sake of a party that knew it was acting on a non-final contract.

²⁴ See D.12-03-008, pp. 14-16.

²⁵ D.12-03-008, pp. 14-15.

²⁶ See generally Application for Approval of Amended Oakley PSA, A. 12-03-____.

²⁷ See February 21, 2012 Proposed Decision, p. 7, R. 10-05-006.

evidence did not establish a need, CBE and other parties gave up their right to present further evidence and to cross-examine any PG&E witnesses on the subject of whether there was a need for the Oakley plant, or any similar plant, in order to integrate renewables, address local capacity needs, provide auxiliary services, or replace once through cooling resources.²⁸ CBE gave up this right to examine the evidence based on a reasonable expectation that PG&E would be required to comply with the settlement's terms. Unfortunately, PG&E has already submitted an application for approval of the Oakley PSA, again contending that the Oakley project is uniquely situated to meet a potential need in 2016. This Commission's failure to provide any effective remedy for PG&E's breach of the Mariposa agreement clearly emboldened the utility to disregard its settlement agreement in the 2010 LTPP. Allowing PG&E to breach its agreements without remedy will effectively end any current and future settlement attempts and unnecessarily waste the time and resources of all parties involved.

V. CONCLUSION

D.12-03-008 erroneously allows PG&E to breach a settlement it entered into without imposing any fines or sanctions, imposing less than a slap on the wrist and effectively leaving PG&E in a better position than had it never entered into the agreement in the first place. While the decision correctly identifies PG&E's violation of Condition B, it fails to recognize the violation of Condition A's clear language, and thus is contrary to the substantial evidence on the record and other Commission findings. Furthermore, it fails to identify the interests the Agreement was meant to protect and the prejudice subsequently caused by the breach. As a result of these erroneous conclusions, the settling parties are left without the rights they originally bargained and without remedy for the harms they suffered. We therefore respectfully ask that the Commission revisit its conclusion that Condition A was not violated and reconsider its decision not to stay or

²⁸ *See id.*

suspend the Mariposa PPA or impose sanctions on PG&E. In the alternative, we request that the Commission reject the amended Oakley application, as it is in breach of Mariposa Settlement Agreement and flaunts the limited requirements suggested by the Commission in its decision.

Respectfully submitted,

April 12, 2012

/s/

Shana Lazerow

SHANA LAZEROW (Bar No. 195491)
Communities for a Better Environment
1904 Franklin, Suite 600
Oakland, CA 94612
(510) 302-0430 x 18 (telephone)
(510) 302-0437 (facsimile)
slazerow@cbeval.org (e-mail)

Attorneys for
COMMUNITIES FOR A BETTER ENVIRONMENT