

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Legal Division

San Francisco, California
Date: September 20, 2007
Resolution No. L-350

RESOLUTION

**RESOLUTION APPROVING AND ADOPTING A
PROPOSED SETTLEMENT WITH CONSTELLATION
NEWENERGY, INC., REGARDING ITS FAILURE TO
TIMELY PROCURE ADEQUATE ENERGY RESOURCES**

INTRODUCTION

We hereby approve and adopt a settlement reached with Constellation NewEnergy, Inc. (CNE), a load-serving entity (LSE)¹ which, under our resource adequacy decisions, is required to submit proof that it has acquired adequate amounts of generation capacity, both for its aggregate system load and also within defined transmission-constrained areas.

The staff of the Commission's Energy Division (Staff) has determined that CNE did not fully comply with these requirements. CNE and Staff have negotiated a settlement agreement, addressing penalties for CNE's non-compliance. Their proposed settlement of the matter is attached as Appendix A.

We herein adopt this settlement agreement to fully resolve this matter, basing our approval on the facts stipulated to by CNE and Staff. Because this is an uncontested matter, we find that this case does not require evidentiary hearings pursuant to Public Utilities Code Section 1701.2(a), or public comment pursuant to Section 311(g)(2).

BACKGROUND

The Resource Adequacy Requirement

In a series of decisions, this Commission has implemented Public Utilities Code Section 380, which established resource adequacy requirements for all LSEs. Our

¹ "Load serving entity" is defined as an electrical corporation, electric service provider, or community choice aggregator. (Public Utilities Code Section 380(j).)

decisions have established resource adequacy policies and regulations to: “[E]nsure that there is adequate, cost-effective investment in electric generation capacity for California and that such capacity is made available to the CAISO when and where it is needed for reliable transmission grid operations.” (D.06-06-064, p. 4, citing D.04-01-050, D.04-07-028, D.04-10-035, and D.05-10-042 as modified by D.06-02-007 and D.06-04-040.) These decisions also set forth the requirements that are to be met by all LSEs. For example, D.06-06-064 created an October 31, 2006, deadline for LSEs to file their system and local Resource Adequacy (RA) year-ahead showings for 2007 (later moved to November 2, 2007).

Constellation NewEnergy, Inc.

CNE is a load-serving entity (LSE) with statewide operations, and is subject to the resource adequacy program pursuant to Public Utilities Code Section 380, Commission decisions D.05-10-042 and D.06-06-064, and the CAISO tariff.

According to Staff, CNE failed to comply with the Commission’s requirements for resource adequacy by inaccurately listing an unexecuted contract in their Year Ahead (YA) System and Local RA Compliance Filing on November 2, 2006 that was not fully executed, and also by failing to be in timely compliance with the Local RA obligation outlined in D.06-06-064 in two of the four Local RA Areas. According to Staff, CNE’s total Local RA procurement deficiency totaled 32.75 MW. CNE and Staff agreed to a set of stipulated facts, contained in Appendix A, Settlement Agreement, as follows.

FACTUAL AGREEMENT CONCERNING CNE’S 2007 YEAR AHEAD SHOWING

CNE and Staff agree that CNE failed to timely meet its obligations for generation capacity by the November 2, 2006, deadline. The facts are as follows: on November 7, 2006, CNE filed a waiver request for the “PG&E Greater Bay Area”, explaining that the counterparty for a 26 MW resource requested inclusion of a new contract provision that prevented CNE from executing the contract. CNE acknowledges that its November 2 compliance filing (CNE-010-E) was inadequate for that reason. On November 10, 2006, the CAISO issued a Market Notice showing that no backstop procurement for the 26 MW shortfall would be required. CNE cured the shortfall on November 30, 2006.

For the “PG&E Other” Local RA area, CNE listed a 6.2 MW resource obtained through Occidental Power Services, Inc., which was confirmed by an email between the two parties. On November 29, 2006, the parties broke off negotiations without a final executed agreement, despite the email confirmation. On December 11, 2006, CNE filed a revised compliance report which cured the deficiency by replacing the resource, and requested a waiver of penalties.

We base our review and approval of the Settlement on this agreement as to the undisputed facts.

Staff declined to grant either of CNE's requests for waivers. Decisions D.05-10-042, D.06-06-064 and D.06-07-031 describe the waiver process and the delegation to the Energy Division for the review of compliance filings and initial review of requests for waiver. In the event that an LSE does not meet its local procurement obligation and the LSE has not been granted a waiver, it will be subject to a penalty of \$40 per kW-year on the amount of its deficiency, in addition to backstop procurement costs. (D.06-06-064, p.4.)

THE SETTLEMENT

Payment of \$107,500 to the State General Fund

In the proposed Settlement Agreement, which we approve and adopt today, CNE agrees based on the undisputed facts to pay \$107,500 to the State General Fund. In light of the facts stipulated to therein, CNE and Staff have agreed that it is in the mutual interests of both parties to resolve this matter through settlement without litigation, and that through such settlement CNE agrees not to appeal the denied requests for waiver of penalties and will pay \$107,500 to the Commission (for application to the General Fund) within 60 days of a final Commission decision approving this Settlement Agreement.

Acknowledgement of Non-Compliance

In the Settlement, CNE acknowledges that its compliance filing did not meet its RA obligations. On November 7, 2006, CNE filed a waiver request for the "PG&E Greater Bay Area", explaining that the counterparty requested inclusion of a new contract provision that prevented CNE from executing the contract, and for this reason its November 2 compliance filing (CNE-010-E) was out of compliance. For the "PG&E Other" Local RA area, CNE listed a 6.2 MW resource obtained through Occidental Power Services, Inc., which was confirmed by an email between the two parties. On November 29, 2006, the parties broke off negotiations without a final executed agreement, despite the email confirmation, and for this reason the filing was out of compliance.

Reliance on Fully Executed Written Contracts Only

The inherent problems with reliance upon e-mail confirmation of contracts is illustrated here. Initially, CNE reported to the Commission in its 2007 Year Ahead Local and System RA Showing (filed on November 2, 2006) that it had secured a 6.2 MW resource through Occidental Power Services, Inc. The facts show that negotiations between Occidental and CNE broke off on November 29, 2006 without reaching a fully executed agreement. We disapprove of the practice of relying on e-mail confirmation of contracts for the purposes of the Year Ahead

RA reports, notwithstanding that it may be an industry practice. In this settlement, CNE agrees to only rely in the future upon fully executed written contracts.

DISCUSSION

For a settlement to be approved by the Commission, the settlement must be: (1) reasonable in light of the whole record, (2) consistent with the law, and (3) in the public interest. (Commission Rule 12.1(d).) Each element is present here.

In light of the undisputed set of stipulated facts that establish the record in this matter, we find the settlement to be reasonable. CNE admits that its 2007 Year Ahead report was out of compliance, and for this reason agrees to pay \$107,500 to the State General Fund. CNE further agrees to rely in the future only on fully executed written agreements, which addresses the specific problem raised by CNE's reliance on email confirmation. The CAISO released a Market Notice showing that no backup procurement would be required, and thus no harm to consumers occurred and thus no further remedial measures are required. Staff and CNE agree not to litigate the potential issue of whether Staff properly denied the waiver requests, which saves Commission resources which would otherwise be expended in lengthy litigation.

We find that the settlement is consistent with the law. In the event that an LSE does not meet its local procurement obligation and the LSE has not been granted a waiver, D.06-06-064 provides for a penalty of \$40 per kW-year on the amount of its deficiency, in addition to backstop procurement costs. No backstop procurement costs were necessary, and the payment of \$107,500 is consistent with the described formula for penalties. Because the penalty amounts have been proscribed by D.06-06-064, we do not need to consider the severity of the offense or the conduct of the utility.

We find that the settlement is in the public interest. The settlement resolves the matter without the need for extensive, time-consuming, and costly Commission proceedings and litigation. It safeguards the interest of the public in adequate, cost-effective investment in electric generation capacity. It protects our Resource Adequacy decisions by enforcing the penalty provisions against those who would fail to timely procure the required resources. It promotes good industry practices with regards to reliance on fully executed agreements. Finally, we note that the settlement fairly represents the interests of both Staff and CNE because it enforces compliance with our decisions and allows CNE to forego expensive and time-consuming hearings in return for a financial payment to the State's General Fund.

Uncontested Matter; No Need for Evidentiary Hearings or Public Comment

Pursuant to Section 1701.1(a) of the Public Utilities Code, the Commission has determined that there is no need for a hearing in this matter, because the Staff and CNE have entered an uncontested settlement, which the Commission finds is

reasonable and in the public interest. This is a case involving the enforcement of the Commission's rules, and the Commission's staff and the party out of compliance with the Commission's rules have entered into a settlement. This is an uncontested settlement, because there are no entities, other than the noncomplying company and the Commission staff enforcing the rules, which have an absolute right to participate as a party and be heard in this matter. *See Re Pacific Gas and Electric Company* (1997), D.97-08-055, 73 CPUC 2d 754, 780-81. As an uncontested settlement, there is no need for a hearing or comments on a proposed resolution. *See id.* at n.44. Pursuant to Section 311(g)(2) of the Public Utilities Code and Rule 14.6(c)(2) of the Commission's Rules of Practice and Procedure, the Commission waives any comment period in order to expeditiously rule on and approve the uncontested settlement.

The Commission has broad prosecutorial discretion in how to enforce its rules, and other entities do not have standing to intervene and challenge the Commission's exercise of its discretion. *Cf Dix v. Superior Court* (1991) 53 Cal.3d 442, 453-54. Although *Dix v. Superior Court* was a criminal case, courts have found such broad prosecutorial discretion for administrative agencies in civil enforcement matters, as well. *See Heckler v. Chaney* (1985) 470 U.S. 821, 831-32. For example, in *PUC v. FERC* (9th Cir. 2006) 462 F.3d 1027, 1050, the Court found that the Federal Energy Regulatory Commission (FERC) had broad discretion in the management of its prosecutorial investigations, which may be formal or preliminary, and public or private. In this regard, the Court noted that the FERC may settle claims without review and third parties do not have a right to participate. *See id.* Of course, such a settlement does not preclude other remedies, which may be available to third parties. *See id.*

In this case, where during Staff's investigation CNE and Staff entered into a settlement to resolve noncompliance with our resource adequacy requirement rules, we find there is no need for formal hearings. In future matters, if there is a violation of the Commission's rules relating to resource adequacy requirements, which is not resolved with a citation or settlement with Staff during its preliminary investigation, the Commission will issue an Order Instituting Investigation and set formal hearings. In no event will the Commission tolerate violations of our resource adequacy requirements for load serving entities.

COMMENTS ON DRAFT RESOLUTION:

For the foregoing reasons, the Commission waives any comment period in order to expeditiously rule on and approve the uncontested settlement.

FINDINGS OF FACT

1. Staff and Constellation NewEnergy, Inc., (CNE) have reached an agreement regarding the facts of CNE's failure to timely procure adequate electric generation capacity.

2. November 2, 2006, was the deadline for California Load Serving Entities (LSEs) to file their system and local Resource Adequacy year-ahead showings for 2007.
3. On November 7, 2006, CNE filed a request for a waiver from penalties for the “PG&E Greater Bay Area”, explaining that the counterparty for a 26 MW resource requested inclusion of a new contract provision that prevented CNE from executing the contract by November 2, 2006.
4. CNE acknowledges that its November 2 compliance filing (CNE-010-E) was not in compliance with the Commission’s RA requirements.
5. On November 10, 2006, the CAISO issued a Market Notice showing that no backstop procurement for the 26 MW shortfall would be required. CNE cured the shortfall on November 30, 2006.
6. For the “PG&E Other” Local RA area, CNE listed a 6.2 MW resource obtained through Occidental Power Services, Inc., which was confirmed by an email between the two parties.
7. On November 29, 2006, the parties broke off negotiations without a final executed agreement, despite the email confirmation.
8. On December 11, 2006, CNE filed a revised compliance report which cured the deficiency by replacing the resource, and requested a waiver of penalties.
9. Energy Division declined both of CNE’s requests for waivers.

CONCLUSIONS OF LAW

1. The Settlement Agreement fully resolves and settles all disputed issues in this matter.
2. The Settlement Agreement is reasonable in light of the undisputed record, consistent with law and prior Commission Resource Adequacy decisions, and in the public interest.
3. Because this is an uncontested matter, there is no need for hearings pursuant to Public Utilities Code Section 1701.2(a), and thus the procedures proscribed therein do not apply.
4. Pursuant to Public Utilities Code Section 311(g)(2), we waive the applicable comment because this is an uncontested matter which resolves an internal enforcement matter.
5. The Settlement Agreement should be adopted.

ORDER

1. The Settlement Agreement appended to this Resolution as Appendix A and signed by Staff and Constellation NewEnergy, Inc., is approved without modification.
2. There will be no hearings in this matter, and the public comment period is waived.
3. The effective date of this order is today.
4. This matter is closed.

I certify that this Resolution was adopted by the California Public Utilities Commission at its regular meeting of September 20, 2007, and that the following Commissioners approved it:

PAUL CLANNON
Executive Director

MICHAEL R. PEEVEY
President
DIAN M. GRUENEICH
JOHN A. BOHN
RACHELLE B. CHONG
TIMOTHY ALAN SIMON
Commissioners

[Appendix A to RES-L-350](#)