

Decision _____

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Investigation on the Commission's own motion into the Operations and Practices of Pacific Gas and Electric Company; Notice of Opportunity for Hearing; and Order to Show Cause Why the Commission Should not Impose Fines and Sanctions for Pacific Gas and Electric Company, March, April and July 2010 Violation of System Resource Adequacy Requirements.

Investigation 11-06-011
(Filed June 9, 2011)

DECISION APPROVING SETTLEMENT AGREEMENT REGARDING PACIFIC GAS AND ELECTRIC COMPANY RESOURCE ADEQUACY REPORTING**Summary**

This decision approves the proposed Settlement Agreement (Appendix A) between the Commission's Consumer Protection and Safety Division and Pacific Gas and Electric Company (PG&E), resolving all issues in this investigation regarding alleged reporting violations by PG&E in March, April and July of 2010 of the Commission's Resource Adequacy Requirement Program.

The Settlement Agreement requires that PG&E shall make a settlement payment to the State of California General Fund in the amount of \$215,000 within 60 days of the Commission issuing a final decision approving the Settlement Agreement without material change.

Investigation 11-06-011 is closed.

Background

In 2005 and 2006, the Commission established a Resource Adequacy Requirement (RAR) program in Decision (D.) 05-10-042 and D.06-06-064 to ensure that sufficient electrical power resources would be available to the California Independent System Operator (CAISO), to spur infrastructure development, and to effectively and fairly allocate procurement responsibilities among participants.

The RAR program requires load serving entities (LSEs) such as Pacific Gas and Electric Company (PG&E) to demonstrate: 1) acquisition of sufficient generation capacity to serve forecasted retail customer load, including a reserve margin, in their service areas; and 2) local resource adequacy, i.e. acquisition of sufficient generation capacity within defined, transmission-constrained areas. The RAR program includes specific reporting requirements and time limits for fulfilling RAR procurement obligations.

In D.04-10-035, the Commission first mandated that LSEs make month-ahead system resource adequacy compliance filings showing they have procured all of their resource adequacy requirements. (D.04-10-035 at 37-40.) Later in D.05-10-042, the Commission implemented RAR program requirements and set penalties for an LSE's failure to acquire the capacity needed to meet its Resource Adequacy (RA) obligations. Penalties were set at three times the monthly cost for new capacity. (D.05-10-042, Conclusion of Law 21.) The Commission noted that RAR program compliance included the requirement to make timely filings and respond to data requests from the Commission, and that the Commission would hold LSE's accountable for compliance with all aspects of the program. (*Id.* at 94.) The Commission addressed additional local resource adequacy requirements in D.06-06-064 and reiterated that penalties would apply for failure

to make timely compliance filings showing an LSE has met its local procurement obligations. (D.06-06-064 at 68 and Conclusion of Law 24.) The decision found that the penalty for failure to make a timely compliance filing would equal the penalty for a deficiency, following a 10-day grace period. (*Id.* at 69.) Resolution E-4195 implements the specifics of the Commission's citation program for resource adequacy as established in both D.05-10-042 and D.06-06-064.

On June 9, 2011, the Commission voted unanimously to issue an Order Instituting Investigation 11-06-011 (OII) into the operations and practices of PG&E based on a May 24, 2011 report by the Commission's Consumer Protection and Safety Division (CPSD) presenting evidence that PG&E failed to comply with the Commission's Resource Adequacy program rules by not timely securing the required energy resources for March, April, and July 2010. The Commission opened the investigation to determine whether PG&E violated Resource Adequacy program rules pursuant to Section 380 of the Pub. Util. Code,¹ D.05-10-042, and D.06-06-064. The Commission ordered PG&E to show cause why it should not be sanctioned for violated Commission rules.

A prehearing conference (PHC) was held on August 2, 2011. Following the PHC, an August 24, 2011 Scoping Memo and Ruling set testimony and hearing dates for September, October and November 2011. In a November 2011 ruling, the schedule was revised based on the parties' request for a delay of the schedule to pursue a settlement.

¹ Section 380 authorizes the Commission to establish resource adequacy requirements and Section 380(e) states that the Commission shall "exercise its enforcement powers to ensure compliance by all load serving entities."

By joint motion filed November 29, 2011, CPSD and PG&E requested adoption of their Settlement Agreement. The proposed Settlement Agreement, including a stipulation of facts by the parties, is attached to this decision as Appendix A.

Terms of the Settlement Agreement

To settle this proceeding, the parties agreed to the following facts:

- On January 29, 2010, PG&E submitted an RA compliance filing for the March 2010 month-ahead compliance period.
- On February 26, 2010, PG&E submitted an RA compliance filing for the April 2010 month-ahead compliance period.
- On June 1, 2010, PG&E submitted an RA compliance filing for the July 2010 month-ahead compliance period.
- CPSD's investigative report states that PG&E failed to comply with RA procurement obligations by listing contracts that were not eligible for the entire claimed capacity for the March, April and July 2010 compliance periods, resulting in a collective deficiency of 713.31 megawatts. CPSD concluded that PG&E had not timely procured the capacity needed to meet its monthly system RA obligations for those three months. CPSD recommended a penalty of \$7,133,100 based on CPSD's interpretation of then effective Commission decisions.
- PG&E states that it made timely RA compliance filings for March, April and July 2010 and had sufficient resources to meet its RA obligations for those months prior to each initial filing date. PG&E states that it made amended filings correcting the reporting errors within 10 days of notification from the Energy Division. According to PG&E, neither PG&E nor the CAISO had to purchase additional RA resources as a result of reporting errors by PG&E in March, April or July 2010.
- PG&E contends that it had the requisite resources for each of the three months in question, it was in compliance with its

resource requirement, and the incidents represent reporting errors only.

- PG&E maintains that Commission decisions allow it a 10-day period to cure any defects in its month-ahead reports and that it cured these specific reporting errors within the allowable time. PG&E further maintains that under the penalty structure set forth by the Resolution E-4195 citation program, the maximum penalty is \$47,000.
- CPSD contends that the Commission did not establish clear distinctions between penalties for under-procurement and reporting errors until its most recent decision in D.11-06-022, which is after PG&E's alleged violations in the March, April and July 2010 filings.

The settlement provides that PG&E shall make a settlement payment to the State of California General Fund in the amount of \$215,000 within 60 days of the Commission issuing a final decision approving the Settlement Agreement without material change.

Discussion

Pursuant to Rule 12.1(d), the Commission will not approve a settlement unless it is reasonable in light of the whole record, consistent with law, and in the public interest.

We have historically favored settlements that are fair and reasonable in light of the record as a whole. Concerning the record in this proceeding, the stipulation of facts in the Settlement Agreement constitutes a clear and succinct description of the facts surrounding the dispute between the parties. In addition, the Settlement Agreement discusses the parties' agreement to enter a public copy

of the CPSD Report and PG&E's reply testimony responding to the report into the record of this proceeding.²

The record indicates that PG&E made monthly RA compliance filings for March, April, and July 2010 and it later amended those filings to correct reporting errors within 10 days of notification of the errors by Energy Division. According to PG&E, it always had the required resources for each of the three months in question and neither it nor the CAISO had to purchase additional resources. On the other hand, CPSD contends the reporting errors constitute a violation of Commission rules, and the Commission did not establish clear distinctions between penalties for under-procurement and reporting errors until D.11-06-022 in June 2011. This decision issued after the alleged violations in 2010 and after the May 2011 CPSD report.

According to the parties' joint motion to accept the settlement, the Settlement Agreement represents a compromise of the parties' litigation positions and does not constitute an admission by either party of any disputed issue of fact, of law, or of any violation or liability by any party. We find that the Settlement Agreement reasonably resolves a potentially time-consuming dispute and each party has made significant concessions to resolve the issues in this proceeding in a manner that reflects a reasonable compromise of their respective litigation positions. It is also worth noting that the Commission has changed the

² The public copy of the CPSD Report and PG&E's Reply Testimony are accepted into the record. The two documents can be found attached to the parties' November 29, 2011 Joint Motion for Approval of Settlement Agreement, as Exhibits A and B of the Settlement Agreement.

penalty structure for the RAR program since the events that form the basis of this investigation.

Further, we find that nothing in the Settlement Agreement contravenes any statutory provisions or prior Commission decisions, and it provides sufficient information for the Commission to discharge its future regulatory obligations with respect to the parties and their interests and obligations. The Settlement Agreement does not contradict current Commission rules and it does not constitute a precedent regarding any principle or issue in this proceeding or any future proceeding.

The Settlement Agreement is in the public interest. It is consistent with the Commission's well-established policy of supporting resolution of disputed matters through settlement, it reflects a reasonable compromise, and it avoids the time, expense, and uncertainty of evidentiary hearings and further litigation. We find that the benefits to the public, including payment to the General Fund, outweigh the benefits of continued litigation and its associated cost.

As for the penalty amount proposed in the Settlement Agreement, we look to the criteria established in D.98-12-075, Appendix B, which has provided guidance in similar cases. We consider the following criteria: 1) the severity of the economic or physical harm resulting from the violation; 2) the utility's conduct to prevent, detect, disclose, and rectify the violation; 3) the utility's financial resources; 4) the public interest involved; 5) the totality of the circumstances; and 6) Commission precedents.

We find that the penalty amount of \$215,000 is reasonable. The facts of this case indicate that PG&E's month-ahead system adequacy compliance reports contained errors, but these errors were fixed within 10 days of PG&E's notification of the errors. The facts also indicate that neither PG&E nor the

CAISO had to purchase additional resources as a result of these reporting errors. There was no economic or physical harm as a result of these reporting errors; the utility rectified the errors after notification. Thus, while PG&E is a large company with significant financial resources, the proposed penalty serves the public interest and is reasonable given the totality of the circumstances in this case. We find the \$215,000 settlement payment to the General Fund reasonable and lawful.

In summary, we find the Settlement Agreement is reasonable in light of the record as a whole, consistent with law, and in the public interest. It resolves all issues before the Commission in this proceeding. Accordingly, this decision adopts the Settlement Agreement.

Categorization and Need for Hearing

The OII categorized this investigation as adjudicatory as defined in Rule 1.3(a) and anticipated that this proceeding would require evidentiary hearings. Because no hearings are now required as a result of the settlement, the hearing determination is changed to state that no evidentiary hearings are necessary.

Assignment of Proceeding

Mark J. Ferron is the assigned Commissioner and Dorothy J. Duda is the assigned Administrative Law Judge and the presiding officer in this proceeding.

Waiver of Comment Period

This is an uncontested matter in which the decision grants the relief requested. Accordingly, 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 otherwise applicable 30-day period for public review and comment is waived.

Findings of Fact

1. In D.05-10-042 and D.06-06-064, the Commission established RAR program requirements and penalties, including penalties for failure to make timely compliance filings.
2. PG&E submitted month-ahead resource adequacy compliance filings for March, April and July 2010 that contained errors regarding the contracts listed.
3. PG&E amended its March, April and July 2010 resource adequacy compliance filings within 10 days of notification from Energy Division.
4. In 2011, after the reports at issue in this proceeding were submitted, the Commission established distinctions between penalties for under-procurement and reporting errors.
5. Under the terms of the Settlement Agreement, PG&E will pay a fine to the General Fund in the amount of \$215,000.
6. The Settlement Agreement avoids the time, expense, and uncertainty of further litigating and resolving this matter.

Conclusions of Law

1. Nothing in the Settlement Agreement contravenes any statute or Commission decision or rule.
2. The benefits to the public of the Settlement Agreement outweigh the benefits of continued litigation.
3. The Settlement Agreement is in the public interest.
4. The penalty level of the Settlement Agreement is reasonable given the totality of the circumstances.
5. The Settlement Agreement should be approved.

6. Hearings are not necessary in this proceeding.

O R D E R

IT IS ORDERED that:

1. The Settlement Agreement between Pacific Gas and Electric Company and the Commission's Consumer Protection and Safety Division, attached hereto as Appendix A, is approved.

2. Pacific Gas and Electric Company shall make a settlement payment of \$215,000 by check or money order payable to the California Public Utilities Commission and mailed or delivered to the Commission's Fiscal Office at 505 Van Ness Avenue, San Francisco, California 94102, within 60 days of the effective date of this order. Pacific Gas and Electric Company shall write on the face of the check or money order "For deposit to the General Fund per Decision 12-XX-XXX."

3. The hearing determination for this proceeding is changed to no hearings necessary.

4. Investigation 11-06-011 is closed.

This order is effective today.

Dated _____, at San Francisco, California.