

Decision 09-08-006 August 20, 2009

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application of Pacific Gas and Electric Company to Establish a Demonstration Climate Protection Program and Tariff Option.

Application 06-01-012
(Filed January 24, 2006)

**DECISION DENYING PACIFIC GAS AND ELECTRIC COMPANY'S
PETITION FOR MODIFICATION OF DECISION 06-12-032
AND RULING ON MOTION TO FILE PORTION OF CLIMATESMART™
PROGRAM 2008 ANNUAL REPORT UNDER SEAL**

1. Summary

We deny the petition of Pacific Gas and Electric Company (PG&E) for modification of Commission Decision (D.) 06-12-032, filed March 16, 2009 (the Decision), on the ground that the petition raises no issue of fact or law that warrants such modification. PG&E seeks changes to the decision to permit the filing of redacted versions of its contracts with third parties for verified emissions reductions. The Decision specifically requires PG&E to include unredacted copies of the contracts as part of the public annual reports it must file with the Commission. Although PG&E claims disclosure of "pricing and key commercial terms" should be confidential to protect ratepayers from market manipulation, the program was presented and approved as a three-year demonstration project where both the Commission and PG&E expected to make

open and public reports about all aspects of the program, expressly requiring the contracts themselves¹.

Also, on March 16, 2009, PG&E filed a Motion For Leave to File Confidential Material Under Seal (Motion), in conjunction with filing a Public Version of its 2008 Annual Report, that sought confidentiality for the contracts. The Motion is denied on the ground that D.06-12-032 requires that the Annual Reports be public, including copies of contracts for greenhouse gas emissions reductions. No opposition to this petition was filed.

2. Background

On January 24, 2006, PG&E filed an application that asked the Commission for approval of a unique three-year voluntary program, the Climate Protection Program, aka ClimateSmart™, to give PG&E customers a means to reduce their personal carbon footprint. Participating customers would pay a premium, a Climate Protection Tariff (CPT), which PG&E would then use to fund new California-based projects to yield sufficient emissions reductions or sequester enough GHG to offset the aggregated customers' gas and electricity footprint. The CPT is fixed for participating customers through 2009. The program's Administrative and Marketing costs would be funded by all PG&E customers in order to allow 100% of the CPT premiums to be invested in greenhouse gas (GHG) reductions. PG&E initially intended to use customer premiums to fund contracts for forestry projects, but also intended to expand emission reduction projects into other areas, including manure management and landfill methane capture, as new protocols were developed.

¹ D.06-12-032 at 35, 52-53; Ordering Paragraph 14.

The Commission granted PG&E's application with modifications in D.06-12-032, issued on December 14, 2006. In the Decision the Commission said, "We agree...with PG&E's basic concept that as a demonstration project, the CPT should be small in scope and utilize regular reporting as a check on how the program is working and the reasonableness of its expenses. We also condition our approval of the application on several 'accountability' measures to ensure funding is spent wisely."²

Following a Request for Proposal (RFP) process, the first Verified Emission Reduction Purchase Agreements (VERPAs) were executed in 2008. PG&E did not raise the matter in connection with the 2007 Annual Report filed in March 2008. After the VERPAs were executed in 2008, PG&E submitted unredacted copies to Energy Division for review.³ On March 16, 2009, PG&E contemporaneously submitted for filing (i) the ClimateSmart™ Program 2008 Annual Report which included redacted versions of the two VERPAs in Appendix H, (ii) a Petition For Modification of Decision 06-12-032 (PFM), and (iii) a Motion For Leave to File Confidential Information Under Seal (Motion) which included a sealed, unredacted copy of each VERPA. PG&E later submitted "Additional Materials for Appendix H" which included the standard form VERPA used in the 2008 RFP solicitations.

The crux of PG&E's PFM and Motion is that after PG&E negotiated the VERPAs, it determined that "pricing and other key commercial terms" should not be included in its public annual reports because "such data could lead to

² D.06-12-032 at 13.

³ PFM at 3, fn. 1.

market manipulation and higher costs for PG&E's participating customers." (PFM at 1; Motion at 2.) We examine this claim below.

3. Petition for Modification

3.1. Timeliness

Rule 16.4 of the Commission's Rules of Practice and Procedure (Rules) governs a petition for modification of a Commission decision. A petition must be filed and served within one year of the effective date of the decision proposed to be modified, or if more than one year has elapsed, the petition must explain why it could not have been presented within one year. If the Commission determines a late submission is not justified, it may issue a summary denial on that ground alone.⁴ Here, PG&E submitted its PFM thirty-three months after the decision was issued. Therefore, it is untimely unless PG&E can establish just cause for why PG&E did not file it within a year of the issuance of the Decision.

PG&E offers four reasons for filing its PFM more than one year after the effective date of the Decision, each discussed separately here. First, PG&E argues that it did not face the issue of whether or not to publicly include pricing and other terms until it was time to file this year after the first contracts were executed in February 2008, the cut-off date for the first annual report. We are not persuaded by this argument because PG&E knew all along that it intended to enter into such contracts. The cornerstone of the ClimateSmart™ program was to make VERPA contracts with third parties for verified emissions reductions. PG&E's chief witness at hearing, Wendy Pulling, said that the program would be "transparent, with regular reporting to our customers, [and] regular reporting to

⁴ Rule 16.4(d).

the CPUC.”⁵ In addition, PG&E did not object to the language in the circulated Proposed Decision which set forth its reporting requirements, including clear instructions to include copies of any executed contracts. Neither the execution of fully anticipated contracts nor the requirement that the complete, unredacted contracts must be filed are a surprise and, thus, are no basis to justify a late filed PFM.

Second, PG&E argues that after four RFPs from vendors of GHG emissions reduction projects, it now discerns “increasing sophistication in the developing marketplace” resulting in potential sellers looking to “the behavior of others and the prices paid to others” when crafting their bids.⁶ This essentially reflects the same concern as PG&E’s third argument where it contends that market pressures are driving prices higher. The common thread through both arguments is that sellers have increasingly more information about other contracts and are bidding higher prices as a result. PG&E cites 2006-2007 industry data published in May 2008 that the “overall value of the carbon market has tripled and...average price for offsets has increased by 50%.”⁷ The same Report also said “a clear trend in 2007 was that customers are increasingly savvy about offsets and are getting more specific about the type of offset credits they want to purchase [emphasis added].”⁸ Regardless, PG&E seems to argue that as of March 2009, the balance of power in a VERPA transaction has tipped towards better-informed sellers who

⁵ D.06-12-032 at 34, citing Reporter’s Transcript Vol. I at 100.

⁶ PFM at 3-4.

⁷ PFM at 4, fn. 2, “Forging a Frontier: State of the Voluntary Carbon Markets 2008” (Report) a report by Ecosystem Marketplace & New Carbon Finance, May 2008.

⁸ Report at 66.

push pricing upwards and the disclosure of VERPA terms will accelerate the trend.

PG&E has largely offered bare statements to suggest that what was considered a nascent market for buying and selling carbon offsets just a few years ago is growing rapidly, with volatile prices, and contract terms being aggregated and published. The developing characteristics of the carbon offset market suggested in the PFM may be true. The increased ability of sellers to acquire information about price and other contract terms might lead to placing PG&E at an increasing disadvantage when bargaining on behalf of its customers.

On the other hand, these are not unexpected consequences for a growing market and program authorization was given conditioned on public disclosure of the entire Annual Report, including numerous specified components including the emissions reduction contracts. Furthermore, rates for participating ClimateSmart™ customers have been frozen during the three-year demonstration period, and are unaffected by the VERPA terms. PG&E offers no explanation as to why it did not anticipate growth and competition in the carbon offset market, and address the issue prior to the Decision. Instead, the participants and the Commission agreed to implement a transparent and limited trial run of the program precisely to examine and measure results for the benefit of future ratepayers, policies, and programs.

Lastly, PG&E states that it is considering whether to seek an extension of the ClimateSmart™ program after the three year demonstration period has concluded in 2009.⁹ Therefore, says PG&E, it is just now “faced with the

⁹ Application 09-05-016 filed May 18, 2009.

dilemma of releasing sensitive commercial data that could affect the price paid by future participants... .”¹⁰ We are not privy to PG&E’s internal analyses of the ClimateSmart™ program, or when the company determined it might wish to extend it. We do not know whether charges to participating customers would increase with such an extension or if PG&E’s shareholders may need to backstop excess VERPA costs over customer premiums. Nonetheless, we recognize it is possible that PG&E’s internal process is very recent and might have led to a decision to file this PFM long after the original Decision.

PG&E’s application for extension of the ClimateSmart™ program is a new application where the Commission may consider more thoroughly whether justification exists for allowing redactions to contract portions of any future required reports and we do not pre-judge that question here. Nonetheless, it is not wholly unreasonable to conclude that PG&E recently determined that disclosure of the 2008 VERPAs could adversely impact its bargaining position for ratepayers, or expose shareholders to additional costs, should the program be extended without limiting disclosure of VERPA information.

Based on the discussion above, we find that PG&E has made sufficient showing to establish cause to justify our consideration of this PFM filed more than one year after the issuance of the Decision. PG&E’s recent plan to seek an extension of the ClimateSmart™ program could reasonably lead to a belief that disclosure of contract terms might harm its participating ratepayers in the future

¹⁰ PFM at 4.

and a modification of the Decision was required. Therefore, we will accept the PFM and consider its merits.

3.2. Redaction of Contract Terms

PG&E petitions for an order allowing it to redact pricing and “other key commercial terms” from the VERPAs submitted with its ClimateSmart™ annual reports for 2008 and forward. No definition of “key commercial terms” is provided. However, a review of the redacted portions of the submitted VERPAs indicates PG&E means any term that deviates from the standard form contract.

PG&E argues that the proposed changes would be consistent with the Commission’s protection of certain electric procurement data approved in D.06-06-066 and non-disclosure would “not meaningfully diminish the objective of promoting openness and information exchange.”¹¹ Beginning with the 2008 report, PG&E specifically wants the Commission to authorize the following:

- PG&E will include – without redaction – the standard form purchase agreement(s) that PG&E uses for its GHG emission reduction contract negotiations.
- PG&E will provide copies of each individual purchase agreement executed with vendors, redacted only as to its price and key commercial terms.
- Concurrent with the filing of its annual reports, PG&E will provide unredacted copies of each individual vendor purchase agreement to the Commission’s Energy Division under the confidentiality provisions of Section 583 of the Public Utilities Code (or other applicable authority) and to nonmarket participants that sign a non-disclosure agreement consistent with the terms set forth in Decision 06-06-066.

¹¹ PFM at 5.

- PG&E will continue to provide aggregated data concerning the actual cost per ton of GHG emission reductions contracted for through the ClimateSmart™ program and the summarized results of solicitations.¹²

As required by Rule 16.4(b), PG&E attached Appendix A to its PFM that has proposed specific wording to carry out the requested modifications to the Decision.

Before we consider a request for confidentiality we first affirm our preference that information should be publicly disclosed and that any party seeking confidentiality bears a strong burden of proof. Next, we examine the Commission's basis for ordering disclosure of the contract information in the Decision, which PG&E now seeks to modify. We acknowledge PG&E's leadership in promoting a program whereby its customers can voluntarily participate in a program to offset their GHG emissions. It is an innovative idea that was approved as a three-year "demonstration program, intended to test the waters," determine the availability of GHG reduction contracts, and measure the willingness of customers to make extra payments for climate neutrality.¹³ The Commission saw the program as an important tool to educate the public and others about how such a program might work. This perspective provides the underpinning of the reporting requirements set forth in the Decision.

Requirements for Reporting and Information Sharing are set forth in Section XI of the Decision. It is clear the Commission intended broad public reporting of information about the program. "We are also aware of other utilities that may be planning GHG reduction programs, and there may be other

¹² PFM at 5.

persons or entities that wish to learn from PG&E's experience."¹⁴ Transparency and regular reporting were promised by PG&E which the Commission deemed important "especially [because] this is a new program with a number of uncertainties." PG&E is required to report annually and publicly on numerous identified aspects of the program, including a "description of GHG reduction contracts signed (with copies of each contract)."¹⁵ If not sufficiently clear, the Commission also stated, "[T]hese reports shall be publicly filed, without redaction....PG&E shall also make the reports available on its website."¹⁶ Removing any remaining doubt about the Commission's intention that all aspects of the Annual Report should be available to the public, it stated, "Third parties, as well as this Commission, may be interested in learning from PG&E's experiences. We therefore expect PG&E to make information about its program available to third parties (and Commission staff) who seek it, even outside the normal reporting period."¹⁷

Given the strong language establishing the public's interest in disclosure of all aspects of the program for the purpose of educating the Commission and others, PG&E must now show new and significant information when seeking to prevent disclosure of contract provisions explicitly ordered to be public in the Decision. In support of its proposal, PG&E analogizes the VERPAs to electric procurement contracts, particularly Renewable Portfolio Standards (RPS), that

¹³ D.06-12-032 at 12.

¹⁴ D.06-12-032 at 34.

¹⁵ D.06-12-032 at 35.

¹⁶ D.06-12-032 at 35.

¹⁷ D.06-12-032 at 36.

are given some protection from disclosure in D.06-06-066. It asks now for similar treatment of VERPAs. D.06-06-066 provides that for RPS contracts, contract summaries are public, including counterparty, resource type, location, capacity, expected deliveries, delivery point, length of contract, and online date; other terms are confidential for three years, or until one year following expiration, whichever comes first.¹⁸

PG&E offers the same argument used in D.06-06-066 that if pricing data for VERPAs is disclosed, those prices could set a floor above which all future contracts are made. However, the linkage alleged, that procurement of renewable resources and GHG reductions are both elements in its procurement strategy likely to be recovered from ratepayers in the future, is an unpersuasive analogy. The comparison ignores the wholly different purposes and ratepayer roles for the two types of contracts. Purchase of energy is the primary role of the utility and it is entitled to ratepayer recovery based on the costs of service. In contrast, PG&E's purchase of GHG emissions reductions is a one-of-a-kind demonstration program to gather information and is funded by voluntary payments from a small percentage of ratepayers.¹⁹ If revenues are insufficient to meet contractual commitments, PG&E must make up the difference without charging the difference to ratepayers.²⁰ Furthermore, not all elements of a procurement plan are treated as confidential by the Commission. The Commission has treated as public information other energy areas that focus on

¹⁸ D.06-06-066 at Appendix 1, p.17.

¹⁹ ClimateSmart™ Annual Report for 2008 at 1.

²⁰ D.06-12-032, Ordering Paragraph 10 at 51.

reducing energy demand and environmental harm, such as the energy efficiency and demand response programs.²¹

PG&E seeks modification as if the idea of protecting market sensitive information is new in relation to the carbon offset market. Yet, PG&E actively participated in the earlier Rulemaking²² that led to D.06-06-066, where the same issues of market sensitivity and confidentiality of contract terms were considered for electric procurement contracts. Thus, PG&E was well aware that in narrow circumstances, the Commission's concerns about market manipulation may prevail over transparency of certain contract terms. It could have and should have raised the issue prior to the Decision being adopted. PG&E did not explain why it was silent as to any concerns about disclosure of the contract terms during the original proceeding while it was promising transparency and full reporting. Nor did PG&E establish some new and significant fact that tips the balance away from the Commission's very strong emphasis on favoring disclosure for the limited trial program.

Additionally, we note that even under the market sensitivity standard recognized in D.06-06-066, the redactions are overbroad. Some redacted language appears in the standard form contract, and some language appears to be redacted for no apparent reason. For example, these bits are redacted: "[Term] is defined in Section 3.3," several uses of the phrase "as of the Effective date," reference to a public document, and even the name and mere contact information for the seller. The Commission determined in D.06-06-066 that not

²¹ D.06-06-066 at 3.

²² Rulemaking 05-06-040.

all procurement plan and related data are market sensitive, only a subset of such information meets this definition. To be shielded from public view, such information must have the potential to materially affect the market price. PG&E did not make any such showing of materiality as to any particular information which it redacted. It relied instead on broad and unsupported statements alleging comparability to electric procurement contracts and concern for higher prices in the future.

Therefore, PG&E has not met its burden to show new issues of fact or law that provide a basis to alter the Decision and permit filing redacted copies of the VERPAs with the 2008 ClimateSmart™ Annual Report or similar contracts in the future 2009 Annual Report.

4. Motion For Leave To File Confidential Material Under Seal

The Motion is made on the same grounds as the PFM. PG&E says it has determined that pricing and other “key commercial terms” in the VERPAs should not be included in its publicly filed annual reports because the data will lead to higher costs for customers. The same arguments are offered: that a VERPA is similar to an electric procurement contract, nondisclosure is consistent with D.06-06-066, and no public policy warrants disclosure beyond the standard form contract and redacted copies of actual contracts. The Motion asks the Commission to modify the Decision to allow it to file redacted copies of VERPAS with its annual reports.

A VERPA is not an electric procurement contract subject to D.06-06-066. The Commission inherently rejected such an analogy when it expressly stated that such contracts should be filed unredacted by PG&E along with its annual reports for the three-year duration of the authorized ClimateSmart™ program.

To suggest the Commission and PG&E merely overlooked the issue is unpersuasive, and there is insufficient information to indicate that a growth in the market was so unexpected as to create a new set of conditions justifying a Commission reversal or modification of the disclosure requirement.

The Motion is denied without prejudice to raise the argument in the new proceeding underway to consider PG&E's Application to Extend the ClimateSmart™ program.

5. Comments on Proposed Decision

The proposed decision of Administrative Law Judge (ALJ) Darling in this matter was mailed to the parties in accordance with Pub. Util. Code § 311(g)(1) and Rule 14.3 of the Commission's Rules of Practice and Procedure. PG&E timely filed Comments on July 20, 2009 which instead requested confidentiality for "pricing information" only, but also would permit PG&E to seek by advice letter the confidentiality sought in this petition for other contract terms based on the same arguments rejected here. No changes were made in response to the Comments.

6. Assignment of Proceeding

Dian Gruenich is the assigned Commissioner and Melanie M. Darling is the assigned Administrative Law Judge in this proceeding.

Findings of Fact

1. The Decision requires Pacific Gas and Electric Company to include copies of its executed contracts for emission reductions when it files its annual reports with the Commission.
2. PG&E introduced no new facts that would cause us to alter the Decision.

3. PG&E has made a sufficient showing to establish cause to justify consideration of this PFM filed more than one year after the issuance of the Decision.

Conclusions of Law

1. D.06-12-032 should not be modified.
2. Copies of emissions reductions contracts executed by PG&E as part of its ClimateSmart™ program can not be filed under seal when submitted as part of the ClimateSmart™ annual reports filed with the Commission.

O R D E R

IT IS ORDERED that:

1. It is ordered that Pacific Gas and Electric Company's March 16, 2009 Petition for Modification of Decision 06-12-032 is denied.
2. Pacific Gas and Electric Company's March 16, 2009 motion for leave to file confidential material under seal is denied, without prejudice to Pacific Gas and Electric Company raising this issue in Application 09-05-016.
3. Application 06-01-012 is closed.

This order is effective today.

Dated August 20, 2009, at San Francisco, California.

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