

Decision 10-12-063

December 16, 2010

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application of Pacific Gas and Electric Company for Approval of Agreements Related to the Novation of the California Department of Water Resources Agreement with GWF Energy LLC, Power Purchase Agreement with GWF Energy II LLC, and Associated Cost Recovery (U39E).

Application 09-10-022
(Filed October 16, 2009)

And Related Matter.

Application 09-10-034
(Filed October 30, 2009)

**ORDER DENYING REHEARING
OF DECISION (D.) 10-07-042**

I. INTRODUCTION

In this Order, we dispose of the application for rehearing of Decision (D.) 10-07-042 (“Decision”) filed by CALifornians for Renewable Energy, Inc. (“CARE”).

In D.10-07-042, we evaluated Pacific Gas and Electric Company’s (“PG&E’s”) application for approval of three transactions which would novate existing power purchase agreements (“PPAs”) with the Department of Water Resources (“DWR”) to PG&E, and then replace the novated agreements with new long-term PPAs. Together, the proposed PPAs would procure 1,090 megawatts (“MW”) of fossil-fuel capacity, including 254 MW of new capacity.

The Decision approved one transaction, the Peakers Transaction under which PG&E will procure 502 MW of capacity, energy, and ancillary services from existing facilities through 2017, and 325 MW through 2021. However, the Decision held that PG&E could only move to seek approval of the Tracy and/or the Los Esteros Critical

Energy Facility (“LECEF”) Transaction if future conditions occur that create an unfilled need for the new capacity authorized by the Commission’s 2006 Long-Term Procurement Plan decision (“*2006 LTPP Decision*”).¹

CARE filed a timely application for rehearing challenging the Decision on the grounds that: (1) Commission approval of the proposed PPAs is preempted by the Federal Energy Regulatory Commission’s (“FERC”) jurisdiction over wholesale rates; (2) approval of the proposed PPAs conflicts with the *2006 LTPP Decision* and Senate Bill (“SB”) 695; (3) the Tracy and LECEF Transactions are a bad deal for ratepayers; (4) PG&E’s Solar Photovoltaic (“PV”) Program should count against the amount of new capacity authorized in the *2006 LTPP Decision*; and (5) CARE was denied adequate due process. Responses were filed by PG&E and Calpine Corporation (“Calpine”).

We have carefully considered the arguments raised in the application for rehearing, and are of the opinion that good cause has not been established to grant rehearing. Accordingly, we deny the application for rehearing of D.10-07-042, because no legal error has been shown.

II. DISCUSSION

A. Commission Approval of PPAs Does Not Interfere With FERC Wholesale Rate Authority

CARE contends the Decision is unlawful because any approval of the proposed PPAs is preempted by FERC’s jurisdictional authority over wholesale rates. (Rhg. App., at pp. 1-2.)

Although the Federal Power Act (“FPA”) vests FERC with jurisdiction over wholesale rates, that does not result in preemption of State authority to approve utility procurement contracts such as the PPAs at issue here. For example, as evidenced by cases such as *New York v. FERC* (2002) 535 U.S. 1, 24, the FPA preserves State

¹ *Order Instituting Rulemaking to Integrate Procurement Policies and Consider Long-Term Procurement Plans (“2006 LTPP Decision”)* [D.07-12-052] __ Cal.P.U.C.2d __ .

regulation of local service issues such as integrated resource planning, generation, distribution, retail sales and the utilities providing distribution and retail services.

Consistent with this authority, and as required by Public Utilities Code section 454.5,² the Commission reviews and approves utility procurement plans.³ These approvals include proposed procurement PPAs to serve retail customers. CARE does not address these authorities, and instead, bases its allegation on the premise that Commission approval of the PPAs is preempted by the FERC's determination in *California Public Utilities Commission et al.* (“*CPUC et al.*”) (2010) 132 FERC ¶ 61,047, *request for clarification granted*, 133 FERC ¶ 61,059 (2010).

CPUC et al. involved FERC review of Commission decisions implementing Assembly Bill (“AB”)1613 (Stats. 2007, ch. 713.), which requires regulated electrical corporations to offer to purchase, at prices set by the Commission, electricity generated by certain Combined Heat and Power (“CHP”) systems with a generating capacity of 20 MW or less. *CPUC et al.* is inapplicable because the procurement PPAs in this proceeding have nothing to do with AB 1613, the Feed-In Tariff Program, or CHP systems.⁴

In addition, FERC clearly recognized that if a generator is not a Qualifying Facility, federal authority does not preempt CPUC orders regarding contracts between utilities and generators as long as the Commission has not set the wholesale rate. (*CPUC et al., supra*, 132 FERC ¶ 61,047, at P 69.) Our Decision does nothing to set or alter a wholesale rate. The Decision merely approved and/or denied proposed retail procurement options. FERC has consistently found that State commissions may lawfully approve retail utility generation and procurement decisions.⁵

² All subsequent section references are to the Public Utilities Code, unless specifically stated.

³ In particular, see Pub. Util. Code, § 454.5, subs. (c) & (d).

⁴ CARE also raises issues of sovereign immunity related to the AB 1613 litigation in FERC Docket No. EL10-84-000. Those issues do not have relevance here. Thus, we do not address them in today's decision.

⁵ See e.g., *Central Vermont Public Service Corporation* (1998) 84 FERC ¶ 61,194, at P 61,975;
(continued on next page)

B. The Decision Is Not Inconsistent With The 2006 LTPP Decision

CARE asserts the Decision erred because it resulted in PG&E relitigating the amount of new capacity that was authorized in the *2006 LTPP Decision*. In particular, CARE argues that the 254 MW of new capacity associated with the proposed Tracy and LECEF Upgrade Projects would exceed the prior capacity cap and should be rejected. (Rhg. App., at pp. 5-7.)

The *2006 LTPP Decision* authorized PG&E to seek 800-1,200 MW (now 1,112 to 1,512 MW) of new capacity by 2015 to meet its estimated electric energy demand.⁶ Contrary to CARE's assertion, nothing in the Decision relitigated that determination. CARE disregards that we clearly stated:

We emphasize that today's decision does not revisit the Commission's determination in D.07-12-052 [the *2006 LTPP Decision*] that PG&E has a need for 800 MW to 1,200 MW (now 1,112 MW to 1,512 MW) of new capacity by 2015. (D.10-07-042, at p. 47.)⁷

CARE also fails to acknowledge that the Decision did not immediately approve the Upgrade Projects. Rather, we held that PG&E could only pursue the Tracy and LECEF Projects if other proposed PPAs were denied, or if other future events create an unfilled need for new capacity. (D.10-07-042, at pp. 38, 69-70 [Ordering Paragraph Numbers 2, 3 & 5].)

Next, CARE suggests the Decision is unlawful in light of litigation involving the reasonableness and validity of contracts approved by FERC. (Rhg. App., at

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Ameren Energy Marketing Company (2001) 96 FERC ¶ 61,306, at P 62,189.

⁶ *2006 LTPP Decision* [D.07-12-052], *supra*, at p. 291 [Conclusion of Law Number 7], & p. 300 [Ordering Paragraph Number 4] (slip op.).

⁷ See also D.10-07-042, at pp. 40, 48.

p. 6, relying on *Morgan Stanley Capital Group, Inc. v. Public Utility District No. 1 of Snohomish County* (“*Morgan Stanley*”) (2008) 128 S.Ct. 2733.)

Morgan Stanley involved FERC review of wholesale electric rates under negotiated contracts between certain commercial sellers and buyers of electricity. In determining whether the proposed wholesale rates are “just and reasonable,” FERC applied the “Mobile-Sierra” presumption, i.e., that rates under freely negotiated contracts are presumed to be “just and reasonable.” The buyers later argued the presumption was wrongly applied. In that instance, the Court remanded the case back to FERC for further evaluation.

Morgan Stanley has no bearing on the Decision at issue here. Whether or not the contracts in *Morgan Stanley* were reasonable is confined to the specific contracts at issue during the time period involved. CARE offers no facts or argument to establish any relationship or similarity between the contracts at issue there and the PPAs proposed in this proceeding.⁸

Finally, CARE argues that approval of the PPAs is unnecessary because SB 695 eliminated the requirement to novate DWR contracts. (Rhg. App., at p. 7.)

Among other things, SB 695 (Stats. 2009, ch. 337.) amended Section 80110 of the Water Code, which suspended Direct Access (“DA”) until DWR no longer supplied power. SB 695 eliminated that suspension subject to certain limits. The Water Code and SB 695 are silent on the issue of novation. CARE’s argument is simply based on a view that since DA may now proceed regardless of whether DWR retains contracts to supply power, we should no longer proceed to novate them. Regardless of this view, it is not unlawful to do so. And CARE ignores our findings that as a matter of policy, it is

⁸ CARE’s argument also appears linked to an assumption that in approving proposed PPAs, the Commission approves the underlying DWR contracts to be novated. That is incorrect. (See *Rulemaking Regarding Whether, or Subject to What Conditions, the Suspension of Direct Access may be Lifted Consistent with Assembly Bill 1X and Decision 01-09-060* (“*DA Suspension Decision*”) [D.08-11-056] (2008) __ Cal.P.U.C.3d __, at p. 9, rehearing denied by *Rulemaking Regarding Whether, or Subject to What Conditions, the Suspension of Direct Access may be Lifted Consistent with Assembly Bill 1X and Decision 01-09-060* (“*Rehearing Order*”) [D.09-08-031] (2009) __ Cal.P.U.C.3d __ .)

in the public interest to complete the phase out of DWR as a supplier of power to public utility customers.²

C. The Commission Reasonably Concluded That The Tracy And LECEF Transactions Could Be Worthy Procurement Options

CARE contends the Decision erred because the proposed Tracy and LECEF Projects (in particular the associated Upgrade Projects) are not a good deal for ratepayers, and thus not “just and reasonable.” (Rhg. App., at pp. 8-9.)

In reviewing proposed PPAs, we consider several factors in determining whether a transaction is “just and reasonable” as required by section 451. These typically include: (1) whether the PPA is reasonable based on relevant market and/or other conditions; (2) whether the PPA is at least as beneficial as the existing DWR contract; and (3) whether the PPA is consistent with the long-term procurement criteria pursuant to section 454.5. (D.10-07-042, at pp. 37-38.)

In addition, we consider whether the PPA will satisfy the goal to complete the novation of DWR contracts; improve fuel efficiency; lower emissions; fit with greenhouse gas reduction strategies; meet Emissions Performance Standards; utilize brownfield sites; meet resource adequacy goals; provide operating resources; and act as a dispatchable ramping resource to back up renewable resources. (See e.g., D.10-07-042, at pp. 14-19.)

CARE offers no arguments or facts to refute the Decision’s findings that the challenged PPAs satisfy a number of the established criteria. For example, CARE did not address the Commission’s determination that the PPAs would accomplish novation of DWR contracts; improve fuel efficiency; further brownfield development; lower emissions; meet the Emissions Performance Standard; and further greenhouse gas reduction strategies. (D.10-07-042, at pp. 53, 58.)

² *DA Suspension Decision* [D.08-11-056], *supra*, at pp. 1-2, 6-8 (slip op.).

Instead, CARE argues that other bids received as part of PG&E's 2008 long-term request for offers ("LTRFO") would provide a better market value. Our Decision acknowledged that the Tracy and LECEF transactions were not the winning bids in PG&E's 2008 LTRFO. At the same time, CARE ignores that they were the next best offers after the Mariposa, Marsh Landing, and Oakley Projects. (D.10-07-042, at p. 39.) Thus, it was still accurate to conclude that they would provide the next best value, and would then be the only available alternatives for PG&E and its customers. (D.10-07-042, at pp. 38, 57-58.) For those reasons, it was reasonable to state that circumstances could justify reconsideration of the Tracy and LECEF transactions.

D. Solar PV MW Do Not Count Against The Amount Of New Capacity Authorized As Part Of LTPP Approval

CARE contends the Decision erred because we failed to apply 500 MW of generation approved under PG&E's Solar PV Program against the new capacity authorized by the *2006 LTPP Decision*. CARE argues that doing so would reduce the need for some of the capacity to be provided by the PPAs proposed in this proceeding. (Rhg. App., at p. 9.)

CARE's argument is flawed because generation resources such as Solar PV are already taken into account when the Commission determines the amount of new capacity that should be authorized in the LTPP proceedings. As indicated in the *2006 LTPP Decision*, when setting the amount of new capacity to be authorized, the Commission factors in the amount of estimated procurement to come from renewable and other energy generation sources.¹⁰ The purpose of the LTPP determination is to establish the amount of additional conventional generation, such as fossil fuel generation, that the utilities should be allowed to procure to meet their energy demand needs.¹¹

Consistent with this purpose, our Decision reiterated that any new capacity to be authorized must come from:

¹⁰ *2006 LTPP Decision* [D.07-12-052], *supra*, at pp. 4-12, 75 (slip op.).

¹¹ *Id.* at pp. 4-12 (slip op.).

...dispatchable ramping resources that can be adjusted for the morning an evening ramps created by the intermittent types of renewable resources.

(D.10-07-042, at pp. 106, 277 [Finding of Fact Number 43].)

Renewable resources such as Solar PV are considered intermittent resources, capable of providing their primary generation capacity mainly during certain portions of the day when the sun or wind tends to be strongest. They can not be counted against the capacity authorized in the *2006 LTPP Decision* because they are not dispatchable and do not have ramping capability.

E. CARE Was Afforded Adequate Due Process

CARE contends it was denied adequate due process because it was not afforded an opportunity to comment on “substantial” modifications made to the Proposed Decision before the Commission adopted and issued its Final Decision. (Rhg. App., at p. 10.)

Due process requirements apply to require the Commission to provide parties adequate notice and opportunity to be heard.¹² CARE's assertions fails to establish it was denied adequate due process here. For example, the various pleadings CARE filed in this proceeding demonstrate that CARE was afforded, and exercised, the opportunity to be heard.¹³

In addition we complied with the relevant rules regarding affording parties the opportunity to comment on Commission decisions. Rule 14.3 of the Commission's Rules of Practice and Procedure require that parties be afforded the opportunity to comment on proposed or alternate decisions.¹⁴ Here, the Proposed Decision was issued

¹² See U.S. Const., 14th Amend., Cal. Const., art. 1, § 7. See also *People v. Western Airlines* (1954) 42 Cal.2d 621, 632.

¹³ See e.g., CARE Opening Brief, dated Feb. 5, 2010.

¹⁴ Cal. Code of Regs., tit. 20, § 14.3. See also Pub. Util. Code, § 311, subs. (d), (e), (g).

on April 20, 2010.¹⁵ Consistent with Rule 14.3, parties were afforded the opportunity to comment in opening comments due May 10, 2010, and reply comments due May 17, 2010. (D.10-07-042, at p. 64.)¹⁶ We note that CARE simply choose not to exercise that opportunity. It filed no opening or reply comments on the Proposed Decision.

Further, it is lawful for the Commission to modify a Proposed Decision based on comments on a Proposed Decision, and then consider those modifications without further comment at the time the Commission issues a Final Decision. Specifically, section 311 provides:

The commission may, in issuing its decision, adopt, modify, or set aside the proposed decision or any part of the decision.

(Pub. Util. Code, § 311, subd. (d).)

In addition, Rule 14.1 states:

A substantive revision to a proposed decision or draft resolution is not an “alternate” [subject to comment] if the revision does no more than make changes suggested in prior comments on the proposed decision or draft resolution, or in a prior alternate to the proposed decision or draft resolution.

(Cal. Code of Regs., tit. 20, § 14.1.)¹⁷

No statute or Rule requires that we provide an additional opportunity for comment after modifications are made to a proposed decision.

¹⁵ Proposed Decision of ALJ Kenney in *Application of Pacific Gas and Electric Company for Approval of Agreements Related to the Novation of the California Department of Water Resources Agreement with GWF Energy LLC, Power Purchase Agreement with GWF Energy II LLC, and Associated Cost Recovery, and related matter*, dated April 4, 2010.

¹⁶ See also Proposed Decision of ALJ Kenney, at p. 59, Section 9.

¹⁷ The Commission website also provides information to the public regarding “Understanding Proceeding Milestones”, located at: <http://docs.cpuc.ca.gov/word/pdf/Report/117477.pdf>. The milestones reflect that the relevant order of events is issuance of the proposed decision, opening and reply comments by parties, then consideration of the proposed decision, as modified by comments and replies, by the Commission at its public business meeting. The milestones afford no additional opportunity to comment on the modifications.

III. CONCLUSION

For the reasons stated above, the application for rehearing of D.10-07-042 is denied because no legal error has been shown.

Therefore, **IT IS ORDERED** that:

1. The application for rehearing of D.10-07-042 is denied.
2. The underlying proceedings, A.09-10-022 and A.09-10-034, are closed.

This order is effective today.

Dated December 16, 2010, at San Francisco, California.

MICHAEL R. PEEVEY
President

DIAN M. GRUENEICH

JOHN A. BOHN

TIMOTHY ALAN SIMON

NANCY E. RYAN

Commissioners