Date of Issuance
December 20, 2010

Decision 10-12-064 December 16, 2010

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application of Pacific Gas and Electric Company for Expedited Approval of the Amended Power Purchase Agreement for the Russell City Energy Company Project. (U39E)	Application 08-09-007 (Filed September 10, 2008)

ORDER MODIFYING DECISION (D.) 10-09-004 TO CORRECT A CLERICAL ERROR, AND DENYING REHEARING OF DECISION, AS MODIFIED.

I. INTRODUCTION

In today's decision, we address the application for rehearing of Decision (D.) 10-09-004 (or "Decision") issued in Application (A.) 08-09-007. This proceeding involves a purchase power agreement between Pacific Gas and Electric Company ("PG&E") and Russell City Energy Company, LLC ("RCEC"), and subsequent amendments of this original power agreement

In Decision (D.) 06-11-048,[1] the Commission approved this power purchase agreement ("Original PPA") as part of Pacific Gas and Electric Company's 2004 Long-Term Procurement Plan ("LTPP").

Subsequently, PG&E filed for approval of an amendment of the Original PPA with RCEC. During the proceeding PG&E, RCEC, the Division of Ratepayer Advocates ("DRA"), California Unions for Reliable Energy ("CURE"), and The Utility Reform Network ("TURN") (collectively, "Joint Parties") entered into a settlement. Pursuant to this settlement, these parties sought approval of an amendment to the Original

[1] *Opinion Approving Results of Long-Term Request for Offers* ("*Order Approving LTRFO Results*") [D.06-11-048, pp. 6-7 (slip op.)] (2006) ___ Cal.P.U.C.3d ___.

PPA. This amendment was called the Second Amended Power Purchase Agreement ("2nd APPA"). In D.09-04-010,[2] the Commission approved the settlement, and thus, the 2nd APPA. This decision was modified and affirmed in D.10-02-033,[3] which is the order disposing of the rehearing applications of D.09-04-010.

On June 22, 2009, Group Petitioners filed a petition for modification of D.09-04-010.[4] In their petition, they asserted that D.09-04-010 needed to be modified. Specifically, they sought the reversal of the Commission's approval of the 2nd APPA based on the claim that RCEC was allegedly already in default and would not be able to meet RCEC's contractual obligations because of various claimed delays related to issuance of the Final Prevention of Significant Deterioration ("PSD") permit by the Bay Area Air Quality Management District ("BAAQMD").

On April 15, 2010, the Joint Parties filed a petition for modification of D.09-04-010, as modified by D.10-02-033. They sought approval of "limited modifications" to the 2nd APPA, and the addition of language to implement the cost recovery mechanism recently adopted by the Legislature in Senate Bill ("SB") 695 (Stats. 2009, ch. 337.) On June 10, 2010, the Joint Parties filed a motion to withdraw the SB 695 issue from their petition for modification.

In D.10-09-004, we disposed of petitions for modification filed by Group Petitioners and Joint Parties. We denied the Group Petitioners' petition as being speculative, but granted Joint Parties' petition to amend the 2nd APPA. The amendments to the 2nd APPA are referred to as "1st Amendment to the 2nd APPA."

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[2] *Application of Pacific Gas and Electric Company for Expedited Approval of the Amended Power Purchase Agreement for the Russell City Energy Company Project* ("*2nd APPA Decision*") [D.09-04-010] (2009) ___ Cal.P.U.C.3d ____.

[3] *Order Modifying Decision (D.) 09-04-010 for Purposes of Clarification, and Denying Rehearing of the Decision, As Modified* [D.10-02-033] (2010) ___ Cal.P.U.C.3d ____, as corrected by D.10-12-019, issued December 6, 2010.

[4] Group Petitioners are comprised of the California Pilots Association, Skywest Townhouse Homeowners Association, and Hayward Planning Association.

Californians for Renewable Energy, Inc. ("CARE") timely filed an application for rehearing of D.10-09-004. In its rehearing application, CARE alleges the following: (1) the jurisdictional authority of the Federal Energy Regulatory Commission ("FERC") over whole sale rates and 132 F.E.R.C. ¶ 61,047 preclude the Commission from approving the amended contract; (2) the Commission erred in finding Group Petitioners' argument that PSD permit and default date issues were speculative; (3) the decision incorrectly states that the "PSD permit has now been issued" and erroneously concludes the matter is now moot; (4) the decision to not give weight to CARE's substantive comments in its reply comments constitutes an abuse of discretion; (5) the terms and conditions of the amended agreement are not just and reasonable based on the record evidence; and (6) the RCEC project is not suited to backup renewable generation, and the record does not contradict this position. CARE also filed a related motion for leave to file confidential documents under seal.[5]

Joint Parties filed a response to CARE's application for rehearing. They argue that the rehearing application has no merit.

We have review each and every allegation of error set forth in CARE's application for rehearing of D.10-09-004. We find that there is no good cause for granting rehearing. Accordingly, CARE's rehearing application is denied.

II. DISCUSSION

A. Neither FERC's jurisdiction over wholesale rates nor FERC's decision in 132 F.E.R.C. ¶ 61,047 precludes the Commission from approving the amended contract.

In its rehearing application CARE asserts that FERC's wholesale rate authority and its decision in 132 F.E.R.C. ¶61,047 precludes the Commission approval of the amended contract. (Rehrg. App., pp. 5-6.) This argument is without merit.

[5] CARE filed a public version of its application for rehearing, and filed at the same time this motion for permission to file a confidential version of this rehearing application. This motion is granted. It should be noted that citations to the rehearing application in this order is only to the public version.

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 or any amendment to a PPA 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 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,[6] the Commission reviews and approves utility procurement plans.[7] 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, *California Public Utilities Commission; Southern California Edison Company, Pacific Gas and Electric Company, San Diego Gas & Electric Company*, (2010) 133 FERC ¶ 61,059.

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.[8]

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[6] All subsequent section references are to the Public Utilities Code, unless otherwise specified.

[7] In particular, see Pub. Util. Code, § 454.5, subds. (c) & (d).

[8] 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.

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 is as long as the Commission has not set the wholesale rate. (*CPUC et al., supra,* 132 FERC ¶ 61,047, at P 69.)

D.10-09-004 does nothing to set or alter any wholesale rate. Based on the record, the Decision merely approved the amendment of a PPA as being in the public interest for the retail customers of the IOU. FERC has consistently found that State commissions may lawfully approve retail utility generation and procurement decisions.[9] Accordingly, CARE's assertion lacks merit.

B. The Commission properly concluded that Group Petitioners' permitting delay claim was speculative.

In the Decision, we rejected Group Petitioners' request to find that because the PSD had not been issued before September 1, 2009, the 2nd APPA was no longer feasible or operative. (D.10-09-004, p. 16.) Specifically, we stated: "This request is speculative, exceeds the scope of the Commission's review in this proceeding, and is now moot. . . ." (D.10-09-004, p. 16.)

CARE takes issue with our use of the term "speculative." CARE claims that it is a fact that RCEC did not receive its PSD permit before September 1, 2009, and thus, there was a default. Accordingly, CARE claims that we erred when we stated that this fact was speculative. (Rehrg. App., p. 6.) CARE's claim has no merit.

CARE misreads how the term "speculative" is used. The term obviously is not used for the fact that there has been a permitting delay past September 1, 2009. Rather the term is used in response to the alleged default claimed by Group Petitioners. There is no evidence in the record to support claimed default, and CARE points to none. Thus, the claim was based on speculation, and contradicted by the fact that "[t]he parties

[9] See e.g., See e.g., *Southern California Edison Company* et al. (1995) 70 FERC ¶ 61,215, at P 61,676; *Central Vermont Public Service Corporation* (1998) 84 FERC ¶ 61,194, at P 61,975; *Ameren Energy Marketing Company* (2001) 96 FERC ¶ 61,306, at P 62,189.

to the contract have not claimed any default, nor asked the Commission to determine such." (D.10-09-004, p. 16.) Therefore, we gave no weight to the claimed default in our determination of "whether the proposed changes to the previous approved 2nd APPA [were] reasonable and in the public interest." (D.10-09-004, p. 16.)

Accordingly, CARE's claim that we have erred by using the term "speculative" is without merit.

C. The Decision did not err when it stated that the "PSD permit has now been issued" and concluded that the matter was "now moot."

In the Decision, we noted that the issue of the BAAQMD's delay in issuing the PSD permit was "now moot." (D.10-09-004, p. 16.) We also stated:

> "Moreover, even if the PSD permit had not yet been issued, and the parties' contingent rights upon occurrence of certain events were found to be substantially relevant, the matter is now moot. The permit has been issued as of February 3, 2010 with an effective date of March 22, 2010. [Footnote omitted.]

(D.10-09-004, p. 9.) Further, the Commission observed: "The Final PSD permit has been issued and the expected delivery date is in sight, assuming the pending permit appeals are promptly resolved." (D.10-09-004, p. 19.)

In its rehearing application, CARE argues that we erred in determining that the PSD permit had been issued and that the matter was moot.[10] (Rehrg. App., pp. 7-8.) This argument has no merit.

[10] In its rehearing application, CARE calls this error intentionally and accuses the Commission of being involved in an unlawful conspiracy with the BASQMD, the United States Environmental Protection Agency ("EPA") and the City of Hayward for allowing RCEC "to commence construction without a District approved Authority to Construct (ATC) permit and PSD permit."(Rehrg. App., p. 8.) The allegation lacks details and is unsubstantiated. In fact, the Commission has not authorized any construction to commence in the absent of RCEC receiving the required permits. Thus, the accusation can not be addressed as a valid argument of legal error. Accordingly, the allegation is rejected.

BAAQMD issued its final Prevention of Significant Deterioration ("PSD") for the Russell City project on February 3, 2010. In this PSD, BAAQMD noted that the effective date was March 22, 2010, unless a petition for review (appeal) was filed with the EPA's Environmental Appeals Board ("EAB") by that date pursuant to 40 C.F.R.§124.19.[11]. (See BAAQMD's PSD for RCEC Facility, p. 1.)

The statements regarding the PSD permit that CARE claims are in error are based on the facts set forth in the BAAQMD's PSD for the Russell City Project, issued February 3, 2010. Thus, CARE's claim lacks merit.

Moreover, the issuance of the PSD permit supports the Decision's conclusion that with the issuance of the permit, "the expected delivery date [was] in sight, with the assumption that the permit appeals would be promptly resolved. (D.10-09-007, p. 19.) The issuance of the PSD also logically made the permitting delay issue mooted, as the Decision correctly noted. Accordingly, based on the record, we reasonably determined that the Russell City project remained viable despite the delay in permitting, despite the permitting delay, and lawfully approved the 1st Amendment to the 2nd APPA.

We note in terms of the appeals of the BAAQMD's PSD permit, twelve petitions for review were filed at the EAB. Seven were dismissed on timeliness grounds. The remaining five petitions for review were filed by California Pilots Association, the Chabot-Las Positas Community College District, Citizens Against Pollution, Robert Sarvey, and CARE/Rob Simpson. On November 18, 2010, the EAB issued an order denying these remaining petitions. (*In Re Russell City Energy Center, LLC* (PSD Permit No. 15487) -- Order Denying Review (November 18, 2010) 15 E.A.D. ___ (slip op.), 2010 EPA App. LEXIS 45.)[12] This denial constituted final agency action. (40 C.F.R. §124.19, subd. (c).)

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[11] See 40 C.F.R.§124.16(a)(1), which provides: "If the appeal involves a new facility, . . . , the permit applicant will be without a permit pending final agency action and may not proceed under the permit during that time period." See also, 40 C.F.R. §124.19(f)(1), providing: "If review of the permit is denied, the permit will become effective."

[12] As of the date of today decision, there is a pending petition for reconsideration, filed by the

(*footnote continued on the next page*)

D. The Commission correctly concluded that to the extent CARE's reply comments exceed the scope under Rule 14.3, and thus, properly gave no consideration of these comments in its determination to approve the 1st Amendment to the 2nd APPA.

In D.10-09-004, we determined that CARE's reply comments went beyond the scope permitted by Rule 14.3 of the Commission Rules of Practice and Procedure.[13] (D.19-09-004, p. 20.) Thus, "[t]o the extent the reply comments exceed this scope," we gave those comments "no weight." (D.10-09-004, p. 20.)[14] By giving it "no weight," we properly did not consider the discussion that went beyond the scope of what was permitted by Rule 14.3.

In its rehearing application, CARE takes issues with this determination. Specifically, CARE asserts that the Commission was legally required to give weight to the substantive comments it made in its reply comments. (Rehrg. App., p. 8.) We disagree.

Rule 14.3(c) provides that reply comments "shall be limited to identifying misrepresnentations of law, fact or condition of the record contained in the comments of other parties. (Cal. Code of Regs., tit. 20, §14.3, subd. c.)

Joint Parties were the only parties that filed opening comments on the proposed decision. The substance of their comments consisted of merely support for the proposed decision and a request that the Commission adopt it as written. (See Joint Opening Comments of Joint Parties on Proposed Decision, filed August 9, 2010, p. 2.)

(*footnote continued from the previous page*)

Chabot-Las Positas Community College District on November 29, 2010, and subsequently supplemented on December 1, 2010. (*In Re Russell City Energy Center, LLC* (PSD Permit No. 15487) -- Order Establishing Deadline for Filing Responses to Motions for Reconsideration and/or Clarification and Stay**,** filed December 3, 2010.)

[13] Subsequent reference to "rule" is to the Commission's Rules of Practice and Procedure, unless otherwise specified.

[14] D.10-09-004 makes reference to Rule 14.3(a) instead of Rule 14.3(c). The latter rule discusses the scope of reply comments. Thus, D.10-09-004 will be modified to correct this minor clerical error.

Instead of responding to the Joint Parties' opening comments, CARE took the opportunity to litigate its position on several issues regarding the Joint Parties' petition for modification. (See generally, CARE's Reply Comments on the Proposed Decision, filed August 13, 2010, pp. 2-5 [public version].) These reply comments look more like opening comments, and arguments that CARE should have made in a response to Joint Petitioners' petition for modification.[15] However, CARE filed no responses to this petition for modification.

Therefore, consistent with Rule 14.3, we correctly concluded that CARE's reply comments went beyond the scope of what was permitted, and lawfully gave these comments "no weight" in terms of deciding whether changes were required before the issuance of D.10-09-004.

E. CARE'S just and reasonable arguments should be rejected.

In its rehearing application, CARE raises an issue of whether the 1st Amendment to the 2nd APPA is just and reasonable, based on the record evidence. (Rehrg. App., pp. 8-11.) One part of this argument appears to be an attempt to relitigate the Commission's previous determination of need for the RCEC project. (Rehrg. App., p. 9.) The other part of CARE's just and reasonable argument is an attempt to ask the Commission to reweigh the evidence in its favor. (Rehrg. App., pp. 9-11.) For the reasons discussed below, CARE's just and reasonable argument should be rejected.

1. CARE's argument calling for a relitigation of the need for the Russell City project is impermissible.

In its rehearing application, CARE asserts that "the need for [RCEC project] has not been demonstrated." (Rehrg. App., p. 9.) In D.10-09-004, we declined

[15] In its reply comments, CARE raises issues of whether the terms and conditions of the amended PPA was just and reasonable (as compared to bids in PG&E's 2008 LTRFO), whether the Russell City project was suited to backup renewable generation, and whether outstanding permitting delays would make the project not viable. (See CARE's Reply Comments on the Proposed Decision, filed August 13, 2010, pp. 2-5.)

to revisit the issue of need because it was beyond the scope of our review of whether to approve the 1st Amendment to the 2nd APPA. (D.10-09-004, p. 19.)

Because the determination of need had been decided in previous decisions, CARE's assertion constitutes an impermissible collateral attack. In D.04-12-048, the Commission approved PG&E's long-term procurement plan ("LTPP") involving 2200 MW.[16] In D.06-11-048, the Commission approved PG&E's results of the utility's 2004 LTRFO. This decision also approved PG&E's resulting projects, including the Original PPA with RCEC.[17]

Thus, in raising the issue of need for the RCEC project in its rehearing application, CARE is essentially attempt to relitigate, and thus, impermissibly collaterally attack the previous Commission determinations on need. These determinations are final and not subject to collateral attack. (See *People v. Western Air Lines, Inc.* (1954) 42 Cal.2d 621, 630; see also, Pub. Util. Code, §1709, which provides: "In all collateral actions or proceedings, the orders and decisions of the commission which have become final shall be conclusive.") Thus, CARE's just and reasonable argument that involves a relitigation of the need for the Russell City project is rejected.

2. CARE's attempt to relitigate the approval of the 1st Amendment to the 2nd APPA is rejected.

CARE argues that the record it cites in the application for rehearing supports its position that the 1st Amendment to the 2nd APPA should not have been approved. (Rehrg. App., pp. 9-11.) CARE's argument constitutes no more than asking

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[16] *Opinion Adopting Pacific Gas and Electric Company, Southern California Edison Company and San Diego Gas & Electric Company's Long-Term Procurement Plans* ("*Utilities' LTPP Decision*") [D.04-12-048] (2004)) ____ Cal.P.U.C.3d ___.

[17] *Opinion Approving Results of Long-Term Request for Offers* ("*Order Approving LTRFO Results*") [D.06-11-048, pp. 6-7 (slip op.)] (2006) ___ Cal.P.U.C.3d ___. See also, *Order Modifying Decision (D.) 09-04-010 for Purposes of Clarification, and Denying Rehearing of the Decision, As Modified* [D.10-02-033], *supra*, at pp. 5 (slip op.). See also, *2nd APPA Decision* [D.09-04-010], supra, at p. 23 & 31 [Finding of Fact No. 5] (slip op.), noting: "The Commission has previously determined the need for the project and the 2nd APPA will satisfy that new resource need."

the Commission to reweigh the evidence and find that the terms and conditions of the amendments to the 2nd APPA as not just and reasonable. Thus, CARE is merely relitigating the Commission's determinations in its rehearing application.

An application for rehearing is not a vehicle for relitigation; rather, the "purpose of an application for rehearing is to alert the Commission to a legal error, so that the Commission may correct it expeditiously." (Rule 16.1 of the Commission Rules of Practice and Procedure, Cal. Code of Regs., tit. 20, §16.1, subd. (c); see also, Pub. Util. Code, §1732.)

CARE's just and reasonable argument does not specify legal error. Therefore, this argument should be rejected.

If CARE's argument is that the record did not support the Commission's approval of the amendment of the 2nd APPA, the argument has no merit. In D.10-09-004, the Commission describes how the approval of the 1st Amendment to the 2nd APPA is support by record. (See record evidence set forth in D.10-09-004, pp. 10-11, citing to the Appendices to the Joint Parties' Petition for Modification.)

F. Contrary to CARE's erroneous contention, the Decision does not address the issue regarding the suitability of the Russell City project as backup renewable generation.

In its rehearing application, CARE claims that the Russell City project " is not suited to backup renewable generation," and thus, it alleges the Decision erred where it states [these] facts are speculative. (Rehrg. App., p. 11.)

In D.10-09-004, we did not address the issue of backup generation raised in CARE's rehearing application. Nor does the Decision speculate about the suitability of the Russell City project to backup renewable generation. Accordingly, CARE has misread D.10-09-004, and thus, CARE's contention is rejected.

III. CONCLUSION

For the reasons discussed above, CARE has failed to demonstrate legal error. Therefore, CARE's application for rehearing of D.10-09-004 is denied.

THEREFORE, IT IS ORDERED that:

1. On page 20, line 17 of D.10-09-004, the reference to "Rule 14.3(a)" is corrected to read: "Rule 14.3(c)".

2. CARE's motion for leave to file the confidential version of its application for rehearing of D.10-09-004 is granted.

2. Rehearing of D.10-09-004, as modified, is hereby denied.

3. The proceeding, Application (A.) 08-09-007, is hereby 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