

Decision 11-03-050

March 24, 2011

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application of Pacific Gas and Electric Company to Implement and Recover in Rates the Costs of its Photovoltaic (PV) Program (U39E).

Application 09-02-019
(Filed February 24, 2009)

**ORDER DENYING REHEARING
OF DECISION (D.) 10-04-052**

I. SUMMARY

In Decision (D.) 10-04-052 (or “Decision”), we approved, subject to modifications, the request of Pacific Gas and Electric Company (“PG&E”) for a five-year solar photovoltaic program (“PV Program”). The PV Program provides for development of solar facilities through both utility-owned generation (“UOG”) and power purchase agreements (“PPA”). Under the UOG portion of the PV Program, PG&E is authorized to install up to 250 MWs of UOG PV facilities from 1 to 20 MW in size in its service territory. PG&E may install these PV facilities at a rate of 50 MW per year, subject to certain provisions adopted in the Decision. (D.10-04-052, pp. 2-3.) Under the PPA portion of the PV Program, PG&E is authorized to solicit energy from 250 MWs of PV facilities from 1 to 20 MW in size located in PG&E’s service territory, also at a rate of 50 MW a year. (D.10-04-052, p. 2.)

Based on the record evidence, we adopted a cost recovery plan that permits PG&E to incur up to \$1.45 billion for the capital costs associated with the UOG portion of PG&E’s PV Program that is booked into PG&E’s Utility Generation Balancing Account (“UGBA”). We also authorized a memorandum account that will track the difference between the actual capital costs and revenue requirement entered into its UGBA. (D.10-04-052, pp. 33-34.) PG&E is required to file for recovery of its capital costs in its GRC. (D.10-04-052, p. 33.) PG&E is also required to file an advice letter to

implement the approved modified PV Program. (D.10-04-052, p. 79 [Ordering Paragraph No. 4].) Capital costs in excess of the authorized revenue requirement will be subject to a reasonableness review. (D.10-04-052, pp. 25-26.) With respect to the Operations and Maintenance (“O & M”) costs, ratepayers will have an opportunity to challenge recovery through the Commission’s reasonableness review in PG&E’s General Rate Case (“GRC”). (D.10-04-052, pp. 26 & 35.) The Decision also imposes a cost savings incentive mechanism for PG&E to have a financial incentive to minimize costs. (D.10-04-052, p. 31.) Pricing under the PPAs will be based on competitive solicitations with the successful bidders entering into a 20-year PPA with PG&E. (D.10-04-052, pp. 3, 22 & 25.) There is also a cost cap for the maximum price ratepayers would have to pay for energy procured under the PV Program through PPAs. (D.10-04-052, p. 56.)

Consumer Federation of California (“CFC”) timely filed an application for rehearing. In its rehearing application, CFC argues: (1) the Decision failed to comply with ratemaking principles set forth in Public Utilities Code section 454.8;¹ (2) the Commission unlawfully ignored section 399.14 and its previous decisions when it authorized the PV Program; (3) the Commission violated section 454 because PG&E failed to provide the foundational evidence on a number of significant issues; (4) the Commission applied the wrong statutory standard of proof; (5) the determination on benefits was not supported by the record; and (6) CFC’s due process was violated when impermissible ex parte communications with PG&E were allowed.

PG&E filed a response to the rehearing application. In its response, it opposes the application for rehearing.

We have reviewed each and every issue raised in CFC’s application for rehearing of D.10-04-052, and are of the opinion that rehearing is not warranted. However, for purposes of clarification, we modify D.10-04-052 as set forth in the

¹ All subsequent section references are to the Public Utilities Code, unless otherwise specified.

ordering paragraphs below. Therefore, CFC's rehearing application of D.10-04-052, as modified, is denied.

II. DISCUSSION

A. **Public Utilities Code section 454.8 does not prohibit the Commission from adopting a cost recovery plan in D.10-04-052.**

In its rehearing application, CFC argues that D.10-04-052 failed to comply with ratemaking principles set forth in section 454.8. (Rehrg. App., p. 2.) Specifically, it claims that cost recovery for the PV Program at this stage of development is not permitted because the investment in solar installations has not yet been made and cannot be found 'used and useful' or prudent. (Rehrg. App., p. 2.) CFC's claims have no merit.

Section 454.8 provides for the recovery of reasonable and prudent costs of the new construction of any addition to or extension of the utility's plant:

when the commission has found and determined that the addition or extension is used and useful, the commission shall consider a method for the recovery of these costs which would be constant in real economic terms over the useful life of the facilities, so that ratepayers in a given year will not pay for the benefits received in other years.

(Pub. Util. Code, §454.8.)

Nothing in section 454.8 supports CFC's claim that cost recovery for the PV Program at this stage of development is not permitted. In looking at the plain language of section 454.8, there is no provision prohibiting us from adopting the mechanism we did in D.10-04-052. As we noted in the Decision, "[t]he only requirement in [section] 454.8 is that when the Commission considers a cost mechanism for a new plant that is used and useful, it would consider a mechanism that would allow the cost to be distributed over the useful life of the facility so that ratepayers only pay for the benefits received in that year." (D.10-04-052, p. 47.)

The California Supreme Court confirmed this view. The Court held: "[T]he operation of [section 454.8] is not limited to cases in which the [C]ommission has already determined the prudence of the construction costs; instead, it applies as soon as

the commission determines the new plant ‘is used and useful.’” (*Toward Util. Rate Normalization v. Public Utilities Com.* (1988) 44 Cal.3d 870, 877.)

Accordingly, section 454.8 does not prohibit the Commission from adopting the modified PV Program and the related costs recovery plan as reasonable. By such an approval, the Commission has determined that the facility will be “used and useful” when it is installed and delivering. Further, actual recovery of costs will not occur until then.

This fact is supported by the record evidence. PG&E testified that cost recovery for the PV Program will only begin once the facilities are installed and delivering. (Exh. 1, Opening Testimony of Joe O’Flanagan/PG&E at p. 6-4.) Actual cost recovery of the operational facility will not begin until January 1 of the year following operation. (Exh. 1, Opening Testimony of Joe O’Flanagan/PG&E at p. 6-4.) Following the commencement of commercial operation at a utility-owned PV Program facility but prior to cost recovery beginning for any such facility, PG&E will file an advice letter seeking cost recovery for that facility approved by the Commission in the Decision. (Exh. 1, Opening Testimony of Joe O’Flanagan/PG&E at p. 6-4.) Logically, at this point, the facility will become “used and useful.”²

The Commission’s interpretation of section 454.8 is also consistent with legislative intent behind that statutory provision. During the Senate’s consideration of the bill that enacted section 454.8, the Senate Floor Analysis made clear that the intent of legislation was to set a maximum cost of a project in advance, subject to modification if circumstances later warrant, and then to require a cost recovery method which would be constant in real economic terms over the life of the facility. (Sen. Rules Com., Off. of Sen. Floor Analyses, 3d reading analysis of Assem. Bill No. 179 (1985-1986 Reg. Sess.) Aug. 20, 1985.)

² We note that the Decision may not be clear that our approval of the PV Program that only provides for cost recovery when the facility is installed and delivering constituted a determination of “used and useful.” Accordingly, we are modifying D.10-04-052 to make this clear.

Therefore, the CFC's argument that the Commission violated section 454.8 is incorrect. The Commission's approval of cost recovery for the PV Program is consistent with section 454.8 and legislative intent behind this statute.

We note that we may not have been clear in the Decision that our approval of the PV Program that only provides for cost recovery when the facility is installed and delivering constituted a determination of "used and useful." We will modify D.10-04-052, as set forth in the ordering paragraphs below.

B. The Decision was consistent with section 399.14 and prior decisions when it authorized PG&E's PV Program.

1. The Commission complied with section 399.14 when it authorized PG&E to update its 2010 Procurement Plan to include its PV Program.

CFC argues that the Commission erred in authorizing PG&E's PV Program by failing to subject it to the requirements of section 399.14. (Rehrg. App., p. 3.) The Decision ordered PG&E to amend its 2010 Procurement Plan to include its PV Program and stated that the Commission would review contracts executed under the PV Program for consistency with PG&E's approved Procurement Plan. (D.10-04-052, p. 48.) CFC alleges, however, that the Commission did not comply with section 399.14(a)(5)(c), which requires the Commission to "review and accept, modify, or reject each electrical corporation's procurement plan...." CFC contends that under this statutory provision, the Commission is required to review and act upon each utility's plan, not its contracts. (Rehrg. App. p. 4.) CFC is incorrect because section 399.14(a)(5)(d) specifically gives us authority to review proposed contracts executed under PG&E's PV Program.

Section 399.14(a)(5)(d) gives the Commission direct authority to review and accept or reject proposed contracts that are part of an approved renewable energy procurement plan. It states, in relevant part:

The commission shall review the results of an eligible renewable energy resources solicitation submitted for approval by an electrical corporation and accept or reject proposed contracts with eligible renewable energy resources

based on consistency with the approved renewable energy procurement plan....

(Pub. Util. Code, §399.14(a)(5)(d).)

It is clear that the language in section 399.14(a)(5)(d) gives the Commission authority to review and act upon PG&E's proposed contracts under the PV Program as long as they are consistent with PG&E's approved Procurement Plan. Accordingly, CFC's argument that the Commission cannot approve PG&E's contracts under its proposed PV Program is contrary to this statute.

In addition, we have the authority under section 399.14(a)(1) to review and accept or reject proposed contracts. Section 399.14(a)(1) states that "the commission shall require each electrical corporation to review and update its renewable energy procurement plan *as it determines to be necessary*." (Pub. Util. Code, §399.14, subd. (a)(1), emphasis added.) Under this statutory provision, the Commission has discretion to order PG&E to update its Procurement Plan to include its PV Program, and subsequently to review and act upon proposed contracts under the PV Program, if it deems this necessary.

We found that the PV Program, as modified, can help facilitate the expeditious deployment of renewable facilities that would not otherwise be selected through the existing renewable portfolio standards ("RPS") process. (D.10-04-052, pp. 20-21.) We discussed at length both the need for, and the many benefits of, PG&E's PV Program as an attractive resource option in advancing the development of renewable generation in California. (D.10-04-052, pp. 14-15.) We concluded that the modified PV Program should be adopted because it has many benefits and can help meet RPS goals. (D.10-04-052, p. 77 [Conclusion of Law No. 1].) Accordingly, we deemed it necessary that PG&E update its approved Procurement Plan to include the PV Program. In doing so, we correctly exercised our authority to act under section 399.14. Thus, CFC's argument that the Commission is authorized to look only at each utility's plan, and not its contracts, is incorrect.

2. The Commission correctly determined that a least-cost and best-fit analysis, as required by section 399.14, is not necessary at this time.

CFC claims that PG&E has failed to demonstrate that its PV Program complies with least-cost and best-fit (LCBF) principles under section 399.14. (Rehrg. App., p. 5.) However, under this section, there is no requirement for the Commission to conduct a LCBF analysis at this time.

Section 399.14 requires an electrical corporation to include a LCBF analysis in its renewable energy procurement plan.³ We directed PG&E to amend its 2010 Procurement Plan to include its PV Program. We then plan to review contracts executed under the PV Program for consistency with PG&E's approved Procurement Plan and compliance with all other relevant RPS procurement requirements. (D.10-04-052, p. 48.) As part of PG&E's Procurement Plan, the PV Program and any associated contracts will be subject to the LCBF requirements of section 399.14. Thus, when we review PG&E's proposed contracts under the PV Program, we will also review these contracts for compliance with LCBF principles.

Nothing in the Decision circumvents the LCBF analysis required by section 399.14. Rather, the Commission will review the proposed contracts for compliance with LCBF principles when it reviews these contracts for consistency with PG&E's Procurement Plan and compliance with RPS procurement requirements. Therefore, we were correct in our determination that a LCBF analysis is not necessary at this time. (D.10-04-052, p. 48.)

³ Section 399.14(a)(3) states: "Consistent with the goal of procuring the least-cost and best-fit eligible renewable resources, the renewable energy procurement plan submitted by an electrical corporation shall include all of the following: (A) An assessment of annual or multiyear portfolio supplies and demand to determine the optimal mix of eligible renewable resources with deliverability characteristics that may include peaking, dispatchable, baseload, firm, and as-available capacity. (B) Provisions for employing available compliance flexibility mechanisms established by the commission. (C) A bid solicitation setting forth the need for eligible renewable energy resources of each deliverability characteristic, required online dates, and locational preferences, if any." (Pub. Util. Code, §399.14, subd. (a)(3).)

C. The record supports the Commission's determinations on PG&E's estimate of projected costs and PG&E's estimate of the land to be included in rate base.

CFC argues that the Commission violated section 454 because PG&E allegedly failed to provide foundational evidence on a number of significant issues. (Rehrg. App., p. 5.) Essentially, CFC is arguing that the record does not support the determinations made by D.10-04-052 on the following issues: (1) PG&E's estimate of the costs of the project and (2) PG&E's estimate of the land to be included in rate base. CFC is wrong.

1. The record supports the Commission's finding regarding PG&E's estimate of project costs.

PG&E's witness, Doug Hermann, indicated in his testimony that cost estimates for the PV Program are based on vendor data and indicative cost estimates from PV manufacturers and system integrators, as well as PG&E-supplied balance of plant components. This witness also provided testimony on PG&E's estimate of the capital costs necessary to construct 250 MW of the UOG portion of its PV Program. This testimony included a breakdown of the PV Program cost components, as well as a detailed description of each component. The testimony also described the global project assumptions PG&E used in preparing its cost estimate. (Exh. 1, Opening Testimony of Doug Herman/PG&E at pp. 4-1 to 4-6.) The evidentiary record demonstrates that CFC's allegation has no merit, because PG&E did provide cost estimates of the project with the application.

2. The record supports the Commission's finding regarding PG&E's estimate of land costs.

The Commission's finding that PG&E provided a sufficient estimate of the cost of land for the PV Program is also supported by the record. Through its witness, Doug Herman, PG&E provided testimony on its estimated land acquisition costs and also described the bases on which it made its estimates. CFC asserts that PG&E's cost estimates are incomplete because PG&E has not yet chosen specific sites. (Rehrg. App., p. 6.) However, Mr. Herman testified that although the specific sites have not been

chosen, PG&E estimated land acquisition costs based on recent land sales information, escalated at 2% per year. (Exh. 1, Opening Testimony of Doug Herman/PG&E at p. 4.4.) Therefore, CFC's claim that PG&E offered no estimate of land costs is incorrect.

D. The Commission applied the correct statutory standard of proof in approving cost recovery for PG&E's PV Program.

CFC asserts that the Commission has allegedly approved a "new rate" that PG&E has not justified by under section 454. (Rehrg. App., p. 5.) Section 454(a) provides:

Except as provided in Section 455, no public utility shall change any rate or so alter any classification, contract, practice, or rule as to result in any new rate, except upon a showing before the commission and a finding by the commission that the new rate is justified. (Pub. Util. Code, §454.)

CFC is wrong that the Commission has approved a new rate, or otherwise "alter[ed] any classification, contract, practice, or rule as to result in any new rate."⁴ Rather, the Commission approved PG&E's PV proposal and a cost recovery plan as reasonable and in the public interest, based on the record evidence. (See D.10-04-052, p. 15.) Thus, CFC's argument that PG&E has not met its burden of proof has no merit.

Moreover, PG&E provided sufficient evidence in support of its application for a PV Program and its cost recovery plan, including benefits to ratepayers. (See e.g., Exh. 1, Opening Testimony of Fong Wan/PG&E at pp. 1-5 to 1-7; Exh. 4, Rebuttal Testimony of Fong Wan/PG&E at p. 1-7.) We weighed this evidence, along with other

⁴ CFC's assertion may be based on the Decision's imprecise use of the word "prices". We will modify the Decision to correct this imprecision, and to make clear that we were adopting a cost recovery plan and not a new rate.

We also note that in its application, PG&E sought a recovery of costs, and did not seek to change rates, or to alter any classification, contract, practice, or rule as to result in any new rate. (See generally, Application of PG&E to Implement its Photovoltaic Program, pp. 3 & 7; see also, Exh. 1, Opening Testimony of Joe O'Flanagan/PG&E at pp. 6-4 to 6-5.)

evidence in the record, and determined that it was just and reasonable and in the public interest to approve PG&E's application for the PV Program and its plan to recover costs. Therefore, PG&E had met its burden of proof upon our approval of its PV Program, subject to certain modifications.

E. The Commission's determination on benefits to be obtained by PG&E's PV Program was supported by the record.

CFC argues that there was "no evidence in the record of benefits to be obtained by PG&E's project" to support the Commission's determination to adopt PG&E's PV Program. (Rehrg. App., p. 7.) CFC is incorrect.

PG&E's witness, Fong Wan, testified to several benefits of the PV Program including: (1) the compatibility of solar technology with PG&E's peak-load energy demands; (2) the speed with which PV can be deployed through PG&E's PV Program given that its focus on medium scale projects are specifically designed to avoid the interconnection and transmission barriers that confront other larger projects; (3) that utility ownership of PV projects bypasses the financial challenges confronting renewable development today; (4) the advancement of state policies and legislative goals, including the Commission's emphasis on an aggressive renewable strategy, part of which would involve utility ownership of new renewable resources; and (5) that utility owned-renewable generation will provide a greater level of transparency for PG&E and the CPUC on the cost of renewable development that cannot be obtained through the RPS contracting process with an independent power producer. (Exh. 1, Opening Testimony of Fong Wan/PG&E at pp. 1-6 to 1-7.)

This PG&E witness further discussed other benefits of the PV Program, including a rapid increase in renewable resource energy deliveries and the diversification of PG&E's and California's renewable portfolio through the addition of utility ownership and a focus on mid-sized PV. (Exh. 1, Opening Testimony of Fong Wan at pp. 1-6 to 1-7.) The record also shows: (1) The energy output from PG&E's PV Program is expected to contribute a significant part of PG&E's RPS goals (Exh. 4, Rebuttal Testimony of Fong

Wan at pp. 1-5 & 1-7); and (2) PG&E's PV Program will stimulate the PV industrial sector and spur the development of new and lower cost technologies, providing further benefits to PG&E customers over time. (Exh. 1, Opening Testimony of Fong Wan, at p.1-2; Exh. 4, Rebuttal Testimony of Fong Wan, at p. 1-7.) The Solar Alliance agreed with this analysis. (Exh. 10, Solar Alliance Data Request Response to PGE-Solar Alliance - 001.)

Contrary to CFC's allegations, the record evidence supports the Commission's determination to adopt PG&E's PV Program in light of the benefits to ratepayers. (See D.10-04-052, p. 21.) CFC's disagreement with the Commission's evidentiary finding that the PV Program is beneficial to ratepayers does not constitute legal error.

F. The Commission did not violate CFC's due process in permitting ex parte communications with PG&E.

CFC reiterates its objection to ex parte meetings and claims that it was denied a fair hearing when the Commission entertained ex parte communications from the applicants. (Rehrg. App., p. 8.) CFC's argument has no legal basis.

Ex parte communications with Commissioners and their advisors are allowed in ratesetting cases pursuant to section 1701.3(c) and the Commission's Rules of Practice and Procedure ("Rule") 8.2(c)(2).⁵ Section 1701.3(c) and Rule 8.2(c)(2) allow individual ex parte meetings between a decision-maker and a party in a ratesetting proceeding so long as the party provides a three-day advance notice of the meeting to the parties, and all other parties are allowed equal time with that decision-maker. Rule 8.3 provides that a notice of qualifying ex parte communications with Commissioners and their advisors must be filed within three days subsequent to the ex parte communication.

On January 29, 2010, PG&E filed notice that President Peevey had granted PG&E's request for an ex parte meeting on February 3, 2010. In its notice, PG&E also referenced Rule 8.2(c)(2) and its provision allowing all other parties to equal time with

⁵ Subsequent references to Rule are to the Commission's Rules of Practice and Procedure, unless otherwise specified.

that decision maker. PG&E adhered to the requirements and process set forth by section 1701.3(c) and Rules 8.2(c)(2) and 8.3. As such, CFC's claim has no legal merit and should be rejected.

III. CONCLUSION

As discussed above, CFC's allegations with respect to our determination to approve PG&E's PV Program lack any legal basis. CFC has failed to provide sufficient grounds for granting rehearing of D.10-04-052. However, for purposes of clarification, we have made a few modifications to the Decision, as specified in the ordering paragraphs. Therefore, the application for rehearing of D.10-04-052, as modified, is denied.

THEREFORE, IT IS ORDERED that:

1. For purposes of clarification, D.10-04-052 is modified as follows:
 - a. The words, "prices are just and reasonable" on page 15, line 14 of D.10-04-052, should be replaced with the words, "recovery of costs is just and reasonable, as specified in this Order."
 - b. On page 47, the following sentence shall be added at the end of line 5:

"Furthermore, it is reasonable for us to find that the adoption of a cost recovery plan that permits recovery of costs only when the facility is installed and delivering means that the facility becomes "used and useful" at that point in time. Public Utilities Code section 454.8 does not preclude the Commission from making such a finding."
 - c. The following should be added as Finding of Fact No. 35 on page 76:

"It is reasonable for us to find that the adoption of a cost recovery plan that permits recovery of costs only when the facility is installed and delivering means that the facility becomes "used and useful" at that point in time."
2. Rehearing of D.10-04-052, as modified, is denied.
3. Application (A.) 09-02-019 is hereby closed.

This order is effective today.

Dated March 24, 2011, at San Francisco, California.

MICHAEL R. PEEVEY

President

TIMOTHY ALAN SIMON

MICHEL PETER FLORIO

CATHERINE J.K. SANDOVAL

MARK FERRON

Commissioners