

Decision 07-02-033

February 15, 2007

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Resolution E-4055. Pacific Gas and Electric Company (PG&E) Request Commission Approval of Two Distinct Power Purchase Agreements With Subsidiaries of Calpine Corporation, for Resource Adequacy (RA) for the Period From 2008 to 2011. By Advice Letter 2916-E Filed on October 23, 2006.

Application 07-01-020
(Filed January 11, 2007)

ORDER DENYING REHEARING OF RESOLUTION E-4055**I. INTRODUCTION**

In this Order we dispose of the application for rehearing of Resolution E-4055 (“Resolution”) filed by Californians for Renewable Energy, Inc. (“CARE”). Since approximately 2004, the Commission has issued a series of decisions establishing Resource Adequacy (“RA”) policies and regulations to ensure that there is adequate, cost-effective investment in electric generation capacity for California and that such capacity is made available to the California Independent System Operator (“CAISO”) when and where it is needed for reliable transmission grid operations.¹ The RA decisions set policies and regulations applicable to California’s three largest investor-owned utilities (“IOUs”), Pacific Gas and Electric Company (“PG&E”), San Diego Gas & Electric Company (“SDG&E”) and Southern California Edison Company (“SCE”), as well as the electric service providers (“ESPs”) and community choice aggregators (“CCAs”) that serve retail customers within the service territory of the IOUs.

¹ The Commission’s RA decisions flow from the regulatory procurement framework adopted by the Legislature in Assembly Bill 57 and Senate Bill 1976, as codified in Public Utilities Code section 454.5 (Amended (as added by Stats. 2002, ch. 850) by Stats. 2005, ch. 366, § 2, effective January 1, 2006.).

Among the relevant RA decisions are the *Long-Term Procurement Decision*,² and *Interim RA Decision*,³ which establish the aggregate or “system” procurement obligations of the applicable IOUs, ESPs and CCAs, as well as the *Local RA Decision*,⁴ which establishes local procurement obligations for these entities as a component of the larger RA program. Attendant to setting the resource obligations, the decisions establish the load forecasting protocols and resource counting conventions that act as the basis for determining RA program compliance.⁵

On October 23, 2006, PG&E filed Advice Letter 2916-E requesting approval of two wholesale purchase power agreements (“PPAs” or “Confirmations”) with subsidiaries of Calpine Corporation (“Calpine”), for the purpose of RA compliance for the period from 2008 to 2011. One PPA is with Metcalf Energy Center, LLC and the other with Los Medanos Energy Center, LLC.

In Resolution E-4055 (“Resolution”), we approved the two PPAs for purposes of meeting PG&E’s Local RA procurement requirement in the Bay Area load pocket through 2011. (Resolution E-4055, p. 15 [Ordering Paragraph Numbers 1 and 2], pp.13-14 [Findings 1, 2, 9, and 18].) In doing so we stated that the binding nature of the PPAs is contingent on our approval of Advice Letter 2915-E (PG&E request for approval of the PPA with Geysers Power Company, LLC), as well as Federal Energy Regulatory

² *Order Instituting Rulemaking to Promote Policy and Program Coordination and Integration in Electric Utility Resource Planning (Opinion Adopting Pacific Gas and Electric Company, Southern California Edison Company and San Diego Gas & Electric Company’s Long-Term Procurement Plans)* (“*Long-Term Procurement Decision*”) [D.04-12-048] (2004) __ Cal.P.U.C.3d__.

³ *Order Instituting Rulemaking to Promote Policy and Program Coordination and Integration in Electric Utility Resource Planning (Interim Opinion Regarding Resource Adequacy)* (“*Interim RA Decision*”) [D.04-10-035] (2004) __ Cal.P.U.C.3d__.

⁴ *Order Instituting Rulemaking to Consider Refinements to and Further Development of the Commission’s Resource Adequacy Requirements Program (Opinion on Local Resource Adequacy Requirements)* (“*Local RA Decision*”) [D.06-06-064] (2006) __ Cal.P.U.C.3d __.

⁵ See for example, *Interim RA Decision* [D.04-10-035], *supra*, at pp. 21-33, 55-56 [Ordering Paragraph Number 1] (slip op.).

Commission (“FERC”) approval of a settlement agreement involving numerous entities and wholesale PPA contracts, including the two PPAs at issue here between PG&E and Calpine.⁶ (Resolution E-4055, p. 2.)

On December 14, 2006, the first condition was met by our approval of Advice Letter 2915-E via Resolution E-4046. On December 28, 2006, the second condition was met when FERC issued its *Order Conditionally Approving Uncontested Settlement*, encompassing the two PPAs at issue here.⁷

A timely application for rehearing was filed by CARE challenging Resolution E-4055 in light of two recent 9th Circuit decisions (*Public Utility District No. 1 of Snohomish County Washington v. FERC* (“PUD v. FERC”) No. 03-72511 et al. (9th Cir. 2006) __ F.3d __, and *Public Utilities Commission of the State of California v. FERC* (“PUC v. FERC”) No. 03-74207 et al. (9th Cir. 2006) __ F.3d__.) CARE challenges the Resolution on the grounds that: (1) CARE made certain erroneous statements in its comments on the draft Resolution; and (2) FERC’s *Order Conditionally Approving Uncontested Settlement* is in error in light of the recent 9th Circuit decisions. Responses to CARE’s application for rehearing were filed by Calpine and PG&E.

We have carefully reviewed the arguments raised by CARE and are of the opinion that good cause has not been established to grant rehearing. Accordingly, the application for rehearing of Resolution of E-4055 is denied.

II. DISCUSSION

Preliminarily, we note that CARE’s application for rehearing fails to provide any specificity as to why Resolution E-4055 is unlawful. Public Utilities Code

⁶ Parties to the proposed settlement agreement are PG&E, the CAISO, and the California Electricity Oversight Board (“CEOB”). Wholesale contracts under the settlement are between PG&E and Calpine entities including Delta Energy Center, LLC, Los Esteros Critical Energy Facility, LLC, Geysers Power Company, LLC, Creed Energy Center, LLC, Gilroy Energy Center, LLC, Goose Haven Energy Center, LLC, Los Medanos Energy Center, LLC, and Metcalf Energy Center, LLC. The proposed settlement would resolve numerous issues related to Reliability Must-Run costs involving these contracts.

⁷ *Los Esteros Critical Energy Facility, LLC* (“*Order Conditionally Approving Uncontested Settlement*”) (December 28, 2006) 117 F.E.R.C. P61,350, 2006 F.E.R.C. LEXIS 2956.

section 1732 provides in pertinent part: “[T]he application for rehearing shall set forth specifically the ground or grounds on which the applicant considers the decision or order to be unlawful...” (Pub. Util. Code, § 1732.)⁸ While CARE discusses at some length its interpretation of the recent 9th Circuit decisions, it does not specify or analyze how the Resolution is unlawful based on either the 9th Circuit decisions or the FERC *Order Conditionally Approving Uncontested Settlement*. CARE’s rehearing application fails to comply with this statutory mandate.

Despite this failing, we will nevertheless discuss CARE’s particular arguments and briefly explain why they are without merit.

A. Erroneous Comments by CARE

CARE requests rehearing on the ground that CARE made an erroneous statement regarding the regulatory authority held by this Commission as opposed to FERC, in its December 6, 2006, comments on the draft Resolution. (CARE Rhg. App., pp. 1-2.)

CARE offers no legal basis to establish that the accuracy of its prior comments regarding the respective authority of this Commission and FERC is relevant for purposes of our approval in Resolution E-4055. Nor does CARE make an argument that the Resolution itself is in error or unlawful. To the extent CARE attempts to link its request for rehearing to *PUD v. FERC* and *PUC v. FERC*, we find that its request is without merit because CARE does no more than broadly speculate regarding how the 9th Circuit decisions might impact FERC’s market-based pricing program. CARE fails to draw any discernable connection between the determinations under the 9th Circuit decisions and our approval in Resolution E-4055.

⁸ Also see Rule 16.1(c) of the Commission’s Rules of Practice and Procedure, Code of Regs., tit. 20, § 16.1, subd. (c), which further requires the applicant to make specific references to the record or law in its allegations of error.

B. FERC Order and 9th Circuit Decisions

CARE next asserts that rehearing is warranted because the FERC *Order Conditionally Approving Uncontested Settlement* is “contemptuous of” the findings in *PUD v. FERC* and *PUC v. FERC*. Specifically, CARE claims that the wholesale power contracts approved by FERC’s settlement approval (i.e., the two PPAs at issue in Resolution E-4055) fail to comply with the alleged requirement under section 206(a) of the Federal Power Act (“FPA”) that all wholesale contracts be approved by FERC [in order to be effective]. (CARE Rhg. App., pp. 5-6.)

We are not persuaded by CARE’s argument. Section 205 of the FPA,⁹ in conjunction with FERC’s implementing regulations,¹⁰ set forth requirements regarding certain rates and charges for sale of power at wholesale (including contracts) which must be placed on file with FERC. However, the implementing regulations provide that even with respect to wholesale rates, charges and contracts which must be placed on file, FERC approval is not necessary for the rates, charges and contracts to be deemed effective.¹¹ Review under section 206(a)¹² (and approval of the nature suggested by

⁹ See, in particular, FPA section 205(c), 16 U.S.C. § 824d(c), which provides:

Under such rules and regulations as [FERC] may prescribe, every public utility shall file with [FERC], within such time and in such form as [FERC] may designate, and shall keep open and in convenient form and place for public inspection schedules showing all rates and charges for any transmission or sale subject to the jurisdiction of [FERC], and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which on any manner affect or relate to such rates, charges, classification, and services.

¹⁰ See 18 C.F.R. § 35.0 *et seq.* (2006).

¹¹ See 18 C.F.R. § 35.4 (2006).

¹² See FPA section 206(a), 16 U.S.C. § 824e(a), which provides:

Whenever [FERC], after a hearing had upon its own motion or upon complaint, shall find that any rate, charge, or classification, demanded, observed, charged, or collected by any public utility for any transmission or sale subject to the jurisdiction of [FERC], or that any rule, regulation, practice, or contract affect such rate, charge, or classification is unjust,

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CARE) is triggered only when there is a complaint, or if otherwise deemed warranted by FERC at its own discretion.

Moreover, even if CARE is correct that advance FERC approval was required for the PPAs under Resolution E-4055, such approval was granted in this instance by virtue of FERC's *Order Conditionally Approving Uncontested Settlement*. If CARE believes that FERC erred or must reconsider its approval in light of the 9th Circuit decisions, those arguments are properly made before FERC or the United States Court of Appeals and not before this Commission.

Finally, CARE raises a related argument that it was not afforded adequate procedural due process in the FERC ratesetting process. Whether or not that claim is true, it does not merit rehearing here because it bears no relation to the lawfulness of Resolution E-4055.

III. CONCLUSION

For the reasons specified above, the application for rehearing of Resolution E-4055 is denied.

Therefore **IT IS ORDERED** that:

1. The application for rehearing of Resolution E-4055 is denied.
2. This proceeding, A.07-01-020, is hereby is closed.

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unreasonable, unduly discriminatory or preferential, [FERC] shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order.

This order is effective today.

Dated February 15, 2007, at San Francisco, California.

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