

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

ENERGY DIVISION

RESOLUTION E-4312

February 25, 2010

R E S O L U T I O N

Resolution E-4312 . Pacific Gas and Electric Company

PROPOSED OUTCOME: Approves a settlement agreement between PG&E and Dynegy related to a plant outage in 2007.

ESTIMATED COST: The settlement amount is confidential.

By Advice Letter 3559-E Filed November 18, 2009.

SUMMARY

Pacific Gas and Electric Company (PG&E) submitted Advice Letter 3559-E on November 18, 2009 requesting review and approval of a settlement agreement between Dynegy, Inc. and PG&E (the parties) related to a 2007 Force Majeure claim with respect to the Moss Landing tolling agreement approved in Commission Resolution E-4002. The final settlement amount is reasonably between the amounts originally proposed by PG&E and Dynegy. In specific, PG&E requests in Advice Letter (AL) 3559-E the Commission find that the settlement agreement and PG&E's entry into it are reasonable and prudent for all purposes, including, but not limited to, PG&E's recovery in rates of all payments made under this Settlement Agreement (Agreement). This Resolution approves AL 3559-E without modification.

BACKGROUND

On March 2, 2006, PG&E entered into a four year physical tolling agreement beginning deliveries on January 1, 2007 with Duke Energy Moss Landing, LLC to purchase the full capacity, energy, and resource adequacy of Moss Landing Units 6 & 7 (the Facility). PG&E submitted the tolling agreement to the Commission by AL 2803-E, which was approved by the Commission in Resolution E-4002 effective July 20, 2006. The tolling agreement is governed by the Master Power Purchase and Sales Agreement (PPA) between Duke Energy Marketing America, LLC and PG&E. The Facility was sold to

Dynegy, which currently operates the Facility and fulfills the requirements of the tolling agreement.

On August 17, 2007, Dynegy reported to PG&E that the Facility suffered a fan motor failure and outage on July 26, 2007, which continued through August 14, 2007. Dynegy invoiced PG&E for the energy delivered during the period, and PG&E withheld part of the capacity payment related to the outage event, amounting to \$3,420,895.

After negotiations and investigation, PG&E and Dynegy continued to disagree as to the characterization of the outage as a Force Majeure event under the tolling agreement, and Dynegy submitted the claim to arbitration. The terms of the tolling agreement and the uncertainty around what constitutes proper plant maintenance pursuant to industry standards create the risk of an adverse arbitration for either party, giving each party an incentive to settle.

On August 6, 2009, the parties reached a settlement. PG&E will pay a portion of the withheld capacity payments to Dynegy within 30 days of a final and unappealable approval of the settlement by the Commission, Dynegy will withdraw the arbitration request, and both parties agree to a full and final release for all known, unknown, and unanticipated injuries, claims or damages arising from the incident.

PG&E filed AL 3559-E, on November 18, 2009 to request approval of the settlement.

NOTICE

Notice of AL 3559-E was made by publication in the Commission's Daily Calendar. PG&E states that a copy of the Advice Letter was mailed and distributed in accordance with Section 3.14 of General Order 96-B.

PROTESTS

Advice Letter 3559-E was not protested.

DISCUSSION

The Commission typically reviews settlements under the standards set forth in Rule 12.1(b) of the Commission's Rules of Practice and Procedure, which state that the settlement must be "reasonable in light of the whole record, consistent with law, and in the public interest."

To make this determination, the Commission reviewed AL 3559-E, the settlement agreement, and the other confidential and public appendices¹. In particular, the Commission reviewed the Force Majeure and capacity payment penalty provisions of the underlying tolling agreement, and reviewed inspection reports of the actual outage in 2007.

Under the terms of the tolling agreement, the Facility is required to maintain Guaranteed Availability of 92%. Outages that reduce the actual availability of the Facility reduce the capacity payment PG&E owes to Dynegy more significantly if the event were to be deemed a regular forced outage, and less significantly if the event were to be deemed Force Majeure. Under the tolling agreement, the dispute hinges on whether the energy not delivered to PG&E during the outage was "Force Majeure Energy" or a deduction from "Available Energy" (energy available for dispatch from the plant).

The tolling agreement spells out a mechanism to calculate a Force Majeure Availability Factor, as well as an Actual Availability Factor. "Force Majeure Energy" is calculated into a Force Majeure Availability Factor which is measured against the Guaranteed Availability Factor, and if below the Guaranteed Availability Factor, the capacity payment for the month is reduced by 1% for each percentage point below the Guaranteed Availability Factor. If the event is not Force Majeure, the actual Available Energy is summed then divided by Total Energy, to compute the Actual Availability Factor, which is compared to the Guaranteed Availability Factor. Total Energy is the maximum possible if the plant was generating at full capacity for a specified period. If Actual Availability is below the Guaranteed Availability Factor, the capacity payment would be reduced by as much as 3% for each percentage point below the Guaranteed Availability Factor.

The tolling agreement describes a Force Majeure Event as a catastrophic equipment failure that could not have been "avoided by compliance with Good Utility Practice". Dynegy took measures that are common in the industry to monitor the fan motors in

¹ Although PG&E attached the tolling agreement and sought confidential treatment for it, under the Commission's confidentiality rules as adopted in R.05-06-040 and D.06-06-066, the tolling agreement has become public since the filing of this Advice Letter, as deliveries under the tolling agreement began more than three years ago. The tolling agreement is subject to line VII (B) of the IOU matrix.

order to prevent equipment failure, but it is unclear whether these measures or additional measures could have prevented this particular event, and whether human error or a failure to follow Good Utility Practice led to the equipment failure causing the outage.

Based on review of the tolling agreement and inspection reports of the outage, the Commission concludes that the settlement is reasonable in light of the record, given the possibility of an adverse arbitration decision to either party, specifically related to the characterization of the fan motor failure as Force Majeure.

The settlement is consistent with law. Public Utilities Code Section 454.5(b) requires electrical corporations to file procurement plans demonstrating the standards by which “the acceptability and eligibility for rate recovery of a proposed procurement transaction” can be determined. The Commission then approves or rejects contracts based on consistency with the procurement plan. The Commission approved PG&E’s applicable procurement plan in D.04-12-028, and approved PG&E’s contract for the Facility in Commission Resolution E-4002. The Commission found the transaction to be consistent with PG&E’s procurement plan related to the loading order and that PG&E’s entrance into the contract to be reasonable and prudent for purposes of rate recovery².

Public Utilities Code Section 454.5(d)(2) requires the Commission to review the electrical corporation’s administration of the contract, and to ensure that disputes under the contract are reasonably resolved. This settlement provides a reasonable resolution of the dispute arising under the contract.

The settlement agreement is in the public interest. The settlement provides for a payment that is reasonable between the positions of PG&E and Dynegy, which is between the amount that PG&E would have owed in the event of a regular forced outage and the amount that PG&E would have owed under a Force Majeure Event.

COMMENTS

This is an uncontested matter in which the resolution grants the relief requested. Accordingly, pursuant to PU Code 311(g)(2), the otherwise applicable 30-day period for public review and comment is being waived.

² Resolution E-4002 Findings #5 and #13

FINDINGS AND CONCLUSIONS

1. The Dynegy Moss Landing Facility suffered an outage on July 26, 2007 lasting until August 14, 2007.
2. PG&E and the operator of the Facility (Dynegy) disagree as to the proper characterization of the outage under the tolling agreement, which impacts the capacity payment owed by PG&E to Dynegy.
3. Given the terms of the tolling agreement, both PG&E and Dynegy have plausible bases for their respective positions thus PG&E faces the risk of being held liable for the entire disputed amount.
4. It is in the public interest to avoid the risk of such adverse outcome.
5. The settlement provides for a capacity payment that falls reasonably between the amounts claimed by each of the parties.
6. This settlement is consistent with PU Code Section 454.5(d)(2) as a reasonable resolution of a dispute related to an approved procurement contract.
7. This settlement is reasonable in light of the record, consistent with law, and in the public interest.
8. This settlement and PG&E's entry into it are reasonable and prudent for all purposes, including, but not limited to, PG&E's recovery in rates of all payments made under this settlement.

THEREFORE IT IS ORDERED THAT:

1. The request of PG&E for Commission approval of the settlement agreement in Advice Letter 3559-E is approved.
2. PG&E is authorized to recover in rates all payments made under this settlement.
3. This Resolution is effective today.

I certify that the foregoing resolution was duly introduced, passed and adopted at a conference of the Public Utilities Commission of the State of California held on February 25, 2010, the following Commissioners voting favorably thereon:

/s/ Paul Clanon

Paul Clanon
Executive Director

MICHAEL R. PEEVEY
PRESIDENT
DIAN M. GRUENEICH
JOHN A. BOHN
TIMOTHY ALAN SIMON
NANCY E. RYAN
Commissioners