

**PUBLIC UTILITIES COMMISSION**505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3298**FILED**03-18-10
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March 18, 2010

TO PARTIES OF RECORD IN INVESTIGATION 09-01-017

This proceeding was filed on January 29, 2009, and is assigned to Commissioner Michael R. Peevey and Administrative Law Judge (ALJ) David Fukutome. This is the decision of the Presiding Officer, ALJ Fukutome.

Any party to this adjudicatory proceeding may file and serve an Appeal of the Presiding Officer's Decision within 30 days of the date of issuance (i.e., the date of mailing) of this decision. In addition, any Commissioner may request review of the Presiding Officer's Decision by filing and serving a Request for Review within 30 days of the date of issuance.

Appeals and Requests for Review must set forth specifically the grounds on which the appellant or requestor believes the Presiding Officer's Decision to be unlawful or erroneous. The purpose of an Appeal or Request for Review is to alert the Commission to a potential error, so that the error may be corrected expeditiously by the Commission. Vague assertions as to the record or the law, without citation, may be accorded little weight.

Appeals and Requests for Review must be served on all parties and accompanied by a certificate of service. Any party may file and serve a Response to an Appeal or Request for Review no later than 15 days after the date the Appeal or Request for Review was filed. In cases of multiple Appeals or Requests for Review, the Response may be to all such filings and may be filed 15 days after the last such Appeal or Request for Review was filed. Replies to Responses are not permitted. (See, generally, Rule 14.4 of the Commission's Rules of Practice and Procedure at www.cpuc.ca.gov.)

If no Appeal or Request for Review is filed within 30 days of the date of issuance of the Presiding Officer's Decision, the decision shall become the decision of the Commission. In this event, the Commission will designate a decision number and advise the parties by letter that the Presiding Officer's Decision has become the Commission's decision.

/s/ KAREN V. CLOPTON
Karen V. Clopton, Chief
Administrative Law Judge

KVC:tcg

Attachment

PRESIDING OFFICER'S DECISION (Mailed 3/18/2010)

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Investigation on the Commission's Own Motion Into the Operations and Practices of Calpine PowerAmerica-CA, LLC; Notice of Opportunity for Hearing; and Order to Show Cause Why the Commission Should Not Impose Fines and Sanctions for Calpine's 2007 Violation of System and Local Resource Adequacy Requirements.

Investigation 09-01-017
(Filed January 29, 2009)

DECISION APPROVING SETTLEMENT AGREEMENT

1. Summary

This decision approves a settlement agreement between Calpine PowerAmerica-CA, LLC (CPA) and the Consumer Protection and Safety Division regarding alleged CPA violations of system and local resource adequacy requirements in its 2007 year-ahead compliance filings. By the terms of the settlement, CPA agrees to pay a fine of \$225,000. This proceeding is closed.

2. Background

On January 29, 2009, the Commission opened this Order Instituting Investigation, Notice of Opportunity to Be Heard, and Order to Show Cause (OII/OSC) into the Operations and Practices of Calpine Power America-CA, LLC (CPA) to determine whether CPA violated Commission resource adequacy program rules, regulations, or orders in its October 31, 2007 year-ahead compliance filings. The OII/OSC identified potential penalties amounting to

\$739,567. The basis of the OII/OSC is the Consumer Protection and Safety Division (CPSD) "Investigation Report of CalpinePower America-CA, LLC," dated December 5, 2008.

A prehearing Conference was held on March 11, 2009. The Assigned Commissioner's Ruling and Scoping Memo that was issued on March 20, 2009 identified the following issues:

- Whether there were procurement deficiencies in CPA's year-ahead system resource adequacy requirement (RAR) and local RAR compliance filings for the 2008 calendar year.
- Whether, and to what extent, any such deficiencies were in violation of the RAR rules.
- Whether, and to what extent, penalties should be imposed.

The direct testimony of CPA was issued on May 11, 2009.

The rebuttal testimony of CPSD was issued on June 12, 2009.

On September 14, 2009, the first day of scheduled evidentiary hearings, CPA and CPSD indicated that a settlement in principle of all issues had been reached, and that a settlement would be filed shortly. Exhibits were identified, and hearings were then adjourned. A joint CPSD and CPA motion for approval of "Settlement Agreement Between the Consumer Protection and Safety Division and Calpine PowerAmerica-CA, LLC" (Settlement Agreement) was filed January 22, 2010. To accommodate the settlement process, the statutory deadline for resolving this proceeding was extended from January 29, 2010 to May 29, 2010, by Decision (D.) 09-12-033.

3. Resource Adequacy Requirements

The need for and substance of RAR, as well as related filing requirements, are detailed in the OII/OSC (pp. 3-6). Briefly:

The Commission established comprehensive RAR rules that require load serving entities (LSEs) to demonstrate both (1) aggregate and

system resource adequacy (acquisition of sufficient generation capacity to serve forecasted retail customer load, including a reserve margin), and (2) local resource adequacy (acquisition of sufficient generation capacity within defined, transmission-constrained areas) in their service areas.

The system RAR requires LSEs to demonstrate that they have acquired sufficient capacity to serve their retail customer load and a 15-17% reserve margin beginning in June 2006. The supply contracts that count for RAR purposes must identify specific resources that provide the qualifying capacity rather than contracts with unspecified resources that provide for liquidated damages in the event of a breach. The Commission also established penalties for non-compliance with system RAR, stating that such penalties were necessary for the program to achieve its objectives of providing reliable, cost-effective electricity and fostering an environment more conducive to investment in generation infrastructure. The penalties were set as a multiple of the cost of the capacity an LSE failed to procure.

Local RAR requires LSEs to demonstrate that they had acquired 100% of their Commission-determined "year-ahead" local procurement obligation for the following calendar year. To meet local requirements, LSEs had to make the specific generation capacity procurement within load pockets¹ where the demand is needed. LSEs are subject to penalties when they fail to make the required compliance filings. The cost for new capacity was set at \$40 per kW-year and a penalty of 100% of the cost was determined to be a reasonable fine.

4. CPA's 2007 Filings

As required by D.05-10-042 and D.06-06-064, Calpine timely submitted Year-Ahead System RAR and Local RAR compliance filings by October 31, 2007,

for the 2008 calendar year. However, the Commission's Energy Division staff found procurement deficiencies in Calpine's compliance filings. Energy Division notified Calpine of the deficiencies on December 13, 2007, and Calpine submitted an amended filing on December 21, 2007.

5. Position of CPSD Prior to Settlement

Notwithstanding CPA's eventual correction of these deficiencies, it is CPSD's position that CPA's failure to comply with the year-ahead filings by October 31, 2007 is subject to penalties pursuant to D.05-10-042 and D.06-06-064. CPSD notes that CPA's non-compliance is serious, because it could have led to the California Independent System Operator (CAISO) taking costly remedial measures.

5.1. System Resource Deficiency

According to CPSD, CPA's October 31, 2007, Year-Ahead Compliance Filing failed to account for a contract expiring in June of 2008 resulting in system-wide deficiencies. Calpine's RA Compliance Filing- Worksheet A. Certification Form dated February 16, 2006 shows contract CPA-2.10.1-8874 expiring on June 30, 2008. The contract in question is a liquidated damages (LD) contract.² CPSD notes that in D.05-10-042, the Commission addressed phasing out LD

¹ D.06-06-064 defined load pockets as areas within an LSE's service area which have physical transmission constraints such that the transfer capability of the transmission serving the area is less than the load demand within the area. Thus additional generation capacity within the load pocket is needed to satisfy the load demand.

² As used by the Commission previously, the term "LD contract" refers to contracts with unspecified resources that provide for liquidated damages in the event of a breach. Here, the importance is not whether contracts between LSEs and resource suppliers have liquidated damages clauses, but that they do not identify specific, committed assets or units (*i.e.*, physical resources) that back up the contractual obligations.

contracts, and any renegotiation of an LD contract subsequent to D.05-10-042 renders that LD contract ineligible to satisfy RA obligations subject to the phase out provisions in D.05-10-042. It is CPSD's position that CPA wrongly included resources from this expired contract in meeting their RAR obligations for the months of July, August, and September 2008, causing a total system deficiency of 70.37 megawatt (MW)-month.

CPSD calculates that CPA's 70.37 MW-month deficiency would be subject to a penalty of \$703,700 using the prescribed amount for capacity (\$40) and penalty multiplier (300%).³

5.2. Local Area Resource Deficiency

CPSD asserts that Calpine's 2008 Year-Ahead Local Compliance Filing included local procurement obligation deficiencies as well. According to CPSD, CPA failed to use the correct number in its demand response (DR) calculations creating a deficiency totaling 10.76 MW-month for 2008. This was due to CPA including DR resource allocations, with values applicable to each month, rather than including the August value for each of the months, as required. CPSD indicates that the Commission created a penalty equal to 100% of the cost of new capacity for failure to meet local procurement obligations in D.06-06-064,⁴ and the associated penalty for the 10.76MW-month deficiency, calculated with the prescribed amount and multiplier, is \$35,867.

5.3. Penalty Assessments

³ See D.05-10-042, Conclusions of Law (COL) 26, and D.06-06-064, COL 25.

⁴ See D.06-06-064, COLs 25 and 26.

The CPSD recommended combined penalties for system and local RAR deficiencies total \$739,567. In D.06-06-064 the Commission addressed situations where penalties overlap and clarified that when two penalties overlap for both system and local procurement obligations elements, only the larger RAR penalty would apply.⁵

CPSD explains that the identified deficiencies in the system and local RAR compliance filings overlapped for July, August, and September 2008. Therefore, the local RAR deficiency penalty would not be added for these three months. The amount of local capacity deficiency during the overlap period is 1.21 MW-month, which computes to a penalty of \$4,033. Deducting this amount from the yearly total reduces the local area penalty from \$35,867 to \$31,834. Therefore, CPSD's recommended penalties are \$703,700 for system deficiencies and \$31,834 for local deficiencies, totaling \$735,534.

6. Position of CPA Prior to Settlement

6.1. System Resource Deficiency

With respect to the CPSD assertion that CPA's 2008 year-ahead system RA compliance filing submitted on October 31, 2007 included procurement from an expired LD contract for the months of July, August and September causing a total system deficiency of 70.37 MW, CPA argues that the LD contract at issue did not expire as alleged by CPSD and there were no total system deficiencies. CPA asserts that at no time was it non-compliant or otherwise had a procurement deficiency in its 2008 year-ahead system RA obligation. Although it is CPA's position the LD contract could have been used to satisfy its 2008 year-

⁵ D.06-06-064 at 68.

ahead system RA compliance obligation for July, August and September, CPA believed that the most efficient way to timely respond to Energy Division was to use additional unit-specific resources for RA compliance purposes.⁶

CPA also states that, consistent with Decision 06-06-064, it believed it was working cooperatively with Energy Division to address the issue.⁷ CPA states that it had no reason to believe that resolving this issue in the way that it did would create any confusion or be perceived as non-compliance. When CPA filed its supplemental 2008 year-ahead system RA compliance on December 21, 2007, it believed it had fully resolved this issue with Energy Division.

6.2. Local Area Resource Deficiency

CPA acknowledges that it did not use the August DR resource allocations for each of the 12 months of the year. However, CPA does not believe penalties should be imposed, because, based on the 2008 RA Filing Guide and other information related to the year-ahead local RA compliance filing, it believed it was correct to use DR numbers applicable to each month at the time of the compliance filing. According to CPA, the section in the 2008 RA Filing Guide that specifically addressed DR and the instructions which accompanied the 2008 year-ahead local RA filing did not instruct CPA to use the August DR value for all months. Also, CPA believes that changes made to the 2009 RA Filing Guide supports the position that the instructions in the 2008 Guide regarding local DR allocations were confusing and needed clarification.

⁶ CPA indicates that excess capacity was available through Calpine Energy Service (CES).

⁷ D.06-06-064 at 62, refers to the informal resolution of alleged RA non-compliance issues with Energy Division.

CPA also states that there was excess capacity available to CES to provide to CPA for RA compliance purposes. Thus, there was no motive for it to purposely under-report DR allocation information in its 2008 year-ahead filing. Moreover, CPA states that once the error was brought to its attention, it was corrected. As was the case with the alleged year-ahead system RA violation, CPA believed that by correcting the error in its supplemental year-ahead compliance filing, CPA had fully resolved the local RA compliance issue.

7. Settlement Agreement

The Settlement Agreement is appended to this decision. Key terms include:

- The parties agree that the way in which CPA completed its February 16, 2006 RA compliance filing led the Commission's Energy Division and CPSD to believe that CPA had not timely procured the capacity needed to meet its 2008 Year-Ahead System RA obligation.
- For settlement purposes only, CPSD accepts that CPA had timely acquired the capacity needed to meet its 2008 Year-Ahead System RA obligation consistent with D.05-10-042 and D.06-06-064.
- CPA shall make a settlement payment to the State of California General Fund in the amount of \$225,000 within 60 days of the issuance of a final and non-appealable decision by the Commission approving the Settlement Agreement without material change.
- The parties agree that this Settlement Agreement is a release of all claims as between CPSD and CPA relating to Investigation 09-01-017 and releases CPA, its officers, directors, employees, affiliates, and successors from all claims regarding this matter.

As CPA and CPSD are the only parties to this proceeding, the proposed settlement is an all-party settlement.

7.1. Standard of Review

We have a long history of reviewing settlements.⁸ In doing so, we have often acknowledged California's strong public policy favoring settlements. This policy supports many worthwhile goals, such as reducing litigation expenses, conserving scarce resources of parties and the Commission, and allowing parties to reduce the risk that litigation will produce unacceptable results.

In assessing settlements we consider individual settlement provisions but, in light of strong public policy favoring settlements, we do not base our conclusion on whether any single provision is the optimal result. Rather, we determine whether the settlement as a whole produces a just and reasonable outcome.

We have specific rules regarding approval of settlements:

"The Commission will not approve stipulations or settlements whether contested or uncontested, unless the stipulation or settlement is reasonable in light of the whole record, consistent with law, and in the public interest." (Rule 12.1(d) of the Commission's Rules of Practice and Procedure)

In addition to consistency with Rule 12.1(d) with respect to all party settlements, it is our general policy to adopt such settlements, conditioned on the following factors:⁹

- a. The settlement agreement commands the unanimous sponsorship of all active parties;

⁸ See, for example, D.88-12-083, 30 CPUC2d 189.

⁹ See D.92-12-019, 46 CPUC2d 538, 550-551.

- b. Sponsoring parties are fairly reflective of the affected interests;
- c. No settlement term contravenes statutory provisions or prior Commission decisions; and
- d. The settlement conveys sufficient information to permit the Commission to discharge future regulatory obligations with respect to parties and their interests.

7.2. Discussion

7.2.1. All Party Settlement

The Settlement Agreement satisfies the conditions for adoption of all party settlement requirements. That the settlement agreement commands the unanimous sponsorship of all active parties and sponsoring parties are fairly reflective of the affected interests is evident. CPA, the accused party, and CPSD, acting of behalf of the Commission and consumers, are the only parties to this proceeding. Also, as discussed below, the Settlement Agreement is consistent with law. Finally, the Settlement Agreement specifies the amount of the fine, the manner in which it must be paid, and when it must be paid, conveying sufficient information to permit the Commission to discharge its responsibility for resolving this proceeding.

7.2.2. Reasonableness in Light of the Record

The range of the penalty is \$0 (CPA's position) to \$735,534 (CPSD's position). We must determine whether a \$225,000 fine is supported by evidence and resolves this proceeding in a reasonable manner.

First of all, we recognize that this is an all-party settlement. It is our general policy to adopt all-party settlements provided they satisfy certain conditions. As discussed above, these conditions have been met. Through compromise, CPA and CPSD were able to agree to a fine in the amount of \$275,000.

Also, CPA and CPSD now agree to certain facts which support the reasonableness of the settlement. First of all, the parties agree that the way in which CPA completed its February 16, 2006 RA compliance filing led the Commission's Energy Division and CPSD to believe that CPA had not timely procured the capacity needed to meet its 2008 Year-Ahead System RA obligation. Secondly, the parties agree that CPA had timely acquired the capacity needed to meet its 2008 Year-Ahead System RA obligation consistent with D.05-10-042 and D.06-06-064.

The severity of the alleged violations would have been high, if CPA had not adequately procured resources and backstop procurement had been required. In that case, the full fine as recommended by CPSD would have been justified and reasonable. However, based on the now agreed to facts, that is not the case here. CPA had adequate resources and was able to sufficiently address both alleged deficiencies in its December 21, 2007 filing. No backstop procurement for 2008 was required. A fine in the lower part of the \$0 to \$739,567 range is therefore appropriate.

Based on the fact that this is an all party settlement and that a lower than maximum fine is appropriate, we conclude that the Settlement Agreement and, in particular, the agreed to \$225,000 fine are reasonable in light of the record.

7.2.3. Consistency with Law

The Settlement Agreement is consistent with law. The process for developing the Settlement was in accordance with Rule 12.1 of the Rules of Practice and Procedure, as modified by the administrative law judge (ALJ).¹⁰

¹⁰ At evidentiary hearing on September 14, 2009, given that the settlement would be an all-party settlement of all issues in the proceeding, CPA requested a waiver of the

Footnote continued on next page

Further, we do not detect that any element of the Settlement is inconsistent in any way with the California Public Utilities Code Sections, Commission decisions, or the law in general.

7.2.4. Public Interest

The Settlement Agreement is in the public interest. It avoids the cost of further litigation, and conserves resources of the parties and the Commission. Furthermore, while the Settlement Agreement by its nature is non-precedential, the fact that a fine has been levied sends a clear message that, whether intended or not, non-compliance with the RAR filing requirements will result in adverse consequences to the LSE. To the extent that this message results in more diligent LSE compliance with RAR, the public interest is served.

8. Conclusion

The Settlement Agreement is an all-party settlement. It is reasonable in light of the record, consistent with law, and in the public interest. As such, it should be adopted.

9. Assignment of Proceeding

Michael R. Peevey is the assigned Commissioner and David K. Fukutome is the assigned ALJ and presiding officer in this proceeding.

Findings of Fact

1. The way in which CPA completed its February 16, 2006 RA compliance filing led the Commission's Energy Division and CPSD to believe that CPA had not timely procured the capacity needed to meet its 2008 Year-Ahead System RA obligation.

requirement that a settlement conference be held prior to the parties executing the settlement agreement. That request was granted.

2. CPA timely acquired the capacity needed to meet its 2008 Year-Ahead System RA obligation consistent with D.05-10-042 and D.06-06-064.

3. The Settlement Agreement is an all-party settlement.

4. Exhibits 1 through 6 were identified at evidentiary hearing on September 14, 2009. There are no objections to the receipt in evidence of Exhibits 1 through 6.

Conclusions of Law

1. The Settlement Agreement is reasonable in light of the record, is consistent with law, is in the public interest and should be adopted.

2. Exhibits 1 through 6 should be received in evidence.

O R D E R

IT IS ORDERED that:

1. The January 22, 2010 Joint Motion of Consumer Protection and Safety Division and Calpine PowerAmerica-CA, LLC for Approval of Settlement Agreement is granted.

2. The Settlement Agreement between Consumer Protection and Safety Division and Calpine PowerAmerica-CA, LLC is adopted. The Settlement Agreement is attached as an Appendix to this decision.

3. Calpine PowerAmerica-CA, LLC must pay a fine of \$225,000.00 by check or money order payable to the California Public Utilities Commission and mailed or delivered to the Commission's Fiscal Office at 505 Van Ness Avenue, Room 3000, San Francisco, CA 94102, within 60 days of the effective date of this order. Write on the face of the check or money order "For deposit to the General Fund per Decision _____."

4. Exhibits 1 through 6 are received in evidence.
5. Investigation 09-01-017 is closed.

This order is effective today.

Dated _____, at San Francisco, California.

INFORMATION REGARDING SERVICE

I have provided notification of filing to the electronic mail addresses on the attached service list.

Upon confirmation of this document's acceptance for filing, I will cause a Notice of Availability of the filed document to be served upon the service list to this proceeding by U.S. mail. The service list I will use to serve the Notice of Availability of the filed document is current as of today's date.

Dated March 18, 2010, at San Francisco, California.

/s/ TERESITA C. GALLARDO
Teresita C. Gallardo

N O T I C E

Parties should notify the Process Office, Public Utilities Commission, 505 Van Ness Avenue, Room 2000, San Francisco, CA 94102, of any change of address to ensure that they continue to receive documents. You must indicate the proceeding number on the service list on which your name appears.

The Commission's policy is to schedule hearings (meetings, workshops, etc.) in locations that are accessible to people with disabilities. To verify that a particular location is accessible, call: Calendar Clerk (415) 703-1203.

If specialized accommodations for the disabled are needed, e.g., sign language interpreters, those making the arrangements must call the Public Advisor at (415) 703-2074 or TDD# (415) 703-2032 five working days in advance of the event.