BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA

FILED
1-27-17
04:59 PM

Application of Pacific Gas and Electric Company for Approval of the Retirement of Diablo Canyon Power Plant, Implementation of the Joint Proposal, and Recovery of Associated Costs Through Proposed Ratemaking Mechanisms. (U 39 E)	Application 16-08-006 (Filed August 11, 2016)

COMMENTS OF THE OFFICE OF RATEPAYER ADVOCATES AND THE UTILITY REFORM NETWORK ON THE JOINT MOTION OF PACIFIC GAS AND ELECTRIC COMPANY, THE COUNTY OF SAN LUIS OBISPO, THE CITY OF ARROYO GRANDE, THE CITY OF ATASCADERO, THE CITY OF MORRO BAY, THE CITY OF PASO ROBLES, THE CITY OF PISMO BEACH, THE CITY OF SAN LUIS OBISPO, THE SAN LUIS COASTAL UNIFIED SCHOOL DISTRICT, FRIENDS OF THE EARTH, NATURAL RESOURCES DEFENSE COUNCIL, ENVIRONMENT CALIFORNIA, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCAL 1245, COALITION OF CALIFORNIA UTILITY EMPLOYEES, AND ALLIANCE FOR NUCLEAR RESPONSIBILITY FOR ADOPTION OF SETTLEMENT AGREEMENT

LAURA TUDISCO
Attorney for
Office of Ratepayer Advocates

California Public Utilities Commission
505 Van Ness Avenue
San Francisco, CA 94102
Telephone: (415) 703-2164
E-mail: ljt@cpuc.ca.gov

MATTHEW FREEDMAN
Attorney for
The Utility Reform Network

785 Market Street, 14th floor
San Francisco, CA 94103
Telephone: (415) 929-8876
E-mail: matthew@turn.org

January 27, 2017

I. INTRODUCTION

Pursuant to Rule 12.2 of the Rules of Practice and Procedure of the California Public Utilities Commission ("CPUC" or "Commission"), the Office of Ratepayer Advocates ("ORA") and The Utility Reform Network ("TURN") submit these Comments to the "Joint Motion of Pacific Gas and Electric Company ("PG&E"), the County of San Luis Obispo, the City of Arroyo Grande, the City of Atascadero, the City of Morro Bay, the City of Paso Robles, the City of Pismo Beach, the City of San Luis Obispo, the San Luis Coastal Unified School District, Friends of the Earth, Natural Resources Defense Council, Environment California, International Brotherhood of Electrical Workers Local 1245, Coalition of California Utility Employees, and Alliance for Nuclear Responsibility for Adoption of Settlement Agreement" ("Joint Motion").[1]

It is premature for the Commission to consider this Settlement Agreement. If the Commission does proceed to consider the provisions in the Settlement Agreement that would require ratepayer funding, then hearings are warranted. ORA and TURN would not object, however, to the Commission's approval of the Community Program if it is funded wholly by shareholders.

II. BACKGROUND

PG&E filed Application (A.) 16-08-006 on August 11, 2016 seeking approval to implement portions of a Joint Proposal for the Retirement of Diablo Canyon Power Plant ("Joint Proposal"). The signatories to the Joint Proposal were PG&E, the Natural Resources Defense Council ("NRDC"), Friends of the Earth ("FOE"), Environment California, International Brotherhood of Electrical Workers ("IBEW") Local 1245, Coalition of California Utility Employees ("CUE"), and the Alliance for Nuclear Responsibility ("A4NR").

When PG&E filed the Application, it also served testimony and workpapers. Protests or responses were due September 15, 2016. ORA, TURN, and other parties filed Protests to the Application.

[1] For purposes of this response, "Settlement Agreement" means the agreement submitted by the Joint Motion.

In its Application, PG&E proposed that ratepayers pay $49.5 million to fund a Community Impact Mitigation Program.[2] The Settlement Agreement of the Joint Parties increases that amount to $75 million to establish an Essential Services Mitigation Fund.[3] In addition, the Settlement Agreement seeks ratepayer funding of $10 million for an Economic Development Fund.[4]

III. LEGAL STANDARD FOR SETTLEMENTS

According to Rule 12.1(d):

> The Commission will not approve settlements, whether contested or uncontested, unless the settlement is reasonable in light of the whole record, consistent with law, and in the public interest.

The provisions in the Settlement Agreement that are the subject of these Comments are those that would require ratepayer funding of the $75 million Essential Services Mitigation Fund ("ESMF") and a $10 million Economic Development Fund ("EDF").[5] Requiring ratepayer funding of these provisions of the Settlement Agreement meets none of the criteria for Commission adoption of settlements.

A. The Record

So far, only the parties that are in agreement with PG&E's Settlement Agreement have submitted testimony. ORA and TURN received the testimony of the County of San Luis Obispo on December 28, 2016. To date, no testimony has actually been admitted

[2] Application, p. 11.

[3] Joint Motion, p. 2.

[4] The structure of the fund for this charitable contribution/ goodwill payment to the community has changed since the proceeding started. In the Joint Proposal attached to the Application, it was called the "Community Impact Mitigation Program" ("CIMP") and was in the amount of $49.5 million. In the Settlement Agreement that is the subject of the Joint Motion, the charitable contributions/ goodwill payments are referred to as the Essential Services Mitigation Fund ("ESMF") in the amount of $75 million, and the Economic Development Fund ("EDF") in the amount of $10 million. The Joint Motion refers to the EDF as "part of the overall CIMP." (Joint Motion, p. 18.) The Joint Motion also refers to "the Community Program." (Joint Motion, p. 12.)

[5] Joint Motion, Appendix 1 and Appendix 2. The $75 million ESMF is "a mitigation measure that is based on many factors including forecasts of tax revenue declines in the future." Apparently, the County will then distribute the funds among various local agencies. (Joint Motion, pp. 16-17, and Appendix 1.) The purpose of the EDF "is to provide immediate funding for actions to create new economic development opportunities, to mitigate impacts associated with the pending closure of Diablo Canyon, and to facilitate the transition of the impacted regional communities." (Joint Motion, p. 17.)

into the record, so to say that the Settlement Agreement is "reasonable in light of the whole record" is premature.

B. The Law

Before the Commission can adopt any decision in this matter, due process requires that parties be given adequate notice and an opportunity to be heard.[6] Adoption of this Settlement Agreement would violate that fundamental precept.

First, there is the notice question. Section 454 of the Public Utilities Code and Rule 3.2 of the Commission's Rules require that, whenever a utility

> "files an application to change any rate, other than a change reflecting and passing through to customers only new costs …. which do[es] not result in changes in revenue allocation, … the [utility] shall furnish to its customers affected by the proposed rate change notice of its application to the commission for approval of the new rate."[7]

On October 3, 2017, PG&E filed with the Commission its Proof of Rule 3.2 Compliance. According to the Notice, approval of the application "would increase total system rates by 1.6 percent in the near term."[8] That statement was made when the request for ratepayer funding for the Community Impact Mitigation Program was $49.5 million.

The Joint Motion requests approval of a Settlement Agreement that would change the original ratemaking proposal to an Essential Services Mitigation Fund, now in the amount of $75 million. According to PG&E, "the annual revenue requirement will increase from $6.3 million to $9.5 million."[9] The Settlement Agreement would also require PG&E ratepayers to pay a lump sum of $10 million to finance an Economic

---

[6] *Railroad Commission of California v. Pacific Gas and Electric Company* (1937) 302 U.S. 388, 393; *People v. Western Air Lines Inc.* (1954) 52 Cal. 2d 621, 632.

[7] Public Utilities Code §454(a).

[8] August 25, 2016 Notification of Pacific Gas and Electric Company's Application Requesting to Increase Rates for the Retirement of Diablo Canyon (A.16-08-006), p. 1.

[9] PG&E Supplemental Testimony of Teresa Hoglund Community Impacts Mitigation Program Settlement, p. 2 (December 28, 2016).

Development Fund.[10] The Joint Motion refers to these two funds as the "CIMP" or the "Community Program."[11]

PG&E describes the "incremental impact of the Agreement" as "*de minimis*," and says it "would not measurably change" the rate impact it originally noticed to customers.[12] The Commission should consider whether the notice PG&E gave its customers in August 2016 regarding the $49.5 million proposal serves as adequate notice of the new $85 million proposal for purposes of compliance with the Public Utilities Code and Commission.

As noted above, only PG&E and parties supporting the Settlement Agreement have submitted testimony thus far. "An opportunity to be heard" has yet to be afforded ORA, TURN or any other party not part of the Settlement Agreement. Until parties have the opportunity to conduct discovery, submit testimony and cross examine other witnesses sponsoring testimony, there is insufficient factual basis for the Commission to determine that the costs for which PG&E seeks ratepayer funding are just or reasonable, as required by Public Utilities Code Section 451.

Adoption of the Settlement Agreement is not consistent with the law relating to due process in general, or to public utilities in particular.

C. The Public Interest

The Joint Motion states that the Settlement Agreement is in the public interest and offers the following:

> "Diablo Canyon has provided reliable electricity for PG&E's customers for more than 30 years. It has done so with the support and assistance of the local community that has provided a home for Diablo Canyon and its employees….

[10] PG&E Supplemental Testimony of Teresa Hoglund Community Impacts Mitigation Program Settlement, p. 2 (December 28, 2016).

[11] Joint Motion, pp. 8,12,15,18. The Settlement Agreement states that it is intended to provide a "complete and final resolution of the CIMP-related issues" subject to certain reservations. (Settlement Agreement, p. 4.) See also PG&E Supplemental Testimony of Thomas P. Jones Community Impacts Mitigation Program Settlement, p. 2 (December 28, 2016) ("the originally proposed $49.5 million Community Program payment should be modified to include a $75 million ESMF and a $10 million EDF.").

[12] PG&E Supplemental Testimony of Teresa Hoglund Community Impacts Mitigation Program Settlement, p. 2 (December 28, 2016).

> [a]ll electric customers in PG&E's service area have benefited from Diablo Canyon's reliable energy."[13]

The Settling Parties conclude that their Settlement Agreement:

> "strikes the right balance between providing appropriate transitional assistance to the community while also recognizing that the community must manage this transition so that it can thrive in the longer term without the historic levels of spending and taxes funded by PG&E customers."[14]

Although PG&E repeatedly refers to the benefits Diablo Canyon has brought to ratepayers,[15] PG&E's shareholders have also reaped significant financial benefits from the plant.[16] PG&E's initial $320 million estimate (in $1968) for construction turned into a $5.5 billion cost by the time the plant was commissioned in 1985.[17] In 1988, the Commission adopted a settlement to address "the rate treatment of all the costs of constructing, owning, and operating Diablo Canyon for the first 30 years of the commercial operation for each unit of the plant."[18] That settlement represented a departure from traditional ratemaking.

In adopting the 1988 settlement, the Commission authorized a "performance-based ratemaking" mechanism that afforded PG&E shareholders revenue based on the power produced by the plant.[19] In the early years, Diablo Canyon's power production was at its highest. As a result of the lucrative 1988 settlement and the Incremental Cost Incentive Price (ICIP) mechanism that provided fixed prices for Diablo Canyon output well in excess of actual operating costs, PG&E realized billions of dollars of excess revenues that benefitted shareholders. After PG&E emerged from bankruptcy, Diablo Canyon came under traditional ratemaking and shareholders were able to earn a return on the

---

[13] Joint Motion, p. 14.

[14] Joint Motion, p. 15.

[15] See, e.g., Joint Motion, pp. 7, 12, 14.

[16] PG&E says in its Section on the "Interests of Settling Parties" that "PG&E represents the interests of its customers." (Joint Motion, p. 4.) PG&E does not mention representing the interests of its shareholders, though it certainly has a fiduciary duty to do so.

[17] D.88-12-083, p. 4.

[18] *Re Pacific Gas and Electric Company (*1988) 30 CPUC 2d 189, 1988 Cal. PUC LEXIS 886.

[19] *Re Pacific Gas and Electric Company (*1988) 30 CPUC 2d 189, 1988 Cal. PUC LEXIS 886.

undepreciated capital costs. The history demonstrates that Diablo Canyon has provided substantial benefits to PG&E shareholders over its existing life despite the massive initial cost overruns. As a result, it would be incorrect to suggest that PG&E ratepayers have been the sole beneficiaries of Diablo Canyon operations.

In any event, PG&E's proposal to require ratepayers to fund millions of dollars for the Community Program is contrary to Commission policy and not in the public interest. The Joint Motion states that:

> "[a]lthough the Settling Parties do not intend the Community Program to directly replace property tax revenues or produce new tax revenues, the Settling Parties viewed the general magnitude of the tax reduction as one indicator of the fiscal impact on the community that should be mitigated by the Community Program."[20]

The proposed Community Program costs are not cost-of-service expenses. PG&E ratepayers already pay the taxes and depreciation expenses for Diablo Canyon and will continue to do so until 2024 and 2025. This is not a situation where there is an early write-down of the asset. The depreciation life of Diablo Canyon remains 40 years--until the expiration of the current licenses.

If PG&E wants to make a charitable contribution or a goodwill payment to the community, it is certainly entitled to do so, but not with ratepayer money. Longstanding Commission policy, upheld by the California Supreme Court, disallows charitable contributions as a charge against ratepayers.[21] Longstanding Commission policy has also denied ratepayer funding of corporate image/ goodwill enhancement.[22]

Moreover, the Commission has supported voluntary shareholder contributions for initiatives that PG&E has proposed that go beyond core regulatory obligations. In Decision 06-12-032, the Commission "strongly encouraged" PG&E to cover some

---

[20] Joint Motion, p. 12.

[21] *Pacific Telephone & Telegraph* v. CPUC (1965) 62 Cal. 2d 634; *Joint Application of Pacific Enterprises, Enova Corporation et al*. (1998) 72 CPUC 2d 343, 1998 Cal.PUC LEXIS 1.

[22] See, e.g., *In the Matter of the Application of Roseville Telephone Company* (1996) 70 CPUC 2d, (1996 Cal.PUC LEXIS 1138; *Pacific Telephone & Telegraph* (1974) 77 CPUC 117, 1974 Cal. PUC LEXIS 1663.

potential costs associated with the ClimateSmart program with shareholder funds.[23] In distinguishing ClimateSmart from other mandatory programs, the Commission explained:

> "if PG&E wants to design its own program, it is reasonable for PG&E to make a contribution to the program's success…PG&E may have greater success with the program and gain a great deal of public goodwill if it demonstrates its commitment to its own program by making this shareholder contribution."[24]

Since PG&E is likely to issue public statements taking credit for the additional payments contained in the settlement to realize badly needed public relations value, there should be a shareholder contribution to cover these costs. Otherwise, the public may be misled into believing that shareholders are the source of the payments. PG&E should not be permitted to accrue goodwill associated with the incremental payments without making any contribution from its own shareholders.

Finally, the Joint Motion argues that "the Commission has previously approved mitigation payments to compensate the local community for similar impacts associated with the depreciation of Diablo Canyon."[25] While factually correct, any suggestion that the Commission authorized the payment as a matter of policy is not supported by Resolution E-3535, which the Joint Motion cites as its authority.

In May 1997, the Commission issued a decision adopting an initial incremental cost incentive price for Diablo Canyon Power Plant and determined the level of sunk costs that would be associated with the plant. In that proceeding, the Commission denied the pleadings of the County and School District for tax relief, which they felt would be necessary because of anticipated tax revenue shortfalls resulting from the Commission's decision.[26] In so doing, the Commission stated that the "…County must direct its request for relief to the Legislature and the Board of Equalization, not this Commission."[27]

---

[23] Decision 06-12-032, p. 20.

[24] Decision 06-12-032, p. 21.

[25] Joint Motion, p. 15.

[26] Resolution E-3535, p. 2.

[27] Re Pacific Gas and Electric Company (1998) 72 CPUC. 2d 560.

After D.98-05-088 was issued, the California Legislature passed into law Chapter 282, Section 8660-001-0162, paragraph 3, of Statutes of 1997.[28] That particular statute stated that if PG&E, the County and the School District entered into a settlement that resolved their tax revenue claims, then PG&E could recover an amount, not to exceed $10 million through base rates in 1998.

Resolution E-3535 noted that PG&E, the County and the School District had reached such a settlement, and the Commission therefore authorized PG&E the additional $10 million.[29] Thus, the Commission did not determine, as a matter of policy, that ratepayers should fund mitigation programs. The Commission was implementing a law passed by the Legislature.

IV. PROCEDURAL ISSUES

ORA and TURN recommend that the Commission allow parties to continue discovery regarding the Settlement Agreement and schedule hearings. Or, pursuant to Rule 12.4 of the Commission's Rules of Practice and Procedure, the Commission should propose alternative terms to the parties to the Settlement that do not include ratepayer funding. The Commission has followed this course of action in the past.[30]

If the Commission considers authorizing any ratepayer funding for the Community Program, then the appropriate amount is a factual matter that will be contested. The Settling Parties claim that the $85 million they agreed to "strikes the right balance."[31] That dollar amount is nearly double the $49.5 million requested when PG&E filed its Application in August 2016. The explanation PG&E and the other signatories to the December 2016 Settlement Agreement offer raises a number of tax and accounting issues. No party, other than PG&E and the proposed beneficiaries of this Settlement Agreement, has had an opportunity to investigate the validity or accuracy of the assertion that the $85 million "strikes the right balance."

---

[28] Resolution E-3535, p. 2.

[29] Resolution E-3535, p. 4.

[30] See, e.g., *Decision Addressing the General Rate Cases of San Diego & Electric and Southern California Gas Company and the Proposed Settlements,* D.16-06-054 (July 1, 2016).

[31] Joint Motion, p. 15.

V. CONCLUSION

It is premature for the Commission to consider adopting the Settlement Agreement provisions that call for ratepayer funding of the Community Program. ORA and TURN recommend that the Commission either deny the Motion for Adoption of Settlement to allow parties time to conduct discovery and time for evidentiary hearings or, in the alternative, propose amendments to remove ratepayer funding for the Community Program.

Pursuant to Commission Rule 1.8, counsel for TURN has authorized ORA to sign these Comments on TURN's behalf.

Respectfully submitted,

/s/ LAURA TUDISCO
Laura Tudisco

Attorney for the Office of Ratepayer Advocates
California Public Utilities Commission
505 Van Ness Avenue
San Francisco, CA 94102
Telephone: (415) 703-2164
E-mail: ljt@cpuc.ca.gov

January 27, 2017