

Decision 11-03-006 March 10, 2011

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Investigation on the Commission's Own Motion Into the Operations and Practices of Constellation NewEnergy, Inc.; Notice of Opportunity for Hearing; and Order to Show Cause Why the Commission Should Not Impose Fines and Sanctions For Constellation NewEnergy, Inc. January 2009 Violation of System Resource Adequacy Requirements.

Investigation 10-04-010
(Filed April 8, 2010)

DECISION APPROVING SETTLEMENT AGREEMENT

1. Summary

This decision approves the settlement between the Commission's Consumer Protection and Safety Division and respondent Constellation NewEnergy, Inc. (CNE) resolving this investigation. CNE shall make a settlement payment to the State of California General Fund in the amount of \$300,000 within 60 days after the date when the Commission serves the decision finally resolving any application for rehearing or, where no application for rehearing has been filed, the period to apply for rehearing has expired. Investigation 10-04-010 is closed.

2. Background

The Commission opened this investigation to consider whether to penalize Constellation NewEnergy, Inc. (CNE) on the evidence presented by the Consumer Protection and Safety Division (CPSD) that CNE failed to secure adequate resources for the month of January 2009 in violation of system resource

adequacy requirements. Decision (D.) 05-10-042, which implements the resource adequacy requirements program, concludes as a matter of law that “a penalty equal to three times the monthly cost for new capacity is an appropriate sanction for an LSE’s [load-serving entity] failure to acquire the capacity needed to meet its [resource adequacy] obligation.” (Conclusion of Law 21.) D.06-06-064, which adopted further refinements to the resource adequacy requirements program, concludes as a matter of law that \$40 per kilowatt (kW)-year is a reasonable and appropriate measure of the cost of new capacity for purposes of resource adequacy requirement penalties. (Conclusion of Law 26.)

As set forth in the order instituting this investigation, CPSD alleged that CNE’s December 1, 2008 resource adequacy compliance filing for its January 2009 procurement obligation was deficient because, although the compliance advice letter indicated that CNE met its obligation, it included contracts totaling 180 MW which were not valid for January 2009. CPSD asserts that CNE is therefore in violation of the Commission’s resource adequacy requirements and that, pursuant to the penalty formula established in D.06-06-064, it should be penalized \$1.8 million.

The assigned Commissioner’s May 11, 2010 scoping memo and ruling identified the following issues to be addressed in this proceeding:

1. Did CNE fail to file a valid month-ahead system resource adequacy compliance advice letter as required by Resolution E-4017?
2. If so, what is the standard for determining whether to assess a penalty and in what amount?
 - a. Does D.05-10-042 establish strict liability for a penalty for violation of resource adequacy requirements, pursuant to the formula set forth therein? or,

- b. Do the principles historically used by the Commission in assessing fines, as set forth in the *Affiliate Rulemaking Decision*, D.98-12-075, apply to the assessment of a penalty for violation of resource adequacy requirements?
3. If the *Affiliate Rulemaking Decision* principles apply,
 - a. What harm was caused by virtue of the violation?
 - b. What was CNE's conduct in preventing, detecting, correcting, disclosing and rectifying the violation?
 - c. What amount of fine will achieve the objective of deterrence based on CNE's financial resources?
 - d. What fine or sanction has the Commission imposed under reasonably comparable factual circumstances?
 - e. Under the totality of circumstances and evaluating the harm from the perspective of the public interest, what is the appropriate fine or sanction?

The matter was set for evidentiary hearing on September 27, 2010, to take evidence on the material factual issues.

By joint motion filed September 24, 2010, and granted by the Administrative Law Judge's (ALJ) e-mail ruling that same day and affirmed here, the parties requested that the evidentiary hearing be taken off calendar in anticipation that they would shortly reach a settlement of the matter.

By joint motions filed October 1, 2010, the parties moved for approval of a proposed settlement of the matter and for the admission of the parties' prepared testimony into evidence.¹

¹ The prepared testimony is collectively offered as a single exhibit including (1) a public version of the March 4, 2010, "CPSD Investigative Report on CNE," sponsored by Peter Spencer; (2) the July 21, 2010, "Prepared Direct Testimony of Edward MacKay on Behalf of CNE;" (3) the July 21, 2010, "Prepared Direct Testimony of Mary Lynch on Behalf of CNE;" (4) the September 6, 2010, "Rebuttal of the CPSD to the Testimony of CNE,"

Footnote continued on next page

3. Discussion

Pursuant to Rule 12.1(d), the Commission will not approve the settlement unless it is reasonable in light of the whole record, consistent with law, and in the public interest.

The parties stipulate to the fact that, after CNE submitted its December 1, 2008, month-ahead resource adequacy compliance filing for January 2009, CNE was required to procure an additional 180 MWs in order to meet its resource adequacy and that CNE amended its filing on December 15, 2008, to reflect that additional procurement. The parties dispute whether this constitutes a violation of the system resource adequacy requirements and, even if it does, whether a penalty should be imposed and in what amount.

CPSD cites to Commission authority in support of its assertion that the deficiency in CNE's December 1, 2008 month-ahead resource adequacy compliance filing automatically subjected CNE to a penalty, and that the amount of the penalty is \$1.8 million. CNE cites to the procedural and decisional background to the Commission's resource adequacy program including D.06-07-031, which provides that the Energy Division will give an LSE notice and a limited time to resolve a violation prior to recommending the initiation of an enforcement action. CNE cites to correspondence from the Commission's Energy Division directing CNE to promptly correct this deficiency and, upon its doing so, confirming that CNE was then compliant, in support of its assertion that it was not in violation of Commission rules or orders. CNE cites to Commission's

sponsored by Peter Spencer; and (5) the September 21, 2010, "Prepared Testimony of Edward MacKay on Behalf of CNE in Rebuttal to the September 8, 2010 Testimony of Peter Spencer." The exhibit is hereby admitted into the evidentiary record.

precedent in support of its assertion that, if there were a violation, mitigating circumstances might reduce or eliminate a penalty, and presents evidence of mitigating circumstances that might do so. Based on the whole record, both parties face substantial litigation risk as to whether their respective positions will prevail. The settlement payment amount of \$300,000 reasonably reflects the litigation risk faced by the parties.

Nothing in the settlement agreement contravenes any statute or Commission's decision or rule. The settlement agreement is therefore consistent with applicable law.

The settlement agreement avoiding the time, expense and uncertainty of further litigating and resolving the matter and, by requiring a settlement payment, affirms the importance of adherence to the Commission's rules and orders. The settlement agreement is therefore in the public interest.

4. Assignment of Proceeding

Commissioner Michael R. Peevey is the assigned Commissioner, and ALJ Hallie Yacknin is the assigned ALJ and the presiding officer in this proceeding.

5. Comments on Proposed Decision

The proposed decision of the ALJ in this matter was mailed to the parties in accordance with Section 311 of the Public Utilities Code and comments were allowed under Rule 14.3 of the Commission's Rules of Practice and Procedure. CPSD and CNE filed opening comments on February 24, 2011, and CPSD filed reply comments on March 1, 2011.

Findings of Fact

1. After CNE submitted its December 1, 2008, month-ahead resource adequacy compliance filing for January 2009, CNE was required to procure an

additional 180 MWs in order to meet its resource adequacy and CNE amended its filing on December 15, 2008, to reflect that additional procurement.

2. CPSD maintains that CNE therefore violated system resource adequacy requirements and must pay a penalty of \$1.8 million pursuant to Commission's decisions.

3. CNE maintains that, under its alleged facts, its action did not constitute a violation of system resource adequacy requirements and that, even if it did, a penalty is not appropriate.

4. Based on the whole record, both parties face substantial litigation risk as to whether their respective positions will prevail.

5. The settlement agreement avoids the time, expense and uncertainty of further litigating and resolving the matter and, by requiring a settlement payment, affirms the importance of adherence to the Commission's rules and orders.

Conclusions of Law

1. The settlement payment amount of \$300,000 reasonably reflects the litigation risk faced by the parties.

2. Nothing in the settlement agreement contravenes any statute or Commission decision or rule.

3. The settlement agreement is in the public interest.

4. The settlement agreement should be approved, and CNE should be directed to make a settlement payment to the State of California General Fund in the amount of \$300,000 within 60 days after the date when the Commission serves the decision finally resolving any application for rehearing of this decision or, where no application for rehearing has been filed, the period to apply for rehearing has expired.

5. This investigation should be closed.

O R D E R

IT IS ORDERED that:

1. The settlement agreement is approved.
2. The parties' prepared testimony is admitted into evidence.
3. Constellation NewEnergy, Inc. (CNE) shall make a settlement payment to the State of California General Fund in the amount of \$300,000 within 60 days after the date when the Commission serves the decision finally resolving any application for rehearing of this decision or, where no application for rehearing has been filed, the period to apply for rehearing has expired. CNE must pay the \$300,000 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 the timeframe directed above. CNE must write on the face of the check or money order "For deposit to the General Fund per Decision 11-03-006."
4. Investigation 10-04-010 is closed.

This order is effective today.

Dated March 10, 2011, at San Francisco, California.

MICHAEL R. PEEVEY
President
TIMOTHY ALAN SIMON
MICHEL PETER FLORIO
CATHERINE J.K. SANDOVAL
Commissioners