Decision 12-05-025 May 24, 2012

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Rio Bravo Rocklin, Complainant, vs. Pacific Gas and Electric Company (U39E), Defendant.	Case 10-07-020 (Filed July 19, 2010)

DECISION ADOPTING SETTLEMENT AGREEMENT

1. Summary

Today's decision resolves a dispute between Rio Bravo Rocklin and Pacific Gas and Electric Company (PG&E). Specifically, Rio Bravo Rocklin claims PG&E owes it approximately $2,000,000 related to capacity purchased from Rio Bravo Rocklin's biomass facility under a Standard Offer Long-Term Energy and Capacity Power Purchase Agreement. Rio Bravo Rocklin and PG&E proposed a settlement which resolves all the disputed issues. This decision approves the settlement, dismisses the complaint with prejudice, and closes the proceeding.

2. Background

Rio Bravo Rocklin is a California General Partnership that owns and operates the Rio Bravo Rocklin generation facility (Rio Bravo).[1] Rio Bravo sells energy and capacity to Pacific Gas and Electric Company (PG&E) under a Standard Offer Number 4 Long-Term Energy and Capacity Power Purchase Agreement (SO4) entered into on December 12, 1984, with a term that expires in 2020. Rio Bravo interconnects to PG&E's system via the Lincoln-Pleasant Grove 60 kilovolt Line.

On July 19, 2010, Rio Bravo filed a complaint against PG&E. Rio Bravo's complaint alleges that: 1) from June 9, 1999, to March 1, 2009, PG&E underpaid Rio Bravo for capacity purchased from its biomass facility; 2) this underpayment was the result of PG&E's failure to inform Rio Bravo that the biomass facility was no longer "remote" and PG&E's failure to apply the appropriate "non-remote" capacity loss adjustment factor (CLAF); and 3) PG&E has been unjustly enriched at Rio Bravo's expense. In addition to findings consistent with these allegations, Rio Bravo asks the Commission to order PG&E to remit approximately $2,000,000, which is the difference between the amount Rio Bravo claims PG&E should have paid for capacity from Rio Bravo as a non-remote resource, and the lesser amount PG&E actually paid during the period between January 1, 1999, and February 28, 2009, plus interest.

PG&E responded to Rio Bravo's complaint on August 27, 2010, by filing an answer to the complaint and a concurrent motion to dismiss the complaint. PG&E argues that Rio Bravo's complaint is without merit because: 1) Rio Bravo

[1] The Rio Bravo Rocklin facility was originally owned by Ultrapower, Incorporated.

has not alleged any contractual basis for additional payment; 2) Rio Bravo fails to identify any law, rule, or Commission order which either requires PG&E to notify Rio Bravo that its facility might have become non-remote or to order a CLAF study; 3) PG&E did not have the necessary information to change its capacity payment factor; and 4) the Commission's adopted CLAF methodology requires a study to revise the CLAF and specifies that the study must be based on PG&E's transmission and distribution system in existence at the time of the study. Thus, PG&E argues that even if it had pertinent information, that information cannot now be used to justify a retroactive increase (or decrease) in capacity payments. Finally, PG&E asserts that because the parties' rights are governed by the terms of their contract, Rio Bravo's claim for equitable restitution cannot be heard. Rio Bravo responded to PG&E's motion to dismiss on September 13, 2010.

A prehearing conference (PHC) was held on November 22, 2010, at 10:00 a.m. Discussions at the PHC focused on PG&E's motion to dismiss the Rio Bravo complaint, the status of discovery between the parties, and the schedule for the proceeding. The subsequent Assigned Commissioner's Ruling and Scoping Memo denied PG&E's motion to dismiss and set forth a new schedule for the proceeding.[2]

On January 12, 2011, Rio Bravo and PG&E filed a joint motion seeking an extension of time for evidentiary hearings in order to pursue resolution and settlement of the disputed issues in this proceeding. After noting that the

[2] As stated in the scoping memo: "As there is no express binding agreement that defines the Parties' rights in this area, nothing appears to preclude Rio Bravo's quasi-

Footnote continued on next page

extension would allow them to focus on settlement discussions, Rio Bravo and PG&E pointed out that the extension was also needed to prepare documentation supporting the settlement, and to submit a joint motion seeking Commission approval of the settlement.[3]

On January 13, 2011, the assigned Administrative Law Judge (ALJ) granted the Rio Bravo and PG&E request and cancelled the scheduled hearings and briefings. The ALJ also directed Rio Bravo and PG&E to provide an update on their settlement efforts on, or before, February 15, 2011. On February 11, 2011, Rio Bravo and PG&E notified the ALJ that negotiations were at an impasse and requested that hearings be rescheduled. Prior to the date set for hearings in the Scoping Memo, Rio Bravo and PG&E reached an agreement that resolved the dispute (Settlement Agreement) and, by motion dated May 27, 2011, requested Commission approval of their Settlement Agreement.

In their motion seeking approval of the Settlement Agreement, Rio Bravo and PG&E assert that the Settlement Agreement is reasonable in light of the record, consistent with the law, and in the public interest. However, the Settlement Agreement requires the payment of ratepayer funds to Rio Bravo. We believe there is a potential conflict of interest where, as here, two commercial entities use ratepayer funds to resolve a dispute. In an abundance of caution, on July 13, 2011, the ALJ directed Rio Bravo and PG&E to submit a brief that discusses the propriety and lawfulness of investor owned utilities (such as

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contract action for unjust enrichment. PG&E's motion to dismiss is therefore denied without prejudice to PG&E's raising such arguments after evidentiary hearings… ."

[3] Rio Bravo and PG&E also acknowledged that the requested extension might extend the proceeding beyond the deadline imposed by Public Utilities Code Section 1701.2(d), and jointly stipulated their assent to an extension of this deadline.

PG&E) entering into settlement agreements with qualifying facilities (such as Rio Bravo), that resolve contract disputes with the payment of ratepayer funds. On August 9, 2011, PG&E and Rio Bravo submitted a joint brief that addressed this issue. On August 11, 2011, the ALJ took the additional step of issuing a ruling requesting comments on the settlement from The Division of Ratepayer Advocates (DRA). On August 31, 2011, DRA concurrently filed a motion for party status in this proceeding and comments on the Settlement Agreement.[4] On September 23, 2011, PG&E and Rio Bravo filed a Joint Response to DRA's comments on the Settlement Agreement.

3. Discussion

3.1. The Settlement Agreement

The Settlement Agreement provides for a payment by PG&E to Rio Bravo to settle all claims related to the complaint and is contingent upon: 1) the issuance of a final and non-appealable Commission decision that approves the Settlement Agreement as reasonable in light of the whole record, consistent with the law, and in the public interest; 2) adoption of the Settlement Agreement without modification; 3) authorization for PG&E to obtain recovery of the full settlement amount in its Energy Resource Recovery Account (ERRA) proceeding (or such other appropriate ratemaking mechanism determined by the Commission); and 4) dismissal of the Complaint with prejudice.

3.2. Comments and Reply Comments on the Settlement

DRA expressed conditional opposition to the settlement in its August 31, 2011, comments (DRA Comments). Specifically, DRA opposes the

[4] DRA's request for party status was granted on September 11, 2011.

settlement unless language authorizing PG&E to "obtain" recovery of the settlement costs through the ERRA is modified so as to only authorize PG&E to "seek" such recovery.[5] According to DRA, in its current form the settlement authorizes PG&E to obtain recovery from ratepayers through the ERRA process but precludes DRA from examining the reasonableness of the settlement expense in the ERRA.

DRA argues that in prior reviews of QF Settlement Agreements, the Commission has issued a decision that approves the settlement but defers review of the reasonableness of the settlement amount to a future ERRA proceeding.[6] According to DRA, "[i]n the past approvals of QF Settlement Agreements the Commission has directed the affected IOU [investor owned utility] to present its recommendation for cost recovery in its annual ERRA Compliance Proceeding."[7] Citing Decision (D.) 07-11-027 and D.09-12-002, DRA asserts that in order for this settlement to follow the process previously used by the Commission to approve QF settlements, the language in the Settlement Agreement authorizing PG&E to obtain recovery of the settlement costs in the ERRA must be modified so that PG&E is only authorized to seek recovery of the settlement costs in the ERRA.

We disagree. While D.07-11-027 and D.09-12-002 addressed the reasonableness and prudence of PG&E's ERRA, neither decision makes mention of any type of settlement agreement. In contrast, other Commission decisions have approved a utility's settlement of claims and concurrently authorized rate recovery of the settlement payment. For example, in D.00-11-041 we approved a

[5] DRA Comments at 1.

[6] DRA Comments at 3, citing D.07-11-027, D.07-12-027, and D.09-12-002.

[7] DRA Comments at 3.

settlement agreement which arose from an Interim SO4. After determining that the settlement at issue met the test of reasonableness and deeming the payments called for in the settlement reasonable, in D.00-11-041 we determined that the "payments should be recoverable by Edison through rates, subject only to Edison's prudent administration of those contracts and the Settlement." (D.00-11-041 at 8.) Moreover, in their joint reply to DRA's comments, PG&E and Rio Bravo note that "the approval sought in the Joint Motion would not pre-approve PG&E's administration of the Rio Bravo contract or preclude DRA from reviewing PG&E's contract administration in [the] ERRA." (Joint Reply at 3.) According to PG&E and Rio Bravo, once Commission approval of the Settlement Agreement's resolution of the underlying contract dispute, including the settlement payment, has become final, there can be no further review of whether the payment is in the public interest. We agree that, if approved, the Settlement Agreement will not preclude a review of the contract administration in the ERRA proceeding. Therefore, consistent with D.00-11-041 we will determine whether or not the settlement is reasonable in this proceeding.

Finally, absent the modification it requests (and which we decline to make), DRA asks that the proceeding be reopened to allow it to participate in settlement discussions to determine whether PG&E's decision to settle the complaint is reasonable and in the public interest. Notably absent from DRA's request is any assertion that it sought and did not receive information that would allow it to ascertain the reasonableness of the Settlement Agreement, that it did not have the opportunity to participate in the proceeding at the outset, or that it was unable to engage the other parties in discussion prior to filing its response. We decline to reopen the proceeding under these circumstances as it would

unnecessarily protract the proceeding and delay resolution of the issues presented.

3.3. The Settlement is Reasonable in Light of the Record

PG&E and Rio Bravo compiled a comprehensive record of the facts underlying this dispute through the exchange of pleadings and testimony.[8] Following the exchange of testimony, the parties actively engaged in substantial discovery, evaluated their positions, and engaged in negotiations to resolve the disputed issues. An examination of the facts and arguments asserted in the pleadings demonstrates conclusively that PG&E and Rio Bravo each made significant concessions to resolve the issues in this proceeding. In light of the record as a whole, the Settlement Agreement resolves the matters at issue in a reasonable manner and provides benefits to PG&E's customers by mitigating the potential risk of litigation.

3.4. The Settlement is Consistent with the Law

As discussed more fully in Section 3.2 above, nothing in the Settlement Agreement contravenes any statue, Commission decision or rule. The Settlement Agreement is therefore consistent with the applicable law.

3.5. The Settlement is in the Public Interest

The Settlement Agreement is consistent with the Commission's well established policy of supporting the resolution of disputed matters through settlement, reflects a reasonable compromise between the Settling Parties' positions, and will avoid the time, expense, and uncertainty of evidentiary

[8] In December 2010, Rio Bravo and PG&E prepared and served direct and reply testimony, with supporting exhibits that set forth their litigation positions.

hearings and further litigation. Accordingly, the Settlement Agreement is in the public interest.

3.6. Conclusion

In our view, the Settlement Agreement reflects the relative risks and costs of continued litigation of the disputed issues. The Settlement Agreement's terms lie within the range of possible outcomes had the matter gone to trial. We further believe that the ratepayer benefits are substantial. Without disclosing key details of the Settlement Agreement, we observe that it allows the parties to put their dispute behind them. There is no evidence of collusion and there is every indication that counsel on each side adequately analyzed the risks and benefits of their clients' respective positions, and advised their clients competently. Thus, the Settlement Agreement should be adopted in full, without modification.

3.7. The PG&E and Rio Bravo Motion for Protective Order

By motion filed concurrently with the Settlement Agreement, PG&E and Rio Bravo seek confidential treatment of information reflecting the terms of the Settlement Agreement. PG&E and Rio Bravo argue that "the Settlement Agreement is confidential because of the market-sensitive nature of its terms and the risk of harm to them from the disclosure of such information." (Joint Motion for Approval of Settlement Agreement, at 1.)

We conclude that disclosure of the Settlement Agreement terms might jeopardize ratepayers' interests with respect to other litigation or potential litigation. Therefore, we grant the motion for protective order as set forth in the ordering paragraphs below.

4. Assignment of Proceeding

The assigned Commissioner is Mark J. Ferron and the assigned ALJ is Darwin E. Farrar.

5. The Need for Hearings

Because this proceeding is resolved by the Settlement Agreement, hearings are no longer necessary.

6. Comments on Proposed Decision

The proposed decision of ALJ Farrar in this matter was mailed on April 23, 2012 to the parties in accordance with Pub. Util. Code § 311 and comments were allowed under Rule 14.3 of the Commission's Rules of Practice and Procedure. Comments were filed on May 23, 2012 by PG&E and Rio Bravo.

Findings of Fact

1. Rio Bravo sells energy and capacity to PG&E under a SO4 Long-Term Energy and Capacity Power Purchase Agreement signed by PG&E on December 12, 1984, with a term that expires in 2020.

2. The Settlement Agreement was reached after extensive discovery and review of the issues presented by this case.

3. The Settlement Agreement represents a significant compromise in the respective litigation positions of the parties.

4. PG&E and Rio Bravo seek a protective order for certain portions of the Settlement Agreement on the grounds that dissemination of the contents would harm PG&E's ratepayers.

5. No hearing is necessary.

Conclusions of Law

1. The Settlement Agreement is reasonable in light of the record as a whole.
2. The Settlement Agreement is consistent with the law.
3. The Settlement Agreement is in the public interest.
4. The May 27, 2011, Settlement Agreement should be adopted.
5. PG&E's payment to Rio Bravo should be recoverable by PG&E through rates subject only to PG&E's prudent administration of the settlement agreement.
6. The May 27, 2011, motion for protective order should be granted.
7. This order should be effective immediately.

O R D E R

IT IS ORDERED that:

1. The May 27, 2011, Settlement Agreement entered into by Pacific Gas and Electric Company and Rio Bravo Rocklin is adopted in full, without modification.
2. Pacific Gas and Electric Company (PG&E) is authorized to recover the full settlement amount in its Energy Resource Recovery Account proceeding, subject to PG&E's prudent administration.
3. The Complaint is dismissed with prejudice.
4. The May 27, 2011, motion for a protective order is granted as set forth below.
    a. The Settlement Agreement which was filed under seal, shall remain under seal for a period of two years from the date of this decision. During that period, the foregoing documents or portions of documents shall not be made accessible or be disclosed to anyone other than Commission staff except on the further order or ruling of the Commission, the Assigned Commissioner, the

Assigned Administrative Law Judge (ALJ), or the ALJ then designated as Law and Motion Judge.

b. If Pacific Gas and Electric Company believes that further protection of this information is needed after two years, it may file a motion stating the justification for further withholding the material from public inspection, or for such other relief as the Commission may then provide. This motion shall be filed no later than 30 days before the expiration of this protective order.

5. Hearings are not necessary.

6. Case 10-07-020 is closed.

This order is effective today.

Dated May 24, 2012, at San Francisco, California.

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