Decision 12-05-026 May 24, 2012

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application of Pacific Gas and Electric Company for Order Approving the Termination of Qualifying Facility Contracts with San Joaquin Cogeneration Project and Byron Power Partners Cogeneration Project. (U39E)	Application 11-11-014 (Filed November 18, 2011)

DECISION APPROVING THE TERMINATION OF QUALIFYING FACILITY CONTRACTS AND SETTLEMENT AGREEMENT

Summary

We approve the unopposed settlement agreements (Settlements) that provide for the termination of power purchase agreements with two existing Qualifying Facilities: San Joaquin Cogeneration Project and Byron Power Partners. We find that the Settlements eliminate uncertain future litigation costs, terminate Pacific Gas and Electric Company's (PG&E) obligations under the power purchase agreements and yield ratepayer benefits by obtaining some of the debt owed by dissolved companies, and should be approved. Finally, we grant PG&E's motion to file a confidential version of this Application under seal pursuant to General Order 66-C.

1. Background

On November 18, 2011, Pacific Gas and Electric Company (PG&E) filed this application seeking authority to terminate power purchase agreements with two existing qualified facilities (QF): between JRW Associates, L.P., also known as the San Joaquin Cogeneration Project (San Joaquin) and Byron Power Partners,

L.P. also known as Byron Power Partners Cogeneration Project (Byron Cogen). The sole and limited partner to JRW Associates, L.P. and Byron Power Partners, L.P. is an entity known as the Ridgewood Electric Power Trust III (the Trust). No protests to this application were filed.

1.1. San Joaquin Cogeneration Project

In 1985, PG&E entered into a 30-year, Standard Offer[1] 2, power purchase agreement for energy and firm capacity[2] with the Trust for a 10.75 megawatt (MW) natural gas-fired cogeneration facility, known as San Joaquin, near Atwater, California. The term of the agreement began on the facility's operational date of April 30, 1991, and expires on April 29, 2021. A copy of the power purchase agreement is included in a separate document filed with the application as Exhibit 1.A.

In July 2008, the project failed to meet its firm capacity requirement and was placed on probation. San Joaquin has not delivered power to PG&E under the power purchase agreement since September 2008. In July 2009, PG&E notified San Joaquin of the requirements needed to prevent de-rating of the facility's firm capacity and how to avoid minimum and early termination charges. San Joaquin did not resume operations. On February 8, 2010, PG&E notified San Joaquin that the facility's firm capacity level was de-rated to zero and a refund was due to PG&E because of early termination of the firm's

[1] In the 1980s, the Commission adopted guidelines and standards governing the prices, terms and conditions of utility purchases of electric power from QFs and approved four types of Standard Offer power purchase agreements. Each standard offer power purchase agreement had its own uniform terms and conditions and no security deposits from the QFs were required under these agreements.

[2] Firm capacity is the amount of energy available for production or transmission, which can be (and in many cases must be) guaranteed to be available at a given time.

capacity without the prescribed notice. San Joaquin terminated gas and electric service, and physically removed all connection to the PG&E grid. On June 2, 2011, the Trust transferred the ownership of the physical San Joaquin facility to Dole Packaged Foods, dissolved the thermal sale agreement and terminated the ground lease.[3]

On December 27, 2010, San Joaquin notified PG&E that it did not have sufficient funds to make any payments for damages. Due to contractual requirements, PG&E did not de-rate the facility until 2010 in order to give San Joaquin time and opportunity to correct its probationary status. On September 22, 2010, PG&E and San Joaquin entered into a tolling agreement suspending PG&E's right to collect damages while PG&E was simultaneously negotiating with a potential buyer that planned to convert the facility into a biogas facility. Negotiations failed. On December 27, 2010, counsel for San Joaquin notified PG&E that the Trust did not have adequate funds to pay the damages it owed to PG&E and was therefore terminating the tolling agreement and dissolving the limited partnership.

PG&E retained an outside consultant to perform an independent investigation as to the likelihood of recovering damages from San Joaquin. PG&E also began negotiations with San Joaquin. After a series of meetings, PG&E obtained a declaration from San Joaquin describing the corporate structure of San Joaquin under the Trust and describing the reasons San Joaquin was unable to commit to the full term of the contract. PG&E's consultant

[3] The transfer included the physical property without transferring liability from the PG&E power purchase agreement or the Public Utilities Regulatory Policies Act (PURPA) Licenses.

ultimately concluded that recovery was unlikely based on her review of the law, corporate organization documents of the Trust and partnerships and financial data.[4]

PG&E entered into settlement discussions with the Trust in an attempt to obtain damages for early termination. The parties successfully negotiated an agreement for a modest settlement.

1.2. Byron Cogen

On April 29, 1985, PG&E entered into a 30-year, Standard Offer 4, power purchase agreement for energy and firm capacity with the Trust (successor in interest to Fayette Manufacturing Corporation) for a 6.5 MW natural gas-fired cogeneration facility, Byron Cogen, in the Altamont Pass area near Tracy, California. The agreement commenced on May 12, 1990 and expires on May 11, 2020. Copies of the contracts are included in a separate document filed with the application as Exhibit 2.A.

In August 2008, the project failed to meet its firm capacity requirement and Byron Cogen was warned by PG&E that the facility would be placed on probation for failure to meet its firm capacity requirements. In July 2009, Byron Cogen again failed to meet its firm capacity requirements and PG&E notified Byron Cogen again that it risked being placed on probation. On March 10, 2010, PG&E notified Byron Cogen of the facility's current probation status and the actions needed to remedy this. Subsequently, PG&E learned that the facility had removed its gas and electric meters, casting doubt on the facilities operation status.

[4] Exhibit 5.

On September 22, 2010, PG&E and Byron Cogen entered into a tolling agreement suspending PG&E's right to collect damages while PG&E was simultaneously negotiating with a potential buyer that planned to convert the facility into a biogas facility. On October 26, 2010, PG&E notified Byron that the facility was being de-rated after failing to cure its probationary status.[5] Negotiations to convert the facility to a biogas facility ultimately failed. On December 27, 2010, counsel for the Trust notified PG&E that it did not have adequate funds to pay damages it owed to PG&E and was therefore terminating the tolling agreement and dissolving the limited partnership.

After a series of meetings and negotiations with Byron Cogen, PG&E obtained a declaration from Byron Cogen describing the corporate structure of Byron Cogen under the Trust and describing the reasons it was unable to commit to the full term of the contract. In addition, PG&E's outside consultant performed an independent investigation to evaluate the likelihood of recovery of damages from Byron Cogen.

PG&E entered into settlement discussions with the Trust in an attempt to obtain damages for early termination. The parties successfully negotiated an agreement for a modest settlement. As part of the settlement agreement, Byron Cogen waives its rights under its PURPA license.

[5] PG&E waited until 2010 to de-rate the facility in order to give the QF ample time and opportunity to correct its probation status.

1.3. Settlement Agreements and Termination of Both Power Purchase Agreements

PG&E and the Trust entered in the Settlement after negotiations with counsel for the Trust. During the negotiations, the Trust informed PG&E that the trust was insolvent and was therefore unable to pay its debt to PG&E. In addition, the Trust disclosed that it lacked assets should PG&E attempt to pursue judgments or liens to recover the debt. The Trust offered a modest amount to prevent litigation.

PG&E's independent consultant performed a thorough analysis and confirmed that recovery was unlikely. PG&E attempted to negotiate taking ownership of the facilities as a form of payment, but the Trust leases the land where the facilities reside from two different owners. PG&E's investigation of each facility found that both were in a dilapidated state with one facility having been vandalized and mined of copper. As a result, PG&E determined that all other options, plans and proposals for recovery of damages have been exhausted.

1.4. The Settlement Agreement

PG&E maintains that the terms of the Settlements are well within the range of terms that would be a reasonable resolution of the dispute. The Settlements contain a confidentiality clause, which bars all parties from disclosing the certain material terms of their agreements. Accordingly, the application's limited public disclosure of the terms and conditions of the Settlements are:[6]

[6] The terms presented are a summary of the terms and conditions of the public portions of the Settlement Agreements.

- Upon payment of the settlement amount to PG&E, the Trust's San Joaquin and Byron Cogen power purchase agreements will be terminated;
- Upon termination of the power purchase agreements, PG&E has no obligation to purchase and San Joaquin and Byron Cogen have no obligation to provide electricity or capacity;
- Upon termination of the power purchase agreements, San Joaquin and Byron Cogen, for themselves and all of the successors and assigns of each respective facility, waive any and all rights they may have pursuant to PURPA; and
- San Joaquin, Byron Cogen, and PG&E release all known and unknown claims against each other under California Civil Code § 1542. San Joaquin and Byron Cogen shall pay PG&E the agreed-upon amount as reflected in the Settlements within 30 days after Commission approval of this Application becomes final and non-appealable.

PG&E will include the amounts recovered under the Settlements in the Energy Resource Recovery Account as a credit to its ratepayers.

2. Discussion

Pursuant to Rule 12.1(d) of the Commission's Rules of Practice and procedure, the Commission will not approve a settlement unless it is "reasonable in light of the whole record, consistent with law, and in the public interest."[7] In determining whether a settlement is fair, adequate, and reasonable, the Commission reviews a number of factors. These factors include whether the settlement reflects the relative risks and costs of litigation; whether it fairly and reasonably resolves the disputed issues and conserves public and private

[7] Commission Rules of Practice and Procedure, Rule 12.1(d).

resources; and whether the agreed-upon terms fall clearly within the range of possible outcomes had the parties fully litigated the dispute.[8] The Commission also has considered factors such as whether the settlement negotiations were at arm's length and without collusion, whether the parties were adequately represented, and how far the proceedings had progressed when the parties settled.[9]

The Settlements satisfy the criteria of Rule 12.1(d). Each of the foregoing factors the Commission reviews to determine reasonableness militates in favor of the Settlements at issue in this proceeding. While the terms of the Settlements are confidential, PG&E has furnished the Commission full details under seal. We have examined all the sealed documents: the Settlements; the portions of the application, which discuss the parties' settlement efforts and PG&E's rationale for Commission approval.

In our view, the Settlements are reasonable. They reflect the relative risks and costs of continued litigation of the disputed issues. The Settlements' terms lie within the range of possible outcomes had these matters gone to trial. Considering the range of possible outcomes and the attendant uncertainty, we agree that the Settlements are a positive outcome. We concur with PG&E's qualitative statement that the Settlements benefit ratepayers by avoiding the uncertainties of litigation, attorney's fees and costs associated with litigation, and the improbability of collecting any judgments awarded PG&E. The Settlements

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[8] *Re Southern California Edison Company,* 66 CPUC 2d 314, 317 (1996); *see also Re Southern California Edison*, 70 CPUC 427, 430 (1996), *Re Pacific Gas and Electric Company*, 30 CPUC 2d 189, 222 (1988).

[9] *Re Southern California Edison* Company (2000) Decision (D.) 00-11-041.

are consistent with this determination, since PG&E has demonstrated that it has very little chance of recovering any damages awarded in connection with its affirmative claims against either San Joaquin or Byron Cogen. Therefore, Commission approval of the Settlement Agreements is in the public interest. The Settlements are also consistent with the law.

There is no evidence of collusion. The parties' identities are separate and their interests, distinct. We note that settlement negotiations have taken more than a year, each side relied on in-house and outside counsel to research and conduct settlement negotiations and the Settlements were reached after the parties had exchanged information and engaged in comprehensive independent investigation. The negotiation process allowed the parties a further opportunity to review the relative strengths and weaknesses of their litigation positions. Every indication is that counsel on each side adequately analyzed the risks and benefits of their clients' respective positions, and advised their clients competently.

Thus, for the foregoing reasons, the Settlements meet the criteria of Rule 12.1(d) and should be approved.

2.1. PG&E's Motion for Protective Order

By motion filed concurrently with the application, PG&E seeks confidential treatment of redacted portions of the application quantifying damages amounts, Exhibits 1, 2, 3, 4, and portions of Exhibit 6.

In D.06-06-066, the Commission analyzed certain data about Investor-Owned Utility's (IOU) procurement, resource adequacy and renewable portfolio standard obligation and deemed some of it confidential as "market sensitive" data pursuant to § 454.5(g). In D.06-06-066, the Commission set forth standards for designating certain information as confidential. In Appendix 1 to

D.06-06-066, the Commission set forth a Matrix that identified several categories of data and the level of confidentiality granted to each category. Specifically, in Ordering Paragraph 2 the Commission stated: "[w]here a party seeks confidentiality protection for data contained in the Matrix, its burden shall be to prove that the data match the Matrix category. Once it does so it is entitled to the protection the Matrix provides for that category."

When an IOU files materials with the Commission and seeks confidential treatment, the IOU must concurrently file a motion with any proposed designation of confidentiality, establishing:

1) That the material it is submitting constitutes a particular type of data listed in the Matrix;
2) Which category or categories in the Matrix the data correspond to;
3) That it is complying with the limitations on confidentiality specified in the Matrix for that type of data;
4) That the information is not already public; and
5) That the data cannot be aggregated, redacted, summarized, masked or otherwise protected in a way that allows partial disclosure. (D.08-04-023 at 24.)

In its motion, PG&E identified as confidential certain redacted portions of the application, and all of Exhibits 1, 2, 3, 4, and portions of Exhibit 6. PG&E's motion is unopposed. PG&E asserts the information at issue is the type of data covered by the matrix under General Order 66-C, Section 2. In addition, to providing the table that identified the specific type of purportedly confidential information and applicable matrix category, PG&E also represented that it was complying with the limitations on confidentiality specified in the Matrix for that

type of data, that the information was not already public, and the data could not be aggregated, redacted, summarized, masked, or otherwise protected.

PG&E has fulfilled the requirements for its motion to file under seal. No party has opposed PG&E's motion to protect certain information contained in the Application and Exhibits 1,2,3,4 and portions of Exhibit 6. Both parties have had the opportunity to access and review the claimed confidential materials. The public versions of the Application contain a summary of the Settlement terms. A comparison of the confidential and public versions of the Application and attached Exhibits reveals that the confidential versions contain market sensitive information regarding the operations and organizational structure of the counterparties, as well as settlement payment amounts resulting from negotiations between the parties. PG&E has limited their request to file under seal only data covered by the matrix.

PG&E has met its burden to show that the data it seeks confidentiality protection for matches the Matrix category. As a result, we conclude that PG&E has demonstrated good cause to maintain the terms of the Settlements in confidence. Therefore, we grant PG&E's motion for protective order as set forth in the order.

PG&E has requested that the protected information remain under seal indefinitely. In establishing the Matrix for treatment of confidential data, the Commission determined the length of time that data would be accorded confidential treatment. Data protected under Section 2 of the Matrix must remain confidential for three years. (D.06-06-066 at Appendix 1, Section II.)

3. Categorization and Need for Hearings

Resolution ALJ 176-3285 dated December 1, 2011, preliminary categorized this proceeding as ratesetting and determined that hearings are necessary. We

affirm the preliminary determination but because of the settlement, hearings are no longer necessary.

4. Comments on Proposed Decision

The proposed decision of Administrative Law Judge (ALJ) MacDonald in this matter was mailed on April 24, 2012, to the parties in accordance with Section 311 of the Public Utilities Code and Rule 14.3. Comments were received on May 14, 2012 and no reply comments were received.

PG&E filed Comments supporting the proposed decision (PD) but requesting that the PD be modified to correct an error made by PG& E in Application (A.) 11-11-014. PG&E also requests that the PD be modified to reflect the requested corrections to its application. We grant PG&E's request to modify A.11-11-014 to correct errors discussed below. In addition, we are modifying the PD to reflect these changes. The requested changes do not impact the overall substance of the application or decision.

PG&E explains that A.11-11-014 mistakenly states, "On June 2, 2011, that the Trust transferred ownership of the physical Byron Cogen facility to Dole Packaged Foods." PG&E asks request that its application be revised to reflect that the Trust transferred ownership of the physical San Joaquin facility (not Byron Cogen) to Dole Packaged Foods. PG&E also requests that corresponding changes be made to the proposed decision.

As a result of PG&E's comments, the decision has been modified to reflect the same changes as follows:

- Section 1.1 has been changed to reflect that the Trust transferred ownership of the physical San Joaquin facility to Dole Packaged Foods.
- Section 1.2 has been edited to remove the corresponding information from the discussion of the Byron Cogen facility.

- Footnote 5 was moved and renumbered to Footnote 3 as a result of the revisions made to section 1.1 and 1.2 of the PD. Subsequent footnote numbers changed accordingly.
- Finding of Fact 10 from the original PD has been removed.
- A new finding of fact reflecting the sale of the San Joaquin facility by the Trust to Dole Packaged Foods was added as FOF 3 to the revised PD.
- The Findings of Fact were renumbered after these changes.

In addition to the above changes, other non-substantive changes were made to improve clarity and correct punctuation errors.

5. Assignment of Proceeding

Mark J. Ferron is the assigned Commissioner and Katherine MacDonald is the assigned ALJ in this proceeding.

Findings of Fact

1. San Joaquin is a 10.75 MW natural gas-fired cogeneration facility near Atwater, California. PG&E entered into a 30-year Standard Offer 2 power purchase agreement with the Trust, which began on April 30, 1991.

2. San Joaquin has not delivered power to PG&E as required under the power purchase agreement since September 2008

3. San Joaquin's firm capacity level was de-rated to zero in 2010. On February 8, 2010, PG&E notified San Joaquin that PG&E was due a refund because of early termination of the firm's capacity without the required notice.

4. The Trust transferred ownership of the physical San Joaquin facility to Dole Packaged Foods, dissolved the thermal sale agreement and terminated the ground lease. The transfer did not include a transfer of liability from the PG&E power purchase agreement or the PURPA license.

5. PG&E and San Joaquin entered into a tolling agreement suspending PG&E's rights to collect damages while PG&E attempted to negotiate with a

potential buyer to convert San Joaquin into a biogas facility. Negotiations failed and the Trust informed PG&E that it lacked adequate funds to pay damages.

6. Byron Cogen is a 6.5 MW natural gas-fired cogeneration facility in the Altamont Pass area near Tracy California. PG&E entered into a 30-year Standard Offer 4 power purchase agreement with the Trust commencing on May 12, 1990.

7. Byron Cogen failed to meet its firm capacity in August 2008 and again in July 2009. PG&E placed Byron Cogen on probation on March 10, 2010.

8. Byron Cogen removed its gas and electric meters.

9. Byron Cogen's firm capacity level was de-rated to zero on October 26, 2010 after failing to cure its probationary status.

10. PG&E entered into a tolling agreement with Byron Cogen suspending PG&E's rights to collect damages while PG&E attempted to negotiate with a potential buyer to convert Byron Cogen into a biogas facility. Negotiations failed.

11. Byron Cogen and San Joaquin leased the land where each facility was located from different owners.

12. PG&E's investigation determined that both facilities were in a dilapidated state. Byron Cogen had been vandalized and mined of copper.

13. PG&E hired an independent consultant who determined that it was unlikely PG&E's would to recover damages from San Joaquin, Byron Cogen, or the Trust.

14. The Trust informed PG&E it was insolvent and unable to pay its debts to PG&E. Negotiations revealed the Trust lacked assets making collection of any potential judgment unlikely.

15. After engaging in a series of negotiations with the Trust, PG&E negotiated settlement agreements to recover a modest amount of damages.

16. While the remainder of the terms of each Settlement Agreement is confidential, PG&E has furnished the Commission full details of both Settlements under seal.

17. No protests of the application have been filed.

18. PG&E seeks a protective order for certain portions of the Application, the entirety of Exhibit 1 (which contains the San Joaquin Settlement Agreement and San Joaquin power purchase agreement, the entirety of Exhibit 2 (which contains the Byron Cogen Settlement Agreement and Byron Cogen power purchase agreement), the entirety of Exhibit 3 (which contains a declaration from the Trust), Exhibit 4 (which contains a declaration from the Trust, and for certain portions of Exhibit 6 (which contains communications between the parties) on the grounds that dissemination of the contents of these documents would harm PG&E and ratepayers.

19. The categorization of ratesetting is affirmed; no hearing is necessary.

Conclusions of Law

1. PG&E exhausted all options, plans and proposals for the recovery of damages from San Joaquin, Byron Cogen and the Trust.

2. The Settlements benefit ratepayers by avoiding the uncertainties of litigation, attorney's fees and costs of litigation, and the improbability of collecting any judgments that might be awarded to PG&E.

3. The parties negotiated the Settlements at arm's length and there is no evidence of collusion.

4. The Settlements between PG&E and San Joaquin, Byron Cogen, and the Trust are reasonable in light of the whole record, consistent with law, and in the public interest.

5. The Settlements should be approved as provided in the following order.

6. The amounts recovered pursuant to the Settlements should be included by PG&E in the Energy Resource Recovery Account as a credit to ratepayers.

7. PG&E's motion for protective order should be granted as set forth in the order.

8. In order that benefits of the Settlements may be realized promptly, this order should be effective immediately.

O R D E R

IT IS ORDERED that:

1. The application of Pacific Gas and Electric Company for approval of the settlement of damages related to the early termination of a power purchase agreement by the JRW Associates, L.P., also known as the San Joaquin Cogeneration Project, between Pacific Gas and Electric Company and the Ridgewood Electric Power Trust III, as set forth in Exhibit 1 to the application, is granted.

2. The application of Pacific Gas and Electric Company for approval of the settlement of damages related to the early termination of a power purchase agreement by the Byron Power Partners, LP, also known as Byron Power Partners Cogeneration Project, between Pacific Gas and Electric Company and the Ridgewood Electric Power Trust III, as set forth in Exhibit 2 to the application, is granted.

3. Pacific Gas and Electric Company's motion for a protective order is granted to the extent set forth below:

> Designated portions of Pacific Gas and Electric Company's Application of Pacific Gas and Electric Company for Order Approving the Termination of Qualifying Facility Contracts with San Joaquin Cogeneration Project and Byron Power

Partners Project and the entirety of Exhibits 1, 2, 3, and 4, plus designated portions of Exhibit 6, all of which Pacific Gas and Electric Company filed under seal as an attachment to its motion for protective order, shall remain under seal for a period of three 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.

4. To ensure that ratepayers receive all quantitative value attributable to the substantial benefits of the Settlements, Pacific Gas and Electric Company must include amounts received pursuant to the Settlements in the Energy Resource Recovery Account as a credit to ratepayers.

5. The categorization of ratesetting is affirmed; hearings are not necessary.

6. Application 11-11-014 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