Decision 88 09 038 SEP 14 1988

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

ORIGINAL

Application of Pacific Gas and Electric Company for an extended order approving a Second Amendment to the Power Purchase Agreement with Crockett Cogeneration regarding the deferral of the purchase of long-term capacity and energy from the Crockett Cogeneration Project.

Application 88-07-022
(Filed July 15, 1988)

OPINION ON REVISED SETTLEMENT

In Decision (D.) 88-08-054, we considered and rejected a proposed settlement of a dispute between Pacific Gas and Electric Company (PG&E) and Crockett Cogeneration (Crockett). However, we also indicated certain modifications that would make the settlement acceptable to us, and we held the proceeding open pending a status report from PG&E. PG&E has filed the report and indicates that Crockett and PG&E have revised their settlement, consistent with D.88-08-054. Our review of these revisions shows that they meet our objections to the original settlement. Accordingly, we approve the settlement as revised.

I. Problems with the Original Settlement

We will not repeat the extensive summary and discussion from D.88-08-054. Basically, Crockett has a large cogeneration project that has experienced various delays. The impact of these delays on Crockett's rights and obligations under its interim Standard Offer 4 contract with PG&E is in dispute. The nature and cause of the various delays, contractual provisions on force majeure and deadline for coming on-line, and the applicable capacity price are among the many matters that might be litigated if the dispute were to be resolved on its merits.

PG&E proposes to settle the dispute short of litigation. The settlement, as originally proposed, involves large pre-operational payments by PG&E to the project developer and to the steam host, and capacity payments somewhat more front-loaded than those already provided under the existing contract (which has levelized capacity payments). Crockett, for its part, would delay its on-line date at least until April 1, 1994, when PG&E's need for additional capacity is higher. PG&E, Crockett, and the Division of Ratepayer Advocates (DRA) all agree that this improved timing yields substantial ratepayer benefits, under most scenarios, compared to payments under the existing contract.

We found three significant problems with the settlement as originally proposed.

First, because any benefits from the settlement would occur only if the project were ultimately to come on-line, but PG&E's payments under the settlement and right to recover for such payments in rates were not so conditioned, the settlement exposed ratepayers to the risk of project development. We found such an assumption of risk antithetical to one of the fundamental purposes of our program for Qualifying Facilities (QFs). However, we also found that, under the facts of the case, sufficient likelihood of ratepayer benefit existed to justify some assumption of risk, provided that the potential loss did not exceed the benefits ($12.7 million net present value) calculated under a plausible worst-case scenario. Payments in excess of such benefits would occur, and would be recovered in PG&E's rates, under the original settlement. We determined that an acceptable settlement would have to provide for refund to ratepayers of any pre-operational payments by PG&E exceeding $12.7 million, if the project were to fail to come on-line pursuant to the terms of the settlement.

Second, we found that important provisions of the settlement were contingent on approvals by the steam host. The

record did not then reflect whether the steam host had given such approvals.

Third, we found that the settlement did not effectively avoid the risk of litigation, which was one of its avowed purposes. The settlement had no provision to the effect that Crockett accepted the settlement as a complete resolution of the dispute described in the recitals at the start of the settlement, nor did the settlement provide that Crockett waived any further recourse or cause of action against PG&E that might be based on the events to date.

We determined that these problems precluded the prospective finding of reasonableness that PG&E had requested. We therefore denied the application but gave PG&E and Crockett an opportunity to revise the settlement to meet our concerns.

II. The Revised Settlement

PG&E has filed a status report in compliance with D.88-08-054. PG&E and Crockett have revised the original settlement to meet the concerns discussed above. PG&E believes that the revised settlement conforms to the conditions for approval in D.88-08-054; we agree. We therefore find that payments by PG&E under the revised settlement should be presumed reasonable to the same extent as if they were made pursuant to a standard offer power purchase agreement.

Specifically, PG&E and Crockett have changed the provisions for pre-operational payments. Under the new schedule for such payments, Crockett (not PG&E) makes all scheduled payments to the steam host, and PG&E makes one payment to Crockett 10 working days after our approval of the revised settlement and three subsequent payments tied to achievement of key project development milestones (Energy Commission certification, start of construction, on-time commencement of operations). This somewhat mitigates the

risk for shareholders (and perhaps ratepayers as well) in that the pre-certification payments to Crockett are $3 million less than under the original settlement, and Crockett does not collect the full amount of the settlement unless the project becomes operational.

Appendix B to PG&E's status report is a letter from the steam host. The letter confirms (1) the validity of the cogeneration and steam sales agreement with Crockett, and (2) the acceptability of the schedule of payments to the steam host, as set forth in the settlement. This supplements the record as required in D.88-08-054.

Appendix C to PG&E's status report is a "General Release and Covenant Not to Sue." This constitutes the waiver and release of claims contemplated in D.88-05-054.

Finally, pages 6-8 and Appendix D of PG&E's status report contain PG&E's proposed accounting treatment for payments pursuant to the revised settlement. This treatment, consistent with D.88-08-054, effectively limits ratepayer exposure and provides for refunds, with interest, in the event that the project fails to come on-line. We adopt this treatment, which is summarized in the Appendix to today's decision.

III. Impact of Today's Decision

We do not expect today's decision to be the first of a long succession of pre-approved paid deferrals or buyouts of QF projects. We continue to believe strongly that the risk of project development should be borne exclusively by the QF developer; we have no enthusiasm for deals, such as this one, that effectively shift some of that risk away from the developer.

Crockett's situation is rare, perhaps unique. It is a very large QF project that would otherwise come on-line when PG&E

has little need for additional capacity. It is also a well-situated project, at least in terms of its proximity to a large and rapidly growing load center on PG&E's system. Few QFs will have similar circumstances. Thus, today's decision does not change our expectation that the utilities should rarely enter into paid deferrals or buyouts. DRA should continue to scrutinize critically any such proposals.

Bay Area Air Quality Management District (BAAQMD) has requested postponement of today's decision and a remand of the matter for public hearings. BAAQMD has two reasons for its request. First, it disputes Crockett's force majeure claim to the extent the claim relates to BAAQMD's part in the permitting of the project. Second, it says that Crockett's existing air quality permit would lapse before the project's earliest on-line date (April 1, 1994) under the settlement. We reject BAAQMD's request.

We have already noted that in dealing with this proposed settlement, we do not reach the merits of the force majeure dispute or of issues properly before other regulatory agencies. (D.88-08-054, mimeo. p. 2.) Our approval of the revised settlement depends on ratepayer benefit; we make no finding one way or the other on Crockett's allegations concerning delays in the permitting process.

Furthermore, we make no finding on the scope or interpretation of Crockett's existing air quality permit. Our understanding of the revised settlement is that Crockett undertakes to pursue its project in good faith pursuant to the terms of the settlement. That undertaking, among other things, obliges Crockett to obtain such permits as are necessary to its performance under the terms of the settlement. This may mean, in view of the rescheduling of the project's on-line date, getting an extension on an existing air quality (or other) permit, or going through a completely new permitting process. We stress again that today's

decision does not prejudge other agencies' exercise of their permitting authority.

Finding of Fact

PG&E and Crockett have revised the settlement that we reviewed and rejected in D.88-08-054.

Conclusions of Law

1. The revised settlement satisfies the concerns stated in D.88-08-054 and should be approved.

2. Payments by PG&E pursuant to its power purchase agreement with Crockett, as modified by the revised settlement, should be presumed reasonable, subject only to review of PG&E's performance of its rights and obligations under the modified power purchase agreement, and provided further that, in the event the project fails to commence deliveries into the PG&E system as scheduled in the modified power purchase agreement, PG&E should refund to ratepayers any pre-operational payments to Crockett in excess of $12.7 million.

3. PG&E should account for pre-operational payments to Crockett using the accounting treatment shown in the Appendix to today's decision.

4. Today's decision does not modify the findings or conclusions of D.88-08-054.

5. This order should be made effective immediately in order to resolve long-standing uncertainties affecting this project.

ORDER

IT IS ORDERED that the revised settlement between Pacific Gas and Electric Company (PG&E) and Crockett Cogeneration (Crockett) is approved. PG&E shall use the rate recovery mechanism described in the Appendix to this order in accounting for pre-operational payments to Crockett. All payments by PG&E pursuant to its power purchase agreement (PPA) with Crockett, as modified by

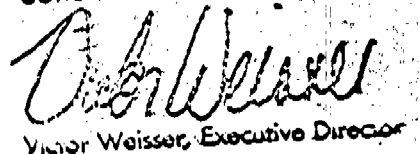
the revised settlement, shall be deemed reasonable and recoverable through PG&E's rates, subject only to review of PG&E's performance of its rights and obligations under the modified PPA, and provided further that, in the event Crockett's Qualifying Facility fails to commence deliveries of energy into the PG&E system as scheduled in the modified PPA, then PG&E shall refund to ratepayers any pre-operational payments to Crockett in excess of $12.7 million.

This order closes the proceeding and is effective today.

Dated September 14, 1988, at San Francisco, California.

STANLEY W. HULETT
President
DONALD VIAL
FREDERICK R. DUDA
G. MITCHELL WILK
JOHN B. OHANIAN
Commissioners

I CERTIFY THAT THIS DECISION WAS APPROVED BY THE ABOVE COMMISSIONERS TODAY.



Victor Weisser, Executive Director

APPENDIX

Rate Recovery Mechanism for PG&E Pre-operational Payments Pursuant to Revised Settlement with Crockett

All lump sum payments paid to Crockett will be booked to the Energy Cost Balancing Account (ECBA) at the time the expenses are incurred, for subsequent recovery in Energy Cost Adjustment Clause (ECAC) rates through the amortization of the ECBA balance. Any expenses in excess of the $12.7 million specified in Decision 88-08-054 will be tracked in a memorandum account so that the appropriate amounts would be refunded to ratepayers, together with accumulated interest computed at the average three-month commercial paper rate as published in the Federal Reserve Bulletin, should the project not come on-line. The following table shows the accounting in detail.

ECBA[1]	Crockett Memorandum Account[2]
1. $14 million within 10 days of final CPUC approval of Settlement.	1. $14 million - $12.7 million = $1.3 million.
2. $1.0 million + interest paid to Crockett within 30 days of CEC certification = $1.0 + X million.	2. $1.0 + X million.
3. $2.55 million + interest paid to Crockett within 30 days of start of construction as defined by substantial financial commitment to the project after close of financing = $2.55 million + Y million.	3. $2.55 + Y million.
4. $2.55 million + interest paid to Crockett within 30 days of start of energy deliveries = $2.55 + Z million.	4. $2.55 + Z million.

1 "X," "Y," and "Z" are interest amounts paid to Crockett at PG&E's authorized overall rate of return.

2 The amounts "at risk" and subject to refund with interest, per Decision 88-08-054.

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