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HEX-3b & HEX-4a & HEX-6a

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application of Pacific Gas and Electric Company for an expedited 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.	ORIGINAL Application 88-07-022 (Filed July 15, 1988)

ORDER MODIFYING AND DENYING REHEARING OF DECISION (D.) 88-08-054 AND D.88-09-038, AND DENYING PETITION FOR MODIFICATION OF D.88-09-038

In D.88-08-054 (the First Decision) the Commission set out the terms under which it would approve a settlement between PG&E and Crockett Cogeneration (Crockett). In D.88-09-038 (the Second Decision) the Commission concluded that PG&E and Crockett had revised their original agreement to comply with the requirements set out in the First Decision and approved the settlement as revised.

Ruth Blakeney (Blakeney) has filed an application for rehearing of the First Decision. The Crockett Power Plant Committee (CPPC) has filed an application for rehearing of the Second Decision. The Division of Ratepayer Advocates (DRA) has filed a petition for modification of the Second Decision. Crockett has filed responses opposing the two applications for rehearing and the petition for modification. PG&E filed one response opposing both Blakeney's application for rehearing and DRA's petition for modification, and a second response in opposition to CPPC's application for rehearing. DRA has filed a reply to PG&E's brief on the petition for modification and PG&E has responded to the reply brief.

Rule 86.2 of the Commission's Rules of Practice and Procedure requires any response to be filed within fifteen days

after the application for rehearing was filed. PG&E's response to Blakeney's application for rehearing was untimely and will be rejected. (This rejection does not affect the portion of PG&E's response directed at DRA's petition for modification.) Moreover, to the extent CPPC's application for rehearing is really directed at the First Decision, rather than the Second Decision, it is untimely under Public Utilities Code §1731(b), and to that extent it is also rejected.

We have carefully considered all of the issues and arguments raised in both applications for rehearing and in the timely responses, and are of the opinion that sufficient grounds for granting rehearing have not been shown. We are, however, of the view that the two decisions should be modified in several respects.

The applications for rehearing apparently assume that we have not considered the parties' arguments concerning force majeure, and that we have not determined that there is a valid dispute between PG&E and Crockett over the force majeure issue. Although there is language in the decisions which might be interpreted as saying that we have not considered the force majeure issue, in fact we have considered the parties' arguments on that issue and have concluded that there is a legitimate dispute between PG&E and Crockett concerning force majeure. All we meant to say in our two prior decisions was that we have not decided the force majeure issue on its merits, as we would if the matter had been fully litigated. Instead, as is appropriate when we review a proposed settlement, we have reviewed the force majeure dispute sufficiently to determine whether the negotiated resolution of the dispute is reasonable. We will therefore modify the First and Second Decisions to accurately reflect the extent to which we have reviewed the force majeure dispute.

We will also make several other modifications to the First Decision. The First Decision discussed whether, in light of our proposed utility/QF negotiation guideline dealing with deferrals, we should consider PG&E'S settlement with Crockett.

After we issued the First Decision, we approved final guidelines for utility/QF negotiations over modified power purchase agreements. (See D.88-10-032.) The final guideline dealing with deferrals differs from the proposed guideline discussed in the First Decision. Accordingly, we will modify the First Decision to emphasize that the guideline discussed there was only a proposed guideline.

Another reason why we considered PG&E's settlement with Crockett prior to CEC action in Crockett's certification proceeding was because the amount that ratepayers would have to pay for a deferral would likely increase if this Commission were to await CEC certification before considering a settlement. We will modify the First Decision to express this consideration more clearly. We will also modify the First Decision's Findings to reflect better why we said we would approve a revised settlement even though that involves some assumption of development risk by ratepayers.

We will also take this opportunity to explain further why we found that a revised settlement would be reasonable. The First Decision noted that if Crockett's project is not viable, then ratepayers would avoid large overpayments based on current planning assumptions. On the other hand, if the project is viable and proceeds without modification of its contract, then ratepayers will make large overpayments. However, the viability of Crockett's project is not certain. Thus, ratepayers were faced with the risk of making large overpayments. Although the revised settlement will have some upfront cost to ratepayers, it avoids this risk of large overpayments and secures a mid-range outcome for ratepayers (between the possible outcomes absent a settlement). Because the revised settlement strikes a middle course between the otherwise possible outcomes and provides certainty to ratepayers we have found it to be a reasonable settlement of the dispute between PG&E and Crockett. As we have previously noted, the Commission is convinced that sufficient

likelihood of ratepayer benefits exists to justify approval of the revised settlement.

DRA's petition for modification asks the Commission to modify the Second Decision so that the payments PG&E makes to Crockett are not recovered in rates until the plant begins energy deliveries. However, the First Decision expressly concluded that it would be reasonable for ratepayers to bear $12.7 million of development risk and that PG&E should refund any pre-operational payments in excess of that amount to ratepayers if the project fails to come on-line pursuant to the terms of the settlement. The Second Decision reaffirmed this conclusion. We have carefully considered the briefs filed by DRA and the opposing parties concerning DRA's proposed modification, and are of the opinion that sufficient cause for modifying our prior conclusion has not been shown.

Therefore, good cause appearing,

IT IS ORDERED that D.88-08-054 is modified as follows:

1. The first full paragraph on page 2 is modified to read:

> All parties agree that this project has experienced delays. A complete narrative would run for pages and would leave no one the wiser because the controversy turns not so much on the events themselves as on questions of who caused (or was at fault for) the delays and what legal force the delays have. We remind all parties that in considering this proposed settlement we do not decide the merits of the force majeure dispute, nor do we consider (much less resolve) the issues before the CEC in its certification proceeding.

2. The following material is inserted at the beginning of the second full paragraph on page 2:

> We have, however, carefully reviewed the arguments of the parties (including PG&E, Crockett, the CEC staff, and Blakeney) on the force majeure issue (even though we do not need to decide the force majeure dispute in

order to determine whether the proposed settlement is reasonable).

3. The second sentence in the first paragraph of the Discussion section on page 7 is modified to read:

> In this case, one key question affecting viability is CEC certification.

4. The following material is added at the end of the first partial paragraph on page 8:

> If this Commission were to await CEC certification before considering a settlement, the amount that ratepayers would have to pay for a deferral would likely increase. We understand that active opposition to the Application for Certification exists and will be considered by the CEC. As we believe it is inappropriate for us to second-guess the action a sister agency may take on an application pending before it, we will not review the likelihood of Crockett's obtaining Energy Commission certification.

5. The second full paragraph on page 8 is modified to read:

> In light of these factors, and the fact that the guideline discussed above is only a proposed guideline, we think that the proposed settlement at least deserves our consideration.

6. The sentence beginning at the bottom of page 9 and continuing at the top of page 10 is modified to read:

> Our rejection of the settlement is based on two factors: first, our conviction that a cornerstone of the QF program is insulation of the ratepayers from development risk, a great deal of which would be borne by ratepayers under the terms of the settlement; and second, our judgment that the project's viability is not certain.

7. The last full paragraph on page 10 and the following paragraph beginning at the bottom of page 10 and continuing on the top of page 11 are replaced with the following:

> Viability of the project hinges primarily on two events: certification by the CEC and Crockett's obtaining a force majeure delay, enabling the project to extend its on-line date. Neither event is certain. Since we cannot be certain of the project's viability, we must consider the possibility that our finding the settlement reasonable would revive an otherwise defunct project and subject the ratepayers to overpayments during a period of excess capacity. Avoiding these same overpayments is the potential ratepayer benefit in the negotiated deferral.
>
> On balance, we think this project is sufficiently viable to merit approval of a settlement involving a paid deferral. The record shows that this project has had various technical problems, and that the project developer has worked diligently and ingeniously to overcome those problems. We are particularly impressed with the dispatchability agreement, entered into at a time when such agreements were quite novel. The Crockett dispatchability agreement ensures that PG&E will be able to integrate this QF into its system consistent with economic dispatch. In short, the project has had its share of problems, but it also has an impressive record of responding to and overcoming those problems.
>
> The dispatchability agreement also bears on the tenability of Crockett's force majeure claim. We repeat that we do not decide the merits of that claim; we observe only that the claim is plausible; it cannot be dismissed out of hand. Crockett's argument (that it could not anticipate that a dispatchability condition might be imposed at the CEC) seems plausible, given the vintage of this standard offer contract. Very similar considerations led us to conclude in the SB 1970 Report that a deferral condition imposed on an existing QF power purchase agreement would support an inference of force

majeure.* Thus, based on our review of the various arguments concerning the force majeure issue, we conclude that there is a legitimate dispute between PG&E and Crockett concerning force majeure.

8. The first sentence in the first full paragraph on page 11 is modified to read:

> Still, because the ratepayer benefits claimed for the proposed settlement are not certain, we do not believe that they justify the ratepayers' assuming the full risk of losing the $17 million up-front payment to Crockett and the $2.9 million payments (NPV) to C&H if the project never comes on line.

9. The following sentence is added at the end of the first full paragraph on page 13:

> We believe that our approval of such a revised settlement would not revive a dead project; rather, such a settlement would allow ratepayers to get increased benefits from a project that realistically has excellent prospects for coming on-line.

10. Finding of Fact No. 2 on page 13 is modified to read:

> 2. The viability of Crockett's project is not certain. One key remaining obstacle is CEC certification. Such certification is opposed by CEC staff and others.

11. Finding of Fact No. 8 on page 14 is modified to read:

> 8. This Commission has not previously authorized pre-operational payments by a utility to a QF. Such payments would constitute an assumption of development risk by ratepayers. The assumption of development risk by ratepayers runs counter to one of the fundamental purposes of the QF program.

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* See Appendix B to Order Instituting Rulemaking 88-06-007, at page 29.

12. A new Finding of Fact, numbered 9A, is inserted on page 14, following Finding No. 9:

> 9A. The arguments of the parties show that there is a valid dispute between PG&E and Crockett over the force majeure issue. Crockett's force majeure claim is plausible; it cannot be dismissed out of hand.

13. A new Finding of Fact, numbered 9B, is inserted on page 14, following Finding No. 9A:

> 9B. If this Commission were to await CEC certification before considering a settlement, the amount that ratepayers would have to pay for a deferral would likely increase.

14. A new Finding of Fact, numbered 10A, is inserted on page 14, following Finding No. 10:

> 10A. Under the facts of this case, sufficient likelihood of ratepayer benefit exists to justify some assumption of development risk by ratepayers, provided that the potential loss does not exceed the benefits ($12.7 million net present value) calculated under a plausible worst-case scenario. 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 fails to come on-line pursuant to the terms of the settlement.

15. A new Finding of Fact, numbered 11A, is inserted on page 15 following Finding No. 11.

> 11A. This project is sufficiently viable to merit approval of a settlement involving a paid deferral. Our approval of a revised settlement would not revive a dead project; rather, such a settlement would allow ratepayers to get increased benefits from a project that realistically has excellent prospects for coming on-line.

16. Conclusion of Law No. 2 on page 15 is modified to read:

> 2. In considering the merits of a proposed settlement, the Commission does not have to decide the underlying legal or factual disputes.

IT IS FURTHER ORDERED that D.88-09-038 is modified as follows:

17. The last sentence on page 1 is modified to read:

> 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 further litigated if the dispute is not settled.

18. The second sentence in the third paragraph on page 2 is modified to read:

> We found that the assumption of development risk by ratepayers runs counter to one of the fundamental purposes of our program for Qualifying Facilities (QFs).

19. The second full paragraph on page 5 is modified to read:

> We have already noted that in dealing with this proposed settlement, we do not decide the merits of the force majeure dispute nor consider issues properly before other regulatory agencies. (D.88-08-054, mimeo. p. 2.) Moreover, our conclusion that Crockett's force majeure claim is plausible relies primarily on events occurring at the California Energy Commission (CEC).

IT IS FURTHER ORDERED that:

20. The response of PG&E to Blakeney's application for rehearing is rejected as untimely.

21. CPPC's application for rehearing is rejected as untimely to the extent it is directed at D.88-08-054.

22. Rehearing of D.88-08-054 as modified herein is denied.

23. Rehearing of D.88-09-038 as modified herein is denied.

24. DRA's petition for modification of D.88-09-038 is denied.

This order is effective today.

Dated NOV 23 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.

[illegible], Executive Director

majeure.[1] Thus, based on our review of the various arguments concerning the force majeure issue, we conclude that there is a legitimate dispute between PG&E and Crockett concerning force majeure.

8. The first sentence in the first full paragraph on page 11 is modified to read:

> Still, because the ratepayer benefits claimed for the proposed settlement are not certain, we do not believe that they justify the ratepayers' assuming the full risk of losing the $17 million up-front payment to Crockett and the $2.9 million payments (NPV) to C&H if the project never comes on line.

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10. Finding of Fact No. 2 on page 13 is modified to read:

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> 8. This Commission has not previously authorized pre-operational payments by a utility to a QF. Such payments would constitute an assumption of development risk by ratepayers. The assumption of development risk by ratepayers runs counter to one of the fundamental purposes of the QF program.

[1] See Appendix B to Order Instituting Rulemaking 88-06-003 at page 29.