

Decision 89 11 052 NOV 2 2 1989

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Rulemaking to Establish Guidelines)
for the Administration of Power)
Purchase Contracts Between Electric)
Utilities and Qualifying Facilities.)

R.88-06-007
(Filed June 8, 1988)

OPINION

ORIGINAL

I. Summary

This decision addresses a petition for modification of Decision (D.) 88-10-032, filed by Harwood Environmental Power Corporation. We dismiss the petition, without prejudice, as procedurally improper.

II. Background

On October 14, 1988, the Commission issued D.88-10-032, which set forth final guidelines on the administration of standard offer contracts (Guidelines). The issue of force majeure was addressed in the Guidelines, as follows:¹

- "4. Decisions about the applicability of the force majeure clause will be made on a case-by-case basis. Factors to be considered will include an examination of the factual basis of the force majeure claim, the specific language of the contractual force majeure clause, and whether the QF has complied with applicable contractual requirements to give notice of the force majeure and to mitigate the delay caused by the force majeure. The effect of

1 Force majeure is a legal doctrine referring to uncontrollable or unforeseeable circumstances or actions which would relieve one party in a contract from certain obligations.

the force majeure on the utility's obligations under the contract will also be considered as cases arise."

- "5. Events giving rise to valid claims of force majeure may include delay in obtaining required governmental permits, depending on the circumstances of the individual QF. However, not all project delays resulting from delays in obtaining required governmental permits are valid claims of force majeure. Permitting delays and denials are a regular part of project development and should be anticipated by project developers. . . ." [D.88-10-032, Appendix (mimeo.), at p. 3.]

On August 4, 1989, Harwood Environmental Power Corporation (Harwood) filed a Petition For Modification of D.88-10-032 (Petition). Harwood is a party to an Interim Standard Offer 4 (ISO4) power purchase agreement with Pacific Gas and Electric Company (PG&E). Under the ISO4, Harwood agreed to sell power to PG&E from a 10 MW woodwaste-burning cogeneration facility located in Willits, California.

Harwood executed its ISO4 on June 27, 1985. In February, 1987, Harwood applied to the City of Willits for a conditional use permit. After a series of delays, the City issued the final Environmental Impact Report (EIR) on January 25, 1989. In May, 1989, the City Council voted to deny the permit.

In its Petition, Harwood seeks: (1) modification of D.88-10-032 to recognize its project specific experience as a force majeure; (2) approval to relocate the project to an unspecified location; and (3) approval of a delay in operation beyond the five-year deadline contained in the ISO4 contract.

Protests were timely filed by PG&E, Southern California Edison Company (SCE), Independent Energy Producers Association (IEP) and the Division of Ratepayer Advocates (DRA). On October 10, 1989, Harwood filed a reply to these protests.

III. Position of the Parties

Harwood petitions the Commission to clarify that the circumstances surrounding Harwood's permitting delays and denial constitute force majeure. In Harwood's view, the chain of extraordinary events that delayed (and ultimately resulted in denial of) its conditional use permit requires this Commission's direct intervention.² Moreover, Harwood asserts that PG&E has "dragged its feet" in responding to Harwood's claim of force majeure. For these reasons, Harwood argues that modification of D.88-10-032 is required.

PG&E, SCE, DRA, and IEP (collectively, "Protestants") protest Harwood's petition for several reasons. First, they all argue that Harwood's requested relief does not constitute the kind of "minor change" contemplated by Rule 43. Because Harwood is seeking this Commission's determination on force majeure relief, based on the facts in this particular case, IEP, DRA, and PG&E argue that a complaint procedure should have been used. Moreover, since Harwood alleges that it was denied a fair, reasonable, and non-arbitrary review of its permit application, DRA argues that it should first seek relief, including appeal if necessary, in a civil court.

PG&E and SCE also assert that the existence of a force majeure would not entitle Harwood to a site change. In PG&E's

² In support of its force majeure claim, Harwood recounts the specific events leading to the preparation of the EIR and the subsequent vote to deny a permit. In their protests, DRA, PG&E, and SCE assert that the information presented by Harwood is incomplete, inconclusive, and in some instances misleading. We will not reiterate the facts alleged by the parties regarding the specifics of this dispute. Rather, as described below, we focus our discussion on the parties' positions regarding the appropriate procedural vehicle for the issues raised in Harwood's petition.

view, force majeure provisions excuse performance under a contract during the period of the force majeure event, and are not intended to create an affirmative right to vary other terms of the contract. In addition, both PG&E and SCE argue that the Guidelines explicitly require a finding of project viability, before any modification to the contract can be negotiated. SCE asserts that granting this type of change would turn a nonviable ISO4 project into a wholly new project, which is contrary to established Commission policy.

IV. Discussion

The threshold issue for our consideration is whether or not a petition for modification is the appropriate vehicle to address Harwood's claim.

As we recently explained in D.88-01-044:

"...a petition should target a generic issue, not a particular adversary. A complaint, rather than a petition, is proper where we are asked to adjudicate a dispute turning on the facts in a particular case." (D.88-01-044, mimeo. at pp. 11-12.)

We agree with Protestants that Harwood's petition seeks to include into general guidelines a specific set of circumstances

unique to Harwood. More specifically, Harwood requests that we modify D.88-10-032 to define force majeure as "including the chain of extraordinary events that have delayed Harwood's obtaining a conditional use permit".³ In addition, Harwood is looking for "an order explaining the obvious to PG&E".⁴ In short, Harwood is asking us to resolve its dispute with PG&E over a specific claim of force majeure and requested relief. As we discussed in D.88-01-044, this type of dispute is properly handled through a complaint filing, rather than a petition. Moreover, as both PG&E and SCE point out, the relief requested by Harwood raises a further issue, project viability, that can only be assessed on a case-by-case basis.

Harwood also asks us to do exactly what we considered, and decided not to do, in formulating our Guidelines:

"Several commenters in this proceeding urge us to identify circumstances under which a QF may (or may not) invoke the force majeure clause. We have reviewed the comments carefully and conclude that any further identification of those circumstances, as well as the effect of force majeure on the utilities' obligations should be considered as cases arise. The complex factual and legal nature of force majeure requires us to take a case-by-case approach." (D.88-10-032, mimeo., p. 32.)

Hence, the modifications proposed by Harwood would require us to rethink our adopted approach for addressing force majeure issues, and would entail major modifications to the Guidelines themselves.

For these reasons, we find that Harwood's petition does not constitute the kind of minor change contemplated by Rule 43.

³ Petition, at p. 13.

⁴ Ibid.

We agree with IEP, DRA and PG&E that Harwood's claim of force majeure, and requested relief, should have come before us in the form of a complaint.

We therefore dismiss Harwood's petition, without prejudice. While Harwood and PG&E's filings contain factual allegations concerning Harwood's claim of force majeure, we decline to address these issues through a petition. Should Harwood decide to refile its claim in the form of a complaint against PG&E, we would then consider Harwood's specific circumstances within the overall context of our adopted Guidelines. In particular, we remind Harwood of our following discussion in D.88-10-032:

"The QF claiming force majeure must establish that the particular delay, and duration of delay, was unanticipated at the time the contract was entered into. The QF must also show that it was without any fault or negligence in contributing to the delay, and that it has been diligent in attempting to end any delay. The QF must also have given the required notice of the delay."

"Assuming that the QF proves that it meets these criteria, the effect of the force majeure must be determined. Before considering a deferral of the on-line date, the extent to which the force majeure event (and not other factors) impacted the QF's ability to meet that requirement must be assessed. If a permit deferral condition is imposed, then the difficult questions of whether, at what price, and for how many years the QF may be entitled to sell power under its contract must be answered. Deliberations over these issues require an examination of all the surrounding circumstances." (D.88-10-032, mimeo. p. 32. Emphasis in original.)

Moreover, we remind Harwood that it is the complainant's burden, under Public Utilities Code § 1702, to clearly set forth the specific action (or inaction) of a utility that is in violation of "any provisions of law or any order or rule of the Commission."

Findings of Fact

1. On June 27, 1985, Harwood executed an Interim Standard Offer 4 with PG&E for a 10 MW woodwaste-burning cogeneration facility located in Willits, California.

2. Interim Standard Offer 4 contains a five-year deadline for project operation.

3. In May, 1989, the City of Willits voted to deny the conditional permit for Harwood's project.

4. On August 4, 1989, Harwood filed a Petition for Modification of D.88-10-032, the Commission's guidelines on the administration of standard offer contracts.

5. In its petition, Harwood seeks (1) modification of D.88-10-032 to recognize its project specific experience as a force majeure; (2) approval to relocate the project to an unspecified location; and (3) approval of a delay in operation beyond the five-year deadline.

6. In D.88-01-044, the Commission clarified that petitions should be used for addressing discrete, generic issues, and not for targeting a particular adversary.

7. D.88-01-044 states that a complaint, rather than a petition, is proper where the Commission is asked to adjudicate a dispute turning on the facts in a particular case.

8. The guidelines adopted in D.88-10-032 state that decisions about the applicability of the force majeure clause will be made on a case-by-case basis.

9. In developing its Guidelines, the Commission considered, but rejected, recommendations to identify additional specific circumstances under which a QF may (or may not) invoke the force majeure clause.

Conclusions of Law

1. Harwood's petition does not constitute the kind of minor change contemplated by Rule 43.
2. A complaint, not a petition, is the appropriate procedural vehicle with which to address Harwood's claim of force majeure, and requested relief.

ORDER

IT IS ORDERED that the Petition for Modification of Decision (D.) 88-10-032 filed by Harwood Environmental Power Corporation is dismissed, without prejudice.

This order becomes effective 30 days from today.

Dated NOV 22 1989, at San Francisco, California.

G. MITCHELL WILK
President
FREDERICK R. DUDA
STANLEY W. HULETT
JOHN B. OHANIAN
PATRICIA M. ECKERT
Commissioners

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

Wesley Franklin