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BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Gas Recovery Systems,

Complainant,

vs.

Pacific Gas and Electric
Company,

Defendant.

Case 86-07-035
(Filed July 15, 1986)OPINIONSummary

This decision approves a settlement and Standard Offer 2 contract between Gas Recovery Systems (Gas Recovery) and Pacific Gas and Electric Company (PG&E).

Background

On March 19, 1986, the Commission suspended Standard Offer 2 for the purchase by California electric utilities of firm capacity from qualifying facilities (QFs). This suspension was ordered in Decision (D.) 86-03-069 and was continued in effect by D.86-05-024 until further order of the Commission. To date, the Commission has not reinstated Standard Offer 2 for PG&E, the defendant in this complaint.

In D.86-05-024, the Commission addressed the issue of determining the status of Standard Offer 2 contracts as of the date of the suspension. In this regard, the Commission concluded that the following standard should be applied in determining a QF's entitlement to a Standard Offer 2 contract:

"The precedents set with regard to the suspension of interim Standard Offer 4 should apply to administration of the suspension of Standard Offer 2. In essence, the matter to be resolved as to a given project is the project's

status on the date of the Standard Offer 2 suspension (March 19, 1986). If the project had reached a stage by that date where it could have satisfied all contract signing prerequisites (including the screening criteria of the QF Milestone Procedure), then that developer should have a reasonable opportunity to cure deficiencies in its submittals as they existed when the suspension occurred. No grace period should be authorized for developers who had not requested a Standard Offer 2 contract, or did not meet contract signing prerequisites, as of the date of the suspension." (D.86-05-024, at p. 28.)

Following the suspension of Standard Offer 2, numerous complaints and several petitions for modification of D.86-03-089 and D.86-05-024 were filed challenging utility decisions not to execute certain Standard Offer 2 contracts. Gas Recovery is among these complainants.

The suspension of Standard Offer 2, however, prompted questions regarding not only a QF's entitlement to a Standard Offer 2 contract, but also the capacity prices to be paid under the agreement should the date of operation of the facility occur after the period for which a capacity price schedule had been established. In the case of PG&E, a firm capacity price schedule for its Standard Offer 2 contracts was adopted in D.83-12-068. This schedule originally covered contracts with on-line dates through 1988. In D.87-09-025, the Commission extended the original firm capacity price schedule to cover on-line dates in the years 1989 to 1991. The extension was an extrapolation of the original prices established in 1983.

Recently, in D.89-07-022, the Commission concluded that QFs that opted to receive capacity payments under Standard Offer 2 based on the capacity schedule in effect on the QF's date of operation, as opposed to the date of contract execution, are not entitled to the capacity schedule adopted in D.83-12-068 and extended by D.87-09-069. While these QFs are entitled to fixed,

levelized capacity payments over the term of the contract, the Commission ordered that, in the absence of a negotiated settlement, firm capacity prices for these QFs will be developed in the upcoming Biennial Resource Plan Update Proceeding.

Following the filing of this complaint, PG&E initially challenged the assertion of Gas Recovery that it was entitled to a Standard Offer 2 contract. Eventually, however, the parties reached a settlement for which Commission approval is sought. In response to the settlement, the Commission's Division of Ratepayer Advocates (DRA) filed comments questioning the facts supporting Gas Recovery's entitlement to a Standard Offer 2 contract and seeking clarification on the issue of the capacity price to be paid under the contract. This filing led PG&E and Gas Recovery to file a supplement to their joint motion amending their settlement and Standard Offer 2 contract to satisfy DRA's concerns.

Gas Recovery Complaint

Gas Recovery develops and owns qualifying facilities. Its complaint alleges that PG&E wrongfully refused to execute a Standard Offer 2 contract for the purchase of electric energy and capacity from Gas Recovery's Fresno Power Project

Specifically, Gas Recovery states that its contract was prepared by PG&E for execution by Gas Recovery on March 17, 1986, two days prior to the Commission's suspension of Standard Offer 2 in D.86-03-069. According to the complaint, on March 17 representatives of Gas Recovery and PG&E met in PG&E's offices where Gas Recovery executed three copies of the Standard Offer 2 contract. Gas Recovery further alleges that PG&E's representative informed Gas Recovery that PG&E would execute the contract at the earliest opportunity and that Gas Recovery would be provided a project description form to be completed and returned by Gas Recovery. Gas Recovery states that it was advised by PG&E that this form was not readily available on March 17 and was not

required as a condition of receiving PG&E's Standard Offer 2 contract.

On March 26, 1986, Gas Recovery received the project description form. Gas Recovery returned the completed form to PG&E on March 31, 1986. On that date and again on May 19, 1986, Gas Recovery inquired of PG&E as to the status of its Standard Offer 2 contract. By letter dated June 16, 1986, PG&E notified Gas Recovery that PG&E had elected not to execute the contract on the basis that a completed project description form had not been submitted to PG&E prior to the Commission's suspension of Standard Offer 2 on March 19, 1986. On June 27, 1986, Gas Recovery made a further request of PG&E to execute the contract which was also refused.

Based on these facts and the Commission's decisions suspending Standard Offer 2, Gas Recovery asserts that its submittal to PG&E of the Standard Offer 2 contract was complete on March 17, 1986. Gas Recovery further asserts that, if its submittal lacked a project description form, such deficiency "1) was due to [PG&E's] negligence or subterfuge and 2) in any event was cured by subsequent submittal as contemplated by Decision No.86-05-024." (Gas Recovery Complaint, at p. 6.) Gas Recovery therefore asks the Commission to find PG&E in violation of Commission orders and to direct PG&E to immediately execute and deliver to Gas Recovery the Standard Offer 2 contract for the Fresno Power Project.

On August 18, 1986, PG&E answered Gas Recovery's complaint. In its answer, PG&E asks that the complaint be dismissed and that the relief requested by Gas Recovery be denied. Specifically, PG&E denies that on March 17, 1986, it either offered a Standard Offer contract to Gas Recovery or indicated that it would execute such an agreement. PG&E does admit, however, to preparing a clean copy of a Standard Offer 2 contract for Gas Recovery on that date.

Similarly, PG&E denies that it informed Gas Recovery on March 17 that it would subsequently provide Gas Recovery with a project description form, that the form was not readily available on that date, or that completion of the form was not a prerequisite to execution of a Standard Offer 2 contract. PG&E also states that Gas Recovery's failure to submit a completed project description form before March 19, 1986, was a critical factor in PG&E's determination that Gas Recovery's project submittals did not meet the Commission's standards set forth in D.86-03-069 and D.86-05-024.

On September 10, 1986, Gas Recovery filed a motion for an immediate order in its favor. Gas Recovery states that PG&E admits in its answer that the absence of a completed project description form prior to March 19 led to PG&E's refusal to execute the Standard Offer 2 contract. Citing D.86-05-024, Gas Recovery argues that it had a reasonable opportunity to cure deficiencies in its Standard Offer 2 submittal. According to Gas Recovery, this single deficiency in its submittal was cured on April 3, 1986 when PG&E received Gas Recovery's completed project description form.

On September 25, 1986, PG&E responded to Gas Recovery's motion and asked that it be denied. In contrast to Gas Recovery, PG&E asserts that D.86-05-024 and subsequent orders relying on that decision stand for the following: "If a QF developer had submitted all documents necessary to obtain [a Standard Offer 2 power purchase agreement (SO 2 PPA)] by the suspension date, and was in a position on the suspension date to cure all deficiencies in the submittals, then the developer is entitled to execute a binding SO 2 PPA for the project." (PG&E Response, at p. 4.) PG&E argues that because Gas Recovery did not submit any project description form for its project before the suspension date, deficient or otherwise, Gas Recovery is not entitled to obtain a Standard Offer 2 contract for its project.

On April 13, 1987, Gas Recovery filed another motion for an immediate order in its favor reasserting its interpretation of D.86-05-024. Gas Recovery again states that it did in fact submit all required material and documents to PG&E as soon as the forms were made available to Gas Recovery and that these submittals contained no deficiencies.

Gas Recovery and PG&E Proposed Settlement

On September 25, 1987, Gas Recovery and PG&E joined in filing a "Joint Motion to Dismiss Complaint and for Approval of Settlement." In this motion, the parties indicate that the following facts are undisputed: (1) On March 17, 1986, Gas Recovery delivered to PG&E a partially executed Standard Offer 2 contract for a 4.0 MW landfill gas fired project to be located in Fresno, California; (2) on March 17, 1986, Gas Recovery also provided PG&E with proof of site control for the project; and (3) on March 28, 1986, Gas Recovery submitted a project description which was received by PG&E on April 3, 1986. The parties indicate, however, that a dispute still exists regarding whether a Gas Recovery representative offered to submit a project description for the project on March 17, 1986.

The parties state in their joint motion that their decision to resolve their dispute and enter into a settlement agreement was based on Commission decisions issued prior to and following the filing of Gas Recovery's complaint. The material terms of the agreement are that PG&E will execute the Standard Offer 2 contract submitted by Gas Recovery on March 17, 1986, and that the parties will release each other from all claims stemming from the complaint proceeding.

The agreement is conditioned, however, upon Commission approval of its material terms. PG&E and Gas Recovery therefore ask for the Commission to approve the agreement, to find the Standard Offer 2 contract resulting from the agreement to be reasonable, and to dismiss the complaint.

On March 4, 1988, DRA filed comments on the proposed settlement. In its comments, DRA states that it objects to the settlement on the grounds that "there is insufficient evidence in the record to demonstrate that Gas Recovery meets the criteria established to qualify as an SO2 orphan." (DRA Comments, at p. 2.) DRA also expresses concern that the record does not address the issue of the capacity price Gas Recovery would receive if the project begins operation after 1991, the last year for which capacity prices were set under Standard Offer 2. DRA states that the parties may be able to provide evidence to support a finding that Gas Recovery is entitled to a Standard Offer 2 contract or that the settlement agreement is reasonable. Until that time, however, DRA does not believe that the present record is sufficient to justify approval of the settlement.

On the issue of Gas Recovery's entitlement to a Standard Offer 2 contract, DRA asserts that Commission orders require that the QF project could have satisfied all contract signing prerequisites by the date of the suspension of the standard offer. DRA states that these prerequisites include a standard offer contract, a project description, and proof of site control. According to DRA, the Commission in D.86-12-061 has also found that this standard can be satisfied if the parties stipulate that the project developer had or could have submitted the form before March 19, 1986.

In this case, DRA asserts that "the undisputed facts are devoid of any evidence that Gas Recovery could have provided the project description form by March 19, 1986, or indeed that the project had achieved definition by that date." (DRA Comments, at p. 4; emphasis original.) In citing D.86-05-024, DRA further states that the Commission has rejected any grace period for developers who had not requested a Standard Offer 2 contract or did not meet contract signing prerequisites as of the date of the suspension.

DRA acknowledges that the Commission has approved settlement agreements even though the parties did not agree that the QF could have satisfied the contract signing prerequisites by the Standard Offer 2 suspension date. According to DRA, however, these negotiated settlements have provided ratepayer benefits in exchange for the utility's execution of the standard offer contract. In this case, however, DRA notes that no concessions have been made by Gas Recovery.

If the Commission approves the agreement, DRA asks the Commission to consider the appropriate capacity payments to be made in the event the project comes on-line after 1991. DRA believes that it is appropriate for PG&E and Gas Recovery to supplement the record in this case to indicate their intended resolution of this problem.

On May 16, 1988, PG&E and Gas Recovery filed a supplement to their joint motion for approval of the settlement agreement. This document indicates that on May 4, 1988, PG&E and Gas Recovery entered a Supplemental Settlement and Release Agreement which supersedes and replaces the original settlement agreement.

Although the material terms of the supplemental agreement mirror those of the earlier agreement, certain additional information and contract terms have been provided in the parties' supplemental filing. Specifically, PG&E and Gas Recovery agree that if Gas Recovery's actual operation date is after 1991, the firm capacity price under the contract shall be equal to the 1991 firm capacity price for Standard Offer 2 as stated in the Firm Capacity Price Schedule ordered in D.87-09-025. A copy of the schedule will be attached to the contract. The supplemental agreement also alters the execution date of the contract to be the tenth day after the effective date of the Commission decision approving the agreement. Except for these changes, the contract will be identical to that submitted to PG&E by Gas Recovery on March 17, 1986.

In addition to this change in the agreement, PG&E's and Gas Recovery's supplemental filing also includes a stipulation of facts. The stipulation reiterates the facts to which PG&E and Gas Recovery had previously agreed, as well as additional areas of agreement. Critical among these is the statement that based on subsequent representations made by Gas Recovery during settlement negotiations, "PG&E does not dispute that Gas Recovery could have submitted a completed project description form for the Facility on March 17, 1986." (Stipulation, at p. 2.)

On January 3, 1989, Gas Recovery filed a motion for an immediate order granting PG&E's and Gas Recovery's supplemental motion and approving the final settlement reached by the parties. Gas Recovery states that the supplemental filing responds satisfactorily to DRA's comments on the parties' settlement of this complaint and that no further dispute exists.

On November 30, 1989, a letter was received by the assigned Administrative Law Judge (ALJ) signed by the attorneys for Gas Recovery and PG&E. The letter was sent in response to an inquiry by the ALJ regarding the capacity schedule which was originally intended to govern the parties' Standard Offer 2 contract. This inquiry had been necessitated by the issuance of D.89-07-022 following the filing of the parties' proposed settlement.

According to this letter, Article 3 of Gas Recovery's Standard Offer 2 contract with PG&E provides as follows: "Seller elects to have its contract capacity price determined from the firm capacity price schedule in effect on the date of execution of the Agreement." (Original emphasis deleted; emphasis added.) The letter states that the parties understand that the capacity price for the project, if operation occurs after 1991, shall be the 1991 capacity price from this schedule.

Discussion

Based on the record in this case, we find that the settlement contained in PG&E's and Gas Recovery's supplement to its joint motion filed on May 16, 1988, is reasonable and should be approved. With the amendments of the stipulation of facts and contract contained in the supplement, the parties have adequately responded to deficiencies in the original settlement which were appropriately pinpointed by DRA. The "fine-tuning" undertaken by the parties in response to DRA's filing ensures that the standard for entitlement to a Standard Offer 2 contract is met by Gas Recovery and that the price terms are consistent with the most recent Commission orders.

Specifically, the final stipulation of facts indicates that Gas Recovery was among those QFs who "could have" met all contract signing prerequisites prior to the suspension of Standard Offer 2. This stipulation reflects that all documentation was submitted to PG&E prior to March 19, except for a project description form. The facts reflect, however, that the information to be included on this form was available on that date and would have been presented to PG&E at that time on the appropriate form if one had been made available. Consistent with D.86-05-024 and our subsequent orders, we find that this record supports Gas Recovery's entitlement to a Standard Offer 2 contract.

The issue which has been made more difficult by the passage of time is the resolution of the capacity prices to be paid under Gas Recovery's Standard Offer 2 contract. At the time of the settlement, the Commission had not addressed the issue of capacity payments to be made under Standard Offer 2 contracts if a facility became operational after 1991. DRA, identifying the possibility that the Gas Recovery project might not become operational by 1991, asked the parties to indicate how capacity payments would be made in this event. The parties responded to DRA by amending their agreement to provide that, if the project became operational after

1991, the firm capacity price under the contract would equal the 1991 firm capacity price contained in the Firm Capacity Price Schedule ordered in D.87-09-025. At the time the parties filed their supplemental motion, this action was reasonable since only the schedule adopted in D.87-09-025 provided any guidance for what capacity payments should be at least through 1991.

With the issuance of D.89-07-022 in July of this year, however, we have now made clear a distinction between a QF who had opted to receive capacity payments based on the capacity schedule in effect on its operation date and a QF who had opted for the firm capacity price schedule in effect on the date of contract execution. In the latter case, the QF exercising the "execution date" option is entitled to be paid under the capacity schedule adopted in D.87-09-069. A QF in the "operation date" category, however, "[a]bsent a negotiated settlement," will have its firm capacity price schedule based on the long-term capacity value adopted in the upcoming Biennial Resource Plan Update Proceeding (BRPU) for PG&E. (D.89-07-022, at p. 1.)

Originally, the record was not clear in this proceeding as to which capacity payment option--the "execution date" option or "operation date" option--was chosen by Gas Recovery under its Standard Offer 2 contract with PG&E. Gas Recovery's and PG&E's joint letter of November 30, 1989, however, clarifies this issue. According to that letter, Gas Recovery had selected the "execution date" option and, as prescribed by D.89-07-022, is therefore entitled to be paid under the capacity price schedule adopted in D.87-09-069.

Under these circumstances, PG&E and Gas Recovery appropriately resolved the issue of the capacity payments to be made under the parties' Standard Offer 2 contract by agreeing to rely on the Firm Capacity Price Schedule adopted in D.87-09-025. We note that this approach has met with no further objections by DRA.

We therefore find that based on the stipulated facts included in the parties' supplemental motion, Gas Recovery is entitled to a Standard Offer 2 contract for its Fresno Power Project. The addition of a provision in that contract to base capacity prices under that agreement on the Firm Capacity Price Schedule adopted in D.87-09-025 is also reasonable. The parties' settlement of this dispute contained in the supplement to the joint motion filed on May 16, 1988, should therefore be approved.

Findings of Fact

1. Gas Recovery is a QF developer who sought to execute a Standard Offer 2 contract with PG&E for its 4.0 MW Fresno Power Project.
2. Gas Recovery and PG&E have entered a settlement of this complaint for which Commission approval is required.
3. Concerns raised by DRA to the settlement originally filed by Gas Recovery and PG&E were addressed by the parties in a subsequent supplemental motion and settlement which superseded the first filing.
4. The stipulation of facts entered by Gas Recovery and PG&E, and modified in response to comments filed by the DRA, indicate that on March 17, 1986, two days prior to the suspension of Standard Offer 2 by this Commission, Gas Recovery could have satisfied all contract signing prerequisites for the execution of a Standard Offer 2 contract.
5. On March 17, 1986, Gas Recovery could have submitted a project description form for its Fresno Power Project.
6. Gas Recovery had a reasonable opportunity to cure the deficiency in its Standard Offer 2 submittal caused by the absence of a project description form by providing the actual, completed form to PG&E on April 3, 1986.
7. Gas Recovery is entitled to execute the Standard Offer 2 contract with PG&E which Gas Recovery signed on March 17, 1989.

8. To reflect capacity prices to be paid Gas Recovery after 1991, it is appropriate for the Standard Offer 2 agreement executed by Gas Recovery on March 17, 1986, to be amended by Gas Recovery and PG&E to include the Firm Capacity Price Schedule adopted by the Commission in D.87-09-025.

9. The parties' determination of the capacity prices to be paid under the Standard Offer 2 contract in the event Gas Recovery's project becomes operational after 1991 is consistent with D.89-07-022.

Conclusions of Law

1. The settlement and Standard Offer 2 contract between PG&E and Gas Recovery which is contained in the parties' supplement to their joint motion for approval of the settlement and dismissal of this complaint is reasonable and should be approved.

2. This complaint should be dismissed.

3. This order should be made effective today to permit the parties to proceed under the approved Standard Offer 2 contract for the Fresno Power Project.

O R D E R

IT IS ORDERED that:

1. The supplement to the joint motion to dismiss this complaint and for approval of settlement filed by Gas Recovery Systems and Pacific Gas and Electric Company is granted.

2. Except as provided in Ordering Paragraph 1 of this decision, Gas Recovery Systems' complaint is dismissed.

This order is effective today.

Dated DEC 18 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

WESLEY FRANKLIN, Acting Executive Director

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