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Decision 91-03-053 March 22, 1991

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application of Pacific Gas and Electric Company for an expedited order approving an amendment to a Power Purchase Agreement with Energy Growth Partnership I regarding an extension of the operational deadline and a decrease in energy payments.

ORIGINAL

Application 90-11-049 (Filed November 29, 1990)

(U 39 E)

O P I N I O N

Summary of Decision

This decision approves an amendment to a power purchase agreement between Pacific Gas and Electric Company (PG&E) and Energy Growth Partnership I (EGPI).

Background

On November 5, 1984, PG&E executed an interim Standard Offer No. 4 (SO-4) Long-term Energy and Capacity Power Purchase Agreement (PPA) with Energy Growth Group, Inc. and Energy Growth Partnership (Energy Growth) for a proposal for 10.8 megawatt (MW) hydroelectric qualifying facility (Facility) near De Sabla City in Butte County, California.

PG&E and Energy Growth amended the PPA on February 27, 1989 (First Amendment). The First Amendment provided, among other things, that the five-year deadline by which the Facility was required to deliver energy to PG&E was extended from November 5, 1989 to January 1, 1992, in exchange for price concessions by Energy Growth. No Commission approval was sought or received for this amendment.

On February 14, 1990, PG&E consented to the assignment of the PPA from Energy Growth to EGPI.

In May 1990, PG&E and EGPI began negotiations to discuss possible modification to the PPA. On June 29, 1990, Energy Growth gave PG&E written notice of a claimed force majeure event based on earth movement at the site in early 1990.

While maintaining that EGPI had not demonstrated a valid force majeure under the PPA, PG&E continued to negotiate EGPI's proposed modifications to the PPA. On November 28, 1990, PG&E signed an Agreement and Mutual Release (Agreement) with EGPI which provides for a second amendment (Second Amendment)¹ to the PPA and terminates the force majeure dispute between PG&E and EGPI. The Second Amendment is the subject of this application.

The terms of the Second Amendment, among other things, extends the deadline for delivery of energy from the Facility from the January 1, 1992 deadline established in the First Amendment to January 1, 1993. In exchange for this extension, EGPI agreed to a 3% reduction in energy payments owed under the PPA for the first five years of energy deliveries. The terms of the Second Amendment also require EGPI to provide security to protect ratepayer benefits resulting from the price reductions contained in the First Amendment. The security will be in the form of an irrevocable letter of credit (LOC) in the amount of \$2 million which will be delivered annually to PG&E. The LOC will be in favor of PG&E, with terms acceptable to PG&E.

While it did not seek a formal approval of the Commission of the First Amendment, PG&E, in this application, requests an ex parte order of the Commission approving the Second Amendment. PG&E also requests that Commission approval of the Second Amendment be final and not subject to further reasonableness review.

¹ For the purpose of this opinion, the terms "Agreement" and "Second Amendment" are used interchangeably.

In addition, PG&E requests that the Commission:

1. Determine that the Agreement is reasonable and prudent as executed and would adequately serve the interest of the ratepayers.
2. Allow EGPI to satisfy Milestone 12 of the Qualifying Facilities Milestone Procedure (QFMP), which requires operation of the Facility to start within five years of the date of execution of the PPA, at any time through and including January 1, 1993, although the date of execution of the PPA was November 5, 1984.
3. Determine that all payments made under the Agreement and the PPA, as modified by the Second Amendment, are reasonable and allow PG&E to recover the payments through the Energy Cost Adjustment Clause (ECAC) or any other appropriate mechanism.

PG&E requests expedited ex parte approval of its application. According to PG&E, if the Agreement is approved, EGPI has an opportunity to obtain better financing for the remainder of development of the Facility. PG&E asserts that it was this opportunity to obtain better financing which led EGPI to seek modifications to the PPA. PG&E claims that EGPI has represented to PG&E that the lending institutions from which that financing would be obtained require an extension in the schedule to ensure that the Facility will be operational before the extended completion date. As a result, PG&E opines that EGPI can obtain better financing for the remainder of development of the Facility only if the Commission approves the Agreement.

EGPI is proceeding with construction and development of the Facility with its current financing. Nonetheless, according to PG&E, delayed consideration of this application would only serve to increase EGPI's expenditures by causing it to continue to finance the project with the less desirable financing.

**Consideration of Guidelines
for Administration of PPAs**

In Decision 88-10-032, the Commission established a set of guidelines (Guidelines) for the administration of standard offer purchased power contracts or agreements between electric utilities and qualifying facilities. The Guidelines provide that a utility may negotiate modification to a standard offer power purchased agreement if a project is shown to be "viable" under the terms of the existing power purchased agreement and commensurate ratepayer benefits are obtained in consideration for the modification. PG&E claims that the Second Amendment meets these guidelines.

PG&E argues that the prepared testimony of PG&E's Ann Kozlovsky and EGPI's Peter Loh demonstrate that the Facility could have been completed and could have commenced delivery of energy by its current operational deadline. PG&E argues that given this showing of viability, PG&E's ratepayers faced full payments under the PPA, as modified by the First Amendment. PG&E believes that EGPI's request for an additional year of development time as a means of securing more advantageous financing for the Facility provides an opportunity for ratepayers to save between \$0.8 and 1.0 million in energy payments associated with the PPA.

In addition, PG&E asserts that the Facility is under construction and that approximately \$15 million have already been invested in the project. PG&E concludes that savings in energy payments and the securing by an LOC of the energy price reductions obtained through the First Amendment demonstrate that ratepayers' interests are better served than they would be in absence of the Second Amendment.

Division of Ratepayer Advocates' Comments

Division of Ratepayer Advocates (DRA) reviewed the Second Amendment and filed its comments on January 4, 1991.

DRA believes that the terms of the Second Amendment are not unreasonable. According to DRA, the Second Amendment could

benefit ratepayers because of the energy price reductions. In addition, DRA opines that the delay in the Facility's on-line date could prove beneficial to ratepayers because the rate impact would be postponed. As such, the Second Amendment, standing on its own, would not appear to be adverse to the interests of the ratepayers.

As to the question of satisfying Milestone 12 of the QFMP, DRA opines that it is not unreasonable to conclude that the Facility could have become operational by the January 1, 1992 deadline established in the First Amendment to the PPA. Accordingly, DRA believes that the Facility was viable under the terms of the First Amendment. However, DRA maintains that it remains to be determined whether the Facility was viable under the terms of the original PPA which required the Facility to be operational in 1989. According to DRA, if the First Amendment is determined to be reasonable, the Second Amendment would not be unreasonable.

Further, DRA recommends that the Commission should not make a determination of reasonableness of payments to be made under the Second Amendment, until a determination of reasonableness has been made regarding the First Amendment. According to DRA, if the First Amendment is found to be unreasonable, then the Second Amendment must also be determined unreasonable.

While the Second Amendment does not include any increase in capacity payments, DRA recommends that the applicable terms for capacity payment set forth in Appendix D of the original PPA and the Forecasted Shortage Cost Schedule, TABLE D-2, Page D-5, should not be updated or escalated. In effect, this would maintain the capacity payments at \$188 per kilowatt-year until year 2003.

PG&E's Response to DRA's Comments

On January 25, 1991, PG&E filed its response to DRA's comments in which PG&E agreed not to increase capacity payments included in the Forecasted Shortage Cost Schedule.

While PG&E agreed not to increase the capacity payments, it extended the date of applicability of the Forecasted Shortage Schedule to year 2003. DRA, in its additional comments, agreed with PG&E's proposal.

Discussion

Our review of the record confirms PG&E's representation that the Commission's approval of the terms of the Second Amendment would allow EGPI to obtain financing for the Facility and provide PG&E an opportunity to save its ratepayers between \$0.8 and \$1.0 million in energy payments associated with the PPA. This savings combined with the security for the ratepayer benefits obtained in connection with the First Amendment would be commensurate in value with the one-year extension requested by PG&E. We will approve the terms of the Second Amendment.

While we approve the terms of the Second Amendment, we make no determination about the reasonableness of all payments made under the Second Amendment, since they piggyback upon payments pursuant to the First Amendment. We agree with DRA that such a determination can only be made after considering the reasonableness of the First Amendment.

As to the question of satisfying Milestone 12 of the QFMP, we can only conclude that the Facility could have been operational by the January 1, 1992 deadline established by the First Amendment. However, it remains to be determined whether extension of time agreed upon in the First Amendment was reasonable; i.e., was the PPA viable with respect to the original 1989 deadline. Accordingly, we will only approve the one-year extension agreed upon in the Second Amendment. The reasonableness of the First Amendment will be reviewed in a subsequent Energy Cost Adjustment Clause reasonableness review.

Findings of Fact

1. On November 5, 1984, PG&E executed an interim SO-4 PPA with Energy Growth for a 10.8 MW Facility near De Sabla in Butte County.

2. PG&E and Energy Growth amended the First Amendment which, among other things, extended the completion date of the Facility to January 1, 1992, in exchange for price concessions by Energy Growth.

3. PG&E did not seek or receive Commission approval for the First Amendment.

4. On February 4, 1990, PG&E consented to the assignment of the PPA from Energy Growth to EGPI.

5. On November 28, 1990, PG&E and EGPI signed the Agreement which provided for the Second Amendment to the PPA.

6. The terms of the Second Amendment, among other things, extend the deadline for completion of the Facility from January 1, 1992 to January 1, 1993, in exchange for reduction in energy rates.

7. The terms of the Second Amendment also require EGPI to provide security through a LOC to protect ratepayer benefits resulting from price reduction contained in the First Amendment.

8. On November 29, 1990, PG&E filed Application (A.) 90-11-049 requesting an ex parte order of the Commission approving the Agreement.

9. A.90-11-049 also requests that the Commission approval of the Agreement be final and:

- a. Determine that the Agreement is reasonable and prudent as executed and would adequately serve the interest of the ratepayers.
- b. Allow EGPI to satisfy Milestone 12 of the QFMP, which requires operation of the Facility to start within five years of the date of execution of the PPA, at any time through and including January 1, 1993, although the date of execution of the PPA was November 5, 1984.

- c. Determine that all payments made under the Agreement and the PPA, as modified by the Second Amendment, are reasonable and allow PG&E to recover the payments through the ECAC or any other appropriate mechanism.

10. On January 4, 1991, DRA filed its comments on A.90-11-049.

11. DRA believes that the terms of the Second Amendment are not unreasonable.

12. DRA recommends that a determination of reasonableness regarding satisfying Milestone 12 of the QFMP and payments for energy should not be made until a determination of is made regarding the reasonableness of the First Amendment.

13. The terms of the Second Amendment would allow EGPI to obtain better financing which may save ratepayers up to \$1 million in energy payments.

14. The savings in energy payments along with the security for ratepayer benefits obtained in connection with the First Amendment would be commensurate in value with the one-year extension requested by PG&E.

15. A determination of reasonableness of energy payments made under the Second Amendment can only be made after determination of reasonableness of the First Amendment.

16. The Facility could have been operational by the January 1, 1992 deadline agreed upon in the First Amendment.

17. It is not certain if the Facility could have been operational by the 1989 deadline established by the original PPA.

Conclusions of Law

1. The terms of the Second Amendment which provide a one-year extension in the on-line date of the Facility in return for certain concessions by EGPI should be approved.

2. A determination of reasonableness of payments to be made under the PPA as amended by the Second Amendment should be deferred until determination of reasonableness of the First Amendment.

3. A determination regarding satisfying Milestone 12 of the QFMP should be deferred pending a determination of the reasonableness of the First Amendment.

4. This order should be made effective immediately to allow EGPI to obtain better financing for the Facility.

O R D E R

IT IS ORDERED that:

1. The Agreement and Mutual Release to provide for a Second Amendment to the Power Purchase Agreement between Pacific Gas and Electric Company and Energy Growth Partnership I effective November 28, 1990 is approved.

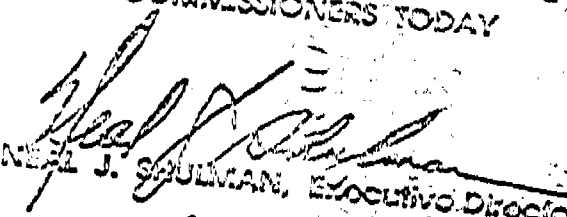
2. This proceeding is closed.

This order is effective today.

Dated March 22, 1991, at San Francisco, California.

PATRICIA M. ECKERT
President
G. MITCHELL WILK
JOHN B. OHANIAN
DANIEL WM. FESSLER
NORMAN D. SHUMWAY
Commissioners

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


NEIL J. SHULMAN, Executive Director

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