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Decision 91-11-053 November 20, 1991

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

ORIGINAL

Ronald E. Rulofson, Complainant, vs. Pacific Gas and Electric Company, Defendant.	Case 88-10-029 (Filed October 14, 1988)

Ronald Rulofson, for himself, complainant.
Linda L. Agerter, Joan Krajewski, Douglas A. Oglesby, Michael S. Hindus, and Peter Ouberg, Attorneys at Law, for Pacific Gas and Electric Company, defendant.
Joseph G. Meyer, for Joseph Meyer Associates, interested party.
Ida M. Passamonti, Attorney at Law, for Division of Ratepayer Advocates.

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OPINION

I. Introduction

A. Summary of Decision

This decision finds that defendant Pacific Gas and Electric Company (PG&E) failed to follow Decision (D.) 85-01-038 with respect to complainant. That decision required PG&E to mail qualifying facilities (QFs) project definition questionnaires within 21 days of the date of decision. Instead, PG&E advised complainant that his position on the waiting list for transmission capacity would be determined by superseded procedures. Had PG&E observed D.85-01-038 with respect to complainant, he would hold fifteenth place on the waiting list. PG&E is ordered to reposition complainant on the waiting list as if he had established priority on the waiting list on February 16, 1985. PG&E is ordered to ensure that no other QFs on the waiting list would be adversely affected by this repositioning, and to undertake facilities additions at shareholder expense if necessary to accommodate energy deliveries by complainant. This relief is conditioned upon complainant's continued compliance with the Qualifying Facilities Milestone Procedure (QFMP). In all other respects, the complaint is denied.

B. Procedural History

Complaint was filed by Ronald E. Rulofson, a QF developer, against defendant PG&E on October 14, 1988. Rulofson asserts that PG&E's violation of Commission decisions concerning transmission capacity constraints has deprived him of the opportunity to sell electricity to PG&E. Answer was filed by PG&E on November 17, 1988. A prehearing conference (PHC) was held on December 20, 1988. At that PHC, the assigned Administrative Law Judge (ALJ) denied the defendant's Motion to Dismiss Complaint and directed the parties to develop a joint stipulation of

chronological events. The joint stipulation was to list the dates of specific events regarding the issue of whether PG&E had correctly observed the QFMP and the procedure for interconnection with respect to complainant. A schedule for evidentiary hearings was adopted.

The proceeding was taken off calendar at complainant's request. Rulofson filed an amended complaint on July 26, 1989. On September 7, 1989, PG&E filed a motion to limit and dismiss certain issues raised by the amended complaint; complainant filed his response to PG&E on October 13, 1989. On November 17, 1989, the ALJ ruled that because the amended complaint did not satisfy Rule 10 of the Commission's Rules of Practice and Procedure which requires that "the specific act complained of shall be set forth in ordinary and concise language," Appendix A of PG&E's motion would be used to frame the issues presented in this case. The ALJ then ordered the defendant to file an Answer consistent with the scope of the proceeding. Complainant's letter request for reconsideration of the November 17, 1989 ALJ ruling was denied.

The "Stipulation of Facts" was filed by complainant and defendant on February 15, 1990.

PG&E's Answer to the amended complaint was filed on February 20, 1990.

On March 13, 1990, the "Motion of Pacific Gas and Electric Company for Limitation of Issues and Approval of Settlement" was filed.[1] On March 22, 1990, PG&E filed its

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1 In the amended complaint, complainant had alleged that PG&E erred by not providing complainant with information about QFs sufficient to enable him to contact and communicate with QFs on waiting and capacity eligibility lists pursuant to Commission Decision (D.) 85-11-017. Under the terms of a partial settlement agreed to by complainant and defendant, within two weeks of

(Footnote continues on next page)

"Motion to Strike Prepared Testimony of Ronald E. Rulofson and Janice C. Rulofson."[2]

Three days of evidentiary hearings were held in San Francisco beginning March 26, 1990. At the start of hearings, the ALJ granted PG&E's motion for limitation of issues and approval of settlement. The ALJ denied PG&E's motion to strike prepared testimony. The ALJ granted PG&E's motion to strike complainant's rebuttal testimony. We affirm the rulings of the ALJ.

C. Proposed Decision of Administrative Law Judge

The proposed decision of the assigned administrative law judge (ALJ) was filed and served on the parties on October 10, 1991 pursuant to Rule 77.1 of the Commission's Rules of Practice and Procedure (Rules). PG&E filed comments on the proposed decision pursuant to Rule 77.2, et seq.; Rulofson served his reply to PG&E's comments on the ALJ and PG&E. Since Rulofson's reply was not properly filed with the Commission's Docket Office as required by Rule 77.5, it has not been considered in this final decision.

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dismissal of that cause of action, PG&E would distribute a mailing to all QFs listed on the waiting and eligibility lists for transmission capacity in PG&E's transmission constrained areas. This would notify QFs that if objection was not received, their name and address would be released. PG&E would then provide those names and addresses to complainant on a confidential basis.

2 PG&E claimed that complainant's testimony is improper in the following respects: (1) it addresses issues which were eliminated from the proceeding by the November 17, 1989 ALJ ruling, (2) it raises new issues of which PG&E had no notice, (3) it employs PG&E's 1988 Answer to the original complaint in an attempt to impeach PG&E with a pleading which PG&E had no duty to amend, and (4) it offers testimony in the form of narrative questions and admits that certain Appendices to that testimony are not accurate.

PG&E challenges the ALJ's finding that PG&E's failure to mail Rulofson a project questionnaire pursuant to D.85-01-038 resulted in material harm to Rulofson. According to PG&E, D.88-04-067 establishes the rule that failure to send a QF notice could result in material harm only if the project otherwise would have received a transmission allocation. PG&E's claim that a QF's relative position on the waiting list makes no material difference assumes that the Commission will not reconsider the negotiated 90 MW limit on interconnection imposed by D.84-11-123. In fact, we have begun an investigation to develop a policy of nondiscriminatory access to electricity transmission services for nonutility power producers (Investigation (I.) 90-09-050). Depending on the results of our investigation, QFs in presently constrained areas may be provided a means for delivering their output to PG&E. We affirm the ALJ's finding that PG&E's placement of Rulofson on the waiting list in a lower position than he would have obtained had PG&E properly sent him a questionnaire constitutes material harm.

PG&E also questions the ALJ's finding that PG&E should ensure that certain QFs should be in no worse position as the result of placing Rulofson in position 15. Although we may not have required such protection in previous orders authorizing QFs to move up on the waiting list, that does not alter the fact that none of the QFs on the waiting list received any notice that their position may be affected by the outcome of this complaint case. The ALJ's determination on this issue will not be changed.

PG&E objects that any facilities additions needed to carry out this decision should not be undertaken at shareholder expense because the harm to Rulofson resulted from an administrative oversight. We find that under these circumstances, utility management, and not ratepayers, should be responsible for costs incurred as the result of an administrative oversight.

We have read and considered the other objections of PG&E to the proposed decision of the ALJ and find them to be unpersuasive. Therefore, no changes to the proposed decision are made.

II. Statement of the Case

Complainant Ronald Rulofson is a QF developer who proposes to generate electricity and sell it to PG&E using a run-of-the-creek hydroelectric facility on Eltapom Creek in Trinity County. The project is located within the PG&E transmission-constrained area as defined by D.84-08-037.[3] Rulofson complains of his project's low priority on the transmission capacity Waiting List.

Based on complainant's April 25, 1985 submittal of a project description form, his project is twenty-third on PG&E's "List of Qualifying Facilities within PG&E's Transmission Constrained Area that are Waiting for a Transmission Allocation

3 Limitations on PG&E's transmission system restricted the development of QFs in portions of its service territory. D.84-08-035 adopted a stipulated Interim Solution to this problem that established a list of QFs waiting for transmission capacity on PG&E's system.

Under CPUC Decision No. 84-08-037 - Humboldt Constrained Area" (Waiting List). Projects representing 141.8 MW of generation precede the complainant's project on the Waiting List.

The last project on the list of QFs with transmission capacity (Eligibility List) established priority on September 19, 1984. The parties apparently agree that had Rulofson followed the requirements set forth in D.84-08-037 before September 19, 1984, he would have received a capacity allocation.

Rulofson claims that but for PG&E's disregard of applicable Commission decisions and its discrimination against him, his project would either have an allocation of transmission line capacity or occupy a higher position on the Waiting List.

Complainant asks the Commission to find that PG&E has not acted properly in its dealings with him and to grant him an allocation of capacity or a combination of capacity allocation and preferential placement on the Waiting List.

Complainant also asks the Commission to review the Waiting List in order to cull non-viable QF projects so that QFs with currently effective power purchase agreements may advance in the Waiting List. The ALJ has repeatedly ruled that this complaint proceeding is not the proper vehicle for examining whether PG&E has reasonably administered the Waiting List. The ALJ has also ruled that this complaint proceeding is not the proper forum for revisiting the Interim Solution and the QFMP.

We affirm the ALJ's limitation of issues. The only parties to the complaint are Rulofson and PG&E. If we addressed the issues tendered by Rulofson in this proceeding, QFs whose positions on the Waiting List are governed by the QFMP would be denied notice and an opportunity to be heard prior to modification of Commission decisions that affect their economic interests. Under these circumstances, granting the relief sought by complainant would result in a change in economic circumstances without an opportunity to be heard. We will not determine whether

PG&E mismanaged the placement of QFs on the Waiting List or review the accuracy of the estimate of capacity available on PG&E's transmission constrained lines that was established by D.84-08-037 and D.84-11-123. We limit our decision to the question of whether PG&E injured the complainant by some act or failure to act according to its duty, and if so, what relief should be granted.

The ALJ had ruled that the reasonableness of PG&E's management of the Waiting List was within the scope of the complaint. However, we find that QF economic interests have been delineated as the result of PG&E's management of the Waiting List, and that a complaint proceeding is not the proper vehicle for determining those rights. Therefore, despite complainant's urging, we do not examine the reasonableness of PG&E's maintenance of the Waiting List.

Reduced to its essential elements, the complaint alleges that PG&E is at fault for Rulofson's failure to qualify for the Eligibility List and his inauspicious position on the Waiting List because of the following:

1. PG&E failed to administer D.84-08-037 correctly with respect to complainant,

2. PG&E erred in not mailing complainant a project definition questionnaire pursuant to D.85-01-038,

3. PG&E failed to send complainant copies of the QFMP as required by D.85-06-163,

4. PG&E has discriminated against complainant in its dealings with QFs in general by failing to provide complainant with (a) a version of Standard Offer 1 (SO 1) which included the QFMP, (b) "Form Letter C" on August 31, 1984, and (c) a place on the Waiting List based on hardship, and

5. PG&E misrepresented to complainant that he would receive a transmission allocation.

The issue is whether PG&E is responsible for complainant's low place on the transmission capacity Waiting List because it has ignored Commission decisions or discriminated against complainant. If PG&E has done nothing wrong, or if complainant has caused his own injury, the complaint must be denied.

III. Facts

A. PG&E's Compliance with D.84-08-037

Rulofson initiated contact with PG&E by his letter of May 15, 1984. He asked PG&E to provide the cost of special facilities needed to interconnect his project into the PG&E grid and a list of information needed for contract negotiations. One month later, PG&E replied by letter that the CPUC had recently begun an investigation to determine the existence of transmission constraints. PG&E wrote that there may be a limitation on additional capacity on the transmission line through Rulofson's area in Trinity County. On July 23, PG&E again advised complainant by letter that there may be transmission limitations which could adversely affect his project. PG&E enclosed a two-page summary of the scope of Order Instituting Investigation (I.) 84-04-077, which included the following query: "Whether revisions are needed in the Commission's existing policies for allocating available utility transmission capacity and interconnection/upgrade costs among QFs as stated in D.82-01-103, D.82-12-120, and D.83-10-093, Commission decisions relating to QFs."

Thus, as of July 23, Rulofson was apprised of the potential difficulty of interconnecting his project with PG&E. By reading the authorities cited by PG&E's July 23 summary of I.84-04-077, complainant could have confirmed that for two or more QFs seeking to use an existing line, a first-come, first-served approach was to be used. As of August 8, Rulofson had copies of

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standard offers (SO) 1 and 4 and an offer from PG&E to meet to review the offers and provide an estimate of the cost of an interconnection study. He did not accept PG&E's offer.

On August 1, 1984, the Commission adopted the "Interim Solution" to the issues addressed by I.84-04-077 (D.84-08-037). The Interim Solution allocates transmission capacity to only those QFs who had signed power purchase agreements since the issuance of I.84-04-077 and had deposited in escrow 1.7 mill/kWh of power to be delivered to PG&E. In the Humboldt constrained area where complainant's project would be located, a maximum 90 MW of capacity was allocated to QFs on a first-come, first-served basis.

1. <u>Rulofson's Business Strategy</u>

On August 16, 1984, PG&E sent Rulofson a copy of D.84-08-037. Despite this notice of the requirements for obtaining limited capacity, complainant did not execute a power purchase agreement to become eligible to participate in the Interim Solution. By letter to PG&E dated August 30, Rulofson asked to be placed on an allocation list for transmission line space. He asserted that a financial commitment to pay for an interconnection study should suffice as a commitment in lieu of signing a power purchase agreement.

On August 30, complainant informed PG&E that he was not ready to execute a standard offer because he needed to ask potential financiers whether they preferred the SO 1 or SO 4 contract.

Also on August 30, Rulofson wrote to CPUC staff. He confirmed that PG&E had told him he needed to sign a power purchase agreement in order to be placed on the Waiting List for transmission capacity. He stated that he had read the copy of D.84-08-037 that PG&E had provided him. He recognized that he could not get onto the Waiting List without signing a sales contract, but nonetheless demanded of the Commission's staff, "Must I sign a power sales agreement in order to be on an allocation list

or shouldn't money and agreements related to interconnect analysis and engineering specs suffice?"

2. PG&E's Notice to QFs

On August 31, 1984, PG&E mailed an announcement to certain QFs to inform them of the Interim Solution and the availability of limited transmission capacity on a first-come, first-served basis. QFs which had executed a power purchase agreement (PPA) or paid for an interconnection study, or had recent continued contact with PG&E were sent "Form Letter C." The letter informed QFs why the transmission investigation was opened, outlined the scope of investigation, and described the criteria for inclusion in the interim solution. Copies of PG&E's standard offers were attached to the letter. PG&E did not send Rulofson a copy of Form Letter C because he had not executed a PPA as of August 31, 1984.

Complainant alleges that PG&E treated him improperly by not sending him "Form Letter C." PG&E admits that it did not send Rulofson Form Letter C. However, PG&E points out that it had provided him with the description of the Commission's investigation of PG&E's constraints, the components of the Interim Solution, and copies of PG&E's Standard Offers, which comprised the Form Letter C mailing, two weeks before it mailed Form Letter C to other QFs. Only one element of the Form Letter C mailing, the Interim Solution Agreement (ISA) had not been mailed to complainant. The ISA authorizes PG&E to deduct from payments to QFs the cost of system upgrades made on behalf of delivering QFs. PG&E claims that Rulofson was not prejudiced by this, as he was not required to sign the ISA until his project was ready to transmit power into PG&E's system.

On September 19, 1984, PG&E reiterated to complainant that he was required to execute a power purchase agreement for placement on the Waiting List and that if he wished, he could proceed with a detailed interconnection study, even though payment

for the study alone would not entitle him to be placed on the Waiting List.

B. PG&E's Compliance with D.85-01-038

On January 16, 1985, the Commission issued D.85-01-038. That decision changed the procedure for obtaining transmission capacity.[4] As of January 16, 1985, the PPA was no longer a prerequisite to an assignment of priority. It was to be signed within certain dates in order to maintain the QF's priority on the Waiting List.

The Commission directed PG&E to mail project definition questionnaires to all QFs within 21 days of the decision date; all QFs were to reply within 10 days of receiving the questionnaire.

PG&E admitted that it did not mail complainant a questionnaire by February 6, 1985. Rulofson claimed that he should be repositioned on the Waiting List with a priority date of February 16, 1985, the date he alleges he would have returned the project description form.

PG&E responded that had complainant returned the form within that time, his project's position on the Humboldt Waiting List would be fifteenth, instead of twenty-third; projects representing 95.2 MW of capacity, instead of 141.8 MW, would precede his project on the Waiting List.

The total capacity available in the Humboldt constrained area is only 90 MW, which is fully subscribed. Of that total, 79 MW are operational, resulting in the possibility that 11 MW may not become operational and will be released to QFs on the Waiting

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4 Under the new procedure, an interconnection priority date would be established on the date the QF provided to the purchasing utility all of the following: (1) a project definition, including proof of site control, (2) a request for an interconnection study by the utility, and (3) the project fee, due no later than the time the QF and the utility execute an interconnection agreement.

List. PG&E's evidence shows that QFs with priority higher than complainant's will claim any portion of the 11 MW which is released.

C. PG&E's Compliance with D.85-06-163

On June 21, 1985, the Commission issued D.85-06-163, which required all affected QFs to comply with the QFMP screening criteria. The Commission also solicited comments on the addition of the QFMP requirements to the standard offers. During the comment period, June 21, 1985 through August 1, 1985, each utility was required to notify every QF which sought to sign a standard offer or negotiate a related agreement of the QF's obligations under the QFMP. This was intended to assure notice to QFs of their altered responsibilities in signing SO 4, since the Commission had not incorporated the QFMP in the standard offers.

Rulofson testified that he had informed PG&E on April 25, 1985 that he did not have a copy of the Interconnection Priority Procedure (IPP) adopted by D.85-01-038. He stated that PG&E sent him a copy of the IPP on June 5, 1985.[5] Rulofson claimed that PG&E violated D.85-06-163 because it did not send him a copy of the QFMP during the comment period.

PG&E replied that it notified Rulofson of the QFMP in accordance with D.85-06-163 on two occasions. PG&E sent him a complete copy of the QFMP on June 5, 1985 and again on December 9, 1985. The utility claimed it gave Rulofson preferential treatment by supplying him with a copy of the QFMP two weeks prior to the comment period and that Rulofson suffered no harm from this deviation from the "notice" requirements.

5 During the quarterly reviews mandated by D.85-01-038, the IPP was renamed the QFMP (Qualifying Facility Milestone Procedure).

IV. Discussion

A. Why did complainant fail to receive a transmission allocation within the 1150 MW transmission capacity limitation established by D.84-11-123?

1. PG&E reasonably discharged its duty to advise complainant of transmission constraints.

Each contracting party must use good faith in its dealings with the other. In this case, PG&E knew of potential roadblocks to Rulofson's realization of his project; he would not be paid if there was no way for PG&E to receive his output. PG&E had a duty to advise Rulofson of this problem. PG&E's July 23, 1984 letter to complainant provided that notice. Moreover, it suggested to the reader that he should attempt to acquire transmission capacity under the existing policies because in the face of a potential shortage, rationing policies may be enacted to make it more difficult to obtain capacity in the future.

2. PG&E administered D.84-08-037 properly with respect to complainant.

Rulofson received all of the information contained in Form Letter C, except for the ISA, approximately two weeks before other QFs did. The lack of ISA is not material because only QFs that were ready to deliver power to PG&E needed to sign the ISA. Rulofson stipulated that he received and read the Interim Solution decision even before Form Letter C was sent out. He was not prejudiced by PG&E's failure to send him Form Letter C. Rulofson's failure to obtain transmission capacity cannot be attributed to PG&E's oversight.

3. PG&E was not at fault for complainant's failure to satisfy the two prerequisites of D.84-08-037.

PG&E had provided Rulofson a copy of D.84-08-037 two weeks before it apprised other QFs of the Interim Solution. Rulofson persistently contended that he should be able to obtain capacity allocation without meeting the requirements of D.84-08-037. PG&E reminded Rulofson of the Interim Solution's requirements. PG&E acted reasonably to enable Rulofson to acquire transmission capacity under the Interim Solution.

4. Complainant did not qualify for the Eligibility List because he chose not to comply with D.84-08-037.

PG&E supplied Rulofson with a copy of D.84-08-037, which stated that a QF must have a signed PPA in order to participate in the capacity allocation program established by the Interim Solution. Rulofson acknowledged that PG&E informed him of the need for a PPA, but insisted to PG&E that a financial commitment to pay for an interconnection study should substitute for a PPA. Rulofson's refusal to accept the terms of D.84-08-037 was based on his wish to consult financial backers before committing to the payment stream of a particular PPA. Rulofson seeks special treatment to accommodate his business strategy. His rationale does not justify granting an exception to the requirement of D.84-08-037 that a QF must have signed a PPA before participating in the Interim Solution. Complainant did not comply with D.84-08-037 and should not be allowed to shift responsibility for his acts to PG&E.

Rulofson asserts that PG&E prevented him from procuring a position on the list by informing him on September 19, 1984, that he could choose to withhold paying for an interconnection study. As of that date, all available capacity in the Humboldt constrained area had been allocated. PG&E's practice of refraining from asking

a QF to pay for a detailed interconnection study when the QF's date of interconnection was uncertain is reasonable. Thus, PG&E's advice to Rulofson that he withhold payment for an interconnection study had no effect on his ability to establish a Waiting List position under the Interim Solution.

B. Was PG&E required to place complainant on the Waiting List based on his submittal of his FERC application to PG&E?

Rulofson sent the PG&E Rates Department a copy of his application to the Federal Energy Regulatory Commission (FERC) for a license to operate a small hydroelectric project on February 8, 1984. Since it was sent to another PG&E department, the parties have argued whether PG&E's Small Power Producer Department should be charged with knowledge of its contents, and if so, whether complainant's priority date can be established according to the date of PG&E's receipt of the FERC application. It is unnecessary to decide this matter, because we dispose of the priority issue without reference to the FERC application.

C. Rulofson was materially harmed by PG&E's failure to mail him a project definition questionnaire pursuant to D.85-01-038.

PG&E argues that whether complainant's project is in 15th or 23rd position on the Waiting List is of no material consequence. While this may be true of complainant's project given today's circumstances, the relative positions may become significant as transmission capacity becomes available. Thus, there is still some advantage to being 46 MW higher up on the Waiting List, as Rulofson would be if he had been mailed the project questionnaire as were other QFs.

The utility is entrusted with rationing a scarce commodity transmission capacity, according to the Commission's rules. PG&E should have sent complainant the project questionnaire pursuant to the Commission's decision.

We will assume that PG&E received Rulofson's completed project questionnaire on February 16, 1985. This alone is insufficient to give complainant a position on the allocation Waiting List. Priority is established by the last of three events.

The second event is submittal of the QF developer's control over the site. We assume that because the parties did not address this issue, it is uncontroverted that Rulofson had control of the generation site.

The third criterion is the provision of a preliminary development schedule. PG&E itself did not distinguish this requirement from the previous requirement that a QF must request an interconnection in order to obtain transmission capacity.[6] Thus, on April 17, 1985, PG&E recommended Rulofson complete a project description and interconnection study cost request for placement on the Waiting List "pursuant to D.84-08-037." This suggestion was made despite the Commission's issuance in January

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6 D.84-08-037 adopted the principle from D.83-10-093 that the first QF to request an interconnection shall have the right to use the existing line. However, that right was extended only to QFs who signed a power purchase agreement with PG&E pending I.84-04-077.

Rulofson has claimed that his priority should be based on the request that PG&E "provide (him) the cost of connecting and of any special facilities required to connect to your system" made by letter dated May 15, 1984. It would be unreasonable to base complainant's priority on that inquiry, since at that time the project was clearly in its early planning stages.

In May of 1984, complainant indicated that the project was 840 kW. In July of 1984, he stated that his project was 1.66 MW. In August of 1984 the project was stated to be 1.7 MW. In February of 1985, he intended to upgrade to 2.5 MW. In April of 1985, the project was described as 1.5 to 2.5 MW. Rulofson did not commit to a project size until he executed an SO1 contract in January of 1986. Thus, it would be unrealistic to treat the May, 1984 inquiry as a bona fide request for interconnection.

1985 of D.85-01-038, which amended the capacity allocation criteria.

Rulofson returned the completed project description form on April 25. He had also completed the preliminary project development schedule. Thus, under a strict reading of D.85-01-038, Rulofson would establish his priority for capacity allocation on April 25. However, a strict reading is not in order because PG&E did not give complainant the same opportunity it gave other QFs to establish priority under D.85-01-038. First, it omitted Rulofson from its February 6, 1985 mailing. Second, it applied criteria from the wrong decision to assign priority to Rulofson.

We find that PG&E violated D.85-01-038 with respect to complainant. The appropriate remedy is for PG&E to treat Rulofson's project as if he had established priority on February 16, 1985, so long as Rulofson maintains compliance with the QFMP (or any other procedure authorized by the Commission to supercede the QFMP).[7] However, PG&E must do so without adversely affecting the interconnection rights held by other QFs. Thus, PG&E may be required to perform special upgrades to its transmission and distribution lines to provide the required remedy.

D. Complainant was not harmed by PG&E's failure to mail him a copy of the QFMP as required by D.85-06-163.

We find that PG&E substantially complied with D.85-06-163 by providing Rulofson a copy of the QFMP two weeks before the comment period, and that substantial compliance is sufficient to avoid harm to Rulofson. He does not complain that he was deprived of the opportunity to comment on the inclusion of the QFMP in

7 It is reasonable to assume that Rulofson would have returned the project questionnaire within 10 days because he did return the project description within 8 days in April, 1985.

standard offers, which was the objective of the notice required by D.85-06-163. Rulofson was able to evaluate whether he should continue his development activities in light of the additional requirements of the QFMP two weeks before the Commission mandated notice of the QFMP. Rulofson was not harmed by PG&E's failure to send him another copy of the QFMP during the comment period established by D.85-06-163. Thus, Rulofson should be granted no relief based on his claim that PG&E violated D.85-06-163.

E. Has PG&E discriminated against complainant in the context of its dealings with QFs in general?

1. PG&E was not required to provide complainant with a version of SO 1 which included the QFMP.

D.85-12-075 required PG&E to file amendments to SO 1 so that the QFMP was incorporated by reference no later than February 1, 1986. PG&E was ordered to append the QFMP to the standard offer and include a term in the standard offer indicating the QF's obligation to meet the QFMP requirements. The terms were to identify the version of the QFMP applicable to the QF and the consequences to the QF of failure to meet QFMP requirements.

Complainant points out that the form of SO 1 that PG&E supplied him was dated May 7, 1984. He signed the offer on January 6, 1986. PG&E signed the offer on February 12, 1986. Complainant asserts that his PPA makes no reference to the QFMP, and further, that his PPA contains a warning that his capacity may be jeopardized if construction is not begun by a certain date, a warning that was subsequently deleted from SO 1. He complains that he was deprived of notice of the requirements for receiving and maintaining an allocation of capacity. He asserts that because of this lack of notice, he continued to devote resources to developing his project, to his detriment.

PG&E claims that it was not obligated under D.85-12-075 to require complainant to execute an amended SO 1 with an attached

QFMP because it offered complainant the agreement prior to the effective date of D.85-12-075.

In D.85-06-163, we declared that "A contract is formed with the qualifying facility's acceptance of those terms which would be indicated by a standard offer completed and signed by the qualifying facility and delivered to the utility." Once accepted, the utility is to have no discretion in refusing the agreement or altering its terms.

Rulofson's January 6, 1986 acceptance of SO 1 created a contract which PG&E could not unilaterally alter to incorporate the QFMP. Thus, Rulofson cannot claim he was harmed by PG&E's tender of the 1984 version of SO 1. Moreover, under complainant's theory, no SO 1 would have been available for him to sign from the date of D.85-12-075, December 18, 1985, until February 1, 1986. We did not order the suspension of SO 1, so complainant's theory provides him no basis for relief.

2. PG&E properly denied complainant priority on the Waiting List based on hardship.

PG&E granted top priority on the Waiting List to certain QFs that were not given notice of D.84-08-037 and would otherwise suffer a hardship, based on PG&E's business judgment. PG&E based its determination on its knowledge of the QF's contact with PG&E, progress on interconnection studies, permitting statutes, financing status, equipment status, scheduled operation date, and status of construction date. PG&E reviewed the hardship cases in December of 1984.

Complainant claims that he is eligible for hardship status although he does not assert that he was not given notice of D.84-08-037. His claim of hardship is based on his efforts to develop his project. He refers to eleven pieces of correspondence and three phone calls between himself and PG&E which occurred between May 15, 1984 and September 19, 1984, his repeated inquiries

as to the cost of an interconnection analysis, the fact that he was filing an application for a FERC permit, and the fact that PG&E never expressly asked him for information concerning the other hardship factors.

PG&E did not consider complainant's project to be a hardship case because according to PG&E, Rulofson received notice of D.84-08-037 even before many other QFs, and in December of 1984, Rulofson's project did not satisfy the hardship criteria.

We find that complainant did not satisfy the hardship criteria in December of 1984 because he had received notice of D.84-08-037 and he had not executed a power purchase agreement. Since he had not undertaken any contractual obligation to deliver energy to PG&E, there was no basis for PG&E to assume he had incurred substantial resources to purchase equipment, construct facilities, and commence power deliveries by a certain date. Based on these facts, we find that complainant is not entitled to a priority position on the Waiting List based on hardship.

3. Under the circumstances that existed, no reasonable person would have believed that transmission capacity was guaranteed to Rulofson when he signed his Standard Offer 1 contract.

Complainant asserts that PG&E represented that his project would receive a transmission allocation either when he executed a power purchase agreement or when he was ready to interconnect his project to the Humboldt line.

The complainant was aware that all existing capacity had been allocated before he signed his PPA. On September 19, 1984, PG&E told Rulofson that he had to get on a waiting list to receive capacity. On November 4, 1985, shortly before complainant executed his SO 1, PG&E again told complainant that all capacity on the Humboldt line had been allocated.

Steven Roberts is a resource analyst for PG&E. According to complainant, Roberts advised him that when complainant's project

was ready to come on line, there would be a "window of capacity availability." However, Roberts testified that in a November 8, 1984 phone conversation with complainant, he confirmed that all available capacity in the Humboldt area had been allocated. He also denied that he advised complainant there would be capacity available if and when his project became operational. On balance, the testimony of Roberts is more credible than that offered by complainant.

Given the notice of capacity allocation problems and Commission decisions that PG&E provided complainant from the time he first contacted PG&E, an objective person would not have concluded that a "window of opportunity" would exist when his project was ready to begin deliveries. Rulofson is not entitled to claim he suffered damage as a result of reliance on his interpretation of his conversations with Roberts.

Rulofson asserts that the reference in his contract to "existing capacity,"[8] plus the fact that his SO 1 contract had not been revised to incorporate the QFMP by reference, led him to believe that capacity existed for his deliveries at the time he signed his PPA with PG&E. Rulofson also claims that PG&E failed to notify him, as it should have, that capacity was unavailable at the time he executed his PPA; PG&E also failed to advise him what procedure to follow to obtain an allocation of capacity. He seeks reimbursement of "additional resources between $12,000 to $15,000" he had committed to the continued development of his project.

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8 The relevant portion of the contract states, "(i)f Seller does not begin construction of its Facility by July 31, 1987, PG&E may reallocate the existing capacity on PG&E's transmission and/or distribution system which would have been used to accommodate Seller's power deliveries to other uses." (Article 2(e), SO 1, emphasis added.)

However, he has not itemized the amount or nature of those alleged expenditures.

PG&E argues that under an objective interpretation of SO 1, no promise of capacity was made. The utility argues that although the quoted language of SO 1 discusses the allocation of existing capacity, it makes no representation that capacity existed.

We note that it is essential to apply an objective standard when interpreting the terms of a contract.

> "By the modern law of contract, the mere state of mind of the parties--with reference to the 'meeting of the minds'--is not the essential object of inquiry, the terms of the promise-act being determinable by an external and not by an internal standard...or by what distinguished writers have termed the objective rather than the subjective test." (Witkin, Summary of California Law, Contracts, (9th ed. 1987) vol. 1, Sec. 119, emphasis in original.)

The SO 1 reference to capacity was expressly qualified by the phrase "which would have been used to accommodate Seller's power deliveries." Rulofson was informed by PG&E that no such capacity existed. No objective interpretation of SO 1 could create the belief in the reader that signing the PPA would confer capacity on the project when the reader was thoroughly informed by the other party to the contract that no capacity existed.

We find that complainant is not entitled to reimbursement of amounts he may have expended after he executed his SO 1 contract because no reasonable person would have believed that the SO 1 contract guaranteed that capacity existed to accommodate deliveries of power to PG&E.

Conclusion

Complainant did not qualify for a place on the Eligibility List because he did not satisfy the requirements of D.84-08-037 to participate in the Interim Solution in a timely fashion. His disadvantageous position on the Waiting List is due

to his business decision to refrain from signing a PPA. His position on the list was based on his return on April 25, 1985 of a completed project description and request for an estimate for the cost of an interconnection study. However, PG&E should have mailed Rulofson a project definition questionnaire by February 6, 1985; it did not. Because of this, PG&E should place complainant in the position he would have been in had PG&E complied with D.85-01-038. PG&E shall award capacity to complainant as if he had established a position on the Waiting List on February 16, 1985. All other relief is denied.

Findings of Fact

1. Complainant Ronald Rulofson is a qualifying facility developer who proposes to generate electricity and sell it to PG&E using a run-of-the-creek hydroelectric facility within the PG&E transmission-constrained area as defined by D.84-08-037.

2. Had Rulofson followed the requirements set forth in D.84-08-037 before September 19, 1984, he would have been allocated transmission line capacity.

3. Based on complainant's April 25, 1985 submittal of a project description form, his project is twenty-third on PG&E's waiting list for transmission line capacity in the transmission constrained area.

4. This complaint proceeding is not the proper forum for revisiting the Interim Solution and the QFMP that resulted from the Commission's I.84-04-077, nor is it the proper forum for examining the reasonableness of PG&E's maintenance of its transmission capacity waiting list.

5. PG&E reasonably discharged its duty to advise complainant of transmission constraints.

6. PG&E had provided Rulofson copies of the Interim Solution and the QFMP in the course of its business dealings with him prior to Commission order. Complainant failed to allege any harm as a result of these actions.

7. PG&E administered D.84-08-037 properly with respect to complainant.

8. Complainant did not qualify for the Eligibility List because he chose not to comply with D.84-08-037.

9. It is reasonable to assume that if PG&E had mailed Rulofson a project questionnaire as required by D.85-01-038, he would be in 15th position on the Waiting List.

10. Complainant was not harmed by PG&E's failure to mail him a copy of the QFMP as required by D.85-06-163.

11. PG&E was not required to provide complainant with a version of Standard Offer 1 which included the QFMP.

12. PG&E properly denied complainant priority on the Waiting list based on hardship because PG&E gave Rulofson notice of D.84-08-037, and hardship status was accorded only QFs that had not been given notice of D.84-08-037 by PG&E.

13. The uncertainty over whether the complainant's QF development can sell its output to PG&E should be resolved as soon as possible to facilitate the economic deployment of this QF's resources.

<u>Conclusions of Law</u>

1. PG&E did not unreasonably discriminate against complainant in violation of Public Utilities Code Section 453 subsections (a) or (b).

2. Complainant is entitled to no relief as the result of PG&E's failure to provide him copies of the Interim Solution and QFMP as ordered by Commission decision.

3. PG&E was not at fault for complainant's failure to satisfy the two prerequisites of D.84-08-037.

4. Complainant is entitled to no relief as the result of his belief that transmission capacity for his project existed based on a clause in PG&E's Standard Offer 1 because no objective reasonable person would have believed capacity existed. No reasonable person would believed that capacity existed in light of events, with which

complainant was thoroughly familiar, that occurred between the date of the Standard Offer (May 7, 1984) and January 6, 1986, when complainant executed his Standard Offer 1 contract.

5. PG&E acted reasonably toward complainant except for its violation of D.85-01-038.

6. Rulofson was materially harmed by PG&E's failure to mail him a project definition questionnaire pursuant to D.85-01-038.

7. Complainant should be granted relief from PG&E's violation of D.85-01-038.

8. The appropriate relief for PG&E's noncompliance with D.85-01-038 is to require PG&E to treat Rulofson as if he had established priority on February 16, 1985, without prejudicing the transmission capacity waiting list rights of QFs holding positions 16 through 22.

ORDER

IT IS ORDERED that:

1. Pacific Gas and Electric Company (PG&E) shall treat Ronald E. Rulofson as if he had submitted a completed project questionnaire on February 16, 1985 so long as Rulofson maintains his compliance with the applicable Qualifying Facilities Milestone Procedure (QFMP) or any other procedure authorized by the Commission to supercede the QFMP.

   a. PG&E shall move Rulofson to position 15 on the "List of Qualifying Facilities Within PG&E's Transmission Constrained Area that are Waiting for a Transmission Allocation Under CPUC Decision No. 84-08-037 - Humboldt Constrained Area" as of March 6, 1990, or its successor list. This results in two qualifying facilities (QFs) occupying position 15 with the intended result that Rulofson will have the same opportunity to interconnect his project as that held by the QF currently in position 15.

b. The rights to interconnection priority currently held by QFs in positions 16 through 22 shall not be adversely impacted by PG&E's placement of Rulofson in position 15.

2. In all other respects, the complaint of Ronald E. Rulofson against Pacific Gas and Electric Company is denied.

This order is effective today.

Dated November 20, 1991, at San Francisco, California.

PATRICIA M. ECKERT
President
DANIEL Wm. FESSLER
NORMAN D. SHUMWAY
Commissioners

Commissioner John B. Ohanian, being necessarily absent, did not participate.

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

NEAL J. SHULMAN, Executive Director