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Decision 92-01-024 January 10, 1992

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Ultrapower-Rocklin, a joint
venture,

Complainant,

vs.

Pacific Gas and Electric Company,
(U 39 M) a corporation,

Defendant.

ORIGINAL

Case 91-04-013
(Filed April 11, 1991)

O P I N I O N

I. Summary

The complaint of Ultrapower-Rocklin (Ultrapower), a biomass-fired Qualifying Facility (QF), against Pacific Gas and Electric Company (PG&E) for the utility's alleged failure to pay Ultrapower the correct capacity price for electricity is denied. PG&E shall pay Ultrapower for capacity delivered under the terms of the parties' contract at the rate of \$184 per kilowatt/year (kW/yr.).

II. Procedural History

Ultrapower filed its "Complaint for Expedited Relief" on April 11, 1991. Ultrapower sought an order declaring that its power purchase agreement (PPA) with PG&E entitled it to a firm capacity price of \$196 kW/yr., based upon its firm capacity availability date of March 16, 1990. Ultrapower stated that no facts were in dispute and that the proceeding may be decided by the Commission without evidentiary hearings.

On May 16, 1991, the "Answer of Defendant PG&E to Complaint for Expedited Relief" was filed. PG&E requested dismissal of the complaint and confirmation that QFs are not entitled to firm capacity prices higher than those corresponding to the fifth year following execution of the PPA.

On June 6, 1991, the "Joint Motion of Ultrapower and PG&E for Establishment of Briefing Schedule" was filed. On June 12, 1991, the assigned administrative law judge granted the motion and found that the parties had waived evidentiary hearing. The Commission's Division of Ratepayer Advocates (DRA) was included as a party for briefing purposes. Accordingly, this matter has been decided on the basis of the parties' concurrent opening and closing briefs.

III. Facts

The parties' pleadings recite the following facts.

Ultrapower and PG&E entered into a PPA on December 12, 1984. The PPA was an interim standard offer 4 (ISO 4) contract with a 30-year term. Under the terms of the PPA, Ultrapower elected to sell 22,000 kW of firm capacity to PG&E. The electricity was to be generated by a wood-fired qualifying facility located in Rocklin, California (Project).

Article 12 of the PPA provides for termination of the agreement "if energy deliveries do not start within five years of the execution date." Ultrapower made its first deliveries of energy to PG&E on June 9, 1989, six months before its deadline of December 12, 1989.

In order to commence the 30-year term of the contract and to establish a firm capacity price, the PPA requires the Project to demonstrate to PG&E's satisfaction that its features and equipment are capable of operating simultaneously to deliver firm capacity continuously into PG&E's system.

On January 15, 1990, at PG&E's request, Ultrapower informed PG&E that the facility would begin demonstrating firm capacity on January 29, 1990. On February 2, 1990, the firm capacity test was interrupted because of poor plant performance caused by the inoperability of the plant fuel feed system. On February 25, 1990, Ultrapower notified PG&E that it would resume testing. Firm capacity of 22,000 kW was demonstrated on March 16, 1990.

March 16, 1990 was established as the Firm Capacity Availability Date (FCAD) for the Project. Accordingly, PG&E provided billing statements to the Project for April and May of 1990 that used a price for firm capacity equal to \$196 kW/yr. This is the Commission-authorized price for firm capacity delivered by a QF that establishes an FCAD in the year 1990 under a 30-year ISO 4 contract.

In June of 1990, PG&E informed Ultrapower that it was reducing the firm capacity price to \$184 kW/yr., retroactive to the previous payments. \$184 kW/yr. is the authorized price for firm capacity that is made available in 1989. PG&E advised Ultrapower that the previous payments were due to an inadvertent administrative error; PG&E's maximum payment is based on the firm capacity price for the fifth year following the execution of the PPA, regardless of the actual FCAD.

Ultrapower believes it is entitled to firm capacity payments at the rate of \$196 kW/yr. and has attempted to resolve this dispute with PG&E. PG&E denies Ultrapower's claim and relies on its February 10, 1989 letter to Ultrapower's president. In that letter, PG&E maintained, "If testing occurs in the sixth year and a QF establishes its FCAD on a date which is past its five-year deadline, it will not receive the subsequent year's price. In this case, the year of five-year deadline will determine the price."

PG&E argues that regardless of whether Ultrapower demonstrated firm capacity within the calendar year of its five-year deadline (1989) or when it actually did (1990), Ultrapower would be entitled only to the capacity price for 1989 from Table E-2¹ of ISO 4.

IV. Discussion

A. Governing Principles

The implementation of standard offers to QFs has raised questions of contract interpretation such as this one. The Commission applies the principles of contract law in its review of utility purchases from QFs (see, e.g., Colmac Energy, Inc. v. Southern California Edison Company (1989) 31 CPUC 2d 549 (applying principles of promissory estoppel)).

Our first reference point is the language of the PPA itself, since it constitutes the parties' outward manifestation or expression of assent. Commission precedent will guide our review of the contract terms.

Ultrapower argues that Commission denial of firm capacity payments at the rate authorized for the year of the FCAD would constitute a modification of its PPA. We encountered a similar argument from PG&E when it opposed the escalation of the firm capacity prices in Table E-2. In that proceeding, as here, we are not retroactively reforming ISO 4 but simply construing express contract terms to give them their clear and logical effect. (PG&E (1986) 22 CPUC 2d 105, 110.) Moreover, Ultrapower's argument overlooks the fact that the ISO 4 which it signed lacks a firm capacity price for the years 1988, 1989, and 1990. Ultrapower relies on the Commission's decision that escalated those prices for its firm capacity payments. Here, we are interpreting the FCAD in light of the entire contract, much as we amended the firm capacity price table in view of the entire standard offer.

¹ Table E-2 lists the Commission-approved forecast of firm capacity values for QFs commencing firm capacity deliveries in 1982-1987.

B. Interpretation of Ultrapower's Contract

The controversy is whether Ultrapower should receive the firm capacity price authorized for 1989 (\$184 kW/yr.) or 1990 (\$196 kW/yr.). The PPA provides the following relevant definitions:

Firm capacity - That capacity, if any, identified as firm in Article 5 except as otherwise changed as provided herein.

Firm capacity availability date - The day following the day during which all features and equipment of the Facility are demonstrated to PG&E's satisfaction to be capable of operating simultaneously to deliver firm capacity continuously into PG&E's system as provided in this Agreement.

Firm Capacity Price - The price for firm capacity applicable for the firm capacity availability date and the number of years of firm capacity delivery from the firm capacity price schedule, Table E-2, Appendix E.

Firm capacity price schedule - The periodically published schedule of the \$/kW-year prices that PG&E offers to pay for firm capacity. (See Table E-2, Appendix E.)

We have previously determined that the date a QF delivers firm capacity, and not the date of its initial energy delivery, determines the firm capacity price in accordance with Table E-2 PG&E (1986) 23 CPUC 2d 1, 2. The parties agree that since no time is specified in the PPA as the FCAD, a QF may demonstrate firm capacity at any time so long as it comes on-line within five years of contract execution.

However, the parties differ as to the year in which an FCAD can be attributed under the contract. Ultrapower maintains that a QF may obtain a higher firm capacity price than the one authorized for the year in which it came on line by establishing an FCAD in the next calendar year. PG&E claims that the FCAD should be attributed to the year in which the QF is required to commence energy deliveries, or in other words, within five years of contract execution.

We interpret the contract's lack of FCAD deadline as an acknowledgment that the QF's incentive to earn firm capacity payments, which are greater than the otherwise applicable "as available" capacity payments, is sufficient to assure that it will demonstrate firm capacity within a reasonable time. If the contract does not specify the time of performance, and the act cannot be done "instantly," a reasonable time is allowed. (Witkin, Summary of California Law, Vol. 1 Contracts, Section 708.)

PG&E asserts that any delay in establishing an FCAD would entitle Ultrapower to a windfall through the receipt of higher firm capacity prices than it would have received had it proceeded promptly and diligently to demonstrate firm capacity following commencement of energy deliveries. Since Ultrapower began its energy deliveries on June 9, 1989, PG&E implies that Ultrapower could have demonstrated firm capacity within the remaining six months of 1989. However, Ultrapower did not do so. The issue is, under the circumstances of this case, whether Ultrapower demonstrated firm capacity within a reasonable period of time.

C. The Decision Extending PG&E's Capacity Payment Table

As noted above, the ISO 4 signed by Ultrapower did not include a firm capacity price for 1989, the fifth year after the date of contract. The Commission extended PG&E's firm capacity price schedule "to include those years in which the QF projects, consistent with the terms of the respective contracts, may come on line."² The Commission intended to provide firm capacity prices for QFs who were entitled to commence operations in years that were not listed on Table E-2. However, the express terms of the ISO 4 contract provide that a QF is entitled to a firm capacity

² "The extension of Table E-2 applies to firm capacity QFs whose interim Standard Offer 4 contracts specify an on-line date in 1988, 1989, or 1990." (PG&E (1986) 22 CPUC 2d 105, 111.)

price authorized for the year in which it demonstrates firm capacity, not in the year it begins deliveries.

We agree with PG&E that the price certainty accorded QFs by virtue of the capacity and energy price tables in interim ISO 4 contemplated a five-year planning horizon, not a six-year horizon. This is borne out by the extension of Table E-2 to cover five years from the date of contract. In Colmac, supra, we explained that capacity prices were provided for firm operation beginning in years contemplated at the time the contract was executed. We have concluded that even the legitimate operation of the force majeure clause would not entitle a QF to a firm capacity price greater than the one authorized for the fifth year following contract execution. (Decision (D.) 88-08-054, mimeo. p. 3, fn. 1.)

We adopt the premise that a QF's right to firm capacity price can be no greater than that of a QF which has demonstrated firm capacity within a reasonable time. A QF whose FCAD was delayed by the occurrence of a force majeure would have demonstrated firm capacity within a reasonable time, yet it would not be entitled to a higher price. Thus, the fact that the PPA does not specify a deadline for the establishment of an FCAD cannot be construed as granting a QF the affirmative right to a higher capacity price due to delayed demonstration of firm capacity.

Ultrapower maintains that no FCAD deadline was contemplated at the time it executed its contract, and no deadline may be imputed retroactively. It argues that a prior Commission decision supports its establishment of FCAD in April of 1990.

Ultrapower relies on D.86-12-013 to justify its claim to the 1990 firm capacity price. In that decision, Commission reasoned that since ISO 4 was suspended in April 1985, and QFs are required to begin power deliveries within five years of contract signing, all interim ISO 4 QFs will have had to begin power deliveries by April 1990. The Commission assumed that QFs would

establish their FCAD in 1990.³ No firm capacity prices were authorized for years after 1990 because there was no need for them.

It is important to note that D.86-12-013 did not find that eight months from the date of initial delivery was the reasonable time for establishing firm capacity as a matter of law. We considered eight months to be the maximum likely period of time needed by a QF to refine its operations as needed to demonstrate firm capacity to PG&E.

D. Imputation of Firm Capacity Availability Date

Ultrapower is required by its ISO 4 contract to establish firm capacity within a reasonable time of its commencement of energy deliveries. Those deliveries began on June 9, 1989.

Ultrapower began its firm capacity demonstration, upon PG&E's request, on January 29, 1990 and completed the test on March 16, 1990. The test took 46 days. This testing period was well within the eight-month maximum period contemplated by the Commission in D.86-12-013. The completion of the last occurred more than nine months after the commencement of energy deliveries the previous June.

Had Ultrapower commenced its firm capacity demonstration date as late as five months after its date of initial energy deliveries, or November 9, 1989, and established firm capacity within the same period as actually required, or 46 days, Ultrapower would have established firm capacity within the same calendar year as the date of initial deliveries. However, commencement of the demonstration was postponed for more than seven months.

³ "We think it reasonable in this context to expect that most QFs in such a situation could achieve firm capacity within eight months, i.e. by the end of 1990. (We note that Basic...asserts that the 'shakedown and testing period,' starting from initial turbine roll, 'is typically between 45 and 90 days in duration.') In any event, such QFs are not inherently entitled to an indefinite capacity price extension, especially when the offer's availability had been suspended more than five years previously." (PG&E, supra, 23 CPUC 2d at 2, fn. 2, emphasis in original.)

The reason for delay is not stated. In fact, Ultrapower's complaint states that the Project scheduled its firm capacity demonstration at PG&E's request. As the complainant, Ultrapower has the burden of showing the reasonableness of its actions. It has not alleged facts to show that the delay in establishing an FCAD was reasonable.

In the absence of facts to show that the FCAD was attained in a reasonable manner, we must rely on the facts before us. The Project demonstrated firm capacity after a 46-day test period. This "shakedown and testing period after initial turbine roll" included a delay caused by a faulty feedstock mechanism. In this case, for the limited purpose of establishing a firm capacity price, it is reasonable to impute an FCAD 46 days after the date of initial energy deliveries. That date would occur in 1989, within five years after contract execution. This result is consistent with the intent the Commission expressed when it extended the capacity price tables: "QFs are not inherently entitled to an indefinite capacity price extension, especially when the offer's availability had been suspended more than five years previously."

V. Conclusion

We conclude that PG&E should pay Ultrapower the firm capacity price authorized for QFs under ISO 4 contract for 30 years that demonstrated firm capacity in 1989, or \$184 kW/yr. Ultrapower's complaint is denied.

Findings of Fact

1. On December 12, 1984, Ultrapower and PG&E entered into an ISO 4 contract.
2. Article 12 of the ISO 4 contract provides for termination of the agreement if the seller does not commence energy deliveries within five years of the execution date.
3. Ultrapower made its first deliveries of energy to PG&E on June 9, 1989.
4. In order to commence the 30-year term of the contract and to establish a firm capacity price, the ISO 4 contract requires the seller to demonstrate to PG&E's satisfaction that it can deliver firm capacity continuously into PG&E's system.
5. On January 15, 1990, at PG&E's request, Ultrapower informed PG&E that it would begin demonstrating firm capacity on January 29, 1990.
6. Ultrapower demonstrated firm capacity on March 16, 1990, 46 days after the commencement of the test.
7. March 16, 1990 is the Firm Capacity Availability Date (FCAD) for the purposes of ISO 4.
8. Ultrapower's demonstration of firm capacity did not begin until more than seven months after its date of initial energy deliveries.
9. Had Ultrapower commenced its firm capacity demonstration date as late as five months after its date of initial energy deliveries, or November 9, 1989, and established firm capacity within the same period as actually required, or 46 days, Ultrapower would have established firm capacity within the same calendar year as the date of initial deliveries.
10. Ultrapower did not give any reason for delaying its demonstration of firm capacity.

11. In the absence of facts to show that Ultrapower's the firm capacity availability date was delayed in a reasonable manner, we may reasonably impute a firm capacity availability date in the same year as the date of initial energy deliveries, or 1989.

12. PG&E is authorized to pay \$184 kW/yr. for firm capacity delivered for 30 years beginning in 1989 under its ISO 4 contract.

13. PG&E is authorized to pay \$196 kW/yr. for firm capacity delivered beginning in 1990 for 30 years under its ISO 4 contract.

14. In this case, the imputation of a firm capacity availability date in 1989 will require PG&E to pay Ultrapower \$184 kW/yr. for firm capacity delivered under the parties' power purchase agreement.

15. This order should be effective immediately to provide price certainty to the seller.

Conclusions of Law

1. ISO 4 does not require the payment of a firm capacity price based on the actual firm capacity availability date if there is an unreasonable delay between the time of initial energy deliveries and the commencement of the demonstration of firm capacity.

2. Where no deadline for performance is given in a written contract, the law implies that performance will occur within a reasonable time.

3. In the absence of any allegation of the reason for the delay, a seven-month delay between the commencement of energy deliveries and the commencement of the QF's demonstration of firm capacity is not reasonable.

4. The utility purchaser's firm capacity payment obligation under a standard offer contract is limited to payment based on the QF seller's demonstration of firm capacity within a reasonable time.

5. Since the QF did not demonstrate firm capacity within a reasonable time, the Commission may impute a date by which, given

the facts of the case, the QF would have demonstrated firm capacity had it acted reasonably.

6. It is reasonable to order PG&E to pay Ultrapower the firm capacity price applicable to deliveries beginning in 1989, or \$184 per kW/yr., for firm capacity delivered under the parties' power purchase agreement.

O R D E R

IT IS ORDERED that:

1. The April 11, 1991 complaint of Ultrapower-Rocklin (Ultrapower) against Pacific Gas and Electric Company (PG&E) for the utility's alleged failure to pay Ultrapower the correct capacity price for electricity is denied.

2. PG&E shall pay Ultrapower for capacity delivered under the terms of the parties' contract at the rate of \$184 per kilowatt/year, retroactive to March 16, 1990.

This order is effective today.

Dated January 10, 1992, at San Francisco, California.

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

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


NEAL J. SHULMAN, Executive Director