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Decision 92-02-014 February 5, 1992

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Investigation on the Commission's own motion into the transmission system operations of certain California electric corporations regarding transmission constraints on cogeneration and small power production development.

ORIGINAL

I.84-04-077
(Filed April 18, 1984)

(U-39-E)

OPINION ON PETITION FOR MODIFICATION OF DECISIONS 82-01-103 AND 85-01-038

Summary

Mid-Set Cogeneration Company, L.P. (Mid-Set) claims that from May 1, 1989 through May 18, 1989, Pacific Gas and Electric Company (PG&E) wrongfully withheld firm capacity payments under an interim Standard Offer 4 (SO4) contract for a 33 megawatt (MW) natural gas project.¹ After Mid-Set filed an action in Kern County Superior Court for breach of contract, PG&E filed this Petition for Modification asking the Commission to resolve the dispute by modifying prior generic decisions. At PG&E's request, the court initially issued a stay of the civil proceeding, pending action before this Commission. The stay has since been lifted.

In this order, we deny the Petition for Modification. The relief sought would go beyond the "minor changes" allowed in Rule 43 of the Commission's Rules of Practice and Procedure. In

¹ Mid-Set is a qualifying facility (QF) as defined by the federal Public Utility Regulatory Procedures Act. As such, Mid-Set is entitled to sell power to PG&E under the terms of a standard offer contract. The SO4 contract chosen by Mid-Set is a long-term contract providing for predictable payments for energy and capacity.

addition, a petition for modification is not the proper vehicle for resolving a contractual dispute between two parties. The dispute between these parties is properly the subject of civil litigation.

The Dispute

Under an S04 contract, a QF is eligible to receive payments that reflect the value of both the energy delivered to the grid and the firm capacity provided by the project. As Mid-Set sees it, PG&E breached Mid-Set's S04 contract by refusing to pay the QF for firm capacity delivered to PG&E's grid from May 1 through May 18, 1989. Mid-Set argues that PG&E gained unjust enrichment from the alleged breach in that it received firm capacity at as-available prices.

PG&E agrees that it is obligated to pay for firm capacity, but disputes Mid-Set's claim as to when the QF began to provide firm capacity to the utility system. To support its position, PG&E relies on three principles that it suggests are supported by D.82-01-103 and D.85-01-038:

1. Before a utility is obligated to make firm capacity payments, a QF must demonstrate to the utility that it is capable of providing firm capacity.
2. Mere compliance with Rule 21 (the utility's rule governing QF interconnections) does not qualify a QF for firm capacity payments.
3. "Operation date" as used in the QF Milestone Procedure (QFMP) and PG&E's S04 Contract indicates the date on which a QF begins to deliver energy as opposed to firm capacity.

To help PG&E and Mid-Set resolve their dispute and to provide guidance for future transactions, PG&E asks that the two cited decisions be modified to confirm these principles.

The Prior Decisions

D.82-01-103

In this decision, issued in January 1982, the Commission ordered the major California electric utilities to file standard offers, for power purchases, that are based on avoided cost principles. This decision was part of Order Instituting Investigation 2 (OIR 2) and was the cornerstone of California's QF program. Among other things, the Commission directed the utilities to develop tariffs setting forth safety standards to govern QF-utility interconnections. These standards (now embodied in PG&E's Rule 21) are expressly incorporated in the S04 contract. Apparently, Mid-Set relies at least partially on its compliance with Rule 21 to demonstrate that it qualified for capacity payments on May 1, 1989. In this petition, PG&E proposes a modification to make it clear that Rule 21 is independent of other terms and conditions in the standard offer (and therefore, we assume, is not to be used to define the firm capacity requirements found elsewhere in the contract). In addition, PG&E asks that the 1982 decision be modified by adding a sentence to one of the findings of fact declaring that utilities must be given discretion to determine whether or not a QF is providing firm capacity.

D.85-01-038

In this decision, issued in January 1985, the Commission adopted interconnection priority procedures for the allocation of transmission capacity among QFs. Attached to this decision as Appendix B is a document entitled "Interconnection Priority Procedure Questions and Answers." There is no reference to this appendix in the decision. We are not told who wrote it or whether it was adopted by the Commission. Thus, its significance is not clear. Nonetheless, PG&E asks this Commission to modify the section of Appendix B entitled "Project Development Plan" (17 CPUC 2d 87, beginning at p. 106). PG&E proposes that we add to the fourth subpart of the answer to Question 3 a parenthetical phrase

to define the "date project is to become operational" as "the expected date of initial energy deliveries to the utility's transmission or distribution system." The apparent purpose of this addition would be to more clearly differentiate the operational date from the date when firm capacity is established.

Protests

Protests were filed by Mid-Set, the Independent Energy Producers Association (IEP), and Dexzel, Inc. (Dexzel). Each protestant asserted that modifications sought by PG&E are broader than the minor changes allowed pursuant to the Commission's Rule 43, and that the contractual dispute between PG&E and Mid-Set which underlies this petition is more appropriately the subject of action in civil court.

Discussion

There are various ways in which this Commission can affect contractual disputes between utilities and QFs. In a line of decisions dating back to at least 1982, the Commission has recognized the advantage that a utility maintains in contract negotiations and in informal dispute resolution. That advantage is derived from the fact that, in many instances, the utility enjoys a monopsonist's control of the QF market. The Commission requires that the utilities bargain in good faith with QFs, and has empowered QFs to file complaints against utilities, asserting failure to bargain in good faith. In considering such complaints, the Commission usually becomes involved in assessing the contractual rights of the parties to the agreement and often directs the utility to perform in a specific manner.

Often, utilities and QFs will settle contractual disputes by modifying their agreements. When the utility presents such contract modifications to the Commission for its approval, it is for the purpose of assuring that costs stemming from the revised contract will be passed through in rates. In making that determination, the Commission normally considers the merits of the

underlying contract dispute to assess the extent to which the settlement reflects the risks that would have been borne by each party had the dispute been litigated.

Since the inception of the QF program, the Commission has issued many generic decisions that define standard contracts and the responsibilities of utilities and QFs. The Commission has issued guidelines to be followed when a utility and QF modify an agreement. Difficulties faced by utilities and QFs in the administration of contracts may cause the Commission to review and sometimes change standard contract terms, or applicable rules and guidelines. Although such changes may be prompted by past experience, they are usually prospective in application.

Having developed a comprehensive program for utility purchases from QFs, the Commission retains a strong interest in assuring that the program functions smoothly. Nonetheless, the Commission has long recognized that many contractual disputes can be resolved in a court of law.

There may be no precise line dividing disputes between utilities and QFs that should more appropriately be resolved by the Commission from those more fitting for civil litigation. The array of potential actions may form a continuum with purely policy matters on one end and limited contract disputes on the other. This Commission and the courts may need to make a case-by-case assessment of the appropriate forum for those cases that fall somewhere in the middle. The dispute underlying the Petition to Modify that is currently before us calls for a legal determination of the rights of parties under an existing contract. Mid-Set has appropriately raised its complaint in a Superior Court. We see no compelling reason to interfere with that process. On the contrary, in this instance, the trial court may be the preferred avenue for resolving the dispute.

Mid-Set asserts that PG&E breached their mutual agreement by refusing to make capacity payments for early deliveries from the

QP. Mid-Set argues that PG&E owes it money. The dispute turns on legal interpretation of the agreement between the parties. When informal efforts at dispute resolution failed, Mid-Set filed a complaint in Superior Court seeking monetary damages.

The Superior Court provides the parties with a level forum for obtaining a final resolution of their conflict. If the court rules on behalf of PG&E, the dispute is resolved with prejudice. If Mid-Set prevails, the dispute is also finally resolved and Mid-Set can be awarded appropriate damages. The current Petition for Modification, on the other hand, provides PG&E with an opportunity to improve its position in the dispute with little risk of loss and little likelihood of resolving the dispute.

If PG&E prevails here, two prior decisions will be modified which may help PG&E to prevail in resolving the dispute. If it loses, the earlier decisions remain intact and PG&E's position is unchanged. Mid-Set, on the other hand, cannot use this process to receive the relief it seeks. If PG&E prevails, Mid-Set may have a more difficult case to make, but it would likely then return to Superior Court. As it has argued here, Mid-Set would assert before the trial court that new changes made to old Commission decisions cannot affect the interpretation of a contract that has long been in effect. Mid-Set would be likely to renew its request that the trial court resolve the contract dispute. If Mid-Set prevails here, the earlier Commission orders remain as they are and Mid-Set would return to the trial court to pursue its case.

The agreement at issue was formed on June 28, 1985. Any interpretation of the rights of the parties under that agreement must rest on the reasonable understanding of the parties as of that date. It would not be equitable to modify earlier decisions for the purpose of affecting the rights of the parties under the PPA. At the same time, it would be meaningless to modify the earlier decisions if doing so would not clarify the rights of the parties.

The parties to the dispute have cited various decisions of this Commission suggesting that the Commission either should or should not accept jurisdiction in this case. Perhaps the most relevant decision, however, was issued after all pleadings in this case were submitted. In Decision (D.) 91-06-048, the Commission deferred to a San Diego Superior Court for resolution of a dispute between San Diego Gas and Electric Company (SDG&E) and the North County Resource Recovery Association (NCRRA) concerning when NCRRA was obligated to commence operation pursuant to its PPA. SDG&E filed with this Commission an Application for Clarification of an earlier decision. The change requested by SDG&E would have clearly stated that a five-year operation deadline should apply to the NCRRA contract. If a five-year deadline was applied, NCRRA would be found to have breached its contract for failure to perform. Thereafter, NCRRA filed a Complaint for Declaratory Relief in the San Diego County Superior Court asking the court to declare that the PPA was still valid and existing and that the rights and obligations of the parties were continuing.

NCRRA then filed a Motion to Dismiss SDG&E's Application for Clarification. In a decision vacating the ALJ's denial of NCRRA's motion, the Commission said:

"While SDG&E has tried to infuse policy considerations into this proceeding, the dispute between SDG&E and NCRRA centers around questions of interpretation of the PPA, whether NCRRA has performed under the PPA, whether a term for performance should be implied in the PPA, the nature of the parties' negotiations in 1983 and if a term for performance is to be implied, whether it must be deemed tolled by uncontrollable forces or other events. These are all legal issues which the Commission believes are more appropriately determined by a court of law.

"Although the Commission has jurisdiction to resolve this type of dispute, we believe that on balance, this dispute involves more contractual issues than Commission policy

questions. To the extent that Commission policy is implicated, we would expect the parties to bring relevant Commission decisions to the attention of the court."

In the present instance as well, the rights and responsibilities of the parties must be defined by the agreement between them. The parties want to determine what Mid-Set needed to do before it could receive capacity payments and what PG&E's obligation was in terms of making those payments. These are legal issues that are more appropriately determined by a court of law.

In D.91-06-048, the Commission placed a stay on SDG&E's Application of Clarification, pending completion of the civil suit. In this instance, we see no merit to retaining PG&E's petition. PG&E has not persuaded us that it is appropriate to use decision modifications to affect existing contractual rights. We will dismiss the petition.

Findings of Fact

1. After Mid-Set filed an action in Kern County Superior Court for breach of contract, PG&E filed this Petition for Modification asking the Commission to resolve the dispute by modifying prior generic decisions.
2. The dispute between Mid-Set and PG&E involves matters of contract interpretation which are within the purview of courts as well as the Commission to resolve.
3. The court has authority to award damages arising out of the contract dispute and the Commission does not.
4. It is inappropriate to modify a prior decision, as proposed by PG&E, for the purpose of affecting the rights of the parties to the existing contract between Mid-Set and PG&E.

Conclusions of Law

1. The Commission and courts have concurrent jurisdiction to resolve contract disputes between utilities and QFs.
2. The Commission may elect not to exercise its jurisdiction.

3. The superior court is qualified to interpret the terms of the PPA as well as published Commission decisions in order to resolve this contract dispute.

4. The court has the additional power to award damages arising out of the contract dispute.

5. In this instance, it is appropriate to defer to the superior court for resolution of the dispute.

6. This Petition for Modification should be dismissed.

7. In order to facilitate completion of the superior court proceeding, this order should become effective immediately.

ORDER

IT IS ORDERED that the Petition for Modification is dismissed.

This order is effective today.

Dated February 5, 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