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Decision 92-03-051 March 11, 1992

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Ultrapower-Rocklin, a joint venture,

Complainant,

vs.

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

Defendant.

ORIGINAL

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

ORDER DENYING REHEARING

Ultrapower-Rocklin (Ultrapower) has filed an application for rehearing of Decision (D.) 92-01-024, alleging error in its Finding of Fact Nos. 9, 10, and 11, and in Conclusions of Law Nos. 1 through 5 as dependent on those Findings. We have considered all the allegations of error in the application and are of the opinion that good cause for rehearing has not been shown.

Ultrapower is a qualifying facility (QF) under the Public Utility Regulatory Policies Act of 1978 (PURPA). Its predecessor in interest signed a standard offer #4 power purchase agreement (PPA) with PG&E on December 12, 1984.

Under PG&E's Commission-approved version of standard offer #4 (and more particularly under the agreement executed by the parties in this case) a QF must come on line within five years of executing its PPA. A QF must also establish its ability to deliver the level of firm capacity agreed upon in the PPA; the date on which its test is completed is called the firm capacity availability date (FCAD). Payment for firm capacity is determined under Table E-2 of Appendix E of the PPA, which on its face makes the price dependent on the FCAD.

On February 10, 1989, PG&E sent Ultrapower a letter, which among other things stated that:

> Under [standard offer] #4 energy deliveries must begin within five years. Firm capacity testing may occur after the fifth year but no later than 8 months after the date of initial energy deliveries. 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 the five-year deadline will determine the price.

Paragraph 10 of the letter provides that if, during the 8-month period, data shows that the QF could pass the test for firm capacity, "Power Control will fix the firm capacity availability date (FCAD) at the date the facility meets the demonstration requirements for purposes of both the firm capacity price and the term of agreement." The paragraph further provides that "the QF will not be permitted to request that a test be conducted in the next calendar year in order to obtain a higher firm capacity price.[1]

Ultrapower began energy deliveries on June 9, 1989, six months before its deadline under the contract. However, it made no attempt to demonstrate the ability to deliver firm capacity until January of the following year, and its first test failed. On its second attempt, begun February 25, 1990, Ultrapower succeeded in completing the test, and established its FCAD on

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1. The reference to the "preceding paragraph" probably means the preceding two subparagraphs, 10 (b) and 10 (c). Paragraph 10 (b) provides that if the QF's test cannot demonstrate the agreed-upon level of firm capacity, the QF may either (1) accept amendment of the contract to reflect the level actually achieved or (2) try again to demonstrate the contract level "by retesting one or more times at a later date not to exceed 8 months from the date of initial energy deliveries." Paragraph 10 (c) provides that "If a QF has not established a firm capacity level through one or more tests within 8 months of the date of initial energy deliveries, no initial or further tests will be permitted, absent extraordinary circumstances," and PG&E then has the right to analyze performance to determine the level of firm capacity actually provided.

March 16, 1990.[2] PG&E's April and May, 1990 billing statements to Ultrapower reflected the 1990 firm capacity price set in Table E-2, the equivalent of $196/kW/yr. However, in June, PG&E notified Ultrapower that it was reducing the price to $184/kW/yr, the price for firm capacity made available in 1989.

On April 11, 1991, Ultrapower filed a complaint with us, alleging inter alia that "There are no factual disputes in this proceeding and it may be decided by the Commission without evidentiary hearings." Complaint, Paragraph 30, p. 12. PG&E agreed that there were no factual disputes but asked that both sides be allowed to brief the questions raised. Ultrapower did not object; concurrent opening briefs were filed on July 1, 1990, and concurrent closing briefs on July 22.

In D.92-01-024, we concluded that Ultrapower had given no reason for its long delay in running the demonstration of firm capacity, and imputed a reasonable date for establishing the FCAD. We accordingly ordered PG&E to pay Ultrapower under the 1989 price schedule rather than that for 1990. Ultrapower's application for rehearing alleges that (1) Findings of Fact Nos. 9, 10 and 11 are improper because of the lack of hearings; and that (2) Conclusions of Law Nos. 1, 2, 3, 4, and 5 are invalid because they are based on improper findings of fact.

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2. We note that February 25 is eight months and sixteen days after the initial energy delivery date of June 9, 1989, and thus fails to meet the eight-month deadline set in Attachment A at page 1 and Paragraph 10.

1. Propriety of Findings of Fact.

Ultrapower alleges that we have violated its constitutional right to be heard by failing to hold hearings. Ultrapower itself asked us not to hold hearings, so as to expedite our decision in this matter. We would therefore reject this allegation even if hearings could possibly change the Findings at issue. However, even given hearings we could not have changed the Findings complained of.

Finding of Fact No. 9 reflects only the fact that there are more than 46 days between November 9 and January 1. Ultrapower could bring no conceivable evidence to convince us otherwise.

Finding of Fact No. 10 states only that the record contains no statement of Ultrapower's reasons for delaying its test. This Finding was entirely proper. Ultrapower has offered, with its application for rehearing, to introduce such reasons now, as we shall discuss below. The offer itself constitutes an admission by Ultrapower that the Finding was correct.

Finding of Fact No. 11 is corollary to No. 10, in that it is based on the absence of the same facts. Accordingly, this Finding is also completely proper.

2. Propriety of Conclusions of Law.

In reviewing our Conclusions of Law, we do not agree that they are founded entirely on the three Findings complained of. Their basis rests mostly on the principles of contract law. Nevertheless, as we believe our Findings to have been proper they cannot invalidate our Conclusions.

3. Testimony offered now.

Ultrapower attaches the testimony of Bradley E. Spencer, plant manager of the Rocklin facility, to its

application. It argues that the testimony raises the question of reasonableness, sufficiently to warrant a hearing. Ultrapower does not claim that the testimony consists of any newly-discovered information, but that it "had no opportunity to make such a demonstration because it had no idea that any party questioned the reasonableness of its actions. Neither PG&E nor the Commission even notified Ultrapower that there was any question regarding the project's timetable." Application, p. 7. (Emphasis in original.)

We cannot agree that Ultrapower lacked notice. Ultrapower's own statement of the issue, restated in its application for rehearing, is: "What is the proper capacity price to be paid a project which passes its Firm Capacity Availability Test in 1990 if its five-year deadline to deliver energy occurred in 1989?" *Id.*, p. 3. It is unlikely that we could decide such a question without examining the reasonableness of the two dates, especially when the test that established the FCAD took place beyond the specified 8-month limit.

Further, Ultrapower has not denied receiving PG&E's February, 1989 letter, quoted above, which clearly indicates that delays this long forfeit Table E-2 prices under the contract.[3] We note that Ultrapower began its final test to establish the FCAD beyond the 8-month limit, for which it asked, and received, PG&E's consent. Such behavior is inconsistent with a claim that Ultrapower did not know and accept that limit.[4]

Under Rule 87 of our Rules of Practice and Procedure, we might, if good reason were shown, grant rehearing despite lack

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3. Interestingly, Ultrapower argued in its briefs that PG&E has the burden of proving that Ultrapower did receive it.

4. Certainly, PG&E had no notice, when giving its consent to the extended delay so that the QF would not forfeit Table E-2 prices altogether, that Ultrapower would attempt to use that consent to avoid taking the 1989 price as well.

of notice. However, we do not see anything in the testimony offered that, upon hearing, could show that Ultrapower merits different treatment from any other QF under the circumstances involved.

Therefore,

IT IS ORDERED that rehearing of D.92-01-024 is hereby denied.

This order is effective today.

Dated March 11, 1992, at San Francisco, California.

DANILE WM. FESSLER
President
JOHN B. OHANIAN
PATRICK M. ECKERT
NORMAN D. SHUMWAY
Commissioners

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

NEAL J. SHULMAN, Executive Director