L/nas

Decision 92-04-029

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

| | |
|---|---|
| Application of Pacific Gas and Electric Company for Authority, Among Other Things, to Increase Its Rates and Charges for Electric and Gas Service.<br><br>(Electric and Gas) U29M | Application 82-12-48<br>(Petition for Modification)<br>(Filed July 26, 1990) |

## ORDER DENYING REHEARING

### SUMMARY

D.91-09-029 (the Decision) denied the Petition for Modification of D.87-09-025 (25 CPUC2d 298, Unpublished Opinion) by PSE Inc., and Granite Road Cogen, Inc., Live Oak Cogen, Inc., Badger Creek Cogen, Inc. and McKittrick Cogen, Inc., each a wholly owned subsidiary of PSE, Inc. (collectively "PSE") requesting extension of the capacity price table to include the year 1992 and escalation for the Standard Offer 2 (SO2) capacity price from the 1991 figure of $202 per kilowatt-year (/kW-year) to the 1992 figure of $213/kW-year. The Decision found no basis to deviate from general policy or previous decisions in order to escalate the capacity price even if the time for the project to come on-line has been extended. (Decision, pp. 14-15.)

PSE's Application for Rehearing (Application) was filed on October 8, 1991. A Response was filed by Pacific Gas & Electric Company (PG&E) on October 21, 1991.

The Application of PSE argues for rehearing of the Decision on five grounds (Application for Rehearing, PSE, p. 1-4). In essence, each argument seeks reversal of the Decision with respect to the capacity price. PSE has failed to allege any facts or any legal arguments which warrant rehearing. Therefore, their Application is denied.

## DISCUSSION

PSE filed its Petition to Modify Decision (D.) 87-09-025 on July 26, 1990. D.87-09-025 granted PG&E's Petition for Modification of D.83-12-068. (14 CPUC2d 15.) D.83-12-068 had adopted capacity price tables for various standard offers, including SO2, through 1988. In D.87-09-025 the Commission extended and escalated the capacity price tables to 1989 through 1991 for Qualifying Facilities (QFs) under the Public Utilities Regulatory Policy Act of 1978 (PURPA).

In the instant Decision, we denied PSE's request for capacity price escalation to $213/kW-year. We affirmed that PSE has five years from final contract execution to bring its projects on-line at a levelized capacity price of $202/kW-year, the 1991 price, for the life of the contract.

1. The Date of Final Execution of the Contract Was the Basis for Extension but not Escalation of the Capacity Price.

PSE alleges first that we erred in basing our Decision on the failure of the parties to sign their contracts in 1986 in compliance with PSE v. PG&E (23 CPUC2d 55; D.86-12-061.) D.86-12-061 involved a complaint brought by PSE against PG&E and ordered the parties to sign the contracts promptly. The contracts were not signed until May of 1987. PSE refers to the conclusion that the contracts should have been signed sooner as the "apparent basis" for the Decision. (Application for Rehearing, p. 1.) PSE then argues that this conclusion is both factually and legally erroneous. PSE contends that it is factually erroneous insofar as PG&E did not return the contracts to PSE for signature until January 22, 1987 and therefore PSE could not have signed the contracts sooner. PSE maintains that it is legally erroneous since D.86-12-061 was not final until January of 1987, and cites Rule 85 and Public Utilities Code section 1731(b) in support of this conclusion.

PG&E argues in its Response that the discussion in the Decision at page 11 that the Commission was "not aware of any reason for the parties to wait even 10 days to sign the contracts" is dicta and not the basis for the Decision. PG&E alleges that PSE's characterization of this dicta as the "apparent basis" for the Decision is "a transparent attempt to suggest errors where none exist." (Response, p. 3.)

Our discussion in the Decision of the timing of the execution of the contracts by the parties is neither mere dicta nor is it an erroneous basis for the Decision. It is part of the logic of the Decision. We note that SO2 was suspended as of March, 19, 1986 by D.86-03-069 (20 CPUC2d 644; Unpublished Opinion) and indefinitely suspended as of March 19, 1986 by D.86-05-024 (21 CPUC2d 124). D.86-05-024 provided that a QF which could have, but had not, satisfied all contract signing prerequisites by the date of suspension should have a reasonable opportunity to cure those deficiencies. (Findings of Fact 1 and 2, Decision, p.14.)

The Decision reviews the actions of the parties leading up to the resolution of the complaint case and subsequent to D.86-12-061. The Decision notes that the contracts were not executed until 1987, but finds that fact to be more relevant to when the projects come on-line than to the decision not to escalate the capacity price. The Decision relies on the principle that "a QF has five years from final standard offer contract execution to come on-line at the prices the QF could expect for contracts fully executed immediately before the standard offer suspension..." (Finding of Fact 7, Decision, p. 15.)

Our discussion compares the circumstances of PSE's case with the application of this principle in cases involving Standard Offer 4 (SO4). (Decision, pp. 10-13.) We conclude that the same principle is appropriately applied to PSE's SO2 contract. Therefore, PSE is allowed five years from final

contract execution to come on-line and the capacity price table is extended, but not escalated.

2. Final Execution of the Contract Was Prompt Enough.

PSE's second allegation is that we erroneously concluded that it failed to cure contract deficiencies "promptly." PSE defends its actions in reaching final contract execution.

PG&E responds that the Decision contains no such implication that PSE failed to act "promptly." PG&E argues that even if there were any such implication, it is not the basis for the Decision.

This second argument is a slight variation on the first. It misunderstands and misstates our policy regarding the consequences of the suspension of Standard Offers. PSE attempts to tie the extension of time to come on-line with the escalation of the capacity price. Where contracts were not fully executed at the time of suspension, but the parties were in a position to do so, or nearly so, we have allowed them to execute the contracts, provided they acted promptly. We have then allowed the QF five years to come on-line, in accordance with the contract provisions, from the date of final contract execution. Our Decision to allow PSE five years from final contract execution in 1987 to come on-line is consistent with previous Commission decisions. It is inconsistent with PSE's argument that we based our Decision on any alleged failure of PSE to act promptly. Although the Decision does not do so explicitly, it implicitly reaches the opposite conclusion. Finding of Fact 3 states, "A reasonable opportunity is neither an indefinite nor an excessive period." (Decision, p. 14.) This finding implies that PSE and PG&E acted promptly enough to justify an extension of time from the date of final execution of the contracts to bring the projects on-line. PSE's argument fails on this basis.

Furthermore, our decision to allow the QF five years to come on-line does not require escalation of the capacity price.

In the Colmac (31 CPUC2d 549; D.89-04-081) and Crockett (29 CPUC2d 3; D.88-08-054; Unpublished Opinion) decisions, where we granted extensions of time to execute SO4 contracts and come on-line, we did not approve escalation of the capacity price.

3. The Allegation that the Decision Unjustly Rewards PG&E is Unsupported.

PSE's third argument is that PG&E had no basis for its refusal to sign the contracts in 1985 and 1986. PSE contends that the Decision rewards PG&E's conduct and is therefore contrary to public policy, citing Public Utilities Code sections 2801-2824 and PURPA.

PG&E responds that the Decision notes that PSE did not contend that action on its Petition was "...required as a result of any conduct on PG&E's part..." (Decision, p. 14.) PG&E argues that it had followed the Commission's order, executed the power purchase agreements and followed them.

Our Decision states: "No party asserts that PG&E's execution and administration of the contracts which are the subject of this proceeding have been improper." (Finding of Fact 13, p. 15.) The earlier decision on PSE's complaint, D.86-12-061, based on stipulated facts, found no misconduct on PG&E's part. The Decision does state that "[i]mproper delay by PG&E might harm the projects, particularly if there would be no capacity price escalation. (Decision., p. 14.) However, this statement is discursive only. We view PSE's bald assertion that PG&E acted improperly as grasping at non-existent straws.

4. Reconsideration of the Equities is Not Required.

PSE's fourth argument is that our reliance on the Colmac decision is misplaced. PSE argues that the conclusion that it would be inequitable to escalate the tables for PSE, since we declined to do so for Colmac, is backwards. PSE distinguishes itself from Colmac, which eventually shut down operations. PSE argues that we have emphasized the viability of

projects and therefore should reward PSE, which has continued the development of its projects.

PG&E responds that the Decision did not rely on Colmac, but only discussed it. In any event, PG&E maintains that the relief which was denied to Colmac, i.e. escalation of the capacity price, would be more appropriate in Colmac's situation.

The Decision discusses the equities in the Colmac case and states: "If it was not equitable to escalate Colmac's capacity price table, given these facts, it is certainly not equitable to do so for PSE." (Decision, p. 13.) The Decision reviews the facts and equities in the Colmac case as well as in the Crockett case. Their significance is in the elaboration of the principle discussed above, that even where the time for contract execution has been extended, we have not escalated the capacity price. The QF is not entitled to any higher capacity price than it could reasonably expect at the time of the suspension of the standard offer. PSE is rearguing a position that was fully explored in the original Decision. It is not alleging any new facts or error of law.

5. The Commission Previously Reviewed and Rejected the Amended Prayer for Relief.

PSE's fifth and final argument is that the Commission erred in failing to consider a lawful alternative. The alternative was an amendment to its Petition in which PSE proposed to reduce its request for relief, even though it maintained that it was entitled to its prior claim for capacity price escalation.

PG&E responds that there is no basis for PSE's claim that we failed to consider this proposal. PG&E argues that we considered and rejected PSE's modified request because it lacked merit.

The Decision discusses PSE's Supplemental Pleading and Revised Request for Relief. The ALJ granted PSE's motion to file this amended pleading. PSE is not only rearguing a position that

was previously considered, but seems to have completely skipped a reading of pages 8-10 in its review of the Decision. Otherwise, PSE could not maintain that we failed to consider its amended request for relief.

## CONCLUSION

PSE's Application of PSE has failed to allege any facts or raise any legal issues which constitute error. PSE's Application consists primarily of reargument of the position that it placed before the Commission in its Petition for Modification. Having reviewed each and every argument presented in the Application, we have found nothing that warrants rehearing or merits reversal of our original Decision. Therefore,

IT IS ORDERED that the Application for Rehearing of D.91-09-029 is hereby denied.

This order is effective today.

Dated April 8, 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

pc