

SEP. 4 1992.

Decision 92-09-041 September 2, 1992

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

CA Hydro Engineering, Inc., et al.,)
Complainants,)

vs.)

Pacific Gas and Electric Company,)
Defendant.)
(U 39 E)

Case 90-02-034
(Filed February 16, 1990)

Jose E. Guzman, Jr., Attorney at Law, for
CA Hydro, Inc., and Hydro Engineering,
Inc., complainants.
Lawrence C. Witalis, Attorney at Law, for
Pacific Gas and Electric Company,
defendant.

O P I N I O N

I. Summary

This decision denies CA Hydro Engineering, Inc.'s (Cal Hydro) complaint against Pacific Gas and Electric Company (PG&E). The dispute centers on whether or not Cal Hydro is entitled to an executed Standard Offer 4 (SO4) contract from PG&E. Cal Hydro fails to meet its burden of proof to convince the Commission that it is entitled to an SO4 contract.

The project Cal Hydro had contemplated when it submitted its proposal to PG&E was in fact being developed by other entities. Cal Hydro made no attempt to pursue its project for several years, essentially abandoning it.

Finally, the credibility of the various witnesses played an important part in the outcome of this decision. Cal Hydro's

witnesses, particularly its sole officer, director, and shareholder, were not as believable as were PG&E's witnesses.

II. Background of Dispute

This case revolves around an S04 contract Power Purchase Agreement (PPA) submitted to PG&E by Cal Hydro in January 1985. The recollections of the various participants involved in this PPA are foggy at best and outright conflicting in certain key instances. To muddy the waters further, the City of Fairfield (the City) was working on developing the same project.

The circumstances of Cal Hydro's original submittal of the PPA to PG&E are disputed by Cal Hydro's sole officer, director, and shareholder, Gary McPeak (McPeak) and his associate in 1985, Frank Wylie (Wylie). While McPeak acknowledges that Wylie handled the filling out of the blank PPA, his version of what Wylie did is different than that supplied by Wylie in his deposition. McPeak admits it was not his idea to submit a PPA to PG&E for an S04 contract. Wylie testified that after he formed the idea of building a cogeneration plant using the Anheuser-Busch brewery in Fairfield, California, he filled in the blanks of the draft PPA entirely by himself with no assistance from McPeak or anyone at PG&E. In order to describe the site in the PPA, Wylie called a title company to obtain a legal description of the parcel of land occupied by the Anheuser-Busch brewery and inserted that description into the PPA. (Exhibit 23.)

On the other hand, McPeak claims that Wylie met with PG&E representatives in their Marysville office for several days using PG&E maps of the Fairfield area to fill out the PPA. (Exhibit 3.) McPeak testified that the project site was intended to describe the PG&E Fairfield substation. On this point, Wylie's testimony was substantiated by PG&E witness Hardy who verified the legal

description was indeed the brewery and not the substation.
(Exhibit 25.)

McPeak further testified that he broke off relations with Wylie in 1985 in part because McPeak believed Wylie to be unreliable, claiming that Wylie did not follow through on things. McPeak acknowledged that the PPA in dispute had listed Wylie's name and address as the contact person. (Tr. Vol. 1, p. 63.) Despite McPeak's stated concerns about Wylie's reliability, McPeak did not see fit to contact PG&E regarding a change in contact person for this PPA. McPeak testified that he relied on Wylie to continue to forward documents to him. (Tr. Vol. 1, p. 66.)¹

There seems to be agreement that the PPA filled out by Wylie eventually found its way to PG&E's general office, specifically the siting department. The date on the PPA by Wylie's signature is January 4, 1985. By around January 7, 1985, it had been received in the siting department.

The witnesses who worked in the PG&E siting department at that time cannot agree or remember exactly how this PPA was handled.

Joseph Meyer (Meyer), a supervising engineer in PG&E's siting department, testified in this proceeding as a consultant for Cal Hydro. Meyer recalls nothing in particular about the Cal Hydro PPA or how it was handled. (Tr. Vol. 2, pp. 220-226.) However, he did testify that a PPA such as the one submitted by Cal Hydro would take at least four weeks to process, not being a perfectly filled out form.

Patricia Eckhardt (Eckhardt) was an engineer under Meyer in the siting department who served as a project coordinator. Her

¹ Again, despite McPeak's concerns regarding Wylie's reliability, Cal Hydro offered him \$8,000 to testify in Cal Hydro's favor. One-half of the fee was contingent on PG&E signing the S04 PPA. Wylie chose not to accept this "consulting" deal.

recollection on the Cal Hydro PPA was not terribly specific except as to her awareness that Cal Hydro was proposing to develop the same cogeneration project with the Anheuser-Busch brewery as was the City. (Tr. Vol. 3, p. 309.) The City had been in contact with PG&E several times since November 1983 regarding its project. (Exhibit 26.)

While not recalling the name of the person she spoke with, Eckhardt testified that she telephoned Cal Hydro's representative and told him that PG&E would not process Cal Hydro's PPA until she received clarification of the apparent competition with the City project. Eckhardt claims the Cal Hydro representative said someone from the City would respond to the issue she raised. Eckhardt never received a response from anyone and, therefore, did not process Cal Hydro's PPA further. (Exhibit 26.) She memorialized these events in a memorandum written in 1985. (Exhibit 39.) Neither McPeak nor Wylie (the only two persons associated with Cal Hydro in 1985) have any recollection of this conversation taking place.

Another engineer in PG&E's siting department, Lanette Kozlowski (Kozlowski), also was involved with the problems surrounding Cal Hydro's PPA. Kozlowski was responsible for compiling the waiting list for transmission capacity for qualifying facilities (QFs) in the transmission constraint area, which included the site of Cal Hydro's project, as required by Commission order. Kozlowski testified that it was apparent to both her and Meyer that Cal Hydro and the City were on the waiting list for the same project, i.e., cogeneration at the Anheuser-Busch brewery. Kozlowski stated Meyer told her he had telephoned McPeak to inform him that if he could not provide proof of site control for Cal Hydro's project, PG&E would not sign the PPA. Meyer indicated to Kozlowski that McPeak understood that PG&E would not execute the PPA contract until site control was proven. (Exhibit 36; also Tr. Vol. 3, pp. 374-377.)

Neither Meyer nor McPeak recollects these phone calls. (Tr. Vol. 1, p. 113; Tr. Vol. 2, pp. 220-226.) Neither gentleman denies outright that they took place. In contrast, Kozlowski had a clear, distinct recollection of these events.

Virtually nothing occurred regarding Cal Hydro's PPA during 1985-89. McPeak was involved in several Standard Offer 2 (SO2) contracts with PG&E in 1985-86. None of these projects were ever developed either, despite the fact that McPeak played a fairly active role in frequently contacting PG&E and pursuing these SO2 contracts. (Tr. Vol. 3, p. 353.)

Only once in 1986 did McPeak make an inquiry to PG&E regarding his SO4 PPA. (Tr. Vol. 3, p. 383.) In 1989, Cal Hydro's interest in the project was revitalized when PG&E, never having removed the Cal Hydro project from the waiting list, informed Cal Hydro that it had received a transmission allocation. McPeak sought PG&E's signature on its PPA on the basis that the brewery was not intended to be the sole steam host for the project, even though the facts in 1985 did not support this theory.

PG&E contends that McPeak now wants the PPA signed so that he will have a valuable SO4 contract to sell to the highest bidder. (Tr. Vol. 3, p. 392.)

This fundamental disagreement between the parties led to the filing of this complaint. The dispute outlined above will be explored further in the sections to follow. Overall, Cal Hydro failed to meet its burden of proof for the relief it is seeking. Cal Hydro's witnesses and its scenario regarding what went on in 1985 are simply not as credible as PG&E's version. Likewise, Cal Hydro cannot now create a new project out of thin air simply because it received notice of transmission allocation.

III. Was PG&E Obligated to Sign Cal Hydro's PPA
As It Was Received Without Further Inquiry?

A. Overview

Cal Hydro's January 4, 1985 signature on the PPA was the subject of considerable debate between the parties as to what rules applied to this PPA. As one witness put it, "the OIR 2 proceedings were a turgid morass of confusion" at this time.² (Tr. Vol. 1, p. 31.)

On January 16, 1985, the Commission issued Decision (D.) 85-01-038 (17 CPUC 2d 87) adopting interconnection priority procedures (IPP) for the allocation of transmission capacity among qualifying cogeneration and small power production facilities. The IPP created certain "milestones" for QFs to meet in order to maintain their position on a waiting list for transmission allocation.³ The first milestone required, among other things, that the QF provide to the utility a project definition including proof of site control.

The decision applies these procedures to "all QFs under contract as well as those that have not yet signed power purchase or interconnection agreements, and to QFs in unconstrained transmission areas as well as those in constrained areas." (Id. at 92.)

Cal Hydro and PG&E fundamentally disagree on the impact of this decision's issuance on the handling of Cal Hydro's PPA.

² The OIR 2 proceedings refer to the series of cases which developed the Commission's policies for QFs.

³ These milestones became known as the "QFMP" or Qualifying Facilities Milestone Procedure.

B. Cal Hydro's Position

Cal Hydro contends that its submittal to PG&E of its PPA form around January 7, 1985 was all that was necessary to form a binding contract with PG&E. Cal Hydro objects to PG&E attempting to apply the Qualifying Facilities Milestone Procedure's (QFMP) site control requirement because that decision was issued some nine days after the PPA arrived at PG&E. While objecting to PG&E reliance on a decision issued after January 7, 1985, Cal Hydro relies extensively on a June 21, 1985 Commission decision known as the "orphan decision" (D.85-06-163, 18 CPUC 2d 264). Cal Hydro argues that this decision limits the utility's review of the standard offer contract to whether the qualifying facility had properly filled in the blanks and signed the agreement. Further, the decision holds that when the QF has done this "a 'meeting of the minds' occurs with the result that the utility's signature on the agreement becomes a mere formality which necessarily follows." (Id. at 282.)

Based on this decision, Cal Hydro argues that PG&E's only proper course of action in January 1985 would have been to sign the PPA asking no questions. Cal Hydro contends that the site control requirement of the QFMP decision of January 16, 1985, cannot apply to its PPA because its PPA arrived at PG&E on January 7, 1985.

C. PG&E's Position

PG&E argues that it is precisely because Cal Hydro had failed to properly fill in the blanks on its PPA that the processing of this contract was slowed down. PG&E contends that because the QFMP decision was issued during its own review of Cal Hydro's filling in of the blanks, the issue of site control was completely appropriate to raise. In addition, PG&E argues that the January 16, 1985 decision did contemplate retroactive application of the QFMP to QFs already under contract, let alone those still under utility review. The site control issue was made more relevant due to PG&E's awareness that the City had been working on

developing the same cogeneration project with Anheuser-Busch for some time. PG&E stated that Cal Hydro's failure to respond to its inquiries as to improperly completed blanks on its PPA resulted in a contract never forming between Cal Hydro and PG&E.

D. Discussion

We agree with PG&E that it was appropriate for it to review the Cal Hydro PPA to determine whether it was properly filled out. Unlike other QFs who worked with PG&E prior to submittal (notably the City for the same project), Cal Hydro had not contacted PG&E, according to Wylie, who filled out the form. We see no reason to believe McPeak's version of what Wylie did. Wylie himself offers the best evidence that he obtained no assistance in filling out the PPA.

Cal Hydro's own consultant, Meyer, testified that the Cal Hydro PPA would have taken twice as long to process as a "perfectly filled out" PPA, approximately four weeks. (Tr. Vol. 2, p. 272.) Clearly, the QFMP decision was issued during that appropriate review time of the PPA.

While the QFMP decision makes proof of site control a requirement for QFs, site control was already an issue for the Cal Hydro PPA because of PG&E's knowledge of the City's project long in the works. It would have been negligent of PG&E not to raise the competition/site control issue with Cal Hydro in light of its over one-year discussions with the City.

In retrospect, this case would have been far less complicated if PG&E had expressed its concerns to Cal Hydro regarding site control in a letter rather than through phone conversations. However, witnesses Eckhardt and Kozlowski are simply more believable than McPeak and Meyer as to whether these phone conversations regarding site control took place. We believe it was appropriate for PG&E to make those inquiries of Cal Hydro. Likewise, Cal Hydro's failure to respond to those inquiries regarding its PPA formed an acceptable reason for PG&E to not sign

the PPA. Even if PG&E had signed the PPA, Cal Hydro would have had to eventually prove site control for its project to move forward. The QFMP decision clearly applied to all QFs under contract as well as those not yet signed. So the decision could be seen as operating retroactively in this regard.

In the next section, we will explore whether Cal Hydro could have ever proved site control for its project set forth in its PPA, whether or not PG&E had signed it.

IV. What Was the Cogeneration Project Cal Hydro Intended to Develop With Its PPA and Could Site Control Ever Have Been Proven?

A. Overview

PG&E and Wylie (who filled out the PPA for Cal Hydro) agree that the only steam host ever contemplated by Cal Hydro for its cogeneration project was the Anheuser-Busch brewery. McPeak testified that it was only one of several possible steam hosts for the project.

B. Cal Hydro's Position

Cal Hydro contends that it had no obligation to identify a particular steam host for its project and has called it the "Fairfield Project" in this proceeding. This is despite the fact that McPeak referred to this same project as the Anheuser-Busch project in sworn testimony in other litigation. (Exhibits 6 and 7.) During hearing, McPeak testified that he did not name the project Anheuser-Busch, he was merely using the same name as PG&E. (Tr. Vol. 2, p. 116.)

Cal Hydro argues that Wylie had every incentive to lie at his deposition to hurt Cal Hydro (complainants' Reply Brief, p. 7), claiming he attempted to extort money from McPeak in their negotiations over a consulting fee. Cal Hydro asks the Commission to ignore the Wylie testimony completely and believe McPeak's version of the facts instead.

Cal Hydro did not produce any documentary evidence to show there was any other steam host contemplated besides the Anheuser-Busch brewery. Cal Hydro's case relies heavily on its argument that no such detail was required in order to obtain PG&E's signature on its PPA. In fact, Cal Hydro was no more specific during hearings than some vague reference to a Fairfield Industrial Park as a "potential" steam host some two and one-half miles from the site listed in the PPA. (Tr. Vol. 1, p. 121.) Cal Hydro concludes that neither in 1985 nor in 1990 during hearings did it have to designate a particular steam host or offer proof of any site control.

C. PG&E's Position

PG&E argues that Cal Hydro's only plan, albeit a weak one, in 1985 was to develop a cogeneration project with the Anheuser-Busch brewery.

PG&E points to testimony by McPeak in other litigation where he refers to the project as "Anheuser-Busch." PG&E questions McPeak's testimony where he now claims to use that description for his project only because PG&E did. In addition, PG&E notes that Cal Hydro failed to obtain a joint venture agreement from the City in 1985 to develop the Anheuser-Busch project for the City.

The City had signed a Memorandum of Understanding (MOU) with Anheuser-Busch as early as March 1983, which set forth principles for an agreement whereby the City would sell Anheuser-Busch steam produced by the City's cogeneration facility. (Exhibit 16.)

PG&E contends that the Anheuser-Busch project always was the brain child of the City. Cal Hydro failed to successfully inject itself into a winning project. Both Wylie and McPeak (in a 1988 deposition) admit their joint attempts to interest the City in a joint venture, offering the City the lure of bringing financing people to the table. (Exhibit 5, p. 146.)

PG&E points to Exhibit 4, a copy of a proposal by which Cal Hydro and another company offered to develop a cogeneration project for Anheuser-Busch and the City around June 7, 1985. Cal Hydro committed in that proposal to obtaining a PPA from PG&E.

McPeak did admit that the City rejected his proposal, confirming Wylie's testimony on this point. (Tr. Vol. 1, p. 83.) PG&E points to Wylie's testimony that after the rejection by the City, McPeak lost interest in the Anheuser-Busch project and moved onto other projects. (Exhibit 23.)

PG&E cites other evidence to support McPeak's lack of interest in the Anheuser-Busch project. Quite compelling is McPeak's own sworn affidavit given in other litigation in 1988:

I concluded that there were no viable cogeneration projects available to me in California, but that such projects did exist elsewhere. During the time Hydro Arizona was winding down, I was examining a project at Anheuser-Busch, City of Fairfield. . . . This proposed project suffered a quick demise because of the severe cogeneration problems developing in California. Hydro ceased to exist as an entity in August 1986. (Exhibit 6.)

PG&E argues that the only steam host or site of Cal Hydro's project ever contemplated was the Anheuser-Busch brewery. PG&E contends that Cal Hydro had no agreement for this steam host when it submitted its PPA to PG&E and after rejection by the City to joint venture a project already in the works for over two years, McPeak lost interest in his still unsigned PPA and moved onto other projects.

D. Discussion

The evidence is overwhelmingly in support of PG&E's contention that Cal Hydro had no site control, no steam host, no definite project in mind other than a cogeneration project with the Anheuser-Busch brewery. The evidence is also clear that Cal Hydro

never had a reasonable basis to believe it would be included in such a project by the City and Anheuser-Busch.

There is no evidence to support Cal Hydro's claim during hearings that the Anheuser-Busch brewery was only one of several potential steam hosts. McPeak's testimony in this case is contradicted by his testimony in prior litigation. The evidence supports PG&E's original concern with the PPA as submitted. Cal Hydro had no project in January 1985 other than a hope and a prayer that the City would include it in a project which had been in the works for nearly two years.

After the City rejected Cal Hydro's joint venture proposal, there is no evidence to support any claim by Cal Hydro that other steam hosts were being considered. In fact, the evidence supports the conclusion that Cal Hydro did nothing regarding this project after the City's rejection of its joint venture proposal until it received notice of transmission allocation in 1989 from PG&E. It is somewhat unfortunate that notice was ever sent since it seems likely this PPA would have died a quiet death otherwise, rather than the painfully slow execution resulting from this proceeding.

V. Conclusion

While both sides raised more extraneous issues than have been discussed in this decision, we believe there is more than ample evidence discussed herein to deny Cal Hydro the relief it seeks in its complaint.

Cal Hydro has failed in its burden of proof to show that PG&E was negligent in its handling of Cal Hydro's incomplete and ill thought-out PPA. There is virtually no reliable evidence to conclude that Cal Hydro had a "real" project in mind when it submitted its PPA, other than the Anheuser-Busch brewery which was being pursued by the City.

McPeak claims his then-associate Wylie was unreliable but made no effort himself to pursue this project with PG&E after ending his association with Wylie. McPeak has presented conflicting accounts of the facts surrounding this PPA in different forums.

No matter what PG&E had done, it seems highly unlikely that Cal Hydro would have been able to pursue its PPA proposal. None of McPeak's projects with PG&E came to fruition.

It would be particularly egregious to PG&E's ratepayers to now saddle them with another SO4 contract given the paucity of evidence in Cal Hydro's behalf. We deny Cal Hydro the relief it seeks in this complaint.

Comments on Proposed Decision

The Administrative Law Judge's proposed decision was mailed on July 28, 1992. Comments were filed by Cal Hydro on August 17, 1992. Reply comments were filed by PG&E on August 24, 1992.

These comments have been reviewed and carefully considered by the Commission. The minor technical change proposed by PG&E has been incorporated into the decision.

Findings of Fact

1. The circumstances surrounding Cal Hydro's submittal of its PPA to PG&E in January 1985 are disputed by the then two principals of Cal Hydro, McPeak and Wylie.

2. Wylie, who filled out the PPA for Cal Hydro, intended the project to be a cogeneration facility with the Anheuser-Busch brewery as the steam host.

3. The Cal Hydro PPA included a legal description of the Anheuser-Busch brewery near Fairfield as its project site.

4. Cal Hydro intended the Anheuser-Busch brewery to be the steam host for its cogeneration project.

5. Cal Hydro's PPA arrived at PG&E's siting department on or about January 7, 1985.

6. The Cal Hydro PPA would have taken PG&E at least four weeks to process, not being a perfectly filled out form.

7. PG&E informed Cal Hydro of its need to explain its project's apparent duplication with the City's project and provide proof of site control. Cal Hydro was told that the PPA would not be signed until this information was provided.

8. Cal Hydro did not pursue its PPA during 1985-89.

9. Cal Hydro reactivated its interest in its PPA in 1989 when informed of possible transmission allocation by PG&E, because it viewed an S04 contract as a valuable commodity to sell to the highest bidder.

10. It was appropriate for PG&E to ask Cal Hydro to prove site control for its project because of the Commission's issuance of D.85-01-038 and because of its prior knowledge of the City's pursuit of the same cogeneration project for some time.

11. Cal Hydro failed in its attempt, through a joint venture agreement, to inject itself into the project being worked on by the City and Anheuser-Busch brewery.

12. McPeak lost interest in the PPA and moved on to other projects.

13. There is no credible evidence to support McPeak's claim during hearings that the Anheuser-Busch brewery was only one of several steam hosts being contemplated for Cal Hydro's project.

Conclusions of Law

1. Cal Hydro has failed to meet its burden of proof to obtain an order in its favor.

2. Cal Hydro never had site control over its supposed project with the Anheuser-Busch brewery nor could it have obtained site control regardless of how PG&E handled its PPA.

3. We should deny Cal Hydro's complaint because the testimony provided by PG&E is more credible.

ORDER

IT IS ORDERED that:

1. Cal Hydro Engineering, Inc.'s complaint against Pacific Gas and Electric Company is denied.
2. Case 90-02-034 is closed.

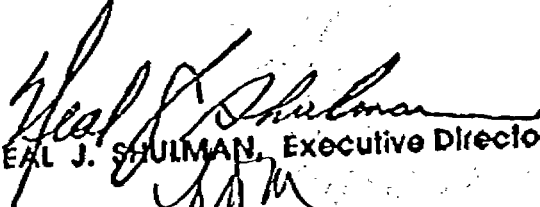
This order becomes effective 30 days from today.

Dated September 2, 1992, at San Francisco, California.

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

Commissioner Patricia M. Eckert,
being necessarily absent, did
not participate.

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


NEAL J. SHULMAN, Executive Director