

Decision S3 05 103 JUN 29 1983

ORIGINAL

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the matter of the Complaint of
Friant Power Authority against
Pacific Gas and Electric Company
for failing to bargain in good
faith on a Non-Standard Power
Purchase Contract and Request
for Approval.

Case 83-05-12
(Filed May 31, 1983)

INTERIM OPINION

The Friant Power Authority (Friant), composed of eight irrigation districts in the San Joaquin Valley, filed this complaint alleging that the Pacific Gas and Electric Company (PG&E) has failed to comply with our order directing electric utilities to negotiate in "good faith" with small power producers. It is, specifically, ordering paragraphs of our January 21, 1982 Decision (D.) 82-01-103 in Order Instituting Rulemaking (OIR) 2 which Friant alleges were violated. That was our initial decision setting standards for prices and terms for utility purchase contracts with small power producers, most frequently referred to as qualifying facilities or QFs. Since then, we have approved standard offers for the three largest electric utilities; these offers must be exercised and contracts signed whenever a QF so elects and has met all the terms and conditions (see, D.82-12-120, issued December 30, 1982 in Application (A.) 82-03-26 et al.).

Friant and PG&E began discussions and negotiations in 1981. The power would come from three powerhouses located at the Friant Dam on Lake Millerton; there would be one 2 MW unit at the river outlet, an 8 MW unit at the Madera Canal Outlet, and a 15 MW unit at the Friant-Kern Canal Outlet. Attached to Friant's complaint are appendices documenting, to some degree, the negotiations with PG&E. They show that a state permit for the diversion and use of water was obtained, as well as a Federal Energy Regulatory Commission (FERC) license for the project. The U. S. Bureau of Reclamation either issued or will issue other permits, and will conduct environmental review.

Friant requests that we order PG&E to execute the nonstandard power purchase contract, submitted as Appendix F to its complaint. At this juncture we need not go into all the terms of the proposed contract, for this decision does not address the merits of Friant's contentions. PG&E would pay 50% of project development costs and would be repaid when revenue bonds are issued by Friant. When the project is fully in operation, PG&E would pay Friant a fixed payment for the first 58 million kWh/year equal to the project's debt service cost, and 80% of avoided cost for all generation in excess. Also, PG&E would pay the applicable "use-of-dam charge," and all operations and maintenance costs.

Friant alleges that it has progressed through the permitting stages, and the development of specifications for the turbines and generators and has completed the bidding process, only to be told by PG&E in May 1983 that PG&E did not desire to proceed. PG&E indicated to Friant that it wanted to establish a schedule to reevaluate the project's economics, essentially putting the project "on hold". (Appendix I to the complaint.) Friant alleges that it requested PG&E to submit the proposed contract for Commission review, but that PG&E refused. Delay for the project could, according to

Friant, substantially escalate costs. It believes the project could be a benefit for PG&E and ratepayers, which could be lost if, due to delays, the FERC license expires because construction does not start within two years from the date the license was issued (September 30, 1982).

A Commission decision by July 11 is requested by Friant. PG&E was directed to file its answer to Friant's complainant by June 20, 1983. ✓

PG&E'S Answer

PG&E filed its answer on June 20, 1983. It lists five defenses to Friant's complaint:

1. It did not execute the nonstandard contract because higher than anticipated federal use-of-dam charges, and "other external conditions beyond the control of the parties, have resulted in the cost of the project greatly in excess of PG&E's avoided cost." (Answer, page 13.)
2. PG&E is willing to execute one of the standard offers with Friant.
3. Given anticipated levels of PG&E's avoided costs it may be 20 years before PG&E's ratepayers are made whole by the project's lower energy costs to PG&E.
4. Friant's complaint fails to allege facts or otherwise demonstrate why PG&E's ratepayers would be indifferent to or prefer Friant's proposed nonstandard contract over a standard offer.
5. Friant's sought relief would put the Commission in the position of "negotiating the contract contrary to its policy established in its D.82-01-103." PG&E contends that we do not have the authority to order PG&E to execute a power purchase contract. (Answer, page 15.)

Discussion

Before we proceed further, and before Friant spends time and money developing its case in hearings, we must in fairness clarify for Friant what we will and what we will not do in the context of this complaint proceeding.

Friant's complaint alleges that PG&E did not bargain in good faith, and the relief it requests is for us to order PG&E to execute the proposed agreement (Appendix F to the complaint). While we will address in this proceeding whether PG&E has negotiated in good faith, we will not grant the relief Friant requests, even assuming arguendo that PG&E did not negotiate in good faith. The parameters of relief for complaints such as Friant's was clearly set out in our decision in OIR 2:

"The Commission will entertain formal complaints raised by QFs who can demonstrate that the utility has failed to bargain in good faith. . . . A utility found not to have bargained in good faith will stand in violation of this order and will be open to potential punitive action by this Commission." (D.82-01-103, issued January 21, 1982 in OIR 2, mimeo. page 106.)

Utilities, and not QFs, were authorized by that decision to file applications for our review of nonstandard power purchase contracts. Here, in essence, given the nature of the requested relief, we have a QF submitting an "application" for approval of a nonstandard contract in the context of a complaint proceeding.

We distinguished complaints from applications for good reason. Utilities were told to negotiate proposed nonstandard contracts in good faith with QFs not wanting to accept a standard offer, but we did not mandate a result. The mandated obligation in terms of end result which utilities do have is to contract under the applicable adopted standard offers. As long as utilities negotiate in good faith with respect to nonstandard contracts, they fulfill our mandate with respect to those types of contracts. If we allow

QFs seeking nonstandard contracts to bring their preferred proposals before us for ratification, instead of utilities applying for approval only after their management thinks a nonstandard contract has merit but wants our ratification in view of cost recovery concerns, the entire negotiating process would take a very different turn from what we envisioned. For then, QFs and utilities would in essence ultimately "negotiate" with us, and not each other. We refuse to so directly interject ourselves into the arena of QF-utility negotiations. Accordingly, we will not order a "result" based upon a QF's complaint, but we will impose sanctions on a utility for bad faith negotiations.

Although the distinction we draw may seem too subtle or without solid basis from Friant's perspective, it is deeply rooted in the role of the regulator vis-a-vis investor-owned public utilities. For ordinarily, in the absence of compelling circumstances, utility management should apply its expertise and judgment within the regulatory parameters we set; we must ensure the parameters are fair and in the overall public interest, but we should not directly "manage." By the nature of the relief Friant requests it is asking us to substitute our judgment for that of the utility's management. We will however make a ratemaking adjustment if we find a utility had a lower cost option for power (e.g. QF power) which it did not exercise, or otherwise acted imprudently.

We will hold a hearing to analyze Friant's contention of bad faith negotiations, but the end result, at most, if Friant prevails will be punitive sanctions against PG&E, and not an order that PG&E execute the purchase agreement.

If Friant desires to proceed with its complaint after reviewing this interim opinion, it may do so. The question of PG&E's compliance with our mandate to negotiate in good faith with QFs seeking nonstandard contracts is an issue in its pending general rate

proceeding, A.82-12-48. While it is too late for Friant to make its point in that proceeding if Friant pursues this complaint, we will endeavor to reach a decision in time to weigh the outcome along with other evidence when we set PG&E's rate of return in its general rate decision at the end of 1983. Our staff has recommended a rate of return penalty in the general rate proceeding, which illustrates why Friant's contentions would be germane. If Friant elects to proceed with this complaint, it should advise Administrative Law Judge Alderson within 15 days, so that hearing dates may be set.

Findings of Fact

1. D.82-01-103 directed electric utilities, such as PG&E, to negotiate in good faith with QFs seeking nonstandard contracts.

2. D.82-01-103 authorized utilities to file applications for our review of nonstandard contracts, and QFs to file complaints alleging bad faith negotiating by utilities. If bad faith negotiations are demonstrated, this Commission may impose sanctions against the utility.

3. The relief Friant requests is our approval of a specific nonstandard power purchase contract.

Conclusion of Law

The result of Friant's complaint, assuming it demonstrates bad faith negotiations by PG&E, would be for this Commission to impose sanctions for PG&E's noncompliance with D.82-01-103; we should not order PG&E to enter a nonstandard contract.

INTERIM ORDER

IT IS ORDERED that the Friant Power Authority's complaint may proceed to hearing; however, this Commission will not direct Pacific Gas and Electric Company to execute a nonstandard power purchase contract.

This order becomes effective 30 days from today.

Dated JUN 29 1983, at San Francisco, California.

I abstain.

FRISCILLA C. GREW, Commissioner

LEONARD M. GRIMES, JR.
President

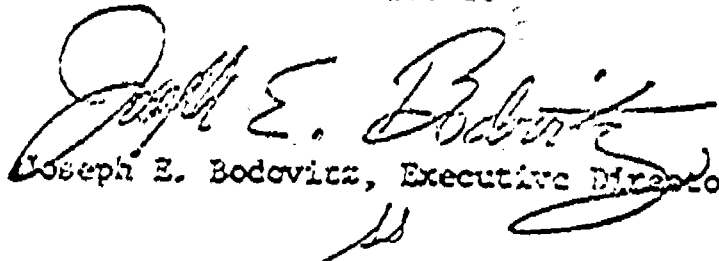
VICTOR CALVO

DONALD VIAL

WILLIAM T. BAGLEY

Commissioners

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


Joseph E. Bodovitz, Executive Director

Discussion

This is the first formally filed complaint by a QF, under our D.82-01-103, alleging bad faith negotiations. Before we proceed further, and before Friant spends time and money developing its case in hearings, we must in fairness clarify for Friant what we will and what we will not do in the context of this complaint proceeding.

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I abstain because I have a
reportable financial interest
in potential small power producers.

#9 Friant