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Decision 96-06-030 June 6, 1996

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

ORIGINAL

Red Top Cogeneration Project, L.P., Complainant, vs. Pacific Gas and Electric Company, Defendant.	Case 92-12-023 (Filed December 10, 1992)

John Clark, for Red Top Cogeneration Project, L.P., complainant.
Alice Reid, Attorney at Law, for Pacific Gas and Electric Company, defendant.
Eric Karlson, for Edson & Modisett, interested party.
Carol Matchett, Attorney at Law, and Perry Rice, for the Division of Ratepayer Advocates.

I N D E X

Red Top Cogeneration Project, L.P. (Red Top or complainant) moves for partial dismissal of this complaint so that it may seek recovery of damages against Pacific Gas and Electric Company (PG&E or defendant) in Superior Court. Complainant believes the remaining issue is whether or not it was eligible to receive discounted prices for gas services under defendant's Schedule G-COG from 1988 through 1992. Complainant seeks an order directing cessation of defendant's collection efforts for alleged undercharges. Defendant opposes complainant's motion for partial dismissal. Defendant requests that the Commission deny all of complainant's requests for relief, find that defendant acted in good faith, dismiss the complaint with prejudice, and find that complainant owes defendant $826,653.39.

We grant complainant's motion for partial dismissal in part and deny it in part. We find that PG&E may bill Red Top $826,653.39. We direct defendant to defer recovery of the $53,571.60 penalties associated with imbalance charges from Red Top until a final decision is issued by the Superior Court.

1. Background

A brief description of the project, along with a summary of the factual and procedural history, is necessary to understand Red Top's motion for partial dismissal, which we address first.

1.1 Project

Red Top, a Colorado limited partnership, operated a 35,615 kilowatt (kW) topping-cycle cogeneration plant in Chowchilla, California. The facility consisted of a natural gas fueled turbine generator and a drum dryer. Red Top sold all of the electricity produced by its facility to PG&E pursuant to a 30-year Interim Standard Offer No. 2 power purchase agreement (PPA) signed December 30, 1983. The exhaust heat from the turbine generator was

used to dry agricultural waste and other materials. Operations began in September 1984, and ended in September 1992.

The energy sources were low-British thermal unit (BTU) gas acquired from nearby wells and pipeline-quality natural gas transported by PG&E. PG&E gas services were purchased at discounted prices offered to cogenerators under Schedule G-COG.

1.2 Dispute and Hearings

The dispute began in July 1991 when PG&E asked Red Top for data to demonstrate compliance with Federal Energy Regulatory Commission (FERC) cogeneration operating and efficiency standards. Based on Red Top's reply, PG&E informed Red Top on October 17, 1991 that PG&E's payments to Red Top for electricity would be reduced, and overpayments by PG&E to Red Top for the past three years must be repaid. This action was taken as a result of PG&E's determination that Red Top did not comply with the applicable standards, consistent with our qualifying facility (QF) monitoring program (Decision (D.) 91-05-007 (40 CPUC2d 2), as modified by D.91-08-036 (41 CPUC2d 214) and D.92-07-071 (45 CPUC2d 106)).

On November 14, 1991, Red Top filed for injunctive relief and a temporary restraining order (TRO) with the Madera County Superior Court, contending that PG&E's reduction in payments violated the PPA and jeopardized Red Top's continuing viability. On November 15, 1991, the Court granted the TRO. On November 18,

1 Our monitoring program provided that the utility could collect data from the QF to determine whether the QF was in compliance with operating and efficiency standards. For a QF found out of compliance, the utility was authorized to substitute a price equal to 80% of the utility's as-available energy and capacity avoided cost for the full avoided cost price. The utility was also authorized to collect past overpayments for any period the QF was not in compliance up to three years from the last date for which efficiency data was submitted. Finally, the utility was permitted to disconnect the QF from parallel operation until compliance with the standards was achieved.

1991, PG&E reinstated full payments to Red Top pursuant to the TRO. On December 2, 1991, the Court denied Red Top's motion for a preliminary injunction. PG&E again notified Red Top its payments would be reduced.

On December 19, 1991, Red Top and PG&E entered into a letter agreement that permitted Red Top to receive full payments for power delivered to PG&E through June 15, 1992, while Red Top sought clarifications from FERC. No FERC ruling was issued by the June 15, 1992 deadline in the letter agreement.

On June 18, 1992, PG&E informed Red Top that its payments would once again be reduced. On July 15, 1992, Red Top requested, and the Court granted, a second TRO. PG&E again reinstated full payments to Red Top pursuant to the Court's order. On August 12, 1992, the Court once again denied Red Top's request for a preliminary injunction.

On August 18, 1992, PG&E informed Red Top that PG&E would apply payments PG&E owed but had not yet paid to Red Top against the amount PG&E believed due from Red Top. PG&E believed this was the only possible means of recapturing some of the money PG&E claimed it was owed given Red Top's sworn declarations to the Court that Red Top would go out of business unless it continued to receive full contractual payments. On September 4, 1992, Red Top terminated operations.

On December 10, 1992, Red Top filed this complaint. A prehearing conference was held on February 9, 1993. Red Top's request for ex parte relief was denied. Evidentiary hearings were held April 7 and 8, 1993, limited to the issue of whether PG&E negotiated in good faith as required by Commission orders and our QF monitoring program. If Red Top prevailed, Red Top sought several forms of relief, including a Commission order that (1) PG&E repay all money withheld plus interest, and (2) the PPA be reformed to allow Red Top an opportunity to earn payments and bonuses which,

according to Red Top, would have otherwise prematurely expired. The proceeding was submitted for decision after closing arguments.

1.3 FERC Declaratory Order and Further Hearings

In pursuit of its interests to establish eligibility for full PPA prices, on November 2, 1992 (about one month before it filed this complaint) Red Top submitted a formal request to FERC for declaratory order. Red Top asked FERC to (1) extend the FERC Order No. 471 waste gas standard for small power producers to cogenerators and (2) exclude waste gas in calculating cogeneration efficiency.[2]

On March 3, 1993, FERC issued a declaratory order granting Red Top's request (62 FERC ¶ 61,205). On April 2, 1993, PG&E filed a request for rehearing. On October 8, 1993, FERC denied PG&E's request (65 FERC ¶ 61,044).

On February 11, 1994, Red Top filed a petition to set aside submission based on new facts, including FERC's declaratory order and denial of PG&E's request for rehearing. On March 16, 1994, Red Top was granted leave to file an amended complaint. Evidentiary hearings were held on September 19 and 20, 1994. The parties presented testimony on the issues of whether Red Top was a QF during the years 1988 through 1992, whether low BTU gas is included in or excluded from the efficiency standard specified in Public Utilities (PU) Code § 218.5(b).

1.4 Decision of the United States Court of Appeals for the Ninth Circuit

On September 22, 1994, the Ninth Circuit Court of Appeals held that federal law preempts the Commission's QF monitoring program to the extent the program authorized utilities to make

2. Order No. 471 states how FERC will determine whether natural gas may be classified as waste within the meaning of Section 201 of the Public Utility Regulatory Policies Act of 1978 (PURPA).

determinations of QF compliance with FERC operating and efficiency standards, to reduce payments for power deliveries from a QF, or to disconnect a QF from parallel operation. The program is not preempted to the extent it provides for QF submission of monitoring data to utilities. (Independent Energy Producers Association, Inc. v. California Public Utilities Commission (9th Cir. 1994) 36 F.3d 848.)

2. Motion for Partial Dismissal

2.1 Red Top's Motion

On October 28, 1994, Red Top filed a motion for partial dismissal. Red Top argues that federal preemption of the Commission's QF monitoring program means the Commission no longer has primary jurisdiction over Red Top's rights under the PPA. Rather, Red Top believes it can be fully compensated for its injuries only through a judgment for damages issued by the Superior Court. Red Top asks that in promotion of judicial economy, all issues related to the Commission's federally preempted QF monitoring program be dismissed, including the issues of Red Top's QF status, PPA administration, whether or not PG&E acted in good faith, reformation of the PPA, and damages. Red Top believes the remaining issue for the Commission is whether or not Red Top was eligible to receive discounted prices for gas services under PG&E's Schedule G-COG from 1988 through 1992. As a part of that issue, Red Top asks for dismissal of the gas imbalance penalty matter because of its relationship with PPA administration.

2.2 PG&E's Opposition

PG&E opposes Red Top's motion. PG&E argues that the Court of Appeals decision does not prevent the Commission from determining whether PG&E acted in good faith under the Commission's QF monitoring program. Moreover, PG&E contends that the Commission's factual determinations regarding Red Top's eligibility for discounted gas services under state law will determine whether Red Top can prevail against PG&E in Superior Court, thereby making

moot the granting of Red Top's motion. PG&E believes that the Commission should rule on all issues, including PG&E's good faith in dealing with Red Top under the Commission's QF monitoring program, the amount due for undercharges from 1988 through 1992, the amount due for 1992 gas services billed but not paid, the 1992 imbalance charge and penalty, and whether Red Top's PPA should be reformed. If the Commission grants Red Top's request to dismiss the good faith issue, PG&E asks that it be dismissed with prejudice.

2.3 Discussion

We grant Red Top's motion to the extent we dismiss all issues related to the preempted portions of our QF monitoring program, including whether PG&E acted in good faith in administering the PPA. Except for data collection, the program is preempted. While dismissal is not complainant's right, dismissal is within the discretion of the Commission, and is appropriate here. (D.92-04-027, 43 CPUC2d 639; D.94-11-066, mimeo, p. 9.) Moreover, Red Top seeks damages from PG&E for breach of obligations under the PPA. The relief sought is beyond that which we may award. Therefore, partial dismissal is reasonable.

PG&E asks that dismissal of the good faith issue be with prejudice. A dismissal with prejudice in these circumstances would be equivalent to an adjudication and denial on the merits. Since we neither address nor decide the merits, dismissal is without prejudice.

The federal QF program does not contain any provisions for discounted gas rates to cogenerators. Rather, discounted gas rates are provided under state law. Neither party disputes our jurisdiction to address gas rate issues. We do not dismiss this proceeding as it pertains to gas rate issues.

Red Top, however, requests dismissal of the gas imbalance penalty issue. The imbalance charge and penalty are assessments for gas that were required to be, but were not, provided by Red Top

to PG&E in accordance with PG&E's gas transportation service tariffs.[3] Red Top argues that it was PG&E's unreasonable behavior in QF monitoring program implementation--which Red Top seeks to address in its case in Superior Court--that caused Red Top to incur the imbalance penalty. Since the issues are intertwined, Red Top asks that the issue be dismissed so it may pursue its claim in Superior Court. PG&E opposes dismissal but asks that, if dismissed, it be dismissed with prejudice.

We grant in part and deny in part dismissal of the gas imbalance penalty issue. We grant dismissal with respect to whether PG&E acted in good faith, including whether any allegedly unreasonable PG&E actions in its implementation of the QF monitoring program caused Red Top to incur the imbalance penalty. We believe dismissal is reasonable, consistent with preemption of our QF monitoring program and dismissal of the good faith issue. Since we neither address nor decide the merits, dismissal is without prejudice.

We deny dismissal to the extent the imbalance issue is a matter of tariff administration. That is, the imbalance penalty is provided in PG&E's tariffs. Just as we determine what, if anything, is due for gas transportation under the tariffs, we find what, if anything, is due under the tariffs for imbalance services, including penalties. Red Top may pursue its claim for damages against PG&E in Superior Court. Our decision will establish the amount Red Top owes for imbalance services and penalties under the tariff. In recognition of the action in Superior Court, we order PG&E to defer collection of the penalties associated with imbalance

3. The total charge for imbalance services was $148,881.83, including a penalty of $53,571.60, for service from February 16, 1992 through September 30, 1992.

charges from Red Top we find due until the Superior Court issues a final decision.[3] Therefore, the remaining issues are whether or not Red Top was eligible for discounted prices for gas services from 1988 through 1992, payment for gas services in 1992, and payment for imbalance charges and penalties in 1992.

3. Amounts in Dispute

PG&E seeks recovery of $826,653.39. The amounts PG&E believes due and the amount we find recoverable are:

TABLE 1
AMOUNTS IN DISPUTE

YEAR	G-COG Gas Transportation: Difference Between Billed And Corrected Amounts	G-COG Gas Transportation: Amount Billed And Not Yet Paid	Imbalance Charges and Penalty:
1988	$ 9,224.10		
1989	132,398.83		
1990	123,638.09		
1991	97,623.51		
1992	135,606.20	179,280.83	148,881.83
TOTAL			$826,653.39

4. Recovery Period

Red Top argues that whether or not it met applicable standards for discounted gas services, the terms of PG&E's tariff limit backbilling to 12 months. Specifically, according to Red

[3] The total charge for imbalance services was $148,881.83, including a penalty of $22,271.80, for service from February 16,

Top, PG&E tariff Form 79-756 (Cogeneration Declaration) states that if the cogeneration facility does not meet the necessary standards "the gas service will be rebilled for 12 months." PG&E first made demand for payment of alleged Schedule G-COG undercharges by letter dated April 7, 1992, according to Red Top. Therefore, Red Top asserts PG&E is precluded from collecting amounts related to service prior to April 1991.

PG&E contends that D.91-08-036 unambiguously allows utility recapture of past overpayments from power producers for three years prior to the last date for which QF efficiency data is provided. Red Top provided that data to PG&E on August 25, 1991. PG&E believes recovery is allowed back to August 1988. PG&E relies on the 36-month recovery period specified in our QF monitoring program (D.91-08-036). In response to Red Top's reference to Form 79-756, PG&E argues that Form 79-756 is completed by each customer each year and is not controlling because it warrants that the customer agrees to meet the operating and efficiency standards only for that year.

PU Code § 736 sets a three-year recovery period for actions the utility brings in court to recover undercollections. Guided by PU Code §§ 736 and 737, D.86-06-035 (21 CPUC2d 270) required utility tariffs to provide a for three-year limit on collection of undercharges (except for residential customer undercharges resulting from billing or meter errors).

PG&E's tariffs also contain Form 79-756 which provides that "if the (QF's) efficiency does not meet the above standards, the gas service will be rebilled for 12 months." Red Top is correct that the general rule requires us to find in favor of the customer where tariffs are inconsistent or ambiguous (ZIP Inc. v. Pacific Bell (1992). PG&E's Form 79-756 may be inartfully drafted. In this case, however, it does not create ambiguity regarding backbilling. Red Top is comparing apples to oranges. Form 79-756 is an agreement which must be renewed annually to validate

operating and efficiency standards that are measured annually. It refers to the annual efficiency standards set forth in Section 218.5. Its reference therefore to twelve months of rebilling refers to a specific twelve-month process for calculating efficiency. Section 736 is a general statute of limitations provision which allows a utility to recoup overpayment for a prior three year period. In this case, to calculate the overpayment requires a determination of the QF's annual efficiency for each of three years. Any other interpretation of the form's purpose leads to the counterintuitive result that PG&E, on behalf of its ratepayers, could not recover a portion of overpayments from a cogenerator who failed to meet the annual standard. Cogenerators would not normally know whether they have met the annual standard until the end of the annual period, at the end of the year. Because the cogenerator need not notify the utility for 30 days of its failure to meet the standards, Red Top's interpretation would prohibit PG&E from ever collecting for the first 30 days of the annual period, that is, the previous January. Red Top would reduce cogenerator liability even further by limiting PG&E's recovery to the twelve months prior to date of PG&E's notice to the cogenerator, in this case April 1. Neither of these interpretations is reasonable especially in light of the utilities' consistent practice of following an annual retrospective review process which, for ease of administration, mirrors that of the FERC.

We find that PG&E may backbill QFs who do not meet operational efficiency standards and have paid discounted gas prices to which they are not entitled for up to three years. In this case, PG&E may backbill Red Top to October 17, 1988.

5. Undercharges for Natural Gas

Discounted gas prices in PG&E's Schedule G-COG are available to cogenerators in compliance with PU Code § 454.4.[4] Whether Red Top was eligible for the discounted prices and must pay for undercharges from October 18, 1988 through 1992 depends upon whether Red Top's facility met the definition of cogeneration in PU Code § 218.5 for 1988 through 1992. PU Code § 218.5 states:

"'Cogeneration' means the sequential use of energy for the production of electrical and useful thermal energy. The sequence can be thermal use followed by power production or the reverse, subject to the following standards:

"(a) At least 5 percent of the facility's total annual energy output shall be in the form of useful thermal energy.

"(b) Where useful thermal energy follows power production, the useful annual power output plus one-half the useful annual thermal energy output equals not less than 42.5 percent of any natural gas and oil energy input."

Section 218.5(a) is called the operating standard, while § 218.5(b) is known as the efficiency standard. Red Top contends

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4 PU Code § 454.4 reads: "The commission shall establish rates for gas which is utilized in cogeneration technology projects not higher than the rates established for gas utilized as a fuel by an electric plant in the generation of electricity, except that this rate shall apply only to that quantity of gas which an electrical corporation serving the area where a cogeneration technology project is located, or an equivalent area, would require in the generation of an equivalent amount of electricity based on the corporation's average annual incremental heat rate and reasonable transmission losses, or that quantity of gas actually consumed by the cogeneration technology project in the sequential production of electricity and steam, heat, or useful work, whichever is the lower quantity."

that it met both standards in all years, while PG&E argues otherwise.

5.1 Operating Standard

PG&E contends Red Top failed to meet the operating standard in 1990 and 1991. PG&E does not dispute that Red Top met the operating standard in 1992.

5.1.1 Red Top's Position

Red Top and PG&E agree that the Red Top dryer would have needed to operate a minimum of 102 hours in 1990 and 159 hours in 1991 to satisfy the 5% useful thermal energy output requirement. Red Top began keeping logs of drying operations in October 1991 (after the Commission's QF monitoring program was instituted in mid-1991) and no permanent logs of dryer operations were kept for prior years, according to Red Top. Red Top asserts the lack of such records is not significant since it had no contractual or other obligation to keep records.

One of the two dryer operators testified that the dryer was operated 140 to 150 hours in 1990, or 38 to 48 hours more than the minimum necessary. The second dryer operator testified that a lot of grapes were dried in 1990, and the dryer was run "quite a bit." Red Top claims the dryer was operated 246 hours in 1991, or 87 hours more than the minimum necessary.

Red Top contends it had an incentive to produce all the records it could since any records it could find would help establish dryer operation. Based on the records it could locate and the testimony of its witnesses, Red Top argues that it met the minimum operating standard in 1990 and 1991.

5.1.2 PG&E's Position

PG&E asserts that Red Top did not produce credible records supporting dryer operations and should not be allowed to profit from its failure to maintain, keep, and produce those records. PG&E prepared a study based on the meter readings for electricity sold to Red Top for dryer operations. Based on its

study, PG&B concludes that it is not reasonable to find the dryer operated the minimum number of hours necessary to meet the operating standard.

5.1.3 Discussion

Red Top ignores the circumstances of this controversy by asserting that it had no obligation to keep records. A cogeneration facility becomes eligible for benefits by self certification. The facility has access to the data to prove or disprove that it meets applicable standards. Moreover, complainant has the burden of proof in a complaint case. While the absence of records is not itself necessarily fatal to Red Top's case, Red Top retains the burden to prove it met the operating standard. We conclude Red Top failed to meet the operating standard in 1990. Red Top offers testimony based on the dryer operators' recollections of 1990 dryer hours, but has no specific recorded data showing sufficient dryer use. Those same operators both declared under oath in Superior Court, "We did not operate the drying facility much if at all in 1990." Red Top's vice president declared under oath in Superior Court that "Red Top did not operate its drying facilities in 1990."[5] Red Top seeks to explain away these statements by saying that not many hours are needed to meet the operating standard. Also, the statements of the vice president, according to Red Top, was made based on limited information; his understanding that only a few hours of operation might have occurred, his understanding that the number of dryer hours needed to be very large to satisfy the necessary requirements, and his conclusion that the distinction between zero and a very large number was not significant at that time. Nonetheless, Red Top's attempts to rehabilitate its

[5] The Administrative Law Judge (ALJ) took official notice of these declarations by written ruling dated May 10, 1995.

witnesses' declarations under oath to the Superior Court are not convincing, particularly in the face of better evidence.

There were two meters for electricity service to Red Top. One meter served Red Top's turbine generator, while the other served the dryer. PG&E presents a study based on the dryer meter records. The study shows some sales to the dryer in 1990, but, given the amount of electricity used, the dryer could not have operated the necessary number of minimum hours in 1990. Red Top contends that Red Top could have used the Caterpillar generator located at the site to run the dryer at times instead of using power metered by PG&E. According to Red Top, this would explain how PG&E's study failed to detect dryer hours in 1990. We note that while Red Top states the generator "could" have been used, it presents no evidence that it was used. The testimony of Red Top's witness served before hearings regarding this generator was withdrawn at Red Top's request. Red Top raised the generator issue in additional direct testimony at hearing, but Red Top's witness testified he had no records to show the generator was operated. Red Top presented no evidence to show the generator was used by Red Top, or used for the purpose alleged.

Red Top argues PG&E's study assumption of 113 kW minimum dryer demand is excessive. To the contrary, Red Top produced a daily log for November 22, 1990 from which we can estimate the dryer fan alone drew approximately 98 kW. Other motors were used in dryer operations (e.g., conveyor motors) and their energy use was reflected on the same meter. PG&E's assumption of 113 kW is reasonable and supported by Red Top's evidence.

The evidence shows the dryer did not operate in 1990 before September. Based upon the September through December 1990 consumption with no baseload usage assumed (i.e., the most favorable assumption for Red Top), if the dryer was operated the minimum number of hours necessary for 1990, the maximum dryer load could not have been more than 64 kW. Since the November 22, 1990

log reveals that one dryer motor alone drew 98 kW, the dryer could not have reasonably operated the required minimum 102 hours in 1990. Red Top argues there is no evidence that the demand meter was ever tested and was accurate.[6] To the contrary, this was a revenue-grade meter. There is no reason to assume the meter was inaccurate. Moreover, the 113 kW dryer demand estimate derived in part from the demand meter data is supported by the November 22, 1990 daily log. Red Top challenges other elements of PG&E's study, but presents no evidence that other assumptions are more reasonable.

Therefore, the best evidence of dryer operation is from PG&E's study based upon actual electricity sales to Red Top for dryer operations. The study supports the conclusion that the dryer did not operate the minimum number of hours in 1990 to meet the operating standard.

While Red Top has records for 1991 showing 246 hours of dryer operation, we again rely on PG&E's study. PG&E's study shows dryer operation could not have reasonably exceeded 93 hours in 1991. Inconsistencies between Red Top's and PG&E's data support PG&E's conclusion. For example, of the 246 hours of operation claimed by Red Top, Red Top's records show the dryer operated several times more hours in December 1991 than in October 1991. PG&E electricity sales to the dryer, however, were slightly less in December than October 1991. The Red Top and PG&E data are incompatible. The actual readings from a revenue producing electricity meter are more objective and have less room for potential error or bias than the handwritten records and testimony

6 The energy meter for electricity sales to the dryer was supplemented for a time by a demand meter. PG&E used the demand meter readings as one element of its study

presented by Red Top. Red Top contends that dryer operators did not necessarily log all hours, thereby explaining why the records may vary with PG&E's study. The potential inconsistency in data recording by dryer operators is additional reason to rely on the more objective PG&E meter.

Therefore, Red Top did not meet the operating standard in 1990 and 1991, and is not a cogeneration facility for purposes of PU Code §218.5(a) in those years. PG&E is due the difference between billed and corrected amounts for G-COG gas transportation in the amount of $123,638.09 for 1990 and $97,623.51 for 1991.

5.2 Efficiency Standard

Since both parties agree Red Top met the operating standard for 1992, whether Red Top owes PG&E for undercharges in 1992 depends upon whether Red Top met the PU Code §218.5(b) efficiency standard in that year. In addition, undercharges for the period 1988-1990 are also implicated under PU Code §218.5(b). The efficiency standard requires that the useful annual power output plus one-half of the useful annual thermal energy output equal not less than 42.5% of any natural gas and oil energy input. Red Top fails the efficiency standard if all natural gas and oil input is used in the calculation but meets the standard if low-BTU gas is excluded. The issue is therefore whether low-BTU gas should be included in, or excluded from, the fuel input.

Red Top contends that proper interpretation of §218.5(b) requires the exclusion of low-BTU gas based on FERC decisions, Commission filings in federal court, Commission decisions, legislative history, PG&E tariffs, and common sense. Red Top argues that all the low-BTU gas it used was waste gas.

PG&E asserts that low-BTU gas should not be excluded. According to PG&E, state, not federal, decisions are controlling; exclusion of low-BTU gas would not yield a valid determination of cogeneration efficiency; state law provides no evidence of the intent to encourage use of low-BTU gas; the plain language of

§ 218.5(b) requires the inclusion of any natural gas and state law does not extend available rate treatment to nonsolar small power producers.

5.2.1 Federal or State Standards

We must first determine if state or federal decisions control. In its motion for partial dismissal, Red Top states that the Commission has the authority to determine whether Red Top was eligible for discounted gas prices. In its opening brief, Red Top asserts that the commission must yield to the federal standard for treatment of low BTU gas. Red Top claims the one and only efficiency standard to be applied to determine Red Top's entitlement to receive gas at G-COG rates during the entirety of the relevant time period is the federal standard. We disagree.

Red Top points to legislative history, showing that § 218.5 essentially codified D.92792 (5 CPUC2d 650). D.92792 ordered that eligibility for the discounted gas rate was dependent upon the cogeneration facility meeting federal cogeneration operating and efficiency standards. (5 CPUC2d 650, 664.) Red Top argues that § 218.5 must therefore be understood in the context of federal standards and FERC rulings.

To the contrary, as we concluded in 1989, any definition of cogeneration we might have used before the addition of § 218.5 is superseded by § 218.5. (See Resolution G-2880, September 27, 1989.) Neither § 218.5 nor § 454.4 include specific reference to federal law or FERC regulations. Had the legislature intended a direct link of the discounted gas rate to compliance with federal law or regulations, it could have so provided. It did not.

Taken to its logical conclusion, Red Top would vest authority with FERC, rather than the Commission, to determine eligibility for discounted gas transportation rates authorized under state law. Neither FERC nor the Commission accepts this position. This jurisdictional issue arose in a proceeding at FERC (U.S Department of the Navy, 69 FERC ¶ 61,304 (1994)). Among other

things, Navy requested that FERC waive the efficiency standard for cogeneration facilities required by § 218.5. We intervened, stating among other things that:

> "Neither Section 218.5 nor Section 454.4 of the California Public Utilities Code refer to or depend on FERC regulations or federal statutes administered by FERC. In particular, neither Section 218.5 nor Section 454.4 refer to or depend on the FERC's certification of QFs or FERC's efficiency standards for cogeneration QFs." (Notice of Intervention, Motion for Summary Disposition and Alternatively Protest of the Public Utilities Commission of the State of California, October 21, 1994, pp. 3-4.)

FERC agreed, saying:

> "We agree with the CPUC that this state standard...is subject to state, not federal, jurisdiction; accordingly, we are without authority to waive the state standard." (69 FERC ¶ 61,304 at 62,173.)

Red Top cites a recent Commission filing in District Court to argue that the Commission has expressly acknowledged eligibility for G-COG service is determined by reference to the federal QF standards.[7] Red Top misunderstands our statement. We said:

> "In contrast, plaintiffs' language (to which we object) is ambiguous because it could be interpreted to mean that FERC has exclusive authority to determine compliance with federal standards for purposes having nothing to do with PURPA. For example, in California, federal standards have been incorporated into state law and regulations in order to give those facilities meeting such standards a discount on their gas rates

[7] This filing presents objections to a proposed order to be issued by the District Court pursuant to a remand from the Court of Appeals in Independent Energy Producers Association, Inc. v. California Public Utilities Commission (9th Cir. 1994) 36 F.3d 848.

Pub. Util. Code §§ 454.4, 454.6 (Utilities are currently authorized by the CPUC, consistent with state law, to determine a QF's compliance with these standards in order to confer this state benefit. By failing to clarify that FERC determines QF status for the purpose of entitling QFs to the benefits of Section 210 of PURPA (a federal benefit), plaintiffs' language could be construed as giving FERC exclusive authority to determine compliance with state standards, mirroring federal standards, for the purpose of entitling QFs to a state benefit, and effectively giving FERC the authority to enforce state law. The clarifying language supplied by the defendants avoids potential litigation over this issue and is consistent with the scope of Ninth Circuit's mandate. (CPUC's Objections and Exceptions to Plaintiff's Proposed Form of Order, December 2, 1994, pp. 3-4, filed in the United States District Court for the Northern District of California, Case No. C-91-2644 MHP, pursuant to a remand from the Court of Appeals in Independent Energy Producers Association, Inc. v. California Public Utilities Commission (9th Cir. 1994) 36 F.3d 848.)

Our statement means that, while state law may incorporate or mirror federal standards, it is nonetheless state, not federal, jurisdiction to enforce state law. Our enforcement includes interpretation of the law. As we observed above, in 1989 we concluded that any definition of cogeneration we might have used before the addition of § 218.5 is superseded by § 218.5. While the legislature has included reference to federal law regarding QFs in some specific statutes (e.g., PU Code § 454.6), it did not do so for the statutes at issue here (PU Code §§ 218.5 and 454.4). Because the legislature could have but did not link discounted gas rates and the cogeneration definition to compliance with federal law or regulations, it is state, not federal, jurisdiction and interpretation of the § 218.5 efficiency standard that must control.

Section 218.5 defines cogeneration differently than does federal regulation.[8] Further, there are differences between the § 218.5 and federal efficiency standards.[9] If the legislature had intended that federal law or federal regulations control, it could have so provided, or explained how to reconcile any differences. The differences between these federal regulations and state codes demonstrate that federal and state programs are not the same. It is state, not federal, jurisdiction to interpret and enforce state law.

Therefore, eligibility for the discounted gas rate is exclusively determined by compliance with state, not federal, law.

5.2.2 Should Low-BTU Gas Be Included in the Efficiency Calculation?

Finding that the Commission has discretion to determine the appropriate efficiency standards for applying gas discounts, we proceed to determine whether low-BTU gas should be included in the calculation of the QF's operational efficiency anticipated by Section 218.5.

Section 218.5 states in pertinent part:

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8 Federal regulation defines cogeneration facility as equipment used to produce electric energy and forms of useful thermal energy (such as heat or steam), used for industrial, commercial, heating, or cooling purposes, through the sequential use of energy. (18 CFR § 292.202(c).) In contrast, § 218.5 defines cogeneration as the "sequential use of energy for the production of electrical and useful thermal energy."

9 For topping-cycle cogeneration, the federal efficiency standard provides that the useful power output plus one-half of the useful thermal output must be no less than 42.5% of the total energy input of natural gas and oil, or, if the useful thermal energy output is less than 15% of the total energy output of the facility, the useful power output plus one-half of the useful thermal output must be no less than 45% of the total energy input of natural gas and oil. (18 CFR § 292.205(a)(2).) Section 218.5 specifies the 42.5% standard in all cases.

> "Cogeneration" means the sequential use of energy for the production of electrical and useful thermal energy. The sequence can be thermal use followed by power production or the reverse, subject to the following standards:...
>
> (b) Where useful thermal energy follows power production, the useful annual power output plus one-half the useful annual thermal energy output equals not less than 42.5 percent of any natural gas and oil energy input.

Red Top argues that PG&E must exclude low-BTU gas from its calculation of Red Top's operational efficiency. In support of its position, it observes that PG&E's tariff expressly applied the federal standard as the appropriate measure of efficiency until August 1, 1991. The FERC has stated that the standard should exclude low-BTU gas for Red Top. In any event, Red Top argues, including low-BTU gas in the calculation is nonsensical because low-BTU gas has no market value and its use conserves of other fossil fuels. The intent of Section 218.5 and Section 454.4, according to Red Top, would not be served by including low-BTU gas in the calculation of Red Top's efficiency.

PG&E argues that state law does not encourage use of low-BTU gas, as Red Top implies, and maintains that the plain language of Section 218.5 requires the inclusion of "any" gas in the calculation.

Section 218.5 defines a "cogeneration" project as one which meets certain efficiency standards. The statute sets forth an efficiency standard that requires the inclusion of "any" natural gas input. The statute is not ambiguous and it does not make an exception for low-BTU gas or any other type of gas. We would only ignore the plain language of the statute for the most compelling of reasons. In this case, Red Top argues that the Legislature could not have intended an interpretation of the statute that would discourage conservation and efficiency. According to Red Top,

PG&E's inclusion of low-BTU gas in the efficiency calculation would do just that by failing to reward the use of low-BTU gas and the associated conservation of a scarce and valuable resource.

To now argue, as Red Top does, that denying it the G-COG gas transportation discount has discouraged conservation and efficiency of a scarce and valuable resource is simply wrong. In this case, applying unwarranted pipeline-quality gas transportation discounts has changed the economics that only encouraged the greater use of pipeline-quality gas over low-BTU gas. The efficient use of a resource should be determined based on the underlying economics of the resource, its substitutes, and the use to which it is put. The misapplication of § 218.5(b) by Red Top in excluding low-BTU gas from the efficiency standard has in fact changed the underlying economics and caused a misallocation of resources, including pipeline-quality gas, over a number of years. This has led to a pattern of consumption for a variety of scarce resources in a lower valued societal use and thus a loss of social welfare that is only partially captured by the recovery of undercharges due PG&E's ratepayers.

Notwithstanding Red Top's expansive view of the statute, we can imagine circumstances where the use of low-BTU gas might otherwise reduce societal welfare. For example, using low-BTU gas could increase air pollution and associated costs to society for cleaning the air. Such an economic externality would represent a societal loss, a circumstance which Section 218.5 could not have intended to promote. We have no evidence of such a circumstance here but make the point to affirm our unwillingness to second-guess a statute where its provisions are clear.

Our interpretation of Section 218.5 implicitly resolves Red Top's position that PG&E's earlier tariff provision required cogenerators to fulfill federal rather than state efficiency standards and its assertion that where a tariff ambiguity exists it must be interpreted in favor of the customer. We have found that

Section 218.5 is controlling in the application of gas discount tariffs and that the plain language of Section 218.5 does not permit the exclusion of low-BTU gas in the efficiency calculation. Neither this Commission nor PG&E may ignore state law on the basis that PG&E's tariffs were ambiguous. Our findings here also obviate the need to determine whether, in fact, a portion of the natural gas fueling Red Top's plant was low-BTU gas because Section 218.5 does not distinguish between low-BTU gas and other fossil fuel inputs. Therefore, Red Top did not meet the efficiency standard during 1988-1992, and is not a cogeneration facility for purposes of PU Code § 218.5(b) for those years. PG&E is due the difference between billed and corrected amounts for G-COG gas transportation in the amount of $9,244.10 in 1988 (from October 16, 1988 through the end of 1988), $132,398.83 in 1989, and $135,606.20 in 1992. These amounts are in addition to those found due PG&E as a result of Red Top's failure to meet the operating standard of PU Code §218.5(a) in 1990 and 1991.

6. 1992 Gas Charges Billed and Not Yet Paid

Red Top does not contest that it owes gas transportation charges in 1992. Rather, Red Top sought to have those charges deducted from the amount it believed it would otherwise recover.[10] We find Red Top owes $179,280.83 for 1992 gas transportation.

7. Imbalance Charges and Penalty

While Red Top argues that PG&E's unreasonable actions implementing the QF monitoring program resulted in Red Top incurring the imbalance charges (particularly the penalty), Red Top presents no evidence that PG&E's calculations and assessment are

[10] Red Top originally sought an order directing PG&E to pay Red Top money plus interest PG&E owed but withheld from Red Top.

inconsistent with the tariff. We find Red Top owes PG&E $148,881.83 for imbalance charges and penalties.

8. Reasonable Repayment Schedule

Finally, Red Top asks that the Commission determine a reasonable repayment schedule of any amounts due. Red Top presents no evidence of a repayment schedule it believes reasonable.

Red Top originally sought relief with the expectation that it would recommence operations. Red Top now says that it is no longer in a position to do so. Without revenue from operations, it is not clear whether Red Top has financial resources to pay the amount we find due. PG&E in its comments to the proposed decision argues that linking collection of both undisputed dollars and amounts resolved in this decision to a final order in the Superior Court action delays and possibly denies recovery of amounts properly due PG&E. We agree. PG&E should commence collection of $773,081.79 from Red Top, provided, however, that PG&E offers Red Top an Amortization Agreement in accordance with PG&E's Gas Rule 11 D.1.a, providing for installment payments for a period not to exceed 12 months. Given the issues pending in Superior Court, PG&E's collection of the $53,571.60 in penalties associated with imbalance charges should be deferred until a final decision of the Superior Court. If the Court makes no order about repayment, upon the final decision of the Superior Court we find PG&E may seek collection of the $53,571.60 of penalties associated with imbalance charges from Red Top.

9. Comments on Proposed Decision

Pursuant to the Assigned Commissioner's May 15, 1996 ruling in this proceeding, parties were given an opportunity to submit comments and reply comments to the draft proposed decision. Red Top and PG&E filed comments on May 22, 1996 and reply comments on May 28, 1996 and May 29, 1996, respectively.

Findings of Fact

1. PG&E's tariffs provide for a three-year limit of PG&E's collection of undercharges from Red Top pursuant to D.86-06-035.

2. PG&E tariff Form 79-756 is an annual agreement that refers to standards which are reviewed annually. Its reference to 12 months of "rebilled" service applies to the twelve months of the annual calculation, not a more general limit on backbilling.

3. PG&E gave notice to Red Top on October 17, 1991 of Red Top's ineligibility for special benefits to cogenerators.

4. Recovery of any amount owed by Red Top to PG&E is due from October 17, 1988 (36 months before October 17, 1991).

5. The best evidence of 1990 and 1991 dryer operations is that based upon actual electricity sales to Red Top for dryer operations.

6. The electricity sales to the dryer are not sufficient for the dryer to have operated the minimum number of necessary hours to meet the cogeneration operating standard in 1990 and 1991.

7. Red Top fails to meet the efficiency standard of § 218.5(b) if all natural gas and oil input is used in the calculation, but meets the standard if low-BTU gas is excluded.

8. Section 218.5 does not permit PG&E to exclude "low-BTU" gas or any other gas from the calculation of operational efficiency.

9. Excluding low-BTU gas from the efficiency standard would not necessarily promote the most efficient use of low-BTU gas.

10. Red Top did not meet operating and efficiency standards of § 218.5 for 1992.

11. Red Top does not contest that it owes gas transportation charges for the years 1988 through 1992.

12. Red Top presents no evidence that PG&E's calculations and assessment of the 1992 imbalance charges and penalties are inconsistent with the tariffs.

13. Red Top presents no evidence of a repayment schedule it believes reasonable.

Conclusions of Law

1. A dismissal with prejudice of the good faith issue in these circumstances would be equivalent to an adjudication on the merits.

2. All issues in this complaint related to the preempted portions of our QF monitoring program should be dismissed.

3. The QF program under federal law and regulations does not provide for discounted gas rates to cogenerators, which are provided under state law.

4. The gas imbalance charge issue should be dismissed with respect to whether PG&E acted in good faith (including any alleged unreasonable PG&E actions in implementing the QF monitoring program); it but should not be dismissed with respect to tariff administration.

5. The backbilling period should be three years, consistent with PG&E's tariffs.

6. Any definition of cogeneration we might have used before the addition of § 218.5 is superseded by § 218.5.

7. Neither § 218.5 nor § 454.4 includes specific reference to federal law or FERC regulations.

8. Discounted gas rate eligibility provided under § 454.4 for cogenerators meeting the definition in § 218.5 is exclusively determined by state law.

9. Low BTU gas should be included as natural gas in the § 218.5 efficiency calculation.

10. Red Top owes PG&E the difference between billed and corrected amounts for G-COG gas transportation in the amount of $9,224.10 for 1988, $132,398.83 for 1989, $123,638.09 for 1990, $97,623.51 for 1991 and $135,606.20 for 1992, $179,280.83 for 1992 gas transportation charges billed but not paid and $148,188.83 for 1992 imbalance charges and penalties.

PG&E should commence collection of $773,081.79 from Red Top, provided that PG&E offers Red Top an Amortization Agreement in accordance with PG&E's Gas Rule 11 D.1.a, providing for installment payments for a period not to exceed 12 months. Given the issues pending in Superior Court, PG&E's collection of the $53,571.60 in penalties associated with imbalance charges should be deferred until a final decision of the Superior Court. If the Court makes no order about repayment, upon the final decision of the Superior Court we find PG&E may seek collection of the $53,571.60 of penalties associated with imbalance charges from Red Top.

12. This order should be effective today to allow timely pursuit of the matter in Superior Court.

O R D E R

IT IS ORDERED that:

1. The motion of Red Top Cogeneration Project, L.P. (Red Top or complainant) for partial dismissal is granted for all matters raised with respect to the qualifying facility (QF) monitoring program, including whether Pacific Gas and Electric Company (PG&E) acted in good faith. The motion for dismissal of the gas imbalance issue is granted with respect to whether PG&E acted in good faith (including whether PG&E actions in its implementation of the QF monitoring program caused Red Top to incur the imbalance penalties) and denied with respect to the issue of tariff administration.

2. PG&E may bill Red Top $773,081.79, provided that PG&E offers Red Top an Amortization Agreement in accordance with PG&E's Gas Rule 11 D.1.a, providing for installment payments for a period not to exceed 12 months. Given the issues pending in Superior Court, PG&E's collection of the $53,571.60 in penalties associated with imbalance charges are deferred until a final decision of the Superior Court. If the Court makes no order about repayment, upon the final decision of the Superior Court PG&E may commence

collection of the $53,571.60 of penalties associated with imbalance charges from Red Top. This proceeding is closed.

This order is effective today.

Dated June 6, 1996, at San Francisco, California.

P. GREGORY CONLON
President
JESSIE J. KNIGHT, JR.
HENRY M. DUQUE
JOSIAH L. NEEPER
Commissioners

Commissioner Daniel Wm. Fessler, being necessarily absent, did not participate.