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Decision 96-10-038 October 9, 1996

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application of San Diego Electric Company (U-902-E) for an Ex Parte Order Approving Modifications to Uniform Standard Offer No. 1 and Standard Offer No. 3.

ORIGINAL

Application 95-11-057 (Filed November 22, 1995)

Application of Southern California Edison Company (U-338-E) for an Ex Parte Order Approving Modifications to Uniform Standard Offer No. 1 and Standard Offer No. 3.

Application 96-01-008 (Filed January 3, 1996)

Application of Pacific Gas & Electric Company (U-39-E) for an Order Approving Modifications to Uniform Standard Offer No. 1.

Application 96-01-014 (Filed January 12, 1996)

PHASE 2 OPINION: REQUEST OF PACIFIC GAS AND ELECTRIC COMPANY FOR ORDER APPROVING SETTLEMENT WITH BERRY PETROLEUM COMPANY

1. Summary

The Commission grants a request by Pacific Gas and Electric Company (PG&E) for an order approving a settlement agreement (Appendix A) between PG&E and Berry Petroleum Company (Berry), a qualifying facility (QF). Under the terms of the settlement agreement, PG&E will execute a new Uniform Standard Offer 1 (USO1) power purchase agreement (PPA) with Berry. The PPA will be subject to the USO1 terms and conditions authorized by the Commission as of December 4, 1995, except that the term of the new agreement will be 15 rather than 30 years. Phase 2 of these consolidated proceedings remains open for consideration of other project-specific issues between the applicant utilities and individual QFs.

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2. Background

For over nine years, Berry or its predecessor has operated a cogeneration facility near Taft, California in conjunction with its oil operations. Berry currently has a Standard Offer 2 (SO2) PPA with PG&E which will expire in January 1997. On December 4, 1995, Berry submitted a signed 30 year USO1 PPA to PG&E. Berry requested a scheduled operating date of January 16, 1997, when the existing SO2 PPA is scheduled to terminate.

In making its request, Berry took the position that PG&E was required to sign the USO1 under then-existing Commission decisions. PG&E took the position that it was not obligated to sign any new PPA for Berry's facility until shortly before the existing SO2 PPA expired. Moreover, PG&E argued, it would be obligated to enter into the then-current standard offer, if any, required by the Commission at that time. PG&E also argued that the tendered USO1 varied in some respects from the USO1 form approved by the Commission and in effect as of December 4, 1995. Finally, PG&E argued that since these applications were filed, there was reason to believe that USO1 would be different when the existing SO2 PPA expired.

On March 19, 1996, Berry filed a prehearing conference statement and stated its interest in and intent to participate in this consolidated proceeding. Following the first prehearing conference on March 27, 1996, PG&E and Berry negotiated at length and reached an agreement resolving their dispute, subject to Commission approval.

3. Discussion

Phase 2 in these consolidated applications deals with project-specific issues. It provides a limited procedure for parties who had entered into negotiations for contracts under the standard offers to pursue their rights before the Commission. The matter is properly before us in these dockets.

On May 31, 1996, PG&E filed a motion for approval of the settlement agreement with Berry. The settlement agreement provides in significant part that PG&E will execute a new US01 PPA with Berry which contains US01 terms and conditions authorized by the Commission as of December 4, 1995. The only exception is that the term of the new US01 will be 15 years, beginning January 16, 1997, rather than 30 years as otherwise provided for US01 as of December 1995. Berry's existing SO2 PPA will continue to govern sales from the facility until that PPA terminates in accordance with its terms. The agreement also provides that within 30 days after PG&E provides Berry a new, executed US01, Berry shall pay PG&E \$50,000.

The settlement agreement now before us would resolve a dispute over whether PG&E must execute a 30-year PPA with Berry. It would avoid the need for litigating whether the PPA tendered by Berry was a standard agreement and whether PG&E was required to execute a US01 more than a year before its commencement date. We are satisfied that the settlement creates no obligation that would not have been required of a US01 executed on December 4, 1995 under then existing requirements. Ratepayers will benefit from the 15-year term since a PPA executed on that date under US01 would

1 The motion was tendered with the title "Pacific Gas and Electric Company's Application for an Order Approving a Settlement Agreement with Berry Petroleum Company." The Docket Office retitled the pleading by substituting the word "Request" for "Application." Rule 44(b) of the Rules of Practice and Procedure defines a motion as "a request for the Commission or the administrative law judge to take a specific action related to a proceeding before the Commission." Since PG&E filed the request for approval of the settlement in an existing proceeding, it is properly considered as a motion.

otherwise allow the QP to select up to a 30-year term. Moreover, the agreement includes a payment of \$50,000, which PG&E will credit to ratepayers. No party filed a response to the motion for approval of the settlement, and there is no indication of any opposition. Based on the circumstances described in the motion and the settlement agreement itself, we are persuaded that the agreement is reasonable and should be approved. PG&E should be eligible for cost recovery in rates of payments made under the PPA authorized by this decision to the same extent that it is eligible for recovery of other USQF payments.

Findings of Fact

1. On December 4, 1995, Berry submitted to PG&E a 30-year USQ1 PPA with a requested commencement date in January 1997. PG&E took the position that it was not obligated to sign any new PPA for Berry's facility until shortly before the existing SO2 PPA expired, that it would be obligated to enter into the then-current standard offer, if any, required by the Commission, and that the tendered USQ1 varied in some respects from the USQ1 form approved by the Commission and in effect as of December 4, 1995. PG&E and Berry reached an agreement resolving their dispute, subject to Commission approval.

4. As of December 4, 1995, PG&E was required to enter into new USQ1 PPAs with a term of up to 30 years in accordance with the decisions of this Commission.

5. The settlement agreement creates no obligation that would not have been required under USQ1 requirements in existence as of December 4, 1995, and it includes a payment of \$50,000 which PG&E will credit to ratepayers.

6. No party filed a response to the motion for approval of the settlement or otherwise indicated any opposition to the settlement.

7. The settlement agreement is a reasonable resolution of the dispute between PG&E and Berry that protects ratepayer interests.

8. It is reasonable for PG&E to recover rates, in the same manner and to the same extent as other reasonably incurred payments, all payments to Berry under any new USO1 signed by Berry and PG&E pursuant to the settlement agreement through the Energy Cost Adjustment Clause or any other rate-making mechanisms established by the Commission including mechanisms for transition cost treatment established pursuant to Rulemaking (R.) 94-04-031/Investigation (I.) 94-04-032.

9. Any recovery of payments under the new USO1 is subject to Commission review of the reasonableness of PG&E's performance and administration of its obligations and exercise of its rights under the new USO1. ^{in addition} otherwise, any new USO1 signed by PG&E and Berry pursuant to the settlement agreement is not subject to further reasonableness review.

Conclusions of Law

1. The settlement agreement between PG&E and Berry is reasonable and should be approved.
2. The motion of PG&E for approval of the settlement agreement should be granted effective the date hereof.

O R D E R

IT IS ORDERED that:

1. The May 31, 1996 motion of Pacific Gas and Electric Company (PG&E) docketed with the title "Pacific Gas and Electric Company's Request for an Order Approving a Settlement Agreement with Berry Petroleum Company" is granted as provided herein.
2. PG&E shall, upon request and in accordance with the terms and conditions of the Settlement Agreement attached as Appendix A, execute a new Uniform Standard Offer 1 with Berry Petroleum Company

(Berry) in connection with Berry's cogeneration facility near Taft, California. PG&E shall, upon providing such Uniform Standard Offer 1 to Berry, file a report in this docket which advises the Commission of that fact and which sets forth the means by which it will credit to ratepayers the \$50,000 payment from Berry. Phase 2 of these consolidated applications shall remain open for consideration of project specific issues between applicant utilities and individual Qualifying Facilities.

This order is effective today, established by the Commission on October 9, 1996, at San Francisco, California.

Any recovery of payments under the new USO1 is subject to Commission review of the reasonableness of PG&E's performance and

GREGORY CONLON
President
DANIEL W. PESSLER
JESSIE J. KNIGHT, JR.
HENRY M. DUQUE
JOSIAH L. NEPPER
Commissioners

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2. The notion of PG&E for approval of the settlement agreement should be granted effective the date hereof.

O R D E R

IT IS ORDERED that:

1. The May 31, 1996 notion of Pacific Gas and Electric Company (PG&E) docketed with the file "Pacific Gas and Electric Company's Request for an Order Approving a Settlement Agreement with Berry Petroleum Company" is granted as provided herein.
2. PG&E shall, upon request and in accordance with the terms and conditions of the Settlement Agreement attached as Appendix A, execute a new Uniform Standard Offer 1 with Berry Petroleum Company.

SETTLEMENT AGREEMENT

THIS SETTLEMENT AGREEMENT (the "Agreement") is made and entered into effective as of the ___ day of May, 1996, by and between **PACIFIC GAS AND ELECTRIC COMPANY ("PG&E")**, a California corporation, and **BERRY PETROLEUM COMPANY**, a Delaware corporation ("**Berry**"). PG&E and Berry are sometimes referred to herein collectively as the "**Parties**".

Recitals

A. On December 4, 1995, Berry submitted to PG&E a modified version of a Uniform Standard Offer 1 (USO1) Power Purchase Agreement ("PPA"), which sought to establish the future terms and conditions for the sales of electricity from Berry's electric generation facility near Taft, California (the "facility"). Berry asked PG&E to execute this USO1 for a thirty year term, with the scheduled operation date beginning on January 16, 1997, when the existing Standard Offer 2 PPA between PG&E and Berry is scheduled to terminate. Berry took the position that under existing decisions of the California Public Utilities Commission ("CPUC") PG&E was required to sign the USO1 tendered by Berry.

B. PG&E disagreed with Berry's position, and argued that it was not obligated to sign any new PPA for Berry's facility until shortly before the existing PPA had expired, and at that time its obligation would be to execute the then-available USO1 (if any) as required by the CPUC. PG&E also argued that the USO1 tendered by Berry varied in some respects from the USO1 form approved by the CPUC and in effect as of December 4, 1995.

C. In November, 1995, San Diego Gas and Electric Company filed an application with the CPUC seeking to change the terms of USO1 from an agreement for up to thirty years in duration to an agreement with a one year term, which could renew from year as directed by the CPUC. PG&E filed a similar application with the CPUC in January 1996, and Berry intervened in and has actively participated in that proceeding (the "USO1 docket").

D. PG&E and Berry have negotiated at length, and have reached an agreement to resolve their dispute about whether PG&E must sign a new PPA with Berry at this time, and if so, what the term of that PPA should be ("the dispute"). This Agreement is the complete and entire agreement resolving that dispute.

E. PG&E, other utilities, and various intervenors in the CPUC USO1 docket have reached a tentative settlement which the parties hope will resolve general issues concerning the terms of prospective USO1 PPAs for other Qualifying Facility power projects. PG&E and Berry hope to seek CPUC approval of this Agreement in accord with the USO1 settlement proceedings before the CPUC.

NOW, THEREFORE, in consideration of the mutual promises and obligations stated herein, and other good and valuable consideration, the receipt of which are hereby acknowledged, the parties, intending to be legally bound, hereby agree as follows:

1. New USOI PPA. PG&E will execute a USOI PPA with Berry for the output of the facility, which contains the USOI terms and conditions authorized by the CPUC as of December 4, 1995, except that the term of the new USOI will be fifteen years, beginning on January 16, 1997, which is the termination date of Berry's existing PPA. Berry's existing PPA will govern electric sales from the facility until that PPA terminates in accordance with its terms.

2. Condition Precedent. 2.1 The Parties' obligations under this Agreement (other than those in sections 2.2-2.4 below) are conditioned upon the CPUC issuing a ruling in terms satisfactory to each Party stating that the CPUC believes that the terms of this Agreement are reasonable and prudent, that payments to Berry under the new USOI will be recoverable in rates at the time such payments are made, and that payments under the new USOI will be treated the same as other QF costs.

2.2 The Parties shall commence and diligently proceed with the process of seeking CPUC approval as soon as possible, as described in paragraph 2.1. The Parties shall submit on or prior to May 31, 1996 a document seeking approval of this Agreement. PG&E and Berry shall cooperate fully in such process. After the CPUC issues a decision on this request for approval, each Party shall promptly inform the other Party whether the terms in that ruling are satisfactory to it.

2.3 If the CPUC does not approve this Agreement on terms satisfactory to each Party, either Party may notify the other that the rights and obligations under this Agreement, including the release of claims provided for in paragraph 4 below and the obligation contained in paragraph 1 above, will terminate. At that point, each Party will have all the rights they had prior to the execution of this Agreement as to the subject of the dispute.

2.4 While the Parties seek approval of this Agreement, Berry will not oppose the settlement principles which have been submitted to the assigned Administrative Law Judge to resolve the general issues as to USOIs tendered after April 16, 1996.

3. Payment By Berry. Within 30 days after PG&E provides an executed new USOI approved by the CPUC to Berry, Berry shall pay PG&E \$50,000. This amount shall be paid either by a check to PG&E or by an offset against power purchase payments otherwise due to Berry from PG&E, at PG&E's election.

4. Release of Claim By Berry

4.1 Upon CPUC approval and PG&E providing to Berry a signed USOI per this Agreement, Berry hereby waives and releases any and all claims, causes of action, damages, or other rights it may have against PG&E as a result of PG&E's refusal to sign the USOI tendered to Berry. Berry also waives any claim that PG&E is obligated to sign a PPA for a term longer than that specified in paragraph 1 above.

4.2 Berry acknowledges that this release as stated in section 4.1 resolves matters which could involve disputed issues of law and fact, and Berry fully assumes the risk that the facts and the law may be other than it believes. Seller expressly waives all rights under California Civil Code section 1542, which provides as follows: "A general release does not extend to claims which the creditor does not know or suspect to exist in his favor at the time of executing the release, which if known by him must have materially affected his settlement with the debtor." Berry, being aware of such code section, hereby expressly waives any rights it may have thereunder, as well as under any other statutes or common law principles of similar application as they may relate to section 4.1 of this Agreement.

5. Choice Of Law

This Agreement shall be governed by and construed in accordance with the laws of the State of California, excluding any choice of law rules that direct the application of the laws of another jurisdiction.

6. Modification

This Agreement may be amended or modified only by a written instrument signed by the authorized representatives of both PG&E and Berry.

7. Captions

Captions are included herein for ease of reference only. The captions are not intended to affect the meaning of the contents or scope of this Agreement.

8. Non-Waiver

Failure by PG&E or Berry to enforce any right or obligation with respect to any matter arising in connection with this Agreement shall not constitute a waiver as to such matter or any other matter.

9. Interpretation

No provision of this Agreement shall be interpreted for or against PG&E or Berry because PG&E, Berry, or their respective attorneys drafted that particular provision.

10. No Third Party Beneficiaries

This Agreement is entered into for the express benefit of PG&E and Berry. This Agreement is not intended, and shall not be deemed to create any rights or interests whatsoever in any other person, including without limitation, any right by a third party to enforce the terms of this Agreement.

11. Entire Agreement

This Agreement is intended as a final, complete, and exclusive statement of the agreement among PG&E and Berry with respect to the terms of the Agreement. This Agreement integrates and supersedes all prior negotiations, correspondence, understandings, and agreements among PG&E and Berry with respect to its subject matter.

IN WITNESS WHEREOF, the parties have caused this Agreement to be executed by their duly authorized representatives.

PACIFIC GAS AND ELECTRIC COMPANY
a California corporation

By: [Signature]
Name: P. James Macias
Title: VP & GM, Electric Transmission
Date Signed: May 21, 1996

BERRY PETROLEUM COMPANY
a Delaware corporation

By: [Signature]
Name: Michael R. Starzer
Title: Vice President, Corporate Development
Date Signed: May 21, 1996

No provision of this Agreement shall be interpreted for or against PG&E or Berry because PG&E, Berry, or their respective attorneys drafted that particular provision.

(END OF APPENDIX A)