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Decision 97-05-074 May 21, 1997

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

ORIGINAL

Kramer Junction Company, et al.,

Complainants,

v.

Pacific Gas and Electric Company,

Defendant.

Case 96-08-060
(Filed August 26, 1996)

OPINION

Summary

The Commission adopts a settlement agreement between Kramer Junction Company (KJC) and LUZ Solar Partnerships III through VII (LSP), and Pacific Gas and Electric Company (PG&E), referred to collectively as the Parties.

KJC/LSP operates five solar electric generation units (SEGS Projects). PG&E provides natural gas transportation to those facilities pursuant to Public Utilities (PU) Code § 454.6 and PG&E tariff Schedules G-PO3/G-EPO,[1] which provide a discounted rate subject to the condition that fossil fuel (gas) usage in such facilities does not exceed 25% of the total energy input in a calendar year.

The Federal Energy Regulatory Commission (FERC) granted KJC/LSP an exemption from the 25% requirement for a limited time and KJC/LSP operated its facilities within the parameters prescribed by the FERC exemption. Section 454.6 and Schedules G-PO3/G-EPO do not address such a FERC exemption. PG&E contends that

[1] For part of the 1992-1993 period, the discounted tariff was known as G-PO3 and then as G-EPO. They are referred to herein collectively as G-PO3/G-EPO.

KJC/LSP operated its facilities in violation of § 454.6 and Schedules G-PO3/G-EPO. Therefore, PG&E backbilled KJC/LSP an additional $1,720,536.16.

As part of the settlement, KJC/LSP agrees to pay PG&E $1,360,000 and continue to exclusively use PG&E gas transportation service through June 30, 2001.

Background

In 1978, Congress enacted the Public Utility Regulatory Policies Act (PURPA), which encourages non-utility companies, such as the Solar Partnerships,[2] to produce electricity from a class of alternative energy producers called qualifying facilities (QFs). As originally enacted, PURPA provided for two types of QFs: (i) small power production facilities, which produce electricity by using primarily waste, biomass, geothermal or renewable resources, such as solar energy, and (ii) cogeneration facilities, which produce electricity and steam or other forms of useful thermal energy. QFs are principally entitled to two benefits, the payments for electricity equal to the purchasing utility's full avoided cost and exemptions from regulation under the Public Utility Holding Company Act and the Federal Power Act. In order to qualify as a QF and to receive these benefits, QFs must comply with certain technical requirements and the restrictions on public utility and public utility holding company ownership set forth in PURPA and the FERC regulations implementing PURPA. (18 CFR Part 292.)

According to FERC's regulations, a solar small power production QF may utilize some fossil fuel, such as natural gas, to maximize the use of solar energy in the production of electricity, but its fossil fuel use may not exceed "25 percent of the total energy input of the facility" during any calendar year . (18 CFR § 292.204(b)(2).)

FERC has the authority to waive the 25% fossil fuel use standard under its "general authority to waive Commission regulation where doing so would be in the public interest." (*Nelson Industrial Steam Company*, 39 FERC ¶ 61,201 (1987); 16 U.S.C.

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[2] The Solar Partnerships are five California limited partnerships, each of which is an owner of one of five solar projects, commonly known as the "SEGS Projects." KJC became the managing general partner of the Solar Partnerships after the original developer, operator and manager of the SEGS Projects, LUZ International, Ltd., became bankrupt.

Section 835h; *Kramer Junction Company et al.*, 61 FERC ¶ 61,309 (1992). The effect of a temporary waiver is that the QF is deemed to be in compliance with FERC's 25% fossil fuel use limitation during the period of the waiver even though the QF technically would violate the standard.

Recognizing the benefits associated with solar electric generating facilities like the SEGS Projects, the California Legislature, in 1987, provided an additional benefit to such facilities. Specifically, the California Legislature made solar electric generating facilities eligible to purchase gas from PG&E (and other gas utilities under the jurisdiction of the Commission) at the same rates these gas utilities make gas available to electric utilities, such as PG&E's electric department. (PU Code § 454.6.[3])

PU Code § 454.6 provides as follows:

> "(a) The commission shall establish rates for gas utilized in solar electric generation station technology projects at not higher than the rates established for gas utilized as a fuel by an electric plant in the generation of electricity.
>
> "For purposes of this section, a solar electric generation station technology project is a project which utilizes solar energy as the primary fuel in the generation of electricity, uses gas as a secondary fuel constituting 25 percent or less of the total fuel utilized on an equivalent basis, has a natural gas efficiency utilization rate of more than 60 percent, and qualifies as a small power production facility under [PURPA]. ..."

In enacting this legislation, the Legislature wanted to advance the following principal policies: (i) promote non-polluting, renewable solar energy as a preferred resource ; (ii) enhance the competitiveness of solar electric generating facilities;

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[3] PU Code § 454.6 was first implemented with a sunset date of 1993, which date was extended in 1992 to January 1, 1996, and which date was extended again for solar electric generation facilities in operation on January 1, 1995, to January 1, 2001. (*Id.*)

(iii) equalize electric utilities and solar electric generating facilities by removing the artificial gas cost advantage for electric utilities and ensuring that competition occurs on the basis of efficiency; and (iv) equalize solar projects and cogeneration facilities, which receive the same benefit under PU Code § 454. (Assembly Bill (AB) 1631 (Friedman), Assembly Committee on Utilities & Commerce (April 20, 1987), at page 2; AB 1631 (Friedman), Assembly Committee on Utilities & Commerce (May 22, 1987), at page 2; AB 1631 (Friedman), Senate Committee on Energy and Public Utilities (June 30, 1987), at page 1; August 24, 1987 Letters by Assemblymen Terry B. Friedman and Bill Leonard to Governor George Deukmejian.)

PG&E implemented this legislative mandate in Schedules G-PO3/ G-EPO as follows:

> "A solar electric generation project utilizes solar energy as the primary fuel in the generation of electricity, uses gas as a secondary fuel constituting 25 percent or less of the total fuel utilized on an equivalent basis, has a natural gas efficiency utilization rate of more than 60 percent, and qualifies as a small power production facility under [PURPA]. This schedule will not be applicable to such projects after January 1, 1996."

The SEGS Projects are certificated by FERC as small power production QFs and collectively supply 150 megawatts (MW) of solar generated electricity to Southern California Edison Company (Edison) at peak periods pursuant to standard power purchase contracts approved by this Commission.

The sun's direct normal radiation is generally insufficient to permit the SEGS Projects to operate at maximum levels. The SEGS Projects use natural gas to supplement solar energy to maximize the efficient use of the plant, particularly when electricity is needed the most on Edison's system.

Since 1987, KJC/LSP has purchased natural gas transportation service from PG&E under Schedules G-PO3/G-EPO and pursuant to PG&E's standard Natural Gas Service Agreements (the Gas Contracts). During 1992 and 1993, KJC/LSP paid PG&E approximately $11 million for this service.

In June 1991, Mount Pinatubo, a long-dormant volcano located in the Philippines, erupted. The eruption released an estimated 20 million tons of sulfur dioxide, and created a world-wide atmospheric layer of sulfuric acid droplets and ash. This had the effect of scattering sunlight and producing a dramatic reduction in the amount of direct solar radiation essential to provide solar power production.

By early fall 1992, it was clear that the Mount Pinatubo eruption had adversely affected the SEGS Projects, and generation was between 54% to 69% of expected generation based on an average of 30 years of direct normal solar radiation.

Due to the decrease in direct radiation and the resulting loss of generation, each of the Solar Partnerships was estimated to lose approximately $1.7 million in revenues from the sale of electricity during the 1992 calendar year alone, for a total estimated loss in 1992 approaching $8.5 million.

Because of the reduction in electricity generation levels, on October 6, 1992, KJC/LSP requested FERC to grant a limited waiver of the 25% fuel use limitation to enable the SEGS Projects to generate as much electricity, through the use of natural gas, as they would have generated in the absence of the effects from the Mount Pinatubo eruption.

At the time KJC/LSP petitioned for the waiver, it was in full compliance with the fossil fuel use limitation under federal and state law.

In petitioning for the waiver, the KJC/LSP specifically limited the requested relief to a period of 120 days during which the SEGS Projects could generate an additional 100 million kWh to offset the effect of the Mount Pinatubo eruption.

On December 4, 1992, FERC granted KJC/LSP's request for a temporary waiver of the 25% fuel use limitation, stating:

> "...we believe that [a] waiver should be considered under appropriate circumstances in order to encourage others to come forward with the latest novel technologies without undue fear of being straddled with the arbitrary enforcement of technical regulations.... We believe that whatever effect, if any, the grant of a limited waiver in these circumstances will have on our future implementation of the fossil fuel use limitation is more than offset by the very real effect [the] waiver will

have on the development of this emerging technology." (61 FERC ¶ 61,309 (1992), 1992 FERC LEXIS 2982, at *18.)[4]

Position of KJC/LSP

Following receipt of the waiver, between December 4, 1992 and early April, 1993, the SEGS Projects burned the additional gas necessary to generate the FERC-authorized 100 million kWh. In connection with the additional gas burn, KJC/LSP regularly provided solar and gas use data to both Edison and PG&E.

KJC/LSP states that by limiting its additional gas burn to the amount authorized by FERC, it believed in good faith that the Solar Partnerships had complied with the requirements of the waiver and PU Code § 454.6, that the Solar Partnerships were eligible for gas service under Schedules G-PO3/G-EPO and that the Solar Partnerships were otherwise in full compliance with their obligations under the Gas Contracts.

KJC/LSP argues that as a matter of state policy and in order to apply Schedules G-PO3/G-EPO fairly and consistently with the underlying legislative intent, the FERC-authorized additional gas burn should not be considered in calculating the 25% fossil fuel use limitation. KJC/LSP contends that the federal and state limitations have always been calculated in a consistent manner to advance the underlying policy objectives shared by the federal and the state statutes. Otherwise, according to KJC/LSP, the Solar Partnerships would be unfairly penalized for engaging in the FERC-authorized gas burn.

Further, KJC/LSP argues that if the FERC-authorized burn is not excluded in calculating the 25% fossil fuel use limitation, allowing PG&E to apply the otherwise applicable gas tariff to all of the Solar Partnerships' gas burn unreasonably

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[4] On July 6, 1993, FERC clarified its July 1992 order to provide that during the 120-day waiver period, additional gas-fired generation would be limited to 100 million kilowatts hours (kWh). (64 FERC 61,025 (1993), 1993 FERC LEXIS 1351, at *12.)

disadvantages the Solar Partnerships for burning the additional gas authorized by FERC. Accordingly, KJC/LSP believes that a fair and equitable manner of implementing Schedules G-PO3/G-EPO would be to require the Solar Partnerships to pay for the additional authorized gas burn at the otherwise applicable higher rate (Schedules G-CS and G-CSP/G-FT) and to pay for the gas within the 25% limitation under the lower rate (Schedule G-EPO).

Position of PG&E

PG&E disputes that KJC/LSP had a good faith or reasonable belief that it complied with the requirements of PU Code § 454.6, or that the Solar Partnerships were eligible for gas service under Schedules G-PO3/G-EPO , or that the Solar Partnerships were otherwise in full compliance with their obligations under the gas service agreements.

PG&E states that in early 1993, KJC/LSP was informed by PG&E that: (a) PU Code § 454.6 limits solar electric generation facilities use of natural gas to no more than 25% of the total fuel utilized, (b) to receive gas from PG&E under the discounted gas rate the tariff requires KJC/LSP to abide by state standards, (c) FERC's approval of KJC/LSP's waiver request does not override the state requirements, (d) unless the Commission modifies the state requirements, PG&E will require KJC/LSP to repay PG&E for the discount it received during the period of non-compliance with state standards and (e) that the appropriate rate schedule would be G-NR2 because the alternate fuel requirement was still in place. According to PG&E, this notice was given to KJC/LSP in writing on or about February 2, 1993, but the SEGS Projects nonetheless continued to burn fossil fuel in excess of the limitations established in PU Code § 454.6 and Schedules G-PO3/G-EPO.

PG&E argues that KJC/LSP sought, and was granted,[5] very specific relief by FERC: a continuation of its status as a small power production facility under PURPA

[5] (61 FERC ¶ 61,309 (1992); 64 FERC ¶ 61,025 (1993).)

by waiver of the specific FERC regulation limiting fossil fuel use (18 CFR § 292.204(b)(2)). By obtaining this waiver, PG&E points out that KJC/LSP was able to maintain its power production facility status, which is only one of the four elements defining a "solar electric generation project" in rate schedules G-PO3/G-EPO.[6] According to PG&E, KJC/LSP did not seek, nor was it granted, any waiver from FERC of the gas tariff requirements established by this Commission.

PG&E argues that FERC has made it clear, in a very similar case, that FERC is "without authority to waive the state standard." (*United States Department of the Navy*, 69 FERC ¶ 61,304 at 62, 173 (1994).) In that case, the Department of the Navy sought a waiver of FERC's efficiency standard applicable to certain cogeneration facilities and also requested that FERC waive the identical efficiency standard in PU Code § 281.5. The Commission intervened and objected to the Navy's request, arguing that the discount on gas rates is available only to cogeneration facilities as defined by California law and that the FERC cannot waive those requirements. FERC agreed with this Commission and held that, even though California's energy standards were identical to those contained in the FERC regulation, the state standard "is subject to state, not federal, jurisdiction; accordingly, [FERC is] without authority to waive the state standard." (69 FERC ¶ 61,304 at 62,173.)

Further, PG&E points out that the Commission addressed much the same question recently in D.96-03-030, issued June 6, 1996. In that case, the Commission carefully considered the interaction of state standards for discounted gas service (in that

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[6] The four elements for a customer to qualify as a solar electric generation project are: (1) that it utilizes solar energy as the primary fuel in the generation of electricity, (2) that it uses gas as a secondary fuel constituting 25% or less of the total fuel utilized on an equivalent basis, (3) that it has a natural gas efficiency utilization rate of more than 60%, and (4) that it qualifies as a small power production facility under the PURPA of 1978.

case, PU Code §§ 218.5 and 454.4) and the interpretation given by FERC to a cogeneration efficiency standard. The Commission rejected the cogenerator's argument and concluded that "eligibility for the discounted gas rate is exclusively determined by compliance with state, not federal, law." (Mimeo. p. 21.)

Lastly, PG&E argues that the law is clear that tariffs must be inflexibly applied by utilities in accordance with their terms. (PU Code § 532; *Empire West v. Southern California Gas Company* (1974) 12 Cal.3d 805, 809.) Not only is a utility authorized to collect underbilled amounts, it is legally obligated to do so. (*See, Consolidated Fiber Glass Products Co. v. PG&E* (1990) 35 CPUC2d 163.)

The Settlement

On February 18, 1997, KJC/LSP and PG&E filed a joint motion requesting that the Commission approve a settlement agreement (Settlement Agreement) that would settle all issues in this proceeding.

The Parties point out that PG&E provides gas transportation service to KJC/LSP under gas service agreements which, by their terms, are scheduled to expire on June 30, 1997. After that date, KJC/LSP could accept gas transportation service from other suppliers, particularly Mojave Pipeline which passes within one mile of the LSP facilities. LSP is the second largest customer in PG&E's Kern Division, historically constituting a load of about 1,900 mmcf/year and annual revenues of approximately $475,000.

Despite strongly-held opposing views on the issue of the application of § 454.6 and tariffs G-PO3/G-EPO, the Parties were able to achieve settlement by agreeing that KJC/LSP would pay PG&E an additional $1,360,000 for 1992 and 1993 over the approximately $12,600,000 that had already been paid to PG&E during that period. The Parties also agreed that KJC/LSP would continue to use exclusively PG&E service and facilities for all natural gas transportation within the State of California used to serve the SEGS Projects for the four-year period July 1, 1997 through June 30, 2001.

The Parties request that the Commission approve the Settlement Agreement pursuant to Rule 51.1(e) of the Commission's Rules of Practice and Procedure (Rules). Further, the Parties request that the Commission find that the terms of the Settlement Agreement are just, reasonable and prudent and that there will be no disallowance of costs or imputed income as a result of PG&E receiving less than the amounts it might allegedly have recovered from KJC/LSP.

Discussion

The issue is not whether FERC has jurisdiction over the application of § 454.6, or whether it has the authority to waive the state 25% gas limitation which mirrors the federal limitation. Rather, the issue is the application of PG&E's tariffs within the state's regulatory scheme and the conduct of KJC/LSP in this matter. With regard to the latter, there is no dispute that KJC/LSP has complied with PG&E's tariff requirements at all times except for the period covered by the waiver, during which time KJC/LSP was in compliance with the terms established by FERC. Apparently, KJC/LSP acted under the assumption that since the state 25% limitation mirrored the FERC limitation, the FERC waiver was sufficient and neglected to seek a waiver from this Commission concurrently with its FERC filing.

This Commission does not necessarily have to grant KJC/LSP a waiver simply because FERC did so. However, having reviewed the FERC decision, we believe that in granting KJC/LSP a limited waiver from the 25% limitation, FERC considered the same policies that underlay the state legislation. Congress had the same goals in mind when it enacted PURPA that the California Legislature had in mind when it enacted § 454.6 – a desire to encourage the development of renewable, alternative energy resources by, among other things, placing solar electric generating facilities and electric utilities on an even playing field. The rationale for the FERC waiver is clear: in light of the extraordinary event that occurred and in order to encourage the development of that emerging technology, FERC wanted to place the solar projects in the position they would have been in had the event not occurred.

Since the FERC waiver was granted for the same policy considerations that are the basis of the state regulatory scheme, we have no reason to disagree with FERC and we choose not to insist on a mechanical application of PG&E's tariff. Rather, we will exercise our discretion and review the reasonableness of the settlement (PU Code § 532).

Rule 51.1(e) provides that the Commission may approve a settlement, whether contested or uncontested, if the settlement is "reasonable in light of the whole record, consistent with law, and in the public interest."

First, for several reasons, the Settlement Agreement is reasonable in light of the whole record. KJC/LSP disputes that PG&E was entitled to backbill KJC/LSP for funds not previously collected during 1992 and 1993 and the Parties also disagree as to the applicable rate for that backbilling, if any. After vigorous negotiations by both Parties, an equitable compromise was reached and that is reflected in the Settlement Agreement. In sum, the Settlement Agreement obtains an additional payment of $1,360,000[7] even though there was no increase in the cost of service. Further, it secures KJC/LSP as a transportation customer for PG&E for four years with an expected contribution to margin of between $240,000 to $400,000 each year for four years. By maintaining and improving the relationship between PG&E and its customer, PG&E can avoid the possible loss of this customer to an interstate pipeline.

Second, the Settlement Agreement is consistent with law. The Settlement Agreement does not violate any statute or Commission decision. In addition, the Settlement Agreement is consistent with the Commission's long-standing policy favoring settlement over litigation.

Third, approval of the Settlement Agreement is in the public interest. Not only does it give rise to an equitable resolution of issues, but also it allows the Parties and the Commission to conserve the resources that would otherwise be required to litigate this matter. It resolves efficiently and equitably a narrow and unique question of tariff interpretation that is not likely to recur and that would, if litigated, probably involve

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[7] This will be credited to the G-CSP account, successor to G-CS account.

substantial legal expenses to the Parties and disproportionate expenditure of Commission resources. In sum, approval of the Settlement Agreement is in the public interest and satisfies the conditions of Rule 51.1(e).

In addition to meeting the specific requirements set out in Rule 51.1(e), the all-party Settlement Agreement presented meets the policy objectives for all-party settlements as set forth by the Commission in D.92-12-019, 46 CPUC2d 538 (1992). Specifically, the Settlement Agreement commands the unanimous sponsorship of all active parties to the proceeding, the sponsoring parties are fairly reflective of the affected interests, no term of the settlement contravenes statutory provisions or prior Commission decisions, and the Settlement Agreement conveys to the Commission sufficient information to permit the Commission to discharge its future regulatory obligations with respect to the Parties and their interests. In sum, the Settlement Agreement should be approved by the Commission as meeting all necessary requirements for such approval.[8]

Lastly, since this is not the appropriate proceeding to do so, we do not address PG&E's request that there should be no disallowance of costs or imputed income resulting from the Settlement Agreement.

The Settlement Agreement is received into the formal record for this proceeding as Exhibit 1.[9]

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[8] The proposed new Natural Gas Service Agreements (Attachment 4 to the Settlement Agreement) do not require Commission approval because they reflect rates, terms and conditions previously authorized by the Commission. Article 2 of the Settlement Agreement also provides LSP with certain gas service options depending on the Commission's decision with regard to the "Gas Accord" (Application 96-08-043); however, as is readily apparent from Article 2, LSP is entitled to exercise such options only when they involve either "applicable form contracts approved by the CPUC" (Article 2(b)) or options "to the extent those terms are authorized by the CPUC" (Article 2(b)). (See, also, Article 2(c).)

[9] Since the Settlement Agreement is nearly one inch thick, it is not attached to this decision.

Findings of Fact

1. KJC/LSP operates five solar electric generation units (SEGS Projects). PG&E provides natural gas transportation to those facilities pursuant to PU Code § 454.6 and PG&E tariff Schedules G-PO3/G-EPO, which provide a discounted rate subject to the condition that fossil fuel (gas) usage in such facilities does not exceed 25% of the total energy input in a calendar year.

2. In June 1991, Mount Pinatubo, a long-dormant volcano located in the Philippines, erupted. By early fall 1992, the Mount Pinatubo eruption had adversely effected the SEGS Projects, and generation was between 54% to 69% of expected generation based on an average of 30 years of direct normal solar radiation.

3. On October 6, 1992, KJC/LSP requested FERC to grant a limited waiver of the 25% fuel use limitation to enable the SEGS Projects to generate as much electricity, through the use of natural gas, as they would have generated in the absence of the effects from the Mount Pinatubo eruption. KJC/LSP specifically limited the requested relief to a period of 120 days during which the SEGS Projects could generate an additional 100 million kWh to offset the effect of the Mount Pinatubo eruption.

4. On December 4, 1992, FERC granted KJC/LSP's request for a temporary wavier of the 25% fuel use limitation.

5. Following receipt of the waiver from FERC, between December 4, 1992 and early April 1993, the SEGS Projects burned the additional gas necessary to generate the FERC-authorized 100 million kWh.

6. When it applied to FERC, KJC/LSP neglected to apply to this Commission for a waiver of the 25% fuel limitation contained in PU Code § 454.6 and PG&E Schedules G-PO3/G-EPO.

7. PG&E contends that KJC/LSP operated its facilities in violation of § 454.6 and Schedules G-PO3/G-EPO. Therefore, PG&E backbilled KJC/LSP an additional $1,720,536.16.

8. On February 18, 1997, the Parties filed a joint motion requesting that the Commission approve a Settlement Agreement that would settle all issues in this complaint proceeding.

9. The Settlement Agreement is received as Exhibit 1 in this proceeding.

10. As a result of the Settlement Agreement, PG&E will retain KJC/LSP as a transportation customer with an expected contribution to a margin of between $240,000 to $400,000 each year for four years.

Conclusions of Law

1. Rule 51.1(e) provides that the Commission may approve a settlement, whether contested or uncontested, if the settlement is "reasonable in light of the whole record, consistent with law, and in the public interest."

2. The Settlement Agreement offered by the Parties contravenes no statute or applicable Commission precedent.

3. The Settlement Agreement helps carry out important statutory policy directives.

4. The Settlement Agreement, as a whole, is reasonable in light of the whole record, consistent with law, and in the public interest.

ORDER

IT IS ORDERED that:

1. The Settlement Agreement between Kramer Junction Company and LUZ Solar Partnerships III through VII, and Pacific Gas and Electric Company, received as Exhibit 1 in this proceeding, is adopted.

2. This proceeding is closed.

This order is effective today.

Dated May 21, 1997, at Sacramento, California.

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