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BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application of Pacific Gas and Electric Company for Approval of a Power Purchase Agreement with Mariposa Energy, LLC. (U39E)

Application 09-04-001
(Filed April 1, 2009)

ASSIGNED COMMISSIONER'S RULING OPENING A NEW PHASE IN THIS PROCEEDING, PRELIMINARILY CHANGING CATEGORIZATION OF NEW PHASE TO ADJUDICATORY, AND SETTING NEW PREHEARING CONFERENCE

1. Summary

In order to fully address Californians for Renewable Energy, Inc.'s (CARE) petition for modification of Decision (D.) 09-10-017 in Application (A.) 09-04-001, this ruling opens a new phase in this proceeding (Phase 2), changes the categorization of this proceeding to adjudicatory, sets a prehearing conference (PHC) for November 9, 2011, and directs parties to file PHC statements by November 4, 2011. Upon conclusion of the PHC, I will issue a new scoping memo to finalize the categorization, need for hearings, scope and schedule.

2. Background and Procedural History

Pacific Gas and Electric Company (PG&E) was authorized by D.07-12-052, The 2006 Long Term Procurement Planning Decision (2006 LTPP), to procure 800 to 1,200 megawatts (MW) of new generation capacity by 2015. This amount was later increased to 1,112-1,512 MW to adjust for projects that

failed after D.07-12-052 was issued.¹ To obtain the new capacity by 2015, PG&E held a competitive solicitation and signed five contracts totaling 1,743 MW of new capacity from gas-fired combustion turbines. These five contracts are summarized below:

Application	Project Name	New Capacity (MW)	Decision
A.09-04-001	Mariposa	184	D.09-10-017
A.09-09-021	March Landing	719	D.10-07-045
A.09-09-021	Oakley	586	D.10-07-045 D.10-12-050
A.09-10-022	Tracy	145	D.10-07-042
A.09-10-034	Los Esteros Critical Energy Facility (LECEF)	109	D.10-07-042
Total (MW)		1,743	

2.1. The Mariposa Power Purchase Agreement

The first project to be proposed by PG&E and approved by the Commission was the Mariposa Power Purchase Agreement (Mariposa PPA). PG&E filed A.09-04-001 on April 1, 2009, seeking an expedited order by November 2009 in order to ensure that the Mariposa Energy Center would be online by 2012. Protests were timely filed by CARE and the Division of Ratepayer Advocates (DRA). PG&E properly noticed and convened a settlement conference on April 28, 2009. PG&E, DRA, CARE, The Utility Reform Network (TURN), and California Unions for Reliable Energy filed a motion for approval of a proposed all-party Settlement Agreement on September 3, 2009. The Settlement Agreement was uncontested and no evidentiary hearings were held.

¹ D.07-12-052 at 300, Ordering Paragraph (OP) 4 and D.10-07-042 at 17.

D.09-10-017 approved the Settlement Agreement without modification and included several key conditions. The relevant conditions, Condition A and Condition B, that are the subject of dispute are as follows:

- A. The total need to be procured from the 2008 Long-Term Request for Offers will be limited to 1,512 MW under peak July conditions, inclusive of the 184 MW included in the Mariposa PPA.
- B. The balance of PG&E's need authorization (1,328 MW) will be met, but not exceeded, by one application for approval of additional agreements resulting from PG&E's 2008 Long-Term Request for Offers.

2.2. Additional Procurement Pursuant to the 2006 LTPP

In D.10-07-042, the Commission rejected the Power Purchase Agreements (PPA) for the GWF Tracy (Tracy) and the LECEF upgrades and explained that approval of these PPAs along with approval of the Marsh Landing and Oakley projects requested in A.09-09-021, would result in procurement of more MWs than authorized by D.07-12-052 through 2015 and therefore would not comply with the 1,512 MW limit adopted in the Mariposa Settlement. Furthermore, D.10-07-042 found that the MWs attributable to the LECEF and the Tracy project should count toward the MWs specified in that Settlement.² Therefore, D.10-07-042 granted PG&E permission to proceed with the second-ranked Tracy Project and LECEF Project only if future circumstances created an unfilled need for the new capacity authorized by D.07-12-052. If the first-ranked Oakley or Marsh Landing projects were rejected by the Commission, D.10-07-042

² D.10-07-042 at 53.

directed PG&E to proceed immediately with both the Tracy Project and the LECEF Project by filing a Tier 1 compliance advice letter.³

In D.10-07-045, issued in A.09-09-021, the Commission approved the 719 MW PPA for the Marsh Landing project but rejected the 586 MW PPA for the Oakley Project.⁴ Therefore, as required by D.10-07-042, PG&E filed Advice Letter 3711-E on August 4, 2010, to proceed immediately with the Tracy Project and the LECEF Project. The Tier 1 advice letter was approved by the Energy Division on September 1, 2010. Thus, out of a total of 1,743 MW requested by PG&E, the Commission had approved 1,157 MW in new generation procurement (184 MW approved in the Mariposa Settlement in D.09-10-017, 245 MW approved by Advice Letter 3711-E, and 719 MW approved in D.10-07-045).

On August 23, 2010, PG&E filed a petition to modify D.10-07-045 in which PG&E requested approval of the 586 MW PPA for Oakley Project with a new online date of 2016. The original online date was 2014. The Commission approved the Oakley Project in D.10-12-050, for the period 2016 and beyond.⁵

3. CARE's Petition to Modify D.09-10-017

On October 11, 2010, CARE filed a petition for modification of D.09-10-017 claiming that PG&E has violated two key provisions of the Settlement Agreement. Responses to CARE's protest were timely filed by PG&E and DRA.

³ D.10-07-042, OP 2.

⁴ D.10-07-045 at 55, OP 3.

⁵ D.10-12-050 denied PG&E's petition to modify D.10-07-045 but treated, *sua sponte*, the petition as an application and approved the Oakley Project for the period of 2016 and beyond. In D.11-05-049, the Commission modified D.10-12-050 and denied rehearing of D.10-12-050, as modified. Several typographical and clerical errors in D.11-05-049 were corrected by D.11-06-003.

At the time of filing of CARE's petition for modification, D.10-12-050, approving the Oakley Project with a new online date of 2016, had not yet been approved. On January 7, 2011, after approval of the Oakley project in D.10-12-050, then-assigned Administrative Law Judge (ALJ) Angela K. Minkin issued a ruling directing parties to comment on the impact of D.10-12-050 on CARE's petition for modification in this proceeding. CARE, DRA and PG&E filed concurrent opening comments in response to the ALJ ruling on January 28, 2011, and the same three entities filed reply comments on February 18, 2011.

3.1. CARE's Petition to Modify D.09-10-017

CARE states that PG&E has violated the settlement agreement approved in D.09-10-017 because PG&E signed contracts to procure a total of 1,743 MW in new capacity from the 2008 long-term request for offer (LTRFO) process. CARE explains that PG&E filed A.09-10-022 and A.09-10-034 seeking approval of 254 MW in upgraded PPAs and also filed A.09-09-021, in which PG&E sought approval of 1,305 MW from the Marsh Landing and Oakley PPAs. CARE therefore contends that PG&E knowingly violated D.09-10-017. CARE asks that the Commission stay or suspend PG&E's PPA with Mariposa LLC and provide sanctions or penalties against PG&E for violation of the Mariposa Settlement Agreement.

3.2. Responses to CARE's Petition

In its response, PG&E states that it filed A.09-09-021, in which it requested approval of four PPAs from the 2008 LTRFO. The total new general resource MW proposed in A.09-09-021 was 1,305 MW. At about the same time, PG&E filed A.09-10-022 and A.09-10-034, requesting approval of the GWF Tracy transaction and the LECEF. Both of these transactions included new PPAs for upgrades to the GWF Tracy Facility and for upgrades to the LECEF. PG&E

maintains that the upgrade PPAs at issue in A.09-10-022 and A.09-10-034 were not winning offers in the 2008 LTRFO process, but instead were proposed by PG&E as part of an overall approach to novation of contracts with the Department of Water Resources.

PG&E states that CARE raised the Mariposa Settlement in protests to both A.09-09-021 and A.09-10-022 (subsequently consolidated with A.09-10-034), but did not seek to reopen the Mariposa Settlement Agreement approved in D.09-10-017. PG&E contends that the petition for modification is untimely, is not based on new facts, and is prejudicial to both the Mariposa Energy Project and PG&E, since the developer has proceeded with the Mariposa Project. Moreover, PG&E maintains that it complied with the Mariposa Settlement, because it filed a single application requesting approval of 1,305 MW of new generation related to the 2008 LTRFO process and that the 254 MW at issue in the GWF Tracy and LECEF were not offered to meet the need identified in D.07-12-052, the Long-Term Procurement decision.

DRA concurred with CARE and stated that PG&E has violated Condition B of the Mariposa Agreement, because PG&E has requested approval of a total of 1,743 MW in new generation rather than the 1,512 MW approved in D.09-10-017 by the submission of three separate applications (A.09-09-021, A.09-10-022, and A.09-10-034). However, DRA explained that CARE's request for sanctions was premature, since, at that time, the Commission had approved only 1,157 MW in new generation related to the 2008 LTRFO process. DRA continued that if the 586 MW Oakley Project was approved, which it was in D.10-12-050, PG&E will exceed the authorized capacity of 1,512 MW by 231 MW and will thereby breach the Mariposa Settlement Agreement. In that case, DRA recommended that

sanctions be imposed on PG&E for violating the Mariposa Settlement Agreement and such sanctions could include suspension of the Mariposa PPA.

4. Impact of D.10-12-050 on CARE's Petition for Modification

In response to ALJ Minkin's ruling directing parties to comment on the impact of D.10-12-050 on CARE's petition for modification in this proceeding, CARE maintains that PG&E has violated Conditions A and B of the Mariposa Settlement by filing applications requesting approval of 1,743 MW of new capacity through multiple applications. Approval of the Oakley project in D.10-12-505 in no way alters CARE's allegation that PG&E has violated the Mariposa Settlement.

DRA states that, while PG&E had clearly violated Condition B of the Mariposa Settlement Agreement, approval of the Oakley Project in D.10-12-050 results in PG&E violating Condition A by exceeding the maximum amount of resources PG&E was required to procure under the Mariposa Settlement Agreement. Therefore, DRA recommends the Commission impose severe sanctions against PG&E for violating the Mariposa Settlement Agreement including staying or suspending approval of the Mariposa PPA.

PG&E states that, in addition to the application requesting approval of the Mariposa PPA, PG&E filed a single application for approval of the remaining winning offers arising out the 2008 LTRFO. PG&E's request for approval of the GWF Tracy project and the LECEF came through applications involving the novation of certain existing Department of Water Resources PPAs. Furthermore, PG&E contends that approval of the Oakley Project occurred outside of the 2006 LTPP decision need determination, and that CARE cannot argue that PG&E has violated the Mariposa Settlement Agreement when the Commission considered concerns about the 2006 LTPP decision need authorization and decided to

approve the Oakley Project. PG&E argues that the Mariposa Settlement cannot be read to limit the Commission's authority to approve new generation resources, such as the Oakley Project.

5. Potential Violations and Scope of Phase 2

Based upon my initial review of CARE's petition for modification, it is reasonable to open a new phase of this proceeding to consider whether PG&E may have, at a minimum, violated Condition B of the Mariposa Settlement Agreement.

Condition B of the Mariposa Settlement Agreement states:

The balance of PG&E's need authorization (1,328 MW) will be met, but not exceeded, by one application for approval of additional agreements resulting from PG&E's 2008 Long-Term Request for Offers.

Both CARE in its petition for modification and DRA in its comments request that the Commission impose sanctions and/or levy fines upon PG&E for violation of the Mariposa Settlement Agreement. Given the importance that the Commission places on maintaining the integrity of an approved settlement agreement, I agree that this issue warrants further investigation. Therefore, in order to determine whether PG&E has violated the Settlement Agreement, I am opening a new phase in this proceeding (Phase 2). The purpose of Phase 2 is to answer the following questions:

1. Whether PG&E has violated the Mariposa Settlement Agreement;
2. If PG&E violated the Mariposa Settlement Agreement, should PG&E be sanctioned and,
3. If PG&E is sanctioned, how should the penalty be computed and should other sanctions apply?

Public Utilities Code § 2107 sets a \$500 minimum and a \$20,000 maximum fine for each offense, and Section 2107

provides that every day is a separate offense. *The Affiliate Rulemaking Decision*, D.98-12-075, provides further guidance with respect to the factors to be considered in assessing fines. If it is determined that violations did, in fact, occur, we will consider the following factors in assessing a penalty:

- a. How many days did each violation continue?
- b. What harm was caused by virtue of the violations? We consider whether there was physical harm, including harm to the environment; economic harm, either through costs imposed upon victims of the violation or unlawful benefits gained by the utility; and harm to the integrity of the regulatory process. The number of violations is a factor in determining the severity of the harm.
- c. What was PG&E's conduct in preventing, detecting, correcting, disclosing, and rectifying the violation? We will consider PG&E's history of conduct as well as any evidence of its good faith effort to comply.
- d. What amount of fine will achieve the objective of deterrence based on PG&E's financial resources?
- e. What fine or sanction has the Commission imposed under reasonably comparable factual circumstances?
- f. Under the totality of these circumstances, and evaluating the harm from the perspective of the public interest, what is the appropriate fine or sanction?

5.1. Prehearing Conference

A PHC is set for November 9, 2011 commencing at 10:00 a.m., located at the Commission Courtroom, State Office Building, 505 Van Ness Ave., San Francisco, CA 94102. At the PHC, parties will have the opportunity to discuss the proposed scope set forth above as well as the schedule, need for hearings, categorization and other procedural matters relating to Phase 2 of A.09-04-001.

5.2. Prehearing Conference Statements

I direct parties to file and serve PHC statements no later than close of business Friday, November 4, 2011 addressing the following matters:

1. Additions or changes to the scope set forth above; and
2. A proposed schedule containing all suggested elements for resolving this matter including testimony, hearings, etc.

6. CARE's Motion to File Confidential Material under Seal

On February 18, 2011, CARE filed a motion for leave to file confidential material under seal cited in reply comments to ALJ Minkin's January 17 ruling. CARE's motion states that its reply comments contain confidential market value information protected under D.06-06-066 for five contracts that were originally bid into PG&E's 2008 LTRFO. Although not explicitly stated in CARE's motion, it appears that all of the redacted material to which CARE cites is the Direct Testimony of Kevin Woodruff in A.09-09-021 on behalf of TURN. The assigned ALJ has already granted confidential status to this material in A.09-09-021. By ruling issued on September 8, 2010, ALJ Darwin E. Farrar allowed this material to be filed under seal and remain confidential for three years from the date of the Ruling.⁶ Therefore, I grant CARE's motion for leave to file under seal in this proceeding; however, the confidential material in question shall remain protected under the timeframe provided for in that Ruling, i.e., three years from September 8, 2010, the date the Ruling was issued. No further protections shall be granted to the material in this proceeding.

⁶ ALJ Farrar's Ruling of September 8, 2010, issued in A.09-09-021 at 9.

7. Category of Proceeding, Need for Hearing and Ex Parte Rules

I preliminarily set the category of Phase 2 of A.09-04-001 to be adjudicatory and preliminarily determine that evidentiary hearings will be necessary. The purpose of Phase 2 is to consider whether PG&E violated the Mariposa Settlement Agreement, and, if so, what remedies, including the potential levying of fines, should be imposed by the Commission. I will issue a Scoping Memo Ruling for Phase 2 following the PHC to confirm the categorization. Any changes to the need for hearing will be approved by the Commission, pursuant to Rule 7.5. Pursuant to Rule 8.3(b), *ex parte* communications are prohibited.

IT IS RULED that:

1. It is reasonable to consider whether Pacific Gas and Electric Company (PG&E) may have violated Condition B of the Mariposa Settlement Agreement adopted in Decision 09-10-017.
2. A new phase is opened in Application (A.) 09-04-001 (Phase 2) to determine if PG&E is found to be in violation of the Mariposa Settlement Agreement and, if so, to determine appropriate penalties.
3. A prehearing conference (PHC) will be held on November 9, 2011 commencing at 10:00 a.m., located at the Commission Courtroom, State Office Building, 505 Van Ness Ave., San Francisco, CA 94102, to address the scope set forth herein as well as to discuss the schedule, categorization and need for hearings.
4. Parties must file and serve PHC statements by close of business Friday, November 4, 2011 addressing the matters set forth in the body of this ruling.
5. The categorization of Phase 2 of A.09-04-001 is preliminarily determined to be adjudicatory.

6. Hearings are preliminarily determined to be necessary in Phase 2 of A.09-04-001.

7. Ex parte communications are prohibited.

8. CALifornians for Renewable Energy, Inc.'s (CARE) motion for leave to file confidential material is granted; however, the material for which CARE seeks protection is the Direct Testimony of Kevin Woodruff in A.09-09-021 on behalf of The Utility Reform Network. Pursuant to Administrative Law Judge Darwin E. Farrar's Ruling issued on September 8, 2010 in A.09-09-021, the confidential material in question shall remain protected under the timeframe allowed by that Ruling, i.e., three years from September 8, 2010.

9. In addition to being served in A.09-04-001, this Ruling shall be served on the service lists to A.09-09-021 and A.09-10-022 et al. These proceedings shall not be consolidated with A.09-04-001.

Dated October 18, 2011, at San Francisco, California.

/s/ MARK J. FERRON

Mark J. Ferron
Assigned Commissioner