

From: Tisdale, Matthew
Sent: 5/10/2013 12:41:15 PM
To: Allen, Meredith (/O=PG&E/OU=Corporate/cn=Recipients/cn=MEAe)
Cc:
Bcc:
Subject: Re: CONFIDENTIAL: Panoche Awards and Reasoned Decision

Sounds very good. Thanks.

From: Allen, Meredith [mailto:MEAe@pge.com]
Sent: Friday, May 10, 2013 12:37 PM Pacific Standard Time
To: Murtishaw, Scott; Tisdale, Matthew; Fitch, Julie A.; Kersten, Colette; Colvin, Michael
Subject: CONFIDENTIAL: Panoche Awards and Reasoned Decision

CONFIDENTIAL

Scott, Matthew, Julie, Colette, Michael,

I wanted to update you on the recent decision of the arbitrators in the dispute resolution process between Panoche and PG&E. Last week, the arbitrators answered all significant issues in PG&E's favor. The arbitration panel has found that GHG compliance was incorporated into contract pricing and that Panoche understood that it would be responsible for future GHG costs, if a change in law occurred. Attached are the awards and reasoned decision issued by a JAMS panel of three arbitrators with respect to the dispute between PG&E and Panoche. The findings and excerpts from the decision are also noted below.

While PG&E is permitted to share with the CPUC the attached awards and decision, these documents along with the arbitration must remain confidential as they are subject to a protective order between PG&E and Panoche.

Please let me know if you would like more information or would like to schedule a meeting to discuss.

Thanks,

Meredith

Language from the decision:

- o “The Panel is satisfied that the PPA does address GHG compliance costs and assigns Panoche responsibility for those costs.” Page 17
- o Mr. Derman EIF’s lead negotiator “admitted that he understood when the PPA was signed that, pursuant to the PPA’s terms, Panoche was responsible for the cost of complying with future legislation that imposed costs on emitters of GHGs.” Page 17
- o “Panoche was aware that it would be responsible for paying the costs of any change in law that imposed a cost on the Plant because of its GHG emission.” Pages 18-19
- o “The PPA represents a heavily negotiated business arrangement between two sophisticated players in the energy industry. As a result of this deal, PG&E received a long-term contract that met its energy-producing needs at a price that it could accept while minimizing its risks and uncertainties. Panoche, on the other end, secured an immensely lucrative opportunity that, conservatively, promised to triple EIF’s investment in less than ten years or quintuple that investment in just over twenty in exchange for, inter alia, accepting the risk of future uncertainties in the Law. One such future uncertainty – AB 32 and its related cap-and-trade regulations – presented itself early on in the parties’ relationship. Under the terms of the PPA, as evidenced by its plain language, by the parties’ actions throughout their negotiations, and by the documentary and testimonial evidence discussed herein, Panoche knowingly accepted the risks associated with AB 32 and the cap-and-trade regulations, including those risks associated with future compliance costs.” Page 31. Also Panoche’s profit margins at the top of page 9, which it concludes (at page 31) made this an “immensely lucrative” project for Panoche.
- o Finding that PG&E was the prevailing party and therefore we are entitled to recover our “costs and reasonable attorneys’ fees.” Page 31.
- o Footnote 15: “Panoche’s projected profit margins were of such a substantial size, however, that there was still ample room for profit even with GHG compliance costs being considered.”

The award granting PG&E’s claim provides, in relevant part, as follows:

“2. It is hereby declared that the PPA addresses greenhouse gas emissions (“GHG”) compliance costs and assigns responsibility for those costs to Panoche;

3. It is hereby declared that at the time the PPA was signed, Panoche understood that, under the PPA, if there was a future change in the law that imposed a cost on the facility because of its GHG emissions, Panoche would be responsible for paying that cost.”

The award denying Panoche’s claim provides, in relevant part, as follows:

“In its Second Amended Counterclaim, Panoche seeks declarations: “that the PPA does not provide for the recovery of GHG costs, either explicitly or by virtue of a payment mechanism;” and that, “[i]n the alternative, if this Panel finds that the PPA did address GHG compliance costs, PEC seeks a declaration that, under section 3.1(b) of the PPA, PEC would not be required to bear AB 32 GHG compliance costs that exceed an annual average of the greater of \$100,000 per year or \$.50 per kW year.”

The Panel, having heard the witnesses’ testimony and considered the evidence and argument of counsel, hereby rules as follows:

1. Panoche’s request for declaratory relief is denied.”

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