

Decision 17-10-012 October 26, 2017

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application of Pacific Gas and Electric Company (U39E) for a Certificate of Public Convenience and Necessity for the Contra Costa-Oakley Generating Station 230 kV Transmission Line Pursuant to General Order 131-D.

Application 15-06-015

DECISION GRANTING MOTION TO DISMISS WITHOUT PREJUDICE

Summary

Pacific Gas and Electric Company's February 6, 2017 Motion to Dismiss its Application for a Certificate of Public Convenience and Necessity for the Contra Costa-Oakley Generating Station 230 kilovolt transmission line without prejudice is granted. This proceeding is closed.

1. Factual Background

On June 17, 2015, pursuant to §§ 1001 *et seq.* of the Pub. Util. Code¹ and General Order 131-D, Pacific Gas and Electric Company (PG&E) submitted this Application for a Certificate of Public Convenience and Necessity (CPCN Application) for authority to construct a new, approximately 2.4 mile-long, single circuit 230 kilovolt (kV) generation transmission line (tie-line). The tie-line would connect Contra Costa Generating Station LLC's (CCGS's) proposed facility, a 624 megawatt (MW) combined-cycle gas-fired power plant to be

¹ Unless otherwise stated, all subsequent section references are to the Pub. Util. Code.

located in the City of Oakley, California (Oakley Generating Station) to the California Independent System Operator (CAISO) controlled grid.

Prior to PG&E filing this CPCN Application, PG&E, CAISO, and CCGS executed a Federal Energy Regulatory Commission (FERC)-accepted Large Generator Interconnection Agreement (LGIA) that took effect on February 8, 2012.² In its CPCN Application, PG&E claimed it had a legal obligation to interconnect to the new generation facility under the terms of the FERC-accepted LGIA via the tie-line.

Notably, the Oakley Generation Station has been the subject of other proceedings before the Commission and the California Energy Commission (CEC). PG&E filed the CEC 2011 Final Decision and Final Staff Assessment documents for the power plant and tie-line in lieu of filing a Proponent's Environmental Assessment with their CPCN Application.³

PG&E's CPCN Application clarified that PG&E terminated its prior agreement regarding the Oakley Generation Station on October 15, 2014. The prior agreement is referred to as the Amended Purchase and Sale Agreement (PSA) for the Oakley Generating Station. PG&E further asserted that this CPCN Application is not related to the terminated PSA.

² PG&E, CAISO, and CCGS amended this LGIA on September 25, 2014.

³ The CEC Final Staff Assessment identifies the Commission's permitting authority over PG&E reconductoring work that may be required for the power plant to achieve Full Capacity Deliverability Status. It states, "Reconductoring would be a reasonably foreseeable consequence of the OGS [Oakley Generating Station]," and "reconductoring of existing transmission lines owned by PG&E would be licensed by the California Public Utilities Commission (CPUC). Through the CPUC licensing process environmental impacts would be identified and, where necessary, mitigated." CEC Final Staff Assessment at 5.5-9.

On July 22, 2015, the Office of Ratepayer Advocates (ORA) filed a protest in opposition to the CPCN Application and alleged that the CPCN Application was not ripe for consideration by the Commission because, among other reasons, construction of the Oakley Generating Station is suspended. The Delta Diablo Sanitation District (DDSD) filed a response to the CPCN Application on July 24, 2015 and expressed concern about the details of the tie-line easement across DDSD's property. DDSD later resolved its concerns and filed a motion to withdraw its response on September 30, 2016. CCGS filed a response in support of PG&E's CPCN Application.

A prehearing conference was held on September 9, 2015. A scoping memo was issued on October 7, 2016. Parties submitted opening prepared testimony on November 7, 2016 and reply prepared testimony on December 7, 2016.

On or about February 2017, CCGS notified PG&E that it had elected to suspend all work under the LGIA that had not been previously suspended, including work under the CPCN Application on the tie-line.⁴

In response to CCGS's notice to PG&E, on February 6, 2017, PG&E filed a Motion to Dismiss its CPCN Application. In its motion, PG&E stated that it was no longer legally obligated to pursue permitting and related regulatory activities in support of the tie-line.⁵ PG&E further stated that it seeks dismissal of the CPCN Application to avoid the further expenditure of time and resources on a project that no one is proposing to construct at this time.

⁴ PG&E's February 6, 2017 Motion to Dismiss at 1. From the pleadings filed by PG&E and CCGS in this proceeding, it is unclear what type of work, if any, occurred under the LGIA.

⁵ PG&E's February 6, 2017 Motion to Dismiss at 1.

PG&E conferred by e-mail with all parties and was authorized to represent that CCGS and Delta Diablo agreed to a dismissal without prejudice. ORA was not willing to stipulate to a dismissal unless the dismissal was with prejudice.⁶ ORA later filed a response in opposition to PG&E's February 7, 2017 Motion to Dismiss.⁷ ORA's response argued in favor of dismissing the CPCN Application with prejudice.⁸

2. PG&E's Request to Dismiss the CPCN Application is Granted

When an Applicant brings a case before the Commission seeking authority to construct under §§ 1001 *et seq.*, the Commission's decision to grant or deny the request is guided by whether the public interest will be served. *See, e.g., Oro Electric Corp. v. Railroad Com. of California*, 169 Cal. 466 (1915), 1915 Cal. LEXIS 521 (herein *Oro Electric Corp.*).⁹

The Commission applies this same broad public interest test to requests for dismissals of CPCN proceedings in transmission cases and looks to a variety of factors in applying this public interest test, including whether the proposed

⁶ PG&E's February 6, 2017 Motion to Dismiss at 2.

⁷ PG&E's February 6, 2017 Motion to Dismiss at 2.

⁸ ORA February 21, 2017 response at 1.

⁹ The Supreme Court found in *Oro Electric Corp.* that the granting or withholding of a certificate of public convenience and necessity is an exercise of the power of the state to determine whether rights and interests of the general public will be advanced by the prosecution of the enterprise which it is proposed to carry on for service of the public. In *Oro Electric Corp.*, the Supreme Court also addressed the broader question of the local control of the streets and the Commission's power over utilities and how power over utilities may be vested at the same time in different governmental bodies, without one in any way clashing with or interfering with the other. This issue does not arise in the present proceeding.

project is still needed due to a change in circumstances, the amount of resources the Commission has or is expected to expended litigating the case, the need to address important and ripe legal or public policy questions, and other factors.¹⁰

We review the facts of this request under a broad public interest test, consistent with *Oro Electric Corp.*, and apply the Commission's reasoning in the two cases, above, where the Commission dismissed CPCN applications seeking authority under §§ 1001 *et seq.*, for the construction of transmission lines. Both cases support a finding in the present case that dismissal without prejudice is appropriate.

In *Coolwater*, the applicant sought authority to construct a transmission line but later requested dismissal after a significant change in circumstances. The Applicant in *Coolwater* determined that no use for its proposed transmission line was likely due to the imminent retirement of a major generation facility located nearby. In this case, CCGS,¹¹ the developer of the Oakley Generating Station, which has yet to be built and is not presently under construction,¹² requested that PG&E suspend all work under the LGIA related to the tie-line.¹³ This work

¹⁰ See, Decision 15-05-040, *Application of Southern California Edison Company for a Certificate of Public Convenience And Necessity for the Coolwater-Lugo Transmission Project*, 2015 Cal. PUC LEXIS 287 (May 21, 2015) (herein *Coolwater*); See, Decision 12-05-022, *Application of the Nevada Hydro Company for a Certificate of Public Convenience and Necessity for the Talega-Escondido/Valley-Serrano 500 kV Interconnect Project*, 2012 Cal. PUC LEXIS 237 (July 6, 2010) (herein *Nevada Hydro*).

¹¹ CCGS is a wholly owned subsidiary of Radback Energy. In CCGS's July 24, 2015 response in support of PG&E's Application, CCGS describes itself as the "...primary beneficiary of PG&E's proposal to construct, own, and operate the Tie-Line." CCGS July 24, 2015 response in support of PG&E's Application at 2.

¹² CCGS July 24, 2015 response in support of PG&E's Application at 3.

¹³ PG&E Motion to Dismiss at 1.

suspension is a significant change in circumstances and is similar to the facts in *Coolwater*. Neither CCGS nor PG&E have provided a firm date for any continuation of work on the tie-line under the LGIA. In *Coolwater*, the Commission found that, in the absence of any timeline for completing or restarting construction, it would be a waste of the Commission's resources to continue to consider approval of the CPCN for the transmission line. The Commission in *Coolwater* further expressed its hesitation to hold in abeyance the CPCN proceedings while waiting for the Applicant to present a clear and complete proposed transmission project.

Likewise, we find that dismissal of this proceeding is appropriate as it is a waste of the Commission's resources to keep this proceeding open after CCGS informed PG&E that the proposed work on the tie-line under the LGIA is suspended and that work will not move forward by any known date.

3. Dismissal without Prejudice is Appropriate

ORA does not oppose dismissal of this CPCN Application. Rather, ORA argues that dismissal with prejudice is the appropriate outcome in this proceeding. ORA's response to the Motion to Dismiss states, "ORA is not seeking to force PG&E and CCGS to a hearing on a project they no longer wish to build,..." but ORA argues for a dismissal with prejudice.¹⁴

ORA explains that, due to the important legal question first presented in this case, dismissal with prejudice based on the existing pleadings is appropriate. The legal question framed by ORA is whether a CPCN application for a tie-line to a non-existent generation facility can ever be found by the Commission to serve the public interest? ORA also argues that this CPCN Application should

¹⁴ ORA response to PG&E Motion to Dismiss at 8.

be dismissed with prejudice to ensure that the Applicant and CCGS do not abuse the Commission's forum by starting and stopping litigation with no respect for the resources expended by the Commission and parties litigating such cases. ORA further argues that the Applicant and CCGS, by starting and stopping this litigation, have gained a strategic advantage because they now know ORA intends to oppose the CPCN request and PG&E and CCGS are now positioned to prepare a stronger litigating position next time around. For all these reasons, ORA requests dismissal with prejudice and seeks a Commission finding based on the pleadings that a CPCN application for any tie-line to a non-existent generation facility can never be found by the Commission to serve the public interest.¹⁵

The Commission in *Coolwater* did not address the question of the appropriateness of a dismissal with prejudice. All parties in *Coolwater* agreed that, if the Commission dismissed the case, the dismissal should be granted without prejudice. Nor did the Commission squarely address this matter in *Nevada Hydro*. However, both cases address some of the underlying concerns raised by ORA.

ORA raised the issue of wasting the Commission's resources and those of parties if the Applicant refiles at a later date, a result which would be permissible should the Commission dismiss without prejudice. *Nevada Hydro* was clear that the Commission should avoid wasting resources. Likewise, *Coolwater* sought to minimize wasting the Commission's time and resources. Without question, the instant case has resulted in wasted resources. Wasted resources alone, however,

¹⁵ ORA response to PG&E Motion to Dismiss at 3.

does not lead to the conclusion that dismissal with prejudice is appropriate. Under the broad public interest test in *Oro Electric Corp.*, other factors must be considered.

ORA identifies another factor to support a dismissal with prejudice, the potential for ratepayer harm. ORA states:

PG&E has not stated what its recourse is to the continuing obligation to an unending contract for a project that the counter-party has suspended. PG&E's primary obligation to seek approval for the project has been met, and a denial with prejudice would ensure that ratepayers are not indeterminately bound to this project, given the lack of transparency and information on the Applicant's transaction that was presented to Commission staff.¹⁶

The Application filed by PG&E contained a minimal amount of information about the tie-line and a demonstration of its need, and, as such, we agree that PG&E's Application would have benefited from additional information and transparency. In an effort to improve upon this process, we direct PG&E to seek modifications to the LGIA with CCGS, to the extent possible, to avoid this scenario in the future, *i.e.*, the filing of a CPCN application for a tie-line when no fully constructed and operational generation facility will exist to interconnect with that tie-line. We further find that, in the circumstances presented by this CPCN Application, repetitive filings could become overly burdensome to parties.

We reject ORA's argument that, based on the existing pleadings, dismissal with prejudice is legally appropriate here. Instead, we find that it is premature to address the merits of this CPCN Application. This proceeding has not been

¹⁶ ORA response to PG&E Motion to Dismiss at 5.

fully briefed and the prepared testimony has not been subject to cross examination. We also reject ORA's argument that dismissal with prejudice is appropriate due to ORA's loss of its strategic advantage because PG&E and CCGS will now know ORA's litigation position the next time around. We disagree. Based on the rationale that Commission proceedings function best in an atmosphere of full and open exchange of information, we find that ORA will not suffer from a strategic disadvantage should this request be refiled. Lastly, to the extent ORA seeks to dispute any prior authorization by the Commission regarding the Oakley Generating Station, the more appropriate process would be a petition for modification of the underlying Commission authorization, rather than to seek a dismissal of this CPCN Application with prejudice.

For these reasons, this proceeding shall be dismissed without prejudice and PG&E will be directed to seek modifications to the LGIA with CCGS to avoid the filing of a CPCN application for a tie-line when no fully constructed and operational generation facility will exist to interconnect with that tie-line.

3. Comments on Proposed Decision

The proposed decision of the Administrative Law Judge (ALJ) in this matter was mailed to the parties in accordance with Pub. Util. Code § 311 and comments were allowed under Rule 14.3 of the Commission's Rules of Practice and Procedure. Comments and Reply Comments were filed on October 2, 2017 and October 9, 2017. The parties contacted the ALJ on October 10, 2017 via email and requested an opportunity to provide a status update on recent events related to the proceeding. The request was granted, and parties filed status updates, which are attached. No changes to the proposed decision have been made in response to comments or the status update, expect for including the attached.

4. Assignment of Proceeding

Clifford Rechtschaffen is the assigned Commissioner and Regina DeAngelis is the assigned Administrative Law Judge in this proceeding.

Findings of Fact

1. PG&E, CAISO, and CCGS executed a LGIA, effective February 8, 2012, which was amended on September 25, 2014.
2. Consistent with the LGIA, effective February 8, 2012 (as amended on September 25, 2014), PG&E filed this CPCN Application seeking authority to construct the tie-line.
3. On or about February 2017, CCGS notified PG&E that it had elected to suspend all work on the LGIA not previously suspended, including work on this CPCN Application.
4. CCGS and Delta Diablo agreed to a dismissal without prejudice.
5. ORA supported dismissal with prejudice.

Conclusions of Law

1. After CCGS's notice to suspend all work under the LGIA, PG&E was no longer legally obligated under the LGIA to pursue permitting and related regulatory activities in support of the tie-line.
2. PG&E's February 6, 2017 Motion to Dismiss without prejudice its CPCN Application should be granted.

O R D E R

IT IS ORDERED that:

1. Pacific Gas and Electric Company's February 6, 2017 Motion to Dismiss its Application for a Certificate of Public Convenience and Necessity for the Contra Costa-Oakley Generating Station 230 kilovolt Transmission Line without prejudice is granted.

2. Pacific Gas and Electric Company shall seek modifications to the Large Generator Interconnection Agreement with Contra Costa Generating Station LLC, effective February 8, 2012 and amended September 25, 2014, to avoid the filing of a Certificate of Public Convenience and Necessity Application for a tie-line when no fully constructed and operational generation facility will exist to interconnect with that tie-line.

3. Application 15-06-015 is closed.

This order is effective today.

Dated October 26, 2017, at Sacramento, California.

MICHAEL PICKER

President

CARLA J. PETERMAN

LIANE M. RANDOLPH

MARTHA GUZMAN ACEVES

CLIFFORD RECHTSCHAFFEN

Commissioners

ATTACHMENT