

**UNITED STATES OF AMERICA 106 FERC ¶ 63,027
FEDERAL ENERGY REGULATORY COMMISSION**

Pacific Gas and Electric Company

Docket No. ER03-708-000

CERTIFICATION OF UNCONTESTED SETTLEMENT

(Issued March 10, 2004)

TO THE COMMISSION:

INTRODUCTION

1. This is to certify the uncontested offer of settlement (“Settlement”) negotiated between Pacific Gas and Electric Company (“PG&E”) and the California Independent System Operator Corporation (“CA ISO”) in this proceeding. Acceptance of the Settlement is in the public interest.

PROCEDURAL HISTORY

2. On June 30, 2003, the Commission accepted for filing PG&E’s revised rate schedule sheets under several Reliability Must-Run Service Agreements (“RMR Agreements”) with CA ISO, suspended them for a nominal period, to be effective June 1, 2003, subject to refund, and established hearing and settlement judge procedures.

3. This proceeding concerns a dispute between PG&E and CA ISO as to what Capital Item costs incurred by PG&E between 1999 and 2002 may be recovered under rates associated with four Reliability Must-Run Service Agreements (“RMR Agreements”) between PG&E and CA ISO. These agreements provide for updates to capital cost items. In its filing at issue here, PG&E submitted revised rate schedule sheets under four separate rate schedules to recover the capital expenditures for various large and small projects on certain generating units that are now constructed and operational. PG&E proposed to recover the total capital costs of these projects, \$33,302,937, by applying a carrying charge of 17.45%, for an annual revenue requirement of \$5,811,362, which is billed as a surcharge under each RMR Agreement.

4. Capital items were divided into large (over \$500,000) and small (under \$500,000). The parties were unable to reach agreement on certain issues involving the total amount for small Capital items, such as what projects qualified for cost recovery and whether appropriate procedures were followed for processing and approval of these requests. It was contended, *inter alia*, that PG&E’s filing was disorganized and lacked detail so that

projects could not be identified and verified. Other protestors raised similar concerns.

5. The Commission concluded that PG&E's proposed revisions had not been shown to be just and reasonable, but were not substantially excessive, and set the matter for hearing, after allowing the rates to become effective, subject to refund, and a nominal suspension. The Commission stated its belief that the issues raised by Intervenors could best be resolved among the parties. It therefore deferred a hearing on the contested filing and established settlement judge procedures, pursuant to 18 C.F.R. § 385.603 (2003).

6. I was designated Settlement Judge in this proceeding by Order of the Chief Judge, issued July 14, 2003. An initial settlement conference was convened on August 20, 2003, where the parties agreed to exchange project information on spread sheets to narrow the issues in dispute.

7. Subsequent settlement conferences were held on September 11, 2003, and October 8, 2003, where continued progress toward resolution of the issues was made. At the latter conference, the parties reached an agreement in principle and devoted further efforts to development of a settlement agreement. This process resulted in the Offer of Settlement that is certified here. That Offer of Settlement was filed on December 3, 2003. Initial Comments on the Offer of Settlement were received from the Trial Staff of the Commission on January 6, 2004. On January 9, 2004, PG&E submitted an "Errata to Offer of Settlement" to correct an erroneous date in Article V.D.2 of the Offer of Settlement, which was called to its attention by Commission Staff. No reply comments have been received to the Offer of Settlement.

THE OFFER OF SETTLEMENT

8. The Offer of Settlement consists of the following documents: (a) and Explanatory Statement in support of the Offer of Settlement; (b) the Offer of Settlement; (c) Exhibit A to the Offer of Settlement; (d) a draft Commission letter order accepting the settlement; and (e) a certificate of service. As noted, PG&E also filed an Errata to Offer of Settlement to correct an erroneous date. The terms of the Offer of Settlement are described in full in these documents. The substantive provisions are hereinafter summarized.

9. Article I contains a procedural history of this proceeding.

10. Article II states that the Settlement will be effective on the date that the Commission issues an order approving the settlement without modification or condition or, if modified or conditioned, upon the date of acceptance of the parties, as provided in Article VII, below. The effective dates for the revised rates for Capital Item Surcharges in Tables B-2 and B-4 of the Settlement is July 1, 2003.

11. Article III describes the terms of the settled issues.
12. Section A states the agreement of the parties to use \$30,747,244 for large Capital Items as the basis for rates.
13. Section B describes the parties' agreement to revise the Surcharge Payment Factors for the Small Capital Items and to allow recovery of such items in PG&E's RMR rates, as set forth in Exhibit A to the Settlement. Exhibit A contains the revised tariff sheets, including a redline version to show changes agreed upon in this Settlement.
14. Section C notes that the rate schedule sheets in Appendix A reflect the changes agreed upon in the settlement, reflecting both the Annual Capital Cost and Surcharge Payment Factor as determined here. It further notes that the target hours are those accepted in an Offer of Settlement in Docket Nos. ER03-094-000 and ER03-299-000 between PG&E and CA ISO.
15. Section D states that the Settlement represents a "black box" agreement and that the parties agree that all of the Capital items at issue were reasonable and prudent under good utility practice. The parties disputed whether certain items should be included in RMR rates, but the Settlement does not reflect an admission by either party that certain small capital items should or should not be included in RMR rates.
16. Section E conveys the parties' agreement that the inclusion in the instant filing of certain Capital items for informational purposes does not preclude PG&E from seeking their recovery in future filings. They agree as well that CA ISO reserves the right to protest the inclusion of these Capital items in future filings.
17. Article IV presents certain going forward performance agreements designed to avoid future disputes among the parties.
18. Section A provides that the negotiated provisions on this Article are not intended to modify, alter or amend the provisions and requirements of the RMR Agreements, particularly Article 7 and the Article 7 timing requirements.
19. Section B provides that CA ISO will conduct an expeditious and reasonable review of PG&E's Schedule L-1 Capital Items requests, in particular a review by engineers knowledgeable about operation of PG&E's power plants. PG&E commits to provide details on all projects submitted to CA ISO for approval, including, at minimum, a project description. Additional details will be promptly provided by PG&E upon specific request by CA ISO.
20. Section C provides that if the actual cost of a Capital Item is less than the approved cost (including Schedule L-2 modifications), the cost recovery will be limited

to the actual cost of the Capital Item.

21. Section D provides that, if no work is done on an approved Capital Item during a Contract Year, it shall be resubmitted as part of the next year's forecast for approval. Capital items approved and begun but not finished during a Contract Year may be carried over to the following year as an approved item, and do not need to be resubmitted for approval.

22. Section E notes PG&E's agreement that a Capital Item must be in operation to be approved for inclusion in RMR rates, and PG&E's agreement that it must file for and receive approval from the Commission to include a Capital Item in RMR rates.

23. Section F notes PG&E's agreement to use the name that CA ISO assigns to a Capital Item in all subsequent discussions and correspondence relating to that item.

24. Article V concerns implementation of the Settlement.

25. Section A states that, upon Commission approval of the Settlement, all Issues herein shall be resolved.

26. Section B notes that Exhibit A to the Settlement contains revised rate sheets that implement the Settlement.

27. Section C requests that the Commission accept the revised rate sheets, at which time the original filed rate sheets will be deemed withdrawn.

28. Section D concerns refunds. It provides that, except as set forth in this Article, and as covered in the settlement in Docket Nos. ER03-94-000 and ER03-299-000, upon the effective date, PG&E's rates for Calendar year 2003 under the RMR agreements shall no longer be subject to refund and that PG&E shall have no refund obligation with respect to 2003 RMR rates. It also provides that nothing herein shall affect any refund obligation in Docket No. EL02-20-000. It further requires that PG&E refund, with interest, the difference between the amounts paid by the CA ISO as of the effective date and the amounts resulting from this Settlement for July 1, 2003¹ to the effective date. The details and method of crediting for refunds is described in Section D(2)(a) through (c). A detailed refund report is required 15 days after the final refund. CA ISO is required to revise its RMR Settlement Database to reflect amounts actually received by PG&E for each billing month. PG&E is further required to show actual amounts paid for

¹ This date was January 1, 2003 in the Settlement. However, this date was corrected as July 1, 2003 in an errata to the Settlement filed by PG&E on January 9, 2004.

applicable Billing months in the Revised Adjusted Column of Prior Period Change Worksheets. The calculation of the refund amount, the refund actually paid or the accompanying Refund Report shall not include any charge, credit or other adjustment not listed in Article V.D.2(a) through (c).

29. Article VI contains the customary reservation provisions found in settlements, including the parties agreements that the settlement represents a negotiated agreement that cannot be deemed to have precedential value; that the resolution of matters in the settlement shall not be deemed “settled practices” as defined in Public Service Commission of the State of New York v. FERC, 642 F.2d 1335 (D.C. Cir. 1980); that the discussions leading to the Settlement were conducted pursuant to Rule 602(e); and that nothing in the agreement affects the rights of parties with respect to claims that amounts invoiced under the PG&E RMR Agreements do not comply with those agreements.

30. Article VII states the party’s agreement that the Settlement shall not become effective until approved by Commission Order without condition or modification, but establishes a process for review and possible approval of any changes required by the Commission.

31. Article VIII contains miscellaneous interpretation provisions of little substantive import.

COMMENTS

32. Staff supports the settlement, describing it as a fair and reasonable resolution of all of the issues set for hearing by the Commission, and the result of concerted efforts by the parties to negotiate settlement principles and operative language.

33. Staff reports that, under the Settlement, PG&E can recover the cost of large Capital items submitted with its filing. These costs, which total approximately \$30.7 million constitute the bulk of the filing and were essentially undisputed. With regard to the costs of disputed small Capital items, Staff advises that the parties have agreed to modify the applicable Surcharge Payment Factors, which resolves questions about the filing for recovery of these items. The Settlement also makes clear that certain items had been included for informational purposes only, and while recovery for those is not sought here, PG&E reserves the right to seek future cost recovery for these items.

34. Perhaps of most importance, Staff points out that the parties have agreed to certain going forward commitments regarding processing and review of project data, the treatment of postponed and completed projects, and project naming. Confusion about the expected small project approval process was the source of much of the dispute in this case. Staff also notes that the new commitments do not alter the provisions of the RMR agreements themselves.

35. Staff further advises that the Offer of Settlement resolves all of the issues set for hearing in a manner satisfactory to all participants and avoids the expense and delay of litigation. Staff believes that the Settlement does not raise any policy implications, and finds no issues of first impression or reversal, nor does it affect other pending matters. Staff notes that PG&E has stated that the standard of review for the Offer of Settlement is the just and reasonable standard.

36. Staff recommends prompt certification of the Offer of Settlement for the Commission's acceptance.

37. PG&E filed an errata to the Settlement on January 9, 2004. The errata indicates that the Settlement incorrectly stated that the refund period for the Settlement should be from January 1, 2003 to the Effective Date of the Settlement. However, the Commission accepted PG&E's filing and made the rates effective as of July 1, 2003, subject to refund. Thus, PG&E states that the proper refund period should be from July 1, 2003 instead of January 1, 2003.

38. No other comments or reply comments have been received.

DISCUSSION AND CONCLUSION

39. This uncontested settlement provides a reasonable resolution of issues set for hearing in this proceeding that is acceptable to all parties.

- Issues underlying the settlement and the major implications:
At issue here was PG&E's request to recover costs it incurred between 1999 and 2002 related to Capital Items installed on its RMR units. CA ISO disputed the appropriateness of recovery of certain Small project Capital Item costs due to its claimed inability to ascertain whether appropriate approvals had been received and other issues surrounding the process for project identification and approval.

Major implications are limited. A black box settlement resolves recovery issues in this proceeding, and commitments are made to improve the approval process in the future. The result is that PG&E recovers the cost of large Capital items, and small Capital items, as well, but has agreed to a modification of the Surcharge Payment Factors to resolve this dispute. The future process commitments will operate to minimize future disputes of this nature.

- Policy Implications:
No policy implications are raised by the settlement. As noted above, the

instant dispute is resolved to the satisfaction of the parties and commitments are made to improve the process in the future. These commitments simply provide guidance to the parties on the approval process and raise no policy implications.

- Effect on Pending Cases:
The parties are not aware of any pending case that might be affected by this settlement.
- Issues of First Impression or Reversals:
No issues of first impression are involved with this settlement, nor does this settlement reverse previous determinations.
- Standard of Review:
The standard of review for this settlement is the just and reasonable standard.

40. Approval of this settlement will avoid costly litigation, promote administrative efficiency and benefit consumers. Accordingly, the public interest will be served by approval of the settlement.

CERTIFICATION

41. Pursuant to 18 C.F.R. § 385.602(g)(1), the following are certified for the Commission's consideration:

- a. The Offer of Settlement, filed by PG&E on December 17, 2003.
- b. An Explanatory Statement included with the submission on December 17, 2003.
- c. Initial Comments of the Commission Staff, filed January 6, 2004.
- d. The Errata to Offer of Settlement, filed by PG&E on January 9, 2004.
- e. All pleadings, orders, and other documents of record in this proceeding.
- f. The attached Draft Letter Order.

**William J. Cowan
Settlement Judge**

DRAFT

**FEDERAL ENERGY REGULATORY COMMISSION
Washington, D.C. 20426**

In Reply Refer To:

Docket No. ER03-708-000

Pacific Gas and Electric Company
Attn: Charles R. Middlekauff, Esq.
Attorney for Pacific Gas and Electric Company
700 11th Street NW, Suite 250
Washington, DC 20001

Dear Mr. Middlekauff:

1. On December 17, 2003, you filed, on behalf of Pacific Gas and Electric Company (APG&E@) an Offer of Settlement (the ASettlement@) in the above referenced docket. The Settlement resolves all issues between PG&E and the California Independent System Operator Corporation (ACA ISO@) pending in this proceeding, which concerns the addition of certain Capital Item costs to the rates under four PG&E reliability must run (ARMR@) agreements. Initial Comments were filed by Commission Trial Staff on January 6, 2004. On January 9, 2004 PG&E filed an errata to the Settlement. On March 10, 2004, the Presiding Settlement Judge certified the uncontested Settlement to the Commission.
2. The subject settlement is in the public interest and is hereby approved. The Commission's approval of this settlement does not constitute approval of, or precedent regarding, any principle or issue in this proceeding. The Commission retains the right to investigate the rates, terms and conditions under the just and reasonable and not unduly discriminatory or preferential standard of Section 206 of the Federal Power Act, 16 U.S.C. § 824e (2000). In addition, the rate schedules submitted as part of the settlement are accepted for filing as designated.

3. This letter terminates Docket No. ER03-708-000.

By direction of the Commission.

Secretary

cc: All Parties

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