

107 FERC ¶ 61, 154
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Pacific Gas and Electric Company

Docket Nos. ER01-2998-002
ER01-2998-003

Pacific Gas and Electric Company

Docket Nos. ER02-358-002
ER02-358-003

Northern California Power Agency

v.

Docket Nos. EL02-64-002
EL02-64-003
(Not Consolidated)

Pacific Gas and Electric Company
The California Independent System
Operator Corporation

OPINION NO. 471

OPINION AND ORDER AFFIRMING INITIAL DECISION

Issued: May 10, 2004

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I. Background

A. The Stanislaus Commitments

2. In 1976, Pacific Gas and Electric Company (PG&E), as part of its effort to secure licensing for two nuclear power projects, agreed in the Stanislaus Commitments to certain licensing conditions in return for the termination of an antitrust investigation by the United States Department of Justice (Department of Justice). The Stanislaus Commitments, originally a contractual agreement between the Department of Justice and PG&E,² generally describe PG&E's obligations to provide interconnection, transmission and power services to a "Neighboring Entity" and/or a "Neighboring Distribution System."

3. The Commission has determined that the transmission portions of the Stanislaus Commitments are jurisdictional and PG&E has been required to file them with the Commission.³

4. The Definitions section of the Stanislaus Commitments defines "firm power" as:

[P]ower which is intended to be available to the customer at all times and for which, in order to achieve that degree of availability, adequate installed and spinning reserves and sufficient transmission to move such power and reserves to the load center are provided.⁴

5. In addition, the Transmission section states that:

[PG&E] shall transmit power pursuant to interconnection agreements, with provisions which are appropriate to the requested transaction and which are consistent with these license conditions. Except as listed below, such service shall be provided (1) between two or among more than two Neighboring Entities or sections of a Neighboring Entity's system which

² The Stanislaus Commitments were included in the Nuclear Regulatory Commission's construction permits and operating licenses of the Diablo Canyon Nuclear Plants.

³ Pacific Gas and Elec. Co., 11 FERC ¶ 61,246 (1980), aff'd without opinion, 679 F.2d 262 (1982).

⁴ Exh. NCP-2 at 7.

are geographically separated, with which, now or in the future, [PG&E] is interconnected, (2) between a Neighboring Entity with which, now or in the future, it is interconnected and one or more Neighboring Distribution Systems with which, now or in the future, it is connected and (3) between any Neighboring Entity or Neighboring Distribution System(s) and [PG&E's] point of direct interconnection with any other electric system engaging in bulk power supply outside the area then electrically served at retail by [PG&E].⁵

This section also states that “[PG&E] shall include in its planning and construction programs such increases in its transmission capacity or such additional transmission facilities as may be required for the transactions” described above, provided that any Neighboring Entity or Neighboring Distribution System requesting transmission service provides sufficient notice for PG&E to accommodate its requirements and compensates PG&E for the costs incurred.⁶ The Commitments do not provide a definition of “transmission” or “firm transmission.”

6. The Wholesale Power Sales section states in part that:

[u]pon request, [PG&E] shall offer to sell firm, full or partial requirements power for a specified period to an interconnected Neighboring Entity or Neighboring Distribution System under a contract with reasonable terms and conditions including provisions which permit [PG&E] to recover its Costs. . . . [PG&E] shall not be required to sell Firm Power at wholesale if it does not have available sufficient generation or transmission to supply the requested service. . . .⁷

7. Finally, “costs” are defined as:

[a]ll capital expenditures, administrative, general, operation and maintenance expenses, taxes, depreciation and cost of capital including a fair and reasonable return on [PG&E's] investment, which are properly allocable to the particular service or transaction as determined by the

⁵ Id. at 13-14.

⁶ Id. at 14-15.

⁷ Id. at 13.

regulatory authority having jurisdiction over the particular service or transaction.⁸

B. The 1991 Settlement Agreement

8. In 1983, PG&E entered into separate interconnection agreements with Northern California Power Agency (NCPA) and the City of Santa Clara, California as Silicon Valley Power (Silicon Valley) (1983 Interconnection Agreements).⁹ In 1988, PG&E entered into an interconnection agreement with Modesto Irrigation District (Modesto) which extends until April 1, 2008 (1988 Interconnection Agreement).¹⁰

9. In November 1991, NCPA and PG&E entered into a comprehensive settlement agreement that included further commitments by PG&E to provide services to NCPA, Silicon Valley, and other Neighboring Entities and Neighboring Distribution Systems (1991 Settlement Agreement).¹¹ As a result, PG&E withdrew a series of suits against its customers based upon the understanding that the 1991 Settlement Agreement would require PG&E to abide by the Commitments which could not be extinguished before January 1, 2050.¹²

10. Section 1 of Attachment 1 (Implementation of Stanislaus Commitments) states, in relevant part, that, if the services requested by NCPA or another Neighboring Entity or Neighboring Distribution System exceed or go beyond those PG&E is obligated to provide by the Stanislaus Commitments, PG&E may, at its option, provide either the

⁸ Id. at 7.

⁹ Initial Decision at P 5.

¹⁰ Id. PG&E has admitted that Modesto is a Neighboring Entity as defined in the Stanislaus Commitments. See Exh. MID-2.

¹¹ Initial Decision at P 8. NCPA and its six city members, including Silicon Valley, are third party beneficiaries to the Stanislaus Commitments under California law because the Commitments were made expressly for the benefit of the Neighboring Entities and Distribution Systems in PG&E's service area and, therefore, they are entitled to enforce the terms of that contract. *United States v. Pacific Gas and Elec. Co.*, 714 F. Supp. 1039, 1048-51 (N.D. Cal. 1989).

¹² Initial Decision at P 8.

services requested by NCPA or the services PG&E is obligated to provide pursuant to the Stanislaus Commitments.¹³

11. On May 6, 1998, PG&E gave notice to NCPA and Silicon Valley that it intended to terminate the 1983 Interconnection Agreements.¹⁴ After the parties were unable to agree upon the terms of replacement interconnection agreements, in 2001, PG&E requested permission from the Commission to terminate the 1983 Interconnection Agreements and filed unexecuted replacement interconnection agreements in Docket Nos. ER01-2998-000 (NCPA) and ER02-358-000 (Silicon Valley).¹⁵ On February 27, 2002, PG&E filed an emergency petition in Docket No. EL02-64-000 requesting, among other things, that the Commission institute a technical conference to allow the parties to reach agreement on the terms of the replacement interconnection agreements and implementation issues. On March 14, 2002, the Commission directed the Commission's Trial Staff (Trial Staff) to convene a technical conference.¹⁶ The negotiations were fruitful. The parties filed a final agreement on a Replacement Interconnection Agreement with PG&E (Replacement IA), a Metered Subsystem Agreement with the CAISO and a Settlement Agreement among PG&E, NCPA, the City of Roseville, Silicon Valley and the ISO (2002 Settlement Agreement) which was approved by the Commission on August 30, 2002.¹⁷ The 2002 Settlement Agreement did not resolve the transmission service rights and the right to be exempted from congestion charges under the Stanislaus Commitments.¹⁸ Therefore, this matter was set for hearing.

¹³ Exh. NCP-21 at 12.

¹⁴ Initial Decision at P 9.

¹⁵ Id.

¹⁶ Id. (citing Pacific Gas and Elec. Co., et al. v. Pacific Gas and Elec. Co., et al., 98 FERC ¶ 61,281 (2002)).

¹⁷ Initial Decision at P 10 (citing Pacific Gas and Elec. Co., et al., 100 FERC ¶ 61,233 (2002)).

¹⁸ See Pacific Gas and Elec. Co., 100 FERC at P 26 .

II. Initial Decision

12. The parties agreed by stipulation that only the following three issues should be addressed: (1) whether the Commitments and/or the 1991 Settlement Agreement require PG&E to provide NCPA, and other Neighboring Entities and/or Neighboring Distribution Systems, with firm transmission; (2) whether CAISO transmission fulfills PG&E's obligations under the Commitments and the 1991 Settlement Agreement; and (3) if CAISO transmission service does not fulfill PG&E's obligations under the Commitments and the 1991 Settlement Agreement, which remedy is appropriate.¹⁹

13. The Presiding Judge found that: (1) there is no obligation to provide firm transmission in the Commitments;²⁰ (2) the CAISO's transmission service fulfills PG&E's obligations;²¹ and (3) a remedy is not appropriate.²²

14. Timely Briefs on Exceptions were filed by the NCPA, Silicon Valley, and Modesto (referred to jointly as Customers). Briefs Opposing Exceptions were filed by PG&E and Trial Staff.

III. Discussion

A. Obligation to Provide Firm Transmission Service

15. The Presiding Judge used federal common law, not California law, to interpret the agreements, concluding that extrinsic evidence cannot be considered unless an agreement is determined to be ambiguous.²³ More specifically, he found that the Stanislaus Commitments do not state the conditions which the transmission service had to meet and do not exempt any Neighboring Entity from paying congestion costs or any other costs related to transmission.²⁴ The Presiding Judge also found that the 1991 Settlement

¹⁹ April 17, 2003 Joint Stipulation of Contest Issues.

²⁰ Initial Decision at P 28-30.

²¹ Id. at P 45.

²² Id. at P 46.

²³ Id. at 24-28. He nevertheless found that extrinsic evidence likewise supported his conclusion. Id. at P 29.

²⁴ Id. at P 16-17.

Agreement does not define “firm transmission” or discuss transmission service.²⁵ The Presiding Judge concluded that neither the Stanislaus Commitments nor the 1991 Settlement Agreement is ambiguous or contains terms with two or more meanings, noting that the term in dispute, “firm transmission,” does not appear in either document.²⁶ Since the Presiding Judge concluded that the documents are clear on their face, the Presiding Judge stated that he did not use extrinsic evidence (i.e., the circumstances under which the contracts were created or the type of service that was provided at the time) to determine the parties’ intent.²⁷

16. On exceptions, NCPA argues that the Presiding Judge erred in applying federal, rather than California, law. NCPA and Silicon Valley both argue that the agreements are ambiguous and that the parties’ intent was to obligate PG&E to provide firm transmission service as that term was understood in 1976. As support, the Customers argue that, in 1976, firm transmission was the only type recognized as reliable. They also point to a June 6, 1979 letter from PG&E stating that PG&E was willing to provide NCPA with firm transmission service. Silicon Valley and Modesto also argue that the fact that the Commitments provide for the delivery of firm power means that firm transmission is required for delivery. NCPA and Modesto also assert that the interconnection agreements provided for firm transmission service, and NCPA states that PG&E has acknowledged that these agreements were intended to implement the Stanislaus Commitments.

17. Finally, NCPA contends that the Presiding Judge ignores testimony that states that firm transmission service cannot be curtailed in favor of another party’s use when he states that firm transmission was equivalent to the service PG&E then used to serve its own retail customers. NCPA adds that firm transmission service (i.e., transmission service which was not subject to interruption due to congestion) was the transmission service that PG&E used to serve its retail customers at that time. NCPA argues that a subsequent change in the standard of service provided to PG&E’s retail customers does not change the original intent of the contract or graft an anachronous comparability concept onto a 1976 agreement or the 1991 Settlement Agreement.

18. In response, PG&E states that all parties agree that the Commitments afford the Customers the right to the transmission service necessary to reliably deliver their firm power to load. PG&E argues that both the text of the Commitments and evidence in the record support the finding that the Commitments require PG&E to provide transmission

²⁵ Id. at P 21.

²⁶ Id. at P 28.

²⁷ Id.

service of the same high quality as PG&E uses to meet its retail customers' load. Trial Staff similarly argues that the Commitments evidence no intent to provide firm transmission service, as they unambiguously state that "sufficient" and "appropriate" transmission service must be provided, and that nothing in the 1991 Settlement Agreement explicitly states that PG&E is required to provide firm transmission. Trial Staff also points out that, even under California law, contracts are interpreted according to the objective intent of the parties.

19. We will affirm the Presiding Judge on this issue. We agree with the Presiding Judge that the Stanislaus Commitments are unambiguous on their face and do not require PG&E to provide firm transmission service. Rather, the Commitments only give the Customers the right to "sufficient" transmission which is "appropriate" to supply the requested transaction. Similarly, the 1991 Settlement Agreement also does not, on its face, require firm transmission service. As NCPA acknowledges, when the language of a contract is explicit and clear and does not lead to an absurd result, then the court may ascertain the intent from the written terms and not go further.²⁸ In addition, we affirm the Presiding Judge's findings that extrinsic evidence supports this conclusion.

B. Sufficiency of CAISO's transmission service

20. The Presiding Judge found that the CAISO's transmission service²⁹ fulfills PG&E's obligations under the Commitments and the 1991 Settlement Agreement. He noted that the Customers³⁰ were not, in fact, challenging the ability of the CAISO to move their power, as required by the Commitments.³¹ Instead, he concluded that the Customers were concerned that the CAISO Open Access Transmission Tariff (CAISO Tariff), unlike the Commitments, contains a congestion charge, and their arguments "rely on the fundamental proposition that requiring them to pay the full costs of the CAISO [T]ariff somehow renders that service less 'firm' or less reliable than what they were entitled to

²⁸ Based upon this concession, NCPA's conflict of law argument is misplaced because NCPA acknowledges that the same principle of contract interpretation is found under California law and federal common law. Furthermore, given the Presiding Judge's consideration of extrinsic evidence, NCPA's argument is also moot.

²⁹ Beginning June 1, 1998, the CAISO took over transmission for PG&E.

³⁰ As noted above, Modesto, unlike NCPA and Silicon Valley, is still taking service under the 1988 Interconnection Agreement which extends into 2008.

³¹ Initial Decision at P 34-37.

receive under the Stanislaus Commitments.”³² He concluded that “I cannot find anything in the record that supports such an assertion.”³³

21. The Presiding Judge further determined that it was not significant that congestion costs are not specifically included within the definition of “costs” in the Commitments. He noted that the definition only identifies general categories of costs (including O&M in which congestion is booked) and does not limit the categories of costs to those identified at the time, instead emphasizing that “all” costs are recoverable if they are determined to be properly allocable to a particular service by the Commission. Given that the Commission has approved the allocation of congestion costs to users of the CAISO’s transmission service, the Presiding Judge concluded that such costs are appropriately allocable to these customers.³⁴

22. On exceptions, the Customers continue to protest the congestion charges; Silicon Valley and NCPA continue to contend that the inclusion of these costs is incompatible with their prior rights to firm transmission without the possible need to pay congestion charges,³⁵ and Modesto argues that the ISO’s transmission service is different from the firm transmission required under the Commitments because it relies on the spot market. NCPA argues that PG&E is estopped from claiming that firm transmission is not required because NCPA relied upon that service when it installed its generating assets. Modesto and NCPA add that ISO transmission service puts at risk critical financing for new generation projects. Finally, while Modesto acknowledges that there will be some variance between the firm transmission it seeks and the service PG&E provides its retail customers, it argues that the difference is not undue and does not outweigh the harm caused by the Customers’ contract expectations.

³² Id. at P 38.

³³ Id. He also found that the record demonstrated that, even if PG&E were required to provide “firm transmission service” pursuant to the Commitments, the Commitments allow PG&E to recover all of the costs associated with providing that service. Id. at P 38-39.

³⁴ Id. at P 40. He also noted that exempting these customers from congestion costs would discriminate against PG&E’s retail customers who receive the same high-quality transmission service. Id.

³⁵ NCPA and Modesto also are still concerned with the possibility that congestion costs may increase significantly.

23. In response, PG&E and Trial Staff support the Presiding Judge's finding that the Commitments provide for the recovery of all costs approved by this Commission as allocable to the service in question. They also agree that the Customers have conflated the quality of transmission service with the price of the service³⁶ and note that there is no issue of unreliable (i.e., lesser quality) service in this proceeding. PG&E also states that, contrary to the Customers' financing concerns, record evidence demonstrates that independent developers have financed, constructed and begun operation of generating plants in California since the ISO took operational control of the grid. Finally, PG&E disputes NCPA's claim of equitable rights because NCPA did not pay for upgrades necessary to deliver new generation to its load.

24. We will affirm the Presiding Judge on this issue. As we discussed above, the Stanislaus Commitments and the 1991 Settlement Agreement do not require PG&E to provide firm transmission service, but rather transmission service that is "sufficient" and "appropriate" to supply the transmission the parties request. As the Presiding Judge found, the CAISO's transmission service does provide that transmission.³⁷

25. In fact, the Customers are not alleging that the CAISO does not provide that quality of transmission. Instead, they are chiefly concerned that they may have to pay congestion costs, notwithstanding that they have proffered no evidence to support their claim that future congestion costs will be high. However, we agree with and adopt the Presiding Judge's finding that the Stanislaus Commitments do not preclude the payment of such costs.³⁸ As he pointed out, under the Stanislaus Commitments, PG&E is entitled to recover all "costs" associated with providing service under the Commitments, and "costs" are defined to include any costs "which are properly allocable to the particular service or transaction as determined by the regulatory authority having jurisdiction over the particular service or transaction." In this instance, we are the "regulatory authority having jurisdiction," and we approved the ISO's usage charges (including congestion costs) as part of the rates in the CAISO Tariff.³⁹ Accordingly, the requirement to pay

³⁶ They also state that concerns about the amount of future congestion costs are overstated.

³⁷ Initial Decision at P 43-45.

³⁸ Id. at P 40.

³⁹ Pacific Gas and Elec. Co., et al., 81 FERC ¶ 61,122 at 61,457-58 (1997).

congestion costs under the CAISO Tariff is not inconsistent with the rights under the Stanislaus Commitments and the 1991 Settlement Agreement.⁴⁰

C. Remedy

26. The Presiding Judge found that no remedy was appropriate at this time because the CAISO Tariff fulfilled PG&E's obligation under the Stanislaus Commitments.

27. NCPA and Silicon Valley argue that the appropriate remedy is that they receive firm, non-congested transmission as they did prior to the termination of their interconnection agreements with PG&E in return for the payment of the full cost of transmission, but not any congestion costs. Silicon Valley and Modesto seek that the ISO treat the Commitments and the 1991 Settlement Agreement as "existing contracts," even though they were not filed as such. In the alternative, Silicon Valley argues that PG&E should be ordered to provide NCPA and Silicon Valley, among others, with sufficient Firm Transmission Rights or another appropriate mechanism to hedge their loads and resources against congestion to the extent the ISO's new congestion mechanism and associated Congestion Revenue Rights fail to do so.

28. In its Brief Opposing Exceptions, Trial Staff argues that no remedy is necessary because Customers failed to show that the Commitments were designed to prohibit transmission services which get firm power to load, even if the transmission service provided was not used in 1976.

⁴⁰ The CAISO Tariff service also meets the other obligations of the Commitments because the Replacement IA guarantees the continued right to interconnection and the CAISO Tariff provides a process for assuring transmission system reliability and the construction of necessary upgrades. Exh. PGE-6 at 3:16-6:30, 16:1-17:18; Exh. NCP-51 at 29:9-33:24. We also note that the CAISO Tariff not only allows the ISO to meet PG&E's obligations set forth in the Commitments but exceeds them because, under the CAISO Tariff, transmission service can be purchased through the payment of congestion costs even if the transmission facilities are committed. This option exceeds the terms of the Commitments which do not afford the entities needing transmission service the right to transmission service if, among other things, "the necessary transmission facilities are committed at the time of the request to be fully-loaded during the period for which service is requested." Exh. NCP-2 at 14. Finally, the record does not support the contention that a new plant cannot be financed under the CAISO Tariff. Tr. at 29:7-10, 49:2-8, 50:22-51:3, 62:10-63:8, 386:13-387:6, 387:8-20, 388:4-22, 390:14-392:8.

29. In light of our affirmance above of the Presiding Judge's determination that CAISO transmission service fulfills PG&E's obligations, we likewise agree with and affirm his finding that no remedy is appropriate.

The Commission orders:

The Initial Decision in these proceedings is hereby affirmed, as discussed in the body of this order.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.