

149 FERC ¶ 61,074
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Cheryl A. LaFleur, Chairman;
Philip D. Moeller, Tony Clark,
and Norman C. Bay.

Sierra Green Energy, LLC

v.

Pacific Gas and Electric Company

Docket No. EL14-87-000

ORDER ON COMPLAINT

(Issued October 27, 2014)

1. On August 4, 2014, Sierra Green Energy, LLC (Sierra) filed a complaint against Pacific Gas and Electric Company (PG&E) pursuant to Rule 218 of the Commission's Rules of Practice and Procedure (Complaint).¹ In its Complaint, Sierra alleges a number of unresolved financial issues with PG&E related to the interconnection of Sierra's generating facility. Specifically, Sierra alleges PG&E has breached the Small Generator Interconnection Agreement (SGIA) and the Power Purchase Agreement (PPA) between the parties, and requests compensation of direct costs incurred as a result of PG&E's alleged negligence.

2. As discussed below, we find that two of Sierra's claims are resolved by virtue of PG&E's answer filed in this proceeding. In addition, we deny Sierra's claim arising from the SGIA, and we decline to exercise jurisdiction over another claim arising from the PPA. We also dismiss a counterclaim submitted by PG&E.

I. Background

3. Sierra is a hydroelectric generator located in Nevada County, California and is a party to the SGIA and PPA. PG&E is a vertically-integrated public utility operating in central and northern California.

¹ 18 C.F.R. § 385.218 (2014).

4. The parties' SGIA provides the terms and conditions governing the interconnection of Sierra's facility and its operation with PG&E's distribution system.² The parties' PPA governs Sierra's wholesale electric sales to PG&E from its hydroelectric facility over a 20-year period, beginning in December 2009.

II. Sierra's Complaint

5. Sierra seeks relief under Rule 218, which provides a simplified procedure for complaints if the amount in controversy is less than \$100,000 and the impact on other entities is *de minimis*.³ Sierra asserts that the amount in controversy is approximately \$11,230 and the impact on other entities is *de minimis*, as the Complaint only names PG&E as the respondent.⁴

6. Sierra alleges that, due to PG&E's negligence, the process for commissioning the facility took an extra day to complete and, as a result, Sierra incurred additional expenses of \$700.⁵ Sierra also asserts that it was erroneously charged \$260.66 for an inspection that was not performed.⁶ (These claims are considered resolved, as we discuss below.)

7. In addition, Sierra raises allegations regarding PG&E's labor rates and the rate PG&E pays for Sierra's output, which are described in detail below.

8. Sierra asserts that it has made every effort to work with PG&E directly to resolve the outstanding issues described below. Sierra claims that, when direct talks with PG&E failed to yield positive results, per the procedures outlined in the SGIA, Sierra engaged the assistance of the Commission's Dispute Resolution Division, after which it alleges PG&E refused to correct the outstanding issues.⁷

² PG&E August 14 Answer, Exhibit 2 (SGIA) at section 1.2.

³ 18 C.F.R. § 385.218 (2014).

⁴ Complaint at 2.

⁵ *Id.* at 3.

⁶ *Id.* at 3-4.

⁷ *Id.* at 1.

A. PG&E Labor Rates

9. Sierra argues that the labor rates PG&E charged to interconnect the facility are extremely inflated. Specifically, Sierra alleges that PG&E's labor rates are overstated compared to general industry averages for certain titled positions, such as project managers. Sierra also asserts that, because PG&E does not actually pay its titled positions at the labor rates it charges interconnection customers (due to inclusion of compensation for administrative and general costs), PG&E's costs are inflated above actual costs. Sierra contends that the SGIA provides for a utility to recover its actual costs for labor and equipment related to the interconnection of the facility from providers with a "plated output" of less than 2.0 MW.⁸ Sierra states that PG&E's labor costs include all direct labor costs (i.e., monthly or weekly pay) as well as indirect labor costs that include such items as retirement, sick leave, and health plan costs, etc. Sierra states that the "template SGIA" provides for these indirect labor costs by applying a multiplier to the employee's actual pay rate (i.e., administrative and general charges) resulting in a 21 percent add on.⁹

10. Sierra further argues that the monthly maintenance fee for its facility is calculated as a percentage of the base charges for interconnection, and because the labor rates are inflated, the monthly fee is affected and likewise greatly overstated.¹⁰

11. Sierra contends that the intent of the SGIA is to allow PG&E to recoup only its "Actual Installed Costs of Interconnection Facilities and Distribution Upgrades," and PG&E is instead using these charges as a profit center.¹¹

12. Sierra requests that the Commission direct PG&E to recalculate all labor rates charged for the interconnection of the facility to reflect actual employee pay rates and direct PG&E to refund the difference to Sierra, with accrued interest at 5 percent per year. Sierra also requests that the Commission similarly require adjustment of the monthly maintenance fee, and direct PG&E to refund the difference to Sierra, plus accrued interest at 5 percent per year.¹²

⁸ *Id.* at 4.

⁹ *Id.* at 4-5.

¹⁰ *Id.* at 5.

¹¹ *Id.*

¹² *Id.* at 7.

B. Payment for Sierra's Output

13. Sierra states that the “PPA template” for small wholesale electricity producers that have a “plated output” of 2.0 MW or less has been reviewed and approved for use by the California Public Utilities Commission (CPUC). Sierra also claims that the CPUC sets the base pay rate for the power purchases in the initial year the PPA is executed and reflects pay rates for power purchases for each subsequent year over the life of the agreement in a payment matrix in the PPA. Sierra asserts that, under its agreement, the payment rates gradually increase until the year 2020 when the rate is frozen for the remaining contract life.¹³

14. Sierra points to an excerpt of the PPA that reflects the payment rates for purchased power for each year over the life of the agreement, asserting that the table provided in section 2.4 of the PPA reflects a payment rate under the 20 year term for each kilowatt of electricity produced for the 2013 production year as 12.527 cents/kWh and 12.897 cents/kWh for the 2014 production year. Sierra claims that PG&E has used a kilowatt reimbursement payment rate of 11.390 cents/kWh, which is the payment rate reflected in the PPA under the 20 year contract life for the year 2010, and has not appropriately increased the payment rate for subsequent years.¹⁴

15. Sierra requests that the Commission direct PG&E to make a restitution payment to Sierra to cover the difference in payment rates for purchased power from the year 2013 to the current date, plus accrued interest at 5 percent per year. Sierra also requests that the Commission direct PG&E to comply with the escalating payment rates for all future payments reflected in the executed PPA for the remainder of the agreement.¹⁵

III. Notice of Filing and Responsive Pleadings

16. Notice of Sierra's Complaint was published in the *Federal Register*, 79 Fed. Reg. 46,790 (2014), with interventions, answers, and protests due on or before August 25, 2014. PG&E filed a timely answer and motion for summary disposition on August 14, 2014. No other interventions were filed.

17. On August 26, 2014, Sierra filed a response to PG&E's August 14 filing. On September 2, 2014, PG&E filed an answer to Sierra's response. On September 16, 2014, Sierra filed a response to PG&E's answer.

¹³ *Id.* at 5-6.

¹⁴ *Id.* at 6.

¹⁵ *Id.* at 7.

IV. Discussion

A. Procedural Matters

18. We accept PG&E's initial Answer.¹⁶ However, Rule 213(a)(2) of the Commission's Rules of Practice and Procedure¹⁷ prohibits an answer to an answer unless otherwise ordered by the decisional authority. We are not persuaded to accept any of the subsequent answers and/or replies of the parties and will, therefore, reject them.

B. PG&E's Answer

19. PG&E disputes each of Sierra's claims and denies each of the allegations contained in the Complaint. However, PG&E concedes Sierra's first two claims because the amounts at issue are small and therefore PG&E agrees to reimburse Sierra the \$700 and \$260.66 sought for these two claims.

20. PG&E responds to Sierra's two remaining claims on both jurisdictional and substantive grounds, as further discussed below. PG&E also moves for summary disposition of Sierra's Complaint.

1. PG&E Labor Rates

21. In response to Sierra's claim that PG&E's labor rates are inflated, PG&E urges the Commission to summarily dispose of this claim, as Sierra has offered no facts to support its claim. PG&E contends that the costs at issue are addressed in PG&E's General Rate Case, which is litigated before the CPUC every three years, and to the extent Sierra wishes to challenge the costs that form the basis of the labor charges for work done at its request, the proper proceeding in which to do so would have been the General Rate Case at the CPUC.¹⁸

22. PG&E further argues that it has charged Sierra its "actual costs" in performing the work to interconnect the facility, and its hourly rates are the same rates PG&E charges all customers for similar work.¹⁹

¹⁶ See 18 C.F.R. §§ 206(f) and 385.213(a)(1) (2014).

¹⁷ 18 C.F.R. § 385.213(a)(2) (2014).

¹⁸ PG&E August 14 Answer at 6.

¹⁹ *Id.* at 6-7.

23. PG&E asserts that, in addition to determining the average salary for employees in each job category, it is appropriate for companies to collect indirect costs as part of the hourly labor rates they impose for work at the request of others. PG&E states that these indirect costs are different from and are not captured in the administrative and general charges referred to in Sierra's Complaint. PG&E claims that it earns no return on the labor rates it charges customers seeking to interconnect their projects.²⁰

2. Payment for Sierra's Output

24. PG&E asserts that the PPA at issue in this claim was reviewed and approved by the CPUC. PG&E argues that it is a CPUC-jurisdictional agreement, and it was not filed with the Commission for review or approval, nor did it need to be. PG&E states that the Commission should dismiss this claim for lack of jurisdiction.²¹

25. In the alternative, should the Commission decide to consider the claim on its merits, PG&E requests summary disposition of this claim, as it argues Sierra misunderstands the relevant sections and table in the PPA. Specifically, PG&E contends that, because the PPA is a form agreement approved by the CPUC and available to projects coming on line over a number of years, the table in section 2.4 of the PPA reflects payment rates based upon Commercial Operation Dates and Delivery Terms. PG&E states that Sierra's Commercial Operation Date was in 2010, and its contract Delivery Term is 20 years. Thus, the correct Market Price Referent for projects with 2010 Commercial Operation Dates and 20-year Delivery Terms is 0.11390 cents/kWh. PG&E asserts that neither section 2.4, nor any other provision in the PPA, provides for any yearly escalation of the Market Price Referent during the life of the contract.²²

3. Counterclaim against Sierra

26. In its answer, PG&E also claims that Sierra is currently in default under its SGIA. Specifically, PG&E asserts that Sierra has failed to make its \$41.27 monthly cost of ownership payment to PG&E for four months (May 2014 through August 2014). PG&E includes a counterclaim for \$165.08 in unpaid cost of ownership charges, and requests that any order in this proceeding require Sierra to cure that default and stay current on its monthly cost of ownership obligation.²³

²⁰ *Id.*

²¹ *Id.* at 7.

²² *Id.* at 8.

²³ *Id.* at 9.

V. Commission Determination

27. Although PG&E disputes Sierra's allegation that, due to PG&E's negligence, Sierra incurred additional expenses for commissioning Sierra's facility, PG&E has agreed to reimburse Sierra \$700.²⁴ Likewise, although PG&E disputes the allegation that PG&E erroneously charged Sierra for an inspection that was not performed, PG&E has agreed to reimburse Sierra \$260.66.²⁵ For purposes of this proceeding, we consider these issues resolved, on the condition that PG&E reimburses Sierra these specific amounts as it offers in its Answer.²⁶

28. Regarding PG&E's labor rates, we are not persuaded by Sierra's Complaint. While it is true that the *pro forma* SGIA allows the "actual costs" of upgrades to be passed on to the interconnection customer,²⁷ whether PG&E passed on more than actual costs, as Sierra argues, has not been established in the Complaint. We find that simply claiming PG&E's labor rates are inflated compared to general industry averages does not demonstrate that PG&E has passed on more than its actual costs to interconnection customers. We are also not persuaded by the assertion that, because PG&E does not actually pay its titled positions at the labor rates it charges interconnection customers (due to inclusion of compensation for administrative and general costs), its costs are inflated above actual costs. Sierra has not presented any evidence that PG&E did not actually incur the costs it includes in its rates. Accordingly, we deny Sierra's Complaint regarding PG&E's labor rates.

29. The matter of payment for Sierra's output turns solely on contractual interpretation of the PPA. Although wholesale electricity sales are subject to the Commission's jurisdiction, whether to assert jurisdiction over purely contractual issues otherwise litigable in state courts depends on three factors. These factors are: (1) whether the

²⁴ PG&E August 14 Answer at 3-4.

²⁵ *Id.* at 4.

²⁶ Due to the small amount involved, we will not require PG&E to file a refund report.

²⁷ "A basic tenet of the Commission's policy for the recovery of interconnection costs is that the Interconnection Customer pays the actual costs of the Interconnection Facilities and Distribution Upgrades..." *Standardization of Small Generator Interconnection Agreements and Procedures*, Order No. 2006, FERC Stats. & Regs. ¶ 31,180, at P 62, *order on reh'g*, Order No. 2006-A, FERC Stats. & Regs. ¶ 31,196 (2005), *order granting clarification*, Order No. 2006-B, FERC Stats. & Regs. ¶ 31,221 (2006).

Commission possesses some special expertise which makes the case particularly appropriate for Commission decision; (2) whether there is a need for uniformity of interpretation of the type of question raised by the dispute; and (3) whether the case is important in relation to the regulatory responsibilities of the Commission.²⁸

30. Initially, the Commission is, in general, no more expert than a court in deciding non-technical contract questions.²⁹ However, interpretation of some types of contractual clauses may involve examination of technical issues which are within the Commission's special expertise.³⁰ Determination of the dispute between Sierra and PG&E depends upon whether the table in section 2.4 of the PPA is interpreted as an escalation clause, as Sierra claims, or as an indication of a single price (set based on the year of commercial operation) for the life of the contract, as PG&E argues. The outcome of this matter appears to turn on interpretation and use of the data included in the table rather than any determination requiring special expertise.

31. With respect to the second factor, since the interpretation and use of data in the table in section 2.4 of the PPA depend upon what, if any, price adjustment is contemplated by the parties under the PPA, we find no need to issue a uniform interpretation of all similar Market Price Referents tables in PPAs.³¹

32. Third, we consider what impact this case has on the Commission's regulatory responsibilities. Sierra does not request that the Commission change any term of the PPA; rather, the relief sought is for the Commission to interpret the meaning and use of data reflected in the table in section 2.4 of the PPA. Sierra also cites no specific Commission policy that it alleges would be violated if PG&E were successful in this action.

²⁸ See *Arkansas Louisiana Gas Co. v. Hall*, 7 FERC ¶ 61,175, at 61,322, *reh'g denied*, 8 FERC ¶ 61,031 (1979).

²⁹ *Id.*

³⁰ *Id.*

³¹ See *PPL Elec. Utilities Corp.*, 92 FERC ¶ 61,057, at 61,147 (2000) (finding there "does not appear to be a need for uniformity of interpretation of the type of question raised in this dispute, since an interpretation of this contract by the [court], even if different from other courts' interpretations of similar contracts, will not impinge significantly on the operations of public utilities across the nation; and we are not, in fact, at this point aware of any contract disputes raising similar issues within [the RTO].").

33. We conclude that Sierra's claim regarding contract payments for output has not satisfied the standards for asserting jurisdiction over this matter. Since we find that we need not exercise jurisdiction under the three applicable factors, we decline to exercise our jurisdiction on this issue. Accordingly, we deny Sierra's Complaint regarding its fourth claim.

34. We find that PG&E's counterclaim against Sierra exceeds the scope of this proceeding. If PG&E wishes to pursue legal action against Sierra for breach of contract, it must file its own complaint in a separate proceeding.³² Accordingly, we will not address the merits of the counterclaim.

The Commission orders:

(A) The issues of commissioning expenses and inspection expenses are hereby considered to be resolved, on the condition that PG&E reimburses Sierra, as discussed in the body of this order.

(B) Sierra's Complaint with respect to PG&E's interconnection labor rates is hereby denied.

(C) The Commission hereby declines to exercise jurisdiction on the claim regarding the contract payments in the PPA, as discussed in the body of this order.

(D) PG&E's counterclaim against Sierra is hereby dismissed, as discussed in the body of this order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

³² See *American Elec. Power Serv. Corp.*, 93 FERC ¶ 61,329, at 62,122 (2000) (rejecting a request for an investigation under Federal Power Act section 206 made as part of a motion to intervene instead of in a separate complaint); *ISO New England, Inc., et al.*, 91 FERC ¶ 61,227, at 61,830 (2000) (rejecting portion of an intervention styled as a complaint and determining that complaints must be filed separately from interventions and protests).