

Decision 08-06-016 June 12, 2008

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

SAN JOAQUIN VALLEY POWER AUTHORITY,

Complainant,

vs.

PACIFIC GAS AND ELECTRIC COMPANY,

Defendant.

Case 07-06-025
(Filed June 26, 2007)

DECISION APPROVING SETTLEMENT

1. Summary

This decision approves a settlement between the complainant, San Joaquin Valley Power Authority (SJVPA), a Community Choice Aggregation (CCA) provider, and defendant Pacific Gas and Electric Company (PG&E) (jointly referred to as "the Parties").

The settlement does two things. First, it addresses PG&E's past CCA marketing by requiring PG&E to bear SJVPA's attorneys' fees (up to \$450,000) in connection with this proceeding. Second, it specifies mutually-agreeable standards that shall apply to future PG&E and SJVPA marketing with respect to SJVPA's CCA program.

2. Background

Assembly Bill (AB 117)¹ allows cities and/or counties to purchase electricity on behalf of residents, businesses, and municipal accounts within their respective political boundaries and serve these accounts as a CCA provider. SJVPA formed a CCA under AB 117; SJVPA's Implementation Plan was certified by this Commission on April 30, 2007.

In the complaint, SJVPA alleged that after forming its CCA, the incumbent provider, PG&E, unlawfully interfered with SJVPA's efforts to begin providing electricity to its communities by contacting SJVPA's customers, disparaging SJVPA and persuading SJVPA's member cities and counties to drop out of the program. According to SJVPA, PG&E convinced two of SJVPA's largest members to drop out.

SJVPA alleged that PG&E's conduct violated the Commission's most recent order setting forth procedures for the establishment of CCAs in California, Decision (D.) 05-12-041, for two reasons. First, SJVPA contended that PG&E used ratepayer funding for certain activities in violation of D.05-12-041. SJVPA alleged not only that PG&E was accounting for its expenditures improperly, but also that PG&E was using staff of the regulated utility to carry out marketing activities against SJVPA in such a way as to mislead customers into thinking that the regulated utility was sponsoring the marketing activities.

Second, SJVPA contended in the complaint that D.05-12-041 sets forth standards of marketing conduct that PG&E was not free to violate in its contacts

¹ Ch. 838, Stats. 2002.

with the SJVPA cities and counties² and other community members. PG&E disagreed with SJVPA's interpretation, asserting that there are no rules – in D.05-12-041 or otherwise – prescribing how PG&E was to communicate with customers and SJVPA member communities, and stating that those communications were protected as free speech by the First Amendment in any event. PG&E also claimed that because there are no marketing rules in D.05-12-041, SJVPA's only option was to ask the Commission to open a rulemaking to develop such rules.

The Parties engaged in extensive discovery and briefing, and worked with a Commission-appointed mediator over several months to arrive at a settlement. When they reached settlement, they filed a motion for approval of the settlement and appended the settlement agreement, attached to this decision as Appendix A. They also followed the Commission's rules for vetting settlements as set forth in Rule of Practice and Procedure 12.³

² The cities and counties originally included in SJVPA's CCA were Kings and Tulare counties, and the cities of Clovis, Corcoran, Dinuba, Fresno, Hanford, Kerman, Kingsburg, Lemoore, Parlier, Reedly, Selma and Sanger. The City of Fresno, and Tulare County, have terminated their membership to the SJVPA.

³ The Parties ask in their motion for approval of the settlement that we waive Settlement Rule 12.1(b), which requires the Parties to convene a settlement conference. Because PG&E and SJVPA are the only parties to the settlement, such a conference is not necessary. While the City and County of San Francisco (CCSF) moved to intervene early in the case, that motion was denied without prejudice to CCSF's right to renew its motion. It filed comments on the settlement agreement but did not renew its motion to intervene. The assigned Administrative Law Judge proposed appending those comments as an Exhibit to this decision (Appendix B hereto), but not making CCSF a party, and CCSF and the other parties all agreed to this approach. The ALJ also allowed SJVPA and PG&E to file reply comments to CCSF's comments. Further, the ALJ gave notice of the settlement to the Parties to the Commission's CCA rulemaking, R.03-10-003.

Footnote continued on next page

3. Provisions of Settlement Agreement

The settlement agreement provides the following:

- Purpose. The purpose of the settlement agreement is to address PG&E's past CCA marketing, to specify mutually-agreeable standards that shall apply to future PG&E and SJVPA marketing with respect to SJVPA's CCA program, and to resolve fully and finally all issues raised in this Complaint proceeding, as reflected in the Complaint, Answer and Scoping Memo. [Article 3.]
- PG&E's Position on CCA Marketing. PG&E acknowledges the statements that it made regarding CCA-related marketing during the CPUC's CCA Phase II Rulemaking (R.03-10-003), in which the Commission established various rules regarding CCA. PG&E disputes that it has misled the Commission in any way, but does make clear as part of the settlement agreement that it changed its previously neutral position on CCA in January 2007. PG&E's revised position regarding CCA programs includes marketing its energy supply services to retain customers. [Article 3 and Section 4.1.]
- Mitigation of Effects of PG&E's Changed Position on CCA Marketing. The Parties intend by their settlement as memorialized in the settlement agreement to address and mitigate the negative effects that SJVPA has alleged it experienced as a result of PG&E's change in position on CCA. [Section 4.2.]
- Equitable Reimbursement of SJVPA's Litigation Costs. PG&E will pay SJVPA up to \$450,000 for its reasonably-incurred litigation costs in connection with the Complaint proceeding. [Section 4.3.]⁴

Under all of the foregoing circumstances, we find it appropriate to waive Rule 12.1(b)'s settlement conference requirement.

⁴ We assume, pursuant to Article 6 of the Settlement, that this payment will be accounted for in accordance with PG&E's Below the Line Accounting Procedures.

- Truthful and Non-Misleading Statements. The Parties agree that their respective CCA marketing and lobbying/petitioning shall be truthful and non-misleading, and that their respective CCA marketing and lobbying/petitioning shall be capable of substantiation. [Section 5.2.]
- Disclaimers. In carrying out their respective CCA marketing and lobbying/petitioning in specified communities, the settlement agreement requires the Parties to use designated disclaimers. [Section 5.3.]
- Financial Accounting. Costs associated with PG&E's CCA marketing activities shall be accounted for in accordance with the Commission's regulatory accounting requirements and PG&E's Below the Line Accounting Procedures except as otherwise required by the settlement agreement, and shall be subject to reasonable review but not approval by SJVPA. [Article 6.]
- Functional Separation Regarding PG&E's CCA Marketing. PG&E shall identify a functional group (the "PG&E Marketing Group") that shall principally interact with customers in conducting PG&E's CCA marketing in the communities participating in SJVPA's CCA program. [Article 7.]⁵

⁵ We expect PG&E to comply with the functional separation terms of the Settlement Agreement, and will be open to hearing complaints about a lack of such functional separation if that arises.

- Lobbying/Petitioning. PG&E's lobbying and petitioning of certain governmental entities, public officials and candidates for elected public office regarding SJVPA's CCA program shall be subject to the use of a designated disclaimer and shall be truthful and non-misleading. Further, with respect to any perceived problems, risks or other shortcomings identified by PG&E concerning SJVPA's CCA program, prior to the communication of those issues to the city and county governments participating in SJVPA's CCA program, PG&E shall make a reasonable, good faith effort under the circumstances to apprise SJVPA of the issues and to provide an opportunity under the circumstances for SJVPA to timely respond to PG&E on the issues. However, the settlement agreement shall not create an affirmative obligation on either Party to resolve any such issues and shall not impede PG&E, after PG&E apprises SJVPA of issues, from timely communicating with the city and county governments participating in SJVPA's CCA program. [Article 8.]
- Dispute Resolution. The settlement agreement establishes a process for resolving additional disputes between the Parties should they arise, including bi-monthly standard meetings and provisions for escalated and emergency meetings as necessary. The settlement agreement also establishes an alternative dispute resolution process. [Article 9.]
- No Admission of Wrongdoing. The settlement agreement and its terms shall not constitute nor be taken to indicate an admission of liability or wrongdoing by either Party, or that either Party's position on any issue lacks merit. [Section 11.1.]
- Effective Date of Provisions. The settlement agreement provides that it shall become effective upon an order by the Commission no longer subject to appeal approving the Agreement and dismissing the Complaint with prejudice, with no required modifications or conditions to the Agreement. Should the Commission approve the settlement agreement subject to modifications or conditions, the Parties agree to meet and confer concerning whether such modifications or conditions are acceptable. [Section 2.2.]

- Dismissal of Complaint. The settlement agreement provides that, upon approval by the CPUC, the CPUC shall also concurrently order the dismissal of the Complaint with prejudice. [Section 2.2.]
- Mutual Releases. Upon approval of the settlement agreement by the CPUC, releases by each of the Parties of the claims raised in the Complaint, Answer and Scoping Memo will become effective. The settlement agreement does not preclude the Parties' respective rights to advance whatever position they desire in any other presently pending and/or future legislative, regulatory or judicial proceeding, other than as set forth in the settlement agreement with respect to the claims of either Party relating to issues raised in the Complaint, Answer or Scoping Memo. [Article 10.]

4. Requirements for Approval of All Party Settlements

Before approving a settlement, the Commission must find that it is "reasonable in light of the whole record, consistent with law, and in the public interest." Rule 12.1(d). Factors to be considered include whether the settlement reflects the relative risks and costs of litigation, whether it fairly and reasonably resolves the disputed issues and conserves public and private resources, and whether it falls well within the range of possible outcomes had the lawsuit gone to trial. D.96-05-070, 66 CPUC2d 314 (1996). The Commission also has considered factors such as whether the settlement negotiations were at arms' length and without collusion, whether the Parties were adequately represented, and how far the proceedings had progressed when the Parties settled.

D.00-05-046, 2000 Cal. PUC LEXIS 371.

4.1. Settlement Agreement Meets the Standard for Commission Approval

The settlement agreement represents a fair compromise of the disputes between the Parties relating to the matters at issue in the Complaint and Answer,

and fully satisfies this standard. Each of the factors to be considered supports approval of the settlement agreement.

4.1.1. Range of Possible Outcomes, Expense of Litigation, and Progress of Case

This settlement falls well within the range of possible outcomes of the litigation, and represents a significant benefit to each Party by eliminating the significant litigation risk, cost, and uncertainty that each Party would have faced in the absence of the settlement. Because the Complaint raised not only difficult issues of facts, but also questions of legal interpretation on which the Commission may or may not have spoken before, each Party faced pronounced and identifiable risks of litigation.

The Parties engaged in substantial briefing and were engaged in extensive and at times contentious discovery practice at the time they reached settlement. Indeed, under the schedule in place at that time, the case was only weeks away from hearing. Given the briefing, settlement discussions, and exchanges of documents and other information between the Parties, the Parties were well aware of their respective positions, litigation exposure, and the substantial expense involved in pursuing the matter through hearing and beyond.

The Parties recognized the possibility that the Commission could resolve the issues in this matter in favor of either SJVPA or PG&E, or in a fashion where each Party “won some and lost some.” PG&E recognized that if SJVPA principally prevailed in this litigation, PG&E was exposed to remedies that could include penalties and mandated changes to certain business operations. On the other side of the table, SJVPA recognized that if PG&E principally prevailed in this litigation, there could be no remedies related to the allegations made in the

Complaint, and the PG&E activities challenged by SJVPA could continue prospectively with the Commission's clear blessing.

Both Parties also recognized the possibility that even if the Commission found in their favor, the non-prevailing Party might seek to appeal the Commission's decision and if such an appeal were granted and successful, the Commission decision might be overturned on or delayed by the appeal, leading to further consumption of time and financial as well as personnel resources.

4.1.2. Arms' Length Negotiation

The Parties engaged, both in the litigation and settlement negotiations, at arms' length. Indeed, the Parties vigorously litigated the case, including at times forceful dispute over discovery issues, up until the time of settlement and, in the settlement talks, engaged in intensive and extensive settlement negotiations spanning multiple mediation sessions in reaching settlement principles and thereafter in arriving at the final form of the settlement agreement.

4.1.3. Adequate Representation

Both Parties were more than adequately represented. PG&E was represented by inside counsel with significant civil litigation experience as well as regulatory litigation experience before the Commission, with the assistance of outside counsel from a major San Francisco law firm with respect to discovery matters. SJVPA was represented by attorneys from two Sacramento law firms, both of whom are familiar to the Commission as experienced regulatory litigators in a variety of matters before the Commission, and one of whom also has many years of civil litigation experience.

4.1.4. Public Interest and Conservation of Resources

Finally, the settlement is in the public interest. It will both address PG&E's past CCA marketing regarding SJVPA's CCA program and specify mutually-

agreeable standards that will apply to future marketing regarding SJVPA's CCA program. It will allow both Parties, whose ultimate interest (as applicable in this matter) is to provide electric service to California businesses and residents, to dedicate resources to that interest rather than contentious, costly, and time-consuming litigation. Last but certainly not least, the settlement will also allow the Commission to resolve the issues raised by the Complaint and Answer without further expenditure of scarce public resources and thus dedicate those scarce resources to other pending and more pressing regulatory matters.

Based on the foregoing, the settlement agreement fairly balances all the pertinent considerations and meets the requirements of Rule 12.1(d). It is a reasonable compromise, consistent with law, and in the public interest. As such, we approve the settlement agreement, without modifications.

5. Assignment of Proceeding

Dian Grueneich is the assigned Commissioner and Sarah R. Thomas is assigned Administrative Law Judge and Presiding Officer in this proceeding.

6. Waiver of Comment Period

This is uncontested matter in which the decision grants the relief requested. Accordingly, pursuant to Section 311(g)(2) of the Public Utilities Code and Rule 14.6(c)(2) of the Commission's Rules of Practice and Procedure, the otherwise 30-day period for public review and comment is waived.

Findings of Fact

1. On April 10, 2008, SJVPA and PG&E filed a joint motion requesting the Commission to adopt a settlement agreement entitled "Settlement Agreement and Release of Claims."

2. All parties have agreed to settle this proceeding.

3. All issues in this proceeding are encompassed by, and resolved in, the settlement agreement.

4. The Parties to the settlement agreement are all of the active parties in this proceeding.

5. The Parties are fairly reflective of the affected interests.

6. No term of the settlement agreement contravenes statutory provisions or prior Commission decisions.

7. The settlement agreement conveys to the Commission sufficient information to permit it to discharge its future regulatory obligations with respect to the Parties and their interests.

Conclusions of Law

1. The settlement agreement fully resolves and settles all disputed issues among the Parties concerning the complaint filed in this proceeding.

2. The settlement agreement is reasonable in light of the whole record, consistent with law, and in the public interest.

3. The settlement agreement should be approved.

4. This decision should be effective today so that the settlement agreement may be implemented expeditiously.

5. Case 07-06-025 should be closed.

O R D E R

IT IS ORDERED that:

1. The settlement agreement set forth in Appendix A is approved.

2. We expect Pacific Gas and Electric Company (PG&E) to comply with the functional separation terms of the Settlement Agreement, and will be open to hearing complaints about a lack of such functional separation if that arises.

3. PG&E's payment of San Joaquin Valley Power Authority's reasonably-incurred litigation costs in connection with the Complaint through the Effective Date shall be accounted for in accordance with PG&E's Below the Line Accounting Procedures.

4. The hearing determination is changed; no hearing is necessary.
5. We dismiss the complaint with prejudice.
6. Case 07-06-025 is closed.

This order is effective today.

Dated June 12, 2008, at San Francisco, California.

MICHAEL R. PEEVEY
President
DIAN M. GRUENEICH
JOHN A. BOHN
RACHELLE B. CHONG
TIMOTHY ALAN SIMON
Commissioners