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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

THE SIERRA CLUB, Petitioner, v. CALIFORNIA PUBLIC UTILITIES COMMISSION, Respondent; SAN DIEGO GAS & ELECTRIC COMPANY, CARLSBAD ENERGY CENTER, LLC AND CALIFORNIA SYSTEM OPERATOR, Real Party in Interest.	A146921 (PUBLIC UTILITIES COMMISSION No. 15-05-051)
PROTECT OUR COMMUNITIES, A CALIFORNIA NON-PROFIT CORPORATION, AND CENTER FOR BIOLOGICAL DIVERSITY, A CALIFORNIA NON-PROFIT CORPORATION, Petitioner, v. CALIFORNIA PUBLIC UTILITIES COMMISSION COUNTY, Respondent; SAN DIEGO GAS & ELECTRIC COMPANY, CARLSBAD ENERGY	A146934 (PUBLIC UTILITIES COMMISSION No. 15-05-051)

CENTER, LLC AND CALIFORNIA INDEPENDENT SYSTEM OPERATOR,

Real Party in Interest.

Petitioners, The Sierra Club, Protect Our Communities Foundation and the Center for Biological Diversity seek review of a decision by the respondent California Public Utilities Commission (PUC or Commission) that approved a power purchase tolling agreement (PPTA) between real parties in interest Carlsbad Energy Center LLC (Carlsbad) and San Diego Gas & Electric Company (SDG&E).

Petitioners contend the Commission has not proceeded in the manner required by law because the decision impermissibly contradicts a reliability determination made in an earlier proceeding and exceeded the permissible scope of the proceeding as convened. They also argue the PUC's decision that the Carlsbad/SDG&E agreement is just and reasonable is unsupported by the evidence and that the PUC abused its discretion when it approved the contract because the contract reduced the size of the PPTA and provides power from a gas fired plant instead of a preferred resource.

We affirm. The earlier proceedings at issue specifically contemplated revisiting the reliability determination that petitioners argue could not be revisited by the SDG&E application. The issues addressed were within the issues as framed in the scoping memo for the proceeding, and there is no statutory or regulatory bar to PUC's considering the issues in connection with SDG&E's application. PUC's determination that the contract is just and reasonable is supported by the evidence, and approval of a modified form of the agreement neither deprived petitioners of an opportunity to be heard nor was an abuse of discretion by the PUC.

BACKGROUND

This dispute is rooted in the local capacity requirement for power SDG&E needs to serve its customers, the sources of that power, and whether SDG&E will need to add capacity by 2018 to reliably meet its customers' needs.

In 2013, the PUC determined that SDG&E would need 298 megawatts of power in addition to its projected supply to reliably serve its customer base in 2018. This

anticipated shortfall of supply was due to the pending closure of the Encina Energy Center. So, the PUC authorized SDG&E to procure the needed power. That decision explicitly did not consider the impact on SDG&E's need for power that would arise in the event power from the San Onofre Nuclear Generation Stations (SONGS) was unavailable for a prolonged period of time. To fulfill the need resulting from closure of Encina Energy Center that was anticipated in the 2013 decision the PUC, in February 2014, approved an agreement between SDG&E and Pio Pico Energy Center LLC to supply 305 megawatts of power for 25 years beginning in June 2017.

In June 2014, the PUC addressed SDG&E's need for additional power due to the permanent closure of SONGS in June 2013, in what has been referred to by the parties as the Track 4 Decision. SDG&E was authorized in the Track 4 Decision to procure between 500 and 800 megawatts of power to meet its needs by the end of 2021. The Commission recognized that a significant amount of this new power would be provided by conventional gas-fired facilities, but at least 175 megawatts was to be from preferred resources, and 25 megawatts from energy storage resources.[1] The Track 4 Decision finds that even with the unexpected retirement of the SONGS facilities, SDG&E had "sufficient supplies to meet projected demands in the SONGS service area through at least 2018." This finding was made, in part, due to the certainty that power from the Pio Pico facility would be procured as authorized by the PUC in February. However, the Track 4 Decision also contains a caveat that procurement levels authorized in the decision would be insufficient to meet all the needs in the area serviced by SONGS

[1] Per the PUC: "The Energy Action Plan of 2005 (EAP) is a joint agency document intended to guide the procurement decisions of the State of California. The term "preferred resource" is a term of art that emanated from the EAP, which stated a policy that California should meet future electric resource needs in the following "Loading Order": · Energy efficiency · Renewable resources · Clean fossil fuels. In subsequent versions of the EAP resources at the top of the loading order came to be known as preferred resources. Although the term was not defined, it is commonly illustrated as including all cost effective energy efficiency, demand response, renewable energy, and combined heat & power (CHP)." (California Public Utilities Commission, Energy Storage Phase 2 Interim Staff Report – January 4, 2013, page 17.)

through 2022, and that additional resources may need to be authorized in other proceedings before the PUC. The decision recognized that such additional procurement needs could become critical as early as 2018. Any necessary procurement could be completed either through the negotiation of bilateral contracts or through an all source request for offers "for some or all capacity" which is an open and competitive process authorized by Public Utilities Code section 454.5 subdivision (c)(1).

In July 2014, SDG&E applied to the PUC for approval of a PPTA with real party in interest Carlsbad. The agreement was intended to provide SDG&E 600 megawatts of power supplied by gas-fired generating units at peak energy demand times for a period of 20 years beginning on November 1, 2017. PUC issued its decision on the application in May 2015. The PUC approved an agreement between SDG&E and Carlsbad on the terms requested, but for 500 rather than 600 megawatts. The Commission found that SDG&E's need for this additional power could arise as early as 2018, and the Carlsbad agreement was a reasonable means for SDG&E to meet this need. It further found SDG&E's proposed cost allocation methodology was a reasonable means to allocate the cost of this agreement to all of SDG&E's customers.

Petitioners requested rehearing. On November 6, 2015, the Commission modified its order in certain respects and denied rehearing of the decision as modified. The petitions for review were timely, and on September 14, 2016, we issued the writ and consolidated the petitions for hearing and decision.

DISCUSSION

I. Review of Public Utilities Commission Proceedings

Our authority to review the legality of a Commission decision arises under section 1756 et seq. of the Public Utilities Code.[2] Pursuant to section 1757, "the review by the court shall not extend further than to determine, on the basis of the entire record which shall be certified by the commission, whether any of the following occurred:
(1) The commission acted without, or in excess of, its powers or jurisdiction.

[2] Unless indicated otherwise, further statutory references are to the California Public Utilities Code.

(2) The commission has not proceeded in the manner required by law.
(3) The decision of the commission is not supported by the findings.
(4) The findings in the decision of the commission are not supported by substantial evidence in light of the whole record.
(5) The order or decision of the commission was procured by fraud or was an abuse of discretion.
(6) The order or decision of the commission violates any right of the petitioner under the Constitution of the United States or the California Constitution."

" ' "There is a strong presumption of validity of the [PUC's] decisions [citations], and [its] interpretation of the Public Utilities Code should not be disturbed unless it fails to bear a reasonable relation to statutory purposes and language [citations]." [Citation.]' [Citation.] Similarly, the PUC's interpretation of its own regulations and decisions 'is entitled to consideration and respect by the courts [Citation.] . . . . " 'A court is more likely to defer to an agency's interpretation of its own regulation than to its interpretation of a statute, since the agency is likely to be intimately familiar with regulations it authored and sensitive to the practical implications of one interpretation over another.' " [Citation.]' [Citation.] With those principles in mind, the interpretation of statutes and regulations nonetheless remains a question of law subject to our independent review. [Citation.]

"We review any challenge to the evidentiary support for the PUC's findings under the substantial evidence standard: ' "The court must consider all relevant evidence in the record, but ' "[i]t is for the agency to weigh the preponderance of conflicting evidence [citation]. Courts may reverse an agency's decision only if, based on the evidence before the agency, a reasonable person could not reach the conclusion reached by the agency." ' [Citation.]" [Citation.]' '[T]he findings of fact by the [PUC] are to be accorded the same weight that is given to jury verdicts and the findings are not open to attack for insufficiency if they are supported by any reasonable construction of the evidence. [Citation.] . . . "When conflicting evidence is presented from which conflicting inferences

can be drawn, the [PUC's] findings are final." [Citation.]' " (*Clean Energy Fuels Corp. v. California Public Utilities Commission* (2014) 227 Cal.App.4th 641, 649.)

II. The Scope of the Regulatory Proceeding

Petitioners' first challenge to approval of the Carlsbad agreement focuses on the permissible range of issues the PUC could address in that proceeding. All three petitioners contend that addressing reliability issues in SDG&E's service area was beyond the permissible scope of issues, and thus, the PUC failed to proceed in a manner required by law. (§ 1757, subd. (a)(2).) To this end they argue the findings impermissibly contradicted those made in the Track 4 Decision that SDG&E had sufficient power supplies through at least 2018. The Sierra Club also argues the reliability issues are beyond the PUC's scoping memo and order that framed the issues to be addressed.

The contention that the issues addressed by the PUC were outside the scoping memo for the Carlsbad proceeding is most easily resolved. The PUC's Rules of Practice and Procedure require the assigned hearing officer to issue a "scoping memo" that "shall determine the . . . issues to be addressed." (Cal. Code Regs., tit. 20, § 7.3; accord *Southern California Edison Co. v. Public Utilities Commission* (2006) 140 Cal.App.4th 1085, 1104.)

The scoping memo and order in the Carlsbad proceeding identified the issues for determination to be:

"1. Does the application comply with SDG&E's procurement authority as granted by [the Track 4 Decision]?

2. Should the LCR identified in [the Track 4 Decision] be adjusted to account for transmission projects identified in the CAISO's 2013-2014 TPP? If so, how?

3. Is the Carlsbad PPTA a reasonable means to meet the 600 megawatt (MW) of identified LCR that [the Track 4 Decision] determined may be met by conventional resources? This issue includes consideration of the following:

- Should the Carlsbad PPTA be required to submit to SDG&E's request for offers Refueling Outage process, whether for the entirety of SDG&E's LCR need or only for the 600 MW identified as permissibly to be met by nonpreferred resources?
- Is the Carlsbad PPTA the best fit for the identified need? This, in turn, encompasses consideration of whether there are better and available alternatives to meet this need.
- Does the Carlsbad PPTA provide additional benefits above and beyond the identified need?
- Will the Carlsbad PPTA enhance the safe and reliable operation of SDG&E's electrical services?
- Are the price, terms and conditions of the Carlsbad PPTA reasonable?
- Are any other commitments made by SDG&E that are contingent on approval of the Carlsbad PPTA reasonable?

4. In Light of Finding of Fact 92 and Conclusions of Law 50 and 51 in [the Track 4 Decision], is Cost Allocation Methodology treatment appropriate ratemaking treatment for the costs of the Carlsbad PPTA? This issue encompasses consideration of whether SDG&E properly complied with its obligation pursuant to D.07-12-052 to establish and consult with a CAM group.

5. Is the Commission required to conduct an environmental review of the Carlsbad project pursuant to the California Environmental Quality Act? The Center for Biological Diversity raised this issue in its protest, and it is fairly within the scope of the proceeding. Therefore, parties may address the issue at their discretion."

A plain reading of this memorandum and order leads to the inescapable and unmistakable conclusion that the proceeding to approve the Carlsbad PPTA would involve interpretation and application of the issues before the Commission in the Track 4 proceeding. Issues number 1 and 3 identified in the scoping memo and order reflect that the Commission would consider whether the application comports with the Track 4 decision and whether the tolling agreement provided a reasonable means for SDG&E to procure the 600 megawatts of power the Track 4 Decision determined could be provided by conventional resources. When one considers that SDG&E's application for approval of the Carlsbad agreement stated that the "expected online date [for the generation units] is November 1, 2017," and the scoping order states the proceeding would consider whether the proposed agreement is the best fit for SDG&E's identified need, any claim that the scoping order did not encompass the issue of SDG&E's need for power before 2018 is unreasonable and without merit.

Our conclusion that the scoping memo and order apprised the parties that issues addressed in the Track 4 Decision would be considered in the Carlsbad/SDG&E proceeding also bears upon the claim by petitioners Protect Our Communities Foundation and the Center for Biological Diversity that the PUC did not provide adequate notice that the Track 4 determination could be reconsidered. As the record reflects, petitioners were both provided notice of the issues that could be affected in the Track 4 Decision and afforded the opportunity to participate in the hearing. In fact, petitioner Sierra Club and others protested the convening of the proceedings before the scoping memo was issued, in part, on the basis that approval of the tolling agreement would be inconsistent with the outcome of the Track 4 proceeding. The parties had notice from the earliest stage of the proceeding that it would address issues within the scope of the Track 4 Decision. But perhaps most significantly, the Track 4 Decision was not as unequivocal as petitioners make it out to be, and approval of the Carlsbad agreement did not alter the decision in any material sense.

Although the Track 4 decision contains a finding that SDG&E had sufficient supplies to meet projected demands in its service area through 2018, it also recognized

that the procurement levels authorized in the decision would not be adequate to meet all needs in the SONGS service area through 2022. The decision specifically recognized that additional procurement could become critical as early as 2018, and would need to be addressed in other proceedings before the Commission. In light of these caveats on the adequacy of supply in the SONGS service area, the proceeding to approve the Carlsbad agreement is neither a surprise nor starkly at odds with the Track 4 Decision, and did not undermine its holding.

III. Evidence Supporting the Just and Reasonable Finding

Another permissive basis for our review is whether the findings of the commission are supported by substantial evidence in light of the whole record. (§ 1757, subd. (a)(4).) As stated above, we employ the familiar substantial evidence standard. We consider all the relevant evidence in the record, but it is the job of the PUC, not us, to weigh and resolve conflicting evidence. We will reverse only if, in light of the evidence in the record, a reasonable person could not have reached the conclusion reached by the PUC. (*Clean Energy Fuels Corp. v. California Public Utilities Commission, supra*, 227 Cal.App.4th at pp.649–650.)

Section 451 requires that services by a public utility and its charges for that service be just and reasonable. Petitioners argue the PUC's finding that the terms of the Carlsbad tolling agreement are just and reasonable is unsupported by the evidence. This argument is primarily based on an assertion that the testimony of an independent evaluator who reviewed the terms of the Carlsbad agreement inappropriately relied on SDG&E's contract with Pio Pico Energy Center, approved by the PUC in 2014, in assessing the fairness of the Carlsbad PPTA. Petitioner Sierra Club asserts the Pio Pico agreement was unsuitable and inappropriate for comparison because it is a smaller facility than Carlsbad and was solicited in 2009. It argues that the PUC's finding "improperly relied on evidence that does not provide credible or valuable market assessments for comparison."

This argument is based on too selective a parsing of the evidence. While the independent evaluator acknowledged that his evaluation of the Carlsbad agreement was "challenged by the lack of recent data from conventional resource solicitation processes,"

the independent evaluator's conclusion was based upon more than solely a comparison to the Pio Pico contract. In addition to consideration of Pio Pico, which was then the PUC's most recent approval of a contract by SDG&E for gas-fired power generation, the independent evaluator considered studies of the costs of the same or similar gas-fired power units for new entrants in the New York and New England energy markets. He also considered a draft report of the California Energy Commission on the estimated capital and operational costs of production for similar gas-fired units. Based upon this review, it was the opinion of the evaluator that "SDG&E acted in an appropriate, fair and unbiased fashion in its negotiations with Carlsbad Energy Center. The parties negotiated aggressively but fairly. The PPTA reflects the cooperative nature of the negotiations and the efforts of both parties to resolve differences in a fair and equitable manner resulting in a Contract that generally balances risk and adequately protects the interests of customers."

Moreover, although the Commission approved a contract for less power than requested by SDG&E, it did so provided the contract would be subject to the same terms and conditions as the agreement for 600 megawatts. "That said, we do not find that the full 600 MW capacity of the proposed Carlsbad Project is needed by 2018. A 500 MW project would address our reliability concerns, while supporting the goal of meeting the state's OTC policies and satisfying a significant portion of the need identified in D.14-03-004 from preferred resources and energy storage. Therefore, based on: (1) the fit to the identified need, (2) the additional benefits provided by the PPTA, (3) the reasonableness of the price per MWh, terms and conditions of the PPTA, and (4) the safety and reliability concerns addressed by the PPTA, we find it reasonable to approve the Carlsbad PPTA conditioned on the reduction of the capacity of the proposed facility from 600 MW to 500 MW subject to the same per-unit price and other terms and conditions."

In light of this record, we cannot conclude that the PUC acted unreasonably or without an evidentiary basis in finding the Carlsbad agreement to be just and reasonable.

IV. Size of the Contract and Sources of Energy to Meet SDG&E's Needs

The remaining issues raised by petitioners essentially arise out of two facets of the

PUC's decision. They say the PUC should have required that more of SDG&E's needed power be supplied by preferred resources obtained through the request for offer process, and at the same time they argue the PUC impermissibly pared back the size of the Carlsbad agreement from 600 to 500 megawatts. But the PUC reduced the size of the agreement to specifically require that more of the power needed by SDG&E be supplied by preferred resources. These claims strike at the core of the PUC's discretionary authority, and illustrate the delicate balance the Commission sought to strike with approval of this PPTA. Because these claims are inter-related, we address them together.

Section 454.5 subdivision (b) (9) (C) provides a preference that a utility will "meet its unmet resource needs through all available energy efficiency and demand reduction resources that are cost effective, reliable, and feasible." The Track 4 decision contains a discussion of the history of the PUC's efforts to implement this preference. The Commission has generally avoided requiring utilities to procure a fixed amount of their needed power from preferred resources before seeking fossil fuel sources. They are instead "required to continue to procure the preferred resources 'to the extent that they are feasibly available and cost effective.' " The logic of the PUC's position is apparent because while section 454.5 contains a directive that utilities will address unmet energy needs with renewable, efficiency and demand reduction resources (§ 454.5, subd. (b)(9)(A) & (C)), the requirement is conditioned on the cost-effectiveness, reliability and feasibility of those sources.

Here, the Commission carefully assessed whether SDG&E's identified need for power in 2018 could be reasonably satisfied through the acquisition of preferred resources, and it struck a balance. It recognized that SDG&E's request for offers had generated a significant and robust response with the potential to produce more than 200 megawatts of SDG&E's needed power. But SDG&E was projected to have a gap in reliable supply by 2018. The Commission was concerned that "it may not be feasible time-wise to complete the RFO and get the selected projects on line before the reliability need becomes critical. SDG&E estimates that it could file an application for approval of RFO projects in the first quarter of 2016. Assuming normal application processing times,

a decision is unlikely before the end of 2016. That would leave only one year before the scheduled closure of Encina at the end of 2017. While a few small projects might be able to reach commercial availability in that amount of time, there is a real risk that a reliability gap could occur that threatens the continued provision of reliable electric service in the SONGS area."

In order to close the gap, the PUC approved the Carlsbad agreement, but reduced the quantity of electricity it would provide from 600 to 500 megawatts. This reduction of quantity was specifically intended to ensure that SDG&E would have to procure at least 200 megawatts of its remaining need identified in the Track 4 Decision from preferred resources and energy storage. There is nothing in the record that suggests the PUC did not assess this reduction in light of what was feasible in the circumstances and strike a balance to ensure that SDG&E will continue to provide reliable service while acquiring a portion of its needed power from preferred resources.[3]

Petitioner Protect Our Communities argues that reduction of the size of the agreement was outside the scope of the proceedings and considered without affording the parties adequate notice and an opportunity to be heard. Again, the record indicates otherwise.

The scoping memorandum and order states that among the issues to be decided was whether the Carlsbad agreement was "a reasonable means to meet the 600 megawatt (MW) of identified LCR that [the Track 4 Decision] determined may be met by conventional resources? This issue includes consideration of the following: . . . Is the Carlsbad PPTA the best fit for the identified need? This, in turn, encompasses consideration of whether there are better and available alternatives to meet this need." This language clearly puts in issue whether the PUC should permit the purchase of 600 megawatts under the Carlsbad agreement and whether there are better and available

[3] The court is in receipt of an amicus curiae brief sought to be filed in support of petitioners by Basin & Range Watch, Coastal Environmental Rights Foundation, Consumer Watchdog, Food & Water Watch, Preserve Wild Santee, and San Diego 350. The brief is rejected as untimely and as not presented in proper form with a request to file upon leave of court. (Cal. Rules of Court, Rule 8.200 (b).)

alternatives. Reducing the size of the contract does not seem out of the scope of the proceedings as a possible better alternative.

Finally, the progress of the proceedings and the testimony fairly apprised the parties that modification of the size of the contract was an issue. The testimony of the independent evaluator expressed some concern over the size of the project and stated that while a project of 400 to 600 megawatts appeared reasonable, the final size of the project could be impacted by the results of the request for offer process for preferred resources. The independent evaluator also discussed with SDG&E and reported on an option for an initial agreement for 400 megawatts. Testimony from a Pio Pico representative also suggested that it could supply a portion of the power SDG&E sought to obtain from Carlsbad. Moreover, petitioners responded and addressed the reduced size of the agreement in their petitions for rehearing. On this record, with parties as obviously sophisticated as the petitioners in proceedings before the PUC, we cannot conclude there was a lack of notice that the size of the contract finally approved by the PUC could be different than desired by SDG&E and Carlsbad.

In the end, the PUC pared back the agreement in a way that it considered would reliably meet a need in SDG&E's service area beginning in 2018 while still requiring SDG&E to procure from preferred resources another 200 megawatts it will require by 2022 in order to fulfill the demand for power identified in the Track 4 Decision. Of SDG&E's authorized procurement level, the Track 4 Decision states: "SDG&E shall ensure that no less than 200 MW of procurement authorized by this decision is from preferred resources or energy storage." In this respect, approval of the 500 megawatt Carlsbad agreement is entirely consistent with the Track 4 order.

DISPOSITION

The decision of the Public Utilities Commission in proceeding 15-05-051 on the Application of San Diego Gas & Electric Company (U902E) for Authority to Partially Fill the Local Capacity Requirement Need Identified in D.14-03-004 and Enter into a Purchase Power Tolling Agreement with Carlsbad Energy Center, LLC as modified on rehearing is affirmed.

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Siggins, J.

We concur:

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McGuiness, P.J.

_____
Pollak, J.