

DEPARTMENT OF PUBLIC SERVICE REGULATION
BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MONTANA

* * * * *

IN THE MATTER of the Complaint)	
of SUPERIOR ENERGY, INC.,)	
)	UTILITY DIVISION
Complainant,)	
)	
vs.)	DOCKET NO. 84.8.46
)	
PACIFIC POWER & LIGHT COMPANY,)	ORDER NO. 5137
)	
Defendant.)	

BACKGROUND

1. On August 27, 1984, Superior Energy, Inc. (Superior), filed a complaint with the Public Service Commission. Following a motion to dismiss, and the Commission's denial of the motion, the parties engaged in extensive negotiations. Following failure of those negotiations, Superior filed a motion for summary judgment. Pacific Power & Light (PP&L) filed a memorandum in opposition to the motion, to which Superior replied. Both parties waived oral argument and an evidentiary hearing, and agreed that the Commission could make a decision based on pleadings filed with it.

I. LENGTH OF CONTRACT

2. During the course of negotiations, PP&L offered a maximum term of 15 years, on the grounds that Superior's fuel supply was not sufficiently secure to offer a longer term.

3. Superior disputes the claim of inadequate fuel supply, and argues that both the PSC's Order No. 5017 and PP&L's approved tariffs require that the length of the contract is at the option of the QF.

4. The PSC declines to make a determination regarding whether Superior's fuel supply is sufficient to justify a 35 year contract. This is a factual issue that would be difficult for the Commission to resolve. Further, a decision on this issue is not essential to resolution of the issues raised by this complaint. Those issues can be disposed of by reference to the Commission's previous orders in Docket Nos. 81.2.15 and 83.1.2. In those dockets, the PSC clearly conveyed its desire that utilities and QF's resolve risk allocations in the negotiating process. The Commission views security of fuel supply as a risk factor that can be resolved satisfactorily by the parties. Absent evidence that PP&L's concern over fuel supply is without foundation, it is entitled to bring that concern to the negotiating table. In view of PP&L's substantial experience in power purchases from facilities such as that proposed by Superior, and in view of the evidence of good faith negotiation, the Commission finds that the issue should be left to the parties rather than to findings by the Commission.

5. The PSC agrees with Superior, that under relevant orders and tariffs, it can determine the length of contract it wishes to sign with PP&L. For example, PP&L's Tariff No. 87-1 (Second Revision) contains no qualifications regarding who may choose the 35 year term listed. This implements the clear intent conveyed in Order No. 5017, Docket No. 83.1.2: "Based on testimony in this docket. . .and concerns expressed to this Commission by prospective QF's, the Commission finds that these long-run avoided cost rate options should be fixed by tariff." (Finding No. 49) Later portions of the order make clear that the term of contract lies with the QF exclusively: "A levelized long-term avoided cost rate shall be an option available to any QF willing to sign at least a four-year contract."

6. The PSC is well aware that PP&L, by trying to limit the contract to a 15 year term, is attempting to address the risk, especially acute with mandated fully levelized rates, that the early

"overpayment" would not be made up in later years if the Superior plant could not fulfill its obligations under the contract. By its decision, the PSC in no way wishes to transfer all risks of nonperformance to PP&L and, ultimately, to its ratepayers. Rather, the PSC finds that Order No. 5017 contains provisions by which PP&L can account for the risk of future nonperformance. Finding No. 120 of that order specifically allows utilities to require insurance sufficient to assure reimbursement for payments made under levelized contracts. This is the avenue by which PP&L can cover the nonperformance risk with Superior.

7. By this decision, the PSC contemplates that there will be further negotiations between parties to arrive at mutually agreeable provisions that fairly allocates the risk of nonperformance. For example, Superior may choose to accept a shorter term contract in exchange for fewer insurance requirements. With the limitation previously discussed, the parties remain free to negotiate the basic issue of risk allocation.

II. PREAPPROVAL BY REGULATORY COMMISSIONS

8. During the course of negotiations, PP&L attempted to insert a contract provision that required as a precondition to its becoming bound by the terms of the contract, the approval of regulatory commission's in the states where it operates. Alternatively, PP&L demanded the Montana PSC's commitment that Montana ratepayers would absorb any expenses found to be imprudent by other commissions. As a final alternative, PP&L attempted to insert a provision limiting its payments to Superior to expense levels allowed by regulatory commissions.

9. Superior, while sympathetic to PP&L's dilemma, opposes all of the alternatives offered on the grounds that they are prohibited either by PURPA or by the PSC's Order No. 5017.

10. In Docket No. 83.1.2, PP&L raised the same concerns that prompted its attempt to negotiate those contract provisions. Because Montana's rates are higher than those approved in the other states, during the proceedings in Docket No. 83.1.2, PP&L asked for a rule that would have allowed a direct Montana allocation of any QF-related expenses found to be imprudent by other commissions. The PSC rejected the request:

Although the Commission sympathizes with the motives underlying the second request, the perceived problem is speculative at this time.

Should another jurisdiction find Montana rates imprudent, however, the Commission intends to assure that PP&L is not required to absorb the associated expenses and will do so in the ratemaking process. The Commission does not expect that any state commission in the Pacific Northwest will disallow the expenses associated with purchase of QF power.

Order No. 5017, Finding No. 109

11. Since issuance of that order, PP&L's concerns have become much less speculative, as the Washington Utilities and Transportation Commission has found Idaho's avoided cost rates imprudently high, and there are indications that the Oregon Commissioner may do the same. Nonetheless, the PSC continues to believe that the assurances it gave in Order No. 5017 are sufficient to allow PP&L to proceed with this contract. Those assurances state clearly that the PSC does not intend to have PP&L's shareholders pick up the expenses incurred because of its purchases of QF power in Montana. Therefore, the Commission finds that a preapproval clause in a contract cannot be required.

12. The alternatives to the approaches that PP&L has proposed in negotiating a contract with Superior are both unnecessary and unduly burdensome. The PSC has previously rejected utilities' attempts to place preapproval clauses in their contracts with QF's. PP&L has offered no reason why that policy should be changed. To allow such provisions would introduce an unnecessarily burdensome requirement that would, in all likelihood substantially lengthen the process of securing fully executed contracts and might even preclude such a contract.

13. PP&L's proposal to shift the risk of an imprudence finding to Superior through a clause allowing reduction or suspension of payments appears directly contrary to the spirit, if not the letter, of PURPA. QF's should not be required to pay the price of disagreements among commissions in the Northwest, just as the shareholders should not. The PSC interprets PURPA and its implementing regulations and orders as assuring QF's of a fixed price not subject to the vagaries of the ratemaking process

14. The PSC has given PP&L all the assurances it believes are necessary in this area. Until changed, the rates in effect are the only ones PP&L can pay. Current payments under lawful tariffs cannot be made contingent on future events, unless expressly allowed by the Commission.

PRICE

15. On December 10, 1984, the PSC issued Order No. 5091a in Docket No. 84.10.64. In that Order the Commission limited the full application of prices currently in effect to contracts that had been "fully negotiated" as of December 7, 1984. For contracts that were not fully negotiated on that date, any price provisions are subject to adjustment to reflect rates found to accurately reflect avoided costs in the now-pending Docket No. 84.10.64.

16. For purposes of Order No. 5091a, Superior claims that the contract in dispute is fully negotiated. The claim is based on the fact that prior to the cut off date, Superior executed a Pacific-Montana Standard Form Agreement minus the jurisdictional approval requirements and for a 35-year term, and submitted it to Pacific. A copy of that partially executed contract was filed in this Docket. Superior further claims that over \$100,000 in expenditures favors a finding that the contract is fully negotiated, since one of the PSC's justifications for allowing the current price for such contracts was the assumption that greater investments had been committed than for those that were still being negotiated. Superior concludes that it would have had a power sales agreement "in hand but for Pacific's refusal offer of acceptable contract terms." (Motion for Summary Judgment, p. 12)

17. In response to Superior's position, PP&L claims that the contract cannot be considered fully negotiated, since there was dispute over a number of essential terms.

18. This is the first occasion when the PSC has been required to interpret the term "fully negotiated," as used in Order No. 5091a. At the time that Order was issued, the PSC realized that any interpretation would probably have to rest on a case-by-case analysis, taking all relevant factual matters into account. Such is the situation presented by this Complaint.

19. Had there been claims and proof that in its negotiations with Superior, PP&L had dealt in bad faith, the PSC might be required to interpret the term "fully negotiated contract" as broadly as Superior urges it to do. This case, however, presents no such situation. By all accounts, PP&L has negotiated diligently and in good faith.

20. Under the circumstances presented in this particular case, the PSC cannot conclude that there is a fully negotiated contract. By the very terms of this order, it is contemplated that further negotiations will go forward on the risk allocation issue.

21. The PSC cannot accept Superior's argument that its signing of a contract demonstrates that it is fully negotiated. Obviously, PP&L did not agree with the contract terms or it would have signed the contract offered by Superior, and this dispute would not have come to the PSC for resolution. By use of the term "fully negotiated contract," the PSC intended to convey that contracts with all essential terms agreed upon must be signed. The need for such a provision arose because one utility under the Commission's jurisdiction had a number of contracts ready for signature but had not signed them in hopes that the PSC would grant a moratorium on all contracts, whether or not terms of individual contracts were agreeable to both parties. Obviously, this is not the situation here.

CONCLUSIONS OF LAW

1. Pacific Power and Light Company is required to purchase power from qualifying facilities, as defined by PURPA and Montana law, subject to the terms and conditions established by the Montana Public Service Commission.

2. The Montana Public Service Commission properly exercises jurisdiction over the matters raised by this complaint. 69-3-663, MCA

3. This order is consistent with federal and state law and with the Commission's previous orders in Docket Nos. 81.2.15 and 83.1.2.

ORDER

Pacific Power and Light Company is to negotiate a contract with Superior Energy, Inc. which complies with the findings contained in this Order.

DONE AND DATED this 29th day of April, 1985 by a vote of 2 - 1.

BY ORDER OF THE MONTANA PUBLIC SERVICE COMMISSION.

CLYDE JARVIS, Chairman

HOWARD L. ELLIS, Commissioner
(Voting to Dissent)

DANNY OBERG, Commissioner

ATTEST:

Trenna Scoffield
Secretary

(SEAL)

NOTE: Any interested party may request the Commission to reconsider this decision. A motion to reconsider must be filed within ten (10) days. See 38.2.4806, ARM.