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Regulators should stop playing the greed card

By Steven F. Greenwald and Jeffrey P. Gray

In early February, Western GeoPower (WGP) announced its termination of a 20-year geothermal power purchase agreement (PPA) with Pacific Gas and Electric Co. (PG&E). A WGP press release explains that the company terminated the agreement because a regulatory approval condition had not been obtained within a 180-day time period stipulated in the PPA.

WGP's CEO, Kenneth MacLeod, acknowledged in *California Energy Markets,* an energy trade publication, that increased prices for renewable power had made the PPA "less attractive" and that the ability to execute a new PPA at a higher price was in the company's best economic interest. In the same article, a spokesperson for the California Public Utilities Commission (CPUC) characterized WGP as motivated by "greed." The CPUC spokesperson was also quoted as saying that, while "legal," WGP's conduct was "a clear example of a seller using market power."

What are the policy implications of this episode? Should it be, as the CPUC intimates, chalked up as an abuse by a "greedy" generator, or does it highlight a "major disconnect" in the pursuit of renewable power?

Timely action required

CPUC-mandated terms and conditions in every California renewable PPA include the right of each party to terminate if "final and nonappealable" regulatory approval is not obtained within 180 days. This condition requires, at a minimum, that the CPUC first issue a final decision approving a PPA and also that the 30-day period for seeking rehearing expire. In WGP's case, the CPUC issued a decision approving the PPA, but the period for seeking rehearing had not expired within the 180 days. Accordingly, even the CPUC spokesperson recognized that WGP had the absolute legal right to terminate the PPA.

Contrary to the CPUC's claim, WGP's termination was not an exercise of "market power." WGP did not insist upon the final and nonappealable condition in the PPA, looking for an out if prices were to rise. On the contrary, the CPUC itself mandated the final and nonappealable provision. Moreover, by committing to the PPA, WGP ceded all market power; it was obligated to abstain from any market participation for the 180-day period. All "power" during this window resided with PG&E and the CPUC. They could lock in the PPA price for the full 20-year term—yet they failed to do so.

Costs of "regulatory certainty"

In our February 2007 column in this magazine, we commented that, though the final and nonappealable condition promises the purchasing utility "regulatory certainty," it exposes electricity consumers to the risk of losing PPA benefits if there is a regulatory delay. The lesson to be learned from the WGP case: Regulators and utilities must honor contractual commitments; if they don't, consumers will enjoy less renewable power and pay higher prices.

Additionally, regulators must develop ways to provide regulatory certainty to utilities without exposing ratepayers to the risks of regulatory paralysis.

The diversionary blame game

Notwithstanding the CPUC's attempt to divert attention from itself to the supposedly "greed-motivated" generator, the question remains: Why couldn't the CPUC approve the PPA within 150 days (allowing the rehearing period to expire within 180 days)? Its failure is particularly perplexing because California places the highest priority on securing renewable power, and the CPUC has implemented numerous initiatives to "streamline" its approval process, including:

- Requiring the inclusion of mandatory PPA "standard terms" to reduce staff review of commercial terms to essentially a "checking the box" exercise.
- Preapproving a market price referent (MPR) through a separate and annual regulatory process; if the PPA price is under the MPR (as was the WGP price), no further price review is necessary.
- Requiring review of the PPA by the utility's Procurement Review Group, which comprises representatives from consumer and community groups, whose mission is to ensure the PPA's overall ratepayer benefits prior to the utility submitting the PPA.
- Requiring that the utility retain an independent evaluator to assess the completeness and fairness of the bid solicitation and the utility's selection process.

These innovations should remove the common obstacles to timely regulatory review. So what delayed the CPUC from approving the WGP PPA within the self-imposed 150-day deadline? The article suggests that CPUC staff may have been diverted to review other "higher priority" renewable PPAs. If this is true, given the state's absolute insistence on achieving the most aggressive renewable standards, California must adequately staff the CPUC.

Move beyond the greed rhetoric

Achieving the state's renewable mandate also requires the CPUC to stop playing the "generator greed" card every time there's a setback. A PPA is a commercial contract, and a party's exercise of its rights in a contract connotes neither greed nor market power—particularly in this case, where a key PPA term allowing termination was mandated by the CPUC.

Accusing generators of employing Enron tactics is anachronistic political rhetoric, not positive energy policy. The CPUC and other regulatory agencies with responsibility to approve PPAs would better serve consumers by streamlining their approval process.

This quote attributed to the maligned WGP CEO perhaps says it best: "[There is] a major disconnect between the public policy statements of the California government [with respect to promoting renewable power] and the ability of the bureaucrats and the agencies to effectively carry out the mandate." ■

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