



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

OFFICE OF
AIR AND RADIATION

James M. Hinrichs
General Manager Western Region
Goal Line L.P.
555 N. Tulip Street
Escondido, CA 92025

Dear Mr. Hinrichs:

This letter represents U.S. EPA's determination of applicability under §72.6(c) of the Acid Rain regulations for Goal Line Limited Partnership's ("Goal Line L.P.") Goal Line Cogeneration Facility ("Goal Line"), ORISPL 54749, in Escondido, California. This determination is in response to your letters of October 15, 1997 and October 20, 1999 requesting a determination and the supplemental submissions dated March 24 and September 21, 2000, March 9, 2001, and June 20 and July 22, 2002.

Background

Goal Line is a qualifying cogeneration facility¹ that consists of a combined cycle unit that commenced commercial operation on November 21, 1994. The combustion turbine at Goal Line burns natural gas and has a nameplate capacity of 41.2 MWe. Exhaust from the combustion turbine is in turn ducted to a heat recovery steam generator ("HRSG") to produce steam. High pressure steam from the HRSG is used in a 10.2 MWe steam turbine generator. Steam from the steam turbine generator is used in compressors used to produce ice at a neighboring ice rink, which is also owned by Goal Line L.P. but leased to Ice Specialties, Inc. All electrical output produced at Goal Line has been sold to San Diego Gas and Electric ("SDG&E") since the unit commenced commercial operation.

The project that became Goal Line was initiated by Oceanside Refrigeration, Inc. ("ORI") in 1985. ORI applied for, and received from SDG&E, a Standard Offer No. 2 Power Purchase Agreement for a proposed 41 MW cogeneration project in Oceanside, California. In 1986, ORI signed and submitted the agreement to SDG&E. (The agreement signed and submitted by ORI is

¹ Arroyo Energy, Limited Partnership, 62 FERC ¶61,257 (1993), reh. denied, 63 FERC ¶61,198 (1993).

hereinafter referred to as the “disputed 1986 agreement.”) A dispute subsequently arose between ORI and SDG&E regarding whether ORI’s actions concerning the disputed 1986 agreement resulted in a contract between ORI and SDG&E requiring SDG&E to purchase the electrical output of ORI’s project at specified prices. In February 1987, ORI filed a complaint against SDG&E with the Public Utilities Commission of the State of California (CPUC). Although encouraged by a CPUC Administrative Law Judge to settle the dispute, initial settlement negotiations failed, and ORI initiated litigation in San Diego County Superior Court by filing a complaint against SDG&E on March 18, 1988.

After the lawsuit was filed, further negotiations resulted in a settlement agreement executed on December 4, 1990, which included a power purchase agreement between ORI and SDG&E for the electrical output of ORI’s project (collectively referred to as “the 1990 agreement”). The CPUC subsequently approved the 1990 agreement in an order issued September 25, 1991, the date upon which the power purchase agreement in the 1990 agreement became effective.

In approving the 1990 agreement, the CPUC assessed the differences between the disputed 1986 agreement and the 1990 agreement. The CPUC concluded that the 1990 agreement saves SDG&E about \$9 million in capacity cost savings and saves SDG&E about \$3.5 million in energy costs through energy curtailment rights not in the disputed 1986 agreement. In particular, the CPUC found that under the 1990 agreement:

the capacity price varies based on when ORI supplies the capacity...These prices are based on a term of 30 years. In contrast, the higher...prices ORI sought in the [disputed 1986 agreement] were only for a 25-year term.²

The CPUC also found that under the 1990 agreement:

the energy price is based on published avoided cost, except during periods of curtailment when it is based on SDG&E’s system decremental cost. In contrast, the [disputed 1986 agreement] paid published avoided cost for all hours and did not provide for a special, lower curtailment energy price.³

The CPUC also noted that the 1990 agreement has performance milestones not present in the disputed 1986 agreement and that financial incentives to delay development of the project by ORI present in the disputed 1986 agreement were removed in the 1990 agreement. Under the disputed 1986 agreement:

² Application of San Diego Gas and Electric Company for an Ex Parte Order Approving Settlement and Power Purchase Agreement with Oceanside Refrigeration, Inc., Decision 91-09-070 at 2 (CPUC, September 25, 1991).

³ Id. at 3.

a developer receives a levelized price based on the year operation begins. The developer receives the indicated price each year of operation. If the developer under a 30-year contract delays operation a year, it receives a higher price each year of its 30-year contract. Under the [1990 agreement], the price for each year of operation is fixed. If ORI delays operation, it simply loses that year's price benefit.⁴

The CPUC also noted that use of the Standard Offer No. 2 Power Purchase Agreement had been suspended in March 1986 and had been replaced by a different standard agreement (Reinstated Standard Offer No. 2 Power Purchase Agreement) starting in 1989. While the 1990 agreement generally conforms to the 1989 standard agreement, the 1990 agreement was somewhat more favorable to ORI and provides ORI "a small premium."⁵

ORI was subsequently purchased by Goal Line L.P. in August, 1993. Goal Line commenced commercial operation in November, 1994.

EPA's Determination

Section 72.6(b)(5) exempts from the Acid Rain Program a qualifying facility that: has, as of November 15, 1990, a qualifying power purchase commitment to sell at least 15% of its total planned net capacity; and consists of units with total net output capacity not exceeding 130% of total planned net capacity. Under §72.2, a qualifying power purchase commitment includes, among other things, a "power sales agreement" that: is in effect on November 15, 1990; commits a utility to purchase electricity from a facility with specified terms and conditions; and is not subsequently revised to change the identity of the electricity purchaser or to allow the costs of compliance with the Acid Rain Program to be shifted to the purchaser. 40 CFR 72.2 (definitions of "power purchase commitment" and "qualifying power purchase commitment").

Most of these criteria are easily applied, and are met, in this case. As noted above, Goal Line is a qualifying facility. Further, the 1990 agreement requires SDG&E to purchase 100 percent of Goal Line's total planned net output capacity. While Goal Line was originally planned as a 41 MW facility, its total net output capacity is 51.4 MW or 125 percent of total planned net output capacity. In addition, U.S. EPA finds that the 1990 agreement is a "power sales agreement" in that it commits SDG&E to buy electricity from Goal Line and establishes the terms and conditions for the sale, including prices for capacity and energy.⁶ Further, the identity of the power purchaser (SDG&E) has not changed since the facility commenced commercial operation in November 1994, and the 1990 agreement has not been modified.

⁴ Id. at 5-6.

⁵ Id. at 11.

⁶ See 1990 agreement, Restatement of Agreement for Power Purchase with a Firm Capacity Qualifying Facility (Oceanside Refrigeration, Inc.) at 4-5 and 13 (December 4, 1990).

However, the unique circumstances of this case make it more difficult to resolve the question of whether there was a power purchase commitment in place before November 15, 1990. The difficulty is that one of the key questions raised in litigation between ORI and SDG&E was whether there was in 1986 a binding contract requiring SDG&E to purchase the electrical output from ORI's qualifying facility.⁷ This issue, along with the other issues raised in the litigation, was never resolved on the merits by the parties or by the Court or the CPUC. Instead, the parties, agreeing that the issues should not be resolved on the merits, decided to compromise and settle the issues, and the CPUC approved the settlement⁸ and, on November 12, 1991, the Court dismissed the lawsuit. The 1990 agreement provides that the parties relinquish their claims and that the 1990 agreement "shall not be treated or deemed to be, an admission of liability" by either party.⁹

For the reasons discussed below, U.S. EPA concludes that the 1990 agreement should be treated, solely for purposes of this applicability determination, as being in effect before November 15, 1990. At the outset, U.S. EPA notes that public policy favoring settlement of legal disputes supports avoiding, if possible, the reopening of the issue of whether ORI and SDG&E had a binding power purchase contract in 1986. Both the Court and the CPUC accepted settlement of this issue, in lieu of litigation on the merits.

In the unique circumstances of this case, U.S. EPA believes that it is reasonable to avoid reopening the contract dispute and to treat the 1990 agreement, which was the basis for settling the dispute, as being in effect before November 15, 1990. First, there appears to have been a genuine dispute -- unrelated to the Acid Rain Program -- between ORI and SDG&E concerning whether they had a power purchase contract in 1986. In fact, the dispute arose long before the November 15, 1990 passage of Title IV provisions establishing the Acid Rain Program and the cutoff date for a §72.6(b)(5) exemption from the Acid Rain Program. The settlement of this dispute appears to be a good faith effort to avoid the burden and risks of litigation, not an effort to affect the applicability of the Acid Rain Program to the unit. Second, the 1990 agreement has some indicies of a pre-1989 agreement. The terms of the 1990 agreement are less favorable to ORI than the standard agreement that SDG&E was accepting in 1986 (i.e., the Standard Offer No. 2 Power Purchase Agreement, of which the disputed 1986 agreement is an example) but

⁷ See First Amended and Verified Complaint for Damages; For Breach of Contract; Deceit; Breach of Covenant of Good Faith Dealing; Restrain of Trade at 11 (December 29, 1988); and Answer of Defendant SDG&E to First Amended and Verified Complaint for Damages at 5-6 (January 27, 1989) in Case No. 596908 before the Superior Court of California for the County of San Diego.

⁸ See Application of San Diego Gas and Electric Company for an Ex Parte Order Approving Settlement and Power Purchase Agreement with Oceanside Refrigeration, Inc., Decision 91-09-070 at 13.

⁹ 1990 agreement at 3.

somewhat more favorable to ORI than the standard agreement (i.e., the Reinstated Standard Offer No. 2 Power Purchase Agreement) that SDG&E began accepting in 1989 in lieu of the previous standard agreement. In particular, the 1990 agreement reduced the amounts paid for electricity from the amounts required under the disputed 1986 agreement, but provided for somewhat higher capacity prices than the 1989 standard agreement.¹⁰ Moreover, because it reduced electricity prices as compared to the disputed 1986 agreement, the 1990 agreement (like the disputed 1986 agreement) did not allow passthrough of Acid Rain Program compliance costs.

In summary, U.S. EPA concludes that Goal Line meets the requirements for an exemption under §72.6(b)(5) from the Acid Rain Program. If, however, Goal Line does not continue to meet these requirements in the future, the unit may become an affected unit under §72.6(a). As an affected unit, the unit will have to comply with all applicable requirements of the Acid Rain Program, including the requirements to apply for and receive an Acid Rain permit (under Part 72), to monitor and report emissions (under Part 75), and to hold allowances to cover sulfur dioxide emissions (under Parts 72 and 73).

EPA's determination in this letter relies, and is contingent, on the accuracy and completeness of the representations in Goal Line's October 15, 1997 and October 20, 1999 letters and supplemental submissions dated March 24 and September 21, 2000, March 9, 2001, and June 20 and July 22, 2002, and is appealable under Part 78. The applicable regulations require you to send copies of this letter to each owner or operator of Goal Line. See §72.6(c)(1). If you have any further questions regarding the Acid Rain Program, please contact Robert Miller of EPA's Clean Air Markets Division at (202) 564-9077.

Sincerely,

/s/ (September 23, 2002)

Peter Tsirigotis, Acting Director
Clean Air Markets Division

cc: Suzanne Blackburn, San Diego APCD
Bob Baker, U.S. EPA Region 9

¹⁰ Id. at 10-11.