EX-5

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Decision 84 07 149 JUL 18 1984

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

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| Application of PACIFIC POWER & LIGHT COMPANY under Section 454 of the Public Utilities Code of the State of California for Authority to Increase Rates for Electric Service. | Application No. 82-07-48 (Filed July 27, 1982) |

ORIGINAL

ORDER DENYING REHEARING OF DECISION (D.) 84-05-097

This proceeding concerns the request of Pacific Power & Light Company (PP&L), a utility with electric operations in several states, for authorization to increase its California electric rates to recover a pro rata portion of its investment in two abandoned nuclear generating projects. They are the Pebble Springs Nuclear Project and the Washington Public Power Supply System Nuclear Plant No. 5. In our original decision (D.83-11-012) we denied amortization, primarily on the basis that, as of that date, the other affected states had already denied amortization.

PP&L applied for rehearing of D.83-11-012. PP&L also called to our notice the fact that two of the four affected states, after we issued D.83-11-012, had at least partly granted PP&L's request for amortization. Because of this application and the change of circumstances, we reviewed the record of this proceeding. The purpose of this review was to determine, in light of the record as submitted, whether we should (1) modify our disposition of the matter, (2) affirm our disposition on other grounds, or (3) order rehearing on some or all of the issues. In D.84-05-097, pursuant to our review of the record, we denied rehearing and adhered to our denial of amortization. We found that PP&L had failed to exercise reasonable managerial skill with respect to these projects.

On June 18, 1984, PP&L challenged D.84-05-097 through dual filings, one a petition for writ of review to the California Supreme Court, and the other an application to this Commission for rehearing. We believe that the latter filing is procedurally proper. In D.84-05-097, we chose an entirely new basis for our disposition of this matter from that which we relied on in D.83-11-012 and which PP&L had challenged in its previous rehearing application. Also, PP&L's filings make clear that it wishes to preserve additional objections for judicial review. Both factors, in our view, argue for a rehearing application preceding any petition for review of D.84-05-097 to the Supreme Court.

We have considered all of PP&L's allegations of error and have concluded that no good cause for granting rehearing is shown. We will comment further on PP&L's procedural objections to D.84-05-097, however, since these objections go to the fundamentals of our decisionmaking process.

First, PP&L suggests that we lack authority to modify a decision for which rehearing is sought without first granting and holding the rehearing. We disagree. Our decisions are not final until the time within which a rehearing application may be filed has expired. A timely filed rehearing application prevents a decision from becoming final at least until we have ruled on that application. Both long-standing practice and judicial precedent support our authority to modify a decision not yet final.

Second, PP&L suggests that we have failed to accord due weight to the findings of the Administrative Law Judge (ALJ) who presided over the hearings in this matter. We do not believe that, in this context, the ALJ's findings should be accorded greater weight than any other portion of the public record. Specifically, our holding in this matter does not turn at all on the determination of the credibility of witnesses as shown by their demeanor or conduct at the hearing.

Our original decision contains only one finding relevant to the question of reasonableness. We declined at that point to accept the "staff recommendations as to a finding of imprudence."

(D.83-11-012 at mimeo. p. 21.) We were reluctant to accept those recommendations in view of the fact that our original basis for disposition of the case made it unnecessary for us to reach the reasonableness issue. When that basis, through change of circumstances, became inapplicable, it was clear that the reasonableness issue was in fact the central issue. We then determined, for reasons set forth in detail in D.84-05-097, that the record taken as a whole supported denial of amortization for failure to exercise reasonable managerial skill.

Third, PP&L suggests that we have applied to it, illegally and retroactively, policies articulated in D.84-05-100, decided on the same day as our denial in D.84-05-097 of PP&L's prior rehearing application. We disagree. Our holding in those decisions, that costs for a cancelled project must have been reasonably incurred, applies to such costs the same long-established rule applicable to recovery of utility expenses in general. Furthermore, in both decisions we require that a utility have acted reasonably in light of uncertainties of which the utility was aware or could have been aware through the exercise of due diligence. We believe this is a logical elaboration of the reasonableness criterion as applied to cancelled projects.

For the foregoing reasons,

IT IS ORDERED that rehearing of D.84-05-097 is denied.

This order is effective today.

Dated JUL 18 1984, at San Francisco, California.

I will file a written dissent.

WILLIAM T. BAGLEY
Commissioner

LEONARD M. GRIMES, JR.
President
VICTOR CALVO
PRISCILLA C. GREW
DONALD VIAL
Commissioners

I CERTIFY THAT THIS DECISION WAS APPROVED BY THE ABOVE COMMISSIONERS TODAY.

Joseph E. Bodovitz, Executive Director

A.82-07-48
D.84-07-149

WILLIAM T. BAGLEY, Commissioner, dissenting:

I must dissent from today's decision which would again deny PP&L an opportunity to be reheard on the issue of whether the company was reasonable in participating in the ownership and construction of two abandoned nuclear plants. The basis of this dissent is that I believe PP&L has been subjected to three adversarial proceedings but has only been allowed to actively participate in one.

The original decision in this matter, D.83-11-012, denied the company recovery on the grounds that no other jurisdiction had allowed PP&L to recover these costs and the amount of money at issue in California was so small that denial would have little if any impact on the company's ability to attract investors. There were no findings as to whether the company was reasonable in entering into these projects. The company applied for rehearing of this decision. The application was assigned, as is the custom, to an attorney in the Legal Division's Appellate section. The function of that section is to independently review the record in the case, the allegations by the applicants, responses from other parties and the basis for the decision. The section attorney then makes a recommendation to the Commission based on his/her objective analysis of the case. The attorney in essence acts as an appellate court law clerk. In this case the assigned attorney premised his analysis and recommendation on a belief that the Commission wanted to deny recovery of the abandonment costs - in other words, he had a result in mind before he conducted the analysis. He acted in support of the original result, found that the company acted unreasonably, and applied a "new" test which had just been articulated in the PG&E case, D.84-05-100, decided by this Commission that same day.

The company filed a second Application for Rehearing as well as a Petition for Writ of Review to preserve its ability to appeal to the California Supreme Court. In this second application proceeding, I urged the Commission to grant a rehearing so that the Applicant could respond, by evidence and argument, to the "new" bases for denial. The Commission, instead, again affirmed the original result.

This result is doubly troubling. Not only was the utility in my opinion not given an adequate opportunity to respond to a bootstrap rationale, as above outlined, but the first rehearing denial was and is flawed. "Reasonableness" is not so abstract a principal that it can be determined by this Commission without the benefit of direct opinion evidence. But the record here only contains testimony by one staff witness that the undertaking of Pebble Springs was unreasonable or imprudent. That witness and a second staff witness (who found Pebble Springs reasonable) both stated that the WNP-5 project, at the initiation stage, was reasonable. The majority ignores this record on two occasions.

At the very least and as a matter of basic fairness, the Commission should have granted a limited rehearing; at the very least and consistent with the Pacific Gas and Electric Company decision, supra, the utility should have been awarded relief for the WNP-5 project, even without a rehearing. When a project is originally not imprudent, when the project is undertaken during a period of uncertainty, and when the dollar magnitude is significant, relief is to be granted by this Commission (D.84-05-100, supra).

Further, even if there were a finding of "retroactive unreasonableness" applicable to both projects, the fact remains that these projects were started during a period, post 1972, of great power-supply uncertainty. Traditional Commission treatment would dictate, under these circumstances, that reimbursement for direct expense as distinguished from carrying costs be granted to the utility. The majority not only did not apply this accepted principal but applied, apparently, a different set of criteria retroactively and without affording applicant an opportunity to be heard. This Commissioner would have granted a rehearing.

/s/ WILLIAM T. BAGLEY, Commissioner

July 18, 1984
San Francisco, California