

L/dp

Decision 91-08-036 August 7, 1991

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application of )  
SOUTHERN CALIFORNIA GAS COMPANY for )  
authority to revise its rates )  
effective October 1, 1989, in its )  
Annual Cost Allocation proceeding. )

**ORIGINAL**

Application 89-04-021  
(Filed April 12, 1989)

And Related Matters. )

Application 89-05-006  
Application 90-02-027  
Application 90-04-029  
Application 90-10-032

ORDER MODIFYING DECISION 91-05-007

Pacific Gas & Electric Co. (PG&E) applied for rehearing of D.91-05-007, then withdrew its application and filed a petition for modification instead. The petition alerts us to a discrepancy in D.91-05-007's provisions for recapture of overcompensation paid to cogenerators who cannot show compliance with the efficiency standards required to qualify them under the Public Utility Regulatory Policies Act of 1978 (PURPA).

In the decision, we required a 90-day probation period for QFs whose data indicate that they are not in compliance with PURPA's QF efficiency standards. The term of probation would act as a grace period, after which the utility was to re-evaluate the QF's performance, and price sanctions were to be imposed only if the QF could not bring its efficiency level up. D.91-05-007, p. 22.

The petition points out that the decision at p. 19 requires utilities to "collect past payments from power producers that do not comply with efficiency standards and whose benefits are ultimately suspended." (Emphasis added.) D.91-05-007 goes on to specify that payments should be collected "for any time period during which the power producer was not in compliance with efficiency standards." *Ibid.* But at Conclusion of Law No. 12

(p. 27), D.91-05-007 we stated that the payments should only cover the period "beginning on the day probation was initiated for the power producer." *Ibid.*<sup>1</sup> PG&E asks for clarification of our intent.

PG&E argues that "there is no reason why a non-complying power producer that is able to cure non-compliance in 90 days should be excused for the prior year's non-compliance while a similar power producer who does not cure non-compliance during probation is saddled with a serious penalty for the same prior non-compliance." Petition, p. 5. Further, PG&E argues, "retroactive collection of overcompensation for all past periods of non-compliance is diametrically at odds with the purpose of probation," which is "intended to provide a non-complying power producer with a penalty-free opportunity to cure non-compliance." Petition, p. 4.

We recognize that D.91-05-007 contains conflicting language on this issue. We have reconsidered the matter and have reached a more consistent result which we articulate today.

Today we modify D.91-05-007 to correct the discrepancy. On consideration, we do not believe it necessary to allow any such "penalty-free" period as PG&E suggests in order to provide an incentive for power producers to cure their failure to qualify under PURPA. They will have incentive enough to cure in the recapture of overpayment made to them during their period of breach.

Nor do we believe that it is proper, or sound policy, to require the ratepayers to overpay a cogenerator in material breach of its contract (as we found in D.91-05-007, Conclusion of Law No. 6, p. 26) during a 90-day period, while the cogenerator attempts to meet contractual guarantees of efficiency it should

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1. Although the petition does not mention it, Ordering Paragraph 1 (p. 28) repeats the retroactive collection language.

have met from the beginning of its operation. Accordingly, we modify D.91-05-007 to provide that inefficiency during any period will be subject to recapture of overpayments.

At the same time, we recognize that some QFs may have been overpaid for extremely long periods, and that demand for recapture in a lump sum could well damage such operators beyond recovery. We think it is reasonable to apply a three-year limit on recapture, similar to the three-year limitation provided by the Legislature in sections 737 and 738 of the Public Utilities Code, on collections by utilities of lawful tariff charges in Superior Court. We have adopted a similar limitation in cases brought before us based on meter error; see *Re Retroactive Billing by Gas and Electric Utilities*, D.86-06-035, 21 CPUC 2d 270. We believe it is fair to hold QFs to the same limitation.

Similarly, when utilities backbill a customer for an amount large enough to cause real hardship, we require them to negotiate payment plans with the customer, so that the lawful charges may be paid without doing great damage to the customer. PG&E correctly points out that overpayments for some QFs are so large that recapture could cause them to go out of business, a result which would not benefit California's ratepayers. Accordingly, we will require the utilities and power producers to negotiate payment plans in good faith when it is necessary.

Therefore, IT IS ORDERED that D.91-05-007 be modified as follows:

1. The second full paragraph on page 19 is deleted and the following language is substituted in its place:

All three utilities should recapture all overpayments to power producers who have failed to maintain the efficiency required of QFs under PURPA, regardless of whether or not QF benefits are ultimately suspended as a result of the breach. We agree with Edison that past payments to non-complying power producers should be reduced. However, we recognize that cumulative past overpayments may in some cases be great enough to threaten the existence of the power producer. We will

accordingly place a limitation on recapture of overpayments to power producers, similar to the limitations imposed by §§ 737 and 738 of the Public Utilities Code and our Decision 86-06-035, 21 CPUC 2d 270. Recapture shall be limited to overpayments for the three years ending on the last date for which QF efficiency data are submitted in response hereto. In cases in which the QF can demonstrate that the amount to be recaptured is great enough to cause serious hardship to the producer, the utility and QF should, in good faith, negotiate a payment plan for the recapture.

2. The last three sentences of the first partial paragraph on page 22 are deleted. In the third sentence of the first full paragraph on page 22, the words "Because we have shortened the probation period" are deleted, so that the sentence begins with the words "It is reasonable."

3. Finding of Fact No. 19 on page 25 is deleted.

4. Conclusion of Law No. 12 on page 27 is deleted and the following language is substituted in its place:

The utilities should recapture past overpayments from power producers for the three years prior to the last date for which QF efficiency data is provided. If the QF can demonstrate that the amount to be recaptured is great enough to cause serious hardship to the producer, the utility and QF should, in good faith, negotiate a payment plan for the recapture.

5. Conclusion of Law No. 17 on page 27 is deleted.

6. The second subparagraph of Ordering Paragraph 1 on page 28 is deleted and the following language is substituted in its place:

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2. However, this does not relieve the power producers of their obligation under their contracts to provide QF efficiency information for prior periods if the utilities require it.

The utilities shall recapture past overpayments from power producers for the three years prior to the last date for which QF efficiency data is provided. If the QF can demonstrate that the amount to be recaptured is great enough to cause serious hardship to the producer, the utility and QF shall, in good faith, negotiate a payment plan for the recapture.

7. On page 29, the penultimate subparagraph of Ordering Paragraph 1 (beginning with the words, "The utilities shall provide a 90-day probation period ...") is deleted.

This order is effective today. . .

Dated August 7, 1991, at San Francisco, California.

PATRICIA M. ECKERT  
President  
G. MITCHELL WILK  
JOHN B. OHANIAN  
NORMAN D. SHUMWAY  
Commissioners

Commissioner Daniel Wm. Fessler, being necessarily absent, did not participate.

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

  
NEAL J. SHULMAN, Executive Director