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Decision 92-02-078

February 20, 1992

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the matter of the application of
Pacific Gas & Electric Co. as to
Resolution G-2967 regarding the
core aggregation access program.

ORIGINAL

} Application 91-12-003
} (Filed December 6, 1991)

ORDER DENYING REHEARING OF RESOLUTION G-2967

Pacific Gas and Electric Company ("PG&E") has filed an application for rehearing of Resolution G-2967. In its rehearing application, PG&E alleges that by mandating that the utility convert some of its firm sales rights to firm transportation rights in order to to provide core aggregators access to all Canadian supplies, the Commission has violated the constitutional prohibitions against the taking of private property for public use without just compensation. It also claims that the conversion will result in contractual shortfalls which will diminish the value of its subsidiary Alberta and Southern Gas Co. Ltd ("A&S"), and thus an unlawful taking has occurred. Further, PG&E contends, without any analysis, that the Commission has violated the equal protection clauses of the federal and state constitutions, and Public Utilities Code Section 1705.

We have examined all the above allegations of error in the application, and are of the opinion that sufficient grounds for granting rehearing have not been shown. Therefore, we will deny the application.

However, we do make the following observations about PG&E's application for rehearing of Resolution G-2967. In its

rehearing application, PG&E contends that a taking without just compensation has occurred based on the Commission's mandate that PG&E convert some of its firm sales rights to firm transportation rights on PGT to provide core aggregators access to all Canadian supplies, not just A&S supplies. However, PG&E fails to acknowledge that the Commission ordered such access in D.91-02-040 in order to prevent "utility dominance in gas procurement markets" which "may undermine the development of more competition in those markets." (Re New Regulatory Framework for Gas Utilities [D.91-02-040] (1991) 39 Cal.P.U.C.2d 360, 364-365.) Thus, in Resolution G-2967, the Commission was ordering PG&E to comply with D.91-02-040.

Accordingly, any issue of taking should have been raised in an application for rehearing of D.91-02-040. In fact, on rehearing PG&E did argue that the Commission's rules governing transportation-only service for core natural gas customers who aggregate their loads violated the California and the United States Constitutions by taking PG&E's property for public use without just compensation. (Application of Pacific Gas and Electric Company for Rehearing of Decision D. 91-02-040, pp. 7-9.) It alleged that "[b]y allowing core customers to purchase gas supplies 'from sellers of their choice' . . . , the Commission bestows those customers with part of PG&E's original load requirement served by A&S, without compensating for the resulting loss." (Application of Pacific Gas and Electric Company for Rehearing of Decision D. 91-02-040, p. 7.) In D.91-05-058, we rejected this argument, and denied PG&E's application for rehearing of D.91-02-040. (D.91-05-058, p. 1 (slip op.).)

Thus, PG&E's application for rehearing of Resolution G-2967 is yet another attempt to relitigate D.91-02-040 during the compliance phase. It is also an attempt to reargue the issue of taking, which the Commission rejected in D.91-05-058. Public Utilities Code Section 1709 provides that "the orders and decision of the commission which have become final shall be conclusive." Thus this statutory provision bars PG&E from making

such a collateral attack of D.91-02-040. (See People v. Western Air Lines (1954) 42 Cal.2d 621, 630; City of Vallejo v. Pacific Gas and Electric Company [D.85-07-030] at p. 7 (slip op.)) (1985) 18 Cal.P.U.C.2d 374.) Thus, the instant rehearing application is without merit and is also denied on collateral estoppel grounds.

However, even if we were to reach the merits of the taking issue, the application for rehearing of Resolution G-2967 should be denied. No unlawful taking without just compensation has occurred because there has been no taking, and an existing rate structure exists to fully compensate PG&E for the use of its rights.

By directing that PG&E convert some of its firm sales rights to firm transportation rights on PGT to provide core aggregators access to all Canadian supplies, the Commission merely has modified the use of the utility's capacity rights to allow PG&E's core customers, such as core aggregators, to arrange for their own gas under a buy/sell agreement with PG&E. PG&E has retained its firm sales right and firm transportation rights. (See Re New Regulatory Framework for Gas Utilities, *supra*, 39 Cal.P.U.C.2d at p. 364.) Such a modification of use is within the Commission's power to regulate and does not constitute a taking. (Pacific Telephone Etc. Co. v. Eshleman (1913) 166 Cal. 640, 675 & 678.)

Further, there is an existing rate structure to compensate PG&E for the use of its firm rights. (See Conclusion of Law #3 and #4, and Final Rules #3 and #9 in Re New Regulatory Framework for Gas Utilities, *supra*, 39 Cal.P.U.C.2d at pp. 369 & 371-372.) In fact, PG&E was able to file tariffs which set forth the rates for the service mandated in D.91-02-040. (See Advice Letter No. 1637-G-D, dated October 18, 1991; and Advice Letter No. 1637-G-E, dated November 14, 1991.) Thus, when the core aggregators are provided access, they will pay for the access based on these tariffs.

No further discussion is required of PG&E's allegations of error. Having considered each and every issue raised by PG&E,

we conclude that rehearing should be denied. However, we will modify Resolution G-2967 to correct a minor error of fact on page 3, as indicated below.

THEREFORE, IT IS ORDERED that:

1. On page 3, line 5, the date "May 21, 1991" should be replaced by the date "June 26, 1991".
2. Rehearing of Resolution G-2967, as modified herein, is denied.

This order is effective today.

Dated February 20, 1992, at San Francisco, California.

DANIEL Wm. FESSLER
President
JOHN B. OHANIAN
NORMAN D. SHUMWAY
Commissioners

Commissioner Patricia M. Eckert
being necessarily absent, did not
participate.

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


NEAL J. SHULMAN, Executive Director