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Decision 95-08-016 August 11, 1995

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Preferred Energy Services, Inc.,	)	
Complainant,	)	
vs.	)	Case 94-01-059 (Filed January 28, 1994)
Pacific Gas and Electric Company,	)	
Defendant.	)	

ORIGINAL

Patrick J. Power, Attorney at Law, for Preferred Energy Services, Inc., complainant.
David W. Anderson, Attorney at Law, for Pacific Gas and Electric Company, defendant.
Joel T. Perlstein, Attorney at Law, and subpoenaed witness Steve Linsey, for Division of Ratepayer Advocates, interested parties.

O P I N I O N

Background

Complainant Preferred Energy Services, Inc. (Preferred) requests that defendant Pacific Gas and Electric Company (PG&E) be ordered to refund excess charges for electrical energy during the phase-in program for continuing nonfirm service customers under Tariff Schedule E-19 and E-20, S, P, or T voltage level, interruptible or curtailable, and who were enrolled in PG&E's nonfirm service program prior to December 1, 1989. Preferred was commissioned by 13 customers of PG&E as follows:

Amcel Corp.
Anchor Glass Container
Celite Corporation
Grefco, Inc.
Jet Plastica Industries
Louisiana Pacific

Manville Corp.

Newark Sierra Paperboard

P&M Cedar Products

Pacific Coast-Pabco Gypsum

Rosberg Plywood

Seagate Technology

Sumiden Wire Products

Section 14 of PG&E's tariffs for these customers provides for the phase-in. In recognition of the changing costs of electric service, which demonstrated that the rate differential granted to these nonfirm customers was no longer justified, Decision (D.) 89-12-057, 34 CPUC 2d 199, in General Rate Case (GRC) Application (A.) 88-12-005 ordered the phase-in of revised incentives for nonfirm service to avoid a large rate shock of up to 40.8% to those customers. The phase-in capped the rate increase to 10% per year for three years. The first 10% applied to rates ordered by D.89-12-057; the cap increased to 20% on January 1, 1991, and to 30% on January 1, 1992.

At issue is whether:

> the 10% is the upward limit each year regardless of increases allocated to the large light and power (LL&P) class, which would consist of Energy Cost Adjustment Clause (ECAC) and Electric Revenue Adjustment Mechanism (ERAM) increases. Preferred argues that the Commission adopted a 10% limit for yearly increases during the phase-in, and that any LL&P change can reduce, but not increase, the 10%. This is demonstrated by the only example offered during the GRC which was of a decrease in ECAC which reduced the 10%. PG&E argues that the ECAC changes are separate and must be incorporated in rate changes, whether the ECAC rate increases or decreases. The major portion of the refunds requested are based on not allowing ECAC increases to take effect in addition to the phase-in increases.

2. ECAC changes (if they are to be considered along with the 10% per year increase) should be handled in an additive manner or compound manner. Additive means the ECAC change would be added to or subtracted from the 10% phase-in. Compound means that the ECAC change would first be applied to the rates, and then the 10% applied; thus, the effect of the ECAC change is compounded. For example, if ECAC increased 10% in two consecutive years, the total rate after two years would be 110% of 110%, or 121%, a 21% increase, as compared to a 20% increase under the additive method. The percentage difference in rates between the additive and compound methods is not great, but considering the high usage of these customers, the dollar difference is significant.

Preferred argues that the additive method is correct. PG&E argues for and has used the compound method, on the basis that the 10% cap is logically intended to be imposed on top of the otherwise effective rates, which would include ECAC rates. As compared to the additive method, compounding results in higher rates when ECAC increases, and lower rates when ECAC decreases.

At the hearing held in San Francisco on October 3 and 4, 1994, complainant presented the testimony of Preferred president Richard J. Kohl and consultant Walter J. Cavagnaro. PG&E presented the testimony of Senior Rate Analyst Andrew M. Bell, and called as a witness former Commission Advisory and Compliance Division (CACD) staff member Steve Linsey.

__Positions of Parties__

__Preferred__

Preferred argues that the intent of the Commission is clear: D.89-12-057 states, "To limit the effect of our adopted incentives on nonfirm customers, we will adopt PG&E's phase-in, which essentially limits rate increases to 10% per year." (34 CPUC 2d at 377.) Preferred believes that the Commission decided to limit rate increases to 10%, regardless of any other rate impact such as ECAC changes. If the Commission meant otherwise, it would have clarified that the 10% dealt only with the phase-in.

Preferred argues that if PG&E thought D.89-12-057 was deficient it should have filed a petition for modification. Public Utilities (PU) Code §§ 454.1 and 455 provide that no utility shall change any rate to result in a new rate except upon a showing before the Commission that the new rate is justified.

Preferred points out that PG&E's own Exhibit (Ex.) 40 at p. 18 in A.88-12-005 presents an illustration that supports Preferred's interpretation: PG&E proposed to use a percentage increase limiter of 10% in 1990, 20% (vs. the 1989 base) in 1991, and 30% in 1992. However, to the extent that the rates for the LL&P class change after the 1990 test year (due, for example, to ECAC decisions), the proposed caps will incorporate these changes. For example, Ex. 40 states that if in an ECAC proceeding the Commission orders a 5% decrease in Schedule E-20 firm rates effective January 1, 1991, then PG&E's 1991 nonfirm limiter will be adjusted downward from 20% to 15%.

Preferred argues that no ECAC increase should be added to the phase-in, but if the Commission decides otherwise, then at issue is how to combine the ECAC increase, whether by the additive or compound method.

Preferred also believes that PG&E made several misrepresentations in Advice Letter (A.L.) 1290-E, which implemented the authorized phase-in. PG&E's statements that the changes were primarily for clarification and were consistent with the decision are false, in Preferred's opinion. Furthermore, PG&E did not serve this A.L. on parties to A.88-12-005.

General Order 96-A at page 8 states:

> "Advice letters shall call attention to each increase or decrease in rate or charge, or change in condition which may result in an increase or decrease. . . ."

Preferred believes that fraud is demonstrated by the following:

1. PG&E stated the changes are primarily for clarifying purposes, a falsehood.

2. The cost allocation language necessary for implementation was purposely deleted from A.L. 1277-B by former PG&E employee Guest. While PG&E stated that D.89-12-057 approved adjustment of caps for nonfirm service due to the level of costs allocated to that class, language pertaining to that provision was omitted from A.L. 1277-E. Preferred argues that the omission was intentional.

3. Because Guest did not want to admit his error, he covered up the mistake in A.L. 1290-E, which he also prepared. PG&E stated in A.L. 1290-E that the filing will not increase any rate or charge, which is incorrect.

Preferred stresses that PG&E witness Andrew Bell admitted in testimony that he did not decide to use the compounding method until late 1990 when he knew that there would be an ECAC rate increase. Bell further admitted that his method is contrary to the method proposed in Ex. 40:

> "Q. Were you aware that the that your reasonable solution was contrary to the example in Exhibit 40?
>
> "A. Yes, I was." (Tr. p. 201.)

In Preferred's opinion, these misrepresentations establish fraud by PG&E, and constitute grounds for vacating Resolution E-3193, which approved A.L. 1290-E, and reinstating the rates established by the decision as filed by A.L. 1277-E.

Preferred further believes that PG&E informed the other customers that it would make refunds to the whole class if refunds are ordered by the Commission, and thereby discouraged those customers from subscribing to Preferred in this matter. Therefore, Preferred asks that we order PG&E to refund the nonsubscribers an amount reduced by an appropriate amount, such as 40%, to be paid by

PG&E to Preferred as compensation for its efforts in prosecuting this action on behalf of the entire class; or alternatively order PG&E to compensate Preferred at 40% of the total refund through its stockholders. In either way, all customers in the class would receive the same refund, at a level of either 60% or 100%. Otherwise those who subscribed to Preferred's services would be penalized relative to the other affected customers.

Finally, Preferred asks that refunds be made with interest.

PG&E

PG&E responds that its interpretation of the phase-in is correct since the Commission adopted its proposal and approved both A.L. 1277-E and A.L. 1290-E to implement it. Both A.L.s were scrutinized by CACD, which recommended approval.

PG&E believes that if ECAC reductions are combined with the phase-in, it is implicit that ECAC increases are also to be combined. The phrase in D.89-12-057 "which essentially limits rate increases to ten percent per year" (34 CPUC 2d at 377) means 10% after adjusting for ECAC changes, otherwise there would be no purpose for the word "essentially," in PG&E's view.

Regarding the method of combining ECAC effects, the additive method would cause greater impacts on customers at the end of the phase-in. Using the compound method, more of the affected customers reached the full level of rates under the revised nonfirm incentives during the period of the phase-in, reducing the potential for rate shock at the end of the phase-in, than would have under the additive method. That is why PG&E elected to use the compound method.

PG&E further stresses that the Schedule E-20 customers received large rate discounts that have been subsidized by other customer classes, and further discounts requested by Preferred would be totally unfair to other customers.

PG&E justifies not serving A.L. 1290-E on all parties to A.88-12-005 by noting that it served it on parties who had been active in commenting on nonfirm electric issues in that application. PG&E states that if it had served A.88-12-005's service list, only Anchor Glass Container among Preferred's clients would have been additionally served and Anchor was served through its counsel of record. Therefore, lack of proper service is not an issue.

Additionally, and critical in PG&E's opinion, is that the complaint is a collateral attack on D.89-12-057, Resolution E-3193, and D.92-05-031. Such a collateral attack is prohibited by PU Code § 1709, which states that final orders and decisions of the Commission shall be conclusive.

Regarding the issue of compensation to Preferred for bringing this case forward, PG&E argues that the Commission has no authority to make a monetary award to Preferred, and that such an award would constitute a punitive award.

<u>**Discussion**</u>

The fundamental disagreement hinges on Commission intent and whether PG&E properly carried out that intent. Complainant argues that PG&E illegally modified the A.L. and that Commission approval was in large part based on the misrepresentations of PG&E, and thus was wrong. Therefore, the refunds requested are appropriate and should be ordered. The affected customers had no opportunity to protest A.L. 1290-E as it may not have been served on all of them.

PG&E argues that its interpretation is proper, as witnessed by approval of the A.L., which merely served to implement the stated intent of the Commission. If it proposed to do otherwise or change the implementation, CACD would have recognized that in its review and recommended against approval. Regarding service of A.L. 1290-E, the affected parties were served, including Cavagnaro, who did not recall receiving it. His lack of recollection could be due to the fact that service was about four years ago.

The amount at issue for both issues and for the entire class is estimated at approximately $15 million by Preferred and $11.1 million by PG&E.

If we trace the sequence of events, the relevant proposed tariff appended to D.89-12-057 stated:

> "If a customer was enrolled in PG&E's non-firm service program prior to December 1, 1989, PG&E will calculate the customer's bills for service after January 1, 1990 using two sets of rates:
>
> "a. The rates described in Sections 3 and 12 of this schedule, using the customer's currently applicable service options.
>
> "b. The rates for standard (not 'extended') nonfirm service that were in effect on January 1, 1989, under the curtailment provisions that applied to the account during 1989 at the greater of the firm service levels that applied to the customer's account during 1989.
>
> * * *
>
> "If (a) exceeds (b) by more than 10 percent, the customer will be billed only for the amount in (b) plus 10 percent. On January 1, 1991, this 10 percent 'cap' will be increased to 20 percent. The cap will increase to 30 percent on January 1, 1992." (Mimeo., Appendix I, p. 19.)

PG&E filed A.L. 1277-E on December 28, 1989 and served it on parties of record in A.88-12-005 and A.89-04-003. A.L. 1277-E was then revised by A.L. 1290-E dated March 7, 1990.

In Exhibit 7 in this proceeding, entitled, "PG&E's Non-firm Service Program Final Study and Proposal" dated June 29, 1990, and presented to the Commission as a final draft in response to Ordering Paragraph 28 of D.89-12-057, repeated the above quotation, with changes including the following additions added after the end of the quote:

"These caps will be increased (decreased) based on any increases (decreases) in the costs allocated to the Large Light and Power Class."

On page 4, paragraph 3, of Resolution E-3193 dated July 6, 1990, which approved A.L 1290-E, the changes at issue here are described: "... PG&E believes that a cap on a customer's bill should be adjusted based on the change in allocated costs experienced by that customer's class. Accordingly, PG&E's modified Phase-In Program language clarifies that a customer's bill cap will be affected only by changes in its own class' allocation."

Paragraph 6 on page 4 states:

"After review of all pertinent documents, CACD concludes that PG&E is correct in its assertion that nothing in the GRC decision, D.89-12-057, precludes it from seeking modification of the provisions of this decision through separate proceedings or through the advice letter procedure. Sections 490 and 701 of the Public Utilities Code also convey authority to the Commission to authorize such modifications."

We agree that the Commission can make such changes. However, that change refers to PG&E's request for authorization to revise the applicability and phase-in, and transfer those Schedule E-19 and E-20 customers who do not meet the minimum demand criteria to another rate schedule. That is not at issue in this case. A.L. 1290-E did not acknowledge that it sought modification of D.89-12-057 with regard to methodology of phase-in or that it sought a change in rates. CACD clearly informed the Commission that the A.L. combined ECAC effects with the phase-in, but could not have been aware of the compound method since PG&E had not yet decided to use it and made no mention of it in the A.L.

We note that much of the attention of the Commission, CACD, and the parties was focused on the protest of A.L. 1290-E by the Californian League of Food Processors (CLFP). CLFP's concern was that the A.L. was unclear about how the varying demands of customers who are seasonal, such as food processors, would be handled. CLFP feared that these customers would be transferred to lower demand classes because of their seasonal demand patterns. PG&E clarified that the A.L. exempts excess demand incurred in 1990 or later from the phase-in process. CACD agreed with the A.L. including PG&E's conclusion that nothing in D.89-12-057 prevents PG&E from seeking modification of the provisions of the decision through the A.L. procedure, and recommended that the protest of CLFP be denied and the A.L. be approved. This is the object of CACD's discussion of modification.

We observe that the only example we have in the GRC of how the implementation would be handled is in PG&E's Ex. 40 at page 3: "For example, if in an ECAC proceeding the Commission orders a 5 percent decrease in E-20 firm rates effective 1/1/91, then PG&E's 1991 nonfirm limiter will be adjusted downward from 20 to 15 percent." While PG&E argues that this treatment of a reduction implies similar treatment for an increase, that is not stated, and it can be argued that the statement that rate increases will be limited essentially to 10% means that the 10% can be reduced but not increased by ECAC changes. One could argue conversely that if increases were not to be applied, that would be explicitly stated.

The intent of D.89-12-057 was to phase-in revised nonfirm incentives to lessen the rate shock for the Schedule E-19 and E-20 customers that would otherwise occur due to a reduction in their incentives. But ECAC-induced rate changes occur nearly automatically; we did not plan to insulate customers from ECAC during the phase-in. If we had done so, the final rate impact on these customers after the phase-in would be much greater, to a degree defeating the purpose of the phase-in, and perhaps only delaying the rate shock, rather than cushioning it. We further note we were certainly aware of this when we approved A.L. 1290-E.

In Resolution E-3193, CACD noted the combined effect of ECAC rate changes and the phase-in, and we approved the A.L. on that basis and with that knowledge. We conclude that no refunds are appropriate with regard to reflecting the ECAC rate changes.

However, that leaves us with the question of how ECAC rate changes should be incorporated, by the additive or compound method. We are troubled by PG&E's actions in choosing the compound method after it knew about the imminent ECAC increase, which it knew would result in higher rates than the additive method for affected customers. PG&E attempts an irrelevant defense that these customers have been subsidized by other customers anyway. That is not at issue in this proceeding.

The only example we have in the GRO of ECAC effect is PG&E's example in Ex. 40, which clearly demonstrates the additive method. And neither A.L. 1290-E nor Resolution E-3193 indicated any intent by PG&E to use any other method. CACD noted that other than creating more restrictive conditions than currently exist, the A.L. filing will not cause any rate or charge to increase. The more restrictive conditions apparently refer to the eligibility provisions for Schedule E-19 and E-20, where the former eligibility clause stated that PG&E may transfer customers to a different schedule if they fail to meet the minimum demand criteria; may was changed to will to eliminate uncertainty. Neither CACD nor the Commission could have been aware of the compounding method since PG&E had not yet decided to use it.

It is true that with ECAC increases, the compound method results in higher rates and achieves rates closer to the ultimate target. However, as witness Bell admits, that is contrary to Ex. 40's example. Absent that conflict, we might agree with PG&E, but we have nothing to support that conclusion. We further note that while using the compound method results in slightly lower increases to some customers at the end of the three-year cycle, these slight benefits do not negate the problem we have with the method, that it was not presented to the Commission and we did not approve it.

We conclude that in D.89-12-057 we approved the additive method as demonstrated by the phase-in example of PG&E. Approval of A.L. 1290-E did not change this. We will order PG&E to make refunds to customers in Schedule E-19 and E-20.

Preferred requests refunds for the period when the additive rates would be lower than compound rates, and no change for other periods when the opposite is true. We cannot look only at changes that benefit complainant; the proper level of refunds must be consistent and consider the entire period. In calculating the refunds, PG&E should recalculate the rates for the entire period of phase-in, with the net refund being the aggregate difference in charges.

Regarding Preferred's allegation of fraud, we note that the elements of fraud are misrepresentation, knowledge of falsity, intent to defraud, justifiable reliance, and resulting damage. (5 Witkin, <u>Summary of California Law</u>, § 676, p. 778; Civil Code § 1709.) Preferred has not demonstrated the existence of each of these elements. Preferred's arguments assume fraudulent intent by PG&E without substantiation. We have no evidence that in submitting A.L. 1277-E PG&E intentionally omitted the ECAC adjustment, nor do we have evidence that Guest covered up the error of omission in A.L. 1290-E.

The statement that the A.L. 1290-E changes are primarily for clarification purposes is reasonably accurate, in our view, since the changes merely complete the implementation started by A.L. 1277-E. The rate impacts were basically approved by D.89-12-057, except for the issue of the additive versus compounding approach. Both methods achieve similar rates. While PG&E erred by not acknowledging the rate impact of A.L. 1290-E, that omission does not constitute fraud. We conclude that PG&E has not committed fraud in this matter.

Regarding PG&E's argument that Preferred's claim is a collateral attack on Commission decisions and resolutions, we note that Preferred is only challenging the implementation of D.89-12-057, not the decision itself. It is challenging A.L. 1290-E with regard to compounding only. PG&E further claims that it is a collateral attack on D.92-05-031 which said of the phase-in, "No customer's bill is increased more than 10% (after adjusting for other post-1990 rate changes) over what its bill would have been for the same usage during the same month of the previous year." (Mimeo. p. 31.) However, that quotation is merely a statement of how the phase-in had been handled historically.

Preferred argues that the Filed Rate Doctrine arising from PU Code §§ 489(a) and 454(a) supports its position that A.L. 1290-E may be vacated. Section 489(a) states,

> "The Commission shall, ... require every public utility ... to file with the commission... schedules showing all rates, tolls, rentals, charges, and classifications collected or enforced, or to be collected or enforced..."

Section 454(a) provides:

> "Except as provided in Sections 454.1 and 455, no public utility shall change any rate or so alter any classification, contract, practice, or rule as to result in any new rate, except upon a showing before the commission and a finding by the commission that the new rate is justified."

Preferred believes that the rates PG&E charged are not lawful because they were not lawfully filed, since they are not consistent with phase-in language in D.89-12-057, and PG&E cannot defend A.L. 1290-E based on its interpretation of the Commission's intent.

We conclude that Section 454(a) was not violated by A.L. 1290-E since the A.L. does not indicate that compounding would be used, or that any method different than the one demonstrated in the

GRC would be used. The ALJ states that the phase-in rates will be increased or decreased by any increases or decreases to the customer's class. The A.L. is not in error; rather it is PG&E's method of implementation of rates that is in error.

We are concerned about the process which created the situation that led to this complaint. PG&E, in A.L. 1290-E, represented that the purpose of its filing was clarification of A.L. 1277-E filed in compliance with D.89-12-057. Our approval of A.L. 1290, however, led to interpretations on the part of the utility which this decision must rectify. To minimize the occurrence of such problems in the future, we hereby direct the utility that in any of its A.L. filings seeking to clarify, modify, or amend in any way a previously filed A.L., it shall clearly set forth in such filings the amounts by which the charges to its customers will change.

Next we deal with the issue raised by complainant regarding subscription to its services. Thirteen customers subscribed to Preferred in this matter, apparently agreeing to pay Preferred 40% of any refund they receive. Thus they would receive net refunds of 60% after paying Preferred its 40% commission, while the other customers would receive the full refunds. Preferred argues that the customers who did not subscribe should not benefit unfairly compared to the subscribers who were responsible for funding Preferred in moving forward with the complaint. PG&E believes we have no authority to make a monetary award to Preferred.

Preferred has not indicated how it believes the Commission can honor its request. The obvious avenues available for compensation of parties through the Commission are intervenor compensation and the Advocates Trust Fund. Preferred has not pursued either of these avenues. We conclude that we should deny Preferred's request for monetary relief.

Finally, we consider PG&E's Motion in Limine to Strike Testimony made at the hearing on October 3, essentially requesting that certain testimony of Cavagnaro be stricken. The motion argues that the testimony is a collateral attack on Commission actions in decisions and A.L. approvals; and that the testimony attacks tariff language that has been in effect. The motion is denied. The testimony at issue is at the center of the controversy in this complaint; to strike would be inappropriate and would have foreclosed the ability to obtain a complete record. As we stated above, there has been no collateral attack on Commission actions.

Findings of Fact

1. Complainant, on behalf of 13 customers, requests refunds of excess charges for electrical energy during the phase-in program for certain Schedule E-19 and E-20 customers, ordered by D.89-12-057.

2. A.L. 1277-E did not adequately address implementation of the phase-in.

3. A.L. 1290-E did not modify the implementation process adopted in D.89-12-057.

4. The phase-in did not intend to exclude the effect of ECAC rate increases.

5. PG&E's Ex. 40 in A.88-12-005 demonstrated the additive method of incorporating ECAC changes with the phase-in.

6. PG&E decided to use the compound method after knowing that it would result in rates higher than if it used the additive method.

7. Preferred asks that the Commission address its compensation in a manner that will not result in lower refunds to its subscribers compared to nonsubscribers.

8. PG&E has been overcharging its Schedule E-19 and E-20 customers for more than two years. Such delay in rectifying a situation is excessive.

Conclusions of Law

1. Rate changes to the customers class, both increases and decreases, should be combined with the phase-in rate changes.

2. Phase-in rates charged Schedule E-19 and E-20 customers using the compound method are inconsistent with D.89-12-057 and are excessive.

3. PG&E should be ordered to refund the excess charges to Schedule E-19 and E-20 customers.

4. Preferred has not adequately supported its allegation that PG&E committed fraud.

5. The complaint is not a prohibited collateral attack on the Commission.

6. The Commission should deny Preferred's request for compensation in this case.

7. Customers served by PG&E under Schedule E-19 and E-20 should receive relief without further delay.

O R D E R

IT IS ORDERED that:

1. Pacific Gas and Electric Company (PG&E) shall refund to the affected Schedule E-19 and E-20 customers the net difference between charges resulting from the rates calculated by the additive method and charges made using the compound method during the phase-in period.

2. Refunds shall include interest at the rate for prime, three-month commercial paper, as reported in the Federal Reserve Statistical Release G.13. Interest accrual shall be determined from the date of each payment to date of refund. Refunds to customers shall be made within 30 days of the effective date of this Order.

3. Except to the extent granted, the complaint in Case 94-01-059 is denied.

4. PG&E shall file a report with the Commission Advisory and Compliance Division showing the names of customers who received refunds and the amounts of the refunds within 30 days of the effective date of this order.

This order is effective today.

Dated August 11, 1995, at San Francisco, California.

DANIEL Wm. FESSLER
President
P. GREGORY CONLON
JESSIE J. KNIGHT, JR.
HENRY M. DUQUE
Commissioners

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

Wesley Franklin

Acting Executive Director