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Decision 97-11-031 November 5, 1997

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking on the Commission's Proposed Policies Governing Restructuring California's Electric Services Industry and Reforming Regulation.	R.94-04-031 (Filed April 20, 1994)
Order Instituting Investigation on the Commission's Proposed Policies Governing Restructuring California's Electric Services Industry and Reforming Regulation.	I.94-04-032 (Filed April 20, 1994)

ORIGINAL

ORDER DENYING REHEARING OF DECISION 96-04-054

I. INTRODUCTION

On February 15, 1996, Pacific Gas and Electric Company ("PG&E") filed an emergency motion asking the Commission to adopt an Interim Competitive Transition Charge ("ICTC") procedure applicable to departing customers, so as to prevent any attempts by departing customers to evade payment of the nonbypassable Competitive Transition Charge ("CTC") by putting themselves beyond the reach of the utilities and the Commission. Twenty four parties filed responses to PG&E's motion, and PG&E filed a reply to these responses.

In Decision (D.) 96-04-054 ("ICTC Decision"), we rejected certain portions of PG&E's request but endorsed the principles underlying the need for the ICTC. In the decision, we authorized the ICTC, not as a rate, but as a mechanism to ensure the collection of the nonbypassable CTC from departing customers. Accordingly, we authorized PG&E to collect an estimate of the

CTC[1] from these customers who depart the PG&E system between December 20, 1995 and January 1, 1998. In D.96-04-054, we also ordered the Commission Advisory and Compliance Division ("CACD") to hold an expedited collaboration open to all parties to focus on those issues relevant to implementation of the ICTC.

The ICTC would apply to "departing load," as defined, and would be deposited in a memorandum account, subject to refund with interest.[2] After the final CTC is adopted, a customer's CTC liability would be offset by funds deposited pursuant to the ICTC, and use of the ICTC would be discontinued. This adjustment mechanism ensures that no individual customer can successfully evade its responsibility for transition costs prior to implementation of the CTC.

Applications for rehearing of the ICTC Decision were timely filed by Agricultural Energy Consumers Association ("AECA"), California Manufacturers Association ("CMA"), California Independent Petroleum Association ("CIPA"), City and County of San Francisco ("CCSF"), Energy Producers and Users Coalition ("EPUC"), Merced Irrigation District and Foster Poultry Farms ("MID"), Praxair, Inc. and Destec Power Services, Inc.

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1. The CTC will enable the utility to collect the net above-market costs associated with utility assets. The CTC will consist of stranded costs, as determined by a market valuation to occur by 2003, plus ongoing transition costs incurred by utility plants that obtain a market price which is less than the cost of production. (Opinion Re: Commission's Proposed Policies Governing Restructuring California's Electric Services Industry and Reforming Legislation ("Preferred Policy Decision") [D.95-12-063 as modified by D.96-01-009] (1996) ___ Cal.P.U.C.2d ___.)

2. "Departing load" is defined as that portion of a customer's load for which the customer, on or after December 20, 1995, discontinues or reduces its purchase of electricity from PG&E, purchases or consumes power from another source to replace these PG&E purchases, and remains at the same location or within PG&E's service territory as it existed on December 20, 1995. (ICTC Decision, p. 2 (slip op.).)

("Praxair"), Texas-Ohio West, Inc. ("TOW"), and University of California and California State University ("UC/Cal State"). For the sake of convenience, these parties will be referred to as the "rehearing parties".

The ICTC Decision has been challenged on the following grounds:

a. **Excess of Commission Jurisdiction** -- Since the ICTC will be paid when a party is no longer a customer of a PUC-regulated utility, the Commission has exceeded its jurisdiction and violated the rule against retroactive rulemaking. Such a rate is also an illegal tax.

b. **Violation of Public Utilities Code Section 1708** -- The Commission modified the Preferred Policy Decision's terms concerning the CTC without providing notice and opportunity to be heard and with no evidentiary basis.

c. **Due Process Concerns** -- There is no basis to impose the ICTC upon customers who select alternative generation options that were available prior to the December 20, 1995 announcement of direct access options. The Commission failed to make necessary findings that an emergency exists, that customers who may exercise pre-existing bypass options unrelated to direct access contribute to the emergency, and that the ICTC's anticompetitive effects are legally defensible. Customers are entitled to notice of the specific rates prior to imposition of the rate to enable them to make economic decisions.

d. **Violations of PU Code Sections 454, 451, and 453** -- The ICTC constitutes a new rate, which PG&E was required to propose by application and which must be justified by evidentiary hearing; ICTC is not just and reasonable because it is charged in order to avoid taking utility service and because it is to be set "on the high side to afford customers a refund" upon true-up; and, the ICTC is discriminatory because it does not apply to a customer who goes out of business or leaves PG&E service territory.

e. **Lack of Assent** -- The finding that departing customers agreed to pay the ICTC by taking PG&E service on December 20, 1995 is unenforceable because the agreement was made under duress, in violation of Public Utilities Code Sections 453 and 454, etc.

f. **California Environmental Quality Act** -- Adoption of the ICTC without consideration of its environmental effects violates CEQA because the Preferred Policy Decision had concluded that electric restructuring is a project subject to CEQA.

g. **Inconsistency of ICTC Decision with Commission Goals for Competition** -- The Commission failed to consider the anti-competitive impacts of the ICTC, the ICTC removes competitive pressure on utilities to mitigate and minimize their stranded costs during the transition period, and the ICTC protects PG&E from competitive losses that are not proper components of the CTC.

Responses to the rehearing applications were filed by PG&E, San Diego Gas & Electric Company ("SDG&E"), and Southern California Edison Company ("Edison").

The CACD held the collaboration on April 24-26, 1996, and issued a report on the collaboration on May 6. Parties were permitted to file comments on this report. After the close of the collaboration, PG&E circulated a proposed ICTC tariff. In D.96-11-041, we approved, with certain modifications, the draft tariff proposed by PG&E to implement the ICTC.

After our adoption of the CTC, and during the pendency of the rehearing applications, the Legislature enacted Assembly Bill ("AB") 1890 (Stats. 1996, ch. 854), which was signed into law on September 23, 1996. AB 1890 provided for a nonbypassable CTC, with some exemptions. (See generally, Pub. Util. Code, §§330, subd. (v), 367, 369, & 371-374.)

We have carefully reviewed each and every allegation raised in the applications for rehearing. In considering the allegations set forth in these applications, we conclude that many of the issues raised by the rehearing parties have been made

moot in light of the enactment of AB 1890 and our compliance with the statute in our implementation of the ICTC in D.96-11-041. Thus, we believe it is unnecessary to discuss the particular merits of these issues.

Also, for those issues which are not moot, we have considered each and every one of the rehearing parties' arguments, and conclude that they are meritless. Thus, good cause do not exist for the granting of a rehearing.

II. DISCUSSION

AB 1890 requires the Commission to establish "an effective mechanism" to ensure the recovery of transition costs. (Pub. Util. Code, §369.) Implicit in this requirement is the duty to ensure that all utility customers as of December 20, 1995, unless otherwise exempted by AB 1890, shall pay the CTC. In implementing this requirement, the Commission has the authority to approve the ICTC mechanism. (See Pub. Util. Code, §373, subd. (b).) Thus, the allegations that the Commission exceeded its jurisdiction in approving the ICTC are moot.

The issues relating to due process and discrimination concerning the imposition of the ICTC on certain customers and not others are also moot. AB 1890 sets forth the requirements of who pays the CTC, and who is exempt. (See Pub. Util. Code, §§369, 371, 372, & 374.) Logically, this means AB 1890 also defines who pays the ICTC and who is exempted. Naturally, those departing customers who are legally required to pay the CTC are also subject to the ICTC. Thus, issues surrounding who is required to pay the ICTC is now controlled by AB 1890, and not by the ICTC Decision, which we issued before the enactment of AB 1890. Accordingly, we have made sure that our conditional approval of PG&E's ICTC tariff in D.96-11-041 legally comports with AB 1890, including the exemption provisions specified in the statute. (See D.96-11-041, pp. 10-18 (slip op.).)

Furthermore, the argument concerning whether departing customers agree to pay the ICTC by taking PG&E service on December 20, 1995 is moot. AB 1890 requires that "all existing and future consumers in the service territory in which the utility provided electricity services as of December 20, 1995," unless otherwise exempt, shall pay the CTC. (Pub. Util. Code, §369.) As discussed above, this requirement also applies to the ICTC. The question of whether the customers "agree" to pay the ICTC becomes a non-issue. Payment is now statutorily mandated.

The due process assertions raised in the rehearing applications relating to evidentiary hearings are without merit. They are solely based on the misunderstanding that the ICTC is a new rate. The ICTC is not a new rate.

Rates are defined by Section 210 of the Public Utilities Code as follows: Rates "includes rates, fares, tolls, rentals, and charges, unless the context indicates otherwise." (Pub. Util. Code, §210.) We do not believe that the ICTC falls within any these categories, as intended by the Legislature.

The factors that distinguish the ICTC from a rate are listed in the following passage from the ICTC Decision:

> "[The ICTC] that we adopt will be in effect for a short period, and all payments will be subject to adjustment when we adopt our final CTC; PG&E will refund any overcollection and the customer will pay any shortfall between the interim payments made and its final CTC responsibility." (ICTC Decision, p. 16 (slip op.).)

Unlike a rate, the purpose of the ICTC is not to collect a revenue requirement. It is being used to secure performance of an obligation to bear one's fair share of transition costs. While the CTC will collect revenue requirement consisting of the difference between the market rate and the utilities' investment (including return) in noneconomic generating facilities and assets, the ICTC will collect only a short-term estimate of the CTC. Thus, within the context of

electric industry restructuring and the CTC, it is clear that the ICTC is not a rate, but a temporary security deposit.

Further, in approving the ICTC, as a security deposit, we are complying with our obligations under AB 1890 to establish an "effective mechanism" to ensure the recovery of transition costs from "all existing and future customers," unless otherwise exempted. (See Pub. Util. Code, §369.) Further, the ICTC will eliminate the likelihood of future ratepayers having to pay the accumulated costs that should have been borne by the departing customers who fail to pay the CTC.

Since the ICTC is not a new rate, no evidentiary hearing is required. The ICTC merely collects a portion of costs which are already embedded in rates[3] as a security deposit. Therefore, the new rate application, customer notice, and evidentiary hearing requirements of Public Utilities Code Section 454 are inapplicable.

Even if the ICTC were found to constitute a rate, no evidentiary hearing was required prior to its adoption pursuant to the holding in Wood v. Public Utilities Commission (1971) 4 Cal.3d 288. In that decision, the Court observed:

> "The Public Utilities Code does not require public hearings before rate increases or rule changes resulting in rate increases may be authorized. Section 454 of that code requires only a showing before the [C]ommission and a finding by the [C]ommission of justification for such increases. It leaves to the commission the determination of the appropriate procedures to be followed. . . ."

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3. "Transition costs are included in current rates." ICTC Decision, p. 18 (Finding of Fact No. 4) (slip op.).)

(Wood v. Public Utilities Commission, supra, 4 Cal.3d at p. 292.)

Further, an evidentiary hearing was not necessary. As we stated in D.96-11-041: the "ICTC is by definition interim, and will be in effect only until we adopt a final CTC approach. The development of the final CTC will require us to consider in detail the same issues that parties would have us now address in evidentiary hearings on the ICTC. It makes little sense to delay the effectiveness of the ICTC to conduct hearings on issues that we necessarily [will] consider again. . . ." (D.96-11-041, p. 4 (slip op.), emphasis in the original.) Thus, the "detailed scrutiny that evidentiary hearings allow would be inappropriate" for an interim measure like the ICTC. (Id.)

It is noted that the ICTC was not adopted without due process. The parties were provided with notice and an opportunity to be heard. The parties were served with the motion and were permitted to file responses. Twenty-four parties filed comments. (ICTC Decision, p. 5 (slip op.).)

Further, with respect to the specific implementation details concerning PG&E's ICTC tariff, the collaboration which was ordered in the ICTC Decision provided all parties with an opportunity to discuss and resolve issues related to the ICTC. We also provided the parties with an opportunity to comment on a report developed from the collaboration, prior to our conditional approval of PG&E's ICTC tariff in D.96-11-041. Twenty-two parties filed comments. (See D.96-11-041, p. 2 (slip op.).)

We also find without merit the allegation that the ICTC Decision has modified the terms of the Preferred Policy Decision and is invalid because the modification was not proceeded by notice and evidentiary hearing as required by Section 1708.[4]

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4. Public Utilities Code Section 1708 states in relevant part: "The commission may at any time, upon notice to the parties, and with opportunity to be heard as provided in the case of complaints, . . . amend any order or decision made by it."

The two charges are different; the CTC recovers transition costs while the ICTC is a security deposit.

"The Preferred Policy Decision [declared] our intent to collect appropriate transition costs from all customers who are retail customers of the regulated electric utilities on or after December 20, 1995." (ICTC Decision, p. 8 (slip op.).) The CTC was adopted "out of a need, 'during the transition to full competition, for a process to account for the lingering effects of today's market structure.'" (Id. at p. 7 (slip op.), quoting the Preferred Policy Decision.)

As to the ICTC, we explained: "All that is necessary now is to secure an appropriate contribution from departing customers until we have completed our proceeding to develop the mechanisms for CTC collection, a proceeding that necessarily will be finished some time before January 1, 1998." (ICTC Decision, p. 11 (slip op.).)

The CTC and ICTC are also calculated in a separate and independent manner. The ICTC is a device that safeguards PG&E's ability to collect the CTC and does not modify the decision which adopted the CTC in any way. Thus, Public Utilities Code Section 1708 is inapplicable.

For the same reasons, we find without merit the CEQA claims raised in the rehearing applications. The ICTC was adopted as a mechanism for preserving the status quo during the pendency of environmental review, and thus, there is no prejudice to the environment from the adoption of the ICTC mechanism.

Moreover, CEQA issues may have become moot by the enactment of AB 1890, and the resulting legislative decisions to move to a new market structure. (See AB 1890/CEQA Decision [D.96-12-75] (1996) ___ Cal.P.U.C.2d ___.) As discussed above, AB 1890 imposes on the Commission a duty to establish an "effective mechanism" to assure the recovery of transition costs

from "all existing and future consumers. . . ." (See Pub. Util. Code, §369; see also, Order Modifying and Denying Rehearing of Decision 95-12-063 As Modified by Decision 96-01-009 [D.97-02-021, pp. 67-68 (slip op.)] (1997) ___ Cal.P.U.C.2d ___, for a discussion of CEQA issues, AB 1890 and mootness.)

The anticompetitive issues concerning the ICTC have been made moot by AB 1890. In raising these antitrust concerns, the rehearing parties are not only challenging the ICTC but also the CTC. Although it recognized the important need, in the transition to a competitive electricity market, to "ensure that no participant in the new market institutions [would have] the ability to exercise significant market power so that the operation of the new market institutions would be distorted" (see Pub. Util. Code, §330, subd. (l)(3)), the Legislature in enacting AB 1890 obviously balanced these anticompetitive concerns with the importance of protecting ratepayers and shareholders with the adoption of the nonbypassable CTC. Through the CTC, the utilities have a reasonable opportunity to recover transition costs resulting from electric restructuring. Logically, the Legislature would not have enacted the provisions for the nonbypassable CTC if it had serious concerns that the CTC would impede competition. Accordingly, if there are no such serious anticompetitive concerns for the CTC, there should be none for the ICTC. Thus, the anticompetitive arguments raised by the rehearing parties are mooted in light of the enactment of the CTC provisions in AB 1890.

III. CONCLUSION

Based on the above discussion, good cause does not exist for granting rehearing. Thus, the applications for rehearing should be denied.

THEREFORE, IT IS ORDERED that rehearing of D.96-04-054 is hereby denied.

This order is effective today.

Dated November 5, 1997, at San Francisco, California.

P. GREGORY CONLON
President
JESSIE J. KNIGHT, JR.
HENRY M. DUQUE
JOSIAH L. NEEPER
RICHARD A. BILAS
Commissioners