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MAIL DATE
11/21/97

Decision 97-11-083

November 19, 1997

ORIGINAL

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application of Pacific Gas & Electric
Company for Authority, Among Other
Things, to Decrease Rates and Charges
for Electric and Gas Services, and
Increase Rates and Charges for Pipeline
Expansion Service.

A.94-12-005
(Filed December 9, 1994)

And a Related Matter.

I.95-02-015
(Filed February 22, 1995)

ORDER DENYING REHEARING OF DECISION 96-11-014

I. INTRODUCTION

PG&E has filed an application for rehearing of Decision (D.) 96-11-014. That decision fined PG&E \$480,000 for failing to comply with Ordering Paragraph 1, Item 1, of D.95-09-073. D.95-09-073 was a product of hearings focused on concerns raised in connection with numerous complaints received from PG&E customers regarding the adequacy of PG&E's response to rainstorms which occurred during 1995. Our findings in that decision resulted in the adoption of 10 improvement measures regarding PG&E's customer service call center and telephone system operations. One improvement measure, noted in Item 1 of Ordering Paragraph 1, requires PG&E to achieve an average queue wait of less than 20 seconds, and busy signal occurrence of less than 1% during normal operations and less than 3% during outages. The improvement measures were adopted with PG&E's concurrence, and PG&E was ordered to implement the measures within 60 days of D.95-09-073, issued on September 7, 1995.

We subsequently found, in D.96-11-014, that PG&E did not meet the requisite Item 1 call center performance level for November and December of 1995. PG&E does not contest, in its application for rehearing, our finding that the utility failed to comply with Item 1 during the period in question. PG&E does, however, contest the imposition of the monetary fine, citing four reasons.

First, PG&E alleges that it has been discriminated against because it is required to comply with a more stringent call center performance standard than other utilities. Second, PG&E suggests that such disparate treatment results in unreasonable differences in call center services throughout California. Third, PG&E contends that it did not have adequate notice that it was required to comply with D.95-09-073's Ordering Paragraph 1. Fourth, PG&E argues that we either exceeded our authority under the Public Utilities Code by imposing a penalty, or that we should at least reconsider the "excessive" amount of the imposed penalty.

We have carefully reviewed each and every allegation of error raised by PG&E and conclude that rehearing of D.96-11-014 must be denied.

II. DISCUSSION

California Public Utilities (P.U.) Code Section 1731(b) establishes a jurisdictional requirement that an application for rehearing of a Commission decision must be filed within 30 days of the issuance of the decision. That section provides no exceptions. PG&E's first three arguments are in fact a collateral attack on the merits of a prior decision, D.95-09-073, and the standards set forth therein. Therefore, we find that PG&E cannot seek rehearing as to its first three arguments since the time for applying for rehearing of D.95-09-073 has long since passed.

Even if Section 1731 did not bar PG&E's rehearing application, PG&E waived its arguments based on equal protection of the law, and the arguments alleging a violation of PG&E's due process rights based on a theory of

impermissible vagueness of our order. PG&E was on notice at least as early as August of 1995, when the Proposed Decision which became D.95-09-073 was issued, that we were contemplating the adoption of a standard for PG&E's call centers that was different than that in place for other utilities in California. While PG&E provided comments to that Proposed Decision, it did not raise any of the arguments cited above. Having elected to forego raising these matters either in comments to the Proposed Decision or in a timely application for rehearing of D.95-09-073 itself, PG&E is barred from raising them now.

PG&E's fourth argument is that we exceeded our authority, in D.96-11-014, by directly imposing penalties on PG&E pursuant to P.U. Code Sections 2107 and 2108.¹ PG&E contends that we must seek imposition and recovery of penalties through the superior court pursuant to P.U. Code Section 2104, which provides that "[a]ctions to recover penalties under this part shall be brought in the name of the people of the State of California, in the superior court" in the county or city in which the cause arose. "The action shall be commenced and prosecuted to final judgment by the attorney of the Commission."

The imposition of the \$480,000 penalty against PG&E is well within our authority.

PU Code Section 2104 does not limit our authority to assess and impose penalties. Rather, that section requires action in superior court if the penalties are not paid voluntarily. (See, e.g., In re Application of Southern California Water Company (1991) 39 Cal.P.U.C.2d 507; TURN v. Pacific Bell (1994) 54 Cal.P.U.C.2d 122, 124; Re Facilities-based Cellular Carriers (1994) 57 Cal.P.U.C. 2d 176, 205, 215.)

¹ Section 2107 provides that any public utility which violates any provision of the Constitution or the Public Utilities Code, or any order or requirement of the Commission, in a case in which penalties have not otherwise been provided, is subject to penalties of \$500 to \$20,000 for each offense. Section 2108 provides that every violation is a separate and distinct offense and, in a case of a continuing violation, each day shall be considered a separate and distinct offense.

PG&E was on notice since at least December 19, 1995 that we were contemplating penalties pursuant to P.U. Code Sections 2107 and 2110. On that date, the Assigned Commissioner issued a Ruling, stating in pertinent part:

This Ruling puts PG&E on notice that it may be subject to penalties pursuant to P.U. code Sections 2107 and 2110, if we find PG&E has without adequate justification failed to comply with D.95-09-073.
[Assigned Commissioner's Ruling, p.4.]

PG&E filed no pleading nor made any argument in response to the Assigned Commissioner's December 19, 1995 Ruling, nor offered any evidence or argument when the matter of compliance with D.95-09-073 went to hearing, that the Commission lacked the power to assess penalties under Sections 2107 and 2108. Consequently, PG&E is barred from presenting this argument at this stage.

Finally, assuming arguendo that the Commission has authority to impose a penalty against it, PG&E asks us to reconsider the imposition of the maximum penalty authorized by law under the circumstances of this case. PG&E first argues that we committed error by calculating each offense on a per diem basis. It claims that our recognition of the evaluation standard as a monthly statistic is inconsistent with our finding that PG&E be penalized under P.U. Code Section 2108 on a per diem basis for each day of violation as a separate and distinct offense. PG&E contends that it can be out of compliance only once in a month for failure to meet monthly standards, and since PG&E was only punished for noncompliance in the month of November 1995, then it has only committed one offense, not 24 individual daily offenses.

PG&E does not provide evidence which indicates that we ever intended to view violations of the monthly standards in the manner argued by the

utility. We have not held that if PG&E failed to meet the monthly standards for a particular month, that the utility would have committed only one offense for that month.

In fact, in D.96-11-014, at p. 16, fn. 5, we noted that while TURN initially viewed PG&E's failure to comply with Item 1 as a single violation of a Commission order, other applications of Sections 2107 and 2108 allow us to find PG&E's call center performance for November represented many violations of a Commission order. We have assessed the penalty according to the totality of the circumstances, including the purposes sought to be achieved by the penalty. Here, D.95-09-073 provided PG&E with 60 days to comply with its provisions. The order was issued on September 7, 1995. Sixty days from September 7 is November 6. Accordingly, we imposed a penalty of \$480,000 which was derived by applying the maximum penalty of \$20,000 per day for the 24 days between November 6, 1997 and November 30, 1997.

As noted in D.96-11-014, at p.16, the \$480,000 penalty is a meager sum for a corporation of PG&E's size and the corresponding rate reduction would be so small as to be undetectable by PG&E's million customers. Therefore, PG&E's claim that the penalty is "excessive" is without support.

III. CONCLUSION

Therefore, we conclude, for the reasons stated above that the application for rehearing does not demonstrate that the Decision is in error. We will order the application for rehearing be denied.

THEREFORE, good cause appearing,
IT IS ORDERED that rehearing of D.96-11-014 is denied.
This order is effective today.
Dated November 19, 1997, at San Francisco, California.

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

I dissent.

/s/ **JOSIAH L. NEEPER**
Commissioner