ALJ/BDP/sid

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Decision 98-09-058 September 17, 1998

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

FLORSHEIM BROTHERS,

Complainant,

vs.

PACIFIC GAS AND ELECTRIC COMPANY,

Defendant.

(U 39 E)

ORIGINAL

Case 96-05-049
(Filed May 30, 1996)

Goodin, MacBride, Squeri, Schlotz & Ritchie, by James Squeri, and Jeffrey P. Gray, Attorneys at Law, for complainant.
Louis Vincent, Attorney at Law, for Pacific Gas and Electric Company.
Roger Poynts, Attorney at Law and Connie Easterly, for Utility Design, Inc.

OPINION

Summary

Florsheim Brothers (Florsheim) allege that Pacific Gas & Electric Company (PG&E), since July 1, 1995, violated PG&E Gas Rule No. 15 by failing to give refunds to line extension applicants for gas trenching costs incurred by applicants who provide the trench used in joint utility installations.[1]

[1] Joint utility (or four-party) installations typically consolidate gas, electric, telephone, and cable extensions in a single trench (joint trench).

PG&E contends that a developer is not entitled to a refund unless installation of the gas facilities adds a cost to the already dug standard electric trench.

The Commission concludes that, as set forth in PG&E Gas Rule No. 15, PG&E cannot change the terms and conditions for providing such refunds to developers, without prior Commission approval.

The relief requested by Florsheim is granted.

Procedural Summary

On May 30, 1996, Florsheim filed its complaint. On July 29, 1996, PG&E timely answered Florsheim's complaint.

On October 24, 1997, a prehearing conference was held. At the prehearing conference, the California Building Industry Association (CBIA) and Utility Design Inc. (UDI) appeared for purposes of moving to intervene. The assigned administrative law judge granted the motions to intervene, ruling that the scope of this proceeding would be limited to the relief requested in the complaint.

Evidentiary hearing was held on February 26, 1998. Concurrent opening briefs were filed on April 13, 1998. Reply briefs were filed on April 24, 1998.

Briefs were filed by Florsheim, PG&E and UDI.

The Complaint

Specifically, Florsheim alleges that it was denied full "value" of the gas portion of the trenching and related costs and fees, all of which are refundable, in both Golf Course Terrace No. 9 and No. 10 subdivisions in Stockton. Also, Florsheim alleges that it was charged excess value for the electric portion of trenching and related costs and fees, all of which are nonrefundable, in both Golf Course Terrace No. 9 and No. 10 subdivisions in Stockton.

Background

Gas and electric utilities each developed their own separate extension rules, unique to their operations. Gas was always installed underground and had its own special rules for balancing costs between the applicant and the utility. For the first half of this century or more, electric facilities were installed overhead and were covered by separate extension rules.

As technology advanced, utilities developed techniques to install electric facilities underground, and ultimately in the same trench as other utilities, including gas facilities. Electric utilities, accordingly, modified their line extension rules to address both overhead and underground extensions.

PG&E's gas rules, for example, require the utility pay for the main (pipe) and trench, and the applicant pays for substructures. PG&E's electric rules require the utility to pay for conductor, but the applicant pays for conduit and trenching.

Position of Florsheim

Florsheim is a developer who builds residential subdivisions in the central valley area of California.

Florsheim argues that PG&E cannot change its responsibilities pursuant to Gas Rule No. 15 without prior Commission approval. Florsheim notes that Public Utilities (PU) § 489 requires all public utilities to file tariffs with the Commission delineating the rates, terms, and conditions of all services they offer. In addition, Section 491 provides that:

> "Unless the commission otherwise orders, no change shall be made by any public utility in any rate or classification, or in any rule or contract relating to or affecting any rate, classification, or service, or in any privilege or facility, except after 30 days' notice to the commission and to the public. ..." (PU Code § 491.)

Florsheim points out that before July 1, 1995, applicants requesting gas service received refunds for gas trenching costs; after July 1, 1995, no such refunds were given.

For example, prior to July 1, 1995, Florsheim developed the Golf Course Terrace Nos. 4 and 5 subdivisions located in Stockton, California. The size of the joint utility trenches used for main extensions in these two subdivisions ranged from 24" wide by 59" or 60" deep, 24" wide by 36" deep, or 12" wide by 48" deep. Pursuant to PG&E's Gas Rule No. 15, Florsheim was provided with a refund for the cost associated with the gas portion of these joint utility trenches.

After July 1, 1995, Florsheim developed the Golf Course Terrace Nos. 9 and 10 subdivisions, also located in Stockton. The size of the joint utility trenches used for the main line extensions in these two subdivisions were essentially identical to the trench sizes used in Golf Course Terrace Nos. 4 and 5. PG&E, however, did *not* provide a refund for the costs associated with the gas portion of these joint utility trenches.

According to Florsheim, without either informing the Commission, the affected applicants, or receiving the Commission's prior approval, PG&E, as of July 1, 1995, repudiated its Gas Rule No. 15 tariff obligations by reversing its longstanding practice of providing refunds to developers (like Florsheim) for the cost of the gas portion of joint trenches provided by extension applicants. And, according to Florsheim, contrary to the express provisions of Gas Rule No. 15,

which clearly states that gas trenching costs are the utility's responsibility, PG&E simply decided on its own to change the rules and to deny any cost reimbursement to line extension applicants who provide the entire joint trench.

Florsheim argues that PG&E unilaterally took action that dramatically affected the essential purpose of its line extension rules which is to allocate cost responsibility for line extensions fairly among the utility, its ratepayers, and applicants for utility service. Florsheim alleges that with no Commission review of the justification for its reversal of policy and without any opportunity for affected parties to contest PG&E's reallocation of cost responsibility, PG&E went forward on its own and unlawfully shifted responsibility for as much as $8 million per year in line extension costs from itself to line extension applicants.

Position of UDI

UDI provides design services to developers of residential subdivisions.

UDI states that developers such as Florsheim typically construct the joint trench which contains the underground lines and equipment that supplies gas, electricity, telephone, and cable television services to the homes within the subdivision. Like many home builders, Florsheim pays a trenching contractor to dig the trench and install (or allow the utilities to install) the gas, electric, telephone, and cable TV lines and equipment. After the facilities are installed, the trenching contractor backfills and compacts the trench according to the standards set by the governing public utility and municipalities. The material and labor cost of digging, backfilling, and compacting the trench with acceptable materials ranges from $10 to $12 per foot.

After the joint trench is completed, the builder transfers ownership and operation of it to PG&E. On or about the same time, PG&E energizes the facilities within the trench.

Also, according to UDI, in a typical four-party trench, the four utilities are allocated cost shares based on the following occupancy of the trench: 16% cable TV; 22% telephone; 22% gas; and, 40% primary and secondary electric.

UDI points out that refunds for the construction costs associated with the gas portion of the trench are based on PG&E Gas Rule No. 15.D.7(a) which states:

> *Rule No. 15.D.7(a)* Applicant's refundable amount is the portion of PG&E's total estimated installed cost, including taxes, to complete the extension (excluding regulators, meters, services, and Betterment), including the *estimated value of the Trenching*; ... [Emphasis added.]

UDI notes that refunds of gas trenching cost are based on the value of the gas trenching. Prior to July 1, 1995, PG&E determined the value by taking the occupancy percentage for gas facilities, such as the 22% stated above for a four-party trench,[2] multiplied by PG&E's trench construction cost per foot.[3] This amount was refunded to developers.

UDI argues that the portion of the trench occupied by PG&E's gas facilities has not changed. According to UDI, the only thing that has changed is that, after July 1, 1995, PG&E will no longer reimburse developers for the gas portion of the joint trench. UDI notes that, as stated by Florsheim, PG&E

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[2] Occupancy percentages are calculated by either the builder or PG&E in a PG&E document known as a, "FORM B - *Authorization For Joint Trench Construction.*"

[3] No matter who performs the trenching, PG&E estimates the per-foot construction cost of the gas portion of the joint trench on a project-specific basis.

refunded the gas trenching costs that Florsheim advanced on Unit Nos. 4 and 5 according to Gas Rule No. 15.D.7(a) above. However, PG&E refused to refund the gas trenching costs on Unit Nos. 9 and 10 for the exact same type of trench.

According to UDI, PG&E decided that, as of July 1, 1995, the gas portion of the trench has a "zero" value and allocated the gas occupancy percentage to the electric portion of the trench. UDI argues that in doing so, PG&E overlooks the fact that its gas facilities use and occupy the trench. For example, in Unit No. 4 above, electric facilities occupied 40% and gas facilities occupied 22% of the trench. Yet, for the exact same size of trench in Unit No. 9, PG&E claims the electric facilities now occupy 62% and gas facilities occupy 0%. UDI submits that, in reality, occupancy of the joint trench has not changed.

Position of PG&E

PG&E states that in 1994, it undertook the task of changing its design for joint electric trenches to lower the cost for all parties. According to PG&E, the design change also improves worker safety and enhances system reliability. As one part of the design change, PG&E standardized the width of the electric trench to 24" from the choices of 12", 18" or 24". This width change also allowed PG&E to standardize the location of the various utilities, electric, gas, communication and cable TV, in the trench, instead of any number of different placements or configurations. Also, according to PG&E, the trench design addresses how the occupants of the trench will divide the costs of the trench among themselves.

PG&E notes that if the utility makes a refund to the developer for the cost of the trench, the utility enters the amount of its payment in rate base. Concomitantly, if the utility refunds nothing to the developer, it enters nothing into rate base.

PG&E argues that its new standard joint electric trench design, 24" wide by 42" or 48" deep, depending on how telephone facilities are installed, is large enough to allow the inclusion of gas facilities in the trench with *no additional cost*. According to PG&E, the question in this case has become whether a developer is entitled to a refund for the part of the trench where gas facilities are installed when those facilities can go into the already dug standard electric trench without the developer spending any money to include the gas facilities. PG&E's position is that the developer is not entitled to a refund unless installation of the gas facilities adds a cost to the trench.

Discussion

In December 1994, the Commission authorized gas and electric utilities, including PG&E, to implement major revisions to their line extension rules. *Re Line Extension Rules of Electric and Gas Utilities*, (D.94-12-026) 58 CPUC2d 1 (1994). These changes to the line extension rules became effective on July 1, 1995. Although the changes represented extensive revisions to Gas Rule No. 15 and Electric Rule No. 15, the changes did not affect the allocation of trenching cost responsibility between the utilities and applicants for service. Both before and after July 1, 1995, an applicant for service was responsible for trenching costs associated with the electric portion of a joint utility trench and the utility was responsible for the trenching costs associated with the gas portion. Therefore, regardless of the merits of PG&E's argument, that the developer is not entitled to a refund unless installation of the gas facilities adds a cost to the trench, PG&E had no authority to cease paying refunds as required by its Gas Rule No. 15.

PG&E's Gas Rule No. 15 is clear and unambiguous with respect to the utility's trenching responsibilities:

> "PG&E is responsible for the installation of Distribution Main, valves, regulators, and other related distribution equipment required

> to complete the extension, *including all necessary Trenching, backfilling, and other digging as required.* (Gas Rule No. 15, emphasis added.)

We conclude that, contrary to PG&E's argument, Gas Rule No. 15 does not limit PG&E's responsibility to pay for gas trenching to "gas-only" trenches, nor does the rule limit PG&E's responsibility to situations where there is an identifiable gas trenching cost.[4] Gas Rule No. 15, as currently in effect, makes PG&E responsible for all gas trenching costs.

Lastly, if PG&E believes that its Gas Rule No. 15 needs to be modified, then it should file an application so that the Commission may properly consider PG&E's proposals (see PU Code § 491). In the meantime, we encourage PG&E to make refunds for gas trenching costs to other similarly situated applicants for line extensions, as Florsheim.

Section 311 Comments

The administrative law judge's (ALJ) proposed decision was filed with the Commission's Docket Office and mailed to all parties on August 18, 1998. Comments were timely filed by Florsheim and PG&E. Reply comments were timely filed by Florsheim.

PG&E argues that the proposed decision disregards the modifier "necessary" before the word "trenching" in PG&E's Gas Rule 15 (set forth above). According to PG&E, the proposed decision reaches the incorrect conclusion that PG&E should make refunds for gas facilities installed in PG&E's standard design joint electric trench. PG&E's contention is that when gas facilities can be accommodated in PG&E's standard design joint electric trench

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[4] As discussed in its brief, Florsheim contends that there is an identifiable cost associated with the gas portion of a joint utility trench. Likewise, PG&E addresses that issue in its brief. However, that issue is not decided in this decision.

without additional trenching cost, there are no "necessary" trenching costs to be refunded.

Florsheim states that the changes to Gas Rule 15 effective July 1, 1995 were the culmination of a 2-1/2 year rulemaking process. At the end of that process, the Commission determined that all gas trenching cost responsibilities should remain with PG&E. And PG&E admitted at hearing that gas trenching cost responsibilities remained unchanged after July 1, 1995. Therefore, Florsheim argues that if PG&E were allowed to change the result of the rulemaking process by simply claiming, *after the fact*, that the word "necessary" actually changed the instances where refunds were given, there would be little, if any, reason for the Commission to engage in the rulemaking process. Florsheim submits that, as the proposed decision notes, if PG&E believes modification to Gas Rule 15 is needed, PG&E must file an application seeking such modification.

We are not persuaded by PG&E's argument. Even if, as argued by PG&E, no additional trenching is required to accommodate the gas facilities, there can be no "free riders" in the trench. As pointed out by UDI, there is a value attached to occupancy of the trench, and that value is certainly not zero for gas facilities.

Furthermore, as pointed by Florsheim, by not providing such refunds, in effect, PG&E shifted responsibility for as much as $8 million per year in line extension costs. PG&E should have filed an application so that the Commission could have properly considered PG&E's proposals. Accordingly, we affirm the ALJ's proposed decision.

Lastly, Florsheim points out that the proposed decision did not address: (1) four additional subdivisions named in Florsheim's First Amended complaint,[5] and (2) clarify that PG&E must, in calculating the ordered refunds, recalculate and refund the appropriate Contributions in Aid of Contribution (CIAC) tax. We agree. The subdivisions added in the amended complaint require no new factual issues to be resolved. Also, PG&E should refund the appropriate CIAC tax. These changes to the proposed decision are adopted.

Findings of Fact

1. Pursuant to PG&E's Gas Rule No. 15 and Electric Rule No. 15, in effect before and after July 1, 1995, the developer (or applicant for service) was responsible for the cost of the electric portion of a joint trench, and the utility was responsible for the gas portion.

2. Typically, the developer digs the joint trench and backfills it after the facilities are installed. And after completion, the utility provides a refund to the developer for the gas portion of the joint trench.

3. Prior to July 1, 1995, PG&E provided refunds to developers (like Florsheim) for the cost of the gas portion of joint trenches.

4. After July 1, 1995, PG&E changed its policy and did not provide refunds to developers for the gas portion of joint trenches, as it did prior to that date.

5. After July 1, 1995, PG&E implemented a new policy whereby refunds would only be provided in situations where its standard trench design had to be enlarged to accommodate gas facilities, or for gas-only trenches.

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[5] These subdivisions are: (1) Brookside Estates No. 22; (2) Brookside Estates No. 24; (3) Sperry Ranch No. 6; and (4) Sterling Estates No. 3.

6. In effect, PG&E's new policy reallocates cost responsibility under its line extension rules thereby making developers responsible for costs for which they had no previous obligation.

7. PG&E did not receive prior Commission approval of its new policy regarding the gas portion of joint trench costs.

8. PG&E's new policy is a change to its Gas Rule No. 15, and this change has not received Commission approval.

Conclusions of Law

1. PG&E may not change its Gas Rule No. 15 without prior Commission approval.

2. Until such time as the Commission approves a change to PG&E's Gas Rule No. 15, PG&E should continue to provide refunds for the gas portion of joint trenches as it did prior to July 1, 1995.

3. If PG&E believes that its Gas Rule No. 15 should be changed, it may file an application with the Commission so that the proposed changes may be properly reviewed, and all parties have an opportunity to be heard.

4. In this proceeding, we do not make any determination on the merits of PG&E's proposal.

5. This is a complaint case not challenging the reasonableness of rates or changes, and so this decision is issued in an "adjudicatory proceeding" as defined in Section 1757.1.

O R D E R

IT IS ORDERED that:

1. The relief requested by Florsheim Brothers (Florsheim) is granted. Pacific Gas and Electric Company (PG&E) shall refund to Florsheim the gas trenching cost portion, including CIAC taxes, of the joint trenches constructed by Florsheim

at Golf Course Terrace Nos. 9 and 10, Brookside Estates Nos. 22 and 24, Sperry Ranch No. 6, and Sterling Estates No. 3, and make appropriate adjustments to the electric portion of these trenching costs, including CIAC taxes.

2. Case 96-05-049 is closed.

This order is effective today.

Dated September 17, 1998, at San Francisco, California.

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