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Decision 00-01-028 January 6, 2000

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking on the Commission's Own Motion to Consider the Line Extension Rules of Electric and Gas Utilities.	R.92-03-050 (Filed March 31, 1992)

ORDER DENYING REHEARING OF DECISION 99-06-079

D.99-06-079 adopted changes to the rules governing the extension of gas and electric service to new customers. The changes were to "promote competition in line extension construction services provided by the utilities and independent contractors." (D.99-06-079, p. 1.) Among other adopted changes, the utilities are to now provide the first inspection of each trench section at no charge to the applicant. (*Id*; Ordering Paragraph (OP) 5.) This results in the costs for first inspections being borne by the ratepayers. Previously, the inspection costs were borne by the applicants for line extensions.

D.99-06-079 was effective June 24, 1999 and directed the utilities to file the necessary tariff rule changes. Pacific Gas & Electric, Southern California Gas Company, San Diego Gas & Electric Company, Southwest Gas Corporation and Southern California Edison (collectively "joint utility respondents (JURs)") subsequently filed a motion for stay, petition for modification and an application for rehearing of D.99-06-079. JURs also made a letter request to the Executive Director to extend the time for the implementation of OP 5. On July 29, 1999, the Executive Director granted the extension to delay the OP 5 implementation until

the Commission acted on the motion for stay. On September 3, 1999, we granted the stay pending resolution of the rehearing application.

In the rehearing application, JURs allege the following legal errors: (1) D.99-06-079 lacks the economic findings required by Pub. Util. Code[1] § 783(b); (2) D.99-06-079 conflicts with other Commission decisions and policies; and (3) the record is inadequate to support the finding of an unlevel playing field between the utilities and the applicant installers. The California Building Industry Association (CBIA) and Utility Design, Inc. (UDI) filed responses in opposition to the rehearing application.

We have reviewed the arguments raised by JURs in the application for rehearing of D.99-06-079 as well as the arguments in the responses filed by CBIA and UDI. As discussed below, we conclude that sufficient grounds for rehearing have not been shown. JURs fail to demonstrate legal error, as required by Section 1732.

JURs allege that D.99-06-079 violates Section 783(b) in two respects. First, JURs argue that D.99-06-079 lacks the economic findings required by Section 783(b) for the adopted rule change. Section 783(b) provides in part:

> "Whenever the commission institutes an investigation into the terms and conditions for the extension of services provided by gas and electrical corporations to new or existing customers, or considers issuing an order or decision amending those terms or conditions, *the commission shall make findings* on all of the following:
> (1) The *economic effect* of the line and service extension terms and conditions upon agriculture, residential housing, mobilehome parks, rural customers, urban customers, employment, and commercial and industrial building and development.
> (2) The effect of requiring new or existing customers applying for an extension to an electrical or gas corporation to provide transmission or distribution facilities for other customers who will apply to receive line and service extensions in the future.
> (3) The effect of requiring a new or existing customer applying

[1] Unless otherwise indicated, all statutory references are to the Public Utilities Code.

> for an extension to an electrical or gas corporation to be responsible for the distribution of, reinforcement of, relocation of, or additions to that gas or electrical corporation.
> (4) The *economic effect* of the terms and conditions upon projects, including redevelopment projects, funded or sponsored by cities, counties or districts.
> (5) The effect of the line and service extension regulations, and any modifications to them, on existing ratepayers.
> (6) The effect of the line and service extension regulations, any modifications to them, on the consumption and conservation of energy.
> (7) The extent to which there is cost-justification for a special line and service extension allowance for agriculture." (Italics added.)

JURs claim that the present record is inadequate to make the requisite economic findings. As such, JURs request that the proceedings be reopened to supplement the record and make the requisite findings. Second, JURs argue that the immediate effectiveness of the adopted rule change violates Section 783(b). Section 783(b) expressly precludes any change from becoming effective until "July 1 of the year which follows the year when the new order or decision is adopted by the commission." (Pub. Util. Code § 783(b).)

CBIA and UDI respond that the findings are not required by Section 783(b). Under Section 783(b), findings are unnecessary for "amendments to permit installations by an applicant's contractor." CBIA argues that this "is precisely the action the Commission took. . . ." (CBIA Response, p. 2.) CBIA maintains that the existing record is adequate to support the Commission's refinement of policy. UDI objects that JURs failed to raise the allegation in their comments to the proposed decision.

JURs' allegation of legal error is without merit. The adopted rule change falls under the Section 783(b) exception for an "amendment to permit installations by an applicant's contractor." There are no published court decisions interpreting the subject language of Section 783(b). Following rules of statutory construction, the Section 783(b) language must be interpreted to mean what it literally says. (Mercer v. Department of Motor Vehicles (1991) 53 Cal.3d 753, 763

["focus on the words used by the Legislature in order to determine their traditional and plain meaning."].) The adopted change constitutes a correction or "amendment." As discussed below, there is also record evidence that the rule change will facilitate or "permit" applicant installations by leveling the playing field. The Section 783(b) exception is therefore applicable. The Commission did not err in omitting Section 783(b) economic findings or making the change immediately effective.

JURs next allege that the rule change conflicts with other Commission policies and decisions. JURs characterize the rule change as a ratepayer subsidy of applicant installations. JURs argue that the rule change violates the Commission's long-standing policy of assigning costs to the parties who caused the costs. For the last 15 years, the Commission has assigned the inspection costs to the applicants and not the ratepayers. D.85-08-043 originally ordered that the line extension rules require payment of the inspection costs by the applicants. D.94-12-026 changed the line extension rules to provide for revenue based allowances, stating that it is "an equitable arrangement between the applicant and ratepayer, as well as between various classes of applicants." (D.94-12-026, p.2 fn. 2.) D.97-12-098 recently articulated a policy of establishing a revenue justification of costs.

CBIA submits that JURs' disagreement with a change in Commission policy does not constitute legal error. CBIA characterizes the rule change as a long overdue correction to anti-competitive tariff provisions. Additionally, CBIA disputes that the rule change creates a ratepayer subsidy. CBIA argues that the rule change creates a substantial potential for utility and ratepayer savings.

JURs' allegation that we erred by deviating from policies expressed in prior decisions is unpersuasive. The evolution of Commission policy does not equate with legal error. The Commission may "rescind, alter, or amend" its decisions pursuant to Section 1708. (Re Regulation of Cellular Radiotelephone

Utilities (1997) 71 CPUC 2d 162, 175 ["We are free to modify or reverse a prior position on an issue . . . ."].)

As we explained in Re Commission's Rules of Practice and Procedure (1997) 70 CPUC 2d 834, 835 [D.97-02-015], Commission decisions are divided in two general categories of precedent. The first category includes decisions wherein the Commission performs a quasi-judicial role and "consistency is especially desired." (*Id.*) The second category includes the decisions cited by JURs wherein the Commission adopts policies that it intends to follow in similar situations, "although it may alter those policies in the future as changing circumstances or priorities require." (*Id.*) Requests to revisit or change Commission policy are therefore better addressed in a petition to modify.

Lastly, JURs allege that there is no evidence of an unlevel playing field to support the rule change. In adopting the rule change, we expressed concern "that an applicant who chooses applicant installation is required to pay additional inspection charges that the applicant who chooses utility-installation would not pay. This does not provide a level playing field." (D.99-06-079, p. 15.) JURs argue that the evidence showed that costs, including inspection charges, are not the primary factor in the selection of an installer. JURs, in support, cite testimony as to why the developer Kaufman & Broad declines to select PG&E as an installer:

> "Typically in the past, PG&E has long lead times, both on their engineering and their installation . . . in most cases my past experience where we had PG&E crews installing substructure, they were slower than private contractors. So for those reasons – and they were also somewhat inflexible and intransigent in the sense of what they would be willing to do for Kaufman & Broad as a developer on the job site. So for those reasons we chose to go applicant-installed to give us as much control over those timing issues." (10/15/97 Trans. p. 195.)

It is CBIA's contention that the record supports the finding of an unlevel playing field between the utility and applicant installers. Absent the rule change, CBIA argues that it is only logical for a developer to select a utility installer so as to avoid the extra inspection charges. Pursuant to Rule 73 of the Commission's Rules of Practice and Procedure, CBIA requests official notice of "the plain economic fact that costs affect economic choices . . . ." (CBIA Response, p. 3.)

Contrary to JURs, there is record evidence supporting the finding of an unlevel playing field. UDI, for example, cited a PG&E letter to a developer which utilized the inspection charges as a selling point to solicit line installation business:

> "We [PG&E] question whether all the services PG&E provides at no cost were considered. Specifically, the 15% excess on our trenching ($4,796.94) will be offset by $3,674.00 inspection charges which Centex will <u>not</u> incur if PG&E does the work." (UDI 10/15/96 Reply Comments, pg. 9; Antonio Decl., Exh. A.)

UDI also cited a complaint from another developer that PG&E utilized the inspection charges as a deterrent to applicant installation:

> "I feel that PG&E's charges to inspect our contractor's work on this project were unfair and abusive. We have found that the time spent by PG&E inspecting the installation of the applicant installed, Option 2 facilities exceeds the hours spent by PG&E while inspecting installations performed by PG&E hired contractors. Ironically, in many cases the contractor hired by the applicant is the same contractor that is hired by PG&E to perform the installation on an Option 1 project." (UDI 10/15/96 Reply Comments, pg. 10; Razzari Decl., Exh. A.)

Beyond these unmeritorious allegations of legal error, JURs request clarification of the term "section of trench" in the adopted rule change. JURs assert that D.99-06-079 cannot be implemented without clarification. UDI responds that the ambiguities should be resolved via the petition to modify. CBIA agrees that ambiguity is not legal error. CBIA adds that JURs declined to propose

a workable and clear definition of "section of trench." D.99-06-079 expressly directed JURs to file the necessary tariff rule changes.

UDI and CBIA are correct that the rehearing application is not the proper vehicle to address the alleged ambiguities. The alleged ambiguities and other related issues regarding the rule change implementation are properly before us in JURs' petition to modify. Applications for rehearing are "restricted" to allegations that a Commission order or decision contains legal error. (Investigation on the Commission's Own Motion into the Matter of Post-Retirement Benefits Other than Pensions (1996) 67 CPUC2d 493, 494 [D.96-08-035].) Petitions for modification are not so restricted and may seek "reconsideration of the policy or other discretionary content of a Commission decision or order." (*Id.*)

No further discussion is required of JURs' allegations of legal error. Accordingly, upon review of each and every allegation of legal error, we conclude that sufficient grounds for rehearing have not been shown.

IT IS ORDERED that the application for rehearing of D.99-06-079 is denied.

This order is effective today.

Dated January 6, 2000, at San Francisco, California.

RICHARD A. BILAS
President
HENRY M. DUQUE
JOSIAH L. NEEPER
CARL W. WOOD
Commissioners

I abstained.

/s/ LORETTA M. LYNCH
Commissioner