

Decision 00-06-002 June 8, 2000

**BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA**

In the Matter of the Application of Pacific Gas and Electric Company (U 39 E) to Confirm the Effectiveness of D.49937 and The Turlock Irrigation District Service Area Agreement, or, in the Alternative, to Authorize Termination of the Turlock Irrigation District Service Area Agreement and Removal of Limitations in D.43185 and D.65185. (U 39 E)

Application 99-08-018  
(Filed August 9, 1999)

**OPINION****Summary**

This decision denies the Application of Pacific Gas and Electric Company (PG&E) for clarification of the Commission's policy on Service Area Agreements. Service Area Agreements are contracts between energy providers in which the providers agree not to compete in each other's service territories. PG&E alleges that Turlock Irrigation District (Turlock or TID) has engaged in behavior indicating its intent to violate its 1953 Service Area Agreement with PG&E. PG&E claims that Commission policy on Service Area Agreements needs clarification so that PG&E can determine an appropriate response to Turlock's actions.

We only issue advisory opinions in extraordinary circumstances. Because PG&E has not made a proper showing of entitlement to an advisory opinion, and it does not otherwise raise a controversy over which we have jurisdiction, we deny the Application.

## Background

In its August 9, 1999, Application, PG&E requests that the Commission "clarify its position regarding the continued validity of Decision No. 49937 (1954) and the 1953 Service Area Agreement ('the Agreement') between PG&E and [Turlock]." <sup>1</sup> Decision No. 49937 approved a Service Area Agreement with Turlock. PG&E alleges that "TID has now offered to serve, and proposes to build duplicate facilities to serve, select customers in PG&E's service territory in violation of the Agreement."<sup>2</sup>

PG&E asserts that a recent Commission decision casts doubt on the continued validity of Service Area Agreements, and leaves PG&E perplexed as to how to respond to Turlock's actions. In that decision, D.98-06-020, the Commission declined to approve a Service Area Agreement between PG&E and the Modesto Irrigation District (Modesto). The agreement restricted competition between PG&E and Modesto for 25 years. The Commission was troubled that the agreement would foreclose potential benefits of competition by preventing economic bypass of the transmission and distribution system. In disapproving the agreement, the Commission reasoned that, "in general the Commission's policy is to promote competition in all markets where competition may be economic."<sup>3</sup>

Several parties protested or filed responses to PG&E's Application here. The protests and responses allege that the Commission lacks jurisdiction to decide the matter because (1) there is no ripe controversy between PG&E and

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<sup>1</sup> Application at 1.

<sup>2</sup> *Id.*

<sup>3</sup> D.98-06-020, *mimeo.*, at 10.

Turlock and the Application improperly seeks an advisory opinion;<sup>4</sup> (2) the dispute is purely contractual and belongs in the civil courts;<sup>5</sup> (3) Turlock is not an entity regulated by the Commission;<sup>6</sup> and (4) the issues PG&E raises in the Application would be better handled in a broader policy context, such as the Distributed Generation rulemaking<sup>7</sup> currently pending before us.<sup>8</sup> PG&E disputes each jurisdictional argument.

After a March 3, 2000 Prehearing Conference (PHC), the Assigned Commissioner issued a scoping memo narrowing the issues in this proceeding and making clear that this proceeding was not the place to set general policy on all Service Area Agreements. Rather, the Commissioner determined that this proceeding would focus solely on whether PG&E's 1953 Service Area Agreement with Turlock is still in force. To the extent this determination required evidence of Turlock's alleged activities in competing distribution facilities in PG&E's

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<sup>4</sup> Protest of the Office of Ratepayer Advocates (ORA) at 5.

<sup>5</sup> Protest of ORA at 5.

<sup>6</sup> Protest of Turlock at 4.

<sup>7</sup> *Rulemaking on the Commission's Own Motion to Solicit Comments and Proposals On Distributed Generation and Competition in Electric Distribution Service*, R.98-12-015; see also D.99-10-065 (Opinion Regarding Distributed Generation and Electric Distribution Competition mailed October 25, 1999), which closed R.98-12-015. A staff study currently due for public distribution on June 2, 2000, will examine general policy surrounding distribution competition.

<sup>8</sup> Protest of Turlock at 12; Protest of ORA at 2; Response of City and County of San Francisco at 2. Southern California Edison Company's (Edison) March 23, 2000 comments on the jurisdictional issues we face do not alter our decision in this proceeding. Thus, we deny PG&E's April 3, 2000 motion to reply to the Edison comments.

service area, the Commissioner provided that this evidence would be the subject of hearings.

### **Discussion**

We find that PG&E seeks an improper advisory opinion, and therefore dismiss the Application with prejudice. PG&E conceded at the PHC that it had several other alternatives to having the Commission reaffirm the validity of the Turlock Service Area Agreement. Thus, there is no basis for the Commission to stray from the general policy against advisory opinions.

The Commission rarely issues advisory opinions. As we stated just last year,

We seldom issue advisory opinions and have clearly articulated our rationale for declining to do so. Our policy against issuing advisory opinions is not unique to the CPUC nor other administrative agencies but is a policy long-adopted by the courts . . . .

*"In order to conserve scarce decisionmaking resources, [we] generally '[do] not issue advisory opinions in the absence of a case or controversy.' [We adhere] to this 'rule' unless [we are] presented with 'extraordinary circumstances.' "*<sup>9</sup>

"Extraordinary circumstances" may exist where a matter is of widespread public interest or another governmental agency would benefit from a timely expression of the Commission's views.<sup>10</sup> However, PG&E makes no such showing here. PG&E concedes that the larger policy issue of distribution

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<sup>9</sup> D.99-08-018 (August 5, 1999), *mimeo.*, at 3-4 (emphasis added; citations omitted); *see also* D.00-01-052 (January 20, 2000), *mimeo.*, at 12-13 (quoting language in text).

<sup>10</sup> D.97-08-016 (August 1, 1997), *mimeo.*, at 6 (citations omitted).

competition will be resolved in other proceedings. Thus, matters of "widespread public interest" – distribution competition and the continued viability of Service Area Agreements generally – are not before us here. Nor is another governmental agency – here, Turlock - clamoring for "a timely expression of the Commission's views." Indeed, Turlock opposes PG&E's Application, as does ORA.

Furthermore, PG&E conceded at the PHC that even if the Commission issued a decision "clarifying" its position on Service Area Agreements, PG&E would still have to take Turlock to civil court to receive any relief. PG&E acknowledged that we have no jurisdiction to hear a complaint case against Turlock or to order it to cease and desist from building a competing distribution system.<sup>11</sup> A decision here would simply arm PG&E with a Commission decision articulating the Commission's policy. Such a decision might or might not influence a court in its deliberations.

Moreover, PG&E has several other options open to it if it believes Turlock is in breach of its Service Area Agreement or if PG&E needs clarification of Commission policy. If PG&E seeks relief for breach of the Agreement, it may take Turlock to court. If it seeks clarification of our policy on Service Area Agreements, the distribution competition staff study currently underway should shed light on that issue. Further, PG&E admits it could have sought, but did not seek, clarification or reconsideration of D.98-06-020, the decision that caused PG&E's confusion.

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<sup>11</sup> Moreover, in an April 17, 2000 letter to the assigned Administrative Law Judge (ALJ), Turlock agreed not to contest a civil court's jurisdiction to hear PG&E's contract claim. Turlock's letter is attached hereto as Appendix A.

What is more, the state Legislature currently is considering legislation that may give the Commission jurisdiction over irrigation districts. On May 18, 2000, PG&E and Turlock both signed on to a letter to sponsoring legislators (Appendix B hereto) supporting legislation to "resolve [their] differences ... to further a rational state policy as it relates to provisions [sic] of electric transmission and distribution services by irrigation districts within electric utility company service territories." Thus, PG&E has acknowledged that legislation is yet another means by which it may achieve the clarity it seeks on an appropriate response to Turlock's actions.

### **No Hearing Is Necessary**

In issuing the scoping memo, the Assigned Commissioner provided for hearings only in the event they were necessary to a determination of the proper outcome of this proceeding. We have resolved this matter on the law, and our determination would be the same regardless of the activity in which Turlock is engaged. Therefore, we make a determination that no hearing is necessary, in accordance with Rule 6.6 of the Commission's Rules of Practice and Procedure.

### **Comments on Draft Decision**

The draft decision of ALJ Sarah R. Thomas in this matter was mailed to the parties in accordance with Pub. Util. Code § 311(g) and Rule 77.7 of the Rules and Practice and Procedure. PG&E filed comments and Turlock filed reply comments. We have made changes to the discussion on pages 5-6 of this decision relating to pending state legislation, and to corresponding Finding of Fact 4. Otherwise, we are not persuaded that a change to the draft decision - particularly one that provides PG&E its requested advisory opinion - is warranted.

## **Conclusion**

PG&E has many options other than a disfavored advisory opinion in order to achieve the result it seeks. In view of our reluctance to devote scarce Commission resources to matters not ripe for adjudication, and the existence of several other means for PG&E to obtain relief, we will dismiss the Application with prejudice.

## **Findings of Fact**

1. PG&E concedes that we do not have jurisdiction to find Turlock in breach of its Service Area Agreement.

2. PG&E concedes that it may take Turlock to court for a determination of whether Turlock is in breach of the Agreement.

3. PG&E could have sought, but did not seek, Commission clarification or reconsideration of D.98-06-020 if it required clarification of our policy on Service Area Agreements.

4. The state Legislature currently is considering legislation that may give the Commission jurisdiction over irrigation districts. PG&E and Turlock have both voiced support for a legislative solution to their differences concerning irrigation district provision of electric transmission and distribution services within electric utility company service territories.

## **Conclusions of Law**

1. The Commission rarely issues advisory opinions. In order to obtain an advisory opinion from the Commission, a party must show that extraordinary circumstances exist.

2. In view of PG&E's numerous options if it believes Turlock is engaged in improper activity, and the Commission's lack of jurisdiction to order Turlock to

cease such activity, we find that no such extraordinary circumstances exist in this proceeding.

3. PG&E has shown no entitlement to relief other than an advisory opinion, as no case or controversy exists over which the Commission has jurisdiction.
4. We should dismiss the Application with prejudice.

**O R D E R**

**IT IS ORDERED** that:

1. The Application of Pacific Gas and Electric Company (PG&E) seeks an improper advisory opinion and shall be dismissed with prejudice.
2. PG&E's April 3, 2000 motion to reply to the March 23, 2000 comments of Southern California Edison Company is denied.
3. This proceeding is closed.

This order is effective today.

Dated June 8, 2000, at San Francisco, California.

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



APPENDIX A

April 18, 2000

**VIA ELECTRONIC MAIL AND U.S. MAIL**

Sarah R. Thomas  
Administrative Law Judge  
California Public Utilities Commission  
505 Van Ness Avenue  
San Francisco, CA 94102

Re: *PG&E Application Re: Turlock Service Area Agreement*  
(A.99-08-018)

Your Honor:

At the March 3, 2000 prehearing conference, you asked whether Turlock Irrigation District (TID) would agree that, were PG&E to bring an action against TID in a judicial court, TID would not assert a primary jurisdiction defense to the lawsuit, on grounds that such jurisdiction rested with the Commission. We are writing to convey TID's agreement in this regard. Our agreement is based on the fact that, at the prehearing conference, a distinction was drawn between raising a defense of primary jurisdiction (pertaining to the forum), and raising an actual defense in the superior court of invalidity of the contract on policy grounds.

In this regard, at the prehearing conference, PG&E's counsel suggested that TID be asked to waive the ability to assert an underlying "policy defense" (i.e., a defense that the agreement is invalid due to Commission policy) in superior court, and PG&E's request was rejected as inappropriate.

Very truly yours,

EMILIO E. VARANINI III

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(END OF APPENDIX A)

May 18, 2000

The Honorable Tom Calderon  
California State Assembly  
State Capitol, Room 2148  
Sacramento, CA 95814

The Honorable Dennis Cardoza  
California State Assembly  
State Capitol, Room 2141  
Sacramento, CA 95814

Dear Tom and Dennis:

The undersigned groups all have an interest in AB 2638 (Calderon) and in resolving differences between us to further a rational state policy as it relates to provisions of electric transmission and distribution services by irrigation districts within electric utility company service territories. After significant discussions we would like to propose the following issues to serve as a framework for developing a consensus on the bill during this legislative session.

1. All parties agree that a statutory solution this legislative session will provide the best framework for resolving these issues and providing the PUC with helpful guidance and appropriate authority.
2. The issues which we would propose to serve as the parameters for discussion include those listed below. They shall be reflected by amendment to AB 2638 as intent language.
  - ◆ Stranded distribution and transmission costs and how they occur and their effects on both utility companies and irrigation districts and the customers which they serve.
  - ◆ Cost-shifting issues relating to electric distribution and transmission service by irrigation districts and utility companies.
  - ◆ Criteria for providing electric distribution and transmission service to customers within utility and/or irrigation district territories, including a review of agreements between electric service providers.
  - ◆ Addressing the issue of shareholder vs. ratepayer impacts, relative to the effects of irrigation district operations within utility company service territories.
  - ◆ Addressing the nature and application of "universal service" requirements for irrigation districts serving customers within utility company service territories.

APPENDIX B


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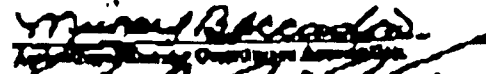
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- Reviewing the issue of condemnation powers available to irrigation districts in pursuing electric transmission and distribution service projects within utility company service territories.
- CEQA issues relating to irrigation district provision of electric transmission and distribution service.
- LAFCO issues relating to irrigation district provision of electric transmission and distribution service.
- ISO and ISO system reliability issues relating to differences between irrigation districts and utility electric companies.

We look forward to discussing these issues in detail and the assistance that you and your staffs will provide. Additionally we will work with Senator Bowen and Assemblyman Wright as the Chairs of the Policy committees that cover these issues in helping us reach agreement. We intend to conduct meetings immediately to begin addressing the issues outlined above in order to reach consensus on a bill that can be adopted during this legislative session.

Sincerely,

  
Mark Tammara  
Irrigation Districts & Electric Company

  
Maria Baccador  
Irrigation Districts & Electric Company

  
Ben Torres  
Irrigation Districts & Electric Company

  
Tom Calderon  
Irrigation Districts & Electric Company