

Decision 00-06-081

June 22, 2000

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Energy Alternatives,

Complainant,

vs.

Pacific Gas & Electric Company,

Defendant.

Case 97-09-030  
(Filed September 17, 1997)

**ORDER DENYING REHEARING OF DECISION 99-12-034**

**I. INTRODUCTION**

Energy Alternatives ("EA") filed a complaint with the California Public Utilities Commission ("Commission") on September 17, 1997 which presented three causes of action in support of its allegation that Pacific Gas and Electric Company ("PG&E") had mismanaged its 1997 Weatherization Program. (Application for Rehearing, p. 2.) EA first alleged that PG&E violated its duty to disclose material information to prospective bidders for the PG&E administrative contract that EA had bid upon, but that was awarded to Richard Heath and Associates. In its second cause of action, EA alleged that PG&E violated its duty to disclose material information for subcontractors under the administrative contract managed by Heath. In its third cause of action, EA alleged that PG&E's actions caused harm to ratepayers.

By Decision ("D.") 99-12-034 (the "Decision"), this Commission denied EA's complaint, concluding that PG&E reasonably implemented its 1997

Weatherization Program. (See D.99-12-034 at p. 17 [Conclusion of Law No. 2 and Ordering Paragraph No. 1] (slip op.).)

An application for rehearing of D.99-12-034 was timely filed by EA on January 18, 2000. In its application for rehearing, EA alleges legal error and accuses this Commission of fraud, or at the very least, that we abused our discretion in rendering our Decision. (Application for Rehearing, p. 2.) PG&E filed a response in opposition to EA's application for rehearing on February 2, 2000.

## II. DISCUSSION

EA's primary allegation of legal error is that D.99-12-034 failed to address the first two causes of action set forth in EA's complaint, and that it failed to include the required findings of fact and conclusions of law as to those issues. (Application for Rehearing, p. 2.) EA fails to note, however, that it withdrew those first two causes of action at the commencement of the proceeding in the Prepared Testimony of EA's witness, John Seale, which stated: "... after discovery Energy Alternatives has decided that it will no longer pursue the first two causes of action in its complaint at the Commission." (Exhibit 1, at p. 21.) In its response to EA's rehearing application, PG&E asserts that, based upon PG&E's reliance on Mr. Seale's testimony, it did not address the first two causes of action in its rebuttal testimony or at hearings. (PG&E Response, at p. 2.)

EA subsequently attempted to reintroduce those two causes of action in its opening brief where it alleged that PG&E did not comply with its obligation, as set forth in D.93-02-011, to disclose all material facts regarding caulking to potential bidders. (EA Opening Brief, at p. 32.) EA also claimed that PG&E should have disclosed its approximate guess as to what contractors would do in 1997 with regard to caulking.

Besides noting that those two causes of action were previously withdrawn by EA, we find that they nonetheless are without merit. PG&E's duty was to provide only known facts, not guesses, regarding what it expected caulking installations would or should be. As we noted in our Decision:

“PG&E argues that the bid package contained all of the *facts* that PG&E possessed at that time and it did not believe that engaging in speculation on what the caulking installations would or should be was in any way helpful to the bidders. PG&E points out that its primary bid package contained notice that the caulking footage was from historical averages by placing it in a column labeled, “Approximate number of Measures Previously Installed” with a footnote, “Based on historical data.”” (D.99-12-034, at p. 8.)

Thus, we agreed with PG&E's position that “the only known ‘facts’ that PG&E had at the time of the bids was historical caulking data that had been applied in previous years.” (PG&E Reply Brief, at pp. 5-6.) As PG&E asserted; “this [data] was the fact that was given to all bidders in the bid package. The bid proposal clearly indicated that the numbers in the cost proposal represented: ‘Approximate number of Measures Previously Installed – Based on historical data of 43,037 total homes.’” (Id.)

Our determination that all potential bidders, including EA, were provided with all material facts applies to EA's other allegation that PG&E was required to speculate as to the possibility that the weatherization program might not be able to achieve a 19% rate of attic insulation. Therefore, we find no merit to EA's claim that its decision not to bid on either the primary contract or the subcontractor contracts was based upon PG&E's failure to provide it with all material information.

EA additionally claims that the Decision contains numerous factual mistakes, that those errors are in favor of PG&E and that “[T]he cumulative effect of those misrepresentations is to suggest fraud on the part of this Commission.” (Application for Rehearing, p. 6.) We first note that EA failed to file any comments to the Proposed Decision, which would have allowed the Commission the opportunity to correct any factual errors.

Moreover, EA fails to substantiate in its rehearing application its claims of material errors in the Decision. An example is EA’s allegation that we erred in our reliance in the Decision on the figure 45,003 as the number of homes that were weatherized during 1997. EA contends that the correct number was 29,060. (Application for Rehearing, p. 2.) However, the record shows that the use of the 29,060 figure, as proposed by EA, is not justifiable. The 29,060 figure actually came from an EA exhibit, Exhibit 4, which attached a PG&E data response table at the back, entitled “EP Calendar Year 1997 (Contract 4600005325) Program Statistics by County. That contract was with Richard Heath & Associates for Program Year 1997, and did not begin until May 1997. (See D.99-12-034 at p. 6 (slip op.)) Prior to that time, low income weatherization work was accomplished through a rollover contract from the 1996 program. The figure of 45,003 homes weatherized for 1997, was taken from the annual Demand-Side Management reports that utilities are required to file with this Commission, which report overall results on a calendar year, rather than on a contract basis. The 45,003 number was derived from the record of PG&E’s 1998 Annual Summary Report on Demand-Side Management Programs, Exhibit 5 in PG&E’s 1998 Annual Earnings Assessment Proceeding. (Application 98-05-001 et al., Appendix A, pp. II Res-8 and 9; PG&E Reply Brief, at p. 4.) Thus, there was no error in our Decision. Rather, we properly relied on annual results while EA used contract results that did not provide a complete picture of the number of weatherized homes for 1997.

EA also chastises us for not finding a conspiracy between PG&E and Richard Heath & Associates to pay bills higher than 32.67 linear feet per unit for caulking, either before or after the award of the prime and sub-contracts. EA is reintroducing the conspiracy claim it previously alleged in its brief, and which we already considered. It does not present new argument. Therefore its claim in its rehearing application will be accorded no weight.

As noted in the Decision, EA failed to prove its conspiracy allegation. (D.99-12-034, at pp. 11-12 (slip op.)) EA again unpersuasively cites the testimony of EA's witness, Mr. Steven Bird, as proof of the conspiracy. Mr. Bird initially testified that a Richard Heath & Associates employee, Mr. Swinter, advised Mr. Bird that "the money is in caulking." (Application for Rehearing, p. 11.) However, Mr. Bird's testimony was unreliable because it consisted solely of hearsay. Furthermore, Mr. Swinter later denied making such a statement. (Declaration of Robert Swinter, dated June 3, 1999, attached to PG&E's reply brief.) Finally, in the Decision we found that payment of the questionable bills was reasonably based upon program policies and an inspection showing that the work was done, notwithstanding the fact that a contractor accused PG&E of providing erroneous information in one training session regarding mobile homes. (D.99-12-034, at pp. 11-12 (slip op.)) While we acknowledged in the Decision that the 1997 weatherization program had its share of unanticipated problems, we held that these did not invalidate the entire process and program as EA claimed. (Id.)

EA also contends that we abused our discretion by declining to endorse its pursuit of a private civil action, as requested by EA in its May 20, 1999 opening brief, at pages 41 – 43. (D.99-12-034, at pp. 13 (slip op.)) (Application for Rehearing, p. 13.) EA contends that the following dicta from an earlier EA complaint decision provided it with the availability of an endorsement from us for civil remedies for harm caused by PG&E:

“The development of a private cause of action predicated upon the failure of a utility or its agent or delegate to discharge the affirmative duty to disclose material information may well be appropriate in the courts of our state.”

We do not agree with EA. First, we determined in the Decision that PG&E’s additional inspections of its weatherization work were reasonable, and that, therefore, the ratepayers were not harmed as alleged by EA. Second, even if we had found PG&E’s actions to be unreasonable, nothing in the dicta indicates that we had any intention of endorsing civil actions. We simply recognize that as a general rule, an aggrieved complainant may appropriately pursue a civil action. We do not, however, indicate that such a civil action is appropriate under the facts as we have determined them in this case. EA’s belief that the Commission’s treatment of this issue amounts to misrepresentation is therefore unfounded.

### **III. CONCLUSION**

Accordingly, we find that EA’s application for rehearing raises no legal issues and instead focuses on rearguing its positions that it previously set forth in briefs. Therefore, for the reasons discussed above, we conclude that sufficient grounds for rehearing have not been shown.

**THEREFORE, IT IS ORDERED** that rehearing of D.99-12-034 is hereby denied.

This order is effective today.

Dated June 22, 2000, at San Francisco, California.

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

President Loretta M. Lynch, being necessarily absent, did not participate.