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MAIL DATE
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Decision 99-03-025 MARCH 4, 1999

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking to Establish Standards of Conduct Governing Relationships Between Energy Utilities and Their Affiliates.	Rulemaking 97-04-011 (Filed April 9, 1997)
Order Instituting Investigation to Establish Standards of Conduct Governing Relationships Between Energy Utilities and Their Affiliates.	Investigation 97-04-012 (Filed April 9, 1997)

ORDER DENYING REHEARING OF DECISION 98-11-026

I. SUMMARY

Pacific Gas & Electric Co. (PG&E) moves for rehearing of D.98-11-026 on the grounds that it violates the California and United States Constitutions, the Public Utilities (PU) Code, our own Rules of Practice and procedure (Commission's Rules or Rules), and California case law on the imposition of penalties. In D.98-11-026 we ordered PG&E to pay a penalty of $1,680,000 for allowing its affiliate, PG&E Energy services, to issue a printed advertisement that did not comply with our legibility requirements for disclaimers. The penalty consists of $17,500 for each of the 20 violations associated with the March 16, 1998 "High Voltage" advertisement and $19,000 for each of the 70 violations associated with the remaining advertisements.

PG&E first alleges that we erred by failing to categorize the penalty phase of this proceeding as adjudicatory and by failing to provide PG&E with the opportunity to appeal our categorization of that phase. PG&E's claims have no merit. What PG&E fails to acknowledge in its application is that we were not bound by Senate Bill (SB) 960 when this proceeding began, on April 9, 1997. The

reason why a categorization of this proceeding even occurred was because on April 9, 1997 we identified and chose this proceeding as a candidate to conduct an experimental implementation of SB 960 procedures that required categorization but that would not become mandatory for Commission proceedings until January 1, 1998. Therefore, contrary to PG&E's claims, we could not have violated any statutes or rules related to SB 960 with regard to this proceeding.

Furthermore, even if SB 960 was applicable here, PG&E is legally barred from presenting these arguments at this time. First, it did not request a recategorization of the enforcement phase of the proceeding prior to the issuance of D.98-04-029, the decision which established that PG&E had violated our Rules. D.98-04-029 was issued prior to D.98-11-026, the decision being challenged by this rehearing application.[1] Second, PG&E failed to seek rehearing of D.98-04-029 on this or any other issue, as required by PU Code Section 1731.

PG&E also claims that we lack authority to directly impose a fine, and that even if we have that authority, the record does not support the penalty amount we assessed. Contrary to PG&E's contentions, we acted within the authority provided us under PU Code Sections 2107, 2108 and 701 when we imposed a $1,680,000 penalty against PG&E. That penalty amount is adequately supported by the record in this case, and is consistent with the Constitutions of the United States and of California.

II. DISCUSSION

Order Instituting Rulemaking (OIR or R.) 97-04-011 and Order Instituting Investigation (OII or I.) 97-04-012 were filed on April 9, 1997. The purpose of these proceedings was to establish standards of conduct governing relationships between energy utilities and their affiliates. At the time this

[1] Challenged D.98-11-026 solely assessed the appropriate penalty for PG&E's noncompliance with our Rules.

proceeding was initiated, we were conducting an experimental implementation of procedures that would become mandatory for our proceedings, effective January 1, 1998, pursuant to SB 960.[2] On April 9, 1997, we identified this proceeding as a candidate for inclusion in the experiment. We preliminarily determined the categorization of the rulemaking proceeding to be "quasi-legislative" and the investigation proceeding to be "ratesetting," as those terms are defined in Experimental Rule 1(e) and (d), respectively. In their prehearing conference statements in this matter, various parties objected to the categorization of the OII as "ratesetting," and argued that both the OII and the OIR should be designated as "quasi-legislative." Although PG&E stated in its prehearing conference statement that it had no objection to the categorization, at the prehearing conference PG&E joined the other utilities' objections. We decided to retain the ratesetting category for investigation, but conduct the proceeding under the rulemaking as the lead—or active—docket, since it appeared at that point to be most suitable given the issues being considered.

On March 27, 1998, The Utility Reform Network (TURN) and the Office of Ratepayer Advocates (ORA) filed a joint emergency motion alleging that PG&E had violated Rule V.F.1 of our Affiliate Transaction Rules, set forth in D.97-12-088, as a result of a March 23, 1998 advertisement by PG&E Energy Services. Specifically, the motion alleged that a violation occurred when PG&E allowed its utility name and logo to be used by its affiliate in printed material without a legible disclaimer.

In D.98-04-029, issued on April 9, 1998, we granted ORA and TURN's motion in part[3] and held that PG&E had indeed violated our Affiliate

[2] The Experimental Rules and Procedures, adopted in Resolution ALJ-170, established the rules and procedures for the experiment and the creation of the sample of proceedings to which the experimental rules would apply.

[3] Because of some mitigating circumstances, we did not impose the injunctive relief requested by ORA and TURN.

Transaction Rules. We could have ordered that the issues brought up in the joint emergency motion be treated as adjudicatory under Article 2.5 of our Rules. However, pursuant to our discretion as to these matters, we decided to address the issues in the existing affiliate rules docket since that appeared to be the most appropriate course of action given the urgency of those issues. PG&E could have requested that we treat these issues as adjudicatory at that time, but it did not.

In D.98-04-029, we requested more information before assessing the appropriate monetary penalty in a subsequent penalty phase. PG&E was directed to file a list of each publication of the advertisement in question. PG&E was also asked to provide documentation which explained the reason for the violation. PG&E made this initial filing. Interested parties were permitted to file comments concerning what they believed the appropriate monetary penalty should be in light of the totality of circumstances in this case. PG&E chose not to file opening comments. It was not until May 18, 1998, in a footnote of a reply, that PG&E first requested that this phase of the proceeding be recategorized as an adjudicatory matter.

On November 5, 1998, we issued D.98-11-026. In that decision we imposed a penalty of $1,680,000 against PG&E for allowing its affiliate, PG&E Energy services, to issue a printed advertisement that did not comply with the Commission's legibility requirements for disclaimers. The monetary penalty was assessed at $17,500 for each of the 20 violations associated with the March 16, 1998 "High Voltage" advertisement and $19,000 for each of the 70 violations associated with the remaining advertisements.

PG&E filed its application for rehearing of D.98-11-026 on December 7, 1998. TURN and ORA filed their joint response in opposition to PG&E's rehearing application on December 22, 1998.

A. PG&E's Request To Recategorize The Penalty Phase Of The Proceeding Was Properly Denied As Untimely.

PG&E first contends that we erred in D.98-11-026 by failing to categorize the penalty phase of this proceeding as adjudicatory and by failing to provide PG&E with the opportunity to appeal the categorization of the penalty phase, as allegedly required by SB 960, California Public Utilities (PU) Code sections 1701.1 and 1701.2, and our Rules. Under PG&E's interpretation of SB 960, we were required to make a separate finding as to how TURN and ORA's emergency motion should be categorized, thereby triggering the right to a request for rehearing within 10 days under PU code Section 1701(a) and our Rules.

Contrary to PG&E's contentions, we acted properly and in a manner that was consistent with the PU Code and with our Rules. As previously noted, SB 960 was not applicable when this proceeding began. Therefore we could not have violated SB 960, PU Code sections 1701.1 and 1701.2, or our SB 960 implementation rules.

Even assuming arguendo that we were obligated to apply SB 960 procedures, those and our own procedures only requires us to categorize proceedings. They make no mention of motions filed in existing dockets, such as the one at issue here. We are provided, however, with the discretion to decide whether a particular phase of a proceeding should be recategorized. Rule 6.1(b) of our Rules, for example, states that when a proceeding may fit more than one category, we may determine which category appears most suitable to the proceeding, or may divide the subject matter of the proceeding into different phases or one or more new proceedings. Rule 6.1(d) adds that in exercising our discretion of subsection (b) of this rule, we shall so categorize a proceeding and shall make such other procedural orders as best to enable us to achieve a full,

timely, and effective resolution of the substantive issues presented in the proceeding.

Our categorization of the proceeding, including its penalty phase, is entirely consistent with Rules 6.1 (b) and (d). We categorized the affiliate rules OIR/OII as quasi-legislative and ratesetting on April 9, 1997. On March 27, 1998, TURN and ORA filed their joint emergency motion alleging that PG&E violated Rule V.F.1, and requesting penalties and injunctive relief. That day, the administrative law judge issued an order granting parties five days to file a response. We could have ordered TURN or ORA to initiate a separate proceeding at that juncture, or ordered them to amend their motion to specify whether or not the issues should be treated as adjudicatory under SB960. We also could have set apart from the general proceeding the enforcement phase initiated by the emergency motion. However, consistent with Rule 6(d), we chose to address the motion for sanctions in the existing affiliate rules docket. This provided the best opportunity to fully and effectively resolve all of the issues.

PG&E was placed on notice prior to the filing of the emergency motion that all matters related to the proceeding would be litigated in the affiliate rules OIR/OII. Yet, PG&E did not ask for a recategorization of the proceeding at the time of the filing of the motion.

On April 9, 1998, we issued D.98-04-029 confirming that PG&E had violated the affiliate rules and directing further proceedings, which later resulted in D.98-11-026, the decision now being challenged by PG&E. When D.98-04-029 was issued, PG&E was clearly placed on notice that we planned to impose a monetary penalty and that the penalty determination would be made in the existing affiliate rules docket. Nevertheless, PG&E failed to seek rehearing of D.98-04-029 on the categorization issue or any other issue.

PG&E again failed to raise any procedural objections in its April 21, 1998 filing in which it disclosed the name and circulation of each of the

publications in which the "High Voltage" ads ran. Again, PG&E failed to challenge the categorization of the penalty phase when given the opportunity to file opening comments by May 6 on the appropriate amount of the penalty. It chose not to file any opening comments at all.

PG&E mentioned recategorization for the first time in a footnote included in its May 18, 1998 reply comments to others' opening comments. It stated there that the proper procedural vehicle for resolving TURN and ORA's motion was to recategorized their complaint as "adjudicatory" pursuant to SB 960, or in the alternative, that the matter be given a new docket number and categorized as an adjudicatory proceeding. (Reply Comments of PG&E, May 18, 1998, p.1 fn.1.)

PG&E's arguments in its application for rehearing of D.98-11-026 are in fact a collateral attack on the categorization of the proceeding as reflected in D.98-04-029. PU 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. Therefore, PG&E cannot seek rehearing as to its recategorization arguments since the time for applying for rehearing of D.98-04-029 was no later than 30 days after April 9, 1998. Having elected to forego raising these matters before us prior to the issuance of D.98-04-029, or in a timely application for rehearing of that decision, PG&E is barred from raising them now.

B. The Commission Has Authority To Impose Penalties On Utilities Directly Without Going To Court Under Public Utilities Code Sections 2104 and 701.

PG&E's next argument is that we acted beyond our authority by directly imposing penalties on PG&E under P.U. Code Sections 2107 and 2108.[4] PG&E maintains that we must seek imposition and recovery of penalties through a 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. (Emphasis added.) "The action shall be commenced and prosecuted to final judgment by the attorney of the Commission."

At one time, we did not attempt to directly impose or collect penalties under Sections 2107 and 2108. Instead, if we found a violation, we ordered our General Counsel to file an action in superior court to recover penalties. (See, e.g., Suburban Water Systems (1964) 63 Cal.P.U.C. 649, 664.) More recently, we have interpreted Sections 2104 and 701[5] to allow us to impose penalties but to require 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; In re Application of Pacific Gas & Electric Company [D.96-11-014] (1996) __ Cal.P.U.C.2d ___.[6] No

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[4] Section 2107 provides that any public utility which violates any provision of the Constitution or the Public Utilities Code, or any of our orders or requirements, 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.

[5] PU code Section 701 authorizes us to do "all things necessary and convenient" in the exercise of our jurisdiction, including imposing monetary penalties for violations of our rules and orders.

[6] PG&E cites our earlier decision, Dimaggio v. Pacific Bell (1992) 43 Cal.P.U.C.2d 392, 395, in support of its request for rehearing on this issue. PG&E is correct that we took a

utility, including PG&E, has ever raised a credible legal argument opposing that interpretation. This authority, is critical to our ability to regulate public utilities and to protect the public interest. If we could not penalize utilities for violating our rules and orders, utilities would have little or no incentive to comply with them.

C. The Record Amply Supports A Penalty Based On 90 Violations Of Rule V.F.1.

Assuming arguendo that we have authority to impose a penalty against it, PG&E claims that the calculation of 90 violations is speculative, unlawful and wholly unsupported by the record evidence. It contends that the burden of proof rested on ORA and TURN to demonstrate both a violation of law and the resulting harm to the market. It states that the record is devoid of any evidence from ORA and TURN. It argues that the only record evidence in this case was submitted by PG&E, and that the evidence it provided supports a finding of, not 90, but 18 violations, the number of separate publications in which the advertisement appeared.

Contrary to PG&E's claims, there was enough evidence on the record to assess very high fines, much higher than the $1,680,000 imposed in D.98-11-026. It does not matter whether it was PG&E that submitted the evidence relied upon in this case rather than ORA or TURN. The fact is that the record shows that the high voltage ads appeared in newspapers and magazines with paid circulation totaling over six million. Thus, PG&E allowed the logo to be used inappropriately a little over six million times. PG&E should have been aware of the circulation level of these newspapers and magazines, or at the least, that its affiliate was mounting a wide-spread advertisement campaign. We could have therefore logically held that PG&E violated Rule V.F.1 six million times. We determined,

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limited view of our authority to penalize utilities in that case, but Dimaggio is an exception to a long line of decisions, issued both prior to and subsequent to the Dimaggio case, in which we have imposed penalties directly on utilities under Section 2107. Thus, contrary to PG&E's claim, we have not changed our position on this issue in recent years.

however, that if we based the penalty on six million violations and assessed a fine per violation of between $500 and $20,000, the resulting fine would be excessive.

TURN and ORA, as well as the Joint Petitioners Coalition and the California Association of Plumbing, Heating and Cooling Contractors recommended a monetary penalty of $10 million based on various factors, including (1) the nature and extent of the harm caused by PG&E's violation of the rules, including both immediate and long-term harm to the market; (2) the size and ability of PG&E to pay significant penalties given that PG&E Corp. reported over $15 billion in operating revenues in 1997 of which PG&E accounted for $9.5 billion; (3) the large number of violations; and (4) PG&E's intent, which these parties stated they do not believe should be weighed as a significant factor.

We rejected the recommended $10 million penalty as excessive. Instead we chose to base our assessment on an extremely conservative conclusion. We determined, as a matter of common sense, that at least five people read the ad in each of the 18 publications. (D.98-11-026, Finding of Fact 5) This resulted in a total of at least 90 violations, based upon the number of publications in which the advertisement appeared (18) multiplied by 5.

PG&E challenges our reliance on the number of readers in making our calculation. Basing its argument on People v. Bestline (1979) 61 Cal. App.3d 879, 923-24, it claims that case law requires that where a statute provides a penalty per violation for misrepresentation, the correct number of violations must be calculated based on the number of "victims," which is limited to only those people who acted upon the misrepresentations. It argues that readership cannot be relied upon in this case since no evidence was taken into the record on how many people were misled, or on how many people acted upon the advertisements. It claims that in the absence of any such evidence, the number of violations should be based on the number of advertisements published, or 18. PG&E bases its arguments on its understanding of California case law interpreting Sections 17500 et seq. of the

California Business and Professions Code, which address false and misleading advertisements, and which carry civil penalties up to $2,500 for each violation.

PG&E's claim that the correct number of violations must be calculated according to the number of victims is meritless. Contrary to its claim, the Bestline case it cites as support does not establish a hard-and-fast rule applicable to all cases involving misleading solicitations. The Bestline court found that the per victim test was a reasonable method for calculating the number of violations under the circumstances of that case, not that it was the only reasonable method for all cases. In fact, Bestline and other cases not mentioned by PG&E have looked to the number of people solicited by the defendant, or who read the advertisement, not the number of "victims," when calculating the number of violations under the Unfair Practices Act. As D.98-11-026 points out, the court in People v. Superior Court (Olson), 96 Cal.App.3d 181, 197 (4th Dist., Div.2 1979) addressed the issue of what constitutes a single violation of Section 17500 et seq. for a false and misleading newspaper advertisement. It held that a single publication constitutes a minimum of one violation with as many additional violations as there are persons who read the advertisement. The court in People v. Morse (1993) 21 Cal App. 4th 259, 272-274, found that using the number of misleading direct mail solicitations (4,000,000 in that case) was permissible, so long as the fine itself was reasonable.

As D.98-11-026 notes, we are not bound by the cases cited by PG&E, especially since they interpret a different statute. In D.98-11-026, we nonetheless addressed and correctly rejected those cases in some detail. (D.98-11-026, mimeo at p.16.) We concluded that what is clear from the case law interpreting the Business and Professions Code is that determining what constitutes a single violation under the statutory scheme is left to the courts to determine on a case-by-case basis. Similarly, in reaching our conclusion in D.98-11-026, we did not set forth a single standard for determining the number of occurrences for all violations

of Rule V.F.1 by written publication, and we noted that in other cases, a different measure might apply.

D. There Is Ample Evidence In The Record To Support A Penalty Near The Top End Of The Range Established Under Public Utilities Code Section 2107.

PG&E incorrectly contends that the record does not support our imposition of penalties near the top end of the range established by PU Code Section 2107. A review of the facts in this case, as explained above, and of the factors that we may lawfully consider when imposing a fine indicates that the amount of the penalty imposed against PG&E is reasonable and proper.

As we indicated in D.98-11-026, we assess penalties on a case by case basis according to the totality of the circumstances. We may consider a number of factors. These include the size and sophistication of a utility and its experience in the regulatory arena (Hale v. Morgan (1978) 22 Cal.3d 388, 405). PG&E is a large utility with approximately 4.2 million customers and with a long history of regulatory experience. Another factor is whether the penalty is proportionate to the utility's wealth and ability to pay (People ex rel. Smith v. Parkmerced Co. (1988) 198 Cal.App.3d 683, 692). The record shows that PG&E received over $9 billion of operating revenues for 1997. We considered these factors when setting the penalty level for each offense.

We may also consider the economic benefit to a utility attributable to its unlawful operations and the continuing nature of its offense (People v. Toomey (1985) 15 Cal.App.3d 1; Kwik-Communications (1994) 53 Cal. P.U.C. 2d 145; Re PagePrompt USA (1994) 53 Cal. P.U.C. 2d 135). The high voltage ads reached a wide audience because of PG&E Energy Services' expectation that they would yield a significant economic return. PG&E Energy Services would not have spent large amounts of money on a mass advertising campaign in many of the nation's

largest newspapers and magazines if it did not believe those advertisements would produce a significant economic benefit. The advertisements thus had the potential to cause substantial confusion and harm.

PG&E particularly challenges our consideration of its company size, the gravity of the violations, and its good faith in assessing the appropriateness of the penalty. Yet it was PG&E that asked us to apply PU Code Section 2104.5 to this case, and that Code section includes those very three factors. We noted in our decision that PG&E was incorrect that Section 2104.5 is directly applicable to this case because that section is limited to penalties for violations involving safety standards for pipeline facilities or the transportation of gas in California. However, we nonetheless chose to look to those factors by analogy when determining the appropriate penalty in light of the range set forth by Section 2107.

While we noted in D.98-11-026 that we did not believe that PG&E purposefully or willfully violated Rule V.F.1, we stated that we could not find these violations were merely inadvertent. PG&E had previous to the violations delegated its responsibility to its affiliates to comply with the rules without providing them with adequate education or supervision to ensure compliance. PG&E later failed to take effective measures to ensure compliance after its discovery of the violations. When the problems of the March 16 advertisements came to light, PG&E only directed that its affiliate correct the problem, but did not take further action to ensure compliance with the rules before the advertisement was published again on March 23 to a far larger audience. This is why the assessed penalty for the violations associated with the March 16 advertisements is less than the penalty for the violations associated with the remaining 70 advertisements. Therefore, although PG&E's good faith in attempting to achieve compliance with the rules after notification of a violation is one factor we considered in mitigation of the penalty amount, its good faith efforts cannot rectify its initial failure to comply with the Rule V.F.1.

Thus, we weighed the above factors against the purpose sought to be achieved by the penalty when we assessed the $1,680,000 fine. This produced a reasonable penalty. That penalty falls far short of the threshold of "shocking the public sentiment" required to conclude that the penalty is excessive and unreasonable. (See People v. Magoni (1925) 73 Cal.App. 78, 80.) Nor has PG&E shown that the penalties prescribed by Section 2107 are "oppressive." (See People v. Western Airlines (1954) 42 C.2d 621, 642.)

E. The Decision Does Not Infringe Upon PG&E's First Amendment Rights.

PG&E argues that D.98-11-026 violates its First Amendment protection of truthful commercial speech. It claims that the decision fails to demonstrate a compelling state interest in regulating its commercial speech in the March 1998 advertisements; that it does not constitute a narrowly tailored means of achieving any such compelling state interest; and that it does not fall within any of the limited exceptions to the First Amendment's prohibition on regulating free speech. (p.13) It contends that the standard of "readership," even if it were supported by the evidentiary record, does not constitute a narrowly tailored means of serving a compelling state interest.

PG&E has failed to demonstrate that D.98-11-026 violates PG&E's First Amendment rights. We find it unnecessary to respond to PG&E's arguments in its rehearing application because we previously dealt with this very issue in D.98-12-089, in this very same affiliates rules docket. As we specifically held therein, in adopting the Affiliates Transaction Rule, we did not violate any the First Amendment Requirements. (D.98-12-089, Mimeo at p.12.) We noted that we had fully satisfied the First Amendment requirements for commercial speech as set forth in Central Hudson Gas & Elec. v. Public Serv. Comm'n (1980) 447 U.S. 557. (Id. at p. 11.) We found that, based on our promotion of competition, and our

serious concerns about cross-subsidization, customer confusion and discrimination, we have substantial interest in promoting competition by, among other things, preventing customer confusion through our disclosure and information standards.

PG&E's First Amendment Rights arguments are therefore an inappropriate collateral attack on our holdings in D.98-12-089 regarding our authority to regulate commercial speech. PU 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. Having elected to forego raising these matters before us in an application for rehearing of D.98-12-089, PG&E is barred from raising them now.

Furthermore, we hold that because the shared use of the utility name and logo in this case without appropriate disclaimers was misleading, the advertisements at issue are not entitled to the same constitutional protections as non-deceptive commercial speech.

III. CONCLUSION

PG&E's rehearing application of D.98-11-026 is summarily denied for the reasons stated above.

THEREFORE, IT IS ORDERED that:

The application for rehearing of D.98-11-026 filed by Pacific Gas & Electric Company is denied.

1. This order is effective today.
2. This proceeding is closed.

Dated March 4, 1999, at San Francisco, California.

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