

Decision 99-09-035

September 2, 1999

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application of PACIFIC GAS AND ELECTRIC CO. for Authority Among Other Things, to Decrease its Rates and Charges for Electric and Charges for Electric and Gas Service, and Increase Rates and Charges for Pipe Expansion Service

A94-12-005

(U 39 M)

Commission Order Instituting Investigation into the Rates, Charges, Service, and Practices of Pacific Gas and Electric Co.

I.95-02-015

ORDER GRANTING MOTION TO STAY NOTE 7
CANCELLATION AND DENYING MOTION TO STAY
PAYMENT OF FINES

D.99-06-080 arises from Pacific Gas & Electric (PG&E)'s response to the severe wind and rainstorms of December 1995. The Commission received hundreds of consumer complaints about PG&E's lack of accessibility and slow response to restore service. As a result, we instituted an investigation to assess the reasonableness of PG&E's response to the December 1995 storms. Evidentiary hearings were held, and D.99-06-080 was thereafter issued on June 24, 1999.

In D.99-06-080, the Commission imposed fines totaling \$85,000 on PG&E. We found that PG&E failed to exercise reasonable diligence in maintaining its distribution infrastructure and acted unreasonably in processing storm related damage claims from consumers. (D.99-06-080, Conclusion of Law Nos. 28, 35, 37.) The Commission also ordered PG&E to cancel Note 7 of its

construction standard for wood poles. The Commission, in support, cited its conclusion that “excessive underbuilds¹ contributed to the severity of the damage caused by the December 1995 storms.” *Id.*; Conclusion of Law No. 13. PG&E as well as the Office of Ratepayer Advocates (ORA) have equated the ordered Note 7 cancellation with the requirement of a 4.0 wood pole loading standard.

On July 12, 1999, PG&E made a letter request to the Executive Director to extend the time for the cancellation of Note 7. *See* Rule 48(b) of the Commission's Rules of Practice and Procedure.² PG&E concurrently filed a Motion to Stay the cancellation of Note 7 with the Commission. ORA and the Consumer Services' Utility Safety Branch (collectively “respondents”) filed a joint Response in opposition to the Motion to Stay the cancellation of Note 7. The Executive Director granted an open extension on July 20, 1999, with the interim wood pole loading factor adopted in the Rights-of-Way phase of the Local Exchange Competition proceeding (D.98-10-058) to be applied in the interim.

In an August 9, 1999 letter, ORA argued that the Executive Director lacks authority to grant an extension of time to comply with a Commission order where the request, as here, is not made until after the existing date for compliance. ORA bases this argument on language in Rule 48(b) that requests for extension of time “must be received by the Executive Director at least three business days before the existing date for compliance.” Under ORA's view of Rule 48(b), the Executive Director, for example, could never grant an extension of time where an order is effective immediately and compliance is required as of the date of the order. We reject that construction of Rule 48(b).

Since the language which ORA cites was added to Rule 48(b), the Executive Director has granted some requests for extension of time under that

¹ “Underbuilds” refers to additional equipment attached to poles by either the utility which owns the poles or by other utilities through joint pole use. Note 7 provides guidance to PG&E employees responsible for determining whether an existing Grade A or B wood pole has adequate strength for additional conductor or equipment attachments.

² Unless otherwise indicated, all rule references are to the Commission's Rules of Practice and Procedure.

Rule where the request was not received by the Executive Director 3 days prior to the existing compliance date. Indeed, one such example is noted in D.96-06-023 (66 CPUC 2d 346, 345, 348 (Findings of Fact Nos. 1, 2)), where the Executive Director granted a Rule 48(b) request made several days after the compliance deadline previously set in D.96-02-023 (64 CPUC 2d 604, 636). Such action is entirely proper.

We view the 3-day provision as directory, not mandatory. In other words, the purpose of the 3-day requirement in Rule 48(b) is not to deprive the Executive Director of the authority to grant a request filed after that time. Rather, its purpose is, in the ordinary case, to provide the Executive Director a reasonable window of opportunity to consider the request before the compliance deadline.

In any event, the Executive Director modified the extension on August 18, 1999. The time for PG&E to cancel Note 7 was delayed until the Commission acted on the pending Motion to Stay. PG&E similarly made a letter request to the Executive Director and filed a Motion to Stay the payment of the fines on July 28, 1999. The Executive Director denied the extension for the fines payment. There were no filings in response to PG&E's Motion to Stay payment of the fines.

Pursuant to Rule 45, PG&E requests a stay of the ordered Note 7 cancellation pending "clarification from the Commission" (Motion, p. 1.) PG&E has filed a Rehearing Application raising purported inconsistencies in D.99-06-080. PG&E contends that a stay is appropriate given conflicting statements in D.99-06-080 with respect to the wood pole loading standard. Ordering Paragraph (OP) 11 in D.99-06-080 directs PG&E to cancel Note 7 of its construction standard for wood poles, which PG&E interprets as a 4.0 wood pole loading standard requirement. D.99-06-080 also states that the 2.67 interim wood pole loading standard adopted in D.98-12-058 is to apply until this proceeding concludes. *Id.* at p. 3, 35. As such, PG&E argues that there is a strong likelihood

D.99-06-080 will be clarified. PG&E claims that there is no prejudice to customers from a stay because it is already in compliance with D.98-12-058.

Respondents dispute the need for clarification of D.99-06-080.

Respondents contend that PG&E is attempting to avoid the settlement it sponsored before the Commission. In the settlement, PG&E "agree[d] to cancel Note 7 of Construction Drawing 015203." (ORA Response, Exhibit 1, p. 8.) Respondents also dispute that D.99-06-080 is inconsistent. D.99-06-080 is characterized by respondents as a modification of the interim safety factor for PG&E, with the safety factor for other utilities to be determined in generic rulemaking.

Respondents argue that D.99-06-080 was directed at a specific utility (PG&E) to cure a specific problem of excessive underbuilds. (D.99-06-080, p. 30.) For that same reason, respondents claim that a stay threatens the integrity of PG&E's electric transmission and distribution system. Finally, ORA requests that PG&E be sanctioned \$5,000 for each day of non-compliance with D.99-06-080. *See* Pub. Util. Code § 2107-2108.

PG&E likewise seeks to stay payment of the \$85,000 in fines pending resolution of its Application for Rehearing. Based on the alleged procedural and substantive errors raised in its Rehearing Application, PG&E contends that the stay is warranted. PG&E concludes that there is a strong likelihood it will prevail on the Rehearing Application. PG&E notes that a stay will not affect rates or customer service. Lastly, PG&E argues that the stay will preserve the status quo existing since this proceeding began three years ago.

Good cause has been shown to stay the implementation of the Note 7 cancellation. As discussed below, PG&E has not demonstrated good cause to stay the payment of the fines. The Commission requires "good cause" for a stay. Re Pacific Gas & Electric Co. (1994) 55 CPUC2d 300, 302. Among other factors, the Commission looks to the probability of prevailing on rehearing and/or the threat of

irreparable harm in its assessment of good cause. Re Southern California Gas Co. (1990) 39 CPUC2d 14, D.90-12-101.

There is good cause to stay the Note 7 cancellation. On the issue of the clarification of D.99-06-080, PG&E has demonstrated a probability of prevailing on rehearing. D.99-06-080 expressly directs the parties to apply the interim wood pole loading standard adopted in D.98-12-058 until this proceeding concludes. *Id.* at p. 3, 35.³ OP 11 also directs PG&E to cancel Note 7 of its internal construction standard for wood poles. In the settlement, the parties agreed to cancel Note 7 in the context of the load on poles “meet[ing] or exceed[ing] the safety factor of 4 prior to deterioration of the wood poles.” (ORA Response, Exhibit 1, p. 8.) Under these circumstances, D.99-06-080 could arguably be interpreted by the parties as inconsistent with respect to the appropriate wood pole loading standard for PG&E. As such, there is a high probability that it will be necessary to clarify the appropriate wood pole loading standard for PG&E.

PG&E’s motion to stay the payment of the fines is denied. As to the probability of prevailing on rehearing, arguments similar to those raised by PG&E herein were rejected by the Commission in D.99-03-025.⁴ PG&E also fails to demonstrate irreparable harm from the payment of the fines. The instant case is analogous to In Re Southern Pacific Company (1995) 58 CPUC2d 654. In In Re Southern Pacific Company, Southern Pacific filed a motion to stay the payment of penalties pending a decision on its rehearing application. Southern Pacific, like PG&E, objected to paying the penalties prior to the final decision on rehearing.

While noting that monetary harm was generally not serious or irreparable, the Commission nonetheless granted the stay. *Id.* at 655. The Commission reasoned that it would be difficult for Southern Pacific to obtain a refund of the penalties from the State’s General Fund if it prevailed on rehearing.

³ It is unclear why the parties believe that an internal design guideline (or lack thereof) would take precedence over a Commission decision, such as General Order 95 and the decisions interpreting it.

⁴ PG&E’s Petition for a Writ for Review of D.99-03-025 is currently pending in the First District Court of Appeal.

Id. PG&E, by contrast, will be able to obtain a refund in the event D.99-06-080 is modified or reversed on rehearing. PG&E was instructed to pay the fines into an escrow account when the Executive Director denied the extension request.

No further discussion is required of PG&E's grounds for the stays. Accordingly, upon review of each and every argument raised by PG&E, we conclude that the Motion to Stay the cancellation of Note 7 should be granted. We concluded that the Motion to Stay the payment of the fines should be denied.

IT IS THEREFORE ORDERED that:

1. PG&E's Motion to Stay the implementation of the Note 7 cancellation is granted. The interim wood pole loading factor adopted in the Rights-of-Way phase of the Local Exchange Competition proceeding (D.98-10-058) is to be applied until the Commission acts upon PG&E's Application for Rehearing.

2. PG&E was advised that it could pay the fines into an escrow with the Executive Director denied the extension request.

This Order is effective today.

Dated September 2, 1999, at San Francisco, California.

I dissent.

/s/ RICHARD A. BILAS
President

I dissent.

/s/ JOSIAH L. NEEPER
Commissioner

HENRY M. DUQUE
JOEL Z. HYATT
CARL W. WOOD
Commissioners