MAIL DATE
10/8/99

Decision 99-10-026 October 7, 1999

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application of Pacific Gas and Electric Company to Identify and Separate Components of Electric Rates, Effective January 1, 1998 (U 39 E).	Application 96-12-009 (Filed December 6, 1996)
Application of San Diego Gas and Electric Company (U 902 M) for Authority to Unbundle Rates and Products.	Application 96-12-011 (Filed December 6, 1996)
In the Matter of the Application of Southern California Edison Company (U 388 E) Proposing the Functional Separation of Cost Components for Energy, Transmission and Ancillary Services, Distribution, Public Benefit Programs and Nuclear Decommissioning, to be Effective January 1, 1998 in Conformance With D.95-12-036 as Modified by D.96-01-009, the June 21, 1996 Ruling of Assigned Commissioner Duque, D.96-10-074, and Assembly Bill 1890.	Application 96-12-019 (Filed December 6, 1996)

ORDER MODIFYING DECISION (D.) 99-06-056 TO CORRECT A TYPOGRAPHICAL ERROR, AND DENYING REHEARING OF THE DECISION, AS MODIFIED

I. BACKGROUND

In Application of Pacific Gas and Electric Company to Identify and Separate Components of Electric Rates, Effective January 1, 1998, Etc. ("Cost Separation Decision") [D.97-08-056, p. 40 (slip op.)] (1997) ___ Cal.P.U.C.2d ___, we ordered the utilities, including Pacific Gas and Electric Company ("PG&E"), to comply with certain billing requirements, including calculating the Power Exchange ("PX") price using a weekly averaging method. D.97-08-056 set a January 1, 1998 deadline for compliance. (See id. at pp. 63-64 [Ordering Paragraph No. 13] (slip op.).)

In a petition for modification, filed on October 29, 1997, PG&E requested an open-ended extension of time for complying with the deadline. In its petition, it also sought permission to use, during the interim period, a fixed 30-day averaging period for calculating direct access customers PX energy costs, instead of using the weekly averaging method adopted in D.97-08-056. In Application of Pacific Gas and Electric Company to Identify and Separate Components of Electric Rates, Effective January 1, 1998, and Related Matters ("First Modification Decision") [D.98-03-050, p. 2 (slip op.)] (1998) ___ Cal.P.U.C.2d ___, we adopted PG&E's proposal to use the fixed 30-day averaging method on an interim basis, but rejected PG&E's request for an open-ended deadline. Rather, we ordered PG&E to implement the original requirement no later than January 1, 1999.

On July 31, 1998, PG&E filed another petition for modification asking us to modify D.97-08-056 and D.98-03-050 to extend the deadline from January 1, 1999 to January 1, 2000, for implementing the requirement that the PX price should be calculated using a weekly averaging method. (D.99-06-056, p. 2.) The petition also requested permission to continue using a fixed 30-day averaging method until January 1, 2000. (Petition for Modification, filed July 31, 1998, p. 1.)

In D.99-06-056, the subject of the instant application for rehearing, we disposed of this petition for modification. In this decision, we found that PG&E had failed to comply with D.98-03-050 and had failed to justify its failure to comply with that order and with the requirements of D.97-08-056. (D.99-06-056, p. 1 (slip op.).) The decision deferred to a later date the issue of whether and to extent to which PG&E should be fined or otherwise penalized for failing to comply with these decisions. (D.99-06-056, pp. 2 & 11-12 [Ordering Paragraph No. 2] (slip op.).) After making these findings, we granted PG&E's petition for modification, but we noted that the granting of the petition did "not represent a finding of reasonableness of PG&E's management of its billing system or failure to

comply with Commission orders." (D.99-06-056, p. 11 [Ordering Paragraph No. 1] (slip op.).)

PG&E timely filed an application for rehearing of D.99-06-056. It asserts that the Commission erred, in D.99-06-056, by finding the utility out of compliance with previous Commission orders, and thus, there are no violations to consider for possibly penalizing the utility. (Application for Rehearing, 4-6.) PG&E also challenges the Commission's authority to directly impose fines, and argues that any penalty imposed would be unfair allegedly because PG&E reasonably did not anticipate the precise PX cost calculation method adopted in D.97-08-056. (Application for Rehearing, p. 7.)

We have reviewed each and every allegation of error raised by the application for rehearing. We are of the opinion that good cause does not exist for the granting of PG&E's rehearing application. However, we will modify D.99-06-056 to correct a minor typographical error on page 1 of the decision.

II. DISCUSSION

(1) The Commission correctly found that PG&E had not complied with D.97-08-056 and D.98-03-050.

In its rehearing application, PG&E argues that since D.99-06-056 granted its petition for modification to extend the deadline until January 1, 2000, its continued use in 1999 of the 30-day averaging PX cost calculation method does not constitute a violation of or a failure to comply with D.97-08-056 or D.98-03-050. Essentially, PG&E is asserting that we granted the petition without qualification, and thus, extinguished our determination concerning PG&E's noncompliance. This argument lacks merit.

PG&E is simply wrong that our granting of PG&E's petition for modification effectively erased our determination that PG&E had been out of compliance with D.97-08-056 and D.98-03-050 as of January 1, 1999. PG&E

misinterprets D.99-06-056 and the effects of the granting of the petition. In D.99-06-056, we qualify the granting of the petition in the following manner:

> "The petition to modify Decision (D.) 97-08-056 and D.98-03-050 filed by [PG&E] on July 31, 1998 is granted to the extent set forth herein. This approval does not represent a finding of the reasonableness of PG&E's management of its billing system or failure to comply with Commission orders." (D.99-06-056, p. 11 [Ordering Paragraph No. 1], emphasis added.)

Thus, contrary to PG&E's argument, we did not grant the petition without any qualification. Rather, as evidenced in the above quoted language, we did qualify our granting of PG&E's petition, especially as it related to our determination that PG&E had failed to comply with our previous decisions. Accordingly, the quoted language demonstrates that we did not effectively erase our determination concerning PG&E's noncompliance when we granted the petition for modification. Therefore, PG&E's argument is based on a misreading of D.99-06-056, and consequently, has no merit.

Further, it is clear that we found PG&E out of compliance as of January 1, 1999, and continued to be out of compliance until the petition was granted as of June 10, 1999. (See D.99-06-056, pp. 9 & 12.) This is the correct interpretation of the effect that D.99-06-056 had on PG&E's noncompliance.

(2) Contrary to PG&E's assertion, the Commission does have a lawful basis for penalizing PG&E for its failure to comply with D.97-08-056 and D.98-03-050, and does have the authority to directly impose fines.

PG&E claims that there is no lawful basis for the Commission to penalize PG&E since it has not violated or been out of compliance with the Cost Separation Decision [D.97-08-056] or the First Modification Decision [D.98-03-050]. This is based on its assertion that the Commission's granting of the petition for

modification extinguished the determination about PG&E's noncompliance. As discussed above, this assertion has no merit. Because there is a determination of noncompliance, the Commission is now obligated to consider whether and to what extent PG&E should be penalized for this noncompliance.

PG&E also argues that Public Utilities Code Section 2104 precludes the Commission from imposing penalties directly on PG&E. (Application for Rehearing, p. 7, fn. 1.) This statutory provision states:

> "Except as provided by Section 2100 and 2107.5, actions to recover penalties under this party shall be brought in the name of the people of the State of California, in the superior court in and for the county, or city and county, in which the cause or some part thereof arose, or in which the corporation complained of has its principal place of business, or in which the person complained of resides. The action shall be commenced and prosecuted to final judgment by the attorney of the Commission. . . ." (Pub. Util. Code, §2104.)

PG&E argues that under Public Utilities Code Section 2104, the superior court, and not the Commission, has the authority to directly assess fines or impose penalties. PG&E's interpretation of Section 2104 is wrong. The plain language of the statute addresses how the Commission must "recover" penalties, not how it must "impose" penalties. (See Pub. Util. Code, §2104.) This Commission has interpreted the words "to recover penalties" to mean that the Commission must recover or collect unpaid penalties or fines through a superior court action. This is a reasonable interpretation of Section 2104.

Further, the Commission's authority to directly impose penalties is not found in Public Utilities Code Section 2104. Rather, the Commission

possesses this authority through Public Utilities Code Section 2107, as well as Public Utilities Code Section 701.[1] Section 2107 provides:

> "Any public utility which violates or fails to comply with any provision of the Constitution of this state or this part, or which fails or neglects to comply with any part or provision of any order, decision, decree, rule, direction, demand, or requirement of the [C]ommission, in a case in which a penalty has not otherwise been provided, is subject to a penalty . . . ." (Pub. Util. Code, §2107.)

Section 701 provides:

> "The [C]ommission may supervise and regulate every pubic utility in the State and may do all things, whether specifically designated in this part or in addition thereto, which are necessary and convenient in the exercise of such power and jurisdiction. (Pub. Util. Code, §701.)

The legislative history of Public Utilities Code Section 2107 supports this interpretation. In fact, the legislative history for Senate Bill No. 485, which is the 1993 amendment of this statutory provision,[2] evidences the Legislature's understanding that the Commission "has broad authority to levy appropriate fines in the course of its business," and cites Public Utilities Code Section 701 for the basis of this authority. It was further noted in the legislative history that this broad authority has been "supplemented by additional specific fine authority" of a specified dollar amount, as set forth in Public Utilities Code Section 2107. (Senate Third Reading of Sen. Bill No. 485 (1993-1994 Reg. Sess.), as amended on April 19, 1993, p. 1.) Further, it was stated by the Senate Committee on

---

[1] The California Supreme Court in Consumers Lobby Against Monopolies v. Public Utilities Com. (1979) 25 Cal.3d 891, 905-906, stated that the Commission's authority under Public Utilities Code Section 701 "has been liberally construed. [Citations omitted.] Additional powers and jurisdiction the [C]ommission exercises, however, 'must be cognate and germane to the regulation of public utilities. . . .' [Citations omitted.]" The ability to directly impose fines is cognate and germane to the Commission's ability to enforce its own decisions when a public utility fails to comply.

[2] Senate Bill No. 485 amended Public Utilities Code Section 2107 to increase the amount of penalties imposed on public utilities. (See Stats. 1993, ch. 221, §12, p. 1462.)

Energy and Public Utilities, that Senate Bill 485 "would increase the fines the Public Utilities Commission can levy against public utilities. . . ." (Senate Committee on Energy and Public Utilities, Analysis of Sen. Bill No. 485 (1993-1994 Reg. Sess), as heard on April 20, 1993, p. 1, emphasis added.) Therefore, the legislative history supports the interpretation that the Commission has the authority to directly impose penalties.

Moreover, after stating that the Commission had the authority to levy appropriate fines, the legislative history for the 1993 amendment of Public Utilities Code Section 2107 observed that "[t]he [Commission] must go to the Superior Court to collect any fines which are levied." (Senate Third Reading of Sen. Bill No. 485 (1993-1994 Reg. Sess.), as amended on April 19, 1993, p. 1, emphasis added.) This observation further confirms the correctness of the our interpretation that Public Utilities Code Section 2104 does not preclude us from directly imposing a penalty, and that this statute only requires that we must go to superior court to collect an unpaid penalty that we have imposed.

(3) The Commission did not err in rejecting PG&E's defense that its management of the CIS system over the years precluded implementation of the billing requirements mandated in D.97-08-056 and the deadline set forth in D.98-03-050.

In its rehearing application, PG&E also argues that D.99-06-056 in effect penalizes the utility for failing to anticipate the precise PX cost calculation method adopted in the Cost Separation Decision [D.97-08-056]. It claims that the method was not presented or argued during the Cost Separation proceeding but rather introduced in the alternate pages to the proposed decision for D.97-08-056. Therefore, PG&E asserts that the adoption of this method was not reasonably foreseeable, and thus, any penalty levied on that basis would be unfair. (Application for Rehearing, p. 7, fn. 2.) These arguments are without merit.

D.99-06-056 does not seek to penalize PG&E for failing to anticipate the requirements of the Cost Separation Decision [D.97-08-056]. Rather, we were unconvinced by PG&E's excuse that its management of the CIS system over the years precluded the implementation of the requirements, and thus, we rejected this defense. (D.99-06-056, pp. 8 & 10.) Therefore, we determined that the utility had not justified its failure to implement the weekly averaging method mandated in Cost Separation Decision [D.97-08-056] or to comply with the deadline set forth in First Modification Decision [D.98-03-050]. (D.99-06-056, p. 8 (slip op.).)

III. CONCLUSION

Based on the above discussion. good cause does not exist for granting PG&E's application for rehearing of D.99-06-056. Therefore, the application should be denied. However, it is noted that there is a minor typographical error on page 1, and D.99-06-056 will be modified in the manner described below.

THEREFORE, it is ordered that:

1. D.99-06-056 is modified to correct a typographical error. On page 1, line 4, "D.98-08-056" is corrected to read as "D.97-08-056."

2. Rehearing of D.99-06-056, as modified, is denied.

This order is effective today.

Dated October 7, 1999, at Los Angeles, California.

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