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MAIL DATE
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Decision 99-11-055 November 18, 1999

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application of PACIFIC GAS AND ELECTRIC COMPANY for Authority Among Other Things, to Decrease its Rates and Charges for Electric and Gas Service, and Increase Rates and Charges for Pipe Expansion Service. (Expansion and Gas) (U 39 M)	Application 94-12-005 (Filed December 9, 1994)
Commission Order Instituting Investigation into the rates, charges, service, and practices of Pacific Gas and Electric Company.	Investigation 95-02-015 (Filed February 22, 1995)

ORDER MODIFYING AND DENYING REHEARING OF DECISION 99-06-080

Decision (D) 99-06-080 addressed Pacific Gas & Electric (PG&E)'s response to the severe wind and rainstorms of December 1995. After receiving hundreds of customer complaints about PG&E's lack of accessibility and slow response to restore service, the Commission 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 issued on June 24, 1999.

In D.99-06-080, the Commission fined PG&E $85,000 pursuant to Public Utilities Code[1] § 2107. We found that PG&E failed to exercise reasonable

[1] Unless otherwise indicated, all statutory references are to the Public Utilities Code.

diligence in maintaining its distribution infrastructure and acted unreasonably in processing storm related damage claims from customers. The Commission also ordered PG&E to cancel Note 7 of its internal construction standard for Grade A or B wood poles. The Commission, in support, cited its conclusion that "excessive underbuilds[2] contributed to the severity of the damage caused by the December 1995 storms." (D.99-06-080, Conclusion of Law No. 13.)

PG&E subsequently made letter requests to the Executive Director to extend the time for the Note 7 cancellation and the fine payment. PG&E concurrently filed motions to stay the Note 7 cancellation and the fine payment. The Executive Director granted the extension for the Note 7 cancellation, 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 until the Commission acted upon the stay motion. The Executive Director denied the extension for the fine payment. On September 2, 1999, we granted the motion to stay the Note 7 cancellation and denied the motion to stay the fine payment.

In its Application for Rehearing, PG&E alleges the following legal errors: (1) the Note 7 cancellation requirement is unduly discriminatory; (2) the fine was imposed in excess of the Commission's jurisdiction; (3) PG&E was denied the legal protections afforded in an enforcement proceeding; (4) PG&E was denied due process; (5) the fine was not supported by substantial evidence; (6) the December 1995 storm claims payments were erroneously excluded from PG&E's 1999 General Rate Case (GRC) forecast; and (7) the December 1995 storm claims payments were erroneously ordered to be rebooked "below-the-line"

[2] "Underbuilds" refers to additional equipment attached to poles by the utility or other utilities through joint pole use. Note 7 provides guidance to PG&E employees for determining whether an existing Grade A or B wood pole has adequate strength for additional conductor or equipment attachments.

in 1999. Responses in Opposition to the rehearing application were filed by the Office of Ratepayer Advocates (ORA) and The Utility Reform Network (TURN).

The Commission has reviewed the arguments raised by PG&E in its Application for Rehearing. We have also reviewed the arguments in the Responses in Opposition filed by ORA and TURN. As discussed below, we conclude that sufficient grounds for rehearing have not been shown. PG&E fails to demonstrate legal error, as required by Section 1732. PG&E's allegations of legal error are without merit. The seventh allegation raises an accounting irregularity which simply necessitates modifying D.99-06-080.

PG&E first alleges that the ordered Note 7 cancellation is arbitrary and unduly discriminatory. This allegation is based on the interpretation of PG&E as well as ORA that the ordered Note 7 cancellation implicates a 4.0 wood pole loading standard. PG&E notes that other joint owners of the same wood poles are only subject to the 2.67 interim wood pole loading standard adopted in the Rights of Way Proceeding, D.98-10-058.

Because the issue underlying PG&E's first allegation is moot, we need not discuss the responses of ORA and TURN. The first allegation is premised on the now incorrect interpretation that the ordered Note 7 cancellation implicates a 4.0 wood pole loading standard for PG&E. As the Commission recently stated in D.99-06-080, "PG&E's claim that cancellation of it [Note 7] would leave the 2.67 minimum in place for all utilities and pole users except PG&E is unfounded." (D.99-10-024, p. 7.) The Commission went on to state that it "intended to continue to apply the uniform minimum wood pole loading safety factor contained in GO 95, interpreted in the manner described in D.98-10-058." (*Id.* at p. 9.)

Second, PG&E alleges that we erred by not seeking the imposition of the fine in a superior court action. More specifically, PG&E alleges that Section 2107 as implemented by Section 2104 does not authorize the Commission to

impose a fine in its own administrative proceedings. Section 2107[3] is silent as to the procedure for imposing fines. Section 2104 provides that "actions to recover penalties under this part shall be brought . . . *in the superior court.*" (Italics added.) PG&E cites earlier decisions wherein the Commission stated that it did not have authority to directly impose fines under Section 2107. (*See* In re Application of Wilmington Cab Co. (1985) 19 CPUC 2d 79 ["We do not presently have authority to impose a fine . . . ."]; In re General Tel. Co. (1976) 79 CPUC 2d 313.)

TURN maintains that we have been consistent in interpreting Section 2107 to allow for direct imposition of fines, citing Re Southern California Water Company, D.91-04-022 and Re U.S. West Cellular of California, Inc., D.90-12-038. ORA cites D.99-03-025, wherein the Commission recently reaffirmed its authority to impose fines in its own proceedings.

PG&E's second allegation that the Commission lacks authority to directly impose the fine is without merit. We rejected the identical allegation in D.99-10-026. As more fully set forth in D.99-10-026, the Commission interprets Section 2107 as implemented by Section 2104 to mean what it literally says. (*See* Mercer v. Department of Motor Vehicles (1991) 53 Cal.3d 753, 763 [first step in statutory interpretation is "to focus on the words used by the Legislature in order to determine their traditional and plain meaning."].) The plain language of Section 2104 addresses how the Commission "recover[s]" or collects penalties in superior court, not how it "impose[s]" penalties. (D.99-10-026, p. 5.) The legislative history of Section 2107 set forth in D.99-10-026 further supports the Commission's authority to directly impose the fine. (*Id.* at p. 6-7.)

PG&E's third allegation is that it was erroneously denied the legal protections of an enforcement or adjudicatory proceeding. PG&E asserts that the

[3] Section 2107 provides in part that "[a]ny public utility which violates or fails to comply with any provision of the Constitution of this state or of this part, or which fails or neglects to comply with any part or provision of any order, decision, rule . . . is subject to a penalty . . . ."

applicable categorization is ratesetting, although it acknowledges that this proceeding was never categorized. PG&E contends that we erred in not applying the rules of evidence for a superior court proceeding. PG&E also contends that the Commission erred in not applying the penalty burden of proof for an enforcement proceeding. PG&E argues that the burden was erroneously placed on it to show reasonable conduct, which is a ratesetting standard for a disallowance. In an enforcement proceeding, the party seeking the penalty bears the burden to show a violation of a law, rule or order. (Re Pacific Bell (1987) 27 CPUC 2d 1, 22.)

Related to the third allegation, PG&E's fourth allegation is that it was fined without the notice required by the Due Process Clause. PG&E contends that D.99-06-080 fails to identify any rule, order or requirement which was violated. PG&E argues that it was thus denied prior notice of the specific standards to which it would be held. PG&E, for example, cites the previously unarticulated standards in D.99-06-080 for billing inserts, outage maintenance support and call center staffing. PG&E likewise alleges that there is no record evidence of unreasonable conduct to support the fine. Assuming, arguendo, there was unreasonable conduct, PG&E reiterates that the conduct does not necessarily equate with a violation of a law, rule or order required to support the fine.

TURN questions how PG&E can claim it lacked prior notice of specific standards. TURN cites PG&E's position in another proceeding that it would be impossible to develop such preexisting standards for utilities. In R.96-11-004, PG&E submitted testimony that "a reliable measure of utility performance in response to a Major Outage cannot, in PG&E's opinion, be designed."

PG&E's third and fourth allegations fail. PG&E was not erroneously denied the legal protections of which it now complains. D.99-06-080 arose from an enforcement proceeding, I.95-02-015. The December 19, 1995 Assigned Commissioner's ruling put PG&E on notice that a fine or penalty could be imposed. It was PG&E who moved that the enforcement proceeding be

consolidated with the 1997 base revenues application. (D.99-06-080, p. 7.) Although the motion was denied, PG&E was not entitled to have the rules of evidence applied even in an enforcement proceeding. Section 1701(a) states that "the technical rules of evidence need not be applied" in "hearings, investigations, and proceedings" before the Commission. (*See also* Rule 64 of the Commission's Rules of Practice and Procedure.)

In any event, the Commission held three days of evidentiary hearings. PG&E introduced prepared testimony, including its December 1995 storm report, and cross-examined witnesses for ORA and the Utility Safety Branch (USB). The Commission expressly imposed the fine for violations of Rule 14 of PG&E's tariff.[4] (*Id.* at p. 59, 73, 79, 82.) Rule 14 requires PG&E to exercise "reasonable diligence and care to furnish and deliver a continuous and sufficient supply of electric energy to a customer." The requirement that PG&E exercise "reasonable diligence and care" is not an unconstitutionally vague standard by which to impose a fine.

In Chodur v. Edmonds (1995) 174 Cal.App.2d 565, the Court held that the "dishonest dealing" term in Bus. & Prof. Code § 10177 was not unconstitutionally vague. The Court explained that "'[i]t would be almost impossible to draft a statute which would specifically set forth every conceivable act which might be defined as being dishonest.'" (*Id.* at p. 570.) Similarly, PG&E submitted testimony that "a reliable measure of utility performance in response to a Major Outage cannot, in PG&E's opinion, be designed." (R.96-11-004.)

Nothing in the record cited suggests that a ratesetting burden of proof was imposed on PG&E. Instead, the record reflects that it was TURN who

[4] It is unclear if PG&E is asserting that Rule 14 is an unconstitutionally vague standard by which to impose the fine. The Commission requires that "a utility's tariffs, or contract, with the public under which it holds out service, must be clear." (Complaint of Ellickson v. General Tel. Co. of Calif. (1981) 6 CPUC 2d 432, 438.)

"call[ed] for a penalty against PG&E." (*Id.* at 21.) The Commission found that TURN was the only party which "focused its efforts on the true purpose of this proceeding." (*Id.* at p. 19.) TURN filed prepared testimony directly addressing PG&E's December 1995 storm response. By contrast, PG&E's prepared testimony consisted of its agreement with certain safety recommendations by ORA and USB. (*Id.* at p. 19.)

As to call center staffing, there is substantial evidence that it was unreasonable for PG&E not to have more customer service representatives (CSRs). "[O]n the peak day of call volumes, December 12, 1995, 4.5 million calls translated to a response only to 249,279 calls by CSRs . . . ." (*Id.* at p. 50.) TURN submitted unrebutted evidence that PG&E could have accommodated another 200 to 300 CSRs. (*Id.* at p. 61.) Additionally, there is substantial evidence that PG&E acted unreasonably in processing claims. In the Commission's opinion, it was unreasonable for PG&E to mail customers letters with the claims forms absolving itself of any liability. This was particularly true given that PG&E's own tariff provides for negligence liability. The evidence established that only 5,800 of 15,000 mailed claims forms were returned to PG&E. (*Id.* at p. 73.) A reasonable inference can be drawn that the letters were intended to and did in fact discourage PG&E customers from submitting claims.

The Commission also opined that it was unreasonable for PG&E not to equally inform all customers of the claims process, including small claims court. There is substantial evidence that PG&E's 800 service phone number was not the functional equivalent of a billing insert advising all customers of the entire claims process. The evidence established that only those customers who phoned PG&E about potential claims were even mailed the forms. Of those customers receiving the forms, only those customers who then mailed the completed forms were orally advised of small claims court by PG&E. (*Id.* at p. 74.) Hence the Commission "concur[red] with ORA that merely calling the service number is

insufficient to tell customers of their rights to file claims as a result of the storm." (*Id.* at p. 80.)

PG&E's fifth allegation is that the December 1995 storm claims payments were erroneously excluded from PG&E's 1999 GRC forecast. PG&E contends that there is no basis to distinguish the storm claims payments from other damage/injury claims payments which are included in ratesetting. PG&E claims that the Commission has an established practice of allowing recovery of claims costs without regard to fault. Because the 1999 GRC is now closed, PG&E also claims that it cannot amend its Account 925 estimate which already includes the storm claims payments.

ORA cites the Commission's longstanding policy that a utility cannot recover in rates costs arising from unreasonable conduct. (*See* Pub. Util. Code § 451.) ORA argues that the storm payments resulted from the settlement of tort claims, thereby establishing *per se* unreasonable conduct by PG&E. TURN suggests that these other claims payments resulting from PG&E's unreasonable conduct be excluded in addition to the storm claims payments.

PG&E's fifth allegation of error also fails. We did not err in excluding the December 1995 storm claims payments from PG&E's 1999 GRC forecast. The Commission disallows from rates costs associated with unreasonable utility practices. (Re Southern California Edison Company (1987) 24 CPUC 2d 476, 486.) Section 451 requires that "[a]ll charges demanded or received by any public utility . . . shall be just and reasonable." Contrary to PG&E, the 1999 GRC proceeding is not closed. The proposed decision in the 1999 GRC is currently out for comment.

Lastly, PG&E alleges that the Commission erred in ordering the 1995 storm claims payments be booked "below-the-line" in 1999. The claims payments were booked in either 1995 or 1996. PG&E contends that it is contrary to generally accepted accounting principles and makes no sense to order the claims payments booked below the line in 1999, which is not the year they were incurred

or realized. PG&E reasons that the above-discussed 1999 GRC forecast exclusion occurs separately from book accounting. ORA agrees that it may be unnecessary for PG&E to rebook the 1995 and 1996 claims payments. ORA recommends that the Commission offset PG&E's Account 925 forecast for its 1999 GRC by the amount of the 1995 claims payments.

The Commission agrees with the parties that the ordered exclusion of the storms claims payments from the 1999 GRC occurs separately from book accounting. Because the rebooking requirement was intended to but does not exclude the storm claims payments from the 1999 GRC forecast (D.99-06-080, p. 60, fn. 26.), we modify D.99-06-080 to eliminate it.

D.99-06-080 is therefore modified, as set forth below. No further discussion is required of PG&E's allegations of legal error. Accordingly, upon review of each and every allegation of legal error raised by PG&E, we conclude that sufficient grounds for rehearing of D.99-06-080 have not been shown.

IT IS ORDERED that:

1. D.99-06-080 is modified as follows:

a. Footnote 26 at page 60 now reads "It is our intent that PG&E not recover those costs from ratepayers in the account used for claims payment recovery, as authorized in the general rate case."

b. The following sentence is omitted from Conclusion of Law No. 28 - "PG&E should also be required to record all claims paid out during the storm below-the-line so that the cost thereof will be borne by its shareholders rather than ratepayers."

c. Ordering Paragraph 29 now reads "PG&E shall not use the expenses related to claims paid out during the storm as a basis for its pending general rate case for justification of any expense forecast. It is our intent that PG&E not recover these costs from ratepayers in the account used for claims payment recovery, as authorized in the general rate case."

2. Rehearing of D.99-06-080 as modified above is denied.

This order is effective today.

Dated November 18, 1999, at San Francisco, California.

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