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Decision 99-12-022 December 2, 1999

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Independent Energy Producers Association, California Manufacturers Association, Toward Utility Rate Normalization, Complainants, vs. Pacific Gas and Electric Company, Defendant.	Case 87-12-022 (Filed December 15, 1987)

ORDER DENYING REHEARING OF DECISION (D.) 99-05-032

I. INTRODUCTION

In Decision (D.) 99-05-032, we resolved a complaint, jointly filed by Independent Energy Producers Association, California Manufacturers Association, and Toward Utility Rate Normalization ("Complainants"). In their complaint, these parties alleged that Pacific Gas and Electric Company ("PG&E") had violated Public Utilities Code Section 453(d), by using the billing envelopes for political advocacy. Specifically, they complained about PG&E's use of its newsletter, the PG&E Progress, which is mailed in the billing envelope. The complaint focuses on the June, July and August 1987 issues of this newsletter, which contained articles about "overpriced electricity." (See Exhibit 3, for a copy of these issues.) The articles in the June 1987 issue explained that the high prices were the result of regulations adopted by the Federal Energy Regulatory Commission ("FERC") and the implementation of Public Utility Regulatory

Policies Act ("PURPA") by the Commission. (See PG&E Progress, June 1987, pp. 1 & 7. For a copy of these pages see D.99-05-032, Appendix A, pp. 1-2 or Exhibit 3.) The June 1987 articles also indicated that PG&E was asking FERC to seek changes in the federal law. (D.99-05-032, p. 4; see also, Appendix A, pp. 1-2.) The articles for the July and August 1987 issues were letters responding to customer inquiries regarding the June 1987 article. (See D.99-05-032, Appendix A, pp. 3-4, for a copy of these articles.) The PG&E response in the July 1987 issue advocated that "something must be done" with PURPA "to protect customers from these high costs." The PG&E response in the August 1987 issues express the utility's "hopes" for changes by "regulators or lawmakers." (See D.99-05-032, pp. 4-5.)

In D.99-05-032, we determined that that these articles were " 'designed or intended [by PG&E] . . . to promote or defeat any change in federal, state or local legislation or regulation,' " and thus, PG&E had violated Public Utilities Code Section 453(d). (D.99-05-032, pp. 10-11 & 15-16.) Accordingly, we ordered PG&E "to refund to its customers 40% of the cost of postage ($920,000) for three issues . . . , plus interest commencing April 1, 1998." (D.99-05-032, p. 16.)

PG&E timely filed an application for rehearing of D.99-05-032. In this rehearing application, it argues that: (1) the record evidence does not support a finding of a violation of Section 453(d); (2) if the Commission is ordering a refund, D.99-05-032 constitutes retroactive ratemaking and an impermissible collateral attack on previous Commission decisions, as well as violates Public Utilities Code Section 1702; (3) however, if the ordered payment is a penalty, then the Commission has violated Public Utilities Code Section 2104 and 2107; (4) the amount of the ordered payment is unsupported by any record; (5) the Commission unreasonably delayed in rendering a decision, and thus, the complaint should be dismissed with prejudice on the grounds of laches, mootness, and procedural due process, (6) Section 453(d) violates the First Amendment of the United States

Constitution and the decision seeks to enforce this statute in an unconstitutional manner.

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. In this decision, we provide an explanation for our denial of the rehearing application. However, we note that today's decision does not address the allegations that characterize the $920,000 as a penalty. In D.99-05-032, we did not order a penalty; rather, we ordered a refund in the amount of $920,000. (D.99-05-032, p. 15.) Therefore, it is not necessary to address the "penalty" issues, including the Commission's authority to directly impose fines and the notice requirements for imposing a penalty, since these issues are not relevant to D.99-05-032 and to the disposition of the application for rehearing of this particular decision.

II. DISCUSSION

A. The record evidence supports a finding of a violation of Public Utilities Code Section 453(d).

In its rehearing application, PG&E argues that that there is no record to support a finding that PG&E violated Public Utilities Code Section 453(d). It asserts that there is no evidence about PG&E's intent in publishing the articles in question, and thus, the Commission's finding is not "supported by substantial evidence in light of the whole record," as required by Section 1757 of the Public Utilities Code. (Application for Rehearing, pp. 3-4.)

PG&E's assertion has no merit. We drew reasonable evidentiary inferences about PG&E's intent from the language in the articles themselves. Based on a reading of the articles, we observed: "PG&E did more than inform its customers about its position. It solicited comments and it sought support of its position to change federal and state law regarding QF issues." Further, we noted D.99-05-032 that "[t]he elaboration of detail, the prominent location – main

article, front page – the requests for comments and responses, all show an intent to promote change. . . ." (D.99-05-032, p. 10.) Accordingly, we correctly determined that the "articles were intended to generate support among PG&E's customers for PG&E's legislative position." (D.99-05-032, p. 11.) In fact, there are letters in the record that demonstrate that the articles did have such an effect. (See Exhibit 3, which contains letters from the customers to PG&E, in response to the articles. For example, see letters from the following customers: J. Maneval, p. 2 (dated June 27, 1987); S. L. Sanderson (dated August 12, 1987); Anne Spangler (dated June 7, 1987); John D. Hane, President of Umpqua Fisherman's Association (dated July 17, 1987). See also note on first page of June 1987 article from R.A. Caselli, stating: "Why don't you include cards that we can mail to put pressure on the legislature." (Emphasis in original.))

Thus, based on the record, we drew reasonable evidentiary inferences to support our finding that the articles were designed or intended by PG&E "to promote or defeat any change in federal, state or local legislation or regulation." These evidentiary inferences constitute substantial evidence. (See People v. Lane (1956) 144 Cal.App.2d 87, 89, holding that the proof of intent "may be substantial evidence if the circumstances are such as to reasonably justify an inference of intent.") Accordingly, contrary to PG&E's assertion, there is substantial evidence in light of the whole record to support the Commission findings in D.99-05-032 about PG&E's intent and its violation of the statutory provision prohibiting political advocacy in billing inserts.

B. The refund ordered in D.99-05-032 does not constitute retroactive ratemaking.

In its rehearing application, PG&E claims that by ordering the refund in D.99-05-032, the Commission retroactively changed rates that were approved in two general rate cases ("GRC") decisions. These decisions were: Re Pacific Gas and Electric Company ("1987 PG&E GRC Decision") [D.86-12-095]

(1986) 23 Cal.P.U.C.2d 149, and Re Pacific Gas and Electric Company ("1990 PG&E GRC Decision") [D.89-12-057] (1989) 34 Cal.P.U.C.2d 199.

With respect to the 1987 general rates, PG&E asserts that the refund ordered in D.99-05-032 constitutes a retroactive change in rates that it claims was deemed "just and reasonable" in the 1987 PG&E GRC Decision [D.86-12-095], supra, 23 Cal.P.U.C.2d at p. 202. Thus, PG&E argues that this change constitutes retroactive ratemaking.

Contrary to PG&E's assertion, the refund ordered does not constitute retroactive ratemaking. As stated in D.99-05-032, this is not about general ratemaking; thus, the prohibition against retroactive ratemaking does not apply. (See Southern Cal. Edison Co. v. Public Utilities Com. (1978) 20 Cal.3d 813, 816.)

Moreover, the refund ordered does not change a rate; rather, the refund was ordered to remedy PG&E's violation of the law, namely the spending of monies collected from ratepayers on an improper purpose. We would not have approved of a rate that would permit PG&E to violate Public Utilities Code Section 453(d). Consequently, our act of ordering a refund did not involve ratemaking, and thus, the prohibition against retroactive ratemaking does not apply. (See Southern Cal. Edison Co. v. Public Utilities Com., supra, 20 Cal.3d at p. 817, stating that "before there can be retroactive ratemaking there must be at least be ratemaking.")

PG&E also argues "any net value lost by not charging the value of the billing insert space should have been reflected and factored" as credits into the 1990 rates that were approved by us in Re Pacific Gas and Electric Company ("1990 PG&E GRC Decision") [D.89-12-057], supra. Since there was no such credit, PG&E alleges in its rehearing application that it constituted retroactive ratemaking to order it to refund the value of billing insert space. (Application for Rehearing, p. 5.)

This argument is based on PG&E's incorrect understanding that there should have been a credit (i.e. a rate) for the amount of the refund. Again, this argument has no merit since we did not change any previously adopted rate in D.99-05-032. Instead, we resolved a complaint filed against PG&E for its violation of Public Utilities Code Section 453(d). Thus, the refund ordered did not constitute general ratemaking. Further, PG&E cites to no legal requirement that refunds to remedy the improper use of ratepayer funds can only be ordered by the Commission if they are reflected as credits in the GRC calculation of the utility's general rates.

C. The refund ordered in D.99-05-032 does not constitute an impermissible collateral attack on the Commission's previous decisions in PG&E's 1987 and 1990 general rate cases.

In its rehearing application, PG&E alleges that the refund ordered constitutes an impermissible collateral attack on the Commission's previous decisions in PG&E's 1987 and 1990 GRCs. (Application for Rehearing, pp. 5-6.) Specifically, PG&E focuses on the allocation of postage costs for PG&E's billing envelope set forth in the 1987 PG&E GRC Decision [D.86-12-095], supra. PG&E claims that the costs for the June, July and August 1987 billing envelopes were already addressed and resolved in that decision. (Application for Rehearing, pp. 6.)

PG&E is wrong that we have allowed the Complainants to collaterally attack the 1987 PG&E GRC Decision [D.86-12-095]. This is because the Complainants were requesting for refunds as a remedy for PG&E's violation of Public Utilities Code Section 453(d). They were not asking for a reconsideration of the allocation of postage costs for the bill envelope. (See generally, Complaint, Case No. (C.) 87-12-022, filed December 15, 1987.) Also, we did not change the allocation adopted in that decision or in any other Commission decision; rather, the ordered payment constituted a remedy for

PG&E's improper spending of monies collected from the customers, whereby the utility was essentially charging the ratepayers an excessive amount. (See Pub. Util. Code, §734.)

Also, as stated in D.99-05-032, p. 13:

> "A specific violation of §453(d) was not an issue in the 1987 GRC. There the issue was the value of the envelope space. Here the issue is the postage costs associated with mailing those copies of the PG&E Progress which violated Pub. Util. Code §453(d). . . . Nowhere in [the 1987 PG&E GRC Decision] is it suggested that PG&E's political advocacy is a legitimate customer service expense which should be legitimately borne by the ratepayers."

Therefore, it is obvious that the complaint was not collaterally attacking a previous Commission decision.

D. D.99-05-032 does not violate Public Utilities Code Section 1702.

Public Utilities Code Section 1702 provides, in relevant part:

> "No complaint shall be entertained by the [C]ommission, except upon its own motion, as to the reasonableness of any rates or charges of any gas, electric, water, or telephone corporation, unless it is signed by the mayor or the president or chairman of the board of trustees or a majority of the council, commission, or other legislative body of the city or city and county within which the alleged violation occurred, or by not less than 25 actual or prospective customers or purchasers of such gas, electricity, water, or telephone service." (Pub. Util. Code, §1702.)

In its rehearing application, PG&E characterizes the complaint as a challenge to the reasonableness of rates, and thus it should have been signed by one of the above person or persons. Since the complaint was not signed by any of these people, PG&E claims that we erred in considering the complaint which it alleges was defective.

This claim has no merit, simply because the complaint did not challenge the reasonableness of any rate, which would have triggered the signature requirement in Public Utilities Code Section 1702. Rather, the complaint raises allegations about whether PG&E violated state and federal statutory provisions by spending ratepayer funds in excess of what was allowable, and therefore, sought refunds for the violations. (See generally, Complaint, Case No. (C.) 87-12-022, filed December 15, 1987.) Thus, the signature requirement set forth in Public Utilities Code Section 1702 was not applicable in the instant case.

E. The amount of the refund is supported by record evidence.

In D.99-05-032, the refund amount of $920,000 was reached by reference to 1987 PG&E GRC Decision [D.86-12-025]. In that decision, the Commission staff had requested a 40% reduction in postage to match the value of including the PG&E Progress in the billing envelope. (1987 PG&E GRC Decision [D.86-12-025], supra, 23 Cal.P.U.C.2d at p. 201.) We rejected this reduction, indicating that ratepayers should bear the cost of postage for the value received. (Id. at p. 202.)

In its rehearing application, PG&E argues that the $920,000 payment that was ordered was derived by the Commission without any evidentiary basis and was arbitrary. PG&E makes this argument because D.99-05-032 incorrectly relies on the Commission staff's recommendations in the 1987 GRC as the basis for calculating the appropriate refund. This is because we rejected these recommendations in the 1987 PG&E GRC Decision [D.86-12-025], and thus, PG&E asserts that those recommendations cannot be controlling for this proceeding. Further, PG&E argues that because all parties stipulated that there were no incremental costs involved with including the PG&E Progress in the billing envelopes, the $920,000 payment is inconsistent with the evidence in this case, and thus, there is no rational basis for this amount. (Application for Rehearing, p. 9.)

PG&E is wrong that there was no evidentiary basis. By referring to the 1987 PG&E GRC Decision, and the factual discussion therein concerning the value received by ratepayers from having the newsletter in the billing envelope (see 1987 PG&E GRC Decision [D.86-12-025], supra, 23 Cal.P.U.C.2d at pp. 201-202), we took "official notice" of facts in that 1987 GRC. (See D.99-05-032, p. 13.) This was proper because the parties had notice that we were basing our calculation on this officially noticed discussion, and the parties had an opportunity to respond. (See Rule 73 of the Commission's Rules of Practice and Procedure, Code of Regs., tit. 20, §73; which provides for the Commission's authority to take official notice; see also, Comments of PG&E on the Draft Decision of ALJ Barnett, filed April 12, 1999, p. 8.)

Further, PG&E sees inconsistencies where there are none because it fails to understand that D.99-05-032 did not change our determination in the 1987 PG&E GRC Decision [D.86-12-025] concerning the allocation of cost of postage related to the billing envelope. D.99-05-032 is about refunding to the ratepayers the value they lost when PG&E used the issues of June, July and August of 1987 PG&E Progress for political advocacy, in violation of Public Utilities Code Section 453(d). Accordingly, the customers did not get the value or benefits that they should have received. These benefits included information about energy conservation, safety and how to save money by taking advantage of different rates. (See Stipulation No. 3 in Exhibit 1; see also, 1987 PG&E GRC Decision [D.86-12-025], supra, 23 Cal.P.U.C.2d at p. 201.)

Thus, the $920,000 amount, which represents the value not received by ratepayers, is consistent with and supported by the evidence. This includes the factual discussion in the 1987 PG&E GRC Decision [D.86-12-025], of which we appropriately took official notice, and facts concerning the value to the ratepayers set forth in Exhibit 1.

F. PG&E's allegations that the complaint should be dismissed, with prejudice, on the grounds of laches, mootness and procedural due process have no merit.

(a) Laches

PG&E argues that the complaint should be dismissed based on the doctrine of laches because the Commission did not dispose of the case until recently. (Application for Rehearing, p. 10.) This argument has no merit.

In its rehearing application, PG&E misapplies the doctrine of laches, because PG&E's laches argument is focused on our delay in resolving the case, and not on any conduct by the Complainants. Under the doctrine of laches, "a proceeding before [an administrative agency shall] be dismissed where an unreasonable time has elapsed – where the proceeding is not diligently prosecuted." (Steen v. City of Los Angeles (1948) 31 Cal.2d 542, 546-547.) Accordingly, for the doctrine of laches to apply, the delay must have been caused by the Complainants who are the parties "prosecuting the cause," and not by the Commission who is the decision-maker. It is noted that PG&E cites to no law to support the proposition that laches applies to dismiss a complaint if the delay is caused by the decision-maker.

(b) Mootness

In its rehearing application, PG&E asserts that the issues in the complaint have been rendered moot because "the debate underlying the articles in question and this case – namely, the Federal Energy Regulatory Commission's policies on purchases from qualifying facilities – has long been closed." (Application for Rehearing, p. 11.) This assertion should be rejected as without merit.

Whether the debate over the policies on purchases from qualifying facilities are closed is not relevant to whether PG&E violated Public Utilities Code

Section 453(d). The issues in the complaint are not about the debate, but are about the violation of the prohibition against the use of the billing envelopes for political advocacy. Therefore, the end of the debate does not moot out the issues raised in the complaint.

Further, contrary to PG&E's contention, the complaint has not been mooted by any assurance that there was "a reasonable expectation that the alleged violation will [not] recur" and there has been no "interim relief of events that have "completely and irrevocably eradicated the effects of the alleged violation." (See Application for Rehearing, p. 10, citing Lee v. Gates (1983) 141 Cal.App.3d 989, 993.) PG&E offered no factual basis to demonstrate the contrary. Thus, there is no basis for dismissing the complaint on the ground of mootness.

(c) Procedural Due Process

PG&E contends that its procedural due process rights were violated because it alleged that it did not receive notice of the ALJ's Ruling of May 7, 1998 and the Complainants' response to this ruling, filed June 8, 1998. In the ruling, the ALJ indicated the preference for not recommending a decision involving important constitutional issues on a stale record, and suggested that he was prepared to dismiss the case unless the parties were prepared to update the records. The Complainants' response stated that the record was fully developed, and the matter was ripe for our consideration. PG&E claims that it did not learn of this ruling until March of 1999. Thus, PG&E argues that it never had an opportunity to be heard.

PG&E is wrong that the Commission denied it an opportunity to be heard. The record for this proceeding indicates that PG&E never tried to file a late response to the May 7, 1998 ALJ's Ruling or to the Complainants' response, or even formally asked for leave to file such a response, along with an affidavit under penalty of perjury that it had not received either the ruling or the Complainants' response. In such a filing, the utility could have raised an issue about the staleness

of the record. However, it did not. Thus it is PG&E who denied itself an opportunity to be heard on the ruling, and not the Commission.

Nevertheless, PG&E received another opportunity to be heard on the issues concerning the staleness of the record. On May 7, 1998, the ALJ issued a Ruling on October 21, 1999, asking for supplemental briefing regarding subsequent changes in law since the record was developed in 1990. On November 4, 1998, the ALJ issued a supplemental ruling regarding the supplemental briefs. This ruling asked the parties to comment on the applicability of Section 3.5 of Article III of the California Constitution. (See infra, for a discussion of this constitutional provision.) Both PG&E and the Complainants filed supplemental briefs on November 20, 1998. Thus, PG&E, as well as the Complainant, had notice and opportunity to discuss the staleness of the record, especially as to how changes in the law and the constitutional provision affected the record. Accordingly, PG&E had an opportunity to state its positions regarding the staleness of the record, and was heard on the matter in the supplemental brief it filed.

G. The Commission has enforced Public Utilities Code Section 453(d) in a manner consistent with Article III, Section 3.5 of the California Constitution and the First Amendment of the United States Constitution.

During the proceeding, two positions on the constitutionality of Public Utilities Code Section 453(d) were presented. PG&E contends that this statute is unconstitutional, based on its analysis of Consolidated Edison Co. v. Public Serv. Comm'n (1980) 447 U.S. 530. In this decision, the United States Supreme Court held that the New York Public Service Commission's ban on bill inserts that discuss controversial issues of public policy directly infringed upon the utility's free speech. (Id. at p. 544.) However, the Complainants assert that PG&E's reliance on this decision is misplaced, and distinguishes it from the instant situation. They claimed that if the Commission did not enforce the statute,

the complainants would be forced to sponsor the speech of PG&E, which would be in violation of the First Amendment principles set forth in Abood v. Detroit Board of Education (1977) 431 U.S. 209. They challenge the expenditure of ratepayer money to sponsor " 'political and policy statements of PG&E, which are prejudicial to and opposed by the Complainants.' " (See Supplemental Brief of Complaints, filed November 20, 1998, p. 6, quoting Complainants' Opening Brief, filed November 19, 1990, pp. 11; see also, Complaint, filed December 15, 1987, pp. 4-5 & 7-8.) Complainants noted that although the issue concerning rate subsidization was raised in Consolidated Edison Co. v. Public Serv. Comm'n, supra, the Court did not rule on the issue of whether Abood v. Detroit Board of Education would prevent a utility from passing on to ratepayers the costs of bill inserts that discuss controversial issues of public policy. Thus, Complainants argue Consolidated Edison Co. v. Public Serv. Comm'n is not controlling in the instant case.

In Consolidated Edison Co. v. Public Serv. Comm'n, supra, the United Supreme Court made the following observations that are relevant to the constitutionality of Public Utilities Code Section 453(d): "The customer of Consolidated Edison may escape exposure to objectional material simply by transferring the bill insert from envelope to wastebasket." (Id. at p. 542.) The prohibition of bill inserts could not be justified as a means of avoiding ratepayer subsidization of the cost of bill inserts, since there was no basis on the record before the Court to assume that the New York Public Service Commission could not exclude the cost of the inserts from the utility's rate base. (Id. at pp. 540-543; see also, D.99-05-032, p. 8.) "Because the Commission has failed to demonstrate that such costs could not be allocated between shareholders and ratepayers, we have no occasion to decide whether the rule of *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), would prevent Consolidated Edison from passing on to ratepayers the costs of bill inserts that discuss controversial issues of public policy." (Id. at pp. 543-544, fn. 13.)

Based on the above discussion, the constitutionality of Public Utilities Code Section 453(d) is an open issue. The debate is between two competing First Amendment interests: PG&E's rights of commercial speech and ratepayers' free speech protections against forced subsidization of another's speech. In D.99-05-032, the Commission took no position either way on the constitutionality of the statute. Instead, the Commission complied with the requirements of Article III, Section 3.5 of the California Constitution. This constitutional provision provides that the Commission has no power to "declare a statute unenforceable, or refuse to enforce a statute, on the basis of it being unconstitutional unless an appellate court has made a determination that such statute is unconstitutional" or to "declare a statute unconstitutional." (Cal. Const., art. III, §3.5, subd. (a) & (b).) Therefore, the Commission's enforcement of Public Utilities Code Section 453(d) was consistent with this constitutional requirement.

Further, in D.99-05-032, the Commission has enforced this statute in a manner consistent with existing First Amendment principles. D.99-05-032 represents our enforcement of Public Utilities Code Section 453(d) through the finding of a violation and the ordering of refunds to the ratepayers for the value they lost by the violation. D.99-05-032 does not stop the utility from exercising their free speech and communicating with ratepayers, so long as it does not violate Section 453(d). Further, D.99-05-032 correctly orders refunds so that there is no forced subsidization of PG&E's speech, i.e. political advocacy, by the ratepayers, which is in accord with the free speech principles in Abood v. Detroit Board of Education, supra, 431 U.S. at pp. 234-235. Because this is an open issue, the United States Supreme Court has not made a determination in any decision that would have prohibited the Commission from ordering refunds in the instant case. (See Consolidated Edison Co. v. Public Serv. Comm'n, supra , 447 U.S. at pp. 543-544, fn. 13; accord, Consol. Edison v. Public Serv. Com'n (1985) 66 N.Y.2d 369, 488 N.E.2d 83, 497 N.Y.S.2d 337, 339, 1985 N.Y. LEXIS 17612, ***6 (per curiam), appeal dismissed by Consol. Edison v. Public Serv. Com'n (1986) 475

U.S. 1114, rehrg. denied, Consol. Edison v. Public Serv. Com'n (1986) 476 U.S. 1179.) Thus, the manner in which we have enforced Public Utilities Code Section 453(d) in D.99-05-032 is consistent with the law on the First Amendment as it currently stands.

III. CONCLUSION

For the above reasons, good cause does not exist for the granting of a rehearing. Therefore, PG&E's application for rehearing of D.99-05-032 is denied.

THEREFORE, it is ordered that:

1. Rehearing of D.99-05-032 is hereby denied.
2. Case 87-12-022 is closed.

This order is effective today.

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

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