ALJ/PAB/eap

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Decision 99-12-034 December 16, 1999

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Energy Alternatives, Complainant, vs. Pacific Gas & Electric Company, Defendant.	Case 97-09-030 (Filed September 17, 1997)

Patrick J. Power, Attorney at Law, for Energy Alternatives, complainant.
Robert B. McLennan, Attorney at Law, for Pacific Gas and Electric Company, defendant.

OPINION

Summary

In this complaint, Energy Alternatives (EA) alleges that Pacific Gas and Electric Company (PG&E), defendant, has mismanaged its 1997 Weatherization Program by instituting changes to allow unlimited installation of caulking which resulted in a change in contract terms, required standards, an erroneous bidding process and increased costs to the ratepayer. EA believes these changes were unreasonable and the abuse of excessive caulking was foreseeable when the method of caulking payment was changed from a flat rate per house to payment by linear foot installed. EA requests that these program changes be eliminated and that excess costs of $2,060,732.20 and additional inspection costs be disallowed and returned to the ratepayer.

PG&E denies that any mismanagement or unreasonable adoption of new rules for the program occurred. PG&E contends the facts are not in dispute, the changes to the 1997 program were made and subsequent abuses did occur. PG&E asserts it acted reasonably under the circumstances. PG&E contends it could not fail to honor its contractual commitment to pay for all *feasible* caulking installed. In addition, its own manual indicated that as much caulking as was required should be installed to achieve greater conservation.

We herein conclude that PG&E reasonably implemented its 1997 program. We deny the request to order a halt to the caulking per linear foot payment since PG&E has already changed the method of caulking payment from linear foot installed back to a flat rate. We also deny the request to order an audit of the 1998 program because there is insufficient cause to do so. We deny the request for findings that will support a civil action seeking damages.

Procedural History

Simultaneous with the complaint, EA filed a Motion for Temporary Restraining Order to stop PG&E from rolling over the 1998 program to the same companies hired in 1997, Richard Heath & Associates (Heath). A Prehearing Conference (PHC) by telephone was held in November 1997 to discuss the motion. Shortly thereafter, complainant filed a Motion for Summary Disposition and Motion to Compel. Complainant withdrew the three motions after PG&E indicated it would put the 1998 program out to bid and not roll-over the contract to the same primary contractor.

During discovery, complainant renewed its Motion to Compel after PG&E failed to provide the contents of the 1997 bids. Bidding sub-contractors opposed disclosing this allegedly confidential information. At the PHC, the assigned ALJ ruled that PG&E must disclose the contracts after redacting all prices within the established cap.

In the complaint, EA raised the following "Causes of Action" alleging unfair business practices against PG&E and Heath during the procurement of the administrator and weatherization sub-contractors to complete the 1997 Energy Partners program:

1. PG&E's process for bidding for the program administrator contract was deficient in the following material respects causing harm to EA:
   a. Failure to provide sufficient information upon which to submit a bid;
   b. Failure to engage in competitive bidding;
   c. Engaging in improper, extensive negotiations after the award of the contract;
   d. Changing the program administration, including program inspection and other procedures, after awarding the contract;
   e. Preparing to roll-over the existing contract to the 1997 administrator without Commission authorization.
2. PG&E and/or Heath made material changes in the program's administration of benchmarks and performance standards, thereby, deviating from the exact conditions in the request for proposal causing harm to EA.
3. PG&E failed to quantify the alleged savings to ratepayers. EA requested that the Commission provide the following relief and findings against PG&E:
   a. PG&E failed to conduct open, fair competitive bidding for the 1997 Energy Partners program administrator contract and sub-contracts;
   b. EA has been damaged by PG&E's failure to conduct open, fair competitive bidding in awarding the Energy Partners contract and sub-contracts for 1997;
   c. PG&E's 1997 contracts to perform under the Energy Partners program are terminated as of December 31, 1997 and a new bidding process instituted;
   d. PG&E has harmed ratepayers and customers qualified to receive weatherization.

EA requested the Commission to determine the extent of the harm and appropriate relief for PG&E's ratepayers and customers.

PG&E filed an answer and requested that the complaint be dismissed because the allegations were resolved in Decision (D.) 97-04-088 and the request for a temporary restraining order was moot since PG&E agreed not to roll-over the 1997 contracts into 1998.

The assigned Administrative Law Judge (ALJ) ruled that complainant could not re-litigate the majority of the issues in the complaint because they were resolved in five prior complaints. The assigned ALJ also ruled that complainant may not in this proceeding litigate issues regarding the 1997 contract for which evidence was available at the time of the last complaint. Therefore, she dismissed all but complainant's allegation that performance under the 1997 program unlawfully deviated from the awarded contract. This issue was not ripe for review in the most recent complaint because the program had not yet been completed.

Complainant objected to this ruling and requested reconsideration. At a second PHC on September 14, 1998, the ruling was clarified to allow complainant to pursue in this proceeding such specific questions as follows:

1. Was complainant positioned equally with Heath to compete for the 1997 prime contract, i.e. did both have equal information regarding the terms of the contract, such as the ability to engage in extensive installation of caulking; or, did subsequent meetings with the successful bidder, Heath, change the prime and/or sub-contract terms?
2. Did the sub-contractors hired by the prime contractor, Heath, meet the benchmark performance standards (32.76 linear feet) in the 1997 Request for Proposal or does their actual performance (1,000-1,600 linear feet) materially depart from this description in the sub-contracts in pre-bid materials?
3. Was the decision to pay costs of excessive caulking under the 1997 program prudent and in the best interest of the ratepayer, that is, was it reasonable for PG&E to interpret the Weatherization Manual to authorize payment of all invoices for large amounts of caulking and to ignore allegedly excessive caulking, erroneous bills and poor, low performance of sub-contractors? (PHC Transcript Sept. 14, 1998)

Evidentiary hearing was held on March 4, 1999, and parties presented witnesses and documentary evidence to address these issues. Parties subsequently filed opening briefs on May 20, 1999 and closing briefs on June 3, 1999. Parties submitted reply letters and the submission date was reset to August 16, 1999 to allow these letters into the record.

Background

PG&E has conducted low-income direct weatherization programs since 1989. Certain aspects of these programs are mandated by Pub. Util. Code § 2790.[1] For the 1997 program, the Commission approved PG&E's Advice Letter, No. 1978-G/1608-E on December 3, 1996. The 1997 program differed from those in prior years by competitively bidding the prime contractor administration, rather

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[1] (a) The commission shall require an electrical or gas corporation to perform home weatherization services for low-income customers, as determined by the commission under Section 739, if the commission determines that a significant need for those services exists in the corporation's service territory, taking into consideration both the cost effectiveness of the services and the policy of reducing the hardships facing low-income households.

(b)(1) For purposes of this section, "weatherization" includes, where feasible, any of the following measures for any dwelling unit:

(A) Attic insulation
(B) Caulking
(C) Weatherstripping
(D) Low flow showerhead
(E) Waterheater blanket
(F) Door and building envelope repairs which reduce air infiltration.

(2) The commission shall direct any electrical or gas corporation to provide as many of these measures as are feasible for each eligible low-income dwelling unit.

(c) "Weatherization" may also include other building conservation measures, energy-efficient appliances, and energy education programs determined by the commission to be feasible, taking into consideration both the cost effectiveness of the measures and the policy of reducing the hardships facing low-income households.

prior years by competitively bidding the prime contractor administration, rather than employing a firm to administer the program. The payment for caulking installation was also different than prior years.

In 1996, while preparing the bidders' package for the 1997 program, PG&E identified two disincentives to bidders under its then-existing fixed price for caulking installation. First, the fixed price encouraged contractors to minimize the amount of caulking per home since the payment for one foot was the same as one thousand feet. Second, it created the motivation to ignore weatherizing a home that may need great amounts of caulking because the amount of caulking installed did not increase the amount paid. Therefore, in the 1997 program, PG&E decided to experiment with caulking payment per linear foot.

PG&E explained that it also changed to a more competitive program based upon the Commission's announcement in 1995 that it expected the electric industry, including energy efficiency programs, to move to a more competitive market. (*Re Electric Restructuring* (1995) 64 CPUC2d 1, 73and D.97-02-014.) PG&E awarded the prime contract to Heath, who in turn competitively bid sub-contracts to perform the work of installing all measures listed in Pub. Util Code § 2790. In the bid package, PG&E provided historical information about the program, including the historical rate of caulking performed under the prior method of flat rate payment.

A complaint regarding the 1997 program slowed the award of sub-contracts and implementation of the program. (*Insulation Contractors Association vs. PG&E (ICA Complaint)*, Case 97-03-046) Ultimately, in D.97-04-088, the Commission found that the use of maximum bid prices was reasonable and that administration of the program, up to the point of this decision, was satisfactory. Sub-contracts were awarded and work began in May 1997. At the completion of

the program in December 1997, 45,003 homes were weatherized at a total cost of $24,001,100.

Caulking Installation

Because the 1997 program resulted in PG&E paying increased costs for caulking installation above the 32.76 linear feet indicated in the bid package, EA contends that the Request For Proposals (RFP) was flawed and PG&E did not abide by its own standard for caulking installation limits. On this point, EA's witness, John Seale, presented internal PG&E notes discussing problems with bills for increased caulking, documents showing contractors who failed inspections, total of caulking installed by contractor, and summaries of testimony regarding the uncertainty of caulking limits presented in the *ICA Complaint*. Seale also presented one sub-contractor's bid in which the bidder takes exception to the uncertainty of whether 32.76 linear feet of caulking per house is an absolute limit.

Seale believed PG&E's response to suspected overbilling and allowing contractors to return to install more caulking after failing an inspection was entirely unreasonable. He argues that payment of these excessive bills, in fact, invalidated the entire bidding process by changing the standards. EA submitted a document in its brief to show that the caulking costs of another weatherization program were $65, compared with PG&E's cost of $71 for caulking per unit.

EA also argues that PG&E had an incentive to minimize the conservation potential in order to minimize lost sales to energy efficiency, which would in turn maximize contributions to the new Competition Transition Charge (CTC). PG&E responds that this argument is not logical since the effect of the program savings ($1 million) is minimal in the context of total CTC and these savings constituted roughly 3% of total energy efficiency savings.

In explaining the caulking requirement, PG&E's witness, Chris Chouteau testified that:

> "...Paying for caulk on a fixed fee per dwelling basis could become an incentive for contractors to under caulk. Caulking a single window and a door can easily use 33 linear feet of caulk. The 32 average feet of caulking that potential bidders received in the bid package was based on PG&E's historical information available at the time. PG&E was tracking the actual amount of caulking installed during the contract rollover period for the 1996 program that took place during the first four months of 1997 when caulking was still being paid on a per unit basis, and an average of 182 linear feet of caulk was being installed per mobile home. PG&E fully expected that the amount of caulking could increase in 1997..." (Exh. 8, pp. 9-10)

PG&E argues that the bid package contained all of the *facts* that PG&E possessed at that time and it did not believe that engaging in speculation on what the caulking installations would or should be was in any way helpful to bidders. PG&E points out that its primary bid package contained notice that the caulking footage was from historical averages by placing it in a column labelled, "Approximate Number of Measures Previously Installed" with a footnote, "Based on historical data."

PG&E argues that its response to questionable bills was reasonable. In July 1997 an inspection team found 750 feet of caulking in a single log cabin. Since log cabins are designed with seams between each log, the inspectors ultimately determined that the caulking was appropriate according to the existing standards and feasible under Pub. Util. § 2790. Shortly thereafter, over-caulking was an issue in a home with propane as the primary heating fuel. Because weatherization services are directed to be provided to low-income customers, which was the case, PG&E determined this home to be eligible, as testified by its witness, Chris Chouteau. PG&E has traditionally weatherized

homes whose primary source of heat is not gas or electricity because electric space heaters are typically the backup heating source.

In August 1997, invoices began to identify increased caulking. The average amount of caulking per unit increased to 107 linear feet in single-family conventional homes, 77 linear feet in 2-4 unit buildings, and 60 linear feet in larger multi-unit dwellings. After receiving and reviewing these results, PG&E concluded these averages to be within reasonable expectations of increased caulking. However, mobile homes increased to an average of 530 linear feet per unit, with one contractor averaging 1,112 linear feet per mobile home. Upon receiving these results PG&E was surprised. It increased its inspections of jobs billing over 500 linear feet for mobile homes to 100% and that of other units from 20% to 35-40% in order to ensure that work had actually been done, was feasible and was done in accordance with applicable installation standards. Many of the inspections resulted in failures.

Failures from inspections were of the following types: measure failures, resulting from sub-standard materials, sub-standard installation or the absence of a required measure, and billing failures where the bill differed from the amount of caulking found during the inspection. As a result, 5.6% of caulking billed was not paid.

After a measure failure, contractors were required to return to correct the failures that were identified during the inspection. Beyond these corrections, PG&E allowed contractors to install additional caulking if it determined additional caulking was feasible. PG&E argues that material changes in the program would have required re-negotiation of all contracts and it considered the basic program to still be sound.

Discussion

To the extent that EA also argues that the changes in the 1997 program to maximum bids and caulking payment by linear foot were unreasonable, these program changes were approved in D. 97-04-088 and we decline to again review these issues. As ruled in this proceeding, we will not allow EA to re-litigate in this proceeding issues already resolved in D. 97-04-088, or issues that were ripe for review at that time. Thus, we confirm that ruling. As contemplated in the *ICA Complaint*, this future proceeding only involves whether program implementation and the results were reasonable and in accordance with the RFP.

PG&E admits the experimental caulking terms in the 1997 program did not work out as intended. PG&E believes caulking is a mandatory measure required to be installed to the degree it is feasible to do so. In deciding to resolve many bill disputes by paying the caulking costs, PG&E relied on its inspections and its interpretation of the overlying statute. PG&E apparently concluded that roughly 95% of the contractors had properly installed the caulking billed and the amount was reasonable based upon instructions of caulking placement in its manual. For example, the manual and PG&E's training instruct contractors to caulk interior wooden panel seam joints, both sides of molding covers at windows, doors, room corners, ceiling perimeters, baseboards, the center of a double-wide unit, around utility and service penetrations and around gaps around kitchen and bathroom plumbing facilities. During the program, some PG&E trainers appeared to have given out erroneous information about caulking seams in mobile homes. PG&E determined since it was near the end of the program, correcting each sub-contract was not feasible.

PG&E correctly observes that the questionable bills were presented at the end of the one-year program. Thus, it could not have resolved these issues sooner than it did. EA complains that PG&E should have enforced its billing

procedure and rules governing caulking installation. However, because the program started late, bills were received near the end of the program, too late to enforce much of anything. In fact, PG&E was still resolving billing disputes in March 1998, according to the internal notes. (Exh. 2, JTS-32)

We believe the actions and decisions of PG&E were reasonable and did not invalidate its RFP. All parties were given notice that historical caulking installation averages were used in the bidding package. This implies that these averages may change under a change in payment providing an incentive to install as much caulking as each unit requires for conservation of energy. Numerous other contractors submitted bids for the prime and sub-contract deriving total costs that presumably generated a profit. EA had an opportunity to submit a bid for the prime and sub-contracts with an exception, as did another potential sub-contractor. In fact, this sub-contractor was awarded a contract along with 24 other sub-contractors. The exception entered shows that this contractor contemplates that there may not be a ceiling on caulking installation since the exception states: "1. If there is no maximum caulking allowance and the current average system wide caulking goes from 32 linear feet to 200-250 linear feet on a single home, will PG&E stop the program...rebid the project...?" Thus, it appears as reasonable to assume that there was no ceiling on caulking. The inclusion of this historical data did not invalidate the process, subsequent bids or subsequent contracts.

There is no evidence to show that PG&E or Heath or both conspired to pay bills higher than 32.67 linear feet per unit for caulking either before or after the award of the prime or sub-contracts. Payment of the questionable bills was reasonably based upon program policies and an inspection showing that the work was done, notwithstanding the fact that a contractor accused PG&E of providing erroneous information in one training session regarding mobile homes

and one contractor misunderstood the billing dispute process. We conclude it would be unreasonable to penalize PG&E because the 1997 program had unanticipated problems. This does not invalidate the entire process and program. In addition, we are not persuaded that PG&E was forewarned by a former witness in another complaint that its change in caulking payments would invite abuse or improper bills. EA's reliance on ICA witnesses' testimony in the *ICA Complaint* for notice of future problems due to the billing change is misplaced. Obviously, this testimony was from opponents with whom PG&E did not agree.

Lastly, the following overall cost of the program was less than budgeted and less than the previous year's program.[2]

Year	Units Completed	Overall Costs	Authorized Funding
1997	45,003	$24,001,100	$29,108,000
1996[3]	45,015	24,954,844	29,109,000
1995[4]	42,000	30,967,000	33,356,000

We also notice that PG&E's average cost of $71 for caulking per unit, as estimated by EA, is not significantly more than the document submitted during briefs showing the caulking cost of $65 per unit in another weatherization

[2] In the Proposed Decision, we notified the parties of the intent to take official notice of these costs provided by PG&E in its closing brief. No objections to such official notice were filed.

[3] 1997 Annual Earnings Assessment proceeding, A.97-05-001, Ex. 2, Appendix A, pp. IIRes-9 and 10.

[4] 1996 Annual Earnings Assessment Proceeding, A.96-05-002, Ex. 19, Appendix A, pp. IIRes-19.

program. Therefore, we cannot conclude that PG&E's 1997 program was uneconomical for the PG&E ratepayer. In addition, inspections showed that customers received the benefit of the additional caulking and services to be provided in the program.

EA argues that PG&E reallocated more housing units to contractors who had an average of caulking installation significantly higher than all other contractors, implying an unreasonable increase in costs for the program. PG&E's past practice was to allocate more work to contractors who were swiftly completing units, which these contractors did. Of the contractors which EA lists with allegedly high installation averages, only one sticks out as having an average several times higher than the running average of caulking per installation for 1997. PG&E points out that the re-allocation took place before it had resolved billing problems or had knowledge of the one contractor's high caulking installation rate. Therefore, EA's argument has no merit.

EA makes other arguments in support of its allegations which we have reviewed and find to be unpersuasive.

We conclude that the additional inspections were to investigate suspected inappropriate bills and suspected abuse of the program in order to protect the interest of ratepayers and were reasonable.

Since we find no harm to ratepayers, we decline to endorse EA's pursuit of a private civil action, as requested. We consider EA's reliance on dicta in *Energy Alternatives vs. PG&E* (1993) 48 CPUC2d 72, citing page 78, as precedent for such an endorsement to be a misrepresentation. In that decision we make general statements about the availability of this remedy for harm caused by a public utility.

This Commission has no jurisdiction to award damages and declines to make any such findings.

Attic Insulation

In its letter to PG&E justifying a reduction in attic insulation from 19% to 13%, Heath says contractors found that project areas were heavily marketed under previous programs, and current projections indicate that only 13% of the units will receive attic insulation based upon the actual installations between June and September 1997. (Exh. 2-JTS 10) EA argues that this change was unreasonable given the larger number of installations at the completion of the program. This argument is without merit. The estimate was reasonable based upon actual results and progress of the program at the time the percentage was adjusted.

Contribution By Energy Alternatives

EA argues that but for this proceeding, PG&E would have rolled over the 1997 program into 1998. PG&E points out that it filed an advice letter for the 1998 program at nearly the same time as the complaints and at the time the advice letter was filed, EA was well aware that the program would be put out to bid. Therefore, we cannot agree with EA's presumption of its contribution to the ratepayer's interest by filing this complaint.

Comments on Proposed Decision

The proposed decision of the ALJ in this matter was mailed to the parties in accordance with Pub. Util. Code § 311(g) and Rule 77.1 of the Rules of Practice and Procedure. PG&E filed comments requesting minor corrections. These corrections have been made in the final order.

Findings of Fact

1. EA alleges that PG&E's implementation of its 1997 Energy Partners program caused harm to EA and to ratepayers by paying bills for amounts of caulking not within the alleged limits of the RFP.

2. Simultaneous with the complaint, EA filed a Motion for Temporary Restraining Order (TRO) to stop PG&E from rolling over the 1998 program to the same company hired in 1997, Heath.

3. Complainant withdrew the motion for a TRO after PG&E indicated it would put the 1998 program out to bid and not roll-over the contract to the same primary contractor.

4. PG&E has conducted low-income direct weatherization programs since 1989. Certain aspects of these programs are mandated by Pub. Util. Code § 2790.

5. The Commission approved the 1997 Energy Partner's weatherization program in PG&E's Advice Letter, No. 1978-G/1608-E on December 3, 1996.

6. The 1997 program differed from those in prior years by competitively bidding the prime contractor administration, rather than employing a firm to administer the program. The payment for caulking installation was changed from a flat rate per unit to the amount installed.

7. In the RFP, the caulking average of 32.67 linear feet was in a column labelled: "Approximate Number of Measures Previously Installed" with a footnote, "Based on historical data."

8. Numerous contractors submitted bids for the prime and sub-contract deriving total costs that presumably generated a profit. One sub-contractor submitted a bid with an exception questioning the increase of the average caulking installation.

9. EA did not submit a bid for the prime or sub-contract.

10. In July 1997, an inspection team found 750 feet of caulking in a single log cabin. Since log cabins are designed with seams between each log, the inspectors ultimately determined that the caulking was appropriate according to the existing standards and feasible under Pub. Util. Code § 2790.

11. Over-caulking was an issue in a home with propane as the primary heating fuel. Because weatherization services are directed to be provided to low-income customers, which was the case, PG&E determined this home to be eligible for the program. PG&E has traditionally weatherized homes whose primary source of heat is not gas or electricity because electric space heaters are typically the backup heating source.

12. In August 1997, invoices began to identify increased caulking. The average amount of caulking per unit increased to 107 linear feet in single-family conventional homes, 77 linear feet in 2-4 unit buildings and 60 linear feet in larger multi-unit dwellings. After receiving and reviewing these results and performing re-inspection of many completed jobs, PG&E concluded these averages to be within reasonable expectations of increased caulking.

13. Bills for caulking in mobile homes showed an average increase to 530 linear feet per unit, with one contractor averaging 1,112 linear feet per mobile home. Upon receiving these results, PG&E increased its inspections of jobs billing over 500 linear feet for mobile homes to 100% and that of other units from 20% to 35-40%, in order to ensure that work had actually been done, was feasible and was done in accordance with applicable installation standards. Many of these jobs resulted in either a billing failure for not installing the amount billed, or a measure failure for sub-standard material or method of installation or the absence of caulking.

14. After a measure failure, contractors were required to return to correct the failures that were identified during the inspection. Beyond these corrections, PG&E allowed contractors to install additional caulking if it determined this was feasible.

15. During the program, some PG&E trainers appeared to have given out erroneous information about caulking in mobile homes.

16. PG&E paid roughly 94.4% of bills submitted for caulking installation after determining that the caulking billed was actually installed and was a feasible amount providing conservation.

Conclusions of Law

1. This Commission has no jurisdiction to award damages for injury to complainant's business.

2. PG&E reasonably implemented its 1997 Energy Partners Program.

3. This decision should be made effective immediately in order to finally resolve disputes regarding PG&E's 1997 Weatherization Program.

O R D E R

IT IS ORDERED that:

1. The complaint is denied.
2. This proceeding is closed.

This order is effective today.

Dated December 16, 1999, San Francisco, California.

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