

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

ENERGY DIVISION

RESOLUTION E-3496
JULY 16, 1997

R E S O L U T I O N

RESOLUTION E-3496. PACIFIC GAS AND ELECTRIC COMPANY REQUESTS REVISIONS TO ITS ELECTRIC TARIFF STANDARD FORM 79-938, CUSTOMER-OWNED STREETLIGHTS.

PG&E'S REQUEST IS DENIED.

BY ADVICE LETTER 1571-E and 1571-E-A, FILED ON MARCH 20 AND MAY 7, 1996..

SUMMARY

1. Pacific Gas and Electric Company (PG&E) requests revision of its electric tariff Standard Form 79-938, Customer-Owned Streetlights -- PG&E Pole Contact Agreement [Agreement]. PG&E's proposed changes are intended to clarify and strengthen its rights to the poles.
2. Marin Street Light Acquisition Joint Powers Authority (MSL), The California City-County Streetlight Association (Cal-SLA), the City and County of San Francisco (CCSF), and Alameda County jointly with the cities of Albany, Dublin, Emeryville, Fremont, Hayward, Livermore, Newark, Piedmont, Pleasanton, San Leandro and Union City [the Cities] protested AL 1571-E.
3. PG&E responded to the protests by a letter and then filed the supplemental AL 1571-E-A to modify its request.
4. This Resolution denies PG&E's request without prejudice..

BACKGROUND

1. Electric tariff rates for PG&E-owned streetlights are higher than for customer-owned streetlights. A city or county may decide to buy PG&E's streetlight system to save on energy bills. They may also want to own streetlights to provide better maintenance and timely replacement of burnt-out lights for reasons of public safety.
2. There are two systems of streetlights. One consists of an integral pole and streetlight fixture. The other consists of

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two components, the [usually wooden] pole and the streetlight fixture. In the latter case, PG&E sells the streetlights, but not the electric distribution poles on which some of the streetlights may be mounted. The Agreement covers the situation where the streetlights are sold but continue to be attached to PG&E's power poles. In addition, the Agreement allows agencies to opt for the attachment of new streetlights to PG&E's poles.

3. The proposed revisions would make numerous changes to the current Agreement and impose more conditions on streetlight pole contacts. The more important of those proposals are:

- o Section 3--Compliance With Safety Requirements. The Permittee would have to place identification tags on its facilities.
- o Section 5--Indemnification and Liability. Permittee would have to defend PG&E against suits arising out of indemnifications and indemnify PG&E under certain extra conditions. PG&E also would limit its liability and make no warranties for poles and their attachments.
- o Section 7--Removals and Emergency Conditions. PG&E would be permitted to discontinue using poles, which would require Permittee to relinquish its use of a pole contact. PG&E also reserves the right to relocate a pole without giving a 30-day notice. PG&E's right to terminate the Agreement is broadened under specific conditions.
- o Section 9--Dispute Resolution. PG&E and the Permittee must first attempt to resolve any dispute through confidential negotiations. Both could seek preliminary injunctions, but are required to perform under the Agreement until the dispute is resolved.
- o Section 10--Miscellaneous. Permittee must not disclose PG&E proprietary information without prior written consent from PG&E. Permittees' payments to PG&E are not subject to force majeure events.
- o Section 11--Terms of Agreement. PG&E is able to terminate the Agreement under certain conditions. The Permittee is deemed to have abandoned equipment if it fails to use the equipment for 60 days.

4. There are three provisions in the proposed Agreement that may result in an increased charge to the Permittee for the pole contact. These are:

- o Section 5.2 proposes that the Permittees pay Ad Valorem taxes if their pole contact leads to increased taxes for PG&E.
- o Section 7.7 proposes that if a Permittee's pole attachment requires installation of additional anchors,

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the Permittee's payments must include Contributions in Aid of Construction (CIAC).

- o Section 8.1 proposes that Permittees pay \$100 for each unauthorized pole contact.

5. In response to protests, PG&E filed a supplemental AL 1571-E-A modifying its original request as follows:

- o The amended Paragraph 10.3 would require that Permittees keep certain information confidential only to the extent permitted by the law.
- o A new Paragraph 11.6 implies that PG&E would first seek Commission approval before assessing a pole attachment fee.
- o Paragraphs 7.5 and 7.6 would now require that the Permittee pay for replacement poles or anchors also under circumstances where any pole owner (not just PG&E) adds new equipment after the pole attachment. If Permittee's pole attachment is the sole reason for a larger pole or additional anchors, the Permittee must pay the additional costs.

NOTICE

1. PG&E served notice of ALs 1571-E and 1571-E-A to certain utilities, government agencies, and other parties that requested such information. ALs 1571-E and 1571-E-A were noticed in the Commission Calendar.

PROTESTS

1. Marin Street Light Acquisition Joint Powers Authority [MSL] --a group of twelve public agencies in Marin County, The California City-County Streetlight Association [Cal-SLA] --an association of the cities and counties in California that buys street lighting services from electric utilities, the City and County of San Francisco [CCSF], and Alameda County jointly with the cities of Albany, Dublin, Emeryville, Fremont, Hayward, Livermore, Newark, Piedmont, Pleasanton, San Leandro and Union City [the Cities] protested AL 1571-E.

2. The protests are discussed below.

DISCUSSION

1. PG&E's AL 1571-E received heavy protests from four groups of interested parties. Discussion of their concerns follow.

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Notice of the Proposed Agreement

2. MSL and Cal-SLA state that PG&E failed to provide sufficient notice. MSL learned about the proposal through its attorney. Cal-SLA contends that most of the people notified on PG&E's service list would have no interest in the pole contact Agreement. Cal-SLA says that it has intervened in every PG&E rate case that involved streetlight rates since 1980 but was not included on the mailing list. According to Cal-SLA, PG&E should have mailed its AL 1571-E to all affected cities and counties in its service area. Otherwise, cities and counties not on the distribution list, and who could have had similar concerns, have not received due process before the Commission.

3. PG&E responds that it has followed the rules of General Order 96-A in that it served AL 1571-E on competing or adjacent utilities and "[o]ther interested parties having requested such notification" of advice letters. Interested parties must contact PG&E if they wish to be on PG&E's advice letter service list. PG&E has no record of MSL or Cal-SLA requesting to be placed on its service list.

4. It is the Energy Division's view that matters concerning streetlights impact all cities and counties. The latter group should be duly notified of any changes in the existing streetlight rules that affect them. The Energy Division recommends that PG&E notice its proposal to all city and county governments in its service area and the League of California Cities.

Lopsided Agreement

5. All of the protesters argue that the proposed revisions are one-sided and that the present Agreement should not be changed to suit the needs of PG&E only. MSL states that the present Agreement with the twelve public agencies that MSL represents has worked well for the past ten years and there is no reason to change the Agreement at this time. According to MSL, PG&E has never complained about the existing mutual Agreement.

6. PG&E counters that unless it is adequately compensated, it should not bear the risk of costs associated with streetlight attachments. PG&E asserts that the poles are utility assets (not public goods) and the protestors have no inherent right to use PG&E's poles without bearing the costs associated with the service.

Contributions in Aid of Construction [CIAC]

7. CCSF protests imposition of income tax liability related to CIAC as inappropriate for CCSF-owned streetlights because it is CCSF [not PG&E] that provides power for its streetlights.

8. PG&E responds that CIAC income tax liability is not based on who supplies power to streetlights. It is rather based on

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whether the Permittee provides funds to PG&E for construction which includes new poles and anchors.

The Confidentiality Clause

9. CCSF and Cal-SLA protest the addition of a confidentiality clause which could restrict a local government's sharing of technical information and material with other parties and public agencies. They contend that this would violate local government sunshine laws and are unenforceable.

10. PG&E acknowledges that cities are required to release certain information, if requested, under the California Records Act. PG&E subsequently modified its request in AL 1571-E to indicate that the Permittee can keep certain information confidential to the extent permitted by the law. PG&E's modification is in Section 10.3 of its supplemental AL 1571-E-A.

Pole Contact Fees

11. Cal-SLA and CCSF protest PG&E's proposal in AL 1571-E reserving the right to assess a Pole Contact Fee with neither the Commission's authorization nor negotiation with the parties. The protestants contend that PG&E's unilateral ability to impose such annual rental fee on public agencies is illegal. They also point out that twice in the past the Commission has denied PG&E [23 CPUC 2d 125, D.86-12-091] and SDG&E [30 CPUC 2d 334, D.88-12-085] pole contact fees.

12. PG&E assuages the contact fee concern by inserting language in its supplemental AL 1571-E-A [paragraph 11.6] in which it implies that the Commission's approval will be sought for pole attachment fees.

Cal-SLA Specific Concerns

13. Cal-SLA points out numerous changes proposed by PG&E that it calls self-serving. Those are listed below together with PG&E's responses.

- o Paragraphs 1.2 and 11.2: It is arbitrary on the part of PG&E to revoke at will licenses granting the use of poles to the Permittees.

PG&E replies that the main purpose of poles is to support its electric distribution system. If streetlights interfere in some way with its electric distribution function or create costs or burdens for PG&E, it is reasonable to terminate the Agreement.

- o Paragraph 1.3: There is no public policy reason to make the proposed Agreement 'personal' in that it cannot be assigned to another party unless agreed to by PG&E.

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PG&E responds that the Agreement should be personal because it wishes to ensure that any party to the Agreement be able to satisfy its requirements.

- o Paragraph 3.1: PG&E allows itself to take any action necessary, at its sole discretion, where there is a hazardous condition, to require an agency to reimburse PG&E for costs without negotiating with the Permittee regarding additional work that needs to be done.

PG&E believes it is reasonable for the Permittee to reimburse PG&E for costs related to hazardous conditions created by the Permittee. PG&E should not have to first consult and negotiate with the Permittee who created those conditions before remedying the condition because PG&E owns the poles and has the right to maintain safe conditions without negotiating with third parties.

- o Paragraph 3.2: PG&E states the obvious that Permittee shall not interfere with PG&E's work on the poles and PG&E's priority in accessing poles and the rights of way. In current contracts this clause is absent and one wonders why is there a necessity for this change?

PG&E maintains that it is important to clarify, as this provision does, exactly what safety standards everyone must comply with.

- o Paragraph 4.1: PG&E inserts a 'Conditions Precedent' clause in the proposed Agreement making it conditional to Permittee's obtaining easements. Cal-SLA asserts that the PG&E pole is sitting in the city's right-of-way and the city acquires the light. It is not the city [Permittee] that needs to obtain an easement. It already owns the right-of-way.

PG&E states that some PG&E poles are not on franchises granted by towns and cities, but are on easements granted by private entities. If a PG&E pole is on privately-owned property, the town or city would need to secure permission to attach or maintain the streetlight on that pole.

- o Paragraph 5.1: PG&E's broadening of Permittee indemnification and liability requirements are extremely one-sided and quite different from the current Agreements which were entered into by negotiation and approved by the Commission.

PG&E states that this clause is reasonable because the Permittee [not PG&E] will maintain the attachments and should be responsible for resulting losses. PG&E also asserts that it wants the Permittee to defend suits arising out of the indemnification provisions, otherwise PG&E would be obliged to absorb losses from the pole attachment.

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- o Paragraph 5.2: Cal-SLA sees no reason why PG&E's ad valorem taxes would increase because a city owns a streetlight on a distribution pole. PG&E offers no evidence to justify this clause.

PG&E explains that if its ad valorem taxes increase as a result of the Permittee's attachment to PG&E's pole, it is reasonable that the Permittee pay for the increase.

- o Paragraph 5.4: PG&E sets a limitation on its liability. Protestors ask why should PG&E not be fully responsible for its wrongdoings.

PG&E replies that limits on liability are common in PG&E's tariffs and in the present case the limit of its liability is to be the sum of the pole rental fees [which means zero liability because PG&E has amended its original request and is not asking for such fees at this time].

- o Paragraph 5.5: PG&E makes no warranties for the poles. No reason is given.

PG&E states that the main purpose of its poles is to support the distribution lines and it is not appropriate to warranty that the poles are in sufficient condition for the streetlight attachment.

- o Paragraph 6: PG&E requires significant additional insurance requirements, without showing why this is necessary.

PG&E replies that the insurance requirements for the Agreement were developed as part of a company-wide, systematic process, and are reasonable.

- o Paragraphs 7.1, 7.2, and 7.3: These relate to dislocation, relocation, and removal of poles, without giving reasons. These are not issues in the current Agreements and therefore are a cause for concern for protestants as to PG&E's motives for doing so.

PG&E contends that such a provision is reasonable because PG&E may not need a certain pole for its distribution system and so should not be required to maintain them just because they support streetlights. PG&E advances similar argument for relocation of a pole for a variety of reasons.

- o Paragraph 11.1: The current Agreements are for ten year period and automatically renewed on an annual basis. The proposed Agreement would change this time period without giving any justification.

PG&E believes that leaving the term unspecified is reasonable and appropriate given the uncertainty of electric industry restructuring, which may cause PG&E to

enter into shorter term agreements until the impact of restructuring on PG&E is certain.

- o Paragraph 11.2: It is not known under what circumstances would there be termination. PG&E reserves the right to decide if the Agreement terminates.

PG&E says it wants to reserve the right to terminate the Agreement if it needs the space or capacity occupied by the streetlight. PG&E also cites the circumstance when the ownership interest in a pole is transferred to another party who needs the space occupied by the streetlight. PG&E is of the opinion that the owners of the pole should have priority over municipalities to use the pole. PG&E also would terminate the Agreement if Permittee fails to comply with the terms of the Agreement or fails to obtain and maintain the appropriate property rights. Finally, the termination clause allows PG&E to terminate the Agreement (which basically is a license) with 90 days' notice, for any reasons it sees fit to do so.

Conclusion

14. The Energy Division has reviewed PG&E's request in ALs 1571-E and 1571-E-A, the four protest letters, and PG&E's response to them. The Protestants raise important factual issues that should be considered in the wider forum of an Application rather than the regulatory procedure provided through an advice letter review.

15. The changes in Standard form 79-938 are substantive and numerous. The protestors, in turn, are adamant that the risk exposure for them is substantial. The Energy Division is aware of PG&E's concerns that its poles are being used for purposes other than originally intended and with little commensurate remuneration. The Energy Division believes that by serving notice of its request to more relevant and concerned parties, PG&E can provide ample time for its Permittees to rearrange their plans, present information for consideration by the Commission, and be better prepared for the possible approval of its request.

16. PG&E may refile its request through an Application, thus providing a better forum for interested parties. The Energy Division therefore recommends that the Commission deny the request, without prejudice, and reject the Advice Letters.

FINDINGS

1. Pacific Gas and Electric Company [PG&E] filed Advice Letters [AL] 1571-E and 1571-E-A on March 20, and May 7, 1996 requesting revision of its electric Standard Form 79-938, Customer Owned Streetlights -- Pole Contact Agreement [Agreement].

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2. The proposed Agreement makes numerous changes to the existing version of the Agreement, putting more conditions on streetlight pole contacts, some of which may result in increased charges to the Permittees for the pole contact.

3. Marin Street Light Acquisition Joint Powers Authority (MSL), The California City-County Streetlight Association (Cal-SLA), the City and County of San Francisco (CCSF), and Alameda County jointly with the cities of Albany, Dublin, Emeryville, Fremont, Hayward, Livermore, Newark, Piedmont, Pleasanton, San Leandro and Union City [the Cities] protested AL 1571-E. PG&E responded timely to the protests.

4. PG&E has not provided sufficient notice of its filing to interested parties.

5. Important issues of fact raised by the protestants should be resolved in an evidentiary proceeding, rather than through the advice letter review process.

6. PG&E's request in this filing should be denied without prejudice and the Advice Letters rejected. PG&E may refile its request through an Application.

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THEREFORE, IT IS ORDERED that:

1. Pacific Gas and Electric Company's (PG&E) request in its Advice Letters 1571-E and 1571-E-A is hereby denied, without prejudice. The Advice Letters shall be marked rejected and returned to the utility.
2. PG&E may file an Application for consideration of its requested changes to the Pole Contact Agreement.
3. This Resolution is effective today.

I hereby certify that this Resolution was adopted by the Public Utilities Commission at its regular meeting on July 16, 1997. The following Commissioners approved it:


WESLEY FRANKLIN
Executive Director

P. Gregory Conlon, President
Jessie J. Knight, Jr.
Henry M. Duque
Josiah L. Neeper
Richard A. Bilas
Commissioners