

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
Nora Mead Brownell, Joseph T. Kelliher,
and Suedeen G. Kelly.

Pacific Gas and Electric Company

Docket No. EL04-19-000

ORDER GRANTING PETITION FOR DECLARATORY ORDER

(Issued January 28, 2004)

1. In this order, we grant Pacific Gas and Electric Company's (PG&E) petition for a Declaratory Order reaffirming PG&E's continuing use of a Commission-approved revenue sharing mechanism for forecast net revenues generated by certain specific secondary uses of PG&E's jurisdictional assets. This order is beneficial because it allows PG&E to make maximum use of its jurisdictional assets to the benefit of both PG&E's ratepayers and shareholders.

Background

2. On March 29, 2000, the Commission authorized a PG&E proposal for a revenue sharing ratemaking treatment for certain, specific secondary uses of its jurisdictional assets.¹ The Commission allowed PG&E to credit the anticipated net revenues on a 50-50 basis between its ratepayers and shareholders, with shareholders bearing any risk of loss.² The Commission provided guidance with respect to the revenue sharing mechanism stating that the revenues and costs should be accounted for on a product-by-product basis, in order to allocate the downside risk to those seeking opportunities for reward (*i.e.*, the shareholders). In addition, since PG&E was proposing to use forecast rather than actual revenues and expenses in calculating the shared net revenues, the Commission granted interim approval for a three-year time period, and directed PG&E to

¹See Pacific Gas and Electric Co., 90 FERC ¶ 61,314 (2000) (March 29 Order).

²PG&E defined net revenues as the gross revenue from the sale of the product less both incremental costs and taxes. PG&E proposed that the incremental costs associated with the product, including both recurring and non-recurring costs specifically attributable to each product, be accounted for separately from the utility costs that appear in FERC numbered accounts.

submit information regarding the effect of the revenue sharing mechanism on the transmission rates concurrent with the filing of its first rate case following that three-year time period to allow the Commission to examine concrete data on these lines of business and to determine the proper risk/reward ratio at the end of the three-year period.³

3. On October 31, 2003, PG&E filed its latest Transmission Owner Tariff (TO7) rate case in Docket No. ER04-109-000.⁴

Instant Application

4. On November 10, 2003, PG&E filed this petition for Declaratory Order requesting the Commission to extend the terms of the March 29 Order, and reaffirm the continued use of the revenue sharing ratemaking treatment approved in the March 29 Order. PG&E argues that the revenue sharing mechanism for secondary products and services favors ratepayers. PG&E states that, rather than degrading PG&E facilities, the revenue sharing mechanism allows PG&E to obtain benefits to the transmission system beyond traditional revenue streams and to pursue secondary products and services aggressively with PG&E's ratepayers and shareholders sharing the benefits 50-50 while the shareholders assume 100 percent of the risk.

5. PG&E points out that the secondary products and services continue to be the same as in the March 29 Order, and that each one either has brought in more revenue than its cost or has been cost neutral. In its filing, PG&E states that ratepayers received a reduction in rates of approximately \$1.3 million in year 2000 and \$3.2 million in 2003, and are forecast to receive a reduction in rates of approximately \$4.2 million in 2004. According to PG&E, the secondary products and services authorized in the March 29 Order have not adversely affected electric transmission reliability, capacity or expansion, and in fact, have resulted in improvements to PG&E's transmission system at no cost to PG&E or its ratepayers. PG&E contends that a Commission decision to credit these revenues against its transmission revenue at this time would have a detrimental impact on its willingness to pursue such revenues, and thus, adversely impact ratepayers. Arguing that this petition has broad application and is inappropriate for determination in a single rate case, PG&E, therefore, requests Commission action on the continuation of this revenue sharing mechanism in this case separate from its TO7 rate filing.

6. In addition, PG&E requests the Commission to declare that PG&E's proposed treatment of a lump-sum payment by Electric Lightware Inc. (ELI) for an existing

³The three-year time period began on April 1, 2000, the effective date of the proposed PG&E rates in Docket No. ER99-4323-000.

⁴See 105 FERC ¶ 61,389 (2003).

contract for an optical fiber communications system constructed along PG&E's right-of-way, and a related new service contract with ELI are consistent with the revenue sharing mechanism for secondary products and services approved in the March 29 Order. Under the March 29 Order, to date, the net revenues for this contract with ELI are split between ratepayers and shareholders annually. ELI now proposes to pay a \$19 million lump sum to PG&E in lieu of the remaining annual payments under the contract, and to enter into a new service contract. PG&E proposes to treat the \$19 million lump sum payment as net revenue to be shared between ratepayers and shareholders pursuant to the March 29 Order's revenue sharing mechanism.

7. According to PG&E, the resulting ratepayer credit was not included in its TO7 rate case in Docket No. ER04-109-000 because ELI only recently requested the change, the agreement is not finalized, and there was no reliable estimate of revenues and costs to include in the TO7 cost of service data. PG&E argues that ELI's and PG&E's payments under these transactions should be addressed within the TO7 rate case, and that it proposes to make adjustments to its transmission revenue requirement to reflect the revenue credit and expense effects of these transactions. PG&E, therefore, requests the Commission to confirm in this docket that PG&E's proposed treatment of the lump sum payment from ELI and the associated new PG&E/ELI service contract are consistent with the March 29 Order's revenue sharing mechanism for secondary products and services. PG&E also requests the Commission to refer the implementation of these transactions to the presiding Administrative Law Judge assigned to the TO7 rate case in Docket No. ER04-109-000.

Notice of Filing and Pleadings

8. Notice of PG&E's petition was published in the Federal Register, 68 Fed. Reg. 67,411 (2003), with motions to intervene and protests due on or before December 1, 2003. The State of California Electricity Oversight Board (Oversight Board) and the Transmission Agency of Northern California (TANC) filed timely motions to intervene and comment.

9. The Oversight Board does not oppose PG&E's petition, stating that the products and services addressed in the March 29 Order and this current petition are secondary and incidental to the transmission of electric energy under the Commission's jurisdiction in light of the limited revenue generated from the products and services at this time. However, the Oversight Board argues that, should the revenues generated from these secondary products and services continue to increase, the classification of these products and services as secondary or incidental at some point will become inappropriate and the Commission's assertion of ratemaking authority over such revenue also will become inappropriate.

10. TANC also does not oppose PG&E's petition but states that any Commission action in this case should not obviate PG&E's obligation to provide full support and documentation for the expenses and revenues derived from new products and services associated with the ELI contract renegotiations in its TO7 rate proceeding.

Discussion

Procedural and Preliminary Matters

11. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2003), the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

12. We note that, on April 6, 2001, PG&E filed for Chapter 11 bankruptcy protection. Although the Bankruptcy Code provides that the filing a bankruptcy petition automatically stays certain actions against the debtor,⁵ the Code also provides an exception from this automatic stay for:

An action or proceeding by a governmental unit . . . to enforce such governmental unit's or organization's police and regulatory power, including the enforcement of a judgment other than a money judgment, obtained in an action or proceeding by the governmental unit to enforce such governmental unit's or organization's police or regulatory power.⁶

13. The Commission has found in the past that actions taken under the authority granted it by the Federal Power Act and the controlling regulations fit within this exception, and therefore, are exempt from the automatic stay provision.⁷ Here, we are exercising our regulatory power under Section 205 of the Federal Power Act.

⁵ 11 U.S.C. § 362(a)(1)(1994 & Supp. 2000).

⁶ 11 U.S.C. § 362(b)(4)(1994 & Supp. 2000).

⁷ See *Virginia Electric and Power Co.*, 84 FERC ¶ 61,254 (1998) and *Century Power Corp.*, 56 FERC ¶ 61,087 (1991). The Commission's conclusion on this matter is consistent with judicial precedent regarding the scope of the exemption to the automatic stay. *E.g.*, *Board of Governors of the Fed. Reserve Sys. v. MCorp Fin., Inc.*, 502 U.S. 32 (1991); *SEC v. Brennan*, 250 F.3d 65 (2nd Cir. 2000); *NLRB v. Continental Hagen Corp.*, 932 F.2d 828 (9th Cir. 1991); *United States v. Commonwealth Cos. Inc.*, 913 F.2d 518 (8th Cir. 1990); *NLRB v. Edward Cooper Painting, Inc.*, 804 F.2d 934 (6th Cir. 1986); *Penn Terra Ltd. v. Dept. of Environmental Resources*, 733 F.2d 267 (3rd Cir. 1984); see generally 3 *Collier on Bankruptcy* § 362.05 (15th ed. rev. 2000).

Declaratory Order

14. We find that PG&E's revenue sharing mechanism for secondary products and services continues to provide an appropriate incentive that will ensure that the revenues from such products and services will be maximized for the good of both the ratepayers and shareholders. We find that PG&E's revenue sharing mechanism provides for the reliability of PG&E's transmission system while pursuing secondary uses of the system, and that the allocation of downside risk to shareholders provides an added incentive for cost efficiency. In light of our review, we find that PG&E's revenue sharing mechanism, under the specific circumstances as described in the petition, continues to be appropriate and acceptable.

15. Accordingly, we will grant the requested extension of the revenue sharing mechanism for secondary products and services under the terms of the March 29 Order for another three-year period. At that time, PG&E will be required to submit an application for continuance of the revenue sharing mechanism concurrent with its first transmission rate case following this three-year period.

16. Additionally, we find that PG&E's proposed treatment of the revenues and expenses associated with the renegotiated contract with ELI are consistent with the March 29 Order guidelines regarding the revenue sharing mechanism for secondary products and services. We also conclude that PG&E's request that the contract changes (currently being negotiated between PG&E and ELI) be considered in PG&E's pending TO7 rate case in Docket No. ER04-109-000 is a matter more appropriately raised with the presiding Administrative Law Judge in that docket.

The Commission orders:

PG&E's petition for a declaratory order is hereby granted, as discussed in the body of this order.

By the Commission.

(S E A L)

Linda Mitry,
Acting Secretary.