

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Pacific Gas and Electric Company) Docket No. ER04-215-000

ORDER ACCEPTING AND SUSPENDING RATE SCHEDULE SHEETS,
ESTABLISHING HEARING AND SETTLEMENT PROCEDURES, AND DENYING
WAIVER OF PRIOR NOTICE REQUIREMENT

(Issued April 16, 2004)

1. In this order, the Commission accepts for filing proposed rate schedule sheets contained in a Quarterly Small Facilities Authorization Letter (Authorization Letter) filed by Pacific Gas and Electric Company (PG&E) pursuant to an agreement between PG&E and the City and County of San Francisco (San Francisco), suspends them for a nominal period, and makes them effective as discussed below. In addition, this order sets the matter for hearing, but holds the hearing in abeyance so that the parties may engage in settlement discussions.
2. Further, this order denies PG&E's request for waiver of the Commission's prior notice requirement for agreements executed prior to the quarter ending October 31, 2003.
3. This order benefits customers because it allows PG&E to continue providing service to San Francisco while encouraging PG&E and San Francisco to resolve their disagreement through direct settlement negotiations and requiring that agreements be filed with the Commission in a timely manner.

I. Background

4. The instant filing was made pursuant to a 1987 agreement between PG&E and San Francisco governing the interconnection of small facilities owned by San Francisco with PG&E's transmission system.¹ The 1999 Amendments modified the 1987 Agreement and were designed to streamline the filing process and to prevent delays in the construction of facilities requested by San Francisco. Among other things, the 1999 Amendments allow PG&E to collect payment from San Francisco for small facilities² prior to filing them with the Commission. Additionally, the 1999 Amendments allow PG&E to submit, on a quarterly basis, all executed small facilities authorization letters (FALs) entered into by the parties during the previous quarter.

II. Description of PG&E's Authorization Letter

5. On November 21, 2003, PG&E submitted its fifth Authorization Letter containing numerous executed FALs with San Francisco.³ PG&E states that between April 2000 and April 2002, it has installed 52 small facilities at the request of San Francisco. PG&E states that these small facilities are located on San Francisco's property, are owned by PG&E and were designed specifically for service to San Francisco for San Francisco's load. The Quarterly Authorization Letter details the terms and conditions for the ownership, operation and maintenance of the facilities. Also included are the cost breakdowns, job descriptions and line diagrams for each of the 52 small facilities.

6. PG&E requests waiver of the Commission 60-day prior notice requirement⁴ to permit the proposed rate schedule sheets to become effective on each facility's initiation date (beginning in 2000). PG&E states that it delayed making this quarterly filing "due to outstanding unresolved disputes with [San Francisco]."⁵

¹ Pacific Gas and Electric Company, 44 FERC ¶ 61,010 (1988) (1987 Agreement). The 1987 Agreement was amended in 1999 (1999 Amendments) and accepted by the Commission in an unpublished letter order issued in Docket No. ER99-2532-000, pursuant to delegated authority on May 27, 1999.

² As defined in sections 3.2 and 3.3 of the Procedures, small facilities are those with total estimated construction costs of up to \$50,000.

³ This is PG&E's fifth quarterly filing.

⁴ 18 C.F.R. § 35.3 (2003).

⁵ PG&E filing at 2.

III. Notice of Filing and Responsive Pleadings

7. Notice of PG&E's filing was published in the Federal Register, 68 Fed. Reg. 68,369 (2003), with comments, protests, and motions to intervene due on or before December 12, 2003. San Francisco filed a motion to intervene and protest on December 12, 2003. The parties filed two joint motions requesting deferral of Commission action until February 27, 2004 and April 28, 2004, respectively. No other motions to intervene or comments were received.

8. San Francisco protests three aspects of PG&E's filing. First, San Francisco states that, contrary to PG&E's assertion,⁶ San Francisco representatives did not inform PG&E that San Francisco agreed with the waiver request, nor did San Francisco authorize PG&E's statement. However, San Francisco does state that it is willing to support the filing as long as it is clear that it is not waiving its rights with respect to the facilities or costs in this filing or its rights to challenge costs, including PG&E's application of tariff rules, and any fraudulent or negligent behavior.

9. Second, San Francisco protests the filing insofar as PG&E has failed to provide a detailed cost breakdown for each of the facilities. San Francisco states that it has asked PG&E to provide detailed cost information on a number of facilities and that PG&E has failed to produce such information. San Francisco explains that until detailed cost estimates are provided, it has no way to determine or verify whether PG&E's small facilities costs are reasonable.

10. Last, San Francisco takes issue with the inclusion of a particular facility, the Ferry Building, in the Authorization Letter.⁷ According to San Francisco, the parties are currently in a dispute over the proper classification of this small facility, and San Francisco requests that the filing as to that project be withdrawn until the parties resolve the issue.

IV. Discussion

11. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedures, 18 C.F.R. § 385.214 (2003), San Francisco's timely, unopposed motion to intervene serves to make it a party to this proceeding.

⁶ PG&E's filing at 4.

⁷ The specific project is designated by PG&E's filing as Exhibit 44.

12. The Commission has twice granted the parties an additional 60-day deferral in order to work out their differences. However this second 60-day time period is set to expire on April 28, 2004, and without Commission action the proposed tariff sheets would go into effect by operation of law.⁸

A. PG&E's Request for Waiver of the Commission's 60-Day Prior Notice Requirement.

13. The Federal Power Act requires that, absent waiver, a rate must be filed with the Commission at least 60 days before a public utility can charge that rate to a customer.⁹ In 1999 the parties requested that the Commission allow PG&E to begin charging San Francisco for small facilities before the rate was filed and accepted by the Commission, and provided for quarterly filings to implement this process.

14. PG&E has not been submitting the FALs as agreed. In fact, PG&E's last "quarterly" FAL filing was made in October of 2000. PG&E attempts to excuse its tardiness here by stating that it was prevented from filing the FALs because of "outstanding unresolved disputes"¹⁰ with San Francisco. This is almost exactly the same argument made by PG&E and rejected in Docket No. ER99-2532-000; the letter order stated "[y]ou state that reaching agreement with [San Francisco] on project costs was the principal reason for deferring filing. This does not constitute an extraordinary circumstance [as required by Central Hudson]. Accordingly, your request for waiver is denied."

15. As we stated in Central Hudson, even in instances where the Commission grants waiver, "we stress[] the need for public utilities to make the filings as soon as possible."¹¹ By any measure, PG&E has failed to do so. Therefore, PG&E's request for waiver is denied.

⁸ 16 U.S.C. § 842d (2000).

⁹ 16 U.S.C. § 824(d) (2000); see also 18 CFR § 35.3 (2003).

¹⁰ PG&E filing at 2.

¹¹ See Central Hudson Gas and Electric Corp., 60 FERC ¶ 61,106 (1992), order on reh'g, (Central Hudson).

16. The Commission has stated that:

if waiver is denied and the proposed rate goes into effect after service has commenced, we will require the utility to refund to its customers the time value of the revenues collected . . . for the entire period that the rate was collected without Commission authorization.¹²

Therefore we will require PG&E to refund the time value of the revenues actually collected for the time period that the rates were charged without Commission authorization until the date refunds are made.¹³ Since PG&E had permission to file its FALs on a quarterly basis, the period for which refunds must be paid runs from the date each FAL should have been filed with the Commission if PG&E had timely filed them until the date the refunds are paid to San Francisco.

B. San Francisco's Protest of Cost Information

17. San Francisco's concern about whether PG&E has provided sufficiently detailed cost information for each facility and the inclusion of the Ferry Building facility in this Authorization Letter raise questions of material fact that cannot be resolved based on the record before us, and are more appropriately addressed in the hearing ordered below. Our preliminary analysis indicates that the Authorization Letter has not been shown to be just and reasonable, and may be unjust, unreasonable, unduly discriminatory or preferential or otherwise unlawful. Therefore, we will accept the Authorization Letter for filing, suspend it for a nominal period, make each small facilities agreement effective 60 days from the date of this filing or January 21, 2004, subject to refund, and set the matter for hearing and settlement judge procedures.

18. While we are setting these matters for a trial-type, evidentiary hearing, we encourage the parties to make every effort to settle their dispute before hearing procedures are commenced. To aid the parties in their settlement efforts, we will hold the hearing in abeyance and direct that a settlement judge be appointed pursuant to Rule 603 of the Commission's Rules of Practice and Procedure.¹⁴ If the parties desire, they may, by mutual agreement, request a specific judge as the settlement judge in this proceeding; otherwise, the Chief Administrative Law Judge will select a judge for

¹² El Paso Electric Company, 105 FERC ¶ 61,131 at P 19 (2003).

¹³ See Prior Notice and Filing Requirements Under Part II of the Federal Power Act, 64 FERC ¶ 61,139, order on reh'g, 65 FERC ¶ 61,081 (1993).

¹⁴ 18 C.F.R. § 385.603 (2003).

this purpose.¹⁵ The settlement judge shall report to the Chief Judge and the Commission within 60 days of the date of this order concerning the status of settlement discussions. Based on this report, the Chief Judge shall provide the parties with additional time to continue their settlement discussions or provide for commencement of a hearing by assigning the case to a presiding judge.

The Commission orders:

(A) PG&E's rate schedule sheets are hereby accepted for filing and suspended for a nominal period, to become effective January 21, 2004, subject to refund, as discussed in the body of this order.

(B) PG&E's request for waiver of the Commission's 60-day prior notice requirement is hereby denied.

(C) Pursuant to the authority contained in and subject to the jurisdiction conferred upon the Federal Energy Regulatory Commission by section 402(a) of the Department of Energy Organization Act and the Federal Power Act, particularly sections 205 and 206 thereof, and pursuant to the Commission's Rules of Practice and Procedure and regulations under the Federal Power Act (18 C.F.R. Chapter I), a public hearing shall be held concerning the justness and reasonableness of the proposed rate schedule sheets contained in the Quarterly Authorization Letter. However, the hearing shall be held in abeyance to provide time for settlement judge procedures, as discussed in Paragraphs (D) and (E) below.

(D) Pursuant to Rule 603 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.603 (2003), the Chief Administrative Law Judge is hereby directed to appoint a settlement judge in this proceeding within fifteen (15) days of the date of this order. Such settlement judge shall have all powers and duties enumerated in Rule 603 and shall convene a settlement conference as soon as practicable after the Chief Judge designates the settlement judge. If the parties decide to request a specific judge, they must make their request to the Chief Judge in writing or by telephone within five (5) days of the date of this order.

¹⁵ If the parties decide to request a specific judge, they must make their joint request to the Chief Judge by telephone at (202) 502-8500 within five days of this order. The Commission's website contains a list of Commission judges and a summary of their background and experience (www.ferc.gov - click on Office of Administrative Law Judges).

(E) Within sixty (60) days of the date of this order, the settlement judge shall file a report with the Commission and the Chief Judge on the status of the settlement discussions. Based on this report, the Chief Judge shall provide the parties with additional time to continue their settlement discussions, or assign this case to a presiding judge for a trial-type evidentiary hearing, if appropriate. If settlement discussions continue, the settlement judge shall file a report at least every sixty (60) days thereafter, informing the Commission and the Chief Judge of the parties' progress towards settlement.

(F) If settlement judge procedures fail and a trial-type evidentiary hearing is to be held, a presiding judge, to be designated by the Chief Judge, shall convene a conference in this proceeding in a hearing room of the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 20426. Such conference shall be held for the purpose of establishing a procedural schedule. The presiding judge is authorized to establish procedural dates, and to rule on all motions (except motions to dismiss) as provided in the Commission's Rules of Practice and Procedure.

(G) PG&E is hereby directed to refund the time value of revenues collected without Commission authorization, as discussed in the body of this order.

(H) PG&E is hereby directed to make time value refunds, within 30 days of the date of this order and to file a refund report with the Commission within 30 days thereafter.

By the Commission.

(S E A L)

Linda Mitry,
Acting Secretary.