

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. ER01-1639-007

ORDER DENYING REHEARING OF REMAND ORDER

(Issued June 1, 2005)

1. On December 22, 2004, the Commission issued an order¹ that responded to a remand by the United States Court of Appeals for the District of Columbia Circuit in *Pacific Gas and Electric Co. v. FERC* (December 22 Order).² The December 22 Order affirmed the initial decision, issued on April 14, 2004,³ in response to that remand, and concluded that:

- before Pacific Gas & Electric Co. (PG&E) filed its original, unilateral proposal under section 205 of the Federal Power Act to increase transmission rates and establish transmission-related rates, PG&E had substantially complied with the joint review requirement of Article 32 in Contract 2948A (Article 32)⁴ with the Western Area Power Administration (Western); and

¹ *Pacific Gas and Electric Co.*, 109 FERC ¶ 61,337 (2004).

² 326 F.3d 243 (D.C. Cir. 2003).

³ *Pacific Gas and Electric Co.*, 107 FERC ¶ 63,011 (2004) (2004ID).

⁴ Executed in 1967, Contract 2948A provides for the interconnection and integration of the loads and resources of PG&E and Western, and contains PG&E's rates for the sale of capacity, energy, and transmission service to Western. Article 32 states the joint review requirement:

Rates and charges under this contract shall be fair and equitable and shall ... together with service charges, be jointly reviewed, and adjusted as appropriate on April 1, 1971, and every five years thereafter... Such review shall take into account substantial savings accruing to either party and applicable costs of construction and production, including changes therein

(continued....)

- since Article 32 does not require an effective date of only April 1, 2001, PG&E's filing of transmission and transmission-related rates, effective on October 28, 2001 did not violate the *Mobile-Sierra* doctrine.⁵

2. Western and the Northern California Power Agency (NCPA), a customer of Western, filed requests for rehearing of the December 22 Order. This order denies the requests for rehearing. This order benefits customers because it will permit the parties to address rates for a locked-in period in the on-going proceedings (Phase II) in this docket before the Presiding Judge.

I. Background

A. Court Remand

3. While the court affirmed the Commission's earlier orders holding that Contract 2948A precluded PG&E's use of section 205 to change its energy rates,⁶ the court vacated and remanded for further consideration the portion of those orders discussing whether PG&E met the joint review requirement of Article 32 (a condition precedent for changing transmission and transmission-related rates under section 205). The court observed that the Commission's orders prohibited PG&E's new transmission and transmission-related rates because PG&E had not met the joint review requirement of Article 32.⁷ The court determined, however, that the Commission (and Presiding Judge) had applied the incorrect standard for determining PG&E's compliance with the joint review requirement and that the evidence in the record of failure to comply was not overwhelming.

and appropriate service charges, during the preceding five years. If the parties are unable to agree on a change of any rate or charge, the matter shall be submitted to [the Commission] for final decision.

⁵ *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 332 (1956); *FPC v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956).

⁶ *Pacific Gas and Electric Co.*, 97 FERC ¶ 61,082, *reh'g denied*, 97 FERC ¶ 61,335 (2001); *Pacific Gas and Electric Co.*, 96 FERC ¶ 63,043 (2001).

⁷ *Pacific Gas and Electric Co. v. FERC*, 326 F.3d 243, 250 (D.C. Cir. 2003).

B. 2004 ID and December 22 Order Affirming ID

4. The Commission instituted hearing procedures in response to the Court's remand to further consider the joint review issue. The resulting *2004ID* applied the court's less stringent substantial compliance standard and concluded that the contacts between the parties established that PG&E had substantially complied with the joint review requirement under Article 32 for transmission, RS and SC rates.⁸ In addition, the Presiding Judge rejected NCPA's assertion that PG&E's original filing was barred under Article 32 because that Article required a filing for a rate change under section 205 in five year increments to become effective only on April 1, 2001 (and not on October 28, 2001, as in this proceeding).

5. The December 22 Order concluded that the Presiding Judge, having applied the proper legal standard, reasonably found upon a review of the record that PG&E satisfied the joint review requirement.⁹ The December 22 Order also affirmed the decision of the Presiding Judge that NCPA should have litigated the effective date issue earlier in these proceedings and that, in any event, NCPA's argument lacked merit given the parties' past practice and prior Commission rate orders allowing an effective date other than April 1.¹⁰

II. Discussion

A. Joint Review Requirement

6. The issue now before us is whether the December 22 Order correctly concluded (in agreeing with the Presiding Judge) that PG&E substantially complied with the joint review requirement of Article 32 before making its rate filing. The arguments raised do not persuade us that we acted incorrectly, and we will deny rehearing.

7. Western continues to assert that joint review did not occur because in previous five-year reviews under Article 32 there was more interaction in person or by telephone before PG&E made its five-year rate filings. Western and NCPA continue to argue that joint review could not have occurred at the settlement meetings addressing mainly energy rates (and only incidentally transmission and a proposal for SC rates) or during a ten-minute phone call on the RS rate because PG&E did not negotiate on these charges independently of energy rates. They contend that PG&E negotiated in bad faith by

⁸ *2004ID* at P 43-45, 59, 60.

⁹ December 22 Order at P 10-19.

¹⁰ *Id.* at P 20; *2004ID* at P 46-58.

insisting that Western forfeit \$1 billion in low energy rates that PG&E knew Western was entitled to receive before PG&E would negotiate on transmission and transmission-related rates.

8. We acknowledge that the parties approached the joint review discussions in a manner differently than in past joint review sessions given the emphasis the parties placed on the more dollar-significant energy rates. Yet, as the December 22 Order noted, discussions on transmission and transmission-related rate proposals did occur at these meetings -- which presented Western with opportunities to make counteroffers, to seek information, or to seek separate negotiation on transmission and transmission-related rates. It is irrelevant that the settlement meetings were not also expressly labeled as “joint review meetings,” since transmission and transmission-related rates and energy rates were discussed in the same forum.

9. The parties in their meetings, e-mails or phone calls disagreed on transmission and transmission-related rate proposals, resulting in an impasse. Western could have asked in follow-up letters, e-mails, telephone calls, or other communications for greater detail, but did not. In short, there were contacts, even if they lacked the formality and depth Western and NCPA would have preferred on transmission and transmission-related rates. These circumstances do not amount to a denial of an opportunity to have asked for access to information on transmission and transmission-related rates. Hard bargaining, moreover, does not amount to bad faith that would be inconsistent with Article 32’s joint review requirement. Western’s and NCPA’s argument does not convince us that joint review did not occur on transmission and transmission-related rates.

10. Western contends that PG&E has the ultimate burden under section 205 to demonstrate that joint review occurred and that it failed to rebut Western’s evidence that no joint review occurred. The December 22 Order essentially concluded, and we affirm here, that PG&E satisfied its burden to substantially comply with the joint review requirement. We found that Western’s interpretation of the contacts is not plausible; Western would have us hold PG&E to strict compliance with the joint review requirement, but that burden would be inconsistent with the Court’s mandate.

11. The December 22 Order declined to follow orders in Docket No. ER00-2360-000, affirming a Presiding Judge’s determination that PG&E had failed to satisfy a strict compliance standard for joint review under Article 32 for an amendment of an RS tariff.¹¹ Western asserts, however, that the principles of *res judicata* and collateral estoppel require the Commission to disregard the evidentiary proceedings in the instant docket and

¹¹ December 22 Order at P 17; *Pacific Gas and Electric Co.*, 95 FERC ¶ 63,022 at 65,212 (2001), *aff’d*, 100 FERC ¶ 61,160 (2002).

to apply the joint review determination in Docket No. ER00-2360-000, involving the same parties and issues, to the instant proceeding. We do not dispute that PG&E did not appeal our orders in ER00-2360-000, which are now final. But those orders applied a strict compliance standard to evaluate PG&E's behavior (which PG&E failed). The Court of Appeals has, however, since rejected a strict compliance standard. Western essentially asks us to disregard the Court of Appeals and to evaluate PG&E's behavior under the now repudiated strict compliance standard. This we may not do. Since the circumstances in this case are different (*i.e.*, the Court of Appeals having now addressed the matter), *res judicata* and collateral estoppel do not apply to require the same outcome on the merits, *i.e.*, rejection of the RS filing.

12. The December 22 Order also found that the Presiding Judge acted properly in issuing an order on December 17, 2003 denying Western's motion to compel discovery responses from PG&E as to joint review that may have occurred *after* the date of the original filing.¹² Western asserts that, if the Presiding Judge had granted its motion, evidence might have surfaced to show that PG&E never intended to conduct joint review before it made its filing and actually engaged in joint review after the filing. We found that PG&E's conduct *after* the filing would be irrelevant to determining whether joint review, a condition *precedent* to making the rate filing, occurred under Article 32. The record as it exists indicates, in fact, that PG&E substantially complied with the joint review requirement.

13. Western argues that Western, a federal agency, must consent in a contract amendment before PG&E, a government contractor, may provide it with new RS and SC services and pass through its RS and SC charges; otherwise, Western would violate its duties under federal contracting laws, Reclamation laws,¹³ and the Anti-Deficiency Act (as relevant here, prohibiting the expenditure by Western of unappropriated funds).¹⁴ PG&E filed a motion to strike or answer these arguments, which Western answered.¹⁵

14. Contract 2984A is a valid and binding contract. Western points us to no Federal law or regulation, and certainly none that we administer, that PG&E's RS or SC rates would violate. The Commission previously found that it has no authority to enforce the

¹² December 22 Order at P 18.

¹³ 43 U.S.C. § 485h(c) (2000).

¹⁴ 31 U.S.C. § 1341 (2000).

¹⁵ PG&E's motion is denied pursuant to Rule 713(d) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.713(d) (2004).

Anti-Deficiency Act,¹⁶ it is not at all clear that PG&E's exercising its rights to make a filing under the Federal Power Act is subordinate to federal contracting or the Reclamation laws or that it is within our authority to make a finding under the Federal Power Act based on those laws. These grounds for rejecting the RS and SC rates in PG&E's filing are unsubstantiated, outside the scope of this proceeding, and are therefore denied.

B. Effective Date of Original Filing

15. Article 32 requires that “[r]ates and charges under this contract ... shall be jointly reviewed, and *adjusted as appropriate on April 1, 1971, and every five years thereafter....*” The December 22 Order stated that the parties and Commission to date have not required an effective date only of April 1.¹⁷

16. NCPA argues that it appropriately raised this issue on exceptions to the *2004ID*. NCPA contends that the filing is barred because the April 1 effective date is a jurisdictional requirement that PG&E did not satisfy and that the Commission failed to provide a textual reading that would support its conclusion.

17. Under NCPA's analysis, which we reject, if PG&E misjudges the Commission's waiver and suspension determinations related to its five year filing, and the Commission directs an effective date other than April 1, the five year rate filing is barred on *Mobile-Sierra* grounds. That hyper-technical interpretation would negate the five-year rate adjustment mechanism and is not a reasonable interpretation of Article 32. We read Article 32 to provide, as reflected in the parties' own course of conduct over the years and in Commission orders, that following the initial effective date of April 1, 1971, rates are to be adjusted every five years “thereafter.” The ideal operation of Article 32 would permit PG&E to promptly update its rates on the start of the new anniversary year on April 1. But such punctuality is not always possible and is not expressly required,¹⁸ and the old, presumably lower, rates will continue until superseded by the new, presumably higher, rates.

¹⁶ See *Pacific Gas and Electric Co.*, 96 FERC ¶ 61,102 at 61,406 (2001).

¹⁷ December 22 Order at P 20.

¹⁸ If the parties had intended that all subsequent rate changes must be effective on April 1, they would have agreed to language along the lines of “... on April 1 every 5 years thereafter” or “... every 5 years thereafter on April 1.” In that case, of course, Western and NCPA also would have effectively waived their rights to seek a 5 month suspension of any proposed rates.

18. The actual effective date in each five year cycle will depend not only on the date of PG&E's filing but also whether the Commission does or does not grant waiver of its 60-day prior notice requirement and the length of the Commission's suspension as well as the time required to address any filing deficiencies, and indeed may not even occur within the fifth, anniversary year. The parties have no control over the Commission's exercise of its authority, which may result in a different and later effective date than April 1.

The Commission orders:

The requests for rehearing of the December 22 Order are hereby denied, as discussed in the body of this order.

By the Commission.

(S E A L)

Linda Mitry,
Deputy Secretary.