

154 FERC ¶ 61,025
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Norman C. Bay, Chairman;
Cheryl A. LaFleur, Tony Clark,
and Colette D. Honorable.

Pacific Gas and Electric Company

Docket Nos. ER15-2418-001

San Francisco Bay Area Rapid Transit District

EL15-30-001

v.

(Consolidated)

Pacific Gas and Electric Company

ORDER ON REHEARING

(Issued January 21, 2016)

1. On October 9, 2015, the Commission issued an order accepting Pacific Gas and Electric Company's (PG&E) proposed revisions to a Network Integration Transmission Service Agreement (Service Agreement) with the San Francisco Bay Area Rapid Transit District (BART), suspending the filing for five months to become effective March 12, 2016, subject to refund, and consolidating the proceeding with the ongoing hearing and settlement judge procedures in Docket No. EL15-30-000.¹ In so doing, the Commission also denied PG&E's request for a retroactive effective date and request for waiver of the Commission's 60-day prior notice requirements.² On November 9, 2015, PG&E filed a request for rehearing of the October 9 Order. In this order, we deny PG&E's request for rehearing.

I. Background

2. Under the Service Agreement, PG&E provides network integration transmission service to BART for the delivery of power purchased by BART from resources located

¹ *Pac. Gas & Elec. Co.*, 153 FERC ¶ 61,021 (2015) (October 9 Order).

² 18 C.F.R. § 35.3 (2015).

outside of the California Independent System Operator Corporation's (CAISO) balancing authority area. The North American Energy Standards Board requires that all interchange transactions correspond to an electronic tag (e-Tag) submitted prior to the interchange that allows each balancing authority area to communicate the scheduling of transactions and approve the transmission path reflected on each e-Tag. The California Air Resources Board identifies the entity responsible for complying with its cap-and-trade program regulations as the purchasing-selling entity listed on the e-Tag for imports into California.³ Until December 31, 2014, when PG&E did not renew its purchasing-selling identification, the e-Tags for BART's interchanges listed PG&E as the purchasing-selling entity.

3. On December 12, 2014, BART filed a complaint against PG&E pursuant to sections 206 and 306 of the Federal Power Act (FPA)⁴ in Docket No. EL15-30-000. In the complaint, BART requested that the Commission direct PG&E to continue providing a purchasing-selling entity identification for use by BART on the e-Tags necessary for the transmission of power from resources outside of the CAISO balancing authority area. BART argued that PG&E had refused to renew the registration of its purchasing-selling entity identification, and this failure constituted a breach of the Service Agreement and prior Commission directives, and violated the FPA.⁵ In response to BART's complaint, PG&E argued that it is neither the purchasing nor selling entity for BART's power purchases and, therefore, should not be listed as such on BART's e-Tags. PG&E also claimed that nothing in the Service Agreement required PG&E to maintain a purchasing-selling identification for BART's interchange transactions. On April 16, 2015, the Commission set BART's complaint for hearing and settlement judge procedures.⁶

4. On August 12, 2015, PG&E filed under section 205 of the FPA⁷ proposed revisions to the Service Agreement. PG&E proposed to add a Schedule 7 (Purchasing-Selling Entity Service) under the Service Agreement to recover all costs it would incur on BART's behalf as the purchasing-selling entity in the event the ongoing complaint proceedings result in a finding that PG&E must provide a purchasing-selling entity identification for use by BART. Under Schedule 7, PG&E proposed to pass through the

³ October 9 Order, 153 FERC ¶ 61,021 at P 2.

⁴ 16 U.S.C. §§ 824e, 825e (2012).

⁵ October 9 Order, 153 FERC ¶ 61,021 at P 3.

⁶ *San Francisco Bay Area Rapid Transit Dist. v. Pac. Gas and Elec. Co.*, 151 FERC ¶ 61,030 (2015) (Complaint Order).

⁷ 16 U.S.C. § 824d (2012).

costs of registering and maintaining the purchasing-selling identification, and the costs of the emission allowances used on BART's behalf. PG&E also requested waiver of the Commission's 60-day prior notice requirements to permit a retroactive effective date of January 1, 2013, for the proposed revisions.

5. In the October 9 Order, the Commission concluded that PG&E's proposed revisions to the Service Agreement had not been shown to be just and reasonable and that the revisions may yield substantially excessive revenues.⁸ Thus, consistent with the longstanding policy established in *West Texas Utilities Co.*,⁹ the Commission suspended PG&E's proposed revisions to the Service Agreement for five months and set the proposed rates for hearing and settlement judge procedures, consolidating the proceeding with the ongoing hearing and settlement judge procedures established in the Complaint Order.¹⁰ The Commission also denied PG&E's requests for a retroactive effective date and waiver of the 60-day prior notice requirement, stating that the filed rate doctrine and rule against retroactive ratemaking preclude granting PG&E's request for a retroactive effective date.¹¹ The Commission further explained that, since the Service Agreement on file as of January 1, 2013 did not permit the recovery of costs associated with PG&E's proposed Purchasing-Selling Entity Service, extraordinary circumstances did not exist to warrant granting PG&E's request.¹²

II. Request for Rehearing

6. PG&E argues that the Commission erred in denying its request for waiver of the prior notice requirements and its request for nominal suspension of the revised Service Agreement. PG&E contends that proposed Schedule 7 is a conditional, new service that PG&E has not previously provided and was, thus, a filing of an initial rate rather than a "rate increase."¹³ Therefore, PG&E asserts, the Commission improperly suspended the

⁸ October 9 Order, 153 FERC ¶ 61,021 at P 21-22.

⁹ 18 FERC ¶ 61,189 (1982) (*West Texas*).

¹⁰ October 9 Order, 153 FERC ¶ 61,021 at P 22.

¹¹ *Id.* P 24 (citing *Ark. La. Gas Co. v. Hall*, 453 U.S. 571, 577 (1981); *Transmission Agency of N. Cal. v. Sierra Pac. Power Co.*, 295 F.3d 918, 930 (9th Cir. 2002), *cert. denied*, 539 U.S. 914 (2003); *Mont.-Dakota Utils. Co. v. Nw. Pub. Serv. Co.*, 341 U.S. 246, 251 (1951)).

¹² *Id.*

¹³ PG&E Rehearing Request at 2 (citing *Chehalis Power Generating, L.P.*, 145 FERC ¶ 61,052 (2013)).

proposed Schedule 7 for five months because PG&E's proposal provides for a new service for which no suspension is appropriate or required.¹⁴ In addition, PG&E explains that the Purchasing-Selling Entity Service is a pass-through of costs that PG&E would incur only if the Commission grants the complaint filed by BART in Docket No. EL15-30-000, rather than a rate increase that may be suspended for five months.

7. PG&E explains that it requested a retroactive effective date for proposed Schedule 7 because the Service Agreement did not include a method for PG&E to recover costs associated with providing Purchasing-Selling Entity Service and PG&E states that it should be fully compensated for the costs associated with providing that service. Despite the Commission's rejection of its request for a retroactive effective date, PG&E claims that the Commission should have waived the 60-day prior notice requirement and should have accepted the revised Service Agreement subject to a one-day nominal suspension.¹⁵ PG&E adds that ratepayer protection consideration for a five-month suspension does not apply because it is not voluntarily adding the Purchasing-Selling Entity Service to the Service Agreement but is, instead, responding to BART's complaint.¹⁶

8. Finally, PG&E argues that imposing the cost responsibility on PG&E and its customers for BART's power imports represents an inappropriate cost shift that the Commission should reject. If, however, the Commission grants BART's complaint, PG&E contends that its customers should be fully protected from the cost impact of that determination and, therefore, the Commission should not have rejected its request for a retroactive effective date. Thus, PG&E asserts that the Commission should have waived the 60-day prior notice requirement and imposed only a nominal suspension in the October 9 Order.¹⁷

III. Commission Determination

9. We deny PG&E's request for rehearing. As an initial matter, we reject PG&E's argument that the Commission should have waived the 60-day prior notice requirement. Under section 205(c) of the FPA, a filing may become effective on less than 60 days'

¹⁴ *Id.* at 1.

¹⁵ *Id.* at 3.

¹⁶ *Id.* at 4.

¹⁷ *Id.*

notice upon a showing of good cause.¹⁸ In this case, we affirm the Commission's decision to deny PG&E's request for waiver of the 60-day notice period. PG&E did not demonstrate good cause to support this request. PG&E's request for waiver of the prior notice requirement was tied to its request for a retroactive effective date, which the Commission found to be impermissible,¹⁹ and PG&E failed to request an effective date that was prospective to its filing submitted on August 12, 2015. PG&E has raised nothing on rehearing to persuade us to change course here.

10. With respect to PG&E's argument that its filing reflected an initial rate and therefore was not subject to the Commission's suspension authority, we disagree. We find that PG&E's proposed Schedule 7 constitutes a changed rate, and that, accordingly, the Commission properly invoked its suspension authority. This finding is consistent with longstanding Commission precedent distinguishing a changed rate and an initial rate.²⁰ In *Southwestern*, the Commission defined an initial rate as one that provides for a new service to a new customer.²¹ The Commission explained: "We believe that our broadened definition of a change in rate is consistent with and serves to further the policies which underlie the FPA. The primary purpose of the legislation is the protection

¹⁸ 16 U.S.C. § 824d(c) (2012); *see also Cent. Hudson Gas & Elec. Corp.*, 60 FERC ¶ 61,106, at 61,339, *order on reh'g*, 61 FERC ¶ 61,089 (1992) (stating that applicant must make a "strong showing of good cause" for the Commission to waive the prior notice requirement for rate increases that do not implement a contract requirement).

¹⁹ October 9 Order, 153 FERC ¶ 61,021 at P 24.

²⁰ *See Pub. Serv. Co. of Colo.*, 74 FERC ¶ 61,354, at 62,087 & n.2 (1996) (finding that a power supply agreement with Glenwood Springs adds a new customer to an existing service and, therefore, constitutes a changed rate); *Northern States Power Co.*, 74 FERC ¶ 61,106, at 61,345 (1996) (finding that Northern States' filing was a changed rate because it unbundled its requirements rates to provide for separately-stated charges for various types of transmission); *Gulf States Utils. Co.*, 45 FERC ¶ 61,246, at 61,725 (1988) (finding that a rate schedule for transmission service was a changed rate because Gulf States was already providing service to Lafayette and Plaquemine and the present filing merely provided for a different service to existing customers); *Sw. Elec. Power Co.*, 39 FERC ¶ 61,099, at 61,292-94 (1987) (*Southwestern*) (defining an initial rate as one that provides for a new service to a new customer); *Fla. Power & Light Co. v. FERC*, 617 F.2d 809, 813-17 (D.C. Cir. 1980) (finding that the Commission had a reasonable basis for changing its policy so as to treat transmission agreement schedules as changed rates subject to the Commission's suspension and refund powers, in light of previously existing interchange agreements, rather than initial rates not subject to such powers).

²¹ *Southwestern*, 39 FERC at 62,293.

of customers from excessive rates and charges.”²² The Commission emphasized that this definition of a changed rate allowed the Commission to give customers refund protection and, therefore, shield them from the ability of utilities to exploit any sort of regulatory lag by filing unjust and unreasonable rates. Stressing this policy of protecting customers, the Commission stated: “Taking a broad view as to what constitutes a change in rate clearly serves, by making filings subject to the Commission’s suspension and refund authority under section 205(e) of the FPA, to protect customers of electricity from excessive or exploitative rates.”²³

11. Consistent with this precedent, in order to support its argument that proposed Schedule 7 constitutes an initial rate, PG&E must demonstrate that Schedule 7 provides for a new service to a new customer. Because both elements must be satisfied, it is therefore not sufficient for PG&E to demonstrate that it is providing a new service if that service is to an existing customer. While we are not making a finding here regarding whether Schedule 7 provides for a new service, notwithstanding PG&E’s proposal to include it as a schedule to the existing Service Agreement, we find that PG&E does not propose to provide Purchasing-Selling Entity Service to a new customer. Specifically, PG&E has provided BART with network integration transmission service since 1998 and, thus, BART is not a new network customer of PG&E. PG&E’s proposed Schedule 7 does not provide for a new service to a new customer and, thus, consistent with Commission precedent, does not constitute an initial rate. Consequently, PG&E’s proposal constitutes a changed rate that is subject to the Commission’s suspension and refund authority.

12. PG&E’s assertion that its proposed rate “is a simple pass-through of costs”²⁴ does not change this analysis. PG&E’s proposed Schedule 7 will result in an increase in the rate BART pays under the Service Agreement. Since this rate increase is a change in the rate for service to an existing customer, it is subject to the Commission’s suspension authority whether or not it is a pass-through of costs.

13. We also note that the precedent PG&E cites in support of its request for rehearing is consistent with our finding here. Specifically, in *Chehalis Power Generating, L.P.*, the Commission reaffirmed its definitions of initial and changed rates in order to carry out

²² *Id.* (citing *Towns of Alexandria, Minn. v. FPC*, 555 F.2d 1020, 1028 (D.C. Cir. 1977); *Mun. Light Boards of Reading and Wakefield Mass. v. FPC*, 450 F.2d 1341, 1348 (D.C. Cir. 1971); *Atl. Ref. Co. v. Pub. Serv. Comm’n of N.Y.*, 360 U.S. 378, 388 (1959); *FPC v. Hope Nat. Gas Co.*, 320 U.S. 591, 610 (1944)).

²³ *Id.*

²⁴ PG&E Rehearing Request at 1.

the primary purpose of the Commission's suspension and refund authority *i.e.*, to protect customers from excessive rates and charges.²⁵

14. Further, we will not revisit the suspension period. The Commission's preliminary analysis²⁶ indicated that PG&E's revisions to the Service Agreement may be substantially excessive, as defined in *West Texas*,²⁷ and a five-month suspension is consistent with that precedent. The Commission's decision to suspend and set a proposed rate for hearing is based upon: (1) a review of the company's rate filing, and that review, due to the need to act within a statutorily-mandated, limited time, is without the benefit of discovery or cross-examination or responsive testimony which may identify underlying details supporting the filing or which may demonstrate errors or other flaws in the filing; (2) an evaluation of the arguments and supporting documents filed by the intervenors, also necessarily without the benefit of discovery, cross-examination, or responsive testimony; and (3) a preliminary analysis developed by the Commission's advisory staff.²⁸ Moreover, this preliminary analysis must typically be made within, as in this case, 60 days. The Commission therefore does not, as a general rule, open its preliminary analysis of the proposed rates to review and challenge, and we see no reason to depart from that precedent here.²⁹

²⁵ 145 FERC ¶ 61,052, at P 13 & n.30 (2013).

²⁶ October 9 Order, 153 FERC ¶ 61,021 at PP 21-22

²⁷ 18 FERC at 61,374.

²⁸ *City & County of San Francisco v. Pac. Gas & Elec. Co.*, 151 FERC ¶ 61,274, at P 17 (2015); *Midwest Indep. Transmission Sys. Operator, Inc.*, 148 FERC ¶ 61,206, at P 356 (2014); *Xcel Energy Servs., Inc.*, 111 FERC ¶ 61,084, at P 15 & n.3 (2005) (citing *West Texas*, 18 FERC at 61,374); *accord, e.g., Pa. Elec. Co.*, 20 FERC ¶ 61,401, at 61,817 (1982); *S. Cal. Edison Co.*, 20 FERC ¶ 61,129, at 61,285 (1982).

²⁹ *Appalachian Power Co.*, 59 FERC ¶ 61,313, at 62,158 (1992); *Jersey Cent. Power & Light Co.*, 56 FERC ¶ 61,376, at 62,435-36 (1991); *Boston Edison Co.*, 55 FERC ¶ 61,087, at 61,265-66 (1991); *New England Power Co.*, 53 FERC ¶ 61,268, at 62,057 & n.15 (1990); *Pa. Elec. Co.*, 20 FERC at 61,817; *S. Cal. Edison Co.*, 20 FERC at 61,285.

The Commission Orders:

PG&E's request for rehearing of the October 9 Order is hereby denied, as discussed in the body of this order.

By the Commission.

(SEAL)

Nathaniel J. Davis, Sr.,
Deputy Secretary.