BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA

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Application of Pacific Gas and Electric Company for Authority to Increase Electric Rates and Charges to Recover Smart Grid Costs Relating to Compressed Air Energy Storage Demonstration Project Under American Recovery and Reinvestment Act of 2009	Application 09-09-019

APPLICATION OF THE CONSUMER FEDERATION OF CALIFORNIA
FOR REHEARING OF D. 10-01-025

This Application for Rehearing is filed pursuant to Public Utilities Code ("PU Code") section 1731(b). The Consumer Federation of California ("CFC") applies to the California Public Utilities Commission ("Commission") for an Order granting rehearing of D.10-01-025 and upon review thereof, an order reversing that decision and dismissing the Application of Pacific Gas & Electric Company ("PG&E") for authority to recover from customers the funds needed to match a smart grid grant under ARRA.

I. THE COMMISSION ACTED WITHOUT, OR IN EXCESS OF, ITS POWERS OR JURISDICTION WHEN IT GRANTED THE APPLICATION.

The Commission is a constitutional entity with the power to fix rates:

> The commission may fix rates, establish rules, examine records, issue subpoenas, administer oaths, take testimony, punish for contempt, and prescribe a uniform system of accounts for all public utilities subject to its jurisdiction.

Cal. Const. Art. 12, sec. 6. The Commission did not fix rates in this case. The Commission authorized PG&E to take from customers the "$24.9 million in costs it said was needed to match an award of $24.9 million in federal funds for Phase 1 of a Smart Grid Compressed Air Energy Storage demonstration project from the United States Department of Energy under the American Recovery and Reinvestment Act,"

PG&E states that its Application is filed "pursuant to Sections 451, 454, 728, 729, 740.4 and 795 of the Public Utilities Code"[1] (PU Code). None of these statutes,

[1] Application at 7

however, authorize PG&E to take from customers the dollars needed to match the DOE research grant.[2]

The Commission does not explain under what authority it is taking the action requested by PG&E. The Commission appears to justify its action by reference to "D.09-09-029 [which] established the process for review of projects and investments by investor-owned utilities such as PG&E when seeking Recovery Act funding."[3] Decision ("D") 09-09-029 is not final. CFC filed an Application for Rehearing of that decision on October 14, 2009, but no ruling has been made as to rehearing.

II. THE DECISION OF THE COMMISSION VIOLATES A RIGHT OF PG&E CUSTOMERS UNDER THE CONSTITUTION OF THE UNITED STATES AND THE CALIFORNIA CONSTITUTION.

A. Unconstitutional Taking.

The Commission exercised the State's police power to confiscate hundreds of millions of dollars[4] from Californians to pay for Smart Grid projects, without first entering findings that the project will benefit those from whom money is being taken.[5] Before 'taking' customers' money and transferring it to a private utility,[6] the Commission is required by Constitution and statute to hold a hearing to determine the funds will be reasonably and prudently spent on projects which benefit the public. U.S. Const.Amend. 5; Cal. Const. Art. 1, § 19. Instead, the Commission expressly recognized no benefits had been quantified,[7] and acted in contravention of the taking clauses of the US and state constitutions. It erred. *Kelo v. City of New London*, 545 U.S. 469, 477 (U.S. 2005)

B. The CFC and Its Members Were Denied Due Process.

Pacific Gas & Electric (PG&E) filed its application on September 21, 2009. CFC protested the Application on the grounds, *inter alia,* that the relief PG&E was requesting was unlawful as an unconstitutional 'taking' of customer funds and an involuntary levy

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2 *See* discussion at page 5 of CFC's Comments on Proposed Decision, filed January 11, 2010.
3 D.10-01-025 at 9.
4 Customers may be asked to contribute as much as $200 million per project.
5 *City of Stockton v. Marina* Towers LLC (2009) 171 Cal.App.4th 93, 104; Code of Civ. Procedure (CCP) § 1240.030
6 *20th Century Ins. Co. v. Garamendi* (1994) 8 Cal.4th 216, 251.
7 D.10-01-025

on ratepayers, and that PG&E offered no evidence to justify its proposal. The Assigned Commissioner, in her Scoping Memo, determined that "issues raised by CFC in its Protest, Prehearing Conference Statement and at the PHC are outside the limited scope of this proceeding" and would not, therefore, be considered.

CFC asked for rehearing of the Scoping Memo and the Commission held its rules do not provide for interlocutory appeals of rulings on procedural and evidentiary matters."[8] The ruling was contrary to law, inasmuch as PU Code section 1730(b)(1) states, "After <u>any</u> order or decision has been made by the commission, <u>any</u> party to the action or proceeding, … may apply for a rehearing in respect to <u>any</u> matters determined in the action or proceeding and specified in the application for rehearing." (*emphasis added)*

Issues presented by CFC related to the reasonableness of rates proposed by PG&E, and should have been found to have been within the scope of the proceeding, as defined by the Assigned Commissioner: "This proceeding will examine whether the proposed revenue requirement to support the requested ratepayer funding … is just and reasonable, … ." The Assigned Commissioner's refusal to include issues raised by CFC constitutes a denial of due process.

CFC was, in effect, dismissed from the case without an opportunity to be heard on issues clearly relevant to PG&E's Application. Further, the Commission found there were no issues of material fact in the case which required an evidentiary hearing. The Administrative Law Judge ignored factual disputes which were critical to the outcome of this case, *e.g.* whether PG&E had "provided a detailed itemized budget for the project," so as to qualify for the fast track procedure designed in D.09-09-029 ; whether the shareholders of PG&E were unable to put up the capital needed to match the DOE grant, and whether customer funding is necessary for the project.[9] The Scoping Memo and Ruling of the Assigned Commissioner is clearly erroneous in its statement that "CFC had failed to "articulate any disputed issues of material facts" which would justify a

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[8] D.10-01-025 at 22.

[9] Prehearing Conference Statement filed Oct. 22, 2009, at 2-3.

hearing.[10] The ruling denied customers the right to confront witnesses and determine the truthfulness of allegations made by PG&E.

The Commission has a duty to "see that the provisions of the Constitution and statutes of this State affecting public utilities…are enforced and obeyed, … ." Public Utilities Code § 2101. "Whatever may be the scope of regulatory power under this section[11], it does not authorize disregard by the commission of express legislative directions to it, or restrictions upon its power found in other provisions of the act or elsewhere in general law*." Pacific Tel. & Tel. Co. v. Public Utilities Com.*, 62 Cal. 2d 634, 653 (Cal. 1965). The Commission should grant rehearing and consider issues relating to the constitutionality and legality of D.10-01-025.

III. THE COMMISSION HAS NOT PROCEEDED IN THE MANNER REQUIRED BY LAW.

A. A Utility Must Prove A Rate Proposal Is Reasonable.

The Commission failed to correctly apply the burden of proof prescribed by PU Code section 454(a). Section 454(a) prohibits a utility from changing its rates unless it demonstrates to the Commission, and the Commission finds, that the new rate is justified, *i.e.,* is lawful, just and reasonable. The Commission has a duty, under Public Utilities Code section 728, to determine and fix, by order, the just, reasonable, or sufficient rates, …" whenever it finds a utility's rates are unlawful, unjust and unreasonable. The Commission did not require PG&E to prove its rate proposal was reasonable.

The Commission, in violation of PU Code section 454(a), appears to have adopted a preclusive conclusion that customers are benefited by the contribution of funds to match a DOE grant.

> In addition, the Commission found that it is reasonable to conclude that investor-owned utility projects that receive DOE grants will be beneficial to the investor-owned utilities' ratepayers.[12]

It is unlawful to conclude without evidence that a rate change will benefit ratepayers.[13]

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[10] Order at 4.
[11] Pub. Util. Code § 701.
[12] D.10-01-025 at 16.

B. Capital Should Be Provided By a Utility, Not Customers.

The Commission has, in the past, determined that customers should not be required to contribute capital to the utility enterprise. The California Supreme Court has held that requiring ratepayers to put up the capital for the utility system "is contrary to the basic principle of utility rate setting." *San Francisco v. Public Utilities Com* (1971) 6 Cal. 3d 119, 128-29. In this case, however, the Commission violated that principle by requiring customers to put up the money for the storage project. The Commission did not offer any explanation for its departure from precedent.

IV. THE DECISION OF THE COMMISSION IS NOT SUPPORTED BY THE FINDINGS.

"A court will uphold the agency action unless the action is arbitrary, capricious, or lacking in evidentiary support. A court must ensure that an agency has adequately considered all relevant factors, and has demonstrated a rational connection between those factors, the choice made, and the purposes of the enabling statute."[14] The Commission failed to address, in its decision, relevant factors like the Constitutionality of its action, its authority to take the action and precedential decisions requiring a different outcome. It also failed to consider factual questions like how PG&E's previously allowed rate of return should be adjusted to reflect returns earned on investments in other business undertakings which have been relieved of the risk and responsibility of committing shareholder funds to a demonstration project.[15]

It would be arbitrary and capricious for the Commission to avoid addressing these issues. "Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29, 43 (U.S. 1983).

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[13] *Elliott v. City of Pacific Grove* (1975) 54 Cal. App. 3d 53, 59, *citing Durant v. Beverly Hills* (1940) 39 Cal. App. 2d 133, 139. ("The rates here complained of, having been fixed by the lawful rate-fixing body, must be presumed to be reasonable, fair and lawful.")

[14] California Hotel & Motel Association, 25 Cal. 3rd 200, 212 (

[15] *Permian Basin Area Rate Cases,* 390 U.S. 747, 806 (U.S. 1968), *citing, Bluefield Co. v. Public Service Comm.*, 262 U.S. 679, 692; *FPC v. Hope Natural Gas Co., supra*, at 603

V. THE FINDINGS IN D.10-01-025 ARE NOT SUPPORTED BY SUBSTANTIAL EVIDENCE IN LIGHT OF THE WHOLE RECORD.

The Commission found "PG&E's funding of Phase 1 represents a good and fair value for its ratepayer investment" (¶12) and Phase 1 offers benefits to ratepayers and to PG&E "[b]ecause the use of compressed air energy storage holds the promise of reducing greenhouse gas and improving grid reliability." (¶13). There is no evidence in the record to support a finding of sufficient benefits to ratepayers that would balance the cost of taking $24 million from them. The record does not show that benefits the DOE is measuring are benefits which California ratepayers will receive, nor does it show that benefits will be quantified at the DOE so that they can be compared to project costs. It is somewhat cavalier to assume that a federal agency will undertake the kind of analysis required by California law.

WHEREFORE, for all the reasons set forth herein, CFC asks the Commission to grant rehearing and issue a reasoned decision addressing issues pertaining to the authority under which it has acted, the compatibility of its action with US and California Constitutions and the evidence supporting its finding that its action will benefit ratepayers.

DATE: February 18, 2010.

CONSUMER FEDERATION OF CALIFORNIA

By: _____//s//_____

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CERTIFICATE OF SERVICE

I hereby certify that on February 18, 2010, I served by e-mail all parties on the service lists for A.09-09-019 for which an email address was known, true copies of the original of the following document which is attached hereto:

APPLICATION OF THE CONSUMER FEDERATION OF CALIFORNIA FOR REHEARING OF D. 10-01-025

The names and e-mail addresses of parties served with these documents by e-mail are shown on an attachment. :

Dated: February 18, 2010

Respectfully submitted,

_____//s//_____

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