

Decision 02-09-054

September 19, 2002

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking to
Establish Standards of Conduct
Governing Relationships Between
Energy Utilities and Their Affiliates.

Rulemaking 97-04-011
(Filed April 9, 1997)

Order Instituting Investigation to
Establish Standards of Conduct
Governing Relationships Between
Energy Utilities and Their Affiliates.

Investigation 97-04-012
(Filed April 9, 1997)

**ORDER GRANTING REHEARING OF DECISION 02-02-046,
VACATING PENALTIES ASSESSED AGAINST PACIFIC GAS
AND ELECTRIC COMPANY AND DENYING HEARING
OF THE DECISION, AS MODIFIED**

I. SUMMARY

In Decision (D.) 02-02-046, we revised the disclaimer requirement set forth in Section V.F.1 of the Affiliate Transaction Rules (ATR) and considered the implications of this revision on the penalty assessed against Pacific Gas & Electric Co. (PG&E) in D.98-11-026. We reduced but did not vacate the penalty because we determined it was based on PG&E's violation of the legibility requirement of the ATR. PG&E applies for rehearing of D.02-02-046 on the grounds that the Commission acted in violation of the California and United States Constitutions, the Public Utilities Code, the Commission's own Rules of Practice and Procedure, and California case law on the imposition of penalties. We have reviewed the allegations raised in PG&E's application for rehearing and for the reasons discussed below, we find that good cause exists to grant rehearing of D.02-02-046 and vacate the penalties imposed on PG&E.

II. BACKGROUND

This case has a long, but significant, procedural history. The Commission initiated Rulemaking 97-04-011 and Order Instituting Investigation 97-04-012 on April 9, 1997. The purpose of these proceedings was to establish standards of conduct governing relationships between energy utilities and their affiliates.

On March 27, 1998, The Utility Reform Network (TURN) and the Office of Ratepayer Advocates (ORA) filed a joint emergency motion alleging that PG&E had violated Rule V.F.1 of the Commission's Affiliate Transaction Rules, set forth in D.97-12-088, as a result of a March 23, 1998 advertisement by PG&E Energy Services. Specifically, the motion alleged that a violation occurred when PG&E allowed its utility name and logo to be used by its affiliate in printed material without a legible disclaimer.

In D.98-04-029, issued on April 9, 1998, the Commission granted ORA and TURN's motion in part and held that PG&E had indeed violated the Commission's Affiliate Transaction Rules. D.98-04-029 requested more information before assessing the appropriate monetary penalty in a subsequent penalty phase. PG&E was directed to file a list of each publication of the advertisement in question. PG&E was also asked to provide documentation which explained the reason for the violation. Interested parties were permitted to file comments concerning what they believed the appropriate monetary penalty should be in light of the totality of circumstances in this case. PG&E chose not to file opening comments but it did file a reply in response to the other parties' comments.

On November 5, 1998, D.98-11-026 was issued. That decision imposed a penalty of \$1,680,000 against PG&E for allowing its affiliate, PG&E Energy services, to issue a printed advertisement that did not comply with the Commission's legibility requirements for disclaimers. The monetary penalty was assessed at \$17,500 for each of the 20 violations associated with the March 16,

1998 “High Voltage” advertisement and \$19,000 for each of the 70 violations associated with the remaining advertisements.

PG&E’s application for rehearing of D.98-11-026 was denied in D.99-03-025. The application alleged error based on the claims that the Commission failed to recategorize the proceeding as adjudicatory and lacked authority to directly impose fines, that the penalty amount was not supported by the evidence, and that the use of readership as a basis for calculating the number of violations violated the First Amendment. The decision denying rehearing found it unnecessary to respond to PG&E’s First Amendment arguments because the Commission had determined in another decision that the affiliate disclaimer did not violate the First Amendment and PG&E had not sought rehearing of that decision. PG&E then filed a petition for writ of review in both the California Court of Appeal and the Supreme Court, where it alleged that D.98-11-026 violated its First Amendment rights by failing to demonstrate a compelling state interest in regulating its commercial speech with regard to an affiliates’ March 1998 advertisement, and that the decision did not constitute a narrowly tailored means of achieving any such compelling state interest. In its response, the Commission argued there was no First Amendment violation.

In the meantime, the Commission issued D.99-09-033, which granted SDG&E and SoCalGas’ application for rehearing of D.98-11-027¹ and revised and shortened, on First Amendment grounds, the language required in the disclaimer for the tagline and logo of Sempra Energy. The original disclaimer in Rule V.F.1 required the following disclosure in “plain legible or audible language”: (1) the affiliate is not the same company as the utility; (2) the affiliate is not regulated by the California Public Utilities Commission; and (3) “you do not have to buy the

¹ D.98-11-027 was issued in response to a petition to modify the disclaimer requirement adopted in D.97-12-088, as it related to the use of the name and logo of Sempra Energy. D.98-11-027 modified the disclaimer requirements so that it would not apply in certain situations (i.e. communications with governmental bodies, annual reports to shareholders, internal written communications), but determined that the disclaimer requirements still applied to the use of the Sempra Energy logo and tag line, and declined to adopt the revised disclaimer language proposed by SDG&E and SoCalGas.

affiliate's products in order to continue to receive quality regulated services from the utility." The Commission revised Section V.F.1 as to SDG&E and SoCalGas because the original language was not narrowly tailored to achieve an appropriate balance between the two utilities' commercial speech rights and the Commission's substantial interest in promoting competition. The Rule was modified by deleting the third part of the disclaimer.

The Commission then issued D.99-09-074, which reopened the proceeding in the PG&E penalty matter, to consider the possible implications that the revisions in D.99-09-033 may have on the penalty assessed against PG&E in D.98-11-026 and D.99-03-025. The Commission filed motions with the courts to dismiss the petitions for writ of review, without prejudice, so the Commission could reconsider the penalties assessed against PG&E; the motions to dismiss were granted.

On February 21, 2002, the Commission issued a decision in the reopened proceeding. In D.02-02-046, the Commission revised the Affiliate Transaction Rules so that the revised disclaimer requirement the Commission adopted for SDG&E and SoCalGas would be made applicable to all utilities covered by the rules. The Commission also determined that the penalty assessed against PG&E should be reduced but not vacated, because we claimed it was based on PG&E's violation of the legibility requirement, which we characterized as distinct from the portion of the rule that was found offensive to the First Amendment. The fine was reduced to \$250,000, based on a finding of 90 violations of Rule V.F.1.

PG&E filed its application for rehearing of D.02-02-046 on March 25, 2002. No responses were filed.

III. DISCUSSION

Before we discuss the reasons for vacating the penalty against PG&E, we first address PG&E's arguments regarding the validity of Rule V.F.1. PG&E

seems to argue that because the Commission declared a portion of the Rule unconstitutional, the entire Rule was unlawful and invalid, and the Commission was accordingly prohibited from imposing a fine based on a violation of the Rule. According to PG&E, “a void act is deemed inoperative as if it had never been passed.” PG&E cites to Reclamation District No. 1500 v. Superior Court of Sutter County (1916) 171 Cal. 672 in support of this proposition. However, we note that that case has been overruled in part by Kopp v. Fair Pol. Practices Com. (1995) 11 Cal. 4th 607, wherein the California Supreme Court clearly rejected the view that an unconstitutional law is to be treated like it was never passed.²

Moreover, only a portion of the rule’s content was deemed unconstitutional by the Commission. Severing the offensive portion of the rule does not render the entire rule invalid. A “statute may be in part constitutional and in part unconstitutional and if the parts are wholly independent of each other, that which is constitutional may stand while that which is unconstitutional will be rejected.” Brockett v. Spokane Arcades, Inc. (1985) 472 U.S. 491, 502. Thus, we do not agree with PG&E that when a portion of the Rule was declared unconstitutional, the entire Rule was deemed inoperative. The remainder of Rule V.F.1 was valid and in effect since the day it was adopted, and it was entirely proper for the Commission to impose a fine for violations of the remaining requirements of the Rule.

However, this brings us to the reason why we now vacate the penalty against PG&E. PG&E argues that we imposed a penalty for violation of a Rule which was declared unconstitutional. In D.02-02-046, our response was to distinguish the disclaimer *legibility* requirement of the Rule, which was not declared unconstitutional, as separate and distinct from the disclaimer *content* of

² The court noted that there were “numerous exceptions” to that view; for example, a statute found to be unconstitutional may be judicially reformed. Moreover, the court noted that a statute found unconstitutional is not “invalidated,” rather the enforcement of such a law is enjoined as written.

the Rule.³ We stated that PG&E’s original \$1.68 million penalty was based only on violating the legibility requirement, and was not based on violating the content requirements of the Rule. (See D.02-02-046, mimeo at 4.) However, we then attempted to reduce the penalty by using as a “mitigating factor” the fact that part of the disclaimer content was found unconstitutional. This seems to indicate that the original fine was in fact based, at least in part, on the *content* of the disclaimer, not just the *legibility*. We find it inappropriate to use as a “mitigating factor” in reducing the fine the fact that a portion of the Rule was declared unconstitutional. This may lead to the implication that PG&E was in fact fined for violating a rule that was later declared unconstitutional.

In order to avoid even the appearance that we imposed a fine for violations of a Rule that we later declared unconstitutional, we find it appropriate given the circumstances in this case to vacate the penalty imposed on PG&E for violations of Rule V.F.1. This decision is not intended to minimize the importance of Rule V.F.1’s disclaimer. Indeed, we affirm that the modified disclaimer is an integral part of the Rules with which all covered utilities must comply.

PG&E raises several other allegations of legal error in its application for rehearing of D.02-02-046. We have reviewed PG&E’s remaining arguments, and find them to be moot since we have determined to vacate the penalty against PG&E. Accordingly, we find no need to address them at this time.

IV. CONCLUSION

We have carefully considered all of the Application’s arguments and are of the opinion that good cause exists to grant rehearing of Decision 02-02-046 in order to vacate those portions of the Decision which impose a penalty on PG&E for violations of Affiliate Transaction Rule V.F.1. We find that, in reducing the

³ PG&E also claims that the Commission cannot separate the legibility requirement from the disclaimer content requirement of the Rule. Although we disagree with PG&E, we deem this argument moot since we are vacating the penalty against PG&E.

penalty amount, it was inappropriate to use as a “mitigating factor” the fact that we declared a portion of Affiliate Transaction Rule V.F.1 unconstitutional. We find this leads to the implication that we fined PG&E for violating a rule that was later deemed unconstitutional. We do not disturb the remaining portions of the Decision which revised the disclaimer requirement set forth in Section V.F.1 and made the revised language the Commission adopted for SDG&E and SoCalGas applicable to all utilities covered by the Rules.

THEREFORE, IT IS ORDERED that

1. PG&E’s application for rehearing of Decision 02-02-046 is granted and the \$1,680,000 penalty that the Commission imposed on Pacific Gas and Electric Company in D.98-11-026 and D.99-03-025, which was subsequently reduced to \$250,000 in D.02-02-046 for violating Rule V.F.1 is vacated.
2. Ordering Paragraphs 2 and 3 of D.02-02-046 are vacated.
3. Rehearing of Decision 02-02-046, as modified herein, is denied.
4. This proceeding is closed.

This order is effective today.

Dated September 19, 2002, at San Francisco, California.

LORETTA M. LYNCH
President
HENRY M. DUQUE
GEOFFREY F. BROWN
MICHAEL R. PEEVEY
Commissioners

I abstain.

/s/ CARL W. WOOD
Commissioner