

Decision 12-09-021

September 13, 2012

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application of Pacific Gas and Electric
Company for Rehearing of Resolution
E-4250.

Application 10-05-015
(Filed May 13, 2010)

**ORDER DENYING REHEARING
OF RESOLUTION E-4250**

I. INTRODUCTION

Assembly Bill 117 (Stats. 2002, ch. 838) (“AB 117”) authorizes cities and/or counties to implement a community choice aggregation (“CCA”)¹ program to procure power for their local residents and businesses. Customers are automatically enrolled in CCA unless they opt out. (Pub. Util. Code, § 366.2, subd. (c)(2).) In Resolution E-4250 (or “Resolution”), we clarified that utilities should not solicit or accept requests to opt out from CCA service until the customers receive proper notification regarding the CCA program pursuant to Public Utilities Code section 366.2(c)(15)(A-C).² Among other things, this statute requires that customers receive notification of the terms and conditions of the CCA services offered. (Pub. Util. Code, § 366.2, subd. (c)(15)(A)(ii).)

PG&E timely applied for rehearing of the Resolution. PG&E’s rehearing application alleges the following legal errors: (1) the Resolution unlawfully restricts the

¹ “CCA” also refers to a community choice aggregator, i.e., the entity providing the CCA procurement service.

² All subsequent section references are to the Public Utilities Code, as amended by Senate Bill 790 (Stats. 2011, ch. 599) (“SB 790”), unless otherwise specified. Prior to SB 790, section 366.2(c)(15)(A-C) was section 366.2(c)(13)(A-C).

flow of information; and (2) the Resolution unlawfully restricts utility and customer activities in violation of sections 216, 218, 366.2, 489, 491 and 728.

The City and County of San Francisco (“CCSF”) and the Marin Energy Authority (“MEA”) filed responses to PG&E’s rehearing application. Both CCSF and MEA request we deny PG&E’s rehearing application.

We have reviewed the allegations raised in the rehearing application, and are of the opinion that the granting of a rehearing is not warranted. Thus, we deny the application for rehearing of Resolution E-4250.

II. DISCUSSION

A. The Resolution does not unlawfully restrict the flow of information.

1. The Resolution does not violate PG&E’s free speech rights.

The Resolution provides that any information that PG&E and the other utilities provide describing customers’ ability to opt out of CCA should be consistent with the statutory purpose of section 366.2(c)(15)(A-C), the CCA tariffs, the Resolution, and should not be misleading either by inclusion or omission of content. (Resolution E-4250, p. 20 [Finding and Conclusion 7].) The Resolution also states that anyone who believes that any of the utilities’ marketing materials are incorrect or misleading may bring their concerns to the attention of Energy Division. (Resolution E-4250, p. 21 [Finding and Conclusion 13].)

PG&E alleges that these provisions of the Resolution violate the First Amendment to the U.S. Constitution and the liberty of speech clause of the California Constitution by imposing content-based, identity-based, one-sided, vague and overbroad restrictions on the free speech rights of customers and utilities. (Rehrg. App., p. 2.)

The First Amendment provides, in part: “Congress shall make no law ... abridging the freedom of speech” (U.S. Const., 1st Amend.) The First Amendment’s freedom of speech provision applies to state and local governments pursuant to the Fourteenth Amendment’s due process clause. (*Kasky v. Nike, Inc.* (2002) 27 Cal.4th 939,

951.) The liberty of speech clause provides: “Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press.” (Cal. Const., art. I, § 2, subd. (a).)

After the issuance of the Resolution, we issued D.10-05-050.³ In D.10-05-050, we clarified that the prohibition on untrue or misleading speech was limited to the utilities’ commercial speech. (D.10-05-050, *supra*, at pp. 16 & 20-21 [Ordering Paragraph 1] (slip op.).)

The Commission’s restriction on the untrue or misleading commercial speech of utilities does not violate either the First Amendment or the liberty of speech clause. Untrue or misleading commercial speech is not protected speech under the First Amendment. (*Central Hudson Gas & Electric Corp. v. Public Service Com. of New York* (1980) 447 U.S. 557, 566 (“*Central Hudson*”).) Thus, it may be prohibited entirely. (*In re R.M.J.* (1982) 455 U.S. 191, 203.) Similarly, the liberty of speech clause only protects commercial speech concerning lawful products and services that is truthful and not misleading. (*Kasky v. Nike, Inc.*, *supra*, 27 Cal.4th at p. 959.)

PG&E alleges that under the First Amendment, the government cannot use the regulatory process to advance some points of view by burdening the expression of others. (Rehrg. App., p. 3 citing *Pacific Gas & Electric Co. v. Public Utilities Com.* (1986) 475 U.S. 1.) PG&E alleges that the Resolution’s prohibition of untrue or misleading statements by the utilities while not imposing a similar prohibition on the CCAs’ speech is an impermissible content-based regulation in violation of the First Amendment. (Rehrg. App., p. 3 citing *Citizens United v. Federal Election Com.* (2010) ___ U.S. ___ [130 S.Ct. 876] (“*Citizens United*”).)

³ *Decision Modifying Decision 05-12-041 to Clarify the Permissible Extent of Utility Marketing with Regard to Community Choice Aggregation Programs* [D.10-05-050] (2010) __ CPUC.3d __, as modified by *Order Modifying Decision (D.) 10-05-050, and Denying Rehearing of Decision, as Modified* [D.12-07-023](2012) __ CPUC.3d __.

We have clarified that we are only regulating the utilities' untrue or misleading commercial speech. (D.10-05-050, *supra*, at pp. 16 & 20-21 [Ordering Paragraph 1] (slip op.)) Both cases relied on by PG&E regarding viewpoint or content regulation are cases involving noncommercial speech, and not commercial speech. (*Citizens United, supra*, 130 S.Ct at p. 899 [holding of case applies in context of political speech]; *Pacific Gas & Electric Co. v. Public Utilities Com., supra*, 475 U.S. at pp. 8-9 [newsletter at issue extends beyond commercial speech].) As explained above, the courts employ a different standard for misleading or untruthful commercial speech, and such speech is not protected by either the First Amendment or the liberty of speech clause.

In any event, PG&E fails to demonstrate that we are suppressing the utilities' viewpoints. We did not prohibit the utilities from expressing their viewpoints; rather, we only prohibited untrue and misleading commercial speech. (See, e.g., *Kasky v. Nike, Inc., supra*, 27 Cal.4th at p. 967 [distinguishing between suppression of points of view as opposed to suppression of false and misleading statements of fact].)

Furthermore, although we do not regulate the CCAs' speech, CCAs are similarly prohibited from engaging in untrue or misleading speech. The recently enacted SB 790 provides:

The governing body of a [CCA] shall adopt a policy that expressly prohibits the dissemination by the [CCA] of any statement relating to the [CCA's] rates or terms and conditions of service that is untrue or misleading....

(Pub. Util. Code, § 396.5.)

PG&E fails to demonstrate that its free speech rights are violated. Thus, we deny rehearing on this issue.

2. The Commission has the authority to regulate the utilities' misleading or untruthful commercial speech concerning CCAs.

PG&E alleges that section 366.2 does not give the Commission the authority to impose restrictions on utilities' speech. (Rehrg. App., p. 3.) According to PG&E, the Commission previously stated that this statute exempts CCAs from consumer protections and does not give the Commission jurisdiction to protect the rights of customers to freely choose between CCAs and the utilities. (Rehrg. App., p. 3, citing *Decision Resolving Phase 2 Issues on Implementation of Community Choice Aggregation Program and Related Matters* [D.05-12-041] (2005) __ CPUC.3d __, at pp. 19-21 (slip op.).)

PG&E misreads the Commission's prior statements regarding consumer protection and the CCA program. In the section of D.05-12-041 relied on by PG&E, we addressed our jurisdiction over disputes between CCAs and their customers. We did not state that AB 117 exempts CCAs from consumer protections. Rather, we stated that AB 117 does not give us the authority to act as a forum for customer complaints against CCAs. (D.05-12-041, *supra*, at pp. 19-20 (slip op.).) We did acknowledge our role in certain areas of consumer protection with regard to the CCA program, such as in preventing cost shifting among customers or ensuring certain operational requirements. (*Ibid.*) Furthermore, contrary to PG&E's assertion, we stated that AB 117 requires the Commission to "establish procedures for notifying customers of the CCA's program and their options for future electrical service." (*Id.* at p. 19 (slip op.).)⁴

The Resolution's regulation of the utilities' speech involves our jurisdiction over the utilities, and our role in implementing the CCA program. We have broad and

⁴ AB 117 also imposes consumer protection requirements on the CCAs themselves. (See, e.g., Pub. Util. Code, § 366.2, subd. (c)(1) [authorizing a CCA to provide consumer protections], see also Pub. Util. Code, § 366.2, subd. (c)(3)(E) [requiring a CCA's implementation plan to include consumer protection procedures for its program participants].)

expansive authority over the public utilities of this state. (See e.g. Cal. Const., art. XII, §§ 1-6; Pub. Util. Code, § 701.) In addition, in SB 790, the Legislature specifically gave the Commission the authority to regulate the conduct of electrical corporations relative to the consideration, formation, and implementation of CCA programs.⁵ (Pub. Util. Code, § 707.) Thus, we have the requisite authority to regulate the utilities' misleading or untruthful commercial speech in relation to the CCA program.

3. The Resolution does not violate Business and Professions Code section 17500.1.

PG&E alleges that Business and Professions Code section 17500.1 bars state agencies and commissions from restricting or prohibiting commercial advertising that has not been determined to be false or misleading under Business and Professions Code section 17500 or prohibited by other law. (Rehrg. App., pp. 3-4.) This allegation lacks merit.

Section 17500.1 provides:

no trade or professional association, or state agency, state board, or state commission within the Department of Consumer Affairs shall enact any rule, regulation, or code of professional ethics which shall restrict or prohibit advertising by any commercial or professional person, firm, partnership or corporation which does not violate the provisions of Section 17500 of the Business and Professions Code, or which is not prohibited by other provisions of law.

This statutory provision only applies to a “state agency, state board, or state commission within the Department of Consumer Affairs.” Thus, it does not apply to this Commission.

⁵ Pursuant to SB 790, we have instituted Rulemaking (R.) 12-02-009 to consider and adopt a code of conduct, rules, and enforcement procedures for electrical corporations.

B. The Resolution does not violate the rule against retroactive ratemaking.

The Resolution found that the purpose of section 366.2(c)(15)(A-C) was to provide potential CCA customers with an opportunity to make an informed decision as to whether to opt out of CCA service. (Resolution E-4250, p. 20 [Finding and Conclusion 5].) The Resolution also found that customers cannot make an informed decision until they receive information regarding the terms and conditions of CCA service, which are contained in the first of four statutorily mandated opt out notices. (Resolution E-4250, pp. 4 & 20 [Finding and Conclusion 5]; see also Pub. Util. Code, § 366.2, subd. (c)(15)(A).) Therefore, the Resolution ordered that any customer who previously opted out of the CCA program without having received information of the terms and conditions of CCA service shall not be removed from the list of potential CCA customers. (Resolution E-4250, pp. 22-23 [Ordering Paragraph 2].)

PG&E alleges that by invalidating opt outs received prior to the effective date of the Resolution, the Commission retroactively changed a utility's rates, tariffs or classifications in violation of sections 455, 489, 491, and 728.⁶ (Rehrg. App., pp. 4-5.) This allegation lacks merit.

PG&E fails to explain how the Resolution violates sections 455, 489, or 491. Thus, PG&E fails to meet the requirements of section 1732, which requires that a rehearing application set forth specifically the ground or grounds on which the applicant considers a decision to be unlawful.

Furthermore, these sections have no bearing on the Commission's authority to declare that opt outs received prior to the issuance of the Resolution are inconsistent

⁶ PG&E's rehearing application also alleges that the Resolution violates section 486. This appears to be a typo as the rehearing application only mentions this section once and section 486 requires "every common carrier" to file with the Commission and make available to the public all rates, fares, charges, and classifications. Elsewhere, PG&E's rehearing application alleges a violation of section 489, which has similar provisions with regard to "every public utility other than a common carrier." A "common carrier" is a person or corporation that provides transportation for compensation to or for the public or any portion thereof. (Pub. Util. Code, § 211.)

with statutory requirements, and thus, invalid. Section 455 sets forth the procedures that govern a public utility's filing of proposed tariff changes that do not increase or result in an increase in any rate. Section 489 requires "every public utility other than a common carrier to file with the commission ... and keep open to public inspection, schedules showing all rates, tolls, rentals, charges, and classifications collected or enforced, or to be collected or enforced...." Section 491 prohibits a public utility from making a change in any rate or classification unless the Commission orders otherwise.

With regard to section 728, PG&E alleges this section implements the "rule against retroactive ratemaking" and prohibits the Commission from retroactively changing a utility's rates, tariffs or classifications, because those changes are limited to those to be "thereafter" observed and in force. (Rehrg. App., p. 5, fn. 4.) Section 728 provides:

Whenever the commission, after a hearing, finds that the rates or classifications, demanded, observed, charged, or collected by any public utility for or in connection with any service, product, or commodity, or the rules, practices, or contracts affecting such rates or classifications are insufficient, unlawful, unjust, unreasonable, discriminatory, or preferential, the commission shall determine and fix, by order, the just, reasonable or sufficient rates, classifications, rules, practices, or contracts to be thereafter observed and in force.

(Pub. Util. Code, § 728.)

Section 728 does not apply in this instance because it only applies where the Commission is promulgating a general rate. The California Supreme Court explained:

In *Pacific Tel. & Tel. Co. v. Public Util. Com.* (1965) 62 Cal.2d 634 ... we construed Public Utilities Code section 728 to vest the commission with power to fix rates prospectively only. But we did not require that each and every act of the commission operate solely in futuro; our decision was limited to the act of promulgating "general rates."

(*Southern Cal. Edison Co. v. Public Utilities Com.* (1978) 20 Cal.3d 813, 816.)

PG&E also alleges that the Resolution's determination that customers who previously opted out were not fully informed is unsupported by the record. (Rehrg. App., p. 5.) This allegation lacks merit. We concluded that certain early opt outs were inadequate based on the requirements of section 366.2(c)(15) and the undisputed facts in this case.

Among other things, section 366.2(c)(15) requires that customers receive notification of the terms and conditions of the CCA services offered. (Pub. Util. Code, § 366.2, subd. (c)(15)(A)(ii).) Based on this statutory requirement, we determined that customers cannot make an informed decision pursuant to section 366.2(c)(15) about whether or not to opt out of CCA service until they are at least made aware of the terms and conditions of CCA service. (Resolution E-4250, pp. 4-5 & 20 [Finding and Conclusion 5].) Thus, we concluded that any customers who previously opted out of CCA service without knowledge of the terms and conditions of CCA service were not fully informed and would not be removed from the list of potential CCA customers. (Resolution E-4250, pp. 22-23 [Ordering Paragraph 2].) Although PG&E questions whether customers who opted out early were not fully informed, PG&E does not explain how a customer can make an informed choice about a service without knowing the terms and conditions of that service.

During the Commission's consideration of the draft resolution, PG&E had an opportunity to comment on but did not dispute that it solicited and received opt outs prior to the statutory notification periods, and thus, before customers were informed of the terms and conditions of CCA service. (See, e.g., Opening Comments of PG&E on Draft Resolution E-4250, dated August 27, 2009, pp. 10-11; Resolution E-4250, p. 20 [Findings and Conclusions 3 & 4].) Section 366.2 requires that a CCA (or electrical corporation at the CCA's request) provide customer notifications within 60 days in advance of commencing automatic enrollment into CCA service. (Pub. Util. Code, § 366.2, subd. (c)(15).) PG&E does not dispute that, at the time we issued the Resolution, no CCA had commenced CCA service. (Resolution E-4250, p. 19 [Finding and Conclusion 1].) PG&E also does not dispute that prior to MEA sending out its phase one

notices on February 5, 2010, no CCA had provided information about the terms and conditions of its service. (Resolution E-4250, pp. 19-20 [Finding and Conclusion 2].) PG&E does not point to any evidence that demonstrates that the terms and conditions for any CCA service were available prior to this date.

Thus, it is undisputed that some customers opted out of CCA service without being informed of the terms and conditions of CCA service. We reasonably concluded that these customers did not make an informed decision within the meaning of section 366.2(c)(15) and should not be removed from the list of potential CCA customers. PG&E fails to demonstrate any legal error in this determination.

We also note that the invalidation of the early opt outs did not result in any prejudice to the customers. Customers who want to opt out of CCA service may still do so once they are fully informed of the CCA's terms and conditions. Since the statutorily required customer notifications must be sent prior to the CCA beginning service, all customers retained the option to receive uninterrupted service from the utility.

We find that PG&E has failed to demonstrate legal error regarding the invalidation of the early opt outs. Therefore, we deny rehearing on this issue.

C. The Commission has the authority to regulate utility-related activities funded by shareholders.

The Resolution prohibits electric utilities from “offer[ing] to provide, or provid[ing], any goods, services, or programs to a local government, or to the electricity customers within that jurisdiction, on the condition that the local government not participate in a CCA, or for the purpose of inducing the local government not to participate in a CCA.” (Resolution E-4250, p. 25 [Ordering Paragraph 4].) This restriction applies regardless of whether the goods, services, or programs are funded by ratepayers or shareholders. (Resolution E-4250, p. 25 [Ordering Paragraph 4].)

PG&E alleges that we exceeded our jurisdiction under sections 216, 218, 366.2, and 701 of the Public Utilities Code by prescribing conduct funded by

shareholders. (Rehrg. App., pp. 6-7.) PG&E alleges that we lack the jurisdiction to regulate this conduct because it does not involve the provision of public utility services.⁷

Pursuant to section 218(a), PG&E is an “electrical corporation” because it owns, controls, operates, or manages an electric plant for compensation within the state. Pursuant to section 216(a), every “electrical corporation,” including PG&E, is a “public utility” subject to the Commission’s jurisdiction.

Section 701 authorizes the Commission to “supervise and regulate every public utility in the State” and to “do all things, whether specifically designated in [the Public Utilities Codes] or in addition thereto, which are necessary and convenient in the exercise of such power and jurisdiction.” The authority of the Commission has been liberally construed. (*Consumer Lobby Against Monopolies v. Public Utilities Com.* (1979) 25 Cal.3d 891, 905.) The only limitation is that the additional power and jurisdiction the Commission exercises must be “cognate and germane” to the regulation of public utilities. (*Id.* at pp. 905-906.) PG&E does not identify anything in sections 216, 218, 366.2, or 701 that prohibits the Commission from regulating shareholder funded activities that are related to its public utility operations.

The Resolution found unpersuasive PG&E’s previous argument that providing goods and services to a local jurisdiction, or the customers within that jurisdiction for the purpose of keeping those customers as bundled customers of the utility was not “utility-related.” (Resolution E-4250, p. 15.) Thus, the Resolution concluded that the Commission had the jurisdiction to order utilities to refrain from that

⁷ The Commission is further considering this issue in R.12-02-009. In its opening comments on the Order Instituting Rulemaking, PG&E stated that it supports the inclusion of the following rule in the new rules of conduct:

Utilities may not condition the availability of any goods or services, such as energy efficiency programs or other ratepayer or *shareholder funded benefits*, on a local government’s decision regarding participation in a CCA program.

(Opening Comments of PG&E in R.12-02-009, filed March 26, 2012, p. 4, emphasis added.)

activity, in order to promote a level playing field between the investor owned utilities and CCAs, regardless of whether that activity was shareholder or ratepayer funded.

(Resolution, E-4250, p. 16.)

The Legislature confirmed the Commission's jurisdiction in SB 790. Among other things, SB 790 tasked the Commission with developing a code of conduct, associated rules, and enforcement procedures for electrical corporations relative to the consideration, formation, and implementation of CCA programs. (Pub. Util. Code, § 707.) The Legislature broadly authorized the Commission to incorporate rules that the Commission finds to be necessary or convenient in order to facilitate the development of CCA programs and to foster fair competition. (Pub. Util. Code, § 707, subd. (a)(4)(A).) SB 790 did not limit these rules to ratepayer funded activities. For instance, SB 790 states that the utilities' marketing activities related to CCAs, which is to be regulated in part by the Commission, must be funded exclusively by an electrical corporation's shareholders. (Pub. Util. Code, § 707, subd. (a).)

PG&E's rehearing application also states that the Commission is singling out the utilities in order to "level the playing field" while not taking any action with respect to CCAs. (Rehrg. App., p. 6.) PG&E does not explain how this constitutes legal error. PG&E does not identify any law that requires or authorizes the Commission to regulate any such conduct by the CCAs. The Commission has previously explained that it has limited jurisdiction over CCAs. (D.05-12-041, *supra*, at pp. 8-10 (slip op.)) In contrast, as noted above, the Commission has general jurisdiction over the conduct of the utilities and the Legislature has tasked the Commission with developing a code of conduct applicable to electrical corporations relative to the CCA program. (See Pub. Util. Code, § 707.) Further, electrical corporations and CCAs are not similarly situated. The Legislature has found that electrical corporations have inherent market power and that the exercise of this market power is a deterrent to the consideration, development, and implementation of CCA programs. (Sen. Bill No. 790 (2011-2012 Reg. Sess.) § 2, subds. (c) & (f).)

PG&E does not demonstrate any legal error on this issue. Thus, rehearing is denied.

III. CONCLUSION

For the reasons stated above, rehearing of Resolution E-4250 is denied.

THEREFORE, IT IS ORDERED that:

1. Rehearing of Resolution E-4250 is denied.
2. Application (A.) 10-05-015 is closed.

This order is effective today.

Dated September 13, 2012 at San Francisco, California.

MICHAEL R. PEEVEY
President
TIMOTHY ALAN SIMON
CATHERINE J.K. SANDOVAL
MARK J. FERRON

I abstain.

/s/ MICHEL PETER FLORIO
Commissioners