

Decision **ALTERNATE PROPOSED DECISION OF COMMISSIONER  
FERRON** (Mailed 9/21/2012)

**BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA**

Application of Pacific Gas and Electric Company (U39M), San Diego Gas & Electric Company (U902M), Southern California Edison Company (U338M), and Southern California Gas Company (U904G) for Authority to Increase Electric and Natural Gas Rates and Charges to Recover California Air Resources Board Assembly Bill 32 Cost of Implementation Fee.

Application 10-08-002  
(Filed August 2, 2010)

And Related Matter.

Application 11-03-010

**DECISION APPROVING PACIFIC GAS & ELECTRIC COMPANY,  
SOUTHERN CALIFORNIA EDISON COMPANY, SAN DIEGO  
GAS & ELECTRIC COMPANY, SOUTHERN CALIFORNIA GAS COMPANY  
AND SOUTHWEST GAS CORPORATION AUTHORITY TO  
INCREASE ELECTRIC AND NATURAL GAS RATES AND  
CHARGES TO RECOVER THE COST OF IMPLEMENTATION FEES  
IMPOSED BY THE CALIFORNIA AIR RESOURCES BOARD**

**1. Summary**

Pacific Gas and Electric Company (PG&E), Southern California Edison Company (SCE), San Diego Gas & Electric Company (SDG&E), Southern California Gas Company (SoCalGas) and Southwest Gas Company (Southwest Gas) are granted authority to recover costs by increasing their electric and gas

rates and charges to collect the costs of fees imposed by the California Air Resources Board pursuant to Assembly Bill 32 (Stats. 2006, ch. 488) from their respective end-use gas transportation and bundled electric generation customers.

These proceedings are closed.

## **2. Background**

### **2.1 Factual Background**

On September 27, 2006, Governor Schwarzenegger signed Assembly Bill 32 (AB 32) (Stats. 2006, ch. 488), which authorized the California Air Resources Board (ARB) to adopt measures necessary to reduce California's greenhouse gas (GHG) emissions to the 1990 level by 2020. AB 32 provides that ARB may adopt a fee on GHG emissions to recover its administrative costs associated with the implementation of AB 32 (AB 32 Implementation Fee). ARB adopted the AB 32 Implementation Fee on September 25, 2009, and the final version was approved by the Office of Administrative Law on June 17, 2010. The AB 32 Implementation Fee regulation instructs ARB staff to issue invoices for the first annual Implementation Fee obligation within 30 days of the passage of the state budget, which was signed by Governor Schwarzenegger on October 8, 2010. Payment of the fee is due within 60 days of receipt of the invoice.

### **2.2 Procedural Background**

A joint prehearing conference and Oral Argument was properly noticed, scheduled, and held on May 9, 2011. On June 10, 2011, the assigned Administrative Law Judge (ALJ) issued a ruling consolidating Applications (A.) 10-08-002 and A.11-03-010. On October 31, 2011, the Division of Ratepayer Advocates (DRA) filed a Motion for Party Status. Its motion was granted by the ALJ via electronic mail on November 17, 2011. Both of these and

all other rulings are confirmed in this Decision. There were no evidentiary hearings in this consolidated proceeding.

### **2.2.1. Application of PG&E, SCE, SDG&E and SoCalGas**

In A.10-08-002, PG&E, SCE, SDG&E and SoCalGas jointly request authority for increases to their electric and gas rates and charges to collect the costs of the ARB AB 32 Implementation Fee from their respective end-use gas transportation and bundled electric generation customers.

In Decision (D.) 10-12-026, the Commission authorized the creation of memorandum accounts for each of the Joint Applicants to record costs associated with the ARB AB 32 Implementation Fee.

In response to the September 16, 2011 Assigned Commissioner's Ruling and Scoping Memo (Scoping Memo), PG&E, SCE, SDG&E and SoCalGas jointly filed an Opening Brief on October 14, 2011. In response, DRA filed a reply brief on November 18, 2011. The contents of the briefs are detailed below.

### **2.2.2. Application of Southwest Gas**

Subsequent to the issuance of D.10-12-026, Southwest Gas filed A.11-03-010, a similar application to A.10-08-002 and seeking essentially identical treatment granted to PG&E, SCE, SDG&E and SoCalGas by the Commission in D.10-12-026. Southwest Gas seeks the establishment of a memorandum account to recover the costs associated with the ARB AB 32 Implementation Fee, pending final disposition of the request based on merit and the law in a general rate case (GRC) likely to be filed in late 2012 for a 2014 test year.<sup>1</sup>

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<sup>1</sup> See A.11-03-010 at 3.

In D.11-07-013, the Commission authorized Southwest Gas to establish a memorandum account to track and record costs associated with the ARB AB 32 Implementation Fee. In that decision, we stated: “[w]e defer, either to a subsequent phase of this proceeding or to Southwest [Gas’] next general rate [case], a determination of whether costs incurred and recorded in the memorandum account will be recoverable in rates, and the appropriate manner in which any approved costs will be recovered. This decision does not prejudge any issues regarding cost recovery.”<sup>2</sup> D.11-07-013 did not close the proceeding opened in A.11-03-010, even though the majority of Southwest Gas’ request was addressed. As subsequently stated in the Scoping Memo, “we find that Southwest must provide its best arguments now for recovery and not defer the issue to its next general rate [case]. We will decide now for Southwest [Gas]... whether they should be allowed to recover AB 32 Implementation fees now.”<sup>3</sup> The Scoping Memo directed Southwest Gas to address issues regarding recovery in briefs, as discussed further below. As directed, Southwest Gas filed its brief on these issues October 14, 2011.

### **3. Reasonableness of Recovery of AB 32 Implementation Fee**

There is one primary issue before the Commission in this proceeding: whether or not PG&E, SCE, SDG&E and SoCalGas and/or Southwest Gas are eligible to recover the ARB AB 32 Implementation Fees from customers outside the GRC cycle.

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<sup>2</sup> See D.11-07-013 at 3.

<sup>3</sup> See September 16, 2011 Assigned Commissioner’s Ruling and Scoping Memo at 9.

At the Oral Argument and followed up by questions in the Scoping Memo for briefing, PG&E, SCE, SDG&E and SoCalGas were directed to provide further written argument to justify the request for authority to recover costs associated with the ARB AB 32 Implementation Fees in between their routinely scheduled general rates cases. Southwest Gas was also directed to argue whether or not it is in a different position, due to the fact that it is not on a regular GRC cycle similar to that of the other Applicants.<sup>4</sup> Southwest Gas was further required to either justify deferral of consideration of the merits of its request to the 2014 test year GRC or present its best argument now to resolve its request based on merit and the law.

The Scoping Memo also required PG&E, SCE, SDG&E and SoCalGas to brief an apparent inconsistency in concurrent positions taken in their Application and a seemingly opposite position argued in comments to Proposed Resolution W-4867,<sup>5</sup> which was adopted on April 14, 2011 as Resolution L-411A. Resolution L-411A<sup>6</sup> was adopted in response to new federal legislation enacted and effective in between GRCs. In this Application, PG&E, SCE, SDG&E and SoCalGas seek fee recovery in between GRCs while, in comments to Resolution L-411A, they oppose a refund mechanism being implemented in

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<sup>4</sup> We note that individual rate case decisions have varied the three year cycle, most recently for SDG&E and SoCalGas, but they are nevertheless on a predictable schedule with attrition mechanisms in place for the interim periods.

<sup>5</sup> Responses submitted on January 7, 2011.

<sup>6</sup> This resolution established a one-way memorandum account for all cost-of-service regulated utilities that do not address the New Tax Law in 2011 or in 2012 test year GRCs, to track the impacts of the Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010 ("New Tax Law" or "Tax Relief Law").

between general rates cases. Southwest Gas did not file comments in response to Resolution L-411A and therefore did not need to brief this issue.

### **3.1. Summary of Brief filed by PG&E, SCE, SDG&E and SoCalGas**

PG&E, SCE, SDG&E and SoCalGas argue that, with the way that the ARB AB 32 Implementation Fee is structured, the utilities act as collection agents on behalf their customers. As represented in the brief, “ARB adopted a regulation that imposes the [ARB AB 32 Implementation] Fee upon ‘upstream’ electric and gas utilities, rather than on the direct sources of emissions.”<sup>7</sup> They represent that having the utilities act as collection agents was done for administrative convenience. The utilities further represent that “ARB reasoned that the imposition of the administrative fee upon natural gas utilities, as opposed to the direct source of emissions, is not inconsistent with AB 32, because gas utilities will have the ability to pass the costs downstream to end-users.”<sup>8</sup> The utilities argue that “the amounts and timing of the fees are within the exclusive control of ARB and the California Legislature. The Joint Utilities have no managerial or legal discretion to avoid incurring the fees as part of their utility cost of service. The Joint Utilities charge no markup and earn no return on the fees.”<sup>9</sup> Similarly, they also state “there is no effective or available cost management incentive.”<sup>10</sup> The parties state that if recovery were denied, there is

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<sup>7</sup> See Opening Brief of PG&E, SCE, SDG&E and SoCalGas (Opening Brief) at 3-4.

<sup>8</sup> See Opening Brief at 4.

<sup>9</sup> See Opening Brief at 6.

<sup>10</sup> See Opening Brief at 13.

“also a potential legal conflict, because the gas utilities are not ‘sources of emissions’ from which the ARB can collect fees attributable to gas combustion by residential and commercial gas customers, and thus Commission approval of the pass-through of the fees to gas customers is essential to ensure that the fee complies with AB 32.”<sup>11</sup> Last, the utilities represent that at the time of the filing of the brief, they have accrued a total of over \$25 million of unrecovered ARB AB 32 Implementation fees in their respective memorandum accounts.<sup>12</sup>

Turning to the second portion of the brief, the utilities contend that there is no conflict in their representations in comments on Resolution L-411A and in this Application: “Resolution L-411A also affirmed that [PG&E, SCE, SDG&E and SoCalGas] could seek recovery between rate cases for the increased costs attributable to those same tax law changes, as an offset to the tax savings under the new law. Here, [PG&E, SCE, SDG&E and SoCalGas] are not incurring any cost savings or benefits under the ARB AB 32 Implementation Fees, but are seeking recovery between rate cases for the increased costs attributable to the ARB’s administrative fees, just like the offsetting costs under Resolution L-411A.”<sup>13</sup> The utilities highlight comments made by PG&E and echoed by the other utilities, which indicate that as a result of the comments made on Draft Resolution W-4867, the Commission made significant revisions in what was adopted as Resolution L-411A.<sup>14</sup> SCE, SDG&E and SoCalGas also

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<sup>11</sup> See Opening Brief at 11.

<sup>12</sup> See Opening Brief at 7.

<sup>13</sup> See Opening Brief at 13.

<sup>14</sup> See Opening Brief at 6.

point to language in Resolution L-411A that exempts them from certain requirements because they have pending GRCs before the Commission in 2012.<sup>15</sup>

SCE, SDG&E and SoCalGas confirm that they do have Z Factor mechanisms to address unforeseen costs in between rate cases, while PG&E does not have such a factor. The Z Factor mechanism was first developed as a component of incentive-based ratemaking and has a long established history in the rate case cycle. The utilities contend that “the Z factor mechanism would not be the appropriate mechanism for recovery of the ARB’s administrative fees. Even though the [ARB] AB 32 Implementation Fee is a government fee, the ARB has imposed it under the assumption that the utilities are acting as the collection agents for the actual sources of GHG emissions...Based on these unique assumptions and circumstances behind the ARB fee rule, any applicable Z Factors would be inapplicable because the costs are not intended to be incurred by the utilities in the first place.”<sup>16</sup>

### **3.2. Summary of Brief filed by Southwest Gas**

Southwest Gas confirms it is on a different rate case cycle than the other utilities.<sup>17</sup> Southwest Gas contends that “regulatory commissions have routine[ly] found that expenses incurred by a utility in complying with the mandates of federal and state law are appropriate[ly] recovered from ratepayers, particularly when there is a corresponding benefit to customers.”<sup>18</sup> Southwest

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<sup>15</sup> See Opening Brief at 11.

<sup>16</sup> See Opening Brief at 18.

<sup>17</sup> See Southwest Gas Opening Brief at 5.

<sup>18</sup> See Southwest Gas Opening Brief at 4.

Gas makes similar arguments about the structure of the ARB AB 32 Implementation Fee, primarily that it is acting as a collection agent. It also represents that the ARB AB 32 Implementation Fee is “mandated by law and are thus not within the control or discretion of Company management.”<sup>19</sup> Southwest Gas also confirms that it does not have an approved Z Factor mechanism. It explains that the “Z Factor is a mechanism used by utilities to recover unforeseen and uncontrollable costs that arise between rate cases. In order to be incorporated into the Z Factor mechanism, such costs must satisfy a variety of criteria. Southwest Gas does not have an approved Z Factor mechanism.<sup>20</sup> As a result, it does not make arguments whether that would be an appropriate method for recovery of the ARB AB 32 Implementation Fee. Southwest Gas contends that it will track the costs in the memorandum account established by D.11-07-013 until the effective date of rates from its next GRC.<sup>21</sup> Southwest Gas estimates that by that time, the memorandum account balance will total approximately \$485,000.<sup>22</sup>

### **3.3. Summary of Reply Brief filed by DRA**

In its reply brief, DRA represents that it disagrees with the Opening Brief of PG&E, SCE, SDG&E and SoCal Gas. It sees no distinction between the imposition of ARB AB 32 Implementation Fee and changes in deferred taxes

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<sup>19</sup> See Southwest Gas Opening Brief at 4.

<sup>20</sup> See Southwest Gas Opening Brief at 6.

<sup>21</sup> See Southwest Gas Opening Brief at 7.

<sup>22</sup> See Southwest Gas Opening Brief at 6.

related to the Tax Relief Act.<sup>23</sup> DRA contends that the two events are “similar in that they both are unanticipated and may impact the utility’s earnings relative to what was adopted for that utility in its last GRC.”<sup>24</sup> DRA continues to say that “the impacts of both the ARB [AB 32 Implementation] Fees and the Tax Relief Act were unanticipated.”<sup>25</sup> DRA further represents that the fees are “within the context of normal business operations and a normal business and regulatory risk. These risks are considered when the Commission determines an authorized cost of capital for utilities and are incorporated within the adopted revenue requirement for the utilities.”<sup>26</sup>

#### **4. Discussion**

PG&E, SCE, SDG&E, SoCalGas and Southwest Gas all represent that, with the way that the ARB AB 32 Implementation Fee is currently structured, the utilities have no ability to control or manage the costs associated with this fee. In its reply brief, DRA does not contest this point. DRA does not address whether or not the structure imposed by ARB would lead to reasonable costs being passed on to ratepayers, absent recovery as the utilities propose here. DRA is completely silent on the arguments made by Southwest Gas.

PG&E, SCE, SDG&E, SoCalGas and Southwest Gas describe the structure of the ARB AB 32 Implementation Fee. They contend that the Z Factor would not be an appropriate mechanism for recovery. In considering this argument, we

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<sup>23</sup> See DRA Reply Brief at 1.

<sup>24</sup> See DRA Reply Brief at 1.

<sup>25</sup> See DRA Reply Brief at 2.

<sup>26</sup> See DRA Reply Brief at 2.

recognize that SCE, SDG&E and SoCalGas have a Z Factor while PG&E and Southwest Gas do not. We also recognize that the structure of the ARB AB 32 Implementation Fee is different for the costs associated with natural gas service versus electric service. However, we prefer not to determine the reasonableness of recovery based on these circumstances for each utility separately. Rather, we think that the most appropriate guiding principle in this unique situation is uniformity. We conclude that it is not in the ratepayer's interest to have variation on the ARB AB 32 Implementation Fee based on utility service territory because a patchwork approach could lead to administrative inefficiency and other sub-optimal outcomes. We make an exception from our standard ratemaking practice because we think it is more important to ensure the correct implementation of AB 32, including the ARB AB 32 Implementation Fee. Therefore, our consideration of the fees will be the same regardless if the utility provides electric or natural gas service, where the utility is in the rate case cycle, and if the utility has a Z Factor mechanism.

Overall, we are persuaded by PG&E, SCE, SDG&E, SoCalGas and Southwest Gas that it is reasonable to track and authorize recovery of these costs now. In part, we find that recovery is reasonable because the ARB AB 32 Implementation Fee costs cannot be managed by the utilities. In general, we agree with DRA that it is good practice to consider these types of costs in a GRC. In this instance, however, we find that the potential harm of delaying consideration of recovery until the next GRC is far greater than any benefit that would stem from that approach. The misalignment of timing of the utility rate case cycles with the implementation and collection of the ARB AB 32 Implementation Fee is an additional factor as to why this recovery is reasonable. While the utilities make several additional points, we find that the above reasons

are sufficient without needing to consider other arguments. Specifically, we do not determine whether the utilities are acting as “collection agents” nor whether ARB intended to have the costs incurred by the utilities or by the ratepayers.

We now turn to the matter of potential conflicting statements made by PG&E, SCE, SDG&E and SoCalGas in this Application and in comments on Resolution L-411A. We agree that the policies at issue in this Application and in Draft Resolution W-4867 and the adopted final version (Resolution L-411A) remove the source of the potential conflict. However, as noted by the utilities, the changes made between Draft Resolution W-4867 and the adopted final version (Resolution L-411A) removes the source of the potential conflict. We are persuaded that PG&E, SCE, SDG&E and SoCalGas did not making conflicting concurrent arguments in this Application and in their comments on Resolution L-411A. Therefore, we determine the reasonableness of recovery in this Application after having fully considered and rejected any concerns about conflicting statements argued in comments on Draft Resolution W-4897/Resolution L-411A.

## **5. Conclusion**

PG&E, SCE, SDG&E, SoCalGas and Southwest Gas should be eligible to recover ARB AB 32 Implementation Fees in between their scheduled general rates case proceedings.

## **6. Comments on Proposed Decision**

The alternate proposed decision of Commissioner Mark J. Ferron was mailed to the parties in accordance with Section 311 of the Public Utilities Code and comments are allowed under Rule 14.3 of the Commission’s Rules of Practice and Procedure. Comments were filed by PG&E, SCE, SDG&E and SoCalGas (in one joint filing) and also by DRA on October 15 , 2012 and reply

comments were filed on October 18, 2012 by PG&E, SCE, SDG&E and SoCalGas (in one joint filing). No substantive changes have been made in response to comments on the proposed decision.

## **7. Categorization and Assignment of Proceeding**

Mark J. Ferron is the assigned Commissioner and Douglas M. Long is the assigned Administrative Law Judge in this proceeding. This proceeding is categorized as ratesetting. ALJ Long is the Presiding Officer.

### **Findings of Fact**

1. AB 32, as enacted by the Legislature and implemented by the California Air Resources Board, imposes Implementation Fees on PG&E, SCE, SDG&E, SoCalGas and Southwest Gas.

2. SCE, SDG&E and SoCalGas currently have a Z Factor mechanism while PG&E and Southwest Gas do not.

3. Resolution L-411A was adopted by the Commission on April 14, 2011 and primarily dealt with the Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010.

4. In comments in what was to be adopted by the Commission as Resolution L-411A, PG&E, SCE, SDG&E and SoCalGas filed comments about recovery in between rate cases. In these comments, PG&E, SCE, SDG&E and SoCalGas opposed refunds between routinely scheduled GRCs in response to new federal legislation enacted and effective between GRC cycles.

5. Southwest Gas did not file comments on the proposed version of Resolution L-411A.

6. Several revisions were made to Draft Resolution W-4867, in part based on comments made by PG&E, SCE, SDG&E and SoCalGas.

**Conclusions of Law**

1. PG&E, SCE, SDG&E, SoCalGas, and Southwest Gas are utilities subject to this Commission's jurisdiction.
2. It is in the ratepayers' best interest to have a uniform outcome across service territories on whether or not the ARB AB 32 Implementation Fee should be recoverable.
3. It is reasonable to track and authorize recovery of the costs associated with ARB AB 32 Implementation Fees.
4. No conflicting concurrent positions were taken by PG&E, SCE, SDG&E and SoCalGas in this application and in the comments regarding Resolution L-411A.
5. Assembly Bill 32 implementation fees are recoverable in GRCs as a prospective expense in the ratemaking forecast.

**O R D E R**

**IT IS ORDERED** that:

1. Application 10-08-002 filed by Pacific Gas and Electric Company (PG&E), Southern California Edison Company (SCE), San Diego Gas & Electric Company (SDG&E) and Southern California Gas Company (SoCalGas) is granted. PG&E, SCE, SDG&E and SoCalGas may recover the reasonable costs recorded in the memorandum account for Assembly Bill 32 Implementation Fees from ratepayers. PG&E, SCE, SDG&E and SoCalGas may also request to recover in rates any further fees expected to be incurred as a forecast cost in a general rate case proceeding.

2. Application 11-03-010 is granted. Southwest Gas Corporation may continue to utilize a memorandum account for Assembly Bill 32 Implementation Fees and may request to recover those costs in its next general rate case.

3. Applications (A.) 10-08-002 and A.11-03-010 are closed.

This order is effective today.

Dated \_\_\_\_\_, at San Francisco, California.