

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

ENERGY DIVISION

**Agenda ID 12747
RESOLUTION E-4612
February 27, 2014**

R E S O L U T I O N

Resolution E-4612. Pacific Gas and Electric Company (PG&E) requests for a one time modification of the standard indemnity clause on a tariff schedule related work agreement with the California Department of Water Resources (DWR).

PROPOSED OUTCOME: This resolution grants the request to modify the indemnity provision of the agreement.

SAFETY CONSIDERATIONS: This resolution provides a limited one time modification of PG&E's standard indemnity clause on its agreement with DWR. Utilities are expected to comply with all federal and state safety regulations, including Public Utilities Code Section 451.

ESTIMATED COST: Cost is unknown.

By Advice Letters 4213-E Filed on April 4, 2013, and 4213-E-A Filed on April 8, 2013.

SUMMARY

California Public Utilities Commission (CPUC) approves a one-time modification of PG&E's standard indemnity clause in its agreement with DWR, because the request is reasonable and the work on this routine project has been completed.

On April 4, 2013, PG&E requested authorization from the CPUC for a limited one-time modification of the standard indemnity clause on its agreement with DWR through a Tier 1 Advice Letter 4213-E.

On April 8, 2013, PG&E submitted Advice Letter 4213-E-A to adjust the Tier classification from Tier 1 to Tier 3. Tier 3 is more appropriate because this Advice Letter modifies a standard tariff form.

No protests were received.

This Resolution approves PG&E's request to modify PG&E's standard indemnity clause of its contract agreement with DWR.

BACKGROUND

DWR requested that PG&E relocate overhead electric distribution facilities adjacent to the Cache Creek levee in Yolo County to accommodate the realignment of the Cache Creek levee.

The project involves the removal of 4 poles and overhead electric conductors and installing 6 new poles on DWR's property. The line will be relocated in a new alignment that will be parallel to realigned levee, at levee mile 3.9 and 4.25, 15 feet from the toe of the levee. The existing pole line has a total length of 1,108 feet. The relocated pole line has a total length of 827 feet. The relocated pole line is shorter because it curves at about a 45 degree angle, whereas the existing line was at a 90 degree angle. A replacement right of way will be provided to PG&E for the new alignment of the distribution pole line. Electric Rule 15.I.1 governs the relocation of distribution facilities.

Relocation is generally performed under PG&E's general contract form, Agreement to Perform Tariff Schedule Related Work, Form 62-4527 (Form). DWR concerns that it is only authorized to indemnify for losses that occur as a result of its own conduct, and that it cannot indemnify for any loss that may be caused by the conduct of any other party. Hence, DWR objected to the scope of the indemnity provision in the Form, and requested that its obligation to indemnify PG&E be limited to any losses that are caused by or result from DWR's negligent or intentional acts or omissions. DWR requests deletion of the sentence in the Form that required the Applicant to defend any suit asserting any claim covered by this indemnity.

PG&E occasionally receives these types of requests from local agencies. Since 2008, PG&E has received four requests from local agencies to modify the indemnity provision in the Form.

In 2009, PG&E had previously agreed to modify the Form in a DWR project to limit the scope of the indemnity to losses caused by DWR's own negligence or willful misconduct, Advice 3461-E. DWR made the identical request for this Cache Creek project. The indemnity provision in the general contract form contains express language that excludes from the scope of the indemnity liability for any loss or damage caused by PG&E's "active" negligence or willful misconduct. The phrase "active negligence" refers to substantial involvement in the cause of the loss. DWR's request would broaden this exception to the indemnity so that it would also exclude liability for any loss or damage caused by

PG&E's "passive" negligence. Passive negligence would refer to very little involvement in the cause of the loss. In other words, DWR would exclude from the indemnity any loss that was caused by PG&E, even if PG&E did not significantly contribute to the loss. The same is true of any portion of the loss caused by a third party, other than DWR. By these indemnity clause modifications, PG&E was not seeking indemnification from DWR for any loss that may have occurred on the job that was not caused by DWR. To the extent any loss was caused by a PG&E contractor, it would be adequately protected through its agreement with the contractor. However, for any loss that might be caused by a third party, PG&E would not be protected by an express contractual indemnity relating to that loss.

To address DWR's concern, PG&E has agreed to modify the indemnity language found in the Form and to use this revised language in a limited one-time agreement.

PG&E's insurance coverage has a substantial self-insured retention limit of \$10 million dollars. Therefore, for any loss that is less than \$10 million, PG&E would self-insure for the loss. PG&E indicated that it would not expect any loss arising from a project of this size to exceed its self-insurance retention.

PG&E submitted this Advice Letter in accordance with the second paragraph of Section 8.2.3 of General Order (GO) 96-B, which allows a utility to provide service to a government agency that deviates from its tariff, but requires an Advice Letter approval promptly submitted to the CPUC.¹

¹ 8.2.3 Emergency Service; Service to Government Agencies

At all times, a utility other than a telephone corporation may provide service (other than resale service) to a government agency for free, or at reduced rates and charges, or under terms and conditions otherwise deviating from its tariffs then in effect. The utility may begin such service without prior Commission approval, but the utility shall promptly submit an advice letter to the appropriate Industry Division to notify the Commission of the utility's provision of such service and of the rates, charges, terms and conditions under which the service is provided. Although the advice letter may be effective pending disposition under General Rule 7.5.3, the Commission may determine, in an appropriate proceeding, the reasonableness of such service.

For purposes of this General Rule 8.2.3, "government agency" means the United States and its departments, Indian tribes recognized by the United States or the State of California, the State of California and its political subdivisions and municipal corporations, including the departments thereof, and public fairs and celebrations.

The second paragraph of the proposed agreement has been revised to read:

Applicant shall indemnify and hold harmless PG&E, its officers, agents and employees, against all loss, damage, expense and liability resulting from injury to or death of any person, including but not limited to, employees of PG&E, Applicant or any third party, or for the loss, destruction or damage to property, including, but not limited to property of PG&E, Applicant or any third party, arising out of or in any way connected with the performance of this agreement, however caused, except to the extent caused by the ~~active negligence or willful misconduct~~ *fault or negligence* of PG&E, its officers, agents and employees. ~~Applicant will, on PG&E's request, defend any suit asserting a claim covered by this indemnity.~~ Applicant will pay all costs that may be incurred by PG&E in enforcing this indemnity, including reasonable attorneys' fees.

Based on Section 8.2.3 of General Order (GO) 96-B, which allows a utility to begin emergency service without prior Commission approval, PG&E started construction on June 27, 2013, and completed the pole relocations on July 11, 2013. But the utility is still required to promptly submit an advice letter to the Energy Division to notify the Commission of the utility's provision of such service and of the rates, charges, terms and conditions under which the service is provided.

NOTICE

Notices of AL 4213-E and AL 4213-E-A were made by publication in the Commission's Daily Calendar. PG&E states that copies of the Advice Letters were mailed and distributed in accordance with Section 4 of General Order 96-B.

PROTESTS

Advice Letter AL 4213-E and AL 4213-E-A were not protested.

DISCUSSION

CPUC staff recommends approval because the request is reasonable and the work of this routine project has been completed.

CPUC staff evaluated this request taking into account the reasonableness of the request, the activity in question, and whether it involves an unacceptable hazard or degree of risk.

Reasonableness of the Request

The modified indemnity clause relieves DWR of the obligation to indemnify PG&E for losses that are caused by PG&E's passive negligence. DWR is also relieved of the obligation to indemnify PG&E where the loss is caused by a third party. Therefore, PG&E's risk is increased slightly in that it does not receive indemnification from DWR for losses resulting from PG&E's passive negligence or losses that are caused by third parties. However, it is reasonable for PG&E to defend claims resulting from its passive negligence and to pursue damage claims of a third party that causes a loss to PG&E.

PG&E agreed to remove the sentence that stated the Applicant is required to defend any suit covered by the indemnity. PG&E stated that DWR's intent is to simply pay any claim that may arise. By statute, Civil Code section 2778(3) states that an indemnity against claims embraces the defense of any such claims. Therefore, even though that sentence was removed from the Form, DWR has an independent obligation under this statute to defend claims arising from DWR's fault or negligence.

Hazard or Degree of Risk of the Project

PG&E has been installing, relocating, and replacing overhead facilities in projects involve maintenance, distribution line extension, overhead conversions, etc., for many years. Therefore, relocating five poles and overhead conductors should involve reasonable risk.

In conclusion, PG&E's request for a limited one time modification of PG&E's standard indemnity clause on its agreement with DWR is reasonable. The CPUC should approve and grant this request.

COMMENTS

P.U. Code section 311(g)(1) provides that this resolution must be served on all parties and subject to at least 30 days public review and comment prior to a vote of the CPUC. Section 311(g)(2) provides that this 30-day period may be reduced or waived upon the stipulation of all parties in the proceeding.

All parties in the proceeding have stipulated to waive the 30-day waiting period required by P.U. Code section 311(g)(1) and the opportunity to file comments on the draft resolution. Accordingly, this matter will be placed on the CPUC's agenda directly for prompt action.

FINDINGS

1. PG&E requests to remove 4 poles and overhead electric conductors in conflict with the levee improvements, and relocate the pole line in a new alignment that will be parallel to realigned levee.
2. The second paragraph of Section 8.2.3 of General Order (GO) 96-B, allows a utility to provide service to a government agency that deviates from its tariff, but requires an Advice Letter approval promptly submitted to the CPUC.
3. Relocation is generally performed under PG&E's general contract form, Agreement to Perform Tariff Schedule Related Work, Form 62-4527.
4. By Advice Letters 4213-E dated April 4, 2013, and 4213-E-A dated April 8, 2013, PG&E requests a limited one-time agreement modifying PG&E's standard indemnity clause as it appears on Form 62-4527.
5. DWR's concern is that it is only authorized to indemnify for losses that occur as a result of its own conduct, and that it cannot indemnify for any loss that may be caused by the conduct of any other party.
6. PG&E's risk is increased by the modified indemnity clause since it does not receive indemnification from DWR for losses resulting from PG&E's passive negligence or losses that are caused by third parties. However, it is reasonable for PG&E to defend claims resulted from its passive negligence.
7. Overhead facilities relocations are routine work activities of reasonable risk and PG&E has adequate amount of self-insurance.
8. Based on Section 8.2.3 of General Order (GO) 96-B, which allows a utility to begin emergency service without prior Commission approval, PG&E started construction on June 27, 2013, and completed the pole relocations on July 11, 2013.

THEREFORE, IT IS ORDERED THAT:

1. PG&E's request for a limited one-time modification of PG&E's standard indemnity clause in its agreement with DWR is approved and Advice Letter 4213-E-A is approved.

This Resolution is effective today.

I certify that the foregoing resolution was duly introduced, passed and adopted at a conference of the Public Utilities Commission of the State of California held on February 27, 2014; the following Commissioners voting favorably thereon:

PAUL CLANON
Executive Director