

BEFORE THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF CALIFORNIA



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Application of Pacific Gas and Electric Company (U39E) for Review of Entries to the Energy Resource Recovery Account (ERRA) and Renewables Portfolio Standard Cost Memorandum Account (RPSMA), and Compliance Review of Fuel Procurement for Utility Retained Generation, Administration of Power Purchase Contracts, and Least Cost Dispatch of Electric Generation Resources for the Record Period of January 1, through December 31, 2010 and for Adoption of Electric Revenue Requirements and Rates Associated with the Market Redesign and Technology Upgrade (MRTU) Initiative.

A.11-02-011  
(Filed February 15, 2011)

**THE DIVISION OF RATEPAYER ADVOCATES  
MOTION TO DISMISS A PORTION OF THE APPLICATION**

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BEFORE THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF CALIFORNIA

Application of Pacific Gas and Electric Company (U39E) for Review of Entries to the Energy Resource Recovery Account (ERRA) and Renewables Portfolio Standard Cost Memorandum Account (RPSMA), and Compliance Review of Fuel Procurement for Utility Retained Generation, Administration of Power Purchase Contracts, and Least Cost Dispatch of Electric Generation Resources for the Record Period of January 1, through December 31, 2010 and for Adoption of Electric Revenue Requirements and Rates Associated with the Market Redesign and Technology Upgrade (MRTU) Initiative.

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**I. INTRODUCTION**

The Division of Ratepayer Advocates (DRA) hereby moves to dismiss the portion of this Application that seeks recovery of \$47.2 million for expenses related to the Market Redesign Technology Upgrade Memorandum Account (MRTUMA). This motion is made on the grounds that notice of the Application was not properly given to the public in violation of this Commission's Rules of Practice and Procedure, Rule 3.2(c). PG&E has faced these identical Rule 3.2(c) issues in the past, have been excused from compliance with the Commission's notice to the public rules and have been instructed to correct these violations. They have not corrected the violations. This motion is made pursuant to Rule 11.2.

PG&E's Application requests a Commission finding that PG&E made appropriate entries to its Energy Resource Recovery Account (ERRA) balancing account for calendar year 2010 (the Record Period) along with other ERRA related requests.

PG&E's Application also seeks recovery of \$47.2 million for expenses related to the MRTUMA. It is this MRTUMA portion of the Application that this motion seeks to dismiss.

## II. PROCEDURAL HISTORY

The Application was filed on February 15, 2011. DRA filed and served its Protest to that Application on March 21, 2011.<sup>1</sup> In that Protest, DRA indicated that one potential issue in the proceeding was "whether the instant application was properly served pursuant to Commission Rules of Practice and Procedure, Rule 3.2."<sup>2</sup> Related to that issue and in the Protest DRA indicated that:

This issue is listed here because the Compliance Filing pursuant to the Commission's Rules of Practice and Procedure, Rule 3.2, has not been made as of the date of this Protest. DRA may withdraw this as an issue at the Pre-Hearing Conference (PHC) if it receives the compliance filing with sufficient time to review that filing prior to the PHC.<sup>3</sup>

In response to DRA indicating that this was a potential issue in the proceeding, PG&E forwarded a document to DRA titled *PACIFIC GAS AND ELECTRIC COMPANY'S (U 39 E) PROOF OF RULE 3.2(c) COMPLIANCE* with a note asking whether the document addressed DRA's Rule 3.2 issue.<sup>4</sup> Two days later, on March 24, 2011, DRA responded to PG&E by outlining the procedural problems with the compliance filing and indicating

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<sup>1</sup> DRA's Protest can be found at: <http://docs.cpuc.ca.gov/efile/P/132717.pdf>.

<sup>2</sup> Id, at p. 12.

<sup>3</sup> Id, at p. 12, footnote 22.

<sup>4</sup> The compliance filing was served on March 10, 2011.

that DRA would not be able to withdraw DRA's Rule 3.2 objection.<sup>5</sup> Also on March 24, 2011, PG&E filed and served a new document also titled *PACIFIC GAS AND ELECTRIC COMPANY'S (U 39 E) PROOF OF RULE 3.2(c) COMPLIANCE*. This

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<sup>5</sup> The email [with some corrected spelling] stated:

I had not seen PG&E's Proof of Rule 3.2(c) Compliance, so thanks for forwarding it. I'm assuming that you sent it to me because of the tentative objection that we raised in the protest.

The filing you sent purports to cover Rule 3.2(b) [governmental entities] and Rule 3.2(c) [newspaper notices], but makes no mention of Rule 3.2(d) [bill inserts].

Rule 3.2(b) – your filing does not indicate which governmental entities the notice was sent to or when it was sent. The rule requires that it be sent within 10 days. Could you please send me confirmation that it was sent within those 10 days and to whom; copies to the cover/transmittal letters would be best. I suggest that a better practice would be to include that information in the filing, but an anomaly in the rules do not require that.

I also have some concern with the language in the notice and will be discussing that with the Public Advisor. The notice for example, indicates that parties other than DRA will be participating, but I am not aware of any other parties in this proceeding.

Rule 3.2(c) – your filing does not show the newspaper notice, the newspapers that the notice was published in or the dates of those publications. The rule requires several things that I need to check the notice and timing against, such as a listing of the PG&E offices where a copy of the application can be examined along with notice that the application can be viewed in the PUC's SF and LA offices.

This rule also requires that PG&E publish within 10 days after filing the application and to file with the Commission 10 days later a list of the papers along with publication dates and a sample of each different notice. Given that all of that needed to happen within 20 days of filing the application and it is now 37 days later, I'm not sure how you will be able to satisfy this requirement. Hopefully there was a different filing that I'm not aware of.

For convenience, I've copied the Rule here:

(c) Gas, electric, telephone, telegraph, water or heat utilities, within ten days after the filing of the application, shall publish at least once in a newspaper of general circulation in the county in which the increases are proposed to be made effective a notice, in general terms, of the proposed increases in rates. Such notice shall state that a copy of said application and related exhibits may be examined at the offices of the California Public Utilities Commission in San Francisco or Los Angeles and in such offices of the applicant as are specified in the notice, and shall state the locations of such offices. Within 10 days after publication, applicant shall file a sworn verification listing the newspapers and publication dates, and including a sample of each different notice. Applicants shall maintain documentation of compliance with this subsection, and shall provide it to any person upon request.

Given these concerns, I will not be able to withdraw DRA's Rule 3.2 objection at this time. To the extent necessary, I guess that I should also say that this is not intended to be a complete list of potential issues with Rule 3.2.

Please feel free to contact me with any comments or questions.

second compliance filing was attached to an email note in which PG&E indicated that the PUC's Docket Office had asked for additional information.

Finally, on April 1, 2011, PG&E filed its reply to DRA's Protest and (in a footnote) dismissed DRA's concerns contained in the March 24, 2011 email by including the following in a footnote:

PG&E filed its proof of Rule 3.2(c) compliance on March 10, 2010. However, PG&E was notified on March 24, 2010 by the CPUC Docket Office that its proof of compliance was rejected for failing to include a listing of newspapers and publication dates, and a sample of each different notice. PG&E remedied the error and re-filed its proof of compliance on March 24, 2010. Therefore, DRA's concerns are now moot.<sup>6</sup>

Detailed below is why DRA's concerns are not moot.

### **III. PG&E DID NOT PROPERLY GIVE NOTICE TO THE PUBLIC OF THE REQUESTED RATE INCREASE AND THEREBY VIOLATED THE PUBLIC'S DUE PROCESS RIGHTS**

Notice to the public of proposed rate increases is ordered by statute and specified in Commission rules. PG&E violated those rules in many respects and thus did not give proper notice to the public of its proposed rate increase, violating the public's due process rights. Those violations compel dismissal of the MRTUMA portion of PG&E's application.

Notice is fundamental to due process: "Engrained in our concept of Due Process is the requirement of notice. Notice is sometimes essential so that the citizen has the chance to defend charges. Notice is required before property interests are disturbed, before assessments are made, before penalties are assessed. Notice is required in a myriad of situations where a penalty or forfeiture might be suffered for mere failure to act."<sup>7</sup>

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<sup>6</sup> Reply of Pacific Gas and Electric Company to Protest of Division of Ratepayer Advocates, p. 1, fn 1.

<sup>7</sup> 7 Witkin, *Sum. Cal. Law*, Const Law § 638, citations omitted.

“Only by following procedures specified in or developed under [Public Utilities] section 454 may the utility then change its published tariff.”<sup>8</sup> The Court of Appeal based this directive on Public Utilities (PU) Code §454(a), which provides, in part, that all changes to any rate require an IOU to “furnish to its customers affected by the proposed rate change notice of its application to the commission for approval of the new rate.” PU §454(a) also requires that:

The notice shall state the amount of the proposed rate change expressed in both dollar and percentage terms for the entire rate change as well as for each customer classification, a brief statement of the reasons the change is required or sought, and the mailing, and if available, the e-mail address of the commission to which any customer inquiries may be directed regarding how to participate in, or receive further notices regarding the date, time, or place of, any hearing on the application, and the mailing address of the corporation to which any customer inquiries relative to the proposed rate change may be directed.

PU Code §454(b) empowers the Commission to “adopt rules it considers reasonable and proper providing for the nature of the showing required to be made in support of proposed rate changes, the form and manner of the presentation of the showing, with or without a hearing, and the procedure to be followed in the consideration thereof.”

California Public Utilities Commission (“CPUC”) Rules of Practice and Procedure, Rule 3.2 was adopted to effectuate this notice requirement.

Rule 3.2(c) - This rule requires that notice of an application be published at least once in a general circulation newspaper in each county affected by the proposed increase

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<sup>8</sup> *Pac. Bell v. PUC*, 79 Cal. App. 4th 269, 274 (Cal. App. 1st Dist. 2000).

within ten days of the filing of the application.<sup>2</sup> This 3.2(c) notice must "state that a copy of said application and related exhibits may be examined at the offices of the [CPUC] in [SF] or [LA] and in such offices of the applicant as are specified in the notice, and shall state the locations of such offices." In this proceeding, PG&E's 3.2(c) newspaper notice does not state that a copy of the application and related exhibits may be examined at any CPUC or PG&E office. The notice also fails to provide addresses for the Los Angeles CPUC office or the PG&E offices.

**A. PG&E Failed to Publish the Newspaper Notice within the Requisite Ten Days**

PG&E's Rule 3.2(c) compliance filing included a schedule for publication that indicates that the newspaper notices were published between February 23, 2011 and February 28, 2011. To the extent that the newspaper notices appeared after February 25, 2011, these notices would not satisfy the requirement that notice be published within the requisite 10 days from the filing of the Application.

**B. PG&E's Newspaper Notice Fails to Contain Required Information**

As indicated above, Rule 3.2(c), in part, requires that:

Such notice shall state that a copy of said application and related exhibits may be examined at the offices of the California Public Utilities Commission in San Francisco or Los Angeles and in such offices of the applicant as are specified in the notice, and shall state the locations of such offices.

The newspaper notice in this case, however, does not contain the address of the Commission's Los Angeles office or, more importantly, the several district offices where

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<sup>2</sup> Rule 3.2(c) provides, in part, emphasis added:

(c) Gas, electric, telephone, telegraph, water or heat utilities, within ten days after the filing of the application, shall publish at least once in a newspaper of general circulation in the county in which the increases are proposed to be made effective a notice, in general terms, of the proposed increases in rates. Such notice shall state that a copy of said application and related exhibits may be examined at the offices of the California Public Utilities Commission in San Francisco or Los Angeles and in such offices of the applicant as are specified in the notice, and shall state the locations of such offices. Within 10 days after publication, applicant shall file a sworn verification listing the newspapers and publication dates, and including a sample of each different notice.

a ratepayer could examine the Application. For comparison purposes, a recent Southern California Edison (SCE) newspaper notice contained the following:

**FOR FURTHER INFORMATION FROM SCE**

As noted above, you may review a copy of this Application and related exhibits at SCE's corporate headquarters (2244 Walnut Grove Avenue, Rosemead, CA 91770). You may also view these materials at the following SCE business offices:

1 Pebbly Beach Rd. Avalon, CA 90704	30553 Rimrock Rd. Barstow, CA 92311	374 Lagoon St., Bishop, CA 93514
505 W. 14 <sup>th</sup> Ave. Blythe, CA 92225	3001 Chateau Rd. Mammoth Lakes, CA 93546	510 S. China Lake Blvd., Ridgecrest, CA 93555
26364 Pine Ave. Rimforest, CA 92378	41694 Dinkey Creek Rd. Shaver Lake, CA 93664	421 W. J St., Tehachapi, CA 93561
120 Woodland Dr., Wofford Heights, CA 93285	6999 Old Woman Springs Rd. Yucca Valley, CA 92284	

Customers with Internet access may view and download SCE's application and the papers supporting it on SCE's Web site, [www.sce.com/applications](http://www.sce.com/applications). Anyone who would like to obtain more information about the application, please write to:

Southern California Edison Company  
P.O. Box 800  
2244 Walnut Grove Avenue  
Rosemead, CA 91770  
Attention: Case Administration

This example from SCE shows that it is not difficult for an Investor Owned Utility to satisfy the Commission's Rules. PG&E's notice does not satisfy or substitute for the notices required by Rule 3.2(c) in that it does not state the location of the CPUC or the PG&E offices at which the application may be examined by the public.

**C. PG&E Failed to File the Newspaper Notice with the Commission within the Requisite Ten Days**

PG&E's Rule 3.2(c) compliance filing was first made on March 10, 2011. Rule 3.2(c), however, provides that this compliance filing be made within ten days of

publication. Assuming, arguendo, that the newspaper notices appeared by February 25, when they were required to be published, the compliance filing was not made within the ten days after that publication. This is a separate and independent basis for granting this motion.

**D. The Notice is Misleading**

The notice that was published in newspapers indicates that parties “of record” other than DRA will be participating.<sup>10</sup> No other parties, however, have appeared in this proceeding. This affirmative and erroneous representation has the potential to mislead a member of the public into believing that other parties will be involved in the case and be protecting their interests.

**E. PG&E Has Violated These Same Commission Rules in the Past and Has Been Warned to Correct the Violations**

PG&E has faced these identical issues in the past, have argued that the defects are immaterial, have been excused from compliance with the Commission’s notice to the public rules and have been instructed to correct these violations. In PG&E’s application for authority to build fuel cells (A.09-02-013) which resulted in Decision (D) 10-04-028, DRA raised the same issues. The Commission addressed those concerns in the Discussion portion as follows:

**7. Compliance with Notice Requirements**

DRA contends PG&E’s application should be dismissed because it was not properly noticed, as required by Rule 3.2. According to DRA, while Rule 3.2 requires notice of the application to be published within 10 days of the filing of the application, PG&E’s notice was not published within the 10-day timeframe. In addition, DRA claims the notice did not include the statement that the application and related exhibits could be examined at any Commission or PG&E office, the notice did not provide the address of the Commission’s Los Angeles office or PG&E offices, and it failed to give a Commission e-mail address and the mailing address for PG&E where customers could obtain further information on

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<sup>10</sup> The Notice says that: “Other parties of record will also participate.”

the application. Finally, DRA maintains PG&E's filing lacks all pertinent information needed to verify proper notice was given.

In response, PG&E contends the notices were given consistent with long-standing Commission practice and were approved by the Commission's Public Advisor. PG&E asserts the notice adequately informed customers that the proposed facilities would increase electric revenue by \$44.5 million over 10 years and would result in an increase that is less than one percent of PG&E's revenues. According to PG&E, DRA quibbles with details of the notice, such as mailing and e-mail addresses, or a delay of one or two days in the notices' publication, and such details are not grounds for the Commission to dismiss the application.

We agree with PG&E that any defects with the notice are not material. We will not dismiss the application solely because of the minor defects in PG&E's notice and there was ample time in this proceeding for interested customers to comment on the applications after notice appeared. PG&E should correct these defects in future applications, ensuring that notice is timely given and that the notice provides all required information, including e-mail and mailing addresses and locations where the application may be viewed by the public. We appreciate DRA's diligence in ensuring that notice under Rule 3.2 is fulfilled, and its attention to this matter should improve the timeliness and completeness of future notices by PG&E.<sup>11</sup>

Regarding this issue, the **Findings of Fact** indicate that:

26. PG&E's notice of its application was not published within the 10-day timeframe required by Rule 3.2 and excluded certain information such as mailing and e-mail addresses for the Commission and PG&E.<sup>12</sup>

and the **Conclusions of Law** hold that:

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<sup>11</sup> D. 10-04-028, p. 33-34, emphasis added.

<sup>12</sup> Id., p. 37.

16. PG&E should correct notice defects in future applications and ensure notice is timely given and provides all information required by Rule 3.2.<sup>13</sup>

Thus it is clear that PG&E had more than adequate notice of the notice to the public rules before preparation of the instant Application and simply choice not to follow them. Allowing such conduct will only serve to encourage all of the utilities to increasingly ignore the Commission's rules until they have no meaning at all.

#### **IV. CONCLUSION**

The Commission should dismiss the portion of PG&E's Application that seeks recovery of \$47.2 million for expenses related to the Market Redesign Technology Upgrade Memorandum Account (MRTUMA) application. This motion should be granted because notice of the Application was not properly given to the public in violation of this Commission's Rules of Practice and Procedure, Rule 3.2(c). PG&E had previously violated the same rules and been admonished to make extra effort to follow the rules, but failed to do so. Such flagrant and repeated disregard of the Commission's rules should not be condoned.

Respectfully submitted,

/s/ MITCHELL SHAPSON

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April 7, 2011

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<sup>13</sup> Id., p. 39.

**CERTIFICATE OF SERVICE**

I hereby certify that I have this day served a copy of **THE DIVISION OF RATEPAYER ADVOCATES MOTION TO DISMISS A PORTION OF THE APPLICATION** in **A.11-02-011** by using the following service:

**E-Mail Service:** sending the entire document as an attachment to all known parties of record who provided electronic mail addresses.

**U.S. Mail Service:** mailing by first-class mail with postage prepaid to all known parties of record who did not provide electronic mail addresses.

Executed on April 7, 2011 at San Francisco, California.

/s/ NANCY SALYER  
\_\_\_\_\_  
NANCY SALYER

**SERVICE LIST**  
**A.11-02-011**

sha@cpuc.ca.gov  
ALR4@pge.com  
mrw@mrwassoc.com  
angelica.morales@sce.com  
case.admin@sce.com  
connor.flanigan@sce.com  
CentralFiles@SempraUtilities.com  
JYork@semprautilities.com  
a110@pge.com  
filings@a-klaw.com  
nes@a-klaw.com  
Sxpg@pge.com  
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