

Decision 03-01-085

January 30, 2003

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application of Southern California Edison Company (U 338-E) for Authority to Institute a Rate Stabilization Plan with a Rate Increase and End of Rate Freeze Tariffs.

Application 00-11-038

Emergency Application of Pacific Gas and Electric Company (U 39 E) to Adopt a Rate Stabilization Plan.

Application 00-11-056

Petition of The Utility Reform Network for Modification of Resolution E-3527.

Application 00-10-028

ORDER DENYING REHEARING OF DECISION 02-12-072**I. SUMMARY**

This Decision denies PG&E's application for rehearing of Decision (D.) 02-12-072. Decision 02-12-072 approved the "2003 Servicing Order Concerning Pacific Gas & Electric Company and the California Department of Water Resources." The 2003 Servicing Order sets forth the terms and conditions under which PG&E will provide the transmission and distribution of DWR-purchased electricity, as well as billing, collection, and related services on behalf of DWR. The 2003 Servicing Order also addresses DWR's compensation to PG&E for providing those services. Such arrangement is authorized by AB1X, enacted in January 2001 in response to the California energy crisis.

PG&E filed a timely application for rehearing of D.02-12-072 on January 2, 2003.¹ We have reviewed PG&E's allegations of legal error and find

¹ Decision 01-09-015 is subject to Public Utilities Code §1731(c) (applications for rehearing are due within 10 days after the date of issuance of the order or decision) and Public Utilities Code

that they do not demonstrate legal error in the Decision. Accordingly, PG&E's application for rehearing is denied.

II. BACKGROUND

In Decision 02-09-053 ("Contract Allocation Decision"), the Commission ordered that PG&E, and the other two large electric utilities, are to assume operational control of DWR electricity contracts beginning on January 1, 2003. The utilities are responsible for selling surplus energy from the DWR contracts, and remitting the revenues from such sales to DWR. This required modifications to the utilities' servicing arrangements with DWR to address the remittance of the revenues from the sales of surplus energy. The Contract Allocation Decision directed DWR to request that the Commission make appropriate modifications to the servicing arrangements, including the "Original Servicing Order" (adopted in D.02-05-048) governing PG&E, in order to enable the utilities to assume operational control of DWR electricity contracts. It also directed DWR and the utilities to jointly file proposed operational agreements under which the utilities would perform the operational, dispatch, and administrative functions for the DWR Long-Term Power Purchase Contracts as of January 1, 2003.

On October 8, 2002, DWR submitted to the Commission a memorandum containing several attachments, including proposed modifications to the Original Servicing Order.² PG&E filed its comments on DWR's proposed modifications to the Original Servicing Order on October 18, 2002. On October 23, 2002, DWR submitted a memorandum entitled "Comments Concerning

§1768 (procedures for judicial review) (Stats. 2001-2002, First Extraordinary Session, Ch. 9.)(SB1X 31).

² DWR Submissions Under Interim Opinion on Procurement Issues: DWR Contract Allocation Decision 02-09-053 dated September 19, 2002, consisting of (i) Proposed Modifications to the Existing Servicing Arrangements in (A.) 01-06-044, (A.) 01-06-039 and (A.) 00-11-038 et al.); (ii) Proposed Initial Draft of the Operating Agreement in (R.01-10-024); and (iii) Specific Accounting and Reporting Procedures Consistent With the Contract Allocation Decision in (A.) 00-11-038 et al. (submitted October 8, 2002).

Submissions Requested by the California Public Utilities Commission Decision 02-09-053.” On December 19, 2002, the Commission adopted Decision 02-12-072, which approves the “2003 Servicing Order Concerning Pacific Gas & Electric Company and the California Department of Water Resources.” At the same meeting, the Commission adopted the Operating Order in D.02-12-069, which sets forth the terms and conditions under which the utilities will administer the DWR Contracts and requires the utilities to dispatch all the generating assets within their portfolios on a least-cost basis for the benefit of their ratepayers. An Operating Order was adopted rather than an Operating Agreement because DWR and the utilities had not yet agreed on a mutually acceptable Operating Agreement. On December 20, 2002, PG&E submitted a proposed Operating Agreement negotiated with DWR, which could replace the Operating Order if approved by the Commission.

III. DISCUSSION

1. The Commission did not act in excess of its authority.

As a preliminary matter, PG&E first claims that the Decision does not clearly state what statutory authority justifies the Decision. According to PG&E, although the Decision refers in passing to AB 1X, the Decision’s conclusions of law refer to no specific statutes, laws, or Commission decisions. PG&E states that “[t]his omission hampers PG&E’s ability to review, interpret, and seek redress from the Decision....” (App. at 3.)

PG&E fails to demonstrate legal error in the Decision. The Decision approves modifications to the Original Servicing Order adopted by the Commission in D.02-05-048. That decision clearly states that the Commission was acting consistent with the statutory authority provided in Water Code sections 80016 and 80106(b). (D.02-05-048, Conclusion of Law 1.) By approving modifications to an existing Servicing Order, the Commission was acting within

its continued authority consistent with these provisions. Moreover, the 2003 Servicing Order itself explicitly states that the utility is ordered to perform the duties set forth in the servicing order pursuant to AB 1X and Commission Orders. (2003 Servicing Order, Section 2.1.) Although the text of the Decision does not explicitly refer to specific code sections, PG&E has neither shown how this amounts to legal error, nor has it demonstrated how it has been “hampered” in its ability to seek review of the Decision, since its Application for Rehearing specifically refers to Water Code sections 80106(b) and 80016 in challenging the Commission’s authority to issue the Decision.

PG&E next argues that no provision in AB 1X, including Water Code sections 80106(b) or 80116, authorizes the action taken in the Decision. PG&E argues that the Commission may not act under Water Code section 80106(b) or section 80116³ because DWR did not “request” the action taken by the Commission. According to PG&E, none of the documents submitted by DWR concerning proposed modifications to the Servicing Order “requested” the modifications to the Original Service Order adopted by the Commission. It is PG&E’s position that PG&E and DWR should be allowed to negotiate and reach an agreement both as to the Operating Agreement and any necessary changes to the Servicing Order. PG&E also argues that DWR’s numerous submissions to the Commission did not constitute “requests” for Commission action, but rather reflected DWR’s position that PG&E and DWR should be allowed to negotiate an operating agreement and any necessary changes to the original servicing arrangements.

³ Water Code Section 80106(b) provides that at DWR’s request, “the commission shall order the related electrical corporation...to transmit or provide for the transmission of, and distribute all power made available by the department, and as agent for the department, provide billing, collection, and other related services on terms and conditions that reasonably compensate the electrical corporation for its services.”

Water Code Section 80116 provides that state agencies are to “give the department [DWR] reasonable assistance or other cooperation in carrying out the purposes of this division” in response to “the request of the department.”

PG&E's arguments are not persuasive and mischaracterize the nature of DWR's submissions. In the Contract Allocation Decision, the Commission asked DWR to request modifications to the Servicing Arrangements with the utilities, including PG&E's Original Servicing Order, as well as a proposed Operating Agreement to enable the utilities to assume operational control of DWR electricity contracts by January 1, 2003. Although it did not specifically refer to Water Code section 80106(b) or 80116 in asking for the Commission's action, DWR submitted its requested modifications on October 8, 2002. DWR later submitted a "request" pursuant to Water Code section 80106(b) asking the Commission to order the utilities to enter into an Operating Agreement. (See December 9, 2002 Letter from Thomas M. Hannigan to President Loretta Lynch re: Request for Operating Agreement.) That document referred to detailed comments filed separately in R.01-10-024 listing DWR's previous "requests." (Including, presumably, the October 8, 2002 submissions.) DWR also recognized that "[a]ny Servicing Order adopted by the Commission must be consistent with that request." (DWR's December 9, 2002 Comments on Administrative Law Judge Draft Decisions adopting 2003 Servicing Order –Applications 01-06-039, 01-06-044, and 00-11-038 et al.)

Moreover, in its October 23, 2002 Comments Concerning Submissions Requested by the California Public Utilities Commission Decision 02-09-053, DWR recognized the need for the Commission's "support and active involvement" in resolving issues related to accounting and revenue sharing principles to be implemented in the operating agreement and the servicing arrangements. Decision 02-12-069 also refers to other submissions by DWR requesting the cooperation of the Commission in adopting operating arrangements between DWR and the utilities in connection with the allocation of DWR's long-term contracts. (See D. 02-12-069 at 5-6.) As the above demonstrates, DWR made several requests for Commission assistance with regard to the modifications approved in the servicing arrangements as well as adoption of the Operating

Order. It is unreasonable, therefore, to say that DWR's submissions may not be characterized as "requests" for Commission action.

Although DWR and PG&E expressed a desire to continue to negotiate a mutually acceptable Operating Agreement as well as necessary related changes to the Servicing Order, no agreement was reached in time for the utilities to assume operational control of DWR's contracts by January 1, 2003. Therefore it was necessary to order PG&E to comply with the existing Servicing Order subject to the necessary modifications. We note that DWR and PG&E have already submitted an Operating Agreement which is currently pending before the Commission. Our action does not prevent DWR and PG&E from continuing to negotiate a mutually acceptable servicing arrangement for submission to the Commission for its approval.

Moreover, this Decision, as well as D.02-05-048, are orders of the Commission having the effect of a servicing arrangement. To suggest that we do not have any control over the content of the arrangement, and thus the content of our own orders, is to deny our broad authority under the Public Utilities Code to regulate the terms of service of a utility subject to our jurisdiction. PG&E's arguments restricting our authority to modify the Servicing Order in this regard constitute an unreasonable interpretation of AB 1X.

PG&E further argues that even if DWR had requested the modifications to the 2003 Servicing Order, they would not be authorized by Water Code 80106(b). According to PG&E, Water Code 80106(b) limits what the Commission may order PG&E to do at DWR's request. That section provides:

At the request of the department, the commission shall order the related electrical corporation or its successor in the performance of related service, to transmit or provide for the transmission of, and distribute all power made available by the department, and, as agent of the department, provide billing, collection, and other related services on terms and conditions that reasonably compensate the electrical corporation for its services, and adequately secure payment to the department.

PG&E claims that this section does not authorize the Commission to “impose the numerous risks and obligations onto PG&E that the Operating Order imposes,” such as disposition of surplus power and management of fuel supply. PG&E also argues that it may not be ordered to perform transmission and distribution functions as an “agent” of DWR, but that its role as an “agent” of DWR is limited to providing “billing, collection” and “related” services under Section 80106(b). These are the same arguments PG&E raises in its Application for Rehearing of the Operating Order. Since the Commission may not impose these obligations under the Operating Order, PG&E argues, the Commission may not order the Original Servicing Order to be modified with respect to these tasks.

The gist of PG&E’s argument is that it should not be made to bear the risk related to the sale of DWR’s surplus power, and should not have to decide what power and at what price to transmit and distribute it, or to sell it as surplus into the market. PG&E also complains that it should not be required to post collateral or be made “responsible for all transaction fees or other costs associated with the sale of surplus power imposed by third party purchasers or any agents of the utility or such purchaser.” (See 2003 Servicing Order Section 3.1(c).)

This argument constitutes a collateral attack on the Operating Order and the obligations imposed on the utilities in the Contract Allocation Decision. In fact, PG&E’s application for rehearing of the Operating Order raises the same objections almost verbatim, and PG&E even attaches and “incorporates by reference” all the arguments contained in that application to the instant application. The 2003 Servicing Order sets forth the mechanisms needed to collect the revenues from these sales and remit them to DWR. It provides that the treatment of surplus power shall be governed by the Contract Allocation Order and as further provided by the Operating Order. PG&E’s arguments concerning the sale of surplus power are currently pending before the Commission in applications for rehearing of the Contract Allocation Decision and the Operating Order, and

should be heard in the context of those decisions. If the Commission modifies or grants rehearing of those decisions in response to those applications, then the Servicing Order may need to be modified accordingly. However, for the time being, we will defer addressing those issues to our response to those applications for rehearing.

2. Hypothetical Conflicts With Possible Future Commission Decisions Do Not Demonstrate Legal Error In the Decision

As discussed above, PG&E and DWR have submitted a negotiated Operating Agreement for the Commission's consideration. PG&E argues that the 2003 Servicing Order may conflict with the terms of the Operating Agreement, which the Commission has yet to approve. PG&E claims that "[t]o the degree that the 2003 Servicing Order attached to the Decision conflicts with the Operating Agreement negotiated between the parties, as approved by the Commission, it is unlawful, arbitrary and capricious."

This argument is too vague and speculative to permit or warrant a response, and accordingly fails to meet the requirements of Pub. Util. Code § 1732 and Rule 86.1 of the Commission's Rules of Practice and Procedure, which require applications for rehearing to "set forth specifically" grounds for legal error. The fact that the Decision might conflict in some way with a possible future order of the Commission does not demonstrate legal error in the Decision. We acknowledged that certain provisions of the proposed Operating Agreement may affect certain provisions of the 2003 Servicing Order. (Decision at 12). If and when we approve the proposed Operating Agreement, the parties may file petitions to modify the 2003 Servicing Order to make it fully conform to the Operating Agreement, or they may submit a mutually acceptable Servicing Agreement for the Commission's consideration and approval.

IV. CONCLUSION

PG&E's application for rehearing fails to demonstrate legal error in Commission Decision 02-12-072. Furthermore, certain issues raised by PG&E will be disposed of in orders on rehearing of the Operating Order and the Contract Allocation Decision, since the same issues were raised by PG&E in applications for rehearing of those decisions.

Therefore, **IT IS ORDERED**, that:

1. PG&E's Application for Rehearing of Decision 02-12-072 is denied.
This order is effective today.

Dated January 30, 2003 at San Francisco, California.

MICHAEL R. PEEVEY
President
GEOFFREY F. BROWN
CARL W. WOOD
LORETTA M. LYNCH
SUSAN P. KENNEDY
Commissioners