

Decision 01-05-061 May 14, 2001

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Investigation whether Pacific Gas and Electric Company, Southern California Edison Company, San Diego Gas & Electric Company, and their respective holding companies, PG&E Corporation, Edison International, and Sempra Energy, respondents, have violated relevant statutes and Commission decisions, and whether changes should be made to rules, orders, and conditions pertaining to respondents' holding company systems.

Investigation 01-04-002
(Filed April 3, 2001)

INTERIM OPINION ON CATEGORIZATION

I. Summary

This decision recategorizes this proceeding from the quasi-legislative to the ratesetting category. In addition, should our investigation result in a decision that there is probable cause to believe Respondents Pacific Gas and Electric Company (PG&E), Southern California Edison Company (SCE), and San Diego Gas & Electric Company (SDG&E), as well as their respective parent holding companies, PG&E Corporation (PG&E Corp.), Edison International (EIX), and Sempra Energy (Sempra) (collectively, Respondents) violated past decisions of this Commission or other law, we will recategorize the proceeding as adjudicatory if we opt to determine finally whether such violations occurred and consider remedies.

II. Background

A. Nature of the Proceeding

This proceeding is an investigation into transactions between the three major California investor-owned utilities and their respective holding companies and affiliates. The Commission seeks to determine both whether these entities engaged in conduct in the past that violates relevant statutes and Commission decisions that allowed them to establish holding companies,¹ and whether additional rules, conditions, or other changes are needed to protect ratepayers and the public from dangers of abuse of the holding company structure.

When this Order Instituting Investigation (OII) was initiated, it was characterized as a quasi-legislative proceeding. According to Public Utilities Code Section 1701(c)(1), “[q]uasi-legislative cases . . . are cases that establish policy, including, but not limited to, rulemakings and investigations which may establish rules affecting an entire industry.”

B. Challenges to Categorization

1. Challenges Based on Ex Parte Rules

Several parties challenge the quasi-legislative categorization. The first pair of challengers – the Commission’s Office of Ratepayer Advocates (ORA)

¹ The holding company decisions for each Respondent are as follows:

PG&E - D.96-11-017, 69 CPUC2d 167 (November 6, 1996) (PG&E Authorization I); D.99-04-068, 194 P.U.R.4th 1 (April 22, 1999) (PG&E Authorization II);

SDG&E – D.95-05-021, 59 CPUC2d 697 (May 10, 1995) (SDG&E Authorization I); D.95-12-018, 62 CPUC2d 626 (December 6, 1995) (SDG&E Authorization II); and D.98-03-073, 184 P.U.R.4th 417 (March 26, 1998) (Sempra Merger Authorization) and

SCE – D.88-01-063, 27 CPUC2d 347 (January 28, 1998) (Edison Authorization).

and The Utility Reform Network (TURN) – objects to the ex parte rules that accompany the quasi-legislative category.² (In quasi-legislative cases that require a hearing, ex parte communications with a decision maker are permitted “without any restrictions.”³) ORA and TURN are concerned that unlimited and undisclosed ex parte communications in this proceeding will compromise the integrity of the decision-making process.

TURN specifically criticizes the recent Memorandum of Understanding (MOU) signed on April 9, 2001 by the California Department of Water Resources, SCE and EIX as “the product of a backroom deal” and asserts that the Commission must guard against even the appearance of non-public process in its proceedings. ORA contends the proceeding should be categorized as ratesetting. TURN proposes that the proceeding be recategorized as adjudicatory so that ex parte contacts are prohibited.

2. Challenges Based on Nature of Investigation and Due Process Rules

A second group, which includes PG&E, PG&E Corp., SDG&E, Sempra – and to some extent the City and County of San Francisco (CCSF), ORA and TURN – claims the quasi-legislative category is inappropriate for an investigation aimed at imposing penalties or other remedies on Respondents.

² *Appeal of Categorization by the Office of Ratepayer Advocates* (ORA Category Appeal), filed April 13, 2001, at 5 (“It is inappropriate to allow unrestricted and unreported ex parte communications on this matter.”); *Appeal of The Utility Reform Network to Initial Categorization of Investigation (I.) 01-04-002 as Quasi-Legislative* (TURN Category Appeal), filed April 16, 2001, at 3 (“Allowing unlimited private, non-reported ex parte meetings is anathema to . . . a [public] process . . .”).

³ Pub. Util. Code § 1701.4(b).

PG&E, PG&E Corp., SDG&E, and Sempra claim that due process considerations mandate another categorization. PG&E and PG&E Corp. ask that the proceeding be bifurcated into separate quasi-legislative and adjudicatory proceedings.⁴ SDG&E and Sempra, in a joint appeal, seek an adjudicatory categorization unless “the Commission clarifies that the only remedies to be considered in this proceeding will be prospective rule changes, [in which case] the proceeding may properly remain categorized as ‘quasi-legislative.’”⁵

CCSF claims the proceeding should be deemed adjudicatory “because the Commission clearly states that its purpose is to ‘determine whether respondent utilities and their respective holding companies have complied with relevant statutes and Commission decisions in the management and oversight of their companies.’”⁶

ORA and TURN do not raise due process concerns but claim that the quasi-legislative categorization is most appropriate for proceedings whose basic thrust is to establish policy. Because, ORA claims, this OII is “a fact-finding mission focused on past compliance, . . . it does not fit within the definition of a quasi-legislative proceeding.”⁷ The ratesetting category, however, is appropriate: “Beyond setting specific rates . . . , a ratesetting proceeding may also include a

⁴ *[PG&E's] Appeal of Categorization for Order Instituting Investigation 01-04-002* (PG&E Category Appeal), filed April 13, 2001, at 2; *PG&E Corporation's Special Appearance to Appeal Categorization* (PG&E Corp. Category Appeal), filed April 13, 2001, at 2.

⁵ *Appeal of San Diego Gas & Electric Company (U 902 M) and Sempra Energy of Categorization* (SDG&E/Sempra Category Appeal), filed April 13, 2001, at 1-2.

⁶ *[CCSF] Objection to Proceeding Categorization* (CCSF Category Appeal), filed April 16, 2001, at 1.

⁷ ORA Category Appeal at 2.

broad policy component.”⁸ Moreover, asserts ORA, the ratesetting category is the “most appropriate for cases in which there is a mix of fact finding and policy making”⁹

Similarly, TURN states that “it is fairly unprecedented for an investigation contemplating enforcement actions to be characterized as quasi-legislative [T]he clear impetus behind this investigation is the concern that the utilities are not in compliance with the existing rules The primary purpose of this OII is therefore clearly related to enforcement.”¹⁰

III. Discussion

A. Ratesetting Category

We conclude that the investigation of Respondents’ prior actions would most appropriately be categorized as ratesetting. Because the ratesetting category is also used for mixed factual and policy proceedings, the ratesetting category is appropriate for that portion of this proceeding that inquires into possible changes in our holding company rules or related decisions. If we should find probable cause to believe that any Respondent violated our prior holding company decisions or other law, we will at that time recategorize the proceeding.

Pursuant to Rule 6.1(b) of the Commission’s Rules of Practice and Procedure, the Commission may determine which category appears most suitable to the proceeding. Additionally, Rule 6.1(d) authorizes the Commission

⁸ ORA Category Appeal at 3, citing *Order Instituting Investigation into Implementation of Assembly Bill 970*, 2000 Cal. PUC Lexis 987, at *3 (AB 970 OII).

⁹ *Id.*, citing AB 970 OII, 2000 Cal. PUC Lexis 987, at *4.

¹⁰ TURN Category Appeal at 2.

in exercising its discretion under subsection (b) to make such other procedural orders as best to enable the Commission to achieve a full, timely, and effective resolution of the substantive issues presented in the proceeding.

We are recategorizing the proceeding at this juncture because the ratesetting category is appropriate where, as here, we anticipate the proceeding will require a mix of fact-finding and policy making. As ORA notes, the ratemaking category is well suited for this type of proceeding. While none of the Respondents propose the ratesetting category, nothing in their arguments calls into question the conclusion that this category is well suited to the task we face. As we show in the next section, Respondents' due process arguments lack merit, and in any event are mooted by the procedure we adopt here.

B. Due Process Claims

We do not believe the quasi-legislative categorization ever compromised Respondents' due process protections. We were and continue to be fully prepared to recategorize the proceeding as adjudicatory if and when we find probable cause to believe Respondents have violated the law and we opt to make final findings on such violations and settle on remedies.

Respondents' due process claims (especially those of PG&E and PG&E Corp.) fundamentally misapprehend both the nature of these proceedings and the requirements of due process. They argue unpersuasively that the OII fails to provide respondents with sufficient notice of the "conduct subject to potential punishment" and that the Commission should bear the "burden of proof" in the proceedings. In the first part of these proceedings, as the OII indicates, we will *investigate* whether respondents have violated, *inter alia*, certain conditions imposed by our decisions authorizing the formation of the holding companies.

In an investigation, due process does not require the full panoply of procedures that are required in an adjudicatory proceeding.¹¹ Specifically, due process does not require that a party be informed of the “specific charges that are being investigated,” and it does not require that a party be permitted to cross-examine witnesses.¹² Nor does due process require, at this stage, a ban on ex parte contacts.¹³ Finally, because no rights or liabilities are being finally adjudicated, there is no burden of proof to place on any party.¹⁴

At the end of the investigation, if we determine that one or more of the Respondents likely have violated the conditions imposed by our holding company decisions or other law, we will specify, in detail, the nature of those alleged violations, and the evidence supporting those charges. At that point, if

¹¹ See generally *Hannah v. Larch*, 363 U.S. 420, 441-42 (1960).

¹² *Id.* The notice cases PG&E and PG&E Corp. cite involve due process considerations arising not in investigations but in criminal prosecutions (*In re Oliver*, 333 U.S. 257 (1948); *In re Hess*, 45 Cal. 2d 171 (1995); and *In re Dennis*, 51 Cal. 2d 666 (1959)), civil proceedings regarding punitive damages (*BMW of North America v. Gora*, 517 U.S. 559 (1996)), and agency enforcement and prosecution actions (D.99-06-090, 1999 Cal. PUC Lexis 432 (June 24, 1999); *Morgan v. United States*, 304 U.S. 1 (1938)). They are therefore distinguishable from this proceeding.

¹³ See *United States v. Litton Indus., Inc.*, 462 F.2d 14, 17 (9th Cir. 1972).

¹⁴ The burden of proof decisions on which PG&E and PG&E Corp. rely are not applicable here because they relate to enforcement actions in which we contemplated the imposition of penalties. See D.97-05-089, 72 CPUC2d 621 (1997) (Commission issued Order to Show Cause ["OSC"] why respondent's certificate of public convenience and necessity should not be revoked, suspended respondent's authority to provide intrastate telecommunications service, and ordered the respondent to return wrongfully assessed charges to customers and pay a \$2 million fine to the state treasury); D.94-11-018, 57 CPUC2d 176 (1994) (Commission issued several OSCs not only to examine the compliance of respondents with a Commission general order, but to determine "whether any sanctions should issue," including removal of improper facilities, fines, contempt penalties, and reports to law enforcement).

we decide to proceed to determine finally whether such violations occurred, and whether Respondents should be held liable for such violations, we will recategorize the proceedings as adjudicatory – thus imposing an ex parte ban and affording Respondents the right to cross-examine witnesses – and proceed to make those determinations. Nothing in this two-stage process violates the Respondents’ due process rights.¹⁵

PG&E and PG&E Corp. overlook the fundamental distinction between an investigation – in which an agency investigates whether a respondent has likely violated a rule, law, or order – and an adjudication – in which an agency makes “binding determinations which directly affect the legal rights of individuals.”¹⁶ As the United States Supreme Court has made clear, different due process rights attach in these two sorts of proceedings, and there is no due process violation if the same agency undertakes both an investigation followed by an adjudication.¹⁷ In approving procedures strikingly similar to those we intend to engage in here, the Court stated:

When the Board instituted its investigative procedures, it stated only that it would investigate whether proscribed conduct had occurred. Later in noticing the adversary

¹⁵ See *Withrow v. Larkin*, 421 U.S. 35, 56-58 (1975) (agency may informally investigate and make findings that there is probable cause that respondent violated regulations, and subsequently proffer former charges in adjudicatory proceeding, without violating due process); *Litton Indus.*, 462 F.2d at 17 (same).

¹⁶ *Hannah v. Larch*, 363 U.S. at 442.

¹⁷ In arguing for an adjudicatory category for the entire proceeding, PG&E Corp. also places misplaced reliance on two cases - *Portland Audubon Society v. Oregon Lands Coalition*, 984 F.2d 1534 (1993); and *Association of National Advertisers, Inc., v. Federal Trade Commission*, 627 F.2d 1151, 1160 (D.C. Cir. 1979) – decided under the Administrative Procedures Act, which does not apply to proceedings before this Commission.

hearing, it asserted only that it would determine if violations had been committed which would warrant suspension of appellee's license. Without doubt, the Board then anticipated that the proceeding would eventuate in an adjudication of the issue; but there was no more evidence of bias or the risk of bias or prejudgment than inhered in the very fact that the Board had investigated and would now adjudicate. Of course, we should be alert to the possibilities of bias that may lurk in the way particular procedures actually work in practice. The processes utilized by the Board, however, do not in themselves contain an unacceptable risk of bias. The investigative proceeding had been closed to the public, but appellee and his counsel were permitted to be present throughout; counsel actually attended the hearings and knew the facts presented to the Board.¹⁸

Thus, we reject Respondents' due process challenges.

Findings of Fact

1. This proceeding will involve a mixed inquiry into issues of fact and policy.

¹⁸ *Withrow*, 421 U.S. at 54. We note, moreover, that it appears unlikely that there will be many, or any, disputed evidentiary issues that due process would require resort to a full-fledged adjudicatory proceeding anyway. Edison International, for example, has conceded that it did not infuse any capital into Southern California Edison Company since June 2000. Accordingly, the only issue with respect to this undisputed fact is whether that failure to infuse capital violated the "first priority" condition in our holding company decisions. That issue, concerning the scope and meaning of a Commission order, is a question of law, and due process does not require that the Commission engage in an adjudicatory proceeding to determine its answer. *See Beazer East, Inc. v. United States EPA*, 963 F.2d 603, 609-10 (D.C. Cir. 1992). Nonetheless, in an abundance of caution, we will not make any binding determination regarding the existence of such violations without first recategorizing that portion of these proceedings as adjudicatory, affording Respondents, notice and an opportunity to be heard, and basing our decision solely on evidence in the record that Respondents have had an adequate opportunity to test and challenge.

2. The ratesetting categorization is appropriate for mixed fact/policy inquiries.

3. Dividing this proceeding into a ratesetting phase and, if necessary, an adjudicatory phase, will provide Respondents an opportunity for notice and a right to be heard should the Commission determine that there is probable cause to find any Respondent in violation of the Commission's holding company decisions or other applicable law.

Conclusions of Law

1. This Commission has discretion pursuant to Rule 6.1 of its Rules of Practice and Procedure to categorize this proceeding in the manner most suitable to the circumstances of this proceeding

2. The investigatory phase of this proceeding is appropriately categorized as ratesetting. This phase of the proceeding will involve an inquiry into Respondents' past conduct and whether it complies with the Commission's holding company decisions or applicable law. It will also involve an inquiry into appropriate prospective changes in our decisions or other rules governing Respondents' holding company structure.

3. Ratesetting proceedings typically involve a mix of policy making and fact-finding relating to a particular public utility.

4. Proceedings that do not clearly fall within a single category, that involve a mix of policy making and fact finding relating to a particular public utility or utilities, are generally best handled under the procedures applicable to ratesetting.

5. Categorizing the first phase of the proceeding – as delineated in the previous paragraph – as ratesetting does not violate any Respondent's due process rights.

6. The OII, which categorized this proceeding as quasi-legislative, should be changed. The investigatory phase of this proceeding should be categorized as ratesetting. If further recategorization is required, as explained in this decision, the Commission will issue another decision at the appropriate time.

INTERIM ORDER

IT IS ORDERED that this proceeding, preliminarily categorized as quasi-legislative, should be recategorized as ratesetting.

This order is effective today.

Dated May 14, 2001, at San Francisco, California.

LORETTA M. LYNCH
President
HENRY M. DUQUE
RICHARD A. BILAS
CARL W. WOOD
GEOFFREY F. BROWN
Commissioners