Decision **DRAFT DECISION OF ALJ MCVICAR (Mailed 8/18/2003)**

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Investigation on the Commission's Own Motion into the Operations and Practices of The Pacific Gas and Electric Company in Connection with Public Utilities Code Section 451, General Order 95, and Other Applicable Standards Governing Tree-Line Clearances.	Investigation 98-09-007 (Filed September 3, 1998; Petition to Modify filed January 6, 2003)

ORDER MODIFYING DECISION 99-07-029

Summary

Pacific Gas & Electric Company's (PG&E) petition to modify Decision (D.) 99-07-029 is granted. The period over which the Commission's Consumer Protection and Safety Division-managed (CPSD) audit of PG&E's vegetation control program is to continue is extended: Rather than continuing for a period not to exceed five years beginning 30 days after the date D.99-07-029 became final, the audit may now continue for a period not to exceed five years beginning 30 days after the effective date this decision modifying D.99-07-029 becomes final. Suggestions by intervenors William P. Adams and James Weil that PG&E pay its ratepayers additional compensation, and that the Commission either deny the petition and order the parties to the underlying settlement back to the bargaining table or order the parties to enter mediation to negotiate a different outcome, are rejected.

Background

By D.99-07-029, the Commission adopted an uncontested settlement agreement proffered by PG&E, CPSD (then called Consumer Services Division, or CSD), Adams, and Weil in the Commission's investigation into PG&E's compliance with tree-line clearance standards. Under the settlement, PG&E shareholders were to fund up to $22.7 million in vegetation-related activities and programs over the following five years and make an immediate, one-time $6 million contribution to the California general fund. The settlement also established various forward-looking PG&E/CSD vegetation management inspection and compliance protocols. The Commission accepted the settlement, the full text of which was set forth in Appendix A to D.99-07-029, as resolving all issues in the proceeding and made no finding as to whether violations had occurred.

On January 6, 2003 PG&E filed a petition to modify D.99-07-029, settlement agreement paragraph III.A.(3)(b), which provides,

> (b) PG&E shall fund a CSD-managed independent audit (Audit Program) of the PG&E Program, which shall monitor (1) PG&E's vegetation control performance in the field (including the electronic data base referenced in Section (2)(c) above); (2) PG&E's vegetation control management; and (3) PG&E's recorded vegetation control costs. CSD shall continue this Audit Program for a period not to exceed five years beginning 30 days after the date that a Commission decision adopting this Settlement becomes final. Following the third year, PG&E and CSD agree to examine the Audit Program to determine whether it should cease at that time or continue for the entire five years. If the Parties seek any change to the Audit Program, they will seek approval from the Commission. CSD shall work with PG&E to develop a Request For Proposal (RFP) for the Audit Program and thereafter shall only seek bids from and contract with independent and experienced auditing

> firms. PG&E shall reimburse the funding for the Audit Program as follows: (1) Year 1 - $500,000, (2) Years 2-5 - $300,000 (for each year). Provided however, that in the event CSD cannot secure bids in years 2-5 at or below $300,000, PG&E and CSD shall revisit the RFP and make good faith efforts to agree upon a reasonable funding level.

This settlement paragraph calls for the audit period to run from September 18, 1999 (30 days after the August 19, 1999 date D.99-07-029 became final) through no later than September 18, 2004. PG&E's petition for modification informed the Commission that the audit had not yet begun and could not be completed by the 2004 closing date. PG&E would have the Commission modify the audit's beginning date to allow the five-year period to run from "January 1, 2003 or such later date as PG&E and CSD believe will best achieve the original purpose of the audit."

CPSD supports PG&E's position.

Adams and Weil participated jointly in the underlying proceeding and responded jointly to PG&E's petition. They support extending the audit period as PG&E requests, but suggest that ratepayers be compensated for the lost time value of money caused by the delay.

Assigned Administrative Law Judge (ALJ) McVicar issued a ruling on March 5, 2003 requiring PG&E to file and serve documentation to support its claim that it was not responsible for the delay in initiating the audit; and requiring the four active parties to file and serve prehearing briefs stating and supporting their positions. Those briefs were also to include any objections to admitting into evidence PG&E's documentation, and/or any request to hold an evidentiary hearing. The parties made the filings, and no party either objected to admitting PG&E's documentation or requested evidentiary hearing.

Discussion

PG&E's Extension Request

PG&E, CPSD, Adams and Weil were four of the eight parties in the underlying proceeding, and the only parties to the uncontested settlement agreement. The remaining four parties have been silent on PG&E's petition for modification.[1] The four settling parties agree that the full three- to five-year period anticipated in the settlement agreement is still needed if the audit is to be effective in achieving its intended purpose. We also agree. PG&E's petition will be granted.

Adams' and Weil's Compensation Suggestion

Adams and Weil point out that since September 1999 PG&E has enjoyed the use of up to $1,700,000 in audit funds that were meant to benefit its ratepayers. They present calculations that estimate the time value of money resulting from the delay to be in the range of $200,000 to $700,000, and suggest the value of the settlement package be increased by that amount. Adams and Weil advocate no specific method for returning that value to ratepayers, although they do believe that using it to increase the audit funding level would not be the best answer. Rather, they seek "constructive suggestions from PG&E and CPSD" as to how ratepayers might best benefit.

PG&E argues that it has attempted to comply with the terms of the settlement agreement and has worked with CPSD from the beginning to facilitate the audit; that there is no evidence that additional funding is warranted or

[1] The other parties were City and County of San Francisco, California Farm Bureau Federation, Southern California Edison Company, and The Utility Reform Network.

necessary; and that PG&E was not responsible for the delay and should not be responsible for additional ratepayer compensation. According to PG&E, it actively engaged CPSD at the beginning of the audit period in 1999, and at least annually thereafter reminded CPSD of the audit requirement and offered to proceed as the settlement agreement required.

CPSD agrees with PG&E's characterization of the delay and supports extending the five-year audit period. Moreover, CPSD assumes responsibility for the delay. From CPSD's brief:

> On or about [the] time the Settlement Agreement was approved in the fall of 1999, the Commission found itself facing several major crises, which posed a major drain on the Commission's time and resources. The "energy crisis" consumed much of CPSD's and the entire Commission's resources over the course of the next two years. An additional factor that contributed to the delay of the audit program was a change in the management of CPSD in late 2000. Although CPSD never intentionally delayed the audit, it simply lacked the necessary staffing to oversee the development and implementation of the RFP.
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> CPSD does not dispute PG&E's position that it was in constant contact with CPSD on a regular basis during this time period, nor does it take issue with the representation of facts and evidence contained in PG&E's supplemental evidence submitted on March 7, 2003. For the above reasons, CPSD delayed implementation of the audit.

An informal inspection of the documentation PG&E filed and served on March 7, 2003 in response to the ALJ's ruling bears out PG&E's and CPSD's

version of the post-decision timeline.[2] Adams and Weil state their position as, "Without assigning blame, we decline to endorse PG&E's position that it was not responsible in any way." And, "Weil and Adams take no position on who was or is responsible for delays in starting the required audit." In light of PG&E's acknowledgement that it took six months after D.99-07-029 was issued and four months after the clock started running to send a draft request for proposals to CPSD, Adams and Weil do question PG&E's assertion that it bore no responsibility for any delay. CPSD's brief, however, gives an overview of the Commission's lengthy RFP and contracting process, concluding that, "Even under the best of conditions, this process would take approximately six months, rather than the 30 days envisioned by the Settlement Agreement."

Given PG&E's explanation of the delay, CPSD's explanation that "CPSD delayed implementation of the audit" and why it did so, and the fact that Adams and Weil do not take a position on who was responsible, we conclude that PG&E was not primarily responsible for the delay. No party disputes that PG&E may have benefited by not having to expend the audit funds beginning in 1999, but we could also foresee scenarios wherein the opposite may turn out to be true.[3]

Settlement agreement paragraph III.A.(3)(b) calls for an independent audit to monitor PG&E's vegetation control performance in the field, PG&E's

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[2] Most of PG&E's documentation consists of correspondence between PG&E and CPSD staff. Because Adams and Weil take no position on who was responsible for the delay, we need not receive those documents into evidence.

[3] PG&E was to expend up to $1,700,000 for the audit. To the extent that the audit might have, *e.g.*, cost less than $1,700,000 if conducted on schedule, PG&E may eventually have to spend more to fund the study during 2003 through 2008 than it would have in 1999 through 2004.

vegetation control management, and PG&E's recorded vegetation control costs. In approving the settlement, we inferred the purpose of this requirement to be to allow PG&E and the Commission to better understand these aspects of PG&E's vegetation control operations, and thereby recognize where changes might be made that would make them more effective and efficient. If CPSD is able to produce a high quality audit for less than the maximum allowed, we would expect them to do so. In that case, the settlement does not call for PG&E to turn over the savings to ratepayers and we infer no such requirement.[4] Once the audit has been completed and PG&E has paid for it, the ratepayers will have received the benefit due them under paragraph III.A.(3)(b).

We conclude that PG&E should not be required to return to ratepayers any amounts saved, whether saved through the time value of money or through reduced audit costs, in connection with the paragraph III.A.(3)(b) audit.

Comments on Draft Decision

The draft decision of the ALJ in this matter was mailed to the parties in accordance with Pub. Util. Code § 311(g)(1) and Rule 77.7 of the Rules of Practice and Procedure. Adams and Weil filed joint comments, and CPSD filed reply comments.

Adams and Weil state that, while they are disappointed in the outcome, they find no legal or factual error in our determination not to flow to ratepayers the time value of money savings PG&E may realize from the audit's delay. They

[4] Contrast this with settlement agreement paragraph III.A.(3)(a) that provides for PG&E shareholders to fund fixed amounts to be used for a quality assurance program. There, any unspent amounts are explicitly directed to be tracked in a balancing account and returned to ratepayers. Settlement agreement paragraph III.A.(3)(b) includes no such provision.

do, however, request that the Commission cite the legal authority upon which it relies to modify the terms of the settlement, considering the settlement's statement that, "this Settlement may not be modified or terminated except in accordance with its terms or by an instrument in writing signed by all Parties hereto."[5]

CPSD states that the record is clear that all parties, including Adams and Weil, support extending the time to perform a three to five-year audit. CPSD concludes that the draft decision is consistent with the terms of the settlement agreement because it provides for the time needed to perform the originally agreed-upon audit.

The four settling parties agree that the intent of the settlement cannot be carried out without the time extension PG&E's petition seeks. Thus, they agree what the outcome should be with respect to matters covered in the original settlement. We explained earlier our determination that ratepayer compensation for delays in the paragraph III.A.(3)(b) audit was not a matter contemplated in the original settlement.

Settlement paragraph III.C.(2) provides,

> "The Parties agree that *the Commission shall have exclusive jurisdiction over any issues related to the interpretation of this Settlement*, and that no other court, regulatory agency, or other governing body shall have jurisdiction over any issue related to the interpretation of this Settlement, the enforcement of the Settlement, or the rights of the Parties to the Settlement, except for judicial review of any Commission decision in this proceeding. All rights and remedies are limited to those

[5] Settlement paragraph III.C.(6).

> available before the Commission or for judicial review." [Emphasis added.]

No party disputes that due to implementation delay, the audit cannot be completed within the time limits set in the settlement agreement. Achieving the parties' intended objective of a three to five-year audit requires changing the audit time limits. Pursuant to the authority provided in paragraph III.C.(2), we interpret the settlement agreement to achieve the parties' intent of a three to five-year audit.

Assignment of Proceeding

Susan P. Kennedy is the Assigned Commissioner and James C. McVicar is the assigned ALJ in this proceeding.

Findings of Fact

1. The audit called for in settlement agreement paragraph III.A.(3)(b) cannot be completed by the end of the five-year period called for in the settlement.
2. All of the settling parties support extending the time allowed to conduct the audit required in settlement agreement paragraph III.A.(3)(b). No party to the proceeding has expressed opposition to such an extension.
3. PG&E was not primarily responsible for the delay in complying with settlement agreement paragraph III.A.(3)(b).
4. The product due to ratepayers under settlement agreement paragraph III.A.(3)(b) is an independent audit of PG&E's vegetation control operations. Once a CPSD-managed audit has been completed at PG&E's expense, PG&E will have fulfilled its obligation under that settlement paragraph.

Conclusions of Law

1. A public hearing is not necessary.

2. Pursuant to settlement agreement paragraph III.C.(2), the Commission has exclusive jurisdiction over any issues of interpretation of the settlement agreement.

3. The audit called for in settlement agreement paragraph III.A.(3)(b) should be allowed to continue for a period not to exceed five years beginning 30 days after the effective date this decision becomes final.

4. PG&E should not be required to give to ratepayers or apply to ratepayers' benefit any savings it may realize due to the delay in complying with settlement agreement paragraph III.A.(3)(b).

5. This decision should be made effective immediately to allow PG&E and CPSD to proceed with the audit without further delay.

IT IS ORDERED that:

1. The following Ordering Paragraph 1(a) is added to Decision (D.) 99-07-029:

   The audit called for in settlement agreement paragraph III.A.(3)(b) shall be allowed to continue for a period not to exceed five years beginning 30 days after the effective date Decision _____, Order Modifying Decision 99-07-029, becomes final.

2. In all other respects, D.99-07-029 remains in effect.

3. This proceeding is closed.

This order is effective today.

Dated _____, at San Francisco, California.