

Decision 11-05-027 May 26, 2011

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application of Heather Epps for Modification
of D.06-07-027 and D.09-03-026.

Application 10-09-015
(Filed September 17, 2010)

DECISION DISMISSING APPLICATION OF HEATHER EPPS

1. Summary

This decision dismisses the Application of Heather Epps for modification of Decision (D.) 06-07-027 and D.09-03-026 because the application fails to present new facts that, if confirmed through evidentiary hearing, would warrant the changes proposed in the application. Most specifically, D.06-07-027 both acknowledged the large technological risks associated with the Smart Meter project and adopted incentive mechanisms for managing those risks. Although technological change did result in the unexpected technological obsolescence of the original Smart Meters, this development, albeit unfortunate, was acknowledged as a real possibility when the Commission approved both the initial and revised Smart Meter project.

2. Background

On September 3, 2010, Ms. Epps tendered to the Commission's Docket Office a petition for modification of Decision (D.) D.06-07-027 and D.09-03-027. The Docket Office rejected the pleading, requesting that the Applicant re-file this matter as an application for modification.¹

After the correction of some technical errors, the Application of Heather Epps for Modification of D.06-07-027 and D.09-03-026 (Application) received a filing date of September 17, 2010. The Application characterized Pacific Gas and Electric Company's (PG&E) Smart Meter upgrade as a "\$500,000,000 mistake" resulting from "lack of proper testing and research before implementing Smart Meters."² The Application requested "that [the Commission] ... shift all costs related to the Smart Meter program ... onto PG&E and its investors."³

PG&E filed Pacific Gas and Electric Company's Protest to the Application of Heather Epps for Modification of D.06-07-027 and D.09-03-026 (PG&E Protest) on October 27, 2010. The PG&E Protest argued that the Application "mischaracterizes the reasons for PG&E's technology upgrade and fails to provide any declaration of facts that would warrant a modification of PG&E's

¹ The Rules of Practice and Procedure (Rules) state at Rule 16.4 that "... a petition for modification must be filed and served within one year of the effective date of the decision proposed to be modified. If more than one year has elapsed, the petition must also explain why the petition could not have been presented within one year of the effective date of the decision." With the passage of time, a request for changes in a decision is viewed as a new application.

² Application at 1.

³ *Id.*

Smart Meter decisions.”⁴ PG&E requested “that the [Commission] dismiss the Application.”⁵

On November 5, 2010, the Commission received the Reply to Pacific Gas and Electric Company’s Protest to the Application of Heather Epps for Modification of D.06-07-027 and D.09-03-026 (Applicant’s Reply). The Applicant’s Reply disputed PG&E’s arguments and asserted that there are “sufficient new facts to warrant modification of the decisions at issue.”⁶

3. Jurisdiction

The Commission’s jurisdiction over the Advanced Metering Infrastructure (AMI) investment program arises from the utility’s obligation to ensure that “[a]ll charges demanded or received by any public utility ... shall be just and reasonable”⁷ and from the statutory constraint that states that “no public utility shall change any rate ... except upon a showing before the commission and a finding by the commission that the new rate is justified.”⁸ Since investment in a major program like AMI has substantial impacts on electric rates, the Commission’s authority to review the costs and resulting rates is clear.

Similarly, the Commission has broad authority to modify its own decisions⁹ and the procedures for doing so are set forth in the Commission’s Rules.¹⁰ When seeking to modify a decision, the request for modification:

⁴ PG&E Protest at 1-2.

⁵ *Id.* at 2.

⁶ Applicant’s Reply at 7.

⁷ Pub. Util. Code § 451. All statutory references are to the Pub. Util. Code.

⁸ § 454(a).

⁹ § 1701.

... must concisely state the justification for the requested relief and must propose specific wording to carry out all requested modifications to the decision. Any factual allegations must be supported with specific citations to the record in the proceeding or to matters that may be officially noticed. Allegations of new or changed facts must be supported by an appropriate declaration or affidavit.¹¹

4. Issues Before the Commission

The parties to the proceeding consist of Heather Epps (Applicant) and PG&E. The Applicant requests that the Commission modify D.06-07-027 and D.09-03-027 so as to shift the costs for the AMI program to PG&E and its investors. PG&E requests that the Commission dismiss the application, and thereby keep the program unchanged.

The central issue before the Commission is whether the Applicant has alleged new facts that, if supported by the Applicant, would warrant granting the application.

5. Positions of Parties

5.1. Positions of the Applicant

The Applicant characterizes the deployment of PG&E's Smart Meters as a "\$500,000,000 mistake."¹² The Applicant alleges that "the problem with Smart Meters" results "from PG&E's lack of proper testing and research before implementing Smart Meters."¹³ A key part of the Applicant's case is as follows:

This lack of sufficient testing and research not only caused system-wide problems with billing and service,

¹⁰ Rule 16.4.

¹¹ *Id.*

¹² Application at 1.

¹³ *Id.*

but also necessitated PG&E's upgrade to the entire Smart Meters system because the original technology lacked needed functionality. The president of the [Commission], Michael Peevey, stated in a presentation to the California Legislature that allowing PG&E to go forward with the Smart Meter program was a half billion dollar mistake and that ratepayers are the individuals paying for this mistake.¹⁴

The Applicant argues that as a result, "[a] significant rise in customers' bills have come from the increase in rates PG&E has passed on to customers in order to pay for the Smart Meter program, which has proved to now be a colossal mistake."¹⁵

More specifically, the Applicant cites both the decision by PG&E to replace the meters that it initially installed (approved in D.09-03-027) and the numerous customer complaints as resulting from PG&E's failure to "properly test or research this technology."¹⁶ The Applicant claims that the three technological developments that PG&E incorporated into its Smart Meter upgrade – a connect/disconnect switch, a Home Area Network gateway, and a solid state meter – were necessary because "PG&E either failed to consider these technological advances or willfully misled the [Commission] in the cost/benefit analysis..."¹⁷

¹⁴ *Id.* at 3-4, footnotes omitted.

¹⁵ *Id.* at 4.

¹⁶ *Id.* at 7.

¹⁷ *Id.*

In its Reply, the Applicant retreats from its initial argument over the inaccuracy of the meters, and states that “[t]he accuracy of PG&E’s Smart Meters have [sic] nothing to do with the Application.”¹⁸

Instead, the Applicant shifts emphasis to its arguments that PG&E should have known about and considered these technological developments at the time of its original application. The Applicant’s Reply argues:

The ZigBee [Home Area Network] technology used in the second round of Smart Meter deployment, however, was already in development in the early 2000’s and as early as April 2004 ZigBee was being discussed in the tech media as a “cost-effective and easy-to-use home network” ...¹⁹

Additionally, the Applicant argues that “the remote connect/disconnect technology which was used to justify the upgrade was available and being used as early as October 1, 2005 in Wisconsin by Shawano Municipal Utilities.”²⁰

The Applicant summarizes its main argument as follows:

In short, the [Commission] was sold a bill of goods regarding PG&E’s initial Smart Meters plan, a plan which was a half-billion dollar mistake. [The Applicant], on behalf of herself and all other PG&E customers, now asks the [Commission] to help in alleviating PG&E rate payers from the ill effects that this mistake is having and will have for years to come on ratepayers’ bills.²¹

¹⁸ Applicant’s Reply at 6.

¹⁹ *Id.* at 4.

²⁰ *Id.* at 5.

²¹ Application at 10.

5.2. Positions of PG&E

In response, PG&E argues that “[t]he Application mischaracterizes the reasons for PG&E’s technology upgrade and fails to provide any declarations of new facts that would warrant a modification of PG&E’s Smart Meter decisions”²² and asks that the Commission dismiss the Application.

More specifically, PG&E argues that:

As part of the Commission approval of the AMI project in D.06-07-027, the Commission determined that there was “sufficient credible evidence to adopt as reasonable a project budget of \$1.7394 billion.” ([Conclusion of Law] 3, at 65.) The Commission further concluded that it was “reasonable to adopt a 10% shareholder and 90% ratepayer risk sharing of cost overruns not to exceed \$100 million beyond the total project costs....” (At 66.) The Commission concluded that PG&E would not be subject to an ex post reasonableness review of costs within the authorized budget, including the \$100 million sharing band. (Id.)²³

PG&E also cites D.09-06-03-026 as authorizing “an incremental budget of \$466.760 million as part of its approval of PG&E’s Smart Meter program upgrade.”²⁴

PG&E argues that “[T]he Applicant’s request to modify the Commission’s Decisions over a year after the Decisions were issued is a misguided attempt to revisit issues that have been conclusively decided by the Commission.”²⁵ Citing D.09-03-026, PG&E argues further that “[t]he record

²² PG&E Protest at 1-2.

²³ PG&E Protest at 2.

²⁴ *Id.* at 2.

²⁵ *Id.* at 3.

clearly demonstrates that PG&E sought authority to upgrade its previously approved advance metering technology because customers would benefit from the substantial innovation and reduction in costs that had rapidly developed in the industry since the time that PG&E first sought approval for its AMI project.”²⁶ PG&E further argues that “the Application criticizes and second-guesses the Commission’s cost-benefit analysis...”²⁷

PG&E also cites The Structure Consulting Group’s finding concerning the accuracy of the Smart Meters as refuting the charge that PG&E did not properly test or research the Smart Meter technology.

Finally, PG&E argues that “[n]o new material facts exist here”²⁸ and therefore the Commission should deny the application.

6. Discussion and Analysis: Should the Commission Dismiss this Application?

The basic question before the Commission is whether the Commission should dismiss this application or proceed to hearings.

The major allegation of the Applicant is that there was a failure by PG&E, and implicitly by the intervenors, including the Division of Ratepayer Advocates (DRA) and The Utility Reform Network (TURN), to bring to the Commission facts concerning Smart Meter technology that should have indicated to the Commission that the technology was risky and should have led the Commission to reject PG&E’s initial Smart Meter proposal. Applicant’s remedy, consists of disallowing recovery in rates of the Smart Meter investments.

²⁶ Id. at 3-4.

²⁷ Id. at 4.

²⁸ Id. at 7.

The record in the AMI proceedings, however, indicates that the Commission was aware of the risks associated with proceeding with the meter technology proposed by PG&E. The decision cites TURN for its position arguing that the Smart Meters have “an uncertain 20-year economic useful life.” TURN also advocated that the Commission reject the use of Smart Meter technology.

More specifically, concerning the issue of rapid technological obsolescence, the decision discusses the major uncertainties and risks associated with the investment in new technologies:

Before the introduction of the personal computer it would have been hard to seriously project the impact, and the rate of change, we have seen in that tool on our personal and business lives. We lack the same vision of how metering and communications technology may change over the useful life of the AMI system. PG&E’s current metering system with manual meter reading is functional; it also is used and useful, but it is technologically obsolete - once we accept that the proposed AMI technology works. But technological obsolescence alone is not sufficient to warrant replacing the system. That is why we apply an economic test - whether or not the present value of all benefits is greater than the present value of the revenue requirement paid by customers for new system for the useful life of the system. Although PG&E expects the system to remain in service for 20 years, only time will tell whether there will be significant unforeseen developments - good or bad - that may lead to an earlier or later replacement of the AMI system.²⁹

Thus, even if a lengthy proceeding were to show that the Commission did not have access to the specific facts cited by Applicant, the record indicates that the Commission did have access to facts concerning the uncertainty of this

²⁹ D.06-07-027 at 28-29.

technology, considered the uncertainty, and acted in a reasonable fashion in face of this uncertainty.

Moreover, the facts alleged by the applicant, even if they were provided to the Commission during the proceeding leading to D.06-07-027, would not have clearly warranted a reversal of the policy adopted. For example, even if information about upcoming ZigBee software were provided in the record of that proceeding, it would not have been unreasonable, in the face of widespread delays in the availability of commercial software for the Commission to proceed exactly as it did.

Furthermore, the proceeding that led to the approval of the initial deployment of the Smart Meters was actively contested by parties supporting and opposing the deployment of this technology. The Commission, by law and precedent, relies on this open regulatory process where facts are brought to the Commission, weighed, and policy is adopted. The Commission followed this procedure in developing its AMI policy.

Regulators understand that there is never a guarantee that a decision adopted in the face of both economic and technological uncertainty will be viewed in retrospect as the best outcome. This is the context in which Commissioner Peevey's remarks to the Legislature "that allowing PG&E to go forward with the Smart Meter program was a half billion dollar mistake and that ratepayers are the individuals paying for this mistake"³⁰ must be interpreted. President Peevey's statement is an honest appraisal of a situation in which an ex-post-facto look at an ex-ante decision reveals that a better course of action

³⁰ Id. at 3-4, footnotes omitted.

could have been chosen. The statement reflects the common experience of regret over the outcome of a decision made.

In summary, the facts presented by the Applicant appear consistent with other facts presented in the proceeding and are not new facts that, if they were made available prior to D.06-07-027, would have resulted in a different decision. D.06-07-027 clearly acknowledges and accepts technological risks identical to those that the Applicant raises on an ex post facto basis. Moreover, the proceedings leading to D.06-07-027 and D.09-03-026 are not procedurally deficient and were fully litigated.

A second way of addressing the Application is to view it as asking the Commission to conduct a post-hoc reasonableness review on the AMI program proposed by PG&E and approved by the Commission. Although the Commission frequently creates a procedure that uses a post-hoc reasonableness review to ensure that a utility exercises reasonable care in a specified activity, in this instance the Commission rejected this approach and instead decided to develop a risk sharing mechanism to provide managerial incentives for efficient cost management and to limit the applicability of reasonableness reviews. Specifically, D.06-07-027 states at Conclusion of Law 5:

5. It is reasonable to adopt a 10% shareholder and 90% ratepayer risk sharing of cost overruns, not to exceed \$100 million beyond the total project costs of \$1.6846 billion, *and only conduct a post-fact reasonableness review of any costs in excess of \$1.7846 billion.*³¹

Thus, the Commission elected to rely on a post-hoc reasonableness review only in the event that cost overruns exceeded a set amount.

³¹ D.06-07-027, Conclusion of Law 5, at 66, emphasis added.

In addition, the Commission specifically considered how to allocate the costs of the mechanical meters that became “stranded”³² when a program to replace these meters with newer meters was adopted and found that:

28. It is reasonable that the stranded costs related to the electromechanical meters deployed as part of PG&E’s original AMI project should be covered by the risk based allowance authorized by D.06-07-027 for the original AMI project.³³

We conclude that the application, in addition to not providing facts that are clearly new and would warrant a different decision, does not raise any new issue that the Commission has not already considered.

In summary, the Applicant has not alleged facts that would warrant a reversal of either D.06-07-027 or D.09-03-026. Finally, the issue of whether to allocate the costs of the technology to the shareholders was considered in D.06-07-027, when it limited the use of a reasonableness review and elected to create an incentive mechanism to encourage managerial efficiencies.

7. Conclusion

As described above, the Applicant has not presented new or changed facts that warrant the Commission’s modifying D.06-07-027 and D.09-03-026. The record shows that that the Commission was fully aware that the deployment of Smart Meters carried technological risks. The application does not allege facts that would warrant a different decision, nor does it raise any issue that the

³² A “stranded cost” is a cost incurred by the utility for investment which is no longer “used and useful” and which the utility cannot recover in rates.

³³ D.09-03-026 at 192. Under these terms, the costs for the meters that are no longer useful would be paid out of the “risk based allowance” that was part of the original authorization of revenue requirement.

Commission has not already considered. There is no valid reason for modifying either decision.

8. Categorization and Need for Hearing

In Resolution ALJ 176-3262 dated October 14, 2010 the Commission preliminary categorized this application as ratesetting, and preliminary determined that hearings were not necessary.

9. Comments of Proposed Decision

The proposed decision of ALJ Sullivan in this matter was mailed to the parties in accordance with Section 311 of the Public Utilities Code, and comments were allowed under Rule 14.3 of the Commission's Rules of Practice and Procedure. Comments were filed by May 4, 2011 by the Applicant and by PG&E. Reply comments were filed on May 9, 2011 by PG&E.

The Applicant argues that the proposed decision "mischaracterizes the applicant's argument," that "new facts ... warrant [a] proposed modification," and that the "risk management incentive program is not relevant."

PG&E argues in support of the proposed decision.

The proposed decision understood the arguments of the Applicant. In particular, the proposed decision found unpersuasive the Applicant's argument that PG&E should have known about certain technological developments. In addition, the Applicant proffered no facts that warrant a modification of the D.06-07-027 and D.09-03-026.

10. Assignment of Proceeding

Michael R. Peevey is the assigned Commissioner and Timothy J. Sullivan is the assigned Administrative Law Judge in this proceeding.

Findings of Fact

1. The Application does not proffer any alleged facts that would warrant modification of D.06-07-027 and D.09-03-026.

2. D.06-07-027 discussed the technological risk of premature obsolescence associated with the Smart Meter project.

3. The proceedings leading to D.06-07-027 and D.09-03-026 were not procedurally deficient and were fully litigated.

4. D.06-07-027 adopted an incentive program to manage risks and rejected the use of a post-hoc reasonableness review, except if costs exceed \$1.7846 billion.

Conclusion of Law

The Application should be dismissed.

O R D E R

IT IS ORDERED that:

1. The Application of Heather Epps for Modification of Decision (D.) 06-07-027 and D.09-03-026 is dismissed.
2. Application 10-09-015 is closed.

This order is effective today.

Dated May 26, 2011, at San Francisco, California.

MICHAEL R. PEEVEY
President
TIMOTHY ALAN SIMON
MICHEL PETER FLORIO
CATHERINE J.K. SANDOVAL
MARK J. FERRON
Commissioners