Decision 02-06-028 June 6, 2002

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 (D.) 02-05-48

This decision modifies Decision (D.) 02-05-048 and denies Pacific Gas and Electric Company's (PG&E) application for rehearing of D.02-05-048, as modified. In D.02-05-048, we ordered PG&E to comply with the terms and conditions of a Servicing Order to provide transmission, distribution, billing and collection and other related services requested by the Department of Water Resources (DWR).

I. BACKGROUND

On February 1, 2001, the Governor signed into law Assembly Bill (AB) 1 from the First Extraordinary Session (AB 1X). In AB 1X, the Legislature responded to the inability of Southern California Edison Company (Edison) and Pacific Gas & Electric Company (PG&E) to buy the power needed to serve their customers.

AB 1X authorizes DWR to purchase electric power to sell directly to the electric utilities' customers. Under Water Code section 80106(a), DWR may contract with the utilities to serve as an agent for DWR in providing transmission, distribution, billing and collection and other related services upon mutual agreement with the utility. Alternatively DWR may request that the Commission order the utility to provide these services. (Water Code § 80106(b).) Upon DWR's request,

> 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 the power and provide billing, collection and other related services, as agent of the department, on terms and conditions that reasonably compensate the electrical corporation for its services.

(Water Code § 80106(b).)

On June 27, 2001, DWR made such a request with respect to PG&E. On September 10, 2001, the Commission issued D.01-09-015, which ordered PG&E to enter into a Servicing Agreement with DWR. PG&E was, however, allowed to seek Bankruptcy Court approval of the Servicing Agreement. (D.01-09-015, at p. 24 (OP 4).) On September 24, 2001, PG&E filed a motion with the Bankruptcy Court seeking an order to allow PG&E to refrain from entering into the Servicing Agreement. This motion was never ruled on by the Bankruptcy Court and has since been withdrawn by PG&E.

On February 21, 2002, the Commission adopted a Rate Agreement (D.02-02-051) between the Commission and DWR. On March 29, 2002, DWR entered into amended and restated servicing agreements with Southern California Edison Company (Edison) and San Diego Gas and Electric Company (SDG&E) to implement provisions of the Rate Agreement. The Commission granted Edison and SDG&E's applications requesting approval of these amended servicing agreements in D.02-04-047 and D.02-04-048, respectively.

On April 18, 2002, DWR sent a Memorandum to the Commission requesting that it order PG&E to enter into an amended and restated servicing agreement with DWR. On May 17, 2002, the Commission issued the Servicing Order Decision, the subject of this rehearing decision.

On May 28, 2002, PG&E filed a timely application for rehearing of the Servicing Order Decision.[1] On May 31, 2002, DWR submitted a letter responding to PG&E's rehearing application. (Letter of Viju Patel, dated May 31, 2002.) DWR submitted a supplemental response on June 4, 2002. (Letter of Viju Patel, dated June 4, 2002.)

We have carefully considered all the arguments presented by PG&E and are of the opinion that no grounds for rehearing have been demonstrated. Therefore, we deny PG&E's application for rehearing of D.02-05-048.

II. DISCUSSION

As an initial matter, we note that PG&E has raised numerous vague allegations of error, with no supporting details in its rehearing application. Additionally, it attempts to "incorporate by reference" its previous comments regarding the Servicing Order to substantiate its arguments. However, PG&E fails to refer to specific pages in those documents, or even specify the arguments on which it relies. These general references to earlier filed comments do not meet the requirements of Public Utilities Code section 1732, which requires applications for rehearing to "set forth specifically" the grounds for error. Furthermore, Rule 86.1 of the Commission's Rules of Practice and Procedure warns applicants that vague assertions as to the record or law without citation may be accorded little attention. Parties often raise numerous issues in their comments that may have nothing to do with identifying legal error, and the Commission cannot be forced to speculate as to which issues or statements the parties consider relevant in their rehearing

[1] The Servicing Order Decision implements the provisions of AB 1X and is subject to the 10-day time limit for filing applications for rehearing under Public Utilities Code section 1731(c). In this instance, rehearing applications were due by May 28, 2002.

applications. However, to the extent that PG&E's rehearing application identifies arguments raised in its comments, and where the comments raise a legal issue, we will address those arguments and issues.

A. The Servicing Order Decision provides that PG&E will be reasonably compensated for providing distribution, transmission, billing and collection services to DWR.

PG&E maintains that the Servicing Order Decision fails to ensure that it will receive reasonable compensation for its services under the Servicing Order. (PG&E App., at p. 7.) First, it believes that DWR is attempting to repudiate its responsibility with respect to certain disputed ISO charges based on language in Attachment I, section 2 of the Servicing Order. Based on a review of the Servicing Order, we conclude that the language cited by PG&E should have been changed, consistent with other changes made to DWR's request. Accordingly, the sentence in dispute, "CDWR does not assume responsibility for any ISO charges invoiced relating to or with respect to the ISO Scheduling Coordinator IDs PGAE or PGAB" shall be changed to "Attachment I does not address responsibility for any ISO charges invoiced relating to or with respect to the ISO Scheduling Coordinator IDs PGAE or PGAB." This statement, as modified, clearly does not decide the issue of ultimate responsibility for the disputed ISO charges and thus cannot be contrary to the FERC's orders. Furthermore, these disputed charges are not part of the enumerated costs under Water Code section 80106(b), and thus need not and have not been addressed in the Servicing Order.[2] Consequently, PG&E's assertion is without merit.

PG&E next asserts that the Servicing Order Decision does not protect against potential uncompensated diversion of its facilities to DWR. It believes that the Commission has abused its discretion by not addressing these concerns in

[2] Indeed, to the extent that PG&E is alleging that DWR not only must pay, but is also ultimately responsible for, the disputed ISO charges, that issue does not yet appear to have been addressed in a FERC order. Moreover, that issue is currently the subject of PG&E's rehearing application of Commission Decision 02-03-058.

greater detail. (PG&E App., at p. 8.) PG&E's comments are based on its concerns that DWR *may* claim a priority right of transmission and distribution of its power, and that PG&E *would* not be compensated in the event this action occurs. These concerns are unfounded. In the Servicing Order Decision we have not made any determination with respect to DWR's ability to claim a priority right of its power over PG&E's power. PG&E fails to explain why we should consider its assertions to be a credible risk, especially when the negotiated agreements between DWR and Edison and SDG&E, respectively, contain substantially the same language as that contained in the Servicing Order.[3] (See, First Amended and Restated Servicing Agreement between State of California Department of Water Resources and Southern California Edison Company, Section 2.1; First Amended and Restated Servicing Agreement between State of California Department of Water Resources and San Diego Gas and Electric Company, Section 2.1.) Furthermore, we are not required to address such a vague and speculative concern in greater detail since PG&E is not entitled to compensation for an expectation of harm that has not yet occurred and may never occur. (See, generally, *Market Street Railway Co. v. Railroad Commission of California* (1945) 324 U.S. 548, 567, which discusses the due process clause requirements for a taking to occur.) Accordingly, there is no abuse of discretion.

The Servicing Order states that delivery of power is pursuant to AB 1X and Commission orders. (Servicing Order, Section 2.1.) AB 1X provides that PG&E will be compensated for use of its assets by DWR. Should DWR not compensate PG&E, PG&E may seek appropriate remedies either under the Servicing Order or applicable law. (See Servicing Order, section 5.4.) Furthermore, PG&E may seek rehearing and judicial review of any Commission orders that PG&E believes would give DWR a priority right without providing

[3] PG&E appears to be arguing here that we should be treating it differently than Edison and SDG&E. Yet, elsewhere in its rehearing application, PG&E asserts that it should be treated the same as Edison and SDG&E.

reasonable compensation to PG&E. (Pub. Util. Code §§ 1731, 1756.) Consequently, our decision to not include the language proposed by PG&E does not constitute legal error.

PG&E further maintains that the Servicing Order Decision ignores PG&E's concerns regarding the costs associated with including a separate Bond Charge line item on customers' bills and improperly prejudges any request for compensation of these costs. (PG&E App., at p. 8.) PG&E is mistaken in both respects. The Servicing Order provides, and DWR has confirmed, that PG&E will be compensated for the *incremental costs* associated with implementing this separate line item. (Servicing Order, Section 7.1; Letter from Viju Patel, dated May 31, 2002.) Thus, PG&E's concerns relating to its incremental costs are unfounded. Further, our statements regarding the CIS system do not prejudge the amount PG&E may recover from DWR. Accordingly, PG&E's claims are without merit.

Finally, PG&E proposes various theories why there should be an upfront determination of the reasonable costs DWR should pay PG&E for implementing a separate Bond Charge line item. (PG&E App., at p. 9.) First, it believes that the "reasonable compensation" standard under Water Code section 80106(b) is only triggered by a request from DWR. PG&E misreads the statute. Only issuance of a *servicing order* is triggered by DWR's request. Under the Servicing Order, P&GE, as an "agent of the department," must provide transmission, distribution, billing, collecting and other related services "on terms and conditions that reasonably compensate [PG&E] for its services." (Water Code § 80106(b).) The Servicing Order contains such terms and nothing in the statute requires that a specific dollar amount be determined in advance. Furthermore, as discussed above, DWR has confirmed that PG&E will be compensated for the reasonable costs associated with implementation of a separate Bond Charge line item.

PG&E next proposes that the Servicing Order is unenforceable against both PG&E and DWR because it is issued under the Water Code. PG&E is incorrect. Nothing limits the enforceability of Commission decisions only to those issued under that Public Utilities Code. Indeed, Water Code section 80106 specifically authorizes the Commission to issue a Servicing Order. If the Commission is authorized to issue such a decision, it must also have the authority to enforce it. With respect to PG&E, the Servicing Order Decision is an order of the Commission, which requires utility compliance and is enforceable by both the Commission and the Courts. (See, e.g., Pub. Util. Code §§ 1735, 2106, 2107, 2108.) With respect to DWR, the Water Code specifically provides that DWR must provide reasonable compensation to PG&E for services provided. Should DWR not provide reasonable compensation, PG&E has the option to seek appropriate remedies, including from the Superior Court. Finally, it should be pointed out that PG&E is demanding upfront determination of an unknown cost. PG&E's prior comments have failed to provide any basis for determining the dollar amount that would constitute "reasonable compensation." For these reasons, we find PG&E's request unconvincing.

B. The Commission was not required to inquire into the reasonableness of DWR's negotiations with PG&E and did not violate Water Code section 80106(b) by changing some of DWR's proposed language.

PG&E maintains that the Commission violated Water Code section 80106(b) by only examining the request before it and not first making a "good faith inquiry into the reasonableness of DWR's efforts to negotiate with PG&E." (PG&E App., at p. 10.) PG&E is basically arguing that it should have been given additional time to negotiate with DWR before we ordered it to comply with the Servicing Order. However, Water Code section 80106 provides DWR the option of either negotiating with the utilities or requesting that the Commission order the utilities to provide transmission, distribution, billing and other related services.

DWR is not required to negotiate, and thus we are not required to inquire into the reasonableness of its negotiation efforts. The fact that we did not provide PG&E additional time to negotiate with DWR does not constitute legal error.[4]

PG&E further accuses the Commission of inserting "different provisions than those proposed by DWR and based on the record before the Commission." (PG&E App., at p. 10.) While the Servicing Order Decision made various changes to DWR's proposed language, some at the request of PG&E, it is unclear which provisions form the basis for PG&E's assertion of error. Under section 1732 and Rule 86.1, it would be inappropriate for us to speculate on which provisions are objectionable to PG&E. However, we shall address the two provisions specifically identified by PG&E in its rehearing application.

PG&E first objects to the insertion of a requirement for a separate line item on customer bills for Bond Charges, which had not been requested by DWR.[5] However, once DWR made its request for a servicing order, the Commission was authorized to order the utility to provide any of the services enumerated under Water Code section 80106(b). As a Commission decision, the Commission has authority to determine the content of its orders, especially here, where the issue concerns what kind of information should be given to utility customers, a matter of Commission expertise. Thus, we are not limited to the specific proposals presented by others. In this instance, we properly exercised our own expertise in determining that a separate line item for Bond Charges would be helpful to utility customers and should be included.[6] To suggest otherwise would deny our broad authority under the Public Utilities Code to regulate the terms of service of a

[4] Furthermore, as DWR states in its response to PG&E's rehearing application, it is not opposed to further negotiation. (Letter from Viju Patel, dated May 31, 2002.) Therefore, PG&E still has the ability to negotiate with DWR.

[5] In its supplemental comments, DWR indicates that Servicing Order is acceptable to DWR. "Specifically, DWR is agreeable to the requirement of a separate line item on customer bills to accommodate a Bond Charge." (Letter of Viju Patel, dated June 4, 2002.) Thus, DWR supports our decision to include such a requirement.

[6] As noted in the Servicing Order Decision, we will be asking both Edison and SDG&E to add a separate line item for Bond Charges to their customer bills. (D.02-05-048, at p. 19, fn. 8.)

utility subject to our jurisdiction. Consequently, PG&E's argument is without merit.

PG&E next challenges the Commission's decision to recast the language of DWR's proposal to reflect that it is a servicing order. This challenge is also without merit. DWR had requested that we issue a servicing order. Since we were ordering PG&E to perform certain services, it would be inconsistent to consider such an order to be an "agreement" between DWR and PG&E. Therefore, it was reasonable to change the language proposed by DWR in complying with DWR's request.

C. The Servicing Order Decision contains sufficient Findings of Fact, and these findings are not contrary to the record.

PG&E raises a general allegation that the Servicing Order Decision's conclusions are not supported by findings citing record evidence. However, it only identifies two specific areas – partial payments and the separate line item for Bond Charges. (PG&E App., at pp. 10-11.) Thus, pursuant to Public Utilities Code section 1732 and Rule 86.1, we shall only address these two specific items.

1. The Commission's interpretation of the statutory provisions of AB 1X does not require findings on partial payment issues.

In its September 24, 2001 Bankruptcy Court motion, PG&E argued that customers should be allowed to direct partial payments on their bills only to PG&E charges. PG&E's arguments, if adopted, would potentially allow PG&E customers to pay the PG&E, but not DWR, portion of their bill without termination of service. The Servicing Order Decision addressed PG&E's arguments and concluded that AB 1X authorized the Commission to dictate how PG&E should apply funds received from customers. (D.02-05-048, at p. 13.) PG&E contends that this conclusion is in error and an attempt to override the provisions of Civil Code section 1479 and Public Utilities Code section 779.2. (PG&E App., at p. 2, fn. 3.) PG&E is mistaken. Civil Code section 1479 provides

a general rule on how a creditor is to apply the payments of a debtor. However, this general rule does not prohibit the Legislature from providing other and more specific rules in certain circumstances. It is clear that the Legislature intended to ensure DWR's ability to pay for the power it provides to utility customers and to repay any bonds it issues. (Water Code §§ 80002.5, 80104, 80108, 80110, 80112, 80134, 80200.) Water Code section 80110 specifically states that DWR "shall have the same rights with respect to the payment by retail end use customers for power sold by the department as do providers of power to such customers." Water Code section 80108 specifically permits the Commission to "issue rules regulating the enforcement of the agency function pursuant to this division, including collection and payment to [DWR]." These provisions clearly indicate that the Legislature intended to treat both DWR and PG&E the same with respect to payment for power provided to utility customers. The Legislature did not intend to allow utility customers to selectively pay PG&E, but not DWR. Instead, these provisions indicate that non-payment of DWR power charges would lead to the same consequences as non-payment to PG&E. Thus, Civil Code section 1479 is not controlling, and we were well within our authority to prevent PG&E from permitting its customers to direct partial payments only to PG&E charges.

Further, it is PG&E, not the Commission, that misreads the language of Water Code section 80110 by contending that the statute refers to "other" providers of power. The pertinent part of that section actually states that DWR shall have "the same rights with respect to the payment by retail end use customers . . . *as do providers of power* to such customers." (Water Code § 80110, emphasis added.) Such a reference is to the utility itself, not to Electric Service Providers

(ESPs). Accordingly, Public Utilities Code section 779.2 is inapplicable.

The Servicing Order Decision contains two Conclusions of Law regarding our interpretation of AB 1X. Since we are merely interpreting the plain language of AB 1X, there is no need to provide additional Findings of Fact on this issue. Consequently, PG&E's assertions that findings are necessary are unfounded.

2. The Commission's requirement that PG&E include a separate line item for Bond Charges on customer bills is not contrary to the record.

In the Servicing Order Decision, we added a requirement that DWR's Bond Charges be listed as a separate line item on customer bills. (D.02-05-48, at p. 19; section 2.2(d) of Service Attachment 1 to Servicing Order, at p. S-A-2.) PG&E believes that this requirement is contrary to the record and not supported by sufficient findings. We disagree.

PG&E maintains that there is "record evidence" that a separate line item would inconvenience customers and impose significant costs. (PG&E App., at p. 11.) It is mistaken. PG&E's "record evidence" consists of a quote in its May 14, 2002 comments to a letter from Les Guliasi to Commissioner Duque on July 18, 2001.[7] (PG&E's Comments on Draft Decision, dated May 14, 2002, at p. 12.) However, this quote, describing PG&E's concerns more than a year ago, does not explain how customers will be inconvenienced or why the delay would result in additional costs. Furthermore, as explained elsewhere in this decision, PG&E is entitled to recover from DWR the incremental costs for adding a line for Bond Charges to its bills. Accordingly, this point is not persuasive.

Next, PG&E identifies various issues dealing with a separate line item for Bond Charges that it believes are not clearly discussed in the Servicing Order Decision. (PG&E App., at pp. 11-12.) Upon consideration of these allegations,

[7] In footnote 7 of its comments, PG&E also refers to another letter from Mr. Guliasi to the Commissioners dated March 1, 2002. However, these referenced letters are not part of the administrative record.

we agree that additional clarification is needed to explain our decision to require a separate line item for Bond Charges. (By "line item" we mean a separate line on each customer's bill that calculates for that customer the amount of a particular charge.) As noted by PG&E, we had concluded in D.01-09-015 that the establishment of a separate line item for "DWR charges" on utility bills would likely cause customer confusion. (D.01-09-015, at p. 20 (COL 10).) At the time that decision was issued, the only monies remitted to DWR were based on the amount of DWR power sold to end-use customers.

Since that time, the Commission and DWR have entered into a rate agreement, which provides for the utilities to collect on behalf of, and remit to, DWR two separate charges – a Power Charge and a Bond Charge. The Bond Charge is a new charge not addressed in D.01-09-015. The Bond Charge is to be assessed on the electric power sold to all customers of PG&E, regardless of whether the power is sold by DWR, the utility, or, under certain circumstances, by an ESP. A line item for Bond Charges is readily understandable, as it is a fixed per kWh charge multiplied by the *total* power used (with limited exceptions).

With respect to the Power Charge, we are also avoiding customer confusion consistent with D.01-09-015. As demonstrated in the Revenue Requirement Decision (D.02-02-052), the proper tracking of revenues for power delivered to end-use customers is complex and requires the use of balancing accounts. (D.02-02-052, at pp. 83-88.) Accordingly, it remains our view that a separate line item for *DWR* Power Charges would be confusing to customers. We wish to avoid the situation where customers cannot simply add the line items on the bill in order to understand the amount they have to pay. Accordingly, we reject any requirement for a separate line item listing the amount of DWR Power Charges on customer bills. Instead, we believe that a simple statement on customers' bills that the Consolidated Utility Bill includes charges for power provided by DWR and the per kWh charge for that DWR power will convey accurate and readily understandable information.

We believe that, from a policy standpoint, customers should be provided with information on their bills that explains what they are paying for. However, this information is only desirable if it can be presented in a clear and simple manner. In D.01-09-015, we declined to include on customer bills a separate line item for DWR charges because we felt it would likely cause customer confusion. However, we have now determined that the Bond Charges can be listed as a separate line item in a clear and simple manner. Thus, we have included the requirement that PG&E add this separate line item on its customers' bills.

PG&E maintains that the Commission must issue findings that support the addition of a separate Bond Charge line item in light of the "short term timing of PG&E's CIS replacement project and the costs to PG&E." (PG&E App., at p. 11.) PG&E further maintains that there is no basis for the Commission's statements that the Bond Charge has not yet been implemented and that PG&E will have sufficient lead time to comply with the Servicing Order Decision. (PG&E App., at pp. 11-12.) Pursuant to Ordering Paragraph 9 of D.02-02-051 and the Rate Agreement, the Commission is to impose bond charges in an amount that is sufficient in total to provide for the timely payment of bond-related costs. When the Commission issued the Servicing Order Decision, it had not yet initiated a proceeding to implement the Bond Charge. There is no need for record evidence to support that statement. Furthermore, as has been stated elsewhere in this decision, PG&E will be compensated for the incremental costs associated with implementing this separate line item. Accordingly, we do not believe any additional findings are required on this issue.

While we disagree with PG&E's assertion that our decision is contrary to the record, we do agree with PG&E that the Servicing Order Decision does not clearly explain why Section 2.2(d) was added. Accordingly, we shall modify the Servicing Order Decision to clarify our rationale for adding a separate Bond Charge line item to customer's bills, as discussed above. Additionally,

while not necessary under Public Utilities Code section 1705, we will add additional Findings of Fact to further clarify our findings with respect to the Bond Charges.

D. This Servicing Order does not require advance approval of the Bankruptcy Court.

PG&E asserts that the Bankruptcy Court must approve the Servicing Order before it can be ordered to comply with the Servicing Order. (PG&E App., at pp. 14-15.) We disagree. First, as PG&E notes in its rehearing application (PG&E App., at p. 15), it must bring to its creditors' attention any "agreements" made outside of the ordinary course of business or actions that would damage PG&E's estate. However, as PG&E has repeatedly stated, the Servicing Order is not an agreement between it and DWR. Rather, it is a Commission order directing PG&E to comply. Consequently, Bankruptcy Court approval is not required prior to PG&E's compliance. Moreover, as has been discussed elsewhere in this order, the Servicing Order Decision does not interfere with PG&E's estate.

In D.01-09-015, we permitted PG&E to seek Bankruptcy Court approval of the Servicing Agreement because the agreement had included a provision for Bankruptcy Court approval. (D.01-09-015, at pp. 12, 24 (OP 4 & 5).) Instead PG&E requested that the Bankruptcy Court issue an order permitting it to *decline from complying* with the Servicing Agreement. In its current submission to the Commission, DWR did not include a provision for Bankruptcy Court approval. Since we are ordering PG&E to comply, we need not include such a provision.

E. The Commission was not required to hold evidentiary hearings.

PG&E maintains that the Commission violated its due process rights by not holding evidentiary hearings. (PG&E App., at p. 13.) However, PG&E fails to identify any factual issues in dispute that would require hearings. Rather,

PG&E refers generally to its prior comments. PG&E specifically raised four issues in its rehearing application. We have addressed these issues.

PG&E first alleges that the Commission has "attempted to eliminate Bankruptcy Court review of the servicing agreement without addressing any of the underlying concerns raised, but not resolved, at the Bankruptcy Court." (PG&E App., at p. 13.) PG&E does not identify those issues here. Upon review of the issues raised in PG&E's September 24, 2001 motion before the Bankruptcy Court[8], it appears that PG&E's Motion raised four main concerns, each of which has been addressed in the Servicing Order Decision, and none of which raises a disputed issue of fact.

The first concern was that a servicing agreement with DWR was premature because the Commission had not yet issued a final decision implementing DWR's revenue requirement. (PG&E Motion, at p. 21.) However, the Commission subsequently has issued such a decision (D.02-02-052). The time for rehearing and judicial review of this decision has passed, and it is now a final decision. Consequently this concern is moot.

PG&E's second concern was that Bankruptcy Court approval of a servicing agreement was required since it believed that such an agreement would affect PG&E's estate and was outside its ordinary course of business. (PG&E Motion, at p. 21.) However, as explained above, this is a Servicing Order, not an agreement. Therefore, we reject as a legal matter that the Servicing Order must be approved by the Bankruptcy Court before it can become effective. Accordingly, we see no disputed issues of fact here. Furthermore, the revenues that PG&E is to remit to DWR is property of DWR, not of PG&E; PG&E only collects them on behalf of DWR. (Water Code §§ 80106, 80112.) Since they are not part of

[8] PG&E's motion, titled *Notice of Motion and Motion Regarding Request by California Department of Water Resources and Order by California Public Utilities Commission that Pacific Gas and Electric Company Enter into Servicing Agreement with the California Department of Water Resources; Supporting Memorandum of Points and Authorities* (PG&E Motion), requested that the Bankruptcy Court issue an order authorizing PG&E to decline from complying with D.01-09-015.

PG&E's revenues, we see no factual basis for asserting that PG&E's estate would be affected by this Servicing Order. Thus again, there is no disputed factual issue requiring evidentiary hearings.

PG&E's third concern involves potential damage to its estate from uncompensated use of its transmission and distribution facilities. (PG&E Motion, at p. 24.) As we have discussed, the Servicing Order Decision has not made any determination with respect to DWR's ability to claim a priority right of its power over PG&E's power. Furthermore, under the Water Code, DWR is to compensate PG&E for use of its facilities. In addition, under the Servicing Order, DWR will compensate PG&E for the use of PG&E facilities and has agreed to do so. Thus, if DWR fails to comply, PG&E may seek appropriate relief, including from the Superior Court. PG&E has not provided any evidence to the contrary, and thus there are no disputed factual issues.

The final concern raised in the PG&E Motion is that PG&E's estate would be damaged if customers were not permitted to direct partial payments of their balances to PG&E. (PG&E Motion, at p. 26.) PG&E bases its argument on its contention that State law grants its customers such a right. As discussed in the Servicing Order Decision (D.02-05-048, at p. 13) and Section II.C.1. above, PG&E's view of State law is incorrect. In short, PG&E's disagreement is with our legal conclusions. PG&E has presented no material issues of disputed fact.

PG&E next asserts in its rehearing application that evidentiary hearings should be held to "address the need for a clear separation of DWR's revenues and PG&E's revenues." (PG&E App., at p. 14.) Based on PG&E's May 6, 2002 letter to the Commission (May 6 Letter)[9], it appears that this assertion arises out of PG&E's disagreement with certain terms in the draft Servicing Order. (May 6 Letter, at pp. 2 (Issue 2), 3 (Issues 8 & 10).) To the extent we agree with PG&E, we have revised these terms from those proposed by DWR to meet

[9] This letter was included as an attachment to PG&E's comments of May 14, 2002 on the Draft Decision.

PG&E's concerns. (See, e.g., Servicing Order, Sections 1.30, 1.31, 2.3, 4.1.) However, we have not made changes where we disagreed with PG&E's comments. Thus, we did not adopt PG&E's proposed change to permit customers to direct partial payments only to PG&E (Service Attachment 1, Section 3). However, as explained above, whether or not this change should have been made is an issue of law, and not an issue of fact.

PG&E next contends that the Servicing Order does not provide protection against diversion of its revenues and facilities without fair compensation. However, PG&E merely repeats its arguments that it may not be compensated in the event DWR claims priority over the use of PG&E's transmission and distribution facilities. (PG&E App., at p. 14.) PG&E's May 6 Letter raised similar concerns. (May 6 Letter, at p. 2 (Issue 3).) As discussed above, there are no material issues of fact in dispute here.

PG&E further contends that the Commission has failed to provide an opportunity to hear evidence related to the disputed ISO charges. (PG&E App., at p. 14.) However, as discussed in Section II.A. above, these charges are not enumerated under Water Code section 80106, and the Servicing Order Decision does not address them. Responsibility for these disputed charges is a separate issue, which is the subject of Commission decision D.02-03-058. PG&E filed for rehearing of that decision on April 4, 2002. Accordingly, this is not a factual issue in this decision.

PG&E finally contends that hearings are needed to explain why the Servicing Order contains different provisions than the amended Servicing Agreements entered into between DWR and the other two utilities. (PG&E App., at p. 15.) PG&E fails to recognize that those Servicing Agreements were the product of successful negotiations between DWR and Edison and SDG&E. On the other hand, PG&E has not been able to reach an agreement with DWR and is being ordered to comply. Nonetheless, PG&E believes it should be treated in the same manner. However, it provides no basis for us to conclude that it is similarly

situated to the other two utilities, which had reached agreements with DWR, such that it warrants identical treatment. There are a variety of reasons why PG&E's Servicing Order is different from the negotiated agreements of the other two utilities. (D.02-05-048, at pp. 16-17.) In short, the Servicing Order is not required to contain the same provisions as the negotiated agreements. Thus, PG&E's claims of "unjust discrimination" are unconvincing.

Because PG&E refers generally to its prior comments in support of its contention that evidentiary hearings should have been held, we are unsure of what additional issues, if any, PG&E believes required hearings. Nevertheless, we will explain our resolution of the other points raised in the May 6 Letter, which will demonstrate why no hearings were required on these issues either.

a. Issue 1 (page 2) concerns PG&E's belief that the servicing agreement is unenforceable absent Bankruptcy Court approval. This concern had also been raised in PG&E's Bankruptcy Motion and is discussed above. (See also, discussion in Section II.D. above.)

b. Issue 4 (page 2) concerns PG&E's assertion that DWR power and PG&E power should be listed as separate line items. We have discussed in this decision our rationale for not requiring a separate line item for DWR power and are modifying the Servicing Order Decision to more clearly explain this rationale.

c. Issue 5 (page 3) concerns PG&E's belief that Sections 8.1 and 8.7 of the Servicing Order do not provide PG&E sufficient access to DWR's information. In its April 12 draft of the Servicing Agreement, PG&E had proposed revisions to these sections to include such a provision. We declined to adopt PG&E's proposed revisions. Instead, we retained the original language of these sections, which contain the same language as corresponding sections in the Amended Servicing Agreements between DWR and Edison and SDG&E.

d. Issues 6, 7, 8 and 12 (pages 3 and 4) identify areas which PG&E believes are inconsistent with Edison's and SDG&E's Amended Servicing Agreements. As noted in the Servicing Order Decision, since this was the last amended servicing arrangement negotiated by DWR, DWR was able to refine PG&E's document to an extent that was not possible with the other servicing agreements. (D.02-05-048, at pp. 16-17.) We exercised our discretion to approve certain language which is clearer.

e. Issue 9 (page 4) concerns an alleged omission of provisions contained in Section 2.2(c) of SDG&E's Amended Servicing Agreement, which requires SDG&E and DWR to notify each other of, and to resolve in good faith, any flaws in the servicing agreement. Similar provisions are contained in Section 10(d) of the Servicing Order. There has been no omission on this topic.

f. Issue 11 (page 4) concerns PG&E's belief that it will not be reimbursed for incremental costs associated with implementing a separate line item for Bond Charges. The Servicing Order Decision addresses this issue and has amended section 7.1 of the Servicing Order to include such a provision.

PG&E has been provided sufficient notice and opportunity to comment on the Servicing Order and the Servicing Order Decision, as detailed in footnote 4 of its rehearing application. Furthermore, it fails to show that there are any material issues of fact in dispute. Therefore, our decision not to hold evidentiary hearings has not denied PG&E due process.

F. The Legislature properly delegated authority to the Commission under Water Code sections 80016 and 80106.

PG&E asserts that Water Code sections 80016 and 80106 are an unconstitutional delegation of the Legislature's authority. (PG&E App., at p. 16.) PG&E relies on the general proposition that the Legislature may not delegate its

authority to an administrative agency if it does not provide adequate standards and safeguards to prevent the agency's abuse of authority, especially when the agency consists of "those who are directly interested in the operation of the regulatory rule." (PG&E App., at p. 16.) However, the factual predicate upon which PG&E bases this assertion is misplaced.

PG&E incorrectly assumes that it is in competition with DWR for the revenues collected under current retail rates. PG&E presumes the retail rates result in a fixed revenue amount from which both parties are to be compensated and that there is no effective mechanism in the event that these rates are insufficient to cover the costs of both DWR and PG&E. In actuality, we have already ordered the utilities to establish balancing accounts to ensure that they will be made whole in the event current retail rates are not sufficient to cover the utilities' costs. (D.02-04-016, at pp. 74-75, 98 (OP 9); see also, D.02-02-052, at pp.78-88, as modified by D.02-03-062.) Since PG&E will be made whole, it cannot be said to be in competition with DWR for revenues derived from the current retail rates.

Furthermore, the cases cited by PG&E in support of its assertions are inapposite. PG&E relies principally on *State Board v. Thrift-D-Lux Cleaners* (1953) 40 C.2d 436. That case concerned the establishment of a minimum rate based on a determination of an administrative board consisting of interested parties, where no standards were provided. (*State Board v. Thrift-D-Lux Cleaners*, *supra*, at p. 448.) In this instance, the reasonable compensation for use of PG&E's facilities is based on PG&E's actual costs. Thus, unlike *Thrift-D-Lux*, there is a clearly defined standard. Additionally, in *Thrift-D-Lux*, the "interested parties" were competitors. As discussed above, PG&E's premise for concluding that DWR is a competitor is flawed. For these same reasons, PG&E has erroneously concluded that the Commission is an "interested party." The fact that Water Code section 80016 authorizes the Commission to provide reasonable assistance and cooperation in ordering PG&E to provide services to DWR and to be reimbursed

its reasonable costs for providing these services does not make us an "interested party" under *Thrift-D-Lux*. Thus, for the reasons discussed, PG&E's assertions are without merit, and there has been no unlawful delegation by the Legislature.

G. The Servicing Order Decision does not take PG&E's property without just compensation.

PG&E contends that the Servicing Order Decision is a taking without just compensation and in violation of the United States and California Constitutions. (PG&E App., at p. 19.) These claims are unfounded. First, PG&E contends that its electric system and billing and collection assets are being used "without any means of adjusting the compensation that DWR unilaterally has determined to pay PG&E." (PG&E App., at pp. 19-20.) However, DWR did not "unilaterally" determine the compensation amounts. Rather, these amounts were the amounts in the original Servicing Agreement submitted by DWR and approved in D.01-09-015. Those amounts reflected PG&E's estimates of its billing and collection costs. (Servicing Order, Attachment G.) Furthermore, Attachment G includes various provisions for adjusting PG&E's compensation. Moreover, the Servicing Order Decision provides for PG&E to recover any incremental costs associated with establishing a separate line item for Bond Charges. (D.02-05-048, at p. 18.) Section 7.1 of the Servicing Order provides that "DWR agrees to pay to Utility fees that will permit recovery of the Utility's incremental cost of establishing procedures, systems and mechanisms necessary to perform Services in connection with Bond Charges." Therefore, the Servicing Order provides a means for adjusting PG&E's compensation for providing services to DWR.

PG&E seems to contend that DWR is required to provide full compensation for any damages and lost profits incurred as a result of the Servicing Order's requirement that there be a separate line item on customer bills for Bond Charges. We are unsure of the basis for this claim. PG&E is presumably still billing its customers and collecting revenues under its current billing system. Therefore, it is unclear how it is damaged or losing profits due to the

Commission's requirement that, at some time in the future when Bond Charges are implemented, the new CIS system include this separate line item. Furthermore, PG&E has provided no basis for why it will cost "several million dollars for every month" the CIS project is delayed. Clearly, it is unreasonable for DWR to provide compensation for such speculative and unsubstantiated claims. (See, *Market Street Railway Co., v. Railroad Commission of California, supra*, 324 U.S. 548.)

An unlawful taking or confiscation does not occur unless a regulation or rate is unjust or unreasonable. (*Duquesne Light Co. v. Barasch* (1988) 488 U.S. 299, 307; *20th Century Ins. Co. v. Garamendi* (1994) 8 Cal.4th 216, 292.) PG&E has failed to demonstrate that the Servicing Order Decision is unjust or unreasonable. Consequently, its assertions are unfounded and without merit.

H. Other modifications should also be made to the Servicing Order Decision.

In addition to the modifications discussed above, we have identified two other changes in the Servicing Order Decision that should be made. The first full sentence on page 16 of the Servicing Order Decision does not clearly identify which ISO charges are disputed by PG&E and should be changed to do so. The change to Section 14.2 of the Servicing Order is needed to be consistent with other changes made elsewhere in the Servicing Order.

III. CONCLUSION

PG&E's application for rehearing fails to demonstrate legal error in Commission Decision 02-05-048.

THEREFORE, IT IS ORDERED that:

1. D.02-05-048 is modified as follows:
   a. On page 16, the first full sentence is deleted and replaced with "The charges about which PG&E makes its claims are charges that the ISO has levied and the dispute regards whether PG&E or DWR should pay them."

b. In Section 14.2 of the Servicing Order, the words "all rights of termination, cancellation, or other remedies" are deleted and replaced with "all rights or remedies".

c. In Section 2 of Attachment I of the Servicing Order, the last full sentence is deleted and replaced with "Attachment I does not address responsibility for any ISO charges invoiced relating to or with respect to the ISO Scheduling Coordinator IDs PGAE or PGAB."

2. The first full paragraph on page 19 of D.02-05-048 is deleted and replaced with:

> "We have also added subsection (d) to section 2.2 of Service Attachment 1 which requires that additional information about DWR Charges be provided on customer bills.[8] In D.01-09-015, we had concluded that the establishment of a separate line item for "DWR charges" on utility bills would likely cause customer confusion. (D.01-09-015, at p. 20 (COL 10).)
>
> However, the Commission and DWR have subsequently entered into a rate agreement, which provides for the utilities to collect on behalf of, and remit to, DWR two different types of charges – a Power Charge and a Bond Charge. The Bond Charges is a new charge not addressed in D.01-09-015. The Bond Charge is to be assessed on the electric power sold to all customers of PG&E, regardless of whether the power is sold by DWR, the utility, or, under certain circumstances, by an ESP. A line item for Bond Charges is readily understandable, as it is a fixed per kWh charge multiplied by the *total* power used (with limited exceptions). By "line item" we mean a separate line on each customer's bill that calculates for that customer the amount of a particular charge.

[8] We intend to also ask both SCE and SDG&E to add the same provision to their amended servicing agreements.

With respect to the Power Charge, we are also avoiding customer confusion consistent with D.01-09-015. As demonstrated in D.02-02-052, the proper tracking of revenues for power delivered to end-use customers is complex and requires the use of balancing accounts. (D.02-02-052, at pp. 83-88.) Accordingly, it remains our view that a separate line item for *DWR* Power Charges would be confusing to customers. We wish to avoid the situation where customers cannot simply add the line items on the bill in order to understand the amount they have to pay. Instead, we believe that a simple statement on customers' bills that the Consolidated Utility Bill includes charges for power provided by DWR and the per kWh charge for that DWR power will convey accurate and readily understandable information.

In PG&E's comments on the Draft Decision, PG&E asserts that this change will "significantly delay the installation of the replacement [customer information system] CIS." PG&E further asserts that adding lines onto customer bills relating to DWR Charges will result in great expense."

3. The following Findings of Fact are inserted after Finding of Fact 15:

15a. D.01-09-015 concluded that the establishment of a separate line item for "DWR charges" on utility bills would likely cause customer confusion.

15b. The Rate Agreement entered into between the Commission and DWR provides for the utilities to collect on behalf of, and remit to, DWR two different types of charges – a Power Charge and a Bond Charge.

15c. The Bond Charge is to be assessed on the electric power sold to all customers of PG&E, regardless of whether the power is sold by DWR, the utility, or, under certain circumstances, by an ESP.

15d. A separate line item for Bond Charges is readily understandable and will not cause customer confusion because it is a fixed per kWh charge multiplied by total power sold (with limited exceptions).

15e. As demonstrated in D.02-02-052, the proper tracking of revenues for power delivered to end-use

customers is complex and requires the use of balancing accounts.

15f. A separate line item for DWR Power Charges would likely cause customer confusion because of the complexity involved in the underlying balancing accounts.

4. Rehearing of D.02-05-048, as modified, is denied.

This order is effective today.

Dated June 6, 2002, at San Francisco, California.

LORETTA M. LYNCH
President
HENRY M. DUQUE
CARL W. WOOD
GEOFFREY F. BROWN
MICHAEL R. PEEVEY
Commissioners