

Decision 06-05-005 May 11, 2006

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
(Filed November 16, 2000)

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

Application 00-11-056
(Filed November 22, 2000)

U 39 E

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

Application 00-10-028
(Filed October 17, 2000)

**OPINION GRANTING PETITION FOR MODIFICATION
OF DECISION 03-10-040**

Background

By this decision, we grant the Petition for Modification of Decision (D.) 03-10-040, (petition) filed on August 3, 2005, by Pacific Gas and Electric Company (PG&E). In D.03-10-040, the Commission addressed how PG&E and the other investor-owned electric utilities were to remit to cities and counties Municipal Surcharge Fees attributable to power charges collected on behalf of the California Department of Water Resources (DWR) pursuant to Assembly

Bill 1 of the First Extraordinary Session (Stats. 2001, Ch. 4) (AB 1X).¹ Through its petition, PG&E seeks confirmation that the Commission, in prescribing how to remit Municipal Surcharge Fees attributable to DWR power charges in D.03-10-040, did not intend to modify more generally how PG&E remits Municipal Surcharge Fees to cities and counties for third-party transactions other than for DWR revenues.

In D.03-02-032, we previously ordered the investor-owned utilities (IOUs) to collect and remit Municipal Surcharge Fees to municipalities associated with DWR revenues pursuant to Pub. Util. Code §§ 6352-6354.1. As also noted in D.03-02-032, PG&E had raised questions as to whether the amounts that it had previously remitted to municipalities based on DWR sales revenues represented the correct amounts.

PG&E had interpreted the Municipal Surcharge Fee remittance methodology applicable to DWR revenues as prescribed in D.03-02-032 differently from Southern California Edison Company (SCE) and San Diego Gas & Electric Company (SDG&E). PG&E remitted such surcharges to each city and county uniformly based upon the average franchise fee factor adopted in its most recent general rate case. SCE and SDG&E, by contrast, remitted Municipal Surcharge Fees to each city or county based upon the specific franchise fee rate in the franchise agreement applicable to each individual city or county. As prescribed by D.03-02-032, workshops were conducted to resolve differences

¹ As explained in Decision D.03-02-032, DWR sales are a special category of third-party electricity sales subject to Municipal Surcharge Fees under the provisions of Pub. Util. Code §§ 6350-6354.1 which codified the Municipal Public Lands Use Surcharge Act. Such remittances to DWR are properly classified as municipal surcharges under §§ 6352-6354.1, rather than “franchise fees” under §§ 6000-6302.

Unless otherwise stated, all code references are to the California Public Utilities Code.

over how PG&E was to collect and remit Municipal Surcharge Fees associated with DWR revenues.

Following the conclusion of the workshops and the filing of related comments, D.03-10-040 was issued. In D.03-10-040, the Commission directed PG&E to calculate and remit Municipal Surcharge Fees applicable to DWR revenues to each municipality based upon the specific rate called for in each municipality's respective franchise agreement, consistent with the remittance methodology employed by SCE and SDG&E.

PG&E subsequently applied the Municipal Surcharge Fee remittance methodology prescribed in D.03-10-040 with respect to DWR power charges. It did not, however, apply that methodology in remitting municipal surcharges attributable to sources other than DWR sales. Instead, PG&E continued to use the same remittance methodology that it had used since 1994 for remitting Municipal Surcharge Fees on third-party sales.² Under this approach, PG&E remits Municipal Surcharge Fees to each city and county based on a uniform factor equal to the average franchise fee factor adopted in PG&E's most recent general rate case.

Although PG&E had been using this methodology since 1994, the cities of San Jose and Sunnyvale only became aware of PG&E's use of the methodology through the workshops ordered by D.03-02-032. San Jose and Sunnyvale thereby discovered that they had been receiving less money under the methodology traditionally used by PG&E as compared with the methodology prescribed in D.03-10-040, as applied to DWR revenues.

² PG&E attached to its petition the Declaration of Taryn Wells, PG&E Accounting Supervisor, attesting to the history of PG&E's collection and remittance practices for municipal surcharges dating back to 1994.

San Jose and Sunnyvale consequently submitted claims to PG&E for additional Municipal Surcharge Fees based on their interpretation that the methodology prescribed in D.03-10-040 applied to all third-party transactions, not just those of DWR. San Jose sought an additional \$3.6 million in fees associated with third-party sales, covering the period 1999-2002, almost \$700,000 for 2003, and an undetermined amount for 2004. Sunnyvale similarly sought \$600,000 in additional fees for the period 1999-2003.

PG&E thus filed this petition in response to the claims by San Jose and Sunnyvale for payment of additional fees.

Timeliness of PG&E's Petition

Under Rule 47(d) of the Commission's Rules of Practice and Procedure, a petition for modification is to be filed within one year of the effective date of the decision proposed to be modified, unless the petition justifies why it could not be presented within this year period. In this instance, more than a year passed between when the Commission issued D.03-10-040 and when PG&E filed its petition. PG&E has justified that this passage of time is not a bar to the petition.

Prior to Sunnyvale and San Jose's claim, PG&E was not, and could not have been, aware that there was any need for the Commission to modify its decision to clarify that the Commission did not intend to alter the utilities' existing methods for remitting Municipal Surcharge Fees to cities and counties.³ It was only after the impasse between PG&E on the one hand, and Sunnyvale and San Jose on the other, over the meaning and intended reach of D.03-10-040

³ While Sunnyvale issued its "final determination" to PG&E to remit additional municipal surcharge revenues to it on January 25, 2005, the determination invited PG&E to explain if it felt Sunnyvale's determination to be in error. PG&E did so on February 9, 2005, but Sunnyvale has not responded to that PG&E explanation. San Jose issued its final determination in this regard to PG&E on April 22, 2005.

that PG&E became aware of the need to request that the Commission clarify this decision's meaning and intended reach. We conclude that given the circumstances as outlined above, PG&E's petition for modification is timely and procedurally appropriate.

Merits of Substantive Arguments - Parties' Positions

PG&E and Other Supporters of the Petition

By its petition, PG&E seeks Commission confirmation that D.03-10-040 is limited in scope to DWR transactions, and is not a directive for PG&E to recalculate past remittances to cities and counties for Municipal Surcharge Fees for third-party transactions other than for DWR power.

SCE filed a response and does not oppose PG&E's petition. In addition, three counties, Contra Costa, Monterey, and Sutter, sent letters to the Commission supporting PG&E's petition. Copies of these letters were attached to PG&E's pleading.

PG&E argues that its current practice is long-standing and is consistent with the statutes. PG&E has used the same remittance approach since the inception of the Municipal Surcharges in 1994. Yet, since that time up to the issuance of D.03-10-040, no city or county challenged PG&E's interpretation of the municipal surcharge statutes, including PG&E's method for determining remittances using the Commission-authorized franchise fee factors adopted in its general rate case.

Pub. Util. Code §§ 6352-6354.1 define how PG&E is to collect surcharges from third party suppliers of gas and electricity and remit those funds to cities and counties. Those surcharge calculations are based on the franchise fee factors

adopted in PG&E's latest general rate case.⁴ Surcharge remittances to a jurisdiction are based on the end use customers receiving third party electricity and natural gas because that is the location of the "end use point."⁵

PG&E argues that the Legislature intended that collections and remittances be confined to sales activities within each locality. In § 6353(d), energy transporters who are not Commission-regulated are required to pay a surcharge based on their individually-negotiated franchise fee agreements in effect in each municipality. In § 6354(j), the Legislature authorized municipalities "notwithstanding any other provision of law" to collect franchise surcharges on their own using the statutory formula until the utility began billing and collecting the surcharge. The statutory formula means using the franchise fee factors authorized by the Commission in the utility's most recent rate case.⁶

Under the municipal surcharge statutes, the utility is the principal collection agent for all cities and counties. PG&E argues that a municipality, however, is not entitled to take advantage of the pooled nature of utility collections of the municipal surcharge amounts to take funds from other jurisdictions for its own benefit. PG&E argues that each municipality is entitled to nothing more or less than it could have collected itself because the surcharge "only applies to the end use point," i.e., where the sales occur within the individual locality.⁷ PG&E further argues that the Legislature never intended to make each city and county precisely whole as a result of industry deregulation,

⁴ Section 6353(d) - "... the franchise fee factor ... authorized for the energy transporter as approved by the commission in the energy transporter's most recent proceeding in which those factors ... were set."

⁵ Section 6353(e).

⁶ Section 6353(d).

⁷ Section 6353(e).

but intended a “rough approximation,” which “does not equal precisely” the lost franchise fees.⁸

PG&E also claims that Sunnyvale and San José’s proposed approach would create a mismatch between the amounts collected under the municipal surcharge statutes, and the amounts remitted to cities and counties. For example, with respect to natural gas, under Sunnyvale and San José’s preferred approach, relatively more of the third party natural gas giving rise to municipal surcharge revenues is delivered to end use customers in jurisdictions that receive relatively lower amounts of franchise fee revenues. Therefore, the total amount of natural gas Municipal Surcharge Fees remitted if jurisdiction-specific factors were used would be less than the amount collected. This result would occur because in collecting municipal surcharge amounts, the adopted average franchise fee factor is applied to the entire dollar value of the third party natural gas delivered to end use customers. This effect is particularly pronounced with respect to PG&E, because the fossil-fueled power plants PG&E divested are all served with third party natural gas, meaning all affect the municipal surcharge collections and remittances. They are also primarily located in jurisdictions that receive relatively lower amounts of franchise fee revenues.⁹

With respect to third party electricity, the situation is reversed. The total amount of electric municipal fee surcharge revenues remitted if jurisdiction-

⁸ Bill Analysis For July 15, 1993, Hearing, Assembly Committee on Utilities and Commerce.

⁹ As PG&E pointed out in its petition, PG&E estimates that for 2004 this difference would be \$8.5 million for natural gas, out of a total municipal surcharge revenue amount collected for natural gas of \$16.6 million.

specific factors were used would be more than the amount collected.¹⁰ PG&E claims that this mismatch is not due to some failure of its accounting or billing system, but is due to the inconsistent interpretation Sunnyvale and San Jose would apply to the municipal surcharge statutes, whereby one amount is collected for municipal surcharge revenues and a different amount is remitted to cities and counties.

Thus, PG&E petitions the Commission to modify D.03-10-040 to clarify that the decision deals only with remittances to cities and counties associated with revenues the utilities collect on behalf of DWR, and to affirm that the Commission had no intention to address the remittance of municipal surcharge revenues generally.

The Cities' Opposition to the Petition

Sunnyvale and San Jose filed responses in opposition to PG&E's petition, arguing that D.03-10-040 was intended to address how PG&E remits all municipal surcharge revenues to cities and counties, not just those applicable to DWR. Sunnyvale and San Jose ask that the Commission require PG&E to modify its previously used approach to remitting municipal surcharge revenues to cities and counties.

Sunnyvale and San Jose claim that PG&E's approach to determining municipal surcharge remittances is illegal, that the Commission has determined that it is illegal, and the Commission has required PG&E to modify it. According to these cities, PG&E would be required to make larger remittances to Sunnyvale and San Jose, but also as a consequence, to make smaller remittances to a number of other cities and counties. Since their respective franchise fee arrangements

¹⁰ PG&E estimates that for 2004 it would have paid out \$1.4 million more than it collected in municipal surcharge revenues for electricity.

provide relatively more revenues to San Jose and Sunnyvale than are provided to cities and counties on average, these cities would like PG&E to remit all municipal surcharge revenues based on a jurisdiction-specific factor, rather than the average franchise fee factors adopted in PG&E's general rate case. Sunnyvale and San Jose would receive more municipal surcharge funds, and other cities and counties would receive less.

Sunnyvale and San Jose interpret D.03-10-040 as providing for a precise, one-for-one replacement of franchise fees with municipal surcharge revenues for each city and county.

Discussion

There is no dispute concerning the remittances that PG&E has made relating to DWR revenues. The only dispute concerns remittances applicable to revenues other than for DWR sales.

The scope of D.03-10-040 was limited to addressing the problem of how PG&E should collect and remit municipal surcharges associated with DWR power sales. In D.03-10-040, we did not address how PG&E collects and remits Municipal Surcharge Fees for all other applicable revenues besides those of DWR. Since we were focused only on issues relating to DWR, we did not consider nor address the manner in which PG&E collects or remits municipal surcharges for all other applicable revenues besides those attributable to DWR sales. For instance, we did not take into account potential financial consequences for various cities and counties if PG&E's traditional remittance methodology was altered.

Given our conclusion that D.03-10-040 was limited to DWR issues, it is beyond the scope of D.03-10-040 to address or consider amending PG&E's long-standing methodology for remitting Municipal Surcharge Fees on other third-

party revenues dating back to 1994. In particular, the Commission did not consider the adverse effects that could result in terms of disrupting the expected stream of municipal revenues and providing essential municipal services if PG&E were required to revise its methodology for remitting municipal surcharges other than those related to DWR revenues. Therefore, we find no basis to expand the limited scope of review of Municipal Surcharge Fees in D.03-10-040.

As pointed out by PG&E and the cities in support of its petition, various unintended consequences could result if PG&E were to recalculate all municipal surcharge fees in the manner contemplated by San Jose and Sunnyvale. While San Jose and Sunnyvale would receive higher revenues under their preferred approach, other cities and counties would lose revenues. Letters that the Commission received from various cities and counties in support of PG&E's petition, express concern that loss of such revenues would be significant and would force budget reductions and potential loss of essential services. The effects of such adverse consequences were not considered in reaching the conclusion as to the remittance methodology PG&E was to use for the municipal surcharges specifically limited to DWR revenues as ordered in D.03-10-040.

We affirm, therefore, that D.03-10-040 does not address PG&E's remittance methodology for municipal surcharges generally, but is limited in applicability to DWR revenues. Accordingly, we shall grant the Petition for Modification of D.03-10-040 as requested by PG&E. In granting PG&E's Petition, we therefore affirm that the general issue of municipal surcharge remittances, other than those for DWR revenues, is beyond the limited scope of what was decided by D.03-10-040.

Comments on Draft Decision

The draft decision of the administrative law judge in this matter was mailed to parties in accordance with Section 311(g)(1) of the Public Utilities Code and Rule 77.7 of the Rules of Practice and Procedure. Comments were filed on April 14, 2006 and reply comments were filed on April 24, 2006. We have taken the comments into account in finalizing this order.

Assignment of Proceeding

Geoffrey F. Brown is the Assigned Commissioner and Peter V. Allen is the assigned Administrative Law Judge for this proceeding.

Findings of Fact

1. Under the provisions of AB1X, the DWR took over responsibility for procuring and selling a portion of the electric power supplied to end use customers in the service territories of the three IOUs beginning in early 2001.
2. Senate Bill 278 (1993) adopted the Municipal Lands Surcharge Act which imposed a surcharge on gas and electric sales by entities other than the incumbent utility.
3. In D.03-02-032, the Commission determined that each of the IOUs shall bear responsibility for making remittances to municipalities for DWR revenues under the provisions of the municipal surcharge set forth in Pub. Util. Code §§ 6350 *et seq.*
4. PG&E employed a method for determining the level of municipal surcharge fees applicable to 2003 revenues due to individual municipalities relating to DWR revenues. PG&E's method was different from the methodology used by SCE and SDG&E.
5. PG&E originally proposed to implement D.03-02-032 by remitting the Municipal Surcharge Fees associated with DWR power uniformly to each city

and county based upon the average franchise fee factor adopted in PG&E's most recent general rate case.

6. In D.03-10-040, the Commission directed PG&E to calculate and remit municipal surcharge fees attributable to DWR revenues due to individual municipalities pursuant to D.03-02-032 using SCE and SDG&E's methodology. The Commission thus directed PG&E, for DWR revenues only, to apply the specific franchise factor called for under the applicable franchise agreement for each individual municipality (rather than a uniform percentage).

7. Since 1994, PG&E has been consistently using a different methodology from that authorized in D.03-10-040 to calculate and remit Municipal Surcharge Fees other than for DWR revenue.

8. D.03-10-040 was limited in its scope to addressing Municipal Surcharge Fees applicable to DWR revenues, and did not consider or address the consequences on cities and counties if PG&E were required to revise its previously existing remittance methodology applicable to all third-party transactions other than those of DWR.

9. While the cities of San Jose and Sunnyvale would receive higher levels of municipal surcharge fees under their interpretation of the Municipal Surcharge Act, other cities and counties would lose municipal surcharge fees.

10. PG&E's petition for modification is timely and procedurally appropriate.

Conclusions of Law

1. PG&E's Petition for Modification of D.03-10-040 should be granted to the extent set forth in the order below.

2. The applicability of the municipal surcharge methodology adopted in D.03-10-040 should be interpreted as being limited to DWR revenues.

3. D.03-10-040 should be clarified to affirm that the Commission did not intend therein to address the Municipal Surcharge Fee remittance PG&E uses to collect and remit fees attributable to third-party sales other than those of DWR.

4. D.03-10-040 does not address PG&E's remittance methodology for Municipal Surcharge Fees generally, but is limited in applicability to DWR revenues. The general issue of Municipal Surcharge Remittances, other than those for DWR revenues, is beyond the limited scope of what was decided by D.03-10-040.

5. In order to promptly clarify D.03-10-040, this order should be effective immediately.

O R D E R

IT IS ORDERED that:

1. The Pacific Gas and Electric Company's (PG&E) Petition for Modification of Decision (D.) 03-10-040 is granted as set forth below.

2. D.03-10-040 is clarified to affirm that the Municipal Surcharge Fee remittance methodology adopted therein applies specifically to Department of Water Resources (DWR) revenues, but does not address PG&E's remittance methodology applicable to third-party revenues other than those of DWR.

3. This decision has no effect on the manner in which Municipal Surcharge Fees are collected or remitted by Southern California Edison Company or San Diego Gas & Electric Company.

This order is effective today.

Dated May 11, 2006, at in San Francisco, California.

MICHAEL R. PEEVEY

President
GEOFFREY F. BROWN
DIAN M. GRUENEICH
RACHELLE B. CHONG
Commissioners

Commissioner John A. Bohn being necessarily
absent, did not participate.