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Decision 06-10-051 October 19, 2006

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application of Pacific Gas and Electric Company for Authority to Increase Revenue Requirements to Recover the Costs to Deploy an Advanced Metering Infrastructure. (U 39 E)	Application 05-06-028 (Filed June 16, 2005)

ORDER DENYING REHEARING OF DECISION (D.) 06-07-027

I. INTRODUCTION

In this Order we dispose of the application for rehearing of Decision (D.) 06-07-027 ("Decision") filed by the Division of Ratepayer Advocates ("DRA").

In Application (A.) 05-06-028, Pacific Gas and Electric Company ("PG&E") sought authorization of its proposed Advanced Metering Infrastructure ("AMI") Project.[1] In D.06-07-027, we authorized deployment of PG&E's AMI Project and adopted a modified revenue requirement and guaranteed ratepayer benefits. The Decision also adopted PG&E's critical peak pricing ("CPP") proposal, which would allow PG&E to offer CPP as a voluntary supplemental tariff to its residential and small commercial and industrial customers with electric demands below 200 kW.

A timely application for rehearing was filed by DRA challenging the CPP program for residential customers on the grounds that it violates provisions of Assembly

[1] PG&E's application flows from the Commission's rulemaking proceeding (R.) 02-06-001 to develop policies for the development of demand response as a resource to enhance electric system reliability, reduce power purchase and individual consumer costs, and protect the environment. (See *Order Instituting Rulemaking on policies and practices for advanced metering, demand response, and dynamic pricing*, (R.) 02-06-001, filed June 6, 2002.) The rulemaking was closed by D.05-11-009, dated November 18, 2005.

Bill No. 1 from the 2001-2002 First Extraordinary Session ("AB 1X," as codified by Water Code section 80000 et seq.).[2] In particular, DRA contends that the CPP tariff will increase residential rates for the first 130% of baseline (Tier 1 and 2 customers),[3] and thus the Decision errs because: (1) it conflicts with the "plain meaning" of Water Code section 80110 and Commission decisions interpreting the statute; and (2) neither AB 1X nor Civil Code section 3513 permit a waiver of the statutory protection under Water Code section 80110. PG&E filed a response to DRA's application for rehearing.

We have carefully reviewed the arguments raised by DRA and are of the opinion that good cause has not been established to grant rehearing. Accordingly, the application for rehearing of D.06-07-027 is denied.

II. DISCUSSION

A. Statutory Construction and Commission Precedent

DRA contends that the Decision errs because allowing CPP participation for residential customers will increase rates for the first 130 % of baseline, contrary to the "plain meaning" of Water Code section 80110, and contrary to Commission precedent regarding the rate protection offered under AB 1X. (DRA Rhg. App., pp. 2-4.) Water Code section 80110 provides in relevant part:

> In no case shall the commission increase the electricity charges in effect on the date that the act that adds this section becomes effective for residential customers for existing baseline quantities or usage by those customers of up to 130 percent of existing baseline quantities, until such time as the department [of Water Resources] has recovered the costs of

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[2] AB 1X, as amended by Senate Bill No. 31 from the 2001-2002 First Extraordinary Session ("SB 31X"), adds Division 27 (commencing with section 80000) to the Water Code, and adds and amends certain provisions of the Public Utilities Code.

[3] PG&E's standard rate tariff applicable to residential customers is schedule E-1, and consists of five tiers of residential customers. The first two tiers constitute 130 percent of baseline for purposes of Water Code section 80110. Customers may also select a time-of-use ("TOU") tariff as their otherwise applicable standard tariff (schedule E-6). However, for purposes of this discussion tariff E-1 is at issue.

> power it has procured for the electrical corporation's retail end use customers as provided in this division.

(Water Code, § 80110.)

In determining how to interpret and apply this provision of AB 1X, DRA relies on the following general principle of statutory construction:

> The primary objective of statutory interpretation is to ascertain and effectuate legislative intent. To do so, a court first examines the actual language of the statute, giving the words their ordinary, common sense meaning. The statute's words generally provide the most reliable indicator of legislative intent; if they are clear and unambiguous, [t]here is no need for judicial construction and a court may not indulge in it. Accordingly, "[i]f there is no ambiguity in the language, we presume the Legislature meant what it said and the **plain meaning** of the statute governs."

(*Pacific Gas and Electric Company v. Dept. of Water Resources* (2003) 112 Cal.App.4th 477, 495, 2003 Cal.App.LEXIS 1506, ** 21-22; *Lewis v. County of Sacramento* (2001) 93 Cal.App.4th 107, 120, 2001 Cal.App.LEXIS 843, * 14 (emphasis added).)

DRA points to the phrase in Water Code section 80110 which states "in no case shall the commission increase the electricity charges," to argue that allowing higher rates to be charged during CPP events violates the "plain meaning" of the statute which clearly and unambiguously prohibits rate increases for the first 130% of baseline. DRA also asserts the statute clearly prohibits the Commission from creating any exceptions.

We are not persuaded by DRA's argument because it wrongly suggests that D.06-07-027 imposes a higher rate by eliminating the availability of the existing E-1 residential tariff rate, and/or requiring CPP pricing for all residential customers. However, neither is true. Our Decision provides that the existing E-1 tariff rates remain in place, preserving the rate level protected by Water Code section 80110. There is no requirement that residential customers pay any other rate than their existing E-1 rate. Our Decision merely allows residential customers to test a different, experimental option. The CPP tariff is a voluntary tariff that acts as an overlay to the E-1 tariff. (D.06-07-027, pp. 30-35.) If a customer elects to try CPP pricing, their overall electric rates could

remain the same, decrease, or increase in relation to the standard E-1 rate, depending on the customer's actual individual usage and consumption pattern.

In addition, to protect against unanticipated rate increases, we require that any customer electing CPP pricing will receive bill protection for the first test year such that if a CPP charge would exceed the customer's CPP credits, PG&E will apply a credit to the next bill to offset that increase. (D.06-07-027, p. 32.) In addition, our Decision requires significant notice and disclosure requirements, and if a customer finds the CPP pricing is not economic they may return to the E-1 tariff rate at any time. (D.06-07-027, pp. 35-37.) Thus, the CPP constitutes an option for residential customers, not an exception to the requirements of Water Code section 80110.

We also note that DRA's interpretation of Water Code section 80110 is inconsistent with relevant statutory construction principles which instruct that even the "plain meaning" of a statute should be disregarded if it would either produce an absurd consequence which the Legislature clearly did not intend, or frustrate the manifest purpose of the legislation when considered as a whole. (See *Pacific Gas and Electric Company v. Dept. of Water Resources, supra,* 112 Cal.App.4th at p. 496, 2003 Cal.App.LEXIS 1506, at * 22; *Lewis v. County of Sacramento, supra,* 93 Cal.App.4th at p. 120, 2001 Cal.App.LEXIS 843, at * 15.)

We agree Water Code section 80110 constitutes a legislative shield to protect Tier 1 and 2 residential customers from spiking electricity rates and from paying *higher* electricity charges than were in place at the time the legislation was enacted in 2001. However, DRA's interpretation would act to restrict the Commission from offering customers a mechanism which would encourage *lower* electricity usage during peak periods and thus, potentially *lower* overall electricity charges. We believe that would inevitably produce an absurd consequence which the Legislature did not intend, and would frustrate the manifest purpose of AB 1X when considered as a whole.

Finally, DRA asserts D.06-07-027 conflicts with our prior decisions which have concluded that the Legislature "unequivocally" intended that for the life of the legislation, residential customers should not pay more than 2001 levels for their energy

usage of electricity up to 130 percent of baseline.[4] In the decisions DRA refers to, our focus was determining the meaning of "electricity charges" as used under Water Code section 80110. Because the statute is ambiguous, we found the term to mean "total rates" (thus including both commodity and non-commodity charges).[5] We see no conflict because as DRA acknowledges, CPP rates could increase charges *during CPP events*. That is only one element of the "total rate." Moreover, to the extent the CPP tariff is intended to help decrease electricity usage during those periods, it is not clear the total rate up to 130% of baseline in fact would increase, nor does DRA establish that it has such an effect.

The Decision is also consistent with other decisions where we have authorized similar tariff options enabling customers to better manage their overall electricity consumption patterns, thereby helping to ensure adequate state-wide electricity supply as more broadly intended by AB 1X. For example, in D.03-03-036, we approved a statewide pricing pilot designed to test TOU and CPP pricing tariffs for a representative sample of residential and small commercial customers on an opt-out basis.[6]

B. Waiver

DRA contends that D.06-07-027 errs because allowing residential customers to opt for a CPP tariff impermissibly waives the rate protection afforded under Water Code section 80110. DRA argues such a waiver is contrary to AB 1X and Civil Code section 3513. (DRA Rhg. App., pp. 5-6.)

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[4] Citing to *Order Instituting Rulemaking on the Commission's Own Motion to Determine Whether Baseline Allowances for Residential Usage of Gas and Electricity Should Be Revised [D.04-02-057]* (2004) __ Cal.P.U.C.3d __ (slip op., pp 90-91.), 2004 Cal.PUC LEXIS 60; and *Order Instituting Rulemaking on the Commission's Own Motion to Determine Whether Baseline Allowances for Residential Usage of Gas and Electricity Should Be Revised* ("*Order Denying Rehearing of D.04-02-057*") [D.04-04-020] (2004) __ Cal.P.U.C. __, 2004 Cal.PUC LEXIS 137, ** 3-4, 9-10.)

[5] See *ante*, fn. 4.

[6] See *Order Instituting Rulemaking on Policies and Practices for Advanced Metering, Demand Response, and Dynamic Pricing* [D.03-03-036] (2003) __ Cal.P.U.C. __, 2003 Cal.PUC LEXIS 167.

As discussed above, AB 1X does not prohibit the Commission from establishing an option. Thus, a customer opting for the CPP tariff is not waiving any AB 1X right in volunteering to choose this rate. However, even assuming for the sake of argument that there is an issue regarding waiver of AB 1X rate protection, DRA's contention is without merit.

DRA reasons any waiver of the rate protection under Water Code section 80110 is unlawful because it runs counter to the restriction on increasing electricity charges, and nothing in AB 1X provides for such waivers. As we explained above, it is not clear that a higher rate for one element of the customer's overall charges will increase the total rate (i.e., total electricity charges) in a manner to conflict with the statutory restriction. Even if the CPP tariff could do so in some circumstances, we view DRA's argument as overly simplistic because all waivers ultimately run counter to some right / protection afforded by a statute, or some obligation imposed under a statute. That alone does not establish that a waiver is impermissible.

Next, DRA asserts that while California law does generally permit individuals to waive certain statutory rights and protections, the waiver authorized by D.06-07-027 violates Civil Code section 3513 which states:

> Any one may waive the advantage of a law intended solely for his benefit. But a law established for a **public reason** cannot be contravened by a private agreement.

(Civil Code, § 3513 (emphasis added).)

DRA states there can be no doubt that AB 1X was enacted for a "public reason" in that the Legislature enacted AB 1X following the Governor's Declaration of Emergency in 2001, because "reliable reasonably priced electric service is essential for the safety, health, and well-being of the people of California." (DRA Rhg. App., p. 6, citing to Water Code section 80000(a).) DRA states that the Legislature determined that under those circumstances, "the public interest, welfare, convenience, and necessity" required the state to step in and purchase power to ensure service to the public. To that end, DRA reasons the rate protection afforded to Tier 1 and 2 customers under Water

Code section 80110 cannot be waived because it is tied to the Legislature's concern about protecting the public from excessive electricity costs, as mentioned several times in AB 1X.

There is little question that AB 1X, as a whole, was enacted for a "public reason." However, our determination is supported by court guidance regarding when waivers are indeed permissible under Civil Code section 3513, regardless of a statute's overall "public reason."

Our Decision comports with court determinations which draw a distinction between legislation enacted to protect the welfare of the general public, as opposed to legislation which protects a smaller class or percentage of citizens. Only in the former case, is the legislation considered to be established for a "public reason."[7] Similarly, the courts have found that "…a literal construction of this statute [Civil Code section 3513] would be unreasonable, for it is difficult to conceive of a statutory right enacted solely for the benefit of private individuals that does not also have an incidental public benefit," thus finding that a party may waive a statutory right where its "public benefit…is merely incidental to [its] primary purpose," but a waiver is unenforceable where it would "seriously compromise any public purpose that [the statute was] intended to serve."[8] Further, the courts have distinguished between blanket waivers which would impermissibly deprive individuals of the benefits and protections served by broad statutory scheme as opposed to acceptable limited waivers of certain provisions which would "not particularly undermine" the overall purpose of the legislation.[9]

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[7] See *Benane v. International Harvester Company* (1956) 142 Cal.App.2d Supp. 874, 879, 1956 Cal.App.LEXIS 2065, * 6; and *Olivia De Haviland v. Warner Bros. Pictures, Inc.* (1944) 67 Cal.App.2d 225, 236, 1944 Cal.App.LEXIS 1300, * 10.

[8] See *Azteca Construction, Inc. v. ADR Consulting, Inc.* (2004) 121 Cal.App.4th 1156, 1166, 2004 Cal.App.LEXIS 1412, * 13.

[9] See *County of Riverside v. Superior Court of Riverside County* (2002) 27 Cal.4th 793, 806, 2002 Cal.LEXIS 1878, ** 12-13.

In the instant situation, the stated goals of AB 1X indicate that the broad "public reason" concerns enabling the State to step in, through DWR, to purchase sufficient electric power to provide reliable and reasonably priced electric service to the public. Water Code section 80110, as a single provision under AB 1X, acts to further protect a smaller class or percentage of citizens – Tier 1 and 2 residential customers. We agree it would be impermissible to allow a waiver which could put at risk, or waive a customer's right, to receive electric service or power. That would indeed frustrate the overall purpose of the legislation and deprive individuals of the benefits and protection served by the broad statutory scheme. However, allowing the limited waiver of a specific provision of AB 1X, here Water Code section 80110, does not undermine the overall purpose of AB 1X because the customer does not waive their right to reliable and reasonably priced electric service. The provision of electric service remains unaltered, and should the customer decide the CPP tariff rate is in their view uneconomic (by not continuing to result in reasonably priced electric service), the customer can opt out and return to service under the E-1 tariff at any time.

Additionally, our Decision fully complies with the applicable legal requirements of Civil Code section 3513 in making sure any waiver is voluntary and with knowledge of the relevant circumstances and consequences. Our Decision sets a number of minimum requirements to ensure that customers have adequate notice and knowledge regarding the CPP option, the statutory protection that would be waived, information regarding operation of the first year bill protection as well as its termination, and how to opt out of the CPP tariff if desired. (D.06-07-027, pp. 35-38, 69 [Ordering Paragraph Number 6.].)

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III. CONCLUSION

For the reasons specified above, the application for rehearing of D.06-07-027 filed by DRA is denied.

Therefore **IT IS ORDERED** that:

1. The application for rehearing of D.06-07-027 is denied.
2. This proceeding, A.05-06-028, is closed.

This order is effective today.

Dated October 19, 2006 at Fresno, California.

MICHAEL R. PEEVEY
President
GEOFFREY F. BROWN
JOHN A. BOHN
RACHELLE B. CHONG
Commissioners

Commissioner DIAN M. GRUENEICH, being necessarily absent, did not participate.