

Decision 08-01-022

January 10, 2008

## BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application of Pacific Gas & Electric Company (U 39 E) for Adoption of Its 2007 Energy Resource Recovery Account (ERRA) Forecast Revenue Requirement and for Approval of Its 2007 Ongoing Competition Transition Charge (CTC) Revenue Requirement and Rates.

Application 06-06-001  
(Filed June 1, 2006)

**ORDER MODIFYING DECISION (D.) 06-12-018 AND  
DENYING REHEARING OF THE DECISION, AS MODIFIED**

**I. INTRODUCTION**

In this decision we dispose of an application for rehearing filed jointly by Merced Irrigation District and Modesto Irrigation District (“Applicants”) of Decision (D.) 06-12-018 (“Decision”). In the Decision, we adopted the 2007 revenue requirements for Pacific Gas and Electric Company’s (“PG&E’s”) Energy Resource Recovery Account (“ERRA”) and ongoing (or “Tail”) Competition Transition Charge (“CTC”). Applicants challenge the Decision on the grounds that: (1) the methodology for calculating ongoing CTC is improper and should not include costs associated with certain restructured qualifying facility (“QF”) contracts; and 2) the record does not support a conclusion that the QF restructuring cost forecasts submitted by PG&E were reasonable, and thus these costs should not have been included in ongoing CTC.

We have carefully considered the arguments raised by Applicants and are of the opinion that they have failed to demonstrate grounds for granting rehearing. However, we modify D.06-12-018 to clarify our determination that PG&E’s QF

restructuring costs were reasonable, and thus, could be included in the ongoing CTC revenue requirement. Rehearing of D.06-12-018, as modified, is denied.

## II. DISCUSSION

### A. The Commission's methodology for calculating ongoing CTC and the inclusion of certain QF restructuring costs in the ongoing CTC revenue requirement are lawful.

Consistent with our decisions implementing PG&E's 2004, 2005 and 2006 ongoing CTC revenue requirements,<sup>1</sup> we determined ongoing CTC based on the requirements of Public Utilities Code section 367(a)(1)-(6). Further, we included costs associated with certain restructured qualifying facility ("QF") contracts in the ongoing CTC revenue requirement that had been approved in these prior decisions.<sup>2</sup> Applicants had previously challenged these two determinations in their applications for rehearing of the *2004 ERRA/Ongoing CTC Decision*, *2005 ERRA/Ongoing CTC Decision*, and *2006 ERRA/Ongoing CTC Decision*. In the instant rehearing application, Applicants do not specifically state the grounds for legal error, but rather incorporate by reference the arguments raised in their prior rehearing applications. Additionally, Applicants refer to their challenges of these decisions that were pending in the California Court of Appeal,

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<sup>1</sup> See *Application of Pacific Gas and Electric Company for Adoption of its 2004 Energy Resource Recovery Account (ERRA) Forecast Revenue Requirement, for Review of Contract Administration, Least Cost Dispatch and Procurement Activities during the Record Period January 1, 2003, Through May 31, 2003, and for Approval of Its 2004 Ongoing Competition Transition Charge (CTC) Revenue Requirement and Proposed Rate Design* ("PG&E 2004 ERRA/Ongoing CTC Decision") [D.05-01-031, p. 26 (slip op.)] (2005) \_\_ Cal.P.U.C.3d \_\_.; *Application of Pacific Gas and Electric Company for Adoption of its 2005 Energy Resource Recovery Account (ERRA) Forecast Revenue Requirement and for Approval of Its 2005 Ongoing Competition Transition Charge (CTC) Revenue Requirement and Rates (U 39 E)* ("PG&E 2005 ERRA/Ongoing CTC Decision") [D.05-02-040, p. 11 (slip op.)] (2005) \_\_ Cal.P.U.C.3d \_\_.; *Application of Pacific Gas and Electric Company (U 39-E) for Adoption of its 2006 Energy Resource Recovery Account (ERRA) Forecast Revenue Requirement and for Approval of Its 2006 Ongoing Competition Transition Charge (CTC) Revenue Requirement and Rates* ("PG&E 2006 ERRA/Ongoing CTC Decision") [D.05-12-045, p. 17 (slip op.)] (2006) \_\_ Cal.P.U.C.3d \_\_.

<sup>2</sup> See *PG&E 2005 ERRA/Ongoing CTC Decision* [D.05-02-040], *supra*, pp. 4-7 (slip op.); *PG&E 2006 ERRA/Ongoing CTC Decision* [D.05-12-045], *supra*, p. 18 (slip op.).

Fifth Appellate District (*Merced Irrigation District et al. v. Public Utilities Com.*, Case Nos. F049265 and F050380).

As a general matter, incorporation of arguments raised in a document that is not part of the underlying proceeding “by reference” does not meet the specificity requirements of Public Utilities Code section 1732 or Rule 16.1(c) of the Commission's Rules of Practice and Procedure. As such, we would normally deny rehearing on these grounds. However, as Applicants point out, they have challenged these same two issues concerning ongoing CTC in decisions adopting PG&E’s 2004, 2005 and 2006 ERRA/ongoing CTC revenue requirements. These challenges are referenced in Applicants’ rehearing application. (Rhg. App., pp. 2-3.) Thus, these issues are not new, and we are well aware of the specific legal arguments referenced in this rehearing application. Nonetheless, Applicants need to raise them in their challenge of each annual ERRA/ongoing CTC revenue requirement decision if they wish to preserve their ability to seek judicial review of these issues. (See Pub. Util. Code, § 1732 [“No corporation or person shall in any court urge or rely on any ground not ... set forth in the application.”].) Based on these considerations, Applicants have provided sufficient specificity to meet the requirements of section 1732, under the circumstances particular to this case.

On July 26, 2007, the California Court of Appeal, Fifth Appellate District upheld our determinations in the *2004 ERRA/Ongoing CTC Decision*, *2005 ERRA/Ongoing CTC Decision*, and *2006 ERRA/Ongoing CTC Decision* when it summarily denied Case Nos. F049265 and F050380. Consequently, our determinations concerning the methodology for calculating ongoing CTC and inclusion of certain QF restructuring costs in ongoing CTC are lawful.<sup>3</sup> Since Applicants did not raise any new grounds for finding legal error on these issues, they have failed to demonstrate grounds for granting rehearing. Accordingly, rehearing on these issues is denied.

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<sup>3</sup>The appellate court’s summarily denial constitutes a denial on the merits. (See *People v. Western Air Lines, Inc.* (1954) 42 Cal2d 621, 630-31.)

**B. The Commission properly concluded that PG&E's forecasted QF restructuring costs were reasonable.**

Applicants also challenge the Commission's determination that PG&E's forecasted QF restructuring costs were reasonable. Specifically, they maintain that since PG&E only provided "summary, conclusive evidence," it failed to prove that its forecast costs were reasonable. (Rhg. App., pp. 3-4.) We disagree.

The utility has the burden of proof to establish reasonableness. The utility "may justify the reasonableness of its request and its operations by making at least a prima facie case of reasonableness, even in the absence of opposition. Where it faces opposition, its reasonableness showing is naturally a more difficult undertaking."<sup>4</sup> "[W]here other parties propose a result different from that asserted by the utility, they have the burden of going forward to produce evidence, distinct from the ultimate burden of proof. The burden of going forward to produce evidence relates to raising a reasonable doubt as to the utility's position and presenting evidence explaining the counterpoint position."<sup>5</sup>

In this instance, PG&E's initial filing did not provide sufficient detail to demonstrate the reasonableness of the proposed QF restructuring costs. However, its rebuttal testimony did provide the necessary information to establish reasonableness. Specifically, this rebuttal testimony noted that the restructuring costs are associated with the termination and buyout of two QF contracts, which had been approved in Resolution E-3643 (1999) 1999 Cal.P.U.C. LEXIS 889 and in *Application of Pacific Gas and Electric Company in the 1999 Annual Transition Cost Proceeding* [D.01-01-020] (2001) \_\_ Cal.P.U.C.3d \_\_; 2001 Cal.P.U.C. LEXIS 39. Further, as PG&E noted:

"[t]hese same two restructured contracts were also the only two forecasted in PG&E's two prior ERRAs proceedings

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<sup>4</sup> *Re Pacific Bell* [D.87-12-067] (1987) 27 Cal.P.U.C.2d 1, 21.

<sup>5</sup> *Id.* at p. 22.

(Application 04-06-003 and A.05-06-007). The total restructuring payments for these contracts have remained the same because the specific contract restructuring terms provide for constant payments from one year to the next for the entire term of the restructured contract.”<sup>6</sup>

Accordingly, PG&E provided evidence that the QF restructuring costs were reasonable. As PG&E explained, we had approved these restructured contracts. Prior to approving a restructured contract, we need to make a finding that the proposed amendments to contract, including the termination payments, are reasonable.<sup>7</sup> By approving the restructured contracts at issue, we necessarily made a determination of reasonableness. Further, we concluded that the termination payments in the restructured contracts were recoverable, limited only by PG&E’s prudent administration of the agreements.<sup>8</sup> PG&E also noted that the termination payments were a consistent amount from one year to the next. Consequently, it was not surprising that the 2007 forecasted QF restructuring costs were the same as the 2006 forecasted costs. Applicants have not presented any evidence to raise reasonable doubt as to PG&E’s position.<sup>9</sup> Accordingly, we properly concluded based on the evidence that the forecasted costs were reasonable.

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<sup>6</sup> Exh. 3 (PG&E/Pappas), p. 3-2

<sup>7</sup> See *Re Proposed Policies Governing Restructuring California’s Electric Services Industry and Reforming Regulation* [D.98-12-066] (1998) 83 Cal.P.U.C.2d 506, 510-511; *Re Proposed Policies Governing Restructuring California’s Electric Services Industry and Reforming Regulation* [D.99-02-085] (1999) 85 Cal.P.U.C.2d 158, 167-168.

<sup>8</sup> See Resolution E-3643, *supra*, 1999 Cal.P.U.C. LEXIS 889, \*10-\*11; *Application of Pacific Gas and Electric Company in the 1999 Annual Transition Cost Proceeding* [D.01-01-020], *supra*, at Appendix B-.

<sup>9</sup> Applicants suggest that it would have been “impossible” for them to present opposing evidence as a result of restrictions over access to certain investor owned utility data adopted in *Order Instituting Rulemaking to Implement Senate Bill No. 1488 (2004 Cal. Stats., Ch. 690 (Sept. 22, 2004)) Relating to Confidentiality of Information* [D.06-06-066] (2006) \_\_ Cal.P.U.C.3d \_\_. (Rhg. App., pp 3-4.) However, unless Applicants believe PG&E has misstated the general terms of the restructured contracts, access to the cost information of each restructured contract would not be necessary to prove unreasonableness.

Although we find no grounds for granting rehearing, we acknowledge that our discussion in the Decision may give the unintended impression that we have applied a burden of proof standard for finding reasonableness. Therefore, we shall modify the Decision to eliminate this confusion.

### III. CONCLUSION

As discussed, good cause does not exist for the granting rehearing. However, for purposes of clarification, D.06-12-018 is modified as set forth in the ordering paragraphs below. Rehearing of D.06-12-018, as modified, is denied.

**THEREFORE, IT IS ORDERED** that:

1. Section 6.B., QF Contract Restructuring Costs, on pages 8-9 of D.06-12-018 is deleted in its entirety and replaced with the following:

**“B. QF Contract Restructuring Costs**

In D.05-02-040 (pp. 6-7), we determined that QF restructuring costs should be included in their entirety in ongoing CTC costs. The Districts contend that PG&E failed to provide testimony justifying its projection of QF restructuring expenditures.

PG&E bears the burden of proving the reasonableness of these costs. The two restructured contracts at issue have been approved in Resolution E-3643 (1999) 1999 Cal.P.U.C. LEXIS 889 and in *Application of Pacific Gas and Electric Company in the 1999 Annual Transition Cost Proceeding* [D.01-01-020] (2001) \_\_ Cal.P.U.C.3d \_\_; 2001 Cal.P.U.C. LEXIS 39. In approving these restructured contracts, we necessarily made a finding that the proposed amendments, including the termination payments, are reasonable. (See *Re Proposed Policies Governing Restructuring California’s Electric Services Industry and Reforming Regulation* [D.98-12-066] (1998) 83 Cal.P.U.C.2d 506, 510-511; *Re Proposed Policies Governing Restructuring California’s Electric Services Industry and Reforming Regulation* [D.99-02-085] (1999) 85 Cal.P.U.C.2d 158, 167-168.) As PG&E’s testimony explains, since the specific contract terms provided for consistent payment amounts from one year to the next, the forecasted amount was the same as in last year’s ERRA

proceeding. While the Districts express concern about their access to PG&E's data regarding QF restructuring costs, they have presented no evidence to raise reasonable doubt as to PG&E's position. We have reviewed PG&E's forecast of QF restructuring costs in detail and find PG&E's costs to be reasonable. We adopt PG&E's QF cost forecast."

2. Rehearing of D.06-12-018, as modified, is denied.
3. Application (A.) 06-06-001 is closed.

This order is effective today.

Dated January 10, 2008 at San Francisco, California.

MICHAEL R. PEEVEY  
President  
DIAN M. GRUENEICH  
JOHN A. BOHN  
RACHELLE B. CHONG  
TIMOTHY A. SIMON  
Commissioners