

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

ENERGY DIVISION

**AGENDA ID: 18142
RESOLUTION G-3561
March 12, 2020**

R E S O L U T I O N

Resolution G-3561. Pacific Gas and Electric Company seeks to revise Form 62-4527, used for customer requested work, to allow the utility to file certain modifications regarding the indemnity clause of the form by a Tier 1 AL instead of a Tier 3 AL.

PROPOSED OUTCOME:

- Approves Pacific Gas and Electric Company's (PG&E) proposal with conditions. The utility shall include the justification for the Form 62-4527 modifications in the Tier 1 ALs it files under this Resolution.

SAFETY CONSIDERATIONS:

- There is no direct impact on safety.

ESTIMATED COST:

- There is no cost impact.

By Advice Letter (AL) 4126-G/5597-E filed on July 26, 2019

SUMMARY

PG&E's proposal to use a Tier 1 AL instead of a Tier 3 AL to seek approval of modifications to the scope of the standard indemnity clause in Form 62-4527, used for customer directed work, done by the utility at the request of government agencies, is approved. This Resolution finds that a departure from the General Order (GO) 96-B rules, which broadly require the use of a Tier 3 AL for utility service provided to a government agency under a deviation to its

tariffs, is appropriate as the indemnity clause modifications are suitable for staff disposition through a Tier 1 AL filing.¹ However, this authorization is conditioned on the requirement that PG&E is to include in such Tier 1 ALs the justification for an indemnity clause modification requested by a government agency. PG&E shall also file a supplemental AL no later than 30 days from today with the revision to Form 62-4527 specified herein. The action taken herein will further the goal of Decision (D.)07-01-024, which adopted GO 96-B, regarding the efficient use of Commission resources.

BACKGROUND

PG&E Form 62-4527 *Agreement to Perform Tariff Schedule Related Work* is used when customers ask the utility to undertake work involving utility-owned infrastructure such as the relocation of a gas or electric line.² It includes a standard clause (indemnity clause) specifying that the customer will hold PG&E, its officers, agents, and employees harmless against all loss, damage, expense, and liability resulting from any injury or death that may occur during the project including incidents involving a third party. The clause further states that the customer would not be responsible for loss, damage or liability resulting from PG&E's negligence or willful misconduct and would be limited to the proportion that an incident was attributable to a negligent or intentional act or omission of the customer, its officers, employees or agents.

The scope of the indemnity clause has been contested by various government agencies in the past. Specifically, the government agencies objected to being liable for incidents that they did not directly cause during a job. In response to these concerns, PG&E has agreed to modify the terms of the Form 62-4527 indemnity clause (which is considered to be a "tariff deviation") executed between the utility and the government agency for the requested project.³ Then,

¹ See GO 96-B Energy Division Rules 5.3(5) and 5.3(8).

² The current version of PG&E Form 62-4527 published in its gas and electric tariffs was filed in AL 4002-G/5349-G, effective August 3, 2018.

³ PG&E AL 4126-G/5597-E, p.1. Typically, these modifications are to conform the indemnity clause with the contracting policy of the government agency or a legal requirement (see Resolutions G-3543 and E-4658).

the amended agreement is to be submitted by the utility to the Commission for approval using a Tier 3 AL pursuant to GO 96-B Energy Industry Rules 5.3 (5) and 5.3 (8), which states:

Matters appropriate to Tier 3 are:

(5) Except as provided in Industry Rule 5.1(4) and in (8) of this Industry Rule, a contract or other deviation. (See also Industry Rule 7.)

(8) Service to a governmental agency pursuant to General Rule 8.2.3. ⁴

Under the rules in GO 96-B, Tier 3 ALs are addressed by a Commission resolution prepared by the reviewing Industry Division, whereas Tier 1 and Tier 2 ALs are disposed of by staff.⁵ A Tier 1 AL may also go into effect pending staff disposition.⁶ As discussed in D.07-01-024, which adopted GO 96-B, the reason for this different treatment is due to the subject matter that is suitable for each AL Tier with the goal of using Commission and stakeholder resources efficiently.⁷ Tier 3 ALs involve utility requests requiring Commission discretion.⁸ In contrast, Tier 1 and Tier 2 ALs concern noncontroversial and ministerial type issues.⁹ Every AL Tier is also subject to a public protest period.

Additionally, the rules in GO 96-B are not to be rigidly applied without regard to prevailing circumstances. As GO 96-B Rule 1.3 provides, the rules in the GO “shall be liberally construed” for the “speedy, and inexpensive handling of informal matters” and that the Commission may authorize an exception to the operation of the GO where appropriate.¹⁰ D.07-01-024 also recognizes that

⁴ PG&E noted that the rule contains a typo and that the correct reference is 9.2.3.

⁵ GO 96-B Rule 7.6 and Energy Industry Rules 5.1, 5.2 and 5.3

⁶ GO 96-B Rule 7.5.3 and Energy Industry Rule 5.1

⁷ D.07-01-024, p. 12.

⁸ D.07-01-024, p. 15

⁹ D.07-01-024, p. 10

¹⁰ GO 96-B Rule 1.3, states, in part: “Construction; Waiver or Variance - The General Rules and Industry Rules shall be liberally construed to secure just, speedy, and inexpensive handling of

aspects of GO 96-B will need updating from time-to-time. The decision expressly provides for updates to be considered by the Commission through a resolution prepared by the Industry Division seeking a change.¹¹

In AL 4126-G/5597-E, PG&E is proposing to revise Form 62-4527 to accommodate future requests from government agencies seeking to limit the scope of the indemnity clause. Under its proposal, PG&E would insert the following parenthetical in the form so that a Tier 1 AL instead of a Tier 3 AL would be used to file such tariff deviations:

“[The foregoing provision may be modified in agreements with governmental agencies to limit the scope of the indemnity to claims caused by the negligent or intentional acts or omissions of the governmental agency. Such modifications to this agreement shall be submitted to the Commission for approval through a Tier 1 Advice Letter.]”

PG&E was prompted to file the AL based on the number of indemnity clause modifications the utility has done for government agencies in the past and the likelihood that such requests would continue. To substantiate this, PG&E listed a sampling of the ALs regarding these tariff deviations that have been previously submitted to the Commission: University of California – Davis (AL 3992-G/5332-E and AL 4396-E), City of Piedmont (AL 3490-E), California Department of Water Resources (AL 3461-E and AL 5541 [withdrawn]), County of Placer (AL 2901-G/3206-E) and the University of California – Merced (AL 2898-G/3196-E).¹²

PG&E stated in the AL that the proposed language will give the utility flexibility to modify the scope of the indemnity clause when entering into an agreement

informal matters, as set forth in this General Order. The Commission in a specific instance may authorize an exception to the operation of this General Order where appropriate.”

¹¹ D.07-01-024, p. 6 states, as following: “Inevitably, aspects of GO 96-B will need updating from time-to-time. GO 96-B provides a simple, generic solution to the updating problem. As needed, Industry Divisions will draft proposed amendments, which the Commission will consider for adoption by resolution after notice and opportunity to comment.”

¹² In November 20, 2019 response to an Energy Division data request, PG&E provided information showing that several of these ALs were submitted as Tier 1 ALs.

with a government agency and authorizing the use of a Tier 1 AL would streamline the Commission approval process for such requests.

PG&E's proposal to file a Tier 1 AL would not apply if the government agency sought to expand the scope of the indemnity clause.

NOTICE

Notice of PG&E AL 4126-G/5597-E was made by publication in the Commission's Daily Calendar. PG&E states that a copy of the Advice Letter was mailed and distributed in accordance with Section 4 of General Order 96-B.

PROTESTS

PG&E AL 4126-G/5597-E was not protested.

DISCUSSION

PG&E is requesting authority to file a Tier 1 AL instead of a Tier 3 AL, as is currently required, to seek approval of modifications to the scope of the indemnity clause in Form 62-4527 made by the utility for a government agency.¹³ As a result, staff would no longer prepare a resolution for Commission consideration of such requests and the matter would be subject to staff disposition.

To determine whether a Tier 1 is appropriate for the tariff deviations, we will examine the purpose of the three Tier AL classification structure adopted in D. 07-01-024. The tiers were created to align utility requests suitable for an AL filing with the commensurate level of Commission review necessary to consider the request. As the decision provides, matters that are ministerial and routine in nature are to be filed in a Tier 1 or Tier 2 AL with staff delegated to approve or reject the AL. Conversely, issues that are more substantive and involve Commission discretion need to be addressed through a resolution. The AL Tier arrangement was devised so that the Commission and stakeholders could focus

¹³ See GO 96-B Energy Division Rules 5.3(5) and 5.3(8).

their resources on more controversial utility requests requiring a resolution while less contentious matters would also be adequately reviewed.¹⁴

Another factor to be considered are GO 96-B rules 5.3(5) and (8) requiring PG&E to file the amended forms via a Tier 3 AL. These rules do not specifically state that changes related to the scope of the indemnity clause are to be filed by a Tier 3 AL. Rather, the ambit of the rules is broad and direct the filing of a Tier 3 in all instances where service to a government agency is provided by a utility under a deviation to its tariffs. Thus, tariff deviations involving a government agency that would be considered routine or ministerial and that otherwise meet the criteria for a Tier 1 or Tier 2 AL would need to be addressed by a resolution unless a departure from the rules is authorized.

With the framework provided above, we can assess whether the indemnity clause modifications are appropriate for a Tier 1 AL. Generally, altering the scope of liability connected with work done by PG&E at the request of a government agency is a substantive matter that would properly require Commission discretion. However, there is good cause for us to reconsider this procedure. As PG&E's AL demonstrates, a number of these tariff deviations have been approved in the past indicating that the appropriateness of such matters is settled and that Commission discretion, a reason for a Tier 3 AL, to address future requests is not necessary. Given these circumstances, it is reasonable to conclude that these requests have become routine and, thus, properly suited for a Tier 1 AL, as PG&E proposes.

Furthermore, allowing the use of a Tier 1 AL for the tariff deviations supports the goal of the AL Tier structure as staff resources that would have been devoted to preparing a resolution could be diverted to controversial matters requiring Commission deliberation. Allowing a departure from the GO 96-B rules is also consistent with GO 96-B rule 1.3 allowing exceptions to the rules as it states that, "The General Rules and Industry Rules shall be liberally construed to secure just, speedy, and inexpensive handling of informal matters..." That tenet would be satisfied through the use of a Tier 1 AL for the Form 62-4527 modifications. And, it is important to note, that the Tier 1 AL would be subject to a public protest period and would undergo staff review with the direction we provide below.

¹⁴ D.07-01-024, p. 12.

Based on the foregoing discussion, we find PG&E's request reasonable and approve it with this modification and the condition discussed below. To ensure that there is sufficient continuing notice of the authorization granted herein, we direct PG&E to file a supplemental AL to AL 4126-G/5597-E to include a reference to this resolution (Resolution G-3561) in the proposed Form 62-4527 language. PG&E shall file this supplemental AL no later than 30 days from today.

We also place the following condition on the authorization granted herein so that government agencies will not have "carte blanche" to make any modifications to the indemnity clause it desires without reason. Accordingly, in the Tier 1 ALs that PG&E files, the utility shall describe, with specificity and applicable cites, whether the modification is necessary for the government agency to conform the indemnity clause to an official agency policy or legal requirement. If such justification is lacking, staff may reject the AL and direct PG&E to file the request as a Tier 3 AL, which we will consider for approval by resolution.

Finally, we note that the action we take herein is consistent with D.07-01-024, which authorizes Industry Divisions to recommend rule changes to GO 96-B by resolution.¹⁵

COMMENTS

Public Utilities Code section 311(g)(1) provides that this resolution must be served on all parties and subject to at least 30 days public review. Please note that comments are due 20 days from the mailing date of this resolution. Section 311(g)(2) provides that this 30-day review period and 20-day comment period may be reduced or waived upon the stipulation of all parties in the proceeding.

The 30-day review and 20-day comment period for the draft of this resolution was neither waived nor reduced. Accordingly, this draft resolution was mailed to parties for comments, and will be placed on the Commission's agenda no earlier than 30 days from today.

¹⁵ D.07-01-024, p.6.

FINDINGS

1. PG&E Form 62-4527 is an agreement between the utility and a customer requesting the utility to undertake work involving utility infrastructure.
2. PG&E Form 62-4527 includes a clause that specifies the level of liability each party assumes for the work, referred to as an “indemnity clause.”
3. Government agencies have objected to the scope of the indemnity clause and PG&E has modified the terms accordingly in the Form 62-4527 both parties have executed for the requested work.
4. Under the rules in GO 96-B, PG&E is to file amendment to the Form 62-4527 indemnity clause by a Tier 3 AL, which requires a resolution for disposition.
5. Modifications to the indemnity clause in PG&E Form 62-4527 done by the utility for government agencies are ministerial and suitable for filing with by a Tier 1 AL.
6. Since Commission discretion is not necessary to consider the indemnity modification requests, future requests are suitable to be filed by PG&E via a Tier 1 AL, if suitably justified.
7. Commission resources will be more efficiently utilized if PG&E can file Form 62-4527 indemnity clause modifications done for government agencies by a Tier 1 AL, if suitably justified.
8. It is reasonable for PG&E to file indemnity clause modifications to Form 62-4527 done for government agencies by a Tier 1 AL if the modification is done to conform to an official policy of the government agency or to meet a legal requirement.
9. The action taken in this resolution is consistent with D.07-01-024, permitting rule changes to GO 96-B by resolution.

THEREFORE IT IS ORDERED THAT:

1. Pacific Gas and Electric Company (PG&E) AL 4126-G/5597-E is approved subject to the filing of a supplemental AL as specified in Ordering Paragraph (OP) 2 below and the condition contained in OP 3.
2. No later than 30 days from today, PG&E shall file a supplemental AL to AL 4126-G/5597-E to include a reference to Resolution G-3561 in the Form 62-4527 indemnity clause.
3. PG&E shall include the justification for the indemnity clause modification in each Tier 1 AL it files pursuant to this Resolution, as specified herein.

This Resolution is effective today.

I certify that the foregoing resolution was duly introduced, passed and adopted at a conference of the Public Utilities Commission of the State of California held on March 12, 2020; the following Commissioners voting favorably thereon:

ALICE STEBBINS
Executive Director