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PRESIDING OFFICER'S DECISION (Mailed 3/29/2005)

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

ENRON ENERGY SERVICES, INC. and ENRON ENERGY MARKETING CORP., Complainants, vs. PACIFIC GAS AND ELECTRIC COMPANY, Defendant.	Case 01-01-032 (Filed January 19, 2001)
ENRON ENERGY SERVICES, INC. and ENRON ENERGY MARKETING CORP., Complainants, vs. PACIFIC GAS AND ELECTRIC COMPANY, Defendant.	Case 01-09-011 (Filed September 6, 2001)

DECISION GRANTING THE MOTION OF COMPLAINANTS AND DEFENDANT TO DISMISS COMPLAINTS AND REFUND DEPOSITS TO COMPLAINANTS

Goodin, MacBride, Squeri, Ritchie & Day, LLP, by Michael B. Day and Jeanne B. Armstrong, for complainants.
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DECISION GRANTING THE MOTION OF COMPLAINANTS AND DEFENDANT TO DISMISS COMPLAINTS AND REFUND DEPOSITS TO COMPLAINANTS

Background

A. C.01-01-032

On January 19, 2001, Enron Energy Services, Inc. and Enron Energy Marketing Corp. (Enron) filed a complaint against Pacific Gas and Electric Company (PG&E) alleging that PG&E had violated its tariffs by failing to remit to Enron amounts owing for direct access (DA) customers' credits.[1] (C.01-01-032, hereinafter the DA credit complaint). The DA credits accrued pursuant to PG&E's tariffs when energy prices skyrocketed in 2000 and 2001, causing credits for direct access customers to become larger than the utility's transmission and distribution (T&D) charges and resulting in negative customer bills. Instead of paying customers or their electric service providers (ESPs) these credits, PG&E reflected the credits on the customers' accounts.[2]

[1] DA credits were calculated under PG&E's schedule PX, were based on wholesale market prices, and were intended to reflect the avoided costs of the utility in not having to procure electric supply for DA customers. The DA credits were essentially subtracted from the utility's frozen bundled service rate. Initially, DA credits were allowed to offset transmission and distribution charges but not produce a bill less than zero. This was the so-called "zero minimum bill" limitation. See CPUC Resolution E-3510, December 1997. In D.99-06-058 (June 10, 1999), the zero minimum bill provision was removed and DA bills were permitted to become negative (i.e., the utility could owe the customer a net credit if PX prices became high enough).

[2] Early in the energy crisis in 2000, PG&E paid certain ESPs for the credits accumulating for their customers, but stopped the practice soon after the Federal Energy Regulatory Commission (FERC) ruled in November and December 2000 that wholesale prices in California, on which the credits were based, were unjust and unreasonable. See FERC Docket No. R.94-04-031.

As the energy crisis unfolded, these credits for DA customers, including Enron's customers, become larger and larger. As of the time of Enron's DA credit complaint, the credits potentially owing to direct access customers on ESP consolidated billing[3] exceeded $400 million. On March 1, 2001, PG&E answered Enron's DA credit complaint, asserting four affirmative defenses.

- PG&E claimed that its rate freeze had been over since at least August 2000 and perhaps as early as May 2000. If the rate freeze had ended in 2000 as PG&E argued, no DA credit would have been owed to PG&E's direct access customers. In other words, the accumulated credits potentially owing to DA customers would not exist.
- PG&E submitted that the DA credits that had accumulated were not just and reasonable since they were based on the same wholesale prices determined by FERC to be unjust and unreasonable. Until FERC determined the just and reasonable prices, the amount of DA credits accumulated for direct access customers could not be finally established.
- Before ordering payment of the credits to ESPs, the Commission needed to clarify that PG&E could pay the credits to ESPs, rather than to their customers.
- Even if PG&E owed the credits, PG&E was in a severe financial situation as the company, Federal and California regulators, and elected officials all struggled to respond with timely and effective solutions to the wholesale electric supply crisis.

[3] Under ESP consolidated billing, PG&E sent its T&D charges directly to the ESP, who then presented the charges to its DA customers along with the ESP's energy charges. ESPs utilizing this form of billing were obligated to pay PG&E those T&D charges whether their customers paid the charges or not. See PG&E Electric Rule 22, section K.3.

Subsequently, certain of these defenses were resolved or addressed by various events and regulatory actions:

- The CPUC ruled that PG&E's rate freeze ended on January 18, 2001.[4] The effect of this ruling was to confirm that most of the DA credits were still owing.[5]
- Based on FERC's investigation of wholesale power prices in California, a reasonable estimation of adjusted DA credits was possible for purposes of settling this case.
- As a result of PG&E's bankruptcy filing, creditors, including ESPs and their customers, had the opportunity to file claims for DA credits. These claims were all resolved as part of PG&E's bankruptcy and factored into the PG&E/Enron settlement.
- The bankruptcy court (and the CPUC) approved a plan for PG&E's emergence from bankruptcy.

After PG&E filed for bankruptcy protection in April 2001, Enron submitted claims in PG&E's bankruptcy proceeding for the same DA credits that were the subject of the DA credit complaint. The DA credits thus came under the jurisdiction of the bankruptcy court as pre-petition debts of PG&E.

B. C.01-09-011

After Enron's direct access customers were returned to utility service beginning in February 2001, PG&E removed the DA credits from those customers' accounts. Leaving the credits would have amounted to a decision to return the credits directly to customers (rather than to Enron) since the credits would have offset bundled service charges. This was partly done

[4] D.04-01-026.

[5] All Enron's DA customers were returned to bundled service on February 1, 2001, i.e., 13 days after January 18, 2001.

since Enron's DA credit complaint had already been filed, laying direct claim to the credits.

In July 2001, Enron began to return many of these customers to DA service. Once on DA service, PG&E issued monthly T&D charges to Enron for these newly returned DA customers. Since the DA credits previously attributable to such customers continued to be in dispute with Enron, PG&E did not put the credits back on the bills, and these T&D charges were accordingly not offset by such credits. Enron refused to pay to PG&E the T&D charges, claiming that the prior DA credits needed to be restored by PG&E. On September 6, 2001, Enron filed another complaint case with the Commission asking the Commission to direct PG&E to restore the DA credits to the DA customer accounts (C.01-09-011, hereinafter the T&D complaint.)

Invoking PG&E's Electric Rule 10, Enron began to deposit the T&D charges into a Commission-administered escrow account pending resolution of the dispute. PG&E did not file an answer to the T&D complaint, because on advice of counsel, PG&E regarded the complaint as a violation of the automatic stay under its bankruptcy since it amounted to an attempt to recover a pre-petition debt, i.e., the DA credits. The amount on deposit, with interest, exceeds $22 million.

After Enron filed for bankruptcy, PG&E submitted claims in Enron's bankruptcy proceeding for the T&D charges, which claims were resolved pursuant to the parties' global settlement agreement.

C. The PG&E/Enron Settlement

The PG&E/Enron settlement was a comprehensive settlement resolving the majority of the claims between Enron and PG&E filed in the parties' respective bankruptcy proceedings. These claims totaled in excess of

$1 billion and included the DA credit claims and the T&D claims. The parties were able to reach an agreement on the amount of DA credits owing: $229 million out of filed bankruptcy claims of $404 million. See Settlement, Sec. 2.2(a).[6]

Under the settlement, PG&E agreed that Enron "shall be entitled to all amounts in the CPUC escrow account" and agreed to cooperate with Enron in securing return of these funds to Enron. (Settlement, Section 4.6.) During the negotiations, the amount of the T&D charges owed by Enron to PG&E was not disputed. In reaching a settlement, PG&E treated the T&D charges as a dollar-for-dollar reduction in any amounts PG&E owed Enron for DA credits. Thus, a correct characterization of the settlement is that under the settlement Enron fulfilled its responsibility to reimburse PG&E in full for all the unpaid T&D charges.

The settlement was submitted for approval in both PG&E's and Enron's bankruptcy proceedings. It was approved on March 15, 2004 by PG&E's bankruptcy court and on April 20, 2004 by Enron's bankruptcy court. The PG&E bankruptcy court specifically ordered: "Pursuant to and subject to the provisions of Section 4.1 of the Settlement Agreement, PG&E shall have no interest in the CPUC Escrow Account." (Ordering Paragraph 7 of March 15 order.)

[6] PG&E agrees with Enron (Prehearing Statement filed November 2, 2004, Declaration of David Gorte, paragraph 12) that the settlement represents a single 'global' compromise and is difficult to separate into individual components in isolation from the economic value of the overall transaction.

With respect to the DA credit complaint and the T&D complaint, Section 4.6 of the settlement requires that Enron file with the CPUC a request for a dismissal with prejudice.

D. The Parties' Request for Dismissal and Return to Enron of the Escrowed T&D Charges

After approval of the settlement by both bankruptcy courts, the parties submitted on April 28, 2004 a joint letter to the Commission requesting dismissal of the complaint cases, with prejudice, and requesting return of the escrowed monies to Enron. On the same day, Enron also filed a "Notice of Dismissal" of these cases. On August 12, 2004, Commissioner Wood issued an Assigned Commissioner's Ruling stating "the material presented by the parties in support of their request for dismissal does not provide me with sufficient information to determine if the dismissal is in the public interest. I am particularly concerned that the settlement does not violate Pub. Util. Code §§ 453(a) and 532."[7] The parties were instructed to appear at a hearing "to

[7] 453. (a) No public utility shall, as to rates, charges, service, facilities, or in any other respect, make or grant any preference or advantage to any corporation or person or subject any corporation or person to any prejudice or disadvantage.

532. Except as in this article otherwise provided, no public utility shall charge, or receive a different compensation for any product or commodity furnished or to be furnished, or for any service rendered or to be rendered, than the rates, tolls, rentals, and charges applicable thereto as specified in its schedules on file and in effect at the time, . . . nor shall any such public utility refund or remit, directly or indirectly, in any manner or by any device, any portion of the rates, tolls, rentals, and charges so specified, nor extend to any corporation or person any form of contract or agreement or any rule or regulation or any facility or privilege except such as are regularly and uniformly extended to all corporations and persons. The commission may by rule

Footnote continued on next page

present their settlement and show how the settlement resolves the issues raised in Case (C.) 01-01-032 and C.01-09-011." The hearing was held on November 9, 2004.

Discussion

Enron's complaint sought tens of millions of dollars from PG&E based on its interpretation of PG&E's tariffs and pertinent Commission decisions. PG&E's answer to the complaint raised significant legal uncertainties regarding the propriety of the DA credits. These were: (1) that PG&E's rate freeze was over in May 2000 and, therefore, no DA credits should have been calculated; (2) that until FERC established the just and reasonable wholesale power prices for 2000 and 2001, the proper level of DA credits could not be calculated; and (3) that the DA credits might belong to customers rather than to Enron.

The parties then settled the dispute in Enron's favor. Our obligation is to see that the tariff is enforced and that no preference is given or received. (§ 453(a) and § 532.)

In *Empire West* v. *So.Cal.Gas* (1974) 12 C.3d 805, the Supreme Court discussed § 532:

> Section 532 forbids any utility from refunding "directly or indirectly, in any manner or by any device" the scheduled charges for its services. In addition, a public utility "cannot by contract, conduct, estoppel, waiver, directly or indirectly increase or decrease the rate as published in the tariff . . . ." (*Transmix*

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or order establish such exceptions from the operation of this prohibition as it may consider just and reasonable as to each public utility.

(Enacted by Stats. 1951, Ch. 764.)

> *Corp.* v. *Southern Pac. Co.*, 187 Cal.App.2d 257, 264 [9 Cal.Rptr. 714]; accord *South Tahoe Gas Co.* v. *Hofmann Land Improvement Co.*, 25 Cal.App.3d 750, 760 [102 Cal.Rptr. 286].) Scheduled rates must be inflexibly enforced in order to maintain equality for all customers and to prevent collusion which otherwise might be easily and effectively disguised. (*R. E. Tharp, Inc.* v. *Miller Hay Co.*, 261 Cal.App.2d 81 [67 Cal.Rptr. 854]; *People* ex rel. *Public Util. Com.* v. *Ryerson*, 241 Cal.App.2d 115, 120-121 [50 Cal.Rptr. 246.) (12 C.3d at 809.)

We have said the same. A utility may not deviate from its published tariff. (C.02-03-060, D.03-11-026 at *mimeo.*, p. 3.) "The filed rate doctrine states that the relationship between a utility and the user of a service is governed by the tariff the utility has filed with the appropriate administrative agency (regulatory authority). This relationship is in the first instance contractual, but the tariff is incorporated into the contract between the utility and its customer. (*Sherwood* v. *County of Los Angeles* (1962) 203 Cal.App.2d 354, 359; *Gardner* v. *Basich Bros. Constr. Co.* (1955) 44 Cal.2d 191, 193-194.) The tariff clearly regulates the terms of service, e.g., price (*Gardner*)." (C.01-08-022, D.02-10-036, at *mimeo.*, p. 5.)

We hold that, although not clear at the time, subsequent events have confirmed that PG&E owed Enron the DA credits alleged in C.01-01-032. There is no doubt that prior to the energy crisis in 2001, PG&E's tariff provided for its owing the DA customer a net credit if PX prices became high enough. (D.99-06-058 removed the zero minimum bill provision.) In D.04-01-026 we ruled that PG&E's rate freeze was over on January 18, 2001. Therefore, prior to January 18, 2001, PG&E was obligated to pay to DA customers any net credit. FERC's investigation into the California wholesale power market provided sufficient guidance as to the just and reasonable level of wholesale prices in California for May 2000 through January 2001. Further,

PG&E may pay the credit to ESPs rather than the ESP customer. Pursuant to PG&E's filed tariff, and especially Rule 22, Enron is entitled to recover the $22 million. We have previously dismissed analogous complaint cases by Enron against Southern California Edison Company (SCE), including return to Enron of escrowed monies for payments of SCE T&D charges made by Enron into a similar escrow account. (*Enron* v. *So.Cal.Edison*, C.01-01-029 and C.01-08-041, dismissed and escrow funds returned to Enron in D.02-08-013 and D.02-08-014.)

Findings of Fact

1. C.01-01-032 and C.01-09-011 allege that PG&E had violated its tariffs by failing to remit to Enron amounts owing for DA customers' credits. Enron deposited with the Commission approximately $22 million.

2. PG&E raised defenses to the complaints (1) that PG&E's rate freeze was over in May 2000 and, therefore, no DA credits should have been calculated; (2) that until FERC established the just and reasonable wholesale power prices for 2000 and 2001, the proper level of DA credits could not be calculated; and (3) that the DA credits might belong to customers rather than to Enron.

3. Prior to the energy crisis in 2001, PG&E's tariff provided for its owing the DA customer a net credit if PX prices became high enough.

4. In D.04-01-026, we ruled that PG&E's rate freeze was over on January 18, 2001. Prior to January 18, 2001, PG&E was obligated to pay to DA customers any net credit.

5. FERC's investigation into the California wholesale power market provided sufficient guidance as to the just and reasonable level of wholesale prices in California for May 2000 through January 2001.

6. PG&E may pay the credit to ESPs rather than the ESP customer.

7. Pursuant to PG&E filed tariff, and especially Rule 22, Enron is entitled to recover the approximate $22 million including interest.

Conclusions of Law

1. C.01-01-032 and C.01-09-011 should be dismissed with prejudice and the money on deposit with the Commission should be disbursed to complainants.

2. The motion of the parties to dismiss is granted.

O R D E R

IT IS ORDERED that:

1. Case (C.) 01-01-032 and C.01-09-011 are dismissed with prejudice.
2. The money on deposit with the Commission in C.01-09-011, approximately $22 million with accumulated interest, shall be disbursed to complainants.
3. These cases are closed.

This order is effective today.

Dated _____, at San Francisco, California.