L/ngs **MAILED 2/11/02**

Decision 02-02-029 February 7, 2002

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application of Southern California Edison Company (E 3338-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 to Adopt A Rate Stabilization Plan. (U 39 E)	Application 00-11-056 (Filed November 22, 2000)
Petition of THE UTILITY REFORM NETWORK for Modification of Resolution E-3527.	Application 00-10-028 (Filed October 17, 2000)

ORDER DENYING REHEARING OF DECISION (D.) 01-10-067

On November 29, 2001, Pacific Gas & Electric Company ("PG&E") applied for rehearing of Decision (D.) 01-10-067 ("Decision"). D.01-10-067 rejects PG&E's proposals to determine PG&E's prospective utility retained generation ("URG") revenue requirement based on the market valuation of the retained generation assets, and/or undercollections in PG&E's Transition Cost Balancing Account ("TCBA"). The Decision concludes that neither amount

should be used in the initial determination of PG&E's prospective URG revenue requirement in this phase of the URG proceeding.

We have carefully considered all the arguments presented by the parties and are of the opinion that good cause for rehearing has not been demonstrated. Accordingly, we are denying PG&E's application for rehearing.

As an initial matter, we note that PG&E's arguments assume that the holdings in the Decision are much broader than they are, or that we were obligated to resolve a broader range of issues than we did. D.01-10-067 simply holds that we are not considering market valuation or past undercollections in this phase of the URG proceeding, but that such recovery is not foreclosed. It does not reach any final conclusions about the recovery of PG&E's uneconomic costs, PG&E's retail rates, or whether the AB 1890 market valuation requirement is still viable. PG&E fails to point to any persuasive authority that requires us to consider transition costs in our current determination of PG&E's URG revenue requirement.

PG&E contends that the structure of our proceedings is a "shell game" on the part of the Commission, and a means of evading compliance with AB 1890. Not only are PG&E's allegations of improper motives unjustified, they are also irrelevant to PG&E's claims of legal error. It is a settled principle that if a law or action is legally valid and adequately supported, allegations of improper motive on the part of the government body responsible for it are not relevant to a legal review of that action. (United States v. O'Brien (1968) 391 U.S. 367, 382; New Orleans Pub. Serv. v. Council of New Orleans (5th Cir. 1990) 911 F.2d 993, 1004.)

I. AB X1-6 AND MARKET VALUATION REQUIREMENT

PG&E argues that the Decision errs in concluding that under AB 1890 and AB X1-6 market valuation is not required for determining the prospective

URG revenue requirement. According to PG&E, since AB X1-6 prohibits the utilities from selling their generation assets, the only way that PG&E can recover the market value of those assets, as AB 1890 contemplates, is for market valuation to be the basis for the URG revenue requirement. PG&E alleges that the failure to use market valuation is inconsistent with previous Commission holdings that market value should be used "to reduce the ratepayers' liability for uneconomic generation assets." (D.00-03-019, at 38-39.)

PG&E also maintains that the Commission misinterpreted AB X1-6 as overruling the market valuation requirement of AB 1890. PG&E claims that the only way to reconcile the two statutes is for the market valuation requirement to remain in effect, and for PG&E to be allowed to recover this amount through its URG revenue requirement. According to PG&E, the Commission's interpretation of AB X1-6 leads to a confiscatory result and is in error.

PG&E's theories fail for a number of reasons. First, as the Decision clearly explains, the market valuation reference in Public Utilities Code section 367 (b)[1] only applies to the calculation and recovery of uneconomic costs and not ratemaking for URG assets. (D.01-10-067, at 8.) The Decision correctly concludes that this section does not require that market valuation be used in the instant URG revenue requirement determination.

Second, PG&E fails to understand that, in the wake of AB X1-6, the measurement and recovery of transitions costs contemplated by AB 1890 is no longer viable since there is no "transition" to a competitive market for the retained assets. The costs of these assets are now to be recovered in the traditional manner. For this reason, PG&E's reliance on pre-AB X1-6 Commission decisions concerning market valuation is misplaced. Furthermore, as we stated in D.01-10-067, "PG&E's interpretation would convert an 'opportunity' to recover

[1] Unless otherwise noted, all section references are to the Public Utilities Code.

stranded costs into a 'guarantee' by converting stranded costs into rate base." (D.01-10-067, at 11.)

Third, regardless of whether there are still transition costs, and whether PG&E is entitled to recover them, the Decision does not set any final rates nor does it foreclose the possibility that market valuation, or transition cost recovery in some other form, will be incorporated into PG&E's URG revenue requirement. The Decision simply concludes:

> In this phase of the rate stabilization proceeding (RSP), we are establishing a URG revenue requirement on a prospective basis. PG&E's proposal raises issues dealing with the sale of assets and uneconomic costs, issues which are unrelated to determining a prospective URG revenue requirement.

(D.01-10-067, at 11.) Because no final rates were set, and the recovery of remaining stranded costs was not foreclosed, PG&E's contention that the Decision is confiscatory is entirely without merit.

Notably, despite PG&E's arguments, the Decision also does not conclude that the section 367 (b) market valuation requirement has been entirely overruled by AB X1-6. Again, the Decision's holdings on market valuation are limited to the conclusion that AB 1890 and AB X1-6 do not require that the Commission use market valuation as the basis for determining PG&E's prospective URG revenue requirement. As explained in the December 21, 2001 Assigned Commissioner Ruling from Commissioner Lynch, we are currently considering the issue of whether the AB 1890 market valuation requirement has been entirely overruled. We did not resolve that issue in D.01-10-067.

PG&E fails to provide any authority that would require the Commission to structure our proceedings to address the issue of the recovery of market valuation of its generation assets in this phase of the proceeding. We have

the discretion to structure our proceedings in a rational manner, and PG&E can identify no legal error in limiting this phase of the proceeding to prospective URG costs. Although we will need to address the issue of recovery of PG&E's stranded costs at some point, there is no clear relation between these past costs and the prospective URG revenue requirement. Therefore, the Commission is justified in focusing on the issue of establishing a prospective URG revenue requirement and excluding PG&E's request to consider recovery of stranded costs incurred in the past. Moreover, the Commission is not obligated to use any single methodology in order to arrive at reasonable rates. (Duquesne Light v. Barasch (1989) 488 U.S. 299, 314.)

II. TCBA UNDERCOLLECTIONS

PG&E similarly contends that the Commission is required to allow PG&E to recover its TCBA undercollections as part of its prospective URG revenue requirement. PG&E presented this scenario as an alternative to its market valuation recovery proposal. According to PG&E, since those undercollections now have been characterized as transition/generation costs they must be recoverable through its URG revenue requirement. PG&E alleges that the Commission must include these past uneconomic costs because they are part of PG&E's URG cost of service.

PG&E's undercollection argument fails for most of the same reasons as its market valuation argument. D.01-10-067 only concludes that the current phase of the proceeding will determine PG&E's prospective revenue requirement, and that the issue of past uneconomic costs should be considered separately. PG&E does not, and cannot, demonstrate that this analytic division is beyond the Commission's discretion. Nor can PG&E contend that any confiscation has occurred since no rates have been set, and PG&E has not been denied recovery of any costs.

PG&E also claims that the Decision violates the equal protection clauses of the federal and state Constitutions, and is discriminatory in violation of Public Utilities Code section 453 because it discriminates between Edison's URG-related costs, and PG&E's related costs. The bases for PG&E's argument are suggestions in Edison's pleadings that TCBA undercollections be incorporated in this phase of the proceeding, and the Commission's settlement with Edison, which provides for some recovery of Edison's undercollections.

PG&E has no legal basis for a discrimination under either section 453 or the equal protection clauses. Section 453 concerns discrimination *by* utilities, and PG&E makes no argument suggesting why that section should apply to the Commission's actions concerning PG&E's and Edison's URG revenue requirements. Moreover, equal protection violations are rare in the field of economic regulation. As the California Supreme Court has stated: "In the area of economic regulation, the high court has exercised restraint, investing legislation with a presumption of constitutionality and requiring merely that distinctions drawn by a challenged statute bear some rational relationship to a conceivable legislative purpose." (People v. Olivas (1976) 17 Cal.3d 236, 243.) This same standard is applied to the Commission's rate decisions. (Toward Utility Rate Normalization (TURN) v. Public Utilities Commission (1978) 22 Cal.3d 529.)

Here, PG&E fails to demonstrate any discrimination. Although PG&E refers to Edison filings seeking certain treatment of TCBA undercollections, PG&E fails to cite any Commission holding endorsing or adopting Edison's suggestions. Since there is no such holding, PG&E can point to no disparate treatment of Edison and PG&E concerning the inclusion of TCBA undercollections in the determination of a prospective URG revenue requirement. Furthermore, as TURN notes in its response, Edison's proposal differs from

PG&E's in a number of significant respects, and therefore there is no reason for the Commission to treat these proposals identically.

PG&E's other claim of discriminatory treatment concerns the settlement that the Commission entered into with Edison. As PG&E points out, the Edison settlement allows for some recovery of TCBA undercollections in Edison's retail rates. D.01-10-067 cannot be considered disparate treatment of PG&E, however, since the Edison settlement and the resulting rate agreement has nothing to do with the specific issue of the utilities' prospective URG revenue requirement, the subject of the current phase of this proceeding. Moreover, as mentioned above, PG&E has not been foreclosed from recovering some or all of its TCBA undercollections in retail rates at some point. We are not considering that issue in our current efforts to calculate the utilities' prospective URG revenue requirements.

Even if PG&E could demonstrate that it was treated differently from Edison, that difference would not be an equal protection violation. The fact that Edison agreed to a settlement of its federal claims against the Commission, unlike PG&E, renders it differently situated from PG&E. Because the two utilities are now in fairly different circumstances, distinctions in their regulatory treatment would be permissible.

III. DUE PROCESS

PG&E contends that the process we used to issue the D.01-10-067 violated its due process rights. Again, PG&E fails to specify any legal basis for its contention. Rather, PG&E claims generally that its due process rights were violated because: (1) PG&E's proposals were singled out for early resolution; (2) the schedule for resolving these issues was altered; and (3) the Commission failed to base its decision on the evidentiary record in the proceeding. None of these allegations demonstrate a violation of PG&E's due process rights.

PG&E's proposal on market valuation was a unique proposal in the URG proceeding, and presented threshold issues that we found convenient to address in advance of resolving the remaining issues concerning prospective URG revenue requirements. (See Assigned Commissioner Ruling (ACR), August 10, 2001.) PG&E itself had motioned for early resolution of issues related to market valuation and undercollections. (See ALJ Ruling, July 18, 2001.) Clearly, it was reasonable to resolve these issues on an expedited basis, and it was within our discretion to do so. PG&E fails to demonstrate any due process violation in the early resolution of certain PG&E proposals.

Similarly, due process does not require us to keep to an inalterable schedule, or to refer to the evidentiary record for legal conclusions. Indeed, PG&E cites no such legal requirements. All significant holdings in D.01-10-067 are legal conclusions, and, in fact, the August 10, 2001 ACR specifically asked for briefs on the "legal question of market valuation." Since the Decision resolves legal issues there was no need for reference to the evidentiary record. In addition, PG&E cannot point to any due process requirement that prohibits us from changing procedural schedules.

IV. EQUITABLE ESTOPPEL

PG&E also maintains that the Commission is equitably estopped from refusing to use market valuation as a basis for PG&E's URG revenue requirement. According to PG&E, the we are bound by the "*quid pro quo*" of AB 1890, and our decisions implementing that statute, which allow PG&E to recover the market value of its generation assets. This argument fails because the standard for applying equitable estoppel against a government agency has not been met.

The standard for estoppel has been stated as follows:

> Generally speaking, four elements must be present in order to apply the doctrine of equitable estoppel: (1) the party to be estopped must be apprised of the facts;

> (2) he must intend that his conduct shall be acted upon, or must so act that the party asserting the estoppel had a right to believe it was so intended; (3) the other party must be ignorant of the true state of facts; and (4) he must rely upon the conduct to his injury.

(Driscoll v. City of Los Angeles (1967) 67 Cal.2d 297, 305.) In the case of estoppel against a government agency the person asserting estoppel must also "demonstrate that the injury to his personal interest if the government is not estopped exceeds the injury to the public interest if the government is estopped." (Stewart v. City of Pismo Beach (1995) 35 Cal.App.4th 1600, 1607.)

PG&E's estoppel claim is unconvincing for a number of reasons. Most significantly, there is no injury to PG&E in the Commission's decision not to rely on market valuation *in its determination of PG&E's prospective URG revenue requirement.* The Commission has not foreclosed the possibility that PG&E will be able to recover its stranded costs in some manner. There is no support for PG&E's contention that the Commission is in any way estopped from refusing to adopt the particular mechanisms suggested by PG&E at this phase. Because the decision in question does not result in any injury to PG&E, the last two prongs of the estoppel test are not met.

Furthermore, during our earlier actions implementing AB 1890, we were not aware of the relevant "facts" leading to this Decision any more than PG&E was. We did not know that operating costs would exceed revenues during a portion of the rate freeze period, or that subsequent legislation would modify portions of AB 1890. For all of these reasons, we are not estopped from determining a prospective URG revenue requirement that is not based on market valuation or past undercollections.

No further discussion of PG&E's allegations is warranted.

THEREFORE, **IT IS ORDERED that:**

1. The Utility Reform Network's (TURN's) motion to accept its late-filed response is granted.

2. PG&E's application for rehearing of D.01-10-067 is hereby denied.

This order is effective today.

Dated February 7, 2002, at San Francisco, California.

LORETTA M. LYNCH
President
HENRY M. DUQUE
RICHARD A. BILAS
CARL W. WOOD
GEOFFREY F. BROWN
Commissioners