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Decision 02-10-067 October 24, 2002

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application of Southern California Edison Company (U 338-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 (U 39 E) to Adopt a Rate Stabilization Plan.	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 MODIFYING DECISION (D.) 02-04-016 AND DENYING REHEARING OF THE DECISION, AS MODIFIED

This rehearing application concerns Commission Decision (D.) 02-04-016 (URG Decision), which established interim cost-of-service revenue requirements for the utility retained generation (URG) of Pacific Gas and Electric Company (PG&E), Southern California Edison Company (Edison) and San Diego Gas & Electric Company (SDG&E) for 2002.

In 1996, with the support of PG&E and other regulated utilities, the California Legislature enacted Assembly Bill (AB) 1890.[1] AB 1890 intended to bring competition into the generation segment of California's electricity market, and provided, *inter alia*, that "[g]eneration of electricity should be open to

[1] Stats. 1996, Ch. 854.

competition and utility generation should be transitioned from regulated status to unregulated status through means of commission-approved market valuation mechanisms." (Former Pub. Util. Code, § 330(*l*)(2).) When enacted, AB 1890 intended that by December 31, 2001, utility non-nuclear generation assets would no longer be subject to Commission rate regulation. (See, e.g., Former Pub. Util. Code, §§ 216(h), 367 and 377.) On January 18, 2001, as part of its response to California's energy crisis, the Legislature enacted AB 6X.[2] AB 6X amended Public Utilities Code sections 216, 330 and 377 to remove the provisions relating to market valuation and prohibited the utilities from disposing of their electric generation facilities prior to January 1, 2006. (Legis. Counsel's Dig., Assem. Bill No 6 (2001-2002 1st Extraordinary Sess.), p. 1.)

As part of the URG Phase of these proceedings, we issued D.01-10-067. That decision determined, *inter alia*, that the market value of PG&E's generation assets should not be used as the basis for determining the URG revenue requirement. (D.01-10-067, at p. 2.) PG&E's rehearing application of D.01-10-067 was denied in D.02-02-029.[3]

On April 4, 2002, we issued the URG Decision, the subject of the instant application for rehearing. In the URG Decision, we reaffirmed that, pursuant to D.01-10-067, PG&E's prospective revenue requirements would not be based on a market valuation approach.[4] (D.02-04-016, at p. 16.) Instead, we adopted interim cost-of-service revenue requirements for PG&E based on net book value. (D.02-04-016, at p. 16.) Balancing accounts were also adopted for the three utilities so that these interim URG revenue requirements would be trued up to reflect actual costs. (D.02-04-016, at pp. 74-75.)

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[2] Stats. 1st Extraordinary Session 2001-2002, Ch. 2.

[3] PG&E did not seek judicial review of these decisions. The decisions are now final and nonappealable.

[4] As part of its testimony in this proceeding, PG&E presented three scenarios for determining its revenue requirement. Of these three scenarios, PG&E indicated that its preference was for the first scenario, which valued PG&E's retained generation at market value.

On May 8, 2002, PG&E filed a timely application for rehearing of the URG Decision. We have carefully considered all the arguments presented by PG&E and are of the opinion that no grounds for rehearing have been demonstrated. Therefore, PG&E's application for rehearing of the URG Decision is denied.

I. DISCUSSION

As an initial matter, we note that PG&E attempts to raise in this rehearing application an argument it had raised in its rehearing application of D.01-10-067. In its rehearing application of D.01-10-067, PG&E alleged that AB 6X did not support the Commission's conclusion that market valuation could not be used to set prospective URG rates. PG&E did not seek judicial review of D.01-10-067 and D.02-02-029 and those decisions are now final. (Pub. Util. Code, § 1756.)

In the instant rehearing application, PG&E again asserts that AB 6X "left the Commission with the obligation to have PG&E realize the market value of its URG assets, presumably through its URG revenue requirement." (Application, at p. 4.) However, this issue had been raised and addressed in D.02-02-029. Had PG&E wanted to challenge this finding, it should have sought judicial review of D.01-10-067, as provided by statute. (See, Pub. Util. Code, § 1756.) However, PG&E failed to do so and is precluded from attacking determinations made in earlier decisions that are now final.. Thus, we deny PG&E's application for rehearing of this issue on these grounds.

II. PG&E's Takings Claim

PG&E asserts that the URG Decision erroneously bases PG&E's prospective non-nuclear URG revenue requirement on net book value rather than market value. PG&E contends that by doing so, the URG Decision "deprives PG&E of important property rights without just compensation." (Application, at p. 2.) PG&E asserts that pursuant to AB 1890, it was to recover in rates the market value of its non-nuclear URG assets, once those assets were valued and removed from Commission regulation. PG&E believes that this "right to market valuation" is "a significant property interest." (Application, at p. 3.) Furthermore, PG&E asserts that it is entitled to sell the output from these assets "free of Commission rate regulation." (Application, at p. 4.) PG&E's arguments appear to be premised on its belief that AB 1890 has conferred a vested right to recover in rates the market value of its non-nuclear URG assets. It is mistaken.

Courts have distinguished between common law rights and rights established by statutes, and found that only the former are "vested." (See *Flournoy v. California* (1964) 230 Cal.App.2d 520, 531.) Contrary to PG&E's assertions, AB 1890 did not confer onto the utilities a constitutional right to sell the output from their non-nuclear URG assets into the FERC wholesale market after a certain date. Moreover, these provisions are not common law rights but were established as part of restructuring California's electricity market under AB 1890. Therefore, even though PG&E expected that these provisions would eventually occur, it had not acquired any vested right with respect to these provisions at the time AB 1890 was enacted that would prevent the Legislature from subsequently amending or repealing them.[5]

While PG&E states that it had made "timely requests" in 2000 to have its URG assets market valued (Application, at p. 3), there is no basis for concluding that the AB 1890 provisions for market valuation were "vested" upon filing of those requests. Courts have generally found that, with respect to vesting of statutory rights, there is no vested right until the administrative agency has acted. (See, e.g., *Liberty State Bank v. Minnesota Life & Health Ins. Guaranty Assn.* (1988, 8th Cir.) 147 F.3d 532, 834; *Senior Exec. Assn. v. U.S.* (1983, D.D.C.) 576 F.Supp. 1207, 1214.) AB 6X was enacted before we had acted on PG&E's

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[5] Further, " '[t]hose who do business in the regulated field cannot object if the regulatory scheme is buttressed by subsequent amendments to achieve the legislative end' [citations]." (*Connolly v. Pension Benefit Guaranty Corp.* (1985) 475 U.S. 211, 227.)

requests for market valuation of its non-nuclear generation facilities. Thus, it is unlikely a reviewing court would find that PG&E had acquired a "vested right" to market based rates merely upon filing of its request.

Moreover, *assuming arguendo* that PG&E had a vested right to market valuation of its generation facilities, PG&E's URG revenue requirements could nonetheless be based on net book value. An unlawful taking or confiscation occurs if a regulation or rate is unjust and unreasonable. (*Duquesne Light Co. v. Barasch* (1988) 488 U.S. 299.) Whether a regulation or rate is just and reasonable depends on a balancing of the interests of the regulated entity providing the services and the interests of the consumers of such services. (*Federal Power Com. v. Hope Nat. Gas Co.* (1943) 320 U.S. 591, 603.) In this instance, we balanced PG&E's interest in receiving higher profits from selling its power based on market value of its URG assets against providing reasonable rates for California ratepayers. Thus, we properly exercised our discretion in setting PG&E's URG revenue requirement based on net book value, since PG&E would recover its actual costs. Furthermore, PG&E's inability may not be able to sell its power at a rate above actual cost is not a basis for finding an unlawful taking. A regulated entity neither has a constitutional right to a profit nor a constitutional right against a loss. (*20th Century Ins. Co. v. Garamendi* (1994) 8 Cal.4th 216, 294.) Accordingly, even if PG&E had some property interest affected by our decision, this would not constitute an unlawful taking.

Finally, PG&E asserts that the URG Decision "establishes URG revenue requirements for the first time since AB X6 went into effect." Consequently, it challenges AB 6X on an as-applied basis. (Application, at p. 4.) This argument, however, is premature. The URG Decision does not do anything more than reaffirm our conclusions in D.01-10-067 that market valuation of generation assets for recovery of past uneconomic costs is outside the scope of a proceeding to establish a *prospective* URG revenue requirement. (D.02-04-016, at

p. 2.) Moreover, the decision specifically notes that "[the URG Decision] does not preclude the possibility of later modifications to the utilities' revenue requirements to account for what were previously considered as stranded or uneconomic costs." (D.02-04-016, at pp. 2-3.) Furthermore, recovery of stranded costs is not decided in this decision, but is the subject of a separate proceeding. (D.02-04-016, at p. 4.) Thus, PG&E may raise its arguments at the time we adopt the final rates for 2002 URG revenue requirement.

III. Benefit Sharing Plan

As part of its testimony in the URG Phase, PG&E proposed that a 50/50 sharing mechanism for Diablo Canyon be adopted. PG&E had originally filed this proposal in A.00-06-046.[6] The benefit sharing mechanism presumed that the rate freeze had ended and proposed that rates be based on a market proxy of $74/kWh. (Exh. URG-11, at p. 3-2.) The URG Decision declined to adopt this proposal, and instead determined that Diablo Canyon's revenue requirement would be based on cost-of-service principles. PG&E proposes three theories why the Commission erred in not adopting its proposed benefit sharing mechanism for ratemaking with respect to Diablo Canyon. All three theories are without merit.

PG&E first contends that the Commission's failure to adopt PG&E's benefit sharing proposal for Diablo Canyon, while approving Edison's Incremental Cost Incentive Pricing (ICIP) mechanism for SONGS, was an abuse of discretion. (Application, at p. 6.) This claim is based on PG&E's assertion that the URG Decision uses the same reasoning to reach two different conclusions with respect to PG&E and Edison's proposed incentive ratemaking methodologies. This claim is without merit. First, PG&E's benefit-sharing proposal is based on a market proxy price, which has no relation to the cost of operating Diablo Canyon. (See, Exh. URG-11, at p. 3.2.) Edison's ICIP mechanism, on the other hand, is based on SONG's cost. (Exh. URG 1, at pp. 46-47.) As discussed previously, market costs are inconsistent with AB 6X and thus cannot be used. Second, PG&E fails to recognize that its proposal was premised on the assumption that the rate freeze has ended, a finding that had not been made when the URG Decision was issued.

Third, the Commission has not discriminated against PG&E in determining the rates for Diablo Canyon in a different manner than for SONGS, since the two facilities are not similarly situated. Edison's ICIP mechanism for SONGS will not end until 2003, whereas PG&E's ICIP for Diablo Canyon ended in 2001. (See, *Re Pacific Gas and Electric Company* [D.97-05-088] (1997) 72 Cal.P.U.C.2d 561, 588; *Re Southern California Edison Co*. [D.96-01-011] (1996) 64 Cal.P.U.C. 241, 272.) Thus, we could properly adopt different methodologies for setting rates for these two facilities.[7]

PG&E next maintains that the Commission's decision is in violation of section 1708 because it "rescinds and modifies" Commission decisions 95-12-063 (*Re Proposed Policies Governing Restructuring California's Electric Services Industry and Reforming Regulation* (1995) 64 Cal.P.U.C.2d 1) and 97-05-088 (*Re Pacific Gas and Electric Company* (1997) 72 Cal.P.U.C.2d 561) without adequate justification. (Application, at p. 8.) PG&E is mistaken. These prior decisions, issued pursuant to AB 1890, contemplated that once Diablo Canyon's ICIP mechanism concluded, its rates would be priced at market rates. (D.95-12-063, 64 Cal.P.U.C.2d at p. 64.) However, AB 6X eliminated the market valuation provisions for Diablo Canyon's rates after 2001. Thus, AB 6X, not D.95-12-063 and D.97-05-088, governs how rates are to be determined after 2001. Accordingly, section 1708 was not implicated in this decision, since we were not modifying a prior Commission decision.

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[6] PG&E had filed A.00-06-046 pursuant to Ordering Paragraph 7 of D.97-05-088.

[7] In fact, Edison had also been required under D.96-01-011 to adopt a 50/50 benefit sharing mechanism for operating SONGS after its ICIP period ends. (D.96-01-011, 64 Cal.P.U.C. at p. 272.) Accordingly, any application by Edison to adopt a benefit-sharing mechanism based on market prices would also be rejected as inconsistent with AB 6X.

Finally, PG&E claims that the Commission is equitably estopped from rescinding its prior approval of benefit sharing ratemaking. (Application, at pp. 8-9.) It notes that the elements for finding equitable estoppel, discussed in D.01-10-067, exist here. PG&E is mistaken. First, as discussed above, our prior decisions were superseded by AB 6X. Therefore, contrary to PG&E's belief, it was not necessary for us to take any action to modify or rescind these prior decisions. Second, in D.01-01-061, PG&E was put on notice that URG revenue requirements should be cost-based. (D.01-01-061, at p. 7.) Since benefit sharing ratemaking is based on market value, PG&E should have been aware that it would be not approved. Third, it was impossible for any party to anticipate the events leading to the Legislature's enactment of AB 6X at the time D.95-12-063 and D.97-05-088 were issued. Fourth, PG&E fails to explain how the "injury" it has sustained as a result of the URG Decision exceeds injury to the public interest. Indeed, under the URG Decision, it is arguable that PG&E has not sustained any injury, since it will be compensated for its actual costs for operating Diablo Canyon. (D.02-04-016, at p. 20.) Finally, any claims of expected "lost profits" would be speculative at best, since we had not approved PG&E's original application. (See, e.g., *Market Street Railway Co. v. Railroad Commission of California* (1945) 324 U.S. 548, 567.) Accordingly, the requirements for equitable estoppel have not been met in this case..

IV. CONCLUSION

PG&E's application for rehearing fails to demonstrate legal error in Commission Decision (D.) 02-04-016.

THEREFORE, IT IS ORDERED:

1. Rehearing of D.02-04-016 is denied.
2. This order is effective today.

Dated October 24, 2002 at San Francisco, California

LORETTA M. LYNCH
President
HENRY M. DUQUE
CARL W. WOOD
GEOFFREY F. BROWN
MICHAEL R. PEEVEY
Commissioners