95 FERC ¶ 61, 247
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Curt Hébert, Jr., Chairman;
William L. Massey, and Linda Breathitt.

Pacific Gas and Electric Company Docket No. ER00-565-001

ORDER DENYING CLARIFICATION AND REHEARING

(Issued May 18, 2001)

In this order, we deny clarification and rehearing of an order issued January 11, 2000 (January 11 Order)[1] related to Pacific Gas and Electric Company's (PG&E) proposed Scheduling Coordinator Services Tariff (SCS Tariff).

Background

In the January 11 Order, the Commission accepted PG&E's proposed SCS Tariff for filing, suspended it, set it for hearing, and conditionally granted waiver of notice to make it conditionally effective March 31, 1998, subject to refund.[2] The Commission also deferred the hearing concerning this proposed SCS Tariff, pending the resolution of issues before it in Docket No. ER97-2358-002, et al.[3] The Initial Decision issued in that

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[1]Pacific Gas and Electric Co., 90 FERC ¶ 61,010 (2000).

[2]In conditionally granting waiver, the Commission found that it needed to first evaluate the Initial Decision in Docket Nos. ER97-2358-002, et al., to determine if extraordinary circumstances exist that would support waiver of prior notice to permit an effective date of March 31, 1998.

[3]In Docket Nos. ER97-2358-002, et al., PG&E originally sought recovery of these costs through its Transmission Revenue Balancing Account Adjustment (TRBAA), which is assessed against customers that take service under PG&E's Transmission Owner Tariff (TO Tariff).

proceeding held that the SC costs should be recovered from the SC customers and not from customers taking service under PG&E's TO Tariff.[4]

Specifically, in the January 11 Order, the Commission stated that PG&E's request for recovery of SC costs through the SCS Tariff was not ripe for resolution. The Commission noted that "PG&E's need to propose an alternative cost recovery mechanism, as well as whether to allow the requested effective date of March 31, 1998, will be moot if the Commission reverses the Initial Decision in Docket Nos. ER97-2358-002 et al." Moreover, the Commission found that it could not evaluate the parties' arguments on the merits of the SCS Tariff without, at the same time, considering the merits of the Initial Decision. Furthermore, the Commission determined that the existence of extraordinary circumstances that would support waiver of prior notice to permit an effective date of March 31, 1998 may also depend on an evaluation of these same arguments.

Requests for Clarification or Rehearing

The Transmission Agency of Northern California, the M-S-R Public Power Agency, Modesto, and the Cities of Redding and Santa Clara, California (collectively the CA Municipal Utilities), San Francisco, SMUD, and Turlock requested rehearing and/or clarification of the January 11 Order. The NCPA requested rehearing of this order.

The NCPA argues that the Commission erred in its decision to suspend for a nominal period, rather than a period of five months, PG&E's proposed retroactive rate increase. Specifically, the NCPA states that the Commission's West Texas[5] policy dictates that a nominal suspension is only appropriate where the Commission's preliminary analysis indicates that no more than ten percent of the proposed increase appears to be excessive, and that this is not the case here. Furthermore, the NCPA argues that the fact that PG&E may have made an incorrect assessment of its ability to recover its costs through the TRBAA, does not warrant imposing a retroactive rate increase on others, who themselves relied on the TRBAA mechanism in assuming they would not be billed for these costs.

In their rehearing and clarification requests, the CA Municipal Utilities, SMUD, and San Francisco contend that the Commission failed to engage in reasoned decision-

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[4]Pacific Gas and Electric Co., et al., 88 FERC ¶ 63,007 (1999), exceptions pending.

[5]West Texas Utilities Company, 18 FERC ¶ 61,189 (1982).

making when it established a retroactive effective date for the SCS Tariff without first determining whether or not extraordinary circumstances exist that would warrant waiver of the prior notice requirement. Furthermore, SMUD contends the Commission erred in failing to reject the SCS Tariff. SMUD argues that a Commission decision on the merits of the SCS Tariff filing is not dependent on the merits of the Initial Decision in Docket Nos. ER97-2358-002, et al. Turlock requests the Commission to hold, on rehearing here, or to clarify, that Turlock and the other parties opposing the SCS Tariff and its retroactive effect will be allowed to re-raise their original arguments.

Preliminary Matters

We note that on April 6, 2001, PG&E filed for Chapter 11 bankruptcy protection. Although the Bankruptcy Code provides that the filing of a bankruptcy petition automatically stays certain actions against the debtor, [6] the Code also provides an exception from this automatic stay for:

> An action or proceeding by a governmental unit . . . to enforce such governmental unit's or organization's police and regulatory power, including the enforcement of a judgment other than a money judgment, obtained in an action or proceeding by the governmental unit to enforce such governmental unit's or organization's police or regulatory power. [7]

The Commission has found in the past that actions taken under the authority granted it by the Federal Power Act and the controlling regulations fit within this exception, and, therefore, are exempt from the automatic stay provision. [8] In the instant matter, we are exercising our regulatory power under section 205 of the Federal Power

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[6] 11 U.S.C. § 362(a)(1) (1994 & Supp. 2000).

[7] 11 U.S.C. § 362(b)(4) (1994 & Supp. 2000).

[8] See Virginia Electric and Power Co., 84 FERC ¶ 61,254 (1998); and Century Power Corp., 56 FERC ¶ 61,087 (1991). The Commission conclusion on this matter is consistent with judicial precedent regarding the scope of the exemption to the automatic stay. E.g., Board of Governors of the Fed. Reserve Sys. v. MCorp Fin., Inc., 502 U.S. 32 (1991); SEC v. Brennan, 250 F.3d 65 (2nd Cir. 2000); NLRB v. Continental Hagen Corp., 932 F.2d 828 (9th Cir. 1991); United States v. Commonwealth Cos. Inc. 913 F.2d 518 (8th Cir. 1990); NLRB v. Edward Cooper Painting, Inc. 804 F.2d 934 (6th Cir. 1986); Penn Terra Ltd. v. Dept. of Envtl. Resources, 733 F.2d 267 (3rd Cir. 1984); see generally 3 Collier on Bankruptcy § 362.05 (15th ed. rev. 2000).

Act as permitted by section 362(b)(4) of the Bankruptcy Code to issue an order that does not threaten the bankruptcy court's control over the property of the bankruptcy estate. [9]

Discussion

We will reject the requests for clarification and rehearing. In the January 11 Order, we found that PG&E's filing was not yet ripe for review and took actions to preserve the status quo pending Commission action on the Initial Decision. In this regard, we accepted PG&E's proposal to defer billing and to defer the hearing pending resolution of the issues before the Commission in Docket Nos. ER97-2358-002, et al.

No party is harmed by this action and, indeed, no party has shown any harm on rehearing. As we stated in the January 11 Order:

> If the Commission rules in PG&E's favor on the Initial Decision, the SCS Tariff will, by PG&E's own estimation, be moot and will be withdrawn. If the Commission rules against PG&E, however, the Commission may consider at that time whether and from whom PG&E may recover its costs under the SCS Tariff and whether extraordinary circumstances that would justify waiver of prior notice have been shown to exist.[10]

The Commission further provided that within 45 days of the resolution of the proceeding in Docket No. ER97-2358-002, et al., the parties shall advise the Commission as to what action they would like the Commission to take regarding the proposed SCS Tariff. The Commission will address the parties' concerns at that time.

We also find no merit to the NCPA's argument that the Commission's West Texas policy requires a five-month suspension in this proceeding. The NCPA has misapplied this policy. The West Texas policy governs the length of the suspension period for proposed increased rates. Here, PG&E's proposal does not constitute a rate increase, but instead seeks compensation for a new service. Thus, no portion of PG&E's proposal can be characterized as an "increase."[11]

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[9]This order does not change any monetary obligations, and therefore, has no effect on the estate.

[10]Pacific Gas and Electric Co., 90 FERC ¶ 61,010 (2000).

[11]See Florida Power & Light Co., 62 FERC ¶ 61,251, reh'g denied, 65 FERC

(continued...)

The Commission orders:

The requests for rehearing and clarification are hereby denied, as discussed in the body of this order.

By the Commission.

(S E A L)

Linwood A. Watson, Jr.,
Acting Secretary.

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[11](...continued)
¶ 61,411 at 63,128-29 (1993).