STATE OF CALIFORNIA GRAY DAVIS, *Governor*

PUBLIC UTILITIES COMMISSION
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3298

December 19, 2001

Held Item H-8
from 11/29/2001 meeting
1/23/2002

TO: PARTIES OF RECORD IN RULEMAKING 97-04-011 AND INVESTIGATION 97-04-012

Enclosed is the revised draft decision of Administrative Law Judge (ALJ) Econome. The original draft decision was mailed to all parties on July 16, 2001. Because the ALJ has substantively revised the draft decision in consultation with Assigned Commissioner Bilas, we are affording parties an additional comment opportunity. This revised draft decision will be on the Commission's January 23, 2002 agenda.

When the Commission acts on the revised draft decision, it may adopt all or part of it as written, amend or modify it, or set it aside and prepare its own decision. Only when the Commission acts does the decision become binding on the parties.

Parties to the proceeding may file comments on the revised draft decision as provided in Article 19 of the Commission's "Rules of Practice and Procedure." These rules are accessible on the Commission's website at http://www.cpuc.ca.gov. Comments are limited to 15 pages, pursuant to Rule 77.3. Comments and reply comments on the revised draft decision are due no later than January 4, 2002, and January 11, 2002, respectively. Parties should limit their comments to the changes set forth in the revised draft decision, and should not repeat earlier comments. Parties should serve the Assigned ALJ with their comments in such a manner that the ALJ receives them on the filing date. ALJ Econome's e-mail address is jjj@cpuc.ca.gov and her fax number is (415) 703-1723.

/s/ LYNN T. CAREW
Lynn T. Carew, Chief
Administrative Law Judge

LTC:sid

Attachments

Decision **REVISED DRAFT DECISION OF ALJ ECONOME**
(Mailed 12/19/2001)

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking to Establish Standards of Conduct Governing Relationships Between Energy Utilities and Their Affiliates.	Rulemaking 97-04-011 (Filed April 9, 1997)
Order Instituting Investigation to Establish Standards of Conduct Governing Relationships Between Energy Utilities and Their Affiliates.	Investigation 97-04-012 (Filed April 9, 1997)

OPINION ON REVISED DISCLAIMER LANGUAGE AND ITS IMPLICATIONS ON THE PENALTIES ASSESSED AGAINST PACIFIC GAS AND ELECTRIC COMPANY IN DECISION (D.) 98-11-026 AND D.99-03-025

I. Summary

This decision revises the disclaimer requirement set forth in Section V.F.1 of the Affiliate Transaction Rules (Rules) so that the revised language the Commission adopted for San Diego Gas & Electric Company (SDG&E) and Southern California Gas Company (SoCalGas) will be made applicable to all utilities covered by the Rules. In D.99-09-033, we revised Section V.F.1 as to SDG&E and SoCalGas because the original language was not narrowly tailored to achieve an appropriate balance between the two utilities' commercial speech rights and the Commission's substantial interest in promoting competition.

This decision also considers the implications of this revision on the penalty we assessed against Pacific Gas and Electric Company (PG&E) in D.98-11-026 and D.99-03-025. We determine that PG&E's penalty should be reduced but not

vacated because it was based on PG&E's violation of the legibility requirement, and is distinct from the portion of the rule that we have subsequently found was not narrowly tailored to achieve an appropriate balance between utilities' commercial speech rights and the Commission's interest in promoting competition.

II. The Commission Revises Rule V.F.1 as to SDG&E and SoCalGas

In D.99-09-033, the Commission addressed SDG&E and SoCalGas' application for rehearing concerning the disclaimer requirement set forth in the Rules. The Commission upheld the disclaimer requirement but revised the language of the disclaimer for the reasons stated above. Although the Commission expressly limited this decision to the two petitioning utilities, we also anticipated that this decision might generate similar petitions for modification of Rule V.F.1 from other utilities covered by the Rules.

III. Administrative Law Judge (ALJ) Ruling Requesting Comments on Whether the Changes to Rule V.F.1 Should Apply to All Utilities

No parties filed petitions for modification, but because of the PG&E penalty issue discussed below, and in order to provide certainty, a December 3, 1999 ALJ ruling requested parties' comments on whether Rule V.F.1 should be modified to apply the modifications adopted in D.99-09-033 for SDG&E and SoCalGas to all utilities covered by the Rules.

The ruling proposed comments on the following proposed modification:

F. Corporate Identification and Advertising

1. A utility shall not trade upon, promote, or advertise its affiliate's affiliation with the utility, nor allow the utility name or logo to be used by the affiliate or in any material circulated by the affiliate,

unless it discloses in plain legible or audible language, on the first page or at the first point where the utility name or logo appears that:

a. The affiliate "is not the same company as [i.e., PG&E, Edison, the Gas Company, etc.], the utility," and the affiliate "is not regulated by the California Public Utilities Commission."

b. In the case of energy service provider affiliates, the disclaimer will be:

The affiliate "is not the same company as [i.e., PG&E, Edison, the Gas Company, etc], the utility, and the California Public Utilities Commission does not regulate the terms of [the affiliate's] products and services."

The application of the name/logo disclaimer is limited to the use of the name or logo in California.

IV. Responses to the ALJ Ruling

PG&E, Southern California Edison Company (Edison), and the Office of Ratepayer Advocates (ORA) and The Utility Reform Network (TURN), jointly, filed responses and replies to the ALJ ruling.[1]

PG&E and Edison argue that the Commission adopted the original disclaimer language after notice and comment, without hearings, and made the modification to the disclaimer as to SDG&E and SoCalGas as a matter of law, because the original language was not narrowly tailored to achieve an appropriate balance between the rehearing applicants' commercial speech rights and the Commission's substantial interest in promoting competition. The utilities argue that this rationale applies with the same force to PG&E and Edison

[1] We grant ORA and TURN's motion to file their comments one day late.

as it does to SDG&E and SoCalGas. Edison points out that such modification would be in keeping with substantially uniform rules for all utilities covered by the Rules, which is a policy the Commission articulated in its Order Instituting Rulemaking leading up to the Rules' adoption. (PG&E also argues that a utility should not be viewed in violation of Rule V.F.1 if it continues to use the original disclaimer language on documents which have been printed in bulk, such as business cards, etc.)

ORA and TURN argue that the Commission should not modify Rule V.F.1 so that it applies to all utilities because D.99-09-033 is based on the specific facts and circumstances presented by shared use of the Sempra name and logo by SDG&E and SoCalGas. Therefore, ORA and TURN argue that there is no basis for extending the changes ordered in the disclaimer to other utilities.

V. Implications of Disclaimer Modification on PG&E Penalty

In D.98-11-026, rehearing denied in D.99-03-025, the Commission assessed a $1,680,000 penalty against PG&E for allowing its affiliate, PG&E Energy Services, to issue a printed advertisement that did not comply with the legibility requirements for disclaimers as set forth in Rule V.F.1. Although the advertisement in question contained the entire text of the required disclaimer, it was not plainly legible as required by the Rules.[2] This penalty consists of $17,500 for each of the 20 violations associated with the March 16, 1998 "High Voltage" advertisement and $19,000 for each of the 70 violations associated with the

[2] We found PG&E violated Rule V.F.1 in D.98-04-029, and requested further information before we assessed the penalty in D.98-11-026. In D.98-04-029, we also gave further guidance on what is "clearly legible" under Rule V.F.1.

remaining advertisements. (PG&E ran the same advertisement in various publications at various times.) At the time PG&E ran the advertisements and the Commission assessed this penalty, the Commission had not revised the disclaimer requirement for SDG&E and SoCalGas.

After the Commission issued D.99-09-033 modifying the disclaimer as to SDG&E and SoCalGas, the Commission issued D.99-09-074. This decision reopened the instant rulemaking/investigation to consider the possible implications that D.99-09-033 may have on the PG&E penalty issues, ordered briefing, and stayed D.98-11-026 and D.99-03-025 pending the outcome of the reopening of the PG&E penalty proceeding.[3]

VI. Responses to D.99-09-074

PG&E, Edison and ORA, TURN and Enron Corp. (jointly) filed responses or replies. Both PG&E and Edison argue that the Commission acknowledged in D.99-09-033 that the original disclaimer rule violates the First Amendment unless modified. Therefore, they argue that this Rule cannot be lawfully enforced against PG&E. Because the penalty determinations in D.98-11-026 and

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[3] PG&E filed a petition for writ of review of D.98-11-026 and D.99-03-025 in the California Supreme Court. PG&E simultaneously filed a petition for writ of review before the California Court of Appeal, essentially raising the same claims in both petitions.

On June 9, 1999, the California Court of Appeal issued a ruling denying the Commission's motion to dismiss PG&E's petition for writ of review. It also denied the Commission's request that the Court consider the merits of PG&E's petition in light of the Commission's answer before the California Supreme Court, and ordered briefing in accordance with California Rules of Court, Rule 58(b). Neither the California Court of Appeal nor the California Supreme Court had acted on PG&E's petitions as of the issuance of D.99-09-074, and they were subsequently dismissed without prejudice in light of our reopening this proceeding.

D.99-03-025 were based on enforcement of an unlawful rule, PG&E argues that the decisions and associated penalty determinations should be vacated. If the Commission decides to reconsider the amount of the penalty, PG&E requests evidentiary hearings.

ORA, TURN and Enron Corp. argue that D.99-09-033 applied only to SDG&E and SoCalGas, and not PG&E. Moreover, D.99-09-033 addressed the content of the disclaimer, and D.98-11-026 and D.99-03-025 penalized PG&E based on the legibility of the disclaimers. According to ORA, TURN and Enron Corp., the penalty should still stand because even if the modified disclaimer were in effect at the time PG&E ran its advertisements, PG&E would still be in violation of the Rules.

VII. Discussion

A. Modification of Rule V.F.1 for All Utilities Covered by the Rules

D.99-09-033 revised Rule V.F.1's disclaimer requirement as to SDG&E and SoCalGas under the following rationale:

> "We have considered our rejection of the request for a revised disclaimer. After careful reconsideration and further reflection, we now believe that the disclaimer set forth in Rule V.F.1 is not narrowly tailored to achieve an appropriate balance between the rehearing applicants' commercial speech rights and our substantial interest in promoting competition. We find the practical aspects raised by the rehearing applicants in their petition for modification and application for rehearing persuasive in determining that we have erred. Thus, we conclude that this disclaimer needs to be and should be changed to meet the standards established by the courts for the last prong of the Central Hudson test.

> "Accordingly, we will grant rehearing in order to correct this error. We believe that additional hearings, either through notice and comments or evidentiary hearings, are not necessary to make the correction. The record for the instant rulemaking/investigation (R.97-04-011/I.97-04-012), which includes the record evidence for the petition for modification, is sufficient. Thus, relying on the record for this proceeding, we adopt the following revised disclaimer, which is narrowly tailored to achieve our stated objectives for promoting competition." (D.99-09-033 at p. 12.)

Although our holding in D.99-09-033 was expressly limited to SDG&E and SoCalGas, the rationale the Commission used to modify the decision (i.e., that the original disclaimer was not narrowly tailored to achieve an appropriate balance between commercial speech rights and the government's interest in promoting competition) applies to all utilities covered by the Rules. Indeed, the Commission rejected SDG&E and SoCalGas' efforts to distinguish their situation from that of other utilities and concluded the evidentiary record supported a disclaimer requirement for all utilities covered by the Rules because exempting SDG&E and SoCalGas from the disclaimer requirement could potentially result in customer confusion and misleading customers about their competitive choices.

Therefore, we modify Rule V.F.1 of the Affiliate Transaction Rules as set forth in the ordering paragraphs so that all utilities are now subject to Rule V.F.1 as modified by D.99-09-033. However, we clarify that utilities will not be found in violation of the Affiliate Transaction Rules if they comply with either version (the original or modified) of Rule V.F.1.

B. PG&E Penalty

PG&E's penalty was based on a violation of the legibility requirement of Rule V.F.1. We have subsequently found that a portion of Rule V.F.1 was not narrowly tailored to achieve an appropriate balance between utilities'

commercial speech rights and the Commission's interest in promoting competition, and modified Rule V.F.1 by removing part (3) which required the utilities to include as part of any disclaimer, "you do not have to buy the affiliate's products in order to continue to receive quality regulated services from the utility." However, that portion of the Rule is distinct from the legibility requirement.[4]

After we issued D.98-11-026, which first assessed a penalty against PG&E for violating the legibility requirement of Rule V.F.1, we issued D.98-12-075, where we established criteria to provide guidance in all subsequent cases in which penalty issues arise. Although D.98-11-026 was issued prior to D.98-12-075, D.98-11-026 considered the appropriate criteria in determining the amount of the penalty.[5] We continue to rely on that discussion, as well as D.99-03-025, which denied rehearing of D.98-11-026. However, we also considered as a mitigating factor intervening events where we found a portion of the disclaimer was not sufficiently narrowly tailored. We therefore reduce the penalty to $62,500, which consists of $500 for each of the 20 violations associated

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[4] See Rule II.I, which states, in part that if "any provision of these rules, or the application thereof to any person, company, or circumstance, is held invalid, the remainder of the Rules, or the application of such provision to other persons, companies, or circumstances, shall not be affected thereby." (D.98-12-088, 77 CPUC2d 422, 498.)

[5] D.98-12-075 (Appendix B) set forth the following criteria: the severity of the economic or physical harm; the utility's conduct to prevent, detect, disclose, and rectify the violation; the utility's financial resources; the public interest involved; the totality of the circumstances; and Commission precedent. In D.98-11-026, we primarily considered the gravity of the harm, the conduct of the utility to mitigate the harm, and the size of the utility. We also referenced the other factors throughout the discussion.

with the March 16, 1998, "High Voltage" advertisement and $750 for each of the 70 violations associated with the remaining advertisement.

VIII. Comments on Draft Decision

The draft decision of ALJ Econome in this matter was mailed to the parties in accordance with Pub. Util. Code § 311(g)(1) and Rule 77.7. The following parties filed comments or replies: ORA and TURN (jointly) PG&E, SDG&E and Southern California Edison Company. We affirm the draft decision regarding the modification of Rule V.F.1 for all utilities, but modify it concerning the penalty we impose on PG&E. (See discussion at VII (B).) The ALJ's revised draft decision was mailed to the parties for comment pursuant to Pub. Util. Code § 311(e) and (g), and Rule 77.6 for comments limited to the proposed changes.

Findings of Fact

1. Although our holding in D.99-09-033 was expressly limited to SDG&E and SoCalGas, the rationale the Commission used to modify the decision (i.e., that the original disclaimer was not narrowly tailored to achieve an appropriate balance between commercial speech rights and the government's interest in promoting competition) applies to all utilities covered by the Rules.

2. The penalty assessed against PG&E in D.98-11-026 and D.99-03-025 was based on a violation of the legibility requirement of Rule V.F.1, and is distinct from the portion of the Rule that the Commission subsequently found was not narrowly tailored to achieve an appropriate balance between the utilities' commercial speech rights and the Commission's interest in promoting competition.

Conclusions of Law

1. Rule V.F.1 of the Affiliate Transaction Rules should be modified as set forth in the ordering paragraphs so that all utilities are now subject to Rule V.F.1, as modified by D.99-09-033.

2. Utilities should not be found in violation of the Affiliate Transaction Rules if they comply with either the original or modified version of Rule V.F.1.

3. Because of mitigating factors discussed herein, we reduce the penalty we imposed on PG&E in D.98-11-026 and D.99-03-025. PG&E should be assessed a $62,500 penalty for its violations of Rule V.F.1.

4. In order to provide certainty to the utilities covered by the Rules and other affected parties, this decision should be effective immediately.

O R D E R

IT IS ORDERED that:

1. Rule V.F.1 of the Affiliate Transaction Rules (Rules) adopted by Decision (D.) 97-12-088, and modified by D.98-08-035 and other decisions, shall be modified to apply to all utilities covered by the Rules as follows:

F. Corporate Identification and Advertising

1. A utility shall not trade upon, promote, or advertise its affiliate's affiliation with the utility, nor allow the utility name or logo to be used by the affiliate or in any material circulated by the affiliate, unless it discloses in plain legible or audible language, on the first page or at the first point where the utility name or logo appears that:

   a. The affiliate "is not the same company as [i.e., PG&E, Edison, the Gas Company, etc.], the utility," and the affiliate "is not regulated by the California Public Utilities Commission."

   b. In the case of energy service provider affiliates, the disclaimer will be:

> The affiliate "is not the same company as [i.e., PG&E, Edison, the Gas Company, etc], the utility, and the California Public Utilities Commission does not regulate the terms of [the affiliate's] products and services."
>
> The application of the name/logo disclaimer is limited to the use of the name or logo in California.

2. The $1,680,000 penalty that the Commission imposed on Pacific Gas and Electric Company (PG&E) in D.98-11-026 and D.99-03-025 for violating Rule V.F.1 shall be reduced to $62,500.

3. No later than 30 days from the effective date of this revised draft decision, PG&E shall pay $62,500 plus interest at 7% per year accruing therefrom, to the General Fund of the State of California.

4. This proceeding is closed.

This order is effective today.

Dated _____, at San Francisco, California.