UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
Nora Mead Brownell, Joseph T. Kelliher,
and Suedeen G. Kelly.

Pacific Gas and Electric Company Docket No. ER01-1639-004

ORDER ON REMAND AFFIRMING INITIAL DECISION

(Issued December 22, 2004)

1. This order responds to a remand by the United States Court of Appeals for the District of Columbia Circuit in *Pacific Gas and Electric Co. v. FERC*.[1] This order affirms the initial decision, issued on April 14, 2004,[2] in response to that remand, and concludes, following consideration of exceptions, that:

- before Pacific Gas & Electric Co. (PG&E) filed its original, unilateral proposal under section 205 of the Federal Power Act to increase transmission rates and establish transmission-related rates, PG&E had substantially complied with the joint review requirement of Article 32 in Contract 2948A (Article 32)[3] with the Western Area Power Administration (Western); and

[1] 326 F.3d 243, 246-50 (D.C. Cir. 2003).

[2] *Pacific Gas and Electric Co.*, 107 FERC ¶ 63,011 (2004) (*2004ID*).

[3] Executed in 1967, Contract 2948A provides for the interconnection and integration of the loads and resources of PG&E and Western, and contains PG&E's rates for the sale of capacity, energy, and transmission service to Western. Article 32 states the joint review requirement:

> Rates and charges under this contract shall be fair and equitable and shall … together with service charges, be jointly reviewed, and adjusted as appropriate on April 1, 1971, and every five years thereafter… Such review shall take into account substantial savings accruing to either party and applicable costs of construction and production, including changes therein and appropriate service charges, during the preceding five years. If the parties are unable to agree on a change of any rate or charge, the matter shall be submitted to [the Commission] for final decision.

- since PG&E substantially complied with the joint review requirement of Article 32 and since Article 32 does not require an effective date of only April 1, 2001, PG&E's original filing proposing to increase transmission rates and establish transmission-related rates does not violate the *Mobile-Sierra* doctrine.[4]

2. This order benefits customers because it resolves a contractual dispute between PG&E and Western and will permit the parties to address rates for a locked-in period in the on-going proceedings (Phase II) in this docket before the Presiding Judge.

I. Background

A. Original Rate Filing and the 2001ID

3. Under California's 1996 restructuring, PG&E transferred the operation of its transmission facilities to the California Independent System Operator Corporation (CAISO). After PG&E sold much of its own generation, it acquired electricity from new sources at market prices. On March 28, 2001, PG&E filed the rate change application at issue in this proceeding, to recover from Western increased transmission costs, increased energy charges at market prices, and the ISO's charges for services to maintain grid reliability for PG&E's energy sales to Western.

4. On May 25, 2001, the Commission issued an order in Docket No. ER01-1639-000 conditionally accepting and suspending for five months PG&E's proposed rates and proposed amendments to Contract 2948A, to become effective subject to refund and the outcome of an evidentiary hearing.[5] Following an evidentiary hearing, the Presiding Judge on September 21, 2001, issued a partial initial decision[6] holding that PG&E lacked the contractual right to make the filing, *i.e.*, that the filing exceeded the section 205 rights granted in Contract 2948A, as amended by a 1992 Letter Agreement, in violation of the *Mobile-Sierra* doctrine. Specifically, the initial decision held: (1) that the 1992 Letter Agreement precluded PG&E from using section 205 to change energy rates and (2) that, as relevant here, PG&E failed, under a strict compliance standard, to satisfy a condition precedent in Article 32 of Contract 2948A requiring a joint review with Western before proposing to change transmission rates and transmission-related charges under

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[4] *United Gas Pipe Line Co. v. Mobile Gas Service Corp.,* 350 U.S. 332 (1956); *FPC v. Sierra Pacific Power Co.,* 350 U.S. 348 (1956).

[5] *Pacific Gas and Electric Co.,* 95 FERC ¶ 61,273, *reh'g denied*, 96 FERC ¶ 61,102 (2001).

[6] *Pacific Gas and Electric Co.,* 96 FERC ¶ 63,043 (2001) (*2001ID*)

section 205.[7] The Commission issued orders affirming the initial decision, rejecting the original filing as barred on *Mobile-Sierra* grounds, and giving PG&E the opportunity to make a future compliance filing consistent with its pre-existing contractual commitments.[8]

B. Court Remand

5. PG&E filed a petition for review of the Commission's orders affirming the *2001ID*. While the court affirmed the Commission's orders holding that Contract 2948A precluded PG&E's use of section 205 to change its energy rates, the court vacated and remanded for further consideration the portion of those orders discussing whether PG&E met the joint review requirement of Article 32 (a condition precedent for changing transmission rates under section 205). The court observed that the Commission's orders, affirming the *2001ID*, prohibited PG&E's new transmission rates because PG&E had not met the joint review requirement of Article 32.[9] The court determined, however, that the Commission (and Presiding Judge) had applied the incorrect standard for determining PG&E's compliance with the joint review requirement and that the evidence in the record of failure to comply was not overwhelming.

6. As the court stated,

> Whether PG&E met its joint review obligations depends on two points—the standard of compliance, and PG&E's actual behavior. In finding PG&E in default, the ALJ rejected any notion of substantial compliance … The case for a substantial compliance standard seems compelling here. Joint review is difficult to define and hard to measure. Unless there is some leeway, a minor defect in compliance could trigger wholly disproportionate consequences with little warning, perhaps engendering wasteful overcompliance efforts… So substantial compliance is enough, and the ALJ's insistence on more was not a reasonable interpretation of the contract.[10]

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[7] *Id*. at 65,292-93.

[8] *Pacific Gas & Electric Co.*, 97 FERC ¶ 61,082, *reh'g denied*, 97 FERC ¶ 61,335 (2001). No compliance filing was filed.

[9] *Pacific Gas and Electric Co. v. FERC*, 326 F.3d 243, 250 (2001).

[10] *Id*. at 251.

> The evidence of PG&E's failure to comply is hardly overwhelming. FERC focuses on its failure to provide Western the necessary data and to adequately discuss and review that data with Western. Article 32 states that review should take into account 'substantial savings accruing to either party and applicable costs of construction and production, including changes therein and appropriate service charges, during the proceeding five years.' … Since the data at issue were in PG&E's possession, the question is whether PG&E adequately made it available to Western.[11]
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> … …
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> If Western had reasonably convenient access to all of the relevant information (and Western asserts no inconvenience), then PG&E has performed its duty of *disclosure*. [12]
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> … …
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> If lack of information is to be one of the grounds for PG&E's failure to meet the review requirement, FERC must make clear what information has not been made available. It has not done so.[13]
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> … …
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> We agree with PG&E that joint review does not require PG&E to sit down and look over Western's shoulder as it considers the information. It does not mean that every single point needs to be discussed. Rather, the information should be made available to Western, giving Western a chance to ask questions and raise concerns, to which, obviously, PG&E must respond clearly, forthrightly and completely. If Western expresses a reasonable desire to meet and discuss open questions, then joint review requires cooperation from PG&E. But issues need not be discussed unless a party sees a need.[14]

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[11] *Id*.

[12] *Id*. (emphasis in original).

[13] *Id*.

[14] *Id*. at 252.

C. 2004 Initial Decision

7. Following the remand, the Commission issued an order instituting proceedings[15] before the Presiding Judge to further consider the joint review issue. The *2004ID* applied the court's less stringent substantial compliance standard and concluded that PG&E substantially complied with the joint review requirement under Article 32 for transmission rates, RS (Reliability Service) rates, and SC (Scheduling Coordinator) costs.[16] The Presiding Judge was satisfied that PG&E's good faith disclosure, cooperation, and affording the opportunity for Western to follow up satisfied PG&E's obligations under Article 32. Specifically, the Presiding Judge stated that Western's own witness acknowledged that during negotiations there were many meetings and calls concerning possible modifications to the energy account. Also, the Presiding Judge noted that PG&E had announced its intention to adjust Western's transmission rates and add a charge for SC services if a global settlement could not be reached. The Presiding Judge also noted that Western did not establish that it sought cost-of-service information from PG&E that it did not receive or that there were no opportunities to obtain requested information in a confidential forum.[17]

8. In its initial brief before the Presiding Judge, the Northern California Power Agency (NCPA), a customer of Western, raised a new *Mobile-Sierra* issue. NCPA asserted that PG&E's original filing was barred under Article 32 because that Article requires a filing for a rate change under section 205 to become effective in five year increments, *i.e.*, only on April 1, 2001. The Presiding Judge rejected this new *Mobile-Sierra* argument as untimely made in a hearing on remand from appellate review, almost three years from its protest to the original rate filing. The Presiding Judge stated that NCPA should have litigated the effective date issue in the earlier proceedings and that, in any event, NCPA's argument lacked merit because the parties' past practice and prior Commission rate orders authorized an effective date other than April 1.[18]

9. Western, NCPA, and Commission Trial Staff filed briefs on exceptions to the *2004ID*, asserting that PG&E did not satisfy the joint review requirement of Article 32. PG&E filed a brief opposing exceptions. On July 2, 2004, NCPA filed a motion for expedition, urging the Commission to reject PG&E's filing on *Mobile-Sierra* grounds, to

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[15] *Pacific Gas and Electric Co*., 104 FERC ¶ 61,284 (2003).

[16] *2004ID* at P 43-45, 59, 60.

[17] *Id*. at P 43-45.

[18] *Id*. at P 55-58, 61 (*e.g*., effective dates of January 2, 1987, September 1, 1991).

avoid an unnecessary trial on increased transmission rates, scheduled to commence on June 7, 2005, before the Presiding Judge in Phase II of this docket. NCPA explains that Contract 2948A expires on December 30, 2004.

II. Discussion

A. Joint Review Requirement

10. The issue before us is whether the Presiding Judge correctly applied the Court's guidance, quoted above, in determining that PG&E substantially complied with the joint review requirement of Article 32. Because "[j]oint review is difficult to define and hard to measure,"[19] the court required the Commission to apply a "substantial compliance standard" to evaluate PG&E's conduct prior to its rate filing. As described by the court, joint review requires PG&E to provide access to and disclosure of the preceding five years of data in specified categories and cooperation in providing an opportunity for follow-up questions. As further described by the court, joint review does not require PG&E "to sit down and look over Western's shoulder as it considers the information"[20] and Western must state a "need" for discussion.[21]

11. Western contends that the Presiding Judge excused PG&E from complying with Article 32's joint review requirement. We disagree.

12. Under the Presiding Judge's analysis of joint review, which we affirm, PG&E, as the party in possession of information, was obligated to be responsive to Western's requests for information, and Western must have communicated its need for information. Considering these joint obligations, the Presiding Judge reasonably concluded that PG&E substantially complied with its joint review obligations through information exchanges and joint discussions regarding transmission rates, RS rates, and SC costs, but that Western, in seeking to prove the contrary, did not persuasively establish that it sought information that PG&E did not make available.

13. In particular, the Presiding Judge observed that Western failed to follow up on its January 4, 2001 e-mail asking PG&E certain cost of service questions about transmission rates, when PG&E responded that it would respond at a then-up coming technical conference; Western did not take up these questions at that conference or at a later

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[19] 326 F.3d at 251.

[20] *Id*. at 252.

[21] *Id*.

meeting or in a later phone call.[22] Similarly, the Presiding Judge reasonably found that Western did not offer explanations for its silence at various pre-filing opportunities to make its questions known.[23] As the Presiding Judge found, there were many meetings and calls negotiating possible modifications to the energy account at which PG&E announced its intention to adjust Western's transmission rates and to add a charge for SC services, if a global settlement could not be reached. The Presiding Judge properly concluded that joint review had occurred.[24]

14. Western and NCPA contend that there was no negotiating impasse and no good faith negotiations on energy and transmission rates before PG&E made its unilateral rate filing. Western asserts that it never had the opportunity to ask for a facility credit in the proposed regional/local transmission rate design (or a comparison of rate design methodologies), to seek unbundling of its existing contract rate with Western before applying separate RS charges, to validate PG&E's load ratio allocation of its SC costs, or to account for any SC or RS credits.

15. Before the rate filing, the parties had basic disagreements over transmission cost allocation and rate design issues that they were unable to settle, making use of the Commission's process appropriate under the contract to resolve Article 32.[25] The parties' inability to agree does not mean, contrary to Western's assertion, that Western was denied its joint review opportunity under Article 32 or that PG&E negotiated in bad faith. PG&E's proposed trade-offs between energy rate increases and transmission rate reductions did not amount to bad faith or preclude counter-proposals from Western.

16. The various exceptions identifying specific aspects of PG&E's conduct before the rate filing, (*i.e*., asserted limited informational exchanges, few meetings, narrow scope of meetings, failure to announce an official joint review session), do not show that PG&E failed to substantially comply with its obligation to engage in joint review under Article 32. Western itself mentions two meetings and the February 12, 2001 conference

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[22] *2004ID* at P 44.

[23] *Id*. at P 44-45.

[24] Id. at P 43.

[25] There wasn't much room for *joint* review when Western did not agree in a February 12, 2001 conference call to pay any amount for a proposed new transmission-related RS charge. Exhibit No. PGE-14.

call, noted above, at which transmission and transmission-related rates were discussed to some extent, although without the formality and depth that Western argues here that it would have preferred.[26]

17. Western also asserts that the Commission is bound to follow an earlier decision in which a judge had found that PG&E had not satisfied a strict compliance standard for joint review under Article 32 for an amendment of an RS tariff.[27] The court's more recent remand in this proceeding, however, repudiated a strict compliance standard for joint review.

18. Before hearings commenced, the Presiding Judge on December 17, 2003 issued an order denying Western's motion to compel discovery responses from PG&E as to meetings and discussions that may have occurred after the date of the original filing.[28] The Presiding Judge concluded that such evidence was irrelevant to joint review prior to the filing. Western argues that the Presiding Judge erred in denying its motion to permit discovery of negotiations that occurred after PGE made its original filing. The Presiding Judge's ruling properly limited the focus of the proceeding, as described by the remanding court, to PG&E's conduct before the rate filing was made. This exception is denied.

19. Accordingly, we find that the Presiding Judge's approach in addressing the remanded joint review issue for transmission rates comports with the court's guidance. We also find no error in the Presiding Judge's application of a substantial compliance standard to the record in this proceeding. The Commission denies all exceptions to the Presiding Judge's conclusion that PG&E substantially complied with its joint review responsibilities, and that his initial decision did not violate the *Mobile-Sierra* doctrine.

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[26] Western's Br. on Exc. at 17 (December 15, 2000 (changes in transmission and new SC and RS charges discussed), January 24-25, 2001 (changes in transmission and SC charge discussed), and a February 12, 2001 conference call on RS charges). *See also 2004ID* at P 43 (Western's witness testified that there were many meetings and calls on energy rates and that during negotiations PG&E announced its intention to adjust transmission rates and to add transmission-related charges).

[27] *Pacific Gas and Electric Co*., 95 FERC ¶ 63,022 at 65,212 (2001) (Docket No. ER00-2360-003), *aff'd,* 100 FERC ¶ 61,160 (2002).

[28] S*ee 2004ID* at P 5.

B. Effective Date of Original Filing

20. The *2004ID* rejected NCPA's argument that PG&E's original filing proposing changes in transmission and transmission-related rates was barred on *Mobile-Sierra* grounds because the effective date was different from April 1, 2001, which NCPA argued was the date required by Article 32.[29] The *2004ID* found that NCPA's argument, made after remand, was untimely and that, on the merits, was inconsistent with the parties' own and the Commission's interpretation of their contract. On exceptions, NCPA contends that Article 32 unambiguously required an April 1 effective date. We affirm the Presiding Judge's conclusion; we agree that the argument is untimely and that past cases have not required an April 1 effective date for protested PG&E rate change applications. There is no justification to now adopt such an interpretation of Article 32.

The Commission orders:

The *2004ID* is hereby affirmed, and all exceptions to that initial decision are hereby denied, as discussed in the body of this order.

By the Commission.

(S E A L)

Linda Mitry,
Deputy Secretary.

[29] *Id*. at P 46-58.