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BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application of Pacific Gas and Electric Company for Authority, Among Other Things, to Increase Rates and Charges for Electric and Gas Service Effective on January 1, 2020. (U39M)

Application 18-12-009

E-MAIL RULING GRANTING IN PART PACIFIC GAS AND ELECTRIC COMPANY'S MOTION FOR OFFICIAL NOTICE OF FACTS AND JOINT COMMUNITY CHOICE AGGREGATORS' MOTION TO FILE SUR-REPLY

Dated June 5, 2020, at San Francisco, California.

/s/ RAFAEL LIRAG

Rafael Lirag
Administrative Law Judge

/s/ ELAINE LAU

Elaine Lau
Administrative Law Judge

From: Lau, Elaine <elaine.lau@cpuc.ca.gov>

Sent: Friday, June 5, 2020 4:19 PM

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Subject: A.18-12-009, Email Ruling Granting in Part PG&E's Motion for Official Notice of Facts and JCCA's Motion to File Sur-Reply

To Parties in A.18-12-009,

Summary

This E-Mail Ruling grants in part and denies in part Pacific Gas and Electric Company (PG&E)'s motion for the Commission to take official notice of the customer count data contained in PG&E Corporation's and PG&E's Form 10-K Annual Reports (10-K Reports). We take official notice that PG&E's 10-K reports filed with the Securities and Exchange Commission contain customer count numbers and that these numbers align with the customer count numbers PG&E revised in its Reply Brief. The Commission will assign the proper evidentiary weight to these numbers in its review of PG&E's general rate case application.

This Ruling also grants in part and denies in part the motion of the East Bay Community Energy, Marin Clean Energy, Peninsula Clean Energy, Pioneer Community Energy, San Jose Clean Energy, and Sonoma Clean Power (collectively the Joint Community Choice Aggregators, or the JCCA) to file a Sur-Reply brief. We reject the Sur-Reply brief included in JCCA's motion but allow JCCA to file a revised Sur-Reply Brief by June 22, 2020, with a scope limited to addressing issues related to PG&E's revised customer count numbers.

Background

On January 27, 2020, PG&E filed its Reply Brief on Unresolved Issues (Reply Brief) in which it revised customer count numbers in response to arguments JCCA made in Opening Briefs. Concurrent with its Reply Brief, PG&E filed a motion (Motion for Official Notice of Facts) to request that the Commission take official notice of PG&E's total number of electric and gas customers contained in its 10-K Reports for the years 2013 through 2018. PG&E explains that the customer count numbers contained in the 10-K Reports support the revised customer counts it provided in Reply Brief. On February 11, 2020, JCCA filed a response to oppose PG&E's motion.

Concurrent with its response, JCCA filed a motion for leave to file a sur-reply brief (Motion to File Sur-Reply Brief) to respond to PG&E's Reply Brief. JCCA includes its Sur-Reply Brief as an attachment to its motion. PG&E filed a response to the JCCA's motion on February 13, 2020, arguing that the Sur-Reply Brief JCCA provided goes beyond a discussion of PG&E's revised customer count data.

PG&E's Motion for Official Notice of Facts

Parties' Arguments

In PG&E's Motion for Official Notice of Facts, PG&E requests that the Commission take official notice of the total number of electric and gas customers contained in its 10-K Reports. PG&E cites Rule 13.9, which states that "(o)fficial notice may be taken of such matters as may be judicially noticed by the courts of the State of California pursuant to the Evidence Code 450 et seq." PG&E also cites the California Evidence Code Section 452(h), which states that judicial notice may be taken of "(f)acts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy." PG&E argues that the 10-K Reports are public documents that it filed with the Securities and Exchange Commission (SEC), and that there is no reason to doubt the accuracy of the information contained in the SEC filings.

JCCA opposes PG&E's motion, arguing that 1) the motion unfairly gives PG&E advantage during the discovery process and takes away JCCA's ability to litigate its core positions with the updated data, and 2) the customer count data contained in the 10-K Reports do not rise to the level of "indisputable accuracy" as required for judicial notice under the Rules and California Evidence Code Section 452(h). JCCA notes that PG&E failed to correct the customer count data throughout the course of the proceeding, PG&E failed to object to the original data's admission into the evidentiary record, and PG&E corrected the data only at the very late stage of the proceeding, in Reply Briefs, right before the submission of the proceeding. JCCA argues that PG&E's late corrections prevent JCCA from using accurate utility data to support its core arguments. In addition, JCCA asserts that the customer count data contained in the 10-K Reports do not rise to the level of "indisputable accuracy" that the California Evidence Code Section 452(h) requires for judicial notice. Because PG&E has provided conflicting customer count data throughout the course of this proceeding, JCCA argues that the customer counts PG&E provided in the 10-K Reports are "reasonably subject to dispute" and are not "capable of immediate and accurate determination," as required by the California Evidence Code Section 452(h) for judicial notice. JCCA argues that even though the 10-K Reports are public filings provided by PG&E, PG&E can make inadvertent errors with the data, as evidenced by the five errata PG&E issued throughout the course of this proceeding.

Discussion

We take official notice that PG&E's 10-K Reports filed with the Securities and Exchange Commission contain customer count numbers and that these numbers align with the customer count numbers PG&E revised in its Reply Brief.

As provided by the Rules and California Evidence Code Section 452(h), the Commission may take judicial notice of facts that "are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy." However, we are not convinced that the customer count numbers provided by PG&E are "capable of immediate and accurate determination" and are supported by "sources of reasonably indisputable accuracy," given the erroneous customer count numbers PG&E provided in this proceeding and PG&E's failure to object to the admission of these erroneous customer count numbers into the evidentiary record. If the customer count numbers were "capable of immediate and accurate determination" and were of "indisputable accuracy," PG&E would have easily and accurately identified these numbers. PG&E's failure to timely provide accurate customer count numbers, as evidenced by the late correction of these erroneous numbers during Reply Briefs, demonstrates that the customer count numbers are not "capable of immediate and accurate determination" and are not "indisputably accurate."

However, as shown in the 10-K Reports PG&E attached to its motion, it is a fact "that (is) not reasonably subject to dispute and (is) capable of immediate and accurate determination by resort to

sources of reasonably indisputable accuracy” that the customer count data PG&E revised in its Reply Brief align with the customer count data contained in its 10-K Reports. It is indisputable that the revised customer count numbers align with those contained in the 10-K Reports. We are also capable of immediately and accurately determining whether the customer count data contained in the 10-K Reports align with PG&E’s revised numbers. Thus, we take official notice that the customer count data in its 10-K Reports for the years 2013 through 2018 align with the customer count data PG&E revised in Reply Briefs but will assign the proper evidentiary weight to these data as part of our review of PG&E’s general rate case application.

JCCA’s Motion to File Sur-Reply Brief

Parties’ Arguments

In its motion, JCCA requests an opportunity to file a Sur-Reply Brief in response to PG&E’s Reply Brief. JCCA argues that, because PG&E chose not to file an Opening Brief but instead chose to address their legal arguments against JCCA’s proposals in Reply Briefs, JCCA does not have the opportunity to rebut PG&E’s arguments and is therefore unfairly disadvantaged. While JCCA opposes PG&E’s motion to take official notice of the revised customer count data on the basis of PG&E’s legal arguments, JCCA supports using the most accurate data in the disposition of this proceeding and requests an opportunity to respond to the arguments PG&E made in Reply Briefs. JCCA includes its Sur-Reply Brief as an attachment to its motion.

In PG&E’s response to JCCA’s motion, PG&E argues that the Sur-Reply JCCA provided goes beyond a discussion of the revised customer count data. PG&E acknowledges that the late correction of the erroneous customer count data may disadvantage JCCA, but notes that it is important to correct the record. PG&E recommends that JCCA be provided an opportunity to file a sur-reply brief that is limited to addressing the revised customer count data. PG&E asserts that JCCA was not prejudiced by PG&E’s election not to file an opening brief, and that PG&E’s election to not file an opening brief does not warrant JCCA to file a Sur-Reply Brief on PG&E’s Reply Brief beyond the issues related to PG&E’s revised customer count data.

Discussion

We grant JCCA an opportunity to file a Sur-Reply Brief, but we limit the Sur-Reply Brief to issues related to the customer count data PG&E revised in its Reply Brief. Even though PG&E failed to provide accurate customer count data throughout the course of the proceeding and failed to timely correct its erroneous data, we agree with PG&E and JCCA that having the most accurate data is important for the proper disposition of this proceeding. PG&E’s lateness in correcting its data, specifically in its Reply Brief, unfairly disadvantages JCCA by taking away JCCA’s opportunity to respond to the corrected data and to support its litigated positions in light of the corrected data. Thus, we grant JCCA an opportunity to file a Sur-Reply Brief but only to respond to the issues related to the customer count data that PG&E corrected in its Reply Brief.

While we agree that JCCA should be afforded an opportunity to respond to PG&E’s revised numbers, we are not convinced that JCCA should be able to respond to all the arguments PG&E raised in its Reply Brief, beyond the scope of the updated customer counts data. We are not convinced that JCCA is prejudiced by PG&E’s election not to file an Opening Brief to address the arguments JCCA presented in testimony. PG&E’s Reply Brief addresses the arguments JCCA raised in its Opening Brief and does not introduce any new arguments. Thus, JCCA should not be given any additional opportunity to respond to the counterarguments PG&E raised in Reply Briefs in response to JCCA’s Opening Brief.

The Sur-Reply JCCA attached to its Motion to File Sur-Reply Brief contains responses to PG&E’s Reply Brief beyond the issues related to PG&E’s revised customer count data. Thus, we reject JCCA’s

Sur-Reply Brief that JCCA attached to its served and filed motion, and direct JCCA to file and serve a revised Sur-Reply by June 22, 2020, with the response limited only to issues related to PG&E's corrected customer count data. The scope of JCCA's Sur-Reply being limited only to issues related to the corrected data, we deny PG&E's request to respond to JCCA's Sur-Reply Brief.

IT IS RULED:

1. Official notice is taken of the fact that the customer count numbers contained in PG&E's and PG&E's Form 10-K Annual Reports align with the customer count numbers PG&E revised in Reply Briefs.
2. JCCA's motion to file a Sur-Reply Brief is granted, but the scope of the Sur-Reply Brief is limited to the issues addressing the customer count data PG&E revised in its Reply Brief.
3. JCCA shall file a modified Sur-Reply Brief by June 22, 2020, with a scope limited to the issues addressing PG&E's revised customer count data.
4. PG&E's request to respond to JCCA's Sur-Reply Brief is denied.

The Docket Office Shall Formally File This Ruling.

Elaine Lau and Rafael Lirag

Administrative Law Judges

California Public Utilities Commission