

32. *Pacific Gas & Electric*

85 Cal. App. 4th 86 (2000), 102 Cal. Rptr. 2d 20

The Court of Appeal (First District, Division 3) reversed a Commission order directing PG&E to issue refunds to customers equal to 40 percent of PG&E's cost of postage for customer bills that included PG&E advocacy material. The Court held that a statute (Section 453(d)) proscribing such advocacy in bill inserts was unconstitutional on its face as violative of the First Amendment. The Court rejected the Commission's argument that the refunds were intended to prevent ratepayer subsidization of utility speech. The Court noted that the Commission never reached the "subsidization" issue in the Commission decision under review. Accordingly, it refused to permit the Commission to employ a newly discovered rationale during appellate review. Federal courts will also refuse to consider an agency rationale advanced for the first time on appeal. *SCE v. Chenery Corp.* (1943) 318 U.S. 80, 94-95. (But see, *Morgan Stanley v. PUD of Snohomish County* (June 26, 2008) 128 S.Ct. at 2733, 2008 U.S. Lexis 5266.)