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Decision 90-12-019 December 6, 1990

BEFORE THE PUBLIC UTILITIES COMMISS OF THE STATE OF CALIFORNIA

In the Matter of the Applicati of Southern California Gas C for authority to revise its effective October 1, 1989, i annual cost allocation proceed

(ORIGINAL)

pplication 89-04-021
led April 15, 1989)

And Related Matters

pplication 89-05-006
Application 90-02-027
Application 90-04-029

OPINION

This decision addresses the issue of monitoring the efficiency of cogeneration customers for purposes of determining whether they qualify for gas rate discounts offered by San Diego Gas & Electric Company (SDG&E) and Southern California Gas Company (SoCal). The decision states the Commission's intent to adopt a settlement filed by several parties to the proceeding if the parties will modify several provisions of the settlement. Specifically, the settlement as proposed should be modified to eliminate provisions which would prohibit Commission staff and others from gaining access to cogenerator data and provisions which would relieve the utilities of tariff enforcement obligations.

I. Procedural Background

The issue of monitoring cogenerators' efficiency was initially raised in SDG&E and SoCal's consolidated annual cost allocation proceedings (ACAP). SDG&E and the Division of Ratepayer Advocates (DRA) argued that cogenerators which do not operate

according to certain efficiency standards should not receive discounts on their gas purchases from the utilities. The Commission has not heretofore addressed the issue in a formal proceeding. In Decision (D.) 90-01-015, we agreed to consider the issue in Phase II of these ACAP proceedings.

This matter was set for hearing in April, 1990. On the first day of hearing, SDG&E moved to defer hearings on the subject of efficiency standards in order that the parties might attempt to settle the matter. The assigned administrative law judge (ALJ) granted the motion.

On July 13, 1990, SDG&E filed a Motion for Approval of Proposed Stipulation and Settlement Agreement (Settlement) on the topic of monitoring cogenerator efficiency for the purpose of determining appropriate gas rates. The Settlement is signed by SDG&E, SoCal, California Cogeneration Council (CCC), Cogenerators of Southern California, University Energy, Onsite Energy, Pacific Energen, and Kelco Division of Merck & Co., Inc.

Parties filed comments on the Settlement. DRA, the Department of General Services (DGS), and Southern California Edison Company (Edison) opposed the Settlement. A prehearing conference was held to determine whether matters addressed in the Settlement should be set for hearing, as requested by DRA. The ALJ ruled that the contested issues raised by DRA could be addressed by the Commission without hearings.

II. The Settlement Provisions

The Settlement, which is attached as Appendix A, establishes that in order for cogenerators to be eligible for the cogeneration gas rate, which is discounted, the cogenerator must

meet the efficiency requirements set forth in Public Utilities Code (Code) Section 218.5.[1]

Operating data to determine eligibility would be provided to a "third party," described as a disinterested entity which possesses the technical expertise to determine cogenerator efficiency. The third party must appear on a pre-approved list of acceptable third parties developed through a cooperative process to be concluded by January 1, 1991, the implementation date of the program. The third party would certify that cogenerator efficiency data was collected using proper techniques and that the data collected is consistent with those techniques.

Under the terms of the Settlement, the utilities would have the right to reassess the determination made by a third party, using the services of another third party.

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1 Section 218.5 provides:

"'Cogeneration' means the sequential use of energy for the production of electrical and useful thermal energy. The sequence can be thermal use followed by power production or the reverse, subject to the following standards:

"(a) At least five percent of the facility's total annual energy output shall be in the form of useful thermal energy.

"(b) Where useful thermal energy follows power productions, the useful annual power output plus one-half the useful annual thermal energy output equals not less than 42.5 percent of any natural gas and oil energy input."

III. Discussion

Several issues were raised by parties commenting on the Settlement:

- o Confidential treatment of operational information;
- o The utilities' liability for tariff enforcement;
- o Treatment of facilities which are not equipped with measuring devices;
- o Jurisdictional issues; and
- o Applicability to Edison.

A. The Utilities' Liability For Tariff Enforcement

DRA expresses concern that the terms of the Settlement permit the utilities to "opt out" of the regulatory framework which requires them to enforce tariffs. According to DRA, the Settlement does so by providing that utilities who rely on third party information cannot be placed at risk for rate disallowances. The Settlement also explicitly provides that the provisions of the Settlement need not be strictly enforced.

DRA refers to two sections of the Settlement. Section 14 states:

> "The utility has the right to rely on the determination made by the third party as described in this Agreement. The utility which relies on such determination shall not be at risk for rate disallowance as a result of such reliance."

Section 11 of the Settlement provides:

> "The collection, reporting and administration provisions of this Agreement represent maximum requirements. The utility may, in the administration of its tariff, impose such less

stringent requirements as it deems appropriate in the prudent exercise of its discretion."

Responding to DRA's claim that the Settlement relieve the utilities from tariff enforcement, SDG&E states the Settlement does not exempt the utilities from tariff enforcement but permits them to use third party analysis in their enforcement efforts. SoCal and CCC make similar comments. CCC adds that the utilities will still be able to provide compliance information to the Commission; under the terms of the Settlement, however, the information would be in the form of reports from third party auditors.

Discussion. Sections 11 and 14 of the Settlement concern us. In effect, they amount to near complete abandonment of tariff administration while protecting the utilities from any risk associated with consequential costs to ratepayers.

Section 11 would permit the utilities to use their "discretion" in determining whether to apply the standards set forth by the terms of the Settlement. Code Section 532 requires the utilities to adhere to their tariffs and prohibits them from charging any rate or furnishing service except as set forth in tariffs. It does not permit the utilities to use discretion in the administration of their tariffs.

In determining appropriate tariff rates, the utilities must adhere to certain rules and standards. (Trammell v. Western Union 57 Cal. App. 3rd. 538, 549.) The purpose of this part of this proceeding is to adopt such rules. The Settlement asks us to adopt certain standards and then allow the utilities to determine whether or not to adhere to them. Section 11 of the Settlement is unlawful under Section 532 because it permits the utilities to determine the extent to which they will enforce their tariffs.

By permitting the utilities to use discretion in administering their tariffs, Section 11 also appears to open the door for utilities to differentiate between customers. Section 453

does not permit the utilities to distinguish between customers in the application of tariff terms:

> "No public utility shall, as to rates, charges, service, facilities, or in any other respect, make or grant any preference or advantage to any corporation or person or subject any corporation or person to any prejudice or disadvantage"

If the utilities were able to apply tariff enforcement efforts selectively, they would be granting an unlawful preference to some customers and imposing an unlawful disadvantage on others. (Empire West v. Southern California Gas Company (1974) 12 Cal. 3rd. 805, 908.) The Settlement provision which appears to permit such selective enforcement is contrary to Code Section 453 and therefore unlawful.

Section 14 poses related legal problems. The section would relieve the utilities from all regulatory risk when they rely on information provided by third party experts. As we have said, cogenerators' operational characteristics affect the payments made to gas utilities which in turn affect the revenue requirement which must be recovered from other ratepayers in rates. The utility has the burden to show that rates are just and reasonable under Section 454 (California Mutual Water Companies Association vs. Public Utilities Commission of Cal. (1955) 287 P. 2d 748, Pacific Lighting Gas Supply Co. (1962) 59 Cal. PUC 610).

A recent Commission decision addresses a circumstance similar to the one we consider today. In D.90-02-044, SoCal's most recent reasonableness review, we found that SoCal's shareholders, not ratepayers, should be at risk for backbilled amounts which resulted from SoCal's failure to strictly enforce its tariffs. In that case, like here, customer facilities needed to meet certain operating standards in order for the customer to qualify for reduced rates. Because the utility did not enforce its tariff by undertaking site inspections, customers received unwarranted rate

discounts. Our conclusion in that case that shareholders should be liable for associated revenue shortfalls was based on our view that Sections 532 and 453 required the utilities administer and enforce their tariffs.

The Settlement filed in this proceeding would establish a regulatory scheme under which the utilities would not be able to demonstrate the reasonableness of rates (to non-cogenerator customers) because the utilities would have no access to information on which it would base cogenerator gas rates. As a matter of law, we cannot approve Section 14 of the Settlement. As a matter of policy, we would not approve a proposal, such as that included in the Settlement, which relieves the utilities of enforcing tariffs while transferring all associated risk to ratepayers.

B. Confidential Treatment of Operational Information

Section 7.c of the Settlement provides that:

> "...unless the cogenerator provides its prior written consent, the Third Party shall not disclose to the utility or any other person or entity, (including government or regulatory agencies) data supplied to it under cover of confidentiality or efficiencies calculated by it, including source data."

In sum, the information which cogenerators would provide to third-party "certifiers" would not be made available to the utilities, the Commission, or intervenors in Commission proceedings.

Certainly there are times to be concerned about full public disclosure of proprietary data. Where true trade secrets are at issue, the Commission has employed appropriate procedures to prevent disclosure of such secrets to those who could gain a competitive advantage from such information. The Settlement, however, does not rely upon such mechanisms. Instead, the Settlement would restrict access to all information, whether or not

it is truly proprietary, by all other parties, whether or not such disclosure would cause competitive harm. We find such terms to be too broad and too restrictive.

The parties to the Settlement have offered no justification for restricting access to such information from the Commission and its staff. The Commission is not a competitor, and no competitive harm can arise from our access to the information. Section 583 offers adequate protection for confidential treatment of information provided to the Commission by the utilities:

> "No information furnished to the commission by a public utility...except those matters specifically required to be open to public inspection by this part, shall be open to public inspection or made public except on order of the commission, or by the commission or a commissioner in the course of a hearing or proceeding. Any present or former officer or employee of the commission who divulges any such information is guilty of a misdemeanor."

Nor have the parties to the Settlement shown cause for withholding information from intervenors who are not competitors.

Cogenerators are eligible to receive discounted gas rates only if they can demonstrate that their operations comply with tariffed provisions. Without such a demonstration, we would be in the position of finding that the rates to other utility customers are automatically just and reasonable based on the assertions of third parties over which we have no authority. Such a practice would be an abdication of our duty to set rates which are just and reasonable.

In summary, we can understand why cogenerators would not want a utility to review its operating data and it is reasonable to have such evaluations undertaken, in the first instance, by a third party. However, the data submitted to such third parties and the results of such analysis must be subject to review and inspection by the Commission and its staff.

The Commission and its staff regularly work with sensitive information, at times valuable to competitors of parties in proceedings. We have a legal obligation to protect such information, and have procedures to ensure its protection. We have an established process whereby requests for access to such information are entertained, considering the information's relevance to the scope and issues before the Commission in a particular proceeding as well as its status as necessarily confidential. If access is granted on a limited basis, an appropriate protective order is issued. In our experience, this process has proven workable and effective. To the extent parties other than staff wish to use cogenerator operating data, they can request access to it of the presiding ALJ.

C. Treatment of Facilities Which Are Not Equipped With Measuring Devices

DGS opposes the Settlement because it would require cogenerators to incur substantial costs. Large cogeneration facilities would be required to install BTU meters, and smaller ones would be required to conduct a monthly test of useful thermal output. DGS states it has no authority to appropriate funds for such a purpose and would not be able to incur these expenses until and unless it received an appropriation from the Legislature.

DGS argues it is up to the utilities, not customers, to enforce tariffs, and that the Settlement proposes a new way of handling tariff enforcement in order to provide confidentiality to cogenerators which DGS does not require. It proposes that the utilities undertake the testing required to permit tariff compliance for government facilities. DGS states it would forgo the confidentiality protections available to cogenerators in the Settlement.

SDG&E argues that government agencies should not be treated differently from other customers and that if they choose

not to spend money to ascertain tariff compliance, they should not be eligible for the tariff.

Discussion. As discussed previously, Section 532 requires the utilities to charge only the rates set forth in their tariffs. The utilities have a duty to enforce their tariffs, a duty which they cannot delegate to unregulated third parties or customers. In this case, we have stated that cogenerators must make available to the utilities operational information if they seek discounted gas rates. They need not, however, take on responsibilities which by law belong to the utilities.

The Settlement parties bargained for an alternative to traditional utility tariff enforcement: cogenerators would install metering equipment and self-test in trade for retaining the confidentiality of operational information. Such alternative enforcement arrangements may be reasonable under certain circumstances. In this case, however, we find that the benefit which would accrue to cogenerators--confidentiality--would not be in the public interest.

We would not require unwilling customers to install their own metering equipment to relieve a utility from tariff enforcement efforts without a clear showing of the need for such a requirement and the costs and benefits associated with it. Absent such a showing, cogeneration customers should have the option to be subject to traditional utility tariff enforcement efforts, which include utility site inspections and testing. We agree with SDG&E that government customers should not be treated differently from other customers in this respect.

D. Jurisdictional Issues

Bonneville Pacific Corporation, Hadson Power Systems, Inc., and Independent Energy Producers Association warn that the Settlement should not be considered a mechanism for determining qualifying facility (QF) status, and raise several jurisdictional

issues that relate to the payments utilities make to cogenerators for energy.

The Settlement and this decision do not address QF status, federal rules, or payments utilities make to cogenerators for the energy they produce. We consider only California gas rates and tariffs.

E. Applicability to Edison

Edison argues that the data received by SoCal under the terms of the Settlement should be shared with Edison for use in its monitoring efforts. In this context, Edison opposes the confidentiality provisions of the Settlement and the requirement that third parties are needed to secure the confidentiality of cogenerator operating information.

SDG&E and CCC believe Edison should raise the issue of electric tariff compliance in the hearings scheduled on that topic rather than in its comments on the Settlement. Similarly, SoCal argues that Edison has no standing to recommend the Settlement provisions apply to it because the Settlement topics are limited to gas tariff matters and Edison has no gas tariffs. SoCal is concerned that if it is required to divulge proprietary customer information to Edison, it may be civilly liable if customers are consequently placed at a commercial disadvantage. SoCal is also concerned that its reputation among its customers for maintaining confidentiality be not be placed in jeopardy.

The Settlement does not address compliance efforts for purposes of determining energy payments to cogenerators. This decision will not resolve that issue because it involves distinct jurisdictional issues regarding state and federal rules. The issue of monitoring cogenerator efficiency for setting energy payments is being considered apart from the Settlement in these consolidated proceedings. Edison's concerns regarding confidentiality provisions of the Settlement are addressed in Section III.A.

IV. Conclusion

Cogenerators which do not meet efficiency standards should not receive gas rate discounts. Rate discounts for cogenerators are designed to promote efficient energy production and to the extent they are provided, other customers must pay higher rates. Because of these effects on other rates, gas discounts should be provided only to customers which are engaged in "cogeneration," according to the efficiency standards defined for cogeneration in Section 218.5.

We do not adopt the Settlement proposed by the gas utilities and cogenerators. While it includes elements which may facilitate better tariff enforcement, it does not adequately protect the interests of utility ratepayers. In essence, the Settlement is a side agreement between utilities and certain QFs to transfer cost and risk to third parties whose interests are not represented among the Settlement signatories.

This decision provides legal and policy guidance to the parties regarding our expectations for resolving Settlement issues. Pursuant to Rule 51.7, we invite the parties to renegotiate the Settlement terms which we have found are not in the public interest.

Finally, we comment that our consideration of this matter in this proceeding does not relieve the utilities from the duty to enforce their tariffs pursuant to the Code.

We have issued the ALJ's proposed decision for public comment even though the decision is not subject to Code Section 311. We do so because the parties for the proceeding did not have an opportunity to brief the issues.

Findings of Fact

1. The issue of monitoring cogenerators' operational efficiency for purposes of billing for natural gas was raised in the consolidated ACAP proceedings of SDG&E and Socal, and in a separate application filed by SDG&E.

2. SDG&E, on behalf of several parties, filed on July 13, 1990, a Motion For Approval of Proposed Stipulation and Settlement Agreement regarding cogenerators' operational efficiency.

3. Gas rates paid by cogenerators affect the revenue requirement which must be recovered from other customers. Gas rates paid by cogenerators thereby affect the rates of other customers.

4. Code Section 218.5 defines "cogeneration" in terms of specified efficiency standards.

5. The Settlement proposes that cogenerators' operating information be considered confidential, and not made available to the utilities, the Commission, or intervenors to Commission proceedings.

6. Cogenerator operational information might be required in a Commission proceeding to determine the reasonableness of utility tariff enforcement and therefore utility rates to non-cogenerator customers.

7. Third party experts, which would audit cogenerator efficiency under the terms of the Settlement, are not subject to Commission jurisdiction.

8. Section 11 of the Settlement would permit the utilities to use discretion in determining the extent to which they would enforce tariffs and rules pertaining to cogenerators' gas rates.

9. Section 14 of the Settlement would relieve the utility of the requirement to demonstrate that its rates are just and reasonable and transfer to utility customers the risks associated with enforcement of tariffs pertaining to cogenerators' gas rates.

10. The Settlement applies to monitoring cogeneration efficiency for purposes of enforcing gas tariffs only.

Conclusions of Law

1. Section 583 protects confidential information provided to the Commission.

2. Section 11 of the Settlement is contrary to Code Sections 532 and 453.

3. Section 14 of the Settlement is contrary to Code Section 454.

4. The Commission should deny SDG&E's Motion For Approval of Proposed Stipulation and Settlement Agreement filed July 13, 1990.

O R D E R

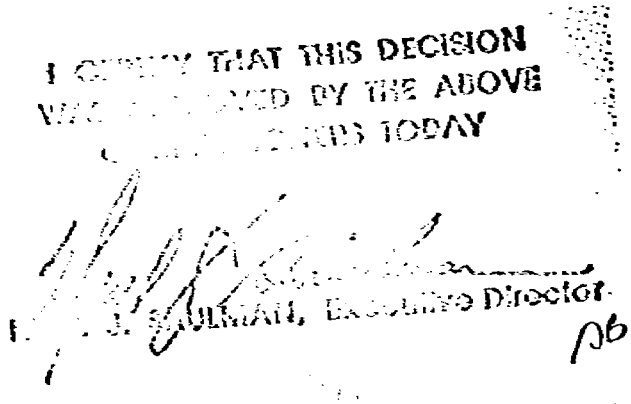
IT IS ORDERED that:

1. San Diego Gas & Electric Company's Motion For Approval of Proposed Stipulation and Settlement Agreement is denied.

2. This proceeding will remain open to provide an opportunity for the parties to reconsider the Settlement provisions consistent with this decision, and for consideration of Southern California Edison Company's application to establish a cogeneration monitoring program for purposes of determining energy payments to cogenerators.

This order is effective today.

Dated December 6, 1990, at San Francisco, California.



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