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Decision 92-01-037 January 10, 1992

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

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| Order Instituting Investigation on the Commission's own motion to develop a policy of non-discriminatory access to electricity transmission services for non-utility power producers. | ORIGINAL<br>I.90-09-050<br>(Filed September 25, 1990) |

## ORDER DENYING REHEARING AND MODIFYING DECISION 91-10-048

San Diego Gas & Electric Company (SDG&E) has filed an application for rehearing and stay of Decision (D.) 91-10-048 on grounds of legal error. We have considered all the allegations of error in the application and are of the opinion that good cause for rehearing has not been shown. Accordingly, we deny the application, although we will modify D.91-10-048 to clarify it.

SDG&E's application for rehearing contends that D.91-10-048 contains inadequate findings and conclusions and thus violates Public Utilities (PU) Code § 1705; is not based on an evidentiary record; fails to justify the nondiscriminatory access policy; ignores the impact of federal jurisdiction and pending legislation; fails to prove that transmission facilities are "bottleneck" monopolies; and may unduly discriminate against SDG&E by requiring its customers to confer uncompensated benefits on others through open access. SDG&E also argues against the decision's policies, claiming they will not meet the goals of the investigation.

The Geothermal Resources Association and Independent Energy Producers Association (GRA/IEP) and the Northern California Power Agency, Power Agency of California, and City of Anaheim (Municipal Utilities) filed responses in opposition to SDG&E's application for rehearing and stay.

D.91-10-048 became effective October 23, 1991. Since SDG&E's application and request for stay was filed November 25,

1991, it did not automatically stay the decision pursuant to Rule 86 of the Commission's Rules of Practice and Procedure and PU Code § 1733. SDG&E did not give specific grounds for its stay request. From the general tone of its application we may assume the utility fears its ratepayers will be harmed by the decision.

SDG&E's motion for a stay was denied on December 4, 1991 by an assigned Commissioner's ruling issued by President Eckert which affirmed the schedule set forth in the decision. The ruling noted that the decision in itself does not affect ratepayers, and that whether SDG&E's fears have substance depends on the outcome of the negotiating conference and subsequent actions taken by the Commission and the Federal Energy Regulatory Commission (FERC). This ruling is correct, and is hereby affirmed.

On December 9, 1991, SDG&E filed a motion to accept late filed comments regarding D.91-10-048, claiming that reproduction problems prevented a timely filing on December 6, 1991. For good cause shown, and because no other party will be harmed thereby, we grant SDG&E's motion to accept late filed comments.

SDG&E's application for rehearing is premature. As the assigned Commissioner's ruling, GRA/IEP, and the Municipal Utilities point out, D.91-10-048 does not actually adopt a transmission access program; rather, it sets the stage for a round of comments responding to the decision, a negotiating conference, and evidentiary hearings. D.91-10-048 makes it clear that we intend to listen to the parties further before adopting a final program. Thus, SDG&E still has an opportunity to argue against the Commission's factual assumptions and policy directions.

SDG&E's argument that D.91-10-048 does not contain adequate findings of fact and conclusions of law overlooks the fact that the decision serves as a basis for further discussion rather than as a final description of a transmission access program. The single finding of fact that "[t]he foregoing goals

and policies constitute a reasonable basis from which the Commission can proceed in this investigation," and the conclusion of law that "[t]he parties should consider the goals and policies articulated above, and should file comments responding to today's decision," reflect the interim nature of D.91-10-048. We do not commit legal error by refraining from adopting findings and conclusions until we decide what program to adopt.

Contrary to SDG&E's apparent assumption, we are not bound to hold hearings in rulemaking proceeding. I.90-09-050 represents an appropriate exercise of our quasi-legislative regulatory authority and therefore does not require a public hearing, as would a contested proceeding of an adjudicatory nature. (See, e.g., Wood v. Public Utilities Commission, 4 C.3d 288 at 292.) In this proceeding, twenty four parties submitted comments which we carefully reviewed before issuing D.91-10-048. This is a common procedure for legislative type investigations at the Commission, and provides the necessary due process. In this proceeding, however, we choose to hold evidentiary hearings once the contested issues in the proceeding are narrowed by settlement negotiations.

SDG&E incorrectly asserts that because not all discrimination is unlawful, we must justify our reasons for choosing a nondiscriminatory approach to transmission access. It also incorrectly asserts that we failed to do so.

PU Code §§ 453 (a) and 532 prohibit utilities from granting preferences or subjecting persons or corporations to prejudice or disadvantage. PU Code § 453 (a) states that "[n]o 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." PU Code § 532 states, in pertinent part, that no utility shall extend to any corporation or person any form of contract, agreement, rule, regulation, facility or privilege except such as are regularly and uniformly extended to all corporations and persons.

These sections have been interpreted to allow different treatment of various classes of customers, suppliers, or employees so long as the classifications and differences in treatment have a rational and lawful basis. However, treating those in the same class differently constitutes unlawful "undue" discrimination. (See, e.g., Gay Law Students Assn. v. Pacific Telephone and Telegraph Company, 24 C. 3d 458, 475 (1979).)

Because there is a statutory presumption that everyone must be treated equally, there is no need for us to justify a policy of nondiscriminatory access. SDG&E is free, however, to argue that different classes of wheeling customers should be treated differently. As D.91-10-048 explains:

> "A key element to our transmission access program is that it be nondiscriminatory. This means that a wheeling utility may not discriminate unreasonably on the basis of the source of the power to be wheeled. This nondiscrimination principle is broad in scope. It applies to both QF-generated power and to power generated by other NUGs [non-utility generators]...
>
> Historically, public utilities have always been required to provide service on a nondiscriminatory basis. This is a cornerstone of public utility law and is also essential to our present goals promote competitive generation and level the playing field in preparation for all-source bidding....
>
> The principle of nondiscrimination does not require identical wheeling terms and conditions for all power; not all "discrimination" is unreasonable discrimination... However, we must ensure that different pricing does not result from differences in bargaining power. Thus, a wheeling utility must show that any disparate treatment is reasonably necessary under the circumstances, and is also consistent with the principles of our transmission access program." (D.91-10-048 at 22-23.)

D.91-10-048 accurately reflects the nondiscrimination provisions of the PU Code. We will clarify D.91-10-048 by adding citations to these provisions.

SDG&E argues that D.91-10-048 fails to address potential discrepancies between the decision's policies and those of the Federal Energy Regulatory Commission (FERC), fails to address potential problems arising from the fact that key players, such as government owned utilities, are not subject to Commission or FERC jurisdiction, and fails to recognize the wisdom of delaying implementation of a transmission access program in view of the fact that FERC, the federal government, and the utilities themselves, are developing legislation, regulations, or other solutions to the wheeling issue. SDG&E states, for example, that D.91-10-048 suggests that wheeling tariffs should be nondiscriminatory at the same time it suggests it initially intends to benefit only QFs, and argues that FERC is unlikely to allow a California utility to limit its open access tariff to QFs.

SDG&E misreads the decision. Contrary to SDG&E's allegation of QF favoritism, the decision expresses its desire to lift a current bidding limitation which favors QFs if FERC approves tariffs substantially consistent with the nondiscriminatory transmission access policies set forth in the decision. D.91-10-048 indicates that in the future nonutility generators other than QFs may also compete in the generation market, and that if transmission access tariffs approved by FERC "are substantially consistent with the principles we have endorsed, that would justify commensurate opening of our competitive resource solicitation process to additional sellers of electricity besides QFs. [footnote omitted] " (Id. at 13.) The decision further emphasizes the necessity of nondiscriminatory tariffs, then states that "[i]n other words, our move to "all-source bidding" is directly linked to relieving the transmission bottleneck for all sources. We hope that this transition can be made in a single leap." (Id.)

In addition, the decision specifically addresses SDG&E's concerns regarding jurisdictional conflicts:

> "[w]e are fully committed to working with FERC to accomplish our program, which we think is broadly consistent with FERC's own policies. To that end, we will cooperate with FERC, both in federal/state workshops and in formal proceedings, to promote mutual understanding and acknowledgment of where each agency is heading. We think a jurisdictional tug-of-war can and must be avoided to make real progress on electric transmission issues." (Id., at 23-24.)

With regard to SDG&E's complaint that D.91-10-048 does not address the relationship between its transmission access policies and municipal utilities, we candidly admitted we have no prescription for reciprocal commitments between investor owned and municipally owned utilities, and noted that this is an important issue to be addressed in the next phase of this proceeding.

As to SDGE's concerns that the D.91-10-048 did not consider pending legislation or cooperative utility transmission access programs; we think that if we delayed our programs because legislation or industry action was imminent, little would get done. We can make adjustments if and when legislation is enacted.

SDG&E's claim that D.91-10-048 fails to prove that transmission lines are a bottleneck monopoly within the meaning of federal anti-trust law is irrelevant. We are not reviewing potential anti-trust law violations, but rather regulating utilities subject to our jurisdiction. We need not make specific findings regarding the monopoly characteristics of each aspect of a regulated utility's operations before we exercise our jurisdiction. SDG&E's fear that D.91-10-048's policies may unduly discriminate against SDG&E by reducing its access to economical purchased power brought in over the utility's extensive transmission system is unrealistic. After discussing

potential conflicts between the interests of ratepayers of wheeling utilities and the ratepayers of utilities purchasing wheeling services, the decision states that: "[w]e stress, above all, that our transmission access program starts with the proposition that the native load customers of the wheeling utility will always have their firm electricity needs served reliably. Those needs take priority over wheeling service." (D.91-10-048 at 18-19.) It also states that "[w]e emphasize that coordination does not require any transmission-owning entity to surrender its planning autonomy." (Id., at 43.) In any event, SDG&E may argue its case at the negotiating conference and subsequent hearings.

Having addressed SDG&E's allegations of legal error, we move briefly to its policy concerns. Basically, SDG&E thinks that implementation of an open access transmission program as outlined in D.91-10-048 will allow others access to SDG&E's transmission capacity to the detriment of the utility and its customers. It prefers current access policies. Again, SDG&E is free to raise these issues at the conference and hearings.

Having considered each and every issue raised by SDG&E, we conclude that rehearing of D.91-10-048 should be denied.

**THEREFORE**, for good cause appearing,

**IT IS HEREBY ORDERED** that:

1. Decision 91-10-048 is modified as follows:

a. The citation "(Public Utilities (PU) Code §§ 453 and 532.)" is inserted after the first sentence of the second full paragraph on page 22 of D.91-10-048.

b. The citation "(Gay Law Students Assn. v. Pacific Telephone and Telegraph Company, 24 C. 3d 458, 475 (1979).)" is inserted after the first sentence in the last paragraph on page 22 of D.91-10-048.

2. SDG&E's motion for acceptance of its late filed comments is granted.

3. Rehearing of Decision 91-10-048, as modified hereby, is denied.

4. The Executive Director shall serve a copy of this decision on the parties list in Appendix A (List of Appearances" to Decision 91-10-048.

This order is effective today.

Dated January 10, 1992, at San Francisco, California.

DANIEL Wm. FESSLER
President
JOHN B. OHANIAN
PATRICIA M. ECKERT
NORMAN D. SHUMWAY
Commissioners

I CERTIFY THAT THIS DECISION WAS APPROVED BY THE ABOVE COMMISSIONERS TODAY

NEAL J. SHULMAN, Executive Director