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Decision 95-11-026 November 8, 1995

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Summary

The ALJ's order solicited parties to brief whether Code Section 821 applies to the proposed transaction and ordered Edison to file a brief on or before 8/1/95. Edison wishes to transfer personnel and assets from an energy efficiency program (ENVEST) to an unregulated affiliate to be formed for the purpose by Edison's parent, SCEcorp. Edison asks either that (a) we find that the personnel and property involved in the ENVEST program are not subject to Public Utilities (PU) Code Section 851, or (b) we authorize the transfer. We cannot conclude that the proposed transfer is not subject to PU Code Section 851 as a matter of law, and we will remand this application to the assigned administrative law judge (ALJ) for further proceedings consistent with this opinion.

Procedural Background

Edison filed its application on May 22, 1995. It was noticed in the Daily Calendar on June 9, 1995. The Division of Ratepayer Advocates (DRA) filed a protest. At the prehearing conference (PHC) held on July 31, 1995, the California Energy Commission (CEC), the California Department of General Services (CDGS), and Toward Utility Rate Normalization (TURN) appeared, generally in opposition to the application.

By post-PHC ruling, the assigned administrative law judge (ALJ) ordered Edison to serve copies of an order allowing additional persons opportunity to become parties by motion in lieu of an appearance at the PHC on the service list in Rulemaking (R.) 91-08-003/Investigation (I.) 91-08-002, the main demand-side management (DSM) proceeding. As a result, two additional parties, the National Association of Energy Service Companies (NAESCO) and Pacific Gas & Electric Company (PG&E) were allowed to appear, and several persons were added to the service list for information-only purposes. PG&E subsequently withdrew. Appearances are set forth in Appendix A.

The ALJ's order solicited parties to brief whether PU Code Section 851 applies to the proposed transaction and ordered the following issue submitted for an interim decision: If an electric utility is authorized by the Commission to provide energy efficiency services for a term and does so pursuant in part to its filed tariff, does the expiration of such term dissolve the utility's duty to provide such services and thereby make the utility's intellectual property developed for such purpose and its employment relationships with personnel previously performing such services no longer necessary or useful, as a matter of law, to the performance of the utility's duties to the public for purposes of the applicability of PU Code Section 851?

The ALJ also ordered Edison and invited other parties to brief whether the Commission should order Edison to extend the term of the ENVEST program until June 30, 1995.

A few days prior to the date set by the ALJ for briefing, DRA, CDGS, CEC, and TURN moved for a reconsideration of the ALJ's PHC ruling. The ALJ issued a ruling confirming the PHC ruling, and CDGS, DRA, and TURN (the Petitioners) then filed a petition for the Commission to reconsider the ALJ's ruling.

Petition to Reconsider

The Petitioners invoked our intervention in a procedural matter at a time when no Commission meeting was scheduled until well after the date which the ALJ had set for filing of briefs on the issue decided in this interim opinion. As we remarked earlier this year, our procedures and processes are not well adapted to the exigencies of granting ex parte relief. (MCI Telecommunications Corporation v. Pacific Bell (1995) CPUC2d (Decision (D.) 95-05-020).) We noted that unlike a judge handling an ex parte request for a temporary

restraining order, we have a duty to publish public notice of the pendency of our action or to show an emergency excusing advance notice. (Id.) We think the same principle applies here, and that the Petitioners should have awaited events. Short of properly convening an emergency meeting, there is no way we could have granted the relief that the Petitioners sought, which was to set aside the ALJ's schedule for determining a threshold jurisdictional issue.

The Petitioners are apparently worried that the threshold issue we decide today will preclude them from showing that the proposed transfer of the ENVEST program is not in the public interest and should not be permitted. Jurisdiction, however, is a fundamental question that we should resolve as early as possible to avoid the danger of using time needlessly. The Petitioners are correct that if we were to decide that we have no jurisdiction under PU Code Section 851 over the subject matter of this application, and if the Petitioners were unable to show any other basis of jurisdiction, they would be so precluded.

They would not, however, be thereby deprived of any due process rights. Since Petitioners' due process rights would not be denied if we decline to hear from them on issues we determine are not within our jurisdiction, it is both logical and efficient to decide the jurisdictional issue before taking up whether the proposed transfer is in the public interest.

In claiming that their rights have been unfairly limited by requiring an interim decision on this issue, the Petitioners also ignore the Commission's Rules of Practice and Procedure. Edison was within its rights in making its motion to determine the Section 851 issue on July 25, 1995. (Rule 45(c).) In the normal course, the Petitioners would have been required to file their response within 15 days. (Rule 45(f).) The ALJ framed the threshold legal issue before the time for such

response, but allowed additional time (14 days) for that response. The due process rights of parties were not violated since they had an opportunity to argue that the issue was not properly framed. The Petitioners claim that persons who were not served with the application originally are prejudiced because the ALJ permitted them to move to participate after the PHC. However, the Petitioners have failed to show that Edison was required to have served its application more widely than the Rules require, and the ALJ allowed a reasonable time (16 days) following service of a notice of availability to the DSM service list for incoming parties to brief the Section 851 issue if they wished. In addition, notice of the application was duly published in our Daily Calendar, and notice of the PHC was also published there. The Petitioners failed in their duty to request in good faith that Edison consent to an extension of time. (Rule 48(a).) The Petitioners' due process rights are adequately protected by Rules 85-86.2, such that interlocutory relief in the nature requested is not necessary.

Finally, with respect to the Petitioners' request that the ALJ's PHC ruling concerning scheduling be set aside, we see no reason to set aside the ALJ's ruling confirming the schedule. The proper time for the Petitioners to move to modify the schedule is after we have acted on this threshold issue and Edison has complied with the ALJ's order to serve an interim portfolio level report. The ALJ still has Edison's separate motion to establish a schedule (which differs from the schedule ordered) under consideration. That motion could not be ruled upon while we were considering Edison's other motion. We leave it to the ALJ to rule whether Edison's schedule motion has become moot. The ALJ's schedule ruling contemplates that the matter would be submitted with the filing of concurrent reply briefs in early March 1996. We expect, however, that the ALJ will make the

appropriate adjustments in the event of any settlement, including any developments that may occur in the future.

Description of the ENVEST Program

ENVEST is a pilot DSM program for large users that authorizes Edison to acquire, lease, sell, and dispose of energy conservation assets using a mix of ratepayer and shareholder funds. (See Resolution E-3337, October 6, 1993.) The purpose of the program is to offer "a one-stop source for energy efficiency solutions such as equipment, maintenance, energy audits, and financing." (Id.) The program contemplated that energy efficiency solutions would be delivered through a network of qualified energy services companies, third party manufacturers and vendors. Edison's role was one of management and financing the improvements, the cost of which would be repaid from projected savings. Through a performance warranty, Edison shareholders assumed the risk, limited by the contract with the customer, that the energy efficiency solutions would not perform as projected. (Id.) The program was authorized for a pilot period ending December 31, 1995 or until such shorter period as Edison could show to be warranted if the program merited "full implementation." (Id.) We authorized Edison to spend (in combination with up to \$75 million in shareholder funds) up to \$15 million in general ratepayer funds, with additional ratepayer funds up to \$9 million through 1995 for administrative support. (Id.)

Edison believes that the pilot program has shown that "properly structured customer energy solutions for large customers have the potential to stand entirely on their own merits, unsupported by utility customer subsidies, while providing important benefits for participating and non-participating utility customers and the California economy." Edison would

Accordingly, Edison is now ready to cede this program to an appropriate affiliate being formed for the purpose. To do so, it wishes to transfer some employees and some intellectual property.

Performance of ENVEST Program to Date as Described by Edison

Between October, 1993 and April 30, 1995, Edison spent \$4.8 million to administer the ENVEST program. Edison has completed one project, signed ten customer agreements with ten public-sector customers and one with a commercial customer and is currently negotiating with ten other public-sector and one other commercial customer. Edison has contacted approximately 140 potential customers, and it remains in discussions with approximately 60 potential customers. Edison has committed \$5.2 million in utility customer funds for project investment and

Edison considers the ENVEST program a success for public-sector customers, many of whom are required by law or regulation to make energy efficiency improvements. Commercial and industrial customers, however, have found the program less attractive because of stringent credit requirements for the program, limited and high-cost financing options, and a limited range of energy-related products and services.

Description of the Proposed Transfer

Edison wishes to transfer certain employees who have been working in ENVEST to a non-utility, wholly-owned subsidiary (a California corporation, as yet unnamed) (Newco) of Edison's parent, SCEcorp. Newco would acquire the right to offer employment to substantially all of Edison's "core" employees assigned to ENVEST. As provided in the form of asset purchase agreement submitted by Edison, Newco would also acquire Edison's operating manuals for the program and the "knowledge, know-how" and related goodwill" acquired by the transferred employees during the course of their involvement with ENVEST. Edison would

retain all of the existing ENVEST contracts with customers, as well as any pending projects not yet reduced to contracts. Edison would also retain customer information, pricing models, and substantially all of the tangible personal property that has been used by the ENVEST program. Newco would pay Edison the greater of the net book value of the assets it acquires or the fair market value, determined by independent appraisal. Edison originally proposed to notify the Commission of the appraised value of the transferred assets before the transfer to Newco, in accordance with its Policies and Guidelines for Affiliated Company Transactions, adopted pursuant to D.93-02-019, In re Reporting Requirements for Electric, Gas, and Telephone Utilities Regarding Their Affiliate Transactions (1993) 48 CPUC2d 163. At the PHC, it stated its desire to present evidence on the valuation of the assets in this proceeding.

Following the proposed transfer, Edison would have Newco administer the existing ENVEST contracts for a fee.

Applicability of PU Code Section 851

TURN submitted what it styled "comments" on the applicability of PU Code Section 851, professing itself unable to brief the legal issue framed on page 4. TURN suggests that jurisdiction under PU Code Section 851 is always a factual issue that can never be determined on a threshold jurisdictional basis.

DRA filed a brief, and makes two related and useful arguments. First, DRA argues that Edison has a continuing duty under the PU Code (e.g., §§701.1, 701.6) and Commission decisions to provide energy efficiency services regardless of the expiration of the authorization of the ENVEST program. DRA cites Edison's comments in another proceeding to show that Edison

¹ DRA correctly points out that the ALJ's ruling concerning the timing of Edison's authority to enter into such arrangements will expire on December 31, 1995.

acknowledges that it has the duty to provide such services. However, DRA does not attempt to develop the scope of such duties in detail, and its second argument makes speculation about those duties unnecessary.

DRA observes that our previous decisions under PU Code Section 851 have all considered the nature of the assets as a factual matter in relation to the various duties of utilities, not merely the duties for which the assets may have been originally acquired. Since it is beyond dispute that after December 31, 1995, when the ENVEST program authorization for new projects expires, Edison will remain a utility, it is inescapable that it will have some remaining duties. Accordingly, we must consider whether the assets in question will be necessary or useful in the performance of those remaining duties.

Edison filed two briefs on the PU Code Section 851 issue. It filed the first with its motion, and it filed a second in response to the ALJ's PHC ruling that framed the PU Code Section 851 issue.

Edison believes that the transfer of the ENVEST program personnel and assets is not subject to PU Code Section 851. That statute provides that no utility such as Edison shall lease, lend, assign, mortgage, or otherwise dispose of or encumber the whole or any part of its line/plant, system or other property that is necessary or useful in the performance of its duties to the public, or any franchise or permit or any right thereunder, without first having secured from the commission an order authorizing it to do so." (PU Code § 851.) As Edison notes in its application, the statute also provides that any purported transfer subject to PU Code Section 851 without prior Commission

² DRA correctly points out that the ALJ's ruling confirming the PHC ruling implicitly and incorrectly assumed that only Edison's duty to provide energy efficiency services was relevant to enter into such agreements.

approval is void. Accordingly, Edison seeks comfort that it is correct in its conclusion that PU Code Section 851 does not apply. Alternatively, Edison asks for approval pursuant to PU Code Section 851.

Edison concedes that transfer of assets in rate base requires PU Code Section 851 approval, but represents that the ENVEST assets are not in rate base. Edison argues that the rationale behind PU Code Section 851 is to assure that a utility will not impair its ability to provide service. Therefore, it continues, because Edison is under no duty to provide the types of services envisioned by ENVEST, the property involved here is not "necessary or useful in the performance of its duties to the public."

Edison argues that it owes no duty to provide energy efficiency services in connection with the ENVEST program even during its term because the Legislature did not require, but merely encouraged, public utilities to promote customer energy efficiency. We disagree. Even if Edison was under no obligation to volunteer to undertake such services when it proposed the ENVEST program and filed Advice Letter 1011-E, it represented to the Commission and the public that it would provide those services to the public under the conditions and for the time stated in the resulting tariff sheets. Edison thus enlarged the scope of its duty to serve. (See Advice Letter 1011-E and accompanying tariff sheets.) ENVEST is necessary in the performance of Edison's duties to the public at least through the end of the current calendar year.

Edison next argues that the expiration of the term of the ENVEST program necessarily dissolves any duty that it has. Edison's application discloses, however, that it has entered into

contracts with customers pursuant to its filed tariffs that obligate Edison to provide services after December 31, 1995. While it could be true that Edison will lack the authority to enter into new arrangements after December 31, 1995, we cannot see how that disability relieves Edison of those obligations that it has already assumed.

Whether the personnel and other assets of ENVEST are either necessary or useful after the end of the year is a separate, factual question. We note that in the performance of its contractual duties to ENVEST customers of Edison with the right to receive the benefits of their contracts after December 31, 1995, Edison contemplates contracting with Newco to perform the required services using the personnel presently employed by Edison. This strongly suggests that the personnel are and will remain useful in the performance of Edison's duties to its existing customers, but we reserve judgment pending a fuller record.⁵

Edison argues that the personnel and intellectual property involved in the ENVEST program will no longer be necessary or useful at the time of the proposed transfer. Knowing that Edison has other duties, as well as duties under the ENVEST program, we cannot conclude that the ENVEST personnel and assets are exempt from PU Code Section 851 as a matter of law. Edison will be free to show that the personnel and assets are not factually necessary or useful to any of its duties at the relevant time. Otherwise, it must show that the proposed transfer is in the public interest at the end of the current calendar year.

Edison next argues that the expiration of the term of

⁵ We remind Edison, however, that this Commission, as well as the Legislature, has authority to define Edison's duties in this respect. Only if the ENVEST program were Edison's last remaining duty could the PU Code Section 851 jurisdictional question be purely legal.
⁶ We specifically decline to decide the utility character of Edison's duties to its ENVEST customers after December 31, 1995 at this time.

Accordingly, we will review the proposed transfer under the public interest standard established by PU Code Section 851. This result is also consistent with Ordering Paragraph 7 of Edison's Resolution E-3337, which required Edison to file any request for full implementation of ENVEST as an application. We will deem Edison's present application as responsive to that order.

This Interim Decision is Not a Vertical Disintegration Holding

At the PHC, CEC suggested that the Commission should be addressing issues associated with the divestiture by electric utilities of business units in a generic proceeding, rather than on a piecemeal basis. NAESCO argues that the motion before us is "a precedent-setting consideration which will resonate in other Public Utility Commissions." CEC, NAESCO, and the other parties are free to argue that we have other bases of jurisdiction over Edison and the ENVEST program⁶ than the basis that we have just asserted, and we encourage them to do so in a timely fashion, because applicable law determines relevancy of evidence. We do not intend this narrow decision as a holding on how electric utilities may, or may not, divest themselves of functions that we may regulate differently under restructuring.

Edison has asked us if the transfer of the ENVEST personnel and assets is exempt from PU Code Section 851 as a matter of law on the grounds that it has no duty to provide the kind of services involved. We have held that it is not so exempt as a matter of

⁶ For example, NAESCO urges that "issues of reasonableness and competitiveness survive the termination of the ENVEST program." The ALJ has determined, on an evidentiary basis, that the reasonableness of Edison's administration of its ratepayer contribution to the program to date is not logically relevant to the PU Code Section 851 issue and that the competitiveness issue is relevant. That is not a ruling that reasonableness has no relevance to any other basis of jurisdiction. If parties want to litigate the reasonableness of Edison's administration of ratepayer contribution in this application, they will need to find a proper procedural and jurisdiction vehicle to do so. For convenience, we will permit the outstanding issues in connection with Resolution E-3337 to be resolved in this proceeding, but we will not require it, nor will we require that all of those issues be resolved simultaneously with the issues presented by Edison's PU Code Section 851 application.

law on such basis. That is all we have done. We have not held that PU Code Section 851 is the sole jurisdictional basis for our oversight of future transfers following restructuring. This leads to the question: Whether Edison Should Be Ordered to Extend ENVEST

At the PHC, the ALJ asked the parties whether they thought that the Commission should order Edison to continue the ENVEST program until June 30, 1996 to allow time for the application to be litigated. Edison's position was that it was unwilling to do so with shareholder money, and TURN's position was that it had reservations about doing so with ratepayer money. The danger exists that the ENVEST personnel will respond to the uncertainty about their possible future employment by seeking other employment, effectively dissolving the subject matter of the application.

The ALJ ordered Edison, and invited other parties, to brief the issue of ordering such an extension.

Edison argues that extending the ENVEST program will do nothing to further its original goals and would unfairly burden its shareholders with substantial costs.

NAESCO is also opposed to extending the ENVEST program. It argues that the pilot program has done what it was intended to do "and has for better or worse demonstrated the marketability of the business concepts it was set up to test." It fears that its members, who compete with Edison in similar DSM lines of

business, will be deprived of the proverbial level playing field if Edison is permitted to extend the life of ENVEST another six months. NAESCO fears that we will eventually allow Edison to transfer ENVEST to Newco, and Newco will gain an unfair competitive advantage from its corporate lineage. If, as NAESCO argues, Edison uses an extension to fortify its position in the industry, that would have a bearing on the ultimate decision.

These, however, are issues that bear on whether it is in the public interest to permit the transfer, not on whether the program should be kept alive after December 31, 1995.

Edison holds ENVEST assets as manager of what amounts to a joint venture between ratepayers and shareholders. We authorized Edison to expend a very substantial amount of ratepayer funds for the pilot program, and Edison will be held to account, at the appropriate time, for its prudence in the administration of those funds, including the value it realizes upon remaining assets at the termination of the pilot program. Edison has chosen one method of liquidating the ENVEST assets, a negotiated sale to an affiliate. It could have chosen another method, such as an auction.

If we determine that it is not in the public interest to permit Edison to divest itself of the assets involved in this application, regardless of the identity of the transferee, that determination would have one implication on the amount that Edison should be held to account for at termination. If we determine that Edison may divest, but not to an affiliate, another implication will arise. If we determine that Edison may divest to Newco, the consideration agreed may or may not determine how much Edison should have realized in the exercise of prudence.

We will thus allow Edison's self-interest to determine whether it will invest shareholder funds in the ENVEST program after December 31, 1995 to save the assets from waste. If Edison anticipates the cost of such funding to be in excess of its expected return, it will be content to take its chances on the prudence outcome. Or if Edison is confident in the outcome of its proposal or its ability to find a buyer for ENVEST, it will

¹ See Resolution E-3337 at 5 and Ordering Paragraph 8 at 12.

act accordingly. Therefore, we will not require Edison to continue the ENVEST program after December 31, 1995 beyond what it will by then already be required to do by existing arrangements with customers.

Findings of Fact

1. Edison is an electrical corporation and public utility subject to our jurisdiction.

2. Edison operates the ENVEST DSM program pursuant to authority granted by Resolution E-3337, October 6, 1993.

3. Edison filed an application on May 22, 1995 seeking a determination that PU Code Section 851 did not apply to the proposed transfer of personnel employed in the ENVEST DSM program or, alternatively, for approval of such transfer pursuant to PU Code Section 851. Notice of the application was published in the Daily Calendar on June 9, 1995. DRA protested the application.

4. The property associated with the ENVEST program is necessary to the discharge of Edison's duties as a utility at least until January 1, 1996 and may be useful in the discharge of Edison's duties after such date.

5. Edison's authority to use ratepayer funds to administer new projects under the ENVEST program expires on December 31, 1995.

Conclusions of Law

1. The transfer of ENVEST personnel as a business unit is not exempt from PU Code Section 851 as a matter of law.

2. Edison's authority to use ratepayer funds to administer new projects under the ENVEST program should not be extended past December 31, 1995.

¹ See Resolution E-3337 at 5 and Ordering Paragraph 8 at 13.

ORDER

THEREFORE IT IS ORDERED that the motion of Southern California Edison Company for a finding that the personnel and property involved in its ENVEST program are not subject to Public Utilities Code Section 851 is denied.

This order is effective immediately.

Dated November 8, 1995, at San Francisco, California.

P. GREGORY CONLON
JESSIE J. KNIGHT, Jr.
HENRY M. DUQUE
JOSIAH L. NEEPER
Commissioners

I dissent.

/s/ DANIEL Wm. FESSLER
Commissioner

Appendix A

Appearances

California Department of General Services	Grueneich Resource Advocates, by Dian Grueneich, attorney-at- law
California Energy Commission	John D. Chandley, attorney-at- law
Division of Ratepayer Advocates	Irene K. Moosen, attorney-at- law
National Association of Energy Service Companies	Terry E. Singer
Southern California Edison Company	Frank J. Cooley, attorney-at- law, and O'Melvany & Myers, by Thomas K. Braun, attorney-at- law
Toward Utility Rate Normalization	Theresa Mueller, attorney-at- law

(END OF APPENDIX A)