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Decision 97-05-041 May 6, 1997

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking on the Commission's
Proposed Policies Governing Restructuring
California's Electric Services Industry and Reforming
Regulation.

ORIGINAL
Rulemaking 94-04-031
(Filed April 20, 1994)

Order Instituting Investigation on the Commission's
Proposed Policies Governing Restructuring
California's Electric Services Industry and Reforming
Regulation.

Investigation 94-04-032
(Filed April 20, 1994)

**INTERIM OPINION CLARIFYING DECISION (D.) 97-04-044 AND
ADOPTING PROCEDURES TO PROVIDE STAFF RESOURCES AND
INITIAL FUNDING FOR THE ENERGY EFFICIENCY AND LOW-INCOME BOARDS**

1. Summary

On April 24, 1997, the Low Income Governing Board (LIGB) created by Decision (D.) 97-02-014 wrote a letter to the Commission requesting clarification of certain issues in D.97-02-014 and D.97-04-044, which set forth the structure, membership, and tasks of the LIGB. The issues raised by the LIGB include the legal structure of the LIGB and applicability of state procurement and contracting rules. These issues are also relevant to the Energy Efficiency Independent Board (EEIB) created by the Commission in the same decisions. The LIGB letter was sent to the Special Public Purpose service list in this proceeding. The EEIB sent a letter to the Commission with its comments on the LIGB letter.

This decision clarifies our prior decisions and sets forth procedures for the LIGB and the EEIB (the Boards) to follow in obtaining staff resources and expending funds for those resources and for other start-up activities. We determine that the Boards must use the state procurement rules, as applicable, (including a competitive bidding process) for hiring of the program administrator; that Board staffing for its own legal,

technical, and administrative functions follow standards of nondiscrimination and broad-based recruitment with clear criteria applied to each candidate (individuals or firms) and documentation of the process; and that utilities be required to make payments or sign any contracts needed for staffing purposes until the utilities transfer funding to the Boards' control. Today's decision provides the Boards with the resources to address the issue of legal structure and other start-up issues, rather than proposing any specific resolution at this time.

2. Background

In its letter of April 24, 1997, the LIGB requested clarification and guidance from the Commission concerning how it could hire staff resources, and what rules it must follow. On Page 8 of D.94-04-044, the Commission stated that "[t]he Boards will comply with state procurement rules that govern the awarding of contracts and hiring of consultants." The LIGB wanted to know if those rules applied to the hiring of staff (e.g., technical, administrative, and legal), whether on a temporary, limited-term basis or a permanent basis. The LIGB suggested that it would like to hire a management consulting firm to perform most or all of the various staffing functions until the Board is ready to open up a program office and hire a permanent executive director (and possibly other staff). In a letter dated April 28, 1997, the EEIB supported the LIGB's request for Commission clarification and guidance. The Boards also requested clarification on how to pay or sign contracts for staff resources until their legal and tax status has been determined.

The Commission placed this item on its Agenda to consider issues raised by the LIGB letter. An Assigned Commissioner's Ruling (ACR) was sent to the Special Public Purpose service list in this proceeding on April 29, 1997, in order to allow parties an opportunity to comment on the LIGB letter. Comments were due on May 5, 1997. SESCO, Inc. filed comments supporting the proposed resolution of issues in the ACR.

3. Application Of State Procurement Rules

For the purpose of clarifying our intent in today's decision, we distinguish between the Boards' procurement process for program administrators and the process

by which the Boards obtain their own staff resources. "Program administrators" refer to the entities to be selected by the Boards for administration of market transformation programs, low-income energy efficiency services and rate assistance, as described on pages 34-35 and 65-67 of D.97-02-014. Per D.97-02-014, the program administrators must be selected through a competitive bidding process in response to a Request For Proposals (RFP) issued by the Boards and approved by the Commission.

We use the term "staff resources" to refer to individuals or firms hired for the legal, technical and administrative functions of the Board itself. These functions include the legal work necessary to create the Board structure, technical assistance in writing the RFPs for program administrators, administrative assistance in noticing and conducting Board meetings and other activities necessary to fulfill the Board functions we describe in D.97-02-014 (pp. 29-34) and D.97-04-044.

We affirm the Boards' understanding that D.97-04-044 requires them to follow state procurement rules in hiring program administrators via a competitive bidding process. However, as pointed out in the LIGB and EEIB letters, the language in D.97-04-044 does not explicitly discuss the applicability of state procurement and other related state hiring rules with respect to staff resources. We did not and do not intend to impose the state procurement rules and other related state hiring rules on the Boards in their process of obtaining staff resources, as defined above.

We hereby clarify this ambiguity, and reiterate that the Boards will adhere to the state procurement rules, when applicable, for the hiring of program administrators, especially with respect to the timeline and criteria required in this procurement process. However, some aspects of the state procurement rules will not apply (for example, the need to get approval from the Department of General Services).

We find that the mandates and the extraordinary deadlines set forth in Assembly Bill (AB) 1890 (Stats. 1996, ch. 854) necessitate a process that will result in the hiring of staff assistance in a shorter time frame. We also are cognizant of the need to allow the Boards to use a streamlined process to obtain staffing and related resources, as long as that process encompasses the main elements of state hiring rules. Today, we set forth the following procedures for the Boards' hiring of staff resources, and believe that the

procedures are necessary and reasonable, and will result in a fair and nondiscriminatory hiring process. These procedures are described below.

4. Procedures For Obtaining Staff Resources

In obtaining technical, administrative, and legal staff assistance, the Boards will first look to see if such assistance is available from the Commission staff. If it is not, we authorize the Board to obtain such assistance through a hiring process that is fair and nondiscriminatory. The Board may use this process to hire staff on a temporary basis or for a long term. We set forth no required timelines for hiring under this process, e.g., how long must the position be advertised, but we expect the process to proceed in a reasonable manner and understand the timelines will vary depending on the urgency of the assistance needed.

The process, which can be used with regard to individuals or firms, shall include all of the following: (1) Each Board will conduct a broad-based recruitment effort that will result in a diverse pool of candidates. This effort might (but is not required to) include recruiting from the master lists of state agencies, as applicable, as well as considering people who have worked with other Commission advisory groups. (2) Each Board should set forth the description of the assistance needed and the qualifications for hiring. (3) Each Board shall develop and apply criteria for evaluating all of the candidates on the same basis. (4) Each Board will fully document all aspects of the hiring. We encourage the Boards to work cooperatively and share staff resources as much as appropriate.

We note that immediate and urgent staff assistance, e.g., on a temporary and limited-term basis, might be accomplished by seeking assistance from a temporary employment agency or a management consulting firm. Thus, we authorize the Boards to use either of these techniques if they so desire to obtain immediate and urgent assistance. Prior to selecting an agency or firm to hire from, however, we will require that the Boards contact at least three such firms.

We intend that there be coordination with the Commission staff, including the General Counsel, on such issues relating to the process of hiring, the review of

contracts, and the hiring of outside legal counsel. We do not propose any specific resolution of the issue of legal structure for the Boards in today's decision. We prefer that the Boards explore the options and issues related to legal structure as part of their start-up efforts, and report their findings and recommendations in the start-up filing required in the assigned Administrative Law Judge's (ALJ) March 19, 1997 ruling. Today's decision provides them with the resources to proceed with these efforts.

5. Expending Funds and Contracting For Staff Resources and Other Start-Up Requirements

As pointed out in the LIGB letter, the Boards may not have the legal authority to sign contracts for staff resources or make any payments related to start-up activities, until a number of interrelated legal and insurance issues are resolved, including their legal status and charter. At the same time, the Boards must proceed expeditiously with certain tasks that necessitate the expenditure of funds and hiring of staff resources in order to meet their filing requirements and other start-up responsibilities. It is therefore necessary to make some interim arrangements for payments and contract signing until the Boards can enter into contracts and have the legal and accounting capability to receive the start-up funds. Accordingly, we authorize the utilities to pay for the staff assistance from the accounts set up to record and track the Boards' start-up funds, up to the maximum start-up funding levels set forth in D.97-04-044.¹

On April 16, 1997, SCE, PG&E and SDG&E filed procedures to provide initial funding for operating costs of the Boards, as required by D.97-04-044. All three utilities intend to set up interest-bearing accounts to track the Boards' start-up costs and present procedures to allow the Boards to begin invoicing them, with only minor differences

¹ D.97-04-044 requires utilities to provide start-up funds in the amount of \$250,000 for each board as follows: \$100,000 from both Pacific Gas & Electric Company (PG&E) and Southern California Electric Company (SCE), and \$50,000 from San Diego Gas & Electric Company (SDG&E).

between them.² Drawing on the utility proposals, we adopt the following procedures: The invoices for staff assistance and other start-up costs will be submitted to the Boards for their approval. The Board-approved invoices will then be sent to a designated utility (or prorated among utilities) for payment from the accounts established for recording and tracking LIGB and EEIB start-up costs. Payments will be made by the utility or utilities within ten days of receiving them from either Board. The Boards and utilities should work together to refine and improve these procedures, as appropriate, based on actual operating experience.

If a contract needs to be executed for staff assistance for a Board, the Board will designate a utility to execute the contract with the provider of the assistance. The Board will select the provider, and the utility selected to sign the contract will not have any specific right to veto the selection. Although this Board will not be a signatory to the contract, it will be a beneficiary under the contract. Invoices under this contract will be submitted to the Board for approval, and then transmitted to the designated utility for payment. Once the funds are transferred to the Board, the designated utility will be relieved of this responsibility.

Any checks written by the utilities during this interim period will be considered an advance from the utilities from expected 1998 funds from the public goods surcharge, as will the funds transferred by the utilities directly to the Boards. (D.97-04-044, mimeo., p.9.) As we directed in D.97-02-014, the advanced funds, plus interest at the commercial paper (prime, three months) rate, published in the Federal Reserve Statistical Release G.13, will be deducted from the initial public goods surcharge collected by the utilities. (D.97-02-014, Conclusion of Law 8.)

With today's clarifications and adopted procedures, we expect the Boards to proceed expeditiously with their start-up activities. However, in light of the issues raised by the Boards since our issuance of D.97-04-044, we recognize that the assigned

² For example, SCE proposes a five-day payment response, SDG&E proposed a ten-day response while PG&E is silent on the issue.

ALJ may need to consider whether revisions to the current procedural schedule are required. (See ALJ Ruling dated March 19, 1997.) The Boards should send any requests for modification of the schedule to the assigned ALJ no later than ten days after the effective date of this order. The assigned ALJ will issue a revised schedule shortly thereafter, as appropriate.

Findings of Fact

1. Our instruction in D.97-04-044 that the Boards comply with state procurement rules governing the awarding of contracts and hiring of consultants applies only to the Boards' procurement of program administrators, and not to Board staffing for its own technical, legal or administrative functions.

2. The mandates and the extraordinary deadlines set forth in AB 1890 necessitate a process that will result in the hiring of the Boards' staff assistance within a time frame that is shorter than one achievable under the timeline requirements of the state procurement and personnel hiring rules.

3. The process set forth in this decision for obtaining Board staff resources encompasses the main elements of the state procurement and hiring rules by requiring that the Boards 1) conduct a broad-based recruitment effort, 2) set forth the description of the assistance needed and the qualifications for hiring, 3) develop and apply criteria for evaluating all of the candidates on the same basis and 4) fully document all aspects of the hiring.

4. The process set forth in this decision for obtaining Board staff resources ensures a fair and nondiscriminatory process that will also facilitate the Boards' achievement of their responsibilities.

5. In order to fulfill their responsibilities, the Boards must proceed expeditiously with certain tasks that necessitate the expenditure of funds and hiring of staff resources. At the same time, the Boards need to resolve a number of interrelated legal and insurance issues, including their legal status and charter, before they have the legal authority to sign contracts or pay for staff assistance. Authorizing the utilities to make

payments and sign contracts for staff assistance on the Boards' behalf, for an interim period, is a reasonable way to address this problem.

6. Today's decision provides the Boards with the necessary resources to address the issue of legal structure and other start-up issues.

Conclusions of Law

1. D.97-04-044 should be modified as follows:

a) Section 4.4 should be modified to read:

"In selecting the program administrators via competitive bid, the Boards will comply with state procurement rules that govern the awarding of contracts and hiring of consultants, when applicable. By 'program administrators,' we refer to the entities to be selected by the Boards for the administration of market transformation programs, low-income energy efficiency services and rate assistance, as described on pages 34-45 and 65-67 of D.97-02-014. However, some aspects of these rules will not apply (for example, the need to get approval from the Department of General Services). In selecting the program administrators, the Boards will follow the timelines required in the state procurement rules. The Boards should pay particular attention to these requirements while developing their internal schedules necessary to achieve the milestones established by the assigned ALJ rulings and Commission orders."

b) Conclusion of Law 6 should be modified to read:

"In selecting the programs administrators, the Boards should comply with state procurement rules that govern the awarding of contracts and hiring of consultants, including the timelines set forth in those rules."

2. The procedures set forth in Section 4 of this decision for obtaining staff resources for the Boards are reasonable and should be adopted.

3. The procedures set forth in Section 5 of this decision for the Boards' expenditure of funds and contracting for staff resources and other start-up requirements are reasonable and should be adopted.

4. Within ten days from the effective date of this decision, the Boards should send any requests for modifications of the procedural schedule to the assigned ALJ.

5. This order should be effective today so that the Boards can proceed with start-up activities as expeditiously as possible.

O R D E R

IT IS ORDERED that:

1. The procedures set forth in Sections 4 and 5 of this decision for the Low Income Governing Board (LIGB) and the Energy Efficiency Independent Board (EEIB) (the Boards) to follow in 1) obtaining staff resources and 2) expending funds and contracting for those resources and other start-up requirements are adopted.

2. Decision 97-04-044 is modified as follows:

a) Section 4.4 is modified to read:

"In selecting the program administrators via competitive bid, the Boards will comply with state procurement rules that govern the awarding of contracts and hiring of consultants, when applicable. By 'program administrators,' we refer to the entities to be selected by the Boards for the administration of market transformation programs, low-income energy efficiency services and rate assistance, as described on pages 34-45 and 65-67 of D.97-02-014. However, some aspects of these rules will not apply (for example, the need to get approval from the Department of General Services). In selecting the program administrators, the Boards will follow the timelines required in the state procurement rules. The Boards should pay particular attention to these requirements while developing their internal schedules necessary to achieve the milestones established by the assigned ALJ rulings and Commission orders."

b) Conclusion of Law 6 is modified to read:

"In selecting the programs administrators, the Boards should comply with state procurement rules that govern the awarding of contracts and hiring of consultants, including the timelines set forth in those rules."

3. Should either the EEIB or LIGB seek to request a delay in the procedural schedule, in light of the issues that the Boards have raised since the Commission's

R.94-04-031, I.94-04-032 ALJ/JLN/wav

issuance of Decision 97-04-044, they shall make such a request in writing to the assigned Administrative Law Judge within ten days from the effective date of this decision.

This order is effective today.

Dated May 6, 1997, at San Francisco, California.

P. GREGORY CONLON

President

JESSIE J. KNIGHT, JR.

HENRY M. DUQUE

JOSIAH L. NEEPER

RICHARD A. BILAS

Commissioners