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Decision 97-06-071 June 11, 1997

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application of Southern California Gas Company (U 904-G) and Southern California Edison Company (U 338-E) for Approval of Demand-Side Management Pilot Bidding Contract.	Application 97-03-045 (Filed March 25, 1997)

ORIGINAL

OPINION ON APPEAL OF ASSIGNED COMMISSIONER'S RULING

Summary

The Commission denies the appeal of Southern California Edison Company (Edison) and affirms the ruling of Commissioner Neeper categorizing this proceeding as a "ratesetting" proceeding. According to Edison, this proceeding should be categorized as a "quasi-legislative" proceeding pursuant to Senate Bill (SB) 960.

Background

On January 13, 1997, the Commission adopted Resolution ALJ-170, which established experimental rules and procedures to gain experience with management of Commission proceedings under the requirements of SB 960 (Leonard; Stats. 1996, ch. 856). SB 960 contains many new requirements governing the procedures under which the Commission manages its proceedings. These requirements take effect on January 1, 1998, the operative date of SB 960.

Most of SB 960's procedural reforms are dependent on how a proceeding is categorized. SB 960 establishes three categories of Commission proceedings: adjudicatory, ratesetting, and quasi-legislative proceedings. For the experiment, Resolution ALJ-170 defined these categories so that the Commission could gain actual experience with the categorization process.

On May 13, 1997, in accordance with the experimental rules set forth in Resolution ALJ-170, Commissioner Neeper issued a ruling categorizing Application (A.)

97-03-045 as a "ratesetting" case. Edison timely appealed Commissioner Neeper's ruling.

Position of Edison

Edison believes that the Application should not be categorized as a ratesetting proceeding because it does not set rates and the associated costs of the subject contract were included in rates in a 1992 Commission decision.[1] And under SB 960:

> "Ratesetting cases, for purposes of this article, are cases in which rates are established for a specific company, including but not limited to, general rate cases, performance-based ratemaking, and other ratesetting mechanisms." (Emphasis added.) (SB 960, Section 7.)

Edison argues that the assigned Commissioner's ruling states that the Application is a ratesetting case because it seeks a finding of reasonableness in the form of preapproval, and under the Commission's experimental rules:

> "'Ratesetting' proceedings are proceedings in which the Commission sets or investigates rates for a specifically named utility (or utilities), or establishes a mechanism that in turn sets the rates for a specifically named utility (or utilities). 'Ratesetting' proceedings include complaints that challenge the reasonableness of rates or charges, past, present, or future." (Emphasis added.) (Experimental Rule 1.)

Edison contends that the first sentence of the experimental rules does not track the language of the statute, and that the second sentence is not in the statute. Moreover, according to Edison, even under the experimental rules, the Application is not a ratesetting case because it is not a complaint challenging the reasonableness of rates.

According to Edison, the correct categorization for the Application is quasi-legislative.

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[1] Edison points out that the funds and associated costs for the project were authorized in 45 CPUC2d 541, Decision (D.) 92-09-080, ordering paragraphs 5, 7, 8; and D.96-01-011, pp. 85-86.

Edison argues that the Demand-Side Management (DSM) pilot bidding program establishes policy, and it was mandated by the Legislature to promote and test the delivery of DSM by third parties pursuant to Public Utilities (PU) Code § 747. According to Edison, the Commission's decision will look to the future, and decide what should be authorized or permitted, based on legislative facts.[2] Edison believes that in general, when the test the Commission is to apply is one of reasonableness, i.e., what ought to be permitted or approved, it is a forward-looking decision that is classically quasi-legislative in nature.

Further, Edison argues that this Application represents exactly the type of quasi-legislative case that is the essence of administrative policy-making. According to Edison, the ratesetting category was a compromise to allow the Commission to deal only with the Commission's lengthy ratesetting proceedings, where it would be difficult for the commissioners to be present for hearings. By contrast, applications on pilot bidding program contracts should normally not even require hearings. Edison contends that this is particularly true in cases such as this Application, where there is no real protest by any party.[3]

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[2] "Legislative facts are the general facts which help the tribunal decide questions of law and policy and discretion." (Experimental Rule 9.f.)

[3] Edison notes that SESCO, Inc. and Residential Services Companies' United Effort ("RESCUE") filed documents they entitled "responses or protests" to the Application. And, in those responses, they also requested that the Commission approve the contract as filed. However, Edison does not mention that SESCO and RESCUE request an evidentiary hearing on the Application "should the good faith efforts of the parties fail to resolve the differences in the cost-effectiveness procedures." (RESCUE Response, date April 28, 1997, p. 1; and SESCO Response, dated April 24, 1997, p. 2.)

Also, Edison argues that the Application is clearly *not* ratesetting under SB 960. According to Edison, it is only ratesetting under a contorted construct of language in the experimental rules that is not in the statute. Edison contends that under this interpretation of the experimental rules, every Application seeking the Commission's approval, and every Application requesting that the Commission find the utility has complied with a Commission decision, could be considered a ratesetting proceeding. According to Edison, ratesetting cases should be confined to the cases Edison believes the Legislature intended: rate cases.

Discussion

Since the Application has been selected for the SB 960 experiment, the Commission must categorize the proceeding as adjudicatory, ratesetting or quasi-legislative.

First, we will address Edison's argument that the Application should be categorized as quasi-legislative.

The experimental rules state:

> "e. 'Quasi-legislative' proceedings are proceedings that establish policy or rules (including generic ratemaking policy or rules) affecting a class of regulated entities, including those proceedings in which the Commission investigates rates or practices for an entire regulated industry or class of entities within the industry." (Resolution ALJ-170, Rule 1(e).)

And, SB 960, Sec. 7, states:

> "(c)(1) Quasi-legislative cases, for purposes of this article, are cases that establish policy, including, but not limited to, rulemakings and investigations which may establish rules affecting an entire industry." (PU Code § 1701.1(c)(1) (emphasis added).

The Application is a request for Commission approval of a contract among Southern California Gas Company (SoCalGas), Edison, and SESCO, Inc. The contract will provide DSM services procured as a result of SoCalGas' DSM pilot bidding program offered in collaboration with Edison.

We agree with Edison that the DSM pilot program establishes policy. However, the policy was approved in 1992 in D.92-09-080, D.93-09-080 and D.93-02-041, and

subsequent Commission directives. As SESCO and RESCUE argue, the issue in the Application is the conformance of the contract and related cost-effectiveness calculations to existing DSM rules (See Response or Protest of SESCO, p. 4, Response or Protest of RESCUE, p. 4, Reply of Edison, and Reply of SoCalGas). The cost-effectiveness calculations may involve a mix of legislative and adjudicative fact finding. Any policy formulation, if required at all, would be incidental.

We do not share Edison's belief that our decision on the Application will "look to the future," and decide what should be authorized or permitted, based on legislative facts. The Application is, essentially, a request for approval of a contract between two utilities and a third party. The Commission's decision must simply find whether the contract conforms to existing policy and rules. And, since there are allegations that the utilities are in violation of the adopted procedures for cost-effectiveness and shareholder reward calculations, the proceeding could involve a reasonableness review and ratemaking disallowance. Clearly, the Application cannot be categorized as quasi-legislative under either the definition in the experimental rules or in SB 960.

As noted above, SESCO and RESCUE allege that, as proposed in the Application, utility administrative costs are excessive, resulting in certain programs not being cost-effective, and shareholder incentives are incorrectly calculated. Since the funding for the program is included in rates, the allegations of SESCO and RESCUE raise issues of reasonableness and potential disallowances, which may require evidentiary hearing. These issues pertain to the reasonableness of rates or charges rather than to "proceedings that establish policy or rules." To put it simply, SESCO and RESCUE raise issues which require a "backward looking" inquiry.

The Application does not squarely fit into any one category. As discussed above, it cannot be categorized as quasi-legislative since its primary focus is not policy establishing or "forward looking" in the sense typical of a quasi-legislative proceeding. Rather, the Application has a mix of forward looking and backward looking elements, and it appears that the backward looking elements predominate.

Resolution ALJ-170 addresses the situation where a proceeding does not clearly fall within a single category. To address this situation in implementing the experimental rules, the Commission stated:

> "For the experiment, a proceeding that does not clearly fit into any of SB 960's defined categories will be conducted under the rules applicable to the ratesetting category unless and until we determine that the rules applicable to one of the other categories, or some hybrid of those rules, would be better suited to the proceeding. Ratesetting proceedings typically involve a mix of policymaking and factfinding relating to a particular public utility. Because proceedings that do not clearly fall within the adjudicatory or quasi-legislative categories likewise typically involve a mix of policymaking and factfinding, we believe that ratesetting procedures are <u>in general</u> preferrable for those proceedings as well." (Resolution ALJ-170, p. 9, emphasis in original.)

Here, there are fact-finding issues dealing with whether the particular contract conforms to our previously established policy for DSM pilot programs, and the reasonableness of this particular contract. Even if some incremental policy making will occur in this proceeding, the Application is still properly categorized as ratesetting under our experimental rules. The categorization reflects the fact that the procedures applicable to the ratesetting category, are most appropriate for cases in which there is a mix of fact finding and policy making, especially where the policy setting aspects of the case are relatively minor.

In sum, we agree with Commissioner Neeper's ruling which states:

> "The instant application seeks a finding of reasonableness, in the form of Commission preapproval, for a negotiated contract entered into by Edison and SoCalGas with a third party. Reasonableness review of a utility's action is an evidentiary inquiry into the facts and circumstances and cost impacts of the particular utility action. This application concerns issues of fact specific to these utilities and the particular terms and conditions of its contract with SESCO, Inc. As part of this application, SoCalGas and Edison are required to provide, and the Commission will review, contract-specific information 'on the cost impacts of each negotiated contract (i.e., by comparing year-by-year total project costs under the contract with long-run avoided costs).' (Re Rules and Procedures Governing Utility Demand-Side Management; D.92-09-080 (1992) 45 CPUC2d 541, 598-99). I conclude that none of this can reasonably be considered to establish policy

> or rules affecting a class of regulated entities, as quasi-legislative proceedings are defined. I conclude that this application should be categorized as ratesetting." (Assigned Commissioner's Ruling May 13, 1997.)

We concur with Commissioner Neeper, because a proceeding that primarily implements policy, rather than establishing it, and looks at facts specific to particular utilities and particular contracts as in this case is more appropriately handled under the procedure, applicable to ratesetting rather than those established for policy making.

Lastly, we address Edison's argument that the definition of ratesetting in the Commission's experimental rules (Resolution ALJ-170) is not the language of statute (SB 960). We believe that, essentially, Edison is rearguing the Commission's Order Denying Rehearing of Resolution ALJ-170 (D.97-03-054).

Regulations implement, interpret, clarify or make specific the statute enforced or administered by an agency. (Compare Government Code § 11342.g.) Regulation is not supposed to simply repeat statute. The Commission had to make a judgment regarding allocation of proceedings between the three categories SB 960 defines based on an understanding of the fact-finding and policy-making activities which are characteristic of the Commission's regulation. The judgment is embodied in the category definitions contained in the experimental rules. In our rehearing order, the Commission stated:

> "... SB 960 creates only three case categories: adjudicatory, ratesetting, and quasi-legislative. Virtually every participant in the process of developing the experimental rules, including members of the Legislature, recognized that many proceedings do not fit clearly into one or another of these categories, and that some proceedings fit into more than one. As indicated by the discussion in Res. ALJ-170, participants in the workshop and comment process came up with four different ways to resolve the problem of proceedings which do not clearly fit one or another category, including administratively defining many more categories of proceedings. We fully considered these options, and concluded that in our judgment, using the ratesetting category as the default category would best reflect the intent of SB 960." (D.97-03-054, pp. 5 and 6.)

We continue to find meritless the argument that the experimental rules are not consistent with SB 960 because they fail to parrot the definitions for case categories set forth in the statute.

Findings of Fact

1. This proceeding involves the review of contract-specific information regarding the cost impact of various DSM pilot program measures proposed by the utilities pursuant to the contract which is the subject of the Application.

2. The primary focus of the Commission's inquiry into the Application will be into the reasonableness and ratemaking aspects of implementation of the DSM pilot program by two utilities, rather than into making future policy. Rather than looking forward, the utilities' actions in implementing existing policy will be reviewed.

3. The policy for such DSM pilot programs has already been established in prior Commission decisions.

4. Any policy determinations made in regard to the Application would be incidental to the review of the contract for compliance with prior Commission decisions.

5. Since funding for the program has already been authorized by the Commission, there is the potential for ratemaking disallowances resulting from the Commission's inquiry into the practices of the two utilities in implementing such DSM pilot programs.

Conclusions of Law

1. Since the Application has been selected for processing under the experimental rules set forth in Resolution ALJ-170, the Application has to be categorized in one of three categories: adjudicatory, ratesetting or quasi-legislative. The Application does not squarely fit into one of these categories.

2. The experimental rules require that when a proceeding may fit into multiple categories, it will be conducted under the rules applicable to the ratesetting category, unless the Commission determines that the rules applicable to one of the other categories would be better suited.

3. Ratesetting proceedings typically involve a mix of policy making and fact finding relating to a particular public utility.

4. Proceedings that do not clearly fall within a single category, that involve a mix of policy making and fact finding relating to a particular public utility or utilities, are generally best handled under the procedures applicable to ratesetting.

5. Because this proceeding primarily implements existing policy and looks at the reasonableness of a specific contract entered into by two utilities, the Application should be handled under the ratesetting category rather than any of the other remaining categories.

6. The Assigned Commissioner's Ruling, finding that the Application is a ratesetting proceeding, should be affirmed.

7. Edison's appeal is based on the assumption that SB 960 definitions of the categories must be without Commission interpretation, clarification, or specificity.

8. Edison made a similar argument challenging the legality of Resolution ALJ-170. The Commission denied Edison's request for rehearing of Resolution ALJ-170 (D.97-03-054).

9. Edison's appeal of the Assigned Commissioner's Ruling in this proceeding should be denied.

ORDER

IT IS ORDERED that Southern California Edison Company's May 23, 1997 Appeal of the Assigned Commissioner's Ruling on Inclusion of Proceeding in Senate Bill 960 Experiment is denied.

This order is effective today.

Dated June 11, 1997, at San Francisco, California.

P. GREGORY CONLON
President
JESSIE J. KNIGHT, JR.
HENRY M. DUQUE
JOSIAH L. NEEPER
RICHARD A. BILAS
Commissioners