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Decision 97-11-013 November 5, 1997

ORIGINAL

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application of San Diego Gas & Electric Company (U 902-E) for an Ex Parte Order Approving Modifications to Uniform Standard Offer No. 1 and Standard Offer No. 3.	Application 95-11-057 (Filed November 22, 1995)
Application of Southern California Edison Company (U-338-E) for an Ex Parte Order Approving Modifications to Uniform Standard Offer No. 1 and Standard Offer No. 3.	Application 96-01-008 (Filed January 3, 1996)
Application of Pacific Gas and Electric Company (U 39-E) for an Order Approving Modifications to Uniform Standard Offer No. 1.	Application 96-01-014 (Filed January 12, 1996)

OPINION ON AS-AVAILABLE CAPACITY PAYMENTS

Summary

In comments submitted pursuant to Decision (D.) 96-10-036, parties have proposed broadly applicable changes in the methodology for setting as-available capacity payments which are required under Uniform Standard Offer 1 (USO1) and Standard Offer 3 (SO3) (collectively, standard offers). The standard offers govern certain utility purchases of power from qualifying facilities (QFs). To the extent that the proposed changes would affect existing agreements, or are intended for application in the restructured electric market in 1998 and beyond, they are found to exceed the limited scope of this proceeding and are not considered herein.

D.96-10-036 contemplated setting as-available capacity payments for new standard offer agreements at zero until January 1, 1998 (or the date the restructured electric market is operating). The Commission is now persuaded from the comments that resolution of disputed factual questions would require a procedural schedule

which is inconsistent with the limited time contemplated for applicability of the policy change. At the same time, parties have raised important questions of policy and of conformance with the Public Utility Regulatory Policies Act of 1978 (PURPA). Accordingly, this decision tables consideration of the proposed policy modification and orders closure of the proceeding, while recognizing that a broader, properly noticed proceeding addressing these questions would be appropriate.

Background

D.96-10-036, as modified by D.96-11-018, resolved Phase 1 issues in this proceeding by approving a compromise proposal (Joint Recommendation) put forth by all but one of the active parties. Most significantly, the Joint Recommendation proposed reducing the 30-year maximum term of defined new standard offer agreements to a reduced term which ends with the conclusion of electric industry restructuring transition.[1] The reduced term applies to agreements formed after April 16, 1996. Preexisting agreements are not affected, and QFs that entered into negotiations for or signed and tendered a standard offer on or before April 16, 1996 are not subjected to the reduced term.

Phase 2 was established to provide a procedure for parties who had entered into negotiations for contracts under the standard offers, and had filed protests to one or more of these applications, to pursue their rights before the Commission if those negotiations were not acceptable to one or both parties. D.96-10-036 resolved Phase 2 issues by allowing 30-year terms for contracts that were formed before April 16, 1996 and by delineating contract formation issues for a variety of circumstances.

While D.96-10-036 resolved the issues raised in these applications, the Commission extended the proceeding to address a separate but related policy issue, one that had not been identified by the parties:

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[1] The Joint Recommendation specified that new standard offer agreements would remain in full force and effect until January 1, 2003. However, the Joint Recommendation predated passage of Assembly Bill (AB) 1890 (Stats. 1996, Ch. 854), which provides for transition to a

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> "In the meantime (prior to 1998), a policy argument we have previously considered but not adopted is ripe for reconsideration. Utilities have previously suggested that energy provided by a QF on an as-available basis does not allow a utility to avoid any capacity costs. (D.82-01-103, supra, at p. 45.) We decided that issue as a matter of policy in 1982, a policy influenced by an overriding desire to encourage the "fullest possible efficient development" of QFs. (Id., at 40.) The basis of this position is that as-available capacity cannot be counted upon to meet reserve requirements or peak loads. This policy argument has some merit in today's changing circumstances, and is one we are entitled to make in examining short-run avoided cost calculation methodology and setting prices at the time of delivery.
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> "It is a commonly understood fact in the industry that the Western markets have excess capacity in the near to mid term, which renders the value of more capacity very low. Quarterly reports of all the IOU's purchasing activity over short terms indicates that capacity is rarely priced above zero. We therefore reconsider, on our own motion, our prior policy decision that the as-available value of capacity be higher than zero for USO1's (or SO3's) formed after the date these applications were effectively noticed and before January 1, 1998 (or when the restructured market is operating). We subject this change in policy to a comment and reply comment phase in this proceeding, as it is a policy intended only to apply to these new offers, prior to the date a restructured market is operating. [Fns. omitted]" (D.96-10-036, slip op. at 37.)

Pursuant to D.96-10-036, the Administrative Law Judge (ALJ) established a schedule for comments and replies on the question of setting as-available capacity payments for new standard offers at zero. Comments were filed by Southern California Edison Company (Edison), Pacific Gas and Electric Company (PG&E), San Diego Gas & Electric Company (SDG&E), Office of Ratepayer Advocates(ORA), Independent Energy Producers Association (IEP), and The Nutrasweet Kelco Company (Kelco). Replies were filed by Edison, SDG&E, IEP, Kelco, and Minnesota Methane LLC.[2]

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fully competitive market by January 1, 2002. D.96-11-018 advanced the termination date by one year to conform to AB 1890.

[2] IEP tendered its reply with the title "Reply Comments and Motion to Strike of Independent Energy Producers." Consistent with Rule 3(b) of the Rules of Practice and Procedure (Rules) regarding multipurpose documents, the Commission's Docket Office filed IEP's pleading as

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Scope of the Extended Proceeding

SDG&E, Edison, and ORA have proposed that we use this extended proceeding as a vehicle to reconsider policies for as-available capacity payments applicable to preexisting USO1 and SO3 agreements as well as those formed after the dates the applications were noticed. SDG&E and ORA also propose that we use this as the vehicle to establish policies for as-available capacity payments after the restructured market commences. IEP, Kelco, and Minnesota Methane oppose these proposals as improperly broadening the scope of the proceeding.

As stated in the portion of D.96-10-036 quoted above, we intended to conduct a very limited reconsideration of our policy on capacity payments. Other portions of the decision reinforce this intention:

> "The assigned administrative law judge will issue a ruling setting the date for comments and reply comments on the Commission's proposed modification to its prior policy decision to assign shortage cost value to as-available avoided cost of capacity for new USO1's formed after the date utilities' applications first appeared on the Commission's Daily Calendar. We intend to further consider setting that avoided cost at zero until the restructured market is operating." (D.96-10-036, slip op. at 42-43.)

> "[W]e intend to address [the issue] now, in this proceeding, and with the limited scope stated (contracts formed after the applications were filed and noticed), and for a limited time (prior to the operation of the restructured market)." (*Id.*, at 43-44.)

> "The Commission should reconsider its policy of paying above zero for new as-available capacity prior to 1998." (*Id.*, Conclusion of Law 7, at 46.)

Based on the foregoing excerpts from D.96-10-036, there can be no doubt that the Commission intended to limit the reconsideration of its policy on as-available capacity payments in two ways. First, it would apply to new agreements only, i.e., those formed after the effective dates of notice of these applications. Second, it would apply only

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comments and did not recognize it as a motion. However, Edison and SDG&E filed responses in opposition to the motion to strike, in which IEP asks that all statements and proposals in

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until 1998 (or when the restructured market is operating). In fact, it was only because of this very limited scope that the Commission determined that it would be appropriate to use this procedural vehicle. (D.96-10-036, slip op. at 37.) Given these repeated, consistent statements defining the scope of the inquiry, any argument that the Commission intended to use this proceeding to conduct a broad inquiry into the assignment of shortage value and the setting of as-available capacity payments for existing agreements, and for 1998 and beyond, cannot be supported.[3]

In attempting to justify their proposals to go beyond the Commission's intention to narrowly reconsider its policy on as-available capacity payments, SDG&E and Edison rely on Ordering Paragraph 9 of D.96-10-036, which states:

> "This proceeding remains open for an order of the assigned administrative law judge setting forth comment and reply comment dates for proposed changes to the methodology for as-available short-run avoided capacity payments at the time of delivery, prior to 1998, *and* for new QF agreements formed after the date of effective notice of utilities' applications." (Emphasis added.)

As Kelco observes, it appears that a single word in Ordering Paragraph 9, the conjunctive *and*, underlies the position that we should use this proceeding to consider changes to the methodology for determining as-available capacity payments under all USO1 and SO3 agreements. The phrase immediately preceding *and* is not modified by the following phrase, as it would be in the absence of *and*. Thus, it could be argued that Ordering Paragraph 9 provides for two areas of inquiry, one dealing with changes to

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various parties' opening comments that exceed the established scope of the proceeding be stricken. Pursuant to Rule 87, we will consider IEP's filing as both comments and as a motion.

[3] SDG&E's assertion that these sections of D.96-10-036 which define the scope of this extended proceeding are themselves ambiguous can only be seen as an absurdity.

the methodology "for as-available short-run avoided capacity payments at the time of delivery, prior to 1998," and the other dealing with changes to the methodology "for new QF agreements formed after the date of effective notice of utilities' applications." We find this to be an unnecessarily strained and illogical reading. On its face, Ordering Paragraph 9 should be read as if the offending *and* were omitted.

Assuming *arguendo* that Ordering Paragraph 9 contemplates the broad inquiry requested by Edison and SDG&E, the question is whether their reading of Ordering Paragraph 9 supersedes or nullifies the other provisions of the decision that do not contemplate such an inquiry. We conclude that it does not.

We first acknowledge a general rule that ordering paragraphs take precedence over statements in the opinion portion of a decision. Thus, in *City of Healdsburg v. Pacific Gas and Electric Company* (1989) 31 CPUC 2d 465, the Commission addressed an asserted conflict between an ordering paragraph and statements in the opinion section of a 1949 decision, D.42443 (48 CPUC 394), and held that:

> "...the ordering paragraph at issue is the final decision of the Commission. It is not subject to modification by prior statements contained in the opinion." (*Id.*, at 475.)

However, after the 1949 decision considered in *Healdsburg* was issued, the Legislature in 1961 amended Section 1705[4] to require that our decisions contain separately stated findings of fact and conclusions of law on all issues material to the order or decision. This amendment to Section 1705 significantly changed the required content of Commission decisions; it was not an idle act. (*California Motor Transport Co. v. Public Utilities Commission* (1963) 59 Cal.2d 270, 274.) It affords a rational basis for judicial review; assists the reviewing court to ascertain the principles relied upon and to determine whether it acted arbitrarily; assists the parties to know why the case was lost and to prepare for rehearing or review; assists others planning activities involving similar questions; and serves to help the Commission avoid careless or arbitrary action.

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[4] All Section references are to the Public Utilities Code.

(*California Motor Transport Co.*, 59 Cal.2d 274-275; see also *Pacific Tel. & Tel. Co. v. Public Utilities Commission* (1965) 62 Cal.2d 634, 648; *Greyhound Lines Inc. v. Public Utilities Commission* (1967) 65 Cal.2d 811, 813; *and California Manufacturers Association v. Public Utilities Commission* (1979) 24 Cal.3d 251, 259.)

While an ordering paragraph would take precedence over an inconsistent statement in the opinion section of a decision, it is readily apparent that, to give effect to Section 1705, we must provide for consistency between separately stated findings and conclusions on the one hand and ordering paragraphs on the other hand. To do otherwise would be to act as though only ordering paragraphs matter, and supporting findings and conclusions have no particular significance if they happen to conflict with the ordering paragraphs. This would contravene Section 1705. In addition, as stated in *Magarian v. Moser* (1935) 5 Cal.App. 2d 208, cited in *Healdsburg* (31 CPUC 2d 465, 474-75), an inconsistency between the formal conclusions of the court on the one hand and the written opinion on the other hand "...cannot be made the basis for a reversal when the findings, conclusions and judgment are consistent...," but "...[i]t is obvious that the judgment as entered must be supported by and conform to the findings...." (*Magarian v. Moser*, at 210.)

Conclusion of Law 7 of D.96-10-036 reflects the intended two-part limitation on the scope of the policy reconsideration discussed repeatedly in the opinion. It does not contemplate or provide for the broader policy reconsideration which is preferred by SDG&E and Edison and which, they argue, Ordering Paragraph 9 supports. Thus, the current case presents an inconsistency which must be resolved without reliance on the general rule in *Healdsburg*. We resolve the inconsistency in favor of the overwhelmingly

clear intention of the Commission to reconsider its policy narrowly. Accordingly, Ordering Paragraph 9 must be read as if the *and* which follows "1998," were omitted.[5]

We conclude that the proposals that would change the methodology for capacity payments made under preexisting standard offer agreements, as well as proposals to establish policies for capacity payments in the restructured industry in 1998 and beyond, exceed the limited scope of this proceeding. Considering such proposals here would be manifestly unfair to the parties who relied on our order limiting the scope of this extension of the proceeding.[6] IEP's motion to strike statements and recommendations that exceed the scope of this proceeding is therefore granted.

Capacity Payments for New Agreements During 1997

We asked parties to comment on whether there are indications of above-zero prices for short-term capacity. PG&E responded that it does not pay a capacity component for non-firm energy and is not aware of any utility that does. Likewise, Edison stated that except for purchases from QFs, it does not pay for capacity associated with non-firm power.

SDG&E offered the only concrete proposal for modifying capacity payments made under the standard offers.[7] Two of SDG&E's planned firm purchases include explicit capacity components, with prices of $10.20/kW-year and $12.00/kW-year

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[5] Even if we resolved the conflict between the conclusion of law and the ordering paragraph in favor of the latter, there would be no basis for finding that Ordering Paragraph 9 supersedes or nullifies other ordering paragraphs. We would still need to resolve the conflict between the utilities' reading of Ordering Paragraph 9 and Ordering Paragraph 4's provision that agreements formed before the applications were noticed are "not the subject of proposed changes to short-run avoided capacity made in this decision."

[6] Moreover, the ALJ ruling issued pursuant to Ordering Paragraph 9 for the purpose of setting dates for comments and replies ordered that the policy reconsideration would be limited to new standard offer agreements formed after the dates the applications were noticed.

[7] Edison supports reduced or zero payments generally but apparently opposes the proposal under consideration by claiming there is no reasonable basis to have different capacity payments based on the execution date of standard offers. ORA believes that capacity value should not exceed wholesale market prices but does not state whether it would apply this position to new QFs only. PG&E supports adoption of a market-based capacity price for new agreements.

respectively. SDG&E used the average price of $11.10/kW-year and discounted it to reflect the lower value of non-firm capacity provided by as-available QFs. SDG&E determined a discount factor of 29% based on the percentage of its QF capacity that, through experience, it believes it can rely upon for firm capacity. Applying this discount factor to the average firm capacity price of $11.10/kW-year produced a recommended as-available payment of $3.22/kW-year. SDG&E proposes to use this price in lieu of the current combustion turbine proxy methodology as the shortage value of additional capacity. Alternatively, SDG&E proposes a zero payment based on quarterly reports of actual payments by SDG&E for spot market firm capacity.

The comments of the utilities suggest that our understanding of the diminished need for capacity payments in the evolving market, as discussed in D.96-10-036, is essentially correct. The utilities state that they are not paying separate capacity components for non-firm energy. In any event, they are apparently able to obtain capacity at significantly less cost than that indicated by the combustion turbine proxy methodology that we have used in the past. However, the comments alone do not constitute, or provide proof of, such propositions. Parties opposing the proposed policy changes are entitled to conduct discovery, test underlying factual assumptions, and provide testimony and documentary evidence before we act to modify those policies. With respect to SDG&E's proposal, Kelco requests an opportunity to examine details of the two bids used by SDG&E. Kelco also finds serious faults with the non-firm discounting process used by SDG&E. We do not accept Kelco's concerns and allegations uncritically, but we agree that SDG&E's proposal raises questions that parties are entitled to address through evidentiary hearings.

While we recognize that opponents of the proposals must be given opportunity for hearings, we also recognize that the end product of evidentiary hearings would be a decision which either rejects contemplated modifications or adopts them for only a short period of time. Neither outcome warrants significant expenditure of time and resources. We conclude that further consideration of the limited proposal to reduce or eliminate capacity payments for new standard offers during 1997 would not be a good use of the Commission's or the parties' resources. As explained below, the efforts of all

stakeholders are better directed to resolving policies for capacity payments for existing as well as new agreements for 1998 and beyond, under the restructured generation market. We therefore table consideration of the proposal and order closure of this consolidated proceeding.

Procedural Guidance

PG&E states that the as-available capacity price set by the Commission will be an issue for new as well as existing agreements after the Power Exchange (PX) commences operations. According to PG&E, Section 390, added by AB 1890, resolves certain Short Run Avoided Cost (SRAC) issues but does not resolve how as-available capacity prices will be set for 1998 and perhaps for some time. PG&E believes that the PX price will not be used as the SRAC price for several years, until the conditions set forth in Section 390(c) can be satisfied. PG&E seeks guidance on where the issue of as-available capacity payments for 1998 and beyond will be resolved. Similarly, SDG&E asks where the various issues of as-available payments will be resolved if not in this proceeding.

This is an inappropriate proceeding for addressing these broader questions for the reasons discussed earlier. However, the comments of PG&E, SDG&E, Edison, and ORA convince us that we should take a broader approach than we contemplated taking when we issued D.96-10-036. Moreover, we are persuaded that substantive issues of policy, and of compliance with PURPA and AB 1890, have been raised in the comments. It has been suggested that we use existing dockets such as the Biennial Resources Plan Update (I.89-07-004) to address these questions. In light of Senate Bill (SB) 960 (Stats. 1996, Ch. 856), we believe a new, properly noticed and structured proceeding to address policies for as-available capacity payments for all USO1 and SO3 agreements represents a better approach.[8] We will entertain applications by the utilities for the purpose of considering changes to the methodology for determining as-available capacity payments. Any such application should be served broadly upon all existing and new

[8] Section 1 of SB 960 establishes a legislative policy that provides for resolution of proceedings within 18 months.

QFs, including those with whom the utility is in negotiations, as well as the service list for this proceeding. It may be appropriate to consolidate such applications, but we will leave that determination to the assigned Commissioner and Administrative Law Judge. Also, it may be appropriate to provide for coordination of such applications with the procedure to implement provisions of Section 390 which will be established in accordance with the discussion in D.96-12-028, slip op. at 17-18, and in D.96-12-088, slip op. at 38-39.

Findings of Fact

1. Proposals to change the methodology for setting as-available capacity payments required under USO1 and SO3 agreements formed before the effective date of notice of these applications exceed the limited scope of this proceeding.

2. Proposals to change the methodology for setting as-available capacity for 1998 and beyond exceed the limited scope of this proceeding.

3. Proposals to change the methodology for setting as-available capacity payments under new agreements during 1997 are properly before the Commission but they raise disputed factual questions and require a procedural schedule which is inconsistent with the limited time contemplated for their applicability.

Conclusions of Law

1. To the extent that Ordering Paragraph 9 of D.96-10-036 may be in conflict with or inconsistent with Conclusion of Law 7 of the same decision, we should resolve such conflict or inconsistency by giving weight to the intention of the Commission to limit the scope of this extended proceeding.

2. These proceedings should be closed.

O R D E R

IT IS ORDERED that:

1. The motion of Independent Energy Producers Association to strike statements and proposals which exceed the established scope of this proceeding is granted.

2. Application (A.) 95-11-057, A.96-01-008, and A.96-01-014 are closed.

This order is effective today.

Dated November 5, 1997, at San Francisco, California.

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