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Decision 97-11-071 November 19, 1997

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application of Southern California Edison Company (U 338-E) for Approval of a Self-Generation Deferral Agreement Between Union Oil Company of California and Southern California Edison Company.	Application 94-08-027 (Filed August 11, 1994; Reopened by Petition for Modification Filed May 19, 1997)

O P I N I O N

1. Summary

Southern California Edison Company (Edison) petitions to modify Decision (D.) 95-06-055 to permit it to roll back the 25% shareholder funding of a cogeneration deferral contract and to permit 100% ratepayer funding of the contract. Edison believes that this change was mandated by the Legislature as part of electric industry restructuring. This decision approves the petition to modify on grounds that Edison has shown that the relevant statute is best interpreted to require such a rollback for the single Edison contract sought to be modified.

2. Background

In D.95-06-055 (June 21, 1995), the Commission approved a self-generation deferral agreement between Edison and Union Oil Company of California (Unocal). Edison was permitted to offer Unocal a discounted rate contract to prevent Unocal from constructing its own self-generation capacity. The Commission's approval, however, was contingent upon Edison's acceptance of shareholder responsibility for 25% of any revenue shortfall arising from the difference between the contract rate and the otherwise applicable tariff.

Edison accepted the condition and established an Optional Pricing Adjustment Clause as part of its tariffs. This tariff language established the accounting procedures by which the 25% shareholder responsibility would stay with shareholders and not be transferred to ratepayers.

Based on the recent legislation restructuring the California electric services industry, Edison seeks to remove the Unocal contract from the Optional Pricing Adjustment Clause tariff. The tariff change would result in ratepayers being responsible for the full revenue shortfall resulting from the Unocal contract.

The petition is opposed by the Office of Ratepayer Advocates (ORA) and by The Utility Reform Network (TURN). Pacific Gas and Electric Company (PG&E) supports Edison's petition, but it urges the Commission to interpret the legislation to permit revision of a PG&E contract, as well as the Edison contract, to eliminate or reduce shareholder funding.

3. Restructuring Legislation

Assembly Bill 1890 (Ch. 854, Stats. 1996), signed by the Governor on September 23, 1996, codifies the parameters for a restructured electric industry, encouraging competition among electricity providers and directing customer rate reductions beginning in 1998. The law adds § 372 to the Public Utilities (PU) Code, addressing the development of cogeneration.[1] As pertinent to this proceeding, § 372(b)(3) provides:

> "[C]onsistent with state policy, with respect to self-cogeneration or cogeneration deferral agreements, the [C]ommission shall do the following:
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> "(b)(3) Subject to the fire wall described in subdivision (e) of Section 367 provide that the ratemaking treatment for self-cogeneration or cogeneration deferral agreements executed prior to December 20, 1995, or executed pursuant to paragraph (1) shall be consistent with the ratemaking treatment for the contracts approved before January 1995."

Edison asks that the Commission modify D.95-06-055 to make the ratemaking treatment for the Unocal agreement consistent with the ratemaking treatment adopted

[1] Cogeneration refers to power generation facilities used as a substitute for utility service.

for all of the other Edison self-generation deferral contracts approved before January 1995 – that is, ratepayers are to assume 100% responsibility for revenue shortfall through the Electric Revenue Adjustment Mechanism that is now in effect and the Transition Cost Balancing Account beginning in 1998. Edison states that because of the legislatively imposed rate freeze, this ratemaking change will not result in any changes to the rate levels charged to other customers.

4. Procedural History

Edison filed its request initially as an advice letter. Citing the new Code provision, Edison stated that its Unocal agreement had been "executed prior to December 20, 1995," and that its ratemaking treatment (25% shareholder participation) should "be consistent with the ratemaking treatment for the contracts approved before January 1995." Edison stated that its five cogeneration deferral agreements approved by the Commission prior to January 1995 provided that 100% of the discount would be absorbed by ratepayers.[2]

Edison's advice letter was opposed by ORA, which stated that § 372(b)(3) referred to cogeneration deferral agreements generally, and that the statute did not single out only Edison agreements. ORA stated that the last self-generation deferral contract approved by the Commission prior to January 1995 was a PG&E contract (USS-Posco), authorized in D.94-11-023 in November 1994, and that the PG&E contract required that shareholders fund 25% of the discount from the otherwise applicable tariff. Since this ratemaking treatment was consistent with that accorded Edison in its Unocal agreement, ORA argued that the Commission should reject Edison's advice letter change.

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[2] The five Edison contracts included Arco-Ellwood, D.89-09-041; Shell, D.90-07-021; Dow, Resolution E-3364; Mobil Oil, D.94-03-075, and Eisenhower Medical Center, Resolution E-3370.

In Resolution E-3482, issued on February 19, 1997, the Commission rejected Edison's advice letter filing because of the argument raised by ORA, suggesting that Edison file a petition to modify the Unocal decision so that the question raised by ORA could be considered more fully. Edison filed its petition to modify on May 19, 1997.

No party filed a response to Edison's petition to modify. On July 11, 1997, the assigned administrative law judge (ALJ) issued an ALJ Ruling directing Edison to address the question of legislative intent in enacting § 372(b)(3) and inviting (but not requiring) comment by other interested commentators, including other energy companies, ORA and TURN. The ALJ Ruling stated that preliminary research suggested that there were at least two contracts approved by the Commission prior to January 1995 in which shareholders assumed 25% responsibility for revenue shortfall (PG&E/USS-Posco and PG&E/Genentech, D.94-09-071 (September 15, 1994)), and the Ruling asked that Edison and others address the implications of these agreements.

Comments were filed on August 11, 1997, by Edison, PG&E, ORA and TURN.

5. Position of Edison

Edison contends that § 372(b)(3) requires the Commission to make the ratemaking treatment for the Unocal agreement (25% shareholder contribution) consistent with the ratemaking treatment applied to other Edison self-generation deferral rate contracts approved prior to January 1995 (0% shareholder contribution).

Edison appears to reach this conclusion by negative inference. First, it argues that since the statute refers to "consistent ratemaking treatment for the contracts," not contract, approved prior to January 1995, the law literally cannot refer to a single contract, the PG&E/USS-Posco agreement, cited by ORA. Second, the PG&E/Genentech agreement (in which 25% shareholder responsibility also was authorized) was not, in the words of the statute, a "self-cogeneration or cogeneration deferral agreement." It was an agreement to induce a business to expand into California. Finally, Edison reasons, the single cogeneration agreement (USS-Posco) in which the Commission applied a 25% shareholder contribution was based on a

settlement and was specifically deemed non-precedential. (D.94-11-023, 57 CPUC2d 304, 308.) Edison states:

> "Thus, prior to January 1995, even though the Commission applied a 25% shareholder contribution to the [USS-Posco] agreement by adopting, in relevant part, a settlement, the Commission had not 'approved' the principle requiring any shareholder contribution to [deferral] agreement discounts....The Commission's long-established guidelines to flow through ERAM 100% of any revenue deficiency for [deferral] agreements had not changed. This was Commission precedent as of January 1995 regardless of any indication that such precedent might change." (Edison Response, at 5.)

Edison acknowledges that "there may not be any direct statement of legislative intent to change the ratemaking treatment" for the Unocal agreement. (Edison Response, at 5.) But it argues that § 372(b)(3) would be meaningless if it is interpreted to mean that the ratemaking treatment of the Unocal agreement should be made "consistent" with that of USS-Posco, since that would mean no change at all in the Unocal agreement. Edison states that the ratemaking treatment for the Unocal agreement can be made consistent with the ratemaking treatment for other deferral agreements only if the reference to "contracts approved before January 1995" is interpreted to mean other Edison agreements approved before January 1995.

Thus, according to Edison, the legislative intent to change the ratemaking treatment for the Unocal agreement can be inferred because to interpret the subdivision otherwise defies common sense.

6. Position of ORA and TURN

ORA and TURN have filed a joint response. They argue that the Commission had established a consistent policy for self-generation deferral agreements by the time the Legislature enacted Assembly Bill 1890. In the Unocal decision (D.95-06-055),

relying on Genentech, USS-Posco and a Southern California Gas Company decision,[3] the Commission stated:

> "We are unwilling to wait for restructuring to occur...to address the issue of allocation of risk between ratepayers and shareholders for discounted deferral agreements. We disagree with the conclusion reached by the administrative law judge...that shareholders receive no financial benefits from a deferral agreement. On the contrary, there is potentially significant financial benefit to shareholders in maintaining market share....The net benefit is particularly pronounced when the cost of customer retention is achieved using ratepayer money. Although these benefits are not easily quantifiable, we do not believe they should be ignored. As such, we believe a nominal shareholder participation is warranted at this time for this agreement.
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> "We are also persuaded that shareholder participation in the revenue shortfall associated with this agreement will provide an incentive for Edison to improve its efficiency and lower its cost in order to retain earnings." (D.95-06-055, 60 CPUC2d 408, 413.)

Like Edison, ORA and TURN cite no legislative history in interpreting § 372(b)(3). They argue, however, that the Legislature was aware of the Commission's developing policy in 1994 to put shareholders at risk for a portion of the discounts in deferral agreements in order to encourage utilities to negotiate the best rates, improve their own efficiency and achieve lower consumer rates. Given that awareness, they infer that the Legislature could not have intended to reverse a Commission policy which furthered the legislative goal of lowering rates for all ratepayers through increased efficiency.

ORA and TURN argue that had the Legislature intended § 372(b)(3) to apply only to Edison or only to the Unocal contract, the statute would have said so, as did

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[3] Re Natural Gas Procurement, D.94-07-064 (approving a settlement that calls on shareholders of Southern California Gas Company to absorb 100% of the revenue shortfall created by discounted contracts).

other sections of Assembly Bill 1890.[4] The absence of such reference, ORA and TURN state, implies that the Legislature did not have the ratemaking treatment of the Unocal contract specifically in mind. Moreover, they state, the words of the statute "ratemaking treatment for self-cogeneration or cogeneration deferral agreements," not agreement, show that a single contract was not contemplated, and that Edison's interpretation thus is inconsistent with the plain language of the statute.

ORA and TURN do not venture to suggest what they believe to be the clear meaning of § 372(b)(3), but they contend that Edison's interpretation leads to what they term an absurd result of (1) leaving the Commission's 1994 decisions with respect to the PG&E contracts intact; (2) reversing the Commission decision on the 1995 Unocal agreement; and (3) leaving intact the Commission restructuring decision in which shareholders would absorb a portion of the discounts associated with deferral contracts approved in 1996 and 1997. ORA and TURN ask, rhetorically, why would the Legislature conclude that there is something unique about contracts approved in 1995 that exempt them from the sharing that applies to contracts approved in 1994, 1996 and 1997?

7. Position of PG&E

PG&E believes that the plain language of the statute provides that the ratemaking treatment of self-generation or cogeneration deferral contracts executed before December 20, 1995, should be consistent with the ratemaking treatment for contracts approved before January 1995. Because the statute speaks in the broadest terms of consistency of ratemaking treatment, PG&E believes that the intent of the law

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[4] See §§ 367(c)(2) and 368(c) and (e), which refer to Edison by identifying it as "an electrical corporation that, as of December 20, 1995, served more than four million customers, and that was also a gas corporation that served less than four thousand customers." ORA and TURN cite the legal doctrine of expressio unius est exclusion alterius, which, roughly in this context, means that if a reference to Edison is explicit in one section but not in another, the exclusion in the latter case may be deemed to be deliberate.

was to look to the general ratemaking treatment for all deferral agreements, including those of both Edison and PG&E, before January 1995.

PG&E states that it had 10 self-generation or cogeneration deferral contracts approved between 1987 and January 1995, all but one of which (USS-Posco) provided for 100% ratepayer funding. Like Edison, PG&E distinguishes and dismisses the Genentech decision because it involved a business attraction discount rate agreement which PG&E believes is not subject to § 372(b)(3).

According to PG&E, the Commission's ratemaking policy since the late 1980s has been to provide for 100% ratepayer funding of the discounts associated with the cogeneration deferral agreements. PG&E states:

> "At the point it was approved in November 1994, the ratemaking treatment for the USS-POSCO Agreement constituted nothing more than a settlement of a disputed matter. It in no way altered the existing Commission policy requiring ratepayers to fully fund discounts." (PG&E Response, at 5.)

PG&E states that it had three cogeneration deferral contracts executed in 1995. Two of these – Semitropic, executed on May 25, 1995, and Avenal State Prison, executed on June 1, 1995[5] - provided for 100% ratepayer funding. However, the third contract, Exxon, executed on June 29, 1995, provided for 50% shareholder funding of the discount. The Commission recently issued D.97-07-052, finding all three of these contracts reasonable.

In view of the broad mandate of § 372(b)(3), PG&E believes that the Exxon decision should be altered to provide for 100% ratepayer funding. PG&E recognizes that the Commission cannot specifically address PG&E issues in this Edison docket.

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[5] The Semitropic and Avenal State Prison contracts were both filed under General Order 96-A, Section X.B (Advice Letters 1513-E and 1516-E, respectively). Both contracts were found reasonable by the Commission in D.97-07-052.

However, it states that once the Commission determines the appropriate interpretation of § 372(b)(3), PG&E will make the necessary filing to deal with the Exxon contract.

8. Discussion

In applying principles of statutory construction, the fundamental rule is to ascertain the intent of the Legislature so as to effect the purpose of the law. (Delaney v. Superior Court (1990) 50 Cal.3d 785, 798; see, generally 58 Cal.Jur.3d §§ 96-118.) In so doing, the Commission should first look to the words contained in § 372, in the context of the language of the entire statute, giving the words their usual and ordinary meaning. (Cal. School Employees Assn v. Governing Bd. (1994) 8 Cal.4th 333, 338.) If the words of the statute do not unequivocally express the Legislature's intent, then a court or agency may consider legislative history and other extrinsic aids in assessing the legislative intent. (Estate of Ryan (1943) 21 CPUC2d 498.)

The plain language of the statute provides that, consistent with state policy, and subject to certain consumer protection "firewall" provisions, the ratemaking treatment of self-generation or cogeneration deferral contracts executed before December 20, 1995, should be consistent with the ratemaking treatment for contracts approved before January 1995.

Edison insists that subparagraph (b)(3) of § 372 applies to the Unocal agreement, because the agreement was executed prior to December 20, 1995, and its ratemaking treatment was not consistent with the ratemaking treatment of five similar Edison contracts approved before January 1995. This assumes, however, that § 372(b)(3) was intended to apply specifically to Edison and to the Unocal agreement, an assumption that we are not prepared to accept. As PG&E points out, the statute speaks in the broadest terms of consistency of ratemaking treatment and cannot reasonably be read with the narrow focus urged by Edison. Had the statute been intended to apply only to Edison, it can be assumed that the Legislature would have said so, just as it did in adding §§ 367(e)(2) and 368(c) and (e) to the PU Code.

PG&E's reading of the statute seems closer to the mark. The statute does not specifically require that ratemaking treatment be consistent with the ratemaking

treatment for a particular utility or for particular contracts approved by the Commission. Rather, it speaks in broad terms. In light of the absence of any language specifying the pre-January 1995 ratemaking treatment that the Legislature had in mind, it would not be unreasonable to infer that the intent of the law was to look to the ratemaking treatment approved by the Commission for these types of contracts before January 1995.

As both Edison and PG&E note, the majority of cogeneration and self-generation deferral contracts approved before January 1995 provided for 100% ratepayer and 0% shareholder funding of the deferral contract discount. Most of these contracts, however, were approved in the late 1980s. The two most recent comparable contracts approved prior to January 1995, PG&E's USS-Posco agreement (approved in November 1994) and the Genentech agreement (approved in September 1994), each carried 25% shareholder funding and reflected the Commission's shift to shareholder participation in discounted contracts. Arguably, then, the ratemaking treatment most "consistent with state policy" the words of § 372) was that accorded the USS-Posco and Genentech agreements.

However, we agree with Edison and PG&E that the Genentech decision should be disregarded in this analysis. It is accurate that the Genentech case did not involve either a cogeneration deferral contract or a self-generation deferral contract and thus is not relevant to our analysis.

The key to this case is to understand that the Legislature clearly intended that some PUC decision should be changed. It is possible to accept the position of ORA and TURN that the Edison situation can be distinguished from the intent of the Legislation. It is also possible to believe that a plausible case can be made that the PG&E contracts in 1995 would not meet the specific intent of the law and shareholder responsibility should continue at the specified level.[6]

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[6] Again, we will not make any decision in this case that should be seen as prejudging any future PG&E case on this issue.

However, to decide to make no changes to either the decision in Edison's case or PG&E's case would be to render the law meaningless. This is clearly not appropriate.

We have already determined that the law could have specified applicability to one utility, but did not do so. Thus, it is necessary to look at the Commission's policy before January, 1995 for all utilities. It is also necessary to look at the Commission's policy with regard to deferral contracts, and not just one contract. As we have determined that the Genentech contract is not at issue here, we find one contract (USS-POSCO) with a 25% shareholder responsibility and many other contracts with no shareholder responsibility. While one decision can be seen as a "Commission policy," it is more straightforward to consider the policy to be formed over the larger number of Edison decisions on point. This is especially clear when we see that the USS-POSCO decision specifically stated that it should not be considered precedential, and thus should not be seen as a change in Commission policy.

We note that this decision should not be read to imply that the Commission made an incorrect or inappropriate decision in D.95-06-055. Our decision at the time was well-considered and appropriate in the context of electric restructuring as it existed then. However, we must defer to the judgment of the Legislature which included this code section as part of a comprehensive restructuring bill.

Therefore, we will grant Edison's Petition for Modification.

Findings of Fact

1. In D.95-06-055, the Commission approved a self-generation deferral agreement between Edison and Unocal in which Edison was required to accept 25% shareholder responsibility for any revenue shortfall.

2. Assembly Bill 1890 has added § 372 to the PU Code.

3. PU Code § 372(b)(3) requires the Commission, consistent with state policy, to provide consistent ratemaking treatment for certain self-cogeneration or cogeneration deferral agreements.

4. Edison on May 19, 1997, filed a Petition for Modification, relying on PU Code § 372(b)(3), to eliminate the 25% shareholder responsibility in D.95-06-055.

5. By ALJ Ruling dated July 11, 1997, Edison was directed to address the question of legislative intent with respect to PU Code § 372(b)(3), and other interested commentators were invited to do the same.

6. Comments were filed on August 11, 1997, by Edison, PG&E, ORA and TURN.

7. Edison had five cogeneration deferral agreements approved by the Commission prior to January 1995, and each provided that 100% of the discount would be absorbed by ratepayers.

8. PG&E had 10 self-generation or cogeneration deferral contracts approved between 1987 and the end of 1994, all but one (USS-Posco) of which provided for 100% ratepayer funding.

9. PG&E's agreement with USS-Posco provided for 25% shareholder funding of the discount.

10. A PG&E business inducement agreement (Genentech) approved prior to January 1995 provided for 25% shareholder funding of the discount.

11. PG&E had three cogeneration deferral contracts executed in 1995, two of which provided for 100% ratepayer funding and one (Exxon) of which provided for 50% shareholder funding of the discount.

Conclusions of Law

1. In applying principles of statutory construction, the fundamental rule is to ascertain the intent of the Legislature so as to effect the purpose of the law.

2. There are two types of ratemaking treatment accorded relevant contracts prior to January 1995, one assigning no portion of any discounts to shareholders and the other assigning a portion of the discount to shareholders.

3. ORA's protest, as set forth in its joint submission with TURN, presents an analysis with a plausible alternative to Edison's view of the legislative intent of PU Code § 372(b)(3).

4. The record is sufficient for the Commission to conclude that Edison has met its burden of showing that PU Code § 372(b)(3) requires a modification of D.95-06-055.

5. The petition to modify should be granted.

O R D E R

IT IS ORDERED that:

1. The Southern California Edison Company Petition for Modification of Decision 95-06-055, dated May 19, 1997, is granted.

2. Application 94-08-027, which was reopened to consider this petition for modification, is closed.

This order is effective today.

Dated November 19, 1997, at San Francisco, California.

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

I dissent.

/s/ HENRY M. DUQUE
Commissioner