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Decision 97-11-086 November 19, 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.	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)

ORIGINAL

ORDER DENYING REHEARING OF DECISION (D.) 97-02-021

I. INTRODUCTION

In Decision (D.) 95-12-063, as modified by D.96-01-009 ("Preferred Policy Decision"), the Commission presented its preferred policy choices for the restructuring of the electric services industry in California. In this decision, the Commission "adopted[ed] 90% of the embedded cost of debt as a reasonable rate of return on the equity portion of the net book value to reflect the reduced risks," and provided the utilities with an opportunity to recover 100 percent of the Competitive Transition Charge ("CTC"), which is the mechanism by which the electric utilities will recover from ratepayers their transition costs, including those related to stranded investments. (Preferred Policy Decision, pp. 3 & 124 (slip op.).)

A number of parties, including The Utility Reform Network[1] ("TURN"), filed applications for rehearing. One argument raised by TURN's rehearing application was that the Preferred Policy Decision was unlawful because the Commission's treatment of stranded assets would constitute "double recovery" in light of past decisions which set the authorized rates of return at levels that already compensated electric utilities for competitive risks. Subsequently, the Legislature enacted Assembly Bill ("AB") 1890, Stats. 1996, ch. 854, which was signed into law on September 23, 1996.

In D.97-02-021, the Commission disposed of many of issues raised in the rehearing applications as moot with the enactment of AB 1890, including the "double recovery" argument raised by TURN. In addressing this particular argument, the Commission stated:

> "However, we note that the risk of 'double recovery' for past period exists because the generation bypassed during 1988-1994 may very well be the same generation found to be uncompetitive in the restructured electric market. The perceived risk of electric utility bypass was considered by the Commission in setting the [return on equity ("ROE") during 1988-1994, so the CTC should not now compensate a utility for displacement of its generation by competition in effect before the date of the Preferred Policy Decision.
>
> "However, although we would tend to agree with TURN concerning this 'double recovery' for past periods, AB 1890 makes this issue moot. The law provides: 'Recovery of costs prior to December 31, 2001, shall include a return as provided for in Decision 95-12-063, as modified by Decision 96-01-009, together with associated taxes." (Pub. Util. Code, §367, subd. (d).) Accordingly, no readjustment is now possible. . . ."
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> (D.97-02-021, p. 63 (slip op.), emphasis in original.)

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[1] It was formerly known as Toward Utility Rate Normalization.

TURN then filed an application for rehearing on this decision, alleging that the Commission's interpretation of Public Utilities Code Section 367(d) in disposing of TURN's double recovery argument as moot violates Public Utilities Code Section 451. TURN also asserts that the Commission's reading of AB 1890 is overly restrictive, and would render Public Utilities Code Section 451 superfluous.

Southern California Edison Company, Pacific Gas and Electric Company, and San Diego Gas and Electric Company filed responses, asserting that TURN's rehearing application has no merit. Also, Edison and PG&E argues that TURN's rehearing application is an improper vehicle for challenging D.97-02-021, because TURN is filing a subsequent application for rehearing on a decision that denied its original application for rehearing. Thus, they argue that the application should be rejected.

We have reviewed each and every allegation raised by TURN, and conclude the application is without merit for the reasons discussed below. Therefore, the application for rehearing is denied.

II. DISCUSSION

Preliminarily, we note that in its rehearing application, TURN is challenging a Commission order denying rehearing. Normally, we would reject such an application. However, in this Application for Rehearing of D.97-02-021, TURN is raising new issues, namely those related to the proper interpretation of Public Utilities Code Section 367(d). These issues did not exist absent the issuance of the rehearing decision that is being challenged. Thus, we believe that the instant situation is different from the norm, and will consider the rehearing application on the merits.

In its rehearing application, TURN argues that the issue of double recovery is not moot, and that the Commission should interpret AB 1890 to be consistent with Public Utilities Code Section 451, which provides that rates be "just and reasonable." (Pub. Util. Code, §451.) TURN's arguments are without merit.

As stated in D.97-02-021, the double recovery argument set forth by TURN in its Application for Rehearing of the Preferred Policy Decision was made moot with the enactment of Public Utilities Code Section 367(d). This statute provides:

> "Recovery of costs prior to December 31, 2091, shall include a return as provided for in Decision 95-12-063, as modified by Decision 96-01-009 [("Preferred Policy Decision")], together with associated taxes." (Pub. Util. Code, §367, subd. (d).)

In the Preferred Policy Decision, the Commission reduced the rate of return on equity to a level 10 percent below the debt return. (Preferred Policy Decision, pp. 111 & 123-124 (slip op.).) The plain language of Public Utilities Code Section 367(d) is very clear that the Legislature has codified the principle of the reduced return on equity and the basis points by which returns should be reduced, as adopted in the Preferred Policy Decision. Thus, the Legislature through the enactment of AB 1890 has expressly adopted this principle as a matter of law, and accordingly, any adjustment to this return on equity is precluded. Therefore, any additional consideration of this return on equity as it relates to the double recovery issue is foreclosed by Public Utilities Code Section 367(d).

We further note that TURN's application for rehearing would have the Commission ignore the plain language of the Public Utilities Code Section 367(d). In fact, TURN is asking us to change the reduced return on equity set forth in the Preferred Policy Decision, by "reduc[ing] the rate of return for the utility's investment in uneconomic assets" to "the commercial paper rate for the duration of the transition period."(TURN's Application for Rehearing, p. 5.) Thus, TURN is suggesting that we interpret Public Utilities Code Section 367(d) in a manner that would alter the language explicitly specified in the statute by the Legislature. The law of statutory construction clearly prohibits such an alteration. " 'If the words of the statute are clear, [one] should not add to or alter them to accomplish a purpose that does not appear on the face of the statute or from the legislative history.' [Citation omitted.]" (California Teachers Assn. v.

San Diego Community College Dist. (1981) 28 Cal.3d 692, 698; see also, Public Util. Com. v. Energy Resources Conservation & Dev. Com. (1984) 150 Cal.App.3d 437, 444.)

Moreover, we find that TURN's argument that Public Utilities Code Section 451 prohibits the Commission's interpretation of Public Utilities Code Section 367(d) is without merit, because it based on a misreading of the following discussion in D.97-02-021:

> " '[W]e note that the risk of "double recovery" for past periods exists because the generation bypassed during 1988-1994 may very well be the same generation found to be uncompetitive in the restructured electric market. The perceived risk of electric utility bypass was considered by the Commission in setting the ROE during 1988-1994, so the CTC should not now compensate a utility for displacement of its generation by competition in effect before the date of the Preferred Policy Decision. ¶[W]e would tend to agree with TURN concerning this "double recovery" for past periods. . . .' " (TURN's Application for Rehearing, p. 3, quoting D.97-02-021, p. 63 (slip op.), emphasis in original.)

TURN relies on the above quoted discussion from D.97-02-021 to infer that the Commission agreed that there was "double recovery," and thus, the reduced return on equity adopted in the Preferred Policy Decision would result in unreasonable and unjust rates in violation of Public Utilities Code Section 451.

However, TURN has drawn an incorrect inference from this discussion. We made no determination in D.97-02-021 that the adopted reduced return on equity would indeed result in unreasonable or unjust rates. Instead, we stated that "the risk of 'double recovery' for past periods exists because the generation found to be uncompetitive may very well be the same generation found to be uncompetitive in the restructured electric market." (D.97-02-021, p. 63 (slip op.), emphasis added.) By this language, we were saying that there was the potential for double recovery rather than the existence of double recovery. Accordingly, we were merely agreeing that a rehearing might have been appropriate to consider the facts in this particular situation, along with previous

Commission decisions and relevant case law. Absent the issue being moot, we would have ordered a limited rehearing to address the "double recovery" issue, so that all parties would have had an opportunity to address this specific issue. Since we did not determine that the return on equity would result in unreasonable and unjust rates, there was no violation of Public Utilities Code Section 451. In fact, we never reached this issue because it became moot with AB 1890. Thus, TURN's reliance on the above discussion in D.97-02-021 to infer that the Commission "agreed" with TURN's allegations of Public Utilities Code Section 451 violation is misplaced. Moreover, TURN has interpreted the meaning of these words of "agreement" beyond what we intended.

In addition, TURN's allegation that the Commission might have adopted a lower return (Application for Rehearing, p. 5) is without merit, because there was no record to support such an adjustment. A rehearing would have been necessary to establish a record; however, the enactment of AB 1890 precluded this rehearing from occurring.

In its application for rehearing, TURN claims that the Commission's interpretation of Public Utilities Code Section 367(d) made Public Utilities Code Section 451 superfluous is without merit. As discussed above, since we made no determination as to whether the return on equity was reasonable or just for purposes of the double recovery issue, the provisions of Public Utilities Code Section 451were not triggered. Thus, the Commission's interpretation did not render Public Utilities Code Section 451 superfluous.

Furthermore, in interpreting Public Utilities Code Section 367(d) as the Legislature intended, the Commission did not read AB 1890 as revoking or repealing Public Utilities Code Section 451. Rather, the Commission was merely following the explicit mandate of AB 1890, which made TURN's double recovery allegation moot.

However, in its rehearing application, TURN nevertheless alleges a conflict between these two statutory provisions. If, assuming arguendo, there is a conflict, the laws of statutory construction govern. In such a situation, the latest and more specific

statute controls. (See Bailey v. Superior Court (1977) 19 Cal.3d 970, 976-978, fns. 8 & 10; Woodard v. Southern Cal. Permanente Medical Group (1985) 171 Cal.App.3d 656, 664; People v. Breyer (1934) 139 Cal.App.547, 550; see also, People v. Jenkins (1980) 28 Cal.3d 494, 502; In re Williamson (1954) 43 Cal.2d 651, 654.) In the instant situation, Public Utilities Code Section 451 is the earlier enacted statute, as well as the general statute. Public Utilities Code Section 367(d) is the later and more specific act, and thus, this later statute controls.

III. CONCLUSION

Therefore, based on the above discussion, we correctly interpreted Public Utilities Code Section 367(d) to conclude that TURN's double recovery argument became moot with the enactment of AB 1890, and such an interpretation did not result in a violation of Public Utilities Code Section 451. Thus, the allegations raised in TURN's Application for Rehearing of D.97-02-021 have no merit.

THEREFORE, IT IS ORDERED that rehearing of D.97-02-021 is denied.

This order is effective today.

Dated November 19, 1997 at San Francisco, California.

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