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MAIL DATE

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Decision 98-05-025 May 7, 1998

ORIGINAL

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 338e) for Approval of Demand-Side Management Pilot Bidding Contract.

Application 97-03-045
(Filed March 25, 1997)

**ORDER DENYING REHEARING AND MODIFYING
DECISION 97-12-024**

In D. 97-12-024, the Commission approved a contract negotiated jointly by Southern California Edison (Edison), Southern California Gas Co. (SoCal) and SESCO, Inc.(SESCO). The contract was negotiated pursuant to the demand-side-management (DSM) pilot bidding programs required by Public Utilities (PU) Code § 747 and the Commission's adopted rules governing DSM contained in Rulemaking (R.) 91-08-003, Investigation (I) 91-08-002, D.94-10-0159, D.985-05-027, D.95-06-017 and D. 95-12-054. The DSM pilot bidding programs were initiated to test the impact of competitive bidding on utility procurement of DSM services. In general, the objective was to test the ability of third-party providers to replace certain utility DSM programs at a lower cost to ratepayers. Because the contract will be cost-effective under only a limited set of circumstances, the Commission required that SESCO provide a cost effectiveness security of \$200,000 in addition to the other security provisions of the contract.

The Commission also stated, in ordering paragraph 2:

"2. SESCO's acceptance of the contract will be deemed a waiver of its right to challenge any cost-effectiveness issues at a later date."

It is this additional condition that SESCO challenges in its application. First, Applicant alleges that the language is so vague that one of SESCO's competitors could challenge one of its programs for being not cost-effective and applicant would be forbidden from responding. Second, SESCO asserts that the decision accepts incorrect cost-effectiveness calculations submitted in the utilities' application not in accordance with the contract. Specifically, Applicant argues that the decision "requires SESCO to accept as correct the fundamentally flawed Total Resource Cost (TRC) and Utility Cost (UT) cost-effectiveness calculations contained in the Utilities' applications ... calculations that conflict with both the contract language ... and with the Commission's own Standard Practice Manual on cost-effectiveness procedures."

This contract was signed over two years ago, following three years of negotiations among the parties. These negotiations included the issue of cost-effectiveness and how it should be measured. Indeed, the requirement for the \$200,000 security, to which SESCO has agreed, was included specifically for the purposes for insuring that the contract would be carried out in a cost-effective manner.

The utilities address this issue at page 2 of their Response to the application:

"Cost-effectiveness is a fundamental and material term of the SESCO Contract, yet it is abundantly clear from the Application for Rehearing that SESCO does not agree with the cost-effectiveness calculations provided in SoCalGas' and SCE's Application accompanying the request for approval of this Contract. It is furthermore apparent that SESCO will argue about the cost-effectiveness calculations if the Contract goes forward. Indeed, one could even argue that the administrative and resource burdens of potentially litigating the cost-effectiveness calculations after this Contract has been performed should be quantified and added into the cost-effectiveness calculation in light of

SESCO's actions in contributing to the difficulties and delays as this Contract goes through the regulatory process.

The utilities remain firm, however, that their application and contract are consistent with SoCalGas' and SCE's understanding of the Contract and Commission requirements that govern this Contract, the cost-effectiveness calculation criteria, and the DSM pilot bidding program. SESCO, on the other hand, apparently disagrees with or fundamentally misunderstands SoCalGas' and SCE's interpretation of the cost-effectiveness terms that were negotiated among the parties to this Contract over three long years.

This Contract was signed over one year ago, and SoCalGas and SCE filed the Contract for Commission approval in March, 1997. Certainly due in no small part to SESCO's protest of the Application submitted for Commission approval the Contract that SESCO signed, as well as SESCO filing its Application for Rehearing, we are still awaiting the opportunity to begin delivering energy efficiency savings to ratepayers as part of the Commission's DSM pilot bidding program. If hearings are convened in this matter, as SESCO suggests if the Application for Rehearing is not resolved to SESCO's liking, such action would impose even more grave delays than those that have already been experienced.

SoCalGas and SCE question whether such continued delays are appropriate. The Commission itself has recognized that had it anticipated at the time it established the DSM pilot bidding programs the industry changes that have since occurred, then "it is unlikely that we would require utilities to enter into a long-term contract for energy efficiency services today" (D.97-03-068, p.3). In light of these changes, perhaps one alternative for the Commission to consider with regard to this Contract is to deny the approval of the Contract due to the time delays and the clear

evidence that there has apparently been no "meeting of the minds" on all material terms sufficient to form a binding contract."

However, as pointed out above, the negotiation and regulatory approval process for this program is apparently in its fourth year. To simply vacate the approval contained in the prior decision would not be fair to the parties nor to the utilities' customers. Further, Applicant has presented a plausible argument that the complained of language in Ordering Paragraph 2 is too vague. The paragraph should therefore be modified to preserve Applicant's right to respond to potential litigation by third parties while reiterating that the Commission considers the issue of cost-effectiveness concluded. Further, in D.97-12-024 the Commission allowed SESCO 30 days to request a hearing on the cost-effectiveness issue, with the decision granting contract approval to be stayed. SESCO has not filed such a request, although it is apparent from its application that it considers the issue far from settled. SESCO should therefore be allowed an additional 30 days from the date of this decision to request an evidentiary hearing.

No legal or factual error having been presented, the Application for Rehearing should be denied. However, Ordering Paragraph 2 should be modified as set out below:

IT IS ORDERED that:

1. The Application for Rehearing by SESCO is denied.
2. Ordering Paragraph 2 is modified as follows.

SESCO's acceptance of the contract will be deemed an acceptance of the provisions relating to cost-effectiveness contained in the contract and reflected in D.97-12-024. SESCO will not initiate any further litigation before the Commission relating to the cost-effectiveness of the contract. Should a third party initiate such litigation, SESCO may respond thereto.

3. If SESCO desires an evidentiary hearing on the cost-effectiveness issues, it shall notify the Commission within 30 days of the effective date of this order.
4. This Order is effective today.

Dated May 7, 1998, at San Francisco, California.

RICHARD A. BILAS
President
P. GREGORY CONLON
HENRY M. DUQUE
JOSIAH L. NEEPER
Commissioners

Commissioner Jessie J. Knight, Jr.
being necessarily absent, did not
participate.