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MAIL DATE
7/28/98

Decision 98-07-104 July 23, 1998

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

ORIGINAL

Application of PACIFIC GAS AND ELECTRIC COMPANY, for authority to (i) Establish its Authorized Rate of Return for Common Equity, (ii) Establish its authorized Capital Structure, (iii) Adjust its Cost Factors for Embedded Debt and Preferred Stock, and (iv) Establish its Overall Rate of Return for Calendar Year 1996. (Electric and Gas) (U 39 M)

Application 95-05-016
Application 95-05-017
Application 95-05-021
Application 95-05-022
Application 95-05-023
(Filed May 8, 1995)

ORDER MODIFYING AND DENYING REHEARING OF DECISION 96-10-072

I. INTRODUCTION

This application for rehearing stems from the denial of a request for intervenor compensation filed by Economic & Technical Analysis Group (ETAG) for its contribution to Decision (D.) 95-11-062. That decision established the 1996 costs of capital for five California energy utilities: Pacific Gas and Electric Company (PG&E), Southern California Gas Company (SoCalGas), Southern California Edison Company (Edison), San Diego Gas & Electric Company (SDG&E), and Sierra Pacific Power Company (Sierra). In that proceeding, the Commission adopted the Rate of Return on Equity (ROE) of 11.6% proposed by the parties in a Joint Recommendation, which was supported by the applicant utilities, the Office of Ratepayers Advocates (ORA),[1] the Department of the Navy and Federal Executive Agencies (FEA), and ETAG.

[1] Formerly known as the Division of Ratepayer Advocates (DRA).

In D.96-10-072, we denied ETAG's request for compensation (RFC), finding that ETAG did not make a substantial contribution to D.95-11-062. ETAG subsequently filed an application for rehearing of D.96-10-072 in which it disputes the Commission's finding that it did not make a substantial contribution to the proceeding. ETAG also asserts that D.96-10-072 contains numerous other errors which are prejudicial to ETAG on the issue of compensation. ORA filed a response in opposition to the application for rehearing, in which it addresses ETAG's arguments regarding substantial contribution, as well as the issue of eligibility to claim compensation.

We have considered all of the allegations of legal error set forth by ETAG, as well as the responses thereto, and are of the opinion that none of them merits granting rehearing. However, we will modify D.96-10-072 to correct a mistake indicating SoCalGas filed an opposition to ETAG's request for compensation.

II. DISCUSSION

Before discussing the merits of ETAG's claims regarding substantial contribution, we first note that in its application for rehearing, ETAG raises arguments regarding eligibility to claim compensation. We did not address the issue of eligibility in D.96-10-072 since we found that ETAG did not make a substantial contribution to the proceeding.[2] As such, we need not address the issue of eligibility in this decision.

Turning to the issue of substantial contribution, we find that ETAG mainly reargues the merits of the evidence it presented in the cost of capital proceeding, and reiterates prior arguments raised in its RFC. Rearguing the

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[2] Under Pub. Util. Code §1803, a finding of substantial contribution is the first requirement that must be met before the Commission may award intervenor compensation. Pub. Util. Code §1803(a). Only then is it necessary to examine the issue of eligibility under Pub. Util. Code §1803(b). Since we found that ETAG did not make a substantial contribution, there was no need to make a finding regarding eligibility in D.96-10-072.

evidence and disagreeing with the Commission's view of the evidence does not articulate any legal error in our decision as required by Public Utilities Code §1732 in an application for rehearing. Nonetheless, we will address each of ETAG's concerns, beginning with its assertion that we erroneously concluded that ETAG did not make a substantial contribution to D.95-11-062.

Public Utilities Code section 1802(h) states:

> "Substantial contribution" means that, in the judgment of the commission, the customer's presentation has substantially assisted the commission in the making of its order or decision because the order or decision has adopted in whole or in part one or more factual contentions, legal contentions, or specific policy or procedural recommendations presented by the customer. Where the customer's participation has resulted in a substantial contribution, even if the decision adopts that customer's contention or recommendations only in part, the commission may award the customer compensation for all reasonable advocate's fees, reasonable expert witness fees and other reasonable costs incurred by the customer in preparing or presenting that contention or recommendation.

Under Pub.Util. Code §1804, the intervenor has the burden of demonstrating that it has made a substantial contribution to a Commission proceeding. To award compensation, we must first determine that the intervenor made a substantial contribution, in that the decision has adopted in whole or in part a factual contention, legal contention, and/or a specific policy or procedural recommendation presented by the intervenor. The question of substantial contribution is left to the Commission's judgement. (Pub. Util. Code §1800(h).) In our judgement, since ETAG's work in the cost of capital proceeding was not the basis for conclusions of D.95-11-062, it did not make a substantial contribution.

ETAG alleges that in D.96-10-072, the Commission erroneously refused to acknowledge ETAG's evidence presented in the cost of capital proceeding. ETAG argues that only its direct estimates were reasonably close to the adopted rate of return, and that its evidentiary showing was the most complete, comprehensive, and reliable. ETAG further claims that the adopted rate of 11.6% cannot be justified without ETAG's evidence.

We disagree that the adopted ROE of 11.6% cannot be justified without ETAG's evidence. The recommended rate was based on testimony of the agreeing parties which supported a range of forecast revenue requirements and ROEs for the respective utilities. We determined that the suggested ROE was a reasonable recommendation based upon the entire record and the positions advocated by all of the parties. ETAG is simply incorrect in its assertion that D.95-11-062 relied on its methodology and calculations in adopting the ROE of 11.6%. In fact, in that decision we specifically expressed concern over the diversity in results of the same financial models run by different parties and placed less weight on those results. (See, D.95-11-062, p. 16.)

ETAG's substantial contribution arguments also fail for another reason. ETAG's request that the Commission find that ETAG made a substantial contribution in the proceeding is made where there has been a settlement reached by the parties. As ORA points out, ETAG's request violates the spirit of negotiation, as the Joint Recommendation was based on a good faith understanding that no party would seek Commission endorsement of their advocacy position or rejection of another party's position. Moreover, we find ETAG's claim that its evidence is the "most reliable" particularly disingenuous in light of the fact that no party was given the chance address the merits of ETAG's methods, which went untested and unchallenged by virtue of the Joint Recommendation. If ETAG had wanted us to rely solely on its methodology and evidence, it could have refused to join the settling parties and litigated the merits of its position.

ETAG also disputes our finding that ETAG did not make a substantial contribution regarding its "Proposed Methodological Issues," which were included in the Joint Recommendation. ETAG claims that it made a substantial contribution because it made a strong and extensive effort to raise serious issues of this sort. However, this does not meet the requirements for a showing of substantial contribution. We expressly rejected ETAG's recommendation to mandate consideration of these issues. We find no legal error on this point.

III. OTHER ERRORS

ETAG alleges other errors in D.96-10-072 which it claims are prejudicial to ETAG on the matter of compensation. ETAG first disputes the following statement: "We also noted that ETAG's methodology would have produced ROEs higher than the settling parties, requiring ETAG to carry a difficult burden of proof justifying its position." (D.96-10-072, at p. 14). ETAG asserts that this statement is incorrect, as the average of ETAG's direct estimates (11.57%) came out below and practically equal to the adopted rate of 11.6%. ETAG apparently misunderstands this statement. In looking at the financial model results (reproduced at D.95-11-062, p. 14), it is clear that with the exception of two instances, ETAG's model results are higher than both DRA and FEA. In many instances, ETAG's results are higher than all of the parties, including the utilities. A review of the record shows that ETAG's initial recommended ROEs for SDG&E, Edison, and SoCalGas (12.0%, 11.7%, and 11.7% respectively) were also higher than the rate recommended by the settling parties. Moreover, similar statements indicating that ETAG had higher recommended ROEs are in both the ALJ's proposed decision and revised proposed decision. ETAG had the opportunity at that time to point out these "errors" but failed to do so. As such, it has waived this argument. Thus, we find no legal error on this ground.

Next, ETAG claims that the decision's following statement: "ETAG maintains that because its calculation of the ROE was closest to the rate eventually adopted, it made a substantial contribution" oversimplifies and misstates its position. (D.96-10-072, p.13.) However, ETAG fails to make an argument as to how this statement is prejudicial, and instead focuses on the superiority of its own evidence. ETAG's arguments here are unconvincing and do not establish legal error.

Finally, ETAG claims that D.96-10-072 erroneously states that SoCalGas opposed ETAG's request for compensation. ETAG merely points out this mistake in its application, and makes no mention of prejudicial error. The decision does in fact state that SoCalGas and Edison both contested ETAG's assertion that it made a substantial contribution. The decision then summarizes Edison's opposition, while noting in a footnote that SoCalGas' response "is the equivalent having been prepared by the same attorney." (D.96-10-072, p. 14.) While ETAG is correct that SoCalGas did not file an opposition to ETAG's RFC, this appears to have been an inadvertent error, and was not essential to the decision's main conclusions. We will accordingly modify the opinion to delete this reference to an opposition filed by SoCalGas.

IV. CONCLUSION

We find the allegations of legal error in ETAG's application for rehearing without merit. We will modify D.96-10-072 to delete any reference that SoCalGas filed an opposition to ETAG's request for compensation.

Therefore, **IT IS ORDERED** that:

1. Rehearing of Decision 96-10-072 is denied.

2. The last sentence on page 13 of the decision shall be modified as follows: "SCE contests this assertion."

3. Footnote No. 7 on page 14 of the decision shall be deleted.

4. This proceeding is closed.

This order is effective today.

Dated July 23, 1998, at San Francisco, California.

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