L/cdl*

Decision 98-12-027 December 3, 1998 **MAIL DATE 12/7/98**

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Joint application of Pacific Gas and Electric Company, San Diego Gas and Electric Company, and Southern California Edison Company for Ex Parte Interim Approval of a Loan Guarantee and Trust Mechanism to Fund the Development of an Independent System Operator (ISO) and a Power Exchange (PX) Pursuant to Decision 95-12-063 et al.	Application 96-07-001 (Filed July 9, 1996)

ORIGINAL

ORDER GRANTING LIMITED REHEARING, PARTIALLY MODIFYING D.97-12-042 AND DENYING REHEARING IN OTHER RESPECTS

I. SUMMARY

This order grants rehearing and modifies Decision (D.) 97-12-042 (Decision) after further consideration of the terms of Public Utilities Code section 376. While we believe D.97-12-042 correctly describes the purpose and mechanics of section 376, we wish to enlarge upon the Decision's analysis of the statute's language regarding utility funding of development costs. This analysis does not change the Decision's conclusions and rehearing is denied in all other respects. The motion for rehearing oral argument is also denied.

II. BACKGROUND

In our "ISO and PX Funding Decision," we approved a method for funding initial development of an Independent System Operator (ISO) and a Power Exchange (PX). (Re Pacific Gas and Electric Company (ISO and PX Funding) [D.96-08-038] (1996) __ Cal.P.U.C.2d. __.) That method involved

authorizing California's three large electric utilities[1] to guarantee up to $250 million in loans to be taken out by two trusts, which were established for the purpose of overseeing the preliminary development of the ISO and the PX.

Assembly Bill (AB) 1890 (Stats. 1996, ch. 854.) determined that the ISO and PX in fact should be established and provided statutory requirements for the funding of ISO and PX development. (E.g., Pub. Util. Code, §§ 334-356, 361.) One focus of AB 1890 was transition cost recovery, and Public Utilities Code section[2] 376 addressed how ISO and PX start-up costs should be handled in that context. In November 1997, we responded to a petition to modify the ISO and PX Funding Decision by authorizing a $50 million increase in the loan guarantees. (Re Pacific Gas and Electric Company [D.97-11-077] (1997) __ Cal.P.U.C.2d __.) We deferred to a "subsequent decision" the consideration of the petition's request that we determine the applicability of section 376 to certain specified amounts.

The "subsequent decision," D.97-12-042, is the subject of the application for rehearing. (Re Pacific Gas and Electric Company [D.97-12-042] (1997) __Cal.P.U.C.2d__.) The parties filing the application for rehearing are referred to as the "Large Customers."[3] The three large utilities opposed the application in a joint response, which they subsequently amended. Enron filed a response supporting the application.[4] In May, 1998, the three large utilities filed

---

[1] Pacific Gas and Electric Company (PG&E) guaranteed $112.5 million in loans, Southern California Edison (Edison) guaranteed the same amount and San Diego Gas and Electric Company (SDG&E) guaranteed $25 million.

[2] Statutory references indicate the Public Utilities Code unless otherwise specified.

[3] These parties are: the California Manufacturers Association (CMA), California Large Energy Consumers Association (CLECA), California Industrial Users (CIU), California Farm Bureau Federation, Energy Producers and Users Coalition (EPUC), and Cogeneration Association of California (CAC).

[4] The utilities moved to strike Enron's response since it requested rehearing after the statutory deadline. We agree that Enron is bound by section 1731, subdivision

applications, A.98-05-004, A.98-05-006, and A.98-05-015, seeking section 376 treatment of certain costs. These proceedings were consolidated and are ongoing. On October 14, 1998 the Large Customers moved for rehearing oral argument in this proceeding to be held contemporaneously with closing argument in the section 376 proceeding so we could consider rehearing issues in the context of the ongoing section 376 proceeding.

III. DISCUSSION

Section 376 provides unique treatment under the electric restructuring transition cost mechanism for certain costs. The statute allows a utility to recover transition costs after the end of the transition period if the inclusion of section 376-eligible costs in rates has diminished "headroom" and prevented the utility from recovering all its transition costs.[5] The language of section 376 indicates that this post-transition period recovery of uneconomic costs is available "to the extent that" the specific terms of the statute are met. Those specific terms include language indicating that eligible costs are to be costs "that have been funded by the electrical corporation and have been found by the commission to be recoverable from the utility's customers. . . ."[6]

In response to issues raised by the three large utilities, the Decision reviewed three types of costs that could have become part of a utility's revenue requirement. The Decision concluded that these types of costs would qualify for

---

(b) but do not believe this requires us to strike its pleading.

[5] During the electric restructuring transition period, the amount of rate revenue allocated to paying transition costs, denominated "headroom," is determined by subtracting the authorized revenue requirement from frozen rates. Because rates are frozen, any increase in the revenue requirement produces a decrease in the ability to pay off transition costs.

[6] The statute also requires the collection of transition costs to have been incomplete because the utility was collecting "costs of programs to accommodate the implementation of direct access, the Power Exchange, and the Independent System Operator[.]" This language is not at issue here.

the treatment provided for in section 376 if they occurred. The analysis supporting this conclusion began with a review of the background of section 376. The Decision noted that if the need to recover new types of costs increased a utility's revenue requirement, it would produce a corresponding reduction in the utility's ability to collect transition costs because of the residual method used to calculate headroom. The development of the ISO and PX and the implementation of direct access allowed the industry to restructure along the lines set out in our preferred policy and AB 1890, but these actions also created new costs for the utilities. The Decision found that the purpose of section 376 was to prevent a reduction in headroom caused by such costs from ultimately impairing a utility's opportunity to collect all of its transition costs.

Following this conclusion about the purpose of section 376, the Decision reviewed three types of costs to determine if they would qualify for section 376 treatment. These costs were: ISO and PX development costs recovered through FERC-approved rates, costs not recovered through FERC-approved rates, and costs incurred under the loan guarantees.[7] Since it was not clear what approach FERC would adopt, the discussion of costs recovered through FERC-approved rates included both recovery through a one-time charge and through a so-called "volumetric" charge.

The application for rehearing makes three allegations of error with respect to these determinations. The application alleges error with respect to the advisory nature of our opinion, as a result of alleged modifications of past decisions, and because the Decision allegedly excludes some terms of section 376 from its analysis of the section's applicability. These allegations are discussed in

---

[7] At the time the Decision issued, proceedings before the Federal Energy Regulatory Commission (FERC) were considering how the ISO and PX would recover their development costs.

turn below. Subsequently, the decision to deny the motion requesting rehearing oral argument is discussed briefly.

A. An Advisory Opinion Was Permitted and Proper in This Case.

The application focuses on the advisory nature of the Decision in its allegations of error. However, no legal rule prevents the Commission from issuing advisory opinions. The application quotes the Unites States Supreme Court in United States v. Fruehauf (1961) 365 U.S. 146 in support of its contentions. As the utilities point out, however, Fruehauf is based on a legal limit that applies to federal courts and is not relevant here. (Cf., U.S. Const., art. III, §2.) Moreover, the language quoted in the application only states the Court "refused" to give advisory opinions; it does not state a rule that would bar this Commission from issuing such an opinion.

The Commission has discretion to issue advisory opinions as part of its authority to rule on applications and other matters brought before it by parties. The Constitution grants the Commission authority to establish its own procedures, subject to due process, while the Public Utilities Code grants the Commission flexibility to undertake tasks necessary to achieve its mandate. In its discretion, the Commission issues advisory opinions where the matter is of widespread public interest and an expression of Commission opinion would be of benefit. The Commission generally holds itself to a firm rule against issuing advisory opinions unless it is presented with extraorinary circumstances.[8] In the ISO and PX Funding Decision we faced those circumstances, and we concluded that we faced them

[8] Re Women's Energy, Inc. [D.97-09-058] (1997) __ Cal.P.U.C.2d __; Re California-American Water Company [D.95-01-014] (1995) 58 Cal.P.U.C.2d 470, 476, 479; Re San Diego Gas and Electric Company [D.94-12-038] (1994) 58 Cal.P.U.C.2d 104, 105; Re Transmission Constraints on Cogeneration, etc. (1993) D.93-10-026, pp. 4-5 (mimeo.); Re Southern California Gas Company [D.93-08-030] (1993) 50 Cal.P.U.C.2d 518, 521; Re San Diego Gas and Electric Company [D.91-11-045] (1991) 42 Cal.P.U.C.2d 9.

here. At the time, development of the ISO and PX was crucial to the implementation of electric restructuring. This was an undertaking for which we had a clear legislative mandate and a clear statutorily-imposed deadline. Related proceedings were taking place before FERC, and we determined that we should indicate how certain costs would be treated under the California rate scheme so that information could be taken into account in those proceedings.

These considerations amply support our decision to issue an advisory opinion. The application for rehearing restates considerations weighing against an advisory opinion. We considered advantages and disadvantages of issuing an advisory opinion when we issued the Decision. Rehearing should not be granted to consider those questions again.

In this connection, we also disagree with the claim that the Decision is overly broad. In fact, the Decision only addresses three types of costs related to the ISO and PX, not the entire spectrum of costs that could come within the amit of section 376. The Decision also clearly indicates the assumptions and predicates upon which it relies, implicitly limiting itself to those circumstances. It was concern about the timely establishment of the ISO and PX—a concern that turned out to be well justified—that prompted us to issue the Decision. We appropriately limited its application to those issues influenced by this concern and reject the contention that it was over-broad.

B. The Decision Does Not Impermissibly Modify Past Holdings.

The Decision concluded that certain costs would be eligible for section 376 treatment as long as certain assumed conditions were met. This conclusion does not have the effect on past decisions that the application claims. Specifically, the Decision does not modify the ISO and PX Funding Decision because it addresses a different subject matter. The ISO and PX Funding Decision

established a mechanism for funding development of the ISO and PX. Subsequently, AB 1890 altered the funding mechanism and determined how development costs would be accounted for under the transition cost recovery mechanism. In determining how section 376 should be implemented, the Decision does not affect the ISO and PX Funding Decision, because that decision was issued prior to the enactment of AB 1890 and does not make any determinations relating to that legislation's transition cost mechanism. Although the issues the Decision addresses were raised alongside issues requiring modification in the large utilities' petition to modify, the issues we resolved in the Decision are independent from the topics dealt with in the ISO and PX Funding Decision. This difference in subject matter is evidenced by the fact that the Decision's ordering paragraphs do not require any changes to be made to the ISO and PX Funding Decision.

A similar allegation with respect to D.97-11-077 also has no merit. We stated there that we would consider section 376 eligibility in a "subsequent decision." That is, the Commission reserved the issue for later action. By disposing of these issues in the Decision, we complied with that prior ruling and did not alter it in any way. The Large Customers state they expected a certain amount of time to pass before we decided the issue. This claim does not demonstrate error, however, for the expectations of the parties are not controlling.

The application makes a similar reference to D.97-11-074, but its reference is not explained. That decision, which addresses transition cost eligibility, discusses section 376 in general terms and indicates that further proceedings will establish the details of most of the transition cost recovery mechanisms. We do not see how those statements would have required modification in order for us to issue the Decision. An application for rehearing must make a specific showing of error so we are not required to puzzle out

whether there is a defect in our decision. (Cf., Pub. Util. Code, §1732.) On this basis as well we conclude this claim, too, does not support a grant of rehearing.

Moreover, California Trucking Assn. v. Public Utilities Com. (1977) 19 Cal.3d 240 does not have the effect the application claims. The Decision engages in an process of legislative interpretation based on a set of assumed, hypothetical facts. Performing a statutory interpretation of section 376 does not necessitate the holding of a trial-type hearing. California Trucking Assn. v. Public Utilities Com., supra, indicates only that when there are disputed factual contentions, the opportunity to provide more than a written argument must be provided.

C. The Terms of Section 376 Do Not Require The Decision to Reach a Different Conclusion.

The Decision correctly explains the purpose and background of section 376. In light of the overall electric restructuring scheme contained in AB 1890, section 376's treatment of development costs that reduce headroom makes a great deal of sense. Although the application alleges the Legislature intended us to impose only the narrowest of constructions on this statute, we are not convinced by these claims. We do not discern any legislative purpose limiting the application of section 376. Instead, we look to the statute's clear goal of neutralizing the effect on headroom of development costs related to "new major programs we created to carry out our plan for industry restructuring." (Re Pacific Gas and Electric Company [D.97-12-042], supra, __Cal.P.U.C. at p. ___, D.97-11-042 at p. 5 (mimeo).)

However, upon further reflection, we are less satisfied with the Decision's treatment of section 376's specific terms. As we stated above, section 376 applies "to the extent that" its specific terms are met. We believe the Decision should contain more extensive consideration of the application of the statute's

terms to the categories of costs it discusses. Nevertheless, we reject the claim that "funded by" restricts the applicability of section 376 to costs directly incurred prior to development because that claim gives the word "funded" too particular a meaning. We conclude that the phrase "funded by an electrical corporation" should be read to encompass the various types of costs addressed in the Decision. These conclusions are explained in detail below. The Decision will be modified accordingly.

The discussion of the one-time charge considered whether such a payment would be eligible for section 376 treatment on the basis of its being "recoverable from the utility's customers" without addressing whether or not the payment of a one-time charge for ISO or PX development costs would constitute "funding" by the utility. Similarly, the discussion of ISO and PX development costs not recovered through FERC rates and costs incurred under the loan guarantees did not address questions of funding. These conclusions reflected our belief that it was readily apparent that these costs met the requirements of section 376. However, after considering the application's allegations, we conclude that the Decision should have explained why those costs amounted to funding by the utility before determining that they are eligible under section 376.

With respect to costs incurred under the loan guarantees, it should be apparent that incurring such costs would amount to funding of development costs by a utility. As the utilities' response to the application for rehearing points out, even the Large Customers concede that if a utility's guarantee is called upon it will have funded development costs within the meaning of section 376. Therefore, we will modify the Decision to state clearly this implicit determination.

Section 376's funding requirement is also clearly met when a utility pays a one-time, FERC-approved charge. Again, the Decision did not address the question of funding because we had so little doubt that a one-time charge should

qualify for section 376 treatment. The payment of a single charge that represents a utility's share of ISO or PX development costs would be a direct contribution to development costs on behalf of that utility. Making a contribution to development costs in this way does not fall outside the rubric of "funding" simply because the contribution would be made after the development costs were incurred. (Cf., Webster's Collegiate Dict. (10th ed. 1995) p. 472.) Section 376 does not use the word "advanced" or in any other way imply that a utility's contribution to development costs must occur prior to the ISO's or PX's incurring those costs. Since a utility that paid a one-time charge for ISO or PX development costs would have provided the funds for development, we believe those costs should receive section 376 treatment consistent with the terms of the statute. We note that reading section 376 in this manner also fulfills the statute's purpose. We will modify the Decision to make this holding explicit as well.

The Decision did explicitly discuss the question of funding when it considered whether the payment of what it called a "volumetric" rate would qualify for section 376 treatment. The Decision concluded that "the purpose of the words 'have been funded by an electrical corporation' is to identify the implementation programs that are the subjects of section 376, and not to impose a condition precedent of direct financial contribution of the utilities." (Decision, p.7 (mimeo.).) The Decision also relied on the title of the ISO and PX Funding Decision to support its conclusion that "volumetric" rates would qualify for section 376 treatment.

Upon further reflection, we believe this reasoning should be augmented. The point that needs to be made is that the phrase "funded by" should be read to include indirect methods of providing financial support for ISO and PX development. "Funded" is a generic word, indicating to us that the utility involved should have been a source of financial support for development costs. Just as

"funded" does not imply a specific time when costs are paid for, the word does not contain a requirement that the financial contribution take place through specific mechanisms. We note that we considered the provision of loan guarantees to constitute funding and the Legislature was aware of this construction. The statute's purpose is to keep headroom levels the same as they would have been had costs relating to ISO and PX development not been included in a utility's revenue requirement. Thus it is perfectly consistent with the statute's language and purpose to conclude that amounts paid by utilities in order to support development costs and passed on to their customers in a way that reduces headroom are eligible for section 376 treatment. The Decision will be modified to make this point.

A slightly different situation would be presented if a utility recovered in its rates amounts charged to it by the ISO or PX that were not included in FERC-approved rates. We have indicated that a utility should be able to include such charges in its rates, if they occurred. The Decision concluded that if such charges were included in rates they should receive section 376 treatment. The application challenges this conclusion as well. On further consideration, we believe that the reasons supporting the application of section 376 to FERC-approved charges that are recovered in rates would also apply to non-FERC-approved charges. If these charges occurred, the utilities involved would provide indirect financial support for development costs. We will modify the decision's discussion of non-FERC-approved charges to reflect this reasoning.

D. The Motion Requesting Rehearing Oral Argument Will Be Denied.

In a motion filed October 14, 1998, the Large Customers requested rehearing oral argument to occur at the same time as the closing arguments in the section 376 proceeding. This motion was apparently prompted by the Large

Customers' concern that the Commission remain aware that similar issues were pending in the two separate proceedings.

We believe this decision adequately addresses the Large Customers' concerns. We are aware of the linkage between this docket and the ongoing section 376 proceedings. By issuing this decision, we hope to make our position clear for the parties in that proceeding. In addition, it does not appear that the Rule 86.3 criteria are satisfied by this application.

THEREFORE, Good Cause Appearing It Is Ordered That:

1. The application of California Manufacturers Association, California Large Energy Consumers Association, California Industrial Users, California Farm Bureau Federation, Energy Producers and Users Coalition, and Cogeneration Association of California for rehearing of D.97-12-042 is granted for the limited purpose of making the subsequent modifications.

2. D.97-12-042 is modified to add a new footnote 5a to the final partial paragraph on page six. New footnote 5a shall appear at the end of the sentence reading "We conclude that they are[]" on the third line of that paragraph and shall read:

> Clearly, making a contribution to development costs in this way does not fall outside the rubric of funding simply because the contribution would be made after the development costs were incurred. Section 376 does not use the word "advanced" or in any other way imply that a utility's contributions to development costs must occur prior to the ISO's or PX's incurring those costs.

3. D.97-12-042 is modified to restate the full paragraph on page seven that begins "A different question . . ." and ends ". . . direct financial contribution by the utilities." The restated paragraph shall read as follows,

including the relevant footnotes six and seven appearing at the bottom of the pages of this order:

> A different question arises if FERC assesses these implementation costs through a volumetric rate. The question raised in that case is whether the utilities have "funded" these programs, as required by § 376.[6] We conclude that they have. "Funded" is a generic word, indicating to us that the utility involved should have been a source of financial support for development costs. Just as "funded" does not imply a specific time when costs are paid for, the word does not contain a requirement that the financial contribution take place through specific mechanisms. We note that we considered the provision of loan guarantees to constitute funding. D.96-08-038, which set up the ISO and PX Trusts and required Petitioners to provide loan guarantees for the money borrowed by the Trusts, was entitled "ISO and PX Funding." The Legislature was aware of this decision when it drafted AB 1890; Section 361 refers to the restructuring trusts set up by that decision, and directs the Commission to ensure that the funds secured by the trusts are turned over to the ISO and PX.[7] The Legislature was thus also aware that we had "funded" the ISO and PX Trusts by requiring the Petitioners to guarantee loans taken out by the Trusts to cover the costs of development and startup of the ISO and PX. In this context, we conclude that the words "have been funded by an electrical corporation" do not impose a condition precedent of

---

[6] An initial question is whether "funded" in the statute modifies "costs" or "programs." In normal usage, programs are funded, and the resulting funds allow the program sponsors to incur costs to carry out the intended program. We will follow this usage and interpret "funded" to refer to the "programs to accommodate implementation." As a secondary matter, the question of recoverability from a utility's customers is clearly answered in the affirmative in this case. The logic discussed with respect to a one-time charge applies in this situation as well.

[7] Petitioners find significance in the use of the words "funds" in § 361 and "funded" in § 367. While similar wording lends some weight to the argument that utilities have funded the ISO and PX implementation programs, we find the overall logic of § 376 to be more instructive of the Legislative intent.

> direct financial contribution by the utilities. Indirect contribution through a volumetric rate meets section 376's terms. This is consistent with the statute's purpose.

4. D.97-12-042 is modified to add a new sentence at the end of the partial paragraph at the top of page nine. The new sentence shall read:

> As discussed with respect to charges recovered in FERC-approved rates, we believe the terms of section 376 would be met by such a method of utility contribution to ISO and PX development costs.

5. D.97-12-042 is modified to delete the last sentence in the paragraph under the heading "Costs incurred under the Loan Guarantees" on page nine and restate that sentence as follows:

> We clarify that such costs would be eligible for section 376 treatment since it is apparent that the terms of section 376 are met by the circumstances described above.

6. In all other respects, rehearing of D.97-12-042 is denied.

7. The Motion Requesting Rehearing Oral Argument of D.97-12-042 filed October 14, 1998 is denied.

This order is effective today.

Dated December 3, 1998, at San Francisco, California.

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