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Decision 99-11-057 November 18, 1999

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application for Rehearing of Southern California Edison Company (U 338-E) of Resolution E-3606.	Application 99-09-035 (Filed September 16, 1999)

ORDER DENYING REHEARING OF RESOLUTION

I. SUMMARY

On September 16, 1999, Southern California Edison Company (Edison) filed for rehearing of Resolution E-3606 which authorized Edison to establish a new memorandum account to record the carrying costs of certain fuel oil in storage and any gains or losses realized from the sale of the fuel oil. Edison objects to the memorandum account being made effective the date of the Resolution, August 5, 1999, rather than January 1, 1999.

Edison contends that the determination of the August 5, 1999 effective date contravenes the Commission's General Order 96-A, is arbitrary and capricious, and results in an unlawful "taking" under the Fifth Amendment of the United States Constitution. As discussed below, Edison has not substantiated legal error with respect to any of these claims. Accordingly, rehearing is denied.

II. BACKGROUND

In a decision issued prior to Resolution E-3606, the Commission permitted Edison to track the carrying costs of the fuel oil inventory for 1998 only. (D.97-11-074, mimeo, at 72, Finding of Fact Nos. 28 and 29.) This decision was issued in the context of numerous rulings on different issues involving the transition of California's electric services industry to a competitive market. The Commission decided to defer ruling on the eligibility of fuel oil for transition cost recovery for 1998 and, therefore, authorized

Edison to apply the 3-month commercial paper rate to its fuel oil inventory. The time allowed reflected the fact that the Independent System Operator (ISO) had been asked to determine whether Edison's fuel oil inventory should be maintained because it was necessary as back-up fuel for system reliability.[1] During 1998, therefore, Edison recorded its fuel oil carrying costs in the ISO/PX /Delay Memorandum Account for the first quarter of the year, and then in the Transition Cost Balancing Account, for the remainder of 1998.[2] (Edison's Application for Rehearing, at 2.)

By November 1998, the ISO still had not issued a determination on the fuel oil matter. On November 20, 1998, Edison filed an advice letter, AL 1351-E, requesting the establishment as of January 1, 1999 of a designated memorandum account to track the fuel oil carrying costs and any gains or loses on the sale of the inventory. The advice letter was protested by the Office of Ratepayer Advocates and Enron. The parties objected to establishing the memorandum account in 1999 at all, and alternatively, contested the length of the time it should be in effect if the account were authorized.

After carefully considering the issues raised by the advice letter and the protests, in Resolution E-3606, the Commission approved the memorandum account with a start date of August 5, 1999, the date of authorization, and an end date of January 21, 2000. The termination of the account coincides with the date when Edison is to file a market valuation of its fuel oil inventory which was ordered in D.99-06-078 (mimeo, at 21, Ordering Paragraphs Nos. 3 and 4).

We now can add to this factual background the ISO's finding, made at its August 26, 1999 Board meeting, that the fuel oil inventory of Edison, like the inventories of other Los Angeles Basin energy generators, was not required for system reliability.

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[1] The ISO is a statutory agency established by the Legislature to implement the restructuring of the electric industry. See Cal. Pub. Util. Code Sections 345 to 350.

[2] "PX" refers to the Power Exchange, which like the ISO, was established by the Legislature. See Cal. Pub. Util. Code Sections 355-356.

III. DISCUSSION

The Commission's consistent policy has been to authorize memorandum accounts, which are essential ratemaking tools, to operate prospectively only. This policy parallels and avoids potential conflicts with the well-established prohibition against retroactive ratemaking when the Commission subsequently determines the amount of the costs recorded in the account that are reasonable and recoverable in future rates.

A. General Order 96-A

Edison claims that January1, 1999 should be the effective date of its memorandum account by operation of General Order 96-A. Section V(A) of the Commission's General Order 96-A provides for, but does not automatically authorize, certain tariff sheets filed by advice letter becoming effective after the fortieth day of the advice letter filing, unless the filing is suspended by the Commission. The tariff sheets eligible to become effective in this way are those covering a new service or commodity, or a changed tariff sheet that does not increase or result in an increase of any rate or charge, or which decreases a rate or charge.[3]

However, Edison understood when it filed its advice letter that Section V(A) would not apply to its request for a new memorandum account, and that the request would have to be approved by a Commission resolution.

> "Since this advice filing proposes the establishment of a new memorandum account, a resolution is required for approval." (Advice Letter1351-E, at 3.)

Edison was correct in its advice letter filing on this point, and there is no merit to the contradictory argument presented in its rehearing application that the memorandum account should have been considered automatically effective under Section V(A) of General Order 96-A without a resolution. (Edison's Application for Rehearing, at 5-6, 10, and n.23.) Edison, moreover, admits that because protests were filed against

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[3] The effective date for telecommunications tariff sheets under the terms of the rule is the 31st rather than 41st day after the advice letter filing.

its request for the memorandum account, it would not have been possible for the Commission to deliberate on the issues and vote out a resolution within the 40-day time period specified in Section V(A). (Edison's Application for Rehearing, n.33 at 13.)

Furthermore, the Commission's consistent practice, as Edison is well-aware, is to notify a utility if a tariff sheet filed by advice letter is approved under Section V(A). This notification is referenced in Section V(C) which provides that if changed tariff sheets, which do not increase rates or charges, are to become effective under Section V(A), "one copy of the tariff sheets bearing the 'Filed' and 'Effective' dates will be returned to the utility and will establish the utility's official file copy of such sheets having been filed with the Commission."

Edison obviously was not sent a copy of its proposed tariff sheet stamped "Filed" and "Effective" by the Commission pursuant to Section V(A) and (C) before the issuance of the August 5, 1999 Resolution E-3606. The tariff sheet for the memorandum account, therefore, could not and did not become effective on January 1, 1999, the 41st day after it was filed. We find, therefore, no legal error in our Resolution E-3606 with respect to General Order 96-A.

B. Policy of Prospective Memorandum Accounts

Resolution E-3606 provides a history of the Commission's policy of having memorandum accounts record costs prospectively, and denying retroactive effective dates for these accounts. Edison has not introduced any new information that would persuade us the memorandum account it sought must by law be made retroactively effective as of January 1, 1999.

Edison contends that there have been exceptions to the Commission's policy, but then cites examples which demonstrate a consistency in the application of the policy. Edison refers to three cases in which the Commission has permitted memorandum accounts to record costs which predate the tariff sheet being filed. (See, Edison's application for Rehearing , at 10-11.) In each case, however, there was a prior

Commission decision and/or statutory provision establishing the conditions of the account, including the effective date.

For example, Edison cites Resolution E-3488, dated July 16, 1997, which established memorandum accounts with effective dates of January 1, 1997. The advice letters which submitted the tariff sheets for these accounts were filed in compliance with a Commission order in D.96-12-077, Ordering Paragraph 7. The effective date of the accounts, January 1, 1997, was determined by the express requirements of Section 374(a)(3) of the California Public Utilities Code. The memorandum accounts and the effective dates were, therefore, authorized for January 1, 1997 and were not established retroactively.

Similarly, Edison claims Resolution E-3538, dated June 18, 1998, evidences an exception to the Commission's policy since the memorandum accounts established by this resolution were granted effective dates prior to the date of the resolution. However, Resolution 3538 accepted the tariff filings submitted with the advice letters in compliance with prior Commission decisions, D.97-06-060, D.97-11-074, D.97-12-039, and D.97-12-096. These decisions addressed complex rate adjustments concerning non-nuclear generation-related costs eligible for recovery in the statutorily prescribed "Competition Transition Charge" (CTC). Specifically, in D.97-11-074, the Commission required that Edison, Pacific Gas and Electric Company, and San Diego Gas & Electric Company file the advice letters in connection with establishing Transition Cost Balancing Accounts and ordered that the accounts be effective as of January 1, 1998. (D.97-11-074, Ordering Paragraph 14.)

Edison's third reference to what it considers a deviation or exception from Commission policy is D.96-12-077, which approved the recording of costs in a CTC exemptions memorandum account as of a year earlier, December 20, 1995. That date, however, was necessary because it complies with requirements set forth in the Commission's electric restructuring policy decision, D.95-12-063, regarding the payment

of CTC charges by customers who leave the utility's system on or after December 20, 1995. (Edison's Application for Rehearing, at 10-11.)

In the cases Edison cites as exceptions to the Commission's policy, therefore, the accounts requested were made effective on a date earlier than the date the related tariffs sheets were approved, but not earlier than the authorization of the accounts by a Commission decision or by statutory directive. In other words, there was no deviation in any of these cases from the Commission's policy of not establishing memorandum accounts with a retroactive effective date.

Unlike the cited cases, moreover, Edison's advice letter of November 20, 1998 does not qualify as a compliance filing in response to a specific Commission order or statutory requirement establishing January 1, 1999 as the effective date for tracking fuel oil inventory carrying costs. In D.97-11-074, the Commission gave specific attention to the question of the carrying costs of Edison's fuel oil inventories. Unlike the conclusions reached in Ordering Paragraph 14 of that decision regarding the Transition Cost Balancing Accounts and CTCs of the three electric utilities (as noted above), on the subject of the carrying costs the Commission reached the following conclusions:

1) "It is appropriate to defer consideration of the transition cost recovery of fuel oil inventory pending the ISO's determination as to whether these inventories are necessary for system reliability."

2) "For 1998 only, the utilities may apply the 3-month commercial paper rate to the unamortized balance of the level of fuel oil inventories." (D.97-11-074, Findings of Fact Nos. 28 and 29. Emphasis added.)

This second finding indicates that the Commission only authorized Edison to apply a certain interest rate to the inventories for 1998. There was no Commission order or statutory requirement authorizing a memorandum account to track carrying costs for any fuel oil inventories beyond December 31, 1998.

In addition, Edison fails to demonstrate the Commission obliged Edison to retain the fuel oil. Edison argues that the memorandum account should have been made effective January 1, 1999 because in D.97-09-049, the Commission approved Edison's proposal to retain "all of the fuel oil." (Edison's Application for Rehearing, at 12.) This argument, however, is not accompanied by a citation to the decision, or by an explanation of how granting Edison's proposal could be interpreted as an order requiring Edison to maintain the inventory, or as an order requiring the tracking of the inventory's carry costs as of January 1, 1999. Again, there simply is no indication that the Commission pre-approved, or was directed by a statutory imperative to have the costs tracked as of January 1, 1999. Edison has not shown, therefore, that the denial of a retroactive memorandum account for its fuel oil carrying costs was arbitrary or capricious.

Furthermore, the Commission's consistent practice regarding memorandum accounts is reasonable. Memorandum accounts were designed to allow utilities the opportunity to record costs incurred prior to the Commission's review of the costs for reasonableness. In order to carry out its ratemaking duties fairly and orderly, the Commission has decided to parallel the prohibition against retroactive ratemaking by requiring that the establishment of a memorandum account not be retroactive. That is, the memorandum account can start to record debits or credits only prospectively from the date the account is authorized. In that way, if recorded costs are subsequently approved for recovery in rates, there will be no confusion or entanglement of issues regarding retroactive ratemaking.

The authority of the Commission to establish such accounting rules for ratemaking purposes is set forth in the California Constitution [4] and is further expressed in Section 701 of the California Public Utilities Code:

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[4] California Constitution, Article XII, Section 2 ("Subject to statute and due process, the commission may establish its own procedures.") Article XII, Section 6 ("The commission may fix rates, establish rules, examine records, issue subpenas, administer oaths, take testimony, punish for contempt, and prescribe a uniform system of accounts for all public utilities subject to its jurisdiction.")

> "The commission may supervise and regulate every public utility in the State and may do all things, whether specifically designated in this part or in addition thereto, which are necessary and convenient in the exercise of such power and jurisdiction."

The Commission's power under Section 701 is limited only by specific countervailing statutory or constitutional restrictions.[5] There is no countervailing law which supersedes the Commission's authority to have memorandum accounts operate prospectively only.

We find no merit, therefore, in Edison's allegation of arbitrary and capricious decisionmaking when we ordered its fuel oil memorandum account to become effective the date it was approved, August 5, 1999, consistent with our long-standing policy of approving prospectively effective memorandum accounts.

C. Constitutional Requirement

Edison includes in its rehearing application a short, conclusory claim that Resolution E-3606 results in a "taking " of utility property in violation of the Fifth Amendment of the United States Constitution. However, Edison offers no analysis that would persuade us that our order is unconstitutional.

It must first be pointed out that Edison's argument is based on the presumption that our memorandum account order is an order affecting rates. Given that presumption, it is well-settled law that a regulatory ratemaking order does not constitute a "taking" under the Fifth Amendment if the order does not undermine the financial integrity of the regulated utility. (Duquesne Light Co. v. Barash (1989) 488 U.S. 299, 310-312.) The Commission's decision in Resolution E-3606 concerns, according to Edison, $1.3 million. As one order of many involving Edison's transition to a restructured, competitive electric industry, this order hardly affects Edison's financial

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[5] See, Assembly of the State of California, et al. v. California Public Utilities Commission (1995) 12 Cal. 4th 87, 103.

well-being. Edison has not shown that the order leaves the company with insufficient operating capital or impedes its ability to raise future capital. Nor has Edison demonstrated that the order will make it impossible to compensate current equity holders for the risk of their investment in Edison. We find, accordingly, no grounds for considering our memorandum account order to be an unconstitutional "taking" of company property.

IV. CONCLUSION

Edison has not shown legal error in Resolution E-3606 which rejected Edison's proposal to allow its memorandum account for fuel oil carrying costs to be operative prior to its authorization. There is no violation of the Commission's General Order 96-A, and the decision is consistent with the well-established policy of the Commission to authorize memorandum accounts prospectively. Finally, Edison has not demonstrated any constitutional infirmity in our policy or in our ruling on the memorandum account.

THEREFORE, IT IS ORDERED that Edison's application for rehearing of Resolution E-3606 is denied.

This order is effective today.

Dated November 18, 1999, at San Francisco, California.

RICHARD A. BILAS
President
HENRY M. DUQUE
JOEL Z. HYATT
CARL W. WOOD
Commissioners

I dissent.

/s/ JOSIAH L. NEEPER
Commissioner