

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA

Application of Southern California Edison Company (U338E) for Approval of its 2009-2011 Energy Efficiency Program Plans And Associated Public Goods Charge (PGC) And Procurement Funding Requests.

Application 08-07-021
(Filed July 21, 2008)

And related matters.

Application 08-07-022
Application 08-07-023
Application 08-07-031
(Filed July 21, 2008)

**REQUEST OF THE DIVISION OF RATEPAYER ADVOCATES
FOR OFFICIAL NOTICE AND FOR REOPENING THE RECORD**

I. INTRODUCTION

Pursuant to Rules 11.1, 13.9 and 13.14 of the Commission's Rules of Practice and Procedure, the Division of Ratepayer Advocates (DRA) requests that the Commission reopen the record to take official notice of the Energy Division's Final 2006-2008 Energy Efficiency Evaluation Report (2006-2008 Evaluation Report). Reopening the record to take official notice of the 2006-2008 Evaluation Report, which while widely available to the parties is not officially part of the record in this proceeding, would enhance the record and support better-supported decision making. Because the 2006-2008 Evaluation Report is not new, and has been filed and/or considered in other pending energy efficiency proceedings, allowing its consideration in this proceeding should not prejudice any parties to this proceeding.

II. DISCUSSION

A. Background

On April 15, 2010, the Energy Division issued a draft Energy Efficiency Evaluation Report that measured energy efficiency impacts for program years 2006-2008. The Draft 2006-2008 Energy Efficiency Evaluation Report was the subject of numerous comments and was

released in its final form July 9, 2010.¹ The Executive Summary of the 2006-2008 Evaluation report explains the purpose of the report:

“The California Public Utilities Commission directed the Energy Division to evaluate [energy efficiency] programs and verify the resulting energy savings and demand reductions. The aggregate results of the evaluation are the subject of this report. Energy Division directed these studies, which were implemented by leading evaluation professionals and subject to an extensive public review process. The 2006-2008 evaluation is the first time the [investor-owned utilities or] IOUs’ portfolios of energy efficiency programs were evaluated using consistent methods laid out in the California Energy Efficiency Evaluation Protocols and the first time consistent data sets were compiled across IOUs at the technology or measure level. This was accomplished with the cooperation and significant contributions of the IOUs and enables aggregation of savings and other parameters across IOUs, technologies, and programs.”²

1. Rulemaking (R.) 09-01-019

The 2006-2008 Evaluation Report was filed in Rulemaking 09-01-019,³ the Order Instituting Rulemaking to Examine the Commission’s Energy Efficiency Risk/Reward Incentive Mechanism. Ultimately, the Commission opted not to use the values in the 2006-2008 Evaluation Report for purposes of calculating the Utilities’ final incentive payments for 2006-2008 energy efficiency program activities. The Commission nevertheless noted that the “[t]he information in the [2006-2008 Evaluation] Report may be valuable and useful for a variety of purposes, including in the planning of future energy efficiency portfolio design.”⁴

2. R. 09-11-014

The 2006-2008 Evaluation Report was also considered in R.09-11-014, the Commission’s rulemaking “to Examine the Commission’s Post-2008 Energy Efficiency Policies,

¹ The 2006-2008 Energy Efficiency Evaluation Report is posted on the CPUC website at <http://www.cpuc.ca.gov/PUC/energy/Energy+Efficiency/EM+and+V/2006-2008+Energy+Efficiency+Evaluation+Report.htm>.

² 2006-2008 Evaluation Report, ES, p. i.

³ Administrative Law Judge’s Ruling Granting Motion to File Comments under Seal and Directing the Filing of Energy Division Report, filed July 21, 2010 in R.09-01-019, p. 3. (“The Commission’s Energy Division is hereby directed to file in this proceeding with the Docket Office a copy of the Energy Division Final 2006-2008 Energy Efficiency Evaluation Report, including appendices thereto. The appendices may be delivered to the Docket Office in CD-ROM form.”)

⁴ D.10-12-049, p. 30. D.10-12-049 recognized that ‘the Energy Division issued its 2006-2008 draft Energy Efficiency Evaluation Report on April 15, 2010, culminating nearly three years of field-based evaluation research. The Report was issued in final form on July 9, 2010, incorporating corrections and responses to parties’ comments.

The Final Energy Division Evaluation Report identified the IOUs’ energy efficiency savings, but did not address the calculation of RRIM earnings... The Energy Division’s evaluated results are, however, in addition to parties’ comments on the process and the results, a part of the record of this proceeding.” D.10-12-049, p. 9.

Programs, Evaluation, Measurement, and Verification, and Related Issues.” The Commission in D.10-10-033 recognized the 2006-2008 evaluation report, noting that in the report:

“the previously discussed policy and methodological frameworks are combined to measure and verify energy savings, test the cost-effectiveness of IOU portfolios, and evaluate whether energy savings program goals were achieved. The completion of this energy efficiency [evaluation, measurement and verification] EM&V effort is a remarkable accomplishment as it is the largest energy efficiency EM&V effort ever undertaken.

The [20]06-[20]08 Evaluation Report finds that between 2006 and 2008, IOU programs saved 4,093 gigawatt-hours and 44 million therms, and reduced peak electric load by 779 megawatts. The number of tons of carbon dioxide reduced, 2.6 million, is also significant. Overall, the 2006-2008 portfolios were found to be cost-effective. The [20]06-[20]08 Evaluation Report also includes recommendations for improving future EM&V.⁵

Thus, while the 2006-2008 Evaluation Report was not filed in R.09-11-014, the Commission cited it to estimate past program impacts and considered its recommendations to improve future EM&V efforts.

3. Applications (A.) 08-07-021 et al

In the current effort to finalize *ex ante* values in response to the Utilities’ Petition for Modification of D.09-09-047,⁶ the 2006-2008 Evaluation Report was frequently cited by Energy Division, DRA and The Utility Reform Network (TURN). For example, the Case Management Statement filed by San Diego Gas & Electric Company and Southern California Gas Company⁷ on behalf of interested parties contains recommendations to use information from the 2006-2008 Evaluation Report on to update net-to-gross ratios,⁸ installation rates,⁹ and the gross realization rate.¹⁰ DRA and TURN noted that:

“the Appendices of the 2006-2008 Energy Efficiency Evaluation Report show that for a variety of reasons, including the retirement of a facility or closure of a production line, realization rates were as low as .31. (Appendix F of 2006-2008 Energy Efficiency Evaluation Report, p. 38.)”

⁵ D.10-10-033, p. 9.

⁶ Southern California Edison Company, Pacific Gas and Electric Company, Southern California Gas Company, and San Diego Gas & Electric Company’s Petition for Modification of Decision (D.)09-09-047, filed September 17, 2010 (PFM).

⁷ Motion of San Diego Gas & Electric Company et. al. Seeking the Right to File Case Management Statement Report, filed February 18, 2011, Attachment A (CMS).

⁸ CMS, pp.2, 5, 7.

⁹ CMS, p. 14.

¹⁰ CMS, p. 27.

While the 2006-2008 Evaluation Report is frequently cited in this proceeding and has been acknowledged as a “remarkable accomplishment” in a prior Commission decision, it has not yet been made an official part of the record of this proceeding.¹¹

B. The Commission Should Reopen The Record To Take Official Notice Of The 2006-2008 Evaluation Report

DRA submits that the Commission should be able to rely on the contents of the 2006-2008 Evaluation Report if doing so will assist it in reaching a well-reasoned and well-supported decision on the issues remaining relating the Utilities’ PFM. However, although the Case Management Statement refers to and cites the 2006-2008 Evaluation Report and the Commission has referred to it with favor in a previous decision, it has not been formally entered into the record of this proceeding. Therefore DRA respectfully requests that the Commission reopen the proceeding and take official notice of the 2006-2008 Evaluation Report.

Rule 13.14 requires a party seeking to reopen the record to “explain why such evidence was not previously adduced.” Here the need to formally include the 2006-2008 Evaluation Report in the record was not previously adduced because DRA reasonably believed that citation to the 2006-2008 Evaluation Report by the Energy Division and other parties, its publication on the Commission’s website since July 2010, the fact that it was filed in R.09-01-019 and considered in R.09-11-014 even though it had not been filed in that proceeding, all sufficed to allow consideration of the 2006-2008 Evaluation Report in the current proceeding to determine *ex ante* values.

However, to deflect any claims that this well-vetted and widely-available material is not available to the decision-makers because it is technically not in the record of this proceeding, the Commission should reopen the record and take official notice of the 2006-2008 Evaluation Report so that may consider it in reaching a decision on *ex ante* values. Consideration of the 2006-2008 Evaluation Report in establishing *ex ante* values for the current portfolio cycle would be entirely consistent with the Commission’s recognition of the report’s value in “planning of future energy efficiency portfolio design.”¹²

¹¹ See note to service list accompanying Reply Comments of the Division Of Ratepayer Advocates On Proposed Third Decision Addressing Petition for Modification of Decision 09-09-047, re-served May 24, 2011 (“DRA is re-serving these comments to omit Attachment A, which ALJ Gamson has advised is not part of record in this proceeding.”)

¹² D.10-12-049, p. 30.

For example, one of the remaining issues is the Gross Realization Rate for custom projects. The Gross Realization Rate (GRR) is a factor applied to forecasted energy savings from custom projects¹³ that accounts for the reality that not all forecasted savings will be achieved. The Proposed Third Decision of Administrative Law Judge Gamson Addressing the Petition for Modification of Decision (D.) 09-09-047 (PD) would maintain the GRR of 0.80 (or 80%) adopted by D.09-09-047 for all savings parameters (kilowatt (kW), kilowatt hour (kWh) and therm) and for all Utilities. NRDC opposes the PD's application of 0.80 to custom measure impacts and claims as an "arbitrary discount" for which "there is no justification" in the record.¹⁴ NAESCO *et al* claim that the "*de facto* 20% discount is not supported by the record in this case."¹⁵ The Utilities claim that the PD's proposed GRR is "unsupported," "completely arbitrary" and "bypasses any established EM&V process."¹⁶

The 2006-2008 Evaluation Report, which the Commission has previously acknowledged is of value for purposes of planning future energy efficiency portfolios, evaluates the GRR for 2006-2008 and is the most recent information available on energy savings of custom projects. If the 2006-2008 Evaluation Report is technically not in the record of this proceeding and that status prevents the Commission from relying on it for the GRR values, the appropriate step is to get the 2006-2008 Evaluation Report into the record, rather than to act as if the report does not exist. Therefore, DRA requests that the Commission grant this motion to reopen the record and take official notice of the 2006-2008 Evaluation Report.

The purpose of ratepayer-funded EM&V is to measure program impacts and to inform the next cycle of energy efficiency programs. Preventing the Commission from using the 2006-2008 Evaluation Report establish *ex ante* value because it has not officially been make part of the

¹³ "Custom measures and projects are energy efficiency efforts where the customer financial incentive and the *ex ante* energy savings are determined using a site-specific analysis of the customer's facility. Customized projects, by their nature, require unique calculations for each project, as they do not rely on fixed DEER or workpaper values." PD, p. 30. As explained in the PD, the GRR would be applied to projects that the Energy Division did not review individually under the proposed custom review process.

¹⁴ Opening Comments of The Natural Resources Defense Council (NRDC) on Proposed Decision of ALJ Gamson on Third Decision Addressing the Petition for Modification of Decision 09-09-047, filed May 16, 2011, p. 5.

¹⁵ Joint Comments of the National Association of Energy Service Companies, Enernoc, Inc, and Global Energy Partners LLC on the Proposed Decision of Administrative Law Judge Gamson Addressing the Third Petitions for Modification of Decision 09-09-047, filed May 16, 2011, p. 7.

¹⁶ Joint Opening Comments of Pacific Gas and Electric Company, Southern California Edison Company, San Diego Gas & Electric Company, and Southern California Gas Company on the Proposed Third Decision of Administrative Law Judge Gamson Addressing the Third Petitions for Modification of Decision 09-09-047, filed May 16, 2011, p. 10.

record in this proceeding would unfairly impact the decision making process and prevent ratepayers from receiving the benefit of the \$97 million in EM&V studies they funded.

C. The 2006-2008 Evaluation Report Is An Appropriate Subject For Official Notice

Rule 13.9 of the Commission’s Rules of Practice and Procedure provides that “[o]fficial notice may be taken of such matters as may be judicially noticed by the courts of the State of California. California Evidence Code Section 452, subsection (c) states that judicial notice may be taken of “[o]fficial acts of the legislative, executive, and judicial departments of the United States and of any state of the United States.” Official acts subject to judicial notice under Evidence Code § 452(c) include records, reports and orders of administrative agencies.¹⁷

For example, in *South Shore Land Co. v. Petersen*, the defendant asked the Court of Appeal to take judicial notice of the Chief Engineer of the Board of Tide Land Commissioners’ report to the Board of Tide Land Commissioners.¹⁸ The Court of Appeal granted the request for judicial notice, holding that the report of the Chief Engineer was an official act of an executive department of the state.¹⁹

The plaintiff in *Carleton v. Tortosa* sought judicial notice of “an official publication of the California Department of Real Estate stating the general areas tested on the real estate brokers’ examination . . . [and] a California Department of Real Estate bulletin containing a ‘Revised Code of Ethics for R. E. Licensees.’”²⁰ The Court of Appeal held that both of the documents “[we]re ‘official acts’ of the executive department of this state” within the meaning of Evidence Code Section 452(c) and, therefore, “these documents are proper subjects of judicial notice.”²¹

The 2006-2008 Energy Efficiency Evaluation Report was prepared at the direction of the Commission by Energy Division staff and consultants, and is similarly the appropriate subject of official notice.

¹⁷ *Rodas v. Spiegel*, 87 Cal.App.4th 513, 518 (2001); see also *Stevens v. Superior Court*, 75 Cal. App. 4th 594, 608 (1999) (two letters that the Department of Insurance issued in approving an insurance program were subject to judicial notice as official acts).

¹⁸ *South Shore Land Co.*, 226 Cal. App. 2d 725, 744 (1964).

¹⁹ *South Shore Land Co.*, 226 Cal. App. 2d at 746.

²⁰ 14 Cal. App. 4th 745, 753 fn. 1.

²¹ 14 Cal. App. 4th 745, 753 fn. 1. Although the Court of Appeal stated the documents were the appropriate subject of judicial notice, it ultimately denied the request for judicial notice, because the plaintiff raised it for the first time on appeal.

III. CONCLUSION

DRA respectfully requests that the Commission reopen the record to take official notice of 2006-2008 Energy Efficiency Evaluation Report.

Respectfully submitted,

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