

Decision 98-07-036 July 2, 1998

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking on the Commission's Proposed Policies Governing Restructuring California's Electric Services Industry and Reforming Regulation.

Rulemaking 94-04-031
(Filed April 20, 1994)

Order Instituting Investigation on the Commission's Proposed Policies Governing Restructuring California's Electric Services Industry and Reforming Regulation.

Investigation 94-04-032
(Filed April 20, 1994)

INTERIM OPINION: ISSUANCE OF REQUEST FOR PROPOSALS TO SELECT ENERGY EFFICIENCY ADMINISTRATORS

Summary

By today's decision, we authorize the issuance of a request for proposals (RFP) to select program administrators for energy efficiency programs funded under Public Utilities (PU) Code Section 381(c)(1). The Energy Division is directed to revise the RFP in accordance with the resolutions we make in this decision. The Energy Division shall submit the revised RFP and policy rules within ten days to the Assigned Commissioners for compliance review and shall submit the sample contract within 30 days. When the Assigned Commissioners are satisfied that the RFP and sample contract are complete and in compliance with today's order, they will issue Assigned Commissioners' Rulings (ACRs) to that effect. Immediately following the issuance of the ACR on the RFP, the Energy Division will issue the RFP by posting a Notice of Availability on the Department of General Services' web site.

Today's decision also initiates the implementation of policy rules governing the use of Public Goods Charge (PGC) funds for promoting energy efficiency. These rules will be attached to the RFP.

Today's decision reaffirms the Commission's commitment to the transition to independent administration for public purpose programs. The Commission wishes to recognize the tremendous efforts and perseverance of both the California Board for Energy Efficiency (CBEE) and the Low-Income Governing Board (LIGB) to realize the policy goals of the Commission. We lift the requirement that the CBEE and the LIGB (the Boards) obtain permission from an Assigned Commissioner before convening meetings of the Board or Technical Advisory Committees. We direct the Boards to update their transition plans and file them with the Commission within 45 days from the effective date of this decision.

Background

By Decision (D.) 97-02-014, the Commission established CBEE to make recommendations about energy efficiency programs in the restructured electric industry. Among other things, CBEE was assigned the task of developing an RFP articulating policy and programmatic guidelines for new administrators of energy efficiency programs, subject to Commission approval. The new administrators would be selected on a competitive basis. The Commission also established LIGB to provide similar advisory capability for the low-income assistance programs funded pursuant to PU Code § 382.

By D.98-04-063, issued on April 13, 1998, the Commission conditionally approved 1) policy rules governing the use of PGC funds for promoting energy efficiency and 2) an RFP proposed by CBEE for selecting energy efficiency administrators, with certain modifications. The Commission's approval was

contingent upon the continuance of the new administrative structure established by D.97-02-014 and subsequent decisions, which was under review in light of a letter determination by the State Personnel Board's (SPB) Executive Officer disapproving the agreements between the Boards and their administrative and technical consultants.¹ This action effectively caused the administrative, technical and legal support for CBEE and the LIGB to cease work. In light of this action, the Commission stated that it would implement the policy rules and issue the approved RFP for energy efficiency programs only when it determined that the administrative structure envisioned by D.97-02-014 was feasible. (D.98-04-063, mimeo., p. 3; Ordering Paragraph 1.) On May 13, 1998, CBEE filed modifications to the policy rules and RFP pursuant to D.98-04-063.

By D.98-05-018, in light of these developments, we extended the term for interim utility administration of energy efficiency and low-income assistance programs until December 31, 1998 and December 31, 1999, respectively.

The Commission recently entered into settlement agreements with the California State Employees Association and the Professional Engineers in California Government which resolve the dispute regarding the provision of administrative and technical support for the LIGB and CBEE. The Commission will contact the SPB to ask that their February 4, 1998 ruling be vacated in light of these developments.

In view of these developments, barriers to pursuing our policies have been substantially removed, and we can go forward with the next step of establishing the new administrative structure. In order to advance the timely work of the

¹ The SPB determination resulted from a request for review by the California State Employees Association of the administrative and technical consultant agreements for the LIGB and CBEE.

CBEE and the LIGB, for a limited interim period the Commission authorizes the Boards to resume the services of the administrative and technical consultants under the previously suspended agreements or retain the services of other consultants pursuant to the terms of the settlement agreement and consistent with the state contracting rules and procedures.

Discussion

We have considered the events that have transpired since the issuance of D.98-04-063, and conclude that it is now feasible to move forward with the administrative structure for energy efficiency and low-income assistance programs adopted in D.97-02-014. Accordingly, we authorize the issuance of the policy rules and RFP submitted by CBEE in its May 13, 1998 compliance filing, with certain modifications. The ultimate signing of a contract to initiate the final step of implementing the new administrative structure may be evaluated contingent on the outcome of the proposal process and other factors. These other factors may include, but are not limited to, necessary legislative changes and any further actions regarding the issues before the State Personnel Board.

In D.98-04-063, we deferred consideration of CBEE's proposed model contract until we could address 1) what entity should sign the contract, 2) what entity should be responsible for procurement activities associated with the RFP, and 3) what entity should hear protests. We can now resolve these issues.

The Commission is the contracting entity for the Independent Program Administrators and will act as the signatory through its authorized representative. The RFP and Contract should be revised accordingly. The Energy Division and Contracts Office shall identify staff to serve as Project Manager and Contracts Officer, respectively. The Energy Division will revise the RFP to reflect that the Independent Program Administrators, selected through

the competitive bid process, are responsible for the procurement activities identified in the Scope of Services section of the RFP.

The Energy Division is directed to revise the RFP and sample contract proposed by CBEE to be consistent with the concepts described in the preceding paragraph; e.g., to clarify the role of the Commission and CBEE in the contract process, to clarify how the joint planning process will be implemented and reflected in contract terms, to further clarify the roles and functions of administrators and implementors, to correct typographical errors and omissions, to insert boilerplate language for the RFP and contract, and to ensure the RFP and sample contract create a structure to transfer administration of energy efficiency programs from the interim administrators to the new administrators.

Consistent with an assumption that the Commission will be the contracting entity, the Department of General Services (DGS) will review potential protests to the RFP award process, consistent with state procurement rules. (Public Contracts Code Section 10343.) In addition, state procurement rules require that DGS review and approve all contracts entered into by the Commission.² (Public Contracts Code Sections 10335, 10336, 10337.) The Energy Division shall ensure that the RFP allows all entities, private and public, to bid to be independent administrators, as well as to provide services as implementors. If DGS is the entity requested to review contracts and any protests, we are concerned about potential conflicts (or the appearance of conflicts) should DGS also submit a proposal under the RFP. Therefore, if DGS does submit a proposal, it should demonstrate clearly how the agency will create an effective “firewall”

² We recognize that this was not our expectation when we issued D.97-05-041. (D.97-05-041, mimeo., p. 3.) However, at that time we had not identified the Commission as the entity signing the contract with program administrators.

to preclude interaction and potential access to information between the staff or office preparing the proposal and the office reviewing contracts and protests. This requirement shall be added to the RFP language.

In D.98-04-063, we also stated that we would clarify whether CBEE's proposal to keep letters of intent confidential could be adopted. (See D.98-04-063, Conclusion of Law 21.) We believe that this proposal is contrary to §§ 6253 and 6254 of the Government Code regarding the inspection of public documents. Therefore, the Energy Division shall modify the RFP to remove the confidentiality provision. In addition, however, it will not be mandatory that proposers submit a letter of intent. There will be a nonmandatory proposers' conference. The RFP should indicate that letters of intent and proposals shall be subject to public inspection.³

Since the requirement to submit a letter of intent is removed, the Commission requires that all proposers obtain a copy of the RFP after its official release by the Energy Division through one of the following official channels: (1) by registering through the State Contracts Register, or (2) by requesting the RFP directly from the Energy Division. (See Ordering Paragraph 2.) This requirement ensures that all proposers will be serviced with any RFP addendum, modifications, or errata.

We also directed our Executive Director to seek a waiver from DGS to extend the model contract term beyond 36 months, per CBEE's proposal. (D.98-04-063; Ordering Paragraph 10.) We have not yet received resolution on this matter. The sample contract is therefore written for a 36-month term.

³ Under Public Contracts Code Section 10342, after bids are opened, all bids shall be available for public inspection.

Should we receive a waiver from DGS, and a longer term is warranted, we may extend the term at a later date.

In addition, the Energy Division shall make revisions to the policy rules adopted in D.98-04-063 to correct omissions and typographical errors. These and other changes to CBEE's compliance filing will be reflected in the revised policy rules issued with the RFP. We direct our Energy Division to make these changes and to submit the documents to the Assigned Commissioners for their review within ten days from the effective date of this decision. After the ACR is issued, Energy Division shall issue the RFP by posting a Notice of Availability on the DGS web site. By today's decision, we also initiate the implementation of policy rules, as revised by Energy Division according to our instructions, governing the use of PGC funds for promoting energy efficiency. Within 30 days, the Energy Division shall also review the sample contract for compliance with this decision and submit it to the Assigned Commissioners who, when they are satisfied that the sample contract is in compliance with this decision, will issue an ACR to that effect.

In view of recent developments, we remove the requirement that CBEE and the LIGB contact one of the Assigned Commissioners' offices before scheduling any further Board meetings or meetings of the Boards' Technical Advisory Committees. (D.98-05-018, mimeo., p. 7; Ordering Paragraph 6.) Within 45 days from the effective date of this decision, CBEE and LIGB should file proposed revisions to the transition plan and milestones laid out in the October 27, 1997 and November 13, 1997 Administrative Law Judge Rulings for each Board. We note that some of milestones relating to CBEE's transition plan are included in the policy rules filed by CBEE on May 13, 1998. However, the RFP will not lay out all of the steps and deadlines required to complete the

transition to new administrators, and this complete transition plan should be developed in CBEE's filing.

Findings of Fact

1. Since our issuance of D.98-04-063, a number of uncertainties surrounding the feasibility of our proposed policy approach for energy efficiency and low-income programs have been substantially removed.

2. The CBEE's filing dated May 13, 1998 is in compliance with our directives in D.98-04-063. However, the RFP, policy rules and sample contract need to be modified further to reflect the designation of the Commission as the contracting agent, improve consistency with the RFP and policy rules, further clarify the role of the Commission and CBEE, remove the requirement for proposers to submit letters of intent to submit proposals, clarify how the joint planning process will be implemented and reflected in contract terms, utilize boilerplate contract language where appropriate, to ensure the RFP and sample contract create a structure to transfer administration of energy efficiency programs from the interim administrators to the new administrators, and correct typographical errors and omissions.

3. State procurement rules require that DGS review potential protests to the RFP award process and review and approve all contracts entered into by the Commission.

4. CBEE's proposal to keep letters of intent confidential is contrary to §§ 6253 and 6254 of the Government Code.

Conclusions of Law

1. The RFP, as revised according to the determinations in this decision, should be issued.

2. The Energy Division should submit the revised RFP and policy rules to the Assigned Commissioners for compliance review within ten days of the date of this decision. The Energy Division, in conjunction with the Contracts office, shall submit the sample contract to the Assigned Commissioners for compliance review within 30 days.

3. When the Assigned Commissioners are satisfied that the RFP and sample contract are complete and in compliance with today's order, they should issue ACRs to that effect.

4. Immediately after the ACR on the RFP is issued, the Energy Division should issue the RFP by posting a Notice of Availability on the Department of General Services' web site. The Notice of Availability will appear as an advertisement on the California State Contracts Register. All proposers must obtain a copy of the RFP after its official release by the Energy Division through one of the following official channels: (1) by registering through the State Contracts Register and electronically downloading the Electronic Bid Package (www.dgs.ca.gov/ads/ads.asp); or (2) by requesting the RFP directly from the Energy Division. This requirement ensures that all proposers will be served with any RFP addendum, modifications, or errata. Requests should be directed to:

Ms. Phyllis White, Project Manager
California Public Utilities Commission, Energy Division, 4-A
505 Van Ness Avenue
San Francisco, CA 94102
Telephone: (415) 703-2451
E-mail: cbee@cpuc.ca.gov

5. The policy rules governing the use of funds for promoting energy efficiency should apply to (1) electric PGC funds for energy efficiency as set forth in PU Code § 381, (2) energy efficiency funds resulting from a gas surcharge mechanism, and (3) gas demand-side management funds for energy efficiency

authorized in the interim until a gas surcharge mechanism is implemented. They should not apply to the interim administration of PGC- funded programs or pre-1998 commitments.

6. If DGS intends to submit a proposal, it should demonstrate clearly in its proposal how the agency will create an effective “firewall” to preclude interaction and potential access to information between the staff or office preparing the proposal and the office reviewing contracts and protests.

7. Should we obtain a waiver from DGS to extend the model contract term beyond 36 months, we may extend the term at a later date if a longer term is warranted.

8. The suspension of transition milestones and schedules for CBEE and LIGB should be lifted. In addition, it is no longer necessary to require the Boards to obtain permission before convening their Board meetings or Technical Advisory Committee meetings.

9. This item did not appear on the agenda mailed on June 22 for the Commission’s meeting of July 2, 1998. This item was added to the agenda pursuant to Government Code Section 11125.3, which allows a state body to act on an item not appearing on its posted agenda when a need to take immediate action exists and the need for action came to the state body’s attention after the agenda for the meeting had been posted. On June 22, 1998, the Commission entered into a Settlement Agreement with the California State Employees Association (CSEA). Among other things, the Settlement Agreement 1) requires the Commission “immediately [to] take all reasonable steps” to transfer civil service responsibilities previously performed by CBEE’s administrative and technical consultants to civil service employees and to hire employees to accomplish that transfer; 2) sets a timeline of 22 to 33 weeks for the Commission to complete that hiring; and 3) allows CBEE to use the services of independent

consultants during a transition period that ends on December 31, 1998. The Commission must act immediately to meet its obligations under the Settlement Agreement and to meet the goal stated in D.98-05-018 of completing the transition to independent administration of energy efficiency services by January 1, 1999. The need for this action came to the Commission's attention on June 30, 1998, when it received confirmation that CSEA had executed the Settlement Agreement, after the date the agenda for the July 2 meeting was posted.

10. In order to implement our policy decisions regarding energy efficiency programs as expeditiously as possible, this order should be effective today.

INTERIM ORDER

IT IS ORDERED that:

1. Release of the Request for Proposals (RFP) for Selection of Energy Efficiency Program Administrators, including the sample contract and the Policy Rules, is authorized contingent upon compliance changes to be reviewed by the Assigned Commissioners. The Energy Division shall make revisions to the RFP and policy rules and submit these changes to the Assigned Commissioners for compliance review within ten days of the effective date of this decision. The Energy Division, in conjunction with the Contracts office, shall submit the sample contract to the Assigned Commissioners for compliance review within 30 days of the date of this decision.

2. Immediately after the Assigned Commissioners issue a ruling stating that they are satisfied that the RFP is complete and in compliance with this decision, the Energy Division shall issue the RFP by posting a Notice of Availability on the Department of General Services' web site. The Notice of Availability will appear

as an advertisement on the California State Contracts Register. The Notice of Availability shall appear on the California State Contracts Register (www.dgs.ca.gov/ads/ads.asp). All proposers shall obtain a copy of the RFP after its official release by the Energy Division through one of the following official channels: (1) by registering through the State Contracts Register and electronically downloading the Electronic Bid Package (www.dgs.ca.gov/ads/ads.asp); or (2) by requesting the RFP directly from the Energy Division. All proposers who obtain a copy of the RFP through one of the two official channels will be served with any RFP addendum, modifications, or errata. Requests should be directed to:

Ms. Phyllis White, Project Manager
California Public Utilities Commission, Energy Division, 4-A
505 Van Ness Avenue
San Francisco, CA 94102
Telephone: (415) 703-2451
Email: cbee@cpuc.ca.gov

3. The Policy Rules, as revised according to the resolutions of this decision, shall govern the use of funds for promoting energy efficiency. These rules shall apply to (1) electric Public Goods Charge (PGC) funds for energy efficiency as set forth in Public Utilities Code § 381, (2) energy efficiency funds resulting from a gas surcharge mechanism, and (3) gas demand-side management funds for energy efficiency authorized in the interim until a gas surcharge mechanism is implemented. They shall not apply to the interim administration of PGC-funded programs or pre-1998 commitments.

4. For a limited interim period, the California Board for Energy Efficiency (CBEE) and the Low-Income Governing Board (LIGB) are authorized to resume the services of the administrative and technical consultants under the previously suspended agreements or retain the services of other consultants pursuant to the

terms of the settlement agreement and consistent with state contracting rules and procedures.

5. CBEE and LIGB shall no longer be required to contact one of the Assigned Commissioners' offices before scheduling any further Board meetings or meetings of the Boards' Technical Advisory Committees.

6. Within 45 days from the effective date of this decision, CBEE and LIGB shall file proposed revisions to the transition plan and milestones laid out in the October 27, 1997 and November 13, 1997 Administrative Law Judge Rulings for each Board. These filings shall be served on the Special Public Purpose service list of this proceeding or successor proceeding.

This order is effective today.

Dated July 2, 1998, at San Francisco, California.

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