

Decision 12-10-046

October 25, 2012

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application of Southern California Edison Company (U338E) for Authority to Implement and Recover in Rates the Cost of its Proposed Solar Photovoltaic (PV) Program

Application 08-03-015
(Filed March 27, 2008)

**ORDER DENYING REHEARING
OF DECISION (D.) 09-06-049**

I. INTRODUCTION

In Decision (D.) 09-06-049 (or “Decision”), the Commission adopted a solar photovoltaic program (“SPVP”) to install 500 megawatts (MW) of solar photovoltaic on existing commercial rooftops in the service territory of Southern California Edison Company (“SCE”), with 250 MW of distributed solar photovoltaic projects owned by SCE and 250 MW owned by independent power producers.

The Division of Ratepayer Advocates (“DRA”) and The Utility Reform Network (“TURN”) jointly filed an application for rehearing of D.09-06-049 (collectively, “DRA/TURN”). Californians for Renewable Energy (“CARE”) also filed an application for rehearing of the Decision.

In their rehearing application, DRA/TURN argue that: (1) the Decision violates due process rights by adopting a 500 MW program given that SCE’s application sought authority for only 250 MW of utility owned generation; (2) substantive due process was denied because there was no factual basis in the record to justify doubling the size of the SPVP program; (3) the Decision’s adoption of a 500 MW program violates Commission Rules requiring notice of proposed rate increases; and (4) the Commission

committed legal error in concluding that Public Utilities Code section 2775.5 does not apply to SCE's SPVP program.¹

In its application for rehearing, CARE contends that: (1) the Commission erred in determining that section 2775.5 does not apply to the SPVP Program; (2) the Decision is unlawful because it results in undue advantage or prejudice; and (3) the Decision should be reopened to include new federal tax credit under the American Recovery and Reinvestment Tax Account ("ARRA"). CARE also makes a request for oral argument under Rule 16.3.

Subsequent to the filing of the applications for rehearing, SCE filed on February 11, 2011, a petition for modification of D.09-06-049 ("petition"), which asked the Commission to: (1) reduce the 250 MW utility owned portion to no more than 125 MW, (2) reduce the 250 MW independent power producers portion to no more than 125 MW, and (3) reassign the remaining 250 MW to a separate competitive solicitation within the SPVP called "IPP Revised." (SCE's Petition for Modification of D.09-06-049, pp. 1-5.) In D.12-02-035, the Commission granted SCE's petition in part, limiting the SPVP program to no more than 125 MW of utility ownership, no more than 125 MW of independent power purchaser ownership, and 225 MW to be procured through the Renewable Auction Mechanism program. (*Decision Partially Granting Southern California Edison Company's Petition for Modification of Decision 09-06-049 (SPVP) and Making Conforming Changes to Decision 10-12-048 (RAM)*, [D.12-02-035] (2012) __ Cal.PUC.3d __.)

We have reviewed each and every allegation raised in the application for rehearing, and are of the opinion that good cause has not been demonstrated to warrant a rehearing. Therefore, rehearing of D.09-06-049 is denied.

¹ Subsequent section references are to the Public Utilities Code, unless otherwise specified.

II. DISCUSSION

A. DRA/TURN's due process claims are moot.

DRA/TURN's allegations regarding violations of procedural and substantive due process and notice of a proposed rate increase are moot. In the *Decision Partially Granting SCE's Petition for Modification* [D.12-02-035], *supra*, at p. 1, we granted SCE's petition for modification of the SPVP Decision adopted in D.09-06-049, reducing the Program to a 250 MW program (125 MW of utility owned generation and 125 MW of independent power purchaser ownership.) This modification is consistent with DRA/TURN's rehearing request that the size of the proposed program be 250 MW, which was fully litigated during the course of this proceeding. (DRA/TURN Rehearing App., pp. 1-7.) Thus, the modification renders moot all allegations concerning the 500 MW program as violating procedural and substantive due process or notice of a proposed rate increase.

B. The Commission's interpretation and application of section 2775.5 is lawful.

Section 2775.5 requires the Commission make certain findings regarding an IOUs proposed solar energy development program before an IOU can move forward with the program. This section also requires electric and gas corporations to obtain the Commission's authorization when they seek to manufacture, lease, sell, or otherwise own or control any solar energy system and seek to recover the costs and expenses from the ratepayers.

DRA/TURN and CARE argue that the Commission's interpretation of Public Utilities Code section 2775.5 is unlawful. Specifically, they allege that the Decision is contrary to the language and purpose of the statute. (See DRA/TURN Rehearing App., pp. 7-11; CARE Rehearing App., p. 1-8.)

In their view, section 2775.5 applies, and it is wrong to distinguish between "solar energy systems" as defined in section 2775.5, and "electric plant" as defined by

section 217 so as to manufacture an exemption to the applicability of this statute. DRA/TURN also maintain that the distinction between solar energy system and an electric plant cannot be based on IOU ownership for purposes of serving load. (See DRA/TURN Rehearing App., pp. 7-11.)

In the Decision, we determined that section 2775.5 does not apply to SCE's solar PV program on the basis of language in the exemption set forth section 2775.5(d) that distinguishes between a solar energy system and electric plant as defined by section 217.

The portion of the statute at issue in the rehearing involves subsection (d) of section 2775.5, which defines "solar energy system" as equipment which uses solar energy to heat or cool or produce electricity and which has a useful life of at least three years." Subsection (d) goes on to say that "solar energy system" does not include an electric plant as defined by section 217." Under section 217, an "electric plant" includes:

all real estate, fixtures and personal property owned, controlled, operated, or managed in connection with or to facilitate the production, generation, transmission, delivery, or furnishing of electricity for light, heat or power, and all conduits, ducts, or other devices, materials, apparatus, or property for containing, holding, or carrying conductors used or to be used for the transmission of electricity for light, heat, or power.

(Pub. Util. Code §217.)

The general rule in determining the meaning of a statute is to first look to its plain language, giving words their ordinary or "plain meaning." (See e.g., *People v. Canty* (2004) 32 Cal.4th 1266, 1276-1277; *Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 735.) Here, the facts showed that if SCE's application is approved, it will then engage in actions, which comport to the plain language of the statute. (See Application of SCE, dated March 27, 2008, at pp. 1-24 [Project objectives include to: (1) to place PV systems on larger commercial rooftops with sufficient size and strength to accommodate approximately 1 to 2 MW of generation; (2) these solar PV systems should not require

any transmission construction, because they interconnect directly with SCE's distribution system...].) SCE's SPVP program entails leasing rooftop space to install solar panels to generate energy and send energy back to the grid to meet SCE's own load requirements.

On its face, section 2775.5 requirements appear to apply to all instances including utility proposals to deploy "solar energy systems", which is defined as "equipment which uses solar energy to heat or cool or produce electricity, and which has a useful life of at least 3 years." (Pub. Util. Code, §2775.5, subd. (d).) The statute offers no clarity as to whether there are any differences between solar energy systems and an electric plant. The statute merely states that "solar energy system does not include an electric plant as defined by Section 217." (Pub. Util. Code, §2775.5, subd (d).) The plain language of section 2775.5 also states nothing about being used to serve and IOU's own load with respect to electric plant.

The plain language rule does not control when there is an ambiguity or when the plain language would lead to an absurd result and/or frustrate the overall purpose and intent of a statute. (*Pacific Gas & Electric v. Department of Water Resources* (2003) 112 Cal.App.4th 477, 496.) This rule dictates that if an ambiguity exists regarding the meaning and applicability of the statute, it must be read and applied in the correct context. (*Walnut Creek Manor v. Fair Employment and Housing Commission* (1991) 54 Cal.3d 245, 268.)

Section 217 does not provide a clear basis to distinguish between electric plant and solar energy systems. As defined, electric plant is a broad term that encompasses electricity generating systems that use solar. In the Decision, the Commission determined that the electric plant exemption in section 2775.5(d) is ambiguous, and pursuant to its authority, the Commission interpreted and resolved the ambiguity. ["Courts will generally not disturb the Commission's interpretation of the Public Utilities Code unless it fails to bear a reasonable relation to the statutory purposes and language."]. (*Greyhound Lines, Inc. v. Public Utilities Commission* (1968) 68 Cal.2d 406, 410.)

Given the breadth of the definition of electric plant, we found it necessary to define a boundary between the terms “solar energy system” and “electric plant.” Absent such a distinction, the breadth of the definition provided in section 217 for electric plant would appear to include solar energy systems, and thus frustrating the intent and purpose of the statute by rendering much of section 2775.5 pointless. (D.09-06-049, pp. 21-22.) To assume that electric plant excludes solar all together would therefore render its inclusion in section 2775.5 meaningless.²

It is not reasonable to interpret electric plant in such a broad way so as to render the statute meaningless. We therefore harmonized the two terms to mean that an electric plant would include solar systems that are owned and/or operated by the utility for purposes of meeting its own load would be considered an electric plant, and exempt from the requirements set forth in section 2775.5. A solar energy system as used in section 2775.5 are those systems that use solar energy to heat, cool, or produce electricity, and which are either themselves manufactured by the utility, and/or are sold or leased by the utility to third parties. (D.09-06-049, pp. 21-22.) So, if the energy generated from the project is used to serve the utilities own load requirements, the project qualified as an electric plant under section 2775.5(d) and is exempt from the statute.

² [A] statute’s overall intent and purpose rather than literal meaning will take precedence, such that the meaning should not be dictated by any single word or sentence, and “[t]he meaning of a statute may not be determined from a single word or sentence; words must be construed in context.... (*Latkins v. Watkins Associated Industries* (1993) 6 Cal.4th 644, 658-659.) Further, a literal construction will not prevail if it is contrary to the legislative intent apparent in the statute. (*Id.*) And a statute will be interpreted to effectuate the spirit of the act, and the overall purpose of the law. (*Lungren v. Deukmejian, supra*, 45 Cal.3d at p. 735.) In keeping with these principles, the Courts have expressed a policy favoring a practical application of statutes. (*Schlessinger v. Rosenfield, Meyer & Susman (“Schlessinger”)* (1995) 40 Cal.App.4th 1096, 1239).]

Thus, the Commission committed no error in concluding that section 2775.5 applies to SCE's SPVP. Within the context of section 2775.5, the statute provides an exemption. In D.09-06-049, the Commission looked at the rule and applied the exemption set forth in statute.³ The requirement for the Commission to make certain findings related to solar energy development do not apply to the extent the solar energy development involved an electric plant and falls within the electric plant exemption. Given the ambiguity within the exemption as to what electric plant means for purposes of section 2775.5(d), we resolved the ambiguity so as not to produce an absurd result in the application of the statute. This is consistent with the Commission's authority.

Since the plain language of the statute is ambiguous, the Commission may also look at the legislative history of section 2775.5 (*Halbert's Lumber v. Lucky Stores* (1992) 6 Cal.App.4th 1233, 1239. ["If the meaning is not clear "courts must take the second step and refer to the legislative history."].)

The spirit and overall purpose and intent of section 2775.5 is fairly straightforward. Section 2775.5 was introduced as a way to prevent the IOUs from leveraging their monopoly position should they seek entry into the market for the manufacture, lease and/or sale of solar energy systems. (See Pub. Util. Code, § 2775.5; see also Summary Digest, Stats. 1978, ch. 1102, § 1.) Given the exemption for electric plant from the requirements provided for in section 2775.5(d), we could reasonably interpret that the statute was not intended to address utility procurement of solar energy or ownership of solar facilities as a way to meet their own load requirements.

Thus, the Decision properly determined that SCE's 125 MW of 1-2 MW of SPVP projects do not qualify as a solar energy system under section 2775.5, as SCE is not proposing to manufacturer the technology itself, nor does SCE intend to sell or lease

³ CARE argues SPVP is inconsistent with section 2775.5 because it places the utility in direct competition with companies participating in CSI for rooftops and grid access. (Rehearing App., pp. 2-3.) The Commission determined that the exemption within the statute applies to SCE's SPVP. However, as discussed in Section C, had the exemption in section 2775.5 not applied, SCE's SPVP complies with the statutes requirements regarding competition.

these systems to third parties. Rather, SCE has proposed building and owning solar projects using third party technology and using the resulting energy generated from those projects to satisfy its own load requirements. SCE's project qualifies as an electric plant under section 2775.5(d), which is exempt from provisions in section 2775.5.

Accordingly, DRA/TURN's interpretation that the exemption does not apply would render section 2775.5 meaningless. If the statute applied in the manner DRA/TURN asserts, an electric plant would be included as a solar energy system, and thus the exemption in statute would never apply. Or, to assume that electric plant excludes solar altogether would appear to render its inclusion in section 2775.5 meaningless.

Therefore, if we had interpreted the statute in the manner DRA/TURN suggested, it would have been contrary to statutory interpretation principles which direct application of reason, practicability and common sense. (See *Walnut Creek Manner v. Fair Employment and Housing Commission*, *supra*, 54 Cal.3d at p. 268 ["Where uncertainty exists consideration should be given to the consequences that will flow from a particular interpretation."]; *Halbert's Lumber v. Lucky Stores*, *supra*, 6 Cal.App.4th at p. 1239 ["The final step...is to apply reason, practicality, and common sense to the language at hand."] .) It is also something of a stretch to suggest the legislature intended for the exemption to never apply especially when the exemption in subsection (d) has remained in the statute since its inception in 1978.

Accordingly, we properly interpreted section 2775.5, and DRA/TURN's claim that the Commission has not followed the rules of statutory interpretation lacks merit.

1. Even if SCE's SPVP is not exempt under section 2775.5(d), the program still complies with the code provision's requirements.

In the Decision, we determined that if the exemption did not apply, the adopted SPVP would still comply with the statutory provisions of section 2775.5. (See D.09-06-049, pp. 23-27.) For example, section 2775.5(b) requires the Commission to

consider whether the SPVP: (1) restricts competition; (2) restricts growth; (3) unfairly employs in a manner which would restrict competition in the market for solar energy systems any financial, marketing, distributing, or generating advantage which the corporation may exercise as a result of its authority to operate as a public utility; or (4) will accelerate the development and use of solar energy systems in the state for the duration of the program. The adopted SPVP meets the requirement of section 2775.5 with respect to competition in that the 1-2 MW solar energy market has not been developed yet under our current policies, and the SPVP will be a viable market option for rooftop solar PV systems in the 1-2 MW range. (D.09-06-049, p. 23.) We also determined that the adopted SPVP will allow for significant competition throughout the solar energy industry value chain, including competition for ownership and operation of the solar generating facilities, and therefore, it will not restrict competition in solar energy industry. (D.09-06-049, p. 23.)

There is no indication that the adopted SPVP will hinder growth. As we explained in the Decision, considering the novel nature of the adopted SPVP program, its impact on the growth of the solar energy industry is speculative at this time.

The adopted SPVP meets the requirement with respect to whether it unfairly employs in a manner which would restrict competition in the market for solar energy systems any financial, marketing, distributing, or generating advantage. The adopted SPVP does not use advantages afforded to SCE as a public utility to restrict competition in the solar energy systems market. The adopted SPVP will solicit competitive bids from solar equipment manufacturers that are active in the market for solar energy systems in SCE's territory, and will only enhance the market for solar energy systems of one to two MW by creating a new market opportunity that currently does not exist. (See D.09-06-049, pp. 23-26.) Therefore, the adopted SPVP is in compliance with this portion of the statute.

The adopted SPVP meets the requirement to accelerate the development and use of solar energy systems in the state for the duration of the program. Because the adopted SPVP proposes to introduce 250 MW of new solar PV rooftop systems, the

influx of the new installations will contribute to the development and use of solar PV systems in the range of one to two MW in the state. The wide deployment of these rooftops is also likely to spur the development of rooftop PV system parts and related equipment. (See D.09-06-049, pp. 23-27.) The adopted SPVP is therefore consistent with this requirement of section 2775.5(b).

Section 2775.5(f) requires that before the Commission passes the costs and expenses of implementing a solar program to the ratepayers, it finds and determines that it is in the ratepayers' interest to do so. We determined that the adopted SPVP is in the interest of ratepayers because it would help promote the development of additional renewable projects on existing rooftops, and that SPVP would also help expand the one to two MW solar market which under current policies has been effectively under-developed. We also observed that the economies of scale and installation efficiencies resulting from deploying large MWs and multi-year projects will also provide benefits to the ratepayers, and generation can be located near load and can be quickly deployed because there is no need to construct new transmission facilities or to conduct extensive environmental review. (See D.09-06-049, pp. 26-27.)

C. CARE's argument that the Decision results in undue advantage or prejudice lacks merit.

CARE argues that the Decision is unlawful because it results in undue advantage or prejudice against "any sale of electric energy for resale of small distributed generation photovoltaic solar located near the load centers." (CARE Rehearing App., p. 2.) CARE maintains the Decision is unlawful because it violates mandates under the Federal Power Act to ensure that with respect to any sale of electric energy for resale in interstate commerce by a public utility, no person is subject to any undue prejudice or disadvantage. (CARE Rehearing App., p. 4.) This argument should be rejected.

The purpose of an application for rehearing is to "alert the Commission to legal error, so that the Commission may correct it..." (Rule 16.1(c) of the Commission's Rules of Practice and Procedure, Code of Regs., tit. 20, §16.1(c).) A rehearing application must present analysis of relevant authority and explanation of how this

authority applies to the facts and citations to the record and or the law.” (Rule 16.1(c) of the Commission’s Rules of Practice and Procedure, Code of Regs, tit. 20, §16.1(c).)

The burden of proving legal error rests upon the rehearing applicant. CARE fails to demonstrate legal error, and instead, revives the same arguments made during the course of this proceeding. (See CARE Protest of SCE’s Application dated April 28, 2008, pp. 1-4; CARE Opening Brief, pp. 8-12.) CARE offers no support for its contention beyond its general allegation.

CARE’s challenges citing federal law are also inapposite. SPVP is a state law utility procurement program, not subject to the jurisdictional authority of the Federal Energy Regulatory Commission. (See *New York v. FERC*, (2003) 535 U.S. 1, 24 (state jurisdiction over resource planning utility buy-side decisions and utility resource portfolios.) Similarly, Order No. 888 governs wholesale transmission access, a matter of exclusive federal jurisdiction. (*Id.* at 16-17, 21; 16 U.S.C. 824(b).) Thus, CARE’s federal allegations are rejected.

CARE’s argument also involves policy restrictions and incentive structures under the California Solar Initiative, the Self Generation Incentive Program and the Emerging Renewables Program that CARE feels are improper and result in a barrier into the market by small distributed generation photovoltaic solar. (CARE Rehearing App., pp. 3-6.) The limitations, defects, or conditions of the program are also not within the scope of this proceeding. (See Scoping Memo and Ruling of Assigned Commissioner and Administrative Law Judge (“Scoping Memo”) dated July 25, 2008, p. 2.) [“The scope of the review in this proceeding should encompass developing issues and information necessary for the Commission to determine if the proposed investment (SCE’s authorization for SPVP and associated cost recovery mechanism) is reasonable and in the public interest.”]⁴

⁴ The Commission determined that comparing SPVP with CSI within a reasonable level of certainty or accuracy is not possible or reasonable due to differences in project size and cost components and different objectives of each program. (D.09-06-049.)

If CARE is arguing that the SPVP program negatively affects the development of a competitive marketplace for DG solar companies, this issue was fully addressed through this proceeding. (See CARE protest of SCE's Application dated April 28, 2008, pp. 1-4; CARE Opening Brief, pp. 3-14.) SPVP intends to fill the gap and encourage development of more distributed renewable resources in the 1-2 MW range initiated under CSI and the larger RPS projects greater than 2 MW and not designed for roof top solar. (D.09-06-049, p. 11.) We determined that 1-2 MW solar energy market has not been developed under current policy and because the adopted SPVP will allow for significant competition throughout the solar energy industry value chain, including competition for ownership and operation of solar generation facilities, it will not restrict competition in solar energy industry. (D.09-06-049, p. 23.) While CARE may disagree with the Commission on this issue, disagreement does not constitute legal error.

The Commission also determined that even if the exemption had not applied, SCE's SPVP does not foreclose competition throughout the solar energy industry value chain, including competition for ownership and operation of the solar generation facilities, and it will not restrict competition in the solar energy industry. (D.09-06-049, pp. 23-26.) Evidence supports this fact. (See SCE Ex.-1; SCE Ex.-2; SCE Ex.-2 revised; SCE's Opening Brief, pp. 24-26; Solar Alliance Ex.-601.) CARE disagrees with this determination but that does not establish the Commission's view is wrong or unlawful. (See e.g., *Southern California Edison Company v. Public Utilities Commission* (2005) 128 Cal.App.4th 1, p. 8, reh'g. den. 2005 Cal.App. Lexis 745 ["The fact that Edison does not like the Commission's findings and conclusions simply does not provide grounds for reversal."].

D. CARE's argument that the Decision should be reopened to include new federal tax credit should be denied.

In its rehearing application, CARE requests that the record should be reopened and consider new evidence regarding the recent changes in the renewable

energy tax credits in the American Recovery and Reinvestment Tax Account of 2009 (“ARRA”). This request is rejected since it constitutes an improper request in an application for rehearing. (See Rule 16.1 of the Commission’s Rules of Practice and Procedure, Code of Regs., tit. 20, §16.1.)

The purpose of an application for rehearing is to address allegations of legal error, and not, for considering new issues and additional evidence that were not part of the proceeding. (Pub. Util. Code §1732.) We note that the request made in CARE’s rehearing application is typically made in a petition for modification. (See Rule 16.4 of the Commission’s Rules of Practice and Procedure, Code of Regs., tit. 20, §16.4 for the rules for filing a petition for modification.)

Thus, CARE’s request is beyond the scope of the application for rehearing process. Accordingly, we deny the request.

E. CARE’s request for oral argument should be denied.

CARE requests oral argument on the basis that this Decision raises issues of major significance, and CARE needs the opportunity of oral argument to address these issues to explain its position. (CARE Rehearing App., p. 8.)

The Commission has complete discretion to determine the appropriateness of oral argument in any particular matter. (See Rule 16.3(a) of the Commission’s Rules of Practice and Procedure, Cal. Code of Regs., tit. §20, 16.3, subd. (a).) Rule 16.3 states:

If the applicant for rehearing seeks oral argument, it should request it in the application for rehearing. The request for oral argument should explain how oral argument will materially assist the Commission in resolving the application, and demonstrate that the application raises issues of major significance for the Commission because the challenged order or decision: (1) adopts new Commission precedent or departs from existing Commission precedent without adequate explanation; (2) changes or refines existing Commission precedent; (3) presents legal issues of exceptional controversy, complexity, or public importance; and/or (4) raises questions of first impression that are likely to have significant precedential impact.

(Rule 16.3 of the Commission's Rules of Practice and Procedure, Code of Regs., tit. 20, §16.3.)

CARE did not meet the requirements listed above. Its rehearing application fails to demonstrate how oral argument will materially assist the Commission in resolving the rehearing application, and fails to show how D.09-06-049 departs from Commission precedent, requires evidentiary hearing in light of material disputed facts, or presents issues of public importance or first impression. CARE's application for rehearing constitutes no more than a relitigation of arguments previously raised and rejected by the Commission, and therefore we deny the request for oral argument.

III. CONCLUSION

For the reasons discussed above, good cause does not exist for the granting of a rehearing of D.09-06-049. Therefore, the applications for rehearing of D.09-06-049, filed by DRA/TURN and CARE are denied.

THEREFORE, IT IS ORDERED that:

1. Rehearing of D.09-06-049 is hereby denied.
2. Proceeding, A.08-03-015, is hereby closed.

This order is effective today.

Dated October 25, 2012, at Irvine, California.

MICHAEL R. PEEVEY

President

TIMOTHY ALAN SIMON

MICHEL PETER FLORIO

CATHERINE J.K. SANDOVAL

MARK FERRON

Commissioners