

**PUBLIC UTILITIES COMMISSION**505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3298**FILED**

09-14-11

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September 14, 2011

Agenda ID #10690

and

Alternate Agenda ID # 10691

Ratesetting

TO PARTIES OF RECORD IN APPLICATION 08-11-001 ET AL.

Enclosed are the proposed decision of Administrative Law Judge (ALJ) Amy Yip-Kikugawa previously designated as the presiding officer in this proceeding and the alternate decision of Commissioner Mark J. Ferron. They will appear on the Commission's October 6, 2011 agenda. The Commission may act then, or it may postpone action until later.

Pub. Util. Code § 311(e) requires that the alternate item be accompanied by a digest that clearly explains the substantive revisions to the proposed decision. The digest of the alternate decision is attached.

When the Commission acts on the proposed decision and alternate proposed decision, they may adopt all or part of it as written, amend or modify it, or set it aside and prepare its own decision. Only when the Commission acts does the decision become binding on the parties.

Pursuant to Rule 14.6(b), comments on the proposed decision must be filed within 14 days of its mailing and reply comments must be filed within 5 days thereafter.

Parties to the proceeding may file comments on the proposed decision and alternate decision as provided in Pub. Util. Code §§ 311(d) and 311(e) and in Article 14 of the Commission's Rules of Practice and Procedure (Rules), accessible on the Commission's website at www.cpuc.ca.gov. Pursuant to Rule 14.3, opening comments shall not exceed 15 pages.

Comments must be filed pursuant to Rule 1.13 either electronically or in hard copy. Comments should be served on parties to this proceeding in accordance with Rules 1.9 and 1.10. Electronic and hard copies of comments should be sent to ALJ Yip-Kikugawa at ayk@cpuc.ca.gov and Commissioner Ferron's advisor Michael Colvin,

at mc3@cpuc.ca.gov. The current service list for this proceeding is available on the Commission's website at www.cpuc.ca.gov.

/s/ KAREN V. CLOPTON
Karen V. Clopton, Chief
Administrative Law Judge

KVC:lil

Attachment

**DIGEST OF DIFFERENCES BETWEEN
ADMINISTRATIVE LAW JUDGE AMY YIP-KIKUGAWA'S PROPOSED
DECISION AND THE ALTERNATE PROPOSED DECISION
OF COMMISSIONER MARK J. FERRON**

A.08-11-001 et al.: Application of Southern California Edison Company (U338E) For Applying the Market Index Formula and As-Available Capacity Prices adopted In D.07-09-040 to Calculate Short-Run Avoided Cost For Payments to Qualifying Facilities beginning July 2003 and Associated Relief.

Pursuant to Public Utilities Code § 311(e), this is the digest of the substantive differences between the proposed decision of Administrative Law Judge Amy Yip-Kikugawa (mailed on September 14, 2011) and the alternate proposed decision (APD) of Commissioner Mark J. Ferron (also mailed on September 14, 2011).

The proposed decision in this matter denies the Petition to Modify Decision (D.) 11-07-010.

The alternate proposed decision grants the Petition to Modify D.11-07-010. The APD concludes that the timing of the Settlement Periods and the corresponding contract term lengths in the Qualifying Facility and Combined Heat and Power Program (as adopted in D.10-12-035) are such that there is no possibility of cost-shifting amongst customers. The APD also grants the request to establish a Settlement Agreement Effective Date.

Decision **PROPOSED DECISION OF ALJ YIP-KIKUGAWA**
(Mailed 9/14/2011)

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application of Southern California Edison Company (U338E) for Applying the Market Index Formula and As-Available Capacity Prices adopted in D.07-09-040 to Calculate Short-Run Avoided Cost for Payments to Qualifying Facilities beginning July 2003 and Associated Relief.

Application 08-11-001
(Filed November 4, 2008)

And Related Matters.

Rulemaking 06-02-013
Rulemaking 04-04-003
Rulemaking 04-04-025
Rulemaking 99-11-022

DECISION DENYING PETITION TO MODIFY DECISION 11-07-010

Summary

This decision denies the petition filed jointly by the California Municipal Utilities Association, Southern California Edison Company, Pacific Gas and Electric Company, San Diego Gas & Electric Company, The Utility Reform Network, the California Cogeneration Council, the Independent Energy Producers Association, the Cogeneration Association of California, the Energy Producers and Users Coalition, and the Division of Ratepayer Advocates to modify Decision 11-07-010. These proceedings remain open.

Background

On December 21, 2010, the Commission issued Decision (D.) 10-12-035, which approved the “Qualifying Facility and Combined Heat and Power Program Settlement Agreement” (Settlement) entered into by Southern California Edison Company, Pacific Gas and Electric Company, San Diego Gas & Electric Company, The Utility Reform Network (TURN), the California Cogeneration Council, the Independent Energy Producers Association, the Cogeneration Association of California, the Energy Producers and Users Coalition, and the Division of Ratepayer Advocates (DRA) (collectively, Settling Parties). The Settlement provides a detailed and comprehensive framework for a Qualifying Facility and Combined Heat and Power Program (QF/CHP Program) in California. Among other things, the Settlement includes certain requirements and cost obligations on electric service providers (ESPs), Community Choice Aggregators (CCAs), publicly-owned utilities (POUs), and their respective customers.¹

¹ Customers who previously received generation services from an investor owned utility, but are now receiving generation services from an ESP are referred to as direct access (DA) customers. Customers who previously received generation and services from an investor owned utility, but are now receiving generation services from a CCA are referred to as CCA customers. Customers who previously received generation and distribution services from an investor owned utility, but are now receiving service from a POU, are referred to as municipal departing load (MDL) customers. There are two categories of MDL. Transferred MDL refers to customers who had previously received generation and distribution services from an investor-owned utility (IOU), but are now receiving service from a publicly owned utility. New MDL is load that has never been served by an IOU but is located in an area that had previously been in the IOU’s service territory (as that territory existed on February 1, 2001) and was annexed or otherwise expanded into by a publicly owned utility.

On April 1, 2011, the Settling Parties and the California Municipal Utilities Association (CMUA) filed a petition for modification of D.10-12-035 (April 2011 Petition). The proposed changes and clarifications specified the extent to which Transferred MDL Customers would be responsible for any non-bypassable charges (NBCs) associated with the Settlement and provide that New MDL Customers will not be responsible for any NBCs associated with the Settlement.

The Commission granted the petition to modify in D.11-07-010. In response to concerns raised in joint comments by Marin Energy Authority (MEA), the Alliance for Retail Energy Markets (AReM), Shell Energy North America (US) L.P (Shell) and the Direct Access Customer Coalition (DACC) that the agreement could result in the shifting of costs from MDL to DA and CCA customers, D.11-07-010 clarified that CCA and DA customers would not be responsible for any costs incurred on behalf of MDL Customers. The decision noted that to the extent the modifications proposed by Settling Parties and CMUA resulted in any unrecovered costs attributable to MDL Customers, these costs would be the responsibility of Settling Parties, consistent with the requirements of Pub. Util. Code § 366.2(d)(1).²

On July 28, 2011, Settling Parties and CMUA (collectively, Joint Petitioners) filed a petition to modify D.11-07-010 (Petition). Joint Petitioners request that the paragraphs and associated Conclusions of Law concerning § 366.2(d)(1) and cost shifting be deleted. Joint Petitioners further state that if the Petition is “granted without modification or alteration,” then the Commission could establish the effective date of the Settlement Agreement as “the date when a Commission

² Unless otherwise stated, all statutory references are to the Pub. Util. Code. Section 366.2(d)(1) prohibits “any shifting of recoverable costs between customers.”

order granting the Petition becomes final and non-appealable” and close the proceedings.³

Concurrent with the Petition, Joint Petitioners filed a motion for expedited consideration of the Petition. The assigned Administrative Law Judge (ALJ) sent an email to parties to see if there would be any opposition to shortening the time to file comments and replies to the Petition. No opposition was received. Pursuant to the shortened comment period, MEA, AReM, Shell and DACC (collectively, Joint Respondents) filed comments opposing the Petition on August 5, 2011. Joint Petitioners filed their reply on August 9, 2011.

Discussion

The Petition seeks to have the following paragraphs and Conclusions of Law deleted from D.11-07-010:

On page 7:

The proposed modifications in the Petition limit the time period to recover certain costs associated with the Settlement from MDL Customers. Therefore, there is a possibility that MDL Customers would not be responsible for some portion of the costs related to generation resources procured on their behalf. Pursuant to Pub. Util. Code § 366.2(d)(1), which prohibits the shifting of recoverable costs between customers, the IOUs cannot recover costs attributable to MDL Customers from bundled or other departing load customers (i.e., CCA and DA Customers). As such, any unrecovered costs attributable to MDL Customers shall be the responsibility of the Settling Parties.⁴

³ Petition at 8.

⁴ As suggested by Joint Respondents, this could include investor owned utility shareholders and the Settling Parties that represent the QF and CHP owners and developers.

On page 12:

In response to comments, this decision has been revised to clarify that consistent with the requirements of Pub. Util. Code § 366.2(d)(1), bundled, CCA and DA customers shall not be responsible for any costs incurred on behalf of MDL Customers. Rather, to the extent the modifications proposed in the Petition result in any unrecovered costs that are attributable to MDL Customers, these costs shall be the responsibility of Settling Parties.

Conclusions of Law:⁵

3. Pub. Util. Code § 366.2(d)(1) prohibits the shifting of recoverable costs between customers.

4. Pursuant to Pub. Util. Code § 366.2(d)(1), the IOUs cannot recover any unrecovered costs attributable to MDL Customers from bundled, DA or CCA customers.

Joint Petitioners contend that these paragraphs and Conclusions of Law are factually and legally flawed.⁶ They state that since the dates in the April 2011 Petition correspond to dates in the Settlement Agreement, the “specified dates

⁵ On September 9, 2011, the Joint Petitioners filed an errata and clarification to the July 2011 Petition. The text of the July 2011 Petition references COLs 3 and 4 from D.11-07-010. However, while Appendix A of the July 2011 Petition lists COLs 3 and 4, it erroneously identifies language from COL 2 rather than 3, and misstates COL 3 as COL 4. With this clarification, the language from the errata is shown here.

⁶ Joint Petitioners also allege that they “did not have an opportunity to comment on” these paragraphs and Conclusions of Law and changes to the proposed decision were made “just prior to the meeting.” (Petition at 4.) We disagree. There is no requirement under the Commission’s Rules of Practice and Procedure to provide parties an opportunity to comment on changes made in response to comments simply because one or more parties may disagree with the changes. The changes were made available prior to the Commission meeting in compliance with § 311.5.

ensure that no cost shifting occurs” and any concerns regarding cost shifting is unfounded.⁷ This would suggest that all costs attributable to MDL customers would be recovered from MDL customers, as mandated by § 366.2(d)(1). If that were the case, it is unclear why Joint Petitioners oppose statements that support the modifications adopted in D.11-07-010 and D.11-07-010 seek to modify.

While Joint Petitioners’ assertions that the proposed changes in the April 2011 Petition “ensure that no cost shifting occurs” may be correct, that does not explain why there is a factual error for the Commission to state what would occur in the event there were unrecovered MDL costs. Indeed, the revisions to the proposed decision articulate existing law and prior Commission decisions, including D.08-09-012, implementing § 366.2(d)(1). If the utilities believe that this constitutes a modification, change or addition to the Settlement Agreement⁸, it would suggest that the Settlement Agreement or the proposed changes in the April 2011 Petition had allowed cost shifting. Such an outcome is contrary to Rule 12.1(d) of the Commission’s Rules of Practice and Procedure, which states:

The Commission will not approve settlements, whether contested or uncontested, unless the settlement is reasonable in light of the whole record, consistent with law, and in the public interest was not consistent with the law.

Moreover, if the Commission had concluded that the Settlement Agreement had allowed cost-shifting, it would not have approved the Settlement Agreement in D.10-12-035.

⁷ Petition at 6.

⁸ Petition at 4.

Joint Petitioners further allege that D.11-07-010 is legally flawed because it suggests that § 366.2(d)(1) “might potentially be violated by changes proposed” in the April 2011 Petition and “endeavor[s] to impose costs from the [Settlement Agreement] on non-jurisdictional entities.”⁹ Joint Petitioners have misread D.11-07-010. The decision does not conclude that there is a potential violation of § 366.2(d)(1). Rather, the decision states that consistent with § 366.2(d)(1), if there are unrecovered costs attributable to MDL customers, there will be no shifting of these costs to DA or CCA customers, as these costs will be the responsibility of Settling Parties.

Moreover, the decision does not impose costs associated with the Settlement Agreement on the QF parties. The Settling Parties consist of the IOUs, the QF and CHP owners and developers, DRA and TURN. Presumably, unrecovered costs would not be recovered from DRA or TURN. Consequently, D.11-07-010 logically concluded that responsible parties “could include IOU shareholders and the Settling Parties that represent the QF and CHP owners and developers.”¹⁰

Contrary to Joint Petitioners’ reading of the decision, D.11-07-010 states which of the Settling Parties could be responsible for potential unrecovered costs and does not impose additional costs on any specific party. Had Joint Petitioners carefully read the paragraphs and Conclusions of Law that they considered objectionable, they would have realized that these paragraphs and Conclusions

⁹ Petition at 7.

¹⁰ D.11-07-010 at 7, fn. 10 (emphasis added).

of Law state the existing requirements of § 366.2(d)(1) and do not modify, change or make an addition to the Settlement Agreement.

The revisions to the ALJ's proposed decision that were adopted in D.11-07-010 clarify why the potential for cost-shifting to CCA and DA customers is unfounded due to the statutory requirements of § 366.2(d)(1). As such, we find no merit in Joint Petitioners' allegations that D.11-7-010 is factually and legally erroneous. Accordingly, the Petition is denied and no revisions shall be made to D.11-07-010.

While we are unsure why Joint Petitioners would find a statement of applicable law to be objectionable, we are taken aback that Joint Petitioners demanded that the Petition be "granted without modification or alteration" in order for the Settlement Agreement to become effective.¹¹ We agree with Joint Petitioners' statements that the Settlement Agreement "represents the culmination of more than a year and a half of negotiations and regulatory approval processes" and would also like to see the Settlement Agreement implemented as soon as possible.¹² However, that does not mean that Joint Petitioners should use the establishment of a Settlement Effective Date to force the Commission to revise a decision because some of the Settling Parties do not find certain paragraphs and conclusions of law to be "acceptable." While the Settling Parties do have a say over revisions to the Settlement Agreement pursuant to Section 16.2.2 of the Settlement Agreement's Term Sheet, they do not have such authority over what may be included in a Commission decision.

¹¹ Petition at 8.

¹² Petition at 2.

Consistent with the Settlement Agreement, the Settlement Agreement Effective Date cannot be set until this decision is final and non-appealable. As such, these proceedings remain open pending the setting of a Settlement Agreement Effective Date.

Comments on the Proposed Decision

The proposed decision of ALJ Yip-Kikugawa in this matter was mailed to the parties in accordance with Section 311 of the Public Utilities Code. Pursuant to Rule 14.6(b) of the Commission's Rules of Practice and Procedure, the 30-day public review and comment period required by Section 311 is reduced by stipulation of the parties. Comments on the proposed decision are due 14 days after the proposed decision is mailed; reply comments are due 5 days after the filing of opening comments. Comments were filed on _____ and reply comments were filed on _____ by _____.

Assignment of Proceeding

Mark J. Ferron is the assigned Commissioner in Application 08-11-001, Rulemaking (R.) 06-02-013, R.04-04-025, R.04-04-003 and R.99-11-022 and Amy Yip-Kikugawa is the co-assigned ALJ in these proceedings.

Findings of Fact

1. D.10-12-035 approved the "Qualifying Facility and Combined Heat and Power Program Settlement Agreement" (Settlement) entered into by Southern California Edison Company, Pacific Gas and Electric Company, San Diego Gas & Electric Company, TURN, the California Cogeneration Council, the Independent Energy Producers Association, the Cogeneration Association of California, the Energy Producers and Users Coalition, and DRA (Settling Parties).
2. On April 1, 2011, the Settling Parties and CMUA filed a petition for modification of D.10-12-035.

3. D.11-07-010 granted the petition to modify D.10-12-035.

4. D.11-07-010 clarified that, consistent with Pub. Util. Code § 366.2(d)(1), CCA and DA customers would not be responsible for any costs incurred on behalf of MDL Customers.

5. On July 28, 2011, Settling Parties and CMUA filed a joint petition to modify D.11-07-010.

6. Settling Parties and CMUA contend that discussion of § 366.2(d)(1) is factually and legally erroneous.

7. The utilities believe that including the requirements of § 366.2(d)(1) in D.11-07-010 constitutes a modification, change or addition to the Settlement Agreement.

8. The Settling Parties consist of the IOUs, the QF and CHP owners and developers, DRA and TURN.

9. Pursuant to the Settlement Agreement, the Settlement Agreement Effective Date cannot be set until this decision is final and non-appealable.

Conclusions of Law

1. Pub. Util. Code § 366.2(d)(1) prohibits any shifting of recoverable costs among customers.

2. Rule 12.1(d) of the Commission's Rules of Practice and Procedure states that the Commission will not approve a settlement unless it is consistent with the law.

3. The Commission could not have approved the Settlement Agreement in D.10-12-035 or the proposed changes in the Petition to Modify D.10-12-035 in D.11-07-010 unless they were consistent with the law, including § 366.2(d)(1).

4. It would be unreasonable to conclude that any unrecovered costs attributable to MDL customers would be recovered from DRA or TURN.

5. The joint petition to modify D.11-07-010 should be denied.

O R D E R

IT IS ORDERED that:

1. The July 28, 2011 joint petition to modify Decision 11-07-010 filed by the California Municipal Utilities Association, Southern California Edison Company, Pacific Gas and Electric Company, San Diego Gas & Electric Company, The Utility Reform Network, the California Cogeneration Council, the Independent Energy Producers Association, the Cogeneration Association of California, the Energy Producers and Users Coalition, and the Division of Ratepayer Advocates is denied.
2. Application 08-11-001, Rulemaking (R.) 06-02-013, R.04-04-025, R.04-04-003 and R.99-11-022 remain open.

This order is effective today.

Dated _____, at San Francisco, California.