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05-27-08

03:05 PM

**BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA**

Petition for Expedited Modification of Energy
Division Resolution E-4013 Approving the
Utilities' Community Choice Aggregation
Service Agreements

A.07-12-032

(Filed December 21, 2007)

**APPLICATION OF PACIFIC GAS AND ELECTRIC
COMPANY AND SOUTHERN CALIFORNIA EDISON
COMPANY FOR REHEARING OF
DECISION NO. 08-04-056**

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Dated: May 27, 2008

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OF THE STATE OF CALIFORNIA**

Petition for Expedited Modification of Energy
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Pursuant to Section 1731(b) of the Public Utilities Code, Pacific Gas and Electric Company ("PG&E") and Southern California Edison Company ("SCE") (jointly, the "Utilities") hereby apply for rehearing of the California Public Utilities Commission's (Commission's) Decision (D.) 08-04-056. For the reasons stated below, the Commission should grant rehearing and correct the following errors of law: (1) D.08-04-056 violates Public Utilities Code sections 366.2 and 394.25(e) by finding that a utility tariff approved pursuant to the Commission's authority under sections 366.2 and 394.25(e) conflicts with the authority granted to local governments to form joint powers agencies under Government Code section 6508.1;¹ and (2) D.08-04-056 violates Public Utilities Code sections 1709 and 1731 because it grants an untimely request to overturn as unlawful Commission Resolution E-4013, an order of the Commission which is final and therefore is conclusive in all collateral actions and proceedings.

¹ D.08-04-056, mimeo at p.6.

I. D.08-04-056 IS CONTRARY TO LAW BECAUSE IT CONSTRUES THE UTILITIES' AUTHORITY TO IMPLEMENT COMMISSION-APPROVED TARIFFS UNDER THE CCA STATUTE AS CONFLICTING WITH THE AUTHORITY OF LOCAL GOVERNMENTS TO FORM JOINT POWER AGENCIES

In D.08-04-056, the Commission addressed a request by the San Joaquin Valley Power Authority (SJVPA) that the Commission order the removal of a previously-approved provision in utility tariffs providing that local government members of a joint powers agency (JPA) offering Community Choice Aggregation (CCA) services to electricity customers under Public Utilities Code section 366.2 be jointly and severally liable for obligations owed to the utility on behalf of the utility's customers. In granting SJVPA's request that the tariff provision be removed, the Commission found that it was "not convinced" that the provision was necessary, and that "the issue of whether a CCA joint power agency should be required to assume joint and several liabilities should be considered as part of the CCA's creditworthiness review." (D.08-4-056, pp. 6- 7.) Furthermore, the Commission concluded, "while the utilities may not require that the members of CCA joint powers agencies assume joint and several liabilities for the debts and obligations of the joint powers agency, consideration of whether there is a need for members to assume joint and several liability should be part of the CCA's creditworthiness review." (*Id.*, p. 8.)

The Utilities do not challenge this part of the Commission's decision as unlawful. Although the Utilities believe that the decision was the wrong policy decision, there is no doubt that the decision was a lawful exercise of the Commission's authority under the CCA statute, Public Utilities Code sections 366.2 and 394.25(e), to determine the terms and conditions under which a CCA is required to demonstrate creditworthiness, including potentially imposing joint and several liability on the members of a JPA CCA in order to ensure such creditworthiness.

However, the Commission’s decision undermined the Commission’s own authority under the CCA statute by going one step further and construing the JPA statute, Government Code section 6508.1, as conflicting with the ability of utilities to implement tariff provisions ***approved by the Commission*** to ensure the same level of CCA creditworthiness the Commission itself can impose directly. (D.08-04-056, p. 6 (“The grant of discretion provided to local government agencies by the Legislature in Government Code Section 6508.1 cannot be overturned by a utility tariff.”))

There is no doubt that the Commission has certain express authority and jurisdiction, albeit limited, to oversee and regulate CCAs under the CCA statute. D.08-04-056 itself acknowledges that the tariffs in question were “filed in February 2006 ***in compliance with*** Decision (D.) 05-12-041, issued in Rulemaking (R.) 03-10-003, ***which adopted rules and policies regarding the CCA program.***” (D.08-04-056, pp. 1- 2, emphasis added.) Moreover, the authority of local governments to employ a JPA for CCA purposes is derived not from Government Code section 6508.1, but from Public Utilities Code section 366.2(c)(10)(B), enacted by the same legislation that authorizes the Commission to ensure compliance by CCAs with creditworthiness and other terms and conditions of CCA service. (Public Utilities Code sections 366.2(d)(1); 394.25(e).) Moreover, section 366.2(c)(10)(B) by its terms does not in any way reference joint and several liability, but merely authorizes local governments to use the JPA form of organization to provide CCA services consistent with the CCA statute. Based on an *in pari materia* construction of AB 117, it is clear that the Legislature intended that the authority it granted to JPAs to offer CCA services was to be construed consistent with, rather than as conflicting with, the authority it granted to the CPUC in the same legislation.

AB 117 also contains a broad grant of residual authority to the Commission to carry out its oversight and regulatory responsibilities for CCA programs. Public Utilities Code section 366.2(c)(4)(D) requires that a CCA program provide for “*Any requirements* established by state law *or by the commission* concerning aggregated service.” (emphasis added.) If the Legislature had intended that the mere formation of a JPA would trump the Commission’s authority over CCA programs under AB 117, it would not have included the broad grant of residual authority over CCA programs to the Commission under section 366.2(c)(4)(D.)

For these reasons, the Commission should grant rehearing and revise D.08-04-056 to find that utilities may implement CCA tariffs that require JPA CCAs to demonstrate creditworthiness through joint and several liability *if* the Commission itself finds that such tariff provisions are necessary under Public Utilities Code Section 366.2 or 394.25(e).

II. D.08-04-056 IS AN UNLAWFUL COLLATERAL ATTACK ON A COMMISSION ORDER THAT HAS BECOME FINAL UNDER PUBLIC UTILITIES CODE SECTIONS 1709 AND 1731

Public Utilities Code section 1709 provides that, “[i]n all collateral actions or proceedings, the orders and decisions of the commission which have become final shall be conclusive.” Likewise, Public Utilities Code section 1731(b) requires that any challenge to the legality of a Commission order or decision be filed within 30 days after the date of issuance. Here, D.08-04-056 purports to grant a request by SJVPA to overturn as unlawful a prior Commission decision, Resolution E-4013, which the Commission issued on November 9, 2006 and which became final and conclusive on all parties shortly thereafter when not challenged within 30 days of issuance.

SJVPA’s application is grounded on the alleged illegality of Resolution E-4013 in approving the utilities’ CCA tariffs. As such, it is an impermissible and untimely collateral attack on the legality of a final Commission decision under both sections 1709 and 1731. If a party, in the guise of a new application or petition for modification, could mount a collateral

challenge to the legality of a Commission order long after the time for rehearing the order has lapsed, there would never be any finality or conclusiveness to the Commission's decisions and orders. This is why Public Utilities Code sections 1709 and 1731 limit the time within which Commission orders can be challenged on legal grounds.

The Utilities note that SJVPA's *legal* challenge to Resolution E-4013 is precluded, but its request that the Commission modify the Resolution for *policy* reasons consistent with the CCA statute is not. This distinction is not academic or irrelevant. Under D.08-04-056's interpretation of the Public Utilities Code, the Commission's prior decisions approving utility tariffs are never conclusive or final, regardless of whether the Commission chooses to modify the tariffs as a matter of public policy. Under the Utilities' rehearing request, the Commission's prior approval is conclusive and final as against untimely legal challenges, but always subject to the Commission's own discretion to modify its orders and decisions prospectively as a matter of policy.

For these reasons, the Commission should grant rehearing and revise D.08-04-056 to reject SJVPA's legal challenge to Resolution E-4013 while preserving the Commission's authority to modify the tariffs prospectively for policy reasons.

Respectfully Submitted,

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By: _____ /s/

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On behalf of PACIFIC GAS AND ELECTRIC COMPANY
and SOUTHERN CALIFORNIA EDISON COMPANY

Dated: May 27, 2008

CERTIFICATE OF SERVICE BY ELECTRONIC MAIL OR U.S. MAIL

I, the undersigned, state that I am a citizen of the United States and am employed in the City and County of San Francisco; that I am over the age of eighteen (18) years and not a party to the within cause; and that my business address is Pacific Gas and Electric Company, Law Department B30A, Post Office Box 7442, San Francisco, CA 94120.

On the **27th day of May 2008**, I served a true copy of:

**APPLICATION OF PACIFIC GAS AND ELECTRIC COMPANY
AND SOUTHERN CALIFORNIA EDISION COMPANY
FOR REHEARING OF DECISION NO. 08-04-056**

- [XX] By Electronic Mail – serving the enclosed via e-mail transmission to each of the parties listed on the official service lists for **A.07-12-032** with an e-mail address.
- [XX] By U.S. Mail – by placing the enclosed for collection and mailing, in the course of ordinary business practice, with other correspondence of Pacific Gas and Electric Company, enclosed in a sealed envelope, with postage fully prepaid, addressed to those parties listed on the official service lists for **A.07-12-032** without an e-mail address.

I certify and declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on this **27th day of May 2008** at San Francisco, California.

/s/
MARTIE L. WAY

**THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA
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Downloaded May 27, 2008, last updated on May 2, 2008
Commissioner Assigned: Michael R. Peevey on February 1, 2008
ALJ Assigned: Kim Malcolm on February 1, 2008

CPUC DOCKET NO. A0712032

Petition for Expedited Modification of Energy Division Resolution E-4013 Approving the Utilities' Community Choice Aggregation Service Agreements	A0712032
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CPUC DOCKET NO. A0712032 CPUC REV 05-02-08

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