



BEFORE THE PUBLIC UTILITIES COMMISSION OF THE
STATE OF CALIFORNIA

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Order Instituting Rulemaking to Consider Smart
Grid Technologies Pursuant to Federal
Legislation and on the Commission's Own
Motion to Actively Guide Policy in California's
Development of a Smart Grid System

R.08-12-009
(Filed December 18, 2008)

SOUTHERN CALIFORNIA EDISON COMPANY'S (U 338-E) RESPONSE TO THE
APPLICATION FOR REHEARING OF DECISION 09-09-029 OF THE CONSUMER
FEDERATION OF CALIFORNIA

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Dated: **October 29, 2009**

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Pursuant to Rule 16.1 of the California Public Utilities Commission (Commission) Rules of Practice and Procedure, **Southern California Edison Company (SCE)** respectfully submits the following response to the Application for Rehearing of Decision 09-09-029 (Application for Rehearing) filed by the Consumer Federation of California (CFC) on October 14, 2009.

SCE urges the Commission to reject CFC's Application for Rehearing because the document fails to demonstrate any legal error in D.09-09-029. First, CFC's collateral attack on the categorization of this proceeding is time-barred as a matter of law. Second, CFC is mistaken in suggesting that a Constitutionally-prohibited "taking" has occurred in D.09-09-029. The Decision does not "confiscate" any money from ratepayers, and does not set or modify any rates. Third, CFC appears to simply misapprehend the review and oversight that the Commission will be providing, and ignores express statements by the Commission in D.09-09-029 that contradict CFC's view.

I.

CFC's Collateral Attack on the Categorization of this Proceeding Is Barred by Commission Rule 16.1 and Should Be Denied

CFC argues in its Application for Rehearing that the Commission erred in denying the Division of Ratepayer Advocates' appeal of the quasi-legislative categorization of this rulemaking.¹ CFC claims: (a) that the Commission erred in its interpretation of the California Public Utilities Code when it denied DRA's appeal in D.09-06-043; and (b) that the standards established in D.09-09-029 for utilities to seek state matching funds for American Recovery and Reinvestment Act (ARRA) Smart Grid projects indicate that the Commission is in fact establishing rates in this proceeding.² CFC's challenge to the categorization of this proceeding is untimely and therefore barred by the Commission's Rules of Practice and Procedure.

As CFC acknowledges in its Application for Rehearing, in D.09-06-043 (Categorization Decision) the Commission expressly denied DRA's appeal of categorization of this proceeding.³ The Categorization Decision was issued on June 22, 2009 and was subject to challenge via an application for rehearing *only until July 22, 2009*, in accordance with the Commission's 30-day limit for filing an application for rehearing, as set forth in Commission Rule of Practice and Procedure 16.1. Thus, CFC is precluded from seeking rehearing of the Categorization Decision (D.09-06-043) in its current Application for Rehearing, dated October 14, 2009. Nevertheless, CFC attempts to attack the categorization of this proceeding under the auspices of seeking rehearing of D.09-09-023. Such an attack is inappropriate. Commission Rule of Practice and Procedure 7.6 makes clear that only certain types of Commission rulings or determinations impact the categorization of a proceeding such that parties may seek to appeal the categorization, and D.09-09-023 is not such a ruling or determination:

¹ CFC Application for Rehearing, at 5-8.

² *Id.*

³ *Id.*, at 6, n. 17.

Any party may file and serve an appeal to the Commission, no later than 10 days after the date of: (1) an assigned Commissioner's ruling on category in a scoping memo pursuant to Rule 7.3(a); (2) the instructions to answer pursuant to Rule 7.1(b); or (3) an order instituting investigation pursuant to Rule 7.1(c). Such appeal shall state why the designated category is wrong as a matter of law or policy.⁴

The only recent ruling in this proceeding that permitted parties to challenge the categorization of this proceeding was the Assigned Commissioner's Ruling Amending the Scope and Schedule of Proceeding to Address Policy Issues Pertaining to Smart Grid Funding Appropriated in the American Recovery and Reinvestment Act of 2009, dated May 29, 2009. That Ruling prompted DRA's prior appeal of categorization. DRA's appeal was properly denied in the Categorization Decision, and the deadline to seek rehearing of that decision has long passed. Accordingly, the Commission should reject CFC's improper collateral attack upon the categorization of this proceeding.

II.

CFC is Mistaken in Asserting that the Commission Has Violated the U.S. Constitution

The CFC suggests that the language of D.09-09-029 somehow constitutes an "unlawful taking" in violation of the U.S. Constitution because the Commission is "confiscating" customers' money.⁵ The CFC is mistaken. As a threshold matter, the Commission possesses and exercises broad authority in the area of rates.⁶ More importantly, D.09-09-029 *does not set or modify any rates*. While the decision may have proposed certain *processes* that the utilities may follow to obtain necessary "co-funding" for smart grid projects that are eligible for federal stimulus funds, the actual Commission assessment of the reasonableness of any utility expenditures and authorization of any corresponding rate increase will occur outside the confines

⁴ CPUC Rules of Practice and Procedure, Rule 7.6(a).

⁵ CFC Application for Rehearing, at 7.

⁶ See Cal. Pub. Util. Code § 454(b) ("The commission may adopt rules it considers reasonable and proper for each class of public utility providing for the nature of the showing required to be made in support of proposed rate changes, the form and manner of the presentation of the showing, with or without a hearing, and the procedure to be followed in the consideration thereof.").

of D.09-09-029, or indeed this OIR proceeding. Whether a utility utilizes an application or a Tier 3 advice letter process, there will still be Commission review and ruling separate and apart from D.09-09-029.

Accordingly, D.09-09-029 provides guidance and direction on processes and policy, but does not contemplate that the Commission will authorize changes to any utility's rates in this proceeding. CFC's characterizations are erroneous.

III.

D.09-09-029's Adopted Procedures for Utilities to Obtain Matching Funds Are Not Unlawful

CFC contends that D.09-09-029 implements unlawful procedures for utilities to seek matching funds from ratepayers for ARRA Smart Grid projects. Specifically, CFC appears to be arguing that the procedures adopted in D.09-09-029: (1) shift the burden of proof regarding the reasonableness of costs to ratepayers; (2) limit the Commission's reasonableness analysis solely to a cost/benefit test; and (3) defer the cost/benefit analysis entirely to the Department of Energy (DOE).⁷ These assertions are unfounded and should be rejected by the Commission.

CFC's contention that D.09-09-029 would shift the burden of proving reasonableness to ratepayers is belied by the Commission's repeated statements throughout the decision that the burden of proving reasonableness of costs will continue to rest with the utility seeking cost recovery. For example, the decision states:

Standard Commission processes will apply for reviewing final projects costs and for including project costs in rates.

* * *

If an IOU desires Commission approval in advance of a DOE decision on project funding, it may file an application requesting Commission approval *and demonstrating that it is reasonable* for the Commission to approve ratepayer funds for these projects.⁸

⁷ CFC Application for Rehearing, at 11-15.

⁸ D.09-09-029, at 26, 33 (emphasis added).

CFC also cites to the filed rate doctrine and claims that the Commission erroneously relied on SCE's analysis of the broad ratesetting discretion provided by California Public Utilities Code § 454(b). These arguments rest on CFC's apparent belief that D.09-09-029 adopted a rebuttable presumption of cost accuracy -- this rebuttable presumption was part of the Proposed Decision that preceded D.09-09-029.⁹ SCE's comments cited by CFC specifically addressed that rebuttable presumption. However, D.09-09-029 *expressly declined* to adopt the rebuttable presumption. Thus, CFC's arguments are not applicable to the decision and should be disregarded.

CFC next argues that D.09-09-029 will improperly restrict the Commission's evaluation of the reasonableness of ARRA Smart Grid project costs to solely a financial cost/benefit test.¹⁰ Again, CFC appears to misapprehend the provisions actually adopted in the decision. As noted above, D.09-09-029 makes clear that the Commission will be applying its *standard processes* when evaluating the reasonableness of ARRA Smart Grid project costs. Although not expressly noted in the text of D.09-09-029, the Commission made clear in the Proposed Decision preceding D.09-09-029 that its standard reasonableness analysis is not confined solely to a financial cost/benefit analysis.¹¹ In addition, even if the Commission's process in considering the reasonableness of ARRA Smart Grid project is not precisely identical to its ordinary reasonableness reviews for General Rate Case or other applications, the Commission is authorized by the California Public Utilities Code to adopt modified standards for a reasonableness determination that are appropriate under the circumstances:

⁹ CFC Application for Rehearing, at 12.

¹⁰ *Id.*, at 12-13.

¹¹ Proposed Decision, at 23 ("We note that a favorable cost benefit ratio is only one element in the determination of the reasonableness of a project.").

The commission may adopt rules it considers reasonable and proper for each class of public utility providing for the nature of the showing required to be made in support of proposed rate changes, the form and manner of the presentation of the showing, with or without a hearing, and the procedure to be followed in the consideration thereof.¹²

Finally, CFC claims that D.09-09-029's adopted procedures "unlawfully defer" the Commission's responsibility to evaluate the cost-effectiveness of the ARRA Smart Grid projects, because the Commission is purportedly deferring to the DOE's review of project costs and benefits.¹³ CFC raised an identical argument in opposition to the Proposed Decision, and the Commission correctly refuted the argument in D.09-09-029: "[t]he Commission does not delegate its review to DOE. The Commission assesses the information that utilities provide to it and makes a determination on the reasonableness of committing ratepayer funds to Smart Grid projects."¹⁴

Nowhere in the decision does the Commission suggest that it will abdicate its responsibility to evaluate the costs and benefits of ARRA Smart Grid projects. Rather, the decision acknowledges that due to the consistency in Smart Grid policies between the DOE and the Commission, "it is reasonable to conclude that IOU projects that receive DOE grants will be beneficial to the IOU's ratepayers," and that "DOE awards will also be attractive from a cost perspective since utilities will have the opportunity to make investments that are beneficial to ratepayers and have only 50% of the cost (or less) fall to ratepayers."¹⁵

Moreover, the strong likelihood that DOE-awarded projects will be cost-effective is not the end of the Commission's review of the project, contrary to CFC's suggestion. Under D.09-09-029, Smart Grid projects that receive ARRA funding awards from the DOE still must be submitted to the Commission for matching fund approval (either via application or Tier 3 advice

¹² Cal. Pub. Util. Code § 454(b).

¹³ CFC Application for Rehearing, at 13-15.

¹⁴ D.09-09-029, at 41.

¹⁵ *Id.*, at 25.

letter), are subject to protests by intervenors, and will be evaluated by the Commission for reasonableness prior to approval.¹⁶

IV.

CONCLUSION

SCE respectfully requests that the Commission reject CFC's Application for Rehearing, and maintain D.09-09-029 as adopted by the Commission.

Respectfully submitted,

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October 29, 2009

¹⁶ *Id.*, at 26-27.

CERTIFICATE OF SERVICE

I hereby certify that, pursuant to the Commission's Rules of Practice and Procedure, I have this day served a true copy of SOUTHERN CALIFORNIA EDISON COMPANY'S (U 338-E) RESPONSE TO THE APPLICATION FOR REHEARING OF DECISION 09-09-029 OF THE CONSUMER FEDERATION OF CALIFORNIA on all parties identified on the attached service list(s). Service was effected by one or more means indicated below:

Transmitting the copies via e-mail to all parties who have provided an e-mail address. First class mail will be used if electronic service cannot be effectuated.

Executed this **29th day of October, 2009**, at Rosemead, California.

/s/ Raquel Ippoliti
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