

Decision 03-10-090

October 30, 2003

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking to Establish Policies and Cost Recovery Mechanisms for Generation Procurement and Renewable Resource Development.

R.01-10-024
(Filed on October 25, 2001)

ORDER DENYING REHEARING OF DECISION 03-06-067

In Decision (“D.”) 03-06-067, the Commission granted in large part Southern California Edison Company’s (“Edison’s”) petition to modify D.02-12-074. Among other things, the Commission granted Edison’s request to set a dollar amount for potential disallowances under the least-cost dispatch standard. However, the Commission denied the request by Edison and other utilities to expand the scope of the cap to cover all procurement activities.

San Diego Gas & Electric Company (“SDG&E”) filed an application for rehearing of D.03-06-067. SDG&E alleges that disallowances of any amount are prohibited by Public Utilities Code section 454.5. SDG&E further argues that, at a minimum, the cap should cover all procurement activities.

We have reviewed each and every allegation of error raised in the application for rehearing and are of the opinion that SDG&E has not demonstrated good cause of rehearing.

I. FACTUAL AND PROCEDURAL BACKGROUND

D.03-06-067 is one of a series of decisions implementing Public Utilities Code section 454.5, which provides guidelines for resumption of procurement by SDG&E, Edison, and Pacific Gas & Electric Company (“PG&E”). In D.02-10-062, the Commission adopted a regulatory framework designed to enable the three investor-owned utilities to resume full procurement effective January 1, 2003. Included in this framework were seven standards of conduct governing utility procurement activity. Standard of Conduct 4 requires the utilities to “prudently administer all contracts and generation resources” and to “dispatch energy in the least-cost manner.” (D.02-10-062 at p. 51.)¹

In D.02-12-074, the Commission approved updated short-term procurement plans filed by the utilities. In addition, the Commission adopted a limit for potential disallowances under Standard 4. In D.03-06-067, the instant decision, the Commission granted Edison’s request to specify a dollar amount for the disallowance cap. However, the Commission denied Edison’s request to expand the scope of the disallowance cap to include all procurement transactions and activities. (D.03-06-067 at pp. 10-11.)

On July 23, 2003, SDG&E filed an application for rehearing of D.03-06-067. The primary focus of SDG&E’s application is Standard 4. SDG&E argues that disallowances of any amount are prohibited under section 454.5(d)(2), which provides that a procurement plan approved by the Commission shall:

Eliminate the need for after-the-fact reasonableness reviews of an electrical corporation’s actions in compliance with an approved procurement plan, including resulting electricity procurement contracts, practices and related expenses.

SDG&E further contends that after-the-fact review under Standard 4, characterized by SDG&E as “hindsight reasonableness review,” exposes the

¹ Standard 4 was subsequently modified in D.02-12-074 and D.03-06-076 (Order Modifying Decisions 02-10-062 and 02-12-074 and Denying Rehearing).

utilities to disallowance risk that could impair their financial stability and creditworthiness. According to SDG&E, this type of review also is contrary to section 1 of Assembly Bill (“AB”) 57 (the bill adopting section 454.5), which states that it is the intent of the Legislature to direct the Commission to review electrical procurement plans in a manner that “provides certainty to the electrical corporation in order to enhance its financial stability and creditworthiness.” (AB 57, § 1(c).) Rather, SDG&E argues, section 454.5 requires “upfront standards and criteria by which the acceptability and eligibility for rate recovery of a proposed procurement transaction will be known by the electrical corporation prior to execution of the transaction.” (Pub. Util. § 454.5(b)(7); see also Pub. Util. § 454.5(c)(3).)

SDG&E concludes that, at a minimum, and in the alternative to granting rehearing, the Commission should revise D.03-06-067 to include all procurement in the adopted disallowance cap. SDG&E reasons that because least-cost dispatch is a part of the short-term procurement plans, there is no legitimate basis for excluding it from procurement activities for purposes of the cap.

No party filed a response to SDG&E’s application for rehearing.

II. DISCUSSION

A. Standard of Conduct 4

As a preliminary matter, SDG&E’s argument that Standard of Conduct 4 is unlawful is procedurally flawed. Although D.03-06-067 discusses Standard 4 in relation to the disallowance cap, the instant decision neither adopts nor modifies Standard 4. Public Utilities Code section 1731 provides:

After any order or decision has been made by the Commission, any party to the action or proceeding . . . may apply for a rehearing in respect to any matters determined in the action or proceeding and specified in the application for rehearing.

(Emphasis added.)

As stated above, Standard 4 was adopted in D.02-10-062, and subsequently modified in D.02-12-074 and D.03-06-076 (Order Modifying Decisions 02-10-062 and 02-12-074 and Denying Rehearing). The least-cost dispatch standard has also been addressed and/or clarified in several other decisions. (See, e.g., D.02-09-053 [Contract Allocation Decision] at pp. 37-40; D.02-12-069 [Operating Order Decision] at pp.51-63; D.03-06-074 [Order Denying Rehearing of D.02-09-053] at pp. 5-11; and D.03-06-075 [Order Modifying D.02-12-069 and Denying Rehearing] at p.5.) SDG&E, as well as PG&E and Edison, have repeatedly challenged the validity of Standard 4 under section 454.5. (See, e.g. SDG&E's Application for Rehearing of D.02-10-062 and SDG&E's Application for Rehearing of D.02-12-074.) The Commission has rejected the utilities' arguments in numerous decisions, which are now final. Furthermore, Edison's petition to modify D.02-12-074 did not raise the issue of the legality of Standard 4. Rather, Edison sought to expand the scope of the disallowance cap beyond the parameters of Standard 4.

For all of these reasons, it does not appear that the legality of Standard 4 is a matter "determined in the action or proceeding." Thus, SDG&E's application does not meet the requirements of Public Utilities Code section 1731(b). (Cf. Northern Cal. Assn. v. Public Utilities Comm. (1964) 61 Cal.2d 126, 135 [a party cannot cure its failure to seasonably seek judicial review of a decision by the device of a series of late-filed petitions, basing its right to review on the latest among them, when, in fact, it is seeking review of the original decision].)

Even if the Commission reaches the merits of SDG&E's argument regarding Standard 4, SDG&E does not present a convincing argument. As stated above, this issue has been repeatedly raised and addressed by the Commission. SDG&E continues to characterize subsequent compliance reviews as prohibited "hindsight reasonableness reviews." SDG&E fails to acknowledge the distinction between review of contract terms and prices, on the one hand, and review of

contract administration, on the other. Standard 4 relates to the administration or management of contracts. The least-cost dispatch standard does not encompass traditional after-the-fact reasonableness reviews of the contracts themselves. (See D.02-12-069 at pp. 54-55; D.03-06-076 at p. 24.)

We have stated a number of times that Standard 4 is an “upfront” standard under section 454.5(b)(7) and (c)(3), which is part of each utility’s procurement plan. As such, review for compliance with this standard is clearly permitted by the statute, which states that approved procurement plans shall “[e]liminate the need for after-the-fact reasonableness reviews of an electrical corporations actions in compliance with an approved procurement plan.” (Pub. Util.Code § 454.5(d)(2). Emphasis added.)

We have also stated that the statute does not prohibit review for least-cost dispatch because the focus of the statute is procurement transactions and contracts, rather than the management of those contracts. (D.03-06-076 at p. 25.) SDG&E contends that this reasoning is inconsistent with the Commission’s position that that least-cost dispatch is an upfront standard that is part of the procurement plan. SDG&E asserts that “[t]he Commission cannot have it both ways – least cost dispatch is either in or out of the plan” (SDG&E’s Application for Rehearing at p. 9.) We reiterate today that the least-cost dispatch standard is an upfront standard that is part of the short-term procurement plans. As such, section 454.5(d)(2) is applicable and allows the Commission to review for compliance with Standard 4. However, we also point out that the primary purpose of the section 454.5, as evinced by the language of the statute and its legislative history, is to eliminate traditional after-the-fact reasonableness reviews of contracts terms and prices.

Finally, SDG&E focuses only on those portions of the statute that support its argument and ignores other portions. For example, SDG&E emphasizes language in section 1 of AB 57, which states that review of procurement plans should be done in a manner that “provides certainty to the

electrical corporation in order to enhance its financial stability and creditworthiness.” (AB 57, § 1(c).) However, that same section also states that the Commission’s review should be done in a manner that “assures just and reasonable rates.” (AB 57, § 1(c).) That section further directs the Commission

to assure that each electrical corporation optimizes the value of its overall supply portfolio, including Department of Water contracts and procurement pursuant to procurement pursuant to Section 454.5 of the Public Utilities Code, for the benefit of its bundled service customers.

(AB 57, § 1 (c).) Subsequent least-cost dispatch review is a necessary component of these objectives.

In sum, SDG&E has failed to demonstrate that subsequent review to ensure compliance with Standard 4 is prohibited by section 454.5.

B. Scope of Disallowance Cap

As stated above, the instant decision sets a dollar limit for potential disallowances under standard 4 and rejects efforts by the utilities to expand the scope of the disallowance. SDG&E says very little about the cap, except that it should cover all procurement activities.

SDG&E asserts that adopting a disallowance cap of any scope does not mitigate the alleged violations of section 454.5. (SDG&E Application for Rehearing at p. 4.) SDG&E further argues that a cap covering only disallowances for least-cost dispatch is not consistent with inclusion of the least-cost dispatch standard in the procurement plans.

[G]iven that least cost-dispatch is included in the adopted short-term procurement plans, the basis for excluding it from all procurement activities for purposes of the cap is artificial and without any legitimate basis.

(SDG&E Application for Rehearing at p. 9.)

SDG&E's argument is without merit. It simply does not follow that, because the least-cost dispatch standard is included in the procurement plans, the disallowance cap must apply to all procurement under the plans. The cap was adopted in response to the utilities' arguments that the least-cost dispatch standard, in particular, violated section 454.5. Among other things, the utilities argued that Standard 4 violated the statute's directive to the Commission to review electrical procurement plans in a manner that "provides certainty to the electrical corporation in order to enhance its financial stability and creditworthiness." (AB 57, § 1(c).) In order to provide additional certainty to the utilities for any potential disallowances under Standard 4, and to support the utilities' return to creditworthiness, we adopted the disallowance cap. (D.02-12-074 at p. 53.) Now, after responding to some of the utilities' concerns regarding Standard 4, SDG&E contends that the cap should be expanded to apply to all procurement activities, even activities that are not in compliance with approved procurement plans.² As stated in D.03-06-067, this could nullify the effectiveness of each utility's procurement plan and would expose ratepayers to extreme risk. (D.03-06-067 at p. 6.) There is nothing in section 454.5 that requires or, indeed, permits such a result.

III. CONCLUSION

For all of the foregoing reasons, SDG&E claims of legal error are without merit.

Therefore **IT IS ORDERED** that San Diego Gas & Electric Company's application for rehearing of D.03-06-067 is denied.

²This argument was previously made by Edison and PG&E as well. (See D.03-06-067. at pp. 6-7.)

This order is effective today.

Dated October 30, 2003, at San Francisco, California.

MICHAEL R. PEEVEY

President

LORETTA M. LYNCH

GEOFFREY F. BROWN

SUSAN P. KENNEDY

Commissioners

Commissioner Carl W. Wood, being
necessarily absent, did not participate.