

Decision 06-06-069

June 29, 2006

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

Rulemaking to implement the provisions of Public Utilities Code § 761.3 enacted by Chapter 19 of the 2001-02 Second Extraordinary Legislative Session.

R.02-11-039  
(Filed November 21, 2002)

**ORDER MODIFYING AND DENYING REHEARING  
OF DECISION 04-12-049, AS MODIFIED**

**I. INTRODUCTION**

In this decision, we dispose of an application for rehearing of Decision (“D.”) 04-12-049 filed by Mirant Delta, LLC and Mirant Poterero, LLC (“Mirant”). We have reviewed each and every allegation of error raised in the application for rehearing and are of the opinion that applicants have not demonstrated good cause of rehearing. However, we will modify the decision to ensure that there is some type of notice and opportunity to be heard when substantive changes to the Maintenance and Operations Guidelines are proposed. Therefore, we deny rehearing of D.04-12-049, as modified.

**II. FACTUAL BACKGROUND**

In 2002, the Legislature passed Senate Bill No. 39XX (“SB 39XX”) in response to the 2000-2001 energy crisis. (Stats. 2002, 2<sup>nd</sup> Ex. Sess., ch. 19.) In enacting SB 39XX, the Legislature declared that electric generating facilities and power plants in California “are essential facilities for maintaining and protecting the public health and safety of California residents and businesses.” (Stats. 2002, - 2<sup>nd</sup> Ex. Sess., ch. 19, § 1(a).) The Legislature further declared that it is in the public interest “to ensure that electric generating facilities and powerplants are

effectively and appropriately maintained and efficiently operated.” (Stats. 2002, 2<sup>nd</sup> Ex. Sess., ch. 19, § 1(b).) SB 39XX added section 761.3 to the Public Utilities Code.<sup>1</sup>

Public Utilities section 761.3 (a) requires the Commission to implement and enforce standards for the maintenance and operation of electric generating facilities to ensure reliability, notwithstanding Public Utilities Code section 216(g), which declares that exempt wholesale generators (“EWGs”) are not public utilities. Section 761.3 further provides that the Commission shall enforce protocols of the ISO for the scheduling of power plant outages.

Section 761.3(b)(1) provides that the Commission and the ISO shall jointly establish the California Electricity Generation Facilities Standards Committee (“Committee”), and that the Committee shall consist of three members; one member of the Commission, one member of the ISO, and one individual with expertise regarding electric generation facilities. Section 761.3(b)(1) requires that the Committee, within 90 days of the effective date of the legislation, adopt and thereafter revise standards for the maintenance and operation of generation facilities. Section 761.3(b)(2) provides for staff support for the Committee. Section 761.3(b)(3) states that “[t]his subdivision shall be operative only until January 1, 2005.”

Section 761.3(c) provides that nothing in section 761.3 authorizes the Commission to establish rates for wholesale sales in interstate commerce or to approve the sale or transfer of control of facilities that have been certified as EWGs by the Federal Energy Regulatory Commission. (“FERC”).

In D.04-05-017, the Commission adopted Logbook Standards for thermal power plants. In D.04-05-018, the Commission adopted General Order (“GO”) 167, which contains rules for the implementation and enforcement of

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<sup>1</sup> SB 39XX also repealed Public Utilities Code section 342 and amended Public Utilities Code section 362.

General Duty Standards and Maintenance Standards, and which provides for the enforcement of the Outage Coordination Protocol adopted by the California Independent System Operator (“CAISO” or “ISO”). In response to applications for rehearing filed by Mirant, the Western Power Trading Forum, et al. (“WPTF”); and Elk Hills Power, LLC (“Elk Hills”), the Commission denied rehearing of D.04-05-017 and D.04-05-018, but modified D.04-05-017 and GO 167. (See D.06-01-047.)

In D.04-12-049, the Commission modified GO 167 to include Operations Standards. Mirant filed an application for rehearing of D.04-12-049, alleging, among other things, that various aspects of the decision exceed the authority of the Commission, the decision violates state law provisions, and the decision violates state and federal constitutional provisions. In addition, Mirant alleges that the decision is preempted by federal law. No party filed a response to the application for rehearing.

### **III. DISCUSSION**

#### **A. Claims Incorporated by Reference**

Mirant incorporates by reference the grounds for rehearing that Mirant set forth in its applications for rehearing of D.04-05-017 and D.04-05-018. As Mirant points out, the enforcement scheme adopted in GO 167 for Maintenance Standards applies equally to Operations Standards.

Mirant’s general arguments that are incorporated by reference were addressed extensively in D.06-01-047, the Commission’s decision denying rehearing of D.04-05-017 and D.04-05-018. As applied to the Operations Standards, we also reject these arguments on the same basis that they were rejected in D.06-01-047.

#### **B. Operations Standards 22, 23, and 24**

More specifically, Mirant challenges Operations Standards 22, 23, and 24, which impose requirements regarding “readiness” of facilities, including

requirements that a Generating Asset Owner (“GAO”) notifies the Commission and Control Area Operator of changes in long-term status of a unit and obtains approval for changes in long-term status. Mirant claims that Operations Standards 22, 23, and 24 exceed the Commission’s authority under state law, and are federally preempted because they are duplicative of, and potentially in conflict with, standards imposed by the Federal Energy Regulatory Commission.

In D.06-01-047, we addressed similar claims made by Mirant relating to the Maintenance Standards. We discussed the Commission’s authority to impose standards on exempt wholesale generators pursuant to Public Utilities Code section 761.3. (D.06-01-047 at pp. 3-5, 20-21.) The same principles apply to the readiness standards adopted in the instant decision. Mirant has not demonstrated that the Commission is without authority under state law to impose such standards.

Regarding federal preemption, as the Commission stated in D.06-01-047, FERC does not have jurisdiction over facilities for *generation* of electric energy. (16 U.S.C. § 824(b).) The standards imposed by the Commission relate to the operations and maintenance of electric generation facilities. The goal of both Public Utilities Code section 761.3 and the standards is to ensure that generating facilities located in California properly maintained and efficiently operated for the public health and safety of Californians. (D.06-01-047 at pp. 50-51.) In contrast, FERC has jurisdiction over interstate sales at wholesale and wholesale rates. (D.06-01-047 at pp. 50-53.) Therefore, we conclude that the operations standards are not preempted by federal law.

In addition, Mirant claims that the “readiness” requirements violate the takings clauses of the United States and California Constitutions. According to Mirant, Operations Standards 22 and 24 “collectively require a Generating Asset Owner to meet ‘readiness’ standards until the Commission determines they their units are no longer needed for service.” (Mirant’s App. for Rehg. at p. 9.)

However, Mirant concedes that Operations Standard 24 “is applicable only to the extent that the regulatory body with relevant ratemaking authority has instituted a mechanism to compensate the GAO for readiness services provided.” Mirant claims that there is no provision for “just and adequate” compensation. Therefore, Mirant claims that the requirement “threatens” to deprive a GAO of its property without just compensation.

Mirant’s argument is without merit. The takings clause prohibits the taking of private property for public use without just compensation. However, whether there is a taking is a factual inquiry that depends on the severity of the burden and the degree to which it interferes with legitimate property interests. (*Penn Central Transportation Co. v. New York City* (1978) 438 U.S. 104; *Lingle v. Chevron* (2005) 161 L.Ed2nd 876, 888-889.) As discussed in D.06-01-047, Mirant’s argument is premature because there has been no taking of property without just compensation. (See D.06-01-047 at pp. 43-45.)

### **C. Modifications to Guidelines by Commission Staff**

Mirant also claims that D.04-12-049 errs in delegating to the Commission’s Consumer Protection and Safety Division (“CPSD”) the authority to modify the Guidelines without any opportunity for notice and comment. Mirant’s argument raises two separate legal issues: (1) whether permitting CPSD to modify the Guidelines without notice and comment violates due process and (2) whether it is improper to delegate authority to CPSD to modify the Guidelines. Mirant contends that CPSD should be required to use the resolution process to modify the Guidelines. The resolution process would provide parties with notice and opportunity to be heard and ensure that the Commission approves of any modifications. According to Mirant, this would satisfy due process and would avoid any delegation of authority problems.

## 1. Status of Guidelines

The Guidelines were initially adopted by California Electricity Generation Facilities Standards Committee (“Committee”), after notice and comment. In both D.04-12-049 and D.06-01-047 we clarified that the Guidelines are not enforceable requirements. Rather, the Guidelines are to be used by GAOs to assist them in meeting certain standards and are to be used by CPSD in audits and enforcement actions to determine whether certain standards are being met.

As we stated in D.04-12-049:

The Guidelines may be used to determine compliance with a Standard. Respondents are unanimous in asking that the Recommended Guidelines not be considered part of the Operations Standards. We agree.

Each Standard is enforceable, while each Guideline is not. We include in the GO what is directly enforceable – that is, the Standards. We adopt the Committee’s recommendation, and repeat the Committee’s language here, because it provides meaningful context and direction on our use of the Guidelines[.]

(D.04-12-049 at pp. 9-10.)

We then quoted the Committee’s statement on the effect of the Guidelines:

The Committee does not intend these guidelines to be enforceable. There may be reasonable ways of meeting a particular standard that do not follow every provision of the associated guidelines. On the other hand, the guidelines may not be an exhaustive list of the actions required by a standard, because at particular plants there may be special conditions not contemplated here.

GAOs should consider the guidelines in reviewing or reformulating their own policies, operating procedures, and implementation schedules, to ensure that the concerns raised by the guidelines are addressed, where relevant, at each power generation unit. We anticipate that that Commission staff will use the guidelines as indicators of the kinds of GAO activities that are sufficient to meet standards. Failure to meet guidelines under a particular

standard may of course raise questions about the completeness of a GAO's program. Failure to meet a guideline, in combination with other evidence, may indicate a violation of the Standards. However, failure to meet a guideline should not be taken, per se, as a failure to meet the associated standard.

(D.04-12-049 at p. 10, quoting Committee Operation Standards, adopted October 27, 2004, Guidelines, at p. 7 [see Attachment 3 to D.04-12-049]; see also D.04-12-049, Findings of Fact Nos. 3, 7, Conclusions of Law Nos. 2, 3, 8, 9.)

In D.04-12-049, we adopted the Guidelines as formulated by the Committee for Operations Standards. We authorized CPSD to modify the Guidelines over time and directed CPSD to make revised Guidelines available to GAOs. (D. 04-12-049 at p. 11.) We also stated that we were adopting the same approach for the Maintenance Standards Guidelines. (D.04-12-049 at p. 14.)

As we noted in our decision, the Guidelines may be reviewed by the Commission in one of several ways. First, a CPSD enforcement action involving the Guidelines may be contested by a GAO. If the enforcement action is formally brought to the Commission by CPSD, the GAO or other participants may recommend that the Scoping Memo for the proceeding identify as an issue the reasonable use of the Guidelines. Second, CPSD may bring any modifications to the Guidelines to the Commission for review and consideration by resolution. Under these circumstances, the parties would have the opportunity to comment. Third, a GAO may petition the Commission for initiation of a proceeding (e.g., an Order Instituting Investigation or an Order Instituting Rulemaking) to review and revise the Guidelines, or the Commission may do so on its own initiative. (D. 04-12-049 at pp. 11-12.)

## **2. Due Process**

The essence of due process, a right guaranteed by both the United States and California Constitution, is that the government may not deprive an individual of life, liberty, or property without notice and opportunity to respond, in

a manner appropriate to the nature of the case. (*Coleman v. Department of Personnel Administration* (1991) 52 Cal.3d 1102, 1108, 1112.) “Notice is required before property interests are disturbed, before assessments are made, before penalties are assessed.” (*Lambert v. California* (1957) 355 U.S. 225, 228.) However, due process is a flexible concept. The resolution of what constitutional protections are appropriate in a particular context depends on the interests affected. (*Coleman v. Department of Personnel Administration, supra*, 52 Cal.3d at pp. 1118-1119.)

Here, the Commission has expressly stated that the Guidelines are not enforceable. Rather, the Guidelines are intended to be used by GAOs and Commission staff as indicators of the type of activities that are sufficient to meet the Standards. As stated in the decision, there may be other reasonable ways to meet a Standard that do not follow the Guidelines. Conversely, the Guidelines do not necessarily provide an exhaustive list of the actions required by a Standard. (D.04-12-049 at p. 109.) On the other hand, as Mirant argues, the Guidelines “could be a significant part of CPSD’s assessment of a [GAO’s] compliance with the Operations Standards.” (Mirant’s App. for Rehg. at p. 10.)

Even if the Guidelines were viewed as binding, which they are not, permitting CPSD staff to modify the Guidelines would not violate due process. The due process clause provides that a person cannot be deprived of a property interest without prior notice and an opportunity to be heard. In the instant case, the decision provides that a GAO may raise the issue of the reasonable use of the Guidelines by contesting a CPSD enforcement action (e.g., GO 167, § 13.3), defending itself in a formal Commission action (e.g. GO 167, § 13.1), or by petitioning the Commission to review and revise the Guidelines. (D.04-12-049 at pp.11-13.) Thus, a GAO would have an opportunity to be heard before a GAO is penalized in a formal enforcement action.

Nevertheless, we recognize that the generator standards and enforcement program adopted in GO 167 is a new relatively new program. It is still unclear how significant or insignificant the Guidelines may be in compliance with and enforcement of the Maintenance and Operations Standards. Because of this uncertainty, we believe it is appropriate to take a more cautious approach to modifying the Guidelines. Therefore, we have determined that, at this point in time, we should require prior notice and opportunity to be heard when substantive changes are made to the Guidelines.

In D.04-12-049, we took a flexible approach. We stated: “CPSD may bring modifications to us for formal approval by draft resolution if desired, but that is not required.” (D.04-12-049 at p. 13.) We continue to believe that, where changes to the Guidelines are non-substantive, CPSD may make such changes without prior notice and opportunity to be heard. On the other hand, when CPSD staff proposes substantive changes, we have concluded that there should be some type of prior notice and comment. This could be accomplished by workshops, resolution, or by any similar process that provides prior notice and opportunity to be heard. We leave it up to CPSD staff to determine what the most appropriate process will be in any given case, as long as due process is satisfied.

We note again that it is not clear how significant the Guidelines will be in enforcement and compliance, nor what type of modifications to the Guidelines may be needed or desired. Therefore, we invite CPSD staff, or a GAO, to file a petition for modification of this decision if, after some time has passed, it appears that the approach we adopt today causes undue delays in making necessary modification to the Guidelines, or is unnecessarily cumbersome for CPSD staff, the Commission, and/or GAOs. At such time, we may revisit this issue to determine if there is a more efficient approach for modifications to the Guidelines.

### 3. Delegation of Authority to Staff

Powers conferred upon public agencies and officers which involve the exercise of judgment or discretion are in the nature of a public trust and cannot be surrendered or delegated to subordinates in the absence of statutory authorization. (*Bagley v. City of Manhattan Beach* (1976) 18 Cal.3d 22, 24; *California School Employees Association v. Personnel Commission* (1970) 3 Cal.3d 139, 144; *Schechter v. County of Los Angeles* (1968) 258 Cal.App.2d 391, 396.) On the other hand, public agencies may delegate the performance of ministerial tasks, including the investigation and determination of facts preliminary to agency action (*California School Employees, supra*, at p. 144), functions relating to the application of standards (*Bagley, supra*, at p. 25), and the making of preliminary recommendations and draft orders (*Schechter, supra*, at p. 397). Moreover, an agency's subsequent approval or ratification of an act delegated to a subordinate validates the act, which becomes the act of the agency itself. (*California School Employees, supra*, at p. 145.)

As the Commission pointed out in *California Association of Competitive Telecommunication Companies* [D.02-02-049] (2002) 2002 Cal.P.U.C. LEXIS 162, cases such as *California School Employees* and *Schechter* follow the general rule that agencies cannot delegate discretionary duties in the absence of statutory authority. However,

they really stand for the narrower principle that while agencies cannot delegate the power to make fundamental policy decisions or "final" discretionary decisions, they may act in a practical manner and delegate authority to investigate, determine facts, make recommendations, and draft proposed decisions to be adopted or ratified by the agency's highest decision makers, even though such activities in fact require staff to exercise judgment and discretion.

(*California Association of Competitive Telecommunication Companies* [D.02-02-049], *supra*, 2002 Cal.P.U.C. LEXIS 162 at pp. \*9-\*10, petn. for writ den. Dec. 4,

2002, *Southern California Edison Company v. Public Utilities Commission*, B157507.) Thus, in determining whether a delegation of authority is unlawful, the question is whether the Commission has delegated its power to make fundamental policy decisions or final discretionary decisions.

We have said that the purpose of the doctrine that legislative power cannot be delegated is to assure that “truly fundamental issues [will] be resolved by the Legislature” and that a “grant of authority [is] . . . accompanied by safeguards adequate to prevent its abuse.” [Citations.]

(*Kuglar v. Yocum* (1968) 69 Cal.2d 371, 376, original alterations.)

To the extent that CPSD makes nonsubstantive changes to the Guidelines, there is no improper delegation. Under such circumstances, the Commission has not delegated its power to make fundamental policy decisions or final discretionary decisions. To the extent that substantive changes are made, we believe that the approach discussed above, in relation to the due process issue, will satisfy delegation principles. Substantive changes would be proposed by resolution, workshops, or some other similar process. CPSD staff has flexibility in determining the most appropriate procedure to follow, depending on the circumstances involved. CPSD would then present proposed changes to the Commission for consideration and approval or ratification

#### **IV. CONCLUSION**

For all of the foregoing reasons, good cause has not been shown for granting rehearing of D.04-12-049. However, we will modify the decision as set forth in this order.

Therefore **IT IS ORDERED** that

1. D.04-12-049 is modified as follows:
  - a. When the Commission’s Consumer Protection and Safety Division (“CPSD”) staff proposes substantive changes to the Guidelines for the Maintenance and Operations Standards, staff shall

provide prior notice and an opportunity to be heard. This may be accomplished by workshops, resolution, or by any similar process that provides prior notice and an opportunity to be heard. We leave it up to CPSD staff to determine that most appropriate process in any given case.

- b. Any proposed substantive changes to the Guidelines shall be presented to the Commission for consideration and approval or ratification.

2. Mirant's application for rehearing of D.04-12-049, as modified by this order, is denied.

- 3. This proceeding is closed.

This order is effective today.

Dated June 29, 2006, at San Francisco, California.

MICHAEL R. PEEVEY  
President  
GEOFFREY F. BROWN  
DIAN M. GRUENEICH  
JOHN A. BOHN  
RACHELLE B. CHONG  
Commissioners