

Decision 09-01-039 January 29, 2009

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking to Promote Policy and Program Coordination and Integration in Electric Utility Resource Planning.

Rulemaking 04-04-003
(Filed April 1, 2004)
(QF Issues)

Order Instituting Rulemaking to Promote Consistency in Methodology and Input Assumptions in Commission Applications of Short-Run And Long-Run Avoided Costs, Including Pricing for Qualifying Facilities.

Rulemaking 04-04-025
(Filed April 22, 2004)
(QF Issues)

**ORDER DENYING APPLICATION FOR REHEARING OF
DECISION (D.) 08-07-048**

I. INTRODUCTION

In D.07-09-040, we adopted specific policies and pricing mechanisms applicable to the electric utilities' purchase of energy and capacity from Qualifying Facilities ("QFs") pursuant to the Public Utilities Regulatory Policy Act of 1978 ("PURPA") (16 U.S.C. § 824a-3). Among other things, we adopted the Market Index Formula ("MIF"), which is an updated short-run avoided cost ("SRAC") formula for pricing SRAC energy. D.07-09-040 also found that the record in the proceeding was sufficient and upheld a May 9, 2005 ruling in which the Administrative Law Judges ("ALJs") found that certain information requested by the parties during discovery in the proceeding should remain confidential, or should be released only under a protective order.

Several parties, including the Cogeneration Association of California ("CAC") and the Energy Producers and Users Coalition ("EPUC"), filed rehearing

applications of D.07-09-040. CAC/EPUC's rehearing application of D.07-09-040 alleged the following error: (1) pricing under the Prospective QF Program does not meet the requirements of PURPA and Public Utilities Code section 390(b)¹; and (2) D.07-09-040's reliance on the current record, which did not allow QF parties access to relevant data, is unlawful under federal law.

D.08-07-048 modified D.07-09-040 in several respects, and denied rehearing of D.07-09-040, as modified. In D.08-07-048, we modified D.07-09-040 to include additional discussion regarding the formulation of the MIF but did not change the formulation of the MIF. (See D.08-07-048, pp. 4-6, p. 17 [Ordering Paragraph 1.b.], pp. 17-18 [Ordering Paragraph 1.c.]) As modified, we determined that the pricing methodology adopted in D.07-09-040 complies with PURPA and section 390(b) and that CAC/EPUC's allegations to the contrary lacked merit. (D.08-07-048, pp. 9-11.) We also determined that CAC/EPUC's allegations regarding D.07-09-040's reliance on the current record and the QF parties' lack of access to certain data lacked merit. (D.08-07-048, pp. 11-12.)

In their joint rehearing application of D.08-07-048, CAC and EPUC allege the following error: (1) the modifications made in D.08-07-048 regarding the determination of avoided cost pricing for the Prospective QF Program fail to meet the requirements of PURPA and section 390(b); and (2) D.08-07-048 unlawfully affirms D.07-09-040 with respect to the discovery rulings denying access to utility data that are inconsistent with D.07-05-032.²

¹ All subsequent section references are to the Public Utilities Code, unless otherwise specified.

² There is currently a pending petition for writ of review of D.07-09-040 and D.08-07-048 filed jointly by Southern California Edison Company and The Utility Reform Network. (*Southern California Edison Company and The Utility Reform Network v. Public Utilities Commission of the State of California*, California Court of Appeal, Second Appellate District, Division Eight, Case No. B210398.) CAC/EPUC also filed a cross petition for writ of review of D.06-12-030, D.07-09-040 and D.08-07-048 in Case No. B210398.

Pacific Gas and Electric Company, Southern California Edison Company, and San Diego Gas and Electric Company filed a joint response to CAC/EPUC's rehearing application requesting that the Commission reject the rehearing application.

We have reviewed each and every argument raised in the rehearing application and are of the opinion that good cause has not been established to grant rehearing. Accordingly, the application for rehearing of D.08-07-048 is denied.

II. DISCUSSION

A. Compliance with PURPA and Section 390(b)

CAC/EPUC allege that due to the many changes D.08-07-048 makes to D.07-09-040, the pricing adopted for the Prospective QF Program fails to meet the requirements of PURPA and section 390(b). CAC/EPUC allege that D.08-07-048 does not meet the requirements of PURPA because D.08-07-048 fails to address that there was no demonstration that the "market" proposed to be the utilities' avoided costs represents the utilities' respective incremental costs. They further allege that D.08-07-048 does not address the fact that section 390(b) sets forth clear calculation requirements for SRAC energy payments which the MIF does not strictly meet. (Rehrg. App., p. 2.)³ These allegations lack merit.

A rehearing application must set forth specifically the grounds on which an applicant considers a Commission decision to be unlawful or erroneous. (Pub. Util. Code, § 1732; Cal. Code Regs., tit. 20, § 16.1, subd. (c).) CAC/EPUC's rehearing application fails to meet the requirements of section 1732 or Rule 16.1 of the Commission's Rules of Practice and Procedure. CAC/EPUC generally allege that D.08-07-048 violates PURPA and section 390(b) because of "the many changes D.08-07-048 makes to D.07-09-040" but fail to specify what these changes are or explain how any such changes would violate PURPA or section 390(b). (See Rehrg. App., p. 2.)

³ CAC/EPUC did not paginate their rehearing application. For purposes of this order, CAC/EPUC's rehearing application is paginated with the page including footnote 1 being page 1.

Other than the general conclusory allegation regarding “the many changes D.08-07-048 makes to D.07-09-040,” CAC/EPUC’s rehearing application references the use of the “market” to determine the utilities’ avoided costs and the calculation requirements of section 390(b). However, D.08-07-048 did not make any changes to the formulation of the MIF that we adopted in D.07-09-040.⁴ It was in D.07-09-040 that we adopted the MIF and determined that a market based heat rate would be part of the MIF calculation. (See e.g. D.07-09-040, pp. 66-67.) Therefore, any challenges to the MIF should have been raised in a rehearing application of D.07-09-040.

The allegations raised by CAC/EPUC in their rehearing application of D.08-07-048 are merely an impermissible collateral attack of D.07-09-040. This is further demonstrated by the fact that CAC/EPUC raised the same conclusory allegations regarding the MIF violating PURPA and section 390(b) in their rehearing application of D.07-09-040. (See CAC/EPUC Rehr. App. of D.07-09-040, pp. 2-3.) In D.08-07-048, we determined that these allegations lacked merit. (D.08-07-048, pp. 9-11.) We previously explained in D.07-09-040 and D.08-07-048 that the MIF adopted in D.07-09-040 complies with PURPA and section 390(b). (See e.g. D.08-07-048, pp. 9-11.) The opportunity for CAC/EPUC to seek judicial review of D.07-09-040 has passed. (See Pub. Util. Code, § 1756.) CAC/EPUC cannot now cure their failure to seasonably seek judicial review of D.07-09-040 in the guise of a challenge to D.08-07-048, when they are in fact seeking review of an issue decided in D.07-09-040. (See *Northern Cal. Assn. v. Public Utilities Com.* (1964) 61 Cal.2d 126, 135.)

CAC/EPUC’s rehearing application fails to set forth specifically the grounds on which D.08-07-048 is unlawful or erroneous. Accordingly, there is no basis for granting rehearing on this issue.

⁴ Subsequent to the issuance of D.08-07-048, we issued: *Order Proposing to Reconsider Administrative Heat Rates for Southern California Edison Company, Pacific Gas and Electric Company, and San Diego Gas and Electric Company Adopted in Decision (D.) 07-09-040* [D.08-11-062]. The administrative heat rates are a component of the Incremental Energy Rates employed in the MIF.

B. Access to Utility Data

CAC/EPUC allege that D.08-07-048 unlawfully affirms discovery rulings that are inconsistent with D.07-05-032. CAC/EPUC also allege that they were refused access to utility data that the foundational federal law deems to be required to calculate avoided costs. (Rehrg. App., p. 3 citing 18 C.F.R. § 292.302.) These allegations are improperly raised in a rehearing application of D.08-07-048 and lack merit.

D.07-09-040 noted that issues regarding the degree of access to specific utility load and supply information were resolved in the ALJs' Ruling on Protective Order and Remaining Discovery Disputes dated May 9, 2005. (D.07-09-040, pp. 137-138.) D.07-09-040 also found that the record was sufficient for the purposes of reaching a decision on the utilities' avoided cost and other issues. (D.07-09-040, p. 139.) D.08-07-048 did not make any modifications to D.07-09-040 regarding this issue. (See D.08-07-048, pp. 11-12.)

Since D.08-07-048 did not modify D.07-09-040 on the issue regarding CAC/EPUC's access to utility data, CAC/EPUC's allegations regarding this issue are merely an attempt to improperly relitigate an issue that was decided in D.07-09-040. These allegations should have been raised in an application for rehearing of D.07-09-040. CAC/EPUC in fact raised the same allegation that lack of access to utility data violated 18 C.F.R. § 292.302 in their rehearing application of D.07-09-040. (CAC/EPUC Rehrg. App. of D.07-09-040, p. 3.) In D.08-07-048, we determined that this allegation lacked merit. (D.08-07-048, pp. 11-12.) The opportunity for CAC/EPUC to seek judicial review of D.07-09-040 has passed. (See Pub. Util. Code, § 1756.) CAC/EPUC cannot now cure their failure to seasonably seek judicial review of D.07-09-040 in the guise of a challenge to D.08-07-048, when they are in fact seeking review of an issue decided in D.07-09-040. (See *Northern Cal. Assn. v. Public Utilities Com.*, *supra*, 61 Cal.2d at 135.)

Similarly, CAC/EPUC should have raised any allegations regarding D.07-05-032 in their rehearing application of D.07-09-040. CAC/EPUC's allegations regarding the applicability of D.07-05-032 are regarding the May 9, 2005 ALJs' ruling

that we upheld in D.07-09-040. Furthermore, since D.07-05-032 was issued prior to the CAC/EPUC's filing of their rehearing application of D.07-09-040, there is no reason why CAC/EPUC could not have raised these allegations in their rehearing application of D.07-09-040.

Regardless, CAC/EPUC fail to demonstrate that we erred in not applying D.07-05-032 to the May 9, 2005 ALJs' ruling. CAC/EPUC allege that: "The Commission should have re-evaluated the ALJ's original discovery rulings in light of D.07-05-032." (Rehrg. App., p. 4.) CAC/EPUC do not explain why we should apply D.07-05-032, which was effective as of May 3, 2007, to an ALJs' ruling that was issued May 9, 2005. As acknowledged by CAC/EPUC: "Critically, however, the ALJ's discovery rulings were rendered before D.07-05-032. Accordingly, the standards and presumptions articulated in D.07-05-032 did not govern the ALJ's rulings." (Rehrg. App., p. 3.) CAC/EPUC fail to articulate what legal principle would require the Commission to retroactively apply D.07-05-032 to a ruling issued two years prior.⁵

III. CONCLUSION

For the reasons stated above, CAC/EPUC's application for rehearing of D.08-07-048 is denied.

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⁵ Furthermore, the fact that the Commission did not explicitly apply D.07-05-032 to the May 9, 2005 ruling does not signify that the May 9, 2005 ruling is necessarily inconsistent with D.07-05-032. (See Resp. to Rehrg. App., p. 5.)

THEREFORE, IT IS ORDERED that:

1. The application for rehearing of Decision 08-07-048 filed by CAC/EPUC is denied.

This order is effective today.

Dated January 29, 2009, at San Francisco, California.

MICHAEL R. PEEVEY
President
DIAN M. GRUENEICH
JOHN A. BOHN
RACHELLE B. CHONG
TIMOTHY ALAN SIMON
Commissioners