

Decision 09-08-031 August 20, 2009

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Rulemaking Regarding Whether, or Subject to What Conditions, the Suspension of Direct Access May Be Lifted Consistent with Assembly Bill 1X and Decision 01-09-060.

Rulemaking 07-05-025
(Filed May 24, 2007)

**ORDER DENYING APPLICATION FOR REHEARING OF
DECISION (D.) 08-11-056**

I. INTRODUCTION

In D.08-11-056 (“Decision”), we adopted a plan to facilitate the removal of the Department of Water Resources (“DWR”) from its role of supplying electric power to retail customers.

CALifornians for Renewable Energy, Inc. (“CARE”) filed a timely application for rehearing of D.08-11-056. CARE alleges the following error: (1) it is premature for the Commission to act because the contracts entered into by DWR may not be valid in light of pending proceedings before the Federal Energy Regulatory Commission (“FERC”) and the federal courts; (2) D.08-11-056 conflicts with the Commission's statutory mandate to represent the interests of California natural gas and electric consumers; and (3) D.08-11-056 violates CARE's due process rights.

The California Alliance for Competitive Energy Solutions and the Alliance for Retail Energy Markets filed a joint response opposing CARE’s 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.08-11-056 is denied.

II. DISCUSSION

A. Pending Review before FERC and the Ninth Circuit

CARE alleges that it is premature for any agency to act when the validity of the DWR contracts is uncertain. (Rehrg. App., p. 2.) CARE alleges that the Decision does not address that the DWR contracts may not be valid in light of the U.S. Supreme Court's decision in *Morgan Stanley Capital Group, Inc. v. Public Utility District No. 1 of Snohomish County* ("*Morgan Stanley*") (2008) 128 S.Ct. 2733 and so should not be ordering steps to finalize the removal of DWR from its role as supplier of power. CARE also alleges that it is premature for the Commission to act when there is an unresolved petition for review filed in the U.S. Court of Appeals Ninth Circuit in Case Nos. 05-71761, et al. (Rehrg. App., p. 1)

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).) CARE generally alleges that the pending legal proceedings should be resolved before we order steps to finalize the removal of DWR from its role as supplier of power but does not provide any basis or analysis as to how *Morgan Stanley*, or any pending proceeding before the FERC or the federal courts, would preclude the Commission from legally authorizing the measures it did in the Decision.¹ (See e.g. Rehrg. App., p. 3.)

The Decision does address the fact that there is ongoing litigation challenging the reasonableness of the existing DWR contracts. (D.08-11-056, p. 80.) The Decision does not make a finding as to the reasonableness of the existing DWR contracts and states that the Commission will not be making any findings as to the reasonableness

¹ Additionally, CARE misstates the holdings of *Morgan Stanley*. For instance, contrary to CARE's assertion, the United States Supreme Court has not ruled that the DWR contracts have not been approved according to the law. (See Rehrg. App., p. 3.) Furthermore, CARE speculates regarding the actions taken by FERC. There is no basis for CARE's assertion that FERC did not address certain issues in its October 17, 2008 order because the validity of the DWR contracts is being considered by the federal courts and it is premature for any agency to act. (See Rehrg. App., p. 2.)

of any existing DWR contracts. (D.08-11-056, p. 83; see also D.08-11-056, p. 90 [Conclusion of Law 7].)

The Decision states that the Commission will review any replacement agreement executed pursuant to DWR contract novation or other negotiations to determine whether the replacement contract is “just and reasonable” under Public Utilities Code section 451.² However, as the Decision notes: “the review of [the replacement contracts] will be separate and distinct from the setting in which the previously executed DWR contracts were negotiated and subsequently litigated.” (D.08-11-056, p. 83.) The Decision also states that any reasonableness review of the replacement agreements under section 451 should in no way be construed as affecting the disposition of any pending litigation relating to existing DWR contracts. (D.08-11-056, p. 90 [Conclusion of Law 8].)

We previously addressed the same issue in the Order Instituting Rulemaking and in the Administrative Law Judge’s (“ALJ’s”) ruling dated August 22, 2008 denying CARE’s motion to dismiss Rulemaking 07-05-025. As stated in the ALJ’s ruling:

[T]he Commission’s inquiry in this proceeding in no way is intended to interfere or conflict with FERC jurisdiction or federal contract review standards. CARE has not demonstrated that continuing with this rulemaking would in any way conflict with the FERC contract review, or that the issues in this rulemaking are rendered moot merely because the FERC is to review the aforesaid contracts.

(ALJ’s Ruling Denying Motion to Dismiss by CARE dated August 22, 2008, p. 5.)

Similarly, CARE’s rehearing application fails to demonstrate that any pending review before the FERC or the federal courts precludes the Commission from lawfully authorizing the measures it did in the Decision.

² All section references are to the Public Utilities Code, unless otherwise specified.

Among other things, Public Utilities Code section 451 requires a public utility’s charges and services, and rules affecting or pertaining to its charges and services, to be just and reasonable.

B. Commission's Statutory Mandate to Protect Ratepayer Interests

CARE alleges that the Commission has failed to carry out its statutory mandate to represent the interests of California natural gas and electric consumers. (Rehrg. App., pp. 3-4, 6-8.) CARE alleges that the replacement contracts could have penalty clauses that could cause the ratepayers' additional monetary damages. (Rehrg. App., p. 3.) CARE also alleges that the Decision harms the prospect of refunds for ratepayers because CARE has a petition for review pending before the United States Court of Appeals for the Ninth Circuit. (Rehrg. App., p. 4.)

CARE's allegation regarding potential penalty clauses in the replacement contracts is speculative and lacks merit. We have yet to approve any replacement contract. Furthermore, any replacement contract would be subject to a reasonableness review under section 451. (See D.08-11-056, p. 83.)

CARE's allegation regarding the Decision harming the prospect of refunds for ratepayers also lacks merit. CARE does not provide an explanation as to how any finding in the Decision would affect CARE's pending petition for review in the Ninth Circuit or any potential refunds for ratepayers. CARE references the fact that the Ninth Circuit issued an order strongly discouraging motions to lift the stay imposed in consolidated appellate proceedings pending review before that court. (Rehrg. App., p. 4.) However, CARE fails to explain what relevance this order has in demonstrating any legal error in the Decision. Moreover, the Ninth Circuit issued its order prior to the issuance of the Decision.

CARE also alleges that the Commission is violating its statutory mandate because it is acting on behalf of the State of California as a "market participant" and not in the public interest on behalf of consumers. (Rehrg. App., pp. 4, 6, and 7.) In support of this allegation, CARE cites *Pub. Util. Com. v. Sellers of Long Term Contracts* (2002) 99 FERC ¶ 61,087 at 61,382- 61,383, which states:

We, however, find that in the instant proceeding, [the Public Utilities Commission of the State of California (CPUC) and the California Electricity Oversight Board (CEOB)] act in the

same capacity as [the California Department of Water Resources (CDWR)]. Based on the fact that in negotiating and executing the contracts at issue, CDWR represented the State of California, CPUC and CEGB, which are also State representatives, “stepped into the shoes” of CDWR by bringing these complaints. Thus, the same standard of review applies to these complainants as would apply to a similar complaint filed by CDWR.³

CARE fails to explain how the FERC’s finding would have any bearing on the instant proceeding. Furthermore, CARE fails to explain how the FERC’s finding would necessarily demonstrate that the Commission is not acting in the public interest on behalf of consumers. Regardless, CARE’s rehearing application fails to provide a basis for any legal error in the Decision.

CARE also alleges that the Commission has violated its statutory mandate by stating that it will review the new replacement contracts pursuant to the just and reasonable standard of section 451 but will not be making findings regarding the reasonableness of any existing DWR contracts. (Rehrg. App., p. 8.) CARE does not explain how the Commission violated any statutory mandate. CARE is mistaken to the extent that it argues that the Commission must do a reasonableness review under section 451 of the existing DWR contracts. There is no such requirement in Assembly Bill No. 1 from the First Extraordinary Session of 2001-2002 (Stats. 2001 (1st Ex. Sess.), ch. 4.) (“AB1X”). As to cost recovery, AB1X provides that DWR, rather than the Commission, is responsible for any just and reasonable review under section 451 for the costs related to the contracts entered into pursuant to the temporary authority bestowed on DWR by

³ The FERC’s finding that the Commission “acted in the same capacity” as DWR was challenged on appeal by the Commission. The Ninth Circuit in 2006 expressly reserved and thus declined to address this issue. (*Pub. Utils. Com. of Cal. v. FERC* (2006) 474 F.3d 587, 592, fn.4.) CARE erroneously asserts that the Ninth Circuit foreclosed the Commission from raising the question of whether the *Mobile-Sierra* doctrine applies to the Commission. (Rehrg. App., p. 7.) To the contrary, the Court in *Pub. Utils. Com. of Cal. v. FERC* (2008) 550 F.3d 767, 768, stated that the remand to FERC in that case was without prejudice to the Commission’s ability to raise the question anew before FERC, or before the Court at a later time.

AB1X. (Water Code, § 80110(c).) Accordingly, CARE's allegations regarding section 451 have no merit.

C. CARE's Due Process Rights

CARE alleges that it alone represents electric consumers in proceedings before the Commission and the FERC and that interests of ratepayers are not adequately represented due to procedural barriers to CARE's participation. CARE alleges that the Decision prejudices CARE's right to a fair hearing before the FERC and the Ninth Circuit. (Rehrg. App., pp. 3-4.) These allegations lack merit.

CARE does not provide an explanation as to how the Decision would pose any procedural barriers to CARE's participation or prejudice CARE's right to a fair hearing before the FERC or the Ninth Circuit. Nothing in the Decision prevents CARE from pursuing its claims.

CARE alleges that its claim regarding the interests of ratepayers not being adequately represented due to procedural barriers to CARE's participation has a basis in law under Section 1287 of the Energy Policy Act of 2005. (Rehrg. App., p. 3.) Section 1287 is codified in 42 U.S.C. § 16471. 42 U.S.C. § 16471 merely authorizes the Federal Trade Commission to issue certain rules to protect electric consumers. Therefore, CARE does not have an identifiable claim pursuant to 42 U.S.C. § 16471.⁴

CARE also alleges that there is a violation of due process because there was no discussion during the proceedings leading to the Decision regarding the fact that AB1X, as codified in Water Code section 80260, terminated the authority of DWR to enter into any new contracts for the purchase of electrical power on or after January 1, 2003. Therefore, CARE alleges that there is no basis for Ordering Paragraphs 7 and 8 in the Decision.⁵ (Rehrg. App., p. 8.) There is no basis for CARE's allegation that there

⁴ For the same reason, CARE's assertion that it will seek relief from cramming by DWR is also not a credible claim. (See Rehrg. App., pp. 6-7.) Moreover, this assertion is not relevant to any demonstration of legal error in the Decision.

⁵ Ordering Paragraph 7 states: "Whether to execute novation by replacing the contract 'as is,' or

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was a violation of due process. CARE previously raised and had an opportunity to be heard regarding the applicability of Water Code section 80260. (See D.08-11-056, pp. 46-47.) The Decision considered the applicability of this statutory provision and concluded that novation of DWR's contracts does not violate this statute because novation does not mean that DWR is entering into a new contract for the purchase of electrical power. (D.08-11-056, p. 47.) CARE does not provide a rationale as to why Water Code section 80260 or any other legal authority, would preclude the Decision's adoption of Ordering Paragraphs 7 and 8.

III. CONCLUSION

For the reasons stated above, CARE's application for rehearing of D.08-11-056 is denied.

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to seek more extensive revisions at the same time shall be assessed on a contract-by-contract basis, rather than necessarily requiring the same approach for every contract." (D.08-11-056, p. 93 [Ordering Paragraph 7].) Ordering Paragraph 8 states: "Novated DWR contracts, as well as any replacement contracts, shall count toward towards the [Investor Owned Utilities' (IOUs')] resource adequacy requirements for a period extending at least through the remaining term of the existing DWR contracts for existing DWR contract quantities. Imposing this requirement is necessary so that the IOUs do not lose resource-adequacy-eligible capacity from the novation process." (D.08-11-056, p. 93 [Ordering Paragraph 8].)

THEREFORE, IT IS ORDERED that:

1. The application for rehearing of Decision 08-11-056 filed by CARE is denied.

This order is effective today.

Dated August 20, 2009, at San Francisco, California.

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