

Decision 10-09-018 September 2, 2010

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application of Pacific Gas and Electric Company for Authority to Increase Electric Rates and Charges to Recover Smart Grid Costs Relating to Compressed Air Energy Storage Demonstration Project under American Recovery and Reinvestment Act of 2009 (U39E).

Application 09-09-019
(Filed September 29, 2009)

**ORDER DENYING REHEARING
OF DECISION (D.) 10-01-025**

I. INTRODUCTION

In this Order we dispose of the application for rehearing of Decision (D.) 10-01-025 (“Decision”) filed by the Consumer Federation of California (“CFC”).

In D.10-01-025 we authorized Pacific Gas & Electric Company (“PG&E”) to recover up to \$24.9 million in ratepayer funding as matching funds for Phase 1 of its proposed Smart Grid Compressed Air Energy Storage (“CAES”) demonstration project.¹ On November 24, 2009, the Department of Energy (“DOE”) awarded PG&E an equal \$24.9 million in federal funding for the project under the ARRA.

¹ PG&E’s application was filed in connection with policies and procedures developed in the underlying Rulemaking (R.) 08-12-009, which resulted in D.09-09-029. That decision established policies and procedures for review of utility Smart Grid projects flowing from enactment of the federal Energy Independence and Security Act of 2007 (H.R. 6, 110th Congress) (“EISA”), and the subsequent American Recovery and Reinvestment Act of 2009 (Pub. L. 111-5, H.R. 1, 123 Stat. 115.) (“ARRA”). (See *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 (Decision Establishing Commission Processes for Review of Projects and Investments by Investor-Owned Utilities Seeking Recovery Act Funding)* (“Rulemaking Decision”) [D.09-09-029] (2009) __ Cal.P.U.C.3d __, 2009 Cal. PUC LEXIS 441.)

The proposed CAES is a three phase project to build and validate the design, performance, and reliability of an advanced underground compressed air energy storage plant near Bakersfield California. The project would use renewable off-peak energy (e.g., intermittent wind energy) to inject compressed air into an underground saline porous rock formation. It would then use the compressed air to power firm dispatchable energy during peak hours when the renewable energy is not available. It would have a generation capacity of 300 MW for up to 10 hours.

The objectives of CAES are to: (1) verify and demonstrate advanced CAES technology to achieve an optimized energy ratio and a heat rate; (2) integrate increased use of intermittent renewable resources in place of fossil energy during peak use periods; and (3) use the CAES plant to provide ancillary services, such as emergency spinning/non-spinning reserve and VAR/voltage support.²

The cost of Phase 1, at issue in this proceeding, totals \$49.8 million. Phase 1 will determine the technical and economic feasibility of using saline rock formations as a storage reservoir for compressed air energy storage facilities. Activities will include plant design, permitting, and transmission interconnection leading up to plant construction.³ The Decision requires PG&E to submit a report at the conclusion of Phase 1 to report the results of its evaluation, including a conclusion as to whether it is technically and economically feasible to proceed with subsequent project phases.⁴ Should PG&E wish to proceed, it must submit separate applications for approval of Phase 2 and Phase 3.⁵

² Application of PG&E for Phase 1 of Compressed Air Energy Storage Smart Grid Demonstration Project (“PG&E Phase 1 Application”), dated September 29, 2009, at p. 2.

³ Other associated Phase 1 activities include: preliminary plant design; field studies; core sample drilling; geological and engineering analyses; a California Independent System Operator study; and siting and permitting under the California Environmental Quality Act/ the National Environmental Policy Act.

⁴ D.10-01-025, at pp. 20, 31 (slip op.) [Finding of Fact Number 19].

⁵ D.10-01-025, at p. 28 (slip op.). Phase 2 would involve plant construction, and Phase 3 would involve monitoring. The total project cost for all three phases is estimated at \$ 356 million. (See PG&E Phase 1 Application, dated September 29, 2009, at pp. 1-2.)

CFC filed a timely application for rehearing challenging the Decision based on allegations that: (1) the Commission lacked authority to approve PG&E's funding request; (2) the Decision authorized an unlawful taking of ratepayer funds in violation of the United States and California Constitutions; (3) the Commission departed from precedent by requiring ratepayers, rather than shareholders, to contribute to CAES capital costs; (4) the Commission failed to consider all the relevant issues needed to make a determination; (5) CFC was denied adequate due process; (6) the Commission violated Public Utilities Code sections 454(a) and 728 by not requiring PG&E to establish that the requested funding is reasonable;⁶ and (7) the Commission's conclusions were not supported by evidence. No response was filed.

We have carefully considered the arguments raised in the application for rehearing and are of the opinion good cause has not been established to grant rehearing. Accordingly, we deny the application for rehearing of D.10-01-025 because no legal error has been shown.

II. DISCUSSION

A. Commission Authority to Approve PG&E's Funding Request

CFC contends the Commission erred because the Decision appeared to rely on D.09-09-029 as the basis of our authority for approving PG&E's ARRA Smart Grid application.⁷ CFC argues any such reasoning is flawed because D.09-09-029 is not final, pending resolution of CFC's application for rehearing of that decision. (Rhg. App., at p. 2.)

CFC's contention is now moot. After CFC filed the instant application for rehearing, we issued D.10-06-051, denying CFC's application for rehearing of D.09-09-029.⁸ CFC's application for rehearing of D.09-09-029 already challenged the

⁶ All subsequent section references are to the Public Utilities Code, unless otherwise stated.

⁷ See *ante*, fn. 1, discussing D.09-09-029 (slip op).

⁸ *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*
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issue of our authority to approve utility ARRA Smart Grid project funding. That challenge was rejected by D.10-06-051. CFC did not pursue any further challenge of D.09-09-029 or D.10-06-051 in the courts. As a result, those decisions are final and the lawfulness of our determination regarding the issue of the Commission's authority is not subject to relitigation here.

Further, as we noted in D.10-06-051, the authority to approve ratepayer funding of ARRA Smart Grid proposals is within this Commission's inherent Constitutional and statutory authority.⁹ Consistent with this authority, we routinely approve utility proposed capital projects, and have specifically done so for other utility Smart Grid project proposals.¹⁰

B. Alleged Unlawful Taking of Ratepayer Funds

CFC contends the Commission improperly exercised its police power by approving PG&E's request, resulting in an unlawful taking of ratepayer money in violation of the 5th Amendment of the United States and Constitution, and Article 1, Section 19 of the California Constitution.¹¹ (Rhg. App., at p. 2.)

The United States Constitution provides in pertinent part:

No person...shall be deprived of...property, without due process of law, nor shall private property be taken for public use, without just compensation.

(footnote continued from previous page)

Grid System ("Order Denying Rehearing of Decision (D.) 09-09-029") [D.10-06-051] (2010) __ Cal.P.U.C.3d __ .

⁹ D.10-06-051, at pp. 8-9 (slip op.), relying on *Consumers Lobby Against Monopolies v. Public Utilities Commission* (1979) 25 Cal.3d 891, 905-906.

¹⁰ See e.g., *Application of San Diego Gas & Electric Company for Approval of Advanced Metering Infrastructure Deployment Scenario and Associated Cost Recovery and Rate Design* [D.07-07-043] (2005) __ Cal.P.U.C.3d __ , 2007 Cal. PUC LEXIS 275; *Southern California Edison Company's (U 388-E) Application for Approval of Advanced Metering Infrastructure Pre-Deployment Activities and Cost Recovery Mechanism* [D.07-07-042] (2007) __ Cal.P.U.C.3d __ , 2007 Cal. PUC LEXIS 339.

¹¹ CFC states that customers may be asked to contribute as much as \$200 million per project for the projects in question. (Rhg. App., at p. 7, fn. 19.) It is unclear where CFC derives its estimate of \$200 million. Our rulemaking decision capped ratepayer contributions to \$30 million for any individual project and/or 50 percent of any total project costs. (D.09-09-029, at p. 26 (slip op.) [Condition Numbers 3 & 4] (slip op.).)

(U.S. Const., 5th Amend.)

The California Constitution provides in pertinent part:

Private property may be taken or damaged for public use only when just compensation...has first been paid.

(Cal. Const., art. 1, § 19.)¹²

“Taking” within the meaning of the constitution involves a change of physical possession, including a permanent or temporary deprivation of the owner of its use.¹³ There are two types of takings: economic taking and the physical taking of property. CFC’s allegations pertain to an alleged economic taking of ratepayer funds.

As we pointed out in D.10-06-051, constitutional claims of economic takings do not apply to ratepayer claims of an improper authorization of rates or charges, such as CFC raises here.¹⁴ The Constitutional protection applies to the regulated entity. At issue in economic takings claims is whether the Commission has allowed the utility to recover costs sufficient to cover the cost of the particular good or service, and earn a fair return on its investment.¹⁵

A claim that unjust or unreasonable charges have been imposed on ratepayers would properly arise under section 451. Section 451 provides in pertinent part:

All charges demanded or received by any public utility...shall be just and reasonable. Every unjust or unreasonable charge demanded or received...is unlawful.

(Pub. Util. Code, § 451.)

¹² Because the federal and state law at issue is similar under both constitutions, our discussion will not distinguish between the two constitutional provisions.

¹³ See e.g., *Pacific Telephone and Telegraph Company v. Eshleman* (1913) 166 Cal. 640, 644.

¹⁴ D.10-06-051, at pp. 6-7 (slip op.).

¹⁵ *Duquesne Light Co. v. Barasch* (1988) 488 U.S. 299, 307-308; *20th Century Insurance Company v. Garamendi* (1994) 8 Cal.4th 216, 292-296. See also *Federal Power Com. v. Hope Nat. Gas Co.* (1943) 320 U.S. 591, 603.

CFC did not raise a section 451 challenge. Even if we were to consider such a challenge, to be successful CFC must show that the \$24.9 million in requested ratepayer matching funds was not just or reasonable in relation to the project goals and benefits.¹⁶ CFC offered no evidence, either here or during the proceeding, to contradict the reasonableness PG&E's proposed CAES budget.¹⁷ Nor did CFC offer evidence to establish that the benefits which may be attributed to compressed air energy storage technologies could not be expected to occur.¹⁸

Nevertheless, CFC suggests we erred since we expressly recognized that the benefits of CAES were not quantified. (Rhg. App., at p. 2, relying on *City of Stockton v. Marina Towers LLC* (“*City of Stockton*”) (2009) 171 Cal.App. 4th 93; *Kelo v. City of New London, Connecticut* (“*Kelo*”) (2005) 545 U.S. 469.)

We did approve the Phase 1 funding although there was no definitive quantification of CAES benefits.¹⁹ However, it was not unlawful to do so. While we do require that utilities demonstrate the reasonableness of their requests, nothing requires us to approve proposals only if the potential benefits have been quantified with certainty. And the case law CFC relies on is inapplicable. *City of Stockton* and *Kelo* address legal standards for review of eminent domain actions and the taking of real property. They do not pertain to economic takings claims, such as CFC's challenge here.²⁰

Additionally, it was not unreasonable to approve the Phase I contribution in light of the fact that development of energy storage technologies such as CAES is consistent with established California policies. For example, utilities must employ

¹⁶ D.10-01-025, at p. 10 (slip op.). CFC does not challenge the use of the traditional cost/benefit analysis.

¹⁷ See PG&E Phase 1 Application, dated September 29, 2009, Appendix 11, at pp. 11-20. See also Motion of Pacific Gas and Electric Company, dated December 4, 2009, Attachment A (PG&E's cost/benefit analysis), Attachments B & C (underlying calculations and assumptions for PG&E's cost estimates).

¹⁸ PG&E Phase 1 Application, dated September 29, 2009, Attachment 1, pp. 23-29 [Discussing benefits of CAES and compressed air energy storage technologies].

¹⁹ D.10-01-025, at p. 15 (slip op.).

²⁰ See *City of Stockton, supra*, 171 Cal.App.4th at p. 104. See also *Kelo, supra*, 545 U.S. at p. 477.

strategies to reduce in greenhouse gas emissions.²¹ A key strategy for accomplishing this goal is to increase reliance on renewable energy resources over conventional generation as the means to meet the State's electric energy needs.²² The Public Utilities Code specifically contemplates the need for continued utility investments in research, development, and demonstration of new technologies in order to develop innovative technologies and ensure that electric service will be safe, reliable, affordable, and environmentally sustainable.²³ Similarly, it expressly supports development of energy storage projects as necessary to achieve a modernized electrical transmission and distribution system, i.e., Smart Grid.²⁴

In the early stages of developing new technologies such as CAES, we recognize it is extremely difficult to project a precise and final quantification of expected benefits. Additionally, Phase 1 mainly involves design, feasibility studies, and permitting. Such activities, while necessary, do not readily lend themselves to measurable results. That does not, however, mean that a project is unworthy of funding. It is generally accepted that energy storage technologies foster beneficial goals such as increased reliance on renewable energy,²⁵ improved grid reliability, and transmission congestion relief.²⁶ Here, as an additional safeguard we prudently provided that if PG&E's Phase 1 report does not show that the project is viable or can not be expected to

²¹ See e.g., D.10-01-025, at p. 16 (slip op.).

²² See e.g., Pub. Util. Code, § 399.11 *et seq.*, and the Energy Action Plan ("EAP") II, dated October 2005. EAP II can be located at: www.cpuc.ca.gov/PUC/energy/Resources/Energy+Action+Plan/

²³ See e.g., Pub. Util. Code, § 399.8, subd. (a).

²⁴ See Pub. Util. Code, § 8360, subd. (g).

²⁵ Renewable energy such as wind are generally available during off-peak energy use periods (e.g., night). The ability to capture that energy and store it for use when energy demand is high then allows decreased reliance on conventional gas and fossil generation sources, hence reducing greenhouse gas emissions. (See PG&E Phase 1 Application, dated September 29, 2009, Attachment 1, at p. 23.)

²⁶ See e.g., PG&E Phase 1 Application, dated September 29, 2009, Attachment 1, at pp. 23-27.

deliver the expected benefits, the project will not move forward, and PG&E must return any surplus ratepayer funds to its customers.²⁷

C. Alleged Improper Ratepayer Contribution to Capital Costs

CFC asserts our Decision is unlawful on the ground that we departed from precedent, which allegedly established that ratepayers should not be required to contribute capital costs to projects such as CAES. In particular, CFC argues the California Supreme Court held it is improper for ratepayers to contribute capital costs in *City and County of San Francisco v. Public Utilities Commission* (“*San Francisco v. PUC*”) (1971) 6 Cal. 3d 119. (Rhg. App., at p. 5.)

We find nothing in *San Francisco v. PUC* that supports such a proposition. That case involved utility accounting procedures for calculating depreciation expenses that were passed on to customers. At issue was the methodology used to calculate those costs for federal tax purposes. The Court found only that it would be improper to require ratepayers to pay any costs that were in excess of the utility’s actual federal tax expense. The Court also stated that we must consider alternative methods for calculating the tax expense. (*Id.* at pp. 129-131.)

CFC also ignores that it is lawful and consistent with the Public Utilities Code to allow utilities to recover from ratepayers the reasonable costs of investments into the electric grid.²⁸ We regularly approve the funding of similar capital projects, whether proposed in general rate cases or in individual utility applications for project approval. And here, the federal Energy Independence and Security Act of 2007 (H.R. 6, 100th Congress) (“EISA”) specifically contemplates that states will allow reasonable ratepayer funding for ARRA Smart Grid projects.²⁹

²⁷ D.10-01-025, at p. 18 (slip op.). CFC also asserts the Decision is unlawful because we failed to hold evidentiary hearings. This issue is addressed in Part E.2 below.

²⁸ See e.g., Pub. Util. Code, § 399.2, subd. (c).

²⁹ EISA, § 1307(a) (PURPA, § 111(d)(16)(B)). It is relevant to note that the majority of Phase I costs are expense rather than capital costs. (See D.10-01-025, at pp. 4, 15 (slip op.))

D. Failure to Consider All Relevant Issues

CFC alleges that the Decision was arbitrary and capricious, because we failed to consider all the allegedly relevant issues that were needed to make a determination. In particular CFC argues the Commission erred by failing to address the constitutionality of the decision, authority to take the requested action, and precedential decisions requiring a different outcome.³⁰ (Rhg. App., at p. 5, relying on *Motor Vehicle Mfrs. Assn. v. State Farm Mutual Automobile Ins. Co.* (“*Motor Veh. Mfrs. Assn.*”) (1983) 463 U.S. 29; and *California Hotel and Motel Assn. v. Industrial Welfare Commission* (“*California Hotel and Motel Assn.*”) (1979) 25 Cal.3d 200.)

We are well aware that we are required to consider all the issues that may be material and important to any particular determination.³¹ However, nothing in *Motor Veh. Mfrs. Assn.* or *California Hotel and Motel Assn.* prescribes what those issues must be. The case law indicates that Court review under the arbitrary and capricious standard is narrow, and a Court will not substitute its own judgment.³² A Court will not deem a decision to be arbitrary or capricious unless the agency entirely failed to consider a material and important issue, offered an explanation that unreasonably runs counter to the evidence, or is entirely implausible.³³

³⁰ CFC also suggests we were required to consider issues such as “how PG&E’s previously allowed rate of return should be adjusted to reflect investments earned on other investments in other business undertakings” which will now not have the risk of investing in the project. (Rhg. App., at p. 5, relying in pertinent part on *Bluefield Water Works & Improvement Company v. Public Service Commission of the State of Virginia* (“*Bluefield*”) (1923) 262 U.S. 679; and *Federal Power Commission v. Hope Natural Gas Co.* (“*Hope*”) (1944) U.S. 591.) It is not clear what other businesses CFC is referring to, or how rate of return adjustments are relevant here. We also do not find that the referenced cases are controlling here. Both involved court review of agency proceedings where a primary issue was the setting of a utility’s rate of return. We set utility rates of return in dedicated proceedings for that purpose (e.g., general rate cases or cost of capital proceedings). Any consideration of PG&E’s rate of return would be appropriate in that context, not in a proceeding such as this.

³¹ *Motor Veh. Mfrs. Assn.*, *supra*, 463 U.S. at pp. 43-44; *California Hotel and Motel Assn.*, *supra*, 25 Cal.3d at pp. 212-213; see also, Pub. Util. Code, ¶ 1705.

³² See e.g., *Motor Veh. Mfrs. Assn.*, *supra*, 463 U.S. at pp. 43-44.

³³ *Id.*

We are guided by section 1705, which requires us to consider and make related findings on only issues that are material to a Decision.³⁴ This statute is broadly written and affords the Commission discretion in determining those issues. In the related underlying rulemaking decision, we established that for an application such as PG&E's, the material issues are whether a project has been awarded DOE funding, and whether the proposed costs are justified in relation to the benefits.³⁵ We clearly considered both those material issues here.³⁶ CFC offers no evidence or authority to establish that the additional issues it views as important were in fact material to our determination.³⁷

E. Alleged Denial of Adequate Due Process

Due process requires the Commission to provide notice and opportunity to be heard before a valid order can be made.³⁸ CFC contends it was denied adequate due process because: (1) it was denied the opportunity to be heard when the Scoping Memo found that the issues it raised were outside the scope of the proceeding; and (2) the Commission failed to require evidentiary hearings. (Rhg. App., at pp. 2-4.) We will address these allegations below.

1. Scope of the Proceeding

Before the Scoping Memo was issued, parties had the opportunity to file protests to PG&E's application as well as prehearing conference ("PHC") statements. CFC filed both.³⁹ In its protest, CFC proposed that we should consider the following issues in determining whether to approve PG&E's request:

³⁴ Pub. Util. Code, § 1705.

³⁵ D.09-09-029, at pp. 31-32 (slip op.).

³⁶ D.10-01-025, at pp. 14-18 (slip op.).

³⁷ See e.g., D.10-01-025, at p. 4 (slip op.) [Indicating DOE funding had been awarded on November 24, 2009], & pp. 10, 14-21 (slip op.) [Regarding whether the costs are justified in relation to the benefits].

³⁸ See e.g., *People v. Western Air Lines, Inc.* (1954) 42 Cal.2d 621, 632.

³⁹ Protest to Application of Pacific Gas and Electric Company for Authority to Increase Electric Rates and changes to Recover Smart Grid Costs Relating to American Recovery and Reinvestment Act of 2009

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- Whether taxes, not ratepayer monies should provide the matching funds for ARRA Smart Grid projects;
- Whether granting ARRA Smart Grid funding requests is an unlawful taking under the Constitution;
- Whether the Commission has no authority to authorize ratepayer funding of capital costs;
- Whether the advice letter process adopted in D.09-09-029 unlawfully shifted the burden of proof;
- Whether in approving ARRA Smart Grid project funding requests the Commission must make findings pursuant to sections 364, 399, 399.2, 399.8, 401, 451, 463, and 701.1(a).

In its PHC statement, CFC proposed the following additional issues for consideration:

- What standard of review should be used to review PG&E's proposal?
- PG&E should have the burden of proof under section 454(a).
- What is the appropriate ratemaking treatment for any approved funding?
- How would a grant of funds further state and federal Smart Grid policies?
- How will costs of the project be recorded on PG&E's books?
- Does PG&E's Phase 1 Application comply with the fast track (advice letter) conditions set out in D.09-09-029?

Consistent with the Commission's rules, the Assigned Commissioner considered the parties' protests and PHC statements, and then issued a Scoping Memo

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("CFC Protest"), dated October 16, 2009; Prehearing Conference Statement of the Consumer Federation of California ("CFC PHC Statement"), dated October 22, 2009.

setting the scope of the proceeding.⁴⁰ The Scoping Memo identified the following issues to be within the scope of this proceeding:

- Whether the funding request proposed by PG&E was just and reasonable;
- Whether the proposed costs were justified in relation to the project benefits; and
- How the costs should be recorded on PG&E's books and whether they would be included in rate base.⁴¹

It is not unlawful for a Scoping Memo to exclude certain issues parties may suggest for consideration. Such a claim mistakenly presumes we must entertain any and all issues deemed relevant by any party. However, no legal authority imposes such a requirement and CFC offers no legal basis for its claim. The relevant rules and statutes afford the Assigned Commissioner discretion to determine the issues to be considered. For example, Rule 7.3 of our rules provides in pertinent part:

- (a) At or after the prehearing conference (if one is held), the assigned Commissioner shall issue the scoping memo for the proceeding, which shall determine the schedule (with projected submission date) and issues to be addressed.

(Cal. Code of Regs., tit. 20, § 7.3, subd. (a).)⁴²

Further, CFC erroneously suggests that the Scoping Memo excluded all the issues that it raised. It did not. CFC's issues related to the reasonableness of proposed costs, the standard of review, and ratemaking treatment for ARRA projects were all considered because they were subsumed within the issues identified by the Scoping Memo. Accordingly, CFC along with other parties had the opportunity to be heard on those issues by filing comments and reply comments on November 13, 2009, and

⁴⁰ Rule 7.3 of the commission's Rules of Practice and Procedure. (Cal. Code of Regs., tit. 20, § 7.3.)

⁴¹ Scoping Memo and Ruling of Assigned Commissioner, dated November 5, 2009, at pp. 5-6.

⁴² See also Pub. Util. Code, § 1701.1, subd. (b).

November 20, 2009, respectively.⁴³ Had CFC wished to lodge a meaningful objection to PG&E's proposal, it had the burden to submit comments and produce evidence to support its own position challenging the reasonableness of granting PG&E's request. However, CFC failed to submit any specific comments or evidence regarding the merits of PG&E's showing. CFC offered only the general and broad allegations contained in its original Protest and PHC statement.

Moreover, the Scoping Memo reasonably explained that CFC's other proposed issues were excluded because they all related to the process, policy, and jurisdictional issues that were at issue in our underlying rulemaking proceeding and relevant to our determinations in D.09-09- 029.⁴⁴ However, they were not material or relevant to the merits of PG&E's individual project proposal at issue in this proceeding.⁴⁵

Finally, relying on section 1731(b)(1), CFC alleges it was unlawfully denied rehearing of its motion for reconsideration of the Scoping Memo. (Rhg. App., at p. 3).⁴⁶ That section states in pertinent part:

(b)(1) After any order or decision has been made by the commission, any party to the action of proceeding may....apply for rehearing in respect to any matters determined....

(Pub. Util. Code, § 1731, subd. (b)(1).)⁴⁷

The plain language of section 1731(b)(1) provides that a party may request rehearing following the issuance of an order or decision of the Commission. The statute

⁴³ Scoping Memo and Ruling of Assigned Commissioner, dated November 5, 2009, at p. 7.

⁴⁴ Scoping Memo and Ruling of Assigned Commissioner, dated November 5, 2009, at p. 6.

⁴⁵ In addition, CFC's challenge is based on issues and criteria that are relevant only to utility project proposals submitted using the advice letter process. PG&E submitted its CAES proposal under the formal application process, not the advice letter process. The two processes differ. (See e.g., D.09-09-029, at pp. 24-27 (slip op.) [Describing the advice letter process]; & pp. 31-33 (slip op.) [Describing the application process].) Accordingly, CFC's argument is not relevant.

⁴⁶ See also, Motion of the Consumer Federation of California for Reconsideration of the Scoping Memo and Ruling of the Assigned Commissioner, dated December 7, 2009.

⁴⁷ See also Rule 16.1 of the Commission's Rules of Practice and Procedure. (Cal. Code of Regs., tit. 20, § 16.1.)

does not apply here because it does not apply to scoping memos or rulings that may be issued by individual Commissioners or Administrative Law Judges.

2. Evidentiary Hearings

CFC asserts that the Scoping Memo also unlawfully denied its request for evidentiary hearings based on an erroneous conclusion that CFC presented no disputed issues of material fact.⁴⁸ (Rhg. App., at pp. 3-4.)

We are not persuaded by CFC's allegation. Due process requirements do not require evidentiary hearings in all proceedings. Our rules give us discretion to determine the need for hearings.⁴⁹ In particular, Rule 12.3 provides that if there are no contested material issues of fact, or if the contested issue is one of law, the Commission may decline to set hearings.⁵⁰

A review of the PHC transcript reflects that CFC believed that all the issues it raised for consideration were disputed factual issues.⁵¹ However, as discussed above, the majority of those issues were in fact policy and legal issues relevant to the underlying rulemaking proceeding. Even if those issues were relevant here, which they were not, they are not factual issues which would warrant evidentiary hearings. Policy and legal issues are typically resolved through the submission of comments, briefs or other written pleadings.

Of the remaining CFC issues, we do not view any as factual issues as contemplated by the rules. CFC's issue concerning how costs should be reflected in PG&E's books, etc., is not an issue of fact. Resolution merely involves application of established standard ratemaking practices. And whether PG&E submitted sufficient documentation to show its request was just and reasonable is an evidentiary question.

⁴⁸ No other party requested evidentiary hearings.

⁴⁹ See e.g., Rule 7.1(a) of the Commission Rule of Practice and Procedure (Cal. Code of Regs., tit. 20, § 7.1, subd. (a).).

⁵⁰ Rule 12.3 of the Commission Rule of Practice and Procedure (Cal. Code of Regs., tit. 20, § 12.3.).

⁵¹ See PHC Transcript, dated October 27, 2009, at pp. 22-25.

PG&E did submit the requisite evidence. We are not aware that CFC ever availed itself of the opportunity to conduct any further discovery if it believed the existing evidence was inadequate. More importantly, CFC never challenged the veracity of that evidence in a meaningful and specific way. It raised only broad and overarching objections, and it never submitted any contrary factual evidence to demonstrate there was a tangible and legitimate factual dispute. Accordingly, it was reasonable to conclude there were no clearly identified disputed issues of fact that would warrant evidentiary hearings.⁵²

F. Alleged Violation of Public Utilities Code Sections 454(a) and 728

CFC contends the Decision is flawed because we failed to require PG&E to show that its request was reasonable pursuant to sections 454(a) and 728. CFC claims the Commission relied solely on the fact CAES received DOE funding as the basis for approving PG&E's application. (Rhg. App., at p. 4, relying on *Elliott v. City of Pacific Grove* ("Elliott") (1975) 54 Cal.App.3d 53, 59; *Durant v. Beverly Hills* ("Durant") (1940) 39 Cal.App.2d 133, 139.)

Section 454(a) provides in pertinent part:

"...no public utility shall change any rate...except upon a showing before the commission and a finding by the commission that the new rate is justified."

(Pub. Util. Code, § 454, subd. (a).)

Similarly, section 728 provides in pertinent part:

Whenever the commission, after a hearing, finds that the rates...are insufficient, unlawful, unjust, unreasonable, discriminatory, or preferential...the commission shall

⁵² Because there was no legal requirement to hold evidentiary hearings in this instance, there is no merit to CFC's related claim that the Commission disregarded its obligations under section 2101, or disregarded any express legislative direction. (Rhg. App., at p. 4, relying on *Pacific Telephone and Telegraph Company v. Public Utilities Commission* (1965) 62 Cal.2d 634, 653.)

determine and fix, by order, the just, reasonable or sufficient rates....

(Pub. Util. Code, § 728.)

We agree that the above statutes require utilities to establish that requested rates and charges are reasonable,⁵³ and we have consistently acknowledged that a utility bears the ultimate burden of proof of reasonableness.⁵⁴ Consistent with the statutes, in this proceeding we squarely placed that burden on PG&E.⁵⁵

At the same time, it was not unreasonable to note that it is useful to know that a project has received ARRA funding. As we established in prior decisions, the Smart Grid benefits DOE seeks to achieve are aligned with those California seeks to achieve.⁵⁶ Such benefits include: reliability of the electric system; lower electricity costs; lower peak demand; lower transmission and distribution losses; lower operations and maintenance costs; reduced transmission congestion costs; reduced costs of power interruptions; lower emissions of greenhouse gasses (“GHG”); and economic opportunities for businesses and new jobs for workers.⁵⁷ CFC points to nothing which would show that we did not conduct the requisite review of PG&E’s application and evidence.

CFC’s reliance on *Elliott* and *Durant* is also misplaced. As argued by CFC, the cases establish that it is unlawful to conclude without evidence that a rate change will benefit ratepayers. These cases are not controlling here. In each case, a city that provided utility service had charged higher rates for service to individuals living outside

⁵³ See Pub. Util. Code, § 451 which states in pertinent part: “All charges demanded or received by any public utility...shall be just and reasonable.”

⁵⁴ See e.g., *In the Matter of the Application of Pacific Bell, a Corporation, for Authority to Increase Certain Intrastate Rates and Charges Applicable to Telephone Services Furnished Within the State of California* [D.87-12-067] (1987) 27 Cal.P.U.C.2d 1, 20-22.

⁵⁵ D.10-01-025, at pp. 9-10 (slip op.).

⁵⁶ D.10-01-025, at pp. 14-18 (slip op.).

⁵⁷ See e.g., D.09-09-029, at pp. 24 -25 (slip op.); D.10-06-051, at pp. 12-13, 18-19 (slip op.).

city limits than they charged to those living within city limits.⁵⁸ The cases were challenged by customers who claimed that the cities' billing practices were discriminatory. There was no claim of any discriminatory billing practices at issue in this proceeding. The cases have no relevance to determinations regarding individual project funding requests.

G. Evidence to Support the Commission's Conclusions

CFC argues the Commission wrongly concluded that the Phase 1 costs are a fair value worthy of investment, alleging that CAES merely offers the "promise" of reducing GHG emissions and improving grid reliability. CFC asserts there was no evidence to support benefits to warrant the level of approved funding. (Rhg. App., at p. 6.)

The record did contain cost/benefit evidence to support the Commission's findings, CFC simply chose not to address it.⁵⁹ We reject CFC's arguments because it never addressed the evidence, or explained why certain evidence was wrong or insufficient.⁶⁰ The Commission may determine the weight and probative value of the evidence before it.⁶¹ CFC's singular approach has been to reiterate its disagreement with our conclusions based on only unsubstantiated claims that there was no evidence, and/or that the evidence was somehow insufficient. Such disagreement does not establish there was legal error.⁶²

⁵⁸ See *Elliott, supra*, 54 Cal.App.3d at p. 54; *Durant, supra*, 39 Cal.App.2d at p. 135.

⁵⁹ See PG&E Phase 1 Application, dated September 29, 2009, Attachment 1, at pp. 12-13, 18-19, and Appendix, at pp. 11-20. See also PG&E Motion, dated December 4, 2009, Attachment A, B, and E.

⁶⁰ See e.g., *Road Sprinkler Fitters Local Union No 669 v. G&E Fire Sprinklers Inc.* (2002) 102 Cal.App.4th 765, 782.

⁶¹ See e.g., *Eden Hospital District v. Belshe* (1998) 65 Cal.App.4th 908, 916.

⁶² *Southern California Edison Company v. Public Utilities Commission* (2005) 128 Cal.App.4th 1, 8.

III. CONCLUSION

For the reasons stated above, the application for rehearing of D.10-01-025 is denied because no legal error has been shown.

Therefore **IT IS ORDERED** that:

1. The application for rehearing of D.10-01-025 is denied.
2. This proceeding, Application (A.) 09-09-019 is closed.

This order is effective today.

Dated September 2, 2010, at San Francisco, California.

MICHAEL R. PEEVEY
President

DIAN M. GRUENEICH
JOHN A. BOHN
TIMOTHY ALAN SIMON
NANCY E. RYAN

Commissioners