

PUBLIC UTILITIES COMMISSION

505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3298



September 3, 2003

TO: PARTIES OF RECORD IN APPLICATION 00-10-045

Decision 03-08-072 was mailed previously, without the dissent of Commissioners Loretta Lynch and Carl Wood. Attached herewith is the dissent.

Very truly yours,

/s/ ANGELA K. MINKIN
Angela K. Minkin, Chief
Administrative Law Judge

ANG:mnt

Attachment

***Dissent of Carl Wood and Loretta Lynch to D.03-08-072
Denying Rehearing of Decision 02-12-064***

The Commission should grant rehearing.

The pivotal issue is the interpretation of the language in Section 332.1, subpart C, concerning treatment of generation assets that are utility-owned or managed. The statute is crystal clear on its face, stating that the Commission “shall utilize revenues associated with sales of energy from utility-owned or managed generation assets to offset an undercollection, if undercollection occurs.” In this proceeding, the record is unambiguous in various respects: (1) there is an undercollection, (2) the intermediate contracts are owned and managed by the utility, and (3) there are net revenues from sales associated with those assets which can be used to offset the undercollection.

Where there is clarity, the majority strives to find ambiguity, which it then uses to defeat the clear purpose of the Legislation. The majority argues that, if the Legislature meant to apply the statute to all generation assets owned or managed by the utility, it would have said so. Instead, it just referred to those assets that are “utility-owned or managed.” Without explaining the extremely subtle distinction it must have in mind, the majority then declares that the Legislature must have meant to limit its application to those assets used “for the benefit of ratepayers.” There is no authority supporting this creative editing of the clear language of the statute. In fact, such an outcome is inconsistent with the rationale of the majority opinion itself. Using the majority’s own logic, if the Legislature meant to limit the language in such a way, it would have said so. The Commission must reopen the proceeding in order to properly apply Section 332.1, part C.

The opinion then goes on to argue that if the net revenues from the contracts were used to write down the AB 265 balance, SDG&E would be denied recovery of its “reasonable and prudent” costs. This is incorrect, since the utility would recover its reasonable costs through application of the interim contract net revenues.

Further, the majority opinion dodges the applicability of Rule 51 by declaring that, in this instance, the Commission was not adopting a settlement in a Commission proceeding. This assertion is wrong on its face, since the settlement was very clearly adopted in a commission proceeding. Just look at the heading on the order, in case you doubt this. Or in the alternative, look elsewhere in the order, where the majority states that the “purpose of this phase of the proceeding was to consider SDG&E’s request to impose a surcharge in order to recover the undercollected amount,...[and that]...Accounting for the power procurement

contracts in A.00-10-045 and in D.01-05-035...is an important part” of that determination.

Either the settlement is in the proceeding, or it is not. If it is not germane to the proceeding, then it cannot be decided here. If it is related to this proceeding, then it is at least a partial settlement of this proceeding. In the latter case, the one which applies here, then the Commission must comply with its own rules for considering settlements when, as occurred here, the Assigned Commissioner issued a ruling directing the parties to ensure that any settlement affecting the proceeding comply with Rule 51.

The settlement adopted by the majority does not comply with Rule 51. This is a serious flaw, since the parties were on notice that a non-compliant settlement would not be adopted in this proceeding. Arguably, the Commission could have reversed the Assigned Commissioner’s ruling in a timely manner, providing parties with notice that the Commission might entertain a settlement in the proceeding that did not comply with the rule. The Commission did not do that, even though the Assigned Commissioner offered the full Commission an opportunity to do so. Instead, remaining commissioners deferred issuing a decision on the ruling, while the proceeding moved through hearings and wound to a conclusion. Only after the fact, through D.02-12-064, did the Commission inform the parties that it was not applying the Assigned Commissioner’s ruling.

The majority attempts to sidestep this roadblock by pointing to a subsequent Assigned Commissioner Ruling stating that the intent was “to assure that any proposed settlement of the issues in [the AB 265] proceedings be conducted in a manner consistent with the Commission’s Rules,” suggesting that “consistency” is somehow looser than “in compliance with.” No matter how one uses the word, this settlement is not consistent with Rule 51. The rule requires a settlement among parties to the proceeding, while this settlement is unilaterally offered by one party. The settlement is not consistent with the rule. The rule requires that all parties be given notice of a proposed settlement prior to signing, and that the proponents first convene at least one conference where all parties have an opportunity to influence the content and direction of the agreement. Here, the proponents held no such conference and provided not even a single party with the opportunity to influence content and direction. Again, the settlement is inconsistent with the rule. On this basis alone, the Commission must reopen the proceeding.

In addition, SDG&E remains in violation of another portion of a standing Assigned Commissioner’s ruling requiring that the company file ex parte notices related to the settlement. At the same time, the majority opinion rejects the City’s

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assertion that one or more commissioners may have been predisposed by such meetings to approve the settlement, saying that the City “has failed to meet the requirements for finding bias.” We do not endorse claims of bias, in this matter. Nonetheless, the majority cannot both fail to require SDG&E to comply with its statutory reporting requirements and chastise the City for failing to produce information that has been unlawfully withheld.

These are among the reasons that D.02-12-064 is unsupportable in its current form, and that rehearing should be granted.

/s/ LORETTA M. LYNCH

Loretta M. Lynch

Commissioner

/s/ CARL WOOD

Carl Wood

Commissioner

San Francisco, California

August 21, 2003