

Decision 03-10-020 October 2, 2003

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Investigation into Implementation of Assembly Bill 970 regarding the identification of electric transmission and distribution constraints, actions to resolve those constraints, and related matters affecting the reliability of electric supply.

Investigation 00-11-001
(Filed November 2, 2000)

ORDER DENYING REHEARING OF DECISION 03-07-033

Southern California Edison Company (Edison) has filed an application for rehearing of our July 14, 2003 *Interim Opinion on Procedures To Implement Public Utilities Code Section 399.25*, D. 03-07-033 (“the Interim Decision”).¹ In that decision, we established a general framework for implementing the portion of Senate Bill 1078 (SB 1078)² that addresses cost recovery of transmission network upgrades necessary to achieve SB 1078’s goal of increasing California’s reliance on renewable power. We do not find Edison’s claims of legal error persuasive. Accordingly, we will deny the request for rehearing.

¹ Responses were filed by California Wind Energy Association (CalWEA) and the Center for Energy Efficiency and Renewable Technologies (CEERT). Edison seeks leave to file a reply to those responses, and CalWEA and CEERT requests leave to file responses to Edison’s reply. The Commission’s rules only allow one opportunity to respond to an application for rehearing, and do not allow for replies to responses. (Rule 86.2 of Commission Rules of Practice and Procedure.) Accordingly, the requests to file additional replies and responses are denied.

² 7 Stats. 2002, ch. 516, p. 2445 (September 12, 2002).

Failure to Adopt “Backstop Mechanism” Guaranteeing Recovery of Transmission Costs

Edison’s first objection to the Interim Decision is that it does not establish a “backstop mechanism” to implement Section 399.25, subsection (b)(4). That subsection provides that if the FERC does not allow a California utility to recover in transmission rates the costs of new transmission facilities necessary to achieve the renewable power goals of SB 1078, this Commission must allow the utility to recover those costs in retail rates, provided we first find that those costs were prudently incurred. Edison has cited no law requiring that we adopt a specific mechanism to implement this provision. Edison’s sole argument is that without such a mechanism in place immediately, “SCE can not be assured that – should FERC choose to disallow recovery of prudently incurred costs in transmission rates – the Commission will permit recovery in retail rates.” (App. Rhg., p. 4.)

This argument is not a claim of legal error. Subsection (b)(4) conditions the recovery of SB 1078-related transmission costs in retail rates upon a finding by this Commission that the particular costs in question were prudently incurred. Whether this condition has been met must be determined on a case-by-case basis, and that determination can be made in an application proceeding, for example. There is no legal requirement that we adopt a specific implementation mechanism at this time. Therefore, this argument is entirely without merit.

Federal Preemption

Edison also contends that the Interim Decision “disregards FERC’s requirement that generators fund network upgrades upfront.” (App. Rhg., p.4.) Edison argues that because FERC has “exclusive jurisdiction” over generation interconnection agreements, and FERC allows the transmission provider to require the interconnection customer to provide the upfront capital for “but-for” transmission upgrades (upgrades that would be unnecessary but for the additional generation) this Commission may not require California electric utilities to provide the upfront funding themselves. Edison further claims that we erred by referring to FERC’s requirement as a policy, when it is

actually a rule of general applicability. In support of this argument, Edison cites FERC's recent order, "Standardization of Generator Interconnection Agreements and Procedures, 104 FERC ¶ 61,103 ("Standard Agreement Order"). FERC issued this order on July 24, 2003, ten days after we issued our Interim Decision.³

In our Interim Decision, we concluded that Section 399.25 "provides for the possibility of rolled-in ratemaking for network upgrade costs." (Finding of Fact (FOF) 2.) As it is used in the Interim Decision, the term "rolled-in-ratemaking" refers to a scenario in which the utility, rather than the developer, finances the up-front costs of transmission upgrades and recovers those costs through rates. (FOF 4.) In FERC proceedings, the term has been used to refer to the scenario in which the interconnection customer funds the up-front costs, and is reimbursed by the transmission provider through transmission credits. In either scenario, the transmission upgrade costs are rolled into transmission rates, and are ultimately paid for by ratepayers.

Edison agrees that costs should be rolled into rates, but objects to the scenario envisioned in the Interim Decision because Edison believes that this Commission "does not have a mechanism to make this happen. In contrast, FERC already has a mechanism." (App. Rhg., p.9.) Edison also objects to this Commission's version of rolled-in ratemaking pursuant to Section 399.25 because, in Edison's view, it shifts the risk of financial loss from the generator to the utility (Id.) (In our view, it shifts the risk to ratepayers, as we stated in the Interim Decision, FOF 4).

Edison argues that this form of rolled-in ratemaking, which we concluded is a possibility under Section 399.25, is preempted by federal law. We disagree.

FERC indisputably has jurisdiction over interconnection agreements (10 U.S.C. § 824i), and the Standard Agreement Order that FERC issued on July 24, 2003 is, as Edison correctly points out, a Final Rule (effective October 20, 2003) that will require

³ On September 22, 2003, FERC issued an "Order Granting Rehearing for Further Consideration." This order extends the time for FERC to consider requests for rehearing of the Standardization Order, but does not stay it or toll the effective date.

public utility transmission providers to use a Standard Interconnection Agreement.⁴ However, as both CalWEA and CEERT point out, the Standard Agreement Order does not require that the developer of new generation advance the up-front costs of transmission upgrades. (CalWEA Response, pp. 203; CEERT Response, p.3.) FERC expressly allows the Transmission Provider “to elect to fund the network upgrades itself, with no advance payment by the Interconnection Customer, and thus no need for subsequent [reimbursement] credits.” (Standard Agreement Order, ¶ 720.) Section 11.3 of the Standard Large Generator Interconnection Agreement, attached to the Order, provides that “unless the Transmission Provider or Transmission Owner elects to fund the capital for the Network Upgrades, they shall be solely funded by the Interconnection Customer.” As the Standard Agreement Order expressly allows the up-front costs to be paid by the Transmission Provider, such an arrangement clearly does not conflict with any of the policy goals discussed in the order. Moreover, this provision does not represent a change in FERC policy; it merely preserves an option that has been available under existing policy. (See, e.g., *San Diego Gas & Electric Co.*, 98 FERC ¶61,332 (2002), cited in the Interim Decision (SDG&E required to fund up-front costs of transmission upgrades necessary to accommodate new generation, based on FERC finding that entire network would benefit).)

The preemption question, therefore, is properly narrowed to whether a federal statute, FERC policy, or FERC rule precludes a state commission from requiring a utility to provide the up-front funding for “but-for” transmission upgrades, subject to

⁴ The Standard Agreement Order applies only to interconnection agreements with large generators, defined as those who have the capacity to generate at least 20 megawatts. (Standard Agreement Order, ¶ 1.) Whether a similar standard agreement should apply to interconnections with small generators is the subject of a separate rulemaking. (*Id.*, ¶ 11, fn. 10; see Standardization of Small Generator Interconnection Agreements and Procedures, Notice of Proposed Rulemaking, Docket No. RM02-12-000, issued concurrently with Standard Agreement Order.) Many generators of renewable power in California will likely fall into the small generator category.

FERC approval of the interconnection agreement. Edison has cited no statute, no provision of the Standard Agreement Order, or any other authority, that expressly precludes a state commission from doing this. The Standard Agreement Order is silent on this question, and as CalWEA correctly points out, the courts are reluctant to infer preemption from silence, especially in the context of a federal statutory scheme that does not entirely supplant state regulation. (See, e.g., *Wisconsin Public Intervenor v. Mortier* (1991) 501 U.S. 597, 607 (declining to infer preemption, under the Federal Insecticide, Fungicide, and Rodenticide Act, of state and local authority to regulate pesticide use).)

Under the Federal Power Act, the states retain regulatory authority over transmission siting and integrated resource planning, among other things. As the Supreme Court noted in *New York v. FERC* (2001) 535 U.S. 1:

FERC has recognized that the States retain significant control over local matters even when retail transmissions are unbundled. *See, e.g.*, Order No. 888, at 31,782, n. 543 ("Among other things, Congress left to the States authority to regulate generation and transmission siting"); *id.*, at 31,782, n. 544 ("This Final Rule will not affect or encroach upon state authority in such traditional areas as the authority over local service issues, including reliability of local service; administration of integrated resource planning and utility buy-side and demand-side decisions, including DSM [demand-side management]; authority over utility generation and resource portfolios; and authority to impose non-bypassable distribution or retail stranded cost charges"). 535 U.S. at 24.

With respect to wholesale rates for electric power, FERC has recognized that FERC's jurisdiction over wholesale rates does not preclude state regulators from determining "whether a purchaser has prudently chosen from among available supply options":

[W]hile the state cannot review the reasonableness of the wholesale rate set by the Commission, it may determine whether it is in the public interest for the wholesale purchaser whose retail rates it regulates to pay a particular price in light of its alternatives." (*Central Vermont Service Corp.* (1998) 84 FERC ¶61,194 (citing *Pike County Light & Power /Co. v. Pennsylvania PUC* (1983) 465 A.2d 735, 738).)

In light of the role state regulators continue to play with respect to transmission upgrades as well as retail rates under the Federal Power Act, we are not persuaded that FERC's silence on this point should be construed as an expression of Congressional intent to preempt state commissions from directing a utility to provide the up-front costs of necessary network upgrades, subject to FERC approval of the interconnection agreement, and to seek recovery of those costs in transmission rates.

Therefore, **IT IS ORDERED** that:

1. Edison's Application for Rehearing of Decision 03-07-033 is denied.

This Order is effective today.

Dated October 2, 2003, at San Francisco, California.

MICHAEL R. PEEVEY
President
CARL W. WOOD
LORETTA M. LYNCH
GEOFFREY F. BROWN
SUSAN P. KENNEDY
Commissioners