

Decision 07-03-018

March 1, 2007

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking
Regarding Policies Procedures and
Rules for the California Solar Initiative,
the Self-Generation Incentive Program
and Other Distributed Generation
Issues.

Rulemaking 06-03-004
(Filed March 2, 2006)

ORDER DENYING REHEARING OF DECISION 06-08-028

This decision addresses the application for rehearing of Decision (D.) 06-08-028, filed by Consumer Federation of California (“CFC”). We have reviewed each and every allegation set forth in the application and do not find grounds for granting rehearing. Therefore, we deny the application for rehearing.

I. FACTS

On August 24, 2006, the Commission issued D.06-08-028 (“Decision”) in Rulemaking (R.) 06-03-004, regarding the Commission’s California Solar Initiative (“CSI”).¹ The Decision adopts performance-based incentives for payments to qualifying solar photo-voltaic technologies through the CSI and an administrative structure and design features for implementation of the CSI. The Decision notes that on August 21, 2006 the Governor signed Senate Bill 1 (“SB 1”) (Stats. 2006, ch. 132) into law, to take effect January 1, 2007.

¹ As explained below, the Commission initiated the CSI as part of its Self-Generation Incentive Program (SGIP) and in 2006, the first year of the CSI, funded incentives to solar projects through the SGIP. (D.06-08-028, p.9.)

SB 1 required the Commission to implement CSI with certain provisions that differ from those in D.06-08-028. The Decision, therefore, directs the Administrative Law Judge (“ALJ”) to issue a ruling requesting comments on aspects of SB 1 that will affect the longer-term implementation of the CSI and require modifications to the Decision. (D.06-08-028, p. 126, Ordering Paragraph 25.) In the Decision the Commission states its goal to issue a further order before January 1, 2007, modifying the Decision as necessary to conform to SB 1. As directed, on September 15, 2006 the ALJ issued a ruling requesting comment on potential modifications to both D.06-08-028 and D.06-01-024² in response to SB 1.

CFC timely filed an application for rehearing on several grounds. CFC claims (1) for several reasons the Commission does not have authority to invest ratepayer funds in solar technologies without first finding that the investment will be cost-effective, (2) the Commission does not have the authority to invest ratepayer funds in solar technologies without first finding the investment will reduce rates, (3) the Commission does not have the authority to spend ratepayer funds on a solar initiative without first finding the investment will benefit ratepayers, (4) the Commission does not have general authority to proceed, (5) in certain respects the Commission’s CSI does not conform to SB 1, and (6) the Commission denied CFC a fair hearing by failing to address the prevailing wage issue. CFC stated that it would file comments responsive to the ALJ’s September 15, 2006 ruling in R.06-03-004, but that it had applied for rehearing in order “to avoid waiving any argument” “concerning the applicability of SB 1 to this proceeding.” (Rehearing Application, p. 2.)

² D.06-01-024, issued January 12, 2006, established the CSI as an independent program. That decision also addresses policies, rules, incentive levels and administration for the CSI program. (*Interim Order Adopting Policies and Funding for the California Solar Initiative* (“*CSI Interim Order*”)[D.06-01-024 (slip op.)] (2006) __ Cal.P.U.C.3d __.)

California Solar Energy Industries Association and the Vote Solar Initiative (“CAL SEIA/Vote Solar”) filed a response to the rehearing application. CAL SEIA/Vote Solar argue that CFC’s rehearing application is an impermissible collateral attack upon the policies adopted in D.06-01-024 which, according to the response, established the “foundational elements of the CSI” and also argue that other issues raised in the rehearing application are “frivolous and irrelevant.” (CAL SEIA/Vote Solar Response, pp. 1 -2.)

II. DISCUSSION

A. Commission Authority to Implement the Solar Initiative

CFC claims that the Commission has no authority under SB 1 to implement CSI³ in 2007 and that the California Energy Resources and Development Commission (“CEC”) has this authority. (Rehearing Application, pp. 3-5.) These arguments lack merit. CFC alleges:

. . . . The only Commission authority to implement a solar initiative in 2007⁴ is P.U. Code § 399 *et. seq.*

The Commission has no authority to spend ratepayer money in the manner described in its D.06-08-028

(Rehearing Application, p. 3.)

SB 1 gave the CEC responsibility for certain aspects of the CSI, but this does not negate the specific responsibilities the legislation gave to this Commission. For example, the Legislature has charged the Commission, in implementing the CSI, with the following:

(1) . . . authorize the award of monetary incentives . . .

³ CFC’s assertions regarding Commission authority specifically related to cost-effectiveness, cost-benefit and rate reduction arguments are addressed below in Sections B. and C of the Discussion.

⁴ We note that CFC challenges our authority to implement CSI beginning in 2007, but does not argue that our implementation authority will change after 2007.

- (2) . . . adopt a performance-based incentive program . . .
- (3) . . . (in consultation with the [CEC] shall) require reasonable and cost-effective energy efficiency improvements in existing buildings as a condition of providing incentives for eligible solar energy systems

- (4) . . . require time-variant pricing for all ratepayers with a solar energy system.

(Pub. Util. Code, § 2851 subd. (a), added by SB 1 (Stats. 2006, ch. 132, § 7).)

CFC ignores these mandatory provisions in Public Utilities Code section 2851(a), which establishes statutory duties the Commission must perform and characterizes the Commission’s role as “implementing” the CSI. Thus, CFC is wrong when it argues that the Commission has no authority to implement CSI.

B. Cost Effectiveness

CFC raises a number of arguments related to its claim that the Commission may not proceed with CSI “without first finding the investment is cost-effective.” (Rehearing Application, pp. 3, 8 - 9.) CFC recognizes that we intend to consider cost-effectiveness in this proceeding, but challenges the Decision’s holding that the issue will be addressed in Phase 2. (Rehearing Application, pp. 8 – 9, citing D.06-08-028, p. 109.) As discussed below, we reject CFC’s arguments on this issue.

1. Senate Bill 1

a) The Decision cannot have violated the terms of SB 1.

CFC argues that SB 1 requires CSI to be found cost-effective before implementation. (Rehearing Application, pp. 3-4.) CFC suggests, but does not actually assert, that D.06-08-028 violates the terms of SB 1 regarding cost-effectiveness. As a threshold matter, SB 1 (Stats. 2006, ch. 132.) did not become effective until January 1, 2007. This was also our target date for implementing our

independent CSI program. (D.06-08-028, p. 2.) On August 24, 2006, when we issued D.06-08-028, both the statutory structure and the Commission's CSI were prospective in nature. The Decision cannot violate laws that were not yet in effect on its date of issuance. In addition, D.06-08-028 states that it will be modified to conform to SB 1. (D.06-08-028, p. 2.) On this basis alone, any argument that D.06-08-028 unlawfully violates statutes adopted in SB 1 has no merit.

b) CFC's reliance on language SB 1 added to the Public Resources Code to support its claim that the Commission must determine cost-effectiveness prior to implementing CSI is misplaced.

In its rehearing application, CFC refers to language adopted in SB 1 to support its claim that the Commission must find CSI to be cost-effective before implementation. (Rehearing Application, pp. 4 - 5.) CFC has not identified any requirement within the SB 1 statutory structure that requires finding cost-effectiveness before implementing CSI. However, certain code sections added by SB 1 reveal that cost-effectiveness is a goal of the Legislature in adopting CSI.

First:

A solar initiative should be a cost-effective investment by ratepayers in peak electricity generation capacity where ratepayers recoup the cost of their investment through lower rates as a result of avoiding purchases of electricity at peak rates, with additional system reliability and pollution reduction benefits.

(Rehearing Application, pp. 4 – 5, citing Pub. Resources Code, § 25780, subd. (a) & (b).) And also:

The Legislature finds and declares that a program that provides a stable source of monetary incentives for eligible solar energy systems will encourage private investment sufficient to make solar technologies cost effective.

(Pub.Util.Code, § 2851, subd. (c)(2), added by SB 1 (Stats. 2006, ch. 132, § 7).)

In summary, the legislature addressed cost-effectiveness of solar technologies as a goal of the CSI, but did not direct the Commission to find or require cost-effectiveness before implementing the program.

CFC also argues that under SB 1 the CEC retains control of the design of the CSI to ensure cost-effectiveness. (Rehearing Application, p. 5, citing Pub.Resources Code §§ 25405.6 & 25782 .) The sections CFC cites do not require us to take any action regarding cost-effectiveness, nor do they give the CEC control of the design of the CSI. CFC’s arguments that SB 1 requires us to find, before implementation, that CSI is cost-effective are without merit.

2. CFC’s claim that the Commission would lose its authority over CSI if it did not determine cost-effectiveness prior to implementation lacks merit.

CFC contends “[t]he Commission has no authority to implement the CSI unless it first finds the CSI is cost-effective. (Rehearing Application, p. 8.) In effect, CFC argues that by not making a determination of cost-effectiveness before implementing CSI, the Commission has lost its authority to implement the program. (Rehearing Application, pp. 3 & 8.)

As discussed above, Commission authority to implement CSI is clearly stated. Neither SB 1 nor any other law provides that the Commission will lose its authority if it does not determine cost-effectiveness before implementing CSI. CFC’s claim is without merit.

3. The Reliable Electric Service Investments Act does not require the Commission to find cost-effectiveness before implementing CSI.

In its application for rehearing CFC includes a number of references to the Reliable Electric Service Investments Act (Pub. Util. Code, § 399 – 399.8, which are part of Article 15, Chapter 2.3.) CFC states that this act requires that ratepayer funds be used cost-effectively, and, that it was in effect when the CSI

rulemaking began. (Rehearing Application, pp. 5- 6.) CFC seemingly argues that the specific references to cost-effectiveness in Article 15, the Reliable Electric Service Investments Act, require the Commission to determine cost-effectiveness before implementing CSI. (Rehearing Application, p. 6.) This contention is wrong.

We did not adopt the Self-Generation Incentive Program (SGIP) or the CSI pursuant to the terms of the Reliable Electric Service Investments Act in Article 15.⁵ We adopted the incentive program for self-generation, now known as the SGIP, in D.01-03-073 in Rulemaking (R.) 98-07-037. (*Interim Opinion: Implementation of Public Utilities Code Section 399.15(b), Paragraphs 4-7; Load Control and Distributed Generation Initiatives* (“*Interim Opinion: Load Control & DGP*”) [D.01-03-073] (2001) __ Cal.P.U.C.3d __, 2001 Cal.PUC LEXIS 218.) In adopting the incentive program, we were acting pursuant to Public Utilities Code section 399.15 (b), added by Assembly Bill (“AB”) 970 (Stats. 2000, ch. 329). The act adopted by AB 970 (Stats. 2000, ch. 329), § 1) is the “California Energy Security and Reliability Act of 2000.” Section 399.15, was codified in Article 16 of Chapter 2.3 in the Public Utilities Code.⁶

In its argument, CFC cites code sections within Article 15, the Reliable Electric Service Investments Act.⁷ Because these sections were not part of AB 970, which provided the authority for the Commission’s SGIP, there is no need to review them individually.⁸

⁵ Generally, the Reliable Electric Service Investments Act, Article 15, addresses programs funded through the Public Goods Charge, which does not include the SGIP or the CSI.

⁶ With the enactment of SB 662 (Stats. 2001, ch. 159, § 173), section 399.15 was renumbered as section 379.5 and became part of Chapter 2.3, Article 6, “Requirements for the Public Utilities Commission.”

⁷ It should be noted, however that one of the sections CFC relies on, section 399.6, was repealed as of September 27, 2006. (SB 1250 (Stats. 2006, ch. 512, § 30).

⁸ CFC itself notes elsewhere in its pleading that the SGIP was “authorized pursuant to AB 970 § 7. . . .” (Rehearing Application, p. 7.)

CFC does not assert directly that the cited sections of the Reliable Electric Service Investments Act control the Commission's implementation of CSI. Yet, in proffering this irrelevant information, CFC ignores that the SGIP work and the initial CSI work has been done pursuant to AB 970 and that the current CSI work is being done pursuant to SB 1. CFC's comments regarding the Reliable Electric Service Investments Act do not identify an error in the Decision and are without merit.

4. CFC's argument that funds spent on the SGIP must be evaluated for cost-effectiveness does not identify an error in the Decision.

CFC argues, "funds spent on the SGIP program must be evaluated for cost-effectiveness." (Rehearing Application, pp. 7 – 8.) CFC's argument that the SGIP must be evaluated for cost-effectiveness does not identify an error in D.06-08-028, which addresses program elements for the CSI, not the SGIP.⁹ Further, if CFC intends to argue that the CSI program itself must be evaluated for cost-effectiveness, the argument does not identify an error in D.06-08-028 because the Decision states that cost-effectiveness will be addressed in Phase 2 of the proceeding. Therefore, CFC's argument is without merit.

CFC references the SB 1 statement that the Commission decision adopting CSI, "modified the self-generation incentive program for distributed generation resources."¹⁰ (Rehearing Application, p. 7, referring to Legis. Counsel's Dig., SB 1 (Stats. 2006, ch.132, §____, p. 1478).) As discussed in the previous section, we adopted the SGIP pursuant to Public Utilities Code section 399.15 subdivisions (b)(4) – (b)(7) and subsequently initiated the CSI as part of

⁹ We note that, in this argument, CFC does not claim that a preliminary finding of cost-effectiveness is required. Rather, it asserts that funds spent on the program must be evaluated for cost-effectiveness.

¹⁰ CFC somewhat misquotes the referenced language from SB 1, by saying that CSI is "a modification of the self-generation incentive program . . ." (Rehearing Application, p. 7.)

the SGIP. In D.06-01-024 we established CSI as an independent program to be managed and administered separately from the SGIP. (*Interim Order Adopting Policies and Funding for the California Solar Initiative*, [D.06-01-024, pp.10 – 11, (slip op.)] (2006).) Public Utilities Code section 379.6 now codifies the separation of the two programs. (Pub. Util. Code, § 379.6, subs. (a)(1) & (a)(3).)

The two programs are now separate and, effective January 1, 2007, CSI implementation is addressed in the statutes enacted by SB 1. CFC is incorrect in assuming that statutory requirements for the SGIP will apply to the independent CSI program. In any case, the statutory references that CFC provides do not address Commission implementation of the SGIP. Public Resources Code section 25555 addresses CEC implementation of energy conservation and demand-side management programs. Public Utilities Code section 379.5 (b)(8) (formerly Pub. Util. Code § 399.15 (b)(8)) requires reevaluation of efficiency cost-effectiveness tests, not an evaluation of SGIP for cost-effectiveness.

CFC provides no explanation or analysis to support a claim of error in D.06-08-028 as related to its assertion that “funds spent on the SGIP program must be evaluated for cost-effectiveness.” Further, CFC ignores the fact that the SGIP and CSI are now independent programs and seemingly forgets that we have been addressing cost-effectiveness (see section II.B.6, below) and that we intend to continue addressing it in Phase 2 of this proceeding. CFC’s argument is without merit.

5. SB 1 does not require the Commission to find customer benefit, ratepayer benefit, or to complete work on a cost-benefit methodology before implementing CSI.

In its arguments about cost-effectiveness, CFC includes an additional and related concept, cost-benefit analysis. CFC states: “The Commission does not have the authority to spend any ratepayer funds on a solar initiative without first finding the investment is cost-effective and will benefit ratepayers.” (Rehearing

Application, p. 3, emphasis added.) Similarly, CFC asserts, [t]he Commission has undertaken no effort to determine that the CSI will be cost-effective and benefit customers.” (Rehearing Application, p. 8, emphasis added.)

Because of the context, it seems clear that CFC intends the above-noted “benefit” phrases to refer to cost-benefit analysis and that CFC believes the Commission is required to complete work related to these benefit concepts before implementing CSI. (See Rehearing Application, p. 8.) However, CFC does not state any basis for these assertions.

There is no requirement, in SB 1 or elsewhere, that we must make findings on customer or ratepayer benefit before implementing CSI. CFC’s claim is, therefore, without merit.

6. Contrary to CFC’s assertion, the Commission has been addressing cost-effectiveness and cost-benefit analyses in DG and related proceedings.

CFC asserts, “the Commission has undertaken no effort to determine that the CSI will be cost effective and benefit customers.” (Rehearing Application, p. 8.) This statement is inaccurate. However, even if the statement were true, it would not identify legal error in the Decision because, as discussed above, the law does not require the Commission to find cost-effectiveness or customer benefit before implementing CSI. Further, CFC does not state grounds for finding error in the Decision based on this argument. In fact, we have been working on and continue to work on a coordinated approach to cost-effectiveness and cost-benefit analyses in our distributed generation (“DG”) and other related proceedings.

In R.98-07-037, we explained our interest in a coordinated approach as follows:

In particular, we seek to develop a cost-effectiveness methodology that can be used on a common basis to evaluate all programs that will remove electric load from the centralized grid, including energy efficiency,

load control/demand-responsiveness programs and self-generation.

(Interim Opinion: Implementation of Public Utilities Code Section 399.15(b), Paragraphs 4-7, supra [D.01-03-073, p. 36, (slip op.)] (2001) __ Cal.P.U.C.3d __.) In R. 04-03-017, we provided a status report specific to solar technologies, saying:

. . . the matter of cost-effectiveness is one we cannot finally resolve at this time. . . . The analytical framework for measuring solar cost-effectiveness is a topic in this proceeding that is yet unresolved. It has been the subject of two consultant reports, hearings and a proposed ALJ decision and may require additional work before we are able to adopt a cost-benefit methodology that fairly captures costs and benefits of solar technologies.

(CSI Interim Order [D.06-01-024], supra, at p. 19 (slip op.).)

The April 25, 2006 Scoping Memo in this proceeding provided that cost-benefit analyses would be addressed in Phase 2 of the proceeding. (*Scoping Memo and Ruling of Assigned Commissioner and Administrative Law Judge*, R.06-03-004, April 25, 2006 (“Scoping Memo”) p. 2.) The Scoping Memo explained the approach as follows:

With regard to cost-benefit analyses, the Commission will establish a way of measuring the cost and benefits of DG projects. The Commission began its work on this issue in R.04-03-017 and the record of that inquiry has been incorporated into this proceeding. As described in R.06-03-004, the Commission intends to coordinate its DG cost-benefit work with findings from the avoided cost rulemaking (R.04-04-025) and the energy efficiency proceedings (R.01-08-028 and related). In Phase II of this proceeding, parties will be given the opportunity for further comment on modifications to the proposed cost-benefit decision that was issued in September 2005.

(Scoping Memo, p. 8.)

As discussed above, we have described our ongoing consideration of cost-effectiveness and cost-benefit analysis related to DG, specifically including solar, and our goal of coordinating this work in several proceedings. CFC's arguments that the Commission has made no effort regarding CSI's cost-effectiveness and benefit to customers or ratepayers have no merit.

D. Reduce Rates

CFC also asserts that "the Commission does not have authority to invest ratepayer funds in solar technologies without first finding the investment will reduce rates." (Rehearing Application, p. 3.) CFC raises this claim in isolation, without providing any legal grounds or explanation. SB 1 does not require a finding that CSI will reduce rates. The claim has no merit.

E. Legislative Authority

CFC argues and proffers case law to the effect that, "[w]hen the [L]egislature prescribes the terms and conditions of a program to promote solar energy, the Commission is without authority to adopt a program which is not designed in accord with the statute's provisions." (Rehearing Application, p.4, citing *Southern California Gas Co. v. Public Utilities Com.* ("Southern California Gas Co.") (1979) 24 Cal.3d 653, 659.)

In *Southern California Gas* the Court found that the Home Insulation Assistance and Financing Act directed the Commission to permit utility companies to institute home insulation assistance and financing programs, but that the Commission lacked authority to require utilities to offer insulation finance programs because the legislature had authorized a permissive program. (*Id.*, emphasis added.)

CFC's argument does not state an error in D.06-08-028 related to the provisions of SB 1. We stated that we would modify the Decision to conform to

SB 1 and adopted procedural steps to do so. Therefore, CFC's argument that D.06-08-028 violates the legislative design of SB 1 lacks merit.

CFC's reliance on the holding in *Southern California Gas Co.* is misplaced because the Commission has specific authority to implement CSI and D.06-08-028 states a procedure for conforming the Commission program to the SB 1 legislative enactment.

F. The Decision's lack of conformance with SB 1 does not constitute legal error.

In its section titled "The Commission's CSI Does Not Conform to SB 1," CFC identifies "factors the Commission must consider" in deciding how to spend the funds authorized by SB 1. (Rehearing Application, p. 9.) The two topics CFC discusses in the section are budget and eligible technologies, but CFC does not assert D.06-08-028 is unlawful due to these points.¹¹ (Rehearing Application, pp. 9 – 11.) CFC also says it will file comments responsive to the September 15 ALJ Ruling Requesting Comment. (Rehearing Application, pp. 2, 9; referencing *Administrative Law Judge's Ruling Requesting Comment on Potential Modifications to Decision 06-01-024 and Decision 06-08-028 in Response to Senate Bill 1* ("ALJ Ruling Requesting Comment") filed September 15, 2006.)

Because CFC does not assert legal error related to these factors, they are not the proper subjects for a rehearing application. CSI is aware that the ALJ sought comments on modifications to D.06-08-028 related to SB 1 and states it will file such comments. The *ALJ Ruling Requesting Comment* included and sought comment specifically on both budget and eligible technologies. (*ALJ Ruling Requesting Comment*, pp. 8 – 10 and pp. 3 – 4, respectively.)

¹¹ In its discussion of factors to consider in conforming CSI to SB 1, CFC again assumes that the CSI budget is limited by SGIP and Public Utilities Code section 399 *et seq.* funding constraints and argues that no new technologies can be found eligible without a finding that they are cost-effective. (Rehearing Application, p. 11.) These arguments are addressed above and will not be considered again here.

CFC has not identified an error in D.06-08-028 resulting from the fact that it did not conform, in certain respects, to SB 1. The Commission ordered further proceedings to modify D.06-08-028 to conform to the SB 1 legislation. Further, the argument is moot because we have now issued D.06-12-033, modifying D.06-08-028 and D.06-01-024 to conform to SB 1.

G. The Prevailing Wage Issue

CFC asserts that it has been denied due process because in this proceeding we did not rule on the question of whether solar developers must pay prevailing wages. (Rehearing Application, pp. 11 – 12.) CFC says that we encouraged the State Building Trades and Construction Trades Council of California (“SBCTC”) to raise the prevailing wage issue “as part of the record of this proceeding.” (Citing CSI *Interim Order* [D.06-01-024], *supra*, at p. 37.) CFC says that CFC raised the issue at the pre-hearing conference,¹² but that the Scoping Memo ruled against including the issue in this proceeding. The Scoping Memo held:

The Commission addressed this issue in R.03-09-006 and the subsequent [court challenge] and will not include it within the scope of this case.

(Scoping Memo, pp. 9 – 10, emphasis added.)

CFC says it has sought “elaboration of that ruling.” (Rehearing Application, p. 12.) However, the passage was a clear statement and provided adequate notice to CFC and other parties that the prevailing wage issue was not within the scope of the proceeding. Due process does not require an elaboration

¹² The Commission’s invitation to SBCTC to raise the prevailing wage issue later in the proceeding was stated in D.06-01-024 in the proceeding R.04-03-017. The March 23, 2006 Prehearing Conference was held in R.06-03-004, a subsequent rulemaking and the instant proceeding. The Commission explained that R.06-03-004 “evolves from and builds on the work we began in three previous proceedings.” R.04-03-017 is identified as one of those proceedings. (*CSI/SGIP Rulemaking* [R.06-03-004], *supra*, at p. 1 (slip op.).)

because the statement “will not include it within the scope of this case,” is clear and does not lend itself to misinterpretation. CFC’s claim that our decision not to address the matter violates CFC’s due process rights has no merit.

CFC asks in its application for rehearing that the Commission “definitively state that contractors installing solar systems that qualify for incentives will be required to pay the prevailing wage to their workers.” (Rehearing Application, p. 12.) However, we may not rule on a substantive issue that was neither included in the scope of the proceeding nor addressed in the evidentiary record.

Further, CFC merely alleges a “denial of due process under the California and U.S. Constitutions” without providing a legal basis for the claim. (See Rehearing Application, p. 12.) Such a vague rehearing assertion may be rejected for lack of specificity. (See Pub. Util. Code, §1732; see also, Cal. Code of Regs., tit. 20, §16.1 (c).) In any case, CFC’s due process claim is without merit.

THEREFORE, IT IS ORDERED that:

1. Rehearing of D.06-08-028 is denied.

This order is effective today.

Dated March 1, 2007, at San Francisco, California.

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