

Decision 08-09-016 September 4, 2008

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Petition for Expedited Modification of
Energy Division Resolution E-4013
Approving the Utilities' Community
Choice Aggregation Service
Agreements

Application 07-12-032
(Filed December 21, 2007)

**ORDER MODIFYING DECISION (D.) 08-04-056,
AND DENYING REHEARING OF DECISION, AS MODIFIED**

I. INTRODUCTION

We issued Resolution E-4013 on November 9, 2006. Resolution E-4013 approved with modifications the proposed tariffs filed by Pacific Gas and Electric Company ("PG&E"), Southern California Edison ("Edison"), and San Diego Gas & Electric ("SDG&E") (collectively, "the utilities") implementing their respective Community Choice Aggregation ("CCA") Programs pursuant to Assembly Bill ("AB") 117 (Stats. 2002, ch. 838).

AB 117 requires a CCA to "register" with the Commission before initiating electricity service to customers. (See *Decision Resolving Phase 2 Issues on Implementation of Community Choice Aggregation Program and Related Matters* ("CCA Phase 2 Decision") [Decision (D.) 05-12-041] (2005) __ Cal.P.U.C.3d __, p. 12 (slip op.).) A CCA is required to include the CCA's service agreement with the serving utility in the CCA's registration packet. (*Id.* at p. 61, Conclusion of Law 7 (slip op.).) Among other things, the utilities' tariff filings sought approval of a standard CCA Service Agreement. Each utility's proposed CCA Service Agreement included, as Section 20, a requirement that the individual members of a CCA joint powers agency ("JPA") would

be jointly and severally liable for the CCA's debts and obligations. Resolution E-4013 approved Section 20 of the utilities' CCA Service Agreements without modification.

On December 21, 2007, San Joaquin Valley Power Authority ("SJVPA") filed a Petition for Expedited Modification of Resolution E-4013. SJVPA requested that the Commission modify Resolution E-4013 to delete Section 20 of the utilities' CCA Service Agreements. On April 25, 2008, we issued D.08-04-056, granting SJVPA's petition to modify Resolution E-4013 to delete Section 20 of the utilities' CCA Service Agreements.

PG&E and Edison (collectively, "rehearing applicants") timely filed an application for rehearing of D.08-04-056. They allege the following legal error: (1) D.08-04-056 violates Public Utilities Code sections 366.2 and 394.25(e)¹ by finding that a utility tariff approved pursuant to the Commission's authority under sections 366.2 and 394.25(e) conflicts with the authority granted to local governments to form joint powers agencies under Government Code section 6508.1; and (2) D.08-04-056 violates sections 1709 and 1731 because it grants an untimely request to overturn as unlawful Resolution E-4013.

On June 11, 2008, SJVPA filed a response to the rehearing application requesting that the Commission deny rehearing of D.08-04-056. On the same day, the County of Marin also filed a response to the rehearing application supporting SJVPA's response.

We have reviewed each and every argument raised in the rehearing application and are of the opinion that modifications, as described herein, are warranted to delete language referencing the authority of the utilities to mandate that members of a JPA CCA assume joint and several liability for the CCA. We also modify D.08-04-056 to correct minor typographical errors. Rehearing of D.08-04-056, as modified, is denied.

¹ All subsequent section references are to the Public Utilities Code, unless otherwise specified.

II. DISCUSSION

A. The Utilities' Authority to Implement Commission Approved Tariffs

Rehearing applicants contend that D.08-04-056 violates sections 366.2 and 394.25(e)² by finding that a utility tariff approved pursuant to the Commission's authority under sections 366.2 and 394.25(e) conflicts with the authority granted to local governments to form joint powers agencies under Government Code section 6508.1.³ Rehearing applicants contend that D.08-04-056 erred in construing Government Code section 6508.1, as conflicting with the ability of utilities to implement tariff provisions approved by the Commission to ensure the same level of CCA creditworthiness the Commission itself can impose directly. (Rehrg. App., at p. 3 citing D.08-04-056, p. 6.) Rehearing applicants request that the Commission grant rehearing and revise D.08-04-056 to find that utilities may implement CCA tariffs that require JPA CCAs to demonstrate creditworthiness through joint and several liability if the Commission finds that such tariff provisions are necessary under Sections 366.2 or 394.25(e). (Rehrg. App., at p. 4.)

² Sections 366.2 and 394.25(e) were enacted as part of AB 117. Among other things, these sections contain provisions to prevent cost-shifting to bundled customers.

³ AB 117 permits a joint powers agency established under Chapter 5 (commencing with Section 6500) of Division 7 of Title 1 of the Government Code to participate in CCA. (Public Utilities Code, §§ 331.1(b) & 366.2(c)(10)(B).)

Government Code section 6508.1 states:

If the agency is not one or more of the parties to the agreement but is a public entity, commission, or board constituted pursuant to the agreement, the debts, liabilities, and obligations of the agency shall be debts, liabilities, and obligations of the parties to the agreement, unless the agreement specifies otherwise.

A party to the agreement may separately contract for, or assume responsibility for, specific debts, liabilities, or obligations of the agency.

Rehearing applicants' contention that D.08-04-056 violates sections 366.2 and 394.25(e) lacks merit. Rehearing applicants do not provide any specifics as to why D.08-04-056 violates sections 366.2 or 394.25(e). We previously considered and found unpersuasive the arguments put forth by the utilities regarding the need for a general rule imposing joint and several liability on JPA CCAs in order to protect bundled ratepayers. In D.08-04-056, we determined that: "the utilities ... have provided no persuasive arguments that Section 20 is necessary or why joint power agency CCAs, which are comprised of public, governmental entities, should be considered inherently uncreditworthy." (D.08-04-056, pp. 6-7.)

We need not address any allegation regarding a violation of sections 366.2 or 394.25(e) because we have yet to make a determination as to the creditworthiness of any particular CCA. Contrary to rehearing applicants' assertion that we undermined our own authority, we did not preclude the possibility that we would require members of a JPA CCA to assume joint and several liability for the CCA.⁴ Although we directed the utilities to remove Section 20 from the CCA Service Agreement, we also stated that "consideration of whether there is a need for members to assume joint and several liability should be part of the CCA's creditworthiness review." (D.08-04-056, p. 8.) Therefore, D.08-04-056 merely determined that the issue of joint and several liability should be considered on a case-by-case basis as part of the consideration of the overall creditworthiness of a particular JPA CCA rather than be a general rule that applies to all JPA CCAs. Rehearing applicants themselves acknowledge that our determination to remove Section 20 from each utility's CCA Service Agreement and instead take up the issue of joint and several liability as part of a CCA's creditworthiness review was a

⁴ Government Code section 6508.1 does not preclude the Commission from requiring members of JPA CCA to assume joint and several liability for the CCA if necessary pursuant to sections 366.2 or 394.25(e). Although a JPA formed pursuant to Government Code section 6500 et seq. is permitted to participate in CCA, a JPA must still meet the requirements of AB 117 in order to be able to offer services as a CCA.

lawful exercise of our authority under sections 366.2 and 394.25(e). (See Rehr. App., at p. 2.)

Rehearing applicants also misconstrue D.08-04-056; nothing in D.08-04-056 was intended to be construed as preventing a utility from implementing a Commission approved tariff. However, rehearing applicants legitimately identify an ambiguity in D.08-04-056. In granting SJVPA's request to delete Section 20 from the utilities' CCA Service Agreements, D.08-04-056 states:

The disagreement is whether the utilities may mandate that SJVPA members assume joint and several liabilities even though they availed themselves of Government Code Section 6508.1. The grant of discretion provided to local government agencies by the Legislature in Government Code Section 6508.1 cannot be overturned by a utility tariff. Here, the local government members elected to not assume the liabilities of SJVPA unless otherwise agreed. Section 20 of the utilities' tariffs would effectively remove this exercise of discretion by requiring joint and several liabilities unless otherwise agreed by the local government members and the utility. Section 20 of the utilities' CCA service agreements is therefore in conflict with Government Code Section 6508.1 and impedes the authority and rights of local government agencies.

(D.08-04-056, p. 6.) Rehearing applicants correctly note that we approved the tariffs in question. Therefore, this discussion in D.08-04-056 regarding the utilities' authority to require members of a JPA CCA to assume joint and several liability for the JPA CCA is not relevant to resolve SJVPA's Petition for Expedited Modification of Resolution E-4013 and creates unnecessary ambiguity regarding the utilities' authority to implement Commission approved tariffs. Any implication that a utility cannot implement a tariff that has been approved by the Commission was unintentional and we modify D.08-04-056, as set forth in the ordering paragraphs below, to clarify this ambiguity by deleting the discussion referencing the utilities' authority to require members of a JPA CCA to assume joint and several liability and by deleting language in the Ordering Paragraphs and Conclusions of Law corresponding to this discussion.

Regardless, it is unnecessary to grant rehearing on the issue of whether the utilities may implement CCA tariffs that are approved by the Commission. Once the Commission approves a utility's tariffs, they have the force and effect of the law. (See *Dyke Water Co. v. Public Utilities Com.* (1961) 56 Cal.2d 105, 123; *Colich & Sons v. Pac. Bell* (1988) 198 Cal. App. 3d 1225, 1232.) Therefore, the utilities, as well as other parties, are *required* to conform to a utility's tariffs once they are approved by the Commission. In the *CCA Phase 2 Decision*, we previously directed that where a CCA fails to conform to a utility tariff approved by the Commission, the utility must decline to provide service to the CCA. (*CCA Phase 2 Decision* [D.05-12-041], *supra*, at p. 17 (slip op.).)

B. Public Utilities Code Sections 1709 and 1731

Rehearing applicants contend that SJVPA's Petition for Expedited Modification of Resolution E-4013 ("SJVPA's Petition") was grounded on the alleged illegality of Resolution E-4013 and thus was an impermissible and untimely collateral attack of a final Commission decision under sections 1709 and 1731.⁵ Rehearing applicants request that the Commission grant rehearing and revise D.08-04-056 to reject SJVPA's legal challenge to Resolution E-4013. (Rehrg. App., pp. 4-5.)

A rehearing application must set forth 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).) Rehearing applicants allege that SJVPA's Petition violates sections 1709 and 1731 but do not demonstrate that it was unlawful for the Commission to grant SJVPA's Petition in D.08-04-056. Accordingly, there is no basis for granting rehearing on this issue.

⁵ Section 1709 provides: "In all collateral actions or proceedings, the orders and decisions of the commission which have become final shall be conclusive." (Pub. Util. Code, § 1709.) Section 1731 describes a party's right to apply for an application for rehearing of a Commission decision. (Pub. Util. Code, § 1731(b).)

Rehearing applicants correctly note that no party filed an application for rehearing of Resolution E-4013 and that Resolution E-4013 is a final and conclusive Commission decision. (See Pub. Util. Code, §§ 1709 & 1731.) However, pursuant to section 1708, the Commission has the discretion to reopen a proceeding after a decision is final. (See Pub. Util. Code, § 1708; *Los Angeles v. Public Utilities Com.* (1975) 15 Cal. 3d 680, 706.) With the provision of appropriate notice and opportunity to be heard, section 1708 gives the Commission the discretion to modify its decisions and does not limit the bases upon which modifications can be made. In granting SJVPA's Petition, we lawfully exercised our discretion pursuant to section 1708 to modify Resolution E-4013.

III. CONCLUSION

For the reasons stated above, D.08-04-056 is modified to delete discussion referencing the authority of the utilities to mandate that members of a JPA CCA assume joint and several liability for the CCA. D.08-04-056 is modified to delete language in the Ordering Paragraphs and Conclusions of Law that correspond to the discussion referencing the utilities' authority. D.08-04-056 is also modified to correct minor typographical errors. Rehearing of D.08-04-056, as modified, is denied.

THEREFORE, IT IS ORDERED that:

1. D.08-04-056 shall be modified as follows:
 - a. The first full paragraph on page 6 beginning with "The disagreement is whether the utilities ..." is deleted in its entirety.
 - b. The first full sentence on page 8 beginning with "However, while the utilities may not require ..." is modified to read:

"However, consideration of whether there is a need for members to assume joint and several liability should be part of the CCA's creditworthiness review."
 - c. Finding of Fact 4 on page 9 is modified to replace "as approved in Resolution E-4133" with "as approved in Resolution E-4013."

- d. Conclusions of Law 1, 2, and 3 on page 9 are deleted in their entirety.
- e. The second sentence of Ordering Paragraph 1 on page 10 is modified to read:

“The issue of whether a CCA joint power agency should be required to assume joint and several liability should be considered as part of the CCA’s creditworthiness review.”

- f. Ordering Paragraph 2 on page 10 is modified to replace “Resolution E-4133” with “Resolution E-4013.”
- 2. Rehearing of D.08-04-056, as modified, is denied.
 - 3. Application 07-12-032 is closed.

This order is effective today.

Dated September 4, 2008, at San Francisco, California.

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