

Decision 08-11-060

November 21, 2008

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking to establish the California Institute for Climate Solutions.

Rulemaking 07-09-008 (Filed September 20, 2007)
--

**ORDER VACATING DECISION (D.) 08-04-039, AS
MODIFIED BY D.08-04-054, AND DISMISSING THE
APPLICATIONS FOR REHEARING OF DECISION**

I. INTRODUCTION

In this Order we dispose of the applications for rehearing of Decision (D.) 08-04-039 as modified by D.08-04-054 (“Corrected D.08-04-039” or “Decision”) filed by the Utility Reform Network (“TURN”), the Division of Ratepayer Advocates (“DRA”), and the Utility Consumers Action Network (“UCAN”) (collectively the “Joint Parties”), and by the Consumer Federation of California (“CFC”).¹

Our Decision approved establishment of the California Institute for Climate Solutions (“CICS”). The CICS was intended to be a grant-making body to fund applied research and development (“R&D”) of practical and commercially viable technologies to reduce GHG emissions and slow global warming. The mission of the CICS was consistent with climate change and GHG emissions policies under Assembly Bill (“AB”) 32, The Global Warming Solutions Act of 2006,² and Senate Bill (“SB”) 1368.³

¹ In D.08-04-054, we corrected typographical errors and inadvertent inconsistencies in D.08-04-039. No substantive changes were made.

² AB 32 (Stats. 2006, ch. 488, effective September 27, 2006), codified in Division 24.5 of the Health and Safety Code. AB 32 requires, among other things, that the California Air Resources Board (“CARB”) adopt regulations to require the reporting of GHG emissions and to monitor and enforce compliance with the program (Health & Saf. Code, § 38530, subd. (a)), and approve a statewide GHG emissions limit equivalent to the level to be achieved by 2020. (Health & Saf. Code, § 38550.)

³ SB 1368 (Stats. 2006, ch. 598, effective September 29, 2006), codified in Division 4.1, Chapter 3

(footnote continued on next page)

Timely applications for rehearing were filed by the Joint Parties, and by CFC. The Joint Parties incorporated by reference the Legislative Counsel of California Letter of April 28, 2008 opposing the Decision. Accordingly, they challenged the Decision on the grounds that: (1) AB 32 and SB 1368 do not provide the Commission with authority to establish the CICS; (2) the Commission exceeded its authority under the California Constitution; and (3) the establishment of the CICS is inconsistent with the statutorily established scheme for energy R&D related to electrical and gas corporations. The Joint Parties also requested an explanation regarding the administration of ratepayer funds.

CFC challenged the Decision on the grounds that: (1) the Commission exceeded its authority under the California Constitution; (2) the Commission unlawfully invaded a field which the Legislature has occupied; (3) the Decision interferes with CARB's authority to regulate GHG emissions; and (4) the surcharge is an unlawful tax. No responses were filed.

On September 23, 2008, the Governor signed the State budget, including trailer bill AB 1338 (Stats. 2008, ch. 760, effective immediately).⁴ AB 1338 contains language regarding the Commission's authority to authorize funds for establishment of the CICS.⁵

As explained below, as a result of the passage of AB 1338 we find it appropriate to vacate the Decision. We will direct the Energy Division to cease any

(footnote continued from previous page)

(commencing with Section 8340) of the Public Utilities Code. SB 1368 requires, among other things, that the Commission, through a rulemaking proceeding, and in consultation with the Energy Commission and CARB, establish a GHG emission performance standard for all baseload generation of load-serving entities, at a rate of emissions that is no higher than the rate for combined-cycle natural gas baseload generation. (Pub. Util. Code, § 8341, subd. (d)(1).)

⁴ The Governor approved AB 1338 on September 30, 2008.

⁵ On September 30, 2008, the Governor vetoed Senate Bill ("SB") 1762. SB 1762 would have authorized a California Climate Change Institute to be established by the University of California, subject to the general oversight of the Legislature.

efforts to review and approve utility advice letters filed for the purpose of implementing tariffs in connection with the Decision. We will also dismiss the applications for rehearing of Corrected D.08-04-039, as moot.

II. DISCUSSION

A. Summary Comparison of the Corrected D.08-04-039 and AB 1338

On April 24, 2008, we approved the Corrected D.08-04-039 authorizing establishment of the CICS. To fund the contemplated R&D grants, we approved ratepayer funding of \$60 million per year for 10 years to be collected via a new surcharge on electric and gas utility customer bills.⁶ The CICS would also be required to obtain non-ratepayer matching funds beginning in Year 5.⁷ R&D grant proposals without discernable ratepayer benefit, consistent with a Commission approved CICS Strategic Plan and Ratepayer Benefit Index, would not receive ratepayer funding.⁸

Our Decision provides surcharge exemptions for gas-fired electricity generators (gas charge exemption), and customers whose rates are capped under AB 1X and customers eligible for California's Alternative Rates for Energy ("CARE") program (from the electric and gas surcharge).⁹ Total commodity plus non-commodity residential electric rates for usage up to 130% of baseline would remain unchanged.¹⁰ We directed the utilities to allocate the additional revenues on an equal cents per kWh or cents per

⁶ See Corrected D.08-04-039, at pp. 6, 18-28.

⁷ See Corrected D.08-04-039, at pp. 9-10, 23, 73 [Ordering Paragraph Number 10].

⁸ See Corrected D.08-04-039, at pp. 22-23, 58 [Finding of Fact Numbers 9, 10] & p. 65 [Conclusion of Law Number 5].

⁹ Corrected D.08-04-039, at pp. 71-72 [Ordering Paragraph Number 4].

¹⁰ Corrected D.08-04-039, at pp. 71-72 [Ordering Paragraph Number 4].

Term basis,¹¹ and to hold collected funds to be paid out directly to each grantee and the CICS hub.¹²

We also established specific requirements with respect to the CICS's structure and governance.¹³ We would have retained oversight and control of the CICS by retaining authority to approve: certain appointments to the Governing Board and Executive Committee; the Strategic Plan; the annual budget; the annual report and external financial audit; the biennial external performance review; and various policies and protocols.¹⁴

On September 30, 2008, the Governor approved AB 1338. In pertinent part, AB 1338 provides:

SEC. 27. (a) The Public Utilities Commission shall not execute an order, or collect any rate revenues, in Rulemaking 07-09-008 (Order Instituting Rulemaking to establish the California Climate Institute for Climate Solutions), and shall not adopt or execute any similar order or decision establishing a research program for climate change unless expressly authorized to do so by statute.

(b) This section does not constitute a change in, but is declaratory of, existing law.

B. Effect of AB 1338

Passage of AB 1338 requires that we reconsider the applicability and continued viability of our Decision. We believe that in the absence of such explicit legislation, our Decision was lawful and within our authority. However, we recognize that our inherent and broad authority is limited when the Legislature acts to impose a

¹¹ Corrected D.08-04-039, at p. 72 [Ordering Paragraph Number 5].

¹² Corrected D.08-04-039, at pp. 71-72 [Ordering Paragraph Number 4].

¹³ Corrected D.08-04-039, at pp. 32-47 (including related attachments).

¹⁴ Corrected D.08-04-039, at p. 65 [Conclusion of Law Number 4].

specific limit on that authority or otherwise provides explicit direction regarding a particular matter.¹⁵

For this reason, we conclude that in this instance, AB 1338 controls to prohibit our authorization of funds to support the CICS. Accordingly, we believe the reasonable course is to vacate the Decision. Due to the effect of AB 1338, the applications for rehearing of Corrected D.08-04-039 are rendered moot and will be dismissed.¹⁶

Notwithstanding the need to take these actions, we disagree with the statement in AB 1338 that it “does not constitute a change in, but is declaratory of, existing law.” AB 1338 is not representative of the law at the time we originally authorized the CICS. Rather, it represents a new and explicit constraint on our authority to do so.

Our reading of the Legislative history for AB 1338 confirms our understanding that the Legislature intended only to require that we seek legislative approval prior to establishing any specific climate institute; it did not intend to preclude us for authorizing R&D funds that may be tangentially related to climate change in our management of various other programs.¹⁷

¹⁵ See e.g., *Southern California Edison Company v. Peevey* (“*Edison v. Peevey*”) (2003) 31 Cal.4th 781, 792; *PG&E Corporation v. Public Utilities Commission* (“*PG&E v. PUC*”) (2004) 118 Cal.App.4th 1174, 1199-1200.

¹⁶ In conjunction with the applications for rehearing, the Joint Parties and CFC also filed a Motion to Stay D.08-04-039. The Motion sought to postpone any rate impacts from the Decision until disposition of the applications for rehearing. The Motion for Stay is also rendered moot by the dismissal of the applications for rehearing.

¹⁷ See e.g., Legislative History for AB 1338, which states:

Institute for Climate Solutions: Requires that the Public Utilities Commission (PUC) to obtain legislative approval prior to establishing the Institute for Climate Solutions.

(Sen. Rules Comm., Off. Of Sen. Floor Analyses, 3d reading of AB 1338 (2008-2009 Reg. Sess.) as amended Sept. 15, 2008, p. 2.)

III. CONCLUSION

For the reasons stated above, we will vacate the Decision and dismiss the applications for rehearing of Corrected D.08-04-039, as moot.

THEREFORE, IT IS ORDERED that:

1. Corrected D.08-04-039 is hereby vacated.
2. The Energy Division shall cease any efforts to review and approve utility advice letters filed in connection with Corrected D.08-04-039.
3. The applications for rehearing of Corrected D.08-04-039 are dismissed as moot.
4. This proceeding, Rulemaking (R.) 07-09-008, is closed.

This order is effective today.

Dated November 21, 2008, at San Francisco, California.

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

Commissioner Grueneich reserves the right to file a concurrence.

/s/ DIAN M. GRUENEICH
Commissioner

Concurrence of Commissioner Dian M. Grueneich

I concur with the proposed Order to the extent that the Order vacates Decision 08-04-037, establishing the California Climate Institute for Climate Solutions (CICS Decision), and dismisses the Applications for Rehearing of that Decision.

However, I strongly disagree with including in this Order the three sentence analysis and conclusion regarding this Commission's interpretation of Section 27(b) in AB 1338:

“...[W]e disagree with the statement in AB 1338 that it ‘does not constitute a change in, but is declaratory of, existing law.’ AB 1338 is not representative of the law at the time we originally authorized the CICS. Rather, it represents a new and explicit constraint on our authority to do so.” (Order, p. 5)

First, this statement is unnecessary to the resolution of the applications for rehearing of the CICS Decision. We vacate the CICS Decision, rendering the applications moot. The question of whether this Commission had the authority in the past to create the CICS is not relevant to our future actions. As the Order points out in the next paragraph, state law now prohibits this Commission from taking similar action unless it has Legislative authorization. There is no policy or other purpose served by dicta “rejecting” the Legislature's interpretation of its own laws.

Second, I am not prepared to adopt the conclusion that the Commission has authority in a legal sense to “disagree” with the Legislature's interpretation of its own statutes. There is no explanation of what step this Commission is actually taking when it “disagrees” with a statute. This Commission does not have the authority to ignore, reject or refuse to comply with laws applicable to it and it is of no legal effect to make a statement of “disagreement.”

Third, parties to this proceeding have argued that this Commission does not have the legal authority to establish an independent entity and cede control over ratepayer funds to that entity. These parties point out that the Commission previously attempted to create an independent entity, the California Board for Energy Efficiency, just ten years ago. This Commission abandoned this effort due to serious concerns regarding the Commission's legal authority. In that case, the Commission sponsored legislation to give it the authority to establish the entity which was vetoed.

As stated in the Concurrence of Commissioner Bohn to the CICS Decision, which I joined, "This decision pushes the boundaries of our duty and our jurisdiction almost to the breaking point." In an April 28, 2008 letter, the Office of Legislative Counsel concluded that this Commission did not have the authority to adopt the CICS. The Office of Legislative Counsel found that while this Commission has broad authority over rates and services provided to ratepayers, this authority does not extend broadly to any matter that has some bearing upon regulated utilities. While there can be legitimate disagreement over whether decisions like the CICS falls within the scope of our authority, there can be no argument that our authority does have limits.

I thus disagree with including in our Order the above referenced sentences. The statements are a broad brush and entirely unnecessary interpretation of Section 27(b) of AB 1338. I support the result of the Order but do not support inclusion of this paragraph in the Order.

Dated November 21, 2008, at San Francisco, California.

/s/ DIAN M. GRUENEICH

Dian M. Grueneich
Commissioner