Decision 09-09-049 September 24, 2009

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application of the Division of Ratepayer Advocates and The Utility Reform Network for Rehearing of Resolution E-4227A Approving in Part and Denies in Part Southern California Edison's Request to Establish a Memorandum Account and Recover up to $30 Million in Costs For a California IGCC Study.	Application 09-04-006 (Filed April 3, 2009)

ORDER MODIFYING RESOLUTION E-4227A, AND DENYING REHEARING OF RESOLUTION, AS MODIFIED

I. SUMMARY

In Resolution E-4227A (or "Resolution"), we approved the request of Southern California Edison Company ("Edison") for a new memorandum account ("memo account") and to track up to $30 million in payments related to a Hydrogen Energy California ("HECA") study. The costs were to be tracked in a HECA memorandum account ("HECAMA") in two parts: $17 million in costs for Phase I, and $13 million in costs for Phase II. Furthermore, we denied Edison's request to recover funds through an advice letter, and limited the amount spent by Edison, subject to recovery through a formal application process.

On April 3, 2009, the Division of Ratepayer Advocates ("DRA") and The Utility Reform Network ("TURN") (or collectively, "rehearing applicants") filed an application for the rehearing of Resolution E-4227A. In this rehearing application, DRA and TURN allege that the Commission has violated the advice letter process established in General Order 96-B by permitting Edison to establish a memo account and record costs. (Rehrg. App., p. 1.) The application for rehearing also alleges that the Commission has violated the due process of interested parties by prejudging the outcome of any future application by Edison to recover funds, without notice and opportunity for

interested parties to be heard, and that the Resolution erroneously relied on information outside the record to approve of the memo account. (Rehrg. App., pp. 2-3.)

Edison filed a response in opposition to DRA and TURN's rehearing application on April 10, 2009. In its response, Edison argues that the rehearing application was not timely filed, and thus, the application for rehearing should be denied as untimely. (Edison Response to Rehrg. App., pp. 4-5.) We believe that the rehearing application was timely filed. Resolution E-4227A was mailed (i.e. issued) on March 4, 2009. (Resolution E-4227A, p. 1.) DRA and TURN's application was filed on April 3, 2009. The application was therefore timely filed within the statutory limit, thirty days later. (Pub. Util. Code, §1731(b).)

We have reviewed each and every allegation raised in the application for rehearing. We find no merit to any of these allegations. However, for the purposes of clarification, we will modify the Resolution in the manner specified below. Rehearing of Resolution E-4227A, as modified, is denied.

II. DISCUSSION:

A. The Commission did not violate the advice letter process by authorizing Edison to create a memo account.

The rehearing applicants allege that the Resolution inappropriately uses "mandatory language" and directs Edison to fund the HECA study, instead of simply authorizing Edison to make the choice to do so. (Rehrg. App., p. 2.) DRA and TURN further allege that the Commission has committed legal error by directing Edison to incur costs, and by permitting Edison to act by advice letter instead of undertaking a formal proceeding. (Rehrg. App., pp. 2-3.) For reasons discussed below, these allegations have no merit.

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1. Contrary to rehearing applicants' assertions, the Commission did not order Edison to incur $30 million in costs for the HECA study or grant recovery of the costs without requiring a formal application.

DRA and TURN argue that the Resolution uses language preventing Edison from exercising its discretion in funding the HECA study, and state that the Resolution obligates Edison to incur costs for Phase I of the study or risk being in violation of Commission orders. (Rehrg. App., pp. 1-2.) This argument has no merit.

Resolution E-4227A specifically authorizes Edison to create a HECAMA and record *up to* $30 million in costs, specifically limiting Edison to record *up to* $17 million during Phase I of the HECA study. (Resolution E-4227A, p. 17, Ordering Paragraphs 1-2.) The Resolution does not require Edison to spend exactly $17 million during Phase I, nor does it authorize (or as rehearing applicants allege, "guarantee") recovery of any or all of the money recorded in the HECAMA. (Resolution E-4227A, p. 12.) The Resolution repeatedly states that Edison must file a formal application to recover funds, and that the Resolution "does not prejudge the Commission's review of any subsequent SCE [Edison] application." (Resolution E-4227A, p. 2; see also, Resolution E-4227A, pp. 1-2, 7-8, 12-15.)

However, we note that Ordering Paragraph No. 2 of Resolution E-4227A could be subject to the incorrect reading given by DRA and TURN. (See Rehrg. App., p. 7.) Accordingly, we will modify this ordering paragraph so that it can not be read as requiring Edison to spend exactly $17 million on Phase I.

Therefore, the Resolution explicitly limits its scope to the creation of the HECAMA, and does not approve recovery of costs without a formal application. (Resolution E-4227A, p. 1.) Accordingly, the allegations raise by DRA and TURN have no merit.

2. The Commission has properly authorized Edison to act by advice letter.

DRA and TURN contend that we have erred by granting Edison's requests by advice letter, and should have instead rejected Advice Letter ("AL") 2274-E and required Edison to apply for the memo account by formal application. (Rehrg. App., p. 11.) DRA and TURN also claim that that Edison "sought approval of an action (funding of Phase 1 of the study) that the utility had not been authorized to seek by advice letter." (Rehrg. App., p. 8.) This is incorrect, as we previously authorized Edison to submit a Tier 3 advice letter to create and record costs in the HECAMA, and denied the portions of the advice letter which must be brought before us by application. (Resolution E-4227A, pp. 1-2.) Therefore, the Resolution does not violate the Commission's advice letter process, and DRA and TURN's request that Edison was required to submit its advice letter request by formal application is meritless.

Generally, a utility may use the advice letter procedure "[s]o long as the utility's action is . . . authorized by statute or Commission order."[1] Tier 3 advice letters, which are effective after our approval, include such matters as "a change that would result in an increase to a rate or charge or a more restrictive term or condition, which change has been authorized by statute or by other Commission order to be requested by advice letter." (General Order 96-B, Energy Industry Rules, Section 5.3.)

Edison's advice letter for our approval of the HECAMA is consistent with our instruction in D.08-04-038[2] for the filing of a Tier 3 advice letter. In D.08-04-038, the Commission authorized Edison's application to perform a feasibility study of a clean hydrogen energy plant. In order to encourage similar research, we instructed Edison to "seek opportunities to leverage the research authorized in this decision" by filing Tier 3 advice letters pursuing other research opportunities. (D.08-04-038, p. 33 (slip op.).)

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[1] *Fourth Interim Opinion Adopting Remaining General Rules and Industry Rules for Energy and Water as Revisions to General Order 96-A* ("*General Order 96-B Decision*") [D.07-01-024] (2007) ___ Cal.P.U.C.3d ___, p. 31 (slip op.).)

[2] *Opinion Authorizing Southern California Edison Company to Perform a Feasibility Study of a Clean Hydrogen Generation Plant* [D.08-04-038] (2008) ___ Cal.P.U.C.3d ___.

Edison says that, pursuant to this authorization, it filed AL 2274-E with a Tier 3 designation to request changes to its tariff schedules to establish a memo account to record and eventually recover costs for participation in the HECA study. (AL 2274-E, pp. 3 & 14; see also Exhibit SCE-1.)[3]

Edison's request for a memo account through the advice letter process was proper, and our approval of the memo account was appropriate. With the understanding that the advice letter process is intended to dispose of "utility requests that are expected neither to be controversial nor to raise important policy questions,"[4] we determined that Edison could appropriately request the HECAMA, consistent with D.08-04-038. (Resolution E-4227A, p. 15.) Acknowledging intervenor concerns that the $30 million requested by Edison would controversially commit ratepayer funds without evidentiary hearings, the Commission denied without prejudice Edison's request in AL 2274-E to recover funds, and instructed Edison to "seek cost recovery through the application process to allow all stakeholders the opportunity for a full vetting of the issues." (Resolution E-4227A, p. 12.)

Therefore, because Edison was properly authorized to seek action through a Tier 3 advice letter, and because we only approved the portions of AL 2274-E which were both authorized and non-controversial, we have acted according to our established advice letter process. (D.08-04-038, p. 29; Resolution E-4227A, p. 13.) As a result, DRA and TURN's allegations that the Commission has abused the advice letter process are without merit.

B. Interested parties have notice and opportunity to challenge a Commission decision regarding recovery of Phase I HECA costs.

DRA and TURN allege that the Commission has deprived intervenors of a "meaningful opportunity to challenge the decision to make Phase I payments [or] the

[3] References to "Exhibit" in this decision is to an exhibit accompanying the advice letter.

[4] General Order 96-B, Section 5.1.

specific amount for which rate recovery is sought." (Rehrg. App., p. 2.) These rehearing applicants claim that "the Commission has committed ratepayer funds for this expenditure regardless of any future application." (Rehrg. App., p. 7.) This allegation is incorrect, as the Commission explicitly refused to "guarantee reimbursement" of the HECAMA, and directed Edison to submit a formal application to recover funds, allowing intervenors the opportunity to challenge recovery of recorded costs. (Resolution E-4227A, pp. 12-13.)

First, we made it clear in Resolution E-4227A that we did not authorize recovery of the costs recorded in the HECAMA, and did not intend to consider this issue until Edison sought recovery through a separate, formal application. (Resolution E-4227A, pp. 12-13.) In fact, we stated that "[a]uthorization to establish a memorandum account and to track expenses in a memorandum account *does not automatically approve the recovery of these expenses*." (Res E-4227A, p. 12, emphasis added.) Therefore, DRA and TURN's assertion that we have already committed ratepayer funds is wrong.

Second, DRA, TURN, and any other interested parties will have notice and opportunity to contest reimbursement through Edison's application. The Resolution repeatedly asserts that Edison must file an application to recover expenses, and that "if there are disputed issues of material fact relevant to SCE's request, it will be possible to conduct an evidentiary hearing, if determined necessary." (Resolution E-4227A, p. 15.) Edison's response to the application for rehearing notes that it is "already complying with Resolution E-4227A and has filed Application (A.) 09-04-008,[5] seeking authorization to recover costs necessary to co-fund the HECA feasibility study." (Response to Rehearing App., pp. 3-4.) Both DRA and TURN are currently participants in proceeding A.09-04-008, so the contention that we have acted to deprive them of notice or opportunity to intervene is without merit. (See e.g., TURN Protest to A.09-04-008; DRA Protest to A.09-04-008.)

[5] *Application of Southern California Edison Co. for Authorization to Recover Costs Necessary to Co-Fund A Feasibility Study of a California IGCC with Carbon Capture and Storage* [A.09-04-008] (2009).

C. The claim that the Resolution is not supported by record evidence or is based on out-of-record evidence has no merit.

As discussed above, a utility is permitted to make requests by advice letter where the utility "has been authorized or required, by statute, by this General Order, or by other Commission order, to seek the requested means by advice letter." (Gen. Order 96-B, sec. 5.1 (1).) Edison was authorized by D.08-04-038 to file Tier 3 advice letters to pursue such plant feasibility research. (D.08-04-038, p. 21 (slip op.).)

Edison provided sufficient factual evidence in its advice letter to support the Commission's determination to approve the memo account. First, Edison demonstrated the reasonability and necessity of the costs it wishes to incur by breaking down its contributions to the HECA study and offering to submit "the entries to the HECAMA for Commission review" in a future proceeding to determine that they were reasonably incurred. (AL 2274-E, p. 3; see also, Exhibit SCE-1, pp. 1 & 30-34; Exhibit SCE-3.) Second, the structure of the HECA study showed that Edison had pursued co-funding by positioning itself as a minority participant in an ongoing HEI study. (AL 2274-E, p. 3; see also Exhibit SCE-2, pp. 5-12.) Third, Edison noted that the HECA study is a "first-of-a-kind study," and described the unique scope of the project as the first "commercial-scale generation facility in operation anywhere in the world that integrates IGCC with carbon capture and sequestration." (AL 2274-E, p. 4; see also Exhibit SCE-1, p. 24.) Finally, Edison demonstrated the relevance and necessity of the HECA study research in detail, describing the potential emissions reductions, environmental and economic benefits to California, and the HECA study's potential to enhance the application of other current research. (AL 2274-E, pp. 4 & 8; Exhibit SCE-1, pp. 3 & 7-9.) Therefore the Commission's decision to approve the memo account requested in AL 2274-E was supported by the record.

DRA and TURN, on the other hand, ignore this record evidence. Rather they make their argument simply by stating that "the Commission's reliance on the

American Recovery and Reinvestment Act (ARRA) and other factors, as reflected in the Commissioners' statements at the Commission meeting approving the Resolution, is not supported by record evidence."[6] (Rehrg. App., p. 5.) The rehearing applicants are wrong in claiming that the Commission relied on extra-record to approve the memo account. Contrary to their assertions, the determinations in Resolution E-4227A are supported by the evidentiary record as discussed above.

With respect to ARRA, the issue of federal funding was initially raised in AL 2274-E, in which Edison stressed the importance of the swift resolution of its participation in the HECA study to "successfully compete for federal funding and incentives." (AL 2274-E, p. 5.) Furthermore, federal funding opportunities were also discussed in the draft of the Resolution, which discussed cap-and-trade bills and the Warner-Lieberman Bill, and stated that Edison "requested authorization to fund the HECA to show its support, and the Commission's, so HEI could use the SCE funds as leverage in its request for [f]ederal funds." (Alternate Draft Resolution E-4227A, p. 5.) ARRA, like other federal funding opportunities, is a possible example of the type of federal funding mentioned in the advice letter and resolution that the Commission was already considering when reviewing Edison's advice letter.

Similarly, DRA and TURN take the Commissioner's statements at the February 20, 2009 meeting out of context, and attribute a specific intent to these words that is not supported in the Resolution. DRA and TURN claim that these statements during the Commission meeting "formed the basis of their decision." However, this claim has no merit. Commissioners' comments from the dais are not part of the decision that may be challenged in a rehearing application. (See Pub. Util. Code §310; see also *Order Modifying Decision (D.) 02-12-064 and Denying Rehearing of the Decision, as*

[6] Specifically, DRA and TURN claim that the resolution improperly relies on the American Recovery and Reinvestment Act ("ARRA"), President Peevey's comments about petroleum coke and carbon dioxide at the February 20, 2009 Commission meeting, and Commissioner Bohn's statement that his staff had independently researched the technology Edison hoped to promote. (Rehrg. App., pp. 9-11.)

Modified [D.03-08-072] (2003) __ Cal.P.U.C.3d __, at p. 22 (slip op.) [noting that "statements made by Commissioners at Commission meeting[s] are not the action of the Commission"].) Therefore, the Commissioners' statements at the February 20th meeting do not affect the determination to approve the memo account, and such determination is supported by the record.

III. CONCLUSION

For these reasons discussed above, DRA and TURN's application for rehearing of Resolution E-4227A, as modified, should be denied.

THEREFORE, IT IS ORDERED that:

1. Ordering Paragraph No. 2 of Resolution E-4227A is modified to read as followings: "SCE shall record no more than $17 million for Phase I of the HECA Study in the HECAMA."

2. Rehearing of Resolution E-422A, as modified, is hereby denied.

3. Application (A.) 09-04-006 is closed.

This order is effective today.

Dated September 24, 2009, at San Francisco, California.

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