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Decision 02-04-065 April 22, 2002

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking into Implementation of Public Utilities Code Section 390.	Rulemaking 99-11-022 (Filed November 18, 1999)

ORDER DENYING REHEARING OF DECISION (D.) 02-02-028 FILED BY SOUTHERN CALIFORNIA EDISON COMPANY

In this decision, we dispose of the application for rehearing of Decision (D.) 02-02-028 filed by Southern California Edison Company (Edison). In D.02-02-028 (Rehearing Decision), we denied the rehearing applications filed by various qualifying facilities and their associations (jointly, "QF Parties") of D.01-03-067. D.01-03-067 modified the transitional short-run avoided cost formula (SRAC Formula) for each utility to calculate its SRAC payments to qualifying facilities (QFs).[1] Among other things, D.01-03-067 established a procedure to replace the Topock index with the Malin index.

In the Rehearing Decision, we modified D.01-03-067 to clarify our decision to replace the Topock index with the Malin index. Rehearing of D.01-03-067, as modified, was denied. On March 11, 2002, Edison filed an application for

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[1] The transitional SRAC Formula was adopted in D.96-12-028 and is specified in Public Utilities Code section 390(b).

limited rehearing of the Rehearing Decision, contending that the modifications made to D.01-03-067 were not supported by record evidence.[2]

The California Cogeneration Council (CCC) filed a response to Edison's rehearing application on March 26, 2002.

Upon careful consideration of all the arguments presented, we conclude that Edison has failed to demonstrate good cause for granting rehearing. Accordingly, this order denies Edison's rehearing application.

I. Edison's Rehearing Application

A threshold issue in this case is whether Edison properly filed an application for rehearing. Normally, a party may not file an application for rehearing of a decision on rehearing. (Toward Utility Rate Normalization v. Public Utilities Com. (1978) 22 Cal.3d 529, 536-37.) The California Supreme Court has concluded that Public Utilities Code section 1756 implicitly appears to foreclose an application for rehearing of a decision on rehearing. (Id. at p. 537.) However, we have previously recognized that an exception may be made when "it is the first opportunity that any party has had to appeal this issue." (Ortega v. AT&T Communications (1997) [D.97-12-052] 77 Cal. P.U.C.2d 297, 298.) Edison argues that the same situation exists in this case because the Rehearing Decision adopted a new resolution to a contested issue when it added new findings of fact and conclusions of law. (Edison App., at p. 5.) Accordingly, it asserts that its rehearing application is properly filed.

We disagree. The modifications made to D.01-03-067 in the Rehearing Decision did not adopt a new resolution, since it did not change our

[2] On the same date that Edison filed its rehearing application at the Commission, three QF parties, the California Cogeneration Council (CCC), the County of Los Angeles (County) and the Independent Energy Producers Association (IEP) filed separate Petitions for Writ of Review of D.01-03-067 and D.02-02-028 in the California Court of Appeal. CCC and County filed in the Second Appellate District, and IEP filed in the Third Appellate District. On April 4, 2002, the California Supreme Court ordered IEP's Petition transferred to the Second Appellate District. The Commission, Edison, CCC, County and IEP have entered into stipulations to hold these three Petitions for Writ of Review, as well as a related Petition for Writ of Review filed by Edison on January 14, 2002, in abeyance until May 10, 2002.

decision to replace the Topock index with the Malin index. Instead, the modifications merely clarified our decision to use the Malin index. This is not a new issue, as parties have had prior opportunity to comment on the use of the Malin index.[3] Accordingly, Edison's rationale is not a basis for concluding that its rehearing application is properly filed.

While we disagree with Edison's rationale, we have concluded that Edison's rehearing application has been properly filed on different grounds. The Rehearing Decision is the second rehearing decision of D.01-03-067. The first rehearing decision of D.01-03-067, D.01-12-025, disposed of applications for rehearing filed by Edison and Pacific Gas and Electric Company. Edison had filed a timely Petition for Writ of Review of D.01-03-067 and D.01-12-025 in the California Court of Appeal, Second Appellate District, on January 14, 2002. Therefore, under the Public Utilities Code, Edison has already filed for rehearing and sought appellate review of its rehearing decision disposing of D.01-03-067.

There are no provisions for a party to seek appellate review of a second rehearing decision, which addresses different issues, of the same underlying decision. Indeed, section 1756 does not appear to permit such a challenge. Edison currently has a petition for writ of review of a rehearing decision disposing of D.01-03-067. There are no provisions in the California Rules of Court to permit a petitioner to amend its petition to add a new issue. Additionally, under the Public Utilities Code, Edison would be foreclosed from doing so, since it had not raised this specific challenge in its prior rehearing application. (Pub. Util. Code § 1732.) Consequently, Edison's only means of challenging the Rehearing Decision would be through an application for rehearing. Accordingly, Edison properly filed for rehearing of the Rehearing Decision.

[3] This is different than the situation in Ortega. In that case, the rehearing decision contained language interpreting federal legislation that had become effective after the close of the record in the proceeding. Therefore, parties had had no prior opportunity to comment on the federal legislation.

II. Evidentiary Support for Modifications Ordered in D.02-02-028

Edison asserts that the modifications to D.01-03-067 ordered in Ordering Paragraph 1 of the Rehearing Decision are not supported by record evidence. (Edison App., at p. 6.) First, it asserts that there is no evidence to support the statement "However, we decline to adopt [Edison's proposed alternative of using an index consisting of a 10/90 average of (1) the simple average of the three Topock border indices currently used in Edison's SRAC formula and (2) SoCalGas' monthly published Schedule G-CS Cost of Gas (WACOG)] as there is no evidence in the record to demonstrate that [it] is sufficiently accurate or robust as required by D.96-12-028." (Edison App., at p. 7.) Edison devotes substantial time in its rehearing application to explain why there is substantial evidence in the record supporting a finding that WACOG is "sufficiently accurate or robust as required by D.96-12-028." However, our conclusion was not with respect to WACOG alone, but rather to Edison's proposed index consisting of *10% Topock and 90% WACOG*. In its prior filings, Edison failed to provide any arguments why such an index would meet the requirements of D.96-12-028. It still provides no rationale in its rehearing application.

It would be unreasonable to conclude that Edison's proposed alternative could be considered sufficiently robust and accurate when it is based on an index (Topock) that we had determined was no longer robust. Indeed, Edison itself had reached this same conclusion. (Emergency Motion of Southern California Edison Company, filed Nov. 28, 2000, at pp. 10-13; Comments of Southern California Edison Company Concerning Joint Assigned Commissioners and Administrative Law Judges Ruling Dated December 1, 2000, filed Dec. 15, 2000, at pp. 3, 6.) Either the Topock index meets the requirements of D.96-12-028 or it doesn't. If it doesn't, then it should not be used in the SRAC Formula. There is no evidence to support a conclusion that while an index comprised of

100% Topock does not meet the requirement of D.96-12-028, an index which is comprised of some lesser percentage of the Topock index, such as the 10% proposed by Edison, does meet that requirement. Accordingly, we properly concluded that there was no evidence in the record to demonstrate that Edison's proposed alternate index was sufficiently accurate or robust as required by D.96-12-028.

Edison also appears to believe that the Commission must state more than one reason for not adopting its proposed index. (Edison App., at p. 9, fn. 6.) Specifically, it states that the Commission must expressly state whether the proposed index was rejected because it failed to comply with the requirements of section 390(b). However, there is no requirement that the Commission state more than one reason for reaching a certain conclusion, and Edison cites no authority to support its assertion. Since we determined that Edison's proposed index did not meet the robustness requirements of D.96-12-028, we did not need to consider whether the proposed index complied with the requirements of section 390(b).

Edison next disputes the Commission's statement in Ordering Paragraph 1 that the Malin index was sufficiently robust and that the Commission had not been presented with any evidence to conclude that this was no longer the case.[4] (Edison App., at p. 9.) Edison relies on two declarations made by its witness Mr. Fillmore as demonstrating that the Malin index was no longer robust. However, the purpose of the November 28 Fillmore Declaration is to discuss Edison's prior fuel procurement policy and the gas portfolio price Edison would pay for long-term gas contracts. (Fillmore Decl., Nov. 28, 2000, ¶2.) One of the

[4] CCC interprets Edison's rehearing application as also challenging the Commission's decision in D.01-03-067 to adopt the Malin index, and asserts that Edison is foreclosed from doing so. (CCC Response, at p. 3.) While we do not believe that Edison is raising such a challenge, we agree with CCC that Edison is foreclosed from raising any challenges of D.01-03-067 at this time. This rehearing decision only addresses challenges to the Rehearing Decision. As discussed previously, the use of the Malin index is not a new issue. If Edison had wanted to challenge the use of the Malin index in the modified SRAC Formula, it should have raised this issue in its rehearing application of D.01-03-067. (Pub. Util. Code § 1731(b).)

purposes of the December 15 Fillmore declaration was to "discuss the reason the recent Topock border postings are not bona fide market prices." (Fillmore Decl., Dec. 15, 2000, ¶ 2.) Neither of these declarations made any statements regarding the robustness of the Malin index, but rather made general references to the "California border." It is unreasonable to interpret such general statements as evidence that the Malin index is no longer robust. Additionally, while Edison asserts that the Malin index's "unprecedented levels" in November 2000 could not be attributed solely to the rise in gas prices in the producing basins, it has not provided any basis to lead the Commission to question the index's robustness. (Emergency Motion of Southern California Edison, filed Nov. 28, 2000, at p. 11.) Moreover, the September 1, 2000 ALJ ruling specifically asked parties to comment "on the reliability and validity of the current border indices for the Transition Formula for SCE, Pacific Gas and Electric Company (PG&E), and San Diego Gas & Electric Company (SDG&E) given the pricing issues identified in ORA's response." (Administrative Law Judge's Ruling Establishing Schedule to Reply to Responses on Petition to Modify Decision 96-12-028 of Southern California Edison Company and to Address the Validity of Border Indices, Sept. 1, 2000, at p. 1.) No parties raised comments questioning PG&E's continued use of the Malin index in its transition formula. Accordingly, Edison's assertions are without merit.

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Therefore **IT IS ORDERED** that rehearing of D.02-02-028 is denied.

This order is effective today.

Dated April 22, 2002 at San Francisco, California.

LORETTA M. LYNCH
President
HENRY M. DUQUE
CARL W. WOOD
GEOFFREY F. BROWN
MICHAEL R. PEEVEY
Commissioners