STATE OF CALIFORNIA ARNOLD SCHWARZENEGGER, *Governor*

PUBLIC UTILITIES COMMISSION

505 VAN NESS AVENUE

SAN FRANCISCO, CA 94102-3298

September 7, 2004

TO: ALL PARTIES OF RECORD IN RULEMAKING 01-08-028

Decision 04-09-026 is being mailed without the written dissent of Commissioner Loretta M. Lynch. The dissent will be mailed separately.

Very truly yours,

/s/ ANGELA MINKIN

Angela Minkin, Chief
Administrative Law Judge

Attachment

L/mal

Mail Date
09/07/04

Decision 04-09-026 September 2, 2004

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking to Examine the Commission's Future Energy Efficiency Policies, Administration and Programs.	Rulemaking 01-08-028 (Filed August 23, 2001)

ORDER DENYING APPLICATIONS FOR REHEARING OF DECISION 03-12-060

I. BACKGROUND

D.03-12-060 is an interim decision in R.01-08-028, a continuing proceeding examining and establishing rules for the Commission's future energy efficiency (EE) policies, administration and programs.[1] During this proceeding we have adopted rules concerning EE programs and criteria that public utilities and non-public utility entities alike should use when submitting EE proposals and applying for funding of those proposals. (See D.01-11-066.)[2] In August 2003, we issued D.03-08-067, permitting public utilities and non-public utility entities to submit EE program proposals for the

[1] D.03-12-060 was modified in part by D.04-02-059, mailed on March 3, 2004, approximately 72 days after D.03-12-060 issued, on December 22, 2003. (D.04-02-059 at 19, Ordering Paragraph Nos. 3-5.

[2] "Funding for electricity efficiency programs is secured from the Public Goods Charge ["PGC"], which is a separate rate component as provided for in Public Utilities Code sec. 381(a). These programs are further provided for by the Reliable Electric Service Investments Act, Public Utilities Code secs. 399-399.15, enacted in 2000. Section 399.4(a)(1) provides that 'it is the policy of this state and the intent of the Legislature that the commission shall continue to administer cost-effective energy efficiency programs authorized pursuant to existing statutory authority,' in order to, *inter alia*, reduce customer demand, and contribute to the reliable and safe operation of the electric grid…. For … electricity efficiency programs, the Commission is directed by Public Utilities Code sec. 399.8 to order SDG&E, SCE, and PG&E to collect [funding from] rates…. The Public Goods Charge for gas programs is secured by a surcharge levied on natural gas consumption as provided for in Public Utilities Code secs. 890-900." (D.02-04-063 at 1, fn 1.)

years 2004-2005. Those proposals were evaluated by our staff pursuant to the adopted criteria set forth in D.03-08-067.[3] D.03-12-060 approves funding for those EE proposals we selected for the 2004-2005 portfolio, which include statewide and local public utility and non-public utility EE programs. (D.03-12-060, as modified by D.04-02-059 at 19-20.) Prior to D.03-12-060, selected non-public utility entity EE programs selected for inclusion in our EE portfolio received PGC funding for local programs and statewide marketing and outreach; statewide EE programs were, however, restricted to public utility proposals. D.03-08-067 solicited EE program proposals from non-public utility entities as well as from public utilities.

D.03-12-060, among other things, discusses the evaluation process used in selecting EE programs for the PY 2004-2005 EE portfolio. However, because we determined that the dicta in D.03-12-060 might inadvertently mischaracterize the evaluation process employed by our staff, we clarified the process actually employed in D.03-12-060. (D.04-02-059 at 6-10.)[4] Attachment 3 to D.04-02-059 sets forth, with specificity, the allocation of the 2004-2005 PGC funds.[5] Attachment 2 to D.04-02-059 describes the programs chosen for the 2004-2005 portfolio. Attachment 1 of that decision sets forth the 2004-2005 PGC funded program budgets and energy savings targets.

Timely applications for rehearing of D.03-12-060 were filed by Women's Energy Matters (WEM), Residential Energy Service Companies' United Effort (RESCUE), and a joint application was filed by Consortium for Energy Efficiency, Inc., Efficiency Partnership, The Energy Coalition, Coalition of Utility Employees, Latino Issues Forum, League of Women Voters, National Association of Energy Services

[3] D.03-08-067 at 22-27. D.03-08-067 concerns the solicitation of EE proposals from public utilities and non-public utility entities for local and statewide EE programs for the 2004 and 2005 period. D.03-08-067 also assigned numerical values to the criteria to be used in the evaluation process.

[4] Among other things, D.04-02-059 also authorizes additional PGC funding for EE programs approved by that order and terminates "bridge funding" authorized by D.03-12-060.

[5] Although the funds were allocated in D.03-12-060, Attachment 3 is a correction to that decision. (D.04-02-059, Attachment 3.)

Companies, Natural Resources Defense Council, American Council for an Energy-Efficient Economy, Pacific Gas and Electric Company, San Jose Silicon Valley Chamber of Commerce, Silicon Valley Manufacturing Group, Southern California Edison Company, Southern California Gas Company, San Diego Gas & Electric Company, University of California, and California State University (hereinafter referred to as "Consortium et al.").[6] The Consortium et al., is comprised of parties and non-parties to this proceeding.[7] All of the applications for rehearing of D.03-12-060 were filed prior to the issuance of D.04-02-059.

We have reviewed each and every allegation of error presented by the applicants for rehearing and are of the opinion that good cause for granting rehearing has not been shown. Accordingly, we deny each of the applications for rehearing.

II. DISCUSSION

Before discussing the various allegations asserted by WEM and RESCUE we note that we have previously, in this proceeding, advised both parties of the requirements of Public Utilities Code section 1732 and Commission Rules of Practice and Procedure rule 86.1, which require applicants for rehearing to set forth their allegations of error with specificity.[8] (D.04-01-032.) Section 1732 provides:

> The application for a rehearing shall set forth specifically the ground or grounds on which the applicant considers the

[6] Attorneys for the Pacific Gas and Electric Company (PG&E) filed the joint application on behalf of the Consortium et al.

[7] Public Utilities Code section 1731 governs whom may apply for rehearing of a Commission decision or order. Section 1731(b) provides in pertinent part: "After any order or decision has been made by the commission, any party to the action or proceeding, or any stockholder or bondholder or other party pecuniarily interested in the public utility affected, may apply for a rehearing in respect to any matters determined in the action or proceeding and specified in the application for rehearing." The Consortium et al., have not stated that the non-parties are stockholders, bondholders or otherwise pecunarily interested for purposes of section 1731. Accordingly, the non-party members of the Consortium et al., have no standing to file an application for rehearing of D.03-12-060 and to that extent, the joint application is dismissed (with prejudice) as to those non-parties.

[8] Unless otherwise indicated, hereinafter all statutory references are to the Public Utilities Code and all references to "rule" are to the Commission's Rules of Practice and Procedure.

> decision or order to be unlawful. No corporation or person shall in any court urge or rely on any ground not so set forth in the application.

Rule 86.1 provides:

> Applications for rehearing shall set forth specifically the grounds on which applicant considers the order or decision of the Commission to be unlawful or erroneous. Applicants are cautioned that vague assertions as to the record or the law, without citation, may be accorded little attention. The purpose of an application for rehearing is to alert the Commission to an error, so that error may be corrected expeditiously by the Commission. (Emphasis added.)

The applications for rehearing of D.03-12-060 presented by WEM and RESCUE are filled with vague assertions without citation to the record or law. In many instances neither party actually asserts error. In D.04-01-032 we specifically advised WEM "… to carefully review the laws and rules concerning applications for rehearing and henceforth to abide by them." (D.04-01-032 at 13; see also, D.03-06-077.) Further failure of WEM to comply with relevant laws, rules and procedure may be viewed by us in the future as a refusal by WEM to abide by its obligation to treat the Commission respectfully and comply with relevant laws, rules and Commission directives.[9]

A. WEM

1. D.03-12-030 did not illegally exclude Community Choice Aggregators from participating in the 2004-2005 solicitation.

WEM alleges that Community Choice Aggregators (CCAs) were illegally excluded from participating in the solicitation to administer in the 2004-2005 funding

[9] Rule 1 provides: "Any person who signs a pleading or brief, enters an appearance at a hearing, or transacts business with the Commission, by such act represents that he or she is authorized to do so and agrees to comply with the laws of this State; to maintain the respect due to the Commission, members of the Commission and its Administrative Law Judges; and never to mislead the Commission or its staff by an artifice or false statement of fact or law."

cycle. (WEM application for rehearing at 2.) It further argues that D.03-12-060 "illegally compounds earlier unlawful decision numbers 03-07-034 and 03-08-067...." (*Id.*, at 3.) WEM's application for rehearing fails to provide sufficient detail with respect to these accusations. Essentially, WEM complains that by D.03-07-034, CCAs are treated as other non-public utility EE program applicants. It appears that WEM is attempting to attack D.03-07-034 and D.03-08-067 by its application for rehearing of D.03-12-060. This attack is untimely. (§ 1731, rule 85.)[10] Further, WEM did file applications for rehearing of both decisions. WEM's application for rehearing of D.03-07-034 was denied by D.04-01-032. WEM applied for rehearing of D.03-08-067 in an untimely manner. However, we accepted that application as a petition for modification, which we addressed in D.04-02-059. (D.04-02-059 at 11, fn 6.)

In D.03-08-067 we clarified that CCAs can apply for PGC funds in the same manner as any other party and would not be granted preferences. (D.03-08-067 at 15.) WEM has not established that D.03-12-060 errs in allocating funds pursuant to our stated policy. This issue is without merit.

In addition, WEM claims to "know of CCAs that wanted to apply but could not...." WEM fails to provide any evidence in support of this allegation. Further, no CCAs have applied for rehearing of D.03-12-060, nor written in support of WEM's application. WEM is an intervenor in this proceeding. It has provided no information about its entitlement to assert the positions, rights or other interests of CCAs or other parties to this proceeding and its status as an intervenor does not in an of itself accords it any such

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[10] Section 1731(b) provides in pertinent part: "…No cause of action arising out of any order or decision of the commission shall accrue in any court to any corporation or person unless the corporation or person has filed an application to the commission for a rehearing within 30 days after the date of issuance …."

Rule 85 provides: "Application for rehearing of a Commission order or decision shall be served on all parties and accompanied by a certificate of service. The application shall be filed within 30 days after the date of issuance, or within 10 days of issuance in the case of an order relating to security transactions and the transfer or encumbrance of utility property. For purposes of this rule, 'date of issuance' means the date when the Commission mails the order or decision to the parties to the action or proceeding."

rights.[11] WEM has not established that the Commission acted unlawfully, and as noted, it cannot use this application in an untimely attempt to attack earlier decisions. (§ 1731, rule 85.)

2. The Commission has the discretionary authority to determine the allocation of PGC funding.

WEM contends that by D.03-08-067 the Commission indicated its intention to limit funding for non-public utility EE programs to 20% or less of the total PGC funding available, and that this action is illegal. In D.03-08-067 we stated:

> ... TURN, SESCO, Local Power and WEM object to the limiting of non-utility funding in any way, based in part on the fact that such limitations would conflict with AB 117.… In essence, these parties propose that the Commission should allow any party to apply for all of the PGC funds the utilities collect pursuant to Pub. Util. Code § 381. [¶] We cannot agree with this reading of AB 117.... There is nothing in this section that would eliminate or in any way limit the Commission's authority to determine the allocation of PGC funding, just as AB 117 does not preclude action by this Commission to establish a separate nongovernmental entity to administer EE funding. Nor does anything in this section require that non-utility entities be permitted to apply for the total amount of PGC energy efficiency funds without limitation. (D.03-08-067 at 12.)

WEM has not established that our analysis of AB 117 errs. As discussed above, it is too late for WEM to challenge D.03-08-067. (§ 1731, rule 85.) Further, the allocation of portions of the PGC funds among the public utilities and non-public utility parties has been an on-going Commission policy. By D.01-11-066, the Commission:

[11] WEM has never claimed, nor do the documents it has filed to date in this proceeding support, that the PG&E customer it represents is a CCA. Thus, WEM has not established that it is an aggrieved party authorized to complain on behalf of CCAs on the issue of participating in the solicitation. (See e.g., *Camp Meeker Water System v. Public Utilities Com.* (1990) 51 Cal.3d 845, 851.)

> … set aside $100 million of the Public Goods Charge (PGC) gas and electric funds available in 2002 and 2003 for non-utility programs. This constitutes approximately 20% of the overall 2002 budget for energy efficiency programs, and approximately 65% of the funding for local programs. In addition, third parties (but not utilities) may apply for a second year of funding – during PY 2003 – for programs they wish to run until December 31, 2003. (D.01-11-066 at 66.)

WEM has not established that the Commission's policy is prohibited by AB 117 or otherwise unlawful or that D.03-12-060 otherwise errs on this issue.

WEM further argues that D.03-12-060 encourages preferential treatment for utility programs and partnerships between utilities and other entities. WEM argues that: "all EE funds from the Public Goods Charge should have been available for any party to apply for …." This is the same argument it already presented to us in comments prior to the issuance of D.03-08-067 and in its application for rehearing of D.03-07-034.[12] We addressed WEM's application for rehearing of D.03-08-067[13] in D.04-02-059.[14] With respect to the current allegation, aside from asserting that AB 117 should not be interpreted as the Commission has interpreted it, WEM has not established any evidence supporting its contention. The issue is without merit.

3. There is no evidence supporting WEM's allegation that the staff failed to follow the adopted criteria in choosing EE proposals.

WEM asserts that the staff failed to award funds according to the adopted criteria and requests "an investigation of who directed the staff to take actions to award

[12] In its application for rehearing of D.03-12-060 WEM references "the August decision" (presumably D.03-08-067).

[13] See Discussion Section I.A, *supra*.

[14] See D.04-02-059 at page 12.

funds to some applicants who did not meet minimum criteria and deny awards to others...." (WEM application for rehearing at 5.)[15] The allegation is unfounded.

In D.01-11-066 we adopted criteria for evaluation and selection of EE proposals. (D.01-11-066 at 5-7; see also, D.02-05-046 at 13-15.) We assigned numerical scores to each of seven initial criteria. At that time we announced:

> The goals and objectives of the Commission's energy efficiency programs are listed below, in order of importance. The Commission will select a portfolio of programs consistent with these policy goals and objectives, while ensuring that the portfolio is cost-effective, provides comprehensive market coverage, and falls within specified budget parameters. The Commission will develop this portfolio for PY 2002 by a combination of utility and non-utility programs to be selected according to the process described in this decision. When evaluating program proposals for 2002 and future years, the Commission will determine how well each utility and non-utility program proposal meets these goals and objectives. In doing so, the Commission will use the point values listed beside each objective to rank each proposal. The point values next to each objective represent the maximum possible score for each objective. A perfect score would be 100 points. (D.01-11-066 at 4.)

By D.03-08-067 we "redefine[d] the process for awarding funding to various types of entities to implement 2004-05 EE programs funded by the "Public Goods Charge" on customer[s'] bills." (D.03-08-067 at 7.) D.03-08-067 established primary and secondary criteria and allocated points to both criteria. (D.03-08-067 at 24-26.) By D.03-08-067 we instructed our staff to evaluate statewide and local EE proposals pursuant to that decision's directives and to provide a recommended portfolio design for our ultimate approval. (*Id.*, at 25-26.)

[15] WEM errs in contending that the staff awarded funds. While the staff may recommend funding certain proposals, ultimate awards are authorized by order of the Commission.

WEM contests the selection method actually employed by the staff, and challenges its lawfulness. By D.04-02-059 we stated that D.03-12-060 may have inadvertently caused some confusion regarding the scoring/evaluation process actually employed and we clarified the process actually used. (D.04-02-059 at 6-10.) As we stated in D.04-02-059, in Conclusion of Law No. 10:

> D.03-08-067 did not establish numerical scores as a minimum threshold for approval or denial of program proposals. D.03-08-067 employed a two-phased evaluation process that applies numerical scoring in the primary phase, which varies in each funding cycle based upon the number of applicants and the amount of funding available, and a certain level of discretion in the second phase to ensure the Commission's directives are met to achieve a balanced portfolio of energy efficiency programs. (D.04-02-059 at 17.)

The overall evaluation method employed by D.03-12-060 was quite similar to that employed in D.02-05-046 and D.01-11-066. (Although D.03-12-060 awarded PGC funding to non-public utility entities' local and statewide EE proposals, whereas both D.02-05-046 and D.01-11-066 awarded PGC funding to non-public utility local EE programs only.) WEM has not shown that D.03-12-060 is unlawful on this point, or that an investigation is warranted. The issue is without merit.

4. WEM Has Not Demonstrated That The Scoring Process Was Erroneous.

WEM argues that we failed to make the scoring process fully transparent; however, it does not actually allege error. WEM complains that EE proposal applicants received a "form letter with their overall scores rather than scores on individual criteria, making it impossible to determine what the Commission saw as a problem with their proposals, and therefore impossible to correct." (WEM application for rehearing at 6.) WEM fails to state whether it received any such letter and whether it has been harmed by such. WEM references text from a motion filed by SESCO on January 14, 2004 demanding, among other things, release of scores, but provides no other information

concerning that motion, including whether WEM supports SESCO's motion and if so, why. (*Id*.)[16] Thus, it is unknown whether WEM is raising a policy issue or whether it is alleging D.03-12-060 errs on this point. WEM's argument is so vague and unspecific that it is not at all clear that WEM is alleging error. WEM has not demonstrated error.

5. WEM's request for the imposition of a "remedy" if the circumstances change is without merit.

WEM claims that at the time D.03-12-060[17] issued[18] its application for rehearing of D.03-07-034 was pending and thus, if the Commission adopted its arguments, or a court did at a later date, "Community Choice cities should still have an opportunity to apply for funds and administer a program in the 2004-2005 cycle." (WEM application for rehearing at 6.) The Commission issued D.04-01-032, the decision denying WEM's application for rehearing of D.03-07-034, on January 8, 2004. WEM filed its application for rehearing of D.03-12-060 on January 20, 2004--twelve days after the Commission denied its application for rehearing of D.03-07-034. WEM knew, or should have known at the time it filed its application for rehearing of D.03-12-060, that its application for rehearing of D.03-07-034 was denied and to that extent, its argument is disingenuous. In any event, its request is not an allegation of error (§ 1732; rule 86.1) and aside from WEM's assertion that it is a proposed remedy, is another instance of WEM raising a policy issue. Further, as discussed herein, by D.03-08-067 we stated that CCAs would not be treated differently in this cycle. (D.03-08-067 at 15.) WEM has not established error and its argument is without merit.

[16] SESCO's January 14, 2004 motion was denied by D.04-02-059 at 17, Conclusion of Law No. 6.

[17] Although WEM actually references D.03-13-060 in its application, we treat the reference as a typographical error.

[18] We approved D.03-12-060 at our meeting of December 18, 2003 and mailed it on December 22, 2003.

6. WEM's renewal of its December 2002 motion and its underlying argument are without merit.

WEM renews arguments made in its December 2, 2002 motion, which was denied by ruling of the presiding Administrative Law Judge (ALJ) on March 19, 2003 and vaguely references its "comments on the workshop."[19] Although WEM fails to clarify what comments it has in mind, we take this opportunity to inform WEM that some of its filings in this proceeding are comprised of frivolous and unprofessional characterizations premised on hearsay, speculation, vague assertions and accusations that are not grounded in any evidence of record or law. (E.g., WEM's December 5, 2003 "Pre-workshop Statement on Customer Needs" at 1; WEM's December 8, 2003 "comment of the draft interim opinion selecting 2004-5 programs and studies" at 3.) We cannot guess what an applicant for rehearing has in mind, nor do we countenance screed. As we have stated *supra*, WEM must comply with section 1732 and rule 86.1. WEM is on notice that henceforth it shall maintain professional discourse in its dealings with the Commission, as required by rule 1. WEM's allegations are without merit.

B. RESCUE

1. RESCUE has not established that the program funding allocations for IOU programs and for non-IOU programs is contrary to AB 117 or otherwise erroneous.

RESCUE declares that D.03-12-060 "cannot lawfully implement a predetermined percentage of funds to IOUs, even if the Commission states [in D.03-08-

[19] WEM does not explain why it is revisiting this issue now—so long after the motion was denied. WEM also references the October 8, 2003 workshop in this proceeding and infers illegal behavior without providing any specific information or evidence. With respect to its "comments," WEM fails to specify whether it is referencing a particular filing, a discussion that took place in a workshop, a particular date, or something other.

067] that it is not an absolute limit." (RESCUE application for rehearing at 2.)[20] In effect, RESCUE is challenging D.03-08-067 because there is actually no discussion of the percentage of funding allocations set aside for IOUs and non-IOUs in D.03-12-060. RESCUE did not apply for rehearing of D.03-08-067 and the challenge is untimely. (§ 1731, rule 85.) In D.03-08-067 we stated:

> …[T]his order changes existing policy and practice or articulates the continuation of existing policy and practice as follows:
>
> We will consider using our funding levels of 70% of PGC funding allocated to statewide utility programs, 10% to statewide marketing and outreach and evaluation, measurement and verification and 20% allocated to other non-utility programs, with some flexibility depending on program proposals…. (D.03-08-067 at 2.)

Further:

> This order does not, as suggested by some parties, eliminate or in any way limit the Commission's authority to determine the allocation of PGC funding, just as AB 117 does not preclude action by this Commission to establish a separate non-governmental entity to administer EE funding. Nor does AB 117[] require that non-utility entities be permitted to apply for the total amount of PGC energy efficiency funds without limitation.
>
> This order seeks to maintain continuity and the stability of currently successful programs to enable the Commission and interested parties to focus on developing of [sic] an integrated energy efficiency policy framework, including integration of EE programs with procurement activities and settling the question of long-term success of California's energy efficiency

[20] Contrary to the requirements of section 1732 and rule 86.1, RESCUE provides no support for its contention.

> programs. In addition, stability and continuity is of great importance because any major shift from current practice in the short-term could disrupt our ability to carry out integrated resource planning. (D.03-08-067 at 4.)

In addition, D.03-08-067 states:

> As we learn from the experiences of non-utility programs, we will have data and information available to more accurately access the value of competitive opportunities for funding. Moreover, we do not feel it is prudent to radically change our policies and procedures from the 2003 solicitation as any major disruption could halt the substantial progress we have made so far…. (D.03-08-067 at 14.)

The actual dollars of PGC funds allocated to the IOUs and non-IOUs for PY 2004-2005 are set forth in the table at page three of D.04-02-059, which modifies, in part, D.03-12-060. Non-public utility programs were allocated a total of $99,389,399 of PY 2004-2005 PGC funds in D.03-12-060. This amount is in keeping with D.03-08-067. (D.03-08-067 at 13.) RESCUE vaguely hints at problems in D.03-12-060 but never specifically articulates actual errors or provides support for its position. RESCUE has not presented a timely challenge to D.03-08-067 and its challenge to D.03-12-060 on this point is ineffective. (§§ 1731; 1732; rules 85 and 86.1.)

RESCUE also contends that the different funding levels indicate that the program proposals were treated differently. However, this is an an unfounded conclusion. RESCUE's remaining argument is merely conjecture based on its conclusion. It provides no other information regarding this allegation. RESCUE's assertion is not borne out by the decision, wherein we stated that the programs were evaluated based on the established criteria. While nothing in AB 117 concerns funding levels for various EE program providers, RESCUE argues that even if the Commission has not allocated an absolute amount of funds for IOU programs, it must have created "some sort of limit, and any such limit is contrary to AB 117." (RESCUE application for

rehearing at 2.) RESCUE's argument is vague and it fails to provide support for its assertions. Nothing in AB 117 supports RESCUE's allegation.

Additionally, RESCUE alleges the setting aside of a portion of PGC funds for IOUs is "potentially a violation of federal antitrust law."[21] RESCUE fails to allege any specific antitrust injury it has sustained. Without explaining its point, RESCUE asserts that allocating a portion of funds for IOUs, "regardless of the quality of non-utility proposals would, on its face, appear to be a restraint of trade forbidden by federal antitrust law." (RESCUE application for rehearing at 2.) RESCUE mentions a 1981 law review article by Phillip Areeda, entitled "Antitrust Immunity for 'State Action' after Lafayette," 95 Harvard Law Review, but provides no discussion of the article.[22] RESCUE does not explain why funding IOUs' qualified EE programs is a restraint of trade nor why such funding "appears" to be forbidden by federal antitrust law.[23] RESCUE references "state action" on page 2 of its application for rehearing, but does not clarify whether it believes D.03-12-060 is an example of state action. RESCUE's argument is too vague to inform us whether it is arguing that D.03-12-060 constitutes state action.[24] (Although RESCUE

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[21] RESCUE references "comments filed earlier in this docket," but does not provide whose comments it refers, nor any dates, or other means of comprehending the relevance of the reference. The reference is too vague and unspecific to be intelligible. RESCUE does not allege violation of the Cartwright Act, Business and Professions Code section 16700, et seq.

[22] RESCUE provides: "The acts of regulators which restrain trade can be found in violation of federal antitrust law. The 'state action' exception to this applies only to those acts of state agencies that are fully and expressly required by state policies adopted by the Legislature. See Phillips Areeda, *Antitrust Immunity for "State Action" after Lafayette*, 95 Harvard Law Review 435 (1981). We are not aware of any California statute which would support the setting aside of [s]ection 381 funds for the utilities, particularly after enactment of AB 117." (RESCUE application for rehearing at 2-3.)

[23] RESCUE never states that it is alleging an actual legal error. Rather it raises the "potential" for error. There is no way of knowing what RESCUE has in mind in arguing that D.03-12-060 may potentially violate federal antitrust law. Like WEM, RESCUE fails to either provide coherent, intelligent allegations of legal error in D.03-12-060 or support its arguments with relevant legal authority. Section 1732 and rule 86.1 require an applicant for rehearing to present its issues to the Commission with specificity. RESCUE has failed to do so.

[24] RESCUE asserts that in allocating the funding, "the Commission is acting in a regulatory role, not in a proprietary role." (*Id.*) The statement is nothing more than a vague conclusion. RESCUE does not provide insight as to its relevance. Whether the reference is to be used in conjunction with its later state action argument is unclear.The Commission is a regulatory agency, charged with regulating public

ignores section 399.4, the statute is relevant to the issue since it requires the Commission to "continue to administer cost-effective energy efficiency programs authorized pursuant to existing statutory authority.") RESCUE has not shown that we are not empowered to set aside funds specifically for IOUs. Section 381 specifically requires the Commission to allocate section 381 funds to EE and conservation programs. It is within our discretion to select appropriate programs. RESCUE cites no law in support of its general assertion of antitrust violation and the allegation is without merit.

RESCUE has not shown that we acted unlawfully in allocating a portion of PGC funds for use by qualified IOU EE programs during the 2004-2005 period, or that such action constitutes a restraint of trade in violation of federal antitrust law. While RESCUE may not be not "aware of any California statute which would support the setting aside of electric utility ratepayer [s]ection 381 funds for the utilities[']" EE programs,[25] its lack of awareness does not establish error by the Commission.[26]

RESCUE additionally argues that setting aside PCG funds for IOU EE programs discriminates against minority organizations and contractors. (RESCUE application for rehearing at 3.) RESCUE does not establish that it is a qualified minority organization that has been injured, nor does it allege that any specific minority organization or contractor has been injured. RESCUE's argument that allocation of 80%

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utilities and is acting in a regulatory role. In this instance, the Legislature has directed the relevant public utilities to collect funds from their ratepayers pursuant to section 381 (for electric utilities) and to hold those funds in special utility accounts for use in energy efficiency and conservation programs approved by the Commission. RESCUE does not explain what it means by, or the relevance of, its parenthetical comment that the Commission would act in a proprietary role if it were spending money from the state's treasury. The Commission is not acting in a proprietary role in this proceeding, since it is not the proprietor of the funds. Moreover, the funds at issue are ratepayer funds and the electric utilities, pursuant to section 381, are acting as trustees of those funds. RESCUE's contention is vague and unsupported, contrary to the requirements of section 1732 and rule 86.1.

[25] That statute specifically requires the Commission to "order the respective electrical corporations to collect and spend these funds … [on, among other things,] … [c]ost-effective energy efficiency conservation activities…." (§ 381(c)(1).)

[26] It should also be noted that section 701 accords the Commission broad authority to "… do all things, whether specifically designated in this part or in addition thereto, which are necessary and convenient in the exercise of … [its] power and jurisdiction."

of the PGC funds for qualified public utility EE programs limits the opportunity of such organizations and companies to secure a representative appears to be a policy argument. RESCUE provides no details regarding what percentage of EE proposals are submitted by minority or veteran organizations or, of that, what percent are qualified. Nor does RESCUE show what percent of minority or veteran programs are selected. RESCUE's reliance on its assumption of the possible rationale employed by the University of California system since 1960 regarding minority student enrollment is irrelevant to this proceeding.[27] The example is not well taken. The public interest in continuing qualified EE programs (if that is indeed what RESCUE takes issue with) that have proven to meet the Commission's EE and conservation goals is not akin to the state's interest in diversity among its state university students. RESCUE's allegation is vague and it has failed to establish legal error..

Finally, RESCUE argues that setting aside a portion of PGC funds for electric investor owned utilities (IOUs) "makes state and municipal agencies subservient to the IOUs." (RESCUE application for rehearing at 3.) RESCUE contends that the programs of such agencies that are selected for the portfolio must contract with an IOU "which has oversight responsibility," over the agencies' program activities, thereby rendering the agencies subservient to the IOUs and creating "another conflict of interest in the administration of PGC funds."[28] RESCUE does not provide that it has authority to raise issues on behalf of state agencies or municipal governments, nor is it likely that RESCUE has standing to do so. (See e.g., Govt. Code § 12511, which vests such authority over state matters in the State Attorney General.) No state agencies or municipalities have alleged error in D.03-12-060. In this instance, it is unclear what agencies RESCUE has in mind or on whose behalf it is arguing. In any event, RESCUE

[27] RESCUE mentions the phrase "continuity rationale" but does not explain what it means by it. Later in its application for rehearing RESCUE takes issue with IOU program extensions. It is unclear whether by its use of the term "continuity" it is referencing IOU program extensions, or something other. The allegation is too vague and thus, without merit.

[28] RESCUE does not provide what other conflicts of interest it is asserting.

has not established that D.03-12-060 "[r]equir[es] the governmental agency to be subservient to the IOU in order to receive its energy efficiency program funding…." RESCUE presents unfounded conclusions without any showing of legal error.

2. RESCUE has not established that the Commission applied the evaluation criteria erroneously.

RESCUE appears to be challenging our decision in D.03-08-067 to permit utilities to submit proposals that would extend their current EE program offerings for two years, if such programs satisfy our public policy objectives for evaluating EE programs. D.03-08-067 issued on August 26, 2003, and challenges to that decision are untimely. (§ 1731; rule 85.)

In addition, RESCUE claims that D.03-12-060 implements evaluation criteria for IOU proposals that are different from the criteria applicable to non-IOU proposals. It further contends that PGC funding was awarded to IOU programs that it alleges received "low scores, while at the same time … [the Commission] rejected non-utility programs with higher scores." (RESCUE application for rehearing at 1.) For reasons discussed *supra* the allegation is without merit.

RESCUE asserts that awarding funding to "the IOUs with low scores," is a fundamental violation of due process and fair competition." (RESCUE application for rehearing at 1.) RESCUE provides no law in support of its general assertion. RESCUE has not articulated how it believes D.03-12-060 violates due process or fair competition.

In D.04-02-059 we acknowledging that certain language in D.03-12-060 may be confusing, and clarified D.03-12-060 accordingly. Beginning at page 6, D.04-02-059 provides:

> …In D.03-12-060, we have strived to create a transparent process for the evaluation of program proposals. Such transparency includes the task of explaining to program proponents how their proposals will be judged. To this end, we have maintained the level of discretion the Commission has used in the past while simultaneously clarifying the

> scoring criteria. Our objective has been to minimize subjectivity in developing a successful statewide energy efficiency program portfolio that serves many competing objectives.

Ultimately, D.04-02-059 provides that "D.03-12-060 did not create a minimum scoring criteria…." (*Id.*, at 9.) RESCUE has failed to establish otherwise. The allegation is without merit.

Additionally, RESCUE takes issue with the criteria applied to IOU program extension proposals, contending that the criteria are undefined and that D.03-12-060 did not clarify "whether proposed IOU program extensions were judged on the same criteria and were ranked in competition with the non-utility programs." (RESCUE application for rehearing at 4.) In numerous past decisions in this proceeding the Commission has articulated the public interest in continuing successful EE programs.[29] To that end, D.03-12-060 provides:

> This decision supports the goals established in D.03-08-067 in which this Commission emphasized program continuity and stability of energy efficiency funding while the Commission considers establishing long-term statewide goals, new measurement and evaluation mechanisms, and potential program structure as called for in the Energy Action Plan. []

> The programs we fund today build on past successes and seek to incorporate new ideas and technologies where possible as part of a larger effort to reduce the per capita use of electricity in California, reduce costs, and improve the electric system's reliability for California customers. Therefore, we authorize continuation of certain utility programs that we approved in 2003. We continue funding for existing statewide marketing and outreach efforts that provide coordination with private

[29] One of our oft-stated goals in this proceeding is to: "Award funding to entities and programs that are most likely to fulfill established energy savings and public policy goals, and program evaluation criteria." (D.03-12-060 at 6.)

> sector energy efficiency programs and energy efficiency messages to consumers through mass-market advertising campaigns, capitalizing on the success of the state's Flex Your Power campaign.
>
> Furthermore, this decision supports the emphasis on integrated resource planning called for in SB 1389, AB 58, and CPUC D.02-10-062 by facilitating integration of procurement-funded energy efficiency programs with other resource acquisition and demand reduction decisions. At the same time, this decision also supports the goals of promoting innovation in energy efficiency programs by providing maximum flexibility in administration of new energy efficiency resources available through utility procurement programs. (D.03-12-060 at 2-3.)

Further, as we stated in D.04-02-059:

> Consistent with the intent of D.03-12-060, all programs for which funding is awarded today are subject to the evaluation, measurement and verification procedures and all other reporting, administrative and contracting requirements adopted in D.03-12-060. Parties implementing the proposals funded in today's order shall refer to that order and comply with its requirements. (D.04-02-059 at 10.)

RESCUE has not established that we have erred on this issue.

In addition, RESCUE renews its argument that the Commission has misinterpreted section 381.1 because status as an IOU is not a criterion set forth in that statute with respect to the issue of who can become an administrator of EE programs. RESCUE does not provide authority in support of this argument. Nothing in section 381.1 in particular, or in AB 117, even suggests that IOUs may not be administrators of EE programs. Without providing any support for its argument, RESCUE declares that the decision "violates AB 117 because it implemented significant preferences for the IOUs in the allocation of PGC EE funds and failed to allocate evaluation points that correspond to the criteria adopted into law by AB 117." There is no merit to RESCUE's allegation.

3. Additional allegations of discrimination against non-public utilities.

RESCUE asserts that D.03-12-060 discriminates against non-public utility entities because such entities are not permitted to extend their existing program using 2004-2005 PGC funding. Pursuant to a July 3, 2003 Assigned Commissioner's ruling, the issue of extending public utilities' statewide and local programs for an additional two years (through the end of 2005) was introduced. (D.03-08-067 at 18-19.) D.03-08-067 determined that public utilities should be permitted to propose extensions of their EE programs for the additional two years but not on an automatic basis. (*Id*., at 19.) To the extent RESCUE is challenging D.03-08-067 its challenge is untimely. (§ 1731, rule 85.)

RESCUE also asserts that under AB 117, IOU and non-IOU programs should have the same opportunities for extension of existing programs. RESCUE does not discuss how AB 117 supports its claim. RESCUE does not allege any harm suffered by non-public utility entities whose programs were or were not extended. Nothing in AB 117 concerns this issue and as discussed above, the allocation of funds is a matter within the Commission's discretion. Further, neither D.03-12-060 nor D.03-08-067 addressed the issue of extensions for non-public utility EE programs. Therefore, this issue now presented by RESCUE was not a material issue in this proceeding.

Next RESCUE contends that D.03-12-060 discriminates against some non-public utility entities, but not others, arguing that the decision grants a "preference to any project proposed by a partnership of an IOU and a local government…." (RESCUE application for rehearing at 5.) RESCUE cites page 15 of the decision, in which the Commission "affirm[s] our position in the July 3 ACR that we strongly encourage proposals from municipalities and local governments that would seek to partner with the utilities…." RESCUE's allegation appears to be based on an assumption that the quoted sentence supports its preference theory, because it fails to provide any evidence of the alleged preference and provides nothing more than conclusory statements about AB 117. The statement does not grant a preference.

RESCUE infers, without actually proving that any preference was in fact granted, that a preference was granted. Based on that unfounded inference RESCUE jumps to its next premise that "[t]o the extent that partnerships between local government and IOU's were granted preference over partnerships between local government and non-utilities, D.03-12-060 violated the provisions of AB 117…." (*Id*.) RESCUE does not say why. RESCUE concludes this assertion by claiming that "[t]his discrimination also runs afoul of the Commerce Clause of the U.S. Constitution …." (*Id*., at 5.) RESCUE cites, but does not discuss, *Associated Industries of Missouri v. Lohman* (1994) 511 U.S. 641, 646-647, and *Oregon Waste Systems, Inc. v. Department of Environmental Quality of Ore.* (1994) 511 U.S. 93, 98, for the proposition that "[t]he U.S. Constitution does not allow state regulation to favor penalize [sic] companies because of their interstate nature." (RESCUE application for rehearing at 5.)[30] RESCUE provides no argument or other discussion concerning why the cited decisions are applicable. As discussed above, section 1732 and rule 86.1 require parties to provide allegations of legal error, not vague assertions. The argument offered by RESCUE is based on unfounded assumptions and impermissible inferences and fails to adequately inform the Commission what about D.03-12-060 it believes is erroneous. The allegation is entirely without merit.

[30] *Associated Industries of Missouri v. Lohman, supra*, 511 U.S. 641, concerns a use tax that applied to all sales of goods purchased outside of Missouri and that were stored, used, or consumed within the state. The tax did not apply to sales of goods occurring within the state. This resulted in a discriminatory treatment of goods in interstate commerce, which is prohibited by the Commerce Clause. In *Oregon Waste Systems, Inc. v. Department of Environmental Quality of Ore., supra,* 511 U.S. 93, Oregon imposed a higher fee on the in-state disposal of waste imported from other states than for disposal of waste generated in-state. The U.S. Supreme Court found that Oregon's surcharge is facially invalid under the negative Commerce Clause. Because RESCUE provides no discussion of the applicability of either of these cases to the underlying proceeding there is no adequate way of examining RESCUE's allegation. Nothing in D.03-12-060 suggests, and RESCUE has not established, that the programs funded or the allocation of overall funds violates the Commerce Clause.

4. RESCUE fails to establish that public utilities are prohibited from receiving funding for EE programs under AB 117.

RESCUE reasserts an argument it raised in its application for rehearing of D.03-07-034, that AB 117 does not permit public utilities to act as administrators. RESCUE's challenge to D.03-07-034 is not timely. (§1731, rule 85.) In any event, contrary to RESCUE's assertion, it is immaterial that status as a utility is not a criteria set forth in section 381.1 and to that extent, RESCUE's contention is without merit. Section 381.1(a) provides in pertinent part:

> … In determining whether to approve an application to become administrators, the commission shall consider the value of program continuity and planning certainty and the value of allowing competitive opportunities for potentially new administrators. The commission shall weigh the benefits of the party' s proposed program to ensure that the program meets the following objectives:
>
> (1) Is consistent with the goals of the existing programs established pursuant to Section 381.
>
> (2) Advances the public interest in maximizing cost-effective electricity savings and related benefits.
>
> (3) Accommodates the need for broader statewide or regional programs.

Not only is there no prohibition against public utilities applying to become administrators, but also the law vests the Commission with the discretion to determine whose program meets its criteria, as long as the programs meet the objectives set forth in section 381.1(a). (See also, §§ 399.4; 701.) Further, the Legislature's noting the importance of program continuity and planning indicates that the Legislature intended public utility EE programs to be included. RESCUE contends that AB 117 states a preference for increasing competition and claims that the Commission cannot comply with AB 117 if it precludes non-IOUs from applying to administer/implement a large

share of the PGE EE funds. However, nothing in the statute supports RESCUE's contention that we misinterpreted AB 117. Further, D.03-12-060 succeeds in increasing competition because when AB117 was enacted, non-public utility entities had not participated in any statewide EE programs. Under D.03-12-060, non-public utility proposals for statewide programs were both permitted and accepted.

In addition, RESCUE takes issue with the October 1, 2001 edition of the Commission's Energy Policy Manual. That version was adopted by D.01-11-061 and RESCUE's challenge of that decision is not timely. (§1731; rule 85.) RESCUE also raises issues concerning allocation of funds in past year solicitations, which are similarly precluded from attack at this late date. (§ 1731; rule 85.) The issue is without merit.

5. RESCUE is using this application to impermissibly reargue positions raised in its application for rehearing of D.03-07-034.

RESCUE alleges that we failed to establish policies and procedures for parties to apply to become administrators for cost-effective EE programs. RESCUE raised this issue in its application for rehearing of D.03-07-034. Challenges to D.03-07-034 are not timely. (§ 1731, rule 85.) RESCUE assserts the very same argument, without adding anything new. For all of the reasons set forth in D.04-01-032 on this topic, RESCUE's argument is without merit.

C. CONSORTIUM ET AL.

Like WEM and RESCUE, the Consortium et al., takes issue with the scoring methodology employed, declaring it "arbitrary," and claiming that it impermissibly amends D.03-08-067 in violation of section 1708.[31] Section 1708 provides:

[31] This rulemaking proceeding has been conducted to date upon notice and an opportunity to comment in workshops and written filings, thus it is not axiomatic that a hearing must be afforded if we alter a regulation under consideration in this proceeding. (§ 1708.5.)

> The commission may at any time, upon notice to the parties, and with opportunity to be heard as provided in the case of complaints, rescind, alter, or amend any order or decision made by it. Any order rescinding, altering, or amending a prior order or decision shall, when served upon the parties, have the same effect as an original order or decision.

The Consortium also takes issue with the description in D.03-12-060 of the scoring process used to compile lists. As discussed *supra*, D.04-02-059 clarified that it had used inadvertent language that may have led to confusion regarding the process actually used. By D.04-02-059 we clarified D.03-12-060 on this point and corrected inadvertent language that may have suggested the evaluation process employed departed form that we adopted in D.03-08-067. Unauthorized selection criteria was not used to arrive at the EE programs selected for PY 2004-2005, and we did not depart from the process adopted in D.03-08-067. The allegations by the Consortium et al., are without merit.

Therefore, **IT IS ORDERED** that:

1. The application for rehearing of Decision 03-12-060 filed by Women's Energy Matters is denied.

2. The application for rehearing of Decision 03-12-060 filed by Residential Energy Service Companies' United Effort is denied.

3. The joint application for rehearing of Decision 03-12-060 filed by Consortium for Energy Efficiency, Inc., Efficiency Partnership, The Energy Coalition, Coalition of Utility Employees, Latino Issues Forum, League of Women Voters, National Association of Energy Services Companies, Natural Resources Defense Council, American Council for an Energy-Efficient Economy, Pacific Gas and Electric Company, San Jose Silicon Valley Chamber of Commerce, Silicon Valley Manufacturing Group, Southern California Edison Company, Southern California Gas Company, San Diego Gas & Electric Company, University of California, and California State University, is dismissed with respect to the non-parties and is otherwise denied.

This order is effective today.

Dated September 2, 2004, at San Francisco, California.

MICHAEL R. PEEVEY
President
CARL W. WOOD
GEOFFREY F. BROWN
SUSAN P. KENNEDY
Commissioners

I reserve the right to file a dissent.

/s/ LORETTA M. LYNCH
Commissioner