

**BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA**

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

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A.07-12-032
(December 21, 2007)

**RESPONSE OF THE
SAN JOAQUIN VALLEY POWER AUTHORITY
TO THE UTILITIES' APPLICATION FOR REHEARING**

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In accordance with Rule 16.1(d) of the Rules of Practice and Procedure of the Public Utilities Commission of the State of California ("Commission"), the San Joaquin Valley Power Authority ("SJVPA") provides the following response to the application for rehearing of Decision ("D.") 08-04-056 ("Rehearing Application") filed by Pacific Gas and Electric Company ("PG&E") and Southern California Edison Company ("SCE") (collectively, "Utilities").

I. RESPONSE

A. The Rehearing Application Lacks Substance And Is Undeniably An Attempt To Sow Ambiguity And Uncertainty Concerning An Otherwise Clear And Final Decision

It is nearly impossible to discern from the face of the Rehearing Application what motivated the Utilities to file for rehearing of D.08-04-056. The Rehearing Application is only five pages, and what it lacks in volume it fails to recover in the weight of its arguments. In fact, the Rehearing Application contains only two arguments, and as to both of those arguments the Utilities freely concede that neither argument warrants changing the outcome of D.08-04-056. SJVPA will more substantively address the Utilities' two arguments below. However, as a primary matter, it is important for the Commission to observe that, instead of arguing substance and practical outcome, the Utilities choose to parse vowels and argue apparent legal subtleties and distinctions.

The Utilities appear to believe that their arguments are “not academic or irrelevant.”¹ SJVPA not only disagrees but is justifiably concerned that the Utilities may directly or indirectly use the hiatus caused by the filing of the Rehearing Application to engender doubt or questions regarding the finality of D.08-04-056. Such uncertainty would not be helpful as communities continue to earnestly consider ways of successfully implementing Community Choice Aggregation (“CCA”) programs. Accordingly, in evaluating the Rehearing Application, the Commission should be wary that the Utilities’ real motivation may lie more in over-analyzing CCA programs, to the detriment of such fledgling programs, than in any true interest in addressing purported legal deficiencies.

B. The Utilities’ Request For A Declaratory Order Is Unwarranted And Beyond The Scope Of This Proceeding

The Utilities would apparently have the Commission believe that D.08-04-056 somehow stands for the proposition that the Commission cannot, *under any future circumstance*, require specific “JPA CCAs to demonstrate creditworthiness through joint and several liability...”² In this regard, the Utilities construct a straw man of their own making. The Commission did not reach such a conclusion in D.08-04-056, nor is such a conclusion necessary in order to address the issues raised by SJVPA’s application.³ Accordingly, the Utilities’ request for revision of D.08-04-056 should be denied.

The Commission was very balanced and clear in D.08-04-056. In D.08-04-056, the Commission rightly balanced the “grant of discretion provided to local governments agencies by

¹ See Rehearing Application at 5.

² *Id.* at 4.

³ See *Scoping Memo and Ruling of Assigned Commissioner* at 4; Ruling Paragraph 1 (“The scope of the proceeding is limited to the issues raised by the application.”).

the Legislature in Government Code Section 6508.1⁴ against the need for Section 20, which sets forth a *default* provision that *universally requires* that members of a CCA joint powers agency will be jointly and severally liable. After weighing these factors, the Commission found, among other things, that “[o]n balance, the provisions of Section 20, as approved in Resolution E-4133, are not necessary to protect the interests of utility ratepayers in light of other provisions of law and policy designed to protect utility customers from the failure of a CCA.”⁵ Moreover, the Commission found that the Utilities “provided no persuasive arguments...why joint power agency CCAs, which are comprised of public, governmental entities, should be considered *inherently* uncreditworthy.”⁶ As a result, the Commission set forth two conclusions. On the one hand, the utilities may not “*unilaterally* impose” joint and several liability on the members of a CCA joint powers agency.⁷ On the other hand, however, “consideration of whether there is a need for members to *assume* joint and several liability should be part of the CCA’s creditworthiness review.”⁸

Instead of accepting the Commission’s clear and balanced conclusions, the Utilities would apparently prefer to speculate. The Utilities now want assurance of a preemptive right to impose joint and several liability “*if* the Commission itself finds that such tariff provisions are

⁴ D.08-04-056 at 6.

⁵ *Id.* at 9; Finding of Fact 4.

⁶ *Id.* at 6 (emphasis added).

⁷ *See* D.08-04-056 at 10; Ordering Paragraph 1 (emphasis added). *See also, id.* at 8 (emphasis added) (“[T]he utilities *may not require* that the members of CCA joint powers agencies assume joint and several liabilities for the debts and obligations of the joint power agency....”).

⁸ *Id.* at 8 (emphasis added).

necessary under Public Utilities Code Section 366.2 or 394.25(e).”⁹ In essence, the Utilities are asking for a declaratory order from the Commission based on unspecified facts. The Utilities’ request should be flatly rejected for at least two key reasons.

First, the Utilities speculate that such “tariff provisions are [or might be] necessary” yet the Commission has already examined this issue and expressly found that such tariff provisions are *not* necessary.¹⁰ The Utilities have offered no new evidence, nor have they specified any facts that would warrant the Commission’s reconsideration of its well-reasoned conclusions.

Second, for numerous sound reasons the Commission is extremely reluctant to issue declaratory orders or advisory opinions.¹¹ On the rare occasion when the Commission does provide declaratory relief, it has based such relief on the existence of extraordinary circumstances or widespread public interest, conditions which simply do not exist in this case.¹² Instead of surreptitiously seeking declaratory relief based on unspecified facts, the Utilities

⁹ Rehearing Application at 4 (emphasis in the original).

¹⁰ See D.08-04-056 at 9; Finding of Fact 4 (On balance, the provisions of Section 20, as approved in Resolution E-4133 are not necessary to protect the interests of utility ratepayers in light of other provisions of law and policy designed to protect utility customers from the failure of a CCA.”). See also, *id.* at 8 (“As we have stated, we intend to reconsider the bonding requirements currently approved for the utility tariffs. We may also consider other ways to protect customers from CCA failure.”) [As promised (*see* D.08-04-056 at 7, note 1), the Commission opened this consideration on May 27, 2008 through the issuance of a ruling in R.03-10-003.]

¹¹ See, e.g., D.84-07-112 [1984 Cal. PUC LEXIS 1318, *9] (“We have traditionally shunned requests for declaratory orders.”) See also, D.03-09-015 [2001 Cal. PUC LEXIS 1248, *36] (internal citations omitted) (“[T]he Commission generally disfavors issuing a decision that provides declaratory relief, or which is advisory in nature.”).

¹² See, e.g., D.03-09-015 [2001 Cal. PUC LEXIS 1248, *39]. Even in these circumstances, however, the general legal principles applicable to declaratory relief would apply, with respect to one of which, in particular, the Utilities’ request is woefully lacking, namely, there must be real facts, admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts. (*See, e.g.,*

should simply follow the logical, fact-imbued processes established by the Commission, namely, the individual creditworthiness review¹³ and the generic security bond investigation.¹⁴

C. The Utilities’ Claim Concerning The Procedural Sufficiency Of SJVPA’s Application Is Not Credible Or Correct, And Is In Any Event Moot

The Utilities assert that SJVPA’s petition to modify Resolution E-4133 “is an impermissible and untimely collateral attack on the legality of a final Commission decision under both [Public Utilities Code] sections 1709 and 1731.”¹⁵ The Utilities’ claim is neither credible nor correct, and has in any event been made moot by the Commission’s express finding.

The Utilities claim is untimely and not credible. In their previous response to SJVPA’s petition, the Utilities (together with San Diego Gas and Electric Company) did not make any claim that SJVPA’s petition was precluded under Rule 16.1 (Applications for Rehearing) or Public Utilities Code sections 1709 and 1731. Instead, the Utilities acknowledged that SJVPA’s petition was filed under Rule 16.4 (Petitions for Modification), without questioning whether or not Rule 16.1 precluded or controlled such filing.¹⁶ The Utilities’ only previous procedural objection to SJVPA’s petition was that the petition was not filed “within the one-year time limit as required by Rule 16.4(d)....”¹⁷ Now, however, the Utilities have changed their theory,

Pacific Legal Foundation v. California Coastal Com., (1982) 33 Cal. 3d 158, 171, quoting from *Aetna Life Ins. Co. v. Haworth*, (1937) 300 U.S. 227, 240-241.)

¹³ See D.08-04-056 at 7-8.

¹⁴ See *id.* at 7, note 1.

¹⁵ Rehearing Application at 4.

¹⁶ See “*Joint Response of San Diego Gas & Electric Company, Pacific Gas and Electric Company and Southern California Edison Company to the San Joaquin Valley Power Authority’s Petition for Expedited Modification of Energy Division Resolution E-4013 Approving the Utilities Community Choice Aggregation Service Agreements*,” dated January 23, 2008 (“Joint Utilities Response”) at 5.

¹⁷ *Id.* (emphasis added).

arguing for the first time that SJVPA's petition is precluded under Rule 16.1. This is simply not credible. Had the Utilities truly believed that SJVPA's petition was precluded under or governed by Rule 16.1, they should have so stated in their original response, not now after a final decision has been issued.

The Utilities' claim is not correct; Rule 16.1 does not control the disposition of SJVPA's petition. The Utilities' rest their assertion as to the applicability of Rule 16.1 on their belief that "SJVPA's application is grounded on the alleged illegality of Resolution E-4013...."¹⁸ However, SJVPA made no such claim. Nowhere in SJVPA's petition does SJVPA state or intimate that Resolution E-4013 is illegal. Rather, SJVPA based its petition on the action of the utilities, not the Commission.¹⁹ As such, and for the numerous other reasons set forth in SJVPA's petition, SJVPA properly brought forward its request through a petition to modify, as SJVPA had been advised to do so by the Energy Division.²⁰

The Utilities claim is moot. After considering the Utilities' procedural objections, the Commission expressly "*accepted* [SJVPA's] application...."²¹ The Commission further stated that the Commission "herein resolves [the application] because no party is prejudiced by its filing and the matter is one of public concern that is relevant to the ongoing oversight of the AB

¹⁸ Rehearing Application at 4.

¹⁹ *See, e.g.*, SJVPA Petition at 7 ("[T]he [joint and several liability] provision is simply included [by the Utilities] among a huge volume of paper accompanying the advice letter, with no hint to anyone that a provision of such significance was included. It is therefore not surprising that nowhere does Resolution E-4013 address the issue of joint and several liability.").

²⁰ *See* SJVPA Reply at 10 ("...SJVPA was informed by the Energy Division in November that SJVPA would need to prepare a petition for modification in order to resolve SJVPA's dispute with the utilities on Section 20.).

²¹ *See* D.08-04-056 at 3 (emphasis added).

117 CCA program.”²² Moreover, the Commission expressly found that “[r]esolving the subject application to modify Resolution E-4013 serves the interests of the public in promoting a reasonable CCA program, as envisioned by AB 117....”²³ So, notwithstanding the Utilities’ untimely claim concerning Rule 16.1, such claim cannot be sustained in light of the Commission’s clear and unambiguous finding that the issues in D.08-04-056 should be addressed by the Commission in order to discharge the Commission’s responsibilities under AB 117 to oversee the implementation of CCA programs.

D. The Commission Should Provide A Prompt And Clear Denial Of The Utilities’ Rehearing Request

As noted above, SJVPA is justifiably concerned that the Utilities will use their Rehearing Application and the suspense of an impending Commission decision in response to the Rehearing Application as an occasion to sow doubt about what the Commission has really said through D.08-04-056. As a result, SJVPA hereby requests that the Commission move to issue a rehearing decision as soon as reasonably practicable in light of these circumstances.

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²²

Id.

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Id. at 9-10; Finding of Fact 1.

II. CONCLUSION

For the reasons described herein, SJVPA respectfully requests that the Commission promptly deny the Utilities' application for rehearing of D.08-05-046.

Dated: June 11, 2008

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Scott Blaising". The signature is stylized with a large, sweeping initial "S" and a long horizontal stroke at the end.

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CERTIFICATE OF SERVICE

I certify that the following is true and correct:

On June 11, 2008, I caused to be served an electronic copy of the attached:

**RESPONSE OF THE
SAN JOAQUIN VALLEY POWER AUTHORITY
TO THE UTILITIES' APPLICATION FOR REHEARING**

on all known parties to A.07-12-032 and R.03-10-003, or their attorneys of record,
addressed as follows:

See attached service list

Executed this 11th day of June, 2008, at Sacramento, California.

A handwritten signature in black ink, appearing to read "Vicki Ferguson", with a long horizontal flourish extending to the right.

Vicki Ferguson

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