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BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application of Southern California Edison Company (U338E) for Approval of its 2012- 2014 California Alternate Rates for Energy (CARE) and Energy Savings Assistance Programs and Budgets.

And Related Matters.

Application 11-05-017
(Filed May 16, 2011)

Application 11-05-018
Application 11-05-019
Application 11-05-020

ASSIGNED COMMISSIONER AND ADMINISTRATIVE LAW JUDGE'S RULING GRANTING, IN PART, RELIEF SOUTHERN CALIFORNIA GAS COMPANY REQUESTS IN ITS MARCH 13, 2012 MOTIONS

1. Summary

This ruling grants, in part, the relief sought by Southern California Gas Company's two motions (filed March 13, 2012) concerning the Rule 1.1 portion of Joint Assigned Commissioner and Assigned Administrative Law Judge's Ruling dated February 16, 2012 and modifies the February 16, 2012 ruling by vacating the Rule 1.1 violation findings and related directives therein.

2. Procedural Background

On November 29, 2011, the East Los Angeles Community Union, the Association of California Community and Energy Services, and the Maravilla Foundation filed a Joint Emergency Motion to Continue the Low Income Energy

Savings Assistance (ESA) Program (ESA Program) for Southern California Gas Company's Low Income Households (Emergency Motion).¹ The Emergency Motion informed the Commission that Southern California Gas Company (SoCalGas) had served notices on November 28, 2011, to its contractors that the ESA Program contracts would be "suspended as of December 1, 2011." The Emergency Motion requested that the Commission take immediate actions to prevent any disruption to the SoCalGas' ESA Program.

On November 30, 2011, the assigned Administrative Law Judge (ALJ) issued an e-mail ruling (November 30, 2011 Ruling) tentatively authorizing and directing certain fund shifts to SoCalGas to resolve the budget concerns which gave rise to the Emergency Motion. The November 30, 2011 Ruling also ordered SoCalGas to file a response to the Emergency Motion by December 1, 2011, and directed SoCalGas to attend an order to show cause (OSC) hearing on December 6, 2011, to respond to questions concerning:

- a. The allegations set forth in the Emergency Motion;
- b. Potential mismanagement, error, and/or other cause leading to or giving rise to the Emergency Motion;
- c. Good cause as to why this current ESA budget issue was not brought to the judge's or the Commission's attention;
- d. Propriety for sanctions, penalties and/or audits; and
- e. Plans for tracking and accounting of the SoCalGas's 2011 ESA Program budget, including any budget activities as

¹ The Emergency Motion was filed in the proceeding docket for Application (A.) 08-05-022 et al. which has since been closed. Thereafter, pursuant to the February 16, 2012, ruling, subsequent filings relating to the Emergency Motion were ordered to be filed in a successor proceeding, A.11-05-017 et al.

they relate to borrowing of funds envisioned and arising from this ruling.

On December 1, 2011, the assigned Commissioner and ALJ issued a Joint Ruling, and confirmed the ALJ's November 30, 2011 Ruling.

On December 1, 2011, SoCalGas filed its response to the Emergency Motion, in which it explained that although SoCalGas reasonably managed its program activities, the program's financial issues were a bigger problem than could be reasonably anticipated based on historical program activity and that SoCalGas took what it viewed as the necessary steps to suspend subcontracted activities for four weeks in order to avoid exceeding its authorized budget and 2011 ESA Program funding.

On December 6, 2011, an OSC Hearing was held.

On February 16, 2012, the assigned Commissioner and ALJ issued a joint ruling finding, *inter alia*, that certain portions of SoCalGas' witness testimony, provided to the Commission during the December 6, 2011 OSC Hearing, violated Rule 1.1 of the Commission's Rules of Practice and Procedures (Post-OSC Ruling).

On March 13, 2012, SoCalGas filed a Motion to Vacate the Rule 1.1 Portion of the Post-OSC Ruling, or Provide Alternative Relief (Motion to Vacate). Concurrently, SoCalGas filed a Motion for Expedited Stay of the portion of the Post-OSC Ruling's "Rule 1.1 requirements until such time as the Commission has ruled on SoCalGas' Motion to Vacate" (Motion for Stay).

On March 30, 2012, ALJ issued a ruling (March 30, 2012 Ruling) granting SoCalGas' alternative relief sought in its two motions by setting a new OSC date of April 13, 2012, to hear the Rule 1.1 issue further, and by staying those

pertinent portions of the Post-OSC Ruling “until SoCalGas has had a fair and full opportunity to present its case and heard on the alleged Rule 1.1 violation.”²

On April 25, 2012, an OSC Hearing was held on Motion to Vacate and Motion for Stay.

3. Discussion

Although SoCalGas’ two motions (Motion to Vacate and Motion for Stay) were not titled as such, SoCalGas agreed during the April 25, 2012 OSC Hearing and we have deemed it appropriate to treat them as a combined motion for reconsideration.³ By February 16, 2012 and March 30, 2012 Rulings and April 25, 2012 OSC Hearing, SoCalGas was afforded ample prior notice and opportunity to prepare and present its entire case, new or additional facts, circumstances or law since December 6, 2011 OSC Hearing, to demonstrate why the Post-OSC Ruling should be reconsidered, modified, amended or vacated as it relates to allegations of SoCalGas’ Rule 1.1 violations. Upon reconsideration and review of additional evidence, we hereby modify the Post-OSC Ruling and vacate the Rule 1.1 violation findings and related directives concerning Rule 1.1 violations in the Post-OSC Ruling, as discussed below.

3.1. Statement of Facts

We reject SoCalGas’ argument that its witness testimony, provided during the December 6, 2011 OSC Hearing, was not misleading and therefore not

² On April 10, 2012, at the request of SoCalGas, ALJ issued a ruling resetting the April 13, 2012 OSC to April 25, 2012. On April 18, 2012, San Diego Gas and Electric (SDG&E) filed a motion seeking clarification or reconsideration of ALJ’s April 10, 2012 ruling which was resolved at the start of April 25, 2012 OSC hearing.

³ April 25, 2012 OSC Hearing Transcript, 4:6-14.

violative of Rule 1.1. SoCalGas argues that because its witness testimony/statements of December 6, 2011 OSC Hearing were mere “impressions” of the witness, they are not statements of fact and therefore should not be construed as misleading. As such, SoCalGas argues such statements do not trigger Rule 1.1 concerns.

In support of its position, SoCalGas cites to inapposite authorities dealing with opinions and valuation statements.⁴ Based on those inapplicable authorities, SoCalGas contends its witness’ testimony which SoCalGas characterizes as “impressions” should be viewed similar to those subjective opinions and valuation statements and thus should not be construed as statements of facts or misleading. We disagree.

SoCalGas’ witness was a percipient witness rendering testimony based on his percipient knowledge and questioned on factual and observational basis for his testimony. Said witness was not on the stand to offer his impression or subjective opinion (or valuation) testimony. The statements at issue by SoCalGas’ witness, Mr. Blattner, as he was recounting the consultation *preceding* SoCalGas’ decision to suspend as SoCalGas’ “next step” was that: “Yes. I received **feedback** that, ‘We understand the – the situation and that you believe a suspension is an unavoidable course of action’ [emphasis added].”⁵ When this SoCalGas’ witness was specifically asked by ALJ “From which offices?,” he testified “The Assigned Commissioner’s office...”⁶ Then this statement was

⁴ Motion to Vacate at 9, 10.

⁵ December 6, 2011 OSC Hearing Transcript, 16:25-28.

⁶ *Id.* at 17:1-3.

further explained during the April 25, 2012 OSC Hearing as follows: "... What the feedback that I understood was we understand the position that you're in and that you feel the suspension is the only course of action."⁷

These statements were contradicted by the advisor to the assigned Commissioner's office who testified consistently and cogently during both the December 6, 2011 OSC Hearing and April 25, 2012 OSC Hearing that he denied providing any such feedback or feedbacks to SoCalGas before SoCalGas decided to suspend the ESA contracts on November 28, 2011.⁸

The fact is SoCalGas provided no additional testimony or evidence to corroborate these particular testimony/statements by its witness (from December 6, 2011 OSC Hearing) during the April 25, 2012 OSC Hearing. The additional evidence SoCalGas presented during the April 25, 2012 OSC Hearing actually further proved that SoCalGas did not receive any feedback, prior to SoCalGas' November 28, 2011 decision to suspend the contracts, from the assigned Commissioner's office or any other offices that "we understand the position that you're in and that you feel the suspension is the only course of action."

For instance, SoCalGas presented two e-mails (Exhibits 9 and 10). Those e-mails were sent in the afternoon of November 28, 2011, to two different Commissioners' advisors, and that was after SoCalGas sent the ESA contract suspension notices to its contractors. Reasonable inferences from those e-mails

⁷ April 25, 2012 OSC Hearing Transcript, 87:24-27.

⁸ December 6, 2011 OSC Hearing Transcript, 17:1-28; and April 25, 2012 OSC Hearing Transcript, 55:26-60:19.

are that: (1) SoCalGas had been considering non-suspension options, as were those Commissioners' advisors until the afternoon of November 28, 2011, and (2) those advisors were just then being informed that those alternative options (to suspension) had been ruled out.

The evidence shows that while the ultimate possibility of suspension was looming, the advisors and the assigned Commissioners' offices were not aware that the nuclear option of ESA Program suspension was the only course of action until after SoCalGas concluded that suspension was the only option and had decided to suspend the ESA contracts by sending out the suspension notices. Only then, SoCalGas sent e-mails to at least two Commissioner's offices, after-the-fact, and those two offices responded to the SoCalGas' e-mails (Exhibits 9 and 10). The evidence SoCalGas presented does not reconcile with the possibility of SoCalGas having been given such alleged feedback, prior to SoCalGas' November 28, 2011 decision to suspend the contracts, from the assigned Commissioner's office or any other offices that "we understand the position that you're in and that you feel the suspension is the only course of action."

As for SoCalGas' communications with the assigned office, and in view of SoCalGas' Exhibits 2 and 4 in light of December 6, 2011, and April 25, 2012 testimony of Mr. Blattner and Mr. Momoh (assigned Commissioner's Advisor), it is clear that the two individuals were not communicating very clearly and therefore we find that it is possible that Mr. Blattner misunderstood Mr. Momoh's e-mail (Exhibit 4).

Mr. Momoh's e-mail (Exhibit 4) and testimony were that he merely relayed the staff's status report that no advice letter had yet been filed and the last communication that staff was aware of from SoCalGas was that advice letter

would be filed as shown on (Exhibit 4). Mr. Blattner's testimony was that he believed Exhibit 4, coupled with a phone conversation he vaguely recalls having with Mr. Momoh during the similar timeframe, led him to the impression that Mr. Momoh, as of November 22, 2011, understood that advice letter option was simply not feasible and the only remaining option was the suspension. Mr. Momoh denies having any such a telephone conversation and instead clarifies that he was simply aiding SoCalGas to assist them to expedite the advice letter process "to avoid shutting down the program."⁹

Upon review of the further evidence introduced by SoCalGas, we find the record did not reveal any plausible communication from the assigned Commissioner's office or any other offices that could even be loosely characterized as such "feedback" or feedbacks SoCalGas witness characterized as "we understand the position that you are in and that you feel the suspension is the only course of action." However, we do find evidence of confusion, and evidence that the statements/testimony may be that of misunderstanding, rather than statements designed to mislead the Commission.

3.2. Intent

Following the reasoning above, be it statement of impression or fact, the issue today is about the intent. Because there was a misunderstanding, rather than a statement consciously designed to mislead the Commission, we do not find intent here. SoCalGas is correct in citing the key element in Rule 1 violations as the intent. Rule 1 provides, in pertinent part, that persons transacting business with the Commission shall never mislead the Commission or its staff by an

⁹ April 25, 2012 OSC Hearing Transcript, 57:3-59-7.

artifice or false statement of fact or law.¹⁰ Violation of this rule indeed requires purposeful intent, recklessness, or gross negligence in regard to communications with the Commission.¹¹

Upon careful review of the circumstances leading to December 6, 2011 OSC Hearing and April 25, 2012 OSC Hearing, we are persuaded that SoCalGas' witness did not possess the requisite intent to mislead the Commission with his testimony, however inaccurate the statement may have been. This conclusion is based largely on the additional contextual and clarifying evidence SoCalGas presented during the April 25, 2012 OSC Hearing. The various communications SoCalGas presented showed a clear, consistent and distinct pattern of diligent efforts, including telephone calls, e-mails, meetings and voicemails (answered and not), on the part of SoCalGas' representatives toward seeking solutions in a very short amount of time and perhaps in somewhat harried and frenzied state. Those communications also showed evidence of some confusion and misunderstanding. SoCalGas also has been diligent and responsive to the Post-OSC Ruling in every manner, aside from the two motions at issue here with which SoCalGas has lawfully, timely and respectfully presented itself.

¹⁰ Rule 1 states that "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."

¹¹ Decision (D.) 04-04-065, at 35 (*citing* D.02-08-063, *Application of Pacific Fiber Link, L.L.C.*, 2002 Cal.PUC LEXIS 533).

Additionally, we note, SoCalGas is not one with a particular history of such misconduct before the Commission.

We further recognize that SoCalGas' witness was not specifically prepared to delve into the specific communications during the December 6, 2011 OSC Hearing and that may have affected his appearance and performance on the stand which was misinterpreted as evasive and lacking in forthrightness. We also find that several other factors likely contributed to what seems to be a less than accurate testimony including (1) the frenzied speed and timing of communications at issue, (2) the fact that these communications occurred over the Thanksgiving holiday weekend, and (3) emotions, distractions and sympathetic concerns by all to divert or otherwise mitigate impacts to many of the contractors' and families affected by a potential program suspension.

We find that all these circumstances contributed to confusion and misunderstanding leading to the inaccurate statement or statements of facts provided in this proceeding by SoCalGas. Based on the foregoing, we are therefore persuaded to modify our Post-OSC Ruling and vacate the Rule 1.1 violation findings and related directives concerning Rule 1.1 violations in the Post-OSC Ruling.

3.3. SDG&E

On March 27, 2012, Division of Ratepayer Advocates (DRA) filed a response to SoCalGas' Motion to Vacate and suggested "expansion" of the Post-OSC Ruling to include employees of both SoCalGas and San Diego Gas & Electric. DRA's basis for the proposed expansion of the scope of the Post-OSC Ruling was that the individual at the center of the alleged SoCalGas' Rule 1.1 violation issue is the "Manager of Regulatory Relations" for Sempra Utilities, the parent company of both SoCalGas and SDG&E. Aside from that

argument no evidence was presented that could remotely establish vicarious liability or any culpability or responsibility of SDG&E concerning the SoCalGas' alleged Rule 1.1 violation. Thus, ALJ ruled during the April 25, 2012 OSC Hearing that no adverse ruling or decision against SDG&E would result from the April 25, 2012 OSC Hearing.

For Good Cause Shown **IT IS RULED** that:

1. The Joint assigned Commissioner and assigned Administrative Law Judge's Ruling dated February 16, 2012 is modified and all Rule 1.1 violation findings against Southern California Gas Company and directives concerning Rule 1.1 violations in that ruling is vacated.
2. This ruling is effective immediately.

Dated October 30, 2012, at San Francisco, California.

/s/ TIMOTHY ALAN SIMON

Timothy Alan Simon
Assigned Commissioner

/s/ KIMBERLY H. KIM

Kimberly H. Kim
Administrative Law Judge