

March 15, 2013

Commissioner Catherine J.K. Sandoval
California Public Utilities Commission
505 Van Ness Avenue
San Francisco, CA 94102

Re: CARE Program “Categorical Eligibility”

Dear Commissioner Sandoval:

The Joint Consumer Groups – the Division of Ratepayer Advocates (DRA), The Utility Reform Network (TURN), the Greenlining Institute (Greenlining), and the Center for Accessible Technology (CforAT) - greatly appreciate your recognition of the important legal, policy, and factual issues arising in the context of the “Categorical Eligibility” enrollment process for the California Alternate Rates for Energy (CARE) program. At the Low Income Oversight Board meeting on February 27, 2013, you asked a number of questions about the proposal submitted on January 31, 2013, by Pacific Gas and Electric Company, San Diego Gas & Electric Company, Southern California Edison Company, and Southern California Gas Company (collectively, IOUs) in Advice Letter 4457 et al. to dramatically change the list of programs supporting “Categorical Eligibility” for CARE and the Energy Savings Assistance Program (ESAP).¹ The IOUs’ submitted this Advice Letter pursuant to Decision (D.)12-08-044, which directed them to jointly submit a Tier 2 Advice Letter proposing changes to the list of Categorical Eligibility programs.² The IOUs’ primary request in the pending Advice Letter would eliminate all but three of the current Categorical Eligibility programs based on their conclusion that those programs do not employ income thresholds consistent with CARE and ESAP, as required by D.12-08-044.³ During the LIOB meeting, you specifically requested 1) a legal analysis of the meaning of “household” as used in Public Utilities Code (PU Code) section 739.1(b)(1), and 2) a quantitative analysis of the degree of alignment between each Categorical Eligibility program and the income limit of 200% of the Federal Poverty Guidelines (FPG), in recognition of the fact that these analyses are germane to the Commission’s disposition of the IOUs’ Advice Letter.

The Joint Consumer Groups agree that such analyses should inform the Commission’s consideration of the IOUs’ proposal. As explained below, the issues you raise are among a longer list of legal, policy, and factual issues pertaining to Categorical Eligibility that should be resolved as expeditiously as possible. Accordingly, we respectfully recommend that the

¹ Southern California Gas Company Advice Letter 4457, San Diego Gas & Electric Company Advice Letter 2455-E/2170-G, Pacific Gas and Electric Company Advice Letter 3361-G/4186-E, and Southern California Electric Company Advice Letter 2849-E (filed jointly).

² D.12-080-044, Ordering Paragraph 88(b).

³ See D.12-08-044, Ordering Paragraph 88(b).

Commission reject without prejudice the IOUs' Advice Letter and formally resolve these pressing issues in the CARE/ESAP proceeding, A.11-05-017 et al., prior to authorizing any changes to Categorical Eligibility enrollment in CARE and ESAP.

Whether the Commission should approve any or all of the IOUs' proposed changes to Categorical Eligibility depends in part on the resolution of legal questions concerning the definition of "household" pursuant to PU Code Section 739.1(b)(1), which establishes CARE eligibility for utility customers with "annual household incomes that are no greater than 200 percent of the federal poverty guidelines," as well as prior Commission orders. A legal question also arises as to the interpretation of "consistent income thresholds" as that term is used in D.12-08-044, in light of both PU Code Section 739.1(b)(1), referenced above, and 739.1(e)(1), which requires the Commission to "improve the CARE application process by cooperating with other [government] entities ... to ensure that all gas and electric customers eligible for public assistance programs in California ... are enrolled in the CARE program." Questions of material fact flow from the application of the definition of "household" and the "income threshold consistency standard" to the particular programs under consideration for Categorical Eligibility.

To the extent that the Commission has discretion regarding these matters, they present questions which were not resolved by D.12-08-044. Commission guidance on the appropriate definition of the term "household" and how "household income" is to be calculated is warranted. Moreover, the fundamental policy question of whether enrollment in a Categorical Eligibility program should definitively establish eligibility for CARE, or whether household income should also be considered in certain circumstances, needs resolution by the Commission.⁴ Likewise, the Commission should resolve the policy question of how closely the CARE eligibility methodology should be aligned with the income thresholds used for other low income programs for those programs to be appropriate for Categorical Eligibility. The standard articulated in D.12-08-044 -- "income thresholds consistent with the CARE and ESA Programs"⁵ -- does not provide sufficient guidance on this policy matter.

The Advice Letter process currently underway is ill-suited to resolving these issues. First, the Advice Letter process is, by its very design, intended to provide "a quick and simplified review of the types of utility requests that are expected neither to be controversial nor to raise important policy questions."⁶ As the Commission explained in D.05-01-032, "advice letters generally concern matters that are not expected to raise factual or policy issues."⁷ Being informal, advice letters "are generally ill-suited to resolving material factual issues" or the interpretation of a

⁴ In D.12-08-044 the Commission determined that income should be considered for CARE eligibility for all customers who have usage at or above 400% of baseline, regardless of whether they enrolled through Categorical Enrollment. (D.12-08-044, pp. 219-221). The Commission did not address the question of whether income should trump enrollment in a Categorical Program in any other circumstances. Absent this fundamental policy clarification, the IOUs' alternative request in their Advice Letter – to income verify some customers enrolling through Categorical Enrollment – is premature and certainly not suitable for consideration via Advice Letter, for the reasons discussed below in this letter.

⁵ D.12-08-044, p. 212.

⁶ General Order 96-B, General Rules, Section 5.1.

⁷ D.05-01-032, Finding of Fact 6.

statute or Commission order.⁸ Accordingly, the Commission has acknowledged that when material factual issues surface as the result of protests or staff review, or “an underlying disagreement regarding the proper interpretation of a statute or Commission order relevant to the advice letter” is revealed, a Commission order may be necessary to resolve the merits of the controversy.⁹ Both of these have occurred in this instance. It would be appropriate under these circumstances for Energy Division to reject the IOUs’ Advice Letter without prejudice so that the Commission can resolve the fundamental legal, policy, and factual issues in a formal proceeding.¹⁰

Second, it is unclear whether Energy Division intends to dispose of the IOUs’ Advice Letter internally, as provided for in General Rule 7.6.1 of G.O. 96-B, as opposed to preparing a draft resolution for consideration by the full Commission, pursuant to General Rule 7.6.2. While both of these avenues are contemplated by the framework established in G.O. 96-B for disposing of Advice Letters, neither avenue is ideal for a full vetting of the legal, policy, and factual issues presented by the pending Advice Letter regarding changes to the list of programs establishing Categorical Eligibility for CARE. In particular, disposition by Energy Division would improperly afford no opportunity whatsoever for these issues to be further developed and considered by the Commission.

Tier 2 Advice Letters, such as the instant Advice Letter, are subject to Energy Division disposition under General Rule 7.6.1 if such disposition would be a “ministerial” act.¹¹ On the other hand, the Commission cannot delegate to staff the power to make fundamental policy decisions.¹² General Rule 7.6.1 clarifies,

Industry Division [here Energy Division] disposition is appropriate where statutes or Commission orders have required the action proposed in the advice letter, or have authorized the action with *sufficient specificity*, that the Industry Division need only determine as a technical matter whether the proposed action is within the scope of what has already been authorized by statutes or Commission orders. (emphasis added)

An advice letter will be subject to Industry Division disposition even though its subject matter is technically complex, so long as a technically qualified person could determine objectively whether the proposed action has been authorized by the statutes or Commission orders cited in the advice letter. Whenever such determination requires more than ministerial action, the disposition of the advice letter on the merits will be by Commission resolution, as provided in General Rule 7.6.2.

⁸ D.05-01-032, Finding of Fact 7.

⁹ D.05-01-032, pp. 8-9.

¹⁰ See D.05-01-032, p. 9.

¹¹ G.O. 96-B, Energy Industry Rule 5.

¹² See, *i.e.*, D.02-02-049, p. 6; G.O. 96-B, General Rule 7.6.1 (citing D.02-02-049).

In this instance, the Commission's order in D.12-08-044 lacks the requisite specificity sufficient to allow Energy Division to determine as a technical matter whether the proposed action is within the scope of what has already been authorized by statutes or Commission orders. The Commission authorized the IOUs to eliminate programs from the Categorical Eligibility list with the following sentence: "As appropriate, the IOUs may also propose to eliminate programs, which do not employ income thresholds consistent with the CARE and ESA Programs."¹³ As noted above, the Commission did not discuss the meaning of "consistent," a term that is vague on its face and can be reasonably construed in a number of different ways (i.e., "generally aligned with," "sharing the same principles or goals," "reasonably similar to," "overlapping in substantial part," "the same as"). The question of how to define "household" for purposes of comparing the CARE income thresholds to those of other programs likewise received no attention in D.12-08-044, nor has this question been explicitly considered by the Commission since the enactment of PU Code Section 739.1(b)(1). Even if Energy Division staff has the technical expertise to compare the eligibility standards for various programs (which is not in doubt), fundamental legal and/or policy issues must first be resolved to enable this ministerial factual analysis. As such, we submit that Energy Division disposition of the IOUs' Advice Letter would be inappropriate.

The complex issues related to assessing the extent to which other low income programs have eligibility thresholds that are sufficiently "consistent" with CARE's income eligibility standard warrant thoughtful examination and formal action by the Commission. The Joint Consumer Groups thus respectfully recommend that the Commission reject without prejudice the IOUs' Advice Letter, and instead solicit comments and legal briefing in A.11-05-017 et al. to further develop the record on the specific issues pertaining to Categorical Eligibility listed above. The Scoping Memo in that proceeding explicitly identified the review of Categorical Eligibility as among the issues to be considered.¹⁴ However, Categorical Eligibility is not among the issues included in Phase 2, which is currently underway.¹⁵ For this reason, we suggest either an amendment to the Scoping Memo to identify Categorical Eligibility as an issue that will also be addressed in Phase 2, or the opening of a Phase 3 devoted to this issue.

Once the Commission has acted on these legal and policy issues, it would be appropriate to consider whether the list of Categorical Eligibility programs should be expanded or contracted or Categorical Eligibility enrollment practices should otherwise be modified. With clear Commission guidance on the fundamental policy issues in place, the Advice Letter process may be appropriate for such a review.

If, contrary to our recommendation, the Commission were to determine that the IOUs' Advice Letter should be addressed on the merits at this time, the Joint Consumer Groups urge such

¹³ D.12-08-044, p. 212.

¹⁴ *Assigned Commission and Administrative Law Judge's Joint Scoping Memo and Ruling*, Sept. 26, 2011, p. 3 (Issue K., "Review of current CARE program, including recertification, post enrollment verification, categorical eligibility, and high usage customers."); *see also Assigned Commission and Administrative Law Judge's Joint Amended Scoping Memo and Ruling*, Jan. 26, 2012, p. 3.

¹⁵ *See Assigned Commission and Administrative Law Judge's Joint Amended Scoping Memo and Ruling*, p. 5; D.12-08-044, Ordering Paragraph 147.

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disposition by a Commission resolution. Disposition by Energy Division is an improper delegation of the Commission's authority because such disposition would not be a ministerial act, as explained above.¹⁶

We appreciate your attention to this matter. Please do not hesitate to contact us with any questions.

Sincerely,

/S/

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Division of Ratepayer Advocates

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¹⁶ See G.O. 96-B, General Rule 7.6.1.

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Service List to A.11-05-017 et al.