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

**Western Water and Power Production)
Limited, LLC, A New Mexico Limited)
Liability Corporation,)
Complainant)
vs.)
Southern California Edison Company)
(U338E),)
Defendant.)
_____)**

C1205021

CASE NO.

COMPLAINT AND PETITION FOR INVESTIGATION

**Public Version
(Exhibits 1, 2 and 3 Confidential)**

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April 25, 2012

3. WWPP seeks enforcement of the Commission's policies and orders designed to prevent undue discrimination against out-of-state energy providers for the benefit of SCE's ratepayers and the citizens of California.

II. PARTIES

4. WWPP is a New Mexico Limited Liability Company, whose address is 10010 Indian School Road N.E., Albuquerque New Mexico 87122. WWPP can be reached through counsel:

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5. On information and belief, SCE is a public utility regulated by the Commission providing electric utility services within the State of California. SCE's regulatory contact is listed with the Commission as follows:

[_____]
2244 Walnut Grove Avenue
Rosemead, California 91770

III. JURISDICTION

6. Sections 701 and 1702, inter alia, of the California Public Utilities Code provide the Commission with authority to supervise and regulate public utilities, including the authority to prevent undue discrimination in interstate commerce. This complaint seeks Commission rejection of SCE's unilateral withdrawal of Advice Letter 2442-E without prior Commission approval and consideration of the Advice Letter on the grounds that SCE's unilateral withdrawal action is inconsistent with applicable California law and Commission policy, the public

interest of the citizens of California, and the Commerce Clause of the United States Constitution.

A. The Legislative Mandate

7. The California Legislature enacted Renewal Portfolio Standards Legislation (the “RPS Law”) pursuant to Senate Bill 1078 in 2002 which established a mandate for California public utilities to acquire within a specific timeframe at least 20 per cent of their energy from renewable energy resources and imposed a duty upon the Commission to regulate the activities of public utilities under the aforesaid law. In 2006 the California Legislature enacted Senate Bill 107 accelerating the timeframe for compliance and in 2009 pursuant to Executive Orders, EO 2-14-08 and EO S-21-09, the percentage of renewable energy portfolio standard was increased to 33 per cent by 2020. The California legislature subsequently codified this increase in Senate Bill 2(1X)(Simitian, Chapter 1, Statutes of 2011, First Extraordinary Session) and codified in Pub. Util. Code sec. 399.11-399.20 (the “Amended RPS Law”).
8. The RPS Law, Section 399.14(a)(2)(D), specifically required the Commission to develop standard contract terms and conditions to be used by public utilities in the acquisition of renewable energy under the Law and provided the Commission with regulatory oversight of the utilities in the procurement of energy under the RPS Law.
9. The Commission issued an Order Adopting Standard Contract Terms and Conditions in Rulemaking 04-04-026 on April 22, 2004. In adopting that Rule the Commission rejected proposals to limit the Commission’s approval authority.

The Commission stated at page 1 “[s]pecifically, subsections 1 and 4 under “Commission Approval” are too broad, and may improperly limit the Commission’s authority. For example, these subsections could be construed to prevent the Commission from taking appropriate action even if a particular solicitation or agreement is subsequently determined to be fraudulent or otherwise illegal or improper.” *See, also* Rulemaking 06-05-027 (May 25, 2006) (wherein the Commission continued its policy of making the “CPUC Approval” not subject to contract modification), and Rulemaking 08-08-009, D.11-04030 at p. 66 (April 14, 2011) (wherein the Commission holds each utility in its procurement process to reasonable outcomes based upon Commission existing policy).

10. SCE is a public utility subject to the jurisdiction of the Commission generally for the rates and services provided by SCE in its retail service territory and is specifically regulated by the Commission in its procurement of renewable energy from third parties under the RPS Law. SCE’s 2008 Procurement Plan was conditionally approved by the Commission subject to Commission subsequent review. D. 08-02-008.
11. The Commission has adopted a specific regulatory scheme, consistent with and in compliance with the RPS Law, for the implementation of the RPS Law. As part of this regulatory scheme, the Commission has in relevant part adopted regulations governing the development and adoption of procedures for the procurement of renewable energy from both in state and out of state renewable energy developers and projects, the adoption of standard contract terms and conditions that must be used by public utilities under its jurisdiction in the acquisition of renewable

energy resources, the creation of an independent evaluation system for public input into the procurement process, a filing, review, an approval process for contracts between public utilities and renewable power providers and developers under the RPS Law, and a Long Term Procurement Plan proceeding addressing the future implementation of the RPS Law as amended.

12. In exercising its comprehensive and long standing policy of regulating all aspects of the RPS procurement policy, the Commission has exercised its authority over the Advice Letter withdrawal actions of utilities. *See, e.g.* D. 11-01-025 p. 29 (January 13, 2011). By SCE's and WWPP's participation in the RPS bid process as regulated by the Commission and their agreement to submit their power purchase agreement to the Commission for prior approval as a contract condition and by submitting pleadings before the Commission in the approval process, both parties having placed their transaction within the purview of Commission approval jurisdiction.
13. While the Commission has no jurisdiction to enforce contracts between the parties or address issues of unfair trade practices, fraud, misrepresentation, violation of the duty of fair dealings and good faith between parties to contract, as well as equitable remedies arising by the conduct of the parties all of which causes of action are implicated as a consequence of the actions of SCE under the PPA, the Commission does have specific authority under the RPS Law and other statutes to enforce and regulate the formation of contracts between the parties through its prior approval authority, uphold the integrity and lawfulness of its own regulatory processes and protect the California ratepayers from market

manipulation by public utility companies under its jurisdiction. Moreover, the Dispute Resolution provisions of the PPA cannot oust Commission jurisdiction and authority to address matters of public interest and violations of regulatory law by utilities as part of its enforcement and investigatory authority.

14. The Commission has an independent interest in this proceeding to investigate and assure itself that its regulatory processes under the RPS Law and its regulations are not being used and/or abused by the utilities under its jurisdiction to: (a) justify the discriminatory treatment of out of state renewable energy suppliers contrary to the constraints imposed by the Federal Power Act, the Commerce Clause of the United States Constitution, and California law and, (b) thwart the development of a robust regional renewable energy marketplace for the benefit of California's retail energy consumers. Moreover, the Commission has an interest to protect itself from liability because utility representations that its unlawful actions are a result of Commission policy. *See*, Exhibits 2 and 3.
15. SCE's withdrawal action directly implicates retail rates and service in California and therefore the Commission's express rate jurisdiction because the PPA provides reliable and dispatchable base load renewable energy and capacity at an overall lesser cost to consumers than most other sources of renewable energy both inside and outside of California.

B. The Public Interest Warrants Commission Intervention

16. The State of California has rightfully asserted its national leadership in the development of renewable energy policies designed to foster and incentivize its deployment. Pub. Util. Code section 399.11.

17. The RPS Law itself states as one of its purposes the need to address the energy issues confronting both the state and the nation. *See*, RPS Law, Section 399.11(b); Amended RPS Law, Section 399.11(b). The Amended RPS specifically prohibits discriminatory treatment of out of state generation. Section 399.11(e)(2).
18. In its implementation of the RPS Law, the Commission has recognized the importance of securing and procuring renewable energy resources from neighboring states. *Id.* The Commission has noted the benefits of market liquidity, the need for a robust TREC Market, and the protection of ratepayers from excessive payments to California utilities. *See*, D.10-03-21 at pp. 3-4 and 18 (March 11, 2010). Moreover, because of the interconnection of facilities located outside California and owned by California utilities or purchased by California utilities from third party out of state entities, and the importance of the development of a regional market for tradable renewable energy credits which will allow California to benefit from both the purchase and sale of renewable energy in interstate commerce, it is crucial that California be perceived as a fair and non-discriminatory jurisdiction.
19. Implicitly, both the RPS Law, Pub. Util. Code §399.16, and Commission policy, D.11-05-005, have recognized the constraints imposed upon California policy makers against discrimination of out of state providers by the State of California and its utilities in the procurement of energy under the Commerce Clause of the United States Constitution.

20. By the California legislature establishing a 33 per cent RPS by 2020, on information and belief, California must rely in part upon the availability and reliability of renewable resources from its neighboring states and the development of a robust renewable energy marketplace. To the extent that California desires to become an exporter of renewable energy to its neighboring states it will have to offer reciprocity to its neighbors for the purchase of its own renewable energy resources.
21. Because of the dire economic and financial conditions confronting the State of California and the nation, it is imperative that California be viewed as having an investment friendly business environment to encourage investment into renewable projects developed for the California market. The Commission has accepted this as a rationale to promote out of state generation for the RPS market in California.
D.10-03-21.
22. The unilateral withdrawal action of the PPA by SCE without Commission review and oversight will undermine the public policy goals of California because it will signal to the renewable energy developers and investors that California has an unreliable and non-transparent third world type business climate and governance thereby hampering the achievement of California's energy public policy.
23. The unilateral withdrawal action of the PPA by SCE without Commission oversight and approval will signal to neighboring states that California is an unreliable partner in the development of the TREC and dispatchable renewable energy market and the extension of comity to California entities seeking to do business in those states will be harmed.

24. California utilities have invested substantial resources in other states to provide energy for the benefit of their retail customers. In doing so, the environment of those states have necessarily been degraded. If the Commission is perceived to be purposefully involved in discriminatory treatment against out of state businesses seeking to develop clean energy resources for the California market, other states will be reluctant to afford business benefits to the California entities doing business outside California in the form of tax credits and benefits that are being currently enjoyed by those entities. Moreover, this will potentially discourage the location and permitting of California owned utility facilities in neighboring states.
25. SCE has specifically communicated to WWPP that one of the principal pretexts for its withdrawal action was to be responsive to California political opposition to out of state renewable energy resources being provided to California to meet the RPS Law and the failure of California policy makers to adequately address SCE's regulatory concerns about the discriminatory treatment of out of state renewable energy resources. At the time SCE withdrew the Advice Letter, it knew it would be violating WWPP's rights under the Commerce Clause. *See*, Application of Southern California Edison Company for Rehearing of Decision 11-01-025, filed February 14, 2011. Consequently, if this withdrawal action is not at least reviewed, if not reversed, by the Commission, the SCE assertion will be accepted as true by the marketplace and neighboring states and California utilities can expect retaliatory and harmful results to themselves and their consumers.

IV. THE ADVICE LETTER FILING

26. SCE timely filed its “2008 RPS Procurement Plan” with the Commission. On February 14, 2008, the Commission issued a decision conditionally accepting among other things the SCE Procurement Plan as modified by the Commission. D.08-02-008. In issuing its decision, the Commission recognized that utilities would be seeking bids from out of state bidders meeting the “delivery” requirements of California law. *Id.*, at 16.
27. Pursuant to the aforesaid Procurement Plan, SCE issued its Notice of Bid soliciting bids from renewable energy developers in and outside the State of California in order to meet its RPS obligations under California Law.
28. As part of its bid package, SCE included a *pro forma* Power Purchase Agreement which contained a requirement for “Commission Approval” of the PPA as required by the Commission in Rulemaking 04-04-026 (April 22, 2004) and D.04-06-014 (June 9, 2004) and the latest applicable “non-modifiable” standard contract provisions. In addition to including the non-modifiable Commission Approval provision, SCE included a provision that allowed either party to terminate the PPA if Commission Approval was not obtained within 365 days after the filing of the Advice Letter seeking Commission Approval. *See*, Exhibit 1, Section 2.04(a) of the PPA.
29. Pursuant to the bid deadline for filing bids, WWPP, a New Mexico limited liability company, submitted its bid to supply to SCE 32MW of firm, bundled, base load energy from a biomass generation project to be developed near Estancia, New Mexico. WWPP did not bid Tradable Renewable Energy Credits

to SCE. WWPP's bid was for bundled energy and renewable credits to be dynamically dispatched. The power and energy were to be delivered via firm transmission to SCE at the 4-Corners substation in Northeastern New Mexico and SCE would be responsible for transmitting the power to California via its transmission rights or facilities. The power and energy are scheduled to be delivered to SCE on or before March 2014.

30. On February 18, 2010, SCE filed a fully executed Renewable Energy Power Purchase and Sale Agreement (the "PPA") with the Commission along with its Advice Letter 2242-E.
31. On or about February 7, 2011, SCE sent to WWPP Amendment Number 1 to the PPA extending the PPA Commission Approval termination date for an additional 120 days from February 18, 2011 until June 17, 2011, the date by which SCE represented it was reasonable to assume the Commission Approval would be received by SCE. SCE also incorporated within the Amendment two PPA amendments incorporating non-modifiable terms adopted by the Commission in D.11-01-025 for inclusion in the PPA. WWPP accepted the two modifications and executed the amendments. *See*, Exhibit 1.
32. In May 2011 it became clear that SCE would not be able to meet a Commission Approval Date under the Amended PPA because of SCE delays in the provision of information requested by Commission staff and the notice and comment requirements for Commission Approval actions under Pub. Util. Code section 311(g) (1) and (2). As a consequence on May 5, 2011, SCE agreed to draft another PPA amendment extending the date for termination as a consequence of

- not receiving timely CPUC Approval in order to allow sufficient time to enable the Commission to approve the PPA consistent with its rules and law.
33. On September 2, 2011, SCE advised WWPP that it had unilaterally withdrawn Advice Letter 2244-E and refused to make a joint filing at the Commission to consider the status of the PPA and the Advice Letter as requested by WWPP.
34. On information and belief SCE never intended to honor its agreement with WWPP to extend the date in the PPA for obtaining CPUC Approval. Instead, it knowingly violated the Commerce Clause and, on information and belief, SCE determined that the economic interests of its affiliates and shareholders would be enhanced by preventing the PPA from ever obtaining CPUC Approval to the detriment of WWPP and SCE's ratepayers. Supporting this belief, was a report to WWPP in early June 2011 by a New Mexico economic development official working on transmission issues related to renewable energy transmission from New Mexico to California that during the spring of 2011 the SCE sale of its facilities at 4 Corners was adversely impacting the cost of transmission and the marketability of New Mexico renewable energy to California. On information and belief, the sale of the 4-Corners facilities would enable SCE to pancake additional transmission rates for transmission from 4 Corners to other CAISO interconnection points west of 4-Corners once the sale was completed and such additional revenues would not be allocated or shared with California ratepayers. Instead, the transmission costs would either be passed on as an additional cost to California ratepayers for out of state renewable supplies or imposed on out of state renewable suppliers. Additionally, during the period between 2008-2011,

SCE's unregulated affiliate, Mission Energy Group, and its development partner, Foresight Energy Inc., were in competition with WWPP for limited New Mexico Renewable Production Credits available under New Mexico law. Mission Energy Group, through its partner, aggressively sought to prevent WWPP from qualifying for the tax credits. As a consequence, WWPP lost millions of dollars in assured tax credits that were instead given to Mission in part because of delays in the CPUC Approval of the PPA. Those tax credits were in effect paid by New Mexico taxpayers to aid Mission Energy and denied to California ratepayers because the loss of those credits made WWPP's power more expensive to California ratepayers under the PPA. On information and belief, the same Mission officers involved in opposing the New Mexico Tax Credits for WWPP were now actively involved in the decision to terminate the PPA.

35. The parties have attempted to informally resolve SCE's unlawful withdrawal of its Advice Letter without success.

V. FACTS

36. In accordance with a Confidentiality Agreement, dated June 4, 2008, by and between SCE and WWPP, WWPP requests that accompanying Affidavits be accepted by the Commission under seal and protected from public disclosure to protect certain PPA negotiations and contract administration. Although WWPP believes that these restrictions are contrary to public policy because the discussions and statements disclosed in the Affidavits do not relate to confidential market sensitive information or trade secrets and pertain to matters of public policy and interest, WWPP feels obliged to honor the Confidentiality Agreement

unless the Commission orders otherwise. Without disclosing the specific communications between the parties in this Pleading, it is WWPP's assertion that the attached confidential Affidavits establish a course of bad faith conduct by SCE in satisfying its regulatory obligations to lawfully administer its renewable energy procurement process, abuse of the regulatory process, and the unconstitutional implementation and enforcement of an alleged discriminatory policy by the State of California, and particularly the Commission, against the purchase of renewable energy in inter-state commerce by California regulated public utilities.

37. Prior to submitting its bid, WWPP and SCE met at SCE's offices with Mr. Stuart Hemphill and other SCE representatives in California for the purpose of ascertaining whether SCE would be able to procure power and energy delivered from a New Mexico project at the 4-Corners substation in Northeastern New Mexico in order to meet renewable energy portfolio requirements under California law and Commission policy. In reliance on the comments and assurances received from Mr. Hemphill and other SCE representatives made at this meeting, WWPP submitted its bid to SCE. The WWPP bid was shortlisted by SCE on July 1, 2008. PPA negotiations between the parties commenced thereafter.

38. As noted in Exhibit 2 attached hereto, WWPP had serious concerns with the PPA provision governing the timeframe for the Commission approval process. Pursuant to Section 2.04 (a) of the PPA, both parties were provided the right to terminate the PPA if the Commission failed to approve the PPA within 365 days

after filing the PPA with the Commission. Because the PPA also prevented WWPP from marketing its power to third parties during the pendency of the Commission review, this provision exposed WWPP to substantial business and financial risk if SCE did not fulfill its contractual obligations. See, e.g., Exhibit 1, Sections, 2.06(b), 3.01(f), 3.04(c),(d) and (g). Based primarily upon assurances received from SCE's representatives, the PPA terms and conditions, and the reputation of the Commission as being a leader in renewable energy procurement in the Western United States, WWPP was satisfied that SCE had an enforceable good faith obligation to use due diligence in obtaining the Commission approval and that the Commission process would be fair and timely. As a consequence, WWPP continued its negotiations with SCE. On December 19, 2009 the PPA was executed by SCE. The PPA is attached hereto under seal as Exhibit 1.

39. Although SCE was willing to negotiate a few PPA provisions, the PPA was presented as an essentially "take it or leave it" proposition and therefore WWPP did not have an equal bargaining position with SCE. The PPA contained many one sided and unconscionable provisions that a party with equal bargaining positions would find commercially or legally unreasonable. Pertinent to this Complaint are the unreasonable confidentiality provisions that the Commission has recently noted and modified in its Decision regarding the 2011 RPS solicitation as being "one sided" and "denies the opportunity for a reasonable check and balance". D. 11-04-030 (Filed April 14, 2011) at p. 38. The Commission ordered utilities to modify this contract provision. *Id.* SCE did not modify the WWPP PPA as required by the Commission. Without this

modification, the Dispute Resolution provisions contained in the WWPP PPA potentially deny it the right to petition government and limit its rights to free speech.

40. As a result of its PPA obligations and timelines for performance and power delivery, see e.g., Exhibit 1 Sections 1.03, 1.04, 2.02(b), and Exhibit G, WWPP commenced immediate performance of a number of its obligations under the PPA. For example, WWPP secured a financing commitment from an Asian construction company for an equity participation in the project, secured a commitment of debt financing from one of the largest Asian commercial banks, obtained approval of the investment from a foreign government, executed transmission rights agreements necessary to transmit the energy to 4-Corners, renegotiated material fuel supply contracts, made option payments to transmission suppliers, commenced preliminary engineering necessary for equipment procurement and project construction, and commenced some construction activities on the site. All these activities required the incurrence of significant costs and executing material supplier contract modifications. Performance of its PPA obligations is ongoing to the present date. WWPP kept SCE informed about its activities.
41. During 2010, the Commission was engaged in a proceeding to consider modifications to its policy governing Tradable Renewable Energy Credits (“TREC”). On March 11, 2010, the Commission issued a decision on the definition and treatment of TRECS. D.10-03-021. As part of its decision, the Commission recognized that dynamically dispatched power was not a TREC. As

a consequence of issues raised by its decision, on May 6, 2010 the Commission placed a stay and moratorium on its treatment of TREC's. *See*, D.10-05-018. The moratorium and stay did not apply to the PPA not only because the PPA was for dynamically dispatched power but because all PPAs executed prior to the date of the decision were exempted from the stay and moratorium and could be presented to the Commission for approval. On January 13, 2011, the Commission issued D.11-01-025 which resolved the TREC issues and again restated its existing policy that out of state bundled bids that were dynamically dispatched were eligible to meet the California RPS. It also dissolved the stay and moratorium and ordered its staff to process out of state PPAs consistent with its decision.

42. On information and belief, on January 6, 2011 SCE met with the Commission Staff and staff of the California Energy Commission to obtain confirmation that the delivery point at 4-Corners substation qualified the power as "delivered" in California under existing law and would be eligible for inclusion in SCE's RPS. Although WWPP was not allowed to participate in the meeting by SCE, on information and belief, the CEC concluded that the power would be eligible for inclusion in the SCE RPS. Also on information and belief, the Commission staff in February or March 2011 requested that SCE provide it with additional pricing information on the PPA. SCE failed to provide the requested information to the Staff until mid-May 2011. As more fully explained in Exhibit 2, WWPP used due diligence in obtaining necessary information from SCE on the status of the CPUC Approval, its continued commitment to the success of the project, and its obligation to diligently pursue CPUC Approval. WWPP reasonably relied upon

- assurances given by SCE that the approval process was moving forward in a reasonable manner and that SCE continued to support approval of the PPA by the Commission and to otherwise meet its obligations to obtain Commission approval. SCE repeatedly refused to allow WWPP to assist it in obtaining timely CPUC Approval.
43. WWPP kept SCE apprised of its activities required by the PPA and the impact on the PPA milestone dates as a result of the delays associated with CPUC Approval.
44. In May 2011 it became clear that SCE would not be able to obtain CPUC Approval in accordance with the Amended PPA because of SCE delays in the provision of information requested by Commission staff and the notice and comment requirements for CPUC Approval under Pub. Util. Code section 311(g) (1) and (2). As a consequence, on May 5, 2011, SCE agreed to draft another PPA amendment extending the date for termination as a consequence of not receiving timely CPUC Approval in order to allow sufficient time to enable the Commission to approve the PPA consistent with its rules and law.
45. On June 17, WWPP first learned that SCE was considering terminating the PPA because of the delay in the obtaining the CPCU Approval. WWPP in a series of meetings thereafter stated, as more fully explained in Exhibit 2, that a termination of the PPA would cause substantial harm to the Project.
46. On June 20, 2011, WWPP's regulatory attorney contacted Mr. Paul Davis, Staff Director of Renewable Energy, to determine the status of the PPA. After several conversations it was learned that the matter had not been placed on the Commission's agenda for approval because SCE advised staff not to place the

matter on the agenda “because of two contractual issues that potentially required amendments to the PPA”. WWPP advised the Commission Staff that this representation to the Commission Staff was false. WWPP through its regulatory attorney requested a meeting between the Commission Staff and WWPP to discuss the matter. Mr. Davis declined the request for the meeting on the grounds that SCE is in charge of asking for the scheduling of PPAs for CPUC Approval and the Staff does not involve itself in matters between utilities and contractors.

47. On June 24, 2011, as more fully explained in Exhibit 3 attached hereto, WWPP was advised by SCE that the PPA would be terminated unless WWPP significantly reduced its PPA price. On information and belief, SCE knew when it made its demand for a price reduction that a biomass project such as WWPP’s project would be unable to meet this demand. Such notice constituted a complete breach of the PPA, and also confirmed SCE’s earlier breaches of failing to act in good faith to take necessary action to have the PPA approved.

48. On June 27, 2011 WWPP was notified by its investor that it would not execute a construction financing agreement until the CPUC Approval issue is resolved to its satisfaction.

49. On June 27, 2011, because of the Commission staff refusal to meet to discuss the status of the Commission approval, consistent with Commission ex parte rules and policies, WWPP requested a meeting with the Commission to find out what procedural options were available to get the PPA scheduled for Commission action.

50. On June 29, 2011 WWPP and the Commission had a conference call. WWPP advised the Commission on the developments concerning its PPA and asked for the Commission to give its guidance on how to get the PPA on the Commission's agenda for immediate consideration. The Commission advised WWPP that it would look into the matter and get back to WWPP's attorney.
51. On July 1, 2011, WWPP declared that because of the actions of SCE a dispute existed between WWPP and SCE under the PPA and, recognizing that SCE's actions had already constituted a full breach, WWPP submitted a proposal to SCE reducing its PPA price to a level to enable the project to remain financially feasible and obtain construction financing in an attempt to resolve the dispute. After receipt of the WWPP proposal and discussions between the parties, SCE sent to WWPP a proposed non-negotiable amendment to the PPA. Again, recognizing that SCE's actions had already constituted a full breach, WWPP signed the amendment as drafted by SCE on July 6, 2011 and sent it back to SCE for its signature in an effort to extend the date for settlement discussions that might resolve the dispute.
52. On July 8, 2011, the Commission advised WWPP that the PPA would be placed on the Commission's agenda for approval at the next Commission Meeting once the Notice and comment provisions of the Public Utility Code were met. The Commission expected that the Notice would be issued as part of the next public notice issued by the Commission. On information and belief, WWPP believes that the Commission also notified SCE of its intent to place the PPA on its agenda.

53. On information and belief, on July 9, 2011 SCE held an internal meeting of upper management, including its affiliates, on the PPA to plan further action. On information and belief, SCE's management determined that SCE should immediately terminate the PPA if the Commission were to take action to set the matter down for approval at its open meeting in order to avoid public scrutiny of its actions and attempt to oust Commission jurisdiction over the PPA. As a consequence, SCE advised WWPP that in addition to executing the non-negotiable PPA Amendment, WWPP must also execute a letter drafted by SCE to the Commission requesting a delay in considering the PPA for Approval or the PPA would be terminated.
54. On July 15, 2011, under duress and coercion and in recognition of the breach by SCE, WWPP signed the new amendment to the PPA extending the date for termination for failure to obtain timely CPUC Approval and the letter drafted by SCE to the Commission asking that the PPA not be set for Commission consideration before September 1, 2011. On information and belief the letter was filed by SCE with the Commission and mailed to the service list for its 2008 solicitation filing.
55. On information and belief and as specifically explained in Exhibits 2 and 3 attached hereto, SCE justified the termination of the PPA by claiming they were in effect forced to do so to comply with implementation and enforcement of an alleged California regulatory and governmental policy designed to favor California renewable project and discriminate against out of state renewable energy providers contrary to law. In making this representation, SCE knew it was

violating the Commerce Clause. *See* Application of Southern California Edison Company for Rehearing of Decision 11-01-025, filed February 14, 2011. On information and belief, SCE was also motivated to terminate the PPA as part of its efforts to manipulate the price of renewable energy to the California market as a consequence of its control over transmission from 4-Corners to El Dorado and to enhance the profitability of its unregulated affiliates.

56. On information and belief, numerous newspaper articles in the Western United States have appeared that report the potential cancellation of renewable energy generation and transmission projects due to alleged state discriminatory policies by California governmental entities based on economic protectionism in California.

VI FIRST CAUSE OF ACTION

(Violation of the Commerce Clause of the United States Constitution)

57. WWPP incorporates Paragraphs 1 through 56 by reference as if fully set forth herein.

58. By reference to its own words and actions, SCE has justified its action to terminate the PPA by the discriminatory policies of the State of California and the Commission which SCE unabashedly represents are designed to disfavor the acquisition of out-of-state renewable energy on grounds other than articulated by law and regulation.¹ *See*, Exhibit 3. In doing so, SCE has acknowledged and

¹ SCE's belief that the Commission favors in-state generation over out-of-state generation was demonstrated to the Commission in its Application for Rehearing of Decision 11-01-025, filed February 14, 2011. In Decision 11-09-019, the Commission dismissed SCE's rehearing application without addressing SCE's allegations, along with the rehearing applications of several other intervenors, finding that such allegations were moot. The Commission knew that there was a Commerce Clause issue when it adopted its policy, and did nothing to remedy the situation by addressing the issue. Now it has the specific opportunity to address the issue by asserting jurisdiction.

admitted, it knew it would be violating the Commerce Clause under the color of state law. *See* Application for Rehearing of Decision 11-01-025, filed February 14, 2011. Under the California Public Utility Act, SCE is liable for exemplary damages for such violations of the Constitution. Pub. Util. Code sec. 2106. Moreover, the Commission is obligated to seek enforcement of the Public Utility Code when it becomes aware of unlawful activities by public utilities. Pub. Util. Code Sec. 2101.

59. Under existing Pub. Utilities Code § 399.11 (e)(2), the California Legislature has determined that out of state renewable generation should not be discriminated against and should be treated similarly to California based generation. The Commission is granted the authority to include out-of state renewable energy resources if the resource meets specific criteria. *See*, SB2(1X)(Simitian, Chapter 1, Statutes of 2011, First Extraordinary Session) codified as Pub Util. Code sect. 399.16(1)(c).

60. Pursuant to this authority, the Commission has adopted specific criteria and rules for including out-of-state resources as eligible in meeting the RPS. *See*, R. 11-05-005. *See also*, R. 06-02-012 and D.11-01-025.

61. Despite assertions made by SCE to the contrary, on its face, the California Law and Commission Rules and decisions may not violate the Commerce Clause as it pertains to the PPA if out of state and domestic renewable energy resources are treated the same. If properly considered by the Commission, the PPA meets the criteria established under the existing statute and Commission Rule. R.11-05-005. If the matter is set for hearing, on information and belief, WWPP asserts that

it will be demonstrated that the PPA is consistent with the SCE 2008 RPS Procurement Plan, is consistent with SCE's Least-Cost, Best-Fit requirements, is consistent with RPS "non-modifiable" standard terms and conditions as established in D.08-04-009, D.08-08-028 and D.10-03-021, as modified by D.11-01-025, was subject to Independent Evaluator review pursuant to D.06-05-039 and D.09-06-050, was considered by the Procurement Review Group process established in D.02-08-071, is below the applicable market price referent established by the Commission, is below the TREC allowable amount, is an advanced project ready for development, is consistent with Interim Greenhouse Gas Emissions Performance Standard for biomass facilities as established D.07-01-039, COL 35, was provisionally certified by the California Energy Commission as an eligible renewable resource under California law pursuant Pub. Util. Code sec. 399.13, and is competitive with other biomass bids received by SCE or other California utilities during the 2011 solicitation process. *See, e.g.* Resolution E-4444 Approving the Power Purchase Agreement and Advice Letter 3754-E as amended between Pacific Gas and Electric Company and Kiara Solar, Inc. (December 15, 2011).

62. Nevertheless, a state or administrative agency may violate the commerce clause by implementing policies that discriminate against out-of-state persons that place more than an incidental burden on interstate commerce or are designed solely for economic protectionism. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142, 90 S. Ct. 844,847 (1970); *Philadelphia v. New Jersey*, 473 U.S. 617,624 (1978); *see also C&A Carbone v. Town of Clarkstone, New York*, 511 U.S. 383, 394, 114 S. Ct.

1677 (1994)(striking down a law that does not explicitly seek to regulate interstate commerce since it nonetheless does so by its practical effect). The flow of electricity is subject to the commerce clause, *New England Power Co v. New Hampshire*, 455 U.S. 331, 338-40 (1982), and states may not impede such flow. *See, e.g., Morgan Stanley Capital Group v. Pub. Util. Dist. No. 1 of Snohomish County Wash.*, 128 S. Ct. 2733, 2737-38 (2008); *Miss. Power & Light Co. v. Miss. ex rel. Moore*, 487 U.S. 354, 371 (1988). The establishment of a mandatory percentage of state preferences for renewable energy from domestic sources, such as established in Pub. Util. Code 399.16(1)(c) and R.11-05-005, may run afoul of the Commerce Clause if it is in practice protectionist and discriminatory as alleged and enforced by SCE. *See, e. g. Wyoming v. Oklahoma*, 502 U.S. 437, 456 (1992).

63. By enabling SCE to be the vehicle and instrumentality of state policy in the administration and procurement of renewable energy through its contracting regulations, SCE, the Commission, and the State of California are effectively partners in the implementation of the discriminatory energy policy. *See, e. g., Cantor v. Detroit Edison*, 428 U.S. 579 (1976)(Unquestionably the term "state action" may be used broadly to encompass individual action supported to some extent by state law or custom); *Wyoming v. Oklahoma*, 502 U.S. 437 (1992). If SCE is not a partner with the State of California, then it has violated CPUC and California policy embodied in the Amended RPS law.
64. If the Commission fails to correct the actions and statements of SCE by staying the SCE unilateral withdrawal of the Advice Letter without Commission oversight

and review and setting this matter down for Commission action under its lawful contract approval authority, the Commission will ratify the discriminatory action taken by SCE in violation of the Commerce Clause and may itself become liable for a violation of the Commerce Clause. *See, Dennis v. Higgins*, 498 U.S. 439, 451 (1991)(holding that a person may file a damage suit in federal court under 42 USC Section 1983 for violations of the Commerce Clause by state officials).

VII SECOND CAUSE OF ACTION
(Violation of Commission Policies)

65. SCE has abused the Commission process as set forth above by: a) misrepresenting to the Commission staff the status of the PPA; b) misrepresenting to WWPP the status of its PPA in order to limit WWPP's ability to present its case to the Commission in a timely manner by unilaterally withdrawing the Advice Letter; c) using the Commission process under its "standard of flexibility and accountability" to hide the disclosure of benefits obtained by its affiliate and itself through its control over transmission facilities and pricing at the expense of California consumers and WWPP by unilaterally withdrawing the Advice Letter; and, d) subjecting the Commission to a claim of a potential violation of the commerce clause as a consequence of its implementation of the RPS procurement process.
66. SCE's unilateral withdrawal action of the PPA without Commission oversight or approval causes irreparable harm to WWPP as well as to SCE's customers because it removes the Advice Letter from the Commission docket and necessarily delays any consideration of the PPA by the Commission. Under federal law, WWPP is entitled to a speedy resolution to claims in arbitration and

- the failure by the Commission to immediately consider the approval of the PPA may be unlawful. *See, e.g. AT&T Mobility LLC v. Conception et ux.*, 131 S. Ct. 1740 (2011).
67. PPA approval is, as a practical matter, a requirement for financing the WWPP project. This delay causes project financing and construction to be indefinitely suspended thereby placing material project contracts and federal and state tax credits in jeopardy and impacting the availability of renewable energy to the public at a least cost and best-fit basis.
68. By unilaterally withdrawing the Advice Letter from the Commission docket without Commission consideration or approval, WWPP and the California public will not have an adequate remedy at law because the project may be terminated and the public benefits foregone whether or not SCE's actions are ultimately determined to be unlawful under the PPA dispute resolution requirements.
69. The Dispute Resolution provisions of the PPA do not provide an adequate remedy to WWPP to remedy the unilateral withdrawal's effect on the project's viability because the arbitration procedures available to WWPP do not give the arbitrator jurisdiction over the Commission or the Commission's procedures for accepting or rejecting CPUC Approval of the PPA. Only the Commission controls its own processes. The Commission has adopted a regulatory process whereby utilities subject to its jurisdiction are held to a "standard of flexibility and accountability" in the procurement of renewable energy resources for achieving their RPS requirements and in the administration of their RPS program. D. 11-04-030 (Filed April 14, 2011).

70. Nevertheless, the Commission has retained jurisdiction under its PPA approval process to consider unlawful and unreasonable acts of public utilities in the procurement process. *Id.*

VIII RULE 4.2 COMPLIANCE

71. Categorization: WWPP proposes that this proceeding be categorized as adjudicatory.

72. Hearings: WWPP believes a hearing is necessary to resolve material facts in dispute.

73. Issue: The issue to be considered is whether or not SCE's actions violated the Commerce Clause of the US Constitution and certain Commission Policies by its unilateral withdrawal of Advice Letter 2242-E.

74. Schedule: WWPP's proposed schedule for resolution of this matter is based on an expedited schedule in order to avoid irreparable injury. WWPP proposes a prehearing conference thirty days following the filing of this Complaint, a hearing within 70 days after the filing of this Complaint, and a Final Commission decision within 180 days following the filing of this Complaint.

IX. RELIEF REQUESTED

75. WHEREFORE, for the reasons stated above, WWPP respectfully requests that the Commission issue an order:

- a. Rejecting SCE's unilateral withdrawal of Advice Letter 2242-E pending the Commission's consideration and final decision addressing the issues and facts set forth in this Complaint and Exhibits in order to prevent WWPP and SCE's ratepayers from experiencing irreparable harm;
- b. Finding that SCE's actions were a violation of the Commerce Clause of the US Constitution and Commission policies;
- c. Requiring the parties to modify the PPA in order to effectuate the policies of the State of California; and
- d. Granting such other and further relief as the Commission deems just and proper.

DONE THIS 19th DAY OF APRIL 2012.

RESPECTFULLY SUBMITTED

/s/

Kevin R. McSpadden
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EXHIBIT 1

[FILED UNDER SEAL]

EXHIBIT 2

[FILED UNDER SEAL

EXHIBIT 3

[FILED UNDER SEAL

VERIFICATION

I am an officer of the complaining LLC herein, and am authorized to make this verification on its behalf. The statements in the foregoing document are true of my own knowledge, except as to the matters which are therein stated on information and belief and otherwise based on the attached Affidavits to the document, and as to those matters I believe them to be true.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on March 19, 2012, at Chicago, Illinois.



David S. Cohen
President
WWPP