

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



FILED

05-28-10
04:59 PM

Application of Southern California Edison
Company (U338-E) For Authorization to Recover
Costs Necessary to Co-Fund a Feasibility Study
of a California IGCC With Carbon Capture and
Storage

Application No. 09-04-008
(Filed on April 3, 2009)

**COMMENTS OF HYDROGEN ENERGY INTERNATIONAL LLC TO
PROPOSED DECISION ON PETITION TO MODIFY DECISION 09-12-014**

DAVID L. HUARD
TARA S. KAUSHIK
Manatt, Phelps & Phillips, LLP
One Embarcadero Center, 30th Floor
San Francisco, CA 94111
Tel: (415) 291-7400
Fax: (415) 291-7474
Email: dhuard@manatt.com
Email: tkaushik@manatt.com

*Attorneys for Hydrogen Energy International
LLC and Hydrogen Energy California LLC*

Dated: May 28, 2010

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

Application of Southern California Edison
Company (U338-E) For Authorization to Recover
Costs Necessary to Co-Fund a Feasibility Study
of a California IGCC With Carbon Capture and
Storage

Application No. 09-04-008
(Filed on April 3, 2009)

**COMMENTS OF HYDROGEN ENERGY INTERNATIONAL LLC TO
PROPOSED DECISION ON PETITION TO MODIFY DECISION 09-12-014**

Pursuant to the Order of the Chief Administrative Law Judge dated May 19, 2010 and Commission Rules 14.3 and 14.6, Hydrogen Energy International LLC ("HEI"), on behalf of Hydrogen Energy California LLC ("HECA"), hereby submits its comments on the Proposed Decision entitled "Decision on Petition to Modify Decision 09-12-014" ("PD").

I. BACKGROUND

As stated more fully in the PD, Southern California Edison Company, Pacific Gas & Electric Company, and San Diego Gas & Electric Company (jointly, "the IOUs") filed a Petition to Modify ("the Petition") D. 09-12-014 ("the Decision") which approved, *inter alia*, the recovery of costs by Southern California Edison Company for its minority co-funding of a study to determine the feasibility of an integrated gasification combined cycle plant with carbon capture and storage known as HECA. The Decision followed Resolution E-4227A ("the Resolution") which allowed the creation of a memorandum account for the co-funding costs and directed the filing of the application that led to the Decision.

The Resolution specifically encouraged the IOUs to work together on the HECA project—a theme which was carried forward in the Decision. However, as conceded by the PD, "while the Commission expressed its support for cooperative actions, and potentially in negotiations of a PPA, D.09-12-014 did not specifically require such cooperation or negotiations." The Petition was filed to seek such specific direction to address a legal issue regarding joint utility cooperation posed by the

anti-trust laws and to ensure that the State Action immunity apply to all joint utility actions through active CPUC supervision. HEI on behalf of HECA filed a Response in support of the Petition. The PD grants the relief requested.

II. COMMENTS

First and foremost, HEI and HECA are truly appreciative of the Commission's continuing support for the HECA project and the recognition of the important benefits of the HECA project to California's ability to meet its clean energy goals. HEI and HECA are also appreciative of the Commission's support for timely action to allow negotiations with the IOUs to be consistent with project timelines and the DOE funding schedule for this first-of-a-kind, California-based, clean energy project.

HEI also supports the Commission's rejection of the continuing efforts of TURN and DRA to hinder the involvement of the IOUs with this project. TURN argues that the Petition raises a request that was rejected, when in fact it was not addressed at all in the Decision. DRA and TURN also re-argue their general policy opposition to IOU involvement in the study of clean energy and to any involvement with projects such as HECA, as well as raising issues rejected in prior Commission orders. HEI and HECA support the Commission's well-reasoned analysis and rejection of the protests.

In response to the TURN and DRA protests, the Commission has directed that the IOUs take several steps to ensure active Commission supervision of the IOUs in this regard. *See, e.g.*, Ordering Paragraphs 3 (d) through (g). The IOUs must: (1) make regular reports (not less than every six months) on the progress and status of their activities, (2) grant TURN and DRA access to these reports and other appropriate documents pursuant to Public Utilities Code section 583 for DRA and the non-disclosure agreements applicable to TURN's participation in the Procurement Review Group process, (3) develop information sharing guidelines and procedures, (4) potentially use an Independent Evaluator to assist in the Commission's supervision, and (5) file any agreements reached between the parties with the Commission for approval. HEI and HECA believe these steps and conditions are both appropriate and consistent with the Commission's responsibilities and prior rulings in this matter.

However, HEI respectfully submits the following limited additional requests for clarification:

(a) HEI and HECA believe that the purpose of the reports is to provide a public statement on process and the status of negotiations but is not intended to be a means to release any information on the particular terms and issues within any Power Purchase Agreement ("PPA") negotiations. This more limited intent should be specifically stated in the PD.

(b) The PD appears to contemplate a more active role for TURN and DRA than they would have in reviewing any other PPA between a utility and third party. The PD states:

Additionally, we make clear that DRA and TURN, the only other parties who actively participated in all phases of the underlying matter which lead to D.09-12-014, shall also have access to these reports and other appropriate documents pursuant to the confidentiality restrictions of Public Utilities Code Section 583 (for DRA) or the non-disclosure agreements provided in the Procurement Review Group process (for TURN). Thus, DRA and TURN will have access to information regarding this process and can also monitor it.

In addition, Ordering Paragraph 7 provides that DRA and TURN "may seek any additional documents exchanged between each of the IOUs" relating to the project.

HEI and HECA recognize the active role DRA and TURN have played in this proceeding and agree that providing copies of the progress reports, with appropriate confidentiality limitations, is a reasonable measure. The Commission should, however, clarify two points. First, access to "other appropriate documents" should include access to any *public* documents surrounding the project (e.g., permitting, incentives), but should not include confidential commercial documents used in the PPA negotiation until a PPA is provided to the PRG. Second, the Commission should clarify that by "monitor" it simply means that DRA and TURN may follow the process through the review of progress reports, again until a PPA is provided to the PRG. Any other interpretation would be unprecedented and could slow or burden the commercial negotiation process – an outcome that could put federal incentives at risk.

(c) The PD proposes to provide TURN and DRA the ability to ask for additional documents exchanged between each of the IOUs or between any IOU and HECA. As to TURN, the Commission relies on the confidentiality agreements in the PRG process to protect such material as confidential. HECA, however, is not a party to those PRG agreements and is not aware of the text of

such. Further, HEI and HECA have non-disclosure agreements with each of the IOUs and a Joint Negotiations Agreement with the IOUs. HEI wishes the Commission to clarify in the PD that such agreements between HECA and HEI, and the IOUs, are not affected or diminished by the order in the PD to provide documents to either TURN or DRA and that TURN, if needed, must enter into confidentiality and non-disclosure agreements with HEI and the IOUs before any affected information is provided to TURN if the PRG agreements do not directly address the situation.

(d) Further, HEI must stress that any IOU and TURN or DRA may potentially need to execute separate confidentiality agreements with third parties if the data that is to be shared is both related to the PPA negotiations and is covered by such an agreement with the third party.

(e) HEI also requests clarification that the scope of the sharing of confidential information with TURN and DRA in this matter is limited to information directly related to a potential PPA with the IOUs and does not extend to matters pending in other venues or as to matters not directly relevant to a PPA that may be submitted to this Commission.

(f) It seems that Ordering Paragraphs 3 (f) and (g) are misnumbered as "7" and "8".

III. CONCLUSION

For the foregoing reasons, HEI respectfully urges the Commission to issue the PD with the slight modifications requested herein which HEI believes are fully consistent with the Commission's intent in the PD.

Dated: May 28, 2010

Respectfully submitted,

MANATT, PHELPS & PHILLIPS, LLP

By: 
David L. Huard
Tara S. Kaushik

*Attorneys for Hydrogen Energy International
LLC and Hydrogen Energy California LLC*

PROOF OF SERVICE

I, Kim O.T. Trinh, declare as follows:

I am employed in the City and County of San Francisco, California. I am over the age of eighteen years and not a party to this action. My business address is MANATT, PHELPS & PHILLIPS, LLP, One Embarcadero Center, 30th Floor, San Francisco, California 94111-3719. On May 28, 2010, I served the within:

**COMMENTS OF HYDROGEN ENERGY INTERNATIONAL LLC TO
PROPOSED DECISION ON PETITION TO MODIFY DECISION 09-12-014**

on the interested parties in this action addressed as follows:

See attached service list.

- (BY PUC E-MAIL SERVICE)** By transmitting such document electronically from Manatt, Phelps & Phillips, LLP, San Francisco, California, to the electronic mail addresses listed above. I am readily familiar with the practice of Manatt, Phelps & Phillips, LLP for transmitting documents by electronic mail, said practice being that in the ordinary course of business, such electronic mail is transmitted immediately after such document has been tendered for filing. Said practice also complies with Rule 1.10(b) of the Public Utilities Commission of the State of California and all protocols described therein.
- (BY U.S. MAIL)** By placing such document(s) in a sealed envelope, with postage thereon fully prepaid for first class mail, for collection and mailing at Manatt, Phelps & Phillips, LLP, San Francisco, California following ordinary business practice. I am readily familiar with the practice at Manatt, Phelps & Phillips, LLP for collection and processing of correspondence for mailing with the United States Postal Service, said practice being that in the ordinary course of business, correspondence is deposited in the United States Postal Service the same day as it is placed for collection.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed on May 28, 2010, at San Francisco, California.



Kim O.T. Trinh

PUC E-Mail Service List
A.09-04-008
[Updated May 19, 2010]

Marilyn.Wade@bp.com
walker.matthews@sce.com
CFPena@SempraUtilities.com
nao@cpuc.ca.gov
bfinkelstein@turn.org
bcragg@goodinmacbride.com
DHuard@manatt.com
tkaushik@manatt.com
crmd@pge.com
michaelboyd@sbcglobal.net
mrw@mrwassoc.com
Angelica.Morales@sce.com
case.admin@sce.com
douglas.porter@sce.com
DNiehaus@SempraUtilities.com
bruce.foster@sce.com
cassandra.sweet@dowjones.com
cem@newsdata.com
ALR4@pge.com
CPUCCases@pge.com
Sean.Beatty@mirant.com
martinhomec@gmail.com
steven@iepa.com
dbp@cpuc.ca.gov
jjj@cpuc.ca.gov
kd1@cpuc.ca.gov
sha@cpuc.ca.gov
rmm@cpuc.ca.gov
wtr@cpuc.ca.gov
tjs@cpuc.ca.gov

ALJ Timothy J. Sullivan
California Public Utilities Commission
505 Van Ness Avenue
San Francisco, CA 94102

U.S. Mail Service List
A.09-04-008
[Updated May 19, 2010]

Commissioner Michael R. Peevey
California Public Utilities Commission
505 Van Ness Avenue
San Francisco, CA 94102