

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA



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Order Instituting Rulemaking on the Commission's Own Motion into Combined Heat and Power Pursuant To Assembly Bill 1613	Rulemaking 08-06-024 (Filed June 26, 2008)
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**COMMENTS OF FUELCELL ENERGY
ON ISSUES IDENTIFIED IN AMENDED SCOPING MEMO AND RULING**

In the September 9, 2010 Amended Scoping Memo and Ruling of Assigned Commissioner and Administrative Law Judge, the Commission seeks comments on four issues related to the petition for modification filed by Pacific Gas and Electric Company, San Diego Gas & Electric Company, and Southern California Edison Company (collectively the "Joint Utilities") and by an order issued by the Federal Energy Regulatory Commission ("FERC") on July 15, 2010 regarding jurisdictional issues relating to this proceeding.

FuelCell Energy, Inc. ("FCE") respectfully submits the following comments in response to the Commission's request.¹

4.1 Management of Greenhouse Gas (GHG) Allowance Procurement and Reimbursement

- (1) If Sellers require reimbursement for GHG allowance costs, at what intervals should invoices be submitted to the Buyers?*
- (2) Is a test (market based or some other method) needed to ensure that the invoices submitted by the Seller leave the ratepayer no worse off than if the Buyer had managed these compliance costs? If so, how should the market test be structured?*

FCE has no recommendation at this time regarding invoicing. A ratepayer indifference test for GHG allowance procurement is not necessary, or at least there are no facts on the record justifying imposing a test at this point. It is reasonable to expect that GHG allowances will be procured by the IOUs or by the Seller through market mechanisms established for this purpose.

¹ FCE manufactures, distributes and provides related services for stationary fuel cell power plants. FCE has been an active party in this proceeding.

A test would add complexity and risk (or at least perceived risk) for participants in the AB 1613 program, both of which could discourage participation. The Commission should adopt an approach to this issue that is simple to administer and straightforward as possible. Given that many issues related to the implementation of AB 32 are unresolved at this point, the Commission may want to defer action on these questions.

4.2 Line loss factor calculation

What is an appropriate calculation for line losses associated with moving the CHP project's power from the Delivery point to the grid controlled by the California Independent System Operator?

FCE supports San Joaquin Refining Company, Inc.'s suggestion to use the QF loss factors approved by the Commission for QFs in Decision 01-01-007 and, for PG&E, the WDAT distribution loss factors. The benefit of this approach would be simplicity and ease of administration. FCE is open to other methods of addressing this question as long as the method is simple, transparent and relatively accurate.

4.3 Contract changes reflecting QF requirements

(1) What changes are necessary to the contracts approved under D.09-12-042 to reflect the requirement for QF certification in addition to the already mandated certification from CEC?

First, a clarification is in order. The "requirement for QF certification" referred to in this question is based on FERC's recent declaratory order, which concluded that: "[b]ecause the CPUC's AB 1613 Decisions are setting rates for wholesale sales in interstate commerce by public utilities, we find that they are preempted by the FPA" and that "to the extent the CHP generators that can take part in the AB 1613 program obtain QF status, the CPUC's AB 1613

feed-in tariff is *not* preempted by the FPA, PURPA or Commission regulations....”² In the same order FERC also stated very clearly that:

[W]e clarify that for those facilities and sellers that are neither QFs nor public utilities selling at wholesale, but may, for example, be states or their subdivisions, agencies, authorities, or instrumentalities, rates for such sales are not within the Commission’s authority. *That is, as relevant in this context, they are not subject to our regulation because they are not rates for QF sales at wholesale under PURPA, and they are not rates for public utility sales at wholesale under the FPA.*³

Therefore, there is no “requirement for QF certification” for public entities that are entirely outside of FERC’s jurisdiction under the FPA and PURPA. There is no reason, in light of FERC’s clarification, that the Commission should oblige a public agency seller under AB 1613 to obtain QF certification, although the seller may choose for its own reasons to do so. Therefore, if the Commission adds any reference to a QF certification requirement it needs to add the words “as applicable.”

Section 2.01 of the Standard Contract for Eligible CHP Facilities with Net Output not Greater than 5 MW already imposes on the Seller an obligation to demonstrate that it has “satisfied all of the requirements necessary for Seller to Operate the Generating Facility in accordance with ... Applicable Law ... legal, and regulatory requirements.”⁴ This would obviously cover any applicable FERC order.⁵ However, if the Commission feels that additional specificity is needed, FCE would not object to adding at the end of this sentence (or elsewhere) “...including the requirement that the Seller must, *if applicable*, obtain QF status under PURPA”.

² 132 FERC ¶ 61,047 at ¶¶ 64-65.

³ Id. at ¶ 71 (emphasis added), referring to Section 201(f) of the FPA.

⁴ See likewise Section 2.01(b) of the Standard Contract for Eligible CHP Facilities.

⁵ Also note that the “Representations and Warranties” section of both contracts obliges the Seller to affirm its compliance with applicable laws and obtain all necessary regulatory authorizations.

(2) If a QF already certified for and participating in the feed-in-tariff program loses its CEC certification under AB 1613 but maintains QF certification by FERC, what should the contract provide as the alternative rate for the QF (e.g. should the QF receive short run avoided cost pricing)?

It seems appropriate that in the scenario described above, the QF would be paid the applicable QF rate.

4.4 Very Small (less than 500 kilowatt) Contract Option

(1) What changes are required from the adopted contracts to make a less than 500 kW contract more streamlined?

FCE suggests streamlining (or in some cases eliminating altogether) requirements in the following sections of the Standard Contract for Eligible CHP Facilities with Net Output not Greater than 5 MW for systems exporting 500 kW or less:

- Sections 1.08 (eliminate charges for scheduling and set up)
- Section 2.02(a)(ii) (eliminate reference to 1-year waiver)
- Section 2.02(b) (eliminate reference to 1-year waiver)
- Section 3.02 (eliminate reference to Seller's demonstration obligation)
- Section 3.20 (eliminate seller obligation to pay for 5 MW cut-off device)
- Section 6.01(b)(1) (eliminate 10% requirement)
- Section 6.01(b)(iii) (eliminate 18 month requirement)
- Section 7.10 (eliminate all insurance requirements except commercial liability)
- Exhibit C (simplify forecasting requirements)
- Exhibit D.3 (eliminate restriction on planned outages)

It may be useful to schedule a workshop or facilitated meeting to enable interested parties, including representatives of companies that sell or operate very small CHP systems, to discuss streamlining issues.

(2) What changes, if any, are required in this contract to comply with the FERC order?

See response to Question 4.3(1) above.

Dated: September 29, 2010

Respectfully submitted,

By: _____ /s/

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PROOF OF SERVICE

I declare that:

I am employed in the County of Sacramento, State of California. I am over the age of eighteen years and am not a party to the within action. My business address is ELLISON, SCHNEIDER & HARRIS; 2600 Capitol Avenue, Suite 400; Sacramento, California 95816; telephone (916) 447-2166.

On September 29, 2010, I served the attached *COMMENTS OF FUELCELL ENERGY ON ISSUES IDENTIFIED IN AMENDED SCOPING MEMO AND RULING* by electronic mail or, if no e-mail address was provided, by United States mail at Sacramento, California, addressed to each person shown on the attached service list.

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on September 29, 2010, at Sacramento, California.

/s/

Karen A. Mitchell

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