BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA

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Application of Southern California Edison (U 338 E) For Authorization to Recovery Costs Necessary to Co-Fund a Feasibility Study of a California IGCC with Carbon Capture and Storage	Application No. 09-04-008 (Filed April 3, 2009)

RESPONSE OF THE UTILITY REFORM NETWORK

TO THE JOINT UTILITIES' PETITION TO MODIFY D.09-12-014

Robert Finkelstein
Legal Director

The Utility Reform Network
115 Sansome Street, #900
San Francisco, CA 94104
415-929-8876, x. 307
bfinkelstein@turn.org

May 17, 2010

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Pursuant to Rule 16.4 of the Commission's Rules of Practice and Procedure, The Utility Reform Network (TURN) submits this response to the "Petition to Modify D.09-12-014 by Southern California Edison Company, Pacific Gas and Electric Company, and San Diego Gas & Electric Company" ("Petition to Modify"). In a ruling issued May 7, 2010, Administrative Law Judge Timothy Sullivan shortened the normal thirty-day response period to eleven days, setting the response date at May 17, 2010.

TURN opposes the Petition to Modify because it is inadequately supported and seeks relief that is overly broad at this juncture. TURN urges the Commission to either deny it without prejudice, or to grant a more limited authorization than that sought in the Petition to Modify. TURN also addresses below the proposed reporting requirements and offers its support for the appointment of an independent evaluator.

I. The Petition to Modify and D.09-12-014

The Petition to Modify describes itself as requesting "a slight modification to D.09-12-014 for the *limited* purpose of clarifying the scope of cooperative activities that the Commission, pursuant to Resolution E-4427A, expects and reasonably anticipates between and among the IOUs in connection with the HECA project."[1] This "slight" modification entails the addition of a new Ordering Paragraph that runs on for over a page (without any corresponding new Finding of Fact or Conclusion of Law), and the "limited purpose" is to exempt the joint activities of the utilities from federal antitrust laws that protect consumers from price fixing and bid rigging. As the Petition to Modify

[1] Petition to Modify, p. 2 [emphasis added].

acknowledges, the relief it seeks would have the Commission declare it to be California state policy "to set aside the norms of competition and to authorize conduct otherwise suspect under the antitrust laws."[2]

This is not the first time the request for antitrust protection has arisen in this proceeding. SCE's comments on the Proposed Decision focused primarily on the utility's request for the Commission to add an Ordering Paragraph that is an abbreviated version of the relief sought in the Petition to Modify.[3] The final decision noted SCE's comments regarding the potential liability under antitrust laws if the utilities went forward with joint discussions with HEI to negotiate terms and conditions for a purchased power agreement (PPA) for the output from the HECA facility.[4] However, it went on to reject the request for further specific authorization, finding such action unnecessary.

> Since Resolution E-4227A has already asked SCE to seek cooperation on commercialization of HECA power, and because commercialization requires the sale and purchase of electricity, there is no need to address further the request for the authorization of cooperation by the utilities in this decision.[5]

The Petition to Modify fails to mention SCE's earlier request for this relief, or the decision's discussion of the same issue. It makes no allegation that anything has changed since the Commission issued D.09-12-014, nor does it explain why the Commission should adopt a different outcome at this juncture than the one adopted in D.09-12-014.

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[2] *Id.*, p. 3.

[3] Comments of Southern California Edison Company on the Proposed Decision of ALJ Sullivan (November 23, 2009), pp. 3-6.

[4] D.09-12-014, p. 47.

[5] *Id.*, p. 52.

II. The Petition to Modify Is Defective Because It Fails To Identify Any Change Since D.09-12-014 Issued.

The Commission recently rejected a petition for modification in part because the petition did not identify any new facts, leaving the Commission to note that "[n]othing has changed" since it issued the decision that the petition sought to modify.[6] The same observation applies here, and the same result is appropriate.

When the Commission issued D.09-12-014, it noted SCE's argument about potential antitrust concerns and explained why it chose not to do anything further.[7] The Petition to Modify simply revives and lengthens the argument the Commission already rejected. If the utilities believed the Commission committed legal or factual error when it issued D.09-12-014, one or all of them should have filed an application for rehearing of that decision. If the utilities have new facts that warrant the Commission's reconsideration of its earlier decision on this issue, they should have presented those facts. But simply renewing the request for relief that the Commission has already denied (in a pleading that fails to acknowledge the earlier request for the same relief) is an insufficient basis for modifying the earlier decision.

III. The Unverified Factual Assertions Set Forth In The HECA LLC "Answer" Are Presented In A Manner That Does Not Comply With Commission Rules and Precludes Meaningful Response Under The Adopted Procedural Schedule.

Hydrogen Energy California LLC (HECA LLC) served an "answer" to the petition earlier today. HECA LLC's pleading sets forth a number of factual assertions regarding conditions the Department of Energy (DOE) has the plant developer to achieve

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[6] D.10-04-003, p. 10 and Findings of Fact 2 and 3.

[7] D.09-12-014, pp. 47 and 52.

commercial power sales through a purchased power agreement (pp. 3-4) and alludes to letter agreements HECA LLC (a subsidiary of HEI) entered into with SCE and Pacific Gas and Electric Company (PG&E). The agreement with SCE was formalized September 18, 2009, and the DOE Cooperative Agreement was executed September 30, 2009 (p. 4). The date of the letter agreement with PG&E is not clear in the HECA LLC Answer. According to the HECA LLC Answer, the target date for a term sheet between HECA LLC and SCE was December 10, 2009 (p. 4). The pleading does not indicate whether that target date was met, but seems to suggest that concerns about anti-trust exposure have stymied the negotiations to date.

The HECA LLC Answer places the Commission in an untenable position. Had the factual assertions been included in the Petition to Modify (with appropriate verification as required under Rule 16.4(b)), parties responding to the Petition to Modify might have had some meaningful opportunity to address those assertions. Instead, the failure to raise the assertions in the Petition to Modify, particularly in a petition that purportedly requires expedited consideration and Commission action, denies interested parties such as TURN any reasonable opportunity to respond. The Commission cannot rely on this unverified factual information without violating its own rules. Therefore, the Commission must ignore the new factual assertions contained in the HECA LLC Answer.

Even if the Commission considered the new factual assertions, it should conclude that the HECA LLC Answer casts doubt on the purported need for expedited and extraordinary action. According to the Answer, the negotiating parties have had "a legitimate collective concern … that the Commission has not issued sufficiently detailed direction to eliminate exposure of the three utilities to claims of violations of anti-trust

law" and a resulting "grave reluctance to commence negotiations for any PPA collectively or separately," such that the resulting delay "has become a major impediment to HECA Project implementation and the schedule and expectations of the DOE funding 'Cooperative Agreement'."[8] As noted above, the Cooperative Agreement was executed on September 30, 2009. If the unverified pleading is to be believed, negotiations stalled out immediately due to the anti-trust concerns. Yet the utilities did not seek the necessary relief until more than four months after D.09-12-014 issued. Where the utilities appear to have "sat on their hands," the Commission should decline the invitation to suspend its usual processes or make other efforts to accommodate the alleged need for exceptional relief.

IV. The Petition to Modify Seeks Overly Broad Relief

There is nothing "slight" or "limited" about the request embodied in the Petition to Modify. The Sherman Act and the antitrust protections thereunder are some of the most fundamental economic protections in federal law. Declaring that those protections are unnecessary in a particular context, even for a single transaction, is an action the Commission should not undertake lightly. If the regulatory agency is going to authorize certain conduct among the utilities that might be viewed as collusion or price-fixing in unregulated business settings, it needs to be very precise about the limits of that conduct. The Petition to Modify fails to give the Commission a sufficient basis for determining the appropriate limits, but rather seeks blanket authorization.

[8] HECA LLC Answer, pp. 4-5.

V. TURN Recommendation

TURN recommends that the Commission deny the Petition to Modify without prejudice, with direction to the three utilities to work in consultation with other interested parties (including consumer representatives) to develop a more detailed proposal for the process they intend to pursue with each other and with HECA LLC toward developing a PPA for the output from the HECA facility. Once they have such a proposal, they could then submit a Petition to Modify D.09-12-014 and present that proposal as a new factual development warranting the Commission's reconsideration of the outcome the earlier decision adopted on this issue.

In the alternative, the Commission should grant authorization that is far more limited than that described in the Ordering Paragraph proposed in the Petition to Modify. The relief should be tailored to the circumstances. At this point, the utilities have simply said they would need to coordinate their efforts in order to move toward a PPA for output from the HECA plant. The Commission should authorize further coordination and discussion only insofar as necessary to develop a joint proposal for the process the utilities expect to pursue with each other and with HECA LLC. Once the utilities present such a joint proposal for the process they hope to pursue, the Commission can then consider extending its authorization as appropriate and as consistent with the proposed process.

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Finally, TURN addresses two related but separate matters. First, the semi-annual reports proposed in the Petition to Modify make sense, but the Commission should 1) encourage the utilities to provide detail sufficient to permit the reader to fully understand what is going on in the discussions among the utilities, and 2) provide the reports (subject to appropriate non-disclosure agreements) to DRA, TURN, and other interested parties. Second, TURN encourages use of an independent evaluator as the Petition to Modify suggests. It may also make sense to have the reporting requirements fall on this independent evaluator rather than the utilities.

May 17, 2010

Respectfully submitted,

By: __/S/ *Robert Finkelstein*___

Robert Finkelstein
Legal Director

The Utility Reform Network
115 Sansome Street, #900
San Francisco, CA 94104
415-929-8876, x. 307
bfinkelstein@turn.org

CERTIFICATE OF SERVICE

I, Larry Wong, certify under penalty of perjury under the laws of the State of California that the following is true and correct:

On May 17, 2010, I served the attached:

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on all eligible parties on the attached lists **A09-04-008** by sending said document by electronic mail to each of the parties via electronic mail, as reflected on the attached Service List.

Executed this May 17, 2010, at San Francisco, California.

/S/
Larry Wong

Service List for A.09-04-008

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