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BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

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)

**AMENDED SCOPING MEMO AND RULING
OF ASSIGNED COMMISSIONER AND ADMINISTRATIVE LAW JUDGE**

1. Summary

This ruling amends the November 4, 2008 Scoping Memo and the April 1, 2009 Amended Scoping Memo previously issued. This ruling revises the scope and schedule for implementing the provisions of Assembly Bill 1613 (AB 1613) (Stats. 2007, ch. 713) relating to the policies and procedures for purchase of excess electricity from eligible combined heat and power (CHP) systems by electric corporations. Parties may file comments on the issues described in Section 4 of this ruling.

2. Background

On June 26, 2008, the Commission opened this rulemaking to implement the provisions of AB 1613. AB 1613 established the Waste Heat and Carbon Emissions Reduction Act which relates to the utilization of excess waste heat through CHP technologies.¹ The legislation expresses the intent to support and

¹ CHP (sometimes referred to as cogeneration) is the production of two kinds of energy – electricity and thermal heat – from a single source of fuel.

facilitate both consumer and utility owned CHP systems and imposes certain requirements on the Commission, the California Energy Commission (CEC), the California Air Resources Board, and electric corporations.

AB 1613 requires the Commission to require an electrical corporation to purchase excess electricity delivered from a new CHP system of not more than 20 megawatts (MW) that complies with certain sizing, energy efficiency, and air pollution control requirements. (Pub. Util. Code Section 2841(a).)² The Commission issued Decision (D.) 09-12-042 on this topic in December 2009. A petition for modification of D.09-12-042 was filed jointly by Pacific Gas and Electric Company (PG&E), San Diego Gas & Electric Company (SDG&E), and Southern California Edison Company (SCE) (the “Joint Utilities”), on February 2, 2010.³ The petition is still pending before the Commission.

Further, AB 1613 directs the Commission to establish a “pay as you save” (PAYS) pilot program for each electrical corporation to finance all the upfront costs for the purchase and installation of CHP systems by eligible customers. (§ 2842.4.) An “eligible customer” for purposes of § 2842.4 is defined as either a nonprofit organization exempt from taxation pursuant to Section 501 of the Internal Revenue Code (26 U.S.C., § 501(a)) or a federal, state or local government facility. By ruling on May 11, 2010, the assigned Administrative Law Judge (ALJ) sought additional comments from parties on this topic. The issue of establishment of a PAYS pilot is still pending in this rulemaking.

² Unless otherwise specified, all statutory references are to the Public Utilities Code.

³ In addition to filing a petition for modification, the Joint Utilities also filed an application for rehearing of D.09-12-042. In D.10-04-055, the Commission modified D.09-12-042, and denied rehearing of the decision, as modified.

3. Petitions at FERC

On May 4, 2010, the Commission filed a Petition for a Declaratory Order at the Federal Energy Regulatory Commission (FERC) requesting FERC to find that the Federal Power Act (FPA), the Public Utilities Regulatory Policy Act (PURPA) and FERC regulations do not preempt D.09-12-042 and D.10-04-055. On May 11, 2010, the Joint Utilities filed with FERC a cross-Petition for Declaratory Order in which they argued that the AB 1613 feed-in-tariff decision is preempted by the FPA insofar as it sets rates for electric energy that is sold at wholesale.

FERC issued an order on July 15, 2010. The FERC order denied in part and granted in part the Commission's and the Joint Utilities' cross-petitions. FERC found that under FPA, FERC has exclusive jurisdiction over wholesale rates and rejected the Commission's argument that requiring utilities to simply "offer" a rate to potential CHP customers is not regulating the wholesale rate. However, FERC found that the AB 1613 feed-in-tariff decision is *not* preempted by the FPA, PURPA, or FERC regulations, as long as the program meets certain requirements. Specifically, the AB 1613 program will *not* be preempted as long as: (1) the CHP generators from which the Commission is requiring the Joint Utilities to purchase energy obtain Qualifying Facility (QF) status from FERC in accordance to PURPA; and (2) the rate established by the Commission does not exceed the avoided cost of the purchasing utility.

In light of the FERC order and in order to adequately respond to some of the outstanding matters raised in the Petition for Modification, this amended scoping memo requests that parties provide additional comments as set forth in Section 4 below.

4. Comments Requested on Issues Raised in Petition for Modification and FERC Order

The scope of this proceeding is herein amended to include the questions set forth in sections 4.1 through 4.4 below. The Commission seeks comment on these questions and parties wishing to file comments may do so by September 29, 2010, and reply comments should be filed no later than October 11, 2010. With the exception of the issues raised in Section 4.1 through 4.4, parties may not comment on any other aspects of the AB 1613 program adopted in D.09-12-042, as amended by D.10-04-055.

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

In the petition for modification of D.09-12-042, the Joint Utilities request that the contract provision that the utilities must purchase GHG allowances on behalf of CHP Sellers be removed. The Joint Utilities reason that they should have the choice to procure allowances on behalf of CHP Sellers, but should not be required to do so.

Regardless of who purchases the allowances, the Buyer (and ultimately the ratepayer) will pay the cost of compliance with GHG regulations. If it is ultimately determined that CHP Sellers should manage allowance procurement for emissions associated with power sold to the Buyer, several logistical issues must be addressed related to compliance cost reimbursement. First, the timing of the Buyer's reimbursements to the Seller for these costs must be addressed, particularly in light of the fact that the retirement of allowances may not be required for several years after the emissions occur. Second, some type of cost control mechanism is needed to ensure that ratepayers are protected from the lack of incentive for the Seller to minimize these compliance costs, given that the

Seller is guaranteed full reimbursement, Parties are requested to respond to the following:

- (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?

4.2 Line Loss Factor Calculation

The Joint Utilities' Petition for Modification recommends several changes to "clean up" the contracts approved in D.09-12-042. Recommended changes to Exhibit C, section 2 of the standard contract (Exhibit B, section 2 of the simplified contract) include adding a loss factor to the time of delivery (TOD) period payment calculation, to be consistent with D.09-12-042.⁴ However, while the Joint Utilities included in their contract modifications a definition for the Loss Factor, it remains unclear as to how line losses are determined.

Parties are requested to respond to the following question: 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?

4.3 Contract Changes Reflecting QF Requirements

As noted above, the FERC Order responding to the Commission's and Joint Utilities' cross-petitions found that if the Commission requires utilities to offer contracts at a certain price for CHP systems, the Commission should be

⁴ See pages 51-52 and Attachment A, Section 1.03 of D.09-12-042.

acting under its PURPA authority and the price should not exceed avoided cost rates. This necessarily would mean that the CHP generators would have to obtain QF status under PURPA. PURPA requires CHP generators to operate at a system efficiency of at least 42%. Generators participating in the AB 1613 feed-in-tariff program are additionally required to obtain certification from the CEC that they maintain a higher efficiency standard of 62% (60% for bottoming-cycle CHP).

Parties are requested to respond on the following:

- (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?
- (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)?

4.4 Very Small (less than 500 kilowatt) Contract Option

In D.09-12-042, the Commission directed the parties to develop a very small (less than 500 kilowatt (kW)) streamlined contract within a set period of time. The Commission granted a request by the Joint Utilities to delay development of this contract until October 2010. Because of the delay in processing the two contracts approved in December 2009, and in light of the FERC ruling, the timing of this very small contract will also need to be updated.

Parties are asked to respond to the following:

- (1) What changes are required from the adopted contracts to make a less than 500 kW contract more streamlined?
- (2) What changes, if any, are required in this contract to comply with the FERC order?

5. Amended Schedule

An initial scoping memo for this rulemaking, issued by ruling on November 4, 2008, established a schedule for the case with a final decision by August 2009. An amended scoping memo was issued on April 1, 2009 which modified the initial schedule and set a final decision date of November 2009, and stated that the proceeding would be completed within 18 months of the amended scoping memo, or October 1, 2010.

Given the need for additional comments to address the petition for modification of D.09-12-042, and in order to allow time to address issues surrounding a PAYS pilot, the schedule for this proceeding is amended as follows:

Event	Date
Comments on Issues in Section 4 of this ruling	September 29, 2010
Reply Comments	October 11, 2010
ALJ Proposed Decision on Petition for Modification of D.09-12-042	Fourth Quarter 2010 or First Quarter 2011
Final Decision on Petition for Modification	First Quarter 2011
ALJ Proposed Decision on PAYS pilot	Fourth Quarter of 2010
Final Decision on PAYS pilot	Fourth Quarter of 2010 or First Quarter 2011

We anticipate that the proceeding shall be resolved as set forth above. In any event, we anticipate that the proceeding will be completed within 18 months of this amended Scoping Memo, as provided in Pub. Util. Code § 1701.5.

IT IS RULED that:

1. The scope, procedures and schedule for implementing policies and procedures for purchases of excess electricity from eligible combined heat and power systems under Assembly Bill 1613 are revised as described in this ruling.
2. Parties may file comments on the issues set forth in Section 4 of this ruling, no later than September 29, 2010, and reply comments no later than October 11, 2010.

Dated September 9, 2010, at San Francisco, California.

/s/ MICHAEL R. PEEVEY
Michael R. Peevey
Assigned Commissioner

/s/ JANET A. ECONOME for
Amy C. Yip-Kikugawa
Administrative Law Judge

INFORMATION REGARDING SERVICE

I have provided notification of filing to the electronic mail addresses on the attached service list.

Upon confirmation of this document's acceptance for filing, I will cause a Notice of Availability of the filed document to be served upon the service list to this proceeding by U.S. mail. The service list I will use to serve the Notice of Availability of the filed document is current as of today's date.

Dated September 9, 2010, at San Francisco, California.

/s/ TERESITA C. GALLARDO

Teresita C. Gallardo

N O T I C E

Parties should notify the Process Office, Public Utilities Commission, 505 Van Ness Avenue, Room 2000, San Francisco, CA 94102, of any change of address to ensure that they continue to receive documents. You must indicate the proceeding number on the service list on which your name appears.

The Commission's policy is to schedule hearings (meetings, workshops, etc.) in locations that are accessible to people with disabilities. To verify that a particular location is accessible, call: Calendar Clerk (415) 703-1203.

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