

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA



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Application of Southern California Edison Company
(U 338-E) Regarding the Distribution of SO2 Allowance
Sale Proceeds Related to the Suspended Operation of
Mohave Generating Station.

Application 06-12-022
(Filed December 20, 2006)

JUST TRANSITION COALITION'S OPENING BRIEF

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SUMMARY OF RECOMMENDATIONS

In accordance with Rule 13.1 of the Commission's Rules of Practice and Procedure, the Just Transition Coalition (JTC) provides the following summary of its recommendations on issues addressed in the briefing on the Commission's authority for this proceeding. JTC recommends that the best and most appropriate use of the SO₂ allowance proceeds is to promote renewable energy development either on Navajo and Hopi lands or owned by Navajo or Hopi governments. This renewable energy development would be selected by Southern California Edison Company (SCE) in its ordinary course of business through its procurement process to meet its Renewable Portfolio Standard requirements, and thus assist SCE in meeting its renewable energy mandate. This proposal would directly benefit ratepayers by assisting SCE in meeting its renewable energy mandate. The Commission has ample legal authority to approve this type of framework and the facts warrant this result.

In its final decision on this Application, JTC specifically recommends that the Commission find, conclude, and order as follows:

- SCE's Mohave Sulfur Credit Sub-Account (MSCSA) established pursuant to Decision (D.) 06-05-016 shall be maintained by SCE through December 31, 2026.
- Consistent with the facts and law specific to the emissions credit revenues at issue, the best and most appropriate use of the SO₂ allowance revenues recorded to date and through December 31, 2026, in SCE's MSCSA, for both ratepayers and the tribal communities impacted by Mohave's operation and closure, is to incentive renewable energy project development either located on Hopi or Navajo lands or owned by Hopi or Navajo governments.
- To that end, the Commission should only authorize disbursement of SO₂ sales revenues currently, and to be, recorded in the MSCSA by SCE as an incentive payment for such renewable development to the extent selected by SCE to meet its Renewable Portfolio Standard (RPS) Program requirements, either by competitive solicitation, bilateral negotiation, or other RPS procurement mechanism.

- Any allowances attributable to the closure of Mohave not sold before December 31, 2026, shall be retired. Any revenues tracked and recorded in the MSCSA that remain as of December 31, 2026, shall be refunded to SCE's ratepayers.

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JUST TRANSITION COALITION'S OPENING BRIEF

The Just Transition Coalition (JTC)¹ respectfully submits this brief pursuant to the January 27, 2012 Administrative Law Judge's Ruling Denying Request of the Navajo Nation for Evidentiary Hearing and Setting Briefing Schedule (January 27 ALJ Ruling). The January 27 ALJ Ruling stated that the final brief "must address the proposals and testimony submitted in responses" submitted in September and October 2011. The brief is required to include: "[a]ll relevant issues, including recent developments in the administration of the federal Clean Air Act" and the party's entire legal argument. Thus, this brief presents JTC's legal position, its response to other parties' positions, and reasons why the Commission should adopt JTC's proposal.

I. INTRODUCTION

In Decision (D.) 06-05-016, the Commission directed Southern California Edison Company (SCE) to establish the Mohave Sulfur Credit Sub-Account (MSCSA) in SCE's Energy Resource Recovery Account (ERRA) tariff to "separately track as a credit entry the revenues from the sales of SCE's sulfur credits created" by the closure of the Mohave Generating Station (Mohave), effective December 31, 2005.² In that same decision, the Commission directed that

¹ The Just Transition Coalition is comprised of the Black Mesa Water Coalition, Indigenous Environmental Network, To' Nizhoni Ani (Navajo-based 501(c)3 meaning "Beautiful Water Speaks"), Sierra Club, and Grand Canyon Trust. Its mission is to restore environmental and economic justice for the Navajo and Hopi people while benefiting California ratepayers with access to electricity generated from clean and renewable energy resources.

² D.06-05-016, Ordering Paragraph 11, at p. 382.

“SCE shall not disburse funds from the Mohave Sulfur Credit Sub-Account without specific Commission authorization to do so.”³

The purpose of this proceeding is for the Commission to decide how these emission allowance revenues will be disbursed. At the present time, approximately \$3.5 million in such revenues have been tracked and recorded in the MSCSA.⁴ This value, which is unlikely to significantly increase, only amounts to approximately 0.06% of the \$6.285 billion base revenue requirement that SCE requested in its recent General Rate Case.⁵ At issue before the Commission is whether it will use this fund to incentivize new tribal renewable resources to meet California’s renewable requirements or give pennies to SCE’s ratepayers.

It is JTC’s position that the Commission authorize SCE to disburse those funds only for the purpose of making incentive payments for RPS-compliant electric generation procured by SCE from qualified renewable projects located on Hopi or Navajo land or owned by Hopi or Navajo governments to meet its RPS requirements. To facilitate this, JTC urges the Commission to require SCE’s MSCSA be maintained and that all sales of SCE’s sulfur credits created by Mohave’s closure continue to be recorded in that account through December 31, 2026. This approach is supported by the facts and law and will ensure the greatest benefit for both SCE’s ratepayers and the Navajo and Hopi people directly impacted by the operation and closure of Mohave.

Navajo and Hopi lands have enormous potential for renewable development, and the Navajo and Hopi governments have expressed an interest in owning and leasing land for renewable resources. Tribal renewable projects are starting to be developed, and utilities in other states have started seeking contracts for the power that these tribal projects will produce. Notably, California agencies have recognized the importance of renewable resources that are geographically diverse, such as these potential tribal renewable opportunities. To incentivize

³ D.06-05-016, Ordering Paragraph 12, at p. 382.

⁴ SCE Supplemental Testimony at p. 1 (August 12, 2011).

⁵ SCE’s General Rate Case Application at p. 1, (Nov. 23, 2010) *available at* [http://www3.sce.com/sscc/law/dis/dbattach3e.nsf/0/61D2DD0CACC8421D882577E300676839/\\$FILE/SCE+2012+GRC+Application.pdf](http://www3.sce.com/sscc/law/dis/dbattach3e.nsf/0/61D2DD0CACC8421D882577E300676839/$FILE/SCE+2012+GRC+Application.pdf).

these new renewable opportunities for the benefit of SCE's ratepayers, JTC recommends that the best and most appropriate use of the sulfur dioxide (SO₂) allowance proceeds is to incentivize renewable energy development either located on Navajo and Hopi lands or owned by Navajo or Hopi governments that can meet SCE's Renewable Portfolio Standard (RPS) Program requirements, which are now set at 33% of SCE's retail energy demand by 2020.⁶ As described in more detail below, qualified projects would be those selected by SCE through bilateral negotiations, competitive solicitations, or other procurement mechanism used by SCE to procure RPS-eligible energy. The revenues applied to this incentive would include all revenues from the sales of SCE's sulfur credits currently recorded, and to be recorded through December 31, 2026, in SCE's MSCSA.

In addition to providing a ratepayer benefit, JTC's proposal would benefit the Hopi and Navajo communities. In terms of the propriety of applying these funds in this manner, the environmental and economic impacts from the operation and closure of the Mohave Generating Station ("Mohave" or "MGS") were immediate and devastating to the Hopi and Navajo communities. Mohave's closure in 2005 followed years in which the facility's operation severely impacted the health and welfare of these communities as well as their access to water. In December 2004, the Commission committed to exploring all options for new energy "sources that will provide the fullest possible benefit to the Hopi and Navajo while protecting the interests of Edison's ratepayers" after it predicted "devastating effects on the Hopi and Navajo people and tribes as a whole" from Mohave's closure.⁷ JTC's proposal meets this commitment by offering a proposal that is aimed at achieving a mutual benefit for both the Hopi and Navajo and SCE's ratepayers.

The Commission has ample legal authority to approve JTC's proposed mechanism, which utilizes the Commission's existing structures to assure ratepayer value. JTC's proposal also

⁶ Senate Bill (SB) 2 (1x) (Stats. 2011, Ch. 1), adding and amending provisions of Public Utilities (PU) Code §399.11, *et seq.*

⁷ D.04-12-016 at pp. 14, 53.

provides the greatest assurance of any of the submitted proposals that the allowance funds will result in completed projects benefiting Navajo and Hopi communities. JTC's proposal thus provides the delicate balance of providing a ratepayer benefit while also benefiting these communities. The devastation that Mohave's operation and closure caused to the Navajo and Hopi communities warrant this result.

II. PROPOSED DISBURSEMENT OF REVENUES

A. Mohave Allowance Revenues

The revenues at issue in this application are from the sale of emission allowances that EPA gave SCE to offset Mohave's SO₂ emissions. This application (A.06-12-022) is a direct result of the Commission, in D.06-05-016, granting JTC's motion in SCE's 2004 general rate case for the creation of the Mohave Sulfur Credit Sub-Account (MSCSA).⁸ Pursuant to that decision, SCE was required to record the revenues from the sales of SCE's sulfur credits created by Mohave's closure in the MSCSA and not disburse those funds without Commission authorization to do so.⁹ SCE's request for that authorization is the subject of this application.

SCE's annual share of allowances until 2010 was 29,800 allowances per year, and, beginning in 2010, it was over 29,200 allowances per year.¹⁰ Since Mohave is closed, SCE no longer needs to use allowances to offset its SO₂ pollution. Thus, the revenue from the sale of SCE's share of Mohave allowances is required to be tracked, and not disbursed absent Commission authorization, in the MSCSA pursuant to D.06-05-016.

When D.06-05-016 was issued,¹¹ the Commission also found that the "sale of Mohave sulfur credits will result in substantial revenue to SCE"¹² (which was estimated at that time to be approximately \$65 million per year) and ordered that SCE "not disburse funds from the Mohave

⁸ D.06-05-016, Ordering Paragraph 11, at p. 382.

⁹ D.06-05-016, at pp. 3, 21, 27; Conclusion of Law 6, at p. 376, Ordering ¶ 11, at p. 382.

¹⁰ See *infra* § III(B), Background on SCE's Allowances.

¹¹ D.06-05-016, Ordering ¶ 11, at p. 382.

¹² D.06-05-016, Finding of Fact 21, at p. 353; *see also id.* at p. 26.

Sulfur Credit Sub-Account without specific Commission authorization to do so.”¹³ However, due to substantial changes in the market, the allowances are now worth substantially less than was originally estimated.¹⁴ As of August 8, 2011, the total amount in the Mohave Sulfur Credit Sub-Account from past sales of allowances was approximately \$3.5 million.¹⁵ This value is not expected to substantially rise from future sales of allowances in upcoming years.¹⁶

B. JTC’s Proposal for Disbursement of the Revenues

JTC has worked extensively in this proceeding to develop a meaningful, constructive, and timely solution to the far-reaching economic and environmental hardships for the Hopi and Navajo people resulting from Mohave’s operation and closure that will also be mutually beneficial to SCE’s ratepayers. JTC’s proposal has consistently recommended that the best and most appropriate use of the Mohave allowance proceeds is to promote renewable energy development that directly benefits the Navajo Nation and/or the Hopi Tribe, while providing RPS-compliant electricity to SCE’s ratepayers. During this case, JTC refined its proposal based on discussions with other parties in an attempt to reach consensus and resolution. While consensus was not ultimately reached, JTC’s proposal remains the best balanced approach reflecting the diverse interests represented in this matter.

JTC’s current proposal, which was described in JTC’s September 16, 2011 Modified Testimony,¹⁷ recommends that all of the proceeds from the sale of the Mohave allowances be used as an adder to incentivize RPS-eligible projects to bid into SCE’s procurement process. JTC’s current proposal has been revised to include renewable projects in California that are owned or co-owned with at least a five percent ownership interest by the Hopi Tribe and/or Navajo Nation, in addition to projects that are located on lands owned by the Hopi Tribe and/or

¹³ D.06-05-016, Ordering ¶ 12, at p. 382.

¹⁴ See *infra* at § III(B) (discussing recent regulatory actions that have impacted the market).

¹⁵ SCE Supplemental Testimony at p. 1 (Aug. 12, 2011).

¹⁶ See *infra* at § III(B) (discussing recent regulatory actions that have impacted the market).

¹⁷ See JTC Modified Testimony at App. A (Sept. 12, 2011) (hereinafter “JTC Modified Test.”); see also JTC Prehearing Conference Statement at p. 3 (July 21, 2011).

Navajo Nation. Moreover, JTC eliminated the previously proposed use of a non-profit to manage the Allowance revenues. Rather, the revenues would be managed by SCE in its procurement process and distributed to projects upon approval through SCE's renewable procurement process. Finally, JTC's current proposal reiterates its previous plan of retiring any allowances that remain unsold by December 31, 2026. After this date, JTC also proposes to credit any remaining revenues to SCE customers through rates.

By utilizing SCE's current RPS procurement process and its various options, SCE will be able to distribute this fund in its ordinary course of business relying on the procurement structure that has been authorized for the RPS by the Commission. This procurement process, which include bilateral contracts and competitive solicitations, represent a long history of the Commission's ability to structure a process that balances the need for regulatory oversight to achieve public interest goals with flexibility and utility discretion to make its expert opinions and analysis, with input from its procurement review group, about the appropriate renewable energy projects to pursue.

JTC's current proposal, as described in JTC's modified testimony served on September 16, 2011, is as follows:

In order to mitigate the social and economic impacts from the operation and shutdown of the Mohave Generating Station and to encourage the development and/or implementation of environmentally sound Renewable Portfolio Standard eligible projects for, or relating to, the generation of renewable energy, the California Public Utilities Commission shall order the following:

I. Revenues from the sale of Southern California Edison Company's ("Edison's") sulfur dioxide ("SO₂") Allowances that are attributable to the Mohave Generation Station ("MGS") will continue to be tracked as credit entries in the Mohave Sulfur Credit Sub-Account approved in California Public Utilities Commission Decision (D.) 06-05-016. (Hereinafter "Allowance Revenues").

II. 100% of the Allowance Revenues shall be provided as added payments within Edison's existing renewable energy procurement process in a reasonable manner to achieve the purpose of this proposal to provide an additional incentive for and compensation to renewable energy projects that directly benefit the Hopi Tribe and/or Navajo Nation, as follows:

A. *Edison Renewable Energy Procurement Process. Included, but not limited to, in this process are:*

(1) *all currently planned or pending Edison solicitations for, or procurement of, Renewable Portfolio Standard (RPS) Program eligible electric generation pursuant to Edison's 2011 RPS Program Plan, approved in CPUC Decision (D.) 11-04-030; Edison's "Renewable Auction Mechanism," authorized in CPUC Resolution E-4414 (8-18-11); and/or Edison's Assembly Bill 1969 "CREST Program" (feed-in tariff); Edison's solar photovoltaic (PV) program, authorized in D.09-06-049 and Resolution E-4299; and/or*

(2) *any Edison solicitation or tariff resulting from implementation by the CPUC of Senate Bill (SB) 1X 2 (33% RPS) or Senate Bill (SB) 32 (expanded feed-in tariff).*

B. *Eligible Projects. Allowance Revenues will be distributed to renewable energy projects that:*

(1) *bid into Edison's renewable procurement process or respond to RPS-eligible tariffs, as described in A. herein, and be accepted and contracted for according to all then-applicable procedures and criteria (with the emission credit revenues not counting as project costs in the project selection process); and*

(2) *benefit the Hopi Tribe and/or Navajo Nation communities pursuant to Paragraph IV.*

C. *Payment of Incentive. All of the Allowance Revenues allocated to a particular project will be payable to the project upon approval of the project through Edison's renewable procurement process.*

III. *If any Allowances remain unsold by December 31, 2026, all of the remaining Allowances shall be retired. If any Allowance Revenues remain unused by December 31, 2026, all the remaining Allowance Revenues shall be credited to SCE customers through rates.*

IV. *For a project to be eligible to receive a portion of the available Allowance Revenues as described in Paragraph II, the project must either be:*

A. *located on lands owned by the Navajo Nation and/or the Hopi Tribe; or*

B. *either located in California or meet the definition of Section 399.16(b)(1-2) of the California Public Utilities Code, and owned or co-owned with at least a 5% ownership interest by the Navajo Nation and/or the Hopi Tribe.*

V. Any eligible project funded pursuant to Paragraph II must demonstrate that the project may result in benefit to California ratepayers by being approved within the Edison Procurement Process consistent with applicable law.

Pursuant to the language of this proposal, the revenues must be allocated in a reasonable manner to achieve the purpose of this proposal. The purpose of the proposal is to mitigate the social and economic impacts to the Hopi and Navajo communities from the operation and shutdown of Mohave and to encourage the development and/or implementation of environmentally sound RPS-eligible projects. SCE can procure potential eligible renewable energy projects through its renewable procurement process or any eligible solicitation or tariff resulting from the RPS. This language is meant to be inclusive of all types of future renewable solicitations and policy developments.

III. BACKGROUND

A. Mohave's Operation and Closure

From 1971 to December 2005, Mohave was a two-unit 1580 megawatt (MW) coal-fired power plant in Laughlin, Nevada.¹⁸ Mohave was owned by four entities, with SCE owning a majority 56% share.¹⁹ Mohave obtained its coal from Black Mesa coal mine, which was located on lands owned by the Hopi Tribe and the Navajo Nation.²⁰ The coal was transported from the mine to Mohave by a coal-slurry mix that traveled along a pipeline.²¹ To produce slurry, the coal was pulverized and mixed with the groundwater from the Navajo Aquifer, a well located underneath Hopi and Navajo land.²² This slurry mix required approximately 4,400 acre-feet of water to be extracted annually.²³

Mohave provided valuable jobs to the impoverished communities surrounding the facility and the mine as well as royalties to the Hopi Tribe and the Navajo Nation. At the time it closed,

¹⁸ D.04-12-016 at pp. 3, 5, 65.

¹⁹ D.04-12-016 at pp. 3, 65.

²⁰ D.04-12-016 at p. 4.

²¹ D.04-12-016 at p. 4.

²² D.04-12-016 at pp. 4-5, 65.

²³ D.04-12-016 at p. 5.

Mohave employed approximately 355 people at the facility and 270 people at the mine.²⁴ The royalties from Mohave represented approximately 30% of the Hopi Tribe's and 10-13% of the Navajo Nation's annual budget.²⁵

Mohave was also a significant source of air pollution.²⁶ The facility emitted thousands of tons of harmful SO₂ and nitrogen oxides (NO_x) emissions, which were uncontrolled for the duration of Mohave's operation.²⁷ The Grand Canyon Trust and the Sierra Club initiated a lawsuit alleging violations of the Clean Air Act for not installing the required pollution control equipment. In a 1999 settlement of the lawsuit, Mohave owners agreed in a consent decree to install controls by December 2005 or to close the facility.²⁸ Even after that settlement, Mohave emitted a significant amount of pollution. From 1999 until December 2005, Mohave emitted approximately 240,000 tons of SO₂, 120,000 tons of NO_x, and 12,000 tons of particulate matter into the air.²⁹ In December 2005, Mohave's owners decided to close the facility rather than install the pollution controls required by the 1999 consent decree.

Before Mohave's closure, the Commission held evidentiary hearings in Application 02-05-046 to investigate the predicted impact of the closure on Navajo and Hopi communities. During those proceedings, then-Chairman Taylor from the Hopi Tribe detailed the economic impact that a closure would have on the Hopi people:

[T]here is no question that the Tribe's economic security is fundamentally tied to the ongoing operation of [Mohave] . . . [A]lmost 30% of our tribal budget is dependent on [Mohave]-derived revenues, a fact which impacts every aspect of Hopi life, including the education of our young people, health and social service programs, our infrastructure, and many other essential programs.³⁰

²⁴ D.04-12-016 at p. 4.

²⁵ D.04-12-016 at pp. 28-29.

²⁶ In fact, Mohave received the third most SO₂ allowances in the western U.S. JTC Modified Test. at p. II-9 (Bessler).

²⁷ Pollution controls for SO₂ could have reduced the pollution by more than 85 percent. JTC Modified Test. at p. II-9 (Bessler).

²⁸ D.04-12-016 at p. 3.

²⁹ JTC Modified Test. at p. II-9 (Bessler).

³⁰ D.04-12-016 at pp. 27-28.

The Commission also recognized that the loss of jobs and over \$15 million in annual royalties due to Mohave's closure would "put a significant burden on the Navajo Nation and its ability to provide service to over 8,000 Navajo families, and would seriously impact local communities and businesses."³¹ Based on its evaluation of the situation, the Commission predicted that the closure of Mohave would have "devastating effects on the Hopi and Navajo people and tribes as a whole, as well as workers at the Mohave facility, at the mines and on the pipeline."³²

The Commission was correct in its assessment. Due to the already depressed economic conditions in these communities, the impacts of the job and royalty loss were significant and immediate.³³ Wahleah Johns, a JTC witness who has lived in the area her entire life, testified that the large job loss has severely impacted the community in and around the Black Mesa Mine:

For many who work at Black Mesa Mine, it supplied a salary that was high compared to the rest of Navajo Nation per capita. It supported many families who live near and work within the Navajo reservation. I have many family members who are mine workers. With MGS's closure, the economic impact of resulting job losses at the mines has been significant and immediate.³⁴

The Black Mesa community has seen a sharp decline in its economic status since the mine's closure:

The communities operate as when I was a child. [There are] many dirt roads, no local economy, and no new and upgraded water sources near communities. . . . the median income for Navajos per capita is \$7,734 (just ¼ of the national average). Many people in Black Mesa must drive daily anywhere from 20-60 miles to haul water for their own consumption and livestock needs and the price of gas is \$4.20 a gallon. The economic status of the Black Mesa People has plummeted with the closure of the Black Mesa mine.³⁵

These communities have not been able to recover from this significant impact.³⁶ This is largely a

³¹ D.04-12-016 at p. 29.

³² D.04-12-016 at p. 14.

³³ See Navajo Nation Testimony, Exh. NN1, at p. 12 (Cicchetti) (Aug. 1, 2008); Navajo Nation Testimony, Exh. NN2, at p. 4 (Mitchell) (Aug. 1, 2008).

³⁴ JTC Modified Test. at p. III-6 (Begaye).

³⁵ JTC Modified Test. at p. III-7-8 (Johns).

³⁶ See Navajo Nation Testimony, Exh. NN 2, at p. 5 (Mitchell) ("[t]he Navajo Nation and the Navajo people have not recovered from the closure of Mohave"); see also JTC Modified Test. at p. IV-11 (Skrelunas) ("[t]he economic impacts have been many.")

result of the fact that “[t]here are currently no other economic alternatives to the revenue generated as a result of the Mohave plant operation.”³⁷

In addition to the economic impacts to these tribal communities, they have suffered from over three decades of environmental harm inflicted during Mohave’s operation. As JTC’s Witness Begaye testified in this proceeding, “[t]he impacts have been felt in the health of my people as well as the animals.”³⁸ “[M]any people’s lifestyles changed for the worse; some consequently developed diabetes. Those who worked in the coal mine suffer from black lung disease and asthma. Others suffered harm, including mental health damage, as a result of being relocated off their land.”³⁹ “Aside from the negative health impacts, strip mining practices as well as the contamination of the water from the mine adversely impacted farming.”⁴⁰

Notably, the communities that bore significant environmental burdens did not receive the benefits of the generated electricity:

[E]ven with this income (the royalties), the economic life for the tribes (the whole tribes, not just those located at Black Mesa) was harsh, with per capita income of \$6,217. Most of these communities existed (and continue to exist) without plumbing or electricity and with few other sources of economic support.⁴¹

The Commission has similarly noted that Black Mesa, where the coal is mined, “is a vast empty area in which most of the inhabitants do not have access to telephone, e-mail or computer service.”⁴²

Mohave’s operation also severely impacted the water resources on the Navajo reservation. Over 60%, or approximately 267,240 acre-feet of the Navajo Aquifer was consumed for its use.⁴³

³⁷ Navajo Nation Testimony, Exh. NN 3, at p. 6 (Trujillo) (Aug. 1, 2008). In fact, the unemployment rate on the Navajo Nation is over 50%. JTC Modified Test. at p. III-7 (Johns).

³⁸ JTC Modified Test. at p. III-2 (Begaye).

³⁹ JTC Modified Test. at p. III-4 (Begaye).

⁴⁰ JTC Modified Test. at p. III-5 (Johns) (strip mining made it harder to plant); *id.* at p. III-5 (Begaye) (contamination of the ground and surface water made the water more saline which reduced the health of the soil for farming).

⁴¹ JTC Modified Test. at p. IV-11 (Skrulunas).

⁴² D.05-09-029 at p.4.

⁴³ JTC Modified Test. at p. III-5 (Johns).

“In addition to the drying up of water, the coal operation resulted in the contamination of the ground and surface water.”⁴⁴ “This operation and use of the Navajo Aquifer has jeopardized and minimized the use of the N-Aquifer for future generations.”⁴⁵ This is particularly devastating because, as this Commission has recognized, the water from the N-Aquifer has “special religious and cultural importance” to these communities.⁴⁶ Not only does water hold special importance, but water resources on the reservation are scarce, as the area receives less than 12 inches per year of rain, on average.⁴⁷

In sum, the environmental, health, and economic impacts of the operation and the closure of Mohave on the Navajo and Hopi communities are significant and far-reaching.

B. History of Allowances and Current Status

In 1990, Congress enacted Title IV of the Acid Rain Program, which initiated a system of buying and trading SO₂ allowances. “Title IV of the Clean Air Act aims to reduce acid rain deposition nationwide, and in doing so creates a cap-and-trade program for sulfur dioxide (SO₂) emitted by fossil fuel-fired combustion devices.”⁴⁸ To reach this goal, allowances are allocated to all qualified units. An allowance authorizes a utility or industrial source to emit one ton of SO₂ during a given year or any year thereafter.⁴⁹ A facility must operate within its allowances, reduce its emissions to the balance with its allowances, or buy allowances from another facility.⁵⁰

At the end of each year, the source must hold an amount of allowances at least equal to its annual emissions, *i.e.*, a source that emits 5,000 tons of SO₂ must hold at least 5,000 allowances that are usable in that year.⁵¹ However, regardless of how many allowances a source holds, it is never entitled to exceed the federal emissions limits set to protect public health.⁵² Allowances are

⁴⁴ JTC Modified Test. at p. III-5 (Begaye).

⁴⁵ JTC Modified Test. at p. III-6 (Begaye).

⁴⁶ D.04-12-016 at p. 5.

⁴⁷ JTC Modified Test. at p. III-6 (Begaye).

⁴⁸ *North Carolina v. EPA*, 531 F.3d 896, 902 (D.C. Cir. 2008).

⁴⁹ 42 U.S.C. § 7651a(3).

⁵⁰ 42 U.S.C. § 7651b(a)-(b).

⁵¹ 42 U.S.C. § 7651b(g).

⁵² 42 U.S.C. § 7651b.

allocated to utilities without charge as an incentive to reduce their emissions. As defined by the Clean Air Act, allowances are not property in the typical legal sense. They are freely transferable and can be sold. However, they are not immune from EPA's revisions to the cap-and-trade program.⁵³

Under this framework, EPA allocated 53,216 tons of SO₂ allowances to Mohave's owners from 2000 through 2009.⁵⁴ EPA allocated 52,224 tons of SO₂ allowances to be held in subaccounts for 2010 and each following year.⁵⁵ As a 56% owner of Mohave, SCE's annual share of allowances until 2010 was 29,800, and, beginning in 2010, is currently over 29,200 allowances. SCE no longer needs to use these allowances to offset SO₂ pollution from the closed Mohave facility.

The value of SO₂ allowances required under the Acid Rain program has been dramatically impacted by recent regulatory actions and judicial rulings. In 2005, EPA issued the Clean Air Interstate Rule (CAIR), which would have made certain sources acquire two Acid Rain allowances for each ton of emissions.⁵⁶ The U.S. Court of Appeals for the District of Columbia (D.C. Circuit) reviewed this rule and found "more than several fatal flaws."⁵⁷ Consequently, it remanded the issue back to EPA to promulgate a rule consistent with its opinion.⁵⁸ Last year, EPA promulgated another interstate transport rule, which, unlike the former-CAIR rule, did not propose a trading scheme that relied on the Acid Rain allowances.⁵⁹ Rather, it created a new allowance trading system.⁶⁰

⁵³ 42 U.S.C. § 7651b(f) ("Nothing in this subchapter or in any other provision of law shall be construed to limit the authority of the United States to terminate or limit such authorization.")

⁵⁴ See 40 C.F.R. § 73.10 (describing the allocation of allowances under Title IV of the Clean Air Act).

⁵⁵ See *id.*

⁵⁶ See U.S. EPA, Rule to Reduce Interstate Transport of Fine Particulate Matter and Ozone (Clean Air Interstate Rule); Revisions to Acid Rain Program; Revisions to the NO_x SIP Call, 70 Fed. Reg. 25162 (May 12, 2005).

⁵⁷ *North Carolina v. EPA*, 531 F.3d 896, 901 (D.C. Cir. 2008).

⁵⁸ *Id.*

⁵⁹ U.S. EPA, Federal Implementation Plans: Transport of Fine Particulate Matter and Ozone and Correction of SIP Approvals: Final Rule, 76 Fed. Reg. 48, 208 (Aug. 8, 2011).

⁶⁰ *Id.*

The court decision and the subsequent new regulatory scheme caused the value of credits to dramatically decrease in value.⁶¹ The new transport rule was challenged and recently stayed in the D.C. Circuit,⁶² and the case is being briefed between February and March 2012.⁶³ As a result, together with the uncertain 2012 Presidential and Congressional elections, it is unpredictable what the future value of the allowances will be.

C. Renewable Development – Hopi Tribe and Navajo Nation

Due to the then-likely closure of Mohave, the Commission directed SCE to explore potential alternative energy “options that provide economic stability to the Hopi Tribe and Navajo Nation, and where appropriate, utilize renewable resources for generation.”⁶⁴ The Navajo Nation covers over 25,000 square miles occupying all of northeastern Arizona, the southeastern portion of Utah, and northwestern New Mexico.⁶⁵ The Hopi Reservation covers more than 1.5 million acres and is located in northeastern Arizona.⁶⁶ On February 4, 2006, the consulting team commissioned to investigate renewable opportunities published the Mohave Alternatives Study, which provides a detailed examination of wind and solar renewable resources at sites “in and around tribal lands.”⁶⁷

The Mohave Alternatives Study shows robust renewable resource potential on Native American land and the Mohave site.⁶⁸ Regarding wind energy projects, “[t]he study found that

⁶¹ See, e.g., JTC Rebuttal Test. at p. 1 (Sept. 19, 2008); SCE Supplemental Testimony at p. 1 (August 12, 2011).

⁶² *EME Homer City Generation v. EPA*, D.C. Circuit No. 11-1302, Doc. No. 1350421 (Dec. 30, 2011).

⁶³ *Id.*

⁶⁴ D.04-12-016 at p. 70.

⁶⁵ Navajo Nation, History, <http://www.navajo-nsn.gov/history.htm>_The Navajo Nation is larger than many states.

⁶⁶ Hopi Tribe, <http://www.hopi-nsn.gov/Home/tabid/59/Default.aspx>

⁶⁷ Mohave Alternatives Study, at p. ES-1 – ES-3, available at http://www.synapse-energy.com/cgi-bin/synapsePublications.pl?filter_type=Client&filter_option=Southern.

⁶⁸ JTC witness Roger Clark, who has significant experience with renewable energy projects and their potential as the Air & Energy Program Director for the Grand Canyon Trust. JTC Modified Test. at p. IV-5 (Clark) (citing the Mohave Alternatives Study).

wind on the tribal lands would be sufficient to support commercial-scale electric generation.”⁶⁹ The Mohave Alternatives Study identified four sites on the tribal lands with Class 3 or better wind resources sufficient for generating electricity on a commercial scale from available wind turbine technology, including Grey Mountain on the Navajo reservation, Aubrey Cliffs on Navajo fee land, Clear Creek on Hopi fee land, and Sunshine on Hopi fee land.⁷⁰ Concerning solar energy projects, the Study “[c]oncluded, from maps provided by the National Renewable Energy Laboratory, that the majority of the Navajo/Hopi land is shown to have a ‘very good’ solar resource potential located near high voltage transmission lines.”⁷¹

The Grand Canyon Trust has also mapped potential solar sites located on Hopi and Navajo reservations, which are near major transmission lines.⁷² This effort identified a 31-square-mile site on the Navajo Reservation and a 40-square-mile site on the Hopi reservation as potential areas to develop commercial-scale, concentrated solar.⁷³ Other studies also demonstrate the feasibility of solar and wind resources in the region; for example, the Arizona Solar Electric Roadmap Study⁷⁴ and the Arizona Renewable Energy Assessment conducted by Arizona’s largest utility, Arizona Public Service.⁷⁵

Recent developments show that formerly-identified sites are capable of passing the initial, pre-development stage and progressing towards actual construction of renewable projects. Large-scale wind projects are being developed on two of the sites identified by the Mohave Alternative Study, Aubrey Cliffs and Sunshine.⁷⁶ At the Aubrey Cliffs site, Big Boquillas Ranch Project, a commercial-scale wind project which is majority-owned by the Navajo Tribal Utility

⁶⁹ JTC Modified Test. at p. IV-5 (Clark).

⁷⁰ JTC Modified Test. at p. IV-5 (Clark).

⁷¹ JTC Modified Test. at p. IV-5 (Clark).

⁷² JTC Modified Test. at p. IV-6 (Clark).

⁷³ JTC Modified Test. at p. IV-6 (Clark).

⁷⁴ See, e.g., JTC Modified Test. at p. IV-2 (Clark); study available at http://www.azcommerce.com/assets/pdfs/publications-and-reports/az_solar_electric_roadmap_study_full_report.pdf.

⁷⁵ See, e.g., JTC Modified Test. at p. IV-5 (Clark); study available at http://www.aps.com/_files/solarRenewable/AZRenewables.pdf.

⁷⁶ JTC Modified Test. at p. IV-9 (Clark and Skrelunas).

Authority, will soon enter construction phase.⁷⁷ It will provide 85 MW for the first phase of development during 2013 and 200 MW for the second phase of development.⁷⁸ At the Sunshine site, the Sunshine Wind Park is a permitted 65 MW project, with approximately 33 percent of the generating capacity located on Hopi fee lands.⁷⁹ Solar projects on tribal land are also being developed. A 30 MW photovoltaic project on Navajo land is currently in the pre-development stage.⁸⁰ A feasibility study, co-funded by the U.S. Department of Energy, has been completed with the conclusion that the 30 MW project is feasible in all respects, once a power purchase agreement has been secured.⁸¹

In addition, the Navajo Nation has identified two additional concrete proposals. A commercial-scale wind project on Grey Mountain, which is located on the Navajo Nation reservation and was also identified by the Mohave Alternatives Study, is currently in the pre-development phase.⁸² This project could interconnect to the Moenkopi-Eldorado transmission line to bring energy to California.⁸³ The Navajo Nation also identified a large-scale photovoltaic project as a potential project that could supply energy to California. This project, called the McKinley Solar Project, is in early development phase and would be owned by Navajo Tribal Utility Authority.⁸⁴

These projects, and the statements made in this proceeding, illustrate that both tribes are willing to develop renewable energy projects on their land or engage in projects as an owner, both on their land as well as in California. In particular, the Hopi Tribe proposal explains that renewable energy projects on Hopi land or in Hopi ownership would “provide the Tribe with much needed potential employment and economic source which was lost in great part as the

⁷⁷ JTC Modified Test. at p. IV-9 (Clark and Skrelunas).

⁷⁸ JTC Modified Test. at p. IV-14 (Skrelunas); Navajo Nation Supplemental Testimony of Tsosi, at p. 10 (Sept. 16 2011).

⁷⁹ JTC Modified Test. at p. IV-9 (Clark and Skrelunas).

⁸⁰ JTC Modified Test. at p. IV-10 (Clark and Skrelunas).

⁸¹ JTC Modified Test. at p. IV-10 (Clark and Skrelunas).

⁸² Navajo Nation Supplemental Testimony of Tsosi, at p. 6 (Sept. 16, 2011).

⁸³ Navajo Nation Supplemental Testimony of Tsosi, at p. 6 (Sept. 16, 2011).

⁸⁴ Navajo Nation Supplemental Testimony of Tsosi, at p. 7 (Sept. 16, 2011).

result of the closure of the Mohave Generation Station.”⁸⁵ Navajo’s proposal similarly states that the Navajo Nation wants to develop and deliver RPS-eligible power to California ratepayers.⁸⁶ Notably, the Navajo Nation has also created a Green Jobs Commission,⁸⁷ demonstrating its commitment to development of a green economy. As JTC Witness Skrelunas, who is the Native American Program Director for Grand Canyon Trust, understands, “Hopi and Navajo tribal governments, along with the tribal communities, are interested in ownership opportunities of utility-scale renewable energy generating projects.”⁸⁸

IV. DISCUSSION

A. The Commission Has Authority to Allocate the Allowances in Accordance with JTC’s Proposal.

It is JTC’s position that SCE’s MSCSA be maintained, that all sales of SCE’s sulfur credits created by Mohave’s closure continue to be recorded in that account through December 31, 2026, and that, through that time, the Commission authorize SCE to disburse those funds only for the purpose of making incentive payments for RPS-compliant electric generation procured by SCE from qualified renewable projects located on Hopi or Navajo land or owned by Hopi or Navajo governments to meet its RPS requirements. This proposal is the best and most direct means of applying these revenues in a manner that encourages the development of renewable energy generation either on Hopi or Navajo lands or with Hopi or Navajo ownership interests, which benefits SCE’s ratepayers.

Pursuant to the applicable law, it is JTC’s position that Commission has broad authority to place conditions on the distribution of the allowance revenues because the Commission’s authority can be limited *only* by express direction or statutory enactment of the California Legislature.⁸⁹ As described below, the Commission’s broad authority is not limited here by inapplicable requirements

⁸⁵ Hopi Final Proposal Statement, at p. 6 (Sept. 16, 2011).

⁸⁶ Navajo Nation Supplemental Testimony of Tsosi, at p. 5 (Sept. 16, 2011).

⁸⁷ Navajo Green Jobs Commission, <http://www.navajogreenjobs.com/>.

⁸⁸ JTC Modified Test. at p. IV-14 (Skrelunas).

⁸⁹ *Pacific Tel. & Tel. Co. v. Pub. Util. Comm’n*, 62 Cal. 2d 634, 650, 653 (1965).

for rate refunds and the gain on sale.

Since the Commission’s power is not expressly limited in this matter, the power of the Commission is broad, and the Commission can use its broad authority to fashion relief that provides a ratepayer benefit, incentivizes new resources of renewable energy, and provides a benefit to the Navajo and Hopi people. In particular, the Commission can require the funds to be used as incentives for renewable development because renewable energy provides a ratepayer benefit. In addition, the Commission can and should require that the funds benefit Hopi and Navajo communities because they are disadvantaged communities that have been adversely impacted by Mohave’s operation and closure. Thus, as the April 7, 2011 Ruling correctly found, the Commission has authority to require “SCE to use the allowance sale proceeds to procure renewable energy that is generated on land of the Hopi Tribe and/or Navajo Nation.”⁹⁰

1. The Commission Has Broad Authority to Distribute the Allowance Proceeds In This Proceeding.

The California Constitution and statutory authorities give the Commission broad authority to regulate the public utilities of the State.⁹¹ This authority includes the ability to act in a supervisory and regulatory manner to do all things “which are necessary and convenient in the exercise of such power and jurisdiction.”⁹² This supervisory and regulatory power has been construed liberally to allow the Commission broad power to regulate utilities within the Commission’s jurisdiction.⁹³ Consistent with this broad authority, the Legislature’s judicial review of the Commission’s decisions is limited to the narrow legal question of “whether the commission has regularly pursued

⁹⁰ Administrative Law Judge’s Ruling on Treatment of Proceeds from Sulfur Dioxide Allowance Sales by Southern California Edison Company, A.06-12-022, at p. 1 (April 7, 2011) (April 7, 2011 ALJ Ruling).

⁹¹ See, e.g., Cal. Const. art. XII, § 6 (“The commission may fix rates, establish rules, . . . and prescribe a uniform system of accounts for all public utilities subject to its jurisdiction”).

⁹² Cal. Pub. Util. Code § 701.

⁹³ *Wise v. Pacific Gas & Elec., Co.*, 77 Cal. App. 4th 287, 293 (1999) (“[T]he PUC . . . [has] broad regulatory power over public utilities”).

its authority.”⁹⁴ While conducting this narrow review, courts have accorded the Commission significant deference, finding that a Commission’s statutory interpretation “should not be disturbed unless it fails to bear a reasonable relation to statutory purposes and language.”⁹⁵

As part of its broad authority, the Commission has the authority to exercise equitable jurisdiction as an incident to its express duties and consistent with its regulation of public utilities and established legal principles.⁹⁶ For example, the Commission can issue injunctions, create constructive trusts, reform contracts, and issue cease and desist orders.⁹⁷

The Commission can also consider the public interest when deciding issues related to utility services and the disbursement of utility capital. In fact, pursuant to Section 851, “[w]here necessary and appropriate, the Commission may attach conditions to a transaction in order to protect and promote the public interest.”⁹⁸ “The primary question for the Commission in Section 851 proceedings is whether the proposed transaction is adverse to the public interest.”⁹⁹ In reviewing a Section 851 application, the Commission may “take such action, as a condition to the transfer, as the public interest may require. The public interest is served when utility property is used for other productive purposes without interfering with the utility's operation or affecting service to utility customers.”¹⁰⁰

⁹⁴ *San Diego Gas & Elec. Co. v. Superior Court*, 13 Cal. 4th 893, 915 (1996) (citing Cal. Pub. Util. Code § 1757); see also *PG&E v. Pub. Util. Comm’n*, 118 Cal. App. 4th 1174, 1194 (2004) (citing new language for Cal. Pub. Util. Code § 1757).

⁹⁵ *Greyhound Lines, Inc. v. Pub. Util. Comm’n*, 68 Cal. 2d 406, 410-411 (1968).

⁹⁶ *Wise*, 77 Cal. App. 4th at 299.

⁹⁷ *Id.* (citing cases approving Commission’s equitable jurisdiction); D.97-02-040 at pp. 25-26 (stating that the Commission may “exercise equitable powers in aid of jurisdiction specifically conferred upon it. Restoration of the status quo is within these powers”); D.01-01-046 at 16 (citing *Consumers Lobby Against Monopolies v. Pub. Util. Comm’n*, 25 Cal. 3d 891, 907 (1979)) (Commission recognized its right to issue injunctions to prevent the actions of a party from causing irreparable harm to another party).

⁹⁸ *In re Citizens Telecomm. Co. of Cal., Inc.*, 210 P.U.R. 4th 189, 236; D.01-06-007 at p. 106 (2001) (attaching conditions to transfer for reasons related to public health and safety).

⁹⁹ D.02-12-021 at p. 7.

¹⁰⁰ *Id.*

The Commission also has specific authority under the Public Utilities Code to put requirements on the distribution of property under a variety of settings. For instance, the Commission retains authority under Sections 761 and 762 of the Public Utilities Code to regulate and put conditions on the sale of commodities.¹⁰¹ Allowances could be considered to be analogous to economic commodities since they are tradable and marketable public goods. As the Senate Reports on the Clean Air Act Amendments of 1989 emphasized, “the allowance system is designed so that the allowances will be treated in part like economic commodities and that as such they will stimulate pollution sources to engage in actions that will advance both the environmental and economic objectives of this title.”¹⁰²

Thus, since the Commission’s authority is not expressly limited, and because the Commission has the authority to put conditions on the disbursement of property, the Commission has broad authority to act in this proceeding consistent with its regulation of utilities.

2. The Commission’s Broad Authority Is Not Limited by Requirements for Disbursements of Other Types of Property.

DRA and SCE have previously argued that the Commission’s authority should be limited by requirements related to rate refunds and gain on sale requirements.¹⁰³ The law governing rate refunds and gain on sale requirements, which limit the Commission’s authority to distribute certain types of property, do not apply to the disbursement of allowance proceeds. Thus, DRA’s and SCE’s arguments should continue to be rejected.

a. The Allowance Revenues Are Not Ratepayer Refunds.

The Mohave allowance revenues are not ratepayer refunds; therefore, limitations that apply to the disbursement of ratepayer refunds do not apply. Rate refunds are “specific amounts held by

¹⁰¹ *San Diego Gas & Elec. Co. v. City of Carlsbad*, 64 Cal. App. 4th 785, 795, n.5 (1998) (“These sections allow extensive PUC regulation of facilities.”). See Cal. Pub. Util. Code § 761; Cal. Pub. Util. Code § 136 (“[o]n proper demand . . . public utility must furnish its commodity . . . upon the conditions . . . prescribed by the [PUC].”).

¹⁰² S. REP. 101-228, at 3704 (1989).

¹⁰³ See, e.g., DRA Reply Br. at pp. 2-5 (Dec. 12, 2008) (discussing rate refunds and gain on sale); SCE Reply Br. at pp. 2-3 (Dec. 12, 2008) (discussing rate refunds).

utilities as rebates from their suppliers and earmarked for customer “refunds” by prior commission orders and utility tariffs.”¹⁰⁴ To qualify as a rate refund, “customers must also participate to the extent of the overcharges which they previously paid.”¹⁰⁵ Section 453.5 of the Public Utilities Code limits the authority of the Commission to disburse funds that qualify as ratepayer refunds.¹⁰⁶

However, this section, does not apply because the revenues from Mohave’s allowances are not rate refunds. To qualify as a ratepayer refund, the fund must meet three requirements: (1) the fund to be refunded must have been previously collected in rates from ratepayers; (2) the funds must be previously ordered to be refunded by a regulatory agency; and (3) the refunds must be made to the customers who paid higher rates, to the extent practical.¹⁰⁷ None of the three criteria for a fund to constitute a rate refund are satisfied in the present case.

First, the proceeds from the allowances are not specific amounts held or collected as rates by SCE. In *Assembly of the State of Cal. v. Public Utilities Commission*, 12 Cal. 4th 87, 91-92 (1995), Pacific Telesis held a specific amount of \$7.9 million as refund principal based upon rates that the telephone company had collected.¹⁰⁸ In contrast, in *Re GTE California Inc.*, D.98-12-084, the funds at issue were not a refund because the phone company was engaging in improper marketing practices rather than overcharging its customers.¹⁰⁹ In our case, neither SCE nor its ratepayers paid for the allowances, and as such, there is no amount to be refunded. In addition, there is no specific amount set aside in an account. The price of the allowances will be determined only when the allowances are sold. Until then, the allowances that have not been sold are just expectations of future revenue.

¹⁰⁴ *Cal. Mfrs. Ass’n v. Pub.Util.Comm’n*, 24 Cal. 3d 836, 845 (1979).

¹⁰⁵ *Id.* at 842 (emphasis removed); see also BLACK’S LAW DICTIONARY (9th ed. 2009) (defining refunds as “[t]he return of money to a person who overpaid, such as a taxpayer who overestimated tax liability or whose employer withheld too much tax from earnings.”)

¹⁰⁶ Cal. Pub. Util. Code § 453.5.

¹⁰⁷ *Assembly of the State of Cal. v. Public Utilities Comm’n*, 12 Cal. 4th 87, 91-92 (1995); *Cal. Mfrs. Ass’n*, 24 Cal.3d at 839-840; see April 7, 2011 ALJ Ruling in A.06-12-022 at pp. 17-18 (citing cases).

¹⁰⁸ *Assembly*, 12 Cal. 4th at 97.

¹⁰⁹ D.98-12-084 (the funds at issue were being used to remedy “harm suffered by victims of GTEC’s alleged marketing practices” rather than harm by over-collection of rates).

Second, the Mohave allowance revenues do not qualify as rate refunds since they are not held as a rebate for overcharging the ratepayers. Funds must be earmarked as a rebate to qualify as a rate refund. For example, in *California Manufacturers Association v. Public Utilities Commission*, 24 Cal. 3d 836, 845 (1979), the utility company was ordered to reimburse the ratepayers and put the amounts in the special account marked for the refund.¹¹⁰ In contrast, in cases where no rate refund was found such as in *Re GTE California Inc.*,¹¹¹ and *Re Communication Telecommunication Systems Int'l*, D.99-04-023,¹¹² no accounts were earmarked for a ratepayer rebate. In the present proceeding, SCE is not holding the allowance proceeds in an account earmarked as a rebate. Here, “[n]either this Commission nor any other regulatory body has previously made an order about the disposition of the SO₂ allowance proceeds; indeed, it is in *this* proceeding that such an order is supposed to be made.”¹¹³

Lastly, refunds cannot be made to ratepayers who paid excessive rates because the ratepayers did not pay for the allowances.¹¹⁴ SCE ratepayers have never acquired an interest in the SO₂ allowances, as they did not pay for them or invest in them in any way, and the allowances were not identified as an SCE expense. Thus, the allowance proceeds are not rate refunds since none of the three criteria for a rate refund have been met.

Importantly, the Commission has explicitly found that the sale of emissions credits was not a result of “utility over-collection.”¹¹⁵ Since emission credits are not a result of utility over-collection, they are not refunds.¹¹⁶ Other Commission cases have also not treated emission credits sales as rate refunds.¹¹⁷

¹¹⁰ 24 Cal. 3d at 839.

¹¹¹ D.98-12-084.

¹¹² D.99-04-023.

¹¹³ April 7, 2011 ALJ Ruling at p. 18 (emphasis in original).

¹¹⁴ See April 7, 2011 ALJ Ruling at p. 18 (“Refunds cannot be made to customers who paid the excessive rates, because there were no charges in rates for the SO₂ allowances”).

¹¹⁵ D. 97-11-074.

¹¹⁶ See *supra* at § IV(A)(2) (defining rate refunds).

¹¹⁷ See D.00-04-065 (allowed the revenues from the sales of the emissions credits credited to offset transition cost recovery); D.95-12-051 (sale of SO₂ emission credits distributed “to the utility’s

Since the allowance proceeds are not rate refunds, the Commission can employ its discretion to determine appropriate distribution.¹¹⁸ For example, in *Re GTE California Inc.*, after the phone company admitted inappropriate marketing practice, it agreed to pay money to the affected community for educational purposes, to a state general fund, and to a consumer protection groups.¹¹⁹ The Commission approved this distribution finding that the Commission was not bound by *Assembly* because the money did “not involve customer refunds in any way” and, therefore, section 453.5 did not apply.¹²⁰ When funds are not rate refunds, like emission credit revenues, the Commission has broad latitude in ordering their distribution as exhibited in the *GTE California Inc.* case.

b. The Regulatory Concept of “Gain On Sale” Is Inapposite to the SO₂ Allowances at Issue in This Application.

The concept of “gain on sale” does not apply to the SO₂ allowances. The phrase “gain on sale” is a regulatory concept that has only been applied to the allocation of the gain on a capital asset, which was “formerly used to serve utility customers.”¹²¹ In other words, the gain on sale concept applies to a utility’s depreciable (*i.e.*, buildings, machinery, equipment, or vehicles) and non-depreciable (*i.e.*, land, water rights, and good will) assets that have been *acquired* by the utility *at a cost* and *used* for purposes of serving their customers.¹²² Here, the allowances at issue are not a depreciable or non-depreciable asset because the utility did not pay for them and the allowances were not used.¹²³ These allowances for the shutdown Mohave are no longer useful to either SCE’s shareholders or ratepayers. As the April 2011 ALJ Ruling aptly articulated: “Ratepayers

energy cost adjustment clause balancing account rather than be afforded annual energy rate treatment”).

¹¹⁸ *See, e.g.*, D. 99-04-023 (Commission approved an equitable remedy because it did not find rate refunds as in *Assembly*).

¹¹⁹ D.98-12-084.

¹²⁰ *Id.*

¹²¹ D.06-05-041 at p. 2.

¹²² D.06-05-041 at pp. 2, 8-9.

¹²³ *See id.*; JTC Opening Br. at pp. 17-19 (Nov. 18, 2008)(discussing why gain on sale requirements do not apply); *see also* TURN/CUE Opening Br. at p. 5 (Nov. 18, 2008).

did not previously pay excessive rates for the allowances, because nobody paid for the allowances at all. Under the federal Clean Air Act, SO₂ allowances are distributed to power plant owners without charge.”¹²⁴

Moreover, the Commission’s overarching policy in determining how a gain on sale of an asset should be allocated between ratepayer and shareholders is governed by the overarching principle that this allocation should be based on the “incidence of risk.”¹²⁵ More specifically, the appropriate allocation of the gain on sale of assets should be based on the reward going “to those who bear the actual costs and burdens of the risks engendered by particular economic actions, such as the purchase of assets.”¹²⁶ Here, no one purchased the allowances at issue, and thus, no one bore the costs, burdens, or risks associated with the purchase of assets. Because ratepayers never bore the costs or risk associated with a utility’s purchase of an asset, the Commission’s policy of distributing gains on sales of such assets is inapplicable.

Further, the SO₂ allowance revenues do not meet other technical requirements for gain on sale treatment. In particular, if the SO₂ credits are deemed an asset subject to gain on sale treatment, the Commission would first have had to determine if they were a depreciable or non-depreciable asset. In turn, shareholders could be in line to receive an allocation of some portion of the sales proceeds of the credits, a position directly at odds with the insistence of SCE and consumer advocates that all revenues flow to the benefit of ratepayers. In addition, if Mohave’s allowance revenues were subject to the gain on sale concept, SCE would have first had to file a Public Utilities Code Section 851 application allowing it to dispose of this property, which it did not.¹²⁷ Section 455.5 also requires notice for property taken out of utility service,¹²⁸ which SCE did not submit.¹²⁹ Thus, the revenues from the SO₂ credits in this application should not require gain on sale treatment.

¹²⁴ April 7, 2011 ALJ Ruling at p. 18.

¹²⁵ D.06-05-041 at p. 26.

¹²⁶ D.06-05-041 at pp. 27-28.

¹²⁷ See Cal. Pub. Util. Code § 851 (requiring utilities to seek Commission approval for any sale of such an asset).

¹²⁸ Section 455.5 requires notice for property taken out of utility service. See D.06-05-041 at p. 4.

Even if the Commission were to decide that the allowances at issue were subject to gain on sale distribution, the Commission still has the needed authority and precedent to allocate the funds as proposed by JTC by allocating the gain on sales to ratepayers in the form of a public benefit. This was the tact taken in *Re Citizens Telecommunications Co. of California*, in which the Commission conditioned the transfer of telecommunications exchanges upon the utility's providing new phone service on previously underserved Native American lands.¹³⁰ The Commission reasoned that imposing such a condition upon the transfer of these exchanges would serve the public benefit because it would increase the public health and safety in areas currently lacking service.¹³¹ While the Commission did not impose all the originally proposed conditions, it did condition the sale of the transfers on various service improvements agreed to by the parties.¹³² In doing so, the Commission noted: "we require the Applicants to build, at their own expense, significant new infrastructure to substantially improve service. The effect of this requirement is to allocate a significant portion of the gain on sale to ratepayers."¹³³ In other words, the Commission found that the improved infrastructure itself was a ratepayer benefit, and in this way a portion of the gain on sale was allocated to them—rather than flowing back to them in the form of reduced rates.

Similarly, JTC's proposal seeks that benefits flow to ratepayers in the form of renewable energy rather than as a minuscule reduction of rates. Since the Commission's other obligations are subordinate to that of ensuring a public benefit, *see In re Citizens Telecommunications*, the Commission has ample authority to impose the conditions that JTC seeks.

¹²⁹ A.06-12-022, SCE Testimony, Appendix A (Dec. 20, 2006). With respect to section 455.5, while the testimony accompanying SCE's application does include a letter notice submitted to the Commission pursuant to that code section, this letter was for the purpose of notifying the Commission of the suspension of the Mohave *generating facilities* only. Outside of this notification, the letter does address resolution of rate issues related to that suspension, including the disposition of proceeds from any sales of SO₂ emission credits attributable to the Mohave suspension.

¹³⁰ D.01-06-007 at p. 50 (recognizing the urgent need to provide service to the tribe).

¹³¹ D.01-06-007 at p. 50.

¹³² D.01-06-007 at p. 54.

¹³³ D.01-06-007 at p. 91.

3. **The Commission Has Authority to Allocate the Mohave Allowance Revenues to Promote Renewable Development.**

Pursuant to California’s RPS program, the Commission is charged with establishing an RPS that requires” every “retail seller” subject to its jurisdiction, including SCE, to procure 33% percent of its total retail sales of electricity in California from eligible renewable energy resources by December 31, 2020.¹³⁴ The Commission also follows a “loading order” that requires investor-owned utilities (IOUs) subject to its jurisdiction to rely first on electric generation from renewable resources in meeting its supply-side needs.¹³⁵ The need for new renewable energy resources has become even more acute since California’s enactment of its landmark climate change law, AB 32, which mandates a reduction in greenhouse gas (GHG) emissions to 1990 levels by 2020.¹³⁶

At the core of both the RPS program and AB 32 is an identified public interest in promoting the environmental and health benefits that will result from increased reliance on renewable energy and a reduction in the use of fossil fuels as quickly as possible. Consistent with these requirements and in recognition of the need to diversify resources, the Commission has specific authority over utility investments “to improve the environment and encourage the diversity of energy sources through improvements in energy efficiency and development of renewable energy resources, such as wind, solar, biomass, and geothermal energy.”¹³⁷

In fact, the Commission has previously exercised its authority to regulate public utilities in creative and purposeful ways to protect the public interest and to encourage renewable energy development and environmental protection. The Commission has previously approved the sale of utility-owned land to a private, alternative energy development corporation.¹³⁸ The Commission found that the sale would expedite the development of a wind-powered electric generation facility that would sell power back to the utility.¹³⁹ The Commission noted that the corporation was better

¹³⁴ Public Utilities Code §§ 399.11; 399.15.

¹³⁵ See D.12-01-033 (describing loading order obligations); Energy Action Plan (EAP) II at 2, available at http://docs.cpuc.ca.gov/word_pdf/REPORT/51604.pdf.

¹³⁶ See Health and Safety Code § 38500, et seq.

¹³⁷ Cal. Pub. Util. Code § 701.1(a).

¹³⁸ D.85-09-017; see also 83-07-014 (allowing SCE to lease land for wind development).

¹³⁹ D.85-09-017; D.83-07-014.

suited to develop wind projects because it qualified for energy tax credits available to commercial enterprises.¹⁴⁰ The decision further noted that “resource flexibility” and “assurance of a more reliable energy supply” were a benefit to ratepayers.¹⁴¹

Another example of the Commission’s broad authority involved Pacific Gas & Electric’s (PG&E’s) sale of a hydroelectric facility to a local water district. This facility also served to provide water service to the local community.¹⁴² In that case, PG&E had determined that it was not economic to restore the facility after being damaged in the storm. Instead, PG&E sought to sell the facility to the district with ratepayers actually paying the district to assume responsibility and future disposition of the facility.¹⁴³ The Commission noted with approval that:

[t]he application also states that the sale will achieve such public interest benefits as relieving PG&E of an obligation to provide consumptive water service, which is not a core business for PG&E, and, in turn, transferring that obligation and the Project to local control. Further, PG&E states that transfer to EID represents the best opportunity....for returning Project 184, a renewable electric generation unit, to operational status to the benefit of all California electric customers.¹⁴⁴

The situation here is analogous to this decision. Mohave was shut down after SCE and the other owners decided it would not be profitable or economical to continue operations. JTC wants Mohave’s allowance revenues to create and fund development of renewable energy either owned by the tribes or on Native American land. For SCE, renewable energy development on the Hopi or Navajo lands, like PG&E providing water service in El Dorado County, is not an area where SCE has focused its core business activity, and yet such development would provide an immense public benefit to the local community and ratepayers.

Further, the Commission has previously approved disbursements based solely on their impact on air quality. For example, the Commission approved a settlement agreement between PG&E and SCE that established an incentive plan to facilitate the conversion of agricultural pumps

¹⁴⁰ D.85-09-017; *see also* D.05-09-030.

¹⁴¹ D.85-09-017.

¹⁴² D.99-09-066.

¹⁴³ D.99-09-066.

¹⁴⁴ *Id.* at p. 13.

from diesel to electric power.¹⁴⁵ In approving the settlement, the Commission weighed the importance of improving air quality against economics and noted that no public interest was served by subjecting the transfer of emission reductions to Commission review under Section 851: “[t]he transfer will not affect, in any way, the utilities' ability to provide service to their customers.”¹⁴⁶ As evidenced by these decisions, the Commission has authority to approve the JTC’s incentive plan to encourage the tribal governments to develop renewable opportunities for California.

Finally, disbursing the allowance revenues to encourage renewable development is consistent with the Clean Air Act. The relevant provision specifying the purpose of Title IV provides:

The purpose of this subchapter is to reduce the adverse effects of acid deposition through reductions in annual emissions of sulfur dioxide . . . It is also the purpose of this subchapter to *encourage energy conservation, use of renewable and clean alternative technologies*, and pollution prevention as a long-range strategy, consistent with the provisions of this subchapter, for reducing air pollution and other adverse impacts of energy production and use.¹⁴⁷

Since the allowance proceeds would be directed to encourage the use of renewable and clean alternative technologies, which would reduce emissions overall, JTC’s proposal fits well within the design of the Clean Air Act.

The Commission would be acting in the public interest, as described by the Legislature in Public Utilities Code Section 399.11 and AB 32, by approving the JTC’s proposal to encourage solar and wind energy development on Navajo and Hopi lands. Moreover, in the face of the express statutory mandate of the RPS Program, coupled with the Commission’s own adopted policies and recommendations to meet GHG emissions reduction targets with a 33% RPS and to ensure an environmentally conscious “loading order” to meet this state’s energy needs, it is clear that the Commission is well within its authority to approve JTC’s proposal.

¹⁴⁵ D.05-06-016 at p. 2.

¹⁴⁶ *Id.* at p. 49.

¹⁴⁷ 42 U.S.C. §7651b (emphasis added).

4. The Commission Can Allocate the Revenues to Benefit a Native American Community.

When considering the public interest, the Commission can and should look beyond direct impacts to ratepayers. As the Commission has stated:

[W]hile the ‘public interest in the service’ [under Section 851 of the Public Utilities Code] obviously includes ratepayers, it is not limited to that portion of the public. Members of the public may be affected by, and therefore interested in, a utility’s facilities even if they are not served by that utility.¹⁴⁸

For example, the Commission has ordered the transfer of property to other entities, such as a church or public park, when the transfer was determined to be in the public interest.¹⁴⁹

In addition to recognizing the need to evaluate the public interest, the California Public Utilities Code also recognizes the interest of the State to improve economically-disadvantaged conditions for minorities, including Native Americans¹⁵⁰ by increasing procurement of renewable energy.¹⁵¹ In particular, Section 8281 recognizes that procurement from minorities, such as Native Americans, “benefits the regulated public utilities and consumers of the state by encouraging the expansion of the number of suppliers for procurements, thereby encouraging competition among the suppliers and promoting economic efficiency in the process.”¹⁵² In fact, Section 8281 also states that the “long-term economic viability” of California “depends substantially” upon the ability to procure renewable energy and other resources from business

¹⁴⁸ D.11-05-048 at p. 9.

¹⁴⁹ D.09-02-021 at p. 8 (Commission invoked its authority under Section 851 to allow PG&E to transfer land to a Church, which planned to use the property to construct homes, finding that the conveyance “will serve the public interest by providing the open space and residential access road and turnaround area for the construction of the much-needed townhomes.”); D.11-12-050 (Granting SCE’s application under Commission’s Section 851 authority to convey a lease for development and use as a public park) .

¹⁵⁰ Cal. Pub. Util. Code § 8282(b) (“The contracting utility shall presume that minority includes . . . Native Americans.”)

¹⁵¹ Cal. Pub. Util. Code § 8281(b)(1)(D) (“It is in the state’s interest to expeditiously improve the economically disadvantaged position of women, minority, and disabled veteran business enterprises.”); *id.* § 8281(b)(1)(E) (“The position of these [minority] businesses can be substantially improved by providing long range substantial goals for procurement by regulated public utilities . . . services. . . especially in renewable energy . . .”).

¹⁵² Cal. Pub. Util. Code § 8281(b)(1)(F).

owners from groups that have been economically disadvantaged, such as Native Americans.¹⁵³

The public goal of aiding disadvantaged communities is also reflected in California Public Utilities Code Section 399.13. Importantly, the Commission specifically has the right to act equitably by requiring a utility procurement process to give preference to projects that benefit disadvantaged communities, such as the Hopi and Navajo communities:

In soliciting and procuring eligible renewable energy resources for California-based projects, each electrical corporation shall give preference to renewable energy projects that provide environmental and economic benefits to communities afflicted with poverty or high unemployment, or that suffer from high emission levels of toxic air contaminants, criteria air pollutants, and greenhouse gases.¹⁵⁴

The Hopi and Navajo communities, which suffered adverse environmental and economic impacts from Mohave's operation and closure, are similar to the type of community contemplated by this section. Thus, encouraging projects that would benefit the Hopi and Navajo and California residents would be consistent with the underlying public interest principles motivating this provision.

Commission decisions also support distributing the Mohave allowance revenues to incentivize renewable development to benefit the Navajo and Hopi communities. In D.00-04-027, the Commission directed Communications Telecommunications Systems International (CTS) to equitably distribute unclaimed reparation funds where CTS subjected its customers to illegal marketing practices.¹⁵⁵ CTS specifically targeted limited and non-English speaking customers. In response, the Commission relied on its authority under Code of Civil Procedure Section 1519.5 to "order an equitable remedy ... putting [the] funds to another use," where the funds would otherwise transfer to the state.¹⁵⁶ The Commission established the Telecommunications Consumers Protection Trust Fund with the intent of "providing customer

¹⁵³ Cal. Pub. Util. Code § 8281(b)(1)(G).

¹⁵⁴ Cal. Pub. Util. Code § 399.13(a)(7).

¹⁵⁵ D.00-04-027 at pp. 12-13.

¹⁵⁶ D.00-04-027 at p. 10.

protection and education.”¹⁵⁷ While the fund was established to benefit current CTS customers, it also benefited future customers who were not customers at the time of the illegal CTS actions.

Similarly, in D.01-06-007, the Commission attached conditions to a utility transaction in order to not only protect ratepayers, but also to protect third parties.¹⁵⁸ The Commission evaluated a transaction between GTE California Incorporated to sell twenty-six telephone exchanges to Citizens Telecommunications Company of California.¹⁵⁹ The Commission approved the sale only after imposing various conditions including “that the [a]pplicants install the following infrastructure for the provision of telephone service to major areas of the Hoopa and Yurok Reservations that currently lack service.”¹⁶⁰ The Commission reasoned that the condition was a proper exercise of its equitable jurisdiction since it would increase public health and safety, further contributing to the public benefit.¹⁶¹

As in D.00-04-027 and D.01-06-007, where the Commission based their equitable jurisdiction on the policy of providing a benefit to the general public,¹⁶² the Commission should exercise its equitable jurisdiction to remedy the harm to indirectly affected Hopi and Navajo communities. Here, the Hopi and Navajo communities are analogous to future customers being protected by the Commission in D.00-04-027. The environmental and economic harms suffered by the Hopi and Navajo communities resulting from the Mohave operation and closure are undisputed.¹⁶³ Thus, the Hopi and Navajo are third parties impacted by the utility operations. The Commission can craft a remedy that provides a public benefit like it did in D.00-04-027 and D.01-06-007. As such, pursuant to the Commission’s statutory authority and prior decisions, the Commission should provide a renewable development incentive to the Hopi Tribe and Navajo Nation for the benefit of the public.

¹⁵⁷ D.00-04-027 at p. 6.

¹⁵⁸ D.01-06-007.

¹⁵⁹ *Id.*

¹⁶⁰ D.01-06-007 at pp. 50, 84.

¹⁶¹ D.01-06-007 at p. 52, n 86.

¹⁶² *Wise v. Pacific Gas & Elec. Co.*, 77 Cal. App. 4th 287, 299 (1999); D.00-04-027 at p. 15.

¹⁶³ D.04-12-016.

B. The Commission Should Allocate the Allowances in Accordance with JTC’s Proposal.

1. The Commission Should Incentivize Procurement from the Native American Communities.

The Commission has an opportunity to incentivize renewable opportunities for California ratepayers that may otherwise not be available while remedying some of the devastating impacts of Mohave’s operation and closure on the Navajo and Hopi communities. Importantly, the potential for renewable development on Navajo and Hopi lands is enormous.¹⁶⁴ The Commission previously ordered a study of potential options for replacing the power from Mohave “from sources that will provide the fullest benefit to the Hopi and Navajo while protecting the interests of Edison’s ratepayers.”¹⁶⁵ The Commission further specified that “[t]he alternatives investigated should include options that provide economic stability to the Hopi Tribe and Navajo Nation, and, where appropriate, utilize renewable resources for generation.”¹⁶⁶ The result of this study, as summarized by JTC witness Roger Clark, is “that the majority of the Navajo/Hopi land is shown to have a ‘very good’ solar resource potential located near high voltage transmission lines.”¹⁶⁷

The sites identified by the Mohave Alternatives Study as having a large potential for renewable resources include Grey Mountain, Sunshine, and Aubrey Cliffs.¹⁶⁸ Since the identification of these resources, large-scale renewable projects are starting development at both the Aubrey Cliffs and Sunshine sites,¹⁶⁹ and, as the Navajo Nation describes, it has begun developmental work at Grey Mountain.¹⁷⁰ In addition to the development of sites identified by

¹⁶⁴ See JTC Modified Test. at pp. IV-2 (Clark) (describing untapped wind and solar potential in Arizona and on Navajo and Hopi lands).

¹⁶⁵ D.04-12-016 at pp. 53, 70.

¹⁶⁶ D.04-12-016 at p. 70.

¹⁶⁷ JTC Modified Test. at IV-5 (Clark).

¹⁶⁸ JTC Modified Test. at IV-5 (JTC Witness Roger Clark summarizing the Mohave Alternatives Study).

¹⁶⁹ JTC Modified Test. at pp. IV, 9, 10 (describing how the Big Boquillas Wind Project and the Sunshine Wind Project are moving forward).

¹⁷⁰ Navajo Nation Testimony at p. 617 (Tsosie) (Sept. 16, 2011).

the Mohave Alternatives Study, both tribes have expressed an interest in and an intention of developing renewable resources.¹⁷¹

Not only is renewable energy likely to be developed on either tribal land or with a tribal ownership interest, tribal renewable energy projects can be constructed to meet the requirements of California's RPS. Importantly, California in general, and SCE in particular, currently obtain power from a facility located on tribal land. The Four Corners Generating Station is located entirely on the Navajo Reservation, pursuant to a lease with the Navajo Nation,¹⁷² and it supplies SCE with approximately 720 MW of electricity.¹⁷³ SCE's ownership of Four Corners Generating Station will expire at or before 2016.¹⁷⁴ After that time, the transmission lines that SCE is currently using could be utilized to transport renewable energy to California. In addition, estimates of California's future renewable energy portfolio from the Renewable Energy Transmission Initiative planning effort include renewables from Arizona and New Mexico.¹⁷⁵ Furthermore, both tribes have expressed an interest in ownership of a renewable project, and these renewable projects could be located in California.¹⁷⁶

Absent California incentives, these tribal renewable resources may contract with utilities in other states rather than California. That has already happened in the case of the Aubrey Cliffs project, which has signed a power purchase agreement with an out-of-state utility.¹⁷⁷

¹⁷¹ See *supra* at pp. 14-16 (discussing the statements made by Navajo Nation and Hopi Tribe that show their desire to develop renewable resources).

¹⁷² D.10-10-016 at p.3; Application of Southern California Edison Company (U 338-E) for Approval of Agreement to Sell its Interest in Four Corners Generating Station, CPUC A.10-11-010 at p. 6.

¹⁷³ D.10-10-016 at p. 4.

¹⁷⁴ See D.10-10-016 at p. 3; A.10-11-010.

¹⁷⁵ See Renewable Energy Transmission Initiative, p. 1-3, RETI Stakeholder Steering Committee (April 2010), *available at* http://www.energy.ca.gov/reti/documents/phase2B/RETI_Phase_2B_Draft.pdf (estimating 13,186 of wind from New Mexico and 19,782 MW of solar and 3,714 of wind from Arizona).

¹⁷⁶ See *supra* at p. 14-16 (describing Hopi and Navajo statements that describe interest in renewable development).

¹⁷⁷ See, e.g., <http://navajotimes.com/news/2011/0811/080411wind.php> (Navajo Nation announcing power purchase agreement with Salt River Project).

The Commission should also incentivize renewable development from the Navajo and Hopi communities because providing an incentive for renewable development will help remedy some of the impact that these communities felt due to the operation and closure of Mohave. The Commission correctly predicted that the closure of Mohave would have “devastating effects on the Hopi and Navajo people and tribes as a whole, as well as workers at the Mohave facility, at the mines and on the pipeline.”¹⁷⁸ At a prehearing conference in this proceeding, the previously assigned ALJ Carol Brown, who oversaw the evidentiary hearing that led to D.04-12-016, stated: “the equitable arguments are incredibly compelling for wanting to do something that would benefit the people who are now suffering because Mohave is closed.”¹⁷⁹ She continued, stating: “I’m not sure anybody will be opposed to something else that was legally defensible that did something a little more creative than giving . . . less than a dollar back per year to an Edison ratepayer.”¹⁸⁰

The record is undisputed that the Hopi and Navajo communities suffered devastating impacts from the operation and closure of Mohave including the deleterious impacts to the water supply availability, air pollution impacts, and economic impacts. An incentive fund for renewable development will help these communities transition into a cleaner future.

2. Investment in Renewable Opportunities Provides A Better Ratepayer Benefit Than SCE’s and DRA’s Proposal.

The Commission should not distribute the SO₂ allowance revenues recorded in SCE’s MSCSA through ratemaking adjustments in its General Rate Case. SCE’s and DRA’s most recent testimony again asserts the same fundamental argument that the allowances are ratepayer assets and should be treated like rate refunds,¹⁸¹ despite the argument not being supported by the applicable law and being rejected by the ALJ.¹⁸² As described above, the SO₂ allowances are not

¹⁷⁸ D.04-12-016 at p. 14.

¹⁷⁹ See Navajo Nation Reply Br. at p. 14 (Dec. 12, 2008) (citing RT 28:6-9).

¹⁸⁰ Navajo Nation Reply Br. at p. 14 (Dec. 12, 2008) (citing RT 26:1-5).

¹⁸¹ *Division of Ratepayer Advocates’ Proposal in Response to the Assigned Commissioner’s Fourth Amended Scoping Memo & Ruling*, at p. 1-2 (Sept. 16, 2011).

¹⁸² ALJ Ruling, at p. 18-19, nn. 87, 110, 111 (April 7, 2011).

ratepayer assets, and it is inappropriate to treat them like a rate refund.¹⁸³ In addition to the legal flaws of SCE's and DRA's argument, SCE's and DRA's proposal would result in an imperceptible and likely meaningless decrease in rates to SCE ratepayers. In contrast, expending the SO₂ allowance proceeds on RPS-eligible renewable energy projects either owned by the tribes or on tribal land would incentivize tribal renewable projects to contract with SCE rather than solely with out-of-state interests.

SCE's and DRA's proposal to credit SCE's ratepayers through the General Rate Case would result in an imperceptible decrease in rates. In SCE's 2012 General Rate Case (GRC), SCE is requesting a base revenue requirement of \$6.285 billion, which is a 28% increase over the authorized revenue requirement for 2009.¹⁸⁴ Whether or not this specific request is authorized, SCE ratepayers will likely not realize any decrease in their rates due to the relatively low worth of the SO₂ allowance revenues¹⁸⁵ in comparison to other GRC funds. The SO₂ allowance revenues are worth approximately \$3.5 million,¹⁸⁶ which is a miniscule fraction (approximately 0.06%) of the \$6.285 billion base revenue requirement requested in SCE's GRC.¹⁸⁷

Due to the relatively low impact the SO₂ allowance revenues will have as part of the GRC, the monetary benefit of these funds to the ratepayers will be minute, if even realized at all.¹⁸⁸ Dr. Cicchetti's testimony on behalf of the Navajo Nation suggests the effect on an average

¹⁸³ *Id.*

¹⁸⁴ SCE's General Rate Case Application, at p. 1, (Nov. 23, 2010) [http://www3.sce.com/sscc/law/dis/dbattach3e.nsf/0/61D2DD0CACC8421D882577E300676839/\\$FILE/SCE+2012+GRC+Application.pdf](http://www3.sce.com/sscc/law/dis/dbattach3e.nsf/0/61D2DD0CACC8421D882577E300676839/$FILE/SCE+2012+GRC+Application.pdf); *Opening Brief of the Division of Ratepayer Advocates*, at pp. 2-3 (Sept. 26, 2011), available at <http://www.dra.ca.gov/NR/rdonlyres/71E47D0C-8786-4850-ABAE-8C420346D539/0/SCEGRCOpeningBrief.pdf>.

¹⁸⁵ *Additional Supplemental Testimony of Charles J. Cicchetti, Ph.D. on Behalf of the Navajo Nation*, at p. 4 (Oct. 4, 2011).

¹⁸⁶ *Supplemental Testimony Pursuant to the August 8, 2011 Assigned Commissioner's Ruling*, at p. 1, n. 12 (August 12, 2011).

¹⁸⁷ SCE's General Rate Case Application, at p. 1, (November 23, 2010), available at [http://www3.sce.com/sscc/law/dis/dbattach3e.nsf/0/61D2DD0CACC8421D882577E300676839/\\$FILE/SCE+2012+GRC+Application.pdf](http://www3.sce.com/sscc/law/dis/dbattach3e.nsf/0/61D2DD0CACC8421D882577E300676839/$FILE/SCE+2012+GRC+Application.pdf)

¹⁸⁸ *Additional Supplemental Testimony of Charles J. Cicchetti, Ph.D. on Behalf of the Navajo Nation*, at p. 4, n. 182 (Oct. 4, 2011).

750KWh customer would be “likely less than a penny per month per customer.”¹⁸⁹ As the Navajo Nation recently clarified, based upon the reduction of value of SO₂ allowances, “Dr. Cicchetti has determined the \$0.0158 per month reduction, or \$0.19 per year per SCE customer [that he previously calculated in August 2009], would decline to \$0.007 per month, or \$0.08 per year for an SCE customer that used 750 KWhs per month.”¹⁹⁰

In fact, based on SCE’s current large request in its GRC, it is unclear whether shareholders would be benefiting more than ratepayers from SCE’s proposal. In its Opening Brief for the 2012 SCE GRC, DRA stated:

[i]n this GRC, SCE is seeking *billions* of dollars from its ratepayers... The increase SCE seeks in this case, if granted, will largely benefit SCE’s shareholders, through increased returns on increased rate base, and SCE’s employees, through wage and benefit increases far beyond what SCE’s ratepayers are likely receiving.¹⁹¹

SCE has inflated its base revenue requirement request to such an extent that not only will the SO₂ allowance proceeds be a drop in the bucket, but the recipients of the benefit from such a high revenue requirement are merely the shareholders and employees of SCE, not the ratepayers. If the SO₂ allowance proceeds are added to the General Rate Case, the benefit to ratepayers would be diluted.¹⁹²

The support for SCE’s/DRA’s proposal relies on the argument that ratepayers, as a matter of equity, should receive the benefit of the SO₂ allowance proceeds.¹⁹³ However, both parties fail to address the fact that the proceeds will have little to no effect on ratepayers. They offer no equitable mechanism through which to provide meaningful benefit to SCE’s ratepayers.

¹⁸⁹ *Id.*

¹⁹⁰ See Navajo Nation Data Request Response to JTC, Question 3 (Oct.19, 2011) (attached hereto as Appendix A).

¹⁹¹ *Opening Brief of the Division of Ratepayer Advocates*, at p. 284 (Sept. 26, 2011), available at <http://www.dra.ca.gov/NR/rdonlyres/71E47D0C-8786-4850-ABAE-8C420346D539/0/SCEGRCOpeningBrief.pdf>.

¹⁹² See Table 1 of SCE’s General Rate Case Application, at p.3 (Nov. 23, 2010); *Supplemental Rebuttal Testimony of Charles J. Cicchetti, Ph.D. on Behalf of the Navajo Nation*, at p. 3-7 (Aug. 19, 2009).

¹⁹³ *Opening Brief of the Division of Ratepayer Advocates*, at p. 9 (Nov. 18, 2008).

Alternatively, JTC's proposal offers a mechanism through which the SO₂ allowance revenues can be used to provide real benefits to California ratepayers by incentivizing renewable projects located on Navajo or Hopi land or owned in part by the tribe to contract with SCE. Studies have shown that investing in alternative resources can produce more ratepayer benefits than returning revenues directly to ratepayers. For instance, the Regional Greenhouse Gas Initiative reduced overall electricity rates more than the value of its revenues because the revenues were invested in energy efficiency instead of being returned directly to ratepayers.¹⁹⁴ In addition, the reliance on renewable energy saves ratepayers from other costs including GHG allowance expenditures and pollution controls.¹⁹⁵

Furthermore, JTC's proposal would facilitate procurement of diverse renewable resources to be procured by SCE to meet its RPS requirements, a clear benefit for SCE's ratepayers. As the Code provides: "[a]chieving the renewables portfolio standard through the procurement of various electricity products from eligible renewable energy resources is intended to provide unique benefits to California."¹⁹⁶ In particular, geographical diversity of renewable resources

¹⁹⁴Paul Hibbard, et. al., *The Economic Impacts of the Regional Greenhouse Gas Initiative on Ten Northeast and Mid-Atlantic States*, Analysis Group: Economic, Financial, and Strategy Consultants (Nov. 15, 2011), *available at* http://www.analysisgroup.com/uploadedFiles/Publishing/Articles/Economic_Impact_RGGI_Report.pdf (Report on the Northeastern and Mid-Atlantic states Regional Greenhouse Gas Initiative (RGGI)). "RGGI has also produced changes in consumers' overall expenditures on electricity. Although CO₂ allowances tend to increase electricity prices in the near term, there is also a lowering of prices over time because the states invested a substantial amount of the allowance proceeds on energy efficiency programs that reduce electricity consumption. After the early impacts of small electricity price increases, consumers gain because their overall electricity bills go down as a result of this investment in energy efficiency." *Id.* at p. 34.

¹⁹⁵ *See, e.g.*, California Air Resources Board, *Updated Economic Analysis of California's Climate Change Scoping Plan*, (March 24, 2010), *available at* http://www.arb.ca.gov/cc/scopingplan/economics-sp/updated-analysis/updated_sp_analysis.pdf (discussing the estimated value of avoided costs from installation of clean renewable resources); Groosman, et. al., *The Ancillary Benefits from Climate Policy in the United States*, Department of Economics, Middlebury College (Nov. 2009) <http://sandcat.middlebury.edu/econ/repec/mdl/ancoec/0920.pdf> (discussing the health related co-benefits associated with climate policy).

¹⁹⁶ Cal. Pub. Code § 399.11(b).

benefits ratepayers because it increases the reliability of the resources.¹⁹⁷ As the California Independent System Operator articulated in a separate proceeding:

From an operations perspective, procurement of renewable resources with complementary variable generation characteristics reduces the impacts of intermittency. Renewable resources in different geographic locations have varying seasonal generation peaks. . . . Additionally, electrical output from the same type of renewable resource may vary by geographic location and time of day. For example, solar resources in New Mexico can begin generating up to an hour before California solar resources begin generating due to the rising of the sun. The inherent and unavoidable intermittency of solar and wind resources can be reduced by diversifying the geographic location of these resources, which in turn reduces the need for the increased use of fossil fuel generation to provide essential services needed to maintain grid reliability.¹⁹⁸

JTC's proposal incentivizes renewable energy with either tribal ownership or located on tribal lands. The development of these types of renewable resources would diversify SCE's current renewable portfolio. This diversity is beneficial to ratepayers, along with incentivizing renewable development in the tribal lands, which are rich with renewable resource potential.

3. JTC's Proposal Would Be a Practical and Fair Way to Allocate the Revenues.

JTC's proposal requests an adder be applied towards eligible renewable energy projects that are chosen through SCE's procurement process. JTC has not dictated exactly how the procurement process should be conducted in part based on the understanding that SCE has its own process to determine viable projects,¹⁹⁹ and SCE's procurement undergoes oversight at the direction of the Commission.²⁰⁰ Thus, SCE can use its predefined procurement processes to select eligible projects. As specified by JTC's proposal, these processes can include any of the

¹⁹⁷ See National Renewable Energy Laboratory, Western Wind and Solar Integration Study, at p. 3 (May 2010), *available at* <http://www.nrel.gov/docs/fy10osti/47781.pdf> ("The benefits of geographical diversity become increasingly important as California raises its Renewable Portfolio Standard).

¹⁹⁸ See Reply Comments of the California Independent System Operator Corporation in R.06-02-012, at pp. 2-3 (Jan. 25, 2010), *available at* <http://docs.cpuc.ca.gov/efile/CM/113500.pdf>.

¹⁹⁹ See Cal. Pub. Util. Commission, Project Viability Calculator, *available at* <http://www.cpuc.ca.gov/PUC/energy/Renewables/procurement.htm>.

²⁰⁰ See, e.g., Cal. Pub. Util. Comm'n, RPS Procurement Process, *available at* <http://www.cpuc.ca.gov/PUC/energy/Renewables/procurement.htm> (overview of RPS procurement process).

RPS procurement processes that have been or will be authorized by the Commission, which includes both competitive solicitations and bilaterally negotiated contracts.

The Commission has approved the use of adders, such as the additional incentive payment proposed by JTC, to encourage development of certain resources. In particular, in D.09-12-042, the Commission approved a ten percent locational adder for combined heat and power facilities located in a local resource adequacy area. Here, as discussed above, use of an adder will incentivize diversity in renewable development, which provides a ratepayer benefit. This adder will also “provide environmental and economic benefits to communities afflicted with poverty or high unemployment” levels by helping remedy the impacts of Mohave’s operation and closure on the Hopi and Navajo communities. Accordingly, the adder will provide a benefit to a particular disadvantaged community similar to the Commission’s programs that benefit low-income households.

a. JTC’s Proposal Is Fair to Both Tribes.

As discussed above, the purpose of the proposal is to provide an incentive for the development of RPS-eligible renewable projects with either a tribal ownership interest or on tribal land to remediate the social and economic impacts of Mohave’s operation and closure on the Hopi and Navajo communities. Pursuant to the language of this proposal, the revenues must be allocated in a reasonable manner to achieve the purpose of this proposal.

JTC’s proposal reasonably provides for both Hopi and Navajo communities since both communities were impacted by Mohave’s operation and closure and both tribes are interested in developing renewables. Notably, JTC’s proposal is thus the middle ground between the Hopi and Navajo proposals because it provides benefits to both tribes rather than just one. Importantly, the projects that Navajo Nation proposes in its testimony could be eligible to bid into SCE’s procurement process under the State’s RPS requirements.²⁰¹ The Navajo Nation has stated that it “would seek to qualify to bid into SCE’s procurement process and would work with

²⁰¹ See Supplemental Direct Testimony of Harrison Tsosie on Behalf of the Navajo Nation at p. 5 (Sept. 16, 2011).

SCE, the California Public Utilities Commission, and other State agencies to ensure that the projects will deliver RPS-eligible power.”²⁰² In addition, Hopi and Navajo tribal governments can choose which projects to present to SCE, so they can dictate what ownership percentage they want in a project.

To assure that each tribe has a fair opportunity to receive funding, the Commission may want to provide initial guidance to SCE as to how to reasonably administer the funds consistent with the purpose of JTC’s proposal. Initially, since the procurement is an incentive, JTC recommends that the tribes have some time to develop potential projects. In particular, in fairness to both tribes, JTC suggests that the funds not be available to projects until after at least January 1, 2014. To ensure that both tribes receive a fair allocation, the fund could be split in one of the following ways:

- SCE could distribute the funds in a pro rata share to the eligible projects based on their size. So, for example, if one project is 4 MW and another is 6 MW, the 4 MW project would get 40% of the funds and the 6 MW project would get 60% of the funds. The Tribes would be encouraged, but not required, to consult each other in this process.
- A winning offer from the Navajo Nation could presumptively receive 50% of the allowance revenues, and a winning offer from the Hopi Tribe could presumptively receive the other 50% of the allowance revenues. If either tribe does not submit a qualifying project by a certain date, the remaining allowance proceeds could be distributed to the winning offer from the other tribe.

Other parameters that could facilitate JTC’s proposal are the following:

- End Date – Since JTC’s proposal is tied to California’s requirement to meet its 33% renewable portfolio standard, all eligible projects could be required to bid before 2020. After 2020, the remaining funds could be distributed between the prior successful projects.
- Reporting – SCE could be required to annually report: any projects offered by Navajo or Hopi in the prior year, whether SCE entered a contract with those projects, and if not, why SCE chose not to contract with those projects. This reporting requirement could be important for accountability.

²⁰² Data Request Response from Navajo Nation to JTC, Question 2(Oct. 6, 2011) (attached as Appendix A).

- Project Funds – The funds could be used by the project developer to incentivize its bid into the process and/or help make its bid more competitive.

All of these potential parameters are examples of the type of guidance the Commission could give to assure that the revenues are distributed in a way that is fair to the parties involved and minimizes the effort required by SCE. With this guidance, and SCE's predefined RPS procurement processes and tariffs, JTC's proposal provides a fair way to allocate the Mohave allowance revenues that provides a benefit to California ratepayers and mitigates the devastation caused by Mohave's operation and closure on the Navajo and Hopi communities.

V. CONCLUSION

JTC recommends that the best and most appropriate use of the SO₂ allowance proceeds is to promote renewable energy development either on Navajo and Hopi lands or owned by Navajo or Hopi governments. This renewable energy development would be selected by SCE in its ordinary course of business through its procurement process to meet its Renewable Portfolio Standard requirements, and thus assist SCE in meeting its renewable energy mandate. This proposal would directly benefit ratepayers by assisting SCE in meeting its renewable energy mandate. The Commission has ample legal authority to approve this type of framework and the facts warrant this result.

Respectfully submitted,

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APPENDIX A

The Navajo Nation A.06-12-022 Re Distribution of S02 Allowance Proceeds DATA REQUEST RESPONSE

JTC Request: JTC - 2- Q2
Date Received : 10-6-2011
Date Response Due: 10-19-2011
Subject Area : Testimony of Harrison Tsosie and Charles J. Cicchetti, Ph.D.

JTC QUESTION(S):

Please provide the following items:

Q-2 Are any of the specified renewable energy projects, from pages 7-8,10 of the Supplemental Rebuttal Testimony of Harrison Tsosie, eligible to bid into SCE's procurement processes? If so, which ones? Please describe the information relied on to answer this question.

COMPANY RESPONSE(S):

A-2 The Navajo Nation objects to this request as compound , vague and ambiguous as to "eligible to bid into SCE's procurement processes ," and overly broad as to time. Subject to and without waiving these objections , the Navajo Nation provides the following response. As stated in the Supplemental Direct Testimony Of Harrison Tsosie On Behalf Of The Navajo Nation (p. 5), all of the projects will be eligible to bid into SCE's procurement process under the California Renewable Portfolio Standard (RPS) and other applicable California law utilized to issue annual solicitations for renewable resources and select renewable energy for distribution in California . This is based on the testimony submitted by the Navajo Nation , and publicly available information about the proposed projects . The Navajo Nation would seek to qualify to bid into SCE's procurement process and would work with SCE, the California Public Utilities Commission , and other State agencies to ensure that the projects will deliver RPS-eligible power.

The Navajo Nation
A.06-12-022 Re Distribution of S02 Allowance Proceeds
DATA REQUEST RESPONSE

JTC Request: JTC - 2- Q3
Date Received : 10-6-2011
Date Response Due: 10 -19-2011
Subject Area : Testimony of Harrison Tsosie and Charles J. Cicchetti, Ph.D.

JTC QUESTION(S):

Please provide the following items:

Q-3 On page 4 of the Additional Supplemental Rebuttal Testimony of Charles J. Cicchetti, Ph.D., Dr. Cicchetti states, "I would reduce my previous estimated effect on the typical 750KWh per month customer in California to an even smaller monthly amount (likely less than a penny per month per customer)." What is Dr. Cicchetti's current estimate of the effect on the typical 750 kWh per month customer in California? Please describe all information and data that supports this estimate.

COMPANY RESPONSE(S):

A-3 In August 2009, Dr. Cicchetti estimated the monthly reduction in an SCE retail customer's bill would be \$0.0158 based on a "high" annual sales of S02 case of \$2,078,319 for midyear 2006. In 2011, SCE reported total sales of S02 credits equaled \$3,495,137 over three years and almost 10 months. These sales would average about \$919,773 per year, or less than half the previous annual estimate. Based on this reduction from just over \$2 million per year to less than \$1 million per year, Dr. Cicchetti has determined the \$0.0158 per month reduction, or \$0.19 per year per SCE customer, would decline to \$0.007 per month, or \$0.08 per year for an SCE customer that used 750 KWWhs per month.

1 It was assumed that all S02 credits would be sold at \$69.74 per ton in 2006.