

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application of Southern California Edison Company (U3338E) for Applying the Market Index Formula and As-Available Capacity Prices Adopted in D.07-09-040 to Calculate Short-Run Avoided Cost for Payments to Qualifying Facilities Beginning July 2003 and Associated Relief.

Application 08-11-001  
(Filed November 4, 2008)

And related matters.

Rulemaking 06-02-013  
Rulemaking 04-04-003  
Rulemaking 04-04-025  
Rulemaking 99-11-022

**ORDER DENYING REHEARING OF DECISION 10-12-035**  
**ON CERTAIN ISSUES RAISED**  
**BY THE CITY AND COUNTY OF SAN FRANCISCO**

**I. INTRODUCTION**

In Decision (D.) 10-12-035 (or “Decision”), we approved the “Qualifying Facility (“QF”) and Combined Heat and Power (“CHP”) Program Settlement Agreement” (“Settlement Agreement”).

Applications for rehearing of the Decision were filed by the City and County of San Francisco (“CCSF”), the California Municipal Utilities Association (“CMUA”), and jointly filed by the Marin Energy Authority, the Alliance for Retail Energy Markets , and the Direct Access Customer Coalition (collectively, “CCA/DA Parties”).

In its rehearing application, CCSF contended that we should grant rehearing and modify the Decision to remove from the Settlement Agreement those provisions that impose requirements on community choice aggregators (“CCAs”), electric service

providers (“ESPs”), and municipal departing load (“MDL”).<sup>1</sup> Specifically, CCSF alleged the following error: (1) D.10-12-035 unlawfully exceeds the Commission’s limited jurisdiction over CCAs; (2) providing for expanded stranded cost recovery for the CHP program is inconsistent with the law and contrary to Commission precedent; (3) D.10-12-035 fails to correctly apply the heightened standard for settlements that do not include all parties; and (4) the Commission failed to provide non-settling parties meaningful notice or opportunity to comment on the Settlement Agreement.

CCA/DA Parties’ rehearing application supported the allegations raised in CCSF’s application for rehearing.<sup>2</sup>

CMUA’s rehearing application challenged the Commission’s approval of the provisions of the Settlement Agreement that would impose new nonbypassable charges (“NBCs”) on MDL customers. Specifically, CMUA argued: (1) the Commission has unlawfully overturned or departed from the precedent in D.08-09-012 that new generation NBCs do not apply to MDL customers; (2) the Commission’s departure from D.08-09-012 is not supported by the findings or the record; and (3) CMUA was not included in the settlement discussions or provided with reasonable notice that issues affecting CMUA members would be resolved adversely to them.

Southern California Edison Company, Pacific Gas and Electric Company, San Diego Gas and Electric Company, The Utility Reform Network, the California Cogeneration Council, the Independent Energy Producers Association, the Cogeneration

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<sup>1</sup> There are two categories of MDL. Transferred MDL refers to customers who had previously received generation and distribution services from an investor-owned utility (“IOU”), but are now receiving service from a publicly owned utility. New MDL is load that has never been served by an IOU but is located in an area that had previously been in the IOU’s service territory (as that territory existed on February 1, 2001) and was annexed or otherwise expanded into by a publicly owned utility. In some instances, the IOU incurred costs on behalf of this load, for which this new MDL was held responsible.

<sup>2</sup> As noted in D.11-03-051, this rehearing application fails to meet the requirements of Public Utilities Code section 1732, which provides that an application for rehearing “shall set forth specifically the ground or grounds on which the applicant considers the decision or order to be unlawful.” (D.11-03-051, p. 3, fn. 1.) D.11-03-051 denied this rehearing application.

Association of California and the Energy Producers and Users Coalition, and the Division of Ratepayer Advocates (collectively, “Settling Parties”) jointly filed a response requesting denial of the rehearing applications.

CCA/DA Parties filed a response supporting CCSF’s rehearing application.

On March 16, 2011, CMUA filed a motion for abeyance of its rehearing application due to pending settlement negotiations with the Settling Parties regarding the issues raised in its rehearing application. We issued D.11-03-051, granting CMUA’s motion for abeyance. We also held in abeyance two issues raised in CCSF’s rehearing application regarding cost allocation to MDL customers and due process, because they were also raised in CMUA’s rehearing application. (D.11-03-051, pp. 3-4.) D.11-03-051 also made certain modifications to D.10-12-035, and as modified, denied rehearing of all other issues raised in the rehearing applications.

On April 1, 2011, CMUA and the Settling Parties filed a petition for modification of D.10-12-035 (“April 2011 Petition”). The April 2011 Petition proposed mutually agreed upon changes and clarifications to D.10-12-035 regarding the NBCs imposed on MDL customers as a result of the QF/CHP program. The April 2011 Petition stated that upon Commission adoption, without change, of the proposed modifications to D.10-12-035, CMUA would submit a letter to the Commission’s Executive Director withdrawing its rehearing application, or that the Commission may deny its rehearing application as moot. (April 2011 Petition, pp. 1-2.) We granted the April 2011 Petition in D.11-07-010.

On July 28, 2011, CMUA and the Settling Parties filed a petition for modification of D.11-07-010 (“July 2011 Petition”) requesting that the Commission delete certain language and conclusions of law in D.11-07-010 regarding potential cost-shifting that may occur as a result of the modifications to the MDL provisions in

D.10-12-035. (July 2011 Petition, p. 2.) In D.11-10-016, we granted CMUA and the Settling Parties' request to modify D.11-07-010.<sup>3</sup>

On October 11, 2011 CMUA submitted a request for withdrawal of its rehearing application to the Executive Director. D.11-10-027 granted this request and dismissed CMUA's rehearing application.

Although CMUA withdrew its rehearing application, CCSF did not withdraw the issues in its rehearing application that were put in abeyance. Therefore, these issues are still outstanding. Given that the settlement negotiations that were the reason for the abeyance are now concluded, we take the two issues remaining in CCSF's rehearing application out of abeyance. We have reviewed the remaining issues in CCSF's rehearing application, and find that good cause has not been established to grant rehearing. Accordingly, rehearing of D.10-12-035 on these issues is denied.

## **II. DISCUSSION**

### **A. Cost Allocation to MDL**

CCSF alleges that the Decision's allocation of costs to MDL is arbitrary and capricious because it departs from established Commission precedent with no justification. (CCSF Rehr. App., p. 18.)

The Settlement Agreement provides that if the Commission determines that the IOUs should purchase CHP generation on behalf of direct access ("DA") and CCA customers, the IOUs are authorized to recover the net capacity costs associated with the CHP program from certain customers, including MDL customers. (Term Sheet, § 13.1.2.2.) The Decision determined that the IOUs should purchase CHP resources on behalf of DA and CCA customers. (D.10-12-035, p. 56.) The Decision also determined that MDL customers should be allocated costs of the CHP program because the greenhouse gas ("GHG") Emissions Reduction Targets set forth in the Settlement

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<sup>3</sup> The July 2011 Petition also requested that the Commission establish a settlement effective date and close the consolidated proceedings. D.11-10-016 granted the request to establish a settlement effective date but declined to close the consolidated proceedings.

Agreement are based on actual retail sales data that includes all current bundled service customers, even if some of those customers later depart for municipal service. (D.10-12-035, pp. 52-53.)

Subsequent to the filing of the rehearing applications, we issued D.11-07-010, as modified by D.11-10-016. D.11-07-010 modified section 13.1.2.2 of the Settlement Agreement Term Sheet relating to the allocation of the QF/CHP program costs to MDL customers. Among other things, D.11-07-010 determined that transferred MDL customers who depart IOU service before the Settlement Effective Date will not be responsible for NBCs associated with the Settlement, while transferred MDL customers who depart IOU service after the Settlement Effective Date would be responsible for these NBCs, subject to certain limitations. (D.11-07-010, pp. 9-10.) D.11-07-010 determined that transferred MDL customers would only be responsible for NBCs associated with the 3,000 MW target during the First Program Period of the QF/CHP Program and not for NBCs associated with the IOUs' GHG Emissions Reduction Targets during the Second Program Period. (*Ibid.*) D.11-07-010 also clarified that new MDL customers would not be responsible for any NBCs associated with the Settlement. (*Id.* at p. 10.) Because we subsequently modified the Decision's allocation of costs to MDL customers, CCSF's allegations regarding this aspect of the Decision are moot.<sup>4</sup>

## **B. Due Process**

CCSF alleges that CCAs and ESPs did not have sufficient notice of the settlement agreement or an adequate opportunity to comment on the settlement agreement. (CCSF Rehr. App., p. 22.) CCSF also alleges that we failed to follow our own procedural rules regarding timely notice to parties on the scope of the relevant proceedings and therefore failed to proceed in a manner required by law. (CCSF Rehr. App., p. 22.)

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<sup>4</sup> The April 2011 Petition stated that the granting of the April 2011 Petition would fully resolve all MDL-related issues in both CMUA's and CCSF's applications for rehearing of D.10-12-035. (April 2011 Petition, pp. 7-8.)

Due process requires that a party affected by the Commission's actions receive adequate notice and an opportunity to be heard before a valid order is made. (*People v. Western Air Lines, Inc.* (1954) 42 Cal.2d 621, 632.) Regardless of any proposed agreement reached among settling parties, the parties' rights are not affected until the Commission takes action. The parties do have a due process right to notice and opportunity to be heard prior to the Commission taking action regarding the proposed settlement.

Here, CCSF and other parties had notice of the Commission's consideration of the proposed settlement agreement and an opportunity to be heard before the Commission issued an order. As detailed in the Decision, all parties received notice of the proposed settlement, and had the opportunity to participate in a settlement conference, propound data requests, file comments and reply comments on the Settling Parties' motion for approval of the proposed settlement, and file comments and reply comments on the Commission's proposed decision. (See D.10-12-035, pp. 9-12, 29-30, 59.) On September 24, 2010, the Settling Parties provided notice of a formal settlement conference. A settlement conference was held on October 7, 2010. Parties had the opportunity to propound data requests, and one party, CMUA, did so. On October 25, 2010, several parties, including CCSF, filed comments on the proposed settlement. The Joint Parties filed reply comments on November 1, 2010. The proposed decision ("PD") of the administrative law judge ("ALJ") was mailed in accordance with Public Utilities Code section 311. Several parties, including CCSF, filed comments on the PD. Several parties, including CCSF, also filed reply comments on the PD. Therefore, CCSF had the opportunity to be heard and did in fact file comments and participate in the proceeding.

CCSF alleges that CCA and ESP parties were not included in the settlement negotiations and were not apprised that the negotiations involved issues affecting them. (CCSF Rehrgr. App., p. 23.) CCSF fails to demonstrate that due process would require CCA or ESP parties to be included in the negotiations so long as they receive notice and an opportunity to be heard prior to the Commission's issuance of a decision on the Settlement Agreement. As explained in the Decision, the Commission's rules do not

require that all parties be involved in settlement negotiations and in fact explicitly accommodate settlements among a limited number of parties to a proceeding. (See D.10-12-035, pp. 31-32, and Rule 12.1 of the Commission's Rules of Practice and Procedure, Code of Regs., tit. 20, § 12.1.) CCSF does not cite to any authority that would require settling parties to give notice to non-settling parties of issues being considered during confidential settlement negotiations. CCSF does not dispute the Decision's finding that the Settling Parties complied with the relevant elements of the Commission's settlement rules. (See D.10-12-035, p. 28.)

There is also no merit to CCSF's allegation that the Commission was required to give notice of the confidential settlement negotiations. According to CCSF, the Commission violated Rule 7.3 of the Commission's Rules of Practice and Procedure when it did not give parties notice of the scope of the proceeding during the 18 months of settlement negotiations.<sup>5</sup> CCSF acknowledges that Rule 7.3 does not provide a deadline for when a scoping memo is to be issued, but alleges that the Commission violated the intent of the rule to give notice to parties of the issues to be considered. (CCSF Rehrgr. App., p. 25.)

CCSF fails to demonstrate that the Commission violated Rule 7.3. Rule 7.3 does not require the Commission to give notice of the scope of settlement negotiations. A scoping memo details issues to be addressed by the Commission. (See Cal. Code of Regs., tit. 20, § 7.3, subd. (a).) Even if it had been required, which it was not, the Commission could not have issued a scoping memo regarding the scope of any proposed settlement until a proposed settlement agreement was submitted to the Commission for its consideration.<sup>6</sup> Prior to the submission of the proposed settlement agreement, there were no issues for the Commission to address.

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<sup>5</sup> Rule 7.3 deals with issuance of scoping memos.

<sup>6</sup> Although the Commission did issue a scoping memo in this case, there is no legal requirement that the Commission issue a scoping memo in order to consider a proposed settlement.

Once the Settling Parties submitted the proposed settlement agreement for Commission consideration, the Commission consolidated the relevant proceedings in order to give notice to all parties affected by the issues in the proposed settlement agreement. (ALJ Ruling, dated October 11, 2010.) The Commission then issued a scoping memo, which provided that the scope of the proceeding included whether the proposed settlement agreement was reasonable in light of the whole record, consistent with the law, in the public interest, and should be approved. (Scoping Memo, dated October 19, 2010.)

CCSF alleges that the Commission unlawfully expanded the scope of the proceeding by consolidating previously unrelated cases. (CCSF Rehr. App., p. 25.) CCSF fails to demonstrate that there is any legal error in the Commission's consolidation of the various proceedings. Rule 7.4 of the Commission's Rules of Practice and Procedure permits proceedings involving related questions of law or fact to be consolidated.

Furthermore, unlike in *Southern California Edison Co. v. Public Utilities Com.* (2006) 140 Cal. App. 4<sup>th</sup> 1085, which CCSF cites in its rehearing application, the scoping memo gave adequate notice of the issues to be considered in the Decision. The Court in *Southern California Edison Co.* annulled a portion of a Commission decision dealing with a prevailing wage proposal when it determined the proposal was beyond the scope of issues identified in the scoping memo, that the Commission had failed to comply with its own rules, and that such failure was prejudicial. (*Id.* at pp. 1105-1106.) Here, since the scope of the issues to be considered was the proposed settlement agreement, and since the proposed settlement agreement included issues related to the GHG-related obligations of CCAs and ESPs, those issues are properly within the scope of the proceeding. CCSF does not identify any issues in the Decision that are not within the scope of issues included in the scoping memo.

CCSF also alleges that the proceedings that followed the filing of the proposed settlement agreement were unacceptably brief. (CCSF Rehr. App., p. 24.) Pursuant to Rule 1.2 of the Commission's Rules of Practice and Procedure, for good

cause shown the ALJ shortened the period for filing comments and reply comments on the proposed settlement agreement. (See ALJ Ruling, dated October 11, 2010.) CCSF fails to demonstrate that it was prejudiced by this expedited schedule. For instance, on October 25, 2010, CCSF filed comments on the proposed settlement agreement, which addressed substantive matters going to the merits of the proposed settlement agreement.<sup>7</sup> These comments addressed the same issues raised in its rehearing application, including issues relating to the allocation of costs to CCA, ESP and MDL customers; and the imposition of GHG emission reduction targets on CCAs and ESPs. The substantive comments filed by CCSF belie claims that it had an inadequate opportunity to comment.<sup>8</sup> As noted in the Decision, “[t]he thoughtful and substantive comments that were filed by the parties demonstrate that they had reasonable opportunity to review and respond to the Proposed Settlement.” (D.10-12-035, p. 30.)

For the foregoing reasons, CCSF fails to demonstrate that the Commission’s consideration and eventual adoption of the settlement agreement violated any of the Commission’s procedural rules or the due process rights of any of the parties.

### III. CONCLUSION

For the reasons stated above, rehearing of D.10-12-035 on the remaining issues in CCSF’s rehearing application is denied.

**THEREFORE, IT IS ORDERED** that:

1. The issues raised in CCSF’s rehearing application that were also raised in CMUA’s rehearing application relating to cost allocation to MDL customers and due process are no longer in abeyance.

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<sup>7</sup> In contrast, the court in *Southern California Edison Co.* found that parties’ comments failed to respond to the merits of the proposals. (*Southern California Edison Co.*, *supra*, 140 Cal. App. 4<sup>th</sup> at p. 1106.)

<sup>8</sup> In its comments on the proposed settlement agreement, CCSF stated that very few of the provisions of the proposed settlement agreement pertain to CCAs and that it takes no position on the majority of the provisions in the settlement agreement. (CCSF Comments, dated October 25, 2010, p. 2.)

2. Rehearing of D.10-12-035 on the issues previously held in abeyance is denied.

This order is effective today.

Dated October 20, 2011, at San Francisco, California.

MICHAEL R. PEEVEY  
President  
TIMOTHY ALAN SIMON  
CATHERINE J.K. SANDOVAL  
MARK J. FERRON  
Commissioners

I abstain.

/s/ MICHEL PETER FLORIO  
Commissioner