



**BEFORE THE PUBLIC UTILITIES COMMISSION OF THE
STATE OF CALIFORNIA**

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In the matter of the Application of PacifiCorp (U901E) for approval to implement a Net Surplus Compensation Rate	Application 10-03-001 (Filed March 1, 2010)
In the Matter of the Application of Sierra Pacific Power Company (U903E) for Approval of a Net Surplus Compensation Rate.	Application 10-03-010 (Filed March 15, 2010)
Application of Pacific Gas and Electric Company To Implement Assembly Bill 920 (2009) Setting Terms and Conditions for Compensation For Excess Energy Deliveries By Net Metered Customers. (U 39 E)	Application 10-03-012 (Filed March 15, 2010)
Application of Southern California Edison Company (U 338-E) in Response to Assigned Commissioner's Ruling Directing Electric Utilities to File Applications Proposing a Net Surplus Compensation Rate Pursuant to Assembly Bill 920.	Application 10-03-013 (Filed March 15, 2010)
Application of San Diego Gas & Electric Company (U902E) Proposing a Net Surplus Compensation Rate Pursuant to Assembly Bill 920.	Application 10-03-017 (filed March 15, 2010)

**OPENING COMMENTS OF SOUTHERN CALIFORNIA EDISON COMPANY
(U 338-E) ON PROPOSED DECISION ADOPTING NET SURPLUS COMPENSATION
RATE PURSUANT TO ASSEMBLY BILL 920**

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I.

INTRODUCTION

Pursuant to Rule 14.3 of the Rules of Practice and Procedure of the California Public Utilities Commission (Commission), Southern California Edison Company (SCE) submits the following opening comments on the Proposed Decision Adopting Net Surplus Compensation Rate Pursuant to Assembly Bill 920 (PD), mailed on November 3, 2010 (Opening Comments).

Although the compensation rate deemed most appropriate by the PD is not that proposed by SCE, SCE can support the Net Surplus Compensation Rate (NSCR) set forth in the PD. However, SCE asks the Commission to revise the PD to remove the inaccurate interpretation of the federal law governing wholesale pricing. SCE is willing to offer the price proposed in the PD because the pricing methodology satisfies the *just and reasonable* criteria and appears relatively simple to calculate. In addition, in these Opening Comments SCE makes other recommendations and requests clarification of certain issues as more fully described below.

II.

DISCUSSION OF LEGAL ISSUES IN THE PD

A. The PD’s Discussion of Jurisdiction Over Wholesale Pricing Is Confused and Inaccurate and Should be Corrected In the Final Decision.

The PD appropriately identifies the jurisdictional issue of the Commission’s authority to establish the NSCR to be paid by the applicants to eligible Net Energy Metering (NEM) customers. The PD acknowledges the applicants’ position that the Federal Power Act (FPA) grants the Federal Energy Regulatory Commission (FERC) sole jurisdiction to set rates for wholesale power sales to and by public utilities unless the generator is a qualifying facility (QF) and the price for power does not exceed the purchasing utility’s avoided cost.¹ However, the PD nevertheless disagrees with applicants’ argument that “the Commission is limited to identifying a net compensation rate pursuant to PURPA.”² In so finding, the PD states “[A] transfer of net surplus energy by a net metering customer to a utility constitutes a wholesale transaction that

¹ PD, *mimeo*, pp. 6-8.

² *Id.*, p. 9.

must comply with *either* the FPA or PURPA.”³ This, of course, is a true statement. It does not follow, however, that the Commission can compel utilities to pay a certain price for wholesale power outside of its authority under PURPA, simply because *the transaction* itself complies with the FPA. The distinction is what the Commission is permitted to do under the FPA and PURPA versus what types of wholesale transactions comply with FPA and PURPA.

With respect to the Commission’s jurisdiction, FERC made clear in its July 15, 2010, Order on the Commission’s decisions implementing Assembly Bill (AB) 1613 that, when the Commission compels a purchase of power, the Commission can only set the price for power sold if it is sold by a QF and the Commission is acting under PURPA. The Commission cannot set the price for any other wholesale sales of electricity. FERC stated:

The [FERC’s] authority under the FPA includes the exclusive jurisdiction to regulate the rates, terms and conditions of sales for resale of electric energy in interstate commerce by public utilities. While Congress has authorized a role for States in setting wholesale rates under PURPA, Congress has not authorized other opportunities for States to set rates for wholesale sales in interstate commerce by public utilities, or indicated that the Commission’s actions or inactions can give States this authority.⁴

Further, a seller’s exemption from Sections 205 and 206 of the FPA does not in any way alter the state’s ability to set the price for power. FERC stated “even if a QF has been exempted pursuant to the [FERC’s] regulations from the ratemaking provisions of the Federal Power Act, a state still cannot impose a ratemaking regime inconsistent with the requirements of PURPA and [FERC’s] regulations. . . .”⁵ FERC further clarified this point, stating:

Various parties argue that this exemption from section 205 means that the sale of energy and capacity from smaller QFs do not need to comply with PURPA. However, contrary to this argument,

³ PD, p. 9 (emphasis in original).

⁴ *Cal. Public Utilities Comm’n*, 132 FERC ¶ 61,047 at p. 64 (2010).

⁵ *Id.* at p. 66 (quoting *Connecticut Light & Power*, 70 FERC ¶ 61,102 at 61,029).

whether a rate is filed under section 205 of the FPA for Commission approval, or is exempt from scrutiny from FPA sections 205 and 206 pursuant to the Commission regulations, the CPUC may not set rates for the sale for resale of energy and capacity by a QF that exceeds the purchasing utility's avoided cost.⁶

Thus, when it comes to the Commission's jurisdiction, the Commission is limited to identifying an NSCR pursuant to PURPA. "Congress has not authorized other opportunities for States to set rates for wholesale sales in interstate commerce."⁷

With respect to the seller's obligations under Federal law, the PD is correct that NEM customers will be exempt from obtaining market-based rate authority under the FPA based on their size and their eligibility for QF status.⁸ As such, they may enter into market-based transactions with utilities without FERC's approval. However, that does not mean that the Commission can set the rate for those non-PURPA transactions. The only rate the Commission may set for wholesale purchases is an avoided cost rate for QFs pursuant to PURPA. Non-PURPA, market-based rates cannot be imposed by the state; they must be agreed upon by the buyer and seller of the power.

The PD confuses what the Commission is permitted to do under Federal law and what a seller is permitted to do under Federal law. The Commission should correct the PD's discussion of federal law to avoid further confusion and litigation on these issues.

Although the discussion of jurisdiction in the PD is inaccurate, SCE is willing to voluntarily adopt and implement the NSCR proposed by the PD.⁹ As discussed in Section III.A, the price proposed in the PD fairly values the excess electricity provided by NEM customers. By

⁶ *Id.* at p. 70.

⁷ *Cal. Public Utilities Comm'n*, 132 FERC ¶ 61,047 at p. 64.

⁸ FERC no longer requires QFs under 1 MW to certify as QFs.

voluntarily adopting the price proposed in the PD, the parties will avoid prolonging the proceeding with challenges to the Commission's jurisdiction to set a rate at a price other than avoided cost and will be able to implement the adopted NSCR by the prescribed statutory deadline of January 1, 2011.¹⁰ This expedient resolution of the issue is in the best interest of all customers. Accordingly, SCE is willing to voluntarily adopt the pricing methodology proposed in the PD, subject to a final determination on the value of the renewable attributes.

B. The PD's Statements Regarding Jurisdiction Over Distribution Facilities Are Contrary to the FPA, FERC Orders, and Case Law

The PD states, "Section 201(b)(1) of the FPA provides that FERC has no jurisdiction, with some limited exceptions inapplicable here, over facilities used in local distribution."¹¹ FERC has expressly rejected this reading of the FPA through FERC Order Nos. 2003 and 2006.¹² For non-QF interconnections, the District of Columbia Court of Appeals upheld FERC's determination in FERC Order Nos. 2003 and 2006 that if the utility's distribution lines are subject to an Open Access Transmission Tariff (OATT) "*and* the interconnection is for the purpose of facilitating a jurisdictional wholesale sale of electric energy," then FERC retains jurisdiction over the interconnection.¹³

Continued from the previous page

⁹ SCE's voluntary adoption of the NSCR is subject to the final determination on the value of renewable attributes as addressed in Section III.B.

¹⁰ Public Utilities Code Section 2817(h)(4)(A).

¹¹ PD, p. 13.

¹² See, e.g., *Standardization of Generator Interconnection Agreements and Procedures*, Order No. 2003, FERC Stats. & Regs. ¶ 31,146 at p. 803 (2003), *order on reh'g*, Order No. 2003-A, FERC Stats. & Regs. ¶ 31,160, *order on reh'g*, Order No. 2003-B, FERC Stats. & Regs. ¶ 31,171 (2004), *order on reh'g*, Order No. 2003-C, FERC Stats. & Regs. ¶ 31,190 (2005), *aff'd sub nom. Nat'l Ass'n of Regulatory Util. Comm'rs v. FERC*, 475 F.3d 1277 (D.C. Cir. 2007), *cert. denied*, 128 S. Ct. 1468 (2008); *Standardization of Small Generator Interconnection Agreements and Procedures*, Order No. 2006, FERC Stats. & Regs. ¶ 31,180 at p. 14, *order on reh'g*, Order No. 2006-A, FERC Stats. & Regs. ¶ 31,196 (2005), *order on reh'g*, Order No. 2006-B, 116 FERC ¶ 61,046 (2006).

¹³ *NARUC*, 475 F.3d at 1282 (emphasis in original). The entire distribution system of investor-owned utilities is covered by OATTs – i.e., their *Wholesale* Distribution Access Tariffs (WDATs).

For interconnections of QFs, according to FERC Order No. 2003, the Commission has jurisdiction where the QF does not have the right to sell power to entities other than the interconnected utility.¹⁴ This same rule stated in Order No. 2003 has been applied to all distribution-level QF interconnections, not just interconnections of QFs to distribution facilities covered by an OATT.¹⁵

For the sake of clarity, SCE respectfully requests that the Commission pursue one of the three solutions presented by PG&E in its application to address its jurisdictional concerns:

1. Interested California parties could file a Petition to Disclaim Jurisdiction with FERC.
2. The Commission could require all NEM customers to become QFs as a condition for eligibility.
3. Ask FERC to approve changes to the wholesale distribution tariff so that the rules for NEM customers electing compensation match the rules for NEM customers not electing compensation.¹⁶

¹⁴ *Fla. Power & Light Co.*, 133 FERC ¶ 61,121 at p. 19 (2010) (“[FERC] has jurisdiction over a QF’s interconnection to a transmission system if the QF’s owner may sell any of the QF’s output to an entity other than the electric utility directly interconnected to the QF. Thus, the presence of the right to sell *any* output to a third party determines [FERC] jurisdiction.”).

¹⁵ *See PJM Interconnection, L.L.C.*, 123 FERC ¶ 61,087 (2007). In *PJM*, FERC explained that the issue of whether the distribution facility is covered by an OATT is irrelevant, as FERC has jurisdiction over “a QF that seeks interconnection to a non-OATT ‘distribution’ facility to make jurisdictional wholesale sales.” *Id.* at p. 7.

¹⁶ Application of PG&E (U 39 E) to Implement Assembly Bill 920 (2009) Setting Terms and Conditions for Compensation for Excess Energy Deliveries by Net Metered Customers (A.10-03-012), dated March 15, 2010, pp. 34-35.

III.

GENERAL DISCUSSION

A. SCE Supports the PD's Adopted Rate and Methodology.

In determining whether the compensation rate should include the value of the electricity and/or renewable attribute, the PD appropriately determines that both should be considered. This approach allows customers with surplus generation to receive fair value for their excess electricity generated and, if their facilities produce renewable attributes that benefit non-participating customers, they will also receive a value for their renewable attributes. Finally, the PD protects customer interests and upholds the intent of AB 920 by determining that payment need only be made to customers who appropriately size their systems to their electrical requirements.

B. SCE Requests Clarification of How to Determine the Renewable Attributes and Energy Rates in the Future.

The PD leaves unanswered the question of how future determinations of the value of renewable attributes will be determined and of how often the energy rate will be updated and used to recalculate the NSCR. As of today, the value of the renewable attribute has not been determined, yet the PD concludes that it should be based on future renewable energy credit (REC) market prices, without commenting on the manner in which that market price should be calculated. SCE offers the following thoughts on how these questions should be answered and urges the Commission to revise the PD to include consideration of these issues.

First, the Commission should clarify that the value of the renewable attribute should be based on the Western Electric Coordinating Counsel-wide REC market prices, since this will

likely be the market reflecting the prices of renewable attributes used to meet California's RPS requirements.

Second, the PD does not identify how frequently the NSCR will be updated. The PD should be clarified to indicate that the rate will be updated once per month. This frequency is not overly burdensome for parties to calculate, yet provides enough granularity to compensate customers for the actual value of their surplus generation. This initial advice filing required by the PD would include both the currently effective NSCR, for customers with relevant periods ending in January 2011, and the methodology by which the NSCR will be recalculated each month.

Third, SCE urges the Commission to adopt the methodology proposed by SCE because it is independent and based on current information, not forecasted guesses. SCE is concerned that when the Commission uses the term "future" renewable energy prices, it implies the Commission will in fact forecast what it believes prices will be and may, in turn, become a self-fulfilling prophecy. For example, if the Commission starts to publish what it believes the REC market prices should be, that action will indeed unduly influence the market. The market price reporting suggested by SCE was done by the Department of Energy (DOE) and is based on current "green" premiums. It is important that the Commission not interfere with the supply-and-demand pricing in the market, and SCE's proposed REC pricing would accomplish that. SCE is unsure of how the Commission suggests deriving this premium.

C. The Commission Should Clarify that RECs Count Toward RPS Goals.

The PD appropriately characterizes its jurisdiction over the eligibility of renewable attributes to count toward renewables procurement standard (RPS).¹⁷ SCE agrees with the PD

¹⁷ PD at pp. 39-43.

that, under the current RPS framework, generators must be certified by the California Energy Commission (CEC) and by the Western Renewable Energy Generation Information System (WREGIS). However, Public Utilities Code Section 2827(h)(5)(B) provides:

Upon adoption of the net surplus electricity compensation rate by the ratemaking authority, ***the net surplus electricity purchased by the electric utility shall count toward the electric utility's renewables portfolio standard [RPS] annual procurement targets*** ... Emphasis added.

To ensure that purchased electricity will count toward RPS procurement targets upon the adoption of the NSCR, the Commission should work with the investor owned utilities, the CEC, and WREGIS to develop a streamlined approach to reporting and counting the renewable attributes resulting from the AB 920 program.

IV.

CONCLUSION

SCE respectfully submits these Opening Comments and urges the Commission to modify the PD as recommended herein.

Respectfully submitted,

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November 23, 2010

CERTIFICATE OF SERVICE

I hereby certify that, pursuant to the Commissioner's Rules of Practice and Procedure, I have this day served a true copy of **OPENING COMMENTS OF SOUTHERN CALIFORNIA EDISON COMPANY (U 338-E) ON PROPOSED DECISION ADOPTING NET SURPLUS COMPENSATION RATE PURSUANT TO ASSEMBLY BILL 920** on all parties identified in the attached service list(s).

Transmitting the copies via e-mail to all parties who have provided an e-mail address.
First class mail will be used if electronic service cannot be effectuated.

Executed this **23th day of November, 2010**, at Rosemead, California.

/s/Melissa Schary _____

Melissa Schary

Project Analyst

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