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

Order Instituting Rulemaking to Consider
Refinements to and Further Development of the
Commission's Resource Adequacy Requirements
Program.

Rulemaking No. 05-12-013

**JOINT MOTION OF THE CITY OF OXNARD,
THE UTILITY REFORM NETWORK, AND THE ALLIANCE FOR RETAIL ENERGY
MARKETS TO VACATE PORTIONS OF THE AUGUST 15, 2006 ASSIGNED
COMMISSIONER'S RULING AND FOR FURTHER RELIEF**

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Pursuant to Rule 11.1 of California Public Utilities Commission (Commission) Rules of Practice and Procedure, the City of Oxnard (City), The Utility Reform Network (TURN), and the Alliance for Retail Energy Markets (AReM),¹ hereinafter “Moving Parties,” move to have portions of the August 15, 2006 *Assigned Commissioner’s Ruling Addressing Electric Reliability Needs in Southern California for Summer 2007* (ACR) vacated for the reasons set forth herein, and to have the Commission direct Southern California Edison Company (SCE) to halt its activities in pursuit of a peaker plant in Oxnard, California, unless and until the Commission addresses the need for such a plant in that location and the utility conducts a solicitation to identify options for fulfilling any need that might exist pursuant to the Commission’s standard practices.

I. INTRODUCTION

If SCE has its way, it will construct a 45 megawatt (MW) fossil-fueled generation plant in Oxnard based on authority it received in a ruling issued by a single Commissioner to respond to conditions that – while warranted at the time of the ACR – no longer exist today. Rather than permit such an outcome, the Commission should revisit the purported need for generation

¹ AReM is a California non-profit mutual benefit corporation formed by electric service providers that are active in California’s direct access market. The positions taken in this filing represent the views of AReM but not necessarily those of individual members of AReM or the affiliates of its members with respect to the issues addressed herein.

resources in this part of SCE's service territory and, if a need is found to exist, pursue competitive procurement processes consistent with the Commission's established procedures before committing to any particular response to that need. In order to achieve this more sensible outcome, the Commission must vacate portions of the August 15, 2006 ACR and direct SCE to instead use the approved procurement processes to demonstrate the need for the plant and identify the most appropriate resource to address such need.

For the last several years SCE has pursued construction of a 45 MW "peaker" generation plant to be located on the beach in Oxnard. SCE claims the Commission authorized the plant in the ACR issued by Commission President Michael Peevey in August 2006. SCE also purports to find authorization in a follow-on resolution, issued in November 2006, establishing ratemaking mechanisms for SCE to record costs associated with the plants built pursuant to the ACR. Despite the fact that both the ACR and referenced resolution specifically addressed the construction of generation facilities to be operational by summer 2007, SCE claims authorization to construct the Oxnard peaker plant at this time, despite the fact that the proposed plant did not meet the underlying requirements articulated in the ACR and regardless of changes in the underlying conditions and circumstances that might have justified such construction in 2006 and 2007.

The Moving Parties urge the Commission to recognize that whatever exigent circumstances motivated the 2006 ACR have long since passed, and there is no longer a need to take extraordinary action in response to those circumstances. Where, as here, the extraordinary action came at the expense of a substantial deviation from the "competitive IOU procurement processes that are key elements of the Commission's procurement regime,"² it is particularly appropriate for the Commission to revisit the situation to ensure consistency with the policies adopted and embraced by the full Commission. Rather than permit SCE to take advantage of past events to rationalize its current construction plans, the Commission must direct the utility to cease all activities associated with the Oxnard peaker until the Commission has assessed the need for new generation resources and the full range of options available to fill that need in a manner consistent with its procurement regime.

² Resolution E-4031, p. 5.

To that end, the Moving Parties seek to have a portion of the August 15, 2006 ACR vacated. As more fully set forth herein, the Commission should direct SCE to cease all activities associated with the development of the so-called “fifth peaker” at the McGrath site in Oxnard California. The limited authorization granted to SCE for construction of the power plants outside of the Commission’s usual construct was based on specific facts and circumstances particular to reliability needs for summer 2007. Given the passage of more than two years since the plant was supposed to be providing electricity in SCE’s service territory and the drastically changed circumstances since that time, SCE should not be allowed to pursue development and construction of the facility without following the Commission’s regular solicitation and approval processes.

II. PROCEDURAL BACKGROUND

On August 15, 2006, Commission President Peevey issued an ACR concurrently in the captioned proceeding and in R.06-02-013. At the time the ACR was issued, the Commission was working in conjunction with the California Independent System Operator (ISO), the California Energy Commission (CEC), regulated entities and other stakeholders “to develop and enhance the electric infrastructure so that it meets California’s growing need for reliable, cost-effective, and environmentally sound electric service.” (ACR, p. 1) Although the state was making progress towards avoiding the market disruptions that had occurred in 2000-2001, the ACR noted the need for additional measures to “assure reliability in 2007, particularly in parts of southern California.” (ACR, p. 2) Citing the July 2006 heat storm and the “surprising” growth in electricity demand throughout the state at that time, President Peevey ordered SCE to undertake certain measures to increase capacity, including “the development and installation of up to 250 MW of black-start, dispatchable generation capacity within its service territory for summer 2007.” (ACR, p. 2)³

As justification for the measures, the ACR notes the severe heat storm and associated energy usage that exceeded the ISO's forecasts. Although the ACR confirmed that California

³ Order Paragraph 1 of the ACR stated that “[i]n order to address and resolve potential resource inadequacies that could affect reliability in southern California in the summer of 2007, [SCE] is directed to take necessary steps to expand its demand response programs and to develop black-start, dispatchable resources in accordance with the foregoing discussions.” ACR, p. 7.

had the right policies in place and expressed confidence that the Commission's "adopted procurement regime" would be successful, the ACR expressed concern that the long term procurement planning proceeding and resource adequacy programs then under development at the Commission had "not been in place for sufficient time to bear full fruit." (ACR, p. 3). Therefore, the 2006 ACR called for "additional steps [that] should be taken now to assure reliability" should a confluence of factors such as those that occurred in summer 2006 occur again in 2007. (ACR, p. 4)

The ISO recommended that the Commission direct the IOUs to develop "a combination of quick-start generation and demand response opportunities that can be developed **over the next six to twelve months** to increase availability supply at the peak hours and enhance grid reliability."⁴ Accordingly, "**in response to critical near-term needs in southern California that have been recently identified by the CAISO**" (ACR, p. 5, emphasis added) the ACR directed "SCE to pursue new utility-owned generation that can be **online in time for summer 2007.**" (ACR, p. 6, emphasis added)

President Peevey acknowledged that the approach set forth in his ACR was not necessarily consistent with the "procurement regime" the Commission had crafted in previous decisions and rulings. Given the novelty of directing the procurement of new utility-owned generation in order to meet a perceived immediate need, the ACR specifically addressed the ongoing Request for Offer (RFO) process and reaffirmed the importance of the regular Commission approval process. The ACR explains that its unusual approach was appropriate in light of the extenuating circumstances in existence *at that time* and "out of concern that SCE's current, ongoing [RFO] process may not be completed in time for summer 2007." In an attempt to balance the Commission's procurement process with the more immediate-term need identified in the ACR, the ruling stated, "[t]o avoid undue impacts on the ongoing RFO process, SCE should pursue development of not more than five non-RFO generation units." (ACR, p. 6)

The ACR directed SCE to file an advice letter to establish a memorandum account to record the acquisition and installation cost of the facilities. (ACR, pp. 6-7) On August 24, 2006, SCE filed Advice Letter 2031-E, *Establishment of Peakers Generation Memorandum Account*

⁴ ACR, p. 5, quoting, from a letter from Yakout Mansour, President and Chief Executive Officer of CAISO, date August 9, 2006 [emphasis added].

(PGMA). The Advice Letter notes that the PGMA is necessary since the ACR directed SCE to “pursue the development and installation of **up to 250 MW** of black start dispatchable generation capacity within its service territory **for summer 2007 operation.**” (Advice Letter, p. 2, emphasis added) SCE’s Advice Letter requested Commission authorization “**to establish the PGMA** to record the revenue requirement associated with the acquisition costs, installation costs, and other related costs associated with peaking generation units and non-ISO transmission facilities’ upgrades associated with interconnection the peaker units.” (*Id.* emphasis added)

In Resolution E-4031, issued on November 9, 2006, the Commission approved SCE’s request to establish the PGMA. In the Resolution, the Commission again noted that the resource identification and acquisition approach initiated by the ACR strays from the agency’s commitment to competitive bidding through an RFO process, but concurred that “mitigating circumstances compel deviating from standard Commission procedure.” (Resolution, p. 5) Specifically, the Resolution notes that in order to have up to 250 MW of new generation online in time for August 1, 2007, there is insufficient time for SCE to engage in the competitive solicitation that would otherwise be required pursuant to D.04-12-048. The Commission concluded that only because of these mitigating circumstances⁵ was it “reasonable to permit SCE to proceed with the development of **this limited amount of utility-owned resources outside of a competitive procurement process.**” (Resolution, pp. 5-6)

Since the issuance of the ACR, SCE has completed the construction of four peaker plants and brought approximately 180 MW of power online by the end of the summer of 2007, as directed in the ACR. Edison also sought to construct a fifth peaker plant within the city limits of the City of Oxnard. This proposed plant was opposed by several environmental and community groups, as well as the City. The City denied SCE’s proposal as inconsistent with the local

⁵ “Mitigating circumstances that require a limited exception from the competitive solicitation requirement of D.04-12-048 and standard Commission practice for requesting changes in authorized revenue requirements include: the unanticipated conditions arising in summer 2006 that prompted the CAISO to identify an urgent need for quick-start peaker units in southern California by summer 2007, the length of time for SCE to initiate and conduct a separate RFO for peaker units that would include new utility-owned resources and third party resources, the length of a formal application process associated with a revenue requirement request, the peaking units not being forecasted in the 2006 GRC, and the anticipated accrual of operational expenses by summer 2007.” Resolution E-4031, Finding 17.

coastal plan, a denial that SCE successfully overturned through an appeal to the California Coastal Commission.

To date, the plant has not been constructed, although Edison continues to pursue development, despite the lack of requisite permits or lack of definitive Commission authority to do so.

III. LEGAL ARGUMENT SUPPORTING MOTION TO VACATE

A. SCE Has No Authorization To Build The Fifth Peaker At This Time.

The Commission should find that the ACR does not provide any current authorization for SCE's pursuit of the fifth peaker, and that whatever authorization the utility did have for development of the peaker plants under the ACR expired several years ago, when it became clear that the peaker slated for Oxnard would not meet the conditions set forth therein. As a response to "critical near-term needs" SCE was directed to pursue and develop "**up to 250 MW** of black-start, dispatchable generation capacity within its service territory **for summer 2007.**"⁶

Everything associated with SCE's authorization to build up to 250 MW of utility-owned generation, from issuance of the ACR to the Commission's approval of SCE's Advice Letter, was predicated on the need to have the facilities operating in SCE's service territory by summer 2007. Whatever authority SCE had to build the fifth peaker under the ACR has expired. The Oxnard plant will not serve to address the critical near term needs that led to the ACR's issuance, nor will it "be online in time for **summer 2007.**" (ACR, p. 6, emphasis added)

The authority for SCE to develop and install up to 250 MW outside of the Commission's regular competitive solicitation process must be viewed as restricted by the conditions that warranted the deviation. And consistent with those conditions, any plant not completed and on-line (or at least substantially completed) by summer 2007 would not meet the criteria so specifically called out in the ACR that led to suspension of the Commission's regular procurement procedures in the first place.

⁶ ACR, pp. 2 and 5.

B. Any Subsequent Commission “Confirmation” of the August 2006 ACR Was Limited To Plants Installed In Time For Summer 2007 Operation; A Condition The Proposed Oxnard Peaker Did Not Satisfy.

The ACR repeatedly notes the exigency of the circumstances present in late summer 2006, and the related need to take “additional steps” to resolve potential resource inadequacies in southern California **for summer 2007**. Absent these circumstances, there would have been no need to forego the usual RFO process to assess the need for any peaker plant and to determine who should build such plants or where such plants should be built.

The effect of an Assigned Commissioner Ruling is set forth in Section 310 of the Public Utilities Code:

Every finding, opinion and order made by the commissioner or commissioners so designated, pursuant to the investigation, inquiry, or hearing, when approved or confirmed by the commission and ordered filed in its office, is the finding, opinion, and order of the commission.

Thus the ACR of August 2006 does not have the effect of a Commission order unless it is confirmed by the full Commission.⁷

To date, Resolution E-4031 is the only Commission decision that even remotely addresses the need for SCE’s peakers. While the resolution did authorize SCE to develop utility-owned peaker plants without using a competitive solicitation process to procure such units, the authorization was limited to the extent such development was “consistent with the requirements of the ACR and this Resolution.”⁸ The ACR was entitled “Addressing Electric Reliability Needs in Southern California for **Summer 2007**” and directed SCE to develop and install peakers within its service territory “for summer 2007 operation.”⁹ As noted earlier, the Resolution listed four specific mitigating circumstances that require a limited exception to the competitive solicitation process for generation resources,¹⁰ and explained that it was only due to the mitigating circumstances that the Commission found it reasonable to permit SCE to proceed

⁷ D.02-01-035 (in A.00-10-012, *et al.*), p. 6.

⁸ Resolution E-4031, Ordering Paragraph 5.

⁹ *Id.*, pp. 1-2.

¹⁰ *Id.*, Finding 17.

with the development of a limited amount of utility-owned resources outside of a competitive procurement process.¹¹

No Commission action has been taken to confirm the ACR as it pertains to the development of a peaker plant that fails to meet the criteria in the ACR that require being operational by summer 2007. If Resolution E-4301 served to confirm the August 2006 ACR in any way for purposes of Section 310, the confirmation was limited to the development of the subset of utility-owned peaker plants that would be available “for summer 2007 operation.” There is nothing in Resolution E-4301 that could be fairly characterized as a “confirmation” or other approval of any broader exception to the Commission’s competitive solicitation process than the “up to 250 MW of black-start, dispatchable generation capacity within its service territory for summer 2007 operation” described in the ACR.¹² Subsequent events have made clear that the peaker plant proposed for Oxnard does not fit within this description, as it did not achieve summer 2007 operation.

Furthermore, the Commission’s approval of SCE’s request for establishment of the PGMA in Resolution E-4031 was granted for the limited purposes of facilitating the tracking of immediate revenue requirements for power plants that would be fully functional by summer 2007. The Resolution states that:

“allowing SCE to request authority to record revenue requirements associated with the peaker plants via an advice letter is not standard Commission practice. *The advice letter process is an informal procedure.* A revenue requirement request, should, under normal circumstances, be filed under an application process with its more formal procedures. However, given that the peaker units were not forecasted in the 2006 GRC, **begin accruing operational expenses by summer 2007**, and that an application process may take a year or longer, there are sufficient mitigation circumstances for SCE’s request.”¹³ (emphasis added)

The fifth peaker accrued no operational expenses by summer 2007. Indeed, the plant is still not operational, and on this basis the Commission can only reasonably conclude that any

¹¹ *Id.*, p. 6.

¹² Resolution E-4031, Finding 1.

¹³ Resolution E-4031, p. 6.

authorization achieved through the Resolution did not extend to any peaker that failed to meet the conditions repeatedly cited in those documents.

Therefore, the Commission should vacate the August 2006 ACR as it pertains to any peakers not completed by summer 2007, and clarify that there is no Commission order or decision authorizing SCE to build this peaker outside of the competitive solicitation process.

IV. CONCLUSION

The authority the ACR conveyed to SCE to construct peaker plants was limited to the conditions set forth in that ruling – namely constructing up to 250 MW of generation *before the end of the 2007 summer season*. Regardless of the reasons why the fifth plant was not completed for the 2007 summer season, there is no basis for an argument that the fifth peaker meets the limited conditions specified in the ACR when the facility now will not be completed until mid-2010 at the earliest.¹⁴

For the reasons set forth herein, the Moving Parties respectfully request that the Commission vacate portions of the Assigned Commissioner Ruling. Further, the Commission should revisit the purported need for generation resources in this part of SCE's service territory under current conditions and, if a need is found to exist, pursue competitive procurement processes consistent with the Commission's established procedures before committing to any particular response to that need.

DATED: December 1, 2009

Respectfully submitted,
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By: 

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¹⁴ See Letter from Bruce Foster of SCE to Commission President Michael Peevey, dated September 24, 2009, p. 1.

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CERTIFICATE OF SERVICE

I hereby certify that, pursuant to the Commission's Rule of Practice and Procedure, I have this day served a true copy of the **JOINT MOTION OF THE CITY OF OXNARD, THE UTILITY REFORM NETWORK, AND THE ALLIANCE FOR RETAIL ENERGY MARKETS TO VACATE PORTIONS OF THE AUGUST 15, 2006 ASSIGNED COMMISSIONER'S RULING AND FOR FURTHER RELIEF** on all parties on the Service List for R.05-12-013, on the Commission's website November 30, 2009, by electronic mail, and by U.S. mail with first class postage prepaid on those Appearances that did not provide an electronic mail addresses.

Executed at San Jose, California this 1st day of December, 2009.

A handwritten signature in blue ink, appearing to read "Katie McCarthy", with a horizontal line drawn through the middle of the signature.

Katie McCarthy