



BEFORE THE PUBLIC UTILITIES COMMISSION OF THE  
STATE OF CALIFORNIA

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Order Instituting Rulemaking on the )  
Commission's Own Motion into Combined Heat )  
and Power Pursuant to Assembly Bill 1613. )  
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Rulemaking R.08-06-024  
(Filed June 26, 2008)

**MOTION OF PACIFIC GAS AND ELECTRIC COMPANY (U 39-E), SOUTHERN  
CALIFORNIA EDISON COMPANY (U 388-E), AND SAN DIEGO GAS & ELECTRIC  
COMPANY (U 902-M) FOR STAY OF DECISION 09-12-042**

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Dated: **May 27, 2010**

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Pursuant to Rule 11.1 of the California Public Utilities Commission’s (“CPUC”) Rules of Practice and Procedure, Pacific Gas and Electric Company (“PG&E), San Diego Gas & Electric Company (“SDG&E”), and Southern California Edison Company (“SCE”) (collectively, the “Joint Utilities”) file this Motion for Stay of Decision (“D.”) 09-12-042 (the “Decision”) until the Federal Energy Regulatory Commission (“FERC”) resolves the CPUC’s and Joint Utilities’ respective Petitions for Declaratory Order (together, the “Petitions”). The Joint Utilities further request an expedited Order on this Motion for Stay in light of the pending deadline to submit Assembly Bill (“AB”) 1613 tariffs and contracts.

**I.**

**INTRODUCTION AND BACKGROUND**

On December 17, 2009, the Commission issued the Decision adopting policies and procedures for purchasing excess electricity under AB 1613. Among other things, the Decision requires electrical corporations (including the Joint Utilities) to purchase excess electricity from

combined heat and power (“CHP”) generators at a price set by the CPUC. The Joint Utilities<sup>1</sup> sought rehearing of the Decision on numerous grounds,<sup>2</sup> including that the CPUC committed clear legal error by exceeding its authority to set the wholesale price for energy in violation of the Supremacy Clause of the United States Constitution and Federal Power Act (“FPA”). The Joint Utilities also sought a stay of the Decision.

On April 26, 2010, the CPUC issued Decision 10-04-055 (the “Rehearing Decision”) on the Joint Utilities’ Application for Rehearing. In the Rehearing Decision, the CPUC failed to cure this defect and instead: (1) reasserted that the AB 1613 program is not federally preempted because it governs utility purchases and does not regulate the conduct of sellers;<sup>3</sup> (2) asserted authority to adopt an AB 1613 price for participating QFs other than the currently available short-run avoided cost rate;<sup>4</sup> and (3) asserted authority to establish AB 1613 prices in excess of current avoided cost to account for various environmental benefits.<sup>5</sup> The Rehearing Decision also dismissed as moot the Joint Utilities’ motion for stay in light of the fact that the Executive Director had previously granted an extension of time to comply with the Decision until June 21, 2010.<sup>6</sup>

On May 4, 2010, the CPUC filed a Petition for Declaratory Order at FERC seeking a declaration by FERC that the Decision is not preempted by federal law. The CPUC argued that “Congress preserved the States’ authority over how retail utilities provide retail service” and “the States have authority over the discretionary procurement decisions of the retail utilities, including the resource portfolios of the retail utilities.”<sup>7</sup> The CPUC denied that it is regulating wholesale

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<sup>1</sup> Southern California Gas Co. joined the Joint Utility Application for Rehearing.

<sup>2</sup> The Joint Utilities sought rehearing on three grounds. First, the CPUC committed clear legal error by exceeding its authority to set the wholesale price for energy in violation of the Supremacy Clause of the United States Constitution and Federal Power Act (“FPA”). Second, the CPUC committed legal error by failing to maintain “ratepayer indifference” as required by AB 1613. Third, the Decision violates AB 1613 by failing to allocate the above-market costs of energy and capacity to all customers who benefit from AB 1613.

<sup>3</sup> D.10-04-055, at 4-5.

<sup>4</sup> *Id.* at 5.

<sup>5</sup> *Id.* at 6-7.

<sup>6</sup> *Id.* at 4.

<sup>7</sup> CPUC Petition at 6.

power sales by utilities in its Petition and insisted that the CHP mandatory purchase program “is an essential component of the CPUC’s current regulation of the procurement practices of the retail sellers of electric energy in California.”<sup>8</sup> In short, the CPUC asked FERC to share its exclusive jurisdiction over the sale at wholesale of electric energy in interstate commerce so that the CHP generators may sell wholesale power to the Joint Utilities at a price set by the CPUC.

On May 11, 2010, the Joint Utilities filed their own Petition for Declaratory Order at FERC seeking a declaration that the Decision is preempted by the Federal Power Act and the Supremacy clause of the United States Constitution. The Joint Utilities argued that this exact issue – namely, whether a state, in furtherance of its own policy interests, can demand that wholesale power be purchased at a price set by the state, or whether such action is preempted by the Federal Power Act – has already been litigated before FERC. There, FERC clearly and firmly found that states may not set wholesale energy prices when acting outside of the Public Utility Regulatory Policies Act of 1978 (“PURPA”).<sup>9</sup>

The Joint Utilities seek a stay of the Decision to allow for a review of the federal preemption issue raised by the CPUC and the Joint Utilities in their respective Petitions. There is clearly ambiguity and confusion surrounding the CPUC’s jurisdiction to set wholesale power prices in implementing AB 1613, as is evidenced by the CPUC’s own Petition for Declaratory Order and the Joint Utilities’ Petition asserting the contrary. The Joint Utilities should be relieved of complying with the Decision pending such review, and thus the Joint Utilities seek a stay of the Decision until such time as FERC issues a final decision on the Petitions.<sup>10</sup> If the CPUC fails to issue a stay, the Joint Utilities will be required to execute long term contracts containing unconstitutional pricing provisions, only to have a later ruling that the pricing requirements of the Decision are preempted.

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<sup>8</sup> *Id.* at 33.

<sup>9</sup> *Midwest Power Systems*, 78 FERC ¶ 61,067 at 61,246.

<sup>10</sup> On May 18, 2010, the CPUC filed a motion to consolidate the Petitions. Although FERC has not yet ruled on the CPUC’s motion for consolidation, the Joint Utilities anticipate that the Petitions will be consolidated into one docket. The Joint Utilities support consolidation to facilitate the FERC’s consideration of the jurisdictional issues presented and conserve the resources of all the interested parties.

As described in more detail below, the CPUC should issue a stay of the Decision because: (1) the Joint Utilities will suffer serious and irreparable harm if the stay is not granted; (2) the Joint Utilities are likely to prevail on the merits of their preemption claim; (3) the “balance of harm” supports a stay; and (4) other relevant factors support a stay.

## II.

### **THE CPUC SHOULD ISSUE A STAY OF THE DECISION UNTIL FERC ISSUES A FINAL DECISION ON THE PETITIONS**

In exercising its discretion to issue a stay, the CPUC normally considers the following factors: (1) whether the moving party will suffer serious or irreparable harm if the stay is not granted; (2) whether the moving party is likely to prevail on the merits of the application for rehearing;<sup>11</sup> (3) a balance of the harm to the moving party (or the public interest) if the stay is not granted and the decision is later reversed, against the harm to the other parties (or the public interest) if the stay is granted and the decision is later affirmed; and (4) other factors relevant to the particular case.<sup>12</sup> As described below, each of these factors weighs in favor of granting a stay of the Decision.

#### **A. The Joint Utilities Will Suffer Serious and Irreparable Injury if a Stay Is Not Granted**

The Joint Utilities must file tariffs and contracts implementing the Decision by June 21, 2010.<sup>13</sup> The tariffs and contracts are “effective on filing” subject to Energy Division’s determination that they are in compliance with the Decision.<sup>14</sup> The contracts that must be filed on June 21, 2010 include the pricing provisions adopted by the CPUC, and are for a term of up to ten

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<sup>11</sup> Although these factors are typically applied in the context of issuing a stay pending the resolution of an application for rehearing, they are equally applicable in this context, wherein the CPUC and Joint Utilities have sought review of the lawfulness of the CPUC’s actions at FERC.

<sup>12</sup> D.08-04-044, p. 3.

<sup>13</sup> Decision, Ordering Paragraph 3 as modified and extended by the Executive Director via letter on January 28, 2010, and April 16, 2010.

<sup>14</sup> *Id.*

years. Thus, if a stay is not granted, the Joint Utilities will be forced to execute long term contracts with above-market pricing that will likely be found to be unconstitutional and preempted by federal law.

The recent Ninth Circuit case *American Trucking Assoc., Inc. v. City of Los Angeles*,<sup>15</sup> is instructive here. In that case, the Port of Los Angeles and Port of Long Beach sought to require motor carriers transporting cargo from container ships to sign mandatory contracts addressing numerous aspects of their trucking services. The American Trucking Associations (“ATA”) brought an action against the Ports on the grounds that mandatory contracts were preempted by the Federal Aviation Administration Act. ATA sought a preliminary injunction against the implementation of the mandatory contracts, which was denied by the District Court. ATA appealed, and the Ninth Circuit reversed. The Ninth Circuit ruled that there was a high likelihood of success on the merits, and ATA members would suffer irreparable harm if they were required to sign unconstitutional agreements. In finding that irreparable harm was likely, the Court highlighted that: (1) the motor carriers would be forced to adhere to unconstitutional conditions: and (2) the motor carriers would be forced to incur large costs that likely could not be adequately remedied through damages.<sup>16</sup>

As the Ninth Circuit found in *American Trucking Ass’n*, irreparable injury will result if the Joint Utilities are forced to adhere to the unconstitutional pricing provisions in the AB 1613 contracts.<sup>17</sup> If the Joint Utilities are forced to sign long term AB 1613 contracts, and those contracts are held to be preempted by the FPA, the Joint Utilities will be forced “to adhere to unconstitutional conditions”<sup>18</sup> for an interim period. Second, and independently, the Joint Utilities will be forced to incur above-market costs, with no assurance of an ability to recoup

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<sup>15</sup> *American Trucking Ass’n, Inc. v. City of Los Angeles*, 559 F.3d 1046 (9<sup>th</sup> Cir. 2009); see also *American Trucking Ass’n, Inc. v. City of Los Angeles*, 596 F.3d 602 (9<sup>th</sup> Cir. 2010) (affirming after remand the district court’s decision to sever preempted provisions of the concession agreements).

<sup>16</sup> See *id.* at 1058-1059.

<sup>17</sup> See *id.* (“[T]he constitutional violation alone, coupled with the damages incurred, can suffice to show irreparable harm.”)

<sup>18</sup> *Id.* at 1058.

those costs once the pricing requirements are deemed preempted. This irreparable injury supports a stay of the Decision.

**B. The Joint Utilities Are Likely to Prevail on the Merits**

The Joint Utilities’ Petition<sup>19</sup> details the numerous legal authorities supporting their conclusion that the Decision is preempted by federal law, and the CPUC’s effort to set a price for power under AB 1613 violates the Supremacy Clause of the Constitution and the Federal Power Act. The Joint Utilities are likely to prevail on the merits of their preemption claim because their position is supported by the plain language of the FPA and longstanding precedent. Specifically, only FERC may set rates for wholesale power sales by public utilities.<sup>20</sup> Part II of the FPA, codified at 16 U.S.C. §§ 824-824m, delegates to FERC ““*exclusive* authority to regulate the . . . sale at wholesale of electric energy in interstate commerce.””<sup>21</sup> Here, the sale of excess power by Combined Heat and Power units pursuant to AB 1613 is a wholesale sale of electric energy in interstate commerce, and thus the CPUC does not have authority to set the price for the sale of that electricity.

When addressing actions by the Iowa Utilities Board that were nearly identical to those undertaken by the CPUC here, FERC determined that the Iowa Utilities Board had the authority to “require electric utilities located in Iowa to purchase from certain types of generating facilities” but did not have the authority to “set rates for the wholesale sales of electric energy by public utilities.”<sup>22</sup> FERC stated that “[u]nder the FPA, [FERC] cannot delegate this wholesale ratemaking authority to the states.”<sup>23</sup> Accordingly, although the CPUC can, under federal law,

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<sup>19</sup> FERC Dkt. No. EL10-66 (May 11, 2010).

<sup>20</sup> See, e.g., *Barton Village Inc.*, 100 FERC ¶ 61,244 at P 12 (2002) (footnote omitted) (“Under the Federal Power Act . . . the Commission has exclusive jurisdiction over . . . wholesale power sales rates . . . [t]hus, we have no legal obligation to review, much less rely upon, the findings by the [state].”); *Midwest Indep. Transmission Sys. Op., Inc.*, 111 FERC ¶ 61,448 at P 41 (2005) (“We disagree . . . that state commissions can serve as co-regulators with regard to wholesale energy markets”).

<sup>21</sup> *Transmission Agency of N. Cal. v. Sierra Pac. Power Co.*, 295 F.3d 918, 928 (9th Cir. 2002) (quoting *New England Power Co. v. New Hampshire*, 455 U.S. 331, 340 (1982)).

<sup>22</sup> *Id.* at 61,246.

<sup>23</sup> *Id.* at 61,247.

require electrical corporations to purchase from certain types of generating facilities to further the State's social and environmental goals, the CPUC cannot set the price at which such purchases will be made except pursuant to its authority under the Public Utility Regulatory Policies Act of 1978. The State simply does not have the authority to set the price of wholesale power in any other manner.

**C. The “Balance of Harm” Weighs in Favor of Granting the Stay**

The harm to the Joint Utilities if a stay is not granted and the Decision is later reversed is greater than the harm to other parties if the stay is granted and the Decision is later affirmed. As noted above, if the CPUC fails to issue a stay, the Joint Utilities will be forced to execute unconstitutional long-term contracts with above-market pricing likely to be found to be unlawful. This is a great harm. On the flipside, if a stay is granted and the Decision is affirmed, parties who seek to sign an AB 1613 contract will only need to wait a little longer to do so.

**D. Other Relevant Factors Support the Stay**

In addition to the factors addressed above, uncertainty surrounding the regulatory obligations of AB 1613 generators also supports a stay of the Decision. Parties that enter into agreements to sell excess electricity pursuant to the contracts established by the Decision face significant uncertainty about the outcome of the Petitions and the Joint Utilities' legal challenge to the pricing requirements in the Decision. It is in the generators,' as well as the Joint Utilities,' interest to obtain clarification concerning the validity of the Decision's pricing requirements before entering into long term contracts.

**III.**

**CONCLUSION**

For all of the foregoing reasons, the CPUC should grant a stay of the Decision until FERC issues a final decision on the Petitions. The Joint Utilities further request an expedited Order on this Motion for Stay in light of the pending deadline to submit AB 1613 tariffs and contracts.

Respectfully submitted,

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May 27, 2010

**CERTIFICATE OF SERVICE**

I hereby certify that, pursuant to the Commission's Rules of Practice and Procedure, I have this day served a true copy of **MOTION OF PACIFIC GAS AND ELECTRIC COMPANY (U 39-E), SOUTHERN CALIFORNIA EDISON COMPANY (U 388-E), AND SAN DIEGO GAS & ELECTRIC COMPANY (U 902-M) FOR STAY OF DECISION 09-12-042** on all parties identified on the attached service list(s). Service was effected by one or more means indicated below:

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 **27th day of May, 2010**, at Rosemead, California.

/s/ RAQUEL IPPOLITI

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