



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. )

Rulemaking R.08-06-024  
(Filed June 26, 2008)

**REPLY OF PACIFIC GAS AND ELECTRIC COMPANY (U 39-E), SOUTHERN  
CALIFORNIA EDISON COMPANY (U 338-E), AND SAN DIEGO GAS & ELECTRIC  
COMPANY (U 902-M) TO RESPONSES TO MOTION FOR STAY OF  
DECISION 10-12-055**

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Dated: **February 11, 2011**

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

Order Instituting Rulemaking on the Commission’s Own Motion into Combined Heat and Power Pursuant to Assembly Bill 1613.	)	Rulemaking R.08-06-024 (Filed June 26, 2008)
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COMPANY (U 902-M) TO RESPONSES TO MOTION FOR STAY OF  
DECISION 10-12-055**

Pacific Gas and Electric Company (“PG&E”), Southern California Edison Company (“SCE”), and San Diego Gas & Electric Company (“SDG&E”) (collectively the “Joint Utilities”) file this Reply to the Responses to the Joint Utilities’ Motion (“Motion”) for Stay of Decision (“D.”) 10-12-055 (the “Decision”). Administrative Law Judge (“ALJ”) Yip-Kikugawa granted permission to file this reply pursuant to Rule 11.1(f) of the California Public Utilities Commission’s (“CPUC” or “Commission”) Rules of Practice and Procedure, via email on Thursday, February 3, 2011. The Joint Utilities respond herein to numerous inaccurate statements in the CHP Parties’ responses to the Joint Utilities’ Motion.

By their Motion, the Joint Utilities requested that action cease in this proceeding until the Commission rules on the Joint Utilities’ respective Applications for Rehearing of D.10-12-055 and/or the Federal Energy Regulatory Commission (“FERC”) or a federal court addresses the Joint Utilities’ Petition for Enforcement pursuant to the Public Utility Regulatory Policies Act of 1978 (“PURPA”).<sup>1</sup> The Joint Utilities filed their respective Applications for Rehearing on January 18, 2011 and filed their Petition for Enforcement of PURPA on January 31, 2011.

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<sup>1</sup> 16 U.S.C. Section 824a-3(h)(2)(B) provides for electric utilities to petition FERC to enforce the provisions of PURPA. The Joint Utilities filed their Petition for Enforcement on January 31, 2011. See Dkt. EL 11-19.

Ultimately, the lawfulness of the Commission’s AB 1613 Decisions, including D.10-12-055, will be determined by FERC or a federal court, unless the Commission grants rehearing and corrects the unlawful aspects of the Decision before that time. As stated in the Motion, the Joint Utilities submit that the Commission should *not* proceed with implementing its AB 1613 program at this time in light of the substantial and legitimate legal issues the Joint Utilities have raised. Although the CHP Parties’<sup>2</sup> claims that the Decision complies with federal law are of limited assistance here, the Joint Utilities use this reply to respond to the most egregious of the inaccurate statements contained within the CHP Parties’ responses.

## I.

### **THE CHP PARTIES’ RESPONSES TO THE MOTION CONTAIN NUMEROUS INACCURATE STATEMENTS**

#### **A. Statements Concerning FERC’s July 15 Order Are Inaccurate**

In an attempt to show that the Joint Utilities will not prevail on the merits of their claims, CCDC and Fuel Cell state: “It is important to remember that in seeking a stay of D.09-12-042, the Joint Utilities similarly predicted success on the merits of their claims that federal law preempted the Commission from setting a wholesale price for sales of energy under AB 1613. FERC effectively rejected those claims.”<sup>3</sup> This statement is false and misleading. Contrary to CCDC’s and FCE’s representations, FERC ruled in the Joint Utilities’ favor, stating very clearly that D.09-12-042 was in fact preempted by federal law. FERC stated:

We disagree with the characterization of the CPUC’s AB 1613 Decisions as merely establishing an “offering price” by the purchaser of power. Rather, we agree with the Joint Utilities that the CPUC’s AB 1613 Decisions constitute impermissible wholesale rate-setting by the CPUC. *Because the CPUC’s AB*

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<sup>2</sup> Here, “CHP Parties” refers to San Joaquin Refining Company (“SJR”), California Clean DG Coalition (“CCDC”) and Fuel Cell Energy (“FCE”).

<sup>3</sup> CCDC & FCE Response, p. 3 (footnotes omitted).

***1613 Decisions are setting rates for wholesale sales in interstate commerce by public utilities, we find that they are preempted by the FPA.*<sup>4</sup>**

In fact, after FERC issued its July 15, 2010 Order, the CPUC suspended the advice letters that had been filed by the Joint Utilities to implement the AB 1613 program, and the Assigned Commissioner then issued a new Scoping Memo to address aspects of FERC's Order. The assertion that the Joint Utilities previously submitted an unsound request for stay of D.09-12-042 – and, by inference, are doing so again – is insincere in light of FERC's Order and the CPUC's response. If anything, the history of this case indicates that when the Joint Utilities submit to the CPUC that their mandated activity is unlawful, FERC is apt to agree. Had the utilities been required to offer contracts before FERC issued its July 15, 2010 Order, the Joint Utilities would have been placed in the unfortunate position of trying to unwind unlawful contracts. The Joint Utilities are simply trying to avoid that eventuality here.

**B. There Is No Evidentiary Support for Statements Supportive of the “Location Bonus”**

All of the CHP Parties defend the location bonus as being supported by the record of this proceeding, but upon closer review, it is clear that “the record” is simply non-existent. Bald statements of support for a 10% location bonus do not meet FERC's standard that any bonus must be based on “an actual determination of the expected costs of upgrades to the distribution or transmission system that the QFs will permit the purchasing utility to avoid.”<sup>5</sup> It is not surprising that those who would seek to benefit from a bonus payment would support it, but that does not mean that any *actual avoided cost determination* has taken place. Only two instances of so-called record support are cited by the CHP parties, and these citations reflect that no real analysis has taken place.

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<sup>4</sup> 132 FERC ¶ 61,047 at P 64 (July 15, 2010) (“July 15 Order”) (emphasis added).

<sup>5</sup> 133 FERC ¶ 61,059 at P 31.

1. **Opening Comments of California Cogeneration Council (7/31/08) Cited by the CHP Parties Do Not Support a “Location Bonus”**

SJR asserts that the record contains a summary of Transmission and Distribution (“T&D”) investment costs that have been adopted for each utility and then cites the Opening Comments of the California Cogeneration Council (“CCC”).<sup>6</sup> In these comments, CCC referenced comments by the Solar Alliance in another proceeding (R.06-05-027), which in turn referenced T&D values developed by E3 in the context of energy efficiency. CCC’s comments were submitted before the AB 1613 generators were required by the Decision to be QFs, and thus the applicability of any of this information in a PURPA avoided cost context is unclear. Moreover, the T&D values that are used to measure the benefits of Energy Efficiency programs cannot simply be applied to increase wholesale power purchase payments. E3’s energy efficiency values have not been used for that purpose and the assumptions behind them – and the data provided in CCC’s comments – were never tested in this proceeding. In fact, SJR’s reliance upon E3’s Energy Efficiency T&D values – which were never subjected to cross examination and for which no foundation exists – is actually contrary to Commission precedent concerning payment for avoided T&D.

A year after CCC submitted the comments the CHP Parties rely upon, the Commission issued Decision 09-08-026 which addressed the use of these values in the context of distributed generation. That Decision indicates that the E3 values for T&D benefits should not be used to compensate generators for T&D deferral benefits, but rather are simply a way of measuring the costs and benefits of the CPUC's distributed generation programs like the California Solar Initiative and Self Generation Incentive Program. The controlling decision concerning payments to DG owners for T&D deferrals is D.03-02-068, which requires generators to meet a number of

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<sup>6</sup> Response of SJR to Motion for Stay, p. 3.

requirements “to defer capacity additions and avoid future cost.”<sup>7</sup> The Commission requires an actual, plant-specific demonstration to establish T&D investment costs deferred by distributed generation, and rejected the use of E3 study estimates cited by CCC, for this purpose. The Commission stated:

The policy context in D.03-02-068 is payment to specific DG facilities for investment deferrals. In this decision [D.09-06-028], we turn to the separate and distinct issue of estimating the collective T&D investment deferral benefits of DG in an effort to analyze the net costs and benefits of our DG programs. We find no compelling reason to change our existing policy regarding contracts for T&D deferrals, as adopted in D.03-02-068, that are relied on for utility resource planning. We intend to measure the benefits of any contracts for T&D deferrals by applying the existing criteria to specific projects, as set forth in D.03-02-068. We concur with SDG&E that this is a matter for consideration on a plant-specific basis and consistent with each utility’s distribution planning process and D.03-02-068.

\* \* \* \* \*

Again, we reiterate that use of this Itron methodology<sup>8</sup> to estimate T&D investment deferrals does not in any way modify the specific physical assurance or other requirements in D.03-02-068 for contracts between DG facilities and utilities for distribution capacity deferrals. In addition, ***this estimation of collective T&D benefits is not intended to prejudge any other Commission proceedings regarding prices for wholesale DG.***<sup>9</sup>

Finally, it is worth noting that in these same comments, CCC advocated that AB 1613 CHP generators should receive the same avoided cost pricing as QFs 20 MW and less.<sup>10</sup> The

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<sup>7</sup> D.03-02-068 at 18. The criteria provided in D.03-02-068 are: (1) The generation must be located where the utility’s planning studies identify substations and feeder circuits where capacity needs will not be met by existing facilities; (2) the generation must be installed and operational in time for the utility to avoid or delay expansion or modification; (3) the generation must provide sufficient capacity to accommodate the utility’s planning needs; and (4) the generation must provide appropriate physical assurance to ensure a real load reduction on the facilities where expansion is deferred. *See id.* D.10-12-055 does not mention this decision, and AB 1613 generators do not have to meet these requirements to obtain a Location Bonus under the Decision.

<sup>8</sup> The Itron methodology utilizes the E3 T&D values. *See* D.09-08-026 at 17.

<sup>9</sup> D.09-08-026 at 16-17 (emphasis added).

<sup>10</sup> Opening Comments of the California Cogeneration Council at 8 (July 31, 2008) (“As the Commission has established avoided cost prices for CHP QFs smaller than 20 MW for many years, and will continue to do so for

Continued on the next page

avoided cost pricing that is currently applicable to QFs does not include the Location Bonus. Moreover, CCC is a party to the QF Settlement, which set avoided cost for QFs as of the Settlement Effective Date, and that avoided cost does *not* include the Location Bonus either. In total, the CCC comments cited by the CHP Parties do not support the Location Bonus adopted by the Commission.

**2. Reply Comments of Fuel Cell Energy (12/13/10) Cited by FCE and CCDC Do Not Support A “Location Bonus”**

These comments also do not support any actual determination of avoided T&D costs. If anything, Fuel Cell Energy’s comments underscore the insufficiency of the record on the Location Bonus. Fuel Cell Energy agreed that the final Decision needed to include further findings supporting the Location Bonus, urging the Commission to “beef up” its foundation for the 10% Location Bonus:

The [CPUC] should either provide citation to further factual support for its determination that the 10 percent adder is a reasonable proxy for avoided transmission and distribution costs, or the [CPUC] should clarify that the 10 percent adder is not part of avoided costs, but rather an incentive payment.<sup>11</sup>

**C. Other Misstatements**

SJR claims that without the Location Bonus, the AB 1613 generators would be undercompensated compared to QFs participating in the Commission’s standard offer program because under the QF Settlement, QFs will receive a “location adjustment” to their payment to account for line losses and congestion and AB 1613 generators do not get that adjustment.<sup>12</sup> SJR

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Continued from the previous page

the foreseeable future, it is logical and non-discriminatory to apply the same avoided cost rates to both small QFs and AB 1613 CHP projects.”).

<sup>11</sup> Reply Comments of Fuel Cell Energy, Inc. Regarding Proposed Decision of Commissioner Peevey at 3-4, (Dec. 13, 2010) (footnote omitted).

<sup>12</sup> SJR Response at 3. It is worth noting that unlike the AB 1613 Location Bonus, the location adjustment contained in the QF Settlement can either increase or decrease a project’s compensation depending on whether that project reduces or increases congestion costs.

then states that AB 1613 QFs “do not receive a separate price adder for avoided transmission losses and congestion because AB 1613 pricing was developed before the [CAISO] implemented its nodal pricing scheme in April 2009.”<sup>13</sup> This entire premise is false. First, the Joint Utilities have consistently maintained that the Commission should apply the same avoided cost price and terms to all QFs, including AB 1613 QFs. Thus, if the Joint Utilities’ position were adopted, there could be no “underpayment” for AB 1613 QF power vis-a-vis all other QF power. Rather, the location adjustment provided in the QF Settlement would apply to all QFs, and all QFs would have their payments increased or decreased depending on whether the QF assisted in reducing congestion or contributed to it.

Second, the Commission did not issue its first pricing decision until December 2009 – more than nine months after MRTU went live. The Commission was well aware of MRTU nodal pricing; in fact, the Joint Utilities repeatedly urged the Commission to allow the MRTU market to determine what AB 1613 CHP resources would be paid. The Joint Utilities repeatedly noted that the market provides location-specific price signals, and that deferring to the market would ensure that AB 1613 generators that relieve congestion would receive a higher price, and those that increase congestion would receive a lower price. For example, in its June 15, 2009 comments, SCE stated:

Further, the MRTU pricing option submitted by the Joint Utilities already takes into account any locational benefits associated with a particular generator’s deliveries. The MRTU “locational marginal price” (LMP) values the energy at the time and location of delivery. Thus, if power is needed in a particular area, and there is congestion on the grid which makes it difficult to serve load in that particular area, power generated in that area will garner a higher price. The CHP parties’ calls to include the purported locational benefits of CHP support the adoption of the MRTU pricing model.

The Commission rejected these arguments in favor of a bonus calculated as a flat 10% of the costs to build and maintain a CCGT for projects located in areas with local capacity

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<sup>13</sup> *Id.* at 4.

requirements. Contrary to SJR's comments, the 10% location bonus was not created because there were no other location-specific pricing options; rather, the Commission and the CHP Parties preferred an approach that did not bear any relationship to actual avoided costs.

## II.

### **SJR'S NEW "EVIDENCE" CONCERNING AVOIDED GHG COSTS SHOULD BE REJECTED AS LEGAL JUSTIFICATION FOR D. 10-12-055**

SJR includes new arguments about why it believes the GHG cost-pass through does not exceed the purchasing utility's avoided cost. This information was not part of the record in this proceeding,<sup>14</sup> and the parties were never asked to submit testimony or briefing on the GHG costs the utilities would avoid through the purchase of AB 1613 power. The fact that SJR apparently feels compelled to advance these new arguments now is, in itself, powerful evidence of the need for the Commission to receive testimony and develop a record of the costs the utility would avoid through the purchase of AB 1613 power. For the record, the Joint Utilities disagree with SJR's newly submitted assumptions and calculations. If the Commission is willing to accept SJR's purported "evidence" on this issue now, rehearing must be granted to accept evidentiary showings from all parties to avoid a violation of due process. Otherwise, the Commission should reject SJR's Response.

## III.

### **CONCLUSION**

For all of the foregoing reasons and those stated in the Motion, the CPUC should grant a stay of the Decision. The Joint Utilities further request an expedited Order on their Motion for Stay in light of the pending AB 1613 tariffs and contracts.

Respectfully submitted,

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<sup>14</sup> Indeed, SJR provides no citation to the record for this new information.

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February 11, 2011

**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 **REPLY OF PACIFIC GAS AND ELECTRIC COMPANY (U 39-E), SOUTHERN CALIFORNIA EDISON COMPANY (U 338-E), AND SAN DIEGO GAS & ELECTRIC COMPANY (U 902-M) TO RESPONSES TO MOTION FOR STAY OF DECISION 10-12-055** on all parties identified in the attached service list(s).

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Executed this **11<sup>th</sup> day of February, 2011**, at Rosemead, California.

/s/ Veronica Flores

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