



BEFORE THE PUBLIC UTILITIES COMMISSION OF THE
STATE OF CALIFORNIA

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Order Instituting Rulemaking to Integrate and)
Refine Procurement Policies and Consider)
Long-Term Procurement Plans.)

Rulemaking 10-05-006
(Filed May 6, 2010)

RESPONSE OF SOUTHERN CALIFORNIA EDISON COMPANY (U 338-E) TO
MOTION OF INDEPENDENT ENERGY PRODUCERS

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I.

INTRODUCTION

Pursuant to Rule 11.1(e) of the California Public Utilities Commission's (CPUC or Commission) Rules of Practice and Procedure, Southern California Edison Company (SCE) hereby responds to the Motion of the Independent Energy Producers Association (IEP) for Expedited Determination of Issue, dated September 23, 2011 (IEP's Motion). SCE requests that the Commission deny IEP's Motion because it is not necessary for the Commission to set up a schedule to consider recovery for Greenhouse Gas (GHG) procurement and compliance costs for either Qualifying Facilities (QFs) or independent power producers (IPPs) which are not QFs.

For QFs, the QF/Combined Heat and Power (CHP) Settlement,¹ has terms designed to provide for recovery of GHG compliance costs as a component of Short Run Avoided Cost (SRAC) set under Public Utilities Regulatory Policy of 1978 (PURPA)² as the market transitions

¹ D.10-12-035, dated December 16, 2010, adopted the QF/CHP Settlement. There are still outstanding issues from Applications for Rehearing related to this decision. Once these issues are fully resolved by expiration of the 30 day period for Applications for Rehearing associated with a final decision resolving these issues, the QF/CHP Settlement will become effective.

² 16 U.S.C. §§ 796 *et seq.*

to full recognition of GHG compliance costs being a component of the cost of energy. SCE agrees with IEP that the effectiveness of the QF/CHP Settlement has been delayed by a few months, but it now appears likely to become effective by the end of November 2011.³ This is well in advance of the California Air Resources Board's (CARB's) first GHG auction in August of 2012. So, no such schedule is necessary to consider recovery of GHG compliance costs for QFs as the QF/CHP Settlement Agreement resolves this issue for contracts governed by it.

For IPPs, with non-QF contracts, the terms and conditions of these contracts, including the pricing of these contracts are subject to Federal Energy Regulatory Commission (FERC) jurisdiction, as discussed in more detail below. As a result, the CPUC has no legal authority to force changes to non-QF power sale contracts, which are not governed by PURPA, to permit the recovery of GHG compliance costs.

II.

THE AVOIDED COST PRICE ADOPTED AS PART OF THE QF/CHP SETTLEMENT AGREEMENT INCLUDES A COMPONENT FOR RECOVERY OF GHG COMPLIANCE COSTS

Section 10 of the QF/CHP Settlement Agreement sets forth the SRAC energy pricing structure adopted in D.10-12-035 that includes recovery of GHG compliance costs. Specifically, Section 10.2.2 of the QF/CHP Settlement Agreement sets the energy price as the higher of the two formulas in Section 10.2.2.1 and 10.2.2.2 (GHG Floor Test) for the first three years of the first period of time for compliance with a cap-and-trade program in California for the regulations of GHG, as established by CARB. The formula in Section 10.2.2.1 is: Energy Price \$/kWh = ((Market Heat Rate * Burnertip Gas Price (BTGP)/1,000,000) + Variable Operation & Maintenance Cost (VOM)) * Time of Use factor (TOU) + Location Adjustment (LA). The

³ Once these appellate issues are fully resolved by expiration of the 30 day period for Applications for Rehearing associated with a final decision resolving these issues, the QF/CHP Settlement will become effective. SCE anticipates that this will happen next month as the CPUC issued its decision, yesterday, October 6, 2011, in A. 08-11-001, resolving the most significant remaining issue. The 30-day period for Applications for Rehearing of this decision will expire next month.

formula is Section 10.2.2.2 is: Energy Price \$/kWh = ((Applicable Heat Rate * (BTGP + GHG Allowance Price)/1,000,000 + VOM + LA + GHG Charges). So, the formula in Section 10.2.2.2 provides for recovery of GHG allowances and other GHG Charges. The higher price resulting from these two formulae sets the price for all contracts approved by the CPUC in D.10-12-035, except for the CHP Requests for Offers (RFOs) pro forma, which will price in GHG compliance costs, as all CHP RFOs will be held after AB 32 was enacted.

There is no need to revisit the costs of GHG compliance for contracts entered into or modified pursuant to the QF/CHP Settlement Agreement. The Commission should not reconsider contentious issues surrounding recovery of GHG compliance costs for QF/CHP contracts already resolved by the Settling Parties and the Commission through the QF/CHP Settlement Agreement in this docket.

III.

FERC HAS EXCLUSIVE JURISDICTION OVER THE RECOVERY OF GHG COMPLIANCE COSTS IN NON-QF CONTRACTS

IEP's Motion notes, at p.2, that "Many parties had expected CARB would address the issue of pre-AB 32 contracts without a means of GHG compliance cost recovery as part of its current development of the regulations on the cap and trade program." Such parties did not understand the limits of state jurisdiction of either CARB or the CPUC over wholesale power prices, if they had this expectation. In providing FERC jurisdiction over wholesale power sales by public utilities, the Federal Power Act gives FERC authority to determine the reasonableness of all rates and changes for the sale of electric energy in interstate commerce:

“[a]ll rates and charges made, demanded, or received by any public utility for or in connection with the transmission or sale of electric energy subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges

shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.”⁴

The Federal Power Act also requires that public utilities file with the FERC:

“Schedules showing all rates and charges for any transmission or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.”

These Federal Power Act provisions give FERC authority over any rate, term, and condition for the wholesale sale of power and any classifications, practices, and regulations affecting rates and charges.

SCE acknowledges that FERC does not have jurisdiction over pricing for the sale of products other than energy, transmission, and ancillary services, and specifically has disavowed having jurisdiction over Renewable Energy Credits (RECs). In *American Ref-Fuel Co.*⁵ FERC found that “RECs are relatively recent creations of the States.” FERC has indicated that states have jurisdiction over sales of RECs, noting that “States, in creating RECs, have the power to determine who owns the REC in the initial instance, and how they may be sold or traded”.⁶ However, the mere fact that the market for purchasing and selling GHG allowances is outside FERC’s jurisdiction does not mean that the issue of the recovery of the costs of GHG allowances (required to be purchased by generators to lawfully generate) is a matter outside of FERC’s jurisdiction where the cost recovery vehicle is a FERC-jurisdictional rate for wholesale power. IPPs do not sell GHG allowances; they sell wholesale power, the pricing of which is exclusively FERC jurisdictional. Part II of the Federal Power Act delegates to FERC “exclusive authority to regulate the transmission and sale at wholesale of electric energy in interstate commerce.”⁷ It is

⁴ 16 U.S.C. Section 824(a)

⁵ 105 FERC ¶ 61,004 (2003), *reh’g* 107 FERC ¶ 61,016 (2004).

⁶ *Id.*

⁷ *Transmission Agency of N. Cal. v. Sierra Pac. Power Co.*, 295 F.3d at 918 (2002) (citing *New England Power Co. v. New Hampshire*, 455 U.S. 331, 340 (1982) (emphasis in original)).

well established that if FERC “has jurisdiction over a subject, the States cannot have jurisdiction over the same subject.⁸

In typical PPAs, purchasers anticipate that generators from whom they purchase power will be in full compliance with a host of environmental laws and regulations. Legal and regulatory compliance costs are just one of the many cost inputs into wholesale power rates. Such wholesale power rates are plainly a matter within FERC’s jurisdiction. IEP’s Motion seeks to have the CPUC establish “mechanisms to cover the cost of complying with the cap and trade provisions of CARB’s regulations implementing AB 32” for contracts entered into before AB 32 was enacted.⁹ The reason that IEP claims the development of such mechanisms is necessary is because these PPAs do not include, and have not been amended to include such mechanisms.¹⁰ IEP seeks to have the CPUC amend FERC-jurisdictional PPAs to recover GHG compliance costs, but the CPUC has no authority to modify an exclusively FERC-jurisdictional rate. SCE does not deny that such compliance costs may be a legitimate cost of producing energy¹¹ but any modifications to FERC-jurisdictional contracts must be made through, and approved by, FERC.

There is simply no support for the position that the CPUC, rather than FERC, has any authority to adjust pricing terms in non-PURPA contracts in order to ensure cost recovery of environmental compliance.¹² So, there is no reason for the CPUC to set a schedule in this docket to adjust pricing terms in pre-AB 32 contracts with IPPs not governed by PURPA because the CPUC has no jurisdiction to adjust such pricing terms. If IEP wants to adjust such pricing terms, it should approach the investor owned utilities (IOUs) to negotiate a solution to present to FERC.

⁸ *Mississippi Power & Light Co. v. Mississippi*, 487 U.S. 354, 377 (1988) (Scalia, J., concurring) (citing *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 962-67 (1986)).

⁹ IEP’s Motion, p.2.

¹⁰ *Id.*

¹¹ *E.g., San Diego Gas & Electric Co.*, 95 FERC ¶ 61,418 (2001).

¹² As FERC recently reminded this Commission, “[w]hile 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.” *Cal. Pub. Utils. Comm’n*, 132 FERC ¶ 61,047 at P 64, *clarified*, 133 FERC ¶ 61,059 (2010), *reh’g denied* 134 FERC ¶ 61,044 (2011).

IV.

CONCLUSION

For the reasons set forth above, SCE respectfully requests that the CPUC deny IEP's motion.

Respectfully submitted,

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