

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



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Order Instituting Rulemaking to Promote Policy and Program Coordination and Integration in Electric Utility Resource Planning.

Rulemaking 04-04-003
(Filed April 1, 2004)
(QF Issues)

Order Instituting Rulemaking to Promote Consistency in Methodology and Input Assumptions in Commission Applications of Short-Run And Long-Run Avoided Costs, Including Pricing for Qualifying Facilities.

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(Filed April 22, 2004)
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**RESPONSE OF
INDEPENDENT ENERGY PRODUCERS ASSOCIATION TO
APPLICATIONS FOR REHEARING OF
D.07-09-040**

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Pursuant to Rule 16.1(d) of the California Public Utilities Commission's (Commission) Rules of Practice and Procedure, the Independent Energy Producers Association (IEP) respectfully responds to the application for rehearing (Application) of Commission Decision (D.) 07-09-040 (Decision) submitted by the Joint Parties on October 25, 2007.¹

The alleged deficiencies in the Decision that the Joint Parties call out do not rise to legal or factual error requiring rehearing. On the contrary, the Decision does a superior job of considering, weighing and balancing the disparate positions of the parties on complex matters well within the Commission's discretion, and expertise, to resolve. The Joint Parties' failure to recognize this is unfortunate and their historical enthusiasm for court litigation when dissatisfied is well known. IEP proposes instead that implementation of the Decision proceed with good faith intentions for success.

¹ The Joint Parties are Pacific Gas & Electric Company (PG&E), Southern California Edison Company (SCE or Edison), San Diego Gas & Electric Company (SDG&E), The Utility Reform Network (TURN), and the Division of Ratepayer Advocates (DRA).

Although the applications are without merit, as further discussed below, IEP suggests a small number of modifications to the Decision (set out in Attachment A to this response) that will provide additional clarity that the Joint Parties apparently find lacking.²

I. DISCUSSION

A. Application Of TOU Factors Consistent With The MPR Is Reasonable And Necessary

The record evidence is overwhelming that TOU/TOD factors should be updated; every party that expressed an opinion, including joint parties TURN, DRA and SDG&E concurred in this as discussed in the Decision. The Decision, accordingly, contains the following determinations:

- “... it is appropriate to update the TOU or TOD factors periodically.” Decision at 74.
- “The evidence in this proceeding clearly demonstrates that the TOU/TOD data is outdated.” *Id.*
- “...as pointed out by the CCC, the TOD factors are too flat to adequately reflect the differential in prices in peak and off-peak periods.” *Id.*
- “We believe that updating the IOUs’ TOU/TOD factors and periods to be consistent with the TOU factors adopted in other procurement proceedings is reasonable.” *Id.*
- “TOU factors are used in the RPS to ensure that the time differentiated value of energy is appropriately taken into account when comparing projects against the MPR. TOU factors used for this proceeding fulfill fundamentally the same role.” Decision at 75.
- “In light of these parallels, it is reasonable to adopt here, as an interim approach, the TOD factors used in calculating the MPR...” *Id.*

² In a separate Application for Rehearing, the California Cogeneration Council suggests that a further update to SRAC pricing based on MRTU becoming operational should not occur on a prescribed schedule as the Decision proposes and only after an opportunity for parties to comment on the suitability at the time of MRTU operation. IEP concurs and thinks that providing that opportunity will reduce the chance of discontent or litigation over the transition. IEP has proposed and set forth in Attachment A a proposed modified Finding of Fact to this end.

IEP respectfully recommends that such key determinations be reduced to Findings of Fact in order to address the Joint Parties' concerns that such findings be separately stated. *See*, Application at 5. Because the Decision reasonably updates the TOU factors it is unnecessary to retain Finding of Fact 29 that contemplates updating those factors in some future, undefined proceeding.

The Joint Parties' consternation over this issue arises almost entirely from the inclusion in the Decision of the following statement: "Unfortunately, the parties recommending specific changes to the TOU/TOD factors and periods did not provide a sufficient showing to support their recommendations." Application at 3; cf. Decision at 74. The Joint Parties' selection of this single line from three pages of discussion, including the determinations recited above, obviously misconstrues its significance. Being dissatisfied with specific solutions to the acknowledged need to update TOU factors, it was perfectly reasonable for the Decision to rely upon an existing, approved and IOU generated basis for that update, particularly where, as here, that approval was in a related docket explicitly linked to this proceeding.

[W]e will use this proceeding to coordinate formally our consideration of these long-term plans with other efforts ongoing in the following dockets: * * 6. Renewable Portfolio Standards.

Order Instituting Rulemaking 04-04-003 at 2-3. Use of the MPR TOU factors for purposes of calculating SRAC also was not unanticipated; in fact, in the 2004 RPS proceeding joint party Edison proposed to apply MPR TOU factors to SRAC pricing, but the Commission determined that "SCE's suggestion that any revision to its TOD factors for purposes of the MPR be applied to existing QF contracts is more properly addressed in R.04-04-025." D.05-12-042, n. 32 at page 20.³

³ Cf., *Comments Of Independent Energy Producers Association On The Alternate Proposed Decision On Future Policy And Pricing For Qualifying Facilities* (September 10, 2007), R.04-04-025, R.04-04-003.

The Joint Parties also complain that MPR based TOU factors are inappropriate in that for PG&E and Edison the factors are “all-in” factors. Application at 7. It is IEP’s understanding that the “all-in” MPR factors are built up by adding together energy and capacity components; in fact, PG&E and Edison have been required to supplement their “energy-only” MPR factors in order to create the “all-in” factor:

Pacific Gas and Electric Company (PG&E) submits a supplement to its 2006 Renewables Portfolio Standard Solicitation (RPS) Protocol modifying its Time of Delivery (TOD) factors filed on December 22, 2005, and to its TOD benchmarking methodology filed on January 17, 2006 pursuant to ALJ ruling dated December 27, 2005. Both the December 22, 2005 TODs and the January 17, 2006 benchmarking methodology were based on the relative value of forward energy prices only.⁴

Edison conducted the same exercise: “The last step is to combine the energy and capacity values to determine the total value of power in each period.”⁵ Edison even laid out in separate tables the values for energy only, capacity only and all-in factors.

It would seem, then, that the Joint Parties’ concern is easily manageable and a proper implementation issue in the workshops where, in fact, it is already scheduled for discussion.⁶ In issue statements submitted for the upcoming implementation workshops, joint parties PG&E and Edison profess to have no recommendation as to how to figure out an MPR based energy factor.⁷ This seems odd since, as discussed above, the exercise has been done before; otherwise the Joint

⁴ *Supplement To The Draft 2006 Renewables Portfolio Standard Solicitation Protocol Of Pacific Gas And Electric Company (U E-39) Filed December 22, 2005 And TOD Factors Benchmarking Study* (February 8, 2006), R.04-04-026, at 1.

⁵ *Southern California Edison Company’s (U 338-E) Supplement To Its Proposal For Benchmarking And Evaluating Time-Of-Delivery Profiles* (February 8, 2006), R.04-04-026, at 6.

⁶ See, “Agenda - Qualifying Facility Program Implementation Workshop” distributed by Elizabeth Stoltzfus on November 7, 2007 by email to the R.04-04-025, R.04-04-003 (QF Issues) service lists.

⁷ *Corrected Joint Pre-Workshop Comments Of Pacific Gas and Electric Company (U 39 E), San Diego Gas & Electric Company (902-E) and Southern California Edison Company (U 338-E)* (October 26, 2007), R.04-04-025, R.04-04-003, at 16.

Parties should be held to explain in the workshop why there should not be consistency between these related applications of TOU factors.

B. The MIF Is A Reasonable Representation Of Avoided Cost

The Joint Parties misstate the requirements of PURPA and FERC's implementing regulations, rendering invalid their allegation of error.

The Federal requirements do not, as the Joint Parties represent, require that SRAC reflect "...the utilities' current SRAC at the time of delivery." Application at 8. The Joint Parties' citation of authority (18 CFR 292.304(d)(2)) is incomplete; only subsection (i) refers to time of delivery whereas the omitted portion of the provision, subsection (ii), refers to avoided costs calculated at the time the obligation is incurred. As the Decision correctly points out and the Joint Parties ignore:

QFs providing electric energy or capacity under a contract are to be paid either avoided costs at the time of delivery, or avoided costs calculated at the time the QF entered the contract, whichever the QF chooses at the time it enters the contract.

Decision at 14-15, citing 18 CFR 292.304(d)(2). The Joint Parties also fail to point out that under the operative regulation:

In the case in which the rates for purchases are based upon estimates of avoided costs over the specific term of the contract or other legally enforceable obligation, the rates for such purchases do not violate this subpart if the rates for such purchases differ from avoided costs at the time of delivery.

18 CFR 292.304(b)(5). IEP recommends that the Commission reduce this regulation to a

Conclusion of Law.

Clearly the SRAC energy prices under the Decision are for application to QFs under a Commission jurisdictional contract;⁸ while subject to updating from time to time SRAC prices necessarily based on estimates and, as a matter of law, do not violate PURPA by virtue of variances with some other, instantaneous measure of avoided cost.

The Joint Parties are also wrong in criticizing the MIF for being a compromise, hybrid approach that incorporates both an administrative and a market-based component. The record evidence is overwhelming that the proposed “market” price, by itself, does not represent a reasonable estimate of avoided cost:

- “FERC has declined to make a finding that QFs have nondiscriminatory access to competitive wholesale markets in California.” Decision at 61. Such a finding must necessarily precede elimination of the mandatory purchase obligation at avoided costs. Decision at 19-20.
- “[t]hese markets represent less than 5% of the total purchases by the utilities, may be subject to manipulation, and reflect only lower cost products.” Decision at 61, FF 14. Moreover, “The market price of energy at the NP15/SP15 trading points does not reflect the costs associated with out-of-market transactions entered into by CAISO for market power mitigation and local reliability purposes.” FF 17.
- “In a well-functioning market, the market clearing price reflects the cost of the marginal resource. Currently that market does not exist in California.” Decision at 61.
- “[t]hese prices would likely understate utility avoided costs.” *Id.*

The MIF is also consistent with and necessary to maintain compliance with P.U. Code 390(b), also as the Decision correctly points, as a matter of law. Decision at 66; CL 9.

While the Commission determined that the Joint Parties’ proposed NP15/SP pricing would “likely understate” avoided cost, it also expressed a less emphatic concern that continued reliance solely on the administrative determination “could potentially” exceed utility avoided cost. Decision at 63. Confronted with these competing interests and concerns, the Decision

⁸ The Commission is not only authorized, but required, to implement the requirements of PURPA. 16 U.S.C.A. 824a-3(f).

approves an approach that, based on the record, finds a balance that best estimates utility avoided costs for the period for which it will apply. IEP fails to understand what determination the Commission could have made that would pass muster with the Joint Parties.

Indeed, by the Joint Parties' argument, any compromise, hybrid approach would constitute legal error (Application at 8) yet the Joint Parties acknowledge the Commission's determination that any of the individual proposals, if solely relied upon, potentially suffer the same deficiency.

Under the standard of review proposed by the Joint Parties, the Commission's authority is constrained to the selection of one among competing proposals, in its entirety, or it is paralyzed to act. That view is absurd and cannot be the case; if applied generally to Commission proceedings the Joint Parties' position would be catastrophic. IEP submits that the Commission is not merely entitled to employ its expertise in the exercise of its authority, but is required to do so under its general obligations to implement PURPA. 16 U.S.C.A. 824a-3(f).

C. The Decision Is Correct In Its Determination Not To Order A Retroactive True-Up Of SRAC Energy Payments

The Joint Parties' allegation of error that failure to order a retroactive true-up of SRAC energy payments is without merit.

In the first place, as discussed above, where, as here, avoided costs are estimated for QFs selling under a contract, there is no violation of PURPA even if those estimates differ from some other measure at the time of delivery. Since SRAC prices made under the current methodology are a lawful representation of avoided cost there is nothing against which the Decision's updated determination should or could be trued up.

Second, the Joint Parties' assertion that the Commission acted without explaining itself is contradicted by its own presentation:

The Decision states that it ‘updates the methodology for calculating SRAC energy prices on a prospective basis only, to ensure that SRAC prices continue to reflect utility avoided costs in the changing electricity markets in California’. [Cite omitted.] The Decision further states that ‘the record in this proceeding does not support a conclusion that the [SRAC transition formula] yielded prices that exceed utility avoided cost or systematically violated PURPA’.

Application at 14. Of course, the Decision also correctly determined that “A decision to revise the Transition Formula, by itself, does not demonstrate that prices under the Transition Formula violate PURPA.” Decision, CL 8.

The Joint Parties’ protestation over this issue does, however, suggest to IEP that a further modification to the findings and conclusions is called for. Finding of Fact 11 currently states that “SRAC energy payments under the Transition Formula have exceeded market prices, and potentially avoided costs, on occasion.” This finding certainly is confusing and indeed wrong in consideration of the other determinations made in the Decision that 1) the Joint Parties’ SP15/NP15 proposals do not reflect a valid market price (Decision at 61); 2) the Joint Parties’ market proposals likely understate avoided cost (Decision at 61); and 3) the record does not demonstrate that transition formula pricing violates PURPA avoided cost requirements (Decision at 9). Applied in the context of the court rulings referred to by the Joint Parties (Application at 15), the Decision concludes that the evidence does not demonstrate a need for retroactive refund, does not demonstrate that a retroactive refund is necessary to arrive at a more accurate SRAC and does not demonstrate a systematic violation of PURPA. For accuracy, clarity and to avoid the inadvertent creation of fodder for the Joint Parties, should their litigiousness persist, Finding of Fact 11 should be deleted or, if retained, be restated in full as:

The evidence shows that SRAC prices determined under the Transition Formula have been, and until the implementation of the MIF or other update are, a correct determination of avoided cost under PURPA.

II. CONCLUSION

On the basis of the foregoing and the record herein, the Joint Parties' assertions of legal error in the Decision are without merit. IEP recommends modifications to certain Findings and Conclusions to more clearly and separately state the determinations made in the Decision. Doing so should satisfy the Joint Parties and better ensure against a successful attack in court if that is what the Joint Parties are committed to pursue. IEP's proposed modifications should be made, and the Application should otherwise be denied.

Dated: November 9, 2007

Respectfully submitted,



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ATTACHMENT A:

PROPOSED NEW AND MODIFIED FINDINGS OF FACT AND CONCLUSIONS OF LAW

IEP proposes the following specific separately stated findings of fact and conclusions of law:

- Finding of Fact (New): “The evidence demonstrates that NP15/SP15 market prices would likely understate utility avoided costs.” Cf. Decision at 61.
- Conclusion of Law (New): “SRAC prices based on estimates of avoided costs paid under a contract do not violate PURPA if such prices differ from avoided costs at the time of delivery.” Cf. 18 CFR 292.304(b)(5).
- Finding of Fact 11 (Existing Modified): ~~“SRAC energy payments under the Transition Formula have exceeded market prices, and potentially avoided costs, on occasion.”~~
- Finding of Fact (New): “The record does not support a conclusion that the Transition Formula has yielded prices that exceed utility avoided costs or systematically violated PURPA.” Cf. Decision at 9.
- Finding of Fact 11 (New Restated): “The evidence shows that SRAC prices determined under the Transition Formula have been, and until the implementation of the MIF or other update are, a correct determination of avoided cost under PURPA.”

- Finding of Fact (New): “The evidence demonstrates that the TOU/TOD factors and periods are outdated and should be updated.” Cf. Decision at 74.
- Finding of Fact (New): “Current TOU/TOD factors and periods are too flat to adequately reflect the differential in prices in peak and off-peak periods.” Cf. Decision at 74.
- Finding of Fact (New): “It is reasonable that TOU/TOD factors be consistent with such factors adopted in other procurement proceedings; TOU/TOD factors used in the RPS to calculate the MPR fulfill fundamentally the same role as such factors fulfill for SRAC pricing and, unless and until updated, shall be used to calculate SRAC.”
- Finding of Fact 29 (Existing Modified): ~~“The Commission should update the TOU factors used to calculate SRAC in an appropriate proceeding.”~~
- Finding of Fact 21 (Existing Modified): “Once MRTU is operational, MRTU day-ahead market clearing prices are expected to ~~will~~ provide more robust day-ahead market prices that would more accurately reflect avoided costs.”

Certificate of Service

I hereby certify that I have this day served a copy of “Response Of Independent Energy Producers Association to Applications for Rehearing of D.07-09-040” on all known parties to R.04-04-025 and R.04-04-003 (List QF Issues) by transmitting an e-mail message with the document attached to each party named in the official service list. Parties without e-mail addresses were mailed a properly addressed copy by first-class mail with postage prepaid.

Executed on November 9, 2007 at Sacramento, California

/s/

Eric Janssen

Service List
R.04-04-003/R.04-04-025 (List
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