



BEFORE THE PUBLIC UTILITIES COMMISSION OF THE **FILED**

STATE OF CALIFORNIA

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Western Water and Power Production Limited,)
LLC, A New Mexico Limited Liability)
Corporation,)

Complainant)

vs.)

Southern California Edison Company,)

Defendant)

Case No. C.12-05-021

SOUTHERN CALIFORNIA EDISON COMPANY'S (U 338-E)

ANSWER TO COMPLAINT

PUBLIC VERSION

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Dated: July 13, 2012

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I.

INTRODUCTION

Pursuant to Rule 4.4 of the California Public Utilities Commission’s (“Commission’s”) Rules of Practice and Procedure, Southern California Edison Company (“SCE”) respectfully submits this Answer to the Complaint (“Complaint”) of Western Water and Power Production Limited, LLC (“Complainant” or “WWPP”). WWPP’s Complaint concerns a contract dispute between WWPP and SCE. It is not appropriate for WWPP to file this Complaint with the Commission, as the Commission does not have authority to adjudicate contract disputes merely because one party is a public utility. [REDACTED]

[REDACTED] Nonetheless, SCE hereby answers the Complaint and requests that the Commission dismiss it and direct WWPP to follow the dispute resolution process described in the contract.

II.

SUMMARY

On December 19, 2009, WWPP and SCE executed a Renewable Power Purchase & Sale Agreement (“PPSA”) for the production and sale of biomass energy. The PPSA required WWPP to construct, own, and operate a generating facility (“Estancia Basin”) in Torrance County, New Mexico. The energy would have been transmitted to California for SCE’s retail customers or sold in other markets. The parties negotiated and agreed to all terms of the PPSA, including termination provisions.

On February 17, 2010, SCE filed Advice 2442-E, seeking the Commission’s approval of the PPSA. SCE supplemented its advice filing with Advice 2442-E-A on May 19, 2011, to include new standard terms and conditions and other information required by Decision (“D.”) 10-03-021, as modified by D.11-01-025. On August 22, 2011, SCE terminated the PPSA pursuant to the terms of the contract. By letter dated August 29, 2011, SCE requested withdrawal of Advice 2442-E and Advice 2442-E-A because the PPSA had been terminated. Under General Order 96-B, Section 5.3, a utility may withdraw its advice letter prior to the date of issuance of a draft resolution. On October 12, 2011, the Commission sent SCE a letter confirming that Advice 2442-E and Advice 2442-E-A had been withdrawn as requested.

WWPP disputes the validity of SCE’s termination. Earlier this year, WWPP and SCE participated in mediation to resolve the dispute. The parties’ efforts were unsuccessful and [REDACTED] WWPP is not, however, entitled to seek relief from the Commission for the termination of this contract. The Commission “does not adjudicate contract disputes merely because one party is a public utility” and it “may not adjudicate contract disputes absent express authorization by the Legislature.” D.01-03-050 (citing *Hempey v. Public Utilities Commission*, (1961) 56 C. 2d 214). Since the Legislature has not authorized the Commission to adjudicate this dispute, the Commission does not have jurisdiction here.

This Complaint is simply WWPP's attempt to revive the PPSA (or get a new contract) and to avoid the terms of the agreed upon contract. Many of WWPP's allegations are false and misleading. Some even violate Commission Rule 1.1, which prohibits "[a]ny person who signs a pleading or brief, enters an appearance, offers testimony at a hearing, or transacts business with the Commission . . . [from] mislead[ing] the Commission or its staff [with] an artifice or false statement of fact or law." WWPP may pursue its claims through the dispute resolution process described in the contract, but doing so here is simply inappropriate.

III.

ANSWER TO COMPLAINT

SCE incorporates by reference the preceding affirmative statements made in SCE's Summary. SCE responds to the specific allegations of the Complaint as follows:

1. Answering paragraph number 1 of the Complaint, this paragraph does not contain allegations of material fact requiring a response from SCE. SCE rightfully withdrew Advice 2442-E and Advice 2442-E-A on August 29, 2011 because the PPSA had been terminated.

2. Answering paragraph number 2 of the Complaint, SCE denies the allegations in this paragraph. SCE rightfully withdrew Advice 2442-E and Advice 2442-E-A on August 29, 2011 because the PPSA had been terminated.

3. Answering paragraph number 3 of the Complaint, this paragraph does not contain allegations of material fact requiring a response from SCE.

4. Answering paragraph number 4 of the Complaint, this paragraph does not contain allegations of material fact requiring a response from SCE.

5. Answering paragraph number 5 of the Complaint, SCE admits that it is a public utility, regulated by the Commission that provides electric utility services in California.

6. Answering paragraph number 6 of the Complaint, SCE denies the allegations in this paragraph. SCE rightfully withdrew Advice 2442-E and Advice 2442-E-A on August 29, 2011 because the PPSA had been terminated.

7. Answering paragraph number 7 of the Complaint, this paragraph does not contain allegations of material fact requiring a response from SCE.

8. Answering paragraph number 8 of the Complaint, this paragraph does not contain allegations of material fact requiring a response from SCE.

9. Answering paragraph number 9 of the Complaint, this paragraph does not contain allegations of material fact requiring a response from SCE.

10. Answering paragraph number 10 of the Complaint, SCE admits that it is a public utility subject to the jurisdiction of the Commission and that its 2008 Renewables Portfolio Standard Procurement Plan was approved by the Commission. To the extent this paragraph alleges that the Commission has jurisdiction to adjudicate contract disputes concerning renewable PPSAs between SCE and third parties, SCE denies that allegation.

11. Answering paragraph number 11 of the Complaint, this paragraph does not contain allegations of material fact requiring a response from SCE.

12. Answering paragraph number 12 of the Complaint, SCE denies that seeking Commission approval of the PPSA placed the parties' contract dispute within the Commission's jurisdiction. SCE also disagrees with WWPP's conclusion that "the Commission has exercised its authority over the Advice Letter withdrawal actions of utilities" and any suggestion that the Commission has exercised authority over contract disputes between public utilities and third parties.

13. Answering paragraph number 13 of the Complaint, to the extent this paragraph alleges that the Commission has jurisdiction to adjudicate contract disputes concerning renewable PPSAs between SCE and third parties, SCE denies that allegation.

14. Answering paragraph number 14 of the Complaint, to the extent this paragraph alleges that the Commission has jurisdiction to adjudicate contract disputes concerning renewable PPSAs between SCE and third parties, SCE denies that allegation. SCE further denies that WWPP has properly alleged any “unlawful actions” by SCE.

15. Answering paragraph number 15 of the Complaint, to the extent this paragraph alleges that the Commission has jurisdiction to adjudicate contract disputes concerning renewable PPSAs between SCE and third parties, SCE denies that allegation.

16. Answering paragraph number 16 of the Complaint, this paragraph does not contain allegations of material fact requiring a response from SCE.

17. Answering paragraph number 17 of the Complaint, this paragraph does not contain allegations of material fact requiring a response from SCE.

18. Answering paragraph number 18 of the Complaint, this paragraph does not contain allegations of material fact requiring a response from SCE.

19. Answering paragraph number 19 of the Complaint, this paragraph does not contain allegations of material fact requiring a response from SCE.

20. Answering paragraph number 20 of the Complaint, this paragraph does not contain allegations of material fact requiring a response from SCE.

21. Answering paragraph number 21 of the Complaint, this paragraph does not contain allegations of material fact requiring a response from SCE.

22. Answering paragraph number 22 of the Complaint, this paragraph does not contain allegations of material fact requiring a response from SCE. To the extent this paragraph alleges that SCE’s withdrawal of Advice 2442-E and 2442-E-A was improper, SCE denies that allegation.

23. Answering paragraph number 23 of the Complaint, this paragraph does not contain allegations of material fact requiring a response from SCE. To the extent this paragraph

alleges that SCE's withdrawal of Advice 2442-E and 2442-E-A was improper, SCE denies that allegation.

24. Answering paragraph number 24 of the Complaint, this paragraph does not contain allegations of material fact requiring a response from SCE.

25. Answering paragraph number 25 of the Complaint, SCE denies the allegations as characterized in this paragraph. Advice 2442-E and 2442-E-A were withdrawn for no other reason than that the PPSA had been terminated. SCE never discussed the withdrawal of Advice 2442-E and 2442-E-A with WWPP, only the termination. SCE admits that SCE filed its Application for Rehearing of D.11-01-025 on or about February 14, 2011. SCE denies that "it knew it would be violating WWPP's rights under the Commerce Clause."

26. Answering paragraph number 26 of the Complaint, SCE admits these statements.

27. Answering paragraph number 27 of the Complaint, SCE admits these statements.

28. Answering paragraph number 28 of the Complaint, SCE admits these statements.

29. Answering paragraph number 29 of the Complaint, SCE admits that WWPP submitted its bid to supply to SCE 32 megawatts of bundled, base load energy from a biomass generation project to be developed near Estancia, New Mexico, that the energy was to be delivered via firm transmission to SCE at the 4-Corners substation, and that the energy was scheduled to be delivered to SCE on or about March 2014. SCE denies that WWPP's bid was necessarily for "bundled energy and renewable credits to be dynamically dispatched."

30. Answering paragraph number 30 of the Complaint, SCE admits that it filed Advice 2442-E on February 17, 2010.

31. Answering paragraph number 31 of the Complaint, SCE admits that SCE and WWPP executed an amendment to the PPSA on or about February 11, 2011 that [REDACTED] [REDACTED] incorporated non-modifiable terms adopted

by the Commission. SCE denies making any representation that WWPP could assume Commission approval would be received within any certain timeframe.

32. Answering paragraph number 32 of the Complaint, SCE denies that it was not “able to meet a Commission Approval Date under the Amended PPA because of SCE delays in the provision of information requested by Commission staff and the notice and comment requirements for Commission Approval actions under Pub. Util. Code section 311(g)(1) and (2).” [REDACTED]

33. Answering paragraph number 33 of the Complaint, SCE admits that it notified WWPP that the PPSA was terminated on August 22, 2011, and requested withdrawal of Advice 2442-E and 2442-E-A from the Commission on August 29, 2011. SCE admits that it refused WWPP’s demands to reinstate the PPSA or otherwise further amend any terms of the PPSA after termination.

34. Answering paragraph number 34 of the Complaint, SCE denies each and every allegation in this paragraph. SCE specifically denies the allegations in this paragraph relating to the June 2011 report from an unnamed “New Mexico economic development official” based on lack of sufficient knowledge, information, and belief.

35. Answering paragraph number 35 of the Complaint, SCE admits that it has tried to resolve the contract dispute with WWPP both informally and through formal mediation, [REDACTED] SCE denies that its withdrawal of the advice letter was “unlawful.” SCE withdrew Advice 2442-E and Advice 2442-E-A on August 29, 2011 because the PPSA had been validly terminated.

36. Answering paragraph number 36 of the Complaint, SCE agrees that WWPP must adhere to the Confidentiality Agreement it signed. SCE denies each and every remaining allegation in this paragraph.

37. Answering paragraph number 37 of the Complaint, SCE admits the statements in this paragraph except those concerning WWPP's alleged bid "[i]n reliance on the comments and assurances received from Mr. Hemphill and other SCE representatives." This allegation is vague and ambiguous, and SCE therefore lacks sufficient knowledge, information, or belief to admit or deny it.

38. Answering paragraph number 38 of the Complaint, SCE agrees [REDACTED] that the PPSA was executed on or about December 19, 2010. SCE denies the remaining allegations in this paragraph based on lack of sufficient knowledge, information, and belief.

39. Answering paragraph 39 of the Complaint, SCE denies the allegations in this paragraph. The WWPP PPSA was heavily negotiated and was not "presented as an essentially 'take it or leave it' proposition." SCE denies any allegation that it failed to modify the WWPP PPSA pursuant to a Commission decision and the implication that the Commission should have been involved in contract negotiations between WWPP and SCE.

40. Answering paragraph number 40 of the Complaint, SCE denies the allegations in this paragraph based on lack of sufficient knowledge, information and belief.

41. Answering paragraph number 41 of the Complaint, SCE generally agrees that during 2010 the Commission was engaged in a proceeding to consider modifications to its policy governing Tradable Renewable Energy Credits ("TRECs") and issued decisions relating to its treatment of TRECs in 2010 and 2011. SCE denies, however, that the WWPP PPSA was necessarily for dynamically dispatched power.

42. Answering paragraph number 42 of the Complaint, SCE admits that there was a conference call on or about January 6, 2011 with representatives from the California Energy Commission ("CEC"), the CPUC and SCE during which the CEC indicated that the WWPP product would likely be RPS-eligible. In January 2011, a letter from Julie Fitch of the CPUC's Energy Division requested that SCE file a supplemental advice letter for all out of state projects.

The supplemental filing for the WWPP project was made on May 19, 2011. SCE always remained committed to fulfilling its obligation under the PPSA, including supporting the approval process. SCE did not “refus[e] to allow WWPP to assist it in obtaining timely CPUC Approval.”

43. Answering paragraph number 43, SCE admits that WWPP submitted at least one monthly progress report for its project and that WWPP indicated verbally that Commission approval was important for the continued progress of their development activities.

44. Answering paragraph number 44 of the Complaint, SCE denies the allegations in this paragraph. [REDACTED]

45. Answering paragraph number 45 of the Complaint, SCE admits that on or about June 17, 2011, WWPP learned that SCE was considering terminating the contract pursuant to the terms of the PPSA. SCE further admits that WWPP claimed that the project would be negatively affected if the PPSA was terminated.

46. Answering paragraph number 46 of the Complaint, SCE denies the allegations in this paragraph based on lack of sufficient knowledge, information and belief. Furthermore, given that a draft resolution had not been issued regarding the WWPP PPSA, the matter could not have been placed on the Commission’s agenda for approval as WWPP contends.

47. Answering paragraph number 47 of the Complaint, SCE admits that, on or about June 24, 2011, SCE advised WWPP of the impending termination but, as a gesture of good faith, offered to consider amending the PPSA. SCE denies the remainder of the allegations in this paragraph.

48. Answering paragraph number 48 of the Complaint, SCE denies the allegations in this paragraph based on lack of sufficient knowledge, information, and belief.

49. Answering paragraph number 49 of the Complaint, SCE denies the allegations in this paragraph based on lack of sufficient knowledge, information, and belief.

50. Answering paragraph number 50 of the Complaint, SCE denies the allegations in this paragraph based on lack of sufficient knowledge, information, and belief.

51. Answering paragraph number 51 of the Complaint, [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

52. Answering paragraph number 52 of the Complaint, SCE denies the allegations in this paragraph based on lack of sufficient knowledge, information, and belief. Furthermore, given that a draft resolution had not been issued regarding the WWPP PPSA, the matter could not have been placed on the Commission’s agenda for approval as WWPP contends.

53. Answering paragraph number 53 of the Complaint, SCE denies the allegations in this paragraph. SCE did not hold any meetings related to WWPP on July 9, 2011, which was a Saturday. On July 7, 2011, SCE held an executive briefing on the WWPP PPSA. No SCE affiliates were present, and SCE never “determined that SCE should immediately terminate the PPA if the Commission were to take action.” On or about July 13, 2011, SCE asked WWPP to sign a joint letter requesting that the Commission hold consideration of Advice 2442-E and 2442-E-A until September 1, 2011, to provide additional time for the parties to continue negotiations on an amendment to the PPSA.

54. Answering paragraph number 54 of the Complaint, SCE admits that [REDACTED]
[REDACTED] SCE and WWPP [REDACTED]
[REDACTED] signed a joint letter asking the Commission to table

consideration of the project until September 1, 2011 given the ongoing negotiations. SCE did not breach the PPSA, and SCE denies that WWPP acted “under duress and coercion.”

55. Answering paragraph number 55 of the Complaint, SCE denies the allegations in this paragraph.

56. Answering paragraph number 56 of the Complaint, this paragraph does not contain allegations of material fact requiring a response from SCE.

57. Answering paragraph number 57 of the Complaint, SCE incorporates its responses to Paragraphs 1 through 56 by reference as if fully set forth herein.

58. Answering paragraph number 58 of the Complaint, SCE incorporates its responses to Paragraphs 1 through 57 by reference as if fully set forth herein. SCE denies that “it knew it would be violating the Commerce Clause” by terminating the PPSA and denies that WWPP is entitled to any relief from the Commission for this contract dispute.

59. Answering paragraph number 59 of the Complaint, this paragraph does not contain allegations of material fact requiring a response from SCE.

60. Answering paragraph number 60 of the Complaint, this paragraph does not contain allegations of material fact requiring a response from SCE.

61. Answering paragraph number 61 of the Complaint, SCE denies that the Commission has jurisdiction to adjudicate contract disputes concerning renewable power purchase and sale agreements between SCE and third parties. SCE rightfully withdrew Advice 2442-E and Advice 2442-E-A on August 29, 2011 because the PPSA had been terminated.

62. Answering paragraph number 62 of the Complaint, this paragraph does not contain allegations of material fact requiring a response from SCE.

63. Answering paragraph number 63 of the Complaint, SCE denies the allegations in this paragraph.

64. Answering paragraph number 64 of the Complaint, SCE denies the allegations in this paragraph.

65. Answering paragraph number 65 of the Complaint, SCE denies the allegations in this paragraph.

66. Answering paragraph number 66 of the Complaint, SCE admits that it rightfully withdrew Advice 2442-E and Advice 2442-E-A on August 29, 2011 because the PPSA had been terminated. SCE further agrees that WWPP should seek resolution of its claims [REDACTED] SCE denies the remainder of the allegations in this paragraph.

67. Answering paragraph number 67 of the Complaint, SCE denies the allegations in this paragraph based on lack of sufficient knowledge, information, and belief.

68. Answering paragraph number 68 of the Complaint, SCE admits that it rightfully withdrew Advice 2442-E and Advice 2442-E-A on August 29, 2011, because the PPSA had been terminated. SCE denies that WWPP does not have “an adequate remedy at law” because WWPP [REDACTED]

69. Answering paragraph number 69 of the Complaint, SCE denies that WWPP does not have “an adequate remedy at law.” WWPP’s Complaint depends on whether the termination of the PPSA was valid pursuant to the terms of the parties’ contract. The Commission does not have jurisdiction to adjudicate contract disputes concerning renewable power purchase and sale agreements between SCE and third parties.

70. Answering paragraph number 70 of the Complaint, SCE denies that the Commission has jurisdiction to adjudicate this contract dispute.

71. Answering paragraph number 71 of the Complaint, SCE agrees that this proceeding should be categorized as adjudicatory.

72. Answering paragraph number 72 of the Complaint, SCE disagrees that hearings are necessary because the Commission does not have jurisdiction to adjudicate this contract dispute.

73. Answering paragraph number 73 of the Complaint, SCE disagrees with WWPP's characterization of the issue. WWPP disputes SCE's termination of the PPSA. The issue therefore is whether SCE rightfully terminated the PPSA, which is a contract dispute.

74. Answering paragraph number 74 of the Complaint, SCE disagrees that an expedited schedule is necessary. The Commission should dismiss the Complaint because it does not have jurisdiction to adjudicate a contract dispute between SCE and third parties.

75. Answering paragraph number 75 of the Complaint, SCE denies that WWPP is entitled to any relief whatsoever.

IV.

AFFIRMATIVE DEFENSES

FIRST, SEPARATE AND AFFIRMATIVE DEFENSE

Affirmative Allegations

SCE re-alleges and incorporates herein each and every one of its affirmative allegations set forth above.

SECOND, SEPARATE AND AFFIRMATIVE DEFENSE

Failure to State a Cause of Action

Complainant fails to state facts sufficient to constitute a cause of action for relief against SCE.

THIRD, SEPARATE AND AFFIRMATIVE DEFENSE

Compliance with all Applicable Tariffs, Rules, Regulations and Laws

Complainant is barred from recovery because SCE complied with all applicable rules, laws, regulations, and tariffs and all applicable domestic and general services rate schedules.

FOURTH, SEPARATE AND AFFIRMATIVE DEFENSE

Proximate Intervening Cause

If Complainant suffered any injury as alleged in the Complaint, which SCE specifically disputes and denies, the intervening and superseding actions, and/or inactions of Complainant itself or some other person or entity other than SCE proximately caused such injury in whole or in part.

FIFTH, SEPARATE AND AFFIRMATIVE DEFENSE

Failure to Mitigate

Complainant failed to mitigate its injury, if any.

SIXTH, SEPARATE AND AFFIRMATIVE DEFENSE

Lack of Standing

Complainant lacks standing to bring this Complaint.

SEVENTH, SEPARATE AND AFFIRMATIVE DEFENSE

Excused Performance

SCE's alleged obligations to perform were discharged, excused, or modified by Complainant, either through its own conduct or the conduct of others.

EIGHTH, SEPARATE AND AFFIRMATIVE DEFENSE

Lack of Damages

SCE has fully performed any conditions, covenants, and promises required to be performed in accordance with the terms of an agreement, if any, out of which the Complaint arises.

NINTH, SEPARATE AND AFFIRMATIVE DEFENSE

Estoppel

The Complaint and each cause of action therein is barred, in whole or in part, by the doctrine of estoppel.

TENTH, SEPARATE AND AFFIRMATIVE DEFENSE

Waiver

The Complaint and each cause of action therein is barred, in whole or in part, by the doctrine of waiver.

ELEVENTH, SEPARATE AND AFFIRMATIVE DEFENSE

Lack of Damages

Complainant's cause of action is barred because it has not suffered any cognizable and/or measurable injury or damages attributable to SCE.

TWELFTH, SEPARATE AND AFFIRMATIVE DEFENSE

Speculative Damages

Complainant's recovery of damages, if any, is barred because the alleged damages attributable to SCE are speculative.

WHEREFORE, SCE prays:

1. That the Complaint and relief requested are denied; and

2. For such other relief as the Commission may deem just and equitable.

Respectfully submitted,

JENNIFER TSAO SHIGEKAWA
JONI A. TEMPLETON

/s/ Joni A. Templeton

By: Joni A. Templeton

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July 13, 2012

VERIFICATION

I am an officer of the applicant corporation herein, and am authorized to make this verification on its behalf. I am informed and believe that the matters stated in **SOUTHERN CALIFORNIA EDISON COMPANY'S (U 338-E) ANSWER TO COMPLAINT** are true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed this 13th day of July 2012, at Rosemead, California.

/s/ Marc L. Ulrich, Ph.D.

Marc L. Ulrich, Ph.D.

Vice President, Renewable and Alternative Power
SOUTHERN CALIFORNIA EDISON COMPANY

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