



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 )

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Case No. 12-05-021

**SOUTHERN CALIFORNIA EDISON COMPANY'S (U 338-E) MOTION TO DISMISS**  
**COMPLAINT**

JENNIFER TSAO SHIGEKAWA  
JONI A. TEMPLETON

Attorneys for  
SOUTHERN CALIFORNIA EDISON COMPANY

2244 Walnut Grove Avenue  
Post Office Box 800  
Rosemead, California 91770  
Telephone: (626) 302-6210  
Facsimile: (626) 302-3990  
E-mail: Joni.Templeton@sce.com

Dated: **July 23, 2012**

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**I.  
INTRODUCTION**

Pursuant to Rules 11.1 and 11.2 of the California Public Utilities Commission’s (the “Commission” or “CPUC”) Rules of Practice and Procedure, Southern California Edison Company (“SCE”) respectfully files this Motion to Dismiss the above-captioned complaint (“Complaint”) of Western Water and Power Production Limited, LLC (“WWPP” or “Complainant”), Case No. 12-05-021.

## II.

### SUMMARY

The Commission does not have jurisdiction to adjudicate contract disputes merely because one party is a public utility and therefore, should dismiss the Complaint. Additionally, WWPP fails to allege any actual injury or specific violation by SCE of any tariff, law or Commission rule or order. As such, the Complaint fails to state a cause of action for relief against SCE.

On December 19, 2009, WWPP and SCE executed a renewable Power Purchase & Sale Agreement (“PPSA”) for the production and sale of biomass energy. The parties negotiated and agreed to all terms of the PPSA, including termination provisions. SCE filed Advice 2442-E and Advice 2442-E-A to seek approval by the Commission for the PPSA.<sup>1</sup> On August 22, 2011, SCE terminated the PPSA pursuant to the agreed upon terms of the contract and subsequently requested withdrawal of Advice 2442-E and Advice 2442-E-A from the Commission because the contract had been terminated.

WWPP disputes the validity of SCE’s termination. Even though WWPP characterizes SCE’s alleged wrongful act as “SCE’s unilateral withdrawal of Advice Letter 2242-E,” part of the relief WWPP seeks from the Commission is an order requiring the parties to modify the PPSA. Since SCE terminated the PPSA, an order from the Commission “rejecting” SCE’s withdrawal of the advice letter will not provide WWPP with any relief without an additional order requiring SCE to execute a new contract with WWPP. Thus, 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. Accordingly, the Commission should dismiss the Complaint. WWPP may pursue its claims through the dispute resolution process described in the contract.

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<sup>1</sup> 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.

The Complaint should also be dismissed because it fails to allege any actual injury or specific violation by SCE of any tariff, law or Commission rule or order as required by Public Utilities Code Section 1702 and Commission Rule 4.1. WWPP's allegations regarding violations of the Commerce Clause of the United States Constitution complain of wrongful acts or omissions by the Commission and the State of California and are inappropriate matters for Commission adjudication. WWPP's allegations that SCE's withdrawal of the PPSA "without Commission oversight or approval" violated "Commission Policies" fail to put forth any actual injury or specific violation by SCE of any tariff, law or Commission rule or order. General Order 96-B, Section 5.3 allows a utility to "unilaterally" withdraw its advice letter prior to the date of issuance of a draft resolution. In this case, SCE's withdrawal of Advice 2442-E and Advice 2442-E-A was the appropriate procedure given that the PPSA had been terminated.

### III.

#### ARGUMENT

##### **A. The Commission Does Not Have Jurisdiction to Adjudicate This Contract Dispute.**

The Commission does not have jurisdiction to adjudicate contract rights asserted by third parties against a public utility. *Lakeland Utility Conservation, Inc. v. San Diego Gas & Electric Co.*, D.01-03-050; *Hempy v. Public Utilities Commission*, (1961) 56 C. 2d 214, 217 ("The Public Utilities Commission is nowhere expressly given the power to adjudicate the rights between a public utility subject to its regulatory powers and its general creditors or those asserting contract rights against it.... [T]he proper forum for such adjudication is the superior court."). In *Lakeland Utility Conservation, Inc. v. San Diego Gas & Electric Co.*, Decision ("D.") 01-03-050, the Commission dismissed Lakeland Utility Conservation, Inc.'s ("Lakeland") breach-of-contract complaint and advised Lakeland to seek its remedy in civil court. In that case, Lakeland sought an order from the Commission finding that Lakeland had completed work pursuant to a contract with San Diego Gas and Electric Company ("SDG&E") and directing SDG&E to pay the total

contract amount. Granting SDG&E's motion to dismiss, the Commission explained that it does not adjudicate contract disputes between a public utility and a third party:

As a general rule, this Commission does not adjudicate contract disputes merely because one party is a public utility. Indeed, the California Supreme Court in *Hempey v. Public Utilities Commission* (1961) 56 C.2d 214, has held that the Commission may not adjudicate contract disputes absent express authorization by the Legislature. This rule is based on Article VI of the California Constitution, which assigns purely judicial functions to the courts. Under Article XII, Section 5, of the Constitution, the Legislature has plenary authority, unlimited by conflicting provisions of other parts of the Constitution to confer jurisdiction on this Commission.

Like Lakeland, WWPP is seeking a resolution to its contract dispute from the Commission. The essence of the Complaint is whether SCE rightfully terminated the PPSA, which is a contract dispute. Indeed, WWPP takes several pages of the Complaint to discuss contract negotiations with SCE and attack the validity of contract provisions, including the provision detailing the PPSA's dispute resolution process. WWPP asks the Commission to reject "SCE's unilateral withdrawal of Advice Letter 2242-E" and require "the parties to modify the PPA." Complaint at 30, ¶ 75. Rejecting SCE's withdrawal of the advice letter will not provide WWPP any relief without an additional order requiring SCE to execute a new contract with WWPP. The relief WWPP actually seeks is reinstatement of its contract based on its assertion that it was improperly terminated. As such, WWPP's complaint presents a contract dispute that is outside the Commission's jurisdiction.

**B. The Complaint Fails to State a Cause of Action for Which Relief Can Be Granted.**

Pursuant to Public Utilities Code Section 1702, a complaint must allege an "act or thing done or omitted to be done by any public utility, in violation, or claimed to be in violation, of any provision of law or of any order or rule of the Commission." In the Complaint, however, WWPP fails to set forth facts sufficient to allege that SCE violated any provision of law or order or rule of the Commission. As such, the Complaint fails to state a cause of action for relief against SCE.

In WWPP's first cause of action, WWPP alleges that SCE "justified its action to terminate the PPA by the discriminatory policies of the State of California and the Commission" and that "SCE, the Commission and the State of California are effectively partners in the implementation of the discriminatory energy policy." Complaint at 23-26, ¶¶ 58, 63. This cause of action essentially alleges that allowing SCE to terminate its contract with WWPP would be a wrongful act by the Commission and the State of California and would violate the Commerce Clause of the United States Constitution. Filing a complaint with the Commission is not an appropriate venue to dispute a Commission decision or policy, or California law. Furthermore, Section 1702 was not designed to compel the Commission to adjudicate *any* alleged violation of *any* law. D.96-07-009 ("We must first dispel the notion that the phrase 'any provision of law' found in § 1702 should be accepted without qualifications....[T]hese are obviously matters beyond the jurisdiction of the Public Utilities Commission. Thus it was early recognized that some limits are necessary to an expansive reading of § 1702."); *see also Motor Transit Co. v. R.R. Com.*, (1922) 189 Cal. 573, 580 ("Clearly it was not the purpose of the statute to provide the commission with power to adjudicate all controversies between litigants in the ordinary sense.").

WWPP's second cause of action alleges that SCE's withdrawal of the PPSA "without Commission oversight or approval" was a violation of Commission policies. Complaint at 27, ¶ 66. WWPP fails to allege any actual injury or specific violation of any tariff, law or Commission rule or order. Indeed, General Order 96-B, Section 5.3 allows a utility to "unilaterally" withdraw its advice letter prior to the date of issuance of a draft resolution. In this case, SCE's withdrawal of Advice 2442-E and Advice 2442-E-A was the appropriate procedure given that the PPSA had been terminated. Even if the Commission were to now approve the withdrawn advice letters, the WWPP PPSA would still be terminated.

If the Commission does not dismiss the Complaint for reasons of jurisdiction, the Complaint should be dismissed for failure to state a cause of action. WWPP may seek its remedy for its breach-of-contract claims through the dispute resolution process described in the

contract. To the extent WWPP seeks to dispute Commission decisions or California law and policy, a complaint before the Commission against SCE is not the appropriate forum.

**IV.**

**CONCLUSION**

For the reasons set forth above, the Complaint filed by Complainant in Case No. 12-05-021 should be dismissed.

Respectfully submitted,

JENNIFER TSAO SHIGEKAWA  
JONI A. TEMPLETON

*/s/ Joni A. Templeton*

By: Joni A. Templeton

Attorneys for  
SOUTHERN CALIFORNIA EDISON COMPANY

2244 Walnut Grove Avenue  
Post Office Box 800  
Rosemead, California 91770  
Telephone: (626) 302-6210  
Facsimile: (626) 302-3990  
E-mail: Joni.Templeton@sce.com

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