Decision **DRAFT DECISION OF ALJ SIMON** **(Mailed 4/20/2006)**

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking to Implement the California Renewables Portfolio Standard Program.	Rulemaking 04-04-026 (Filed April 22, 2004)

OPINION DENYING PETITION FOR MODIFICATION OF DECISION 05-07-039

I. Summary

We deny the petition of Southern California Edison Company (SCE) for modification of certain aspects of Decision (D.) 05-07-039 that address SCE's use of geothermal output from Calpine's Geysers geothermal facility for compliance with SCE's obligations under the Renewables Portfolio Standard (RPS) program.

II. Procedural Background

In. D.05-07-039, we approved with conditions the 2005 RPS procurement plans of Pacific Gas and Electric Company, San Diego Gas & Electric Company, and SCE. As part of that decision, we also considered the status for RPS compliance purposes of certain SCE contracts for the output of the Geysers geothermal project. After considering arguments about the application of Pub.

Util. Code § 399.12(a)(2)[1] and our Resolution E-3809, we concluded that "[p]rior to counting any geothermal output from contracts that were the subject of Resolution E-3809 (January 30, 2003) toward any RPS Incremental Procurement Target, SCE must present to Energy Division staff certification by the Energy Resources Conservation and Development Commission that the geothermal output is incremental geothermal output." (Ordering Paragraph 11.)

On August 26, 2005, SCE filed both an Application for Rehearing of Decision 05-07-039 (Application) and a Petition for Modification of Decision 05-07-039 (Petition). The Utility Reform Network (TURN) filed a response to the Application and the Petition on September 12, 2006. SCE filed a reply to TURN's response on September 16, 2006.

In D.06-01-046, we rejected SCE's claims of legal error in D.05-07-039 and denied its Application. In that decision, we did not address SCE's claims in the Petition that are not strictly claims of legal error. We turn to those claims now.

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[1] Section 399.12(a)(2) provides:

> A geothermal generation facility originally commencing operation prior to September 26, 1996, shall be eligible for purposes of adjusting a retail seller's baseline quantity of eligible renewable energy resources except for output certified as incremental geothermal production by the Energy Commission, provided that the incremental output was not sold to an electrical corporation under contract entered into prior to September 26, 1996. For each facility seeking certification the Energy Commission shall determine historical production trends and establish criteria for measuring incremental geothermal production that recognizes the declining output of existing steamfields and the contribution of capital investments in the facility or wellfield.

All subsequent references to sections are to the Public Utilities Code, unless otherwise specified.

III. Discussion

SCE summarizes its request for modification as seeking "to clarify that the decision [D.05-07-039] has only prospective effect and that SCE will not be penalized or otherwise prejudiced based on its good faith reliance on Resolution E-3809." (Petition, p. 2.)

Although couched as a request for clarification, SCE's request for prospective effect is just another version of the claim we rejected in D.06-01-046. SCE is asking us to declare that the requirements of § 399.12(a)(2) that geothermal production be certified as incremental by the California Energy Commission (CEC) do not apply to SCE until (at the earliest) July 2005, when we issued D.05-07-039. We will not repeat here our legal analysis in D.06-01-046, which rejected SCE's claims of legal error in our interpretation of § 399.12(a)(2). In its Petition, SCE advances no new legal argument explaining why this section of the RPS legislation should be implemented as of mid-2005 but ignored for the prior two and a half years.

SCE also argues that "[t]he Commission clearly has the discretion to. . . stat[e] that SCE will not be subject to penalties for prior years in which the Geysers output was reported as incremental. . . or in future years in which there are shortfalls. . ." (Petition, pp. 2-3.) We reject this argument for two related reasons.

First, SCE's request is premature. As we set out in D.03-06-071, each utility is required to provide us, in its first compliance report of the year, information about its prior year's procurement. In its Renewables Portfolio Standard Compliance Filing (March 1, 2006) (March Report), SCE notes that the CEC has

not yet certified RPS procurement for 2005.[2] SCE also notes that pursuant to D.05-07-039, it may be able to use contracts signed in the first half of 2006 as part of its demonstration of compliance for shortfalls greater than 25% in 2005 under the flexible compliance rules. Until SCE puts these pieces together and completes its report of 2005 procurement, neither SCE nor we will be able to determine whether SCE even has a shortfall that could put it in danger of being penalized as a result of its misplaced reliance on procurement from the Geysers project.[3] We decline to speculate on what we might do if such an event occurred. SCE's further invitation that we eschew any penalties arising from a shortfall due to SCE's reliance on the Geysers output in years after 2005 is even more speculative, and we summarily reject it.

Second, SCE's request for a preview of our enforcement intentions is inconsistent with the carefully balanced enforcement process we set out in D.03-06-071 and D.03-12-065. With attention to due process requirements, we approved a multi-step process for penalizing a utility that did not meet its RPS obligations. In addition to presenting information about procurement in its first compliance filing, "[i]f the utility is below the 75% [of target] annual threshold. . ., this filing is the utility's opportunity to demonstrate why its. . . shortcoming is a result of one or more of the four reasons for non-compliance

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[2] The CEC's verification of RPS procurement for years prior to 2005 is found in its Renewables Portfolio Standard Procurement Verification Report (February 2006) (http://www.energy.ca.gov/2006publications/CEC-300-2006-002/CEC-300-2006-002-CMF.PDF).

[3] SCE states as much in its March Report, noting that it "believes it may be able to satisfy any final 2005 shortfall by application of the Commission's flexible compliance rules." (Attachment A, n. 9.)

outlined [in D.03-06-071]." (D.03-06-071, *mimeo*., p.53.) The utility also includes a calculation of the maximum penalty that might be due if the Commission does not accept the utility's proffered explanation for the shortfall. We then consider the utility's reasons for non-compliance and determine whether the reasons excuse the non-compliance. If they do not, we determine "the actual penalty to be assessed." (D.03-12-065, *mimeo*., p. 15.)

This plan has no place in it for us to make determinations about penalties in advance of the need to do so. Indeed, there can be no such place, since the due process requirements of notice to the utility and the adequacy of our consideration of the utility's position, as we explained in D.03-12-065, cannot be satisfied without specific information about the utility's actual procurement situation that, as noted above, SCE has not yet provided. If and when SCE's reporting on its RPS compliance progress indicates that it may have a procurement shortfall that could subject it to penalties, SCE will have the opportunity to provide explanations of the shortfall for our consideration. Until then, however, there is no potential enforcement about which we could exercise our discretion.

V. Comments on Draft Decision

The draft decision of ALJ Simon in this matter was mailed to the parties in accordance with Pub. Util. Code § 311(g)(1) and Rule 77.7 of the Rules of Practice and Procedure. Comments were filed on _____.

IV. Assignment of Proceeding

Michael R. Peevey is the Assigned Commissioner and Burton W. Mattson and Anne E. Simon are the assigned Administrative Law Judges (ALJs) for this proceeding.

Finding of Fact

SCE has not provided sufficient information to determine whether it might be subject to penalties for failing to meet its obligations to date under the RPS program.

Conclusions of Law

1. The application of Pub. Util. Code § 399.12(a)(2) to SCE's RPS obligations should not be delayed until July 2005.

2. The Commission's discretion with respect to penalties for enforcement of SCE's RPS obligations should not be considered until SCE has provided information showing that it might be subject to penalties.

O R D E R

IT IS ORDERED that Southern California Edison Company's Petition for Modification of Decision 05-07-039 is denied.

This order is effective today.

Dated _____, at San Francisco, California.