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Date of Issuance
04/26/2010

Decision 10-04-055 April 22, 2010

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking on the Commission's Own Motion into Combined Heat and Power Pursuant to Assembly Bill 1613.	Rulemaking 08-06-024 (Filed June 26, 2008)

ORDER DISMISSING MOTION FOR STAY OF DECISION (D.) 09-12-042, MODIFYING D. 09-12-042, AND DENYING REHEARING OF D. 09-12-042, AS MODIFIED

I. INTRODUCTION

In Decision (D.) 09-12-042 (or "Decision"), we adopted the policies and procedures for purchase of excess electricity from eligible Combined Heat and Power ("CHP") systems by an electrical corporation under The Waste Heat and Carbon Emissions Reduction Act, Assembly Bill ("AB") 1613 (Stats. 2007, ch. 713).

On January 20, 2010, Pacific Gas and Electric Company ("PG&E"), Southern California Edison Company ("Edison"), Southern California Gas Company ("SoCalGas"), and San Diego Gas and Electric Company ("SDG&E") (collectively, "Joint Utilities"), jointly filed a timely application for rehearing of D.09-12-042. The Joint Utilities allege the following legal error: (1) the Commission exceeded its authority to set the wholesale price for energy in violation of the Supremacy Clause of the United States Constitution and the Federal Power Act ("FPA"); (2) the Commission failed to maintain "ratepayer indifference" as required by AB 1613; and (3) D.09-12-042 violates state law by failing to allocate the above-market costs of energy and capacity to all customers who benefit from the AB 1613 program. On January 20, 2010, the Joint Utilities also filed a Motion for Stay of D.09-12-042. Joint Utilities' motion requests that the Commission stay the Decision for ninety days.

On January 20, 2010, the Alliance for Retail Energy Markets ("AReM") also filed a timely application for rehearing of D.09-12-042. AReM alleges that D.09-12-042's allocation of AB 1613 contract costs to unbundled customers is unlawful because: (1) the allocation of any of the costs of the AB 1613 contracts to unbundled customers while failing to equally allocate any of the benefits violates Public Utilities Code section 2841(e)[1]; and (2) the allocation of costs to all customers based on indirect societal benefits is inconsistent with Commission precedent, and is arbitrary, discriminatory, an abuse of the Commission's discretion, and in violation of sections 1705, 451, and 453.

Responses to the rehearing applications and/or Motion for Stay were filed jointly by PG&E, SDG&E, and Edison; by AReM; by San Joaquin Refining Company, Inc.; jointly by California Clean DG Coalition ("CCDC") and Fuelcell Energy, Inc.; and by the Division of Ratepayer Advocates.

We have reviewed each and every argument raised in the rehearing applications and are of the opinion that modifications, as described herein, are warranted to: (1) clarify instances where reference to "avoided cost" is referring to the utilities' short-run avoided costs as previously adopted by the Commission in D.07-09-040; (2) clarify language in the Decision that could lead to ambiguity regarding the fact that the price adopted in the Decision is the price utilities must offer under the AB 1613 program; (3) correct an inaccuracy regarding the Federal Energy Regulatory Commission's ("FERC's") requirements for obtaining certification as a qualifying facility ("QF"); (4) clarify statements referencing any above-market portion of contract costs; (5) clarify the statement that the pricing formula adopted in the Decision reflects the current market price for power; (6) clarify that the discussion regarding procurement of emissions allowances is merely illustrative; (7) include additional findings of fact regarding how direct access ("DA") and community choice aggregation ("CCA") customers receive

[1] All subsequent section references are to the Public Utilities Code, unless otherwise specified.

benefits associated with the 10% location bonus; (8) delete references to D.02-11-074; and (9) correct typographical errors, as set forth below. Rehearing of D.09-12-042, as modified, is denied.

II. DISCUSSION

A. Motion for Stay

Ordering Paragraph 3 of the Decision directed PG&E, Edison, and SDG&E to file tariffs and standard contracts adopted in the Decision within forty-five days of the Decision's mailing date. The Decision mailed on December 21, 2009, and pursuant to Ordering Paragraph 3, the utilities were required to file the tariffs and standard contracts by February 4, 2010.

On January 20, 2010, the same day they filed their rehearing application, Joint Utilities filed a Motion for Stay requesting a ninety-day stay of the Decision. On January 27, 2010, pursuant to Rule 16.6 of the Commission's Rules of Practice and Procedure, Edison, on behalf of itself, PG&E, and SDG&E requested a ninety-day extension of time to comply with Ordering Paragraph 3. On January 28, 2010, the Executive Director granted PG&E, Edison, and SDG&E an extension of ninety days from the filing date of Joint Utilities' application for rehearing, for complying with Ordering Paragraph 3. The Executive Director did not grant an extension of time as to any ordering paragraphs in the Decision other than Ordering Paragraph 3.

On April 14, 2010, Edison, on behalf of itself, PG&E, and SDG&E requested an additional sixty-day extension of time to comply with Ordering Paragraph 3. On April 16, 2010, the Executive Director granted the request for an additional extension of time, extending the deadline for utilities to file the tariffs and standard contracts to June 21, 2010.

Because the alleged "serious and irreparable injury" that Joint Utilities argued warranted a stay was based on the directives in Ordering Paragraph 3 (see Joint Utilities' Motion for Stay, p. 3), the Executive Director's grant of an extension of time to comply with Ordering Paragraph 3 effectively mooted Joint Utilities' Motion for Stay.

As such, we find it is unnecessary to address the merits of the Motion and we dismiss the Motion for Stay as moot.

B. The Commission's Authority to Set the Price for the AB 1613 Program

The Joint Utilities allege that the Commission exceeded its authority to set the wholesale price for energy in violation of the Supremacy Clause of the United States Constitution and the FPA. Joint Utilities argue that pursuant to the FPA, the FERC has exclusive authority to regulate wholesale power sales and that the sole exception to this rule is the states' authority to establish an avoided-cost price when utilities purchase power from QFs pursuant to the Public Utilities Regulatory Policy Act of 1978 ("PURPA") (16 U.S.C. § 824a-3).[2] (Joint Utilities' Rehrg. App., pp. 4-7.) Joint Utilities allege that the Commission exceeded its jurisdiction in setting a price for the AB 1613 program to the extent that it set a wholesale rate that exceeds the utilities' avoided costs and did not require CHP facilities to obtain QF status.

We previously considered and rejected the same jurisdictional arguments that the Joint Utilities make in their rehearing application. Joint Utilities' arguments are based on the erroneous premise that the Commission is setting a price for wholesale power sales. As explained in the Decision, the Commission is not setting a price for wholesale power sales. (D.09-12-042, pp. 8-9.) Rather, the Commission is requiring California utilities under its jurisdiction to offer a certain price to encourage development of highly efficient CHP facilities in order reduce greenhouse gas ("GHG") emissions.

[2] "Avoided costs" are defined as "the incremental costs to an electrical utility of electrical energy or capacity or both which, but for the purchase from the qualifying facility or facilities, such utility would generate itself or purchase from another source. (18 C.F.R. § 292.101(b)(6).) We adopted the methodology for determining utilities' short-run avoided costs pursuant to PURPA in *Opinion on Future Policy and Pricing for Qualifying Facilities* [D.07-09-040] (2007) __Cal.P.U.C.3d __. At times the Decision generally refers to the utilities' short-run avoided cost previously adopted by the Commission as "avoided cost." In order to avoid any ambiguity, we modify the Decision, as set forth in the ordering paragraphs below, to clarify instances where we are referring to the utilities' short-run avoided costs as previously adopted by the Commission in D.07-09-040.

We modify the Decision, as set forth in the ordering paragraphs below, to clarify language in the Decision that could lead to ambiguity regarding the fact that the price adopted in the Decision is the price utilities must offer under the AB 1613 program.

The Decision acknowledges that: "Under the Federal Power Act, only the FERC may set rates for wholesale power sales to and by public utilities." (D.09-12-042, p. 72 [Finding of Fact ("FOF") 1].) As the Decision explains, although the FERC regulates the wholesale sellers, it does not regulate the resource portfolios, including procurement choices, of the buyer. (D.09-12-042, p. 8 (citation omitted).) The state has jurisdiction over retail sales service, which includes directing the planning and resource decisions of electric utilities under its jurisdiction. (16 U.S.C. § 824, subd. (b).) Through the AB 1613 program, the Commission is exercising its jurisdiction over the procurement practices of the purchaser. The AB 1613 program does not regulate the conduct of sellers. (D.09-12-042, p. 14.)

The Commission has long recognized the serious threats posed by GHG emissions and global warming. (See e.g. *Interim Opinion on Phase I Issues: Greenhouse Gas Emissions Performance Standard* [D.07-01-039] (2007) __Cal.P.U.C.3d __, pp. 212-216 (slip op.).) Through the AB 1613 program, the Commission is exercising its jurisdiction to reduce GHG emissions. As explained in the Decision, the Commission is not federally pre-empted from regulating in the area of GHG reductions. (D.09-12-042, pp. 11-12.) Joint Utilities do not demonstrate that there is any conflict between the Commission and the FERC in this area.

Furthermore, outside of PURPA, the Commission has the authority to adopt an offering price under the AB 1613 program for QFs participating in the program that differs from the short-run avoided costs adopted in D.07-09-040. As noted in the Decision, AB 1613 is a different program and it is not necessary for a CHP facility to obtain QF status in order to participate in the AB 1613 program.[3] However, a CHP

[3] There is an inaccuracy in footnote 6 of the Decision, which states: "CHP systems participating in this program never would be QFs if they do not apply to the FERC for certification to become

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facility participating in the AB 1613 program is not precluded from also obtaining status as a QF.

Since the efficiency and emissions standards required by the AB 1613 program are more stringent than the FERC's standards for QF certification, most if not all CHP facilities eligible under the AB 1613 program, could also qualify as a QF. In order for a CHP facility to participate in the AB 1613 program, it must obtain certification from the California Energy Commission ("CEC") and maintain that certification throughout the contract period. (D.09-12-042, p. 76 [FOF 52].) Subsequent to the issuance of the Decision, the CEC issued its final *Guidelines for Certification of Combined Heat and Power Systems Under the Waste Heat and Carbon Emissions Reduction Act, Public Utilities Code Section 2840 et seq.* ("CEC Guidelines").[4] Among other things, the CEC Guidelines require CHP facilities to achieve: at least a 60% Energy Conversion Efficiency; a nitrogen oxide (NOx) emission standard of 0.07 pounds per megawatt-hour (MWh); and a GHG emissions performance standard of no more than 1,100 pounds of carbon dioxide (CO_2) equivalent emissions per MWh. (CEC Guidelines, p. 3.) Each of these requirements furthers the environmental purpose of AB 1613.

Even if a CHP facility were to obtain certification as a QF, federal law does not preempt the Commission from adopting a price that utilities must offer to eligible CHP facilities pursuant to the AB 1613 program. As explained in the Decision, PURPA does not preempt state environmental laws. (D.09-12-042, p. 7.) Consequently, because of the environmental objectives of the CHP systems' eligibility requirements regarding efficiency and emissions standards under the AB 1613 program, as well as any additional

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a QF." In order to become a QF, a co-generator or small power producer with more than 1 megawatt ("MW") must file with the FERC an application for certification or notice of self-certification that establishes that it meets the FERC efficiency standards. (18 C.F.R. §§ 292.203(b) and (d), 292.207.) We modify footnote 6, as set forth in the ordering paragraph below, to accurately reflect the FERC regulations.

[4] The CEC Guidelines can be found at: http://www.energy.ca.gov/2009publications/CEC-200-2009-016/CEC-200-2009-016-CMF.PDF

environmental cleanup costs allocated to the excess electricity for sale to the utility (e.g., under AB 32), they necessarily require the utilities to offer higher prices than the short-run avoided costs for QFs under PURPA.[5]

This is analogous to FERC's examination of renewable energy credits (RECs) in *American Ref-Fuel Co., et al.*, in which FERC referred to 13 states that have programs with RECs premised on promoting goals, such as improved air and water quality and reduction of GHG emissions. (See *American Ref-Fuel Co., et al.* (2004) 107 FERC ¶ 61,016 at PP 2-3.) FERC held that its avoided cost regulations for QFs under PURPA did not contemplate the existence of RECs, and, therefore, the determinations concerning state-created RECs must be based upon state law. (See *Id.* at PP 6 & 16.) Therefore, the same reasoning should apply to the environmental compliance costs required under AB 1613, which also were not contemplated under PURPA. States do not violate the short-run avoided cost regulations of FERC when States require utilities to offer to pay additional compensation for the environmental attributes of the QF. (See *Id.* at PP 15-17.) The short-run avoided cost pricing adopted by the Commission in D.07-09-040 does not include these environmental attributes. However, long-term procurement by utilities would have to comply with the GHG emissions performance standards and other environmental compliance costs. Therefore, due to the decreased need for new generation or additional procurement by utilities as a result of the development of CHP systems, the utilities would avoid the higher costs associated with that long-term procurement.

As explained further below, the AB 1613 offering price adopted in the Decision reflects the attributes of an eligible CHP facility participating in the AB 1613 program. This offering price is only applicable to CHP facilities that maintain their certification for the AB 1613 program with the CEC. If a CHP facility that is also a QF is

[5] The FERC's regulations under PURPA require a cogeneration facility to have an energy efficiency standard of no less than 42.5% in order to obtain certification as a QF. (18 C.F.R. § 292.205.) In addition, there are no GHG or NOx standards required by FERC to become a QF.

decertified from the AB 1613 program by the CEC, the CHP facility would still retain its QF status and the avoided cost pricing adopted in D.07-09-040 would apply. The FERC has exclusive authority to certify and decertify QFs. (*Independent Energy Producers Assn. v. Cal. Pub. Utils. Com.* (9th Cir. 1994) 36 F.3d 848, 855; 18 C.F.R. § 292.207.)

For the forgoing reasons, Joint Utilities do not demonstrate that the Commission's authority to require utilities to offer a certain price under the AB 1613 program is preempted by either the FPA or PURPA. Accordingly, there is no basis for granting rehearing on this issue.

C. Ratepayer Indifference

AB 1613 requires that "ratepayers not utilizing combined heat and power systems are held indifferent to the existence of this tariff." (Pub. Util. Code, § 2841, subd. (b)(4).) Joint Utilities allege that the Decision fails to maintain "ratepayer indifference" as required by AB 1613 because: (1) the Decision adopts a price based on the cost of building and operating a Combined Cycle Gas Turbine ("CCGT"); and (2) the Decision includes "societal benefits" in the price for power. These allegations lack merit.

Joint Utilities assert that the Decision should have adopted pricing based on the market for "as-available" resources or the Commission adopted utility avoided cost for as-available power rather than based on the cost of building and operating a CCGT. (Joint Utilities' Rehrg. App., p. 13.) The Commission did not err in adopting an AB 1613 price based on the building and operating costs of a CCGT. Evidence in the record supports that the operating profile of a CHP facility most closely resembles that of a CCGT. (See e.g., Comments of SDG&E and SoCalGas, 8/24/09, p. 3.) Based on the record, the Decision finds that a CCGT represents a reasonable proxy for the generation that a utility would have to procure if not for a CHP facility participating in the AB 1613 program. (D.09-12-042, p. 35.)

The Decision states that the pricing formula adopted in the Decision reflects the current market price for power. (D.09-12-042, p. 39.) The Decision also infers that there may be a stranded above-market portion of contract costs. (D.09-12-042, p. 24.) These statements may create confusion in light of our determination that a CCGT

is a reasonable proxy for the marginal unit avoided by an eligible CHP facility. Accordingly, we modify the Decision, as set forth in the ordering paragraphs below, to clarify these statements.

The Commission previously considered and rejected the proposal that pricing for the AB 1613 program be based on as-available power. The Decision explains that because of the eligibility requirements of the AB 1613 program:

> CHP systems under this program are likely to operate as if they were a firm resource, in order to provide consistent thermal and electrical output to the host. While the product being delivered under the contract will be as-available … the eligible CHP facility will be operating as a firm resource.

(D.09-12-042, pp. 36-37; see also Reply Comments of CCDC, 9/3/09, p. 6; see also Reply Comments of California Cogeneration Council, Cogeneration Association of California, Energy Producers and Users Coalition, 9/3/09, p. 4, fn. 5.) The Decision further explains that the pricing option adopted in the Decision includes Time of Delivery factors applied to the Market Price Referent, and therefore, accounts for the value of different products such as baseload and as-available electricity. (D.09-12-042, p. 37.) Joint Utilities do not demonstrate that there is any legal error regarding the Commission's determination that the price offered under the AB 1613 program should be based on the cost of building and operating a CCGT.

The Commission also did not err in including environmental and locational benefits in the AB 1613 price. Joint Utilities do not demonstrate that our determinations regarding the GHG compliance costs and locational bonus violate AB 1613's mandate of maintaining ratepayer indifference.

Joint Utilities dispute that the costs for GHG compliance reasonably approximate the value of the GHG reduction benefits obtained. Joint Utilities allege that there is often an inverse correlation between GHG costs and GHG benefits because if a generator elects to run less efficiently, its GHG compliance costs will be higher but the

GHG reduction benefits to non-participating customers will be lower. (Joint Utilities' Rehrg. App., p. 14.)

Joint Utilities' allegation lacks merit with regard to a CHP facility operating under the AB 1613 program. Joint Utilities' hypothetical scenario does not take into account that CHP facilities under the AB 1613 program must meet certain minimum efficiency levels as determined by the CEC. (Pub. Util. Code, § 2843; CEC Guidelines, pp. 3-4.) The Decision provides that the obligation of the buyer to be responsible for any GHG compliance costs would only be up to the emissions associated with operating the CHP facility at these minimum efficiency levels. The Decision requires the CHP facility to be responsible for any additional compliance obligation deriving from suboptimal operation of the facility. (D.09-12-042, pp. 48-49.) Therefore, to the extent that a CHP facility under the AB 1613 program elects to run less efficiently, ratepayers would not be accountable for any extra GHG compliance costs.[6]

Joint Utilities allege that there is no support in the Decision for a ten percent location bonus. (Joint Utilities' Rehrg. App., p. 15.) This allegation lacks merit. The Decision determines that a 10% location bonus is appropriate in constrained areas because CHP sited in these areas would provide system benefits such as transmission and distribution upgrade deferrals and local grid stability and reliability. The record supports that a ten percent adder is an appropriate proxy for determining these locational benefits. (Comments of Fuelcell Energy, Inc., 8/24/09, p. 9; Comments of CCDC, 8/24/09, p. 9.)

[6] As the Decision acknowledges: "the [California Air Resources Board] has not yet determined the point of compliance for these small and medium (up to 20 MW), highly efficient CHP units, nor have they determined how new CHP entrants will operate under a cap-and-trade system." (D.09-12-042, p. 47.) Therefore, the Decision's discussion regarding the utility Buyer's procurement of emissions allowances may be premature. (See D.9-12-042, p. 47.) We modify the Decision, as set forth in the ordering paragraph below, to clarify that the discussion regarding procurement of emissions allowances is merely illustrative.

D. Allocation of Costs and Benefits to all "Benefiting Customers"

AB1613 requires the costs and benefits associated with any tariff or contract entered into pursuant to the AB 1613 program to be allocated to all "benefiting customers." (Pub. Util. Code, § 2841, subd. (e).) AB 1613 states that "benefiting customers" may, as determined by the Commission, include bundled service customers of the electrical corporation, DA customers, and CCA customers. (*Ibid*.)

1. Allocation of Energy and Capacity Costs

The Joint Utilities allege that the Decision violates the mandate in section 2841(e) because it does not allocate alleged above-market costs of energy and capacity purchased under the AB 1613 program to all benefiting customers. Joint Utilities' allegation lacks merit. Joint Utilities' allegation is based on the erroneous premise that the price offered under the AB 1613 program does not reflect the price avoided by an eligible CHP facility. As explained above, the Decision finds that a CCGT represents a reasonable proxy for the generation that a utility would have to procure if not for a CHP facility participating in the AB 1613 program. (D.09-12-042, p. 35.) Therefore, there are no additional costs relating to energy and capacity that need to be allocated.

Joint Utilities' rehearing application presents various price comparisons that allegedly illustrate above-market costs of energy and capacity of the offering price adopted in the Decision. (Joint Utilities' Rehrg. App., p. 16.) These price comparisons fail to take into account the Commission's determination that the market price or the short-run avoided cost pricing adopted in D.07-09-040 do not accurately reflect the price avoided by an eligible CHP facility under the AB 1613 program. Furthermore, Joint Utilities' price comparisons are based on prices for as-available power, which is inconsistent with the Commission's determination that these CHP facilities operate as a firm resource. As explained above, these CHP facilities will be operating like a firm resource. Accordingly, pricing is appropriately based on firm power rather than as-available power. Therefore, Joint Utilities do not demonstrate any legal error with regard to this issue.

2. Allocation of Costs to DA and CCA Customers

AReM alleges that the Decision's allocation of AB 1613 contract costs to unbundled customers is unlawful because: (1) the allocation of any of the costs of the AB 1613 contracts to unbundled customers while failing to equally allocate any of the benefits violates section 2841(e); and (2) the allocation of costs to all customers based on indirect societal benefits is inconsistent with Commission precedent, and is arbitrary, discriminatory, an abuse of the Commission's discretion, and in violation of sections 1705, 451, and 453. These allegations lack merit.

a) Allegation that Allocation Violates Section 2841(e)

The Decision determines that all retail end-use customers, including DA and CCA customers, will receive the environmental and locational benefits of the AB 1613 program, and thus, should pay for the costs associated with these benefits. This determination complies with section 2841(e). Contrary to AReM's allegations, unbundled customers will receive benefits from the AB 1613 program.

AReM alleges that the only "tangible benefits" of the AB 1613 contracts are: the energy, the capacity value, any RECs, and avoided GHG emissions associated with the power product. AReM alleges that these "tangible benefits" will only be attributed to the buying utility. (AReM Rehrg. App., p. 5.) AReM's allegations do not demonstrate that the Commission's determination to allocate environmental and locational costs to DA and CCA customers violates section 2841(e). The energy, capacity value, and any RECs associated with the power sold under the AB 1613 program, are included in the offered contract price. These benefits are not associated with the GHG compliance costs or locational adder, and thus, are not related to the costs allocated to DA and CCA customers. In accordance with section 2841(e), the only costs allocated to DA and CCA customers are those associated with the benefits these customers receive under the AB 1613 program.

The benefits of the AB 1613 program are not limited to the "tangible benefits" that AReM lists in its rehearing application. (See AReM Rehrg. App., p. 5.) As

stated in the Decision: "Although the AB 1613 contracts have identified certain quantifiable benefits that shall be conveyed to the buyers, all customers will benefit from reduced GHG emissions, potential reduction in congestion and more efficient utilization of natural gas as a result of encouraging development of these CHP systems." (D.09-12-042, p. 22.) The Decision further finds that since GHG compliance costs and an adder for locating within certain load areas would directly be associated with the benefits received by all customers, it would be reasonable to allocate these costs among all customers. (D.09-12-042, p. 24.) The Commission's determination that DA and CCA customers receive benefits from the AB 1613 program and thus should be allocated the costs associated with those benefits is consistent with the requirement in section 2841(e) that the costs and benefits associated with any tariff or contract entered into pursuant to the AB 1613 program be allocated to all "benefiting customers." (Pub. Util. Code, § 2841, subd. (e).)

Section 2841(e) provides that "benefiting customers" may include DA and CCA customers. Thus the Legislature clearly contemplated that DA and CCA customers could receive benefits from the AB 1613 program, even though these customers would not necessarily be receiving energy from a CHP facility participating in the AB 1613 program. AB 1613 gives the Commission the discretion to determine who are "benefiting customers" under the program. (Pub. Util. Code, § 2841, subd. (e).) The Commission properly exercised its discretion to determine that DA and CCA customers receive benefits from the AB 1613 program, and therefore, should bear responsibility for the costs associated with those benefits.

b) Allegation that Allocation Violates Section 1705

AReM alleges that the Decision's finding that CHP systems will produce environmental and locational benefits and that all customers will receive those benefits is conclusory, and thus violates section 1705, which requires Commission decisions to contain findings of fact and conclusions of law on all issues that are material to the Commission's decision or order.

Contrary to AReM's allegations, the Decision contains findings of fact and conclusions of law that support that CHP facilities operating under the AB 1613 program provide environmental benefits. One of the goals of the AB1613 program is to encourage the development of more efficient CHP systems that would provide environmental benefits, particularly in the form of reduced emission of carbon dioxide and other carbon-based greenhouse gases. (Pub. Util. Code, § 2840.6, subd. (b); D.09-12-042, p. 72 [FOF 4].) As evidenced by the text of AB 1613 itself, the Legislature clearly considered the reduction of greenhouse gas emissions as being environmentally beneficial. (See Pub. Util. Code, § 2840.6, subd. (b).) Further, as noted in the Decision, AB 1613's policy goal to reduce carbon-based emissions is part of the state's overall objective to reduce GHG emissions, as articulated in AB 32 (Stats. 2006, ch. 598). (D.09-12-042, p. 10.)

Due to AB 1613's eligibility requirements regarding efficiency and emissions, CHP systems participating in the AB 1613 program will further AB 1613's policy objective of reducing greenhouse gas emissions. (See Pub. Util. Code, § 2843; D.09-12-042, pp. 10-11, p. 72 [FOFs 5-7] & p. 76 [FOF 52]; CEC Guidelines, pp. 3-4.) Therefore, the Decision concludes that: "Purchase of electricity under AB 1613 would serve the public interest by encouraging additional efficient use of energy and the reduction of GHG emissions." (D.09-12-042, p. 77 [Conclusion of Law ("COL") 1].)

As stated in the Decision, all customers, including CCA and DA customers, will receive environmental benefits from the AB 1613 program. (D.09-12-042, p. 73 [FOF 13].) There is no basis for distinguishing among various customer classes in allocating the environmental benefit of reduced GHG emissions. Consequently, there is no basis for distinguishing among various customer classes in allocating the costs associated with this benefit.[7]

[7] AReM alleges that only the buying utility's bundled customers receive the environmental attributes of the power purchased under AB 1613 program because any RECs associated with the power product purchased under an AB 1613 contract will be conveyed to the buying utility. (AReM Rehrg. App., p. 5.) However, it is the price offered under the AB 1613 program, and not the GHG compliance costs that includes certain green attributes

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There is also a basis for determining that DA and CCA customers receive benefits from the locational bonus and should be allocated the associated costs. Contrary to AReM's allegations, the local Resource Adequacy ("RA") capacity credit is not the only benefit customers will receive from the 10% locational bonus. (See AReM Rehrg. App., p. 7.) As explained above, based on the record, the Decision determines that a 10% location bonus is appropriate in constrained areas because CHP sited in these areas would provide system benefits such as transmission and distribution upgrade deferrals and local grid stability and reliability. (D.09-12-042, pp. 33 & 38.) Because all customers, including DA and CCA customers, receive transmission and distribution services from the investor owned utilities, these customers would also receive the benefits of any transmission and distribution upgrade deferrals.

Moreover, all customers, including DA and CCA customers, would benefit from local grid stability and reliability from CHP facilities sited in distribution or transmission constrained areas. One of the goals of AB 1613 is to "dramatically advance the efficiency of the state's use of natural gas by capturing unused waste heat, and in so doing, help offset the growing crisis in electricity supply and transmission congestion in the state." (Pub. Util. Code, § 2840.6, subd. (a).) As with a reduction in GHG emissions, the Legislature viewed stability and reliability as intended benefits of the AB 1613 program. As noted in the Decision, all customers benefit from reduced transmission congestion. (D.09-12-042, p. 22.) The locational benefits are system-wide benefits that are not limited to local RA capacity credits, and thus are not allocated only to a utility's bundled customers. Therefore, costs associated with the locational benefits also should not be allocated only to bundled customers.

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such as RECs. (D.09-12-042, pp. 50-51.) Therefore, the Commission's allocation of any RECs associated with the power sold under the AB 1613 program is not relevant to its allocation of GHG compliance costs.

In accordance with section 2841(e), DA and CCA customers should be allocated the costs associated with the locational benefits. The Decision contains findings of fact and conclusions of law stating that all customers, including DA and CCA customers, should pay for the locational bonus since all customers receive benefits from optimal citing of the CHP systems participating in the AB 1613 program. (D.09-12-042, pp. 73 [FOFs 11, 13, 18, 19], p. 77 [COL 4].) However, the findings of fact in the Decision may not precisely and clearly set forth all of our reasons for allocating the costs of the locational bonus to DA and CCA customers, as explained above. Therefore, we modify the Decision, as set forth in the ordering paragraphs below, to include additional findings of fact setting forth this rationale.

c) Allegation that Allocation Violates Sections 451 and 453

AReM alleges that since unbundled customers will bear the costs of their own GHG compliance associated with the energy they consume, requiring unbundled customers to pay for GHG compliance costs associated with energy that bundled customers consume violates the just and reasonable requirement of section 451 and the prohibition on unreasonable and unfairly discriminatory rates contained in section 453. (AReM Rehrg. App., p. 8.)

AReM fails to demonstrate that the Decision violates sections 451 or 453. AB 1613 requires that the costs and benefits of the AB 1613 program be allocated to all benefiting customers. (Pub. Util. Code, § 2841, subd. (e).) It is in accordance with AB 1613, and not unreasonable or discriminatory, to allocate to unbundled customers the costs associated with the benefits they will be receiving as a result of the AB 1613 program. In the event that unbundled customers have to bear any GHG compliance costs associated with the energy they consume, those costs would not be associated with the AB 1613 program. The Decision only allocates costs and benefits associated with the AB 1613 program.

AReM's allegation that the Decision violates section 451 lacks merit. The GHG costs allocated to DA and CCA customers are reasonable. As explained above, all

customers will receive environmental benefits from the AB 1613 program, and therefore it is reasonable to allocate the costs associated with these benefits to all customers. (See also, D.09-12-042, p. 78 [COL 4].) It would be unreasonable for DA and CCA customers to be exempt from these costs when all customers, including DA and CCA customers, will be receiving the environmental benefits and when bundled and POU customers will be paying for these costs. (See D.09-12-042, p. 78 [COL 6].) Further, excluding DA and CCA customers from having to pay a fair share of these costs would allow these customers to receive certain benefits from the AB 1613 program without paying for the associated costs, in contravention of section 2841(e).

AReM's allegation that the Decision violates section 453 lacks merit. The AB 1613 costs are not allocated in a discriminatory manner. Pursuant to AB 1613, all benefiting customers are allocated the costs associated with the benefits they are receiving as a result of the AB 1613 program. These costs are allocated on an equal cents/kilowatt-hour basis. (D.09-12-042, p. 73 [FOF 19].) No class of customers would pay more or less than any of the other classes for the benefits received. Furthermore, allocation of these costs to DA and CCA ensures a level playing field so that no entity receives an unfair advantage over the utilities that are required to participate in the AB 1613 program. Since the Commission determined that all customers, including DA and CCA customers, will receive environmental benefits from the AB 1613 program, it would be discriminatory to exempt only DA and CCA customers from paying for the costs associated with those benefits.

d) Allegation that Allocation is Inconsistent with Prior Commission Decisions

AReM alleges that the Decision's reliance on *Order Granting Rehearing to Modify Decision 02-10-063* [D.02-11-074] (2002) __Cal.P.U.C.3d __,[8] to support the

[8] The Decision references Attachment A to D.02-11-074. D.02-11-074 granted rehearing to modify *Decision Adopting Methodology for Setting Charges to Recover Bond-Related Costs Incurred by the Department of Water Resources* [D.02-10-063] (2002) __Cal.P.U.C.3d __. D.02-10-063 was replaced in its entirety by Attachment A to D.02-11-074.

allocation of the GHG compliance costs and locational bonus to all customers is misplaced. AReM also alleges that the Decision's allocation of the costs associated with the AB 1613 program is inconsistent with the Commission's prior decisions. AReM cites to two Commission decisions: *Direct Access Cost Responsibility Surcharge Decision* [D.02-11-022] (2002) __Cal.P.U.C.3d __, and *Opinion on New Generation and Long-Term Contract Proposals and Cost Allocation* [D.06-07-029] (2006) __Cal.P.U.C.3d __. (See AReM Rehrg. App., p. 11, fn. 23.)

The Decision states that the Commission's determination to allocate the costs and benefits of the AB 1613 program to all retail end-use customers, including DA and CCA customers, is supported by prior Commission decisions such as D.02-11-074. (D.09-12-042, p. 23.) In D.02-11-074, the Commission determined that all retail end-use customers should bear responsibility for costs associated with power purchased by the Department of Water Resources ("DWR") during the Energy Crisis. The Commission's reasoning in D.02-11-074 was based in part on the fact that the DWR purchases helped to stabilize the entire grid during the Energy Crisis. This rationale is analogous to the rationale in the Decision that all retail end-use customers will benefit from AB 1613 and thus should bear responsibility for the associated costs.

Although the Commission did not err in referencing D.02-11-074, the Decision's reference to D.02-11-074 creates unnecessary confusion and discussion regarding issues relating to the Energy Crisis. As explained above, there are independent reasons why these costs should be allocated to DA and CCA customers. Therefore, we modify the Decision, as set forth in the ordering paragraphs below, to delete reference to D.02-11-074.

AReM does not demonstrate that the Decision's allocation of environmental and locational costs is inconsistent with D.02-11-022. In D.02-11-022, the Commission determined that continuous DA customers that had not consumed DWR-procured power should not be required to pay any DWR bond costs. The Commission determined that no costs were incurred on behalf of these customers when DWR power was procured. The Commission reasoned that since the purpose of the bond charge was

to compensate for the undercollection of historic costs incurred by DWR, it was equitable that the charges bear some relationship to those groups of customers that actually purchased power from DWR. (D.02-11-022, *supra*, at p. 60 (slip op.).) The Commission's rationale for granting an exception to continuous DA customers from the DWR bond charge does not apply in this instance. For the reasons explained above, DA and CCA customers receive environmental and locational benefits from the AB 1613 program and are only allocated the costs associated with the benefits they receive.

AReM also does not demonstrate that the Decision's allocation of environmental and locational costs is inconsistent with D.06-07-029. In D.06-07-029, the Commission adopted a cost allocation mechanism to allocate the costs and benefits of new generation to all benefiting customers in a utility's service territory. Similarly, in the Decision, the Commission allocated the costs and benefits associated with the AB 1613 program to all benefiting customers. Under the AB 1613 program, certain benefits are conveyed only to the utility's bundled customers. DA and CCA customers are not allocated any costs associated with these benefits. Rather, they are allocated costs associated with the benefits they receive under the AB 1613 program.

AReM's allegations that the Decision is inconsistent with D.02-11-022 and D.06-07-029 are based on the erroneous premise that DA and CCA customers do not receive any benefits under the AB 1613 program. As explained above, DA and CCA customers receive benefits under the AB 1613 program and thus are allocated the associated costs. Accordingly, we do not find that the Decision is inconsistent with either D.02-11-022 or D.06-07-029.

E. Typographical Errors

Joint Utilities' rehearing application alleges that there is a typographical error in the Decision in that the Decision states that CHP systems will be subject to a statewide cap of 500 MW, but also rejects the statewide cap. (Joint Utilities' Rehrg. App., p. 9, fn. 29.) Joint Utilities are correct that the Decision ultimately declines to adopt a statewide cap for the AB 1613 program. (D.09-12-042, p. 28.) Rather, the Decision determines that an electrical corporation should file an application seeking authorization

to establish a maximum kilowatt hours limitation on the amount of excess electricity it must purchase under the AB 1613 program. (D.09-12-042, p. 28.) Therefore, we modify the Decision, as set forth in the ordering paragraph below, to delete the contradictory statement that CHP systems will be subject to a statewide cap.

We also modify the Decision to correct a typographical error in FOF 20. We modify FOF 20, as set forth in the ordering paragraph below, to delete the words "electrical corporation" that were inadvertently inserted near the end of the sentence.

III. CONCLUSION

We dismiss the Motion for Stay of D.09-12-042 as moot. For the reasons stated above, we modify D.09-12-042 to: (1) clarify instances where reference to "avoided cost" is referring to the utilities' short-run avoided costs as previously adopted by the Commission in D.07-09-040; (2) clarify language in the Decision that could lead to ambiguity regarding the fact that the price adopted in the Decision is the price utilities must offer under the AB 1613 program; (3) correct an inaccuracy regarding the FERC's requirements for obtaining certification as a QF; (4) clarify statements referencing any above-market portion of contract costs; (5) clarify the statement that the pricing formula adopted in the Decision reflects the current market price for power; (6) clarify that the discussion regarding procurement of emissions allowances is merely illustrative; (7) include additional findings of fact regarding how DA and CCA customers receive benefits associated with the 10% location bonus; (8) delete references to D.02-11-074; and (9) correct typographical errors. Rehearing of D.09-12-042, as modified, is denied

THEREFORE, IT IS ORDERED that:

1. The Motion for Stay of D.09-12-042 filed by Joint Utilities is dismissed as moot.

2. D.09-12-042 shall be modified as follows:

   a. The first sentence of footnote 6 on page 7 is modified to read:

      "Indeed, CHP systems with more than 1 MW participating in this program never would be QFs if they do not apply to the FERC for certification to become a QF."

b. The first full sentence on page 11 beginning with "Finally as discussed in Section 3.4…" is deleted in its entirety.

c. The first sentence of the second full paragraph on page 13 beginning with "These factors all support…" is modified to read:

"These factors all support a conclusion that requiring the utilities to offer a certain price under the AB 1613 program would be within the Commission's authority."

d. The second sentence of the second paragraph on page 16 beginning with "While one could argue…" is modified to read:

"While one could argue that indifference would be achieved by setting the price equal to the short-run avoided cost price adopted in D.07-09-040 or the market price, we do not believe that such a narrow application would be the appropriate measure in this instance."

e. The first three sentences of the first paragraph on page 23 beginning with "This determination is supported…" are deleted in their entirety.

f. The fourth sentence of the first paragraph on page 23 is modified to delete the word "similarly."

g. The second paragraph on page 24 beginning with "The second consideration…" is modified as follows:

"The second consideration is what costs should be allocated to the benefiting customers. AB 1613 requires the costs and benefits associated with any tariff or contract entered into pursuant to the AB 1613 program to be allocated to all benefiting customers. As we discussed in Section 3.1 above, the purpose of this FIT is to encourage the development of a certain type of CHP system that provides certain energy efficiency and environmental attributes. The price utilities offer to the eligible CHP facilities should include costs associated with these energy efficiency and environmental attributes."

h. The second sentence of the third paragraph on page 24 beginning with "As discussed in this decision…" is modified to read:

"As discussed in this decision, pricing offered under the contracts shall include costs associated with GHG

attributes, in the form of GHG compliance costs, and an adder for locating within certain load areas."

i. The first sentence of the second paragraph on page 39 beginning with "While we find…" is modified to read:

"While we find that the pricing formula adopted in this decision for determining the price utilities must offer to eligible CHP facilities reflects the marginal unit currently avoided by an eligible CHP facility, it is possible that the formula will need to be revised in the future as the market for power from this source of generation develops."

j. The third and fourth sentences of the first paragraph on page 47 beginning with "For compliance costs associated…" is modified to read:

"For instance, for compliance costs associated with procuring emissions allowances, as opposed to direct compliance costs in the form of fees or taxes, we believe that instead of reimbursing the Seller for allowance costs paid by the Seller, the Buyer shall procure allowances on behalf of the Seller. In this scenario, since the utility Buyer will be procuring allowances for its entire portfolio it will be better equipped to manage allowance procurement at a lower cost for ratepayers."

k. The first full sentence on page 69 beginning with "This price is not limited…" is modified to read:

"This price is not limited to the short-run avoided cost price adopted in D.07-09-040 or the CAISO market price."

l. Finding of Fact 20 on page 74 is modified to read:

"An electrical corporation should file an application seeking authorization to establish a maximum kilowatt hours limitation on the amount of excess electricity it must purchase under this program before a maximum MW limitation is set."

m. Finding of Fact 62 is added to read:

"A ten percent location bonus is appropriate in constrained areas because CHP sited in these areas would provide system benefits such as transmission

and distribution upgrade deferrals and local grid stability and reliability."

n. Finding of Fact 63 is added to read:

"The record supports that a ten percent locational adder is an appropriate proxy for determining the locational benefits of the AB 1613 program."

o. Finding of Fact 64 is added to read:

"Because all retail end-use customers, including DA and CCA customers, receive transmission and distribution services from the investor owned utilities, all customers receive the locational benefits of any transmission and distribution upgrade deferrals."

p. Finding of Fact 65 is added to read:

"All retail end-use customers benefit from the locational benefits of local grid stability and reliability."

3. Rehearing of D.09-12-042, as modified herein, is denied.

This order is effective today.

Dated April 22, 2010, at Los Angeles, California.

MICHAEL R. PEEVEY
President
DIAN M. GRUENEICH
JOHN A. BOHN
TIMOTHY ALAN SIMON
NANCY E. RYAN
Commissioners