

Decision 10-06-004 June 3, 2010

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

Application of Southern California Edison Company (U338E) for Modification of Resolution E-4293, Resolution E-4263, Resolution E-4300, and Resolution E-4295.

Application 10-03-009  
(Filed March 9, 2010)

**DECISION ON MODIFICATION OF FOUR RESOLUTIONS  
RELATIVE TO RPS CONTRACT COST RECOVERY**

**1. Summary**

Southern California Edison Company (SCE) applies for modification of four resolutions. The requested modifications are with respect to conditions under which costs are recoverable for electricity bought by the utility from sellers pursuant to the renewables portfolio standard program. SCE asserts that the four resolutions limit cost recovery compared to the cost recovery authorization provided in similar prior resolutions, thereby jeopardizing its ability to proceed with the contracts approved by these recent resolutions.

We grant the application in part by modifying the language and findings to revert to that employed in prior resolutions. We make the same modifications in two resolutions adopted after the date this application was filed. We also provide clarification regarding our expectations for utility administration of renewables portfolio standard contracts. This proceeding is closed.

**2. Background**

On December 21, 2009, the Commission issued three of the four resolutions which are the subject of this application. On January 26, 2010, the Commission

issued the fourth resolution.<sup>1</sup> Each resolution approves without modification a power purchase agreement (PPA) between SCE and a seller of electricity pursuant to the renewables portfolio standard (RPS) program, and authorizes cost recovery by SCE.

On March 9, 2010, SCE applied for modification of the four resolutions. SCE asserts that the Commission has since 2005 repeatedly found payments made by SCE pursuant to RPS contracts to be fully recoverable in rates over the term of the contracts, subject to Commission review of SCE's contract administration. SCE states that the Commission now, without explanation in these four resolutions, limits SCE's cost recovery.

SCE claims the limitation presents two problems. First, by referring to a non-modifiable standard term and condition (STC) rather than the contract itself, SCE is concerned that it could be obligated to pay the seller pursuant to the contract but not be able to receive cost recovery for the payments. Second, by

---

<sup>1</sup> The four resolutions are:

- Resolution E-4293 (issued December 21, 2009) approves a 20-year contract between Southern California Edison Company (SCE) and Echanis, LLC for 40 megawatts (MW) to 104 MW of wind energy from a project located in Harney County, Oregon.
- Resolution E-4263 (issued December 21, 2009) approves a 10-year contract between SCE and Ventura Regional Sanitation District for 1.57 MW to 5 MW of landfill gas energy from a project located in Ventura County, California.
- Resolution E-4300 (issued December 21, 2009) approves a two-year contract between SCE and Puget Sound Energy, Inc. for 50 MW to 223.6 MW of wind energy from a project located in Sherman County, Oregon.
- Resolution E-4295 (issued January 26, 2010) approves a one-year contract (through the end of June 2010) between SCE and Sierra SunTower, LLC for 5 MW of solar thermal energy from a project located in Lancaster, California.

conditioning SCE's rate recovery on actions that SCE believes are in the sole control of the seller, SCE is concerned that the risk of contract breach by the seller is inappropriately placed on SCE. SCE concludes that these limitations jeopardize SCE's ability to proceed with the underlying contracts and, if the limitations are applied in future resolutions, will undermine SCE's ability to enter into new contracts. SCE proposes modified language in both dicta and findings of the four resolutions.

SCE asks for a quick decision, asserting that its rights to terminate three of the affected contracts will expire soon, and, in the case of one project, construction may be delayed if this issue is not resolved quickly. SCE moved for an order shortening time to respond or protest. The motion to shorten time was granted.

On March 29, 2010, responses in support of the application were filed by Independent Energy Producers Association (IEP) and San Diego Gas & Electric Company (SDG&E), and a protest in opposition was filed by the Division of Ratepayer Advocates (DRA). On April 5, 2010, replies in opposition to the protest of DRA were filed by SCE and Pacific Gas and Electric Company (PG&E).

On April 12, 2010, a prehearing conference (PHC) was held to obtain a more complete and better understanding of Applicant's and parties' positions. The Administrative Law Judge (ALJ) asked Applicant to identify the original language used by the Commission regarding cost recovery. On April 15, 2010, Applicant filed and served a document with the original language, the language it believes objectionable, and its proposed modifications.

### 3. Discussion and Analysis

SCE asks for relief in two areas: (a) assurance of cost recovery and (b) clarification of parties' obligations. SCE proposes to both delete and add language to address its concerns.

We decline to adopt the more complicated language recommended by SCE. Rather, we revert to the language used in similar prior resolutions. This language is simpler and covers all situations, as we explain further below. We also clarify our expectations with respect to utility contract administration.

#### 3.1. Assurance of Cost Recovery

SCE's first concern involves assurance of cost recovery.

The four resolutions include the following language in dicta and findings:

Provided the generation is from an eligible renewable energy resource, or Seller is otherwise compliant with Standard Term and Condition 6, set forth in Appendix A of D.08-04-009 and included in the terms of the PPA, payments made by SCE under the PPA are fully recoverable in rates over the life of the PPA, subject to Commission review of SCE's administration of the PPA.<sup>2</sup>

STC 6 is non-modifiable and addresses eligibility:

Seller, and, if applicable, its successors, represents and warrants that throughout the Delivery Term of this Agreement that: (i) the Project qualifies and is certified by the CEC [California Energy Commission] as an Eligible Renewable Energy Resource ("ERR") as such term is defined in Public Utilities Code Section 399.12 or Section 399.16; and (ii) the Project's output delivered to Buyer qualifies under the requirements of the California Renewables Portfolio Standard. To the extent a change in law occurs after execution of this Agreement that causes this representation and

---

<sup>2</sup> Resolution E-4293 at 11, 17 (Finding 10); Resolution E-4263 at 8, 11 (Finding 10); Resolution E-4300 at 10, 13 (Finding 13); Resolution E-4295 at 10, 13 (Finding 11).

warranty to be materially false or misleading, it shall not be an Event of Default if Seller has used commercially reasonable efforts to comply with such change in law.<sup>3</sup>

SCE argues that pursuant to non-modifiable STC 6, it is not an event of default if the project no longer qualifies as an ERR due to a change in law occurring after contract execution, so long as seller has used “commercially reasonable efforts” to comply with the change in law. According to SCE, it would still be obligated to pay for deliveries under the contract if, despite the seller’s commercially reasonable efforts to comply with the change in law, the generation was no longer from an ERR. SCE concludes that rate recovery cannot be limited to situations where “the generation is from an eligible renewable energy resource,” as provided in the first portion of the Resolutions’ rate recovery finding.<sup>4</sup>

SCE is also concerned that the language ties rate recovery to actions solely in control of the seller. In particular, SCE says rate recovery is dependent on two such actions: (a) the generation is from an ERR or (b) seller fulfills STC 6 (i.e., uses commercially reasonable efforts to comply with a change in law).

To cure these problems, SCE proposes the following modifications (language to delete is in brackets, and to add is underlined):

---

<sup>3</sup> Decision (D.) 07-11-025, Attachment A at 2.

<sup>4</sup> SCE’s concern is misplaced because the phrase continues: “or Seller is otherwise compliant with Standard Term and Condition 6, set forth in Appendix A of D.08-04-009 and included in the terms of the PPA.” We need not address this further, however, because we decline to adopt SCE’s proposed language for other reasons explained in this order.

[Provided the generation is from an eligible renewable energy resource, or Seller is otherwise compliant with Standard Term and Condition 6, set forth in Appendix A of D.08-04-009 and included in the terms of the PPA, p] Payments made by SCE under the PPA are fully recoverable in rates over the life of the PPA, subject to Commission review of SCE's administration of the PPA, provided SCE reasonably administers Standard Term and Condition 6, set forth in Appendix A of D.08-04-009, as it is included in the terms of the PPA and any related terms included in the PPA including the definition of commercially reasonable efforts.

We are persuaded by PG&E, however, to “condition rate recovery for RPS PPAs only on the Commission’s review of the utility’s administration and enforcement of the PPA.”<sup>5</sup> This is the language used in prior resolutions. SCE supports use of the original cost recovery language as an alternative to its modified language, along with use of the original cost recovery language in future resolutions.<sup>6</sup> We adopt the following language (language to delete is in brackets, and language to add is underlined):

[Provided the generation is from an eligible renewable energy resource, or Seller is otherwise compliant with Standard Term and Condition 6, set forth in Appendix A of D.08-04-009 and included in the terms of the PPA, p] Payments made by SCE under the PPA are fully recoverable in rates over the life of the PPA, subject to Commission review of SCE's administration of the PPA.

We adopt the simpler language because it covers all situations. Administration of the PPA includes all contract clauses. STC 6 is one such clause, is non-modifiable, and is included in all RPS contracts. Contract

---

<sup>5</sup> April 5, 2010 PG&E Reply at 2.

<sup>6</sup> April 15, 2010 SCE Further Information Regarding Proposed Cost Recovery Language at 2.

administration includes STC 6. We need not separately identify STC 6, nor related terms employed in some contracts which more specifically define “commercially reasonable efforts.” If related terms are included in a contract, administration includes those terms.<sup>7</sup>

Moreover, administration of the contract includes enforcement of contract terms by the utility. As quoted above, PG&E separately recognizes utility administration and enforcement of the PPA as part of Commission review before authorizing cost recovery. We need not specifically and separately identify enforcement, however, since enforcement is an integral part of contract administration.<sup>8</sup> Each resolution says: “Such enforcement activities shall be reviewed pursuant to the Commission’s authority to review the administration of such contracts.”<sup>9</sup> There is no proposal to modify this language, and we retain it without modification.

We also decline to add language that may lead to misinterpretation or misunderstanding. For example, SCE proposes additional language as part of its

---

<sup>7</sup> SCE points out that some contracts include limits on the out-of-pocket expenses that a seller is required to incur in making commercially reasonable efforts to comply with a change in law. The Commission-approved SCE 2009 pro forma RPS model contract, for example, includes a limit of \$1,000,000 in required out-of-pocket expenses by the seller. (SCE Application at 8, citing §§ 1.10, 3.18, and 10.02(c) of SCE’s June 22, 2009 Amended 2009 RPS Procurement Plan, Attachment 2-3.) For its 2010 pro forma contract, SCE does not include a specific amount, but requires that seller propose a dollar amount, with the amount subject to SCE’s acceptance. (April 2010, Amended 2010 RPS Procurement Plan, Attachment 2-5, § 1.10.)

<sup>8</sup> Utility contract administration, for example, includes bringing an action against the seller for contract breach, if necessary.

<sup>9</sup> Resolution E-4293 at 14; Resolution E-4263 at 10; Resolution E-4300 at 11; Resolution E-4295 at 12.

recommended cure. SCE acknowledges that the “language SCE proposes is admittedly nuanced.”<sup>10</sup> We agree with SCE that its proposed language is nuanced. Nuanced language can be vulnerable to misinterpretation or misunderstanding. This is another reason we believe reverting to the prior language is reasonable.<sup>11</sup>

SDG&E proposes further language changes (which it describes as minor) to SCE’s proposed modifications. We decline to adopt SDG&E’s proposed additional modifications because the additional language is unnecessary, while adding to the risk of misinterpretation or misunderstanding.

We are also not persuaded to modify the resolutions on the basis of SCE’s claim that compliance with important terms is solely in the control of the seller. To the contrary, the buyer has important contract administration responsibilities. The simpler prior language captures these important responsibilities. We clarify our expectations with respect to utility contract administration to explain why SCE’s concern is misplaced.

STC 6 requires that the seller warrant throughout the term of the PPA that (i) the project qualifies and is certified as an ERR and (ii) the output qualifies under requirements of the California RPS. The only exception is upon a change in law, wherein seller is contractually obligated to use commercially reasonable efforts to comply with the change in law.

---

<sup>10</sup> SCE Reply to DRA Protest, April 5, 2010 at 2.

<sup>11</sup> SDG&E says the difference between the language in the resolutions and that proposed by SCE “is a subtle, but important distinction.” (SDG&E Response, March 29, 2010 at 4-5.) We agree it is subtle. Subtle differences can lead to misinterpretation or misunderstanding. The language in prior resolutions is less subject to these potential problems.

One approach to contract administration is for the utility buyer to rely on the RPS seller honoring this term, including both the ongoing warranty and the use of commercially reasonable efforts to comply. If breached by the seller, the buyer may, upon learning of the breach, stop payments to the seller and seek damages, to the extent permitted under the PPA. Significant payments may have been made for non-RPS-eligible electricity, however, if the breach is not discovered for an extended period of time. Such payments by the utility would undermine the purpose of the RPS program, and pursuit of damages could involve complex and costly litigation.

Ongoing achievement of RPS goals is too important for a utility buyer to passively accept that its purchases are RPS-compliant if and when they are not. It is also too important, in the case of a change in law, for the buyer to passively accept that seller has engaged in commercially reasonable efforts to comply with a change in law if and when that is not the case.

Therefore, we expect utility contract administration to include active monitoring of each seller's compliance with STC 6. Utilities seek recovery of RPS procurement costs in an annual Energy Resource Recovery Account (ERRA) filing, or a filing in another appropriate cost-recovery proceeding. To meet its burden of proof, each utility should make an affirmative showing in each ERRA (or other appropriate) proceeding of its active monitoring of RPS sellers' compliance with STC 6, and the results of that active monitoring. Disallowance of a utility's requested rate recovery is appropriate when the utility's ERRA (or other appropriate) showing fails to establish that the utility's contract

administration, including active monitoring of STC 6 and related terms, is reasonable through clear and convincing evidence.<sup>12</sup>

SCE asserts that the seller has the responsibility for complying with STC 6. The CEC, according to SCE, imposes several requirements for CEC-certification as an ERR and, if the seller violates one of those requirements, SCE “may have no way of discovering such violation before contract payments are made.”<sup>13</sup> We are not convinced. Responsible contract administration by the buyer includes the buyer assuring itself (and in turn assuring the Commission and ratepayers) that each seller is performing in accordance with the contract.

The CEC website lists eligible facilities that participate in the RPS program.<sup>14</sup> The list is updated monthly. Beginning in 2008, the Qualified Reporting Entity (or in some cases the load serving entity) reports meter data to the CEC. CEC staff verifies the accuracy of the data, with one of the first steps in the process being to verify that the facility is RPS certified. RPS data is also reported to the Western Renewable Energy Generation Information System

---

<sup>12</sup> SCE explains this element of ERRA as follows: “The function of the ERRA reasonableness proceeding is to ensure that contract administration actions are reasonable, consistent with Commission directives, administered equally, and consistent with utility and/or industry practice. It is the IOU’s burden to demonstrate that its actions are reasonable through clear and convincing evidence [citing D.87-07-026 at 19-20; D.88-03-036 at 5].” SCE Amended 2010 RPS Procurement Plan, April 9, 2010, Attachment 1 at 22.

<sup>13</sup> SCE Application at 11.

<sup>14</sup> The list may be accessed via this link:  
[http://www.energy.ca.gov/portfolio/documents/list\\_RPS\\_certified.html](http://www.energy.ca.gov/portfolio/documents/list_RPS_certified.html)

(WREGIS) for use in tracking and trading of renewable energy credits.<sup>15</sup> The utility buyer may use CEC and WREGIS sources to facilitate active and responsible contract administration.

Moreover, the utility's contract with the seller may require the seller to report to the utility if and when certain events occur. For example, if CEC eligibility requires that an ERR use no more than a certain percentage of fossil fuel, the utility may require the seller to include a statement on its monthly invoice of the percentage fossil fuel used over the relevant prior period. This may or may not coincide with the facility losing ERR status, but would alert the utility to more closely monitor a particular contract. Similarly, the utility may require the seller to state on its invoice the amount of money spent in the relevant prior period on maintaining its ERR status when there is a change in law.

These are some, and there might be other, ways for the utility to accomplish reasonable monitoring. We do not specify the technique for active monitoring of seller compliance with STC 6. Rather, we expect each utility to devise a method and make an affirmative showing in each ERRA (or other appropriate) filing of its method, along with the results of its active monitoring of RPS sellers' compliance with STC 6. We also note that, because the contract term may begin before commercial operation, administration and active monitoring may need to include obligations both before and after the commercial operation

---

<sup>15</sup> WREGIS is an independent, renewable energy tracking system for the region covered by the Western Electricity Coordinating Council. WREGIS tracks renewable energy generation from units that register in the system using verifiable data and creates renewable energy certificates for this generation.

date, as appropriate. Thus, in some cases, the showing for cost recovery in an ERRA (or other appropriate) filing may need to address the period before the commercial operation date.

### **3.2. Clarification of Parties' Obligations**

SCE's second concern involves clarification of parties' obligations.

The four resolutions include the following two findings, of which SCE objects to the second sentence of the second finding:<sup>16</sup>

- Procurement pursuant to the PPA is procurement from eligible renewable energy resources for purposes of determining SCE's compliance with any obligation that it may have to procure eligible renewable energy resources pursuant to the California Renewables Portfolio Standard (Public Utilities Code Section 399.11 et seq.), D.03-06-071 and D.06-10-050, or other applicable law.
- The immediately preceding finding shall not be read to allow generation from a non-RPS eligible renewable energy resource under this PPA to count towards an RPS compliance obligation. Nor shall that finding absolve SCE of its obligation to enforce compliance with Standard Term and Condition 6, set forth in Appendix A of D.08-04-009, and included in this PPA.

The resolutions include related language in the dicta:<sup>17</sup>

Therefore, while we include the required finding here, this finding has never been intended, and shall not be read now, to allow the

---

<sup>16</sup> Resolution E-4293 at 18 (Findings 15 and 16); Resolution E-4263 at 11-12 (Findings 11 and 12); Resolution E-4300 at 13-14 (Findings 14 and 15); Resolution E-4295 at 14 (Findings 13 and 14).

<sup>17</sup> Resolution E-4293 at 14; Resolution E-4263 at 9-10; Resolution E-4300 at 11; Resolution E-4295 at 12.

generation from a non-RPS eligible resource to count towards an RPS compliance obligation. Nor shall such a finding absolve any contracting party of its obligation to obtain CEC certification and/or to pursue remedies for breach of contract to ensure that only RPS-eligible generation is delivered and paid for under a Commission-approved contract. Such contract enforcement activities shall be reviewed pursuant to the Commission's authority to review the administration of such contracts.

According to SCE, the second sentence in the second finding obligates SCE to enforce compliance with STC 6 in isolation of how the term is used in the relevant contract. SCE recommends the finding be changed to clarify that SCE's obligation is to enforce STC 6 in combination with related terms in the contract, and that its obligation is limited to "reasonable" enforcement. Specifically, SCE proposes the following modified language for the second finding (language to delete is in brackets and language to add is underlined):

The immediately preceding finding shall not be read to allow generation from a non-RPS eligible renewable energy resource under this PPA to count towards an RPS compliance obligation. Nor shall that finding absolve SCE of its obligation to reasonably enforce compliance with Standard Term and Condition 6, set forth in Appendix A of D.08-04-009, [and] as it is included in this PPA and any related terms included in this PPA including the definition of commercially reasonable efforts.

SCE proposes similar modified language for the dicta as follows (language to delete is in brackets and language to add is underlined):

Therefore, while we include the required finding here, this finding has never been intended, and shall not be read now, to allow the generation from a non-RPS eligible resource to count towards an RPS compliance obligation. Nor shall such a finding absolve any contracting party of its obligation to obtain CEC certification and/or to reasonably pursue remedies for breach of [contract to ensure that only RPS-eligible generation is delivered and paid for under a

Commission-approved contract] Standard Term and Condition 6, set forth in Appendix A of D.08-04-009, as it is included in this PPA and any related terms included in this PPA including the definition of commercially reasonable efforts. Such contract enforcement activities shall be reviewed pursuant to the Commission's authority to review the administration of such contracts.

We decline to adopt SCE's recommendations. First, the Commission neither expects nor requires "unreasonable" contract enforcement by any utility. Including "reasonably" adds nothing.

Second, for the reasons stated above, simpler and more generalized language similar to that used in prior resolutions is preferred. This approach covers all situations, and is less likely to be misinterpreted or misunderstood.

We adopt the following language for the second finding (language to delete is in brackets and language to add is underlined):

The immediately preceding finding shall not be read to allow generation from a non-RPS-eligible renewable energy resource under this PPA to count towards an RPS compliance obligation. Nor shall that finding absolve SCE of its obligation to enforce compliance with [Standard Term and Condition 6, set forth in Appendix A of D.08-04-009, and included in] this PPA.

We adopt the following language for the dicta (language to delete is in brackets and language to add is underlined):

Therefore, while we include the required finding here, this finding has never been intended, and shall not be read now, to allow the generation from a non-RPS-eligible resource to count towards an RPS compliance obligation. Nor shall such [a] finding absolve [any contracting party] the seller of its obligation to obtain CEC certification [and/] or the utility of its obligation to pursue remedies for breach of contract [to ensure that only RPS-eligible generation is delivered and paid for under a Commission-approved contract]. Such contract enforcement activities shall be reviewed pursuant to

the Commission's authority to review the administration of such contracts.

The adopted language also makes a minor wording change. It replaces "any contracting party" with more specificity relative to the obligations of the seller and the utility.

Just as we state above regarding cost recovery and contract administration, we state here that SCE's "obligation to enforce compliance with this PPA" and "pursue remedies for breach of contract" is with regard to all contract clauses. It includes, but is not limited to, non-modifiable STC 6. It includes, but is not limited to, contract terms related to STC 6, if any, such as a definition of commercially reasonable efforts included in some contracts. We adopt simpler, more generalized language, because it covers all situations and is less likely to be misinterpreted or misunderstood.

And, just as we state above regarding cost recovery, we repeat here: utility contract enforcement activities will be reviewed pursuant to the Commission's authority to review contract administration. We expect utility contract administration to be active, and require an affirmative showing in ERRA filings that meets the utility's burden of proof by presentation of clear and convincing evidence. This responsibility applies to all contract terms, as necessary for the utility to carry its burden of proof. We specifically clarify this responsibility with respect to STC 6. We are serious about utility contract administration sufficiently assuring that energy purchased pursuant to RPS contracts is RPS-eligible electricity (subject only to limited cases which may occur due to a change in law).

#### **4. Conclusion**

We grant the application in part. We decline to adopt the modified language proposed by SCE or SDG&E for the reasons stated above. Rather, we

adopt simplified language consistent with that used in prior resolutions and explain our expectations for a utility's administration of these contracts.

## **5. Categorization and Need for Hearing**

On April 8, 2010, the Commission preliminarily categorized this proceeding as ratesetting.<sup>18</sup> No party opposed the preliminary categorization, either in responses or protests to the application, or at the PHC. The assigned Commissioner did not file a Scoping Memo,<sup>19</sup> thereby allowing limited resources to be focused on quickly placing a proposed decision on our agenda for consideration. We affirm the preliminary determination that the categorization is ratesetting.

On April 8, 2010, the Commission also preliminarily determined that hearing would be necessary.<sup>20</sup> No party requested hearing, either in responses or protests to the application, or at the PHC.<sup>21</sup> While a PHC was held to better understand positions, no hearing was held. Rather, the matter has been resolved based on the pleadings. An assigned Commissioner's decision to reverse our preliminary determination on the need for hearing must be placed on the Commission's Consent Agenda for approval.<sup>22</sup> We do not consider that reversal in a separate decision but, for administrative efficiency, we address the matter

---

<sup>18</sup> Resolution ALJ 176-3251.

<sup>19</sup> Rule 7.3(a) of the Commission's Rules of Practice and Procedure (Rules).

<sup>20</sup> Resolution ALJ 176-3251.

<sup>21</sup> DRA cautiously said it "does not think it likely hearings will be necessary..." (DRA Protest at 5.)

<sup>22</sup> Rule 7.5.

here. We agree with parties and the assigned Commissioner that no hearing is necessary, and reverse our preliminary determination otherwise.

## **6. Comments on Proposed Decision**

On May 3, 2010, the proposed decision of ALJ Burton W. Mattson in this matter was mailed to the parties in accordance with Pub. Util. Code § 311 and comments were allowed under Rule 14.3. Comments were filed on May 24, 2010 by SCE, PG&E, SDG&E, and DRA. Reply comments were filed on June 1, 2010 by SCE, SDG&E, and DRA.

We make limited changes to the proposed decision and summarize them here. First, as recommended by SCE, we make similar changes to two resolutions adopted after the date this application was filed.<sup>23</sup> The changes to all six resolutions are stated in Attachment A.

We decline to include several PG&E resolutions, as recommended by PG&E. We will address those items in PG&E's Application 10-05-010.

---

<sup>23</sup> The two resolutions are:

- Resolution E-4316 (issued April 12, 2010) approves, with modification, cost recovery for an amended 10-year contract between SCE and Imperial Valley Resource Recovery Company, LLC for 16.4 MW of biomass energy from a project located in Imperial Valley, California.
- Resolution E-4325 (issued May 10, 2010) approves cost recovery for a 20-year contract between SCE, Ram Power, Inc. and Orita Geothermal 1 LLC for 40 MW to 100 MW of geothermal energy from a project located in Imperial County, California. It also pre-approves cost recovery for two additional 20-year contracts between SCE and Ram Power, Inc. for two potential expansions of 40 MW to 100 MW of geothermal power from projects located in Imperial County, California.

SDG&E suggests that we delete the discussion of active monitoring. We decline to do so. SDG&E says it is unclear what purpose is served by imposing a specific requirement on a single contract term when IOUs are required to demonstrate reasonable administration of an RPS contract in order to secure cost recovery in appropriate proceedings. We agree that reasonable administration is required. This is necessary for not just some, but all, contract terms. The proposed decision already stated that a utility has an affirmative duty to actively monitor and reasonably administer all contract terms, not just STC 6. We make further modifications to more clearly state that an IOU has an affirmative duty to actively monitor and reasonably administer all contract terms, to the extent necessary and reasonable to carry its burden of proof. We retain the active monitoring requirement specifically regarding STC 6 because, for the reasons stated in the decision, STC 6 is a particularly important term. Further, given the modifications that have been made to STC 6 over time, and the concerns relative to various responsibilities as expressed by respondents and parties, the adopted treatment is necessary and reasonable.

We decline to adopt DRA recommendations to change Conclusion of Law 2, or require the utility to notify the Commission by letter if there is any reason to question a particular seller's compliance with STC 6. We need not require notification by letter, for example, since each utility must already keep the Commission informed of relevant matters and changes with respect to the RPS program. Utilities do this through contact with Energy Division, and the filing of periodic reports. If this needs to be made more specific relative to STC 6, the Executive Director or Energy Division Director may require IOUs to notify the Commission by letter.

## **7. Assignment of Proceeding**

Michael R. Peevey is the assigned Commissioner and Burton W. Mattson is the assigned ALJ in this proceeding.

### **Findings of Fact**

1. STC 6 is a Commission-required standard term and condition for RPS contracts, and some contracts include related terms to define commercially reasonable efforts.

2. Administration of an RPS contract includes administration of all clauses.

3. Utility contract enforcement is an integral part of utility contract administration.

4. Using more words than necessary, particularly when the proposed additional language is nuanced or subtle, can make dicta or findings vulnerable to misinterpretation or misunderstanding.

5. Ratepayers reasonably expect electricity delivered pursuant to RPS contracts, with very limited exception, to be RPS-eligible given the seller warrants throughout the term of the contract that (i) the project is an ERR and (ii) project output qualifies under the California RPS program.

6. The only exception to this electricity being RPS-eligible is in relationship to a change in law.

7. Ongoing achievement of RPS goals is too important for a utility buyer to passively accept that its purchases are RPS-compliant if and when they are not; and it is too important, in the case of a change in law, for the utility buyer to passively accept that seller has engaged in commercially reasonable efforts to comply with the change in law if and when that is not the case.

8. A utility buyer can devise reasonable ways to become informed with regard to violations of STC 6.

9. The categorization of this proceeding is ratesetting.
10. No hearing is necessary.

### **Conclusions of Law**

1. The application to modify four resolutions should be granted in part by reverting to simpler, more direct language used in similar prior resolutions; modification of two resolutions adopted after the filing of this application should be accomplished herein; and the application should be denied in all other respects.

2. Each utility with an RPS obligation should devise a method to actively monitor each RPS seller's compliance with STC 6, administer that active monitoring, and make an affirmative showing in each ERRA (or other appropriate) proceeding of its active monitoring method and results; with the affirmative showing to be part of the utility's ERRA (or other appropriate) showing of its reasonable contract administration of all contract terms, inclusive of obligations both before and after the project's commercial operation date, as appropriate.

3. Disallowance of requested rate recovery is appropriate when the utility's showing relative to contract administration and active monitoring fail to establish that the utility's contract administration is reasonable through clear and convincing evidence.

4. The Commission neither expects nor requires unreasonable contract enforcement.

5. This decision should be effective immediately so that SCE may proceed with the affected contracts with increased certainty and without delay.

**O R D E R**

**IT IS ORDERED** that:

1. The application is granted in part and denied in all other respects.

Six resolutions are modified as provided in Attachment A.

2. As part of its renewables portfolio standard program, Southern California Edison Company shall (a) devise a method to actively monitor each seller's compliance with Standard Term and Condition 6 and related contract terms, (b) administer that active monitoring, and (c) make an affirmative showing in each Energy Resource Recovery Account proceeding of its method for active monitoring and the results of that monitoring. This shall be part of Southern California Edison Company's showing of reasonable contract administration of all contract terms, inclusive of obligations both before and after the project's commercial operation date, as appropriate.

3. Each electric utility under the Commission's jurisdiction, pursuant to the renewables portfolio standard program, shall (a) devise a method to actively monitor each seller's compliance with Standard Term and Condition 6 and related contract terms, (b) administer that active monitoring, and (c) make an affirmative showing in each Energy Resource Recover Account (or other appropriate cost-recovery) proceeding of its method for active monitoring and the results of that monitoring. This shall be part of each electric utility's showing of reasonable contract administration of all contract terms, inclusive of obligations both before and after the project's commercial operation date, as appropriate. The Executive Director shall serve a copy of this order on the service list in Rulemaking 08-08-009, thereby performing service on each Commission-regulated electric utility with a renewables portfolio standard program obligation. These utilities are Southern California Edison Company, Pacific Gas and Electric Company, San Diego Gas & Electric Company,

PacifiCorp, Sierra Pacific Power Company, Bear Valley Electric Service Division (a division of Golden State Water Company), and Mountain Utilities.

4. This proceeding is categorized as ratesetting and no hearing is necessary.
5. Application 10-03-009 is closed.

This order is effective today.

Dated June 3, 2010, at San Francisco, California.

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

## ATTACHMENT A

### MODIFICATIONS TO RESOLUTIONS

Resolutions E-4293, E-4263, E-4300, and E-4295 are modified as follows:

1. Language in Resolution E-4293 at 11 and 17 (Finding 10); Resolution E-4263 at 8 and 11 (Finding 10); Resolution E-4300 at 10 and 13 (Finding 13); and Resolution E-4295 at 10 and 13 (Finding 11) is changed as follows:

From:

Provided the generation is from an eligible renewable energy resource, or Seller is otherwise compliant with Standard Term and Condition 6, set forth in Appendix A of D.08-04-009 and included in the terms of the PPA, payments made by SCE under the PPA are fully recoverable in rates over the life of the PPA, subject to Commission review of SCE's administration of the PPA.

To:

Payments made by SCE under the PPA are fully recoverable in rates over the life of the PPA, subject to Commission review of SCE's administration of the PPA.

2. Language in Resolution E-4293 at 18 (Finding 16); Resolution E-4263 at 12 (Finding 12); Resolution E-4300 at 14 (Finding 15); and Resolution E-4295 at 14 (Finding 14) is changed as follows:

From:

The immediately preceding finding shall not be read to allow generation from a non-RPS eligible renewable energy resource under this PPA to count towards an RPS compliance obligation. Nor shall that finding absolve SCE of its obligation to enforce compliance with Standard Term and Condition 6, set forth in Appendix A of D.08-04-009, and included in this PPA.

To:

The immediately preceding finding shall not be read to allow generation from a non-RPS-eligible renewable energy resource under this PPA to count towards an RPS compliance obligation. Nor shall that finding absolve SCE of its obligation to enforce compliance with this PPA.

3. Language in Resolution E-4293 at 14; Resolution E-4263 at 9–10; Resolution E-4300 at 11; and Resolution E-4295 at 12 is changed as follows:

From:

Therefore, while we include the required finding here, this finding has never been intended, and shall not be read now, to allow the generation from a non-RPS eligible resource to count towards an RPS compliance obligation. Nor shall such a finding absolve any contracting party of its obligation to obtain CEC certification and/or to pursue remedies for breach of contract to ensure that only RPS-eligible generation is delivered and paid for under a Commission-approved contract. Such contract enforcement activities shall be reviewed pursuant to the Commission's authority to review the administration of such contracts.

To:

Therefore, while we include the required finding here, this finding has never been intended, and shall not be read now, to allow the generation from a non-RPS-eligible resource to count towards an RPS compliance obligation. Nor shall such finding absolve the seller of its obligation to obtain CEC certification, or the utility of its obligation to pursue remedies for breach of contract. Such contract enforcement activities shall be reviewed pursuant to the Commission's authority to review the administration of such contracts.

4. Language in Resolution E-4316 at 12 (Finding 9) is changed as follows:

From:

Provided the generation is from an eligible renewable energy resource, payments made by SCE under the amended PPA are fully recoverable in

rates over the life of the amended PPA, subject to Commission review of SCE's administration of the amended PPA.

To:

Payments made by SCE under the amended PPA are fully recoverable in rates over the life of the amended PPA, subject to Commission review of SCE's administration of the amended PPA.

5. Language in Resolution E-4316 at 9 is changed as follows:

From:

Provided the generation is from an eligible renewable energy resource, payments made by SCE under the amended PPA are fully recoverable in rates over the life of the PPA, subject to Commission review of SCE's administration of the amended PPA.

To:

Payments made by SCE under the amended PPA are fully recoverable in rates over the life of the amended PPA, subject to Commission review of SCE's administration of the amended PPA.

6. Language in Resolution E-4325 at 15 (Finding 12) is changed as follows:

From:

Provided the generation is from an eligible renewable energy resource, or is otherwise compliant with Standard Term and Condition 6, set forth in Appendix A of D.08-04-009 and included in the terms of the Agreements, payments made by SCE under the Agreements are fully recoverable in rates over the life of the Agreements, subject to Commission review of SCE's administration of the Agreements.

To:

Payments made by SCE under the Agreements are fully recoverable in rates over the life of the Agreements, subject to Commission review of SCE's administration of the Agreements.

7. Language in Resolution E-4325 at 2 is changed as follows:

From:

Provided the generation is from eligible renewable energy resources, deliveries pursuant to the proposed Agreements are reasonably priced and fully recoverable in rates over the life of the contract, subject to Commission review of SCE's administration of the Agreements.

To:

Deliveries pursuant to the proposed Agreements are reasonably priced and fully recoverable in rates over the life of the contracts, subject to Commission review of SCE's administration of the Agreements.

8. Language in Resolution E-4325 at 11 is changed as follows:

From:

Provided the generation is from an eligible renewable energy resource, or Seller is otherwise compliant with Standard Term and Condition 6, set forth in Appendix A of D.08-04-009 and included in the terms of the Agreements, payments made by SCE under the Agreements are fully recoverable in rates over the life of the Agreements, subject to Commission review of SCE's administration of the Agreements.

To:

Payments made by SCE under the Agreements are fully recoverable in rates over the life of the Agreements, subject to Commission review of SCE's administration of the Agreements.

9. Language in Resolution E-4325 at 15 (Finding 14) is changed as follows:

From:

The immediately preceding finding shall not be read to allow generation from a non-RPS eligible renewable energy resource under these Agreements to count towards an RPS compliance obligation. Nor shall that

finding absolve SCE of its obligation to enforce compliance with Standard Term and Condition 6, set forth in Appendix A of D.08-04-009, and included in these Agreements.

To:

The immediately preceding finding shall not be read to allow generation from a non-RPS eligible renewable energy resource under these Agreements to count towards an RPS compliance obligation. Nor shall that finding absolve SCE of its obligation to enforce compliance with these Agreements.

10. Language in Resolution E-4325 at 12-13 is changed as follows:

From:

Therefore, while we include the required finding here, this finding has never been intended, and shall not be read now, to allow the generation from a non-RPS eligible resource to count towards an RPS compliance obligation. Nor shall such a finding absolve a seller from its obligation to obtain CEC certification or absolve the purchasing utility of its obligation to enforce compliance with Standard Term and Condition 6, set forth in Appendix A of D.08-04-009, and included in the PPA. Such contract enforcement activities shall be reviewed pursuant to the Commission's authority to review the administration of such contracts.

To:

Therefore, while we include the required finding here, this finding has never been intended, and shall not be read now, to allow the generation from a non-RPS eligible resource to count towards an RPS compliance obligation. Nor shall such a finding absolve a seller from its obligation to obtain CEC certification, or the utility of its obligation to pursue remedies for breach of contract. Such contract enforcement activities shall be reviewed pursuant to the Commission's authority to review the administration of such contracts.

**(END OF ATTACHMENT A)**