

Decision 06-01-046

January 26, 2006

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking to Implement the California Renewables Portfolio Standard Program.	Rulemaking 04-04-026 (Filed on April 22, 2004)
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**ORDER DENYING REHEARING
OF DECISION (D.) 05-07-039**

I. INTRODUCTION

In this Order we dispose of the applications for rehearing of Decision (D.) 05-07-039 (“Decision”) filed by the Center for Energy Efficiency and Renewable Technologies (“CEERT”) and Southern California Edison Company (“SCE”).

In D.05-07-039, we approved, with additions, the procurement plans and draft requests for offers (“RFOs”) for the 2005 solicitation for the Renewables Portfolio Standard (“RPS”) program submitted by Pacific Gas and Electric Company (“PG&E”), SCE, and San Diego Gas & Electric Company (“SDG&E”). The Decision also clarified the requirement for reporting on RPS compliance.

CEERT and SCE timely filed applications for rehearing. CEERT challenges the Decision on the grounds that: (1) it violates Senate Bill (“SB”) 1078 (Stats. 2002, ch. 516, §3.) (codified as Public Utilities Code, Sections 399.11,¹ et seq.) by permitting “contracts” to count for compliance with the 2005 annual procurement target (“APT”). SCE challenges the Decision on the grounds that: (1) it is inconsistent with Resolution E-3809; (2) the objection by The Utility Reform Network (“TURN”) to SCE’s 2005 Short-Term Renewable Procurement Plan constituted an impermissible collateral

¹ All other section references are to the Public Utilities Code, unless otherwise specified.

attack on Resolution E-3809; and (3) it modifies Resolution E-3809 without complying with Commission Rule 47 and Section 1708. In addition, SCE requests oral argument.

PG&E filed a response to CEERT's application for rehearing. TURN filed a response to SCE's application for rehearing.

We have carefully considered each and every argument raised in the applications for rehearing and are of the opinion that good cause does not exist to grant rehearing. Accordingly, the applications for rehearing of D.05-07-039 filed by CEERT and SCE are denied. In addition, the request for oral argument is denied.

II. DISCUSSION

A. Consistency With Senate Bill 1078 / Public Utilities Code Section 399.11, et seq.

CEERT challenges Finding of Fact ("FOF") 15 and Conclusion of Law ("COL") 8 of the Decision on the ground that they violate the mandates of SB 1078, as reflected in Section 399.11, et seq. The finding and conclusion are essentially identical.

FOF 15 states:

"In view of the current schedule for RPS solicitations in 2005, it is reasonable to allow PG&E, SDG&E, and SCE, at their option to treat contracts resulting from the 2005 solicitation and signed on or before June 30, 2006 as available to demonstrate compliance with their 2005 APTs." (D.05-07-039, at p. 38 [FOF 15].)

COL 8 states:

"In order to be consistent with the schedule for the 2005 RPS solicitation, PG&E, SDG&E, and SCE, should be allowed, at their option, to treat contracts resulting from the 2005 RPS solicitation and signed on or before June 30, 2006 as available to demonstrate compliance with their 2005 APT." (D.05-07-039, at p. 40 [COL 8].)

In particular, CEERT states that the FOF 15 and COL 8 are wrong because allowing contracts to "count" for purposes of meeting the 2005 APT: (a) violates the procurement requirements established under Sections 399.15(b) and 399.14(g), as well as

the *Flexible Rules Decision* [D.03-06-071]²; (b) is inconsistent with another finding and conclusion in the Decision; and (c) creates a dangerous precedent for future years by signaling that the existence (or future existence) of a “contract” alone is the equivalent of renewable power actually being delivered. (CEERT Rhg. App., at pp. 3-8.) As explained below, CEERT’s arguments are without merit.

1. APT Requirements Under Section 399.15(b) and 399.14(g) and the *Flexible Rules Decision* [D.03-06-071]

CEERT contends that for purposes of complying with the APT requirement, Sections 399.15(b) and 399.14(g) create “direct and unambiguous statutory requirements,” which have been interpreted and applied by the Commission in the *Flexible Rules Decision* [D.03-06-071]. CEERT claims that the Commission has interpreted the statutes such that procurement can only be satisfied by the actual delivery of renewable generation output, rather than just the execution of a contract. (CEERT Rhg. App., at pp. 4-5.) CEERT goes on to state that the RPS statutes make no exception in how “procurement” compliance is to be achieved for any year or for any solicitation “schedule,” and certainly create no authority in the Commission to permit a “discretionary” application of that standard by or for any utility. Further, that the mere signing or even approval of a contract for procurement is only the promise of a power delivery and is not “procurement” of electrical output itself as required by Section 399.14(g). (CEERT Rhg. App., at pp. 4-5.) We find these contentions without merit.

Section 399.15(b) sets forth the APT requirement, which provides in pertinent part:

² *Order Instituting Rulemaking to Establish Policies and Cost Recovery Mechanisms for Generation Procurement and Renewable Resource Development (“Flexible Rules Decision”)* [D.03-06-071] (2001) ___ Cal.P.U.C.3d ___, 2001 Cal. P.U.C. LEXIS 1215.

“(b) The commission shall implement annual procurement targets for each electrical corporation as follows:

- (1) Beginning on January 1, 2003, each electrical corporation shall, pursuant to subdivision (a), increase its total **procurement** of eligible renewable energy resources by at least an additional 1 percent of retail sales per year so that 20 percent of its retail sales are **procured** from eligible renewable energy resources no later than December 31, 2017. An electrical corporation with 20 percent of retail sales **procured** from eligible renewable energy resources in any given year shall not be required to increase its **procurement** of such resources in the following year.”

(Pub. Util. Code, § 399.15, subd. (b)(1), emphasis added.)

The term “procure” is defined by Section 399.14(g), which provides in relevant part:

“(g) For purposes of this article, “procure” means that a utility may acquire the renewable output of electric generation facilities that it owns or for which it has contracted.” (Pub. Util. Code, § 399.14, subd. (g).)

CEERT is incorrect that the statute itself creates a direct and unambiguous requirement. The statute does not require that procurement is satisfied only by actual delivery of renewable generation output. It provides only that procurement may be satisfied if the utility “acquires” renewable generation output either from its own facilities or by contract. (Pub. Util. Code, §399.14, subd. (d).) To reach the conclusion CEERT proffers, the statute would need to further define the term “acquire” as meaning actual delivery. However, the Legislature has not restricted the term to such a specific and narrow definition, as well as an impractical one. Accordingly, the term is open to interpretation and we have given the term a reasonable interpretation.

CEERT is correct that we have interpreted procurement for purposes of the statute to mean actual generation output being “available,” rather than just the execution of a contract. (*Flexible Rules Decision* [D.03-06-071], *supra*, at p. 26, fn. 36 (slip op.)) However, that is the general rule and CEERT is wrong when it contends that the statute

does not permit the Commission make an exception how procurement compliance is to be achieved. Further, CEERT is mistaken that we have no authority and discretion in making that determination. CEERT fails to acknowledge Section 399.14(a)(2)(C) and the flexible compliance conditions which we adopted in the *Flexible Rules Decision* in our implementation of the statute.

In enacting SB 1078, the Legislature explicitly authorized this Commission to exercise discretion in adopting flexible rules for procurement compliance. Section 399.14(a) provides:

“(2) Not later than six months after the effective date of this section, the [C]ommission shall adopt, by rule, for all electrical corporations, all of the following:

(C) Flexible rules for compliance, including, but not limited to, permitting electrical corporations to apply excess procurement in one year to subsequent years or inadequate procurement in one year to no more than the following three years.” (Pub. Util. Code, § 399.14, subd. (a)(2)(C), emphasis added.)

Based on this statutory mandate, we adopted the *Flexible Rules Decision* [D.03-06-071], *supra*, at p. 24 (slip op.), in which we stated that the flexible compliance mechanism applies to achieving the APTs. Inadequate procurement in any given year was identified as the main controversy to resolve. (*Id.* at p. 26 (slip. op.)) To address that potential problem, we adopted a flexible compliance program which allows the utilities to carry over a 25% deficit of their APT.³ It includes a provision that annual shortfalls in excess of the 25% APT are allowed upon demonstration of one of four conditions: (a) insufficient response to RFO; (b) **contracts already executed will**

³ See *Flexible Rules Decision* [D.03-06-071], *supra*, at p. 28 (slip op.), stating: “[a] utility will be required to meet 75% of its APT each year but will be allowed to carry over a deficit of 25% of its APT to the next year without explanation. A utility will be allowed to carry over any deficit up to the 25% allowed by the TURN/SDG&E proposal for up to three years, but must satisfy this deficit within that three year period.”

provide future deliveries sufficient to satisfy current year deficits; (c) inadequate public goods funds to cover above-market renewable contract costs; and (d) seller non-performance. (*Id.* at p. 29 (slip op.))

The Decision allows utilities to treat contracts resulting from the 2005 RPS solicitation and signed on or before June 30, 2006 as “available” to demonstrate compliance with their 2005 APTs. The Decision is clear that it does not intend to change any prior determination that “procurement” should be interpreted to mean “actual generation output being available, rather than just the execution of a contract.” (D.05-07-039, at p. 12.) Because the utilities are faced with potential under-procurement in 2005, the Decision invokes the flexibility previously approved regarding acceptance of contracts under condition subdivision (b) of the *Flexible Rules Decision*. (D.05-07-039, pp. 12-13.) Section 399.14(a) recognizes that some amount of flexibility will need to be granted in order to ensure utilities will meet the intended annual procurement targets. Contrary to CEERT’s claim, the statute does permit exceptions in how annual procurement targets are met and does vest us with authority and discretion to develop flexible rules for compliance. In the Decision, we acted reasonably within the parameters of the statute and the adopted flexible rules for compliance. Accordingly, no legal error has been shown.

2. Consistency with Other Findings in the Decision

CEERT contends that the Decision errs by allowing contracts not signed during calendar year for the 2005 solicitation to “count” for purposes of meeting 2005 APTs. CEERT argues that it is inconsistent for the Decision to reaffirm that procurement is met by “available” renewable generation output, and to simultaneously allow the 2005 APT to be met by future contracts which have not yet been signed and will not exist until 2006. CEERT argues this result relies on a fiction beyond what the law permits and does so “without good reasons.” (CEERT Rhg. App., at pp. 5-7.)

For the reasons discussed above, CEERT’s argument has no merit in light of the Legislature’s enactment of Section 399.14(g) and our determinations in the

Flexible Rules Decision [D.03-06-071], *supra*. We did not act inconsistently when we affirmed the general rule, and then granted a reasonable limited exception to the general rule due to unique circumstances. The granting of this limited exception is within our statutory authority and consistent with the parameters set forth in the *Flexible Rules Decision*.

Further, in arguing that the flexibility granted by FOF 15 and COL 8 is without good reason, CEERT ignores the unique circumstances which drive the reasonableness of the conclusions in this instance. The Decision recognizes that a general rule which allowed contracts to be counted in the year of the solicitation rather than the year they are actually signed could create an incentive to draw out contract negotiations. Contrary to CEERT's assertion, and as we stated in the Decision, we created no new rule for the RPS Program. (D.05-07-039, at p. 14.) Rather, we merely acted in a manner consistent with the contract condition that we had previously adopted in *Flexible Rules Decision* [D.03-06-071]. Our Decision reaches a result which effectively responds to the unique timing difficulties associated with implementing the 2005 RPS Program solicitation. The 2005 solicitations were not scheduled to begin until very late in the year. This makes fulfilling the required APTs with contracts signed in the same calendar year virtually impossible. By finding that contracts signed on or before June 30, 2006 will provide a reasonable measure of assurance that actual future deliveries will occur and be "available," we acted to balance the statutory mandates with the timing realities of the 2005 RPS procurement process. (D.05-07-039, at pp. 13-14.) Further, our Decision clarifies that a schedule for 2006 procurement is being initiated that will allow procurement on a calendar year basis, rendering allowances such as this under the flexible compliance rules unnecessary in the future. (D.05-07-039, at pp. 13-14.) Thus, the exception is limited solely to the 2005 RPS procurement process.

In the *Flexible Rules Decision*, we discussed a similar problem in balancing real world issues facing the utilities with the statutory requirement to increase total utility procurement of eligible renewable resources. In that instance, we rejected a proposal by the California Wind Energy Association ("CalWEA") which would have allowed utilities

only the first three months of a year in which to purchase and receive deliveries to make up for a prior year's shortfall. We concluded that the proposed restriction would not ultimately reflect the goals of the statute, and did not take into account the uncertain process of actually bringing additional generation units on line or the real world issues facing the utilities. (*Flexible Rules Decision* [D.03-06-071], *supra*, at pp. 26-27 (slip op.)) In both instances, we acted within the parameters of our statutory authority under Section 399.14(a). Thus, there is no legal error.

3. Future Precedent

CEERT contends that the Decision creates a dangerous precedent in that the existence of a contract (or future contract) will be determined as equivalent to the actual delivery of renewable power. (CEERT Rhg. App., at pp. 6 and 8.)

We note that this fear is unsubstantiated, and does not constitute legal error as required by Section 1732. Thus, this contention is without merit.

B. Consistency With Resolution E-3809

SCE contends that the Decision errs because it is inconsistent with, and modifies, Resolution E-3809, dated January 30, 2003. SCE claims FOF 15 of this Resolution "unconditionally" and "unequivocally" found that "any procurement" pursuant to five contracts with Calpine for geothermal output from the Geysers facility ("Calpine Contract") can be counted toward SCE's 1% annual renewable procurement obligation under Section 399.15(b)(1). SCE states its conclusion is supported by the Commission's approval of its 2004 RPS Compliance Report and 2004 Renewable Procurement Plan in which SCE counted all procurement under the Calpine Contract toward its 2003 Incremental Procurement Target ("IPT"). (SCE Rhg. App., at pp. 10-13.) As explained below, SCE's interpretation of Resolution E-3809 is flawed for several reasons. Resolution E-3809, FOF 15 ("Finding") states:

"Any procurement pursuant to the [Calpine] PPAs is deemed transitional procurement by SCE from a renewable resource for purposes of determining SCE's compliance with any

obligation that it may have pursuant to D.02-08-071⁴ and D.02-10-062⁵, or **other applicable law**, to procure an additional 1% of its annual electricity sales from renewable resources.” (Resolution E-3809, at p. 24 [FOF 15] (slip op., emphasis added).)

The FOF clearly conditions the ability to count Calpine Contract output toward the 1% IPT, as dependent upon compliance with “other applicable law.” SCE states that it is aware “other applicable law” as used here refers to SB 1078. (SCE Rhg. App., at p. 11.). We agree, and noted in the Decision that under the statutory provisions enacted by the Legislature in SB 1078, a utility attempting to count geothermal energy output towards meeting the 1% IPT target pursuant to Section 399.15(b)(1), can only do so after the output has been deemed incremental by the CEC pursuant to Section 399.12(a)(2). Thus, for purposes of SCE’s proposed 2005 RPS solicitation resource mix⁶, the Decision states that in order to be counted toward meeting the 1% incremental procurement target under Section 399.15(b)(1), the CEC must first certify geothermal

⁴ *Order Instituting Rulemaking to Establish Policies and Cost Recovery Mechanisms for Generation Procurement and Renewable Resource Development* (“2002 Net Short Decision”) [D.02-08-071] (2002) __ Cal.P.U.C.3d __, 2002 Cal. P.U.C. LEXIS 517. D.02-08-071 addressed the extent to which, if at all, the respondent utilities should be permitted to immediately contract for a portion of their net short in partnership with the California Department of Water Resources.

⁵ *Order Instituting Rulemaking to Establish Policies and Cost Recovery Mechanisms for Generation Procurement and Renewable Resource Development* (“2002 Procurement Plan Decision”) [D.02-10-062] (2002) __ Cal.P.U.C.3d __, 2002 Cal. P.U.C. LEXIS 674. D.02-10-062 adopted the utilities’ 2002 procurement plans and provided further detail regarding the direction the utilities should take in their long-term procurement planning.

⁶ This includes both resources in the 2005 RPS solicitation and previously acquired renewables “banked forward” by SCE to 2005 and/or later years.

energy output as incremental pursuant to Section 399.12(a)(2).⁷ (D.05-07-039, at pp. 21-22.)

SCE does not contest the requirements established in Section 399.12(a)(2) or argue that the Decision is wrong as to how the requirements would apply. However, SCE views the words “any procurement” in the FOF as directly linked with the 1% IPT language. By ignoring the condition of compliance with “other applicable law,” SCE constructs its argument based on its erroneous contention that Resolution E-3809 found that all the geothermal output from the Calpine Contract would be deemed incremental.⁸ (SCE Rhg. App., at pp. 10-12.) SCE’s argument is based on an unreasonable and mistaken characterization of the actual language of the FOF, rather than legal error.

As noted by TURN, SCE participated in the drafting of SB 1078 and was fully aware of its provisions and requirements. (TURN Response to SCE Petition to Modify D.05-07-039, at p. 2.) Section 399.12(a)(2) was part of the legislation as it was enacted. Accordingly, SCE knowingly ignores that even if the Commission wanted to

⁷ See D.05-07-039, Conclusion of Law 9, which provides:
 “Delivery of geothermal output should not be counted toward the procuring utilities’ incremental procurement target unless the geothermal output has been certified as incremental geothermal output by the Energy Commission.” (Decision, at p. 40 [Conclusion of Law 9] (slip op..))

See D.05-07-039, Ordering Paragraph 11, which provides:

“Prior to counting any geothermal output from contracts that were the subject of Resolution E-3809 toward any RPS Incremental Procurement Target, SCE must present to Energy Division staff certification by the Energy Resources Conservation and Development Commission that the geothermal output is incremental geothermal output.” (Decision, at p. 43 [Ordering Paragraph 11] (slip op..))

⁸ SCE states that it relied on its understanding of Resolution E-3809 in maintaining the Calpine Contract. (SCE Rhg. App. at p. 2.) However, SCE now realizes that it is unlikely that the CEC will certify the entire historical output of the Calpine Contract as incremental geothermal output. In that case SCE will not be able to count that output in satisfaction of its 1% annual renewable procurement requirement beginning in 2003 and thus, SCE contends that it may be subject to penalties of up to \$25 million. (SCE Rhg. App., at pp. 3-4, 11.)

deem the geothermal output as incremental, it could not conclusively do so. In Section 399.12(a)(2), the Legislature explicitly delegates specific authority to the CEC to make that determination.

Even if Resolution E-3809 could be read as SCE suggests, SCE ignores FOF 14 of the Resolution, which provides:

“Any procurement pursuant to the PPAs is deemed part of SCE’s **“baseline”** quantity of eligible renewable resources for purposes of Section 399.15 of the Public Utilities Code or other applicable law.” (Resolution E-3809, at p. 24 [FOF 14] (slip op., emphasis added).)

For purposes of RPS implementation, the APT is comprised of two components, the IPT and baseline. Renewable generation must be classified as either incremental or baseline, but it cannot be both.⁹ Accordingly, even if SCE were correct that FOF 15 said the geothermal output could be deemed incremental, FOF 14 found it to be baseline. At best, SCE could argue the Resolution was ambiguous or confusing. But there is no rational justification to contend it “unequivocally” and “unconditionally” found the output to count as incremental for purposes of the 1% IPT.

Finally, SCE’s interpretation of Resolution E-3809 is contrary with how we have consistently viewed the treatment of geothermal output relative to the RPS statute. For example, approximately one month before issuing Resolution E-3809, we addressed Pacific Gas and Electric Company’s (“PG&E”) Advice Letter 2303-E which similarly sought approval of several renewable energy contracts.¹⁰ The California Biomass Energy Alliance protested, arguing in part, that PG&E was inappropriately counting power from

⁹ See *Order Instituting Rulemaking to Implement the California Renewable Portfolio Standard Program (“RPS Implementation Decision”)* [D.04-06-014, at pp. 3-4, Appendix B, p. B-2 (slip op.)] (2004) ___ Cal.P.U.C.3d ___ .

¹⁰ PG&E Advice Letter 2303-E filed November 15, 2002 and Resolution E-3805, dated December 19, 2002. SCE Advice Letter 1676-E filed December 24, 2002 and Resolution E-3809, dated January 30, 2003.

existing geothermal facilities toward its 1% renewable IPT. We issued Resolution E-3805, dated December 19, 2002, stating:

“We find that the contracts for which PG&E is seeking approval meet the one percent target, pending the CEC review. If the power from these resources is not certified as “incremental,” then PG&E needs to make up for the amount of renewable energy it is missing as part of its one percent requirement. PG&E should keep the Energy Division informed regarding the status of the CEC’s certification of PG&E’s renewable resource contracts and provide copies of its correspondence with the CEC.” (Resolution E-3805, at p. 13 (slip op.).)

We also stated that:

“This resolution only applies to the interim renewable energy contracts for which PG&E is seeking Commission approval in AL 2303-E, and does not prejudge issues to Renewables Portfolio Standard program implementation. Issues related to annual renewable energy procurement targets, flexible compliance mechanisms, and other details are currently being discussed in R.01-10-024.” (Resolution E-3805, at p. 15 (slip op.).)

Again in the *RPS Implementation Decision* [D.06-04-014], *supra*, we cautioned that counting output from the Calpine geothermal facilities toward the statutory 1% IPT was conditioned upon CEC approval. In D.06-04-014, we stated:

“TURN also argued that the OIR did not identify the portion of 2003 renewable procurement eligible to satisfy the IPT for each utility, focusing primarily on SCE and PG&E’s agreements to purchase existing geothermal output from Calpine’s Geysers facility. Under D.03-06-076 PG&E and SCE may use their interim procurement geothermal contracts to satisfy certain aspects of their RPS procurement requirements. The extent to which this interim procurement can be banked forward to satisfy future IPT is subject to determination by the CEC.” (*RPS Implementation Decision* [D.04-06-014], *supra*, at p. 10, fn.11, Appendix B, p. B-4, fn. 4 (slip op.).)

SCE contends that D.04-06-014 counted all procurement pursuant to the Calpine Contract as incremental because the above statement did not appear in a finding of fact or conclusion of law. (SCE Rhg. App., at p. 13, fn. 30.) It is true there was not a specific finding or conclusion embodying this policy discussion, nor was there any finding or conclusion stating that the output in question was viewed as incremental. We were not legally required to make findings of fact or conclusions of law on this specific issue. Rather, the material issues in the proceeding focused on the clarification of standard contract terms and conditions for use on the RPS program under Section 399.14(a)(2)(D). The findings and conclusions in D.04-06-014 reflect our determinations on these material issues. (See Pub. Util. Code, §1705.)

However, that does not negate our clear policy on the issue of geothermal output nor does it justify SCE's disregard of the policy. As previously explained, both before and after Resolution E-3809, we stated a consistent view that CEC determination is a legal prerequisite to a utility's ability to count geothermal output as incremental for purposes of the RPS statute.

Accordingly, there is no factual or legal basis to support SCE's erroneous contention that we changed our view on this issue solely for SCE in Resolution E-3809, and did so absent any explanation for this departure from our own previously stated policy and contrary to statutory requirement.

Finally, SCE states that both its 2004 RPS Compliance Report and 2004 Renewable Procurement Plan counted the Calpine Contract geothermal output toward meeting the 1% IPT. SCE states that no one objected to the Compliance Report and Energy Division approved the Renewable Procurement Plan. Thus, SCE suggests the Commission is bound by SCE's proposed treatment of the geothermal output in those documents. (SCE Rhg. App., at pp. 12-13.)

SCE's reliance on statements or actions of Commission staff as binding upon the Commission is misplaced. As SCE knows, or should have known better, Commission staff does not have the authority to make or change Commission policy. Moreover, as the Decision correctly points out, Commission staff does not have the

authority to alter statutory requirements.¹¹ Section 399.12(a)(2) provides that only the CEC may determine whether the geothermal output in question is incremental. Commission policy as stated in Resolution E-3805, Resolution E-3809 and the *RPS Implementation Decision* [D.04-06-014], *supra*, reflect that condition of statutory compliance. This policy was clearly articulated in all three Commission decisions prior to SCE's submittal of its 2004 RPS Compliance Report and 2004 Renewable Procurement Plan. That SCE chose to rely on its own proposals, rather than statutory requirements and Commission policy was bad judgment on its part. However, that does not constitute legal error by the Commission.

C. Collateral Attack of Resolution E-3809

SCE contends that TURN's objection to its 2005 Short-Term Renewable Procurement Plan was an impermissible collateral attack on Resolution E-3809. SCE states that a collateral attack is barred by Section 1709 and principles of *res judicata*. SCE again contends that Resolution E-3809 clearly determined its geothermal output was incremental. (SCE Rhg. App., at pp. 13-15.) Accordingly, though it is not explicitly stated, SCE appears to argue that the Decision errs because it relies on the alleged TURN collateral attack to change Resolution E-3809.

Section 1709 provides:

“In all collateral actions or proceeding, the orders and decisions of the commission which have been final shall become conclusive.” (Pub. Util. Code, § 1709.)

In the instant case, Section 1709 does not bar TURN from raising its objection. Thus, SCE's collateral attack argument has no merit.

¹¹ See D.05-07-039, at p. 22 also citing to *Order Instituting Rulemaking on the Commission's Own Motion to Determine Whether Baseline Allowances for Residential Usage of Gas and Electricity Should Be Revised* [D.04-02-057, at p. 2 (slip op.)] (2004) __ Cal.P.U.C.3d __, 2004 Cal. P.U.C. LEXIS 60, and *Order Instituting Rulemaking on the Commission's Own Motion to Determine Whether Baseline Allowances for Residential Usage of Gas and Electricity Should Be Revised* [D.04-04-020, at p. 12 (slip op.)] (2004) __ Cal.P.U.C.3d __, 2004 Cal. P.U.C. LEXIS 137. Both these decisions brought utility rates into conformance with statutory requirements despite previously authorized rate levels.

SCE's argument is based on its incorrect assumption that Resolution E-3809 conclusively determined that the geothermal output was incremental for purposes of the RPS statute. As discussed in Section II.B of today's order, Resolution E-3809 did not, and could not, have made that determination. The Resolution determined only that the geothermal output could be counted as incremental if it met the requirements of "other applicable law." All parties agree that means compliance with the requirements in SB 1078.

Thus, the outcome under the Decision and the Resolution are the same. The Decision merely states that as to SCE's proposed 2005 renewable resource mix, it does not prejudge one way or the other whether the geothermal output can be counted as incremental. (D.05-07-039, at pp. 22-23.) That determination is dependent upon the CEC's certification pursuant to Section 399.12(a)(2). Accordingly, the Decision states: "[w]e are simply stating that until SCE has presented appropriate certification from the Energy Commission of incremental output for the Geysers contracts, it may not allocate this energy to its Incremental Procurement Target." (D.05-07-039, at pp. 22-23.)

Further, as we discussed above, after Resolution E-3809 was issued, we addressed an identical objection by TURN regarding the treatment of SCE's Geysers facility geothermal output. We reiterated that the output was subject to CEC certification prior to allocation as incremental. (*RPS Implementation Decision* [D.04-06-014], *supra*, at p. 10, fn. 11, Appendix B, p. B-4, fn. 4 (slip op.)) The Decision is consistent with Resolution E-3809 and our determinations regarding the RPS treatment of Geysers geothermal output. SCE's position regarding the allocation of its geothermal output contravenes the RPS statute as well as our clear policy determinations about its application. Accordingly, TURN is not barred from raising the same objection in this proceeding.

D. Applicability of Rule 47 and Public Utilities Code Section 1708

SCE contends that by requiring compliance with Section 399.12(a)(2), the Decision is an "abrupt change of course" by which the Commission has imposed a new

requirement and modified Resolution E-3809. SCE contends the Decision errs because it can not modify Resolution E-3809 without first complying with Rule 47 of the Commission's Rules of Practice and Procedure and Section 1708. (SCE Rhg. App., at pp. 16-21.) We find these contentions have no merit.

SCE cites to Rule 47(d)¹² of the Commission's Rules of Practice and Procedure which sets the 1 year time frame for filing a petition for modification. SCE states only that the Commission may find that an untimely petition for modification is barred by the doctrine of laches. (SCE Rhg. App., at p. 16.) That is the sum total of SCE's Rule 47 argument. SCE does not specifically set forth the grounds upon which it believes the Decision is unlawful with respect to Rule 47, as required by Section 1732. Moreover, Rule 47 applies to the filing of petitions for modification. (Code of Regs, tit. 20, §47.) The instant case does not involve the filing of such a pleading; thus, Rule 47 neither applies nor is relevant.

We also reject SCE's Section 1708 claim on the same ground, namely, that this statutory provision does not apply. Section 1708 applies when we rescind, alter, or amend a Commission order and decision. (Pub. Util. Code, §1708.)¹³ SCE's argument

¹² Rule 47(d) provides:

"Except as provided in this subsection, a petition for modification must be filed and served within one year of the effective date of the decision proposed to be modified. If more than one year has elapsed, the petition must also explain why the petition could not have been presented within one year of the effective date of the decision. If the Commission determines that the late submission has not been justified, it may on that ground issue a summary denial of the petition." (Code of Regs., tit. 20, §47, subd. (d).)

¹³ Section 1708 provides:

"The Commission may, at any time, upon notice to the parties, and with opportunity to be heard as provided in the case of complaints, rescind, alter, or amend any order or decision made by it. Any order rescinding, altering, or amending a prior order or decision shall, when served upon the parties, have the same effect as an original order or decision." (Pub. Util. Code, § 1708.)

is premised on a misinterpretation of our determination in Resolution E-3809, regarding whether all geothermal output from the Calpine Contract has been deemed incremental for purposes of meeting the statutory 1% IPT. Contrary to SCE's claim, Resolution E-3809 did not deem such output incremental. Accordingly, the Decision does not alter, modify or rescind any determination regarding the geothermal output in Resolution E-3809. The Decision is consistent with Resolution E-3809 in this regard and thus, Section 1708 does not apply. Accordingly, the cases SCE cites support its Section 1708 argument also do not apply.¹⁴

SCE attempts to make an equity argument based on its own misinterpretation. SCE argues how it relied on its understanding of Resolution E-3809 as the basis for concluding that it had no exposure to penalties during the years 2003, 2004 and 2005, and as basis for planning its procurement activities to avoid exposure to penalties in the future. SCE states that subsequent to Resolution E-3809, the Commission and stakeholders had opportunities to disabuse SCE of its reliance on Resolution E-3809. (SCE Rhg. App., at pp. 17-19.) SCE states it now realizes it is unlikely the CEC will certify all of the Calpine Contract output as incremental. Thus, to the extent it will be out of compliance with the RPS statute, SCE notes that it could potentially be subject to penalties of up to \$25 million. (SCE Rhg. App., at pp. 3-4.)

SCE further states that it has made "substantial investments of time, money, and other resources" in reliance on its interpretation of Resolution E-3809, thus the

¹⁴ *Order Instituting Rulemaking on the Commission's Own Motion to Determine Whether Baseline Allowances for Residential Usage of Gas and Electricity Should Be Revised* [D.04-02-057], *supra*; *Order Instituting Rulemaking on the Commission's Own Motion to Determine Whether Baseline Allowances for Residential Usage of Gas and Electricity Should Be Revised* [D.04-04-020], *supra*; *Rulemaking and Investigation on the Commission's Own Motion into Universal Service and to Comply with the Mandates of Assembly Bill 3643* [D.98-01-023] (1998) 78 Cal.P.U.C. 2d 272, 1998 Cal. P.U.C. LEXIS 97; *Application of Pacific Gas and Electric Company for Adoption of its 2004 Energy Resource Recovery Account (ERRA) Forecast Revenue Requirement, for Review of Contract Administration, Least Cost Dispatch and Procurement Activities During the Record Period From January 1, 2003, and for Approval of its 2004 Ongoing Competition Transition Charges (CTC) Revenue Requirement and Proposed Rate Design* [D.05-01-031] (2005) 2005 Cal. P.U.C. LEXIS 33.

Decision errs by having reopened and reversed the Resolution absent the required extraordinary circumstances and without exercising great care.¹⁵ (SCE Rhg. App., at p. 18.) Although the potential penalties to SCE may be significant and unfortunate, SCE's misinterpretation does not constitute legal error committed by the Commission. Further, to be swayed by SCE's equity argument would be inconsistent to the mandates in SB 1078 regarding the allocation of geothermal facility output. SCE's suggestion that we or others should have disabused it of its misunderstanding is disingenuous. As discussed above, we clearly and repeatedly articulated that the statutory requirements of Section 399.12(a)(2) apply for purposes of allocating geothermal output. Further, SCE itself acknowledges that we are without authority to disregard that statutory mandate. (SCE Rhg. App., at p. 19.) There has been no change in the interpretation of Section 399.12(a)(2) by this Commission. As discussed above, there has been no modification of a previous decision regarding the interpretation of the statute.

Finally, SCE claims that we have somehow imposed a new requirement; that is Section 399.12(a)(2). However, Section 399.12(a)(2) is not new. It was imposed by the Legislature and in existence at the time SB 1078 first became effective (January 1, 2003), and was in place and required by law prior to the date of Resolution E-3809 (dated January 30, 2003). As discussed above, we have clearly and repeatedly articulated that the statutory requirements of Section 399.12(a)(2) apply for purposes of allocating geothermal output, and we have been consistent in this interpretation. What has happened here is no more than SCE's incorrect interpretation of Resolution E-3809, and not a Commission modification of a previous interpretation. Accordingly, SCE's Section 1708 argument has no merit.

¹⁵ Citing to *PG&E Co.* [D.92058] (1980) 4 Cal.P.U.C. 2d 139, 149. We note that because Section 1708 does not apply, this cited decision has no relevance, and SCE's reliance on this case is misplaced.

E. Request for Oral Argument

SCE requests oral argument broadly claiming that the Decision changes existing Commission precedent or departs from existing Commission precedent, and that oral argument will materially assist the Commission in resolving the issues presented in the application for rehearing. (SCE Rhg. App., at p. 1.) We deny the request for the reasons stated below.

Rule 86.3 of the Commission's Rules of Practice and Procedure sets forth the general criteria for granting oral argument and provides:

“(a) An application for rehearing will be considered for Oral argument if the application or a response to the application demonstrates that oral argument will materially assist the Commission in resolving the application, **and** (2) the application or response raises issues of major significance for the Commission because the challenged order or decision:

- (i) adopts new Commission precedent or departs from existing Commission precedent without adequate explanation;
- (ii) changes or refines existing Commission precedent;
- (iii) presents legal issues of exceptional controversy, complexity, or public importance; and/or
- (iv) raises questions of first impression that are likely to have significant precedential impact.”

(Code of Regs., tit. 20, § 86.3, subd. (a), emphasis added.)

While SCE makes a broad claim that the Decision changes or departs from existing precedent and oral argument will materially assist us, SCE fails to adequately explain why or how the stated criteria apply to this case and how it would otherwise meet the standard for consideration of oral argument. Further, as explained above, SCE has failed to demonstrate that the Decision departs from Commission precedent. Accordingly, the request for oral argument is denied.

III. CONCLUSION

For the reasons stated above, the applications for rehearing of D.05-07-039 filed by CEERT and SCE are denied because no legal error has been shown. In addition, the request for oral argument is denied.

THEREFORE, IT IS ORDERED that:

1. Rehearing of Decision 05-07-039 is denied.
2. The request for oral argument is denied.

This order is effective today.

Dated January 26, 2006, at San Francisco, California.

MICHAEL R. PEEVEY
President
GEOFFREY F. BROWN
DIAN M. GRUENEICH
JOHN A. BOHN
RACHELLE B. CHONG
Commissioners