

Decision 08-10-039

October 16, 2008

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application of
Southern California Edison Company
(U 338-E) for Approval of Results of
Fast Track of Its New Generation
Request for Offers and for Cost
Recovery.

Application 07-02-026
(Filed February 28, 2007)

ORDER DENYING REHEARING OF DECISION (D.) 08-05-028**I. INTRODUCTION**

Decision (D.) 08-05-028 (or “Decision”) grants the application by Southern California Edison Company (“SCE”) for approval to enter into a 10-year power purchase agreement (“Blythe/SCE contract”) with Blythe Energy, LLC (“Blythe”) for up to 490 megawatts of capacity and energy deliverable from August 1, 2010 through July 31, 2020. In addition, D.08-05-028 grants SCE the authority to allocate the costs and benefits of the Blythe/SCE contract to all benefiting customers in accordance with the cost allocation methodology adopted in D.06-07-029.

A timely application for rehearing of the Decision was filed by Californians for Renewable Energy, Inc. (“CARE”). In its rehearing application, CARE challenges D.08-05-028 on the following grounds: (1) The Commission can not approve the Blythe/SCE contract because the contract has not been first submitted to the Federal Energy Regulatory Commission (“FERC”) for review, as required by the United States Supreme Court’s recent decision in *Morgan Stanley Capital Group Inc. v. Public Utility District No. 1 of Snohomish County* (“*Morgan Stanley*”) (2008) 128 S.Ct. 2733; and (2) CARE’s unresolved complaint at FERC concerning the Blythe/SCE contract and an unresolved petition for review of the same FERC docket to the Ninth Circuit should be

resolved before the Blythe/SCE contract is signed because the contract could contain penalty clauses that may cause SCE ratepayers monetary damages.

A response to the rehearing application was filed by SCE. SCE opposes the rehearing application.

We have reviewed each and every allegation set forth in the application for rehearing and are of the opinion that CARE has not demonstrated grounds for granting rehearing. Accordingly, the application for rehearing of D.08-05-028 is denied.

II. DISCUSSION

A. **The Supreme Court's *Morgan Stanley* decision provides no basis for rehearing of the Commission's approval of the Blythe/SCE contract.**

CARE asserts that rehearing of the Decision is warranted in light of the United States Supreme Court's recent decision in *Morgan Stanley*. According to CARE, "[t]he court held that contract rates are presumptively reasonable only when the [FERC] has had an initial opportunity to review the contracts without applying the *Mobile-Sierra* presumption and therefore that the presumption should not apply to contracts entered into under 'market-based' tariffs." (Rehrg. App., p. 1.) Therefore, CARE asserts, the Blythe/SCE contract can not be approved by the Commission according to the law because the contract was not first submitted to FERC for review. (Rehrg. App., pp. 1-2.)

Nothing in the Supreme Court's opinion in *Morgan Stanley* supports CARE's assertion that the Blythe/SCE contract can not be approved by us in this proceeding. *Morgan Stanley* does not address our authority to approve contracts, nor does *Morgan Stanley* suggest in any way that we may not approve a contract until it has been first reviewed by FERC. In contrast, *Morgan Stanley* observed that under FERC's market-based rate tariff system, contracts are no longer filed with and reviewed by FERC before going into effect. (See *Morgan Stanley*, *supra*.)

Accordingly, CARE's assertion of legal error is meritless and is rejected.

B. CARE’s assertions regarding ongoing proceedings before FERC and the Ninth Circuit provide no basis for rehearing of the Commission’s approval of the Blyth/SCE contract.

CARE next asserts that an “outstanding unresolved complaint” at FERC¹ concerning the Blyth/SCE contract and an “outstanding unresolved petition for review” of the same FERC docket to the Ninth Circuit provide sufficient reason to grant rehearing. According to CARE, these proceedings should be resolved before the Blyth/SCE contract is signed because the contract “could have penalty clauses that could cause [SCE’s] ratepayers’ monetary damages.” (Rehrg. App., p. 2.)

Preliminarily, it is noted that CARE’s assertion is vague, offered without specific legal grounds, and therefore does not comply with the requirements of Public Utilities Code Section 1732 which requires the rehearing applicant to “set forth specifically the ground or grounds on which the applicant considers the decision or order to be unlawful.” (Pub. Util. Code, § 1732.)² Not only does CARE not identify any specific contract provision, CARE does not specify or analyze how the pendency of the FERC complaint or its petition for review to the Ninth Circuit renders the Decision unlawful. We could reject CARE’s assertion on this basis alone. Nevertheless, as explained below, CARE’s assertion is otherwise without merit and should be rejected because no legal error is demonstrated.

Regarding the complaint at FERC, CARE asserts that FERC granted rehearing in Docket No. EL07-50 on November 21, 2007 and that “presumably, this rehearing will now be scheduled and decided according to the guidance issued by the Supreme Court [in *Morgan Stanley*].” (Rehrg. App., p. 1.) Contrary to CARE’s

¹ FERC Docket No. EL07-50.

² Also, see Rule 16.1(c) of the Commission’s Rules of Practice and Procedure which states that “[a]pplications for rehearing shall set forth specifically the grounds on which the applicant considers the order or decision of the Commission to be unlawful or erroneous, and must make specific references to the record or law.” (Code of Regs., tit. 20, §16.1, subd. (c).)

assertion, FERC's November 21, 2007 "Order Granting Rehearing for Further Consideration" does not grant rehearing on the subject matter of the complaint.³ The order is merely a tolling order issued for the purpose of "afford[ing] additional time for consideration of the matters raised or to be raised..." As stated in the order, "[i]n the absence of Commission action within 30 days, the request for rehearing (and any timely requests for rehearing filed subsequently) would be deemed denied."⁴

Moreover, given that FERC has not yet ruled on CARE's request for hearing in Docket No. EL07-50, CARE's petition for review to the Ninth Circuit appears to be premature. The Federal Power Act requires a complainant to exhaust all administrative remedies before seeking judicial review of a FERC order.⁵ CARE filed its petition for review to the Ninth Circuit on April 24, 2008, and FERC has not yet acted on that request except to issue a ministerial tolling order.

In any event, we acted lawfully in rejecting CARE's argument that these proceedings should be resolved before the Blythe/SCE contract is signed because the possibility that the contract could contain penalty clauses that might result in ratepayer monetary damages. The argument is speculative and meritless. As we noted when CARE raised the same argument in its comments on the proposed decision:⁶

This Commission is only weighing whether the 10-year PPA for the output from the facility is needed by [SCE] to serve the needs of its system, and whether the choice of this resource to fill that need is reasonable. Based on our findings set forth in the decision, we find that the contract is needed and is a reasonable selection by [SCE] from its RFO.

³ Order Granting Rehearing for Further Consideration, Dockets Nos. EL07-49-002 and EL07-50-001 (Nov. 21, 2007).

⁴ Order Granting Rehearing for Further Consideration, Dockets Nos. EL07-49-002 and EL07-50-001 (Nov. 21, 2007); 18 C.F.R. § 385.713 (2007).

⁵ See 16 U.S.C. § 8251 (a)-(b); *City of Tacoma v. Taxpayers of Tacoma* (1958) 357 U.S. 320, 336 ("Congress in [Section 8251] prescribed the specific, complete and exclusive mode for judicial review of [FERC's] orders.").

⁶ CARE Comments on Proposed Decision Approving Power Purchase Agreement with Blythe Energy, LLC at 1-3 (Apr. 24, 2008).

In addition, we are aware of the outstanding FERC and Ninth Circuit issues and the possibility that a final decision on some of these issues could affect the Blythe/SCE contract. If there are monetary consequences as a result of changes to the terms of the contract, we will address at that time how to fairly allocate those costs. The FERC issues, as well as those on appeal to the Ninth Circuit are inchoate at this time, so we can not base this decision on unknown future possibilities.

(D.08-05-028, p. 20, emphasis added.) CARE's application lacks any new or compelling justification to alter our position regarding CARE's purely speculative concern. The application fails to demonstrate any legal error to warrant rehearing of the Decision on this issue.

III. CONCLUSION

For the reasons specified above, the application for rehearing of D.08-05-028 is denied.

THEREFORE, IT IS HEREBY ORDERED that:

1. The application for rehearing of D.08-05-028 is denied.
2. This proceeding, A.07-02-026, is hereby closed.

This order is effective today.

Dated October 16, 2008, at San Francisco, California.

MICHAEL R. PEEVEY
President
DIAN M. GRUENEICH
JOHN A. BOHN
RACHELLE B. CHONG
TIMOTHY ALAN SIMON
Commissioners