

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

ENERGY DIVISION

RESOLUTION E-4554

August 15, 2013

**REDACTED
RESOLUTION**

Resolution E-4554. Southern California Edison Company ("SCE") requests approval of two agreements with Harbor Cogeneration Company, LLC ("Harbor") for procurement of combined heat and power ("CHP") products.

PROPOSED OUTCOME: This Resolution denies the two agreements between Southern California Edison and Harbor Cogeneration Company pursuant to the terms of the Qualifying Facility and Combined Heat and Power Program Settlement Agreement.

SAFETY CONSIDERATIONS: The Harbor Agreements are between Southern California Edison Company and Harbor Cogeneration Company. Based on the conflicting information on the facility's operational configurations before us in the Advice Letter, Independent Evaluator's Report, and FERC Notice of Self-Certification, the Commission cannot conclude that the Harbor Agreements will not result in any adverse safety impacts on the facilities or operations of SCE.

ESTIMATED COST: Capacity, energy, and variable cost components of the Harbor Agreements are confidential at this time due to its selection through the CHP Request for Offers, which is a competitive solicitation.

By Advice Letter 2772-E filed on August 31, 2012.

SUMMARY

Southern California Edison Company's ("SCE's") Master Power Purchase and Sale Agreement Confirmation Letters for Resource Adequacy Capacity and Unit Contingent Tolling ("Harbor Agreements") with Harbor Cogeneration Company, LLC ("Harbor" or "Seller") are the result of a successful bid, Short

Listing, evaluation, and selection through the 2011 SCE CHP Request for Offer (“RFO”) process. We conclude that the Harbor facility (“Facility”) does not conform to the requirements of an eligible CHP Facility as required by the terms, goals, and objectives of the Qualifying Facility (“QF”) and Combined Heat and Power Program Settlement Agreement (“Settlement”), which was adopted by the Commission in Decision (“D.”) 10-12-035. Specifically, the Harbor facility is not an Existing CHP Facility under the Settlement, and it does not meet the eligibility requirements established for a New CHP Facility under the Settlement, and SCE’s request for approval of the Agreements is thus denied.

On August 31, 2012, SCE filed Advice Letter (“AL”) 2772-E requesting Commission approval of two Master Power Purchase and Sale Agreement Confirmation Letters with Harbor for the period between January 1, 2014 to December 31, 2020. Harbor, which is owned by Southwest Generation Company, is located in Wilmington, California. The Facility is currently comprised of an 80 MW General Electric 7111EA combined cycle gas turbine (“CCGT”), a heat recovery steam generator (“HRSG”), and two steam turbines. The Facility currently has a 118 MW nameplate capacity (Power Rating). The Facility currently does not operate as a cogeneration facility: it currently operates as a combined cycle gas turbine generating facility. SCE expects it to operate as a simple cycle gas turbine cogeneration facility.¹

SCE’s presentation to the Commission of the Harbor Agreements necessitates the reaffirmation of key policy objectives of the CHP Program. The purpose of the CHP Program is to encourage the continued operation of existing efficient CHP Facilities; the repowering or change in operations of inefficient CHP Facilities; and the development of new CHP Facilities for diversity, reliability, and environmental benefits. The Program also seeks to maintain greater regulatory and market certainty.²

In its comments on the Draft Resolution, SCE argued that Harbor is an Existing CHP Facility as defined in the Settlement and as defined in the federal regulations. SCE’s interpretation of an eligible CHP Facility under the Settlement frustrates and is in direct contravention with the key policy objectives of the Settlement and is therefore unsupportable and incorrect. As noted, the

¹ AL 2772-E, p. 3-4.

²Settlement Term Sheet Sections 1.2.1.3, 1.2.1.4, 1.2.2.1, 1.2.3.3, and 1.2.3.6

Settlement was specifically designed to, among other key policy objectives, “encourage the *continued* operation of the State’s Existing CHP Facilities”³ The policies governing Existing CHP Facilities provide clear context for the correct—and only reasonable – interpretation of an eligible CHP Facility that seeks to qualify under the Settlement as an Existing Facility: an Existing CHP Facility is one that had been operating as a CHP facility at the time of the Settlement date. Harbor, on the other hand, was not operating as a CHP facility at the time of the Settlement, and it would only begin to operate as a CHP facility if it were awarded a contract pursuant to the Settlement. Therefore, executing a contract with Harbor would not “encourage the *continued* operation of existing efficient CHP Facilities.”⁴

We determine that Harbor is a New CHP Facility under the Settlement that must, according to the overall policy objectives of the State’s CHP Program⁵, meet the efficiency requirements for new facilities (“new, clean, and efficient”) that the Settlement references to 18 C.F.R. 292.205. As the Cogeneration Association of California correctly pointed out in its comments on the Draft Resolution, a New CHP Facility under the Settlement is subject to the federal Fundamental Use Test. And because Harbor does not meet the efficiency requirements for a New CHP Facility set forth in Section 4.2.2.1 of the Settlement Term Sheet, SCE’s contract with Harbor is denied.

SCE argues that Harbor qualifies as an existing qualifying cogeneration facility under Title 18 of the Code of Federal Regulations Section 292.205 (“18 C.F.R. 292.205”). However, the Energy Policy Act of 2005 – which revised the federal code –describes existing qualifying cogeneration facilities as those that were extant as qualifying cogeneration facilities on the date the law was passed. Since Harbor relinquished its QF status many years prior to that date and was not a qualifying cogeneration facility on August 8, 2005, it does not qualify as an eligible CHP Facility under the Settlement.

Although from 1987 to 1999 Harbor had been selling power to SCE as a certified QF, Harbor lost its thermal host. In 1999 Harbor requested and FERC granted

³ Settlement Term Sheet, Section 1.2.1.3 (emphasis added).

⁴ Ibid.

⁵ The State’s CHP Program is embodied in Commission Decision (“D.”) 10-12-035, which adopted the QF/CHP Settlement. (See Settlement Term Sheet, Section 1.1.)

exempt wholesale generator status on the condition that Harbor voluntarily relinquish its QF status, which Harbor accordingly did. At the time of SCE's first CHP RFO in July 2012, therefore, Harbor was operating not as a QF but as a merchant generator. Only after bidding, Short Listing, evaluation and selection in SCE's first CHP RFO, Harbor in December 2012 self-certified as a QF at FERC. In its notice of self-certification ("Form 556") Harbor proposed to operate with substantial changes to its Facility since its pre-1999 operation as a QF. These promised future changes include two additional generation units and the development of a subsidiary company to serve as its thermal host.

Harbor is a New CHP Facility according to the Settlement Agreement, which references the Federal regulations for the efficiency requirements of New CHP Facilities under the State's CHP Program. Pursuant to 18 C.F.R.292.205(d)(3) and Section 1253 of the 2005 Energy Policy Act,⁶ the Fundamental Use Test requires new cogeneration facilities to use at least 50% of its annual energy output for industrial, commercial, residential, or institutional purposes or else obtain a facility-specific FERC determination of satisfaction of the Fundamental Use Test. Harbor fails to meet this requirement.

In addition to Harbor's failure to qualify as a cogeneration facility under the Settlement, the Commission is troubled by the conflicting descriptions from SCE, the Independent Evaluator ("IE"), and Harbor of the facility's operational configuration for purposes of meeting the QF cogeneration standards specified for recipients of power purchase agreements resulting from the CHP RFO.

SCE understands that Harbor will convert from a CCGT generating facility into a simple cycle gas turbine CHP facility. This entails "directing the steam to the steam host instead of to the steam boiler" such that under this arrangement its generating capacity will decrease from 118 MW to 80 MW.⁷ The IE describes that, "Steam will be directed to the steam host instead of the two steam turbines when Harbor is being dispatched by the CAISO."⁸

⁶16 U.S.C. § 824a-3(n).

⁷AL 2772-E, p. 5.

⁸ Report of the Independent Evaluator Southern California Edison Company First Combined Heat and Power Request for Offers-Track 1 and Power Purchase Agreement with Harbor Cogeneration Company, LLC ("IE Report"), (August 2012), p. 13

In contrast, Harbor's Form 556 describes components and operations of a combined cycle CHP facility. Harbor states that under normal dispatch of the 82.2 MW capacity (gross) combustion turbine, waste heat will be recovered in the two-pressure level Heat Recovery Steam Generator ("HRSG"). The HRSG's higher pressure exhaust steam will supply the 10 MW high pressure steam turbine. The HRSG's lower pressure exhaust steam will combine with the exhaust steam from the high pressure steam turbine to supply the 10 MW low pressure steam turbine. Exhaust steam from the low pressure steam turbine will be either vented to the atmosphere or supplied to Harbor Cogeneration Ice Supply, LLC, Harbor's proposed thermal host for use in ice-making. Harbor contends that it meets FERC's criteria for QF qualification.⁹

Although the Commission finds that Harbor does not conform with the requirements of an eligible CHP Facility under the Settlement, the Commission states what should be an obvious matter, that the IOU's bid requests must include sufficiently specific information on the thermal host, the nature and magnitude of its anticipated energy requirements, and its likely effects on the operations of the CHP Facility. Consistent with our previous requirement that the IOUs calculate GHG Emissions for all offers that meet the minimum eligibility requirements in E-4553, thermal host information is crucial to understanding the viability of the CHP project, its performance under the applicable State and Federal regulations, and its consistency with the objectives and requirements of the QF/CHP Settlement. A facility will need to conform with the requirements of a qualifying cogeneration facility upon commencing the CHP agreement and, per the terms, policies, and objectives of the Settlement, fulfill operational and efficiency requirements of new qualifying cogeneration facilities if it is a New CHP Facility under the Settlement.

In addition, the Commission notes that the magnitude of a CHP Facility's GHG Debit or Credit does not disqualify them from entering a CHP agreement.

Harbor will not count toward SCE's MW Target or GHG Emissions Reduction Target ("ERT"). Considering SCE's progress to the MW Target A goal (from the approved and pending contracts of the 2011 CHP RFO), and SCE's minimal progress toward the GHG ERT thus far, the Commission amplifies its urging to

⁹ FERC Accession No: 20121227-5111. "Form 556 of Harbor Cogeneration Company, LLC, under QF13-218." http://elibrary.ferc.gov/idmws/File_list.asp?document_id=14077843

SCE to conduct future solicitations and evaluate future CHP offers so that it meets all of the ultimate requirements and objectives of the Settlement.

BACKGROUND

On December 16, 2010, the Commission adopted the Qualifying Facility and Combined Heat and Power Program Settlement Agreement (“Settlement”) with the issuance of D.10-12-035. The Settlement resolves a number of longstanding issues regarding the contractual obligations and procurement options for facilities operating under legacy and new qualifying facility (“QF”) contracts.

The QF/CHP Settlement establishes Megawatt (“MW”) procurement targets and Greenhouse Gas (“GHG”) Emissions Reduction Targets the investor-owned utilities (“IOUs”) are required to meet by entering into contracts with eligible CHP Facilities, as defined in the Settlement. Pursuant to D.10-12-035, the three large electric IOUs must procure a minimum of 3,000 MW of CHP and reduce GHG emissions consistent with the California Air Resources Board (“CARB”) Scoping Plan, currently set at 4.8 million metric tonnes (“MMT”) by the end of 2020.

Among other things, D.10-12-035 updates methodologies and formulas for calculating the Short Run Avoided Cost (“SRAC”) energy price to be used in the Standard Contract for QFs with a Power Rating that is Less than or Equal to 20MW (the “QF Standard Offer Contract”), Transition PPAs, amendments to existing QF PPAs, and Optional As-Available PPAs. The SRAC methodology under the QF/CHP Settlement includes:

- (1) By January 1, 2015, transitioning SRAC pricing from a formula that is based in part on administratively-determined heat rates to a formula that solely uses market heat rates;
- (2) IOU-specific time-of-use (“TOU”) factors to be applied to energy prices to encourage energy deliveries during the times when the energy is most needed by customers;
- (3) A locational adjustment based on California Independent System Operator (“CAISO”) nodal prices; and,
- (4) Pricing options based on whether a cap-and-trade program or other form of GHG regulation is developed in California or nationally.

In addition, the Commission defined several procurement processes for the IOUs within the Settlement. Per Section 4.2.1, the Commission directs the three IOUs to

conduct Requests for Offers exclusively for CHP resources (“CHP RFOs”) as a means of achieving the MW Targets and GHG Emissions Reduction Targets. The Settlement Term Sheet establishes terms and conditions regarding eligibility, contract length, pricing, evaluation and selection and other terms and conditions of the RFOs.

Per Section 5.1.4, the IOUs will conduct three CHP RFOs during the Initial Program Period scheduled at regular intervals, with the first initiated no later than 90 days after the Settlement Effective Date, February 21, 2012. The three RFOs shall solicit CHP resources for an amount no less than the Net MW Target (the MW Target A, B, or C¹⁰ not otherwise procured by the Section 4 procurement processes) for each IOU.

SCE launched the 2011 CHP RFO for 630 MW on December 15, 2011. SCE posted to its website¹¹ Participant Instructions, an offer template, contract documents for CHP and Utility Prescheduled Facility (“UPF”) offers, and other information. Participant Instructions referenced the pro forma contracts for the CHP and UPF offers, described eligibility and contract term requirements, materials for submission, and the evaluation criteria. Baseload CHP offers were encouraged to submit the CHP Pro Forma PPA attached as Exhibit 5 to the Settlement. UPFs were encouraged to submit four “UPF Documents.”¹²

SCE decided to use a two track solicitation for the first RFO to manage the risk related to interconnection costs that would be borne by the IOUs and ratepayers. The First Track solicited Existing CHP Facilities, Utility Prescheduled Facilities (“UPFs”), and New or Repowered CHP Facilities with an existing interconnection and a CAISO Phase I Interconnection Study. If the Offeror had no such study completed, the Offeror permitted SCE to terminate the contract if network upgrade costs based on a future study exceeded a certain amount. The

¹⁰ Per Settlement Term Sheet Section 5.1.2, each IOU allocation of the total 3,000 MW Target is divided into interval MW Targets that correspond to the three RFOs: “A,” “B,” and “C.” SCE’s 1,402 MW Target is split into 630, 378, and 394 MW for these interval Targets, respectively.

¹¹<http://www.sce.com/EnergyProcurement/renewables/chp/rfo.htm>

¹² The four UPF Documents include: EEI Master Power Purchase and Sale Agreement Cover Sheet (“EEI Master Agreement”); EEI Paragraph 10 to the Collateral Annex (“Paragraph 10”); Unit Contingent (“UC”) Tolling Confirmation; and Resource Adequacy (“RA”) Confirmation.

Second Track was for New or Repowered CHP Facilities where the Offeror was unwilling to give SCE the termination right.

At the 2011 CHP RFO Offeror's Conference, SCE outlined "Keys to a Successful Offer" including a preference for competitively-priced offers, optionality by varying the offer's term length and providing curtailment provisions, a preference to execute Pro-Forma CHP or UPF Documents, and signs of project viability for new, expanded or repowered CHP including progress toward interconnection.

On February 16, 2012, SCE received Indicative Offers from the Offerors. SCE evaluated the Indicative Offers almost exclusively with a quantitative valuation of the net present value (NPV) of the contract cost or benefit. The net present value was normalized by the contract's contribution to the Settlement MW Target to yield a \$NPV/MW metric. From the Indicative Offers SCE selected a Short List of offers that were qualified for further participation in the RFO. SCE notified bidders of the Short List on March 16, 2012. SCE then negotiated contractual terms with Short Listed Offerors and, if terms were agreed upon by both parties, the Offeror was permitted to submit a Final Offer. Final Offers, which were contractually binding if SCE selected the Final Offer, were submitted on May 29, 2012. SCE then evaluated the Final Offers considering quantitative factors, as it did with the Indicative Offers, and qualitative (non-price) factors. SCE continued to use the \$NPV/MW metric and calculated the net NPV for all offers and combinations of offers. The first qualitative factor SCE evaluated was the contract's contribution to the Settlement GHG Emissions Reduction Target. SCE evaluated the Final Offers on additional qualitative factors.

SCE notified the Offerors of Selected Offers on June 21, 2012. SCE selected five qualified Final Offers from four counterparties, including Harbor Cogeneration. SCE proposed that the five projects total 832 MW and 99,151 metric tons of GHG per the terms of the Settlement

Harbor's offer consists of Resource Adequacy capacity, dispatchable capacity and energy and other products. On July 2, 2012 SCE executed the RA and UC Toll Confirmations with Harbor. Pursuant to Section 4.10.2 of the Term Sheet, SCE utilized a Tier 3 filing to submit AL 2772-E for new, repowering, or existing PPAs that are materially modified from the PPAs approved in the Settlement. AL 2772-E is the third of four Advice Letters submitted for Commission approval pursuant to the 2011 SCE CHP RFO.

Harbor initially self-certified with the Federal Energy Regulatory Commission ("FERC") as a qualifying cogeneration facility in 1987.¹³ The cogeneration facility consisted of a General Electric G7111E gas-fired topping cycle combustion turbine that rejected heat to a HRSG, which in turn supplied steam to the Port of Long Beach for thermally enhanced oil recovery in the Wilmington Oil Field.¹⁴ In April 1989, Harbor began an Interim Standard Offer 4 ("ISO4") PPA with SCE for 80 MW of energy and capacity.¹⁵ In 1995, Harbor submitted to FERC a notice of self-recertification as a QF.¹⁶

In 1997, SCE filed Application 97-12-043 for a Commission order approving an agreement to terminate the ISO4 PPA, which was granted in D.98-09-073. This Decision approved an agreement in which Harbor would receive payments for an amount equal to the total payment under the ISO4 PPA for the period starting April 1, 1997 to October 1, 2008. The PPA termination was motivated in part due to subsidence caused by the extraction of oil in the area of the thermal host.¹⁷ In January 1999, Harbor requested FERC's (1) authorization to make power sales to wholesale customers at market based rates and (2) determination of status as an exempt wholesale generator ("EWG").¹⁸ In March 1999, FERC approved the request to become an EWG with market-based rate authority, contingent upon Harbor relinquishing its QF status. On March 29, 1999, Harbor notified FERC that it had relinquished its QF certification, effective February 15, 1999.¹⁹ Relinquishing QF status terminated the ISO4 PPA.

¹³ FERC Accession No. 19870615-0498. "Harbor Cogeneration submits addl info to certification appl under QF86-476." http://elibrary.ferc.gov/idmws/File_list.asp?document_id=891233

¹⁴ FERC Accession No. 19951003-0235. "Harbor Cogen submits notice of self-recertif of qualifying facil status for existing cogen facil located in Wilmington Oil Field, Los Angeles, CA under QF86-476." http://elibrary.ferc.gov/idmws/File_list.asp?document_id=56031

¹⁵ SCE January 29, 1999 QF Semi-Annual Status Report, QFID 2067

¹⁶ FERC Accession No. 19951003-0235.

¹⁷ Port of Long Beach, "Notice of Preparation and Initial Study," p. 21. <http://www.polb.com/civica/filebank/blobdload.asp?BlobID=4950>

¹⁸ FERC Docket ER99-1248 and Docket EG99-58, respectively

¹⁹ FERC Accession No. 19990401-0561. "Harbor Cogeneration Co informs FERC that it relinquished its QF status effective 990215 under QF86-476 et al." http://elibrary.ferc.gov/idmws/File_list.asp?document_id=1933100

In 2001, Harbor expanded its generating capacity. Harbor sold the expanded capacity to CAISO for the summers of 2001-2003 and sold the remaining capacity and energy to the California market as a merchant.²⁰ The expanded capacity consists of two back pressure steam turbines: a 15.6 MW Westinghouse high pressure (“HP”) steam turbine and an 11.5 MW De Laval low pressure (“LP”) steam turbine. These turbines utilize the steam produced by the HRSG and enable operation as a combined cycle generation facility.²¹

In 2002, Harbor entered a tolling agreement (“2002 Toll”) with SCE and sold 100 MW of capacity for the June through October periods of 2003-2007.²² The 2002 Toll was effective through October 2004, at which time Harbor executed a new tolling agreement (“2004 Toll”) with SCE. The 2004 Toll was for all of the Facility’s capacity and energy for the period of April 1, 2005 to May 31, 2008.²³ On April 29, 2008, Southwest Generation Company, LLC (“Southwest”) acquired Harbor from Black Hills Generation, Inc.²⁴ Harbor continued to operate as an EWG until 2012.

²⁰ Securities and Exchange Commission (“SEC”) File No. 333-52664, Black Hills Corporation, Form 10-K/A (2001), p. 12.

http://www.sec.gov/Archives/edgar/data/1130464/000113046402000006/form10k_01.txt

²¹ Southwest Generation, “Our Asset Portfolio.” <http://www.southwestgen.com/portfolio.html>

²² SEC File No. 001-31303, Black Hills Corporation, Form 10-K (2003), p. 104.

<http://www.sec.gov/Archives/edgar/data/1130464/000113046404000110/form10k-2003.htm>

²³ SEC File No. 333-52664, Black Hills Corporation, Form 10-K (2004), p. 7.

http://www.sec.gov/Archives/edgar/data/1130464/000113046405000116/form10k_2004.htm

²⁴ SEC File No. 001-31303, Black Hills Corporation, Form 8-K (April 29, 2008), p. 2.

http://www.sec.gov/Archives/edgar/data/1130464/000113046408000148/form8k-ipp_sale.htm

Table 1: Prior and Proposed Contract Term Periods between Harbor and SCE

MW (Contract ID)	Agreement Type	Start	Termination
80 MW (QFID 2067)	ISO4	4/12/1988	2/15/1999
(None)	Exempt Wholesale Generator	2/15/1999	
100 MW	Summer Cap. & Energy Toll	2002	2004
98 MW	Capacity & Energy Toll	4/1/2005	5/31/2008
(None)	EEI Agreement	10/16/2008	
80 MW (N/A)	CHP RFO Agreements	1/1/2014	12/31/2020

Harbor bid into the CHP RFO to provide Resource Adequacy capacity through a RA Confirmation and dispatchable capacity and energy, and other products through a UC Tolling Confirmation. RFO participants using the RA and Toll Confirmations were also required to submit an EEI Master Agreement and an EEI Collateral Annex, which are respectively modified by an EEI Cover Sheet and Paragraph 10 to the Collateral Annex. These four documents comprise an “EEI Agreement,” which SCE has been authorized to enter into within the credit limits specified in D.04-12-048. SCE and Harbor previously executed an EEI Agreement effective October 16, 2008. The RA and Toll Confirms are based on SCE’s pro forma confirmations.

Table 2: Structure of Agreements between SCE and Harbor

“Harbor Agreements”	
Resource Adequacy Confirmation (“RA Confirm”)	Unit Contingent Toll Confirmation (“Toll Confirm”)
The Harbor Agreements are subject to an “EEI Agreement,” comprised of:	
Edison Electric Institute Master Power Purchase and Sale Agreement (“EEI Master”), modified by an EEI Cover Sheet.	
EEI Collateral Annex, modified by Paragraph 10 to the Collateral Annex (“Paragraph 10”)	

The Harbor Agreements contractually obligate Harbor to modify its current operations to meet FERC efficiency requirements under 18 C.F.R. 292.205, given that during the RFO Harbor did not operate as a cogenerator. SCE interpreted the Settlement Term Sheet to allow participation of a project that would qualify

as a CHP Facility prior to commencement of deliveries under an agreement executed pursuant to the CHP Program.²⁵

NOTICE

Notice of AL 2772-E was published in the Commission's Daily Calendar. Southern California Edison states that a copy of the Advice Letter was mailed and distributed in accordance with General Rule 3.14 of the Commission's General Order 96-B. AL 2770-E was served to the service list of R.12-03-014 regarding the Long Term Procurement Plans.

PROTESTS

Advice Letter 2772-E was timely protested by California Cogeneration Council ("CCC"), Cogeneration Association of California ("CAC"), and Energy Producers and Users Coalition ("EPUC") on September 20, 2012. The CAC and EPUC protests were identical in content. AL 2772-E received a timely reply from SCE on September 27, 2012.

Eligibility as a Qualifying Cogeneration Facility

CCC and CAC/EPUC protest that since Harbor does not have a thermal host it cannot meet the eligibility requirements for participating in the CHP RFO per Section 4.2.2.1 of the Settlement Term Sheet.

CCC states that Harbor's generating facility is ineligible to bid into the CHP RFO because Harbor does not have a commitment from a thermal host and thus cannot meet the requirements of California Public Utilities Code Section 216.6 or 18 C.F.R. 292.205. CCC describes Harbor as a "fossil-fuel-fired generating facility" whose security of a thermal host is "highly speculative," which "creates a substantial risk" of Harbor not performing under the Harbor Agreements. CCC recommends that a non-CHP Facility should have "concrete commitment" from a thermal host to viably meet the eligibility criteria.²⁶

CAC/EPUC also identify the uncertainty of Harbor's thermal host and state that the AL "speaks only of SCE's 'understanding' of Harbor's intent to physically

²⁵ IE Report, p. 33.

²⁶ Protest of the California Cogeneration Council to SCE's AL 2772-E ("CCC Protest"), (September 20, 2012), p. 2-3.

modify its facilities and obtain a contract to sell thermal energy.” CAC/EPUC recommend that the Commission confirm that Harbor satisfies the QF efficiency and operating standard prerequisites before approving the Harbor Agreements.²⁷

SCE replies that Harbor will meet the definition of CHP Facility upon operation.

SCE states that Section 4.2.2.1 of the Term Sheet does not specify at what point the CHP Facility must meet the State and Federal eligibility criteria. SCE reasons that the annual calculation of compliance to the standards of 18 C.F.R. 292.205(a) and P.U. Code Section 216.6 are contingent upon the *prior* 12 months of energy and fuel input and output data. SCE cautions that a “blanket rule” requiring satisfaction of the eligibility criteria to be a qualified cogeneration facility prior to participation in a CHP RFO is infeasible for as of yet unconstructed or non-operational CHP Facilities. SCE adds that to do so would “render all New, Expanded, or Repowered CHP Facilities ineligible.”²⁸

The Commission discusses these matters in detail within the “Consistency with Definition of Qualifying Cogeneration Facility” and “Consistency with Eligibility Requirements for CHP RFOs” sections of the Resolution.

Applicability of the Fundamental Use Test

CCC protests that Harbor may not meet the Fundamental Use Test given the intermittent thermal product that it would supply under a tolling agreement.

CCC questions whether Harbor’s conversion to a CHP Facility would meet the Fundamental Use Test under 18 C.F.R. 292.205(d)(2)-(3) given that under a tolling agreement it is unclear whether an intermittent thermal product would be acceptable to a thermal host. CCC cites a June 22, 2012 call with Energy Division and the Settling Parties, during which they were told that certain CHP Facilities were eliminated from SCE’s bid evaluation process due to failure to meet the Fundamental Use Test (“FUT”), to claim that it would be “wholly discriminatory to choose Harbor” without confirmation that Harbor itself meets the FUT.²⁹

²⁷Protests of Cogeneration Association of California and Energy Producers and User’s Coalition to AL 2772-E (“CAC/EPUC Protests”), (September 20, 2012), p. 3.

²⁸ Reply of SCE to the Protests of CCC, CAC, and EPUC to AL 2772-E (“SCE Reply”), (September 27, 2012), p. 3.

²⁹CCC Protest, p. 3-4.

SCE replies that the Fundamental Use Test is inapplicable to Harbor.

SCE requires that, "...Bidders meet the definition set forth in 18 C.F.R. 292.205 including, where applicable, the Fundamental Use Test, in order to participate in the CHP RFO." SCE cites the two conditions³⁰ in Section 292.205(d) that exempt cogeneration facilities from criteria including the FUT. SCE states that because Harbor operated as a qualifying cogeneration facility before August 8, 2005, SCE interpreted the FUT to be inapplicable to Harbor.

The Commission discusses the applicability of the Fundamental Use Test in the "Consistency with Definition of Qualifying Cogeneration Facility" section of the Resolution.

Greenhouse Gas Emissions Accounting

CCC and CAC/EPUC protest that the SCE's GHG Credit proposed from the Harbor Agreements is insubstantial and unfounded.

CCC claims that the GHG Credit from the Harbor Agreements is "practically non-existent" and commensurately does not warrant the CPUC risking approval of a contract without certainty in regard to Harbor's (1) security of a thermal host and (2) satisfaction of the Fundamental Use Test.³¹ CAC/EPUC claim that without a contracted thermal host, it is "impossible to verify" the GHG Credit proposed by SCE.³²

SCE replies that it accounted the GHG Credit consistent with Section 7.4.1 of the Settlement Term Sheet.

SCE states that the calculation of the GHG Credit is consistent with Section 7.4.1 of the Settlement Term Sheet which requires that the GHG benefit "... [b]e calculated at the time of execution...and shall not be altered for the term of the PPA." SCE determined that the Harbor Agreements were more cost competitive than other offers while considering GHG. SCE alludes to the Settlement's

³⁰ 292.205(d) states that "any cogeneration facility that was either not a qualifying cogeneration facility on or before August 8, 2005, or that had not filed a notice of self-certification or application for Commission certification as a qualifying cogeneration facility under Section 292.207 of this chapter prior to February 2, 2006" must also satisfy certain criteria including subsection (3) Fundamental Use Test.

³¹ CCC Protest, p. 4.

³² CAC/EPUC Protests, p. 3.

allowance of projects counted as GHG Debits to justify the argument that the magnitude of the GHG Credit does not provide reason to reject the contract.

The Commission rejects CCC and CAC/EPUC's recommendations to deny the GHG Credit based on its magnitude or verifiability pursuant to the GHG Accounting Methodologies in Sections 7.3.2 and 7.4.1 of the Settlement Term Sheet. These sections respectively permit GHG Debits and require accounting upon the execution of the agreement. The Commission discusses SCE's calculation of the GHG Credit in the "Consistency with GHG Accounting Methodology" section of the Resolution.

Ambiguity about the "New" or "Existing" CHP Facility Classification

CCC and CAC/EPUC protest that Harbor is not an "Existing CHP Facility" and assert that Harbor is ineligible to convert to a Utility Prescheduled Facility per Sections 4.2.2.2 and 4.8.1.1 of the Settlement Term Sheet.

CCC asserts that SCE misconstrues the definition of an "Existing CHP Facility" and references to statements regarding Harbor's previous operations and future facility modifications. CCC is concerned about SCE's assertions that (1) Harbor is an Existing CHP Facility because it operated as a CHP prior to the Settlement Effective Date ("SED") while also considering that (2) Harbor must modify the facility to meet the Term Sheet's definition of 'CHP Facility.' CCC cautions the Commission against accepting this interpretation of an Existing CHP Facility or assertions that Harbor qualifies as a Utility Prescheduled Facility ("UPF").³³

CAC/EPUC assert that Harbor is not an "Existing QF" and therefore does not qualify for UPF conversion. CAC/EPUC thus recommend that since Harbor is not "eligible for utility dispatch," the Commission reject the Tolling Confirm.³⁴

SCE replies that it was inclusive of Harbor's "unique situation" in order to ensure a robust, competitive, and fair solicitation.

SCE states that Harbor "technically meets the definition of an Existing CHP" but also "has the characteristics of a New CHP Facility" because it was not operating as a CHP Facility as of the SED and did not have a steam host upon the execution of the Harbor Agreements.³⁵ SCE states that it had discretion to accept Harbor's

³³CCC Protest, p. 5-6.

³⁴CAC/EPUC Protests, p. 2

³⁵SCE Reply, p. 3.

offer to be inclusive of bids and yield a competitive RFO. SCE characterizes the protestors' interpretation of the eligibility requirements as overly restrictive.

The Commission rejects the protests that Harbor be ineligible to become a Utility Prescheduled Facility because SCE does not propose such a conversion to a UPF.

The Commission discusses SCE's interpretation of Harbor's characteristics as both an "Existing" and "New" CHP Facility in the "Consistency with Definition of Qualifying Cogeneration Facility" section of the Resolution.

Eligibility of CHP Power Products

CAC/EPUC protest that the Resource Adequacy Confirmation (1) should not count toward the MW Target and (2) does not achieve the CHP Program's Policy Objectives per Section 1.2.1.3 of the Settlement Term Sheet.

CAC/EPUC claim that the RA Confirmation procures capacity without baseload energy operations necessary to sustain a thermal host and thus conflicts with the CHP Program's objective of encouraging Existing CHP Facilities and developing New CHP Facilities to benefit the State's electricity consumers per Section 1.2.1.3 of the Settlement Term Sheet. CAC/EPUC posits a "fundamental difference" between the RA Confirmation and RA capacity under the Pro Forma contracts, wherein the Confirmation "decouples capacity and energy" and is thus "not consistent with" and not "contemplated by the Settlement." CAC/EPUC reference a Transition PPA requirement that a Seller must meet a 95% Firm Contract Capacity Performance Requirement to earn full capacity payments to assert that the Settlement contemplates baseload CHP operations, with RA capacity as a "collateral benefit." CAC/EPUC claim that the RA Confirm does not "procure any energy produced by a CHP operation," nor does it "provide the incentive or encouragement for CHP operation."³⁶

CAC/EPUC recommend procuring RA capacity through an all-source RFO, counting Harbor toward potential Second Program Period Targets, or increasing the Initial Program Period Targets.³⁷

SCE replies that the Settlement does not preclude RA-Only contracts and that Harbor is not an RA-Only Transaction.

³⁶CAC/EPUC Protests, p. 2-3.

³⁷CAC/EPUC Protests, p. 3-4.

SCE references Section 4.2.2.1 of the Settlement Term Sheet, which allows any CHP facility to bid into the RFO if it has a nameplate capacity greater than 5 MW, meet the State and Federal definitions of cogeneration, and complies with the Emissions Performance Standard. SCE states that CHP Facilities that seek to provide other non-baseload products are not excluded. SCE also references Section 4.2.1 of the Settlement Term Sheet which requires that the IOUs “conduct RFOs for CHP resources.”³⁸ SCE argues that the Settlement did not rephrase this term to specifically require “bundled” energy and RA products, and thus did not prohibit RA contracts.

SCE adds that the Harbor Agreements combine both RA and UC Tolling Confirmations that require Harbor to provide RA and energy. Thus, “while not required by the Settlement” under the Agreements SCE would purchase both capacity and energy from Harbor, as CAC/EPUC suggest.³⁹

Although SCE is correct that Section 4.2.1 did not specifically prohibit RA-only contracts, the Commission recently considered whether RA-only contracts are allowed in three versions of Draft Resolution E-4569, which concerned the disposition of SCE’s requests to enter RA Confirmations with Calpine’s Los Medanos Energy Center and Gilroy CHP Facilities. The Energy Division version would have permitted the procurement of RA-only contracts. The alternate versions both would have prohibited SCE from selecting RA-only contracts in its 2011 CHP RFO or accepting RA-only offers in future CHP RFOs but differed in the amount of CHP capacity that will be counted toward the MW Targets. On July 25, 2013 the Commission approved the alternate E-4569, which rejected the RA-only contracts but provided that SCE could resubmit the LMEC and Gilroy contracts as a Tier 1 Advice Letter and count the MWs associated with the contracts one of three ways: (1) the capacity to match the thermal host’s steam requirements; (2) the capacity to match baseload operations; or (3) half the capacity originally proposed to count toward the MW Target in AL 2771-E. The Commission rejects the CAC/EPUC protest that Harbor is an RA-only transaction because pursuant to the Toll Confirm, Harbor would provide energy when dispatched by the CAISO.

³⁸SCE Reply, p. 4-5.

³⁹SCE Reply, p. 5.

Preference for Pro Forma PPA Offers in the RFO

CCC posits that the selection of Harbor likely violated the requirement for SCE to give preference to Pro Forma offers that are competitive to non-Pro Forma offers per Section 4.2.12 of the Settlement Term Sheet.

SCE did not reply to this protest. The Commission rejects the protest that preference was not given to competitive Pro Forma offers. While the Independent Evaluator assessed that SCE “appropriately selected Harbor’s qualifying offer” among the four other executed contracts from the 2011 CHP RFO, Commission analysis determines that Harbor did not meet the eligibility requirements of Section 4.2.2.1 of the Settlement Term Sheet.⁴⁰ Regardless of Harbor’s ineligibility and the Commission’s rejection of SCE’s RA-only contracts with LMEC and Gilroy resulting from the CHP RFO in E-4569, SCE complied with Section 4.2.12 of the Settlement Term Sheet. This section states that the IOU must “...give preference to Pro Forma offers with no options, relative to non-Pro Forma offers, to the extent that such Pro Forma offers are competitive with the non-Pro Forma offers.” The Commission notes that SCE selected a competitive Pro Forma CHP PPA with Berry Petroleum, which the Commission approved in Resolution E-4553, but it cannot provide additional detail as results of RFOs are confidential at this time.

DISCUSSION

On August 31, 2012, SCE filed Advice Letter AL 2772-E which requests Commission approval of two “Harbor Agreements” with Harbor Cogeneration Company.

Specifically, SCE requests that the Commission:

1. Approve the Harbor Agreements in their entirety;
2. Find that the Harbor Agreements, and SCE’s entry into the Confirmations, are reasonable and prudent for all purposes, subject only to further review with respect to the reasonableness of SCE’s administration of the Harbor Agreements;

⁴⁰IE Report, p. 2.

3. Find that the 80 MW associated with the Confirmations apply toward SCE's procurement target of 1,402 MW of CHP capacity in the Initial Program Period, as established by the QF/CHP Program;
4. Find that the Harbor Agreements contribute a 3,125 MT credit toward SCE's GHG Target as they are for an Existing CHP Facility with a change in operations; and
5. Authorize other and further relief as the Commission finds just and reasonable.

Energy Division evaluated the CHP PPA based on the following criteria:

- Consistency with D.10-12-035, which approved the QF/CHP Program Settlement including:
 - Consistency with Definition of CHP Facility and Qualifying Cogeneration Facility
 - Consistency with Eligibility Requirements for CHP Requests For Offers ("RFOs")
 - Consistency with MW Counting Rules
 - Consistency with GHG Accounting Methodology
 - Consistency with Cost Recovery Requirements
- Need for Procurement
- Cost Reasonableness
- Public Safety
- Project Viability
- Consistency with the Emissions Performance Standard
- Consistency with D.02-08-071 and D.07-12-052, which respectively require Procurement Review Group ("PRG") and Cost Allocation Mechanism ("CAM") Group participation

In considering these factors, Energy Division also considers the analysis and recommendations of an Independent Evaluator as is required for the CHP RFOs per Section 4.2.5.7 of the Settlement Term Sheet.⁴¹

⁴¹Per Settlement Term Sheet 4.2.5.7: "Each IOU shall use an Independent Evaluator (IE) similar to that used in other IOU RFO processes. It is preferable that the IE have CHP expertise and financial modeling experience."

Consistency with D.10-12-035 which approved the QF/CHP Program Settlement including:

On December 16, 2010, the Commission adopted the QF/CHP Program Settlement with the issuance of D.10-12-035. The Settlement resolves a number of longstanding issues regarding the contractual obligations and procurement options for facilities operating under legacy and new QF contracts. Among other things, it establishes methodologies and formulas for calculating SRAC to be used in the new QF Standard Offer Contract. Furthermore, the Settlement allows for bilaterally negotiated contracts with CHP QFs to determine energy and capacity payments mutually agreeable by relevant parties and subject to CPUC approval. Finally, the Settlement establishes a MW and GHG target for the IOUs. The IOUs must procure a minimum of 3,000 MW of CHP. The IOUs must reduce greenhouse gas emissions consistent with their allocation of the CARB Scoping Plan CHP Recommended Reduction Measure in proportion to the IOUs' and Energy Service Providers' / Community Choice Aggregators' current share of statewide retail electricity load. The QF/CHP Settlement became effective on November 23, 2011. The Settlement Term Sheet establishes criteria for contracts with Facilities including:

Consistency with Definition of CHP Facility and Qualifying Cogeneration Facility

The protests question whether Harbor is eligible to participate in the CHP Program's RFO and whether SCE and Harbor's commencement of these Agreements is consistent with the intent of the Settlement. The answers to these questions chiefly depend on whether Harbor is an "Existing CHP Facility" or a "New CHP Facility." Harbor's vintage subsequently determines the applicability of the Fundamental Use Test. If the Fundamental Use Test applies, Harbor's compliance (or non-compliance) with the FUT will, in part, determine whether Harbor satisfies the RFO Eligibility Requirements.

- Existing vs. New CHP Facility

The Settlement defines a "CHP Facility" as a facility that meets the federal definition of a qualifying cogeneration facility under 18 C.F.R. 292.205. It delineates an "Existing CHP Facility" from a "New CHP Facility" on the basis of

whether the facility was operational as a CHP Facility, as defined in the Settlement, before the Settlement Effective Date (November 23, 2011).⁴²

SCE replied to protests by asserting that Harbor “technically meets” the Settlement’s definition of an Existing CHP Facility because it was certified as a qualifying cogeneration facility in 1999.⁴³ SCE also replied by stating that Harbor also has characteristics of a New CHP Facility because, for example, it does not have (1) the requisite operational data to calculate compliance with the Federal Operating and Efficiency Standards and (2) a contractual agreement with a thermal host. **The assertions that Harbor has attributes of both Existing and New CHP Facility are unwarranted, given a closer examination of the Federal criteria for qualifying cogeneration facilities.**

The Commission agrees with CCC and CAC/EPUC that Harbor does not qualify as an “Existing CHP Facility.”

Harbor’s technical qualification as an Existing CHP Facility under the Settlement relies on the determination of whether it is a “new cogeneration facility” under 18 C.F.R. 292.205(d).⁴⁴ Section (d) requires that a cogeneration facility that was either, “Not a qualifying facility on or before August 8, 2005, or that had not filed a notice for self-certification or an application for [FERC] certification as a qualifying cogeneration facility under [18 C.F.R.] Section 292.207 prior to February 2, 2006,” show that it meets certain criteria for new cogeneration facilities.

SCE stated that “because Harbor had operated as a qualifying cogeneration facility before August 8, 2005[...it] interpreted 18 C.F.R. 292.205(d), and the Fundamental Use Test in particular, as being inapplicable to Harbor.”⁴⁵ SCE’s interpretation of the federal code, however, is unsupported by the policies and goals of the Settlement, the plain language of the Energy Policy Act of 2005 (“EPAAct”), its codification in PURPA Section 210(n), and FERC’s promulgation of EPAAct regulations at 18 C.F.R. 292.205(d). As such, it is clear that SCE’s

⁴²Settlement Term Sheet Section 17: Glossary of Defined Terms, p. 65, 67, and 72.

⁴³ SCE Reply, p. 3.

⁴⁴“Existing Qualifying Cogeneration Facility” is not specifically defined in 18 C.F.R. 292.205, but the term is respectively referenced and defined in 18 C.F.R. 292.309(h) and (i). The definition in Section 292.309(i) uses the same two criteria listed in, and is cites to Section 292.205(d).

⁴⁵ SCE Reply, p. 4.

interpretation of the federal code contravenes the terms and intent of the QF/CHP Settlement and the intent of EPAct.

The Settlement was intended and written to, among other things, “encourage the *continued* operation of the State’s Existing CHP Facilities”; the repowering or change in operations of inefficient CHP Facilities; and the “development ... of new, clean and efficient CHP Facilities.”⁴⁶ In adopting the Settlement, the Commission intended to capture the State CHP goals, promote the State Energy Action Plan II’s policies, and reduce GHG emissions in furtherance of AB 32. It is plainly evident from the language of the Settlement that Existing CHP Facilities are only facilities that were *existing as qualifying CHP facilities* at the time of the Settlement Effective Date.⁴⁷ Under the Settlement, too, New Facilities were expected to be “clean and efficient,” hence the eligibility criteria makes reference to the tighter efficiency requirements for new qualifying cogeneration contemplated by EPAct. As CAC correctly pointed out in its comments on the Draft Resolution, a New CHP Facility under the Settlement is subject to the federal Fundamental Use Test. The Commission therefore intended that, as a New CHP Facility under the Settlement, Harbor should meet the efficiency requirements for new cogeneration facilities found at 18 CFR 292.205(d).

EPAct (enacted on August 8, 2005) amended Section 210 of the Public Utility Regulatory Policies Act of 1978 (“PURPA”)⁴⁸ to require FERC to revise 18 C.F.R. 292.205 to conform with the EPAct. FERC issued a final rule on February 2, 2006.⁴⁹ In Section 1253, parts (n)(2)(A) and (n)(2)(B) of the EPAct, Congress required that FERC’s then existing regulations for qualifying cogenerating facilities to “continue to apply” to a cogeneration facility that either:

- (1) “Was a qualifying cogeneration facility on the date of enactment of subsection (m); or”

⁴⁶Settlement Term Sheet, Section 1.2.1.3.

⁴⁷See also Settlement Term Sheet, Sections 1.2.1.4, 1.2.2.2, 1.2.2.7, and 1.2.6.2.

⁴⁸ 18 U.S.C. Section 824a-3(n)(2)(A) provides in pertinent part, “(A) was a qualifying cogeneration facility *on August 8, 2005*” (Emphasis Added).

⁴⁹ Energy Policy Act of 2005, Sec. 1253.119 Stat. 970 Public Law 109-58 – Aug. 8, 2005. <http://www.gpo.gov/fdsys/pkg/PLAW-109publ58/pdf/PLAW-109publ58.pdf> and FERC Order 671, <http://www.ferc.gov/whats-new/comm-meet/020206/E-2.pdf>.

(2) "Had filed with the FERC a notice of self-certification, self-recertification, or an application for Commission certification under 18 C.F.R. 292.207 prior to the date on which the [FERC] issues the final rule required by subsection (n)."

While Harbor was a qualifying cogeneration facility prior to August 8, 2005, it was not a "qualifying cogeneration facility" "on the date of enactment."⁵⁰ Harbor relinquished its original qualifying facility status on February 15, 1999. On December 27, 2012 Harbor filed a notice for self-certification with FERC.

We find that in our interpretation of the Settlement, Harbor must be designated a "new cogeneration facility" under Section 292.205(d).

As of the Settlement Effective Date, Harbor did not conform with the requirements for a new qualifying cogeneration facility under 18 C.F.R. 292.205 and thus was not defined as an eligible "CHP Facility" at that time. Since Harbor was not a "CHP Facility" as of the Settlement Effective Date, it cannot qualify as an "Existing CHP Facility." Therefore, SCE's request to enter the Agreements, in which Harbor will begin operation on January 1, 2014 (after the Settlement Effective Date), constitutes Harbor as a "New CHP Facility."

Harbor does not meet the definition of an "Existing CHP Facility" under the Settlement; rather it is a "New CHP Facility."

Even assuming *arguendo* that Harbor might be considered an Existing CHP Facility, the significance of the changes to its configuration and capacity expansion cast further questions on whether Harbor could conceivably remain an "existing QF" under FERC's regulations. In Order 671, FERC discusses petitioners' requests for clarifications regarding the definition of a new qualifying cogeneration facility. FERC clarifies that there is a "rebuttable presumption" that an "existing QF" that files for recertification does not become a "new cogeneration facility." The rebuttable presumption is useful to note given the similarity of this instance, where SCE and the applicant for self-certification (Harbor) assert that the Facility is an Existing CHP Facility.⁵¹ In FERC's example, it cautions that changes to an "existing cogeneration facility...such as an increase in capacity" could be so great to require "that what an applicant is claiming to be

⁵⁰ See Footnote above regarding the definition of "Existing Qualifying Cogeneration Facility," and EPA Act Section 1253, amending PURPA to add Sections (m)(2)(B)(i) and (m)(2)(B)(i).

⁵¹ AL 2772-E, p. 4 and FERC Accession No: 20121227-5111, p. 12.

an existing facility should, in fact, be considered a ‘new’ cogeneration facility at the same site.”⁵²The difference between FERC’s example and this instance is worth reiterating: Harbor was not an existing cogeneration facility at the time of the EPAct and self-certified in 2012, and thus we cannot say that it meets FERC’s description of an “existing QF” filing for recertification.

According to the self-certification, Harbor is configured to operate with its original 80 MW (gross) gas turbine and its two 20 MW (total gross) steam turbines that were added in 2001. Furthermore, Harbor has established a subsidiary company to serve as its thermal host that proposes to build an ice-making plant. The 25% expansion of capacity and new thermal host make it apparent that Harbor has substantially changed its facility since it relinquished QF status. FERC’s Order 671 requires FERC’s consideration of these changes before deeming Harbor a “new cogeneration facility.” While this consideration is discussed for the sake of argument, the Commission repeats that Harbor is not an Existing CHP Facility under the Settlement, and is instead a New CHP Facility under the Settlement.

Harbor proposes to operate with a capacity expansion and thermal host, neither of which were part of the Facility when it was previously a qualifying cogeneration facility in 1999. Given this change in operations from Harbor’s 1995 options, we are not in a position to determine that Harbor is an “existing cogeneration facility” not subject to the requirements under 18 C.F.R. 292.205(d).

In comments to the Draft Resolution, SCE suggests that the Commission purposefully omitted detail about the 700% capacity increase for the hypothetical “existing QF” hypothesized above to suggest that FERC would not find Harbor’s 25% expansion to warrant reclassification as a “new cogeneration facility.” SCE adds that FERC found that another existing QF’s 26% increase in capacity did not warrant a change in classification.⁵³ The Commission noted the rebuttable presumption purely for the sake of argument, which is unnecessary to support the AL’s rejection. In addition, the case SCE cited involved an “existing QF” that added capacity to accommodate the growing needs of its extant thermal host.

⁵² FERC Order 671, p. 58-59.

⁵³ FERC Accession No. 20100603-3037. “Order denying rehearing re Medical Area Total Energy Plant, Inc et al under QF83-334.”

http://elibrary.ferc.gov/idmws/file_list.asp?document_id=13822778

This dissimilarity highlights the differences between Harbor's circumstance and those the Commission previously noted.⁵⁴

- Applicability of and Compliance with the Fundamental Use Test

To be eligible to count towards Settlement MW and GHG Targets, all CHP Facilities, excluding those that convert to Utility Prescheduled Facilities, must meet the federal definition of a qualifying cogeneration facility under 18 C.F.R. § 292.205 by the term start date and through the duration of the proposed PPA, and must also maintain QF certification. With reference to the federal regulations, the Settlement establishes minimum operating and efficiency requirements for topping-cycle facilities, establishes efficiency standards for bottoming-cycle facilities, and, for certain new facilities, mandates compliance with a Fundamental Use Test.

Topping-cycle CHP Facilities must demonstrate that their useful thermal energy output is no less than 5 percent of the total annual energy output. Additionally, any topping-cycle CHP Facility installed on or after March 13, 1980, that is fueled by natural gas or oil must operate at an annual efficiency of at least 42.5 percent, or, if the useful thermal energy output is less than 15 percent of the total energy output of the facility, the efficiency must be no less than 45 percent. Bottoming-cycle CHP Facilities installed on or after March 13, 1980, must meet an annual efficiency requirement of at least 45 percent.

Facilities over 5 MW that were not certified by FERC as a qualifying cogeneration facility on August 8, 2005, or that had not filed to FERC for such certification by February 2, 2006, must also demonstrate that they satisfy the Fundamental Use Test of 18 C.F.R §292.205(d)(3). This test requires that facilities demonstrate that their energy output is used fundamentally for industrial, commercial, residential, or institutional purposes and is not intended fundamentally for the sale of electricity.⁵⁵ The so-called "safe harbor" for PURPA Section 210(n)'s "fundamental use" requirement would have at least 50 percent of the aggregate annual energy output of a facility be used fundamentally for industrial, commercial or institutional purposes, and not be intended for sale to an electric utility. Facilities may also petition FERC for a discretionary determination that it

⁵⁴ Draft Resolution E-4554, p. 22.

⁵⁵FERC Order No. 671, P 49.

complies with the “fundamental use” requirement.⁵⁶ For the purposes of the Settlement, the Fundamental Use Test applies to New CHP Facilities regardless of whether they seek to execute a contract with an obligatory purchase requirement.

The Commission rejects SCE’s reply that the Fundamental Use Test of 18 C.F.R. 292.205(d)(3) is inapplicable to Harbor, because Harbor is a “new cogeneration facility” and therefore is subject to the Fundamental Use Test.

The Commission agrees with SCE that a CHP facility need not have secured a contract with a thermal host prior to participating in the CHP RFO. First, it is reasonable that a thermal host could potentially require that a CHP Facility to have a contract with a utility buyer prior to committing to co-locating with the CHP Facility. Second, it would be unnecessarily prohibitive to require a new qualifying cogeneration facility to satisfy the Operating Standard and Efficiency Standard in advance of participation in the RFO. CAC/EPUC’s recommendation that the Commission, “confirm satisfaction of [the Operating and Efficiency] prerequisites” is impractical, particularly for CHP Facilities that have not commenced operation. 18 C.F.R. Sections 292.205(a)(1) and 292.205(a)(2) require the standards to be met during the first 12 months the facility produces electric energy and subsequent years thereafter. The Commission recognizes SCE’s discretion to ensure a “robust, fair, and competitive” solicitation that is inclusive of New, Expanded, and Repowered CHP Facilities and agrees that CHP Facilities must meet the Eligibility Requirements of Section 4.2.2.1 of the Term Sheet upon commencement of operations.

The Commission agrees with SCE that contracted CHP Facilities will meet the prerequisite definitions and eligibility for contracts upon the commencement of the agreement.

The Commission affirms that contracted CHP Facilities must meet the Settlement’s requirements of CHP Facilities by the term start date. We also exercise our discretion to examine the viability that the CHP Facilities will meet such requirements. The Commission relies on engineering calculations of operational parameters to provide a reasonable basis on which to determine whether a project will meet the Federal requirements of a new qualifying cogeneration facility and the State requirements of a New CHP Facility.

⁵⁶FERC Order No. 671, P 54.

Harbor's Form No. 556 reports projected fuel use and energy and thermal output, which can be used for purposes of estimating compliance with the standards for cogeneration facilities under P.U. Code Section 216.6, and 18 C.F.R. 292.205. SCE provided Harbor's projected operational data to the Commission, which demonstrates that on an annual basis the facility will not use at least 50% of energy output for useful industrial purposes. Refer to detailed calculations in Confidential Appendix A.

Harbor fails to demonstrate compliance with the Fundamental Use Test requirement.

Consistency with Eligibility Requirements for CHP Requests for Offers ("CHP RFOs")

Per Section 4.2 of the Settlement Term Sheet, the IOUs are directed to conduct Requests for Offers exclusively for CHP resources as a means of achieving their MW and GHG Emissions Reduction Targets. Per Section 4.2.2, CHP Facilities with a nameplate Power Rating greater than 5 MW may bid into the CHP RFOs. The CHP Facility must meet the State and Federal (PURPA) requirements⁵⁷ for cogeneration and the Emissions Performance Standard ("EPS"). A CHP Facility that has met the PURPA efficiency requirements as of September 20, 2007 and that converts to a Utility Prescheduled Facility is eligible to participate in the CHP RFOs whether it is a Qualifying Facility or Exempt Wholesale Generator.

The Harbor Facility has a nameplate Power Rating of greater than 5 MW, by the time of operation would meet the State definition of cogeneration under P.U. Code Section 216.6, and the EPS is not applicable to Harbor. However, as discussed previously, as a New CHP Facility under the Settlement, Harbor does not conform with the Federal requirements to meet the Fundamental Use Test required under 18 C.F.R. 292.205(d)(3).

Harbor is not eligible to commence a contract from the SCE CHP RFO per Section 4.2.2.1 of the Settlement Term Sheet because it fails to conform with the Fundamental Use Test under 18 C.F.R. 292.205.

The execution of the Harbor Agreements is troublesome given this failure to conform with the efficiency standards of the Fundamental Use Test. The

⁵⁷ State definition of cogeneration per Public Utilities Code Section 216.6. Federal definition of cogeneration per 18 C.F.R. §292.205 implementing the Public Utility Regulatory Policies Act ("PURPA").

purpose of the CHP Program is to encourage through procurement, the continued operation of existing CHP facilities; the repowering or change in operations of inefficient CHP facilities; and the development of new, clean, and efficient CHP facilities for diversity, reliability, and environmental benefits.⁵⁸ Harbor's proposed procurement does not meet these goals. Harbor was not operating as a CHP facility at the time of the Settlement, and it would only begin to operate as a CHP facility if it were awarded a contract pursuant to the settlement. Therefore, executing a contract with Harbor would not "encourage the continued operation" of existing efficient CHP Facilities. And because Harbor does not meet the standard under the Fundamental Use Test required under the Settlement of a New CHP Facility, SCE's selection of Harbor does not meet any of the objectives of the Settlement.

Moreover, two key objectives of the CHP Program were to maintain greater regulatory and market certainty.⁵⁹ However, SCE's inappropriate selection of Harbor unduly affected the procurement of legitimate CHP facilities that bid into the RFO. Thus, SCE's contract with Harbor clearly contravenes the purpose of the CHP settlement.

SCE's execution of the Harbor Agreements does not meet the procurement policies of the CHP Program per Section 1.2.1 of the Settlement Term Sheet, nor does it meet the objective to increase regulatory and market certainty per Section 1.2.2.1.

Ensuring regulatory and market certainty for the Second and Third CHP RFOs merits emphasizing evaluations of offers pursuant to Section 4.2.5.6 of the Settlement Term Sheet. In E-4553, we required that the IOUs calculate GHG Debits and Credits for all offers received that meet the minimum eligibility requirements. As discussed in the previous section, a CHP Offeror need not have a contractually-secured a thermal host in advance of the RFO. However, the IOU's bid packages must request sufficiently specific information on the thermal host, the nature and magnitude of its anticipated energy requirements, and its likely effects on the operations of the CHP Facility. While the Commission does not have general regulatory authority over thermal hosts, this information is crucial to understanding the viability of the CHP project, its performance under

⁵⁸Settlement Term Sheet Sections 1.2.1.3 and 1.2.1.4

⁵⁹Settlement Term Sheet Sections 1.2.2.1, 1.2.3.3, and 1.2.3.6

the applicable State and Federal regulations, and its consistency with the objectives and requirements of the Settlement.

In evaluating whether each RFO bid meets minimum eligibility requirements, the IOUs should rely on credible and substantiated information on the thermal host, the nature and magnitude of its anticipated energy requirements, and its likely effects on the operations of the CHP Facility.

Consistency with Settlement MW Counting Rules

SCE requests that the capacity procured through the Harbor Agreements contribute to their MW Target. SCE asserts that Harbor qualifies as an “Existing CHP Facility” and as such cites the Counting Rule for QFs that formerly sold to the IOUs and are not listed in the July 2010 Semi-Annual Report per Section 5.2.3.2 of the Settlement Term Sheet. Under this rule, SCE cites the most recent Cogeneration and Small Power Production Semi-Annual Report in which Harbor was listed. In SCE’s January 1999 Report, Harbor was listed under QFID 2067 with a Contract Nameplate of 80 MW.

According to Harbor’s 2012 Form No. 556, the CHP Facility that will be delivering power subject to the Agreements is comprised of an 80 MW combustion turbine and two steam turbines that total 20 MW. These three turbines will presumably operate at part load to provide the 80 MW pursuant to the RA and Toll Confirms. The two steam turbines represent expansion generating capacity, additive to the 80 MW capacity that provided steam for EOR under QFID 2067 in SCE’s July 1999 Semi-Annual Report. As previously stated, Harbor installed these two turbines in 2001 to operate as a CCGT generating facility during its time as an Exempt Wholesale Generator.

The Commission rejects the assertions that the generating facility that is proposed to operate under the Harbor Agreements is an “Existing CHP Facility.” The 20 MW of expansion capacity that will be operating under the Harbor Agreements was not included as part of Harbor’s 1987 self-certification or 1995 self-recertification as a Qualifying Facility, which it relinquished in 1999. As detailed above, Harbor does not meet the Federal requirements of a new qualifying cogeneration facility.

Harbor fails to meet the requirements of a New CHP Facility, so it is ineligible to commence an agreement executed pursuant to the CHP RFO. The Contract Nameplate capacity of 1999 will therefore not count toward the MW Target.

The 80 MW Contract Nameplate value for the Harbor Facility as listed in SCE’s 1999 Semi-Annual Report will not count toward SCE’s MW procurement Target.

Consistency with Settlement Greenhouse Gas Accounting Methodology

SCE requests that the emissions reduction from Harbor's completion of a physical change count as a GHG Credit to the GHG Emissions Reduction Target. SCE asserts that Harbor qualifies as an "Existing CHP Facility" to the extent that it had been operational as a CHP Facility in 1999, before the Settlement Effective Date. SCE compares the difference of the Facility's prior two years of operation as a CCGT and anticipated operations after changing to a CHP Facility against the Double Benchmark per Section 7.3.1.2 of the Settlement Term Sheet. Under this Accounting Methodology, SCE compares Harbor's emissions from historical 2010-2011 operations to those from forecasted operations under the Harbor Agreements to calculate a GHG Credit of 3,215 MT CO₂e.

The Commission denies the use of the Accounting Methodology for a Physical Change under Section 7.3.1.2 of the Settlement Term Sheet. A Physical Change counted as a GHG Credit refers to three cases: (1) a Repowered CHP Facility, in which a CHP Facility on or after the Settlement Effective date has its prime mover(s) replaced or refurbished; (2) an Expanded CHP Facility, in which the facility increases the Power Rating to various extents depending on the type of operating cycle; or (3) a Fuel Change, in which a Facility converts to a less GHG intensive fuel.⁶⁰ Harbor's change from a CCGT generation facility to a CHP Facility⁶¹ is not suitable for the Accounting Methodology for a Physical Change.

The GHG Credit of 3,215 MT CO₂e proposed to result from the Harbor Agreements is inappropriately calculated as a Physical Change pursuant to Section 7.3.1.2 of the Settlement Term Sheet.

The Accounting Methodologies per Section 7.3.1.1 or 7.3.2.1 of the Settlement Term Sheet for New CHP Facilities would be appropriate for Harbor, in which their anticipated operations are compared against the Double Benchmark.⁶² Section 7.4.1 of the Settlement Term Sheet requires that the GHG benefit to be "calculated at the time of the execution" of the PPA, but since Harbor had not yet secured a thermal host in July 2012, Energy Division found it prudent to reanalyze GHG emissions once Harbor had greater certainty of the

⁶⁰Settlement Term Sheet Sections 17: Glossary of Defined Terms, p. 73, 67, and 7.3.1.2.

⁶¹ SCE expects the Harbor to be a Simple Cycle Gas Turbine CHP Facility, while Harbor describes the facility as a Combined Cycle Gas Turbine CHP Facility.

⁶² 8,300 Btu/kWh Heat Rate and 80% efficient boiler

project's development. As shown in Harbor's Form No. 556 from December 2012, Harbor proposes that Harbor Cogeneration Ice Supply, LLC, serve as the thermal host.

Energy Division used operational parameters that Harbor provided to SCE in February 2013 to revise thermal output parameters within the CHP Reporting Template. Under Harbor's expected generation dispatch and the resultant quantity of useful thermal energy, Energy Division calculates that Harbor's operation would result in a net increase in GHG emissions of 100 MT. Detailed information on this calculation is included within Confidential Appendix A.

Operational parameters from more recent information on Harbor suggest that Harbor's thermal output as a New CHP Facility would result in a net increase of 100 MT CO₂e.

The Commission would not reject the Advice Letter on the individual basis of a GHG Debit, as they are allowed per Section 7. Regardless, Harbor fails to meet the requirements of a New CHP Facility, so it is ineligible to commence an agreement executed pursuant to the CHP RFO. Neither SCE's proposed GHG Credit nor Energy Division's estimate of a net increase in GHG emissions resulting from the procurement through the CHP RFO will count toward the GHG Target.

The procurement will not be counted toward the QF/CHP Settlement greenhouse gas ("GHG") Emissions Reduction Target.

Consistency with Cost Recovery Requirements

Ordering Paragraph 5 of D.10-12-035 orders the three large electric IOUs to recover the net capacity costs from CHP Program contracts on a non-bypassable basis from all bundled service, Direct Access ("DA") and Community Choice Aggregator ("CCA"), and Departing Load Customers ("DLC"), except for CHP DLC. With this authorization, the Settlement supersedes to the extent necessary D.06-07-029 and D.08-09-012, which established and modified the Cost Allocation Mechanism, respectively. Section 13.1.2.2 of the Settlement Term Sheet requires that the IOU recover CHP contract costs, net of the value of energy and ancillary services provided to the IOU. Non-IOU load-serving entities ("LSEs") receive Resource Adequacy ("RA") credits in proportion to the allocation of the net capacity costs that they pay.

On January 17, 2012, the Commission made effective SCE AL 2645-E as of November 23, 2011, which authorized SCE to revise its New System Generation Balancing Account to recover the net capacity costs of CHP contracts as it was

directed by D.10-12-035. AL 2645-E determines the net capacity costs as the result of a debit and credit, where:⁶³

- Debits include: Capacity and energy costs, including QF/CHP Program contracts that are eligible for net capacity cost recovery
- Credits include: Energy revenues for QF/CHP Program contracts that are eligible for net capacity cost recovery

The Facility does not conform with the requirements of a new qualifying cogeneration facility in order to be eligible to commence contracts resulting from the CHP RFO, pursuant to Section 4.2.2.1 of the Settlement Term Sheet.

SCE is not authorized to recover costs in accordance with Section 13.1.2.2 of the Settlement Term Sheet and AL 2645-E, consistent with the directives of the QF/CHP Settlement.

Need for Procurement

SCE’s total MW procurement goal for the CHP Program is 1,402 MW, with 630 MW allocated to Target A. SCE’s 2020 GHG Emissions Reduction Target is 2.15 MMT. As of the April 1, 2013 CHP Semi-Annual Report, SCE has executed contracts proposed to contribute 847 MW and 132,372 MT toward these goals.

Procurement Need to Meet the MW Target and GHG Emissions Reduction Target

The Settlement Term Sheet provides reasons and assertions by which an IOU may make a showing to justify its inability to meet the MW Target and/or GHG Emissions Reduction Target. These reasons include:

Reason To Justify An Inability To Meet a CHP Program Target	MW Target	GHG Emissions Reduction Target
Lack of sufficient offers	Section 5.4	Section 5.4
CHP Facility is inefficient compared to the Double Benchmark	Section 5.4	Section 6.9.1
RFO Offer prices are in excess of levels from independent or publicly-available sources	Sections 5.4 & 5.4.1	Sections 5.4, 5.4.1, 6.9.2, & 6.9.2.1
Amount of GHG emissions reductions	Section 5.4	Section 5.4

⁶³ SCE Advice Letter 2645-E. <http://www.sce.com/NR/sc3/tm2/pdf/2645-E.pdf>

A lack of need exists	-	Section 6.9.3
Portfolio fit	-	Section 5.4

The 2011 CHP RFO closed on May 9, 2013 with the withdrawal of the final participant in Track 2. As a result, SCE’s procurement from the 2011 CHP RFO includes Berry (42 MW approved in E-4553), Los Medanos Energy Center (280.5 MW reduced to a maximum of 140.25 MW per alternate version 1 of E-4569), Gilroy (120 MW reduced to a maximum of 60 MW per alternate version 1 of E-4569),⁶⁴ and Sycamore (300 MW proposed for approval in Draft Resolution E-4555).

The Commission strongly urges SCE to consider CHP contract procurements that align with the policy intentions of the Settlement and meet participant eligibility requirements. The Commission also recommends SCE to consider facilities that reduce GHG emissions to decrease the risk of over-procurement during the Second Program Period.

Cost Reasonableness

To determine the robustness of an RFO the Commission may compare the MWs associated with CHP QFs that would be eligible to participate with the RFO, the total MWs received during the RFO, and the MWs an IOU needs to fulfill an interim (A, B, or C) MW Target. The IE approximates that 4,000 MW of CHP facilities could participate in the RFO and would be able to provide electricity to the IOUs and count toward the MW Targets. From this range of potential Offerors, those currently with agreements that end beyond the Transition Period may be less likely to participate. As described in the Confidential Appendix A, SCE received Indicative Offers from CHP facilities (excluding alternative offers from an individual facility) which total an amount several times greater than their MW Target A of 630 MW. Therefore, the number of Offerors that participated in the SCE CHP RFO provided a highly robust solicitation.

The 2011 SCE CHP RFO received offers from a number of counterparties, providing a variety of projects and robust amount of capacity several times greater than SCE’s MW Target A.

⁶⁴ Here we describe a contingency of the maximum potential capacity that SCE could count toward the MW Target, given the options within the alternate version of E-4569.

SCE's evaluation methodology uses a two stage approach. The first stage evaluates Indicative Offers almost exclusively by the net present value of their costs and benefits and their contribution to the Settlement MW Target. Inputs to calculate \$NPV/MW include:

$$\frac{\$NPV}{MW} = \frac{(Benefits - Costs) \text{ discounted at rate} = 10\%}{Settlement MW}, \text{ where:}$$

Benefits include:

- Capacity benefits based on monthly firm capacity offered according to CPUC Resource Adequacy accounting, pursuant to CPUC and CAISO rules for dispatchable and non-dispatchable facilities;
- Energy benefits based on the forecasted market and locational value of energy; Ancillary Service and Real-Time flexibility benefits for dispatchable facilities based on a production simulation of deliveries;
- Credit/Collateral values based on providing performance assurance per Term Sheet Section 4.2.8.

Costs include:

- + Capacity charges; Variable O&M charges; Energy Payments; Other costs;
- + Seller and/or Buyer responsibility of GHG Compliance Cost per Term Sheet Sections 4.2.7.2 - 4.2.7.3;
- + Annual Transmission system upgrade costs for new, expanded, or repowered facilities based on a CAISO Phase I Interconnection Study;
- + Debt Equivalence indirect costs estimated to be incurred as a debt-like obligation by executing long-term PPAs.

To determine whether offer prices were excessive compared to alternatives, SCE developed long-term forecasts of RA capacity, natural gas, electricity, and GHG costs per Term Sheet Section 5.4.1.

The quantification of \$NPV/MW is used in order to minimize cost while choosing projects that fulfill the MW Target, which SCE considered to be a procurement need. As required by Section 4.2.5.7 of the Settlement Term Sheet, SCE used this measure as an analysis of market value for the Offers. \$NPV/MW was the primary metric used in determining the Short List. Once notifying the Short Listed Offerors of their status, SCE began negotiations with the counterparties.

Under the presumption that Harbor was an eligible participant in the CHP RFO, SCE ranked Harbor's offer highly. Modifications to the standard RA and UC Tolling Confirmation were necessary to require that Harbor make changes to the facility to meet QF requirements and to allow SCE to not purchase from Harbor if it failed to do so.⁶⁵ Once both parties mutually agreed upon the terms of the negotiated Harbor Agreements, Harbor was permitted to submit a Final Offer that, if selected by SCE, was contractually-binding.

The Harbor Agreements are modified to Pro Forma RA and UC Toll Confirmations to account for changes to the facility to meet QF/CHP requirements.

The second stage of evaluation considered Final Offers based on quantitative and qualitative factors. Quantitative evaluation relied on the use of net present value. For Final Offers SCE calculated the \$NPV/MW for each Offer, the net \$NPV cost of individual Offers, and net \$NPV cost for all combinations of Offers.

Qualitative factors of a project included its:

- + GHG Debit or Credit based on the accounting rules per Term Sheet Section 7, using the Semi-Annual Reporting Template developed by CPUC Energy Division;
- + Project development progress and viability for new, expanded, or repowered facilities: Environmental and permitting status; Project development experience; Site control; Electrical interconnection status;
- + Women, Minority, and Disabled Veteran-Owned Business Enterprises ("WMDVBE") Status;
- + Offeror concentration, dispatchability and curtailability;
- + Cost-effectiveness of GHG reductions.

The qualitative evaluation of a project's GHG Debit or Credit is used to determine how it will contribute to the 2020 GHG Emissions Reduction Target, which SCE considered to be a procurement goal. From these evaluations SCE selected a combination of projects that met their procurement objectives.

Harbor was selected with four other facilities for the purposes of exceeding the Target A goal of 630 MW (particularly in consideration of the 1,402 MW Target at

⁶⁵IE Report p. 33.

the end of the Initial Program Period), at least \$/MW cost. Sycamore, the fifth contract executed pursuant to the 2011 SCE CHP RFO is pending Commission disposition and is calculated to contribute a GHG Credit to the Emissions Reduction Target.

While Harbor was selected due to its high-ranking net present value compared to other Facilities that qualified for Final Selection, it is ineligible to commence a CHP RFO contract.

Additional information about the terms of the Agreements and analysis of its value among other Offerors is included in the Confidential Appendix A.

While Harbor was considered to be of reasonable cost compared to other offers, it is ineligible to commence an agreement because it does not meet the eligibility requirements for New CHP Facilities under Section 4.2.2.1 of the Settlement Term Sheet.

Public Safety

California Public Utilities Code Section 451 requires that every public utility maintain adequate, efficient, just, and reasonable service, instrumentalities, equipment and facilities to ensure the safety, health, and comfort of the public.

The Harbor Agreements are between Southern California Edison Company and Harbor Cogeneration Company. The Commission's general jurisdiction extends only over SCE, not Harbor. Based on the conflicting information on the facility's operational configurations before us in the AL, IE Report, and Form 556, the Commission cannot conclude that these Harbor Agreements will not result in any adverse safety impacts on the facilities or operations of SCE.

Project Viability

Harbor is a New CHP Facility as defined in the Settlement. The current facility's combustion turbine and HRSG operated as a cogenerator that provided steam to enhanced oil recovery in Wilmington, CA from 1987 to 1999. In 1999, Harbor relinquished its status as a QF CHP and soon after received Exempt Wholesale Generator status. In 2001, the Harbor facility expanded its capacity with two steam turbines and operated as an Exempt Wholesale Generator until 2012. After successfully participating in SCE's 2011 CHP RFO, Harbor was required to secure a thermal host to commence operations under the Agreements. SCE stated that as of filing in August 2012, Harbor did not have a thermal host. The

Independent Evaluator concluded that Harbor faces risk of failing to secure a steam host, which would prevent it from performing under the Agreements.⁶⁶

Per Harbor's December 2012 QF self-certification, the Commission learned that Harbor created a subsidiary, Harbor Cogeneration Ice Supply, LLC, to serve as its steam host. Harbor submitted confidential information to the Commission on the thermal host. Beyond the fact that the facility will not meet the requirements of a New CHP QF, the Commission has substantial concern about the viability of this project. These concerns stem from the fact that steam is used to make ice only during the time Harbor is dispatched, which is dependent on future CAISO market conditions,⁶⁷ and are discussed in the Confidential Appendix.

The Commission does not have sufficiently credible information to find that Harbor will be a viable CHP project.

Consistency with the Emissions Performance Standard

California Public Utilities Code Sections 8340 and 8341 require that the Commission consider emissions costs associated with new long-term (five years or greater) power contracts procured on behalf of California ratepayers. D.07-01-039 adopted an interim Emissions Performance Standard ("EPS") that establishes an emission rate for obligated facilities to levels no greater than the greenhouse gas emissions of a combined-cycle gas turbine power plant.

Pursuant to Section 4.10.4.1 of the CHP Program Settlement Term Sheet, for PPAs greater than five years that are submitted to the CPUC in a Tier 2 or Tier 3 advice letter, the Commission must make a specific finding that the PPA is compliant with the EPS.

The EPS applies to all energy contracts that are at least five years in duration for baseload generation, which is defined as a power plant that is designed and intended to provide electricity at an Annualized Plant Capacity Factor ("APCF") greater than 60 percent.

Under the Harbor Agreements, the Facility will operate for seven years from January 1, 2014 until December 31, 2021. Therefore this procurement qualifies as a "long term financial commitment" per D.07-01-039. The annualized plant capacity factor for the facility does not exceed the 60% baseload threshold. The

⁶⁶IE Report, p. 37.

⁶⁷AL 2772-E, p. 4, footnote 11.

EPS does not apply to the Harbor Facility, as noted in **Error! Reference source not found.** of the Confidential Appendix A.

The EPS does not apply to Harbor, whose annualized plant capacity factor is less than 60%.

Consistent with D.02-08-071 and D.07-12-052, SCE's Procurement Review Group ("PRG") and Cost Allocation Mechanism ("CAM") Group were notified of the CHP PPA.

SCE's PRG consists of representatives from: the Division of Ratepayer Advocates, The Utility Reform Network, California Department of Water Resources-California Energy Resources Scheduling, Coalition of California Utility Employees, the Union of Concerned Scientists, the Independent Evaluator, and the Commission's Energy and Legal Divisions. SCE's CAM Group includes PRG participants as well as certain other non-wholesale market participants of bundled service, direct access, and community choice aggregator customers.

SCE consulted with the PRG on the launch of the 2011 CHP RFO on December 7, 2011 and invited PRG members to the Offeror's Conference held January 13, 2012. SCE consulted with its PRG and CAM groups regarding its evaluation, Short Listing, and selection processes during conference calls on February 8, March 15, and May 23. On June 20, 2012, SCE presented its Final Selection of Offers to the PRG and CAM groups, which included the Harbor Agreements.

SCE has complied with the Commission's rules for involving the PRG and CAM groups.

Independent Evaluator Review

SCE retained Barry Sheingold of Merrimack Energy Group, Inc. as the Independent Evaluator ("IE") to oversee the negotiations and transactions pursuant to the CHP Program to evaluate overall merits for Commission approval of the Agreements. These agreements included the 2011 CHP Request For Offers and Transition PPAs. AL 2772-E included a public and confidential Independent Evaluator's report. In its report, the IE determined that:

- i) SCE reasonably designed and fairly implemented its first CHP RFO pursuant to the Settlement Agreement.⁶⁸
- ii) SCE's evaluation framework and implementation of [the RFO] was fair and it provided for fair and consistent comparisons between different types of projects and different types of counterparties.
- iii) SCE did not provide preferential treatment to any affiliate that participated in the RFO.
- iv) SCE acted reasonably in selecting the five offers for contract award and execution.

The Independent Evaluator concludes that SCE appropriately selected Harbor's highly-ranked offer and finds that the Harbor Agreements merit Commission approval.⁶⁹ More information on the findings of the IE Report is included in Confidential Appendix A.

The Commission disagrees with the IE's opinion that Harbor merits approval. Harbor fails to meet the threshold eligibility requirement of qualifying as a New CHP Facility and meeting the Fundamental Use Test required of a facility beginning operation as a new QF. The new vintage of Harbor is most clearly demonstrated by the fact that it has self-certified under a new QFID with deliveries from 20 MW of capacity added to the facility since its prior operation as a CHP in 1999. Without meeting the requirement of a New CHP Facility, Harbor is ineligible to commence an RFO agreement.

The Commission disagrees with the IE's conclusion that the Harbor Agreements merit approval.

COMMENTS

Public Utilities Code section 311(g)(1) provides that this resolution must be served on all parties and subject to at least 30 days public review and comment prior to a vote of the Commission. Section 311(g)(2) provides that this 30-day period may be reduced or waived upon the stipulation of all parties in the proceeding.

The 30-day comment period for the draft of this resolution was neither waived nor reduced. Accordingly, this draft resolution was mailed to parties for

⁶⁸ IE Report, (August 2012), p. 2.

⁶⁹ Id. at p. 37.

comments on July 9, 2013. Four parties submitted timely comments on August 5, 2013. SCE and Southwest were opposed to the draft resolution's conclusion, while CCC and CAC were supportive with revisions. Energy Division updated discussions to reflect the Commission's rejection of AL 2771-E, which sought approval for RA-only products received through the 2011 SCE CHP RFO. Energy Division completed additional minor edits.

Harbor's Eligibility under the Settlement and Federal Requirements

CCC and CAC concur with the Commission's analysis of the intent of the EAct amendments for criteria for new cogeneration Facilities, promulgated by FERC in 292.205(d).⁷⁰ SCE and Southwest disagree with the findings that Harbor is a New CHP Facility under the Settlement and is subject to the Federal criteria for new cogeneration facilities.

SCE cites Settlement and Pro Forma definitions for an "Existing" and "New" CHP Facility to conclude that in the absence of a requirement that a CHP Facility be operational "on" the Settlement Effective Date, Harbor must be considered an Existing CHP Facility. Similarly, SCE references EAct Section 1253 Part (n)(2)(B) and FERC Order 671 to conclude that requirements for "not yet certified" QFs do not encompass Harbor's case (of a QF that was previously, but no longer certified on the EAct's date of enactment). Southwest concurs. These arguments are dubious.

As discussed above, our disposition of the Harbor agreement is based on the Settlement's provisions governing of Existing CHP Facilities, which can only be interpreted to refer to facilities that were operating as qualifying CHP facilities *as of the Settlement Effective Date*, as well as the Settlement's provisions governing New CHP Facilities, which we require conformance with the Fundamental Use Test.

SCE and Harbor rely on FERC's use of "on or before" within the language of 18 CFR 292.205(d) to regard Harbor as an existing cogeneration facility exempt from the FUT. The two dates by which FERC exempts cogeneration facilities are derived from the [EAct's](#) Section 1253 (n)(2)(A) and (n)(2)(B). We observe that FERC's Order 732 bears out an interpretation of 18 CFR 292.205 by referencing

⁷⁰Comments of CCC on Draft Resolution E-4554 ("CCC Comments"), (August 5, 2013), p. 3-4 and Qualified Support of the CAC to Draft Resolution E-4554 ("CAC Comments"), (August 5, 2013), p. 3.

EPA's Section 1253(n).⁷¹ In any event, our disposition of the Harbor agreement is based on our interpretation and implementation of the QF/CHP Settlement Agreement, in particular the Settlement's definitions of Existing and New CHP Facilities, and the Settlement's requirement that New CHP Facilities conform with the efficiency requirements of qualifying cogeneration facilities at 18 CFR 292.205(d).

Harbor was not a QF on August 8, 2005, as it relinquished its certification in 1999 and filed for certification in 2012. Subject to the criteria for New CHP Facilities, Harbor fails to meet the FUT and thus is ineligible for a PPA as a New CHP Facility under the Settlement.

Future CHP RFO Participants' Security of a Thermal Host

CCC and CAC acknowledge and agree with the Draft's recommendation that a CHP Facility "need not have secured a thermal host prior to participating in a CHP RFO." However, both reiterate their protests requesting greater certainty for information needed for thorough RFO evaluations. CCC recommends that a CHP Offeror have a "firm and sufficient" commitment with a thermal host.⁷² CAC recommends that a CHP Offeror have sufficient "data and information" of their thermal host's requirements and its effect on their CHP Facility's operations.⁷³ Both argue that bids submitted to the RFOs must contain quality information on the thermal host is imperative to permit the IOU and CPUC to complete fair evaluations for every facility upon Settlement Terms for eligibility, contribution to CHP Program goals, and comparison to the Double Benchmark.⁷⁴

The Commission agrees with CCC and CAC and modified the resolution within the "Consistency with Eligibility Requirements for CHP Requests for Offers" section.

⁷¹ "However, the text of section 210(n)(2) of PURPA states that the Commission's prior cogeneration requirements shall continue to apply to any facility that 'was a qualifying cogeneration facility on [August 8, 2005].'" (Order 732 (Revisions to Form, Procedures, and Criteria for Certification of Qualifying Facility Status for a Small Power Production or Cogeneration Facility), issued March 19, 2010, 130 FERC ¶ 61,214 at P 47 (emphasis added and removed).)

⁷²CCC Comments, p. 1.

⁷³ CAC Comments, p. 2.

⁷⁴ Per Settlement Term Sheet Sections 4.2.2.1, 4.2.5.6; 7.1.2 and 5.4

Preference for Competitive Pro Forma PPA Offers

CCC restates its protest that SCE's improperly selected non-Pro Forma PPA offers over Pro Forma PPA offers and asserts that the Draft erred in finding that SCE complied with Section 4.2.12 of the Settlement Term Sheet, given that the Berry's CHP PPA represented only one of the five contracts executed.⁷⁵CAC similarly asserts that the Settlement's MW procurement requirements are intended to target CHP Facilities that need contracts but are otherwise uncompetitive due to cost and operational constraints. CAC suggests that other eligible "integrated, baseload, and highly efficient" CHP Facilities that conformed to the Pro Forma PPA, were "disregarded" by SCE in favor of Harbor. CCC and CAC request that the Commission send an appropriate market signal to prevent a distortion of the Program during subsequent RFOs.⁷⁶

The Commission quotes Section 4.2.12 of the Settlement Term Sheet to acknowledge that the Pro Forma PPA provides the standard contract for "the product contemplated by the program." The Commission clarifies the rejection of CCC's protest by modifying its response in the "Protests" section.

The Commission responds to CCC and CAC's request for a market signal to preserve the integrity of the CHP Program. Consistent with previous CHP resolutions, amidst contention between the Settling Parties the Commission relies upon and reaffirms the goals and objectives of the State CHP Program. The Commission completed modifications in consideration of comments to the Draft and in pursuit of the Settlement's objectives within the "Consistency with Eligibility Requirements for CHP Requests for Offers" section.

Other Comments

Southwest's comments regarding Harbor's potential delivery pattern and economic effects its subsidiary thermal host, and its incurred costs since contract execution are not germane to determining eligibility as a qualifying cogeneration facility under the terms of the Settlement.⁷⁷Harbor's suggestion that the Commission ignored obligations under Sections 5.5 and 5.6 of the Toll Confirms

⁷⁵ CCC Comments, p. 5.

⁷⁶ CAC Comments, p. 3.

⁷⁷Southwest Comments, p. 1-3.

is invalid.⁷⁸Neither SCE nor Southwest's comments addressed the Commission's concerns about Harbor's configuration.

SCE's request for GHG neutral accounting per Section 7.3.3.1 of the Settlement Term Sheet is inapplicable to New CHP Facilities. The Commission's GHG analysis is consistent with the Settlement (the Draft acknowledges Section 7.4.1 of the Term Sheet) and is not counted toward the ERT.⁷⁹The Commission found the potential for a GHG Debit through its viability assessment in using the most recent operational information as provided by SCE and as briefed by Harbor.⁸⁰ Both GHG Emissions and Project Viability are among the standard evaluation criteria for the Commission's CHP resolutions.

FINDINGS AND CONCLUSIONS

1. Southern California Edison Company filed Advice Letter ("AL") 2772-E on August 31, 2012, in which it requested Commission approval of Resource Adequacy and Unit Contingent Tolling Confirmation Letters with Harbor Cogeneration Company ("Harbor"). AL 2772-E was timely protested by the California Cogeneration Council ("CCC"), Cogeneration Association of California, and Energy Producers and Users Coalition. ("CAC/EPUC") on September 20, 2012. SCE provided a timely reply to the protests on September 27, 2012.
2. The Commission agrees with CCC and CAC/EPUC that Harbor does not qualify as an "Existing CHP Facility."
3. We find that in our interpretation of the Settlement, Harbor must be designated a "new cogeneration facility" under Section 292.205(d).
4. Harbor does not meet the definition of an "Existing CHP Facility" under the Settlement; rather it is a "New CHP Facility."
5. Harbor proposes to operate with a capacity expansion and thermal host, neither of which were part of the Facility when it was previously a qualifying

⁷⁸Draft E-4554 discussed the Agreements' obligations to modify the facility and comply with QF status requirements on pages 3-4, 10.

⁷⁹SCE Comments, p. 3-4 and Draft E-4554, p. 27

⁸⁰Draft E-4554, p. 27-28 and Southwest Comments, p. 2.

cogeneration facility in 1999. Given this change in operations from Harbor's 1995 operations, we are not in a position to determine that Harbor is an "existing cogeneration facility" not subject to the requirements of 18 C.F.R. Section 292.205(d).

6. CCC protests that Harbor may not meet the Fundamental Use Test given the intermittent thermal product that it would supply under a tolling agreement.
7. With reference to the federal regulations, the Settlement establishes minimum operating and efficiency requirements for topping-cycle facilities, establishes efficiency standards for bottoming-cycle facilities, and, for certain new facilities, mandates compliance with a Fundamental Use Test.
8. The Commission rejects SCE's reply that the Fundamental Use Test of 18 C.F.R. Section 292.205(d)(3) is inapplicable to Harbor, because Harbor is a "new cogeneration facility" and therefore is subject to the Fundamental Use Test.
9. The Commission agrees with SCE that contracted CHP Facilities will meet the prerequisite definitions and eligibility for contracts upon the commencement of the agreement.
10. Harbor fails to demonstrate compliance with the Fundamental Use Test requirement.
11. Harbor is not eligible to commence a contract from the SCE CHP RFO per Section 4.2.2.1 of the Settlement Term Sheet because it fails to conform with the Fundamental Use Test under 18 C.F.R. 292.205.
12. SCE's execution of the Harbor Agreements does not meet the procurement policies of the CHP Program per Section 1.2.1 of the Settlement Term Sheet, nor does it meet the objective to increase regulatory and market certainty per Section 1.2.2.1.
13. In evaluating whether each RFO bid meets minimum eligibility requirements, the IOUs should rely on credible and substantiated information on the thermal host, the nature and magnitude of its anticipated energy requirements, and its likely effects on the operations of the CHP Facility.
14. The 80 MW Contract Nameplate value for the Harbor Facility as listed in SCE's 1999 Semi-Annual Report will not count toward SCE's MW procurement Target.

15. CCC and CAC/EPUC protest that the SCE's GHG Credit proposed from the Harbor Agreements is insubstantial and unfounded.
16. The Commission rejects CCC and CAC/EPUC's recommendations to deny the GHG Credit based on its magnitude or verifiability pursuant to the GHG Accounting Methodologies in Sections 7.3.2 and 7.4.1 of the Settlement Term Sheet.
17. The GHG Credit of 3,215 MT CO₂e proposed to result from the Harbor Agreements is inappropriately calculated as a Physical Change pursuant to Section 7.3.1.2 of the Settlement Term Sheet.
18. Operational parameters from more recent information on Harbor suggest that Harbor's thermal output as a New CHP Facility would result in a net increase of 100 MT CO₂e.
19. The procurement will not be counted toward the QF/CHP Settlement greenhouse gas ("GHG") Emissions Reduction Target.
20. SCE is not authorized to recover costs in accordance with Section 13.1.2.2 of the Settlement Term Sheet and AL 2645-E, consistent with the directives of the QF/CHP Settlement.
21. The Commission does not have sufficiently credible information to find that Harbor will be a viable CHP project.
22. The Emissions Performance Standard does not apply to Harbor, whose annualized plant capacity factor is less than 60%.
23. SCE has complied with the Commission's rules for involving the PRG and CAM groups.
24. The Commission disagrees with the IE's conclusion that the Harbor Agreements merit approval.

THEREFORE IT IS ORDERED THAT:

1. The request of the Southern California Edison Company for the Commission to approve the Harbor Agreements as requested in Advice Letter AL 2772-E is denied.

This Resolution is effective today.

I certify that the foregoing resolution was duly introduced, passed and adopted at a conference of the Public Utilities Commission of the State of California held on August 15, 2013; the following Commissioners voting favorably thereon:

/s/ Paul Clanon
Paul Clanon
Executive Director

MICHAEL R. PEEVEY
President
MICHEL PETER FLORIO
CATHERINE J.K. SANDOVAL
MARK J. FERRON
CARLA J. PETERMAN
Commissioners

Confidential Appendix A

Summary of 2011 SCE CHP Request For Offers
(Tracks 1& 2)
and
Analysis of RA and UC Confirmations with
Harbor Cogeneration Company

REDACTED