PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

AGENDA ID# 18213
ENERGY DIVISION **RESOLUTION E-5011**
April 16, 2020

R E S O L U T I O N

Resolution E-5011. Bloom Energy's and National Fuel Cell Research Center's Requests for Commission Review of Energy Division Disposition Letter Concerning Net Energy Metering Fuel Cell Tariffs.

PROPOSED OUTCOME:

- This Resolution rejects Bloom Energy's and National Fuel Cell Research Center's Requests for Commission Review of the February 8, 2017 Disposition Letter by the Director of the California Public Utilities Commission's Energy Division, concerning Pacific Gas and Electric Company (PG&E) Advice Letter (AL) 4971-E/-E-A, Southern California Edison Company (SCE) AL 3523-E/-E-A, and San Diego Gas & Electric Company (SDG&E) AL 3017-E, which proposed modifications to the Net Energy Metering Fuel Cell tariffs.

SAFETY CONSIDERATIONS:

- There is no impact on safety.

ESTIMATED COST:

- There is no cost impact.

By Bloom Energy's and National Fuel Cell Research Center's Requests for Commission Review of Energy Division Disposition of Advice Letters 4971-E/-E-A (PG&E), 3523-E/-E-A (SCE), and 3017-E (SDG&E).

SUMMARY

This Resolution rejects Bloom Energy Corporation's and National Fuel Cell Research Center's Requests for Commission Review of the February 8, 2017 Disposition Letter by the Director of the California Public Utilities Commission's Energy Division, concerning Pacific Gas and Electric Company (PG&E) Advice Letter (AL) 4971-E/-E-A, Southern California Edison Company (SCE) AL 3523-E/-E-A, and San Diego Gas & Electric Company (SDG&E) AL 3017-E, which proposed modifications to the Net Energy Metering Fuel Cell tariffs.

BACKGROUND

On December 2, 2016, Pacific Gas and Electric Company (PG&E) filed Advice Letter (AL) 4971-E, and Southern California Electric Company (SCE) filed AL 3523-E.[1] On December 12, 2016, San Diego Gas & Electric Company (SDG&E) filed AL 3017-E. On December 30, 2016, SCE filed supplemental AL 3523-E-A. On January 19, 2017, PG&E filed supplemental AL 4971-E-A. These ALs requested approval of modifications to PG&E's, SCE's, and SDG&E's (collectively "the utilities") Net Energy Metering Fuel Cell (NEMFC) tariffs in order to comply with the requirements of Assembly Bill (AB) 1637 (Low, 2016).

The existing NEMFC tariff was legislatively scheduled to sunset on January 1, 2017. AB 1637 amended Public Utilities Code Section 2827.10[2] to extend the sunset date of the NEMFC tariff to December 31, 2021, increase the eligible system size for the tariff from one megawatt (MW) to five MW, increase the total capacity allowed to take service under the tariff by an additional 500 MW beyond what was installed as of January 1, 2017, require customer-generators taking service under the tariff to comply with emissions standards

[1] On December 22, 2016, Applied Medical Resource Corporation protested SCE's AL 3523-E due to a concern related to terms in the Rates section of the tariff, which SCE had included as a "clean-up" item. In supplemental AL 3523-E-A, SCE subsequently removed the language that was the subject of the protest. Therefore, Applied Medical Resource Corporation's protest is moot.

[2] All subsequent citations are to the Public Utilities Code unless otherwise noted.

from the California Air Resources Board's (ARB) distributed generation certification program, and require generating technologies to comply with greenhouse gas (GHG) emissions standards to be adopted by ARB by March 31, 2017.[3] The last statutory requirement is the central issue in this Resolution.

The utilities' ALs interpreted the new GHG emissions standards requirement as only applying to fuel cells that commence operation on or after January 1, 2017. The utilities reasoned that fuel cells commencing operation before this date should not be required to meet the GHG emissions standard because the requirement did not exist until the Governor signed AB 1637 into law.

However, AB 1637 requires both fuel cells that commence operation on or after January 1, 2017, and fuel cells that were already taking service under the NEMFC tariff before January 1, 2017, to meet ARB's GHG emissions standard. AB 1637 further requires that both new and existing fuel cells meet the GHG emissions standard on an ongoing basis—instead of a one-time basis before commencing operation—as AB 1637 requires ARB to establish annual GHG emissions standards and to update the annual standards every three years. Evidence of the legislative intent of AB 1637 supporting this position is contained in the August 31, 2016 Assembly Floor Analysis of AB 1637, which states that "[t]he bill's new GHG standard applies to existing installed fuel cells, as well as future installed fuel cells, requiring all NEMFC participants to meet annual GHG reduction standards, to be adopted by ARB, to remain eligible for NEMFC."[4]

On February 8, 2017, the Director of the Commission's Energy Division, sent a Disposition Letter that approved with modifications the utilities' ALs.

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[3] On December 12, 2019, CARB adopted the NEMFC GHG emission standards, subject to finalization. The standards are retrievable here: https://ww3.arb.ca.gov/regact/2019/fcnem19/finalres1936.pdf.

[4] http://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201520160AB1637#.

The Disposition Letter required the utilities to modify their NEMFC tariffs to apply the GHG emissions standards to all new and existing fuel cells.

On February 13, 2017, PG&E filed AL 5021-E. On February 14, 2017, SCE filed AL 3558-E, and SDG&E filed AL 3044-E. On July 28, 2017, SDG&E filed supplemental AL 3044-E-A. These ALs proposed modifications to the utilities' NEMFC tariffs to comply with the Disposition Letter's requirements.

On February 21, 2017, Bloom Energy Corporation (Bloom) and the National Fuel Cell Research Center (NFCRC) filed Requests for Commission Review of the Disposition Letter pursuant to General Order (GO) 96-B Section 7.7.1.[5] The Requests for Commission Review claim that the Disposition Letter incorrectly requires the utilities to apply the GHG emissions standards to existing fuel cells that took service under the NEMFC tariffs existing prior to January 1, 2017. The Requests for Commission Review argue that application of the GHG emissions standards to fuel cells taking service under the prior versions of the NEMFC tariffs is improper, contrary to the intent of the Legislature, and would represent a dramatic and inequitable departure from prior Commission policy.

NOTICE

Bloom states that it served copies of its Request for Commission Review on the Commission, the utilities, and Applied Medical Resource Corporation, protestant to SCE AL 3523-E. NFCRC states that it served copies of its Request for Commission Review on the Commission, the utilities, and Applied Medical Resource Corporation.

Energy Division served Draft Resolution E-5011 on Bloom, NFCRC, the utilities, and Applied Medical Resource Corporation.

[5] Section 7.6.3 in the current version of GO 96-B published on May 10, 2018.

PROTESTS

No parties filed comments on Bloom's or NFCRC's Requests for Commission Review.

DISCUSSION

Bloom's and NFCRC's Requests for Commission Review present the following arguments: (1) the plain language of Section 2827.10 and axiomatic principles of statutory construction prohibit retroactive application of new GHG emissions standards; (2) prior versions of Section 2827.10 also incorporated emissions standards as eligibility criteria, and the Commission did not apply these emission standards retroactively; (3) the Commission has not retroactively applied emissions standards to fuel cells under the Self-Generation Incentive Program; (4) evidence of legislative intent is unpersuasive; (5) severe policy implications of retroactive application militate against retroactivity; and (6) retroactive application would constitute an uncompensated regulatory taking, and is otherwise unlawful. Below the Commission analyzes the claims presented in the Requests for Commission Review and upholds the determination found within the February 8, 2017 Disposition Letter.

The Disposition Letter Correctly Applies the New GHG Emissions Standards to Existing as Well as Newly Installed Fuel Cells

Bloom argues that the Commission's interpretation of Section 2827.10 as applying to existing fuel cells improperly results in retroactive application of the statute. However, legislation routinely impacts existing state programs and applies updated standards to industry. As the United States Supreme Court has noted, "legislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations. This is true even though the effect of the legislation is to impose a new duty or liability based on past acts." *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 16 (1976) (citations omitted).

Nevertheless, the basic rule in California is that "a statute may be applied retroactively only if it contains express language of retroactivity or if other sources provide a clear and unavoidable implication that the Legislature

intended retroactive application." *Myers v. Phillip Morris Cos., Inc.*, 28 Cal. 4th 828, 844 (2001). The U.S. Supreme Court has found that the approach to determine if retroactive application is appropriate is to "weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or [slow] its operation." *Linkletter v. Walker*, 381 U.S. 618, 629 (1965).

The plain language of Section 2827.10 does not differentiate between existing and newly installed fuel cells, and it does not provide different requirements for newly installed and existing fuel cells. Instead, the statute requires an "[e]ligible fuel cell customer-generator" to meet only one set of requirements.

Various other subsections support interpreting Section 2827.10 to apply to all fuel cells. Section 2827.10(c)(1) provides that "[e]very electrical corporation . . . shall file with the commission a standard tariff providing for net energy metering for eligible fuel cell customer-generators . . . [and] every electrical corporation shall make this tariff available to eligible fuel cell customer-generators . . . " This language does not provide that eligible fuel cells only include either existing or newly installed fuel cells. Additionally, Section 2827.10(g), as modified by AB 1637, provides that "[a] fuel cell electrical generating facility shall not be eligible for the tariff unless it commences operation on or before December 31, 2021 . . ." The plain language in this subsection does not establish a cut-off start date. If the Legislature had intended to establish two separate standards based on the date a fuel cell commenced operation, this section of the statute should have made a distinction between existing and newly installed fuel cells. However, the Legislature did not make any such distinction.

AB 1637 additionally did not create a new and distinct NEMFC tariff for newly installed fuels cells. Instead, it modified the existing NEMFC tariff to apply to all fuel cells that commence operation on or before December 31, 2021.

Further, Bloom asserts that the statute led previously eligible fuel cell customer generators to reasonably expect that they would remain eligible for their lifespan. This interpretation is contradicted by the August 31, 2016 Assembly Floor

Analysis of AB 1637, which states that "[f]uel cells must continue to meet the applicable annual standard during operation to maintain eligibility for NEMFC."

Finally, section 2827.10(a)(3)(A)(iii) requires that "eligible fuel cell customer-generators" use "technology the commission has determined will achieve reductions in emissions of greenhouse gases" pursuant to "a schedule of annual greenhouse gas emissions reduction standards for a fuel cell electrical generation resource" to be developed by ARB. Section 2827.10(b) requires ARB to "establish a schedule of annual greenhouse gas emissions reduction standards for a fuel cell electrical generation resource." Notably, the statute does not differentiate between existing and newly installed fuels cells. Instead, it requires ARB to establish one schedule of annual GHG emissions reduction standards.

In sum, the plain language in Section 2827.10, as amended by AB 1637, indicates a legislative intent to apply ARB's GHG standards to existing and newly installed fuel cells.

Even if the Plain Language of the Statute Were Ambiguous, Legislative History Supports Application of ARB's Standards to Existing Fuel Cells

The California Supreme Court has said, in regards to interpreting a statute, that ". . . if the language allows more than one reasonable construction, [courts] may look to such aids as the legislative history of the measure and maxims of statutory construction. In cases of uncertain meaning, we may also consider the consequences of a particular interpretation, including its impact on public policy." *Wells v. One2One Learning Found.*, 39 Cal. 4th 1164, 1190 (2006).

The legislative history in this case supports the Commission's construction. The August 31, 2016 Assembly Floor Analysis of AB 1637 states "[t]he bill's new GHG standard applies to existing installed fuel cells, as well as future installed fuel cells, requiring all NEMFC participants to meet annual GHG reduction standards, to be adopted by ARB, to remain eligible for NEMFC." This language is clear and unmistakably evidences legislative intent to apply the GHG standards to existing fuel cells. Further, this is a persuasive source of legislative intent as the California Supreme Court has used Assembly Floor Analyses to

discern legislative intent. *See, e.g.*, *People v. Cornett*, 53 Cal. 4th 1261, 1269-70 (2012).

When considering the "consequences of a particular interpretation, including its impact on public policy," the Commission's interpretation of the statute gains further support.[6] *Wells*, 39 Cal. 4th 1164, 1190. The purpose and effect of this piece of legislation is essentially to achieve GHG emissions reductions. Requiring all fuel cells to meet the new GHG standards retroactively would further this purpose. If the statute only applies to fuel cells that commence operation on or after January 1, 2017, previously eligible fuel cells would be allowed to emit higher concentrations of GHGs, which would hinder the purpose of the legislation.

Bloom argues that a letter written by the author of AB 1637, Assemblymember Evan Low, after the bill's passage to President Picker expressing the author's intent not to retroactively apply the GHG standards can be considered evidence of legislative intent. However, in *Cal. Building Industry Ass'n v. State Water Resources Control,* the California Supreme Court questioned whether a Senator's letter should be relied upon to discern legislative intent. 4 Cal. 5th 1032, 1042 (2018). The Court asserted "we do not consider the motives or understanding of individual legislators who voted for a statute when attempting to construe it. This is true even when the legislator who authored the bill purports to offer an opinion." *Id.* at 1042-43. The Court explained that there is "'no guarantee . . . that those who supported the proposal shared the author's view of its compass.'" *Id.* at 1043. Therefore, the bill author's letter is not persuasive.

The Commission's Interpretation of Section 2827.10 Does Not Constitute a Taking Under the United States or California Constitutions

The United States Supreme Court has yet to develop a "set formula to determine where regulation ends and taking begins." *Penn Cent. Transp. Co. v. City of N.Y.*,

[6] Because the Commission has jurisdiction over the NEMFC tariff, its interpretation of AB 1637 and Section 2827.10 is entitled to judicial deference. *See New Cingular Wireless PCS, LLC v. Pub. Util. Comm'n*, 246 Cal. App. 4th 784 (1st Dist. 2016).

438 U.S. 104, 124 (1978). In *Keystone Bituminous Coal Ass'n v. DeBenedictis*, the Court stated that a "land use regulation can effect a taking if it 'does not substantially advance legitimate state interests, . . . or denies an owner economically viable use of his land.'" 480 U.S. 470, 485 (1987). The Court ultimately held that a restriction or regulation on coal mining was not a taking because of the law's identification of important public interests, and because the plaintiff could not show an economic deprivation "significant enough to satisfy the heavy burden placed upon one alleging a regulatory taking." *Id.* at 493-97. The Court acknowledged that takings are more likely to be found when interference is a physical invasion by government than when interference "arises from some public program adjusting the benefits and burdens of economic life to promote the common good." *Id.* at 488, n.18.

In *Connolly v. Pension Benefit Guaranty Corp.,* the Court held that retroactive liability for an employer's pension plan withdrawal was not a taking because employers knew of Congress' goal that employees receive their promised benefits. 475 U.S. 211, 227 (1986). The Court stated "[t]hose who do business in the regulated field cannot object if the legislative scheme is buttressed by subsequent amendments to achieve the legislative end." *Id.* (quoting *FHA v. The Darlington, Inc.*, 358 U.S. 84, 91 (1958)).

Similarly, in *Andrus v. Allard,* 444 U.S. 51 (1979), the Court upheld a statute's retroactive application prohibiting the sale of artifacts created from eagle feathers because the ban served a substantial public purpose—protecting the eagle from extinction.

A taking does not exist here because any retroactive application of Section 2827.10, as amended, serves a substantial public interest: GHG emissions reduction. In 2009, the EPA determined that GHG emissions "endanger public health and welfare by fostering global 'climate change.'" *Utility Air Regulatory Group v. Envtl. Prot. Agency,* 573 U.S. 302, 311 (2014). Therefore, the reduction of GHG emissions is a substantial public interest and regulation of such should not be construed as a taking. Nor has Bloom demonstrated an economic deprivation "significant enough to satisfy the heavy burden placed upon one alleging a regulatory taking." *Keystone Bituminous Coal Ass'n*, 480 U.S. 470, 493-97.

For the reasons described above, Bloom's and NFCRC's Requests for Commission Review are rejected.

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. Please note that comments are due 20 days from the mailing date of this resolution. Section 311(g)(2) provides that this 30-day review period and 20-day comment period may be reduced or waived upon the stipulation of all parties in the proceeding.

The 30-day review and 20-day comment period for the draft of this resolution was neither waived nor reduced. Accordingly, this draft resolution was mailed to parties for comments on March 13, 2020.

FINDINGS

1. Assembly Bill 1637 (Low, 2016) requires both fuel cells that commence operation on or after January 1, 2017, and fuel cells that were already taking service under the Net Energy Metering Fuel Cell tariff before January 1, 2017, to meet the California Air Resources Board's greenhouse gas emissions standards.
2. To be eligible for the Net Energy Metering Fuel Cell tariff, generating technologies must comply with greenhouse gas emissions standards that the California Air Resources Board adopted.

THEREFORE IT IS ORDERED THAT:

1. The Requests for Commission Review filed by Bloom Energy Corporation and the National Fuel Cell Research Center on February 21, 2017, are rejected.
2. The modifications to Pacific Gas and Electric Company's (PG&E) Net Energy Metering Fuel Cell tariff contained in PG&E Advice Letter 5021-E are approved with an effective date of February 13, 2017.

3. The modifications to Southern California Electric Company's (SCE) Net Energy Metering Fuel Cell tariff contained in SCE Advice Letter 3558-E are approved with an effective date of February 14, 2017.
4. The modifications to San Diego Gas & Electric Company's (SDG&E) Net Energy Metering Fuel Cell tariff contained in SDG&E Advice Letter 3044-E and SDG&E Advice Letter 3044-E-A are approved with effective dates of February 14, 2017, and July 28, 2017, respectively.

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 April 16, 2020; the following Commissioners voting favorably thereon:

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ALICE STEBBINS
Executive Director