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Decision 07-03-046 March 15, 2007

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking to Continue Implementation and Administration of California Renewables Portfolio Standard Program.	Rulemaking 06-05-027 (Filed May 25, 2006)

ORDER MODIFYING DECISION (D.) 06-10-050 AND DENYING REHEARING OF DECISION AS MODIFIED

On November 22, 2006 Southern California Edison Company ("SCE") filed an application for rehearing of Decision (D.) 06-10-050. D.06-10-050 ("Decision") adopts procedures for setting procurement targets for load serving entities ("LSEs"), and also adopts guidelines concerning compliance with the targets. Specifically, the Decision adopts a methodology for determining the LSE's baseline procurement amounts ("BPAs"), as well as those entities' annual procurement targets ("APTs"). The Decision also discusses the requirements for compliance with the RPS Program. LSE's may be subject to penalties if they have not met their APTs.

We have carefully considered the arguments presented by SCE and conclude that good cause exists to modify the BPA formula to align more closely with the statutory requirements. With this modification, no grounds for rehearing have been demonstrated. Therefore, we are denying rehearing of the Decision as modified.

I. DISCUSSION

A. Calculation of Baseline

SCE alleges that we erred in our calculation of the BPA for the state's investor owned utilities ("IOUs"). According to SCE the Commission's baseline

calculation is in error because: (1) the calculation is not based on the actual percentage of 2001 sales as required by section 399.15 (a)(3)[1]; (2) the baseline formula includes a 1% adjustment that is not authorized by the statute; and (3) the formula neglects to make certain other adjustments that are required by section 399.12 (a). Although most of SCE's arguments lack merit, SCE correctly identifies an error in one part of the Decision's formula.

Pursuant to the RPS legislation, the Commission must determine the BPA as the baseline for determining the APTs that LSEs are required to meet. To set these targets:

> [T]he commission shall establish an initial baseline for each electrical corporation based on the actual percentage of retail sales procured from eligible renewable energy resources in 2001, and, to the extent applicable, adjusted going forward pursuant to Section 399.12.

(§ 399.15 (a)(3).) Section 399.12 (a) provided that the baseline should be adjusted for energy procured from certain geothermal, hydroelectric, and waste combustion facilities, but those provisions have been eliminated as of January 1, 2007.

The Decision adopts the following formula for determining the baseline for LSEs:

> 2003 Initial Baseline Procurement Amount = 2001 RPS-eligible procurement + 1% of 2001 total retail sales

(Decision, Attachment A, p. 5.)

As SCE notes, the Decision states that SCE supports this formula, but SCE clarifies in its rehearing application that in fact SCE believes the formula is error. SCE suggests substituting the following formula:

> 2003 Initial Baseline = (2001 RPS-eligible procurement/2001 retail sales) x 2003 retail sales + additional procurement adjustments pursuant to § 399.12 (a)

[1] All section references are to the Public Utilities Code unless otherwise specified.

(SCE App. for Rehg., at p. 5.)

SCE's first contention is that the baseline formula adopted by the Commission does not comply with section 399.15 (a)(3) because it is based on the actual megawatt-hour energy amount of 2001 RPS-eligible procurement rather than the "actual percentage of retail sales procured from eligible renewal resources in 2001," as section 399.15 (a)(3) requires. SCE's argument regarding the percentage requirement in section 399.15 (a)(3) is well-taken. Our formula as set forth in the Decision does not comply with the literal requirements of the statute because it uses the actual amount of 2001 RPS sales, rather than the percentage of those sales. In today's order we will modify the formula to correct this error.

SCE's two other arguments concerning errors in the formula are not persuasive, however. SCE claims that it is error for the Commission's formula to add 1% of 2001 retail sales to calculate the baseline. The only support SCE provides for its allegation that this adjustment is illegal is that, "the statute plainly does not authorize such an adjustment." (SCE App. for Rehg., at p. 4.) This is unconvincing. The statute leaves the specifics of the baseline determination to us, and simply states that the Commission's baseline be, "*based on* the actual percentage" of 2001 retail sales. (§ 399.15(a)(3), emphasis added.) The statute contains no express or implied limitation on what adjustment the Commission can make using the percentage of 2001 retail sales from renewables as a basis. Moreover, as TURN notes, the 1% adjustment is consistent with the statutory goal of increasing renewable energy procurement by 1% per year.

SCE's argument that the Commission errs in failing to make the baseline adjustments mandated by section 399.12 (a) is also misplaced. As stated, section 399.15 (b)(2) provides that the baseline should be adjusted "going forward" pursuant to section 399.12. Section 399.12 (b) [formerly (a)] provides certain limitations on what facilities should be included as "eligible renewable energy resource[s]," specifically exempting certain hydroelectric and municipal waste resources from eligibility. As SCE notes in a footnote, new legislation which became effective in January, 2007 altered section 399.12, eliminating references to geothermal facilities, as well as references to what procurement

is eligible to be included in the baseline. For instance, the earlier provision concerning existing hydroelectric facilities read:

> The output of a small hydroelectric generation facility of 30 megawatts or less procured or owned by an electrical corporation as of the date of enactment of this article shall be eligible only for the purposes of establishing the baseline of an electrical corporation pursuant to paragraph (3) of subdivision (a) of Section 399.15.

(2006 § 399.12 (a)(3).) The similar section now provides:

> An existing small hydroelectric generation facility of 30 megawatts or less shall be eligible only if a retail seller owned or procured the electricity from the facility as of December 31, 2005.

(Current § 399.12 (b)(1)(A).)

Notably, the relevant provisions in section 399.12 only concern whether certain facilities are RPS-eligible. Since the current section 399.12 no longer contains any reference to adjusting or establishing the baseline, and section 399.15(a)(3) only refers to making adjustments "going forward," SCE has no claim that the Commission failed to make mandatory adjustments to the baseline pursuant to these provisions. Therefore, SCE has not shown that we failed to comply with the current statutory structure.

Although two of SCE's arguments are unpersuasive, as mentioned, SCE correctly notes an error because the Commission's baseline formula is not based on the percentage of RPS eligible 2001 retail sales as required by the statute. However, SCE has not shown that its suggested formula is mandated. Rather, we will modify the baseline formula only to correct the failure to reference the percentage of RPS-eligible 2001 retail sales. The new formula will be as follows:

> 2003 Initial Baseline Procurement Amount = (2001 RPS-eligible procurement/2001 total retail sales) x 2003 total retail sales + 1% of 2001 total retail sales

With this change, the formula will comply with the section 399.15 (a)(3) requirement that the baseline be based on the actual percentage of RPS-eligible procurement in 2001, and

will be entirely consistent with the statute. No further adjustments to the baseline formula are warranted in response to SCE's arguments.

B. Making Up Earlier Shortfalls after 20% Goal

SCE argues that the Decision errs in requiring LSEs to make up previous RPS procurement shortfalls or be subject to penalties, even after an LSE has reached the statutory goal of 20% RPS eligible retail sales. According to SCE, these provisions are inconsistent with section 399.15 (b)(1). SCE's argument is unconvincing.

Pursuant to section 399.15 (b)(1) (as of January 1, 2007):

> Each retail seller shall… increase its total procurement of eligible renewable resources by at least an additional 1 percent of retail sales per year so that 20 percent of its retail sales are procured from eligible renewable resources no later than December 31, 2010. A retail seller with 20 percent or retail sales procured from eligible renewable energy resources in any year shall not be required to increase its procurement of eligible energy resources in the following year.

Thus, there are two targets that LSEs must meet. They must increase renewable sales by 1% each year and they must have 20% renewables by the end of 2010. In addition, section 399.15 (b)(4) expressly requires that if a retail seller fails to adequately procure renewables one year, it must procure more in later years to make up for the shortfall.

To enforce the APTs as provided in the RPS legislation both the statute and the Decision provide for flexible compliance rules. As modified effective January 1, 2007, section 399.14 (a)(2)(C)(i) requires the Commission to adopt:

> Flexible rules for compliance, including rules permitting retail sellers to apply excess procurement in one year to subsequent years or inadequate procurement in one year to no more than the following three years. *The flexible rules for compliance shall apply to all years, including years before and after a retail seller procures at least 20 percent of total retail sales of electricity from eligible renewable energy resources.*

(Emphasis added for SB 107(Stats. 2006, ch. 463) provision effective January 1, 2007.)

In the Decision, we refine our flexible compliance rules pursuant to the RPS legislation. In discussing flexible compliance, which allows retail sellers three years to make-up deficits in meeting APTs, the Decision addresses SCE's argument that deficit make up should not be required after the 20% goal is achieved. The Decision concludes that if deferrals from previous deficits have not been satisfied, an LSE may need to procure more than the 20% target until those deficits are cleared. As the Decision explains:

> If the 20% in 2010 is read to be an absolute maximum, meaningful flexibility of not more than three years could be reasonably provided only by slowly reducing the time for deferral from three years to zero. We have not done so and do not do so here. Rather, a more reasonable reading of the RPS legislation as a whole, while giving reasonable reading to its individual parts, is to permit deferral for up to three years after 2009, even if that requires in excess of 20% to be procured in some years.

(Decision, at p. 34.)

In its rehearing application, SCE resurrects its argument that it cannot be penalized for failing to procure more than 20% RPS eligible energy regardless of past deficits. Again, SCE relies primarily on the language in section 399.15(b)(1): "A retail seller with 20 percent of retail sales procured from eligible renewable energy resources in any year shall not be required to increase its procurement of eligible energy resources in the following year."

SCE's contention fails for a number of reasons, most of which have been discussed in the Decision. First, SCE's interpretation fails to provide for enforcement of each year's APT's. Second, as TURN notes, it is reasonable to interpret the language in section 399.15(b)(1) as applying to increasing the APT to a percentage greater than 20%, rather than excusing the requirement to comply with previous APTs. Similarly, it is reasonable to conclude, as the Decision notes, that LSE that has reached 20% is excused from increasing its renewable procurement only if it made up any recent APT shortfalls. (Decision, at p. 33.)

The most compelling reason SCE's argument is wrong, however, is the new language at the end of section 399.14 (a)(2)(C)(i) which states:

> The flexible rules for compliance shall apply to all years, including years before and after a retail seller procures at least 20 percent of total retail sales of electricity from eligible renewable energy resources.

This provision leaves no remaining doubt that the legislature contemplates that deficits need to be made up even after the 20% goal is achieved. Even if there were a conflict between this provision and section 399.15 (b)(1), it is well established that, "later and more specific enactments prevail, *pro tanto*, over earlier and more general ones." (*Wells v. One2One Learning Found.* (2006) 39 Cal.4th 1164, 1208.) Applying this principle, the new language in section 399.14 (a)(2)(C)(i) would control, because that provision is both later and more specific than the language in section 399.15 (b)(1).

For these reasons, the Decision is correct in subjecting the IOUs to penalties for failure to make up past deficits, even after the 20% goal is achieved.

II. CONCLUSION

Because SCE has identified an error in the Decision's BPA formula, we will modify that formula as set forth in today's order. Other than that one modification, SCE has not demonstrated legal error in the Decision. Therefore, rehearing of the Decision, as modified today, is denied.

Therefore **IT IS ORDERED** that:

1. The formula at the bottom of page 5 of Attachment A in D.06-10-050 is deleted and replaced with:

> 2003 Initial Baseline Procurement Amount = (2001 RPS-eligible procurement/2001 total retail sales) x 2003 total retail sales + 1% of 2001 total retail sales

2. In the second to last sentence at the end of the first paragraph, on page 23 of D.06-10-050, which begins "PG&E, SCE and TURN…," the word "SCE" is deleted.

3. SCE's December 22, 2006 motion for leave to file a reply to TURN's response to SCE's application for rehearing is denied.

4. Rehearing of D.06-10-050, as modified herein, is denied.

This order is effective today.

Dated March 15, 2007, at San Francisco, California.

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